

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N

MUSLIM ASSOCIATION OF CANADA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION UNDER Rule 15.04(3)(g.1) of the *Rules of Civil Procedure*

FACTUM OF THE MUSLIM ASSOCIATION OF CANADA
(application for relief under the *Charter of Rights and Freedoms*,
returnable April 4 and 6, 2023)

McCarthy Tétrault LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Geoff R. Hall LSO# 347010
ghall@mccarthy.ca
Tel: 416-601-7856

Anu Koshal LSO# 66338F
akoshal@mccarthy.ca
Tel: 416-601-7991

Adam H. Kanji LSO# 78024R
akanji@mccarthy.ca
Tel: 416-601-8145

Lawyers for the Applicant
Muslim Association of Canada

TO: **DEPARTMENT OF JUSTICE CANADA**
Civil Litigation Section
50 O'Connor Street, 5th Floor
Ottawa ON K1A 0H8

Lynn Marchildon LSO# 43723N
Tel: 613-670-6222
Lynn.Marchildon@justice.gc.ca

James Gorham LSO# 43931S
Tel: 416-618-2369
James.Gorham@justice.gc.ca

Anna Maria Konewka LSO# 67820E
Tel: 613-670-6473
AnnaMaria.Konewka@justice.gc.ca

Mitchell Meraw LSO# 79690L
Tel: 343-573-1403
Mitchell.Meraw@justice.gc.ca

Tel: 613-952-1228

Lawyers for the Respondent
Attorney General of Canada

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N

MUSLIM ASSOCIATION OF CANADA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION UNDER Rule 15.04(3)(g.1) of the *Rules of Civil Procedure*

TABLE OF CONTENTS

	Page No.
PART I - OVERVIEW	1
PART II - THE FACTS	4
A. MAC	4
B. The RAD Audit.....	5
i. What RAD is.....	5
ii. Step one of the MAC audit: a “risk-based assessment” that identifies Muslims as a source of terrorist financing risk	6
iii. Step two of the MAC audit: the RAD Audit Referral Analysis	8
iv. Step three of the RAD audit: interviews and site visits, culminating in the AFL.....	10
C. The expert assessment of the RAD Audit.....	11
i. The FATF regime and the resulting risk-based approach creates the wrong starting point	13
ii. Implementation of the RAD audit.....	14
a. Reliance on Islamophobic writings and selection bias	14
b. Problematic “links analysis”	16
c. The discourse of taqiyya	16
d. The MAC audit inappropriately assesses MAC’s endeavours to advance religion through a Protestant Christian lens.....	17

a)	The CRA’s approach to MAC’s Eid festivals.....	18
b)	The CRA’s approach to MAC’s youth activities.....	19
D.	Observation on Dr. Emon’s evidence	20
E.	The CRA’s evidence in response to this application	20
	PART III - THE ISSUES.....	21
	PART IV - LAW AND ARGUMENT	22
A.	A preliminary note on MAC’s standing to assert <i>Charter</i> claims	22
B.	The RAD audit infringes section 15 of the <i>Charter</i>	23
i.	Adverse effects discrimination	23
ii.	The test for infringement under section 15 of the <i>Charter</i>	24
a)	Step One of the section 15 analysis	24
b)	Step Two of the section 15 analysis.....	25
C.	The RAD audit infringes sections 2(a) of the <i>Charter</i>	27
a)	Step One of the section 2(a) analysis	27
b)	Step Two of the section 2(a) analysis	28
D.	The RAD audit also results in infringements of section 2(b) and section 2(d) rights	30
i.	Infringement of section 2(b)	30
ii.	Infringement of section 2(d)	31
E.	The appropriate remedy is an order terminating the audit.....	32
	PART V - ORDER REQUESTED	34

PART I - OVERVIEW

1. Let us begin with a rhetorical question that is deliberately absurd, and has an answer that is self-evident, but which is nonetheless illustrative for this case. If the federal government wished to audit the terrorist financing risk posed by a Jewish charity, started with a list of international organizations associated with terrorism that consisted predominantly of Jewish organizations, developed its plan for the audit by writing a document that cited *Mein Kampf* as a data point to identify risks raised by Jewish organizations, and then proceeded with its audit analysis with a flawed understanding of Judaism and by trying to link members of the charity with the list of predominantly Jewish international organizations, would the audit be regarded as a thorough exercise in protecting Canada from the risk of terrorist financing? Or would the exercise be regarded as anti-Semitic and deeply flawed?

2. That hypothetical is obviously not one that could happen in modern Canada. Sadly, though, this application raises a parallel question in respect of a Muslim charity. If the government wishes to assess the terrorist financing risk raised by a Muslim charity in Canada, starts with an analytical methodology that identifies Muslim groups as a particular source of terrorism risk, then proceeds to collect literature that includes Islamophobic writings from newspapers, blogs and admittedly questionable sources in order to identify the risks that need to be determined, and then proceeds with a flawed analytical process that links Muslims to inherent risks and demonstrates a flawed understanding of Islam, is the exercise a thorough exercise in protecting Canada from terrorist financing? Or is the exercise Islamophobic and deeply flawed?

3. The Muslim Association of Canada (“MAC”) is Canada’s largest grassroots Muslim charity. It operates mosques, schools and community centres across the country, serving Canada’s

Muslim community (indeed, all of Canada) in a myriad of ways. It is a registered charity, and depends on charitable donations to fund its operations and programs. In turn, those charitable donations are contingent on MAC's ability to issue charitable receipts making donations tax deductible to donors.

4. MAC's very existence is threatened. Since 2015, it has been the subject of an audit by the Canada Revenue Agency (the "CRA"), and specifically a specialized branch of the Charities Directorate of the CRA – the Review and Analysis Division ("RAD"). RAD's role is to prevent registered charities from facilitating terrorist funding. Unfortunately, the way RAD fulfils this goal is discriminatory towards Muslims, and denies their freedom of religion. It also denies Muslims their freedom of expression and freedom of association rights.

5. The evidence in this case demonstrates that the audit process with respect to MAC has involved three discrete steps:

- (a) First, it began with a so-called risk-based analysis, modelled on international standards, which identifies Muslim groups as Canada's primary source of terrorist funding risk. The risk-based analysis was used in this case to choose MAC for audit.
- (b) Second, before launching the formal audit process, RAD proceeded to try to identify risks to be considered in the audit – and used inherently unreliable and blatantly Islamophobic sources to identify the supposed risks.
- (c) Third, the audit then failed to understand Muslim religious practices on their own terms, applied standards that CRA and RAD do not apply to non-Muslim charities,

and engaged in a “links analysis” that sought to establish links between MAC and individuals or entities deemed to be problematic or risky (all of whom are Muslim).

6. The current status of the audit is that RAD has issued to MAC an administrative fairness letter or “**AFL**”, which purports to find serious violations by MAC and expresses a preliminary conclusion that MAC’s charitable status ought to be revoked. MAC has provided a detailed response to the AFL, and the CRA has yet to issue a final decision on the audit. But, realizing that the die is already cast by a severely flawed audit process, MAC has also instituted this application under the *Charter of Rights and Freedoms* to stop the audit process on the basis that the audit, as it has been undertaken by the CRA to date, discriminates against Muslims and restricts their freedom of religion, freedom of expression, and freedom of association.

7. The entire RAD audit of MAC, from starting point through to implementation, has involved systemic bias against Muslims and has had discriminatory effects. This is established by the only expert evidence adduced in this case, a report from Dr. Anver Emon of the University of Toronto, a renowned Islamic studies scholar. Dr. Emon’s report outlines, in great detail, the many flaws exhibited by RAD’s audit of MAC.

8. The CRA counters MAC’s formidable evidence not as one might expect, namely by leading its own expert evidence to establish that there has been no systemic bias or discriminatory effect. Rather the CRA leads only fact evidence in response, and seeks to establish that RAD’s policies are facially neutral, that there has been no intentional discrimination against Muslims, and that the audit has been carried out in a manner that administrative law would consider sufficiently reasonable that a court should not intervene on judicial review. But this evidence from the CRA

misses the point and is irrelevant. MAC raises a case of *systemic bias* and *adverse effects discrimination*. The evidence adduced by the CRA is no answer to such a case.

9. The result is infringement of sections 15, 2(a), 2(b) and 2(d) of the *Charter*. The appropriate remedy for these infringements under section 24(1) of the *Charter* is an order terminating the audit.

PART II - THE FACTS

A. MAC

10. MAC is the largest grassroots Muslim organization in Canada. It was incorporated as a not-for-profit entity in 1997, and it has been a registered charity since 1999 for the purpose of “Advancement of Religion”.¹

11. MAC promotes a moderate, balanced view of Islam in Canada, and aims to educate and motivate Canadian Muslims to put their faith into action for the benefit of all Canadians. MAC has over 500 members, 1,500 volunteers, and serves more than 150,000 members of the Canadian Muslim community, through local chapters in 14 cities across Canada.²

12. MAC has four main areas of impact: (i) helping Muslims develop a Muslim-Canadian identity (one can be both Muslim and Canadian, as opposed to having to choose one or the other); (ii) upholding a balanced and mainstream message of Islam, one that promotes peace and understanding and rejects all forms of violence and extremism; (iii) delivering social programs and services, as required by the Muslim faith; and (iv) creating spaces for Canadian Muslims to come together and find belonging with each other.³

¹ Affidavit of Yasser Haddara, sworn November 11, 2022 [“**Haddara Affidavit**”], paras. 2 and 15, Application Record [“**AR**”], Tab 3, pp. 32, 36.

² Haddara Affidavit, para. 3, AR, Tab 3, p. 33.

³ Haddara Affidavit, para. 15, AR, Tab 3, p. 36.

13. Across Canada, MAC operates 22 mosques and community centres, and 30 schools.⁴

14. MAC relies on charitable donations for its operations, and to fund its charitable works. Because MAC is a registered charity, donations to it are tax deductible. If MAC were to lose its charitable status, it would no longer be able to provide the services that it currently provides to the Muslim community.⁵

B. The RAD Audit

i. What RAD is

15. The Charities Directorate of the CRA has two separate groups that conduct audits of charities and have the power to revoke charitable status. The first is known as “Compliance Division”. It handles the bulk of audits, and addresses most issues in respect of charitable status (such as the requirement to keep adequate books and records). The second group is the “Review and Analysis Division”, known almost universally by the acronym “**RAD**”. RAD is responsible to prevent the abuse of registered charities for the financing of terrorism, and has its own, specially trained team of auditors to conduct investigations relating to charitable organizations who may be abusing the charitable registration system.⁶

16. While RAD claims that it does not track the religious affiliations of the charities that it audits, RAD audits disproportionately target Muslim charities. CBC News has reported that a study by the International Civil Liberties Monitoring Group found that between 2008 and 2015, 75% of the charities who had their charitable status revoked by RAD were Muslim charities.⁷ At a hearing

⁴ Haddara Affidavit, para. 16, AR, Tab 3, p. 36.

⁵ Haddara Affidavit, para. 18, AR, Tab 3, p. 37.

⁶ Cross-examination of Sophie Amberg, held February 16, 2023 [“**Amberg Cross-examination**”], Q. 39; Privacy Impact Assessment (PIA) Summary – Review and Analysis Division, Ex. 1 to the Amberg Cross-examination.

⁷ Haddara Affidavit, para. 55, AR, Tab 3, p. 48; CBC Article – Canada Revenue Agency’s targeting of Muslim charities amounts to discrimination, says civil liberties group, AR, Tab 3S, p. 606.

before the Standing Senate Committee on Human Rights on November 28, 2022, senior CRA personnel testified that, since 2008, RAD has completed 39 audits, 14 of which resulted in a revocation of charitable status, and that 12 of those revocations were with respect to Muslim charities (85%).⁸ On cross-examination in this application, Sophie Amberg, a Director at RAD, confirmed the first two numbers (39 audits and 14 revocations), but claimed that the third number (i.e., 12 Muslim charities had their status revoked) is wrong. She did not provide any different number, and had no explanation for why the witness who gave the figure of 12 revocations of Muslim charities (Geoff Trueman, a very senior CRA official who is senior to Ms. Amberg's boss) would have given incorrect information to the Senate of Canada. Moreover, she was unaware of any correction having been provided by RAD or the CRA to the Committee.⁹

17. In 2015, MAC was notified that it had been selected for a RAD audit.¹⁰ The audit that proceeded can be divided into three discrete steps, as described below.

ii. Step one of the MAC audit: a “risk-based assessment” that identifies Muslims as a source of terrorist financing risk

18. RAD's starting point is three publications that overtly identify Muslim organizations as a threat of terrorist financing risk.

19. The first publication is a 2013 publication of the federal government entitled *Building Resilience Against Terrorism: Canada's Counter-Terrorism Strategy*, which is described as a “coordinated national strategy to counter terrorism”.¹¹ This document states that “[v]iolent Islamist

⁸ Evidence from the Standing Senate Committee on Human Rights, November 28, 2022, Ex. 2 to Amber Cross-examination.

⁹ Amberg Cross-examination, QQ. 67-71.

¹⁰ Haddara Affidavit, para. 28, AR, Tab 3, p. 42.

¹¹ Affidavit of Sophie Amberg, affirmed December 22, 2022 [“**Amberg Affidavit**”], paras. 6, 8; **See:** *Building Resilience Against Terrorism*, Ex. B to the Amberg Affidavit.

extremism is the leading threat to Canada’s national security” and lists as “The Terrorist Threat” Islamist extremist groups, violent homegrown Sunni Islamist extremists, as well as the Air India bombers and the Liberation Tigers of Tamil Eelam – all minority groups in Canada.¹² It lists primarily Muslim organizations as terrorist threats, and refers to “ongoing struggles in the Middle East” as “another example where foreign conflicts pose a threat of international terrorism”.¹³

20. The second publication is a report from the Financial Action Task Force (“**FATF**”), an intergovernmental organization (of which Canada is a founding member) formed by the G7 group of countries to combat money laundering, which “informs RAD’s work and understanding of risk, including the audit selection process.”¹⁴ The FATF report refers to 10 terrorist groups, eight of which are Muslim organizations.¹⁵

21. The third publication was issued by the federal government in 2015 and is entitled *The Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada*. It is often referred to by the acronym “**NIRA**”, which refers to “National Inherent Risk Assessment”. This document is “the key policy tool by which Canada identifies, assesses and understands its money laundering and terrorist financing risks” in accordance with the FATF. This document lists 10 terrorist groups, of which eight are Muslim and two are non-Muslim (one Sikh and one Tamil).¹⁶

¹² *Building Resilience Against Terrorism*, p. 2, Ex. B to the Amberg Affidavit.

¹³ *Building Resilience Against Terrorism*, p. 8, Ex. B to the Amberg Affidavit.

¹⁴ Amberg Affidavit, para. 41; **See:** *Risk of Terrorist Abuse in Non-Profit Organizations*, Ex. O to the Amberg Affidavit.

¹⁵ *Risk of Terrorist Abuse in Non-Profit Organizations*, p. vi, Ex. O to the Amberg Affidavit.

¹⁶ Affidavit of Charlene Davidson, affirmed December 23, 2022 [“**Davidson Affidavit**”], paras. 30 and 36; *Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada*, p. 28, Ex. E to the Davidson Affidavit.

22. Individually and collectively, these three publications paint a picture of terrorist financing as a problem that is foreign and associated with minority groups in Canada – predominantly Muslims.

iii. Step two of the MAC audit: the RAD Audit Referral Analysis

23. By the time MAC was informed that it had been chosen for a RAD audit, RAD had already undertaken significant planning for its audit of MAC. A key part of this preparation is a remarkable, and troubling, 65 page document entitled “RAD Audit Referral Analysis”, created on April 22, 2013 – two years before MAC was notified of the audit – and was modified prior to the start of the audit on August 27, 2015.¹⁷

24. The RAD Audit Analysis includes the following elements:

- (a) It expresses concern that MAC might have an “ideological affiliation” with a group called the Egyptian Muslim Brotherhood, without making any distinction between political connections to the Egyptian Muslim Brotherhood (a specific group in Egypt) and a religious ideology upon which the Muslim Brotherhood is founded.¹⁸ The problem with this approach is that while MAC follows the religious ideology of Imam Hassan al-Bann that led to the establishment of the Muslim Brotherhood, adopting the *religious ideology* of the Muslim Brotherhood is not the same thing as supporting the *political ideology* of the Egyptian Muslim Brotherhood.¹⁹ RAD conflated two entirely separate concepts.

¹⁷ RAD Audit Referral Analysis, p. 1, Ex. 4 to the Amberg Cross-examination.

¹⁸ RAD Audit Referral Analysis, pp. 1, 2, 7, 63, Ex. 4 to the Amberg Cross-examination; **see also:** Amberg Cross-examination, QQ. 302-307.

¹⁹ Haddara Affidavit, paras. 19-21, AR, Tab 3, pp. 37-38.

- (b) It cites a “report” from Tom Quiggan,²⁰ a far-right activist and media personality. His work is blatantly Islamophobic, and it is difficult to imagine that anyone takes his writings seriously (although apparently RAD did so). He claims that “Justin Trudeau supports terrorist front groups” and is “politically accountable & responsible for Islamist terror attacks.” He claims that the January 6, 2021 attack on the U.S. Capitol had an “entrapment element”. He has tweeted, “Justin Trudeau is found dead in his bed, strangled with a pair of Halal socks, given to him by Cabinet Minister Omar Alghabra.” He was affiliated with the organizers of the trucker convoy that occupied Ottawa in the winter of 2022.²¹ Reputable Canadian media (*Maclean’s* magazine) calls the Quiggin report “far-fetched” and notes that it “risks vilifying an already at-risk community”.²² Indeed, under cross-examination, a member of the RAD’s audit team, Marika Farant, conceded Mr. Quiggan’s posts were racist and Islamophobic.²³
- (c) It makes repeated references to Islamophobic articles from the *Toronto Sun* written by journalist Brian Daly.²⁴ Mr. Daly’s articles contain false and misleading information and wrongly accuse MAC of supporting terrorist groups.²⁵ Mr. Daly’s articles have been retracted by the published of the *Toronto Sun*.

²⁰ RAD Audit Referral Analysis, p. 64, Ex. 4 to the Amberg Cross-examination.

²¹ Haddara Affidavit, paras. 35-41, AR, Tab 3, pp. 44-45; The Muslim Brotherhood in North America (Canada/USA) by Tom Quiggan, AR, Tab 3M, p. 321; Muslim Brotherhood: the new Islamist bogeyman in Canada, AR, Tab 3N, p. 524.

²² Muslim Brotherhood: the new Islamist bogeyman in Canada, AR, Tab 3N, p. 524.

²³ Examination of Marika Farant, held February 17, 2023 [“**Farant examination**”], QQ. 153-157.

²⁴ RAD Referral Analysis, pp. 11 (especially fn. 21), 30 (especially fn. 140), 51-57, 65 (especially fns. 274, 276, 277, 283, 286, 287, 288, 289 and 290), 63 (especially fns. 315, 316, 317 and 318), Ex. 4 to the Amberg Cross-examination.

²⁵ Haddara Affidavit, paras. 47-52, AR, Tab 3, pp. 46-47; Articles by Brian Daly, AR, Tab 3P, pp. 543-555; ATIP Response re Daly Articles, AR, Tab 3Q, pp. 555-572.

- (d) It makes repeated references to blog posts from *Point de Bascule*, an Islamophobic website that the document itself notes “is a Montreal based website known to depict Muslim organizations unfavourably and to level accusations against a number of them for allegedly supporting terrorism and undermining Western values” such that “articles from this source may display important editorial biases in their content and coverage.”²⁶
- (e) It makes a reference to what the CRA admits in the document itself is another “blog of questionable reliability” called *BlazingCatFur*.²⁷ “Questionable reliability” is a considerable understatement. “Blatantly Islamophobic” would be closer to the mark.
- (f) It makes reference to another “unverified post in the blog *Alternative Angle*”, authored by an Islamophobic author named Jonathan Halevi.²⁸
- (g) It cites a known Islamophobic writer named Lorenzo Vidino for a supposed explanation of the Muslim Brotherhood.²⁹ The work of Lorenzo Vidino is thoroughly discredited, as explained in the expert report of Dr. Emon.³⁰

iv. Step three of the RAD audit: interviews and site visits, culminating in the AFL

25. The RAD audit itself lasted 13 months, involving numerous interviews, the extraction by RAD of 746 gigabytes of data (including one million financial transactions, 415,874 emails, and

²⁶ RAD Audit Referral Analysis, pp. 10 (especially fn. 13), 40-41 (especially fn. 186, 187, 188 and 189), 48 (especially fn. 247), Ex. 4 to the Amberg Cross-examination.

²⁷ RAD Audit Referral Analysis, p. 39 (especially fn. 177), Ex. 4 to the Amberg Cross-examination.

²⁸ RAD Audit Referral Analysis, p. 47 (especially fn. 238), Ex. 4 to the Amberg Cross-examination.

²⁹ RAD Audit Referral Analysis, p. 64 (especially fn. 321), Ex. 4 to the Amberg Cross-examination.

³⁰ See para. 35 below.

63,523 other files).³¹ This extensive canvass found a grand total of four emails that RAD considered to be evidence of a relationship between MAC and the Muslim Brotherhood. These four emails were mass email blasts that included Sharaf Sharafeldin, Executive Director of MAC, as one of many recipients. The mass emails invited recipients to supposed Muslim Brotherhood conferences. Mr. Sharafeldin did not respond to any of the four unsolicited emails, and he did not attend any of the conferences.³²

26. The result of the RAD audit was the issuance, on March 17, 2021, of the AFL. The AFL proposes revocation of MAC's charitable status.³³

27. MAC has detailed, both in formal responses to the AFL and in evidence filed on this application, that these allegations are wrong.³⁴

C. The expert assessment of the RAD Audit

28. The only expert evidence before the Court on this application is adduced by MAC. Dr. Anver M. Emon is a leading scholar of Islamic legal history and theory. He is Director of the Institute of Islamic Studies at the University of Toronto. He is a Professor in both the Faculty of Law and the Department of History at the University of Toronto. He is the Canada Research Chair in Islamic Law and History. He holds two doctorates, a J.S.D. from Yale Law School and a Ph.D. in history from the University of California at Los Angeles.³⁵ Dr. Emon was also appointed by the

³¹ Haddara Affidavit, para. 30, AR, Tab 3, p. 42.

³² Haddara Affidavit, para. 89, AR, Tab 3, p. 58.

³³ Haddara Affidavit, para. 31, AR, Tab 3, p. 42.

³⁴ See: MAC's Response to AFL, August 12, 2021, Ex. HH to the affidavit of Julianne Myska, affirmed December 23, 2022 [**"Myska Affidavit"**]; MAC's Response to AFL, December 3, 2021, Ex. II to Myska Affidavit; MAC's Response to AFL, January 12, 2022, Ex. JJ to Myska Affidavit; Haddara Affidavit, para. 32, AR, Tab 3, p. 43.

³⁵ CV of Professor Anver Emon, AR, Tab 4A, p. 765.

Minister of National Revenue herself to sit on the federal Advisory Committee on the Charitable Sector.³⁶

29. Strikingly, the CRA has adduced no expert evidence of its own.

30. Dr. Emon is the co-author of a peer-reviewed study called *Under Layered Suspicion*. The study notes that “Muslim-led charities have for years expressed concerns about the selection, frequency, and reasoning behind audits of their organizations.” *Under Layered Suspicion* identifies that “there is a basis for these concerns” as a result of “whole-of-government policies and patterns of audit practices”. When the federal government’s anti-terrorism financing and anti-radicalization policies are operationalized by RAD, they “create the conditions for potential structural bias against Muslim-led charities”. As a result, “Muslim-led charities are uniquely vulnerable to penalties or even deregistration at the hands of the CRA”.³⁷

31. In his expert report on this application, Dr. Emon builds on the work of *Under Layered Suspicion* and examines the MAC audit in detail. He provides the following opinions:

- (a) “The CRA fails to exert basic due diligence, in many cases, to discount and disqualify evidence that is supported or financed by identified Islamophobic organizations.”³⁸ Specifically, the audit’s research on the Muslim Brotherhood and links between MAC and the Muslim Brotherhood “suffer[s] from serious research

³⁶ Affidavit of Anver Emon, sworn June 13, 2022 [“**Emon Affidavit**”], para. 1, AR, Tab 4, p. 762.

³⁷ Executive Summary of *Under Layered Suspicion*, p. 2, Appendix A to the Expert Report of Dr. Anver Emon, found at Ex. C to the Emon Affidavit [“**Emon Report**”], AR, Tab 4C, p. 869.

³⁸ Emon Report, p. 8, AR, Tab 4C, p. 785.

defects”,³⁹ and “performs an end-run around the fact that the Muslim Brotherhood of Egypt is not on Canada’s terrorist entities list...”.⁴⁰

- (b) The MAC audit engages in problematic “link analysis”, which results in negative inferences being drawn about MAC as a result of supposed links with unsavoury individuals or organizations.⁴¹
- (c) The MAC audit engages in “a troubling pattern of skepticism that mirrors the discourse on *taqiyya* (dissimulation) in Islamophobic circles”.⁴² It is highly troubling that RAD acted with implicit bias in a way that mimics *taqiyya* and perpetrates stereotypes.
- (d) The MAC audit improperly assesses MAC’s endeavours to advance religion through a Protestant-Christian lens.

i. The FATF regime and the resulting risk-based approach creates the wrong starting point

32. Dr. Emon notes that the FATF recommends a “risk-based approach” to anti-terrorist financing. Canada’s risk-based approach has the effect of “Othering” terrorism as necessarily foreign.⁴³ Specifically, Canada’s risk-based approach identifies 10 “terrorist groups with a Canadian nexus”, eight of which are Muslim-identified, one of which is Tamil-identified, and one of which is Sikh-identified. The result is that official Canadian government policy “expressly considers 100% of all terrorist financing risk in Canada to be posed by groups that map onto racial

³⁹ Emon Report, p. 9, AR, Tab 4C, p. 786.

⁴⁰ Emon Report, p. 15, AR, Tab 4C, p. 792.

⁴¹ Emon Report, p. 8, AR, Tab 4C, p. 785.

⁴² Emon Report, p. 8, AR, Tab 4C, p. 785.

⁴³ Emon Report, p. 19, AR, Tab 4C, p. 796.

and religious minorities in Canada”, and “80% of terrorism financing risk is posed by groups that directly map onto Canada’s Muslim minority.”⁴⁴

33. In other words, the whole starting point is wrong. The federal government identifies the risk of terrorist financing with minority groups it labels as “foreign”, in particular Muslim entities. With such a starting point it is hardly surprising, although deeply disappointing, that Muslim Canadians are all painted with the same brush and an organization like MAC that runs mosques and schools is regarded as inherently suspect because its membership belongs to the same religious group as organizations like Al-Qaeda.

ii. Implementation of the RAD audit

a. Reliance on Islamophobic writings and selection bias

34. Then the specific implementation of the MAC audit compounds the problem. As Dr. Emon notes, “[t]he CRA characterizes the Muslim Brotherhood by relying on evidence that is either selective, alarmist, or even Islamophobic in nature.”⁴⁵ The AFL relies on “uncritical resort to journalistic accounts” and “alarmist articles”.

35. For example, Dr. Emon notes that in its assessment of the Muslim Brotherhood of Egypt, the AFL chooses to rely on testimony provided by Lorenzo Vidino in 2015 before the Standing Senate Committee on National Security and Defence to paint a nefarious portrait of the Muslim Brotherhood of Egypt, and ignores a 2013 finding by the Standing Committee on Foreign Affairs and International Development that, despite a contentious history, the Muslim Brotherhood in Egypt has “a pragmatic and ideologically flexible side” that might be characterized as “democratic

⁴⁴ Emon Report, pp. 17-21, AR, Tab 4C, pp. 794-798.

⁴⁵ Emon Report, p. 26, AR, Tab 4C, p. 803.

but not completely liberal.” The work of Lorenzo Vidino is highly suspect. As Dr. Emon notes, Lorenzo Vidino has been described in reputable academic circles as an:

Italian American legal scholar whose research promotes conspiracy theories about the Muslim Brotherhood in Europe and the United States. Vidino is connected to numerous anti-Muslim think tanks in the United States and Europe and has published in various anti-Muslim outlets.⁴⁶

As Dr. Emon explains, Lorenzo Vidino “draws on several suspect Orientalist biases about Muslims and Islam”, and says that to appreciate the illogic of Lorenzo Vidino’s analysis one would have to imagine a suggestion that “all Christians who read the Bible in a literal manner are somehow all similarly connected (ideologically, financially, and organizationally) by virtue of their Biblical hermeneutics.”⁴⁷

36. As another example, Dr. Emon opines that RAD exercised “selection bias” by selectively citing from a 2015 UK study of the Muslim Brotherhood, despite the suspect nature of the study (it was instigated by former UK Prime Minister David Cameron in an apparent effort to appease Gulf allies) and without mentioning that the UK government did not go on to declare the Muslim Brotherhood a terrorist group despite diplomatic pressure to do so,⁴⁸ and without mentioning that the UK Parliament expressly rejected the report and discredited it as politically motivated. Neither Canada nor the United States has declared the Muslim Brotherhood of Egypt a terrorist entity. The CRA never mentions this fact in the AFL.⁴⁹

⁴⁶ Emon Report, p. 29, citing Bridge Initiative Team, “Lorenzo Vidino”, The Bridge Initiative, April 22, 2020 at footnote 68, AR, Tab 4C, p. 806.

⁴⁷ Emon Report, p. 30, AR, Tab 4C, p. 807.

⁴⁸ Emon Report, p. 32, AR, Tab 4C, p. 809.

⁴⁹ Farant examination, QQ. 92-95.

b. Problematic “links analysis”

37. Dr. Emon notes that the CRA’s methodology of assessing a charitable organization’s third party speakers through a public benefit/terrorism/radicalization nexus “seems to apply only to Muslim-led organizations.”⁵⁰ It is only Muslim charities that get tainted by everything any particular member has said at some point in his or her life, as if every particular statement is attributable to the uniform thinking of the charity as a whole.

38. Dr. Emon opines that the AFL uses “links analysis” to try and establish a connection between MAC and the Muslim Brotherhood through an analysis of emails received by MAC. Dr. Emon uses the term “links analysis” to refer to the way in which the CRA draws connections (often tenuous) between MAC and groups associated with or suspected of terrorism in order to support its risk assessment. Such analysis seems absurd on its face (if one receives an email from a supposed Nigerian prince informing someone of a long lost inheritance, does that create a connection between the recipient and Nigeria?), but RAD’s analysis was taken to an even more extreme absurdity. All of the emails in question were unsolicited and none were responded to. As Dr. Emon expresses it through rhetorical questions, “what is the salience of email evidence, especially if the emails in question were unsolicited or spam? Do such emails convey institutional intentionality or design with sufficient heft to warrant the claims the CRA makes of MAC?”⁵¹

c. The discourse of *taqiyya*

39. Dr. Emon finds especially problematic a statement in the AFL that answers provided by MAC in the course of the audit were inherently suspect and less reliable than documents, emails

⁵⁰ Emon Report, p. 37, AR, Tab 4C, p. 814.

⁵¹ Emon Report, p. 53, AR, Tab 4C, p. 830.

and financial transactions.⁵² RAD's refusal to grant much weight to the words of those interviewed in the audit "is entirely consistent with an Islamophobic narrative among some national security pundits about the inherent reliability of Muslims. These pundits invoke a medieval Islamic term of art to explain why Muslims are apparently unreliable – *taqiyya*." He explains that the term *taqiyya* originates from a time when Shia Muslims were a persecuted minority and adopted a tactic of concealing their beliefs or identity in order to survive in a Sunni-dominated premodern world.⁵³

40. In Dr. Emon's opinion, "[t]hrough the CRA never invokes the term *taqiyya*, it nonetheless started the AFL by characterizing MAC officials as disingenuous and untrustworthy with respect to its questions about the Muslim Brotherhood. ... The CRA seemed to imply that the Organization aimed to hide the truth by advising its staff on how to respond to questions."⁵⁴ This aspect of the CRA's analysis demonstrates both explicit and implicit bias.

d. The MAC audit inappropriately assesses MAC's endeavours to advance religion through a Protestant Christian lens.

41. Dr. Emon opines that "[t]he CRA applies its understanding of the Common Law on 'advancing religion' to MAC in a manner that: (1) ignores MAC's understanding of religion; (2) raises serious concerns for non-Christian, non-Protestant charities such as MAC; and (3) superimposes a national security/threat assessment metric on certain expressions of the Islamic faith."⁵⁵

⁵² The statement from the AFL is: "Words that are spoken in the midst of an audit are often measured, calculated, and sometimes vague. Documents, emails, and financial transactions that occur during an audit period are snapshots of an event in time. They are written, produced, or transaction in an environment where there is little need for the person or organization to be cautious. They are often a realistic glimpse at the Organization's true intentions", Administrative Fairness Letter, dated March 17, 2021, pp. 13-14, AR, Tab 3B, pp. 128-129.

⁵³ Emon Report, p. 55, AR, Tab 4C, p. 832.

⁵⁴ Emon Report, pp. 57-58, AR, Tab 4C, pp. 834-835.

⁵⁵ Emon Report, p. 61, AR, Tab 4C, p. 838.

42. This effect occurs in part through reliance on the work of Lorenzo Vidino, who “see[s] in the Muslim Brotherhood an international ideological movement designed in part to penetrate Western societies and undermine social cohesion.” Using a “public benefit/terrorism/radicalization nexus, the CRA operationalized Vidino’s formula in its AFL on MAC.”⁵⁶

a) The CRA’s approach to MAC’s Eid festivals

43. An example of the problem is the AFL’s treatment of MAC’s Eid festivals. Specifically, the AFL alleges that the only religious element is the Eid prayer (typically 1-2 hours) and does not extend to other portions such as community celebrations, meals and gatherings. However, Muslims do not format their religious beliefs, practices and identities in Protestant terms. Eid cannot properly be understood in Protestant Christian terms, yet “nowhere in the analysis of the Eid Festival is there an analysis of the whole program of activity related to Eid.”⁵⁷ The result is that “[i]n its analysis of MAC’s Eid Festival, the CRA analyzed MAC’s activities in a way that reflected the CRA’s failure to understand the teachings of Islam.”⁵⁸

44. The Muslim conception of Eid is intimately tied to the holy month of Ramadan. Yet the AFL fails to appreciate that reality, and instead seeks to map Eid festivals onto a Protestant Christian framework. It may well be that some Christians regard a one-hour religious service on Christmas Eve as the religious content of an otherwise mostly secular Christmas season (e.g., family meals and gift-giving); it does not in any way follow that the Muslim approach to Eid would be analogous. Rather, as Dr. Emon opines:

There is no Eid ul-Fitr without Ramadan; one implies the other in basic Islamic teaching. Consequently, while the CRA may only see the Eid festival as featuring one or two hours

⁵⁶ Emon Report, pp. 61-62, AR, Tab 4C, pp. 838-839.

⁵⁷ Emon Report, p. 68, AR, Tab 4C, p. 845.

⁵⁸ Emon Report, p. 67, AR, Tab 4C, p. 844.

of ‘religious content’, that is because ignore [*sic*] the whole program of activity within which it necessarily falls, but virtue of Islamic teaching and Muslim practices.

...

The CRA assessed the expenditures for the Eid al-Fitr festival without locating it in the context of MAC’s ‘whole program of activities’ during the month of Ramadan, for which the Eid festival is a capstone. It is not a single day, but rather a 31-day period, with costs distributed across all thirty-one days to advance religion. The presumption that the Eid festival is only a single day, and can be segregated from Ramadan certainly is consistent with the CRA’s tendency to view ‘advancing religion’ through a public protestant lens. That bias precludes a meaningful application of Islam and Muslim religious practice, which in turn would animate a very different cost calculus.⁵⁹

b) The CRA’s approach to MAC’s youth activities

45. A second example of the problem of RAD’s public Protestant lens is its approach to MAC’s youth activities. “[T]he CRA does not locate the youth social programming in the larger context of MAC’s educational commitment to advancing religion.”⁶⁰ Once again, the perspective of the Protestant Christian majority is invoked by RAD but is an inappropriate basis to assess a Muslim charity like MAC. Dr. Emon notes “it is not surprising to see Muslim-led charities organizing youth activities that attempt to integrate Muslim youth within the Canadian culture context, in regions of the country that experience heightened forms of Islamophobia.”⁶¹

46. Dr. Emon also notes that MAC’s sponsorship of sporting activities for children and youth is not unique to MAC. “Religious communities across Canada support youth engagement through organized sports.”⁶² Dr. Emon describes two non-Muslim (Christian) registered charities organized to advance religion that engage in extensive sports activities for youth.⁶³ It is puzzling

⁵⁹ Emon Report, pp. 69-70, AR, Tab 4C, pp. 846-847.

⁶⁰ Emon Report, p. 73, AR, Tab 4C, p. 850.

⁶¹ Emon Report, p. 77, AR, Tab 4C, p. 854.

⁶² Emon Report, p. 77, AR, Tab 4C, p. 854.

⁶³ Emon Report, pp. 77-79, AR, Tab 4C, pp. 854-856.

and troubling that youth sports appears to be perfectly well accepted as an aspect of the advancement of religion when it is done by Christians, but not when it is done by Muslims.

D. Observation on Dr. Emon's evidence

47. While Dr. Emon was cross-examined in this proceeding, he was not cross-examined on *any* of the evidence outlined in paras. 31 to 46 above. It stands uncontradicted and unchallenged in evidence before this Court.

E. The CRA's evidence in response to this application

48. The evidence that the CRA has chosen to adduce on this application is noteworthy, both for the witnesses and the nature of the evidence proffered.

49. In terms of the witnesses, the CRA has chosen not to (or has found itself unable to) introduce any expert evidence of its own. The CRA has not advanced expert evidence from anyone to say that Dr. Emon is wrong, or to challenge his research methodology.

50. The CRA's failure to adduce its own expert evidence is very telling, and leaves Dr. Emon's evidence uncontradicted. Dr. Emon was cross-examined, but his evidence was not shaken, much less displaced. This Court is left with no basis to reject Dr. Emon's evidence in its entirety, and no alternative expert evidence to accept in place of Dr. Emon's evidence.

51. In terms of the nature of the evidence proffered, the CRA has adduced fact evidence from two officials of RAD (Ms. Amberg and Ms. Myska) and one official of the Department of Finance (Charlene Davidson). The focus of this fact evidence is RAD's:

- (a) method of selecting charities for audit and conducting audits does not deliberately discriminate against Muslims;

- (b) policies and procedures are facially neutral;
- (c) policies and procedures were applied in MAC's case; and
- (d) actions in MAC's case were reasonable.

52. The difficulty with this evidence is that it does not meet the case that MAC advances. MAC advances a section 15 case that it has suffered *adverse effects discrimination* (not deliberate discrimination), and a section 2 case that its rights to freedom of religion, expression and association have been infringed (none of which require deliberate action by government). MAC is not advancing a judicial review seeking to challenge a decision of the CRA or RAD – this is not even the right Court in which to mount such a challenge (only the Federal Court would have jurisdiction over a judicial review).

53. The CRA is fighting this case as if it were a case in which deliberate discrimination was being alleged, or as if judicial review was being sought to determine whether CRA has acted reasonably. For the case that MAC actually advances, it is no answer that the policies and procedures are facially neutral and were applied in a reasonable manner.

PART III - THE ISSUES

- 54. Has RAD's audit of MAC infringed section 15 of the *Charter*?
- 55. Has RAD's audit of MAC infringed section 2(a) of the *Charter*?
- 56. Has RAD's audit of MAC infringed section 2(b) or section 2(d) of the *Charter*?
- 57. What is the appropriate remedy under section 24(1) of the *Charter*?

PART IV - LAW AND ARGUMENT

A. A preliminary note on MAC's standing to assert *Charter* claims

58. It is not known to MAC at present whether the Attorney General will take issue with MAC's ability to assert *Charter* rights. In any event, it is a non-issue.

59. If non-human entities (like churches, or in this case a Muslim charity established for the advancement of religion) can independently assert *Charter* rights is somewhat unclear in the case law, it is because the issue is theoretical and not real. Even if a non-human entity like MAC were unable to assert *Charter* rights directly, it would clearly have standing to assert those rights on behalf of its members and stakeholders. This was recently recognized in *Ontario v. Trinity Bible Chapel*,⁶⁴ a case involving a section 2(a) claim by two Christian churches: "the churches represent the interests of their human congregants" such that even if they do not have independent access to section 2(a), "they do have standing to raise the s. 2(a) rights of their human parishioners."

60. The same logic applies here. It would be absurd for a charity created for the advancement of a religion that is a minority in Canada not to have direct standing to assert rights under sections 2(a), 2(b), 2(d) and 15 of the *Charter*. But even if the law led to such an absurd result, MAC at a minimum has standing to raise the *Charter* rights of their members and stakeholders. If Christian churches have standing to assert *Charter* rights on behalf of their congregants, then Canada's largest Muslim charity that operates mosques across Canada must have the same standing on behalf of those who attend those mosques.

⁶⁴ *Ontario v. Trinity Bible Chapel*, 2022 ONSC 1344 at [para. 82](#).

B. The RAD audit infringes section 15 of the *Charter*

i. Adverse effects discrimination

61. Section 15(1) “reflects a profound commitment to promote equality and prevent discrimination against disadvantaged groups.”⁶⁵ Adverse effects discrimination sees through facially neutral governmental policies to determine whether there is systemic discrimination:

Why is it so critical to expand on our understanding of adverse effect discrimination? If we do not, there is a significant risk that discrimination embedded in apparently neutral institutional policies, rules, or procedures will not be recognized as discriminatory. This risk is accentuated by the necessity in anti-discrimination law to connect the experience of exclusion, harm, prejudice, or disadvantage to a recognized ground of discrimination.⁶⁶

62. Because section 15(1) captures adverse effects in addition to discriminatory intention, a claim that policy is facially neutral and is applied without intentional discrimination, or that “this is the way things are done” – in other words, precisely the arguments the CRA is raising in this case – is no defence under section 15(1). As explained by the Supreme Court of Canada:

It is helpful to start by defining the concept. Adverse impact discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground.... Instead of explicitly singling out those who are in the protected groups for differential treatment, the law indirectly places them at a disadvantage....

Increased awareness of adverse impact discrimination has been a “central trend in the development of discrimination law”, marking a shift away from a fault-based conception of discrimination towards an effects-based model which critically examines systems, structures, and their impact on disadvantaged groups.... Accompanying this shift was the recognition that discrimination is “frequently a product of continuing to do things ‘the way they have always been done’”, and that governments must be “particularly vigilant about the effects of their own policies” on members of disadvantaged groups....⁶⁷

⁶⁵ *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at [para. 27](#).

⁶⁶ *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at [para. 29](#), quoting Prof. Colleen Sheppard, “Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*” (2001), 46 *McGill L.J.* 533, at p. 542.

⁶⁷ *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at [paras. 30-31](#) [citations omitted].

ii. **The test for infringement under section 15 of the *Charter***

63. The test under section 15 is well established, and was recently reaffirmed by the Supreme Court of Canada in *R. v. Sharma*.⁶⁸ The test has two steps:

- (a) **Step One:** Does the law or state action create a distinction based on an enumerated or analogous ground, on its face or in its impact?
- (b) **Step Two:** Does the law or state action impose a burden or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage?⁶⁹ This part of the test requires an objective analysis of the interference caused by the impugned state action.⁷⁰

a) *Step One of the section 15 analysis*

64. With respect to Step One in this case, the *starting point* is easy: religion is an enumerated ground, and therefore differential treatment of MAC because it is Muslim is prohibited.

65. To determine whether there is a *distinction* on that enumerated ground of religion, there must be an assessment of whether there has been a disproportionate impact on the claimant group. This entails drawing a comparison between the claimant and other groups or the general population, although the claimant is not required to identify a mirror comparator group.⁷¹

66. In this case, the only expert evidence providing such a comparison is provided by Dr. Emon. Dr. Emon's evidence establishes that RAD's risk-based analysis approaches the issue of charitable status through a Protestant Christian lens. This approach inherently advantages one

⁶⁸ *R. v. Sharma*, [2022 SCC 39](#).

⁶⁹ *R. v. Sharma*, [2022 SCC 39](#) at [para. 28](#).

⁷⁰ *Ktunaxa Nation v. British Columbia*, [2017 SCC 54](#) at [para. 70](#).

⁷¹ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at [164](#).

group – the Christian majority – over other groups like Muslims who are not part of the majority. There is also direct evidence that the CRA treats Muslim charities differently. First, Muslim groups are quantitatively overrepresented. There is uncontroverted evidence that at least 75% of charities that have had their charitable status revoked by the CRA as a result of RAD audits are Muslim.⁷² Second, the AFL demonstrates that Muslim groups are assessed more harshly, resulting in qualitative inequality, as charities like MAC are treated with enhanced scrutiny and suspicion (e.g., the AFL’s treatment of MAC’s Eid festivals and youth sports programming).

67. The animating norm of section 15(1) is substantive equality. Formal equality alone is insufficient.⁷³ For this reason, the CRA’s argument that it approaches audits without regard for religious affiliation is not enough. That argument only establishes formal equality. If the CRA’s approach creates substantive inequality even if the criteria used are facially neutral, Step One has been established.

b) Step Two of the section 15 analysis

68. Step Two asks whether disadvantage is reinforced, perpetuated or exacerbated. This requires an examination of the historical or systemic disadvantage of the claimant. In particular, two factors may be helpful to consider, although they are not necessarily components: (i) whether there has been stereotyping or prejudice; and (ii) whether there is arbitrariness.⁷⁴ In this case, the RAD audit of MAC entails both stereotyping and arbitrariness.

69. The RAD audit is premised on a links analysis that begins with terrorist organizations – disproportionately Muslim ones – and connects those organizations to other individuals and

⁷² Haddara Affidavit, para. 55, AR, Tab 3, p. 48; Canada Revenue Agency’s targeting of Muslim charities amounts to discrimination, says civil liberties group, *Canadian Broadcasting Corporation*, AR, Tab 3S, p. 606.

⁷³ *R. v. Sharma*, 2022 SCC 39 at [para. 38](#).

⁷⁴ *R. v. Sharma*, 2022 SCC 39 at [paras. 52-53](#).

organizations in a manner that paints all Muslims with the same brush. In *Ontario (Attorney General) v. G*,⁷⁵ a key factor in finding a discriminatory impact was that the impugned law furthered stereotypes and prejudicial notions about persons with disabilities, and reinforced the stigmatizing idea that those with mental illness are inherently and permanently dangerous. Similarly in this case, the links analysis and the entire audit process further the stereotypical notion that Muslims are foreign, “the other”, and inherently suspect of having ties to extremism.

70. *Kahkewistahaw First Nation v. Taypotat*⁷⁶ defined the arbitrariness inquiry in Step Two as an examination of “whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage”. Arbitrariness in that sense is present in this case. The RAD audit does not evaluate MAC according to its own characteristics, but rather evaluates MAC as belonging to a risky and inherently untrustworthy group with foreign loyalties. The effect is to lump MAC in with groups that have been a terrorist threat around the world, simply on the basis that MAC and those posing the threat share the same religion. In sum, the CRA perpetuates and exacerbates disadvantage already experienced by Muslim groups in Western society, further entrenching the dangerous stereotype that all Muslim groups are associated with terrorism. Moreover, given the CRA’s official role and its extensive reliance on problematic sources, their actions improperly lend legitimacy to hate groups espousing inflammatory, false narratives about Muslim threat. Furthermore, if the CRA continues on this path and revokes MAC’s charitable status, it will jeopardize the very existence of MAC as a

⁷⁵ *Ontario (Attorney General) v. G*, 2020 SCC 38 at [paras. 62-65](#).

⁷⁶ *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at [para. 20](#).

grassroots religious organization, which provides religious teachings and community support to Muslims across the country.

C. The RAD audit infringes sections 2(a) of the *Charter*

71. Canadian courts have spoken eloquently of the fundamental importance of freedom of religion to Canadian values:

An important feature of our constitutional democracy is respect for minorities, which includes, of course, religious minorities.... Indeed, respect for and tolerance of the rights and practices of religious minorities is one of the hallmarks of an enlightened democracy.⁷⁷

72. A claim under section 2(a) of the *Charter* has two steps:

- (a) **Step One:** Does the claimant sincerely believe in a belief or practice that has a nexus with religion? The religious belief must be asserted in good faith and must not be fictitious, capricious or an artifice.⁷⁸
- (b) **Step Two:** Does the impugned measure interfere with the claimant's ability to act in accordance with their religious beliefs in a manner that is more than trivial or insubstantial.⁷⁹

a) Step One of the section 2(a) analysis

73. Step One is not an issue in this case. There can be no doubt that MAC, its members and its stakeholders sincerely believe in the tenets of Islam and that MAC's reason for being is to advance

⁷⁷ *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at [para. 1](#) [citation omitted].

⁷⁸ *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at [paras. 52 and 56](#).

⁷⁹ *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at [para. 59](#).

those beliefs. There can be no doubt that belief in Islam, one of the major religions of the world, is not “fictitious, capricious or an artifice”.

b) Step Two of the section 2(a) analysis

74. Turning to Step Two, several important principles come into play.

75. First, the state must respect religious differences and may not interfere with such differences unless there is a strong basis for doing so: “[p]art of secularism, however, is respect for religious differences. A secular state does not – and cannot – interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests.”⁸⁰

76. Second, the state must not prefer one religious group over another: “[n]or can a secular state support or prefer the practices of one group over those of another.... The pursuit of secular values means respecting the right to hold and manifest different religious beliefs. A secular state respects religious differences, it does not seek to extinguish them.”⁸¹

77. Third, freedom of religion entails not only individual manifestation of religious observance but also communal acts. “Religion is about religious beliefs, but also about religious relationships.”⁸² As a result, “[r]eligious freedom under the Charter must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions.”⁸³ Put another way, “[t]he protection

⁸⁰ *Loyola High School v. Quebec*, 2015 SCC 12 at [para. 43](#).

⁸¹ *Loyola High School v. Quebec*, 2015 SCC 12 at [para. 43](#).

⁸² *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at [para. 182](#).

⁸³ *Loyola High School v. Quebec*, 2015 SCC 12 at [para. 60](#).

of individual religious rights under s. 2(a) must therefore account for the socially embedded nature of religious belief.”⁸⁴

78. All three of these principles establish that RAD’s audit of MAC constitutes more than a trivial or insubstantial interference with the freedom of religion of MAC, its members, and its stakeholders. The manner in which MAC was chosen for audit, and the manner in which the audit itself has been undertaken, reflect a Protestant Christian lens that fails to respect religious differences between the Protestant Christian majority and the Muslim minority. The effect of the lens is to favour Protestant Christian charities over non-Christian ones. MAC, its members and its stakeholders cannot fully exercise their religious rights individually but must also, in order to adhere to the tenets of their faith, do so communally through institutions like MAC, MAC’s schools, MAC’s mosques, and MAC’s community centres. For example, it is a fundamental tenet of Islam that Muslims give money to charitable efforts – a concept that the CRA fails to appreciate and, to the contrary, views as sinister. The CRA seeks to enjoin MAC from offering events with social elements, such as Eid festivals and community and athletic events for youths, as the CRA takes the position that these endeavours are not “religious” in nature. Notwithstanding the fact that that is incorrect, given the nature of Eid and the importance of community in Islam, the CRA does not apply the same standards to other religious groups (e.g. with respect to Christmas, Hanukkah and Diwali celebrations). The existential threat to MAC caused by the RAD audit interferes with those communal rights in a manner that is far more than trivial or insubstantial.

79. Based on the conclusions in the AFL, Muslim charities like MAC are not permitted to organize social and athletic activities for their children, and their religious celebrations (such as

⁸⁴ *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at [para. 64](#).

Eid) must be religious only and not have too much of a “social” component. The CRA does not apply the same standards to Christmas parties, or Hannukah celebrations, or Diwali celebrations. As a consequence, Muslims cannot freely practise their religion, in all of its facets, in the way that members of other religions can. This violates Muslims’ freedom of religion under s. 2(a).

D. The RAD audit also results in infringements of section 2(b) and section 2(d) rights

80. While the main focus of this application is infringements of section 2(a) and section 15 of the *Charter*, the RAD audit also results in infringements of section 2(b) and section 2(d).

i. Infringement of section 2(b)

81. The links analysis methodology of the RAD audit infringes the ability of MAC members to exercise their freedom of expression. Section 2(b) involves a three-part test: (i) does the activity in question have expressive content?; (ii) does the method or location of the expression remove the protection?; and (iii) if the expression is protected, does the government action in question infringe that protection either in purpose or effect?⁸⁵

82. Freedom of expression “ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure.”⁸⁶ Section 2(b) requires an effects-based analysis: “Even if the government’s purpose was not to control or restrict attempts to convey a meaning, the Court must still decide whether the effect of the government action was to restrict the plaintiff’s free expression.”⁸⁷

83. There can be no doubt that RAD’s links analysis creates a chilling effect on the expression of MAC, MAC’s members, and MAC’s stakeholders. The entire links analysis methodology posits

⁸⁵ *Canadian Broadcasting Corporation v. Canada*, 2011 SCC 2 at paras. [33](#) and [38](#).

⁸⁶ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at [970](#).

⁸⁷ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at [976](#).

that expression between MAC (or its members or its stakeholders) and persons or entities that RAD deems problematic is something that is suspicious and in need of investigation. Even unanswered unsolicited mass emails are a source of suspicion. MAC is held responsible for all thoughts of all of its members, and indeed of all Muslims everywhere. What is the natural inclination in these circumstances? It is to suppress expression. Expressing views, or allowing third party speakers to express views, or even receiving spam emails, can lead to the loss of charitable status. The rational response is to stay quiet about one's views and not to invite third party speakers (it is not clear what can be done to protect against spam emails).

84. This is an atrocious way to treat a religious minority. Muslims in Canada should not be silenced through the mechanism of a RAD links analysis that raises the risk that any expressive content could be regarded as suspicious and a basis for MAC's loss of charitable status.

ii. Infringement of section 2(d)

85. The links analysis methodology of the RAD audit infringes the ability of MAC members to exercise their freedom of association.

86. No specific test has been developed under section 2(d), and there have been two broad periods of jurisprudence under section 2(d). "The first period is marked by a restrictive approach to freedom of association. The second period gradually adopts a generous and purpose approach to the guarantee."⁸⁸ The law is currently in the second period of development.

87. The purposive approach to section 2(d) "recognizes that freedom of association is empowering, and that we value the guarantee enshrined in s. 2(d) because it empowers groups

⁸⁸ *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at [para. 30](#).

whose members' individual voices may be all too easily drowned out.”⁸⁹ A fundamental purpose of section 2(d) is to protect the individual from state-enforced isolating in the pursuits of his or her ends.⁹⁰

88. There can be no doubt that RAD's links analysis interferes with the freedom of association of MAC, MAC's members, and MAC's stakeholders. The entire links analysis methodology posits that association between MAC (or its members or its stakeholders) and persons or entities that RAD deems problematic is something that is suspicious and in need of investigation. MAC as a whole is held responsible for any contacts that any member may have with anyone anywhere in the world – a which of course should lead a sensible MAC member to limit his or her contacts. Section 2(d) of the *Charter* is yet another reason why the RAD audit of MAC is intolerable.

E. The appropriate remedy is an order terminating the audit

89. Since the earliest days of the *Charter*, the courts have recognized that section 24(1) creates a broad and unfettered discretion to craft a remedy for infringements of the *Charter*:

What remedies are available when an application under s. 24(1) of the Charter succeeds? Section 24(1) again is silent on the question. It merely provides that the appellant may obtain such remedy as the court considers 'appropriate and just in the circumstances'. It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.⁹¹

90. Despite the wide discretion section 24(1) creates, several principles have developed. As is the case for Charter rights themselves, section 24(1) requires a generous and expansive interpretive

⁸⁹ *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at [para. 55](#).

⁹⁰ *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at [para. 55](#); *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at [para. 86](#) (*per* Dickson C.J.C. dissenting, but in a case that was overruled in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4).

⁹¹ *R. v. Mills*, [1986] 1 S.C.R. 863 at [para. 278](#).

approach. A remedy must be purposive, responsive, and effective. A remedy must meaningfully vindicate the rights and freedoms of the claimants. A remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed. The judicial approach to remedies must remain flexible and responsive to the needs of a given case.⁹²

91. Given that the RAD audit started with an inherently discriminatory premise and has misfired repeatedly throughout, the only remedy that achieves all of the applicable principles is an order terminating the audit. Put bluntly, the current RAD audit is so tainted by *Charter* infringements that it is unsalvageable. As a registered charity, MAC understands that it is subject to audit by the CRA, but it is not subject to an audit that holds it to a different standard than audits of other religious charities.

92. Such an order would not preclude a future audit that proceeds on the basis of a non-infringing selection process and a non-infringing audit process. MAC is not claiming immunity from scrutiny of its right to charitable status. It is merely asking that any inquiry by the CRA or RAD be commenced and proceed throughout in a non-*Charter* infringing manner.

93. In the alternative, MAC has suggested in its notice of application an order that the existing audit continue but in *Charter*-compliant manner. While that approach might manage to salvage some of the expenditure of resources by the CRA and RAD in the existing audit, and would be better than no remedy at all, it is a decidedly second-best solution. Given the multitude of flaws in the existing audit it is difficult to imagine how it can be salvaged at this point in a *Charter*-

⁹² *Doucet-Boudreau v. Nova Scotia*, 2003 SCC 62 at paras. [24](#), [25](#), [55](#) and [59](#).

compliant manner. At a minimum, such a salvage effort would require extensive judicial supervision and examination of the conduct of RAD officials in the completion of the audit.

94. Aside from termination of the audit or extensive judicial supervision of the completion of the existing one, there is no meaningful remedy available that would fulfil the purposes of a section 24(1) remedy.

PART V - ORDER REQUESTED

95. MAC seeks a declaration that RAD's audit of it infringes sections 2(a), 2(b), 2(d) and 15 of the *Charter*, and seeks an order terminating the audit as a remedy under section 24 of the *Charter*. MAC also seeks its costs of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of February, 2023.



Geoff R. Hall / Anu Koshal / Adam H. Kanji

McCarthy Tétrault LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Geoff R. Hall LSO# 347010
ghall@mccarthy.ca
Tel: 416-601-7856

Anu Koshal LSO# 66338F
akoshal@mccarthy.ca
Tel: 416-601-7991

Adam H. Kanji LSO# 78024R
akanji@mccarthy.ca
Tel: 416-601-8145

Lawyers for the Applicant
Muslim Association of Canada

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Ontario v. Trinity Bible Chapel*, [2022 ONSC 1344](#)
2. *Fraser v. Canada (Attorney General)*, [2020 SCC 28](#)
3. *R. v. Sharma*, [2022 SCC 39](#)
4. *Ktunaxa Nation v. British Columbia*, [2017 SCC 54](#)
5. *Andrews v. Law Society of British Columbia*, [\[1989\] 1 S.C.R. 143](#)
6. *Ontario (Attorney General) v. G*, [2020 SCC 38](#)
7. *Kahkewistahaw First Nation v. Taypotat*, [2015 SCC 30](#)
8. *Syndicat Northcrest v. Amselem*, [2004 SCC 47](#)
9. *Loyola High School v. Quebec*, [2015 SCC 12](#)
10. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009 SCC 37](#)
11. *Law Society of British Columbia v. Trinity Western University*, [2018 SCC 32](#)
12. *Canadian Broadcasting Corporation v. Canada*, [2011 SCC 2](#)
13. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [\[1989\] 1 S.C.R. 927](#)
14. *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015 SCC 1](#)
15. *Reference Re Public Service Employee Relations Act (Alta.)*, [\[1987\] 1 S.C.R. 313](#)
16. *Saskatchewan Federation of Labour v. Saskatchewan*, [2015 SCC 4](#)
17. *R. v. Mills*, [\[1986\] 1 S.C.R. 863](#)
18. *Doucet-Boudreau v. Nova Scotia*, [2003 SCC 62](#)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

...

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

...

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

MUSLIM ASSOCIATION OF CANADA and ATTORNEY GENERAL OF CANADA
Applicant Respondent

Court File No. CV-22-00679625-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**FACTUM OF THE MUSLIM ASSOCIATION OF
CANADA**

McCarthy Tétrault LLP

Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Geoff R. Hall LSO# 347010

ghall@mccarthy.ca
Tel: 416-601-7856

Anu Koshal LSO# 66338F

akoshal@mccarthy.ca
Tel: 416-601-7991

Adam H. Kanji LSO# 78024R

akanji@mccarthy.ca
Tel: 416-601-8145

Lawyers for the Applicant
Muslim Association of Canada