500-09-029550-217 – 500-09-029549-219
500-09-029539-210

COURT OF APPEAL OF QUÉBEC

(Montréal)

On appeal from a judgment of the Superior Court, District of Montréal, rendered on April 20, 2021 by the Honourable Justice Marc-André Blanchard.

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Nos. **500-09-029550-217 C.A.M.** – 500-17-109983-190, 500-17-108353-197, 500-17-109731-193, 500-17-107204-193 S.C.M.

ATTORNEY GENERAL OF QUEBEC
JEAN-FRANÇOIS ROBERGE, in is capacity as Minister of Education
SIMON JOLIN-BARRETTE, in is capacity as Minister of Immigration, Diversity and Inclusion

APPELLANTS / INCIDENTAL RESPONDENTS
(Defendants)

v.

ICHRAK NOUREL HAK
NATIONAL COUNCIL OF CANADIAN MUSLINS (NCCM)
CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION
FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT
ANDRÉA LAUZON
HAKIMA DADOUCHE
BOUCHERA CHELBI
COMITÉ JURIDIQUE DE LA COALITION INCLUSION QUÉBEC

RESPONDENTS
(Plaintiffs)

(Style of cause continues on the next page)

BRIEF OF THE INCIDENTAL APPELLANTS ENGLISH MONTREAL SCHOOL BOARD, MUBEENAH MUGHAL AND PIETRO MERCURI

Dated December 2, 2021

- and -

ENGLISH MONTREAL SCHOOL BOARD
MUBEENAH MUGHAL
PIETRO MERCURI

RESPONDENTS / INCIDENTAL APPELLANTS
(Plaintiffs)

- and -

QUÉBEC COMMUNITY GROUPS NETWORK

MIS EN CAUSE / INCIDENTAL APPELLANT
(Intervener)

- and -

CANADIAN HUMAN RIGHTS COMMISSION
MOUVEMENT LAÏQUE QUÉBÉCOIS
LORD READING SOCIETY

MIS EN CAUSE
(Interveners)

- and -

FRANÇOIS PARADIS, in is capacity as President of the National Assembly of Quebec
QUEBEC ENGLISH SCHOOL BOARDS ASSOCIATION
FÉDÉRATION DES FEMMES DU QUÉBEC
FONDS D'ACTION ET D'ÉDUCATION JURIDIQUE POUR LES FEMMES

INTERVENERS

Nos. **500-09-029549-219 C.A.M.** – 500-17-109983-190, 500-17-108353-197, 500-17-109731-193, 500-17-107204-193 S.C.M.

POUR LES DROITS DES FEMMES DU QUÉBEC – PDF QUÉBEC

APPELLANT / INCIDENTAL RESPONDENT
(Intervener)

v.

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MUBEENAH MUGHAL
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MOUVEMENT LAÏQUE QUÉBÉCOIS

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INTERVENERS

Me Perri Ravon
Me Giacomo Zucchi
Me Jennifer Klinck
Me Mark C. Power
Juristes Power Law
Suite 800
465 Saint-Jean Street
Montréal, Québec H2Y 2R6

Tel.: 514 819-6607
Fax.: 514 819-6607
pravon@juristespower.ca
gzucchi@juristespower.ca
jklinck@powerlaw.ca
mpower@powerlaw.ca

Lawyers for English Montreal School Board, Mubeenah Mughal and Pietro Mercuri

Me Luc Alarie
Me Guillaume Rousseau
Alarie Legault, Law Office
Suite 720
800 Square-Victoria Street
Montréal, Québec H4Z 1A1

Tel.: 514 617-5821
Fax.: 514 954-4495
lucalarie@alarielegault.ca
guillaume.rousseau@hotmail.ca

Lawyers for Mouvement laïque québécois

Me Theodore Goloff
Robinson Sheppard Shapiro,
S.E.N.C.R.L.
Suite 4600
800 Square-Victoria Street
Montréal, Québec H4Z 1H6

Tel.: 514 393-4007
Fax.: 514 878-1865
tgoloff@rsslex.com

Lawyers for Lord Reading Society

Me Frédéric Bérard
Me Camille Savard
Gattuso Bouchard Mazzone s.e.n.c.r.l.
Suite 2200
1010 Sherbrooke Street West
Montréal, Québec H3A 2R7

Tel.: 514 284-2322
Fax.: 514 284-3483
fberard@gattusogbm.com
csavard@gattusogbm.com

Lawyers for Fédération autonome de l'enseignement

Me Azim Hussain
Me Alexandra Belley-McKinnon
Cabinet d'avocats Novalex inc.
Suite 301
1195 Wellington Street
Montréal, Québec H3C 1W1

Tel.: 514 903-0835, ext. 132 / 135
Fax.: 514 903-0197
ahussain@novalex.co
abelleymckinnon@novalex.co

Me Jérémy Boulanger-Bonnelly
411 Galt Street
Verdun, Québec H4G 2P5

Tel.: 438 828-0480
j.bonnelly@mail.utoronto.ca

Lawyers for Andréa Lauzon, Hakima Dadouche, Bouchera Chelbi and Comité juridique de la Coalition Inclusion Québec

Me David Grossman
Me Olga Redko
IMK LLP
Suite 1400
Place Alexis Nihon, Tower 2
3500 De Maisonneuve Blvd. West
Montréal, Québec H3Z 3C1

Tel.: 514 934-7730 (Me Grossman)
Tel.: 514 934-7742 (Me Redko)
Fax.: 514 935-2999
dgrossman@imk.ca
oredko@imk.ca

Lawyers for Ichrak Nourel Hak, National Council of Canadian Muslims (NCCM) and Corporation of the Canadian Civil Liberties Association

Me Christiane Pelchat
Réseau-Environnement
295 place D'Youville
Montréal, Québec H2Y 2B5

Tel: 438 341-2828
Fax: 514 874-1272
cpelchat@reseau-environnement.com

Lawyer for Pour les droits des femmes du Québec – PDF Québec

Me Stéphanie Lisa Roberts
Me Isabelle Brunet
Bernard, Roy (Justice-Québec)
Suite 8.00
1 Notre-Dame Street East
Montréal, Québec H2Y 1B6

Tel.: 514 393-2336
Fax.: 514 873-7074
stephanie.roberts@justice.gouv.qc.ca
isabelle.brunet@justice.gouv.qc.ca

Lawyers for Attorney General of Quebec, Jean-François Roberge, in is capacity as Minister of Education and Simon Jolin-Barrette, in is capacity as Minister of Immigration, Diversity and Inclusion

Me Julius Grey, Ad. E.
Me Arielle Corobow
Grey Casgrain s.e.n.c.
Suite 1715
1155 René-Lévesque Blvd. West
Montréal, Québec H3B 2K8

Tel.: 514 288-6180
Fax.: 514 288-8908
jhgrey@greycasgrain.net
acorobow@greycasgrain.net

Lawyers for Quebec Community Groups Network and Canadian Human Rights Commission

Me Marion Sandilands
Conway Baxter Wilson LLP/s.r.l.
Suite 400
411 Roosevelt Avenue
Ottawa, Ontario K2A 3X9

Tel.: 613 780-2021
Fax.: 613 688-0271
msandilands@conwaylitigation.ca

Me Katie Spillane
Dionne Schulze Avocats s.e.n.c.
Suite 502
507 Place d'Armes
Montréal, Québec H2Y 2W8

Tel.: 514 842-0748, ext. 232
Fax.: 514 842-9983
kspillane@dionneschulze.ca

Lawyers for Quebec English School Boards Association

Me Véronique Roy
Me Sean Griffin
Me Lana Rackovic
Me Fady Toban
Me Geneviève Claveau
Langlois Avocats LLP
20th Floor
1250 René-Lévesque Blvd. West
Montréal, Québec H3B 4W8

Tel.: 514 842-9512
Fax.: 514 845-6573
veronique.roy@langlois.ca
sean.griffin@langlois.ca
lana.rackovic@langlois.ca
fady.toban@langlois.ca
genevieve.claveau@langlois.ca

Lawyers for Fédération des femmes du Québec and Fonds d'action et d'éducation juridique pour les femmes

Me Christian Trépanier
Me Maxime-Arnaud Keable
Fasken Martineau DuMoulin LLP
Suite 800
140 Grande Allée West
Québec, Québec G1R 5M8

Tel.: 418 640-2011 (Me Trépanier)
Tel.: 418 640-2013 (Me Keable)
Fax.: 418 647-2455
ctrepanier@fasken.com
mkeable@fasken.com

Lawyers for François Paradis, in is capacity as President of the National Assembly of Quebec

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INTRODUCTION

[1] In its decision pertaining to the stay of Bill 21, this Court stressed that the interplay between ss. 28 and 33 of the *Canadian Charter* was a novel question, never yet considered by an appellate court. Justice Mainville underscored that "section 28 of the *Canadian Charter* has not, as of yet, been applied in connection with a provision relying on the override power of section 33 of the *Canadian Charter*."[1] For her part, Chief Justice Duval Hesler highlighted that "[n]o Canadian appellate court has yet considered the interplay between this section and the notwithstanding clause, nor has the Supreme Court of Canada".[2]

[2] Section 28 of the *Canadian Charter* provides:

Rights guaranteed equally to both sexes	Égalité de garantie des droits pour les deux sexes
28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.	28. Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.

[3] In this case, there is substantial agreement between the AGQ and the English Montreal School Board, Mubeenah Mughal and Pietro Mercuri ("the EMSB *et al*") on the theory of s. 28, as put forward in their submissions in first instance, and specifically agreement that: (a) s. 28 (and the use of terms "notwithstanding anything in this Charter") was borne out of the concern that women's substantive equality was not, at the time, adequately guaranteed; (b) s. 28 operates in conjunction with other rights and freedoms and thereby corresponds to one of two broad types of equality guarantees in Canadian and international law; (c) s. 28 is not redundant of s. 15, among other reasons because s. 28 impacts the scope of all other rights and freedoms, and because s. 28 is not subject to the notwithstanding clause.

[4] The fundamental disagreement between the EMSB *et al* and the AGQ concerns whether the notwithstanding clause can be used to cut down the scope of the s. 28 guarantee. In first instance, the AGQ maintained, and the trial judge accepted, that when the notwithstanding clause is invoked by the legislature with respect to ss. 2 and 15 of the

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[1] *Hak c Procureure générale du Québec*, 2019 QCCA 2145 at para 133.
[2] *Hak c Procureure générale du Québec*, 2019 QCCA 2145 at para 20.

Canadian Charter, those rights "no longer exist", such that s. 28 (which is not subject to the notwithstanding clause) can no longer guarantee their equal exercise and cannot serve to invalidate legislation that impacts the equal exercise of those underlying rights.[3]

[5] It was an error of law for the trial judge to accept the AGQ's theory. The theory of the AGQ and the trial judge is: (a) irreconcilable with the history of ss. 28 and 33; (b) incompatible with the text and operation of s. 33; and (c) incompatible with the text and operation of s. 28. A proper understanding of the text and operation of ss. 33 and 28 illuminates the interplay between the two provisions: s. 28 guarantees equality in the exercise of rights, even when those underlying rights are subject to the notwithstanding clause. Moreover, only the EMSB *et al*'s theory is consistent with the historical context surrounding the drafting and adoption of the two provisions.

[6] The intent of the framers regarding the interplay between ss. 28 and 33 is incontrovertible based on the record: in 1981, s. 28 was deliberately removed by the framers from the scope of the notwithstanding clause, in order to ensure that gender equality could never be overridden through s. 33. In *Syndicat de la fonction publique* – which contains the most exhaustive analysis of s. 28 and its history by any Court and which is cited at length by the trial judge in the instant case – the Quebec Superior Court relies on this same history, as well as the doctrine, to conclude: "*bien que le principe d'égalité prévu à l'article 15 puisse être écarté par le législateur en vertu de l'article 33, aucune loi ne pourrait opérer, même expressément, une distinction fondée sur le sexe sous peine d'invalidité*".[4] The AGQ and the trial judge's theory give no effect to the very deliberate decision of the framers.

[7] The text and operation of s. 33 are entirely consistent with this historical context and achieve the framers' unequivocal intent regarding the interplay of ss. 28 and 33. Far from directly restricting the scope of *Canadian Charter* rights, s. 33 presupposes their existence. The effect of s. 33 is not to deny or curtail rights; it is rather to permit the operation of legislation notwithstanding the acknowledged existence of those rights. The right is not abolished or cut down because s. 33 has been invoked; the statute is merely

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[3] *Hak c Procureur général du Québec*, 2021 QCCS 1466 at paras 819-820, 874-875 [TJ], **Schedule I [S-I], vol 1 at 173, 189**.

[4] *Syndicat de la fonction publique du Québec inc c Québec (Procureur général)*, 2004 CanLII 76338 (QC SC), REJB 2004-52276 at para 1416.

permitted to operate. The subject of the s. 33 declaration is not the *Canadian Charter* right itself, but the statute.

[8] Where a litigant seeks to have legislation struck down, and where the *Canadian Charter* rights are violated by a statute declared to operate notwithstanding those rights, the explanation of how the notwithstanding clause produces its effects will be of no practical consequence. When s. 28 is engaged, however, the difference is stark. Because s. 33 does not restrict *Canadian Charter* rights themselves, there is absolutely no impediment to s. 28 – which is not subject to s. 33 – operating in conjunction with those rights.

[9] The text and operation of s. 28 are also entirely consistent with the historical context and achieve the framers' unequivocal intent regarding the interplay between ss. 28 and 33. Section 28 is drafted not only as a substantive guarantee ("guaranteeing" the equal exercise of rights), but indeed contains some of the most assertive language found in the *Canadian Charter* (the guarantee applying "notwithstanding anything in the *Charter*"). At minimum, this language of pre-eminence, taken together with the historical context, indicates that the scope of s. 28 cannot be cut down through the invocation of the notwithstanding clause. Further reinforcing this conclusion, s. 28 uses an established device for protecting equality rights, the same used in s. 10 of the *Quebec Charter* and art. 14 of the *European Convention of Human Rights*: these provisions operate together with the rights they guarantee equally even in the absence of a violation of those underlying rights.

[10] In sum, in this case, the historical context and the framers' intent regarding ss. 28 and 33, as well as the text and operation of the two provisions, all form a coherent whole confirming that gender equality in the exercise of rights can never be overridden by legislatures through the invocation of the notwithstanding clause.

[11] In this case, the evidence pertaining to a violation of s. 28 is particularly strong. As the trial judge found, Bill 21 has a disproportionate impact on women, specifically on Muslim women, notably on their exercise of freedom of religion. In fact, the evidence establishes that every person having been denied or having lost employment due to Bill 21 is a Muslim woman who wears the hijab, that Muslim women are most susceptible to being affected by Bill 21 because of a constellation of factors, that the National Assembly's

intent was to ban religious symbols considered "oppressive" towards women and that Muslim women have been the focal point of the public debates surrounding Bill 21.

[12] If s. 28 cannot serve to invalidate legislative provisions in the instant case, "*son insertion dans la Charte aura été une cruelle imposture*".[5]

PART I: FACTS

[13] The EMSB *et al* rely on the factual findings at paragraphs 5 to 71, 323, 664, 668, 802 to 807, 994 to 996, 998 and 1102 to 1104 of the trial judgment.[6]

[14] The two core provisions that the EMSB *et al* seek to have invalidated because they violate s. 28 of the *Canadian Charter* are ss. 6 and 8 of Bill 21. Section 6 prohibits all persons listed in Schedule II (including principals, vice principals and teachers of educational institutions under the jurisdiction of English school boards) from wearing religious symbols in the exercise of their functions, while s. 8 bans face coverings for all persons covered by Schedules I and III (including school board staff and school board commissioners). For their part, ss. 4 (first paragraph), 7, 10, 12 (first and second paragraphs), 13, 14 and 16 are intrinsically connected to the prohibitions contained at ss. 6 and 8.

[15] As the trial judge found, in light of all the evidence, Bill 21 – and specifically the religious symbol ban contained at s. 6 – disproportionately disadvantages women, in particular Muslim women, notably disproportionately impacting their exercise of freedom of religion and expression, and contributing to feelings of ostracization ("*Le Tribunal souligne que 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*").[7] The trial judge's factual findings are owed deference; this Court may intervene only if there is a palpable and overriding (i.e. obvious, patent) error, "in the nature not of a needle in a haystack, but of a beam in the eye".[8]

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[5] *Syndicat de la fonction publique du Québec inc c Québec (Procureur général)*, 2004 CanLII 76338 (QC SC), REJB 2004-52276 at para 1421, citing author William F. Pentney, now Justice at the Federal Court.

[6] **S-I, vol 1 at 8-18, 65, 146-147, 170-171, 211-213, 233-234**.

[7] TJ at paras 802-807, 1102, **S-I, vol 1 at 170-171, 233**.

[8] *Brusenbauch c Young*, 2019 QCCA 914 at para 11; *JG c Nadeau*, 2016 QCCA 167 at para 77; *Housen v Nikolaisen*, 2002 SCC 33 at paras 10-37.

[16] The uncontested evidence on the record shows that, since the adoption of Bill 21, every documented case of a person denied employment or having lost their job because they wear religious symbols is of a Muslim woman who wears the hijab.[9] To obtain this information, and in addition to relying on evidence introduced through affidavits and through requests for documents addressed to the AGQ, access to information requests were sent with respect to every known organization and person covered by the prohibition on religious symbols (Schedule II of Bill 21)[10] – over 300.[11]

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[9] TJ at para 805, **S-I, vol 1 at 171** ("*D'ailleurs au CSSM tous les dossiers de demande de poste, en l'occurrence huit, fermés par suite de l'entrée en vigueur de la Loi 21 concernent des femmes musulmanes portant le hijab*"); "Admissions communes de English Montreal School Board, Mubeenah Mughal, Pietro Mercuri et le Procureur Général du Québec" [Common admissions], EMSB-28-19 at 2-3 of 3 (para 4), **Schedule III a)** [**S-III a)**]**, vol 20 at 6496-6497**; Commission scolaire de Laval's response to Access to Information Request dated January 7, 2020, regarding persons not teaching due to Bill 21, EMSB-28-9, **S-III a), vol 18 at 5801-5803**; Commission scolaire des Affluents' response to Access to Information Request dated December 4, 2019, regarding persons not teaching due to Bill 21, EMSB 28-8, **S-III a), vol 18 at 5796-5800**; Commission scolaire de la Pointe-de-l'Île's responses to Access to Information Request dated March 9, 2020, and August 13, 2020 regarding persons not teaching due to Bill 21 and Power Law's request for details dated July 30, 2020, *Filed jointly*, EMSB 28-12.1, **S-III a), vol 18 at 5827-5839**; Commission scolaire de la Seigneurie des-Mille-Îles' response to Access to Information Request dated December 5, 2019, regarding persons not teaching due to Bill 21, EMSB 28-11, **S-III a), vol 18 at 5814-5816**; Commission scolaire Marie-Victorin's response to Access to Information Request dated November 7, 2019, regarding persons not teaching due to Bill 21, EMSB-28-13.1/CV-1, **S-III a), vol 19 at 6158-6162**; Affidavit of C. Vandal (Centre de services scolaire Marie-Victorin), EMSB-28-13.1, **S-III a), vol 19 at 6156-6157**; Commission scolaire de Montréal's response to Access to Information Request dated December 11, 2019, regarding persons not teaching due to Bill 21, EMSB-28-10, **S-III a), vol 18 at 5804-5813**; Affidavit of A. Watson, EMSB-28-15 at 1 (para 5), **S-III a), vol 16 at 5163** (EMSB relies on affidavit evidence for its own school board); Emails (redacted) between A. Watson and teacher applicants, EMSB-23-42-1/AW-1, **S-III a), vol 16 at 5166-5170**; Déclaration sous serment de S.H., September 26, 2019, **Schedule II** [**S-II**]**, vol 2 at 494.143-494.150** (confirmed additional case to those reported in responses to access requests); Déclaration sous serment de S.B.R., September 18, 2019, **S-II, vol 3 at 494.188-494.194** (confirmed additional case to those reported in responses to access requests); Déclaration sous serment de M. Najdi, September 19, 2019, **S-II, vol 3 at 494.202-494.215** (confirmed additional case to those reported in responses to access requests); Examination of Me L. Bellerose, Centre de services scolaire de Montréal [CSSDM], August 25, 2020 at 38 (*huit dossiers fermés: "huit femmes […] huit hijabs"*), **Schedule III b)** [**S-III b)**]**, vol 24 at 7744**.

[10] For which the AGQ had not provided complete information in response to the requests for documents.

[11] Common admissions, EMSB-28-19 at 1-2 of 3 (para 2), **S-III a), vol 20 at 6495-6496**; "Liste d'organismes auxquels une demande d'accès à des documents a été envoyée au nom d'EMSB et al", EMSB-28-19/AC-2, **S-III a), vol 20 at 6501-6511**; "Liste des personnes pour lesquelles une demande de communication de documents a été envoyée au Procureur général du Québec, au nom d'EMSB et al", EMSB-28-19/AC-3, **S-III a), vol 20 at 6512-6513**.

[17] Furthermore, the uncontested evidence on the record shows that every documented case of a person who has had to remove their religious symbol in order to work is of a Muslim woman who wears the hijab.[12]

[18] These statistics are bolstered by broader social statistics and extensive qualitative evidence that explain why Muslim women are more severely impacted by the law (as the trial judge found, "*[d]e toutes les personnes visées, les femmes de confession musulmane apparaissent particulièrement vulnérables*"[13]), specifically:

(a) uncontested statistics regarding persons occupying positions covered by the religious symbol ban and regarding Quebec's teaching population: two times more women than men occupy positions covered by the ban; the teaching population, which has been predominantly female for the past 10 years, constitutes 78% of persons occupying positions covered by the ban;[14]

(b) uncontested statistics regarding Quebec's religious demographics and religious symbols worn: Muslims constitute the second largest religious group in Quebec after Christians and the hijab is worn by around 50% of Muslim women in Quebec;[15]

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[12] Examination of Me L. Bellerose, CSSDM, August 25, 2020 at 34-35, 38-41 ("*les trois autres cas, c'est la même chose, « sexe féminin », « hijab »*"), **S-III b), vol 24 at 7740-7741, 7744-7747**.

[13] TJ at para 805, **S-I, vol 1 at 171**.

[14] Of the approximately 131,406 persons occupying positions covered by the prohibition on wearing religious symbols at s. 6 of Bill 21, the number of women is more than double the number of men (approximately 84,849 women compared to 40,549 men) (Common admissions, EMSB-28-19/AC-4, Tab A, **S-III a), vol 20 at 6515**). The teaching population in Quebec's public schools (including principals and vice principals) makes up around 78% of persons covered by the religious symbol ban (around 103,000 of 131,000) (Common admissions, EMSB-28-19/AC-4, compare Tab A, **S-III a), vol 20 at 6515** and Tab H, **S-III a), vol 20 at 6570-6584**). The teaching population is predominantly female, and this is not a new reality (around 75% of teachers are women and this percentage has been a constant in the past 10 years in Quebec) (Common admissions, EMSB-28-19/AC-4, Tab H (at 15 of 15), **S-III a), vol 20 at 6584** [74 028 : (74 028 + 23 721) X 100 = 75.73%]; Extracts of statistics concerning school boards' staff from 2010 to 2019 from the *Ministère de l'Éducation et de l'Enseignement supérieur* available at the *Banque de données des statistiques officielles sur le Québec*, EMSB-28-4.2, **S-III a), vol 18 at 5735-5738**). See TJ at para 802, **S-I, vol 1 at 170**.

[15] Expert report of S. Lefebvre [Lefebvre report], EMSB-28-16, based on the last National Household Survey (2011) by Statistics Canada at 5 of 112 (para 10), 7 of 112 (para 15), 8 of 112 (table) and at 11-12 of 112 (para 28), **S-III b), vol 31 at 10087, 10089-10090, 10093-10094**; Affidavit of K. Neuman, EMSB-28-14, **S-III a), vol 20 at 6163-6165**; Detailed Data Tables from Survey of Muslims in Canada 2016, EMSB-28-14-1/KN-1 at 42 of 255, **S-III a), vol 20 at 6207**. See TJ at para 806, **S-I, vol 1 at 171**.

(c) uncontested evidence regarding the visibility and perception of religious symbols in Canada and Quebec: the hijab, unlike the cross around the neck, cannot be concealed;[16] at the largest organization covered by Bill 21 (the *Centre de services scolaire de Montréal*), questions put to human resources about the application of Bill 21 only concern the hijab;[17] the hijab is considered the most "disturbing" religious symbol in Quebec and attracts the most negative attention (at the opposite end of the spectrum, the presence of the cross is normalized);[18] and the visibility of the hijab is directly tied to the discrimination and hate crimes faced by Muslim women in Quebec;[19] and

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[16] The hijab covers a woman's hair and frames her face and neck and, unlike the cross worn around the neck – the most common religious symbol worn by lay Christians in Quebec – the hijab cannot be concealed (Lefebvre report, EMSB-28-16 at 11 of 112 (para 27), **S-III b), vol 31 at 10093**).

[17] According to Me L. Bellerose, who is "*responsable au niveau ressource humaines de l'aspect de l'application de la Loi sur la laïcité de l'État pour […] le CSSDM*" : "*Ce que je peux dire, c'est que 100 % de nos cas ont impliqué le hijab, la seule chose que je peux dire. J'ai eu aucune autre question sur aucun autre signe religieux*" (Examination of Me L. Bellerose, CSSDM, August 25, 2020 at 12, 82, **S-III b), vol 24 at 7718, 7788**). The CSSDM has the largest number of persons covered by Bill 21 of any organization (9861 teachers, 184 principals and 223 vice-principals) (Common admissions, EMSB-28-19/AC-4 at 3 of 15, 8 of 15, 13 of 15, **S-III b), vol 20 at 6572, 6577, 6582**).

[18] According to a study conducted by the Quebec *Commission des droits de la personne et des droits de la jeunesse* in 2016 and analysed by expert sociologist Paul Eid, people in Quebec consider the hijab to be the most "disturbing" ("*dérangeant*") of all religious symbols (Expert report of P. Eid [Eid report], EMSB-28-17 at 22-23 (para 42), **S-III b), vol 31 at 10220-10221**). For further evidence regarding the contrast in the perception of the hijab and the cross, see: Examination-in-Chief of expert D. Koussens, November 23, 2020 at 68, 77, **S-III b), vol 29, 9511, 9513**; Examination-in-Chief of expert J. Beauchemin, November 17, 2020 at 45-46, **S-III b), vol 28 at 9254.15**; Cross-Examination of J. Beauchemin, November 17, 2020 at 117, 123-124, 126-128, **S-III b), vol 28 at 9254.33, 9254.35-9234.36**; Cross-Examination of J. Beauchemin, November 18, 2020 at 23-24, **S-III b), vol 29 at 9264**; Examination-in-Chief of expert G. Legault, 16 November 2020 at 52-54 ("*les signes peuvent avoir une force symbolique différente*"), **S-III b), vol 28 at 9103**. See also TJ at para 804, **S-I, vol 1 at 171** ("*d'ailleurs la focalisation de PDF et MLQ sur cet aspect de la question démontre bien à quel point on peut voir dans la Loi 21 une volonté de faire disparaître cette réalité, alors qu'on ne traite pas du port d'une croix, de la kippa ou d'une médaille religieuse par exemple*").

[19] Numerous uncontested studies analysed by expert Paul Eid tie the visibility of the hijab to the discrimination faced by the women who wear it (Eid report, EMSB-28-17 at 35-36 (paras 63-64), **S-III b), vol 31 at 10233-10234**; Examination-in-Chief of expert P. Eid, November 3, 2020 at 53, 57-58, **S-III b), vol 25 at 8003, 8007-8008**). Statistics Canada evidence introduced by the AGQ points to the visibility of the hijab as explaining the high proportion of Muslim women victims of hate crimes (AGQ Exhibit PGQ-13 at 19, **S-III a), vol 9 at 2786**), discussed in the Second Supplementary Expert Report of P. Eid, EMSB-28-17.3, **S-III b), vol 34 at 11490-11491**.

(d) evidence regarding the different role of religious symbols for non-Christians, specifically Muslim women: unlike Christianity, the dominant religion in Quebec, which tends to limit the visibility of religion in the social sphere, Islam is a religion where the wearing of religious symbols is a core aspect of religious practice;[20] the wearing of the hijab has an important religious significance to Muslim women who wear the hijab in Quebec, in addition to having a doctrinal source.[21]

[19] The statistics are also bolstered by extensive evidence of how Bill 21 exacerbates pre-existing disadvantage:

(a) uncontested evidence regarding pre-existing disadvantage faced by Muslim women in Canada and Quebec: throughout Canada, Muslim women earn among the lowest average incomes and have among the highest rates of unemployment (despite their education levels), face discrimination in access to employment, and are among those most targeted for harassment and hate crimes (and in Quebec are the most targeted);[22] and

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[20] Lefebvre report, EMSB-28-16 at 9-10 of 112 (paras 22-23), **S-III b), vol 31 at 10091-10092**; Examination-in-Chief of expert S. Lefebvre, November 6, 2020 at 32-36, **S-III b), vol 26 at 8463-8464**. On contrast between orthodoxies (including Christianity) and orthopraxis (including Islam), see: Examination-in-Chief of expert S. Lefebvre, November 6, 2020 at 25-29, **S-III b), vol 26 at 8461-8462**; November 9, 2020 at 19, **S-III b), vol 26 at 8478**.

[21] See e.g.: Déclaration sous serment de H. Dadouche, June 18, 2019 at 2 (paras 5-6), **S-II, vol 2 at 494.57**; Déclaration sous serment de B. Chelbi, March 12, 2020 at 2 (paras 9-10), **S-III a), vol 15 at 4602**; Eid report, EMSB-28-17 at 60-61 (para 108), **S-III b), vol 31 at 10258-10259**. On the doctrinal source for the wearing of the hijab in the Coran, see: Lefebvre report, EMSB-28-16 at 11 of 112 (para 26, footnote 26), **S-III b), vol 31 at 10093**; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 27 January 2015, Case Nos 1 BvR R 471/10 & 1 BvR 1181/10 (Germany) at para 90 [Case Nos 1 BvR R 471/10 & 1 BvR 1181/10], discussed by experts P. Bosset and D. Koussens (Expert Report of P. Bosset and D. Koussens, EMSB-REP-3 at 26 of 99 (para 83), **S-III b), vol 34 at 11406**; Examination-in-Chief of expert P. Bosset, November 24, 2020 at 89-93, **S-III b), vol 29 at 9539-9540**; Examination-in-chief of expert D. Koussens, November 24, 2020 at 43-49, **S-III b), vol 29 at 9505-9506**).

[22] Eid report, EMSB-28-17 at 9-10 (para 20) (highest rates of unemployment despite education levels), 13-14 (paras 25-27) (lowest average incomes), 45, 48 (paras 78, 83) (most targeted for harassment and hate crimes in Quebec), **S-III b), vol 31 at 10207-10208, 10211-10212, 10243, 10246**. On hate crimes, see also Second Supplementary Expert Report of P. Eid, EMSB-28-17.3, **S-III b), vol 34 at 11490-11491** ("*dans mon rapport, je soulignais qu'entre 2015 et 2017, "ce sont les musulmans qui forment, et de loin, le groupe le plus ciblé par des crimes haineux, tous motifs et groupes confondus" (p. 45). Or, dans la pièce PGQ-13, rien ne permet de savoir si cette tendance serait différente en 2018, car ce document ne fournit pas les données nécessaires pour établir des comparaisons*").

(b) qualitative evidence about the range of harms faced by Muslim women in connection with Bill 21: increase in prejudice, harassment and assaults faced by Muslim women, in addition to the severe harm of loss of employment and professional mobility.[23]

[20] Indeed, the evidence before the trial judge, when he reached his conclusions regarding Bill 21's disproportionate impact on women, amply satisfies the Supreme Court's analytical framework on adverse impact discrimination. While in *Fraser*, the Supreme Court made clear that statistical evidence is not necessary, adverse effect discrimination will be established where the statistics reveal "a disparate pattern of exclusion or harm that is statistically significant and not simply the result of chance".[24] Just as in *Fraser*, where 100% of members working reduced hours through job-sharing were women, in the present case, 100% of people having lost their jobs because of Bill 21 are women.

[21] The case law is also clear that: (a) qualitative evidence, including direct evidence and expert evidence, can complement statistical evidence, as it does in the present

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[23] Where the public associates legislative restrictions with a given social group, prejudice towards that group is expected to increase, as accepted by the trial judge at para 996, **S-I, vol 1 at 213** (Expert report of E. Hehman [Hehman report], EMSB 28-18 at 5-6 of 31 (paras 8-15), **S-III b), vol 32 at 10549-10550**; Examination-in-Chief of expert E. Hehman, November 4, 2020 at 14-18, **S-III b), vol 25 at 8170-8171**). For examples of quasi-official discourse focusing on Muslim women, see: Extract of the Coalition Avenir Québec website entitled "Neutralité religieuse : la CAQ abrogera la loi 62 et fera adopter une véritable Charte de la laïcité" dated October 18, 2017, EMSB-28-1, **S-III a), vol 18 at 5710**; CBC News, "Muslim head scarf a symbol of oppression, insists Quebec minister for status of women" dated 6 February 2019, EMSB-28-2, **S-III a), vol 18 at 5712-5714**; Global News, "Quebec status of women minister calls Muslim head scarf a symbol of oppression" with video from web page dated 6 February 2019, EMSB-28-2, **S-III a), vol 18 at 5715-5719**. Uncontested evidence establishes that Islam has been the "focal point" of Quebec debates around religious diversity since 2006 and up until today (Eid report, EMSB-28-17 at 25-26 (paras 46-47), **S-III b), vol 31 at 10223-10224**; Re-examination of expert J. Maclure, November 5, 2020 at 180-183, **S-III b), vol 26 at 8369-8372**). A 2020 survey establishes that the Quebec population most associates Bill 21 with Islam and the hijab (Hehman report, EMSB 28-18 at 9-13 of 31 (paras 28-36) **S-III b), vol 32 at 10553-10557**). Muslim women who wear religious symbols recount the increase in insulting comments, negative attitudes and assaults at their behest around the time Bill 21 was tabled (Examination-in-Chief of M. Dridj, November 2, 2020 at 17-18, **S-III b), vol 25 at 7865-7866**; Déclaration sous serment de I. Hak, June 13, 2019 at 5 (para 39), **S-II, vol 2 at 494.13**; Affidavit of F. Ahmad, June 13, 2019 at 2 (paras 11-12), **S-II, vol 2 at 494.27**).

[24] *Fraser v Canada*, 2020 SCC 28 at paras 58-59, citing Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U." (2001) 46 McGill LJ 533 at 546.

case;[25] (b) there is adverse impact discrimination even where the pool of affected people includes or could include members of more advantaged groups;[26] (c) identifying "mirror comparator groups" is not required;[27] (d) not all members of the protected group (in this case, women) need to be affected by the law or affected in the same way;[28] (e) and the stigmatizing effects of a legislative provision constitute a distinct negative impact.[29]

[22] All of the evidence regarding the disparate impacts of Bill 21 on Muslim women must be assessed in light of the National Assembly's avowed intent to ban religious symbols considered contrary to gender equality[30] and the fact that Muslim women have been the focal point of the public debates surrounding Bill 21[31] – both findings of fact of

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[25] *Fraser v Canada*, 2020 SCC 28 at paras 55-60, citing Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U." (2001) 46 McGill LJ 533 at 545-546, 548. See also: *Gaz métropolitain inc. c Commission des droits de la personne et des droits de la jeunesse*, 2011 QCCA 1201 at paras 27, 47 (wide range of evidence can be relevant to show that the disparate impact is not merely the result of chance); *Withler v Canada (Attorney General)*, 2011 SCC 12 at paras 58, 63-65 (a finding of discrimination does not require identifying a "mirror comparator group"); *Ontario (Attorney General) v G*, 2020 SCC 38 at paras 65, 67.

[26] *Fraser v Canada*, 2020 SCC 28 at paras 59, 97; *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at para 11; *Symes v Canada*, [1993] 4 SCR 695 at 770-771.

[27] *Withler v Canada (Attorney General)*, 2011 SCC 12 at paras 58, 63-65 (a finding of discrimination does not require identifying a "mirror comparator group"); *Ontario (Attorney General) v G*, 2020 SCC 38 at paras 65, 67.

[28] *Fraser v Canada*, 2020 SCC 28 at paras 72-74. Indeed, discrimination can be compounded by the fact that members of a protected group – such as Muslim women who wear religious symbols – face multiple, intersecting forms of discrimination: *Fraser v Canada*, 2020 SCC 28 at para 74; *Turner v Canada (Attorney General)*, 2012 FCA 159 at paras 48-49; United Nations, Office of the High Commissioner, *Women's Rights are Human Rights*, 2014 at 37-38.

[29] *Ontario (Attorney General) v G*, 2020 SCC 38 at paras 65, 67.

[30] TJ at paras 803, **S-I, vol 1 at 171** ("*le port de signes religieux par les femmes musulmanes constitue une des causes de l'adoption de la Loi 21 notamment parce que certains les qualifient de symbole de soumission de la femme envers l'homme*"); Québec, Assemblée nationale, Commission permanente des institutions, *Journal des débats de la Commission permanente des institutions*, 42-1, vol 45, n°33 (7 mai 2019) EMSB-28-3 at 6 of 7, **S-III a), vol 18 at 5726**. See also: News article published on the CBC News website entitled "Muslim head scarf a symbol of oppression, insists Quebec's minister for status of women" and News article published on the Global News website entitled "Quebec status of women minister calls Muslim head scarf a symbol of oppression" with video from web page (USB key) dated 6 February 2019, Filed jointly, EMSB-28-2, **S-IIIa), vol 18 at 5712-5720**.

[31] "*À cet égard, d'ailleurs la focalisation de PDF et MLQ sur cet aspect de la question démontre bien à quel point on peut voir dans la Loi 21 une volonté de faire disparaître cette réalité, alors qu'on ne traite pas du port d'une croix, de la kippa ou d'une médaille religieuse par exemple*" (TJ at para 804, **S-I, vol 1 at 171**). See also Re-examination of expert J. Maclure, November 5, 2020

the trial judge. Indeed, the evidence must also be assessed in light of the gendered purpose of the law and the fact that some provisions apply exclusively to Muslim women.[32] The trial judge found:"*il ne fait aucun doute que le principe d'interdiction du port d'un signe religieux découle du port de celui-ci par les femmes de confession musulmane*".[33]

[23] The trial judge did not accept the AGQ's submissions on adverse impact discrimination, specifically the AGQ's submission that those persons benefiting from Bill 21's "grandfather clause" should not be included in the assessment of adverse impact. Persons "grandfathered" under s. 31 of Bill 21 are still subjected to the prohibition under s. 6: s. 31 simply carves out an exception as long as the person is exercising "the same function within the same organization". As the trial judge found, persons "grandfathered" under s. 31 face harsh professional and psychological impacts as a result of s. 6: they are frozen in their current positions, denied both upwards mobility towards leadership roles, and lateral mobility as between organizations.[34] The evidence on the record also indicates that "grandfathered" persons face increased stigma, prejudice and emotional distress.[35]

[24] Nor did the trial judge accept the AGQ's submission that an assessment of adverse impact discrimination should be based merely on a calculation of who wears religious

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at 180-187, **S-III b), vol 26 at 8369-8376** (Islam is the "focal point" of Quebec debates around religious diversity since 2006, and up until today, including during the Bouchard Taylor commission hearings).

[32] Bill 21, Preamble ("AS the Québec nation attaches importance to the equality of women and men"); Bill 21, s. 8 (obligation to exercise functions with one's face uncovered); Lefebvre report, EMSB-28-16 at 14 of 112 (para 34), **S-III b), vol 31 at 10096** ("*seules des femmes musulmanes couvrent leur visage pour des motifs religieux dans l'ère contemporaine*"). The legislature "does not speak in vain"; gender equality would not be referenced in the Preamble of a law on religious symbols if the legislature conceived of such symbols and their ban in a gender-neutral fashion (*AG (Que) v Carrières Ste-Thérèse Ltée*, [1985] 1 SCR 831 at 838; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont.: LexisNexis, 2014) at 448-449). Preambles are recognized by the Supreme Court as an apt reflection of legislative purpose (*Rawluk v Rawluk*, [1990] 1 SCR 70 at 90).

[33] TJ at para 803, **S-I, vol 1 at 171**.

[34] TJ at paras 998, 1102, **S-1, vol 1 at 213, 233**.

[35] Testimony of B. Chelbi, who explains the psychological and professional impacts of not being eligible for a promotion as pedagogical advisor because she wears the hijab (Examination-in-Chief of B. Chelbi, November 3, 2020 at 14-15, **S-III b), vol 25 at 7900-7901**); Testimony of M. Dridj, who explains the psychological and professional impacts of learning that, with the Bill 21, she would be frozen in the same employment position (Examination-in-Chief of M. Dridj, November 2, 2020 at 13-14, **S-III b), vol 25 at 7861-7862**); Testimony of T. Dee on the impact of measures such as the "grandfather clause" on minority teachers (Examination-in-Chief of expert T. Dee, November 4, 2020 at 44-47, **S-III b), vol 25 at 8151-8152**); Hehman report, EMSB-28-18 at 13 of 31 (para 36), **S-III b), vol 32 at 10557**.

symbols among persons subject to Bill 21 or who wish to work in categories of employment subject to Bill 21 (a calculation which the AGQ maintained was impossible to carry out in any case[36]). As the trial judge recognized, who wears religious symbols is not at all determinative of disparate impact; the question is whose religious symbols are visible, whose religious symbols attract attention, and who is losing their job and facing increased stigma because of the law.[37] Finally, the trial judge did not accept the AGQ's submission that adverse impact discrimination would be impossible to prove in this case, a submission which flies in the face of the jurisprudence, and is a bald attempt to state a standard of proof that is not only far higher than any recognized in the case law, but one that is specifically conceived to be impossible to meet.[38] Public employers in Quebec do not collect data concerning what religious symbols are worn by their employees.[39] The government cannot insist that allegations of discrimination be substantiated with data that it does not collect – and that it says is impossible to collect. In any event, such data is not helpful in assessing disparate impact for the reasons explained.

PART II: ISSUES IN DISPUTE

[25] Ground of appeal nº 7.1: Bill 21 impermissibly violates section 28 of the *Canadian Charter* and should be declared inoperative.

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[36] Plan d'argumentation modifié du Procureur général du Québec, December 8, 2020 at para 249 ("*Les parties demanderesses ne peuvent faire cette preuve puisqu'il leur est impossible de recenser le nombre de personnes visées par la mesure*").
[37] See e.g. TJ at paras 668, 803-805, **S-I, vol 1 at 171**.
[38] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 77; *R v Sharma*, 2020 ONCA 478 at paras 101-105; *Radek v Henderson Development (Canada) and Securiguard Services (No.3)*, 2005 BCHRT 302 at paras 509-513.
[39] Negative responses received from School Boards across the Province to Access to Information Requests regarding persons not teaching due to Bill 21, EMSB-28-13, **S-III a), vol 19 at 5840-6155** (see e.g.: "*Concernant le quatrième volet de votre demande, la CSDM ne détient aucun document à ce sujet (article 1 de la Loi) puisqu'aucun recensement visant les personnes qui portent un signe religieux n'est nécessaire dans le cadre de l'application de la Loi sur la laïcité de l'État*" (178 of 315, **S-III a), vol 19 at 6017)**); Demande de communication de documents des demandeurs à la défenderesse en date du 13 janvier 2020, P-20 [LAUZON], **S-III a), vol 14 at 4496-4500**; Réponse de la défenderesse à la demande de communication de documents des demandeurs en date du 27 février 2020, P-21 [LAUZON], **S-III a), vol 15 at 4501-4504**; Fiche de renseignement portant sur la « Synthèse et retour sur la section 3 » des Résultats préliminaires de l'Enquête sur la gestion en contexte de diversité ethnoculturelle, linguistique et religieuse 2018 en date du 5 février 2019, P-23 [LAUZON], **S-III a), vol 15 at 4561-4564**.

[26] Ground of appeal 9.3.1: The trial judge erred in concluding that Bill 21 pursues a pressing and substantial objective.

[27] Ground of appeal nº 9.3.2: The infringing measures of Bill 21 have no rational connection to the objective pursed by the legislator.

PART III: SUBMISSIONS

Ground of appeal no 7.1: Bill 21 impermissibly violates section 28 of the *Canadian Charter* and should be declared inoperative

A. SECTION 28 WAS DELIBERATELY REMOVED FROM THE SCOPE OF THE NOTWITHSTANDING CLAUSE IN ORDER TO ENSURE THAT GENDER EQUALITY CANNOT BE OVERRIDEN

[28] As seen in this part, the trial judge's conclusion that s. 28 cannot serve to invalidate legislation where s. 33 has been invoked with respect to the underlying rights guaranteed equally to men and women by s. 28 (specifically the rights guaranteed by ss. 2 and 15 of the *Canadian Charter*[40]), is fundamentally incompatible with the historical context and the framers' intent surrounding the adoption of ss. 28 and 33.

a. The significance of historical context and deliberate decisions made by the framers

[29] The historical context of the adoption of a *Canadian Charter* provision is crucial to its interpretation.[41] This was confirmed recently by the Supreme Court in *Conseil scolaire francophone de la Colombie-Britannique*, which considered it "necessary to review the background to the enactment of s. 23",[42] including the language policies that existed at the time of the *Canadian Charter*'s adoption, policies s. 23 was intended to correct.

[30] In the *Reference re Senate Reform*, the Supreme Court based its interpretation of the constitutional amending formula on "the history, language and structure of Part V" of the *C.A. 1982*. The Court put forward an interpretation of the constitutional provisions founded in a detailed historical review of the proposals leading to the amending formula. The interpretation was also "supported by the language of Part V" of the *C.A. 1982*. The Court rejected the "narrow textual approach"[43] proposed by the federal government.

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[40] TJ at paras 874-876, **S-I, vol 1 at 189**.
[41] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 344.
[42] *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 at paras 4-20.
[43] *Reference re Senate Reform*, 2014 SCC 32 at paras 64, 73, 75.

[31] The Supreme Court is also clear that deliberate decisions made by the framers must be attributed significance. In interpreting s. 10(b) of the *Canadian Charter* in *R v Prosper*, Chief Justice Lamer relied on evidence indicating that the framers of the *Canadian Charter* "consciously chose not to constitutionalize a right to state-funded counsel under s. 10". He stressed: "at issue is a specific clause which was proposed, considered and rejected by our elected representatives. In my opinion, it would be imprudent for this Court not to attribute any significance to the fact that this clause was not adopted".[44]

[32] Courts have given particular weight to historical context in the area of equality rights. In *Andrews v Law Society of British Columbia*, Justice McIntyre (for the majority on this point) concluded that the language of s. 15 was "deliberately chosen in order to remedy some of the perceived defects under the *Canadian Bill of Rights*", which formed part of the provision's "linguistic, philosophic and historical contexts". This historical backdrop, as well as "the expanded concept of discrimination being developed under the various Human Rights Codes" at the time, supported the Court's interpretation of s. 15 as guaranteeing substantive rather than formal equality.[45]

[33] While the historical context and the framers' intent are important, they may yield to the need to give a "progressive", "liberal", rights-conferring interpretation to the *Canadian Charter*, which "accommodates and addresses the realities of modern life".[46].

[34] In the present case, the history of s. 28 reveals not only that the provision was introduced as an overriding provision, but that it was later deliberately removed from the scope of the notwithstanding clause in order to ensure that gender equality could not be overridden using s. 33. Moreover, rather than being in tension, the historical context and the framers' intent in this case command a progressive, rights-conferring interpretation of the *Canadian Charter*.

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[44] *R v Prosper*, [1994] 3 SCR 236 at 266-267. Historical context falls on a spectrum in how it is used by Courts: on the one hand, a few statements of public servants will be given little weight (*Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at 504, 508). On the other hand, an amendment specifically considered and rejected by the framers will be given significance (*R v Prosper*, [1994] 3 SCR 236 at 266-267).

[45] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 170-171.

[46] *Reference re Same-Sex Marriage*, 2004 SCC 79 at paras 22-23. See also: *R v Kapp*, 2008 SCC 41 at para 22.

b. Section 28 was itself introduced as an overriding provision

[35] Even prior to the introduction of the notwithstanding clause, the debates surrounding the adoption of s. 28 make clear that s. 28 was intended to itself be an "overriding" provision. Following the recommendations made by the ad hoc conference on Canadian Women and the Constitution, the provision which would become s. 28 (s. 25 at the time) – is referred to in the following terms in March of 1981 by the New Democratic Party (the party that would introduce the amendment adding s. 28 to the constitutional draft text): "The first suggestion is that there be a general statement, either in Section 1 or perhaps in Section 25 [today s. 28], that the rights and freedoms set out in this charter be guaranteed to men and women equally. <u>This should be an overriding statement</u>, 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". [47]

[36] For context, the member of the New Democratic Party explained:[48]

> A number of valuable clarifications and strengthenings were proposed by the ad hoc conference on Canadian women and the Constitution, about which hon. members have heard a great deal. There was a tremendously successful meeting in Ottawa the weekend of February 14 attended by over 1,000 women. I will not go through all the groups in Canada that have endorsed the recommendations of that conference, but once again there are literally dozens and dozens of them. This reflects the keen interest and participation in the creation of this charter of Canadian women.
>
> I hope all hon. members will read very carefully the further suggestions made by the ad hoc conference. These are all now available to all hon. members. I hope hon. members will look particularly at three of the suggestions because the women
>
> La conférence extraordinaire qui avait pour thème les Canadiennes et la constitution – dont les députés ont naturellement entendu parler – a proposé des précisions et des améliorations substantielles. Cette conférence, qui a réuni à Ottawa plus de 1,000 femmes la fin de semaine du 14 février dernier, fut un véritable succès. Je vous ferai grâce de tous les organismes can[a]diens qui ont approuvé les recommandations de la conférence, mais sachez qu'ils se comptent par dizaines. Cela montre à quel point les Canadiennes s'intéressent et souhaitent participer à l'élaboration de la charte.
>
> J'espère que tous les députés liront attentivement les autres propositions faites par cette conférence, puisqu'elles sont maintenant à leur disposition. J'ose espérer notamment qu'ils se pencheront plus particulièrement sur trois propositions, car les femmes souhaiteraient qu'on leur

[47] Canada, *House of Commons Debates*, 32-1, No 7 (4 March 1981) at 7898 (per Pauline Jewett, New-Westminster-Coquitlam).

[48] Canada, *House of Commons Debates*, 32-1, No 7 (4 March 1981) at 7898 (per Pauline Jewett, New-Westminster-Coquitlam).

themselves would like to see them highlighted in the charter.	accorde une place importance dans la charte.

[37] In April of 1981, the day before s. 28 was formally added to the constitutional draft text, the Right Honourable Jean Chrétien, then Minister of Justice, stated:[49]

As I indicated on several occasions to the House and the media, Mr. Speaker, we have also agreed, as the government, to accept the amendments proposed by the New Democratic Party. When we were sitting in committee, we received a great many representations concerning Clause 15, which deals with the rights of women and sexual equality and which has been the subject of a long debate. That clause has been accepted by virtually all committee members. After the committee had completed its work, the groups representing women kept on making representations to emphasize their eagerness to have absolute equality of the sexes enshrined, representations which I have referred to the cabinet, assuredly with the assistance of the hon. Minister of Employment and Immigration (Mr. Axworthy) who is responsible for the status of women to Parliament, and we have been glad to allow the New Democratic Party to propose this amendment. […] [T]his party will gladly vote tomorrow in favour of NDP amendment which will ensure equal status to women, as requested by many pressure groups.	Monsieur le président, nous avons aussi été d'accord comme gouvernement pour accepter comme je l'ai dit à plusieurs reprises à la Chambre et devant la presse les amendements que propose le Nouveau parti démocratique. Comme on le sait, alors que nous étions devant le comité, nous avons reçu bien des représentations au sujet du droit des femmes et de l'égalité des sexes à l'article 15, ce qui a été longuement débattu. L'article a été virtuellement accepté par tous les membres du comité. Après que celui-ci eut terminé son travail, les groupes représentant les femmes ont continué leurs représentations de façon à clarifier encore plus leur désir d'obtenir l'égalité absolue dans la charte des droits et j'ai fait des représentations au Cabinet, aidé bien entendu de l'honorable ministre de l'Emploi et de l'Immigration (M. Axworthy) qui est le responsable de la condition féminine devant le Parlement et nous avons accepté en ce faisant de laisser le Nouveau parti démocratique avec plaisir présenter cet amendement. […] [C]'est avec grand plaisir que les membres de notre parti voteront demain soir pour l'amendement des néo-démocrates en particulier alors que cela donne l'égalité aux femmes telle que requis par de nombreux groupes de pression.

[38] The amendment to the *Constitution Act, 1981* was voted on April 23, 1981 with s. 28 added in the following terms:[50]

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.	28. Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont

[49] Canada, *House of Commons Debates*, 32-1, No 9 (22 April 1981) at 9399 (per Hon Jean Chrétien, Minister of Justice and Minister of State for Social Development) [emphasis added].
[50] Canada, *House of Commons Votes and Proceedings*, 32-1, No 187 (23 April 1981) at 1775-1776.

garantis également aux personnes des deux sexes.

[39] Importantly, the debates concerning s. 28's inclusion in the *Canadian Charter* were alive to its role in protecting women who were also members of other marginalized groups.[51]

c. Section 28 made subject to the notwithstanding clause

[40] The notwithstanding clause was agreed to following the provincial ministers' conference of November 2 to 5, 1981. On November 9, 1981, the Right Honourable Pierre Elliott Trudeau, Prime Minister, confirmed that, at that time, the notwithstanding clause was intended to apply to s. 28:[52]

> Right Hon. Joe Clark (Leader of the Opposition): […] However, let me ask a specific supplementary question of the Prime Minister in relation to the resolution that is being drafted. Would the Prime Minister confirm that in the original accord, signed by himself and the nine premiers on Thursday, the opt-out or override provisions do not apply to the guarantee of equality of male and female persons which, the Prime Minister will recall, was set down deliberately in a separate section, Section 28, of the original resolution? […]
>
> Le très hon. Joe Clark (chef de l'opposition): […] Néanmoins, permettez-moi de poser une question supplémentaire au premier ministre au sujet de la nouvelle résolution. Peut-il confirmer que les dispositions d'abstention prévues dans l'entente qu'il a conclue avec les neufs premiers ministres, jeudi, ne s'appliquent pas à l'égalité des hommes et des femmes à laquelle on avait consacré tout un article, l'article 28, dans la résolution initiale? […]
>
> Right Hon. P. E. Trudeau (Prime Minister): My understanding is that in the work done by the federal and provincial officials the "notwithstanding" clause would indeed apply to that particular section.
>
> Le très hon. P. E. Trudeau (premier ministre): Si j'ai bien compris, les autorités fédérales et provinciales se sont entendues pour que la clause « nonobstant » s'applique effectivement à cet article.

[41] In the "Resolution Respecting Constitution Act" of November 20, 1981, ss. 28 and 33(1) read as follows: [53]

> 28. Notwithstanding anything in this *Charter* except section 33, the rights and freedoms referred to in it are guaranteed equally to male and female persons.
>
> 28. Indépendamment des autres dispositions de la présente *charte*, exception faite de l'article 33, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.

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[51] Canada, *House of Commons Debates*, 32-1, No 7 (4 March 1981) at 7898 (per Pauline Jewett, New-Westminster-Coquitlam); Canada, *House of Commons Debates*, 32-1, No 12 (24 November 1981) at 13198 (per Margaret Mitchell, Vancouver East).

[52] Canada, *House of Commons Debates*, 32-1, No 11 (9 November 1981) at 12634.

[53] Canada, *House of Commons Debates*, "Resolution Respecting Constitution Act", 32-1, No 12 (20 November 1981) at 12992-12993 [emphasis added].

[…]	[…]
33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*, or section 28 of this *Charter* in its application to discrimination based on sex referred to in section 15.	33. (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente c*harte*, ou de l'article 28 de cette c*harte* dans son application à la discrimination fondée sur le sexe et mentionnée à l'article 15.

d. Outcry of women's groups and parliamentarians and removal of s. 28 from the scope of s. 33 so that gender equality could not be overridden

[42] The inclusion of s. 28 "in its application to discrimination based on sex referred to in section 15" in the scope of s. 33 led to an outcry of women's groups and parliamentarians, captured, in particular, in the debates of Friday, November 20 and Monday, November 23, 1981. These debates reflect the framers' desire to restore s. 28 to its full initial force and ensure that gender equality could not be overridden through the invocation of s. 33.

[43] Having just introduced the "Resolution Respecting Constitution Act", in which the notwithstanding clause applied to s. 28 "in its application to discrimination based on sex referred to in section 15", Mr. Chrétien stated:[54]

For those who remain concerned about the override clause, let me remind them that it has been said that 'The price of liberty is eternal vigilance'. Pressure groups must remain vigilant and we are seeing such vigilance now from women who are arguing for the removal of the override clause in Section 28 and the aboriginal people who are fighting for the reinstatement of their rights.	Pour ceux qui s'inquiètent encore de la clause dérogatoire, je leur rappelle que : « Le prix de la liberté est l'éternelle vigilance ». Les groupes de pression doivent rester vigilants, et c'est ce que font actuellement les femmes qui demandent la suppression de la clause dérogatoire à l'article 28 ainsi que les autochtones qui se battent pour le rétablissement de leurs droits.
[…]	[…]
…the charter enumerates equality rights. In this area the government is taking bold steps forward in order to ensure the equality of women before and under the law. I know some would have hoped that we could do even better, and I hope we can in the next	…la charte énumère les droits à l'égalité. Dans ce domaine, le gouvernement prend des dispositions audacieuses afin d'assurer aux femmes l'égalité devant la loi. Je sais qu'on avait espéré faire mieux, mais j'espère que nous le pourrons d'ici à

[54] Canada, *House of Commons Debates*, 32-1, No 12 (20 November 1981) at 13043 (per Hon Jean Chrétien, Minister of Justice and Minister of State for Social Development) [emphasis added].

few days. The ball is now squarely in the court of Premier Blakeney. This government and the party I belong to are confident we can and must succeed. But we also know that we must not break the accord or all will be lost. I am sure that the efforts of the Minister of State for Mines (Mrs. Erola) who is responsible for the status of women will bring about the result that is the desire of every member of this House.	quelques jours. Il incombe à M. Blakeney de prendre une décision. Le gouvernement actuel et le parti auquel j'appartiens sont persuadés qu'ils peuvent et doivent réussir. Nous savons cependant que nous ne devons pas violer l'accord car autrement tout serait perdu. Je suis convaincu que le ministre d'État (Mines) (M[me] Erola) chargée de la condition féminine pourra obtenir les résultats que souhaitent tous les députés.

[44] That same day, on November 20, 1981, the Right Honourable Joe Clark, Leader of the Opposition (Progressive Conservatives), introduced an amendment to remove s. 28 from the scope of s. 33:[55]

That the proposed *Constitution Act, 1981* be amended	Que l'on amende la *Loi constitutionnelle de 1981* proposé
(a) by striking out clause 28 and substituting the following:	(a) en remplaçant l'article 28 par ce qui suit :
28. Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.	28. Indépendamment des autres dispositions de la présente *charte*, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.
(b) by striking out subclause 33(1), and substituting the following:	(b) en remplaçant l'article 33(1) par ce qui suit :
33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*.	33. (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des article 7 à 15 de la présente *charte*.

[45] Mr. Clark explained:[56]

Our first amendment, which I will move later today, will reinstate, without qualification, the guarantee in Section 28 of the equality of male and female persons.	Notre premier amendement, que je présenterai plus tard dans la journée, réinstaurera, sans modification, l'article 28 garantissant l'égalité des sexes.
[…]	[…]

[55] Canada, *House of Commons Debates*, 32-1, No 12 (20 November 1981) at 13050.
[56] Canada, *House of Commons Debates*, 32-1, No 12 (20 November 1981) at 13047, 13049-13050, 13052 [emphasis added].

The present resolution [the resolution which on November 20, 1981 made section 28 subject to the notwithstanding clause "in its application to discrimination based on sex referred to in section 15"] will allow Parliament or a legislature to treat women as less equal than men, or men as less equal than women. We intend that the rights and freedoms set forth in all the provisions of the resolution will be guaranteed equally to male and female persons.

[…]

That is an amendment which I hope will commend itself to this whole House, so that this whole House can go on record as supporting the guarantee of equal treatment of male and female persons in Canada.

[…]

What must be put right into the Constitution of Canada is the guarantee that male and female persons will be treated equally in relation to the rights and freedoms of Canadians.

[…]

The hard reality, however, that we have all encountered is that barriers do stand in the way of women, barriers that do not stand in the way of men. I personally am proud to be able to play some small role, with the introduction of the amendment today, in trying to bring those barriers down and trying to move us, in law and in thought, toward that kind of equality which exists in fact, if one regards the capacities and potential of male and female persons in this country.

La résolution actuelle [la résolution qui, le 20 novembre 1981, rend l'article 28 sujet à la clause dérogatoire « dans son application à la discrimination fondée sur le sexe et mentionnée à l'article 15 »] permettra à un Parlement ou à une assemblée législative de traiter différemment les femmes et les hommes. Nous tenons à ce que les droits et libertés énumérés dans les dispositions de la résolution soient garantis également aux hommes et aux femmes.

[…]

C'est un amendement qui, j'espère, obtiendra l'appui de tous les députés afin que la Chambre puisse montrer à tous les Canadiens qu'elle désire garantir un traitement équitable aux hommes et aux femmes du pays.

[…]

Nous devons constitutionnaliser la garantie que les femmes et les hommes seront placés sur le même pied en ce qui a trait aux droits et libertés des Canadiens.

[…]

Pourtant, la dure réalité, que nous avons tous constatée, c'est que les femmes doivent surmonter des obstacles qui n'existent pas pour les hommes. Personnellement, je suis fier de pouvoir jouer un petit rôle dans la présentation de l'amendement aujourd'hui afin d'essayer de renverser ces barrières et de nous rapprocher, selon le droit et selon la pensée, de cette sorte d'égalité qui existe effectivement si nous considérons les capacités et le potentiel des Canadiens et des Canadiennes.

[46] Edward Broadbent, leader of the New Democratic Party, stated:[57]

I ask in all seriousness, would we want children anywhere in Canada to read a

Mais revenons au document en question. Oserions-nous vraiment faire lire à nos

[57] Canada, *House of Commons Debates*, 32-1, No 12 (20 November 1981) at 13054-13056 [emphasis added].

document which says, “Men and women are equal except when a group of politicians say they are not”? That is what is in this document. It is neither good for young boys nor for young girls.	enfants un document qui dirait ceci : « Les hommes et les femmes sont égaux, sauf lorsque quelques hommes politiques affirment le contraire ». C’est pourtant ce qu’on dit dans ce document. On ne peut pas proposer cela ni aux petits garçons ni aux petites filles.
In our culture at this time, this kind of symbolism can mean only one thing. It does not mean that males can be discriminated against as well as females. Everyone in this chamber and everyone in Canada knows that it means it is acceptable to discriminate against women, against young women, against girls. We find that totally offensive in this year of 1981.	Dans le contexte culturel de notre époque, ce genre de symbolisme ne peut signifier qu’une chose. Il ne veut pas dire que la discrimination peut toucher les hommes comme les femmes. Chaque député ici présent et chaque citoyen canadien sait que cela veut dire qu’on peut user de discrimination envers les femmes, toutes les femmes quel que soit leur âge. En 1981, c’est totalement inacceptable.

[47] The leader of the New Democratic Party concluded by declaring: “We must restore the original positive wording of Section 28 which ensures the paramountcy of the principle that men and women are equal. The Leader of the Opposition mentioned his intention of moving an amendment. We had the same proposal, so it would be totally redundant for us to do that. I simply indicate that the amendment will have our full support, if for no other reason than that in the original document we wrote it in the first place”.[58]

[48] The debates concerning the proposed amendment to s. 28 continued on Monday, November 23, 1981. A member of the Progressive Conservative Party explained that a “tremendous furor has been created over the application of the ‘notwithstanding clause’ to the guarantee that rights should apply equally to men and women”. He stressed: “in reference to Section 28, this party, as proposed by my leader on Friday last [Mr. Clark, the leader of the Conservative Party of Canada], insists that Section 28, as it appeared in the resolution which came out of the joint committee, be restored in its full power”.[59]

[49] The same day, the Honourable Judy Erola, Minister of State (Mines) asked:[60]

What is this equality that we women have been fighting for? How many generations of	Quelle est cette égalité pour laquelle nous, les femmes, nous battons? Combien de

[58] Canada, *House of Commons Debates*, 32-1, No 12 (20 November 1981) at 13054-13056 [emphasis added].
[59] Canada, *House of Commons Debates*, 32-1, No 12 (23 November 1981) at 13121 (per Jake Epp, Provencher) [emphasis added].
[60] Canada, *House of Commons Debates*, 32-1, No 12 (23 November 1981) at 13123-13124 [emphasis added].

men and women have asked the question: What do women want? Well, for our grandmothers who were not even considered persons and who fought for the vote, and for our mothers who supplied the labour force during the war and since, and for our sisters and daughters and granddaughters, I will tell you what we want. We want the rights in the *Charter of Rights and Freedoms* guaranteed equally to male and female persons. That means the original wording of Section 28:

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

It is that simple. We want the reference to Section 28 in the override clause, Section 33, deleted. The charter will then carry a forceful statement of equality. This will give the courts a strong direction that sex discrimination cases require their strictest scrutiny.

[…]

In April, 1981 this guarantee of equality for women and men was passed by all three parties in the House of Commons. Women thought that they had a guarantee that all laws in Canada would have to treat men and women in Canada equally. So there it was. We have the charter, standing the way we want it, clearly defined. The battle was won, we thought. However, it was not. Why? Because the provinces, the Supreme Court and the opposition parties put this government in the position of bargaining for consensus. The provinces changed the charter without consulting the people within the provincial boundaries.

[…]

générations d'hommes et de femmes ont posé la question: qu'est-ce que veulent les femmes? Eh bien, au nom de nos grand-mères qu'on ne considérait même pas comme des personnes et qui ont combattu pour le droit de vote, au nom de nos mères qui ont travaillé pendant la guerre et qui travaillent encore, et au nom de nos sœurs, de nos filles et nos petites-filles, je vais vous dire ce que nous voulons. Nous voulons que les droits soient garantis dans la charte des droits et des libertés aussi bien aux femmes qu'aux hommes. Autrement dit, nous voulons la version originale de l'article 28:

> Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.

C'est aussi simple que cela. Nous voulons soustraire l'article 28 à l'application de l'article dérogatoire, et nous voulons que le renvoi à l'article 33 soit supprimé. La charte constituera alors une puissante déclaration d'égalité. Les tribunaux seront ainsi invités à examiner de près toute affaire de la [*sic*] discrimination fondée sur le sexe.

[…]

En 1981, les trois partis à la Chambre ont souscrit à cette garantie d'égalité entre les femmes et les hommes. Les femmes croyaient qu'on leur garantissait ainsi que toutes les lois au Canada placeraient les hommes et les femmes sur un même pied. Nous avions donc une charte nettement définie renfermant la disposition voulue. Nous avions cru avoir gagné la bataille. Toutefois, il n'en était rien. Pourquoi? C'est que les provinces, la Cour suprême et les partis de l'opposition ont obligé le gouvernement à marchander pour obtenir l'assentiment général. Les provinces ont modifié la charte sans consulter les citoyens vivant sur leur territoire.

[…]

When it was found that the charter had changed, bowing to the pressure of the provincial premiers, the women looked up and said "No". Women, united as never before, said no. It was time to tell the provinces no. Much credit is due to special groups and dynamic individuals who I will name later on this afternoon, but the credit for speaking out goes to the women of Canada, women working both in and out of their homes, mothers, grandmothers and daughters and particularly the women of this House.

Lorsqu'elles ont constaté que la charte avait été édulcorée à la suite des pressions que les premiers ministres provinciaux avaient exercées, les femmes ont relevé la tête et elles ont dit « non ». Unies comme jamais auparavant, elles ont dit « non ». Le moment était venu de dire « non » aux provinces. Une bonne partie du mérite en revient à certains groupes spéciaux et à certaines personnes dynamiques que je nommerai tantôt. Mais le mérite d'avoir exprimé ce « non » revient d'un[e] manière générale aux filles, aux mères et aux grand-mères du Canada, qu'elles exercent leur activité à l'intérieur ou à l'extérieur du foyer, et tout particulièrement à celles qui siègent à la Chambre.

[50] For her part, a member of the New Democratic Party stated:[61]

We are talking about our very rights as human beings, in the case of women, the women's human right to equality, and in the case of the native peoples of Canada, their rights as the original peoples of this country. This editorial is talking about these as complaints [i.e., an editorial in *The Citizen* of Ottawa referring to "the complaints by various women's and native organizations about the constitutional resolution now before Parliament"]. That is why a great many of us are distressed by the possibility that eviscerated Clause 28 will remain.

Il s'agit de nos droits fondamentaux d'êtres humains. Dans le cas des femmes, il s'agit de leurs droits à l'égalité et, dans le cas des autochtones du Canada, de leurs droits en tant que premier peuple de ce pays. Cet éditorial parle de plaintes [i.e., un éditorial dans *The Citizen* d'Ottawa qui réfère aux « plaintes formulées par divers organismes de femmes et d'autochtones au sujet de la résolution constitutionnelle dont le Parlement est saisi »]. C'est pourquoi bon nombre d'entre nous sont désespérés à l'idée que l'article 28 soit entièrement vidé de sa substance.

[…]

[…]

For those who would argue that they can only accept the [e]quality of women conditionally, I believe that they too are saying that they do not believe in the fundamental principle of equality of women with men. They are denying, as I said a moment ago, women's human right to equality. It is a goal to be achieved because we do not have it yet; it is a goal to be achieved in and of itself. That is how a lot of us see the original Section 28. We see this, as I say, symbolically as an expression of

Quant à ceux qui prétendront qu'ils ne peuvent accepter l'égalité de la femme que sous conditions, cela revient à dire qu'ils ne croient pas au principe fondamental de l'égalité des sexes. Comme je le disais il y a un instant, ils refusent aux femmes le droit à l'égalité. C'est pourtant une chose à réaliser parce que nous ne l'avons pas encore; c'est un objectif à atteindre en soi. Voilà ce que bon nombre d'entre nous voient dans l'article 28 initial. Nous y voyons symboliquement l'expression de l'égalité

[61] Canada, *House of Commons Debates*, 32-1, No 12 (23 November 1981) at 13130-13131 (per Pauline Jewett, New-Westminster-Coquitlam) [emphasis added].

the equality in our society of men and women, their entitlement equally to the rights and freedoms in the charter. We see it that way, as I say, symbolically. We also see it as a section in its original form of enormously important substance, because we do not in fact have equality, and when I say "we" I mean women. We do not in fact have equality today. Therefore, Section 28 becomes a goal to achieve.

[…]

As a previous speaker said, there should be no taking of credit; every woman's group in Canada had a great deal to do with getting the paramountcy clause, as I call it, Clause 28, included in April.

[…]

Three days ago, an article appeared in the newspaper *La Presse*:

> A gentle Yvette. The organizer of the Yvettes' movement, Mrs. Louise Robic, slightly worried the Liberals by insisting that the government account for its failing to entrench women's rights. Canadian women want to know what happened to their rights and freedoms […] "A lot of women will be suffering from ulcers", she said.

[…]

Finally, I submit that if we do not restore Section 28—and all of what I have said applies to Section 34 concerning the rights of the aboriginal people—it will go down not as an important day in Canadian history but as a day of infamy. I do not believe that is too strong a word to describe this.

des hommes et des femmes, de leur droit à jouir également des droits et des libertés prévus dans la charte. Nous y voyons donc un symbole. Dans sa formulation originale, nous y voyons également une substance importante, car nous n'avons pas en fait l'égalité et quand je dis « nous », je veux dire les femmes. En fait nous n'avons pas l'égalité aujourd'hui. Voilà pourquoi l'article 28 reste un objectif à atteindre.

[…]

Comme l'a dit un orateur précédent, personne n'a le droit de se vanter; tous les groupes féministes ont largement contribué à obtenir cette clause fantastique comme je l'appelle, l'article 28, inséré en avril.

[…]

Il y a trois jours un article paraissait dans le journal *La Presse*:

> Une Yvette Docile. L'organisation du mouvement des Yvettes, Madame Louise Robie, a inquiété un peu les libéraux en réclamant des comptes du gouvernement sur le retrait de la protection des droits de la femme. Les femmes du Canada veulent savoir ce qui est arrivé de leurs droits et libertés … vous allez avoir un paquet de femmes avec des ulcères a-t-elle lancé.

[…]

Enfin, je crains que si nous ne rétablissons pas l'article 28–et tout ce que j'ai dit s'applique également à l'article 34 sur les droits des autochtones–nous ne nous souvenions de ce jour non pas comme d'un jour important dans l'histoire du Canada mais comme d'un jour de honte. Je ne crois pas que le mot soit trop fort.

[51] On November 23, 1981, Mr. Chrétien confirmed that there was agreement regarding the amendment proposed by the Progressive Conservatives to have s. 28 "in

its application to discrimination based on sex referred to in section 15" removed from the scope of s. 33:[62]

(13140) Mr. Chrétien (Minister of Justice): On a point of order, Mr. Speaker, I am pleased to be able to inform the House that I have obtained from all provinces which are parties to the accord their agreement that Section 28 on the equality of men and women should apply without the override clause.	(13140) M. Chrétien: J'invoque le Règlement, monsieur l'Orateur. J'ai l'honneur d'annoncer à la Chambre que toutes les provinces signataires de l'Accord ont accepté que l'article 28 sur l'égalité des hommes et des femmes s'applique sans la clause dérogatoire.

[52] The vote on the proposed amendment was held on November 24, 1981.[63] Sections 28 and 33(1) included in the "Resolution Respecting Constitution Act, 1981" of November 25, 1981 read as they do today: [64]

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.	28. Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.
33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.	33. (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des article 7 à 15 de la présente charte.

e. The history of ss. 28 and 33 makes clear that s. 28 was removed from the scope of s. 33 in all its applications, not merely when s. 28 is applied in conjunction with a narrow subset of Charter rights that are themselves not subject to s. 33

[53] The drafting history and debates surrounding ss. 28 and 33 provide a precise indication of the full scope of s. 28's exclusion from s. 33: on November 23, 1981, s. 28 was removed from the scope of s. 33 in all its applications.

[54] In contrast, in first instance, the AGQ put forth the untenable theory that, when s. 28 was removed from the scope of the notwithstanding clause on November 23, 1981, this was only to ensure that gender equality could not be overridden in the exercise of those

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[62] Canada, *House of Commons Debates*, 32-1, No 12 (23 November 1981) at 13112, 13123, 13130, 13140 [emphasis added].
[63] Canada, *House of Commons Votes and Proceedings*, 32-1, No 262 (24 November 1981) at 4129-4130.
[64] Canada, *House of Commons Debates*, "Resolution Respecting Constitution Act", 32-1, No 12 (25 November 1981) at 13255.

rights not otherwise covered by the notwithstanding clause. In other words, according to the AGQ, s. 28 was removed from the scope of the notwithstanding clause only for the purpose of guaranteeing that gender equality in the exercise of a specific subset of rights (such as mobility rights and voting rights, which are not otherwise covered by the notwithstanding clause) could not be overridden.

[55] This theory is flatly contradicted both by the history of the amendments to ss. 28 and 33 and by the aforementioned debates.

[56] The language added to, and then removed from, s. 33 – "section 28 of this *Charter* in its application to discrimination based on sex referred to in section 15" – leaves no doubt that the central concern and debate in November of 1981 regarding s. 28 was whether s. 33 could be used to override gender equality as protected by s. 15. It strains credulity to suggest that "section 28 of this *Charter* in its application to discrimination based on sex referred to in section 15" was removed from the notwithstanding clause in order to ensure equal exercise by men and women of a narrow set of non-section 15 rights (including mobility rights and voting rights, which are never mentioned in the debates surrounding s. 28).[65] In fact, if its only role was to guarantee the pre-eminence of gender equality for a narrow subset of non-s.15 rights, the amendment Mr. Clark proposed would have had no effect, since s. 28 was at that time only subjected to the notwithstanding clause "in its application to discrimination based on sex referred to in section 15" – not in its application to any other rights.

[57] The clear intent of the framers of restoring s. 28 to "its full power", evidenced in the cross section of debates considered above, would not have been met if the removal of s. 28 from the notwithstanding clause meant that the pre-eminence of gender equality was guaranteed only for a very limited set of rights.

[58] On the AGQ's interpretation, the amendment restoring s. 28 to "its full power" would – perversely – have had the effect of further weakening s. 28. Before the amendment, s. 33 applied to s. 28 only in its application to discrimination based on sex referred to in

[65] To the extent that any statement made by the Right Honourable Joe Clark supports the AGQ's theory, it is not only contradicted by other statements made by Mr. Clark himself, affirming that the amendment to ss. 28 and 33 would ensure a broad guarantee of gender equality, but is not shared by any other member of Parliament debating the question.

s. 15. On the AGQ's theory, after the amendment, s. 33 would apply to s. 28 in its application to all *Charter* rights except those not otherwise subject to s. 33.

[59] In first instance, the AGQ relied heavily on the autobiography of the late Mr. Roger Tassé, civil servant, to support his theory of the interaction between ss. 28 and 33. In fact, Mr. Tassé's apparent understanding of s. 28 in November of 1981 (as told in his autobiography) contradicts that of the framers:[66]

> Dans une communication adressée à mes collègues provinciaux, le 16 novembre, je leur ai fait part de la conclusion à laquelle nous en étions arrivés.
>
> Des collègues provinciaux m'avaient donné à entendre que certains désiraient que l'article 28 soit inclus dans l'article 33 pour éviter qu'une loi comportant une clause « nonobstant » dérogeant à la protection garantie contre la discrimination fondée sur le sexe ne soit déclarée invalide parce qu'elle serait en conflit avec la garantie d'égalité aux personnes des deux sexes de l'article 28. J'étais d'avis que la crainte qu'une clause « nonobstant » fondée sur le sexe en vertu de l'article 33 serait susceptible d'être invalidée parce que contraire à l'article 28 ne me semblait pas fondée. Si on le jugeait nécessaire, cependant, une modification de l'article 33 pourrait être apportée qui préciserait qu'une clause « nonobstant » adoptée en vertu de l'article 33 ne puisse s'appliquer à des catégories de droits autres que celles spécifiquement mentionnées à l'article 33.
>
> La Résolution déposée à la Chambre des communes le 18 novembre précisait qu'une clause « nonobstant » pourrait s'appliquer à l'article 15 de la Charte et aussi à l'article 28, mais seulement dans son application à la discrimination fondée sur le sexe mentionnée à l'article 15.

[60] Whereas Mr. Tassé apparently believed it was not necessary to subject s. 28 to the notwithstanding clause because s. 15 was already covered, the elected representatives at the time had the opposite understanding: a few days after Mr. Tassé recounts that he shared his view with colleagues, the framers expressly included s. 28 in the scope of the notwithstanding clause, specifically "in its application to discrimination based on sex referred to in section 15".[67]

[61] Thus, the framers' understanding was that it was necessary to explicitly subject s. 28 to the notwithstanding clause to make it possible for discrimination based on sex to be overridden. Further, as seen above, the framers then removed s. 28 from the scope of the notwithstanding clause in order to restore the pre-eminence of gender equality in the *Canadian Charter*. In sum, Mr. Tassé's own account shows that his interpretation of s. 28

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[66] Roger Tassé, *Ma vie, le droit, la Constitution et bien plus encore! Mémoires d'un sous-ministre fédéral de la Justice* (Cowansville: Yvon Blais, 2013) at 1-2, 346-347.

[67] Canada, *House of Commons Debates*, "Resolution Respecting Constitution Act", 32-1, No 12 (20 November 1981) at 12992-12993.

in November of 1981 – relied on by the AGQ – predated subsequent amendments which unequivocally demonstrate that his view was rejected, as Mr. Tassé himself acknowledges.

[62] M. Romanow, then Saskatchewan's Minister of Intergovernmental Affairs, who Mr. Tassé describes as having played a pivotal role in the removal of s. 28 from s. 33,[68] explains that the removal of s. 28 from the scope of s. 33 "meant that sexual equality in section 15 could not be overridden".[69]

f. Syndicat de la fonction publique on the history of s. 28 and the doctrine on the interplay between ss. 28 and 33

[63] In *Syndicat de la fonction publique* – which contains the most exhaustive analysis of s. 28 and its history by any Court – Justice Julien reviewed the history of the adoption of s. 28, as well as the literature on the relationship between ss. 28 and 33. She concluded, in light of the history and the doctrine, that s. 28 gives pre-eminence to gender equality in the *Canadian Charter* (not that it gives pre-eminence to gender equality with respect to a subset of rights, such as mobility rights and voting rights). The following passage of Justice Julien's decision is cited in full by the trial judge:[70]

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[68] Roger Tassé, *Ma vie, le droit, la Constitution et bien plus encore! Mémoires d'un sous-ministre fédéral de la Justice* (Cowansville: Yvon Blais, 2013) at 347 ("*La réaction de Roy Romanow, le ministre des Affaires intergouvernementales de la Saskatchewan, ne se fit pas attendre. Il communiqua avec Jean Chrétien lui suggérant fortement que la mention de l'article 28 à l'article 33 soit retirée. Déjà, des protestations s'étaient fait entendre à travers le pays particulièrement par des groupes de femmes contre toute tentative de modifier l'article 28. La suggestion de Roy Romanow a été subséquemment approuvée par tous les signataires de l'accord du 5 novembre et le texte de la Résolution dut modifié en conséquence*").

[69] Roy Romanow, John Whyte & Howard Leeson, *Canada… Notwithstanding. The Making of the Constitution 1976-1982* (Toronto: Thomson Carswell, 2007) at 213 [emphasis added].

[70] *Syndicat de la fonction publique du Québec inc c Québec (Procureur général)*, 2004 CanLII 76338 (QC SC), REJB 2004-52276 at paras 1408-1422 [footnotes omitted]. Citing: André Tremblay, "Le principe d'égalité et les clauses anti-discriminatoires" (1984) 18 RJT 329 at 340-41; Gerald A Beaudouin, "Étude des différents secteurs de la *Charte*" in Service de la formation permanente, Barreau du Québec, *La Charte canadienne des droits et libertés* (Cowansville: Yvon Blais, 1982-1983) at 30 (Justice Julien cites page 72, however the correct citation is page 30); Gérald A Beaudoin et Edward Ratushny (eds), *Charte Canadienne des droits et libertés,* 2e éd (Montreal: Wilson & Lafleur, 1989) at 672 (Justice Julien cites John B. Laskin *et al*., *The Canadian Charter of Rights Annotated*, vol 6 (Aurora, ON: Canada Law Book Limited, 1982) at 672, however the correct citation should be the former); Gérald A Beaudoin, *Les droits et libertés au Canada* (Montreal: Wilson & Lafleur, 2000) at 715; William F Pentney, "Les principes généraux d'interprétation de la *Charte*" in Gérald A Beaudoin et Edward Ratushny (eds), *Charte canadienne des droits et libertés,* 2e éd (Montreal: Wilson & Lafleur, 1989) at 58. Cited in full by the trial judge at para 834, **S-I, vol 1 at 177-182**.

1408 Selon le Conseil consultatif canadien sur la situation de la femme, les femmes ont insisté afin de faire valoir le droit à l'égalité des sexes dans le cadre de l'avènement de la Charte canadienne.

1409 Elles ont obtenu la protection accordée par l'article 15. Toutefois elles s'inquiétaient de la portée de l'article 1 interprété comme restreignant les droits protégés par la Charte canadienne :

art. 1 La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans les limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

1410 Les groupes de femmes étaient d'avis que le libellé de l'article 1 s'éloignait de la norme internationale prévue au Pacte de 1966.

1411 Les femmes désiraient obtenir une déclaration d'intention garantissant de façon égale aux hommes et aux femmes les droits et libertés énoncés à la Charte canadienne.

1412 Cette garantie n'a pas été incorporée à l'article 1. Elle est apparue sous la forme de l'article 28, le 21 avril 1981. Il vise à assurer l'égalité des personnes des deux sexes indépendamment des autres dispositions de la Charte canadienne.

1413 Plus tard, en novembre 1981, suite à une conférence fédérale - provinciale, l'article 33 est introduit à la Charte canadienne. Cet article permet aux gouvernements provinciaux d'outrepasser les droits inscrits à la Charte canadienne, incluant le droit à l'égalité des sexes protégé par les articles 15 et 28.

1414 Les groupes de femmes se mobilisent à nouveau. Le 24 novembre 1981, les gouvernements fédéral et provinciaux acceptent de soustraire la référence expresse à l'article 28 du libellé de l'article 33 qui se lira dorénavant comme suit :

« art. 33 Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte. » […]

1416 De façon générale, les auteurs abondent dans le sens d'une primauté accordée à la protection de l'égalité des sexes par l'article 28. Ainsi, bien que le principe d'égalité prévu à l'article 15 puisse être écarté par le législateur en vertu de l'article 33, aucune loi ne pourrait opérer, même expressément, une distinction fondée sur le sexe sous peine d'invalidité.

1417 L'auteur Me André Tremblay s'exprime ainsi :

> L'article 15 énonce un principe d'égalité en quatre volets et il le fait de façon beaucoup plus large que ses concurrents. De plus, les motifs de discrimination sont énumérés de façon indicative, à cause du mot « notamment ». […] Le motif privilégié de discrimination est le sexe, puisque l'article 28 assure l'égalité absolue des deux sexes à l'égard des droits et libertés mentionnés dans la *Charte*. En d'autres termes, l'article 28 crée une présomption irréfragable d'invalidité des dérogations au principe d'égalité des sexes, et cela ne peut être modifié ou atténué ni par l'article 1 ni par l'article 33 de la *Charte*.

1418 L'enseignement dispensé aux avocats en 1982 par le Service de la formation permanente du Barreau du Québec allait dans ce sens :

> L'article [15] doit se lire en conjonction avec l'article 28 […]. Disons tout de suite que les droits à l'égalité sont sujets à l'application possible de la clause nonobstant énoncée à l'article 33. Cependant, l'égalité des deux sexes échappe à la clause nonobstant vu que l'article 28 débute par les mots : « Indépendamment des autres dispositions de la présente *charte*… ».

1419 Ce raisonnement fut adopté en 1989 au *Traité sur la Charte canadienne* :

> La présence du mot « indépendamment » à l'article 28 et son histoire législative viennent renforcer la conclusion selon laquelle l'article 33 ne permet pas de valider une loi qui violerait les garanties en matière d'égalité des sexes.

1420 Cette position est suivie par Gérald A. Beaudoin :

> Cet article 28 fait en sorte que l'article 33, qui s'applique à l'article 15, ne peut, selon nous, s'appliquer au principe d'égalité des deux sexes ; aucun législateur ne peut, en recourant à la clause « nonobstant », édicter une mesure violant l'égalité entre hommes et femmes.

1421 L'auteur William F. Pentney [now Justice at the Federal Court] est particulièrement éloquent :

> Il en résulterait, pour l'égalité des sexes édictée par l'article 15, un statut plus élevé que celui qui est accordé aux autres motifs de discrimination et cela permettrait sans doute à l'article 28 d'atteindre son but, en rendant plus significative et plus effective l'égalité garantie par l'article 15. Selon nous, c'est le rôle minimum qui puisse être attribué à l'article 28. S'il n'a pas au moins pour effet d'assurer la protection la plus forte possible à l'égalité des sexes en vertu de l'article 15, il constituera une disposition superflue et son insertion dans la *Charte* aura été une cruelle imposture.

1422 Ainsi selon les auteurs, en raison du contexte historique de son adoption et des objectifs visés, l'article 28 protégerait de façon particulière le droit à l'égalité des sexes. Le législateur ne pourrait y déroger par application de l'article 33.

g. The trial judge's theory of the interplay between ss. 28 and 33 gives no meaning to the events of November of 1981, contrary to the Supreme Court's directions

[64] In the present case, the trial judge relied on the history of the adoption of s. 28 to appear to reject a conception of s. 28 as merely interpretive.[71] Yet, he ignored this same history – history which he recognizes is the same as that relied on by Justice Julien[72] – in

[71] TJ at paras 852-854, **S-I, vol 1 at 186**.
[72] TJ at para 833, **S-I, vol 1 at 176** ("*Le Tribunal ne possède aucune raison de ne pas suivre le raisonnement d'autant plus que la preuve en l'instance concorde avec celle faite dans cette affaire*").

reaching his conclusion as to the interplay between ss. 28 and 33.[73] According to the trial judge's theory of the interplay between ss. 28 and 33 (which is that s. 28 can have no effect where the underlying right it guarantees the equal exercise of is made subject to s. 33[74]), the removal of s. 28 from the scope of the notwithstanding clause on November 23, 1981 meant that s. 28 was only insulated from s. 33 in its conjoined application with other rights that are themselves insulated from s. 33. As seen above, such a theory is incompatible with the history of the amendments to ss. 28 and 33 and with the framers' intent in removing s. 28 from the scope of the notwithstanding clause – which both make clear that s. 28 was removed from the scope of s. 33 in all its applications.

[65] On the trial judge's theory of the interplay between ss. 28 and 33, both the inclusion of s. 28 in the scope of s. 33 and the subsequent outcry and exclusion of s. 28 from s. 33 in November of 1981 are given no meaning. Precisely as the Supreme Court cautioned against in *R v Prosper*, the trial judge's theory fails to "attribute any significance to" deliberate decisions made by the framers.[75]

[66] Importantly, the trial judge does not accept an alternate theory of the history of ss. 28 and 33 as that put forward by EMSB *et al* or attempt to explain it away. Instead, he (a) recognizes that the historical context corresponds to that relied on by Justice Julien ("*la preuve en l'instance concorde avec celle faite dans cette affaire*"), (b) indicates that he has no reason to not follow her reasoning and reproduces in full the historical context relied on by Justice Julien,[76] and then (c) promptly ignores the history and adopts an interpretation of s. 28 contrary to that adopted in *Syndicat de la fonction publique*.[77]

B. THE INVOCATION OF THE NOTWITHSTANDING CLAUSE DOES NOT ANNUL THE EXISTENCE OF RIGHTS AND IS NOT ANALOGOUS TO S. 32 OF THE *CANADIAN CHARTER*

[67] The text and operation of s. 33 are entirely consistent with this historical context and achieve the framers' unequivocal intent regarding the interplay of ss. 28 and 33: s. 28

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[73] TJ at para 840, **S-I, vol 1 at 184** ("*le fait que le législateur soustrait l'article 28 de l'application de l'article 33 n'ajoutent rien au débat quant à sa portée*").
[74] TJ at paras 874-876, **S-I, vol 1 at 189**.
[75] *R v Prosper*, [1994] 3 SCR 236 at 267.
[76] TJ at paras 833-834, **S-I, vol 1 at 176-182**.
[77] TJ at para 840, **S-I, vol 1 at 184** ("*le fait que le législateur soustrait l'article 28 de l'application de l'article 33 n'ajoutent rien au débat quant à sa portée*").

guarantees equality in the exercise of rights, even when those underlying rights are subject to the notwithstanding clause.

a. The invocation of the notwithstanding clause does not annul the existence of rights

[68] The trial judge erred in law by concluding that s. 33, when invoked by a legislature, has the effect of annulling or suspending the existence of rights (e.g., concluding that the effect of invoking s. 33 is that "*il n'existe juridiquement plus de droits et libertés*" or "*il ne subsiste plus de droits ou de libertés*").[78]

[69] Far from directly restricting the scope of *Canadian Charter* rights, s. 33 presupposes their existence. The effect of invoking s. 33 is not to deny or curtail *Canadian Charter* rights. It is rather to permit the operation of legislation notwithstanding the acknowledged existence of those rights. Section 33 allows the legislation to operate "as it would have but for" the right. The *Canadian Charter* right is not abolished or cut down because s. 33 has been invoked; the statute is merely permitted to operate. The subject of the s. 33 declaration is not the *Canadian Charter* right itself, but the statute.

[70] As Dean Robert Leckey and Eric Mendelsohn explain:[79]

> Reference in s 33(2) to a law's having the operation it would 'but for the provision of this Charter' signals that Charter rights continue to apply. Conversely, if activating the notwithstanding clause made rights inapplicable to a protected law – a formulation absent from the constitutional text – it would be redundant to specify that the law shall have its operation despite those rights: that consequence would arise automatically. […]
>
> The legal system is familiar with rules that limit the remedial options for vindicating a right without suspending or extinguishing it, be it in public law, private common law, or private civil law. In such instances, there can be a violation of rights that is real, not hypothetical. The interpretive principle that calls for construing exceptions narrowly further supports the idea that one should not read s 33 as interfering with the application of Charter rights and freedoms – a reading that is not required to make sense of the effects clause – absent sound, specific justification for doing so.
>
> The best explanation of how the notwithstanding clause produces its necessary effects is the simplest one: s 33(2) makes space within the Charter, and thus within the Constitution of Canada, for laws that infringe rights by temporarily ensuring their operation without regard to their impact on specified rights and freedoms. In other words, the effects clause prevents a protected law's breach of Charter rights from amounting to 'inconsistency' with the Constitution of Canada for purposes of the supremacy clause. In this respect, the notwithstanding clause functions similarly to s 1, signaling that the Charter, overall, regards a law's impact on rights as permissible.

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[78] TJ at paras 874-875, **S-I, vol 1 at 189**.

[79] "The Notwithstanding Clause: Legislatures, Courts and the Electorate", 72:2 UTLJ (advanced access published in May 2021, forthcoming publication in 2022) at 8-10 [footnotes omitted].

[71] Where a litigant seeks to have legislation struck down, and where the *Canadian Charter* rights are violated by a statute declared to operate notwithstanding those rights, the explanation of how the notwithstanding clause produces its effects will be of no practical consequence. This explains why the question has not yet been specifically considered in the case law.[80] When s. 28 is engaged, however, the difference is stark. Because s. 33 does not restrict *Canadian Charter* rights themselves, there is absolutely no impediment to s. 28 operating in conjunction with those rights. And, unlike the AGQ and the trial judge's theory, this understanding of s. 33, which flows from the text of the provision, corresponds with the legislative history of ss. 28 and 33.

b. Whereas ss. 32(1) and (2) directly define the application and scope of the Charter, s. 33 instead governs the operation of legislation

[72] The trial judge erred in law in accepting the AGQ's erroneous analogy between ss. 32 and 33 of the *Canadian Charter*, in terms of their interaction with s. 28.[81]

[73] Subsection 32(1) provides that the Charter "applies" ("*s'applique*") "to the Parliament and government of Canada" and "to the legislature and government of each province" within their spheres of competence. In this way, s. 32(1) directly defines the extent of the *Charter*'s application. Subsection 32(2) provides that s. 15 "shall not have effect" ("*n'a d'effet que*") until three years after s. 32 comes into force. This provision directly restricts a specific *Canadian Charter* provision, preventing it from having any effect for a specified period.

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[80] Grégoire Webber explains that "key expressions in the notwithstanding clause – 'shall operate' and 'shall have such operation as it would have' (in the French version: '*a effet*' and '*a l'effet qu'elle aurait*') – have escaped interrogation. Even the Supreme Court of Canada in its only decisions devoted to interpreting the clause did not explore these key expressions, and instead spoke of the 'override provision' and of the 'protection' of legislation from 'the application' of targeted sections of the Charter" ("Notwithstanding rights, review, or remedy? On the notwithstanding clause and the operation of legislation" (2021) 71:4 UTLJ 510 at 518). See: *Ford v Quebec*, [1988] 2 SCR 712 at 733; *Devine v Quebec*, [1988] 2 SCR 790 at 812. See also Leckey and Mendelsohn on the Supreme Court's *obiter dicta* in referring to the notwithstanding clause: "A majority of the Supreme Court has written that s 33 'permits Parliament or a provincial legislature to temporarily exempt an Act from the application of rights and freedoms guaranteed by ss. 2 and 7 to 15 of our Charter' ([*Ontario v G*] at para 137). A majority has also stated that the provincial legislature 'withdrew all Quebec laws from the Canadian Charter regime for five years from their [sic] inception' (*Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429 at para 15, McLachlin CJC)" ("The Notwithstanding Clause: Legislatures, Courts and the Electorate", 72:2 UTLJ (advanced access published in May 2021, forthcoming publication in 2022) at 8 (footnote 24)).

[81] TJ at paras 822-824, **S-I, vol 1 at 174**.

[74] The operation of s. 33 is very different. Section 33 does not define the application or scope of *Canadian Charter* rights. Instead, s. 33(1) provides that Parliament or a provincial legislature "may expressly declare in an Act […] that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter" ("*peut adopter une loi où il est expressément déclaré que celleci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte*") (emphasis added). Subsection 33(2) clarifies the effect of such a statutory declaration: "An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this *Charter* referred to in the declaration" ("*La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte*") (emphasis added).

[75] In drawing an analogy between ss. 32 and 33, in terms of their interaction with s. 28, the AGQ and the trial judge relied on case law that either stands for the opposite conclusion (*Re Boudreau and Lynch*) or does not address ss. 28 at all (*R v Cornell*).[82]

[76] *Re Boudreau and Lynch* concerned the effect of s. 28 in the first three years of the *Canadian Charter*. In that case, the Nova Scotia Court of Appeal drew a crucial distinction between ss. 32 and 33: while s. 28 does not impact s. 32(2) (it could not eliminate the probationary period of three years for the application of s. 15), it counters the legislative override provisions of s. 33 with regard to any form of sexual discrimination:[83]

> [12] In my opinion Mr. Justice Burchell and Chief Justice Glube were correct in their interpretation of the *Charter*, and it is therefore unnecessary to consider these other issues at the present time. Section 28 of the *Charter* was not intended to eliminate the probationary period of three years during which Parliament and the provincial legislatures could determine their course of action under the new Constitution. It was simply intended to prevent any continuation of sexual discrimination by affirmative legislative action once the full *Charter* had come into force. By doing so the legislators have treated sexual discrimination as the most odious form of discrimination and taken away from legislative bodies the right to perpetrate it in the future. Other types of discrimination may without reasons being given be carried on under the legislative override provisions of s. 33.

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[82] TJ at paras 822-824, **S-I, vol 1 at 174**, citing *Re Boudreau and Lynch*, 1984 CanLII 3055 (NSCA), [1984] NSCJ No 489 and *R v Cornell*, [1988] 1 SCR 461.

[83] *Re Boudreau and Lynch*, 1984 CanLII 3055 (NSCA), [1984] NSCJ No 489 at para 12 [emphasis added]; see also para 9.

[77] The trial judge's reliance on *R v Cornell* to support an attempted analogy between ss. 32(2) and 33 is similarly misplaced. To be clear, *R v Cornell* said nothing about s. 28 or its relationship with s. 33. The Supreme Court's comments concerning s. 32(2) cannot be transposed to s. 33 because the provisions are fundamentally different. In any event, with respect to s. 32(2), the Court concluded that s. 7 could not protect the right to equality in that case – the facts of which arose before 1985 – "on the basis of the clear intention of the framers of the *Charter* as to when the constitutional protection of the right to equality before the law was to take effect", i.e., not until April 17, 1985.[84] This further shows why there can be no analogy with the relationship between ss. 28 and 33: the legislative history overwhelmingly establishes that the framers were specifically concerned with ensuring that the notwithstanding clause could not be invoked with respect to "section 28 […] in its application to discrimination based on sex referred to in section 15."

C. SECTION 28 IS A SUBSTANTIVE, PRE-EMINENT GUARANTEE THAT OPERATES TOGETHER WITH THE RIGHTS IT GUARANTEES EQUALLY EVEN IN THE ABSENCE OF A VIOLATION OF THOSE RIGHTS

[78] The text and operation of s. 28 are entirely consistent with the historical context and achieve the framers' unequivocal intent regarding the interplay of ss. 28 and 33: s. 28 guarantees equality in the exercise of rights, even when those underlying rights are subject to the notwithstanding clause.

a. Section 28 is a substantive guarantee

[79] The location of s. 28 under the "General" section of the *Canadian Charter* ("*Dispositions générales*") does not resolve the issue of whether the provision is merely interpretive, as the trial judge noted.[85] What ss. 25 to 31 have in common is that they each reference either the other rights and freedoms contained in the *Canadian Charter* or the *Canadian Charter* as a whole. However, the provisions have different wordings and purposes, which determine their interpretive and substantive effects.

[80] Section 29 (which provides that "Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools") is considered to be a bar to

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[84] *R v Cornell*, [1988] 1 SCR 461 at 478; see also 464-465, 477.
[85] TJ at para 850, **S-I, vol 1 at 186**.

competing rights rather than a merely interpretive provision. In *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, Justice Wilson explained that "s. 29 is there to render immune from *Charter* review rights or privileges which would otherwise, i.e., but for s. 29 be subject to such review".[86] This distinction between a bar or immunity and "an interpretive provision informing the construction of potentially conflicting Charter rights" is one that the Supreme Court endorsed in *R v Kapp*.[87]

[81] In contrast to ss. 27 and 25, which indicate how rights are to be "interpreted" or "construed", and to s. 29, which is articulated in purely negative terms, s. 28 provides the manner in which rights and freedoms are positively "guaranteed". Section 28 is in fact the only provision in the "General" section of the *Canadian Charter* in which the operative verb is to "guarantee". While s. 28 may play an interpretive role like many, if not most, *Canadian Charter* provisions,[88] and while it applies – by its own terms – in conjunction with other rights and freedoms, it is substantive in that it also confers a guarantee of gender equality.

[82] The guarantee in s. 28 operates much like that in s. 1 of the *Canadian Charter*, which "guarantees" the rights and freedoms set out in the *Canadian Charter* "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Indeed, ss. 1 and 28 are the only two provisions that "guarantee" the rights in the *Canadian Charter*. Unlike s. 1, which restricts the apparent scope of the rights and freedoms contained in the *Canadian Charter* (the guarantee of rights and freedoms

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[86] *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 SCR 1148 at 1198 (per Wilson J.). See *Reference re an Act to Amend the Education Act*, [1986] OJ No 2355 (ONCA) at paras 159-171, aff'd [1987] 1 SCR 1148 for a discussion of the legislative history of s. 29 and the intention of the framers to shield denominational school rights from *Charter* review.

[87] *R v Kapp*, 2008 SCC 41 at paras 64 (majority's reasons), 87 (per Bastarache J.). Even in the case of provisions that use interpretive language such as s. 25 ("The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms"), the Supreme Court has declined to conclude that they are merely interpretive (*R v Kapp*, 2008 SCC 41 at para 64). Only s. 27, which provides that the *Charter* "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians" has been clearly identified as a merely interpretive provision (*R v Kapp*, 2008 SCC 41 at para 88; see e.g. *Church of Atheism of Central Canada v Minister of National Revenue*, 2019 FCA 296 at para 15).

[88] *Canadian Charter* provisions that contain substantive guarantees can also serve interpretive functions. See for example: how ss. 8 to 14 of the *Canadian Charter* were used to "interpret" s. 7 (*United States v Burns*, 2001 SCC 7 at para 57). Similarly, s. 15 has been used to interpret the content of s. 7 (see *R v Mills*, [1999] 3 SCR 668 at para 21). The question is whether s. 28 serves only an interpretive function. Here, the text of s. 28, its history and the case law all indicate that s. 28 is a substantive guarantee.

is subject to reasonable limits), s. 28 expands their scope to ensure their equal enjoyment on the basis of sex equality.[89]

[83] As the trial judge concluded, the idea that s. 28 is merely interpretive cannot be reconciled with the strength of the language used in the provision (nor with its history, as discussed in Part A above).[90]

[84] The Supreme Court's analysis in *R v Hess* leads to the same conclusion. In that case, the Court considered whether statutory rape provisions of the *Criminal Code* that were only applicable to men amounted to sex discrimination. While the majority of the Court found that the provisions did not infringe ss. 15 or 28 of the *Canadian Charter*, it is noteworthy that it conducted an independent analysis of each provision, rather than assessing s. 28 in the context of its s. 15 analysis.[91]

[85] The Federal Court of Appeal in *Native Women's Association of Canada v Canada* also recognized that s. 28 contains a substantive right. The Court concluded that the federal government had violated both ss. 2(b) and 28 of the *Canadian Charter* by providing unequal funding for participation in constitutional negotiations.[92] While the Supreme Court overturned the Court of Appeal's decision, Sopinka J. did so based on a lack of evidence that "the funded groups were less representative of the viewpoint of women with respect to the Constitution", never questioning the idea that s. 28 protects a substantive right.[93]

[86] That s. 28 is a substantive guarantee, rather than only an interpretive provision, is confirmed by the Superior Court of Quebec in *Syndicat de la fonction publique*. Following her review of the history of the adoption of s. 28 and in particular the role of women's groups in the adoption of s. 28, Justice Julien affirmed that s. 28 grants "particular

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[89] Katherine J de Jong, "Sexual Equality: Interpreting Section 28" in Anne F Bayefsky & Mary Eberts, eds, *Equality rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 493 at 523.

[90] TJ at paras 832-833, 851-854, **S-I, vol 1 at 176, 186**. The trial judge's conclusions regarding the substantive nature of s. 28 are not clear: he indicates s. 28 is merely interpretive in nature in the introduction to his judgment (at para 4, **S-I, vol 1 at 7**), but he then rejects this proposition in his analysis on s. 28 (at para 855, **S-I, vol 1 at 186**). To the extent that the trial judge concluded that s. 28 cannot be used to invalidate legislation (at para 873, **S-I, vol 1 at 189**) – a proposition that he appears to have rejected in other parts of his analysis on s. 28 (at para 855, **S-I, vol 1 at 186**) – this is an error of law.

[91] *R v Hess*; *R v Nguyen*, [1990] 2 SCR 906 (per Wilson J.) at 932-933.

[92] *Native Women's Assn of Canada v Canada (CA)*, [1992] 3 FC 192 (FCA) at 212.

[93] *Native Women's Assn of Canada v Canada*, [1994] 3 SCR 627 at 657-658.

protection" against gender-based discrimination ("*protégerait de façon particulière le droit à l'égalité des sexes*").[94]

b. Section 28 asserts the pre-eminence of the gender equality guarantee

[87] The guarantee contained in s. 28 applies "notwithstanding anything in the *Charter*" ("*indépendamment des autres dispositions de la présente charte*") – language that is unique to s. 28 and indeed constitutes some of the most assertive language found in the *Canadian Charter*.[95] In *Health Services*, the Court underscored that freedom of association under s. 2(d) was "cast in broad terms and devoid of limitations".[96] In *Sauvé*, the Court insisted on the "broad, untrammeled language" of the right to vote under s. 3.[97] In the case of s. 28, not only is the guarantee "devoid of limitations" and "untrammelled", it also contains a positive affirmation that the guarantee applies notwithstanding anything in the *Charter*.[98]

[88] Just as in *Mills*, where the Supreme Court noted, in discussing the meaning of s. 24 of the *Canadian Charter*, that "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion",[99] in the case of s. 28, it is difficult to imagine a more unequivocal guarantee of sex equality.

[89] At minimum, the language of pre-eminence contained in s. 28 ("notwithstanding anything in the *Charter*"), taken together with the historical context, indicates that the scope of s. 28 cannot be cut down through the invocation of the notwithstanding clause.

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[94] *Syndicat de la fonction publique du Québec inc c Québec (Procureur général)*, 2004 CanLII 76338 (QC SC), REJB 2004-52276 at para 1422. As the trial judge noted (at para 845, **S-I, vol 1 at 184-185**), statements made in *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 which interpret s. 28 differently, are not binding on this Court and don't reflect a fulsome purposive interpretation of s. 28; they are inconsistent with the provision's text, history and purpose. Moreover, the notwithstanding clause had not been invoked in *McIvor*, and the Court believed the case could be addressed entirely through s. 15.

[95] Federal government representatives in subsequent constitutional negotiations recognized s. 28 as "the strongest section in the *Charter*". Testimony of Norman Spector [who would become Chief of Staff to Prime Minister Mulroney] (September 1, 1987), Special Joint Committee on the 1987 Constitutional Accord – Evidence at 16:25. See also Testimony of Lowell Murray [then leader of the conservative government in the Senate] (September 1, 1987), Special Joint Committee on the 1987 Constitutional Accord – Evidence, at 16:26.

[96] *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 39.

[97] *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 11.

[98] On the relationship between ss. 28 and 32, see paras 72-76 of the present submissions. On the relationship between ss. 28 and s. 1, see para 118 of the present submissions.

[99] *Mills v The Queen*, [1986] 1 SCR 863 at 965.

The trial judge's view that s. 28 is subsidiary to s. 33 in the vast majority of its applications (i.e., except in connection with a narrow subset of rights) is not only incompatible with the history of ss. 28 and 33 (as seen in Part A above), but is also irreconcilable with the text of the s. 28 guarantee.

c. Section 28 uses an established device for guaranteeing equality rights: like s. 10 of the Quebec Charter, it operates together with the rights it guarantees equally even in the absence of a violation of those rights

[90] There are crucial consequences to a proper understanding of s. 28 as making use of an established device for protecting equality: not only is s. 28 a substantive guarantee, but it operates together with the rights it guarantees equally even in the absence of a violation of those rights.

[91] Two types of guarantees against inequality or discrimination can be distinguished at law. A first type, exemplified in s. 15 of the *Canadian Charter*, protects against discrimination without reference to the exercise of other rights or freedoms:

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15 (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[92] Making out a claim of discrimination under s. 15 requires showing that a law "has the effect of reinforcing, perpetuating, or exacerbating disadvantage"[100] faced by a group, which is identified based on enumerated or analogous grounds.

[93] A similar provision is found in the *International Covenant on Civil and Political Rights* at art. 26:[101]

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language,	Toutes les personnes sont égales devant la loi et ont droit sans discrimination à une égale protection de la loi. A cet égard, la loi doit interdire toute discrimination et garantir à toutes les personnes une protection égale et efficace contre toute discrimination, notamment de race, de couleur, de sexe, de

[100] *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 27.
[101] *International Covenant on Civil and Political Rights,* 19 December 1966, 999 UNTS 171 art 26 (entered into force 23 March 1976, accession by Canada 19 May 1976).

religion, political or other opinion, national or social origin, property, birth or other status.	langue, de religion, d'opinion politique et de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation.

[94] A second type of guarantee, exemplified in s. 10 of the *Quebec Charter*, treats equality as a matter of equal enjoyment of other rights and freedoms:

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.	10. Toute personne a droit à la reconnaissance et à l'exercice, en pleine égalité, des droits et libertés de la personne, sans distinction, exclusion ou préférence fondée sur la race, la couleur, le sexe, l'identité ou l'expression de genre, la grossesse, l'orientation sexuelle, l'état civil, l'âge sauf dans la mesure prévue par la loi, la religion, les convictions politiques, la langue, l'origine ethnique ou nationale, la condition sociale, le handicap ou l'utilisation d'un moyen pour pallier ce handicap.
Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.	Il y a discrimination lorsqu'une telle distinction, exclusion ou préférence a pour effet de détruire ou de compromettre ce droit.

[95] The *European Convention of Human Rights* similarly states at art. 14:[102]

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.	La jouissance des droits et libertés reconnus dans la présente Convention doit être assurée, sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation.

[96] The *International Covenant on Civil and Political Rights* also contains an example of this second type of guarantee, which addresses equality on the basis of sex in the exercise of other rights and freedoms. In fact, art. 3 contains almost identical language to s. 28 of the *Canadian Charter*:[103]

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[102] *European Convention on Human Rights*, 4 November 1950, ETS 5 art 14 (entered into force 3 September 1953).

[103] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 3 (entered into force 23 March 1976, accession by Canada 19 May 1976).

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant (Article 3 of the *ICCPR*).	Les États parties au présent Pacte s'engagent à assurer le droit égal des hommes et des femmes de jouir de tous les droits civils et politiques énoncés dans le présent Pacte (Article 3 du Pacte international relatif aux droits civils et politiques).

[97] The *International Covenant on Civil and Political Rights* was ratified by Canada in 1976. In 1980, the Chief Commissioner of the Canadian Human Rights Commission stressed, when discussing the language that would become s. 28 of the *Canadian Charter*:[104]

Scholars will know, and deputies and senators will know this is not special language, it comes from international treaties now ratified by Canada.	Les universitaires, les députés, les sénateurs sauront qu'il ne s'agit pas là d'un libellé spécial; il est tiré de traités internationaux déjà ratifiés par le Canada.

[98] Just like s. 10 of the 1975 *Quebec Charter*, it is well established that article 3 of the *International Covenant on Civil and Political Rights* contains a substantive guarantee that grounds causes of action. It is also well established that art. 3 is not redundant with the anti-discrimination provisions contained at art. 26 of the *ICCPR*. In *Türkan v Turkey*, the Human Rights Committee found that Turkey's prohibition on head coverings in the university setting constituted "intersectional discrimination" and "violated article 26 [general anti-discrimination provision] and article 3 [gender equality], in conjunction with ("*lu conjointement avec*") article 18, of the Covenant [freedom of religion]".[105]

[99] Section 28 of the *Canadian Charter* is akin to this second type of guarantee: just like s. 10 of the *Quebec Charter*, it guarantees equal enjoyment of rights and freedoms, but – unlike s. 10 – it is restricted to the ground of sex.

[100] It is well established that s. 10 of the *Quebec Charter*, a substantive guarantee of equality, necessarily operates in conjunction with one or more rights and freedoms:[106]

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[104] Canada, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32-1, No 5 (14 November 1980) at 5:9.

[105] Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2274/2013*, UNHRCOR, 123rd Sess, UN Doc CCPR/C/123/D/2274/2013 at para 7.8 [*Türkan v Turkey*] [emphasis added].

[106] *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 at para 6; *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 [emphasis added].

> [35] […] s. 10 requires that the plaintiff prove three elements: "(1) a 'distinction, exclusion or preference', (2) based on one of the grounds listed in the first paragraph, and (3) which 'has the effect of nullifying or impairing' the right to full and equal recognition and exercise of a human right or freedom".
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> [35] […] l'art. 10 requiert du demandeur qu'il apporte la preuve de trois éléments, soit « (1) une "distinction, exclusion ou préférence", (2) fondée sur l'un des motifs énumérés au premier alinéa et (3) qui "a pour effet de détruire ou de compromettre" le droit à la pleine égalité dans la reconnaissance et l'exercice d'un droit ou d'une liberté de la personne ».

[101] In this regard, this Court has explained:[107]

> Contrairement à la Constitution américaine et à la *Charte canadienne* qui reconnaissent le droit à l'égalité dans sa généralité, la *Charte québécoise* ne le reconnaît qu'à l'égard des droits et libertés de la personne. L'égalité n'est pas envisagée comme un droit autonome mais comme une simple modalité de particularisation d'un autre droit […].

[102] Importantly, finding a violation of s. 10 of the *Quebec Charter* does not require finding that the underlying right is violated. As the Supreme Court explained in *Bombardier*:[108]

> [54] This means that the right to non-discrimination cannot serve as a basis for an application on its own and that it must necessarily be attached to another human right or freedom recognized by law. However, this requirement should not be confused with the independent scope of the right to equality; the *Charter* does not require a "double violation" (right to equality and, for example, freedom of religion), which would make s. 10 redundant: see, *inter alia*, 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.
>
> [54] Cela signifie que le droit à l'absence de discrimination ne peut à lui seul fonder un recours et doit nécessairement être rattaché à un autre droit ou à une autre liberté de la personne reconnus par la loi. Il ne faut toutefois pas confondre cette exigence avec la portée autonome du droit à l'égalité; la *Charte* n'exige pas une « double violation » (droit à l'égalité et, par exemple, liberté de religion), ce qui rendrait l'art. 10 superflu : voir, entre autres, 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.

[103] David Robitaille, cited by the Supreme Court in the above passage of *Bombardier*, explains: [109]

> Si la norme d'égalité québécoise n'est susceptible d'aucune application indépendante, elle possède néanmoins une portée autonome. L'article 10 peut ainsi se trouver enfreint par une mesure conforme, en elle-même, aux exigences d'un autre article mais qui crée une

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[107] *Commission scolaire St-Jean-sur-Richelieu c Commission des droits de la personne du Québec*, [1994] RJQ 1227, 1994 CanLII 5706 (CA) at para 59.
[108] *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 54 [emphasis added].
[109] David Robitaille, "Non-indépendance et autonomie de la norme d'égalité *québécoise* : des concepts 'fondateurs' qui méritent d'être mieux connus" (2004) 35 RDUS 103 at 128, 130-131.

> inégalité de traitement dans la reconnaissance ou l'exercice du droit ou de la liberté consacrée par cette autre disposition. […]
>
> D'ailleurs, si la violation de l'article 10 nécessitait celle concomitante d'un droit ou d'une liberté de la personne, une constatation de discrimination ne constituerait alors qu'une circonstance aggravante du non-respect du droit ou de la liberté invoqué.

[104] In *Commission scolaire St-Jean-sur-Richelieu*, this Court concluded that s. 40's guarantee of the right to free, public education had not been violated by the school authorities' refusal to pay for the services of a specialized accompanying person who would have facilitated the integration of their child with autistic traits into the regular classroom. Nevertheless, this Court found that the disability-based distinction imposed on the child in the exercise of his right to free public education was discriminatory in that it had a real exclusionary effect on him.[110] The independent scope of the right to equality under the *Quebec Charter* thus allows the provision to give rise to a remedy even where the underlying right does not.[111]

[105] Article 14 of the *European Convention of Human Rights* operates in the same way as s. 10 of the *Quebec Charter*, i.e. not requiring a violation of the underlying right.[112] The European Court of Human Rights ("ECHR") has repeatedly held that "the application of Article 14 does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Articles of the Convention".[113]

[106] In sum, not only does the invocation of the notwithstanding clause not annul the existence of ss. 2 and 15 of the *Canadian Charter*, but the mechanism of s. 28, like that of s. 10 of the *Quebec Charter* and art. 14 of the *European Convention on Human Rights*, does not require finding a violation of ss. 2 or 15.

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[110] *Commission scolaire St-Jean-sur-Richelieu c Commission des droits de la personne du Québec*, [1994] RJQ 1227, 1994 CanLII 5706 (CA) at para 87.

[111] This is particularly striking for socio-economic rights under the *Quebec Charter*, which are not covered by the *Charter*'s supremacy clause at s. 52.

[112] See e.g. *Biao v Denmark* [ECHR], No 38590/10 (24 May 2016) at paras 138-140 (the Court finds violation of Art. 14 of the Convention, read in conjunction with Art. 8 (right to private and family life), without finding violation of Art. 8).

[113] See e.g.: *EB v France* [ECHR], No 43546/02 (22 January 2008) at para 47; *Biao v Denmark* [ECHR], No 38590/10 (24 May 2016) at para 88.

D. BOTH SS. 28 AND 15(2) OF THE *CANADIAN CHARTER* FURTHER SUBSTANTIVE EQUALITY

[107] The trial judge erred in law in suggesting that ss. 28 and 15(2) of the *Canadian Charter* may be contradictory,[114] when in fact they both further substantive equality.

[108] The EMSB *et al* maintain that there is no inconsistency between s. 28 and an ameliorative program for women adopted pursuant to s. 15(2), as both favour substantive equality. As such, giving s. 28 the pre-eminence that both the history and a purposive interpretation of its words requires (which, at minimum, means that the scope of s. 28 cannot be cut down through the invocation of the notwithstanding clause) supports, rather than limits, giving full effect to s. 15(2).

[109] The history of s. 28's adoption shows that both s. 15 and s. 28 were specifically intended to leave behind the formalistic interpretations of the equality guarantee under the *Canadian Bill of Rights*.[115]

[110] Furthermore, the Supreme Court has clearly rejected "formalist approaches to equality rights":[116]

> [44] […] Formalist approaches to equality rights involve a "decontextualized application of objectified rules and definitions" that fails to account for, among others, conditions of material inequality, the concrete impacts that laws have on individuals and groups, and the manner in which individuals' choices are embedded in their social and economic surroundings […]
>
> [44] […] Les approches formalistes relatives aux droits à l'égalité consistent à [TRADUCTION] « appliquer des règles et des définitions objectives sans égard au contexte » qui ne tiennent pas compte de conditions telles que l'inégalité importante, les effets concrets qu'ont les lois sur les individus et les groupes, et la manière dont les choix des individus sont ancrés dans le contexte socioéconomique dans lequel ils évoluent […]

[111] Because s. 28 protects substantive gender equality, it does not conflict with s. 15(2). As the majority of the Supreme Court stressed in *Kapp*, "Sections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole."[117] Thus, "the two sections are confirmatory of each other." Properly understood,[118]

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[114] TJ at paras 871-872, **S-I, vol 1 at 189**.
[115] See e.g. Canada, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32-1, No 5 (14 November 1980) at 5:9, 5:15-5:16 (per Gordon Fairweather, Chief commissioner of Canadian Human Rights Commission and Svend Robinson).
[116] *Ontario (Attorney General) v G*, 2020 SCC 38 at para 44.
[117] *R v Kapp*, 2008 SCC 41 at para 16.
[118] *R v Kapp*, 2008 SCC 41 at para 37 [emphasis added].

[37] […] Section 15(2) supports a full expression of equality, rather than derogating from it. "Under a substantive definition of equality, different treatment in the service of equity for disadvantaged groups is an expression of equality, not an exception to it": P. W. Hogg, Constitutional Law of Canada (5th ed. Supp. 2007), vol. 2, at p. 55-53.	[37] […] Le paragraphe 15(2) favorise la pleine expression de l'égalité plutôt que la dérogation à celle-ci. [TRADUCTION] « Selon la définition de l'égalité réelle, la différence de traitement destinée à traiter de façon équitable des groupes défavorisés représente une expression d'égalité, non une exception à celle-ci » : P. W. Hogg, *Constitutional Law of Canada* (5e éd. suppl. 2007), vol. 2, p. 55-53.

[112] Just as s. 15(2) is not an exception or a derogation from s. 15(1), s. 15(2) is not in tension with s. 28 – both express the very same value. For this reason, giving the s. 28 gender equality guarantee the full pre-eminence that its text, context, and history require (which, at minimum, means that the scope of s. 28 cannot be cut down through the invocation of the notwithstanding clause) generates no conflict with s. 15(2), because ameliorative programs within the meaning of s. 15(2) advance s. 28's purpose of promoting substantive gender equality.

E. BILL 21 INRINGES S. 28 OF THE *CANADIAN CHARTER* AND THE INFRINGEMENTS ARE NOT JUSTIFIED UNDER S. 1

[113] Section 28, which guarantees equality in the exercise of rights even when those underlying rights are subject to the notwithstanding clause, is breached in the instant case based on the facts on record. As the trial judge found, and as outlined in paragraphs 15 to 24 of the present submissions, the prohibition on wearing religious symbols contained in s. 6 of Bill 21 disproportionately impacts Muslim women. It notably prevents Muslim women from exercising their freedom of religion and freedom of expression (s. 2 of *Canadian Charter*) and their right to equality (s. 15 of *Canadian Charter*) on an equal footing with men.

[114] While a stated goal of Bill 21 is the improvement of gender equality,[119] all the evidence on record indicates that Bill 21 harms women, without promoting their equality in any way: (a) the women being denied employment – or who could be denied employment – because of Bill 21 are educated women seeking jobs as teachers or in the

[119] Bill 21, Preamble ("AS the Québec nation attaches importance to the equality of women and men"); Québec, Assemblée nationale, Commission permanente des institutions, *Journal des débats de la Commission permanente des institutions*, 42-1, vol 45, n°33 (7 mai 2019) EMSB-28-3 at 6 of 7, **S-III a), vol 18 at 5726**.

public service; (b) the affiants in this case are examples of women autonomously exercising their freedom of religion;[120] and (c) the majority of Muslim women in Quebec who wear the hijab choose to do so, often against the wishes of their families, and adhere strongly to values of gender equality.[121] In this way, Bill 21's purported concern for gender equality stereotypes Muslim women in a way that does not correspond to their actual characteristics or circumstances.[122] It is important to stress that a legislature or government's general statement that a law is intended to "help women" is not particularly helpful, especially where all the evidence points in the opposite direction.[123]

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[120] See e.g.: Déclaration sous serment de F.B., September 18, 2019 at 2 (paras 6-7), **S-II, vol 3 at 494.159**; Déclaration sous serment de Ghadir Hariri, June 21, 2019 at 2 (paras 8-10), **S-II, vol 2 at 494.79**; Déclaration sous serment de de I. Hak, June 13, 2019 at 2 (para 13), **S-II, vol 2 at 494.10**.

[121] Eid report, EMSB-28-17 at 6, 59-61, 63 (paras 15, 105-106, 108, 112), **S-III b), vol 31 at 10204, 10257-10259, 10261**.

[122] Examination-in-Chief of expert S. Lefebvre, November 6, 2020 at 48-50 (in response to a question from the Court), **S-III b), vol 26 at 8467**; *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 65.

[123] *R v Morgentaler*, [1988] 1 SCR 30, discussed in *Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101 at para 98 (in *Morgentaler*, while the purpose of the law was to protect women's health, the Supreme Court found that the legislative restrictions on abortion access did not contribute to the objective of protecting women's health and, in fact, caused delays that were detrimental to women). With respect to the ECHR's case law on religious symbols, note that the Court in *SAS c France* [ECHR], No 43835/11 (1 July 2014) at para 119 rejected the proposition from *Dahlab c Suisse* [ECHR], No 42393/98 (15 February 2001) [*Dahlab*] that the hijab is contrary to gender equality ("*La Cour estime […] qu'un État partie ne saurait invoquer l'égalité des sexes pour interdire une pratique que des femmes – telle la requérante – revendiquent dans le cadre de l'exercice des droits que consacrent ces dispositions, sauf à admettre que l'on puisse à ce titre prétendre protéger des individus contre l'exercice de leurs propres droits et libertés fondamentaux*"). See Expert Report of D. Koussens and P. Bosset, EMSB-REP-3 at 25 of 99 (para 81), **S-III b), vol 34 at 11405**. The fact that the ECHR abandoned its approach from *Dahlab* is also explained by the AGQ experts M. Fatin-Rouge Stefanini and P. Taillon in their report (AGQ Exhibit PGQ-12 at 120, **S-III b), vol 34 at 11220**), though with less clarity. Note that AGQ experts M. Fatin-Rouge Stefanini and P. Taillon several times mischaracterized European decisions in their report (see Expert Report of P. Bosset and D. Koussens, EMSB-REP-3 at 19-20 of 99 (paras 55-58), **S-III b), vol 34 at 11399-11400**), twice actually referring to a dissenting judgment as the majority decision (Examination-in-Chief of expert D. Koussens, November 23, 2020 at 45-47, **S-III b), vol 29 at 9505-9506**). Experts Bosset and Koussens also explain that the ECHR's case law on religious symbols systematically hinges on the application of a "margin of appreciation" (see e.g. Cross Examination of expert D. Koussens, November 24, 2020 at 25, 57, **S-III b), vol 29 at 9523, 9531**) and that "*La différence entre les deux contextes juridiques rend hasardeuse toute prétention à vouloir tirer des enseignements directs, en droit interne canadien, de l'existence d'une marge nationale d'interprétation dans le droit de la CEDH*" (Expert Report of P. Bosset and D. Koussens, EMSB-REP-3 at 30 of 99 (para 97), **S-III b), vol 34 at 11410**). The 2015 decision of the German Constitutional Court – Case Nos 1 BvR R 471/10 & 1 BvR 1181/10 – discussed by

[115] Section 8 of Bill 21 (the ban on face coverings) also infringes s. 28 of the *Canadian Charter*, by preventing Muslim women from exercising their freedom of religion and expression (s. 2 of *Canadian Charter*) and their right to equality (s. 15 of *Canadian Charter*) on an equal footing with men. Unlike s. 6 of Bill 21, which could affect groups in addition to Muslim women, s. 8 of Bill 21 can only apply to Muslim women. The only religious symbols that cover a person's face in Quebec contemporary society are those worn by Muslim women (the niqab or the burqa).[124] By singling out Muslim women who wear the niqab or the burka for sweeping exclusion from employment in the public service, s. 8 "itself invokes prejudicial and stereotypical views about [these women], feeding harmful stigma" against them.[125] Such a targeted measure "sends a strong and sinister message" to all members of Quebec society that these Muslim women are less worthy of participating in that society through public service, and less worthy of having their fundamental religious freedom protected.[126] The evidence establishes an increase in prejudice, harassment and assaults faced by Muslim women as a result of Bill 21.[127] These harms are sufficient to establish an infringement of s. 28.[128]

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experts Pierre Bosset and David Koussens similarly rejects the argument that the hijab is contrary to gender equality (see footnote 21 above).

[123] TJ at paras 871-872, **S-I, vol 1 at 189**.

[124] Lefebvre report, EMSB-28-16 at 14 of 112 (para 34), **S-III b), vol 31 at 10096** ("*seules des femmes musulmanes couvrent leur visage pour des motifs religieux dans l'ère contemporaine*"); *National Council of Canadian Muslims (NCCM) c Attorney General of Québec*, 2018 QCCS 2766 at paras 45-46 (application to stay the coming into force of s. 10 of Bill 62, which banned the wearing of face coverings: "nothing can lead the Court to any other reasonable understanding of the relevant sections of the Act, the real effect and the logical intent of the legislator that can be deciphered from the contested legal dispositions are directed at a very identifiable and extremely minimal number of Muslim women").

[125] *Ontario (Attorney General) v G*, 2020 SCC 38 at paras 65, 67.

[126] *Vriend v Alberta*, [1998] 1 SCR 493 at paras 100-102.

[127] Affidavit of F. Ahmad, June 13, 2019 at 2 (paras 11-12), **S-II, vol 2 at 494.27**. See evidence cited at footnote 23 regarding increase in prejudicial attitudes.

[128] What's more, as the trial judge explained, "*il demeure possible de contester constitutionnellement une disposition législative en utilisant la logique et le bon sens dans la mesure où l'existence d'un contexte factuel n'ajoutera rien de nécessaire au débat judiciaire*" (TJ at para 916, **S-I, vol 1 at 196**). See also: *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at paras 77-78; *Vriend v Alberta*, [1998] 1 SCR 493 at paras 47-48.

[116] In this case, the government does not plead s. 1.[129] The absence or insufficiency of government submissions on s. 1 must lead a Court to conclude that the *Canadian Charter* infringements are not justified.[130]

[117] To the extent that s. 1 even applies to s. 28 (which operates "notwithstanding anything in this Charter"),[131] the language and history of s. 28 require that any infringement to section 28 be reviewed on the basis of a particularly stringent justification standard. This requirement has been adopted by the Supreme Court in the context of s. 23 (minority language rights) and s. 3 (the right to vote) based on their exclusion from the notwithstanding clause[132] – which is precisely the case for s. 28, as seen in Part A above.

[118] In any case, the infringements of s. 28 in the instant case are not justified under s. 1. If the government's objective is to promote gender equality, the *Canadian Charter* infringements cannot be justified under s. 1. While the promotion of gender equality – a stated goal of Bill 21 – is obviously a pressing and substantial objective, there is no rational connection between (a) preventing women who wear religious symbols from working and (b) promoting gender equality. The idea that the ban on religious symbols may somehow "liberate" affected women finds no support in the evidence, and is in fact irreconcilable with the evidence.

[119] The government elected not to introduce into evidence any impact assessment as to how Bill 21 could promote gender equality.[133] The absence of any impact assessment

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[129] TJ at para 1008, **S-I, vol 1 at 215;** Défense du Procureur général du Québec en réponse à la Demande de révision judiciaire et en jugement déclaratoire et avis de question constitutionnelle des demandeurs English Montreal School Board, July 31, 2020 at para 91, **S-II, vol 3 at 629**. Indeed, the government's failure to plead s. 1 directly impacted the evidence introduced in this case: Avis de gestion du Procureur général du Québec et pièces au soutien, August 25, 2020, at paras 8, 13, **S-II, vol 3 at 608.1-608.4**; Jugement de la Cour supérieure accueillant l'Avis de gestion du Procureur général du Québec (Blanchard, J.C.S.), September 1, 2020, **S-II, vol 3 at 608.35-608.38**.

[130] *Denis c R*, 2018 QCCA 1033 at para 102; *Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3 at paras 278-280; *R v Ruzic*, 2001 SCC 24 at para 91; *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at paras 128-129.

[131] Peter Hogg, *Constitutional Law of Canada*, 5th ed by Carswell (Toronto: Thomson Reuters, 2019) at 55.17(c) ("[I]t is possible that even the limitation clause (s. 1) does not qualify s. 28, having regard to s. 28's opening words, "Notwithstanding anything in this Charter").

[132] *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 at para 148.

[133] Demande de communication de documents des demandeurs à la défenderesse en date du 13 janvier 2020, P-20 [LAUZON], **S-III a), vol 14 at 4496-4500**; Réponse de la défenderesse à la

strongly suggests that the law is not minimally impairing.[134] Finally, the violation is not proportional as it leads to a net negative outcome for gender equality.

Ground of appeal 9.3.1: The trial judge erred in concluding that Bill 21 pursues a pressing and substantial objective.

Ground of appeal nº 9.3.2: The infringing measures of Bill 21 have no rational connection to the objective pursed by the legislature.

[120] The trial judge erred in law in concluding that the National Assembly pursues a pressing and substantial objective in restricting the wearing of religious symbols and that such a restriction is rationally connected to a pressing and substantial objective pursued by the legislature.[135]

[121] The trial judge concluded that Bill 21 "*vise à atteindre la laïcisation de l'État*".[136] The only matter that Bill 21 regulates, however, is the wearing of religious symbols. The specific organization of relations between the State and religions that Bill 21 pursues is one that prohibits the wearing of religious symbols by public servants.

[122] The imposition of a model of secularism that requires the infringement of public servants' freedom of religion challenges the very basis of freedom of religion and women's right to equal exercise of such freedom under s. 28.

[123] An objective that serves to undermine the very rights subject to constitutional protection cannot be pressing and substantial for the purposes of a s. 1 justification – the objective of the government cannot be the violation of *Canadian Charter* guarantees.[137] If the purpose of Bill 21 is to impose a model of secularism that requires the infringement of public servants' freedom of religion, then that is an impermissible purpose. In *AG (Que) v Quebec Protestant School Boards*, the Supreme Court upheld the conclusions of

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demande de communication de documents des demandeurs en date du 27 février 2020, P-21 [LAUZON], **S-III a), vol 15 at 4501-4504**.

[134] *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at paras 156 (per McLachlin C.J. and LeBel J. for the majority) and para 239 (Deschamps J. for the dissent).

[135] TJ at paras 1018-1037, **S-I, vol 1 at 217-221**.

[136] TJ at para 1028, **S-I, vol 1 at 219**.

[137] *AG (Que) v Quebec Protestant School Boards*, [1984] 2 SCR 66 at 74, 84-85; *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 333, 352; *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 at para 153.

Beauregard J.A. that a s. 1 justification "must assume the merits of the guaranteed right, and not challenge its very basis".[138]

[124] Conversely, if the purpose is to advance *Canadian Charter* compliant secularism, then Bill 21 is not rationally connected to that purpose. The essence of a conception of secularism that is compliant with the *Canadian Charter* is state neutrality that enables the free exercise of religion. There is no "causal connection between the limit (i.e., restrictions on the wearing of religious symbols) and the intended purpose (i.e., the promotion of constitutionally compliant secularism)".[139] Indeed, far from furthering the objective of constitutionally compliant secularism, Bill 21 suppresses it.

PART IV: CONCLUSIONS

[125] For these reasons, with respect to Superior Court file no. 500-17-109983-190 and Court of Appeal nos. 500-09-029550-217, 500-09-029549-219 and 500-09-029539-210, the EMSB *et al* ask the Court of Appeal to:

a) **ALLOW** the EMSB *et al*'s incidental appeal;
b) **SET ASIDE** the trial judge's legal conclusions on s. 28 of the *Canadian Charter*;
c) **DECLARE** that ss. 4 (first paragraph), 6, 7, 8, 10, 12 (first and second paragraphs), 13, 14 and 16 of Bill 21 impermissibly violate s. 28 of the *Canadian Charter* and are therefore invalid and of no force or effect pursuant to s. 52 of *C.A. 1982*;

THE WHOLE with costs, in first instance and in appeal.

Montreal, this 2st of December 2021

Power Law

POWER LAW
Me Perri Ravon
Me Mark Power
Me Jennifer Klinck
Me Giacomo Zucchi
465, St-Jean Street, #800

[138] *AG (Que) v Quebec Protestant School Boards*, [1984] 2 SCR 66 at 74, 78, 84-85.
[139] *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 59.

Montreal, Quebec, H2Y 2R6
Tel./Fax.: 514-819-6607
gzucchi@powerlaw.ca

PART V: AUTHORITIES

DOCTRINE:

GOVERNMENT DOCUMENTS:

INTERNATIONAL SOURCES:

ATTESTATION

We, the undersigned, Power Law, attest that the present brief complies with the requirements of the *Civil Practice Regulation (Court of appeal)*, CQLR c C-25.01, r 10.

Montreal, this 2st of December 2021

Power Law

POWER LAW
Me Perri Ravon
Me Mark Power
Me Jennifer Klinck
Me Giacomo Zucchi

465, St-Jean Street, #800
Montreal, Quebec, H2Y 2R6
Tel./Fax.: 514-819-6607
gzucchi@powerlaw.ca