Court File No. A-105-16

FEDERAL COURT OF APPEAL

B E T W E E N :

EDGAR SCHMIDT

Appellant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

MOTION RECORD
(Leave to Intervene - British Columbia Civil Liberties Association)

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Court File No. A-105-16

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NOTICE OF MOTION
(Motion for Leave to Intervene)
(British Columbia Civil Liberties Association)

TAKE NOTICE THAT the British Columbia Civil Liberties Association (BCCLA) will make a motion to the Court in writing pursuant to Rules 109 and 369 of the *Federal Court Rules*.

THIS MOTION IS FOR an Order that:

1. The BCCLA be granted leave to intervene, pursuant to Rule 109 of the *Federal Court Rules*, in this Appeal of the decision of Justice Noël, dated March 2, 2016, dismissing the Appellant's simplified action, in order to provide submissions on the statutory interpretation question before the Court;

2. The BCCLA be entitled to receive all materials filed in this appeal in electronic or hard-copy format;

3. The BCCLA be entitled to file a memorandum of fact and law not to exceed 20 pages, or such other length as this Court may direct;

4. The BCCLA be entitled to make oral submissions not exceeding 30 minutes, or such other duration as this Court may direct;

5. The BCCLA shall accept the record as adduced by the parties, and shall not seek to file any additional evidence;

6. The BCCLA shall not seek its costs in respect of these proceedings, and shall not be liable for costs; and

7. The style of cause of these proceedings be amended to add the BCCLA as an intervener, and hereinafter all documents shall be filed under the amended style of cause.

THE GROUNDS FOR THE MOTION ARE:

1. This appeal raises questions that have attained a public dimension, and engage serious issues related to statutory interpretation, access to justice, and the rule of law;

2. The BCCLA has a long-standing interest in issues of access to justice and the rule of law, and has significant experience in questions of statutory interpretation respecting constitutional issues;

3. The BCCLA has the necessary knowledge, skills and resources to contribute to this Appeal and will dedicate these to the matter before the Court;

4. The BCCLA will make submissions on the applicable principles of statutory interpretation that are useful and different from the parties, and will not duplicate the submissions of any party;

5. The BCCLA's intervention will not cause prejudice to the parties or cause delay in the proceedings;

6. The BCCLA's intervention is in the interests of justice and is consistent with the imperatives in *Federal Courts Rule* 3, to secure the "just, most expeditious and least expensive determination of every proceeding on its merits".

AND TAKE FURTHER NOTICE that in support of this motion, the BCCLA will rely upon:

1. The Affidavit of Grace Pastine, dated August 18, 2016;

2. The draft memorandum of fact and law, contained as an exhibit to Ms. Pastine's affidavit;

3. The written representations, dated August 19, 2016; and

4. Such further and other material as counsel may advise and this Honourable Court may permit.

August 19, 2016

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AFFIDAVIT OF GRACE PASTINE
(Affirmed August 18, 2016)

I, GRACE PASTINE, of the City of Vancouver, in the Province of British Columbia, AFFIRM THAT:

1. I am the Litigation Director at the British Columbia Civil Liberties Association ("BCCLA"). I have personal knowledge of the matters deposed to in this Affidavit, or have received the information from others, in which case I believe it to be true.

2. The BCCLA seeks leave to intervene in *Schmidt v Attorney General of Canada*, Court File No. A-105-16, and I am authorized to affirm this affidavit on its behalf.

The BCCLA Has a Genuine Interest in This Appeal

3. The BCCLA is a non-profit, non-partisan, unaffiliated advocacy group. It has been registered as a society under British Columbia law since its incorporation in 1963. The objects of the BCCLA include the promotion, defence, sustainment and extension of civil liberties and human rights throughout British Columbia and Canada.

4. The BCCLA has approximately 2,300 members and donors involved in various professions, trades or callings. The BCCLA has nine employees, including an Executive Director, a Litigation Director and a Policy Director, who are responsible for the day-to-day work of the organization. This gives the BCCLA a significant status in this country as a grassroots citizens' organization with the resources of a full-time staff devoted exclusively to civil liberties.

5. The BCCLA is further distinguished by having a committed volunteer board of directors that directs the BCCLA's policy and agenda. Through its board, the BCCLA taps the expertise and energies of a wide range of academics, professionals and lay persons with expertise in civil liberties work. As a result, the BCCLA has amassed expertise in considering the often challenging issues raised by civil liberties concerns.

6. The BCCLA has demonstrated a long-standing, genuine, and continuing concern for the rights of the citizens in British Columbia and Canada to liberty, democracy and freedom. In various fora, the BCCLA speaks out on the principles that promote individual rights and freedoms, including freedom of thought, belief, conscience, religion, opinion and expression, equality, privacy and autonomy generally.

7. The BCCLA works in furtherance of its objectives in a variety of ways:

(a) The BCCLA engages in public education, by commenting on current civil liberties and human rights issues in various media outlets, by participating in conferences and other public events at which civil liberties and human rights are discussed, by publishing newsletters and producing books and other publications which are available to the general public on civil liberties and human rights issues, and by maintaining a web site containing many of its position papers and other public documents;

(b) The BCCLA prepares position papers and makes submissions to various governmental bodies at the federal, provincial and municipal levels concerning the advancement of civil liberties and human rights and the implications for civil liberties and human rights of proposed legislative or policy initiatives;

(c) The BCCLA provides assistance to persons who complain to us about violations of their civil liberties or human rights, including assistance in pursuing administrative or informal remedies; and

(d) The BCCLA takes action in its own right when it perceives violations of civil liberties or human rights have occurred, either by launching complaints with the government or other administrative agencies, or by appearing in court, sometimes as plaintiff but most often as intervener, in legal matters that raise civil liberties issues.

The BCCLA Has the Necessary, Knowledge, Skills and Resources, Which It Will Dedicate to This Appeal

8. The BCCLA has made submissions in the Federal Court, both as an intervener and as a party, in numerous cases involving civil liberties or human rights.

9. In August 2015, the BCCLA and Canadian Association of Refugee Lawyers filed a constitutional challenge to amendments made to the *Citizenship Act* by Bill C-24 that allowed for the revocation of Canadian citizenship from dual citizens and required applicants for citizenship to declare an "intent to reside" in Canada (*British Columbia Civil Liberties Association, Canadian Association of Refugee Lawyers, and Asad Ansari v. The Attorney General of Canada*, Federal Court File No. T-1380-15).

10. The BCCLA is also engaged in active litigation in the Federal Court in *British Columbia Civil Liberties Association v. The Attorney General of Canada*, Federal Court File

No. T-2210-14, a lawsuit against the Communications Security Establishment challenging the legality of its spying operations, and a companion proposed class action, *Lindsay M. Lyster and John Doe v. The Attorney General of Canada*, Federal Court File No. T-796-14, on behalf of Canadians whose private communications and metadata information has been collected by the Communications Security Establishment, one of Canada's spy agencies. The BCCLA is also litigating the disclosure of information subject to section 38 the *Canada Evidence Act* as it pertains to both the aforementioned cases in *The Attorney General of Canada v. The British Columbia Civil Liberties Association*, Federal Court File No. DES-1-16.

11. In 2007, in *Amnesty International Canada et al v. Attorney General of Canada et al*, the BCCLA brought an application for judicial review with respect to detainees held by the Canadian Forces ("CF") in Afghanistan and to the transfer of these individuals to Afghan authorities (2008 FC 336). The BCCLA sought declarations that sections 7, 10 and 12 of the *Canadian Charter of Rights and Freedoms* applied to the detainees. The respondents were the Chief of Defence Staff for the CF, the Minister of National Defence, and the Attorney General of Canada. The BCCLA argued that individuals detained by the Canadian Forces were at risk of being tortured upon transfer to Afghan authorities, unless appropriate safeguards are taken by Canadian authorities. The federal court dismissed the application for judicial review. The BCCLA appealed the decision to the Federal Court of Appeal (2008 FCA 401).

12. In addition to the cases listed above brought by the BCCLA in its own name, the BCCLA also intervened in the Federal Court in *Canada (Human Rights Commission) v. Warman*, 2012 FC 1162, regarding the constitutionality of the hate speech provisions of the *Canadian Human Rights Act*.

13. Throughout all of these cases, the BCCLA has acted as a responsible and capable litigant.

14. The Supreme Court of Canada has also granted the BCCLA leave to intervene in many other cases involving civil liberties or human rights, including:

(a) *A.B. v. Bragg Communications Inc.*, 2012 SCC 46;

(b) *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36;

(c) *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62;

(d) *Babcock v. Canada (Attorney General)*, 2002 SCC 57;

(e) *BC Freedom of Information and Privacy Association v. Attorney General of British Columbia*, SCC File No. 36495 (factum to be filed by August 25, 2016);

(f) *Brendan Paterson v. Her Majesty the Queen*, SCC File No. 36472 (factum to be filed by September 6, 2016);

(g) *Canada (Attorney General) v. Bedford*, 2013 SCC 72;

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

(i) *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44;

(j) *Canada (Attorney General) v. Whaling*, 2014 SCC 20;

(k) *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2;

(l) *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3;

(m) *Chamberlain v. Surrey School District No.* 36, 2002 SCC 86;

(n) *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19;

(o) *Crookes v. Newton*, 2011 SCC 47;

(p) *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47;

(q) Google Inc. v. Equustek Solutions Inc., et al., SCC File No. 36602 (factum to be filed by October 5, 2016)

(r) *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18;

(s) *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*,2015 SCC 46;

(t) *Her Majesty the Queen v. Robert David Nicholas Bradshaw*, SCC File No. 36472 (factum to be filed by September 6, 2016);

(u) *Jessica Ernst v. Alberta Energy Regulator, SCC* File No. 36167 (heard January 12, 2016; judgment reserved);

(v) *M.M. v. United States of America*, 2015 SCC 62;

(w) *Matthew John Anthony-Cook v. Her Majesty the Queen*, SCC File No. 36410 (heard March 31, 2016; judgment reserved);

(x) *May v. Ferndale Institution*, 2005 SCC 82;

(y) *Mission Institution v. Khela*, 2014 SCC 24;

(z) Mounted Police Association of Ontario v. Canada (Attorney General), 2015 SCC 1;

(aa) *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23;

(bb) *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19;

(cc) *R v. Williamson*, 2016 SCC 28;

(dd) *R. v. Appulonappa*, 2015 SCC 59;

(ee) *R. v. Butler*, [1992] 1 S.C.R. 452;

(ff) *R. v. Carvery*, 2014 SCC 27;

(gg) *R. v. Chehil*, 2013 SCC 49;

(hh) *R. v. Clay*, 2003 SCC 75;

(ii) *R. v. Cornell*, 2010 SCC 31;

(jj) *R. v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43;

(kk) *R. v. Cuerrier*, [1998] 2 S.C.R. 371;

(ll) *R. v. D.C.*, 2012 SCC 48;

(mm) *R. v. Davey*, 2012 SCC 75;

(nn) *R. v. Emms*, 2012 SCC 74;

(oo) *R. v. Fearon*, 2014 SCC 77;

(pp) *R. v. Hart*, 2014 SCC 52;

(qq) *R. v. Ipeelee*, 2012 SCC 13;

(rr) *R. v. J.F.*, 2013 SCC 12;

(ss) *R. v. Jordan*, 2016 SCC 27;

(tt) *R. v. K.R.J.*, 2016 SCC 31;

(uu) *R. v. Khawaja*, 2012 SCC 69;

(vv) *R. v. Lloyd*, 2016 SCC 13;

(ww) *R. v. Mabior*, 2012 SCC 47;

(xx) *R. v. MacKenzie*, 2013 SCC 50;

(yy) *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74;

(zz) *R. v. Manning*, 2013 SCC 1;

(aaa) *R. v. McCrimmon*, 2010 SCC 36;

(bbb) *R. v. National Post*, 2010 SCC 16;

(ccc) *R. v. Nur*, 2015 SCC 15;

(ddd) *R. v. O.N.E.*, 2001 SCC 77;

(eee) *R. v. Pham*, 2013 SCC 15;

(fff) *R. v. Safarzadeh-Markhali*, 2016 SCC 14;

(ggg) *R. v. Sharpe*, 2001 SCC 2;

(hhh) *R. v. Sinclair*, 2010 SCC 35;

(iii) *R. v. Smith*, 2015 SCC 34;

(jjj) *R. v. Tse*, 2012 SCC 16;

(kkk) *R. v. Vu*, 2013 SCC 60;

(lll) *R. v. Willier*, 2010 SCC 37;

(mmm) *R. v. Yumnu*, 2012 SCC 73;

(nnn) *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158

(ooo) *Reference re Same-Sex Marriage*, 2004 SCC 79;

(ppp) *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4;

(qqq) *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68;

(rrr) *Sriskandarajah v. United States of America*, 2012 SCC 70;

(sss) *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31;

(ttt) *WIC Radio Ltd. v. Simpson*, 2008 SCC 40;

(uuu) *Wood v. Schaeffer*, 2013 SCC 71; and

(vvv) *World Bank Group v. Wallace*, 2016 SCC 15.

It Is in the Interests of Justice to Allow the BCCLA to Intervene in This Appeal

15. The BCCLA has a longstanding interest in ensuring that legislation complies with the *Charter*. It believes that the proper application of the examination provisions at issue in this litigation is an important tool in ensuring such consistency.

16. The overarching question in this Appeal is a question of statutory interpretation, the answer to which has significant public interest consequences. The resolution of the interpretive question before the Court will have profound implications for the rule of law and access to justice in Canada. Since the enactment of s. 52 of the *Constitution Act, 1982,* the Courts have been given the primary responsibility of determining whether legislation conforms with substantive constitutional norms. Given the nature of Canada's adversarial tradition, this means that the burden of vindicating constitutional rights rests on individual litigants, who must have the resources to pursue constitutional litigation. The BCCLA, given its involvement in many significant *Charter* cases over the last several decades, knows that this can be an exceptionally difficult task. Many persons who are impacted by constitutionally suspect laws simply lack the skills, ability and resources to fight complex, lengthy and costly lawsuits against the state.

Groups like the BCCLA have often stepped in to bring litigation to vindicate *Charter* rights, but the resources of these groups are also limited. The difficulty of pursuing *Charter* litigation represents a significant access to justice problem in Canada.

17. Properly applied pre-legislative screening is a powerful access to justice tool, as it shifts some of the burden from individuals to the executive. It is a potentially useful preventative measure that can better ensure that *Charter* violations do not occur in the first place. It also gives fuller meaning to the state's duties to ensure the rule of law, and in particular, the rule of constitutional law as applied to the state's own conduct. Pre-legislative screening, if applied properly and meaningfully, usefully contributes to the goal of a *Charter*-compliant statute book without the need for victims of rights violations or civil liberties groups like the BCCLA to litigate. Conversely, a defective approach to pre-legislative screening undermines the ability of the state to live up to the ideal of constitutional supremacy and the rule of law.

18. The BCCLA has a direct interest in furthering access to justice and the rule of law in this country. This flows necessarily from the BCCLA's interest in protecting liberty and security of the person and ensuring that the rights guaranteed by law can be enjoyed by all on an equal basis. While the BCCLA does not have the capacity to offer free and low-cost legal representation and rarely acts as counsel for individual litigants, the BCCLA employs a caseworker who receives over 1000 calls and emails per year from the public seeking assistance, and responds with legal information and referrals to pro bono lawyers and other sources of legal support. In 2015, the BCCLA referred over 350 individuals to various sources of legal information, advice and support.

19. Combined with the cases that the BCCLA takes on as a litigant and its intervention activities (both of which are more fully described below), this individual case-work represents a

significant burden on the BCCLA's resources in fulfilling its mandate. The fact that the BCCLA, as opposed to other NGOs in Canada, devote much of its energy towards litigation reflects its belief that access to justice is critical for all Canadians. The amount of time and resources that the BCCLA expends on these activities is impacted by the constitutional quality of legislation enacted by Parliament, and regulations enacted by delegates.

20. The BCCLA has a long history of advocating for increased access to the justice system through both public interest litigation and publicly funded legal aid. As far back as 1963, the BCCLA issued position statements on civil and criminal legal aid funding. In 1986, the BCCLA published a position statement on public interest intervention before the courts. In 1988, we made a submission to the BC Justice Reform Committee addressing, among other things, the underfunding of the legal aid system and the need to invest resources in making justice more accessible.

21. In 2012, the BCCLA published a report examining the various challenges facing the criminal justice system in BC entitled "Justice Denied: The Causes of BC's Justice System Crisis". The BCCLA concluded in this report that BC's criminal justice system is in crisis due in part to cuts to legal aid and chronic underfunding of the system as a whole, which make the system inaccessible to average Canadians.[1] The report's overarching recommendation was to affirm the justice system as an essential service that requires fully funded resources to fulfill its role.

22. In the courts, the BCCLA intervened in *Vancouver (City) v. Ward*, 2010 SCC 27 to argue that *Charter* damages are an appropriate remedy for damage claims made under s. 24(1) of the

[1] BC Civil Liberties Association, *Justice Denied: The Causes of BC's Justice System Crisis* (2012).

Charter because of the important role damages play in ensuring the people whose *Charter* rights have been violated are able to access the justice system.

23. The BCCLA also intervened in *Breeden et al. v. Black*, 2012 SCC 19 and *Les Éditions Écosociété Inc. et al v. Banro Corporation*, 2012 SCC 18, which dealt, among other issues, with the effect of the tests for jurisdiction *simpliciter* and *forum non conveniens* on access to justice and freedom of expression for defendants in defamation suits.

24. The BCCLA intervened in both the Court of Appeal and the Supreme Court of Canada in *Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)*, 2010 BCCA 439, 2012 SCC 45 to argue for a refinement of the test for public interest standing to clarify the ability of public interest organizations to access the justice system.

25. Throughout all of these activities, the BCCLA has advocated for increased access to justice for persons in Canada as a cornerstone of the rule of law and the full attainment of substantive constitutional rights, the very same considerations that are implicated by the instant appeal.

26. The BCCLA also has a great deal of experience in litigation raising questions of statutory interpretation, particularly in cases where there are significant interplays with *Charter* issues.

27. The BCCLA intervened at the BC Court of Appeal in *R v. Terezakis*, 2007 BCCA 384, leave to appeal to SCC refused, File No. 32252 (31 January 2008), to argue that the meaning of "criminal organization" contained in the *Criminal Code* is unconstitutionally vague and that given the severe penalties attached to the provision, it must be subject to a particularly stringent vagueness and overbreadth analysis.

28. The BCCLA intervened in both the BCCA and the SCC in *R. v. Appulonappa*, 2015 SCC 59, a case that, along with a series of companion cases, dealt with both the correct interpretation of "human trafficking" and "human smuggling" and the constitutionality of a criminal offence based on that definition. The BCCLA's submissions focused on the appropriate methodology for ascertaining "legislative purpose" for the purpose of scrutiny under ss. 7 and 1 of the *Charter*.

29. As can be seen from these interventions, the BCCLA believes that proper statutory interpretation can be critical in ensuring the fullest attainment of constitutional rights, and conversely, that improper interpretation of statutes can have dramatically negative consequences for *Charter* rights. In this case, the BCCLA is concerned that the interpretation given to the examination provisions will lead to a weakening of constitutional protections in Canada, and a further shift in the burden onto individuals to litigate *Charter* issues before the Courts.

The BCCLA Will Advance Different and Valuable Insights to the Matters in Issue

30. The proposed submissions of the BCCLA are contained in the draft memorandum of fact and law, attached as **Exhibit "A"** to this affidavit.

31. If granted leave to intervene in this Appeal, the BCCLA's final memorandum of fact and law may be modified in minor ways from this draft. However, it will be substantially similar to this document, and will not contain any new or different arguments than those contained in the attached draft.

32. As shown in the attached draft memorandum, the BCCLA submits that a proper interpretation of the statutes in question require the court to ensure that full meaning be given to Parliament's choice to create a reporting requirement. The adoption of a "no credible argument" standard gives rise to significant problems in the prevention of the enactment of

Charter-infringing legislation. The BCCLA's submissions seek to assist the Court in its interpretive task by examining how the Respondent's proposed standard operates at a theoretical and practical level within the context of *Charter* litigation, and whether this accords with Parliament's intention in enacting examination/reporting schemes.

Timing of this Motion

33. The BCCLA is bringing this motion shortly after the Applicant files his memorandum of fact and law. The broad public interest aspects of this case, and the significant public attention that it attracted, made the BCCLA aware of this litigation. However, it has waited until the Appellant had completed his written argument in order to ensure that it could make a submission that was different – and therefore potentially useful – from those of the Appellant. On the other hand, given the nature of the BCCLA's proposed submissions, it was unnecessary to wait until the Respondent had filed a memorandum of fact and law, as it was inherently unlikely that there would be any duplication of argument.

34. The BCCLA's experience in bringing intervention motions before the Courts of Appeal for British Columbia and Ontario, as well as the Supreme Court of Canada, has been that intervention motions are normally brought approximately a month following the filing of an appellant's factum. However, I am aware that this Court has indicated that it expects earlier interventions. The BCCLA has therefore sought to file this motion at the earliest possible time that would still allow it to satisfy itself that it could make submissions that were useful and different from those of the parties. It has also provided a draft memorandum of fact and law in part to ensure that an intervention at this time causes the minimum prejudice possible to any party by alerting them in a high level of detail to the proposed submissions of the BCCLA at an

early stage, and to minimize the time needed if leave is granted for the BCCLA to file its materials.

Terms of Proposed Intervention

35. The BCCLA requests permission to file a memorandum of fact and law not to exceed 20 pages, or such other length as the Court will direct. It also seeks the right to make up to 30 minutes of oral argument on the hearing of this appeal, or such other time as the Court will direct. If granted leave to file a memorandum of the requested length, it will be substantially the same as the attached draft, unless this Court directs otherwise.

36. The BCCLA will abide by any limitation this Court puts on its participation in this case as an intervener, will abide by any time table set by the Court for further steps in the appeal, and will cooperate with the parties and any other interveners to ensure that its participation does not prejudice any party or the Court. Given that the BCCLA has already prepared a draft memorandum of fact and law, I anticipate that it would be able to file its materials relatively shortly after the decision on this motion.

37. If granted leave to intervene, the BCCLA will not seek costs against any other party, and asks that no costs be awarded against it. The BCCLA is a non-profit organization with limited resources, and is represented by *pro bono* counsel.

38. I make this affidavit in support of the BCCLA's motion for leave to intervene in the herein appeal, and for no improper purpose.

AFFIRMED BEFORE ME at the City of Vancouver in the Province of British Columbia, this 18th day of August, 2016

A Commissioner for taking Affidavits for British Columbia

Micheal Vonn

BC Civil Liberties Association
900 Helmcken Street, 2nd Floor
Vancouver, BC V6Z 1B3

GRACE PASTINE

Court File No. A-105-16

FEDERAL COURT OF APPEAL

B E T W E E N :

EDGAR SCHMIDT

Appellant

- and -

ATTORNEY GENERAL OF CANADA

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BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Intervener

MEMORANDUM OF FACT AND LAW OF THE INTERVENER BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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Counsel for the Intervener,
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This is **Exhibit A**
to the Affidavit of Grace Pastine
affirmed before me on 18 Aug 2016

Commissioner for Taking Affidavits in the
Province of British Columbia

Court File No. A-105-16

FEDERAL COURT OF APPEAL

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Appellant

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BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Intervener

MEMORANDUM OF FACT AND LAW OF THE INTERVENER BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

PART I – STATEMENT OF FACTS

1. The Intervener, British Columbia Civil Liberties Association ("BCCLA") takes no position on the disputed facts of this appeal, and accepts the facts that have been agreed to.

PART II – POINTS IN ISSUE

2. The issue before this Court is whether the Honourable Trial Judge erred in his interpretation of the standard to be applied under the examination provisions, and if so, what is the correct standard.

PART III - SUBMISSIONS

A. A STATUTORY STANDARD MUST BE MEANINGFUL

3. The provisions in issue ("Examination Provisions") require the Minister of Justice ("Minister")[1] or the Clerk of the Privy Council ("Clerk") to examine proposed legislation and determine what legislation needs to be reported for inconsistency with the *Charter of Rights and Freedoms* and/or the *Bills of Rights*. This obligation forms part of a broader scheme designed to equip Parliament and regulation-makers with the information and perspectives it needs to discharge its duty to ensure respect for constitutional rights. A report brings to the attention of legislators the need to carefully reflect on the legality of a proposed law. The lack of a report might be understood as a tacit imprimatur by the Minister.

4. The modern principle of statutory interpretation requires that statutes be read in light of "the object of the Act, and the intention of Parliament".[2] The foundational premise of this rule is that "[a]ll legislation is presumed to have a purpose."[3] When Parliament enacts a law, it does so for a reason. The law operates to achieve Parliament's aims.

5. The same is true for each section within a law – every provision exists for a reason and is presumed to fulfil some function. All of the words of a statute must be interpreted in a way that has them performing a genuine function directed towards advancing legislative intent.[4] The statute book should not contain dead letters.

6. The Trial Judge considered many interpretive doctrines in upholding the "no credible argument" standard used within the Department of Justice under the Examination Provisions,

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[1] Reference to the Minister should be taken as also applying to the Deputy Minister's functions under the *Statutory Instruments Act* as well.
[2] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21.
[3] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at 255.
[4] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 SCR 471 at para. 38.

but, he did not consider whether the Respondent's standard would make the Examination Provisions meaningful, or whether it would render them perfunctory. However, the no credible argument standard employed by the Respondents and accepted by the Court does exactly this – it renders the Examination Provisions meaningless.

7. For enactment of the Examination Provisions to serve any function, the standard applied must allow for legislation to be reportable, even if only theoretically.[5] Where, as here, the standard being applied is so trivial that no law would ever be reported, then the entire reporting mechanism is charade,[6] attractive on paper, but meaningless in practice. The reporting function of the Examination Provisions is meaningful only insofar as there exists the possibility that the Minister or Clerk could find some proposed legislation to be reportable. Absent such a possibility, there is really no reporting duty at all.

8. The no credible argument threshold is trivially low – so low as to be even less than the test for striking pleadings on a "plain and obvious" standard.[7] A standard this low is wholly inappropriate in fulfilling its function of alerting legislators to serious constitutional problems and enhancing their deliberative process and ability to avoid enacting unconstitutional laws. A standard this low does not do the work of dividing legislation between reportable and non-reportable because it inevitably shifts all legislation – regardless of content – into the latter category. Whatever standard Parliament envisioned when it enacted the provisions in question, it could not have been one so extreme that it makes the reporting regime perform no function.

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[5] Jennifer Bond, "Failure to Report: The Manifest Unconstitutional Nature of the *Human Smugglers Act*" (2014) 51 OHLJ 377 at 386.
[6] Kent Roach, "Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law" (2006) 31 Queen's LJ 598 at 625.
[7] *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959 at 980 ["*Hunt*"].

9. As is explained in more detail below, if all that the standard demands is the existence of an argument in support of proposed legislation that is reasonable, *bona fide*, and capable of acceptance, then no legislation will ever be reportable. There are always be arguments that meet this standard, even for legislation that is clearly unconstitutional. Because the Respondent's standard makes the Examination Provisions meaningless, it should be rejected.

B. UNDER THE NO CREDIBLE ARGUMENT STANDARD NO LEGISLATION IS REPORTABLE

10. The fact that arguments meeting the Respondent's no credible argument standard will always exist in *Charter* arises for two reasons: (1) the standard's trivial content; and (2) the nature of the *Charter* and constitutional litigation. It is the interplay of these two factors that results in inevitable non-reporting.

i) The Content of the Standard

11. Under the Department of Justice's interpretation of the Examination Provisions, the duty to report is triggered only where there exists no "credible argument" in defence of the law. The existence of even a single credible argument will lead to no report being filed in the House of Commons or to the regulation making authority. The Respondent's definition of a credible argument consists of three components: the argument must be (1) reasonable; (2) *bona fide*; and (3) "capable of being successfully argued before the courts".[8]

12. There is no clear definition of what constitutes a "reasonable argument", which is itself a serious problem with the Respondent's proposed standard. In some contexts, it has been held to mean "objectively sensible or justifiable, something that would not be considered stupid or

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[8] *Agreed Statement of Fact*, Appendix 1: *Statutory Examination Responsibilities and Legal Risk Management in Drafting Services* (March 9, 2006), **Appeal Book ["AB"], Vol. I, Tab 5 at 187**; *Agreed Statement of Fact*, Appendix 2: *Legal Risk Management in the Public Law Sector* (November 26, 2007), **AB, Vol I, Tab 5 at 203**.

unnecessary or wasteful".[9] In the context of decisions, Lord Diplock has taken unreasonable to mean "conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt."[10] The British Columbia Court of Appeal equates an unreasonable argument with a frivolous one, meaning one that is "doomed to failure", "brought for improper purposes", or which has "absolutely no possibility of success".[11]

13. While "[i]t is extremely difficult to state what lawyers mean when they speak of reasonableness" it is a concept largely focused on "logical thought, working upon the basis of the rules of law."[12] This view is reflected in the modern administrative law notion of reasonableness, which focuses on transparency and intelligibility of reasoning.[13] It connotes a requirement that the thought process leading to a conclusion be clear and understandable. In the context of the credible argument standard, the reasonableness requirement appears to demand an argument that is intelligible and logically valid within the legal reasoning process.

14. To the extent that reasonableness also is concerned with whether decisions fall within a range of possible, acceptable outcomes,[14] in the context of *Charter* litigation, in which all rights[15] are always subject to reasonable limits, this more substantive prong can have little application. Even when a law blatantly violates a constitutionally entrenched right, it can still be a defensible outcome to uphold its validity and continue its operation.

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[9] *Frame v. Nova Scotia (Commission of Inquiry into the Westray Mine Disaster)*, [1997] NSJ No. 62 (SC) at para. 19.
[10] *Secretary of State for Education and Science v. Metropolitan Borough of Tameside*, [1976] 3 All ER 665 at 695E (HL).
[11] *United States of America v. Bennett*, 2014 BCCA 159 (CanLII) at para. 14 and the authorities cited therein.
[11] John Salmond, *Jurisprudence*, 10th ed. (Glanville Williams Ed.) (London: Sweet & Maxwell, 1947) at 183.
[11] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190 at para. 47, and the authorities cited therein.
[12] John Salmond, *Jurisprudence*, 10th ed. (Glanville Williams Ed.) (London: Sweet & Maxwell, 1947) at 183.
[13] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190 at para. 47; *Landry v. Canada (Attorney General)*, 2014 FC 764 (CanLII) at para. 25.
[14] *Dunsmuir, supra* at para. 47
[15] Notwithstanding claims to the contrary, even violations of rights such as s. 7 or 11 can be justified under s. 1. See *R. v. Michaud* (2015) 328 CCC (3d) 228 (Ont CA) and *R. v. KRJ*, 2016 SCC 31 ["*KRJ*"], respectively.

15. An argument is *bona fide* when it is made genuinely and in the absence of fraud or deceit.[16] This criterion would exclude constitutional arguments that were dishonest or misleading. Given that one does not presume the Attorney General to mislead the courts, this claim would appear to restate a general ethical duty of all crown counsel.

16. The meaning of "capable of being successfully argued" can only exclude arguments that are certain to fail. If there is any uncertainty that an argument will be rejected, no matter how remote, one must necessarily conclude that the argument is "capable" of acceptance. The Respondent's test does not demand anything more than this. The question the government poses is not whether a law is likely capable of acceptance. It is capability *simpliciter*, and as such, cannot exclude anything but arguments that are *incapable* of acceptance, being those claims that will necessarily and with certainty be rejected.

17. Taken together, these three requirements create a *de minimis* standard. When they are applied to the context of constitutional litigation, it becomes clear that they do not exclude any arguments that a barrister might ethically make to a court. In the context of *Charter* litigation, there are always honest, legally articulated arguments that are capable of being accepted, even if the chance of acceptance is infinitesimally small. Thus, there will always exist credible arguments for every bill or proposed regulation, with the result that reporting will never occur.

18. A standard with such minimal content should already be highly suspect within the context of the overall purpose of the Examination Provisions. As already noted, this standard is certainly no higher than that applied in pleadings motions, where the question is whether it is plain and obvious that an action cannot succeed. The foundation of such a standard, as explained

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[16] *Black's Law Dictionary*, 9th ed. (St. Paul: Thomson Reuters, 2009), *sv* "bona fide"; *The Shorter Oxford English Dictionary*, 3d ed. (London: OUP, 1959), *sv* "bona fide".

by the Supreme Court in *Hunt*, was to protect the Courts and litigants from intentional abuse by manifestly vexatious litigants.[17] But Parliament does not legislate vexatiously, nor enact laws that are an abuse of process. While Parliament may pass laws that are clearly unconstitutional, they do not do so in bad faith. The Examination Provisions must be taken as being directed at Parliament as it actually works, that is to say, to detect constitutionally defective legislation, and to bring such defects to the attention of the House so that such concerns can be given reasoned consideration.

ii) The Nature of Constitution and Constitutional Litigation

19. For a no credible argument standard to be meaningful, it requires a static body of substantive rules that will dictate certain outcomes in particular cases. Such stability of legal analysis is a necessary tool for the Minister or Clerk to make the extreme, absolutist conclusions needed for a law to be reportable. Anything less, and those officials could never arrive at the legal conclusions that would trigger reporting. The dynamic nature of the Constitution, and the reality of constitutional litigation fundamentally lacks this certainty, making it impossible for one to conclude that a law is reportable.

20. As the comments of O'Leary J.A. in *Byatt* reflect, the open-textured nature of our Constitution makes it impossible to write-off arguments at an early stage as incapable of legal acceptance. In *Byatt*, after the federal ban on prisoner voting was struck down in *Sauvé (No. 1)*[18] an identical Alberta ban was also struck down.[19] The Attorney General then sought a stay pending appeal, which O'Leary J.A. granted. While he noted that *Sauvé (No. 1)* was very recent, and that there existed no significant difference between the federal and provincial acts, he

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[17] *Hunt, supra* at 968, 970-976.
[18] *Sauvé v. Canada (Attorney General)* (1992), 7 OR (3d) 481 (CA), aff'd [1993] 2 SCR 438.
[19] *Byatt v. Dykema*, 1997 CanLII 14742 (AB QB) at paras. 9, 14-33.

nevertheless concluded that there was a serious issue (not merely a "credible" one) on appeal. He stated:

> ...novel arguments should never be written off, so to speak, in a case such as this. In my view, constitutional litigation is the type of litigation where novel arguments may be accepted as opposed to commercial litigation, for example, where certainty and precedent are justly given a great deal more importance.[20]

The Constitution is a "living tree",[21] which opens the door to a near limitless set of arguments that can be made "credibly", no matter how unrealistic.

21. The insufficient certainty within constitutional analysis and adjudication can be seen in a number of different ways. The most problematic aspect for the purposes of the credible argument standard is the flexible approach to precedent and *stare decisis* in constitutional matters. While as a practical matter courts considering constitutional questions resort to precedent in arriving at their conclusions, occasionally they depart from prior views on the content of the *Charter*. Under the extreme standard employed by the Department of Justice, whether or not a reversal or change in the law is remote or unlikely is irrelevant.

22. The examining Minister or Clerk need not accept existing jurisprudence as governing whether a potential argument is capable of being accepted. This is because *stare decisis* is not absolute, particularly in constitutional litigation where even lower level courts sometimes decline to follow Supreme Court decisions where there has been a sufficient legal or factual change in

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[20] *Byatt v. Alberta (Attorney General)*, 144 DLR (4th) 436 (Alta CA (O'Leary JA, In Chambers)) at para. 10.
[21] *Edwards v. Canada (Attorney General)*, [1930] AC 124 (PC) at 136.

circumstance.[22] While it is safe to assume as a practical matter that prior *Charter* decisions will generally be followed, it is impossible to say that this will *inevitably* occur.

23. As long as the relevant question is whether an argument is *capable* of being accepted (as opposed to "likely", or even remote possibility of being accepted), a no credible argument conclusion is impossible to reach. One cannot ever exclude the possibility that an existing set of legal rules or norms might be replaced with a wholly new set. History has proven that yesterday's dissent can become tomorrow's majority view.[23] Even when a prior decision is of a very recent vintage, judges have accepted arguments to overturn constitutional precedent. Thus, in *Fraser* (2011),[24] Rothstein and Charron JJ. would have overturned the Court's holding in *BC Health Services* (2007)[25] that s. 2(d) of the *Charter* protected the right to meaningful collective bargaining.

24. Moreover, even in the absence of prior dissents, the Supreme Court has overturned itself on *Charter* interpretation. They have done so at the urging of interveners, as in the case of s. 11(b) of the *Charter*,[26] or by legal academics, as in the case of s. 15.[27] Dissents provide an easy case for dismissing precedent, but actual experience has shown that even unanimous decisions *can* change, and therefore arguments premised on such reversals are *capable* of acceptance.

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[22] *Canada (Attorney General) v. Bedford*, [2013] 3 SCR 1101 at paras. 38-46; Joseph J. Arvay et al., "*Stare Decisis* and Constitutional Supremacy: Will our Charter Past Become an Obstacle to Our Charter Future?" (2012) 58 SCLR (2d) 61.

[23] Compare. e.g., *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 (s. 2(d) of *Charter* does not protect right to strike, Dickson C.J. and Wilson J., dissenting on this point) with *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 SCR 245 (s. 2(d) of the *Charter* does protect right to strike).

[24] *Ontario (Attorney General) v. Fraser*, [2011] 2 SCR 3 at paras. 172-269 (*per* Rothstein J., concurring in the result, but dissenting on this point).

[25] *Health Systems and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391.

[26] Compare *R. v. Morin*, [1992] 1 SCR 771 (framework for unreasonable delay) with *R. v. Jordan*, 2016 SCC 27 at para. 45 (majority accepting "invitation" of Appellant and two interveners to adopt a fundamentally different 11(b) framework). Note that while *Morin* contained a dissent, the decision in *Jordan* was not based on it.

[27] Compare *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 (introducing "human dignity" criterion into test for violation of equality rights) with *R. v. Kapp*, [2008] 2 SCR 483 at para. 22 (citing approximately 20 scholarly publications criticizing *Law* when rejecting human dignity as aspect of s. 15 "test").

25. Even where there is no suggestion from any quarter that a clear precedent be abandoned, one cannot exclude the possibility that it could happen, because from time to time it has happened. For example, the Court in *Hape*[28] elected to overturn *Cook*[29] and dramatically restrict the territorial scope of the *Charter*, notwithstanding no suggestion from any party that they should do so.[30] This is to say nothing of the questionable international law views that grounded the Court's decision – views which lack any support by international legal scholars.[31] It was an unexpected, dramatically rights-limiting change[32] that no one would ever have suggested as even remotely likely.

26. Given the nature of sometimes flexible approaches to precedent in constitutional matters, the minimal content of the credible argument standard simply cannot compel the Minister or Clerk to restrict themselves to arguments that are consistent with existing precedents. Arguments that are wholly inconsistent with existing, unquestioned precedents can still be "credible". This simply opens the door to a unbounded universe of arguments to draw on to support the constitutionality of a law.

27. Another way of understanding the meaninglessness of the Respondent's standard in the context of constitutional law is to consider what would be necessary to reach a conclusion that there is no argument that is: (1) reasonable, (2) *bona fide*, and (3) capable of being accepted by a court of law. Reaching such an, absolutist conclusion requires a static legal framework with

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[28] *R. v. Hape*, [2007] 2 SCR 282 at paras. 103-113.
[29] *R. v. Cook*, [1998] 2 SCR 597 at paras. 25, 46-48. While the majority in *Hape* did not expressly say that they have overturned *Cook*, the reversal was manifest, and there is general acceptance that *Cook* was indeed reversed: *Hape, supra* at paras. 182-183 (per Binnie J., dissenting); John H. Currie, "*Khadr's* Twist on *Hape*: Tortured Determinations of the Extraterritorial Reach of the Canadian *Charter*" (2008) 46 Can YB Int'l L 307 at 313; Kent Roach, "*R. v. Hape* Creates Charter-Free Zones for Canadian Officials Abroad" (2007) 53 Crim LQ 1 at 1.
[30] *Hape, supra* at paras. 182-183, 187 (per Binnie J., dissenting).
[31] *Currie, supra*; Chanakya Sethi, "Does the Charter Follow the Flag? Revisiting Constitutional Extraterritoriality after *R. v. Hape*" (2011) 20 Dal J Leg Stud 102; David P. Stewart, "Introductory Note to *R. v. Hape*" (2007) 46 ILM 813 at 814; Pierre-Hughes Verdier, "*R. v. Hape*" (2008) Am J Int'l L 143 at 147.
[32] *Currie, supra* at 316.

easily applied and deterministic rules. Ambiguities in the frameworks for analyzing constitutional question removes the Minister and the Clerk's ability to conclude that no credible argument exists. It is a conclusion that simply cannot be made in the absence of an extraordinary level of legal certainty.

28. Constitutional law, more so than any other field, lacks the certainty needed to reach a no credible argument conclusion. In many ways, this is a crucial virtue of our constitutional order. Flexibility allows our Constitution to grow and evolve to meet society's ever changing needs and evolving notions of the social good. But this flexibility comes with a cost in the form of less certainty in outcome – certainly less than in any other area of the law. The no credible argument standard requires an exceptional level of certainty that simply cannot be achieved given the deferential, contextual, indeterminate and ever changing frameworks that are applied in constitutional litigation. Even when precedent is followed, constitutional precedents are inherently non-deterministic.

29. The clearest example of this problem is the framework under s. 1 of the *Charter*. While the *Oakes*[33] test is easily repeated by lawyers, it is in fact a highly dynamic and indeterminate schema. While *Oakes* itself was couched in strict language, the Court quickly adopted a far more deferential tone in *Edwards Books*.[34] Then, the Court moved to a highly contextual approach in *Irwin Toy*,[35] an approach that has proven durable. But even as the court sought to provide clear signposts to guide this contextual analysis, consistency in practice has been elusive, rendering s. 1 outcomes notoriously unpredictable.[36]

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[33] *R. v. Oakes*, [1986] 1 SCR 103.
[34] *R. v. Edwards Books and Art Ltd.*, [1986] 1 SCR 713.
[35] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927.
[36] *Sujit Choudhry*, "So What is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 SCLR (2d) 501 at 513-521.

30. These difficulties have not been resolved as the *Charter* has matured. Rather, they continue to characterize the jurisprudence. In one of its most recent *Charter* decisions – *KRJ*[37] – all of the members of the Supreme Court agreed that the nature of an infringed *Charter* right was an important contextual factor to take into account in applying *Oakes*, but reached dramatically different conclusions on what that meant in practice. Justice Abella found that the absolutist nature of s. 11 of the *Charter* required the state to provide a more compelling justification in order to save a law,[38] while Justice Brown found the procedural nature of s. 11 to demand less.[39] This kind of result is aptly summed up by Professor Mendes:

> section 1 gives to the Canadian judiciary an extraordinarily vague yardstick to ascertain just how limited the guarantee of rights and freedoms is to be. To say that this most critical section of the *Charter* is "open-textured" is to make the ultimate grand understatement.[40]

Less diplomatic are those who speak of s. 1 indeterminacy as "judicial chaos".[41] Whether one agrees with that characterization, the flexible nature of *Oakes* is undeniable, and exemplifies the problem inherent in the Respondent's standard.

31. By way of further example, consider the minimal impairment requirement, which traditionally has been the driving factor under *Oakes* analyses.[42] Here, the unpredictable nature of context-driven levels of deference have had the greatest impact, resulting in what Professor Hogg has modestly called "an unpredictable jurisprudence".[43] At times, this standard requires careful tailoring; in other cases, it merely asks whether Parliament had a reasonable basis for

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[37] *KRJ. supra.*
[38] *Ibid.*, at paras. 124-126 (per Abella J., dissenting in part).
[39] *Ibid.*, at paras. 134-135 (per Brown J., dissenting in part).
[40] Errol Mendes, "The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1" (2005) 27 SCLR (2d) 47 at 49.
[41] Mark Zion, "Effecting Balance: *Oakes* Analysis Restaged" (2012) 43 Ottawa L Rev 431 at 450.
[42] *Trackman, supra* at 100.
[43] Peter G. Hogg, *Constitutional Law of Canada*, 5th ed., Loose-leaf (Rel. 2015-1) (Toronto: Carswell, 2015) at 38--43.

concluding that it impaired a right minimally.[44] Most problematically, it is near-impossible to predict where along this spectrum Courts will fall in any given case. It will always be open to credibly argue the deference given in a given case should be significant.

32. Similarly, balancing salutary and deleterious effects demands conclusions that are both empirical and deeply normative, neither of which can be meaningfully ascertained at the time the Examination Provisions are applied. The absence of proven facts at this stage is inherently problematic for constitutional analysis.[45] The weighing of social goods versus individual harms in the absence of proven facts will always yield an uncertain result.

33. In summary, the certainty required to make the no credible argument standard meaningful – in the sense of actually dividing laws into two groups – requires a more stable framework than the common law, and, in particular, constitutional litigation provide.

C. THE NO CREDIBLE ARGUMENT STANDARD IN PRACTICE: TWO CASE STUDIES

34. The inability of the no credible argument standard to meaningfully screen legislation is usefully illustrated by considering two examples of legislation that were *not* reported: marijuana regulations and bail provisions. These examples are not put forward to demonstrate the misapplication of the Examination Provisions. Under the Respondent's reading of the examination provisions, the absence of reports in these cases is understandable. Rather, they illustrate how, in the context of constitutional litigation, a no credible argument standard is meaningless and performs no actual function.

i. Medical Marijuana

[44] *McKinney v. University of Guelph*, [1990] 3 SCR 229 at 286.
[45] *MacKay v. Manitoba*, [1989] 2 SCR 357; *Danson v. Ontario (Attorney General)*, [1990] 2 SCR 1086.

35. The first example relates to medical marijuana access rules that were repeatedly found to be unconstitutional by various courts, after which the regulations were re-enacted in nearly identical language without any reports made.

36. In *Parker*,[46] the Ontario Court of Appeal ruled that certain ill persons had a constitutional right to use marijuana in order to treat their symptoms. In response, the Governor in Council promulgated the *Marihuana Medical Access Regulations* ("*MMAR*").[47] This scheme provided patients with licences to possess marijuana and issued licenses to patients or third parties (known as DPPLs) to grow the plant. The *MMAR*s prohibited patients from paying DPPL holders, and prohibited DPPL holders from growing for more than one patient, or to cooperate with more than two other DPPL holders in growing.

37. These limits were struck down in *Hitzig*[48] because the scheme did not sufficiently guarantee lawful access to marijuana for those who were constitutionally entitled to it. The Court accepted that many patients were incapable of growing for themselves, and did not have access to a DPPL holder due to the restrictions on remuneration, cooperation, and the one grower per client limit. The flaw identified in *Hitzig* was the same as the one identified in *Parker*.[49] Indeed, the Ontario Court of Appeal indicated that the result "should not surprise anyone" who had read *Parker* or the equivalent Alberta decision in *Krieger*,[50] as both fully addressed this flaw that was continued in the *MMAR* regime.[51]

38. Subsequently the Government designated a private company as a general supplier of medical marijuana in addition to DPPLs and it re-enacted the struck-down provisions in

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[46] *R. v. Parker* (2000), 146 CCC (3d) 193 (Ont CA).
[47] SOR/2001-227 (now repealed).
[48] *Hitzig v. Canada* (2003), 177 CCC (3d) 449 (Ont CA).
[49] *Hitzig, supra* at paras. 94-95, 100-104.
[50] *R. v. Krieger* (2000), 225 DLR (4th) 164 (Alta QB), aff'd 225 DLR (4th) 183 (Alta CA).
[51] *Hitzig, supra* at paras. 124-126.

"virtually identical terms".[52] The prohibition against DPPL holders growing for more than one patient was again struck down in *Sfetkopoulos*, where the Federal Court found the limit to be arbitrary, and rejected all four justifications put forward in its defence.[53] An appeal to this Court was dismissed from the bench,[54] and applications for a stay and for leave to appeal to the Supreme Court were dismissed.[55] Between the Court of Appeal and Supreme Court decisions, the Crown faced a similar *Charter* challenge in *Beren*, unsuccessfully arguing that *Sfetkopoulos* was wrongly decided and should not be followed.[56]

39. Cabinet responded by re-enacting the restriction on the number of patients a DPPL could grow for, but simply replaced the word "one" with "two". The Regulatory Impact Analysis Statement accompanying this re-enactment cited the same justifications related to distribution, diversion, and compliance with UN treaties that were already rejected in *Sfetkopoulos*.[57] The only arguably new justifications relied on were concerns about mould and fire in larger grow operations,[58] which admittedly could arise with or without the limitation in question.[59]

40. Before this renewed restriction was challenged, the entire *MMAR* scheme was repealed and replaced with a new regulatory framework – the *Marijuana for Medical Purposes Regulations*[60] – which eliminated designated growers entirely (effecting replacing "two" with "zero") – and required supply solely though licensed producers, an approach found

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[52] *Sfetkopoulos v. Canada (Attorney General)*, [2008] 3 FCR 399 (FC) at para. 5 ["*Sfetkopoulos*"].
[53] *Ibid.* at paras. 13-18.
[54] *Canada (Attorney General) v. Sfetkopoulos*, 2008 FCA 328 (CanLII).
[55] *Canada (Attorney General) v. Sfetkopoulos*, 2009 CanLII 20680 (SCC).
[56] *R. v. Beren and Swallow*, 2009 BCSC 429 (CanLII) at para. 106-107, 120-127.
[57] *Regulatory Impact Analysis Statement for Regulations Amending the Marihuana Medical Access Regulations*, Can. Gaz. 2009, Part II, Vol. 143, No. 11 at 794-795, 798.
[58] *Ibid.* at 795, 799.
[59] *Ibid.* at 795.
[60] *Marijuana for Medical Purposes Regulations*, SOR/2013-119.

constitutionally insufficient in *Sfetkopolous*.[61] This regime was struck down in *Allard* because, it further restricted access to medical marijuana,[62] which was the same flaw identified in *Parker*, *Hitzig*, *Beren* and *Sfetkopoulos*. The Government subsequently indicated it would not appeal.[63]

41. Despite all of the above, the Deputy Minister and Clerk have never made a report.

ii) Grounds for Refusing Bail

42. The second case study relates to Parliament's response to the Supreme Court striking down an overly vague ground for denying bail by enacting a vaguer one.

43. In the early 1990s, a person could be denied bail when pre-trial detention was "necessary in the public interest".[64] This ground for denying bail was struck down by the Supreme Court in *Morales* as violating s. 11(e) of the *Charter*. The majority held that the public interest ground was vague and imprecise[65] and gave "the courts unrestricted latitude to define any circumstance as sufficient to justify pre-trial detention".[66] This violated the prohibition against vagueness and unfettered discretion to impact liberty.[67]

44. Five years later, Parliament enacted new bail provisions, which authorized detention "on any other just cause being shown".[68] This new ground was then struck down in *Hall*,[69] where the Court was of the unanimous view that the law was unconstitutional for exactly the same reasons

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[61] *Sfetkopoulos, supra* at para. 19.
[62] *Allard v. Canada*, 2016 FC 236 (CanLII) at paras. 234-236, 253-254, 289.
[63] *Davey v. Canada*, 2016 FC 492 (CanLII) at para. 5.
[64] *R. v. Morales*, [1992] 3 SCR 711 at 723 (setting out the then-existing text of s. 515(10)(b) of the *Code*).
[65] *Ibid.* at 726.
[66] *Ibid.* at 732.
[67] *Ibid.* at 728.
[68] *Criminal Code, supra*, s. 515(10)(c).
[69] *R. v. Hall*, [2002] 3 SCR 309.

the public interest ground was struck down in *Morales*.[70] Indeed, as Iacobucci J. noted on behalf of four members of the Court:

> The phrase falls considerably more afoul of the vagueness doctrine than the old "public interest" ground because it fails even to specify a particular basis upon which bail may be denied.[71]

45. Notwithstanding that the new legislation was vaguer than its predecessor, no report was ever made to the House of Commons by the Minister.

46. The *Parker-Allard* and *Morales-Hall* studies are examples where the various proposed legislation in issue met the credible arguments standard, [72] notwithstanding the legislation's manifest inconsistency with directly applicable jurisprudence and the absence of any change in factual circumstances. These examples demonstrate that, under the credible argument standard employed by the Minister and Clerk, no reports will issue even when a finding of unconstitutionality has been viewed by the courts as obvious and inevitable.

D. CONCLUSION

47. During the proceedings below, the Trial Judge commented to a witness that "we've all been lawyers… we can always find an argument to try to defend the position that there is no breach".[73] He was right. There are always arguments that can ethically be made that are framed in the language of law and that, even if obviously wrong and contrary to precedent are still technically "capable" of acceptance in constitutional litigation.

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[70] *Ibid.* at paras. 21-22.
[71] *Ibid.* at para. 93 (per Iacobucci J., dissenting, but not on this point).
[72] Mr. Keyes, who held relevant positions within the Department of Justice during a period of time covering both examples, testified in these proceedings that, in his view, even in cases where laws were struck down under his tenure, they were always defenced with credible arguments: Evidence of Mark Keyes, *Transcript of Proceedings, September 23, 2015*, **AB, Vol IV, Tab 17 at 1674 ll. 7-18.**
[73] Evidence of Martin Low, *Transcript of Proceedings, September 21, 2015*, **AB, Vol III, Tab 15 at 1630 ll. 26-28.**

48. What this means, however, is that the Respondent's standard under the Examination Provisions perform no work. It identifies no defects, screen no laws, and is incapable of ever generating a report. If all that triggers the reporting obligation is the absence of any credible argument, then the standard is meaningless. Parliament may as well have never enacted it.

49. But Parliament did enact it, and in doing so, they evidenced a clear intention for the standard to do something.

50. The Respondent maintains that its standard has some minimal content and that this is enough. It is true that even their proposed standard is not a void, at least in an abstract sense. While there will always be credible arguments, not all arguments are credible. One can imagine arguments that are unintelligible, made in bad faith, or can be said – with absolute, 100% certainty – to be legally unacceptable. But those are abusive, vexatious and radically flawed submissions that are inherently non-legal in content.[74] They are not the arguments that the Attorney General would make before a court. She would have no need, as she would always have resort to credible arguments, however weak.

51. A standard that only protects against arguments that do not meet the "norms and standards" of a lawyer's submissions to a court[75] is surely not what Parliament intended. All that does is provide protection against the non-existent threat of a bad-faith Attorney General making vexatious claims before the courts. The Examination Provisions are more robust in their goal.

52. In enacting the Examination Provisions, Parliament must have intended it to effectively pursue the goal of an informed legislature, and a constitutionally compliant statute book. The

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[74] For an example of the kinds of arguments that would not be credible, see the discussion of Organized Pseudolegal Commercial Arguments in *Meads v. Meads*, 2012 ABQB 571 (CanLII).

[75] Evidence of William Pentney, *Transcript of Proceedings, September 21, 2015*, **AB, Vol. III, Tab 15, p. 1398 ll. 26-28**.

reporting component of this scheme must be given an interpretation that makes it actually do some work in furtherance of these broader objectives. At a minimum, it was been intended to divide laws into two groups: those that are, as a practical matter, defensible, and those that are not. Where the dividing line between the two groups is drawn is a matter of legitimate debate. The only standard that can be rejected out of hand as being meaningless is that which is currently employed within the Department of Justice. Its application writes out the examination provisions entirely and offends the principle that when Parliament enacts a law, they mean for it to do something.

PART IV – ORDER SOUGHT

53. The BCCLA submits that because the no credible argument standard applied by the Respondents and accepted by the Trial Judge is inappropriate in the context of the Examination Provisions. The appeal should be allowed and a meaningful standard should be declared.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DONE at the City of Toronto, this • Day of •, 2016

Daniel Sheppard

Counsel for the Intervener
British Columbia Civil Liberties Association

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Court File No. A-105-16

FEDERAL COURT OF APPEAL

B E T W E E N :

EDGAR SCHMIDT

Appellant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

WRITTEN REPRESENTATIONS OF THE PROPOSED INTERVENER BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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PART I – FACTS

A. Overview

1. The British Columbia Civil Liberties Association (BCCLA) seeks leave to intervene in this appeal from the decision of Justice Noël, dated March 2, 2016, in which the Court dismissed the Appellant's simplified action, and approved of the Respondent Attorney General of Canada's "no credible argument" standard as the correct test under s. 4.1 of the *Department of Justice Act*, s. 3 of the *Bill of Rights*, and ss. 3(2) and (3) of the *Statutory Instruments Act* (collectively "the examination provisions").

2. The examination provisions form the legislative cornerstone of Canada's system of pre-legislative scrutiny, in which government bills and regulations are examined in order to ensure that they conform to both the *Charter of Rights and Freedoms* as well as the *Bill of Rights*. While the Department of Justice has an extensive internal process for considering the *Charter* in the Government's legislative work, it is only the examination provisions that place a statutory obligation on the state to take due care to ensure that it's laws do not infringe on the rights of individuals.

3. The question of the proper standard to be applied under the examination provisions is therefore an issue of broad public importance. It has serious implications not only for the proper pre-legislative scrutiny of proposed legislation, but also for access to justice and the rule of law in Canada.

4. The core dispute between the parties is whether the requirement to make a report of a *Charter* or *Bill of Rights* inconsistency is triggered where the examiner is of the view that the legislation in question is more likely than not unconstitutional (the Appellant's proposed

standard) or only where the examiner concludes that there exists no credible argument that could be made to defend the constitutionality of the law (the Respondent's proposed standard). The Court below accepted the latter standard was the correct one.

5. The Court below employed three main approaches to statutory interpretation in its analysis: plain meaning; legislative intent; and constitutional/institutional context. However, when legislation is ambiguous, Courts ought to have resort to a wider-range of interpretive tools. Because the examination provisions describe a conclusion, but not the standard by which the Minister arrives at that conclusion, there is an ambiguity on the issue of the correct standard. As such, the full range of statutory interpretation doctrines should be brought to bear.

6. The BCCLA seeks to intervene in order to explore one doctrine of statutory interpretation that was not employed by the Court below, and which does not appear to be the focus of the parties to the appeal: the presumption that Parliament does not legislative needlessly, and that all portions of a law are intended to produce some meaningful effect.[1] When examined through this lens, the BCCLA respectfully submits that the standard adopted in the Court below is untenable. That standard renders the reporting aspect of the examination provisions to be a dead letter. This conclusion, which renders a legislative provision *de facto* meaningless, does not accord with the principles of statutory interpretation, and produces a result that is deeply harmful to the interests of the communities that the BCCLA serves, and to the public interest more generally.

B. The BCCLA

7. The BCCLA is a non-profit non-partisan, unaffiliated advocacy group. It has been registered as a society under British Columbia law since its incorporation in 1963. The objects of

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[1] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 SCR 471 at para. 38 (quoting *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at 210), **Moving Party's Book of Authorities [BoA], Tab 1**.

the BCCLA include the promotion, defense, sustainment and extension of civil liberties and human rights throughout British Columbia and Canada.[2]

8. The BCCLA has demonstrated a long-standing, genuine, and continuing concern for the rights of the citizens in British Columbia and Canada to liberty, democracy and freedom. The BCCLA works in furtherance of its objectives in a variety of ways, including public education; position papers and submissions to governmental bodies; direct assistance to individuals whose rights have allegedly been violated; and litigation before the courts, either in its own name, or as an intervener.[3]

C. The BCCLA's Interests in this Appeal

9. The question of the correct standard to be applied under the examination provisions has a far reaching impact, and should be of significant interest to all Canadians who are concerned about the protection and promotion of constitutional rights. The selection of the standard to be used has significant implications on access to justice and the rule of law, two foundational principles that rest at the core of the BCCLA's very purpose for existing.

10. When rights-infringing laws are enacted, individuals carry the burden of bringing constitutional challenges before the Courts. For most individuals, this can be a near-overwhelming task. Constitutional litigation is normally lengthy and costly, and many victims of rights violations simply lack the ability to pursue litigation to vindicate their rights. This represents a critical access to justice problem for Canadians.[4] The BCCLA and other similar groups directly seek to ameliorate this problem by expanding its own resources to assist

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[2] Affidavit of Grace Pastine, dated August •, 2016 ["*Pastine affidavit*"] at para. 3, **Moving Party's Motion Record [MR], Tab 2**.
[3] *Pastine affidavit, supra* at para. 7, **MR, Tab 2**.
[4] *Pastine affidavit, supra* at paras. 15-16, **MR, Tab 2**.

individuals with legal advice and referrals, and to engage in strategic *Charter* litigation in its own right.[5] However, the BCCLA's work cannot be a full solution to the systemic and institutional access to justice problems posed by the realities of modern constitutional litigation.

11. Pre-legislative screening seeks to avoid this problem by preventing unconstitutional legislation from being enacted in the first place, thus preventing individuals from having their rights violated and forcing them to expend the resources – if they have them – on litigation. Properly functioning pre-legislative scrutiny shifts the burden of vindicating rights from individuals (who can least bear the costs) to the state (which can best bear them). As an entity that is deeply and consistently concerned with access to justice issues, the meaningful functioning of the examination provisions is therefore of serious importance to the BCCLA.[6]

D. The BCCLA's Proposed Submissions

12. The BCCLA seeks to intervene in this appeal in order to assist the Court by providing submissions on an aspect of statutory interpretation that is different from the submissions of the parties, namely, that the reporting aspect of the examination provisions must be interpreted in a manner that makes them have a genuine function within the statutory scheme.

13. The BCCLA does not take a position on the correct standard to be applied, but does take the view that the "no credible argument" standard employed by the Respondent violates this principle, and renders the reporting provisions of the three statutes meaningless. Both as a theoretical and a practical matter, no law could ever be found reportable under this extreme standard. If no law could ever be reportable, then there is in effect no reporting standard at all. This cannot be consistent with Parliament's intent. At a minimum, Parliament must have

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[5] *Pastine affidavit, supra* at paras. 7-11, **MR, Tab 2**.
[6] *Pastine affidavit, supra* at paras. 17-18, **MR, Tab 2**.

intended that the reporting obligation was capable of being triggered, and so must have envisioned a evaluative test that could be failed.

14. In order to assist the Court and the parties to better understand the BCCLA's proposed submissions, it has provided a full draft memorandum of argument, that sets out in detail the full written submissions it would propose to make if granted leave to intervene.[7]

PART II – POINTS IN ISSUE

15. The sole issues to be determined on this motion are whether leave to intervene should be granted to the BCCLA, and if so, on what terms.

PART III – SUBMISSIONS

A. The Applicable Legal Framework

16. This Court has held that in determining whether leave to intervene should be granted pursuant to Rule 109, the most important consideration is whether the proposed intervener is able to assist the Court by bringing a distinct perspective and expertise to bear on the issues in dispute.[8] As the Federal Court observed, the "overriding consideration requires, in every case, that the proposed intervener demonstrate that its intervention will assist the determination of an issue" by "add[ing] to the debate an element which is absent from what the parties before the Court will bring".[9] Ultimately, this Court has the inherent authority to allow an intervention on terms and conditions which are appropriate in the circumstances.[10]

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[7] Draft Memorandum of Fact and Law of the British Columbia Civil Liberties Association, being Exhibit A to the *Pastine affidavit, supra*, , **MR, Tab 2(A)**.
[8] *Globalive Wireless Management Corp v. Public Mobile Inc et al,* 2011 FCA 119 at para. 5(c), **BoA, Tab 2**.
[9] *Canada (Attorney General) v. Sasvari*, 2004 FC 1650 at para. 11, **BoA, Tab 3**.
[10] *Canadian Pacific Railway Company v. Boutique Jacob Inc,* 2006 FCA 426 at para. 21, **BoA, Tab 4**.

17. This Court has outlined two closely related analytical frameworks for considering motions for leave to intervene. In *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*[11] the primary – though not necessarily decisive – considerations were stated as follows:

a. Is the proposed intervener directly affected by the outcome?

b. Does there exist a justiciable issue and a veritable public interest?

c. Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

d. Is the position of the proposed intervener adequately defended by one of the parties to the case?

e. Are the interests of justice better served by the intervention of the proposed third party?

f. Can the Court hear and decide the case on its merits with the proposed intervener?

18. In *Pictou Landing*, Stratas J.A. critiqued certain aspects of the *Rothmans*, and added additional considerations that His Honour believed were left unaddressed by that framework. In his view, the most relevant considerations were:[12]

a. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized?

b. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?

c. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?

d. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties

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[11] *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 FC 74 (T.D.) at para. 12, aff'd [1990] 1 FC 90 (CA), **BoA, Tab 5**.

[12] *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21 (CanLII) at para. 11, **BoA, Tab 6**.

before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?

e. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

19. Subsequently, in *Sport Maska Inc.*, this Court re-affirmed the *Rothmans* test, but noted that, in substance, it encompassed the considerations expressed in *Pictou Landing*, particularly given it's flexible nature, and its focus on the "interests of justice" as a guiding consideration.[13]

20. It is respectfully submitted that, whatever framework is applied, the BCCLA's motion ought to be granted.

B. The BCCLA Has a Genuine Interest in the Public Interest Aspects of this Appeal

21. Both the *Rothmans* and *Pictou Landing* frameworks make the important observation that interventions are most appropriate in cases that have a public interest dimension to them, as opposed to purely private disputes.[14] Both also stress the importance of the proposed intervener's interest on the matters before the Court.

22. This case is fundamentally one of a public character (the second *Rothmans* and fourth *Pictou* factor). While it is true that the Appellant has a long standing personal concern over the issue in question, ultimately it is the Canadian public as a whole who have the most direct interest on how the apparatus of government seeks to identify and avoid the enactment of unconstitutional legislation. While Mr. Schmidt litigates in his own name, it is far to see this as a lawsuit brought in the broader public interest.

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[13] *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44 (CanLII) at paras. 41-42 ["*Sport Maska*"], **BoA, Tab 7**; *Prophet River First Nation v. Canada (Attorney General)*, 2016 FCA 120 (CanLII) at paras. 4, 6, **BoA, Tab 8**.
[14] See also *Authorson (Guardian of) v. Canada (Attorney General)* (2001), 147 O.A.C. 355 (C.A.) at para. 9, **BoA, Tab 9**; *Childs v. Desormeaux* (2003), 67 O.R. (3d) 385 (C.A.) at para. 3, **BoA, Tab 10**.

23. Moreover, the implications of how the standard to be applied under the examination provisions seriously impacts the interests of the BCCLA (firth *Rothmans* and second *Pictou* factor). As set out in the affidavit of Ms. Pastine, there are strong linkages between the standard under the examination provisions and considerations of access to justice and the rule of law – fundamental principles that animate the purpose and functions of the BCCLA.[15]

24. The requirement for an intervener to have a direct or genuine interest in the precise issues on appeal exist to exclude "busybody" litigants who disrupt and delay proceedings without providing any ascertainable benefit to the work of the Court. Having a genuine interest in an appeal provides "the Court an assurance that the proposed intervener will apply sufficient skills and resources to make a meaningful contribution to the proceeding."[16]

25. The BCCLA's history has demonstrated that it is a responsible, diligent actor before the Courts, who always endeavours to apply the skills and resources to make its interventions meaningful and helpful.[17] Its history also demonstrates its long-standing concern for the broad access to justice issues that are implicated by the issues on this appeal.[18] Finally, the BCCLA has specific experience with respect to the interaction of constitutional matters and statutory interpretation, the primary issues before the Court.[19] This further reflects both its interests on the issues before the Court, and its ability to meaningfully assist in their proper resolution.

C. The BCCLA's Proposed Intervention is in the Interests of Justice Because it will Provide Useful Submissions that are Different from those of the Parties

26. Perhaps the most significant consideration on a motion for leave to intervene is the question of whether an intervener will assist the Court by making useful submissions that are

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[15] *Pastine Affidavit, supra* at paras. 16-25, **MR, Tab 2**.
[16] *Pictou Landing, supra* at para. 9, **BoA, Tab 6**.
[17] *Pastine Affidavit, supra* at paras. 8-14, **MR, Tab 2**.
[18] *Pastine Affidavit, supra* at paras. 20-25, **MR, Tab 2**.
[19] *Pastine Affidavit, supra* at paras. 26-28, **MR, Tab 2**.

different from those of the parties (aspects of the last three *Rothmans* and the third *Pictou* factor). Given the central importance of this factor in determining intervention motions, Stratas JA in *Ishaq* provided the following suggestions for how to consider whether a proposed intervener has established it will make useful submissions that will actually further the Court's proper consideration of the case:

a. Identify one or more specific controlling idea(s) on which the case will turn;

b. Offer, with specificity, the submission(s) the intervener will make on the controlling idea(s);

c. Ensure the submission(s) will not need to go beyond the evidentiary record; and

d. Distinguish the proposed submissions from those already before the Court.[20]

27. The controlling issue in this case are the principles of statutory interpretation, and how they apply to a provision within the context of Canada's system of constitutional government.

28. The BCCLA has sought to provide a highly detailed account of the submissions that it would propose to make on this interpretive question by actually providing those submissions in draft form in the within motion.[21]

29. As can be seen from the proposed submissions of the BCCLA, they do not go beyond the evidentiary record in this case. They rely entirely on the content of the Appeal Book itself, as well as case law from Canadian Courts, the writings of legal scholars (but not social science or other fact-based articles),[22] the contents of the Canada Gazette, and two dictionaries. This is not a case where the BCCLA seeks to expand the record through a book of authorities, or to make

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[20] *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151 (CanLII) at para. 28, **BoA, Tab 11**.
[21] *Proposed submissions, supra*, **MR, Tab 2(A)**.
[22] Law review articles are of a fundamental different kind than social social science journal articles included in books of authorities in an attempt to establish an empirical fact. The latter have been criticized by this Court in *Ishaq, supra*, **BoA, Tab 11**, but the former have always been considered valid authorities in Canadian courts.

submissions that require the court to take notice of "facts" that are neither in the record nor judicially noticeable.

30. Finally, it is clear that these submissions are distinct from those of the parties. This motion was brought shortly after the Appellant filed his memorandum of fact and law specifically to ensure that the BCCLA's submissions did not replicate those of the Appellant. Further, these submissions are distinct from the central arguments put forward by the CCLA as intervener in the Court below, who focused its submissions on the impact of *Charter* values themselves as an interpretive lens. While the BCCLA finds itself in agreement with the CCLA's views, it does not repeat them in its proposed submissions.

31. Ultimately, the BCCLA's submissions ask this Court to employ a principle of statutory interpretation that has not been the focus of the parties, but which is – in its respectful submission – critical to the proper resolution of this case. In doing so, it asks the Court to more carefully consider the true content of the "no credible argument" standard suggested by the Respondent, and how that standard actually functions within the context of constitutional law and *Charter* litigation.

32. Through the proposed submissions included in this motion, the BCCLA has set out a serious, detailed, and distinct set of submissions that engage with the central question on this appeal in a manner that would not be addressed but-for its intervention.

D. The BCCLA's Intervention Will not Cause Prejudice to the Parties

33. The interests of justice also favour granting leave to the BCCLA to intervene because its intervention will not cause any prejudice to the parties or to the Court, and is consistent with the "just, most expeditious and least expensive determination of every proceeding on its merits"[23] (the fifth *Rothman* and *Pictou* factors).

34. The BCCLA has sought to file this motion as quickly as possible following the filing of the Appellant's memorandum of fact and law. It did so to ensure that it would put forward submissions different from those of the Appellant, but also to ensure that all parties and the Court received a comprehensive picture of the BCCLA's proposed submissions at an early stage.[24]

35. Although the Respondent will be required to respond to a wider-range of statutory interpretation arguments than if no interventions were permitted, this is not a form of prejudice that justifies denying leave to intervene.[25] Presenting a broad spectrum of perspectives on important matters of public concern is to the benefit of everyone. The early provision of a full memorandum of argument ensures that the Respondent has sufficient time to respond to both the Appellant and the BCCLA's submissions fully and adequately.

E. Additional Considerations

36. Although this appeal can be decided on its merits without the BCCLA's participation (the last of the *Rothman* factors), this is far from determinative of the motion. As Stratas J.A. noted in *Pictou*, "If an intervener can help and improve the Court's consideration of the issues... why

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[23] *Federal Court Rules*, SOR/98-106, r. 3 ["Rules"]
[24] *Pastine affidavit, supra* at paras. 33-34, **MR, Tab 2.**
[25] *Louie v. Lastman* (2001), 208 D.L.R. (4th) 380 (Ont. C.A.), at para. 13, **BoA, Tab 12.**

would the Court turn the intervener aside…?"[26] The BCCLA's intervention will enhance the Court's ability to consider the issues on appeal by being exposed to a different perspective and set of arguments on the core interpretive issue before the Court. If an "intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter" then the interests of justice will favour granting them leave, even if the Court could decide the case without their participation.[27]

37. The BCCLA has complied with the requirements of Rule 109(2) (the first of the *Pictou* factors). In particular, the BCCLA's draft submissions demonstrate how its "participation will assist the determination of a factual or legal issue related to the proceeding"[28] by setting out a distinct argument on the statutory interpretation question before the Court.

PART IV – ORDER SOUGHT

38. The BCCLA requests an order

a. Granting the BCCLA leave to intervene in this appeal pursuant to Rule 109 of the *Federal Court Rules*;

b. Entitling the BCCLA to receive all materials filed in this appeal in either an electronic or a hard-copy format (at the discretion of the party filing the materials);

c. Permitting the BCCLA to file a memorandum of fact and law not exceeding 20 pages, or such other length as this Court may direct;

d. Permitting the BCCLA to make oral submissions at the hearing of this appeal not exceeding 30 minutes or such other duration as this Court may direct;

e. Requiring the BCCLA to accept the record as adduced by the parties, and prohibiting it from filing additional evidence;

f. Amending the style of cause of these proceedings to add the BCCLA as an intervener; and

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[26] *Pictou Landing, supra* at para. 9, **BoA, Tab 6**; See also *Sport Maska, supra* at para 40, **BoA, Tab 7**.
[27] *Pictou Landing, supra* at para. 9, **BoA, Tab 6**.
[28] *Rules, supra*, r. 109(2)(b).

g. That this intervention proceed on a no-costs basis.

39. The BCCLA will accept any other conditions that the Court sees fit to impose, including abiding by any timelines for the filing of materials.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DONE at the City of Toronto this • day of August, 2016

Daniel Sheppard

Counsel for the Proposed Intervener
British Columbia Civil Liberties Association

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