Court File No.: CV-11-442790

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

REVA LANDAU

Applicant

- and -

ATTORNEY GENERAL OF ONTARIO

- and -

HER MAJESTY THE QUEEN IN THE RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF EDUCATION

Respondents

- and -

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervener

FACTUM OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION
(Motion Returnable October 17, 2012)

October 1, 2012

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
155 Wellington St. W., 35th Floor
Toronto, ON M5V 3H1

Andrew K. Lokan (LSUC #31629Q)
Tina H. Lie (LSUC # 54617I)

Tel: (416) 646-4300
Fax: (416) 646-4301
Email: andrew.lokan@paliareroland.com
tina.lie@paliareroland.com

Lawyers for the Intervener,
the Canadian Civil Liberties Association

TO: **REVA LANDAU**
95 Prince Arthur Avenue
Toronto, ON M5R 3P6
Tel: (416) 968-2876

Applicant

AND TO: **ATTORNEY GENERAL OF ONTARIO**
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Robert E. Charney
Tel: (416) 326-4452

Joshua Hunter
Tel: (416) 326-4466
Fax: (416) 326-4015

Lawyers for the Respondent

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PART I – OVERVIEW

1. This application concerns the constitutionality of providing full public funding to Catholic separate schools in Ontario. The applicant challenges the current funding scheme on the basis that it violates ss. 2(a) and 15 of the *Charter of Rights and Freedoms* (the "*Charter*") – freedom of religion and the right to equality, respectively. The respondent, Attorney General of Ontario (the "Attorney General"), seeks to strike out the Notice of Application on the basis that (a) the applicant lacks standing, and (b) a series of Supreme Court of Canada and other appellate decisions are determinative of the issues raised on the application.

2. The CCLA intervenes on this motion as a friend of the court. In granting the CCLA leave to intervene in the application, and this motion, Justice Aston noted that there was a "good probability" the CCLA would be able to assist the Court by way of argument on the issues, including "the question of possibly developing a record which might become the basis of a reconsideration of apparently binding authority".[1]

3. The CCLA submits that where, as here, the decisions of the Supreme Court of Canada on which the Attorney General relies are (or may be) open for reconsideration, the applicant should be permitted to develop the record necessary to allow that Court to revisit its prior precedents. In order to do that, the motion to strike should be dismissed.

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[1] *Landau v. Attorney General of Ontario et al.*, Court File No. CV-11-442790, Endorsement of Aston J., August 13, 2012 (CCLA's Brief of Authorities, Tab 1).

PART II – FACTS

A. The Application

4. The applicant seeks declarations respecting the constitutionality of the current scheme of funding of separate schools in Ontario.

5. At the core of this application is the interplay between s. 93(1) of the *Constitution Act, 1867*, which protects the "rights or privileges" of denominational schools at the time of confederation, and the *Charter*, which enshrines rights and freedoms that are fundamental to Canadian society. Section 93(1) of the *Constitution Act, 1867* provides:

> 93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:
>
> > (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;

6. Section 29 of the *Charter* specifically protects the "rights or privileges" of separate schools guaranteed by or under the constitution. It states:

> 29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

7. The crux of the application is whether either or both of these constitutional provisions renders the entire scheme of separate school funding immune from *Charter* scrutiny.

B. The Supreme Court of Canada's Decisions

8. On this motion, the Attorney General relies on a series of decisions of the Supreme Court of Canada to assert that the principle of *stare decisis* makes it plain and obvious that the application cannot succeed.[2] In the CCLA's submission, the only decisions of the Supreme Court of Canada that dealt squarely with the scope of immunity afforded by s. 93(1) are *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*[3] and *Adler v. Ontario*.[4]

(1) Reference re Bill 30 (1987)

9. All of the decisions on which the Attorney General relies stem from *Reference re Bill 30* – a 1987 decision of the Supreme Court of Canada, in which the Court upheld Bill 30, the legislation that extended full public funding to Catholic high schools.[5] In that case, the court had to grapple for the first time with the scope of protection afforded by s. 93(1) of the *Constitution Act, 1867* in the context of the *Charter*. The Court concluded that:

(a) the public funding of Catholic schools through to secondary school was a "right or privilege" guaranteed under s. 93(1);[6] and

(b) that "right or privilege" was immune from scrutiny under the *Charter* because "[i]t was never intended... that the *Charter* could be used to invalidate other provisions of the Constitution". Although it was not necessary, s. 29 of the *Charter* confirmed the intention to shield the rights

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[2] Notice of Motion, para. 4 (Motion Record, Tab 1).
[3] *Reference re Bill 30, An Act to Amend the Education Act (Ont.)* [1987] 1 S.C.R. 1148 [*Reference re Bill 30*] (CCLA's Brief of Authorities, Tab 2).
[4] *Adler v. Ontario*, [1996] 3 S.C.R. 609 [*Adler*] (CCLA's Brief of Authorities, Tab 3).
[5] *Reference re Bill 30*, *supra* (CCLA's Brief of Authorities, Tab 2).
[6] *Reference re Bill 30*, *supra*, at para. 58 (CCLA's Brief of Authorities, Tab 2).

and privileges under s. 93(1) from review under the *Charter*; s. 29 was, in Justice Wilson's words, merely included "for greater certainty".[7]

10. In arriving at the first conclusion, Justice Wilson, who wrote the reasons for the majority, reconsidered and overruled a 1928 decision of the Privy Council, which specifically considered the issue and determined the opposite: in *Tiny Separate School Trustees v. The King*, the Privy Council concluded that "there was no guaranteed right in the separate schools to funding" at the time of confederation.[8]

11. More specifically, Justice Wilson overruled *Tiny* by reframing the question. According to her, in considering if public funding for Catholic high schools was a "right or privilege" conferred by s. 93(1), the appropriate question should not be whether there was a s. 93(1) right to funding (the question that the Privy Council asked and answered in *Tiny*), but rather whether the provision conferred on Catholic separate schools a right to offer secondary school education at the time of confederation. She concluded that

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[7] *Reference re Bill 30*, *supra*, at para. 62 (CCLA's Brief of Authorities, Tab 2). Justices Estey and Beetz, who concurred in the result, disagreed, however, on the applicability of s. 29 of the *Charter*. According to Justice Estey, the rights granted by Bill 30 were not "guaranteed" under the *Constitution Act, 1867*. As a result, s. 29 could not operate so as to protect those rights. Nevertheless, Justice Estey found that the plenary power afforded to the provincial legislature under s. 93 was sufficient to shield Bill 30 from *Charter* review: see paras. 81-82, 86 (per Estey J., concurring). The majority of the Court also found that s. 93(3), which provides for an appeal to the Governor General from any act or decision by a province "affecting any Right or Privilege", expressly contemplated that a provincial legislation may pass legislation which augments the rights or privileges of separate school supporters: see paras. 23, 61. However, as Justice Wilson made clear in her reasons, "[i]t cannot be concluded... that rights or privileges conferred by post-Confederation legislation under s. 93(3) are 'guaranteed' within the meaning of s. 29 in the same way as rights or privileges under s. 93(1)": para. 61. Thus, at its core, the scope of the *Charter* immunity afforded to separate school funding requires an analysis of s. 93(1).

[8] *Reference re Bill 30*, *supra*, at paras. 50-51, 56 (CCLA's Brief of Authorities, Tab 2). In *Tiny Separate School Trustees v. The King*, the Privy Council considered s. 120 of the *Common Schools Act* of 1859 which provided that out of the sum granted for common schools and "not otherwise expressly appropriated by law", the Governor in Council could authorize certain expenditures in aid of common schools. Section 20 of the *Scott Act* provided that separate schools were entitled to "share in the fund annually granted by the Legislature... for the support of Common Schools". However, since there was no limit in the amount that the Governor in Council could appropriate for common schools under the *Common Schools Act*, there was no guaranteed right to funding of the separate schools: see [1928] A.C. 363 (J.C.P.C.) at paras. 28, 41-42 [*Tiny*] (CCLA's Book of Authorites, Tab 4).

they did, and that, in order to make that right meaningful, an adequate level of funding was required.[9]

12. The CCLA submits that the recasting of the question in this manner dramatically and unjustifiably expanded the scope of protection afforded by s. 93(1). For the reasons set out below, including the current make up of Canadian society and the non-derogable nature of freedom of religion, a narrow interpretation of the "rights or privileges" of s. 93(1) is now required. The Court's reasoning and decision in *Reference re Bill 30* should thus be revisited.

(2) Adler v. Ontario (1996)

13. In *Adler v. Ontario*, the Supreme Court of Canada considered a constitutional challenge brought by a group of parents who sent their children to private religious schools.[10] The appellants argued that the provision of funding to Catholic schools but not other religious schools violated ss. 2(a) and 15 of the *Charter*.

14. Justice Iacobucci, writing for the majority, disposed of the *Charter* challenge on the basis that "any claim to public support for religious education must be grounded in s. 93(1) which is a 'comprehensive code' of denominational school rights". Relying on *Reference re Bill 30*, Justice Iacobucci found that the funding of both Catholic separate schools and public schools was within the scope of the "comprehensive code"; as a result, "public funding for the province's separate schools cannot form the basis for the appellants' *Charter* claim."[11]

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[9] *Reference re Bill 30, supra*, at paras. 53, 57-58 (CCLA's Brief of Authorities, Tab 2).
[10] *Adler, supra* (CCLA's Brief of Authorities, Tab 3).
[11] *Adler, supra*, at paras. 27, 44 (CCLA's Brief of Authorities, Tab 3).

15. The other judges differed, however, in their assessment of the extent to which the *Charter* applied to the appellants' claims.[12]

(3) The Other Supreme Court of Canada Decisions

16. The other Supreme Court of Canada decisions on which the Attorney General relies are *Ontario Home Builders' Association v. York Region Board of Education*, and *Ontario English Catholic Teachers Assn. v. Ontario*. In the CCLA's submission, they do not deal directly with the scope of constitutional protection afforded to separate school funding:

(a) In *Ontario Home Builders'*, the Court dealt with the issue of whether an Educational Development Charge ("EDC") imposed on individuals seeking a building permit was *intra vires* the province's jurisdiction. A *Charter* argument was raised by an intervenor, which the majority of the Court rejected, relying on *Reference re Bill 30.*[13]

(b) In *OECTA*, the Court was faced with a challenge to the constitutionality of the funding model for all schools boards in the province.[14] However, the issue was not whether the funding model infringed the *Charter* rights of non-Catholics, but rather whether the scheme prejudicially affected the rights or privileges of separate schools under s. 93(1).[15]

17. *Reference re Bill 30* and *Adler* are at the core of the Attorney General's *stare decisis* argument. In *OECTA*, the Court was not required to, and did not, assess

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[12] In particular, Justices Sopinka, McLachlin and L'Heureux-Dube all found that the *Charter* applied to the appellants' claim because s. 93(1) did not render the funding of *public* schools immune from scrutiny under the *Charter*. However, Justice McLachlin, dissenting, differed in her conclusions on whether there was a violation of the *Charter*, and if so, whether the breach was saved by s. 1. See paras. 209, 225,
[13] *Ontario Home Builders' Association v. York Region Board of Education*, and *Ontario English Catholic Teachers Assn. v. Ontario*, [1996] 2 S.C.R. 929 at paras. 76-77 (CCLA's Brief of Authorities, Tab 5).
[14] *Ontario English Catholic Teachers Assn. v. Ontario*, [2001] 1 S.C.R. 470 [*OECTA*] (CCLA's Brief of Authorities, Tab 6)
[15] See *OECTA*, *supra*, at paras. 43, 53, 80 (CCLA's Brief of Authorities, Tab 6).

whether the *Charter* applied to the new funding model, and if so, whether the *Charter* was violated. Over 25 years have passed since *Reference re Bill 30*, and over 15 years have passed since *Adler*. For the reasons set out below, the time has come for a reconsideration of these decisions. The application should not be struck at this early stage.

PART III – ISSUES AND LAW

18. The Attorney General raises two issues on this motion:

(a) *Should the Notice of Application be struck because it discloses no reasonable cause of action?* The CCLA submits that it should not. Even if the decisions of the Supreme Court of Canada are found to be sufficient to dispose of the issues raised on the application, the Notice of Application discloses sufficient grounds for why those decisions ought to be revisited. The principle of *stare decisis* should not be used to prevent the development of the law – particularly in a case that involves the reconciliation of historical compromises given at the time of confederation and the rights and freedoms that are fundamental to our society today.

(b) *Does the applicant have standing to bring this application?* The CCLA submits that she does. She is an Ontario resident and tax payer whose freedom of religion will likely have been violated (and will thus have been exceptionally prejudiced) if the *Charter* is found to apply. She thus has standing to seek to vindicate her rights. Alternatively, she meets the test for public interest standing.

A. The Notice of Application should not be Struck

19. For the reasons set out below, the CCLA submits that the Court should dismiss the Attorney General's motion to strike.

(1) The Onus on a Motion to Strike is High

20. It is well settled that on a motion to strike, the moving party has the onus of showing that it is "plain and obvious" and beyond reasonable doubt that the action cannot succeed on the facts as pleaded.[16] In considering a motion to strike, the Court is required to accept the facts as pleaded as true.[17] The threshold on a motion to strike is particularly high in cases involving constitutional or *Charter* issues.[18]

21. As the Supreme Court of Canada noted in *R. v. Imperial Tobacco Canada Ltd.*, "[v]aluable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed."[19] While the Court was referring to permitting novel claims to proceed, the CCLA submits that equal "care" must be taken in a motion to strike out a constitutional claim on the basis of *stare decisis*.

22. After all, precedents may not be applicable, they can change, and previously binding decisions can be overruled. In its recent decision in *Carter v. Canada*, the B.C. Supreme Court described the tension between the rationale for *stare decisis* and the need for evolution in the law:

> The rationales for the *stare decisis* rule are clear: the need for consistency, predictability and certainty in the law, promoting respect for the law. At the same time, respect for the law will diminish if it fails to adapt and change in response to changed circumstances. The Supreme Court of Canada has accordingly overruled its own previous decisions on some occasions.[20]

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[16] *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45 at para. 17 [*Imperial Tobacco*] (CCLA's Brief of Authorities, Tab 7).
[17] *Imperial Tobacco*, *supra*, at para. 22 (CCLA's Brief of Authorities, Tab 7).
[18] *Lockridge v. Ontario (Director, Ministry of the Environment)*, [2012] O.J. No. 3016 (Div. Ct.) at para. 25 (CCLA's Brief of Authorities, Tab 8).
[19] *Imperial Tobacco*, *supra*, at para. 21 (CCLA's Brief of Authorities, Tab 7).
[20] *Carter v. Canada*, 2012 BCSC 886 at para. 900 [*Carter*] (CCLA's Brief of Authorities, Tab 9).

23. The tension is particularly acute in constitutional cases, where a strict adherence to *stare decisis* could stunt the "living tree". Indeed, the need to avoid a strict application of *stare decisis* and the appropriateness of reconsidering past precedents in interpreting the constitution are reflected in *Reference re Bill 30* itself, where, as described above, the majority overruled the binding precedent of the Privy Council in *Tiny*, and expanded through its interpretation the nature of the "rights or privileges" that are afforded protection under s. 93(1).

24. More recent case law makes clear that a court can reconsider a binding precedent where there is a change in the "social, political, or economic assumptions underlying a previous decision".[21] Precedents can also be reconsidered where the precedent departed from the purpose of a *Charter* provision or does not reflect *Charter* values.[22]

25. In this application, the applicant seeks to vindicate her rights and freedoms under the *Charter*. The narrower the immunity afforded to denominational schools under s. 93, the more room for the application of the *Charter*. Where overruling a past

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[21] *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.*, (2005), 76 O.R. (3d) 161 (C.A.) at para. 124 [*David Polowin*] (CCLA's Brief of Authorities, Tab 10). This is seen, for instance, in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 [*Health Services*] (CCLA's Brief of Authorities, Tab 11), in which the Supreme Court of Canada overruled a series of decisions from 1987 known as the "Labour Trilogy", which denied constitutional protection to collective bargaining and strikes. Four years later, in *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3 [*Fraser*] (CCLA's Brief of Authorities, Tab 12), the Court again reconsidered and clarified its decision in *Health Services*. In fact, Justice Rothstein (dissenting) would have overruled *Health Services* and returned to the state of the law under the Labour Trilogy.

[22] *Fraser*, *supra*, at paras. 134-136 (per Rothstein J., dissenting) (CCLA's Brief of Authorities, Tab 12); *David Polowin*, *supra*, at para. 124 (CCLA's Brief of Authorities, Tab 10).

precedent would enlarge the scope of protection offered by the *Charter*, the Court should be hesitant to strike out the application at this early stage in the proceeding.[23]

26. Moreover, in considering a motion to strike out a Notice of Application, the Court should take into account the fact that the Notice need only state the "grounds to be argued, including a reference to any statutory provision or rule to be relied on".[24] As a result, the Court must exercise "some degree of caution" and make "due allowance for the different requirements mandated" for a Notice of Application as opposed to a Statement of Claim when applying Rule 21.[25] This requires the Court to not only accept the facts stated in the Notice of Application as true, but also to treat the grounds with some degree of flexibility.

(2) Where there is Reason to Believe a Precedent should be Reconsidered, the Court should not Strike Out the Proceeding

27. Recognizing that past precedents may need to be revisited, the courts have made clear that, even where there is a binding precedent that is determinative of the issues on an application, the court should let the application proceed if there is some indication that the precedent is open for reconsideration.[26]

28. In *Canada (Attorney General) v. Bedford*, the Court of Appeal for Ontario emphasized that lower courts are required to follow the binding precedents of the

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[23] This is in contrast to Justice Rothstein's (dissenting) reasons in *Fraser* - in *Fraser*, Justice Rothstein wrote (at para. 141) that the fact that "the error in *Health Services* concerns a question of constitutional law" was a factor in favour of overturning that precedent; however, the majority rejected this argument, finding that the constitutional nature of the issue could militate against overruling a precedent "where the effect is to diminish *Charter* protection": *Fraser*, *supra*, at para. 58 (CCLA's Brief of Authorities, Tab 12).
[24] Rule 38.04(b), *Rules of Civil Procedure*, R.R.O. Reg. 194.
[25] *Barbra Schlifer Commemorative Clinic v. HMQ Canada*, 2012 ONSC 5271 at para. 41 (CCLA's Brief of Authorities, Tab 13).
[26] See *Wakeford v. Attorney General of Canada*, 2001 CanLII 28318 (Ont. S.C.) at para. 14 [*Wakeford*] (CCLA's Brief of Authorities, Tab 14).

Supreme Court of Canada.[27] It made clear, however, that a court of first instance still has a role to play where a party argues that a binding precedent should be revisited:

> This is not to say that a court of first instance has no role to play in a case where one party seeks to argue that a prior decision of the Supreme Court should be reconsidered and overruled based on significant changes in the evidentiary landscape. The court of first instance does have a role in such a case, albeit a limited one. It may allow the parties to gather and present the appropriate evidence and, where necessary, make credibility findings and findings of fact. In doing so, the court of first instance creates a necessary record should the Supreme Court decide that it will reconsider its prior decision. [Emphasis added][28]

29. In short, if the Supreme Court of Canada is to reconsider a prior decision, it needs a record to consider. Thus, where, as here, the applicant seeks to argue that a prior decision of the Supreme Court of Canada should be revisited – and, for the reasons set out below, there is good reason to do so – the Court should allow the application to proceed.

(3) The Supreme Court of Canada's Precedents should be Reconsidered

30. It is well settled that the language of the constitution is to be given a "progressive interpretation" so that it may continuously adapt to new conditions and new ideas.[29] The constitution is a "living tree" and should be interpreted as such. In the words of

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[27] *Canada (Attorney General) v. Bedford*, 2012 ONCA 186 at para. 75 [*Bedford*] (CCLA's Brief of Authorities, Tab 15).

[28] *Bedford*, *supra*, at para. 76 (CCLA's Brief of Authorities, Tab 15); see also *Leeson and Korte v. University of Regina et al.*, 2007 SKQB 252 at para. 9 (CCLA's Brief of Authorities, Tab 16); *Air Canada Pilots Assn. v. Kelly*, [2012] F.C.J. No. 976 (C.A.) at para. 48 (CCLA's Brief of Authorities, Tab 17).

[29] Peter W. Hogg, *Constitutional Law of Canada*, 5th Ed. Supplemented, last updated 2011, Vol. 2 (Toronto: Thomson Reuters Canada Limited) at 60-8.1 [Hogg] (CCLA's Brief of Authorities, Tab 18).

Professor Hogg, the constitution should be given "a flexible interpretation, so that the constitution can be adapted over time to changing conditions".[30]

31. A "flexible interpretation" of s. 93(1) of the *Constitution Act, 1867*, must, however, take into account the fact that this provision's "rights or privileges" are, indeed, "frozen at Confederation".[31] That is, in considering whether a s. 93(1) "right or privilege" existed, the court must have regard to what existed in 1867.

32. The CCLA submits that the reasoning of the majority in *Reference re Bill 30* should be reconsidered. In overruling the Privy Council's decision in *Tiny*, the majority in *Reference re Bill 30* adopted an expansive interpretation of s. 93(1) "rights or privileges". As described above, rather than asking the straightforward (and narrow) question of whether separate secondary schools had a right to funding at the time of confederation (the question that the Privy Council asked in *Tiny*), Justice Wilson expanded the question to whether separate schools had a right to offer secondary level education. Such an expansive view of s. 93(1) acted to cut down *Charter* rights of non-Catholics and to undermine the principle of the "duty of neutrality" discussed below.

33. Put simply, the narrower the scope given to "rights or privileges" under s. 93(1), the more room for the *Charter*. For the reasons set out below, the CCLA submits that the courts should construe those "rights or privileges" that are immune from the *Charter* as narrowly as possible. It is only by interpreting s. 93(1) in such a manner that the courts can strike the appropriate balance between the constitutional bargains struck at

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[30] Hogg, *supra*, Vol. 2, at 36-25; see also 8-23 to 8-24 (CCLA's Brief of Authorities, Tab 18).
[31] *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, [1989] 1 S.C.R. 377 at para. 36 (CCLA's Brief of Authorities, Tab 19).

the time of confederation and the rights and freedoms that are fundamental to our society today.

34. On this motion, however, this Court need not determine that the circumstances or conditions have changed such that the Supreme Court of Canada *should* or *will* overrule *Reference re Bill 30* and its subsequent decisions. If this Court is satisfied that there is some basis for the Supreme Court to reconsider its past precedents, then the application should be permitted to proceed to a hearing on the merits.

(i) The Changing Conditions in Canadian Society

35. The interpretation of the scope of "rights or privileges" under s. 93(1) of the *Constitution Act, 1867* should take into account the section's purpose. At the time of confederation, public (or "common") schools in Ontario were largely Protestant, and s. 93(1) was included to protect the education rights and privileges of the Catholic minority. In *OECTA*, the Supreme Court of Canada described this rationale as follows:

> The original purpose of s. 93 was to give the provinces plenary jurisdiction over education while protecting the religious education of the Protestant minority in Quebec and the Catholic minority outside Quebec. ... The animating principles were, and are, religious freedom and equitable treatment." [Emphasis added][32]

36. There has been a significant change in the social, cultural and religious landscape in Canada. While the principles of "religious freedom and equitable treatment" gave life to s. 93 in 1867, the continued application of s. 93 in a manner that shields the entire scheme of separate school funding from scrutiny under the *Charter* only serves to erode those very principles today.

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[32] *OECTA*, *supra*, at para. 28 (CCLA's Brief of Authorities, Tab 6).

37. Indeed, since the Supreme Court of Canada's decision in *OECTA*, the Court has recognized the clear distinction that is now drawn between church and state. In *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, Justice LeBel (dissenting) discussed the gradual "dissociation of the functions of church and state", acknowledging that this represented a significant shift from the time of confederation and the enactment of s. 93 of the *Constitution Act, 1867*:

> [A]t the time of Confederation in 1867, the concept of religious neutrality implied primarily respect for Christian denominations. One illustration of this can be seen in the constitutional rules relating to educational rights originally found, *inter alia*, in s. 93 of the *Constitution Act, 1867*.
>
> Since then, the appearance and growing influence of new philosophical, political and legal theories on the organization and bases of civil society have gradually led to a dissociation of the functions of church and state. ... These societal changes have tended to create a clear distinction between churches and public authorities, placing the state under a duty of neutrality. [Emphasis added][33]

38. Most recently, in *S.L. v. Commission scolaire des Chenes*, the Supreme Court of Canada described a very different "religious portrait" of Canadian society today from that which existed in 1867:

> The religious portrait of our society is a key factor in the adoption of a policy of neutrality, not only in Quebec but also elsewhere in Canada. As a result of globalization of trade and increased individual mobility, the diversity of religious beliefs in Canada has increased sharply over the past decades. The 2001 Census of Canada listed approximately 95 religious groups that were large enough to be considered separate religious institutions for the purpose of statistical records. Furthermore, more than 23 percent of Canadians declared that they were members of non-Christian religions or reported no religious identity at all.[34]

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[33] *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650 at paras. 66-67 (per LeBel J., dissenting) (CCLA's Brief of Authorities, Tab 20). Although Justice LeBel dissented in the result, the majority did not take issue with his comments respecting the dissociation of church and state. See also *Reference re Same-Sex Marriage*, [2004] 3 SCR 698 at paras. 22-30 (CCLA's Brief of Authorities, Tab 21).

[34] *S.L. v. Commission scolaire des Chenes*, [2012] 1 S.C.R. 235 at para. 11 (CCLA's Brief of Authorities, Tab 22).

39. The changing conditions since 1867 are also reflected in the decisions of Quebec (and subsequently Newfoundland) to withdraw from the "pact" made at confederation.[35]

40. Put another way, even if the "adjudicative facts" giving rise to the instant application are found to be similar to those considered in *Reference re Bill 30* (i.e., the existence of full funding for separate schools through to the secondary level),[36] the "legislative facts" (including the social economic and cultural context, as reflected in the Notice of Application) are different. Such legislative facts are equally as important in adopting a progressive interpretation of the constitution.[37]

41. In *Carter*, for instance, a case involving the difficult issue of assisted suicide, the B.C. Supreme Court noted that the adjudicative facts were indistinguishable from those considered in a prior Supreme Court of Canada decision.[38] However, the court went on to describe the different "legislative and social facts" which distinguished the case from its precedent:

> The evidence as to legislative and social facts in this case, however, is different from that in Rodriguez. By evidence as to "legislative and social facts", I refer to all of the evidence tendered in this case on matters other than the adjudicative facts - regarding topics such as the legislation and experience in jurisdictions with legalized physician-assisted death or assisted death, palliative care practice including palliative sedation, end-of-life decision making, Canadian public opinion regarding euthanasia or physician-assisted death, Parliamentary and other reports since *Rodriguez*, and medical ethics.[39]

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[35] In 1997, Quebec enacted an amendment to the constitution, which made ss. 93(1) to (4) inapplicable to the province: See *Constitution Act, 1867,* section 93A. The following year (in 1998), Newfoundland and Labrador enacted an amendment to its constitution. The province is no longer required to protect the rights and privileges given to separate schools, but rather to provide for "courses in religion that are not specific to a religious denomination" and to permit religious observances in schools "where requested by parents." *Newfoundland Act*, 12 &13 Geo. VI, c. 22 (U.K.), s. 17.

[36] The facts giving rise to the claim are referred to "adjudicative facts": see *Danson v. Ontario (Attorney General)* [1990] 2 S.C.R. 1086, at para. 27 (CCLA's Brief of Authorities, Tab 23).

[37] See Hogg, *supra*, at 60.1(f), pp. 60-8.1 - 60-9 (CCLA's Brief of Authorities, Tab 18).

[38] *Carter*, *supra*, at para. 941 (CCLA's Brief of Authorities, Tab 9).

[39] *Carter*, *supra*, at para. 942 (CCLA's Brief of Authorities, Tab 9).

42. While changes in legislative and social facts alone may not be enough for a lower court to overrule a binding precedent of the Supreme Court of Canada, such changes could influence the Supreme Court of Canada to reconsider its previous decisions.[40]

(ii) Canada's International Commitments to Freedom of Religion

43. It is now well settled that Canada's international obligations inform the courts' interpretation of the *Charter*.[41] Canada's commitments under international law further support a narrow reading of s. 93(1).

44. Article 18 of the International Covenant on Civil and Political Rights ("ICCPR"), which Canada ratified in 1976, provides for the "right to freedom of thought, conscience and religion", including an obligation on state parties (including Canada) to "have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions".[42] Freedom of religion under art. 18 is a non-derogable right.[43]

45. In 1999, the United Nations Human Rights Committee (the "Committee") considered Canada's compliance with art. 18 in *Waldman v. Canada*.[44] In that case, the

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[40] *Carter*, *supra*, at para. 946 (CCLA's Brief of Authorities, Tab 9).
[41] *Health Services*, *supra*, at para. 69 (CCLA's Brief of Authorities, Tab 11).
[42] *1966 International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 and 1057 UNTS 407, [1980] ATS 23/ 6 ILM 368 (1967) (ratified by Canada, 19 May 1976) ["*ICCPR*"], Art. 18 (CCLA's Brief of Authorities, Tab 24).
[43] *ICCPR*, *supra*, Art. 4(2) (CCLA's Brief of Authorities, Tab 24). In particular, art. 18 is not a right from which a state can derogate in the time of public emergency under art. 4(1).
[44] *Waldman v. Canada*, Communication No. 694/1996, CCPR/C/D/694/1996 (U.N. H.R.C.) [*Waldman*] (CCLA's Brief of Authorities, Tab 25). The Committee's decisions are also relevant to interpreting the scope of the *Charter*: Hogg, *supra*, Vol. 2, 36-39 to 36-41 (CCLA's Brief of Authorities, Tab 18) ("The decisions of the Human Rights Committee of the United Nations are relevant to the interpretation of the Charter, not only because Canada is a party to the [ICCPR] which they interpret, but also because they are considered interpretations by distinguished jurists of language and ideas that are similar to the language and ideas of the Charter.").

complainant wanted to give his children a Jewish education but faced financial hardship in so doing, a hardship not experienced by Catholic parents. As a result, he filed a complaint with the Committee, alleging violations of, *inter alia*, art. 18 of the ICCPR. In response to the complaint, Canada argued that the distinction drawn between Catholic schools and other religions was based on "objective and reasonable criteria" – namely, the fact that it was enshrined in s. 93 of the *Constitution Act, 1867*.[45]

46. The Committee specifically considered and rejected Canada's argument, finding that the distinction was neither reasonable nor objective simply because the public funding of Catholic schools was entrenched in Canada's constitution:

> The Committee begins by noting that the fact that a distinction is enshrined in the Constitution does not render it reasonable and objective. In the instant case, the distinction was made in 1867 to protect the Roman Catholics in Ontario. The material before the Committee does not show that members of the Roman Catholic community or any identifiable section of that community are now in a disadvantaged position compared to those members of the Jewish community that wish to secure the education of their children in religious schools. Accordingly, the Committee rejects the State party's argument that the preferential treatment of Roman Catholic schools is nondiscriminatory because of its Constitutional obligation. [Emphasis added][46]

47. Thus, the Committee found Canada to be in violation of the ICCPR.[47] In subsequent reports, the Committee has continued to note Canada's violation of the ICCPR, and has recommended that Canada "adopt steps in order to eliminate discrimination on the basis of religion in the funding of schools in Ontario".[48]

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[45] *Waldman*, *supra*, at para. 10.3 (CCLA's Brief of Authorities, Tab 25).
[46] *Waldman*, *supra*, at para. 10.4 (CCLA's Brief of Authorities, Tab 25).
[47] *Waldman*, *supra*, at para. 11 (CCLA's Brief of Authorities, Tab 25).
[48] Human Rights Committee, *Concluding observations of the Human Right Committee – CANADA*, 20 April 2006, CCPR/C/CAN/CO/5, [*"Concluding Observations"*] *at* para 21 (CCLA's Brief of Authorities, Tab 26).

48. Despite its reliance on s. 93(1) of the *Constitution Act, 1867* in *Waldman*, Canada has made no declarations or reservations with respect to art. 18 of the ICCPR to allow for the anomaly entrenched in that section.[49] To the contrary, Canada has objected to countries who sought to rely on their own constitutions to make reservations to the right to freedom of religion, making clear its position that freedom of religion is a right from which there can be no derogation, regardless of the content of a state's constitution.[50]

49. The non-derogable nature of freedom of religion supports the proposition that s. 93(1) of the *Constitution Act, 1867* – which derogates from that right – should be construed as narrowly as possible. The majority in *Reference Re Bill 30* did not adopt such an interpretation; to the contrary, the majority overruled the narrow interpretation adopted by the Privy Council in *Tiny*, and interpreted those "rights or privileges" expansively. The CCLA submits that such an interpretation is no longer supportable today. In the circumstances, the application should not be struck at this preliminary stage on the basis of *stare decisis*, and should be permitted to proceed to a hearing on the merits.

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[49] United Nations Treaty Collection, "International Covenant on Civil and Political Rights", < http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf>, accessed 1 October 2012 ["*UN Treaty Database*"]. See Declarations and Reservations beginning at p. 3 (CCLA's Brief of Authorities, Tab 27).

[50] In 2007 and 2011, Canada objected to the reservations made by Maldives and Pakistan respectively, which sought to make Article 18 of the ICCPR subject to the provisions of their own constitutions:. *UN Treaty Database* at pp. 16-17 (CCLA's Brief of Authorities, Tab 27).

B. The Applicant has Standing to Bring this Application

50. In order for the applicant to have standing, she need not have a cause of action for damages or other coercive relief. She is entitled to initiate proceedings for the sole purpose of challenging the constitutionality of the separate school funding scheme.[51]

51. Contrary to the Attorney General's submissions, the applicant is not affected by the public funding of separate schools "the same way as every other person resident and paying taxes in Ontario".[52] She is "exceptionally prejudiced" because she is required to fund, through her taxes, a school board that does not reflect her values and beliefs.

52. The fact that the public funding of separate schools would violate the *Charter* cannot seriously be in dispute. As Justice Estey commented in *Reference re Bill 30*:

> It is axiomatic (and many counsel before this Court conceded the point) that if the *Charter* has any application to Bill 30, this Bill would be found discriminatory and in violation of s. 2(a) and s. 15 of the *Charter of Rights*. Notwithstanding this conclusion, the real contest in this appeal is clearly between the operation of the *Charter* in its entirety and the integrity of s. 93. [Emphasis added][53]

53. In the words of Justice Estey, the "real contest" on this application is whether and the extent to which the *Charter* applies.[54] If the entire funding scheme is found to fall within s. 93(1) and thus immune from the *Charter*, then by definition, there can be no *Charter* scrutiny; on the other hand, if some part of the scheme falls outside s. 93(1), then the applicant's *Charter* rights and freedoms may well have been violated.

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[51] Hogg, *supra*, at 59-4 (CCLA's Brief of Authorities, Tab 18).
[52] See Factum of the Moving Parties, para. 11.
[53] *Reference re Bill 30*, *supra*, at para. 78 (CCLA's Brief of Authorities, Tab 2).
[54] *Reference re Bill 30, supra,* at para 79 (CCLA's Brief of Authorities, Tab 2).

54. In these circumstances, the applicant has a "direct, personal interest" in the Court's interpretation of s. 93(1) of the *Constitution Act, 1867* and the *Charter*.[55]

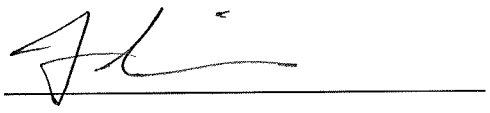
55. In the alternative, the applicant meets the newly modified test for public interest standing set out in the Supreme Court of Canada's recent decision in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*.[56] The applicant raises serious issues; she is genuinely interested in the outcome, and this is, in all the circumstances, a reasonable and effective manner to bring the issue to the Court.[57] Under the more flexible approach of *Downtown Eastside Sex Workers*, the applicant should be granted public interest standing.

PART IV – ORDER REQUESTED

56. The CCLA respectfully requests that the Court dismiss the respondent's motion to strike.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 1, 2012



Paliare Roland Rosenberg Rothstein LLP
Andrew K. Lokan (LSUC #31629Q)
Tina H. Lie (LSUC # 54617I)

Lawyers for the Intervener, the Canadian Civil Liberties Association

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[55] *Bedford v. Canada*, 2010 ONSC 4264 at para. 47, var'd, *Bedford*, *supra*. The Court of Appeal for Ontario did not address the Attorney General of Canada's renewed attempt to challenge the applicants' standing on appeal: *Bedford*, *supra*, at paras. 48-50 (CCLA's Brief of Authorities, Tab 15).
[56] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside Sex Workers*] (CCLA's Brief of Authorities, Tab 28).
[57] See *Downtown Eastside Sex Workers*, *supra* 37-44 (CCLA's Brief of Authorities, Tab 28).

SCHEDULE "A"
TABLE OF AUTHORITIES

1. *Landau v. Attorney General of Ontario et al.*, Court File No. CV-11-442790, Endorsement of Aston J., August 13, 2012
2. *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148
3. *Tiny Separate School Trustees v. The King*, [1928] A.C. 363 (J.C.P.C.)
4. *Adler v. Ontario*, [1996] 3 S.C.R. 609
5. *Ontario Home Builders' Association v. York Region Board of Education*, [2001] 1 S.C.R. 470
6. *Ontario English Catholic Teachers Assn. v. Ontario*, [2001] 1 S.C.R. 470
7. *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45
8. *Lockridge v. Ontario (Director, Ministry of the Environment)*, [2012] O.J. No. 3016 (Div. Ct.)
9. *Carter v. Canada*, 2012 BCSC 886
10. *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.*, (2005), 76 O.R. (3d) 161 (C.A.)
11. *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391
12. *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3
13. *Barbra Schlifer Commemorative Clinic v. HMQ Canada*, 2012 ONSC 5271
14. *Wakeford v. Attorney General of Canada*, 2001 CanLII 28318 (Ont. S.C.)
15. *Canada (Attorney General) v. Bedford*, 2012 ONCA 186
16. *Leeson and Korte v. University of Regina et al.*, 2007 SKQB 25
17. *Air Canada Pilots Assn. v. Kelly*, [2012] F.C.J. No. 976 (C.A.)
18. *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, [1989] 1 S.C.R. 377

19. *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R.

20. *Reference re Same-Sex Marriage* , [2004] 3 S.C.R. 698

21. *S.L. v. Commission scolaire des Chenes*, [2012] 1 S.C.R. 235

22. *Danson v. Ontario (Attorney General)* [1990] 2 S.C.R. 1086

23. *1966 International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 and 1057 UNTS 407, [1980] ATS 23/ 6 ILM 368 (1967) (ratified by Canada, 19 May 1976)

24. *Waldman v. Canada*, Communication No. 694/1996, CCPR/C/D/694/1996 (U.N. H.R.C.)

25. Human Rights Committee, *Concluding observations of the Human Right Committee – CANADA,* 20 April 2006, CCPR/C/CAN/CO/5

26. United Nations Treaty Collection, "International Covenant on Civil and Political Rights", < http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf>, accessed 1 October 2012.

27. *Bedford v. Canada*, 2010 ONSC

28. *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45.

SCHEDULE "B"
TABLE OF STATUTORY AUTHORITIES

***Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, ss. 93, 93A**

Legislation respecting Education

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec;

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education;

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

93A. Paragraphs (1) to (4) of section 93 do not apply to Quebec.

***Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982 c. 11, s. 1, s. 2(a), s. 15(1), s. 29**

GUARANTEE OF RIGHTS AND FREEDOMS

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits

prescribed by law as can be demonstrably justified in a free and democratic society.

FUNDAMENTAL FREEDOMS

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

EQUALITY RIGHTS

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

GENERAL

Rights Respecting Certain Schools Preserved

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

***Rules of Civil Procedure*, R.R.O. Reg. 194, Rules 21, 38.04(b)**

DETERMINATION OF AN ISSUE BEFORE TRIAL

WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

(a) the court has no jurisdiction over the subject matter of the action;

Capacity

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

Another Proceeding Pending

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).

APPLICATIONS

CONTENT OF NOTICE

38.04 Every notice of application (Form 14E, 68A, 73A, 74.44 or 75.5) shall state,

(a) the precise relief sought;

(b) the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and

(c) the documentary evidence to be used at the hearing of the application. R.R.O. 1990, Reg. 194, r. 38.04; O. Reg. 484/94, s. 8.

***Newfoundland Act*, 12 & 13 Geo VI, c. 22 (U.K.), s. 17**

EDUCATION

17. (1) In lieu of section ninety-three of the *Constitution Act, 1867*, this Term shall apply in respect of the Province of Newfoundland and Labrador:

(2) In and for the Province of Newfoundland and Labrador, the Legislature shall have exclusive authority to make laws in relation to education but shall provide for courses in religion that are not specific to a religious denomination.

(3) Religious observances shall be permitted in a school where requested by parents.

***1966 International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 and 1057 UNTS 407, [1980] ATS 23/ 6 ILM 368 (1967) (ratified by Canada, 19 May 1976), Arts. 4, 18**

Article 4

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Court File No.: CV-11-442790

REVA LANDAU	- and -	**ATTORNEY GENERAL OF ONTARIO**	- and -	**CANADIAN CIVIL LIBERTIES ASSOCIATION**
Applicant		Respondents		Intervener

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FACTUM OF THE INTERVENER,
CANADIAN CIVIL LIBERTIES ASSOCIATION
(Motion Returnable October 17, 2012)

PALIARE ROLAND ROSENBERG
ROTHSTEIN LLP
Barristers
155 Wellington St. W., 35th Floor
Toronto, ON M5V 3H1

Andrew K. Lokan (LSUC #31629Q)
Tina H. Lie (LSUC # 54617I)

Tel: (416) 646-4300
Fax: (416) 646-4301
Email: andrew.lokan@paliareroland.com
tina.lie@paliareroland.com

Lawyers for the Intervener,
the Canadian Civil Liberties Association