**Court File No:**

***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**

Respondent

  **APPLICATION under Rule 14.05(3)(g.1) of the Rules of Civil Procedure and the**

***Canadian Charter of Rights and Freedoms***

**notice of application**

**TO THE RESPONDENT**

 **A LEGAL PROCEEDING HAS BEEN COMMENCED** by the applicant. The claim made by the applicant appears on the following page.

 **THIS APPLICATION** will come on for a hearing at Toronto, Ontario.

 **IF YOU WISH TO OPPOSE THIS APPLICATION**, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant’s lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

 **IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION**, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant’s lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, butat least four days before the hearing.

  **IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.**

Date ................................................................. Issued by

 Registrar,

 393 University Avenue

 Toronto, ON M5G 1E6

TO: **HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE**

 **OF ONTARIO AS REPRESENTED BY THE MINISTER OF EDUCATION AND**

 **THE ATTORNEY GENERAL OF ONTARIO**

 c/o The Attorney General of Ontario

 Constitutional Law Branch

 720 Bay Street, 8th Floor

 Toronto, ONT

 M5G 2K1

**application**

1. THE APPLICANT makes an application for:
	1. A declaration that any aid to Ontario Catholic separate schools that was not guaranteed by the *British North America Act*, 1867 and *the Constitution Act*, 1982 and that is not equally available to any other religious or philosophical group (e.g. atheist or humanist) violates s.15(1) and s.2(a)(b) of the *Canadian Charter of Rights and Freedoms* ("the *Charter*") and is not saved by s.1 of the *Charter*.
	2. A declaration that any government aid to Ontario Catholic separate schools for Grades 11 and 12 that is not equally available to any other religious or philosophical group violates s.2(a)(b) and s.15(1) of the *Charter* and is not saved by s.1 of the *Charter*.
	3. A declaration that any government aid to Ontario Catholic separate schools for Grades 9 and 10 that is not equally available to any other religious group or philosophy violates s.2 and s.15(1) of the *Charter* and is not saved by s.1 of the *Charter*.
	4. A declaration that government aid to Ontario Catholic separate schools for Grades 1 to 8 which is not equally available to any other religious group and philosophy violates s.2(a)(b) and s.15(1) of the *Charter* if it is greater than the aid available in 1867, that is:
		1. The taxes of corporations cannot be used to support Catholic separate schools
		2. Only the taxes of Catholic ratepayers or non-shareholder wholly Catholic-owned businesses who live within 3 miles of a separate school and who declare themselves to be separate school supporters can be used to support Catholic separate schools.
		3. A small amount of grants from general revenues (not to exceed 20% of all revenues available to Catholic separate schools) could be available if the Catholic rate-payers supply matching funds.
	5. An order that Ontario *Education Act*, R.S.O. 1990, c. E-2 be immediately amended so as to eliminate all government aid for Grades 9 and 10 in Catholic separate schools and Grades 11 and 12 of Catholic separate schools.
	6. An order that Ontario *Education Act* be immediately amended so as to reduce all government aid for Grades 1 to 8 in Ontario Catholic separate schools to only that aid available in 1867, that is, only property taxes from Catholics who declare themselves to be separate school supporters and who live within 3 miles of a separate school, and property taxes from wholly Catholic owned businesses can be used to support separate schools, as well as grants from the provincial government not to exceed 20% of revenues from all sources;
	7. The costs of this application; and
	8. Such further and other relief as the Applicant may advise and this Honourable Court permit.

THE GROUNDS for this Application are:

**HISTORICAL BACKGROUND**

1. At the time of Confederation in 1867, the rights of Catholics to "separate schools" in Upper Canada/Canada West (which became known as Ontario in 1867) was governed by *An Act to Restore to Roman Catholics in Upper Canada certain Rights in Respect to Separate Schools* S.U.C., 1863, (26 Vict., c. 5), also referred to as the *Separate Schools Act* or the "Scott Act". There was some overlap between what was taught in common/separate schools and grammar schools, but by 1865 most of what would now be described as "secondary education" was provided in grammar schools which were governed by the *Act to Amend the Law Relating to Grammar Schools in Upper Canada* of 1853 (16th Vict., c. 186) and the *Grammar School Improvement Act* of 1865 (29 Vict., c.23).
2. At the time of Confederation, all "public" education in both Upper and Lower Canada was to some degree religious. Even the "public schools" in Ontario had a Protestant Bible, the reading of the Lord's prayer, and religious instruction of a general Christian Protestant nature. For several reasons, including preserving the right of Protestants in Lower Canada/Canada East (which in 1867 became known as Quebec) to not be forced to attend Catholic "public" schools or to pay for their own schools without any government funding, Upper Canada/Canada West (which in 1867 became known as Ontario) agreed that Catholics in Ontario could also have their own "separate schools" which were to some degree state supported. Only separate schools established under the *Separate Schools Act*, that is the Act that governed what were mainly primary schools, received provincial government funding, and exempted Catholic rate-payers from contributing to "public schools". There were no "separate" grammar schools.
3. The state support of "separate schools" in Ontario was limited at the time of Confederation. Only the rates of Catholics who declared themselves to be "separate school" supporters and who lived within three (3) miles of a separate school, or the rates of businesses which were wholly Catholic-owned could go to the support of primary "separate schools". Incorporated businesses did not support "separate schools". The Upper Canada government did give grants for maps in a small amount (provided they were matched by funds raised by the Catholic separate schools) as well as grants on a per capita basis (again provided they were matched by funds raised by Catholic separate schools).
4. For example, in 1867, Upper Canada Separate schools had a total of $48,828 available to them. Of this amount, approximately 20% was legislative grants from the Upper Canada government, and the rest was monies raised by rates paid by Catholic separate school rate-payers and supporters of Catholic schools.
5. In contrast, "common" schools had not only legislative grants, and public school ratepayers support, but municipal assessments, and other sources such as the "Clergy Reserve Fund". The result was that Separate schools received only about 62% as much funding per student as public ("common") schools.
6. The provision of what would now be described as secondary education was to some extent in a state of flux. Starting with the *Grammar Schools Act* of 1853(16 Vict., c.186) and continuing with the *Grammar School Improvement Act* of 1865(29 Vict., c.23), Dr. Ryerson, the Superintendent of Education, had moved grammar school education towards a system in which Grammar schools, which originally provided a classical education geared towards boys, were providing almost all of what today would be considered secondary education for both boys and girls, though some common/separate schools were still providing some secondary school education. However, while some common schools were providing education in introductory levels in algebra and geometry, subjects generally considered to be of a "secondary level" such as Trigonometry, Logarithms, Physics, Chemistry, French, Greek and Latin were provided only by grammar schools.
7. The position of Dr. Ryerson, the Superintendent of Education at the time of the passage of the *Separate Schools Act* of 1863, was that he agreed to the Act on the understanding that there would be no further demands by Catholics for additional funding or any other state educational assistance. Dr. Ryerson's position was that gradually separate schools would disappear and all Upper Canada (Ontario) students would be in one "public" school system.
8. The current educational funding system in both Ontario and Quebec in regard to separate schools is very different than at the time of Confederation:
9. The Catholic separate school system is funded almost wholly by general public funds(not Catholic school supporters and rate-payers) from Grade 1 to Grade 12 in Ontario. Funding to Grade 12 was enacted in 1986 [*Education Amendment Act* (No. 1), S.O. 1986, c.21].
10. The majority of revenues provided to Roman Catholic separate schools does not come from the property taxes provided by separate school supporters, but from general Ontario government revenues. All students in the public and separate school systems receive roughly the same amount per student, taking into consideration different programs and needs. In effect, the taxes of non-Catholics(from income tax, HST, etc.) are supporting Catholic separate schools. For example, in the 2009-2010 year, 5.6% of all operating expenses for Catholic boards came from residential property taxes, approximately 11% from business property taxes, and about 79.6 % from general provincial revenues. For public schools, 12.6% of all operating expenses came from residential property taxes, about 13% from business property taxes, and about 69.8% from provincial funding. In 1867, separate schools would have had no funding from business property taxes, and only about 20% from general provincial government revenues.
11. The co-guarantor of "separate school" funding at the time of Confederation, Quebec, in 1997 by the *Constitution Amendment*, 1997 restructed Quebec school boards on linguistic lines, ratther than a denominational basis. There is no longer a "Protestant" and a "Catholic" school system in Quebec.
12. Public schools in Ontario no longer have Protestant religious instruction, or the reading of the Lord's Prayer or the Bible. They are much more truly "non-sectarian", that is, basically neutral on the position of religion.
13. A teacher of any, or no, religious persuasion has an equal chance of being hired in the "public" school system. The "separate" school system is legally allowed to prefer Roman Catholic teachers, to ask for a letter from a priest, etc. As approximately 30% of all students in Ontario attend separate schools, Roman Catholic teachers are at an advantage because they can work in either the public or the publicly-funded separate school system. Teachers who are not Roman Catholic, aside from any issues they might have with teaching or at the minimum agreeing to support Roman Catholic doctrine, have less of a chance of being hired in the Roman Catholic separate school system. Therefore, non-Catholic teachers have less of a chance of obtaining a teaching job, or of being promoted.
14. Roman Catholic parents can send their children to either the separate or public school system. They might prefer one or the other for a variety of reasons, including location, etc. Parents who are not Roman Catholic may or may not be allowed to send their child to a primary Separate School system. Even if they are given permission, they might not want to send their child to a Separate school that is closer because they would not agree with what the child is being taught.

Application of the *Canadian Charter of Human Rights and Freedoms (*the *"Charter")*

1. Section 2 of *the Charter* says everyone has the following freedoms:
	1. freedom of conscience and religion;
	2. freedom of thought, belief, opinion and expression, including freedom of the press
2. Section 15(1) states "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."

1. Section 27 states: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."
2. Section 32(1) states: "This Charter applies

 (*a*) to the Parliament and government of Canada in respect of all matters within the authority

 of Parliament including all matters relating to the Yukon Territory and Northwest

 Territories; and

 (*b*) to the legislature and government of each province in respect of all matters within the

 authority of the legislature of each province."

1. Section 29 of the *Charter* states that "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."
2. Constitution Act, 1867 (*British North America Act)*, s.93 states that:

"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."

1. Section 93(3) of the *British North America Act* gave a political avenue to follow if a provincial government made changes to the rights of separate schools even if these rights were not covered by s.93(1).
2. The funding of Catholic separate schools in Ontario was declared contrary to the Optional Protocol to the International Covenant on Civil and Political Rights(Communication No. 694/1996; CCPR/C/67/D/694/1996, the "Waldman" case). Canada is a signature to this protocol.
3. In *Reference re Bill 30*, an *Act to Amend the Education Act,* [1987]1 S.C.R. 1148, the Supreme Court ruled that because s.93(3) of the *Constitution Act,* 1867 (*British North America Act*) assumed that Upper Canada(Ontario) could pass legislation post-Confederation affecting Catholic Separate Schools, the *Charter* did not apply to legislation affecting Separate Schools. Therefore, the Ontario government could extend government funding to Catholic secondary schools and to no other denominational schools without violating the Charter. The Supreme Court therefore never addressed the issue of whether extending funding for Catholic, and only Catholic, schools to all grades of secondary education violated s.15(1) or s.2(a) or (b) or s.27 of the *Charter* and if it did, if it would be saved by s.1.
4. The logic of the Supreme Court in *Reference re Bill 30* and in the case of *Adler v. Ontario*, [1996] 3 S.C.R. 609, should be revisited:
5. *Reference Re Bill 30* appears to be saying that because the province has the plenary power to legislate on denominational schools, the *Charter of Rights* does not apply. This contradicts decisions in other cases which clearly state that even after establishing the legislation is intra vires, the court must then determine if there is a violation of the *Charter*. It is interesting that in both cases s.32 of the *Charter*, which states the *Charter* applies to the legislature and government of all provinces in regard to all matters within their authority, is not referred to in the decisions.
6. Both cases placed great emphasis on the pact made at Confederation between the then Upper and Lower Canada in regard to separate schools; but Quebec withdrew from its side of the bargain in 1997 under the *Constitution Amendment*, 1997 which allowed Quebec to re-organize its school system along linguistic rather than religious lines. This was of course not mentioned in the *Reference re Bill 30* case of 1985 and the proposed *Constitution Amendment* had not been enacted at the time of the *Adler* case, though one dissenting judgement referred to the proposed Amendment making its way through the courts. But it is a crucial fact that should be considered in a revisiting of the decisions.
7. If s.93(3) prevented the Charter from applying to Ontario legislation in regard to separate schools, then s.29 of the *Charter* becomes redundant and a basic principle of statutory and constitutional interpretation is interpretations that create redundancies should be avoided.
8. In the *Adler* case, the reasoning of the majority was that not only did the *Charter* not apply to legislation involving separate schools, but it did not apply to public schools. Theoretically, according to *Adler*, the provincial government could pass laws forbidding, for example, Sikhs teaching in the public schools and the *Charter* would not apply. This type of reasoning shows why the logic in the *Reference re Bill 30* and the *Adler* cases must be revisited.
9. Current Canadian jurisprudence places emphasis on what was the "purpose" of particular legislation. It was not the purpose of the legislators when they passed the *Constitution Act,* 1867 to place Roman Catholics in Upper Canada (now Ontario) in a privileged position in regard to the funding of their educational system. While different motives have been suggested, they never intended for Roman Catholic education to be fully funded by the provincial government, and for all other religious groups, including Protestant ones such as Anglicans, to receive no funding. That Ontario now has a much more "non-sectarian" public school system, in contrast to the position at the time of Confederation, has never been properly considered by the Supreme Court.
10. A basic principle of statutory interpretation is if there could be more than one interpretation, statutes should be interpreted in a way that does not violate the *Charter*. It is possible to interpret s.93(3) in a way that recognizes Ontario can legislate on denominational schools but still have the *Charter* apply. It is submitted that this is the interpretation that should be adopted and that once it is established the *Charter* applies to legislation involving separate schools, it is obvious, as Justice Estey said in *Reference re Bill 30*, that legislation such as the current *Education Ac*t (R.S.O. 1990, c. E-2) is in violation of the *Charter*.
11. While it could be argued that considering the question of whether separate schools were funded for secondary education in *Reference re Bill 30* was not necessary because the court ruled the *Charter* did not apply, the majority of the Supreme Court in that case did address the issue of whether "secondary" separate school education was funded in 1867. Judging from the decision, the Supreme Court either had very limited information before them or ignored information. For example:
12. the Supreme Court relied on the age of the children attending common/separate schools and not what they were studying, in contrast to what was being studied at grammar schools
13. the Supreme Court dismissed grammar schools as classical schools and made no reference to the *Act to Improve the Common and Grammar Schools of the Province of Ontario* of 1871 which renamed the Grammar Schools as "High Schools" (that is, Ontario's current secondary school providers), or to the references by Dr. Ryerson in 1865 to "grammar schools" being the intermediate schools between common schools and university.
14. the Supreme Court made no reference to the documentation that consistently referred to common schools as elementary schools or that discussed how by 1867 most secondary education was in fact being performed by grammar schools.
15. Documentation from separate school supporters claimed at the most that grades 9 and 10 had traditionally been covered by provincial funding; even these supporters did not claim that grades 11 and 12 had been covered.
16. Therefore, any re-examination of separate school funding in 1867 should conclude grades 11 and 12 were not funded.
17. While there is evidence that there was teaching of some secondary school subjects at the Grade 9/10 level in some common/separate schools in 1867, it is not clear it was a right guaranteed by law. Exceptions to the *Charter* should be interpreted narrowly. Therefore, all public funding of Grades 9 and 10 in Catholic Separate schools should be removed.
18. The issue of how the funding of separate schools has changed from one in which a separate school student received about 2/3 of the funding of public school students to one in which separate school pupils receive funding on the same basis as public school students or from a system funded mostly by separate school supporters to one in which it is funded mostly by public general revenues has never been clearly raised or discussed in court. In fact, from reading the *Reference re Bill 30* references to "full" funding, a reader would think that in 1867 separate schools were funded on the same basis as, and had the same funding per student, as public schools. Therefore, the level of public funding for Grades 1 to 8 should be revisited and the funding limited to what was available in 1867.
19. It is an established principle in Canadian law that exceptions to the *Charter* and Human Rights Codes should be interpreted narrowly in order to fulfil the purposes of the legislation. Given that s.93(1) of the *British North America Act* contradicts s.15(1) and s.2(a) and (b) of the *Charter*, the only way to reconcile this difference is to interpret s.93(1) as narrowly as possible so it guarantees the Separate school system only those rights which clearly existed at the time of Confederation. The support of the Separate Catholic school system beyond the minimum required by s.93(1) of the *Constitution Act* violates the commitment to equality and accommodation of a wide variety of beliefs which is mandated by s.2(a) and (b), s.15(1) and s.27 of the *Charter*.

**The Applicant**

1. The Applicant is a Canadian citizen, Ontario resident and property owner, and Ontario tax payer. Because the majority of Roman Catholic school funding comes from general provincial government revenues, the Applicant's tax money is going to support the Separate Catholic School Board. The Applicant cannot direct this money to go only to the "non-sectarian" publicly supported school system, or to any other denominational publicly-supported school system, or to a publicly-supported atheist or humanist school system.
2. The Applicant is also a shareholder of Canadian shares and Canadian mutual funds, and the property taxes of any corporation of which the Applicant owns taxes and which has property in Ontario could be going to support the Separate School Board . In 1867, the property taxes of such corporations would not have been available to the Catholic Separate School system.
3. The Separate School Board supports various policies of which the Applicant does not approve. The Applicant is thereby being forced to fund, through her own taxes or the property taxes paid by corporations in which she owns shares, a particular religious educational system which propagates policies of which she does not approve. Her right to freedom of religion and equal benefit of the laws is being infringed. Catholics are not being forced to fund a denominational educational system of which they do not approve because the only publicly-supported denominational education system is the Roman Catholic one.
4. The applicant's right to freedom of religion and equal benefit of the laws is further being infringed because the Applicant is being forced to support a system in which teachers who are not Catholic do not have the same access to publicly-financed teaching jobs as teachers who are Catholic. The applicant supports a publicly-financed educational system in which teachers of all religious (or no religious) persuasion have equal rights. Her dignity as an individual and her right to equal protection of the law is being infringed because she is being forced to support a publicly financed school system which discriminates against teachers who are not Catholic. Catholics are not being forced to support a school system which discriminates against Catholics because neither of the publicly-funded school systems discriminate against Catholics.

**Statutory Provisions**

*Constitution Act,* 1867, 30 & 31 Victoria, c.3 (formerly known as *British North America Act*), especially s.93

*Constitution Act, 1982*, s.52, and especially Part I, *Canadian Charter of Rights and Freedoms* sections 1, 2, 15, 27, 32.

*An Act respecting Common Schools in Upper Canada* (*Common Schools Act*), C.S.U.C. 1859, c.64

*An Act to Restore to Roman Catholics in Upper Canada certain Rights in Respect to Separate Schools* (*Scott Act*), 1863, (26 Vict., c. 5)

*An Act to Amend the Law Relating to Grammar Schools in Upper Canaada (Grammar Schools Act* of 1853), 16 Vict., c.186.

*An Act for the further improvement of Grammar Schools in Upper Canada (Grammar Schools Improvement Act* of 1865), 29 Vict., c.23.

*An Act to Improve the Common and Grammar Schools of the Province of Ontario* of 1871 (34 Vict., c.33)

*Education Amendment Act* (No. 1), S.O. 1986, c.21 (now incorporated in R.S.O. 1990, c.E-2)

*Education Act*, R.S.O. 1990, c.E-2, as amended by *Education Quality Improvement Act*, S.O. 1997, c. 31

Such further and other grounds as the applicant may advise and this Honourable Court may permit.

**Documentary Evidence**

The following Documentary evidence will be used at the hearing of the application:

1) The Affidavit of Reva Landau together with exhibits including from the following list of authorities:

1. *Annual Report of the Normal, Model, Grammar and Common Schools* in Ontario by the Chief Superintendent of Education for the years 1867 and 1866 and with attached relevant Statistical Reports. Ottawa: Hunter, Rose, 1868.
2. Harris, Robbin S. *Quiet Evolution*. Toronto: University of Toronto Press, 1967
3. Hodgins, J. George. *Documentary History of Education in Upper Canada*. Toronto: L.K. Cameron, 1907
4. Hodgins, J. George. *The Legislation and History of Separate Schools in Upper Canada*. Toronto: William Briggs, 1897.
5. Houston, Susan E. and Prentice, Alison. *Schooling and Scholars in Nineteenth-Century Ontario*. Toronto: University of Toronto, 1988.
6. MacPherson, W.E. *The Ontario Grammar Schools* in Bulletin of the Departments of History and Politics and Economic Science in Queen's University, No.21, October, 1916. Kingston: The Jackson Press
7. St. John, J. Bascom, *Separate Schools in Ontario*, Reprinted from The Globe and Mail, January 1, 1963
8. Walker, Franklin. *Catholic Education and Politics in Upper Canada*. Toronto: J.M. Dent & Sons (Canada) Limited, 1955.

And such further and other documentary evidence as counsel shall advise and this Honourable Court permit.

Date of Issue: December 22, 2011 **Reva Landau**

 RCP-E 14E (March 31, 2010)