

R v NS (2012): Niqab Rules Balance Religious Freedom and the Right to a Fair Trial

This article was written by a law student for the general public.

Introduction

In *R v NS*,^[1] decided on December 20, 2012, the Supreme Court of Canada ruled on whether a witness could be allowed to wear a niqab^[2] for religious reasons while testifying in a criminal trial. The Court determined that this issue would be examined on a case-by-case basis. The following featured court ruling examines the Court's four-part test meant to balance the witness' right to religious freedom (section 2(a) of the *Charter of Rights and Freedoms* (*Charter*)) and the accused's right to a fair trial (sections 7 and 11(d) of the *Charter*).^[3]

Facts

NS wanted to wear a niqab while testifying in the sexual assault trial of her uncle and cousin. Her uncle and cousin did not want her to wear a niqab, saying that covering her face would infringe on their rights to a fair trial. They asked for an order forcing her to remove the niqab. NS explained that her Muslim beliefs required her to wear her niqab in public, where men, other than her close family, can see her.^[4] Her uncle and cousin argued that allowing her to wear the niqab infringed on their rights because it prevents effective cross-examination and interferes with the ability of the judge or jury to assess NS's credibility.

Procedural History

The preliminary inquiry judge from the Ontario Provincial Court ruled in 2008, that NS would be prohibited from wearing her niqab while testifying. NS appealed this decision to the Ontario Superior Court. In 2009, the Superior Court reversed the decision, and decided that NS could testify while wearing a niqab provided she expressed a sincere religious reason for doing so.^[5] The Court also ruled that a preliminary inquiry judge would have the option to exclude NS's evidence if the niqab prevented accurate cross-examination. NS appealed the Ontario Superior Court's decision to the Ontario Court of Appeal and her uncle and cousin cross-appealed.^[6]

In 2010, the Ontario Court of Appeal found that a judge faced with the witness' request to wear a niqab should determine if wearing the niqab is the result of a sincere religious belief, and if so, whether it intrudes on the accused's right to a fair trial.^[7] The Court noted that if court procedures could not be adapted to accommodate religious practices, the witness would be ordered to remove her niqab to ensure the accused's right to a fair trial was

maintained. Accommodation of religious practices could entail the removal of certain individuals from the room so the witness could feel comfortable removing her niqab while testifying. Accommodation could also involve having the witness testify without the niqab via closed-circuit television or behind a one-way screen. The Court of Appeal sent the matter back to the preliminary inquiry judge to determine the niqab issue. NS appealed the decision to the Supreme Court of Canada.^[8]

Issues

The issue in this case is whether a witness, who wears a niqab for religious reasons, can be forced to remove it when testifying in court.^[9] This issue engages two *Charter* rights:

- the witness's freedom of religion (protected under s. 2(a))^[10]
- the accused's fair trial rights, including the right to make full answer and defence (protected under ss. 7^[11] and 11(d)).^[12]

Decision

The Supreme Court of Canada dismissed the appeal and formulated a list of questions to be considered by a judge in deciding whether a witness should be allowed to wear a niqab while testifying. The matter was sent back to the preliminary inquiry judge for determination.

Court's Analysis

The Supreme Court found the harmful effects of requiring a witness to remove her niqab had to be determined in conjunction with not being able to see a witness' entire face. The Court recognized that requiring the removal of a niqab may result in a complainant being less likely to testify, bring charges in the first place, or, if she is the accused, be unable to testify in her own defence.

In coming to its conclusion, the Court noted that allowing a witness in a criminal trial to hide her face for religious reasons limits the accused's right to a fair trial. This is because, wearing a niqab can limit the effectiveness of cross-examination and assessment of the credibility of the witness, which can be central in cases such as this one. The impact of an unfair trial, on an individual level, to the accused is severe. This is because the individual has a right to his freedom unless the state proves that he committed a crime meriting imprisonment.^[13] Moreover, the right to a fair trial is important to maintain public confidence in the justice system.

On the other hand, the Court noted that forbidding a witness to cover her face for religious reasons opposes the Canadian tradition of religious freedom.^[14] Forbidding this outright could discourage individuals, who wear the niqab, from bringing charges for crimes forward or from acting as witnesses.

In keeping with these considerations, the Court ruled that a judge should ask the following

four questions to determine if a witness should be allowed to wear a niqab while testifying:

(1) Would ordering the witness to remove the niqab while testifying interfere with her religious freedom?

a. The Court noted that sincere religious belief is different than strength of religious belief.[\[15\]](#)

(2) Would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness?

a. The Court noted that there is a common law tradition of witnesses showing their faces; however, if there is no serious risk to trial fairness, the witness should be allowed to wear a niqab.[\[16\]](#)

(3) Is there a way to accommodate both rights and avoid the conflict between them?

a. The Court noted that the parties should be able to place before the Court evidence relating to possible options for accommodation of their potentially conflicting claims.

(4) If no accommodation is possible, do the salutary [positive] effects of requiring the witness to remove the niqab outweigh the deleterious [negative] effects of doing so?[\[17\]](#)

a. The Court noted that the judge has to examine the negative effects of limiting sincere religious beliefs by determining what harm would be caused to the individual and the larger societal context.[\[18\]](#) As well as positive effects of the removal of the niqab, such as the response during cross-examination.[\[19\]](#)

This approach taken by the Court reaffirms that accommodation should be used to reconcile rights, and that if this cannot be done, assessments should be done on a case-by-case basis.

Witnesses with sincere religious beliefs will be required to remove their niqab if a) it poses a significant risk to the fairness of the trial, and b) the positive factors associated with the removal of the niqab outweigh the negative factors of doing so.[\[20\]](#)

Significance of the Ruling

In the *R v NS* case, the Court grappled with assumptions deeply embedded in common law criminal practice and the *Criminal Code*, as well as the accepted judicial view, that seeing the face of a witness assists in credibility assessment and is important to a fair trial. It also grappled with whether the niqab, as an expression of a witnesses' deeply held religious convictions, has a place in a courtroom. By articulating a four-part test, the *R v NS* decision gives judges specific guidelines to use when determining whether a witness can wear a niqab while testifying in a trial. The test requires a careful balancing of competing rights and will be based on the specific facts and circumstances of each case.

- [1] *R v NS*, 2012 SCC 72 [NS].
<<https://www.canlii.org/en/ca/scc/doc/2012/2012scc72/2012scc72.html>>
- [2] A niqab is a veil that covers the face except for the eyes. It is worn in public areas by some women as a requirement of Muslim faith.
- [3] *Canadian Charter of Rights and Freedoms*, s 2(a), 7, 11(d), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 .
<<http://laws-lois.justice.gc.ca/eng/Const/page-15.html>>
- [4] *Supra* at note 1 at para 4.
- [5] *R v NS*, 95 OR (3d) 735, 191 CRR (2d) 228
<<https://www.canlii.org/en/on/onsc/doc/2009/2009canlii21203/2009canlii21203.html>>
- [6] *Supra* note 1 at 5.
- [7] *R v NS*, 2010 ONCA 670
<<https://www.canlii.org/en/on/onca/doc/2010/2010onca670/2010onca670.html>>
- [8] *Supra* note 1 at 6.
- [9] *Ibid* at 7.
- [10] *Charter*, *supra* note 3, s 2(a).
- [11] Section 7 was not exhaustively explored in the analysis of the Supreme Court.
- [12] *Ibid* at 11d.
- [13] *Supra* note 1 at 38.
- [14] *Ibid* at 2.
- [15] *Ibid* at 12.
- [16] *Ibid* at 10.
- [17] *Ibid* at 9.
- [18] *Ibid* at 36-37.
- [19] *Ibid* at 38.
- [20] *Ibid* at 3.