

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

B E T W E E N:

**ENGLISH MONTREAL SCHOOL BOARD,
MUBEENAH MUGHAL, and PIETRO MERCURI**

APPELLANTS
(Respondents on Cross-Appeal)

– and –

**ATTORNEY GENERAL OF QUEBEC,
JEAN-FRANÇOIS ROBERGE, in his official capacity, and
SIMON JOLIN-BARRETTE, in his official capacity**

RESPONDENTS
(Appellants on Cross-Appeal)

– and –

**MOUVEMENT LAÏQUE QUÉBÉCOIS and
FRANÇOIS PARADIS, in his official capacity**

RESPONDENTS

(Style of cause continued on next page)

**AMENDED FACTUM OF THE INTERVENER,
MUSLIM ADVISORY COUNCIL OF CANADA**

(Pursuant to Rules 37 and 42 of the Rules of the Supreme Court of Canada)

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(Style of cause continued)

AND BETWEEN:

**WORLD SIKH ORGANIZATION OF CANADA and
AMRIT KAUR**

APPELLANTS
(Respondents on Cross-Appeal)

– and –

ATTORNEY GENERAL OF QUEBEC

RESPONDENT
(Appellant on Cross-Appeal)

AND BETWEEN:

**ICHRAK NOUREL HAK,
NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM), and
CANADIAN CIVIL LIBERTIES ASSOCIATION**

APPELLANTS
(Respondents on Cross-Appeal)

– and –

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SIMON JOLIN-BARRETTE, in his official capacity**

RESPONDENTS
(Appellants on Cross-Appeal)

– and –

**FRANÇOIS PARADIS, in his official capacity,
MOUVEMENT LAÏQUE QUÉBÉCOIS, and
POUR LES DROITS DES FEMMES DU QUÉBÉC**

RESPONDENTS

AND BETWEEN:

FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT

APPELLANT
(Respondent on Cross-Appeal)

– and –

**ATTORNEY GENERAL OF QUEBEC,
JEAN-FRANÇOIS ROBERGE, in his official capacity, and
SIMON JOLIN-BARRETTE, in his official capacity**

RESPONDENTS
(Appellant on Cross-Appeal)

AND BETWEEN:

**ANDRÉA LAUZON, HAKIMA DADOUCHE, BOUCHERA CHELBI, and
LEGAL COMMITTEE OF THE COALITION INCLUSION QUÉBEC**

APPELLANTS
(Respondents on Cross-Appeal)

– and –

ATTORNEY GENERAL OF QUEBEC

RESPONDENT
(Appellant on Cross-Appeal)

AND BETWEEN:

LORD READING LAW SOCIETY

APPELLANT
(Respondent on Cross-Appeal)

– and –

ATTORNEY GENERAL OF QUEBEC

RESPONDENT
(Appellant on Cross-Appeal)

– and –

QUÉBEC COMMUNITY GROUPS NETWORK, ICHRAK NOUREL HAK, NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM), CANADIAN CIVIL LIBERTIES ASSOCIATION, FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT, ANDRÉA LAUZON, HAKIMA DADOUCHE, BOUCHERA CHELBI, LEGAL COMMITTEE OF THE COALITION INCLUSION QUÉBEC, CANADIAN HUMAN RIGHTS COMMISSION, LORD READING LAW SOCIETY, WORLD SIKH ORGANIZATION OF CANADA, AMRIT KAUR, PUBLIC SERVICE ALLIANCE OF CANADA (PSAC), CHRISTIAN LEGAL FELLOWSHIP, QUEBEC ENGLISH SCHOOL BOARDS ASSOCIATION, WOMEN'S LEGAL EDUCATION AND ACTION FUND, POUR LES DROITS DES FEMMES DU QUÉBEC, MOUVEMENT LAÏQUE QUÉBÉCOIS, ENGLISH MONTREAL SCHOOL BOARD, MUBEENAH MUGHAL, PIETRO MERCURI, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY

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PART I - OVERVIEW

1. The intervener, Muslim Advisory Council of Canada (“**MACC**”), only makes submissions on the first question raised by the English Montreal School Board et al.: Does section 28 of the *Charter* contain a substantive guarantee that can affect the use of section 33?

2. The answer is yes for three reasons:
 - (a) **Section 28 Supersedes *Charter* Shields:** Section 28 makes gender equality absolute, superseding all shields. There are three shields in the *Charter*: sections 1, 25, and 33. Courts have held that section 28 supersedes the first two. The drafting history shows that section 28 was expressly carved out of the third. This suggests that section 28 creates a substantive right: legislatures can never disproportionately deny rights in a manner that affects one gender more than another.

 - (b) **Section 28 Affects Other *Charter* Rights:** Courts have used section 28 to change the scope of other rights – a substantive effect consistent with the substantive right proposed above. In this case, applying that proposed substantive right to section 3 raises a concern with Bill 21.

 - (c) **Gender Equality is Unique:** The drafters intended to prioritize gender equality over other forms of equality. This is justified. Gender is the most pervasive marker of identity. Other forms of equality are characterized by the need to protect minorities. Gender equality is different because women are a majority and gender equality also protects men. Everyone benefits from gender equality – not just minorities. This justifies giving effect to the drafters’ intention to prioritize gender equality, which requires a substantive interpretation of section 28.

PART II - POSITION ON APPELLANTS' QUESTIONS

3. MACC takes no position on the outcome of this appeal, or on any of the other questions raised by the appellants.

PART III - ARGUMENT

A. Section 28 Enshrines Absolute Equality of the Sexes, Superseding All Shields

4. Section 28 is absolute. As explained below, the text is absolute. Hansard supports this. There are three shields in the *Charter*: sections 1, 25, and 33. Courts have held that section 28 supersedes the first two. The drafting history shows that section 28 was expressly carved out of the third. To be absolute, it must have a substantive effect independent of other rights.

5. Section 28 states that it applies “notwithstanding anything in this Charter”. The French text says « indépendamment des autres dispositions de la présente charte ». This language – unique in the *Charter* – indicates that the protections in this section were supposed to both be absolute and have an effect independent of other rights.

6. This conclusion is expressly confirmed in Hansard. Jean Chrétien, then the Minister of Justice, announced the amendment that would create section 28 by explaining that after section 15 had been created, women’s groups:

kept on making representations to emphasize their eagerness to have **absolute equality of the sexes enshrined**, ... and we have been glad to allow the New Democratic Party to propose this amendment. ... this party will gladly vote tomorrow in favour of this NDP amendment which will ensure equal status to women, as requested by many pressure groups.¹

7. That conclusion is also reinforced by the fact that section 28 supersedes sections 1 and 25 of the *Charter*, and was expressly carved out of section 33 of the *Charter*.

¹ *House of Commons Debates*, [32nd Parl, 1st Sess, Vol 9](#) (22 April 1981) at [9399](#) (Jean Chrétien) (emphasis added).

(i) Section 28 Supersedes the Shield in Section 25

8. Section 25 of the *Charter* can operate as a shield against breaches of *Charter* rights.² But this Court has held that section 28 supersedes that shield. In *Kapp*, this Court held:

Is this shield absolute? Obviously not. First, it is restricted by s. 28 of the *Charter* which provides for gender equality “[n]otwithstanding anything in this Charter”.³

9. Similarly, in *Dickson*, this Court held:

Even when s. 25 would otherwise prioritize an Aboriginal, treaty, or other right, there may be other relevant limitations on the application and effect of s. 25. Examples include s. 28 of the *Charter* ... These provisions ... ensure that a right protected under s. 25 does not shelter gender-based discrimination.⁴

10. Section 25 can be used to deprive people of *Charter* rights, but it can never be used to disproportionately deny rights in a manner that affects one gender more than another. Section 28 provides “absolute equality” in the sense that it supersedes this shield.

(ii) Section 28 Supersedes the Shield in Section 1

11. Section 1 can also operate as a shield against breaches of *Charter* rights. But section 28 supersedes that shield. For example, in *Howell*, the Supreme Court of Newfoundland & Labrador found a breach of section 15. In response to an argument under section 1, the court held: “Section 28, however, overrides s. 1 and guarantees equal rights to male and female persons.”⁵

² *Dickson v Vuntut Gwitchin First Nation*, [2024 SCC 10](#) at paras [155-159](#), [164-165](#); *R v Kapp*, [2008 SCC 41](#) at paras [80-81](#), [89](#), [93-94](#), [96](#).

³ *R v Kapp*, [2008 SCC 41](#) at para [97](#).

⁴ *Dickson v Vuntut Gwitchin First Nation*, [2024 SCC 10](#) at para [173](#).

⁵ *R v Howell* (1986), [26 CCC \(3d\) 104](#) (NL SC) at p 110.

12. In *Reference Re Family Benefits Act*, the Nova Scotia Court of Appeal quoted with approval this extra-judicial writing of a justice of the Court of Appeal for Ontario:

Based upon past experience, there was fear either that the legislatures through s. 33 might, on the one hand, exempt a law discriminating against women from the ambit of the Charter, or, on the other hand, that the courts might, through the 'limitations' clause in s. 1, so construe a law which discriminates against women as to consider it such a reasonable limit 'as can be demonstrably justified in a free and democratic society'. Therefore, the purpose of s. 28 is clear.⁶

13. The court further quoted with approval an article stating, “[g]iven s. 28, it will almost never be demonstrably justifiable to deny sexual equality as provided by section 15(1).”⁷

14. While there has been limited jurisprudence on this point, these authorities suggest that – like section 25 – section 1 can be used to deprive people of rights, but it can never be used to disproportionately deny rights in a manner that affects one gender more than another. In other words, section 28 creates “absolute equality” because it supersedes this and other *Charter* shields.

(iii) Section 28 was Expressly Carved Out of Section 33

15. The English Montreal School Board has described at length the history that section 33, as initially drafted, was able to override section 28, but after a public outcry, section 28 was expressly carved out of section 33.⁸ Two additional points from the debates on section 28 confirm that this change was intended to make the protection for gender equality absolute.

16. First, the leader of the NDP explained that even the possibility of overriding gender equality was offensive and undermined the society that the drafters were attempting to build:

⁶ *Reference Re Family Benefits Act (NS)*, Section 5 (1986) [75 NSR \(2d\) 338](#) (CA) at p 352.

⁷ *Reference Re Family Benefits Act (NS)*, Section 5 (1986) [75 NSR \(2d\) 338](#) (CA) at p 353.

⁸ Factum of English Montreal School Board et al. at paras 18-38.

would we want children anywhere in Canada to read a document which says, “Men and women are equal except when a group of politicians say they are not”? ... It is neither good for young boys nor for young girls. ... We find that totally offensive in this year of 1981. ... We must restore the original positive wording of Section 28 which ensures the **paramountcy of the principle that men and women are equal**.⁹

17. Second, some legislators indicated that unless gender equality was to be guaranteed without limitations, section 28 or even the entire *Charter* might not be approved.¹⁰

18. This drafting history suggests that – like sections 25 and 1 – while section 33 can be used to deprive people of rights, it can never be used to disproportionately deny rights in a manner that affects one gender more than another.¹¹

B. Section 28 Substantively Affects Other Rights

(i) Section 28 Creates and Changes Rights

19. In order to give effect to the absolute protection in section 28, courts have created new rights, or expanded or narrowed the scope of other rights. These are substantive effects and affirm section 28’s status as a substantive provision, rather than a merely interpretive one.

20. In *Osolin*, this Court considered the appropriate limits on cross-examination of a sexual assault claimant. This Court recognized that “99 percent of the offenders in sexual assault cases are men and 90 percent of the victims are women”. Given those statistics, section 28 required that a “complainant should not be unduly harassed and pilloried to the extent of becoming a victim of

⁹ *House of Commons Debates*, [32nd Parl, 1st Sess, Vol 12](#) (20 November 1981) at [13055-13056](#) (Ed Broadbent) (emphasis added).

¹⁰ *House of Commons Debates*, [32nd Parl, 1st Sess, Vol 12](#) (23 November 1981) at [13114](#) (John Bosley: “it is critical that Section 28 apply without limitations ... without that change at least some will argue that the resolution will not deserve our support”); [13130](#) (Pauline Jewett: “Not a single member of this House ... should support Section 28 if this override remains in it”).

¹¹ The Superior Court of Québec appears to have endorsed this conclusion, albeit in *obiter*: *Syndicat de la fonction publique du Québec inc c Québec (Procureur general)*, [2004 CanLII 76338](#) (QC SC) at paras [1429-1430](#).

an insensitive judicial system”.¹² In effect, the court used section 28 to create a new right – sexual assault claimants will not be unduly harassed, pilloried, or victimized by the judicial system – and then narrowed the protections of sections 7 and 11(d) of the *Charter* to account for this right.

21. In *Red Hot Video*, the British Columbia Court of Appeal considered Parliament’s power to ban pornography. Justice Anderson held that due to section 28, section 2(b) of the *Charter* could not protect “exposure to male audiences of the violent and degrading material” that “has a tendency to make men more tolerant of violence to women and creates a social climate encouraging men to act in a callous and discriminatory way towards women.” In effect, the court used section 28 to narrow the scope of section 2(b) to advance “true equality between male and female persons”.¹³

22. Absolute protection for gender equality in section 28 has also been used to find legislation unconstitutional. In *P*, the accused was indicted for having intercourse with his foster daughter. The Supreme Court of British Columbia relied primarily on section 28 to quash the indictment on the basis that a woman would only be liable for an offence with lower punishments for intercourse with their foster son.¹⁴ In this analysis, section 28 provided more protection for gender equality what would have been provided by section 15. There was undisputed evidence that girls were more likely to be at risk of abuse than boys.¹⁵ Given that, failure to protect sons as much as daughters may not perpetuate disadvantage under the second step of the section 15(1) test. Furthermore, protecting daughters from abuse more than sons might be saved by section 15(2). In short, section 15 would not have been sufficient to invalidate the provision. However, given its broader scope, section 28 created an absolute right that does not exist under section 15.

¹² *R v Osolin*, [1993] 4 SCR 595 at p 669.

¹³ *R v Red Hot Video Ltd*, 1985 CanLII 633 (BC CA), Anderson JA (concurring) at paras 49-51.

¹⁴ *R v P*, 1988 CanLII 3345 (BC SC) at paras 1-3, 13-17.

¹⁵ *R v P*, 1988 CanLII 3345 (BC SC) at para 14.

(ii) Section 28 Affects the Interpretation of Section 3

23. The analysis above shows that section 28 enshrines absolute, substantive gender equality that supersedes all shields embedded within the *Charter*. Specifically, section 28 guarantees that rights cannot be disproportionately denied in a manner that affects one gender more than another. Courts can invoke section 28 to create, expand, and narrow other *Charter* rights to ensure gender equality. Section 3 is one such *Charter* right.

24. Section 3 guarantees the right to “effective representation,”¹⁶ which includes rights to “play a meaningful role in the electoral process,”¹⁷ to have “a reasonable opportunity to present their positions,”¹⁸ to not be subject to any measures “decreasing the capacity of members and supporters of disadvantaged parties to introduce ideas and opinions into the open dialogue and debate that the electoral process engenders,”¹⁹ and to not be subject to any measures that “enhance the imbalance on an already tilted playing field.”²⁰

25. Bill 21 imposes barriers, amongst others, on women who wear a hijab, niqab, or burqa (Islamic head coverings) from accessing their democratic rights under section 3 of the *Charter*.

26. Because of their religious beliefs and practices, women who wear a hijab, niqab, or burqa are already viewed with suspicion by a largely secular society. They may also be viewed unfavourably by their own religious community because of their gender. More than two thirds of Muslim women in Québec have been a victim of or witness to a hate crime; and more than half have been subjected to racial or religious slurs. Moreover, almost half of Muslim women in Québec

¹⁶ *Figuroa v Canada (Attorney General)*, [2003 SCC 37](#) at paras [19](#), [21](#).

¹⁷ *Figuroa v Canada (Attorney General)*, [2003 SCC 37](#) at paras [25-30](#).

¹⁸ *Libman v Quebec (Attorney General)*, [\[1997\] 3 SCR 569](#) at para [47](#).

¹⁹ *Figuroa v Canada (Attorney General)*, [2003 SCC 37](#) at para [53](#).

²⁰ *Longley v Canada (Attorney General)*, [2007 ONCA 852](#) at paras [41-44](#), leave to appeal ref'd [2008 CanLII 18947](#) (SCC).

have been unfairly treated by a person in a position of authority due to their gender and/or racial or religious identity.²¹ The democratic playing field is tilted against them.

27. Bill 21 further tilts the playing field against Muslim women in Québec by:

- (a) Prohibiting them from sitting in the National Assembly;²²
- (b) Prohibiting them from taking on virtually all roles that an aspiring politician may pursue to build credibility and a record of public service. Those roles include being justices of the peace; clerks or deputy clerks; sheriffs or deputy sheriffs; commissioners; ministers; prosecutors or lawyers for regulators, commissions, or ministries; peace officers; principals or vice principals; teachers or other employees of school boards, childcare centres, or private schools; employees of government departments, government agencies, budget-funded bodies municipalities, or public transit authorities; and physicians, dentists, midwives at hospitals, or other employees of health and social services;²³ and
- (c) Stigmatizing their choice to wear a hijab, niqab, or burqa. Bill 21 declares that its rules are important to recognize the “paramountcy” of laicity to “Québec’s legal order” and to promote “the equality of women and men”.²⁴ This declaration brands women who wear a hijab as inherently antagonistic to the law and gender equality.

28. These measures make it harder, if not impossible, for women who wear a hijab, niqab, or burqa to be taken seriously as candidates for public office, or when presenting their positions.

²¹ Association for Canadian Studies, “[Law 21: Discourse, Perceptions & Impacts](#)” at pp 52-56.

²² *An Act respecting the laicity of the State*, [SQ 2019, c 12](#), art 7, Schedule III(1).

²³ *An Act respecting the laicity of the State*, [SQ 2019, c 12](#), arts 6, 8, Schedule I, Schedule III.

²⁴ *An Act respecting the laicity of the State*, [SQ 2019, c 12](#), Preamble.

Indeed, due to Bill 21, more than 60% of all Muslim women in Québec (not just those who wear a hijab, niqab, or burqa) are less willing to participate in political life. Additionally, more than half of all Muslim women in Québec are less willing to express themselves in public.²⁵ This is an indirect means of preventing women who wear a hijab, niqab, or burqa from playing a meaningful role in the electoral process, and consequently exercising their section 3 rights. Equally religious Muslim men do not face the same barriers. In that way, Bill 21 violates section 3 rights in a manner that affects women more than men.²⁶ Section 28 prohibits precisely this type of disproportionate denial of rights in a manner that affects one gender more than another.

C. Gender Equality is Unique and Merits Substantive Treatment Under s. 28

29. The only way to give full effect to the intention of the drafters of the *Charter* to prioritize gender over other forms of equality is for section 28 to be interpreted as giving rise to a substantive right – a prohibition on disproportionately denying rights in a manner that affects one gender more than another – which supersedes all shields in the *Charter*, including section 33. There are good reasons for prioritizing gender over other forms of equality.

30. Women comprise more than half of the Canadian population.²⁷ There are more women than any other group traditionally protected by section 15, such as visible minorities (<27%²⁸), people with a disability (<27%²⁹), or people professing a religion other than Christianity (<13%³⁰).

²⁵ Association for Canadian Studies, “[Law 21: Discourse, Perceptions & Impacts](#)” at pp 58-60.

²⁶ MACC limits its argument to Muslim women because the Superior Court found that they were the targets of the law and those affected « d’abord et avant tout »: *Hak c Procureur general du Québec*, [2021 QCCS 1466](#) at paras [803-807](#), [876](#). However, parts of Bill 21 also affect Sikh and Jewish men in a similar manner. In theory, those groups could argue they are denied section 3 rights more than Sikh and Jewish women, respectively, raising a similar concern under section 28.

²⁷ Statistics Canada, [98-10-0027-01](#).

²⁸ Statistics Canada, [98-316-X2021001](#).

²⁹ Statistics Canada, [13-10-0374-01](#).

³⁰ Statistics Canada, [98-316-X2021001](#). This figure excludes people who profess no religion.

31. Additionally, gender equality protects men as much as women. Discrimination against men can give rise to a breach of sections 15 and 28.³¹ The same protections apply to individuals with diverse gender identities. As such, virtually the entire population is protected. That is different from any other type of equality, which at most protects a fraction of the population.

32. Perhaps due to its ubiquity as a marker of identity, gender is used routinely in daily life, from bathrooms to sports teams to clothes. Studies show that all groups consider gender more salient than other forms of diversity, like race.³²

33. The analysis above helps explain why the drafters of the *Charter* decided to prioritize gender equality over other types of equality by adding section 28, and supports the interpretation that section 28 creates a substantive right beyond the protections in section 15.

PARTS IV-VI - COSTS, ORDER, AND CONFIDENTIALITY

34. MACC requests no costs and asks that no costs be awarded against it. MACC makes no submissions on the rest of the order or on confidentiality.

Dated at Toronto this 15th day of September, 2025.

³¹ *R v Hess*; *R v Nguyen*, [1990] 2 SCR 906, Wilson J at p 928, Sopinka J at p 936, McLachlin J (dissenting) at 943-944; *R v ML2*, 1998 CanLII 18142 (AB QB) at paras 48, 61-62, 74.

³² Leoandra Onnie Rogers & Andrew N Meltzoff, “Is Gender More Important and Meaningful Than Race? An Analysis of Racial and Gender Identity Among Black, White, and Mixed-Race Children” (2017) [23:3 Cultural Diversity and Ethnic Minority Psychology 323](#) at 329-330.

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PART VII - AUTHORITIES

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