

ONCA File #: C68942

COURT OF APPEAL OF ONTARIO

BETWEEN

LONDON DISTRICT CATHOLIC SCHOOL BOARD

Plaintiff/Respondent/Respondent in Appeal

– and –

MYRIAM MICHAIL

Defendant/Moving Party/Appellant

**NOTICE OF MOTION
CONSTITUTIONAL CHALLENGE
Moving Party Myriam Michail**

January 26, 2021

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The Moving Party, Myriam Michail, will make a motion to the Court of Appeal on a date and time to be fixed by the Registrar, at the Court of Appeal for Ontario Osgoode Hall, 130 Queen Street West, Toronto, Ontario M5H 2N5.

PROPOSED METHOD OF HEARING: the motion is to be heard:

In writing under subrule 37.12.1(1) because it is unopposed

In writing as an opposed motion under subrule 37.12.1(4)

X Orally

THE MOTION IS FOR:

1. The Court to answer the [Constitutional Questions](#) raised in this motion and sent to the Attorneys General of Ontario and Canada on January 19, 2020 outlining a challenge to the constitutional validity or applicability of provision 136 (1) (a) (audio and visual only) (i), (b), (c) and 136 (4) of the *Courts of Justice Act* R.S.O. 1990.
2. That the Court orders the release and the publication of the recordings of the hearings of Mitchell J. of November 18, 2020, of Leitch J. of March 21, 2017 and of Grace J. of June 19, 2017 all of the Superior Court of Justice in London, Ontario.
3. The release of all audio recordings and transcripts be granted to ensure the open courts principle is upheld.
4. If necessary, an order extending the time to file and serve the factum for the appeal which is inherently delayed.
5. Such further and other relief I may request, and this Court deems just.

THE GROUNDS FOR THE MOTION ARE:

6. This matter is of major public interest and raises issues that are of national importance to the constitutional rights of individual litigants, to the rule of law, to the maintenance and preservation of an open justice system in our Courts and to the proper administration of justice.
7. The issues at the heart of this proceeding regarding the constitutional validity or applicability of the *Courts of Justice Act* R.S.O. 1990, specifically sections:136 (1) (a) (audio and visual only) (i), (b), (c) and 136 (4) would require the Court to reconsider a long standing undertaking established by the Court and prior precedential decisions of the Court of Appeal imposing unreasonable and overbroad conditions that I respectfully submit are in violation of my

constitutional rights to freedom of expression and that flies in the face of a democratic society and the open court principle.

8. The ban imposed in this undertaking based on the impugned subsections 136(1) (a) (i), (b), (c) and the punishment under subsection 136 (4) infringes and denies rights guaranteed by section 2(b), 7, 12 and section 15 of the *Canadian Charter of Rights and Freedoms* and cannot be demonstrably justified in a free and democratic society as required by [section 1](#) of the *Charter*.
9. In fact, Section 136 (4) of the *CJA* is an infringement on liberty. It threatens the public with unfair steep fine and/or imprisonment if they do not comply with an order that is arbitrary which is evidence of a totalitarian and oppressive regime. It shifts the focus away from an illegitimate publication ban that infringes on an individual's constitutional rights to an alleged offence where in fact there is none. It is preposterous and unjust to require an innocent person to pay any fine at all, let alone a grossly prohibitive fine of \$25,000.00 and/or serve six months imprisonment for exercising a right guaranteed by the *Charter*.
10. Video/audio recordings and transcripts must be accessible to the public, to uphold the spirit of our free and open judiciary. Furthermore, to allow the public to follow this matter from the originating proceeding to date, it is necessary to order the release of all audio recordings and transcripts of this matter.
11. It is submitted that there is no evidence of harm to anyone that is of a quality or character manifestly superior to the evidence of the existence of severe and numerous deleterious effects of provision 136 (1) (a) (i), (b), (c), 136 (4) of the *Courts of Justice Act* on the general public and individual litigants who are left oppressed, uninformed, excluded, silenced, mistreated and without recourse or evidence.
12. Our legal system needs to be transparent and uphold the rule of law by allowing cameras in the courtroom and making it a guaranteed right to disseminate court proceedings and transcripts. Decisions should not remain unpublished, hidden or kept secret. Essentially, by allowing this practice to continue, this Court will be confirming that cases, such as mine, may be executed behind closed doors, without accountability or public scrutiny. As it is for my case, the judgements and consequences of those secret hearings, will forever determine my status in

society, livelihood and trample on my fundamental constitutional and human rights causing a chill effect on free speech and bringing the administration of justice to disrepute.

13. The elimination of this unfair provision would not only protect the rights of all Canadians but will also increase public confidence and support of our justice system.

Constitutional Questions and Serious Questions of General Importance

- See Attached [Notice of Constitutional Questions](#)

This constitutional challenge is not about

- a challenge regarding procedures that are subject to publication bans, trials of young offenders, family matters, sealing orders or that involve witnesses or jury;
- a request for live media broadcasting of hearings;
- a request for media or litigants to take photographs or video record/film any person in or entering or exiting the court or entering or leaving the room in which a court hearing is to be or has been convened; and
- a third party or the media.

This constitutional challenge is about

- the total ban of cameras in Appellate courts and in the Superior Court of Justice and the Ontario Court of Justice for applications or motions where there are no witnesses, no jury and no publication ban, making covertness the rule, is unconstitutional and oppressive;
- the constitutional rights of litigant's/party, to natural justice and fair trial as guaranteed by s. 15(1) of the *Charter*, where the litigant/party shall not be deprived of their constitutional right to obtain and disseminate evidence in the form of audio/video recordings of their own hearings;
- the oppressive undertaking based on ss. 136(4) of the *CJA*, in breach of s. 7 and 12 of the *Charter*, threatening the liberty and security of Canadians with a \$25,000.00 fine and/or 6 months imprisonment, if they exercise their right to free speech flies in the face of our democratic society and the open court principle; and
- ending the culture of covertness by establishing that the constitutional principle of open justice includes the disclosure of unredacted transcripts, audio and video recordings of proceedings and the disclosure and the publications of all decisions.

Question 1:

Do the impugned Subsections 136(1) (a)(i), (b), (c) of the *Courts of Justice Act* violate the Canadians' Constitutional rights guaranteed by s. 2(b) of the *Charter* to freedom of information, freedom of expression and the constitutional requirement of Court's openness by banning the right to audio/video recording of a party's own proceedings and to archive, publish, broadcast, reproduce or otherwise disseminate the most accurate, complete and honest evidence?

Question 2:

- a. Do the impugned Subsections 136(1) (a)(i), (b), (c) of the *Courts of Justice Act* R.S.O. 1990 violate Canadians' Constitutional rights guaranteed by the *Charter* under s.15(1) for an equal protection of the law, access to evidence and fair trial by depriving Canadians of their right to obtain the most complete, accurate and honest evidence of what transpired during their own hearings, thus denying them a fair and open process and obstructing the proper administration of justice? As in my case, I have been falsely accused of vexatious conduct and I am unable to properly advocate for myself as my evidence has been concealed.
- b. Does the discretion of presiding judges allowing them to arbitrarily deny access to information to which the public is constitutionally entitled in violation of the constitutional requirement of openness by denying access to transcripts and history records as is the case in my matter where there is no ban and it is of high public interest?

Question 3:

Does the impugned Subsection 136 (4) of the *CJA* as a punishment for subsection 136.1(a)(i), (b), (c) violate and threaten the public's Constitutional right to security and liberty guaranteed by 7, 12 and 15 (1) of the *Charter of Rights and Freedoms*? Can the courts arbitrarily restrict "*what is meant to be made public silencing the person trying to assert their constitutional right.*" And threaten Canadians with excessive and exaggerated fines and imprisonment, and compelling Canadians to sign an oppressive undertaking silencing their free speech?

Question 4:

If the ban imposed by the impugned subsections 136(1) (a) (i), (b), (c) and the punishment under subsection 136 (4) infringe and deny rights guaranteed by section 2(b), 7, 12 and 15 (1) of the *Canadian Charter of Rights and Freedoms*, can they be demonstrably justified in a free and democratic society as required by [section 1](#) of the [Charter of Rights and Freedoms](#)?

Does this ban meet the test of s. 1, where the objective of the impugned legislation has to be of sufficient importance to override a constitutionally protected right? Or is it grossly disproportionate and overbroad? The objective has to be:

- of a pressing and substantial nature; and
- the means chosen to obtain the objective have to be proportionate to the ends.

Remedies Sought Under the Charter

1. I am claiming remedy under [s. 24\(1\)](#) of the *Charter of Rights and Freedoms*¹

24(1) Enforcement of guaranteed rights and freedoms

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

2. I seek a declaration that **the impugned Subsections** 136 (1) (a) (i), (b), (c), with 136 (4) of the *Courts of Justice Act R.S.O. 1990* are unconstitutional, and in violation of s. 2(b), 7, 12 and 15(1) of the *Charter of Rights and Freedoms* and cannot be justified under section 1 of the *Charter*. As a consequence, it should be struck down and found to be of no force and effect pursuant to s. 52 of the *Charter*. There are no “stringent” reasons to support the banning of modern technology, specifically discreet audio and video recording devices from the courtroom where there is no jury, no witnesses, no publication ban or sealing order.
3. I am requesting that this Court orders the recordings of all my hearings of November 18, 2020, March 21, 2017 and June 19, 2017 at the Superior Court in London and the March 20, 2019, October 18, 2018 and August 30, 2018 at the ONCA and allows me to video record future hearings and disseminate all audio and video recordings of hearings as it is the practice with the Supreme Court of Canada without threats to my liberty and security.
4. I am requesting that this Court grant me access to these materials as a constitutional right that is guaranteed to every Canadian. It is my position that it is my constitutional right to obtain and disseminate audio recordings and transcripts of hearings that I was a party to. There is no justification for the current ban.
5. I seek a declaration that:
 - a. The open court principal includes the right to audio/video record and archive recordings of proceedings. Restrictions on direct access and archiving of court audio or video recordings should only be in accordance with the “Dagenais/Mentuck” test.
 - b. The open court principal includes the publication of all decisions.
 - c. The open court principal includes the disclosure of unredacted transcripts.
 - d. The open court principal includes the disclosure of the file “History Record”.
 - e. I seek a declaration that open court principal includes the disclosure of the parties’ names on their daily scheduling and dockets unless a ban is in force.
 - f. The open court principal includes the disclosure of links to join in any hearing scheduled on Court’s daily dockets unless a ban is in force, without having to seek permission or reveal identity.

¹ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982.

6. I seek a mandatory order granting me the right to obtain the transcripts and recordings of my November 18, 2020, March 21, 2017 and June 19, 2017 hearings and the right to disseminate.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Affidavit of Myriam Michail Sworn January 25, 2021
2. [Notice of Constitutional Challenge to Attorneys General](#)
3. [August 2006 Report Justice and the Media First Report to the Attorney General for Ontario](#)
4. [May 2008 – Blue Ribbon Committee Final Report](#)
5. Public outcry to quash s. 136 of the CJA: <https://www.wakeupcallcanada.com/in-the-media>
6. [Affidavit of Myriam Michail Sworn September 11, 2020 for 137.1 Motion](#)
7. [Michail's Factum for 137.1 Motion at the London Superior Court](#)
8. Michail's [Reply Factum November 8, 2020](#)
9. Notice of Appeal and Supplementary Notice of Appeal

Any further documents that would be deemed necessary.

All of which is respectfully submitted this 26th day of January 2021.



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ONCA File #: C 68942
London Superior Court File # 2208/19

COURT OF APPEAL OF ONTARIO

BETWEEN

LONDON DISTRICT CATHOLIC SCHOOL BOARD

Plaintiff/Respondent/Respondent in Appeal

– and –

MYRIAM MICHAIL

Defendant/Moving Party/Appellant

ORDER

THIS MOTION, made by the Appellant, Myriam Michail, regarding the constitutional validity or applicability of provision 136 (1) (a) (i), (b), (c) and 136 (4) of the *Courts of Justice Act* R.S.O. 1990

WAS HEARD THIS DAY at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

ON READING the Notice of Motion, and the documents attached thereto,

THIS COURT ORDERS THAT the audio recordings and the transcripts of the hearings of November 18, 2020 Court file 2208/19 and March 21, 2017 and June 19, 2017 Court file 624/17 allow their unrestricted publication from the Ontario Superior Court of Justice located at 80 Dundas St, London, ON N6A 6K1 to be transcribed and disseminated.

THIS COURT ORDERS THAT all recordings be released to Appellant once they have been transferred to the Court of Appeal for Ontario.

LONDON DISTRICT CATHOLIC SCHOOL BOARD

Plaintiff/Respondent/Respondent in Appeal

– and –

Court File No. C68942

MYRIAM MICHAIL

Defendant/Moving Party/Appellant

COURT OF APPEAL FOR ONTARIO
Proceeding Commenced at London, Ontario

Notice of Motion
Constitutional Challenge

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