

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

N.S.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

and

M--D.S

Respondent

and

M--L.S

Respondent

FACTUM OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

PART I: OVERVIEW

A. Background

1. This case is about the right of a Muslim woman who has consistently been wearing niqab as a religious practice to testify in court with her niqab in proceedings involving allegations of sexual assault committed against her. At the heart of this appeal is the reconciliation of her right to access justice as a religious woman and the accused's right to a fair trial as guaranteed by the *Canadian Charter of Rights and Freedoms* (the "Charter"). These rights should be reconciled in the same manner that this Court has previously employed to reconcile freedom of expression with the right to a fair trial. Specifically, an accused who seeks an order compelling a witness to remove her niqab, which she wears as a manifestation of sincere religious beliefs, should be required to establish: first, that there is a real and substantial risk to the fairness of the trial, a risk that cannot be prevented by reasonable alternative measures; and second, that the salutary effects of the order mandating the witness to remove her niqab outweigh its deleterious effects.

B. Facts

2. CCLA adopts the facts section of the Appellant’s factum.

PART II: CCLA’S POSITION ON APPELLANT’S QUESTION

3. The issue of whether a witness who wears a niqab as a matter of sincere religious belief should remove her niqab before testifying in court should be resolved in accordance with the framework set out by this Court in *Dagenais* and *Mentuck*.

Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835 at 875-877, Respondent Attorney General of Ontario’s Book of Authorities (“*Dagenais*”)

R. v. Mentuck, [2001] 3 S.C.R. 442 at paras. 31-33, CCLA’s Book of Authorities, Tab 1 (“*Mentuck*”)

PART III: STATEMENT OF ARGUMENT

A. THE CHOICE OF WEARING NIQAB IS PROTECTED BY FREEDOM OF RELIGION

4. This Court has recognized that a subjective and deferential approach is appropriate in determining whether a person’s right to freedom of religion is triggered. A claimant seeking to invoke freedom of religion does “not need to prove the objective validity of their beliefs” but only that:

(1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual’s spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief.

Syndicat Northcrest v. Amselem, [2004] 2 S.C.R. 551 at paras. 42-56, Appellant’s Book of Authorities, Tab 10 (“*Amselem*”)

5. With respect to sincerity of belief, this Court has cautioned against a full-scale investigation and emphasized that sincerity of belief is to be evaluated on a subjective basis and on a low threshold of “honesty of beliefs”. The Court’s role is “only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice”.

Amselem, *supra* at paras. 51, 52 and 54

6. A person's choice of dress and manner of appearance in public, including wearing a niqab, if rooted in a sincere religious belief, is protected by the right to freedom of religion. That right would be infringed if he or she were ordered to dress differently or to change his or her appearance or to remove her niqab as that would interfere with the person's ability to act in accordance with his or her religious beliefs in a manner that is "more than trivial or insubstantial."

Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para. 32, Respondents Attorney General of Ontario's and M.D.S.'s Books of Authorities

B. RECONCILIATION OF THE RIGHT TO FREEDOM OF RELIGION AND THE RIGHT TO FAIR TRIAL

7. The Court of Appeal in this case correctly recognized that both the right to freedom of religion and the right to a fair trial have equal status under the *Charter* and neither is to be regarded as inherently superior to another. The Court of Appeal set out a number of contextual factors to be taken into account when reconciling the two rights, but it failed to provide the necessary practical guidance for courts faced with competing claims of this nature.

Reasons, Court of Appeal, paras. 48, 70 and 73, Appellant's Record, pp. 77, 90 and 92

8. The CCLA submits that the framework employed by this Court in reconciling the rights to freedom of expression and a fair trial in *Dagenais* and *Mentuck* (the "D-M Framework") would also be appropriate in reconciling the rights to freedom of religion and a fair trial.

9. In *Dagenais*, four accused persons, alleging infringement of their fair trial rights, sought an order prohibiting the broadcast of a fictional television mini-series depicting factual circumstances very similar to the facts at issue in each of their trials. Noting that "*Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights," this Court established a two-part test for determining when a publication ban should be ordered. The *Dagenais* test was later reformulated in *Mentuck*.

Dagenais, *supra* at 875-77

10. In *Mentuck*, the Crown sought a publication ban to protect the identities of undercover officers and to preserve the efficacy of undercover police operations. Both the accused's right to a fair trial and the society's right to freedom of expression were invoked. This Court restated the test as follows:

A publication ban should be ordered only when:

- (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably available alternative measures will not prevent the risk; and
- (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

Mentuck, supra at paras. 31-33

11. The D-M Framework, which recognizes the equal status of two *Charter* rights and allows appropriate balancing and reconciliation, is well-suited to the present case. The CCLA submits that if an accused seeks an order at a preliminary inquiry or at trial that would infringe a witness' right to freedom of religion, that order should be granted only when the accused can prove that:

- (a) the order is necessary to prevent a real and substantial risk to trial fairness because reasonably available alternative measures will not prevent the risk; and
- (b) the salutary effects of the order outweigh the deleterious effects on the rights and interests of the individuals and the public, including the effects on the right to freedom of religion, the administration of justice and access to justice.

C. APPLICATION OF THE D-M FRAMEWORK

12. In accordance with the D-M Framework, as adapted, it is unlikely that an accused could establish that an order compelling a witness to testify without her niqab, in violation of her right to freedom of religion, is justified. First, there is no real and substantial risk to fair trial rights. Second, any salutary effects of the order are outweighed by the deleterious effects on the rights of the witness, the administration of justice and access to justice. Alternatively, to the extent an accused can show real and substantial risk to trial fairness, reasonable alternative measures to prevent the alleged risk to trial fairness must be thoroughly explored before an order requiring a witness to remove her niqab can be justified.

I. There is no real and substantial risk to the right to a fair trial

13. The right to a fair trial, including the right to make full answer and defence, protected under section 7 of the *Charter*, is a fundamental component of our justice system. However, there is minimal, if any, risk to an accused's fair trial rights when a witness testifies with her niqab because: (i) allowing a witness to testify with her niqab promotes truth-seeking and trial

fairness; (ii) a niqab does not prevent defence counsel from conducting a rigorous cross-examination; and (iii) demeanour in general, and facial expression in particular, is not a reliable indicator of credibility.

(i) ***Allowing a witness to testify with her niqab promotes trial fairness***

14. The constitutional right protected under section 7 of the *Charter* is the right to a fair trial, which is broader than just the right to make full answer and defence. In *Levogiannis*, this Court stated: “The goal of the court process is truth-seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth”. In *O’Connor*, this Court stated that a fair trial takes into account “not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process”.

R. v. Levogiannis, [1993] 4 S.C.R. 475 at 483 , Respondent Attorney General of Ontario’s Book of Authorities (“*Levogiannis*”)

R. v. O’Connor, [1995] 4 S.C.R. 411 at 517, CCLA’s Book of Authorities, Tab 2 (“*O’Connor*”)

15. The goal of getting at the truth in the interest of a fair trial is promoted when a woman who wears a niqab for religious reasons is allowed to testify in court with her niqab. This is because a woman who sincerely believes that her religion requires her to wear a niqab in public, but who is forced, or knows she may be forced, to remove her niqab in open court is less likely to engage and participate in the judicial process. If she does testify, she is likely to experience significant discomfort, anxiety and stress, which may adversely impact the quality of her evidence.

16. In the course of providing guidance to judges in Britain on the issue of religious dress, the Judicial Studies Board’s Equal Treatment Advisory Committee noted as follows:

It should not automatically be assumed that any difficulty is created by a woman in court, in whatever capacity, who chooses to wear a niqab. Nor should it ever be assumed without good reason that it is inappropriate for a woman to give evidence in court wearing the full veil. Where, for example, the case involves domestic abuse or the possible abuse of her children, the judge may consider it contrary to the interests of justice to make her choose between giving evidence to secure a conviction and wearing the full veil.

Judicial Studies Board, Equal Treatment Advisory Committee, *Equal Treatment Bench Book*, Ch 3.3 (April 2010) at 3-18/3, CCLA's Book of Authorities, Tab 3 [Emphasis added]

(ii) *Defence counsel's ability to conduct a rigorous cross-examination is not hindered*

17. The right to a fair trial includes the right to cross examination as a component of full answer and defence. The right to cross-examination stems from the accused's need to test evidence. The right to cross-examination, however, does not include the right to force a witness to change his or her appearance or to testify in a manner preferred by opposing counsel.

Levogiannis, supra at 485-486, 490-92

18. The right to make full answer and defence is not infringed when a witness is blind, or when a witness' mouth occasionally twists into a grimace due to a congenital defect, or when a witness speaks a language other than that of the court proceeding and requires interpretation, or when a witness has a hearing disability and requires a sign language interpreter. Courts regularly accept the testimony of these witnesses even if the witness demeanour can be observed only partially. Similarly, courts also allow witnesses, including complainants and other material witnesses, to give evidence and be cross-examined by telephone pursuant to section 714.3 of the *Criminal Code* notwithstanding that demeanour cannot be observed at all.

R. v. R.S.M., 1999 BCCA 0218 at para. 14, CCLA's Book of Authorities, Tab 4

R. v. A.F., (2005) 376 A.R. 124 (C.A.) at para. 3, CCLA's Book of Authorities, Tab 5

R. v. Chapdelaine, 2004 ABQB 39 at paras. 22, 25 and 27, CCLA's Book of Authorities, Tab 6

R. v. Butt, (2008) 280 Nfld. & P.E.I.R. 129 (NLPC) at paras. 28 and 29, CCLA's Book of Authorities, Tab 7

19. The case of a witness wearing a niqab for religious reasons should be viewed in the same light. The inability to see all of the witness' face does not prevent rigorous cross-examination and thorough testing of the evidence.

(iii) *Demeanour not observable due to a niqab is not a reliable indicator of credibility*

20. Appellate courts throughout Canada have recognized that demeanour evidence, particularly on its own, is an inherently unreliable predictor of credibility. As early as 1952, the British Columbia Court of Appeal stated as follows in *Faryna v. Chorny*:

If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we

are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box.

Faryna v. Chorny, [1952] 2 D.L.R. 354 (BCCA) at 356, Appellant's Book of Authorities, Tab 1

21. Subsequently, in *Pelletier*, the Alberta Court of Appeal quoted the following from Justice McKenna's paper on demeanour:

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

R. v. Pelletier, [1995] 165 A.R. 138 (ABCA) at para. 18, Respondent Attorney General of Ontario's Book of Authorities

22. More recently, the Ontario Court of Appeal stated in *Neinstein* that "demeanour alone is a notoriously unreliable predictor of the accuracy of evidence given by a witness" and the Nova Scotia Court of Appeal stated as follows in *P-P(S.H.)*:

Appearances alone may be very deceptive. A most reprehensible witness may be telling the truth. A polished, well-mannered individual may prove to be a consummate liar.

Reasons of intelligence, upbringing, education, race, culture, social status and a host of other factors may adversely affect a witness' demeanour and yet may have little bearing on that person's truthfulness.

Law Society of Upper Canada v. Neinstein, [2010] 99 O.R. (3d) 1 (Ont. C.A.) at para. 66, Respondent Attorney General of Ontario's Book of Authorities

R. v. P-P(S.H.) (2003), 176 C.C.C. (3d) 281 (NSCA) at 291, CCLA's Book of Authorities, Tab 8

23. The unreliability of demeanour in making credibility assessments has also been recognized by experts outside of the courts. For example, Marcus Stone notes that "there is no known physiological connection between brain processes of a lying person and any bodily or vocal signs. Also, psychological research confirms that there are no specific physical signs of

lying ... The demeanour of witnesses tends to be flattened and sterilized so that it has minimal, if any, value for assessing credibility.”

Marcus Stone, “Instant Lie Detection? Demeanour and Credibility in Criminal Trials” (1991) Crim. L. Rev. 821 at 829, CCLA’s Book of Authorities, Tab 9 (“Stone”)

Also see: Ronalda Murphy, Steven Penny, Marilyn Pilkington and James Stribopoulos, *Evidence: A Canadian Casebook*, 2nd Edition, Hamish Stewart, Ed. (Emond Montgomery Publications Limited: 2006) at 328, CCLA’s Book of Authorities, Tab 10

Also see: Jeremy Blumenthal, “A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanour Evidence in Assessing Witness Credibility” (1993) 72 Neb. L. Rev. 1157 at 1163 and 1204, CCLA’s Book of Authorities, Tab 11

24. To the extent that this Court finds the demeanour of a witness to be useful in making credibility assessments, the ability to make such assessments is not compromised when faced with a niqab-wearing witness. Demeanour is not restricted to a person’s facial expressions but includes “every visible or audible form of self expression manifested by a witness”. In the context of a witness testifying with her niqab, the accused’s counsel and the trier of fact can directly observe numerous aspects of the witness’ demeanour, including voice, eyes, body language, and any outburst of emotions so that credibility can be adequately assessed.

Stone, *supra* at 822-23

II. The deleterious effects of an order requiring a witness to testify without her niqab outweigh any potential salutary effects

25. The sole salutary effect of ordering a witness to remove her niqab when testifying is that it would allow the accused’s counsel and the trier of fact to observe all of the witness’ face at the time of her testimony. As argued above, however, demeanour evidence is inherently unreliable and facial expressions are not an accurate predictor of whether a witness is telling the truth. Moreover, forcing a witness to testify in a manner that contravenes her religious obligations is likely to cause significant discomfort and anxiety, further diminishing the value of observing facial expressions during testimony.

26. In contrast, there would be significant deleterious effects if a witness is ordered to testify without her niqab. These include the potential loss of valuable testimony, undermining public interest in the proper administration of justice, undermining the dignity of witnesses, and marginalizing religious minorities and infringing their right to access the justice system.

Although in this case, the witness wearing the niqab is the complainant, in other cases, the niqab wearing witness may be a defence witness and be prevented from testifying.

27. The negative consequences would be particularly acute for sexual assault cases. Sexual assault has always been an underreported crime and primarily perpetrated against women. The primary reason women choose not to report sexual assault is fear of the criminal justice system. Abused women from immigrant and visible minority communities are even more intimidated by the law enforcement and justice systems in Canada and therefore less likely to resort to the court system in the first place. Forcing women to testify without their niqab may further discourage them from bringing forward complaints of sexual assaults and other such crimes.

R. v. Osolin, [1993] 4 S.C.R. 595 at 669, Respondent Attorney General of Ontario's Book of Authorities

R. v. Seaboyer, [1991] 2 S.C.R. 577 at 648-650, Respondent Attorney General of Ontario's Book of Authorities

Statistics Canada, "Measuring Violence Against Women," Statistical Trends 2006 at 26 and 37, CCLA's Book of Authorities, Tab 12

Larry C. Wilson, "Independent Legal Representation for Victims of Sexual Assault: A Model for Delivery of Legal Services" (2005) 23 Windsor Y.B. Access Just. 249 at 255-259, CCLA's Book of Authorities, Tab 13

Ekuwa Smith, "Nowhere to Turn? Responding to Partner Violence Against Immigrant and Visible Minority Women" (Ottawa, Canadian Council on Social Development, Project for the Canadian Department of Justice, 2004) at IX, CCLA's Book of Authorities, Tab 14

28. The public interest in the proper administration of justice is also undermined by preventing a person who wears a niqab for religious from wearing it when testifying in court. The principle of proper administration of justice ought to recognize respect for the autonomy and dignity of the witness, and take into account the values of religious accommodations, multiculturalism and access to justice.

29. For all of the above reasons, the CCLA submits that in the context of this case, the deleterious effects of forcing a witness to testify in a manner that contravenes her religious beliefs outweigh any potential salutary effects of such an order.

III. In the alternative, the availability of reasonable alternative measures to prevent any risk to trial fairness must be assessed

30. If an accused can show that the inability to see all of a witness' face presents a real and substantial risk to his or her fair trial rights, an order mandating the witness to remove her niqab cannot be justified before reasonable alternative measures have been thoroughly canvassed. The D-M Framework requires that the order be necessary to prevent a real and substantial risk to fair trial rights. Reasonable alternative measures will need to be assessed on a case-by-case basis but may include having the cross-examination of the witness conducted by a female lawyer, credibility assessment undertaken by a female judge and/or placing a screen between the witness and any male members in the courtroom. These measures would enhance the ability of the court and counsel to observe the witness' face during her testimony without infringing the witness' right to freedom of religion. Such measures have already been implemented by courts in other jurisdictions rather than forcing a witness to remove her niqab.

For example, see: *Re S*, [2007] 2 F.L.R. 461 (Family Division) [U.K.], Respondent Attorney General of Ontario's Book of Authorities

PART IV: SUBMISSIONS ON COSTS

31. The CCLA requests that this Court award no costs to or against the CCLA.

PART V: ORDER REQUESTED

32. CCLA requests an order granting CCLA leave to make oral submissions of not more than 15 minutes in length.

33. CCLA requests that this Court allow the appeal and make an order in accordance with the principles set out above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF NOVEMBER, 2011.

Bradley E. Berg

Rahat Godil

Lawyers for the Intervener,
Canadian Civil Liberties Association

PART VI: TABLE OF AUTHORITIES

A. CASES

Case

Cited at Paragraph(s)

<i>Alberta v. Hutterian Brethern of Wilson Colony</i> , 2009 SCC 37	6
<i>Dagenais v. Canadian Broadcasting Corp.</i> , [1994] 3 S.C.R. 835	3, 9
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<i>R. v. Chapdelaine</i> , 2004 ABQB 39	18
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<i>R. v. O'Connor</i> , [1995] 4 S.C.R. 411	14
<i>R. v. Osolin</i> , [1993] 4 S.C.R. 595	27
<i>R. v. Pelletier</i> , [1995] 165 A.R. 138 (ABCA)	21
<i>R. v. P-P(S.H.)</i> (2003), 176 C.C.C. (3d) 281 (NSCA)	22
<i>R. v. R.S.M.</i> , 1999 BCCA 0218	18
<i>R. v. Seaboyer</i> , [1991] 2 S.C.R. 577	27
<i>Re S</i> , [2007] 2 F.L.R. 461 (Family Division) [U.K.]	30
<i>Syndicat Northcrest v. Amselem</i> , [2004] 2 S.C.R. 551	4, 5

B. SECONDARY SOURCES

Source

Cited at Paragraph(s)

Judicial Studies Board, Equal Treatment Advisory Committee, Equal Treatment Bench Book, Ch 3.3 (April 2010)	16
Marcus Stone, "Instant Lie Detection? Demeanour and Credibility in Criminal Trials" (1991) Crim. L. Rev. 821	23, 24

Source (cont'd.)

- Ronalda Murphy, Steven Penny, Marilyn Pilkington and James Stribopoulos, *Evidence: A Canadian Casebook*, 2nd Edition, Hamish Stewart, Ed. (Emond Montgomery Publications Limited: 2006) 23
- Jeremy Blumenthal, “A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanour Evidence in Assessing Witness Credibility” (1993) 72 Neb. L. Rev. 1157 23
- Statistics Canada, “Measuring Violence Against Women,” Statistical Trends 2006 27
- Larry C. Wilson, “Independent Legal Representation for Victims of Sexual Assault: A Model for Delivery of Legal Services” (2005) 23 Windsor Y.B. Access Just. 249
- Ekuwa Smith, “Nowhere to Turn? Responding to Partner Violence Against Immigrant and Visible Minority Women” (Ottawa, Canadian Council on Social Development, Project for the Canadian Department of Justice, 2004) 27

PART VII: LEGISLATION CITED

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

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other means of communication.

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

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

Audio evidence — witness in Canada

714.3 The court may order that a witness in Canada give evidence by means of technology that permits the parties and the court to hear and examine the witness elsewhere in Canada, if the court is of the opinion that it would be appropriate, considering all the circumstances including:

- (a) the location and personal circumstances of the witness;
- (b) the costs that would be incurred if the witness had to be physically present;
- (c) the nature of the witness' anticipated evidence; and
- (d) any potential prejudice to either of the parties caused by the fact that the witness would not be seen by them.