able to speak of an official conversation with the Roman Catholic Church in this country. He told the House:

> I . . . can inform the House that the view taken by the Catholic Church in England and Wales is that in the instance of mixed marriages the approach of the Catholic Church is pastoral. It will always look to provide guidance that supports and strengthens the unity and indissolubility of the marriage. In this context the Catholic Church expects Catholic spouses to sincerely undertake to do all that they can to raise children in the Catholic Church. Where it has not been possible for the child of a mixed marriage to be brought up as a Catholic, the Catholic parent does not fall subject to the censure of canon law.[8]

Bob Morris was thus right to question the alleged absoluteness of the obligation required of the Roman Catholic partner in a mixed marriage in the 1983 Code of Canon Law. The obligation is always within the unity of marriage and is interpreted with pastoral flexibility.

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Niqabs in Canadian Courts: *R v NS*

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In *R v NS*[1] the Supreme Court of Canada (SCC) was asked to consider a straightforward question: must a Muslim woman remove a niqab (face covering leaving only the eyes showing) when giving evidence in a sexual assault case in which she is the complainant. Two justices said 'yes'; one said 'almost always, no'; and the majority said 'maybe yes, maybe no – it depends'.[2] The matter was

8 HL Deb 22 April 2013, col 1221.
1 2012 SCC 72.
2 Four justices constituted the majority on the seven-member bench. Of the two remaining justices who did not sit, one had heard the case in the Ontario Court of Appeal and the other, also recently appointed from the Ontario Court of Appeal, stood down to ensure a seven-member bench.

then returned to the preliminary inquiry judge to make the actual decision, which could still be subject again to appeal to the SCC. The court divided on the three available answers to the question: yes, no and maybe. The division, however, leaned in favour of requiring removal of the niqab because the reasons for judgment favouring 'maybe' were concurred in in the result by those favouring removal. In the end, the court did not give a clear answer to the question, but rather provided a four-part test for trial judges who must continue to make the decision, subject to appeal. The practical utility of this response may be doubted.

The facts were not at issue. NS laid charges of sexual assault against her uncle and cousin and at the preliminary inquiry declined to remove her niqab while giving testimony on the ground that her religious belief required her to wear a niqab in public when men other than close family members might see her. She admitted to removal for driver's licence photographs and that she would also remove it for a border crossing security check. According to the Ontario Court of Appeal, she alleged she had been assaulted from 1982, when she was six years old, until 1987.[3] She reported this to a school teacher in 1992, but when the teacher informed her parents they declined to press charges. NS did so in 2007 and the preliminary inquiry was held in 2008. She had been wearing a niqab for about five years at the time of the SCC decision in 2012,[4] and therefore would have begun to do so in her early thirties, about the time she went to the police. The Ontario Court of Appeal had found that if both the complainant's religious freedom rights and the accused's fair trial rights were engaged, the context should determine whether the niqab should be removed and the case was returned to the preliminary inquiry judge to decide. NS appealed to the SCC.

Writing for the majority, McLachlin CJC stated that the proper approach was to balance the rights of freedom of religion and trial fairness. She rejected at the outset any approach that required witnesses to 'park their religion at the courtroom door',[5] as inconsistent with the Canadian tradition of accommodating religion unless it poses a serious risk to a fair trial. Freedom of religion is protected by section 2(a) of the Charter and the right to a fair trial by sections 7 and 11(d).[6] She suggested a four-part framework for balancing conflicting Charter rights:[7]

i. Would requiring the witness to remove the niqab while testifying interfere with her freedom of religion?

3 2010 ONCA 670 at para 2.
4 *R v NS* at para 88 *per* Abella J.
5 Ibid at para 2.
6 The majority adopted the approach to balancing rights set out in two earlier cases concerned with publication bans: *Dagenais v CBC* [1994] 3 SCR 835 and *R v Mentuck* [2001] 3 SCR 442.
7 *R v NS* at para 9.

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ii. Would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness?
iii. Is there a way to accommodate both rights and avoid the conflict between them?
iv. If no accommodation is possible, do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so?

In response to the first question, McLachlin CJC stated that NS must show that her wish to wear a niqab was based on sincere religious belief. The preliminary inquiry judge had found that her belief was not sufficiently 'strong' because she occasionally removed it. But in the view of the majority, this approach to the sincerity test was inappropriate for two reasons: first, strength of belief is irrelevant provided the belief is sincere; and secondly, strength does not allow for inconsistent adherence to a religious belief either over time or for specific exceptions, although the test of sincerity does accommodate these possibilities.[8] She remitted determination of sincerity back to the judge and proceeded for the rest of her reasons on the assumption that NS was sincere.[9]

Turning to the Charter right to be balanced, to a fair trial, McLachlin CJC acknowledged the defendants' claim that their fair trial right was denied because a covered face prevents effective cross-examination and interferes with the assessment of credibility, but noted an absence of evidence on the record to support either claim.[10] She accepted that both the common law and the Criminal Code[11] support the position that seeing a witness's face is important to a fair trial, and that this should not be set aside without compelling evidence,[12] thereby raising the doubt that it could be set aside with sufficient evidence. What that evidence might be was not considered. She concluded on the fair trial question that, where evidence is uncontested, credibility and cross-examination are not at issue so that an inability to see the complainant's face is not an impediment to a fair trial. If a niqab poses no risk to trial fairness, it may be permitted on religious grounds.[13] It seems most unlikely that the evidence in a sexual assault case would be uncontested, so that the utility of this observation is doubtful at best.

Having found that both rights – religious freedom and trial fairness – were engaged, McLachlin CJC turned to the third question of accommodation so as to

8 Ibid at para 13.
9 Ibid at para 14.
10 Ibid at paras 16–20.
11 RSC 1985, c C-46.
12 *R v NS* at paras 21–27.
13 Ibid at paras 28–29.

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preserve both. However, beyond re-stating the principle of accommodation she returned the matter to the preliminary trial judge for a decision.[14] In respect to the fourth question of whether the salutary effects of requiring removal outweigh the deleterious effects of doing so, she likened this test to the proportionality test for legislation in *R v Oakes*:[15] that where legislation limits a Charter right it must be rationally connected to the legislation's purpose, minimally impair the right alleged and be proportionate in its effect. She listed some possible deleterious effects of requiring removal such as harm to sincere religious belief, state interference with religious belief and the possibility that niqab-wearing women will be deterred from reporting sexual assaults so that perpetrators will go unpunished.[16] The salutary effects of requiring removal include preventing an unfair trial and safeguarding the reputation of the administration of justice.[17] However, again she remitted the decision to the preliminary trial judge.[18]

Finally, McLachlin CJC considered the broader question of whether there should be a clear rule one way or the other and suggested several reasons why a clear rule is inappropriate:

i. Canadian Charter jurisprudence requires clashes of rights to be reconciled through accommodation on a case-by-case balancing basis;
ii. Canadian courts are not religion-free, neutral or secular spaces but spaces where there is respect for religious traditions;
iii. Canadian approaches to religious freedom claims involve respect for individual religious belief; and
iv. Canadian courts aspire to the ideal of neutrality in the law, meaning that the state will neither favour nor hinder any religious belief but limits expression only to an extent that is demonstrably justifiable: a total niqab ban must be justified on the basis of the public good.[19]

The self-congratulatory, self-contradictory and generally fatuous nature of these observations requires no further comment.

While LeBel and Rothstein JJ agreed that the matter be returned to the preliminary trial judge to decide, they provided, in a judgment written by LeBel J, a very clear direction that the claimant be required to remove her niqab prior to giving evidence on the grounds that the case is primarily about the

14 Ibid at para 33.
15 [1986] 1 SCR 103.
16 *R v NS* at paras 36–37.
17 Ibid at paras 38–43.
18 Ibid at para 45.
19 *R v NS* at paras 52–58.

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constitutional values of openness and religious neutrality in Canadian courts.[20] While emphasising how traumatic these cases can be for litigants and witnesses,[21] they placed greater emphasis on the adversarial nature of a criminal trial in the common law tradition, whose features form part of the constitutional right to a fair trial: the consequences of restricting the defendant's rights are more serious for the defendant, whose liberty is at stake, so that balancing should favour the defendant.[22]

LeBel J suggested that there were both practical and constitutional problems with the view of the majority. Practically, he was critical of the position that a right to wear a niqab might depend on the nature or importance of the evidence by pointing out that the complex and dynamic nature of a trial is unpredictable and that it is rarely clear at the outset what evidence might prove to be significant.[23] Constitutionally, he noted that the constitution requires openness to difference provided this is connected to the democratic roots of Canadian society. Open and independent courts are a core component of a democratic society and a trial is an act of communication with the public so that it can see how the administration of justice works. A niqab does not facilitate acts of communication; rather it prevents a witness from interacting fully with counsel, judge, jury and the parties. It is incompatible with the rights of the accused, the nature of public adversarial trials in Canada and the constitutional values of openness and religious neutrality. It shields the witness on the basis of an assertion of religious belief that is difficult to assess or even to question.[24] For LeBel J, a clear prohibition on wearing a niqab would protect these principles of openness and communication for and to the public in a democratic society.[25]

If LeBel J deflected the core issue in the case away from balancing religious freedom and trial fairness to the fundamental principles of the justice system, the dissenting opinion of Abella J, who did not favour returning the matter to the preliminary inquiry judge to decide, agreed that balancing rights was at issue, but emphasised the religious freedom of women to choose to wear a niqab while giving evidence. Removal of a niqab was said to interfere with religious freedom in a substantial manner[26] and accommodation was not a realistic possibility.[27] She adopted the low threshold of earlier cases in relation to establishing sincerity by limiting inquiries as far as possible and only to ensure that the claim is not an artifice. She was uncertain as to what evidence would show sincerity and dismissed past practice and the practices of co-religionists, given

20 Ibid at para 60.
21 Ibid at paras 64–66.
22 Ibid at para 68.
23 Ibid at para 69.
24 Ibid at paras 73–77.
25 Ibid at para 78.
26 Ibid at para 84.
27 Ibid at para 85.

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the spectrum of practice and belief within religions. She thought it unrealistic to assume a witness would wear a niqab to gain an advantage and pointed to the fact that NS had worn one for five years as a sign of sincerity.[28] She did not agree that strength of belief was relevant and thought that equation would risk re-entering inquiries into sincerity.[29]

Turning to the issue of trial fairness, Abella J conceded at the outset that seeing more of a facial expression is better than seeing less,[30] but regarded the general expectation of visibility to differ from a general rule that there always be visibility.[31] She noted that evidence is accepted from witnesses whose demeanour can only be partially observed because the witness may be deaf, does not understand the language of proceedings, is assisted by an interpreter or has physical or medical limitations affecting demeanour.[32] She further noted that demeanour is only one factor relating to credibility; others include powers of observation, judgment and memory and the ability to describe what has been heard or said.[33] She opined that a niqab is only a partial obstacle to the assessment of demeanour and has no effect on expression through eyes, body, gestures or tone of voice.[34] There is no ideal evidence from an ideal witness[35] and requiring NS to remove her niqab would be more harmful than not.[36] Several times, Abella J expressed the concern that perpetrators of these types of crimes would not be brought to justice if niqabs had to be removed to give evidence.[37]

R v NS presents a number of difficult yet recurring issues in clash of rights cases which challenge foundational principles of the common law and liberal democracy:

i. The role of sincerity in religious freedom cases;
ii. The role of proportionality tests in the accommodation of minority religious positions; and
iii. The role of the courts in relation to these clashes as neutral, open and secular spaces within society.

Since the adoption of sincerity as the threshold requirement for a freedom of religion claim under section 2(a) of the *Canadian Charter of Rights and Freedoms*, the role of that requirement has been uncertain. Chosen to reduce the likelihood

28 Ibid at para 88.
29 Ibid at para 89.
30 Ibid at paras 82, 91.
31 Ibid at para 92.
32 Ibid at paras 102–105.
33 Ibid at para 99.
34 Ibid at para 106.
35 Ibid at para 107.
36 Ibid at para 109.
37 Ibid at paras 94–95, 109.

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that courts would conduct overly searching inquiries into belief claims, an inquiry in which courts have been hesitant to engage for obvious reasons, sincerity remains problematic when a mere claim is sufficient to trigger the balancing of religion with some other right, whether it be contractual or property as in *Syndicat Northcrest v Amselem*, [38] the creation of a provincial photograph database as in *Alberta v Hutterian Brethren of Wilson Colony*, [39] the right to personal security as in *Multani v Commission scolaire Marguerite-Bourgeoys*[40] or a uniform religious education course in all schools as in *SL v Commission scolaire des Chênes*.[41] In the most recent section 2(a) case, *SL*, the SCC reduced the weight to be accorded to sincerity by adding a second requirement for a religious freedom claim that the claimant prove on the balance of probabilities that there would be a significant infringement of religious freedom as a result of enforcing the other right to be balanced. This dilution of the sincerity test left doubt as to how robustly it could function with this additional burden of proof on the claimant before a court would balance the other claim.

In *NS*, all three opinions accepted a sincerity test as a threshold requirement, but seemed to reduce it once more to a bare sincerity test. Both McLachlin CJC and Abella J criticised the preliminary inquiry judge's view that this involved strength of belief but offered only a bare sincerity requirement in its place. Can a belief that is not strongly held be a sincere belief? While strength and sincerity are conceptually distinct, strength is a factor in or an indicium of sincerity. Nevertheless, the apparent retreat from the second requirement of proving infringement is welcome because it reduces the onerous burden of proof placed on the complainant in *SL*. Once more a claim of sincerity is sufficient to engage the balancing of conflicting rights. In light of the fact that both McLachlin CJC and Abella J devoted greater consideration to the right to be balanced – of trial fairness – it may be wondered whether merely claiming a belief is, indeed, sufficient to proceed to the proportional assessment. If so, then in one sense *NS* is to be welcomed, but in another sense it might still be wondered if mere sincerity is strong enough to stand on its own when weighed in the balance. After *NS*, the scope, content and utility of mere sincerity remains uncertain.

The second issue is that of balancing conflicting rights that are essentially quite different in nature and ultimately irreconcilable. The test adopted by McLachlin CJC and Abella J of weighing salutary and deleterious effects is a relatively recent recension of the final part of the *Oakes* test in relation to legislation.

38 (2005) 241 DLR (4th) 1 (SCC). For a comment see M Ogilvie, 'And then there was one: freedom of religion in Canada – the incredible shrinking concept', (2008) 10 Eccl LJ 197–204.

39 2009 SCC 37. For a comment see M Ogilvie, 'The failure of proportionality tests to protect Christian minorities in Western democracies: *Alberta v Hutterian Brethren of Wilson Colony*', (2010) 12 Eccl LJ 208–214.

40 2006 SCC 6.

41 2012 SCC 7. For a comment see M Ogilvie, 'What's sincerity got to do with it? Freedom of religion in Canada', (2012) 14 Eccl LJ 417–425.

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The salutary/deleterious formulation is slightly baffling if it does not simply mean listing a few factors on each side of the balance and then choosing one. Like every proportionality test, it gives complete discretion to a court to decide what to consider, how to categorise it and how to weigh it in comparison. Such tests provide no clear guidance for trial judges and yield results that fail to be compelling or persuasive to reasonable people who may have different values from those of the judge. The administration of justice may suffer reputational damage as a result, especially where the outcome is not widely shared and approved by the population.

While McLachlin CJC and Abella J played the game of balancing irreconcilable rights, LeBel J offered a Gordian knot solution of focusing instead on the foundational values undergirding the criminal justice system and then comparing each conflicting right to those in order to decide which to enforce. There is much to be said for this approach. Not only are the values commensurate with liberal democracy – such as transparency and religious neutrality by a state actor, the courts – but they also transcend the intractable problem posed by a clash of rights that are incompatible and impossible to compare on a fair, transparent and unbiased basis, and in relation to which there may be no right answer. Moreover, the approach of LeBel J sustains values that have evolved through the exercise of judicial wisdom over a long period of time and represent values still widely shared in Western societies. Their adoption avoids the difficulty stemming from the analogies used by Abella J to justify permitting a niqab to be worn. A witness who is mentally or physically impaired in some way is not analogous to a woman who wishes to wear a niqab; a witness with a disability does not wish to have a disability that cannot be removed as simply as a niqab. Conversely, there are other situations where witnesses might also wish to hide their faces but are not permitted to do so, including those called to testify in cases concerned with organised crime, gangs or even other women who have laid sexual assault charges.[42] There is no denying the discomfort and stress testifying in these cases must cause but, to maintain a transparent justice system where the presumption of innocence is protected, open faces in open courts are required.

Permitting some witnesses to choose to hide their faces not only jeopardises the principle of transparency in the administration of justice but also brings into doubt the principle of equality under the law. The long-standing common law expectation that all witnesses are to be treated alike, although not mentioned in the case, is also worthy of protection. Where the law of the land is concerned, law replaces religion because all are subject to its rules, including those who voluntarily seek its assistance and those who may be subject compulsorily to its decisions. Where those rules are transparent, reasonable, tested over time

42 Several organisations widely regarded as radically feminist were interveners in the case on behalf of NS.

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and widely shared there can rarely be situations for their dislodgement. There is much to be said for the approach taken by LeBel and Rothstein JJ, and its future exploration in clash of rights cases might well result in replacing an approach that attempts to accommodate claims which are incompatible and ultimately irreconcilable by one that measures those claims against widely shared fundamental values of the legal system.

The third issue of the role of the courts in clashes of irreconcilable rights largely resolves itself in light of the foregoing. While there is a place for religious expression in pluralistic societies, the protection of that expression, which occasionally requires its limitation – for example, by permitting niqabs to be worn generally, with exceptional situations such as giving evidence, having photographs taken for state purposes, voting or receiving medical treatment – requires a referee who is above, beside and outside religions and who applies values that are widely although not always universally accepted. Should these values no longer be widely accepted, they will over time be replaced. In Western societies today, those values in relation to legal systems, the fruits of centuries of trial and error, include open courts, transparent rules, equality in the application of those rules, neutrality in adjudication and reasonable and transparent outcomes.

R v NS demonstrates once more the futility of tests of sincerity and proportionality in these types of cases. In relation to sincerity, the court appears to have retreated from the position it took earlier in the year in *SL* that sincerity involved not only its assertion but also proving that a significant infringement of a belief or practice would result from the defendant's position. Mere sincerity is again sufficient to claim section 2(a) protection but whether a mere assertion will weigh sufficiently heavily in the balance against other claims remains doubtful. The four-part proportionality test proposed in *NS* is not only complex and repetitive but is likely to be unpredictable and difficult to rationalise in its outcome especially where mere sincerity is the favoured result over other more secular and reasonable claims. The absolute protection of freedom of religion remains doubtful. Absolute religious freedom claims will always be subject to limitation, as they should be in a liberal democracy. Furthermore, such a complex test casts doubt on the administration of justice generally and places a heavy burden on trial judges, legally as well as socially, whose decisions remain subject to appeal.

However, the question remains of whether any of this was really necessary. *NS* is not like any of the previous Charter clash of rights cases. Although framed at the level of the individual protagonists as a clash between religious freedom and trial fairness, it was also a case that directly challenged how the common law has understood and arranged judicial decision-making for almost a millennium: witnesses should not be permitted to give evidence from behind a mask or a veil. Common law countries do not permit concealed faces generally except for children at Hallowe'en, or at private parties. By comparison, *Amselem* and *Multani* were about clashes of rights asserted by individuals, while *Wilson Colony* and

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SL were about clashes between individuals and the state. But the individual claim to trial fairness in *NS* necessarily brings other broader matters into play concerning the administration of justice generally. It also raises the question of whether the approach demonstrated in the judgment of LeBel J of identifying fundamental principles of the common law at stake could not also be adapted to cases involving clashes of rights between private individuals and/or state actors. In *Amselem*, for example, greater consideration might have been given to how contract and property rights are at the heart of liberal democracy. In *Multani*, greater consideration might have been given to the principle that hidden knives, no matter how sacred, constitute a danger to public safety, particularly when available to young men. In *Wilson Colony*, greater consideration might have been given to whether it is appropriate in a liberal democracy for the state to compel photographs from every person. In *SL*, the role of parents and religious institutions in the upbringing of their own children might have been privileged over the state in teaching about religious and moral values.

In each of these cases, no matter how different their facts or the individual rights at issue, fundamental questions lurk just below the surface of individual rights claims, challenging the courts to think more deeply about the foundational values of liberal democracy, which it is their duty to sustain and uphold. Identification of those values and their application to the facts might well have resulted in different outcomes, which on the surface might be interpreted as discrimination against minority religious groups, but which might also have sustained the underlying values of Canadian society on which these groups' political, civil and religious rights to full participation in Canadian society rest, with a few, borderline expression limitations in the larger public good a feature that they share with all other persons and institutions in society.

The Charter was originally said to protect individuals from an overreaching state. Implicit in this vision is the protection of those things that individuals need to flourish according to their own decisions, including physical security of the person, property and contractual rights, freedom from state compelled religious views and freedom from an overreaching state generally. It is difficult to conclude from the most recent group of section 2(a) cases that the SCC understands this: the court has stood behind state actors in *Multani*, *Wilson Colony* and *SL* and in *Amselen* defeated the private rights required for individual flourishing. By supporting the enlargement of the state over individuals, in the name of the Charter, the SCC is putting liberal democracy – and the values it represents, such as individual freedom, transparent justice and the rule of law – at risk. *NS* also puts equality under the law at risk, leaving doubts as to whether the SCC is equal to the task of upholding the fundamentals of Canadian statehood.

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