

## WEARING OF THE NIQAB AND FAIRNESS OF THE TRIAL

### R. v. N.S. - Supreme Court of Canada (2012)

#### FACTS

N.S., an Ontario woman of Muslim faith, says she has been the victim of several sexual assaults. The two men accused of these attacks are part of her family.

N.S. is called to testify during the trial of the two men. She asks the judge for the **right to testify with her niqab**, a veil that conceals the entirety of her face with the exception of the eyes. The accused oppose it and ask the judge to compel N.S. to testify without her niqab. They invoke their **right to a fair trial** and full defense.

According to the accused, wearing the veil prevents them from **assessing the credibility** of N.S.'s testimony: it is not possible to see her facial expressions and the emotions that emanate from her body language.

N.S. explains that she cannot remove her niqab in public where men who are not close family members can see her. She admits, however, that she has already removed her niqab for a woman to take her driver's license picture. She also admits that she would remove her veil if it were necessary for a security check at a border crossing.

In the circumstances, the judge decided that N.S. should take off her niqab to testify. N.S. objected and the case went to the Supreme Court of Canada.

N.S. argues that her **freedom of religion** allows her to testify while wearing her niqab and that forcing her to remove it violates her freedom of religion.

## QUESTIONS

1. Does the prohibition of the niqab infringe the witness' freedom of religion?
2. If so, is this infringement justified under section 1 of the Charter?

## PREPARATION FOR PLEADINGS

Here are some ways to help you develop your legal arguments.

In your pleadings, you do not have to answer all of these questions. You can choose not to answer questions if your answers are not convincing or if they seem to benefit the opposing party.

### Question 1

*Does the prohibition of the niqab infringe the witness' freedom of religion?*

The **scope** of freedom of religion can be summarized as follows:

- ◆ It protects the right to practice religious beliefs **openly and without fear**;
- ◆ It provides that no person may be compelled to act contrary to their **sincere beliefs** unless a restriction is necessary to preserve the safety, order, health, public uses or the rights and freedoms of others.

### Question 2

*If so, is this infringement justified under section 1 of the Charter?*

Apply the section 1 test (found on page X of your student guide). Do not consider the 4th step of the test ("proportionality").

- a) What is the **objective** of banning the niqab before the courts? Is this **objective important enough** to justify a breach of a witness' freedom of religion?



- ◆ It protects the right to practice religious beliefs **openly and without fear**;
  - ◆ It provides that no person shall be compelled to act contrary to their sincere beliefs unless a restriction is necessary to preserve the safety, order, health, public uses or the rights and freedoms of others.
- a) What is the **objective** of banning the niqab before the courts? Is this objective **important enough** to justify a breach of a witness' freedom of religion?
- ◆ The **scope** of the **right to a fair trial and full answer and defense** can be summarized as follows:
    - ◇ The court must remain neutral and cannot favor one party over another;
    - ◇ An accused has the right to know all the evidence against him;
    - ◇ An accused has the right to defend himself, to present his own evidence and to explain his arguments.
- b) Is the banning of the niqab a logical way to achieve the above objective?
- ◆ How important is the testimony of the victim in a criminal trial?
  - ◆ Why is it important to see a person's face when testifying?
- c) Is it **reasonable and necessary** to prohibit the wearing of the niqab in **all circumstances** before the courts?
- ◆ Are there other alternatives that would not undermine freedom of religion to the same extent?
  - ◆ What might a niqab wearing woman do if she is forced to make a choice between her religion and her participation in the justice system?
  - ◆ What is the impact of the trial on the lives of the accused if they are convicted?
  - ◆ Can the wearing of the niqab in the courts diminish citizens' confidence in the justice system?

Do not forget to anticipate the arguments of the adverse party!