
TOP COURT AFFIRMS BALANCED APPROACH TO COMPETING CHARTER RIGHTS

*By Jennifer M. Leddy**

A. INTRODUCTION

On December 20, 2012, the Supreme Court of Canada released a decision¹ of interest to religious charities because of its respectful and serious treatment of the constitutional right to freedom of religion, as well as to other charities because of the framework outlined in the majority decision for balancing competing rights under the *Canadian Charter of Rights and Freedoms* (“Charter”).

In this case, a Muslim woman invoked freedom of religion to wear a niqab, a veil covering her face other than her eyes, while testifying as the complainant in a criminal trial concerning historical sexual assaults. The woman asserted that her religious beliefs required that she must be covered in public or in the presence of men who are not direct relatives. The accused, her uncle and cousin, responded by asserting that their 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 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.

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¹ *R.v.N.S.*, 2012 SCC 72

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 Appeal² upheld the decision of the Superior Court justice but on different grounds. 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 appealed the decision of the Court of Appeal to the Supreme Court of Canada. The decision of the Supreme Court of Canada has three sets of reasons: the majority decision written by Chief Justice McLachlin for herself and Justices Deschamps, Fish and Cromwell, concurring reasons written by Justice Lebel for himself and Justice Rothstein, and dissenting reasons by Justice Abella. The focus of this Bulletin is on the majority reasons for decision.

B. MAJORITY REASONS FOR DECISION

Chief Justice McLachlin did not provide a clear rule for witnesses who wish, for religious reasons, to wear the niqab while testifying in a criminal proceeding. Nor did she decide whether the complainant in this case should be required to remove the niqab before testifying. Instead, removal of the niqab is to be determined on a case-by-case basis balancing of the competing rights to freedom of religion and to a fair trial. As a result, the case was sent back to the preliminary inquiry judge to be determined according to the framework for balancing rights that is set out in the decision. The Chief Justice did, however, venture to say that "where the liberty of the accused is at stake, the witness's evidence is central to the case and her credibility vital, the possibility of a wrongful conviction must weigh heavily in the balance, favouring removal of the niqab."³

² 2010 ONCA 670, 102 O.R. (3d) 161 – For a discussion of the reasons of the Court of Appeal decision please see Jennifer M. Leddy, *Veiled Testimony: Reconciling Competing Charter Rights*, Charity Law Bulletin No. 31, October 28, 2010

³ *Supra* note 1 at para 44

1. Framework for Resolving Charter Rights

The Chief Justice referred to the framework developed in previous Supreme Court cases to identify and resolve conflicting Charter rights with respect to publication bans, and stated that in this case applying the framework would involve responding to four questions:⁴

- a) Would requiring the witness to remove the niqab while testifying interfere with her religious freedom?
- b) Would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness?
- c) Is there a way to accommodate both rights and avoid the conflict between them?
- d) If no accommodation is possible, do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so?

After examining the elements involved in responding to these questions, the Chief Justice concluded that “...where a niqab is worn because of a sincerely held religious belief, a judge should order it removed if the witness wearing the niqab poses a serious risk to trial fairness, there is no way to accommodate both rights, and the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so.”⁵ A brief discussion of each the four questions is set out below.

2. Would requiring the witness to remove the niqab while testifying interfere with her religious freedom?

In responding to this question, the Chief Justice held that at this stage of the inquiry, which is to determine whether the right to freedom of religion is engaged, the witness need only demonstrate that her desire to wear the niqab while testifying is based on a “sincere” religious belief and that the preliminary inquiry judge made in an error in requiring her to exhibit a “strong” belief. The Chief Justice stated that inconsistency of practice or making exceptions are not necessarily evidence of insincerity because beliefs can change over time and exceptions can depend on the circumstances such as removing the niqab for security checks or drivers photos. The Chief Justice referred the case back to the preliminary inquiry judge to do a proper analysis of sincerity of belief but based the rest of her analysis on the assumption that the witness had demonstrated sincerity of belief.

⁴ *Supra* note 1 at para 9

⁵ *Supra* note 1 at para 46

3. Would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness?

The Chief Judge noted that common law assumptions, such as those associated with certain myths with respect to sexual assault, can be abandoned if they are found to be in error or based on stereotypes. However, without expert evidence, she was not willing to disregard the long established common law assumption that seeing a witness's face is important for two key elements of a fair trial - effective cross examination and assessment of credibility. However, whether it is important to see the witness's face in a particular case will depend on the evidence to be given. If it is uncontested, then covering the face will have no impact on credibility and cross examination and thus not infringe the right to a fair trial. The Chief Justice concluded that "If wearing the niqab poses no serious risk to trial fairness, a witness who wishes to wear it for sincere religious reasons may do so."⁶

4. Is there a way to accommodate both rights and avoid the conflict between them?

The Chief Justice held that reconciling competing rights is accomplished by finding a "just and proportionate balance" between the two competing rights in the particular case not by banning "religion from the courtroom, transforming the courtroom into a 'neutral' space where witnesses must park their religious convictions at the door or by ...ignoring the ancient and persistent connection the law has postulated between seeing a witness's face and trial fairness."⁷ The preliminary inquiry judge must attempt to accommodate the competing rights with the help of options presented by the parties and in a way that preserves both rights. The Chief Justice observed that accommodation may not be possible in this case because excluding men from the courtroom to allow the witness to uncover her face may infringe the open court principle, the accused's right to be present at his trial and possibly his right counsel of his choice. Requiring the witness to remove the niqab, but to testify behind a screen or by closed-circuit television may not fulfil the witness's religious obligations

5. If no accommodation is possible, do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so?

For the Chief Justice, the response to this question must be found in proportionality – e.g. do the salutary effects, including those of a fair trial, outweigh the deleterious effects, including the effects on freedom of religion?

⁶ *Supra* note 1 at para 29

⁷ *Supra* note 1 at para 31

The Chief Justice held that, having already determined that the witness's religious belief is sincere, the preliminary inquiry judge must examine the harm that would be done by limiting this belief and may inquire at this stage into the strength of the witness's belief, the extent of state interference with the practice, and any steps taken to limit exposing her face to people in the courtroom. The judge should also examine the broader societal harm of requiring the witness to uncover her face, particularly that it may discourage others who share the same belief from reporting and testifying in sexual assault cases, effectively denying them justice.

In assessing the salutary effects of requiring removal of the niqab, the preliminary inquiry judge must consider the nature of the hearing, the nature of the evidence, and the impact of an unfair trial on the liberty of the accused and on the administration of justice. As stated above, the more central the credibility and cross-examination of the witness are to a case, where the liberty of the accused is stake, the more likely that the niqab will be ordered removed.

6. Contextual Balancing vs. a Clear Rule

The Chief Justice concluded her judgment by comparing her approach of “contextual balancing” with the other submissions before the court advocating for a clear rule establishing that the niqab may always be worn in court or that it may never be worn in court. In her view, neither of these positions is tenable because to always allow the niqab to be worn would provide no protection for the accused's right to a fair trial and would undermine the public's confidence in the administration of justice. To never allow the niqab to be worn would be inconsistent with the Charter requirement to limit rights and freedoms only to the extent that can be demonstrably justified. It would also fly in the face of the fact that the “...need to accommodate and balance sincerely held religious beliefs against other interests is deeply entrenched in Canadian law.”⁸

It is to be noted that Justice Lebel came down in favour of a clear rule that the niqab not be allowed because of the implications for the rights of the accused and “constitutional values of openness and religious neutrality in contemporary democratic, but diverse Canada.”⁹

⁸ *Supra* note 1 at para 54

⁹ *Supra* note 1 at para 6.

Justice Abella came down in favour of a clear rule that would allow the niqab in all cases with the exception of when the witness's identity was in issue because in her opinion "the harmful effects of requiring a witness to remove her niqab, with the result that she will likely not testify, bring charges in the first place, or, if she is the accused, be unable to testify in her own defence, is a significantly more harmful consequence than not being able to see a witness' whole face."¹⁰

C. CONCLUSION

The Supreme Court of Canada has provided a very helpful framework for trial judges faced with balancing competing charter rights. It remains to be seen how it will play out in the courts below both in criminal and civil cases. The Chief Justice, in setting out the various factors to be weighed in assessing whether the salutary effects of removing the niqab outweigh the deleterious effects, acknowledges that the case is not the last word; "Future cases will doubtless raise other factors, and scientific exploration of the importance of seeing a witness's face to cross-examination and credibility assessment may enhance or diminish the force of the arguments made in this case."¹¹

¹⁰ *Supra* note 1 at para 109

¹¹ *Supra* note 1 at para 44