

**SUPERIOR COURT OF JUSTICE
(TORONTO REGION)**

IN THE MATTER OF criminal proceedings against M---D.S. and M---L.S.,
currently at the preliminary inquiry stage in the Ontario Court of Justice before
the Honourable Mr. Justice Weisman, wherein N.S. is the complainant;

AND IN THE MATTER OF an application to intervene in the nature of certiorari
and mandamus for an extraordinary remedy pursuant to Part XXVI of the
Criminal Code of Canada and/or an originating application for relief pursuant to
s.24(1) of the Canadian Charter of Rights and Freedoms

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

and

ONTARIO HUMAN RIGHTS COMMISSION

Proposed Intervenor

and

N.S.

Applicant

and

M---D. S.

Respondent

and

M---L. S.

Respondent

**FACTUM OF THE PROPOSED INTERVENOR
ONTARIO HUMAN RIGHTS COMMISSION**

OVERVIEW

1. The Commission supports the Application and seeks to intervene because:
 - The Ontario Human Rights Commission (“Commission”) takes no position on the jurisdictional issue raised by the Applicant N.S.
 - The Commission has a real, substantial and identifiable interest in the issue before the Court and a decision in this matter will have broad policy and public interest implications that will impact persons other than the existing parties.
 - The Record before Mr. Justice Weisman sufficiently established that N.S. has a sincerely held religious belief that she cannot remove her niqab in the presence of males who are not family members.
 - The requirement that N.S. testify in open court without her niqab infringes her right to religious freedom under the *Canadian Charter of Rights and Freedoms*. Allowing N.S. to testify while wearing her niqab does not significantly impair the defendants’ right to full answer and defence.
 - There is insufficient information in the record to determine whether N.S.’s religious beliefs could have been accommodated.

PART I – INTERVENOR’S STATEMENT AS TO FACTS

2. The Commission accepts the applicant’s statement of facts.

PART II – RESPONSE TO APPLICANT’S ISSUES

3. The Court, at the March 2, 2009 hearing, identified three issues to be addressed:
 - A. Jurisdiction;
 - B. The Commission’s application for leave to intervene; and
 - C. Position on the merits of N.S.’s application.

A. Issue of Jurisdiction

4. The Commission takes no position on the jurisdictional issue raised by N.S.

B. Application for Leave to Intervene

5. The Court should consider the following factors in deciding whether to grant a proposed intervenor leave to intervene as a friend of the court:
 - i. The nature of the issue – the extent to which the proposed intervenor has a real, substantial and identifiable interest in the matter and the broad public impact on persons other than the existing parties;
 - ii. The issues that arise – the extent to which the matter is one of public policy or public interest;
 - iii. The likelihood that the proposed intervenor can make a useful contribution to resolve the issue – the extent to which the intervenor’s experience and expertise will bring a perspective that can usefully assist the court;
 - iv. The prevention of injustice to the immediate parties.

Rothman, Benson & Hedges Inc. v. Canada (Attorney General) (T.D.) [1990] 1 F.C. 74, at pages 79-80.

Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada Ltd. (1990) 74 O.R. (2d) 164.

6. The Commission submits that, based on an assessment of the aforementioned factors, the Court should grant the Commission leave to intervene in these proceedings.
7. First, the Commission has a real, substantial, and identifiable interest in the matter. The Commission is statutorily mandated, under the *Human Rights Code*, R.S.O. 1990, c. H-19, as amended, to protect human rights in Ontario and has been doing so for nearly 50 years. Given the recent changes to the human rights regime in Ontario, the Commission’s role has moved from one of processing individual complaints to focusing on systemic and public

interest discrimination issues. It is respectfully submitted that the matter before this Court is precisely this type of issue.

8. The matter before this Court raises an issue of competing rights. On the one hand, the complainant is being forced to remove her niqab or veil, which she wears pursuant to her religious beliefs. On the other hand, the defendants believe that their right to full answer and defence would be circumscribed by an inability to question the complainant without her veil. The Commission is uniquely positioned to provide the Court with a perspective as to the analysis required when faced with two potentially competing rights.
9. Second, the issues that arise are a matter of public policy and public interest. Issues of competing rights arise with increasing frequency in the context of human rights and constitutional law litigation. A decision in the matter before this court will not only have specific application in this case, but will have broader ramifications in determining how to balance religious beliefs against other rights. In this religiously and culturally diverse city and province, this type of issue will continue to arise in various forms and venues. While a decision in this matter will directly affect Muslim women who wear a niqab, the Court's analysis and reasoning will also impact other cases of religious accommodation and the nature and extent of religious accommodation provided in our courtrooms.
10. Third, the Commission can make a useful contribution to assist the Court to resolve the issue, and bring experience and expertise to the hearing of the application. The issue to be decided on this application is squarely within public policy, the public interest and the Commission's mandate. Specifically, section 29 of the *Human Rights Code*, R.S.O. 1990 c. H. 19 as amended, states, in part:

The functions of the Commission are to promote and advance respect for human rights in Ontario, to protect human rights in Ontario and,

recognizing that it is in the public interest to do so and that it is the Commission's duty to protect the public interest, to identify and promote the elimination of discriminatory practices...

11. In fulfillment of this mandate, the Commission has frequently been granted intervenor status at all levels of court and before administrative tribunals, bringing to these various proceedings its experience and expertise on a number of issues, including issues of competing rights.

12. For example, the Commission has intervened at the Supreme Court of Canada in a trilogy of noteworthy religious accommodation cases over the past five years:

- In *Amselem*, orthodox Jewish residents of a Montreal condominium wanted to build a succah, or religious hut, on their balconies during the annual nine-day religious festival of Succot. Other condominium owners claimed that this religious belief conflicted with their right to peaceful enjoyment and free disposition of property under the Quebec *Charter of Human Rights and Freedoms*;

Syndicat Northcrest v. Amselem [2004] 2 S.C.R. 551.

- In *Multani*, a Sikh youth sincerely believed that he was required to carry his kirpan, or religious dagger, at all times, including at school, albeit in a discrete and restricted fashion. This religious belief was in conflict with the school's safety concerns regarding weapons on school property;

Multani v. Commission Scolaire Marguerite-Bourgeoys [2006] 1 S.C.R. 256.

- In *Hutterian Brethren*, members of a Christian religious group sincerely believed that having their photograph voluntarily taken violated the Bible's second commandment against idoltry and was a sin. This religious belief competed against Alberta's security concerns in preventing identity theft, fraud and other misconduct through the use of a mandatory photo requirement on driver's licences.

Her Majesty the Queen in Right of the Province of Alberta v. Hutterian Brethren of Wilson Colony and Hutterian Brethren Church of Wilson Colony, 2007 ABCA 160.

13. The Supreme Court of Canada accepted the Commission's position in the first two cases (i.e. religious accommodation was granted) while the Court has not yet rendered a decision in *Hutterian Brethren*.

14. In the field of human rights, the consideration of conflicting or competing rights is a developing area with little jurisprudential guidance and precedents. Therefore, it is critical that the decision on this issue be fully informed with the benefit of expert perspectives.

15. We note that the Court of Appeal for Ontario has granted leave to intervene to a non-profit organization because, in part, it was able to place the issues in a "slightly" different perspective than the Attorney General. We submit that our perspective is more than "slightly", if not substantially, different than the other parties.

Peel, supra.

16. The Commission submits that there would no injustice nor prejudice to the immediate parties if the Commission was permitted to intervene. The Commission has complied with the Court's timeframes for filing materials and has not delayed the ongoing preliminary hearing in this case.

17. For these reasons, the Commission respectfully request that leave to intervene be granted and that our following submissions on the merits be considered. The Commission also requests the opportunity to make oral submissions if the Court believes it would be of assistance.

C. The Commission's Position on the Merits of the Application

18. The Commission will address the following issues:

- a. Does the requirement that the complainant testify without her niqab in open court, in the circumstances of this case, breach her section right to freedom of religion under section 2(a) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*")?

- b. If there is a section 2(a) *Charter* breach, is the requirement on the complainant to remove her niqab, while testifying in a sexual assault preliminary inquiry a reasonable limit that can be demonstrably justified in a free and democratic society?

a. Section 2(a) Breach

i. When is Freedom of Religion Triggered

19. Freedom of religion is the freedom to undertake practices and harbour beliefs having a nexus with religion, in which an individual demonstrates that he or she sincerely believes, in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.

Amselem, supra at para. 46.

20. Religion is a highly personal matter and difficult to define. Freedom of religion under the *Charter*, and protection against religious discrimination under human rights legislation, thus focuses on a subjective, not an objective, practice and belief of religious tenets.

[R]eligion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

Ibid at Syllabus, page 2.

21. In determining whether section 2(a) of the *Charter* is triggered, an individual advancing an issue premised upon a claim of freedom of religion must demonstrate:

- 1) He or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or

subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and

2) He or she is sincere in his or her belief.

Ibid. at para. 56.

22. Courts are fully entitled to conduct legitimate and effective inquiries in order to ensure that a belief has a nexus with religion, is held in good faith, is neither fictitious nor capricious, and is not an artifice. The permitted inquiry in assessing an individual's sincerity of religious belief is one of fact that can be based on several non-exhaustive criteria, including:

- (i) Requiring claimants to provide evidence concerning the nature of their beliefs, and to answer questions about whether those beliefs are consistent with current practices,
- (ii) Invite claimants to provide evidence from third party references (whether from family, friends, colleagues or otherwise) to verify their current practices; and/or
- (iii) Invite claimants to provide evidence from other adherents or religious officials or experts concerning their beliefs (although an inability to provide this evidence would not in itself render a belief unworthy of protection).

Ibid., at paras. 51, 53 and 54.

Multani supra at para. 35.

23. The Court would then be able to review the totality of information received and make the permitted conclusions concerning the sincerity of the religious belief for which accommodation is sought.

Amselem, supra at para. 53.

24. However, a Court is not qualified to rule on the validity or veracity of any given religious practice or belief. Courts should be wary of becoming the arbiter of religious dogma:

To require a person to prove that his or her religious practices are supported by a mandatory doctrine of faith, leaving it for judges to determine what those mandatory doctrines of faith are, would require courts to interfere with profoundly personal beliefs in a manner inconsistent with the principles set out by Dickson C.J. in *Edwards Books, supra*, at p. 759:

The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. [Emphasis added.]

Amselem, supra at para. 49.

R. v. Jones, [1986] 2 S.C.R. 284 at para. 20.

25. There are at least two reported instances where religious freedom has been asserted and inquiries have led to findings that a professed religious belief was not sincerely held:

- In *Bothwell v. Ontario*, a fundamentalist Christian tried to claim the benefit of the existing religious exemption from Ontario's mandatory photo requirement for driver's licences. Applying *Amselem*, the Ontario Divisional Court found Mr. Bothwell had not met his burden of proving that his refusal to be photographed was linked to a sincere religious belief. The evidence before the Court was that the objection to the driver's license photo requirement was a secular one related to privacy concerns and not religious ones. Mr. Bothwell was indifferent to digital photographs of his immediate family, lacked concern for Polaroid and digital photos of himself, and did not object to the digital photo requirement until after he was told that the only grounds for exemption were religious ones. The Court, after

considering all the information, found that Mr. Bothwell had not established that he had a sincere religious belief.

Bothwell v. Ontario, [2005] O.J. No. 189 at paras. 55, 60-64 (Div. Ct.).

- In *Nijjar v. Canada 3000 Airlines Ltd.*, a practicing Sikh challenged an airline policy prohibiting the wearing of kirpans longer than four inches. Although the case was decided before *Amselem*, the Tribunal took the same subjective approach, focusing on the sincerity of Mr. Nijjar's beliefs, rather than their correspondence with the teachings of Sikhism. The federal human rights tribunal dismissed the complaint, in part because Mr. Nijjar's testimony showed that wearing a kirpan longer than four inches was a matter of personal preference, not religious belief.

Nijjar v. Canada 3000 Airlines Ltd. (1999), 36 C.H.R.R. D/76 at paras. 43 and 47-51 (C.H.R.T.).

26. Where sincerity of belief is found and a religious freedom triggered, a court must then determine if there has been sufficient interference with the exercise of that right so as to constitute an infringement of freedom of religion under the *Charter*. Such interference must be more than trivial or insubstantial.

Amselem, supra at paras. 57 and 60.

ii. Application of the Law to the Facts of this Case

27. By his ruling dated October 16, 2008 ("Ruling"), it appears that Justice Weisman effectively determined that N.S.'s right to freedom of religion was not infringed. The Commission submits that, in arriving at this conclusion, Mr. Justice Weisman went beyond determining whether N.S.'s religious beliefs were sincere and improperly delved into the validity and veracity of her spiritual and religious beliefs.

28. From the record, Mr. Justice Weisman found that N.S.'s beliefs were "strong". There is nothing in the Ruling that suggests that N.S.'s religious requirement to wear a niqab was not undertaken in good faith or was fictitious, capricious or an artifice. Although the Court does not use the term, "sincerity", such conclusion can be clearly implied from the Ruling.
29. Even if this Honourable Court were to interpret the conclusions drawn by Justice Weisman in respect of N.S.'s drivers' licence photograph as being part of an inquiry into the sincerity of N.S.'s religious belief, there is nothing in the record to suggest that N.S. was ever provided with the opportunity to provide an explanation. There are a multitude of reasons why she may have had her photograph taken; it may have been that her religious beliefs have become more fervent since she took the photograph; she may have believed that she could request that only a female police officer look upon her photograph; or that she did not even consider the possibility that she might have to show her photograph to anyone.
30. There is also no evidence in the record from third party references to verify her current practices or evidence from other adherents or religious officials or experts concerning her beliefs. It appears that the Ruling was based on unsworn testimony and the "11th hour" filing of a drivers' licence. We submit that such an inquiry was deficient in the circumstances.
31. Once a sincerity of belief was found, the Court's inquiry should have ended. It was not for the Court to question the level and intensity, or "strength", of N.S.'s religious beliefs.
32. Further, the Court improperly found that N.S. only wore her veil for "comfort". Upon review of the transcript, N.S. clearly indicated a religious prohibition against removing her veil in front of one of the accused and, even though the other accused was a family member, she indicated that she would be more

“comfortable” not to reveal her face. Thus, this case is distinguished from the *Nijjar* case because N.S.’s veil is the basis of her religious beliefs and is not a matter of personal preference.

33. The facts in this case can be distinguished from *Bothwell*, where the court determined that Mr. Bothwell did not have a sincere religious belief, because there is no evidence that N.S.’s photograph without her niqab was taken for secular reasons. N.S. did take precautions based on her religious beliefs and requested both a screen and a female officer when the photograph was taken.

34. It is important to note that N.S. was given very little notice (thirty minutes) to come to court, she seemingly was not told why she was coming to court, she was not first given the opportunity to seek legal advice and the Court did not seek clarification as to what she meant by being more comfortable. Also, it should be expected that N.S. likely never had to justify her religious need to wear a niqab and while her explanation may not be legalistic, it is clearly logical and reasonable from a personal perspective.

35. The Commission submits that there is sufficient information in the record to conclude that N.S.’s religious belief to wear her niqab in public is sincere and in good faith, and that by ordering her to remove her niqab to testify, there would be substantial interference with her right to freedom of religion.

36. If the Court believes there is insufficient information in the record to base a decision on the sincerity of N.S.’s religious beliefs, this matter should be returned for the type of inquiry contemplated by the Supreme Court.

b. Reasonable limit under section 1 of the *Charter*

i. Section 1 of the Charter

37. The defendants’ have asserted that their right to full answer and defence would be compromised if N.S. were permitted to testify while wearing a niqab.

An analysis and potential reconciliation of these two rights occurs under section 1 of the *Charter*.

38. Under section 1 of the *Charter*, the onus is on a respondent to prove that, on a balance of probabilities, the infringement is reasonable and can be demonstrably justified in a free and democratic society. There are two requirements to meet this onus:

(1) The objective being pursued must be sufficiently important to warrant limiting a constitutional right (i.e. pressing and substantial analysis), and

(2) The means chosen by the state must be proportional to the objective (i.e. proportionality analysis). In determining proportionality, there are three components to the analysis:

- i. Does the impugned limit have a rational connection to the objective?
- ii. The limit/impairment must be minimal in that it must be tailored so that rights are impaired no more than is necessary.
- iii. Is there proportionality between the effects of the limit and the objective that has been identified as of sufficient importance.

R v. Oakes, [1986] 1 S.C.R. 103 at para. 70.

ii. Potential Competing Rights

39. It is trite law that freedom to exercise one's religion is not absolute and that it can conflict with other constitutional rights. Freedom of religion can be limited when acting in accordance with religious beliefs that may cause harm to, or interfere with, the rights of others. The reconciliation of competing rights occurs as part of a section 1 analysis, which provides a practical and comprehensive mechanism involving the review of a range of factors in assessing competing interests and the imposition of restrictions upon individual rights and freedoms.

Multani, supra at paras. 26 and 30.

Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825 at paras. 74-75.

40. It is important to note that this type of reconciliation of rights may not be necessary when the alleged competing right is not substantially interfered with. For example, in *Amselem*, the Supreme Court refused to pit freedom of religion against the right to peaceful enjoyment and free disposition of property under section 1 because the impact on the former was substantial while impact on the latter was considered "at best, minimal", and could not be considered as validly limiting religious freedom.

Multani, supra at para. 28.

41. In this case, the defendants assert that full answer and defence would only be met if N.S. were not wearing her niqab thereby permitting the Court to view her full facial demeanour (even though there was no suggestion that N.S. would not give a fair and candid account of the events with her veil). As noted in the Ruling, however, there now widespread acceptance that little emphasis should be placed on a witness' demeanour in assessing credibility. Counsel for N.S. has exhaustively set out relevant case law regarding the unreliability of demeanour in assessing credibility, upon which the Commission relies. Needless to say, there are numerous ways to challenge and assess a witness' credibility without observing full facial expression, including an assessment of opportunity for knowledge, powers of observation, judgment and memory, ability to describe clearly what was seen and heard, and consistency.

42. Given the speculative and unsubstantiated value in the need to see a witness' face in order to properly assess credibility, the Commission submits that the interference with the asserted right of full answer and defence is, at best,

minimal. Consequently, there is no need for the Court to engage in a reconciliation of two competing rights.

43. However, if the Court finds that there are two rights, both of which have been substantially interfered with, the Commission submits that the record does not establish whether N.S.'s religious beliefs could have been accommodated and, thereby, minimally impaired.

iii. Minimal Impairment

44. The Commission does not dispute that the objective pursued, i.e. requiring N.S. to testify without her veil pursuant to the right of full answer and defence, is pressing and substantial. Nor do we dispute that the impugned limit has a rational connection to its objective. However, the Commission submits that N.S.'s rights have not been minimally impaired by the requirement that she remove her veil in open court to testify.

45. The burden in meeting the minimal impairment branch under s. 1 of the *Charter* is analogous to the duty owed in human rights cases to accommodate to the point of undue hardship. The Supreme Court held in *Multani* that there is a "logical" correspondence between the concept of reasonable accommodation, or accommodation short of undue hardship as developed in the human rights jurisprudence, and the concept of minimal impairment in a s. 1 analysis.

Ibid. at para. 53.

46. In the human rights context a defence of undue hardship to an assertion of a religious right requires that the respondent prove that:

- (1) The impugned requirement was adopted for a purpose or goal that is rationally connected to the function being performed;
- (2) The impugned requirement was adopted in good faith in the belief that it was necessary for the fulfillment of the purpose or goal; and

- (3) The impugned requirement was reasonably necessary to accomplish its purpose or goal, in the sense that accommodation could not be possible without incurring undue hardship.

British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3 at para. 54.

47. Though developed in the employment context, the test for justification applies in all contexts to which human rights legislation applies.

British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) [1999] 3 S.C.R. 868 at para. 19.

48. Religious accommodation is an important thread in the fabric of society:

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct...Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses..." [emphasis added]

R v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at 336.

49. Those in a position to accommodate such a right should make all reasonable and good faith efforts to do so. As stated by the Supreme Court:

While no right can be regarded as absolute, a natural corollary to the recognition of a right must be the social acceptance of a general duty to respect and to act within reason to protect it. In any society the rights of one will inevitably come into conflict with the rights of others. It is obvious then that all rights must be limited in the interest of preserving a social structure in which each right may receive protection without undue interference with others.

Ontario Human Rights Comm. v. Simpsons-Sears, [1985] 2 S.C.R. 536 at 554.

50. The onus on a respondent to establish a *bona fide* and reasonable justification for infringement of a religious right is stringent. The respondent

must establish that it has considered and reasonably rejected all viable forms of accommodation. A simple statement that a complainant cannot be accommodated, if based upon impressionistic views or evidence, will not suffice to satisfy the onus. A respondent alleging "undue hardship" must provide objective, real and direct evidence.

British Columbia (Superintendent of Motor Vehicles), supra at paras. 32, 41 and 42.

51. In this case, it is unclear from the record whether there would be an accommodation measure that would address the (potentially) competing rights. While Justice Weisman considered the possibility of a screen, it does not appear that other options were canvassed with either the complainant or the defendants. While this may be a situation where no accommodation is even possible, the procedural component of the duty to accommodate requires, at a minimum, that there be a process where possible accommodation measures are canvassed.

ADGA Group Consultants Inc. v. Lane, 2008 CanLII 39605 (ON S.C.D.C.) at para. 106 (On. Div. Ct.).

52. The Court may wish to send the matter back for this type of inquiry if it believes that this type of information is lacking in the record and is ultimately necessary for a decision.

PART III – ADDITIONAL ISSUES

53. The Commission does not raise any additional issues.

PART IV – ORDER REQUESTED

54. The Commission supports the order requested by the applicant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Dated at Toronto, Ontario this 4th day of March, 2009

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