

N.S. Niqab Case 2012

N.S. v. R. (SCC) Judgement 20 December 2012

N.S. v. R. involves a sexual assault complainant who wears a niqab – a veil that covers the face, with the exception of the eyes. The question before the SCC was **whether N.S. can access the Canadian justice system wearing her niqab.**

LEAF (Women's Legal Education & Action Fund) intervened before the Supreme Court of Canada.

N.S., who is now in her 30s, alleges that she was repeatedly sexually abused as a child from the ages of 6 – 12 by her uncle and cousin (the accused). N.S. reported the alleged abuse to a teacher when she was a child, but her father convinced the police not to lay charges. As a result, charges were not laid until 2007.

On the first day of the preliminary inquiry (pre-trial), the accused objected to N.S. wearing her niqab while testifying, asserting a right to “demeanour evidence”, including N.S.’s full facial expressions.

The preliminary inquiry judge ordered the complainant to remove her niqab. The Ontario Superior Court of Justice and the Ontario Court of Appeal quashed that order. The lower courts, however, did not hold that N.S. has a right to wear the niqab. Instead both courts directed that the accuseds’ objection be re-considered by the preliminary inquiry judge. N.S. is appealing to the SCC for an order that she is entitled to wear the niqab at the preliminary inquiry and trial.

LEAF argued that N.S. is entitled to wear her niqab at the preliminary inquiry and trial, and that an Order requiring N.S. to remove her niqab as a precondition to testifying would violate her rights under ss.7 and 15 of the *Charter*.

LEAF argued that the accuseds’ objection to the complainant testifying in her niqab must be situated in the context of the historical and ongoing legal and procedural norms that re-victimize sexual assault complainants and reinforce their inequality.

In particular, LEAF argued that the objection must be seen in the context of defence tactics to “whack the complainant.” In other words, the removal of the niqab in this context is best understood as an attempt to humiliate, degrade and intimidate the complainant. Such intimidation can force a complainant to withdraw from participating at trial, likely putting an end to the prosecution.

LEAF’s submission was that whatever one’s personal views are on the niqab, effectively disenfranchising sexual assault complainants who wear the niqab from the criminal justice system is inconsistent with promoting their substantive equality (s. 15) and respecting and protecting their s.7 *Charter* rights to life, liberty and security of the person.

In a split decision, the SCC imposed a test aimed at balancing the complainant’s rights against those of the accused.

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R. v. N. S.

20 December 2012

In R. v. N.S., the Supreme Court of Canada ruled on whether a witness in a preliminary inquiry in a criminal case should be allowed to wear a niqab for religious reasons while testifying.

N.S., who at the time of the inquiry was an adult woman, alleged that she had been repeatedly sexually abused as a child by her uncle and cousin (the accused). On the first day of the preliminary inquiry, the accused objected to N.S. wearing her niqab while testifying, asserting a right to “demeanour evidence”, including N.S.’s full facial expressions. The issue proceeded to the Supreme Court, which ruled that the right of a witness to wear a niqab while testifying must be decided on a case-by-case basis, having regard to a four-part test:

- (1) Would ordering 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 for the accused?
- (3) Is there a way to accommodate both rights and avoid the conflict between them?
- (4) If no accommodation is possible, do the positive effects of requiring the witness to remove the niqab outweigh the negative effects of doing so?

The Court sought to balance the witness’ right to religious freedom under s. 2(a) of the *Canadian Charter of Rights and Freedoms* with the accused’s right to a fair trial under sections 7 and 11(d) of the *Charter*. It held that a judge must assess whether there is a way to accommodate both sets of rights and to avoid the conflict between them—including by using reasonably available alternative measures that would allow the witness to follow her religious convictions while still preventing a serious risk to trial fairness. Ultimately, however, the Court held that, even where a witness has a sincere religious belief, she will be required to remove her niqab if it poses a significant risk to the right of the accused to a fair trial. Factors affecting trial fairness will include whether the witness’ proposed evidence is central to the trial, and whether the evidence is contested.

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