INTERVENER ARGUMENTS FÉDÉRATION DES FEMMES DU QUÉBEC AND WOMEN'S LEGAL EDUCATION & ACTION FUND

PART I – FACTS

1. Interveners from the Fédération des femmes du Québec and Women's Legal Education & Action Fund (LEAF) (collectively, the "**Interveners**") rely on the facts as found by the trial judge.

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PART II – ISSUES IN DISPUTE

2. The Interveners will only intervene on ground 7.1, that is: Does Bill 21 violate section 28 of the *Charter*?

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PART III – GROUNDS

3. The Interveners submit to the Court an interpretation of section 28 of the *Canadian Charter of Rights and Freedoms*[1] ("**section 28**") (the "***Charter***") which allows for this provision to reach its true objective of ensuring substantive equality[2] between sexes.[3]

OUTLINE

4. This case requires developing an analytical framework for section 28, a provision that was adopted 40 years ago and that enshrined sex equality in the Constitution. **(A)**

5. By interpreting section 28 in light of the applicable principles, it is possible to articulate its purpose and scope. First, according to the Interveners, Section 28 must guide

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* comprising Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11.

2 The principle of substantive equality is discussed in paragraphs **14** and following.

3 Enshrining sex equality must be read as a guarantee of gender equality as well, which will be addressed further in paragraph **13**.

the interpretation of the *Charter*'s provisions. Second, the provision is also substantive, in that it guarantees the right to substantive sex equality despite potential recourse to the notwithstanding clause. The Interveners then propose a test which allows for the application of section 28's substantive guarantee. **(B)**

6. Finally, the Interveners submit that the notwithstanding clause cannot be used in such a way as to undermine women's, or a group of women's, guarantee of substantive equality in the enjoyment of their rights and freedoms. **(C)**

7. To the extent that it applies the Interveners' proposed analytical framework to the facts of this litigation, the Court would find sections 4, 6, 7, 8, 10, 13, 14, 15 and 16 of the *Act respecting the laicity of the State*[4] ("**Bill 21**") (the "**provisions of Bill 21**") unconstitutional on the basis that they impair the right to full and equal recognition and exercise of freedom of religion and freedom of expression for Muslim women wearing the veil. In other words, and considering the evidence submitted at trial,[5] the actual effect of Bill 21 is to disproportionately impact a group of one sex's[6] freedom of religion and expression.

ARGUMENTS

A. Introductory remarks

8. Section 28 has rarely been the subject of in-depth analysis in the jurisprudence.[7] This appellate court will be the first to articulate a fulsome analytical framework for Section 28.

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4 RLRQ, c. L-0.3.

5 *Hak c. Procureure générale du Québec*, 2021 QCCS 1466, para. 807 ["**Trial Judgment**"], **Joint Schedules (hereafter, "J.S."), vol. 1, p. 171.**

6 In *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 72, the majority of the Supreme Court reminds us that methods which are "partially discriminatory" (such as those aimed at pregnant women only, as opposed to all women), are no less discriminatory than those that negatively impact all members of a protected group. See also Colleen Sheppard, Rebecca Jones and Nathaniel Reilly, "Contesting Discrimination in Quebec's Bill 21 : Constitutional Limits on Opting out of Human Rights", published in *Directions*, Canadian Race Relations Foundation, November 2019: https://issuu.com/crrf-fcrr/docs/directions8_bill_21_commentary_sheppardjonesreilly, p. 8, endnote on page 43.

7 Trial Judgment, paras. 831-845, **J.S., vol. 1, p. 176-185.** In an article from 2005, Professor Baines also noted the legal vacuum around section 28: Beverley

It must give section 28 a large and liberal interpretation that guarantees substantive equality between "male and female persons" in the enjoyment of their rights and freedoms.[8]

9. Indeed, section 28 constitutes a historic gain for Canadian women who advocated fiercely for sex equality to be included in the *Charter*:[9]

> The formal inclusion of women as full rights bearers under the Charter is an important step in this progression. Under the Charter, we are required to ask and answer a whole new set of constitutional questions and to change the content of heretofore "established" rights and freedoms. Previously excluded groups often formulate new questions which the existing power structure is bound, even according to its own norms, to take seriously.

10. However, as evidenced in the trial judgment,[10] this historic gain may remain incomplete and ineffective, in that the guarantee of substantive equality could remain subject to political winds and the "tyranny of the majority".[11]

Baines, "Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation", (2005) 17:1 *CJWL* 45, p. 52. Moreover, in *Hak c. Procureure générale du Québec*, 2019 QCCA 2145, para. 20, the honourable Nicole Duval Hesler (then Chief Justice of Quebec) aptly underscored in her dissent that "[n]o Canadian appellate court has yet considered the interplay between this section and the notwithstanding clause, nor has the Supreme Court of Canada."
Regarding *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, leave to appeal to SCC refused, 33201 (Nov 5, 2009) ["***McIvor***"], a rare case discussing section 28's scope, the trial judge in *Hak* rightly underlines the fact that, although an appellate court decision from another province does have "significant interpretative value", the lower courts of other provinces are "not officially bound" by them: Trial Judgment, at paras 843-845, **J.S., vol. 1, p. 184-185.** In *McIvor*, at para. 64, the British Columbia Court of Appeal was of the view, in an analysis of only one paragraph, that section 28 does not confer any rights, and cannot be violated.

8 *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, p. 344. See also: *Hunter and others v. Southam Inc.,* [1984] 2 S.C.R. 145, p. 155-157. More recently, see: *Re Same-Sex Marriage*, 2004 SCC 79, paras. 22-24.

9 Sheilah L. Martin, "Some Constitutional Considerations on Sexual Violence Against Women", (1994) 32:3 *Alb L Rev* 535, p. 539.
Section 28 has a unique history and was enacted in a particular context, in which section 28 was expressly protected from the reach of section 33. On this issue, the Interveners rely on the legislative history set out by the Appellant English Montreal School Board, at paras 28 and following of the arguments in its factum.

10 Trial Judgment, paras. 873-876, **J.S., vol. 1, p. 189.**

11 *R. v. Big M Drug Mart Ltd.*, *supra*, note 8, p. 337.

11. Yet section 28 explicitly adds to the text of the *Charter* a constitutional guarantee of equality of enjoyment of rights and freedoms "to male and female persons", "[n]otwithstanding anything else in this Charter". The inclusion of this guarantee in the *Charter* necessarily has substantive legal implications.[12]

B. Interpreting section 28

12. Section 28 must be interpreted according to the interpretative principles recognized by the Supreme Court,[13] including the principles of purposive interpretation, of large and liberal interpretation, and of accounting for the text of the law:[14]

> [21] A *Charter* right must be understood "in the light of the interests it was meant to protect" [...], accounting for "the character and the larger objects of the Charter itself", "the language chosen to articulate the specific right or freedom", "the historical origins of the concepts enshrined" and, where applicable, "the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter" [...]. It follows that Charter rights are to be interpreted "generous[ly]", aiming to "fulfil[l] the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection" (*ibid.*). At the same time, it is important not to overshoot the actual purpose of the right or freedom in question [...].
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> [References omitted]

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12 In *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, paras. 55-56, Justice Abella, writing for the majority, refers to "the substantive constitutional entitlement of women to be free from discrimination in compensation" [emphasis added].

13 In *Quebec (Attorney General) c. 9147-0732 Québec inc.*, 2020 SCC 32, para. 11, the majority addresses in a general manner "the interpretation of the Constitution" and does not differentiate between sections of the constitutional text. Thus, the Interveners submit that any argument related to the placement of section 28 in the *Charter* can reasonably be discarded.
See also B. Baines, *supra*, note 7, p. 63; Cee Strauss, "Section 28's Potential to Guarantee Substantive Gender Equality in *Hak c. Procureure générale du Québec*", (2021) 33:1 *CJWL* 84, p. 89-90. Please note that Cee Strauss is a Staff Lawyer at LEAF.

14 *R. v. Stillman*, 2019 SCC 40, para. 21.

13. Moreover, it is understood that the Constitution is "a living tree which [...] accommodates [...] the realities of modern life".[15] As such, the *Charter* can adapt to social changes in order to ensure that the rights and freedoms it guarantees do not "become frozen in time to the moment of [their] adoption".[16] According to these interpretative principles, the Interveners submit that the terms "male and female persons" in section 28 must be read as a guarantee of gender equality.[17]

1. Purpose of section 28: to guarantee substantive equality

14. The theory of substantive equality is fundamental to Canadian equality rights jurisprudence.[18] As such, there is no doubt that the equality provided in section 28 is substantive sex equality,[19] and not simply formal equality.

15. In Canadian constitutional law, substantive equality requires an investigation into "the impact of the law on the individual or the group concerned":[20]

> [15] Substantive equality, as opposed to formal equality, is based on the idea that: "[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration": *Andrews*, p. 171 [...]:
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> > To approach the ideal of full equality before and under the law – and in human

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15 *Re Same-Sex Marriage, supra*, note 8, para. 22; *Edwards c. Canada (A.G.)*, [1930] 1 D.L.R. 98, 1929 CanLII 438 (UK JCPC), p. 106-107.

16 *Re B.C. Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486, p. 509

17 See *Centre for Gender Advocacy v. Attorney General of Quebec*, 2021 QCCS 191, paras. 1-6 and 103 and f., Appeal Summons, March 8, 2021, #500-09-029391-216. Consequently, the word "sex" must be read as meaning "gender" in the rest of the factum.

18 Historically, constitutional challenges based on the right to sex equality are based on section 15. As the Quebec legislator derogated from section 15 in this case, the relevancy of section 28 is beyond question: C. Strauss, *supra*, note 13, p. 86. Moreover, on this, see the comments on the purpose of the "double guarantee" in *Hak c. Procureure générale du Québec*, 2019 QCCA 2145, para. 52 (dissenting reasons from Chief Justice Duval Hesler), re Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6e éd., Cowansville, Yvon Blais, 2014, para. XII-3.33.

19 B. Baines, *supra*, note 7, p. 63-64; Kerri Anne Froc, *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms*, doctorate dissertation, Queen's University, 2015, p. 423 [unpublished].

20 *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, p. 165.

> affairs, an approach is all that can be expected – the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.[21]
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> [Emphasis added]

16. Recently, in *Fraser v. Canada,* the Supreme Court reiterated the fundamental character of substantive equality in the section 15 analysis, which requires paying particular attention to the actual impact of a law:[22]

> [42] Our subsequent decisions left no doubt that substantive equality is the "animating norm" of the s. 15 framework (*Withler*, at para. 2; see also *Kapp*, at paras. 15-16; *Alliance*, at para. 25); and that substantive equality requires attention to the "full context of the claimant group's situation", to the "actual impact of the law on that situation", and to the "persistent systemic disadvantages [that] have operated to limit the opportunities available" to that group's members (*Withler*, at para. 43; *Taypotat*, at para. 17; see also *Québec v. A*, at paras. 327-332; *Alliance*, at para. 28; *Centrale*, at para. 35).
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> [Emphasis added]

17. Thus, to enforce this guarantee of substantive equality, this Court must analyze the actual impact of Bill 21 on the rights and freedoms of the individuals or groups concerned.

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21 *R. v. Kapp*, 2008 SCC 41, para. 15, citing Andrews *v. Law Society of British Columbia*, *supra* note 20.

22 *Fraser v. Canada (Attorney General)*, *supra*, note 6, para. 42.

18. The study of the actual impact of a law under section 28 requires an intersectional approach to discrimination. This approach recognizes the particular reality of discrimination which results from the confluence, the combination or the fusion of various grounds of discrimination[23] (which the Interveners will call "**intersectionality**" but could also be designated as interrelated grounds of discrimination).

19. The Supreme Court recognizes that certain situations lend themselves to an intersectional analysis, as they engage more than one ground of discrimination.[24] As Chief Justice Wagner stated, it is important to consider the discrimination as experienced by the individual or the group concerned through a lens of interrelated grounds:[25]

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23 The English Oxford Dictionary, third ed., June 2015, online, sub verbo "*intersectionality*": "***2.*** Sociology. The interconnected nature of social categorizations such as race, class, and gender, regarded as creating overlapping and interdependent systems of discrimination or disadvantage; a theoretical approach based on such a premise."
See also Trial Judgment, paras. 856-859, **J.S., vol. 1, p. 186-187**, where the trial judge believed that a similar argument from the Appellants Andréa Lauzon, Hakima Dadouche, Bouchera Chelbi and the Comité juridique de la Coalition Inclusion Québec [Translation] "had some merit".

24 *Fraser v. Canada (Attorney General)*, *supra*, note 6, para. 116, where Justice Abella indicated that it is possible to conduct an intersectional analysis of sex and the role of a parent. See also:

- *Withler v. Canada (Attorney General)*, 2011 SCC 12, para. 58, where Justices Abella and McLachlin, then Chief Justice, indicated that it may be necessary to apply "a conflux of factors, any one of which taken alone might not be sufficiently revelatory of how keenly the denial of a benefit or the imposition of a burden is felt." See also para. 63.
- *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, paras 93-94 (reasons of Iacobucci J.), where the Supreme Court recognizes the possibility of considering a combination of grounds to find discrimination under section 15.
- *Corbiere v. Canada (Minister of Indian and Northern Affairs),* [1999] 2 S.C.R. 203, para. 72 *in fine*, where Justice L'Heureux-Dubé writes that Aboriginal women are doubly disadvantaged on the basis of both sex and race, and are particularly affected by the contested legislation.
- *New Brunswick (Minister of Health and Community Services) v. G.(J.),* [1999] 3 S.C.R. 46, para. 114, where Justice L'Heureux-Dubé states that issues of fairness in child protection hearings affect women in particular, and have particular importance for the interests of members of disadvantaged and vulnerable groups.
- *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, p. 645-646, where Justice L'Heureux-Dubé, dissenting, states that categories of discrimination may overlap.
- In the Federal Court of Appeal, see also *Turner v. Canada (Attorney General)*, 2012 FCA 159, paras. 48-49, where Justice Mainville determines that an analysis of a primary ground of discrimination must not ignore other grounds, nor the "possibility that compound discrimination may have occurred as a result of the intersection of these grounds".

25 The Right Honourable Richard Wagner, P.C., Chief Justice of Canada, "How Do Judges Think About Identity? The Impact of 35 Years of Charter Adjudication", (2017) 49:1 *Ottawa L Rev* 43, p. 51.

> Évidemment, l'expérience de la discrimination varie – parfois dramatiquement – en fonction des motifs de discrimination interreliés. À titre d'illustration, l'expérience d'une femme de faire partie d'une minorité visible peut être totalement différente de celle d'un jeune homme portant les mêmes caractéristiques. Si l'un deux n'est pas citoyen, ou se distingue par une orientation sexuelle différente, ces expériences seraient d'autant plus différentes. The Court has committed to addressing such intersecting forms of discrimination.
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> [emphasis added, references omitted]

20. For example, being a woman, being Muslim and wearing a religious symbol (in this case, a veil) can constitute grounds of discrimination.

21. However, unlike section 15 of the *Charter*, which guarantees a right to equality, section 28 guarantees to "male and female persons" equal enjoyment of the rights and freedoms referred to in the *Charter*. When applied to the section 28 guarantee of equality, the concept of substantive equality means that section 28 protects, in this case, Muslim women who wear the veil from a law which compromises their rights and freedoms guaranteed by sections 2 and 15 of the *Charter* – and from a law which, due to the fusion of prohibited grounds, constitutes intersectional discrimination.

22. The intersection of more than one ground of discrimination, under Bill 21, results in actual consequences for Muslim women who wear the veil, consequences which do not, by definition, impact men or other distinct groups of women.[26] Moreover, the trial judge notes that a Muslim man who wears a beard is manifesting an [Translation] "orthopraxy indicating strong religious belief", which does not hold the same meaning for the [Translation] "defenders of Bill 21".[27]

23. As such, an intersectional approach must guide the analysis of the Court on the scope of section 28. Otherwise, there is a risk of implementing a protection

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26 Trial Judgment, paras. 802-807, **J.S., vol. 1, p. 170-171.**

27 *Id.*, para. 804, **J.S., vol. 1, p. 170.** See also paras. 663-664, **J.S., vol. 1, p. 146.** Note that all translations in this factum are unofficial.

which is not inclusive and is therefore incomplete, in that it would authorize a legislator to enact a law the actual impact of which is to compromise the rights and freedoms of a sub-group of one sex.

> **Scope of section 28**
>
> **28.** Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

24. In order for the purpose of section 28 to be given full effect, the Interveners suggest that this provision has a dual scope: first, it guides the interpretation of the provisions of the *Charter* **(a)**; second, the provision is substantive in that it guarantees the right to substantive sex equality despite potential use of the notwithstanding clause **(b)**. The Interveners then propose a test which will allow for the application of section 28's substantive guarantee **(c)**.

a) Interpretation guided by section 28

25. Section 28 is an interpretive tool that helps apply the "filter" of sex equality to the *Charter*.[28] In other words, the equality guarantee must be taken into account when interpreting and applying all of the provisions of the *Charter*.

26. This approach guarantees the protection of substantive equality in the interpretation and implementation of all *Charter* provisions. In practice, section 28's wording is added at the end of each provision of the *Charter*.[29]

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[28] K. A. Froc, *supra*, note 19, p. 403; C. Strauss, supra, note 13, p. 95. See also: *Symes v. Canada*, [1993] 4 S.C.R. 695, p. 819, where Justice L'Heureux-Dubé, dissenting, uses the expression "prism of the values enshrined in the Charter".

[29] Cee Strauss, *supra*, note 13, p. 95-96, based on Katherine de Jong, "Sexual Equality: Interpreting s. 28" dans AF Bayefsky & M Eberts (dir.), *Equality Rights and the Canadian Charter of Rights and Freedoms*, Toronto, Carswell, 1985, p. 522. According to the Interveners, and although the current case does not raise the question of a constitutional justification based on section 1 of the *Charter*, the wording of section 28 must be considered as added at the end of section 1 of the *Charter* as well.

27. *R. v. Morgentaler*[30] is a good illustration of the proposed approach, though it does not explicitly address section 28. Justice Wilson, in her concurring opinion, applies the filter of sex equality – implicitly – to the questions raised. She considers the experience of a woman faced with the decision to interrupt (or not) her pregnancy and emphasizes the fact that "[i]t is probably impossible for a man to respond, even imaginatively, to such a dilemma", particularly because this dilemma is "outside the realm of his personal experience".[31] After all, reproduction is not experienced in the same way for men and women. In her reasons, Justice Wilson considers the actual impact of the contested provision on a group of individuals – pregnant women – in the context of the breach of security of the person (section 7 of the *Charter*).[32]

28. Similarly, in *Native Women's Assn. of Canada v. Canada (C.A.)*, the Federal Court of Appeal held that the federal government limited the freedom of expression of Indigenous women because the Native Women's Association of Canada was excluded from constitutional discussions, in contrast to predominantly male groups, thus violating sections 2*(b)* and 28:[33]

> [28] In my opinion, by inviting and funding the participation of those organizations in the current constitutional review process and excluding the equal participation of N.W.A.C., the Canadian government has accorded the advocates of male-dominated aboriginal self-governments a preferred position in the exercise of an expressive activity, the freedom of which is guaranteed to everyone by s. 2 (*b*) and which is, by s. 28, guaranteed equally to

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30 [1988] 1 S.C.R. 30. In this case, the Appellants, physicians practicing in abortion clinics, contested the constitutionality of section 251 of the *Criminal Code* which prohibited anyone from providing an abortion to a female person, except for therapeutic abortions done in a hospital. The majority of the Supreme Court declared section 251 invalid, judging that it violated the right to life, liberty, and security of the person protected by section 7 of the *Charter*. See C. Strauss' analysis, *supra*, note 13, p. 96- 96. See also: K. A. Froc, *supra*, note 19, p. 412-413; C. Lynn Smith, "Adding a Third Dimension: The Canadian Approach to Constitutional Equality Guarantees", (1992) 55:1 *Law & Contemp Probs* 211, p. 231.

31 *R. c. Morgentaler*, *supra*, note 30, p. 171.

32 *Id.*, note 30, p. 171-172.

33 *Native Women's Assn. of Canada v. Canada (C.A.)*, [1992] 3 F.C. 192, para. 28. The Supreme Court set aside this decision in *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627; however, the Court did not comment on the use of section 28 by the Federal Court of Appeal. On this, see: B. Baines, *supra*, note 7, p. 65-66.

> men and women. It has thereby taken action which has had the effect of restricting the freedom of expression of aboriginal women in a manner offensive to ss. 2 (b) and 28 of the Charter. In my opinion, the learned trial judge erred in concluding otherwise.

29. In this case, the Federal Court of Appeal's interpretation of section 28 guaranteed the exercise of the freedom protected by section 2*(b)* of the *Charter* equally as between sexes.

30. Therefore, the equality guarantee protected by section 28 should systematically guide courts' interpretive work when they are called to assess the constitutional validity of a law,[34] even at the stage of a potential justification based on section 1. The section 28 equality guarantee should also guarantee substantive equality in the interpretation and implementation of all provisions of the *Charter*.

b) Substantive nature of section 28

31. Section 28 benefits from a "special protection".[35] This means that a law that has the effect of violating the substantive sex equality guarantee cannot remain in force, despite any derogation from the rights and freedoms set out in sections 2 and 7 to 15 of the *Charter*.[36] Indeed, this Court must give such a meaning to

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34 This is the approach preferred by Justice Julien in *Syndicat de la fonction publique du Québec v. Quebec (A.G.)*, 2004 CanLII 76338 (S.C.), EYB 2004-52276, paras. 1429 and 1433, as analyzed by C. Strauss, *supra*, note 13, p. 98.

35 As is the case with rights protected by section 3 of the *Charter*: *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, para. 36.
Moreover, it is interesting to note that in the recent case of *Toronto (City) v. Ontario (Attorney General)*, 2021, SCC 34, para. 60, the Court mentions that section 33 "preserves a limited right of legislative override" and that it "applies to permit legislation to operate 'notwithstanding a provision included in section 2 or sections 7 to 15' *only*" [italics in the original text, emphasis added].
The Supreme Court of Nova Scotia clearly stated, in 1984, in *Re Boudreau and Lynch*, 16 DLR (4th) 610, 1984 CanLII 3055 (S.C. N.S.), para. 12: "[T]he legislators have treated sexual discrimination as the most odious form of discrimination and taken away from legislative bodies the right to perpetrate it in the future. Other types of discrimination may without reasons being given be carried on under the legislative override provisions of s. 33 […]".

36 Regarding section 33, the Interveners refer to the arguments by Andréa Lauzon, Hakima Dadouche, Bouchera Chelbi and the Comité juridique de la Coalition Inclusion Québec in their factum in sections 5.1 and 5.2, paras. 125 and following.
Regarding the interaction between sections 28 and 33, the Interveners refer to the arguments by English Montreal School Board in their factum at section A, paras. 28 and following.

the words "[n]otwithstanding anything in this Charter" in section 28. Otherwise – that is, if section 28 cannot invalidate a provision that violates the constitutional guarantee it aims to protect – section 28 would have no purpose.

32. The Interveners suggest therefore that section 28 is not affected by the notwithstanding clause when the actual impact of a law violates the sex equality guarantee protected by the *Charter*. In this respect, it constitutes a constitutional limit on Parliamentary sovereignty.

33. Otherwise, section 28 would be stripped of almost any effectiveness. To confine section 28 to an "interpretive" role without the capacity to invalidate a law that does not respect the guarantee it enshrines is to allow a legislator – as in the present case – to set aside the substantive sex equality guarantee by overriding the rights and freedoms protected by sections 2 and 7 to 15 of the *Charter*.

c) Application of the substantive nature of section 28

34. In light of the above, the Interveners believe that the substantive nature of section 28 must be operationalized by a test that is both tailored to the provision and that aligns with the guarantee of equality it enshrines.[37]

35. The Interveners suggest that a party invoking a violation of section 28 should demonstrate that the law (1) makes a distinction, an exclusion, or a preference (2)

Regarding the anomalous nature of the overriding power of section 33, the Interveners refer to the arguments of the Fédération autonome des enseignants in its factum at paras 36-44.
See also: *Hak c. Procureure générale du Québec*, 2019 QCCA 2145, para. 50 (dissenting reasons of Chief Justice Duval Hesler): "In light [*sic*] the foregoing historical background, the interpretation of section 28 must logically give effect to the words: *"Notwithstanding anything in this Charter". This wording could lead one to believe that section 28 blocks the effect of a section 33 override when a statute restricts access to certain fundamental rights unequally between the sexes.* [emphasis added]", citing K. A. Froc, *supra*, note 19, p. 380 See also: B. Baines, *supra*, note 7, p. 59 and *Syndicat de la fonction publique du Québec inc. v. Quebec (Attorney General)*, *supra*, note 34, paras. 1422 and 1429: "Ainsi selon les auteurs, en raison du contexte historique de son adoption et des objectifs visés, l'article 28 protégerait de façon particulière le droit à l'égalité des sexes. Le législateur ne pourrait y déroger par application de l'article 33." […] and "Cela dit, l'opinion dominante est favorable à la primauté de l'article 28 sur l'article 33. "

37 That is, a right to equality distinct from the one enshrined in section 15 of the *Charter*.

based on sex that (3) has the effect of nullifying or impairing the right to full and equal recognition and exercise of one or more rights and freedoms of the *Charter*.[38]

36. First, the party must demonstrate that the law in fact affects them differently as opposed to other persons who are subject to it, such that the party is unable to exercise one of their guaranteed rights or freedoms in a full and equal manner. In this case, the evidence accepted by the trial judge demonstrates that Muslim women who wear the veil are prevented from fully and equally exercising their freedom of religion and their freedom of expression.[39]

37. Second, the party must establish that the distinction, exclusion, or preference that they experience is based on sex. No causal connection is required. Rather, one must prove that the law disproportionately affects one sex over another. In this case, the trial judge determined, in light of the evidence, that only Muslim women who wear a veil are affected by the law, in that it is impossible for these women to follow the provisions of Bill 21 without contravening their sincere religious beliefs; they therefore find themselves denied employment opportunities or career advancement, as opposed to men and even other women.[40]

38. Third, the party must prove that the actual impact of the law is to impair one sex's (or a sub-group of one sex's) right to full and equal recognition and exercise of one or more rights and freedoms. At trial, the Court accepted that the actual impact

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38 In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier inc. (Bombardier Aéronautique Centre de formation)*, 2015 CSC 39, paras. 42-43 and 52-32, the Supreme Court analyses the burden of proof in two steps, as required by section 10 of the *Charter of Human Rights and Freedoms*, RLRQ, c. C-12 ["***Quebec Charter***"]. The test for *prima facie* discrimination requires that the applicant prove (1) a distinction, exclusion or preference; (2) based on a ground listed in the first subsection of section 10; 3) that has the effect of nullifying or impairing the right to full and equal recognition and exercise of one or more rights and freedoms of the *Quebec Charter*. As such, this Court could freely draw from a part of the analysis that applies to a recourse based on section 10 of the *Quebec Charter* in order to operationalize the guarantee of substantive equality enacted by section 28, as developed and suggested by K. A. Froc, supra, note 19, p. 420.

39 Trial Judgment, para. 807, **J.S., vol. 1, p. 171.**

40 *Id.*, para. 805, **J.S., vol. 1, p. 171.**

of Bill 21 is felt unequally by Muslim women, in that it impairs their freedom of religion and of expression.[41]

39. According to the Interveners, an applicant does not need to prove that the legislator intended to commit a discriminatory act in order to demonstrate a breach of section 28. According to the theory of substantive equality, proof of the discriminatory impact of a law is sufficient. Still, it must be noted that the trial judge determined that "le port de signes religieux par les femmes musulmanes constitue une des causes de l'adoption de la Loi 21 notamment parce que certains les qualifient de symbole de soumission de la femme envers l'homme."[42]

40. The Interveners disagree with the legislator's approach, and instead advocate for the respect of the constitutional rights and freedoms of Muslim women to practice their religion and to exercise control over their bodies by choosing to wear, or not to wear, a veil.[43] The Interveners believe that the State should not prohibit a practice that affects bodily integrity and that is asserted by one sex, or a sub-group of one sex, in the context of their exercise of a fundamental right.[44]

41. The test proposed above is not a new one. It mainly relies on jurisprudence flowing from the application of section 10 of the *Quebec Charter*, a provision that also constitutes a guarantee of equality in the enjoyment of rights and freedoms.[45]

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41 *Id*., para. 807, **J.S., vol. 1, p. 171.**

42 Trial Judgment, para. 803, **J.S., vol. 1, p. 171.**

43 C. Sheppard, R. Jones and N. Reilly, *supra*, note 6, p. 6.

44 Moreover, see Professor Bakht's discussion of the relative nature of the "difference": Natasha Bakht, "In Your Face: Piercing the Veil of Ignorance About Niqab-Wearing Women", (2015) 24:3 *Social & Legal Studies* 419, p. 423.

45 For example, in *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525. p. 540-541, the Supreme Court maintained that Jewish teachers' right to equality, protected by section 10 of the *Quebec Charter*, was violated by their employer's practice of not paying them for a leave taken to celebrate Jewish holidays. In reaching this decision, the Supreme Court did not conduct a particularized and extensive analysis of the violation of the teachers' freedom of religion. See K. A. Froc, *supra*, note 19, p. 420.
In *Singh v. Montreal Gateways Terminal Partnership*, 2019 QCCA 1494, paras. 16-17, the Appellants had proven a *prima facie* violation of the right to equality in the exercise of their religion, but the Respondents had shown that the contested prohibition was justified under section 10 by a professional requirement. See the analysis of the trial judge regarding

42. Such a test will allow the courts to determine, using a contextual analysis, if the actual impact of the law is to affect unequally or disproportionately the enjoyment by one sex, or a sub-group of one sex, of their *Charter* rights and freedoms.

43. To the extent that the applicant satisfies their burden of proof, the court would have to implement the guarantee of substantive equality protected by section 28 and invalidate the contested provision. Even in the presence of a law that relies on the notwithstanding clause, section 28 would not be affected by derogation from the rights and freedoms protected by sections 2 and 7 to 15.

44. In this case, the factual determinations of the trial judge fully satisfy the test proposed above. By adopting a decidedly intersectional approach which illustrates the experience of discrimination based on the confluence, combination or fusion of grounds, the judge writes:

> [802] [Translation] According to the statistics compiled by the Minister of Labour, Employment and Social Solidarity, women represent 88 % of teachers at the primary and preschool levels and 61 % at the secondary school level. Clearly, the consequences of prohibiting teachers from wearing religious symbols will overwhelmingly affect women.
>
> [803] In addition, there is no doubt that the principle of prohibiting the wearing of a religious symbol stems from the wearing of such by Muslim women. On the one hand, prior to the more prominent presence of this practice in public space, there was no concrete concern on this subject in the social discourse. On the other hand, the wearing of religious symbols by Muslim women is one of the reasons for enacting Bill 21, including the fact that certain people qualify them as a symbol of submission of women towards men.
>
> [804] Moreover, in this respect, PDF and MLQ's focus on this aspect of the issue clearly demonstrates the extent to which one can see in Bill 21 a desire to erase this reality, as their submissions do not mention the wearing of a cross, a kippa or a religious medal, for example. In addition, the wearing of a beard by

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prima facie proof of discrimination: *Singh v. Montréal Gateway Terminals Partnership (CP Ships Ltd./Navigation CP ltée)*, 2016 QCCS 4521, paras. 205-209.

> Muslims or Sikhs does not seem to have the same significance for the defenders of Bill 21, while no one can deny the fact that, for these religious men, it is an orthopraxy indicating strong religious belief.
>
> [805] Of all the persons targeted, Muslim women appear particularly vulnerable. In fact, in CSSM, all applications for a position that were closed following the coming into force of Bill 21, in this case 8, concerned Muslim women who wore the veil.
>
> [806] A census dated 2011 established that there were 243 400 Muslims in Quebec, the second largest religion in the province after Christians. This proportion is twice the size of the Jewish and Sikh populations combined.
>
> [Emphasis added]

45. The provisions of Bill 21[46] prohibit government employees from wearing religious symbols in the exercise of their functions. In addition, they impose on government employees the obligation to exercise their functions with their face uncovered. At the end of his analysis, the trial judge determined, based on the evidence, that these provisions disproportionately affect Muslim women who wear a veil, infringing their freedom of religion and their freedom of expression:[47]

> [807] [Translation] The Court stresses that the evidence unmistakably reveals that the impact of Bill 21 will negatively impact Muslim women, first and foremost. On the one hand, by violating their freedom of religion, and on the other hand by doing the same to their freedom of expression, as the way one dresses is both a pure and simple expression and can also be an indication of religious belief.
>
> [Emphasis added]

46. The trial judge also concluded that Bill 21 violates section 15 of the *Charter*.[48] Under the test proposed by the Interveners, it would not have been

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46 C. Sheppard, R. Jones and N. Reilly, *supra*, note 6, p. 2-3 and 9.
47 Trial Judgment, para. 807, **J.S., vol. 1, p. 171.**
48 *Id.*, para. 876, **J.S., vol. 1, p. 189.**

necessary for the trial judge to find such an infringement, which required demonstrating: (1) a distinction based on an enumerated or analogous ground; (2) that imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. He could simply have determined that the actual impact of the law is to impair the right of Muslim women wearing a veil to full and equal recognition and exercise of one or more of their rights and freedoms protected by the *Charter*.

47. In effect, because section 28 is a guarantee of substantive sex equality with respect to the rights and freedoms set out in the *Charter*, it protects, in this case, Muslim women who wear the veil from the intersectional discrimination they experience through the effect of a law which defeats their rights and freedoms under sections 2 and 15 of the *Charter*.

48. In light of the foregoing, the Interveners are of the view that had the trial judge given his factual determinations the judicial effect suggested by the analytical framework on section 28 that the Interveners are presenting, he would have concluded that the test proposed has been satisfied.

49. Furthermore, the Attorney General of Quebec submitted no evidence or argument on the basis of section 1 of the *Charter* to justify the constitutional violations caused by Bill 21.[49]

50. Therefore, should the Court adopt the analytical framework proposed above, it would conclude that the provisions in Bill 21 violate section 28 and are, as a result, unconstitutional.

C. The notwithstanding clause should not be used in such a way as to infringe a sub-group of women's right to substantive equality in the enjoyment of their rights and freedoms

51. The trial judge emphasizes the [Translation] "casual and inconsiderate"[50] use of the notwithstanding clause in Bill 21.

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49 Trial Judgment, paras. 921, 1008 and 1039, **J.S., vol. 1, p. 196 and 215.**

50 Trial Judgment, para. 770, **J.S., vol. 1, p. 165.** See also Trial Judgment, paras. 754-755 and 759-762, **J.S., vol. 1, p. 162 and 163-164.**

52. To the extent that a legislator wishes to invoke the notwithstanding clause, the actual impact of the override should, according to the Interveners, have a universal impact on all sexes (including sub-groups of sexes), failing which the law would be unconstitutional, as it would contravene the guarantee of equality between "*male and female persons*" in the exercise of their rights and freedoms.

53. A declaration of constitutional validity with respect to the provisions of Bill 21 could set an alarming precedent within a free and democratic society. Indeed, the impact of this case, should this Court endorse the legislator's use of section 33, far exceeds Bill 21. In this case, the actual impact of Bill 21 is to disproportionately affect the freedom of religion and the freedom of expression of Muslim women who wear the veil (as well as their right to equality under section 15). Yet in another context, it would be unconstitutional and inadmissible for the use of the notwithstanding clause in a facially neutral law to disproportionately affect the exercise of the rights and freedoms of one sex or a sub-group of one sex. The significant constitutional gains in pay equity and in matters of bodily integrity, to note only two examples, were far too hard-won to jeopardize them by way of a "casual and inconsiderate" use of the notwithstanding clause.

54. In sum, section 28 explicitly enshrines equality of enjoyment of rights and freedoms between the sexes in the Constitution. Interpreting the *Charter* such that section 33 can suspend this guarantee is just as unacceptable outside of the framework of violating the rights of Muslim women wearing the veil. In other words, section 33 should not, in the future, be used to validate the constitutionality of a law that violates section 28.

CONCLUSION

55. In summary, the Interveners first suggest that the purpose of section 28 is to guarantee substantive sex equality, which requires an intersectional approach to discrimination.

56. To give this purpose its full effect, section 28 must be understood to be an interpretive tool which also has the substantive capacity to invalidate a legislative provision. Section 28 must also be understood as being completely unaffected by the notwithstanding clause.

57. In its interpretive capacity, section 28 requires that the filter of substantive sex equality in section 28 guide the interpretation and the implementation of each provision of the *Charter*.

58. In its substantive capacity, section 28 serves to invalidate laws that violate the guarantee of substantive sex equality that it enshrines. In order to operationalize this substantive function, the Interveners suggest that a party invoking an infringement of section 28 should demonstrate that the law (1) makes a distinction, an exclusion or a preference (2) based on sex that (3) has the effect of nullifying or impairing the right to full and equal recognition and exercise of one or more rights and freedoms of the *Charter*.

59. Should this Court adopt such a test, then in light of the trial judgment's factual determinations, it would have to conclude that the provisions of Bill 21 are unconstitutional. This is because no evidence was submitted to demonstrate that the infringement of section 28 of the *Charter* is reasonable and justified in a free and democratic society, to the extent that such a violation could even be justifiable.

60. In addition, the Interveners believe that this Court should not interpret section 28 in such a way as to allow for section 33 to be used to derogate disproportionately from the constitutional rights of a sub-group of one sex.

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PART IV – CONCLUSIONS

61. In the Interveners' opinion, the analysis presented above strongly suggests that the provisions of Bill 21 are invalid, as they violate section 28.

THE WHOLE, without costs.

Montreal, March 25, 2022

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PART V – REFERENCES

Case Law **Paragraph(s)**

Intervener arguments Sources

Case Law *(cont.)* **Paragraph(s)**

Intervener arguments | Sources

Case Law *(cont.)* **Paragraph(s)**

Doctrine

Intervener arguments Sources

Doctrine *(cont.)* **Paragraph(s)**

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