IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S246 of 2015

BETWEEN:

YAU MING MATTHEW MOK
Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS (NSW)
Respondent

Part I: Publication

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: Issues

2. In applying a criminal offence provision, namely s. 310D *Crimes Act 1900 (NSW)*, by virtue of s. 89(4) *Service and Execution of Process Act 1992 (C'th)* ("*SEPA*"), is the prosecution relieved of the burden of proving all of the elements of the offence, in particular the element that the accused be an "inmate", as required by the applied State legislation?

3. Is s. 89(4) *SEPA* an offence creating provision?

Part III: Section 78B

4. The appellant considers that notice pursuant to s. 78B of the *Judiciary Act 1903 (C'th)* is not required.

Part IV: Citations

5. The citation for the reasons of judgment of the New South Wales Supreme Court (Rothman J.) is *Director of Public Prosecutions (NSW) v. Yau Ming Mathew Mok* [2014] NSWSC 618.

6. The citation for the reasons of judgment of the New South Wales Court of Appeal (Meagher, Hoeben and Leeming JJA) is *Mok v Director of Public Prosecutions (NSW)* [2015] NSWCA 98.

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Part V: Narrative Statement of Relevant Facts

7. On 24 February 2003, the appellant was arrested and charged with a number of fraud offences in New South Wales. A year later, on 11 March 2004, the appellant pleaded guilty to those charges before a Magistrate sitting at the Local Court at the Downing Centre, and he was consequently committed to the District Court for sentence. The appellant's matters were then adjourned on a number of occasions, and, ultimately, 13 April 2006 was fixed for the purpose of sentencing the appellant. However, on that day, the appellant failed to appear. As a consequence of that, Freeman DCJ issued a bench warrant for the apprehension of the appellant.

8. Many years later, on 14 December 2011, the appellant was charged with unrelated offences in Victoria, and eventually, on 26 February 2013, the appellant was sentenced to a term of imprisonment by the Melbourne Magistrates' Court. On the same day, a Victorian detective executed the warrant, which had been issued by Freeman DCJ in New South Wales, and arrested the appellant.

9. On the next day, 27 February 2013, Magistrate Bazzari, a Victorian Magistrate, issued a warrant to remand a person to another state, and ordered that the appellant be delivered into the custody of a New South Wales police officer for the purpose of transporting him to New South Wales, in accordance with the provisions of the *Service and Execution of Process Act 1992 (C'th)*. The next day, on 28 February 2013, two New South Wales police officers accompanied the appellant to the airport. While being escorted to the aircraft, the appellant made off, but was apprehended a short while later. He was then transported, without further incident, to Redfern Police Station in New South Wales, where he was charged with the offence of attempting to escape from lawful custody, contrary to s. 310D *Crimes Act 1900*.

10. At the hearing of the charge before the Local Court, it was argued that the prosecution had failed to make out a *prima facie* case, because the appellant was not an "inmate" within the meaning of s. 310A *Crimes Act 1900*. Buscombe LCM (as his Honour then was) upheld that submission, and dismissed the charge against the appellant.

11. Thereafter, the New South Wales Director of Public Prosecutions assumed carriage of the matter, and appealed his Honour's ruling, pursuant to s. 56(1)(c) *Crimes (Appeal and Review) Act 2001*. Having heard argument, Rothman J. allowed the appeal, set aside the orders of Buscombe LCM, and remitted the matter for further hearing[1]. In effect, his Honour had concluded that the appellant had been an "inmate" for the purposes of s. 310A; and hence the Magistrate had erred in concluding that the offence could not be made out.

12. The appellant subsequently appealed against the decision of Rothman J. The Court of Appeal (Meagher, Hoeben and Leeming JJA) granted the appellant leave to appeal, but dismissed his appeal[2], albeit on grounds different to those espoused by Rothman J., and for reasons other than those advanced by counsel for the Director[3].

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[1] *See DPP v. Mok* [2014] NSWSC 618.
[2] *Mok v. DPP* [2015] NSWCA 98.
[3] *Mok v. DPP* [2015] NSWCA 98 at [19]-[20].

Part VI: The appellant's arguments

A. The legislative background

13. Although the Court of Appeal ultimately decided the appellant's appeal on a basis different to any of those advanced by the parties at each instance, it is nonetheless instructive to set out the legislative background at the outset.

14. The offence, with which the appellant was charged, namely s. 310D(a) *Crimes Act 1900*, relevantly provides as follows: "Any inmate who escapes or attempts to escape from lawful custody…is guilty of an offence." The expression "inmate" is, in turn, defined by s. 310A *Crimes Act 1900*: "In this Part: 'inmate' has the same meaning as it has in the *Crimes (Administration of Sentences) Act 1999.*"

15. In accordance with s. 3 *Crimes (Administration of Sentences) Act 1999*, "'inmate' means a person to whom Part 2 applies". Those circumstances were set out in s. 4, which is contained in Part 2 of the Act. It was common ground between the parties that only sub-paragraphs (1)(d) and (1)(e) of s. 4 were relevant to the issue in dispute. Section 4 relevantly provides:

> (1) This Part applies to: …
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> (d) any person the subject of a warrant or order by which a court has committed the person to a correctional centre on remand in connection with proceedings for an offence committed, or alleged to have been committed, by the person, and
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> (e) any person the subject of a warrant or order by which a court or other competent authority has committed the person to a correctional centre otherwise than as referred to above...

16. The warrant issued by Freeman DCJ was directed to "the Commissioner of Police for the State of New South Wales, and to all Police Officers in the said State", and commanded them "forthwith to apprehend the said Offender and to bring him before me or some other Judge of the said Court or some Justice or Justices of the Peace, in and for the said State to be dealt with according to law." Because that warrant did not purport to commit the appellant to a correctional centre, it was common ground between the parties that the New South Wales warrant did not render the appellant an inmate. Therefore, s. 310D did not criminalise the actions of the appellant, solely by virtue of the warrant issued by Freeman DCJ.

17. It was also common ground that, in ordering the appellant be taken, in custody, to New South Wales, the Victorian Magistrate was proceeding in accordance with s. 83(8) *SEPA*. Pursuant to s. 89(4) of the Act, "The law in force in the place of issue of a warrant, being the law relating to the liability of a person who escapes from lawful custody, applies to a person being taken to the place of issue in compliance with an order mentioned in subsection (1)."[4]

[4] An order pursuant to s. 83(8) is an order mentioned in subsection (1) and thus s. 89(4) has effect, *see also Mok v. DPP* [2015] NSWCA 98 at [28]-[30].

18. Both parties accepted that s. 310D *Crimes Act 1900* came within the expression "the law in force in the place of issue", as the expression is employed by s. 89(4). The point of contention, below, between the two parties boiled down, essentially, to the meaning to be given to the expressions "court" and "competent authority", as employed in s. 4(1)(d) and (e) *Crimes (Administration of Sentences) Act 1999*; and whether these expressions were to be given a literal meaning, or whether they should be interpreted by analogy.

B. The Court of Appeal's reasoning

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19. The Court's reasoning is encapsulated in the following passages[5], which are worth repeating in full:

> The lengthy submissions and analyses in the courts below all turned on the elaborate definition of "inmate", for s. 310D in terms applies only to persons who are "inmates" as defined. But the effect of s. 89(4) applying s. 310D to persons being returned to New South Wales was not merely confined to those persons who were being returned in accordance with the *SEP Act* and who sought to escape who happened to be "inmates". Unlike s. 79, s. 89(4) *does*
> 20 contain an "express provision which would enable [the court] to alter the language of a State statute and apply it in that altered form", to paraphrase what Mason J. said in *John Robertson & Co.*
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> The matter may be further tested as follows. The premise of s. 89(4) is that a person is in custody by reason of an order made under the *SEP Act* in the execution of a warrant. On that assumption, s. 89(4) makes applicable the law of the warrant's place of issue relating to the liability of a person who escapes from lawful custody. The place of issue will often (as here) be different from the place where an escape takes place. The place of issue will always be
> 30 different from the place where the order committing the person into custody is made (that is why the *SEP Act* has been invoked). And of course it would not be expected that one State will enact laws relating to the escape from lawful custody where a person is in custody by reason of an order or warrant made by another State's court or magistrate. To paraphrase once more what Mason J. said in *John Robertson & Co*, State law relating to the liability of a person who escapes from lawful custody must be applied, as surrogate federal law, upon the assumption that escape from lawful custody imposed by an order made by a magistrate in another State is not outside their field. If that were not so, the section could have no work to do.

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20. A fundamental premise, underlying the Court of Appeal's reasoning, is that s. 89(4) *SEPA* creates a Commonwealth offence, and therefore the law, which is applied by virtue of s. 89(4), must be construed as a Federal law, with such modifications as are necessary to carry it into effect for the specific class of persons nominated, namely (in this case) persons the subject of an order under s. 83(8) *SEPA*[6]. However, it is submitted that s. 89(4) does not create a new, Commonwealth offence. Unlike s. 4 *Commonwealth Places (Application of Laws) Act 1970*, which applies the "applied provisions" "in accordance with the tenor", s. 89(4) does not contain any words, which

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[5] *Mok v. DPP* [2015] NSWCA 98 at [48]-[50] (emphasis in original).
[6] *See Mok v. DPP* [2015] NSWCA 98 at [31].

impliedly, let alone expressly, call for the modification or transformation of the applied law. On the contrary, s. 89(4) provides expressly that "the law in force in the place of issue of [the] warrant" applies. In other words, it is that law, and not some "surrogate Federal law"[7], which applies.

21. However, the Court of Appeal reasoned that, despite the language of s. 89(4) *SEPA*, the provision created a Commonwealth offence. Its analysis proceeded as follows[8]:

> Section 8(4)(a) and (b) of the *SEP Act* produce the result that *any* New South Wales or Victorian law falling within the description in s 8(4) (i.e. with respect to the execution of another State's process) which might otherwise have applied to Mr. Mok on 28 February 2013 is inoperative by reason of s. 109 of the *Constitution*. Otherwise such a law would be inconsistent with the command in s. 8(4) that the federal regime be exclusive. A law imposing criminal sanctions upon a person who is in custody, pursuant to the execution of a New South Wales bench warrant, and who escapes in Victoria while being returned, is plainly a law with respect to the execution of process in another State.
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> Accordingly, s. 4(2)(a) of the *Commonwealth Places (Application of Laws) Act* ensured that s. 310D was not made applicable by subs 4(1) and (4) of the same Act. The only federal law, relevant for present purposes, making State law applicable was s 89(4) of the *SEP Act*. It followed that s. 310D was not made applicable "in accordance with [its] tenor". To the contrary, s. 310D was made applicable "to a person being taken to the place of issue in compliance with an order mentioned in subsection (1)".

22. Section 8(4)(a) *SEPA* provides, "Subject to this Act, this Act applies to the exclusion of a law of a State (the *relevant State*) with respect to the service or execution in another State of process of the relevant State that is process to which this Act applies". Firstly, it is submitted that the law of escape is not a law with respect to the service or execution of process in another State. However, even if it were, s. 8(4) *SEPA* expressly provides that the exclusion of State law is "subject to this Act". Section 89(4) *SEPA* is a provision, which, by its very terms, preserves and applies State law. Therefore, contrary to the reasoning of the Court of Appeal, s. 8(4)(a) *SEPA* does not support a conclusion that s. 89(4) *SEPA* creates a new, Commonwealth offence. On the contrary, s. 89(4) *SEPA* is merely an exception to the general exclusion, which is otherwise provided by s. 8(4)(a) *SEPA*.

23. It is true that, if the appellant had committed an offence, the offence was a Commonwealth offence. However, the Commonwealth offence owes its existence to s. 4(1) *Commonwealth Places (Application of Laws) Act 1990*, since the place of the offence, Tullamarine, was undoubtedly a Commonwealth place. That act applies the applicable provision, and it does so without rewriting such provision[9]:

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[7] *Cf. Mok v. DPP* [2015] NSWCA 98 at [38].
[8] *Mok v. DPP* [2015] NSWCA 98 at [35]-[36] (emphasis in original).
[9] *R v. Porter* (2004) 61 NSWLR 384 at 388 [11]-[12] *per* Spigelman CJ, *quoting Commonwealth v. Western Australia* (1999) 196 CLR 392 at 415 [51] *per* Gleeson CJ and Gaudron J. (citations omitted) (emphasis added); *see also R v. Porter* (2001) 53 NSWLR 354 at 363 [41] *per* Spigelman CJ ("The effect of s. 4 of the

> Section 4 of the *Applications of Laws Act* is analogous to the application of a State procedural law to courts exercising federal jurisdiction, by the operation of s. 79 of the *Judiciary Act 1903 (C'th). A State law so applied operates as a federal law, but the meaning of the State act is unchanged.*
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> Similarly, in the case of s. 4 of the *Application of Laws Act, the meaning of the applied State law is unchanged. Section 4 applies State laws in accordance with their tenor, "not to rewrite them".*

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24. A second fundamental premise of the Court of Appeal's reasoning was that s. 89(4) *SEPA* "contain[s] an 'express provision which would enable [the court] to alter the language of a State statute and apply it in that altered form"[10]. It is submitted that this conclusion is erroneous, and unsupported by the legislative language, even if it be assumed that s. 89(4) creates a new, Commonwealth offence, Far from containing an "express provision", it is submitted that the language of s. 89(4) *SEPA* is clear and unambiguous. Unlike s. 68(2) *Judiciary Act 1903 (C'th)*, which speaks of investing State courts with "the like jurisdiction" in respect of federal offences[11], s. 89(4) *SEPA* contains no such modification, or qualification. It is "the law in force in the place of
20 issue of [the] warrant" which applies.

25. Remarkably, the reasoning of the Court of Appeal is devoid of any reference to the words in the *SEPA,* which amount to an "express provision" permitting the application of State legislation in an altered form. Certainly there are no such words in s. 89(4) *SEPA*, nor are any such words to be found elsewhere in the statute. Nor does the limiting of s. 89(4) to "person[s] being taken to the place of issue in compliance with an order mentioned in subsection (1)" amount to an "express provision" allowing the application of State law in an altered form.

30 26. The limitation of s. 89(4) to persons, who are subject of a relevant order, simply makes plain that the law of the State operates only when the mechanisms provided by the *SEPA* for the transfer of a person to another State have been invoked, and are in train. So, for example, the law in force in the place of issue of the warrant would not apply to a person, who escapes from lawful custody in another State, before an order under s. 83(8)(b) or s. 86 had been made. In any event, the statutory language is clear: it is still "[t]he law in force in the place of issue of a warrant", which "applies" to persons subject to a relevant order.

27. While accepting that s. 79(1) *Judiciary Act 1903 (C'th)* is not directed to rights and
40 liabilities[12], the language employed by s. 79 is nonetheless quite similar to that employed by s. 89(4) *SEPA*. Accordingly, it is submitted that, contrary to the reasoning of the Court of Appeal[13], this Court's authorities interpreting that provision are of assistance in the interpretation of s. 89(4) *SEPA*, just as the New South Wales

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Commonwealth Places Act is to enact a Commonwealth law in the same terms as each State law, which falls within its terms.").

[10] *Mok v. DPP* [2015] NSWCA 98 at [49].

[11] *See Mok v. DPP* [2015] NSWCA 98 at [42].

[12] *Cf. Mok v. DPP* [2015] NSWCA 98 at [44], *citing Solomons v. District Court (NSW)* (2002) 211 CLR 119 at 125 *per* Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ.

[13] *Mok v. DPP* [2015] NSWCA 98 at [44]: "Authorities on s. 79 are of limited assistance to this appeal."

Court of Criminal Appeal considered such authority to be of assistance in the interpretation of the *Commonwealth Places Act*[14]. Because of the absence of any express provision modifying the State law applied, s. 79 has been held to apply the State law in its "unaltered" form. The authorities, which support that proposition, are legion[15], subject to necessary modifications, as described in *John Robertson & Co. Ltd. v. Ferguson Transformers Pty. Ltd.*[16]

28. The Court of Appeal proceeded on the assumption that s. 89(4) *SEPA* "would have no work to do" if the State law were to be applied in accordance with its very terms[17]. However, it is submitted that this assumption is erroneous; and can be tested as follows. Assuming that the appellant had been arrested in New South Wales in relation to the warrant issued by Freeman DCJ, and had then made off, he would not have been guilty of an offence contrary to s. 310D *Crimes Act 1900*, since he would not have been an "inmate" as that expression is defined by s. 310A *Crimes Act 1900* and s. 4 *Crimes (Administration of Sentences) Act 1999*. However, having been in lawful custody, he would have been guilty of the common law offence of escape[18].

29. Similarly, it is submitted that, although s. 310D *Crimes Act 1900* does not apply to the actions of the appellant in making off while in custody in Victoria, because he was not an "inmate", s. 89(4) *SEPA* nonetheless applies all of the law in force in the place of issue of the warrant, insofar as it relates to "the liability of a person, who escapes from lawful custody". This body of law not only includes s. 310D, but also any other statutory offences, as well as such offences as may be provided by the common law[19]. Therefore, although s. 310D could not be applied by s. 89(4), because one of the elements of the offence, namely the accused being an "inmate", cannot be made out, nonetheless s. 89(4) would impose liability for the common law offence of escape. It can thus be seen that the Court of Appeal's assumption that the State law must necessarily be transmogrified in order to give meaning to s. 89(4) is, quite simply, false.[20]

30. The above analysis demonstrates also why s. 89(4) should not be interpreted in the manner espoused by the Court of Appeal. Section 310D was inserted into the *Crimes Act* by Part 1, Sched. 3 *Crimes Legislation Amendment (Sentencing) Act 1999*. The predecessor to that provision was s. 34(1) *Correctional Centres Act 1952*. Both that

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[14] *See* above at [23].

[15] *ASIC v. Edensor Nominees Pty. Ltd* (2001) 204 CLR 559 at 611 [134]-[135] *per* McHugh J.; *Solomons v. District Court of New South Wales* (2002) 211 CLR 119 at 146 [60] *per* McHugh J., *quoting Pederson v. Young* (1964) 110 CLR 162 at 165 *per* Kitto J. (emphasis added) ("[Section 79] *does not operate to give a State law a new or extended meaning when it is made applicable in federal jurisdiction.*"); *Austral Pacific Group Limited v. Airservices Australia* (2000) 203 CLR 136 at 155 [54] *per* McHugh J., *quoting Maguire v. Simpson* (1977) 139 CLR 362 at 376 *per* Gibbs J. ("[Section] 79 does not enable a court exercising federal jurisdiction to give an altered meaning to a State statute...."); *Commonwealth v. Mewett* (1996) 191 CLR 471 at 556 *per* Gummow and Kirby JJ.; *Commissioner of Stamp Duties (NSW) v. Owens (No. 2)* (1953) 88 CLR 168 at 170.

[16] (1973) 129 CLR 65 at 95 *per* Mason J.

[17] *Mok v. DPP* [2015] NSWCA 98 at [50].

[18] The common law offence of escape has expressly been preserved, *see* s. 343(a) *Crimes Act 1900*. As to the nature and history of the offence, *see R v. Scott* [1967] V.R. 276.

[19] *Compare* s. 3(5) *SEPA* (emphasis added): "A reference in this Act to a law of the Commonwealth or a State is a reference to a law (*whether written or unwritten*) of or in force in the Commonwealth or the State, as the case may be."

[20] Of course, s. 89(4) *SEPA* would, in other cases, have work to do in applying the provisions (or common law) of other States, which may apply to the specific factual matrix.

provision, and the current s. 310D, impose criminal liability upon persons, who are inmates, in the sense in which that expression is conventionally understood, that is to say, in custody at a correctional centre, or similar. Neither provision purports to cover the entire field in respect of persons, who may escape from lawful custody, for example escaping from the custody of a police officer. Rhetorically, one might ask why, if a State provision applies only to persons held by Corrective Services or similar, does the Commonwealth have an interest in extending the scope of such a provision to situations, which would not be criminalised under the State provision, had the conduct occurred within the State. It is submitted that there can be no such interest, and s. 89(4) *SEPA* should not be read so as to expand the reach of State provisions beyond their intended scope.

31. Conversely, if a person is an "inmate" within the meaning of s. 4(1) *Crimes (Administration of Sentences) Act 1999,* and then escapes from lawful custody in another jurisdiction, the offence under s. 310D *Crimes Act 1900* would apply to such a person, just as it would to an "inmate", who escapes from lawful custody within New South Wales. Again, this demonstrates that s. 89(4) does have real work to do by applying s. 310D according to its terms.

32. In any event, even if s. 89(4) *SEPA* demanded an "alteration" of s. 310D *Crimes Act 1900*, it is submitted that the Court of Appeal's approach extended well beyond the bounds of the permissible. In *John Robertson & Co.*, this Court held that a statute, which is applied in accordance with s. 79 *Judiciary Act 1903 (C'th)*, must be construed to apply to Federal courts as well, even if the provision, as drafted, was intended to apply to State courts only. Accordingly, references to matters peculiar to the State would have to be interpreted in a way, which would permit the application of the provision to Federal courts. It is submitted that this process does not, however, involve a wholesale rewriting of the provision.

33. In the present case, it is an element of the offence contrary to s. 310D that the person be an "inmate". Yet, the Court of Appeal held[21] that, "Section 89(4) requires putting to one side the carefully crafted definitions of 'inmate', and applying the new federal offence to all persons being taken to the place of issue." Given that acknowledgement, it is submitted that the interests of the issuing State are not furthered by "putting to one side" that definition, which it had so carefully crafted. Such a re-drafting of the issuing State's statutes would not accord with the purpose of s. 89(4), which is plainly to allow State law to be applicable beyond its boundaries, to the same extent that it regulates similar conduct within its own boundaries.

34. That submission may be illustrated by a further example. If, because of a deliberate, legislative choice, the definition of inmate had been limited to persons aged only 18 or above, the construction placed upon s. 89(4) by the respondent would mean that a child, too, would be guilty of the offence contrary to s. 310D. With respect, it defies logic that the ambit of State legislation should be expanded, beyond its intended limits, by a Commonwealth enactment, where the Commonwealth has only a tangential interest.

[21] *Mok v. DPP* [2015] NSWCA 98 at [51].

35. It is submitted that the Court of Appeal's reasoning creates a provision, the reach of which extends well beyond that envisaged by the New South Wales statute. To do so not only extends the operation of a State offence into the Federal sphere, but also creates an entirely different offence. In such circumstances, it cannot be said that it is the New South Wales law, which has been "applied", as required by s. 89(4).

36. Accordingly, it is submitted that the Court of Appeal erred in ignoring, entirely, the element of the offence that the accused be an "inmate", as defined.

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Part VII: Relevant materials

37. The relevant statutory provisions are set out verbatim in Annexure A (attached).

Part VIII: Orders sought

38. The following orders are sought:

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(a) The appeal be allowed;

(b) The judgment and orders of the Court of Appeal of New South Wales be set aside and, in their place, orders that

(i) the appeal be allowed; and

(ii) the respondent pay the costs of the proceedings before the Court of Appeal;

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(c) The judgment and orders of Rothman J. be set aside, and, in their place, an order that the respondent pay the costs of the proceedings before Rothman J.

(d) Costs.

Part IX: Estimate of Time

39. The appellant estimates no more than 1 hour will be required to present his argument.

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Dated: 11 December 2015

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