

THE NIQAB AND WITNESS TESTIMONY: BALANCING THE INTERESTS

Emir Crowne, Fiorina Santelli** and Varoujan Arman****

1. Introduction

In *R. v. N.S.*,¹ the Ontario Court of Appeal held, in a unanimous judgment, that preliminary inquiry judges can consider Charter values in evaluating matters relating to the preliminary inquiry, and established a framework for establishing and reconciling competing rights claims. The judgment is now under appeal to the Supreme Court of Canada. Oral arguments were heard on December 8th, 2011.

2. Legal Context

*Canadian Charter of Rights and Freedoms:*²

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

.....

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

.....

11. Any person charged with an offence has the right

.....

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

*Criminal Code of Canada:*³

* B.A., LL.B., LL.M., LL.M., Ph.D., Associate Professor, Faculty of Law, University of Windsor, Windsor, Ontario.

** J.D. candidate (class of 2013), Faculty of Law, University of Windsor, Windsor, Ontario.

*** Associate, Blaney McMurtry LLP, Toronto, Ontario.

1. *R. v. S. (N.)* (2009), 191 C.R.R. (2d) 228, 95 O.R. (3d) 735, 84 W.C.B. (2d) 107 (Ont. S.C.J.), rev'd in part 326 D.L.R. (4th) 523, 262 C.C.C. (3d) 4, 80 C.R. (6th) 84 (Ont. C.A.), leave to appeal allowed 326 D.L.R. (4th) v, 263 C.C.C. (3d) iv, 284 O.A.C. 400 (S.C.C.).

2. *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*.

3. R.S.C. 1985, c. C-46.

537(1) A justice acting under this Part may

.....

(i) regulate the course of the inquiry in any way that appears to the justice to be consistent with this Act and that, unless the justice is satisfied that to do so would be contrary to the best interests of the administration of justice, is in accordance with any admission of fact or agreement recorded under subsection 536.4(2) or agreement made under section 536.5;

.....

540(1) Where an accused is before a justice holding a preliminary inquiry, the justice shall

(a) take the evidence under oath of the witnesses called on the part of the prosecution and allow the accused or counsel for the accused to cross-examine them; . . .

.....

548(1) When all the evidence has been taken by the justice, he shall

(a) if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or

(b) discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction.

Part XVIII of the *Criminal Code* outlines procedures with regard to the preliminary inquiry and authorizes the preliminary inquiry judge to consider Charter values in making determinations under the sections within this Part.

3. Facts⁴

N.S. was a 32-year-old woman who brought forward allegations of sexual assault beginning in 1982 when she was six years old until 1987. The police investigated the matter in 1992 but no charges were laid at the insistence of N.S.'s father given that one of the accused was N.S.'s uncle, M-L.S. and the other accused, M-D.S. was a close family friend.⁵ N.S. finally came forward and informations were sworn in 2007.

N.S. was a Muslim woman who chooses to wear a niqab which is a full veil covering the face, hair, ears, and neck except for the eyes. N.S. wears the niqab when she is in public or in the presence of non-familial

4. *R. v. N.S.*, *supra*, footnote 1, at paras. 2 and 3 (C.A.).

5. The Ontario Court of Appeal noted at footnote 1 of their decision that M-D.S. is "sometimes referred to as her cousin and sometimes as a family friend"; *ibid.*

males, in accordance with the teachings of Islam. As at the commencement of the proceedings, N.S. had been wearing the niqab for five years.

4. Procedural History⁶

At the preliminary inquiry both accused sought an order requiring N.S. to remove her niqab while testifying. N.S. was informally questioned by the preliminary inquiry judge without the assistance of counsel. She strongly objected to the motion and stated that the niqab was an important aspect of her beliefs and she was not permitted to be without it in public, particularly in the presence of men. She stated that the removal of the niqab would be uncomfortable for her. In addition to this testimony, it was discovered that N.S. had removed her niqab for the purpose of her driver's licence photo. Based on this information, the preliminary inquiry judge ordered that N.S. remove the niqab while testifying.

N.S. then sought an order from the Ontario Superior Court of Justice⁷ quashing the order of the preliminary inquiry judge and permitting N.S. to wear the niqab while testifying. The preliminary inquiry order was quashed and the matter was remitted to the preliminary inquiry judge for further consideration. It was determined that the preliminary inquiry judge had failed to consider the appropriate information, including the genuineness of N.S.'s religious belief.

N.S. and the accused appealed to Court of Appeal.⁸ The Court of Appeal considered three issues: the jurisdiction of the preliminary inquiry judge with regard to witness attire; the correctness of the order requiring N.S. to remove the niqab; and the ability of the Court of Appeal to determine the niqab removal issue.

5. Analysis

In upholding the Superior Court decision, the Court of Appeal held that a preliminary inquiry judge has the statutory power to determine how and when a witness should testify, including the attire of that witness, and that this often required the consideration of Charter values.⁹ As well, the court criticized the preliminary inquiry

6. *Ibid.*, at paras. 4-7.

7. *Ibid.* (S.C.J.).

8. *Ibid.* (C.A.).

9. *Ibid.*, at paras. 28-44 (C.A.). At paras. 30 and 31, the court held:

. . . It is well-established that a preliminary inquiry judge has no jurisdiction to grant *Charter* remedies either under s. 24(1) of the *Charter*

judge for conducting a limited and informal inquiry, without the presence of counsel for N.S., which provided inadequate information.¹⁰

After making the sweeping and unqualified statement that “wearing of a niqab in public places is controversial in many countries including Canada”,¹¹ the court then analogized niqab-wearing witnesses to those wearing dark sunglasses, saying the following:¹²

Take for example, a witness who is wearing dark sunglasses when that witness takes the stand. As a matter of course, a preliminary inquiry judge would ask the witness why he or she was wearing sunglasses. There are several possible responses. The witness may be wearing sunglasses as a fashion statement in the exercise of his or her right to freedom of expression. The witness may be wearing sunglasses because a disability requires the witness to shield his or her eyes from the bright lights of the courtroom. The witness may be wearing sunglasses to disguise his or her appearance out of fear that the accused may seek retribution against that witness. All of these explanations can be expressed in terms that invoke constitutional values. The party seeking to cross-examine the witness may argue that those sunglasses inhibit the questioner’s ability to fully assess the witness’s reaction to the questions and effectively cross-examine the witness. This, too, impacts on constitutional values.

or s. 52(1) of the *Constitution Act, 1982*: see *Mills* (1986), at pp. 954-55; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at pp. 638-39; *Hynes*, at paras. 30-33; *R. v. Howard* (2009), 250 C.C.C. (3d) 102 (P.E.I.C.A.); see also *R. v. Conway* [2010] 1 S.C.R. 765, (2010), 255 C.C.C. (3d) 473, at paras. 24, 25, 38.

There is, however, a difference between granting a *Charter* remedy for an infringement of a *Charter* right or making a declaration of constitutional invalidity, and taking *Charter* principles and values into consideration when exercising statutory powers. That distinction was made in *R. v. L.R.* (1995), 100 C.C.C. (3d) 329 (Ont. C.A.), where the accused brought an application requiring the production at the preliminary inquiry of certain psychiatric records of the victims. At the time, the production of the records was governed by the provincial mental health legislation. In holding that the preliminary inquiry judge had jurisdiction to decide whether the records should be produced, Arbour J.A. said at p. 340:

“*What the provincial court was asked to do in this case was to hear the evidence for both parties. In doing so, he must inevitably decide its admissibility. He was not asked to adjudicate an alleged infringement of the Charter, nor to grant a constitutional remedy. Within the context of the preliminary inquiry proceedings, he was competent to determine the admissibility of the mental health records within the procedures set out in s. 35 of the Mental Health Act. [Emphasis added.]*”

10. *Ibid.*, at paras. 90-95.

11. *Ibid.*, at para. 41.

12. *Ibid.*, at para. 42.

This likening of sunglasses to the issue at hand is weak, and perhaps inappropriate. This analogy, unfortunately, circumvents the issue because the wearing of sunglasses as a fashion statement is simply not akin to a sincere, religious belief that is laden with ramifications for this life and beyond. Indeed, if the wearing of the sunglasses were one of medical necessity, it is doubtful that they would ever be ordered removed.

Nevertheless, the court went on to state that a preliminary inquiry judge must reconcile the competing rights of the parties, namely, freedom of religion and the right to cross-examine as an essential component of the right to full answer and defence and, consequently, a fair trial. In assessing competing claims, no Charter right should be treated as absolute or inherently superior to another.

The court then set out the scope of the competing rights. The court first noted that not every limit on the right to cross-examine compromises trial fairness.¹³ Nor was there an independent constitutional right to face-to-face confrontation.¹⁴ The court emphasized that there should be regard for contextual considerations at each stage of analysis including the actual effect of denying face-to-face confrontation given the circumstances of a particular case.

The court then considered the religious rights of N.S. The Supreme Court of Canada decision in *Syndicat Northcrest v. Amselem*¹⁵ set out the expansive constitutional protection afforded to freedom of religion. In examining an alleged infringement under s. 2(a) of the Charter, the claimant must demonstrate “sincere belief in a practice that has a nexus with his or her religious beliefs and, second, that the impugned measure interferes with the claimant’s ability to act in

13. *Ibid.*, at para. 51.

14. *Ibid.*, at para. 53:

While it is clear that face to face confrontation between the accused and prosecution witnesses is the accepted norm in Canadian criminal courts, there is no independent constitutional right to a face to face confrontation: *Levogiannis*, at p. 367. There are a number of evidentiary rules, both statutory (s. 715 of the *Criminal Code*) and common law (some hearsay exceptions) that admit statements made by declarants who do not testify at trial at all. Departures from the traditional face to face public confrontation between accused and witness will run afoul of the *Charter* only if they result in a denial of a fair trial to the accused. The *Charter* focuses not on face to face confrontation *per se*, but on the effect of any limitation on that confrontation on the fairness of the trial. Fairness takes into account the interests of the accused, the witness and the broader societal concern that the process maintains public confidence.

15. *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 241 D.L.R. (4th) 1, 121 C.R.R. (2d) 189 (S.C.C.).

accordance with those religious beliefs in a way that goes beyond the trivial or insubstantial".¹⁶ Significantly, with regard to the preliminary inquiry judge's reliance on the driver's licence, the court indicated that past practice cannot be equated with present belief when making inferences about the sincerity of that belief.¹⁷

In setting out the approach to be taken in reconciling these rights, the court said that the threshold inquiry is whether these constitutional values are, in fact, engaged. If the judge is satisfied that the conduct is religiously motivated, and that the belief is sincerely held,¹⁸ it must then be determined whether the accused's ability to conduct cross-examination is substantially hindered. In order to prove that the ability to cross-examine was more than minimally impaired, the defence would have to indicate that the interference caused by the niqab was beyond that of discerning demeanour.¹⁹

If those competing claims are engaged:²⁰

... the judge must then attempt to reconcile those two rights by giving effect to both. It is at this stage that context becomes particularly important. Context includes the somewhat limited manner in which the wearing of the niqab interferes with the trier of fact's assessment based on demeanour. The trier of fact still hears and sees the witness. Tone of voice, eye movements, body language, and the manner in which the witness testifies, all important aspects of demeanour, are unaffected by the wearing of the niqab. Nor does the wearing of the niqab prevent the witness from being subjected to a vigorous and thorough cross-examination.

Context also includes the nature of the proceeding, the forum in which the trial is to be conducted (*i.e.*, judge alone or judge and jury), the nature of the evidence to be given by the witness and whether the nature of the defence to be advanced is linked to the ability to see the witness's face.²¹

Another aspect of this contextual analysis involves consideration of other constitutional values and societal interests that may be engaged in requiring N.S., a practising Muslim, to remove her niqab.

16. *R. v. N.S.*, *supra*, footnote 1, at para. 64 (C.A.), citing *Syndicat Northcrest v. Amselem*, *supra*, at paras. 57-61; *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 264 D.L.R. (4th) 577, 38 Admin. L.R. (4th) 159 (S.C.C.), at para. 34; and *Hutterian Brethren of Wilson Colony v. Alberta*, [2009] 2 S.C.R. 567, 310 D.L.R. (4th) 193, 194 C.R.R. (2d) 12 (S.C.C.), at para. 32.

17. *Ibid.*, at para. 68.

18. *Ibid.*, at para. 70.

19. *Ibid.*, at para. 71.

20. *Ibid.*, at para. 73.

21. *Ibid.*, at paras. 74-78.

Regard for underlying values such as multiculturalism,²² gender equality,²³ the truth-seeking function of the courts²⁴ and the open court principle²⁵ were highlighted by the Court of Appeal.

22. At para. 79 the court wrote:

N.S. is a Muslim, a minority that many believe is unfairly maligned and stereotyped in contemporary Canada. A failure to give adequate consideration to N.S.'s religious beliefs would reflect and, to some extent, legitimize that negative stereotyping. Allowing her to wear a niqab could be seen as a recognition and acceptance of those minority beliefs and practices and, therefore, a reflection of the multi-cultural heritage of Canada recognized in s. 27 of the *Charter*. Permitting N.S. to wear her niqab would also broaden access to the justice system for those in the position of N.S., by indicating that participation in the justice system would not come at the cost of compromising one's religious beliefs.

23. At para. 80, the court stated:

N.S. is also a woman testifying as an alleged victim in a sexual assault case. Permitting her to wear her niqab while testifying would recognize her as an individual and acknowledge the particularly vulnerable position she is in when testifying as an alleged victim in a sexual assault prosecution. Adjusting the process to ameliorate the hardships faced by a complainant like N.S. promotes gender equality.

24. At para. 81 the court stated:

There is also a significant public interest in getting at the truth in a criminal proceeding. Arguably, permitting N.S. to testify while wearing her niqab would promote that interest. Without the niqab, N.S. would be testifying in an environment that was strange and uncomfortable for her. One could not expect her to be herself on the witness stand. A trier of fact could be misled by her demeanour. Her embarrassment and discomfort could be misinterpreted as uncertainty and unreliability. Furthermore, there may be cases where the Crown determines that it cannot in good conscience call upon the witness to testify if she is forced to remove her niqab. In those cases, the evidence will be lost and a trial on the merits may be impossible -- hardly a result that serves the public interest in the due administration of justice.

25. At para. 82 the court held:

There is also a societal interest pointing against a witness wearing a niqab when testifying. Society has a strong interest in the visible administration of criminal justice in open courts where witnesses, lawyers, judges and the accused can be seen and identified by the public. A public accusation and a public response to that accusation, in a forum which tests the truth of the accusation through the adversarial process, enhances public confidence in the administration of criminal justice. All engaged in the criminal process, including witnesses, judges and lawyers, are ultimately accountable to the public. Allowing a witness to testify with her face partly covered affords the witness a degree of anonymity that undermines the transparency and individual accountability essential to the effective operation of the criminal justice system. Viewed from this perspective, allowing N.S. to wear a niqab while she testifies could compromise public confidence both in the conduct of the criminal trial and in the eventual verdict: see Ian Dennis, "The Right to Confront Witnesses: Meanings,

The court also indicated that the effect of insisting on the removal of the niqab may result in Muslim women avoiding the criminal justice system for fear of having to compromise their beliefs in order to testify, thereby further stigmatizing them. The court encouraged the option of constructive compromises where all-female court staff and a female judge could minimize the infringement incurred by N.S.²⁶ However, the court also acknowledged that, if all efforts to reconcile failed, then the right to full answer and defence must prevail over the witness's religious freedoms and ordering the removal of the niqab would become necessary.

With these considerations in mind, the Court of Appeal upheld the decision of the Superior Court and remitted the matter to the preliminary inquiry judge, indicating that any contemplation of N.S.'s attire during testimony must be conducted in accordance with the framework set out above.

6. Practical Significance

In remitting the matter to the preliminary inquiry judge, the court implicitly determined that N.S. should be permitted to testify, while wearing her niqab, about her religious beliefs and the sincerity of those beliefs before the larger issues are addressed. It may appear therefore that, in determining the sincerity of her beliefs for the purpose of determining the preliminary issue, the court recognizes that the judge's ability can, nevertheless, remain intact. One is left to wonder, therefore, how the judge's ability might be different depending on whether N.S.'s testimony relates to her personal beliefs or to the basis of the criminal charges against the accused.

7. Application to Civil Litigation

Although the Court of Appeal was silent on what extent, if any, its comments ought to be applied to the civil litigation context, there is considerable precedential weight to be had. Just as criminal law proceedings invariably involve decisions that can affect the liberty of the accused, so too in many civil law proceedings are there analogous interests also at stake. Therefore, the potential application of *R. v. N.S.* to the various kinds of litigation that take place outside of the criminal realm, and the unique issues that can arise, should not be forgotten.

Myths and Human Rights" (2010), 4 *Crim. L.R.* 255, at pp. 260-62.
26. *Ibid.*, at para. 85.