



THE
TESSELLATE
INSTITUTE

Working Paper: The Right to Testify in Niqab in a Sexual Assault Case

June 2012

Supreme Court Case: N.S. v. R

Lina Khatib, MPA

This policy brief argues that N.S. should be entitled to wear her niqab. In very exceptional circumstances, if the judge finds that the niqab hinders the fair trial process, N.S.' religious requirement should be accommodated by the courts to the fullest extent possible. This can be done by using the accommodation measures afforded to witnesses through the Criminal Code, including an effort to reduce the number of people to whom she is required to show her face and/or limit those people to women.

Working Paper: The Right to Testify in Niqab in a Sexual Assault Case

SUPREME COURT CASE: N.S. V. R

Copyright, The Tessellate Institute, 2012

Disclaimer:

The opinions expressed in this policy paper are those of the author and not necessarily that of the *Tessellate Institute* or its Board of Directors.



Executive Summary

The recent case of *N.S. v. R* involves a sexual assault complainant who wears a niqab, or face veil, which covers her entire face except for her eyes. The question before the Supreme Court of Canada (SCC) is whether or not N.S. can testify in a Canadian court while wearing her niqab. The case represents a conflict between the witness's constitutional rights to freedom of religion and equality when testifying, on the one hand, and the accused's constitutional legal right to make full answer and defence in a criminal proceeding, on the other.

This policy brief argues that N.S. should be entitled to wear her niqab. In very exceptional circumstances, if the judge finds that the niqab hinders the fair trial process, N.S.' religious requirement should be accommodated by the courts to the fullest extent possible. This can be done by using the accommodation measures afforded to witnesses through the Criminal Code, including an effort to reduce the number of people to whom she is required to show her face and/or limit those people to women.

While other women have asserted their right to wear niqab in court in jurisdictions such as the United States, Australia and New Zealand, *N.S. v. R* is unique in that the woman wearing niqab is the alleged victim and prime witness in a sexual assault case. Sexual assault is an area of law that has been particularly tainted by misogyny and racism. Not only are sexual offences severely under-reported, they also have lower conviction and higher acquittal rates than other violent offences (StatsCan, 2006). While efforts to reverse this trend have been enormous, practical and on the ground change has been slow (Bakht, 2010b). Muslim women who are asked to choose between being faithful to their religious beliefs (that they believe niqab is a religious obligation) and providing testimony in a sexual assault trial (in a Canadian court without their niqab) may feel obliged to give precedence to their religion. These types of pressures will almost certainly make niqab-wearing women reluctant to seek justice or protection when needed from the state, and are thus likely to further their exclusion and isolation in Canadian society.

The rights and interests of a Muslim woman who wears the niqab can only be properly considered and appreciated when a contextual understanding of her rights is adopted. These rights include her religious freedom (*Charter* s. 2) and equality right (*Charter* s. 15 & 28). In addition, the importance of having these rights interpreted in a manner that is "consistent with the preservation and enhancement of the multicultural heritage of Canadians" is clearly emphasised by the *Charter* (*Charter* s. 27). The rights of the complainant must also be considered in relation to those of the accused. The accused has the right to a fair trial according to section 11 of the *Charter*. The counsel for the defence argues that the ability to observe demeanor is important

during cross-examination and is therefore part of a fair trial. However, a number of studies on the ability to detect deceit and bias among witnesses show that the use of demeanour, such as facial expression, in order to evaluate testimony, can be dangerous and unreliable. While the use of demeanor is symbolic and embedded in our legal system, there is no independent constitutional right to a bare face-to-face confrontation with one's accuser (AGO, 2011).

This case is about *Charter* rights, inclusion and access to justice. Women who wear niqab are often targets of discrimination and acts of hate because of how they are dressed. The SCC's decision will not only have specific application in this case and others to follow, but may also have broader policy and public interest implications that can restrict the activities (voting, citizenship oath, receiving/delivering social services etc...) of those who wear niqab in public spaces.

This brief concludes that there is no risk of unfair trial due to a witness testifying with her niqab because demeanour in general and facial expression in particular, is an unreliable indicator of truthfulness. Furthermore, the niqab does not prevent defence counsel from conducting a rigorous cross-examination since facial expression is but one element in a vast toolkit available for credibility assessment. Moreover, N.S. should be entitled to wear her niqab out of respect for her *Charter* rights and respect for her dignity and position as a sexual assault complainant. Lastly, permitting N.S. to testify in her niqab will promote access to justice, and the truth seeking function of the court.

Background

N.S. alleges that she was sexually assaulted as a child by M---I.S. and M---D.S. from 1982-1987. N.S. is a Muslim and wears a niqab when in public and around men who are not direct relatives. The defendants wanted N.S. to remove her niqab during the preliminary inquiry testimony asserting a right to “demeanour evidence,” including N.S.’s full facial expressions. At the preliminary inquiry, which is held to see if there is enough evidence to go to trial, the judge ordered N.S. to remove her niqab. His decision was appealed to the Superior Court and the order was overturned because the preliminary inquiry judge had exceeded his jurisdiction by balancing *Charter* values (freedom of religion vs. right to full answer and defence) and had also proceeded to question N.S. about her religious beliefs without giving her an opportunity to consult counsel (*R. v. N.S.*, 2010).

The Court of Appeal decision also clarified that if a witness establishes that wearing her niqab is a sincere religious practice, the onus moves to the accused to show that the failure to remove niqab violates their right to a fair trial (*R. v. N.S.*, 2010). Neither the Superior Court nor the Court of Appeal asserted that N.S. had the right to wear niqab and the matter was to be re-considered by the preliminary inquiry judge. N.S. has appealed to the Supreme Court of Canada (SCC) for an order that she is entitled to wear the niqab for religious reasons while testifying at the preliminary inquiry and any trial that may follow.

Competing Rights

Religious Freedom:

While there may be intense religious debate about whether the niqab is or is not mandated within Islam, such debate is irrelevant to the *N.S. v. R* case. Muslims are made up of people of diverse backgrounds and have varied beliefs and interpretations regarding religious requirements (Bakht, 2010a). The SCC in *Syndicat Northcrest v. Amselem*¹ affirmed that a religious practice is one that is sincerely and subjectively felt to be connected to the observance of one’s religion, regardless of whether or not the practice is universal, normative, or required by a religious authority. This is why, in the context of our legal system, it is not up to the Canadian public, Islamic scholars, or the courts to determine whether Muslim women are religiously mandated to wear the niqab. Based on the trial judge’s factual findings, N.S. has already sufficiently testified as to the sincerity of her conviction that she must not remove her

¹ Orthodox Jews wanted to erect succahs (temporary small dwellings) on their balconies in a residential building during Succot (Jewish holiday). Those who ran the business of the buildings, Syndicat Northcrest, claimed the succahs violated by-laws forbidding structures to be built on the balconies.

niqab in an open courtroom (*R. v. N.S.*, 2010).

It is interesting to note that there are a variety of courtroom circumstances where the opportunity to assess demeanour is absent altogether. In such situations, accommodations are uncontroversial (see Appendix I). Indeed, “no one would suggest that witnesses whose facial expressions are limited, whether due to facial paralysis, muscle limitations, severe burns or other reason, should be excluded or their evidence accorded less weight” (LEAF, 2011). Moreover, if we ask women to remove their niqab, should we then ask men with full beards to shave for fear of having faces partially concealed? There is no saying to what extent the courts will have to dictate appearance. Furthermore, when we put such a strong emphasis on demeanour, we are in effect suggesting that we cannot have blind judges or blind lawyers because obviously a blind judge or a blind lawyer is not able to view facial demeanour (Applicant, 2011). Lastly, if the court can accept evidence from someone who is deceased or absent through hearsay, are we in a sense giving preference to a dead witness over a witness wearing a niqab? We must remain cognizant of the rules that already exist within our legal system before infringing on N.S.’s right to wear her niqab.

Right to Full Answer and Defence:

The counsel representing the accused argue that they cannot adequately represent their clients if they are unable to follow N.S.’s expression while she is being questioned (Applicant, 2011). The accused’s statutory right to cross-examine Crown witnesses at the preliminary inquiry is fundamentally important to the conduct of a fair trial. Cross-examination is the process of asking questions and eliciting responses from witnesses in a public courtroom (AGO, 2011). Cross-examination, however, is but one of the means by which the accused makes full answer and defence and not every limit on the right to cross-examination compromises trial fairness (AGO, 2011). While demeanour evidence is permitted to evaluate the trustworthiness of a person in court based on their appearance, attitude, behaviour and/or disposition, there is no independent constitutional right to a bare face-to-face confrontation with one’s accuser (AGO, 2011). The accused argues that there is a common law rule about the use of demeanour as it relates to the right to full answer and defence. This common law rule, however, infringes on N.S.’ religious freedom and does not meet the requirements of the Oakes test in justifying infringement on an established right or freedom.

Since N.S.’ sincere religious belief has already been sufficiently demonstrated in court, the accused bears the onus to prove why infringement on her established right is justified. According to the Oakes test, a limitation on a right or freedom is deemed appropriate if it can be established that: (i) there is a pressing and substantial objective; (ii) there is a rational connection between the means chosen and the objective; and finally (iii) the infringement must be a minimal impairment on the right or freedom in question (Kelly, 2008).

In this case, (i) the pressing and substantial objective is to promote trial fairness, which is better served when a witness is permitted to testify with her niqab, because it creates an environment that facilitates truth-seeking and respects religious freedom; (ii) the objective sought (trial fairness) is not rationally connected to the proposed means (removing the niqab) as the niqab does not hinder defense counsel's ability to conduct a rigorous and thorough cross-examination; and (iii) the religious freedom in question is maximally infringed, as it forces a person who would rather not, out of deep seated religious conviction, show their face in a courtroom full of people and in front of two men who allegedly sexually assaulted her as a child.

Non-Verbal Cues that Remain

There are numerous ways to challenge and assess a witness' credibility without observing full facial expression. N.S.'s credibility can be assessed, and her evidence effectively tested, short of requiring her to remove the niqab, through: her eyes; tone of voice; hesitations; movements; trembling; surprise; choice of words; logic of story; plausibility; and posture and body language, all of which remain available for evaluation (CAIR, 2011) (see Appendix II). Demeanour assessment involves a complex mix of a wide variety of considerations and is described broadly as "every visible or audible form of self-expression manifested by a witness whether fixed or variable, voluntary or involuntary, simple or complex (AGO, 2011)."

Detecting Deceit

Reliance on demeanour is dangerously arbitrary. There "...is a growing body of case law and social science literature that warns judges about the excessive use of demeanour evidence because of its inherent unreliability (Bakht, 2010b)." Judges and lawyers are not taught how to read facial expressions for truth or deceit and this is not a recognized area of their legal training (Bakht, 2010b). Indeed, data on lie detection suggests that lawyers are like the average person in their inability to detect accurately and consistently when an individual is lying (Bakht, 2010b). With rare exception, "no one can do better than chance at spotting liars simply by their demeanour (Ekman 1992)." In other words, the ability to accurately read facial cues is little better than that of chance.

Cultural Biases

Credibility assessments based on demeanour can be unreliable and even wrong. Such assessments can reflect cultural biases, where certain types of behaviour have no fixed or universal meaning. For example, an uninformed behavioural assumption is that avoiding eye contact means dishonesty. In most Aboriginal communities in Canada, however, direct eye contact is seen as rude and gaze aversion is seen as respectful, especially to authority (Applicant, 2011). Lawyers and fact finders rarely know the witnesses they encounter and non-verbal cues can be interpreted inaccurately (Applicant, 2011).

Sexual Assault Myths

Reliance on demeanour can be especially detrimental to sexual assault victims as it

can cause difficulty for complainants whose attitude and disposition does not accord with fixed conceptions of the appropriate reactions to sexual assault (Bakht, 2010b).² There is no universally appropriate reaction to sexual assault, and reliance on demeanor evidence allows misconceptions of “appropriate reactions” to reign, thereby disadvantaging certain victims. Moreover, this is a case of sexual assault upon a child between the ages of 6-11. The consequences of childhood sexual assault, and the resulting trauma, are likely to manifest years later into adulthood.

Equality Rights:

N.S.’s right to wear the niqab is one that extends beyond her religious freedom. The gendered aspect of this issue lies in the fact that this is a case of sexual assault allegedly committed by two men upon a female child (Bakht, 2010b). The context of this alleged offence cannot be forgotten. The majority of sexual assaults in Canada are committed by men on girls and women (Bakht, 2010b). Sexual assault continues to be vastly under-reported and under-prosecuted, especially amongst marginalized girls and women (StatsCan, 2006). Furthermore, sexual assault is a difficult crime to get through the system due to the legal process and the personal nature of the crime. This issue is even more pronounced when the crime is committed within the family because girls and women often do not know or want to report family members to the police. If niqab-wearing women risk being forced to remove their niqab to testify, the likelihood of these women reporting sexual assault diminishes even further, denying them access to the justice system, and exacerbating their inequality (LEAF, 2011). In this case, N.S. had potentially been suffering in silence for two decades after having reported the incident to a teacher and not receiving any support, counseling or legal response. Any barriers placed before women, including women who wear the niqab, can be disastrous for their access to justice.

The subjective religious requirement of wearing the niqab is a specific article of faith exclusive to women. While Muslims interpret the Islamic requirement of modesty differently across the globe, no interpretation requires men to cover their faces by wearing a niqab (Bakht, 2010b). Section 28 of the *Charter* provides that: “Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.” The choice the court order imposed on N.S. is between walking away from her religious convictions as a person of faith, and walking away from the pursuit of justice. Her status as a woman is what connects this impossible choice (CAIR, 2011). *N.S. v. R.* involves the possible exclusion of niqab-wearing women from a basic democratic process, an exclusion which denies sexual assault victims gender equality rights and access to justice.

A Contextual Approach

Promoting a Fair Trial:

The truth-seeking function of the court promotes a fair trial. The constitutional right to

² For more information see: Natasha Bakht in *What’s in a Face* – “the ideal rape victim”

a fair trial, however, is broader than just the right to make full answer and defence. The SCC in *R. v. Levogiannis*³, stated: "The goal of the court process is truth-seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth." In *R. v. Levogiannis*, a child was permitted to testify behind a screen so that he could focus on giving a full and candid testimony, and avoid being distracted by the difficulties of facing the accused in a sexual assault case. Similarly, the objective of obtaining the truth in the interest of a fair trial is promoted when a woman who wears a niqab for religious reasons is allowed to testify in court with her niqab. This is because a woman who sincerely believes that her religion requires her to wear a niqab in public, but who is forced, or knows she may be forced, to remove her niqab in an open court is less likely to engage and participate in the judicial process.

A contextual approach allows us to assess the impact on the ability to give evidence if N.S. is required to remove her niqab. The nature of the allegations must be carefully considered as N.S. is faced with the task of describing intimate and painful details of her childhood. It is also worth questioning why the accused has vested such an interest in having N.S. remove her niqab. The issue of the niqab was not raised until the eleventh hour even though the accused was aware of N.S. and her dress code before the charges were laid. Could the attempt to have N.S. unveil be a function of intimidation, a means to deflect attention from other details of the case or perhaps to simply prolong the trial? These are all elements that should be considered when assessing the context of the case.

As stated in the Court of Appeal decision, "Without the niqab, N.S. would be testifying in an environment that is strange and uncomfortable for her. One could not expect her to be herself on the witness stand. A trier of fact could be misled by her demeanour (*R. v. N.S.*, 2010)." If N.S. does testify without her niqab, she is likely to experience significant discomfort, anxiety and stress, which may adversely impact the quality of her evidence. Indeed, any witness would behave differently if asked to testify without, for example, his or her shirt on. Many victims have difficulty testifying to traumatic events, however, the very act of removing the niqab combined with the added pressure of appearing in a court to testify about a sexual assault could be traumatic enough to have an adverse impact on the quality of evidence given, thus undermining the fair trial process.

If a child can testify behind a screen to promote the truth-seeking function of the court, why would N.S. not be allowed to testify in her niqab while facing the accused? While N.S. is now an adult, this is a case of alleged sexual assault upon a child between the ages of 6-11. N.S. is asking to be accepted as she is, and seeks to be permitted to testify in the garment that she is accustomed to wearing, to which she ascribes religious value.

³ A case in which the accused was charged with touching a child for a sexual purpose. The child was permitted to testify behind a screen so that he could focus on giving a full and candid testimony, rather than experiencing difficulties in facing the accused.

The Value of Multiculturalism:

The Court of Appeal explicitly recognized that the balancing of interests requires a contextual analysis of this case. A contextual analysis necessitates consideration of "other constitutional values and societal interests that may be affected by the judge's decision as to whether a witness should be required to remove her niqab (*R. v. N.S.*, 2010)." A pro-actively inclusive and non-judgmental approach to freedom of religion as it pertains to the niqab may involve confronting conscious or unconscious prejudice (Applicant, 2011).

Muslim women on the whole face discrimination both within the Canadian Muslim community and within the broader society. They therefore represent a minority within a minority (CAIR, 2011). The wearing of face veils in public places is controversial in many countries, including Canada. In a society where exposed faces are the norm, "women who venture out in niqab are often mocked, and have been at times harassed and assaulted (CAIR, 2011)."

Multiculturalism entails the acceptance and positive recognition of minority beliefs within society. The reason this case is a cause célèbre is precisely because we live in Canada: a multicultural society. While political parties may hold varying views pertaining to assimilation vs. celebration of differences as appropriate approaches towards cultural diversity, the courts must continuously respect and uphold multiculturalism as a fundamental characteristic of Canadian heritage and identity.

Section 27 of the *Charter* states that the "*Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada," where multiculturalism is viewed as a shared value and as part of a common good. The *Charter* guarantees that Muslim women have the religious freedom to wear the niqab. The fact that there is no law that says that women cannot wear the niqab makes it easier to interpret the practice in a flexible manner in order to accommodate innovation that removes barriers to justice for members of disadvantaged groups (CAIR, 2011).

Religious Accommodation:

If there are exceptional circumstances (e.g. the identity of the sexual assault victim has been challenged), the judge may decide that the testimony from a woman wearing niqab infringes the fair trial rights of the accused. Alternatives would then have to be arranged to accommodate the witness. Once the specific needs of the witness and the difficulties she might experience in testifying without her niqab are identified, the court may consider the usefulness of the accommodation measures available in the Criminal Code (see Appendix III). For instance, section 486.2 states that a testimony can be made outside the courtroom or behind a screen or other device that would allow the witness not to see the accused. This measure is applicable when the judge is of the opinion that the order is necessary to obtain a full and candid account from the witness (AGO, 2011). The Court of Appeal cited a case in which the accommodation was to ensure all court personnel were female and everyone else

except the accused were excluded. While the examples cited may not be ideal to the present case, appropriate accommodation measures can be considered once there is a proper understanding of the relevant facts and circumstances.

Recommendations

- 1) N.S. should be entitled to access the Canadian justice system while wearing her niqab. This means permitting N.S. to testify at the preliminary inquiry and trial while wearing her niqab. This will further her right to a fair trial without infringing upon that of the accused. This will also ensure that N.S.'s unique position as a sexual assault complainant and as a woman wearing niqab are taken into account and that her rights to religious freedom and gender equality are upheld.

- 2) In the exceptional circumstances that the Court finds that the trial process is hindered due to N.S.'s niqab, the Court should be proactive in identifying constructive compromises and reasonable accommodation measures in order to ensure access to justice and equality are adequately served.

- 3) In New Zealand, Judge Lindsay Moore devised a compromise in *Police v. Razamjoo*, a criminal case involving false statements made to the police as part of an insurance fraud, with regards to niqab in the courtroom. Judge Moore concluded that the two female witnesses who were wearing niqab would be allowed to give their evidence from behind screens so that only the judge, counsel and female court staff would be able to see the witnesses' faces. If accommodation measures are required for N.S., the courts must put emphasis on reducing the number of people to whom she is required to show her face and/or limit those people to women.

APPENDIX I

Acceptable Evidence

- Absent witnesses whose transcripts are read
- Hearsay –reliability is independent of demeanour
- Audio recordings admitted for the truth of their contents
- Video statements that are not in HD
- CCTV live testimony that is not in HD
- Persons who speak with mechanical aids (Lou Gherig’s disease, throat cancer, etc.)
- Stroke victims with significant facial paralysis
- Persons with significant facial disfigurement through disease, congenital defect, or trauma
- Persons suffering from depression with flat affect
- Persons who communicate by sign language
- Persons who communicate in a language unknown to the fact finders such that fact finders cannot assess demeanour through cadence, tone and inflection
- Silent demeanour cues when a party is represented by a visually impaired lawyer

APPENDIX II

Other Demeanour Cues

- Eye contact, the accused can still look at the accuser in the eye
- Body language is unaffected by the niqab
- Voice tone and inflexion is unaffected
- The cadence of speech, confident and smooth, or hesitant and halting, is unaffected
- The niqab has no impact on gestures, which can send strong nonverbal messages
- The niqab has no impact on revealing subconscious movements like shaking, nodding, tensing up or shrugging

**Appendices retrieved from Applicant’s Factum paragraph 37, 40*

APPENDIX III

Criminal Code Accommodation Measures

- Section 486-- exclusion of the public in certain cases
- Section 486.1-- the presence of a support person in the courtroom
- Section 486.2-- testimony outside the courtroom or behind a screen or other device that would allow the witness not to see the accused
- Section 486.4 and 486.5-- publication bans
- Section 715.1 --adoption of videotaped evidence

REFERENCES

Cases

R. v. N.S., [2010] ONCA 670 (Ont. C.A.) at para. 11, 67, 79-83, 85, 98

Syndicat Northcrest v. Amselem, [2004] 2 S.C.R. 551 at para. 47, 50, 52

R. v. Levogiannis, [1993] 4 S.C.R. 475 at pp. 12, 25

Police v. Razamjoo, [2005] D.C.R. 408 (D.C.N.Z.)

Legal Factum

LEAF Factum

N.S. v. R [2011] SCC (Factum of the Intervener Women's Legal and Education and Action Fund at para. 11, 27)

Applicant's Factum

N.S. v. R [2011] SCC (Factum of the Applicant at para. 27, 37, 40, 55)

CAIR Factum

N.S. v. R [2011] SCC (Factum of the Intervener Canadian Council on American-Islamic Relations at para. 1, 10, 11, 27, 34)

AGO Factum

N.S. v. R [2011] SCC (Factum of the Attorney General for Ontario at pp. 10, 11, 27, 31)

Secondary Sources

Statistics Canada. (2006). *Measuring Violence Against Women: Statistical Trends* (Catalogue number 85-570-XIE). Retrieved April 15, 2012 from: ywccanada.ca/data/research_docs/00000043.pdf

Bakht, Natasha. (2010b). "Sexual Assault Law, Practice and Activism in a Post-Jane Doe Era" in Elizabeth Sheehy (Ed.). *What's in a Face? Demeanor Evidence in the Sexual Assault Context* (pp. 1, 5, 6, 7, 13). Ottawa: University of Ottawa Press. Available at SSRN: <http://ssrn.com/abstract=1550233>

Bakht, Natasha. (2010a). "Defining Reasonable Accommodation" in Lori Beaman (Ed.). *Veiled Objections: Facing Public Opposition to the Niqab* (pp. 2). Vancouver: UBC Press. Available ay SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1476029

Ekman, Paul. (1992). *Telling Lies*. New York: W.W. Norton. pp. 285.

Kelly, David. (2008). *The Courts, the Charter and Federalism* (2nd ed) Herman Bakvis and Grace Skogstad (Eds.). London: Oxford University Press. pp.41-60.

Legislation Cited

FUNDAMENTAL FREEDOMS

Fundamental freedoms

2. Everyone has the following fundamental freedoms:
 - (a) freedom of conscience and religion;

LEGAL RIGHTS

Proceedings in criminal and penal matters

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;

EQUALITY RIGHTS

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

GENERAL

Multicultural heritage

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.