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The Re-emergence of a Clash of Rights: A Critical Analysis of the Supreme Court of Canada's Decision in *R. v. S. (N.)*

Ranjan K. Agarwal and Carlo Di Carlo*

I. INTRODUCTION

"Your liberty to swing your fist ends just where my nose begins."
— Oliver Wendell Holmes, former Justice of the Supreme Court of the United States

Courts and scholars alike have recognized the difficulty of defining the limits of rights. As the quote above suggests, the principle for these limits is easy and even, in some regards, obvious — an individual's exercise of his or her freedoms should not deprive others of their freedoms. Striking this balance in practice, however, is difficult.

In *R. v. S. (N.)*,[1] the Supreme Court of Canada confronted this difficulty. This matter forced the Supreme Court to balance the complainant's freedom of religious belief to wear a *niqab* while testifying against the defendants' right to a full defence. The Court articulated four factors to consider in resolving this conflict of rights. The majority decision prescribes a "contextual balancing"[2] of the two rights that will strive to respect both.

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1 [2012] S.C.J. No. 72, [2012] 3 S.C.R. 726 (S.C.C.) [hereinafter "*N.S.*"].

2 *Id.*, at para. 47. This is the only reference in the majority decision to its approach being "contextual".

However, the balancing approach taken by the majority in *N.S.* represents a subtle shift in the case law from reconciling rights to balancing rights. Justice Iacobucci's extra-judicial articulation of the distinction assists in understanding this shift in case law. In his article,[3] he argues that the Supreme Court's case law regarding conflicting rights under the *Canadian Charter of Rights and Freedoms*[4] has strove to reconcile ostensibly conflicting rights by properly defining or circumscribing the scope of these rights according to context. According to the reconciliation approach, the rights are understood in a manner wherein both are simultaneously respected and rendered compatible. In contrast, in *N.S.*, the Court sought to balance (as Iacobucci J. refers to the term) the two competing rights. The reasons of the majority (to an extent, of all the reasons) used a contextual approach to identify situations where one right would have primacy over the other. Despite its statements to the contrary, the logic of the majority's reasons implicitly assumes that, depending on context, each of the impugned rights must be enjoyed to their full extent, or not at all. This stands in stark contrast to the compatibility between rights that cases before *N.S.* required.

This paper will articulate the difference between the balancing and reconciliation approach to competing rights claims. It will then demonstrate how the majority's reasons fall into the camp of the former and thus represent a subtle, yet important conceptual shift from the jurisprudence. Further, this paper will argue that the framework used by the Supreme Court in *N.S.* is inappropriate, and may have led to the shift from reconciliation to balance. Finally, it will consider some of the practical implications of the decision which may be connected to the court's balancing approach, namely: (a) the majority's insensitivity to the procedural burdens that its test will cause complainants; (b) the problems that demonstrating strength of belief may cause for complainants; and (c) the fact that the decision may create an access to justice issue.

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[3] Hon. Frank Iacobucci, "'Reconciling Rights': The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) 20 S.C.L.R. (2d) 137 [hereinafter "Iacobucci, 'Reconciling Rights'"].

[4] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

II. Reconciling Rights in Theory and Practice

1. The Press Freedom Cases

In 1994, barely 10 years after the Charter was proclaimed in force, the Supreme Court of Canada grappled with the issue of competing rights in the first of a series of press freedom cases. In December 1992, the Canadian Broadcasting Corporation ("CBC") intended to broadcast *The Boys of St. Vincent*, a fictional mini-series about sexual and physical abuse of children in a Catholic institution. Four former or current members of the Christian Brothers, a Catholic religious order who were charged with sexually and physically abusing children, sought an injunction restraining CBC from broadcasting the program until the end of their trials. The application judge and the Court of Appeal for Ontario granted the injunction.[5] The CBC appealed the decision to the Supreme Court of Canada.

The competing rights in this case were CBC's freedom of the press, which is protected by section 2(b) of the Charter, and the respondents' right to a fair trial, which is protected by sections 7 and 11(d). The CBC was not challenging a statute or legislation that, for example, requires a judge to order a publication ban. Instead, it was challenging the court's discretion to order a publication ban in certain circumstances.[6] As such, the common law test for issuing a publication ban and the traditional section 2(b) and section 1 framework needed to be modified. The majority (Lamer C.J.C. and Sopinka, Cory, Iacobucci and Major JJ. and La Forest J. on this issue) developed the following approach:

> A publication ban should only be ordered when:
>
> (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

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[5] *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.), revg [1992] O.J. No. 2703, 12 O.R. (3d) 239 (Ont. C.A.) [hereinafter "*Dagenais*"].

[6] *Id.*, at 874-75.

> If the ban fails to meet this standard (which clearly reflects the substance of the *Oakes* test applicable when assessing legislation under s. 1 of the *Charter*), then, in making the order, the judge committed an error of law and the challenge to the order on this basis should be successful.[7]

This approach required, in its application, consideration of "the objective of the order, to examine the availability of reasonable alternative measures that could achieve this objective, and to consider whether the salutary effects of the publication ban outweigh the deleterious impact the ban has on freedom of expression".[8] The majority ultimately held that the publication ban was overbroad (because it prohibited broadcast throughout Canada and banned reporting on the ban itself)[9] and, as such, failed the analytical framework established by the Court.

The Post-*Dagenais* decisions utilized its framework and principles to resolve other conflicts of rights. The emphasis continued to be on using context to understand the proper scope of the rights and reconciling any apparent incompatibilities.

In *R. v. Mills*,[10] the Supreme Court relied on *Dagenais* to negotiate a conflict between an accused's right to a full defence and the complainant's privacy rights. *Mills* is an example of the Supreme Court using context to define the content of conflicting rights in a compatible manner. The accused was charged with one count of sexual assault and one count of unlawful sexual touching. At issue were provisions of the *Criminal Code*[11] governing third party productions of records of complainants or witnesses in sexual assault proceedings. The accused alleged that these provisions violated his right to a full defence under sections 7 and 11(d) of the Charter.

The Supreme Court began its analysis of this conflict by noting that neither the accused's right to a full defence nor the complainant's right to privacy "can be defined in such a way as to negate the other".[12] The Court, commenting on the impact of *Dagenais* on this analysis, noted:

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7 *Id.*, at 878 (emphasis added).
8 *Id*.
9 *Id.*, at 881.
10 [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668 (S.C.C.) [hereinafter "*Mills*"].
11 R.S.C. 1985, c. C-46.
12 *Supra*, note 9, at para. 17.

> As this Court's decision in *Dagenais*, *supra*, makes clear, *Charter* rights must be examined in a contextual manner to resolve conflicts between them. Therefore, unlike s. 1 balancing, where societal interests are sometimes allowed to override *Charter* rights, under s. 7 rights must be defined so that they do not conflict with each other. The rights of full answer and defence, and privacy, must be defined in light of each other. …[13]

According to this approach, courts must take a contextual approach in determining the scope of rights. The Court stated that rights "often inform" and "are informed by" other rights or interests at play in particular circumstances.[14] This view is consistent with Iacobucci J.'s articulation of rights (discussed below) not existing in the abstract — only circumstances can determine their content and scope. Applying this approach, the Court in *Mills* held that the impugned provisions were constitutional.

The contextual approach to defining the content of rights was also apparent in *Trinity Western University v. British Columbia College of Teachers*.[15] Trinity Western University ("TWU"), a private teaching institution affiliated with the Evangelical Free Church of Canada, applied for permission to assume full responsibility for its teacher training program. The British Columbia College of Teachers refused this application on the grounds that TWU followed discriminatory practices. All of the staff and students at TWU had to adhere to the TWU Community Standards, which prohibited a list of practices that were "biblically condemned", including homosexual behaviour.

The Supreme Court characterized the issue at the "heart of this appeal" as reconciling the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system.[16] The Court held that this conflict should be resolved through the "proper delineation" of the rights involved: "properly defining the scope of the rights avoids a conflict in this case".[17] The Court noted that all freedoms are "inherently limited by the rights and freedoms of others".[18] The Supreme Court reconciled the rights involved in this

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13 *Id.*, at para. 21.
14 *Id.*, at para. 61.
15 [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772 (S.C.C.) [hereinafter "*TWU*"].
16 *Id.*, at para. 28.
17 *Id.*, at para. 29.
18 *Id*.

case by circumscribing the freedom of religion of TWU attendees to holding their beliefs.[19] By limiting the scope of religious freedom according to the context in which they are sought to be used, the Supreme Court was able to resolve the conflict in a manner that respected both of the competing values at stake.

In *R. v. Mentuck*,[20] which was decided the same year, the Court revisited the *Dagenais* framework. In *Mentuck*, the accused was charged with second degree murder of a 14-year-old girl. At his first trial in 1998, the charges were stayed after crucial evidence was ruled inadmissible. After the trial, the RCMP engaged in an undercover operation targeting the accused, which led to the Crown reinstating the indictment. During the trial, the Crown sought a publication ban of information regarding the undercover operation. The trial judge granted a partial ban. The accused appealed to the Supreme Court of Canada, which granted a temporary but full ban. The accused was eventually convicted.

Mentuck differs from *Dagenais* in that neither party was asserting a freedom of the press interest (though two media organizations did in their capacity as interveners). In *Mentuck*, the accused wanted the information disclosed to protect his fair trial rights under sections 7 and 11(d) of the Charter where the Crown sought the ban to "protect the safety of police officers and preserve the efficacy of undercover police operations"[21] (which is protected by the interest in the "proper administration of justice").[22] As such, the Court, in a unanimous decision, restated the *Dagenais* test to apply to cases where interests other than the freedom of the press are at issue:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the

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19 *Id.*, at para. 37.
20 [2001] S.C.J. No. 73, [2001] 3 S.C.R. 442 (S.C.C.).
21 *Id.*, at para. 28.
22 *Id.*, at paras. 30, 33.

> accused to a fair and public trial, and the efficacy of the administration of justice.[23]

Using this test, the Court held that the trial judge's partial ban was appropriate in scope and given the Charter interests.

The *Dagenais*/*Mentuck* test was applied most recently (other than in *N.S.*) in *B. (A.) v. Bragg Communications Inc.*[24] In that case, AB, a minor, alleged that she was defamed online. She sought an order allowing her to bring her civil action anonymously and seal certain parts of the court file that might identify her. The rights or interests engaged in *B. (A.)* differ from both *Dagenais* and *Mentuck*: the media organizations that opposed the order relied on the open court principle, whereas AB relied on the harm to her privacy.[25] Justice Abella, writing for a unanimous Court, described the applicable test as follows:

> The inquiry is into whether each of these measures is necessary to protect an important legal interest and impairs free expression as little as possible. If alternative measures can just as effectively protect the interests engaged, the restriction is unjustified. If no such alternatives exist, the inquiry turns to whether the proper balance was struck between the open court principle and the privacy rights of the girl. ...[26]

The Court concluded that the benefit of protecting AB's identity outweighed any risks to the open court principle.[27]

2. "Reconciling Rights"

In 2003, Iacobucci J. (as he was then) consolidated the jurisprudence at the time in his article "'Reconciling Rights': The Supreme Court of Canada's Approach to Competing Charter Rights".[28] Justice Iacobucci's article makes the following points:

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[23] *Id.*, at para. 32.

[24] [2012] S.C.J. No. 46, [2012] 2 S.C.R. 567 (S.C.C.) [hereinafter "*B. (A.)*"]. The co-author Ranjan Agarwal was co-counsel to the Canadian UNICEF Committee, an intervener in this appeal.

[25] *Id.*, at para. 11.

[26] *Id.*

[27] *Id.*, at para. 29.

[28] Iacobucci, "Reconciling Rights", *supra*, note 3.

- "[N]o Charter right is absolute" and "there is no hierarchy of rights in the Charter."[29] Justice Iacobucci argues that the Supreme Court of Canada's jurisprudence has repeatedly affirmed that no one Charter right is supreme over any other Charter right.
- "Charter rights are not defined in abstraction, but rather in the particular factual matrix in which they arise."[30] In a competing rights case, there is no Charter violation, so the courts must examine "the underlying interests at stake as reflected in the Charter provisions at play"[31] in trying to reconcile those rights. As a result, there may be different relationships between different rights in different contexts.[32] For this same reason, the reconciliation analysis must be flexible, which is evidenced by the restatement in *Mentuck*.[33]
- The "more correct term" for dealing with competing rights claims is "reconcile" as opposed to "balance". As Iacobucci J. states, "The exercise in which courts engage when they define the content and scope of rights in relation to one another, more closely approximates rights 'reconciliation' than rights 'balancing'. The latter term, which connotes assigning primacy to one right over another right or interest after having weighed the relevant considerations, is customarily used in section 1 *Oakes* test jurisprudence and is perhaps better suited to that sort of analysis."[34]
- In the same vein, the "clash" or "conflict" of rights imagery should be avoided. Justice Iacobucci argues that rights may not always be in conflict, especially where the court can reconcile them.[35]
- Because conflicting rights cases involve two individuals' constitutionally guaranteed rights (as opposed to the state justifying a violation of an individual's rights), "there is no rule about onus *per se*".[36] Justice Iacobucci argues that the party making the allegation

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[29] *Id.*, at 139.
[30] *Id.*, at 141.
[31] *Id.*, at 144.
[32] *Id.*, at 156.
[33] *Id.*, at 161.
[34] *Id.*, at 142. See also *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter "*Oakes*"].
[35] Iacobucci, "Reconciling Rights", *supra*, note 3, at 159.
[36] *Id.*, at 142.

bears the burden of demonstrating the need for modification but, then, the judiciary bears the burden of reconciling the rights.

- The "proportionality" framework used in the section 1 analysis is appropriate for reconciling competing rights. This framework ensures that the court's discretion is not applied arbitrarily or unfettered.[37]
- The reconciliation of rights serves two purposes: (a) it facilitates a dialogue between the legislature and the courts; and (b) it ensures that the common law accords with Charter values.[38]

Justice Iacobucci's article was cited by the Court of Appeal for Ontario in *N.S.* In doing so, the Court of Appeal emphasized the "reconciliation" part of the *Dagenais*/*Mentuck* framework ("reasonably alternative measures will not prevent the risk"), which did not have as much prominence in other cases.

3. Human Rights Approach

In January 2012, the Ontario Human Rights Commission formulated its "Policy on Competing Human Rights".[39] Though this Policy is not necessarily relevant to Charter jurisprudence, it provides another view on the task of reconciling competing rights (in this case, statutory human rights, which deal with equality and discrimination). The Policy describes competing human rights as involving "situations where parties to a dispute claim that the enjoyment of an individual or group's human rights and freedoms, as protected by law, would interfere with another's rights and freedoms". The Policy affirms many of the same principles identified by Iacobucci J.: no rights are absolute; there is no hierarchy of rights; and the full context, facts and constitutional values at stake must be considered.

The Policy applies a process for addressing competing human rights complaints that is similar to the *Dagenais*/*Mentuck* framework:

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37 *Id.*, at 158.

38 *Id.*, at 161-64.

39 Ontario Human Rights Commission, "Policy on Competing Human Rights" (January 26, 2012), online: OHRC <http://www.ohrc.on.ca/en/policy-competing-human-rights> [hereinafter "Policy"].

Stage One: Recognizing competing rights claims

Step 1: What are the claims about?

Step 2: Do claims connect to legitimate rights?

(a) Do claims involve individuals or groups rather than operational interests?

(b) Do claims connect to human rights, other legal entitlements or bona fide reasonable interests?

(c) Do claims fall within the scope of the right when defined in context?

Step 3: Do claims amount to more than minimal interference with rights?

Stage Two: Reconciling competing rights claims

Step 4: Is there a solution that allows enjoyment of each right?

Step 5: If not, is there a "next best" solution?

Stage Three: Making decisions

- Decisions must be consistent with human rights and other laws, court decisions, human rights principles and have regard for OHRC policy
- At least one claim must fall under the Ontario *Human Rights Code*[40] to be actionable at the Human Rights Tribunal of Ontario[41]

In practice, it is not clear whether competing statutory rights are, in fact, "reconciled" as Iacobucci J. recommends or the Policy suggests. *Ontario (Human Rights Commission) v. Christian Horizons*[42] is the leading "competing rights" decision under the Ontario Code. In that case, Christian Horizons, an Evangelical Christian organization that operated residential homes and camps, disciplined a support worker for violating its "Life Style and Morality Statement" by being in a same-sex relationship. Christian Horizons relied on section 24(1) of the Ontario Code, which allows religious organizations "primarily engaged in serving the interests of persons identified by their … creed" to give

40 R.S.O. 1990, c. H.19 [hereinafter "Ontario Code"].
41 Policy, *supra*, note 39.
42 [2010] O.J. No. 2059, 102 O.R. (3d) 267 (Ont. Div. Ct.).

preference to similarly identified individuals if that qualification is reasonable and *bona fide*. The Divisional Court held that Christian Horizons could not rely on this defence because support workers do not do any tasks that require an adherence to Evangelical Christian beliefs.[43] There was no analysis, either by the Human Rights Tribunal of Ontario or the Divisional Court, as to solutions that would allow both the support worker and her employer to enjoy their respective rights.

The Tribunal's jurisprudence on competing rights[44] seems to suffer from the same frailty as *N.S.* and other cases in this area (which we develop below): if the courts cannot reconcile the competing rights, one of the rights will trump the other, which undermines the Supreme Court's, Iacobucci J.'s and the Commission's admonishment that no one right is absolute or supreme.

III. *N.S.*

1. Facts[45]

NS alleged that her uncle and cousin repeatedly sexually assaulted her from 1982, when she was a six-year-old girl, until 1987. In 1992, NS revealed the assaults to her teacher and immediate family. The police investigated the matter. Ultimately, at the insistence of NS's father, the police did not lay any charges. In 2007, when NS was 32, she revived her allegations of sexual assault against her uncle and her cousin. Both of the accused were charged with various sexual offences.

NS is a Muslim woman who chooses to wear a veil or *niqab*. The *niqab* covers her entire face except her eyes. NS gave evidence that, in accordance with her faith, she always wore her *niqab* in public. She testified that she was only without her *niqab* when she was: (a) not in public; and (b) around immediate family, women or children. At the time of the commencement of the proceedings, NS had been wearing the *niqab* for approximately five years.

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[43] *Id.*, at paras. 104-105.

[44] See, *e.g.*, *Kacan v. Ontario Public Service Employees Union*, [2012] O.H.R.T.D. No. 1340, [2012] CLLC ¶220-051 (Ont. H.R.T.); *Taylor-Baptiste v. Ontario Public Service Employees Union*, [2012] O.H.R.T.D. No. 1336, 1 C.C.E.L. (4th) 104 (Ont. H.R.T.), affd [2013] O.H.R.T.D. No. 179, 2013 HRTO 180 (Ont. H.R.T.).

[45] This summary of the facts relies on *R. v. S. (N.)*, [2010] O.J. No. 4306, 102 O.R. (3d) 161, at paras. 2-3, 5 (Ont. C.A.) [hereinafter "*N.S.* CA"].

2. Preliminary Examination

At the preliminary inquiry, both accused sought an order requiring NS to remove her *niqab* when testifying. The defendants argued that the *niqab* would interfere with their counsel's ability to cross-examine NS and thus make full answer and defence. The preliminary inquiry judge held a *voir dire* to determine this issue. Before the preliminary inquiry judge began his informal questioning of NS, Crown counsel (twice) provided its "strong position" that NS be entitled to independent legal advice before testifying.[46] Despite this submission, the judge elected to proceed immediately with the informal questioning. NS wore her *niqab* during the *voir dire*.

The judge's stated aim was to understand the basis of NS's objection to removing her *niqab*. During his questioning, NS made it clear that her objection to removing the veil was "very strong" and that the basis of her objection was her religious faith.[47] NS also stated: "I would feel a lot more comfortable if I didn't have to, you know, reveal my face. You know, just considering the nature of the case and the nature of the allegations. …"[48] After this exchange, the judge decided that NS should have independent counsel and adjourned the matter.

At the next appearance, the defendants' counsel submitted that, at the previous hearing, the judge had failed to question NS about whether or not she made any exceptions to wearing a *niqab*.[49] In particular, the defendants' counsel had learned from the officer in charge that NS had a driver's licence with her picture.[50] The defendants' counsel wanted NS to be recalled as a witness so that he could ask her if she had any exceptions and, in particular, whether she wore her *niqab* for her driver's licence photo. During this testimony, NS confirmed that she was not wearing her *niqab* for her driver's licence photo. She testified that the photograph had been taken by a female photographer behind a screen that prevented any

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[46] Transcript of the Preliminary Inquiry before Weisman J., held on September 11, 2008, at 7, 8 [hereinafter "NS Transcript"].

[47] *Id.*, at 12.

[48] *Id.*, at 13.

[49] Transcript of the Preliminary Inquiry before Wiseman J., held on October 16, 2008, at 37 [hereinafter "Second NS Transcript"]. None of the parties filed the Second NS Transcript at the Court of Appeal. Consequently, the Court of Appeal noted that no evidence was called at the October Appearance (see *N.S.* CA, *supra*, note 45, at para. 6). However, the accused filed the Second NS Transcript at the Supreme Court of Canada.

[50] *Id.*, at 36.

one else from seeing NS's face.[51] As the Court of Appeal noted, this fact took on "some significance" in the judge's ruling.[52] The judge found the fact that NS had a driver's licence and would be required to produce it to "all sorts of males" to be inconsistent with the "strength" of NS's religious beliefs.[53] The judge concluded that NS's preference to keep her *niqab* on was an issue of "comfort" and thus ordered that she remove her *niqab* before testifying.[54]

NS applied to the Superior Court to quash the order of the preliminary inquiry judge. The Superior Court quashed the order and held that NS be permitted to testify wearing a *niqab* if she asserted a sincere religious reason for doing so. The Superior Court also held that the preliminary inquiry judge would have the option to exclude her evidence if the *niqab* was found to prevent true cross-examination. NS and one of the accused both appealed this decision.

3. Court of Appeal

The Court of Appeal held that a court facing a conflict of rights between the witness's freedom of religion and the accused's fair trial right, first must determine whether the witness's request to wear a *niqab* was motivated by a sincere religious belief. If so, the court must next determine whether the request impinged upon the accused's fair trial rights in a manner that was "more than minimal or insignificant".[55] If both of the rights are sufficiently engaged, then a court must look to the factual context in which these rights are to be applied in order to determine their content and to attempt to reconcile them. The court identified several contextual factors to consider in making this assessment, including:

- the limited manner in which wearing the *niqab* interferes with the trier of fact's assessment based on demeanour
- whether it is a jury or judge-alone trial

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51 *Id.*, at 42.

52 *N.S.* CA, *supra*, note 45, at para. 6.

53 *R. v. S. (N.)*, [2009] O.J. No. 1766, 95 O.R. (3d) 735, at para. 98 (Ont. S.C.J.).

54 *Id.*

55 *N.S.* CA, *supra*, note 45, at para. 71. The court noted that minimal interference would not justify "any limitation on the witness's exercise of her right to freedom of religion".

- issues of access to justice
- the nature of the proceeding
- the nature of the evidence to be given (whether it is peripheral or whether the credibility of the witness will be central to the prosecution case)
- the nature of the defence advanced
- other constitutional values and societal interests[56]

The court did not decide whether NS could wear her *niqab*. Instead, it returned the matter to the preliminary inquiry judge to be dealt with in accordance with its holding. Both NS and one of the accused appealed to the Supreme Court of Canada.

4. Supreme Court of Canada

The Supreme Court's decision had three sets of reasons. All of the reasons would have returned the matter to the preliminary inquiry judge, but each with different directions regarding the *niqab*. This paper focuses on the majority decision.

The concurring reasons of LeBel and Rothstein JJ. agreed with the conclusion of the majority to dismiss NS's appeal. However, they would have created a "clear rule" that *niqabs* never be worn by witnesses.

The basis of Abella J.'s dissent was her belief that depriving the accused of a portion of the demeanour evidence of the witness was not sufficiently impairing to the accused's right to fair trial. In Abella J.'s assessment, requiring the removal of the *niqab* would cause tremendous harm, not only to the witness herself, but to society more generally. This contrasted with what she saw as the limited salutary benefits, given the questions that have arisen regarding the value of demeanour evidence, and the fact that only a small portion of demeanour evidence would be denied to the accused.

The majority decision implemented the *Dagenais*/*Mentuck* framework for resolving rights conflicts. The majority applies this framework using four questions:

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[56] *Id.*, at paras. 70-87.

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?[57]

Although the Court does not explicitly say so, it would appear that once the witness establishes that she has a sincere religious reason to wear the *niqab*, the defendant would bear the onus of demonstrating the remaining factors (although the witness would also seem to have to produce evidence regarding accommodation).[58]

Sincere Religious Belief: The majority reaffirmed the low threshold that exists for demonstrating sincerity of religious belief. The analysis is only to focus on sincerity of belief and not on strength. Past departures from the practice in question will not necessarily deny the witness the ability to raise freedom of religion arguments at trial.[59]

Trial Unfairness: The Supreme Court held that the *niqab* would deprive the accused of an aspect of NS's demeanour evidence. This would potentially affect two aspects of the accused's fair trial rights: an effective cross-examination and the assessment of a witness's credibility. The Supreme Court held that, absent evidence to the contrary, it was unwilling to disregard the common law's "long-standing" assumption of the importance of demeanour evidence.[60]

Reconciliation: The Court then held that if both of the rights are engaged, both parties must place evidence before the court relating to possible options for accommodation of the conflicting claims.[61] Only if accommodation is impossible, would a court move on to the last factor.

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[57] *N.S.*, *supra*, note 1, at para. 9.

[58] *Id.*, at para. 3.

[59] *Id.*, at para. 13.

[60] *Id.*, at para. 22.

[61] The Supreme Court's approach to this issue has since been applied internationally. In September 2013, a United Kingdom trial judge, relying largely on the reasons in *N.S.*, held that a defendant could wear her niqab in court but not while testifying. That being said, the court also made it clear that it "may use its inherent powers to do what it can to alleviate any discomfort, for example

The majority identifies some options (excluding men from the courtroom or testifying via closed-circuit television or behind a one-way screen) but, in the same paragraph, seems to assume that none of these options will be possible.[62] The Court of Appeal identified others: the use of an all-female court staff and female judge; an order that a witness be cross-examined by female counsel; closing the court to all male persons other than the accused and counsel; calling on the witness to wear a style of *niqab* made with a kind of fabric that least interferes with the judge's ability to assess her demeanour.[63]

Proportionality: Most of the analysis is done at the last factor, where a court has to balance the salutary/deleterious effects of requiring NS to remove her *niqab*. At this stage, a court is to assess the *strength* of the witness's religious beliefs as well as "broader societal harms" in determining the salutary effects of refusing to force a witness to remove her *niqab*. In terms of determining the deleterious effects, the court has to consider the potential harm done to the accused's fair trial right by assessing factors such as the nature of the proceeding and the nature of the evidence given by the witness. This latter factor seems to be at the crux of the entire analysis. As the Supreme Court states: "[W]here the liberty of the accused is at stake, the witness's evidence is central to the case and her credibility vital, the possibility of a wrongful conviction must weigh heavily in the balance, favouring removal of the *niqab*."[64]

In short, the majority of the Supreme Court of Canada concludes that, in the absence of a reconciliation that protects both NS's religious freedom and the accused's right to a fair trial, NS's religious beliefs have to give way.

IV. ANALYZING *N.S.*

1. Some Rights Are Absolute

In our view, the majority of the Supreme Court of Canada actually balanced NS's and the accused's rights notwithstanding the language of "reconciliation". This view is demonstrated by a comparison to the Court

by allowing the use of screens or allowing her to give evidence by live link". *The Queen v. D. (R.)*, [2013] EW Misc 13 (C.C.).

62 *N.S., supra*, note 1, at para. 33.

63 *N.S.* CA, *supra*, note 45, at paras. 85-86.

64 *N.S.*, *supra*, note 1, at para. 44.

of Appeal's reasons, which discusses reconciliation more forcefully. The Court of Appeal noted that it was attempting to "reconcile the rights so that each is given full force and effect within the relevant context".[65] Its treatment of the accused's right to a full defence and fair trial is consistent with the reconciliation approach. The Court of Appeal's conceptualization of the content of the accused's right reflects the contextual analysis that this approach requires. It noted that not every limit on the right to cross-examination compromises trial fairness and that trial fairness is measured by reference to the "entirety of the process".[66] It stated: "The *Charter* focuses not on face to face confrontation *per se*, but on the effect of any limitation on that confrontation on the fairness of the trial. Fairness takes into account the interests of the accused, the witness and the broader societal concern that the process maintains public confidence."[67]

According to the Court of Appeal, whether being deprived of a face-to-face cross-examination will result in a loss of the constitutional right to make a full defence will depend on a "fact-specific" inquiry.[68] This inquiry, the court notes, "must" have regard to "other legitimate interests engaged in the circumstances".[69] In discussing the contextual factors that courts should consider, the Court of Appeal notes that one of these factors includes "the somewhat limited manner in which the wearing the *niqab* interferes with the trier of fact's assessment based on demeanor".[70] The Court of Appeal's reasons allow for the possibility that subsequent courts can circumscribe accused's right to a fair trial and full defence by defining these rights in accordance with their context. This view is similar to what Iacobucci J. refers to as "definitional reconciliation".[71] It also consistent with the approach taken by the Supreme Court in prior case law. In *TWU*, the Supreme Court noted that "properly defining the scope of the rights avoids a

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65 *N.S.* CA, *supra*, note 45, at para. 47.

66 *Id.*, at para. 51.

67 *Id.*, at para. 53.

68 *Id.*, at para. 60.

69 *Id*.

70 *Id.*, at para. 73. The Court of Appeal continues:

> The trier of fact still hears and sees the witness. Tone of voice, eye movements, body language, and the manner in which the witness testifies, all important aspects of demeanour, are unaffected by the wearing of the *niqab*. Nor does the wearing of the *niqab* prevent the witness from being subjected to a vigorous and thorough cross-examination.

71 Iacobucci, "Reconciling Rights", *supra*, note 3, at 160.

conflict in this case".[72] Further, in his dissent in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*,[73] Iacobucci J. avoided a conflict of rights by using context to restrict the scope of freedom of religion to exclude "the imposition upon a child of religious practices which threaten the safety, health or life of the child".[74]

The Supreme Court is much blunter in its approach to context and the scope of the parties' rights. Although the decision requires courts to take a contextual analysis, the purpose of this analysis is different than that of the Court of Appeal. The majority's reasons do not suggest the possibility of using context to limit the scope and content of a right. Instead, context is used to determine whether or not the right will apply. This results in a situation-based analysis, as becomes clear towards the end of the majority's reasons, when the Supreme Court advises that in the absence of reconciliation, the witness's *niqab* must come off. As such, the Court's decision is far from contextual. Instead it suggests that when courts are dealing with witnesses in situations such as those faced by NS, they should order the removal of the *niqab* regardless of all other factors. This position becomes even clearer considering the skepticism the Court exhibits towards its own suggestions for accommodating NS's religious requirements.

This absolutist approach, which Iacobucci J. warned against, severely limits the impact of the contextual factors that the Supreme Court states a court should consider when making this decision.[75] It also leads one to question how contextual the analysis is. In our view, there are several risks to this approach:

- *First*, it arguably led the Supreme Court to be insensitive to some of the procedural burdens that complainants will have to face because of the majority's reasons.
- *Second*, it fails to appreciate the subjective nature of religious belief and of the freedom of religion analysis established in case law.

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[72] *TWU*, *supra*, note 15, at para. 29.

[73] [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 (S.C.C.) [hereinafter "*B. (R.)*"]. This case dealt with a conflict between the religious rights of parents and their child's right to life under s. 7 of the Charter in the context of medical treatments for the child.

[74] *Id.*, at para. 225.

[75] *Id.*, at paras. 37-43.

- *Finally*, it arguably caused the Supreme Court not to fully consider the impact its decision will have on access to justice for complainants in NS's situation.

A greater appreciation of the factual context would have led the Supreme Court to be more cognizant of these issues, and arrive at a holding that was more accessible.

The majority's discussion regarding the need for expert evidence also demonstrates that the Court was more interested in balancing rights than reconciling them. The majority states an unwillingness to limit an accused's right to cross-examination without a record that shows the "long-standing assumptions of the common law regarding the importance of a witness's facial expressions" to be unfounded.[76] This suggests that absent social science evidence to the contrary, the accused's right to fair trial and full defence inherently contains the right to a face-to-face confrontation during cross-examination.[77] We question whether the Court's distance from the everyday realities of trial led to this view: it is unreasonable to believe that a witness in NS's socio-economic position would be able to commission the type of social science study that would undermine the "ancient and persistent connection the law has postulated between seeing a witness's face and trial fairness".[78]

Further, this position implies that the right to full defence can be defined in abstraction.[79] In contrast to the Court of Appeal, whose reasons suggest that the preliminary inquiry judge should look to context to determine the scope and content of the rights at play, the Supreme Court's reasons suggest that rights have an inherent content. Context should only be used to determine whether or not this is a situation where the right can apply. This is indicative of the balancing approach to conflicting rights.

Only Abella J.'s dissent suggests that context can determine the content of the accused's rights:

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[76] *Id.*, at para. 22.

[77] It could also be suggested that this is tantamount to creating an independent constitutional right to face-to-face confrontation during cross-examination, something which the Court of Appeal notes is contrary to case law. See *N.S.* CA, *supra*, note 45, at para. 53, citing *R. v. Levogiannis*, [1990] O.J. No. 2312, 1 O.R. (3d) 351, at 351 (Ont. C.A.), aff'd [1993] S.C.J. No. 70, [1993] 4 S.C.R. 475 (S.C.C.).

[78] *N.S.*, *supra*, note 1, at para. 31.

[79] This statement also comes close to contradicting the Supreme Court's holding in *R. v. Nikal*, [1996] S.C.J. No. 47, [1996] 1 S.C.R. 1013, at para. 92 (S.C.C.), that "rights do not exist in a vacuum".

> I concede without reservation that seeing more of a witness' facial expressions is better than seeing less. What I am not willing to concede, however, is that seeing less is so impairing of a judge's or an accused's ability to assess the credibility of a witness, that the complainant will have to choose between her religious rights and her ability to bear witness against an alleged aggressor. This also has the potential to impair the rights of an accused, who may find herself having to choose between her religious rights and giving evidence in her own defence.[80]

Justice Abella's approach to this issue considers "a number of interests"[81] to determine the content of the accused's rights in this matter, including:

- the exclusionary impact of forcing a religious person to choose between their religious beliefs and their ability to participate in the justice system
- the impact of such an order in the context of allegations of sexual assault
- judicial note taken of the limited impact of demeanour evidence

Overall, Abella J.'s dissent addresses this issue in a manner that is comparable to the definitional approach outlined by Iacobucci J. in *B. (R.)*. Using context, she is defining the right in a circumscribed manner. Ultimately, Abella J. does not conceptualize her approach in a manner consistent with the reconciliation of rights. She is very clear that the "rights cannot be reconciled" and that she is balancing interests. In our view, this stated approach is a better reflection of the Court's approach and provides better guidance to lower courts and counsel arguing these issues in subsequent cases.

2. Is *Dagenais*/*Mentuck* Appropriate?

The fact that all of the reasons in *N.S.* represent a subtle shift in the case law from reconciling rights to balancing them may suggest a need to reconsider further applications of the test established in *Dagenais* and *Mentuck*. Though the Supreme Court has applied the *principles* of *Dagenais* to a variety of contexts to inform decision-making, generally

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80 *N.S.*, *supra*, note 1, at para. 82.
81 *Id.*, at para. 93.

the Court has restricted its application of its three-part test (necessity, accommodation, and balancing salutary and deleterious effects) to cases dealing with freedom of expression.[82]

Perhaps there is reason to continue this limited application of the *Dagenais*/*Mentuck* test. The third part of the test, which is similar to the last stage of the *Oakes* analysis, lends itself to a consideration of broader considerations than the content and scope of the rights involved. This may result in a balancing of rights (*i.e.*, looking at factors to decide which right in this context will predominate) as opposed to reconciling rights. Such broader considerations may be more appropriate in cases dealing with freedom of expression, which will necessarily impact more than just the parties involved. However, in cases where the conflict is more evidently limited to two individuals, such broader considerations may distract from the purpose of the analysis. This proposal for the limitation of the *Dagenais* framework may find some support in Iacobucci J.'s "Reconciling Rights". In his discussion of the *Dagenais* framework, he notes that where the court is attempting to reconcile Charter rights in a manner that addresses "broader, social purposes", the analysis required is "more holistic and approximates a section 1 analysis".[83] Implicit in this argument may be the corollary point that more intimate conflicts also require a different approach. *TWU* and *B. (R.)*, two of the examples of reconciliation noted above that deal with more personal rights, use the principles of *Dagenais* but do not make use of the tripartite test.

3. The Practical Impact

The majority decision's failure to examine the context to determine the content and limits of the accused's rights to full defence and a fair trial may also be correlated to some of the problematic practical implications of its decision. Because the majority did not focus on determining the limits of the rights at play in the conflict, it did not fully appreciate the context. In particular, the implications of its decision

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[82] See, for example: *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42, [2002] 2 S.C.R. 522, at para. 40 (S.C.C.); *Globe and Mail v. Canada (Attorney General)*, [2010] S.C.J. No. 41, [2010] 2 S.C.R. 592, at para. 90 (S.C.C.); and *B. (A.) v. Bragg Communications Inc*, [2012] S.C.J. No. 46, [2012] 2 S.C.R. 567, at para. 11 (S.C.C.).

[83] Iacobucci, "Reconciling Rights", *supra*, note 3, at 161.

suggest that the Court did not appreciate the additional hardships that the decision would place on witnesses in NS's position.

(a) Increased Procedural Burdens for Witnesses

In striving to balance the rights at play in *N.S.*, the majority's proposed solution increases the procedural burdens placed on witnesses. This will likely make it necessary that a complainant in such circumstances seek the assistance of counsel to guide them through the byzantine court process. This point was appreciated by LeBel J., who noted in his concurring reasons that the application of the criteria established by the majority "could trigger new motions, and possibly another type of '*voir dire*' that would add a new layer of complexity to a trial process that is not always a model of simplicity …".[84]

Further, the majority's test requires that complainants take an active role if they wish to testify with their *niqab*s. Although the accused would seem to bear the burden in this test (with the exception of establishing sincerity of religious belief), the complainants are expected to place evidence before the court relating to possible options for accommodation.[85] This would effectively require that the complainant not only be prepared to produce expert evidence on the effect of demeanour evidence at trial, but also be prepared to counter the evidence brought forward by the accused. Without the assistance of counsel, it is impractical to believe that a person without a legal background would be adequately prepared to handle such burdens. Further, the effective evidentiary burden that the majority's reasons place on a complainant seems onerous given that at the Supreme Court none of the nine interveners was able to provide any social science evidence on the impact of demeanour evidence.[86] This would suggest that no such evidence exists in Canada, leaving the complainant in the improbable situation of having to commission this evidence herself.

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84 *N.S.*, *supra*, note 1, at para. 69

85 *Id.*, at para. 33.

86 *Id.*, at paras. 17, 20.

(b) The Need to Prove Strength of Religious Beliefs

A second problematic aspect of the majority decision is its requirement in the last stage of the *Dagenais* test that courts consider the strength of the witness's religious belief. As Abella J. noted, it is not clear how this assessment is consistent with the witness's rights, particularly given the "highly subjective and imprecise nature of the freedom of religion analysis".[87] This would also seem to contradict *Dagenais*'s holding that the court respect both sets of rights in resolving an apparent conflict.[88]

More practically, given the context in which this analysis would take place — at a provincial court, likely with a witness who is without counsel (as NS initially was) — this test risks a descent into the "inquisition"-type examinations that the Supreme Court prohibited in *Syndicat Northcrest v. Amselem*.[89] This is even more troubling given the fact that the majority did not provide any guidance regarding how such an assessment would be undertaken. As Abella J. noted in the context of the sincerity analysis, it is unclear what evidence a court would look to in assessing the strength of a witness's beliefs.[90] Judging from the transcript of the *voir dire* in *N.S.*, where the preliminary inquiry judge dealt with his manner of questioning NS, whether she would have counsel and whether she would be sworn in an *ad hoc* manner, this is likely to result in a disorienting process for the witness.[91] This in turn, puts an additional burden on a witness in NS's position, a factor which the majority did not truly consider (or did not attach enough weight to).

(c) Access to Justice

In light of the above, as well as other factors, the majority's decision creates substantial access to justice issues for complainants in NS's circumstances. Although the majority did note some of the access to justice issues that persons such as NS may encounter if ordered to remove their *niqabs*, only Abella J. explicitly connected this to defining the accused's

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87 *Id.*, at para. 89.
88 *Dagenais*, *supra*, note 5, at para. 72.
89 [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551, at para. 52 (S.C.C.).
90 *N.S.*, *supra*, note 1, at para. 88.
91 NS Transcript, *supra*, note 46, at 9-11.

right to a fair trial, quoting the following *dicta* from *Mills*: "[A]n assessment of the fairness of the trial process must be made 'from the point of view of fairness in the eyes of the community and the complainant'."[92]

Forcing women who sincerely believe that their religion requires them to wear a *niqab* in public to remove it may result in these women not bringing charges for crimes that they allege have been committed against them. This will create an inhibition to seek justice that will "undermine the public perception of fairness" of the justice system.[93] This effect is likely to be more marked among Muslims, who as a marginalized community are more likely to have a pre-existing perception that the justice system will treat them unfairly.[94]

V. CONCLUSION

As the adage goes, context matters. However, as the Supreme Court's decision in *N.S.* demonstrates, the purpose that context is used for is critical. In contrast to the prior case law, the Supreme Court did not use context to determine the content and scope of the rights at play in this case. As a result, the Court ended up balancing the competing rights in *N.S.* (notwithstanding that they used the language of reconciliation). Although this is conceptually problematic and risks the coherency of the Charter, as this paper suggests, it may also have led to practical problems with the decision.

POSTSCRIPT

In Fall 2011, this case was re-heard by the preliminary inquiry judge, who applied the four factors articulated by the Supreme Court of Canada.[95] The preliminary inquiry judge held that NS must remove her *niqab* while testifying. In reaching this conclusion, he applied the "reconciling rights" framework as follows.

Sincere Religious Belief: NS testified as to her religious beliefs. She described wearing the *niqab* as a "matter of respect, honour and modesty". NS stated that removing the *niqab* in public would be

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92 *N.S.*, *supra*, note 1, at para. 95.

93 *Id.*

94 Tom R. Tyler, "Procedural Justice, Legitimacy and the Effective Rule of Law" (2003) 30 Crime & Just. 283, at 294-95.

95 *R. v. S. (M.)*, [2013] O.J. No. 1855, 282 C.R.R. (2d) 6 (Ont. C.J.).

"sinning" but she does do so to participate in society, including when taking her driver's licence and passport photos and when required by government officials. The preliminary inquiry judge held that NS's "religious beliefs are of long duration, and are an important part of who she is as a human being". He concluded that NS "sincerely believes" that her religion requires her to wear a *niqab* during the trial.[96]

Trial Unfairness: Neither party led any evidence to rebut the "common law assumption" that the accused will see his or her accuser's face. As such, the preliminary inquiry judge, given the Supreme Court's strong pronouncements, held that allowing NS to testify with a *niqab* would impair the defendants' counsel's ability to assess her credibility. And, in the court's view, the case depended on NS's credibility.[97]

Reconciliation: According to the court's reasons, the only option proposed by NS's counsel to reconcile these two rights was a one-way screen, similar to those used in child assault cases. The court noted that this option did not assist because the purpose of the screen is to shield the witness from seeing others in the courtroom. One of the defendant's counsel proposed that NS testify by close-circuit television. NS refused, viewing this as still creating "a sexualized atmosphere". The court also rejected the option of excluding men from the courtroom on the basis that the court cannot bar male members of the public or media from attending the trial, and the defendants are entitled to choose their counsel. As a result, the preliminary inquiry judge concluded that "no accommodation or alternative measures are possible".[98]

Proportionality: Given the Supreme Court's reasons, the outcome on this issue was predetermined: the accused's right to a fair trial trumped NS's religious freedoms. The preliminary inquiry judge attempted to identify the competing interests, but ultimately concluded that NS has to remove her *niqab*.[99] NS's counsel advised that she intends to appeal the decision.[100]

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[96] *Id.*, at paras. 4-8.

[97] *Id.*, at paras. 9-12.

[98] *Id.*, at paras. 13-15.

[99] *Id.*, at paras. 16-27.

[100] Michele Mandel, "Woman in sex assault case must remove niqab to testify, judge rules", *cnews* (April 24, 2013), online: Canoe <http://cnews.canoe.ca/CNEWS/Crime/2013/04/24/20766356.html>.