SCC File No. 33989

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)

B E T W E E N:

N.S.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

M---D.S.

Respondent

- and -

M---L.S.

Respondent

RESPONDENT'S FACTUM
(ATTORNEY GENERAL FOR ONTARIO)

DAVID B. BUTT
501 - 205 Richmond Street W.
Toronto, Ontario
M2N 7E9
Tel: (416) 361-9609
Fax: (416) 361-9443
Email: dbutt@barristersatlaw.ca

Counsel for the Appellant

TERRI H. SEMANYK
Shanbaum. Semanyk Professional Corp.
1207 - 150 Isabella Street,
Toronto, Ontario K1S 1V7
Tel: (613) 238-6969, Ext: 2
Fax: (613) 238-9916
Email: tsemanyk@sspclaw.ca

Ottawa Agent for the Appellant

ELISE NAKELSKY
BENITA WASSENAAR
Crown Law Office – Criminal
Ministry of the Attorney General
720 Bay Street, 10th Floor
Toronto, Ontario M7A 2S9
Tel: (416) 212-2149, (416) 326-4191
Fax: (416) 326-4656
Email: elise.nakelsky@ontario.ca
benita.wassenaar@ontario.ca

Of Counsel for the Respondent
Attorney General for Ontario

ROBERT E. HOUSTON, Q.C.
Burke-Robertson
70 Gloucester Street
Ottawa, Ontario
K2P 0A2
Tel: (613) 236-9665
Fax: (613) 235-4430
E-mail: rhouston@burkerobertson.com

Ottawa Agent for the Respondent
Attorney General for Ontario

MICHAEL DINEEN
DOUGLAS USHER
Rusonik, O'Connor, Ross, Gorham & Angelini LLP
100 – 36 Lombard Street
Toronto, Ontario
M5C 2X3
Tel: (416) 598-1811, Ext. 5747
Fax: (416) 598-3384
Email: dineen@criminaltriallawyers.ca

Counsel for the Respondent M---d.S.

BRIAN A. CRANE, Q.C.
Gowling Lafleur Henderson LLP
2600 – 160 Elgin Street
Box 466 Station D
Ottawa, Ontario
K1P 1C3
Tel: (613) 233-1781
Fax: (613) 563-9869
Email: brian.crane@gowlings.com

Ottawa Agent for the Respondent M---d.S.

ENZO M. BATTIGAGLIA
600 - 1000 Finch Avenue W.
Toronto, Ontario
M3J 2V5
Tel: (416) 650-1011
Fax: (416) 650-1980

Counsel for the Respondent M---l.S.

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PART I
OVERVIEW AND STATEMENT OF FACTS

Overview

1. On October 13, 2010, the Court of Appeal for Ontario released its unanimous judgment in this case. The central issue on appeal emanated from an apparent conflict between the constitutional rights of a witness (who is the appellant in this case) and the accused in the same criminal proceeding. The appellant contends that her religious beliefs dictate that she must wear a full body dress and a veil covering her face, known as a niqab, at all times when she is in public, including while she testifies in court. The accused contends that his right to make full answer and defence requires that the appellant's face be observed, particularly for the purposes of cross-examination. The Court of Appeal examined the competing *Charter* values of a witness'

fundamental freedom of religion and an accused's right to a fair trial; and, devised a method by which to best reconcile and accommodate those principles in the context of a specific case.

2. Throughout the years, the rules of evidence and procedure have evolved in an effort to accommodate the truth-seeking function of the courts while still ensuring a fair trial. As minority groups and diverse practices are increasingly accepted in society, progressive changes have similarly been permitted in the courts. Leading jurisprudence from this Honourable Court, allowing for the use of closed-circuit televisions and screens to aid vulnerable complainants, illustrates the manner in which the justice system has evolved to accommodate the disparate needs of judicial participants. In cases like this one, the potential use of constructive compromises is critical to the reconciliation of rights, as there may be measures available to mitigate the possible impact on a witness' right to exercise her religious beliefs and an accused's right to a fair trial. In addition to the constitutional considerations, the proper determination of this issue necessitates consideration of significant legal principles, including the importance of cross-examination, the relevance of demeanour evidence, and the need for a contextual approach to each specific case. The Court of Appeal recognized that a multi-faceted balancing exercise was required to equitably decide this issue and, as such, articulated a clear and comprehensive framework to determine whether a witness may provide testimony while wearing a niqab.

A. Procedural History and the Positions Advanced by the Parties

3. The appellant is the complainant in this matter, which involves allegations of historical sexual abuse. For religious reasons, she wears a niqab which covers her body and face, except for her eyes. Both the Crown and the accused are respondents on this appeal, acting as separate parties. The issue of testimony from the appellant, while wearing her niqab, first arose at the

beginning of the preliminary inquiry on September 10, 2008[1]. The accused persons sought an order forcing the appellant to remove her niqab while testifying at the hearing on the basis that wearing it violated their right to make full answer and defence. The preliminary inquiry judge briefly questioned the appellant about her choice to wear her niqab and, on October 16, 2008, he ordered her to remove it during her testimony.

4. On November 14, 2008, the appellant appealed and sought an order in the Superior Court of Justice for extraordinary remedies in the nature of *certiorari* and *mandamus* to have the ruling of the Ontario Court of Justice quashed; and, she brought an originating application for a *Charter* remedy under section 24(1) to permit her to wear her niqab while testifying. The Court heard submissions from the appellant, the accused, the Crown, and the Ontario Human Rights Commission, which was given intervener status. On April 30, 2009, the Superior Court judge quashed the lower court's order and set out a two-stage test for determining the issue, but declined to impose an order allowing the appellant to wear her niqab. He remitted the matter back to the preliminary inquiry judge.

5. On May 29, 2009, the appellant filed a notice of appeal in the Court of Appeal for Ontario, seeking an order that she be permitted to wear her niqab throughout her testimony at both the preliminary inquiry and the trial. On August 12, 2009, the accused, M.—D.S., also filed a notice of appeal with the Court, seeking an order that the ruling of the Superior Court judge be set aside and the order of the preliminary inquiry judge restored. The Crown was a respondent on both appeals. Five parties, namely the Ontario Human Rights Commission, the Criminal Lawyers Association, the Women's Legal Education and Action Fund, the Muslim Canadian Congress, and the Canadian Civil Liberties Association, were granted intervener status. On June 8 and 9, 2010, the Court of Appeal heard oral submissions from all of the parties.

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[1] To date, the preliminary inquiry has not been completed. The lower court is awaiting a decision from this Court as to whether the appellant may wear her niqab while testifying. Following the judgment of the Court of Appeal, both the Crown and the accused parties were content to proceed, however the appellant was not.

6. On October 13, 2010, the Court of Appeal released its unanimous judgment in this case. The Court quashed the lower court rulings and articulated a thorough legal framework to be applied when determining whether a witness may testify while wearing her niqab. Based on the limited information obtained at the preliminary inquiry, the Court was precluded from making a definitive order as to whether the appellant ought to be permitted to wear her niqab while testifying. The matter was remitted back to the preliminary inquiry judge for re-consideration of the issue in accordance with the Court's judgment.

7. The appellant was granted leave to appeal to this Honourable Court on March 17, 2011. She argues that there is no real conflict between a witness' religious freedom claim and the accused's fair trial rights because fair trial rights are unaffected when a witness wears a niqab. She takes the position, with heavy reliance on social science research papers, that facial cues are not helpful in assessing credibility and that reliance on demeanour evidence is highly subjective and undependable. She claims that demeanour evidence is still largely available even when a niqab is worn. She further argues that the Court of Appeal erred by not accepting the research results and by relying, instead, on the long-standing judicial treatment of demeanour evidence as it relates to the assessment of credibility.

8. It is the Crown's position that the Court of Appeal correctly devised a comprehensive legal framework to address this issue and made no errors of law. The Court aptly recognized that a collision of the constitutional rights of a witness and the accused may arise when that witness wants to wear her niqab when testifying. In order to reconcile the witness' freedom of religion with the accused's right to make full answer and defence, a court will have to utilize a contextual analysis that considers the particular facts of the case as well as the broader societal interests. Constructive compromises and accommodation measures ought to be considered as well. The appellant claims that a veiled witness does not impact on the accused's rights. It is the Crown's

position that such an argument disregards significant constitutional and legal principles. The full spectrum of the witness' and the accused's *Charter* rights must be considered in order to properly reconcile those rights in the context of a specific case. While there may be some limitations on the use to be made of demeanour evidence, it is, nonetheless, entrenched in our fact-finding process and the manner in which cross-examination is conducted and credibility assessments are made. The Court appropriately acknowledged the potential relevance and use to be made of all evidence, including demeanour evidence, and fashioned a test that ensures a complete exploration of all aspects of the constitutional and legal ramifications relevant to a determination as to whether a witness may provide testimony while wearing a niqab.

B. The Evidence Taken at the Preliminary Inquiry

9. In this prosecution, the appellant alleges that, 25 years ago, she was sexually abused as a child by both her cousin, M.—D.S., and her uncle, M.—L.S. She alleges that, between 1983 and 1987, M.—D.S sexually abused her on many occasions, including acts of forced sexual touching and forced fellatio. She was between the ages of 6 and 10 years at the time while he was between 19 and 23 years of age. She also alleges that M.—L.S. committed numerous sexual offences against her during the same time frame. He was between 22 and 26 years of age at the time. The alleged offences include forced sexual touching, forced fellatio, grinding his penis on her body, and one incident of forced sexual intercourse. She reported the sexual abuse to her family in 1992 and then to the police in May 2007. The appellant is a practicing Muslim and has worn a niqab for more than five years. It is her belief that it is contrary to her religion to bare her face to men. She wears her niqab when she is in the presence of any male who she could potentially marry, which includes all males who are not direct members of her family.

Appellant's Record, Reasons of Court of Appeal for Ontario, page 55

10. At the outset of the preliminary hearing, the accused persons brought an application for an order that the appellant remove her niqab while testifying, on the basis that her veil could prove to be an impediment to a proper assessment of her credibility, particularly during cross-examination, and to their ability to make full answer and defence. The Crown opposed the application. The preliminary inquiry judge conducted a "...very informal inquiry" with the appellant. He took brief unsworn evidence from her while her face remained covered. He did not allow counsel to examine her or call any evidence. He asked her about the reasons for wearing her niqab and the strength of her religious views. The following exchange took place:

> **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 for five years now**...there's body language, there's eye contact. I mean, I can look directly at the defence counsel, that's not a problem...**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.]

It was also learned that the appellant had her driver's licence photograph taken while her face was unveiled. The photograph was taken by a female, in an open office, with a screen between the appellant and any potential male onlookers. Following this exchange, the preliminary inquiry judge determined that the appellant should have counsel. She retained her own counsel, who was given standing at the hearing. Oral submissions were made on behalf of all parties.

Appellant's Record, Excerpt of Transcript of the Preliminary Inquiry, pages 150-152

C. The Ruling of the Ontario Court of Justice

11. On October 16, 2008, the preliminary inquiry judge ordered that the appellant testify at the hearing without wearing her niqab. He determined that it was an evidentiary issue, within his jurisdiction, involving the manner in which the appellant would testify. He observed that, in the specific circumstances of this case, the use of a screen in the courtroom would not be helpful because the appellant would still be seen by the accused and other males. He stated that the accused has the right to face his accuser, although it is not an absolute right. He acknowledged that observations of demeanour have received diminished emphasis from the courts and that there are other ways to assess demeanour, including body language, voice inflection, and eye contact. However, he found that the appellant detracted from the strength of her religious belief when she said that wearing her niqab would make her "a lot more comfortable" and because of her unveiled driver's licence photograph. He concluded that the appellant's religious belief is "…not that strong" and ordered that she must testify at the hearing without her niqab.

Appellant's Record, Reasons of the Ontario Court of Justice, pages 4-13

D. The Ruling of the Superior Court of Justice

12. On April 30, 2009, the Superior Court judge quashed the lower court ruling, but declined to grant an order permitting the appellant to wear her niqab. He held that the preliminary inquiry judge was "…not a court of competent jurisdiction" to consider *Charter* rights and then refused to determine the *Charter* issues himself. Instead, he sent the issue back to the Ontario Court of Justice for re-consideration, through the implementation of two smaller hearings, which he constructed, within the preliminary inquiry. The first stage of the hearing would deal with the validity of the witness' religious beliefs; and, the second stage would be comprised of questions about the substantive offences to determine whether the witness could be properly cross-examined while wearing the niqab. Demeanour evidence could be explored at this point. He noted that if the only impairment caused by the niqab would be its effect on the ability to determine the witness' demeanour and credibility, then its impact on cross-examination may be

minimal. At the trial level, the presiding justice would have to make the same two determinations, with the added responsibility of balancing the competing *Charter* issues and other societal interests. The Superior Court judge declined to grant the additional remedy under section 24(1) of the *Charter*, permitting the appellant to wear her niqab, until the parties properly established their respective *Charter* claims.

Appellant's Record, Reasons of the Superior Court of Justice, pages 14-51

E. The Judgment of the Court of Appeal for Ontario

13. Both the appellant and the accused appealed to the Court of Appeal for Ontario. The Court fully addressed the claims on appeal, including the jurisdictional arguments, the respective *Charter* claims, the concept of reconciliation, and the potential for accommodation of the appellant's needs during the proceedings. The Court was cognizant of the difficult nature of the tasks of both the appellant and the accused in the court proceedings. The appellant must testify in open court about childhood sexual abuse and it was no surprise to the Court that she may find solace in her religious beliefs. The accused must respond to those allegations, in part by trying to cast doubt on the appellant's credibility. It was with this accepted wisdom that the Court proceeded to develop a comprehensive framework to best resolve the important competing claims in this case. A detailed summary of the judgment is set out in the paragraphs below.

Appellant's Record, Reasons of the Court of Appeal for Ontario, pages 54-55, 63-64, and 76

(1) The Power of the Preliminary Inquiry Judge to Regulate the Hearing

14. The Court of Appeal held that, while a preliminary inquiry judge has no remedial jurisdiction under the *Charter* to grant a remedy, (s)he does have the jurisdiction to consider and balance *Charter* values when exercising statutory powers. The preliminary inquiry judge is authorized, in accordance with section 537(1)(i) of the *Criminal Code*, to regulate the conduct of the hearing to ensure its proper function in the judicial process. The Court determined that the preliminary

inquiry judge's regulation of the hearing may include the consideration of *Charter* values. The Court held that, just as the preliminary inquiry judge has the power to order how and when a witness will testify, (s)he also has the power to regulate the type of attire worn by that witness, including the power to order the witness to adjust the attire to allow the proper conduct of the inquiry. In exercising that statutory power, the preliminary inquiry judge must consider the impact of that attire on the proceedings and the effect any order may have on the legitimate interests of the accused and the other participants in the process.

Appellant's Record, Reasons of the Court of Appeal for Ontario, pages 73-75

15. The power to regulate, as found in section 537(1)(i) of the *Code,* justifies a vast array of orders customarily made by judges in the course of controlling the conduct of the preliminary inquiry, including orders directed at witnesses. Such orders might entail allowing a witness with a physical disability to testify in a certain manner, allowing a witness' cross-examination to be interrupted to attend a religious observance, allowing a witness to testify through an interpreter, or closing the courtroom to the public where the ends of justice will be best served by doing so. There are also several other statutory provisions in the *Code* which provide a preliminary inquiry judge with powers that will necessitate the consideration of competing *Charter* values. One example cited by the Court was that section 714.3 of the *Code* authorizes a preliminary inquiry judge to order that the evidence of a witness be taken by way of audio link, provided that the witness can be examined and that the court can hear the testimony.

Appellant's Record, Reasons of Court of Appeal for Ontario, pages 67-73

(2) The *Charter* Rights

16. The Court of Appeal recognized that the competing *Charter* values of the appellant's freedom of religion, particularly as a sexual assault complainant, and the accused's fair trial

rights must be balanced and reconciled to the fullest extent possible. The Court elucidated the scope of each right, as outlined below:

(a) The appellant's freedom of religion:

- The appellant's freedom of religion will be infringed if she demonstrates a sincere belief in a religious practice that is interfered with in a manner that is more than trivial or insubstantial.

- The subjective and personal nature of religious claims will involve testimony from the appellant to explain the nexus between her religious practices and beliefs.

- It will be a straightforward inquiry, limited to the appellant's explanation for the conduct at issue. The court must not enter into theological debates; and, conformity with standard religious practice will not be solely determinative.

- Other factors, such as exclusion of the male public, may be considered at this point.

(b) The fair trial rights of the accused:

- The accused's statutory right to cross-examine Crown witnesses at the preliminary inquiry is fundamentally important to the conduct of a fair trial and a meaningful application of the presumption of innocence. However, cross-examination is but one of the means by which the accused makes full answer and defence.

- Not every limit on the right to cross-examine compromises trial fairness. Cross-examination is, primarily, the process of asking questions and eliciting responses from witnesses in a public courtroom. However, while that is the accepted norm in Canadian courts, there is no independent constitutional right to a face-to-face confrontation with one's accuser. There are a number of evidentiary rules, most notably the hearsay exceptions, which may allow for the admissibility of statements by declarants who do not testify at trial. Departures from the customary norm to face one's accuser will contravene the *Charter* only if the result is a denial of the accused's fair trial right.

- Furthermore, appropriate jury instructions may assist in minimizing any unfairness which may flow from an evidentiary or procedural rule that has limited the scope of cross-examination. Fairness takes into account the interests of the accused, the appellant, and the broader societal concern, namely that the process must maintain public confidence.

- Covering the appellant's face may impede cross-examination by limiting the ability to assess her demeanour, which is relevant to the determination of her credibility and reliability. Additionally, non-verbal communication provides valuable insights. Certain facial expressions may lead the examiner in a different direction.

- It is true that credibility assessments based on demeanour can be unreliable and even wrong. Such assessments can reflect cultural biases. The Court stated that, "Judgments based on demeanour are no substitute for those based on a critical analysis of the substance of the entire evidence." Courts are cautioned not to rely predominantly on

demeanour to assess credibility. The niqab still allows for many aspects of demeanour evidence to be assessed, including eye contact and tone of voice.

- Nonetheless, the criminal justice system places considerable value on the ability to see the face of the witness during testimony. Appellate deference is justified on the basis that trial judges have the opportunity to see and hear the witnesses.

- The opportunity to see a witness' face may also be important to issues in a case, other than assessing credibility and providing non-verbal cues. Such cases may include the identity of the witness or the observation of injuries to a witness.

Appellant's Record, Reasons of the Court of Appeal for Ontario, pages 76-89

(3) The Legal Framework

17. The Court developed a comprehensive framework to assist with the reconciliation of the rights asserted when the issue of testimony from a veiled witness arises. It is as follows:

Step One: The court should first inquire if the course of action that the witness asserts is religiously motivated and if the belief is sincerely held.

- If the religious freedom claim is not made out in accordance with the case law, then that ends the matter and the witness is required to remove her niqab while testifying.

Step Two: If there is a valid religious claim, then the court must determine the extent to which the niqab would interfere with or cause an impediment to cross-examination of the witness. At this point, the judge is not deciding whether the niqab will result in a denial of the accused's rights to cross-examine and to a fair trial. The only issue is whether the niqab will impose an impediment to cross-examination that is more than trivial.

- This assessment must be fact-specific and based, in part, on the nature of the evidence to be provided by the witness and its potential impact on the case. Where a witness' credibility is not at issue and/or the testimony is of a peripheral nature then, presumably, the niqab would cause a minimal impediment to cross-examination.

- A judge can take judicial notice of the relevance of demeanour to the assessment of a witness' credibility and of the potential assistance that demeanour may afford to the cross-examiner during questioning.

- Counsel for the accused must establish any claim that the niqab impairs cross-examination; or, interferes with some other aspect of the case, such as the identification of the witness.

Step Three: If the judge is satisfied that the witness' freedom of religion claim and the accused's right to cross-examine are "sufficiently engaged", then the judge must attempt to reconcile the rights by giving effect to both.

- At this stage, context is important, particularly the limited manner in which the niqab interferes with demeanour assessments since observations of tone of voice, body language and eye contact can still be made during cross-examination.

- The diverse interests, set out below, cannot all be fulfilled; although, the reconciliation process requires that all factors be considered. The judge's reasons should demonstrate a complete understanding of the competing interests at stake. Contextual factors may include:

    - Assessments based on tone of voice, eye movements, and body language;
    - Jury instructions that help to explain limits on the ability to cross-examine;
    - The nature of the proceedings and whether the case is at the preliminary inquiry stage (when credibility is not relevant), or at the trial stage (when the case may turn on credibility);
    - The forum in which the trial is to be heard, namely judge alone or judge and jury;
    - The nature of the evidence to be given by the witness wearing the niqab;
    - The nature of the defence to be advanced;
    - Other constitutional values and societal interests, including negative stereotyping and a recognition of minority beliefs;
    - The nature of the witness' role in the hearing;
    - The public interest in getting at the truth in a criminal proceeding; and,
    - The societal interest in the visible administration of criminal justice in open court where witnesses can be seen and identified by the public.

- Of equal importance at this stage is the consideration of "constructive compromises". Accommodation measures or the use of testimonial aids (ie. the screen, closed-circuit television, exclusion of the public, adoption of videotaped evidence, the use of an all female court staff and judge) are available if it is determined that testimony from a veiled witness will infringe the accused's fair trial rights. Efforts to reconcile divergent rights would allow the judge to fully explore with the witness how her religious rights might be respected to minimize the impact on the accused's fair trial rights. For instance, there may be a less intrusive fabric that the witness could wear so as to only minimally impede an assessment of her demeanour.

- The judge may reassess his or her initial decision as the matter proceeds.

Step Four: If the competing *Charter* rights cannot be reconciled and the judge concludes that the niqab would infringe the accused's right to make full answer and defence, then that right must prevail over the witness' religious freedoms. The Court may order the witness to remove her niqab.

Appellant's Record, Reasons of the Court of Appeal for Ontario, pages 90-100

(4) Application to this Case

18. The Court of Appeal sought to apply the above framework to this case; however, deficiencies in the evidentiary foundation did not allow for a meaningful review. The Court held that the

inquiry that was conducted did not allow for a proper determination as to whether an order directing the appellant to remove her niqab would undermine her freedom of religion. The Court further held that the preliminary inquiry judge erroneously assessed the strength, or lack thereof, of the appellant's religious convictions in a manner that was inconsistent with this Court's jurisprudence on the issue. The Court of Appeal stated that, "The full facts of this case, as they relate to this issue, are not known."

Appellant's Record, Reasons of the Court of Appeal for Ontario, pages 100-103, 105

19. The Court of Appeal held that the preliminary inquiry judge ought to have allowed the following steps to be taken at an inquiry into this issue:

- The appellant, or witness, should have the opportunity to consult counsel before she is questioned about her religious beliefs.
- The appellant, or witness, should have the opportunity to testify and explain the nexus between her religious beliefs and wearing a niqab. She should also be permitted to explain the sincerity of her convictions and call additional evidence on the issue.
- Counsel for both the accused and Crown should have the opportunity to examine the appellant, provided the questions (at this point) relate solely to her religious beliefs.
- The accused and the Crown should have the opportunity to call evidence on the issue.
- If the accused's claims extend beyond fair trial rights, such as an identification issue, then there should be the opportunity to call evidence on this position as well.

The Court held that the order directing the appellant to remove her niqab while testifying constituted an error in law on the face of the record and that it should be quashed. Such a determination could only be made after the framework, as set out in the judgment, was properly applied. The Court remitted the case back to the preliminary inquiry judge for completion of the hearing. If the preliminary inquiry judge is still required to determine whether the appellant can wear her niqab while testifying, then he was ordered to do so in accordance with this judgment.

Appellant's Record, Reasons of the Court of Appeal for Ontario, pages 100-103

(5) Significant Conclusions of the Court of Appeal for Ontario

20. At the completion of the judgment, the Court stressed the importance of assessing these types of claims on a case-by-case basis. The reconciliation of the competing *Charter* rights must be determined in accordance with the specific facts of each case and the context in which the competing claims are made. The Court explicitly warned against an order to remove the niqab at the preliminary inquiry if the only basis for the order was that facial cues were crucial to the assessment of a witness' credibility. If the same argument were made at a subsequent jury trial and the case did turn on the credibility of that witness, then the trial judge would have a more challenging determination to make. However, the Court urged a respectful approach focused on the fundamental purpose of the rights at issue:

> I would hope … 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**. [Emphasis added.]

The specific circumstances in each case guide the manner of the reconciliation of constitutional rights and the implementation of suitable accommodations. The Court held that a general rule, either allowing or disallowing the niqab, simply cannot be applicable to every situation.

Appellant's Record, Reasons of the Court of Appeal for Ontario, pages 103-105

PART II

RESPONDENT'S POSITIONS WITH RESPECT TO THE APPELLANT'S QUESTION

21. As her Question in Issue, the appellant asks whether a sexual assault complainant, who wears a niqab in accordance with her genuine religious beliefs, must "partially disrobe" in order to participate in the courtroom proceedings. The Court of Appeal never ordered the appellant to remove her niqab. The Court developed a comprehensive, sensitive and functional framework to assist a judge faced with a witness' claim that her religious beliefs require her to wear a niqab while testifying and an accused's claim that the niqab interferes with his ability to cross-examine her. The test was the result of the thoughtful application of well-settled legal principles to a new and challenging issue, although, to-date, there has been no opportunity to apply the framework to this issue.

PART III

STATEMENT OF ARGUMENT

22. The appellant is seeking an order that she be permitted to wear her niqab while testifying as a witness during the preliminary inquiry and at any trial that may follow. She has focused the majority of her argument on the utility of demeanour evidence, most particularly facial cues, and the social science literature which argues that judicial reliance on such observations ought to be minimized. She takes the position that the niqab does not interfere with the accused's ability to effectively cross-examine a veiled witness or the trier of fact's capability to assess that witness' credibility. The basis for this position is essentially that facial cues are irrelevant and that other aspects of demeanour remain available even when the niqab is worn.

23. It is the Crown's position that the Court of Appeal took the correct approach in devising a framework through which the issue of testimony from a veiled witness could be properly decided. The Court accurately recited the well-settled *Charter* jurisprudence from this Court in

relation to the reconciliation of constitutional rights and freedoms, specifically the freedom of religion and the right to make full answer and defence. The analysis included a thorough exploration of the value of demeanour evidence, particularly facial cues, and the potential impact of the niqab on cross-examination and the ensuing credibility assessment of the witness. The concerns now raised by the appellant are already answered and accounted for in the Court's judgment. With proper reflection on the availability of constructive compromises and the implementation of accommodation measures to facilitate the reconciliation process, the Court articulated an entirely comprehensive framework to determine whether a witness may testify in criminal proceedings while wearing her niqab.

Part I: The *Charter* Analysis

(a) Reconciling *Charter* Rights

24. When a court is faced with the apparent collision of the constitutional rights of a witness and the accused in the same criminal proceeding, the court must first attempt to reconcile those rights so that each right is given the fullest expression within the relevant context. In the case of *Dagenais v. Canadian Broadcasting Corporation*, this Court was faced with disparate *Charter* claims over the imposition of a publication ban. Lamer C.J. (as he then was) rejected a hierarchical approach to conflicting *Charter* rights and held that no *Charter* right should automatically trump another. He stated:

> ...**A hierarchical approach to rights, which places some above others, must be avoided**, both when interpreting the *Charter* and when developing common law. When the protected rights of individuals come into conflict...***Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights**. [Emphasis added.]

Appellant's Record, Reasons of the Court of Appeal for Ontario, pages 77-78
Reference Re Same Sex Marriage, [2004] 3 S.C.R. 698 at paragraph 50
Dagenais v. Canadian Broadcasting Corporation, [1994] 3 S.C.R. 835 at paragraph 72

25. Subsequently, in *R. v. Mills*, this Court had the task of reconciling competing *Charter* rights in the context of an accused who was charged with sexual offences and who sought access to the complainant's therapeutic records. The accused brought a constitutional challenge to the statutory provisions for the production of third party records. McLachlin and Iacobucci JJ. explained the tension between sections 7, 11(d), 8, and 15 of the *Charter*, stating:

> On the one hand stands the accused's right to make full answer and defence. On the other hand stands the complainant's and witness's right to privacy. **Neither right may be defined in such a way as to negate the other and both sets of rights are informed by the equality rights at play in this context.** [Emphasis added.]

They stated further that, "No single principle is absolute and capable of trumping the others; all must be defined in light of competing claims."

R. v. Mills, [1994] 3 S.C.R. 668 at paragraphs 17, 23, 61

26. This case is analogous to *Mills* in both its tension between sections 7 and 11(d) on the one hand and section 2(a) on the other; and, as a result of the sensitive context of the subject matter in the cases. Both prosecutions involved the protection of the fair trial rights of accused persons charged with sexual offences and the protection of the fundamental rights of complainants. There is a broad societal interest in ensuring that accused persons can make full answer and defence, including the ability to effectively cross-examine, and that sexual assault complainants have sufficient protection to come forward with their allegations. When section 7 *Charter* rights are at stake, but in conflict with other rights, that conflict should be resolved through section 7 itself, and not through section 1. McLachlin and Iacobucci JJ. held:

> As this Court's decision in *Dagenais, supra*, makes clear, *Charter* rights must be examined in a contextual manner to resolve conflicts between them. Therefore, unlike s. 1 balancing, where societal interests are sometimes allowed to override *Charter* rights, **under s. 7 rights must be defined so that they do not conflict with each other. The rights of full answer and defence, and privacy, must be defined in light of each other**, and both must be defined in light of the equality provisions of s. 15. [Emphasis added.]

They further held that even when different *Charter* rights are raised, the analysis will not change and the rights must always be defined contextually.

> *Mills, supra,* at paragraphs 21-22, 64-68

27. It was further noted, in *Mills,* that an accused's fair trial rights must account for considerations beyond his or her own personal rights and must include an assessment of the fairness of the trial process from the point of view of the complainant and the community as well. This Court held:

> The right of the accused to make full answer and defence is a core principle of fundamental justice, but it does not automatically entitle the accused to gain access to information contained in the private records of complainants and witnesses. **Rather, the scope of the right to make full answer and defence must be determined in light of policy and equality rights of complainants and witnesses**...Most cases, however, will not be so clear...**courts must determine the weight to be granted to the interests protected by privacy and full answer and defence in the particular circumstances of each case**... [Emphasis added.]

The accused's fair trial rights must be balanced with the appellant's right to express her freedom of religion while considering the community's interest in an open trial process. The rights of the interested parties must be analyzed contextually and assessed on a case-by-case basis.

> *Mills, supra,* at paragraphs 64, 72, 76, 94

(b) Freedom of Religion

(i) The General Principles

28. The freedom of conscience and religion is a fundamental freedom, guaranteed under section 2(a) of the *Charter*. In *Syndicat Northcrest v. Amselem*, this Court gave freedom of religion an expansive definition. Iacobucci J. cited previous jurisprudence which defined the concept of freedom of religion as the right to entertain whatever religious belief an individual chooses and to do so openly, without fear of reprisal. He outlined the test under section 2(a) as follows:

> 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…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**. Only then will freedom of religion be triggered. [Emphasis added.]
>
> *Syndicat Northcrest v. Amselem,* [2004] 2 S.C.R. 551 at paragraphs 39, 40-43, 46-47, 56, 62

29. In the subsequent case of *Alberta v. Hutterian Brethren of Wilson County,* McLachlin C.J. concisely outlined the following two-part test to determine whether a claimant's freedom of religion has been infringed:

> (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and,
>
> (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial.

Trivial or insubstantial interference was described as interference which does not threaten actual religious beliefs or conduct.

> *Appellant's Record,* Reasons of the Court of Appeal for Ontario, pages 85-89
> *Alberta v. Hutterian Brethren of Wilson County,* [2009] 2 S.C.R. 567 at paragraph 32
> *Amselem, supra,* at paragraphs 57-61

(ii) The Religious Practices of the Witness

30. The role of the court is not to determine whether a religion requires a particular practice, but rather to decide whether a claimant's belief is a sincere or honest one. Any inquiry is not intended to be an affront or cast doubt on the appellant's faith. As emphasized by the Court of Appeal in this case, a witness' right to freedom of religion is not inherently triggered by participation in the criminal justice system. Rather, a witness, who seeks to exercise a religious practice while testifying, must demonstrate a sincere belief in the religious practice and that the impugned act will interfere with her ability to act in accordance with that practice in a non-trivial way. As such, there is a significant subjective and personal nature to a freedom of religion claim. The establishment of such a claim will almost certainly involve testimony from the witness to explain the nexus between the religious practice in question and her beliefs. Typically, the evidentiary hearing itself should be straightforward and limited to the witness'

explanation of her religious claim. The Court of Appeal stated, "I would stress…the narrow focus of the inquiry into N.S.'s religious beliefs. Maintaining that focus should avoid a prolonged proceeding." The inquiry may also provide some answers as to how, if at all, the witness' religious practice can be accommodated in the courtroom without infringing any *Charter* rights.

> *Appellant's Record,* Reasons of the Court of Appeal for Ontario, pages 85-89 and 102
> *Amselem, supra,* at paragraphs 51-54
> *Hutterian Brethren, supra,* at paragraphs 32, 89

31. The presiding judge will not enter a theological debate or query the witness' level of compliance with her religion. The evidence called should simply reveal the genuineness of her personal religious belief. There are many factors which may be examined at this stage, such as the credibility of the witness' testimony on this issue and whether the belief is consistent with the witness' other current religious practices, although the criteria used to demonstrate the witness' religious convictions may differ, depending on the case. This Court stated in *Amselem*,

> 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 current beliefs are religiously 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**. [Emphasis added.]

Past compliance with religious practices is not necessary to establish a genuine religious belief at the time of trial. The important factor is the present, personal beliefs of the witness.

> *Appellant's Record,* Reasons of the Court of Appeal for Ontario, pages 85-89
> *Amselem, supra,* at paragraph 53

(iii) The Incomplete Inquiry of the Appellant in this Case

32. In this case, the preliminary inquiry judge suggested, following his brief inquiry of the appellant, that her religious beliefs were "not that strong" and subject to exceptions, such as her unveiled driver's licence photograph. While the existence of the photograph should not have been determinative of the sincerity of her beliefs, it may still comprise some of the available evidence on this issue. A proper inquiry into her religious freedom claim never occurred in this

case. She was not properly questioned, there was no other evidence of her religious belief called, and there was no opportunity to consider how her religious freedom claim might co-exist with the accused's right to make full answer and defence. Had evidence been advanced in support of the appellant's religious freedom claim, then the utility of one of the available accommodations, such as testifying with the use of a closed-circuit television or a screen, could have been explored as well.

Appellant's Record, Reasons of the Ontario Court of Justice, pages 101-103

(c) The Right to Make Full Answer and Defence

(i) Cross-Examination

33. The accused's right to make full answer and defence is guaranteed under sections 7 and 11(d) of the *Charter*. It is one of the principles of fundamental justice and is integrally linked to other principles of fundamental justice, such as the presumption of innocence and the right to a fair trial. While these rights do not guarantee that an accused will receive the perfect procedure at trial, or even the most favourable procedure, the requirements of fundamental justice embrace the necessity for procedural fairness, including the accused's statutory right to cross-examine Crown witnesses at the preliminary inquiry, pursuant to section 540 of the *Criminal Code*. In *R. v. Lyttle*, this Court held:

> [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.]

Of note, in this particular case, there is no suggestion that the accused would be deprived of the opportunity to cross-examine. The only issue is whether the appellant may wear her niqab during the questioning.

Appellant's Record, Reasons of the Court of Appeal for Ontario, pages 78-84
R. v. Osolin, [1993] 4 S.C.R. 595 at pages 663-665
Mills, supra, at paragraphs 72-76
R. v. Rose, [1998] 3 S.C.R. 262 at paragraphs 98 and 99
R. v. Lyttle, [2004] 1 S.C.R. 193 at paragraph 41

34. The Court of Appeal recognized that the niqab itself had the potential to impede cross-examination. This was by no means a statement that the niqab would prevent the proper truth-seeking function, but rather was an acknowledgement that it *could* affect a case, depending on the particular facts. The Court stated:

> 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 constitutional values underlying those interests. [Emphasis added.]

Once a valid religious claim is made, the presiding judge must determine the extent to which the niqab will interfere with the cross-examination of that witness and whether that impediment will be more than trivial. The assessment must be fact-specific, dependent on the significance of the witness' evidence to the entire case and the importance of her credibility to an appraisal of her testimony. If there is only minimal interference with the cross-examination of the witness, then a limitation on her religious freedom will not be justified.

> *Appellant's Record,* Reasons of the Court of Appeal for Ontario, pages 84 and 90-91
> *Amselem, supra,* at paragraph 84

35. The appellant's position on cross-examination is essentially subsumed in her broader argument challenging the relevance of demeanour evidence in general. The Crown submits that the Court of Appeal was correct to acknowledge the potential for the niqab to impact on cross-examination as an important consideration distinct from the issue of demeanour more generally. A trier of fact's use of demeanour in assessing the credibility of a witness is a different process than the cross-examiner's interaction with that same witness. This point was elegantly made in

the case of *Police v. Razamjoo*[2], from the District Court in Auckland, New Zealand. In that case, the trial judge was faced with the issue of whether two witnesses should be permitted to testify while veiled[3]. The accused argued that the inability to observe their demeanour would impair his right to a fair trial. The trial judge commented on the nature of cross-examination as follows:

> Although effective cross-examination is generally the outcome of careful preparation and the 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.** [emphasis added]

In the case at bar, the Court of Appeal developed a contextual approach, including the ability of the presiding judge to change his or her ruling on this issue part way through a witness' testimony, if the assessment changes. This will permit ongoing consideration of the full panoply of factors affecting the impact, if any, of a niqab on cross-examination.

> *Appellant's Record,* Reasons of the Court of Appeal for Ontario, page 81, 104-105
> *Police v. Razamjoo,* [2005] D.C.R. 408 (D.C.N.Z.) at paragraph 81

(ii) Demeanour Evidence

36. This Court has repeatedly, clearly, and recently affirmed the relevance of demeanour as an essential component of credibility assessments. As stated in *R. v. Khelawon*:

> Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, **whose demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence**. [Emphasis added.]

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[2] This is an insurance fraud case and not as fraught with sensitivities as the case at bar, which involves sexual assault allegations.

[3] In *Razamjoo*, "burqa" (not "niqab") was the word used to describe a Muslim veil covering the entire face and body.

However, the appellant takes the position that the Court of Appeal erred by recognizing the relevance of demeanour evidence. To make her argument, the appellant relies on current literature and research that questions the value of demeanour evidence. In particular, the appellant makes reference to an unpublished "research report" as containing "uncontradicted scientific evidence". The Crown takes the position that this is an improper method to attempt to ground her argument, and that the state of the social science research is not as straightforward as the appellant asserts. The conclusion in a recent legal article is telling:

> There remains a great deal that we do not know about lie detection that should matter to the legal system, but we know more than the legal literature usually reflects. While the newest results on lie detection support the now-traditional view in legal academia that demeanor is not a valuable tool in making credibility decisions, they undermine the further conclusion that accurately detecting lies is impossible and, as a result, we should view credibility decisions by juries as not better than a coin flip. When bias and context are incorporated, we should expect that deception detection accuracy is highly heterogeneous and varies substantially based on the situation. **We just do not yet know enough about bias, base rates, and the value of context to say whether the social science evidence supports that currently skeptical view on legal lie detection**. [Emphasis added.]

Furthermore, such reports have not been tendered as expert evidence and, as such, can only provide the social context in which the utility of demeanour evidence should be assessed.

> *Laurentide Motels v. Beauport (City),* [1989] 1 S.C.R. 705 at 799
> *R. v. S.(R.D.)* [1997] 3 S.C.R. 484 at paragraph 129
> *R. v. Lifchus*, [1997] 3 S.C.R. 320 at paragraphs 29-30
> *R. v. Khelawon*, [2006] 2 S.C.R. 787 at paragraph 35
> *R. v. Spence*, [2005] 3 S.C.R. 458 at paragraphs 58, 68-69
> Max Minzner, "Detecting lies using demeanor, bias, and context" (2008) 29 Cardozo L. Rev. 2557 at 2578; see also Barry R. Morrison, Laura L. Porter & Ian H. Fraser, "The role of demeanour in assessing the credibility of witnesses" (2007) 33 Advocates' Q. 170 at 183, 190-192

37. In any event, the Court of Appeal explicitly addressed the appellant's demeanour argument and the limitations of demeanour evidence:

> 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' body language, her eyes, her tone of voice and the manner in which she responds to questions. All are important aspects of demeanour.
>
> **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.** [Emphasis added.]
>
> *Appellant's Record,* Reasons of the Court of Appeal for Ontario, pages 81-82

38. The Court of Appeal's acknowledgement that demeanour is part of the trial process does not reflect an unwillingness to break with legal tradition. Rather, it is driven by fundamental aspects of the Canadian legal system, namely a public, adversarial process in which face-to-face confrontation is the norm and cross-examination is central to credibility determinations. Moreover, the widely acknowledged limitations and dangers of demeanour evidence do not render such evidence irrelevant in all cases. Demeanour evidence remains a tool in the trier of fact's toolkit. Concerns about demeanour evidence can be addressed through judicial education and training and appropriate jury instructions, such as the following sample instruction:

> What was the witness's manner when he or she testified? **Do not jump to conclusions, however, based entirely on the witness's manner. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently.** Witnesses come from different backgrounds. They have different intellects, abilities, values, and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or the most important factor in your decision.[4]

The value of demeanour and possible limitations to its relevance will vary depending on the case. The highly individualistic nature of credibility determinations necessitates an approach to

[4] When a witness is wearing a niqab, it may also be appropriate to provide an instruction that the jury should not discount the weight to be given to her testimony simply by virtue of the fact that she is wearing a niqab. Alternatively, if the witness normally wears a niqab but was ordered to remove it during her testimony, it may be appropriate to consider a jury instruction to explain that leaving her face unveiled may affect her demeanour.

demeanour evidence which is tailored to the facts and circumstances of the particular case. The contextual analysis developed by the Court encompasses just such an approach.

> *R. v. Pelletier* (1995), 165 A.R. 138 at 142 (C.A.)
> *Law Society of Upper Canada v. Neinstein* (2010), 99 O.R. (3d) 1 (C.A.) at paragraph 66
> *R. v. C.H.* (1999), 182 Nfld. & P.E.I.R. 32 (N.S.C.A.) at paragraph 24; leave denied [1999] S.C.C.A. No. 618
> Canadian Judicial Council, *Preliminary Instructions,* online: (March 2011) Canadian Judicial Council <http://www.cjc-ccm.gc.ca/cmslib/general/NCJI-Jury-Instruction-Preliminary-2011-03-E.pdf > 4.11 at paragraph 5
> Barry R. Morrison, Laura L. Porter & Ian H. Fraser, "The role of demeanour in assessing the credibility of witnesses", *supra* at 191
> S. Casey Hill, David M. Tanovich & Louis P. Strezos, McWilliams' Canadian Criminal Evidence, 4th ed., vol. 2 (Aurora: Canada Law Book, 2011) at 27-1 to 27-12
> *R. v. S.(R.D.)*, *supra* at paragraph 128

39. The Court of Appeal's approach to demeanour also reflects the reality that it is virtually impossible to excise this complex and multifaceted concept from our justice system. The purely instinctual treatment of a veiled witness at a recent Immigration and Refugee Board hearing is similar to the common sense approach underlying the Court's judgment. The Board did not consider *Charter* values, but simply held the following:

> It should be noted that the appellant attended her hearing wearing a burqa that obscured all but her eyes. This struck the panel as odd as, in the photographic evidence contained in the disclosure, she was pictured with her face uncovered and in at least one case without wearing head cover at all. **As the panel is required to assess credibility and is of the opinion that seeing an appellant's face is essential to both identification and assessing her demeanour, the appellant was asked to remove her burqa**, which she did. [Emphasis added.]

Indeed, demeanour is embedded into our system and the fact finding process. It is, in part, the integrated nature of demeanour evidence which gives it significant value. Triers of facts must triangulate observed demeanour with the substance of the testimony.

> *Manjra v. Canada (Minister of Citizenship and Immigration)*, 2010 CanLII 94683 (I.R.B.) at paragraph 4
> *R. v. Khelawon*, *supra* at paragraph 35
> *Morales v. Artuz*, 281 F.3d 55 (U.S. C.A., 2nd Cir. 2002) at 61-62
> Barry R. Morrison, Laura L. Porter & Ian H. Fraser, "The role of demeanour in assessing the credibility of witnesses", *supra* at 190
> Max Minzner, "Detecting lies using demeanor, bias, and context", *supra* at 2567-8

(iii) Facial Cues

40. Just as it is impossible to extract demeanour from the trial process, it is similarly not feasible to isolate facial cues as a separate and distinct aspect of demeanour. Demeanour assessments involve a complex mix of a wide variety of considerations, including "movements, glances, hesitations, trembling, blushing, surprise or bravado". Demeanour has been described as broadly as "every visible or audible form of self-expression manifested by a witness whether fixed or variable, voluntary or involuntary, simple or complex". Demeanour assessments form part of the credibility analysis, a process which, although within the competence of ordinary people, is a "difficult and delicate matter" that is not scientific or purely intellectual. Although the Court of Appeal correctly acknowledged that some aspects of demeanour may still be available with the niqab, the Crown submits that the veil's ability to limit access to demeanour evidence may go beyond facial cues, depending on the circumstances of the case. Again, the case of *Razamjoo* is instructive. The presiding judge in that case commented on the witness' testimony while veiled, as follows:

> A sense of the witness' character emerged, though much more slowly than is usual when a witness can be seen. There was however still a strong sense of disembodiment, far greater than arises in receiving evidence by video link or the playing of an evidential videotape.

The record in the case at bar is insufficient to determine the precise impact of the appellant's niqab on demeanour. However, the approach set out by the Court of Appeal, particularly the ability for the judge to change the ruling once the person actually testifies, will ensure an individualized understanding of demeanour in the particular circumstances of the case.

Laurentide Motels v. Beauport (City), supra at 799
Barry R. Morrison, Laura L. Porter & Ian H. Fraser, "The role of demeanour in assessing the credibility of witnesses", *supra* at 179
R. v. Marquard, [1993] 4 S.C.R. 223 at paragraph 49
R. v. R.E.M., [2008] 3 S.C.R. 3 at paragraph 49
R. v Gagnon, [2006] 1 S.C.R. 621 at paragraph 20
Police v. Razamjoo, supra at paragraph 69

(iv) Judicial Notice

41. The appellant specifically takes issue with the statement of the Court of Appeal that "[a] judge can take judicial notice of the relevance of demeanour to the assessment of a witness's credibility and reliability". However, that one sentence ought not to be taken out of context. The statement is part of a paragraph dealing with the nature of the proof required for the determination of whether a niqab would interfere with the accused's ability to cross-examine the witness. The comment is simply part of an early step in a multi-stage test that culminates in a contextual analysis aimed at understanding the specific relevance of demeanour in the particular circumstances of the case. Referring to the summary of the Court of Appeal's test, as set out in paragraph 17 of this factum:

- At step two, when determining whether the accused's ability to cross-examine is engaged, the defence must demonstrate an air of reality to a specific claim such as the need for the witness' face to be revealed in order to establish identity. However, a judge can take judicial notice of the relevance of demeanour generally, and specifically in relation to cross-examination.

- If the judge is satisfied that the witness' religious freedom and the accused's right to cross-examine are sufficiently engaged, then the judge would move to step three and attempt to reconcile the two rights using a detailed, contextual analysis.

Given that step three of the test requires an appreciation for and assessment of the specific implications of a niqab in the particular case, the comment about judicial notice in step two cannot constitute an error. Again, the judge's ability to change the ruling after testimony begins underscores the individualized nature of the analysis. The more fundamental response to the appellant's demeanour argument, however, is this Court's repeated affirmation of the relevance of demeanour, as noted above.

Appellant's Record, Reasons of the Court of Appeal for Ontario, pages 90-92
Laurentide Motels v. Beauport (City), supra at 799
R. v. S.(R.D.) supra at paragraph 129
R. v. Lifchus, *supra* at paragraphs 29-30
R. v. Khelawon, *supra* at paragraph 35

(d) Societal Interests

42. The Court of Appeal explicitly recognized that the proposed contextual analysis required a consideration of "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". The Crown supports the Court's specific recognition of the following considerations:

- the risk of negative stereotyping of Muslims in Canada;
- Canada's multi-cultural heritage;
- access to justice;
- promoting gender equality of sexual assault victims;
- the courts' truth seeking function;
- an open court process;
- confidence in the administration of justice; and,
- public accountability.

Appellant's Record, Reasons of the Court of Appeal for Ontario, pages 95-97

43. The latter three principles are implicit in the following comment from the U.S. Supreme Court, in interpreting the American confrontation clause: "[t]he Sixth Amendment's guarantee of face-to-face encounter between witness and accused serves ends related both to appearances and to reality". The Court of Appeal elaborated on the societal interest in the open court process, confidence in the administration of justice, and public accountability, stating:

> 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 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.

In the case of *Razamjoo*, these fundamental principles heavily influenced the trial judge's analysis and determination.

Coy v. Iowa, 487 U.S. 1012 (1988) at 2801
Appellant's Record, Reasons of the Court of Appeal for Ontario, pages 96
Police v. Razamjoo, supra at paragraphs 95, 103-109

(e) The International Experience Supports the Court of Appeal's Approach

44. While there is not a plethora of persuasive international jurisprudence on this issue, the experiences of other jurisdictions generally support the Court of Appeal's framework, particularly the need for a case by case approach to the balancing of interests:

- ***The Queen and Anwar Shah Sayed*:** In this criminal case, the witness was ordered to testify without her niqab in a fraud trial. The trial judge noted that the issue had arisen "in the circumstances of this particular case, which is a criminal prosecution, and it is within that context that the issue before the court is to be determined". She stated that her decision "will not and, in fact, cannot serve as a precedent". The Crown in that case had submitted that the issue needed to be determined on a case by case basis.

- ***Re S*:** The court was faced with the issue of whether the petitioner in a family law case should be required to remove her veil while testifying. The court noted that "[e]ach case must obviously be looked at in its own circumstances".

- ***Police v. Razamjoo*:** The trial judge engaged in a fact-specific analysis that weighed various interests, both in his decision as to whether the veil should be worn and in permitting accommodations for the unveiled witnesses.

- An ***Equal Treatment Bench Book*** for judges and a ***Guidance Note*** for prosecutors have been developed in the U.K. Both caution against assuming, without good reason, that a woman must remove her veil. Rather, it is necessary to consider the particular circumstances of the case.

National Transcription Services, *Decision of Justice Deane of the District Court of Western Australia in the Queen and Anwar Shah Wafiq Sayed,* Transcript of Proceedings, 19 August 2010 at 1041, 1045, 1047, 1051, 1058
Re S (Practice: Muslim Women Giving Evidence), [2007] 2 FLR 461 (High Ct. Fam. Div. at paragraph 17
Police v. Razamjoo, supra at paragraphs 75, 105, 107-108
Judicial Studies Board, *Equal Treatment Bench Book*, (December 2007), Part 3, Chapter 3.3, online: Judiciary of England and Wales <http://www.judiciary.gov.uk/Resources/JCO/Documents/Training/2009_etbb_3_religon.pdf> at 3-18/3, 3-18/6
COPFS Policy Division, *The Niqab (Face Veil) and the Courts* (October 2008), online: Crown Office and Procurator Fiscal Service <http://www.copfs.gov.uk/sites/default/files/Publications/Resource/Doc/15023/0000502.pdf> at paragraphs 2.16, 2.22, 7.33

Part II: The Need for Accommodation: "Constructive Compromises"

45. In certain cases, accommodation measures are available if the presiding judge determines that the testimony from a veiled witness would infringe the fair trial rights of the accused. This should not be an 'all or nothing' situation. In this case, the Court of Appeal held that potential

"constructive compromises" must also be considered as part of the reconciliation process. There may be available measures to mitigate any potential harm to the competing *Charter* values and, in the end, produce a process in which both values can be sufficiently proctected. Certainly, this Court's contextual approach to balancing *Charter* rights demonstrates that a blanket rule, for instance either allowing all women to wear niqabs or prohibiting niqabs in the courtroom completely, would not suffice and certainly would not accommodate the intricacies of diverse cases. In *R. v. Harrer*, this Court held:

> As in other cases involving broad concepts like "fairness" and "principles of fundamental justice", **one is not engaged in absolute or immutable requirements**; these concepts vary with the context in which they are invoked…Specifically here, **one is engaged in a delicate balancing to achieve a just accommodation between the interests** of the individual and those of the state in providing a fair and workable system of justice. [Emphasis added.]

To that end, Crown counsel may consider whether to bring an application to use testimonial aids such as the presence of a support person in the courtroom, a screen, or a closed circuit television, depending on whether those options would satisfy the witness' needs. These testimonial aids are most often used to assist in obtaining full and candid accounts from witnesses and, as such, they may not provide the *perfect* answer to the issue of accommodating the witness' religious freedom. However, there may be other alternatives which could be arranged to accommodate the witness after a hearing in which the witness' precise concerns have already been established.

Appellant's Record, Reasons of the Court of Appeal for Ontario, pages 97-100, 103
R. v. Harrer, [1995] 3 S.C.R. 562 at paragraph 14

46. In *R. v. Levogiannis*, this Court upheld the constitutionality of the predecessor to section 486.2(2) of the *Criminal Code*, which now allows a judge to permit a witness to testify outside the courtroom (by way of a closed circuit television) or behind a screen, if the judge decides that the order is necessary to obtain a full and candid account from the witness. The screen allows the complainant not to see the accused, but does not obstruct the view of the complainant by the accused, counsel, or the trier of fact. L'Heureux-Dubé J. stated that the main objective of this

legislation was to "get at the truth" and that the rules of evidence are not cast in stone, but rather evolve with time to accommodate the truth-seeking functions of the courts, while still ensuring the accused's right to a fair trial. In the companion case of *R. v. L.(D.O.)*, which upheld the constitutionality of section 715.1 allowing the admissibility of videotaped evidence from young sexual abuse complainants, L'Heureux-Dubé J. stated that criminal justice should be enforced in a manner that is "…both fair to the accused and sensitive to the needs of those who participate as witnesses." She held, in both cases, that the accused's right to cross-examination remained intact even with use of these provisions.

R. v. Levogiannis, [1993] 4 S.C.R. 475 at paragraphs 17, 20-24, 32
R. v. L. (D.O.), [1993] 4 S.C.R. 419 at paragraphs 46, 58-60
R. v. J.Z.S., [2008] B.C.J. No. 1915 (B.C.C.A.) at paragraph 41
R. v. J.Z.S., [2010] 1 S.C.R. 3

47. Upon determining the specific needs of the witness and difficulties she might experience in testifying without her niqab, the court may consider the usefulness of the accommodation measures available in the *Criminal Code*, for example:

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

The Court of Appeal also suggested the possibility of closing the courtroom to all male persons, other than the accused and his counsel; or, even use of an all female court staff, a female judge, and (where constitutionally permissible) an order that the witness be cross-examined by female counsel. Other options may include different styles or fabrics of niqabs which may minimize the interference with the trier of fact's ability to assess her demeanour.

Appellant's Record, Reasons of the Court of Appeal for Ontario, pages 97-100

48. Other jurisdictions that have addressed this issue have used or suggested various accommodations, alone or in combination, including:

- screens;
- a headscarf that does not cover the face;
- the use of female court staff;
- the presence of a support person;
- closed circuit television; and,
- clearing the public gallery.

While the examples provided may not be the precise compromise or accommodation needed in the present case, appropriate accommodations can be considered once there is a proper appreciation of the relevant facts. From a jurisdictional perspective, there is room for creativity in devising "constructive compromises" which permit the fullest expression of the rights at issue. Accommodations are more likely to be required at the trial level where the judge could rely on the broadly defined inherent jurisdiction of superior courts to devise solutions that go beyond the measures in the *Criminal Code*. For similar accommodations at the preliminary inquiry, the judge could rely on section 537(1)(i) of the *Code*, the scope of which is discussed below in relation to the preliminary inquiry judge's jurisdiction to order removal of a witness' veil.

> *Police v. Razamjoo, supra* at paragraph 110-112
> *Re S (Practice: Muslim Women Giving Evidence), supra,* at paragraph 16
> *Equal Treatment Bench Book, supra,* at 3-18/4, 3-18/6
> Note, *supra* at paragraphs 2.25, 7.32-7.40
> National Transcription Services, *Decision of Justice Deane of the District Court of Western Australia in the Queen and Anwar Shah Wafiq Sayed,* Transcript of Proceedings, 6 October 2010 at 1083-1084
> National Transcription Services, *Decision of Justice Deane of the District Court of Western Australia in the Queen and Anwar Shah Wafiq Sayed,* Transcript of Proceedings, 15 October 2010 at 1834-1874
> *R. v. Cunningham*, [2010] 1 S.C.R. 331 at paragraph 18
> *R. v. Caron*, [2011] 1 S.C.R. 78 at paragraph 24

Part III: The Proper Forum and Context for Application of this Framework

(a) The Power of the Preliminary Inquiry Judge to Regulate the Hearing

49. The Court of Appeal correctly determined that a witness' religious freedom claim could properly be made at both the preliminary inquiry and trial levels. In accordance with section

537(1)(i) of the *Code*, preliminary inquiry judges have the power to regulate the course of the inquiry, which justifies several orders routinely made during the hearing including orders directed at witnesses. For instance, the preliminary inquiry judge has the power to interrupt a witness' cross-examination for a religious observance and to determine when a witness can testify using an interpreter. In both examples, the preliminary inquiry judge will be assessing constitutional values. The Court of Appeal correctly held that, similar to the power to regulate how and when a witness testifies, the preliminary inquiry judge has the jurisdiction to make an order with respect to a witness' attire. In exercising that power, the preliminary inquiry judge can further consider the impact of the niqab on the proceedings, the effect any order may have on the legitimate interests of the accused or other judicial participants, and whether the applicant will be permitted to wear the niqab during her testimony. In this manner, the preliminary inquiry judge is regulating the hearing "…to ensure that it can perform its proper function."

Appellant's Record, Reasons of the Court of Appeal for Ontario, pages 67-71, 73, 75
R. v. Seaboyer, [1991] 2 S.C.R. 577 at paragraphs 111-112 and 115
R. v. L.R. (1995), 100 C.C.C. (3d) 329 (Ont. C.A.) at pages 340 and 342

(b) Credibility Assessments: Limited Scope for Removal at the Preliminary Inquiry

50. While the Court of Appeal clearly held that the preliminary inquiry judge has the power to regulate the hearing, the Court was in no way sanctioning the position that determinations of credibility *should* be made at the preliminary inquiry level. The Court held,

> Context also includes the nature of the proceeding…The reconciliation may be very different at **the preliminary inquiry, where a 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 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. [Emphasis added.]

To be clear, the Court later concluded,

> …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**. [Emphasis added.]
>
> *Appellant's Record,* Reasons of the Court of Appeal for Ontario, pages 93 and 103

51. The assessment of the demeanour of the appellant will have minimal, if any, impact on the conduct of the preliminary inquiry. While the Court correctly declined to entirely ban preliminary inquiry judges from considering the issue in rare circumstances, there would be negligible justification for litigating this issue at this stage. The limited scope for removal of a niqab at a preliminary inquiry alleviates the concern that there may be inconsistent findings between the preliminary inquiry and trial levels or that the determination made by a preliminary inquiry judge may undermine the trial judge's decision.

> *Appellant's Record,* Reasons of the Court of Appeal for Ontario, pages 67-73

(c) The Court of Appeal Correctly Returned this Case to the Preliminary Inquiry Level

52. Despite acknowledging the limited scope for removal at the preliminary inquiry, the Court of Appeal was correct not to make a determination on removal of the niqab in this case, given the incomplete record. A proper evidentiary foundation was never established and, as such, the Court of Appeal could not have allowed the appellant to testify while wearing her niqab. The Court held:

> 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 freedom of religion…
>
> **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.…The Crown and defence should also have had the opportunity to call evidence on the issue**…

> 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' demeanour and reliability, **the defence should have the opportunity, once the religious claim is established, to put that position forward**...
>
> **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. [Emphasis added.]

The inadequate examination of the appellant precluded the Court from making such an order. In the circumstances, the Court took the most appropriate course by remitting this matter to the preliminary inquiry judge to determine the legal issue in accordance with its judgment.

Appellant's Record, Reasons of the Court of Appeal for Ontario, pages 100-102

Part IV: Other Points Raised by the Appellant

(a) The Appellant's Reference to the "Three Elephants in the Room"

53. At paragraphs 48 to 65 of her factum, the appellant claims that there are "three elephants in the room" which must be addressed. Firstly, she states that the status of the niqab in the Muslim religion is irrelevant. As previously mentioned, the Court of Appeal declined to make any such inquiry. Consistent with this Court's section 2(a) jurisprudence, the Court of Appeal stated:

> 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... [Emphasis added.]

Appellant's Record, Reasons of the Court of Appeal for Ontario, pages 88

54. Secondly, the appellant states that any religious and/or social debate surrounding women who wear niqabs ought not to be an issue in this case. Certainly there was no such debate in the Court of Appeal's judgment. In fact, the Court recognized the level of controversy which could be raised by the niqab and specifically noted that, while the niqab may prompt debate and

discussion about vital public policy, such interests would *not* be resolved in this case. The Court explicitly stated:

> 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. [Emphasis added.]
>
> *Appellant's Record,* Reasons of the Court of Appeal for Ontario, pages 73-74

55. Furthermore, the Court of Appeal was extremely mindful of the potential for stereotyping and, in fact, encouraged a positive recognition of minority beliefs as a means of reinforcing acceptance in our multi-cultural society. The Court stated:

> …**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.
>
> *Appellant's Record,* Reasons of the Court of Appeal for Ontario, pages 95-96

56. The third "elephant" referred to by the appellant is a reference to the courts' general treatment of sexual assault complainants. The appellant states that an important aspect of her religious freedom claim is that she is also a sexual assault complainant, who will have to testify about intimate and traumatic events. The Crown remains extremely sensitive to the specific needs of sexual abuse complainants and the importance of access to justice for all victims of crime, including women who wear niqabs. The Crown attempts to ensure that the interests of complainants, including the harm suffered by them, are considered at every stage of the prosecution. Accordingly, the Crown can apply for the use of testimonial aids, such as those set out in paragraphs 47 and 48 of this factum, in an effort to accommodate the needs of the witness or alleviate the encroachment on her freedom of religion. In the specific circumstances of this

case, there is the added concern that the appellant may feel re-victimized if she is ordered to remove her niqab and testify before the men who she alleges sexually abused her. The nature of the allegations and the appellant's vulnerability in that regard may be factors, amongst several, which can be used in the balancing exercise and ultimate determination of this issue. The Court was intensely sensitive to the appellant's reality and stated:

> **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.** [Emphasis added.]

Appellant's Record, Reasons of the Court of Appeal for Ontario, pages 76

57. The Court went beyond merely recognizing the appellant's situation, but embedded this reality into the framework for analysis in tangible ways. The Court stated:

> 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**.
>
> 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 a 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. [Emphasis added.]

The Court also incorporated an appreciation for the appellant's unique position by promoting the use of "constructive compromises" and encouraging lawyers to treat the rights in the *Charter* "as something more than additional weapons in the lawyer's legal arsenal".

Appellant's Record, Reasons of the Court of Appeal for Ontario, page 95-96, 105

(b) Other Possible Scenarios: When the Veiled Witness is Not the Complainant

58. There may be circumstances in which the woman seeking to wear her niqab is not the complainant. For instance, she may not be a central witness to the case and her credibility will be less at-issue. The considerations will inevitably change. Similarly, if an accused person, who wears a niqab, chooses to testify in her own defence, then the deliberations may again change and may not even invoke the same *Charter* claims. The appellant claims, at paragraphs 66 to 68 of her factum, that an accused woman would be permitted to wear a niqab while testifying based on the same social science research. Any argument to that effect ought to also contemplate the accused's additional protections under the *Charter*. To determine the permissibility of such testimony, due consideration should be afforded to these other possible scenarios in which religious freedoms may be claimed. This is a highly fact-driven determination, which must be assessed on a case-by-case basis. Indeed, the Court held:

> 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.** [Emphasis added.]
>
> *Appellant's Record,* Reasons of the Court of Appeal for Ontario, page 103

(c) The Guidelines for the Lower Courts

59. Contrary to the position taken by the appellant at paragraphs 69 to 72 of her factum, the Court of Appeal's judgment is a clear statement of the framework to be applied when courts are faced with a religious freedom claim. The Court devised a step-by-step process to facilitate the appropriate reconciliation of the constitutional rights of a witness and an accused. Paragraph 17 of this factum provides an overview of the test. In summary form, the test is as follows:

> Step One: Does the proposed course of action have a religious motivation stemming from a sincerely held belief? If so, move on to step two.
>
> Step Two: What is the extent of the impact on cross-examination? If it is more than trivial, move on to step three.

Step Three: Attempt to reconcile the witness' right to freedom of religion with the accused's right to full and answer defence using a contextual analysis that considers the particular facts of the case as well as broader societal interests. At this stage, constructive compromises should be considered. Of note, the judge can re-assess the decision whether to remove the niqab as the proceedings progress.

Step Four: If reconciliation is impossible and the right to full answer and defence is infringed, then an order to remove the niqab may result.

The respectful and sensitive approach taken by the Court of Appeal for Ontario must underlie the proper application of the test.

PART IV
SUBMISSIONS CONCERNING COSTS

60. There are no concerns regarding costs. This Court ordered that the fees of counsel for the appellant and the accused be paid by the Attorney General of Ontario. Counsel for the parties agreed upon an hourly rate of pay, which was endorsed by this Court on August 26, 2011.

PART V
ORDERS SOUGHT

61. The respondent Crown is seeking that the appeal be dismissed and the judgment of the Court of Appeal for Ontario affirmed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Elise Nakelsky
Of Counsel for the Respondent

Benita Wassenaar
Of Counsel for the Respondent

September 20, 2011

PART VI

TABLE OF AUTHORITIES

Para #(s)

Cases

Para #(s)

Other References

Para #(s)

PART VII

STATUTES, REGULATIONS, RULES

None cited.