

TOP FIVE 2013

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

R v NS, 2012 SCC 72, [2012] 3 S.C.R. 726.

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<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12779/index.do>

Facts

N.S.'s cousin and uncle were being tried for repeatedly sexually assaulting N.S. when she was a child. The men tried to get an order requiring N.S. to remove her niqab – a veil that covers her face but not her eyes – when testifying. They argued that N.S. wearing her niqab while testifying would compromise their right to a fair trial because it would conceal her facial expressions and demeanor and make it difficult to assess or challenge her credibility on the witness stand. On the other hand, N.S. asserted that her religious beliefs required her to wear a niqab in public where men (other than certain close family members) might see her. These two arguments meant that there was a clash of rights guaranteed under the *Canadian Charter of Rights and Freedoms*. N.S.'s right to freedom of religion was in conflict with the co-accused's rights to a fair trial, including the right to assess and challenge the reliability of witness testimony.

Canadian Charter of Rights and Freedoms

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;

...

Procedural History

The preliminary inquiry judge found that N.S.'s religious beliefs were "not that strong" and ordered her to remove her niqab. N.S. sought a judicial review of this order.



The Superior Court of Justice quashed the order and returned the matter to the first court with the instruction that N.S. could testify with a niqab if she established a “sincere religious reason” for doing so. However, this Court also ruled that the preliminary inquiry judge could exclude her evidence if the niqab was found to have impeded the accused’s ability to challenge her testimony.

N.S. appealed again. The Ontario Court of Appeal laid out specific factors for judges to consider when deciding whether to permit a witness to testify wearing a niqab, and again returned the matter to the preliminary inquiry judge. N.S. appealed this decision to the Supreme Court of Canada (SCC). Her appeal was heard in December 2011.

Issues

When, if ever, should a witness who wears a niqab for religious reasons be required to remove it when testifying?

Decision

In December 2012, the majority of the SCC dismissed N.S.’s appeal. The Court created an approach to balance a witness’s freedom of religion and the accused’s right to a fair trial. The matter was again sent back to the preliminary inquiry judge to apply the test and to decide whether N.S. would have to remove her niqab.

Ratio

A witness who wears a niqab for sincere religious reasons may be required to remove it when testifying in a criminal trial if: a) No

other reasonable measures can prevent the risk to the fairness of the trial; and b) The benefits outweigh the negative effects of requiring removal of the niqab.

REASONS

Majority

Section 2(a) of the *Charter* protects freedom of conscience and religion. For a religious practice to be protected it must be based on a “sincere” religious belief. The majority found that N.S. did have a sincere religious belief that she had to wear a niqab while testifying.

Sections 7 and 11(d) of the *Charter* give the accused a right to a fair trial, including a right to make a full defence. The majority had to decide whether allowing N.S. to testify with a niqab would cause a serious risk to the fairness of the trial. They concluded there would be a serious risk because it is “deeply rooted” in the criminal justice system that seeing a witness’s face is important for assessing credibility and proper cross-examination. But, they recognized that in some instances wearing the niqab would not pose a serious risk to trial fairness, such as when evidence is uncontested.

The majority then outlined factors that would help judges determine whether the benefits of a witness removing her niqab would outweigh the negative effects. The following factors should be considered when thinking about the negative effects of a witness removing a niqab:

- What is the impact of failing to protect this particular witness’s sincere belief?
- How important is the religious practice to the witness?



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- What is the degree of state interference with the religious practice?
- How does the actual situation in the courtroom affect the harm to the witness?
- Are there broader social harms that would result? (e.g. discouraging people who wear niqabs from participating in the justice system)

The following questions should be considered when thinking about the benefits of requiring a witness to remove her niqab:

- What is the nature of the evidence being given by the witness?
- How important is the witness's evidence to the case?
- What type of proceeding is it?
- Is public confidence in the justice system being protected?

The majority's framework is to be used by judges when making a decision about niqabs in the courtroom. They felt that this approach was fairer than an absolute rule that always allowed niqabs or never allowed them.

Concurring Minority

Justice LeBel and Justice Rothstein agreed with the majority's decision to dismiss N.S.'s appeal. However, they did not agree that witnesses should be allowed to wear niqabs in certain circumstances. They rejected the majority's case-by-case approach because the factors added too much uncertainty and complexity. Thus, they determined that there had to be a clear rule – always or never. While

both rights are extremely important, the justices held that making sure that justice is done openly is a "fundamental part of a democratic society". Therefore, we should never allow witnesses to wear niqabs when testifying.

Dissenting Minority

Justice Abella disagreed with the majority. She would have created a rule that always allowed witnesses to wear niqabs, except in very limited circumstances when the witness's face is directly relevant to the case (e.g. where her identity is in issue). She did not agree that seeing less of a witness's face significantly undermined the ability to assess credibility. In fact, she pointed to several examples in which the Court will accept testimony in less than ideal circumstances, such as when an interpreter is required or when the witness has a speech impairment. She found that the fairness of the trial should be understood from the perspective of not just the accused, but also of the community and the complainant. Under these circumstances, she reasoned that considering the fairness of a trial only from the perspective of the accused could discourage women from Muslim communities from coming forward in sexual assault cases because it could force them to choose between their religious beliefs and their ability to participate in the justice system.



DISCUSSION

1. In this case, the judges of the SCC produced three different conclusions. Sum each of these up in one or two sentences.

2. Do you agree that the ability to see a witness's face is a fundamental part of assessing credibility? Why or why not?

3. Do you think requiring witnesses to remove their niqabs will cause some people to avoid testifying or bringing charges, in effect forcing these people out of the justice system? Explain.

4. In the preliminary hearing, the judge found that N.S.'s religious beliefs were "not that strong" because of evidence that she would remove her niqab under some circumstances, such as posing for a driver's license photo or to go across a border. Are these examples comparable to testifying in court? Why or why not?

5. This case stemmed from sexual attacks that happened when N.S. was a young child. How, if at all, is this fact reflected in the decision? Might the Court have ruled differently if the charges in question involved theft or something less violent in nature? Explain.