Court File No. 33989

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

N.S.

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

-and-

M---d.S.

Respondent

-and-

M---l.S.

Respondent

-and-

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), ONTARIO HUMAN RIGHTS COMMISSION, BARBRA SCHLIFER COMMEMORATIVE CLINIC, MUSLIM CANADIAN CONGRESS, SOUTH ASIAN LEGAL CLINIC OF ONTARIO, BARREAU DU QUÉBEC, CANADIAN CIVIL LIBERTIES ASSOCIATION, WOMEN'S LEGAL EDUCATION AND ACTION FUND, and CANADIAN COUNCIL ON AMERICAN-ISLAMIC RELATIONS

Interveners

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: STATEMENT OF FACTS

1. N.S. appeals the decision of the Court of Appeal for Ontario remitting the issue of the removal of her niqab for determination by a preliminary inquiry judge. For the reasons below, the Criminal Lawyers' Association (Ontario) ("CLA") submits that this Court should dismiss the appeal and send the matter back to the preliminary inquiry judge. The CLA accepts the facts as set out in the Appellant and Respondents' facta.

PART II: THE CLA'S POSITION ON THE QUESTIONS IN ISSUE

2. The main issue on this appeal is the extent to which the right to a fair trial, enshrined in ss. 7 and 11 of the *Canadian Charter of Rights and Freedoms*, can be limited by a witness's request to wear a niqab on religious grounds. The CLA submits that the right of an accused to make full answer and defence should prevail over the request of a witness to wear a niqab while testifying. Given the importance of demeanour to counsel's ability to cross-examine effectively and to the determination of guilt or innocence, permitting a witness to testify while wearing a niqab infringes the accused's right to make full answer and defence. It should not be permitted to have this effect.

PART III: STATEMENT OF ARGUMENT

3. The CLA submits that this Court should consider the following factors in the resolution of this appeal:

- **(i)** Demeanour evidence continues to be an important factor in the assessment of credibility and is critical to effective cross-examination;
- **(ii)** The Appellant's assertion that demeanour evidence is "unreliable" on the basis of one unpublished social science paper, which has not been subjected to cross-examination, is dangerous and improper;
- **(iii)** A complainant's rights under the *Charter* are not equivalent to the rights of the accused;
- **(iv)** Significant *Charter* issues should only be decided on a full evidentiary record; in this case there is an insufficient factual basis upon which to determine N.S.'s application.

(i) Demeanour evidence is an important factor in the assessment of credibility and is critical to effective cross-examination

4. Although N.S. asserts that demeanour is "arbitrary" and unreliable, it continues to be a significant factor in the assessment of evidence under Canadian law. This is not only because facial cues may assist the trier of fact in determining whether a witness is being truthful, but also because facial cues can be critical to counsel's ability to carry out an effective cross-examination. Thus, demeanour is closely linked to an accused's ability to make full answer and defence.

Appellant's Factum at para. 36

5. Canadian law assumes that demeanour is part of the assessment of witness testimony and the determination of guilt or innocence. For this reason, this Court has consistently held that appellate courts must defer to findings of guilt or innocence made by judges and juries who were able to "see and hear" the witnesses:

- "...an appellate court which has neither seen nor heard the witnesses and as such is unable to assess their movements, glances, hesitations, trembling, blushing, surprise or bravado, is not in a position to substitute its opinion for that of the trial judge..."

  L'Heureux-Dubé J., *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705 at p. 799

- "...certain doubts, although reasonable, are simply incapable of articulation. For instance, **there may be something about a person's demeanour in the witness-box which will lead a juror to conclude that the witness is not credible. It may be that the juror is unable to point to the precise aspect of the witness's demeanour which was found to be suspicious, and as a result cannot articulate either to himself or others exactly why the witness should not be believed**. A juror should not be made to feel that the overall, perhaps intangible, effect of a witness's demeanour cannot be taken into consideration in the assessment of credibility." [Emphasis added.]

  Cory J., *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 29

- "Assessing credibility is not a science. **It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events.** That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected." [Emphasis added.]

  Bastarache and Abella JJ., *R. v. Gagnon*, [2006] 1 S.C.R. 621 at para. 20
  See also *R. v. R.E.M.*, [2008] 3 S.C.R. 3 at para. 68

6. It would be a radical departure from a core principle of the Canadian criminal justice system to now find that demeanour evidence is "arbitrary" and assessing demeanour an

"insignificant little practice", as N.S. submits. If N.S. is correct, Canadian appellate law will be changed tumultuously. The principle of finality will have to be redefined.

Appellant's Factum at paras. 35, 38

7. The CLA agrees that triers of fact must be careful not to impose stereotypical, culturally-informed notions of what a guilty person "looks like". However, requiring judges and juries to be conscious of their own biases does not detract from the fact that facial cues and body language can provide important information to triers of fact. Did the witness appear surprised by a question? Did he flush, look remorseful or contrite? Did he involuntarily react, press his lips together in annoyance or clench his jaw in anger? Such gestures are part of the "complex intermingling of impressions" that this Court has recognized as essential to the assessment of witness testimony. They are no longer visible to the trier of fact once the witness dons a niqab.

Wigmore on Evidence (Chadbourn rev. 1974), vol. 5, pp. 150-54, 199-200

8. Other jurisdictions have come to similar conclusions regarding the importance of facial cues and body language.[1] In the United States the right of an accused to "confront" a witness is so important that it has been given constitutional status. The U.S. Supreme Court has held that the purpose of the Sixth Amendment's Confrontation Clause is threefold: (1) it ensures that the witness will give his statements under oath; (2) it "forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'"; and (3) it permits the jury "to observe the demeanour of the witness in making his statement, thus aiding the jury in assessing his credibility."

Maryland v. Craig, 497 U.S. 836 (1990) at pp. 845-46
See also *California v. Green*, 399 U.S. 149 (1970) at p. 158
See also *Romero v. Texas*, 173 S.W. 3d 502 (2005) at pp. 505-06

9. In the New Zealand case *Police v. Razamjoo, infra*, the District Court noted that while judges must exercise "extreme caution" when assessing the demeanour of witnesses from different cultural and linguistic backgrounds, there are nevertheless important cues to be gleaned from a witness's demeanour:

> **Those are situations in which the demeanour of a witness undergoes a quite dramatic change in the course of his evidence. The look which says "I hoped not to be asked that question", sometimes even a look of downright hatred at counsel by a**

[1] Of the cases cited in paras. 8-14 of this factum, only *Police v. Razamjoo, infra*, deals directly with the issue of witnesses wishing to testify with their faces obscured based on religious grounds.

> **witness who obviously senses he is getting trapped, can be expressive. So too can abrupt changes in mode of speaking, facial expression or body language.** The witness who moves from expressing himself calmly to an excited gabble; the witness who from speaking clearly with good eye contact becomes hesitant and starts looking at his feet; **the witness who at a particular point becomes flustered and sweaty, all provide examples of circumstances which, despite cultural and language barriers, convey, at least in part by his facial expression, a message touching credibility.** [Emphasis added.]
>
> *Police v. Razamjoo*, [2005] DCR 408 at para. 78

10. In *Razamjoo*, two witnesses in an insurance fraud trial requested, on religious grounds, to wear their burqas while testifying. The court ordered that the witnesses remove their burqas; however, the judge permitted the witnesses to give their evidence from behind a screen which allowed the judge, counsel, and female court staff to see the witnesses' faces.

> *Police v. Razamjoo, supra* at paras. 67-68, 108-10

11. The right of an accused to cross-examine witnesses "without significant and unwarranted constraint" is an essential component of the right to make full answer and defence and is protected by ss. 7 and 11(d). As Cory J. held in *R. v. Osolin, infra*:

> **There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible.** Even with the most honest witness cross-examination can provide the means to explore the frailties of the testimony.... **It is the ultimate means of demonstrating truth and of testing veracity. Cross-examination must be permitted so that an accused can make full answer and defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused.** This is an old and well-established principle that is closely linked to the presumption of innocence. [Citations omitted; emphasis added.]
>
> *R. v. Osolin*, [1993] 4 S.C.R. 595 at para. 157
> *See* also *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at paras. 33-34
> See also *R. v. Lyttle*, [2004] 1 S.C.R. 193 at paras. 2, 41-43

12. An advocate's ability to effectively cross-examine a witness is integrally tied to his observations of a witness's facial cues, body language and gestures. Such information can provide counsel with a wealth of information about the witness, including whether a line of questioning should be pursued or abandoned, or if a witness is dissembling or prevaricating. As the court in *Razamjoo* held:

> **But there is another far more important factor touching a fair trial. Cross-examination is a very important tool in the search for the truth from a body of evidence**....

> 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. [Emphasis added.]
>
> *Police v. Razamjoo, supra* at paras. 80-81

13. The Court of Appeal in Northern Ireland has also held that the right to cross-examine requires counsel for the accused to be able to observe the witness's face:

> I think it appropriate to observe that, in my opinion, counsel for the Ministry in his submissions accorded insufficient recognition to the importance of counsel being able to cross-examine, face to face, an important witness giving evidence on a vital issue in dispute between the parties. **Where issues are in dispute between the parties unimpeded cross-examination plays a vital part in the trial and gives vital assistance to the due administration of justice. I consider that counsel would be impeded in the cross-examination of a witness, whose evidence he wished to challenge, if he could not see his face fully**, and I find it difficult to envisage circumstances in which the interests of justice would require that the face of a vital witness giving evidence on an important matter in dispute should be screened from counsel cross-examining him. [Emphasis added.]
>
> *Doherty v. Ministry of Defence*, [1991] 1 NIJB 68 at 88-89; see also 97-98

14. Similarly, in *R. v. Davis, infra,* the House of Lords held that the use of "protective measures" for key witnesses – including allowing witnesses to testify anonymously from behind a screen, unseen by the defendant or defendant's counsel – was a breach of the common law right to confrontation and of the right to a fair trial under article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms.*[2]

> *R. v. Davis,* [2008] 3 All ER 461 at paras. 22, 35

15. In Canada, witnesses may testify behind screens or give obstructed view testimony in some circumstances. However, in that situation the accused, defence counsel, the judge and the

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[2] Article 6(3)(d) reads: "Everyone charged with a criminal offence has the following minimum rights: ... to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". Article 6(3)(d) jurisprudence holds that no conviction should be based solely or to a decisive extent upon the statements or testimony of anonymous witnesses. *R. v. Davis*, *supra* at para. 25.

jury are all able to see the witness's face. In *R. v. Levogiannis, infra*, this Court upheld the *Criminal Code* provision permitting young sexual abuse complainants to testify behind a screen. L'Heureux-Dubé J. explicitly noted that because the accused was able to see the complainant's face, cross-examination of the complainant was not significantly impeded.

R. v. Levogiannis, [1993] 4 S.C.R. 475 at paras. 17, 32-33
Criminal Code of Canada, s. 486.2

16. The *Criminal Code* provisions permitting witnesses to testify behind a screen or outside the courtroom reflect the deeply entrenched view that the ability of an accused to observe the demeanour of the witness is critical to fair trial rights, even in situations with vulnerable witnesses where the evidence might be lost if not for special measures. Disguising the witness's face or body endangers these rights.

17. In Canada, the right of an accused to cross-examine witnesses at the preliminary inquiry is statutorily protected under s. 540 of the *Criminal Code* and is part of the recognized discovery function of preliminary inquiries. Where the purpose of cross-examination is to establish a foundation for a key issue at trial, restrictions on the right to cross-examine at the preliminary inquiry will result in a jurisdictional error.

R. v. Al-Amoud (1993), 10 O.R. (3d) 676 (Gen. Div.) at pp. 679-682
R. v. Cover (1988), 44 C.C.C. (3d) 34 (Ont. H.C.J.) at pp. 36-37
Re Skogman and the Queen (1984), 13 C.C.C. (3d) 161 at pp. 171-72
R. v. Durette (1979), 47 C.C.C. (2d) 170 (Ont. H.C.J.)
R. v. George (1991), 69 C.C.C. (3d) 148 (Ont. C.A.)
R. v. B.(E) (2002), 162 C.C.C. (3d) 451 (Ont. C.A.)

18. As this Court explained in *R. v. Potvin, infra*, the curtailment of the opportunity to cross-examine a witness at a preliminary inquiry may constitute a breach of an accused's s. 7 rights:

> Although it is true that credibility is not specifically an issue to be determined at a preliminary inquiry, this does not mean that an accused is taken unawares or unfairly surprised by the admission of testimony taken at a preliminary inquiry if a witness subsequently becomes unavailable. **If a judge presiding at a preliminary inquiry seeks to curtail cross-examination designed to test a witness's credibility and that witness's testimony is subsequently admitted at trial under s. 643(1), this may very well constitute an infringement of the accused's right under s. 7 of the *Charter* to have had a full opportunity to cross-examine the witness.** [Citations omitted; emphasis added.]

R. v. Potvin, [1989] 1 S.C.R. 525 at pp. 545-46

19. Given the significance of the accused's statutory right to cross-examine at a preliminary inquiry and the integral importance of demeanour evidence to the right to cross-examination, allowing a witness to wear a niqab while testifying at a preliminary inquiry would result in a jurisdictional error and impair the right of the accused to make full answer and defence under the *Charter*.

(ii) The Appellant has failed to lay a proper scientific record

20. The Appellant asserts that there is "scientific consensus" about the unreliability of demeanour evidence. However, the Appellant failed to call any expert testimony on this issue in the proceedings below and does not cite any of the "unequivocal peer reviewed research" to support her argument. Instead, the Appellant relies on a single, unpublished, four page paper which has not been tested through cross-examination. Given the number of social science studies which support the view that nonverbal cues can aid in the assessment of deception, this gap in the evidentiary record is particularly troublesome. The Court should hesitate to depart from centuries of Canadian and common law jurisprudence based on such a limited and one-sided scientific "record."

> Appellant's Factum at paras. 32-33
> P. Ekman, "Why Lies Fail And What Behaviors Betray A Lie" in J.C. Yuille (Ed.), *Credibility Assessment* (1989) Dordrecht, The Netherlands: Kluwer, 71
> P. Ekman, O'Sullivan, M., Frank, M. G., "A Few Can Catch A Liar" (1999) Psychological Science 10(3)
> R. E. Riggio, Tucker, J., Widaman, K., "Verbal and Nonverbal Cues as Mediators of Deception Ability" (1987) Journal of Nonverbal Behavior 11(3), 126
> A. Vrij et. al., "Detecting deceit via analysis of verbal and nonverbal behaviour" (2000) Journal of Nonverbal Behavior 24(4), 239
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21. Furthermore, dismissing the value of demeanour evidence on the basis of social science studies ignores the differences between credibility assessments made in a laboratory study and in a courtroom. In a courtroom, the trier of fact does not solely consider demeanour in making a credibility assessment. The trier of fact's "toolkit" for credibility determinations also includes what the witness says, the context in which he or she says it, the testimony of other witnesses,

the physical evidence, the submissions of counsel and the rules of evidence. This is in contrast to laboratory studies, where subjects generally attempt to determine deception in a factual vacuum.

R. v. S.(W.) (1994), 90 C.C.C. (3d) 242 (Ont. C.A.) at pp. 250, 253
R. v. C.H., [1999] N.J. No. 273 (Nfld. C.A.) at para. 24

(iii) A complainant's rights under the *Charter* are not equivalent to the rights of the accused

22. N.S. says that her rights are on an equal footing with the rights of the accused. This position has no basis in law. The two central parties in a criminal trial are the state and the accused. Given the power differential between these parties and the severe consequences to an accused person if he is found guilty, ss. 7 to 14 of the *Charter* enshrine fundamental legal protections. The principles of fundamental justice in s. 7 and the guarantee of a right to a fair trial enshrined in s. 11(d) are "inextricably intertwined" and protect a right to full answer and defence. These rights are powerful: as this Court recently explained in *R. v. Ahmad, infra*, "[u]nder the rule of law, the right of an accused person to make full answer and defence may not be compromised."[3] The *Charter* does not provide any equivalent protections to complainants or other witnesses.

Appellant's Factum at para. 73
R. v. Seaboyer, supra at para. 21
Dersch v. Canada (Attorney General), [1990] 2 S.C.R. 1505 at para. 15
R. v. Ahmad, [2011] 1 S.C.R. 110 at paras. 2, 35, 65

23. Even in *R. v. Mills, infra*, in which the Court recognized that a complainant's s. 8 *Charter* rights can be engaged in a criminal trial, the Court drew the line at infringing the right of the accused to make full answer and defence. In those circumstances, the right of the accused will prevail over the privacy interests of the witness:

> From our preceding discussion of the right to make full answer and defence, it is clear that the accused will have no right to the records in question insofar as they contain information that is either irrelevant or would serve to distort the search for truth, as access to such information is not included within the ambit of the accused's right.... **However, the accused's right must prevail where the lack of disclosure or production of the record would render him unable to make full answer and defence. This is because our justice system has always held that the threat of convicting an innocent**

[3] *R. v. Ahmad, infra* at para. 2. *Ahmad* addressed the rights of the accused in the context of competing societal interests (the protection of society through the prevention of disclosure of potentially injurious or sensitive information and the prosecution of criminally accused individuals). The Court firmly held that "an unfair trial cannot be tolerated", even in the context of national security concerns.

> **individual strikes at the heart of the principles of fundamental justice.** [Emphasis added.]
>
> *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 89

24. Even if the Court decides to embark on a balancing exercise between the rights of the accused under ss. 7 and 11 of the *Charter* and a witness's freedom of religion under s. 2(a), the legal rights of the accused at stake in the criminal proceedings, and the severity of the potential consequences to the accused's life and liberty, should weigh heavily in favour of a presumption of ordering the witness to remove her niqab.

25. In particular, allowing the witness to wear a niqab will have a considerable impact on the accused's right to full answer and defence where the witness's evidence and credibility is central to the case against him. This case will turn in significant part on the credibility of the witnesses. There is little, if any, other evidence. This makes credibility cues – including demeanour – even more important.

26. Another factor to consider in "balancing" the rights of the accused and the witness, as set out in *Syndicat Northcrest v. Amselem, infra*, is the degree to which an order to remove the niqab would constitute a "non-trivial" interference with the witness's religious beliefs. As N.S. stated, wearing the niqab is a matter of comfort and she has removed it in other circumstances, such as to obtain a driver's licence. A preliminary inquiry judge should assess the degree to which a witness has reasonably participated in any efforts to accommodate her religious beliefs. As this Court explained in *Central Okanagan School District No. 23 v. Renaud, infra*, the search for accommodation is a multi-party inquiry and a complainant has a duty to assist in securing appropriate accommodation.

> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at paras. 57-63
> *Transcript of Preliminary Inquiry*, September 11, 2008 at p. 13, Appellant's Record at p. 152
> *Ruling of Weisman P.C.J.*, October 16, 2008 at p. 8, Appellant's Record at p. 11
> *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at para. 43

(iv) Significant *Charter* issues should only be decided on a full evidentiary record

27. The existing record is wholly insufficient to assess N.S.'s request as against the impact on the right of the accused to make full answer and defence. The only information available to this Court consists of unsworn statements by N.S. that were not subject to cross-examination and which do not clearly assert interference with religious interests. This Court has been consistent in its view that courts must not decide constitutional issues in the absence of a proper factual

foundation. This is important if the Court accepts the submission that protecting full answer and defence must guide the decision.

> *Danson v. Ontario*, [1990] 2 S.C.R. 1086 at p. 1099
> *MacKay v. Manitoba,* [1989] 2 S.C.R. 357 at pp. 362, 366
> *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at pp. 253-55
> *R. v. Luke* (1994), 87 C.C.C. (3d) 121 (Ont. C.A.) at p. 127
> *Adult Entertainment Association of Canada v. Ottawa (City)* (2007), 224 O.A.C. 267 (C.A.) at paras. 25-28

28. This matter should therefore be referred back to the preliminary inquiry judge for determination on the basis of a full factual record.

29. Given the longstanding and continued importance of demeanour evidence in the Canadian judicial system and the importance of such evidence to the right of an accused to make full answer and defence, the CLA submits that the legal rights of the accused should prevail over the complainant's "interest" in wearing a niqab. The limited factual and scientific record in this case does not permit this Court to make a determination on the facts. The matter should be sent back to the preliminary inquiry judge.

PART IV: SUBMISSIONS ON COSTS

30. The CLA does not seek costs and asks that none be awarded against it.

PART V: NATURE OF THE ORDER REQUESTED

31. The CLA seeks leave to make oral submissions of not longer than 20 minutes.

32. The CLA requests that this Court make an order in accordance with the above principles.

All of which is respectfully submitted this 21st day of November, 2011.

Frank Addario

Emma Phillips

Counsel for the Intervener, Criminal Lawyers' Association (Ontario)

PART VI: TABLE OF AUTHORITIES

Secondary Sources **Paragraphs**

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Vrij, A. et. al., "Rapid Judgments in Assessing Verbal and Non-Verbal Cues: Their Potential for Deception Researchers and Lie Detection" (2004) Applied Cognitive Psychology 18, 283	20
Wigmore on Evidence (Chadbourn rev. 1974), vol. 5	7

PART VII: STATUTES / REGULATIONS / RULES

Criminal Code (R.S.C., 1985, c. C-46)	**Code criminel (L.R.C. (1985), ch. C-46)**
Testimony outside court room — witnesses under 18 or who have a disability	Exclusion — témoins âgés de moins de dix-huit ans ou ayant une déficience
486.2 (1) Despite section 650, in any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.	**486.2 (1)** Par dérogation à l'article 650, dans les procédures dirigées contre l'accusé, le juge ou le juge de paix ordonne, sur demande du poursuivant ou d'un témoin qui soit est âgé de moins de dix-huit ans, soit est capable de communiquer les faits dans son témoignage tout en pouvant éprouver de la difficulté à le faire en raison d'une déficience mentale ou physique, que ce dernier témoigne à l'extérieur de la salle d'audience ou derrière un écran ou un dispositif permettant à celui-ci de ne pas voir l'accusé, sauf si le juge ou le juge de paix est d'avis que cela nuirait à la bonne administration de la justice.
Other witnesses	Autres témoins
(2) Despite section 650, in any proceedings against an accused, the judge or justice may, on application of the prosecutor or a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of.	(2) Par dérogation à l'article 650, dans les procédures dirigées contre l'accusé, il peut rendre une telle ordonnance, sur demande du poursuivant ou d'un témoin, s'il est d'avis que cela est nécessaire pour obtenir de ce dernier un récit complet et franc des faits sur lesquels est fondée l'accusation.
Application	Demande
(2.1) An application referred to in subsection (1) or (2) may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings.	(2.1) Les demandes peuvent être présentées soit au cours de l'instance au juge ou au juge de paix qui la préside, soit avant l'instance au juge ou au juge de paix qui la présidera.
Factors to be considered	Facteurs à considérer
(3) In making a determination under subsection (2), the judge or justice shall take into account the factors referred to in subsection 486.1(3).	(3) Pour décider si l'ordonnance prévue au paragraphe (2) est nécessaire, il prend en compte les facteurs énumérés au paragraphe 486.1(3).
Specific offences	Infractions particulières
(4) Despite section 650, if an accused is charged with an offence referred to in subsection (5), the	(4) Par dérogation à l'article 650, dans le cas où une personne est accusée d'une infraction

presiding judge or justice may order that any witness testify	mentionnée au paragraphe (5), le juge ou le juge de paix peut ordonner qu'un témoin dépose :
(a) outside the court room if the judge or justice is of the opinion that the order is necessary to protect the safety of the witness; and	a) à l'extérieur de la salle d'audience, s'il est d'avis que cela est nécessaire pour assurer la protection du témoin;
(b) outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of.	b) à l'extérieur de la salle d'audience ou derrière un écran ou un dispositif permettant au témoin de ne pas voir l'accusé, s'il est d'avis que cela est nécessaire pour obtenir du témoin un récit complet et franc des faits sur lesquels est fondée l'accusation.
Offences	Infractions
(5) The offences for the purposes of subsection (4) are	(5) Les infractions visées par le paragraphe (4) sont les suivantes :
(a) an offence under section 423.1, 467.11, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;	a) les infractions prévues aux articles 423.1, 467.11, 467.12 ou 467.13 ou une infraction grave présumée avoir été commise au profit ou sous la direction d'une organisation criminelle, ou en association avec elle;
(b) a terrorism offence;	b) les infractions de terrorisme;
(c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the Security of Information Act; or	c) les infractions aux paragraphes 16(1) ou (2), 17(1), 19(1), 20(1) ou 22(1) de la Loi sur la protection de l'information;
(d) an offence under subsection 21(1) or section 23 of the Security of Information Act that is committed in relation to an offence referred to in paragraph (c).	d) les infractions au paragraphe 21(1) ou à l'article 23 de cette loi, commises à l'égard d'une infraction mentionnée à l'alinéa c).
Same procedure for determination	Audition du témoin
(6) If the judge or justice is of the opinion that it is necessary for a witness to testify in order to determine whether an order under subsection (2) or (4) should be made in respect of that witness, the judge or justice shall order that the witness testify in accordance with that subsection.	(6) Le juge ou le juge de paix qui estime devoir entendre le témoin pour se faire une opinion sur la nécessité d'une ordonnance visée aux paragraphes (2) ou (4) est toutefois tenu de procéder à l'audition de la manière qui y est prévue.
Conditions of exclusion	Conditions de l'exclusion
(7) A witness shall not testify outside the court room under subsection (1), (2), (4) or (6) unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the witness by means of closed-circuit television or	(7) Le témoin ne peut témoigner à l'extérieur de la salle d'audience en vertu des paragraphes (1), (2), (4) ou (6) que si la possibilité est donnée à l'accusé ainsi qu'au juge ou juge de paix et au jury d'assister au témoignage par télévision en circuit

otherwise and the accused is permitted to communicate with counsel while watching the testimony.	fermé ou par un autre moyen et si l'accusé peut communiquer avec son avocat pendant le témoignage.
No adverse inference (8) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.	Conclusion défavorable (8) Le fait qu'une ordonnance visée par le présent article soit ou non rendue ne peut donner lieu à des conclusions défavorables.
Taking evidence **540. (1)** Where an accused is before a justice holding a preliminary inquiry, the justice shall (a) take the evidence under oath of the witnesses called on the part of the prosecution and allow the accused or counsel for the accused to cross-examine them; and (b) cause a record of the evidence of each witness to be taken (i) in legible writing in the form of a deposition, in Form 31, or by a stenographer appointed by him or pursuant to law, or (ii) in a province where a sound recording apparatus is authorized by or under provincial legislation for use in civil cases, by the type of apparatus so authorized and in accordance with the requirements of the provincial legislation.	Prise des témoignages **540. (1)** Lorsque le prévenu est devant un juge de paix qui tient une enquête préliminaire, ce juge doit : a) d'une part, recueillir les dépositions sous serment des témoins appelés par la poursuite et permettre au prévenu ou à son avocat de les contre-interroger; b) d'autre part, faire consigner la déposition de chaque témoin : (i) soit par un sténographe nommé conformément à la loi ou qu'il nomme ou dans une écriture lisible sous forme de déposition d'après la formule 31, (ii) soit, dans une province où l'utilisation d'un appareil d'enregistrement du son est autorisée par ou selon la loi provinciale dans les causes civiles, au moyen du type d'appareil ainsi autorisé et conformément aux prescriptions de la loi provinciale.
Reading and signing depositions (2) Where a deposition is taken down in writing, the justice shall, in the presence of the accused, before asking the accused if he wishes to call witnesses, (a) cause the deposition to be read to the witness; (b) cause the deposition to be signed by the witness; and (c) sign the deposition himself.	Lecture et signature des dépositions (2) Lorsqu'une déposition est prise par écrit, le juge de paix, en présence du prévenu et avant de demander à ce dernier s'il désire appeler des témoins : a) fait lire la déposition au témoin; b) fait signer la déposition par le témoin; c) signe lui-même la déposition.

Authentication by justice	Validation par le juge de paix
(3) Where depositions are taken down in writing, the justice may sign	(3) Lorsque des dépositions sont prises par écrit, le juge de paix peut signer :
(a) at the end of each deposition; or	a) soit à la fin de chaque déposition;
(b) at the end of several or of all the depositions in a manner that will indicate that his signature is intended to authenticate each deposition.	b) soit à la fin de plusieurs ou de l'ensemble des dépositions, d'une manière indiquant que sa signature est destinée à authentiquer chaque déposition.
Stenographer to be sworn	Assermentation du sténographe
(4) Where the stenographer appointed to take down the evidence is not a duly sworn court stenographer, he shall make oath that he will truly and faithfully report the evidence.	(4) Lorsque le sténographe désigné pour consigner les témoignages n'est pas un sténographe judiciaire dûment assermenté, il doit jurer qu'il rapportera sincèrement et fidèlement les témoignages.
Authentication of transcript	Attestation de la transcription
(5) Where the evidence is taken down by a stenographer appointed by the justice or pursuant to law, it need not be read to or signed by the witnesses, but, on request of the justice or of one of the parties, shall be transcribed, in whole or in part, by the stenographer and the transcript shall be accompanied by	(5) Lorsque les témoignages sont consignés par un sténographe nommé par un juge de paix ou conformément à la loi, il n'est pas nécessaire qu'ils soient lus aux témoins ou signés par eux; ils sont transcrits, en totalité ou en partie, par le sténographe à la demande du juge de paix ou de l'une des parties et la transcription est accompagnée :
(a) an affidavit of the stenographer that it is a true report of the evidence; or	a) d'un affidavit du sténographe déclarant qu'elle est un rapport fidèle des témoignages;
(b) a certificate that it is a true report of the evidence if the stenographer is a duly sworn court stenographer.	b) d'un certificat déclarant qu'elle est un rapport fidèle des témoignages, si le sténographe est un sténographe judiciaire dûment assermenté.
Transcription of record taken by sound recording apparatus	Transcription des dépositions prises par un appareil d'enregistrement du son
(6) Where, in accordance with this Act, a record is taken in any proceedings under this Act by a sound recording apparatus, the record so taken shall, on request of the justice or of one of the parties, be dealt with and transcribed, in whole or in part, and the transcription certified and used in accordance with the provincial legislation, with such modifications as the circumstances require mentioned in subsection (1).	(6) Lorsque, en conformité avec la présente loi, on a recours à un appareil d'enregistrement du son relativement à des procédures aux termes de la présente loi, l'enregistrement ainsi fait est utilisé et transcrit, en totalité ou en partie, à la demande du juge de paix ou de l'une des parties, et la transcription est certifiée et employée, avec les adaptations nécessaires, conformément à la législation provinciale mentionnée au paragraphe (1).

Evidence	Preuve
(7) A justice acting under this Part may receive as evidence any information that would not otherwise be admissible but that the justice considers credible or trustworthy in the circumstances of the case, including a statement that is made by a witness in writing or otherwise recorded.	(7) Le juge de paix agissant en vertu de la présente partie peut recevoir en preuve des renseignements par ailleurs inadmissibles qu'il considère plausibles ou dignes de foi dans les circonstances de l'espèce, y compris une déclaration d'un témoin faite par écrit ou enregistrée.
Notice of intention to tender	Préavis
(8) Unless the justice orders otherwise, no information may be received as evidence under subsection (7) unless the party has given to each of the other parties reasonable notice of his or her intention to tender it, together with a copy of the statement, if any, referred to in that subsection.	(8) À moins que le juge de paix n'en ordonne autrement, les renseignements ne peuvent être admis en preuve que si la partie a remis aux autres parties un préavis raisonnable de son intention de les présenter. Dans le cas d'une déclaration, elle accompagne le préavis d'une copie de celle-ci.
Appearance for examination	Comparution en vue d'un interrogatoire
(9) The justice shall, on application of a party, require any person whom the justice considers appropriate to appear for examination or cross-examination with respect to information intended to be tendered as evidence under subsection (7).	(9) Sur demande faite par une partie, le juge de paix ordonne à toute personne dont il estime le témoignage pertinent de se présenter pour interrogatoire ou contre-interrogatoire sur les renseignements visés au paragraphe (7).