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MADE YOU LOOK: NIQABS, THE MUSLIM CANADIAN CONGRESS, AND R V NS

Fathima Cader*

R v NS was the first Canadian case to involve a niqab-wearing sexual assault complainant. At the Supreme Court of Canada, the Muslim Canadian Congress [MCC] was especially vocal in arguing it would be un-Canadian to allow NS to testify while wearing a niqab. This paper sets out to investigate the MCC's depictions of Muslim women, Muslim men, and the mainstream public, with specific attention paid to the details of the MCC's "clash of civilisations" framing, its impact on the Court's reasons, and its implications for women combatting sexual violence.

R c NS a été la première cause canadienne où une plaignante, victime d'une agression sexuelle, portait le niqab. Dans ses interventions devant la Cour suprême du Canada, le Congrès musulman canadien [CMC] a souligné avec beaucoup d'insistance qu'il serait anti-canadien de permettre à NS de témoigner en portant son niqab. Le présent article vise à briser les stéréotypes que le CMC a véhiculé dans ses arguments concernant les femmes musulmanes, les hommes musulmans et le grand public, et porte une attention spéciale aux particularités de la conception par le CMC du « choc des civilisations », leur impact sur les motifs de la Cour et leurs conséquences pour les femmes qui luttent contre la violence sexuelle.

Here a margin advances. Or a center retreats. Where East is not strictly east, and West is not strictly west, where identity is open onto plurality, not a fort or a trench.¹

I. INTRODUCTION

Of the nearly 40% of women in Canada who have been sexually assaulted since turning 16,² 90% of them do not report the crimes to police,³ in part because of the pervasiveness of victim-blaming myths,⁴ such as the misconception that a woman's clothing can "invite" rape. Consider the 2011 judgement of

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¹ Mahmoud Darwish, "Edward Said: A Contrapuntal Reading" translated by Mona Anis, (2007) 67 *Cultural Critique* 175 at 178.

² *R v Ewanchuk*, [1999] 1 SCR 330 at para 68 (concurring reasons by L'Heureux-Dubé J). See also "Measuring Violence Against Women: Statistical Trends 2006" *Statistics Canada* (October 2006), online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-570-x/85-570-x2006001-eng.pdf>> at 24.

³ Shannon Brennan & Mia Dauvergne, "Police-reported crime statistics in Canada, 2010" *Statistics Canada* (Ottawa 2011), online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11523-eng.pdf>> at 12.

⁴ See e.g. Claire L'Heureux-Dubé, "Beyond the Myths: Equality, Impartiality, and Justice" (2001) 10:1 *Journal of Social Distress and the Homeless* 87.

Manitoba Judge Robert Dewar, who declined to sentence Kenneth Rhodes, already convicted of sexual assault, to jail, ruling that the complainant's clothes had constituted an "invitation however involuntary" to the rape, notwithstanding her unequivocal rebuffing of Rhodes' advances.⁵

*R v NS*⁶ appeared to provide a new twist on this preoccupation with complainants' clothing: here, the concern was not that the complainant, NS, had been wearing too little clothing, and therefore had effectively invited the child molestation of which she accused two men, but that she now wore too much, and therefore was not entitled to testify against them in court while dressed in her everyday clothes.

In their interventions at the Supreme Court of Canada, the Muslim Canadian Congress was especially vocal in arguing that it would be un-Canadian to allow NS to testify while wearing her niqab (a veil that covers the face but not the eyes).

In debunking the stereotypes that anchored the MCC's submissions, this paper takes guidance from then Justice Claire L'Heureux-Dubé:

Debunking is more than simply being able to recognize myths and stereotypes. It is about exposing the ideological and cultural foundations of the myths and stereotypes prevalent in each culture and eradicating these fictions from the reasoning of all those who interpret our general culture, and, in particular, those in positions of power who contribute to their reinforcement.⁷

Accordingly, this paper's focus is on the ideological and cultural underpinnings of the MCC's submissions.

Beginning with a summary of the case's legal history, this case surveys the socio-political terrain of MCC's involvement in *R v NS*. It considers the implications of the MCC's diversion from certain procedural rules of intervention, especially with respect to representations the MCC makes of Muslim women, Muslim men, and the mainstream public in its submissions. Finally, this paper considers the Supreme Court's judgement for points of commonality with or divergence from the MCC's submissions. My hope here is to chart a way forward for lawyers and advocates whose work involves survivors of rape, howsoever dressed.

II. CASE HISTORY

NS alleges that from 1982 to 1987, beginning when she was six years old, she was sexually assaulted on multiple occasions by two men.⁸ In 2007, she brought charges of sexual assault against the two men. By 2005, NS had begun wearing niqabs as part of her practice of Islam. This would make NS the first niqab-wearing sexual assault complainant in Canadian history to engage the criminal trial process.⁹

However, that exceptionalist characterisation of the case would not emerge until after the prosecution called NS as a witness at the preliminary inquiry, when the two accused men responded by seeking a

⁵ *R v Rhodes*, [2011] MJ No. 67.

⁶ *R v NS*, 2012 SCC 72 [*NS 2012*].

⁷ L'Heureux-Dubé, *supra* note 4 at 91.

⁸ *R v NS*, 2010 ONCA 670 at para 3 [*NS 2010*].

⁹ Niqab-wearing witnesses in Canadian legal proceedings include those in the Maher Arar Inquiry.

court injunction requiring NS to remove her niqab before being allowed to testify against them. As judicial scrutiny shifted from accused to complainant, from men's rape to women's attire, the case headed firmly down a detour that, years later, remains unresolved.

It started with the preliminary inquiry judge holding a *voir dire*, during which NS wore her niqab. NS testified that her religious belief required her to cover her face when in the presence of men who are not her close relatives.

Judge Norris Weisman concluded that NS's belief was "not that strong,"¹⁰ because she had once removed her niqab to take a driver's licence photo (the photographer had been female) and because she had stated that she would, if required, remove it for border crossing security checks. He therefore ordered her to unveil.

NS objected. She would go on to progress through the Superior Court of Justice,¹¹ the Court of Appeal,¹² and the Supreme Court,¹³ seeking an order permitting her to testify while veiled. In December 2012, a majority of the Supreme Court held that the matter should be remitted to Weisman J, to be decided in accordance with their newly devised balancing test. In April 2013, Judge Weisman again ordered NS to remove her niqab. NS is again appealing.

This twist on the otherwise familiar preoccupation with finding the perfect rape victim is the fallout of national debates about the place of niqab-wearing women in Canada. From the Parti Québécois' Quebec Charter of Values,¹⁴ which would ban civil workers from wearing specified religious symbols, most notoriously hijabs and niqabs;¹⁵ to Quebec's Bill 94,¹⁶ which would ban women who wear niqabs from accessing essential services;¹⁷ to then Citizenship and Immigration Minister Jason Kenney's Operational Bulletin 359,¹⁸ which bans women wearing niqabs from giving citizenship oaths, Canadian policymakers have made clear their determination to delimit acceptable modes of expression and spheres of movement for women.

Consequently, this spinoff case about a woman's clothing has attracted significantly more attention than the original case about alleged child rape, attracting submissions at both appellate levels from organisations spanning a range of political perspectives.

¹⁰ Quoted in *NS 2010*, *supra* note 8 at para 4.

¹¹ *R v NS*, 2009 CanLII 21203 (ON SC).

¹² *NS 2010*, *supra* note 8.

¹³ *NS 2012*, *supra* note 6.

¹⁴ Government of Quebec, "Parce que nos valeurs, on y croit" *La Charte des valeurs québécoises* (September 2013), online: *La Charte des valeurs québécoises* <http://www.nosvaleurs.gouv.qc.ca/medias/pdf/Valeurs_document_orientation.pdf>.

¹⁵ "Charter of Quebec values would ban religious symbols for public workers," *CBC News* (10 September 2013) online: *CBC News* <<http://www.cbc.ca/news/canada/montreal/charter-of-quebec-values-would-ban-religious-symbols-for-public-workers-1.1699315>>.

¹⁶ Bill 94, An Act to establish guidelines governing accommodation requests within the Administration and certain institutions, 2nd Sess, 39th Leg, 2011 [Bill 94].

¹⁷ See Pascale Fournier & Erica See, "The 'Naked Face' of Secular Exclusion: Bill 94 and the Privatization of Belief" (2012) 30.1 Windsor YB Access Just 63.

¹⁸ "Operational Bulletin 359 - December 12, 2011" Citizenship and Immigration Canada (12 December 2011), online: *Citizenship and Immigration Canada* <<http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob359.asp>> [Bulletin].

The MCC argued that NS should be required to unveil before testifying, because they felt niqabs symbolise gender oppression, represent a refusal to integrate into the Canadian mainstream, and pose a threat to national security. By tasking the Canadian state with the impossible responsibility of simultaneously rescuing Muslim women from Muslim men and containing Muslims women's behaviour when their actions revealed too much agency, the MCC betrayed its dependence on stereotypes that dehumanise Muslim women, demonise Muslim men, and patronize everyone else.

III. NEITHER FORT NOR TRENCH: SOCIAL CONTEXT

In the 1990s, Bernard Lewis and Samuel Huntington, buttressed by decades of Western anti-Arab and anti-Muslim sentiment,¹⁹ presented their “clash of civilizations” thesis.²⁰ In it, they argued that Western states are inherently enlightened and Muslims inherently savage. Though their thesis had long been preempted by Edward Said's deconstruction of Orientalist stereotypes²¹ and their imperialist thrust was soon roundly critiqued by Tariq Ali as a “clash of fundamentalisms.”²² the original clash thesis continues to hold court, with polls showing that large numbers of Canadians continue to believe the West and Muslims are locked in “irreconcilable” and “unending ideological struggle.”²³

In 2002, Hélène Cixous wrote of a 9/11 “battle of signs,” describing one side as comprising the “masks” of “the Islamists’ spectacular and overinvested beards”²⁴ – this despite the fact that the collapsing of racialised bodies and lives into metonyms had already had deadly racist consequences: the first recorded 9/11-related hate-crime in the US was the murder of Balbir Singh Sodhi, killed on September 15, 2001. His killer had decided Sodhi was Muslim because of his beard, turban, and brown skin.²⁵ Sodhi was Sikh.

Meanwhile, the US had declared war on Afghanistan. As images of Afghan women in burqas (Taliban- mandated blue face-concealing robes) flooded Western media, a coalition of Western states launched Operation Enduring Freedom in October 2001, under the two-fold banner of anti-terrorism and

¹⁹ Jack G Shaheen, *The TV Arab* (Bowling Green, OH: Bowling Green State University Popular Press, 1984); Jack G Shaheen, *Reel Bad Arabs: How Hollywood Vilifies a People* (North Hampton, MA: Olive Branch Press, 2009).

²⁰ See e.g. Bernard Lewis, “The Roots of Muslim Rage” *The Atlantic Monthly* (September 1990), online: [The Atlantic Monthly](http://www.theatlantic.com/magazine/archive/1990/09/the-roots-of-muslim-rage/4643/) <<http://www.theatlantic.com/magazine/archive/1990/09/the-roots-of-muslim-rage/4643/>> and Samuel P Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996).

²¹ Edward Said, *Orientalism* (New York: Random House, 1978).

²² Tariq Ali, *The Clash of Fundamentalisms: Crusades, Jihads and Modernity* (New York: Verso, 2002).

²³ Descriptors taken from Jack Jedwab, “Canadian Opinion Ten Years after 9-11”, *Association for Canadian Studies* (11 September 2011), online: [Association for Canadian Studies](http://www.acs-aec.ca/pdf/polls/Canadian%20Opinion%20Ten%20Years%20After%209-11.pdf) <<http://www.acs-aec.ca/pdf/polls/Canadian%20Opinion%20Ten%20Years%20After%209-11.pdf>>. See also Randy Boswell, “Western, Muslim societies ‘irreconcilable’: poll”, *National Post* (11 September 2011), online: [National Post](http://news.national-post.com/2011/09/11/westernmuslim-societies-%E2%80%9Dirreconcilable%E2%80%99-poll/) <<http://news.national-post.com/2011/09/11/westernmuslim-societies-%E2%80%9Dirreconcilable%E2%80%99-poll/>>.

²⁴ Hélène Cixous, “The Towers: Les tours” (2002) 28 *Signs* 431 at 431. Tellingly, her piece also homogenises Afghani women.

²⁵ Alvin Powell, “Religious consciousness rises in U.S.: Eck looks at Post-Sept. 11 attitudes in U.S” *Harvard Gazette* (2002) online: [Harvard Gazette](http://www.news.harvard.edu/gazette/2002/02.14/10-eck.html) <<http://www.news.harvard.edu/gazette/2002/02.14/10-eck.html>>.

women's rights. As the safety and civil liberties of Muslim women in North America were increasingly curtailed,²⁶ it became commonplace to speak of the liberation of Afghan women.²⁷

Over a decade later, semiotic analyses of the enduring War on Terror remain pressing. Policy battles over the rights and obligations of veil-wearing Muslim women in the West have proven especially relentless. Mainstream opposition generally decries the fabric as evidence of the oppression of Muslim women by Muslim cultures, a defiance of the enlightenment and freedom proffered by Western states.

Yet as Saadia Toor reminds us, "we must always entertain a healthy dose of skepticism towards projects that present the 'Muslim world' as some sort of organic entity. In a quintessentially Foucauldian sense, their ideological purpose is to create this very 'Muslim world' of which they propose to speak."²⁸

In particular, under the false dichotomy of the clash thesis, to concede the rights and dignity of women who wear veils, would be to concede defeat to religious fanaticism and gender oppression. However, where the concern is gender equality, policies that deny niqab-wearing women access to justice, far from furthering women's meaningful participation, ensure the opposite, by entrenching the exclusion of women increasingly marginalised post-9/11. Indeed, after the release of the Quebec Charter of Values, the Montreal Police Service had to create a special unit on Charter-related hate crimes.²⁹

Nonetheless, the clash thesis remains powerful. In 1993, then Supreme Court Justice L'Heureux-Dubé held that face-to-face confrontation in court is a "culturally biased vision of human characteristics and, as a result, should not be viewed as part of our fundamental principles of justice."³⁰ In 2013, the now retired L'Heureux-Dubé stated niqabs are a sign of "oppression" and that laws regarding unacceptable clothing in the name of secularism are necessary to ensure "immigrants" "become like us."³¹ This departure from her stereotype-busting comments of over two decades ago (which opened this paper) arguably reflects the ascendancy of the gendered logic of the War on Terror.

The anxieties of anti-niqab opposition also typically reflect another axiom of the clash thesis: that there are bad Muslims and there are good, and never the twain shall meet. The thesis assigns specific sartorial and phenotypical markers (signs" and "masks") to dichotomous categories of Muslims.³² Bad

²⁶ See e.g. "Mapping Muslims: NYPD Spying and its Impact on American Muslims" *Creating Law Enforcement Accountability & Responsibility Project* (March 2013), online: City University of New York School of Law <<http://www.law.cuny.edu/academics/clinics/immigration/clear/Mapping-Muslims.pdf>>.

²⁷ Lila Abu-Lughod, "Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others" (2002) 104:3 *American Anthropologist* 783.

²⁸ Saadia Toor, "Gender, Sexuality, and Islam under the Shadow of Empire" (2011) 9.3 *The Scholar and Feminist Online* <http://sfonline.barnard.edu/religion/print_toor.htm> (Toor).

²⁹ Ingrid Peritz, "Quebec Muslims facing more abuse since charter proposal, women's groups say", *The Globe and Mail* (2 October 2013) online: The Globe and Mail <<http://www.theglobeandmail.com/news/national/quebec-muslims-facing-more-abuse-since-charter-proposal-womens-groups-say/article14672348/>>; Kyl Chhatwal, "Values charter raises the temperature in Quebec", *The Record* (23 September 2013) online: The Record <<http://www.therecord.com/opinion-story/4117482-values-charter-raises-the-temperature-in-quebec/>>; "Quebec police to investigate violence tied to 'values charter'", *Toronto Sun* (2 October 2013) online: Toronto Sun <<http://www.torontosun.com/2013/10/12/quebec-police-to-investigate-violence-tied-to-values-charter>>.

³⁰ *R. v. Levogiannis*, [1993] 4 SCR 475 at 491.

³¹ Allan Woods, "Ex-Supreme Court judge expected to back Quebec values charter", *Toronto Star* (23 September 2013) online: Toronto Star <http://www.thestar.com/news/canada/2013/09/23/exsupreme_court_judge_to_back_quebec_values_charter.html>.

³² For an example of an influential policy report that lists the binarised characteristics of good Muslims and of bad, see Angel Rabasa et al, "Moderate Muslim Networks" *RAND Corporation* (2007), online: RAND Corporation

Muslims – i.e. “extremists” or “fundamentalists” – are those with proclivities towards terrorism and misogyny, sartorially demonstrable through veils and beards. Good Muslims – i.e. “moderate” and “progressive” and “integrated” – are hyper-secularist in their understanding of gender equality and are uncritically patriotic.

In reality, there exist no identity markers unique to or consistent among Muslims, not even women’s veils.³³ Edward Said observes:

"Islam" as it is used today seems to mean one simple thing but in fact is part fiction, part ideological label, part minimal designation of a religion called Islam. In no really significant way is there a direct correspondence between the "Islam" in common Western usage and the enormously varied life that goes on within the world of Islam, with its more than 800,000,000 people, its millions of square miles of territory principally in Africa and Asia, its dozens of societies, states, histories, geographies, cultures.³⁴

The clash thesis further holds that good Muslims are those who assist the “liberation” of veil-wearing Muslim women from these women’s own interpretations of Islam for these women’s own good and despite these women’s own opposition. It is this keen edge of an instrumentalist feminism that makes the MCC so intriguing.

The MCC is perhaps the most widely-quoted Canadian Muslim organisation in the media today. It compels mainstream attention, arguably because the group is at once Muslim and a reliable source of denunciations of, according to founder Tarek Fatah, “radical Muslim men who consider themselves ultimately responsible for the conduct of the womenfolk, [whose] outlook is rooted in a medieval ethos that treats women as nonpersons, unable to decide for themselves what they should wear.”³⁵

Fatah later explained he supported Quebec’s Bill 94,³⁶ which would deny niqab-wearing women access to medical care, because “I welcome the rescue of all Muslim-Canadian women.”³⁷

In 2012, after Minister Kenney banned women who wear niqabs from giving citizenship oaths unless they unveiled,³⁸ the MCC threw Minister Kenney a thank-you reception, where it described the ban as “an admirable and commendable recommitment to Canadian values.” It invited Ottawa to expand the legislation “to ban masks, niqabs and burqas in all public dealings.”³⁹

<<http://www.rand.org/pubs/monographs/MG574.html>>. For an authoritative critique of this binary, see Mahmood Mamdani, *Good Muslim, Bad Muslim: America, the Cold War, and the Roots of Terror* (New York: Three Leaves Press/Doubleday, 2005).

³³ Consider Jewish wigs and scarves, Sikh pugh (turbans), or Yoruba gele (head wraps).

³⁴ Edward Said, *Covering Islam: How the Media and Experts Determine How We See the Rest of the World* (New York: Pantheon, 1981) at x.

³⁵ Tarek Fatah & Farzana Hassan, “The deadly face of Muslim extremism” *National Post* (12 December 2007), online: Muslim Canadian Congress <<http://www.muslimcanadiancongress.org/20071212.html>>.

³⁶ *Bill 94*, *supra* note 16.

³⁷ Tarek Fatah, “The rest of Canada should follow Quebec’s lead toward making Muslim women unveil”, *The Mark* (15 April 2010), online: The Mark <<http://www.themarknews.com/articles/1306-ban-the-niqab>>.

³⁸ *Bulletin*, *supra* note 18. The ban was challenged in the Federal Court by citizenship applicant Zunera Ishaq on October 17, 2014. At the time of publication, a decision has not been released.

³⁹ For webcast, see “Muslim Canadian Congress Thanks Hon. Minister Jason Kenney for Banning the Niqab” *RawalTV* (25 January 2012), online: YouTube <<http://www.youtube.com/watch?v=SnL3cBrGDxw>>.

There were no niqab-wearing women at the reception and none had been invited to speak about the directive's impact on their lives – but one unexpectedly arrived mid-way through the event. After making a dramatic entry, the gatecrasher tore off her veil. Underneath was a jubilant MCC spokesperson, Raheel Raza.⁴⁰ It was theatre without heart, the relentless precession of simulacra, and a forceful reminder that Canadian women who wear niqabs are not seen as part of the Canadian politic whose values were being affirmed.

The MCC's indulging an Immigration Minister whose anti-immigrant policies have been criticised by even the United Nations High Commissioner for Refugees⁴¹ demonstrates the ways that exaggeratedly unconditional displays of national loyalty are requisite to good Muslim identity. Unlike those Canadians whose normative whiteness allows their citizenship to go unquestioned, racialised people in Canada must express their loyalty explicitly and frequently when asserting claims of national belonging.⁴² Muslims in particular must contend with the sense, as Krista Riley observes, that “[o]ptions for exercising or demonstrating citizenship do not extend beyond celebrations of that citizenship; to apply a critical eye to either the institution of citizenship or to the country itself would result in one's membership in the nation being called into question.”⁴³

In playing Good Muslim/Bad Muslim so adeptly, the MCC wins at a losing game, for as Riley notes, “vocal expressions of patriotism [...] do not guarantee the extent to which such national belonging will be recognised; in fact, their very necessity negates the possibility of a full, unchallenged national belonging.”⁴⁴ Ultimately, success in slippery games of national belonging requires that the MCC reduce Muslim women's legion voices and needs into rhetorical pawns. This objectification of women, masked as benevolence, has been already widely critiqued.⁴⁵

Thus, the value of examining the MCC's submissions in this case lies in our exploring the mutually reinforcing relationship between gender-regulation and nation-building. It also helps us chart a social justice politic that, while attuned to equality's sartorial trappings, remains committed to exposing equality's socio-economic determinants.

⁴⁰ Stuart Bell “Widespread support for burka ban, Jason Kenney says; Muslims salute minister for ‘courageous’ move”, *National Post* (23 Jan 2012), online: National Post <<http://news.nationalpost.com/2012/01/23/widespread-support-for-burka-ban-jason-kenney-says-muslims-salute-minister-for-courageous-move/>>.

⁴¹ “UNHCR Submission on Bill C-31” *United Nations High Commissioner for Refugees Branch Office for Canada* (May 2012), online: UNHCR Branch Office for Canada <<http://www.unhcr.ca/resources/documents/RPT-2012-05-08-billc31-submission-e.pdf>>.

⁴² Sedef Arat-Koç, “The disciplinary boundaries of Canadian identity after September 11: Civilizational identity, multiculturalism, and the challenge of anti-imperialist feminism” (2005) 32:4 *Social Justice* 32 at 43.

⁴³ Krista Melanie Riley, “How to Accumulate National Capital: The Case of the “Good” Muslim,” (2009) 2:2 *Global Media Journal* 57 at 63.

⁴⁴ *Ibid* at 64.

⁴⁵ See e.g. Meena Sharify-Funk, “Representing Canadian Muslims: Media, Muslim Advocacy Organizations, and Gender in the Ontario Shari'ah Debate” (2009) 2 *Global Media Journal: Canadian Edition* 73; Riley, *supra* note 43.

IV. USEFUL AND DIFFERENT: THE PROCESS OF INTERVENING

A. Leave to Intervene

Organisations wishing to intervene in a given case must first secure leave to do so by showing that their submissions will be “useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal.”⁴⁶

In *R v NS*, nine parties applied to intervene: the Ontario Human Rights Commission, the Barbara Schlifer Commemorative Clinic (the Schlifer Clinic), the Criminal Lawyers' Association of Ontario (CLA), the South Asian Legal Clinic of Ontario (SALCO), the Barreau du Québec, the Canadian Civil Liberties Association (CCLA), the Women's Legal Education and Action Fund (LEAF), Council on American-Islamic Relations-Canada (CAIR-CAN), and the MCC.

The SCC used to grant leave only rarely in civil cases⁴⁷ and never in criminal appeals.⁴⁸ Public interest organisations were especially unlikely to receive leave. Now, however, interventions are available in all classes of cases and to a wide range of parties, though the Court's openness to hearing large numbers of public interest interveners seems to be waning.⁴⁹ The Court can still deny leave to intervene, even in criminal cases where an important public interest is at stake, without providing reasons.⁵⁰

The *Rules of the Supreme Court of Canada* provide that “any person interested” in the appeal should submit a motion for intervention, explaining their interest and any prejudice they would suffer if the intervention were denied.⁵¹ Pigeon J has held that “any interest is sufficient to support an application [...] subject always to the exercise of [the Court's] discretion.”⁵²

The motion should also identify the arguments the person intends to make, which must be “useful and different;”⁵³ their relevance and use to the proceedings; and their difference from those of the other parties.⁵⁴ Applicants generally satisfy these requirements by attaching a draft intervenor's factum to their motion.⁵⁵

In *R v NS*, Deschamps J granted all nine motions,⁵⁶ indicating that the Court was persuaded that all nine organisations were credible and had something “fresh” to contribute to the proceedings.

B. Written Submissions

Deschamps J then ordered that the nine interveners “shall be entitled to each serve and file a factum not to exceed 10 pages in length.”⁵⁷ This is as per the *Rules*, which provide that legal arguments must fit within 10 pages.⁵⁸

⁴⁶ *R v Morgentaler*, [1993] 1 SCR 462 at para 1; reaffirmed in *R v De Trang*, 2002 ABQB 185 at para 7.

⁴⁷ Henry S Brown, *Supreme Court of Canada Practice 2012* (Toronto: Carswell/LexisNexis, 2012) at 381.

⁴⁸ *Ogg-Moss v The Queen*, [1984] 2 SCR 171 at 171.

⁴⁹ Brown, *supra* note 47 at 382-383.

⁵⁰ *Ibid* at 386.

⁵¹ SOR/2002-156, R 42 [*Rules*] at R 55 and R 57(1).

⁵² *Norcan Limited v Lebrock*, [1969] SCR 665 at 66.

⁵³ Reference re Workers' Compensation Act, 1983 (Nfld) (Application to intervene), [1989] 2 SCR 335.

⁵⁴ *Rules*, *supra* note 51, R 57(2).

⁵⁵ Brown, *supra* note 47 at 389.

⁵⁶ *R v NS* [2010] SCCA No 494 at 4 [*NS SCCA*].

⁵⁷ *Ibid*.

Accounting for cover pages, signatures, tables of authorities, etc., all the interveners' facta were under 40 pages long – with one exception: the MCC's factum weighed in at 129 pages.

The MCC's factum had two tabs: Tab A was titled "Factum" and Tab B "Other Documents." While the MCC confined its legal arguments to the prescribed 10 pages in Section A, those arguments relied heavily on the 109 pages of secondary non-legal materials in Tab B. Tab B supplied the social rhetoric that animated the legal arguments in Tab A. As such, though innocuously titled "Other," it was in fact critical to the MCC's factum. None of the other interveners submitted a factum containing a section comparable to the MCC's Tab B.

The Court has wide discretion to impose restrictions on and grant privileges to interveners. This includes the discretion to allow an intervener to "adduce further evidence and otherwise supplement the record."⁵⁹ In this case, the Court did not provide reasons illuminating their decisions regarding the interventions.

C. Oral Submissions

All nine interveners in *R v NS* requested permission to present oral arguments. After receiving their facta, the Court granted permission to make oral submissions to only the CLA, the Schlifer Clinic, and the MCC.⁶⁰ None of these groups advanced NS's position that she categorically be allowed to wear her veil.

The Court's refusal to hear submissions from the two groups, LEAF and CAIR-CAN, who had submitted facta arguing NS should be allowed to wear her niqab is troubling.

Had the Court issued reasons explaining its intervention decisions, this may have helped dispel the spectre of a bias against NS's particular formulation of an anti-racist feminism.

To be fair, the Court rarely issues reasons for intervention decisions, but notable examples include *Reference re Workers' Compensation Act*⁶¹ and *R v Finta*,⁶² in which Sopinka J and McLachlin J, as she then was, respectively, explained why the "useful and different" rule had led them to grant leave to intervene to some organisations and not others.

V. THE FACTUM

In its factum, the MCC argued that niqabs represent gender oppression, as experienced by Muslim women and exerted by Muslim men; that niqabs symbolise an intolerance of Canadian values; and that niqabs pose a threat to mainstream society's security. These arguments demonstrate more of a concern with policing the borders of culture than protecting an accused's fair trial rights.

⁵⁸ *Rules, supra* note 51, R 42(6).

⁵⁹ *Ibid.*, R 59(1)(b).

⁶⁰ *NS SCCA, supra* note 56 at para 7.

⁶¹ [1989] 2 SCR 335.

⁶² [1993] 1 SCR 1138.

A. The Oppressed Muslim Woman

The MCC argued that ordering NS to unveil would uphold the “salutary effects of promoting gender equality”⁶³ on the basis that allowing women to wear niqabs was “inconsistent with gender equality and the full participation and integration of marginalized groups into Canadian society.”⁶⁴

Yet the assumption that governments are entitled to dictate women’s wardrobes has already been challenged by women who have successfully overturned Canadian laws that, for instance, prohibit women from being topless in public.⁶⁵ If ordering women to cover parts of their bodies can be understood as undermining women’s autonomy, so too must ordering women to bare parts of their bodies. Yet whereas the former group of women is typically understood as demonstrating ownership of their bodies, the latter is characterised as having none.

Niqabs in particular function now in the West as a preeminent icon of gender subordination, as reflected in the MCC’s assertion that “[t]he covered female face is a reminder to the wearer that she is not free, and to the observer that she is a possession.”⁶⁶ This is a paraphrase, near-verbatim, of editorialist Barbara Kay’s declaration, attached via an editorial in Tab B, that “[f]ull cover is worn as a reminder to the ‘bearer’ that she is not free, and to remind the observer that the bearer is [...] something less than a full human being.”⁶⁷

To support this point, the MCC cited *Police v Razamjoo*,⁶⁸ a New Zealand case involving a niqab-wearing witness. The MCC claimed that in *Razamjoo* “all that is accessible to the trier of fact are the disembodied voice and eye movements of the witness.”⁶⁹ The MCC’s dehumanising reduction of the female witness to a collection of “disembodied” body parts, when translated to *R v NS*, sexualises the female sexual assault complainant by reducing her testimony to the sum of her visible body parts. This objectification reinforces, at a conceptual level, the forced denuding and sexual abuse alleged at the material level.

This argument also renders women invisible in a way that the sheer physicality and continued assertion of their presence in a courtroom, veiled or otherwise, belies. Flatly asserting the existentially oppressed nature of women who wear niqabs denies the complex testimonies of these very same women.

Indeed, Muslim women have long articulated myriad interlocking reasons for practising various forms of veiling. These range from liberal conceptions of autonomous agency, to spiritual motivations, to considerations of earthly socioeconomics, including patriarchy’s legion manifestations.⁷⁰ Such a

⁶³ Factum of the Intervener, The Muslim Canadian Congress at para 3 [MCC Factum].

⁶⁴ *Ibid* at para 14.

⁶⁵ See e.g. *R v Jacob*, 31 OR (3d) 350; *District of Maple Ridge v Meyer*, 2000 BCSC 902.

⁶⁶ MCC Factum, *supra* note 63 at para 14.

⁶⁷ Barbara Kay, “Not ‘worn,’ but ‘borne,’” *National Post* (26 March 2010), online: National Post <<http://www.nationalpost.com/opinion/columnists/story.html?id=cd274b84-89e6-4f1b-a5eb-d04414ce0229>> [Kay].

⁶⁸ *Police v Razamjoo*, [2005] DCR 408.

⁶⁹ MCC Factum, *supra* note 63 at para 5.

⁷⁰ See e.g. Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton, NJ: Princeton University Press, 2005); Leila Ahmed, *A Quiet Revolution: The Veil’s Resurgence, from the Middle East to America* (New Haven, CT: Yale University Press, 2011); Alia Al-Saji, “The racialization of Muslim veils: A philosophical analysis” (2010) 36 *Philosophy and Social Criticism* 875.

multiplicity fatally complicates any seductively and prescriptively rigid conceptions of choice and coercion or of oppression and resistance.⁷¹

In contrast, the MCC spoke of niqabs functioning as “a reminder to the wearer” of her subordination.⁷² This wilful reductiveness mirrors the pantomime the MCC undertook earlier at the Kenney reception, illustrating how niqab-wearing women are pre-empted and displaced from the public arena. A coerced silence is violence.

Meanwhile, NS has stated that wearing a niqab makes her feel more confident and comfortable in the courtroom.⁷³ It follows that, for NS, her veil facilitates her freedom.

The MCC’s approach of steamrolling over NS’s own testimony regarding her own experiences, and then being rewarded with permission to make oral submissions, reproduces a problem identified in Sirma Bilge’s study of certain Western reactions to Muslim women’s veils:

In the French headscarf debates, these accredited insiders were French women of Muslim background who publicly opposed the veil, and received much media attention and political acclaim, whilst those who wore the veil were rejected as legitimate sources of knowledge. Their exclusion from public debates, particularly from the Stasi Commission’s hearings, relied on the submission/false consciousness thesis [...] Conversely, those who opposed the veil offered highly praised expert testimonies to the Stasi Commission.⁷⁴

Indeed, the MCC did cast its net wider than niqabs, referencing *Dahlab v Switzerland*,⁷⁵ a European Union case about a female Muslim teacher who wished to wear a headscarf at work. The MCC quoted the European Court of Human Rights decision, which relied on clash-of-civilisation tropes to rule against the teacher.

Yet *Dahlab* is easily distinguishable from *R v NS*: headscarves were not at issue in *R v NS* and *Dahlab*’s face was always visible. Thus, *Dahlab*’s inclusion in the factum’s section on gender equality reveals the MCC’s preoccupation with the wardrobes of all visibly Muslim women, including those clothes that do not touch on the demeanour issues at the heart of *R v NS*. This recalls Natasha Bakht’s observation that “opponents of the ‘veil’ tend to conflate the different types of head coverings making it difficult to assess the specific nature of their objections.”⁷⁶

More broadly, NS’s singular determination and litigious persistence in the face of the “whack-the-complainant”⁷⁷ tactics that alienate so many women from Canada’s criminal justice system bears out

⁷¹ Sirma Bilge, “Beyond Subordination vs. Resistance: An Intersectional Approach to the Agency of Veiled Muslim Women” (2010) 31:1 *Journal of Intercultural Studies* 9; Falguni A Sheth, “Unruly Muslim Women and Threats to Liberal Culture” (2005) 18 *Peace Review* 455.

⁷² MCC Factum, *supra* note 63 at para 14.

⁷³ *NS 2010*, *supra* note 8 at para 5.

⁷⁴ Bilge, *supra* note 71 at 16.

⁷⁵ No42393/98 (15 February 2001).

⁷⁶ Natasha Bakht, “Objection, Your Honour! Accommodating Niqab-Wearing Women in Courtrooms” in Ralph Grillo et al, eds, *Legal Practice and Cultural Diversity* (Surrey UK: Ashgate Publishing, 2009).

⁷⁷ See e.g. C Schmitz, “Whack Sex Assault Complainant at Preliminary Inquiry”, *Lawyer’s Weekly* (27 May 1988).

Judith Butler's comment that "freedom is not a potential that waits for its exercise. It comes into being through its exercise."⁷⁸

Accordingly, if the MCC is concerned that niqabs prevent women from speaking for themselves, it would behoove it to facilitate the testimony of a woman who is fighting to state her case. Doing so would require the MCC acknowledge the many systemic forces that restrict the self-determinative power of women in Canada, including the slashing of legal aid funding;⁷⁹ the ease with which the Canadian Border Service Agency enters shelters to deport women fleeing domestic violence;⁸⁰ the highly disproportionate rates of the murders, disappearances, and imprisonment of Aboriginal women;⁸¹ the ever-widening poor-rich gap;⁸² and the "feminization of poverty" in Canada, noted by the SCC over two decades ago.⁸³

Yet the MCC's pivotal oppressed/liberated dichotomy, with its insistence on essentialising Muslims, forecloses systemic or socioeconomic analyses of the debate over religious clothing for women. As Toor reminds us:

What passes for the victimization of women by 'Islam' is all-too-often part and parcel of a more global phenomenon—an increase in the moral and sexual regulation of women by communities and kin-networks as a response to political, social and cultural anxieties; such anxieties have intensified under economic and cultural globalization. The regulation

⁷⁸ Judith Butler, "Performativity, Precarity and Sexual Politics" (2009) 4:3 AIBR. *Journal of Iberoamerican Anthropology* 321.

⁷⁹ Between 2002 and 2004, legal aid funding in BC was cut by 40%, mostly in family and poverty law. More cuts followed in 2009. See Leonard T Doust, "Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia" Public Commission on Legal Aid (March 2011), online: Canadian Bar Association <http://www.cba.org/bc/Practice_Resources/PDF/pcla_report_03_08_11.pdf>. In 1996, financial eligibility criteria for Ontario legal aid certificates was cut by 22%. See Michael Trebilcock, "Report of the Legal Aid Review 2008" Ontario Ministry of the Attorney General, online: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/>>. In 2012, Legal Aid Ontario reduced their refugee and immigration services by \$1 million. See "Changes to refugee and immigration services" Legal Aid Ontario, online: Legal Aid Ontario <http://www.legalaid.on.ca/en/info/refugee_immigration.asp>. In 2014, plans emerged to close 16 community legal aid clinics in Toronto. See Hilary Caton, "Group forms to stop potential closure of legal clinics across the Greater Toronto Area" *Inside Toronto* (Oct 17, 2014), online: Inside Toronto <<http://www.insidetoronto.com/news-story/4921295-group-forms-to-stop-potential-closure-of-legal-clinics-across-the-greater-toronto-area>>.

⁸⁰ Saira Peekser, "Shelter storm: Women without status are forced to choose between assault and deportation" *Now Toronto* (3 March 2011), online: Now Toronto <<http://www.nowtoronto.com/news/story.cfm?content=179448>>.

⁸¹ See Darcie Bennett et al "Blueprint for an Inquiry: Learning from the Failures of the Missing Women Commission of Inquiry" B.C. Civil Liberties Association, West Coast Women's Legal Education and Action Fund, *Pivot Legal Society* (2012), online: Pivot Legal Society <http://www.pivotlegal.org/blueprint_for>; Amnesty International, "Matching International Commitments With National Action: A Human Rights Agenda for Canada" (December 2012), online: Amnesty International <http://www.amnesty.ca/sites/default/files/amnesty_cdnhumanrights_12_0.pdf> at 14-15; Nico Trocme, Della Knoke & Cindy Blackstock "Pathways to the Overrepresentation of Aboriginal Children in Canada's Child Welfare System" (2004) 78 *Social Service Review* 577 at 579.

⁸² David A Green & Kevin Milligan, "Canada's Rich and Poor: Moving in Opposite Directions" *Canadian Centre for Policy Alternatives* (February 2007), online: Canadian Centre for Policy Alternatives <<http://www.policyalternatives.ca/sites/default/files/uploads/publications/reports/docs/Canadas%20Rich%20and%20Poor.pdf>>.

⁸³ *Moge v Moge*, [1992] 3 SCR 813.

of women and their sexuality is, after all, a common feature of all patriarchal societies, traditional or modern, and certainly not simply Muslim ones.⁸⁴

Along these lines, and in stark contrast to MCC, fellow intervener LEAF noted that “[h]ow women are dressed has historically been a recurring pre-occupation of sexual assault trials [...] women are either wearing too little or too much clothing to be either believed or worthy of protection.”⁸⁵

LEAF was referring to the infamous era of *R v Ewanchuk*’s “bonnets and crinolines,”⁸⁶ when female sexual assault survivors were penalised for not having been dressed conservatively enough for the court’s taste. Decades later, the “perfect victim” paradigm remains live: research has shown that in Canada a female victim’s newsworthiness still hinges on her social status, with all its contingent race and class implications.⁸⁷

In the MCC’s factum, Kay declared “[i]t doesn’t matter if there are only 20 women in Quebec wearing the niqab. Even one is too many.” She even argued this group’s marginality is a good thing because:

When there are few, and the law easily implemented, is precisely the time to grasp the nettle, and send a clear message to those considering it: In our country, the covered female face is incompatible with gender equality [...] and incompatible with our communal sense of decency.⁸⁸

Yet the notion that it is “decent” to bring the weight of the state down on a handful of differently-dressed women – even a single woman – who have committed a crime contravenes the *Charter*’s commitment to “the preservation and enhancement of the multicultural heritage of Canadians.”⁸⁹

In summary, the MCC’s focus on NS’s clothing is a function of the MCC’s mistaking what a Muslim woman wears for a sign of internal or inherent truths. Despite the challenges that women generally and niqab-wearing women specifically face in bringing forward allegations of rape, NS is enacting a particularly courageous form of freedom for all survivors of child rape, all women, and, indeed, all society. It would benefit the MCC to remember this when it contends that NS is nothing more than a carrier of misogyny, a prisoner and a possession. If the MCC actually supports “the full participation [...] of marginalized groups into Canadian society,”⁹⁰ it cannot encourage the mandated exclusion of already marginalized women from the public arena.

⁸⁴ Toor, *supra* note 28.

⁸⁵ Factum of the Intervener, Women’s Legal Education and Action Fund at para 50, online: Women’s Legal Education & Action Fun http://leaf.ca/wordpress/wp-content/uploads/2012/02/Final_Factum_SCC_R-v-N-S-.pdf.

⁸⁶ *R v Ewanchuk*, 1998 ABCA 52.

⁸⁷ Ken Dowler, Thomas Fleming & Stephen L Muzzatti. “Constructing Crime: Media, Crime, and Popular Culture” (2006) 48:6 *Canadian Journal of Criminology and Criminal Justice* 837.

⁸⁸ Kay, *supra* note 67.

⁸⁹ *Canadian Charter of Rights and Freedoms*, Part I of the *The Constitution Act*, 1982, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Charter*] at s 27.

⁹⁰ MCC Factum, *supra* note 63 at para 14.

B. The Oppressive Muslim Man

In the MCC's framing of gender inequity, the oppression of Muslim women would be non-existent but for the oppressiveness of Muslim men. To underscore the impoverishment of such thinking is neither to minimize nor to condone patriarchy's operations among Muslims, but simply to remember that Muslim women who wear niqabs, like all women, live at the intersections of multiple vectors of power. To facilitate an emancipation that individual niqab-wearing women might accept as genuinely helpful, we must devise analyses and strategies that are contextual: they must be historically-rooted, forward-thinking, and multi-pronged.

Instead, in Tab A, the MCC stated that "[t]he covered female face is a reminder to [...] the observer that she is a possession."⁹¹ In Tab B, Kay stated that the sight of women wearing niqabs arouses in all observers a "fear (of the men who own them)."⁹² The MCC itself never clarified who "possesses" niqab-wearing women. Even were it not for the identification provided separately by Kay, the MCC would not need to clarify, as the presumption of the ever-implicit male Muslim oppressor is that normalised: the MCC has only to faintly gesture at her for readers to hark to him. Yet to the extent that male entitlement over female bodies is at issue in *R v NS*, we cannot forget that this is a case about a woman seeking justice for male trespass over her body.

The alienation of Oppressed Muslim Woman from Oppressive Muslim Man also misses the fact that women's networks of care often include men – friends, fathers, brothers, lovers, mentors. As Jennifer Nedelsky has argued, feminist conceptualisations of women's autonomy should be grounded in the interconnectedness, rather than the atomisation, of our lives.⁹³

In contrast, there is implied in the MCC's divisive formulations a castigation of Muslim men who do not stop Muslim women from wearing veils. This approach does nothing to facilitate women's freedom, since it sets out the acceptable ways that men can dictate women's clothing. It also intensifies pressure on women who choose to wear niqabs to defend their selfhood and the humanity of their male Muslim colleagues.

In fact, the MCC's hyper-individualism has practical implications as well for women who are forced to wear niqabs. The notion that Muslim women are, ontologically, either oppressed or liberated, requires that, once liberated, Muslim women renounce all ties to perceived sources of their oppression. Yet the wholesale rejection of kin-networks, including those that may be financially, emotionally, or socially significant, alienates women from homes, families, and friends, leaving them even more vulnerable to violence at a time when Canadian support services are increasingly unable to meet demand.⁹⁴

This is not a suggestion that women remain in abusive situations. Rather, it is a reminder of Sherene Razack's warning: "you can't fight violence against women with racism because racism is likely to strengthen patriarchal currents in communities under siege."⁹⁵ Denying women access to justice because of how they dress amplifies the vulnerability, thus emboldening the people who would assault them.

⁹¹ *Ibid.*

⁹² Kay, *supra* note 67.

⁹³ Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 Yale JL & Feminism 7.

⁹⁴ 5,300 victims of sexual assaults or other violent offences request assistance from victim service agencies daily across Canada. 90% of them are women. See Statistics Canada "Family Violence in Canada: A Statistical Profile 2008" (Ottawa 2008), online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-224-x/85-224-x2008000-eng.pdf>> at 15.

⁹⁵ Sherene Razack, "Imperiled Muslim Women, Dangerous Muslim Men and Civilized Europeans: Legal and Social Responses to Forced Marriages" (2004) 12 Fem Legal Stud 129 at 132 ["Imperiled"].

In short, the MCC's denial of women's rights and realities does nothing to diminish the pervasiveness of sexualised violence in this country. The idea that requiring all women to bare parts of their body is a remedy for those women forced to cover parts of their bodies is untenable. Instead, ethically sound and practically useful approaches will have to incorporate contextual understandings of the interplay between an individual's autonomy and her social networks.

C. Integration

1. Integrating the Niqab-Wearing Subject

The MCC's factum began: "The niqab has proven to be a controversial and polarizing garment."⁹⁶ It continued: "the principles of a free and democratic society should weigh heavily against the deleterious effects of the infringement on freedom of religion."⁹⁷ This is a classic expression of the clash of civilizations binary: niqabs are controversial, because Canada is secular and democratic while niqabs are excessively religious and oppressive. Put baldly, this means it would be treason to envision a democracy that permits women to wear niqabs. Accordingly, the MCC contends that the wearing of niqabs should be "removed from the core values of a free and democratic society."⁹⁸

However, the assumption that secularism produces a religiously neutral state is suspect. The very first words of the *Charter*, Canada's most definitive articulation of freedom and democracy, are "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."⁹⁹

Should there be any confusion as to which god reigns supreme over this country's principles, the federal government recently extinguished funding for non-Christian chaplaincies in federal prisons. Public Safety Minister Vic Toews responded to objections by reassuring the public that all prisoners, including Aboriginal prisoners, could turn to the Christian chaplains for religious guidance.¹⁰⁰

Furthermore, the very first freedom protected by the *Charter* is a religious one:

2. Everyone has the following fundamental freedoms:
 - (a) freedom of conscience and religion.¹⁰¹

In *Syndicat Northcrest v Amselem*, the Supreme Court defined "religious practice" as including those practices that an individual "sincerely" and "subjectively" believes is connected to their religion,¹⁰² regardless of whether or not the practice is normative amongst other observers or is required by a religious authority.¹⁰³ This coincides with the No Bill 94 Coalition's assertion that "[i]t is not for the Canadian public, the courts, or any given Islamic scholar to determine whether Muslim women are

⁹⁶ MCC Factum, *supra* note 63 at para 1.

⁹⁷ *Ibid* at para 3.

⁹⁸ *Ibid* at para 23.

⁹⁹ *Charter*, *supra* note 89, at Part I.

¹⁰⁰ Jill Mahoney, "Government cuts non-Christian prison chaplains" *The Globe and Mail* (5 October 2012), online: The Globe and Mail <<http://www.theglobeandmail.com/news/politics/government-cuts-non-christian-prison-chaplains/article4591355/>>.

¹⁰¹ *Charter*, *supra* note 89, s 2.

¹⁰² *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 69 [*Amselem*].

¹⁰³ *Ibid* at para 54.

religiously-mandated to wear the niqab; it is for each Muslim woman to decide the extent of her obligation within the parameters of her faith.”¹⁰⁴

Nonetheless, the MCC challenged the sincerity of NS’s religiosity in two ways. First, it argued that

[t]he question is not what a particular practice or belief may mean to the religious community at large, but rather to the individual claimant. This is especially true where the practice in question, such as the wearing of the niqab, has traditionally carried both religious and non-religious significance.¹⁰⁵

The MCC then provided three areas of non-religious significance: culture, politics, and family.¹⁰⁶

NS has clearly stated that the reasons she wears niqabs are religious. It makes her intent no less religious that niqabs may also have cultural, political, familial, or other resonances for others or for herself. The *Amselem* test does not require exclusivity of intent, as people regularly do things for multiple and overlapping reasons. In fact, the “personal connection with the divine”¹⁰⁷ that the Court is concerned with is one invariably mediated by culture, politics, and family – all the trappings of life. Thus, the *Amselem* test’s threshold is low, with the Court holding that inquiries into sincerity must be “as limited as possible,” in part because of “the widening understanding of what constitutes religion in our society.”¹⁰⁸ Instead of clinging to restrictive ideas of authenticity and purity, the *Amselem* test encourages us to celebrate religious identity as a palimpsest, inevitably crafted in ambiguity and impurity.

The MCC also challenged NS’s sincerity by arguing that since NS had previously taken off her niqab under state duress, her insistence now on wearing a niqab was “inconsistent” with previous practice, such that it fell outside the protections of s. 2(a).¹⁰⁹ However, the *Amselem* test provides that

it is inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely 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.¹¹⁰

2. Integrating into the Non-Niqab Wearing Public

In Tab B, Kay took a different approach when considering the pains of integration. She focused on the emotional wellbeing of people who interact with women who wear niqabs, insisting that “no citizens

¹⁰⁴ Non/No to Bill 94 Coalition, “Frequently Asked Questions” (5 April 2010), online: No to Quebec Provincial Bill 94 <<http://nonbill94.wordpress.com/frequently-asked-questions-faqs/>>.

¹⁰⁵ MCC Factum, *supra* note 63 at para 8.

¹⁰⁶ *Ibid* at paras 9-10.

¹⁰⁷ *Amselem*, *supra* note 102 at para 56.

¹⁰⁸ *Ibid* at para 52.

¹⁰⁹ MCC Factum, *supra* note 63 at paras 9-10.

¹¹⁰ *Amselem*, *supra* note 102 at para 53.

can be psychologically comfortable sharing public space with other citizens who refuse to be seen”¹¹¹ and that

[i]t is no use pretending fully covered women do no harm to the social fabric. They arouse internal disturbance in others: a mixture of self-consciousness, pity, guilt, fear (of the men who own them) and resentment, the last because in any encounter with them we feel shunned, and cannot ‘read’ their expression, which is a necessity for both social and security reasons.¹¹²

She concluded that to ban niqabs is to show “respect for community standards in the public spaces we collectively support.”¹¹³ Kay’s remarks bear out Bakht’s observation that some non-wearers of niqabs understand their hostility as “compulsory and not something to be unlearned.”¹¹⁴

Kay’s and the MCC’s arguments flow from grossly impoverished views not just of Muslim women and men, but of society at large. These arguments assume that everyone shares the MCC’s antagonistic reaction to women who wear niqabs and that no non-wearers are capable of self-reflexivity. This is demonstrably untrue. The No Bill 94 Coalition, for instance, included 28 organisations, academic and activist, Francophone and Anglophone, Muslim and non-Muslim.¹¹⁵ Besides women in niqab, the Coalition’s protests were also attended by people spanning the spectrum of the Canadian mainstream and left.¹¹⁶

These mobilisations refute Kay’s claim that “I can’t remember a time when Quebecers were more unified on a government initiative.”¹¹⁷ Helpfully, however, Kay provides an exhaustive list of just who counts in her imagined nation: “separatists, federalists, left-wingers, right-wingers, Christians, atheists, democratic Muslims, francophones, anglophones, allophones.”¹¹⁸ All others, all those critical of the ban, are one and the same with “the odd imam crying ‘Islamophobia!’”¹¹⁹

Eerily, Kay ends her polemic with: “Democratic Muslims will thank Quebec for the ban, which other provinces should emulate, and as for undemocratic Muslims – well, if democracy wasn’t what they wanted, why are they here in the first place?”¹²⁰

This repackaging of the banal racist cry, here respectfully submitted to the Supreme Court and still heard on Canadian streets, to *go back where you came from* bears out Razack’s observation that the

¹¹¹ Kay, *supra* note 67.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ Natasha Bakht, “Veiled Objections: Facing Public Opposition to the Niqab” in Lori Beaman, ed, *Reasonable Accommodation: Managing Religious Diversity* (Vancouver: University of British Columbia Press, 2012) at 14.

¹¹⁵ See “About” *No to Quebec Provincial Bill 94* (5 April 2010), online: No to Quebec Provincial Bill 94 <<http://nonbill94.wordpress.com/2010/04/05/about/>>.

¹¹⁶ For photos, see Coalition Against Bill 94, “Toronto Rally Against Bill 94” (June 13, 2010), online: Coalition Against Bill 94 <<https://notobill94.wordpress.com/2010/06/13/toronto-rally/>>.

¹¹⁷ Kay, *supra* note 67.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

stereotyped figures of the imperiled Muslim woman, the barbaric Muslim man, and the civilized Westerner have been used to justify the expulsion of Muslims from the Canadian politic.¹²¹

3. Re-Envisioning ‘Integration’

So what, finally, makes a good citizen, a good Muslim? Ontological speculations about the nature of goodness fall well beyond the scope of this paper, but, so as not to leave too frustrating an open end to this prolonged goading of the good/bad Muslim dichotomy, I turn to anthropologist Talal Asad’s description of a “political Islam” whose possibilities

lie not in the aspiration to acquire state power and to apply divinely authorized law through it but [...] in a struggle guided by deep religious commitments that are both narrower and wider than the nation state. Politics in this sense is [...] ‘political’ because ordinary subjects demand collectively to be heeded.¹²²

Asad states that such a project recognises that “[n]ational unity’ is by definition exclusive, [...] it is the illusion that enables the state to demand sacrifice; it can be confronted with the awareness of greater dangers and the promise of wider friendships.”¹²³

The grace of this formulation is predicated on the hope that our identities and their constitutive differences and contradictions (we are large, we do contain multitudes) can serve as sites of connection, rather than exclusion. We are none of us forts, neither are we trenches.

E. Security

Covering one’s face may seem impractical in societies where established surveillance regimes demand constant identification. This frequently prompts the argument that niqab-wearing women represent a threat to public safety. Yet, instead of being articulated as a priority, this argument commonly manifests as an afterthought, functioning to add weight to more populist arguments, especially – and contradictorily – the argument that women who wear niqabs lack agency.

For example, the MCC relegated its security arguments to footnotes and secondary materials, thus deploying these particular anxieties not as substantive points, but as background colour. Specifically, the MCC argued that “[t]he niqab is worn to purposefully conceal *all* distinguishing features by both the pious and the opportunistic” (emphasis in the original).¹²⁴ The associated footnote comprised citations for two articles from Dubai, attached in Tab B: “Veiled woman attacks and tries to rob man in Sharjah elevator: Police urge people not to enter lifts if they see strangers” and “Dubai Police: Niqab an obstacle to tackling beggars.”

That the MCC provided two examples of quasi-criminal behaviour abroad demonstrates its desire that the Court perceive women who wear niqabs as “opportunistic” conduits to violent crime. Leaving aside the dubiousness of making this argument in a case involving the alleged rape of a child, the feebleness

¹²¹ Sherene Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008).

¹²² Talal Asad, “Muhammad Asad, Between Religion and Politics” (2012) 1 *Islam & Science* 77 at 87.

¹²³ *Ibid.*

¹²⁴ MCC Factum, *supra* note 63 at para 5.

of the MCC's examples indicates that security is hardly a well-founded concern, based on speculation, rather than fact. Moreover, whereas a negligible number of crimes globally involve people using niqabs as a disguise, there are countless examples of crimes that remain unsolved even though the perpetrator's face was visible and there are countless ways of disguising one's identity without facial coverings.

In reinforcing stereotypes of visibly observant Muslims as dangerous, this argument reveals the slippage that confounds contradictory representations of niqab-wearing women: on the one hand, they are hapless, voiceless subjects requiring protection from Muslim men; on the other, society requires protection from them. An instrumentalist approach helps resolve the paradox: both narratives regarding the victimisation and the aggressiveness of Muslim women enable the surveillance of Muslim communities and their eviction from the mainstream public.¹²⁵

VI. THE HEARING

The Supreme Court heard the case on December 8, 2011. All three interveners who presented oral arguments submitted different balancing tests for the court's consideration, with onuses of different weight placed on witnesses and accuseds to demonstrate *Charter* infringements.¹²⁶

The Schlifer Clinic, for instance, argued that witnesses should be required to unveil only in the rarest of circumstances. It went so far as to argue that it did not think such circumstances actually existed, but appreciated that the court might be reluctant to make an absolute rule. During his submissions, Fish J called on counsel for the Schlifer Clinic, Rahool Agarwal, to respond to the MCC's argument that Muslim women wear niqabs for religious and non-religious reasons. Justice Fish suggested this would affect the assessment of the witness's religious rights, as non-religious reasons would place a witness's niqab outside the *Charter*'s protection. Agarwal responded that the Schlifer Clinic disagreed with the MCC. He said that while there may be situations where people wear niqabs for cultural reasons, which may be available for questioning, the Schlifer Clinic's view of *Amselem* is that the extent of a section 2(a) inquiry is limited to assessments of sincerity.

The concern for the possible non-religiosity of a witness's reasons for wearing niqabs continued into the MCC's presentation. Counsel for the MCC, Tyler Hodgson, argued that the witness should have to prove her reasons are religious, regardless of the practice's doctrinal foundations or its performance by others.

At first blush, this argument is of no impact on NS's position, as she has consistently stated that she wears niqabs for religious reasons. Where things become contentious is in the MCC's opinion about the extent of the inquiry. Citing *Multani*,¹²⁷ the MCC argued that any exceptions exhibited by NS would go to assessments of either her sincerity of belief or the triviality of the infringement of her rights. Abella J disputed this reasoning, stating that whether or not a practice allows for exceptions does not impact an assessment of sincerity. She cautioned that to take the MCC's approach would be to suggest that if a witness wore niqabs at her husband's direction, her practice could never be sincere. Abella J's insertion

¹²⁵ See Razack, "Imperiled" *supra* note 95 at 168-9; Natasha Bakht, "Religious Arbitration in Canada: Protecting Women by Protecting Them from Religion" (2007) 119 CJWL at 135.

¹²⁶ For webcast of oral arguments see "SCC Case Information: Webcast 33989" *Supreme Court of Canada* (4 December 2012), online: Supreme Court of Canada <<http://www.scc-csc.gc.ca/case-dossier/cms-sgd/webcast-webdiffusion-eng.aspx?cas=33989>>.

¹²⁷ *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6.

of this example is insightful, as it highlights one way that the agency of Muslim women is commonly discounted.

In reply, counsel for NS, David Butt, pointed out that aside from the issue of the differences between exception and practice, there is a significant difference between briefly showing one's face and prolonged scrutiny.

In short, the extent of an *Amselem* inquiry was a recurring theme in the oral submissions, with a specific focus on the multiplicity of reasons women wear niqabs. While this was a source of concern for the Court and therefore possibly dangerous for NS's application, it was also a positive affirmation, even if not recognised as such by court or counsel, of political nuance.

VII. THE JUDGEMENT

The Supreme Court released its judgement on December 20, 2012 in a rare split decision. For the majority, McLachlin CJ and Deschamps, Fish and Cromwell JJ dismissed NS's appeal and set out a balancing test to resolve potential conflicts of rights. Though they agreed with the majority's disposition, LeBel and Rothstein JJ argued that there should be a clear rule forbidding women from wearing niqabs at any stage of a criminal trial. In a spirited dissent, Abella J argued that no witness should be required to remove her niqab, unless her face is directly relevant to the case. Each of their reasons demonstrated the influence of the MCC's arguments in different ways: the concurring reasons mirror the MCC arguments very closely, the dissent rejects those arguments, and the majority incorporates some aspects.

A. Majority: Balancing Test

Chief Justice McLachlin wrote the majority decision. She held that absolute rules permitting or forbidding witnesses from wearing niqabs were untenable. Instead, guided by an interest in protecting the value of facial demeanour evidence, the majority devised a balancing test, derived from *Dagenais*, *Mentuck*, and *Oakes*:¹²⁸

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?¹²⁹

The MCC had argued in favour of a *Dagenais/Mentuck* approach similar to the one above. So had the Attorney General, the CCLA, the Schlifer Clinic, and SALCO, though each applied the test differently. Where the MCC's influence on the court's reasoning is most evident is in the majority's explanation of the test.

¹²⁸ *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835; *R v Mentuck*, [2001] 3 SCR 442; *R v Oakes*, [1986] 1 SCR 103.

¹²⁹ *NS 2012*, *supra* note 6 at para 9.

1. Sincerity

The majority stressed that it was “inappropriate” for the preliminary inquiry judge to have concluded that NS’s beliefs were “strong” enough, because NS had once removed her niqab for her driver’s licence photo and had said she would do so for a security check.¹³⁰ The Court stated that “the question of whether she has a claim focuses on sincerity of belief rather than its strength,”¹³¹ such that:

A sincere believer may occasionally lapse, her beliefs may change over time or her belief may permit exceptions to the practice in particular situations. [...] a witness should not be denied the right to raise s. 2(a) merely because she has made what seemed to be a compromise in the past in order to participate in some facet of society.¹³²

This is a rejection of the MCC’s argument that exceptions would necessitate a finding of insufficient sincerity. However, the majority did not do away entirely with the issue of *strength* of belief. At the test’s final step, when assessing the deleterious effects of requiring the witness to remove her niqab, the majority held:

the task is to evaluate the impact of failing to protect that sincere belief in the particular context. It is difficult to measure the value of adherence to religious conviction, or the injury caused by being required to depart from it. The value of adherence does not depend on whether a religious practice is a voluntary expression of faith or a mandatory obligation under religious doctrine [...]. However, certain considerations may be helpful. How important is the practice to the claimant?¹³³

The majority did not explain how one would measure importance, and if past inconsistencies would impact such a consideration.

2. Neutrality

Notwithstanding their concern with upholding the value of demeanour evidence, the majority identified secularity as the reason animating anti-niqab arguments: “On this view, if the niqab is an expression of the wearer’s religious views, it has no place in the courtroom. Courtrooms should be “neutral” spaces, operating on “neutral” principles.”¹³⁴ This touches on the civilizational thrust of the MCC’s argument that niqabs and their wearers operate outside a secular Canadian mainstream.

The majority’s rejection of this view was unequivocal:

The answer is not to ban religion from the courtroom, transforming the courtroom into a “neutral” space where witnesses must park their religious convictions at the door. [...] It is inconsistent with Canadian jurisprudence, courtroom practice, and our tradition of requiring state institutions and actors to accommodate sincerely held religious beliefs

¹³⁰ *Ibid* at paras 12-13.

¹³¹ *Ibid* at para 13.

¹³² *Ibid*.

¹³³ *Ibid* at para 36.

¹³⁴ *Ibid* at para 50; see also para 1.

insofar as possible. [...] Second, to remove religion from the courtroom is not in the Canadian tradition. Canadians have since the country's inception taken oaths based on holy books — be they the Bible, the Koran [*sic*] or some other sacred text.¹³⁵

B. Minority: Prohibit Niqabs

Unlike the majority decision, the concurring reasons, written by LeBel J, were framed from the outset in civilizational terms: “This appeal also illustrates the tension and changes caused by the rapid evolution of contemporary Canadian society and by the growing presence in Canada of new cultures, religions, traditions and social practices.”¹³⁶

LeBel J did not mention that, with respect to the indigeneity of Aboriginal traditions, all other traditions in Canada are imports, including the prescriptively normative ones implied in his conception of Canada (emphasis added):

this Court must decide how to frame the relationship — or *clash* — between the affirmation of a religious right by a victim of sexual assault and the right of the accused to conduct his defence. [...] The Court of Appeal and the complainant treated the issue in this case as purely one of conflict and reconciliation between a religious right and the protection of the right of the accused to make full answer and defence. This clash arises, but the equation involves other factors. The case engages basic values of the Canadian criminal justice system. Is the wearing of the niqab compatible not only with the rights of the accused, but also with the constitutional values of openness and religious neutrality in contemporary democratic, but diverse, Canada?¹³⁷

His was the only judgment to use word “clash.” The only other place it was used in this case was in the MCC’s factum. All the other judges, parties, and interveners used the more common adjectives “competing” and “conflicting.” While the MCC used “clash” to describe an allegedly inherent conflict between Muslims and Canada, LeBel J appropriated it here to describe an allegedly inherent conflict between a Muslim sexual assault complainant and the Canadian courtroom. The unusualness of the word’s appearance here is in contrast to its ubiquity elsewhere: a ProQuest search for articles containing the search string *Islam AND “clash of civilizations”* produces 240 hits for the period between December 2010 and December 2012.¹³⁸ Thus, even if there is no causal connection between the MCC’s usage of the term and Justice LeBel’s, his language certainly reflects a populist rhetoric.

The issue of protecting democracy in the face of this witness’s obstinacy was a recurring theme in Justice LeBel’s reasons. He signalled his fears regarding the dangers posed to democracy by diversity when he stated that “[t]he Constitution requires an openness to new differences that appear within Canada, but also an acceptance of the principle that it remains connected with the roots of our contemporary democratic society.”¹³⁹

¹³⁵ *Ibid* at paras 50-56.

¹³⁶ *Ibid* at para 59.

¹³⁷ *Ibid* at paras 59-60.

¹³⁸ Data search done by author on December 23, 2012, accessing the ProQuest website, online: Proquest <<http://www.proquest.com>>.

¹³⁹ *NS 2012*, *supra* note 6 at para 72.

And thus the latter half of his judgement is an exposition on the niqab-wearer's perceived opposition to democracy. He identified democracy as a core Canadian value, which he described as crucial to "an independent and open justice system."¹⁴⁰ He asserted that "[t]he religious neutrality of the state and of its institutions, including the courts and the justice system"¹⁴¹ and that "[s]uch a system is critical to the maintenance of the rule of law."¹⁴² He concluded that "[a] clear rule that niqabs may not be worn would be consistent with the principle of openness of the trial process and [...] with the tradition that justice is public and open to all in our democratic society."¹⁴³

Justice Lebel's rule was expansive in its absoluteness: it should apply "at all stages of the criminal trial, at the preliminary inquiry as well as at the trial itself."¹⁴⁴

There are a number of problems with Lebel J's chain of association. He never explained how niqab-wearing women threaten the court's independence or the rule of law, especially since, in turning to the courts for justice, NS is entrenching herself within the Canadian court system. Second, as noted in the majority judgement, the state's institutions are not religiously neutral, but are rooted in Christianity. Lebel J's suggestion that wearing a niqab in a courtroom is an affront to the court's perceived religious neutrality is tantamount to also prohibiting people from wearing turbans, yarmulkes, or clerical collars in courtrooms. Third, Lebel J confounded the "openness" or "publicness" of a trial, which one normally associates with the court's accessibility to the public, with the nakedness of a witness's face. He said:

Wearing a niqab [...] does not facilitate acts of communication. Rather, it restricts them. It removes the witness from the scope of certain elements of those acts [...] The niqab shields the witness from interacting fully with the parties, their counsel, the judge and, where applicable, the jurors.¹⁴⁵

As stated by NS, her niqab has not removed her from the scope of public activity. On the contrary, it has facilitated her approaching the court for redress. Given judicial recognition elsewhere of the extent to which sexual assault is under-reported,¹⁴⁶ this case is evidence that NS is interacting more fully with the legal system than the vast majority of women who have suffered similar traumas. It is a denial of her humanity to refuse to admit that she is speaking and that she is demanding to be heard, simply because one cannot access those aspects of her demeanour to which one feels entitled.

But the biggest problem with Lebel J's expression of the clash thesis is that he failed to define what he means by the term "democracy." If we understand the term broadly to refer to civilian engagement in the public sphere, then it bears repeating that this case centres on a woman seeking to engage the legal system. If we understand it more restrictedly to refer to citizenship and voting, then one wonders how voters who wear niqabs fit into this picture. Such a train of thought necessarily draw to an abrupt halt when we recall Minister Kenney's prohibition of women who wear niqabs from giving citizenship oaths, thus denying them the capacity to vote, notwithstanding their clear grasp of Canadian values, as

¹⁴⁰ *Ibid* at para 73 .

¹⁴¹ *Ibid*.

¹⁴² *Ibid* at para 74.

¹⁴³ *Ibid* at para 78.

¹⁴⁴ *Ibid*.

¹⁴⁵ *Ibid* at para 77.

¹⁴⁶ *Ibid* at para 37.

demonstrated by their passing increasingly difficult citizenship tests.¹⁴⁷ Is a democracy that so blatantly excludes marginalized people worthy of the name?

C. Dissent: Permit Niqabs

Abella J is the lone wolf in this judgement. She began by making clear that she had desire to wade into the civilizational discourse encouraged by MCC and adopted by Lebel and Rothstein JJ:

Controversy hovers over the context of this case: whether the niqab is mandatory for Muslim women or whether it marginalizes the women who wear it; whether it enhances multiculturalism or whether it demeans it. [...] But we are not required to try to resolve any of these or related conceptual issues in this case, we are required to try to transcend them in order to answer only one question: Where identity is not an issue, should a witness' sincerely held religious belief that a niqab must be worn in a courtroom, yield to an accused's ability to see her face.¹⁴⁸

Unlike all the other judges, while Abella J did “concede without reservation that seeing more of a witness' facial expressions is better than seeing less,”¹⁴⁹ she also provided the strongest reminder that “trial fairness cannot reasonably expect ideal testimony from an ideal witness in every case, and that demeanour itself represents only one factor in the assessment of a witness' credibility [...] the ideal is subject to several exceptions and qualifications in the interests of justice.”¹⁵⁰

She provided an extensive list of examples of ways the court system has evolved to further access to justice, by accepting evidence from witnesses unable to testify under ideal circumstances: admission of evidence and directing of cross-examination over telephone, screens for children, interpreters for witnesses who cannot communicate in French or English, admission of transcripts of evidence by witnesses unable to attend trial because of a disability, and exceptions to hearsay evidence.¹⁵¹

Taken together, these examples remind readers that niqab-wearing women are capable of providing admissible evidence, under both direct- and cross-examination. Abella J noted that a witness's niqab “has no effect on the witness' verbal testimony, including the tone and inflection of her voice, the cadence of her speech, or, most significantly, the substance of the answers she gives.”¹⁵² This is a markedly more dignified characterisation of women who wear niqabs than those provided by the other judges; it is infinitely more human than the MCC's.

Having established that demeanour evidence is not conclusive to assessments of credibility, Abella J observed that the societal harm done by “forcing a witness to choose between her religious beliefs and her ability to participate in the justice system” is greater than its benefit to trial fairness.¹⁵³ The harms

¹⁴⁷ “Massive failure rates follow new, tougher Canadian citizenship tests” *The Toronto Star* (25 November 2010), online: The Toronto Star <<http://www.thestar.com/news/canada/article/897998--massive-failure-rates-follow-new-tougher-canadian-citizenship-tests>>.

¹⁴⁸ *NS 2012*, *supra* note 6 at para 80.

¹⁴⁹ *Ibid* at para 82.

¹⁵⁰ *Ibid* at para 107.

¹⁵¹ *Ibid* at para 105.

¹⁵² *Ibid* at para 92, 103-106.

¹⁵³ *Ibid* at para 94.

she (and the majority¹⁵⁴) identified include making women reluctant to report offences or otherwise participate in the justice system, such that perpetrators will be rendered immune from legal consequences: “To those affected, this is like hanging a sign over the courtroom door saying ‘Religious minorities not welcome’.”¹⁵⁵ In this way, Abella J incorporated the systemic analyses of rape foreclosed by the MCC.

Abella J also held that any assessments of the strength of NS’s belief, including at the stage of balancing religious rights against trial fairness, would be tantamount to re-entering “inappropriate inquiries”¹⁵⁶ regarding a claimant’s religious orthodoxy or past practice. She described it as “manifestly unrealistic to assume that a witness would insincerely wear the niqab in an effort to gain some sort of testimonial advantage.”¹⁵⁷ Thus, she did away entirely with the MCC’s and the preliminary inquiry judge’s preoccupations with NS’s past and potential future religious practice.

Abella J made one concession: where a witness’s face is directly relevant to the case, such as when her identity is at issue, she should remove her niqab.¹⁵⁸ This is a greatly more limited exception than the majority’s conclusion that a witness should be allowed to wear her niqab only when the evidence is uncontested.

Abella J rejected the majority’s rule as “essentially mean[ing] that sexual assault complainants, whose evidence will inevitably be contested, will be forced to choose between laying a complaint and wearing a niqab, which [...] may be no meaningful choice at all.”¹⁵⁹

D. Sequel

NS returned to the same judge who had previously ordered her to unveil. Having ruled in 2008 he did not believe NS’s religious belief was sincere, Weisman J held in April 2013:

I am satisfied [...] that N.S.'s wish to wear her niqab in court is based on a religious belief that is both sincere and strong. She could have had her day in court back in 2008. She has chosen, however, to spend the last five years fighting for her right to freedom of religion, all the way to the Supreme Court of Canada.¹⁶⁰

Nevertheless, he again ordered her to unveil, citing risks to trial fairness. Arguably, this was the only option open to him under the test handed down by the Supreme Court.

In July 2014, the Crown withdrew the sexual assault charges against the two men, saying there was no reasonable prospect of conviction.¹⁶¹

¹⁵⁴ *Ibid* at para 37.

¹⁵⁵ *Ibid* at para 94.

¹⁵⁶ *Ibid* at para 89.

¹⁵⁷ *Ibid* at para 88.

¹⁵⁸ *Ibid* at para 83.

¹⁵⁹ *Ibid* at para 96.

¹⁶⁰ *R v NS* (24 April 2013), Toronto (ON OJ), Weisman J.

¹⁶¹ Katrina Clarke, "Toronto woman who lost fight to wear niqab in court 'disillusioned' after Crown drops sex assault case" *National Post* (21 July 2014), online: National Post <<http://news.nationalpost.com/2014/07/21/toronto-woman-who-lost-fight-to-wear-niqab-in-court-disillusioned-after-crown-drops-sex-assault-case>>.

VIII. GOING FORWARD

Putting the onus on NS to continue this battle for the sake of tortured justice is to intensify the pressures already placed on women to accept gendered violence as inevitable. That few survivors of rape report the assaults to police should not be read as a chastisement of the women who do not report rape. Rather, the meanness of the number is an indictment of how the criminal justice system re-traumatizes victims.¹⁶² That NS chooses to engage the legal system, forcing it to examine its motivations and its usefulness, is to the system's benefit. That people ever turn to the court, knowing that great pain awaits them in the labyrinthine twists of the law's truth-seeking functions, is something for which the legal system must be grateful. But for their bravery, the halls of our justice system would echo with emptiness.

Our task therefore must be to envision a criminal justice system able to uphold the principle of the presumption of innocence without continuing to alienate rape survivors. Irrespective of the outcome, there is no winning in these kinds of cases, only a testing, at every turn, of our capacity, as individuals and institutions, to manifest a vision of justice that is compassionate.

And so, any critique of the MCC is but a means towards an end. Rather than shift the good/bad Muslim dichotomy to different axes, the focus must remain on the broader inequities of which the MCC is a symptom. The usefulness of this scrutiny lies in its providing entry into greater discussions about how some people are discursively and systematically excluded from accessing justice. As the refrain goes, none of us is free until all of us are free: our task must be to wrest back the notion of "us" from the atomising paranoia of our times.

Perhaps the most instructive lesson we can take from the MCC is about how to listen better. When the law is fundamentally a collection of stories about how we relate to each other, *R v NS* is a story about the extraordinary lengths that one woman was willing to go to in order to tell her story, to tell it in even so unsympathetic an arena as a courtroom. This case gives us with the opportunity to reassess and to retell the stories we have been told about how women are assaulted in this country and which women are allowed to fight back.

In particular, the hyper(in)visibility imposed on women who wear niqabs is a function of the fact that niqabs themselves are generally understood as providing comment on the social politics of seeing. The cloth, like all clothing, is an exercise in the visual.

Thus, with gratitude for all the pithiness that art makes possible, I return to the visual, with this piece from Hannah Habibi:¹⁶³

¹⁶² See e.g. L'Heureux-Dubé, *supra* note 4.

¹⁶³ Reprinted with permission of the artist <<http://www.hannahhabibi.com>>.

