

VEILED TESTIMONY: RECONCILING COMPETING CHARTER RIGHTS

*By Jennifer M. Leddy**

A. INTRODUCTION

On October 13, 2010, the Ontario Court of Appeal released a decision that will be of interest to faith based groups because of its treatment of the constitutional right to freedom of religion. In the case of *R. v. N.S.*¹ the Court of Appeal affirmed that there is no hierarchy of rights under the *Canadian Charter of Rights and Freedoms* (“the Charter”), that no right is absolute or superior to another and that when rights appear to collide, the court must first attempt to reconcile them, having regard to the specific factual context and possible “constructive compromises.”

The complainant in a criminal trial, a Muslim woman, invoked freedom of religion to wear a niqab, a veil covering her face other than her eyes, while testifying in a criminal trial concerning historical sexual assaults. She asserted that her religious beliefs require that she must be covered in public or in the presence of men who are not direct relatives. The accused responded by asserting that his constitutional right to make full answer and defence required the complainant to uncover her face when testifying.

At the preliminary inquiry, the judge conducted an informal examination of the complainant’s religious beliefs. In ordering her to testify without the niqab, he concluded that her religious beliefs were not

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¹ [2010] O.J. No. 4306.

particularly strong, given that she had uncovered her face to have her driver's licence photo taken and that she merely expressed herself to be "more comfortable" testifying while wearing the niqab.

The complainant brought a proceeding before a Superior Court justice to quash the order that she remove her niqab when testifying. The Superior Court justice quashed the ruling of the preliminary inquiry judge, returning the matter to him to be determined according to the procedure set out in the Superior Court justice's reasons. The Ontario Court of Appeal upheld the decision of the Superior Court justice but on different grounds. This Bulletin is focused on the reasons and procedure for reconciling competing *Charter* rights that are outlined in the decision of the Ontario Court of Appeal delivered by Justice D.H. Doherty.

B. RECONCILING RIGHTS – DESCRIPTION OF RIGHTS

The Court of Appeal held that a preliminary inquiry judge has no remedial jurisdiction under the *Charter* but must exercise his or her statutory powers in accordance with the *Charter*, which includes reconciling competing *Charter* rights or values.

The Ontario Court of Appeal followed the Supreme Court of Canada case of *Reference Re Same Sex Marriage*² in outlining the approach a court must take when faced with an apparent collision of constitutional values. The court must first attempt to reconcile the rights so that both can be given full force and effect within the relevant context.³ In doing so, no *Charter* right can be treated as absolute or inherently superior over another.⁴

An article by Justice Iacobucci⁵ was also referred to by the Ontario Court of Appeal ("the Court") to underline the importance and breadth of the task of reconciling competing *Charter* rights:

However, it is proper for courts to give the fullest possible expression to all relevant *Charter* rights, having regard to the broader factual context and to the other constitutional values at stake.

² [2004] 3 S.C.R. 698, at para 50.

³ *Ibid.*

⁴ *R. v. Mills*, [1999] 3 S.C.R. 668, at para.61.

⁵ Justice Iacobucci, "'Reconciling Rights' The Supreme Court of Canada's Approach to Competing *Charter* Rights" (2002, 20 S.C.L.R. (2d) 137, at 140

The Court held that the initial step in reconciling competing constitutional values begins with identifying and describing the values that are engaged. The Court's analysis of the constitutional value of the accused's right to a fair trial is discussed first, followed by the complainant's claim to freedom of religion.

1. The Right to a Fair Trial

The accused submitted that his statutory right to cross-examine Crown witnesses pursuant to s. 450 of the *Criminal Code* is integral to his right to make full answer and defence which, in turn, is a significant element of the constitutionally protected right to a fair trial (the *Charter* sections 7 and 11 (d)). While accepting that the right of the accused to cross examine prosecution witnesses without any "significant or unwarranted constraint,"⁶ is a fundamental component of the right to make full answer and defence, the Court held that it is not an end in itself but a means to make full answer and defence. The Court noted that: "Trial fairness is not measured exclusively from the accused's perspective but also takes account of broader social issues. Those broader interests place a premium on a process that achieves accurate and reliable verdicts in a manner that respects the rights and dignity of all participants in the process, including, but not limited to, the accused."⁷ Thus, a limit on the right to cross examination does not necessarily jeopardize a fair trial. For, example, counsel are restricted from asking irrelevant or minimally probative questions or those that threaten national security. In addition, a face to face "confrontation" with a witness may be normative but it is not a constitutionally protected right.

The Court described two rationales for concluding that not seeing the witness's face during cross-examination could impede the rights of an accused to a fair trial. One rationale is that the trier of fact's ability to assess the demeanour of the witness may be limited, and the other is that non-verbal communications, such as facial expressions, can be very helpful to the cross examiner.⁸ By contrast, counsel for the complainant emphasized that "credibility assessments based on demeanour can be unreliable and flat-out wrong...and can reflect cultural assumptions and biases."⁹ He also noted that wearing a niqab does not prevent the trier of fact from assessing the witness's body language, eyes, tone of voice and manner of responding.

⁶ *R. v. Lyttle*, [2004] 1 S.C.R. 193 at para 41.

⁷ *Supra* note 1 at para 50

⁸ *Ibid* at para 54.

⁹ *Ibid* at para 55.

Being able to see a witness's face may, however, be important not only for the issue of credibility but also in those cases where identity is an issue or where there is a question of whether the witness has certain marks on his or her face.

The Court observed that many authorities place considerable value on the ability of lawyers and the trier of fact to be able to see the witness's face and also expressed that the public adversarial process usually requires a face to face confrontation in order to allow the truth to emerge.¹⁰ The Court concluded this part of its judgment by stating that an accused, who does not see the face of his accuser during testimony, undeniably, "loses something of potential value" to the defence. Whether an accused loses the constitutional right to make full answer and defence in a fair trial depends on an inquiry which examines the actual effect of denying face to face confrontation in the particular circumstances of the case and having regard to other legitimate interests.¹¹

2. Freedom of Religion

The complainant submitted that she had the right to wear her niqab, while testifying, on the basis of freedom of religion which is guaranteed under s.2 (a) of the *Charter*. The Court noted that the Supreme Court of Canada has taken a "broad and expansive" approach to freedom of religion, protecting both religious beliefs and conduct flowing from those beliefs, as well as, obligatory and voluntary expressions of faith.¹² In describing the approach to be taken to a S.2 (a) *Charter* claim, the Court relied on the Supreme Court of Canada decision in the *Amselem*¹³ case, which described the approach as follows:

...an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief.

¹⁰ *Ibid* at para 60.

¹¹ *Ibid*.

¹² *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, at para 62 and 46-47.

¹³ *Ibid* at para 56

In addition, the impugned measure must interfere with the claimant's ability to act in accordance with those religious beliefs in a way that goes beyond the trivial or insubstantial.¹⁴

In order for the claimant to obtain *Charter* protection for the religious practice she wishes to exercise during the criminal proceedings, there must be an inquiry to determine if the practice falls within the parameters of freedom of religion as established by the Supreme Court of Canada. Given the subjective nature of a claim based on freedom of religion, this inquiry will be less interested in accepted or official religious practice and more interested in "the manner in which [the complainant] interprets and practices Islam as it relates to the wearing of the niqab."¹⁵ In other words, established religious practice does not determine whether there is a nexus between the claimant's practice of wearing a niqab in public and religion and the Court "will not enter into theological debates."

Sincerity of religious belief is also not dependent upon conformity with established religious practice. Nor does the fact that the claimant may have allowed an exception in the past (e.g. the driver's licence photo) or perhaps failed to follow her religious practices in the past, lead to the conclusion that her present assertion of those beliefs is not sincere. "Past practice cannot be equated with present belief.... Past perfection is not a prerequisite to the exercise of one's constitutional right to religious freedom."¹⁶ The Court did, however, hold that it would be important to determine during the inquiry the extent to which the claimant's belief that she must wear a niqab in public allows exceptions. If testifying in court without the niqab, would fall within the boundaries of these exceptions, then "requiring her to remove the niqab to testify, even if she did not want to do so, would not interfere with her ability to act in accordance with her personal beliefs."¹⁷

C. RECONCILING RIGHTS – THE APPROACH IN THIS CASE

The Court decided that the approach to reconciling the competing *Charter values* in the case before the Court should include the following steps:

¹⁴ *Ibid* at para 57-61.

¹⁵ *Supra* note 1 at para 67

¹⁶ *Ibid* at para 68

¹⁷ *Ibid* at para 69

- 1) A determination whether the constitutional values underlying both claims are engaged in the specific circumstances. The judge would determine if the witness's practice is connected to religion and if her beliefs are sincerely held.
- 2) If the judge is satisfied the witness has advanced a valid claim based on freedom of religion, the judge must next determine the extent to which wearing the niqab would interfere with the accused's ability to cross-examine the witness. This is a fact specific inquiry and a minimal interference would not impair an accused's right to a fair trial. For example, if the witness's credibility were not in issue and she were testifying to a peripheral issue. The judge can take judicial notice of the importance of demeanour in assessing credibility. If the accused wishes to establish that wearing the niqab impairs cross examination beyond credibility (e.g. identity) the defence must establish that claim.
- 3) If the judge is satisfied that both the witness and accused's rights are sufficiently engaged, the judge must then attempt to reconcile those rights by giving effect to both through a contextual analysis. Contextual factors to take into account include:
 - (a) That fact that the niqab interferes in a "somewhat limited manner" with the trier of fact's assessment of credibility based on demeanour, given that other aspects of demeanour such as tone of voice, eye movements, body language, and the manner in which the witness testifies are unaffected by the niqab;
 - (b) The judge's instructions to the jury - instructions to the effect that any difficulty that the jury has in assessing credibility of a witness of the Crown redound to the Crown;
 - (c) The nature of the proceeding - at a preliminary inquiry the credibility of the witness is largely irrelevant but the trial may turn on the credibility of the witness;
 - (d) The forum in which the trial will be conducted (judge alone/trial by jury);
 - (e) Nature of the evidence to be given by the witness who wants to wear the niqab; if the evidence is largely peripheral and the witness's credibility will not be in issue, the argument that the niqab be

removed is weak. By contrast, if the witness is central to the prosecution's case, the argument is stronger at least at trial;

- (f) Nature of the defence to be advanced (e.g. identity); and
 - (g) Other constitutional values and societal interests that may be affected by the judge's decision. (e.g access to justice by a minority, avoidance of negative stereotyping, getting at the truth, transparency and public confidence in the administration of the criminal justice system.)
- 4) Possible "constructive compromises" must also be considered as part of the reconciliation process. For example, using an all-female court staff, a female judge, female counsel, closing the court to all males except the accused and his counsel, or wearing a different style of niqab with a fabric that makes it easier to assess the witness's demeanour.

Efforts to reconcile the competing rights may fail. If the judge concludes that the wearing of the niqab in all of the circumstances would infringe the rights of the accused to make full answer and defence, that right must prevail over the witness' religious freedoms and the witness must be ordered to remove the niqab.¹⁸

D. THE DECISION

The Court concluded that the preliminary inquiry judge did not conduct a proper inquiry into the claimant's freedom of religion claim and the order directing her to remove her niqab while testifying constituted an error in law and should be quashed. The Court ordered the matter to be remitted back to the preliminary inquiry judge for a new inquiry, based on the reasoning outlined in this decision. In doing so, the Court opined that a defence objection to the wearing of the niqab at the preliminary inquiry based exclusively on arguments that facial demeanour was important in assessing credibility would likely fail, but the same objection made at trial, and particularly a trial by jury, is more difficult.

¹⁸ *Ibid* para 88.

E. COMMENTARY

- 1) The Court has developed a very considered and fair approach to reconciling competing *Charter* values. Even though the decision was made in the context of a preliminary inquiry in a criminal proceeding, the clear message is that no *Charter* right is absolute or inherently superior to another. When *Charter* rights appear to collide, the first task is not to obliterate one, but to reconcile the two so that each is given force and effect to the extent possible within the specific context.
- 2) The decision of the Court reflected sensitivity to Canada's multi-cultural heritage and the minority position of Muslims in Canada. In its contextual analysis, the Court identified the potential for a decision on wearing the niqab to either perpetuate negative stereotyping or to reflect and affirm Canada's multi-cultural heritage. It also suggested that permitting the complainant to wear her niqab could increase access to the courts for those in a similar position by sending a message that "participation in the justice system would not come at the cost of compromising one's religious beliefs." The Court also, in a remarkable show of empathy to the complainant, raised the possibility that uncovering the witness's face may not uncover the truth because the woman might be so nervous and uncomfortable without the niqab that the trier of fact might be misled by her demeanour.
- 3) While all of the diverse contextual factors and interests in play in the effort to reconcile competing *Charter* claims can not be given full effect, the Court does expect each of them to be considered during the reconciliation process. According to the Court:

If a person has a full opportunity to present his or her position and is given a reasoned explanation for the ultimate course of conduct to be followed, the recognition afforded that person's rights by that process itself tends to validate that person's claim, even if the ultimate decision does not give that person everything he or she wanted¹⁹.

- 4) The Court's analysis, supported by contextual factors and interests, as well as, constructive compromises, has provided future cases with a helpful process and clear framework for reconciling competing *Charter* rights.

¹⁹ *Ibid* para 83

F. CONCLUSION

While each case will be determined by its facts, it can be said that both freedom of religion and the right to a fair trial emerged from this case as robust *Charter* rights.