Court File No. 33965

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for the Province of Ontario)

BETWEEN:

N.S.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

M____D.S.

Respondent

- and -

M____L.S.

Respondent

FACTUM OF THE RESPONDENT M____D.S.

David B. Butt
501-205 Richmond Street West
Toronto, Ontario
M5V 1V3
Tel: 416-361-9609
Fax: 416-361-9443
E-mail: dbut@barristersatlaw.ca
Counsel for the Appellant

Terri H. Semanyk
Shanbaum Semanyk Professional Corporation
150 Isabella Street, Suite 1207
Ottawa, Ontario K1S 1V7
Tel: 613-238-6969, ext: 2
Fax: 613-238-9916
E-mail: tsemanyk@sspclaw.ca
Agents for the Appellant

Michael Dineen & Douglas Usher
481 University Avenue
Suite 510
Toronto, Ontario M5G 2E9
Tel: 416-598-5269
Fax: 416-340-1672
E-mail: usherllb@gmail.com
Counsel for the Respondent M___D.S.

Brian A. Crane, Q.C.
Gowling Lafleur Henderson LLP
2600-160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869
brian.crane@gowlings.com
Agents for the Respondent M___D.S.

Elise Nakelsky
Attorney General of Otnario
720 Bay Street, 10th Floor
Toronto, Ontario M5G 2K1
Tel: 416-212-2149
Fax: 416-326-4656
E-mail: elise.nakelsky@ontario.ca
Counsel for the Respondent
Her Majesty The Queen

Robert E. Houston, Q.C.
Burke-Robertson
70 Gloucester Street
Ottawa, Ontario K2P 0A2
Tel: 613-566-2058
Fax: 613-235-4430
E-mail: rhouston@burkerobertson.com
Agents for the Respondent
Her Majesty The Queen

Enzo M. Battigaglia
1000 Finch Avenue West
Suite 600
Toronto, Ontario M3J 2V5
Tel: 416-650-1011
Fax: 416-650-1980
Counsel for the Respondent, M___L.S.

INDEX

Court File No.: 33965

IN THE SUPREME COURT OF CANADA
(On appeal from the Court of Appeal for the Province of Ontario)

BETWEEN:

N.S.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

M_____D. S.

Respondent

- and -

M_____L. S.

Respondent

FACTUM OF THE RESPONDENT M_____D. S.

PART I - STATEMENT OF FACTS

OVERVIEW OF THE POSITION OF THE RESPONDENT M_____D. S.

1. The case at bar engages broad and important issues about the judicial process. These include whether to adapt courtroom procedures to accommodate religious practices, the importance of cross-examination to the right of an accused person to make full answer and defence, and the extent to which demeanour can be useful to triers of fact and to counsel. However, the judgment under appeal is ultimately a narrow one. The preliminary inquiry justice ordered the Appellant to remove her niqab following a brief

hearing at which he alone questioned the unsworn Appellant. The Court of Appeal determined that this evidentiary record was insufficient to rule on whether the Appellant should be permitted to wear her niqab, and remitted the issue to the preliminary inquiry justice for a fuller hearing at which all of the competing interests at stake can be balanced. The actual parties to the litigation have accepted the unanimous decision of the Court of Appeal. Only the Appellant challenges this decision. On the basis of the thin record in the case at bar, she asks this Court to jettison the centuries-old assumption of our legal system that observation of a witness can be useful to a trier of fact or to a cross-examiner. She further asks for a definitive ruling on her entitlement to cover her face while testifying at the preliminary inquiry and the trial, even though the parties to the litigation have had no opportunity to lead sworn evidence on this issue or to test the Appellant's evidence through cross-examination. The fundamental flaw of these arguments is simple: they are not supported by any evidence. The appeal should be dismissed, the decision of the Court of Appeal affirmed, and the issue remitted to the preliminary inquiry justice to be decided after a proper evidentiary hearing and due consideration of all of the competing interests and relevant Constitutional principles.

2. The facts of the case are thoroughly reviewed in the judgments below, and the Respondent accepts the Appellant's statement of facts.

PART II - POSITION OF THE RESPONDENT WITH RESPECT TO THE QUESTION IN ISSUE

3. The Appellant frames the question in issue as follows:

> Must a sincerely observant niqab wearing sexual assault complainant partially disrobe - remove her niqab - as a condition of participation in courtroom proceedings?

The Respondent would state the issue differently. The Court of Appeal held that "the full facts of this case, as they relate to this issue, are not known." The order under appeal remitted the issue for an evidentiary hearing. The primary issue before this Court is whether to affirm this order, or whether to make a definitive pronouncement based on the limited evidentiary record that presently exists. The position of the Respondent is that the Court of Appeal reached the correct conclusion, and that the appeal should be dismissed.

PART III – STATEMENT OF ARGUMENT

Overview of the position of the Respondent

4. The Respondent submits that the ability to observe the face of a witness is important both to a cross-examiner and to a trier of fact. Important elements of our legal system presume the importance of observing a witness, and this long-established presumption should not be lightly set aside. Nobody asserts that facial cues are foolproof signs of whether a witness is lying, but they can be significant information that help the observer understand what a witness is attempting to communicate and get a sense of who the witness is and how he or she is reacting to questioning. Depriving the defence of this information with respect to a critical Crown witness would be a major interference with the ability to make full answer and defence. Nonetheless, the Respondent does not advocate a blanket rule against the wearing of the niqab by a witness, but accepts the decision of the Court of Appeal that a case-specific balancing of the relevant interests is required. The paramount concern in conducting this balancing must be trial fairness. The record as it exists is insufficient to assess some of the crucial factors in issue. In particular, it is unclear whether or not the Appellant sees wearing the niqab as a mandatory religious requirement or as a personal preference and a matter of comfort. It is equally unclear whether she might be satisfied by possible compromises that would mitigate the impact of unveiling while protecting the rights of the accused, such as the use of a screen. The issue should accordingly be remitted to the preliminary inquiry justice for an evidentiary hearing where these factors can be explored.

The assessment of demeanour has value to a cross-examiner

5. The argument of the Appellant rests entirely on the proposition that seeing a witness's face has no value for the assessment of demeanour or for cross-examination. The Appellant asserts that there exists a "scientific consensus" to this effect, and that by assuming the contrary the justice system suffers "the disrespect of the intellectually discerning." These claims should fail, for two principal reasons. First, the claim of a scientific consensus is not borne out by the authorities cited by the Appellant. Her factum cites only a single, unpublished, scientific paper in support of this assertion. She has led no evidence that has been tested by way of cross-examination, which might assist the Court in understanding the limits of the scientific studies on which she relies and the extent to which they are applicable to the justice system. Other literature exists suggesting that demeanour may have value in detecting deception, so this Court cannot presume that a complete scientific consensus exists.[1] Absent evidence and cross-examination, this Court is in no position to adjudicate the scientific issue of the usefulness of facial cues in interpreting and assessing a witness's evidence.

6. The Appellant's argument also misses the mark by focusing exclusively on whether facial cues permit a reliable determination of whether a person is lying. This is not the only significance of facial cues to the trial process. Facial expressions help observers interpret and understand what a witness is saying. The same answer given with a smile

[1] For example: Aldert Vrij et. al., "Rapid judgements in Assessing Verbal and Nonverbal Cues: Their Potential for Deception Researchers and Lie Detection" (2004) Applied Cognitive Psychology 18 (3). pp. 283-296.

or with a scowl may be understood quite differently. Such expressions give the litigants and trier of fact important information about the witness and his or her attitude towards the process and reaction to questioning. For example, a witness who grins when confronted with an inconsistency or accused of wrongdoing may be further cross-examined about why he or she did so. In the case at bar, the most important value of facial cues at the preliminary inquiry will be to the cross-examiner. It is not the role of the cross-examiner to try to determine with a relatively high degree of accuracy whether or not the witness is lying. The paper relied on by the Appellant suggesting that facial cues may have limited value in guessing whether a person is lying is therefore largely beside the point. The fact that facial expressions can be misinterpreted or misleading in some cases does not render them without value in understanding human communication.

The assessment of demeanour underlies important aspects of the legal system and should not be lightly discarded

7. Demeanour assessment is a central component of our legal system. As Charron J. observed in *R. v. Khelawon* at para 35:

> Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence.

This view is long-standing, and has been articulated by this Court in decisions stretching back nearly a century, such as this statement of Estey J. in the 1947 case *White*

v. The King, quoting the 1919 case *Reymond v. Township of Bosanquet*:

> The issue of credibility is one of fact and cannot be determined by following a set of rules that it is suggested have the force of law and, in so far as the language of Mr. Justice Beck may be so construed, it cannot be supported upon the authorities. Anglin J. (later Chief Justice) in speaking of credibility stated:
>
> > by that I understand not merely the appreciation of the witnesses' desire to be truthful but also of their opportunities of knowledge and powers of observation, judgment and memory—in a word, the trustworthiness of their testimony, *which may have depended very largely on their demeanour in the witness box and their manner in giving evidence.* Reymond v. Township of Bosanquet.
>
> The foregoing is a general statement and does not purport to be exhaustive. Eminent judges have from time to time indicated certain guides that have been of the greatest assistance, but so far as I have been able to find there has never been an effort made to indicate all the possible factors that might enter into the determination. It is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his powers to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biassed, reticent and evasive. All these questions and others may be answered from *the observation of the witness' general conduct and demeanour in determining the question of credibility.* (Emphasis added)

R. v. Khelawon [2006] 2 S.C.R. 787 at paragraph 35

White v. The King [1947] S.C.R. 268 at 272

Reymond v. Township of Bosanquet (1919) 59 Can. S.C.R. 452, at 460

8. A finding by this Court that demeanour has no value for a cross-examiner or trier of fact in assessing the evidence of a witness would have far-reaching effects on the justice system. For example, evidentiary rules about hearsay rest substantially on the

understanding that seeing a witness give evidence offers an important advantage to a trier of fact. The ability of trial courts to observe the witness is also one of the foundations of appellate deference to findings of fact, as described by Iacobucci J. (in dissent) in *R. v. Belnavis*:

> The reasons for this principle of deference are apparent and compelling. Trial judges hear witnesses directly. They observe their demeanour on the witness stand and hear the tone of their responses. They therefore acquire a great deal of information which is not necessarily evident from a written transcript, no matter how complete.

If the Appellant's argument were to be accepted, landmark decisions of this Court such as *R. v. B.(K.G.)* and *Housen v. Nikolaisen* would be entirely undermined. The assumption that demeanour assessment has value is so deeply rooted in our legal traditions that there is a heavy onus on the Appellant when she asks this Court to abruptly discard it. Such a revolutionary change in the foundations of our legal system should not rest on the meager scientific citations, untested by cross-examination, provided by the Appellant. It would be open to the Appellant to lead expert evidence in support of her position at the evidentiary hearing ordered by the Court of Appeal in this case, and the Respondent submits that without such an enhanced evidentiary record her claim cannot succeed.

R. v. Belnavis [1997] 3 S.C.R. 341

R. v. K.G.B. [1993] 1 S.C.R. 740

Housen v. Nikolaisen [2002] 2 S.C.R. 235

The evidentiary record is insufficient to support the Appellant's s. 2(a) Charter claim

9. The record in the case at bar is further insufficient even to bring the Appellant's wish to be veiled within s. 2(a) of the *Canadian Charter of Rights and Freedoms*. The Appellant bears the onus of showing that the alleged infringement is "capable of interfering with religious belief or practice": *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. The preliminary inquiry justice considered her evidence that she would be "a lot more comfortable" with her veil and that she had removed it to have her driver's license photo taken, and concluded that wearing her niqab was not a religious requirement but a practice that she preferred. This conclusion was reasonably available on the record before him, and if this Court were to accept the record as sufficient there would be no basis for appellate interference. At the further evidentiary hearing ordered by the Court of Appeal, the Appellant may well establish that removing her niqab would substantially interfere with her religious practice, but this cannot be simply assumed on the basis of unsworn and ambiguous evidence with no cross-examination permitted. This Court has repeatedly directed that Constitutional issues must not be decided in the absence of a proper factual foundation. With no sworn evidence to consider in the case at bar, this Court should decline to rule on the merits of the Appellant's claim.

R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713

Danson v. Ontario (Attorney General) [1990] 2 S.C.R. 1086 at 1099-1101

MacKay v. Manitoba [1989] 2 S.C.R. 357 at 362-63, 366

Canadian Council of Churches v. Canada (Minister of Employment and Immigration) [1992] 1 S.C.R. 236 at 253-55

Important competing interests are at stake

The Respondent's Constitutional right to make full answer and defence

10. The Respondent's ability to have his counsel cross-examine the witnesses against him is a central component of his right to make full answer and defence. The *Criminal Code* entitles the defence to cross-examine witnesses at the preliminary inquiry.[2] The Quebec Court of Appeal, citing Professor Paciocco, recently described the importance of cross-examinations for discovery purposes at the preliminary inquiry as follows:

> Professor Paciocco has contested the attempts to reduce this exploratory role [of the preliminary inquiry], which he has linked directly to the obligation to disclose evidence. He wrote the following on this subject:
>
> > In other words, while there is no constitutional right to have a pretrial determination of the sufficiency of the case, if the denial of the preliminary inquiry results in inadequate disclosure there is a Charter violation. The discovery function of the preliminary inquiry is therefore hardly secondary or ancillary according to the constitutional jurisprudence; it is the sole function to acquire constitutional support.
> >
> > . . .
> >
> > Cross-examination can turn lines of disclosure into pages of discovery, enabling defence counsel to explore information not found in what are often the selective, even skeletal statements obtained by the police. It permits the defence to correct innocent non-disclosure caused by prosecutors or police officers who fail to see the relevance of information that the accused uncovers during cross-examination, and it permits defence counsel to observe the demeanour and quality of the witnesses, factors important in the tactical decision that counsel will make. . . .
>
> This ancillary role of the preliminary inquiry cannot be minimized, or even hidden, as the Crown proposes.
>
> *R. c. P.M.* (2007) 222 C.C.C. (3d) 393 (Q.C.A.) at paragraphs 82-83

[2] In Ontario the significance of observing demeanour during the discovery process as well as at trial is recognized in the Rules of Civil Procedure dealing with video conferencing: see Rule 1.08(5)(d)

11. The inability of defence counsel to observe the face of the critical prosecution witness is a significant interference with counsel's cross-examination. Doherty J.A., referring to a New Zealand case which raised a similar issue, explained this as follows:

> Non-verbal communication can provide the cross-examiner with valuable insights. The same words may, depending on the facial expression of the witness, lead the questioner in different directions. In *Police v. Razamjoo*, [2005] DCR 408, a New Zealand trial judge faced with an application by two Muslim witnesses to testify wearing veils said this at para. 81:
>
> > Although effective cross-examination is generally the outcome of careful preparation and a thorough grasp of the case, the actual process is often partly instinctive. It involves an ongoing evaluation of how the witness is performing and, particularly what are sensitive areas from that witness's point of view. Tiny signals, quite often in the form of, or involving, facial expressions are received and acted upon almost, sometimes completely, unconsciously by the cross-examiner. Cross-examining counsel do not have the luxury of being able to make judgments as to what to ask and how to ask it against an overview such as a judge enjoys at the conclusion of a case. A distinction needs to be drawn between the significance of demeanour in the context of such an overview and the significance of demeanour to counsel in what is, in many ways, a "heat of battle" situation, in making what need to be virtually instantaneous decisions in the course of conducting a cross-examination.

The open and secular nature of courts

12. The establishment of open and secular courts is a core value of Canadian democracy. As Deschamps J. said in *Canadian Broadcasting Corp. v. Canada (Attorney General)*: "The open court principle is of crucial importance in a democratic society." Permitting a witness to conceal his or her appearance while testifying undermines the transparency and openness of judicial proceedings. The Respondent again adopts the words of Doherty J.A. in the case at bar:

> There is also a societal interest pointing against a witness wearing a niqab when testifying. Society has a strong interest in the visible administration of criminal justice in open courts where witnesses, lawyers, judges and the accused can be seen and identified by the public. A public accusation and a public response to that accusation, in a forum which tests the truth of the accusation through the adversarial process, enhances public confidence in the administration of criminal justice. All engaged in the criminal process, including witnesses, judges and lawyers, are ultimately accountable to the public. Allowing a witness to testify with her face partly covered affords the witness a degree of anonymity that undermines the transparency and individual accountability essential to the effective operation of the criminal justice system. Viewed from this perspective, allowing N.S. to wear a niqab while she testifies could compromise public confidence both in the conduct of the criminal trial and in the eventual verdict: see Ian Dennis, "The Right to Confront Witnesses: Meanings, Myths and Human Rights" (2010) 4 Crim. L. R. 255, at pp. 260-62.
>
> *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] 1 SCR 19 at paragraph 1

The proper balance of interests

13. Even assuming the Appellant's wish to be veiled while testifying is protected by s. 2(a) of the *Charter*, it does not automatically follow that she is entitled to the order she seeks. The right to freedom of religion is not absolute, and as Iacobucci and Major J.J. concluded in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*: "although the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower." In *P. (D.) v. S. (C.)*, L'Heureux-Dube J. expressed this as follows: "As the Court has reiterated many times, freedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others." McLachlin C.J. said in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*:

> A review of the various components of the concept of freedom of religion might suggest that the rights protected by s. 2(a) of the Charter are absolute, but such is not the case. This freedom is limited by the rights and freedoms of others. The diversity of opinions and convictions requires mutual tolerance and respect for others. Freedom of religion is also subject to limits necessary "to protect public safety, order, health, or morals . . . ." (Big M, supra, at p. 337; Ross v. New Brunswick School District No. 15, 1996 CanLII 237 (SCC), [1996] 1 S.C.R. 825, at para. 72; Trinity Western University v. British Columbia College of Teachers, 2001 SCC 31 (CanLII), [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 29). This Court has stressed that, in order to prove a violation of freedom of religion, it must be shown that the interference with the religious belief or practice in question is not trivial or insubstantial. Thus, churches and their members are not exempted from making any effort, or even sacrifice, inter alia in the exercise of their freedom of worship

The competing interests described above must be considered as well. As Abella J. stated in *Bruker v. Markowitz*:

> The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright- line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.

The extent to which religious practice must yield to other compelling societal interests is illustrated by this Court's recent decision in *Alberta v. Hutterian Brethren of Wilson Colony*. The claimants in that case sought to be permitted to be issued driver's licenses without being photographed. They led evidence stronger than that in the case at bar of an absolute religious objection: being photographed was entirely forbidden by their religious beliefs. This Court nonetheless held that being denied driver's licenses was not a sufficiently serious limit on the religious practice of the claimants to justify the risk

of the fraudulent use of licenses without pictures if the claimants were granted a religious exemption. In the case at bar, the Appellant's religious objection appears on the limited record we have to be less strong, and the competing interest of the ability to make full answer and defence and the ability of judges and jurors to observe a witness is more important.

B. (R.) v. Children's Aid Society of Metropolitan Toronto [1995] 1 S.C.R. 315, at paragraph 226

P. (D.) v. S. (C.) [1993] 4 S.C.R. 141

Bruker v. Markowitz [2007] 3 S.C.R. 607 at paragraph 2

Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village), [2004] 2 SCR 650 at paragraph 69

Alberta v. Hutterian Brethren of Wilson Colony [2009] 2 S.C.R. 567

14. The "complex, nuanced, fact-specific exercise" described by Abella J. should be based on evidence called in the trial courts, rather than on sweeping assertions made in the appellate courts. A nuanced assessment will require consideration of the limits of the Appellant's religious belief and any exceptions she makes, and a consideration of possible compromises that could minimize her discomfort while protecting the Appellant's right to make full answer and defence. This assessment should be left to the presiding justice at the preliminary inquiry following the appropriate hearing.

The test to be applied

15. Should this Court wish to provide guidance to lower courts confronted with a witness who wishes to conceal his or her face while testifying, the Respondent offers the following respectful submissions on the test that should be applied. The decision must be a discretionary one, requiring as it does a potentially difficult balancing of competing interests. The presiding justice should consider the following four factors:

1) The role of the witness at the proceeding and the extent to which the witness's credibility and reliability will be in issue. In a case such as the one at bar, where the Crown's case stands or falls on the credibility or reliability of a single witness, this factor should take on overriding importance. Similarly, where the witness's evidence is non-contentious this factor should be decisive;

2) The nature and extent of the witness's objection to uncovering her face. For a niqab-wearing woman, does she always wear the niqab in public, or like many niqab-wearing women will she make exceptions for voting or other important civic functions?[3] Does the witness see the wearing of the niqab as an absolute religious requirement or is it a preferred way of expressing her religious beliefs?

3) Whether any steps can be taken to mitigate the effects of uncovering the witness's face, such as the use of a screen or a closed-circuit television;

4) Any case-specific reason that seeing the witness's face is particularly significant, such as the ones suggested at paragraphs 57-59 of the judgment of the Court of Appeal: where the identity of the witness is in question or where the witness's

[3] See for instance The Take: On niqab and the law. *Toronto Star*, February 9, 2009

facial appearance is relevant to an issue in the case.

These factors should be considered within the context of the presumption that judicial proceedings will be open and public, and the paramount consideration must be the fairness of the trial. Where the concealing of the witness's face will interfere with the ability to make full answer and defence and impair the fairness of the trial, the witness must be ordered to remove her veil.

16. In the case at bar, there is insufficient evidence on the record as it exists to assess the factors set out above, particularly the second and third factors. This Court is not in a position to make a definitive pronouncement on the proper balancing in this case, and a further proceeding where evidence is called will be required.

The appropriate order

The preliminary inquiry justice has jurisdiction to rule on the issue

17. In the Superior Court, Justice Marrocco held that the preliminary inquiry justice had no jurisdiction to balance *Charter* values, and that he had accordingly committed jurisdictional error by doing so in ordering the Appellant to remove her niqab. The Appellant and Crown supported this reasoning in the Court of Appeal. The Respondent submits that the preliminary inquiry itself was the proper forum for determining whether the Appellant could wear her veil while testifying. This issue is ultimately one involving the proper regulation of the preliminary inquiry, and the

presiding justice accordingly had jurisdiction under s. 537(1) of the *Criminal Code* to make an order. While the preliminary inquiry justice is not a court of competent jurisdiction pursuant to s. 24(1) of the *Charter*, he has statutory authority to control witnesses during the proceeding. In exercising this statutory jurisdiction, he was bound to take into account *Charter* values and ensure his rulings were consistent with the Constitution. It would be inefficient and contrary to the policy of the *Code* to force the parties to go to Superior Court to litgate what is essentially a procedural issue arising at the preliminary inquiry.

The appeal should be dismissed

18. The Court of Appeal thoroughly set out the competing interests at stake in this case and directed a proper evidentiary hearing in the correct forum for those interests to be considered and reconciled. The Appellant has not put forward any basis to interfere with the Court of Appeal's judgment. She seeks sweeping declarations about the value of demeanour assessment and about her entitlements under s. 2(a) of the *Charter* on what is a manifestly inadequate evidentiary record. This Court should resist prematurely ruling on complex Constitutional issues in the abstract, and should uphold the order of the Court of Appeal and remit the issue for further consideration by the preliminary inquiry justice.

PART IV

COSTS

19. The Respondent seeks no further order as to costs.

PART V

ORDER REQUESTED

20. The Respondent respectfully requests that the appeal be dismissed.

DATED at TORONTO, this 23rd day of September, 2011

DOUGLAS USHER

MICHAEL DINEEN

Counsel for the Respondent M_____d S.

PART VI

AUTHORITIES REFERRED TO

Publication Ban

Interdiction de publication