2010 CarswellOnt 7640, 2010 ONCA 670, 102 O.R. (3d) 161, 262 C.C.C. (3d) 4, 80 C.R. (6th) 84, 269 O.A.C. 306, 326 D.L.R. (4th) 523

R. v. S. (N.)

Her Majesty the Queen (Respondent) and N.S. (Appellant / Respondent by way of cross-appeal) and M---d.S. (Respondent / Appellant by way of cross-appeal) and M---l.S. (Respondent)

Ontario Court of Appeal

Doherty, M.J. Moldaver, Robert J. Sharpe JJ.A.

Heard: June 8-9, 2010
Judgment: October 13, 2010
Docket: C50534-C50892

Proceedings: reversing in part *R. v. S. (N.)* (2009), 191 C.R.R. (2d) 228, 2009 CarswellOnt 2268, 95 O.R. (3d) 735 (Ont. S.C.J.)

Counsel: David Butt for Appellant / Respondent by way of cross-appeal, N.S.

Michael Dineen for Respondent / Appellant by way of cross-appeal, M---d.S.

No one for Respondent, M---l.S.

Elise Nakelsky for Respondent, Her Majesty the Queen

Joanne Birenbaum, Susan M. Chapman for Intervener, Women's Legal Education & Action Fund

Frank Addario, Emma Phillips, Simran Prihar for Intervener, Criminal Lawyers' Association

Bradley Berg, Rahat Godil for Intervener, Canadian Civil Liberties Association

Prabhu Rajan, Kikee Malik for Intervener, Ontario Human Rights Commission

Tyler Hodgson, Margot G. Finley for Intervener, Muslim Canadian Congress

Subject: Criminal; Constitutional

Criminal law --- Pre-trial procedure — Preliminary inquiry — Evidence — Miscellaneous

Two accused were separately charged with sexual offences involving complainant S — S was Muslim and wore veil in public — Judge at preliminary inquiry refused S's request to testify while veiled — Judge questioned S informally and decided her religious belief was not strong and ordered veil removed for testifying — Trial judge found S's removal of veil to have driver's license photo taken as persuasive evidence her religious beliefs were not that strong — S applied to quash ruling and for order permitting her to wear veil — Application was granted in part — Judge exceeded his jurisdiction, as he was not court of competent jurisdiction to make rulings on Canadian Charter of Rights and Freedoms — Ruling was quashed, but it was not appropriate to make order requested in abstract — S appealed — Appeal allowed in part — Trial judge erred in law by requiring S to remove veil — Order constituted error in law on face of record — Serious issues were before court for both parties — Trial judge failed to conduct adequate inquiry into S's claim that her religious beliefs compelled her to wear veil in public — Focusing on driver's license photo was incorrect — Trial judge had inadequate information to determine S's claim and his assessment was inconsistent with jurisprudence — Trial judge erred by not allowing S to have counsel — S should have been allowed to testify and both sides should have been able to call further evidence — Defence should have opportunity to make submissions to court where their argument is based beyond claims on witness demeanour and reliability — Case-by-case analysis was required — Reconciling competing Charter values is fact-specific and context is both vital and variable — Trial judge must determine if constitutional values were engaged — If genuine religious belief not found, matter is ended and witness must remove veil to testify — If valid religious right claim is found, trial judge then determines if there is something more than minimal interference with accused's rights — If both accused's and witness' rights are engaged, trial judge must engage in reconciliation attempt by trying to give effect to both — Context includes nature of proceedings, forum in which trial will be conducted, nature of and importance evidence to be given, and nature of defence to be advanced — Trial judge can reassess ruling as matter proceeds — Accused's right to make full answer and defence ultimately prevails over religious freedoms and if veil interferes with that right it will be ordered removed.

Criminal law --- Charter of Rights and Freedoms — Life, liberty and security of person [s. 7] — Right to make full answer and defence

Two accused were separately charged with sexual offences involving same complainant S — S was Muslim and wore veil in public — Judge at preliminary inquiry refused S's request to testify while veiled — Judge questioned S informally and decided her religious belief was not strong and permitted exceptions — Trial judge found S's removal of veil to have driver's license photo taken as persuasive evidence her religious beliefs were not that strong — S applied to quash ruling and for order permitting her to wear veil — Application was granted in part — Judge exceeded his jurisdiction as he was not court of competent jurisdiction to make rulings on Canadian Charter of Rights and Freedoms — Questioning complainant without benefit of counsel was prejudicial to her — Ruling was quashed, but it was not appropriate to make order requested in abstract — S appealed — Appeal allowed in part — Trial judge erred in law by requiring S to remove veil — Order constituted error in law on face of record — Serious issues were before court for both parties — Trial judge failed to conduct adequate inquiry into S's claim that her religious beliefs compelled her to wear veil when testifying — Focusing on driver's license photo was incorrect — Trial judge had inadequate information to determine S's claim and his assessment was inconsistent with jurisprudence — Trial judge erred by not allowing S to have counsel — S should have been allowed to testify and both sides should have been able to call further evidence — Defence should have opportunity to make submissions to court where their argument is based beyond claims on witness demeanour and reliability — Case-by-case analysis was required — Reconciling competing Charter values is fact-specific and context is both vital and variable — Accused's statutory right to cross-examine witnesses called by

Crown was component of his right to make full answer and defence at trial which is protected by ss. 7 and 11(d) of Charter — Seeing witness's face could show demeanour and non-verbal responses to questions which could affect assessment of credibility and could also show non-verbal cues, clarify identity if it's in issue, and provide for more effective cross-examination — Loss of right to see full face of witness is loss of something but is not necessarily loss of constitutional right to make full answer and defence in fair trial — Loss is determined by case-specific analysis.

Criminal law --- Pre-trial procedure — Preliminary inquiry — Procedure — Powers of justice — Charter jurisdiction

Two accused were separately charged with sexual offences involving same complainant S — S was Muslim and wore veil in public — Judge at preliminary inquiry refused S's request to testify while veiled — Judge questioned S informally and decided her religious belief was not strong and permitted exceptions — Trial judge found S's removal of veil to have driver's license photo taken as persuasive evidence her religious beliefs were not that strong — S applied to quash ruling and for order permitting her to wear veil — Application was granted in part — Judge exceeded his jurisdiction, as he was not court of competent jurisdiction to make rulings on Canadian Charter of Rights and Freedoms — Ruling was quashed but it was not appropriate to make order requested in abstract — S appealed — Appeal allowed in part — Trial judge erred in law by requiring S to remove veil — Order constituted error in law on face of record — Trial judge failed to conduct adequate inquiry into S's claim that her religious beliefs compelled her to wear veil when testifying — Trial judge had inadequate information to determine S's claim and his assessment was inconsistent with jurisprudence — Trial judge at preliminary inquiry has no remedial jurisdiction under Charter but does have jurisdiction to consider and balance Charter values when exercising their statutory powers — Under s. 537(1)(i) of Criminal Code, preliminary inquiry judge is authorized to regulate course of proceeding — Consideration of Charter values is inevitable given that decisions made at preliminary inquiries through statutory powers must be exercised in accordance with Charter — Power to regulate how and when witness will testify includes determining necessity of change of attire before testifying, and that includes wearing of veil.

Annotation

R. v. S. (N.) establishes the contextual inquiry that will govern in future cases where a witness seeks to wear a facial veil while testifying in court. The fact-specific analysis outlined by Doherty J.A. is admirably nuanced and balanced. The Court of Appeal acknowledged that concealing a witness's face can limit cross-examination in various, sometimes subtle, ways, and that these limitations may, depending on the circumstances, interfere with the accused's right to make full answer and defence. On the other hand, Doherty J.A. recognized that requiring a witness to remove a facial veil has the potential to undermine religious freedom. The judgment makes it clear that these competing *Charter* interests must be reconciled in the circumstances of each case. Even when the Court considered the wider policy implications of allowing or not allowing a witness to wear a facial veil, these broad societal interests seem to pull equally in both directions. Multiculturalism, respect for minorities and access to justice concerns lie in favour of allowing the witness to testify while veiled, but the values of transparency, accountability and openness in the administration of justice weigh against the use of the veil in court.

The balanced approach taken by the Court of Appeal has many strengths. It resists the urge to oversimplify a difficult issue, recognizes the valid *Charter* and policy concerns on both sides, and gives trial judges the freedom to rule in a way that is sensitive to the individual realities of each case. If this case-specific approach has a

weakness, it is that it ultimately provides trial judges with little direction on how to decide the issue. The Court of Appeal has fully considered the problem and released its judgment, but an answer to the fundamental question whether witnesses in Ontario courts may testify while wearing a facial veil seems just as elusive as ever. With so many factors to consider, judges may find themselves adrift in a sea of conflicting policy considerations. Doherty J.A. expressed the hope that some of these cases may be resolved by the parties reaching constructive compromises, for example agreeing to proceed with all-female court personnel (see para. 85). However, where such compromises cannot be reached, Doherty J.A. acknowledged that the decision may be a difficult one for the judge (see para. 101). In practice, the crucial part of the judgment in *S. (N.)* may be the guidance provided to appellate courts: it is for the trial judge to engage in this nuanced contextual analysis, and their rulings are entitled to deference on appeal (*ibid.*).

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Hutterian Brethren of Wilson Colony v. Alberta (2009), *(*sub nom. *Alberta v. Hutterian Brethren of Wilson Colony)* 194 C.R.R. (2d) 12, 2009 CarswellAlta 1094, 2009 CarswellAlta 1095, 2009 SCC 37, 310 D.L.R. (4th) 193, *(*sub nom. *Alberta v. Hutterian Brethren of Wilson County)* [2009] 2 S.C.R. 567, 9 Alta. L.R. (5th) 1, 81 M.V.R. (5th) 1, 390 N.R. 202, [2009] 9 W.W.R. 189, 462 W.A.C. 1, 460 A.R. 1 (S.C.C.) — referred to

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s. 6 — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 2(a) — considered

s. 2(b) — considered

s. 7 — considered

s. 8 — considered

s. 11(d) — considered

s. 14 — considered

s. 15 — considered

s. 24(1) — considered

s. 27 — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 52(1) — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 136 — referred to

s. 136(3)(a) — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

Pt. XVIII — referred to

s. 486 — referred to

s. 486.1 [en. 2005, c. 32, s. 15] — referred to

s. 486.2 [en. 2005, c. 32, s. 15] — referred to

s. 537(1) — referred to

s. 537(1)(a) — referred to

s. 537(1)(h) — considered

s. 537(1)(i) — considered

s. 537(1.1) [en. 2002, c. 13, s. 28(3)] — referred to

s. 540(1) — referred to

s. 548 — referred to

s. 714.3 [en. 1999, c. 18, s. 95] — considered

s. 714.3(a) [en. 1999, c. 18, s. 95] — considered

s. 714.3(d) [en. 1999, c. 18, s. 95] — considered

s. 715 — referred to

s. 784 — referred to

s. 784(2) — referred to

APPEAL of judgment reported at *R. v. S. (N.)* (2009), 191 C.R.R. (2d) 228, 2009 CarswellOnt 2268, 95 O.R. (3d) 735 (Ont. S.C.J.).

***Doherty J.A.*:**

I. The Issue

1 The central issue on this appeal arises from an apparent conflict between the constitutional rights of a witness in a criminal proceeding and the constitutional rights of the accused in that same proceeding. The witness, N.S., an alleged victim of historical sexual assaults, contends that her religious beliefs dictate that she must wear a veil covering her face, except her eyes, when testifying. The accused, M---d.S., who is facing serious criminal charges, contends that his right to make full answer and defence requires that he, his counsel and the preliminary

inquiry judge be able to see the accuser's face when she testifies and, in particular, when she is cross-examined.

II. Background

2 N.S. alleges that when she was a young girl, she was repeatedly sexually assaulted by her uncle, the accused, M---l.S., and her cousin,[FN1] the accused, M---d.S. In 1992, N.S. revealed the assaults to a teacher who spoke to N.S.'s parents. N.S.'s father did not want to proceed, and the police did not lay charges at that time. The accused were ultimately charged with various sexual offences against N.S. in two informations sworn in 2007. The offences allegedly occurred between 1982, when N.S. was six years old, and 1987.[FN2]

3 N.S. is a Muslim. She wears a full body dress or hijab and a veil or niqab, which covers her entire face except for her eyes. N.S. wears the hijab and niqab when she is in public or in the presence of males who are not "direct" members of her family.[FN3] As of the date of these proceedings, N.S. had been wearing the hijab and niqab for about five years.

III. The Preliminary Inquiry

4 On September 10, 2008, M---l.S. and M---d.S. elected trial by judge and jury. At the outset of the preliminary inquiry, both accused sought an order requiring N.S. to remove the niqab covering her face when testifying at the preliminary inquiry.

5 The Crown argued that as the application raised *Charter* issues, the preliminary inquiry judge did not have any power to make the order requested. The judge determined that he did have that jurisdiction and decided that he would informally question N.S. about her objection to removing the niqab before deciding whether she would be required to remove it before testifying. Crown counsel suggested that N.S. should have the opportunity to consult with counsel before being questioned. However, the judge elected to proceed immediately with the informal questioning. N.S. wore her niqab while being questioned by the judge. The exchange, set out below, followed:

> N.S.: Okay. So the — the objection is very strong. It's a respect issue, one of modesty and one of — in Islam, we call honour. The other thing is the — the accuseds in the case are from the same community, they all go to the same place of worship as my husband as well and I've had this veil on for about five years now and it's — my face doesn't make any special, you know, like, I know that — you know, there's body language, there's eye contact. I mean, I can look directly at the defence counsel, that's not a problem. But I don't — you know, I really feel that, you know, it's a part of me and showing my face to — and it's also about — the religious reason is to not show your face to men that you are able to marry. It's to conceal the beauty of a woman and, you know, we are in a courtroom full of men and one of the accused is not a direct family member. The other accused is a direct family member and I, you know, I would feel a lot more comfortable if I didn't have to, you know, reveal my face. You know, just considering the nature of the case and the nature of the allegations and I think, you know, my face is not going to show any signs of — it's not going to help, it really won't.
>
> THE COURT: All right. So there is a difference of opinion as between you and counsel as to whether it will help. Now, can you just tell me, when are you without your veil?
>
> N.S.: Only with family members. So people that you are not allowed to marry. So, father, brother, father in law, dads, brothers, moms brothers and women, all women, and children.

THE COURT: But not in public.

N.S.: Not in public, no.

[Emphasis added.]

6 After N.S. had explained her objection, the preliminary inquiry judge decided that she should have counsel. The matter was adjourned and N.S. was represented on the next appearance. No evidence was called. However, it is apparent from the transcript of the judge's reasons, that during submissions he was advised that N.S. had her picture taken without her niqab for the purpose of obtaining her driver's licence. The photograph had been taken by a female photographer behind a screen that protected N.S. from potential male onlookers. The fact that N.S. had allowed a picture of her uncovered face to be taken for the purpose of her driver's licence took on some significance in the preliminary inquiry judge's ruling.

7 In his ruling, the preliminary inquiry judge described his task as balancing the right of the accused to make full answer and defence against N.S.'s "strong religious feeling that it is sinful" to remove her niqab when testifying. After reference to the limited value of demeanour in assessing credibility, the preliminary inquiry judge indicated that he was required to assess "the strength of this religious belief held by the complainant and just how important to her, her constitutional rights and freedom of religion is." He went on:

> It may be one thing for a female photographer to take the picture but that driver's licence can be required to be produced by all sorts of males all the way from police officers and border guards and numerous people who simply ask for your driver's licence for the purpose of identification when you produce your credit card, or whatever, and so it did not satisfy me as the trier of fact that it was consistent with the strength of [N.S.'s] belief to be content to have her face unveiled on a driver's licence open not only for the female photographer to see but for numerous males and modern society. The other thing is that in investigating just how important a belief this was, it came down to her candid admissions that it was a matter of her being "more comfortable" and to me that really is not strong enough to fetter the accused's right to make full answer and defence.
>
> So, in making this admittedly difficult decision and balancing the complainant's right of religion against the accused's right to make full answer and defence including the right to disclosure upon a preliminary inquiry, I find that the complainant's religious belief is not that strong, and that it is [not][FN4] open to exceptions and that it is, as she says, a matter of comfort and I think she has to testify in this preliminary inquiry without the use of her veil.
>
> [Emphasis added.]

IV. Proceedings in the Superior Court

8 The preliminary inquiry did not proceed. Instead, N.S. moved for an order in the nature of *certiorari* quashing the order requiring that she remove her niqab and ordering that she be allowed to wear her niqab when testifying. She coupled her extraordinary remedy claim with an application under s. 24(1) of the *Canadian Charter of Rights and Freedoms* seeking identical relief. N.S. alleged that the preliminary inquiry judge had no jurisdiction to make the ruling he did, and that his order violated her right to freedom of religion under s. 2(a) of the *Charter*. She also alleged that the procedure followed by the preliminary inquiry judge was unfair to her and resulted in jurisdictional error. The Crown supported N.S.'s position that the preliminary inquiry judge had no

jurisdiction to require her to remove her veil before testifying at the preliminary inquiry. The Crown argued that as constitutional values were implicated, the trial judge had exclusive jurisdiction to decide whether N.S. should be required to remove her niqab before testifying and that she could not be required to remove it at the preliminary inquiry.

9 The accused, M---d.S., opposed the application and supported the order of the preliminary inquiry judge. The co-accused, M---l.S., did not take part in the proceedings in the Superior Court.

10 The Ontario Human Rights Commission was granted intervener status. It took no position on the jurisdictional issue, but did make submissions as to how best to address the apparently competing constitutional rights of the witness and the accused.

11 The Superior Court justice granted *certiorari* quashing the order of the preliminary inquiry judge. At paras. 83-85, he held that the preliminary inquiry judge had exceeded his jurisdiction by balancing *Charter* values and that the preliminary inquiry judge's decision to question N.S. without giving her an opportunity to consult counsel was "clearly prejudicial".

12 Although the Superior Court justice concluded that the preliminary inquiry judge had no jurisdiction to balance competing *Charter* claims, he was satisfied that the preliminary inquiry judge had the jurisdiction to decide whether N.S. should be required to remove her niqab when testifying as requested by the accused. At para. 101, the Superior Court justice traced that authority to s. 537(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, which, among other things, empowers the preliminary inquiry judge to regulate the conduct of the proceedings.

13 The Superior Court justice held, at paras. 88-101, that where an application is made to require a witness to remove her niqab, the court must enquire into the reason for the wearing of the niqab and the genuineness of any religious belief relied on to explain the wearing of the niqab. On this inquiry, the witness would be permitted to wear the niqab and could be questioned by both counsel. If the preliminary inquiry judge was satisfied that the witness was wearing the niqab "for a religious or other valid reason", she should be permitted to testify wearing the niqab.

14 At paras. 102-117, the Superior Court justice further directed that if the witness was allowed to testify wearing the niqab, she should be examined-in-chief and cross-examined on the substance of the allegations. At the end of the cross-examination, the preliminary inquiry judge would determine whether the accused had been afforded the full right of cross-examination contemplated by s. 540(1) of the *Criminal Code*. If the preliminary inquiry judge decided that, in the circumstances, the wearing of the niqab by the witness had prevented the accused from cross-examining the witness "as that term is understood in s. 540(1)", her testimony would be ruled inadmissible on the preliminary inquiry.

15 The Superior Court justice further held that proper judicial review of proceedings at the preliminary inquiry involving a request that a witness wear or remove a veil required that the relevant parts of the proceedings be video recorded. He said at para. 78:

> In future, when these matters arise, in order to permit meaningful judicial review, the preliminary inquiry judge should insist that the contentious portions of the proceedings involving the veiled witness be videotaped. Visual aids are important because the absence of visual clues is the cause for complaint.

16 The Superior Court justice made no reference to s. 136 or the *Courts of Justice Act*, R.S.O. 1990, c. C43,

which places significant limitations on the recording of court proceedings. An order directing that a part of this preliminary inquiry should be videotaped could only be made by the presiding judge if the requirement in s. 136(3)(a) was met. That provision requires a case-specific analysis. There is no basis for a *per se* rule requiring videotaping in all cases involving a witness who proposes to testify wearing her niqab.

17 The Superior Court justice then turned to s. 24(1) of the *Charter*. After acknowledging that a Superior Court justice could grant relief under s. 24(1) as a court of competent jurisdiction, the Superior Court justice declined to grant any remedy under that section and specifically declined to decide whether N.S. should be required to remove her niqab. At paras. 119-121, he held that he could not make any determination on the record before him and that the preliminary inquiry was the appropriate place to create the necessary record.

18 The Superior Court justice next addressed the role of the trial judge should the matter ever get to trial. He indicated that the trial judge was a court of competent jurisdiction for the purposes of the *Charter* and would be required to balance the competing *Charter* values raised by the witness's desire to testify while wearing a niqab. By reference to case law, at paras. 122-142, the Superior Court justice outlined some of the considerations that would be relevant to that balancing process.

19 In the result, the Superior Court justice quashed the order requiring that N.S. testify without a niqab and remitted the matter to the preliminary inquiry judge for determination in accordance with the procedure outlined in his reasons.

V. Proceedings in This Court

20 N.S. appealed the order granting prerogative writ relief to this court pursuant to s. 784 of the *Criminal Code*. She also purported to appeal to this court pursuant to s. 24(1) of the *Charter*. In her notice of appeal, N.S. requested an order permitting her to wear her veil while testifying at the preliminary inquiry and at trial. M--d.S. also appealed pursuant to s. 784, seeking an order setting aside the decision of the Superior Court and restoring the order of the preliminary inquiry judge. The Crown is a respondent in both appeals. In addition, several interested organizations were granted intervener status.

21 The arguments in this court focussed on three issues:

i) Did the preliminary inquiry judge have jurisdiction to decide whether N.S. should be required to remove her niqab before testifying?

ii) If the preliminary inquiry judge had that jurisdiction, did he err in law in requiring N.S. to remove her niqab?

iii) Should this court decide whether N.S. should be required to remove her niqab before testifying?

A. Preliminary Issues

22 Before examining those issues, I will briefly address two preliminary procedural matters. The first concerns the scope of review contemplated on the *certiorari* application brought by N.S. The second addresses the relevance of s. 24(1) of the *Charter* on this appeal.

23 Where an accused or the Crown seeks to review, by way of extraordinary remedies, decisions made at the preliminary inquiry, the moving party must normally demonstrate jurisdictional error: e.g. see *R. v. Arcuri*,

[2001] 2 S.C.R. 828 (S.C.C.); *R. v. DesChamplain*, [2004] 3 S.C.R. 601 (S.C.C.); *Cohen v. R.*, [1979] 2 S.C.R. 305 (S.C.C.). However, where the moving party on the extraordinary remedy application is a "third party", that is a party other than the accused or the Crown, and the challenged order finally decides the rights of the third party, extraordinary remedy relief will lie on the more traditional grounds of both jurisdictional error and error of law on the face of the record: *Cunningham v. Lilles* (2010), 254 C.C.C. (3d) 1 (S.C.C.), at paras. 57-58; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), at pp. 864-67.

24 In *Dagenais*, at p. 865, Lamer C.J. explained that an order prohibiting publication of court proceedings that offended *Charter* principles constituted "an error of law on the face of the record", which was reviewable on a *certiorari* application. In my view, by the same reasoning, an order directing a witness to remove her niqab that offended her right to exercise freely her religious beliefs would, absent adequate justification for that order, offend *Charter* principles and constitute an error of law on the face of the record. Consequently, when a witness challenges an order made by the preliminary inquiry judge on the basis that the order is contrary to *Charter* principles, the Superior Court must review the correctness of the challenged decision in determining whether to grant extraordinary remedy relief. The scope of review on the *certiorari* application will be the same as the scope of review on an appeal where correctness is the applicable standard of review.

25 *Dagenais*, at p. 866, also expanded the remedies available on *certiorari* beyond the traditional order quashing the impugned order to include any remedy that could be granted under s. 24(1) of the *Charter*. After *Dagenais*, a Superior Court justice seized with a *certiorari* application in respect of an order that is challenged on constitutional grounds may, in addition to quashing that order, grant any other relief that the justice could have granted on an original application under s. 24(1) of the *Charter*.

26 The second preliminary point concerns the relationship between this court's appellate jurisdiction and s. 24(1) of the *Charter*. Appellate jurisdiction is purely statutory: *R. v. Meltzer*, [1989] 1 S.C.R. 1764 (S.C.C.). Section 24(1) does not create appellate jurisdiction but instead works within the existing appellate structure to provide a further source of remedial power: see *R. v. Mills*, [1986] 1 S.C.R. 863 (S.C.C.), per MacIntyre J. at p. 958, per LaForest J. at p. 977. This court's jurisdiction flows from s. 784 of the *Criminal Code*, which provides an appeal from a decision granting or refusing an order in the nature of *certiorari*. I can find no statutory authority for an appeal to this court from the decision of a Superior Court justice either granting or refusing a remedy under s. 24(1) of the *Charter*. However, in light of the broadened remedial scope available on a *certiorari* application after *Dagenais*, and this court's power on an appeal from an order granting or refusing *certiorari* to make the order that could have been made in the Superior Court, it would seem that this court's remedial powers also encompass the powers contemplated by s. 24(1) of the *Charter*: *Criminal Code*, s. 784(2).

27 What does this mean? Simply, that the claim advanced by N.S. can be fully addressed on its merits, and the appropriate remedial order made within the confines of the extraordinary remedy application. The application to the Superior Court justice under s. 24(1), and the purported appeal pursuant to s. 24(1), are redundant in so far as the review of the order made by the preliminary inquiry judge is concerned: see Kent Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora, Ont.: Canada Law Book, 2009) at paras. 6.392, 6.426.

B. Main Issues

(i) Did the preliminary inquiry judge have jurisdiction to decide whether the witness, N.S., should be required to remove her niqab before testifying?

28 The Superior Court justice observed that a preliminary inquiry judge has no jurisdiction to decide wheth-

er a *Charter* right has been infringed or to grant a remedy under s. 24(1) of the *Charter*. He then said, at para. 83:

> His Honour started out with the premise that he was dealing with the manner in which the applicant gave evidence, however, as his reasoning progressed he balanced *Charter* values which he cannot do because he is not a court of competent jurisdiction.
>
> [Emphasis added.]

29 I agree that a preliminary inquiry judge has no remedial jurisdiction under the *Charter*. I do not, however, agree that a preliminary inquiry judge has no jurisdiction to consider and balance *Charter* values when exercising statutory powers granted to the preliminary inquiry judge.

30 The preliminary inquiry plays an important but limited charge vetting role in the criminal justice system. The preliminary inquiry judge must decide whether the Crown has adduced sufficient evidence to justify an accused's committal for trial pursuant to s. 548 of the *Criminal Code*: *R. v. Caccamo* (1975), [1976] 1 S.C.R. 786 (S.C.C.), at pp. 809-10; *R. v. Dubois*, [1986] 1 S.C.R. 366 (S.C.C.), at pp. 373-74. As the accused's guilt is not in issue at the preliminary inquiry, it is not the time or place to adjudicate the accused's *Charter* claims. Arguments at the preliminary inquiry about *Charter* infringements, based on an incomplete record which will be re-litigated if there is a trial, are bound to produce incorrect results and waste valuable judicial resources: see *R. v. Hynes*, [2001] 3 S.C.R. 623 (S.C.C.), at paras. 33-43. It is well-established that a preliminary inquiry judge has no jurisdiction to grant *Charter* remedies either under s. 24(1) of the *Charter* or s. 52(1) of the *Constitution Act, 1982*: see *Mills*, at pp. 954-55; *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.), at pp. 638-39; *Hynes*, at paras. 30-33; *R. v. Howard* (2009), 250 C.C.C. (3d) 102 (P.E.I. C.A.); see also *R. v. Conway* (2010), 255 C.C.C. (3d) 506 (S.C.C.), at paras. 24, 25, 38.

31 There is, however, a difference between granting a *Charter* remedy for an infringement of a *Charter* right or making a declaration of constitutional invalidity, and taking *Charter* principles and values into consideration when exercising statutory powers. That distinction was made in *R. v. R. (L.)* (1995), 100 C.C.C. (3d) 329 (Ont. C.A.), where the accused brought an application requiring the production at the preliminary inquiry of certain psychiatric records of the victims. At the time, the production of the records was governed by the provincial mental health legislation. In holding that the preliminary inquiry judge had jurisdiction to decide whether the records should be produced, Arbour J.A. said at p. 340:

> What the provincial court was asked to do in this case was to hear the evidence for both parties. In doing so, he must inevitably decide its admissibility. He was not asked to adjudicate an alleged infringement of the *Charter*, nor to grant a constitutional remedy. Within the context of the preliminary inquiry proceedings, he was competent to determine the admissibility of the mental health records within the procedures set out in s. 35 of the *Mental Health Act*.
>
> [Emphasis added.]

32 Arbour J.A. specifically rejected the Crown's contention that because there was a potential clash between the witness's constitutionally protected privacy rights and the accused's constitutionally protected full answer and defence rights, the preliminary inquiry judge had no jurisdiction to decide whether the records should be ordered produced at the preliminary inquiry. She put it this way at p. 342:

> In my opinion, therefore, the Crown could not bypass the competence of the Provincial Court judge to adjudicate the competing interests of fair hearing to the accused and protection of privacy to the witness by "constitutionalizing" their respective entitlements so as to deprive the presiding judge of jurisdiction.
>
> [Emphasis added.]

33 Part XVIII of the *Criminal Code* gives the preliminary inquiry judge powers to make orders that must inevitably engage a consideration of potentially competing *Charter* values. One example will suffice to make the point. Section 537(1)(h) authorizes a preliminary inquiry judge to close the courtroom to the public where "the ends of justice will be best served by so doing". In exercising that statutory power, the preliminary inquiry judge will inevitably be required to address values underlying a variety of constitutional rights, potentially including those protected by s. 2(b) (freedom of expression), s. 8 (privacy rights), and s. 11(d) (fair trial rights). Whatever order the preliminary inquiry judge makes, however, will be made pursuant to his or her statutory power under s. 537(1)(h) and not pursuant to any *Charter* remedial power.[FN5]

34 There are numerous other statutory provisions found in different parts of the *Criminal Code* and other legislation that apply at the preliminary inquiry and give the preliminary inquiry judge powers that will inevitably be exercised having regard to different and competing constitutional values. Once again, one example will suffice. Section 714.3 of the *Criminal Code* authorizes the preliminary inquiry judge to order that the evidence of a witness be taken by way of audio link. The audio link allows the witness to be elsewhere when testifying as long as the parties and the court can hear the testimony and examine that witness.

35 Section 714.3 sets out various statutory preconditions to the exercise of the discretion granted to the judge by that section. These preconditions will necessarily engage competing *Charter* values. Section 714.3(a) requires the court to consider the "circumstances of the witness". Sometimes the circumstances of the witness may engage the values underlying the equality rights protection afforded by s. 15 of the *Charter*. Section 714.3(d) requires the court to consider "any potential prejudice to either of the parties". This criterion speaks to the accused's constitutional right to make full answer and defence. As with the exercise of powers under Part XVIII of the *Criminal Code*, a preliminary inquiry judge who is asked to decide whether to permit testimony by way of audio link is exercising the specific statutory power given to him or her under s. 714.3. The judge is not exercising *Charter* jurisdiction. He or she will nonetheless engage in a balancing of competing *Charter* values. [FN6]

36 Not only is a consideration of *Charter* values inevitable given the nature of the decisions that a preliminary inquiry judges must make, the controlling jurisprudence demands that a preliminary inquiry judge exercise his or her statutory powers in accordance with the *Charter*: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), per Lamer J., for the majority on this point, at pp. 1077-78; *Vancouver Sun, Re*, [2004] 2 S.C.R. 332 (S.C.C.), at paras. 30-31; *Multani c. Marguerite-Bourgeoys (Commission scolaire)*, [2006] 1 S.C.R. 256 (S.C.C.), at paras. 99, 102-107. If the preliminary inquiry judge must render decisions that are in accordance with the *Charter*, he or she must have regard to competing *Charter* values and endeavour to render decisions that reflect an appropriate reconciliation of those values.

37 There is no specific statutory provision in Part XVIII of the *Criminal Code* that addresses orders involving the attire of witnesses. The powers of the preliminary inquiry judge, however, include both those expressly given by statute and those that flow by necessary implication from the express statutory powers: *R. v. Girimonte* (1997), 121 C.C.C. (3d) 33 (Ont. C.A.), at para. 21.

38 Section 537(1)(i) provides that the preliminary inquiry judge may:

> ...regulate the course of the inquiry in any way that appears to the justice to be consistent with this *Act*...

39 The power to regulate contained in s. 537(1)(i) justifies a wide variety of orders routinely made by a preliminary inquiry judge in the course of controlling the conduct of the inquiry. Many of these orders will be directed at witnesses. For example, a witness who is under a physical disability may ask to be allowed to testify while sitting rather than standing. No one would question the preliminary inquiry judge's power to allow the witness to testify while seated. If, however, statutory authority is needed for such an order, it is found in s. 537(1)(i). While the decision would not normally be seen as reflecting *Charter* values, it does reflect a consideration of those values expressed in s. 7 (security of the person) and s. 15 (equality). A witness might also ask that his cross-examination be interrupted so that he can attend a religious observance. The preliminary inquiry judge has the authority to interrupt the cross-examination and direct that the evidence of another witness be heard until the first witness is once again available for cross-examination. In making that kind of order, the judge is regulating the course of the inquiry. In this hypothetical, the preliminary inquiry judge would take into account both the witness's religious beliefs and any harm caused to the defence by the interruption of the cross-examination. The power to regulate the inquiry would also encompass a determination as to whether a witness should be permitted to testify through an interpreter. Once again, constitutional values, specifically those protected by ss. 11(d) and 14, might well be in play.

40 I am satisfied that just as the preliminary inquiry judge has the power to regulate how and when a witness will testify, he or she has the power to determine whether a witness should be required to change his or her attire before testifying. If a witness's attire is interfering with the proper conduct of the preliminary inquiry, the authority to regulate the conduct of that inquiry must include the ability to order the witness to alter his or her attire so as to permit the proper conduct of the inquiry. The attire of a witness may be inappropriate in the courtroom for a variety of reasons. For example, clothing that demonstrates a disrespect for the proceedings and thereby interferes with the proper conduct of the proceeding must not be tolerated. That is, of course, not this case. However, M---d.S. argues that the wearing of the niqab interferes with his ability to properly cross-examine N.S. and, therefore, interferes with the proper conduct of the inquiry.

41 The wearing of a niqab in public places is controversial in many countries including Canada. The controversy raises important public policy concerns that have generated heated debate. Those difficult and important questions are not the focus of this proceeding and cannot and should not be resolved in this forum. I think it is helpful when considering whether the preliminary inquiry judge's power to regulate the proceedings extends to orders requiring the removal of the niqab, to consider an example that does not engender the controversy presently surrounding the wearing of the niqab.

42 Take for example, a witness who is wearing dark sunglasses when that witness takes the stand. As a matter of course, a preliminary inquiry judge would ask the witness why he or she was wearing sunglasses. There are several possible responses. The witness may be wearing sunglasses as a fashion statement in the exercise of his or her right to freedom of expression. The witness may be wearing sunglasses because a disability requires the witness to shield his or her eyes from the bright lights of the courtroom. The witness may be wearing sunglasses to disguise his or her appearance out of fear that the accused may seek retribution against that witness. All of these explanations can be expressed in terms that invoke constitutional values. The party seeking to cross-examine the witness may argue that those sunglasses inhibit the questioner's ability to fully assess the witness's reaction to the questions and effectively cross-examine the witness. This, too, impacts on constitutional

values.

43 Were the sunglasses hypothetical to occur, no one could reasonably question the preliminary inquiry judge's power to decide whether the witness should be allowed to wear sunglasses while testifying. I cannot imagine that anyone would suggest that the judge could not make that decision, after conducting the appropriate inquiry, because deciding the question involved balancing *Charter* values. I am also certain that, were the sunglasses hypothetical to arise, it would be addressed and resolved expeditiously in the exercise of the judge's power to regulate the inquiry.

44 I do not suggest that the issues surrounding the wearing of the niqab can necessarily be resolved as easily as the issues arising out the sunglasses hypothetical. I do think, however, that insofar as the preliminary inquiry judge's exercise of his or her jurisdiction is concerned, the two problems are not qualitatively different. In both instances, the preliminary inquiry judge has to regulate the preliminary inquiry by deciding whether the witness will be allowed to wear what the witness wants to wear while testifying. In exercising that statutory power, the preliminary inquiry judge will take into account the impact of that attire on the proceedings and the effect of any order he or she may make on the legitimate interests of the accused and the other participants in the process. Whether the question involves the wearing of the niqab or the wearing of sunglasses, the preliminary inquiry judge is not deciding whether there is a *Charter* breach and is not granting or refusing a *Charter* remedy. The preliminary inquiry judge is, as authorized by s. 537(1)(i), regulating the course of the preliminary inquiry to ensure that it can perform its proper function.

(ii) Did the preliminary inquiry judge err in law in requiring N.S. to remove her niqab?

45 Before turning to the constitutional concepts and analysis, I think it is important to remind one's self of what is at stake in human terms. N.S. is facing a most difficult and intimidating task. She must describe intimate, humiliating and painful details of her childhood. She must do so, at least twice, in a public forum in which her credibility and reliability will be vigorously challenged and in which the person she says abused her is cloaked in the presumption of innocence. The pressures and pain that complainants in a sexual assault case must feel when testifying will no doubt be compounded in these circumstances where N.S. is testifying against family members. It should not surprise anyone that N.S., when faced with this daunting task, seeks the strength and solace of her religious beliefs and practices.

46 M---d.S. is facing serious criminal charges. If convicted, he may well go to jail for a considerable period of time. He will also wear the stigma of the child molester for the rest of his life. In all likelihood, the mere fact that charges have been laid has led many within his family and community who are aware of those charges to look at M---d.S. in a very different way. M---d.S. is presumed innocent. His fate will depend on whether N.S. is believed. In a very real sense, the rest of M---d.S.'s life depends on whether his counsel can show that N.S. is not a credible or reliable witness. No one can begrudge M---d.S.'s insistence that his lawyer have available all of the means that could reasonably assist in getting at the truth of the allegations made against him.

(a) Reconciling Rights

47 The two perspectives summarized above reveal the quandary faced by the preliminary inquiry judge. Both M---d.S. and N.S. have powerful claims that seem to lead to diametrically opposed conclusions. At least at first blush, it would appear that the constitutional values in issue collide. Faced with an apparent collision of constitutional values, a court must first attempt to reconcile the rights so that each is given full force and effect within the relevant context: *Same-Sex Marriage, Re*, [2004] 3 S.C.R. 698 (S.C.C.), at para. 50. As Justice Iac-

obucci put it, writing extra-judicially in "'Reconciling Rights' The Supreme Court of Canada's Approach to Competing *Charter* Rights" (2002), 20 S.C.L.R. (2d) 137, at p. 140 ["Reconciling Rights"]:

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

48 Reconciliation of apparently conflicting rights requires that no *Charter* right be treated as absolute and that no one right be regarded as inherently superior to another: *R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.), at para. 61; *Dagenais*, at p. 877; *R. v. Creighton*, [1995] 1 S.C.R. 858 (S.C.C.), at para. 34. Nor can the reconciliation of competing rights be addressed in the abstract without regard to the specific factual context. Once again, I borrow the words of Justice Iacobucci in Reconciling Rights, at p. 141:

> The key to rights reconciliation, in my view, lies in a fundamental appreciation for *context*. *Charter* rights are not defined in abstraction, but rather in the particular factual matrix in which they arise. When understood in this way, the exercise of reconciling competing *Charter* values becomes a less onerous and daunting task. [Emphasis in original.]

(b) Fair Trial Rights

49 The first step in the reconciliation process requires one to identify and describe the constitutional values engaged by the competing arguments. I will begin with M---d.S. Mr. Dineen, counsel for M---d.S., submits, correctly, that his client's statutory right to cross-examine witnesses called by the Crown at the preliminary inquiry, pursuant to s. 450, is a component of his right to make full answer and defence at trial. That right is protected under ss. 7 and 11(d) of the *Charter*: *Mills*, at para. 69; *R. v. B. (E.)* (2002), 57 O.R. (3d) 741 (Ont. C.A.), at para. 44. Cross-examination has been repeatedly described as a matter of fundamental importance that is integral to the conduct of a fair trial and a meaningful application of the presumption of innocence: see *R. v. Osolin*, [1993] 4 S.C.R. 595 (S.C.C.), at pp. 663-65; *Mills*, at para. 72-76; *R. v. Lyttle*, [2004] 1 S.C.R. 193 (S.C.C.). In *Lyttle*, at para. 41, Fish J.A. said:

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

50 However, cross-examination is not an end in and of itself. Rather, it is one of the means by which the accused makes full answer and defence. Full answer and defence is, in turn, a crucial component of a fair trial, a constitutionally protected right and the ultimate goal of the criminal process. Trial fairness is not measured exclusively from the accused's perspective but also takes account of broader societal interests. Those broader interests place a premium on a process that achieves accurate and reliable verdicts in a manner that respects the rights and dignity of all participants in the process, including, but not limited to, the accused: *Osolin*, at pp. 667-72; *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.), at p. 603; *Mills* (1999), at paras. 72-76, 94; *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419 (S.C.C.).

51 Not every limit on the right to cross-examination compromises trial fairness. The right to cross-examine witnesses does not extend to questions that will elicit evidence that undermines the truth-seeking function of the court. Nor does the right to cross-examination extend to any and all questions that may adduce relevant evidence no matter how minimally probative and regardless of the harm those questions may do to other legitimate in-

terests, such as national security or a witness's constitutionally protected privacy right. Nor are the limits on cross-examination to be considered in isolation from other procedural aspects of the criminal trial. Trial fairness is ultimately measured by reference to the entirety of the process: *R. v. Darrach*, [2000] 2 S.C.R. 443 (S.C.C.), at paras. 23-25; *R. v. Rose*, [1998] 3 S.C.R. 262 (S.C.C.). For example, appropriate jury instructions may go some considerable way to mitigate any unfairness that may flow from an evidentiary or procedural rule that has limited the scope of cross-examination.

52 Cross-examination involves, first and foremost, the eliciting of evidence from prosecution witnesses through the process of oral questions and answers. In the accepted tradition of the common law, questioning occurs in a public forum in the presence of the judge, Crown counsel, the accused and his counsel, the witness and the public: *R. v. Levogiannis* (1990), 1 O.R. (3d) 351 (Ont. C.A.), at p. 366, aff'd *R. v. Levogiannis*, [1993] 4 S.C.R. 475 (S.C.C.); *R. v Davis*, [2008] 3 All E.R. 461 (H.L.), at para. 22.

53 While it is clear that face to face confrontation between the accused and prosecution witnesses is the accepted norm in Canadian criminal courts, there is no independent constitutional right to a face to face confrontation: *Levogiannis*, at p. 367. There are a number of evidentiary rules, both statutory (s. 715 of the *Criminal Code*) and common law (some hearsay exceptions) that admit statements made by declarants who do not testify at trial at all. Departures from the traditional face to face public confrontation between accused and witness will run afoul of the *Charter* only if they result in a denial of a fair trial to the accused. The *Charter* focuses not on face to face confrontation *per se*, but on the effect of any limitation on that confrontation on the fairness of the trial. Fairness takes into account the interests of the accused, the witness and the broader societal concern that the process maintains public confidence.

54 Covering the face of a witness may impede cross-examination in two ways. First, it limits the trier of fact's ability to assess the demeanour of the witness. Demeanour is relevant to the assessment of the witness's credibility and the reliability of the evidence given by that witness. Second, witnesses do not respond to questions by words alone. Non-verbal communication can provide the cross-examiner with valuable insights. The same words may, depending on the facial expression of the witness, lead the questioner in different directions. In *Police v Razamjoo* [2005] DCR 408, a New Zealand trial judge faced with an application by two Muslim witnesses to testify wearing veils said this at para. 81:

> Although effective cross-examination is generally the outcome of careful preparation and a thorough grasp of the case, the actual process is often partly instinctive. It involves an ongoing evaluation of how the witness is performing and, particularly what are sensitive areas from that witness's point of view. Tiny signals, quite often in the form of, or involving, facial expressions are received and acted upon almost, sometimes completely, unconsciously by the cross-examiner. Cross-examining counsel do not have the luxury of being able to make judgments as to what to ask and how to ask it against an overview such as a judge enjoys at the conclusion of a case. A distinction needs to be drawn between the significance of demeanour in the context of such an overview and the significance of demeanour to counsel in what is, in many ways, a "heat of battle" situation, in making what need to be virtually instantaneous decisions in the course of conducting a cross-examination.

55 Mr. Butt, counsel for N.S., makes the valid point that credibility assessments based on demeanour can be unreliable and flat-out wrong. Assessments of credibility based on demeanour can reflect cultural assumptions and biases. Judgments based on demeanour are no substitute for those based on a critical analysis of the substance of the entire evidence. Appellate courts have repeatedly cautioned against relying exclusively or even

predominantly on demeanour to determine credibility. Mr. Butt also makes the valid point that the trier of fact does not lose all aspects of demeanour evidence if the witness wears a niqab. The trier of fact will still be able to consider the witness's body language, her eyes, her tone of voice and the manner in which she responds to questions. All are important aspects of demeanour.

56 It is, however, undeniable that the criminal justice system as it presently operates, and as it has operated for centuries, places considerable value on the ability of lawyers and the trier of fact to see the full face of the witness as the witness testifies. Appellate deference is justified to a significant extent on the accepted wisdom that trial judges and juries have an advantage over appeal judges in assessing factual questions because they, unlike appeal judges, have seen and heard the witnesses: *R. v. M. (R.E.)*, [2008] 3 S.C.R. 3 (S.C.C.), at p. 22. Similarly, the principled approach to the admission of hearsay evidence recognizes the value, insofar as the assessment of reliability is concerned, in the trier of fact's ability to observe the witness's demeanour as the witness made a statement which is proffered as evidence of its truth: see *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (S.C.C.), at pp. 763-64.

57 A witness's appearance while testifying, in addition to assisting in assessing the witness's credibility and providing non-verbal cues to assist the cross-examiner, may also further cross-examination in other ways in certain specific cases. There may be cases where the identity of the witness is an issue. In those cases, the opportunity to look at the witness may be essential to identifying the witness which, in turn, may be crucial to effective cross-examination of that witness or to other aspects of the defence. For example, a witness may claim to have spoken to an accused at a certain time and place. Seeing the face of the witness may allow the accused to indentify the witness in a way that will assist the accused in the cross examination and may perhaps also provide some explanation as to why the witness might fabricate or be mistaken about the content of the conversation.

58 There may also be sexual assault cases where the accused contends that neither the name of the complainant nor the details of the allegations provided in the disclosure mean anything to him. In effect, the accused asserts that the charges against him are a terrible mistake and he is at a loss to understand the basis for the charge. I am not sure how an accused could defend himself in that situation without seeing the face of the complainant.

59 There may also be cases where, because of other evidence, the complainant's facial appearance may have relevance to the truth of her allegations. For example, the complainant may have given a statement to the police in which she describes an attack that would inevitably have left some visible marks on her face. An accused may argue that he can only test that part of the complainant's evidence by seeing her face during cross-examination at the preliminary inquiry.

60 The criminal justice system assumes that the truth is most likely to emerge through a public adversarial process. Face-to-face confrontation, especially between an accused and his accuser, is a feature of that adversarial process. The value of confrontation to the cross-examiner cannot be dismissed because credibility assessments based on demeanour, like credibility assessments based on anything else, can prove to be wrong. An accused who is denied the right to see the full face of a Crown witness, particularly the accuser, during cross-examination loses something of potential value to the defence. Whether he loses his constitutional right to make full answer and defence in a fair trial will depend on a fact-specific inquiry. That inquiry must look to the actual effect of denying face-to-face confrontation of the witness in the circumstances of the particular case. That inquiry must also have regard to other legitimate interests engaged in the circumstances and the constitutional values underlying those interests. I will return to the contextual issues that arise in this case after addressing the

other key component of the reconciliation of rights analysis in this case: N.S.'s claim that she is entitled to wear a niqab in the exercise of her right to freedom of religion.

(c) Freedom of Religion

61 N.S. contends that s. 2(a) of the *Charter* which guarantees freedom of religion protects her right to wear her niqab while testifying.[FN7] Supreme Court of Canada jurisprudence takes a broad and expansive approach to religious freedom: *Syndicat Northcrest c. Amselem*, [2004] 2 S.C.R. 551 (S.C.C.), at para. 62. The protection afforded to religious freedom reaches both religious beliefs and conduct that is motivated by or manifests those beliefs. The protection afforded to religious belief is, however, considerably broader than the protection afforded to conduct manifesting that belief: *Trinity Western University v. College of Teachers (British Columbia)*, [2001] 1 S.C.R. 772 (S.C.C.), at para. 30.

62 In *Amselem*, at paras. 46-47, Iacobucci J. described the constitutional protection afforded freedom of religion as:

> The freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.
>
> But, at the same time, this freedom encompasses objective as well as personal notions of religious belief, 'obligation', precept, 'commandment', custom or ritual. Consequently, both obligatory as well as voluntary expressions of faith should be protected under the Quebec (and the Canadian) *Charter*. It is the religious or spiritual essence of an action, not any mandatory or perceived — as — mandatory nature of its observance, that attracts protection. An inquiry into the mandatory nature of an alleged religious practice is not only inappropriate, it is plagued with difficulties.

63 Iacobucci J., at para. 56, described the approach to be taken to a claim that conduct was protected by s. 2(a) of the *Charter*:

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

64 Under the controlling jurisprudence, an infringement of s. 2(a) will be made out where the claimant demonstrates, first, a sincere belief in a practice that has a nexus with his or her religious beliefs and, second, that the impugned measure interferes with the claimant's ability to act in accordance with those religious beliefs in a way that goes beyond the trivial or insubstantial: *Amselem*, at paras. 57-61; *Multani*, at para. 34; *Hutterian Brethren of Wilson Colony v. Alberta*, [2009] 2 S.C.R. 567 (S.C.C.), at para. 32.

65 Unlike an accused's right to make full answer and defence in a fair trial, a witness's right to freedom of religion is not inherently triggered by participation in the criminal justice process. A witness who seeks to exercise a religious practice while testifying must establish that the practice falls within the scope of the right to freedom of religion as described in the Supreme Court of Canada authorities cited above.

66 Given the subjective and personal nature of a freedom of religion claim as explained in *Amselem*, that inquiry must almost inevitably involve testimony from the witness explaining the connection between the practice in issue and his or her religious beliefs. Nor do I think that it does any injustice to call upon the witness who claims that his or her religious beliefs compel certain conduct to adduce evidence to establish that claim within the parameters set out in *Amselem* and subsequent cases from the Supreme Court of Canada. I would think that, in most cases, the inquiry would be relatively straightforward and would be limited to the witness's explanation for following the course of conduct in issue. I note that Mr. Butt, in oral argument, advised the court that N.S. welcomed the opportunity to explain to a judge why she felt the very real obligation to wear her niqab while testifying.

67 In evaluating the evidence advanced in support of the religious freedom claim, a court is interested only in whether the practice is a manifestation of the sincerely held personal, religious belief of the witness. The court will not enter into theological debates. Nor is conformity with established or accepted religious practices the ultimate measure of the sincerity of one's religious beliefs. The inquiry looks to the personal beliefs of the claimant. In this case, it is the manner in which N.S. interprets and practises Islam as it relates to the wearing of the niqab that is important: *Multani*, at paras. 32-33. *Amselem*, at para. 53, describes the nature of the inquiry into religious belief in these terms:

> Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of the claimant's testimony [citation omitted], as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices. It is important to underscore, however, that it is inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held. ... Because of the vacillating nature of religious belief, a court's inquiry into sincerity, if anything, should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom.

68 In measuring the sincerity of N.S.'s asserted religious belief, her decision to allow her picture to be taken without her niqab to obtain her driver's licence (and any other exceptions she may make) may provide some insight into whether her current religious beliefs dictate that she wear the niqab while testifying. A court cannot, however, reason that because a person has made exceptions to her religious beliefs in the past, or perhaps has simply failed to follow her religious practices in the past, that her present assertion of those beliefs is not sincere. Past practice cannot be equated with present belief. Few among us who have religious beliefs can claim to have always acted in accordance with those beliefs. Past perfection is not a prerequisite to the exercise of one's constitutional right to religious freedom.

69 Without attempting an exhaustive description of the inquiry that would be appropriate in this case, I think it would be important, given the information provided concerning the licence photograph, to determine the extent to which N.S.'s belief that she must wear a niqab in public admits of exceptions. If that belief admits of an exception that could reasonably cover the circumstance of a witness testifying at a criminal trial, I do not think that N.S.'s right to religious freedom would extend to her decision that she would not avail herself of that exception in this particular situation. If testifying without the niqab — perhaps in modified circumstances, including,

if need be, the exclusion of the male public except for the accused and counsel — would fall within the boundary of the exceptions that N.S. has recognized to her requirement to wear a niqab in public, requiring her to remove that niqab to testify, even if she did not want to do so, would not interfere with her ability to act in accordance with her personal religious beliefs.

(d) The Approach to Be Taken to Reconciling the Rights in Issue in this Case

70 A court faced with a claim by a witness that her religious beliefs compel her to wear a niqab when testifying and with a claim by the accused that the wearing of the niqab interferes with his ability to cross-examine, should begin by determining whether the constitutional values underlying both claims are in fact engaged in the specific circumstances. The court should first make the necessary inquiry to determine whether the course of action the witness seeks to follow is religiously motivated and that her belief is sincerely held.[FN8] If the court concludes that the religious freedom claim is not made out under the criteria set out in the case law, that would the end the matter and the witness would be required to remove her niqab when testifying.[FN9]

71 If the judge is satisfied that the witness has advanced a valid religious right claim, the judge must next determine the extent, if at all, to which wearing the niqab would interfere with the accused's ability to cross-examine the witness. At this stage, the judge is not deciding whether wearing the niqab would result in a denial of the accused's right to cross-examine and to a fair trial, but only whether the wearing of the niqab would impose an impediment on cross-examination that was more than minimal or insignificant. This assessment must be fact-specific. For example, if the witness's credibility was not in issue and she was giving evidence on a peripheral non-contentious matter, I would think that the judge would determine that any limit the wearing of the niqab imposed on her cross-examination was so insignificant that it could be safely disregarded. If the judge were to conclude, in the specific circumstances of a given case, that allowing the witness to wear her niqab did not interfere with cross-examination, or interfered only to a minimal extent, the accused's right to make full answer and defence would not be engaged. A minimal interference with cross-examination would not impair an accused's right to a fair trial and would not justify any limitation on the witness's exercise of her right to freedom of religion: *Amselem*, at para. 84.

72 A judge can take judicial notice of the relevance of demeanour to the assessment of a witness's credibility and reliability. The judge could also take judicial notice of the potential assistance that demeanour could afford to the cross-examiner in the course of conducting that cross-examination. If, however, the defence contention is that the wearing of the niqab impairs cross-examination beyond the ways described above, it is incumbent upon the defence to establish those claims. For example, if the defence contends that the identity of the witness is in issue and, therefore, her face must be exposed, the defence must demonstrate an air of reality to that claim before it will be taken into account in assessing the extent to which the wearing of the niqab may affect cross-examination.

73 If the judge is satisfied that both the witness's religious freedom claim and the accused's right to cross-examine claim are sufficiently engaged, the judge must then attempt to reconcile those two rights by giving effect to both. It is at this stage that context becomes particularly important. Context includes the somewhat limited manner in which the wearing of the niqab interferes with the trier of fact's assessment based on demeanour. The trier of fact still hears and sees the witness. Tone of voice, eye movements, body language, and the manner in which the witness testifies, all important aspects of demeanour, are unaffected by the wearing of the niqab. Nor does the wearing of the niqab prevent the witness from being subjected to a vigorous and thorough cross-examination.

74 The contextual factors outlined above do not stand alone. Other features of the trial process will also impact upon the effect the wearing of a niqab has on the ability to cross-examine the witness. In jury cases, the judge's instructions will play a significant role. In determining whether to allow the witness to wear her niqab, a judge in a jury case will bear in mind that the jury will be instructed that the onus of proof is on the Crown and that any difficulties the jury may encounter in assessing the credibility of a Crown witness because that witness is wearing a niqab must redound against the Crown as the party bearing the onus of proof. An instruction in these terms could well go a long way to negative any negative impact on the defence flowing from a limitation on the ability to cross-examine a witness who is wearing a niqab.

75 Context also includes the nature of the proceeding: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.). The reconciliation may be very different at a preliminary inquiry, where the witness's credibility is essentially irrelevant, than at trial, where the outcome of the case and the accused's liberty may turn entirely on the witness's credibility. A defence claim that it cannot cross-examine the witness if she is wearing a niqab based entirely on broad arguments about the impact of the loss of demeanour evidence may have little force when made at the preliminary inquiry stage. The same arguments will carry more force at trial, especially if the witness's credibility is central to the Crown's case.

76 The forum in which the trial will be conducted is also part of the context. If the case is to be tried by a judge alone, that 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. Where, however, the case is tried by a jury, it will be for the jury to ultimately determine the effect of the niqab on its ability to accurately assess the credibility and reliability of the witness. The potential significance of the jury in assessing whether the witness should be required to remove her niqab was alluded to in the recent decision of *R. v Anwar Sayed* (19 August 2010), Perth 164/2010 (WADC), a decision of Her Honour Justice Deanne of the District Court of Western Australia:

> Being in a position to view a witness's face whilst that person is giving evidence may or may not in the end assist jury members to determine issues of credibility or reliability, but that is a matter entirely for them. The jury are the only people who can answer that question at the relevant time. It appears to me that the fundamental question is whether or not the court in the circumstances of this particular case, insofar as they are known, should deny the members of the jury that opportunity.
>
> [Emphasis added.]

77 Context also includes the nature of the evidence to be given by the witness who wants to wear her niqab. If her 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. However, where the witness who claims the right to wear a niqab is central to the prosecution case and her credibility is virtually determinative of the outcome, an argument that a full view of the witness's face, at least at trial, is essential to cross-examination becomes a much stronger argument.

78 The nature of the defence to be advanced and any specific grounds linking the ability to see the witness's face to the defence's ability to make full answer and defence, are also part of the context. I have set out some examples earlier in these reasons where the position of the defence gives added significance to the opportunity to

see the face of the witness when she testifies.

79 Perhaps the most difficult aspect of the contextual analysis is that which requires the court to take into account other constitutional values and societal interests that may be affected by the judge's decision whether a witness should be required to remove her niqab. N.S. is a Muslim, a minority that many believe is unfairly maligned and stereotyped in contemporary Canada. A failure to give adequate consideration to N.S.'s religious beliefs would reflect and, to some extent, legitimize that negative stereotyping. Allowing her to wear a niqab could be seen as a recognition and acceptance of those minority beliefs and practices and, therefore, a reflection of the multi-cultural heritage of Canada recognized in s. 27 of the *Charter*. Permitting N.S. to wear her niqab would also broaden access to the justice system for those in the position of N.S., by indicating that participation in the justice system would not come at the cost of compromising one's religious beliefs.

80 N.S. is also a woman testifying as an alleged victim in a sexual assault case. Permitting her to wear her niqab while testifying would recognize her as an individual and acknowledge the particularly vulnerable position she is in when testifying as an alleged victim in a sexual assault prosecution. Adjusting the process to ameliorate the hardships faced by a complainant like N.S. promotes gender equality.

81 There is also a significant public interest in getting at the truth in a criminal proceeding. Arguably, permitting N.S. to testify while wearing her niqab would promote that interest. Without the niqab, N.S. would be testifying in an environment that was 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. Her embarrassment and discomfort could be misinterpreted as uncertainty and unreliability. Furthermore, there may be cases where the Crown determines that it cannot in good conscience call upon the witness to testify if she is forced to remove her niqab. In those cases, the evidence will be lost and a trial on the merits may be impossible — hardly a result that serves the public interest in the due administration of justice.

82 There is also a societal interest pointing against a witness wearing a niqab when testifying. Society has a strong interest in the visible administration of criminal justice in open courts where witnesses, lawyers, judges and the accused can be seen and identified by the public. A public accusation and a public response to that accusation, in a forum which tests the truth of the accusation through the adversarial process, enhances public confidence in the administration of criminal justice. All engaged in the criminal process, including witnesses, judges and lawyers, are ultimately accountable to the public. Allowing a witness to testify with her face partly covered affords the witness a degree of anonymity that undermines the transparency and individual accountability essential to the effective operation of the criminal justice system. Viewed from this perspective, allowing N.S. to wear a niqab while she testifies could compromise public confidence both in the conduct of the criminal trial and in the eventual verdict: see Ian Dennis, "The Right to Confront Witnesses: Meanings, Myths and Human Rights" (2010) 4 Crim. L. R. 255, at pp. 260-62.

83 Obviously, these diverse interests cannot all be given full voice. The reconciliation process does, however, demand that each be acknowledged and considered in the course of arriving at the appropriate order. The judge's reasons for whatever decision he or she makes take on an important role. If those reasons demonstrate a full and sensitive appreciation of the various interests at stake, the reasons themselves become part of the reconciliation of the apparently competing interests. If a person has a full opportunity to present his or her position and is given a reasoned explanation for the ultimate course of conduct to be followed, the recognition afforded that person's rights by that process itself tends to validate that person's claim, even if the ultimate decision does not give that person everything he or she wanted.

84 Not only is context crucial in reconciling rights but, as Ms. Nakelsky, Crown counsel, submitted, possible "constructive compromises" must also be considered as part of the reconciliation process. Measures may be available to mitigate any potential harm to both the witness's right to exercise her religious beliefs and the accused's right to fully defend himself. These compromises may minimize apparent conflicts between those two rights and produce a process in which both values can be adequately protected and respected.

85 Attempts to reconcile competing interests using "constructive compromises" might include the use of an all female court staff and a female judge. Those measures might also include, where constitutionally permissible, an order that a witness be cross-examined by female counsel. Consideration might also be given to using the measures provided for in the *Criminal Code* to protect complainants testifying in sexual assault cases and child witnesses. If necessary, the court could be closed to all male persons other than the accused and his counsel. In this case, resort to the measures outlined above could result in N.S., if she was required to remove her niqab, revealing her face to only one male person, M---d.S., to whom her religious beliefs indicated she should not.[FN10] Without diminishing the significance of even that intrusion, it certainly respects and protects her religious rights much more than would a simple order that she remove her niqab.

86 Efforts to reconcile competing rights would also entitle the judge to explore with the witness the extent to which her religious beliefs might be fully respected while minimizing the impact on the accused's fair trial rights. For example, during the inquiry into the witness's religious freedom claim, the witness may indicate that she wears different styles of niqabs and/or that different fabrics are used in the niqab. If such evidence was before the judge, he or she could call upon the witness to wear a style of niqab made with a kind of fabric that least interferes with the trier of facts' ability to assess her demeanour.[FN11]

87 It is also important in considering how to reconcile rights, to bear in mind that the trial judge may reassess his or her initial decision as the matter proceeds. A judge may, after seeing the witness testify wearing her niqab on the inquiry into her religious beliefs, decide that she should be permitted to wear the niqab as she begins her testimony concerning the allegations. The judge could change that ruling as the testimony progressed if the judge decided that the actual effect on the cross-examination was more significant than he or she expected. As is evident from the trial judge's observations in *Razamjoo*, at para. 69, the effect of wearing the niqab will vary from case to case and may well be different than the anticipated or assumed effect.

88 Efforts to reconcile the rights of the witness and the accused may ultimately fail. A judge may conclude that in all of the circumstances, and despite resort to available modifications in the process, including, in jury cases, the appropriate instruction, the witness's wearing of the niqab would significantly impair the accused's ability to cross-examine that witness and result in a denial of the accused's right to make full answer and defence and his right to a fair trial. If the judge concludes that the wearing of the niqab in all of the circumstances would infringe the accused's right to make full answer and defence, that right must prevail over the witness's religious freedoms and the witness must be ordered to remove the niqab.[FN12]

89 In holding that where the accused's right to make full answer and defence would be infringed, the witness's right must yield, I rely on *Mills*, in which the accused's right to make full answer and defence potentially clashed with a complainant's privacy interest in her psychiatric records. After a discussion of the reconciliation of these competing rights in the context of a criminal trial, the majority said, at para. 89:

> From our preceding discussion of the right to make full answer and defence, it is clear that the accused will have no right to the records in question insofar as they contain information that is either irrelevant or would

> serve to distort the search for the truth, as access to such information is not included within the ambit of the accused's right. ... However, the accused's right must prevail where the lack of disclosure on production of the record would render him unable to make full answer and defence. This is because our justice system has always held that the threat of convicting an innocent individual strikes at the heart of the principles of fundamental justice.
>
> [Emphasis added.]

(e) Application to this Case

90 The preliminary inquiry judge was in uncharted waters. With respect, I think he failed to conduct an adequate inquiry into N.S.'s claim that her religious beliefs compelled her to wear her niqab while testifying. The limited and informal inquiry conducted by the preliminary inquiry judge did not permit a determination of whether an order directing N.S. to remove her niqab would undermine her right to freedom of religion. The judge fastened on N.S.'s having removed her niqab for the purpose of obtaining her driver's licence photograph and her indication to him that she was "more comfortable" testifying with the niqab as indicia that her religious belief was "not that strong".

91 Not only did the preliminary inquiry judge have inadequate information to determine the validity of N.S.'s religious right claim, his determination based on his own assessment of the strength of her religious beliefs was not consistent with the criteria set out in the jurisprudence from the Supreme Court of Canada.

92 The preliminary inquiry judge also erred in not acceding to the Crown's request and giving N.S. an opportunity to consult with counsel before questioning her about her religious beliefs. She was entitled to the opportunity to speak to a lawyer at that stage given the very significant issue at stake for her.

93 N.S. should have been allowed to testify to and explain the connection between her religious beliefs and the wearing of the niqab while testifying, and to demonstrate the sincerity of those beliefs. She should also have been given the opportunity to call any further evidence on the issue. M---d.S. and the Crown should have been given the opportunity to question N.S. However, those questions would have had to have been relevant to the issues germane to the religious belief inquiry. The Crown and defence should also have had the opportunity to call evidence on the issue. I would stress, however, the narrow focus of the inquiry into N.S.'s religious beliefs. Maintaining that focus should avoid a prolonged proceeding.

94 If the defence argument that the wearing of the niqab interferes with the making of full answer and defence extends beyond claims based on the witness's demeanour and reliability, the defence should have the opportunity, once the religious claim is established, to put that position forward. I would not think that this would generally require the calling of evidence. For example, if the identity of the witness is an issue, the defence may be able to demonstrate its concern by reference to material provided by way of Crown disclosure. Submissions by defence counsel as to the nature of the defence should also suffice.

95 The preliminary inquiry judge did not conduct a proper inquiry into N.S.'s religious freedom claim. His order directing her to remove her niqab while testifying constituted an error in law on the face of the record. That order should be quashed.

(iii) Can this court make a definitive order?

96 It follows from my reasons that I would affirm, albeit on different grounds, the order of the Superior Court justice quashing the order of the preliminary inquiry judge. A determination of whether N.S. should be allowed to testify wearing her niqab, and/or what modifications should be made in the process, can only be made after the inquiry outlined in these reasons. I would remit the matter to the preliminary inquiry judge for the completion of the preliminary inquiry. If the judge is required to determine whether N.S. can wear her niqab while testifying, he will do so in accordance with these reasons.

97 I have stressed the need for a case-by-case assessment of the kind of claim raised in this case. Reconciling competing *Charter* values is necessarily fact-specific. Context is vital and context is variable. Bright line rules do not work. However, hopefully for the assistance of those charged with the responsibility of making these decisions at first instance, I would offer these observations.

98 If a witness establishes that wearing her niqab is a legitimate exercise of her religious freedoms, then the onus moves to the accused to show why the exercise of this constitutionally protected right would compromise his constitutionally protected right to make full answer and defence. I would think that a defence objection to the wearing of the niqab at the preliminary inquiry, based exclusively on the argument that the witness's facial demeanour was important in the assessment of credibility or to assist the cross-examination, would fail, at least to the extent that the judge would begin by permitting the witness to wear her niqab while giving her evidence. As explained earlier in these reasons, the preliminary inquiry judge could revisit his or her initial decision in the unlikely event that as the cross-examination proceeded, it became apparent that the wearing of the niqab was effectively denying counsel the ability to cross-examine the witness.

99 While a defence objection to a witness wearing her niqab at the preliminary inquiry, based exclusively on the asserted loss of demeanour evidence, would in all likelihood fail, the same objection made at trial in a case to be tried by a jury raises much more difficult problems. Where the case turns on the witness's credibility, it must be conceded that the jury will lose some information relevant to the witness's credibility if the witness is allowed to wear her niqab. The extent of that loss is open to debate. However, in a jury case, it is the jury's obligation and no one else's to evaluate demeanour and determine the extent to which it impacts on the outcome. Where the credibility of the witness is virtually determinative of the outcome, denying the jury full access to that witness's demeanour could be seen as detracting from the accused's right to trial by jury.

100 Where the application to require the witness to remove her niqab is brought in a jury trial, the judge must have regard to the jury's role as the ultimate trier of fact. The jury must determine the significance of the witness's demeanour. The judge will also bear in mind, however, that the jury will have the benefit of his instructions with respect to the assessment of demeanour and the potential impact of the wearing of the niqab. Those instructions will counter, to some degree, any prejudice to the defence ability to effectively cross-examine the witness. Demeanour instructions would not, of course, make up any detriment to the cross-examination occasioned by the questioners' inability to see the witness's full face as she was being cross-examined.

101 There is no getting around the reality that in some cases, particularly those involving trial by jury, where a witness's credibility is central to the outcome, a judge will have a difficult decision to make where the witness claims the constitutional right to wear her niqab while testifying. There can be no doubt that judges who actually see the participants in the process are in a better position to make the sensitive determinations required than an appellate court. Assuming the appropriate inquiry has been made, the proper constitutional principles applied, and the relevant factors properly considered, this court should show deference to the trial judge's decision.

102 If, in the specific circumstances, the accused's fair trial right can be honoured only by requiring the witness to remove the niqab, the niqab must be removed if the witness is to testify. I would hope, however, that if the individual rights recognized in the *Charter* are treated as something more than additional weapons in the lawyer's legal arsenal, the parties will engage in good faith efforts to reconcile competing interests and produce a satisfactory resolution that recognizes and respects both the accused's right to a fair trial and the witness's right to exercise her religious beliefs.

103 I repeat, each case must turn on its own facts. The full facts of this case, as they relate to this issue, are not known.

VI. Conclusion

104 The appeal brought by N.S. is allowed in part. The cross-appeal brought by M---d.S. is dismissed.

***M.J. Moldaver J.A.*:**

I agree.

***Robert J. Sharpe J.A.*:**

I agree.

Appeal allowed in part.

FN1 This accused is sometimes referred to as her cousin and sometimes as a family friend.

FN2 This summary comes from an outline provided by the Crown to the Superior Court justice.

FN3 Different terms are used to describe N.S.'s veil and clothing. I have used the terms used by her counsel.

FN4 The word "not" appears in the transcript but is clearly either a misprint or the judge misspoke. The word "not" does not belong in the sentence.

FN5 Other sections of Part XVIII that grant powers that could routinely engage competing *Charter* considerations include s. 537(1)(a), the power to adjourn, and s. 537(1.1), the power to prevent improper cross-examination.

FN6 Section 6 of the *Canada Evidence Act*, R.S.C. 1985, c. C5, which permits the court to make orders as to the manner in which a person shall testify if that witness "has difficulty communicating by reason of physical disability", is another example of a statutory power that could only be properly exercised having regard to *Charter* values, particularly those underlying s. 15 and s. 11(d).

FN7 The Women's Legal Education and Action Fund ("LEAF"), one of the interveners, argues that this case should be decided based on the rights guaranteed under ss. 7 and 15 of the *Charter*. N.S. did not advance either claim at the preliminary inquiry or before the Superior Court justice. There is nothing in the record to suggest that but for her religious beliefs, N.S. would have claimed the right to testify while wearing her niqab. There are

several provisions of the *Criminal Code* which provide special protection for complainants when they testify in sexual assault cases (e.g. ss. 486, 486.1, 486.2). In a specific case, there may be an argument for protections beyond those specifically created by the *Criminal Code* for complainants in sexual assault cases. No such argument, other than one based on N.S.'s religious beliefs, was put forward at the preliminary inquiry or in the Superior Court. This case should be litigated as presented by the parties and on the record created by the parties.

FN8 Some of the interveners indicated that other freedoms, such as freedom of conscience and freedom of thought belief or opinion could raise the same issues as does N.S.'s freedom of religion claim. This may be. However, I would leave those questions be resolved in cases in which they actually arise. It may be for example the reconciliation of statements expressing political beliefs with the right to make full answer and defence would be quite different than would be the reconciliation of the right to make full answer and defence with conduct manifesting a religious belief.

FN9 It would, of course, always be open to the Crown having regard to the complainant's desires to stay the prosecution rather than require the witness to testify without her niqab.

FN10 N.S.'s beliefs do not prevent her from showing her face to the other accused, her uncle M---l.S.

FN11 This, like many of the other potential compromises (*e.g.* the use of a female counsel to cross-examine), could be usefully explored at the pre-trial conference stage. It may be there are niqabs that would satisfy the religious requirements of the witness and yet still allow the trier of fact to see to some extent the facial expressions of the witness.

FN12 The judge would, of course, make any order available that would reduce the negative impact on the witness of the order requiring her to remove the niqab. As indicated earlier, the Crown could also stay the proceedings if so inclined.

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