

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

N.S.

Applicant

-and-

HER MAJESTY THE QUEEN

Respondent

-and-

M---d.S.

Respondent

-and-

M---l.S.

Respondent

-and-

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PART I – OVERVIEW

1. This is a sexual assault case. Sexual assault complainants have historically paid a purchase price for justice not demanded of other witnesses. Women have been required to lay bare their sexual histories, their medical and therapeutic records, and other intimate details of their lives in order to seek justice against men who abuse them. Arbitrary obstacles to their evidence have been erected including demands for recent complaint and corroboration. Complainants have been routinely and unfairly evaluated as victim-worthy (or not) based upon their dress and demeanor.
2. An order forcing the removal of this complainant's intimate religious clothing must be evaluated in light of the history of discriminatory demands made of women in sexual assault cases. Acute sensitivity to context is required when defining complainants' and accuseds' *Charter* rights.¹ Here this means careful attention to the legal and procedural norms which have re-victimized sexual assault complainants and reinforced their inequality. Notwithstanding developments intended to limit their influence, discriminatory assumptions about complainants continue to pervade the prosecution of sexual assault, particularly in the examination and assessment of credibility.²
3. N.S. is a Muslim, niqab-wearing, sexual assault complainant. Her rights, not only under ss.2(a), but also ss.7 and 15 of the *Charter*, must be given full analysis and weight. Prioritizing freedom of religion would overlook the totality of the *Charter* rights advanced, including the complainant's rights to equality and to physical and psychological integrity. This would do a grave injustice to the rights asserted. An order requiring N.S. to remove her niqab at the behest of two male co-accused in a sexual assault trial will have a profound impact on her and on niqab-wearing Muslim women and will send a chilling message to all women who have experienced sexual assault.
4. The procedural issues in this appeal are as important as the substantive. The legal questions include who bears the onus of establishing their rights and the procedure for doing so. The accused seek the order,

¹ *R. v. Mills*, [1999] 3 S.C.R. 668 at paras. 72 and 93.

² As noted by Professor Elizabeth Sheehy, "Every law reform in evidence law that has been generated to overcome sex discrimination in the adjudication of rape has been met with counter-moves by the defence bar and the re-emergence of myths and stereotypes about women, men and rape in the guise of new legal practices and judicial discourses", in "Evidence Law and the "Credibility Testing" of Women: A Comment on the E Case" (2002) 2 Queensland University Technology Law and Justice Journal 157 and also at 157-58, 172; see also Lise Gotell, "When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) *Alta. L. Rev.* 743 at paras. 1- 4; Lise Gotell, "The Discursive Disappearance of Sexualized Violence" in Dorothy E. Chunn, Susan B. Boyd and Hester Lessard, ed. *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver: UBC Press, 2007) 127 at 135-136, 143-44, 151; Melanie Randall, "Sexual Assault Law and "Ideal Victims"; Credibility, Resistance and Victim Blaming", (2010) 22(2) *Canadian Journal of Women and the Law* 397-434; Natasha Bakht, "What's in a Face? Demeanour Evidence in the Sexual Assault Context" in Elizabeth Sheehy ed., *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012)(forthcoming) at p.3, 7; *R v. Seaboyer*; *R. v. Gayme*, [1991] 2 S.C.R. 577 at p.665 (Per L'Heureux Dube J., dissenting in part); *R. v. Osolin*, [1993] 4 S.C.R. 595 at pp. 624-625(per L'Heureux Dube J. in dissent); *R. v. Mills*, [1999] 3 S.C.R. 668 at paras.58 and 90.

the accused bear the onus. The preliminary inquiry judge has no jurisdiction to grant the *Charter* remedy requested by the accused. The order in question engages profound constitutional rights. This cannot be masked by characterizing the order as a matter of statutory interpretation at the preliminary inquiry and yet a *Charter* determination at trial. The Court of Appeal correctly held that this appeal engages the “**constitutional rights** of a witness in a criminal proceeding.”³ These rights are no less constitutional at the preliminary inquiry than at trial.

5. This is a complex case with a simple solution. This Court’s long-standing jurisprudence in *O’Connor* and *Mills* and the established procedural practices following these decisions provide a complete and principled mechanism for reconciling the rights in question.⁴ The accused are the *Charter* applicants. Accordingly they bear the onus of demonstrating on a *voir dire* at trial why the Court should make the extraordinary order of requiring the complainant to remove her niqab.

PART II - POINTS IN ISSUE

6. The point in issue as stated in the Notice of Appeal is whether the Court of Appeal erred in balancing the *Charter* ss. 2(a), 7, 15 and 28 rights of the complainant with the s.7 *Charter* rights of the accused to make full answer and defence. LEAF submits that:

- i. The complainant is entitled to testify at the preliminary inquiry in her niqab. The preliminary inquiry judge has no jurisdiction to order it removed.
- ii. At trial, the accused bear the onus of demonstrating, on the specific facts of the case, that their s.7 *Charter* rights to full answer and defence are impeded by the complainant wearing her niqab. A bald assertion of a right to demeanor evidence of the complainant’s full facial expressions will not suffice. The principles and procedures which govern records applications established under *O’Connor* and *Mills* should be adapted to govern any such motions by the accused.
- iii. An order requiring the complainant to remove her niqab violates her rights under ss.7, 15, 2(a) and 28 of the *Charter*.

PART III – ARGUMENT

No Jurisdiction to Order Removal at Preliminary Inquiry

7. The forced removal of the niqab cannot be interpreted as incidental to the exercise of the power to regulate the preliminary inquiry proceeding. The order in question is not analogous to asking someone to

³ *R. v. N.S.* 2010 ONCA 670 (“Appeal Judgment”) at para.98 (emphasis added) and also at paras. 1 and 101.

⁴ *R. v. O’Connor*, [1995] 4 S.C.R. 411; *R. v. Mills*, *supra*.

spit out her gum or turn off her cell phone in court. The lower Courts' finding that an order stripping a sexual assault complainant of her niqab is merely a form of regulating the proceeding, grossly trivializes N.S.'s rights and the severe consequences of the order for her and for all niqab-wearing sexual assault complainants. The nature of the order as a determination of *Charter* rights, rather than a rule regulating the proceeding, is reflected in the consensus of all involved that the complainant is entitled to counsel.

8. The Court of Appeal erred in relying on *R. v. L.R.* (1995), 100 C.C.C. (3d) 329, which is no longer good law in light of *R. v. O'Connor* and its progeny. The preliminary inquiry judge does not have the power to review disclosure decisions or order production of psychiatric records. In recognition of the ss.7, 8 and 15 *Charter* privacy and equality rights of complainants, records applications are made at trial.

9. The preliminary inquiry is not a trial. Assessments of credibility are not made. The purpose of the preliminary inquiry is to determine if the Crown has some evidence upon which a jury could convict. While the accused may use the preliminary inquiry to explore the Crown's case, the accused have no constitutional right to this opportunity and it is one that is routinely and permissibly confined by the inability of a preliminary inquiry judge to order either disclosure or production of documents. The right of cross-examination at the preliminary inquiry cannot be expanded by way of statutory interpretation to effectively empower a preliminary inquiry judge to order a remedy under s.24(1) of the *Charter*.

Accused are the Charter Applicants: Bald Assertion of Right to Demeanor Insufficient

10. The accuseds' objection to the niqab rests exclusively on the claim that demeanor evidence gleaned from the lower half of the complainant's face is fundamental to their *Charter* right of full answer and defence. The accuseds bear the onus of establishing the content of the right and the nature and extent of the infringement. While LEAF submits that the Court of Appeal erred in finding that a witness must first demonstrate "that wearing her niqab is a legitimate exercise of her religious freedoms", the Court below correctly went on to hold that "the onus then moves to the accused to show why the exercise of this constitutionally protected right would compromise his constitutionally protected right to make full answer and defence" (para.98). The lower Court further correctly held that the test which the accused must meet is "necessarily fact-specific" (para.97).

11. There is, of course, no constitutional right to full demeanor evidence in respect of all testimony. No one would suggest that witnesses whose facial expressions are limited, whether due to facial paralysis, muscle limitations, severe burns or other reasons, should be excluded or their evidence accorded less weight. With the modernization of the hearsay rule, evidence may be adduced and admitted without any access by the parties or the Court to the demeanor of the witness. What constitutes full access to demeanor is in any event unclear. There is no precise definition of demeanor, nor can there be. Is access to demeanor unacceptably limited where a person's face is visible but their voice is a flat whisper with no cadence or fluctuation? What if medication or trauma renders the witness without affect? The face of a man with a very full beard may be partially concealed. The standard is malleable, not absolute.

12. Moreover, the lower Court correctly acknowledged that the truth seeking function of the criminal trial may be subverted by requiring N.S. to testify without her niqab, given the unreliability of her demeanor when stripped of her niqab in public, possibly for the first time in eight or more years: "without the niqab, N.S. would be testifying in an environment that was strange and uncomfortable for her. One could not expect her to be herself on the witness stand. A trier of fact could be misled by her demeanor" (para.81). Indeed any witness would behave differently if asked to testify without, for example, his or her shirt on.

13. Indeed, demeanor evidence has a proven history of subverting the truth-seeking function of the criminal trial. The misuse of demeanor evidence has had devastating consequences for complainants and accused alike; take the examples of Susan Nelles or Guy Paul Morin.⁵ In the context of the sexual assault trial, stereotypical beliefs (rape mythologies) about how a rape victim ought to look or behave continue to pervade the judicial process.⁶

14. Stereotypical assumptions which "deem certain types of women "unrapeable" or which hold other groups of women responsible for their assault "because of their occupation or appearance", are based on discriminatory beliefs that women frequently lie about being sexually assaulted, are not reliable reporters of

⁵ Government of Ontario, Ministry of the Attorney General, *The Commission on Proceedings Involving Guy Paul Morin*, 1998, presided over by then Justice Fred Kaufman, Vol.2, Recommendation 76A: *Overuse and misuse of consciousness of guilt and demeanour evidence*, p. 1142-3; In *R. v. Nelles*, the prosecution sought an inference of guilt from a physician's observation that Ms. Nelles had "a strange expression on her face" and showed "no sign at all of grief" at the death of one of the babies, see *R. v. Nelles*, [1982] O.J. No.3654 (Prov. Ct. Crim. Div.)(QL) at para.62.

⁶ See authorities at note 2 and, for example, the Transcript of Reasons for Judgment on Sentencing of Justice Dewar in *R.v Rhodes* (February 18, 2011) (Man. Q.B.) at <http://www.scribd.com/doc/50396234/Kenneth-Rhodes-Sentencing-Transcript>.

events, are prone to exaggerate, are deluded or hysterical, and falsely report sexual assault for reasons of jealousy, fantasy, spite, neurosis or guilt over a sexual encounter.⁷ If a complainant is not angry and visibly upset, it is often assumed that the offence was not serious or did not occur. On the other hand, if she is perceived to be too angry and upset, it is often assumed she is lying or vindictive.

15. The use of demeanor in the context of sexual assault trials also risks compounding already prevalent sexist, racist and classist rape mythologies with respect to who is a credible victim and how a “real” victim will conduct herself on the stand.⁸ Aboriginal and racialized women have long been considered inherently less innocent, less credible and less worthy than white women.⁹ N.S. is a racialized woman from a stigmatized religious/racial minority. The influence of prejudices (whether overt or hidden) relating to these additional markers of discrimination in the assessment of her demeanor further throw into question the purported value of her demeanor evidence to the truth-seeking function of the criminal trial.

16. The suggestion that “central witnesses” have their credibility scrutinized more and differently than other witnesses has a long history of being used as an excuse for creating arbitrary and unnecessary obstacles to the evidence of sexual assault complainants, such as unique demands for corroboration and recent complaint.¹⁰ The alleged “centrality”¹¹ of the evidence of the sexual assault complainant to the prosecution does not elevate the importance or reliability of her demeanor above and beyond that of any other witness who appears before the Courts. Credibility assessments of various witnesses, whether “central” or not, are determinative in many if not most criminal trials, not just sexual assault cases.

17. It is women’s words that matter, not how we look or what we are wearing, whether a “bonnet and crinoline” or otherwise. The accuseds’ right to cross-examination and to full answer and defence are protected by scrutinizing what N.S. says. Given the total absence of probative value of demeanor evidence in many cases and its prejudicial nature, particularly in sex assault cases, a bald assertion of a right to demeanor is insufficient to engage the accused’s s.7 *Charter* rights without further evidence as to why demeanor is relevant on the specific facts of the case. Alternatively, even if this Court finds that their s.7 rights may be minimally engaged, this minimal engagement alone, without further evidence on the facts of

⁷ *R v. Mills*, *supra* at para. 90; *R. v. Osolin* *supra* at pp.624-625.; Bakht, *What’s in Face?* at p.7; Sherene Razack *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at p.68; and see authorities at notes 2 and 6 *supra*.

⁸ *Ibid.*

⁹ Razack, *Looking White People in the Eye*, *supra*, and references at n.2.

¹⁰ *R. v. Osolin* at pp.627-628 (per L’Heureux Dube J.).

¹¹ Appeal Judgment, paras. 75, 77, 101.

the case, is insufficient to trigger a reconciliation of rights exercise. The prejudicial impact of demeanor evidence and its established history of subverting the truth-seeking goal of sexual assault trials, outweighs any interest the accused might have in forcing this complainant to remove her niqab in open court.

Application for Order on Voir Dire at Trial

18. Where accused persons establish that there is something so unique about a complainant that her veracity can be objectively judged by demeanor, *Mills* provides the framework for the reconciliation of the accuseds' rights and the complainant's interlocking ss.7, 15, and 2(a) *Charter* rights. Specifically, the objection must be made by the accused as follows: by way of written application; supported by evidence and argument as to the specific relevance of the full-face demeanor of the complainant to the facts of the case; on notice to the complainant and the Crown; to be determined in a single *voir dire* at which the complainant is represented by counsel and non-compellable.¹² The balancing of the rights by the Court in such cases must occur prior to the issuance of an order, not after the fact as suggested in the court below.

19. Consistent with the records application context, the question to be determined on the *voir dire* is whether the accused has discharged his onus, on a balance of probabilities, of establishing that his right to a fair trial would be infringed by the admissibility of the niqab-wearing complainants' testimony. Simply asserting a right to demeanor evidence is insufficient to establish the necessary evidentiary foundation.

No Virtue Testing at Preliminary Inquiry or Trial: Nexus to Religion and Sincerity Presumed

20. The requirement that a sexual assault complainant remove deeply personal clothing as a precondition to testifying at the preliminary inquiry must be seen in the context of defence tactics to "whack the complainant" which have not been eradicated. Similarly, the suggestion that it is appropriate to subject the veiled complainant to cross-examination on the sincerity of her religious beliefs must be considered in view of the persistence of practices intended to humiliate, degrade and intimidate complainants.

21. For niqab-wearing complainants, the sexual assault preliminary inquiry and trial must not automatically commence with a hearing into the validity, sincerity and voluntariness of their religious practice. A Muslim complainant's religious convictions should be presumed, as they would be with a nun who comes to Court wearing a habit. The enhancement of demeanor and credibility arguably afforded by

¹²As argued *infra* the complainant is similarly non-compellable at the *voir dire* and the preliminary inquiry in respect of the sincerity of her religious beliefs in wearing the niqab.

a nun's habit, a priest's or monks clerical robes, a Jewish man's kippah, or other religious articles, has not resulted in Courts requiring the removal of these items. Nor has it resulted in an exploration of the extent of these witness' commitment to the practice and the scope of any exemptions.

22. Cross-examination of the complainant on her religious beliefs, including exemptions to the practice of wearing the niqab, carry the real danger of facilitating yet another form of wide-ranging virtue testing of the complainant, as well as attacks on her credibility through a collateral attack on her religious beliefs. The "twin myths" will be resurrected in a new form: the complainant's religious purity will be challenged as a means of undermining her credibility in making the sexual assault allegations. The inquiry into religious belief in *Amselem* and other decisions of this Court is very narrow. This Court has confirmed that it will not become the "arbiter of religious dogma" and that the sincerity inquiry is limited to the claimant's "belief at the time of the alleged interference" and not her past beliefs or practices.¹³ Nevertheless, a ss.2(a), 7 and 15 *Charter* analysis here reveals a very real concern that questions asked of a niqab-wearing complainant might include: Have you been to mosque recently? Were you recently in a restaurant eating non-halal meat? Do you drink alcohol? Have you had extra-marital sex? Accused may argue that answers to these questions are relevant either to the sincerity of the belief, the possibility of exemptions to the practice of wearing the niqab, or the seriousness of the interference with the right. Moreover, sexual assaults are frequently committed by men known to the complainant, and often, as in this case, family members. The accused are very often privy to the details of complainants' lives. The potential for misuse of personal information in the sincerity/practice examination is obvious.

The *Charter* Rights of the Complainant

23. Even before being represented by counsel in this case, the complainant relied upon a complex matrix of *Charter* rights, referring to her religious beliefs and "the nature of the allegations" as interlocking reasons for refusing to remove her niqab.¹⁴ The significant rights violated by an order to remove the niqab include complainants' rights to access to justice without having to relive being forcibly stripped by the accused, and the rights of Muslim women to practice their religion in accordance with their beliefs without

¹³ *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at paras.47, 50, 52.

¹⁴ The court below states in footnote 7 of its decision that LEAF was first to raise the ss.15 and 7 *Charter* sexual assault context of this case and that the case ought to be decided on the record. However, the complainant herself explained to the court that "we are in a courtroom full of men and...I would feel a lot more comfortable if I didn't have to...reveal my face...you know, just considering the nature of the allegations...my face is not going to show any signs of – it's not going to help, it really won't." (Appeal Judgment para.5).

sacrificing their fundamental right to the law's protection.¹⁵ The equality impacts of the order are unavoidably gendered and raced. Only Muslim women wear the niqab and it is in the context of a sexual assault proceeding that this Court is being asked to strip a complainant of this intimate article of clothing, which she describes as "a part of me".

24. The substantive s.7 *Charter* rights of complainants engaged by the proposed court order include: the right to be free from state induced psychological harm; the right to personal dignity, autonomy and integrity; the right to physical security of the person; the right to make fundamental personal choices¹⁶; and the right to liberty.¹⁷ Forcing niqab-wearing women to choose between accessing the justice system and their faith and personal integrity (physical, psychological and emotional) contravenes s.7 in a manner inconsistent with the principles of fundamental justice.¹⁸

25. The principles of fundamental justice in this case include the complainant's right to a non-discriminatory fair trial, free of stereotypes and mythologies relating to her demeanor, and the right of access to justice, unencumbered by arbitrary and insurmountable obstacles. The precepts of fundamental justice include "avoidance of unprobative and misleading evidence" and concern for the "fair trial process" from the point of view the complainant, the community and the accused.¹⁹ Negating the complainant's significant *Charter* rights in this case in order to permit the accused to exploit a category of evidence which has proven misleading and discriminatory, would not accord with the principles of fundamental justice and bears little or at best an insufficient relationship to the goal of advancing the truth-seeking function of a fair criminal trial and the accuseds' rights of full answer and defence.

¹⁵ The words of a niqab-wearing witnesses in a Michigan court are telling: "I wish to respect my religion and so I will not take off my clothes", cited in Bakht, *What's in a Face* at p.9, footnote 61.

¹⁶ In *Blencoe v. British Columbia*, [2000] 2 S.C.R. 307 at paras.49-53 the Supreme Court of Canada confirmed that s.7 liberty interests may be engaged when the law prevents persons from "making fundamental personal choices"; see also *R. v. Morgentaler*, [1988] 1 S.C.R. 30 per Dickson CJC at pp. 54-57 and per Wilson J. at pp.164-171.

¹⁷ A compellable witness who is ordered to remove her niqab and refuses, risks criminal sanction and/or imprisonment, thus engaging her s.7 *Charter* rights. As well, to the extent that women are deterred from reporting sexual assault, their physical security and liberty are diminished. On a systemic level, male sexual violence against women has a profound impact on women's liberty, freedom of movement and personal choices. It operates as a "method of social control over women" and defines women's "relationship with society"; see *Jane Doe Board of Commissioners of Police for the Municipality of Metropolitan Toronto*, [1998] O.J. No.2681 (Gen. Div) at p.4 and *R. v. Seaboyer* at p.649.

¹⁸ A law or action is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind" the law or government action and when "the deprivation of the right in question does little or nothing to enhance the state's interest", see *Rodriguez v. B.C.*, [1993] 3 S.C.R. 519 at 595; See also *R. v. Morgentaler*, *supra*; and *R. v. Parker* (2000), 49 O.R. (3d) 481 C.A.) at paras. 102-117.

¹⁹ *R. v. Mills* at para.72.

26. The complainants' s.7 *Charter* rights must inform, and be informed by ss.15 and 28 of the *Charter*. Section 28 of the *Charter*, which confirms the equal application of rights to men and women, demands that *Charter* rights be interpreted and defined by the experiences and political and social realities of men and women. Section 7 fair trial rights cannot be understood exclusively through the lens of men accused of sexual assault. The s.7 rights of the complainant at stake in this case are not subordinate or of lesser value or weight.²⁰ The complainant's entitlement to wear her niqab is not an assertion of "special rights". The rights asserted are foundational. As are the consequences. At a personal level for niqab-wearing women, the order may be experienced as an act of male violence, a public undressing and nakedness, thus implicating the Canadian justice system in a very particular form of humiliation of Muslim women contrary to ss.7, 15 and 2(a) of the *Charter*. The psychological harm and violation of personal integrity is thus uniquely raced and gendered. In a public forum the complainant would be ordered to remove a deeply personal item of Muslim religious dress worn only by women. Further, at this particular moment in history in which Muslims are a distrusted and marginalized minority in the West, the implications of an order requiring a woman to remove her niqab are particularly potent.²¹ Such an order may be experienced by the niqab-wearing complainant as an enactment of dominant society's sense of cultural/racial/religious superiority over the Muslim minority – a forced unveiling to bring Muslim women into secular life.²²

27. Systemically, sexual assault continues to be vastly under-reported and under-prosecuted, especially when marginalized women are victimized. Both Parliament and this Court have recognized the importance of addressing this serious problem. Yet if niqab-wearing women risk being forced to remove their niqabs to testify, or if they face an onerous or demeaning procedure to justify their veils, the likelihood of these women reporting sexual assault diminishes even further, thus heightening their risk of being sexually assaulted, denying them access to the justice system, and exacerbating their inequality.

²⁰ *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 at para.72; *R v. Mills*, at para. 21.

²¹ The Ontario Human Rights Commission in its Policy on Racism and Racial Discrimination (December 2009) states: "A contemporary and emerging form of racism in Canada has been termed "Islamophobia." Islamophobia can be described as stereotypes, bias or acts of hostility towards individual Muslims or followers of Islam in general. In addition to individual acts of intolerance and racial profiling, Islamophobia leads to viewing Muslims as a greater security threat on an institutional, systemic and societal level"; see also Natasha Bakht, "Veiled Objections: Facing Public Opposition to the Niqab" in *Reasonable Accommodation: Managing Religious Diversity*, Lori Beaman ed., (Vancouver: UBC Press, 2012)(forthcoming).

²² Historically, the forced unveiling of Muslim women, for example by the French in Algeria, has constituted an act of political and national domination. While this example may not be directly relevant to the Canadian context, the resonances are relevant. Sherene Razack describes the "culturalization of racism" and writes: "Muslims are stigmatized, put under surveillance, denied full citizenship rights, and detained in camps on the basis that they are a pre-modern people located outside of reason, a people against whom a secular, modern people must protect themselves" in *Casting Out, the Eviction of Muslims From Western Law and Politics* (Toronto: University of Toronto Press, 2008) at pp.173-174.

Conclusion

28. The wearing of the “veil” in post-9/11 Western society has often been perceived as an affront to Western values and traditions.²³ Public responses to the niqab are frequently informed by anti-Muslim racism (Islamophobia).²⁴ The procedural legal issues and substantive rights in this appeal must not be influenced by any discomfort that the wearing of the niqab produces or by the stereotype that women who wear the niqab are “hiding” something and should thus be subjected to heightened scrutiny. N.S. comes before the Court having reported childhood sexual abuse. She is entitled to access to justice in the prosecution of this serious offence, dressed as she is, without being re-victimized, literally as well as metaphorically. It may be that Western society believes that it is protecting Muslim women by forcing the removal of their veils.²⁵ Excluding niqab-wearing complainants from access to justice, however, will serve only to further marginalize and stigmatize this already disadvantaged group of women contrary to ss.2(a), 15 and 7 of the *Charter*.

29. Ironically, having regard to the current fear and distrust of veiled Muslim women, it is the complainant herself who is most likely to be prejudiced by the wearing of the niqab. Courts and juries will need to be alert to existing prejudices that a Muslim woman who covers her face cannot be believed, is uniquely dishonest, or is using the niqab as a ruse to “hide behind the veil”. The lower Court erred in suggesting that an adverse inference can be drawn. Instead, careful instructions to the trier of fact will be crucial to prevent misuse by the jury of the fact that the complainant wears a niqab. In a political climate in which niqab-wearing women are the targets of disdain, distrust and newly proposed laws to restrict their civic participation, the courts need to be vigilant to ensure that discriminatory barriers are not created for niqab-wearing women, effectively shutting them out of the justice system and leaving them beyond the law’s protection.

PART IV and V – COSTS AND ORDERS SOUGHT

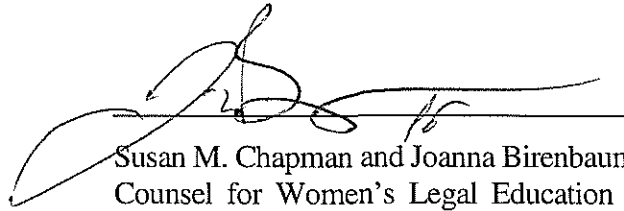
30. LEAF seeks orders that: (1) LEAF be granted permission to present oral argument at the hearing of this appeal; (2) no costs of this appeal be ordered for or against LEAF.

²³ Bakht, *Veiled Objections*, *supra*; see also Homa Hoodfar, “The Veil in Their Minds and on Our Heads: Veiling Practices and Muslim Women” in *The Politics of Culture in the Shadow of Capital*, Lisa Lowe and David Lloyd (Durham: Duke University Press, 1997) at 248-279 with respect to perceptions of the veil in the West and the complexities of the political, economic and social experiences of women who wear the veil.

²⁴ Joan Wallach Scott, *Politics of the Veil* (Princeton: Princeton University Press, 2007) and citations at notes.21-23.

²⁵ The purported desire to advance the equality of niqab-wearing women by stripping them of their clothing is suspect given the laws lack of similar pre-occupation with the restrictive clothing worn by women of other religions, such as nun’s and their habits, or Orthodox Jewish women’s shaidls and neck-down covering.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF NOVEMBER, 2011.



A handwritten signature in black ink, appearing to be a cursive combination of the names Susan M. Chapman and Joanna Birenbaum, written over a horizontal line.

Susan M. Chapman and Joanna Birenbaum
Counsel for Women's Legal Education and Action fund
(LEAF)

PART VI - AUTHORITIES

| <u>Cases</u> | Paragraph Nos. |
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| <i>Blencoe v. British Columbia</i> , [2000] 2 S.C.R. 307..... | 24 |
| <i>Dagenais v. Canadian Broadcasting Corporation</i> , [1994] 3 S.C.R. 835 | 26 |
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| <i>R. v. Mills</i> , [1999] 3 S.C.R. 668 | 2, 5, 15, 25, 26 |
| <i>R. v. Morgentaler</i> , [1988] 1 S.C.R. 30..... | 24 |
| <i>R. v. Nelles</i> , [1982] O.J. No.3654 (Prov. Ct. Crim. Div.)(QL) | 13 |
| <i>R. v. O'Connor</i> , [1995] 4 S.C.R. 411 | 5 |
| <i>R. v. Osolin</i> , [1993] 4 S.C.R. 595 | 2, 15, 16 |
| <i>R. v. Parker</i> (2000), 49 O.R. (3d) 481 (C.A.)..... | 24 |
| <i>R.v. Rhodes</i> , Transcript of Judgment on Sentencing, February 18, 2011 (Man.Q.B.) | 13 |
| <i>Rodriguez v. British Columbia Attorney General</i> , [1993] 3 S.C.R. 519..... | 24 |
| <i>R. v. Seaboyer; R. v. Gayme</i> , [1991] 2 S.C.R. 577..... | 2, 24 |
| <i>Syndicat Northcrest v. Amselem</i> , 2004 SCC 47..... | 22 |

Secondary Sources

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| Bakht, Natasha, “Veiled Objections: Facing Public Opposition to the Niqab” in <i>Reasonable Accommodation: Managing Religious Diversity</i> , Lori Beaman ed., (Vancouver: UBC Press, 2012)(forthcoming)..... | 26, 28 |
| Bakht, Natasha, “What’s in a Face? Demeanour Evidence in the Sexual Assault Context” in Elizabeth Sheehy ed., <i>Sexual Assault in Canada: Law, Legal Practice and Women’s Activism</i> (Ottawa: University of Ottawa Press, 2012)(forthcoming)..... | 2, 15, 23 |

- Gotell, Lise, “The Discursive Disappearance of Sexualized Violence” in Dorothy E. Chunn, Susan B. Boyd and Hester Lessard, ed. *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver: UBC Press, 2007) 127 2, 14, 15
- Gotell, Lise, “When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records” (2006) *Alta. L. Rev.* 743-778 2, 14, 15
- Government of Ontario, Ministry of the Attorney General, *The Commission on Proceedings Involving Guy Paul Morin*, 1998, presided over by then Justice Fred Kaufman, Vol.2, Recommendation 76A: *Overuse and misuse of consciousness of guilt and demeanour evidence*..... 13
- Hoodfar, Homa, “The Veil in Their Minds and on Our Heads: Veiling Practices and Muslim Women” in *The Politics of Culture in the Shadow of Capital*, Lisa Lowe and David Lloyd (Durham: Duke University Press, 1997) 28
- Ontario Human Rights Commission, *Policy on Racism and Racial Discrimination* (June 2005, updated December 2009) <http://www.ohrc.on.ca/en/resources/Policies/RacismPolicy?page=erace-Part.html> 26
- Randall, Melanie, “Sexual Assault Law and “Ideal Victims”; Credibility, Resistance and Victim Blaming”, (2010) 22(2) *Canadian Journal of Women and the Law* 397..... 2, 14, 15
- Razack, Sherene, *Casting Out, the Eviction of Muslims From Western Law and Politics* (Toronto: University of Toronto Press, 2008) 26
- Razack, Sherene, *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) 15
- Scott, Joan Wallach, *Politics of the Veil* (Princeton: Princeton University Press, 2007)..... 28
- Sheehy, Elizabeth, “Evidence Law and the “Credibility Testing” of Women: A Comment on the E Case” (2002) 2 *Queensland University Technology Law and Justice Journal* 157..... 2, 14, 15