THE POTENTIAL IMPACT OF CHARTER SECTION 28 ON QUEBEC'S CONTROVERSIAL SECULARISM LAW AND THE PURSUIT OF GENDER-EQUALITY IN CANADIAN COURTS

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ABSTRACT

The Western liberal democratic order, anchored in respect for individual rights and constitutional norms, faces a critical challenge as Quebec follows the pattern of several European nations in enacting laws restricting religious attire. While the Quebec Law 21, "An Act Respecting the Laicity of the State," is ostensibly neutral, it particularly restricts Muslim women's rights. This paper explores an ongoing, novel legal strategy challenging Quebec's secularism law, focusing on Section 28 of *Canada's Charter of Rights and Freedoms*. While Section 28 mandates gender equality in Charter implementation, its potential remains largely unexplored in the decades since Charter enactment. Drawing on feminist legal scholarship and Critical Race Theory, this paper examines the implications of Section 28's application in gender-equality and intersectional analysis, particularly in combating laws like Quebec's. By contrasting Supreme Court cases that overlook Section 28 with those few recognizing its significance, this paper evaluates its role in challenging discriminatory legislation, including the use of Section 33's notwithstanding clause. Furthermore, it contextualizes Quebec's Law 21 within broader discussions of secularism, citizenship, and gendered Islamophobia. By utilizing Critical Race Theory and intersectional analysis, this paper sheds light on the hidden implications of ostensibly neutral laws, particularly for marginalized groups like Muslim women. Finally, it considers the potential impact of a revitalized Section 28 on the ongoing pursuit of substantive women's equality in Canada. Through an examination of the *Hak et al.* case and the broader legal landscape, this paper advocates for a reinvigoration of Section 28 to address contemporary challenges to gender equality in Canada.

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Introduction

Western liberal democratic order hinges on a respect for individual rights that allows diverse societies to prosper through adherence to constitutional rules and norms, international agreements, and human rights.[2] Respect for gender and minority rights is echoed across many democratic constitutions, including Canada's, which enshrines gender equality and religious freedom in its constitutional order.[3] Yet, the province of Quebec recently followed the growing trend in Europe of enacting laws which restrict religious attire, a move which disproportionately affects the rights of Muslim women. Debates about tolerance often position democratic values and minority rights as opposing to justify regressive policies that run counter to the equality principle, demanding novel legal strategies to counter this deceptive and insidious ideology.

Recently, a constitutional challenge to the Quebec secularism law shone a light on a barely examined provision of Canada's *Charter of Rights and Freedoms*. Section 28 requires gender equality in the implementation of *Charter* rights and freedoms. The plaintiffs currently challenging the Quebec law argue that section 28's guarantee of gender equality performs two functions. First, section 28 serves as a check on all *Charter* interpretation; second, it confers a substantial right, and is not merely an interpretive aid. Additionally, the plaintiffs ask the court to develop a judicial test so section 28 can be properly applied.[4] This strategy is notable because, in the four decades since the advent of the *Charter*, the Supreme Court has yet to adequately

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[2] *The International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 arts 9—14 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*]. The ICCPR affirms the importance of "freedom of thought, conscience, and religion," and goes on to assert that limitations on religious freedom as prescribed by law ought to be "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others" (article 18.1-3). The UN's founding *Charter* declares at the outset a central purpose of promoting and enhancing gender equality (Preamble). As evidenced in the gender-neutral language of the *Universal Declaration of Human Rights,* GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 1. Article 1 of the Declaration states "all human beings are born free and equal in dignity and rights", gender ought not influence one's ability to access one's rights.

[3] *Canadian Charter of Rights & Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. at sections 2a, 15a. [*Charter*]

[4] *"Argumentation des Intervenantes." (25 March 2022*). Online: Women's Legal Education & Action Fund, <https://www.leaf.ca/wp-content/uploads/2022/04/59-9550-Argumentation-final-FFQ-FAEJ.pdf> at para 5.

consider the role of section 28,[5] leading to limited scholarship on section 28. Yet, when the *Charter* was being drafted, feminist activists considered section 28 as key to achieving women's equality.[6] As a result, there is a gap in both legal doctrine and case law concerning section 28 and the scholarship surrounding it.

Drawing on the work of Kerri Froc, Cee Strauss, and Beverly Baines, this article seeks to examine this novel legal strategy and what it could mean for gender-equality and intersectional analysis in Canada in general, and the impugned Quebec law in particular. I begin by situating Law 21 within the context of laïcité in Quebec. In reviewing historical and contemporary secularism and surrounding theories, it is necessary to approach it from an intersectional lens. Drawing on the work of Sherene Razack, Will Kymlicka, Vrinda Narain, and Talal Asad, I argue that Law 21 cannot be understood without first contextualizing secularism citizenship, and gendered Islamophobia. Next, I review the ways Law 21 has been challenged in lower courts. Beginning with the 2019 application to stay Law 21's enforcement, I analyze the legal strategy and the judgments, foregrounding the necessity of using section 28 to circumvent the invocation of section 33. Before moving on in the chronology of challenges to Law 21, I pause to examine important section 28 jurisprudence. I contrast two cases, one that ignores section 28 entirely and one that approximates an

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[5] Several Canadian legal scholars echo this sentiment. See Cee Strauss, Fay Faraday and Diana Majury.
Cee Strauss, "Section 28's Potential to Guarantee Substantive Gender Equality in Hak c Procureur General du Quebec" (2021) 33:1 *Can J Women & L* 84. at page 88. Strauss, staff lawyer for LEAF, wrote: "the Court has never seriously interpreted section 28 with a view to understanding its purpose in the way that it has with other *Charter* rights and freedoms."
Fay Faraday, "One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination." (2020) 94:2 *Supreme Court Law Review* at page 28. Professor Faraday notes, "Section 28 is significantly understudied and has to date played a limited role in litigation."
Diana Majury, "The Charter, Equality Rights and Women: Equivocation and Celebration" (2002) 40:3 *Osgoode Hall Law Journa*l, at 308. Professor Majury examined the history of section 28 and concluded: "Despite these great hopes [...] Section 28 is seldom alluded to in current *Charter* literature and cases."

[6] Majury points out that section 28 "was considered of vital importance by those who were advocating on behalf of women's rights when the *Charter* was being drafted and going through the parliamentary process" (Ibid, at 307).
Marilou McPhedran, "Women's Constitutional Activism in Canada and South Africa" (2008) *Putting Feminism on the Agenda* ed. Suzan Bazilli (190-218), at 220. McPhedran, former legal counsel, and strategist for the *Ad Hoc Committee of Canadian Women on the Constitution*, wrote: "As one of the feminist framers of section 28, I confirm that section 28 was intended to be rights bearing, not to muscle out other rights but to enhance them with gender equality so that the rights of women are equal, not secondary."

actualization of section 28's potential. The purpose of this framework is to illuminate the distance between how section 28 was treated by the Quebec Superior Court in a 2004 case and in the *Hak v Quebec* cases in 2019 and 2021. I then explore the creative use of section 28 in the most recent *Hak* case, as contained in the factum for LEAF's Intervention on the merits. I will then demonstrate how LEAF's strategy is entirely in line with what section 28's advocates and original framers envisioned. I conclude this article by considering the implications of a reinvigorated section 28 on the ongoing fight to secure substantive women's equality in Canada and provide a forum for intersectional discrimination analysis.

The examination of the fight against Law 21 necessitates a critique of secularism, specifically from the analytical perspective of critical race theory. Critical race theory and postcolonial feminist theory, both of which take an intersectional lens for granted, allows us to interrogate the positioning of multiculturalism and feminism/women's rights as oppositional. They also allow for a greater understanding of the limits of tolerance when religious freedom conflicts with the state's vision of secularism. Carol A. Aylward writes, "Critical Race Theory requires us to contextualize the problem and to deconstruct what appear to be 'neutral' laws by locating the problem within the social reality of racism."[7] Similarly, intersectionality goes a step further than the standard analytical approach to discrimination. Legal scholar and activist Kimberle Crenshaw coined the term "intersectionality" to address the "tendency to treat race and gender as mutually exclusive categories of experience and analysis."[8]

Like public discourse and activism, courts tend to engage with discrimination as if it occurs neatly on one single-axis. Professor Colleen Sheppard remarks that the Court's hitherto approach to discrimination cases, comparing the claimant to a single comparator group, "tends to undermine the possibility of an appreciation of complex identities and the intersectionality of the experience of inequality."[9] Understanding Law 21 requires an examination of how ostensibly neutral legislation contains ignored or carefully hidden implications. The analytical tools of critical race theory and intersectionality will be used to call attention to the lived experience of Muslim women (who are most affected by a law that targets and excludes them under the

[7] Carol A. Aylward is the director of the Law Programme for Indigenous Blacks and Mi'kmaq at Dalhousie University. She is the author of "Intersectionality." *Journal of Critical Race Theory* vol 1 no 1 (2010), at 139.
[8] Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine" (1989) 1:8 *University of Chicago Legal Forum* at 139.
[9] N Colleen Sheppard, "Grounds of Discrimination: Towards an inclusive and contextual approach." (2001) 80:3 *Can Bar Review* 893 at 913.

disguise of religious neutrality and secularism) and to examine the role a reinvigorated section 28 could have on women's equality going forward.

i. Law 21 Situated Within Historical & Contemporary Secularism

In 2019, the Quebec Legislature passed "An Act Respecting the Laicity of the State,"[10] hereafter referred to as Law 21. Ostensibly, the Law received parliamentary assent in the name of religious neutrality and *laïcité* (state secularism).[11] However, critics have noted that the law's true purpose is to manage diversity and signal who is included in Quebec society.[12] Law 21 pre-emptively invoked the *Charter* section 33 notwithstanding clause, enabling the law to withstand legal challenges alleging that it infringes on religious freedom and gender equality. Indeed, Bill 62, an antecedent version of Law 21 under the previous provincial government, did not employ section 33 and was unable to withstand a constitutional challenge. Justice Marc-André Blanchard of the Quebec Superior Court ruled the provisions violated both the *Canadian Charter* and the *Quebec Charter*, asserting that "irreparable harm will be caused to Muslim women" if Bill 62 went into effect.[13] Because the governing CAQ party

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[10] *Loi sur la laïcité de l'État*, SQ 2019, c 12, s 15.

[11] See Jason Magder "Legault Defends Bill 21: 'Think What is Best for our Children'." *Montreal Gazette* (April 5, 2019). When speaking to reporters, the Quebec premier Francois Legault defended the Law by saying: "In Quebec, we made decisions regarding the separation between the government and religion, and it has to be shown in people in an authority position."

[12] See Jesse Feith "Charles Taylor calls CAQ's religious symbols bill 'clear discrimination'." *Montreal Gazette* (April 3, 2019). The anxiety expressed by Western governments concerning the hijab is a frequent topic of scholarly research; many agree that presenting these policies as a defense of secularism is disingenuous.

See also Sherene H. Razack, "The Sharia Law Debate in Ontario" (2007) 15:3 *Feminist Legal Studies* 3-32. Sherene Razack examined the Sharia law debate in Ontario, and described a "contemporary Western project to mark Muslims as suspect bodies and to limit their citizenship rights" (at 6). She continues: "Being tough on Muslims, as many European scholars have observed, is one significant way in which contemporary Western governments secure their own domestic base" (at 18).

See also Vrinda Narain, "Taking Culture out of Multiculturalism" (2014) 26:1 *Can J Women L* at 116-152, 128. Vrinda Narain examined a previous attempt by the Quebec government to ban the niqab and points out that "even policies that may appear to be secular might well reflect a particular majority religion understanding that could violate minority religious tenets."

See also Talal Asad, "Reflections on Laicite and the Public Sphere (Keynote address)," (2005) 5:3 *Soc Science Reseach Council* at 25. Talal Asad, writing about similar policies in France, states: "The banning of the hijab made clear who rightfully belongs in public space."

[13] *National Council of Canadian Muslims v Attorney General of Quebec*, 2018 QCCS 2766 at para 28 [*NCCM*].

campaigned on a renewal of the secularism bill with the invocation of the notwithstanding clause, the successful passage of Law 21 was not a surprise where the other attempt had failed. Civil liberties and feminist activists have consistently and forcefully argued that the violation of religious freedom disproportionately affecting Muslim women could not be justified. Nevertheless, polling reveals a majority of Quebecois(es) agree with the decision to enhance Quebec's secular character at the expense of religious freedom in general, and Muslim women in particular.[14] Despite its broad approval in the province, there has been significant pushback against Law 21 from the international community, across Canada, and within Quebec itself.[15]

Although the law is ostensibly targeted at eliminating religious symbols in the public space regardless of gender, thereby also affecting Sikh and Jewish men, it effectively restricts the rights of women who wear the headscarf or the niqab. Muslim women teachers have been highly visible in the ensuing debate. Following an unsuccessful attempt at the Superior Court, Ichrak Hak and public interveners Canadian Civil Liberties Association (CCLA) and National Council of Canadian Muslims (NCCM), took their battle to the Quebec Court of Appeal. Dozens of female teachers who wear the headscarf submitted testimony confirming that Law 21 effectively requires the choice between the teaching job they trained for and their sincerely held religious beliefs.[16] Chief Justice Duval Hesler examined the evidence presented and concluded, "women have comprised the vast majority of approximately 100,000 teachers in Quebec […] even assuming that men and women

[14] See Forum Research Inc. "Majority of Canadians do not Approve of Quebec Religious Symbols Law. (31 July 2019). The Forum poll, which consisted of random sampling of Canadian and Quebecois(e) voters and found the latter group gave the Law a 64% approval rating. Dr. Lorne Bozinoff, President of Forum Research, writes: "The majority of Canadians disapprove of Quebec's government introducing a law that prevents provincial employees from wearing religious symbols…But in Quebec? The majority approves. The provincial government gets elected by Quebec voters, so given voters' overwhelming support for the policy, it's unlikely to be amended any time soon" at 1.

[15] For evidence of provincial approval within Quebec see, Forum Research Poll.
For evidence of international pushback see, Amnesty International, "Amnesty International Report 2020/21 The State of the World's Human Rights." (2021): which expressed concern that Law 21 "raises[s] concerns about gender equality, discrimination, religious freedom and freedom of expression," at 112.

[16] Demanderesse Hak testified at the Quebec Superior Court. Her words were summarized in the holding: "L'entrée en vigueur de la Loi sur la laïcité la force maintenant, affirme-t-elle, à abandonner son projet d'enseignement puisqu'elle ne peut accepter qu'on la force à retirer son hijab. Elle déclare que «ce métier faisait partie intégrante de moi» (para 24) alors qu'elle demeure pour l'instant encore étudiante en éducation" *Hak c. Procureure générale du Québec*, 2019 QCCS 2989, at para 99.

were to wear religious symbols in the same proportion the *Act* would have a much greater impact on female teachers."[17] Thus, Muslim women, already highly visible in a society fraught with tension over demographic changes, are judicially recognized to be disproportionately affected by the Quebec law.[18]

The approach taken by the Quebec government in promoting a particular version of citizenship within the secular state can be contextualized through the gendered Islamophobia and growing anxiety over immigration. As a result of Islamophobic rhetoric cynically exploited by the Quebec state, Law 21 has been enacted, further isolating Muslim women and anyone else who wears religious symbols. Secularism is often seen as an inevitable product of the evolution of human reason. In fact, it is an institutional model that materialized in the 17th century to confront the hegemony of the Catholic Church in an era of emerging pluralism and instability on the European continent.[19] The secularism model is intrinsically linked with Christianity, both in its historical development and, through the words of Danielle Celermajer, theologically, as the idea that religion can be contained in the private sphere is an assumption made possible through the Protestant Reformation's assertion that Christians could have a private relationship with God.[20] Yet in the West, contemporary assertions of secularism often focus on newcomers practicing non-Judeo-Christian religions. For generations, Canadian policy explicitly facilitated the immigration of Europeans and excluded people of colour. Although Canada has long since removed these overtly racist policies, replacing them with a points system that ostensibly better reflects the values of multiculturalism, tolerance, and equality, Professor Michael Humphry argues that the "underlying premise of the policy" remains the immigrant's assimilation to the new country.[21] The question of Islam's

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[17] *Hak c. Procureure générale du Québec*, 2019 QCCA 2145*,* at para 54.

[18] See Natasha Bakht, "In Your Face: Piercing the Veil of Ignorance About Niqab-Wearing Women" (2015) 24:3 *Social & Legal Studies,* at 419-441. Professor Bahkt has written about Bill 62: "These ideas seep into mainstream consciousness such that the private sector, which need not abide by such prohibitions, follow suit… the Quebec government's backing of these discriminatory ideas has emboldened public views of this nature."

[19] See Viet Bader, "Religions and States. A New Typology and a Plea for Non-Constitutional Pluralism" (2003) *Ethical Theory Moral Practice*, 6:1 55–91; Danielle Celermajer, "If Islam Is Our Other, Who Are 'We'?" (2007) *Australian J of Soc Issues,* 42:1 at 103-123.

[20] *Celermajer*, at 11.

[21] See Michael Humphrey. "Culturalising the Abject: Islam, Law and Moral Panic in the West." (2007) *Australian J Soc Issues* 42:1 9-25. at page 12.
See Vrinda Narain, Vrinda Narain. "Taking Culture out of Multiculturalism." (2014) 26:1 *Can J Women L,* at 116-152., for further elucidation of this point in the Canadian context. Professor Narain writes: "An interesting example is the recent Canadian Citizenship Guide,

cultural compatibility with secular modernity and the risk the West associates with that perceived tension is not merely about the character of the religion but also the underlying assimilationist expectations of immigration policy.[22] It is against this backdrop that the perceived tension between Islam and secularism must be understood.

In discussing the West's "retreat from multiculturalism," Kymlicka remarks that immigrants who are seen to share a common "Judeo-Christian" background receive less backlash than Muslims, who are often the target of racial discrimination and stereotyping, "Muslims are not only seen as potentially bringing with them illiberal practices, but also as having a strong religious commitment to them."[23] Razack observes that the "secular/religious divide" functions as a "colour line, marking the difference between the white, modern, enlightened West, and people of colour, and in particular, Muslims."[24] This colour line is "particularly pernicious" in the wake of 9/11 "when, in the name of anti-terrorism, Western states have won support for a variety of punitive and stigmatizing measures against Muslims and other groups of colour."[25] Razack's analysis asks us to be attentive to the ways in which the West positions itself as modern and thus outside of traditional culture, while those immigrating to the West are seen to be trapped in traditional culture.[26] Western public policy uses secularism to root out group-based identities in order to protect a particular version of citizenship, where the citizen is primarily loyal to the state, rather than faith and culture.[27] The discourse around rare but high-profile instances of

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which notes the need to integrate new citizens, emphasizing common Canadian values and asserting the importance of cohesion, exhorting new citizens to adapt themselves" (2013, at page 122).

[22] See Michael Humphrey. "Culturalising the Abject: Islam, Law and Moral Panic in the West." (2007) Australian J Soc Issues 42:1 9-25 at page 11. Professor Humphrey writes: "Whereas before September 11 Islamic difference was framed in terms of cultural compatibility, after September 11 all Islamic difference is framed in terms of risk. Now even cultural signs of religious identity are suspected as being surface manifestations of a deeper hidden threat" (emphasis added).

[23] Will Kymlicka, "Nationalism, Membership, and the Politics of Minority Claims-Making" (2022) *Can J Political Science* 1-24t 22.

[24] Sherene H. Razack, "The Sharia Law Debate in Ontario." (2007) 15:3 *Feminist Legal Studies* at 3-32" at 6.

[25] *Ibid.*

[26] See Susan Okin, "Is Multiculturalism Bad for Women?" (1997) *Boston Review,* for this kind of argument. Okin's article contains the argument that some minority women would be better off to shed their cultures than have their cultures protected by liberal democracies.

[27] See Michael Humphrey, "Culturalising the Abject: Islam, Law and Moral Panic in the West" (2007) *Australian J Soc Issues* 42.1 at 9-25. At lage 11 Concerning laicite policies in

honour killings, female circumcision, or forced-marriage echo the post-9/11 anti-terrorism outlook that the West is constantly under threat. Against this backdrop, Islamic symbols represent an attachment to cultures that compete with the Muslim's loyalty to the western state, its values, and institutions.[28] Any sign of attachment to Islam is suspect to the West, interpreting the hijab specifically as a threatening sign of fundamentalism and a threat to the hegemony of domestic order.

Associating immigrants with excessive religiosity and patriarchal values serves an additional purpose; it allows freedom, tolerance, rationality, and gender equality to be associated with "*us*," and patriarchy, oppression, and intolerance with "*them*." It bears emphasizing that in this worldview, the "*them*" are predominantly racialized. Natasha Bakht echoes this point in examining another high-profile instance of Muslim women being restricted from wearing religious symbols.[29] In *R v N.S.*, the court was asked to decide whether the plaintiff in a sexual assault case must remove her niqab when testifying in court.[30] The Supreme Court acknowledged that asking the claimant to remove her niqab would interfere with religious freedom, but proceeded to set up a conflict of rights between the plaintiff's religious freedom and the accused's right to a fair trial.[31] The majority reasoning contained mixed results for women's right to religious freedom. On the one hand, it rejected the contention that a witness must never testify while wearing a religious facial covering, concluding that it would conflict with freedom of religion and accommodation of individual belief.[32] On the other, the practical result of the court's decision to advocate a "just and appropriate balance"

France, Humphrey observes that the state's vision of the "ideal Muslim" is one that would call themselves "French first and Muslim second."

[28] See Talal Asad, "Reflections on Laicite and the Public Sphere (Keynote address)" (2005) 5:3 *Soc Science Reseach Council* at 34. Speaking about the French Stasi Commission which sought to evaluate the implementation of the *laicite* principle into policy, Asad notes that when constitutional rights come into conflict "the state's right to defend its personality would trump all other rights."

[29] "The problem of excessive religiosity is perceived as something outsiders bring to Canadian society… Increased migration of the other heightens the need to protect fundamental Canadian values such as an open and independent court system. 'That We don't do "that" here and that It is not part of Our values is a useful fiction that works to keep narratives of patriarchy and oppression associated with Them and not with Us" *Supra* note 17 at 430.

[30] *R v N.S.* [2012] 3 SCC 726.

[31] *Ibid* at para 1; the court at the outset frames the case as a conflict of rights. The accused's right to a fair trial concerned the contention that a covered face might interfere with cross-examination and credibility assessment.

[32] *Ibid,* at paras 54-56.

between the parties' rights meant that N.S. was ultimately forced to remove her niqab.[33] Running parallel to judicial decisions like *R v N.S.,* which positions Muslim women as simultaneously under threat of patriarchal modesty norms and a threat to western values, are legislative attempts to prohibit Muslim women from wearing religious symbols. Judicial opinion and government legislation deeply influences the contours of public debate in Canada. Despite evidence of a split between Canadians' disapproval and Quebec's approval of Law 21,[34] the particular anxiety surrounding religious symbols worn by Muslim women is not limited to the second-largest province. The ruling in *R v N.S*. reflects a tendency to view Muslim women with suspicion even outside of Quebec. Like many western liberal democracies, the limits of Canada's tolerance of diversity and commitment to religious freedom is tested by the perceived threat the majority society sees behind Islam and its practitioners.

Law 21 effectively places an asterisk next to the citizenship rights of Muslim women.[35] Unless they abandon their sincerely held religious beliefs they are excluded from public life and as a result, their socio-economic status is significantly constrained. To appreciate this reality, Law 21 must be viewed in the context of racism, anxiety over immigration, gendered Islamophobia, secularism, and the perpetuation of the very patriarchal norms the West frequently associates with Islam.[36] While the state

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[33] "The result is that where a niqab is worn because of a sincerely held religious belief, a judge should order it removed if the witness wearing the niqab poses a serious risk to trial fairness, there is no way to accommodate both rights, and the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so" *Ibid,* at para 46.

[34] *Supra* note 14.

[35] Kymlicka argues that if the national majority does not view immigrants and minorities as sufficiently committed to the "national we," the former will suffer what he calls membership penalties: "They may be formally admitted to the nation but continue to be seen as less deserving and their claims-making seen as less legitimate…These membership penalties are not precluded by citizenship" (2022, at page 2). In this paper, Kymlicka drew on a survey he conducted of 2100 Canadians to conclude: "the evidence suggests that immigrants and national minorities in Canada do indeed face a membership penalty." *Supra* note 22 at 4.

[36] Martha Nussbaum "Veiled Threats?" *New York Times* (11 July 2010) The Opinion Pages. In her defense of religious accommodation to women who wear the burqa, Martha Nussbaum anticipates the criticism that "the burqa is a symbol of male domination that symbolizes the objectification of women." The flaw in this argument according to Nussbaum is that "society is suffused with symbols of male supremacy that treat women as objects. Sex magazines, nude photos, tight jeans — all of these products, arguably, treat women as objects, as do so many aspects of our media culture…Proponents of the burqa ban do not propose to ban all these objectifying practices … The way to deal with sexism, in this case as in all, is by persuasion and example, not by removing liberty."

claims to treat all religions equally, it nevertheless retains the exclusive right to determine which religious expressions are tolerated or suppressed. After 9/11, great care has been taken to frame laws and policies that stigmatize Muslims as neutral, while positioning Muslim women as in need of saving.[37] Despite the narrative that Muslim women are being liberated,[38] these policies are part of the myriad of ways the state regulates women.[39] Shortly before tabling the Bill that became Law 21, Quebec's Minister for the Status of Women proudly declared, "a woman should be free to wear

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This is point is echoed and expanded upon by Leti Vopp: "We identify sexual violence in immigrant of color and Third communities as cultural, while failing to recognize the cultural aspects of sexual violence affecting mainstream white women. This is related to the general failure to look at the behavior of white persons as culture while always ascribing the label of culture to the behavior of minority groups"
Leti Volpp. "Feminism versus Multiculturalism." (2001) 101:5 Columbia L Rev at 1189.

[37] Vrinda Narain examined a previous attempt by the Quebec government to ban the niqab, and wrote: "Perhaps too simplistically, the issue was presented as one that set gender equality in opposition to religious freedom, casting the state in a role that rescues Muslim women from barbaric customs and outdated laws. Muslim women, simultaneously, were cast as victims, lacking agency and free choice, and in need of rescue by a benevolent, enlightened state."
Supra note 11 at 145.
Sherene Razack reminds us: "Of all the things that secularism can mean, it has not always meant tolerance. Those who do not fit the public personality of the state are simply defined as religious minorities and find themselves in a defensive position"
Supra note 11 at 20.

[38] Lila Abu-Lughod, "Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Other." (2002) 104:3 *American Anthropologist* 783-790. Abu-Lughod analyzes "this obsession with the plights of Muslim women" (at page 783). She challenges readers to be cognizant of two points. First, the need to "work against the reductive interpretation of veiling as the quintessential sign of women's unfreedom" (*Ibid*, at page 786) Second, to take care "not to reduce the diverse situations and attitudes of millions of Muslim women to a single item of clothing" (*Ibid*). Rather than fall into these ways of perceiving Muslim women, Abu-Lughod challenges readers to resist the "Muslim women need saving" trope by asking: "how we might contribute to making the world a more just place" (*Ibid* at 789).

[39] Constance Backhouse, *Petticoats and Prejudice* (Toronto: Canadian Scholars' Press and Women's Press, 2000). In *Petticoats and Prejudice*, Constance Backhouse examines women's legal history in Canada and examines nineteenth century case law, statutes, and the press to articulate the place of Canadian women in a patriarchal and colonial legal landscape. My reason for referencing Professor Backhouse's book is to show that the Canadian government has long regulated women's lives in many areas, from marriage, divorce, child custody, rape, infanticide, abortion, prostitution, labour law, and certainly how they dress. Law 21's effort to restrict what Muslim women may wear is merely a twenty-first century version of this trend, but with an additional nativist, Islamophobic component.

what she wants to wear or not wear."[40] Paradoxically, Minister Charest's statement ignores that many Muslim women freely choose to cover their head. The meaning of the veil to the women who wear it is dismissed by a society that presumes to understand how it is constituted for Muslims. Narain writes, "the veil is a complex, nuanced issue that is seen in mainstream Western society as fixed, unchanging, and ahistorical."[41] Muslim women who wear a headscarf are already highly visible and thus easier targets for anti-Muslim sentiment.[42] Law 21 not only creates adverse impact discrimination against them, it further highlights their vulnerability and perpetuates gendered Islamophobia and intolerance. The state claims to treat all citizens equally; yet, the Law's application singles out Muslims and Muslim women facing particularly acute marginalization.

Law 21 operates within a framework of racism, sexism, and the ironic perpetuation of the very patriarchal norms the West associates with Islam. Quebec retains exclusive authority to accept or suppress certain sincerely held religious expressions while claiming to treat all religions equally and framing discriminatory laws as neutral. In the context of the war on terror and anxiety over immigration, Muslim women are cynically positioned as in need of liberation and their agency in choosing to wear the headscarf is dismissed. Understanding that context, we can now turn to the ways Muslim women have challenged this discriminatory law, employing a novel legal argument with the potential to move the needle for women and non-binary folks fighting for gender equality.

II. The First Constitutional Challenge to Law 21: Application for a Stay of Enforcement

As soon as the Law was passed, plaintiff Ichrak Hak, together with the CCLA and the NCCM filed a challenge at the Quebec Superior Court. Their aim was to suspend two sections of Law 21: section 8, which requires an uncovered face to access certain state services, and section 6, which prevents government employees from

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[40] Philip Authier, "Québec minister for women stands by belief that hijabs are oppressive," Montreal Gazette (7 February 2019), online: https://montrealgazette.com/news/Québec/Québec-minister-for-women-stands-by-belief-that-hijabs-are-oppressive.

[41] *Supra* note 11 at 147.

[42] Brian Leber, "Police-reported hate crime in Canada, 2015" (2017) *Juristat (Statistics Canada),* Catalogue no 85-002-X. A recent tally of hate crimes released by Statistics Canada noted that "Muslim populations had the highest percentage of hate crime victims who were female" at 19.

See also, Viet Bader notes a "hostility upsurge against Muslims" (2003, at 78).

"wearing religious symbols in the exercise of their functions."[43] Section 6 casts a wide net in defining government employees, including but not limited to police, lawyers, judges, elected representatives, and public-school teachers. In the three years since the bill became law, many Muslim women have lost the ability to work in their chosen field and been the targets of public backlash as their head-coverings have made them highly visible targets of a polarized society. Because these individuals are being discriminated against because they are women *and* Muslims (and likely also racialized) any effective challenge to Law 21 and the narrative pitting secularism against Islam must be intersectional.

Sindrah Ahmed, who conducted 21 interviews with Muslim women in Toronto, wrote, "Muslim women face the brunt of violence that is motivated by anti-Muslim animus."[44] A recent Statistics Canada study of hate crimes noted that "Muslim populations had the highest percentage of hate crime victims who were female."[45] This reality is captured by the term "gendered islamophobia."[46] As the disproportionate effect of Law 21 on female teachers demonstrates, women and girls are often visibly identifiable "others," and thus particularly vulnerable to exclusion and discrimination based on religion, ethnicity, or a combination of the two. Minoo Moallem, a research specialist in gender studies, writes, "Through gendered Islamophobia, Muslim women are constructed as the ultimate victim of a timeless patriarchy defined by the barbarism of the Islamic religion, which is in need of civilizing."[47] Hak and 12 other intervenors wrote affidavits touching on the political climate; xenophobia and discrimination; the hijab and identity; and Law 21's effect on the careers they desired and trained for.[48] Particularly poignant is the statement of

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[43] *Supra* note 9.
See *Supra* note 16: *Hak c. Procureure générale du Québec*, 2019 QCCS 2989 at para 3 for the plaintiff's requests to make those sections "inopérants en vertu de … la Constitution."
[44] Sidrah M. Ahmed, "Islamophobic violence as a form of gender-based violence: a qualitative study with Muslim women in Canada" (2019) 3:1 *J Gender-Based Violence,* 45–66at 46.
[45] Police-reported hate crime in Canada, 2015, *Juristat (Statistics Canada),* Catalogue no 85-002-X.
[46] Jasmine Zine, "Muslim Women and the Politics of Representation" (2002) 19:4 *American J Islamic Soc Sciences* 1–22.
[47] Minoo Moallem, *Between warrior brother and veiled sister: Islamic Fundamentalism and the politics of patriarchy in Iran* (California, University of California Press, 2005).
[48] *Supra* note 16, at paras 92-115.

Mme Ahmad, who claims the Law further accentuates the climate of "la dissension et l'intolérance" created by the government.[49]

While the judge at the Superior Court acknowledged that the impugned sections of Law 21 violate constitutional principles of equal rights freedom of religion,[50] the pre-emptive use of the notwithstanding clause insulated the law from attack. Additionally, Justice Michel Yergeau weighed individual interests against the public good of protecting Quebec's secular character and found in favor of the latter.[51] Justice Yergeau found the aforementioned affidavits to be "purement hypothétiques et souvent spéculatives"[52] and therefore inadequate to demonstrate serious or irreparable damage sufficient to justify an interlocutory injunction.[53] However, the lived reality of discrimination for Muslim women and girls is not hypothetical and it is not speculative. Rather, it is produced by the state singling out Muslims as suspicious and illiberal.

Six months after the Superior Court judgement, the appellants sought relief at the Quebec Court of Appeal. The intervening time worked in their favour; the affidavits were no longer considered hypothetical as the Court acknowledged "le risque de subir un préjudice irréparable s'est donc concrétisé."[54] The appellants also introduced a new strategy. To overcome the Quebec Legislature's preemptive use of section 33, the appellants raised an argument based on a section of the *Charter* not affected by the notwithstanding clause: section 28's guarantee of equality between the sexes. Since Law 21 disproportionately affects Muslim women, the appellants argued it violates the gender equality right guaranteed by section 28.[55] Justice Nicole Duval

[49] *Supra* note 16, at para 105.
[50] *Supra* note 16, at para 125.
[51] "La loi est tenue pour l'avoir été dans l'intérêt du public et à l'avantage du bien commun" *Supra* note 16, at para 128.
[52] *Supra* note 16 at para 116.
[53] "Une fois écartées les garanties des Chartes, on ne peut attendre du Tribunal qu'il suspende des volets d'une loi validement adoptée sur la base de ce qui demeure au rang d'hypothèses." *Supra* note 16 at para 118.
[54] *Supra* note 16 at para 90.
[55] Court of Appeal Chief Justice Duval-Hesler summarized the change in the plaintiff's legal strategy as follows: "le jugement de première instance était largement axé sur l'existence d'une disposition dérogatoire qui, selon le juge, fermait la porte aux arguments de charte, alors que l'ajout du rôle de l'article 28 dans le présent débat en fait clairement un débat de charte, l'égalité entre les personnes des deux sexes échappant à la dérogation de l'article 33, si c'est là l'interprétation à donner aux textes des deux articles" *Supra* note 16, at para 21.

Hesler accepted the appellants position and ruled for the suspension of section 6.[56] However, the other two Justices rejected the appeal. Both Justice Dominique Belanger and Justice Robert M. Mainville ruled that the state of section 28 was too uncertain to justify issuing a suspension order.[57] However, Justice Mainville went a step further in asserting there was insufficient evidence of disparate impact to support a section 28 claim,[58] despite the fact that several Muslim women lost the ability to enter the applicant pool for teaching positions or lost jobs they already held. Hak's subsequent appeal to the Supreme Court of Canada, requesting a temporary stay while the case was decided on the merits, was denied. However, the strategy of employing section 28 to succeed where section 15 failed was continued in the application on the merits.

Four years before Law 21 was passed, Marilou McPhedran, legal counsel and strategist for the group that advocated for section 28's inclusion in the *Charter*,[59] wrote the following:

> "In the event of a challenge on behalf of Muslim women for whom wearing a niqab is presented as their protected choice, consistent with their section 15 equality rights and their section 2 fundamental freedom of religious expression in the Canadian Charter, then they may ask the courts to adjudicate their claim against the Quebec law, potentially arguing for the Baines view of section 28 as independently rights enhancing, free of the section 33 override."[60]

Before examining how the appellants in *Hak v Quebec* implemented McPhedran's proposed strategy in their 2021 challenge to Law 21 on the merits, it is useful to pause and delve into the history of this under-examined section of the Charter. The

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[56] "Il faut en conclure que l'article 6 de la Loi paraît limiter de manière disproportionnée, et de façon immédiate, le droit des femmes à l'égalité et à la liberté de religion comparativement aux hommes, musulmans ou non, ce qui viole possiblement l'art. 28 de la Charte canadienne" *Supra* note 16 at para 61.

[57] "Il n'est pas manifeste que l'article 28 de la Charte empêche le législateur québécois d'invoquer la clause dérogatoire" *Supra* note 16 at para 93.

[58] "En effet, à ce stade préliminaire, nous n'avons que *peu de preuve* quant à l'effet de l'article 6 de la loi *sur les femmes par contraste aux hommes*" *Supra* note 16 at para 128 (emphasis added).

[59] The Ad Hoc Committee of Canadian Women on the Constitution, hereafter referred to as "Ad Hoc."

[60] Marilou McPhedran, Judith Erola, Loren Braul, "Helluva Lot to Lose in 27 days: The Ad Hoc Committee and Women's Constitutional Activism in the Era of Patriation." (2015) *Patriation and its Consequences: Constitution Making in Canada* ed. Louis Harder, Steve Patten. UBC Press (203-225) at 219.

advocacy surrounding its drafting, implementation, and evolution provides crucial insight into its untapped potential. It also allows us to understand its application in subsequent cases. After a brief examination of section 28's chronological and ideological history, I will return to the contemporary court challenge to Law 21, where section 28 takes on a more pronounced role.

Iii. A Brief Judicial Chronicle of Section 28

McPhedran, legal counsel and strategist for Ad Hoc throughout the 1980s and 1990s, wrote,

> "As one of the feminist framers of section 28, I confirm that section 28 was intended to be rights bearing, not to muscle out other rights but to enhance them with gender equality so that the rights of women are equal, not secondary. And I predict that section 28 has an influential future yet to come, likely as an "integrator" protecting and embedding sex equality in complex discrimination scenarios."[61]

Written in 2008, this sentiment anticipates the strategy activists opposing Law 21 are currently employing to fight state discrimination against Muslim women who wear the headscarf. McPhedran was surely aware that since the *Charter* was enacted in 1981, the use of section 28 has been so consistently sidelined by the courts as to render futile constitutional arguments based on it. The provision Ad Hoc fought so hard for became a symbolic feminist tool that rarely left the toolbox after it proved ineffectual. Baines writes that the Supreme Court has yet to develop "any analysis of it."[62] Froc points out that even in the rare times appellants base an argument on section 28, "many of these cases completely ignored section 28 even when parties raised it … or explicitly sidelined it as unworthy of consideration."[63] One example is found in *McIvor v. Canada*, a case addressing First Nation women's loss of status upon marrying non-status men. Justice Sopinka asserted that "the respondents' contentions regarding ss. 2(b) and 28 of the *Charter* are better characterized as a s. 15 *Charter* argument."[64] Undermining section 28 merely because equality provisions are already contained in section 15 "send[s] a clear message of section 28's marginalization."[65] Yet, the legislative history and the plain language of section 28's text informs us that feminist

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[61] *Ibid* at page 219.
[62] Beverley Baines "Section 28 of the Canadian Charter of Rights and Freedoms: A purposive interpretation" (2005) 17:1 Can J Women L, 2005, 45-70 at 52.
[63] Keri Froc, "The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms." (Doctor of Philosophy, Queen's University, 2015) [unpublished] at 311.
[64] *McIvor v. Canada (Registrar of Indian & Northern Affairs).* [2009] SCC 33201 at para 76.
[65] *Ibid.*

activists anticipated this marginalization and tirelessly sought to protect against the interpretation the courts currently use.

Newfoundland (Treasury Board) v. N.A.P.E.[66] is illustrative of how the court's sidelining of section 28 allows the government to violate section 15 when women's rights are pitted against other concerns. *N.A.P.E.* concerned the provincial government's decision to delay a pay equity program due to fiscal constraints. The Supreme Court found that the government's actions were indeed in violation of section 15.[67] Acknowledging that "'[w]omen's jobs' are chronically underpaid,"[68] Justice Binnie writing for the court in upholding the discriminatory program nevertheless upheld the violation of women's right to equal pay as reasonably justifiable under section 1 given the ongoing financial crisis. It is plainly obvious that the judgement in *N.A.P.E* runs contrary to the spirit of the *Charter* envisioned by Ad Hoc and enshrined in section 28. Faraday writes, "if section 1 analysis does not consider the gendered implications of justifying a breach of Charter rights – including a breach of Charter rights other than section 15 – it risks reintroducing and rehabilitating the discriminatory norms and practices that were found to violate equality rights under section 15."[69]

When the Canadian Labour Congress intervened in *N.A.P.E.*, their factum attempted to draw the Court's attention to another pay-equity case decided earlier that same year.[70] ***Syndicat de la fonction publique c. Procureur général du Québec*** concerns another pay-equity scheme that expert evidence determined insufficient for the purpose of achieving equal pay for equal work.[71] Despite being from a lower court, *Syndicat* is important to this inquiry because it explicitly deals with section 28's history, purpose, and utility. Madame Justice Carole Julien began her investigation of section 28 by delving into the core of the uncertainty, "Nous savons que l'article 15 de la *Charte canadienne* consacre le droit à l'égalité entre les sexes. En ce cas, pourquoi l'article 28 a-t-il été introduit à la *Charte canadienne*? Quel est son sens ? Quelle est sa portée?"[72] Justice Julien outlines the entire history of Ad Hoc's victory securing an independent

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[66] *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees.* [2004] 3 SCR 381.
[67] *Ibid* at para 51.
[68] *Ibid* at para 45.
[69] *Ibid* at 28.
[70] *Newfoundland (Treasury Board) v. N.A.P.E*, Factum of the Intervener, Canadian Labour Congress at para 14.
[71] *Syndicat de la fonction publique c. Procureur général du Québec*, [2004] RJQ 524 (QCSC) [*Syndicat*]
[72] *Ibid* at para 1406.

gender equality provision that withstands the influence of sections 1 and 33.[73] Having set out the legislative history of section 28 and acknowledged the judicial lacuna surrounding its usage, Justice Julien asks the same question at the heart of *Hak*, "Le législateur québécois pourrait, par l'article 33, déroger expressément à l'article 15. Cependant, le droit à l'égalité des sexes ferait-il exception en raison de l'article 28?"[74] In evaluating section 28's independence from the notwithstanding clause, Justice Julien quoted Federal Court Justice William F. Pentney, "this is the minimum role that can be attributed to Article 28. If it does not at least have the effect of providing the strongest possible protection for equality of the sexes under section 15, it will constitute a superfluous provision and its insertion in the Charter will have been a cruel sham."[75] Having reviewed the history and doctrine, the court in *Syndicat* concludes, " l'opinion dominante est favorable à la primauté de l'article 28 sur l'article 33."[76] Following the dismissal of a section 33 application, Justice Julien further inferred that the only remaining way for the government to justify a gender equality violation is through section 1. The Quebec Attorney General did not invoke section 1 defense.[77] Thus, the holding in *Syndicat* declined to definitively resolve the uncertainty surrounding section 1's applicability to section 28. However, in evaluating whether the discriminatory pay-equity scheme can be salvaged, Justice Julien concluded that section 28 creates an extremely high bar in determining gender equality violations justifiable in a free and democratic society, "la *Charte Canadienne* protège le droit à l'égalité entre les sexes de façon particulière à l'article 28. Le Tribunal doit être particulièrement exigeant lorsqu'il s'agit d'évaluer la validité d'une loi qui, par ses effets, porte atteinte à l'égalité entre les sexes."[78] This conclusion led the court to declare the impugned provisions of the law invalid and inoperative because they violate section 15.[79]

Syndicat is exemplary for demonstrating section 28's potential. Although Ad Hoc envisioned the provision as capable of standing independently of section 15, they also sought its inclusion in order to buttress section 15 against the notwithstanding clause, and to raise the bar to a section 1 justification. Their design was intended for judicial

[73] *Ibid* discussion at paras 1410-1414.
[74] *Ibid* at 1415.
[75] *Ibid* at para 1421 (William F. PENTNEY, *loc. cit.*, note 313, 58). Penny is a current Federal Court Judge and former Minister of Justice and former Deputy Attorney General.
[76] *Ibid* at 1429.
[77] *Ibid* at 1397.
[78] *Ibid* at 1532.
[79] *Ibid* at 1629.

reflection on legislators' arguments used to justify infringing women's rights. Whereas *N.A.P.E.* ignores section 28 entirely and leaves section 15 unsupported, *Syndicat* centrally employs the former to reinforce the latter. The two judgements differ because *Syndicat* uses section 28 as a baseline, meaning Justice Julien adopts a holistic framework of gender equality in evaluating the *Charter*, while *N.A.P.E.* restricts consideration of gender impact to section 15. Section 28, as understood by the lower court in *Syndicat* and echoed by the appellants in their 2021 appeal to the Supreme Court, has huge potential. Unlike the general equality provision of section 15, section 28 applies specifically to the *Charter* itself, and thus precludes the use of the tools historically used to justify a violation of gender equality. Section 28 also has the potential to provide an entry point into acknowledging discrimination on several enumerated grounds, ensuring that all relevant factors are considered in legal proceedings concerning discrimination. A more thorough explanation of this concept will be presented later in this article, where I will argue that section 15 analysis forces litigants to identify a single comparator group, thus flattening an individual's intersectional identity. Because section 28 functions to guarantee gender equality independent of enumerated groups and comparator groups, this often-ignored section might bring about more equitable outcomes in legal decisions when the applicant has a complex identity shaped by multiple intersecting factors.

The centrality of section 28 in Justice Julien's *Syndicat* decision stands in stark contrast to how it was treated by Justices Duval Hesler, Belanger, and Mainville when the *Hak* case was at the Court of Appeal in 2019. That decision reveals no concern for the original understanding of section 28. Chief Justice Duval Hesler declined to examine the "interplay between sessions 28 and 33," considering it unnecessary for the purposes of the application for a stay.[80] Justice Belanger barely surveyed the section's text, history, or status, yet strikes an equivocal posture in stating, "it is not clear that section of the *Charter* precludes the Quebec legislature from invoking the notwithstanding clause."[81] This ambivalence is all the more perplexing because after the *Charter* was passed, the *Barreau du Québec* provided education to lawyers that states,

> "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

[80] *Supra* note 16 at para 49.
[81] *Ibid* at para 93.

> échappe à la clause nonobstant vu que l'article 28 débute par les mots: "Indépendamment des autres dispositions de la présente charte".”[82]

Justice Mainville delved deeper into section 28 than his colleague on the bench. Yet, in the eight paragraphs he directly addressed the appellant's section 28 argument, he demonstrates only a cursory knowledge of its judicial history and none of the legislative history. He ultimately dismissed the section's utility by asserting that "[t]he state of the law on section 28 is therefore much too nebulous and embryonic" to be of use in suspending Law 21.[83] He did acknowledge the potential for a broader constitutional argument, but left it to the trial judge to determine the merit.[84]

Iv. The Next Constitutional Challenge to Law 21: Application on the Merits

The 2019 cases were to determine whether a temporary stay of the Law should be granted. The merits of the case were first tried in 2021 at the Superior Court.[85] Building on their previous strategy, the plaintiffs refocused their strategy around section 28, "Bill 21 violates gender equality in a manner contrary to section 28 of the Canadian Charter."[86] Section 28 did not feature heavily in the Superior Court case, as it was merely one of many arguments raised by the plaintiffs. Ultimately, the court upheld the constitutional validity of Law 21, with the exception of its application to English education. Justice Blanchard acknowledged the Law's discriminatory nature by stating, "There is no doubt that in this case the negation by Bill 21 of the rights guaranteed by the Charters has severe consequences for *the persons* concerned. Not only do *these people* feel ostracized and partially excluded from the Quebec public service, but also some see their dream become impossible."[87] However, his analysis obscures that one group is disproportionately oppressed by this law: Muslim women. Concerning section 28, Justice Blanchard determined it was merely interpretive and "does not allow laws to be invalidated independently."[88] In any case, the notwithstanding clause suspends the rights targeted by its use, so according to Justice

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[82] Gérald A. Beaudoin, «Étude des différents secteurs de la Charte» dans Service de la formation permanente, *Continuing Education Service Barreau du Québec* (Cowansville: Éditions Yvon Blais, 1982) at72.
[83] *Supra* note 16 at 134.
[84] *Supra* note 16 at 127.
[85] *Hak v Attorney General of Quebec*, 2021 QCCS 1466.
[86] *Ibid* at para 173.
[87] *Ibid* at para 1102 (emphasis added).
[88] *Ibid* at para 4.

Blanchard, "there are no longer any rights or freedoms to be guaranteed equally to people of both sexes as provided for in Article 28."[89]

Women's Legal Education & Action Fund (LEAF) and the Fédération des Femmes du Québec (FFQ) joined Hak in her subsequent appeal, where they substantially broadened the scope of their section 28 argument. As of the time of this writing, the Quebec Court of Appeal has yet to release its judgement. Regardless of the outcome, both the appellants and the Quebec Government have signaled their resolve to litigate this case to the highest judicial authority. This represents a novel opportunity for the Supreme Court to finally interrogate section 28. In the remainder of this article, I will explore the strategy outlined in their factum, namely, the decision to ground an intersectional approach to ruling on the validity of the impugned law through section 28 of the *Charter*.[90] The use of section 28, which in the four decades since the *Charter* was enacted has yet to be robustly examined by the highest court,[91] has four potential implications. First, it can support the general equality provision which lists gender as a ground for a section 15 claim. Second, section 28 can function to restrict the application of the notwithstanding clause. Third, section 28 potentially provides an entry-point for subsequent courts to approach discrimination claims from an intersectional standpoint, rather than as discrete silos of discrimination. Finally, I will specifically address the constitutionality of Law 21 and how section 28 dismantles this legislated gendered Islamophobia.

LEAF's Intervention to the Quebec Court of Appeal on behalf of Hak v. Quebec

The reasoning given in *Syndicat* surrounding the gender equality provisions of the *Charter* is in-line with the premise of LEAF's factum in *Hak,* which states, "la garantie d'égalité protégée par l'article 28 devrait systématiquement guider le travail d'interprétation effectué par les tribunaux appelés à évaluer la validité constitutionnelle d'une loi."[92] In addition to requesting the Court develop a test aimed at operationalizing the substantive nature of section 28's gender-equality guarantee, the LEAF factum makes two key assertions:

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[89] *Ibid* at para 875.
[90] The LEAF factum concludes: "À notre avis ... les Dispositions de la Loi 21 sont invalides, puisqu'elles contreviennent à l'article 28" *Supra* note 3 at para 61.
[91] Early in the factum, LEAF acknowledges the novelty of the argument: "L'article 28 n'a guère fait l'objet d'une analyse approfondie en jurisprudence. Cette Cour d'appel sera la première à articuler un cadre d'analyse complet de l'article 28" *Supra* note 3, at para 8.
[92] *Ibid* at para 29.

25. L'article 28 est un outil interprétatif permettant d'appliquer le « filtre » de l'égalité des sexes à la Charte. En d'autres termes, la garantie d'égalité doit être prise en considération dans l'interprétation et l'application de l'ensemble des dispositions de la Charte.
26. Cette approche garantit la protection de l'égalité réelle dans la lecture et la mise en œuvre de l'ensemble des dispositions de la Charte. En pratique, le libellé de l'article 28 s'ajoute à la fin de chacune des dispositions de la Charte.[93]

At the time of this writing, the Quebec Court of Appeal has yet to issue its judgment. There is good reason to believe that the argument laid out in this factum has the ability to revolutionize the constitutional tool-box available to those using the courts to promote gender equality. First, the factum presents the Court with a unique opportunity to make a landmark ruling with constitutional significance. Second, the Quebec Government is clear that they intend to defend Law 21; meanwhile, the Federal Government has signalled its willingness to intervene on behalf of the Hak at the Supreme Court.[94] Thus, regardless of the outcome at the Court of Appeal, we can expect either the provincial government or the intervenors to appeal the decision to the Supreme Court. If Hak's appeal reaches the Supreme Court, the fight against Law 21 has potentially far-reaching consequences beyond securing employment rights for Muslim women who wear the headscarf. A reinvigorated section 28 could change the constitutional landscape for all groups seeking gender equality. This aligns with the understanding of early advocates of section 28's inclusion into the Charter. The next section will provide a brief account of the perspective of the section's original framers.

V. Section 28 & the Charter

The appellants in *Hak* ask the Court to develop a test for section 28, which declares that rights and freedoms are guaranteed "equally to male and female persons."[95] On its face, section 28 appears to echo the gender equality provision of section 15(a). The similarity has contributed to the idea that section 28 is merely duplicative. Both genders have successfully employed section 15 for gender equality claims. Why, given the usefulness of section 15, was another gender equality

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[93] *Supra* note 3.

[94] When Fatemeh Anvari lost her teaching job for wearing a hijab in contravention of Law 21, Prime Minister Trudeau said: "we have not ruled out the possibility of intervening as the federal government at some point in time."
Sara Ross, "Hijab-wearing teacher who lost job due to Bill 21 was 'trying to make a statement': Quebec lawmakers." CTV News Montreal (December 10, 2021).

[95] Canadian Charter of Rights and Freedoms, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 28.

provision added to the *Charter*? Baines contends that section 28 was included because feminist activists "did not believe [section 15] would protect the right to sex equality. More specifically, they did not believe that the wording of the section was adequate to the task."[96] In short, Canadian feminist activists looked to their own constitutional history along with that of America and the United Kingdom, realizing that a general equality provision merely listing gender within other enumerated grounds was not the best way to constitutionally guarantee gender equality. Rather, they sought an independent provision. The six women's groups invited to testify before the *Special Joint Committee* for *Charter* debate unanimously united around this theme believing it would serve to protect women's rights.[97] Yet, four decades later section 28 has been nearly forgotten. Strauss succinctly summarizes the current status of section 28 that *Hak*'s constitutional challenge seeks to change,

> "Since at least the mid-1990s, courts have primarily perceived it as redundant or ineffectual. Redundant because gender equality is already provided for in section 15 of the *Charter*- so what does section 28 have to add? Ineffectual because it is located under the heading "General" alongside interpretive *Charter* provisions, which has led courts to construe it as interpretive and, therefore, not rights conferring."[98]

To understand how this occurred and re-imagine section 28's true significance, and its potential to effect true international analysis on cases of gender equality, it is important to reflect upon the initial development of the Charter. In light of my argument that section 28 has the potential to usher in a new era of gender equality

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[96] Professor Baines' perspective is relevant because throughout the 1980s she contributed legal counsel to the Ad Hoc Women's Committee who fought for section 28. Baines lists four reasons for the distrust feminist activists felt around the insufficiency of section 15 to secure gender equality. First, the memory of the Supreme Court of Canada's infamous denial that women were indeed persons, a decision overturned by the British Privy Council. Second, comments from prominent members of Parliament that women were not in fact equal to men. Third, feminists had watched as the Supreme Court used stare decisis human rights cases to interpret the Canadian Bill of Rights, often resulting in the denial of gender-equality claims. Finally, the sequential positioning of gender equality rights after the protected grounds of race, national origin, and religion suggested the court might interpret the list of protected grounds hierarchically, as was the case with the Fourteenth Amendment in the United States.
Supra note 61.

[97] *Supra* note 62 The Committee was created to hold televised hearings on the constitutional debates surrounding the *Charter*. Professor Kerri Froc researched and described the women's groups' testimony at pages 137-142.

[98] *Supra* note 4 at 86.

analysis, one that adequately captures the intersectional identity of many Canadian women, it is necessary to first understand section 28 from the perspective of the original framers.

Feminist activists and lawyers advocated for an independent gender equality provision and fought to ensure that section 28 would not be subject to any limitations contained in the *Charter*. This was anticipated by feminist activists early in the constitutional process and became a key battleground for Ad Hoc, who formed their committee in response to the Canadian Advisory Council on the Status of Women (CACSW) and other groups' fear of "women's rights being diminished in the new Charter."[99] Froc quotes from CACSW's presentation at Ad Hoc's first conference, which resolved to fight Charter entrenchment until a number of changes were made including "a statement of purpose that rights and freedoms under the Charter are guaranteed equally to men and women with no limitations."[100] National Association of Women and the Law (NAWL) echoed this sentiment in their submission to the *Special Joint Committee*, "Section 1 is a dangerously broad limitation clause."[101] They continue, recommending "the inclusion of a 'purpose clause' in this charter…such a clause would undertake to guarantee the equal right of men and women to the enjoyment of all civil, political and economic rights set forth in the Charter…Any ambiguity, for example, in Section 15(1) could be clarified by reference to the overall purpose."[102] This statement, made over a year before the *Charter* came into being, demonstrates the first seeds of section 28, and links its initial purpose to restricting section 1.

Achieving an independent gender equality provision unrestricted by sections 1 and 33 was not a simple task. Starting in February 1981, Ad Hoc worked with female MPs including Margaret Mitchell, Pauline Jewett, and Flora MacDonald to lobby on behalf of an independent gender equality provision. A key aspect of this strategy was to "negotiate textual changes to support Ad Hoc's proposed amendments" with the Department of Justice.[103] The text of section 28 reads, "Notwithstanding anything else in this Charter, the rights and freedoms in it are guaranteed equally to male and female persons." These words grew out of the initial "purpose clause" recommended by NAWL that Ad Hoc then fashioned into section 28. The NDP ultimately proposed

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[99] *Supra* note 3 at 152.
[100] *Ibid* at 157-8.
[101] National Association of Women and the Law, "Women's Human Right to Equality: A Promise Unfulfilled." (1980) Submitted to The Special Joint Committee on the Constitution.
[102] *Ibid* at 7.
[103] *Supra* note 3 at 201.

the section which was unanimously passed in the House on April 23, 1981. As such, the phrase "Notwithstanding anything in this Charter" was enacted with the specific purpose of insulating section 28 from the application of sections 1 and 33.

With the introduction of a federal-provincial compromise known as the Kitchen Accord in November 1981, the phrase "Notwithstanding anything in this Charter" took on even greater significance. Ad Hoc turned their attention to protecting section 28 not just from the reasonable limitations of section 1, but also from the notwithstanding clause. Following the Kitchen Accord, Prime Minister Trudeau was asked if section 28 would trump the notwithstanding clause. He responded that his "impression is that the clause would continue."[104] However, when asked again three days later the Prime Minister responded, "this particular section would be subject to the 'notwithstanding clause'."[105] Feminist activists were not pleased with losing their rights "as the price of an agreement,"[106] and mobilized around this, lobbying relentlessly to reverse this horse-trade. Twenty-seven days after the Kitchen Accord, then Attorney General Jean Chrétien capitulated, "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."[107] Following their success, the *Toronto Star* quoted Minister Responsible for the Status of Women Judy Erola, who indicated that the removal of the override meant that "Section 28 can be called in aid to Section 15. This will bolster Section 15 so that judges will know that, when we say no discrimination on the basis of sex, we mean never."[108]

The story of Ad Hoc, the fight for section 28, and the particular care to liberate it from sections 1 and 33 is informative. From it we can take 4 inferences. First, section 28 was always meant to succeed where section 15 failed. Feminist activists understood both sections as right-bearing provisions, but section 28 went further in applying to the *Charter* as a whole. In the words of Strauss, "Section 28 requires courts to examine the gender inequality that has been baked into the very structure of our legal concepts and to reformulate those concepts to affirm the legal personhood of those who have faced gender-based discrimination."[109] Second, the

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[104] House of Commons Debates, 32nd Parl, 1st Sess, No 11 (November 6, 1981) at 12594.
[105] *Ibid* at 12635.
[106] *Ibid.* Prime Minister Trudeau characterized subjecting section 28 to the notwithstanding clause as "we were asked to take them out as the price of an agreement" with the premiers.
[107] House of Commons Debates, 32nd Par, 1st Sess, 1981f, at 13140.
[108] Bruce Ward "Experts Call Charter 'Tip of Legal Iceberg' in Constitutional Accord" *Toronto Star* (November 27, 1981).
[109] *Supra* note 4 at 96.

words "Notwithstanding anything in this charter" serve a very important function. Baines concludes, "If section 28 is to have any function, therefore, it must be to preclude sections 1, 27,[110] and 33 from discriminating on the ground of sex."[111] Section 1 limitations justifiable in a "free and democratic society" do not include those that violate gender equality. Nor can section 33 protect any law that violates gender equality. Third, the relentless work to secure this status and the initial pushback from government suggests this was not a debate of mere symbolic relevance; both sides saw section 28's status within the *Charter* as worth fighting for. Finally, it is significant that the text of section 33 applies to sections 7-15, but not section 28. This suggests there is work for section 28 to do when the notwithstanding clause override neutralizes section 15.

Section 33: the *'Notwithstanding'* Clause

The legislative override contained in *Charter* section 33 allows the Quebec Government to implement a law that clearly violates the constitutional principles of gender equality and freedom of religion. As a result of a compromise between the provincial and federal government to facilitate *Charter* negotiations, section 33 does not apply to the entire *Charter*. Rather, section 33 allows Parliament or provincial legislatures to "expressly declare in an Act" that section 2 and sections 7–15 of the *Charter* to not apply to the particular piece of legislation they are enacting.[112] Most notably for the purpose of this examination, the right to gender equality is contained in section 15 and is thus subject to the override. Section 28, as the LEAF factum points out, is not enumerated in section 33's text.

Section 33 is rarely invoked.[113] However, given that Quebec has employed the notwithstanding clause more than any other province, Quebec's willingness to apply

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[110] Section 27 of the *Charter* states: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

[111] *Supra* note 61 at 68.

[112] Charter section 2 contains the fundamental rights, such as freedom of expression, freedom of conscience, freedom of association and freedom of assembly. Charter sections 7-15 contain, for example, the right to life, liberty and security of the person, freedom from unreasonable search and seizure, freedom from arbitrary arrest or detention, and other legal rights.

[113] See Elini Nicolaides, Dave Snow, D. "A Paper Tiger No More? The Media Portrayal of the Notwithstanding Clause in Saskatchewan and Ontario." (2020) 54:1 Can J Political Science at 60-74.

In 2020, Eleni Nicolaides and Dave Snow sought to update the first major empirical study of the notwithstanding clause completed in 2001 by Tsvi Kahana. Nicolaides and Snow's

it to Law 21 was hardly a surprise.[114] Patricia Hughes speculates that the notwithstanding clause functions as a sort of pressure valve that integrates Quebec into Canadian society, "Quebec's use of the override permits it to retain some measure of control over those matters of significance to its identity as a 'distinct society.'"[115] David Schneiderman notes that "most governments in all parts of the country do not want to be seen to be overriding Charter rights, and that the general public find it unseemly for their elected politicians to be seen to be doing so."[116] The same publication notes that both former Prime Minister Pierre Trudeau (who negotiated the terms of the *Charter* in 1981) and the Canadian Bar Association were in favour of eliminating section 33.[117] Justification for its removal often centres around the primacy of rights and freedoms and their indispensable function as a check against majoritarianism. "One of the purposes of a written constitution which contains a bill of rights," writes Hughes, "is that it serves as a counterbalance to the majoritarian nature of the legislatures."[118] On the other side of the debate, critics argue that the legislative override allows elected officials, not unelected judges, to have "the 'last word' the 'final say' on rights."[119] The dichotomy between these two visions of section 33 is exemplified in the legislative history and public controversy surrounding Law 21. The National Assembly of Quebec tried to pass Bill 62, ostensibly a secularism bill restricting the Islamic veil, without invoking section 33 and ultimately failed the ensuing constitutional challenge.[120] However, with the vast majority of the Quebec electorate supporting the secularism principle and its heavy-handed application, the government was able to bypass the *Charter* by invoking section 33 pre-emptively.

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analysis (which excluded re-enactments and counted Quebec's omnibus use as a single use) found the notwithstanding clause was used a total of 20 times (at 62).

[114] In fact, shortly following the Charter's entrenchment, Quebec enacted retroactive legislation inserting the clause into every law between 1982-1985. See Bill 62, Act Respecting the Constitution Act, 1982, 1982 (Que.), c. 21.
The omnibus bill's "retrospective effect given to the override provision," was upheld by the Supreme Court in Ford v. Quebec [1988] 2 SCR 712 at para 35.

[115] Patricia Hughes. "Section 33 of the Charter: What's the Problem Anyway?" (2000) 49 UNB LJ at 176.

[116] Peter Lougheed, "Why a Notwithstanding Clause?" (1998) The Centre for Constitutional Studies at page iv.

[117] Ibid at 4.

[118] Supra note 114 at 171.

[119] Robert Leckey, Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate" (2021) 72:2 U of Toronto LJ at 196.

[120] National Council of Canadian Muslims v Attorney General of Quebec, 2018 QCCS 2766.

The Quebec Government made use of the notwithstanding clause in an act of the legislature for the purpose of shielding the Law from claims that it violates freedom of religion, freedom of expression, and equality. This pre-emptive use insulates Law 21 from the reach of the courts. However, Leckey and Mendelsohn argue that the primacy of section 33 is not absolute, "Attention to the Constitution's text and its foundational principles, including democracy and the protection of minorities, militates against interpreting section 33 as a mechanism that gives majoritarian preferences the force of law without regard to the resulting impacts."[121] Although not addressing the legislative override specifically, the Supreme Court of Canada offers a powerful argument in favour of aligning the law with the constitutional values and rights, "Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the 'sovereign will' or majority rule alone, to the exclusion of other constitutional values."[122] If the purpose of the *Charter* is to prevent government institutions from violating fundamental rights codified through the democratic process, then we should be especially wary of the notwithstanding clause. Hughes argues that wariness of the clause "matters because governments are not beyond engaging in oppression and because they are, like all of us, susceptible to prejudice."[123] The Quebec Government employed a legitimate tool; however, that does not mean the resulting law should escape criticism or creative legal arguments. In the present litigation of Law 21 before the Quebec Court of Appeal, the appellants employed a part of the *Charter* that they argue is not subject to the notwithstanding clause. LEAF asserts in their factum, "une déclaration de validité constitutionnelle des Dispositions de la Loi 21 pourrait constituer *un précédent alarmant dans le cadre d'une société libre et démocratique*. En effet, l'impact du présent dossier dépasse largement la Loi 21, dans la mesure où cette Cour avalisait *un tel emploi de l'article 33*."[124] As the aforementioned legislative history suggests, Section 28 is not, and was not intended to be, subject to the legislative override. Thus, this legal strategy should serve to invalidate those sections of Law 21 that violate the rights of Muslim women.[125]

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[121] Supra note 118 at 214.
[122] Reference Re Secession of Quebec, [1998] 2 SCR 217 at 67.
[123] Supra note 114 at 177.
[124] Supra note 3 at para 53 (emphasis added).
[125] The LEAF factum states: "L'article 28 doit premièrement guider l'interprétation des dispositions de la Charte. Il comporte deuxièmement un caractère substantiel garantissant le droit à l'égalité réelle des sexes, et ce, malgré un recours éventuel à la clause dérogatoire. Les Intervenantes proposent ensuite à cette Cour un test permettant de mettre en application ce caractère substantiel de l'article 28" *Ibid* at 2.

VI. The Potential Utility of Section 28

A thorough analysis by Canada's highest court resulting in a reinvigorated section 28, an independent gender equality provision that is *both* rights-bearing and interpretive, has the potential to profoundly change the legal landscape. Thus far, the fight against Law 21 has illustrated the potential of section 28 in preventing other *Charter* provisions from impinging on women's ability to achieve true equality in accessing their constitutional rights and demonstrated the section's functioning as a legal tool to fight legislation that effectively prevents "male and female persons" from true gender equality.[126] But it is important not to overlook another dimension of section 28's utility, to ensure that "definitions and understandings of all the Charter rights and freedoms are derived from women's perspective as well as men's perspective."[127] This is why the LEAF factum claims that in practice section 28 should be added to the end of each *Charter* provision.[128] This naturally impacts one of the most significant aspects of a renewed section 28 analysis — raising the bar to a section 1 justification.

The *Charter*'s opening phrase asserts that the rights and freedoms enumerated therein are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[129] In theory, this is a high bar that ought to produce decisions that are consistent with the unwritten constitutional principles, which includes minority rights.[130] However, as the Ad Hoc Committee understood, a country that strives for a free and democratic society is not an inherently gender equal one. More work must be done to ensure that women achieve substantive equality and that the *Charter* is not another tool weaponized against those seeking equal access to their rights. To that end, recognition from Canada's highest court that section 28 influences any section 1 analysis is needed.

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[126] Froc discusses how the phrase male and female persons" in section 28's text was specifically chosen to evoke a dual consideration: both women as human and right's bearing (as opposed to a foetus), and to call to mind the historical moment in 1930 of the Privy Council recognizing women's' personhood following *Edwards v Attorney-General for Canada.* Supra note 62 at 386.

[127] Donna Greschner, "Aboriginal Women, the Constitution and Criminal Justice" (1992) 26 *UBC L Rev* 338 at 352.

[128] "Dans sa dimension interprétative, l'article 28 commande que le filtre de l'égalité réelle des sexes de l'article 28 guide la lecture et la mise en œuvre de chacune des dispositions de la Charte" *Supra* note 3 at para 56.

[129] *Charter,* section 1.

[130] *Quebec Secession Reference,* [1998] 2 SCR 217. In the *QSR*, the court confirmed that the fundamental organizing principles of the Constitution are: "federalism; democracy; constitutionalism and the rule of law; and respect for minorities" (at para 32).

Peter Hogg argues that the words of section 28 "Notwithstanding anything in this Charter" suggest it is not subject to section 1.[131] This might push the Court's interpretation too far. The Supreme Court might be reluctant to decide that each section 1 analysis encompasses evaluation of gender impact. But even recognition similar to Madame Justice Julien's in *Syndicat,* that section 28 forces courts to be "particulièrement exigeant" when evaluating the constitutionality of a law that undermines gender equality, would serve to guide lower courts in their section 1 analysis and provide grounds for appeal when that analysis fails to adequately account for gender.[132]

The second potential way a revitalized section 28 could impact the constitutional landscape is by the explicit recognition that the section is immune from the application of the notwithstanding clause. Shortly after the *Charter* came into effect, Commissioner and former Supreme Court Justice Rosalie Abella acknowledged in the 1984 Royal Commission Report "Equality in Employment" that the application of section 33 to section 28 remains to be "judicially determined."[133] Nevertheless, Abella cited the late Canadian judge and legal scholar Walter Tarnopolsky who she says "persuasively asserts" that section 28 protects gender equality rights from "being overridden by either sections 1 or 33."[134] Hogg also agrees with this analysis.[135] Strauss goes further, arguing that the application of section 28 "operates to retroactively neutralize section 33(1)'s application to section 2 and sections 7-15 to the extent that the impugned government action, or the methods and concepts employed in the analysis, has a disproportionately gendered effect."[136] Either of these interpretations would bode well for the appellants in *Hak*, who seek Law 21's annulment on the grounds it violates women's' equality. In the factum, LEAF argues, "l'article 33 ne saurait, à l'avenir, être employé pour valider la constitutionnalité d'une loi contrevenant à l'article 28."[137] Beyond this case, a clear ruling from the Supreme Court that legislation cannot rely on the legislative override to immunize it from charges of violating the principle of gender equality sends a message to Canadians and legislators. Canadians will see that gender equality really means no gender discrimination, in

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131 Peter W. Hogg, *Constitutional Law of Canada*, 2: 5 (Toronto, *Carswell*, 2016) at 55-65.
132 *Supra* note 70 at para 1532.
133 Equal Pay Commission, *Equality in Employment* (Ottawa: A Royal Commission Report, 1984) at16.
134 *Ibid.*
135 *Supra* note 130 at 55-65.
136 *Supra* note 4 at 107.
137 *Supra* note 3 at 52.

principle and in practice. Legislators will know that the notwithstanding clause cannot be relied upon to protect statutes that violate gender equality. This would effectively prevent a repeat of the situation when the notwithstanding clause allowed Law 21 to succeed where Bill 62 failed. A clear ruling that restrains the legislative override might also spark renewed interest in defining the scope and limitations of section 33's use, particularly regarding preemptive use for a bill that has already failed due to its unconstitutional status.

Third, section 28 can function going forward to confirm that courts cannot rule in such a way that sees entrenchment of mens' rights at the expense of women's or used to pit mens' rights against women's rights. That is to say, when rights conflict, the solution cannot be to deny women simply because that is what we have always done. This is not an abstract concern; *N.A.P.E.* and *Syndicat* are two cases testifying to the fact that women's rights are routinely sacrificed in the name of economic stability or efficiency. This is the foundational norm that is strengthened in times of economic hardship, such as the record-high inflation in Canada as of this writing. Further, several scholars have remarked that the resurgence of the far-right among liberal democracies carries with it a return to patriarchal norms, including promoting "traditional values" and "masculine grievances."[138] Canada is not immune to these political trends. Strengthening *Charter* rights is one way to safeguard women from the uncertainty of the electorate and a potential coalition government that includes or is influenced by the far-right. This concern is also especially relevant when one considers the increasing demands placed on women of colour and immigrant women by politicians pitting democracy and multiculturalism against each other.

Section 28 immediately follows the *Charter*'s multicultural provision that states, "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."[139] As Lila Abu-Lughod, Razack, and Kymlicka have all pointed out, multiculturalism is often positioned as existing at odds with gender equality through the narrative that immigrant women exist in oppressive patriarchal societies at odds with liberalism.[140] The idea that Western nations are experiencing a culture clash that pits newcomers' patriarchal norms against gender equality has found expression in public discourse, politics,

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[138] See Katrine Fangen and Inger Skjelsbæk. "Editorial: Special Issue on Gender and the Far Right." (2020) 21:4 *Politics, Religion & Ideology*, 411–415 at 411.
This point is also made by C Enloe (2017), P.E. Johnson (2017), A.R. Hochschild (2017), R. Kuhar & D. Patternote (2017), T. Akkerman (2015).

[139] *Charter*, section 27.

[140] See Susan Okin, "Is Multiculturalism Bad for Women?" (1997) *Boston Review*.

legislation, and the courts.[141] This is the spectre that haunts Law 21's text, which states in the preamble that "the Quebec nation attaches importance to the equality of women and men." Ironically, this Law has the effect of forcing women to dress a certain way or face unemployment, and thus places the very patriarchal constraints on women's choices that the secular state of Quebec associates with Islam. Section 28's guarantee of gender equality and section 27's interpretive instruction that *Charter* application respect the diversity of Canada are not in tension. They are in fact complimentary. When read in dialogue with each other, the provisions call for the recognition that women in Canada have rights to both equality and their cultural identity, which comprises their race, religion, language, and traditions. This provides a counterpoint to regressive policies like Law 21, which singles out Muslim women, many of whom are immigrants and racialized. Reading sections 27 and 28 together also implies that courts must consider the gender-consequences of legislation not in the abstract or by evaluating discrimination exclusively through a comparator group like white men. Rather, analysis must be grounded in the context of the specific communities affected by that legislation. Courts must be attentive to the lived reality of Canadian women, consistent with the multicultural heritage enshrined in section 27, and the protection of minority rights principle of the Constitution.[142] Strauss writes, "In many cases, sections 27 and 28 could work together to illuminate 'interconnected and mutually enforcing forms of oppression.'"[143] Similarly, section 25 which states that the rights and freedoms contained in the *Charter* "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada" can be read in conjunction with section 28 to safeguard against judgments that are nominally gender-neutral, but in fact discriminate against First Nations women, a particularly vulnerable population of Canadians. In light of the preceding analyses, section 28 can usher in a new era of intersectional legal analysis. Collectively, sections 25 and 27 enhance section 28 to

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[141] *Supra* note 29 provides a larger discussion of *R v N.S.*, a case determining if the plaintiff in a sexual assault trial must remove her niqab in order to testify, which is emblematic of this sentiment. Justice LeBel goes beyond the immediate concern, the tension between the accused's rights to a fair cross examination, to posit that the "clash" goes even further: "Is the wearing of the niqab compatible not only with the rights of the accused, but also with the constitutional values of openness and religious neutrality in contemporary democratic, but diverse, Canada?" *Supra* note 29 at para 60.

[142] Vrinda Narain notes: "While not a right, multiculturalism as a constitutional value is an interpretive tool to help determine how courts apply and determine rights" *supra* note 11 at 127.

[143] *Supra* note 4 at 110.

further protect women who face discrimination based on multiple intersecting identities such as race, religious expression, or indigeneity.

Section 28 also has potential to evolve alongside the growing understanding, acceptance, and protection of the rights of trans and non-binary Canadians. The Ad Hoc feminist activists were not explicitly thinking about women's rights as existing alongside LGBTQ+ rights. Rather, they were working from a binary understanding of gender that often saw the economic, political, and legal success of men come at the expense of women's rights. An originalist interpretation of the explicitly stated "male and female persons" in section 28 would suggest this foreclosed using the section to advance the rights of those who do not neatly fit in those categories. However, a guiding principle of Canadian constitutional interpretation is the Living Tree doctrine, which allows for growth according to the standards of the day.[144] The *Charter* was not intended to fix Canadians' rights to the beliefs and values of 1982. Rather, Froc argues that the *Charter* serves to "channel judicial discretion in interpretation in a particular way, by foreclosing reversion to pre-1982 interpretations and requiring the development of new, innovative meanings for equality."[145] If the purpose of section 28 is to codify the court's consideration of rights as impacted by gender, achieving that end requires the courts to move towards a more inclusive understanding of gender. Of course, this interpretation of section 28 is not determinative, and liberal democracies around the world have been slow to adopt a more expansive vision beyond the gender binary. However, at the heart of section 28 is what Catherine MacKinnon calls the "substantive principle" of "non-subordination."[146] This principle of non-subordination on the basis of gender ought to apply regardless of the claimant's identification with the binary categories of male or female.

Having considered section 28's potential impact on immigrants, racialized and Indigenous women, non-binary and trans Canadians, a picture starts to form. This image falls under the umbrella of intersectionality. Crenshaw explained the need for a new model of discrimination analysis, "the paradigm of sex discrimination tends to be based on the experiences of white women; the model of race discrimination tends

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[144] See *Edwards v Canada (Attorney General)* [1930] AC 124 at 106, 1929 UKPC 86. In his ruling deciding that women were indeed "persons" capable of holding office in Canada, Lord Sankey famously wrote: "The BNA Act planted in Canada a living tree capable of growth and expansion within its natural limits" (at para 106).

[145] *Supra* note 62 at 393.

[146] Catherine MacKinnon, "Making Sex Equality Real," in Lynn Smith et al, eds, *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, Inc, 1986), at 41.

to be based on the experiences of the most privileged Blacks. Notions of what constitutes race and sex discrimination are, as a result, narrowly tailored to embrace only a small set of circumstances."[147] Crenshaw is articulating the shortcomings of assessing discrimination on a single axis. An individual's identity is composed of many elements, several of which can simultaneously be the subject of discrimination. Margot Young further explains why an intersectional approach is so important, "Discrimination is not randomly distributed, skipping haphazardly from one trait to another, but piles up in the same channels ... The most disadvantaged individuals and groups will typically experience stigmatization and discrimination along several identity vectors. Oppressions are interlocking and stack one upon the other."[148] Evaluating complex discrimination requires more than acknowledging the discrimination of a claimant on the grounds of, for example, race *plus* gender; Strauss points out "it is a particular experience of inequality that is *more than the sum of its parts*."[149] Yet, this is how Canadian courts typically deal with complex discrimination cases.

The equality provision of section 15 contains enumerated grounds; to successfully argue against a violation of section 15, the claimant's situation must adequately conform to this list or face the added challenge of convincing the court their situation is an analogous ground.[150] The appropriate section 15 test has two parts: "the first stage of the s. 15 test is about establishing that the law imposes differential treatment based *on protected grounds*, either explicitly or through adverse impact. At the second stage, the Court asks whether it has the effect of reinforcing, perpetuating, or exacerbating disadvantage."[151] The recurring problem with the first stage is that it fails to consider that the claimant's identity can sit at the intersection of multiple protected grounds under section 15. Sometimes the section 15 test easily resolves the claimant's problem. For example, in *Andrews*,[152] the claimant faced discrimination on one single axis; his British citizenship prevented him from obtaining

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[147] *Supra* note 7 at 151.
[148] Margot Young, "Social Justice and the Charter: Comparison and Choice" (2013) 50:3 *Osgoode Hall LJ* "Social Justice and the Charter" at 676.
[149] Supra note 4, at page 112 (emphasis added).
[150] Section 15 of the *Charter* states: "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*" [emphasis added to enumerated list of categories of discrimination].
[151] *Frasier v. Canada (Attorney General)*, 2020 SCC 28 at para 81 [emphasis added].
[152] *Andrews v. Law Society of British Columbia* [1989] 1 SCR 143.

professional equivalency in Canada. This was easily resolved through the use of comparator groups. However, when discrimination occurs along multiple axes the comparator group approach is ill-equipped to evaluate and address the complexity of the problem.

While Canadian courts acknowledge that discrimination occurs on multiple axes, they have difficulty analyzing discrimination in a way that encompasses the reality of intersecting forms of oppression, a concept noted by an abundance of legal scholars.[153] Jurisprudence is still a long way from integrating a truly intersectional framework for addressing complex discrimination cases. Ten years after *Andrews* in *Law v Canada,* Justice Iacobucci acknowledged that,

> "…it is open to a claimant to articulate a discrimination claim under more than one of the enumerated and analogous grounds ... Where a party brings a discrimination claim on the basis of a newly postulated analogous ground, or on the basis of a combination of different grounds, this part of the discrimination inquiry must focus upon the issue of whether and why a ground or confluence of grounds is analogous to those listed in s.15(1)."[154]

Through statements like this, Diane Pothier recognizes the Supreme Court's recent progress towards accepting indivisible intersecting grounds as the source of a claimant's discrimination; however, "the theoretical possibility of claims on multiple grounds of discrimination does not mean that such claims fit the mindset of what is expected in anti-discrimination law."[155] Because the legal understanding of enumerated grounds of discrimination under section 15 treats them as "separate, distinct, and effectively mutually exclusive," claimants often try to simplify their claim by emphasizing only one ground, disconnecting it from the others.[156] Sheppard and Alyward echo Pothier's argument that this method requires claimants to make the strategic choice of isolating one aspect of their identity as the dominant explanation for discriminatory treatment.[157] Similarly, Baines states, "The Court is mired in categorical analysis, forcing litigants to choose among the personal characteristics that have led to their unequal treatment."[158] The *Ontario Human Rights Commission* laments

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[153] Alyward (2010) at page 28; Baines (2005) at 65; Froc (2015) at 401; Sheppard (2001) at page 911; Young (2013) at 682.
[154] *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at para 93.
[155] Diane Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 *CJWL*, 37-73 at 58.
[156] *Ibid* at 59.
[157] *Supra* note 8 at 911. *Supra* note 6 at 15.
[158] *Supra* note 61 at 65.

the cases that have "fallen through the cracks," insofar as courts and claimants will eschew the more difficult element to prove, "preferring the least problematic categorization available."[159]

This inability to interrogate complex discrimination cases holistically is evident in the earlier *Hak v. Procureur Général* case asking for an injunction, when Justice Mainville states, "En somme, *les appelants ne font plus le débat des signes religieux*. Ils limitent le débat portant sur l'article 28 au foulard islamique et au voile intégral…une forme de discrimination à l'égard des femmes."[160] To focus the debate exclusively on women's equality and ignore the freedom of religion issue means an important instance of discrimination is being ignored. Rather, the discrimination the appellants are fighting is a particular experience of inequality that combines being a Muslim with being a woman, and in many cases the additional burden of being racialized or a newcomer. Justice L'Heureux-Dubé, writing for the minority in *Canada (Attorney General) v Mossop*, notes,

> "…categories of discrimination may overlap ... individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex. Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals."[161]

Justice L'Heureux-Dubé's reasoning gets close to asserting the need of an intersectional approach; yet, this is a dissenting opinion, illustrating the lack of an unambiguous commitment to creating a framework capable of properly categorizing discrimination cases where the categories overlap.

It is a positive sign that, as the *Ontario Human Rights Commission* points out, the addition of a new analogous ground in *Corbiere v. Canada*[162] "is an important first step in acknowledging that grounds are not rigid, watertight compartments and in signaling

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[159] "An Intersectional Approach to Discrimination" Discussion paper for the *Ontario Human Rights Commission* (2001) at 8.
[160] *Supra* note 16 at para 123 [emphasis added].
[161] *Canada (Attorney General) v Mossop,* [1993] 1 SCR 554 at 645-46.
[162] In *Corbiere*, the Court evaluated a provision of the Indian Act barring band members from voting in band elections if they did not live on the reserve. The Court created a new analogous ground of "Aboriginal residency" in response.

a move towards an intersectional and contextual approach."[163] However, the *Commission* also notes the need to go beyond this first step and recommends centralizing the duty to accommodate within standards for "persons who present with complex identities."[164] Requiring respondents to provide individual accommodation that is grounded in a contextual approach to the lived reality of the claimant would begin to address the unique experience of discrimination across multiple axes. If the duty to accommodate is combined with a unanimous shift in the Court's approach from a single-ground perspective to a foundation that conceives an individual's intersectional identity as linked to multiple grounds of discrimination, with subsequent analysis grounded in contextual factors, the Court might finally successfully implement an intersectional framework to discrimination cases.

If the failure to incorporate intersectional analysis is maintained by a rigid understanding of the enumerated grounds in section 15, what role does section 28 have to play? Baines envisions a marriage between the two sections that together "reach an outcome neither could achieve alone."[165] Although skeptical that the Court is willing to move beyond separate categorical analysis, Baines suggests intersectional claims could be feasibly advocated "by combining section 15(1) grounds other than sex with the promise of equality in section 28."[166] If section 28 can enhance the protection of equality rights in section 15, as Ad Hoc envisioned, it might also open the door to a recognition of intersecting discrimination claims, albeit limited to ones that encompass sex-based inequalities. In addition to creating an entry point for intersectional analysis, Baines points out that taking section 28 gender equality in tandem with a section 15 equality right "would address the association between these sections, revealing that neither section need be condemned as redundant in spite of the other's existence."[167]

Canada's Supreme Court has, as Alyward writes, "opened the door a crack to allow for the development of a proper Intersectional discrimination analysis … It is up to those appearing before the courts on behalf of all women to enlarge the crack by refining and defining intersectional analysis. In this endeavour LEAF has more than a minimal role to play."[168] Alyward's challenge is taken up by those currently

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[163] "An Intersectional Approach to Discrimination." Discussion paper for the *Ontario Human Rights Commission* (2001) at 18.
[164] *Ibid* at 25.
[165] *Supra* note 61 at 66.
[166] *Ibid.*
[167] *Ibid* at 67.
[168] *Supra* note 6 at 48.

appealing Law 21 at the Quebec Court of Appeal, notably in LEAF's intervening factum, the conclusion of which states,

> "L'approche intersectionnelle doit ainsi guider l'analyse que la Cour entreprend sur la portée de l'article 28. Autrement, l'on risquerait de mettre en œuvre une protection qui n'est pas inclusive et donc incomplète, en ce qu'elle autoriserait un législateur à adopter une loi d'on l'effet réel est de compromettre les droits et libertés de groupes minoritaires d'un sexe."[169]

The issues raised in *Hak* touch on multiculturalism, freedom of religion, and gender equality. The people affected by Law 21 are not just discriminated against because they are Muslim, their identities expose them to overlapping axes of discrimination on the basis of their religion, gender, and possibly race. The intersectionality of Law 21's discriminatory effect must be recognized by the court. By focusing the appeal on section 28 rather than section 15, the claimants not only circumvent the Quebec Government's use of the notwithstanding clause, they can also emphasize the intersectional nature of this case by not having to be restricted to comparator group analysis. Should this case reach the Supreme Court, as it is expected to, the justices will be tasked with laying out a test such that section 28's independent gender equality provision can finally be operationalized. That section 28 test could mark the beginning of an intersectional approach to gender equality cases in Canadian courts.

Conclusion

Kerri Froc, Canada's leading legal scholar on section 28, has referred to the provision's potential as a "big bang" needed to fill the void,[170] as well as an "untapped power" to transform *Charter* analysis and realize the promise of true gender equality in Canada.[171] Indeed, the argument put forth by those currently fighting Law 21 at the Quebec Court of Appeal suggests that section 28 might succeed in securing gender equality where the more commonly-relied on section 15 has failed. While legislative history and intent are not determinative of constitutional interpretation, a thorough understanding of the Ad Hoc Feminists' role in *Charter* negotiations shows that there is reason to hope for an alternative vision of how the *Charter* speaks to gender equality in Canada. The exclusion of women from the public sphere and the denial of the full benefits of citizenship has taken many forms in Canadian legal history. The post-9/11 orientalist discourse that positions Muslims as a pervasive threat to social order, while

[169] *Supra* note 3 at 23.
[170] *Supra* note 62 at 21.
[171] *Ibid* at 491.

simultaneously positioning Muslim women as in need of saving, is a neo-colonial legacy Canada would do well to shed.

Addendum

In the final stages of preparing this article, the Quebec Court of Appeal released its judgment in *Organisation mondiale sikhe du Canada c. Procureur général du Québec*, in which the original plaintiff Ichrak Nourel Hak is an impleaded party and LEAF is an intervenor.[172] The appellate court upheld Law 21 in a decision that has already garnered significant attention. The Court ruled that the law does not violate Canada's constitutional structure or principles and significantly engaged with the appellants' section 28 argument.[173] Justices Manon Savard, Yves-Marie Morrissette and Marie-France Bich determined that section 28 does not independently guarantee a right to gender equality because it is merely interpretive,

> Section 28 does not create a standalone right to sexual equality. It serves an interpretative purpose and is one of the elements that must be considered when courts examine the meaning, scope and application of ss. 2 to 23 of the Canadian Charter … Consequently, insofar as s. 33 of the Canadian Charter allows legislatures to override ss. 2 and 7 to 15, it also allows them to override the effect of s. 28 … Section 28 cannot defeat s. 33 … The Act cannot be invalidated, in whole or in part, on the ground that it violates s. 28.""[174]

While this certainly has implications for the topic of this article, upon careful examination, the Court of Appeal's decision does not alter the core arguments presented herein.

Before the judgement was released, all parties involved expressed that they were prepared to take this case to the highest judicial body. On March 1, 2024, the Canadian Civil Liberties Association, the English Montreal School Board, and the World Sikh Organization of Canada, declared their intent to pursue an appeal at the Supreme Court.[175] Within an hour of the judgment the federal government signalled its

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[172] *Organisation mondiale sikhe du Canada c. Procureur général du Québec*, 2024 QCCA 254.
[173] *Ibid* at paras 148, 174-175, 182, 211.
[174] *Ibid* at paras 505-506.
[175] Frédérik-Xavier Duhamel, "Quebec's Appeal Court upholds Bill 21, which bans public officials from wearing religious symbols." March 2024, online: the Globe and Mail <https://www.theglobeandmail.com/canada/article-quebecs-appeal-court-upholds-bill-21-which-bans-public-officials-from/>,

willingness to also take part. The Honourable Arif Virani, Minister of Justice and Attorney General of Canada, issued the following statement,

> "I expect the parties will seek leave to appeal to the Supreme Court of Canada. If leave is granted, it becomes, by definition, a national issue. Our government will be there to defend the Charter before the Supreme Court of Canada. This case touches on fundamental freedoms and rights and the interpretation and application of the Charter. We are firmly committed to engage in these important national discussions that have broad implications for all Canadians."[176]

This aligns with my assertion that the crucial ruling on Law 21 will come from Canada's highest judicial authority. The Supreme Court will not only consider the constitutionality of a secularism law that functions to exclude Muslim women from Quebec society, it will also necessarily comment on the Quebec Court of Appeal's determination that section 28 is merely interpretive. Thus, the Supreme Court's analysis will advance jurisprudence concerning section 28 and determine how individuals and groups seeking gender equality will use it in the future. Regardless of the outcome, the four decades of section 28's marginalization are coming to an end. I look forward to the broader legal significance of the issues outlined in this article being determined by the Supreme Court.

[176] Department of Justice Canada, "Statement by Minister Virani on the Quebec Court of Appeal's decision in Hak et al. v. Attorney General of Québec." February 29, 2024, online: Government of Canada <https://www.canada.ca/en/department-justice/news/2024/02/statement-by-minister-virani-on-the-quebec-court-of-appeals-decision-in-hak-et-al-v-attorney-general-of-quebec.html>.