ONCA File #: C 68942
London Superior Court File # 2208/19

COURT OF APPEAL OF ONTARIO

BETWEEN

LONDON DISTRICT CATHOLIC SCHOOL BOARD

Plaintiff/Respondent/Respondent in Appeal

– and –

MYRIAM MICHAIL

Defendant/Moving Party/Appellant

NOTICE OF CONSTITUTIONAL QUESTION

January 19, 2021

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Self-Represented Appellant

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The Appellant, Myriam Michail, intends to question the constitutional validity *or* applicability of the *Courts of Justice Act* R.S.O. 1990, specifically subsections:

1. 136 (1) (a) (audio and visual only) (i), (b), (c)
2. The punishment under 136 (4)

Section 136 formerly contained in s. 67(2)(a)(i) and Section 67(2)(*a*)(ii), which reads as the following:

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) … 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(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.

And its applicability in several documents i.e. the *Consolidated Provincial Practice Direction*

67. Unless this section provides otherwise, all persons must execute an undertaking with the court to access the digital recordings. The undertaking prescribes the way in which the digital recording is to be used and the terms and conditions under which the digital recording is being provided. All digital recordings are subject to the prohibition set out in s. 136 of the *Courts of Justice Act*, which prohibits the broadcast, reproduction and dissemination of audio recordings. Any person who contravenes s. 136 is guilty of an offence and subject to a penalty, in accordance with s. 136(4) of the *Courts of Justice Act*.

And the Undertaking which states:

I, _____(please print legibly), acknowledge

a) The digital recording is being provided to me solely for the purpose of:

☐ supplementing or replacing handwritten notes of the court proceeding, or

☐ to enable me to listen to the following court proceeding that I was unable to attend in person: _____(name of case) on the following date(s): _____, or

☐ preparation in connection with the legal proceedings with respect to this case, or **[Note: Only a litigant, accused or prosecutor of record may use the digital recording for this purpose.]**

☐ access provided pursuant to a court order

b) Any other use of the digital recording is prohibited without an order from the presiding judicial officer or a judicial officer of the Court.

2. I understand and agree that the digital recording to be provided pursuant to this request will be provided subject to the following terms and conditions:
   a. I have read and understand s.136 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, including that 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.
   b. I will not publish, broadcast, reproduce or otherwise disseminate the digital recording, including any annotation in the audio file, in any way.
   c. I will not copy, save, upload or download the digital recording.
   d. I will not authorize, assist or permit anyone to publish, broadcast, reproduce or otherwise disseminate the digital recording, including any annotation in the digital recording, in any way.
   e. I will not provide the digital recording, or copies of same, in any format to any third party.
   f. If a witness exclusion order has been made in the proceeding, I will not disclose the contents of the digital recording to any prospective witness who has not given evidence.
   g. When the digital recording is not being used for the purpose permitted by the undertaking, I will keep the digital recording in a secure place where it cannot be accessed by other persons.
   h. I will destroy the digital recording and render it inoperable when the purpose for which the digital recording was provided to me has concluded.

The Constitutional Challenge attached to this Notice under Schedule "A" is novel in that it is advanced by a party to a legal proceeding and not a third party.

The integrity of our legal system, the supremacy of our constitution, the constitutional principle of open justice, the litigant's right to freedom of expression, to gather evidence and to an open and fair process, to equality before the law, and the liberty and security of the person, and the public's right to see justice being done, are at the forefront of this constitutional challenge.

The miscarriage of justice in my case, brings to light the detrimental impact of the current closed judicial system on Canadians and our country.

CONSTITUTIONAL CHALLENGE [See Schedule "A"]

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

- a challenge regarding 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 entering or leaving the room 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 litigant's/party, to natural justice and 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;

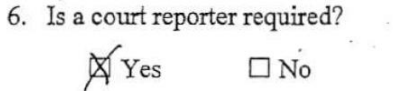
- the oppressive undertaking based on ss. 136(4) of the *CJA*, in breach of s. 7 and 12 of the *Charter*, threatening the liberty and security of Canadians with a $25,000.00 fine and/or 6 months imprisonment, if they exercise their right to free speech flies in the face of our democratic society and 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.

The question is to be argued on a date and time to be fixed by the Registrar, at the Court of Appeal for Ontario Osgoode Hall, 130 Queen Street West, Toronto, Ontario M5H 2N5.

The following are the material facts giving rise to the constitutional questions:

1. The constitutional questions and remedies sought have risen after the termination of a proceeding that took place at the Superior Court of Justice, London, Ontario, file # 2208/19, to which I was a party, when in November 2020, Judge Mitchell refused to release the recording of the November 18, 2020 hearing to the transcriptionist in breach of my constitutional rights under s. 2(b) and 15(1) of the *Charter*, where transcripts are needed to show evidence of a lack of natural justice and procedural fairness that I endured.

2. This same issue has risen before, after the termination of another proceeding that took place at the same court back in 2017 file # 624/17 when both Justice Duncan Grace and Justice Lynne Leitch denied the Transcriptionist request to obtain access to the recordings to transcribe court proceedings although a court reporter was requested in the Certificate of Readiness


6. Is a court reporter required?

☒ Yes ☐ No

3. When the Court transcriptionist requested the CD recording all three judges refused to release the recordings to the transcriptionist although provision 87 of the *Consolidated Provincial Practice Direction* states:

> Court Services Division Staff and Transcriptionists
> 87. Copies or access to digital recordings shall be provided upon request at no charge to the following:
> a. Court Services Division Staff who require access in the course of their employment responsibilities; and,
> b. Transcriptionists authorized by Regulation 158/03 under the *Evidence Act* who require access to transcribe court proceedings and who have signed an "Undertaking of Authorized Court Transcriptionist for Access to Audio Court Recordings".

4. The judges' repeated refusal to release recordings and transcripts is in breach of the constitutional principle of open justice, the public's right to be informed of what goes on in our courts and the litigants' constitutional right to obtain evidence. The Motion hearing is a court proceeding and was open to the public. My proceeding is a civil matter, where:

   - The matter is of the highest public interest;

- The proceeding does not fall under any specified types of restricted access;
- There is no publication ban;
- The request does not fall under Section 2.2.1 "*Court Orders Restricting Access*", as there is no privacy or security issues;
- It is not a young offender's trial;
- It is not a family matter;
- There are no sealing orders;
- There are no witnesses to protect;
- There is no jury involved;
- There is no reporting of sexual offences involved;
- It will not cause the victim, any further harm;
- There is no rational connection between banning the dissemination of the recording of the proceedings and the fairness of the process.

5. At both the Superior Court and the ONCA I am required to sign an undertaking in order to acquire a recording of my own hearing. The terms and conditions of this undertaking are unreasonable, frightening, unjustified and an infringement of Canadians' *Charter* rights. The undertaking threatens with imprisonment and/or a massive and coercive fine if I dare to share the recordings of my own hearings with anyone although there is no publication ban.

6. At the ONCA, Rouleau, Miller and Fairburn JJ.A. refused to grant me permission to video record my hearing on March 20, 2019 under ss. 136 (3)(a) of the *Courts of Justice Act* and refused to grant me permission to disseminate the audio recordings of any of my hearings to make them accessible at any time to persons who are interested to hear and see justice being done.

7. This denial to obtain crucial evidence is extremely prejudicial to a self-represented litigant coping with a medical condition, who was even denied her right to file an Application under s. 6(2) of the *JRPA* and falsely accused of being a vexatious litigant, by a powerful party/repeat offender. Furthermore, courts should not impede efficient and accurate communication to the public.

8. Previously, OECTA's legal Counsel P. Cavalluzzo and LDCSB's counsel B. Traynor characterized my case as "of national importance" and raises "issues that are important to the development of the law" and "given the number of complex and novel administrative law issues raised in the application" of broad "public importance" it "should be considered by 3 judges" at the Divisional Court. Mr. Cavalluzzo made this matter clear to Grace J. at the hearing of June 19, 2017[1] and also wrote in his May 25, 2017 Factum:

> 34. … As this Court has previously stated "constitutional matters are of enormous importance, and are matters to be considered here by a fully constituted Divisional

[1] I am unable to obtain the transcript as Grace J. refused to release the recording to the Court transcriptionist.

> Court." That sentiment is especially true in this case given the national importance of the exclusive representation principle.

9. Grace J. stated his 2017 ONSC 3986 decision:

> [50**]** I am of the view that interests of justice require that Ms. Michail's application for judicial review be heard by three justices. … given consideration of the breadth and complexity of the issues she wishes to raise and canvass.

10. It defeats reason that the Court acknowledges that "*Constitutional matters are of enormous importance, and are matters to be considered here by a fully constituted Divisional Court*"[2] yet, they are not archived and made available for future reference. This prohibition compromises public interests and deprives Canadians of their right to be informed and "*restrict what is meant to be made public silencing the person trying to assert their constitutional right."*

11. How can Courts report that "**all judicial proceedings must be held in public"** and simultaneously ban all audio or video recordings and refuse to release recordings to transcriptionists? The impugned provisions are coercive, they violate the open courts principle and obstruct the public right to have access to courts' documents and proceedings and to watch justice being done. Canadians have the right to rely on recordings to obtain direct, complete and accurate information when needed.

12. To prohibit the use of cameras in the courtroom, to ban the dissemination of information and threaten a cruel punishment of imprisonment and an excessive fine outlined in subsection 136 (4) violates s.2 (b), 7, 12 and 15(1) of the *Charter* and is an assault on Canadians' right to freedom of expression and the search for truth and justice. Images and sounds are vital to communicate accurate and complete information.

13. I am faced with false allegations of vexatiousness for expressions I made in matters of public interest, threatened with health damaging litigation, having my legal rights seized and paying unfair legal costs. The LDCSB is requesting that I be punished and humiliated at every forum because of my "conduct" in having *"broadened the subject matter to involve the constitutionality of provincial legislation, the "open courts" principle, and other issues …"*.

14. I am finding myself trapped between a rock and a hard place, either suffer in silence or speak out and be humiliated and severely punished.

15. The Motion Judge at the November 18, 2020 hearing failed to observe the principle of natural justice and procedural fairness:

- I contend that Judge Mitchell had predetermined the result of my s. 137.1 motion where from the onset, before hearing any evidence or arguments she made her position clear that s. 137.1 <u>should not</u> and <u>cannot</u> <u>ever</u> be applied in a proceeding under s. 140 of the *CJA* as reflected in paragraphs 19 and 21 of her decision. This would be evident if one were able to listen to the recording of the hearing;

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[2] *Jafine v. College of Veterinarians of Ontario* (Gen. Div.), 1991 CanLII 7126 (ON SC)

- Judge Mitchell admonished me for having filed legitimate appeals, for bringing a s.137.1 of the *CJA* motion and for resisting the LDCSB's vindictive, unjustifiable and overly broad requested order[3]. This would be evident if one were able to listen to the recording of the hearing,

16. Being unrepresented, I have found myself automatically dismissed, severely punished, repeatedly denigrated, denied due process, my evidence ignored and my arguments disregarded and not even set out in decisions, then falsely accused of engaging in vexatious litigation to intimidate me, censor expressions on public issues, and deter others from participating in discussions on matters of public interest before the judiciary.

17. Justice dictates that recordings of all my hearings be released, archived and disseminated for the public to hear first-hand what truly took place during the hearings. Concealing such crucial evidence is unconstitutional and oppressive. Firthermore, it is my right, to rely upon the transcript, the denial of my right to obtain transcripts left me in a precarious position leading to an unfair process at the Court of Appeal before and it is reoccurring now.

18. The refusal to disclose recordings gives rise to an adverse inference that if the recordings were to be made public, they would have been of assistance to my position that as a SRL, I was repeatedly denigrated, denied due process, my evidence ignored and my arguments disregarded and not even set out in decisions. Indeed:

> "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."[4]

19. In addition, Mitchell J. has not published a decision on Costs that she issued on January 11, 2021. Previously, Paciocco J.A. and Grace J. have refused to publish their decisions, despite my requests for publication. Similarly, Arbitrator Brown refused to publish his three Arbitration Awards. This practice has spread to almost all courts' levels and administrative boards/tribunals as it is evident in my case where numerous decisions remain "unpublished". This demonstrates a pattern of disregard for the rights of the public and for the rule of law and the *Charter.* The public has an inalienable right to a fair administration of justice which relies on full disclosure and openness in our courts. All legal decisions should be available to the public to follow. As many decisions rely on findings in prior decisions, the public must be able to follow a case from

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[3] To punish, humiliate, abuse and usurp my constitutional rights, for having spoken the truth on matters of public interest, the LDCSB is also requesting:

> 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.

[4] Quoted in *Canadian Broadcasting Corp. v. New Brunswick* (AG) Re R. v. Carson [1996] SCJ No. 38

start to finish. It is illogical for a judge to refer to another decision, without that decision being made available for reference. Decisions should not be buried and hidden from the public, and escape peer review.

20. It was incumbent on judges to provide "stringent" reasons/justification for this ban, the concealment of decisions and their repeated violations of my rights and the rights of all Canadians. The Court's failure to bring forward any justification for this persistent violation of Canadians' constitutional rights is especially significant. Such breach cannot be saved or justified by s.1 of the *Charter* and the constitutional validity *or* applicability of the *Courts of Justice Act* ss. 136(1)(a)(i), (b), (c), and 136(4) need to be declared unconstitutional.

21. Indeed, each court is left to set its own rules however, all operational decisions must be in compliance with the constitution to ensure and fulfill the proper and efficient judicial function of administering justice in an orderly, just and efficient manner and not to implement an injustice, deny me evidence and silence expression or advocacy on matters of public interest.

> a common law rule conferring discretion cannot confer the power to infringe the *Charter*. Discretion must be exercised within the boundaries set by the principles of the *Charter*; exceeding these boundaries results in a reversible error of law.[5]

22. Fish J. stated that the constitutional principle of open justice and the "unbroken line of authority" [6] at the Supreme Court "over the past two decades" would grant litigants the right to audio and video record and disseminate proceedings especially in Appellate courts:

> the Dagenais/Mentuck test applies to all discretionary court orders that limit freedom of expression and freedom of 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]

23. As it stands, Canadians are oppressed, helpless and left without recourse. As in my case, I am left at the mercy of an unlawful employer, a powerful repeat offender[7] who is falsely accusing me of their own wrongdoings and vexatious conduct, using litigation as a strategy to frighten, bully, and coerce a weaker party into silence. I am falsely accused of vexatiousness, defamed and threatened with severe punishment and legal costs, although my case is proven to have high

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[5] *Dagenais v. Canadian Broadcasting Corp*. [1994] SCJ No. 104 para. 71

[6] *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 para. 7 and 2, 4, 26, 27, 28

[7] Based on uncontested findings in the two Arbitration Awards and two WSIB decisions. There are findings of serious misconduct on the part of my employer including: violations of the *Code*, the *Collective Agreement* and the *OHSA*, harassment, discrimination, deceit, bias, reprisal and the tort of intentional infliction of mental suffering. Arbitrator Brown, among other findings, wrote in a July 2015 unpublished Arbitration Award: **[p. 3, 42, 59, 60, 61, 63, 64 and 67]**

> I conclude the facts at hand do satisfy all of the elements of the tort of intentional infliction of mental suffering. The reprisal in particular was flagrant and outrageous.

merit and this same request was denied three times by the ONCA, including two rule 2.1 requests, one submitted by my union and the second by the employer[8].

24. I find myself arbitrarily denied my constitutional rights to obtain transcripts of my own hearings, to access and disseminate audio recordings of my own hearings, abused and oppressed by powerful judges and lawyers, falsely accused and threatened with cruel and unusual punishment, if I dare to disseminate the recordings of my hearings to defend myself and my reputation.

25. Sadly, all parties, including lawyers for the Attorneys General of Ontario and Canada, and the Ontario Labour Relations Board who are mandated to be impartial colluded to obstruct the adjudication of the Constitutional Challenge, as evident from the email exchange initiated by the Attorney General of Canada and all seven lawyers representing the five powerful Respondents.

26. For decades, advocates for an open justice system have been pushing for cameras in courts.

27. **In 2005,** AGO Michael Bryant (2003-2007) established a blue-ribbon Panel[9] that included two judges from the ONCA: James MacPherson J.A. and Benjamin Zarnett J.

28. **In 2006 a Comprehensive Report[10] was issued** stating, among others:

> **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.

29. **In 2007 a Pilot Project** was run by ONCA where proceedings were livestreamed.

30. **In 2008 a Second Report** branded the pilot project an overwhelming success and recommended that courtroom cameras should be continued in the ONCA, their use should be expanded to other Appellate Courts and that the *Ministry of the Attorney General should consider an amendment to the Courts of Justice Act to permit the use of cameras in Ontario Courts*[11].

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[8] The 2.1 request was based on a false contention that I was appealing Paciocco's J.A. decision. The truth is that I was appealing Brown J.A. decision regarding the Constitutional Challenge.

[9] See August 2006 Report p. 54, 55 and 56 for a list of all participants.

[10] See August 2006 Report p.15

[11] May 2008 - Final Report **p. 4, 5, 11, 12,13, 14, 15, 16**

31. **Over fourteen years have passed since the first report. The Ministry of Justice and all AG**[12] have failed to implement the recommendations and concealed the second report, keeping the status quo despite full knowledge of the deleterious effects of subsections 136(1) (a) (i), (b), (c) and 136 (4) which are aimed to silence, intimidate and stifle public participation and deter public criticism and advocacy for change.

32. In an interview with a Toronto Star Reporter on June 24, 2019, 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.)

33. Since his appointment at the SCC in 2017, chief Justice R. Wagner has advocated for cameras in court rooms.

The following is the legal basis for the constitutional questions: [Schedule "A"]

34. The Canadian Constitution Act, guarantees:

- **Under 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.
- **Under Section 2 Fundamental freedoms**
  Everyone has the following fundamental freedoms:
  (b) Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- **Under 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.
- **Under Section 12 Treatment or punishment**
  Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.
- **Under Section 15. (1) Equality Rights**
  Equality before and under law and equal protection and benefit of law
  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.

[12] Chris Bently (2007), John Gerretsen (2011), Madeleine Meilleur (2014), Yasir Naqvi (2016), Caroline Mulroney (2018) and Doug Downey 2019

- **Under Section 52(1) Primacy of 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.

35. This total ban of cameras in Appellate courts and for applications or motions in the Superior Court of Justice and the Ontario Court of Justice is overbroad and unconstitutional. It could not be saved by s.1 of the *Charter* as a reasonable limit justified in a free and democratic society. Subsections 136(1) (a) (i), (b), (c) combined with the cruel punishment in 136 (4) are not a reasonable and demonstrably justifiable limit under s. 1 of the *Charter.* There is no rational connection between the total banning of the video and audio recording of all types of proceedings and any salutary objective.

36. To uphold the rule of law and the Constitution, the onus rests upon any party[13] who would be seeking secrecy by denying public access to court audio/video recordings to provide the extraordinary reasons to justify the denial of this fundamental constitutional principles of: (a) the "open court"; (b) freedom of expression, including freedom of the press and other media of communication to publicize court proceedings guaranteed by section 2(b) of the *Charter*, (c) the right to the equal protection and equal benefit of the law without discrimination guaranteed by section 15 (1) and the right not to be subjected to any cruel and unusual treatment or punishment. guaranteed by section 12 of the *Charter*.

37. **The Oakes Test:** The restrictions in subsections 136(1) (a) (i), (b), (c) and 136 (4) do not meet the minimal impairment branch of the Oakes[14] test which requires that the objective of the law must relate to a societal concern that is "pressing and substantial" and that the means used to attain the objective are "proportional" and rationally connected to the objective of the legislation, minimally impair the right in question, and that the harmful effects of the restriction are proportional to the salutary objective.

38. **The "Dagenais / Mentuck test:** The denial of public access to court proceedings and decisions that may limit the freedom of expression under s. 2(b) must satisfy the "Dagenais/Mentuck" test. The prohibition of cameras and audio recording is an infringement of s. 2(b) of the Charter because openness is the presumption[15]. A publication ban should only be ordered when
    1) there is a serious risk to the proper administration of justice,
    2) reasonably alternative measures will not prevent the risk,
    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.

39. In compliance with "Open Justice" Constitutional principle and as a guaranteed right under s. 2(b) and 15(1) of the *Charter*, cameras should be allowed in all Appellate Courts and for

[13] Keeping in mind that no one is above the law
[14] *R. v. Oakes*, [1986] 1 SCR 103 para. 70, 73, 74, 75
[15] *Dagenais v. Canadian Broadcasting Corp*. 1994 SCJ 104 para. 77 and *R. v. Mentuck* 2001 SCJ No. 73

Applications or Motions in the Superior Court of Justice and the Ontario Court of Justice in Ontario subject to curtailment, only to the extent necessary when there is a need "*to protect social values of superordinate importance*" [16].

40. Subsections 136(1) (a) (i), (b), (c) and 136 (4) shift the focus away from an illegitimate publication ban that infringes on an individual's constitutional rights to an alleged offence where in fact there is none. The punishment in subsection 136 (4) is grossly disproportionate and 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*".

41. The undertaking I was asked to sign is *de facto* a rigid "permanent publication ban". It prevents the dissemination of the recording even after the proceedings are concluded. It is preposterous to convict an innocent person under an unconstitutional law with such cruel punishment of $25,000.00 fine and/or six months imprisonment for exercising a fundamental right guaranteed by the *Charter* and an afront to Canadians' rights guaranteed under section 7 and 12 of the *Charter*. This tyrannical document is designed to silence the public and is alien to a democratic nation like Canada.

42. Subsections 136(1) (a) (i), (b), (c), combined with 136 (4), should be held to be of no force or effect. The deleterious effects to the freedom of expression and the legal rights of those affected by this prohibition outweigh the salutary effects <u>if any</u>.

I am kindly requesting that Attorneys General make it known that they wish to make written or oral submissions. A further notice of the date, time and place will follow.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on this 19th day of January, 2021

Myriam S. Michail

Myriam Michail

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

SCHEDULE "A"

Constitutional Questions and Request for Certification

In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.[17]

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.[18]

Constitutional Questions of General Importance

I am bringing the following constitutional questions of general importance before the court:

Question 1:

Do the impugned Subsections 136(1) (a)(i), (b), (c) of the *Courts of Justice Act* violate the Canadians' Constitutional rights guaranteed by s. 2(b) of the *Charter* to freedom of information, freedom of expression and the constitutional requirement of Court's openness by banning the right to audio/video recording of 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 allowing 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 it is of high public interest?

Question 3:

Does the impugned Subsection 136 (4) of the *Courts of Justice Act* R.S.O. 1990 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*

[17] Fish J. *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, 2005 SCC 41

[18] English Philosopher Jeremy Bentham Quoted in A.G. (Nova Scotia) v MacIntyre, 1982 CanLII 14(SCC), [1982] 1 SCR 175 per Dickson CJ

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.

Remedies Sought Under the *Charter*

1. I am claiming remedy under s. 24(1) of the *Charter of Rights and Freedoms*[19]

   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.

2. I seek a declaration that **the impugned Subsections** 136 (1) (a) (i), (b), (c), with 136 (4) of the *Courts of Justice Act* **R.S.O. 1990** are unconstitutional, and in violation of s. 2(b), 7, 12 and 15(1) of the *Charter of Rights and Freedoms* and cannot be justified under section 1 of the *Charter*. As a consequence, it should be struck down and found to be of no force and effect pursuant to s. 52 of the *Charter*. There are no "stringent" reasons to support the banning of modern technology, specifically discreet audio and video recording devices from the courtroom where there is no jury, no witnesses, no publication ban or sealing order.

3. The Court to order the release of the recordings of all my hearings of November 18, 2020, March 21, 2017 and June 19, 2017 at the Superior Court in London and the March 20, 2019, October 18, 2018 and August 30, 2018 at the ONCA and allows me to video record future hearings and disseminate all audio and video recordings of hearings as it is the practice with the Supreme Court of Canada without threats to my liberty and security. I am requesting that this Court grant me access to these materials as a constitutional right that is guaranteed to every Canadian. It is my position that it is my constitutional right to obtain and disseminate audio recordings and transcripts of hearings that I was a party to. There is no justification for the current ban.

4. I seek a declaration that:

[19] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982.

a. The open court principal includes the right to audio/video record and archive recordings of proceedings. Restrictions on direct access and archiving of court audio or video recordings should only be in accordance with the "Dagenais/Mentuck" test.

b. The open court principal includes the publication of all decisions.

c. The open court principal includes the disclosure of unredacted transcripts.

d. The open court principal includes the disclosure of the file "History Record".

e. I seek a declaration that open court principal includes the disclosure of the parties' names on their daily scheduling and dockets unless a ban is in force.

f. The open court principal includes the disclosure of links to join in any hearing scheduled on Court's daily dockets unless a ban is in force, without having to seek permission or reveal identity.

5. I seek a mandatory order granting me the right to obtain the transcripts and recordings of my November 18, 2020, March 21, 2017 and June 19, 2017 hearings.

6. Such further and other relief I may request and this Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on this 19th day of January, 2021

Myriam Michail