R. v. N.S.: WHAT IS FAIR IN A TRIAL? THE SUPREME COURT OF CANADA'S DIVIDED OPINION ON THE NIQAB IN THE COURTROOM

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I. INTRODUCTION

In 2008, a woman entered an Ontario courtroom to give evidence at a preliminary inquiry involving childhood sexual assault charges against her uncle and cousin. She sought to testify while wearing a niqab, a garment that conceals the entire head and face, leaving only an opening for the eyes.[1] The Court was asked to decide the novel question of whether it could accommodate the Muslim veil in a justice system that provides the accused with a right to face his accuser. The Supreme Court of Canada divided three ways, with justices disagreeing deeply both about the analysis for determining whether to permit a witness to wear the niqab and the values and interests at play in the analysis.

While the majority judgment endorsed a variety of commitments to fundamental constitutional principles, it left unresolved tension in the articulation of essential components of trial fairness. Framed as a collision between equally important *Canadian Charter of Rights and Freedoms*[2] rights, the majority's effort at reconciliation and balancing paired rhetorical guarantees of substantive equality and respect for difference and multiculturalism with vanishing results for members of a marginalized social group — in this case, veiled Muslim women. The likely adverse impact of the judgment on this group will only confirm the aphorism that hard cases make bad law, and highlights the need for constitutional soul-searching to realign constitutional aspirations of equality with social realities.

II. CASE HISTORY

R. v. N.S. originated as a procedural decision in a criminal preliminary inquiry. The charges involved two men accused of historical sexual assault against a female relative. The alleged abuse occurred between 1982 and 1987, beginning when the complainant was six years old. As a teenager, she revealed the allegations to a high school teacher, but parental reluctance held police back from laying charges. It was not until 2007 that N.S., now an adult in her 30s, was able to lay a complaint and to proceed with charges in a prosecution in which she would be the principal witness.

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1 *R v NS*, 2012 SCC 72, 290 CCC (3d) at paras 1, 4 [*NS*]. The niqab is contested amongst Muslims. For some, it is believed to be a firm religious requirement; for others, it is a careful way to conform to a strict Islamic rule of modesty in dress. For still many more, it is variously viewed as an unnecessary burden, an anti-social affront, misguided asceticism, or a proclamation of fanaticism.

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

As is common in sexual assault trials, the complainant's credibility as victim would be critical to securing a conviction. But how would a trier of fact determine the credibility of the alleged victim as a witness if her face were not fully exposed? How would defence counsel be able to adequately test and press her evidence through cross-examination if she were to have the advantage of concealing her expressions from the Court's gaze? These questions were raised as a challenge to N.S.'s assertion that her constitutional right to religious freedom assures accommodation of the niqab.

The accuseds objected to N.S.'s attire, asking the preliminary inquiry judge for an order to require her to remove her niqab to testify. They claimed that their statutory right to cross-examine the witness was unfairly restricted and that any obstruction to counsel's ability to effectively challenge the witness would improperly derogate from the constitutional right to make full answer and defence. Further, they argued the possibility of imprisonment raised a constitutional liberty interest, which should only be suspended in accordance with principles of fundamental justice. The defence submitted that a witness's religious preferences, however sincere, could not meet the test of fundamental justice if it leads to a deprivation of liberty. Nothing short of "face-to-face" confrontation would satisfy the state's constitutional obligations to the accused.

Addressing the preliminary inquiry judge without counsel, N.S. explained that she was a devout Muslim who adopted the niqab as a form of religious practice, complying with a faith-based conviction.[3] She stated that the niqab was a core tenet of her belief system and personal identity.[4] She declared that she would be uncomfortable with removing the veil in an open courtroom that was, by her description, "full of men."[5] She further highlighted the fact that the accuseds were both members of her community and of her family; they even attended the same mosque as her husband.[6] Removing the veil in such circumstances, she stated, would put her in a position of dishonour within the value system of her religious-cultural community, of which the accuseds were also members. She disagreed with defence counsel that exposing her face would add any evidentiary value — "it's not going to help, it really won't," she declared.[7] She reassured the Court that defence counsel would have ample opportunity to read her body language and have direct eye contact during cross-examination.

The preliminary inquiry judge administered a form of the *Amselem* test, the Supreme Court's lead precedent regarding religious accommodation, which requires the claimant to establish a sincerely-held religious belief.[8] The judge found that N.S. had not established a sufficiently "strong" belief because she admitted to having previously removed her niqab to

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3 *R v NS*, 2010 ONCA 670 at paras 3-6, 262 CCC (3d) [*NS*, ONCA]. It is worth noting that at the preliminary inquiry, NS's comments with respect to the sincerity of her religious belief and the impact of removing the niqab were given unsworn, as the judge refused to administer the oath to the witness while wearing her niqab.

4 See Natasha Bakht, "Objection, Your Honour! Accommodating *Niqab*-Wearing Women in Courtrooms" in Ralph Grillo et al, eds, *Legal Practice and Cultural Diversity* (Farnham, Surrey: Ashgate, 2009) 115 at 116 citing a variety of factors that may motivate women to adopt different forms of Islamic veil, including hijab or niqab.

5 Transcript of preliminary inquiry, quoted in *NS*, ONCA, *supra* note 3 at para 5.

6 *Ibid*.

7 *Ibid*.

8 *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551 [*Amselem*].

be photographed for a driver's licence by a female official.[9] She had also stated that she would, on request, remove her niqab for identification purposes at international border crossings.

On appeal at the Ontario Superior Court of Justice, Justice Frank Marrocco rejected the preliminary inquiry judge's approach and reaffirmed the *Amselem* "subjective sincerity test," which requires evidence about the sincerity of the conviction, not the consistency of the claimant's conduct.[10] The Court held that "where an application is made to require a witness to remove her niqab, the court must enquire into the reason for the wearing of the niqab and the genuineness of any religious belief relied on to explain the wearing of the niqab."[11] Quashing the preliminary inquiry judge's order requiring that N.S. testify without a niqab, the matter was remitted to the preliminary inquiry judge for redetermination.

On appeal to the Court of Appeal for Ontario, the Court considered the various aspects of the case and sought to set out a framework for balancing the competing rights of a witness to religious freedom with those of the accused to a fair trial. Justice Doherty, writing for the panel, framed the issue at the very outset of his judgment as "an apparent conflict between the constitutional rights of a witness in a criminal proceeding and the constitutional rights of the accused in that same proceeding."[12] This framing recognized the presumptive interest for a woman who wears the niqab to be accommodated while testifying. However, it also took as a given that a witness testifying in a niqab would raise concerns about the fairness of the trial.

Although the decision of the Court of Appeal affirmed that the niqab engaged constitutional rights and triggered the duty to accommodate, N.S. appealed. The Court's balancing test, framed to resolve the "conflict" between two opposed sets of interests and rights (trial fairness versus religious freedom), had dominated the appellate Court's decision and left N.S. subject to the substantial discretion of the criminal court judge. She would be expected to explain and defend her religious attire in a pre-trial hearing before being permitted to testify. Instead, she sought an outright recognition of a right to testify in a niqab.

The case captured the public's attention as it worked its way through the legal system. The issue dovetailed with polarized public discourse around multiculturalism, immigration, and the scope of public tolerance.[13] Five intervenors had appeared before the Court of Appeal, representing groups concerned with the rights of the criminally accused,[14] the interests of

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9 *NS*, ONCA, *supra* note 3 at paras 6-7.

10 *R v NS* (2009), 95 OR (3d) 735 at paras 92-97 [*NS*, ONSC]. See also *NS*, *supra* note 1 at paras 11-13 (per McLachlin, CJ): "The preliminary inquiry judge failed to conduct an adequate inquiry into whether N.S.'s refusal to remove her niqab was based on a sincere religious belief."

11 *NS*, ONCA, *supra* note 3 at para 13, referring to *N.S.*, ONSC, *ibid* at paras 88-101.

12 *NS*, ONCA, *ibid* at para 1.

13 See e.g. Sheema Khan, "Hate it if you want, but don't ban the niqab," *The Globe and Mail* (14 December 2011), online: The Globe and Mail <http://www.theglobeandmail.com/commentary/hate-it-if-you-want-but-dont-ban-the-niqab/article4180899> warning of the danger of banning unpopular minority opinions and practices, especially where it exacerbates social exclusion. For a contrary, contemporaneous view, see Barbara Kay, "Feminists back women as possessions in Supreme Court case," *The National Post* (9 December 2011), online: The National Post <http://www.fullcomment.nationalpost.com/2011/12/09/barbara-kay-feminists-back-women-as-possessions-in-supreme-court-case/> warning of the danger of mixing religion and state, and of allowing "multicultural correctness" to turn a blind eye to symbols of inequality.

14 Criminal Lawyers' Association.

sexual assault victims,[15] individual expressive freedoms,[16] and competing approaches to equality,[17] amongst others. Nine were granted leave to make written submissions to the Supreme Court,[18] and three were also permitted time for oral argument.

III. JUDGMENT AT THE SUPREME COURT

The majority judgment, penned by Chief Justice McLachlin and endorsed by three others of the seven-member panel (Justices Deschamps, Fish, and Cromwell), seized the middle ground between the diametrically opposed minority judgment of Justice LeBel (joined by Justice Rothstein) and Justice Abella's solo dissent.[19] The majority judgment built on Justice Doherty's proportionality approach, articulating a framework for trial judges to use when deciding whether to allow a witness to testify in a niqab. The framework is comprised of four sequential questions:

1. Would requiring the witness to remove the niqab while testifying interfere with her religious freedom?

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

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

4. If no accommodation is possible, do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so?[20]

Under the first question, the inquiry incorporated the *Amselem* test. The claimant bears the onus of establishing a sincere belief in a requirement to wear the niqab. Sincerity is not compromised by lapsed practices or inconsistent observance. The Court resisted any invitation to engage in evaluating or assessing a claimant's correctness of religious observance, or the substantive coherence of religious lifestyle choices. Implicitly recognizing that many religious people face tough choices all the time in secular society and routinely strike compromises between their personal convictions and social realities, the Court refused to allow past practice to define a claimant's sincerity of belief.[21] On the facts of the *N.S.* case, the Court could have ended the analysis at this point and remitted the matter to the preliminary inquiry judge to re-determine the issue. But in the interest of articulating a

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15 Women's Legal and Education Action Fund (LEAF).

16 The Canadian Civil Liberties Association (CCLA).

17 Ontario Human Rights Commission and the Muslim Canadian Congress. These two intervenors took opposing views: the former highlighted the importance of accommodation and respect for religious choices to promoting an inclusive society; the latter highlighted the oppressive nature of the niqab and encouraged a ban to liberate Muslim women from patriarchal cultural practices.

18 In addition to the five intervenors at the Court of Appeal, Supreme Court intervenors included the Barbra Schlifer Commemorative Clinic, South Asian Legal Clinic of Ontario (SALCO), Canadian Council on American-Islamic Relations (CAIR-CAN) and the Barreau du Québec.

19 *NS*, *supra* note 1 at para 2 (per McLachlin CJ): "A secular response that requires witnesses to park their religion at the courtroom door is inconsistent with the jurisprudence and Canadian tradition, and limits freedom of religion where no limit can be justified. On the other hand, a response that says a witness can always testify with her face covered may render a trial unfair and lead to wrongful conviction."

20 *NS*, *ibid* at para 9.

21 *Ibid* at para 13.

judicial approach to the broader issue of conflicting rights, the Court proceeded to explain the subsequent questions to explore.

The second issue was whether the niqab posed a threat to trial fairness. The majority highlighted two main components of the multilayered constitutional right to a fair trial. First was the need for meaningful cross-examination, coupled with the importance of effective credibility assessment. Chief Justice McLachlin was persuaded that the niqab posed a presumptive obstruction to trial fairness because it prevents the accused, counsel, and the court from viewing the witness's face during cross-examination.[22] Rolled into this presumption of obstruction was the idea that any limit on accessing demeanour evidence compromises both the effectiveness of the cross-examination and the ability of the trier of fact to assess credibility.[23]

Having set up the conflict of rights with the first two questions, the next question was to ask whether the conflict could be resolved through accommodation or compromise. In order to make this determination, the Court held that the parties should adduce evidence outlining possible options that might yield a solution that respects both the witness's religious freedom and the accused's right to a fair trial.[24] Only if this aversion of conflict, or "accommodation,"[25] is impossible should the judge then move to the final question, which involves a careful balancing of interests.

Upon reaching the balancing stage, trial judges were directed to determine whether the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of allowing her to wear it. This test is lifted from the Supreme Court's section 1 jurisprudence dealing with justifying government incursions on *Charter* rights.[26] Justification of a rights breach requires reasoning, and for at least the past 20 years, Canadian courts have employed the proportionality inquiry.[27] Proportionality, or justificatory analysis, was likely considered appropriate here because, regardless of how the niqab question will be resolved in any particular case, the impact would necessarily be interpreted as a limitation of one party or the other's *Charter* right.

Looking at the deleterious effects of limiting a *Charter* right, the Court described two levels of potential harm. The first involved the direct and personal impact on the affected individual, which necessitates considering both subjective and objective factors, such as the "value of adherence to a religious conviction," the importance of the "practice to the claimant," and the "degree of state interference with the religious practice."[28] The second level of inquiry involved considering the "broader societal harms of requiring a witness to remove the niqab in order to testify."[29] This latter inquiry focused not on the individual impact that accompanies a court order to unveil, but the wider consequences of discouraging

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22 *Ibid* at paras 20-21, acknowledging that the evidentiary "record sheds little light on the question of whether seeing a witness's face is important to effective cross-examination and credibility assessment and hence to trial fairness."

23 *Ibid* at paras 25-27.

24 *Ibid* at paras 30-33.

25 *Ibid* at para 32.

26 See *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].

27 *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 878 [*Dagenais*].

28 *NS*, *supra* note 1 at para 36.

29 *Ibid* at para 37.

potential complainants and witnesses from reporting offences, pursuing prosecution, or participating in the justice system.[30] This factor would be especially concerned with consequences for sex crime prosecutions, described by the Court as being "vigorously pursued" by the justice system in recent decades.[31]

Turning to salutary effects, the majority characterized the primary benefits of forcing a witness to remove her niqab as "preventing harm to the fair trial interest of the accused and safeguarding the repute of the administration of justice."[32] Because the niqab imposes a "severe" cost on the individual's right to "effective cross-examination and credibility assessment,"[33] its restriction would, under this analysis, often be necessary to protect trial fairness. Indeed, for the majority, the more important the witness's evidence to the trial, the less likely that she would be permitted to testify in a niqab. The majority did not, however, go so far as to create an absolute ban on niqabs. The judgment noted that it is only justifiable to compel the removal of the niqab where the risk to trial fairness is, as the Court stated in *Dagenais*, "real and substantial."[34] An absolute ban would capture witnesses whose testimony would not pose such danger to trial fairness. Chief Justice McLachlin pointed out that "uncontested and uncontroversial evidence does not engage the fair trial interest."[35] Indeed, this would likely be the *only* type of evidence from behind a niqab that would not imperil a fair trial.

The result of the majority's reasoning is that where the proceeding involves high stakes (such as the potential of imprisonment for the accused) and where the witness's evidence is critical and contested (as in most sexual assault prosecutions), a woman in a niqab will almost certainly be required to expose her face for cross-examination.[36] The majority further rejected certain exceptions that the Court of Appeal had endorsed. For instance, Chief Justice McLachlin was sceptical of the suggestion that the harm to trial fairness would be diminished in a trial before a judge alone (as compared to a judge and jury). She was doubtful that a judge would be able to predict whether the niqab would interfere with credibility assessments at trial based solely on inquiries into the witness's religious freedom claim in the setting of a preliminary inquiry.[37] Similarly, she was not convinced that, in a jury trial, a judge's curative instruction could mitigate any harm caused by a witness's niqab.[38] The result of the majority judgment is a proportionality test that creates a de facto rule that women complainants in sexual assault cases must unveil to testify for the prosecution.

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30 *Ibid* at para 37.

31 *Ibid*. This argument was emphasized in the intervenor submissions of the Barbra Shlifer Commemorative Clinic and the South Asian Legal Clinic of Ontario (SALCO).

32 *NS*, *ibid* at para 38.

33 *Ibid* at para 38.

34 *Ibid* at para 28, citing *Dagenais*, *supra* note 27 at 878, in which the Court stated that any risk to trial fairness must be "real and substantial."

35 *NS*, *supra* note 1 at para 56.

36 On 24 April 2013, Justice Weisman of the Ontario Court of Justice applied the majority judgment to decide whether to permit N.S. to testify in niqab and concluded: "Having followed the directions of the Supreme Court on this voir dire, I find that I am obliged to require N.S. to remove her niqab while testifying at the preliminary inquiry" (*The Queen v M-d S and M-l S* (24 April 2013) (Ont Ct J)).

37 *NS*, *supra* note 1 at para 41.

38 *Ibid*, at para 42.

IV. MINORITY AND DISSENT

The minority judgment of Justices LeBel and Rothstein reached the same outcome as the majority, but adopted a very different analysis. In particular, the minority justices rejected the majority's acceptance of the principle that a witness should be permitted to testify in a niqab, subject to a case-by-case proportionality exercise. For Justice LeBel, only a "clear rule"[39] could provide the necessary constitutional assurances of trial fairness.[40] From this perspective, the balancing of interests was settled: legal tradition regarding participation in the trial process was sufficiently tied to foundational common law and constitutional values that the niqab should never be accommodated.[41] Conditioning the respect for differences on the "preserv[ation] of common values of Canadian society," Justice LeBel identified a "core common value" of open-faced communication.[42] By this logic: "A clear rule that niqabs may not be worn would be consistent with the principle of openness of the trial process and would safeguard the integrity of that process as one of communication."[43]

Justice Abella took the opposite position, refusing to concede that the niqab is, presumptively, an obstruction to a fair trial and rejecting the idea of a ban, whether explicit or de facto. She relied on a variety of sources, highlighted by many of the intervenors and mostly ignored by the majority, which cast doubt on the value of demeanour evidence.[44] She further noted that if a "rule" of open-faced examination exists, it is subject to routine exceptions. She cited examples of courts that "regularly accept the testimony of witnesses whose demeanour can only be partially observed."[45] These included witnesses who cannot hear,[46] who require the use of a language interpreter,[47] who have physical or mental disabilities which impact their cognitive or expressive functions,[48] who are children,[49] or who are not able to be present and instead give evidence by telephone.[50] Invoking the Court's reasoning in *R. v. Mills* that trial fairness must account for more than just the accused's best interests, but also the "view of fairness in the eyes of the community and the complainant,"[51] Justice Abella encouraged a deeper enquiry into what fairness owes those with personal characteristics that require special consideration. She concluded that "trial fairness cannot reasonably expect ideal testimony from an ideal witness in every case."[52]

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39 *Ibid* at para 78

40 *Ibid* at para 69 (per LeBel J): "[T]he niqab should be allowed either in all cases or not at all … a clear rule should be chosen."

41 *Ibid* at para 67 (per LeBel J): "[T]he Canadian criminal trial process remains faithful in its core aspects to an adversarial model. This process developed in the common law. Some of its features are now part of the constitutional order.… This model of justice imposes a significant personal burden on witnesses and parties. This burden cannot be lifted entirely."

42 *Ibid* at paras 70-71.

43 *Ibid* at para 78.

44 *Ibid* at paras 98-108.

45 *Ibid* at para 102. The minority justices accepted that exceptions are warranted in some cases, but rejected an exceptionalism approach in this case (at para 75).

46 *Ibid* at para 102.

47 *Ibid* at para 92.

48 *Ibid* at para 103. Justice LeBel drew a distinction between people with physical disabilities that impair communication and a woman in niqab. For the disabled, the accommodation will be an assistive mechanism that promotes their communication, while the niqab "does not facilitate acts of communication" (at para 77). The logic of this argument, of course, fails to explain how a ban on the niqab promotes communication when it will have the effect of silencing many women who would otherwise testify.

49 *Ibid* at para 92, citing the use of screens for children.

50 *Ibid* at para 104.

51 *Ibid* at para 95, citing *R v Mills*, [1999] 3 SCR 668 at para 72.

52 *NS*, *ibid* at para 107.

V. THE JUDGMENT: OPINION AND IMPACT

No doubt, opinions about the Court's ruling in *N.S.* are as diverse as the competing viewpoints at play in the judgments. It is rare for the Court to be so divided.[53] From the perspective of conventional rights analysis, the majority's approach reflected the dominant jurisprudential trend.[54] Indeed, virtually all of the judicial analysis at all levels of court assumed that the case should be analyzed as a "conflict" of rights requiring "balancing." The conflict was framed as freedom of religion versus trial fairness. The freedom of religion claim was grounded in multiculturalist values, while the trial fairness argument was rooted in the values of the adversarial system. Two important "justice" causes — the protection of minorities and the protection of the criminally accused — were at odds in this logic. Because both sides' claims were just, but pitted the interests of two vulnerable individuals in conflict, the case presented a classic dilemma.

N.S.'s claim did not dispute the importance of the accused's right to a fair trial, but rather questioned the particular threat that the niqab could actually pose to the accused's constitutional trial rights, including the presumption of innocence and right not to be unjustly deprived of liberty. This challenge required the Court to consider the logic and evidentiary basis for constitutionalizing specific forms of courtroom practice, such as open-faced cross-examination. The Court did not find any evidence to support the assumption that the ability to see a witness's entire face is necessary for effective cross-examination or credibility assessment,[55] nor did it hear any evidence to support the contrary assertion.[56] All the Court had to rely on was the "common law assumption" that witnesses in criminal courts are expected to testify "with their faces visible to counsel, the judge and the jury."[57] For the majority, this "ancient and persistent connection"[58] between open-faced testimony and a fair trial would prevail, absent evidence to refute the "long-standing assumptions of the common law regarding the importance of a witness's facial expressions to cross-examination and credibility assessment."[59]

The second formulation of trial fairness in the majority's judgment emphasized systemic and institutional integrity. This view concentrated on public interest considerations and

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53 Kirk Makin, "Changes coming fast for Supreme Court" *The Globe and Mail* (29 March 2013), online: The Globe and Mail <http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/changes-coming-fast-for-supreme-court/article10585748/>: "Of the 66 substantial decisions it rendered last year [2012], the court spoke unanimously in 65 per cent of the cases."

54 See *Oakes*, *supra* note 26.

55 *NS*, *supra* note 1 at para 17 (per McLachlin CJ): "We have no expert evidence in this case on the importance of seeing a witness's face to effective cross-examination and accurate assessment of a witness's credibility. All we have are arguments and several legal and social science articles submitted by the parties as authorities."

56 *Ibid* at paras 20-21.

57 *Ibid* at paras 21-22. The experience of the United States is instructive, as this issue has arisen under the Sixth Amendment of its Constitution, which expressly links the right "to be confronted with the witnesses against him" to the right to a fair trial (US Const amend VI). Justice Antonin Scalia of the Supreme Court of the United States, a fervent originalist interpreter of the US constitution, has described the defendant's right to a "face-to-face" confrontation with witnesses as a constitutional custom "that traces back to the beginnings of Western legal culture" (*Coy v Iowa*, 487 US 1012 at 1015-19 (1988)), writing for a 6-3 majority. In a subsequent decision, the Court reversed, splitting 5-4, with Justice Sandra Day O'Connor writing that face-to-face confrontation is an important but not "indispensable element" of the confrontation right (*Maryland v Craig*, 497 US 836 at 837 (1990)).

58 *NS*, *ibid* at para 31.

59 *Ibid* at para 22.

prioritized the maintenance of confidence in the criminal justice system as a whole.[60] Yet, the majority's consideration of the public interest was remarkably narrow, focussing almost entirely on the public perception of the treatment of the accused in the trial process. Fairness was defined as an abstract and idealized standard of accuseds' rights, with little consideration of the perspectives of other participants in the trial such as victims of sexual assault or vulnerable members of the public. The judgment similarly neglected to analyze what fairness might mean in different cultural contexts or how blind spots about the impact of "neutral" rules could contribute to systemic social exclusion.

For those concerned with the sex equality and social diversity implications of the decision, the effect of the majority's balancing test (and of the minority's ban) will be seen to shift the state's constitutional burden of providing a fair trial onto the niqab-wearing witness. The witness must now choose whether to break a religious conviction in order to deliver a fair trial to the accused, knowing that the more central her evidence is to the likelihood of conviction, the less likely she is to be permitted to testify in niqab. If she chooses not to testify, the state will be faced with a choice: either it abandons the prosecution due to lack of evidence, or it asks the court to compel the witness to give her evidence unveiled. This last option lies at the bottom of the slippery slope of state intrusion into personal expression. Forced removal of witnesses' niqabs would have both liberty and dignity limiting effects, with heightened adverse impact because it would primarily affect vulnerable minorities. Perhaps the most cross-purpose outcome is the scenario of an accused woman unable to testify in her own defence, or in someone else's, on account of the niqab.[61]

Although the majority were prepared to tolerate some uncomfortable outcomes in the interest of preserving tried and tested practices, they rejected the minority's call for an outright ban on niqabs. Yet, despite citing values of diversity, inclusion, and access to justice, the majority's analytical framework leads to the inevitable result that women like N.S. will find themselves outside of *Charter* protection. This outcome roused Justice Abella, who noted the logical disjuncture between the stated *Charter* values and the necessary implications of the majority judgment:

> The majority's conclusion that being unable to see the witness' face is acceptable from a fair trial perspective if the evidence is "uncontested", essentially means that sexual assault complainants, whose evidence will inevitably be contested, will be forced to choose between laying a complaint and wearing a niqab, which, as previously noted, may be no meaningful choice at all.[62]

If the judgment represented a clear victory for trial fairness it might perhaps have been celebrated. However, it remains unclear from the majority judgment what trial fairness means beyond its discomfort with the niqab. While courts have generally taken witnesses as they are, this case makes state interference in intimate personal characteristics a matter of trial judge discretion. The majority agreed unquestioningly that "more is better" when it comes

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60 *Ibid* at para 38, emphasizing the importance of preserving "public confidence in the justice system."

61 *Ibid* at para 109. Justice Abella highlighted this point.

62 *Ibid* at para 96. See *supra* note 31 citing Justice Weisman's April 2013 order that NS remove her niqab to testify.

to exposing the face.[63] But is the "most" physical exposure the "best" condition for cross-examination? If so, is the "best" form of cross-examination the standard required for constitutional compliance? If so, why stop at removing niqabs?

The justification for enforcing a strict rule (or narrow test) against the niqab was wrapped in commitments to constitutional values. Meanwhile, N.S. lacked the evidence to rebut the presumptions of established courtroom practice. Given the legal system's preference for precedent, the status quo shifts languidly if at all. It is thus noteworthy that all of the justices appear to have agreed with the principle that even strict rules regarding trial fairness require flexibility.[64] Such flexibility not only helps to mitigate for individual variation and different needs, but also to correct the trajectory of institutional inertia. The numerous exceptions to conventional courtroom rules, emphasized by many intervenors and highlighted in Justice Abella's judgment, suggested that trial fairness has long been an elastic concept, moulding to real-world circumstances and accommodating novel needs.

Examples of rule flexibility may be presented as derogation, but they can also represent principled and necessary modifications to the institutional modes of administering justice. Accommodation doctrine is derived from normative commitments to equality, and is enshrined in the *Charter* as part of section 15.[65] Even when section 15 is not explicitly invoked, accommodation analysis always raises themes of substantive equality. For example, the fact that the justice system enables individuals to give testimony through assistive devices or with the help of a sign or language interpreter is integral to achieving the goals of the justice system.[66] These measures become necessary norms to facilitate the goals of open justice, but also to remove barriers to equal participation.[67] Accommodation can promote the public interests of communication, inclusion, and participation in the administration of justice, while also enhancing the dignity interest of the affected individuals.[68] Justice Abella noted the link between the denial of accommodation and its discriminatory impact:

> As a result, as the majority notes, complainants who sincerely believe that their religion requires them to wear the niqab in public, may choose not to bring charges for crimes they allege have been committed against them, or, more generally, may resist being a witness in someone else's trial. It is worth pointing out as well that where the witness is the accused, she will be unable to give evidence in her own defence. *To those affected, this is like hanging a sign over the courtroom door saying "Religious minorities not welcome."*[69]

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63 Even Justice Abella in her dissent, stated: "I concede without reservation that seeing more of a witness' facial expressions is better than seeing less. What I am not willing to concede, however, is that seeing less is so impairing of a judge's or an accused's ability to assess the credibility of a witness, that the complainant will have to choose between her religious rights and her ability to bear witness against an alleged aggressor" (*NS*, *ibid* at para 82).

64 Even the minority justices, who supported a clear ban on the niqab, recognized the need for accommodation in some instance to facilitate "access to justice" for people with disabilities. See *NS*, *ibid* at para 77.

65 *Supra* note 2, s 15.

66 *NS*, *supra* note 1 at para 92.

67 See e.g. *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 (concerning the adverse effects discrimination caused by a hospital's failure to provide sign language interpretation).

68 The minority judgment focused on the goal of "communication," viewing the niqab as an obstacle. See *NS*, *supra* note 1 at para 78. The minority justices might have considered the obstacle to be the rule against the niqab. From this perspective, if communication is the goal, then it logically follows that measures that enable witnesses to approach and address the court are preferable to those which do not.

69 *Ibid* at para 94 [emphasis added].

VI. CONCLUSION

In many respects, the *N.S.* case put the criminal trial system itself on trial. Could conventional standards of justice be met while modifying traditional courtroom practices? This was certainly not the first time the Court was called upon to examine traditional norms in the face of evolving social pressures. In Chief Justice McLachlin's opus on accommodation, *British Columbia (Public Service Employee Relations Commission v. BCGSEU*), the Court rejected a workplace physical standard that adversely affected the female claimant because it bore only tenuous connection to the desired outcome of workplace efficiency and safety.[70] The Court required more than impressions from past practice to justify a standard that excluded the claimant from employment. Evidence of actual risk or harm to a legitimate specific objective had to be shown. In *N.S.*, the Court acknowledged that there was no evidence of any harm to trial fairness caused by a partially covered face. Demeanour was not proven to be essential to cross-examination or credibility assessment, despite being a longstanding customary practice. Notwithstanding this dearth of evidence, the Court was not persuaded to follow its doctrine of bending neutral rules when they have exclusionary effects.

It is tempting to view *N.S.* as a singular case. As much as it attracts an accommodation analysis, the implications of constitutionalizing the niqab generated concern for some about undermining fundamental civic values. Indeed, just days after the Supreme Court heard oral argument in the case, the Minister of Citizenship, Immigration and Multiculturalism issued an operational bulletin outlining a new requirement that individuals taking the citizenship oath must expose their faces.[71] In public remarks, Minister Jason Kenney addressed women in niqab directly: "All we ask of you is to fulfil the requirements of citizenship and that you swear an oath before your fellow citizens that you will be loyal to our traditions that go back centuries."[72] The Minister emphasized that an open-faced oath was more than a technical requirement and that it goes to the heart of our collective identity: "It is a public declaration that you are joining the Canadian family, and it must be taken freely and openly—not with faces hidden."[73] A similar conception of citizenship motivated the introduction of Bill 94 in the Quebec National Assembly.[74] This law requires women in niqab to unveil in order to receive a wide range of government services. Not surprisingly, both the Quebec legislation

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70 [1999] 3 SCR 3. Referring to standards and accommodation, Chief Justice McLachlin wrote for a unanimous Court: "Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards" (*ibid* at para 68).

71 Citizenship and Immigration Canada, Operational Bulletin 359, "Requirements for candidates to be seen taking the Oath of Citizenship at a ceremony and prodedures for candidates with full or partial face coverings" (12 December 2011), online: Citizenship and Immigration Canada <http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob359.asp>. The bulletin provides: "At time of check-in, all candidates wearing full or partial face coverings must be reminded that they will be required to remove their face coverings for the oath taking portion of the ceremony.… They are to be informed that failure to do so will result in the candidate not becoming a Canadian citizen on that day and not receiving their citizenship certificate."

72 Speaking notes for The Honourable Jason Kenney, PC, MP, Minister of Citizenship, Immigration and Multiculturalism, "On the value of Canadian citizenship" (Montreal, Quebec: 12 December 2011), online: Citizenship and Immigration Canada <http://www.cic.gc.ca/english/department/media/speeches/2011/2011-12-12.asp>.

73 *Ibid*.

74 Bill 94, *An Act to establish guidelines governing accommodation requests within the Administration and certain institutions*, 2nd Sess, 39th Parl, 2011.

and Minister Kenney's bulletin garnered significant public attention and fuelled a spirited debate.

The immediate impact of the *N.S.* decision is narrow: few women in Canada currently wear the niqab and a small minority of them can be expected to encounter the criminal justice system. But how related and emerging questions might be answered will depend on a host of political and other factors, including the substantial renewal of the bench already underway at the Supreme Court.[75] The minority judgment, endorsed by two justices in the twilight of their tenure, provided a constitutional justification for an absolute ban on niqabs in the courtroom. Their reasoning would lend support to those making legal arguments to extend a niqab ban to citizenship ceremonies and other public services. But the minority's justification of a ban was rejected by both the majority and dissent. The Court resoundingly endorsed a fundamental principle of inclusion and accommodation of women in niqab. This principle is not absolute, though, and is subject to reasonable limits based on legitimate objectives and actual harm, analyzed through the proportionality test. That the principle of accommodation was articulated in a case involving a competing interest of the highest order — an accused's liberty — suggests that the accommodation right that adheres to the niqab is indeed secure. It is difficult to imagine that an outright ban in a public setting could ever be constitutionally justified based on the majority's reasoning in *N.S.* Governments wishing to restrict the wearing of the niqab in accordance with proportionality will need evidence establishing a real and clear danger to a more important interest. Whether the governments of Canada or Quebec will revisit their approaches to niqabs in citizenship ceremonies and public services, respectively, remains to be seen. It may be just a matter of time before the Supreme Court is once again asked to define the constitutional rights of veiled Muslim women.

[75] Makin, *supra* note 53, noting that, "By the end of 2014, only one judge — Chief Justice Beverley McLachlin — will have spent more than a decade on Canada's top bench."