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Ontario Court of Appeal Recognizes Importance of Access to Justice for Niqab-Wearing Women

October 13, 2010 - Toronto - The Ontario Court of Appeal released its decision today in the case of *R. v. N.S.* on the right of a sexual assault complainant to testify wearing her niqab.

"The Court sent a strong signal today that sexual assault complainants will be permitted to wear their niqabs while testifying, subject to limited exceptions and the strictures of the complainant's religious beliefs" says LEAF legal director Joanna Birenbaum. "This is a significant decision affirming the importance of fair trials and access to justice for Muslim women and all sexual assault complainants".

The Court of Appeal judgment specifically recognizes the "powerful" nature of the complainant's rights to wear her niqab while testifying, and the unique "hardships" and "particularly vulnerable position" suffered by women who report sexual assault.

The Court also recognizes that Muslims are a "minority that many believe is unfairly maligned and stereotyped in contemporary Canada" and that a failure to adequately consider the complainant's rights could "legitimize that negative stereotyping".

"It is also important that the Court confirmed the unreliability of demeanor evidence in general and in the specific circumstance of sexual assault" says LEAF co-counsel Susan Chapman. "The Court went so far as to hold that allowing the complainant to wear her niqab could advance the truth seeking function of the criminal trial". The Court noted that a complainant who normally wears the niqab and is required to unveil cannot be expected to "be herself" on the stand. A trier of fact might well be misled by her expressions of embarrassment and discomfort.

The Court held that the ultimate decision of whether to permit a witness to testify wearing a niqab must be determined on a case by case basis. A bald assertion of a right to demeanor evidence is unlikely ever to be sufficient, particularly at the preliminary inquiry stage.

LEAF asked the Court of Appeal to consider the demand that a sexual assault remove her niqab in the context of the long history of sexual assault complainants being harassed, re-victimized, humiliated and intimidated, especially at the preliminary inquiry. Such tactics have long been used to shut down prosecutions or prevent women from reporting sexual assault in the first place.

Chapman explains that "LEAF is pleased that the Court of Appeal recognized this history of discrimination and has clearly indicated that objections to the niqab must be carefully scrutinized in order to fully protect and respect the complainant's rights and the interests of society in just and fair criminal proceedings".

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