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Faisal Bhabha

Osgoode Hall Law School of York University, fbhabha@osgoode.yorku.ca

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**R. v. N.S.: WHAT IS FAIR IN A TRIAL?
THE SUPREME COURT OF CANADA'S DIVIDED OPINION
ON THE NIQAB IN THE COURTROOM**

FAISAL BHABHA*

I. INTRODUCTION

In 2008, a woman entered an Ontario courtroom to give evidence at a preliminary inquiry involving childhood sexual assault charges against her uncle and cousin. She sought to testify while wearing a niqab, a garment that conceals the entire head and face, leaving only an opening for the eyes.¹ The Court was asked to decide the novel question of whether it could accommodate the Muslim veil in a justice system that provides the accused with a right to face his accuser. The Supreme Court of Canada divided three ways, with justices disagreeing deeply both about the analysis for determining whether to permit a witness to wear the niqab and the values and interests at play in the analysis.

While the majority judgment endorsed a variety of commitments to fundamental constitutional principles, it left unresolved tension in the articulation of essential components of trial fairness. Framed as a collision between equally important *Canadian Charter of Rights and Freedoms*² rights, the majority's effort at reconciliation and balancing paired rhetorical guarantees of substantive equality and respect for difference and multiculturalism with vanishing results for members of a marginalized social group — in this case, veiled Muslim women. The likely adverse impact of the judgment on this group will only confirm the aphorism that hard cases make bad law, and highlights the need for constitutional soul-searching to realign constitutional aspirations of equality with social realities.

II. CASE HISTORY

R. v. N.S. originated as a procedural decision in a criminal preliminary inquiry. The charges involved two men accused of historical sexual assault against a female relative. The alleged abuse occurred between 1982 and 1987, beginning when the complainant was six years old. As a teenager, she revealed the allegations to a high school teacher, but parental reluctance held police back from laying charges. It was not until 2007 that N.S., now an adult in her 30s, was able to lay a complaint and to proceed with charges in a prosecution in which she would be the principal witness.

* Assistant Professor, Osgoode Hall Law School of York University. The author acted as counsel to one of the intervenors in *R v NS*, 2012 SCC 72, 290 CCC (3d). The opinions expressed herein are entirely his own. He thanks numerous individuals for constructive conversations, including Benjamin Berger, Sonia Lawrence, Bruce Ryder, Mihad Fahmy, Julia Williams, Fahad Siddiqui, Sharifa Khan, Nader Hasan, Ranjan Agarwal, Mayya Mukhamedyarova, Fathima Cader, and Diana Younes.

¹ *R v NS*, 2012 SCC 72, 290 CCC (3d) at paras 1, 4 [NS]. The niqab is contested amongst Muslims. For some, it is believed to be a firm religious requirement; for others, it is a careful way to conform to a strict Islamic rule of modesty in dress. For still many more, it is variously viewed as an unnecessary burden, an anti-social affront, misguided asceticism, or a proclamation of fanaticism.

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

As is common in sexual assault trials, the complainant's credibility as victim would be critical to securing a conviction. But how would a trier of fact determine the credibility of the alleged victim as a witness if her face were not fully exposed? How would defence counsel be able to adequately test and press her evidence through cross-examination if she were to have the advantage of concealing her expressions from the Court's gaze? These questions were raised as a challenge to N.S.'s assertion that her constitutional right to religious freedom assures accommodation of the niqab.

The accuseds objected to N.S.'s attire, asking the preliminary inquiry judge for an order to require her to remove her niqab to testify. They claimed that their statutory right to cross-examine the witness was unfairly restricted and that any obstruction to counsel's ability to effectively challenge the witness would improperly derogate from the constitutional right to make full answer and defence. Further, they argued the possibility of imprisonment raised a constitutional liberty interest, which should only be suspended in accordance with principles of fundamental justice. The defence submitted that a witness's religious preferences, however sincere, could not meet the test of fundamental justice if it leads to a deprivation of liberty. Nothing short of "face-to-face" confrontation would satisfy the state's constitutional obligations to the accused.

Addressing the preliminary inquiry judge without counsel, N.S. explained that she was a devout Muslim who adopted the niqab as a form of religious practice, complying with a faith-based conviction.³ She stated that the niqab was a core tenet of her belief system and personal identity.⁴ She declared that she would be uncomfortable with removing the veil in an open courtroom that was, by her description, "full of men."⁵ She further highlighted the fact that the accuseds were both members of her community and of her family; they even attended the same mosque as her husband.⁶ Removing the veil in such circumstances, she stated, would put her in a position of dishonour within the value system of her religious-cultural community, of which the accuseds were also members. She disagreed with defence counsel that exposing her face would add any evidentiary value — "it's not going to help, it really won't," she declared.⁷ She reassured the Court that defence counsel would have ample opportunity to read her body language and have direct eye contact during cross-examination.

The preliminary inquiry judge administered a form of the *Amselem* test, the Supreme Court's lead precedent regarding religious accommodation, which requires the claimant to establish a sincerely-held religious belief.⁸ The judge found that N.S. had not established a sufficiently "strong" belief because she admitted to having previously removed her niqab to

³ *R v NS*, 2010 ONCA 670 at paras 3-6, 262 CCC (3d) [NS, ONCA]. It is worth noting that at the preliminary inquiry, NS's comments with respect to the sincerity of her religious belief and the impact of removing the niqab were given unsworn, as the judge refused to administer the oath to the witness while wearing her niqab.

⁴ See Natasha Bakht, "Objection, Your Honour! Accommodating *Niqab*-Wearing Women in Courtrooms" in Ralph Grillo et al, eds, *Legal Practice and Cultural Diversity* (Farnham, Surrey: Ashgate, 2009) 115 at 116 citing a variety of factors that may motivate women to adopt different forms of Islamic veil, including hijab or niqab.

⁵ Transcript of preliminary inquiry, quoted in NS, ONCA, *supra* note 3 at para 5.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551 [*Amselem*].

be photographed for a driver's licence by a female official.⁹ She had also stated that she would, on request, remove her niqab for identification purposes at international border crossings.

On appeal at the Ontario Superior Court of Justice, Justice Frank Marrocco rejected the preliminary inquiry judge's approach and reaffirmed the *Amselem* "subjective sincerity test," which requires evidence about the sincerity of the conviction, not the consistency of the claimant's conduct.¹⁰ The Court held that "where an application is made to require a witness to remove her niqab, the court must enquire into the reason for the wearing of the niqab and the genuineness of any religious belief relied on to explain the wearing of the niqab."¹¹ Quashing the preliminary inquiry judge's order requiring that N.S. testify without a niqab, the matter was remitted to the preliminary inquiry judge for redetermination.

On appeal to the Court of Appeal for Ontario, the Court considered the various aspects of the case and sought to set out a framework for balancing the competing rights of a witness to religious freedom with those of the accused to a fair trial. Justice Doherty, writing for the panel, framed the issue at the very outset of his judgment as "an apparent conflict between the constitutional rights of a witness in a criminal proceeding and the constitutional rights of the accused in that same proceeding."¹² This framing recognized the presumptive interest for a woman who wears the niqab to be accommodated while testifying. However, it also took as a given that a witness testifying in a niqab would raise concerns about the fairness of the trial.

Although the decision of the Court of Appeal affirmed that the niqab engaged constitutional rights and triggered the duty to accommodate, N.S. appealed. The Court's balancing test, framed to resolve the "conflict" between two opposed sets of interests and rights (trial fairness versus religious freedom), had dominated the appellate Court's decision and left N.S. subject to the substantial discretion of the criminal court judge. She would be expected to explain and defend her religious attire in a pre-trial hearing before being permitted to testify. Instead, she sought an outright recognition of a right to testify in a niqab.

The case captured the public's attention as it worked its way through the legal system. The issue dovetailed with polarized public discourse around multiculturalism, immigration, and the scope of public tolerance.¹³ Five intervenors had appeared before the Court of Appeal, representing groups concerned with the rights of the criminally accused,¹⁴ the interests of

⁹ *NS*, ONCA, *supra* note 3 at paras 6-7.

¹⁰ *R v NS* (2009), 95 OR (3d) 735 at paras 92-97 [*NS*, ONSC]. See also *NS*, *supra* note 1 at paras 11-13 (per McLachlin, CJ): "The preliminary inquiry judge failed to conduct an adequate inquiry into whether N.S.'s refusal to remove her niqab was based on a sincere religious belief."

¹¹ *NS*, ONCA, *supra* note 3 at para 13, referring to *N.S.*, ONSC, *ibid* at paras 88-101.

¹² *NS*, ONCA, *ibid* at para 1.

¹³ See e.g. Sheema Khan, "Hate it if you want, but don't ban the niqab," *The Globe and Mail* (14 December 2011), online: The Globe and Mail <<http://www.theglobeandmail.com/commentary/hate-it-if-you-want-but-dont-ban-the-niqab/article4180899>> warning of the danger of banning unpopular minority opinions and practices, especially where it exacerbates social exclusion. For a contrary, contemporaneous view, see Barbara Kay, "Feminists back women as possessions in Supreme Court case," *The National Post* (9 December 2011), online: The National Post <<http://www.fullcomment.nationalpost.com/2011/12/09/barbara-kay-feminists-back-women-as-posessions-in-supreme-court-case/>> warning of the danger of mixing religion and state, and of allowing "multicultural correctness" to turn a blind eye to symbols of inequality.

¹⁴ Criminal Lawyers' Association.

sexual assault victims,¹⁵ individual expressive freedoms,¹⁶ and competing approaches to equality,¹⁷ amongst others. Nine were granted leave to make written submissions to the Supreme Court,¹⁸ and three were also permitted time for oral argument.

III. JUDGMENT AT THE SUPREME COURT

The majority judgment, penned by Chief Justice McLachlin and endorsed by three others of the seven-member panel (Justices Deschamps, Fish, and Cromwell), seized the middle ground between the diametrically opposed minority judgment of Justice LeBel (joined by Justice Rothstein) and Justice Abella's solo dissent.¹⁹ The majority judgment built on Justice Doherty's proportionality approach, articulating a framework for trial judges to use when deciding whether to allow a witness to testify in a niqab. The framework is comprised of four sequential 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?
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?²⁰

Under the first question, the inquiry incorporated the *Amselem* test. The claimant bears the onus of establishing a sincere belief in a requirement to wear the niqab. Sincerity is not compromised by lapsed practices or inconsistent observance. The Court resisted any invitation to engage in evaluating or assessing a claimant's correctness of religious observance, or the substantive coherence of religious lifestyle choices. Implicitly recognizing that many religious people face tough choices all the time in secular society and routinely strike compromises between their personal convictions and social realities, the Court refused to allow past practice to define a claimant's sincerity of belief.²¹ On the facts of the *N.S.* case, the Court could have ended the analysis at this point and remitted the matter to the preliminary inquiry judge to re-determine the issue. But in the interest of articulating a

¹⁵ Women's Legal and Education Action Fund (LEAF).

¹⁶ The Canadian Civil Liberties Association (CCLA).

¹⁷ Ontario Human Rights Commission and the Muslim Canadian Congress. These two intervenors took opposing views: the former highlighted the importance of accommodation and respect for religious choices to promoting an inclusive society; the latter highlighted the oppressive nature of the niqab and encouraged a ban to liberate Muslim women from patriarchal cultural practices.

¹⁸ In addition to the five intervenors at the Court of Appeal, Supreme Court intervenors included the Barbra Schlifer Commemorative Clinic, South Asian Legal Clinic of Ontario (SALCO), Canadian Council on American-Islamic Relations (CAIR-CAN) and the Barreau du Québec.

¹⁹ *NS*, *supra* note 1 at para 2 (per McLachlin CJ): "A secular response that requires witnesses to park their religion at the courtroom door is inconsistent with the jurisprudence and Canadian tradition, and limits freedom of religion where no limit can be justified. On the other hand, a response that says a witness can always testify with her face covered may render a trial unfair and lead to wrongful conviction."

²⁰ *NS*, *ibid* at para 9.

²¹ *Ibid* at para 13.

judicial approach to the broader issue of conflicting rights, the Court proceeded to explain the subsequent questions to explore.

The second issue was whether the niqab posed a threat to trial fairness. The majority highlighted two main components of the multilayered constitutional right to a fair trial. First was the need for meaningful cross-examination, coupled with the importance of effective credibility assessment. Chief Justice McLachlin was persuaded that the niqab posed a presumptive obstruction to trial fairness because it prevents the accused, counsel, and the court from viewing the witness's face during cross-examination.²² Rolled into this presumption of obstruction was the idea that any limit on accessing demeanour evidence compromises both the effectiveness of the cross-examination and the ability of the trier of fact to assess credibility.²³

Having set up the conflict of rights with the first two questions, the next question was to ask whether the conflict could be resolved through accommodation or compromise. In order to make this determination, the Court held that the parties should adduce evidence outlining possible options that might yield a solution that respects both the witness's religious freedom and the accused's right to a fair trial.²⁴ Only if this aversion of conflict, or "accommodation,"²⁵ is impossible should the judge then move to the final question, which involves a careful balancing of interests.

Upon reaching the balancing stage, trial judges were directed to determine whether the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of allowing her to wear it. This test is lifted from the Supreme Court's section 1 jurisprudence dealing with justifying government incursions on *Charter* rights.²⁶ Justification of a rights breach requires reasoning, and for at least the past 20 years, Canadian courts have employed the proportionality inquiry.²⁷ Proportionality, or justificatory analysis, was likely considered appropriate here because, regardless of how the niqab question will be resolved in any particular case, the impact would necessarily be interpreted as a limitation of one party or the other's *Charter* right.

Looking at the deleterious effects of limiting a *Charter* right, the Court described two levels of potential harm. The first involved the direct and personal impact on the affected individual, which necessitates considering both subjective and objective factors, such as the "value of adherence to a religious conviction," the importance of the "practice to the claimant," and the "degree of state interference with the religious practice."²⁸ The second level of inquiry involved considering the "broader societal harms of requiring a witness to remove the niqab in order to testify."²⁹ This latter inquiry focused not on the individual impact that accompanies a court order to unveil, but the wider consequences of discouraging

²² *Ibid* at paras 20-21, acknowledging that the evidentiary "record sheds little light on the question of whether seeing a witness's face is important to effective cross-examination and credibility assessment and hence to trial fairness."

²³ *Ibid* at paras 25-27.

²⁴ *Ibid* at paras 30-33.

²⁵ *Ibid* at para 32.

²⁶ See *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].

²⁷ *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 878 [*Dagenais*].

²⁸ *NS*, *supra* note 1 at para 36.

²⁹ *Ibid* at para 37.

potential complainants and witnesses from reporting offences, pursuing prosecution, or participating in the justice system.³⁰ This factor would be especially concerned with consequences for sex crime prosecutions, described by the Court as being “vigorously pursued” by the justice system in recent decades.³¹

Turning to salutary effects, the majority characterized the primary benefits of forcing a witness to remove her niqab as “preventing harm to the fair trial interest of the accused and safeguarding the repute of the administration of justice.”³² Because the niqab imposes a “severe” cost on the individual’s right to “effective cross-examination and credibility assessment,”³³ its restriction would, under this analysis, often be necessary to protect trial fairness. Indeed, for the majority, the more important the witness’s evidence to the trial, the less likely that she would be permitted to testify in a niqab. The majority did not, however, go so far as to create an absolute ban on niqabs. The judgment noted that it is only justifiable to compel the removal of the niqab where the risk to trial fairness is, as the Court stated in *Dagenais*, “real and substantial.”³⁴ An absolute ban would capture witnesses whose testimony would not pose such danger to trial fairness. Chief Justice McLachlin pointed out that “uncontested and uncontroversial evidence does not engage the fair trial interest.”³⁵ Indeed, this would likely be the *only* type of evidence from behind a niqab that would not imperil a fair trial.

The result of the majority’s reasoning is that where the proceeding involves high stakes (such as the potential of imprisonment for the accused) and where the witness’s evidence is critical and contested (as in most sexual assault prosecutions), a woman in a niqab will almost certainly be required to expose her face for cross-examination.³⁶ The majority further rejected certain exceptions that the Court of Appeal had endorsed. For instance, Chief Justice McLachlin was sceptical of the suggestion that the harm to trial fairness would be diminished in a trial before a judge alone (as compared to a judge and jury). She was doubtful that a judge would be able to predict whether the niqab would interfere with credibility assessments at trial based solely on inquiries into the witness’s religious freedom claim in the setting of a preliminary inquiry.³⁷ Similarly, she was not convinced that, in a jury trial, a judge’s curative instruction could mitigate any harm caused by a witness’s niqab.³⁸ The result of the majority judgment is a proportionality test that creates a *de facto* rule that women complainants in sexual assault cases must unveil to testify for the prosecution.

³⁰ *Ibid* at para 37.

³¹ *Ibid*. This argument was emphasized in the intervenor submissions of the Barbra Shlifer Commemorative Clinic and the South Asian Legal Clinic of Ontario (SALCO).

³² *NS*, *ibid* at para 38.

³³ *Ibid* at para 38.

³⁴ *Ibid* at para 28, citing *Dagenais*, *supra* note 27 at 878, in which the Court stated that any risk to trial fairness must be “real and substantial.”

³⁵ *NS*, *supra* note 1 at para 56.

³⁶ On 24 April 2013, Justice Weisman of the Ontario Court of Justice applied the majority judgment to decide whether to permit N.S. to testify in niqab and concluded: “Having followed the directions of the Supreme Court on this *voir dire*, I find that I am obliged to require N.S. to remove her niqab while testifying at the preliminary inquiry” (*The Queen v M-d S and M-l S* (24 April 2013) (Ont Ct J)).

³⁷ *NS*, *supra* note 1 at para 41.

³⁸ *Ibid*, at para 42.

IV. MINORITY AND DISSENT

The minority judgment of Justices LeBel and Rothstein reached the same outcome as the majority, but adopted a very different analysis. In particular, the minority justices rejected the majority's acceptance of the principle that a witness should be permitted to testify in a niqab, subject to a case-by-case proportionality exercise. For Justice LeBel, only a "clear rule"³⁹ could provide the necessary constitutional assurances of trial fairness.⁴⁰ From this perspective, the balancing of interests was settled: legal tradition regarding participation in the trial process was sufficiently tied to foundational common law and constitutional values that the niqab should never be accommodated.⁴¹ Conditioning the respect for differences on the "preserv[ation] of common values of Canadian society," Justice LeBel identified a "core common value" of open-faced communication.⁴² By this logic: "A clear rule that niqabs may not be worn would be consistent with the principle of openness of the trial process and would safeguard the integrity of that process as one of communication."⁴³

Justice Abella took the opposite position, refusing to concede that the niqab is, presumptively, an obstruction to a fair trial and rejecting the idea of a ban, whether explicit or de facto. She relied on a variety of sources, highlighted by many of the intervenors and mostly ignored by the majority, which cast doubt on the value of demeanour evidence.⁴⁴ She further noted that if a "rule" of open-faced examination exists, it is subject to routine exceptions. She cited examples of courts that "regularly accept the testimony of witnesses whose demeanour can only be partially observed."⁴⁵ These included witnesses who cannot hear,⁴⁶ who require the use of a language interpreter,⁴⁷ who have physical or mental disabilities which impact their cognitive or expressive functions,⁴⁸ who are children,⁴⁹ or who are not able to be present and instead give evidence by telephone.⁵⁰ Invoking the Court's reasoning in *R. v. Mills* that trial fairness must account for more than just the accused's best interests, but also the "view of fairness in the eyes of the community and the complainant,"⁵¹ Justice Abella encouraged a deeper enquiry into what fairness owes those with personal characteristics that require special consideration. She concluded that "trial fairness cannot reasonably expect ideal testimony from an ideal witness in every case."⁵²

³⁹ *Ibid* at para 78

⁴⁰ *Ibid* at para 69 (per LeBel J): "[T]he niqab should be allowed either in all cases or not at all ... a clear rule should be chosen."

⁴¹ *Ibid* at para 67 (per LeBel J): "[T]he Canadian criminal trial process remains faithful in its core aspects to an adversarial model. This process developed in the common law. Some of its features are now part of the constitutional order.... This model of justice imposes a significant personal burden on witnesses and parties. This burden cannot be lifted entirely."

⁴² *Ibid* at paras 70-71.

⁴³ *Ibid* at para 78.

⁴⁴ *Ibid* at paras 98-108.

⁴⁵ *Ibid* at para 102. The minority justices accepted that exceptions are warranted in some cases, but rejected an exceptionalism approach in this case (at para 75).

⁴⁶ *Ibid* at para 102.

⁴⁷ *Ibid* at para 92.

⁴⁸ *Ibid* at para 103. Justice LeBel drew a distinction between people with physical disabilities that impair communication and a woman in niqab. For the disabled, the accommodation will be an assistive mechanism that promotes their communication, while the niqab "does not facilitate acts of communication" (at para 77). The logic of this argument, of course, fails to explain how a ban on the niqab promotes communication when it will have the effect of silencing many women who would otherwise testify.

⁴⁹ *Ibid* at para 92, citing the use of screens for children.

⁵⁰ *Ibid* at para 104.

⁵¹ *Ibid* at para 95, citing *R v Mills*, [1999] 3 SCR 668 at para 72.

⁵² *NS, ibid* at para 107.

V. THE JUDGMENT: OPINION AND IMPACT

No doubt, opinions about the Court's ruling in *N.S.* are as diverse as the competing viewpoints at play in the judgments. It is rare for the Court to be so divided.⁵³ From the perspective of conventional rights analysis, the majority's approach reflected the dominant jurisprudential trend.⁵⁴ Indeed, virtually all of the judicial analysis at all levels of court assumed that the case should be analyzed as a "conflict" of rights requiring "balancing." The conflict was framed as freedom of religion versus trial fairness. The freedom of religion claim was grounded in multiculturalist values, while the trial fairness argument was rooted in the values of the adversarial system. Two important "justice" causes — the protection of minorities and the protection of the criminally accused — were at odds in this logic. Because both sides' claims were just, but pitted the interests of two vulnerable individuals in conflict, the case presented a classic dilemma.

N.S.'s claim did not dispute the importance of the accused's right to a fair trial, but rather questioned the particular threat that the niqab could actually pose to the accused's constitutional trial rights, including the presumption of innocence and right not to be unjustly deprived of liberty. This challenge required the Court to consider the logic and evidentiary basis for constitutionalizing specific forms of courtroom practice, such as open-faced cross-examination. The Court did not find any evidence to support the assumption that the ability to see a witness's entire face is necessary for effective cross-examination or credibility assessment,⁵⁵ nor did it hear any evidence to support the contrary assertion.⁵⁶ All the Court had to rely on was the "common law assumption" that witnesses in criminal courts are expected to testify "with their faces visible to counsel, the judge and the jury."⁵⁷ For the majority, this "ancient and persistent connection"⁵⁸ between open-faced testimony and a fair trial would prevail, absent evidence to refute the "long-standing assumptions of the common law regarding the importance of a witness's facial expressions to cross-examination and credibility assessment."⁵⁹

The second formulation of trial fairness in the majority's judgment emphasized systemic and institutional integrity. This view concentrated on public interest considerations and

⁵³ Kirk Makin, "Changes coming fast for Supreme Court" *The Globe and Mail* (29 March 2013), online: *The Globe and Mail* <<http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/changes-coming-fast-for-supreme-court/article10585748/>>: "Of the 66 substantial decisions it rendered last year [2012], the court spoke unanimously in 65 per cent of the cases."

⁵⁴ See *Oakes*, *supra* note 26.

⁵⁵ *NS*, *supra* note 1 at para 17 (per McLachlin CJ): "We have no expert evidence in this case on the importance of seeing a witness's face to effective cross-examination and accurate assessment of a witness's credibility. All we have are arguments and several legal and social science articles submitted by the parties as authorities."

⁵⁶ *Ibid* at paras 20-21.

⁵⁷ *Ibid* at paras 21-22. The experience of the United States is instructive, as this issue has arisen under the Sixth Amendment of its Constitution, which expressly links the right "to be confronted with the witnesses against him" to the right to a fair trial (US Const amend VI). Justice Antonin Scalia of the Supreme Court of the United States, a fervent originalist interpreter of the US constitution, has described the defendant's right to a "face-to-face" confrontation with witnesses as a constitutional custom "that traces back to the beginnings of Western legal culture" (*Coy v Iowa*, 487 US 1012 at 1015-19 (1988)), writing for a 6-3 majority. In a subsequent decision, the Court reversed, splitting 5-4, with Justice Sandra Day O'Connor writing that face-to-face confrontation is an important but not "indispensable element" of the confrontation right (*Maryland v Craig*, 497 US 836 at 837 (1990)).

⁵⁸ *NS*, *ibid* at para 31.

⁵⁹ *Ibid* at para 22.

prioritized the maintenance of confidence in the criminal justice system as a whole.⁶⁰ Yet, the majority's consideration of the public interest was remarkably narrow, focussing 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' 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. The judgment similarly neglected to analyze what fairness might mean in different cultural contexts or how blind spots about the impact of "neutral" rules could contribute to systemic social exclusion.

For those concerned with the sex equality and social diversity implications of the decision, the effect of the majority's balancing test (and of the minority's ban) will be seen to shift the state's constitutional burden of providing a fair trial onto the niqab-wearing witness. The witness must now choose whether to break a religious conviction in order to deliver a fair trial to the accused, knowing that the more central her evidence is to the likelihood of conviction, the less likely she is to be permitted to testify in niqab. If she chooses not to testify, the state will be faced with a choice: either it abandons the prosecution due to lack of evidence, or it asks the court to compel the witness to give her evidence unveiled. This last option lies at the bottom of the slippery slope of state intrusion into personal expression. Forced removal of witnesses' niqabs would have both liberty and dignity limiting effects, with heightened adverse impact because it would primarily affect vulnerable minorities. Perhaps the most cross-purpose outcome is the scenario of an accused woman unable to testify in her own defence, or in someone else's, on account of the niqab.⁶¹

Although the majority were prepared to tolerate some uncomfortable outcomes in the interest of preserving tried and tested practices, they rejected the minority's call for an outright ban on niqabs. Yet, despite citing values of diversity, inclusion, and access to justice, the majority's analytical framework leads to the inevitable result that women like N.S. will find themselves outside of *Charter* protection. This outcome roused Justice Abella, who noted the logical disjuncture between the stated *Charter* values and the necessary implications of the majority judgment:

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.⁶²

If the judgment represented a clear victory for trial fairness it might perhaps have been celebrated. However, it remains unclear from the majority judgment what trial fairness means beyond its discomfort with the niqab. While courts have generally taken witnesses as they are, this case makes state interference in intimate personal characteristics a matter of trial judge discretion. The majority agreed unquestioningly that "more is better" when it comes

⁶⁰ *Ibid* at para 38, emphasizing the importance of preserving "public confidence in the justice system."

⁶¹ *Ibid* at para 109. Justice Abella highlighted this point.

⁶² *Ibid* at para 96. See *supra* note 31 citing Justice Weisman's April 2013 order that NS remove her niqab to testify.

to exposing the face.⁶³ But is the “most” physical exposure the “best” condition for cross-examination? If so, is the “best” form of cross-examination the standard required for constitutional compliance? If so, why stop at removing niqabs?

The justification for enforcing a strict rule (or narrow test) against the niqab was wrapped in commitments to constitutional values. Meanwhile, N.S. lacked the evidence to rebut the presumptions of established courtroom practice. Given the legal system’s preference for precedent, the status quo shifts languidly if at all. It is thus noteworthy that all of the justices appear to have agreed with the principle that even strict rules regarding trial fairness require flexibility.⁶⁴ Such flexibility not only helps to mitigate for individual variation and different needs, but also to correct the trajectory of institutional inertia. The numerous exceptions to conventional courtroom rules, emphasized by many intervenors and highlighted in Justice Abella’s judgment, suggested that trial fairness has long been an elastic concept, moulding to real-world circumstances and accommodating novel needs.

Examples of rule flexibility may be presented as derogation, but they can also represent principled and necessary modifications to the institutional modes of administering justice. Accommodation doctrine is derived from normative commitments to equality, and is enshrined in the *Charter* as part of section 15.⁶⁵ Even when section 15 is not explicitly invoked, accommodation analysis always raises themes of substantive equality. For example, the fact that the justice system enables individuals to give testimony through assistive devices or with the help of a sign or language interpreter is integral to achieving the goals of the justice system.⁶⁶ These measures become necessary norms to facilitate the goals of open justice, but also to remove barriers to equal participation.⁶⁷ Accommodation can promote the public interests of communication, inclusion, and participation in the administration of justice, while also enhancing the dignity interest of the affected individuals.⁶⁸ Justice Abella noted the link between the denial of accommodation and its discriminatory impact:

As a result, as the majority notes, complainants who sincerely believe that their religion requires them to wear the niqab in public, may choose not to bring charges for crimes they allege have been committed against them, or, more generally, may resist being a witness in someone else’s trial. It is worth pointing out as well that where the witness is the accused, she will be unable to give evidence in her own defence. *To those affected, this is like hanging a sign over the courtroom door saying “Religious minorities not welcome.”*⁶⁹

⁶³ Even Justice Abella in her dissent, stated: “I concede without reservation that seeing more of a witness’ facial expressions is better than seeing less. What I am not willing to concede, however, is that seeing less is so impairing of a judge’s or an accused’s ability to assess the credibility of a witness, that the complainant will have to choose between her religious rights and her ability to bear witness against an alleged aggressor” (*NS, ibid* at para 82).

⁶⁴ Even the minority justices, who supported a clear ban on the niqab, recognized the need for accommodation in some instance to facilitate “access to justice” for people with disabilities. See *NS, ibid* at para 77.

⁶⁵ *Supra* note 2, s 15.

⁶⁶ *NS, supra* note 1 at para 92.

⁶⁷ See e.g. *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 (concerning the adverse effects discrimination caused by a hospital’s failure to provide sign language interpretation).

⁶⁸ The minority judgment focused on the goal of “communication,” viewing the niqab as an obstacle. See *NS, supra* note 1 at para 78. The minority justices might have considered the obstacle to be the rule against the niqab. From this perspective, if communication is the goal, then it logically follows that measures that enable witnesses to approach and address the court are preferable to those which do not.

⁶⁹ *Ibid* at para 94 [emphasis added].

VI. CONCLUSION

In many respects, the *N.S.* case put the criminal trial system itself on trial. Could conventional standards of justice be met while modifying traditional courtroom practices? This was certainly not the first time the Court was called upon to examine traditional norms in the face of evolving social pressures. In Chief Justice McLachlin's opus on accommodation, *British Columbia (Public Service Employee Relations Commission v. BCGSEU)*, the Court rejected a workplace physical standard that adversely affected the female claimant because it bore only tenuous connection to the desired outcome of workplace efficiency and safety.⁷⁰ The Court required more than impressions from past practice to justify a standard that excluded the claimant from employment. Evidence of actual risk or harm to a legitimate specific objective had to be shown. In *N.S.*, the Court acknowledged that there was no evidence of any harm to trial fairness caused by a partially covered face. Demeanour was not proven to be essential to cross-examination or credibility assessment, despite being a longstanding customary practice. Notwithstanding this dearth of evidence, the Court was not persuaded to follow its doctrine of bending neutral rules when they have exclusionary effects.

It is tempting to view *N.S.* as a singular case. As much as it attracts an accommodation analysis, the implications of constitutionalizing the niqab generated concern for some about undermining fundamental civic values. Indeed, just days after the Supreme Court heard oral argument in the case, the Minister of Citizenship, Immigration and Multiculturalism issued an operational bulletin outlining a new requirement that individuals taking the citizenship oath must expose their faces.⁷¹ In public remarks, Minister Jason Kenney addressed women in niqab directly: "All we ask of you is to fulfil the requirements of citizenship and that you swear an oath before your fellow citizens that you will be loyal to our traditions that go back centuries."⁷² The Minister emphasized that an open-faced oath was more than a technical requirement and that it goes to the heart of our collective identity: "It is a public declaration that you are joining the Canadian family, and it must be taken freely and openly—not with faces hidden."⁷³ A similar conception of citizenship motivated the introduction of Bill 94 in the Quebec National Assembly.⁷⁴ This law requires women in niqab to unveil in order to receive a wide range of government services. Not surprisingly, both the Quebec legislation

⁷⁰ [1999] 3 SCR 3. Referring to standards and accommodation, Chief Justice McLachlin wrote for a unanimous Court: "Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards" (*ibid* at para 68).

⁷¹ Citizenship and Immigration Canada, Operational Bulletin 359, "Requirements for candidates to be seen taking the Oath of Citizenship at a ceremony and procedures for candidates with full or partial face coverings" (12 December 2011), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob359.asp>>. The bulletin provides: "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."

⁷² Speaking notes for The Honourable Jason Kenney, PC, MP, Minister of Citizenship, Immigration and Multiculturalism, "On the value of Canadian citizenship" (Montreal, Quebec: 12 December 2011), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/departement/media/speeches/2011/2011-12-12.asp>>.

⁷³ *Ibid.*

⁷⁴ Bill 94, *An Act to establish guidelines governing accommodation requests within the Administration and certain institutions*, 2nd Sess, 39th Parl, 2011.

and Minister Kenney's bulletin garnered significant public attention and fuelled a spirited debate.

The immediate impact of the *N.S.* decision is narrow: few women in Canada currently wear the niqab and a small minority of them can be expected to encounter the criminal justice system. But how related and emerging questions might be answered will depend on a host of political and other factors, including the substantial renewal of the bench already underway at the Supreme Court.⁷⁵ The minority judgment, endorsed by two justices in the twilight of their tenure, provided a constitutional justification for an absolute ban on niqabs in the courtroom. Their reasoning would lend support to those making legal arguments to extend a niqab ban to citizenship ceremonies and other public services. But the 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 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 *N.S.* Governments wishing to restrict the wearing of the niqab in accordance with proportionality will need evidence establishing a real and clear danger to a more important interest. Whether the governments of Canada or Quebec will revisit their approaches to niqabs in citizenship ceremonies and public services, respectively, remains to be seen. It may be just a matter of time before the Supreme Court is once again asked to define the constitutional rights of veiled Muslim women.

⁷⁵ Makin, *supra* note 53, noting that, "By the end of 2014, only one judge — Chief Justice Beverley McLachlin — will have spent more than a decade on Canada's top bench."

**DANIELS V. CANADA:
THE INEVITABLE COMES TO PASS, AT LAST**

IAN PEACH* AND AARON MINTZ**

I. INTRODUCTION

In 1999, the late Harry Daniels, former president of the Native Council of Canada/Congress of Aboriginal Peoples, launched an action to have the courts issue a declaration that Métis persons and those persons identified by the federal government as “non-status Indians” be considered “Indians” for the purpose of understanding the meaning of that term in section 91(24) of the *Constitution Act, 1867*.¹ The Government of Canada opposed this action quite vigorously, tying it up in procedural challenges for years. Finally, on 8 January 2013, the Federal Court of Canada decided the substantive question in issue.² Justice Phelan concluded that Métis persons and “non-status Indians” are, indeed, “Indians” within the meaning of that term in section 91(24) of the *Constitution Act, 1867* and granted the plaintiffs a declaration to that effect.³

While it took the Congress of Aboriginal Peoples and the other plaintiffs over 13 years to secure this declaration, and the federal government is appealing this decision so the legal debate on this matter is not yet at an end, the decision of the Federal Court was, to be blunt, inevitable. The federal government’s policy approach towards Aboriginal peoples has long attempted to draw a bright line between “status Indians” and other Aboriginal peoples, by claiming that the federal jurisdiction contained in section 91(24) of the *Constitution Act, 1867* is limited to “status Indians” or, even more narrowly, “status Indians” residing on reserves. This interpretation of the federal jurisdiction has been reflected in policy choices, such as the limitation of which Aboriginal peoples have access to federally-delivered or federally-funded programs and services, and the federal insistence that provincial or territorial governments be parties to self-government agreements. The federal government thus treats the concept of the “status Indian” as something that is inherently distinct from other Aboriginal peoples and has attempted to claim that this distinction has been a consistent feature of the division of powers between the federal and provincial governments since Confederation in 1867.⁴

When one probes beneath the rhetoric of federal officials, however, one discovers that the law in Canada has had a highly flexible understanding of who is an “Indian” over the decades, particularly prior to the 1951 revision of the *Indian Act* and the creation of the Indian Register.⁵ The federal government’s interpretation of who is “Indian,” and, therefore, who can be a beneficiary of the federal government’s exercise of its jurisdiction, has long been a consequence of broader federal policies about the treatment of Aboriginal peoples.

* Associate, KTA Inc; previously Dean, Faculty of Law, University of New Brunswick.

** Student-at-Law, Timmins-Temiskaming Community Legal Clinic.

¹ (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

² *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 6, 357 DLR (4th) 47 [Daniels].

³ *Ibid* at paras 600-601.

⁴ See e.g. *ibid* at paras 5, 69.

⁵ RSC 1985, c I-5.

There is no inherent difference between what we know today as “status Indians” and “non-status Indians,” nor has there been a consistent definition of just who falls within each category. If there has been anything consistent in the federal government’s approach to identifying some Aboriginal peoples as “Indians” and not others, it has been that these identifications have been driven by broader federal policy goals, most particularly, for much of Canadian history, the goal of assimilation.

Historically, the class of persons the federal government recognized as being within their jurisdiction was drawn in ever-narrower terms. In recent years though, some Aboriginal peoples have been added to the class of people that the federal government recognizes as “status Indians.” Sometimes this is an outcome of successful equality rights challenges to the federal definition of status,⁶ but it can also be a consequence of federal administrative decisions, such as the designation of the Indigenous community of Miawpukek (previously known as Conne River), previously deemed “non-status Indians,” as “status Indians” in 1985.⁷ Neither seems consistent with an assertion that there is an inherent distinction between “status” and “non-status Indians,” nor is there any federal legislative history to support this idea. The Federal Court of Canada was therefore right to conclude that the constitutional jurisdiction of the federal government is not limited to those the federal government currently recognizes as “status Indians.”

II. *RE ESKIMO* AS PRECEDENT FOR *DANIELS*

Daniels is not the first time Canadian courts have been asked to determine the extent of the class of persons who were considered “Indians” in 1867. A pivotal prior example of the importance of the definition of this term comes from the Supreme Court of Canada’s decision in *Re Eskimo*.⁸ In the 1930s, the Canadian government had been supporting Inuit in northern Quebec and billing the Quebec government.⁹ Quebec, feeling the fiscal burden of the Depression, argued that the Inuit were “Indians” and thus a federal responsibility; the federal government opposed this, not wanting to be burdened with the cost of providing support, a position rather similar to their position on whether Métis and “non-status Indians” were “Indians” throughout the period of the *Daniels* case.¹⁰ The Supreme Court, however, determined that the provision of services to the Inuit was a federal responsibility.

Chief Justice Duff, for the majority, reviewed the history of the part of Canada that was Rupert’s Land in the period before, and for a time after Confederation, to determine whether Inuit were “Indians,” in a manner very similar to Justice Phelan’s analysis in *Daniels*. Chief Justice Duff noted that in the 1857 census of the region undertaken by the Hudson’s Bay Company, “esquimaux” (Inuit) were included in the term “Indians” and, indeed, “Indians” was synonymous with Aboriginal peoples (or “aborigines,” in the language of the period).¹¹

⁶ See e.g. *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, 306 DLR (4th) 193.

⁷ Miawpukek First Nation, “About Miawpukek,” online: Miawpukek First Nation <<http://www.mfangov.ca/about-miawpukek/>>.

⁸ [1939] SCR 104 [*Re Eskimo*].

⁹ For a discussion of the background to *Re Eskimo*, see e.g. Sarah Bonesteel, *Canada’s Relationship with Inuit: A History of Policy and Program Development* (Ottawa: Indian and Northern Affairs Canada, 2008).

¹⁰ *Ibid.*

¹¹ *Re Eskimo*, *supra* note 8 at 106-107.

He also noted that historical documents made it clear that Inuit in Quebec and Labrador were also treated as "Indians."¹² Of course, Inuit were never, and still are not, subject to the *Indian Act*, which simply serves to make it clear that "Indians," for the purpose of understanding the *Constitution Act, 1867*, and "Indians," as subjects of the *Indian Act*, are not synonymous.¹³

In his concurring judgment, Justice Cannon noted that the English word "Indians" was construed as equivalent to the French word "sauvages," for example in the Quebec resolutions and the *Constitution Act, 1867* itself, and that the term included all Aboriginal peoples in British North America.¹⁴ Justice Kerwin also wrote a concurring opinion that reviewed a number of historical documents to come to the same conclusion.¹⁵ One lesson from this case of relevance to *Daniels* is that analysis of the historical record is critical to making rational determinations about the meaning of section 91(24) of the *Constitution Act, 1867*.

III. DANIELS V. CANADA

Re Eskimo gives us an analytical framework with which to analyze the decision of Justice Phelan in the current case of *Daniels*. Justice Phelan noted:

In the absence of any record of debates or discussions concerning this Indian Power [in subsection 91(24) of the *Constitution Act, 1867*], the Court had to rely on what was done just before and for some period after Confederation to give context and meaning to the words of s 91(24).

The evidence concerning non-status Indians establishes that such persons were considered within the broad class of "Indians". The situation regarding Métis was more complex and in many instances including in the Red River area, Métis leadership rejected any inclusion of Métis as Indians. Nevertheless, Métis generally and over a greater area were often treated as Indians, experienced the same or similar limitations imposed by the federal government, and suffered the same burdens and discriminations. They were at least treated as a separate group within the broad class of "Indians."¹⁶

He then went on to review the evidence of the historical expert witnesses and documents. As he noted,

[g]iven the nature of this litigation, the Court was presented with over four centuries of history since first contact between European settlers and the indigenous population in what became Canada.... The pre-Confederation evidence was directed at what the term "Indian" meant at the time and thus likely was the meaning that the Framers of Confederation had in mind when it was inserted into the s 91 powers assigned to the federal government.¹⁷

This is consistent with how the Supreme Court of Canada used historical evidence in *Re Eskimo*, as described above. Justice Phelan undertook a thorough and careful analysis of the

¹² *Ibid* at 109-15.

¹³ *Supra* note 5, s 4.

¹⁴ *Supra* note 8 at 117.

¹⁵ *Ibid* at 119-24.

¹⁶ *Daniels, supra* note 2 at paras 24-25.

¹⁷ *Ibid* at para 183.

historical evidence to assist him in understanding what the term “Indians” would have meant to the framers of the Constitution from 1864 to 1867. He also notes that “the Supreme Court [in *Re Eskimo*] accepted that those of mixed heritage were identified and treated differently from ‘whites’ and were seen as ‘Indian.’”¹⁸

Justice Phelan also noted, “[i]n the same vein, the federal government had largely accepted the constitutional jurisdiction over non-status Indians and Métis until the mid 1980s when matters of policy and financial concerns changed that acceptance.”¹⁹ He then reviewed the history of policies for defining “Indians,” both pre- and post-Confederation, the process of enfranchisement of “deserving Indians,” as he notes they were described, and how “legislative and administrative events produced, by evolution, a group called Métis and non-status Indians.”²⁰ This confirms that the distinctions the federal government has made between “status Indians” and Métis and “non-status Indians” are not based on any inherent differences, though there certainly are important distinctions,²¹ but simply on policy and fiscal positions.

Indeed, Justice Phelan notes that, “[t]he evidence establishes the diversity of people and degree of aboriginal connection which fell under the word ‘Indian’ [among the Mi’kmaq in the 19th century].”²² He also comments, “[i]n what is now known as the Quebec-Windsor corridor, by the mid 1860s, ... [t]he extent of the intermarriage was such that there were few ‘pure blood’ natives left.”²³ Later, Justice Phelan notes, “[i]t was [the plaintiff’s historical witness William] Wicken’s opinion that prior to Confederation the term ‘Indian’ was understood, at least by the Framers, to include half-breeds. In coming to that conclusion ... Wicken relied on the pre-Confederation Indian statutes or statutes in relation to Indians.”²⁴ He reiterates this point stating, “Wicken, on the basis of this understanding, concluded that the Framers would have intended the word ‘Indian’ in the constitution and the power which went with it, to be a broad power to be able to deal with the diversity and complexity of the native population whatever their percentage mix of blood relationship, their economies, residency or culture.”²⁵ While Justice Phelan noted that both Alexander von Gernet and Stephen Patterson, the Crown’s historical witnesses, were of the view that “the Framers would have had no interest in dealing with half-breeds who were not acknowledged as members of a band or who lived as ‘whites,’”²⁶ he also noted that Gwynneth Jones, another historical expert witness, observed that “because so much of ‘Indian’ relations were policy driven, the Framers wanted and needed a broad power to ensure maximum flexibility.”²⁷ Such an approach would certainly have been logical in the circumstances that confronted the Framers of the Constitution in the 1860s.

¹⁸ *Ibid* at para 558.

¹⁹ *Ibid* at para 27.

²⁰ *Ibid* at paras 92, 94.

²¹ *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207, clearly identified that the Métis were a distinct community.

²² *Daniels*, *supra* note 2 at para 218.

²³ *Ibid* at para 240.

²⁴ *Ibid* at para 265.

²⁵ *Ibid* at para 273.

²⁶ *Ibid* at para 274.

²⁷ *Ibid* at para 275.

Justice Phelan also identified several other instances in legislation, government reports, and pre-Confederation treaties in which “half-breeds” were defined as “Indians,” even if they did not live on a reserve. At one point in his judgment, for example, he notes, “[William] Robinson counted half-breeds in the population subject to the treaties for purposes of calculating overall annuities owed.”²⁸ The Robinson-Huron and Robinson-Superior treaties provided “the model for the post-Confederation numbered treaties in Western Canada.”²⁹ He concludes, “[t]his experience and recognized need speaks to the requirement for and understanding that the s 91(24) power had to be sufficiently broad that the federal government could address a wide range of situations, in a wide range of ways covering a diverse composition of native people.”³⁰

The historical evidence makes this conclusion rather obvious. This is really the only basis on which one can understand the meaning of the word “Indian” in the *Constitution Act, 1867* as there was no discussion of the term or the extent of the “Indian power” at either the Charlottetown or Quebec Conferences of 1864 or the London Conference of 1866.³¹ Justice Phelan also notes that in the Northwest in the period after Confederation, “the aboriginal population was mixed, varied, and interrelated. It was not possible to draw a bright line between half-breeds/Métis and Indians.”³² He later, notably, comments that “the early post-1867 evidence shows that half-breeds were considered as at least a subset of a wider group of aboriginal-based people called ‘Indians.’”³³ He also cites several examples of post-Confederation legislation and notes, “[t]he foregoing examples established that the federal government exercised jurisdiction over a broad range of persons with native ancestry who did not have status as Indians under the *Indian Act*.”³⁴

Justice Phelan also correctly notes that the federal government’s assertion that it can define for constitutional purposes who is an “Indian” by its own legislation would allow “the federal government to expand and contract their constitutional jurisdictions over Indians unilaterally.”³⁵ While it would be appropriate to alter the extent of federal jurisdiction by agreement of the relevant parties, including the Aboriginal people(s) concerned, through something such as a self-government agreement, unilateral actions of the federal government, either asserting or denying jurisdiction, are not appropriate. Justice Phelan notes:

It is a settled constitutional principle that no level of government can expand its constitutional jurisdiction by actions or legislation.... The federal government may wish to limit the number of Indians for which it will grant recognition under the *Indian Act* ... but that does not necessarily disqualify such other Indians from being Indians under the Constitution.³⁶

²⁸ *Ibid* at para 311.

²⁹ *Ibid* at para 306.

³⁰ *Ibid* at para 318.

³¹ *Ibid* at paras 332-36.

³² *Ibid* at para 381.

³³ *Ibid* at para 420.

³⁴ *Ibid* at para 467.

³⁵ *Ibid* at para 112.

³⁶ *Ibid* at para 113.

Justice Phelan thus comes to the following conclusion:

Both in principle and in practice, one of the essential elements of the Indian power was to vest in the federal government the power to legislate in relation to people who are defined, at least in a significant way, by their native heredity. As said earlier, the factor which distinguishes both non-status Indians and Métis from the rest of Canadians ... is that native heritage – their “Indianess.”³⁷

Later, he expands upon this conclusion and connects it specifically to the Supreme Court of Canada’s decision in *Re Eskimo*, stating:

Applying the purposive approach in light of the finding in *In Re Eskimo Reference*, above, I accept the Plaintiffs’ argument supported by the opinions of Professor Wicken and Ms. Jones that the purpose of the Indian Power included the intent to control all people of aboriginal heritage in the new territories of Canada.... Absent a broad power over a broad range of people sharing a native hereditary base, the federal government would have difficulty achieving this goal.³⁸

In the end, Justice Phelan decides that:

The case for inclusion of non-status Indians in s 91(24) is more direct and clear than in respect of Métis. The situation of the Métis is more complex and more diverse and must be viewed from a broad perspective. On balance, the Court also concludes that Métis are included in s 91(24).

Therefore, the Plaintiffs will be entitled to a declaration in their favour and to that effect.³⁹

IV. EARLY DEFINITIONS OF “INDIAN”

Given the historical record of Indigenous-Crown relations, this really is the only logical conclusion one could come to. Settler-state governments did not seek to define who was an “Indian” for some time after contact; even when they did, their initial legislative definitions were quite broad and effectively recognized Aboriginal authority to define their citizens and members. The first legislative definition of “Indian” was contained in *An Act for the better protection of the Lands and Property of the Indians in Lower Canada* in 1850.⁴⁰ This definition was a broad one, and it included all persons of “Indian blood” who were “reputed to belong to the particular Body or Tribe” and their descendants, all persons intermarried with this first group and residing among them, and their descendants, all persons residing among the “Indians” whose parents on either side were “Indians,” and all persons “adopted in infancy by any such Indians” and their descendants.⁴¹ This broad definition did not last long, however; the legislation was amended the following year to exclude those adopted in infancy and non-Indian men married to Indian women.⁴²

³⁷ *Ibid* at para 544.

³⁸ *Ibid* at para 566.

³⁹ *Ibid* at paras 600–601.

⁴⁰ (UK), 13 & 14 Vict, c 42.

⁴¹ *Ibid*, s 5.

⁴² *An Act to repeal in part and to amend an Act, intituled, An Act for the better protection of the Lands and property of the Indians in Lower Canada, 1851*, (UK), 14 & 15 Vict, c 59, s 2.

Post-Confederation, an “Indian” was a male person of “Indian blood” belonging to a band, or his wife and children, and a band was defined as a grouping of “Indians” who have an interest in a reserve or Indian lands in common, with the legal title in the Crown, or share alike in the distribution of money with governmental responsibility.⁴³ Running opposite to this was a “non-treaty Indian”; they lacked a relationship with the Crown, though they had “Indian blood” and lived the “Indian mode of life” or were members of an “irregular band,” which itself was simply a grouping of people with “Indian blood” that had no treaty, or an interest in land or money from the Crown.⁴⁴ These definitions are not very precise; there is no clear understanding of what an “Indian mode of life” is, nor of how much blood one requires to have “Indian blood.”

There are a number of good critiques of the construction of the “Indian mode of life,” so we will refrain from giving it a lengthy discussion.⁴⁵ Two points, however, are worth noting. First, it was generally accepted that there was a clear definition of what it meant to be living an “Indian mode of life.” This was not a contentious term. Second, the entire definition of “Indian” in the early days was based on an individual’s relationship with the Crown. Distinctions were made between otherwise equivalent people based on whether they lived on a reserve or shared in the distribution of government money.

The 1906 *Indian Act* brought no significant changes to the definitions found in the 1876 *Act*, but it began defining a number of other concepts.⁴⁶ Foremost is that of enfranchisement, which was practically restricted to treaty Indians, since it was based on the enfranchised Indian receiving a portion of the reserve.⁴⁷ The exception to this restriction shows the emphasis on the reserve status: section 122 of the 1906 *Indian Act* allowed that an Indian who was not a member of a band in question (including a “non-treaty Indian” in general) but who has been allowed to live on the reserve was treated as effectively the same as any member of that band in terms of their right of access to the enfranchisement process.⁴⁸

Thus, enfranchisement was focused on land rights and was meant to be applied on a case-by-case basis to particular reserves. Most importantly, enfranchisement acted to erase the individual from the class of “Indian.”⁴⁹ This fit with the general purpose of the *Indian Act*, with its focus to protect the Indians and to “uplift” them into the proper, settler lifestyle. To ensure that it achieved this policy purpose effectively, the enfranchisement rules in the *Indian Act* varied over time. Voluntary enfranchisement was provided for under various amendments to the *Indian Act*, but enfranchisement was also mandatory under certain circumstances, and these circumstances varied over time. Indeed, 1920 amendments to the *Indian Act* included a provision that allowed “Indians” who were not band members (who today would be defined as “non-status Indians” and therefore not “Indians” at all by the federal government) to be enfranchised.⁵⁰ This provision does raise the question of whether

⁴³ *An Act to amend and consolidate the laws respecting Indians, 1876*, (UK) 43 Vict, c 28, s 3.

⁴⁴ *Ibid.*

⁴⁵ See e.g. Constance MacIntosh, “From Judging Culture to Taxing ‘Indians’: Tracing the Legal Discourse of the ‘Indian Mode of Life’” (2009) 47:3 *Osgoode Hall LJ* 399.

⁴⁶ *Indian Act*, RSC 1906, c 81.

⁴⁷ *Ibid.*, s 2(h).

⁴⁸ *Ibid.*, s 122.

⁴⁹ *Ibid.*, s 119.

⁵⁰ *An Act to Amend the Indian Act*, 10-11 George V, c 50, s 3.

the federal government consistently took the view that those who were not band members and did not live an “Indian mode of life” were not “Indians”; if they were not, according to the federal government’s definition of that term, there would be no need to provide them with a means to enfranchise.

There is one final provision of the 1906 *Indian Act* that demonstrates the evolving nature of reserves and of Indian status: the provision that established “special reserves.” A special reserve was:

[A]ny tract or tracts of land, and everything belonging thereto, set apart for the use or benefit of and held in trust for any band or irregular band of Indians, the title of which is vested in a society, corporation or community legally established, and capable of suing and being sued, or in a person or persons of European descent.⁵¹

Functionally, this special reserve was similar to a reserve, but was not set up by treaty. We can see in this a parallel to the division between “status Indians” (at the time known as “treaty”) and “non-status Indians” (“non-treaty”).

This system, too, fits with the assimilationist policy of the time. An “irregular band” was nomadic or semi-nomadic, which did not fit in well with the settler culture and its conception of private property. By forming a treaty and its associated reserve, the band would be pinned down in one location, and could be more easily convinced to accept the adoption of settler culture. The final stage of that acceptance would be full enfranchisement.

Ironically, then, according to the conception at the time, the “non-treaty Indians” were the most purely “Indian.” By not being considered “treaty Indians,” however, they were denied a number of rights that were granted to the further-assimilated “treaty Indians.” This culminated in the overhaul of the *Indian Act* in 1951, which abolished the concept of the irregular bands entirely.⁵² As Robert Groves puts it, the 1951 *Act* “ended the presumption that a reasonable number of Indian people remained to be brought into regular relations with the Crown.”⁵³ Those “Indians” who had not partially assimilated by concluding a treaty with the Crown were left out in the cold, redefined as not being “Indian” at all.

V. THE RATIONALE FOR HAVING AN “INDIAN” DESIGNATION

It is impossible to understand the changes in the definition of “Indian” as a set of coherent policy choices without an understanding of the uses to which those definitions were put. The definition of “Indian” in place periodically was not a reflection of any understanding of who was inherently an Indigenous person; simply put, defining “Indian” was an exercise to advance the desire of the federal government to “elevate” (otherwise known as assimilate) Aboriginal peoples and bring them into the dominant, settler culture. By having a definition of “Indian,” and of various related concepts such as “non-status Indian,” “Indian living off-reserve,” “landless band” or “irregular band,” and “enfranchisement,” the government could

⁵¹ *Indian Act*, *supra* note 46, s 2(j).

⁵² *Supra* note 5.

⁵³ Robert K Groves, “The Curious Case of the Irregular Band: A Case Study of Canada’s Missing Recognition Policy” (2007) 70:1 Sask L Rev 153 at 166.

track the progression of individuals from "Indian" to full assimilation over a large population.

Beyond the general desire to assimilate Aboriginal peoples, the federal policy was also driven by a desire to contain the federal cost of providing services to Aboriginal peoples. By setting out just who is an "Indian," the federal government could further set out its own requirements for any social programs it enacted to benefit "Indians." Throughout the history of the *Indian Act*, and persisting into the present day, is the fear that benefits earmarked for "Indian" people are used by those who do not "deserve" it, because they do not act like a stereotypical "Indian." For example, during the debates on amendments to the *Indian Act* in 1920, W.A. Boys, MP from North Simcoe said: "Personally I see no reason why Indians who leave the reserve and work in the shops of Montreal, Brantford or other cities should have the protection to which an Indian is entitled to under the Act ... many of them are professional men, doctors and lawyers, and should not be treated as wards.... They are in just the same position as white men."⁵⁴

Boys' concern was for an "Indian" man to be liable for debts. Today, the equivalent debates are those over educational funding for "Indians" and the *lack* of taxation of "status Indians." Thus, both the assimilationist policy driver and the fiscal driver have continued to push the federal government in the same direction: Aboriginal peoples are wards of the state and beneficiaries of Crown largesse, rather than parties to historical agreements with the Crown designed to establish a positive relationship with Aboriginal peoples, that would facilitate the settlement of North America by European powers. Justice Phelan's decision in *Daniels* is one step in the direction of bringing an end to the idea that Aboriginal peoples are simply the beneficiaries of Crown largesse, and that it is, therefore, legitimate for the Crown to decide, unilaterally, who it wishes to benefit with its largesse from among Aboriginal peoples generally.

VI. CONCLUSION: ASSESSING THE *DANIELS V. CANADA* DECISION

Justice Phelan's decision in *Daniels* is thus a valuable contribution to our understanding of Aboriginal law, Canadian constitutional history, and the division of powers in the *Constitution Act, 1867*. The most obvious feature of this case, of course, is that it is very long — 619 paragraphs to be precise. Justice Phelan, however, had a reason to write such a long decision; with its length is a seriousness and thoroughness of analysis. His decision addresses the testimony of each expert witness and assesses the wealth of sometimes-competing interpretations of the historical record to attempt to understand who the Framers of the Constitution would have understood to have been included in the term "Indians" when they proposed to provide the federal government with a constitutional jurisdiction over "Indians and lands reserved for the Indians." His analytical approach is also consistent with that of the Supreme Court of Canada in its decision in *Re Eskimo*.

Beyond this, it is also simply necessary to address the issue. Under the division of powers, either the federal or provincial governments is vested with jurisdiction over every

⁵⁴ *House of Commons Debates*, 13th Parl, 4th Sess, Vol 5 (23 June 1920) at 4030-31 (WA Boys).

governmental activity. The fact that section 91 of the *Constitution Act, 1867* gives the federal government jurisdiction over “Indians” makes the question of just who is included within the scope of this federal jurisdiction inevitable. It is true that a self-government agreement that vests jurisdiction over an Aboriginal people in an Aboriginal government, separate from either the federal or provincial governments, would make the question of whether the federal or provincial governments have jurisdiction over that Aboriginal people effectively irrelevant. Until such self-government authority is negotiated or otherwise recognized by the federal and provincial governments, the question about the meaning of the term “Indians” in section 91 of the *Constitution Act, 1867* is necessarily with us.

Given the thoroughness of Justice Phelan’s analysis of the historical record and the logic of the conclusions he draws from it for both Métis and “non-status Indians,” it seems difficult to challenge his result as ill-considered. Nonetheless, the federal government has appealed the decision and, no doubt, this case will not be resolved until decided upon by the Supreme Court of Canada. Still, it is difficult to imagine a logically and legally sound set of reasons for the higher courts to overturn Justice Phelan’s decision. The inevitable result has, indeed, come to pass after many years of litigation.