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## Ishaq v Canada: “Social Science Facts” in Feminist Interventions

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[See table of contents](#)

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Article abstract

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## ***Ishaq v Canada: “Social Science Facts” in Feminist Interventions***

**Dana Phillips\***

*This article examines the role of social science in feminist intervener advocacy, focusing on the 2015 case of Ishaq v Canada (Minister of Citizenship and Immigration). In Ishaq, a Muslim woman challenged a Canadian government policy requiring her to remove her niqab while reciting the citizenship oath. The Federal Court of Appeal dismissed several motions for intervention by feminist and other equality-seeking organizations, emphasizing their improper reliance on unproven social facts and social science research. I argue that this decision departs from the generous approach to public interest interventions sanctioned by the federal and other Canadian courts. More importantly, the Court’s characterization of the intervener submissions as relying on “social science facts” that must be established through the evidentiary record diminishes the capacity of feminist interveners to effectively support equality and access to justice for marginalized groups in practice.*

*Dans cet article, j’examine le rôle des sciences sociales en ce qui a trait à la défense des intérêts des organisations intervenantes féministes, notamment au regard de la décision rendue en 2015 dans l’affaire Ishaq c. Canada (Ministre de la Citoyenneté et de l’Immigration). Dans cette affaire, une femme musulmane a contesté une politique du gouvernement fédéral qui l’obligeait à retirer son niqab pendant qu’elle prêtait le serment de citoyenneté. La Cour d’appel fédérale a rejeté plusieurs requêtes en intervention présentées par des organisations féministes et d’autres organisations qui revendiquent l’égalité, reprochant à celles-ci de se fonder à tort sur des faits sociaux et des données de recherches en sciences sociales qui n’avaient pas été établis. Je soutiens que cette décision s’éloigne de l’approche généreuse approuvée par les tribunaux fédéraux et d’autres tribunaux canadiens à l’égard des interventions au nom de l’intérêt public. Surtout, en dépeignant leurs observations comme des observations fondées sur des « faits relevant des sciences sociales » qui doivent être établis au moyen du dossier de preuves, la Cour diminue la capacité des organisations intervenantes féministes de soutenir réellement l’égalité et l’accès à la justice pour les groupes marginalisés.*

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## I. INTRODUCTION

Feminist advocates have played a significant role in Canadian public interest litigation, especially under the *Canadian Charter of Rights and Freedoms* [*Charter*].<sup>1</sup> Often, the cases in which they participate raise complex questions of social and legislative fact,<sup>2</sup> inviting the introduction of social science research into the courtroom.<sup>3</sup> While not without dangers,<sup>4</sup> social science research offers a powerful tool for feminist and other equality-seeking advocates trying to illustrate systemic and intersectional dimensions of discrimination that are not well understood. At the same time, the burden of leading social science evidence can prove onerous in practice, thwarting access to justice for marginalized groups.<sup>5</sup> Feminist legal scholars have reflected at length on the promises and pitfalls of litigating under the *Charter* (and otherwise),<sup>6</sup> and on the value of social science research as a tool for feminist advocacy.<sup>7</sup> In this paper, I examine the role of social and legislative facts, and social science research, in feminist interventions in public interest litigation, focusing on the 2015 case of *Ishaq v Canada (Minister of Citizenship and Immigration)* [*Ishaq*].<sup>8</sup> My analysis is informed by interviews with two individuals involved in the case.

The *Ishaq* case marks an important moment in the ongoing controversy over women's practices of veiling in Canadian public life. In *Ishaq*, a Pakistani Muslim woman on the cusp of becoming a Canadian citizen challenged a federal government policy requiring her to remove her facial covering while reciting the citizenship oath.<sup>9</sup> Justice Stratas of the Federal Court of Appeal dismissed six motions for intervention by seven organizations, including several with feminist mandates. Relying on the revised test for intervention he had set out in the recent case of *Canada (Attorney General) v Pictou Landing First Nation* [*Pictou*],<sup>10</sup> he found that none of the organizations had established that they would "advance different and valuable insights and perspectives that will actually further the Court's determination of the matter."<sup>11</sup>

<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. FL Morton & Avril Allen, "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada" (2001) 34:1 Can J Political Science 55 at 56.

<sup>2</sup> Regarding my use of the terms "social" and "legislative" fact, see *infra* note 83.

<sup>3</sup> See e.g. *Canada (AG) v Bedford*, 2013 SCC 72 [*Bedford*]; *Tanudjaja v Canada (AG)*, 2014 ONCA 852; *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588.

<sup>4</sup> See e.g. Kristin Bumiller, "The Nexus of Domestic Violence Reform and Social Science: From Instrument of Social Change to Institutionalized Surveillance" (2010) 6 Ann Rev Law Soc Sci 173 (on how social scientists have uncritically followed feminist anti-violence agendas down an instrumental, criminal law-oriented path); Graham Mayeda, "Taking Notice of Equality: Judicial Notice and Expert Evidence in Trials Involving Equality Seeking Groups" (2008) 6 JL & Equal 201 (noting the gaps and biases in social science research).

<sup>5</sup> Mayeda, *ibid* at 204; Christine Boyle & Marilyn MacCrimmon, "To Serve the Cause of Justice: Disciplining Fact Determination" (2001) 20 Windsor YB Access Just 55 at 67.

<sup>6</sup> See e.g. Radha Jhappan, ed, *Women's Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002); Sherene Razack, *Canadian Feminism & the Law*, 1st ed (Toronto: Canadian Scholars' Press Inc, 1991).

<sup>7</sup> See e.g. Joan Brockman, "Social Authority, Legal Discourse, and Women's Voices" (1991) 21 Man LJ 213; Bumiller, *supra* note 4; Boyle & MacCrimmon, *supra* note 5.

<sup>8</sup> 2015 FCA 151 [*Ishaq*]. This was a procedural decision dismissing the motions of several interveners. For the related substantive decision, see *infra* note 9.

<sup>9</sup> *Ishaq v Canada (Minister of Citizenship and Immigration)*, 2015 FC 156 [*Ishaq FC*], *aff'd* 2015 FCA 194 [*Ishaq FCA*].

<sup>10</sup> 2014 FCA 21 [*Pictou*].

<sup>11</sup> *Ishaq*, *supra* note 8 at para 29.

Justice Stratas placed particular emphasis on the need to establish social facts through expert evidence before the original trier of fact, rather than via appellate level submissions, as some of the proposed interveners were purportedly trying to do.

In this paper, I argue that Justice Stratas' decision departs from the generous approach to public interest interventions sanctioned by the federal and other Canadian courts. More importantly, his characterization of the intervener submissions as relying on "social science facts"<sup>12</sup> that must be formally established through the evidentiary record diminishes the capacity of feminist (and other) interveners to effectively support equality and access to justice for marginalized groups in practice. Given the extensive time and resources required to lead social science evidence, Justice Stratas' approach would make intervention impractical in most cases, while increasing the burden on individual litigants in the rest. It thereby threatens to disrupt the delicate balance between the individual and systemic dimensions of a case that effective feminist advocacy demands.

In addition to archival and doctrinal research and analysis, this paper draws upon in-depth interviews with two legal advocates involved in the attempted interventions in *Ishaq*. In giving their consent to participate in this research, the interviewees chose not to be identified by name or organization for the purposes of this paper. I thus refer to them anonymously as "X" and "Y". While clearly quite restricted in scope, my selection of interviewees is purposive in that it includes key participants in the attempted interventions under discussion. The interviews are not intended to form an independent basis for the arguments I am advancing, but rather to supplement insights derived from the *Ishaq* archive, case law, and secondary literature. They are particularly helpful in anchoring my reflections on the practical aspects of the *Ishaq* case.

Following this introduction, Part II gives an overview of the background context and proceedings in the *Ishaq* case, with a focus on the attempted interventions and the decision of Justice Stratas. Having thus set the stage, Part III introduces some concepts and concerns at the heart of this paper. Part IV then scrutinizes the legal basis for the decision, examining how it fits with the law around interventions and judicial notice of social and legislative facts in the *Charter* era. Finally, Part V turns to the practical considerations at play in *Ishaq*. Why did the prospective intervener organizations (and why do interveners generally) seek to include social science research in appellate factums rather than as expert evidence at trial? And, how might the Federal Court of Appeal's approach in *Ishaq* affect the dynamics of public interest litigation, and thereby, women's equality? It is in this section that I draw most extensively from my interviews with X and Y. I conclude with some short reflections on the relationship between feminist advocacy inside and outside the courtroom.

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<sup>12</sup> *Ibid* at paras 20-21.

## II. THE *ISHAQ* LITIGATION

### A. Background to the Case

Zunera Ishaq immigrated to Canada from Pakistan in October 2008 on a spousal sponsorship. Determined to become a citizen with the right to vote,<sup>13</sup> she finally received government approval in January 2013.<sup>14</sup> The final step was to attend a citizenship ceremony and recite the oath of citizenship. That would not occur until nearly two years later, following a protracted legal challenge regarding her right to wear the niqab while saying the oath.<sup>15</sup>

The challenge arose in response to a policy introduced by the federal government in December 2011, requiring citizenship candidates to remove facial coverings while taking the oath.<sup>16</sup> Under the new policy, candidates with facial coverings could still meet privately with a female official for the purposes of identification, but were no longer afforded a similar accommodation for the oath-taking itself.<sup>17</sup> According to the government, the new policy sought to ensure that all citizenship candidates actually take the oath, by ensuring an opportunity to see their mouths moving.<sup>18</sup>

As argued by Ms. Ishaq and several of the interveners in the case, the public comments of then Citizenship and Immigration Minister Jason Kenney and then Prime Minister Stephen Harper belied the government's neutral framing of the policy in the litigation context.<sup>19</sup> For instance, in a December 2011 CBC television interview, Kenney publicly opined "that the tribal cultures which force women to cover their faces tend to treat women like property rather than human beings, and I don't think we want to lend the legitimacy of the Canadian state to that kind of practice."<sup>20</sup> Subsequently, in light of the government's decision to appeal the Federal Court ruling in *Ishaq*, Harper said the following in the House of Commons:

It is very easy to understand why we do not allow people to cover their faces during citizenship ceremonies. Why would Canadians, contrary to our own values, embrace a practice at that time that is not transparent, that is not open and frankly is rooted in a culture that is anti-women?<sup>21</sup>

<sup>13</sup> Ms. Ishaq took steps to bring her application as quickly as possible, such as limiting her travel outside Canada at the cost of missing significant family events. *Ishaq FC*, *supra* note 9 (Factum of the Applicant at para 8). The right to vote was particularly important to her. *Ishaq FC*, *supra* note 9 (Factum of the Applicant at para 9).

<sup>14</sup> *Ishaq FC*, *supra* note 9.

<sup>15</sup> "Zunera Ishaq, who challenged ban on niqab, takes citizenship oath wearing it" *CBC News* (10 Oct 2015) online: <<http://www.cbc.ca/news/politics/zunera-ishaq-niqab-ban-citizenship-oath-1.3257762>> ["Zunera"].

<sup>16</sup> The policy was introduced as Operational Bulletin 359 on December 12, 2011, and later inserted into Citizenship and Immigration Canada's policy manual "CP 15 – Guide to Citizenship Ceremonies" at s.6.5. *Ishaq FC*, *supra* note 9 at para 4.

<sup>17</sup> *Ishaq FC*, *supra* note 9 at paras 3-5, 26.

<sup>18</sup> *Ibid* (Factum of the Respondent at para 1).

<sup>19</sup> *Ishaq FCA*, *supra* note 9 (Factum of the Applicant at paras 34-38; Motion Record of the Barbra Schlifer Commemorative Clinic, Affidavit of Amanda Dale, paras 36-41; Motion Record of the South Asian Legal Clinic of Ontario and the South Asian Bar Association of Toronto, Affidavit of Shalini Konanur at para 31).

<sup>20</sup> Interview of Jason Kenney (12 Dec 2011) on *Power and Politics*, CBC Television. See *Ishaq FCA*, *supra* note 9 (Motion Record of the Barbra Schlifer Commemorative Clinic, Exhibit F).

<sup>21</sup> *House of Commons Debates*, 41<sup>st</sup> Parl, 2<sup>nd</sup> Sess, Vol 147, No 183 (10 March 2015).

Kenney and Harper's comments leave little doubt that the 2011 policy targeted niqab-wearing Muslim women for not fitting the government's understanding of Canadian "culture" and "values." Indeed, as Fathima Cader notes, the policy arose in a period when the role of the niqab in Canadian society was being contested on a number of fronts.<sup>22</sup>

Ongoing animosity towards Muslim people in Canada and other Western countries has been fueled in part by the portrayal of Islamic societies as oppressive to women. Muslim women who wear veils such as the hijab, the niqab, or the burqa have thus become particular targets for anti-Muslim sentiment.<sup>23</sup> Even though research shows that women wear veils for a large variety of reasons,<sup>24</sup> those who oppose veiling practices often take a reductionist view of veiling as a simple manifestation of gender oppression in Islamic society.<sup>25</sup> Those who oppose veils that cover the face, such as the niqab, also argue that veiling raises security and identification concerns, and thwarts effective communication.<sup>26</sup> Under the guise of promoting gender equality and/or security, many countries have implemented laws and policies to curtail the wearing of veils in public.

While Canada, unlike France and Belgium<sup>27</sup>, has not gone so far as to enact an outright ban on veiling in public, a number of efforts have been made in recent years to limit the practice.<sup>28</sup> Most recently, controversy has swirled around the passing of Bill 62 in Québec. The Bill, which became law in October 2017, requires both public employees and those receiving public services, to uncover their faces in the name of state religious neutrality.<sup>29</sup>

<sup>22</sup> Fathima Cader, "Made You Look: Niqabs, the Muslim Canadian Congress, and *R v NS*" (2013) 31:1 Windsor Yearbook of Access to Justice 67 at 69.

<sup>23</sup> The hijab is a headscarf that covers the head and chest but not the face. "Hijab", which translates to "modesty" or "veil" in Arabic, is also used as an umbrella term for different types of veils. The burqa is a type of veil that covers the face and body. See Natasha Bakht, "Veiled Objections: Facing Public Opposition to the Niqab" in Lori Beeman, ed, *Reasonable Accommodation: Managing Religious Diversity* (Vancouver: UBC Press, 2012) 70 at footnote 3.

<sup>24</sup> Bakht, "Veiled Objections", *ibid* at 71-76.

<sup>25</sup> *Ibid* at 79.

<sup>26</sup> *Ibid* at 84-88; 90-92.

<sup>27</sup> Natasha Bakht, "In Your Face: Piercing the Veil of Ignorance About Niqab-Wearing Women" (2014) *Soc & Leg Stud* 419 at 432.

<sup>28</sup> In 2007, following a controversy over whether niqabi women should have to lift their veils to vote in a Québec provincial election, the Canadian government introduced a bill requiring voters to show their faces to election officials, despite the fact that voters are not required to prove their identity via photo identification (Bill C-6, *An Act to amend the Canada Elections Act (visual identification of voters)* tabled in Parliament on Oct 26, 2007, 2<sup>nd</sup> Sess, 39<sup>th</sup> Parl, 2007). The Bill died on the *Order Paper* of the 39<sup>th</sup> session of Parliament and never became law. For a description of the political controversy leading to the Bill, see Bakht, "Veiled Objections", *supra* note 23 at 93-94. Bill C-6 was followed in 2011 by the policy at issue in the *Ishaq* case. In 2013, public controversy swirled around the introduction of Bill 60 in Québec, better known as the "Quebec Charter of Values" (Bill 60, *Charter affirming the values of State secularism and religious neutrality and of equality between men and women, and providing a framework for accommodation requests*, 1<sup>st</sup> Sess, 40<sup>th</sup> Leg, Québec, 2013). The Bill, which enjoyed popular support among citizens of Québec but ultimately failed to become law, sought to prohibit public employees from wearing "overt" religious symbols, and to require all those providing or receiving public services to have their faces uncovered.

<sup>29</sup> Bill 62, *An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies*, 1<sup>st</sup> Sess, 41<sup>st</sup> Leg, Québec, 2017, passed and assented to 18 October 2017.

The *Ishaq* case represents a unique adjudicative moment in the extensive public debate surrounding practices of veiling in Canada. The timing of the *Ishaq* litigation enabled the Conservative Harper government to turn the case into an election issue, mobilizing anti-Muslim sentiments associated with Western anti-terrorist and women's rights rhetoric.<sup>30</sup> However, the government's public messaging was significantly watered down in its actual litigation materials, where the only trace of the policy's political *raison d'être* was the assertion that the citizenship oath should be taken in an "open and transparent,"<sup>31</sup> and "socially cohesive"<sup>32</sup> manner.

## B. Proceedings

With the assistance of counsel, Ms. Ishaq brought an application for judicial review of the policy on the grounds that it violated her freedom of religion and equality rights under ss. 2(a) and 15 of the *Charter*. She argued that the policy was intended to target Muslim women, despite its neutral framing by the government, and that it perpetuated negative stereotypes. Moreover, it failed every step of the *Oakes* test<sup>33</sup> for justification under s.1. Ms. Ishaq argued, amongst other things, that the visual observation method was not rationally connected to the goal of confirming the taking of the oath, given that oath administrators cannot read lips, and that new citizens are required to sign a declaration saying that they took the oath in any event. Nor was the policy minimally impairing, because niqab-wearing women could easily be accommodated, as they were under previous practice. Ms. Ishaq also argued that the policy was *ultra vires*; its mandatory nature unduly fettered the discretion of the citizenship judge, and it ran contrary to the *Citizenship Act*<sup>34</sup> and *Regulations*, as well as the *Canadian Multiculturalism Act*.<sup>35</sup>

The government argued that Ms. Ishaq's application was premature, because a citizenship judge had not yet applied the policy to her.<sup>36</sup> This position discounted the systemic impacts of the policy's very existence (prior to any specific application) on niqab-wearing women, and sought to use the deference afforded to administrative decision-makers to insulate the policy from a fulsome *Charter* review. According to the government, the policy was a non-binding guideline that did not fetter the discretion of the citizenship judge. However, the government argued, were a judge to apply the policy to Ms. Ishaq, it would not violate the *Charter*. In the government's view, the potential violation of religious freedom was trivial, as the oath takes only a minute to recite, and Ms. Ishaq had removed her niqab publicly in exceptional circumstances in the past. Moreover, choosing not to recite the oath would still leave her with all the benefits of permanent residency. With respect to s.15, the government argued that there was no proof of pre-existing disadvantage, stereotype or prejudice perpetuated by the policy.<sup>37</sup>

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<sup>30</sup> Tonda MacCharles and Ben Spurr, "Harper pitting country against Muslims, some Niqab wearers say" *Toronto Star* (30 Nov 2015) online: <<https://www.thestar.com/news/federal-election/2015/10/07/harper-pitting-country-against-muslims-some-niqab-wearers-say.html>>; Cader, *supra* note 22 at 70-71.

<sup>31</sup> *Ishaq* FC, *supra* note 9 (Factum of the Respondent at para 1).

<sup>32</sup> *Ishaq* FCA, *supra* note 9 (Factum of the Appellant at para 1).

<sup>33</sup> *R v Oakes*, [1986] 1 SCR 103.

<sup>34</sup> *Citizenship Act*, RSC 1985, c C-29.

<sup>35</sup> *Canadian Multiculturalism Act*, RSC 1985, c 24 (4th Supp); *Ishaq* FC, *supra* note 9 (Factum of the Applicant).

<sup>36</sup> *Ibid* (Factum of the Respondent at para 22).

<sup>37</sup> *Ibid* (Factum of the Respondent).

Should a *Charter* violation be found, the government asserted that the *Doré* test<sup>38</sup> for *Charter* review of administrative decisions would apply on a standard of reasonableness. The policy's application would be reasonable because the policy furthered the important objectives of ensuring candidates take the oath, and "reinforce[ing] the Canadian values of openness, and transparency."<sup>39</sup> Moreover, the effect on Ms. Ishaq would be minimal because briefly removing the niqab is not a serious limitation on religious freedom, and citizenship is a privilege not a right.

The Federal Court found that Ms. Ishaq's challenge to the policy was not premature.<sup>40</sup> It found, furthermore, that the government's policy was mandatory in nature, leaving the citizenship judge without discretion to apply it, and running contrary to paragraph 17(1)(b) of the *Regulations*, which requires a citizenship judge to "administer the oath of citizenship with dignity and solemnity, allowing the greatest possible freedom in the religious solemnization or the solemn affirmation thereof."<sup>41</sup> Given that the policy could be set aside on administrative law grounds, the Court declined to address the *Charter* arguments.

The Federal Court of Appeal dismissed the government's appeal in a terse six-paragraph decision, affirming the policy's mandatory nature and the corresponding administrative law findings in the lower court.<sup>42</sup> In declining to address the *Charter* arguments, the Court of Appeal stated that it was "in the interests of justice that we not delay in issuing our decision through the examination of an unnecessary issue so as to hopefully leave open the possibility for the respondent to obtain citizenship in time to vote in the upcoming federal election."<sup>43</sup>

The government's motions for stays of both the Federal Court and Federal Court of Appeal decisions were dismissed following the latter decision.<sup>44</sup> The government sought leave to appeal to the Supreme Court of Canada (SCC), however the newly elected Liberals later discontinued the motion, ending the proceedings.<sup>45</sup> In the meantime, Ms. Ishaq was finally able to complete her path to citizenship; she took the oath on October 9, 2015, just 10 days before the federal election.<sup>46</sup>

### C. Motions to Intervene

Seven organizations brought motions to intervene in the *Ishaq* case at the Federal Court of Appeal: the Women's Legal Education and Action Fund [LEAF]; the Barbra Schlifer Commemorative Clinic (the Schlifer Clinic); the South Asian Legal Clinic of Ontario [SALCO] and the South Asian Bar Association of Toronto [SABA], in coalition; the Ontario Human Rights Commission [OHRC]; the National Council of Canadian Muslims [NCCM]; and the Canadian Civil Liberties Association (CCLA).<sup>47</sup> Several of the prospective interveners would have brought feminist perspectives and analyses to the case, most notably

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<sup>38</sup> *Doré v Barreau du Québec*, 2012 SCC 12.

<sup>39</sup> *Ishaq* FC, *supra* note 9 (Factum of the Respondent at para 66).

<sup>40</sup> *Ishaq* FC, *supra* note 9.

<sup>41</sup> *Ibid* at para 53, Emphasis in original; *Citizenship Regulations*, SOR/93-246, at 17(1)(b).

<sup>42</sup> *Ishaq* FCA, *supra* note 9.

<sup>43</sup> *Ibid* at para 5.

<sup>44</sup> *Ishaq v Canada (Minister of Citizenship and Immigration)*, 2015 FCA 212.

<sup>45</sup> *Canada (Citizenship and Immigration) v Ishaq*, [2015] SCCA No 456.

<sup>46</sup> "Zunera", *supra* note 15.

<sup>47</sup> *Ishaq*, *supra* note 8.



LEAF, the Schlifer Clinic, and SALCO.<sup>48</sup> These organizations also included the most social science research and other non-legal sources of information in their motion materials. I focus on them for these reasons.

LEAF was founded in 1985 as a feminist legal advocacy organization with a mandate to pursue women's equality under the *Charter*.<sup>49</sup> The organization has led the way for feminist interventions in *Charter* litigation.<sup>50</sup> In *Ishaq*, LEAF sought to situate the government's policy within the historical context of the state's regulation of women's clothing and disenfranchisement of women. LEAF also sought to advance an intersectional analysis of equality, noting in particular the barriers and vulnerabilities faced by immigrant women in Canada. In her affidavit on the motion, Executive Director Diane O'Reggio stated: "Immigrant women are more likely to face poverty, are more vulnerable to intimate-partner violence (especially if sponsored by a spouse), and may face language and cultural challenges in accessing services or employment."<sup>51</sup> These claims were supported by citations to a 2011 Statistics Canada report,<sup>52</sup> and to a number of reports prepared by non-profit organizations, which themselves cited data from statistics Canada as well as academic literature.<sup>53</sup>

Unlike LEAF, the Schlifer Clinic is a grassroots feminist organization providing frontline services to women experiencing violence, in addition to systemic legal advocacy.<sup>54</sup> In its motion to intervene, the Clinic noted that the appeal in *Ishaq* would directly affect its niqab-wearing clients, and expressed particular concern about "the misperceptions of, and prejudices against, niqab-wearing women that, in the Schlifer Clinic's view, inform the Policy."<sup>55</sup> Given that the government had publicly framed its policy as advancing gender equality, the Schlifer Clinic sought to offer its own perspective—grounded in "both first-hand and systemic experience"<sup>56</sup>—on the intersectional gender inequalities that the policy would in fact perpetuate. The Clinic stated that it would draw on international and domestic legal scholarship to illustrate the stereotypes furthered by the policy, citing two academic articles as examples.<sup>57</sup> Against such

<sup>48</sup> A robust conceptualization of "feminist" is beyond the scope of this paper. Suffice it to say that I understand the term to refer here to genuine, longstanding, and critical engagement in championing gender equality.

<sup>49</sup> *Ishaq* FCA, *supra* note 9 (Motion Record of LEAF, Affidavit of Diane O'Reggio at para 3).

<sup>50</sup> Morton & Allen, *supra* note 1 at 79.

<sup>51</sup> *Ishaq* FCA, *supra* note 9 (Motion Record of LEAF, Affidavit of Diane O'Reggio at para 19).

<sup>52</sup> Tina Chui, "Immigrant Women", *Women in Canada: A Gender-based Statistical Report* (Ottawa: Statistics Canada, July 2011) <<http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11528-eng.pdf>>.

<sup>53</sup> Ontario Council of Agencies Serving Immigrants, *Making Ontario Home 2012: A Study of Settlement and Integration Services for Immigrants and Refugees*; Ending Violence Association of BC, MOSAIC, Vancouver & Lower Mainland Multicultural Family Support Services Society, *Immigrant Women's Project: Safety of Immigrant, Refugee and Non-Status Women*; Sheryl Burns, "Single Mothers Without Legal Status in Canada: Caught in the Intersection Between Immigration Law and Family Law" (YWCA Vancouver, 2010); Canadian Research Institute for the Advancement of Women, "Fact Sheet: Immigrant and Refugee Women" (CRIAOW, No 5, 2003). See the affidavit at para 19 for original citations with pinpoints.

<sup>54</sup> *Ishaq* FCA, *supra* note 9 (Motion Record of the Schlifer Clinic, Affidavit of Amanda Dale at para 9).

<sup>55</sup> *Ibid* at paras 4-5.

<sup>56</sup> *Ibid* at para 18.

<sup>57</sup> *Ishaq* FCA, *supra* note 9 (Motion Record of the Schlifer Clinic, Written Representations at para 10), citing: Sahar Aziz, "From the Oppressed to the Terrorist: Muslim American Women in the Crosshairs of Intersectionality" (2012) 9 *Hastings Race & Poverty LJ* 191; and Rhadika Coomaraswamy, "Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women" (2002-2003) 34 *Geo Wash Intl L Rev* 483.

stereotypes, the Clinic noted the “complex humanity” of Muslim women, citing in support a 2013 study of niqab-wearing women in Canada.<sup>58</sup> The Clinic also emphasized the link between social and political exclusion and vulnerability to violence. In support of this point, their application materials referred to a 2013 report by the Canadian Council for Muslim Women on violence against Muslim women,<sup>59</sup> and cited a UN Report of the Special Rapporteur on Violence Against Women.<sup>60</sup>

SALCO is a community legal clinic serving low-income South Asians in the Greater Toronto Area.<sup>61</sup> While not explicitly self-identifying as feminist, SALCO lists violence against women as an area of expertise and has advocated for the rights of women—in particular non-status women, niqab-wearing women, and women facing violence—in numerous contexts.<sup>62</sup> Like the Schlifer Clinic, SALCO argued that the *Ishaq* appeal directly affected its clients, nearly half of whom are Muslim, and many of whom SALCO has helped to assert the right to wear the niqab in an employment context. SALCO’s proposed submissions focused on the *Charter* value of multiculturalism; the organization promised to provide a “framework for understanding multiculturalism [...] grounded in Canadian legal scholarship and political philosophy.”<sup>63</sup> In its application, SALCO presented some demographic information about South Asians in Canada, supported by two Statistics Canada publications included as exhibits to the affidavit of Executive Director Shalini Konanur.<sup>64</sup> However, SALCO’s claims about the marginalization and underrepresentation of South Asians in government went beyond the data included as evidence on the motion to intervene.<sup>65</sup> In her affidavit, Ms. Konanur also made claims about the various barriers facing South Asians “[b]ased on my experience, and the experience of SALCO’s staff.”<sup>66</sup>

The submissions of the other interveners did not include references to social science research or other sources apart from primary legal sources. However, like the organizations just described, they asserted a number of claims that could be characterized as social or legislative facts, such as the existence of prejudice and stereotyping against niqab-wearing women,<sup>67</sup> and the resentment of Muslim women in Canada at having to unveil only for “show.”<sup>68</sup>

<sup>58</sup> *Ibid* at para 18, citing Lynda Clarke, *Women in Niqab Speak: A Study of the Niqab in Canada* (Gananoque: Canadian Council of Muslim Women, 2013).

<sup>59</sup> *Ishaq* FCA, *supra* note 9 (Motion Record of the Schlifer Clinic, Affidavit of Amanda Dale at para 44) referring to Canadian Council for Muslim Women, *Violence Against Muslim Women, Health and Justice for Muslim Women*, 2013.

<sup>60</sup> *Ishaq* FCA, *supra* note 9 (Motion Record of the Schlifer Clinic, Written Representations at para 23) citing Yakin Erturk, Report of the Special Rapporteur on Violence Against Women, its causes and consequences (18 May 2009) A/HRC/11/6.

<sup>61</sup> *Ishaq* FCA, *supra* note 9 (Motion Record of SALCO, Affidavit of Shalini Konanur at para 1).

<sup>62</sup> *Ibid* at paras 17 and 22.

<sup>63</sup> *Ishaq* FCA, *supra* note 9 (Motion Record of SALCO, Written Representations at para 32).

<sup>64</sup> Statistics Canada, *Canada’s Ethnocultural Mosaic, 2006 Census*, Catalogue No 97-562-X (Ottawa: Statistics Canada, April 2008); Colin Lindsay, *The Profiles of Ethnic Communities in Canada: The South Asian Community in Canada*, Catalogue No 89-621-XIE-No 6 (Ottawa: Statistics Canada, 2001).

<sup>65</sup> *Ishaq* FCA, *supra* note 9 (Motion Record of SALCO, Affidavit of Shalini Konanur at para 2).

<sup>66</sup> *Ibid* at para 27.

<sup>67</sup> For example, the OHRC asserted that stigma, prejudice, stereotyping and historical disadvantage were present in the *Ishaq* case, but did not provide a supporting source. *Ishaq* FCA, *supra* note 9 (Motion Record of OHRC, Written Representations at para 22).

<sup>68</sup> *Ishaq* FCA, *supra* note 9 (Motion Record of NCCM, Affidavit of Ihsaan Gardee at para 28). The NCCM relied on its organizational experience to make this claim.

#### D. Decision on the Motions

In a reproofing decision, Justice Stratas of the Federal Court of Appeal exercised his discretion under Rule 109 of the *Federal Courts Rules*<sup>69</sup> to deny all six motions for intervention. Applying the test for intervention which he himself had laid out in *Pictou*, he highlighted the third factor—“[...] will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court’s determination of the matter?”—as the most important and problematic.<sup>70</sup> To meet this criteria, interveners had to, in Justice Stratas’ words, find “the particular itch that needs to be scratched” in the case, and tell the Court “specifically how they will go about scratching it.”<sup>71</sup> The prospective interveners in *Ishaq* had all failed to do so.

In some cases, the perceived problem was that the interveners’ proposed submissions were too vague, failing to outline clear and detailed points of argument, or to say anything different than what had already been raised by Ms. Ishaq herself.<sup>72</sup> Where the interveners did raise distinct issues—such as violence against women, the state’s historical regulation of women’s clothing, the barriers faced by immigrant women, or existing stereotypes of niqab-wearing and other Muslim women—Justice Stratas found that these were matters of fact that fell beyond what could be supported by the evidence in the case, which was focused on Ms. Ishaq’s own situation and not the broader effects of the government’s policy.<sup>73</sup>

Indeed, making arguments “dependent on facts absent from the evidentiary record” was a bad intervener habit according to Justice Stratas, though he did not specify which arguments or facts were at fault in this case.<sup>74</sup> In his view, interveners ought to participate more often in fact-finding at the first instance, in order to properly raise issues of concern to them.<sup>75</sup> Otherwise, they are stuck with the evidentiary record as they find it and cannot “simply import into the appeal the evidence they need to make their arguments.”<sup>76</sup>

In particular, Justice Stratas admonished the prospective interveners in *Ishaq* for their assertion of “new factual matters in the area of social science”<sup>77</sup> and their citation of “reports that assert social science positions.”<sup>78</sup> In his view, this amounted to raising new evidence, which, he emphasized, is not admissible on appeal unless a) the test for fresh evidence is satisfied, or b) the court can judicially notice the evidence.<sup>79</sup> According to Justice Stratas, however, judicial notice should almost never apply to the kinds of facts at issue. In his words:

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<sup>69</sup> SOR/98-106, r 109.

<sup>70</sup> *Ishaq*, *supra* note 8 at para 7.

<sup>71</sup> *Ibid* at para 10.

<sup>72</sup> *Ibid* at paras 33 and 37.

<sup>73</sup> *Ibid* at para 36.

<sup>74</sup> *Ibid* at para 9.

<sup>75</sup> *Ibid* at para 16.

<sup>76</sup> *Ibid* at para 18.

<sup>77</sup> *Ibid* at para 19.

<sup>78</sup> *Ibid* at para 22.

<sup>79</sup> *Ibid* at para 15.

An interest group devoted to a cause in a particular area might consider certain social science facts to be obvious or indisputable articles of faith. But to the Courts—neutral decision-makers divorced from all causes—such social science facts are controversial and must be proven.<sup>80</sup>

Tied to Justice Stratas' restrictive approach to social facts was a more general concern about overstepping the judicial role by opening the door for interveners to address broad policy issues. Judges, he admonished, are not legislators, and must stay squarely within the boundaries of legal reasoning.<sup>81</sup> By drawing on social science to illustrate the broader context of the government's policy, the prospective interveners had crossed the line.

### III. THE CONSTRUCTION OF FACTS

Justice Stratas' ruling raises important questions about the potential for feminist and other equality-seeking organizations to marshal their knowledge and expertise in litigation. Those questions circle largely around the construction and treatment of facts in the courtroom. I offer some thoughts on that here, to help frame my analysis in the rest of the paper.

It should be noted at the outset that Justice Stratas' repeated reference to "social science facts" in *Ishaq* tends to conflate social science research with the social facts that such research supports. In a more recent case, he clarifies that his decision in *Ishaq* was concerned both with the practice of citing social science publications, and the making of "factual assertions in the hope that the court will improperly take judicial notice of them."<sup>82</sup> Although clearly related, these must be acknowledged as distinct issues.

The concerns raised in *Ishaq* about the role of social science research and social facts in litigation have gained increasing attention in *Charter* cases, wherein the traditional focus on case-specific, or "adjudicative" facts, is often supplanted by what have been termed "social" and "legislative" facts<sup>83</sup>—i.e. general facts that assist judges in interpreting the law and the case-specific facts.<sup>84</sup> Such facts are often supported by social science research, whether appearing in the courtroom as evidence, within submissions, or via independent judicial research.

The "procedural hodgepodge" by which social science research enters the courtroom reflects ongoing uncertainty about how courts should deal with social and legislative facts.<sup>85</sup> As some scholars have noted,

<sup>80</sup> *Ibid* at para 20. See also para 21.

<sup>81</sup> *Ibid* at paras 25-27.

<sup>82</sup> *Canada (Minister of Public Safety and Emergency Preparedness) v Zaric*, 2016 FCA 36 at para 14 [*Zaric*].

<sup>83</sup> The Supreme Court of Canada has clarified that "non-adjudicative facts are now generally called 'social facts' when they relate to the fact-finding process and 'legislative facts' in relation to legislation or judicial policy." (*R v Spence*, 2005 SCC 71, at para 56 [*Spence*]). More recently, the Court described social and legislative facts as "facts about society at large, established by complex social science evidence" (*Bedford*, *supra* note 3 at para 48). Note, however, that some commentators still use "legislative facts" to refer to both social and legislative facts, as the initial distinction drawn was between adjudicative and legislative facts. See Kenneth Culp Davis, "An Approach to Problems of Evidence in the Administrative Process" (1941) 55 Harv L Rev 364 at 402.

<sup>84</sup> Alan N Young, "Proving a Violation: Rhetoric, Research and Remedy" (2015) 67:0 SCLR 617 at 621.

<sup>85</sup> Allison Orr Larsen, "Factual Precedents" (2013) 162 U Pa L Rev 59 at 71. While Larsen makes the point in the U.S. context, the same issue arises in Canada. See Young, *ibid* at 620-621.

such “facts” often look more like law than fact; for instance, they speak to general issues beyond the experience of the parties, and seem to carry precedential weight.<sup>86</sup> Indeed, many scholars have recognized the tendency for law and fact to blur together, especially in constitutional cases.<sup>87</sup> Some have even argued that the distinction has no substantive grounding, and is instead merely functional in nature.<sup>88</sup> From this perspective, the doctrinal division between law and fact is merely a tool for distinguishing assertions that must be proved via formal evidence from the host of implicit generalizations that can simply be assumed within the course of judicial reasoning—a distinction that can have profound effects on the ability of marginalized people to challenge the current legal and social order. The doctrine of judicial notice provides a middle ground in this schema, by allowing courts to explicitly recognize a factual issue at play in litigation, while dispensing with the need for its formal proof. Implicit assumptions made in the course of legal reasoning may in turn be understood as a kind of implicit notice.

In their 1988 article “Social Science Research in Law,” John Monahan & Laurens Walker argued that social science research directed at legislative facts has a dual character: it is empirical like fact, but general like law. On practical grounds, Monahan and Walker argued that such research ought to be treated as a law-like source of authority—what they called “social authority.”<sup>89</sup> This meant that general social science research would come before the courts via briefs or independent judicial research, rather than expert testimony, and would be evaluated in a manner analogous to legal precedent.<sup>90</sup> Monahan and Walker observed that courts determine the weight of a legal precedent by considering the level of court from which it originates, the quality of reasoning, the closeness of the facts to the present case, and the approval that the precedent has received from other courts.<sup>91</sup> While acknowledging that these factors do not map perfectly onto the evaluation of social science research, they suggested that, by analogy,

courts should place confidence in social science research to the extent that the research (a) has survived the critical review of the scientific community, (b) has used valid research methods, (c) is generalizable to the legal question at issue, and (d) is supported by a body of other research.<sup>92</sup>

Monahan and Walker saw their proposal as a clear improvement over the confusion that persisted—and continues to persist today—about the appropriate procedures by which social science research should

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<sup>86</sup> Danielle Pinard, “Au-Dela de la Distinction du Fait et du Droit en Matiere Constitutionnelle: Les Postulats Necessaires” (2012) 48 RJT ns 1 at 26; John Monahan & Laurens Walker, “Social Science Research in Law: A New Paradigm” (1988) 43:6 *American Psychologist* 465 at 467 [“Social Science Research”].

<sup>87</sup> For a helpful overview of the literature on this point, see Larsen, “Factual Precedents”, *supra* note 85 at 67-68. See also: John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (New York: Russell & Russell, 1927) at 55; David L Faigman, *Constitutional Fictions: A Unified Theory of Constitutional Facts* (Oxford: Oxford University Press, 2008) at 117-118.

<sup>88</sup> Danielle Pinard, “Le Droit et le Fait dans l’Application des Standards et la Clause Limitative de la Charte Canadienne des Droits et Libertés” (1989) 30 *Cah Droit* 137 at 139; Ronald J Allen & Michael S Pardo, “The Myth of the Law-Fact Distinction” (2003) 97:4 *Nw UL Rev* 1769 at 1771; Faigman, *ibid* at 117-118.

<sup>89</sup> Monahan & Walker, “Social Science Research”, *supra* note 86.

<sup>90</sup> *Ibid* at 468.

<sup>91</sup> *Ibid*.

<sup>92</sup> *Ibid*.

be obtained, evaluated, and established as precedential in litigation. Of particular relevance to this paper, they noted that it is much cheaper to include social science research in a court brief than to present it through expert witnesses, such that “[a] brief might be the only way an indigent person could present social science information.”<sup>93</sup>

The latter point speaks to how the placement of issues within the taxonomy of law and fact has practical consequences for who can raise what knowledge in the courtroom. Indeed, as Christine Boyle and Marilyn MacCrimmon observe,

the choice may affect fundamental values such as equality and access to justice. Whether a matter is classified as law or fact has consequences, for instance, for the burden of proof in terms of who benefits from the status quo.<sup>94</sup>

In *Ishaq*, for instance, characterizing claims about the barriers, stereotypes, and vulnerabilities faced by different groups of women as matters of *fact* lends credence to the government’s argument that Ms. Ishaq has failed to *prove* any pre-existing disadvantage perpetuated by the policy. In this way, a lack of prejudice becomes the status quo assumption.

Monahan and Walker’s proposal to treat social science research in the same way as legal precedent has been largely rejected by courts and scholars, leading the authors to alter their initial proposal.<sup>95</sup> However, as discussed further in Part IV, Canadian courts have on occasion achieved a similar result through the doctrine of judicial notice, which has provided a mechanism for courts to consider relevant social science research and other novel information without hearing it as evidence.<sup>96</sup>

All of this is not to deny that there are good reasons, from an equality perspective and otherwise, to hold factual claims to a strict standard of proof. As some scholars have noted, allowing judges to consider social science materials and to determine social facts without the safeguards of the evidentiary process can easily lead to the enshrinement of ill-informed findings.<sup>97</sup> Furthermore, those findings may, in some cases, reflect nothing more than stereotypical assumptions, and thereby work against the interests of a given marginalized group.<sup>98</sup> In the American context, Allison Orr Larsen has observed with concern the proliferation and growing influence of *amicus curiae* briefs as a source of off-the-record factual expertise at the Supreme Court. Larsen argues that this trend is troubling, given that the research data offered in *amicus* briefs is presented by partisan interest groups, and not effectively tested through the adversarial process.<sup>99</sup>

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<sup>93</sup> *Ibid* at 467.

<sup>94</sup> Boyle & MacCrimmon, *supra* note 5 at 63.

<sup>95</sup> John Monahan, Laurens Walker & Gregory Mitchell, “Contextual Evidence of Gender Discrimination: The Ascendance of Social Frameworks Essay” (2008) 94 Va L Rev 1715 at 1718.

<sup>96</sup> See for example: *R v Parks*, [1993] OJ No 2157 [*Parks*]; *Willick v Willick*, [1994] 3 SCR 670.

<sup>97</sup> In Young’s words: “Untested, voluminous but selective data does not bode well for an informed decision.” *Supra* note 84 at 639. See also: Brianne J Gorod, “The Adversarial Myth: Appellate Court Extra-Record Factfinding” (2011) Duke LJ 1; Larsen, “Factual Precedents”, *supra* note 85.

<sup>98</sup> Mayeda, *supra* note 4 at 214, 230-231.

<sup>99</sup> Allison Orr Larsen, “The Trouble with Amicus Facts” (2014) 100 Va L Rev 1757.

These are legitimate concerns, which—as I discuss in Part IV—Canadian courts have largely heeded. However, as Graham Mayeda argues, the practical barriers to justice created by an overly stringent approach to social and legislative facts are also problematic, and may in some circumstances weigh more heavily than the dangers of untested research.<sup>100</sup> In Part V, I demonstrate how this applies to public interest interventions in Canada such as those attempted in *Ishaq*. First, though, I briefly explore the legal context of the decision.

#### IV. THE DECISION IN LAW

The courts deal with social and legislative facts and social science research raised by interveners on a regular basis, though they rarely take time to make particular findings on the issue. While a systemic review of such cases is beyond the scope of this paper, a brief review of the case law on interventions at the federal courts, and on judicial notice—focused around the jurisprudence cited within the *Ishaq* decision itself—suggests that Justice Stratas’ approach is overly restrictive.

##### A. Interventions

Rule 109 of the *Federal Courts Rules* allows a court to grant leave, on motion, for any person to intervene in proceedings before the court.<sup>101</sup> Those seeking leave to intervene must describe, in their notice of motion, “how the proposed intervenor wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.”<sup>102</sup> Prior to *Pictou*, the test for leave to intervene at the federal court came from the 1989 case of *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* [*Rothmans*],<sup>103</sup> wherein Justice Rouleau set out the following considerations:

- (1) Is the proposed intervenor directly affected by the outcome?
- (2) Does there exist a justiciable issue and a veritable public interest?
- (3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
- (4) Is the position of the proposed intervenor adequately defended by one of the parties to the case?
- (5) Are the interests of justice better served by the intervention of the proposed third party?
- (6) Can the Court hear and decide the cause on its merits without the proposed intervenor?<sup>104</sup>

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<sup>100</sup> Mayeda, *supra* note 4 at 216.

<sup>101</sup> *Supra* note 69, r 109 (1).

<sup>102</sup> *Ibid*, r 109 (2)(b).

<sup>103</sup> [1990] 1 FC 74 [*Rothmans*], aff’d [1990] 1 FC 90 (CA). The test’s application alongside r 109 was affirmed in *Canadian Union of Public Employees (Airline Division) v Canadian Airlines International Ltd*, [2010] 1 FCR 226.

<sup>104</sup> *Rothmans*, *ibid* at para 12.

While this test appears to set a high threshold for intervention, the courts have not called for strict adherence to the listed criteria. Even in *Rothmans*, Justice Rouleau found that interventions may be allowed even when the public interest is adequately defended by the parties,<sup>105</sup> and despite a lack of direct interest in the outcome.<sup>106</sup> Case law has also indicated that an intervention may be granted despite the possibility that a court could decide the case on its merits without the intervener.<sup>107</sup>

In *Pictou*, Justice Stratas revised the *Rothmans* test “in light of today’s litigation environment.”<sup>108</sup> Some of his modifications recognized the flexible approach already adopted in the case law.<sup>109</sup> However, he also placed greater emphasis on expediency, most notably by adding a new factor which considers whether the intervention would be consistent with “the just, most expeditious and least expensive determination of every proceeding on its merits,” as called for by Rule 3 of the *Federal Court Rules*.<sup>110</sup> The addition of this factor speaks to the significant concerns courts have expressed about expediency in recent years<sup>111</sup> — concerns that are echoed by legal advocates seeking to promote access to justice. Unfortunately, by encouraging interveners to lead evidence at the first instance, the ruling in *Ishaq* does not seem to take effective account of this factor (see Part V for more on this point).

The flexible approach to the *Rothmans* test evidenced in the jurisprudence is difficult to square with Justice Stratas’ strict interpretation of the reformulated test in *Ishaq*, whereby interveners must identify a particular “itch that needs scratching” and demonstrate their unique ability to scratch it. Indeed, the decision in *Ishaq* appears to go against the general thrust of the jurisprudence, which underscores the need for a generous approach to interventions, especially in *Charter* cases. As the Court observed in *Rothmans*:

There can be no doubt as to the evolution of the jurisprudence in 'public interest litigation' in this country since the advent of the Charter. The Supreme Court appears to be requiring somewhat less by way of connection to consider 'public interest' intervention once they have been persuaded as to the seriousness of the question.<sup>112</sup>

<sup>105</sup> *Ibid* at paras 15-16. In support of this point, Justice Rouleau cited *R v Seaboyer*, [1986] OJ No 128, wherein the Ontario Court of Appeal allowed LEAF to intervene in support of the *Criminal Code* rape shield provisions. Although LEAF’s position was largely aligned with the Attorney General for Ontario, the Court of Appeal noted that, “LEAF, by reason of its special knowledge and expertise, may be able to place the issue in a slightly different perspective which will be of assistance to the Court.” (para 8) Since *Rothmans*, interventions have been granted in several other cases on a similar basis. See for example: *Peel (Regional Municipality) v Great Atlantic and Pacific Canada Limited* (1990), 74 OR (2d) 164 (CA) [*Peel*]; *Rudolph v Canada (Minister of Employment and Immigration)* [1992] FCJ No 62 (CA).

<sup>106</sup> *Rothmans*, *supra* note 103 at paras 17-18. This was affirmed in *Canada (Attorney General) v United States Steel Corp*, 2010 FC 1330 at para 36 [*United States Steel Corp*].

<sup>107</sup> *United States Steel Corp*, *ibid* at para 64.

<sup>108</sup> *Supra* note 10 at para 6.

<sup>109</sup> For example, the new test eliminates the question of whether the Court would be able to decide the case without the intervener. The requirement to be “directly affected” is also replaced with the less stringent criteria of having a “genuine interest” in the particular issue before the courts.

<sup>110</sup> *Pictou*, *supra* note 10 at para 11; *Federal Court Rules*, *supra* note 69, r 3. The concern about expediency may also be the driving force behind Justice Stratas’ affirmation of the need to consider whether the intervener’s position is adequately defended by one of the parties, despite much downplaying of this concern in the jurisprudence. See *supra* note 105.

<sup>111</sup> See for instance *Hryniak v Mauldin*, 2014 SCC 7. Justice Stratas cites this decision in support of adding the expediency factor in *Pictou*. *Ibid* at para 10.

<sup>112</sup> *Supra* note 103 at para 11.



A relaxed threshold for interveners in constitutional and other public interest cases has since been affirmed by other courts, indicating an ongoing willingness to hear from a variety of organizations where broad social interests are at stake.<sup>113</sup> While the SCC has placed increasing restrictions on the scope of intervener submissions in recent years, raising questions about the Court's depth of engagement with interveners, the trend has nevertheless been to grant a high percentage of intervention applications.<sup>114</sup>

The courts' approach to public interest interveners has, in some respects, been tied to the development of the law on public interesting standing.<sup>115</sup> The connection is not surprising; while interveners and public interest parties are distinct, they both seek to bring systemic perspectives that take litigation outside the traditional model of private adversaries. Their roles may also overlap where an intervener seeks the right to participate as a party in the proceeding, rather than just as an *amicus curiae*.<sup>116</sup>

In some cases, courts have called for a generous approach to intervention to compensate for narrower rights to public interest standing. For instance, in *Canadian Council of Churches v Canada (Minister of Employment and Immigration)* [*Canadian Council*],<sup>117</sup> the SCC justified a more restrictive approach to public interest standing partly on the basis that "the views of the public litigant who cannot obtain standing need not be lost. Public interests organizations are, as they should be, frequently granted intervener status."<sup>118</sup> The Federal Court picked up on this point in *Pfizer Inc. v Canada* [*Pfizer*], finding that the decision in *Canadian Council* "impacts on developments in this area of the law in favour of granting intervention rights to public interest organizations or industry associations in appropriate circumstances."<sup>119</sup>

According to the logic in *Pfizer*, the SCC's recent liberalization of public interest standing in *Canada (AG) v Downtown Eastside Sex Workers United Against Violence* [*SWUAV*]<sup>120</sup> might seem to ease the need for public interest interventions. However, the resources required to bring a suit, and the burdens

<sup>113</sup> See for e.g., *Peel*, *supra* note 105; *Halpern v Canada (Attorney General)* [2003] OJ No 720 (CA in Chambers). See also Daniel Sheppard, "Just Going Through the Motions: The Supreme Court, Interest Groups and the Performance of Intervention" (2018) 82 SCLR (2d) 179 at 180-181.

<sup>114</sup> Sheppard, *ibid* at 184-188; Benjamin R D Alarie & Andrew J Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48 Osgoode Hall L J 381 at 395 (finding that over 90% of parties seeking leave to intervene at the Supreme Court of Canada from 2000-2009 were successful). As of 2001, LEAF had never been denied the right to intervene at the Supreme Court of Canada since the advent of the *Charter* (Morton & Allen, *supra* note 1 at 78).

<sup>115</sup> In fact, these two areas of law appear to share common roots; the first three criteria of the *Rothmans* test are almost identical to the test for public interest standing developed in a trilogy of cases prior to *Rothmans*, and cemented in the case of *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 [*Canadian Council*]. See Dana Phillips, "Public Interest Standing, Access to Justice, and Democracy under the Charter: Canada (AG) v Downtown Eastside Sex Workers United against Violence" (2013) 22 Const F 21. That might explain why the criteria—especially the third one—seem ill suited to interveners, who become involved in litigation after the issues are defined by the parties, and do not generally submit new questions to the court.

<sup>116</sup> *Pfizer Inc. v Canada*, [1999] FCJ No 957, at para 20.

<sup>117</sup> *Supra* note 115.

<sup>118</sup> *Ibid* at para 43.

<sup>119</sup> *Supra* note 116 at para 22.

<sup>120</sup> 2012 SCC 45 [*SWUAV*].

imposed on those who carry litigation, make intervention an important alternative in many cases.<sup>121</sup> I suggest that *SWUAV*'s affirmation of the value of systemic perspectives in *Charter* litigation is better read as supporting a generous approach to both standing *and* intervention. Indeed, as I discuss further in Part V, non-party interventions may be critical to fulfilling the principle of access to justice affirmed in *SWUAV*.<sup>122</sup>

### **B. Judicial Notice of Social Facts and Social Science Research**

The Federal Court of Appeal's strict approach to the attempted interventions in *Ishaq* was largely justified by concerns about improperly raised social facts and social science research. While not entirely out of line with the jurisprudence, I argue that the ruling fails to appreciate the nature of the facts and supporting materials raised by the interveners within the overall context of the case.

To begin with, Justice Stratas' invocation of the case law around fresh evidence and judicial notice itself indicates a somewhat uncharitable approach to the intervener submissions. There is nothing to suggest that the interveners were seeking to have social science citations admitted into the evidentiary record or relied upon as such. Nor were the individuals I spoke to—albeit not representative of all the interveners—expecting the court to make formal findings of fact based upon the social science research cited.<sup>123</sup> After all, the SCC commonly accepts and considers intervener submissions that include citations to social science research without treating such citations as a formal proffer of evidence, or invoking the above doctrines. Nevertheless, the prospective interveners were surely hoping that the court would at least consider (and maybe tacitly accept) the information on offer—what may be likened to informal or implicit notice.<sup>124</sup> The case law on judicial notice may thus be instructive in analyzing Justice Stratas' decision. Indeed, these cases offer some important insights into the role of social and legislative facts and social science research in litigation as envisioned by the courts.

As affirmed by the SCC in *R v Find* [*Find*], a court may take judicial notice of a fact that is either “(1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.”<sup>125</sup> There has, however, been some recognition that social and legislative facts may call for a more relaxed approach to judicial notice. In *Danson v Ontario (AG)*, the SCC found that “less stringent admissibility requirements” apply to legislative facts than to adjudicative facts, due to their general

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<sup>121</sup> The Honourable Mr. Justice John Sopinka, “Intervention” (1988) 46 *Advocate Vancouver* 883 at 885. In 2001, Morton & Allen noted that feminist advocacy groups were more than twice as likely to participate as interveners than as actual litigants. *Supra* note 1 at 59.

<sup>122</sup> *SWUAV*, *supra* note 120 at para 51.

<sup>123</sup> Interview of X (6 April 2016) [X interview]; Interview of Y (11 April 2016) [Y interview]. This research was reviewed and approved by the Human Participants Review Committee on April 4, 2016, and conforms to the standards of the *Senate Policy for the Ethics Review Process for Research Involving Human Participants* of York University.

<sup>124</sup> Peter W Hogg, *Constitutional Law of Canada*, 5th ed, vol 2, loose-leaf (Scarborough Ontario: Thomson Carswell, 2007) at 60-14, cited in Young, *supra* note 84 at 637.

<sup>125</sup> 2001 SCC 32 [*Find*].

nature.<sup>126</sup> In the later case of *R v Spence* [*Spence*], the Court recognized social facts as a distinct type of non-adjudicative fact that could also attract a less stringent approach.<sup>127</sup>

One of the main lines of jurisprudence to grapple with judicial notice of social facts relates to the ability of criminally accused individuals to challenge jurors for cause due to potential racial prejudice. In some of these cases (those cited by Justice Stratas), the courts have attempted to reign in judicial consideration of social facts and social science research absent properly introduced evidence. In others, however, they have found significant leeway to judicially notice social facts demonstrated through reports and studies not on the record.

Take, for instance, the Ontario Court of Appeal's lengthy decision in *R v Parks* [*Parks*].<sup>128</sup> The trial judge in *Parks* had disallowed the Black accused from challenging jurors for cause on the basis of potential racial prejudice, absent evidence of such prejudice sufficient to rebut the presumption of juror impartiality. Despite the absence of evidence on the record, the Court of Appeal took it upon itself to conduct an extensive review of the social science literature and American jurisprudence on anti-Black racism in North America. On the basis of these materials, Doherty J.A. found for the Court that "[r]acism, and in particular anti-black racism, is a part of our community's psyche."<sup>129</sup> The Court concluded that the trial judge had erred in refusing to allow the challenge for cause. In a series of cases that followed *Parks*, the Court of Appeal's finding of systemic racial prejudice was incrementally extended, first to presumptively allow the *Parks* challenge for cause in any jury trial in Ontario where an accused is Black,<sup>130</sup> and then in any trial where the accused is a visible racial minority.<sup>131</sup>

The SCC soon confirmed that widespread racial prejudice may be the proper subject of judicial notice in challenge for cause cases, and in any event, that where it is established in a given case, it may be judicially noticed in future cases. The Court also affirmed that judicial notice has precedential value.<sup>132</sup> On this view, at least some of the claims made by the prospective interveners in *Ishaq* would be strong candidates for judicial notice. For instance, the historical discrediting of women on the basis of dress (raised by LEAF) has already been recognized by the SCC in the context of sexual assault,<sup>133</sup> as has the existence of negative stereotypes about niqab-wearing women by the Ontario Court of Appeal.<sup>134</sup> Moreover, stereotyping and prejudice against niqab-wearing and other Muslim women is not so far from the type of racism that the courts took notice of in the *Parks* line of cases, albeit in a different legal context.

Other challenge for cause cases, however, have called for a more restrained approach. In *R v Alli*, Doherty J.A. framed the "appellate activism" in *Parks* as exceptional, and suggested that courts

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<sup>126</sup> [1990] 2 SCR 1086 at para 28 (Westlaw).

<sup>127</sup> *Supra* note 83 at para 56.

<sup>128</sup> *Supra* note 96.

<sup>129</sup> *Ibid* at para 54.

<sup>130</sup> *R v Wilson*, [1996] OJ No 1689.

<sup>131</sup> *R v Koh*, [1998] OJ No 5425.

<sup>132</sup> *R v Williams*, [1998] 1 SCR 1128 at para 54. This finding raises the question of whether social facts should carry precedential value. For an in-depth discussion of this issue in the U.S. context, see Larsen, "Factual Precedents", *supra* note 85.

<sup>133</sup> *R v Ewanchuk*, [1999] 1 SCR 330 at para 103.

<sup>134</sup> *R v NS*, 2010 ONCA 670 at para 79.

should be wary of looking outside the record to make new factual findings.<sup>135</sup> The point was reiterated by the SCC in *Find*, where the Court stated: “The scientific and statistical nature of much of the information relied upon by the appellant further complicates this case. Expert evidence is by definition neither notorious nor capable of immediate and accurate demonstration.”<sup>136</sup>

The SCC once again exhibited caution in *Spence*, declining to take judicial notice of sympathy between jurors and victims of the same race that may lead to partiality, as urged by the intervener African Canadian Legal Clinic.<sup>137</sup> The Court in *Spence* identified “a preference for social science evidence to be presented through an expert witness” as the prevailing approach in Canadian *Charter* jurisprudence.<sup>138</sup> However, the Court still entertained the intervention, and even referred to the Clinic’s claims about the complex effects of racial bias on trial fairness as “a useful submission that went beyond the more case law orientated argument of the respondent.”<sup>139</sup> The Court thereby displayed a much more open posture to intervention than the Federal Court of Appeal did in *Ishaq*, even in a situation where the intervener was explicitly calling for judicial notice of a novel and complex social fact.

*Spence* also added important nuance to the test for judicial notice of social and legislative facts, finding that the standard to be met depends on the role of the relevant fact in the case. The Court stated:

I believe a court ought to ask itself whether such "fact" would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute *for the particular purpose for which it is to be used*, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the "fact" to the disposition of the controversy.<sup>140</sup>

This finding indicates that courts should adjust the latitude afforded to social and legislative facts and social science research according to the role they play in the case. The main problem with Justice Stratas’ decision in *Ishaq* is that he overlooks this point. Instead, he seems to insist that the very appearance of social science research or (what appear to be) social facts in intervener submissions signals that the interventions should fail.<sup>141</sup>

In one interviewee’s view, the restrictive approach taken in *Ishaq* reflects a stance particular to the federal courts (though more aggressive than usual), and will not likely have much influence beyond them.<sup>142</sup> To be sure, other courts, including the SCC, regularly receive and consider social science research cited by interveners without concern.<sup>143</sup> It is worth noting, however, that the British Columbia Court of

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<sup>135</sup> [1996] OJ No 3032 at paras 7-8.

<sup>136</sup> *Find*, *supra* note 125 at para 49.

<sup>137</sup> *Supra* note 83.

<sup>138</sup> *Ibid* at para 68.

<sup>139</sup> *Ibid* at para 48.

<sup>140</sup> *Ibid* at para 65. Emphasis in original. See also para 60.

<sup>141</sup> This is precisely what Justice Stratas asserts in *Zaric*, citing *Ishaq* as authority. *Supra* note 82 at para 14.

<sup>142</sup> Y interview, *supra* note 123. X also noted the belief that the Federal Court of Appeal is generally unfriendly to interveners. X interview, *supra* note 123.

<sup>143</sup> Raji Mangat, “Here from the Beginning: The Promise (and Perils) of Trial-Level Intervention” [unpublished draft, on file with author] at 15.

Appeal recently dismissed West Coast LEAF's motion to intervene in a family law case on the basis that the organization would have to rely on "academic social science material" not before the trial court.<sup>144</sup> In the Court's view: "Permitting West Coast LEAF to introduce evidence, as it is evidence, not 'authorities,' at this stage of the proceedings would essentially hijack the appeal."<sup>145</sup> If this case is any indication, we ought to take seriously the possibility of further judicial wariness regarding the use of social science research by feminist and other public interest interveners. In the next Part, I consider the practical implications of such an approach.

## V. THE DECISION IN PRACTICE

Having briefly explored the legal basis for the *Ishaq* decision, I turn now to the practical considerations at play in the case. Here I draw greatly on my interviews with X and Y, two legal advocates involved in the attempted interventions. Beginning where the last section ends, I first canvas the interviewees' reflections on the role of social facts and social science research in public interest interventions. I go on to consider the dynamics of public interest interventions more generally.

### A. Social Facts and Social Science Research

Part of what surprised X and Y about the *Ishaq* ruling was that neither saw the social science publications cited in the motion materials as essential to the interventions being proposed. They also both made a point of noting that their organizations were not pushing the courts to make particular findings of fact.<sup>146</sup> Was Justice Stratas right, then, to find that the materials cited amounted to improperly raised evidence of social facts? Was it right for him to characterize the claims at issue as "social facts" in need of evidence to begin with?

To be sure, both interviewees viewed social science scholarship as an important part of what grounded their expertise as public interest interveners generally. "It's absolutely critical," Y exclaimed.<sup>147</sup> However, neither viewed this knowledge as working in isolation. X saw her organization's submissions as supported by social science *and* by case law.<sup>148</sup> Y commented that social science scholarship frequently serves as a "bridge between the grassroots and the legal,"<sup>149</sup> thereby pointing to personal experiences and convictions as an additional point of reference. Justice Stratas' characterization of the intervener submissions as relying on "social science facts" thus ignores how social science works in tandem with legal authority and experiential knowledge to ground the analyses offered by the interveners.

An exclusive focus on social science also ignores the normative dimension of the claims made by the interveners. Their assertions, for instance about the discriminatory stereotypes perpetuated by the government's policy, were not only grounded in fact, but also in legal and political analysis—hence their citation of case law, legal and political scholarship, and their own firsthand experience and perspective,

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<sup>144</sup> *JP v British Columbia (Director of Child, Family and Community Services)*, 2016 BCCA 124 at para 16.

<sup>145</sup> *Ibid* at para 17.

<sup>146</sup> X interview, *supra* note 123; Y interview, *supra* note 123.

<sup>147</sup> Y interview, *ibid*.

<sup>148</sup> X interview, *supra* note 123. As noted in Part IV, some of the claims made by the prospective interveners in *Ishaq* had already been affirmed in previous case law.

<sup>149</sup> Y interview, *supra* note 123.

in addition to studies and reports. In her article “Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication,” American scholar Suzanne Goldberg argues that focusing on “the facts” about a social group whose constitutional rights are at stake allows courts to hide controversial value judgments behind a veneer of objectivity.<sup>150</sup> Her analysis helps to illuminate the mischief in *Ishaq*. By framing the issues presented by the interveners as matters of fact, Justice Stratas avoids engaging with these submissions on a normative level.

Of course, judges must draw a line between assertions that call for evidence, and those that can be judicially noticed, or simply melded into the flow of legal reasoning. The case law on judicial notice points to two criteria that contribute to this determination. One is the controversy surrounding the claim. Only matters that are “notorious,” “capable of immediate and accurate demonstration” or “not [...] the subject of reasonable dispute” can be accepted without evidence. A highly controversial matter would not qualify. A second criterion is the degree to which the claim approaches the ultimate issue(s) in a case. As articulated in *Spence*, a claim that goes to the heart of the case will be subject to greater evidentiary scrutiny than one that relates only to the background.<sup>151</sup>

In X’s view, the claims at issue in *Ishaq* did not warrant strict treatment as facts according to either criterion. Where social science materials speak to controversial issues at the heart of a case, she agreed with the Court that they should be formally introduced as expert evidence subject to cross-examination. In her view, that simply was not the case in *Ishaq*, where the role of such materials was limited to establishing context, for instance by highlighting the vulnerabilities and institutional barriers that arise due to intersecting factors such as gender, immigration status, religion and race.<sup>152</sup> Nor did X find claims about the challenges faced by different groups of women in Canada controversial: “I don’t think these are contentious statements”, she asserted, opining that this kind of analysis could be advanced as a “common sense argument” without citing any studies.<sup>153</sup>

Y agreed that interveners often “cite beyond anything that we really need to cite.”<sup>154</sup> However, she was more ambivalent about the character of the materials on offer. “[T]he social science piece is really tricky,” she admitted, “because interveners... we rely on these materials all the time in our authorities, but they’re really not properly before the court; they can’t be relied on as evidence, but we’re kind of relying on them as evidence.”<sup>155</sup> Y was more inclined to view the claims regarding the vulnerabilities and stereotypes faced by immigrant and Muslim women as speaking to the central issues in the case, at least with respect to the *Charter* (though she noted that the Court was unlikely to have addressed the *Charter* issues). Despite this acknowledgment, she focused on the reality that effective advocacy may call for “shooting from the hip.”<sup>156</sup> In her view, it is important as an intervener to make the court aware of relevant social science literature, even if they are not able to formally rely on it.

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<sup>150</sup> Suzanne B Goldberg, “Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication” (2006) 106 Colum L Rev 1955.

<sup>151</sup> *Supra* note 83 at paras 60 and 65.

<sup>152</sup> X interview, *supra* note 123.

<sup>153</sup> *Ibid.*

<sup>154</sup> Y interview, *supra* note 123.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

Y's comments highlight the grey zone that exists between law and fact in practice, where courts may—and arguably should—consider certain social science reports, or social fact-like assertions, without demanding their formal proof. Indeed, both X and Y observed that courts do this on a regular basis. “Courts deal with that stuff all the time – they admit all kinds of things and it all goes to weight,” observed X.<sup>157</sup> Y added: “The courts make broad sweeping statements all the time without having had an evidentiary record before them – that doesn't trouble them at all when it's closer to their own common sense and comfort zone.”<sup>158</sup> The latter comment indicates that judges have their own “articles of faith,” which are not identified as “facts,” but simply implied as part of the status quo.<sup>159</sup>

If judges nakedly assert their understandings of the world, why do interveners support theirs with social science data, at the risk of being perceived to be delving into factual matters? Beyond the desire expressed by Y to bring relevant literature before the courts, both interviewees noted that social science citations serve as an important means to bolster institutional credibility. “[S]ocial and legislative fact citations are as much to signal the credibility of the organization as for the content itself,” explained Y.<sup>160</sup> While X was less adamant about the need for citations, she agreed that they help to establish the credibility of an organization's submissions. In her words, the citations say, “we're not making this up, this isn't coming out of nowhere.”<sup>161</sup>

Judicial insistence that references to social science research are improper unless introduced as evidence thus creates a dilemma for interveners. If they assert social or legislative facts that seem at all contentious to the court (if not to the organization) without supporting citations, they may lose credibility in the eyes of the court. But when they do include the citations, they are accused of “bootlegging evidence in the guise of authorities.”<sup>162</sup> The only other option is to lead the relevant social science scholarship as evidence at the first instance of a proceeding. However, as will be discussed below, this option too raises a number of challenges.

## **B. Challenges to Intervening at the First Stage**

While there are good reasons to think that social science research should be tested through the evidentiary process (see Part III), in practice, X and Y pointed to a number of problems that would arise were interveners expected to formally introduce such research as evidence at the first stage of proceedings.

One of the main concerns relates to the limited resources of intervening organizations. X emphasized that intervening at the first stage of a case is expensive, especially if you lead evidence, which may require payment to expert witnesses among other costs.<sup>163</sup> Even without leading evidence, intervening at trial incurs additional disbursements, and requires a much larger time commitment on the part of counsel than

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<sup>157</sup> X interview, *supra* note 123.

<sup>158</sup> Y interview, *supra* note 123.

<sup>159</sup> See *supra* note 80.

<sup>160</sup> Y interview, *supra* note 123.

<sup>161</sup> X interview, *supra* note 123.

<sup>162</sup> *Ishaq*, *supra* note 8 at para 22, citing *Canada (Canadian Human Rights Commission) v Taylor*, [1987] 3 FC 593 at para 30.

<sup>163</sup> X interview, *supra* note 123.

appellate level interventions.<sup>164</sup> It is, therefore, often financially impractical for intervener organizations to become involved at the first instance of a case.<sup>165</sup> As X pointed out, the challenge was even greater during the years of the Harper government, when the *Ishaq* litigation was initiated. Faced with a proliferation of pressing equality issues at a time of deep funding cuts, public interest organizations “had to do more with less.”<sup>166</sup> Y added that timing can also be an issue; she was not sure if her organization had become aware of the *Ishaq* case far enough in advance of the Federal Court hearing to intervene there.<sup>167</sup>

Beyond the barriers imposed by limited time and resources, X and Y pointed to the reluctance of courts to allow interveners to participate in the fact-finding process. According to Y, it is somewhat rare for courts to grant leave for an organization to intervene as a party with rights to file evidence.<sup>168</sup> Public interest organizations, she explained, have also been dissuaded by the courts’ historically narrow approach to public interest standing. Indeed, the work involved in bringing a suit combined with the uncertainty of being granted standing to proceed is part of what pushed public interest organizations towards *amicus curiae* interventions in the first place.<sup>169</sup> While *SWAUV* saw the courts broaden their approach to public interest standing, the extent to which such a ruling might also open the door for *intervening* parties is unclear.

The courts’ historically restrictive approach to public interesting standing stemmed in part from a concern about resolving issues within a proper adversarial context.<sup>170</sup> Where there is a rights-seeking litigant with private standing, that concern is less pressing. On the other hand, courts must pay careful attention to the role of interveners in relation to the parties. As noted by X, interveners are generally expected not to take a position on the particular facts of the case. While evidence may be led regarding the social context or possible impacts of an impugned law or policy, the courts are wary (rightly, in X’s view) of allowing interveners to unduly burden the parties by extending the length and cost of the litigation:

To say that interveners should be in at the first stage where they can lead their evidence, to me, does not address the legitimate concern I think we would see from judges at the first instance about ‘what is your participation in the evidence going to do to the parties and the trajectory of the case, and is that fair?’<sup>171</sup>

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<sup>164</sup> I wish to thank Raji Mangat, Director of Litigation at West Coast LEAF, for sharing insights based on her experience as an intervener at different levels of court. I owe this point to my discussions with her.

<sup>165</sup> X interview, *supra* note 123.

<sup>166</sup> *Ibid.* See also: Carissima Mathen, “Access to *Charter* Justice and the Rule of Law” (2008) 25 *National Journal of Constitutional Law* 191-204 at 197; Vinessa Redford, “The Precarious Future of Women’s Equality in Canada: Access to Justice and the Court Challenges Program” (2011) 2 *J Pub Pol’y Admin & L* 29.

<sup>167</sup> Y interview, *supra* note 123.

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> Phillips, *supra* note 115 at 26.

<sup>171</sup> X interview, *supra* note 123.



For instance, were an intervener to introduce social science research through an expert witness at trial, rather than citing it in a brief on appeal, the parties would have to review the expert's report and decide whether to cross-examine the expert and/or call counter-experts of their own. Courts may thus view interveners who seek to lead evidence as overstepping their proper role. In X's view, Justice Stratas' decision was not an attempt to dismiss the concerns that lead to a carefully circumscribed role for interveners at the first instance, but rather a simple failure to acknowledge them, resulting in an "irreconcilable tension."<sup>172</sup>

### C. The Relationship Between Intervenors and Rights-Seeking Litigants

The potential burden of extensive interventions at the first instance speaks to the importance of the relationship between interveners and rights-seeking litigants, and by extension, the systemic and individual dimensions of the case. Courts, X explained, have to manage the role of interveners so as to "appreciate [the case's] impact beyond the parties without unduly burdening the parties"—a delicate balance.<sup>173</sup> In a case like *Ishaq*, that balance is arguably of equal importance to feminist advocates who seek to raise systemic perspectives while also attending to individual women's experiences and choices.<sup>174</sup> As Y put it: "My goal is always to make the 'isms' real. So, what does 'intersectional impacts' actually mean? What does it mean for real lives of real women?"<sup>175</sup>

Reflecting these concerns, both interviewees affirmed that the impact on the rights-seeking party was important to consider in deciding whether to lead evidence as an intervener. At the same time, X was more apt to emphasize that interveners "shouldn't be beholden to the interests of the parties," noting that even when the interests overlap, they seldom align perfectly.<sup>176</sup> While agreeing that interveners should maintain a sphere of independence, Y thought that it was important to consult with counsel for the rights-seeking party prior to becoming involved at the first instance, in order to ensure the intervention would be helpful. This struck her as especially important in a case like *Ishaq*, where a woman's citizenship hung in the balance. "It depends on the case, but you need to look at the case and think about 'do I have a responsibility not to intervene?' There can often be a tension between the individual and the systemic, in terms of the best strategy or remedy to address the systemic issues and the best strategy or remedy for the individual, but they kind of merge in Ms. Ishaq's case..."<sup>177</sup> For Y, then, the systemic issues raised through intervention were inextricably bound up with the case of the individual rights claimant.

Y explained that sometimes, as in *Ishaq*, counsel for a rights-seeking litigant might be grateful to interveners who are able to bring forward systemic arguments that they don't have the time or resources

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<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

<sup>174</sup> Note, for instance, the following statement from the Schlifer Clinic: "We respect and broaden women's choices to determine their own lives according to their values, hopes and positive self-regard." *Ishaq* FCA, *supra* note 9 (Motion Record of the Schlifer Clinic, Affidavit of Amanda Dale at para 15). Of course, feminist advocates may also intervene in cases where they do not support the rights-seeking party. See for example *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 (where LEAF intervened against a public interest litigant seeking to challenge certain *Criminal Code* provisions relating to abortion on the grounds that they violated the rights of the foetus).

<sup>175</sup> Y interview, *supra* note 123.

<sup>176</sup> X interview, *supra* note 123.

<sup>177</sup> Y interview, *supra* note 123.

to take on. At the same time, counsel may have good reasons not to want interveners to participate in fact-finding at the first instance. Ms. Ishaq's counsel, for example, was seeking an order that would allow her to complete the citizenship process in time to vote in the federal election—something that was very important to her. Had interveners started bringing in experts to address the historical context and effects of the government's policy on Muslim women generally, it would have become a much bigger and slower case.<sup>178</sup> Ms. Ishaq would thus have had to wait much longer to obtain citizenship, and would not have received it in time to vote in the election.

Even where interventions occur at the appellate level without the introduction of evidence, they will burden the parties to some degree, as counsel must review the intervener submissions.<sup>179</sup> Although Ms. Ishaq did not oppose the prospective interventions at the Court of Appeal, they might still have caused a delay sufficient to prevent her from voting in the election. In one sense, then, Justice Stratas' refusal to allow the interventions—and the courts' refusal to consider the *Charter* arguments at play in the case—may have resulted in an important benefit to Ms. Ishaq.<sup>180</sup>

The potential gain for Ms. Ishaq, however, comes at a cost—the loss of the broader perspectives and systemic analyses of the interveners. The Schlifer Clinic put it as follows:

Having regard to the fact that it is Muslim women who are affected by the Policy and that the Policy is purportedly intended to promote women's equality, the gendered analysis proposed by the Clinic is central to the fulsome hearing of this appeal.<sup>181</sup>

Indeed, as I have argued elsewhere, *Charter* cases tend to raise issues of broad social import, and therefore call for systemic perspectives, even when individual rights are at stake.<sup>182</sup> Public interest organizations, moreover, are often well positioned to offer such perspectives, due to their greater (albeit still limited) resources, their experience working with multiple similarly situated individuals (where the organization offers frontline services), and their familiarity with the social science literature.<sup>183</sup>

#### **D. Consequences, and Thoughts Looking Forward**

According to X, were all courts to adopt an approach similar to the Federal Court of Appeal in *Ishaq*, the result would be a chilling effect on interventions. This, in her view, “deprives the court of an important resource,” especially given the significant contribution of interveners to the development of Canadian law.<sup>184</sup> As X pointed out, the jurisprudence itself recognizes the value of that contribution. Consequently,

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<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

<sup>180</sup> Y, for her part, was skeptical that Justice Stratas' decision reflected a concern about burdening Ms. Ishaq (though she acknowledged the importance of that concern). In her view, the Court simply did not wish to wade through the intervener material. Y interview, *ibid.*

<sup>181</sup> *Ishaq FCA*, *supra* note 9 (Motion Record of the Schlifer Clinic, Written Representations at para 37).

<sup>182</sup> Phillips, *supra* note 115 at 29.

<sup>183</sup> *Ibid* at 27.

<sup>184</sup> X interview, *supra* note 123.

a restrictive approach “does not meet the goals of what we have historically understood intervention to be.”<sup>185</sup>

The loss of intervener perspectives also has consequences for access to justice. So LEAF stated in its motion materials:

Immigrant women, some of the most marginalized members of society, do not have the resources, economic or otherwise, to litigate their rights before the Federal Court of Appeal. The opportunity for LEAF to intervene before this Court [...] is an important way to provide access to justice for these women.<sup>186</sup>

Y expressed additional concerns regarding the public perception of justice:

...it is important that public interest organizations are there and seen to be there—[for the sake of] democratic participation, and access to the courts, and courts as being representative. [...] for all kinds of symbolic and real reasons, it would have been better to have one or two of these organizations there.<sup>187</sup>

In *Ishaq*, Y emphasized, these factors were especially important, because the case itself was about citizenship and the right to political participation.<sup>188</sup>

Some might object that Justice Stratas’ decision actually carves out a greater role for interveners, by suggesting that they participate in fact-finding at the first instance. The problem, as already noted above, is that interveners will rarely be able to take up such a role. And, even if they do, they are likely to cause significant delays and costs to the rights-seeking litigant—much greater than would be the case had they intervened at the appellate level. In contrast to the situation where interveners are barred from participating at all, the danger here is that the individual litigant will be lost in a deluge of evidence concerning the systemic dimensions of the case. As Y put it: “when we take on broad, systemic test case litigation with full evidentiary records, it’s a bit much for individuals who really need a [...] remedy to take on. They’ve got to live that case for a decade.”<sup>189</sup>

On a practical level, then, Justice Stratas’ decision tends to encourage cases at two ends of a spectrum. Either interveners participate fully in the fact-finding process, resulting in broad test case litigation, or they do not participate much at all, leading to a narrow and highly individualized decision. While both types of cases may be important and appropriate in some circumstances, the gap between them limits the potential to attend to individual and systemic considerations within a single frame. In this way, Justice

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<sup>185</sup> *Ibid.*

<sup>186</sup> *Ishaq* FCA, *supra* note 9 (Motion Record of LEAF, Affidavit of Diane O’Reggio at para 18).

<sup>187</sup> Y interview, *supra* note 123. A similar view was advanced in a recent Canadian conference paper: Nathalie Des Rosiers & Christian Pearce, “Interventions”, *Interventions Symposium*, The David Asper Centre for Constitutional Rights (2009), online: <<http://www.aspercentre.ca/resources/publications/conference-papers.htm>>. See also Alarie & Green’s “acceptance” theory of the function of interventions, *supra* note 114.

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.* See also Young, *supra* note 84 at 628 (noting that the adjudicative facts of a test case can be quite disconnected from the broader issues at stake).

Stratas' approach preserves what Lorne Sossin identifies in the context of public interest standing as an "artificial dichotomy between 'individual' and 'systemic' *Charter* litigation."<sup>190</sup> Here lies the importance of a more generous approach to social and legislative facts and social science research presented by interveners. While insisting that interveners present social science research as formal evidence ensures that the research is well-tested, appellate level interventions that can bring systemic issues to light without the significant complications imposed by expert evidence may well offer the best compromise for the courts and parties alike. Such an approach may also offer the most robust access to justice for marginalized groups.

This is not to say that interveners should always have unlimited access to appellate courts. While some may equate access to justice with an ever-expanding place for public interest organizations in the courtroom, I have suggested that true access calls for a balance between individual and systemic considerations. As Y explained, the involvement of multiple interveners sometimes creates a "piling up" effect that can work against this balance. In such situations, the need to articulate a distinct contribution may lead even well-intentioned organizations to raise issues that are tangential and distracting to the case. In Y's estimation, moreover, the "piling up" effect may be increasing due to an expanding number of organizations seeking to intervene in litigation in Canada, which may in turn be pushing courts to act as gatekeepers.<sup>191</sup> The proliferating role of *amicus* briefs at the Supreme Court of the United States is a cautionary tale in this regard.<sup>192</sup>

In this environment, Y suggested that organizations can strengthen both their effectiveness and their chances of being granted leave to intervene by working in coalitions.<sup>193</sup> In her view, this would have been desirable in the *Ishaq* case. In addition to "mobilizing resources,"<sup>194</sup> coalitions can also help to ensure that organizations make submissions that are both sophisticated in terms of legal analysis, and properly rooted in the experiences of the groups being represented.<sup>195</sup>

## VI. REFLECTIONS ON FEMINIST ADVOCACY

In this paper, I have argued that an overly strict approach to the "facts" raised by feminist and other public interest interveners runs counter both to Canadian jurisprudence, and to the potential to realize equality through litigation in practice. I conclude with a brief word about how feminist advocacy inside the courtroom connects to the world beyond it.

In seeking an explanation for the increased courtroom success of feminist advocates in the *Charter* era, Frederick Morton & Avril Allen situate feminist litigation efforts within a broader feminist campaign of "influencing the influencers," which included the creation and funding of LEAF, support for feminist

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<sup>190</sup> Lorne Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid" (2007) 40 UBC L Rev 727 at 727.

<sup>191</sup> Y interview, *supra* note 123.

<sup>192</sup> See the text accompanying note 99.

<sup>193</sup> Y interview, *supra* note 123.

<sup>194</sup> Rosanna Langer, "Five Years of Canadian Feminist Advocacy: Is it Still Possible to Make a Difference?" (2005) 23 Windsor YB Access Just 115 at 143.

<sup>195</sup> Y interview, *supra* note 123. LEAF has often worked in coalition with other organizations for this reason. Jhappan, *supra* note 6 at 11.

scholarship, and involvement in judicial appointments and education.<sup>196</sup> This understanding of feminist advocacy around the *Charter* casts doubt on the strict separation of law, politics, and research that courts—such as the Federal Court of Appeal in *Ishaq*—sometimes insist upon. Instead, it recognizes that the broader efforts of feminist lawyers, scholars, and activists may prove essential to the traction feminist interveners are able to gain in litigation.

The reverse may also be true. As Y so interestingly remarked, intervener facta not only enhance access to justice and the perception of justice, they also contribute to public education: “it’s a source, it’s like writing an article [...] to some extent you are creating the written argument as part of a body of knowledge.”<sup>197</sup> Just as the mobilization of feminist perspectives outside the courtroom supports the litigation efforts within, so might litigation contribute to the production and circulation of feminist knowledge more broadly.<sup>198</sup> At a time when feminists are seeking to combat reductive stereotypes about immigrant, Muslim and niqab-wearing women, that seems awfully important. Let us hope that the next court takes a more contextualized view of the “facts.”

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<sup>196</sup> Morton & Allen, *supra* note 1 at 79.

<sup>197</sup> Y interview, *supra* note 123.

<sup>198</sup> In the words of Langer, “[t]here is a significant cross-fertilization between feminist legal academics, legal advocates and the social policy arguments raised in courts.” *Supra* note 194 at 4. Jhappan makes a similar point about the productive potential of publicity generated by litigation. *Supra* note 6 at 21.