

**IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)**

B E T W E E N :

N.S.

Appellant

- and -

HER MAJESTY THE QUEEN

M---D.S.

M---L.S.

Respondents

- and -

**ONTARIO HUMAN RIGHTS COMMISSION
BARBRA SCHLIFER COMMEMORATIVE CLINIC
CRIMINAL LAWYERS' ASSOCIATION
MUSLIM CANADIAN CONGRESS
SOUTH ASIAN CLINIC OF ONTARIO
BARREAU DU QUÉBEC
CANADIAN CIVIL LIBERTIES ASSOCIATION
WOMEN'S LEGAL EDUCATION AND ACTION FUND
CANADIAN COUNCIL ON AMERICAN-ISLAMIC RELATIONS**

Interveners

FACTUM OF THE INTERVENER

THE CANADIAN COUNCIL ON AMERICAN-ISLAMIC RELATIONS (CAIR-CAN)
(Filed pursuant to Rules 37 & 42 of the *Rules of the Supreme Court of Canada*)

PEGGY SMITH LAW OFFICE

160 Johnson Street
Kingston, ON K7L 1Y1

Mihad Fahmy
Faisal Bhabha

Tel: (519) 641-1861
Fax: (519) 204-0375
Email: mihad@rogers.com
fbhabha@osgoode.yorku.ca

Solicitor for the Intervene CAIR-CAN

CHAMP & ASSOCIATES

43 Florence Street
Ottawa, ON K2P 0W6

Khalid Elgazzar

Tel: (613) 237-4740 ext. 2
Fax: (613) 232-2680
Email: kelgazzar@champlaw.ca

Ottawa Agent for the Intervener
CAIR-CAN

TO: REGISTRAR OF THE SUPREME COURT OF CANADA

Supreme Court Building
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

DAVID B. BUTT

501-205 Richmond St. West
Toronto, ON M5V 1V3

Tel: (416) 361-9609
Fax: (416) 361-9443
Email: dbut@barristersatlaw.ca

Solicitor for the Appellant

AND TO:

**ATTORNEY GENERAL
OF ONTARIO**

720 Bay Street, 10th Floor
Toronto, ON M5G 2K1

Elise Nakelsky

Tel: (416) 212-2149
Fax: (416) 326-4656
Email: elise.nakelsky@ontario.ca

Solicitor for the Respondent
Her Majesty the Queen

AND TO:

**RUSONIK, O'CONNOR, ROBBINS
ROSS, GORHAM & ANGELINI LLP**

100-36 Lombard St.
Toronto, ON M5C 2X3

Michael Dineen
Douglas Usher

Tel: (416) 598-1811 ext.5747
Fax: (416) 598-3384
Email: dineen@criminaltriallawyers.com

Solicitor for the Respondent M---d.S.

SHANBAUM SEMANYK

PROFESSIONAL CORPORATION

1207-150 Isabella St.
Ottawa, ON K1S 1V7

Terri H. Semanyk

Tel: (613) 238-6969 ext.2
Fax: (613) 238-9916
Email: tsemanyk@sspclaw.ca

Ottawa Agent for the Appellant

BURKE-ROBERTSON

70 Gloucester Street
Ottawa, ON K2P 0A2

Robert E. Houston, Q.C.

Tel: (613) 566-2058
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

Ottawa Agent for the Respondent
Her Majesty the Queen

**GOWLING LAFLEUR
HENDERSON LLP**

2600-160 Elgin St.
Box 466 Station D
Ottawa, ON K1P 1C3

Brian A. Crane, Q.C.

Tel: (613) 233-1781
Fax: (613) 563-9869
Email: brian.crane@gowlings.com

Ottawa Agent for the Respondent M---d.S.

AND TO:
ENZO M. BATTIGAGLIA
600-1000 Finch Ave. West
Toronto, ON M3J 2V5

Tel: (416) 650-1011
Fax: (416) 650-1980

Solicitor for the Respondent M---I.S.

AND TO:
**ONTARIO HUMAN RIGHTS
COMMISSION**
180 Dundas Street West, 8th Floor
Toronto, ON M7A 2R9

Reema Khawja
Anthony D. Griffin

Tel: (416) 326-9870
Fax: (416) 326-9867
Email:

Solicitor for the Intervener Ontario
Human Rights Commission

AND TO:
NORTON ROSE OR LLP
3800 – 200 Bay Street
P.O. Box 84
Toronto, ON M5J 2Z4

Rahool P. Agarwal
Michael Kotrly
Vasuda Sinha

Tel: (416) 216-3943
Fax: (416) 216-3930
Email: rahool.agarwal@nortonrose.com

Solicitor for the Intervener Barbra
Schlifer Commemorative Clinic

**GOWLING LAFLEUR HENDERSON
LLP**
2600-160 Elgin St.
Box 466 Station D
Ottawa, ON K1P 1C3

Brian A. Crane, Q.C.

Tel: (613) 233-1781
Fax: (613) 563-9869
Email: brian.crane@gowlings.com

Ottawa Agent for the Intervener Ontario
Human Rights Commission

NORTON ROSE OR LLP
1500 – 45 O'Connor Street
Ottawa, ON K1P 1A4

Sally Gomery

Tel: (613) 780-8604
Fax: (613) 230-5459
Email: sally.gomery@nortonrose.com

Ottawa Agent for the Intervener Barbra
Schlifer Commemorative Clinic

AND TO:

**SACK GOLDBLATT MITCHELL
LLP**

1130 – 20 Dundas Street West
P.O. Box 180
Toronto, ON M5G 2G8

Frank Addario
Amma Phillips

Tel: (416) 979-6446
Fax: (416) 591-7333
Email:

Solicitor for the Intervener Criminal
Lawyers' Association (Ontario)

AND TO:

BORDEN LADNER GERVAIS LLP

40 King Street West, 44th Floor
Toronto, ON M5H 3Y4

Tyler Hodgson

Tel: (416) 367-6460
Fax: (416) 361-2526
Email: thodgson@blg.com

Solicitor for the Intervener Muslim
Canadian Congress

AND TO:

BENNETT JONES LLP

3400 One First Canadian Place
P.O. Box 130
Toronto, ON M4X 1A4

Ranjan K. Agarwal
Daniel Holden
Jessica Weiss

Tel: (416) 777-6503
Fax: (416) 863-1716
Email: agarwalr@bennettjones.com

Solicitor for the Intervener South
Legal Clinic of Ontario

**SACK GOLDBLATT MITCHELL
LLP**

500 – 30 Metcalfe Street
Ottawa, ON K1P 5L4

Colleen Bauman

Tel: (613) 235-5327
Fax: (613) 235-3041
Email: cbauman@sgmlaw.com

Ottawa Agent for the Intervener Criminal
Lawyers' Association (Ontario)

BORDEN LADNER GERVAIS LLP30 –

100 Queen Street, Suite 1100
Ottawa, ON K1P 1J9

Nadia Effendi

Tel: (613) 237-5160
Fax: (613) 230-8842
Email: neffendi@blg.com

Ottawa Agent for the Intervener Muslim
Canadian Congress

BENNETT JONES LLP

1900 – 45 O'Connor Street
World Exchange Plaza
Ottawa, ON K1P 1A4

Sheridan Scott

Tel: (613) 683-2302
Fax: (613) 683-2323
Email: scottss@bennettjones.com

Ottawa Agent for the Intervener South Asian
Asian Legal Clinic of Ontario

AND TO:

BCF S.E.N.C.R.L.

1100, boul. René-Lévesque Ouest
Bureau 2500
Montréal, QC H3B 5C9

Babak Barin
Tel: (514) 397-8500
Fax: (514) 397-8515
Email: bbarin@bfc.ca

Solicitor for the Intervener Barreau du
Québec

NELLIGAN O'BRIEN PAYNE LLP

1500 – 50 O'Connor Street
Ottawa, ON K1P 6L2

Pamela J. MacEachern
Tel: (613) 231-8276
Fax: (613) 788-3681
Email:

Ottawa Agent for the Intervener Barreau du
Québec

AND TO:

BLAKE CASSELS & GRAYDON LLP

Box 25
Commerce Court West
Toronto, ON M5L 1A9

Bradley E. Berg
Rahat Godil

Tel: (416) 863-4316
Fax: (416) 863-2653
Email: brad.berg@blakes.com

Solicitor for the Intervener Canadian
Civil Liberties Association

BLAKE CASSELS & GRAYDON LLP

45 O'Connor Street, 20th Floor
World Exchange Plaza
Ottawa, ON K1P 1A4

Nancy K. Brooks

Tel: (613) 788-2200
Fax: (613) 788-2247
Email: nancy.brooks@blakes.com

Ottawa Agent for the Intervener Canadian
Civil Liberties Association

AND TO:

**WOMEN'S LEGAL EDUCATION
AND ACTION FUND**

703 – 60 St. Clair Avenue East
Toronto, ON M4T 1N5

Joanna L. Birenbaum
Susan Chapman

Tel: (416) 595-7170 ext.223
Fax: (416) 595-7191
Email: j.birenbaum@leaf.ca

Solicitor for the Intervener Women's
Legal Education and Action Fund

BLAKE CASSELS & GRAYDON LLP

45 O'Connor Street, 20th Floor
Ottawa, ON K1P 1A4

Nancy K. Brooks

Tel: (613) 788-2200
Fax: (613) 788-2247
Email: nancy.brooks@blakes.com

Ottawa Agent for the Intervener Women's
Legal Education and Action Fund

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CANADIAN COUNCIL ON AMERICAN-ISLAMIC RELATIONS (CAIR-CAN) PAGE

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PART I - OVERVIEW AND STATEMENT OF RELEVANT FACTS

1. This case is about access to justice for Muslim women who wear the niqab. Muslim women on the whole face vulnerability both within the Canadian Muslim community and within the broader society. Muslim women who wear the niqab are especially vulnerable. They are a minority within a minority. Their distinct form of dress is viewed by many with suspicion or disgust. In popular discourse they are either vilified as fanatics who refuse to integrate, or infantilized as victims who are prevented from seeing their own oppression. Women who venture out in niqab are often mocked, and have been at times harassed and assaulted. They are frequent targets of “cultural racism”—discriminatory attitudes veiled under the guise of female liberation, safety, security or the rule of law.¹

2. The intervener is a national Muslim advocacy organization that defends ss. 7 and 11(d) rights in the administration of the justice system. The intervener has also long urged public institutions to be more sensitive to, and inclusive of, diverse religious practices.² There is no “conflict” of rights in this case. The Court is being asked to *define* rights in accordance with *Charter* values. Those very values create an expectation for Muslim women in niqab that they will be accommodated—that is, *taken as they are*—when they engage with the justice system. Accommodation is the essence of substantive equality.

3. The decision of the Court below recognizes the importance of individual freedom and respect for difference, but it fails to establish a procedure that assures equal treatment for women in niqab. It distinguishes them on the basis of their sex and religion, and establishes a potentially invasive inquiry to evaluate their belief and practice.³ This burden is overly onerous.

4. The intervener makes two unique contributions to this appeal hearing. First, it urges this Court to find a presumption of admissibility with respect to the testimony of women in niqab. This presumption is supported by the *Charter*’s express and unwritten guarantees of religious freedom, equality, multiculturalism, the protection of minorities and access to justice.

5. Secondly, the intervener submits that any rule or practice requiring the removal of a niqab is not prescribed by law and is therefore not justifiable.

¹ Alia Al-Saji, “The Racialization of Muslim Veils: A Philosophical Analysis” (2010) 38 *Philosophy and Social Criticism* 875 at 887-891, Book of Authorities of the Intervener CAIR-CAN (Intervener’s Book of Authorities), Tab 15.

² Affidavit of Ihsaan Gardee at para. 18, Application for Leave to Intervene of the Intervener CAIR-CAN, Tab 2.

³ *R v N.S.*, 2010 ONCA 670 at paras 90-95, 95 OR (3d) 735, leave to appeal to SCC granted, 33989 (March 17, 2011), Appellant’s Record, Tab 4.

PART II - STATEMENT OF ISSUES

6. The intervener accepts the issues as stated by the appellant.

PART III - STATEMENT OF ARGUMENT

A. *Sections 27, 28 and 15 should frame the analysis at all stages of this case*

7. Section 27 of the *Charter* provides:

This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada.⁴

8. This Court has described Canada as a:

multiethnic and multicultural country ... which accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities — and is in many ways an example thereof for other societies....”⁵

9. Section 27 refers to the multicultural heritage of Canadians. This implies an approach which views multiculturalism as a shared value, as part of a common good and of the evolving Canadian heritage. This approach is reinforced in the *Canadian Multiculturalism Act*, by which the government pledges to:

...recognize and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges that freedom of all members of Canadian society to preserve, enhance and share their cultural heritage... [and to] recognize and promote the understanding that multiculturalism is a fundamental characteristic of the Canadian heritage and identity and that it provides an invaluable resource in the shaping of Canada’s future.⁶

10. Section 28 of the *Charter*⁷ provides that: “Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.” The choice the appellant faces is between walking away from her religious convictions as a person of faith, and walking away from the pursuit of justice as a victim of an alleged sexual assault. Her status as a woman is what connects this impossible choice. The intervener urges this Court to recognize the relevance of s. 28 to this case.

⁴ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, s. 27, Intervener’s Book of Authorities, Tab 13 [*Charter*].

⁵ *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551 at para 87, Appellant’s Book of Authorities, Tab 10 [*Amselem*].

⁶ *Canadian Multiculturalism Act*, RSC 1984 (4th Supp), c 24, Intervener’s Book of Authorities, Tab 14.

⁷ *Charter*, *supra* note 4, s. 28.

B. *Intersectional lens and the “right to integrate”*

11. The rights and interests of a Muslim woman who wears the niqab can only be properly appreciated through an intersectional understanding. Viewing this case through the combined lens of ss. 15, 27 and 28 magnifies the appellant’s status as a member of a minority within a minority. It requires this Court to adopt a contextual and nuanced approach to accommodation that accounts for the intersecting sex equality and religious and cultural equality interests at stake.⁸

12. In *Andrews v. Law Society of British Columbia*, this Court noted the interconnectedness of ss. 2(a), 27 and 15 in promoting substantive equality. McIntyre J. stated:

It must be recognized, however, as well that the promotion of equality under s. 15 has a much more specific goal than the mere elimination of distinctions. If the Charter was intended to eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage); 2(a) (freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2)...⁹

13. This Court has further identified the values of multicultural diversity and pluralism as the normative basis for a “right to integrate” into mainstream society:

Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections found in human rights codes to their constitutional enshrinement in the *Canadian Charter of Rights and Freedoms*, the right to integrate into Canada’s mainstream based on and notwithstanding these differences has become a defining part of our national character.¹⁰

14. Section 27 mandates a consideration of how Canada’s multiculturalism project is to be furthered or “enhanced.” Neither static nor purely descriptive, this lens is meant to *promote* a shared set of goals and values,¹¹ the core of which is substantive equality. There is a normative force to s. 27 that mandates action to protect and nurture minority cultures as a shared investment in Canadian heritage.

⁸ Natasha Bakht, “Reinvigorating Section 27: An Intersectional Approach” (2009) 6:2 J.L. & Equality 135 at 149, Intervener’s Book of Authorities, Tab 16 [Bakht].

⁹ *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at 171, Intervener’s Book of Authorities, Tab 1. [Andrews].

¹⁰ *Bruker v. Markovitz*, 2007 SCC 54 at para 1, [2007] 3 SCR 607, Intervener’s Book of Authorities, Tab 2 [Bruker].

¹¹ Bakht, *supra* note 8 at 143.

15. Recognizing normative power in s. 27 does not require applying it as a sword. Rather, s. 27 may be seen as a shield to protect against forced assimilation. Such protection is a necessary corollary of the right to integrate.

C. *Multiculturalism and religious freedom require accommodating difference*

16. Section 2(a) embodies a freedom which, like ss. 15 and 27, creates an imperative to recognize and accommodate difference. In outlining the content of freedom of religion, this Court in *Syndicat Northcrest v. Amselem* invoked multiculturalism as a rationale for broadly conceiving of religious freedom. Iacobucci J., writing for the majority, reasoned that a multicultural society requires the accommodation of genuinely-held religious practices, even where there is some “minimal” impact on the interests of others.¹²

17. This Court has recognized the inherent public good in accommodating diverse religious and cultural practices.¹³ The accommodation of differences is about the meaningful inclusion of minorities within all of society’s institutions, at all levels. The principle of *taking people as they are* necessitates an adjustment of courtroom practices to enable such members of diverse populations to equally access institutions of justice. This is not only consistent with, but is also necessitated by, the multicultural project embodied within s. 27.

18. In order to establish a protected practice under section 2(a), the claimant must assert a sincerely held belief, which is for the trial judge to assess as a matter of fact on the basis of the claimant’s oral evidence.¹⁴ Requiring additional proof “to gauge the sincerity of belief” would have the effect of diminishing the freedom itself.¹⁵

19. Based on the trial judge’s factual findings, the appellant has already testified as to the sincerity of her conviction that she must not remove her niqab in an open courtroom. It is irrelevant whether the practice is orthodox or dissident within Islamic doctrine, universally embraced or marginal. Freedom of religion protects both obligatory and voluntary expressions of faith¹⁶ This Court should accept the appellant’s testimony as sufficient to establish a protected religious practice within the meaning of s. 2(a).

¹² *Amselem*, *supra* note 5 at para 87.

¹³ *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at paras 78-79, [2006] 1 SCR 256 Intervener’s Book of Authorities, Tab 5 [*Multani*].

¹⁴ *Ibid* at para 53.

¹⁵ *Ibid* at para 54.

¹⁶ *Ibid* at para 47.

D. *Respect for difference promotes the constitutional protection of minorities*

20. The duty to accommodate religious difference is more than an individual right; it carries a collective benefit, a common good.¹⁷

21. The protection of minorities is a foundational, unwritten constitutional imperative.¹⁸ It is entrenched in various forms in the *Charter*, but the value of protecting minorities long precedes it, dating back to the nation's genesis:

Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.¹⁹

22. Applying this analysis to the present case means obliging the state to ensure that the application of courtroom rules and practices does not impose unfair disadvantages attributable to socially constructed differences. Where difference operates as a disadvantage, constitutional protection for minorities should be triggered as a restraining force on the action or custom that leads to the friction, in this case, the custom of testifying with an exposed face.

E. *Presumption in favour of admissibility*

23. The process outlined by the Court below, for a case-by-case determination as to whether to compel the removal of a witness's niqab, would impose an invidious burden on Muslim women who wear the niqab. They would be forced to face potentially invasive questioning by the court and by opposing counsel in each instance that they appear as a witness. Muslim women who wear the niqab would be subjected to repeated hurdles that others will never experience.

24. The intervener submits that courts should be proactive in identifying accommodation issues as a matter of access to justice and equality. Where a female witness is wearing a face covering, the court should, as a matter of practice, initiate a simple inquiry to ascertain whether it is a niqab, being worn in fulfilment of a sincerely-held religious belief. Testimony to this effect should be sufficient. Cross-examination on the belief should rarely, if ever, be necessary.

¹⁷ *Ibid* at paras 78-79.

¹⁸ *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 80-81, Intervener's Book of Authorities, Tab 11.

¹⁹ *Ibid*.

25. Under the process set out by the Court below, significant weight is placed on a jury's preferences regarding the niqab.²⁰ Deferring to juries on an access and equality issue risks affixing the imprimatur of the justice system on attitudes that may be based on stereotypes, without any bulwark against potential discrimination.

26. The presumption should be that the oral evidence of a woman in niqab is *prima facie* admissible. The accused should bear a high onus of rebutting this presumption on the basis of actual harm. Courts must be careful to prevent objections based on stereotypes from defeating the presumption in favour of admissibility.

27. There is no basis to assume that a niqab, which usually covers the face below the eyes, will create obstructions to the trier-of-fact or impose an unfair disadvantage on the accused, whether at a preliminary inquiry or at trial. The appellant's credibility can be assessed, and her evidence effectively tested, short of requiring her to remove the niqab. Her eyes, tone of voice, choice of words, logic of story, plausibility, posture and body language all remain available for evaluation.

28. There is no evidence or reason to assume that a woman who customarily wears the niqab will be made more valuable or reliable as a result of removing her niqab. It is just as likely that the opposite would be true, given the discomfort she would experience.

29. An open-ended, case-by-case determination is therefore insufficient for ensuring that women in niqab will be equally protected by the law and will experience equal access to justice. Only a presumption in favour of admissibility can appropriately balance the considerations of multiculturalism, equality and access to justice.

F. *Section 1 does not apply because no state action is "prescribed by law"*

30. There should be no *Oakes*²¹ test analysis because limitations on *Charter* rights are only applicable when they are "prescribed by law"²². In this case, there is no "law" that says a witness must bear her face in court. If such a practice exists, it is, at best, a judicial convention or custom, which is, by definition, not prescribed.

²⁰ *R v N.S.*, *supra* note 3 at para 76.

²¹ *R v Oakes*, [1986] 1 SCR 103 at 135, Intervener's Book of Authorities, Tab 8.

²² *Charter*, *supra* note 4, s. 1.

31. While a judicial convention constitutes “government action”, attracting *Charter* scrutiny, it is not “law” and is not open to a s. 52 remedy. Applying a section 1 analysis in this case would have the effect of injecting the character of law into this custom where no such prescription is express.

32. Unlike a statute, which has received legislative consideration, conventions are rarely critically or seriously reviewed. There is no evidence that policy-makers have considered the views of experts on the subject, or canvassed alternatives. The practise may have grown out of important legal principles or values, but it may also be based on dominant cultural or gender norms that have no clear or proven connection to the stated objective.

33. Such dominant norms underlie many of our inherited traditions. These practices are never culturally neutral.²³ This is why customs must be subjected to scrutiny in accordance with the multiculturalism, equality and access to justice considerations discussed above. If the custom is not prescribed by law, there is no reason to show it any deference, given its impact on the appellant’s *Charter* rights.

34. For these reasons, practices that are not prescribed by law should be interpreted to be flexible in structure, open to adjustments and accommodating of innovation, with a view to removing barriers to justice for members of disadvantaged groups. Such an approach is rooted in the combined force of the *Charter*’s equality-enhancing provisions, including ss. 15, 27 and 28.

35. This Court is urged to rule that practise conventions that are not prescribed by law should be subject to judicial evaluation in accordance with equality,²⁴ multiculturalism²⁵ and access-to-justice indicators, as a proactive measure. Where the convention is found to cause a *Charter* breach, or risks excluding a person from participating in the practise of justice, that convention should be abandoned or satisfactorily refined, without the need for government to articulate an *ex post facto* justification.

G. *The infringement does not minimally impair the right under section 1*

36. In the alternative, should this Court find that s. 1 does apply, the intervener submits that the infringement of the appellant’s freedom of religion is not minimally impairing.

²³ Benjamin Berger, “The Cultural Limits of Legal Tolerance” (2008) 24 Can. J. L. & Juris. 245 at p 263, Intervener’s Book of Authorities, Tab 17.

²⁴ *R. v Osolin*, [1993] 4 SCR 595 at para 166, Intervener’s Book of Authorities, Tab 9.

²⁵ *R. v Gruenke*, [1991] 3 SCR 263 at para 36, Intervener’s Book of Authorities, Tab 7.

37. The lenses of multiculturalism, the protection of minorities and equality should continue to inform this Court's analysis of the section 1 issues. This Court has stated:

Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.²⁶

38. The accommodation of difference, even where there is some “minimal impact” on the interests of others, is part and parcel of both preserving and enhancing our multicultural society.²⁷ In *Central Okanagan School District No. 23 v. Renaud*, this Court invoked Canada's character as “multicultural” in raising the undue hardship defence bar to “not trivial but substantial.”²⁸ This same standard should be applied when deciding whether to limit the accommodation of the appellant's freedom of religion under s. 1.

39. In *Multani*, this Court found a breach of freedom of religion by a neutral rule that was expressly designed to promote important health and safety considerations. Yet, the Court highlighted the importance of the values of multiculturalism and diversity and concluded that an absolute prohibition on the Sikh *kirpan* failed to minimally impair the right, and was therefore unjustifiable.²⁹

40. The analogous “prohibition” in the present case would be to find a prescribed rule requiring the witness to be examined with her face exposed. Such a rule would force a woman in niqab to choose between the practise of her faith and her participation in the justice system. That choice is too onerous, strikes at the core of a woman's dignity, and does not minimally impair the right at stake.

H. *The right to cross-examine does not require seeing the face*

41. Unlike Canada, the United States Constitution explicitly guarantees a right to “confront” one's accuser, the Confrontation Clause (6th Amendment). The U.S. Supreme Court has interpreted this right to include a “preference”, though not a requirement, for face-to-face confrontation.³⁰

42. In the United Kingdom, the Judicial Studies Board has considered the question of access to justice for women wearing the niqab. It found that:

²⁶ *Bruker*, *supra* note 10 at para. 2.

²⁷ *Amselem*, *supra* note 12 at para 87.

²⁸ *Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970 at 984-985, Intervener's Book of Authorities, Tab 3.

²⁹ *Multani*, *supra* note 13 at paras 74-77.

³⁰ *Maryland v. Craig*, 497 US 836 (1990), Intervener's Book of Authorities, Tab 4.

To force a choice between that identity... and the woman's involvement in the criminal, civil justice, or tribunal system (as a witness, party, member of court staff or legal office-holder) may well have a significant impact on that woman's sense of dignity and would likely serve to exclude and marginalise further women with limited visibility in courts and tribunals. This is particular concern for a system of justice that must be, and must be seen to be, inclusive and representative of the whole community.³¹

43. In a Family Court matter in Britain, the court made arrangements to accommodate a witness in niqab. This included setting up a screen between male counsel and the witness, and closely supervising court entrances to ensure that no men in or entering the courtroom could see the unveiled woman. The female judge explained as follows:

In my view, the facility of screens and the ability, if at all possible, to list these cases before a female judge, would obviate the objections of litigants or witnesses subject to an assessment of the genuine nature of their unwillingness to appear before the court without the veil.³²

44. Similarly, a New Zealand trial judge found that "it would be contrary to the interests of justice" to compel a female witness wearing niqab to remove her veil, and ordered the use of a screen so that only the judge, counsel and (female) court staff could see her face.³³

I. *It is not proportional to the objective of ensuring a fair trial to limit the appellant's religious freedom*

45. It is a false dichotomy to view this case as a contest between fair trial rights on the one hand and a religious freedom on the other. The intervener submits that, through the lenses of multiculturalism, access to justice and equality, the values of diversity are introduced into the definition of trial fairness itself.

46. This Court has warned against too easily finding "conflicts" of rights. Overlapping interests must be reconciled through the careful definition of the right at play:

[A]ny potential conflict should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict...³⁴

³¹ Judicial Studies Board (UK), *Equal Treatment Bench Book*, London: JSB, 2007, ch 3.3, at 3-18/2, online: Judiciary of England and Wales <http://www.judiciary.gov.uk>, Intervener's Book of Authorities, Tab 18.

³² *Re S. (Practice: Muslim Women Giving Evidence)*, [2007] 2 FLR 461 at para 16, Intervener's Book of Authorities, Tab 10.

³³ *Police v. Razamjoo*, [2005] DCR (NSW) 408 at para 108, Intervener's Book of Authorities, Tab 6.

³⁴ *Trinity Western University v. College of Teachers*, 2001 SCC 31 at para 29, [2001] 1 SCR 772, Intervener's Book of Authorities, Tab 12.

47. It is unclear what, if any, actual harm the accused would suffer by allowing the appellant to testify in niqab. Any potential harm is speculative and is not based on evidence. Meanwhile, no threat to fundamental justice, to the presumption of innocence or to the court's independence is created by the applicant's desire to give evidence wearing a niqab.

48. The intervener submits that properly defining the rights in this case will not present a conflict between a fair trial and an inclusive trial. The fact that the accused prefers the appellant to give evidence without her niqab should not be sufficient to engage a competing *Charter* right. The fairness of the trial must be evaluated holistically on the basis of both individual and public interests, including multiculturalism, access to justice and equality.

PARTS IV AND V - COSTS AND ORDER SOUGHT

49. The intervener seeks no costs order, leave to make oral submissions of ten (10) minutes in length, and otherwise supports the Appellant's remedial request.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of November, 2011.

Mihad Fahmy and Faisal Bhabha
Counsel to the Intervener, CAIR-CAN

PART VI – TABLE OF AUTHORITIES

<u>Jurisprudence</u>	Paragraph(s)
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