Assessing the Contours of the Freedom to Wear the Niqab in Canada

By

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A thesis submitted to the Graduate Program in Law
in conformity with the requirements for the
Degree of Masters of Law

Queen’s University
Kingston, Ontario, Canada
September, 2013

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Abstract

This thesis uses the recently decided R v NS to assess the contours of the freedom to wear the niqab, as part of religious freedom, in Canada. By criticizing the majority and concurring opinions I argue that, properly understood, a witness’s religious freedom should protect her from an order to unveil when she is testifying in court. I show that the concurring opinion holds the witness to an illiberal, unfair standard of personal behaviour that fails to respect the witness’s religious freedom. I show that the majority’s decision, though following a justified liberal process of balancing rights, failed to protect NS’s meaningful choice to practice her religion, a standard set by the court in Hutterian Brethren. I then assess the broader implications of R v NS. I argue that in theoretical terms R v NS reaffirms Canada’s commitment to a liberal system of reciprocal rights and rejects a perfectionist approach according to which societal values can override rights. These theoretical lessons are then applied to other policies regulating the veil. I argue that despite its shortcomings, R v NS should generate optimism that perfectionist policies will be rejected and that the veil will only be limited minimally and only when the limit is necessary to uphold other legitimate aims.
Acknowledgements

I am grateful to Professor Darryl Robinson for agreeing to supervise this project, for his support as a Professor in general, and for his good advice and help in this particular project.
Table of Contents

Chapter 1 – Introduction 1

Chapter 2 – *R v NS* 2012 SCC 72: The Decision and a Critique 8

Chapter 3 – A Meaningful Choice to Practice One’s Religion 35

Chapter 4 – Moving Forward: *R v NS* Applied 53

Chapter 5 – Conclusions 80

Bibliography 82
Chapter 1 – Introduction

The niqab, a form of the Islamic full-veil, has caused some controversy in Canada in the past few years in a number of contexts. In both the Québec and the federal 2007 elections the question arose whether veiled voters should be allowed to vote without unveiling for identification. The two jurisdictions arrived at opposite conclusions, with Canada approving alternative methods of identification and Québec requiring unveiled facial identification. Québec saw a few more accommodation-related incidents over the years, the most notable of which happened when Naima Atef Amed of Montreal, a permanent resident taking government-sponsored French classes, was expelled from the course in 2009 when she refused to remove her niqab. The incidents caused fierce popular debate and demands that the government intervene. The Québec government first assembled a public commission to consider whether requests for accommodation of religious needs are a serious concern and how the government should respond. The commission concluded that there was no cause for either concern or political

1 The niqab is the most common form of the Islamic full-veil in Canada. Mainly practiced in Arab countries such as Saudi Arabia, the niqab conceals most of the face but exposes the eyes. Another form of the Islamic full-veil is known as the burqa. Most commonly practiced in Afghanistan, the burqa conceals the whole face with a see-through veil that enables the woman to see and speak. I will refer to the “niqab” or to a “niqabi woman” when discussing R v NS and to the Islamic full-veil or parts thereof when discussing other policies effecting the practice.

2 During the 2007 elections in Quebec the Chief Electoral Officer, under the pressure of the three major parties, canceled a previous decision of his that allowed veiled voters to substitute identifying with a vouch by an acquaintance. In contrast, Canada's Chief Electoral Officer announced six months later during Federal by-elections that veiled voters could substitute identifying with one of two alternative measures: showing two pieces of identification and taking an oath or being vouched for by an acquaintance (“6 niqab legal controversies in Canada” CBC News (20 December 2012) online: CBC <http://www.cbc.ca/news/canada/story/2012/12/19/f-niqab-list.htm> [CBC]).

3 Ibid.

Nevertheless, a few months after the commission published its report, the then government tabled a bill regulating the Islamic full-veil in all interactions between an individual and the Administration. And recently it was revealed that the current government is intending to pass a “Charter of Québec Values,” a broader legislation that will ban all public employees from wearing religious headgear, with the aim of promoting “the neutrality of the state.”

Québec is so far the most fruitful ground for accommodation-related controversies in Canada. But the federal level knows its own niqab controversies, and – being federal – the policies that these controversies yield could prove most important in the lives of niqabi women. In 2011 Citizenship and Immigration Canada published a policy requiring all citizenship applicants to unveil in order to take the oath required to receive citizenship. And in the latest legal development, the Supreme Court of Canada (SCC) decided in December of 2012 on the matter

5 The Commission questioned the sense of alarm that the public debate in the province implied, finding that “the foundations of collective life in Québec are not in a critical situation.” (Ibid at 10) The Commission noted that the fear expressed is “disproportionate to the demographic weight of Muslims in Québec, who accounted for 2% at the most of the population in 2007,” (Ibid at 67-68) and further commented on the question of Muslims’ intentions themselves, concluding that there was no evidence that “there is an ‘Islamist project’”. In fact, the Commission portrayed immigration as a factor strengthening Québec society (Ibid at 77-79). In light of these findings, the Commission recommended that the government implement any change, if at all, in an incremental manner and avoid dramatic changes of policy. The Commission also recommended favouring the social route of negotiation to the legal route of adjudication (Ibid at 51).

6 Bill 94, An Act to Establish Guidelines Governing Accommodation Requests within the Administration and Certain Institutions, 1st Sess, 39th Leg, Québec, 2010 [Bill 94]. Article 1 of the Bill states:

The purpose of this Act is to establish the conditions under which an accommodation may be made in favour of a personnel member of the Administration or an institution or in favour of a person to whom services are provided by the Administration or an institution.

For political responses to Bill 94 see e.g. CBC, supra note 2.


of *R v NS*, setting the legal formula for solving a conflict between the accused’s fair trial right and a witness’s religious freedom, expressed by donning the niqab.\(^9\) Adopting an approach based on a compromise between the two rights, the SCC identifies the considerations that could sway a decision in great detail, creating a clear path according to which cases similar to the one at hand will be decided. Setting the standard to which all policies nationwide—applied, in the works, or forthcoming—will be held, *R v NS* is the main subject of this thesis.

Chapter 2 critically examines the decision itself. *R v NS* is most interesting because the three reasons offered by the court represent three dominant rival philosophical approaches to religious freedom and the extent of protection religious practices should receive. The majority’s judgment, delivered by McLachlin CJ, focuses on the effect the niqab has on trial fairness. Based on a common-law assumption that facial cues help in assessing the credibility of a witness, McLachlin CJ finds that the niqab may have a significant effect on the accused’s right to trial fairness. She finds that this effect on trial fairness outweighs the effect that requiring the niqabi woman to unveil will have on the niqabi woman’s religious freedom. Hence, the majority’s judgment portrays the case in terms of balancing competing Charter rights and delivers a result that prefers the most adversely affected right, in this case the right to trial fairness. The concurring reasons, delivered by LeBel J, approach the case not in terms of competing rights but in terms of societal values and institutions that enable justice. LeBel J portrays justice as based on a system of open communication within courts and between courts and the public. Portrayed in these terms, justice requires that individuals approaching the court system take upon themselves the responsibility to communicate openly and neutrally with other parties in court. As

a result, a niqabi woman does not have the right to wear the niqab in court under any circumstances. The dissenting reasons of Abella J balance competing Charter rights by striking a different balance than the majority between religious freedom and the right of the accused to a fair trial. Abella J defines a comparative case to the niqab: the case of a witness with limited communication abilities. Finding that the justice system accommodates witnesses with limited communication abilities, Abella J argues that the same treatment should be extended to niqabi women and that they should always be allowed to testify wearing the niqab. Since her reasons are based on a comparative case, Abella J approaches the case first and foremost as a question of equality of access to justice. In chapter 2 I will analyze the three reasons in R v NS. In particular, following Abella J, the examples of a witness with limited communication abilities and a niqabi witness will be compared. I will argue that the considerations of justice applying to the two kinds of witnesses are similar and do not justify differential treatment. I will conclude that the arguments of McLachlin CJ and LeBel J are unpersuasive and that they do not rise to the challenges posed by Abella J’s arguments.

Chapter 3 is dedicated to my own argument. I find that the majority in R v NS implies that choices are relevantly different, legally speaking, from immutable conditions. I agree. Unlike Abella J, I do not claim that niqabi women are unable to unveil, but rather, that they choose not to. But I argue that, rightly understood, religious freedom must protect the religious individual’s choice on its own merits. I find support for my view in McLachlin CJ’s discussion in Hutterian

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10 Abella J does not claim directly that niqabi women are unable to unveil. Rather, she compares between witnesses who are unable to testify in the common way and niqabi witness. She also refers to the fact that religious command is experienced by believers as obligatory and non optional. Ibid at para 93. See also the discussion of Abella J’s position in section 2.1.2 below.
Brethren of “meaningful choice to follow [one’s] religious beliefs and practices.”

I follow McLachlin CJ’s main idea, according to which religious freedom is not absolute and can be limited so long as the limits do not prevent such “meaningful choice,” meaning meaningful opportunity to practice one’s religion. Following McLachlin CJ’s definition of “meaningful choice” in Hutterian Brethren, I disagree with her conclusion in the case of NS. McLachlin CJ believes that asking NS to unveil will not cause much harm to NS’s meaningful choice to practice her religion. I think that McLachlin CJ believes so because she is picturing the limitation in terms of time and frequency. Testifying is a temporary and almost unique situation. But I do not think that the temporal element is the important one. Rather, I think that the key question is whether the applicant voluntarily engages in the situation. In more than one respect, NS did not choose to be in the trial in which she may be required to unveil. To take her right to practice her religion in this particular situation would indeed be to curtail her meaningful choice to practice her religion.

Ultimately, my approach is liberal and rights-based. I follow a variant of the philosophy shared by both McLachlin CJ and Abella J. Like them, I believe that the right to wear the niqab should be balanced against others’ rights. The niqab should receive full accommodation where the activity the niqabi woman asks to participate in fulfills a basic need or a right and where the niqabi woman has no available alternative avenue to secure her interest. On the other hand, where the activity the niqabi woman asks to participate in does not fulfill a basic need or a right, a compelling public interest could dictate that in order to participate in the activity the woman will have to unveil. Being a liberal argument, I develop my argument using the words of

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McLachlin CJ and Abella J themselves as well as the words of liberal theoreticians, mainly of John Rawls.

Chapter 4 discusses \( R v NS \)'s wider implications. I will first discuss the decision in its theoretical context. More than its actual results for the parties to the trial, \( R v NS \) is important for its achievements in the theoretical field. \( R v NS \) reaffirms the Canadian commitment to a reciprocal system of rights and rejects outright the rival societal values approach. The strongest lesson from \( R v NS \) is hence that policies based in the societal values approach are likely to fail under judicial scrutiny. I support the theoretical commitment expressed by the Court. As part of the debate in chapter 4, I will argue that the liberal approach is justified using ideas expressed by a founding father of liberalism, John Stuart Mill. I will then apply the theoretical lesson of \( R v NS \) to two other prominent examples of niqab regulation policies: Quebec’s Bill 94 and Citizenship and Immigration Canada Bulletin 359. The examples will show that when the liberal approach is applied, veil-limiting policies are likely to be moderate and justified policy tools.

\( R v NS \) is expected to have a wide effect in Canada. As a decision of the highest court in Canada, \( R v NS \) is binding to all other courts, legislatures and governments of Canadian jurisdictions. Furthermore, \( R v NS \) strikes a balance between two competing sets of Charter rights. At least theoretically, Charter rights are norms of the highest legal strength in the Canadian system. Other public interests and the policies that advance them are subordinated to Charter rights.\(^{12}\)

\(^{12}\) Section 1 of the Charter states: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” (Canadian Charter of Rights and Freedoms, part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter]. In the famous case of \( R v Oakes \), [1986] 1 SCR 103, 26 DLR (4th) 200, a test was developed for “reasonable limits justifiable in a free and democratic society” which is known as the proportionality test. According to the test, the limiting measure should be related to the
Lastly, \( R \ v \ NS \) is useful for the analysis of future cases because its subject matter touches upon common questions regarding the Islamic full-veil. Dealing with the question of testifying in court, \( R \ v \ NS \) explores the impact that concerns of identification and communication can have on the right to veil. The public interest in the ability to identify every person, and in open communication in public, are two of the concerns most commonly invoked in the debate about the Islamic full-veil, as will be discussed in chapter 4. Since \( R \ v \ NS \) gives an authoritative answer to the weight of the two concerns of identification and communication, the decision is likely to be easily applicable, \textit{mutatis mutandis}, to a great range of other cases questioning the veil.\(^{13}\) \( R \ v \ NS \) is hence the most authoritative legal source on the level of accommodation the niqab receives in Canada to date, and other niqab regulating policies will likely form in its image.

Chapter 5 draws mixed conclusions. Despite its failure to guarantee an unqualified right to testify wearing the niqab, \( R \ v \ NS \) provides reasons to believe that the freedom to veil is largely protected in Canada.

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\(^{13}\) With regard to identification the whole court concluded that the niqab should be removed whenever identification is required. With regard to communication the majority set the test that will be explicated in the next chapter.
Chapter 2 - *R v NS* 2012 SCC 72: The Decision and a Critique

*R v NS* was decided based on the common-law practice that witnesses’ faces are generally revealed to counsels, parties and triers of the facts. In this chapter I will, with the dissenting opinion of Abella J, challenge this decision. In specific, I will inquire whether, in a liberal constitutional regime such as Canada, where religious freedom is protected by s 2(a) of the *Charter*, the niqab should be accommodated in court by being exempted from the common-law practice. I will explore different reasons to exempt niqabi witnesses from the common-law practice and a few reasons not to exempt them. I will conclude that the reasons to exempt niqabi witnesses from the practice are stronger than the reasons not to do so.

2.1 *R v NS*

The inquiry of *R v NS* starts with the facts of the case. NS’s uncle and cousin stand charged of sexually assaulting her when she was a child. NS was called to testify for the prosecution. NS wears a niqab and testified that she does so out of religious conviction. At the preliminary inquiry, one of the accused asked that NS be ordered to remove the niqab while testifying. The accused claimed that his right to a fair trial, including the right to cross-examination and the right to face his accuser, was a stake. The judge ordered NS to remove her niqab, based on a finding that her religious belief was “not that strong” because she removed the niqab when she was
photographed for her driver’s licence and she testified that she would remove it if required to do so at a border crossing.\(^{14}\)

The decision of the preliminary inquiry judge sparked a legal debate that went all the way to the Supreme Court. NS applied to the Ontario Superior Court of Justice, which held that she should be allowed to testify wearing her niqab if she asserted a sincere religious reason for doing so, but that the judge could exclude her evidence if the niqab prevented true cross-examination.\(^{15}\) Both NS and the accused appealed the judgment to the Ontario Court of Appeal which held that sincerity is the correct test for a request for religious reasons and that the religious freedom of NS should be reconciled with the accused’s right to a fair trial. If reconciliation was not possible by way of adapting court procedures to accommodate the niqab, the right to a fair trial may require that NS be ordered to remove her niqab. The Court named several considerations to be included in the process of balancing the parties’ rights, including, for example, whether the credibility of the witness is at issue and the impact of the niqab on the demeanor assessment.\(^{16}\) NS appealed to the Supreme Court of Canada.

2.1.1 Reasons for Judgment *per* McLachlin CJ and Concurring Reasons *per* LeBel J

McLachlin CJ, writing the majority’s decision, treated the case in question as a matter of conflicting rights that requires a balancing exercise as a solution. When defining the issue at hand, McLachlin stated: “Two sets of *Charter* rights are potentially engaged – the witness’s freedom of religion (protected under s. 2(a)) and the accused’s fair trial rights, including the right

\(^{14}\) *R v NS*, *supra* note 9 at para 4.

\(^{15}\) *R v NS*, (2009) 95 OR (3d) 735, 191 CRR (2d) 228, restated in *R v NS*, *supra* note 9 at para 5.

\(^{16}\) *R v NS*, 2010 ONCA 670, 102 OR (3d) 161, restated in *R v NS*, *supra* note 9 at para 6.
to make full answer and defence (protected under ss. 7 and 11(d)).” McLachlin CJ then set the task to resolve the conflict of rights in this case.

McLachlin CJ found that the solution to such a conflict of rights has to be a compromise between the rights. She rejected what she called two “extremes”18: a “secular”19 approach that requires witnesses to “park their religion at the courtroom door”20 and sets a rule according to which the niqab will never be allowed in court, and an approach according to which a witness will always be allowed to testify wearing the niqab. McLachlin CJ rejected the secular approach because it is “inconsistent with the jurisprudence and Canadian tradition,”21 a “tradition of requiring state institutions and actors to accommodate sincerely held religious beliefs insofar as possible.”22 McLachlin CJ rejected the approach that always allows the niqab in the courtroom because it may damage the fairness of a trial and lead to wrongful convictions. McLachlin CJ found that “[w]hat is required is an approach that balances the vital rights protecting freedom of religion and trial fairness when they conflict.”23

Following precedents that set a test for balancing conflicting Charter rights,24 McLachlin CJ designed a process of balance for this case that involved answering four questions:

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?

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17 *R v NS*, supra note 9 at para 7.
20 *Ibid*.
21 *Ibid*.
22 *Ibid* at para 51.
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?\(^{25}\)

With respect to the first question, McLachlin CJ found that a claim based on freedom of religion could be brought whenever the claimant holds a sincere religious belief. If the claimant has managed to manifest a sincere religious reason then the first question is answered in the affirmative: requiring the witness to remove her niqab while testifying interferes with her religious freedom.

The core of the legal analysis can be found in McLachlin CJ’s answer to the second question. Based on precedents and on reference to different Charter sections, McLachlin CJ found that the right to a fair trial in section 11(d) includes the right to make full answer and defence.\(^{26}\) The accused claimed that his right to a fair trial is impinged by the use of the niqab because the niqab restricts the ability to assess non-verbal cues and thus prevents effective cross-examination as well as effective assessment of NS’s credibility by the trier of the facts (the judge or the jury).\(^{27}\)

The accused argued that communication involves not only words, but facial cues:

> A facial gesture may reveal uncertainty or deception. The cross-examiner may pick up on non-verbal cues and use them to uncover the truth. Credibility assessment is equally dependent not only on what a witness says, but on how she says it. Effective cross-examination and accurate credibility assessment are central to a fair trial. It follows … that permitting a witness to wear a niqab while testifying may deny an accused’s fair trial rights.\(^{28}\)

\(^{25}\) *R v NS*, *supra* note 9 at para 9.

\(^{26}\) *Ibid* at para 15.

\(^{27}\) *Ibid* at paras 16-18.

\(^{28}\) *Ibid* at para 18.
NS claimed that the importance of seeing the witness’s face is exaggerated and also that, to the extent that non-verbal cues are helpful, the niqab does not restrict the majority of them.  

McLachlin CJ found that although not an independent constitutional right of the accused, the general common law rule required witnesses to testify with visible faces. She further found that this rule was based on a “common law assumption” that facial cues help assess credibility. She admitted that this was a mere assumption, but argued that the assumption could only be displaced if it could be demonstrated to be erroneous. McLachlin CJ found that NS and interveners in this case did not provide sufficient evidence against the assumption. Given the common-law rule, McLachlin CJ found that covering the face may impede cross-examination and credibility assessment, and concluded that covering the witness’s face may impact the right of the accused to a fair trial. However, she found that whether covering the witness’s face actually impedes cross-examination and credibility assessment depends on the kind of evidence the witness is asked to provide. Only if the evidence in question is contested and the witness’s credibility is at issue can veiling be said to pose a “real and substantial” risk to trial fairness.

The answer to the second question, whether permitting the witness to wear the niqab while testifying creates a serious risk to trial fairness, thus depends on the nature of the evidence that the witness is asked to provide. And only if it is decided that allowing the witness to wear the

29 Ibid at para 19.
30 Ibid at para 21.
31 Ibid at paras 17, 20, 22.
32 Ibid at para 24.
33 Ibid at para 25.
34 Ibid at paras 27, 28.
niqab creates a serious risk to trial fairness would the analysis move to the next step. Otherwise, a witness who wears the niqab for sincere religious reasons will be allowed to testify veiled.35

After defining the method by which the risk to trial fairness will be assessed, McLachlin CJ moved to consider the proper solution, should both religious freedom and trial fairness be at stake. McLachlin found that the solution cannot be to deny completely one of the rights in this case.36 A compromise should be sought that upholds both rights. But McLachlin CJ also found that

On the facts of this case, it may be that no accommodation is possible; excluding men from the courtroom would have implications for the open court principle, the right of the accused to be present at his trial, and potentially his right to counsel of his choice. Testifying without the niqab via closed-circuit television or behind a one-way screen may not satisfy N.S.’s religious obligations.37

She thus answered the third question in the negative: there is no way to accommodate both rights and avoid the conflict between them.

Unable to find an alternative that upholds both rights, McLachlin CJ moved to assess the salutary effects and deleterious effects of requiring a niqabi witness to unveil. Her findings reaffirm her commitment to trial fairness and the common-law rule requiring witnesses’ faces to be visible. McLachlin found that the deleterious effects of limiting a sincerely held religious practice depended on several considerations, such as the importance of the practice to the claimant and the degree of state interference with the practice in light of the actual situation in the

36 Ibid at para 31.
37 Ibid at para 33.
courtroom.\footnote{Ibid at para 36 (when assessing the importance of the practice to the claimant the \textit{strength} of the religious reason \-- rather than its \textit{sincerity} \-- would be important).} She further mentioned broader societal effects to be considered as well, including the effect on other potential claimants and the potential harm to justice at large should they choose not to come forward with their claims, a consideration that may be especially weighty in sexual assault cases.\footnote{Ibid at para 37.} But all these heavy considerations were ultimately subordinated to what McLachlin CJ found to be the salutary effects of limiting the use of the niqab in court.

McLachlin CJ found that salutary effects will include assuring a fair trial for the accused and “safeguarding the repute of the administration of justice” since “the right to a fair trial is a fundamental pillar without which the edifice of the rule of law would crumble.”\footnote{Ibid at para 38.}

McLachlin CJ did suggest that the right to a fair trial may be at greater or lesser risk in different stages of the trial or in different kinds of proceedings,\footnote{Ibid at para 39.} and with respect to different kinds of evidence that the witness is asked to provide.\footnote{Ibid at paras 39-42.} She stressed that this list of factors is not closed and could change based on the facts of future cases as well as on future scientific evidence with regard to the importance of seeing a witness’s face. But with regard to the case at hand she concluded that “where 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.”\footnote{Ibid at para 43.} Thus, McLachlin CJ’s answer to the fourth question was that, in this case, the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so. McLachlin CJ’s right-reconciling exercise
concluded in this case by dismissing the appeal and indicating that NS might be required to remove her niqab.

In his concurring opinion, LeBel J agreed with McLachlin CJ’s conclusion that the appeal should be dismissed, but for different reasons. The reasons LeBel J gave were based on the importance he sees in the adversarial system as a mechanism to achieve justice and to secure rights, and on the values he defines as basic in the Canadian system. When defining the questions involved in the case, LeBel J said:

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?

LeBel J then moved to judge the case in two steps. He first referred to the question of balancing the rights involved, and found that such a balancing process works in favour of the accused. Unlike McLachlin CJ, LeBel J found that such a balancing process would work in favour of the accused in every case of conflict with the niqab. For this reason, LeBel J opted for a clear rule applying to all proceedings and to all kinds of evidence. He said:

We should not forget that a trial is itself a dynamic chain of events. It can often be difficult to foresee which evidence might be considered non-contentious or important at a specific point in a trial. The solution may vary at different stages of a trial, and also with what is known about the evidence. What looked unchallengeable one day might appear slightly dicey a week later. Given the nature of the trial process itself, the niqab should be allowed either in all cases or not at all when a witness testifies.

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44 Ibid at para 58.
46 Ibid at paras 62-68.
47 Ibid at para 69.
LeBel J then moved to define the values of the Canadian criminal justice system and to consider the effect they have on this case. He defined an “independent and open justice system in which the interests and the dignity of all are taken into consideration” as “a key aspect of the traditions grounding this democratic society.” LeBel J referred to a trial as “an act of communication with the public at large” and as “a process of communication” within the courtroom itself. This idea of “open communication” led LeBel J to find that the common-law rule requiring revealed faces justifiably limits the right of a witness to wear the niqab.

2.1.2 Dissenting Reasons per Abella J

Abella J’s dissenting reasons challenge the particular rule set in the majority’s decision and the approach to religious freedom that this rule expresses. As shown above, at the heart of McLachlin CJ’s and LeBel J’s reasons is the common-law assumption that concealing the face while giving testimony may harm the fair trial rights of the accused. In her dissenting opinion, Abella J challenged the application of the common-law rule to the niqabi witness by comparing niqabi women to other witnesses who enjoy exemption from the rule. She said:

The court system has many examples of accepting evidence from witnesses who are unable to testify under ideal circumstances because of visual, oral, or aural impediments. I am unable to see why witnesses who wear niqabs should be treated any differently.

By relying on this comparative case, Abella J not only challenged both McLachlin CJ’s and LeBel J’s conclusions in the case of NS, but also the broader ideas on which McLachlin CJ’s and

48 Ibid at para 73.
49 Ibid at para 76.
50 Ibid at para 77.
51 Ibid at para 82.
LeBel J’s reasons are based. She portrayed the question at hand first and foremost in terms of equality of access to justice and, by doing so, she denied McLachlin CJ’s view that the case involved only the right to a fair trial and religious freedom. By bringing in the comparative case she also challenged LeBel J’s view that individuals accessing courts are compelled to communicate openly with all participants in the process.

Abella J started by conceding that “seeing more of a witness’s facial expressions is better than seeing less,” but rejected the idea that seeing less of the witness’s face is so harmful to the fairness of the trial that the witness should be asked to remove her veil. Abella J’s reasons for rejecting this conclusion lay in the outweighing deleterious effects of requiring a niqabi woman to unveil in order to testify.

Abella J described the effects of the majority’s decision on a niqabi woman from the woman’s own perspective. The niqabi woman experiences the command to wear the niqab as “‘obligatory and nonoptional’, that is, as not providing a genuine choice to the religious believer.” Since the niqabi woman sees herself as unable to not follow the religious command, a court’s decision preventing a niqabi woman from acting according to her religion will force her to choose between pursuing justice in violation of a divine command, or foregoing justice and respecting the divine command. Complainants who believe that they cannot choose to remove the veil will thus not bring charges for crimes against them, or will refuse to testify. They may also be suffering harm to their own right to a fair trial if they are not allowed to testify in their

\[52\] *Ibid* at paras 82, 91.
\[53\] *Ibid* at para 86.
\[55\] *R v NS, supra* note 9 at paras 93, 94.
own defence when they are the accused.\textsuperscript{56} Abella J found that this result undermines the public perception of the fairness of the justice system as a whole.\textsuperscript{57} She further highlighted the specific damage that the rule McLachlin CJ offers will cause in cases of sexual assault, where the evidence the witness is asked to provide is always contested.\textsuperscript{58} These deleterious effects to a niqabi women’s access to justice formed the basis for Abella J’s reasons.

Abella J then moved to assess the way the niqab affects trial fairness. She found that the ideal that witnesses’ demeanour should be visible to the court was often compromised, and that this compromise alone never disqualified a testimony.\textsuperscript{59} The examples she gave included witnesses who are hard of hearing, who do not speak the language,\textsuperscript{60} who have “physical or medical limitations that affect a judge’s or lawyer’s ability to assess demeanour,” such as witnesses who have suffered a stroke or have a speech impairment.\textsuperscript{61} She also described situations in which evidence is accepted without the court being able to assess demeanour at all, such as a transcript of evidence from a disabled witness unable to attend court,\textsuperscript{62} and other exceptions to hearsay evidence.\textsuperscript{63} “[W]e are left to wonder,” she concluded, “why we demand full “demeanour access” where religious belief prevents it.”\textsuperscript{64}

\begin{flushleft}
\textsuperscript{56} \textit{Ibid} at para 94. I suspect that Abella J might be making a mistake here. The accused already enjoys a right not to testify against herself (\textit{Charter, supra} note 11, s 11(c)). She can thus escape the problem altogether, if she so wishes. If she wishes to testify in her own defense, why would the prosecution ask her to unveil? The accused testifying veiled is an improvement over her not testifying at all. It seems like the prosecution does not have a valid claim of harm.
\textsuperscript{57} \textit{Ibid} at para 95.
\textsuperscript{58} \textit{Ibid} at para 96.
\textsuperscript{59} \textit{Ibid} at paras 97-106.
\textsuperscript{60} \textit{Ibid} at para 102.
\textsuperscript{61} \textit{Ibid} at para 103.
\textsuperscript{62} \textit{Ibid} at para 104.
\textsuperscript{63} \textit{Ibid} at para 105.
\textsuperscript{64} \textit{Ibid} at para 108.
\end{flushleft}
2.2 A Critique

In my critique of the decision in *R v NS* I will not challenge, in itself, the common-law rule requiring witnesses to testify with their faces revealed. This decision separates me from other commentators on the case. I will not challenge the common-law rule itself because such a challenge is not particular to the niqab and, in fact, avoids the complexities that the niqab poses in the context of the court altogether. If a critique of the common-law rule was successful and the rule was abandoned, then the accused would not have a right to see the witness’s face as part of the accused’s right to a fair trial. As a result *anyone* would be allowed to veil or to be otherwise obscured while testifying in court. The niqabi woman would be allowed to veil in court not because of her religious belief but because there would be no right-based requirement for her to unveil. Though this is a practical solution that has the merits of efficacy and simplicity, debating it does not offer any insight with respect to religious freedom and the extent to which faith-based claims should be accommodated in Canada. My aim in this thesis is to explore the peculiar challenges that faith at large, and the niqab in specific, pose on a constitutional system

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65 Beverly Baines criticizes McLachlin CJ for advancing the common-law assumption “for which she provided no evidence or precedent” and for refusing to weigh arguments against the assumption (Beverly Baines, “Banning the Niqab in the Canadian Courtroom: Different Standards for Judges” *JURIST - Forum* (24 January 2013), online: JURIST – Forum <http://jurist.org/forum/2013/01/bev-baines-canada-niqab.php>. Stephanie Voudouris criticizes directly the assumption that demeanour can be easily assessed and that the niqab hinders this assessment (Stephanie Voudouris, “Peeling Back the Court’s Decision in R v NS” *The Court* (23 January 2013), online: The Court <http://www.thecourt.ca/2013/01/23/peeling-back-the-courts-decision-in-r-v-ns/> [Voudouris]). Lisa Dufraimont also argues that “[t]he weight of the empirical evidence supports the view that facial cues and other aspects of demeanour are not reliable guides in assessing the truthfulness of witness testimony”; but nevertheless finds that “the Court’s cautious approach in *S.(N.)* appears prudent in an area where the empirical claims advanced strain against the law’s basic assumptions about procedural fairness” (Lisa Dufraimont, Annotation of *R v S(N)*, (2013) 98 CR (6th) 5 at 5, 6). Faisal Bhabha criticizes the decision’s adverse effect on the marginalized group of niqabi women. The core of his critique, I believe, is that the majority did not allow flexibility of procedural rules that could avoid such adverse effect (Faisal Bhabha, “R v NS: What’s Fair in a Trial? The Supreme Court of Canada’s Divided Opinion on the Niqab in the Courtroom” (forthcoming, 2013, Alberta LR) available online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2261857> [Bhabha].
committed to balancing rights. My critique will hence proceed with the common-law rule requiring witnesses to testify with their faces revealed in mind. My critique argues that there are conclusive reasons to extend to niqabi witnesses the accommodation that some groups of witnesses receive, such as witnesses whose disabilities restrict facial cues.

I argue that the *R v NS* case was decided unjustly because the majority’s decision discriminated against niqabi women without proper justification. The courts accommodate witnesses whose demeanour cannot be fully assessed, but the SCC refused to extend the same accommodation to niqabi women. McLachlin CJ simply supported the general common-law rule that witnesses testify with their faces uncovered but failed to account for the many cases where this rule is abandoned and to give reasons why NS would not be another such case. LeBel J acknowledged that courts exempt some witnesses from this rule, and gave a reason for discriminating between those witnesses and niqabi woman. As I will argue below, this reason is not persuasive. Abella J’s conclusion that the exemption of some witnesses form the common-law rule should be extended to niqabi women is the most persuasive position of the three. In this section I will evaluate and reject the reason given by LeBel J to discriminate between niqabi women and other witnesses whose demeanour cannot be fully assessed. I will then show that the reasons for exempting disabled persons from the common-law rule of open testimony apply equally to niqabi women. These reasons support Abella J’s conclusion that niqabi women should be allowed to testify veiled. Finally, I will offer an argument that I think informs the majority’s

66 In fact, McLachlin CJ even goes further by claiming that the few supposedly exceptions to the common-law rule actually confirm the rule. She mentions two aids: permitting children to testify via closed-circuit TV – permitted because it does not prevent the accused from seeing the witness – and testifying by audio link – permitted only when the judge is satisfied that no prejudice is caused to either of the parties by the fact that the witness would not be seen by them. McLachlin CJ does not refer to other cases, to which LeBel J and Abella J refer, in which persons with demeanour-effecting disabilities or linguistic barriers are allowed to testify, cases that clearly challenge the common-law rule (*R v NS, supra* note 9 at para 23).
decision, although it is not explicitly expressed by the majority.\footnote{Although McLachlin CJ ignored the analogy with disability made by both Abella J and LeBel J, I assume that the claims that some classes of witnesses are accommodated by courts even though their demeanour is hard to assess are correct. For the purposes of my argument I assume that this judicial reality is not merely tolerated by McLachlin CJ but also found justified by her. In fact, as Abella J notes, some of the exceptions Abella J refers to were ordered by McLachlin herself (Ibid at para 105, quoting McLachlin J (as she then was) in R v Khan, [1990] 2 SCR 531, 41 OAC 353). McLachlin CJ’s judgment that a niqabi woman might be ordered to unveil, therefore, differentiates between other witnesses whose demeanour cannot fully be assessed and niqabi witnesses. This differentiating treatment should be justified. The possible reasons I explore here are meant to fulfill this justification requirement.}

In a nutshell, the argument makes a distinction between an individual’s choices and circumstances for the purpose of deciding the extent of accommodation that individual deserves. I believe that this argument could support the majority’s decision better than arguments brought forward by the majority. In this section I will explain the argument. In chapter 3 I will develop my own argument with regard to \( R v \ NS \) as an answer to the choice-circumstances distinction. I conclude that the majority was wrong because I find that the reasons in favour of extending the accommodation to niqabi witnesses are more persuasive than the reasons not to do so.

2.2.1 A Critique of LeBel J’s Reason to Discriminate Between Disabled Witnesses and Niqabi Witnesses

Why should niqabi witnesses not receive the same exemption from the common-law requirement to show one’s face that witnesses with disabilities receive? How can it be justified that the rule about unveiled faces makes an exception for one group of witnesses but not for the other? The answer has to lie in a relevant differentiating factor between the two groups. My first task is to uncover this relevant differentiating factor.

LeBel J’s minority concurring opinion found that the niqabi woman should be treated differently from the disabled witness because the result of each case of accommodation is different in terms
of “advancing communication.” As noted above, LeBel J described the credibility of the criminal justice system as dependent on a process of open communication. LeBel J then referred directly to exceptions to the “openness” rule accepted in courts:

To facilitate this process [of communication], the justice system uses rules and methods that try to assist parties that struggle with handicaps to overcome them in order to gain access to justice and take part effectively in a trial. Blind or deaf litigants, and parties with limited mobility, take part in judicial proceedings. Communication may sometimes be more difficult. But the efforts to overcome these obstacles and the rules crafted to address them tend to improve the quality of the communication process. Wearing a niqab, on the other hand, does not facilitate acts of communication. Rather, it restricts them. It removes the witness from the scope of certain elements of those acts on the basis of the assertion of a religious belief in circumstances in which the sincerity and strength of the belief are difficult to assess or even to question. The niqab shields the witness from interacting fully with the parties, their counsel, the judge and, where applicable, the jurors. (my emphasis)\(^68\)

LeBel J then finds that exceptions to the common-law rule are justified when the overall aim of communication is promoted, and he believes that this is true of cases involving witnesses who are blind or deaf, or witnesses with limited mobility, but not true of cases involving the niqab. LeBel J’s reason for discriminating between disabled witnesses and niqabi witnesses is unpersuasive. First, he made a mistake with regard to the alternatives he considered in the analogy of the two cases. Second, the baseline LeBel J used to compare the two cases fails to respect NS’s religious freedom. These two moves lead him to the erroneous conclusion that it is justified to discriminate between the two groups. Third, the reasons for making the exception for witnesses with “handicaps” in the first place are equally applicable to niqabi witnesses. LeBel J failed to recognize this fact.

\(^{68}\) R v NS, supra note 9 at para 77.
LeBel J compared disabled witnesses with niqabi witnesses in terms of “facilitating communication” but failed to adequately take into account the analogous alternatives in the two cases. LeBel J found that the efforts to overcome the obstacles to communication posed by handicaps facilitate communication. This statement is true given the two alternatives to such efforts: in the first, a witness with a disability is not allowed to testify at all. In the second, a witness with a disability is allowed to testify but no effort is made to facilitate the testimony. Indeed, allowing a witness with a disability to testify and making an effort to facilitate the communication of the testimony in a clear and comprehensible manner to the parties, counsel and the trier of the facts would facilitate communication. Without such efforts the testimony would not be heard at all or could end up useless and tantamount to no testimony at all.

Now consider the analogous alternatives in the case of the niqabi witness. A fair and comprehensive analogy must follow carefully the steps taken in the case of the witness with a disability. In the first alternative, the niqabi witness will not be allowed to testify wearing the niqab. In this alternative it should be considered that the result may be that at least some niqabi women will choose not to testify.69 This alternative does not facilitate communication in the same way that not allowing a disabled witness to testify does not facilitate communication. LeBel J neglected to consider this option. But this is a very realistic possibility. It is most realistic especially since, as noted by Abella J, religious persons experience religious commands as mandatory and hence a rule requiring them to neglect a religious practice in order to participate in a certain activity will be experienced by them as compelling them to not participate in the activity. In the second alternative, the niqabi witness is ordered to testify unveiled. Here, it

69 This possibility was mentioned by the Canadian Civil Liberties Association (R v NS, 2012 SCC 72, (sub nom R v SN) 353 DLR (4th) 577 (Factum of the Intervener Canadian Civil Liberties Association), online: CCLA <http://ccla.org/wordpress/wp-content/uploads/2011/12/Appeal-Factum-FINAL.pdf> at para 15 [FOI CCLA]).
should be considered that the niqabi witness might not behave naturally and her demeanour and communication will be unauthentic. The submission of LEAF illuminates why this might be the case:

[T]he lower Court correctly acknowledged that the truth seeking function of the criminal trial may be subverted by requiring N.S. to testify without her niqab, given the unreliability of her demeanor when stripped of her niqab in public, possibly for the first time in eight or more years: “without the niqab, N.S. would be testifying in an environment that was strange and uncomfortable for her. One could not expect her to be herself on the witness stand. A trier of fact could be misled by her demeanor” (para.81). Indeed any witness would behave differently if asked to testify without, for example, his or her shirt on. 70

LeBel J failed to take this possibility into consideration as well. LeBel J only envisioned one option, where the niqabi witness both proceeds to testify without her niqab and her demeanour is not affected by her being unveiled. LeBel J’s conclusion was based on his mistaken assumption that this is the sole option. I find the assertions that at least some niqabi women will not testify unveiled at all or that their testimony will be unauthentic very persuasive. Considering these two alternatives makes it clear how allowing a niqabi woman to testify wearing her niqab does, in fact, facilitate communication. Thus it is this alternative that should be equated with “the efforts to overcome these obstacles [posed by handicaps]” to which LeBel J refers.

The second objectionable move that LeBel J made is related to his first mistake noted above but is even more fundamental and reflects an underlying negative attitude toward the niqab. In constructing the two comparative cases of the disabled witness and the niqabi witness, LeBel J compared the efforts to overcome obstacles posed by disabilities to the wearing of the niqab.

70 R v NS, 2012 SCC 72, (sub nom R v SN) 353 DLR (4th) 577 (Factum of the Intervener Women’s Legal Education and Action Fund), online: LEAF <http://leaf.ca/cases/r-v-n-s-scc/> at para 12 [FOI LEAF]. Voudouris uses the same idea as one basis for her criticism of the decision, supra note 65.
LeBel J then said that “the efforts to overcome these [disability-related] obstacles and the rules crafted to address them tend to improve the quality of the communication process. Wearing a niqab, on the other hand, does not facilitate acts of communication.” By constructing the comparison in this way, LeBel J inevitably reaches the conclusion that the niqab should not be accommodated. To decide whether an accommodation is appropriate, LeBel thinks it is necessary to answer one question: Does this accommodation improve or impede communication? This question is inherently comparative: it compares the communicative results of the accommodation with communication under some default or baseline condition in the absence of accommodation. If communication is better with the accommodation than it is in the baseline case, then the accommodation is appropriate.

When persons with disabilities approach the court, the baseline is the kind of testimony that they can give with their disability. The court then tries to facilitate communication by finding an improvement over this baseline. With disabilities, the baseline is rather clear: LeBel J does not consider the baseline to be the testimony that the disabled person would give if that person were fully able-bodied. Relative to such a ludicrous baseline, even the most effective measures to improve communication in testimony may still yield a loss in terms of communicative effectiveness. And if they could only yield a loss, then according to LeBel J’s reasoning, that would count against accommodating the disabled person, and maybe also against allowing the disabled person to testify.

But with niqabi women, the baseline is less clear and intuitive. With a niqabi woman, the two possible baselines are, first, where a niqabi woman communicates wearing her niqab, and

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71 R v NS, supra note 9 at para 77.
second, where a niqabi woman communicates without her niqab. Measured relative to the latter baseline, accommodation of niqabi testimony may still count as a loss of clarity in communication, in the same way as accommodation of disabled witnesses would count as a loss relative to a baseline where the disabled witness is not disabled. While this comparison was obviously an irrelevant consideration in the case of disabled witnesses, LeBel J focuses exclusively on this comparison in the case of niqabi witnesses, neglecting to consider the other possible baseline – the baseline that seemed most plausible in the case of disabled witnesses – where the niqabi woman approaches the court wearing her niqab. From this baseline, accommodation can clearly count as a gain in communication.

A respectful treatment of NS’s religious freedom would recognize that she is approaching the court wearing the niqab as part of her, even if the final result of the legal analysis would limit the niqab in court. Respect for NS and her rights demands that the baseline for comparison should recognize that she is approaching the court wearing the niqab, that the niqab is a part of her, and that the court has to justify its removal should NS be required to unveil. NS’s religious freedom, though it is not absolute in the sense that she is not immune from removing the niqab in certain cases, entitles her to demand that the baseline for consideration in court, from which departures must be justified, is one where she wears the niqab. LeBel J’s refusal to recognize NS in this light fails to respect her religious freedom. While concluding that NS might be required to remove the niqab in certain circumstances is not in itself disrespectful, redefining her as approaching the court unveiled, in strike opposition to the life that she leads out of religious conviction, is disrespectful. The attitude reflected is not one that asks to limit the niqab where it
is harmful to others but one that does not recognize the general right of a woman to don the niqab.

A closer look at McLachlin CJ’s and LeBel J’s lines of argumentation may be helpful to explain why LeBel J’s treatment is unjustified. McLachlin CJ followed four steps, the first of which clearly recognized that NS’s religious freedom will be interfered with if she is required to unveil in order to testify. McLachlin CJ then proceeded to conclude that NS may nevertheless be required to unveil. But the baseline McLachlin CJ worked with was that NS is veiled as part of her protected religious belief. Unlike McLachlin CJ, LeBel J did not follow a well-ordered multi-staged process of analysis and never explicitly recognized in his treatment of the case the fact that NS’s religious freedom was interfered with by his conclusion. Nevertheless, the title of the section in which he made his core argument is “Conflict Between Religious Rights and the Criminal Justice Process,” and in his only passing reference to NS’s religious freedom he says “I do not cast doubt on the sincerity of the appellant’s religious beliefs.” LeBel J, then, was aware of the fact that NS’s religious freedom would be affected by any measure not allowing her to testify in her niqab. He did recognize that she had a claim based on religious freedom. This acknowledgement should have meant that NS is perceived as approaching the court wearing the niqab, just like a disabled person approaches the court disabled.

72 Ibid at paras 10-14 (a section titled “Would Requiring the Witness to Remove the Niqab While Testifying Interfere With Her Religious Freedom?” in which McLachlin CJ established that in order to base a claim on the guarantee of religious freedom in s 2(a) of the Charter a claimant must show a sincere religious belief and where she declared that she proceeded on the assumption than NS has established a sincere religious belief).
73 Ibid at para 62.
74 Ibid at para 65.
2.2.2 Reasons Not to Discriminate Between Disabled Witnesses and Niqabi Witnesses: Equal Access to Justice; Equal Criminal Responsibility

The third flaw in LeBel J’s decision is his failure to recognize that access-to-justice reasons to abandon the common-law rule of open testimony in the case of a disabled witness extend to a niqabi witness as well. As noted above, LeBel J said:

_To facilitate this process [of communication], the justice system uses rules and methods that try to assist parties that struggle with handicaps to overcome them in order to gain access to justice and take part effectively in a trial. Blind or deaf litigants, and parties with limited mobility, take part in judicial proceedings. Communication may sometimes be more difficult. But the efforts to overcome these obstacles and the rules crafted to address them tend to improve the quality of the communication process…(my emphasis)_.

This confusing quote suggests two alternative reasons to assist witnesses to overcome disability-related difficulties. The first reason to do so is in order for them to gain access to justice. This newly gained access to justice in turn facilitates the process of communication that is the trial simply by including more members of the public as participants in the process. The second reason to assist witnesses to overcome disability-related difficulties is because the efforts to overcome these obstacles tend to improve communication. The discussion in section 2.2.1 was dedicated to this latter alternative reason. The discussion in this section is dedicated to the former reason for exempting disabled witnesses from the open testimony common-law rule: to allow them access to justice. I argue that this reason equally applies to niqabi witnesses.

If a person with a disability is disallowed to testify against an assaulter, her access to justice is denied. Equal access to justice is not just a basic right in itself and a foundation of a just legal

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75 _Ibid_ at para 77.
system but is also an important guarantee of all other rights, as clearly stated in s 24(1) of the

*Charter*:

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been
infringed or denied may apply to a court of competent jurisdiction to obtain such
remedy as the court considers appropriate and just in the circumstances.

Section 24(1) applies only in the context of the *Charter* to rights and freedoms guaranteed by the
*Charter* and to the relationship between individuals and the state. It thus does not guarantee a
general right to access justice. Other laws create rights between individuals and between
individuals and the state and also create specific avenues to access justice should rights be
infringed. But the *Charter* exemplifies here a broader principle of access to justice, the idea that
rights and obligations must be, as a matter of justice, complemented with an avenue to enforce
them.\(^{76}\) Access to justice is one of the most effective means to guarantee all other rights. The
guarantee that, should your right be violated, you can approach the courts and receive a remedy
is, to a great extent, what deters potential violators from violating your rights in the first place.
The right to security of the person,\(^{77}\) for example, will mean nothing (at least in a legal sense) if
it is merely an unenforceable statement that others should not intervene with one’s body. This
right receives actual protection only when the police attempts to assure that violations do not
happen *ex ante* and the courts provide remedy *ex post*. In the unfortunate case where a violation
has happened, the right is protected when the judicial system holds the violator responsible. In
many cases, and in all cases of sexual assault, testimony is necessary for holding the alleged
assaulter responsible for violating the victim’s security of the person. For this reason a decision


\(^{77}\) Here I refer not only to the right to security of the person that is protected by the *Charter*, *supra* note 11, s 7, but also to the more general right to security of the person that is the source of different legal obligations, mainly in criminal law, not to harm others. Section 271 of the *Criminal Code*, RSC, 1985, c C-46, criminalizing sexual assault, is an example of a legal obligation not to harm others that protects the right to security of the person.
with regard to the acceptability of the testimony in this case has an actual bearing on the victim’s right to security of the person.

If access to criminal justice is not guaranteed to disabled witness because their demeanour cannot be fully assessed, then potential violators will be less deterred from violating the rights of disabled persons comparing to the rights of others who enjoy access to criminal justice. This deleterious effect on disabled persons’ rights is one reason for courts to accept disabled persons’ evidence although their demeanour cannot be fully assessed. Another reason for such exception is a consideration of equal criminal responsibility. Not allowing the exception would mean that some criminals will be held less accountable than others not because the nature of their crime is different but because of irrelevant characteristics of their victims.

The same considerations apply to niqabi women. If they are not allowed to testify wearing the niqab then their access to justice is compromised, either because they might not testify at all or because their testimony might be less than authentic. This disenfranchisement also means that they are more vulnerable to assault than the next person because their assaulter can anticipate suffering less from the hand of the law. A rule requiring that the accused should have unmitigated access to the accuser’s non-verbal cues adversely affects both groups – disabled persons and niqabi women – in the same manner and to the same extent.

The portrayal above shows that more is at stake in the case of R v NS than is admitted by the majority. The majority considered the niqab as creating a conflict between two Charter rights: NS’s religious freedom vis-à-vis the accused’s right to a fair trial. The majority reached the
conclusion that NS might be required to remove her niqab based on the argument that an alternative accommodating both rights may be unattainable and that the accused’s right to a fair trial would suffer more than the religious freedom of NS. The minority concurring opinion and the dissenting opinion noticed that more issues are at stake than merely the two conflicting rights. Both opinions referred to cases where the accommodation of a witness with a disability would hinder the accused’s right to a fair trial in the same way as would accommodating a niqabi woman. This referral to other cases shows that the real issue at stake is access to justice and, in this case, the right to security of the parson that access to justice protects. I find, then, that not respecting NS’s religious freedom will result in an unequal access to justice and in unequal protection of her right to security of the person.78

Since the effects on their rights are similar, and LeBel J did not give a persuasive reason why the two groups should be treated differently, I conclude with Abella J that NS deserves the same treatment as the disabled witness. The result is a rule according to which a woman should always be permitted to testify wearing her niqab.

78 Both FOI CCLA (supra note 69) and FOI LEAF (supra note 70) portrayed the case in terms of the rights to security of the person (Charter, s 7) and to equality (Charter, s 15). As noted above, Abella J’s reasons also convey the message that discriminating between disabled witnesses and niqabi witnesses will violate equality rights.
2.2.3 Implied Reasons of the Majority

I have shown that the distinction between disabled witnesses and niqabi witnesses drawn by LeBel J is not persuasive. The distinction based on the consideration of communication makes acute mistakes in the analogy between the cases, it is initiated from a position disrespecting the niqabi woman’s religious freedom, and it fails to acknowledge that the reason to exempt disabled witnesses from the common-law rule of open communication applies equally to niqabi women.

I said that there is a way to draw a distinction between handicaps and the niqab that is more persuasive than the reason LeBel J provided. One could argue that although considerations of justice point to similar conclusions in both cases of disability and the niqab, there is a reason to make the effort to facilitate communication in the case of a witness with a disability while denying such facilitation to the niqabi witness. Indeed, I believe that both McLachlin CJ and LeBel J are making such an argument, even though in not so many words. I believe that their insistence on the common-law rule requiring an open testimony and their resistance to allowing niqabi women an exception from the rule similar to the exception allowed to witnesses with disabilities are based on a distinction they make between chosen behaviour and non-chosen personal characteristics. Or, maybe better put, I believe that the best way to understand their arguments is as if they make this distinction.

According to an argument distinguishing choices from circumstances, the niqab is not equivalent to a disability because the niqab is a choice while a disability is a condition. A niqab is a
behaviour, and – technically speaking – the niqab can be removed; the niqab wearer can choose to not wear it. Disability, on the other hand, is a circumstance, a condition beyond the power of volition of its subject. A witness with a disability cannot choose to become able for the time of her testimony, whereas a niqabi witness can choose to unveil for that time. According to this argument, disabled persons suffer from unequal access to justice if their disability is not accommodated while niqabi women do not. According to this argument the voluntary nature of donning the niqab versus the non voluntary nature of disability is the relevant factor justifying the discrimination between the two cases.⁷⁹

According to the argument discriminating between choices and circumstances, the niqabi woman in fact has equal access to justice, but she chooses not to exercise it. This choice is her right but, if the niqabi woman will not testify without her niqab, she has no complaint against others with respect to the choice’s consequences in terms of access to justice. If she is worried about the adverse effect on her access to justice, she is free to avoid this effect. The argument implied by the choice-circumstance dichotomy is that a person who voluntarily chooses a course of action takes upon herself the consequences of her action while a person limited by circumstances is not responsible for such consequences. The argument is applying the ‘Volenti non fit inuria’ maxim, according to which a person who consents to an effect on him cannot be seen, legally speaking,

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⁷⁹ I want to point out a possible response to this argument. I will not be pursuing this further, but I think it is nevertheless worth considering. It can be pointed out that not all cases of disability are circumstantial and completely non-chosen. People engage in risky behaviour, despite being aware of the risks at the outset. Thus, when those risks eventuate and cause disabilities, there is one sense in which the person chose this disability. (We hold people accountable for engaging in risky behaviour where the negative consequences befall someone else; there is nothing to prevent us from holding such a person responsible when the risk befalls himself, especially when others have to suffer the consequences too, such as in the case of accused in a criminal trial that is now unable to assess demeanour fully). Why should it matter whether the choice is available at the present moment, or took place months prior? (For niqabi women, the choice will always be the moment of the trial. For risky disabled people, the choice occurred earlier.) Here, attitudes towards risk are a secular equivalent of religion. There’s not much one can do to argue over the appropriate level of risk-averseness, as with religion.
as harmed by the same effect.\textsuperscript{80} In this case, NS chose the niqab, thereby consenting to the effects the niqab will have on her life. Her choice and consent mean that when NS is affected by the consequences the niqab has in the context of the trial she cannot claim to be harmed by those consequences.

The argument distinguishing between choices and consequences is interesting and not without merit. In fact, I think that this distinction can be very helpful when a liberal democratic state comes to assess what it owes to its religious members. For this reason I will dedicate the next chapter to exploring the argument, defending it to a certain extent, and drawing its conclusions with respect to the extent of religious freedom at large and accommodating the niqab in particular. Having said that, this argument is not strong enough to justify a rule requiring a niqabi witness to unveil in order to testify against her alleged assaulter. The reason is that the niqabi woman is compelled into the situation by the acts of her assaulter. Whereas I believe the religious person’s choice to practice her religion does put the responsibility on her to live with the consequences of her choice, this can only be the case with respect to activities in which she can choose to participate or not to participate. This line of thought will be explored in chapter 3.

\textsuperscript{80} Joel Feinberg, “Legal Paternalism” (1971) 1:1 CJ Phil 105 at 106-107.
Chapter 3 – A Meaningful Choice to Practice One’s Religion

In chapter 2 I argued that \( R v NS \) was effectively decided based on a distinction between unfavourable immutable circumstances like a disability, and personal choices like the religious practice of donning the niqab. In this chapter I argue that, while it is true that religious practice is a choice, and while it might be true that circumstances and choices deserve different legal treatment in some contexts, merely pointing to these two facts does not justify the ruling in this case.

The law commonly distinguishes between choices and circumstances. For example, as Carissima Mathen notes, the distinction between choices and circumstances commonly plays a prominent role in section 15 jurisprudence. When claimants approach the court with a request to receive a benefit under a certain law, the court checks to which group of persons the law applies. If the claimants do not compose part of the group by virtue of the claimants’ choice, the court does not consider the law to be discriminatory. Such, for example, was a case reaffirming the exclusion of common-law partners from a property-division regime designed for married couples. The court justified the rule by claiming it was respecting the autonomous exercise of the individual’s choice not to marry.\(^8\)

Even if the distinction between choices and circumstances is established in a certain area of the law, such as in section 15 jurisprudence, religious choices should receive different treatment than

that received by other personal choices. Religious choices are distinguished from other personal choices in that religious choices are protected in a liberal democracy generally and under s 2(a) of the *Charter* in particular. Thus, choices made based on religious commitments cannot be merely dismissed by being equated with other non-protected choices.

The notion that religion is a choice is helpful in one sense: it helps to argue that religious freedom is not absolute and that not *every* request for accommodation based on religion should be fulfilled.\(^{82}\) But this notion in itself is unhelpful in generating a principle that will guide us in determining which requests for accommodation *should* be accepted. Some requests should be accepted because religion is a protected choice.

Thus the contrast between choices and circumstances is unhelpful in itself and without exploring the context in which requests for accommodation of both kinds of needs are made. For the purpose of defining a principle to determine when accommodation of religious needs will be granted, a more useful principle is that of a “meaningful choice,” offered by McLachlin CJ in *Hutterian Brethren*.\(^{83}\) As I will argue in this chapter, the idea of “meaningful choice” supports always accommodating the niqab in court. The decision in *R v NS* was unjustified because, by denying NS’s request for accommodation, it compelled NS to choose between following a religious practice and securing her right to security of the person through access to justice. Placing NS in this dilemma is denying her a meaningful choice to practice her religion, a result that McLachlin CJ herself finds unjustified.

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\(^{82}\) Note that not every request for accommodation of a disability will be granted either. As all rights, the right to equality on the basis of disability is subject to limitations as set by section 1 of the *Charter* and *Oakes* (see *supra* note 12 explaining limits of rights).

\(^{83}\) *Supra* note 11.
I will first explain in section 3.1 why religion must be characterized as a choice in a liberal democracy. I will argue in section 3.2 that, nevertheless, the choice to practice religion is protected in a liberal democracy generally, and in Canada by the Charter in particular. Hence I find that the idea of choice in itself does not take us far enough in understanding when to grant accommodation and when to deny it. We are left with a spectrum of choices, some of which demand accommodation and some of which do not, and the question is where NS’s case falls on this spectrum. In section 3.3 I will assess McLachlin CJ’s ruling in Hutterian Brethren and the principle of “meaningful choice” for which she advocates. I will argue that following the Hutterian Brethren decision should lead us to always accommodate the niqab in courts.

3.1 Religion as a Choice

Liberal democracy characterizes religious practice as a choice in the sense that liberal democracy does not accept religious reasons as decisive reasons in the political sphere. Religious persons act in accordance with what they believe is a divine command. For some religious persons the divine command gives reasons for action in all areas of life and under all circumstances. For religious persons, the authority of the divine command is absolute and decisive. But in a diverse society, religious persons and non-adherents live together under one legal-political regime. And the divine command behind religious reasons for action does not offer to non-adherents any reason for action and no decisive reasons to regulate the political sphere in a certain way. The fact of diversity informs a liberal democracy’s idea that political action should be justified in terms that
are reasonably acceptable by all, what Rawls calls a “public reason.”84 The core idea of public reason is the requirement of reciprocity in reason-giving:

Hence the idea of political legitimacy based on the criterion of reciprocity says: Our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions – were we to state them as government officials – are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons.”85

Public reason is the commitment of a liberal democracy to only pass laws and policies that are justified by reasons that each member of society can be reasonably expected to reasonably accept.86 By doing so, liberal democracy hopes to fulfill the ideal that persons with different personal conceptions of the good can live together.

Liberal philosophers argue that public reason is required by the ideals of liberty and equality, the two foundations of a liberal democracy.87 Public reason fulfills the requirement of liberty by providing citizens with reasons for action that each citizen can reasonably adopt as her own. A citizen is not only expected to follow rules because the state has the power to enforce them but because these rules are justified by reasons that the citizen can reasonably adopt as her own. In that sense the citizen can be said to be autonomous, fulfilling the ideal of liberty. As Rawls says, “[public reason] is a relation of free and equal citizens who exercise ultimate political power as a

84 The idea of public reason appears in the works of many liberal political and moral philosophers, but lately is mostly associated with the work of Rawls. For an overview of the idea see Jonathan Quong, “Public Reason” in Edward N Zalta ed, The Stanford Encyclopedia of Philosophy (Summer 2013), online: SEP <http://plato.stanford.edu/archives/sum2013/entries/public-reason> [“Public Reason”].
86 T M Scanlon, when discussing morality and not merely justice, makes a similar claim that an action is right if it can be justified to others by reasons that they could not reasonably reject. See T M Scanlon, What We Owe to Each Other (Cambridge, MA; London: Harvard University Press ,1998).
87 “Public Reason”, supra note 84.
collective body.  

Public reason fulfills the requirement of equal respect by providing to all citizens reasons that they could reasonably accept.

Religious reasons for action are founded on the concept of divine authority and it is this authority that makes religious practices obligatory in the eyes of the believer. But divine authority gives reasons only to those who buy into the concept, and does not provide reasons to non-adherents to accept the obligatory nature of the practice. Divine authority as a ground for legislation thus violates the value of equal respect to all citizens, viz. the idea that authority should be justified with reasons that everyone can reasonably accept. For this reason divine authority is non-reciprocal and is inadmissible in itself as a public reason.

Divine command nevertheless can be translated, to some extent, into public reason. Such a translation will work in the following way: Everyone wants and should be allowed to pursue the good life as one sees it. The freedom to pursue the good life as one sees it is a general value that everyone can be reasonably expected to reasonably accept. This principle fulfills the ideals of liberty and equality. A religious person sees the good life as the life in which she can follow a certain practice, such as donning the niqab, which she believes is commanded by the divinity. In the same way that everyone wants and should be allowed the freedom to pursue one’s conception of the good life, the religious person wants and should be allowed the freedom to pursue her conception of the good life by practicing her religion. By translating the divine command into the language of the pursuit of the good, a religious person can give a public reason for the protection of practices that are mandated, in her eyes, by divine command.

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88 Ralws, supra note 85 at 769-770.
Religious reasons can therefore be translated into public reason, but the requirement of reciprocity means that personal reasons are not absolute. Persons are entitled to exercise their liberty only when the liberties of others are preserved. Religious reasons therefore lose the absolute power of the divine command. When they lose their absolute power, religious reasons become choices. This is not a unique feature of religious reasons. All personal reasons, to suffice the requirement of reciprocity, lose their absolute command when the liberties of others are at stake. The requirement to give reasons to others who do not share adherence to the divine command (or to any other philosophical categorical imperative) results in abandoning the absolute justificatory force of the divine command and replacing it with the justificatory force of liberties at large. The commitment to equal liberty inevitably results in the characterization of private reasons as choices in the sense that the private reasons of one individual are not recognized as creating an obligation that the polity has a reason to respect to the fullest.

Some, like Paul Horwitz, criticize the inability of liberalism to accept the obligatory nature of religious reasons:

The value of liberal democracy is its willingness to cherish religious freedom as a valuable part of the freedom of any autonomous individual. Where it fails is in its inability to fully recognize that religion is (or, at least, may be) more than a mere choice on the individual's part. Rather, it is a radically different but equally valid mode of experiencing reality. As long as the religious adherent's practices are private, or public but minimally intrusive, they are accepted; but where these conditions do not apply, where the beliefs are taken so seriously as to interfere with the liberal understanding of the public good, the liberal state views religion as a choice that is wrong, unreasonable, or dangerous, according to liberal epistemology, and so denies the possibility of co-existence.89

89 Paul Horwitz, “The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond” (1996) 54 UT Fac L Rev 1 at 24.
I, on the contrary, suggest that this tendency of liberalism is a necessary outcome of liberalism’s commitment to equal liberty. The commitment to equal liberty is desirable, and so the outcome of public reason is accepted. I suggest that we work with this tendency, rather than against it. Furthermore, as I will argue immediately, public reason is only one facet of liberalism, the other being a strong commitment to religious freedom.

3.2 Religion as a Protected Choice

In the last section I argued that, in a liberal democracy, religion is inevitably seen as a choice. As I argue below, the characterization of religion as a choice does not have justificatory power in itself to disregard the wishes of religious persons to practice their faith. This is because a liberal democracy stands not only for the requirement of reciprocity manifested through the idea of public reason but also for a strong recognition of civil rights. One such right is religious freedom itself.

Liberty and equality call for the protection of religious freedom. This could be explained by repeating, to a certain extent, the debate regarding the translation of religious reasons into public reasons presented in section 3.1 above. The most valued interest in a person’s life is to lead the good life as the person sees it. Religion fulfills this goal for believers by providing a moral theory and ideas about the world, the meaning of life, and the relationship between the person and others around her. Religion informs conscience and identity. Equal liberty is the

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90 R v Edwards Books and Art Ltd, [1986] 2 SCR 713 at p 759, 35 DLR (4th) 1 at 759 (per Dickson CJ: 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.)
commitment to let each person pursue the good life as she sees it; to fulfill her most basic desire to lead an authentic life according to her conception of the good. Religious freedom is hence the materialization of equal liberty to lead the good life as it applies to religious persons. A liberal democracy is hence committed to religious freedom as a right. 91

In the Canadian context the commitment to religious freedom receives the highest normative status since religious freedom is explicitly protected by s 2(a) of the Charter. And while, as I argued above, the reciprocity requirement means that religious freedom is not absolute, Canada is still committed to an expansive protection of religious freedom – a protection that complements its Charter status.

Rights, understood as basic interests that everyone has a reason to protect, provide public reasons to form laws and policies that uphold them. For this reason Rawls claims that “[t]he criterion of reciprocity is normally violated whenever basic liberties are denied”, religious freedom being

See also Mike Madden, “Second Among Equals? Understanding the Short Shrift that Freedom of Religion is Receiving in Canadian Jurisprudence” (2010) 7:1 JL & Equality 57 at 59-63 [Madden].

91 The specific principle that justifies religious freedom is in considerable controversy. The controversy, as Avihay Dorfman puts it, pertains to the question “why is it that this special principle [of religious freedom], rather than the more general principle of liberty, figures so prominently in our lived experience and, in particular, in the constitutional commitment to religious liberty?” (Avihay Dorfman, “Freedom of Religion” (2008) 21 Can JL & Juris 279 at 279). Dorfman suggests that the religious freedom, understood as a special phenomenon rather than as a token of liberty at large, can be explained by historic reasons (that have weak justificatory power in themselves) or by normative justifications. Most normative justifications, Dorfman argues, are unsatisfactory because they do not explain what separates religion from other concepts, such as conscience or culture. Dorfman argues that the only normative justification for religious freedom that can explain the special status of religion is that religious freedom is “a remedy that redresses the (warranted) exclusion of certain religious arguments from the democratic process” (Ibid at 280). The exclusion of religious arguments from the democratic process is warranted because religious arguments violate the commitment to public reason, as I explained above in section 3.1. Though I focus on religious freedom being a token of general liberty and as informing conscience and identity, Dorfman’s argument is compatible with my understanding of religious freedom. Both our arguments show the connection between the liberal commitment to reciprocity and the liberal commitment to religious freedom.
one of these basic liberties. Rawls thus affirms that a realm of basic liberties is demanded by the idea of public reason itself.

I find then that the notion of religion as a choice does not help, in itself, in determining the extent to which religious practice should be accommodated in a liberal democracy. Religion is understood as a choice in the sense that it cannot have an absolute power to override the rights of others and in the sense that it does not offer others reasons to accept such overriding power. But religion merits accommodation that suits the strong normative power of religious freedom in Canadian society, both theoretically speaking and as a matter of positive law. The discussion above shows that not every request for accommodation of religious practices should be fulfilled. But it does not offer any principle to suggest where or when we should stop short of accommodation. My interest is in revealing exactly such a principle. To do so, more content has to be given to the notion of “choice.” In what follows, I will argue that we should follow the idea of “meaningful choice” promoted by McLachlin CJ in Hutterian Brethren.

3.3 Meaningful Choice to Practice One’s Religion

Alberta v Hutterian Brethren of Wilson Colony is most helpful for the purpose of developing a principle regarding the extent of accommodation for religious practices. Like R v NS, Hutterian Brethren deals directly with the question of accommodating religious needs where others’ rights are involved and affected by possible accommodation. The decision of McLachlin CJ in Hutterian Brethren sensitively takes into account the interests at issue and skilfully balances the

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92 Rawls, supra note 85 at p 771.
93 Supra note 11.
needs of religious persons and those of the public at large to create what I find to be a just principle. After presenting McLachlin CJ’s ruling, I will argue that the correct application of this ruling in the case of \( R \ v \ NS \) would mean always allowing niqabi witnesses to testify wearing their niqab.

*Hutterian Brethren* involved a regulation in Alberta imposing a universal photo requirement for all driving licences and abolishing a previously existing exemption for religious needs. The aim of the new regulation was to combat identity theft. The province proposed to lessen the impact of the new requirement by allowing the members of the Wilson Colony, Hutterites who “[sincerely] believe that the Second Commandment prohibits them from having their photograph willingly taken,”\(^94\) to carry licence cards without a photo. But the province insisted that a photograph of all drivers, including members of the Wilson Colony, be taken and placed in a data bank. The proposal was rejected by the members of the Wilson colony. Instead, they proposed that no photo of them be taken and that the driver's licence issued to them be deemed not a valid form of proof for identification purposes. The province rejected this proposal. The constitutionality of the regulation was then challenged by members of the Wilson Colony on the basis of section 2(a) of the *Charter*.

McLachlin CJ, delivering the majority decision, referred to the problem that religious freedom poses to the state, the same problem that the debate in \( R \ v \ NS \) implies. She said:

> Freedom of religion presents a particular challenge in this respect because of the broad scope of the Charter guarantee. Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs,

McLachlin CJ then moved to propose a balance that would allow both effective freedom of religion and effective discretion for the state to promote compelling public interests – interests in securing the rights of others – even when such promotion would adversely affect religious persons. The balance McLachlin CJ offered differentiates between serious incidental effects on religious persons and less serious effects. She said:

The incidental effects of a law passed for the general good on a particular religious practice may be so great that they effectively deprive the adherent of a meaningful choice: see Edwards Books. Or the government program to which the limit is attached may be compulsory, with the result that the adherent is left with a stark choice between violating his or her religious belief and disobeying the law: Multani. The absence of a meaningful choice in such cases renders the impact of the limit very serious.

However, in many cases, the incidental effects of a law passed for the general good on a particular religious practice may be less serious. The limit may impose costs on the religious practitioner in terms of money, tradition or inconvenience. However, these costs may still leave the adherent with a meaningful choice concerning the religious practice at issue. The Charter guarantees freedom of religion, but does not indemnify practitioners against all costs incident to the practice of religion. Many religious practices entail costs which society reasonably expects the adherents to bear. The inability to access conditional benefits or privileges conferred by law may be among such costs. A limit on the right that exacts a cost but nevertheless leaves the adherent with a meaningful choice about the religious practice at issue will be less serious than a limit that effectively deprives the adherent of such choice. (my emphasis)96

95 Ibid at para 36.
96 Ibid at paras 94-95. R v Edwards Books and Art Ltd, [1986] 2 SCR 713, 35 DLR (4th) 1 concerned the constitutionality of the Retail Business Holidays Act of Ontario that generally demanded business closure on Sundays. It was held that although the Act abridges the freedom of religion of some Saturday-observers, it is justifiable as a reasonable limit under section 1 of the Charter. Multani v Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6, [2006] 1 SCR 256 concerned a decision of a school governing board to prohibit a sikh student from bringing a kirpan (a small dagger carried at all times) to school, claiming that wearing a kirpan infringes the school's code of conduct which prohibited the carrying of dangerous objects in the interest of safety. It was held that an absolute prohibition against wearing a kirpan infringes the freedom of religion of the student under section 2(a) and that the infringement cannot be justified under section 1 of the Charter, since it has not been shown that such a prohibition minimally impairs the student's rights. The infringement was found to more than minimally impair the right because it meant that the student would not be able to attend a public school while practicing his faith.
McLachlin CJ’s ruling is important for the debate over religious freedom in two ways. First, McLachlin CJ takes as given the idea that religion is a choice subject to limitation, i.e. not absolute. Second, this characterization of religion as a choice nevertheless does not end the debate, but rather marks its opening point. The Charter protection of religious freedom is taken to mean that sincere believers deserve to be able to practice their religion without bearing severe costs. Their choice to practice their religion is protected. The debate then moves to assess which costs are so severe that religious persons are not expected to bear them, and which costs are incidental and are expected to be borne by religious persons.

In determining which costs effectively deprive religious adherents of a “meaningful choice” to practice their religion and which do not, McLachlin CJ considers the kind of activity that the religious person asks to participate in while at the same time practicing her religion to the full extent. Activities such as participating in the market (Edward Books) or obeying the law (Multani) were found to be so important that non-accommodation of religious needs while performing them deprives the religious person of “a meaningful choice as to the religious practice.”\(^{97}\) In the case at hand, McLachlin CJ found that a requirement to take a photograph in order to obtain a driver’s licence did not deprive members of the Wilson Colony of “meaningful choice to follow or not to follow the edicts of their religion.”\(^{98}\) She distinguished between the different activities based on their being obligatory and thus creating rights versus being chosen and thus creating privileges.

\(^{97}\) *Hutterian Brethren, supra* note 11, at para 96.  
\(^{98}\) *Ibid* at para 98.
First, McLachlin CJ found that there is no obligation in law to be photographed; being photographed is only a condition for participating in a chosen activity, in this case in driving. Thus “[d]riving automobiles on highways is not a right, but a privilege.”\textsuperscript{99} The definition of driving as a privilege and not a right plays an important part in the argument. First, defining driving as a privilege highlights the fact that there is no obligation in law to obtain a driver’s licence. If the law obliged persons to obtain a driver’s licence, it could be said that they have a right to equal access to obtaining the licence (as in \textit{Multani}). Since there is no obligation, a right to equal access does not exist. The term “privilege” here means that the onus is on the person to meet the standard set by the state and not on the state to meet a standard of accommodation.

Second, the definition of possessing a driver’s licence as a privilege marks the fact that driving is not a basic need. There could be activities not mandated by law but nevertheless vital for one’s subsistence. Such an activity is, for example, participating in the labour market (as in \textit{Edward Books}). Faced with such basic needs that are fulfilled through private interactions, the state may be compelled to assure equal access to the activity. But McLachlin CJ found that driving is not one of the activities that fulfill basic needs. McLachlin CJ was not persuaded by the Hutterites’ claim that their lifestyle is dependent on being able to drive themselves.\textsuperscript{100} McLachlin CJ further highlighted the fact that the Hutterites had an alternative available to them: to hire others to drive for them. This alternative would uphold the general interest in security \textit{and} the Hutterite’s religious freedom without causing them the deleterious effects they claimed. The availability of such an alternative is another reason to define driving yourself as a privilege and not a right. For all these reasons McLachlin CJ concluded that non-accommodation will not present the Hutterites with “an invidious choice: the choice between some of its members violating the Second

\textsuperscript{99} \textit{Ibid.}
\textsuperscript{100} \textit{Ibid} at para 97.
Commandment on the one hand, or accepting the end of their rural communal life on the other hand.”

*Hutterian Brethren* is widely criticized. Whichever argumentative route commentators take, most of them find the decision unjust because they find that the claims to harm made by the Colony members were not adequately taken into consideration. Many commentators side with the dissenting opinion of Abella J, who found that the adverse effect on Hutterites will be “dramatic” since the Colony members’ “inability to drive affects them not only individually, but also severely compromises the autonomous character of their religious community.”

Defending the specific balance struck by McLachlin CJ is beyond the scope of this thesis and is unnecessary for my purposes. My claim is simply that the definition of “meaningful choice” made by McLachlin CJ is just because it expresses the liberal notion of reciprocal rights. Mike Madden thinks that McLachlin CJ’s statement that “many religious practices entail costs which society reasonably expects the adherents to bear” suggests that

> [T]he real issue in a religious freedom proportionality analysis is *whether a majority of the larger societal population is willing to tolerate the claimants’ religious practice or belief* – an idea that seems to run contrary to the purpose of entrenching a constitutional right to freedom of religion. (my emphasis)

I disagree with this interpretation. Madden takes issue with McLachlin CJ’s referral to “society” and interprets it to mean “the majority.” But the liberal reciprocity principle means that *each and

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102 *Ibid* at para 114. For critiques of the decision see e.g. Sara Weinrib, “An Exemption for Sincere Believers: The Challenge of Alberta v. Hutterian Brethren of Wilson Colony” (2011) 56:3 McGill LJ 719 (A critique of the decision’s focus on the final step of the *Oakes* test); Madden, *supra* note 90 (A critique supporting Abella J’s dissenting opinion); Mark Witten, “Rationalist Influences in the Adjudication of Religious Freedoms in Canada” (2012) 32 WRLSI 91 (A critique of the majority’s failure to comprehend religious claims); Mathen, *supra* note 81 (Calling the case “a loss under section 2(a)”).
103 *Hutterian Brethren, supra* note 11, at para 95.
104 Madden, *supra* note 90 at 76.
every member of society can reasonably expect adherents to bear some costs of their religious choices, including adherents themselves. Thus, McLachlin CJ’s words do not convey the idea of a majority expressing limited willingness to tolerate religious practices. Rather, her words put in practical terms the consequences of a commitment to a liberal system of reciprocal rights.

McLachlin CJ’s discussion of a “meaningful choice” provides a workable, justified, principle to apply to all requests for accommodation of religious needs. And as I will argue immediately, applying the concept of a “meaningful choice” as it is presented in Hutterian Brethren to the case of R v NS shows that NS should be allowed to testify wearing her niqab.

NS should be allowed to testify veiled because she is obliged to testify, because she has a right to access justice, and because she is accessing justice to protect her rights. Firstly, NS is obligated to testify in two ways. NS did not choose to approach the court; she was compelled to do so by her assailters when they violated her basic right to security of the person. Once her right was violated, the only way to restore her interest in her security of the person was by approaching the justice system and securing a remedy in the form of a trial and possible conviction. NS’s testimony is imperative in this process. It should be considered that there is no alternative available for NS to secure her interest in justice. The state has a monopoly over the legitimate use of force, punishment and the administration of justice. If NS wishes to secure her rights, her only avenue is approaching the court. Secondly, once she reported the crime and a trial was set,

NS was called to testify by the prosecution, and she is required to provide her testimony. This is an obligation by law which, according to the principle articulated by McLachlin CJ, creates a right for equal access. NS’s niqab should be accommodated because she did not choose to participate in the trial in more than one sense.

Refusing to accommodate NS’s niqab while she exercises her right to access justice deprives her of a meaningful choice to practice her religion in another sense as well. NS’s is not a case of an “inability to access conditional benefits or privileges conferred by law” but a case of inability to access the non-conditional fundamental right of access to justice. In discussing s 24(1), McLachlin CJ said: “a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach.” This is important to bear in mind in the case of NS. A ruling that does not allow her to testify wearing her niqab does not only render her basic right to security of the person unenforceable and thus nonexistent, but potentially erodes all her rights. As Faisel Bahaba puts it, “despite citing values of diversity, inclusion and access to justice, the majority’s analytical framework leads to the inevitable result that women like NS will find themselves outside of Charter protection.”

Finally, access to justice is important not only for NS herself, but also for the public as a whole. McLachlin CJ and LeBel J were of the opinion that the accused’s right to a fair trial should be

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106 *Criminal Code, RSC, 1985, c C-46 s 698* (Section 698. (1) provides: “Where a person is likely to give material evidence in a proceeding to which this Act applies, a subpoena may be issued in accordance with this Part requiring that person to attend to give evidence.” Section 698. (2) allows a competent court to issue a warrant that person be arrested and brought to give evidence).


108 *Bhabha, supra* note 65 at 10.
zealously preserved for the system to maintain its image of justice. But as Bahaba rightly notes, access to justice plays a similar role in upholding such an image. Bahaba says:

The … formulation of trial fairness in the majority’s judgment emphasized systematic and institutional integrity. This view concentrated on public interest considerations and prioritized the maintenance of confidence in the criminal justice system as a whole. Yet, the majority’s consideration of the public interest was remarkably narrow, focussing [sic] almost entirely on the public perception of the treatment of the accused in the trial process. Fairness was defined as an abstract and idealized standard of accuseds’ [sic] rights, with little consideration of the perspectives of other participants in the trial such as victims of sexual assault or vulnerable members of the public.109

McLachlin CJ did not consider R v NS in terms of NS’s “meaningful choice” to practice her religion. But her conclusion, that the deleterious effects of a requirement that NS unveil to testify would be less significant than the salutary effects on trial fairness, implies that McLachlin CJ believes that a requirement to unveil will not deny NS a meaningful choice to practice her religion. I think McLachlin CJ believes that NS would still have a meaningful choice to practice her religion because she would only be required to unveil temporarily, for the duration of the testimony. And McLachlin CJ seems to believe that the legal formula she defines means that such a restriction on the right to don the niqab will only occur rarely, where a niqabi woman is asked to provide contested evidence in court. But it is not the temporal element that determines whether a “meaningful choice” is left to the adherent, but rather the elements of voluntariness and entitlement. According to the “meaningful choice” standard set for accommodation of religious needs by McLachlin CJ in Hutterian Brethren, NS should be allowed to testify wearing her niqab. NS is compelled to participate in the trial and the interest of NS in this case is in itself protected as a right to access justice that is the guarantee for all other rights and a pillar of the justice system.

109 Ibid.
As Abella J said:

The majority’s conclusion that being unable to see the witness’ face is acceptable from a fair trial perspective if the evidence is “uncontested”, essentially means that sexual assault complainants, whose evidence will inevitably be contested, will be forced to choose between laying a complaint and wearing a niqab, which, as previously noted, may be no meaningful choice at all. (my emphasis)\(^{110}\)

The case of NS, with its sexual assault basis, shows the extreme deleterious effects that could be the result if courts are not required to always accommodate the niqab. Since access to justice is a most imperative pillar of the justice system and an indispensable guarantee to all other rights, I conclude with Abella J that the witnesses should always be allowed to testify veiled.

\(^{110}\) R v NS, supra note 9 at para 96.
Chapter 4 – Moving Forward: *R v NS* Applied

In chapters 2 and 3 I argued against the majority and concurring opinions in *R v NS*. The courts allow witnesses whose demeanour cannot be easily assessed to testify, despite the common-law rule requiring open testimony, when the inability to assess the demeanour is a result of immutable conditions like disabilities. Nevertheless, the SCC refused to extend the same treatment to niqabi witnesses. Since the effect on trial fairness is similar in the two cases, the different treatment can only reasonably be a result of a distinction that the majority makes between immutable characteristics and religious practice understood as a choice. I argued that, since the decision that a witness should unveil has the power to prevent the witness from accessing justice, niqabi witnesses’ religious freedom should afford them the same accommodation as other witnesses who pose similar obstacles to trial fairness. I argued this while upholding the idea that religious practice is a choice in the sense that it does not deserve absolute accommodation in every case. I supported McLachlin CJ’s thesis in *Hutterian Brethren* that society is justified in asking religious members to bear some of the costs of their religious lifestyle. I opposed the decision in *R v NS* because it was unjustified by the parameters set by McLachlin CJ herself in *Hutterian Brethren*. I argued that not accommodating her niqab in court would leave NS with no meaningful choice to practice her religion.

In this last chapter I explore the wider implications of *R v NS*, the most authoritative decision with regard to accommodation of the niqab in Canada to date. I want, first, to highlight the positive aspect in the *R v NS* decision. The positive aspect is the affirmation of the liberal theory
of rights and the rejection of the perfectionist theory of societal values. I then want to argue that this positive aspect of *R v NS* can be useful in other present and future debates regarding the niqab in particular, and religious practice in general. Lastly, I will stress that the positive aspects of *R v NS* can be harnessed and used for the better only if we accept the definitions of the right-based debate, including the idea that rights are not absolute. If proponents of minority rights do not accept the non-absolute character of rights, they risk losing public support for the rights view and inadvertently promoting a perfectionist theory of societal values – an approach that is categorically harmful to minority rights.

4.1 The Positive Aspect of *R v NS*

The reasons of McLachlin CJ, LeBel J and Abella J represent three different philosophical approaches. McLachlin CJ found that no strict rule should be adopted with respect to the niqab in court and that a case by case process of *balancing competing rights* should determine whether the niqab would be allowed. LeBel J highlighted the place of *societal values* in the legal system and, based on values of neutrality and openness, concluded that the niqab should be never allowed in court. Abella J’s reasons followed the process of balancing competing rights but concluded that the niqab should always be allowed in court. Abella J arrived at this conclusion by comparing the case to other cases where witnesses with personal immutable characteristics that pose obstacles to credibility assessment were nevertheless allowed to testify. She found that the interest in *equal access to justice* supported these cases, and in the same way should support a clear rule allowing niqabi witnesses to testify wearing the niqab. This is a unique perspective, distinguished from McLachlin CJ’s in its view of the niqab as an un-chosen personal
characteristic. But despite the differences between them, both McLachlin CJ and Abella J take
the right-based approach to the conflict in this case and both reject LeBel J’s suggestion that the
justice system is defined by societal values that demand that individuals leave their religious
affiliation at the doors of the court. Both McLachlin CJ and Abella J rejected the idea that
individual rights are formed only within a context of specific societal values. As I explain here,
the positive aspect of R v NS is that it supports liberalism and rejects perfectionism. To support
this aspect of R v NS, this section criticizes perfectionism using the ideas of John Stuart Mill, a
founding father of liberalism.

4.1.1 Perfectionist Politics

Perfectionism is the idea that the state is a moral agent in the lives of its members, and that it has
the responsibility to promote valid ideas about the good life and to discourage invalid ideas about
Littlefield Publishers, 2003) at 1 [Wall & Klosko].} According to this idea, individual actions should be held to a standard of the
good life and should be judged by the extent to which they promote such good or damage it.
Individual liberties, or rights, are defined only with relation to the general good and as a tool to
promote it.

LeBel J’s view is unmistakably perfectionist. For example, LeBel J asks:

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

Littlefield Publishers, 2003) at 1 [Wall & Klosko].}
In this quote LeBel J expresses the view that the niqab cannot simply be assessed as part of NS’s religious freedom, but must first be shown to be compatible with some “basic values” such as openness and religious neutrality in order to receive the protection reserved for religious freedom. In another example, later in his reasons, LeBel J states:

Those common values [of Canada] are the ones that allowed Canada to develop and live as a diverse society. They preserve a public space where all will be welcome as they are, but where some core common values will facilitate the interaction between all members of society. (my emphasis)

On its face, this quote gives the impression that LeBel J supports equal inclusion, including accommodation for individual needs (“all will be welcome as they are”). And the second part of the quote gives the impression that common values play only a supportive, non-coercive, role (“core common values will facilitate the interaction”). But of course LeBel J’s conclusion in R v NS was that the niqab should be banned in courts because, according to LeBel J, it does not facilitate communication.

LeBel J’s approach is perfectionist because he uses “core common values” such as openness and neutrality to define the scope of individuals’ rights. Equal liberties are not protected in their own right, but only to the extent that they promote values approved of by the state, that is, that they facilitate perfection. It might be hard to see why this position is perfectionist because LeBel J speaks of neutrality and openness, values that can be interpreted to be liberal values. Indeed, my discussion of liberal politics below addresses the liberal requirement that the state should be neutral towards different conceptions of the good. But in the liberal context, neutrality requires

\[112 \text{ R v NS, supra note 9 at para 60.}\]
\[113 \text{ Ibid at para 71.}\]
the state not to privilege citizens holding one conception of the good over those holding others. According to the liberal neutrality requirement, state policies should not distribute advantages and disadvantages unequally to citizens holding different values. And a liberal democracy is required to be neutral towards different conceptions of the good exactly because according to the liberal theory individuals are justified in holding non-neutral, value-ridden, conceptions of the good. What LeBel J does, on the contrary, is to demand that individuals themselves be “neutral.” This requirement curtails individuals’ rights to hold whichever conception of the good they see fit.

Furthermore, the idea of a personal neutral viewpoint is both impossible and inherently unequal. Personal viewpoints are inherently and inescapably value-ridden. Neutrality is only sensible when it is defined as an attitude towards two or more other values; neutrality characterizes the viewpoint of an outside spectator, not of a participant. Persons cannot hold neutral conceptions of the good. Persons can nevertheless mistake their own conception of the good for neutrality. And it is typically easy to make this mistake when you are a member of the majority and the behavior of your peers is so familiar that it seems to be neutral, while the behavior of strangers is so visibly different that its underlying values become noticeable. NS’s case is a perfect example. LeBel J wants NS to be “neutral.” What would that entail? The possibilities are endless. For example, if everyone were required to wear niqabs then NS’s behaviour would be neutral. This is not the image of neutrality that LeBel J sees. LeBel J sees secularity as neutral because, as a member of the majority, the secular dress style is so familiar that the values it expresses become invisible and it seems to be a flavourless default. This example shows what is inherently unequal about the requirement that individuals be neutral. To insist that an individual be neutral, in the
context of a democracy, is to insist that the individual embrace the conception of the good considered neutral by the majority, which will generally be the conception of the good favoured by the majority. To interpret neutrality in this way is illiberal.

In my treatment of the *R v NS* decision in chapter 1 I argued at length against LeBel J’s societal values approach. LeBel J spoke of values such as neutrality, openness and communication. I showed that his conclusion that accommodating the niqab does not promote communication is based on misguided ideas about the level of attachment of niqabi women to the practice of donning the niqab as part of their faith and about the impact of a requirement that they should unveil on their behaviour while testifying in court. More importantly, I showed that the baseline for evaluating communication that LeBel J adopts is disrespectful of niqabi women’s religious freedom. These are all consequences of LeBel J’s perfectionist views. As was shown in this section, and as will be immediately discussed further, perfectionist politics have another consequence. Although in the quote above LeBel J presents the perfectionist view as conducive to diversity, it is my contention that the greatest fault of perfectionism is in fact that it works against political diversity.

A legal-political culture that supports diversity is valuable for several reasons. Firstly, diversity of conceptions of the good is a fact of life in Canada. Politics that are compatible with diversity are likely to generate peace. I will expand on this point when I discuss liberal politics in section 4.1.2. Secondly, diversity of ideas is also beneficial for all of us in that it allows all of us to critically evaluate our conception of the truth and of the good, as will be explained further immediately. Lastly, perfectionist policies that limit the freedoms of a specific minority also
limit the freedoms of every member of society insofar as it curtails every member’s protection from the tyranny of the majority. Though we may be in the majority on one particular issue, we are each likely to find ourselves as part of a minority on some other given issue. Perfectionist policies have implications for the protection of all minority issues, and as such, we are all affected.

The perfectionist attitude against diversity lies in the basic idea that the state should promote one conception of the good life. The idea that the state should promote a specific conception of the good presupposes both that there is one specific good to be promoted and that the state successfully discovered this true conception of the good and is in fact promoting the correct one. Both presuppositions are weak, but the more problematic is the latter. Some people object to perfectionism on relativistic grounds, denying that any conception of the good is better than any other. But I am not interested in defending relativism, nor is it necessary for me to do so in order to proceed with my critique of perfectionism. I leave it, then, as merely a suggestion for reflection, and move to the second presupposition: that the state has successfully discovered the true conception of the good and is in fact promoting the correct one.

Perfectionists proceed with great confidence that the conception of the good they promote is in fact the true conception of the good. Given the reality that there is substantial disagreement about the good life, the first perfectionist presumption that there is, in fact, one true conception of the good must lead to the conclusion that humans are fallible, and that some humans make mistakes about the true conception of the good. The problem of fallibility gives rise to the question: what makes the state believe that it found the true conception of the good, that it did not make a
mistake? The true answer is that there is no good reason for the state to believe that it is infallible. The perfectionist state proceeds on a false assumption.\textsuperscript{114}

The state can gather support for its chosen position on the good life from the public, and can assume that if the majority agrees with the chosen conception then there is a good chance that the state is correct. Better yet, the state can decide that if there is, in fact, majority support for its position on the good then \textit{it does not matter anymore if this position is correct}. The fact is that perfectionist states promote a conception of the good supported by the majority, or by otherwise strong elites. It is thus clear why those states are confident in their politics. But the conceptual faults remain. Not only does perfectionism ignore the fact of human fallibility, it also relies on popular support for ideas without inviting objections, thereby harming not just the silenced minority, but the majority too. Speaking against censorship and in favour of a free market of ideas, John Stuart Mill wrote that:

\begin{quote}
If all mankind minus one were of one opinion, mankind would be no more justified is silencing that one person than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner, if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation – those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.

\ldots

We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still.\textsuperscript{115}
\end{quote}

\textsuperscript{115} \textit{Ibid.}
The fault in assuming that the prevailing conception of the good is infallible is aggravated because promoting one conception of the good requires suppressing, by use of political or social powers, competing conceptions of the good. This creates the problem that alternative conceptions of the good are eliminated from the public debate. The prevailing conception of the good is thus preserved unchallenged. A vicious cycle is created wherein a (possibly misguided) confidence about the good supports politics that in turn suppress dissent and eliminate the introduction of views that could challenge the (possibly misguided) prevailing idea about the good. If the prevailing idea about the good is in fact misguided, then even in perfectionist terms everyone is losing because a false conception of the good is being implemented. On this issue Mill wrote that:

If the cultivation of the understanding consists in one thing more than in another, it is surely in learning the grounds of one’s own opinions. Whatever people believe, on subjects on which it is of the first importance to believe rightly, they ought to be able to defend against at least the common objections.\footnote{Ibid at 97.}

One may object that the arguments brought here against perfectionism are limited to policies restricting speech and expression. It may be that ideas deserve equal place in public because all ideas are beneficial and harmless. But surely, so the objection goes, actions can be harmful and therefore it is justified banning actions that do not promote the good. But Mill’s words with respect to the need for a diverse public discourse apply for similar reasons to actions. Mill wrote:

That mankind are not infallible; that their truths, for the most part, are only half truths; that unity of opinion, unless resulting from the fullest and freest comparison of opposite opinion, is not desirable, and diversity not an evil, but a good, until mankind are much more capable than at present of recognizing all sides of the truth, are principles applicable to men’s modes of action not less than to their opinions. As it is useful that while mankind are imperfect there should be
different opinions, so it is that there should be different experiment of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when anyone thinks fit to try them.\footnote{Ibid at 120.}

This quotation explains both the connection between arguments about the truth and arguments about the good, and the connection between ideas and actions. Mill’s discussion of a market of ideas pertains to the pursuit of truth. When he speaks of conceptions of the good, Mill highlights the need to experience them in order to evaluate them. To debate arguments about the good life, a political and social reality in which different conceptions can be experienced is needed.

To conclude, perfectionist politics work against political diversity. Perfectionist politics diminish a debate infused with plurality of ideas. And perfectionist policies regulating behaviour proceed from a specific value-ridden perspective and evaluate individual behavior by measuring the extent to which the behaviour promotes the good or hinders it. The result is a limitation of the liberties of some, usually minority groups. And whereas liberal arguments result in some limitations of liberties too, there are notable differences. First, perfectionist arguments are not bound by a balancing process that only limits rights to the extent that is necessary to avoid a greater deleterious effect on another right. Thus, perfectionist arguments can potentially limit rights more severely. Perfectionism is committed to the good and not to liberty, so potentially rights could be completely eroded if they are found to be working against a claimed societal good. Second, perfectionist arguments and their policy results are demeaning because they signal publicly that the viewpoints of certain members of society are inferior. The views are wrong because they are incompatible with the majority’s perfectionist conception of the good life, and are thus not deserving of accommodation or respect. Perfectionist arguments do not point to
harm to others; they do not justify non accommodation by invoking wrongdoing. They simply invoke wrongfulness.

4.1.2 Liberal Politics

Liberalism avoids the faults of perfectionism by taking a neutral position towards the different conceptions of the good and by promoting instead equal liberties. The principle of state neutrality claims that “in a pluralistic society the state should not favour or take sides between different citizens’ moral, religious, and philosophical views, or as this is generally referred to, their conceptions of the good.”

Neutralism is a natural consequence of the liberal norm of equality, as explained by Ronald Dworkin:

Since the citizens of a society differ in their conception [of the good life], the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or more powerful group.

Bruce Ackerman connects neutrality to equality as well. The work neutrality does, according to him, is to rule out justification appealing to “privileged moral authority” and to hold that:

No reason is good reason if it requires the power holder to assert:
(a) That his conception of the good is better than that asserted by any of his fellow citizens, or
(b) That, regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens.

These quotations reveal the important work that neutrality does in sustaining diversity: neutrality rejects ideas of moral supremacy of one conception of the good over another. This feature of

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118 Wall & Klosko, supra note 111 at 6.
119 Ibid at 2.
121 Bruce Ackerman, Social Justice in the Liberal State (New Haven, Conn: Yale University Press, 1980) at 11, reprinted in Wall & Klosko, supra note 111 at 4.
liberalism creates the basic condition allowing individuals holding different conceptions of the good to live together.

Neutrality is best executed in the legal realm by appealing to rights. In *SL v Commission scolaire des Chênes*, Deschamps J wrote of the ideal of neutrality in the law:

following a realistic and non-absolutist approach, state neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it *shows respect for all postures towards religion*, including that of having no religious beliefs whatsoever, *while taking into account the competing constitutional rights of the individuals affected.* (my emphasis)

In chapter 3 I explained liberalism’s commitment to a strong notion of rights that spring from, and thus are also limited by, public reason. Everyone shares an interest in pursuing the good life as she understands it and so everyone will agree that such pursuit should only be limited when it intrudes on others’ pursuit. In this part I want to show that this system of reciprocal rights is a pronunciation of a commitment to diversity.

The neutral position allows diversity by holding individuals accountable only to rules that they can reasonably be expected to accept. A strong notion of rights, defined by the ideas of liberty and reciprocity, sustains diversity insofar as it entitles members to pursue their conceptions of the good as part of their liberties and sets rules that all members can reasonably be expected to accept to arbitrate between members when the exercise of one member’s liberties impedes on another’s ability to enjoy hers. Both liberty and public reason provide conditions for peaceful coexistence for individuals who disagree with one another: liberty, by providing each member a sphere of self-rule that is independent of the preferences of others, limits the number of cases.

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where individuals have contradicting interests that must be reconciled in the first place; and public reason, by offering for consideration only reasons that all individuals can reasonably be expected to reasonably accept, provides a peaceful method for resolving the remaining cases where the conflicting interests of different individuals must be reconciled. This system of rights limited by public reason is the strongest pronunciation of the idea of state neutrality.

Mill’s critique of perfectionist politics is particularly relevant for religious practices at large and the debate surrounding the niqab in particular. Religious practice is first and foremost an expression of a specific conception of the good. In this sense it is closer to speech than to actions. This is especially true when religious practice does not harm others. Merely worn in public, the niqab is an expression of Muslim faith. The critique of perfectionism shows why, in general, the niqab should be protected as any other idea. When the niqab could be limited, it is because it is harmful to others.

The debate between perfectionism and neutrality sheds light on the positive aspect of the R v NS decision. The majority and dissent showed respect to NS by recognizing that the niqab was protected as part of her religious freedom. The majority justified the intervention in NS’s individual behaviour not by appealing to societal values but only by appealing to the rights of the accused that were found, on balance, to be more sensitive in this case. The result is that wearing the niqab in general is accepted as a valid choice that is protected to the extent that it does not impede other rights (at which point the weight of the competing rights will need to be balanced), and that the niqabi woman is recognized to be an equal member of the civic system. Thus, the decision reflects the necessity of balancing equal rights in a diverse society, and the result of the balance reflects a judgment on the level of potential harm to each of the sides, should their rights
be limited. The harm to NS by virtue of the decision does not reflect the inadmissibility, and hence the inferiority, of her religious beliefs in Canadian society. *R v NS* expresses a neutral position that supports diversity.

The faults in LeBel J’s perfectionist reasons highlight the positive aspect of the *R v NS* decision. The majority of the court – both the majority opinion and the dissenting opinion – rejected the perfectionist approach and affirmed the commitment of Canada to the liberal system of rights and its supremacy. The majority rejected LeBel J’s idea that some societal values antecede rights and that rights are only defined with relation to such values. As a result, the majority of the court rejected the idea of a complete ban on the niqab in the context of the court. McLachlin CJ, while allowing for the limit of the niqab in court, justified the limit by highlighting the importance of another basic right: the right of the accused to a fair trial. Thus, McLachlin CJ set a high standard for requests to limit the religious freedom on niqabi women. Any such request should show that the exercise of religious freedom seriously interferes with a basic right of another individual and that the harm to the other individual’s right is greater than the harm that would be caused to religious freedom if the latter is limited. This is a result of *R v NS* that should encourage optimism when discussing other policy developments regarding the niqab in Canada.

Its commitment to neutrality and to debating the niqab only through the system of rights is the source of optimism that the ruling in *R v NS* will play a role in protecting the niqab in future. As Bhabha puts it:

[T]he minority’s justification of a ban was rejected by both the majority and dissent. The Court resoundingly endorsed a fundamental principle of inclusion and accommodation of women in niqab. This principle is not absolute, though, and it is subject to reasonable limits based on legitimate objectives and actual
harm, analyzed through the proportionality test. That the principle of accommodation was articulated in a case involving a competing interest of the highest order – an accused’s liberty – suggests that the accommodation right that adheres to the niqab is indeed secure. It is difficult to imagine that an outright ban in a public setting could ever be constitutionally justified based on the majority’s reasoning in \( R \) v \( NS \). Governments wishing to restrict the wearing of the niqab in accordance with proportionality will need evidence establishing the real and clear danger to a more important interest.\(^{123}\)

I will now move on to discuss other policies regarding the niqab in light of \( R \) v \( NS \).

4.2 Other Niqab Controversies in Canada in Light of \( R \) v \( NS \)

4.2.1 Québec’s Bill 94

Bill 94, \textit{An Act to Establish Guidelines Governing Accommodation Requests within the Administration and Certain Institutions},\(^{124}\) is so far the most prominent example of wide-scale proposed legislation to regulate the niqab in Canada. The Bill was tabled in March 2010 by the Liberal government of Jean Charest. The Bill was adopted in principle by the National Assembly on February 15\(^{th}\) 2011. Since then the Bill was discussed in Committee but no further development has occurred. The Parti Québécois, now in government in Québec, already pronounced its opposition to the Bill on the grounds that it was not strong enough. Recently, it was revealed that the Parti Québécois will soon introduce the “Charter of Québec Values,” a piece of legislation imposing broader restrictions on the wearing of religious symbols by public employees, though the details of the legislation are yet unknown.\(^{125}\) Hence Bill 94 itself will

\(^{123}\) Bhabha, \textit{supra} note 65 at 14.

\(^{124}\) \textit{Supra} note 6.

\(^{125}\) \textit{The Globe and Mail}, \textit{supra} note 7.
probably never become a law. But the ambitions that the Bill expresses are likely to be echoed in the future “Charter of Québec Values.” For this reason it is valuable to discuss the Bill.

Bill 94 establishes the conditions under which the practice of the Islamic full-veil, including the niqab, will be accommodated in Québec. This aim is achieved without mentioning directly the veil itself. Article 1 of the Bill states:

The purpose of this Act is to establish the conditions under which an accommodation may be made in favour of a personnel member of the Administration or an institution or in favour of a person to whom services are provided by the Administration or an institution.

An adaptation of a norm or general practice, dictated by the right to equality, in order to grant different treatment to a person who would otherwise be adversely affected by the application of that norm or practice constitutes an accommodation.126

The operative Articles of the Bill, Articles 4, 5 and 6, explicate the standard of accommodation itself. Article 4 states that accommodation must comply with the right to gender equality and the principle of the religious neutrality of the state. Article 5 states that accommodation must be reasonable and not impose undue hardship on the accommodating institution. Article 6 goes to the heart of the matter:

The practice whereby a personnel member of the Administration or an institution and a person to whom services are being provided by the Administration or the institution show their face during the delivery of services is a general practice.

If an accommodation involves an adaptation of that practice and reasons of security, communication or identification warrant it, the accommodation must be denied.127

126 Bill 94, supra note 6.
127 Ibid, Article 6.
The Bill caused concern and attracted criticism from proponents of minority rights. The concerns can be divided into two main categories. First, the Bill is potentially widely applicable and sets, on its face, a strong limitation on the right to veil in Québec. Article 1 states that the Bill applies to employees of the Administration and other public institutions that the Bill specifies. Articles 2 and 3 detail in depth the entities and persons that are deemed part of “the Administration”. On its face, virtually every person in Québec is affected by the Bill, either as a member of the Administration, or as a receiver of services. Furthermore, a norm of broad application in the main institutions of the province has a great potential of becoming a general practice in other private institutions as well. All in all, it seems that if Bill 94 will become a law in Québec, it has the potential of having a universal effect on society. In their article “The ‘Naked Face’ of Secular Exclusion: Bill 94 and the Privatization of Belief,” Pascale Fournier and Erica See argue that because of its broad applicability Bill 94 will have “immediate and dramatically harmful effects on religious women who wear the niqab.” Fournier and See predict that the direct result of the Bill will be the disappearance of niqabi women from the public space and their enhanced dependence on “male family members to navigate the ‘market place’ on their behalf.” They say:

In addition to denying veiled women access to courts and government buildings, it has the effect of preventing even the most banal activities such as going to the local office of the electric company to enquire about charges or picking up a child from a government-funded daycare. . . . According to section 6 of the Act, any accommodation of the “naked face” principle must be denied ‘if reasons of security, communication or identification warrant it.’

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129 Ibid at 76.
130 Ibid at 63.
131 Ibid at 68.
The second concern with the Bill relates to the values expressed by the Bill and the discourse and public attitudes that they create. Fournier and See look at “the importance of Bill 94 in negotiating the relationship between religion and the state in Modern Québec.”\footnote{Ibid at 65.} Focusing on its language and the public debate surrounding it, Fournier and See view Bill 94 as a token of “a colonial discourse on gender equality.”\footnote{Ibid at 66.} This is because the Bill harnesses the values of state neutrality and gender equality to work against the Islamic full-veil. The language of the Bill suggests that the Islamic full-veil is a practice of sexual subordination.\footnote{Ibid at 65.} The language of the Bill further suggests that practicing faith while communicating with or as part of the Administration violates the neutrality of the state. As Fournier and See rightly note, proponents of the Bill ignore the fact that both neutrality and gender can (at least) equally stand for the Islamic full-veil. Veiled women practicing their faith in public can be viewed as exercising their equal liberties both as women and as religious persons – as living the ideals of gender equality and the equal standings of all citizens regardless of their conceptions of the good. Fournier and See find the imposition of a negative conception of the Islamic full-veil on those who practice it for alleged reasons of liberation from sexual subordination to be “colonial”.

Indeed, the language of Bill 94 makes it clearly a perfectionist policy. LeBel J’s ideas in \textit{R v NS} on the role that the principle of neutrality plays in demanding that individuals suppress their religious affiliation when they approach the public sphere are echoed in the language of the Bill. These ideas are perfectionist on at least one of two levels. First, the Bill seems to be motivated by perfectionist ideas. The Bill seems to assume that its wide applicability will help to erode the
practice of the Islamic full-veil, and that this erosion is promoting correct values. Second, even though the Bill is phrased in general terms that do not specifically signal out particular minorities, it will have unique adverse effects on Muslim women wearing the veil. These unique adverse effects will violate the neutrality of the state and will promote its secularity instead.

If we highlight the appeal of the Bill to values of neutrality and gender equality, the Bill seems perfectionist also in that it does not define a right with which the Islamic veil is interfering. The veil is simply said to be an obstacle to general social practices and values like showing one’s face in public. The contrast with the argument made by McLachlin CJ in *R v NS* is striking. In *R v NS*, McLachlin CJ supported the common-law rule whereby witnesses are required to show their faces not as a value in itself but only as a tool to assess credibility, a part of the trial fairness right of the accused. Bill 94, on the other hand, does not give a justification for the requirement other than it being a general practice or value. Invoking the general practice as valuable without showing that it is necessary to uphold the rights of others implies that the practice’s value is intrinsic.

I think that, in light of the Canadian Charter tradition and *R v NS*, Bill 94 will not have the wide implications that Fournier and See predict. First, the notions of neutrality and gender equality are non-operative parts of the Bill. The operative part of the Bill is found in Article 6 and the conditions it sets for accommodation. Second, the justifications that the Bill enumerates for refusing requests for accommodation, i.e. security, communication and identification, are all likely to be interpreted very narrowly.
I expect that decisions to deny accommodation made under the Bill will face judicial scrutiny using an analytical route similar to the one chosen in *Hutterian Brethren and R v NS*. The conclusions of the SCC cases speak for the balance struck by the courts between freedom of religion and other rights and social goals. In the same way, a decision under Bill 94 will be judged by the effects of the decision on the religious freedom of the claimant and whether the decision denies her a meaningful choice to practice her religion. Only where the limit on the veil will have an effect on the veiled woman that does not meaningfully prohibit her from practicing her religion, and where the public interest in security, communication or identification gains more than the harm that the veiled woman suffers, will it be justified under the Bill to ask the woman to unveil. I suspect that given the high standard set in *R v NS* and *Hutterian Brethren*, only a small selection of reasons in very limited contexts can support decisions that veiled women should unveil when providing or receiving public services.

The cases of *Hutterian Brethren* and *R v NS* illuminated the scope of freedom of religion vis-à-vis considerations of security, communication and identification as it currently stands in Canada. According to *Hutterian Brethren*, dealing with security and identification, one’s freedom of religion will be limited by a requirement to identify oneself for security reasons only where the limitation to freedom of religion is, all things considered, proportionate. In *R v NS*, freedom of religion retreated in front of a consideration of communication because communication formed part of another’s *Charter* right. Furthermore, the other *Charter* right was balanced against religious freedom. On that aspect, the case’s lessons are that not all communication requires the removal of the veil, that the requirement to unveil has to be narrowly tailored around the exact purpose of the communication, and that the consideration of communication will be balanced
against the religious freedom protecting the veil. Applying the jurisprudence to Bill 94, I think it is clear that the Bill will be applied narrowly and have a limited effect. Even when in conflict with security concerns, the gravest of the three grounds on which accommodation must be rejected according to the Bill, freedom of religion does not retreat easily, as we saw in *Hutterian Brethren*. It retreats even less easily when in conflict with a lesser concern, communication, *even when this concern arises in the form of another Charter right*, as in *R v NS*. When the concern with communication is not connected to another *Charter* right, I think it is even less likely to exclude accommodation for the veil. In particular, I do not believe that the Bill could deny access to courts or other basic civil services. It is hard to imagine that a woman would be asked to unveil to place an inquiry at the local office of the electric company or to pick up a child from a government-funded daycare.\(^\text{135}\)

On top of Bill 94 being likely to have only a modest effect beyond the current case law, the effect that the Bill may add is legitimate. The considerations of security, communication and identifications can stand for others’ rights. The consideration of security does so in the most straightforward way; when it is invoked it is because others’ right to security might be compromised. Identification is closely linked to security, as is in the context of border control. And as in *R v NS*, communication can form part of others’ rights too. The reciprocal system of rights stands for the limitation of religious freedom when, all things considered, such limitation is justified to protect others’ rights. Bill 94 is an example for why *R v NS* generates optimism when looking forward to consider the contours of accommodation for the Islamic full-veil in Canada. *R v NS* prevents legislation like Bill 94 from becoming a force suppressing social diversity, marginalizing minorities and promoting a specific conception of the good, and *R v NS*

\(^{135}\) Which are Fournier and See’s worries, see text accompanying note 131.
creates a constitutional framework in which such legislation as Bill 94 is interpreted as protecting legitimate interests and reciprocal rights.

My conclusions with regard to Bill 94 might not apply to the future “Charter of Québec Values.” From what we know so far, the legislation does not impose a standard for accommodation that gives specific reasons appealing to others’ rights to deny requests for accommodation. Rather, the legislation invokes the principle of state neutrality as an uncompromising reason to limit individuals’ religious freedom. If this is the case, then the legislation does not leave room for a limited liberal interpretation and is clearly perfectionist. Though I cannot assess a piece of legislation yet unknown, I hope that my analysis of Bill 94 is helpful in pointing to the analytical questions, and the possible critique, that could be directed at the “Charter of Québec Values.”

4.2.2 Citizenship and Immigration Canada Operational Bulletin 359

Another policy that is defined in perfectionist terms is Citizenship and Immigration Operational Bulletin number 359. Published on December 12, 2011, the bulletin is titled Requirements for Candidates to be Seen Taking the Oath of Citizenship at a Ceremony and Procedures for Candidates with Full or Partial Face Coverings. The Bulletin states in uncompromising terms the requirement that veiled applicants unveil when they take the oath of citizenship:

- At time of check-in, all candidates wearing full or partial face coverings must be reminded that they will be required to remove their face coverings for the oath taking portion of the ceremony;
- They are to be informed that failure to do so will result in the candidate not becoming a Canadian citizen on that day and not receiving their citizenship certificate.

136 Bulletin 359, supra note 8.
137 Ibid.
Introducing the Bulletin, the then Minister of Immigration, Jason Kenney, said

All we ask of people is to fulfill the requirements of citizenship and to swear an oath before one’s fellow citizens that one will be loyal to our traditions that go back centuries. This common pledge is the bedrock on which Canadian society rests. That is why starting today, my department will require that all those taking the oath do so openly. From today, all persons will be required to show their face when swearing the oath.

I have received complaints from members of Parliament, from citizens, from judges of the citizenship court that it is hard to ensure that individuals whose faces are covered are actually reciting the oath. Requiring that all candidates show their faces while reciting the oath allows judges and everyone present to share in the ceremony, to ensure that all citizenship candidates are in fact, reciting the oath as required by our law. This is not simply a practical measure. It is a matter of deep principle that goes to the heart of our identity and our values of openness and equality. The citizenship oath is a quintessentially public act. It is a public declaration that you are joining the Canadian family and it must be taken freely and openly.

To segregate one group of Canadians or allow them to hide their faces, to hide their identity from us precisely when they are joining our community is contrary to Canada’s proud commitment to openness and to social cohesion. It’s important to note that this is an expectation. If Canada is to be true to our history and to our highest ideals, we cannot tolerate two classes of citizens. We cannot have two classes of citizenship ceremonies. (my emphasis)\(^\text{138}\)

The language of the Bulletin, coupled with fact that the Bulletin was adopted by a political figure through the use of administrative powers outside the public gaze of politics or the reason-based system of courts, add to a suspicion that it may be a case of minority persecution. Professor Sharry Aiken said: “It’s a hotly contested issue. It might have been appropriate to wait for the Supreme Court decision [in } R v \text{NS}],” and “The message seems to be that if you want to live in Canada, don’t wear the niqab in any interactions with the state.”\(^\text{139}\) The Bulletin is also suspected


of being perfectionist because it is unclear to what extent veiling during citizenship ceremonies is a real policy problem. For example, Raminder Gill, a citizenship judge and a former Tory MPP who supports the bulletin, himself noted that he only sees a couple of people each year who cover their faces at the citizenship ceremonies he presides over.\textsuperscript{140} For some minority rights proponents, the contrast between this marginality of the actual problem and the official answer in the form of the Bulletin (or in the form of legislation, as in the case of Bill 94 and the “Charter of Québec Values”) suggests a political motivation to marginalize minorities for reasons of mere disrespect or fear. And they are concerned that while there is no serious policy problem to justify the legal treatment, the greatest effect of such legal measures would be to reinforce negative images of minorities amongst the public. For example, another commentator on the Bulletin, Professor Mohammad Fadel, said that the new rules seem more likely to stigmatize the person wearing the veil than anything else.\textsuperscript{141}

The Bulletin is definitely phrased in perfectionist language, invoking societal values of cohesion and openness as reasons to limit the religious freedom of applicants without pointing to a specific harm to others that is the result of accommodating religious needs. And as in the case of Bill 94, it is interesting to see how LeBel J’s ideas about societal values like openness are echoed in this policy measure. The objections that arise with any other perfectionist policy arise here as well. Kenney said that “we cannot have two classes of citizenship ceremonies,” but it is hard to see in what way accommodating the religious needs of veiled applicants means having “two classes” of ceremonies when allowing parties of different religious backgrounds to swear on

\textsuperscript{140} \textit{Ibid.}
\textsuperscript{141} \textit{Ibid.}
their sacred text of choice in courts is not considered as having more than one system of justice.

In *R v NS* McLachlin CJ said:

> [T]o 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 or some other sacred text. The practice has been to respect religious traditions insofar as this is possible without risking trial fairness or causing undue disruption in the proceedings.\(^{142}\)

In light of *R v NS*, it might be that the justifications for refusing to accommodate the veil that appeal to societal values will be rejected if brought under judicial review.

The Bulletin might be held to different standards than other pieces of legislation because the Bulletin is operating in the context of immigration, in which the state’s prerogative to set the rules for accepting applicants is largely accepted. That is to say, the limitation on religious freedom contained in the Bulletin might be found to be a “reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society”\(^{143}\) given the context of immigration in which the Bulletin operates. Nevertheless, applicants for citizenship are guaranteed religious freedom by section 2(\(a\)) of the *Charter* (that applies to “everyone”) and this guarantee requires the Bulletin to meet the constitutional standard. Thus the Bulletin could be challenged, and the state might be required to show that veils cause specific harm or undue disruption of the proceedings. Kenney’s words did not highlight procedural difficulties in accommodating religious needs or undue hardship. Rather, the then Minister of Immigration clearly approached the issue as a matter of civic principles. *R v NS* generates optimism that this value-ridden nature of the Bulletin, which has the force to marginalize a minority and to promote an atmosphere of exclusion, will be scrutinized.

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\(^{142}\) *R v NS*, *supra* note 9 at para 53.

\(^{143}\) *Charter* s 1, *supra* note 12.
4.3 The Compromise at the Heart of the Rights-Based Approach

So far in this chapter I have argued that the \( R \text{ v } NS \), despite its faults (examined in detail in chapters 2 and 3), has positive implications for other Islamic full-veil controversies in Canada insofar as it rejects perfectionist grounds for limiting the religious freedom of veiled women. The examples of Bill 94 and Bulletin 359 discussed in section 4.2 and the yet unknown “Charter of Québec Values” are policies that seek to promote the societal values of the majority at the expense of the liberties of individuals belonging to minorities. If \( R \text{ v } NS \) will be applied to these policies, I suspect that they will be applied only very narrowly where a specific substantial harm to others’ rights justifies, on balance, limiting the right to veil. I hope that the policies will be constitutionally challenged and that the respective governments will be asked to justify the limitations on concrete grounds or else to change their policies.

This chapter closes the debate of the contours of the right to veil in Canada that this thesis is dedicated to. The highlighted positive aspect of \( R \text{ v } NS \) and the examples of policies to which the case applies are meant to persuade the reader that minority rights can be protected if and only if we are committed to a system of reciprocal rights, and to protecting a meaningful choice to practice religion by balancing it against the rights of others. The fault of perfectionist policies is the \textit{a priori} inferior treatment that they extend to different conceptions of the good. The answer to such treatment has to be denying that policies are justified in proceeding based on a presumption of the superiority of a certain conception of the good over another. The answer is a commitment to a reciprocal system of rights that implements the value of equality and
reciprocity. Properly understood, rights are always equal and reciprocal and hence are necessarily non-absolute. Thus, we have to accept that requests for accommodation of religious needs will not always be accepted. When the legitimate interests of others will be, on balanced, more adversely affected, religious needs will retreat. This result is not to be grieved, because it upholds the political equality of all of society’s members and their rights. Demands for absolute accommodation for religious needs are unjustified; they are a violation of the theoretical grounds on which such claims are made. If advocates of minority rights support such absolute demands, they risk losing support for their cause. If proponents of rights make uncompromising claims that reject the reasonable concerns of the majority, they effectively educate the majority that the liberal system of rights cannot protect the majority’s interests. This could result in more and more members of the majority (and, more importantly, policy makers) shifting from liberal views to perfectionist views – a categorically undesired result for all of us.
Chapter 5 – Conclusions

In this thesis I have used \( R \ v \ NS \) to assess the contours of the right to veil in Canada. Starting with the case itself, I argued that \( R \ v \ NS \) was unjustifiably decided. The majority’s decision restated the common-law rule that requires testifying with revealed face, without attending to the fact that this rule is commonly relaxed when the witness’s circumstances prevent them from testifying in the ordinary fashion but considerations of justice demand that they should testify. The concurring opinion gave reasons to discriminate between witnesses whose immutable circumstances demand accommodation and niqabi witnesses, but those reasons are unpersuasive and illiberal. Accepting the court’s assumption that religious freedom is not absolute, I nevertheless argued that NS’s religious freedom should have protected her from an order to unveil when she is testifying in court. I developed my argument around McLachlin CJ’s conception of a “meaningful choice to practice one’s religion.”

Despite its unjustified conclusion, \( R \ v \ NS \) is positive in one sense. \( R \ v \ NS \) reaffirms the Canadian commitment to a liberal system of reciprocal rights and rejects outright the rival perfectionist societal values approach suggested by the minority concurring opinion. \( R \ v \ NS \) thus inspires optimism that policies based on the societal values approach will be held to the liberal standard and will either fail under judicial scrutiny or be limited to cases where applying them will not curtail the meaningful choice of the religious person and where the limitation will be justified on balance with others’ rights and justified interest. I applied the theoretical lesson of \( R \ v \ NS \) to two other prominent examples of niqab regulation policies to show that the decision could possibly
limit the impact these policies will have. Despite its failure to guarantee an unqualified right to testify wearing the niqab, *R v NS* provides reasons to believe that the freedom to veil is largely protected in Canada.
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