

R. v. N.S., 2012 SCC 72 (CanLII)

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 Jurisdiction - To order witness to remove
 head covering \(e.g., niqab\)](#) , [Maritime Law
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SUPREME COURT OF CANADA

CITATION: R. v. N.S., 2012 SCC 72

DATE: 20121220

DOCKET: 33989

BETWEEN:

N.S.
 Appellant
 and
Her Majesty The Queen, M---d S. and M---l S.
 Respondents
 - and -

**Ontario Human Rights Commission, Barbra Schlifer Commemorative Clinic, Criminal
 Lawyers' Association (Ontario), Muslim Canadian Congress, South Asian Legal Clinic of
 Ontario, Barreau du Québec, Canadian Civil Liberties Association, Women's Legal
 Education and Action Fund and Canadian Council on American-Islamic Relations**
 Interveners

CORAM: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: McLachlin C.J. (Deschamps, Fish and Cromwell JJ.
(paras. 1 to 57) concurring)

CONCURRING REASONS: LeBel J. (Rothstein J. concurring)
(paras. 58 to 79)

DISSENTING REASONS: Abella J.
(paras. 80 to 110)

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R. v. N.S.

N.S.

Appellant

v.

**Her Majesty The Queen,
M---d S. and
M---l S.**

Respondents

and

**Ontario Human Rights Commission,
Barbra Schlifer Commemorative Clinic,
Criminal Lawyers' Association (Ontario),
Muslim Canadian Congress,
South Asian Legal Clinic of Ontario,
Barreau du Québec,
Canadian Civil Liberties Association,
Women's Legal Education and Action Fund and
Canadian Council on American-Islamic Relations**

Interveners

Indexed as: R. v. N.S.

2012 SCC 72

File No.: 33989.

2011: December 8; 2012: December 20.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Charter of Rights — Freedom of religion — Right to fair hearing — Right to make full answer and defence — Muslim witness at preliminary hearing in sexual assault trial wanting to testify with her face covered by niqab — Whether requiring witness to remove the niqab while testifying would interfere with her religious freedom — Whether permitting her to wear niqab while testifying would create a serious risk to trial fairness — Whether both rights could be accommodated to avoid conflict between them — If not, whether salutary effects of requiring the witness to remove niqab outweigh deleterious effects — Canadian Charter of Rights and Freedoms, ss. 2(a), 7 and 11(d).

Criminal law — Evidence — Cross-examination — Muslim witness at preliminary hearing in sexual assault trial wanting to testify with her face covered by niqab — Whether permitting her to wear niqab while testifying would create a serious risk to trial fairness.

The accused, M---d S. and M---l S., stand charged with sexually assaulting N.S. N.S. was called by the Crown as a witness at the preliminary inquiry. N.S., who is a Muslim, indicated that for religious reasons she wished to testify wearing her niqab. The preliminary inquiry judge held a *voir dire*, concluded that N.S.'s religious belief was "not that strong," and ordered her to remove her niqab. On appeal, the Court of Appeal held that if the witness's freedom of religion and the accused's fair trial interests were both engaged on the facts and could not be reconciled, the witness may be ordered to remove the niqab, depending on the context. The Court of Appeal returned the matter to the preliminary inquiry judge. N.S. appealed.

Held (Abella J. dissenting): The appeal should be dismissed, and the matter remitted to the preliminary inquiry judge.

Per McLachlin C.J. and Deschamps, Fish and Cromwell JJ.: The issue is when, if ever, a witness who wears a niqab for religious reasons can be required to remove it while testifying. Two sets of *Charter* rights are potentially engaged — the witness's freedom of religion and the accused's fair trial rights, including the right to make full answer and defence. An extreme approach that would always require the witness to remove her niqab while testifying, or one that would never do so, is untenable. The answer lies in a just and proportionate balance between freedom of religion and trial fairness, based on the particular case before the court. A witness who for sincere religious reasons wishes to wear the niqab while testifying in a criminal proceeding will be required to remove it if (a) this is necessary to prevent a serious risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (b) the salutary effects of requiring her to remove the niqab outweigh the deleterious effects of doing so.

Applying this framework involves answering four questions. First, would requiring the witness to remove the niqab while testifying interfere with her religious freedom? To rely on *s. 2(a)* of the *Charter*, N.S. must show that her wish to wear the niqab while testifying is based on a sincere religious belief. The preliminary inquiry judge concluded that N.S.'s beliefs were not sufficiently strong. However, at this stage the focus is on sincerity rather than strength of belief.

The second question is: would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness? There is a deeply rooted presumption in our legal system that seeing a witness's face is important to a fair trial, by enabling effective cross-examination and credibility assessment. The record before us has not shown this presumption to be unfounded or erroneous. However, whether being unable to see the witness's face threatens trial fairness in any particular case will depend on the evidence that the witness is to provide. Where evidence is uncontested, credibility assessment and cross-examination are not in issue. Therefore, being unable to see the witness's face will not impinge on trial fairness. 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.

If both freedom of religion and trial fairness are engaged on the facts, a third question must be answered: is there a way to accommodate both rights and avoid the conflict between them? The judge must consider whether there are reasonably available alternative measures that would conform to the witness's religious convictions while still preventing a serious risk to trial fairness.

If no accommodation is possible, then a fourth question must be answered: do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so? Deleterious effects include the harm done by limiting the witness's sincerely held religious practice. The judge should consider the importance of the religious practice to the witness, the degree of state interference with that practice, and the actual situation in the courtroom – such as the people present and any measures to limit facial exposure. The judge should also consider broader societal harms, such as discouraging niqab-wearing women from reporting offences and participating in the justice system. These deleterious effects must be weighed against the salutary effects of requiring the witness to remove the niqab. Salutary effects include preventing harm to the fair trial interest of the accused and safeguarding the repute of the administration of justice. When assessing potential harm to the accused's fair trial interest, the judge should consider whether the witness's evidence is peripheral or central to the case, the extent to which effective cross-examination and credibility assessment of the witness are central to the case, and the nature of the proceedings. Where the liberty of the accused is at stake, the witness's evidence central and her credibility vital, the possibility of a wrongful conviction must weigh heavily in the balance. The judge must assess all these factors and determine whether the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so.

A clear rule that would always, or one that would never, permit a witness to wear the niqab while testifying cannot be sustained. Always permitting a witness to wear the niqab would offer no protection for the accused's fair trial interest and the state's interest in maintaining public confidence in the administration of justice. However, never permitting a witness to testify wearing a niqab would not comport with the fundamental premise underlying the *Charter* that rights should be limited only to the extent that the limits are shown to be justifiable. The need to accommodate and balance sincerely held religious beliefs against other interests is deeply entrenched in Canadian law.

Competing rights claims should be reconciled through accommodation if possible, and if a conflict cannot be avoided, through case-by-case balancing. The *Charter*, which protects both freedom of religion and trial fairness, demands no less.

Per LeBel and Rothstein JJ.: This appeal illustrates the tension and changes caused by the rapid evolution of contemporary Canadian society and by the growing presence in Canada of new cultures, religions, traditions and social practices. This case is not purely one of conflict and reconciliation between a religious right and the protection of the right of the accused to make full answer and defence, but engages basic values of the Canadian criminal justice system. The *Charter* protects freedom of religion in express words at s. 2(a). But fundamental too are the rights of the accused to a fair trial, to make full answer and defence to the charges brought against him, to benefit from the constitutional presumption of innocence and to avert wrongful convictions. Since cross-examination is a necessary tool for the exercise of the right to make full answer and defence, the consequences of restrictions on that right weigh more heavily on the

accused, and the balancing process must work in his or her favour. A defence that is unduly and improperly constrained might impact on the determination of the guilt or innocence of the accused.

The Constitution requires an openness to new differences that appear within Canada, but also an acceptance of the principle that it remains connected with the roots of our contemporary democratic society. A system of open and independent courts is a core component of a democratic state, ruled by law and a fundamental Canadian value. From this broader constitutional perspective, the trial becomes an act of communication with the public at large. The public must be able to see how the justice system works. Wearing a niqab in the courtroom does not facilitate acts of communication. Rather, it shields the witness from interacting fully with the parties, their counsel, the judge and the jurors. Wearing the niqab is also incompatible with the rights of the accused, the nature of the Canadian public adversarial trials, and with the constitutional values of openness and religious neutrality in contemporary democratic, but diverse, Canada. Nor should wearing a niqab be dependent on the nature or importance of the evidence, as this would only add a new layer of complexity to the trial process. A clear rule that niqabs may not be worn at any stage of the criminal trial would be consistent with the principle of public openness of the trial process and would safeguard the integrity of that process as one of communication.

Per Abella J. (dissenting): 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 the accused not being able to see a witness's whole face. Unless the witness's face is directly relevant to the case, such as where her identity is in issue, she should not be required to remove her niqab.

There is no doubt that the assessment of a witness's demeanour is easier if it is based on being able to scrutinize the whole demeanour package — face, body language, or voice. That, however, is different from concluding that unless the entire package is available for scrutiny, a witness's credibility cannot adequately be weighed. Courts regularly accept the testimony of witnesses whose demeanour can only be partially observed and there are many examples of courts accepting evidence from witnesses who are unable to testify under ideal circumstances because of visual, oral, or aural impediments. The use of an interpreter, for example, may well have an impact on how the witness's demeanour is understood, but it is beyond dispute that interpreters render the assessment of demeanour neither impossible nor impracticable. A witness may also have physical or medical limitations that affect a judge's or lawyer's ability to assess demeanour. A stroke may interfere with facial expressions; an illness may affect body movements; and a speech impairment may affect the manner of speaking. All of these are departures from the demeanour ideal, yet none has ever been held to disqualify the witness from giving his or her evidence on the grounds that the accused's fair trial rights are impaired. Witnesses who wear niqabs should not be treated any differently.

Since not being able to see a witness's whole face is only a partial interference with what is, in any event, only one part of an imprecise measuring tool of credibility, there is no reason to demand full "demeanour access" where religious belief prevents it. A witness wearing a niqab may still express herself through her eyes, body language, and gestures. Moreover, the niqab has no effect on the witness's verbal testimony, including the tone and inflection of her voice, the cadence of her speech, or, most significantly, the substance of the answers she gives. Defence counsel still has the opportunity to rigorously cross-examine the witness.

A witness who is not permitted to wear her niqab while testifying is prevented from

being able to act in accordance with her religious beliefs. This has the effect of forcing her to choose between her religious beliefs and her ability to participate in the justice system. As a result, complainants who sincerely believe that their religion requires them to wear the niqab in public, may choose not to bring charges for crimes they allege have been committed against them, or, more generally, may resist being a witness in someone else's trial. Where the witness is the accused, she will be unable to give evidence in her own defence. The majority's conclusion that being unable to see the witness's face is acceptable from a fair trial perspective if the evidence is "uncontested", essentially means that sexual assault complainants, whose evidence will inevitably be contested, will be forced to choose between laying a complaint and wearing a niqab, which may be no meaningful choice at all.

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By McLachlin C.J.

Applied: *Dagenais v. Canadian Broadcasting Corp.*, [1994 CanLII 39 \(SCC\)](#), [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001 SCC 76 \(CanLII\)](#), 2001 SCC 76, [2001] 3 S.C.R. 442; *R. v. Mills*, [1999 CanLII 637 \(SCC\)](#), [1999] 3 S.C.R. 668; *R. v. Rose*, [1998 CanLII 768 \(SCC\)](#), [1998] 3 S.C.R. 262; *R. v. Seaboyer*, [1991 CanLII 76 \(SCC\)](#), [1991] 2 S.C.R. 577; *R. v. Osolin*, [1993 CanLII 54 \(SCC\)](#), [1993] 4 S.C.R. 595; *R. v. Lytle*, [2004 SCC 5 \(CanLII\)](#), 2004 SCC 5, [2004] 1 S.C.R. 193; **referred to:** *Syndicat Northcrest v. Amselem*, [2004 SCC 47 \(CanLII\)](#), 2004 SCC 47, [2004] 2 S.C.R. 551; *R. v. Levogiannis* [reflex](#), (1990), 1 O.R. (3d) 351, [aff'd 1993 CanLII 47 \(SCC\)](#), [1993] 4 S.C.R. 475; *R. v. J.Z.S.*, [2010 SCC 1 \(CanLII\)](#), 2010 SCC 1, [2010] 1 S.C.R. 3, [aff'g 2008 BCCA 401 \(CanLII\)](#), 2008 BCCA 401, 261 B.C.A.C. 52; *Housen v. Nikolaisen*, [2002 SCC 33 \(CanLII\)](#), 2002 SCC 33, [2002] 2 S.C.R. 235; *White v. The King*, [1947 CanLII 1 \(SCC\)](#), [1947] S.C.R. 268; *R. v. W. (R.)*, [1992 CanLII 56 \(SCC\)](#), [1992] 2 S.C.R. 122; *Police v. Razamjoo*, [2005] D.C.R. 408; *R. v. Oakes*, [1986 CanLII 46 \(SCC\)](#), [1986] 1 S.C.R. 103; *Alberta v. Hutterian Brethren of Wilson Colony*, [2009 SCC 37 \(CanLII\)](#), 2009 SCC 37, [2009] 2 S.C.R. 567; *M. (A.) v. Ryan*, [1997 CanLII 403 \(SCC\)](#), [1997] 1 S.C.R. 157; *R. v. Arcuri*, [2001 SCC 54 \(CanLII\)](#), 2001 SCC 54, [2001] 2 S.C.R. 828; *R. v. Hart* [reflex](#), (1999), 174 N.S.R. (2d) 165; *R. v. Swain*, [1991 CanLII 104 \(SCC\)](#), [1991] 1 S.C.R. 933; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006 SCC 6 \(CanLII\)](#), 2006 SCC 6, [2006] 1 S.C.R. 256; *Ontario Human Rights Commission v. Simpson-Sears Ltd.*, [1985 CanLII 18 \(SCC\)](#), [1985] 2 S.C.R. 536; *Commission scolaire régionale de Chambly v. Bergevin*, [1994 CanLII 102 \(SCC\)](#), [1994] 2 S.C.R. 525; *Central Okanagan School District No. 23 v. Renaud*, [1992 CanLII 81 \(SCC\)](#), [1992] 2 S.C.R. 970; *Saumur v. City of Quebec*, [1953 CanLII 3 \(SCC\)](#), [1953] 2 S.C.R. 299; *R. v. Big M Drug Mart Ltd.*, [1985 CanLII 69 \(SCC\)](#), [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986 CanLII 12 \(SCC\)](#), [1986] 2 S.C.R. 713; *S.L. v. Commission scolaire des Chênes*, [2012 SCC 7 \(CanLII\)](#), 2012 SCC 7, [2012] 1 S.C.R. 235.

By LeBel J.

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(Attorney General), 1996 CanLII 184 (SCC), [1996] 3 S.C.R. 480.

By Abella J. (dissenting)

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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Moldaver and Sharpe JJ.A.), [2010 ONCA 670 \(CanLII\)](#), 2010 ONCA 670, 102 O.R. (3d) 161, 326 D.L.R. (4th) 523, 269 O.A.C. 306, 262 C.C.C. (3d) 4, 80 C.R. (6th) 84, 220 C.R.R. (2d) 146, [2010] O.J. No. 4306 (QL), 2010 CarswellOnt 7640, setting aside in part a decision of Marrocco J. [2009 CanLII 21203 \(ON SC\)](#), (2009), 95 O.R. (3d) 735, 191 C.R.R. (2d) 228, 2009 CanLII 21203, [2009] O.J. No. 1766 (QL), 2009 CarswellOnt 2268, quashing the order of Weisman J. of the Ontario Court of Justice, dated October 16, 2008. Appeal dismissed, Abella J. dissenting.

David B. Butt, for the appellant.

Elise Nakelsky and *Benita Wassenaar*, for the respondent Her Majesty The Queen.

Douglas Usher and *Michael Dineen*, for the respondent M---d S.

No one appeared for the respondent M---l S.

Written submissions only by *Anthony D. Griffin* and *Reema Khawja*, for the intervener the Ontario Human Rights Commission.

Rahool P. Agarwal, *Michael Kotrly*, *Vasuda Sinha* and *Brydie Bethell*, for the intervener the Barbra Schlifer Commemorative Clinic.

Frank Addario and *Emma Phillips*, for the intervener the Criminal Lawyers' Association (Ontario).

Tyler Hodgson, *Heather Pessione* and *Ewa Krajewska*, for the intervener the Muslim Canadian Congress.

Written submissions only by *Ranjan K. Agarwal* and *Daniel T. Holden*, for the intervener the South Asian Legal Clinic of Ontario.

Written submissions only by *Babak Barin* and *Sylvie Champagne*, for the intervener Barreau du Québec.

Written submissions only by *Bradley E. Berg* and *Rahat Godil*, for the intervener the Canadian Civil Liberties Association.

Written submissions only by *Susan M. Chapman* and *Joanna Birenbaum*, for the intervener the Women's Legal Education and Action Fund.

Faisal Bhabha, for the intervener the Canadian Council on American-Islamic Relations.

The judgment of McLachlin C.J. and Deschamps, Fish and Cromwell JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] How should the state respond to a witness whose sincerely held religious belief requires her to wear a niqab that covers her face, except for her eyes, while testifying in a criminal proceeding? One response is to say she must always remove her niqab on the ground that the courtroom is a neutral space where religion has no place. Another response is to say the justice system should respect the witness's freedom of religion and always permit her to testify with the niqab on. In my view, both of these extremes must be rejected in favour of a third option: allowing the witness to testify with her face covered unless this unjustifiably impinges on the accused's fair trial rights.

[2] A secular response that requires witnesses to park their religion at the courtroom door is inconsistent with the jurisprudence and Canadian tradition, and limits freedom of religion where no limit can be justified. On the other hand, a response that says a witness can always testify with her face covered may render a trial unfair and lead to wrongful conviction. What is required is an approach that balances the vital rights protecting freedom of religion and trial fairness when they conflict. The long-standing practice in Canadian courts is to respect and accommodate the religious convictions of witnesses, unless they pose a significant or serious risk to a fair trial. The *Canadian Charter of Rights and Freedoms*, which protects both freedom of religion and trial fairness, demands no less.

[3] For the reasons that follow, I conclude that a witness who for sincere religious reasons wishes to wear the niqab while testifying in a criminal proceeding will be required to remove it if:

- (a) requiring the witness to remove the niqab is necessary to prevent a serious risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; *and*
- (b) the salutary effects of requiring her to remove the niqab, including the effects on trial fairness, outweigh the deleterious effects of doing so, including the effects on freedom of religion.

II. The Background

[4] The facts may be briefly stated. M---d S. and M---l S. stand charged with having sexually assaulted N.S. The accused are N.S.'s cousin and uncle, respectively. The prosecution called N.S. as a witness at the preliminary inquiry. N.S., who is a Muslim, wished to testify wearing her niqab. M---d S. and his co-accused, M---l S., sought an order requiring N.S. to remove her

niqab when testifying. The preliminary inquiry judge held a *voir dire*, during which N.S. wore her niqab. N.S. testified that her religious belief required her to wear a niqab in public where men (other than certain close family members) might see her. She admitted that she had removed her niqab for the photo on her driver's licence, which was taken by a female photographer, and that, if required, she would remove it for a security check at a border crossing. The judge concluded that N.S.'s religious belief was "not that strong" and ordered her to remove her niqab. N.S. objected. The preliminary inquiry was adjourned. N.S. applied to the Superior Court of Justice to quash the order of the preliminary inquiry judge and to permit her to testify wearing the niqab.

[5] At the Superior Court of Justice, Marrocco J. quashed the order that N.S. testify without her niqab (2009 CanLII 21203 (ON SC), (2009), 95 O.R. (3d) 735). He held that N.S. should be allowed to testify wearing a niqab if she asserted a sincere religious reason for doing so, but that the preliminary inquiry judge would have the option to exclude her evidence if the niqab were found to have prevented true cross-examination. N.S. appealed, and M--d S. cross-appealed.

[6] The Court of Appeal, *per* Doherty J.A., held that a judge faced with a request to testify wearing a niqab should determine whether the request was the result of a sincere religious belief, and if so, whether it impinged on the accused's fair trial rights 2010 ONCA 670 (CanLII), (2010 ONCA 670, 102 O.R. (3d) 161). If the rights of the witness and accused could not be reconciled by adapting court procedures to accommodate the religious practice, the accused's fair trial interest may require that the witness be ordered to remove her niqab. This would depend on whether the credibility of the witness was in issue, how much the niqab interfered with demeanour assessment, whether the trial was a jury trial or a judge-alone trial, the stage of the proceedings, the nature of the evidence to be given (i.e. is it central or peripheral, controversial or uncontested), the nature of the defence to be advanced, and other constitutional values and societal interests. The Court of Appeal returned the matter to the preliminary inquiry judge, to be dealt with in accordance with its directives. N.S. appealed.

III. The Issues

[7] The issue is when, if ever, a witness who wears a niqab for religious reasons can be required to remove it while testifying. Two sets of *Charter* rights are potentially engaged — the witness's freedom of religion (protected under s. 2(a)) and the accused's fair trial rights, including the right to make full answer and defence (protected under ss. 7 and 11(d)). This Court set out the framework for identifying and resolving rights conflicts that arise at common law in *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835. This approach was further refined in *R. v. Mentuck*, 2001 SCC 76 (CanLII), 2001 SCC 76, [2001] 3 S.C.R. 442. The framework was developed in the context of publication bans, but its principles have broader application.

[8] The first task under a *Dagenais/Mentuck*-type inquiry is to determine whether, in the case at hand, allowing the witness to testify in a niqab is necessary to protect her freedom of religion. The second task is to determine whether requiring the witness to testify without the niqab is necessary in order to protect the fairness of the trial. This involves considering whether there are alternative measures for protecting trial fairness that would also allow the witness to exercise her religious practice. Finally, if there is a true conflict that cannot be avoided, it is necessary to assess the competing harms and determine whether the salutary effects of requiring the witness to remove the niqab (for example, reducing the risk of a wrongful conviction) outweigh the deleterious effects of doing so (for example, the harm from interfering with the witness's sincerely held religious belief): see *Dagenais*, at p. 878; *Mentuck*, at para. 32.

[9] Applying this framework involves answering four questions:

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

IV. Would Requiring the Witness to Remove the Niqab While Testifying Interfere With Her Religious Freedom?

[10] N.S. bases her claim to wear a niqab while testifying on the guarantee of freedom of religion in *s. 2(a)* of the *Charter*:

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

[11] In order to rely on *s. 2(a)*, she must show that her wish to wear the niqab in court is based on a sincere religious belief: *Syndicat Northcrest v. Amselem*, 2004 SCC 47 (CanLII), 2004 SCC 47, [2004] 2 S.C.R. 551. The issue at this stage is whether N.S. *sincerely believes* that her religion requires her to wear a niqab in the presence of men who are not her relatives, including while testifying in court.

[12] The preliminary inquiry judge failed to conduct an adequate inquiry into whether N.S.'s refusal to remove her niqab was based on a sincere religious belief. Based on the fact that N.S. removed the niqab for her driver's licence photo and said she would do so for a security check, the preliminary inquiry judge seems to have concluded that her beliefs were not sufficiently "strong".

[13] This was not an appropriate determination of whether N.S. has a *prima facie* religious claim. First, the question of whether she has a claim focuses on sincerity of belief rather than its strength. While, as I will discuss, the strength of a claimant's religious belief may be relevant in balancing it against the accused's fair trial rights, the belief need only be sincere in order for it to receive protection. Second, inconsistent adherence to a religious practice may suggest lack of sincere belief, but it does not necessarily do so. A sincere believer may occasionally lapse, her beliefs may change over time or her belief may permit exceptions to the practice in particular situations. Departures from the practice in the past should also be viewed in context; a witness should not be denied the right to raise *s. 2(a)* merely because she has made what

seemed to be a compromise in the past in order to participate in some facet of society. The preliminary inquiry judge did not explore these possibilities. I therefore agree with the Court of Appeal that the matter must be returned to the preliminary inquiry judge for full consideration of whether N.S.'s desire to wear a niqab is based on sincere religious belief.

[14] The balance of my reasons proceeds on the assumption that N.S. has established a sincere religious belief that she must wear a niqab while testifying in a public criminal proceeding. In such circumstances, can the judge order that the niqab be removed on the basis that it will adversely affect the accused's fair trial interests?

V. Would Permitting the Witness to Wear the Niqab While Testifying Create a Serious Risk to Trial Fairness?

[15] M--d S. submits that permitting N.S. to wear the niqab while testifying would infringe his fair trial rights. Both *ss. 7* and *11(d)* of the *Charter* protect an accused's right to a fair trial and to make full answer and defence. *Section 11(d)* of the *Charter* states:

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;

The right to a fair trial in *s. 11(d)* encompasses a right to make full answer and defence: *R. v. Mills*, 1999 CanLII 637 (SCC), [1999] 3 S.C.R. 668, at para. 69. More broadly, *s. 7* of the *Charter* provides that a person cannot be deprived of his liberty except "in accordance with the principles of fundamental justice". Those principles include the right to a fair trial and to make full answer and defence. The principles of fundamental justice in *s. 7* and the requirements of *s. 11(d)* are "inextricably intertwined": *R. v. Rose*, 1998 CanLII 768 (SCC), [1998] 3 S.C.R. 262, at para. 95, citing *R. v. Seaboyer*, 1991 CanLII 76 (SCC), [1991] 2 S.C.R. 577, at p. 603.

[16] M--d S. argues that allowing N.S. to testify with her face covered by a niqab denies his fair trial rights in two ways: first, by preventing effective cross-examination; and second, by interfering with the ability of the trier of fact (judge or jury) to assess N.S.'s credibility.

[17] We have no expert evidence in this case on the importance of seeing a witness's face to effective cross-examination and accurate assessment of a witness's credibility. All we have are arguments and several legal and social science articles submitted by the parties as authorities.

[18] M--d S. and the Crown argue that the link is clear. Communication involves not only words, but facial cues. A facial gesture may reveal uncertainty or deception. The cross-examiner may pick up on non-verbal cues and use them to uncover the truth. Credibility assessment is equally dependent not only on what a witness says, but on how she says it. Effective cross-examination and accurate credibility assessment are central to a fair trial. It follows, they argue, that permitting a witness to wear a niqab while testifying may deny an accused's fair trial rights.

[19] N.S. and supporting interveners, on the other hand, argue that the importance of seeing a witness's face has been greatly exaggerated. They submit that untrained individuals cannot use facial expressions to detect deception. Moreover, to the extent that non-verbal cues are useful at all, a niqab-wearing witness's eyes, tone of voice and cadence of speech remain available to the cross-examiner and trier of fact.

[20] The record sheds little light on the question of whether seeing a witness's face is important to effective cross-examination and credibility assessment and hence to trial fairness. The only evidence in the record is a four-page unpublished review article suggesting that untrained individuals cannot accurately detect lies based on the speaker's facial cues. This material was not tendered through an expert available for cross-examination. Intervenors have submitted articles arguing for and against a connection, but they are not part of the record and not supported by expert witnesses, and so are more rhetorical than factual.

[21] This much, however, can be said. The common law, supported by provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, and judicial pronouncements, proceeds on the basis that the ability to see a witness's face is an important feature of a fair trial. While not conclusive, in the absence of negating evidence this common law assumption cannot be disregarded lightly.

[22] As a general rule, witnesses in common law criminal courts are required to testify in open court, with their faces visible to counsel, the judge and the jury. Face-to-face confrontation is the norm, although not an independent constitutional right: *R. v. Levogiannis* [reflex](#), (1990), 1 O.R. (3d) 351 (C.A.), at pp. 366-67, aff'd [1993 CanLII 47 \(SCC\)](#), [1993] 4 S.C.R. 475. To be sure, long-standing assumptions of the common law can be displaced, if shown to be erroneous or based on groundless prejudice — thus the reforms to eliminate the many myths that once skewed the law of sexual assault. But the record before us has not shown the long-standing assumptions of the common law regarding the importance of a witness's facial expressions to cross-examination and credibility assessment to be unfounded or erroneous.

[23] In recent years, Parliament and this Court have confirmed the common law assumption that the accused, the judge and the jury should be able to see the witness as she testifies. To protect child witnesses from trauma, Parliament has passed legislation permitting children to testify via closed-circuit television or from behind a screen so that they cannot see the accused: *Criminal Code*, s. 486.2(1). This Court has upheld these testimonial aids, relying on the fact that they do not prevent the accused from seeing the witness: *R. v. J.Z.S.*, [2010 SCC 1 \(CanLII\)](#), 2010 SCC 1, [2010] 1 S.C.R. 3, aff'g [2008 BCCA 401 \(CanLII\)](#), 2008 BCCA 401, 261 B.C.A.C. 52. Before a witness is permitted to testify by audio link, the *Criminal Code* expressly requires that the judge consider “any potential prejudice to either of the parties caused by the fact that the witness would not be seen by them”: ss. 714.3(d) and 714.4(b). This, too, suggests that not seeing a witness's face during testimony may limit the fairness of a trial.

[24] Covering the face of a witness may impede cross-examination: see C.A. reasons, at para. 54. Effective cross-examination is integral to the conduct of a fair trial and a meaningful application of the presumption of innocence: see *R. v. Osolin*, [1993 CanLII 54 \(SCC\)](#), [1993] 4 S.C.R. 595, at pp. 663-65; *Mills*, at para. 69. Unwarranted constraints may undermine the fairness of the trial:

. . . the right of an accused to cross-examine witnesses for the prosecution — without significant and unwarranted constraint — is an essential component of the right to make full answer and defence. [Emphasis added.]

(*R. v. Lyttle*, 2004 SCC 5 (CanLII), 2004 SCC 5, [2004] 1 S.C.R. 193, at para. 2)

Non-verbal communication can provide the cross-examiner with valuable insights that may uncover uncertainty or deception, and assist in getting at the truth.

[25] Covering a witness's face may also impede credibility assessment by the trier of fact, be it judge or jury. It is a settled axiom of appellate review that deference should be shown to the trier of fact on issues of credibility because trial judges (and juries) have the “overwhelming advantage” of seeing and hearing the witness — an advantage that a written transcript cannot replicate: *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 24; see also *White v. The King*, 1947 CanLII 1 (SCC), [1947] S.C.R. 268, at p. 272; *R. v. W. (R.)*, 1992 CanLII 56 (SCC), [1992] 2 S.C.R. 122, at p. 131. This advantage is described as stemming from the ability to assess the demeanour of the witness, that is, to *see* how the witness gives her evidence and responds to cross-examination.

[26] Changes in a witness's demeanour can be highly instructive; in *Police v. Razamjoo*, [2005] D.C.R. 408, a New Zealand judge asked to decide whether witnesses could testify wearing burkas commented:

. . . there are types of situations . . . in which the demeanour of a witness undergoes a quite dramatic change in the course of his evidence. The look which says “I hoped not to be asked that question”, sometimes even a look of downright hatred at counsel by a witness who obviously senses he is getting trapped, can be expressive. So too can abrupt changes in mode of speaking, facial expression or body language. The witness who moves from expressing himself calmly to an excited gabble; the witness who from speaking clearly with good eye contact becomes hesitant and starts looking at his feet; the witness who at a particular point becomes flustered and sweaty, all provide examples of circumstances which, despite cultural and language barriers, convey, at least in part by his facial expression, a message touching credibility. [para. 78]

[27] On the record before us, I conclude that there is a strong connection between the ability to see the face of a witness and a fair trial. Being able to see the face of a witness is not the only — or indeed perhaps the most important — factor in cross-examination or accurate credibility assessment. But its importance is too deeply rooted in our criminal justice system to be set aside absent compelling evidence.

[28] However, whether the ability to observe a witness's face impacts trial fairness in any particular case will depend on the evidence that the witness is to provide. Where evidence is uncontested, credibility assessment and cross-examination are not in issue; therefore, being unable to see the witness's face will not impinge on the accused's fair trial rights; as *Dagenais* notes, the risk to trial fairness must be “real and substantial” (p. 878), or in other words, the risk must be a serious one (*Mentuck*, at para. 34).

[29] 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.

VI. Is There a Way to Accommodate Both Rights and Avoid the Conflict Between Them?

[30] If both freedom of religion and trial fairness are engaged on the facts, the question is how a judge should reconcile these rights.

[31] The answer to this question lies in the *Dagenais/Mentuck* approach and the jurisprudence of this Court. The answer is not to ban religion from the courtroom, transforming the courtroom into a “neutral” space where witnesses must park their religious convictions at the door. Nor does it lie in ignoring the ancient and persistent connection the law has postulated between seeing a witness’s face and trial fairness, and holding that a witness may always wear her niqab while testifying. Rather, the answer lies in a just and proportionate balance between freedom of religion on the one hand, and trial fairness on the other, based on the particular case before the Court.

[32] Under the *Dagenais/Mentuck* framework, once a judge is satisfied that both sets of competing interests are actually engaged on the facts, he or she must try to resolve the claims in a way that will preserve both rights. *Dagenais* refers to this as the requirement to consider whether “reasonably available alternative measures” would avoid the conflict altogether (p. 878). We also call this “accommodation”. We find a way to go forward that satisfies each right and each party. Both rights are respected, and the conflict is averted.

[33] When the matter returns to the preliminary inquiry judge, the parties should be able to place before the court evidence relating to possible options for accommodation of the potentially conflicting claims. This is the first step in the reconciliation process. The question is whether there is a reasonably available alternative that would conform to the witness’s religious convictions while still preventing a serious risk to trial fairness. On the facts of this case, it may be that no accommodation is possible; excluding men from the courtroom would have implications for the open court principle, the right of the accused to be present at his trial, and potentially his right to counsel of his choice. Testifying without the niqab via closed-circuit television or behind a one-way screen may not satisfy N.S.’s religious obligations. However, when this case is reheard, the preliminary inquiry judge must consider the possibility of accommodation based on the evidence presented by the parties.

VII. Do the Salutary Effects of Requiring the Witness to Remove the Niqab Outweigh the Deleterious Effects of Doing So?

[34] If there is no reasonably available alternative that would avoid a serious risk to trial fairness while conforming to the witness’s religious belief, the analysis moves to the next step in the *Dagenais/Mentuck* framework. The question is whether the salutary effects of requiring the witness to remove the niqab, including the effects on trial fairness, outweigh the deleterious effects of doing so, including the effects on freedom of religion (*Dagenais*, at p. 878; *Mentuck*, at para. 32).

[35] As *Dagenais* makes clear, this is a proportionality inquiry, akin to the final part of the test in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103. The effect of insisting that the witness remove the niqab if she is to testify must be weighed against the effect of permitting her to wear the niqab on the stand.

[36] In terms of the deleterious effects of requiring the witness to remove her niqab while testifying, the judge must look at the harm that would be done by limiting the sincerely held religious practice. Sincerity of belief is already established at the first step of determining whether

the s. 2(a) right is engaged; at this stage the task is to evaluate the impact of failing to protect that sincere belief in the particular context. It is difficult to measure the value of adherence to religious conviction, or the injury caused by being required to depart from it. The value of adherence does not depend on whether a religious practice is a voluntary expression of faith or a mandatory obligation under religious doctrine: *Amsalem*, at para. 47. However, certain considerations may be helpful. How important is the practice to the claimant? What is the degree of state interference with the religious practice?: see *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII), 2009 SCC 37, [2009] 2 S.C.R. 567, at paras. 89-95. How does the actual situation in the courtroom — the people present and any measures that can be put in place to limit facial exposure — affect the harm to the claimant of limiting her religious practice? These are but some considerations that may be relevant to determining the impact of an order to remove the niqab on the witness's right to freedom of religion.

[37] The judge should also consider the broader societal harms of requiring a witness to remove the niqab in order to testify. N.S. and supporting interveners argue that if niqab-wearing women are required to remove the niqab while testifying against their sincere religious belief they will be reluctant to report offences and pursue their prosecution, or to otherwise participate in the justice system. The wrongs done to them will remain unredressed. They will effectively be denied justice. The perpetrators of crimes against them will go unpunished, immune from legal consequences. These considerations may be especially weighty in a sexual assault case such as this one. In recent decades the justice system, recognizing the seriousness of sexual assault and the extent to which it is under-reported, has vigorously pursued those who commit this crime. Laws have been changed to encourage women and children to come forward to testify. Myths that once stood in the way of conviction have been set aside.

[38] Having considered the deleterious effects of requiring the witness to remove the niqab, the judge must also consider the salutary effects of doing so. These include preventing harm to the fair trial interest of the accused and safeguarding the reputation of the administration of justice. An important consideration will be the extent to which effective cross-examination and credibility assessment on this witness's testimony is central to the case. On an individual level, the cost of an unfair trial is severe. The right to a fair trial is a fundamental pillar without which the edifice of the rule of law would crumble. No less is at stake than an individual's liberty — his right to live in freedom unless the state proves beyond a reasonable doubt that he committed a crime meriting imprisonment. This is of critical importance not only to the individual on trial, but to public confidence in the justice system.

[39] The nature of the proceeding may also be a relevant factor in assessing the harm to the fair trial interest of the accused if the witness is permitted to testify wearing the niqab: see *M. (A.) v. Ryan*, 1997 CanLII 403 (SCC), [1997] 1 S.C.R. 157, at para. 36. For example, determining whether evidence is admissible on a *voir dire* might not raise the same concerns for getting at the truth through cross-examination and credibility assessment as would determining a central factual element of the Crown's case.

[40] The Court of Appeal suggested that the fair trial interest might be attenuated at the preliminary inquiry stage, where the judge is not tasked with making credibility findings: *R. v. Arcuri*, 2001 SCC 54 (CanLII), 2001 SCC 54, [2001] 2 S.C.R. 828, at para. 32. This may be questioned, however, given that evidence taken on a preliminary inquiry is subject to cross-examination and can be read in as part of the record at trial: s. 715, *Criminal Code*. Moreover, one of the purposes of a preliminary inquiry is to permit defence counsel to probe the strength of the Crown's case by cross-examining its witnesses. Permitting the witness to wear a niqab at the preliminary inquiry might hamper fulfillment of that purpose.

[41] The Court of Appeal suggested that harm to the fair trial interest might be less significant in a trial before a judge alone than before a judge and jury. Where a judge is the trier of fact, she would have the benefit of observing the witness at two points: first during the *voir dire* on the witness's religious freedom claim, and second when the witness gives testimony and is cross-examined. As the Court of Appeal stated:

[The] judge during the inquiry into the witness's religious freedom claim may well develop a sense of the extent to which the wearing of the niqab will affect that judge's ability to make a proper assessment of the witness. The judge could properly take that impression into account in deciding how best to reconcile the witness's right to freedom of religion with the accused's right to full cross-examination. [para. 76]

This said, judges must guard against over-confident predictions that they will be able to make sound credibility assessments, or that the inability to see the witness's face will not affect cross-examination, on the basis of a preliminary impression of a person whose face they cannot see.

[42] The Court of Appeal also suggested that, in a trial by jury, the harm of being unable to see the witness's face might be offset by a curative instruction to the jury. However, a note of caution is in order. A curative instruction is hardly a remedy for deficient cross-examination or impaired credibility assessment resulting from an inability to see the witness's face.

[43] Another factor to consider is the nature of the evidence to be given by the witness. The Court of Appeal observed that if the witness's "evidence is relatively peripheral, or if it is clear that the witness's credibility will not be an issue, arguments that the removal of the niqab is essential to permit cross-examination become weak" (para. 77). As already discussed above, if the witness's evidence is uncontested, the accused's trial fairness interests are not put at risk by the witness wearing a niqab. However, even when trial fairness is engaged, the importance of the evidence may bear on the judge's assessment of the risk posed by the witness's face being concealed. As Cromwell J.A. (as he then was) commented in *R. v. Hart*, [reflex](#), (1999), 174 N.S.R. (2d) 165 (C.A.):

The trial judge should consider the importance of the evidence to the case. The more important the evidence to the prosecution's case, the more reluctant the trial judge should be to allow it to be given without full cross-examination. [para. 104]

[44] These are but some of the factors that may be relevant to determining whether the party seeking removal of the niqab has established that the salutary effects of doing so outweigh the deleterious effects. 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. At this point, however, it may be ventured 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.

[45] The judge must assess all these factors and determine whether, in the case at hand, the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so.

VIII. The Alternatives

[46] I have proposed that courts should deal with the conflict between rights in cases such as this by finding a just and appropriate balance between freedom of religion on the one hand and fair trial rights on the other. The result is 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. This approach follows the path this Court has taken in cases where rights conflict: *R. v. Swain*, 1991 CanLII 104 (SCC), [1991] 1 S.C.R. 933, at pp. 978-79 and 986-87; *Dagenais*, at p. 878; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 (CanLII), 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 2.

[47] Some of the submissions before us, however, argue against a contextual balancing and in favour of a clear rule. Some argue that a witness should always be permitted to wear a niqab in court, while others argue that she should never be permitted to cover her face in court. In my respectful view, while both positions offer the advantage of a clear rule, neither can be sustained.

[48] I turn first to the position that a witness should always be permitted to wear a niqab in court. The basic problem with this solution is that it offers no protection for the accused's fair trial interest and the state's correlative interest in avoiding wrongful convictions and maintaining public confidence in the administration of justice. Proponents of this position, including a number of interveners, responded by saying the niqab has little or no impact on cross-examination and credibility assessment, and hence does not impinge on the accused's right to, and the state's interest in, a fundamentally fair trial. This response, as discussed, flies in the face of assumptions deeply embedded in common law criminal practice and the *Criminal Code*, as well as the accepted judicial view that seeing the face of a witness assists in credibility assessment and is important to a fair trial.

[49] In the absence of evidence showing that these beliefs, backed by centuries of practice, are unsubstantiated "myths" that should be excised from the law, we should not take such a radical step. It follows that the view that witnesses can never be ordered to remove the niqab cannot be accepted. The *Dagenais/Mentuck* approach of finding a just balance between the conflicting rights is not displaced.

[50] At the other end of the spectrum lies the approach that says the courtroom must be a space in which individuals' particular religious convictions have no place. On this view, if the niqab is an expression of the wearer's religious views, it has no place in the courtroom. Courtrooms should be "neutral" spaces, operating on "neutral" principles. Changes of procedure on religious grounds should therefore not be allowed, it is argued.

[51] In my view, this option must also be rejected. It is inconsistent with Canadian jurisprudence, courtroom practice, and our tradition of requiring state institutions and actors to accommodate sincerely held religious beliefs insofar as possible. Importantly, it limits religious rights where there is no countervailing right and hence no reason to limit them. As such, it fails the

proportionality test which has guided *Charter* jurisprudence since *R. v. Oakes* in 1986.

[52] First, as already discussed, our jurisprudence teaches that clashes between rights should be approached by reconciling the rights through accommodation if possible, and in the end, if a conflict cannot be avoided, by case-by-case balancing: *Dagenais*. An absolute rule that courtrooms are secular spaces where religious belief plays no role would stand as a unique exception to this approach. No attempt to accommodate the witness's sincere religious belief would need to be made. No effort to minimize the intrusion on the right would need to be considered. The reconciliation between competing rights that we have advocated case after case would not be attempted. Why? Simply because the venue where the rights clash is a courtroom.

[53] Second, to remove religion from the courtroom is not in the Canadian tradition. Canadians have since the country's inception taken oaths based on holy books — be they the Bible, the Koran or some other sacred text. The practice has been to respect religious traditions insofar as this is possible without risking trial fairness or causing undue disruption in the proceedings. The *Canada Evidence Act*, R.S.C. 1985, c. C-5, now permits a witness to affirm instead of taking a religious oath, but it does not remove the option of the oath from the courtroom.

[54] Third, the Canadian approach in the last 60 years to potential conflicts between freedom of religion and other values has been to respect the individual's religious belief and accommodate it if at all possible. Employers have been required to adapt workplace practices to accommodate employees' religious beliefs: *Ontario Human Rights Commission v. Simpson-Sears Ltd.*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536, at p. 555; *Commission scolaire régionale de Chambly v. Bergevin*, 1994 CanLII 102 (SCC), [1994] 2 S.C.R. 525, at pp. 551-52; *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), [1992] 2 S.C.R. 970, at p. 982. Schools, cities, legislatures and other institutions have followed the same path: *Saumur v. City of Quebec*, 1953 CanLII 3 (SCC), [1953] 2 S.C.R. 299, at pp. 327-29; *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at pp. 336-37; *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713, at p. 782; *Amselem*, at para. 103; *Multani*, at para. 2. The need to accommodate and balance sincerely held religious beliefs against other interests is deeply entrenched in Canadian law. For over half a century this tradition has served us well. To depart from it would set the law down a new road, with unknown twists and turns.

[55] Most recently, in *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 (CanLII), 2012 SCC 7, [2012] 1 S.C.R. 235, Justice Deschamps wrote of the ideal of “neutrality” in the law:

. . . following a realistic and non-absolutist approach, state neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the individuals affected. [para. 32]

[56] This brings me to the final reason for rejecting an approach that would never allow a witness to testify while wearing a religious facial covering. It does not comport with the fundamental premise underlying the *Charter* that rights should be limited only to the extent that the limits are shown to be justifiable. This principle is set out in s. 1 of the *Charter*, in relation to laws — laws that limit the rights guaranteed by the *Charter* are invalid to the extent that the limit is not reasonably justified in a free and democratic society. A total ban on religious face coverings for all evidence given by all witnesses in the courtroom would mean that freedom of religion is

being limited in situations where there is no good reason for the limit. As discussed above, uncontested and uncontroversial evidence does not engage the fair trial interest. A total ban that would permit the state to intrude on freedom of religion where it cannot be justified is not consistent with the premise on which the *Charter* is based — a generous approach to defining the scope of the rights it confers, coupled with the need to justify intrusions on those rights because of conflicting interests or the public good.

IX. Conclusion

[57] I would dismiss the appeal. The matter should be remitted to the preliminary inquiry judge to be decided in accordance with these reasons.

The reasons of LeBel and Rothstein JJ. were delivered by

LEBEL J. —

I. Introduction

[58] The Chief Justice proposes to dismiss the appeal of N.S. I agree with her conclusion. However, she crafts a rule that would allow witnesses to wear niqabs in certain circumstances. I have reservations about her approach and will propose a different rule. I will add some observations about the important issues raised by this appeal in respect of some of the principles informing and governing the Constitution of Canada and the application of its criminal law. But I will not restate the facts of the appeal. I will be content to rely on their exposition in the Chief Justice's reasons, except where I find it necessary to add a few details to their presentation.

[59] Once again, this appeal signals the difficulties attendant on the trial of charges of sexual assault and related offences, particularly in the context of the life of a family. As we will see, however, there is more to this case. This appeal also illustrates the tension and changes caused by the rapid evolution of contemporary Canadian society and by the growing presence in Canada of new cultures, religions, traditions and social practices. Now, this Court must decide how to frame the relationship — or clash — between the affirmation of a religious right by a victim of sexual assault and the right of the accused to conduct his defence or, rather, to make full answer and defence to the charges against him. The complainant says that her Islamic faith requires her to wear a full-face veil, the niqab, in public, in court. The accused responds that the complainant must remove her veil, particularly when she gives evidence or is cross-examined, in order to protect his right to a fair trial and to make full answer and defence. The Court of Appeal tried to reconcile the conflicting claims. At the end of a long and carefully crafted judgment, it found that N.S. would have to remove her veil, if that became necessary, in order to allow the defence to conduct an effective cross-examination [2010 ONCA 670 \(CanLII\)](#), (2010 ONCA 670, 102 O.R. (3d) 161). It did not clearly decide whether wearing a niqab is compatible with the nature of a public adversarial trial in the courts of Canada and with the principles that govern such a trial under the *Canadian Charter of Rights and Freedoms*, the criminal law and the common law.

[60] The Court of Appeal and the complainant treated the issue in this case as purely one of conflict and reconciliation between a religious right and the protection of the right of the accused to make full answer and defence. This clash arises, but the equation involves other factors. The case engages basic values of the Canadian criminal justice system. Is the wearing of the niqab compatible not only with the rights of the accused, but also with the constitutional values of openness and religious neutrality in contemporary democratic, but diverse, Canada?

[61] Exploring this aspect of the case may lead to further questions about the meaning of multiculturalism in our democratic environment. I will first consider the conflict between the religious rights claimed by the appellant and the rights of an accused facing criminal charges. I will then briefly reflect on the values of the Canadian justice system and on their relevance to the resolution of the issues before this Court.

II. Conflict Between Religious Rights and the Criminal Justice Process

[62] Freedom of religion is a fundamental right. It often goes to the core identity of human beings. The *Charter* protects it in express words in s. 2(a). But fundamental too are the rights of the accused to make full answer and defence to the charges brought against him and to benefit from the presumption of innocence. The right to cross-examine is considered to be part of the constitutional right to make full answer and defence. But it is not unlimited (*R. v. Crawford*, 1995 CanLII 138 (SCC), [1995] 1 S.C.R. 858, at paras. 27-28; *R. v. Levogiannis*, 1993 CanLII 47 (SCC), [1993] 4 S.C.R. 475). Religious rights are not unlimited either (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII), 2009 SCC 37, [2009] 2 S.C.R. 567).

[63] In the instant case, this Court must resolve a conflict between two protected constitutional rights within the framework established by the constitutional system. It is not a question of reconciling a constitutional right, the guarantee of freedom of religion, with a mere common law right, the right to cross-examine a witness, the complainant. As found in the jurisprudence, the right to cross-examine is a component of the constitutional right of the accused to make full answer and defence to the charges against him or her.

[64] Indeed, the reasons of the Chief Justice recognize the importance of the right of cross-examination as a tool to ensure the effectiveness of the right of the accused to make full answer and defence. It tests the witness. Many cross-examinations fail or, in the end, actually assist the prosecution. Some succeed, on occasion brilliantly. Like the Chief Justice, I think that allowing participants to observe the face of a witness during cross-examination is an important part in the exercise of the right of the accused to defend himself against criminal charges, and that the appellant has failed to show that this view is wrong.

[65] I do not cast doubt on the sincerity of the appellant's religious beliefs. I do not doubt that the environment of a criminal trial is hardly congenial or comfortable for the witnesses or the parties, particularly in cases involving matters such as sexual assaults, even sexual assaults within the family circle, as in this case. Lawyers and judges get used in their lives to the courtroom environment. As judges, we may forget how new, strange or intimidating it may prove to be for those who do not live their lives in the law.

[66] Parliament and courts have put processes in place designed to protect young persons and victims of crimes like sexual assault during a criminal trial. They are available to all

those who belong to the classes of persons that are deemed to be in need of protection in the course of a trial. Nevertheless, despite these safeguards, the courtroom environment can be traumatic for many litigants and witnesses.

[67] But the Canadian criminal trial process remains faithful in its core aspects to an adversarial model. This process developed in the common law. Some of its features are now part of the constitutional order. The accused, who is the target of the process, may himself be going through a painful and traumatic experience from the time of the criminal investigation to the arrest, the laying of charges and the wait for a trial date in open court. Indeed, he is the target of a process established to satisfy the public interest in the pursuit and punishment of crime. Nevertheless the criminal process itself is also designed to ensure that the accused is given a fair trial, to safeguard the constitutional presumption of innocence and, hopefully, to avert wrongful convictions. The adversarial model is based on interaction between the prosecution, the plaintiff, counsel for the parties, witnesses and, finally, the judge and, where applicable, the jurors. This model of justice imposes a significant personal burden on witnesses and parties. This burden cannot be lifted entirely. The price might very well be reading the most basic rights of the accused out of the criminal law and of the *Charter*.

[68] In this context, it would be possible to expound at length on the theme of the reconciliation of rights. But the Court is, first of all, tasked with resolving a problem of balancing of rights, which both enjoy constitutional protection. I agree, in this respect, with the reasons of the Chief Justice that, when the issue involves the credibility of a key witness in respect of the core questions raised by a charge, the rights of the accused must be protected. Since cross-examination is a necessary tool for the exercise of the right to make full answer and defence, the consequences of restrictions on the rights in question weigh more heavily on the accused, and the balancing process works in his favour. A defence that is unduly and improperly constrained might impact on the determination of his guilt or innocence. As a result, the witness, the complainant in this case, must be asked to remove her veil while giving evidence at the preliminary inquiry and at trial.

III. The Niqab — Some Practical Aspects of the Conduct of the Trial

[69] But this does not mean that I agree with the solution the Chief Justice proposes to the problem of a witness wearing a niqab while testifying. In her view, whether a witness will be allowed to wear a niqab would depend on the nature or the importance of the evidence. The application of these criteria looks highly problematic. First, their application could trigger new motions, and possibly another type of “*voir dire*” that would add a new layer of complexity to a trial process that is not always a model of simplicity. We should not forget that a trial is itself a dynamic chain of events. It can often be difficult to foresee which evidence might be considered non-contentious or important at a specific point in a trial. The solution may vary at different stages of a trial, and also with what is known about the evidence. What looked unchallengeable one day might appear slightly dicey a week later. Given the nature of the trial process itself, the niqab should be allowed either in all cases or not at all when a witness testifies. In my opinion, a clear rule should be chosen. Because of its impact on the rights of the defence, in the context of the underlying values of the Canadian justice system, the wearing of a niqab should not be allowed.

IV. Values of the Canadian Criminal Justice System

[70] A few years ago, Abella J. wrote some words of caution about the need to respect

differences, but at the same time to preserve common values of Canadian society:

Endorsed in legal instruments ranging from the statutory protections found in human rights codes to their constitutional enshrinement in the *Canadian Charter of Rights and Freedoms*, the right to integrate into Canada's mainstream based on and notwithstanding these differences has become a defining part of our national character.

The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary.

(*Bruker v. Marcovitz*, 2007 SCC 54 (CanLII), 2007 SCC 54, [2007] 3 S.C.R. 607, at paras. 1-2).

[71] Those common values are the ones that allowed Canada to develop and live as a diverse society. They preserve a public space where all will be welcome as they are, but where some core common values will facilitate the interaction between all members of society. In his seminal opinion on the interpretation and application of s. 1 of the *Charter* in *Oakes*, Dickson C.J. adverted to the presence and importance of these common values (*R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103). In his comment on the meaning of the words “free and democratic society” in s. 1 of the *Charter*, he emphasized that these values were the source of the constitutional rights guaranteed by the *Charter*:

The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. [p. 136]

[72] Dickson C.J. recognized in *Oakes* that the *Charter* is grounded in a long history and tradition. The “living tree” keeps growing, but always from its roots. Today, we may rightly say that, in s. 27 of the *Charter*, Canada accepts the importance of multiculturalism in its social life. In s. 27, Canada signals its acceptance that it's changing through every day of its history. At the same time, however, the recognition of multiculturalism takes place in the environment of the Constitution itself, and is rooted in its political and legal traditions. The Constitution requires an openness to new differences that appear within Canada, but also an acceptance of the principle that it remains connected with the roots of our contemporary democratic society.

[73] The will to maintain an independent and open justice system in which the interests and the dignity of all are taken into consideration remains a key aspect of the traditions grounding this democratic society. The religious neutrality of the state and of its institutions, including the courts and the justice system, protects the life and the growth of a public space open to all regardless of their beliefs, disbeliefs and unbeliefs. Religions are voices among others in the public space, which includes the courts.

[74] A system of open and independent courts has become a core component of a democratic state, ruled by law (T. Bingham, *The Rule of Law* (2010), at p. 8). This system is part of the complex web of institutions, rules and values embraced by the notion of the rule of law, of a state and a society living under and within the law. Such a system is critical to the maintenance of

the rule of law, a fundamental Canadian value, as this Court held, for example, in the *Quebec Secession Reference* (*Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217) and in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3.

[75] There are all sorts of exceptions to the openness of the courts and to the publicity of trials. But they remain exceptions. Courts work under a general principle that they are open to the public and that the public is entitled to know or learn about what goes on before them. As La Forest J. wrote:

The importance of ensuring that justice be done openly has not only survived: it has now become “one of the hallmarks of a democratic society” . . . The open court principle, seen as “the very soul of justice” and the “security of securities”, acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law. In *Attorney General of Nova Scotia v. MacIntyre*, 1982 CanLII 14 (SCC), [1982] 1 S.C.R. 175, openness was held to be the rule, covertness the exception, thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice.

(*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 (SCC), [1996] 3 S.C.R. 480, at para. 22)

[76] From this broader constitutional perspective, the trial becomes an act of communication with the public at large. The public must be able to see how the justice system works. The principle of openness ensures that the courts and the trial process belong to all regardless of religion, gender or origin.

[77] In the courts themselves, as I mentioned above, the trial is a process of communication. To facilitate this process, the justice system uses rules and methods that try to assist parties that struggle with handicaps to overcome them in order to gain access to justice and take part effectively in a trial. Blind or deaf litigants, and parties with limited mobility, take part in judicial proceedings. Communication may sometimes be more difficult. But the efforts to overcome these obstacles and the rules crafted to address them tend to improve the quality of the communication process. Wearing a niqab, on the other hand, does not facilitate acts of communication. Rather, it restricts them. It removes the witness from the scope of certain elements of those acts on the basis of the assertion of a religious belief in circumstances in which the sincerity and strength of the belief are difficult to assess or even to question. The niqab shields the witness from interacting fully with the parties, their counsel, the judge and, where applicable, the jurors.

[78] A clear rule that niqabs may not be worn would be consistent with the principle of openness of the trial process and would safeguard the integrity of that process as one of communication. It would also be consistent with the tradition that justice is public and open to all in our democratic society. This rule should apply at all stages of the criminal trial, at the preliminary inquiry as well as at the trial itself. Indeed, evidentiary issues arise and evolve at the different stages of the criminal process, and they affect the conduct of the communication process taking place during the trial.

[79] Because of the way the litigation and the appeals were conducted, I agree with the disposition proposed by the Chief Justice. I would remit the matter to the judge presiding at the

preliminary inquiry, the stage at which this case has remained bogged down for years as a result of the incidents that this Court is now trying to resolve.

The following are the reasons delivered by

ABELLA J. —

INTRODUCTION

[80] Controversy hovers over the context of this case: whether the niqab is mandatory for Muslim women or whether it marginalizes the women who wear it; whether it enhances multiculturalism or whether it demeans it. These are complex issues about which reasonable people can and do strenuously disagree. But we are not required to try to resolve any of these or related conceptual issues in this case, we are required to try to transcend them in order to answer only one question: Where identity is not an issue, should a witness' sincerely held religious belief that a niqab must be worn in a courtroom, yield to an accused's ability to see her face. In other words, is the harm to the accused's fair trial rights in not being able to see a witness' entire face, greater than the harm to that witness' religious rights.

[81] N.S., the complainant, is alleging that she was repeatedly sexually assaulted by the accused while she was a child. She asserts that her religious beliefs require her to wear a niqab — a veil which covers her face but not her eyes — while testifying in front of any man who is not a direct family member. The accused argues that his right to a fair trial requires that he, his counsel, and the judge be able to see N.S.'s face during her testimony and cross-examination. The issue, therefore, is weighing the competing harms.

[82] I concede without reservation that seeing more of a witness' facial expressions is better than seeing less. What I am not willing to concede, however, is that seeing less is so impairing of a judge's or an accused's ability to assess the credibility of a witness, that the complainant will have to choose between her religious rights and her ability to bear witness against an alleged aggressor. This also has the potential to impair the rights of an accused, who may find herself having to choose between her religious rights and giving evidence in her own defence. The court system has many examples of accepting evidence from witnesses who are unable to testify under ideal circumstances because of visual, oral, or aural impediments. I am unable to see why witnesses who wear niqabs should be treated any differently.

[83] I would, however, make an exception in cases where the accused can demonstrate that the witness' face is directly relevant to the case, such as where the witness' identity is in issue. In such cases, seeing the witness' face is central to the issues at trial, rather than merely being a part of the assessment of demeanour.

Analysis

[84] I agree with the majority that the issue at the first stage of the analysis is whether N.S.'s claim to wear a niqab while testifying is grounded in the guarantee of freedom of religion in *s. 2(a)* of the *Canadian Charter of Rights and Freedoms*. There is no question that an order requiring N.S. to remove her niqab in the courtroom would interfere with her freedom of religion

in a substantial manner: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII), [2009] 2 S.C.R. 567, at para. 32.

[85] Where both sets of competing *Charter* interests are shown to be engaged, the next step is to attempt to reconcile them through reasonably available alternative measures, or accommodation. But where the rights cannot be reconciled, a “true conflict” is made out, and the court will be required to balance the interests at stake: *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII), [2004] 3 S.C.R. 698, at para. 50. In the context of a witness wearing the niqab, I see very little realistic possibility for accommodation.

[86] The crux of this case, therefore, is whether the impact of not having full access to the usual “demeanour assessment package” can be said to so materially harm trial fairness that the religious right must yield. In my view, with very limited exceptions, the harm to a complainant of requiring her to remove her niqab while testifying will generally outweigh any harm to trial fairness.

[87] This Court has adopted a low threshold when it comes to establishing sincerity of belief. Inquiries into sincerity are to be “as limited as possible”, intended “only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice”: *Syndicat Northcrest v. Amselem*, 2004 SCC 47 (CanLII), [2004] 2 S.C.R. 551, at para. 52. As a result, sincerity of belief is only the first step through the gate in the discussion regarding a claimant’s freedom of religion: *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 (CanLII), [2012] 1 S.C.R. 235, at paras. 2 and 26-27.

[88] In my view, particularly in the context of this case, a probing inquiry into the claimant’s sincerity of belief is unwarranted. For a start, it is unclear what sort of evidence a court would actually require in order for the claimant to establish a sincerity of religious practice: Sara Weinrib, “An Exemption for Sincere Believers: The Challenge of *Alberta v. Hutterian Brethren of Wilson Colony*” (2011), 56 *McGill L.J.* 719, at p. 728. Rigorous focus on a claimant’s past religious practice to determine whether his or her current beliefs are sincerely held is largely inconclusive, as are the beliefs of co-religionists given the spectrum of beliefs and practices even within the same religion: *Amselem*, at para. 53. Moreover, it strikes me as manifestly unrealistic to assume that a witness would insincerely wear the niqab in an effort to gain some sort of testimonial advantage. As a result, I agree that the preliminary inquiry judge improperly focussed on N.S.’s decision to remove her niqab when having her driver’s licence photo taken and at potential security checks. The record shows that N.S. has worn her niqab for five years in sincere religious observance. In my view, she met the sincerity threshold.

[89] With great respect, however, I disagree with the majority that the “strength” of a witness’ belief, while not relevant in assessing the witness’ *prima facie* religious claim, is nonetheless somehow relevant when balancing that claim against trial fairness. It is unclear to me how a claimant’s “strength” of belief — particularly given the highly subjective and imprecise nature of the freedom of religion analysis — affects the protection a claimant should be afforded under the *Charter*. Such an approach, in my respectful view, risks re-entering into inappropriate inquiries into a claimant’s past practices, or into the extent to which a claimant’s practices follow a religion’s orthodox traditions.

[90] The next stage of the analysis is to ask whether permitting the witness to wear the niqab while testifying creates a serious risk to trial fairness. The accused argues that allowing N.S. to testify with her face covered by a niqab violates his right to a fair trial both by preventing effective cross-examination and by presenting an obstacle to the trier of fact’s ability to assess her

credibility. This brings us to the heart of the issue.

[91] There can be no doubt that the assessment of a witness' demeanour is easier if it is based on being able to scrutinize the whole demeanour package — face, body language, voice, etc. Nor is there any doubt that historically and ideally, we *expect* to see a witness' face when he or she is testifying. That, however, is different from concluding that unless the entire package is available for scrutiny, a witness' credibility cannot adequately be weighed.

[92] To start, while I think it is clear that witnesses in common law criminal courts are expected to testify with their faces visible to counsel and the trier of fact, it does not follow that if they are unable to do so, they cannot testify. A general expectation is not the same as a general rule, and there is no need to enshrine an historic practice into a “common law” requirement. Canada's justice journey has absorbed and accommodated an evolutionary recognition that while history assists in understanding the past, it need not necessarily command the future. That is why we have come to use screens for children, interpreters for those without facility in our official languages, and a myriad of other means to facilitate a witness' ability to give evidence in the courtroom. As this case demonstrates, courts are engaged in a constant process of reconciling historic expectations and practices with the *Charter's* vision.

[93] A number of interests are engaged when a witness is not permitted to wear her niqab while testifying. First, she is prevented from being able to act in accordance with her religious beliefs. As noted by Martha C. Nussbaum, religious requirements are experienced as “obligatory and nonoptional”, that is, as not providing a genuine choice to the religious believer:

. . . laws . . . often put religious minorities in something like Antigone's dilemma: either they have to violate a sacred requirement or they have to break the law and/or forfeit some state-granted privilege.

(Liberty of Conscience: In Defense of America's Tradition of Religious Equality (2008), at pp. 117 and 167)

[94] This has the effect of forcing a witness to choose between her religious beliefs and her ability to participate in the justice system: Natasha Bakht, “Objection, Your Honour! Accommodating *Niqab*-Wearing Women in Courtrooms”, in Ralph Grillo et al., eds., *Legal Practice and Cultural Diversity* (2009), 115, at p. 128. As a result, as the majority notes, complainants who sincerely believe that their religion requires them to wear the niqab in public, may choose not to bring charges for crimes they allege have been committed against them, or, more generally, may resist being a witness in someone else's trial. It is worth pointing out as well that where the witness is the accused, she will be unable to give evidence in her own defence. To those affected, this is like hanging a sign over the courtroom door saying “Religious minorities not welcome”.

[95] The order requiring a witness to remove her niqab must also be understood in the context of a complainant alleging sexual assault. As this Court stated in *R. v. Mills*, 1999 CanLII 637 (SCC), [1999] 3 S.C.R. 668, “an assessment of the fairness of the trial process must be made ‘from the point of view of fairness in the eyes of the community and the complainant’ and not just the accused” (para. 72): see also *R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, per McLachlin J., at para. 193. Creating a judicial environment where victims are further inhibited by being asked to choose between their religious rights and their right to seek justice, undermines the public perception of fairness not only of the

trial, but of the justice system itself.

[96] The majority's conclusion that being unable to see the witness' face is acceptable from a fair trial perspective if the evidence is "uncontested", essentially means that sexual assault complainants, whose evidence will inevitably be contested, will be forced to choose between laying a complaint and wearing a niqab, which, as previously noted, may be no meaningful choice at all.

[97] This brings us to the extent to which N.S., by exercising her freedom of religion in wearing a niqab, harms the accused's fair trial rights. The right to a fair trial is crucial to the presumption of innocence and maintaining confidence in the criminal justice system. While I agree that witnesses generally and ideally testify with their faces uncovered in open court, abridgements of this "ideal" often occur in practice yet are almost always tolerated.

[98] "Demeanour" has been broadly described as "every visible or audible form of self-expression manifested by a witness whether fixed or variable, voluntary or involuntary, simple or complex": Barry R. Morrison, Laura L. Porter and Ian H. Fraser, "The Role of Demeanour in Assessing the Credibility of Witnesses" (2007), 33 *Advocates' Q.* 170, at p. 179. Trial judges often rely on many indicators *other than* facial cues in finding a witness credible, including

certitude in speaking, dignity while on the stand, exhibition of disability, exhibition of anger, exhibition of frustration, articulate speaking, thoughtful presentation, enthusiastic language, direct non-evasive answering, non-glib answering, exhibition of modesty, exhibition of flexibility, normal (as in as expected) body movement, cheerful attitude, kind manner, normal exhalation, normal inhalation....

(Morrison, at p. 189.)

[99] Moreover, while the ability to assess a witness' demeanour is an important component of trial fairness, many courts have noted its limitations for drawing accurate inferences about credibility. In *Faryna v. Chorny*, [1952] 2 D.L.R. 354, for example, the British Columbia Court of Appeal held that relying on the "appearance of sincerity [would lead to] a purely arbitrary finding and justice would then depend upon the best actors in the witness box" (p. 356). According to the court, demeanour "is but one of the elements that enter into the credibility . . . of a witness", with other factors including the witness' opportunity for knowledge, powers of observation, judgment, memory and ability to describe clearly what he or she has seen and heard (pp. 356-57).

[100] The Court of Appeal for Alberta similarly urged caution in relying on demeanour in *R. v. Pelletier* [1995 ABCA 128 \(CanLII\)](#), (1995), 165 A.R. 138:

I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is it the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground, perhaps from shyness or a

natural timidity? For my part I rely on these considerations as little as I can help.

...I judge a witness to be unreliable if his evidence is, in any serious respect, inconsistent with these undisputed or indisputable facts, or of course if he contradicts himself on important points. I rely as little as possible on such deceptive matters as his demeanour. [para. 18]

(Citing a 1973 paper by Justice MacKenna and approvingly quoted in P. Devlin, *The Judge* 1979, at p. 63.)

See also *R. v. Levert* 2001 CanLII 8606 (ON CA), (2001), 159 C.C.C. (3d) 71, at p. 81.

[101] The Canadian Judicial Council's model jury instructions also acknowledge the inherent limitations in relying on demeanour:

What was the witness's manner when he or she testified? Do not jump to conclusions, however, based entirely on the witness's manner. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different intellects, abilities, values, and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or the most important factor in your decision.

(Model Jury Instructions, Part I, Preliminary Instructions, 4.11 Assessing Testimony (online))

[102] And courts regularly accept the testimony of witnesses whose demeanour can only be partially observed. Section 14 of the *Charter*, for example, states that a witness who cannot hear, or who does not understand or speak the language used in the proceedings, has the right to the assistance of an interpreter. In such cases, "the trial judge ha[s] to make credibility findings through the filters of the interpreters": *R. v. A.F.* 2005 ABCA 447 (CanLII), (2005), 376 A.R. 124 (C.A.), at para. 3; see also *R. v. R.S.M.*, 1999 BCCA 218 (CanLII), 1999 BCCA 218 (CanLII), at paras. 12-14. The use of an interpreter may well have an impact on how the witness' demeanour is understood, but it is beyond dispute that interpreters render the assessment of demeanour neither impossible nor impracticable. As stated by the Alberta Court of Appeal in *R. v. Davis* 1995 ABCA 188 (CanLII), (1995), 165 A.R. 243:

The interpreter is usually calm and professional and so the English interpretation heard by the judge is done in a calm, non-contentious manner. There is a brief time delay allowing the witness, who [might] understand English, more time to provide her answer. An interpreter no doubt communicates in appropriate language when possible, and may well improve upon the explanation of the witness. I do not suggest for a moment that is done dishonestly, but rather because there may often be no more appropriate translation.

This is not to say that witnesses who testify through interpreters can never demonstrate demeanour. They can and do, and the assessment of that demeanour may help a fact-finder determine truth. [Emphasis added; paras. 18-19.]

[103] A witness may also have physical or medical limitations that affect a judge's or lawyer's ability to assess demeanour. A stroke may interfere with facial expressions; an illness may affect body movements; and a speech impairment may affect the manner of speaking. All of these are departures from the demeanour ideal, yet none has ever been held to disqualify the witness from giving his or her evidence on the grounds that the accused's fair trial rights are thereby impaired.

[104] There are other situations where we accept a witness' evidence without being able to assess demeanour at all. The *Criminal Code*, R.S.C. 1985, c. C-46, permits a judge to order and admit a transcript of evidence by a witness who is unable to attend the trial because of a disability, even when the accused's counsel is not present for the taking of the evidence: ss. 709 and 713. Courts also allow witnesses, including material witnesses, to give evidence and be cross-examined by telephone: *Criminal Code*, s. 714.3; see also *R. v. Chapdelaine*, 2004 ABQB 39 (CanLII), 2004 ABQB 39 (CanLII); *R. v. Butt* 2008 CanLII 50489 (NL PC), (2008), 280 Nfld. & P.E.I.R. 129.

[105] Exceptions to hearsay evidence are another example where the trier of fact is completely unable to assess the demeanour of the person whose statement is being admitted as evidence. In *R. v. Khan*, 1990 CanLII 77 (SCC), [1990] 2 S.C.R. 531, McLachlin J. developed a principled exception to the hearsay rule where the statement met the requirements of necessity and reliability (p. 542), with the result that the Court in a sexual assault case admitted the statement of a three-year-old child to her mother because it was unrealistic to require the child to testify and undergo cross-examination. The Court noted that "in most cases the concerns of the accused as to credibility [can] be addressed by submissions as to the weight to be accorded to the evidence" (at p. 547).

[106] Wearing a niqab presents only a partial obstacle to the assessment of demeanour. A witness wearing a niqab may still express herself through her eyes, body language, and gestures. Moreover, the niqab has no effect on the witness' verbal testimony, including the tone and inflection of her voice, the cadence of her speech, or, most significantly, the substance of the answers she gives. Unlike out-of-court statements, defence counsel still has the opportunity to rigorously cross-examine N.S. on the witness stand.

[107] It is clear from all of this that trial fairness cannot reasonably expect ideal testimony from an ideal witness in every case, and that demeanour itself represents only one factor in the assessment of a witness' credibility. As Morden A.C.J.O. noted in *R. v. Levogiannis* reflex, (1990), 1 O.R. (3d) 351 (C.A.), the ideal is subject to several exceptions and qualifications in the interests of justice:

Accepting that [face-to-face confrontation] is a right, of a kind, I do not think that it can be said to be an absolute right, in itself, which reflects a basic tenet of our legal system. It is a right which is subject to qualification in the interests of justice.

The reason underlying the right is said to be that it is more difficult not to tell the truth about a person when looking at that person eye to eye. . . . [B]ut. . . it is difficult to dogmatize about this — and in some cases...eye to eye contact may frustrate the obtaining of as true an account from the witness as is possible. This is why I think the right is more accurately considered to be one that is subject to exceptions or qualifications rather than a fundamental or absolute one. [p. 367]

[108] And since, realistically, not being able to see a witness' whole face is only a partial

interference with what is, in any event, only one part of an imprecise measuring tool of credibility, we are left to wonder why we demand full “demeanour access” where religious belief prevents it.

[109] In my view, therefore, 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.

[110] Since, in my view, N.S.’s sincerity has been established, I see no reason to require her to remove her niqab. I would therefore allow the appeal and remit the matter to the preliminary inquiry for continuation, directing that N.S. be permitted to wear her niqab throughout both the preliminary inquiry and any trial that may follow.

Appeal dismissed, ABELLA J. dissenting.

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Solicitors for the intervener the Barbra Schlifer Commemorative Clinic: Norton Rose OR, Toronto; Simcoe Chambers, Toronto.

Solicitors for the intervener the Criminal Lawyers’ Association (Ontario): Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Muslim Canadian Congress: Borden Ladner Gervais, Toronto.

Solicitors for the intervener the South Asian Legal Clinic of Ontario: Bennett Jones, Toronto.

Solicitors for the intervener Barreau du Québec: BCF, Montréal; Barreau du Québec, Montréal.

Solicitors for the intervener the Canadian Civil Liberties Association: Blake,

Cassels & Graydon, Toronto.

Solicitors for the intervener the Women's Legal Education and Action Fund: Green & Chercover, Toronto; Women's Legal Education and Action Fund, Toronto.

Solicitors for the intervener the Canadian Council on American-Islamic Relations: Peggy Smith Law Office, Kingston.

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