

SCC's niqab ruling played it too safe



[By Jacob Stilman](#)

The Supreme Court of Canada has waded into treacherous waters where the rights of accused persons to make full answer and defence to a criminal charge conflict with their accusers' rights of freedom of religion. An accused's right to make full answer and defence is a core legal guarantee under the Canadian Charter of Rights and Freedoms, subsumed under s. 7 and 11(d) of the Charter. On the other hand, the right to freedom of religion is also an express guarantee of individual rights pursuant to s. 2(a) of the

Charter.

The case of *R. v. N.S.* pits these core rights and values into direct conflict. In this case, the two accused argue that the complainant's wearing of a niqab (a full facial veil) impinges upon their ability to adequately challenge her evidence in court, by obscuring her face and therefore being unable to effectively judge her credibility.

The Supreme Court of Canada ruled Thursday that N.S., a Muslim woman, who wanted to testify in a sexual assault case while behind the veil, may have to remove it if credibility became an issue, CBC reports. [Read CBC](#)ellip; [Read R. v. N.S.](#) Supreme Court, in its split decision, has attempted to create a balance between these two competing rights and values. In so doing, the court has not so much settled the issue with a broad legal determination, as it has provided a set of guidelines to judges at the trial level assist them in navigating these tricky waters. However, this approach is fraught with problems, as in attempting to establish guidelines to assist trial courts in resolving this conflict, it has merely moved the goalposts. Although this issue does not arise frequently, defence practitioners would have preferred a set of black letter rules rather than the far less conclusive guidelines that have now emerged from this decision.

As criminal lawyers, our function in court is to diligently defend our clients, who are the accused. This duty effectively means that the rights of the accused to a full and fair trial will almost invariably trump other rights, even when those other rights being asserted are guaranteed under the Charter. It should not be surprising, therefore, if the reaction to this ruling by the Supreme Court is met with some degree of reticence by the defence bar. However, I anticipate that the prosecution side will also greet this decision with trepidation.

The problem with this decision is that it tries to be "too fair" to all sides and in so doing has created a legal and procedural vacuum, which will only serve to add layers of complexity to trial proceedings when this situation next arises. This is because the majority judgment requires that the trial judge make numerous determinations that are really collateral to the case at hand. For example, the trial court will need to determine whether the niqab-wearing witness' proclaimed religious conviction is "sincere." One can well imagine how countless hours of valuable court time will be expended challenging the authenticity of the witness' beliefs. What evidence is to be adduced in challenging or buttressing this element of the test? And what sort of evidentiary burden is to be applied in making the determination of "authenticity?"

The trial judge will also be charged with making a determination as to whether or not the witness' evidence is contentious. Is credibility a live issue, in other words. This type of preliminary determination could easily spiral into a day's worth of argument and counter-argument.

Thirdly, the trial judge is called upon to engage in judicial "balancing;" trying to navigate an approach which accommodates the conflicting interests, and if none can be found, then having to determine on a non-specified set of factors how best to resolve the apparently unresolvable. Effectively, the Supreme Court, through its indecision in this issue, has kicked the ball right back to the trial

court, and has said “deal with it.”

And this decision, coming as it has in the context of a sexual assault trial with a female complainant and male accused, does not appear to contemplate a situation wherein the niqab wearer is in fact the accused herself. How would the prosecution react to a situation where, at a jury trial, the accused remains fully cloaked and her face concealed before the triers of fact? To take matters even further, what if a male accused declares that his “faith” requires that he wear some sort of facially-concealing garment?

I would offer the opinion that both the defence and the Crown would have greatly preferred to have been handed a definitive pronouncement on this issue: either permit witnesses to testify while wearing a niqab if they so choose, or prohibit it outright. A clear decision in this regard would have eliminated the very real potential for the procedural circus that can easily ensue under this now officially sanctioned, but ill-defined, guideline approach.