ONCA File #: C68942
Motion #: M52196

COURT OF APPEAL OF ONTARIO

BETWEEN

LONDON DISTRICT CATHOLIC SCHOOL BOARD

Plaintiff/Respondent/Respondent in Appeal

– and –

MYRIAM MICHAIL

Defendant/Moving Party/Appellant

FACTUM

CONSTITUTIONAL CHALLENGE
Moving Party Myriam Michail

March 16, 2021

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"WHERE THERE IS NO PUBLICITY, THERE IS NO JUSTICE"

PART I – OVERVIEW

See **Affidavit of Myriam Michail Sworn January 25, 2021 para. 1 to 21**

1. The constitutional principle of open justice, the litigant's right to freedom of expression and to gather evidence, ensuring an open and fair process with equality before the law, the liberty and security of all persons, and the public's right to be informed and see justice being done, are all at the forefront of this challenge.
2. I am challenging the constitutional validity and applicability of subsections 136(1) (a) (i), (b), (c) and 136 (4) of the *Courts of Justice Act "CJA".* I submit that the total prohibition where even a party in a litigation is not entitled to make, obtain or disseminate audio/video recordings of their own hearings where there are no witnesses, no jury, and no publication ban, under the impugned subsections 136 (1) (a) (i), (b), (c), and the threat of imprisonment and an excessive fine outlined in s. 136 (4) of the *CJA*, violate s. 2(b), 7, 12 and 15(1) of the *Canadian Charter of Rights and Freedoms ("the Charter").*
3. There is no rational connection between the total banning of video and/or audio recordings of all proceedings, especially those heard before appellate and superior courts, where matters do not fall under a restricted category as set out by legislation. Therefore, these provisions should be struck down and found to be of no force and effect pursuant to s. 52 of the *Charter* as they should be alien to the tradition of our free and democratic nation.
4. This constitutional challenge is novel in that it is advanced by the litigant, who is party to the proceeding, rather than a third party i.e., the media and to challenge the constitutional validity of this law under s. 15(1) of the *Charter.* This is also the first challenge to the constitutionality of subsection 136(4) of the *CJA*, which imposes cruel punishment and a grossly harsh sentence which only serves to silence and intimidate the public. To be clear:

This constitutional challenge <u>is not about</u>

- procedures that are subject to publication bans, trials of young offenders, family matters, sealing orders or that involve witnesses or jury;

- a request for live media broadcasting of hearings;
- a request for media or litigants to take photographs or video record/film any person in or entering or exiting the court or the courtroom in which a court hearing is to be or has been convened; and
- a third party or the media.

This constitutional challenge <u>is about</u>:

- the total ban of cameras in Appellate courts and in the Superior Court of Justice and the Ontario Court of Justice for applications or motions where there are no witnesses, no jury and no publication ban, making covertness the rule, is unconstitutional and oppressive;
- the constitutional rights of a litigant/party, to natural justice and a fair trial as guaranteed by s. 15(1) of the *Charter*, where the litigant/party shall not be deprived of their constitutional right to obtain and disseminate evidence in the form of audio/video recordings of their own hearings;
- the oppressive undertaking based on ss. 136(4) of the *CJA*, being in breach of s. 7 and 12 of the *Charter*, threatening the liberty and security of Canadians by establishing a $25,000.00 fine and/or 6 months imprisonment, if they exercise their right to free speech which flies in the face of our democratic society and the open court principle;
- ending the culture of covertness by establishing that the constitutional principle of open justice includes the disclosure of unredacted transcripts, audio and video recordings of proceedings and the disclosure and the publications of all decisions.

PART II – CONSTITUTIONAL QUESTIONS IN ISSUE

In any constitutional climate, the administration of justice thrives on exposure to light and withers under a cloud of secrecy.[1]

See **<u>Notice of Constitutional Challenge to Attorneys General</u>** January 19, 2021

Question 1:

a. Do the impugned Subsections 136(1) (a)(i), (b), (c) of the *Courts of Justice Act* violate Canadians' Constitutional rights guaranteed by s. 2(b) of the *Charter* to freedom of information and freedom of expression?

[1] Fish J. in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41.

b. Is the constitutional requirement of Open Justice violated by banning the right to audio/video recording of a party's own proceedings and to archive, publish, broadcast, reproduce or otherwise disseminate the most accurate, complete and honest evidence?

Question 2:

a. Do the impugned Subsections 136(1) (a)(i), (b), (c) of the *Courts of Justice Act* R.S.O. 1990 violate Canadians' Constitutional rights guaranteed by the *Charter* under s.15(1) for an equal protection of the law, access to evidence and fair trial by depriving Canadians of their right to obtain the most complete, accurate and honest evidence of what transpired during their own hearings, thus denying them a fair and open process and obstructing the proper administration of justice? As in my case, I have been falsely accused of vexatious conduct and I am unable to properly advocate for myself as my evidence has been concealed.

b. Does the discretion of presiding judges allow them to arbitrarily deny access to information to which the public is constitutionally entitled in violation of the constitutional requirement of openness by denying access to transcripts and history records as is the case in my matter where there is no ban and the matter is of high public interest?

Question 3:

Does the impugned Subsection 136 (4) of the *CJA* as a punishment for subsection 136.1(a)(i), (b), (c) violate and threaten the public's Constitutional right to security and liberty guaranteed by 7, 12 and 15 (1) of the *Charter of Rights and Freedoms?* Can the courts arbitrarily restrict "*what is meant to be made public silencing the person trying to assert their constitutional right*." threaten with excessive and exaggerated fines and imprisonment, and compel Canadians to sign an oppressive undertaking silencing their free speech?

II. Question 4:

If the ban imposed by the impugned subsections 136(1) (a) (i), (b), (c) and the punishment under subsection 136 (4) infringe and deny rights guaranteed by section 2(b), 7, 12 and 15 (1) of the *Canadian Charter of Rights and Freedoms,* can they be demonstrably justified in a free and democratic society as required by section 1 of the *Charter of Rights and Freedoms*?

Does this ban meet the test of s. 1, where the objective of the impugned legislation has to be of sufficient importance to override a constitutionally protected right? Or is it grossly disproportionate and overbroad? The objective has to be:

- of a pressing and substantial nature; and
- the means chosen to obtain the objective have to be proportionate to the ends.

Questions of General Importance to The Public and our Democracy
Should Judges misuse their power to conceal decisions from the public?

5. I am challenging the constitutionality of the common practice and/or common law rule of judges' not publishing decisions. Judges' refusal to publish their decisions is in violation of the open justice constitutional principle. It demonstrates a pattern of disregard to the rule of law, the rights of the public and is further evidence of a lack of transparency.
6. To date, several decisions in my case remain unpublished, Mitchell J. has not published her decision on Costs [Exhibit 21] of January 11, 2021, Paciocco J.A. did not publish his decision of September 4, 2018 [Exhibit 16] and Grace J. same [Exhibit 20] despite my requests for the publication of these decisions.
7. The public has a constitutional right to be informed of all decisions and to be able to follow the progress of a case from start to end. It is illogical to refer to a decision, without that decision being available. Decisions should not be hidden from the public, or escape peer review.
8. In other instances, decisions were sent in a letter signed by clerks. It is my position that this is inappropriate. When a judge or vice-chair decides a matter, the decision must be signed by the person who made the decision and published. This is necessary to establish an accurate litigation timeline and to maintain the public's trust and confidence in our justice system.
9. This practice has spread to almost all court' levels, administrative boards and tribunals. In labour law, secrecy is the rule claiming "confidential nature of Arbitration". Decisions are buried leaving no jurisprudence for public view. In my case, Arbitrator Brown refused to publish three Arbitration Awards. [click here]

PART III - HISTORY OF THIS CONSTITUTIONAL CHALLENGE

10. This constitutional challenge has been before this court previously, but was dismissed for lack of jurisdiction due to the "absence of a valid appeal". *Michail v. OECTA,* 2019 ONCA 319

What Gave Rise to This Challenge? Factual Basis: The Case at Bar

See **Affidavit of Myriam Michail Sworn January 25, 2021 para.22 to 82**

11. Decisions on *Charter* cases must be carefully considered as they will profoundly affect the lives of Canadians. The Supreme Court of Canada ("SCC") "*discourages adjudication of constitutional issues without a factual foundation*"[2] since "*Context is the key to understanding the scope and impact of a limit on a Charter right*."[3] In *MacKay v. Manitoba*, 1989 CanLII 26 (SCC), Cory J., stated: *"Charter decisions should not and must not be made in a factual vacuum."*

12. The constitutional questions and remedies sought have risen after the termination of a proceeding that took place at the Superior Court of Justice in London, file # 2208/19, to which I was a party, when on November 12, 2019, weaponizing the court, the LDCSB filed a Vexatious Litigant Application to restrict my access to justice and effectively stop my matter from reaching a resolution. This Application is in essence seeking to impose a draconian permanent injunction against me[4] that violates my constitutional rights and causes a permanent stigmatization in the eyes of society. If it is determined that I am a vexatious litigant this will only serve to silence and disarm me. I will be punished for speaking out on matters of public interest. This is the action that has resulted in my being in this court now. [click here]

13. In response, I filed a motion under s. 137.1 of the *CJA*. After the hearing of this motion, Mitchell J. refused to release the recording of the hearing to the transcriptionist. **[click here]**

14. Previously, in 2017 after the termination of another proceeding, file #624/17, Duncan Grace J. and Lynne Leitch J. denied the transcriptionist request to obtain access to the recordings to transcribe. **[click here]**

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[2] *R. v. DeSousa*, [1992] 2 SCR 944 par. 17
[3] *Toronto Star v. AG Ontario*, 2018 ONSC 2586
[4] "An Order requiring the Respondent to deliver a copy of the vexatious litigant order and any written decision arising from this Application to any person, or body with whom she initiates or continues any complaint, including, without limitation, any court, administrative body, police, regulatory body, and the Crown."

15. The refusal of three Superior Court judges to release transcripts of my own three hearings to a Court transcriptionist, paired with my inability to disseminate the audio recordings due to the impugned s.136 (1)(a)(i), (b), (c) constitute a palpable infringement of my *Charter* rights under s. 2(b) and 15(1), where transcripts are needed to show evidence of the lack of natural justice and procedural fairness I endured.
16. I implored Leitch J. to recognize the hardship that withholding this evidence will cause me, and the impact that it will have on the remainder of the proceeding. [Exhibit 2] –She ignored my plea. The audio recording of Leitch J.'s hearing is crucial evidence as the denial of due process that took place at this hearing brought this torturous litigation to where it is now. [click here]
17. At the onset of the November 18, 2020 hearing, Mitchell J. made it clear, before hearing any evidence or arguments, that s. 137.1 cannot ever be applied in a proceeding under s. 140 of the *CJA* as reflected in paragraphs 19 and 21 of her decision. Mitchell J. admonished me for having filed legitimate appeals, for bringing a s.137.1 motion and for resisting the LDCSB's draconian permanent injunction. This would be evident if one were able to listen to the recording of the hearing. I require the recording to use as evidence of a lack of impartiality and fair process.
18. At the ONCA, I sent requests and filed a motion to get permission to video record the hearing. Feldman J.A. refused to allow the motion to be heard although it was perfected.
19. After the hearing, I requested the transcripts and recordings of my two hearings at the ONCA. I was faced with the same undertaking as at the superior court, prohibiting me from sharing with the public and the requirement to file a motion to get a judge's permission. The terms and conditions of this undertaking are unreasonable and frightening. The total publication ban is oppressive and in breach of Canadians' *Charter* rights. Furthermore, relying on the impugned s.136(4) of the *CJA*, the undertaking threatens a $25,000.00 fine and/or six months imprisonment if I disseminate the recordings in violation of s. 2(b), 7, 12 and 15(1) of the *Charter* and is meant to silence the public.
20. These impugned provisions have caused me irreparable harm, trampled on my freedom of expression, my legal rights to a fair and open process and threatened my right to the liberty and security of my person.

I am requesting that this Court uphold the rule of law and grant me access to these materials as a constitutional right guaranteed to every Canadian.

Attorneys General Failure to Protect the Public Interests- Concealment of the 2008 Report

21. The public's repeated plea to reclaim their constitutional rights and declare s. 136 of the *CJA* unconstitutional, is not an attempt "*to create a default authorization for video recording*" which *"would be contrary to the* Act*"* when the *Act* is in violation of the Constitution[5].

22. For decades, advocates for an open justice system have been pushing for cameras in courtrooms without any success as reported in *Michail v. OECTA,* 2019 ONCA 319 para.11*:*

> Proposals to amend the *Act* to allow video recording of hearings of motions and appeals, as the moving party pointed out, have been made from time to time. Whatever the merits of those proposals, they have not been adopted legislatively, and are not law.

23. In 2005, The Attorney General of Ontario ("AGO") Michael Bryant established a blue-ribbon Panel[6] to address courtroom cameras' initiative. **A Comprehensive Report was issued in 2006** stating:

> **Recommendation #3: Cameras in the courtroom**
> The Panel recommends that: The Courts of Justice Act should be amended to permit cameras for proceedings in the Court of Appeal and Divisional Court, and for applications or motions in the Superior Court of Justice and the Ontario Court of Justice, where no witnesses will be examined at the hearing, subject to the discretion of the panel or judge, which discretion should be exercised recognizing the primacy of openness.
>
> Further, on those unusual occasions where witnesses are called to testify in any of the above appeals, applications or motions, cameras for such proceedings would be permitted where the presiding judge, the parties and witnesses agree.

24. P. 19 of the Report states that the Canadian Judicial Council modified its position to exempt the SCC, and in 2002 also exempted all appellate courts. Its concern is now focused on trial court.

25. **A Pilot Project 2007** was run by the ONCA where proceedings were livestreamed.

26. **In 2008 a Second Report**[7] branded the pilot project an overwhelming success and recommended that courtroom cameras should be continued in the ONCA, their use expanded to other Appellate Courts and

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[5] *Michail v. Ontario English Catholic Teachers' Association*, 2019 ONCA 319 para. 11
[6] See report p. 54, 55 for a list of all participants which include MacPherson J.A. and Zarnett J.A.
[7] May 2008 – Blue Ribbon Committee Final Report **p. 4, 5, 11, 12,13, 14, 15, 16**

an amendment to s. 136 of the *CJA* is justified. Instead of implementing the recommendation, this report was concealed from the public. I was required to complete and submit a formal freedom of information request to access a document that should be public.

27. **The Ministry of Justice and all Attorneys General since 2008,** which includes, Chris Bently (2007), John Gerretsen (2011), Madeleine Meilleur (2014), Yasir Naqvi (2016), Caroline Mulroney (2018) and Doug Downey (2019) did not implement the recommendations.

28. It is my position, that the AG have failed the public by not implementing the crucial recommendations in the 2008 report, despite their knowledge of the deleterious effects of s.136:

- In March, 14, 2011, AGO Bentley, reported to be "*prepared to speak with the judiciary about their interest in having the discussion at this point in time*."[8] Nothing was done and no information regarding the outcome of such talks.
- March 17, 2016, when asked if there was any appetite for cameras in courts. AGO Madeleine Meilleur stated, without context or follow up: "To tell you the truth, no"[9].

Following My March 20, 2019 Hearing

- A few days after my hearing, on April 8, 2019, Macpherson J.A., on his own initiative, surprised Canadians with a groundbreaking order to broadcast the Carbon tax hearings.[10]
- The same day, Brian Gray, a spokesman with Ontario's Ministry of the AG, stated the ministry has no immediate plans to consider again any amendments to the Courts of Justice Act to allow a broader use of cameras in Ontario courts.[11]
- May 9, 2019, a spokesperson for AG said it's "*not a high priority*."[12]
- June 16, 2019: AG Mulroney states: "*It's not a priority for me*."[13]

[8] The Canadian Press: "Ontario to consider allowing cameras in courts"
[9] The Canadian Press: "As Ghomeshi case resumes next week, cameras in courts remain elusive",
[10] The Canadian Press: "*Ontario's top court allowing rare livestream of carbon-price legal fight*".
[11] The Law times: "Ontario courts should get cameras",
[12] Loonie Politics: "Ontario needs to address the lack of transparency in courtrooms".
[13] The Canadian Press:*AG Caroline Mulroney says it's 'essential' that Ontario* courts modernize

- June 24, 2019: In an interview with a Toronto Star Reporter, former Superior Court Chief Justice Heather Smith when asked about her thoughts on cameras in the courtroom, stated:

> There is a place for cameras in the courtroom — such as has been done recently in a case of high public interest at the Court of Appeal for Ontario and they may well be appropriate for courts such as the Superior Court's Divisional Court (which hears appeals from administrative tribunals and regulatory bodies.)

Following the Rouleau, Miller and Fairburn JJ.A. 2019 ONCA 319, **Ruling:**

- April 24, 2019, an article in the Canadian Press stated:

> While judges do have authority to allow video or audio recordings of proceedings under certain circumstances – such as in disputes with wide public significance – the court said Myriam Michail had not persuaded them this was one of those circumstances.[14]

- May 14, 2019: Brian Gray said he could not comment on the ruling "*As this matter is still within the period to seek leave to the Supreme Court of Canada,*"[15]

- On March 3, 2021, John Struthers, president of the Criminal Lawyers' Association, commenting on Anne Molloy J.'s decision to stream online in a live YouTube her decision on a notorious case stated:

> The creative and completely appropriate use of YouTube to ensure the public could have access to this important case may foster a greater understanding of our system of justice, Open courts are a critical component of free and fair society.[16]

29. The above comments are evidence that it is time for this Court to address this pressing issue of real open justice. This case provides the context necessary to make this determination.

PART IV - Open Court Constitutional Principle - Rule of Law

30. In *MacIntyre v. Nova Scotia (Attorney General), 1982* CanLII 14 (SCC) Dickson J. wrote:

> … It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. … The authorities have held that subject to a few well-recognized exceptions, … all judicial proceedings must be held in public.

31. In Canadian Broadcasting Corp v New Brunswick *(1996)* 3 SCR 480, the SCC reiterated at par. 21 to 23:

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[14] Canadian Press: "Ontario court rules open-court principle does not mean right to record proceedings
[15] Lawtimes: "Fight to release audio and video recordings fails".
[16] Lawtimes: Lawyers applaud use of YouTube for Minassian verdict

> The open court principle, seen as "the very soul of justice" and the "security of securities", acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law. ... The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). …

32. In *R. v. Campbell*, [1997] 3 S.C.R. 3 at para. 10:

> One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. *Another social goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule.* [Emphasis added]

33. In *Edmonton Journal v. Alberta ("Edmonton Journal")*[17], Wilson J. stated that the public interest in open courts is rooted in the need:

> 1) to maintain an effective evidentiary process;
> 2) to ensure a judiciary and juries that **behave** fairly and that are sensitive to the values espoused by the society;
> 3) to promote a shared sense that our courts operate with integrity and dispense justice; and
> 4) to provide an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the courts affects them.

34. In *Vancouver Sun*, 2004, the SCC provided *"The Parameters of the Open Court Principle"* at par. 23-31:

> 23 This Court has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings: … "
>
> 25 … Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.
>
> 26 The open court principle is inextricably linked to the freedom of expression protected by s. 2(b) of the Charter and advances the core values therein. … Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.
>
> 27 ... Dickson J. found "it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pretrial stage remains shrouded in secrecy": MacIntyre, at p. 186.

35. The open justice principle plays a crucial role in a democracy as stated by Fish J.[18]:

> [2] … What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.
>
> [4] ... Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would subvert the ends of justice or unduly impair its proper administration.

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[17] *Edmonton Journal v. Alberta*, 1989 CanLII 20 (SCC) para. 22
[18] *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 para. 2, 4, 7, 26, 27, 28

> [7] I would dismiss the appeal. In my view, the Dagenais/Mentuck test applies to all discretionary court orders that limit freedom of expression and freedom od the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2(b) of the Charter. [emphasis added]

36. In *Named Person v. Vancouver Sun*, 2007 SCC 43, Bastarache J. wrote:

> 88 .... It is clear that members of the public must have access to the courts in order to freely express their views on the operation of the courts and on the matters argued before them. …

37. In *Canadian Broadcasting Corp. v. Canada*, 2011 SCC 2, Deschamps J. Stated:

> [1] ... Public access to the courts also guarantees the integrity of judicial processes inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law.

38. Based on the foregoing overview of the case law, it is well-established that the open justice principle plays a crucial role in a democracy to ensure judicial independence from political interference and to maintain public confidence in the administration of justice.

What Does the "Open Court Principle" Entail?

39. All recordings of hearings should be made available to the public, as Bastarache J. explains *"The hearing rooms where the parties present their arguments to the court must be open to the public, which must have access to pleadings, evidence and court decisions."*[19] "*All judicial proceedings must be held in public*"[20]

40. Images and sounds are vital to communicate accurate messages. The internet is a great tool to disseminate and convey information. As Bennie J. states it is "*one of the great innovations of the information age"* whose *"use should be facilitated rather than discouraged*"[21].

What Constitutes "Public Access"?

41. Freedom of expression protects both speaker and the audience. Currently, nearly every court, board, and tribunal claim that they are not a "court of record", to conceal recordings and circumvent the public's

[19] *Application to proceed in camera, Re* 2007 SCC 43, 2007 para. 81
[20] *MacIntyre v. Nova Scotia (Attorney General),* 1982 *CanLII 14 (SCC)*
[21] *SOCAN v. Canadian Assn. of Internet Providers*, 2004 SCC 45 at para. 40

right to access information. Concealing recordings and prohibiting cameras in the courtroom undermines public confidence in the administration of justice.[22]

42. Limiting access to only those able to attend is unjustified, the public has an inalienable right to full disclosure of court proceedings. Hennessy J. stated in *Restoule v. Canada*, 2018 ONSC 114:

> 74 ... I am of the view that the live streaming should be archived. It would be a regrettable waste to invest in live streaming and make it only accessible in real time to those who have ability to clear their work or other schedules without knowing in advance what witnesses will be on at a specific time. As we navigate a world which provides access through technology to the events happening around the globe at a time that is convenient to us, it is hard to understand why restrictions would be placed on the live streaming of these proceedings.

43. The legal system is funded by public monies, which entitles the public to an open legal process. Withholding recordings, decisions and transcripts prevents the public from knowing of any wrongful conduct in our courts, ultimately preventing any systemic issues coming to light.

44. Technology fosters inclusion. Individuals who are constricted by disability, schedule, family, distance, resources or any other limitation should not have their rights denied.

45. Comments of counsels and judges should not be hidden from public view. What happens in our courts should be likened to what happens in our executive and legislative branches of government; both of which are broadcast, recorded, and available to the public.

The Detrimental Impact of s.136 (1) (a) (i), (b), (c) on Our Judicial System

46. Canadians have to go through an onerous process, almost always without success, under s.136 (3) to obtain permission to record their own hearing. This constitutes "*a serious obstacle to disclosure*" and *"so broad as to swallow up the initial mandate to disclose records"*[23], draining the party's financial, mental and physical abilities and resources.

47. The *Practice Direction Concerning Civil Appeals at the Court of Appeal for Ontario* rule 17 imposes an onerous process to access audio recordings and the signing of the oppressive undertaking. Presently all hearings conducted through Zoom begin with a warning stating:

> Unless permission is given by the court, it is an offence under s. 136 of the Courts of Justice Act, R.S.O. 1990, c. C.43, punishable by a fine of not more than $25,000 or imprisonment of up to six

[22] *Vancouver Sun (Re)*, 2004 SCC 43 ("***Vancouver Sun***") at paras. 23-25.
[23] *Toronto Star v. AG Ontario*, 2018 ONSC 2586

months, or both, to record any part of the hearing, including by way of screenshot/capture and photograph, as well as to publish, broadcast, reproduce or disseminate any such recording.

48. Although the open court principle *"applies to all judicial proceedings"* and at *"all stages"*[24] links to hearings are not made public. A request with full name must be sent to the registrar 48 hours in advance, requests are screened and subject to "judicial approval". [click here]

Covertness Has Become the Rule and Openness the Exception

49. The issue of real open and transparent courts should have never become a point of contention between the public, the government and the judiciary. The failure of justice in my case highlights the detrimental impact of covertness on our system. The words of English philosopher Jeremy Bentham resonate strongly:

> In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity.[25]

50. The ruling in my matter, *Michail v. OECTA*, 2019 ONCA 319, and judges refusal to release transcripts, confirm the discouraging reality that covertness has become the rule. Without providing reasons, my right to video record or disseminate any recordings of my own hearings was denied. Dickson J. stated:

> It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered."[26]

51. Many Canadians have raised concerns regarding the ailing judicial system. Justice Mary Lou Benotto (as she then was) spoke out against the use of "*Inflated claims, speculative legal theories and scorched earth tactics are a routine part of counsel's arsenal*"[27].

52. March J. stated[28]: "Matters have become so bad that many citizens and even some lawyers are speaking in terms of outright corruption of the court system, including corruption by many of the judges.

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[24] *Vancouver Sun* at para. 23; *Toronto Star* 2005 at para. 31.
[25] Quoted in *Canadian Broadcasting Corp. v. New Brunswick* (AG) Re R. v. Carson [1996] SCJ No. 38
[26] *A.G. (Nova Scotia) v MacIntyre* (Attorney General), [1982] 1 S.C.R. 175, para. 185
[27] *Ethics in Family Law:* Is Family Law Advocacy a Contradiction in Terms? M. Benotto J.
[28] A guide to recording your own court hearing in Ontario By Mike March, presently a Superior Court Judge.

53. In 2012, retired judge John Gomery stated that judges suffering from "judicial cowardice" "still ignore the rules and impose limits on media coverage of the courts."[29]

54. On February 5, 2018, during a ceremony marking his appointment to the SCC, Chief Justice Richard Wagner pointed out shortcomings in the system stating:

> the court system, in general, needs to be updated to reflect a desire for increased openness" and "While Canadians expect transparency and accountability, we continue to operate under 1970s models of judicial administration. [30]

55. The elimination of these impugned provisions would ensure accountability and increase public confidence and respect in our judicial system. Our justice system must be transparent.

Adverse Inference

56. Judges' refusal to allow cameras in the courtroom for the public to hear and see what goes on in the courtroom, the insistence that hearings be conducted secretly and decisions unpublished, would call for an adverse inference that if recordings and decisions were disseminated, they would be of assistance to my position that as an SRL, I was repeatedly denigrated, denied due process, my evidence ignored and my arguments disregarded and not even set out in decisions. Video recordings would provide details and evidence of tone of voice, demeanor, body language, reactions and facial expressions.

57. The concealment of the most accurate evidence at the court's disposal is an obstruction to the administration of justice, highhanded and a breach of the rules of natural justice and procedural fairness. its objective is to stifle potential public discourse, and shield the courts and its stakeholders from any possible criticism.

PART V – Legal Arguments

Reverse Onus - The burden of displacing the presumption of openness

The proper question to be asked is not "why do I need it?" but rather "why should I not have it?"[31]

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[29] "Judges who limit media access to courts accused of "judicial cowardice"" By Kailah Bharath

[30] Source: The Canadian Press · Posted: Feb 05, 2018

[31] *Ontario Medical Association v Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090, par.34

58. Pursuant to s.1 of the *Charter*, "*The burden of proof lies with the party seeking the ban*". This makes it clear that I do not require a reason to obtain the recordings, as "*there is no statutory basis to refuse to provide it*"[32] to me or to prohibit me from disseminating the materials.

59. The impugned Ss. 136 allowed the judges in my matter[33], to reverse the onus and make me bear the burden of justifying my request to obtain audio and video recordings of my own hearings.

60. The ruling based on s.136 of the *CJA* that *"Judges have a wide discretion to authorize video recording under s. 136(3), but there must be some reason for it that relates to the circumstances of the particular case"* constitutes a serious breach of s.2(b) and 15(1) of the *Charter* in obstructing access to information gathering and allowing secrecy *where there should be none*[34].

61. The judges got it "*the wrong way around*"[35], when they reversed the onus[36] of proof by holding that I bore the burden to justify releasing me "*from the obligation not to disseminate*" audio/video recordings of my own hearings and "*to restrict what is meant to be made public silencing the person trying to assert their constitutional right."* It was incumbent on the judges seeking secrecy to demonstrate on *"a stringent standard of justification"* why they are denying me my right to obtain and disseminate video and/or audio recordings of my own hearings.

62. <u>This situation provides irrefutable evidence of the urgent need to declare ss. 136 (1) (a) (audio and visual only) (i), (b), (c) and 136 (4) unconstitutional and of no force or effect.</u>

<u>Ss 136 (1) (a) (i), (b), (c): Breach of s. 15 (1) and s. 2(b) of the *Charter*</u>

A. One Law for All: *Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination*

63. Equality rights are at the core of the *Charter*. Justice must be served to all equally especially when dealing with a historically vulnerable group (employees) and being self-represented with a disability.

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[32] *Ontario Medical Association v Ontario (Information Privacy Commissioner)*, 2017 ONSC 4090, par. 32
[33] *Michail v. OECTA*, 2019 ONCA 319, paras 15, 20 and 21
[34] *Dagenais v. Canadian Broadcasting Corp*. [1994] SCJ No. 104 para. 71 to 77
[35] Morgan J. in *Toronto Star v. AG Ontario*, 2018 ONSC 2586 par. 65, 72 and 130
[36] *R. v. Oakes*, [1986]1 S.C.R. 103 para.70 and *R. v. Mentuck, 2001 SCC 76, 2001* para.26

Yet, judges in my case, discriminated against me by stating that permission is only granted *"in the unusual circumstances of Restoule, broadcasting and archiving of video recordings of the trial were permitted."*[37] The constitutional principle of open justice should apply to all cases, and the spirit and intent of the law should be upheld and respected by our judiciary and government in all instances:

> 108 … Even in private actions the public might have an interest in knowing the submissions put forward in claims such as those for wrongful dismissal or for personal damages. [emphasis added][38]

B. Personal Attendance at a Specific Time:

64. Canadians who are unable to attend at the time for a hearing should not be deprived of their right to access the information. Proceedings that are not held *in camera* must be made easily accessible to all Canadians at any time, from anywhere. We cannot in good conscious claim that our system is open to the public, while simultaneously creating barriers to public participation.

C. Access to Evidence – Technical Difficulties

65. The refusal to release recordings and the prohibition against cameras in the courtroom are in violation of my rights under s.15.1 of the *Charter* to access evidence to ensure a fair hearing.

66. Furthermore, concerns were repeatedly raised that transcriptionists are struggling with "horrible" audio quality[39], that "*transcripts are expensive, and sometimes (luckily not very often) they're quite wrong*"[40]and even altered. Allowing litigants to video recordings would eliminate any risks ambiguity and ensure a full and accurate account of a proceeding.

D. Violation of the *Human Rights Code*

67. Access to court proceedings must be available to those who are limited by disability, financial restraint, physical limitation, distance, resources, family or work commitment. It is a violation of Canadians'

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[37] *Michail v. Ontario English Catholic Teachers' Association*, 2019 ONCA 319 para.16
[38] *Edmonton Journal v. Alberta*, 1989 CanLII 20 (SCC) para.108
[39] Toronto Start Article: Ontario's court transcriptionists are struggling with 'horrible' audio quality
[40] Technology and the Law: 30 April 2019, By Cynthia Spry

human rights for Parliament to enact legislation that restricts access to court proceedings to people who don't have the ability to attend without providing any "stringent reasons".

Judges' Discretion v. Primacy of the Canadian Constitution and the Rule of Law

68. No legislation should give judges the power to arbitrarily deny constitutional rights as in my case where there was no legal reason why the transcripts should have been denied or requests to audio/video record and disseminate recordings rejected. Governments and/or judges should not violate or obstruct Canadians' rights and impose unjustified restrictions[41].

69. After the French revolution, on August 17, 1789, Nicolas Bergasse, on behalf of the Committee on the Constitution, presented a Report on the Organization of Judicial Power to l'Assemblée nationale in France, a copy of which is published on the Department of Justice for the Government of Canada's website, stating in the Introduction *"Some of the interventions made by Bergasse, Duport and Thouret on the reform of the justice system remain relevant to this day in many respects*." Bergasse's statements below are relevant:

- However, since the grand purpose of the laws in general is to guarantee liberty and thus to place the citizen in a position where he can enjoy all the rights that are declared to belong to him by the Constitution, we feel that the courts and judges will be properly instituted only as long as, in the use they make of the authority given to them and the public force at their disposal, it will be virtually impossible to violate this freedom that the law requires them to guarantee.
- Judicial power will accordingly be poorly organized if a judge enjoys the dangerous privilege of interpreting the law or adding to its provisions.
- Because it is not hard to see that if the law can be interpreted and augmented or, what amounts to the same thing, applied at the whim of an individual, man is no longer under the protection of the law but rather under the power of the person who interprets or augments it. And since the power of one man over another is essentially what the institution of the law is proposed to destroy, we can clearly see that, on the contrary, this power would acquire prodigious strength if the ability to interpret the law were left to the person who held that power. [Emphasis added]

70. In *Committee for the Commonwealth of Canada v. Canada* 1991 para. 269-271 McLachlin J. stated:

> 270 … Second, the limit on the right should not go beyond what is necessary to achieve that objective — it should not be overbroad, and should contain sufficient safeguards to ensure that as the law is applied, the right in fact will not be infringed more than necessary. This latter danger

[41] *Application to proceed in camera, Re* 2007 SCC 43

may occur, for example, if too much discretion is granted to administrators charged with applying the limit or law in question. [Emphasis added]

71. The scenario described by McLachlin J. is exactly what transpired in my case where Grace J., Mitchell J. and Leitch J. refused to release recordings to the transcriptionist. My requests to video record or disseminate audio recordings of my hearings were all denied at the ONCA. [click here]

72. At the hearing of March 20, 2019, I asked Rouleau J.A. if there is a publication ban on my case and his answer was "No", I said "Ok, so I can disseminate the recording?" he replied "No". Although Judges' discretion must be exercised in compliance with the *Charter*,[42] Rouleau, Miller and Fairburn JJ.A. refused to grant me permission under s. 136(3)[43] and referenced a decision that would support my position where Blair J.A. (Doherty and Lauwers JJ.A. concurring) wrote in *R. v. Dunstan*, 2017 ONCA 432 , par. 55:

> [55] ... The foregoing considerations lead as well to the reasoning that the authorized exceptions to the prohibition should be interpreted liberally to enable the court to allow what would otherwise be permissible – were it not for the prohibition and depending on the circumstances of the particular case – in order to advance the ultimate goal, which is to further the fair administration of justice, including the fairness of the trial. In this way, a "reasonable and just meaning" of s. 136(3) is better achieved, in my opinion. [Emphasis added]

73. S.136 allows for an environment where the spectrum of discretion is too far-reaching, often resulting in an abuse of power, whether intended or not, as it happened in my case.

What Were the Objectives of this Legislation?

74. In *R. v. Dunstan*, 2017 ONCA 432, Blair J.A. explains:

> [53] Section 136 is the descendant of s. 67 of the *Judicature Act*, R.S.O. 1980, c. 223, which introduced a prohibition against televising or photographing court proceedings or persons entering or leaving a courtroom. Its objectives were the maintenance of order and decorum in the courtroom and courthouse and the protection of unimpeded access to and from the courtroom by participants in court proceedings: .... Section 136 has been expanded to prohibit unauthorized audio recordings of court proceedings, but the meaning and scope of the section is not otherwise changed: ....

[42] *Toronto Star Newspapers Ltd. v. Ontario* (2005), 2005 SCC 41 para. 4, 7, 28
[43] *Michail v. OECTA*, 2019 ONCA 319

The Dagenais/Mentuck Test

75. Since openness is the presumption[44], the SCC developed the *Dagenais/Mentuck* test[45] to guide the exercise of judicial discretion in restricting access to judicial proceedings. Public bans are only allowed when:

1) there is a serious risk to the proper administration of justice;
2) reasonably alternative measures will not prevent the risk; and
3) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

76. In *Toronto Star v. AG Ontario*, 2005 SCC 41 Judge Fish wrote:

> 27 Iacobucci J., writing for the Court, noted that the "risk" in the first prong of the analysis must be *real*, *substantial*, and *well-grounded in the evidence*: "it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained" (para. 34).

77. In 2004 the SCC provided *"The Parameters of the Open Court Principle"*[46] at paras. 23 to 31:

> 30 …The judge is required to consider not only "whether reasonable alternatives are available, but also to restrict the order as far as possible without sacrificing the prevention of the risk": Mentuck, supra, at para. 36.
>
> 31 … The burden of displacing the general rule of openness lies on the party making the application: ...

78. In *Dagenais v. Canadian Broadcasting Corp*. 1994 the Supreme Court reiterated:

> 71 … Discretion cannot be open-ended. It cannot be exercised arbitrarily. More to the point, as I stated in Slaight Communications Inc. v. Davidson, …:
>
> > As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1.
>
> .... *Discretion must be exercised within the boundaries set by the principles of the Charter; exceeding these boundaries results in a reversible error of law.* [Emphasis added]

79. Although none of these factors are pertinent or present in my case, and no "*social values of superordinate importance*" [47]to protect, yet I am unable to reclaim my rights.

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[44] *Dagenais v. Canadian Broadcasting Corp.* 1994 SCC 39 para. 77
[45] *R. v. Mentuck* 2001 SCC 76, para. 32 & 34
[46] *Vancouver Sun*, 2004 SCC 43,
[47] *Nova Scotia (Attorney General) v. MacIntyre*, *[1982]* CanLII 14 (SCC).

Irrelevant, Not Applicable and/or Invalid Arguments

80. Previously raised arguments regarding young offenders' trials, family matters, or jury involved are neither relevant nor applicable to this challenge. These matters are/can be protected by sealing orders and publication bans i.e. Section 2.2.1 "Court Orders Restricting Access".

A. Order and Decorum in the Courtroom Argument - Public Confidence in the Judiciary

81. While cameras in the courtroom may have been a major source of disruption in the past, with the advancement in technology, this argument is no longer pertinent, as acknowledged by Hennessy J.: "*There is no impact on the serenity of the courtroom, nor is there any negative impact on decorum within the courtroom*".[48]

82. Video recording and archiving hearings would not interfere *"with the objectives the legislature was seeking to accomplish"* as it will "*not touch the notion of maintaining order and decorum in, or the objective of ensuring unimpeded access to, the courtroom one way or the other".* It would only

> allow what would otherwise be permissible — were it not for the prohibition, in order to advance the ultimate goal, which is to further the fair administration of justice.[49]

83. As stated above, the 2008 Report branded the 2007 Pilot project that was run by the ONCA, an overwhelming success and recommended that courtroom cameras should be continued in the ONCA, and that their use should be expanded to include the Divisional Courts and for applications or motions in the Superior Court of Justice and the Ontario Court of Justice.

84. Counsels and judges who act *with dignity and professionalism* would not be intimidated that what they say or do would be on record for the public to watch and comment on[50].

B. Witnesses Argument

85. No arguments can be made regarding witnesses as there are no witnesses in proceedings in appellate courts and for applications or motions in the Superior and Ontario Courts of Justice, as acknowledged by Hennessy J in *Restoule v. Canada*, para 44 and the 2008 Report.

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[48] *Restoule v. Canada (Attorney General)*, 2018 ONSC 114, para. 82
[49] R.A. Blair J.A. in *R. v. Dunstan*, 2017 ONCA 432, para. 55
[50] *Restoule v. Canada (Attorney General)* 2018 ONSC 114, para. 43

C. Cost Argument

86. Audio and video recordings are the most efficient and inexpensive means of communication compared to the prohibitive cost of obtaining a written transcript. Audio and video recordings will effectively allow the sharing of limitless hours of legal arguments and concepts which can then be conveyed in a clear and accurate manner to the public. Thanks to modern technology the cost of archiving "*is now miniscule*"[51].

D. Archiving Video and Sound Recordings of Proceedings

87. In *Restoule v. Canada*, at para. 75 reports that both Ontario and Canada AG argued that *"members of the public could "manipulate and re-broadcast misleading clips from the edited live stream*"., resulting in an inaccurate portrayal of events.

88. This unfounded speculation fails since the entire audio and visual recordings will be readily available as in the SCC's practice. Hennessy J. had a cogent and compelling response stating:

> [76] The defendants' rationale for their position that archiving creates a risk of manipulation of the contents, is less than compelling. Every lawyer and judge who has read media accounts of their trials has had the lived experience that content is not necessarily reported faithfully or in context. For the most part, the errors seem innocent. Perhaps they are not always innocent. In other words, the current ways that the media cover and report on trials provides no assurance that the public is receiving a full unbiased or accurate view. Some traditional media corporations have structures for ethics oversight. These are seen as the best insurance against glaring errors or misconstructions. However, most Canadians no longer receive their news through traditional media governed by ethical rules. They receive their news in a "curated" form put together by journalists and/or non-traditional reporters. The dignity of the justice system is surviving "the disruption" of this new type of media coverage.

Distinctions and Similarities to Previous Challenges

89. This challenge is about my rights as a litigant and a member of the public. In this challenge, there are no values in conflict.

90. In *Edmonton Journal*, the right of the public to an open court process, and the right of litigants to the protection of their privacy in matrimonial disputes came into conflict. The prohibition on publication imposed by s. 30 resulted in substantial interference with freedom of expression and significant reduction in the openness of the courts.[52] S. 30(1) of the *Alberta Judicature Act* was found to not constitute a

[51] Daniel Henry 2012 Vox Libera Award acceptance speech

[52] *Edmonton Journal v. Alberta*, 1989 CanLII 20 (SCC) para. 32, 33, 79 to 89, 92, 99, 100, 113, **115 to 117**

reasonable limit on the freedom of the press which can be justified under s. 1 of the *Charter* as it lacked the required degree of proportionality as the objective of the legislation could be met "*through less sweeping measures*".

91. In *Toronto Star v. AG Ontario,* 2018 ONSC 2586, Morgan J. ruled that certain provisions of Ontario's *Freedom of Information and Protection of Privacy Act* (*FIPPA*) that delay or block access to tribunal records, are "*a serious obstacle to disclosure*"[53] and unconstitutional. At para. 90 and 94, Morgan J. also took issue with the reverse onus stating: "*The burden of displacing the general rule of openness lies on the party making the application."* "*the onus must remain on the party seeking to keep the information from the public rather than the other way around.*"

92. In *Regina. v. Squires*, 1992 CanLII 7627 (ON CA), the *only* issue before the court was whether s. 67(2)(*a*)(ii) of the Judicature Act[54]is constitutional. It was found that photographing people entering or leaving will lead to disruption. Although this matter is not an issue in this challenge, Tarnopolsky J.A.'s judicious dissenting opinion must be seriously considered:

> Section 67(2) (*a*) (ii) infringes freedom of expression as guaranteed by s. 2(*b*) of the *Charter* and should be declared of no force and effect. Section 67(2) is patently directed to limiting expression by means of visual representations. Free expression is a necessary precondition for the exercise of other guarantees. Without liberty to communicate there is no means of exchanging the viewpoints that compete in modern society's quest for the truth. (…)Since reporting, including making visual representations, is not incompatible with the function of the courtroom, and alternatively, promotes the values underlying freedom of expression, there is a violation of s. 2(*b*).
>
> Section 67(2)(*a*)(ii) is not saved by s. 1. Section 1 cannot be invoked to justify limiting a fundamental right or freedom without cogent and persuasive evidence. (…) There has been no demonstration of harm, only a remote and unproven possibility. Aside from failing the rational connection test, the provision cannot satisfy the minimal impairment element. Nothing could be more overbroad than an absolute ban. (,,,) Section 67(2)(*a*)(ii) is not a reasonable and demonstrably justified limit pursuant to s. 1.

93. In *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41 regarding sealing orders, as a general principle, expressed in section 135 of the *CJA*, all courts shall be open to the public. A sealing order is an exceptional measure that violates the open court principle, a principle that should be curtailed

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[53] The lawyers involved in this case, Mr. Marvy, Counsel for the OLRB and Mr. Cavalluzzo, counsel for LIUNA, who wrote to the Star to "*return the mistakenly disclosed documents and destroy any copies of the documents in your possession*" are also involved in my case.

[54] Section 136 formerly contained in s. 67(2)(a)(i) and Section 67(2)(*a*)(ii)

only where there is a need *"to protect social values of superordinate importance," Nova Scotia v. MacIntyre*, supra.

Refusal to Publish decisions

94. Judges are denying fundamental rights without providing "stringent" reasons as is the case in *Michail v. OECTA*, 2019 ONCA 319, where Rouleau, Miller and Fairburn JJ.A. stated:

> As the motion judge noted, it is left to the individual motion judge to decide whether or not to publish his or her reasons on the court's website.

95. The practice of not publishing decisions is another violation of the constitutional principle of open justice that cannot be saved or justified by s.1 of the *Charter*.

96. While each court is left to set its own rules to ensure the proper and efficient judicial function of administering justice in an orderly and effective manner, this power conferred to our judiciary to protect rights and freedoms cannot be used to the detriment of the individual, the public interest and our democracy:

> 70 Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.[55]

97. Chief Justice Strathy stated on September 13, 2018**: [**click here**]**

> The courts' decision-making is also open and transparent. … Judges must explain their decisions with reasons, and those decisions are open to public examination and criticism. … This ensures an informed debate about matters of public importance. And that debate is the sign of a healthy democracy.

Could the infringement be saved as being reasonable and demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Charter*?

98. I submit that subsections 136.1(a) (i), (b), (c) and 136(4) contravene s. 2(b), 7, 12 and 15(1) of the *Charter.* This total ban is overbroad and unconstitutional and could not be saved by s.1 of the *Charter* as a reasonable limit justified in a free and democratic society.

99. Allowing the video recording and dissemination of recordings would have no adverse effect on decorum, on the serenity of hearings, on truth finding or on the privacy of participants in the justice system. In the

[55] *MacIntyre v. Nova Scotia (Attorney General)*, 1982 *CanLII 14 SCC*

case of the Supreme Court of Canada, the adoption of real open hearings has neither disrupted court proceedings, nor truth findings or decorum. There is no discernable objective for the denial of freedom of expression and information and open justice to all citizens to justify overriding numerous *Charter*-protected rights to freedoms, security and liberty.

100. It has been long established that the exclusion of the public from court's procedures infringes the freedom of expression protected by s.2(*b*)[56]

> Measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press guaranteed by s. 2(*b*). To the extent that such measures prohibit public access to the courts and to information about the courts, they may also be said to restrict freedom of expression in so far as it encompasses the freedom of listeners to obtain information that fosters public criticism of the courts.

The Oakes Test

101. All previously provided objectives in earlier challenges are now either no longer pertinent or not applicable to this current challenge.

102. The permanent and overbroad publication ban imposed by subsections 136.1(a) (i), (b), (c) "*is simply too broad a restriction without adequate justification to afford a defence under s. 1"*[57] The impugned provisions drastically violate Canadians' rights under s. 2(b) and 15(1) of the *Charter* therefore cannot pass the Oakes proportionality test[58] as summarized by Lamer C.J.C. in *R. v. Chaulk*, [1990] 3 S.C.R. 1303:

1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are *pressing and substantial* in a free and democratic society before it can be characterized as sufficiently important.
2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a *proportionality test*; that is to say they must:
   (a) be *'rationally connected'* to the objective and not be *arbitrary, unfair or based on irrational considerations*;
   (b) impair the right or freedom in question *as 'little as possible'*; and
   (c) be such that their effects on the limitation of rights and freedoms are *proportional to the objective*. [Emphasis added]

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[56] Canadian Broadcasting Corp. v. New Brunswick, 1996 CanLII 184 (SCC), para.1
[57] *Edmonton Journal (The) v. Alberta (Attorney General)* 1989 CanLII 20 (SCC) para. 41, 42
[58] *R. v. Oakes*, 1986 SCR 103 para. 70, 73, 74, 75

103. The impugned provisions 136 (1) (a), (i), (b), (c) of the *Courts of Justice Act*

1. Serve *no pressing and substantial concerns* or *any sufficiently important objective.*
2. Have no *rational connection* between the total banning of the video and audio recording of all types of proceedings and the objective sought. The impugned provisions are *arbitrary, unfair or based on irrational considerations.*
3. Impair Canadians' rights and freedoms drastically. A total ban is clearly overbroad and does not meet the minimal impairment branch of the Oakes[59] test. The absolutist character of this ban, without justification or any legal foundation, violates guaranteed rights under s. 2(b) and 15(1) of the *Charter*.
4. There is no proportionality between the effect of the impugned measures on the protected right and the attainment of the objective as they go much further than is necessary and fail to strike a proportionate balance between the goals of the legislature and the constitutional rights of all Canadians. No salutary effect can derive from denying fundamental rights that can be saved or justified by s.1 of the Constitution.

Gross Disproportionality: Punishment Ss.136 (4), Breach of S.7 and S. 12 of the *Charter*

104. Punishing Canadians with a prohibitive fine of $25,000.00 and/or six months imprisonment for exercising a constitutional right is an egregious violation of s. 7 and 12 of the *Charter* and is grossly disproportionate. It is "*so excessive as to outrage standards of decency*" in the eyes of an informed member of the public and "*abhorrent or intolerable to society*".[60]

105. Ss. 136(4) lacks a reasonable purpose and would lead to an actual deprivation of individuals' rights to life, liberty, and security of the person. It is meant to silence the public.

106. In *R. v. Nur*, 2015 SCC 15, 2015 para.107, two principles of fundamental justice are invoked, the principle that a law which deprives a person of their liberty cannot be arbitrary - where there is no

[59] *R. v. Oakes*, [1986] 1 SCR 103
[60] *R. v. Nur*, 2013 ONCA 677 (CanLII), paras. 75 to 78

connection between the effect and the object of the law - and the principle that a law which deprives a person of their liberty cannot be overbroad - where the law goes too far and interferes with some conduct that bears no connection to its objective.

107. In order to find a violation of s. 12, it must first be found that the fine or threat of imprisonment constitute a form of "*treatment or punishment*." In the case at bar, the threat of fine or imprisonment or both is a treatment and a punishment therefore engage s. 12 of the *Charter*.

108. Based on the *"two-step inquiry into gross disproportionality",* Ss. 136(4) constitutes cruel and unusual punishment as it is grossly disproportionate *first* if applied to me*, and second "the sentence is grossly disproportionate when applied to reasonable hypotheticals",*

> A number of factors may inform the gross disproportionality analysis, both as it applies to the particular accused and to reasonable hypotheticals: see Smith, at p. 1073; *Goltz, at paras. 25-27; and Morrisey, at paras. 27-28. The factors identified in the case law are:*
> • the gravity of the offence;
> • the personal characteristics of the offender;
> • the particular circumstances of the case;
> • the actual effect of the punishment on the individual;
> • the penological goals and sentencing principles reflected in the challenged minimum;
> • the existence of valid effective alternatives to the mandatory minimum; and
> • a comparison of punishments imposed for other similar crimes.

109. Subsection 136 (4) shifts the focus away from an illegitimate publication ban to an alleged offence/crime where in fact <u>there is none.</u> A six-month sentence for exercising a constitutional right could not survive a s.12 challenge. As stated in *R. v. Nur*, 2013 ONCA 677 (CanLII) para. 80 and 81

> 81 The gravity of the offence is measured by reference to the essential elements of the offence that the Crown must prove to establish guilt and not by the circumstances surrounding the commission of the offence in the particular case before the court.

110. If ss.136(4) is found to be grossly disproportionate, it would be illogical to conclude that it is nonetheless proportionate under s. 1. *Such deprivation is unconstitutional as it is not consistent with the principles of fundamental justice*[61]. Doherty J.A. stated in *Nur*:

> [178] ... Given the very high bar set for a finding that a sentence constitutes cruel and unusual punishment, I find it very difficult to imagine how a sentence that clears that high bar could ever qualify as a reasonable limit demonstrably justified in a free and democratic society.

[61] *R. v. Nur*, 2013 ONCA 677 (CanLII), para. 61

> [179] ... In my view, the basic *quid pro quo* underlying s. 1 does not exist where the state imposes punishment that is "so excessive as to outrage standards of decency" and so disproportionate as to be "abhorrent or intolerable" to Canadians: *Ferguson*, at para. 14. What possible societal benefit could render such punishment "demonstrably justified in a free and democratic society?"
> [181] If an argument can be made that could justify sheltering a sentence that amounted to cruel and unusual punishment under s. 1, I have not heard it.

Attorney General of Ontario

111. *"The onus of establishing a reasonable limit to a guaranteed right is on those supporting the law"*[62]. If Subsections 136 (1)(a)(i), (b), (c) and 136 (4) of the *CJA* are found to be unconstitutional, the burden shifts to the AGO to demonstrate that the provisions should be saved under s. 1 of the *Charter,* and to provide "stringent" reasons to support the banning of modern technology and to continue to deny public access to court records, recordings of proceedings, the right to disseminate recordings, the concealment of decisions, and the threat to the liberty and security of the public, all of which would result in a departure from the fundamental constitutional principles of s. 2(b), 7, 12 and 15(1) of the *Charter.*[63]

Remedies Sought Under S. 52 (1) and s. 24(1) of the *Charter of Rights and Freedoms*

112. The impugned legislation has produced unconstitutional effects and there are no "stringent" reasons to support the banning of modern technology, specifically discreet audio and video recording devices from the courtrooms and the dissemination of recordings. Therefore, I seek a declaration that the impugned overbroad Ss 136 (1) (a) (i), (b), (c), with the punishment under ss.136 (4) of the *CJA* are unconstitutional, and in violation of s. 2(b), 7, 12 and 15(1) of the *Charter* and cannot be justified under s.1 of the *Charter*. As such, it should be struck down and found to be of no force and effect pursuant to s. 52(1) of the Constitution.

113. It is up to Parliament *to revise the law, should it choose to do so, so that it no longer produces unconstitutional effects*[64]. S. 52(1) confers no discretion to judges to grant a constitutional exemption. To do so would unduly infringe on Parliament's power to craft legislation and undermine the rule of law.

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[62] *Edmonton Journal (The) v. Alberta (Attorney General)* 1989 CanLII 20 (SCC) para. 54
[63] *R. v. Oakes*, 1986 SCR 103 para. 67, 69
[64] *R. v. Ferguson*, 2008 SCC 6

If the impugned legislation produced unconstitutional effects and found in violation of the rights guaranteed by the *Charter*, then the appropriate remedy is to strike down the provision as being of no force or effect.

> In such cases, the least intrusive remedy is to strike down the constitutionally defective legislation under s. 52. It is then left up to Parliament to decide what legislative response, if any, is appropriate.[65]

114. That the Court orders the release of the recordings of the hearings of November 18, 2020, March 21, 2017 and June 19, 2017 and my ONCA hearings and allows me to publish any and all information relating to my proceedings, including audio and video recordings of hearings on my website wakeupcallcanada.com

115. It is proposed that regarding the question in issue, the public interest in the maintenance and preservation of an open justice system, it is appropriate for this Court to grant declarations that:

a. The open court principle includes the publication of all decisions.

b. The open court principle includes the disclosure of unredacted transcripts.

c. The open court principle includes the disclosure of the file "History Record".

d. The open court principle includes the disclosure of the parties' names on their daily scheduling and dockets unless a ban is in force.

e. The open court principle includes the disclosure of links to join scheduled hearings unless a ban is in force, without having to seek permission or reveal identity.

PART VI - GENERAL DAMAGES

116. All Attorneys General have failed their mandate to protect our judicial system and the public interests, by allowing substantial on-going constitutional violations to take place; therefore, the AGO must be held liable for the injustice that I, as well as many Canadians, have endured. Had the Ministry of Justice implemented the recommendations from the 2008 report, I would not have gone through the hardships I have; rather, the Ministry showed disregard to the public interests and failed to uphold the Constitution.

117. I am seeking damages in the amount of $2,000,000.00, which shall be distributed equitably to the Chief Justice of the ONCA and Regional Senior Judges of Superior Courts to assist with the immediate

[65] *R. v. Ferguson*, 2008 SCC 6 para. 51

implementation of the necessary cameras and technology. Full disclosure to the public on how the money is spent is required for the sake of transparency and accountability.

118. The Courts and the AGO have all the necessary data to begin implementing changes and move forward with transparency, to uphold the rule of law and protect Canadians' *Charter* rights.

PART VII - COSTS SUBMISSIONS

119. Constitutional challenges are multi million-dollar actions. Most Canadians cannot afford to proceed with a constitutional challenge to vindicate their rights and bring about change. Despite my relentless efforts, I was unable to secure legal counsel willing to represent me pro-bono, for reduced fees or on contingency.

120. In a report publish in 2016, The Costs of Charter Litigation, Professor Alan Young wrote:

- I have never had costs awarded against my clients in cases in which the constitutional challenge had been dismissed.
- … It doesn't seem right that the government enacts the Charter and commits itself to having individuals protected through our justice system, and yet makes it economically impossible for that to happen.
- In addition, the costs of litigation have sent the price of a Charter challenge soaring out of reach for ordinary litigants and many public-interest groups. … We are stuck with this Charter that looks wonderful on paper, but it's just that – paper – unless people have the ability to enforce their rights. … Only those who drive a Cadillac get to use the Charter highway.

121. My only option was to proceed on my own; however, this came with a very high cost to my health and well being. No amount of monetary compensation can cure the harm that I suffered nor restore the decade of my life that I have spent trying to vindicate my rights.

122. The monetary cost of this litigation caused me severe financial hardship. I was fired without cause in October 2014, the LDCSB is unlawfully withholding my legitimate entitlements as I refuse to sign a gag provision, and I refuse to endorse a dishonest and fraudulent statement of facts. I was left without income for years and then on Canada disability pension until September 2019 when WSIB ruled in my favour. [click here] To fund my litigation and pay my bills I had to take a loan against my home. I continue to suffer severe prejudice due to the repeated offences and breaches of the law perpetrated by the powerful employer /repeat offender/tortfeasor, who is weaponizing the court against me.

123. This challenge raises *"a genuine issue of law of significance to the public at large"* Where:

> First, the interests involved are not usually those of private parties in pursuit of monetary remedies. Financial incentives seem to be misplaced as Charter issues and Charter remedies involve the interest of the public at large. It is not evident that the indemnification rationale holds. Moreover, there is a lack of symmetry of resources as between the public interest rights seekers and government defenders. Second, the encouragement of settlements rationale is, at best, an awkward fit as Charter claims are not ordinarily susceptible to compromise.[66]

124. No costs should be awarded against me "*to ensure that ordinary citizens will not be deterred from bringing important constitutional arguments before the courts."*[67] As stated by Lebel J. in *Okanagan*:

> [38] In cases of this nature, as I have indicated above, the more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance. Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues.

125. A sincere apology from the AGO and the Ministry of Justice to the public and myself for their failure to protect our rights and a commitment to rebuild the broken trust are warranted.

126. The AGO must be held liable for all costs incurred regarding this constitutional challenge.

Final Message: *it's time - constitutionally and practically - for judges to make it happen*

127. In 2012, CBC media Lawyer Daniel Henry in his Vox Libera Award acceptance speech pleaded to allow cameras in the courtroom. His plea fell on deaf ears. Nine years later, I am renewing his plea with the hope to be heard:

> Today, when citizens can have direct access to that electronically, and the justice system denies that to them, it's just not, in a modern sense, open justice. it's just not good enough. …
> When we're denied the ability to see and hear legal arguments in *any* court, trial courts included, on matters of public interest, it's just not good enough. …
> Whatever the reason for it, it's time—constitutionally and practically—for judges to take another look at making it happen.
>
> My message to trial judges: you are masters of your own courts; you are independent. Let the public see and hear the great work that you do. End your audio-visual isolation. Connect to Canadians, and join the modern society you serve. You're presiding over public proceedings, after all.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on this 16th day of March, 2021

Myriam S. Michail

Myriam Michail

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[66] Access to Charter Justice Robert J. Sharpe (2013) p.7

[67] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, para. 39

Schedule A - TABLE OF AUTHORITIES

Cases Considered or Referenced	Paragraphs
1. *Restoule v. Canada (Attorney General)*, 2018 ONSC 114	42, 64, 82, 86, 88
2. *Toronto Star v. AG Ontario*, 2018 ONSC 2586	11, 46, 48, 62, 92
3. *Canadian Broadcasting Corporation V. HMQ*, 2013 ONSC 6983	
4. *Société Radio-Canada c. Québec (Procureur général)*, 2011 SCC 2	
5. *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41	35, 75
6. Canadian Broadcasting Corp. v. New Brunswick, *1996 CanLII 184* (SCC)	31, 49, 99
7. *Regina v. Squires (1992), 18 C.R. (4th) 22, 59 O.A.C. 281, 11 O.R.*	91
8. *R. v. Oakes*, [1986] 1 S.C.R. 103	3, 62, 103, 104, 112
9. *R. v. Mentuck*, 2001 SCC 76, 2001 CarswellMan 535	35, 62, 76
10. *Dagenais v. Canadian Broadcasting Corp*.1994 SCJ No. 104	58, 74, 77
11. *A.G. (Nova Scotia) v MacIntyre*, 1982 CanLII 14(SCC)	30, 92
12. *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71	125
13. *Named Person v. Vancouver Sun*, 2007 SCC 43	36, 39, 66
14. *R. v. Nur*, 2013 ONCA 677	103, 106, 109,110
15. *Vancouver Sun (Re)*, *2004* SCC 43	34, 41, 76
16. *Edmonton Journal v. Alberta*, 1989 CanLII 20 (SCC)	33,61, 89,101, 111
17. *R. v. Dunstan*, 2017 ONCA 432 (CanLII)	72, 81
18. *Ontario Medical Association v Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090,	56
19. *R. v. DeSousa*, [1992] 2 SCR 944	11
20. *The Costs of Charter Litigation* *Alan Young May 3, 2016*	120, 121
21. *Access to Charter* Justice Robert J. Sharpe (2013) p.7	124

Schedule B – Relevant Statutes and Regulations
Canadian Charter of Rights and Freedoms

* **Section 1: Rights and freedoms in Canada**

  The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

* **Section 2 (b): Fundamental freedoms**

  Everyone has the following fundamental freedoms:

  a. freedom of conscience and religion;
  b. freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

* **Section 7: Life, liberty and security of person**

  Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

* **Section 12: Treatment or punishment**

  Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

* **Section 15: Equality before and under law and equal protection and benefit of law**

  (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

* **Section 24 (1): Enforcement of Guaranteed Rights and Freedoms**

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

* **Section 52 (1): Primacy of the Constitution of Canada**

  The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Courts of Justice Act

136(1) Prohibition against photography, etc., at court hearing

Subject to subsections (2) and (3), no person shall,

(a) take or attempt to take a photograph, motion picture, audio recording or other record capable of producing visual or aural representations by electronic means or otherwise,

(i) at a court hearing,

(ii) of any person entering or leaving the room in which a court hearing is to be or has been convened, or

(iii) of any person in the building in which a court hearing is to be or has been convened where there is reasonable ground for believing that the person is there for the purpose of attending or leaving the hearing; or

(b) publish, broadcast, reproduce or otherwise disseminate a photograph, motion picture, audio recording or record taken in contravention of clause (a); or

(c) broadcast or reproduce an audio recording made as described in clause (2)(b).

136(2) Exceptions

Nothing in subsection (1),

(a) prohibits a person from unobtrusively making handwritten notes or sketches at a court hearing; or

(b) prohibits a lawyer, a party acting in person or a journalist from unobtrusively making an audio recording at a court hearing, in the manner that has been approved by the judge, for the sole purpose of supplementing or replacing handwritten notes.

136(3) Exceptions

Subsection (1) does not apply to a photograph, motion picture, audio recording or record made with authorization of the judge,

(a) where required for the presentation of evidence or the making of a record or for any other purpose of the court hearing;

(b) in connection with any investitive, naturalization, ceremonial or other similar proceeding; or

(c) with the consent of the parties and witnesses, for such educational or instructional purposes as the judge approves.

136(4) Offence

Every person who contravenes this section is guilty of an offence and on conviction is liable to a fine of not more than $25,000 or to imprisonment for a term of not more than six months, or to both.

Practice Direction Concerning Civil Appeals at the Court of Appeal for Ontario

17. Digital Audio Recordings

1. The Court of Appeal is not a "court of record". Its oral hearings are not monitored or transcribed as a matter of routine. However, the Court of Appeal records all hearings that are held in open court through the use of digital audio recording. Unless a judge orders otherwise, a copy of a digital audio recording is available upon request, provided that the proceedings are not subject to a statutory publication ban or other court order that prevents the release of the digital audio recording.

2. Requests for access to digital audio recordings should be made in the Registrar's Office and are subject to payment of the prescribed fee, unless a fee waiver certificate is produced. Such recordings are for personal use, and will not be released unless the person requesting the recording signs an undertaking agreeing to respect the limits on the permitted uses of the recording.

3. If a person wishes to have a transcript of a hearing made, he or she must first bring a motion for permission to do so before a single judge. Once the order is obtained, the person may have the recording transcribed at her or her own expense.

4. The publication, broadcasting, reproduction or other dissemination of an audio recording of a court hearing is prohibited unless expressly authorized by a court order.

Protocol Regarding the Use of Electronic Communication Devices in Court Proceedings

This Protocol is founded on the “open courts” principle, which requires transparency and accountability in the judicial system to foster public confidence in the administration of justice.

(1) Application

This Protocol applies to all persons attending or participating in a location where public court proceedings in the Ontario Court of Justice before a justice of the peace or a judge are being conducted or transmitted. Use of electronic communication devices should never interfere with court proceedings or the ability to have a fair trial.

(**2)** Definitions

"Electronic communication devices" include all computers, personal electronic and digital devices, and mobile, cellular and smart phones.

"Judicial Officer" means a judge or justice of the peace of the Ontario Court of Justice.

(3) Use of Electronic Communication Devices in Court Proceedings

The use of electronic communication devices in silent or vibrate mode is permitted, except as follows:

i. The presiding judicial officer orders otherwise.
ii. Legislation (e.g. the Child, Youth and Family Services Act) or a court order restricts public attendance.
iii. No photos or videos may be taken unless there is a court order pursuant to section 136 of the Courts of Justice Act.
iv. Audio recording of proceedings is permitted by counsel, paralegals licensed by the Law Society of Ontario, court staff, members of the media, and litigants for note-taking purposes only but the presiding judicial officer must be advised before the recording is commenced. **Members of the public** are also permitted to make audio recordings for note-taking purposes only if the express permission of the presiding judicial officer is first obtained. These audio recordings cannot be transmitted.
v. Talking on electronic communication devices is not permitted while court is in session.

(4) Publication Bans and Other Restrictions

Anyone using an electronic communication device to transmit information has the responsibility to identify and comply with any publication bans, sealing orders, or other restrictions imposed by statute or by court order.

(5) Judicial Orders

The presiding judicial officer retains overriding responsibility to maintain courtroom decorum and to ensure that court proceedings are conducted in a manner consistent with the proper administration of justice. In deciding whether to restrict the use of electronic communication devices, the presiding judicial officer may consider whether there is evidence regarding factors such as:

i. whether the use of electronic communication devices would disrupt the court proceedings or interfere with the proper functioning of the court electronic equipment; or
ii. whether the use of electronic communication devices would interfere with witness testimony, or unreasonably infringe anyone's privacy or security.

(6) Enforcement of the Use of Electronic Communication Devices

Anyone who uses an electronic communication device in a manner that the presiding judicial officer determines to be unacceptable may be ordered to turn off the device, leave the device outside the courtroom, leave the courtroom, or abide by any other order the presiding judicial officer may make.

LONDON DISTRICT CATHOLIC SCHOOL BOARD
Plaintiff/Respondent/Respondent in Appeal

– and –

Court File No. C68942
Motion M52196
MYRIAM MICHAIL
Defendant/Moving Party/Appellant

COURT OF APPEAL FOR ONTARIO
Proceeding Commenced at London, Ontario

Factum Motion

Constitutional Challenge

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