File No. 33989

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

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

-and-

N.S.

Applicant

-and-

M—D.S.

Respondent

-and-

M—L.S.

Respondent

FACTUM OF THE INTERVENER
BARBRA SCHLIFER COMMEMORATIVE CLINIC
(pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

PAGE

PART I - OVERVIEW AND STATEMENT OF FACTS 1

A. Overview 1

B. Statement of Relevant Facts 2

PART II - STATEMENT OF POSITION 2

PART III - STATEMENT OF ARGUMENT 3

A. The Proposed Analytical Approach 3

B. Trauma Caused to Complainants and Trial Fairness 5

C. Balancing Salutary and Deleterious Effects 7

PART IV - COSTS SUBMISSIONS 10

PART V - ORDER REQUESTED 10

PART VI - TABLE OF AUTHORITIES 12

PART VII - STATUTORY PROVISIONS 14

PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal directly engages the rights and interests of complainants in sexual assault proceedings. To bring the perpetrator of the crime to justice, complainants must engage the criminal justice system, which exposes them to a threat of reprisal and an almost inevitable attack on their credibility. Complainants are forced to grapple with these hurdles having already suffered a uniquely violent and invasive attack – sexual assault is "an assault upon human dignity and constitutes a denial of any concept of equality for women."[1]

2. This case brings to light an additional and particularly oppressive burden for complainants from minority religious and ethno-racial identity groups. The complainant in this case may be compelled to remove her niqab before testifying against her alleged attackers. In other words, she is being asked to disregard her religious beliefs – by removing an article of clothing, no less – in order to access justice.

3. The Barbra Schlifer Commemorative Clinic (the "**Schlifer Clinic**" or the "**Clinic**")[2] intervenes in this appeal to assist the Court by providing the perspective of its clients: women survivors of sexual assault. This Court's decisions in *Seaboyer*,[3] *Mills*[4] and *Osolin* confirmed that the courts must be particularly sensitive to the needs and circumstances of sexual assault complainants. This case demonstrates that there is a need for further protection of complainants in a position similar to that of the Appellant, who face systemic discrimination and social exclusion on the basis of their ethno-racial identities.

4. The Clinic proposes an analytical framework that provides for appropriate protections for complainants while also reconciling the competing *Charter* values in this case. This framework encompasses the Clinic's belief that the initial onus should be on the accused to demonstrate that his right to a fair trial is compromised by the complainant's niqab. The analysis should also recognize the probable traumatic effect of compelling a complainant to remove her niqab, which may thereby distort the truth-seeking function of the judicial process.

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[1] *R v Osolin*, [1993] 4 SCR 595, Schlifer Clinic's Book of Authorities, Tab 1, at 669 [*Osolin*].
[2] The Schlifer Clinic is a front-line service provider that offers a broad range of support services to women survivors of sexual violence. It was established in 1985 and since that time has assisted over 44,000 women in the Greater Toronto Area. The Clinic provides legal representation, professional counselling, and language interpretation services to women from a variety of religious and ethno-racial backgrounds.
[3] *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577, Schlifer Clinic's Book of Authorities, Tab 2 [*Seaboyer*].
[4] *R v Mills*, [1999] 3 SCR 668, Appellant's Book of Authorities, Tab 7 [*Mills*].

5. In the Clinic's submission, there is a real risk that a finding against the Appellant would create an additional barrier for other Muslim women seeking redress for sexual violence. This Court must weigh the broader deleterious effects on access to justice for such women caused by the compelled removal of a niqab, or even the prospect of such an order.

B. Statement of Relevant Facts

6. The Schlifer Clinic adopts the facts as set out in the Appellant's factum.

PART II - STATEMENT OF POSITION

7. The Schlifer Clinic intervenes in this appeal to provide assistance regarding the appropriate framework for considering an accused's request for an order removing a complainant's niqab in a sexual assault proceeding. With respect to this framework, which the Clinic submits would apply either at a preliminary inquiry[5] or at trial, the Clinic makes three submissions:

(a) the accused, not the complainant, should bear the initial onus of demonstrating a risk of deprivation of his right to full answer and defence;

(b) an order compelling the removal of a complainant's niqab before she testifies may cause significant psychological trauma to the complainant, and as a result could undermine trial fairness rather than enhance it; and

(c) balancing the salutary and deleterious effects of an order compelling the removal of a niqab requires consideration of (i) the systemic underreporting of sexual violence, and (ii) the discriminatory impact on Muslim women who choose to wear a niqab and have suffered sexual violence – in particular, the possibility of exacerbating their existing social exclusion by impeding their access to the criminal justice system.

8. The Clinic submits that it would be beneficial for the Court to direct that an order compelling the removal of a niqab be made only in the rarest of circumstances.[6] The accused

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[5] Arguably, an order to remove a complainant's niqab could be beyond the jurisdiction of the preliminary inquiry judge: see LEAF's Factum, paras 7-9. The Schlifer Clinic's submissions proceed on the basis that a finding has been made that the preliminary inquiry judge does have such jurisdiction.

[6] The Clinic also agrees with the position of the Appellant and LEAF regarding the unhelpfulness of a witness' demeanour: Appellant's Factum, paras 22-36, and LEAF's Factum, paras 13-20. The consequence of this would be that an accused's request for removal of a complainant's niqab would generally be rejected if the only basis for the request is the mere assertion that the complainant's demeanour is necessary to assess credibility or for the purposes of assisting cross-examination.

should be required to demonstrate that his right to a fair trial is substantively infringed by the complainant testifying while wearing a niqab. A mere assertion to this effect would not be sufficient.

PART III - STATEMENT OF ARGUMENT

A. The Proposed Analytical Approach

9. The Court of Appeal's approach generally follows this Court's decisions in *Dagenais*[7] and *O'Connor.*[8] Like this case, *Dagenais* and *O'Connor* dealt with judicial orders made pursuant to discretionary powers. Where the order engages *Charter* rights, the judge should perform a two-step inquiry: (1) an assessment of the competing *Charter* rights engaged by the order, and (2) a balancing of the salutary and deleterious effects, with reference to the *Charter* rights and values at issue as well as broader societal interests. Broadly, the Court of Appeal adhered to this structure.

10. However, with respect, the analytical approach adopted by the Court of Appeal contained a significant defect. The Court held that the complainant should have the initial onus of demonstrating that her freedom of religion would be impaired by the order compelling the removal of her niqab. Instead, the initial, threshold onus should be placed on the accused, for two reasons.

11. First, the Court should presume that the complainant is wearing a niqab for valid reasons. The principles underlying ss. 15 and 27 of the *Charter* demand this approach. The right to equality without discrimination and the Constitution's express acknowledgment of Canada's multicultural heritage requires our justice system to recognize that religions are expressed through various lifestyle choices, and that such choices are valid and worthy of respect. Practically, this means that those choices should not be questioned until they can be proven to interfere with other *Charter* values.[9]

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[7] *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, Respondent AGO's Authorities, Tab 3 [*Dagenais*].
[8] *R v O'Connor*, [1995] 4 SCR 411, Schlifer Clinic's Book of Authorities, Tab 3 [*O'Connor*].
[9] See the comments of the English Judicial Studies Board: "While there may be a diversity of opinions and debates between Muslims about the nature of dress required, for the judicial system the starting point should be respect for the choice made, and for each woman to decide on the extent and nature of the dress she adopts." (emphasis added) (*Fairness in Courts and Tribunals: A summary of the Equal Treatment Bench Book*, quoted in Natasha Bakht, "Objection, Your Honour! Accommodating Niqab-Wearing Women in Courtrooms", in Grillio et al eds, *Cultural Diversity and Law* (London: Ashgate Publishing, 2008), Appellant's Book of Authorities, Tab 5, at 4).

12. Forcing the complainant to bear the initial burden of proof casts unjustified suspicion and doubt on the sincerity of her personal choices and motivations.[10] In the Clinic's submission, that approach serves to revive myths and stereotypes about sexual assault complainants, which would in this case compound the discrimination already suffered by the Appellant as a result of her ethno-racial identity.

13. Second, it is the accused who is requesting the order. This appeal arises from a motion by the accused relating to the judge's authority to regulate the preliminary inquiry under s. 537(1)(i) of the *Criminal Code*.[11] The party seeking the relief should have the burden of showing why the relief should be granted.[12] Moreover, it is not axiomatic that demeanour is necessary to assess credibility or to conduct an effective cross-examination. Accordingly, the judge should be allowed, as a threshold matter, to reject any frivolous assertions that fair trial rights have been impaired. In this regard, the court would play an important gate-keeping function.

14. Accordingly, the Clinic respectfully proposes that this Court adopt the following analytical approach:

(a) the accused must first demonstrate that removal of the complainant's niqab is necessary to prevent a real and substantial risk to his right to make full answer and defence;[13]

(b) if the accused is successful at the initial stage, the analysis will then turn to the *Charter* rights of the complainant that are engaged by the forced removal of her niqab. Following *Amselem*,[14] the court's inquiry in respect of the complainant's religious rights should be deferential to the complainant;[15]

(c) the court must then reconcile the *Charter* rights at issue and balance the salutary and deleterious effects of an order compelling removal of the niqab.

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[10] See also *O'Connor*, *supra* at para 122, per L'Heureux-Dubé J.
[11] Reasons of the Superior Court of Justice dated April 30, 2009, at para 81, Appellant's Record, Tab 3, p 33; *Criminal Code*, RSC 1985, c C-46, section 537(1)(i).
[12] *O'Connor*, *supra* at para 131, per L'Heureux-Dubé J.
[13] *Dagenais*, *supra* at para 73, per Lamer CJC; The jurisprudence provides little guidance on the standard for determining whether a *Charter* right is engaged in the context of a *Charter* values analysis. Some assistance may be drawn from L'Heureux-Dubé J's dissenting opinion in *O'Connor* – in the context of whether a stay of proceedings engaged an accused's section 7 rights – she applied a standard of "actual prejudice": *O'Connor*, *supra* at para 74, per L'Heureux-Dubé J.
[14] *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, Appellant's Book of Authorities, Tab 10 [*Amselem*].
[15] The Clinic also agrees with the submissions of LEAF regarding the need to avoid "virtue testing" with respect to assessing religious belief: see paras 20-22 of LEAF's Factum.

15. Under this approach, a judge hearing the application could take judicial notice that the complainant is wearing a niqab as an expression of her Muslim faith. Accordingly, it is possible that the complainant would not be required to provide evidence of her religious beliefs. In *O'Connor* and *Mills*, the framework for reconciling competing rights did not require the calling of any evidence in respect of the complainant's *Charter* rights, such as the right to privacy.[16]

B. Trauma Caused to Complainants and Trial Fairness

16. An order compelling the removal of a complainant's niqab has the potential to undermine trial fairness, rather than enhance it. Forced removal of a niqab may result in serious psychological stress and trauma for the complainant. This could impede the trier of fact's ability to ascertain the truth, thus impairing the fairness of the trial process.[17]

(i) The truth-seeking function of the judicial process and the right to a fair trial

17. The primary objective of the judicial process is the attainment of truth.[18] This is especially true in the context of criminal proceedings, where a failure to ascertain the truth may result in a miscarriage of justice.[19]

18. Attainment of the truth is a constituent element of the right to a fair trial. A fair trial, as protected by ss. 7 and 11(d) of the *Charter* is "one which permits the trier of fact to get at the truth and properly and fairly dispose of the case."[20]

19. Fair trial rights operate predominantly to safeguard the accused. However, in the context of the principles of fundamental justice entrenched in the *Charter*, trial fairness must also reflect a broader spectrum of interests:

> …fundamental justice embraces more than the rights of the accused. For example, this Court has held that an assessment of the fairness of the trial process must be made from the "point of view of fairness in the eyes of the community and the complainant" and not just the accused.[21]

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[16] *O'Connor, supra* at para 118, per L'Heureux-Dubé J, and at para 31, per Lamer CJC and Sopinka J; *Mills, supra* at paras 53, 62 & 85, per McLachlin J (as she then was) and Iacobucci J.

[17] Importantly, the possibility of trauma caused by the removal of a niqab should not be misinterpreted to lead to a presumption that the removal of the niqab would negatively affect the complainant's credibility. In *O'Connor*, L'Heureux-Dubé J provided a similar caution in the context of a complainant's counselling records: *O'Connor*, *supra*, at para 143, per L'Heureux-Dubé J.

[18] *R v Levogiannis*, [1993] 4 SCR 475, Schlifer Clinic's Book of Authorities, Tab 4, at para 19 [*Levogiannis*].

[19] *Seaboyer*, *supra* at 605, per McLachlin J (as she then was).

[20] *Seaboyer*, *supra* at 608, per McLachlin J (as she then was).

[21] *Mills*, *supra* at para 72, per McLachlin J (as she then was) and Iacobucci J. See also *O'Connor*, *supra* at paras 65 & 107, per L'Heureux-Dubé J.

20. A trial process that strategically favours the accused but that undermines its broader truth-seeking function is not a fair trial for the purposes of the *Charter*. An accused is not entitled to "the most favourable procedures that could possibly be imagined", or the "fairest of all possible trials", but rather a trial that is "fundamentally fair."[22] As this Court held in *Mills*, "the right to full answer and defence does not include the right to evidence that would distort the search for truth inherent in the trial process."[23]

21. This understanding of the right to a fair trial was entrenched in *Seaboyer* and *Mills*, where this Court affirmed that evidence that would prejudice the trier of fact against the complainant may not be admissible, even if marginally probative.[24]

(ii) Trauma may interfere with the search for the truth and trial fairness

22. This case raises a concern similar to that addressed in *Seaboyer* and *Mills*. Compelling the removal of the complainant's niqab creates a serious risk of undermining the truth-seeking function of the trial process.

23. Testifying in a sexual assault trial is an extremely traumatic experience for survivors of sexual violence.[25] It has been described in academic literature as a "second rape."[26] The potential for revictimization and trauma caused by cross-examination often causes women to not report incidents of sexual violence in the first place.[27]

24. Compelling the removal of a complainant's niqab would likely exacerbate the trauma that may already be caused by the process of testifying against her alleged attacker. An order compelling the removal of the niqab is, for some, tantamount to an order to disrobe in open court. Moreover, given that for many a niqab is an essential expression of faith, such an order would likely serve to cause further trauma because it could undermine a Muslim woman's personal autonomy to observe a specific religious practice.[28]

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[22] *O'Connor*, *supra* at para 193, per McLachlin J (as she then was); *Mills, supra* at para 112, per McLachlin J (as she then was) and Iacobucci J.
[23] *Mills*, *supra* at para 76, per McLachlin J (as she then was) and Iacobucci J.
[24] *Mills*, *supra* at para 74, per McLachlin J (as she then was) and Iacobucci J; *Seaboyer*, *supra* at 609.
[25] *Levogiannis*, *supra* at para 14.
[26] Sadie Bond, "Psychiatric Evidence of Sexual Assault Victims: The Need for Fundamental Change in the Determination of Relevance," (1993) 16 Dalhousie LJ 416, Schlifer Clinic's Book of Authorities, Tab 5, at 418; Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: the Implications of the Charter for Sexual Assault Law," (2002) 40 Osgoode Hall LJ 251, Schlifer Clinic's Book of Authorities, Tab 6, at 260.
[27] Tina Hattem, Survey of Sexual Assault Survivors: Report to Participants (Ottawa: Department of Justice, 2000), Schlifer Clinic's Book of Authorities, Tab 7, at 9 [*Hattem*]; TK Logan, et al, "Barriers to Services for Rural and Urban Survivors of Rape," (2005) 20 J Interpers Violence 591, Schlifer Clinic's Book of Authorities, Tab 8, at 606.
[28] *Amselem*, *supra* at para 42.

25. This trauma could have significant consequences for a complainant's ability to give her evidence, and may cause her to choose not to give evidence at all. As a result, the trier of fact's ability to get at the truth could be greatly impaired.[29]

(iii) The traumatic effect of a removal order should be considered when determining whether the right to a fair trial is at risk

26. The potential traumatic effect of an order to remove a complainant's niqab should be a consideration when determining whether the right to a fair trial is at risk. This would reflect an understanding of trial fairness that includes the perspective of not only the accused but also broader societal interests.[30]

27. Using the framework proposed by the Clinic, if the accused is successful in demonstrating that the complainant's niqab substantially interferes with his right to full answer and defence, the complainant can, if necessary or by her own choice, provide evidence. Upon an evaluation of the traumatic effect caused to the complainant by removing her niqab, the judge may conclude that the fair trial right would not be infringed and no further constitutional inquiry would be necessary.

C. Balancing Salutary and Deleterious Effects

28. The reconciling of the accused's fair trial right and the complainant's freedom of religion should include two contextual factors that were not considered by the Court of Appeal: (i) the effect of a removal order on the underreporting of sexual violence, and (ii) the potential discriminatory exclusion of a class of women from access to the justice system.

(i) The underreporting of sexual violence

29. There is no dispute that sexual assault is significantly underreported as compared to other violent crimes. In *Seaboyer*, L'Heureux-Dubé J. discussed at length the reality of underreporting of sexual violence;[31] recent statistics confirm that not much has changed.[32]

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[29] The Court of Appeal acknowledged the potential effect of a removal order on the trial process' truth-seeking function, though it considered that issue only at the rights-balancing stage: Reasons of the Court of Appeal dated October 13, 2010 ("Court of Appeal Reasons"), Appellant's Record, Tab 4, at 95-96.

[30] *Mills*, *supra* at para 72, per McLachlin J (as she then was) and Iacobucci J. See also *O'Connor*, *supra* at paras 65 & 107, per L'Heureux-Dubé J.

[31] *Seaboyer*, *supra* at 649-650, per L'Heureux-Dubé J. Survivors of sexual violence do not come forward for a variety of reasons, including a fear of reprisal by their attacker, a fear of revictimization at the hands of the police and criminal justice system, and the belief that their suffering is not worthy of police involvement: *Seaboyer, supra* at 648-649, per L'Heureux-Dubé J; *Hattem, supra* at 9.

30. The reporting of crime is essential to the proper administration of the justice system.[33] If crimes are not reported, there can be no justice for the wrongful act. The importance of encouraging reporting of sexual assault, which is systemically underreported, has been legislatively enshrined by Parliament in ss. 276(3) and 278.5(2) of the *Criminal Code* and constitutionally endorsed by this Court in *Seaboyer* and *Mills*.

31. The order sought by the accused in this case, like the orders sought in *Seaboyer* and *Mills*, will likely affect reporting, but with the added dimension of disproportionately affecting a class of women who face significant stigmatization and vulnerability.[34] The prospect of being forced to remove a niqab as a precondition to seeking accountability for sexual violence will undoubtedly cause further underreporting for this group of women.[35]

32. The potential effect on the reporting of sexual offences should be a factor the court considers when determining whether to order the removal of a niqab. This approach is consistent with ss. 276(3) and 278.5(2) of the *Criminal Code*, as well as this Court's pronouncements in *Seaboyer* and *Mills*. It would also give effect to s. 27 of the *Charter* by expressly recognizing the unique difficulties faced by vulnerable minorities.

33. The outcome of this appeal could also have an impact on reporting by other Muslim female complainants. A broad, discretionary test may empower judges to achieve justice on a case-by-case basis, but it provides little comfort to Muslim women who must decide whether to report an incidence of sexual violence to the authorities.

34. Accordingly, the Clinic submits that Muslim female sexual assault complainants should be required to remove their niqabs in only the rarest of cases. Mere assertions by the accused, without more, that the removal is necessary to avoid an infringement of fair trial rights would be insufficient.[36] Such a direction is compelled by the contextual factors raised by the Clinic and the other parties and interveners. It would also be of great assistance to preliminary inquiry

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[32] Shannon Brennan and Andrea Taylor-Butts, *Sexual Assault in Canada, 2004 and 2007* (Ottawa: StatCan, December 2008), Schlifer Clinic's Book of Authorities, Tab 9, at 8.

[33] The integrity of the justice system has been characterized by this Court as a principle of fundamental justice requiring *Charter* protection: *R v Darrach*, [2000] 2 SCR 443, Schlifer Clinic's Book of Authorities, Tab 10, at para 3; *O'Connor*, *supra* at para 61, per L'Heureux-Dubé J.

[34] Natasha Bakht "Veiled Objections: Facing Public Opposition to the Niqab" in Lori Beaman ed, *Defining Reasonable Accommodation* (Vancouver: UBC Press, 2010) (forthcoming), Appellant's Book of Authorities, Tab 12, at 7 & 28.

[35] See also *O'Connor*, *supra* at para 121, per L'Heureux-Dubé J: "…the courts must take care not to create a class of vulnerable victims who have to choose between accusing their attackers and maintaining the confidentiality of their records."

[36] The Court of Appeal made a direction that a defence objection to the wearing of the niqab, "based exclusively on the argument that the witness's facial demeanour was important in the assessment of credibility or to assist the cross-examination, would fail," although it was limited to the preliminary inquiry: Court of Appeal Reasons at para 98, Appellant's Record, Tab 4, at 103-104 ; see also *O'Connor*, *supra* at para 174, per L'Heureux-Dubé J.

judges and trial judges, as well as provide the benefit of certainty to sexual assault complainants and advisers such as the Schlifer Clinic.

35. The benefit of certainty for the reporting of sexual assaults was recognized by this Court in *Canadian Newspapers*.[37] At issue in that case was the constitutionality of Parliament's removal of judicial discretion to refuse a publication ban on information relating to sexual assault complainants. The Court held that the provision was consistent with the *Charter* because it provided certainty to complainants and thus encouraged reporting, which was a sufficiently important legislative objective. Judicial discretion undermined that objective because it deprived the complainants of certainty.[38]

(ii) Discriminatory exclusion from the criminal justice system

36. The difficulties faced by Muslim women in accessing the justice system are exacerbated as a result of their social identities. Muslim women face compound discrimination and social exclusion on the basis of religion, gender and ethno-racial identity. Muslim women who wear a niqab suffer from additional stigmatization, prejudice and stereotyping. Courts should acknowledge and consider this potential discriminatory consequence when reconciling the rights of the accused with the rights of the complainant.

37. As noted above, this Court has accepted in earlier jurisprudence that women and, in particular women who have experienced sexual violence, tend not to seek recourse through the legal system "due to their perception that the institutions with which they would have to become involved will view their victimization in a stereotypical and biased fashion."[39] This Court has also recognized that individuals who belong to groups that have historically experienced discrimination are effectively excluded from "mainstream society" through the "construction of a society based only on mainstream attributes."[40]

38. As a woman, a Muslim, and a person who wears a niqab, the complainant is a member of multiple groups that regularly experience alienation, discrimination and exclusion from Canadian society and its institutions. In the Clinic's submission, the complainant and others in a

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[37] *Canadian Newspapers Co v Canada (Attorney General)*, [1988] 2 SCR 122, Schlifer Clinic's Book of Authorities, Tab 11 [*Canadian Newspaper*].
[38] *Canadian* Newspapers, *supra* at para 18.
[39] *Seaboyer*, *supra* at 649-650, per L'Heureux-Dubé J.
[40] *Eaton v Brant County Board of Education*, [1997] 1 SCR 241, Schlifer Clinic's Book of Authorities, Tab 12, at para 67.

situation similar to hers face compounded discrimination and exclusion on the basis of interlocking social identities: gender, ethno-racial identity and religion.

39. Failure to properly account for this unique position risks categorising women who wear a niqab as unworthy of the protection offered by the criminal justice system. Courts have recognised that the exclusion of members of a particular group from societal institutions sends the message that these individuals are "less worthy of respect, concern and consideration."[41] In this case, the practical effect of this message will be to prohibit an already marginalized class of women from using the justice system to seek recourse against individuals who have assaulted them. Without meaningful access to the justice system, there is a significant risk that women in a situation similar to that of the complainant will be targeted and subject to a heightened threat of violence and abuse.

40. By contrast, by expressly requiring that the actual needs and circumstances of the Appellant and women in similar situations be considered, as a core of the analysis, the Court will enhance trial fairness by eliminating discrimination from the trial process.

> The eradication of discriminatory beliefs and practices in the conduct of [sexual assault] trials will enhance rather than detract from the fairness of such trials. Conversely, sexual assault trials that are fair will promote the equality of women and children, who are most often the victims. [42]

PART IV - COSTS SUBMISSIONS

41. The Schlifer Clinic does not seek costs, and requests that no order as to costs be made against it.

PART V - ORDER REQUESTED

42. The Clinic respectfully requests that the disposition of this appeal be made in accordance with the foregoing submissions. The Clinic also requests that it be permitted to present oral argument at the hearing of the appeal, for 10 minutes or for a length of time that the Court determines to be just.

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[41] *Egan v Canada*, [1995] 2 SCR 513, Schlifer Clinic's Book of Authorities, Tab 13, at para 90, per L'Heureux-Dubé J; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, Schlifer Clinic's Book of Authorities, Tab 14, at paras 42-43.

[42] *O'Connor*, *supra* at para 129, per L'Heureux-Dubé J. See also para 109: "an important element of trial fairness is the need to remove discriminatory beliefs and bias from the fact-finding process".

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of November, 2011.

Raheel P. Agarwal

Brydie Bethell per

Brydie Bethell

Michael Kotrly

Vasuda Sinha per

Vasuda Sinha

PART VI - TABLE OF AUTHORITIES

Jurisprudence	**Paragraph(s)**
R v Osolin, [1993] SCR 595	1, 3
R v Seaboyer; R v Gayme, [1991] 2 SCR 577	3, 17, 18, 21, 22, 29, 30, 31, 32, 37
R v Mills, [1999] 3 SCR 668	3, 15, 19, 20, 21, 22, 26, 30, 31, 32
Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835	9, 14
R v O'Connor, [1995] 4 SCR 411	9, 12, 13, 14, 15, 16, 19, 20, 26, 30, 31, 34, 40
Syndicat Northcrest v Amselem, [2004] 2 SCR 551	14, 24
R v Levogiannis, [1993] 4 SCR 475	17, 23
R v Darrach, [2000] 2 SCR 443	30
Canadian Newspapers Co v Canada (Attorney General), [1988] 2 SCR 122	35
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Egan v Canada, [1995] 2 SCR 513	39
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497	39

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Tina Hattem, Survey of Sexual Assault Survivors: Report to Participants (Ottawa: Department of Justice, 2000)	23, 29
TK Logan, et al, "Barriers to Services for Rural and Urban Survivors of Rape," (2005) 20 J Interpers Violence 591	23
Shannon Brennan and Andrea Taylor-Butts, *Sexual Assault in Canada, 2004 and 2007*, (Ottawa: StatCan, December 2008)	29
Natasha Bakht "Veiled Objections: Facing Public Opposition to the Niqab" in Lori Beaman ed, *Defining Reasonable Accommodation* (Vancouver: UBC Press, 2010) (forthcoming)	31

PART VII - STATUTORY PROVISIONS

Criminal Code (R.S.C., 1985, c. C-46)	**Code criminel (L.R.C. (1985), ch. C-46)**
276 (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account (*a*) the interests of justice, including the right of the accused to make a full answer and defence; (*b*) society's interest in encouraging the reporting of sexual assault offences; (*c*) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case; (*d*) the need to remove from the fact-finding process any discriminatory belief or bias; (*e*) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury; (*f*) the potential prejudice to the complainant's personal dignity and right of privacy; (*g*) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and (*h*) any other factor that the judge, provincial court judge or justice considers relevant.	276 (3) Pour décider si la preuve est admissible au titre du paragraphe (2), le juge, le juge de la cour provinciale ou le juge de paix prend en considération: *a*) l'intérêt de la justice, y compris le droit de l'accusé à une défense pleine et entière; *b*) l'intérêt de la société à encourager la dénonciation des agressions sexuelles; *c*) la possibilité, dans de bonnes conditions, de parvenir, grâce à elle, à une décision juste; *d*) le besoin d'écarter de la procédure de recherche des faits toute opinion ou préjugé discriminatoire; *e*) le risque de susciter abusivement, chez le jury, des préjugés, de la sympathie ou de l'hostilité; *f*) le risque d'atteinte à la dignité du plaignant et à son droit à la vie privée; *g*) le droit du plaignant et de chacun à la sécurité de leur personne, ainsi qu'à la plénitude de la protection et du bénéfice de la loi; *h*) tout autre facteur qu'il estime applicable en l'espèce.
278.5 (2) In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates. In particular, the judge shall take the following factors into account: (*a*) the extent to which the record is necessary for the accused to make a full answer and defence;	278.5 (2) Pour décider s'il doit rendre l'ordonnance prévue au paragraphe (1), le juge prend en considération les effets bénéfiques et préjudiciables qu'entraînera sa décision, d'une part, sur le droit de l'accusé à une défense pleine et entière et, d'autre part, sur le droit à la vie privée et à l'égalité du plaignant ou du témoin, selon le cas, et de toute autre personne à laquelle le dossier se rapporte et, en particulier, tient compte des facteurs suivants : *a*) la mesure dans laquelle le dossier est nécessaire pour permettre à l'accusé de présenter une défense pleine et entière;

(*b*) the probative value of the record; (*c*) the nature and extent of the reasonable expectation of privacy with respect to the record; (*d*) whether production of the record is based on a discriminatory belief or bias; (*e*) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates; (*f*) society's interest in encouraging the reporting of sexual offences; (*g*) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and (*h*) the effect of the determination on the integrity of the trial process.	*b*) sa valeur probante; *c*) la nature et la portée de l'attente raisonnable au respect de son caractère privé; *d*) la question de savoir si sa communication reposerait sur une croyance ou un préjugé discriminatoire; *e*) le préjudice possible à la dignité ou à la vie privée de toute personne à laquelle il se rapporte; *f*) l'intérêt qu'a la société à ce que les infractions d'ordre sexuel soient signalées; *g*) l'intérêt qu'a la société à ce que les plaignants, dans les cas d'infraction d'ordre sexuel, suivent des traitements; *h*) l'effet de la décision sur l'intégrité du processus judiciaire.
537. (1) A justice acting under this Part may (*i*) regulate the course of the inquiry in any way that appears to the justice to be consistent with this Act and that, unless the justice is satisfied that to do so would be contrary to the best interests of the administration of justice, is in accordance with any admission of fact or agreement recorded under subsection 536.4(2) or agreement made under section 536.5;	537. (1) Un juge de paix agissant en vertu de la présente partie peut : *i*) régler le cours de l'enquête de toute manière qui lui paraît désirable et qui n'est pas incompatible avec la présente loi et, sauf s'il est convaincu que cela ne servirait pas au mieux l'intérêt de la justice, est en conformité avec tout aveu et tout accord consignés au dossier en application du paragraphe 536.4(2) avec ou tout accord intervenu au titre de l'article 536.5;