

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)**

B E T W E E N:

**ENGLISH MONTREAL SCHOOL BOARD,
MUBEENAH MUGHAL and PIETRO MERCURI**

APPELLANTS
(Respondents on Cross-Appeal)

– and –

**ATTORNEY GENERAL OF QUÉBEC,
JEAN-FRANÇOIS ROBERGE, in his official capacity,
SIMON JOLIN-BARRETTE, in his official capacity**

RESPONDENTS
(Appellants on Cross-Appeal)

– and –

**MOUVEMENT LAÏQUE QUÉBÉCOIS, POUR LES DROITS DES FEMMES DU
QUÉBEC and FRANÇOIS PARADIS, in his official capacity**

RESPONDENTS

(Style of cause continued on next page)

**FACTUM OF THE INTERVENER
WOMEN'S LEGAL EDUCATION AND ACTION FUND**
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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(Style of cause continued)

AND BETWEEN:

**WORLD SIKH ORGANIZATION OF CANADA
AMRIT KAUR**

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(Respondents on Cross-Appeal)

– and –

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RESPONDENT
(Appellant on Cross-Appeal)

AND BETWEEN:

**ICHRAK NOUREL HAK,
NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM),
CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION**

APPELLANTS
(Respondents on Cross-Appeal)

– and –

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RESPONDENTS
(Appellants on Cross-Appeal)

– and –

FRANÇOIS PARADIS, in his official capacity

**MOUVEMENT LAÏQUE QUÉBÉCOIS
POUR LES DROITS DES FEMMES DU QUÉBEC**

RESPONDENTS

AND BETWEEN:

FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT

APPELLANT
(Respondent on Cross-Appeal)

– and –

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SIMON JOLIN-BARRETTE, in his official capacity**

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(Appellants on Cross-Appeal)

AND BETWEEN:

**ANDRÉA LAUZON, HAKIMA DADOUCHE, BOUCHERA CHELBI
LEGAL COMMITTEE OF THE COALITION INCLUSION QUÉBEC**

APPELLANTS
(Respondents on Cross-Appeal)

– and –

ATTORNEY GENERAL OF QUÉBEC

RESPONDENT
(Appellant on Cross-Appeal)

– and –

MOUVEMENT LAÏQUE QUÉBÉCOIS

RESPONDENTS

AND BETWEEN:

THE LORD READING LAW SOCIETY

APPELLANT
(Respondent on Cross-Appeal)

– and –

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RESPONDENT
(Appellant on Cross-Appeal)

– and –

QUEBEC COMMUNITY GROUPS NETWORK, ICHRAK NOUREL HAK, NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM), CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION, FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT, LAUZON, ANDRÉA, HAKIMA DADOUCHE, BOUCHERA CHELBI, LEGAL COMMITTEE OF THE COALITION INCLUSION QUÉBEC, CANADIAN HUMAN RIGHTS COMMISSION, LORD READING LAW SOCIETY, WORLD SIKH ORGANIZATION OF CANADA, AMRIT KAUR, AMNISTIE INTERNATIONALE, SECTION CANADA FRANCOPHONE, PUBLIC SERVICE ALLIANCE OF CANADA (PSAC), CHRISTIAN LEGAL FELLOWSHIP, QUEBEC ENGLISH SCHOOL BOARDS ASSOCIATION, FÉDÉRATION DES FEMMES DU QUÉBEC, WOMEN'S LEGAL EDUCATION AND ACTION FUND, POUR LES DROITS DES FEMMES DU QUÉBEC, MOUVEMENT LAÏQUE QUÉBÉCOIS, ENGLISH MONTREAL SCHOOL BOARD, MUBEENAH MUGHAL, PIETRO MERCURI, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA, PUBLIC INTEREST LITIGATION INSTITUTE, MUSLIM ADVISORY COUNCIL OF CANADA, RAOUL WALLENBERG CENTRE FOR HUMAN RIGHTS, TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA, CHINESE CANADIAN NATIONAL COUNCIL FOR SOCIAL JUSTICE AND CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC, DROITS COLLECTIFS QUÉBEC, ADVOCATES' SOCIETY, INTERNATIONAL COMMISSION OF JURISTS (CANADA), TASK FORCE ON LINGUISTIC POLICY AND ANDREW CADDELL, ASSOCIATION DES AVOCATS DE LA DÉFENSE DE MONTRÉAL-LAVAL-LONGUEUIL, SERGE JOYAL, P.C., SOUTH ASIAN BAR ASSOCIATIONS (TORONTO, CALGARY, BRITISH COLUMBIA, AND EDMONTON), CANADIAN MUSLIM LAWYERS ASSOCIATION, CANADIAN ASSOCIATION OF BLACK LAWYERS, AND FEDERATION OF ASIAN CANADIAN LAWYERS (ONTARIO), CANADIAN LABOUR CONGRESS, CANADIAN CONSTITUTION FOUNDATION, CANADIAN CONFERENCE OF CATHOLIC BISHOPS, MIGRANT JUSTICE CLINIC, CONSTITUTIONAL RIGHTS CENTRE INC., HAMSHUCHAS HADOIROIS, INTERNATIONAL ASSOCIATION, COMMISSION NATIONALE DES PARENTS FRANCOPHONES, WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION, CANADIAN COUNCIL OF MUSLIM WOMEN, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, BARBRA SCHLIFER COMMEMORATIVE CLINIC AND WOMEN IN CANADIAN CRIMINAL DEFENCE, LIGUE DES DROITS ET LIBERTÉS, BRITISH COLUMBIA HUMANIST ASSOCIATION AND CANADIAN SECULAR ALLIANCE, ONTARIO HUMAN

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PART I – OVERVIEW

1. This Court is being called on to interpret s. 28 of the *Canadian Charter of Rights and Freedoms* (“**Charter**”) for the first time since the enactment of the *Charter*.¹ The Women’s Legal Education and Action Fund (“**LEAF**”) urges this Court to conduct the purposive analysis necessary to meaningfully develop the gender equality guarantee housed in s. 28.

2. LEAF intervenes to inform this Court’s analysis of s. 28 with two main submissions:

- (i) The purpose of s. 28 is to guarantee gender equality in the exercise of *Charter* rights and freedoms. To fulfill this purpose, s. 28 (a) operates on a substantive equality standard; (b) calls for intersectional analysis; and (c) extends its protection to persons of all genders.
- (ii) Section 28 is a substantive provision. When legislation results in the unequal enjoyment of *Charter* rights and freedoms for those who experience gender-based discrimination, that legislation infringes s. 28 and may therefore be of no force or effect. This is the case regardless of whether s. 33 has been invoked.

PART II – POINT IN ISSUE

3. LEAF intervenes to provide submissions on the interpretation and application of s. 28, which states that: “*Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.*”

PART III – STATEMENT OF ARGUMENT

A. The purpose of s. 28 is to guarantee the equal exercise of *Charter* rights and freedoms for persons of all genders

4. This Court must “specify the purpose underlying” s. 28 and “delineate the nature of the interests it is meant to protect.”² Section 28 must be given a generous and expansive interpretation.³ Considering its “linguistic, philosophic, and historical contexts”⁴ and “the manner in which the constitutional provisions are intended to interact with one another,”⁵ LEAF submits that the

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

² *Hunter v Southam*, [1984] 2 S.C.R. 145, at 157.

³ *Canada (Attorney General) v Power*, 2024 SCC 26, at para 26 [**Power**]; Beverley Baines, “Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation,” (2005) 17:1 CJWL 45, at 62-ff [**Baines**].

⁴ *Power*, at para 26, citing *Reference re Senate Reform*, 2014 SCC 32, at para 25 [**Senate Reform**].

⁵ *Senate Reform*, at para 26.

purpose of s. 28 is to guarantee substantive equality in the enjoyment of rights and freedoms, from an intersectional perspective, for persons of all genders.

(a) Section 28 guarantees substantive equality

5. LEAF submits that s. 28’s reference to rights and freedoms “guaranteed equally to male and female persons” must be understood as a guarantee of substantive equality. Canadian jurisprudence has been at the forefront of the understanding that the right to equality is integrally linked to the concept of substantive equality.⁶ In harmony with Canadian equality rights doctrine, s. 28 necessarily operates on a substantive equality standard. 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.”⁷

6. A substantive equality standard for s. 28 also harmonizes with the historical context of the provision. Section 28’s guarantee that *Charter* rights and freedoms shall be exercised equally as between male and female “persons” arose from the historical fact⁸ of the denial of legal “personhood”⁹ to women and the reality that only men fully enjoyed rights and freedoms.¹⁰ Section 28 responds directly to that historical circumstance. Analyses under s. 28, therefore, require an understanding of that context and of ongoing systemic disadvantage.

(b) Section 28 calls for intersectional analysis

7. Ensuring that s. 28 analysis is faithful to substantive equality – as in, it attends to the full

⁶ *R v Kapp*, 2008 SCC 41, at para 15, referring to *Andrews v Law Society of British Columbia*, [1989] 1 RCS 143, at 165. Substantive equality as the “animating norm of the s. 15 framework” (as discussed in *Fraser v Canada (AG)*, 2020 SCC 28, at para 42 [*Fraser*], and *R v Sharma*, 2022 SCC 39, at para 37 [*Sharma*]) must infuse the s. 28 framework.

⁷ *Fraser*, at para 42; Baines, at 63-65; Kerri Anne Froc, *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms*, doctoral thesis in philosophy, Queen’s University, 2015, at 423 [unpublished] [K.A. Froc, “**Untapped Power**”].

⁸ *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at 394 (per McIntyre J).

⁹ *Edwards v Canada (Attorney General)*, [1930] A.C. 124 [*Edwards*].

¹⁰ Cee Strauss, “Section 28’s Potential to Guarantee Substantive Gender Equality in *Hak c Procureur général du Québec*”, (2021) 33:1 CJWL 84, at 93-94 [*Strauss*]; Baines, at 50; K. A. Froc, “Untapped Power”, at 204; also: Daniel Proulx, “L’objet des droits constitutionnels à l’égalité” (1988) 29 *Les Cahiers de droit* 567 at 592.

context of a claimant group’s position – will often require including intersectionality¹¹ as one of its analytical tools.¹² This is because intersectional analysis recognizes that grounds of discrimination – for instance, gender and religion – are co-constitutive, and that in some cases, it is only by taking each of them into account that the “actual impact of the law”¹³ on a claimant group becomes legible.¹⁴

8. Chief Justice Wagner has recognized the importance of intersectional analysis in equality law extra-judicially, writing, “*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*

¹¹ The Oxford English Dictionary, last modified in July 2023, online, defines intersectionality as “[t]he interconnected nature of social categorizations such as race, class, and gender, regarded as creating overlapping and interdependent systems of discrimination or disadvantage”.

¹² Shreya Atrey, *Intersectional Discrimination*, Oxford University Press, 2019 at 78; Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) University of Chicago Legal Forum 139.

¹³ *Fraser*, at para 42.

¹⁴ See Nywani Albert, “The Potential Impact of Charter Section 28 on Quebec’s Controversial Secularism Law and the Pursuit of Gender-Equality in Canadian Courts” (2024) 33 Dalhousie Journal of Legal Studies 1, at 34-35 [Albert]; Sirma Bilge & Olivier Roy, « La Discrimination Intersectionnelle: La Naissance et le Développement d’un Concept et les Paradoxes de sa Mise en Application en Droit Antidiscriminatoire », (2010) 25 CAN. J.L. & SOC. 51, at 53, 57-59, 68-69: a single-axis reasoning erases victims whose experiences do not map neatly onto one ground, causing them to “fall between the cracks” (our translation). As Bilge and Roy point out, modern anti-discrimination law’s “isolated treatment of grounds” (our translation) forces victims to choose one box, marginalising individuals and groups who experience multiple, interlocking forms of oppression. This structural flaw, they argue, can only be remedied by a holistic, intersectional approach that treats the combined effects of sex, religion, and race as “more than the sum of the parts”, citing *Baylis-Flannery v. DeWilde*, [2003] HRT0 28, at para. 145. In *Turner v Canada (AG)*, 2012 FCA 159, at para 48, Justice Mainville wrote that “[t]he concept of intersecting grounds also holds that analytically separating these multiple grounds minimizes what is, in fact, compound discrimination.”

celle d'un jeune homme portant les mêmes caractéristiques."¹⁵ Justice Karakatsanis, addressing discrimination in the justice system, held that "[t]he grounds of discrimination shaping ... [a] situation may intersect, compounding to form an individual or group's experience."¹⁶ The "intersectionality of disadvantage"¹⁷, repeatedly considered by various judges of this Court¹⁸, is a

¹⁵ 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 Law Review* 43, at 51.

¹⁶ *Sharma*, at para 196 (Justice Karakatsanis, dissenting) [references omitted]. Similar intersectional dynamics permeate other legislative spheres—whether in education, employment, health care, or social assistance—where laws that appear neutral on their face can have disproportionately adverse impacts once gender intersects with race, religion, or other grounds.

¹⁷ *Sharma*, at para 196 (Justice Karakatsanis, dissenting).

¹⁸ *Withler v Canada (Attorney General)*, 2011 SCC 12, at para 58, where Chief Justice McLachlin and Justice Abella indicate that it may be necessary to "reference to 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"; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at paras 93-94, where Justice Iacobucci recognizes the possibility of considering a combination of grounds and analogous grounds in order to conclude discrimination under s. 15 (1); *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para 72 *in fine*, where Justice L'Heureux-Dubé, in a concurring opinion, writes that Indigenous women are doubly disadvantaged because of their sex and race and are particularly affected by the challenged legislative measures; *New Brunswick (Minister of Health and Community Services) v G. (J.)*, [1999] 3 S.C.R. 46, at para 114, where Justice L'Heureux-Dubé, in a concurring opinion, opines that issues related to fairness in child protection hearings affect women particularly and are of particular importance to the rights of members of disadvantaged groups; *Canada (Attorney General) v Mossop*, [1993] 1 S.C.R. 554, at 645-646, where Justice L'Heureux-Dubé, dissenting, remarks in her analysis under the *Canadian Human Rights Act* that more than one ground of discrimination "may be present and intersect". See also *Fraser*, at para 116, where Justice Abella indicates that "a robust intersectional analysis of gender and parenting [...] can be carried out under the enumerated ground of sex, by acknowledging that the uneven division of childcare responsibilities" limits the opportunities available to women [however, she expressly does so

particularly relevant framework for assessing the effect of *An Act respecting the laicity of the State* (“Act”). As a result of s. 6 of the *Act*, Muslim women wearing a head covering face unique barriers not experienced by Muslim men, nor experienced by other groups of women – and yet they experience those barriers precisely because they are Muslim women.¹⁹

9. Section 28 is tailor-made for such analysis, as its internal structure operates intersectionally by design: it is triggered when “persons” who face gender-based discrimination are differentially denied their exercise of another *Charter* right or freedom due to their gender. Due to this built-in link to the *Charter*’s other rights and freedoms, the s. 28 guarantee will often pertain when the alleged gender-based discrimination intersects with other experiences of structural marginalization. For instance, the s. 28 guarantee would be triggered when a law disproportionately denies women their freedom of religion (s. 2(a)), or their right not to be discriminated against based on religion (s. 15(1)), as compared to men.

10. Historical context also supports the view that one of the purposes of s. 28 is to foreground intersectional analyses. The parliamentary debates and committee reports show that in enacting s. 28, legislators were focused on s. 28’s potential to secure *Charter* protections for women who experience marginalization. Indeed, when the New Democratic Party introduced the provision in the spring of 1981, it stressed the importance of the guarantee “for women, and more particularly for native women.”²⁰ Section 28 was also described as a tool to protect the rights of immigrant

without addressing “whether family/parental status should be recognized as an analogous ground under s. 15(1)”].

¹⁹ Trial judgment, at paras 802-807. In *Fraser*, at para 72-75, this Court’s majority notes that “practices amounting to ‘partial discrimination’ are no less discriminatory than those in which all members of a protected group are affected”; see also Colleen Sheppard, Rebecca Jones and Nathaniel Reilly, “Contesting Discrimination in Quebec’s Bill 21: Constitutional Limits on Opting out of Human Rights”, in *Directions*, Canadian Race Relations Foundation, November 2019, at 8, footnote 43 and *Nova Scotia (Workers’ Compensation Board) v Martin*, 2003 SCC 54, at para 76.

²⁰ House of Commons Debates, 32-1, (March 4, 1981), at 7898 (Hon Pauline Jewett): “This should be an overriding statement, making it clear, in case there is any doubt in section 15 or anywhere else, that the rights apply fully, completely, and equally to women and men alike. This is important for all women but, perhaps I should say, particularly important for native women.”

women.²¹

11. Finally, LEAF refers to EMSB’s factum on the point that international law sheds light on the intersectional protection provided by s. 28.²²

(c) Section 28 guarantees substantive equality for persons of all genders

12. LEAF submits that the expressions “male and female persons / *personnes des deux sexes*” should be interpreted to include persons of all genders. This interpretation is consistent with a substantive equality standard. Section 28 guarantees equal exercise of *Charter* rights and freedoms for those “who have been traditionally, and who continue to be, disadvantaged with respect to the legal status of personhood because of gender.”²³ In other words, s. 28 speaks to *gendered hierarchy*; it guarantees equality in the exercise of rights and freedoms to those who experience gender-based discrimination. Gender-based discrimination, in 1982, was understood as something that women – as opposed to men – experienced.²⁴

13. But our Constitution, “by way of progressive interpretation, accommodates and addresses the realities of modern life.”²⁵ The *Charter* was never meant to “fix Canadians’ rights to the beliefs and values of 1982.”²⁶ As this Court seeks to purposively interpret a constitutional provision, LEAF urges this Court to allow s. 28 to “evolve alongside the growing understanding, acceptance, and protection of the rights of trans and non-binary Canadians.”²⁷ The Constitution should be interpreted in a way that allows for the “possibility of growth, development and adjustment to

²¹ House of Commons Debates, 31-1 (November 24, 1981), at 13198 (Hon Margaret Mitchell): “Why is Section 28 so important? I should like to mention quickly some examples of discrimination ... first, immigrant women. We know that the Immigration Act in some ways discriminates against women. [...] Will the Constitution now help to protect their rights and move them toward citizenship more quickly?”

²² EMSB’s factum, at paras 46-50 (International Covenant on Civil and Political Rights (“*ICCPR*”), art. 3; European Convention on Human Rights (“*ECHR*”), art. 14).

²³ Beverley Baines, “Women, Human Rights and the Constitution”, in Audrey Doerr and Micheline Carrier, eds., *Women and the Constitution in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1981), at 55.

²⁴ Baines, at 47, 50, 60 and 66.

²⁵ *Reference re Same-Sex Marriage*, 2004 SCC 79, at para 22.

²⁶ *Albert*, at 34.

²⁷ *Albert*, at 34.

changing societal needs.”²⁸

14. This Court’s “living tree” metaphor is particularly apt in the present case, as it was originally developed to support a gender-inclusive reading of the Constitution. In 1929, Lord Sankey referred to the “living tree” to support a “large and liberal” interpretation of “qualified persons”, such that “qualified persons” includes women.²⁹ Here, to account for the full spectrum of gender identity as we know it to exist in 2025, s. 28’s gender equality protection cannot only extend to “male and female persons” – it must protect “persons of all genders”.

B. Section 28 establishes a substantive guarantee that, if infringed, may result in the impugned law or provision being declared of no force and effect

15. The text of s. 28 provides that the rights and freedoms referred to in the *Charter* are “guaranteed” equally to persons of all genders. Apart from its use in s. 28, this terminology (“guarantee”) is strictly used in reference to substantive rights and freedoms set out in the *Charter*.³⁰ The only available interpretation of the word “guarantee” is a guarantee of a substantive right.

16. Moreover, in *Vuntut Gwitchin First Nation*, this Court ruled that s. 25 is not merely interpretative and may act as a “protective shield”,³¹ rejecting the claim that all of the provisions in the “General / *Dispositions générales*” division of the *Charter* – where s. 28 is located – merely provide interpretative guidance.³² LEAF further submits that the wording “General / *Dispositions générales*” suggests that those provisions apply to the *Charter* “generally” or that they apply to the other provisions of the *Charter*.

²⁸ Re *B.C. Motor Vehicle Act*, [1985] 2 SCR 486, at 509. Our reference to “changing societal needs” is meant to refer to the fact that “[t]he last few decades have seen a greater social understanding of trans issues and advancements in trans rights” (V.S. Wells, “Transgender” The Canadian Encyclopedia (16 September 2022), online: The Canadian Encyclopedia, <https://www.thecanadianencyclopedia.ca/en/article/transgender>). Transgender and non-binary identities themselves have not changed – they have always existed, as have intersex people.

²⁹ *Edwards*, at 107.

³⁰ *Charter*, s. 1, 24(1), (2), 25, 26, 28, 29, 35(4).

³¹ *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10, at paras 164, 175.

³² Emmett Macfarlane “Not Merely Interpretative: The Supreme Court’s Application of Section 25 of the Charter of Rights and Freedoms and its Implications for Section 28” (2024) 33:2 Const Forum Const 17, at 24.

17. Finally, as EMSB explains,³³ s. 28's language and internal structure signal its belonging to a specific type of equality guarantee. This type is one that guarantees equality in the exercise of other rights and freedoms. The other examples of this type of guarantee ground substantive causes of action, without requiring claimants to demonstrate a violation of the underlying right.³⁴ Section 28 should be no different.

(a) Proposed test for the application of the s. 28 guarantee

18. If s. 28 grounds a substantive cause of action, what analysis should a court undertake to determine whether it has been violated? LEAF submits that a party alleging a violation of s. 28 should demonstrate that (a) the impugned legislation creates a distinction, exclusion, or preference (b) based on gender³⁵ – (c) that has the effect of nullifying or impairing the right to full and equal recognition or exercise of one or more rights and freedoms referred to in the *Charter*.

19. To the extent that the claimants meet their burden of proof under the proposed framework, the court would be required to declare that the impugned legislation infringes s. 28. An infringement of the s. 28 guarantee could lead to the conclusion that the infringing law or provision is of no force and effect.³⁶

20. This proposed test is not novel. It is based on the case law arising from the application of s. 10 of the *Québec Charter*, which also guarantees equality in the enjoyment of rights and freedoms.³⁷ Further development of s. 28 case law can serve to distinguish the application of this type of equality guarantee in the *Charter* context, as opposed to the human rights context in which s. 10 of the *Québec Charter* applies.

21. In the present case, the trial judge determined that it is impossible for Muslim women wearing a head covering to comply with the provisions of the *Act* without contravening their sincere

³³ EMSB's factum, at paras 43-57.

³⁴ *Québec Charter of Human Rights and Freedoms* ("**Québec Charter**"), s. 10: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aéronautique Centre de formation)*, 2015 SCC 39, at para 35 [**Bombardier**]; Katherine de Jong, "Sexual Equality: Interpreting s. 28" in AF Bayefsky & M Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) at 521-522; see also ICCPR, art. 3; ECHR, art. 14.

³⁵ See note 19, *supra*.

³⁶ Section 52 of the *Constitution Act, 1982*.

³⁷ K.A. Froc, "Untapped Power", at 420. See *Bombardier*, at paras 42-43, 52-62; *Commission scolaire régionale de Chambly v Bergevin*, [1994] 2 SCR 525, at 540-541. See also D. Robitaille, "Non indépendance et autonomie de la norme d'égalité québécoise: des concepts 'fondateurs' qui méritent d'être mieux connus" (2004), 35 R.D.U.S. 103.

religious beliefs and their freedom of expression.³⁸ Moreover, while Jewish and Sikh men are also affected by the *Act*, the trial judge found that “*la preuve révèle indubitablement que les effets de la Loi 21 se répercuteront de façon négative sur les femmes musulmanes d’abord et avant tout.*”³⁹ On the test advanced by LEAF’s submissions, the *Act* would infringe s. 28 of the *Charter*.

(b) The s. 28 guarantee is unaffected by s. 33 of the *Charter*

22. Section 28 provides that gender equality is guaranteed “[n]otwithstanding anything in th[e] *Charter*.” The Court of Appeal stated that s. 28’s preamble is meant to provide for the supremacy of this provision over the other “interpretative” provisions,⁴⁰ but this is an understatement of the scope of s. 28. The preamble of s. 28 states “*Notwithstanding anything in this Charter*”, and not “*Notwithstanding any interpretative provision in this Charter*”. Unambiguously, s. 28 guarantees gender equality in the exercise of the *Charter*’s rights and freedoms, notwithstanding anything in the *Charter*. This necessarily includes s. 33. This is also consistent with the text of s. 33, which only refers to ss. 2 and 7 to 15 – not s. 28.⁴¹ Given how clear the texts of s. 28 and s. 33 are, it is not surprising that numerous scholars agree that s. 28 is unaffected by s. 33.⁴²

³⁸ Trial judgment, at paras 805, 807. Although the evidence of disproportionate impact on Muslim women is both quantitative and qualitative in the present instance, LEAF submits that, consistent with s. 15 equality rights doctrine (*Sharma*, at para 49, *Fraser*, at paras 56-67), a claimant’s evidence of distinction in a s. 28 challenge can be qualitative or quantitative, and in certain cases, stem from judicial notice.

³⁹ Trial judgment, at para 807.

⁴⁰ Court of Appeal’s judgment, at para 456.

⁴¹ Section 28 is not the only *Charter* provision that is shielded from the operation of s. 33. This Court has noted that the framers of the *Charter* “signaled the special importance” of the right to vote (as guaranteed by s. 3 of the *Charter*) “not only by its broad, untrammelled language, but by exempting it from legislative override under s. 33’s notwithstanding clause” (*Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, at para 11). The Court added that in recognition of the importance of the right to vote, the framers “accorded it special protections”, as the right to vote “cannot be suspended under the ‘notwithstanding clause’” (at para 36). LEAF submits that in exempting s. 28 from the legislative override, the framers were similarly signaling its special importance.

⁴² Albert, at 29; Peter W. Hogg, *Constitutional Law of Canada*, 2: 5 (Toronto, Carswell, 2016) at 55-65; Marilou McPhedran, Judith Erola, Loren Brault, “Helluva Lot to Lose in 27 days: The

23. Remaining at the level of the text, s. 28 guarantees that the rights and freedoms “referred to” in the *Charter* apply equally to all genders. LEAF agrees with the Court of Appeal for Saskatchewan that the content of the rights and freedoms specified at ss. 2 and 7 to 15 is unaffected by the invocation of s. 33.⁴³ At the same time, LEAF also submits that the effect of s. 33 on these *Charter* rights and freedoms is irrelevant to the operation of s. 28. Whether substantively in play or not, ss. 2 and 7 to 15 remain textually *referred to* in the *Charter* and are, by the language of s. 28, guaranteed equally to persons of all genders.

24. This means that the test proposed above can be applied to determine a violation of s. 28 whether or not s. 33 has been invoked. It also means that s. 28 circumscribes the use of s. 33⁴⁴, preventing a legislature from invoking s. 33 if the impact of the override provision is to create inequality in the exercise of rights and freedoms for those who experience gender-based discrimination.

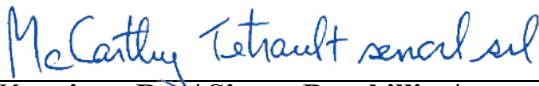
PART IV– SUBMISSIONS CONCERNING COSTS

25. As a public interest intervener, LEAF asks that no costs be awarded to or against it.

PART V – ORDER SOUGHT

26. LEAF takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of September, 2025.


 Veronique Roy/ Simon Bouthillier/
 Anita Badaku-Kpalley


 Cee Strauss,
 Women’s Legal Education and Action Fund

AdHoc Committee and Women’s Constitutional Activism in the Era of Patriation.” (2015) *Patriation and its Consequences: Constitution Making in Canada* ed. Louis Harder, Steve Patten. UBC Press (203-225), at 218-219; Strauss, at 105-107; Baines, at 61, 67; Mary Eberts, “Notwithstanding v. Notwithstanding: Sections 28 and 33 of the Canadian Charter of Rights and Freedoms” (2024), *The notwithstanding clause and the Canadian charter : rights, reforms, and controversies*, ed. Peter L. Briro, McGill-Queen’s University Press (338-362), at 355; K.A. Froc, “Untapped Power”, at 380; Kerri Froc, “A Law in Rupture: Section 28, Equal Rights, and the Constitutionality of Quebec’s Bill 21 Religious Symbols Ban” in Kislowicz, H., Moon, R. & Froc, K., eds, *Canada’s Surprising Constitution: Unexpected Interpretations of the Constitution Act, 1982* (Vancouver: UBC Press), 2024 at 38. Also: *Syndicat de la fonction publique du Québec inc v Québec (Procureur général)*, 2004 CanLII 76338 (QC CS), at paras 1416-1429.

⁴³ *Saskatchewan (Minister of Education) v UR Pride Centre for Sexuality and Gender Diversity*, 2025 SKCA 74 at para 91.

⁴⁴ Baines, at 61.

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