Court File No.: COA-23-OM-0345

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N :

**CAROLYN BURJOSKI**

Applicant (Appellant/Moving Party)

-and-

**WATERLOO REGION DISTRICT SCHOOL BOARD**

Respondent (Respondent/Responding Party)

APPLICATION UNDER Rules 14.05(2), 37 and 68 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194 and sections 2(1) and 6(1) of the *Judicial Review Procedure Act*, RSO 1990, c, J.1

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# REPLY FACTUM OF THE MOVING PARTY, CAROLYN BURJOSKI
# (Motion for Leave to Appeal)

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**February 23, 2024**

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1. The moving party, Carolyn Burjoski ("**Burjoski**") makes the following submissions in reply to the factum tendered by the responding party, Waterloo Region District School Board (the "**Board**"), on this motion for leave to appeal.

**The Governing Test for Leave to Appeal to this Court**

2. At paragraphs 27-35 of its factum, the Board sets out an incomplete and misleading description of the test for leave to appeal to this Court, as set out in *Sault Dock* and its progeny. The Board suggests that "public importance" – coupled with one of the four classes of cases set out at paragraph 8 of *Sault Dock* – is the *sole* basis for granting leave to appeal. The Board then suggests that this case does not involve any issues of "public importance", and therefore does not meet its version of the applicable test.

3. Totally absent from the Board's factum is any reference to the further principles set forth at paragraphs 9 and 10 of *Sault Dock*. Mr. Hall's article itself – cited by the respondents as an accurate description of the applicable test – states at page 96:

> At the same time, *Sault Dock* left open the possibility that the Court of Appeal for Ontario can sometimes serve as a court of error even when acting as a second appellate tribunal. It held that leave may be granted in special circumstances, such as the introduction of new evidence, obvious misapprehension by the Divisional Court of the relevant facts, a clear departure from established principles of law resulting in a miscarriage of justice, or clear error by the Divisional Court (although more than the mere possibility of error must be present for leave to appeal to be granted on this basis). Furthermore, in [*Dominion Glass*], the Court of Appeal held that the guidelines in *Sault Dock* are somewhat relaxed where the decision sought to be appealed was rendered by the Divisional Court in the exercise of its original jurisdiction as opposed to its appellate jurisdiction, leaving yet more room for argument on the merits of a case when seeking leave to appeal.[1]

[1] Geoff R. Hall, "Applications for Leave to Appeal: The Paramount Importance of Public Importance" (1999) 22 Adv. Q 87, at page 96, Book of Authorities of the Responding Party, Waterloo Region District School Board, Tab 1, page 15 of 23.

4. Thus, the main thrust of the Board's submission is misleading. The test for granting leave to appeal does not depend solely on "public importance". This Court may grant leave as it considers appropriate, having regard to s. 6(1)(a) of the CJA and the common law principles set out in *Sault Dock*, *Dominion Glass,* and other restatements of the test. Burjoski relies on her main factum in support of her assertion that leave ought to be granted in this case.

**The Public Importance of this Case**

5. In any event, the Board's suggestion at paragraph 34 of its factum that Burjoski's factum is "*silent on how the proposed appeal involves a question of public importance*" is incorrect. Burjoski repeats and relies on paragraphs 3, 4, 5 and 40 of her main factum in response to that contention.

6. The common thread running through the issues raised in Burjoski's main factum on this motion is the question of how public officials ought to conduct themselves when considering shutting down public debate on matters of significant interest to the public. This, itself, is obviously a matter of public importance. Delegates ought to be permitted to speak at school board meetings (provided they do so respectfully), no matter what sensitive or controversial issues their delegations may raise. The issues raised in this case touch upon significant questions on the application of the law governing public debate and therefore transcend the interests between the parties.

7. Burjoski also relies on the below submissions at paragraphs 18-22 in support of her contention that this proposed appeal is of significant public interest.

**Burjoski's Reply to the Board's Submissions on the Doré Analysis**

8. At paragraphs 39-49 of its factum, the Board attempts to distinguish this case from other cases cited by both the Board and Burjoski, by suggesting that:

a) because in this case the Chair's decision to terminate Burjoski's delegation was sustained by the Trustees by a 5-4 vote (and hence determined by a vote of "democratically elected trustees"), the Chair's duty under the *Doré* framework to consider any infringements of Burjoski's *Charter* rights and balance them against the applicable statutory objectives was apparently not necessary, or was otherwise relieved or watered down;

b) because in this case the Chair's decision was pronounced orally as opposed to in writing, his duty under the *Doré* framework was similarly relieved or watered down;

c) because in this case the Chair's decision was made in the "education context", his duty under the *Doré* framework was similarly relieved or watered down.

9. None of the Board's submissions have any merit.

10. **First**, the fact that a given administrative decision is made (or sustained) by a group of "democratically elected trustees" has nothing to do with the decision-makers' duty under the *Doré* framework. While it is true that not all administrative decisions require formal reasons, and that the reasonableness of a given decision takes its colour from its context,[2] this does not mean that a democratic process somehow waters down the requirement set

[2] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para 53. [*Trinity Western*].

out in *Doré.* The fact that the Chair's decision in this case was sustained by a vote has no bearing on the Chair's and the Board's failure to consider *Doré* at all. A total failure to consider *Doré* is an error in law, reviewable on the correctness standard, full stop.

11. In passing, Burjoski submits that the Board's reliance on *Catalyst Paper Corp. v. North Cowichan (District)*[3] for the proposition that a decision's "rationale may be '*deduced from the debate, deliberations and the statements of policy*' that gave rise to the decision in question" is misleading and unhelpful. *Catalyst* was about a judicial review of the passage of a municipal by-law, which clearly has nothing to do with the issues in this case.

12. In *Catalyst*, the Supreme Court of Canada discussed the concept of reasonableness in relation to by-laws passed by a municipality. It is in *that* context that the Court offered the following commentary at paragraph 29:

> It is important to remember that requirements of process, like the range of reasonable outcomes, vary with the context and nature of the decision-making process at issue. Formal reasons may be required for decisions that involve quasi-judicial adjudication by a municipality. But that does not apply to the process of passing municipal bylaws. To demand that councillors who have just emerged from a heated debate on the merits of a bylaw get together to produce a coherent set of reasons is to misconceive the nature of the democratic process that prevails in the Council Chamber. The reasons for a municipal bylaw are traditionally deduced from the debate, deliberations and the statements of policy that give rise to **the bylaw.** [Emphasis added].

13. Here, the Court was speaking of "**the bylaw**" and not, as the Board suggests at paragraph 39 of its factum, of "**the decision in question**". The principles found in *Catalyst* are obviously limited to the municipal by-law context and are not of general application. Moreover, they have nothing to do with the *Doré* analysis. *Catalyst* certainly does not stand for the proposition that simply because an elected body makes an administrative decision,

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[3] *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 at paragraph 29 (SCC).

*Doré* does not apply, or applies in some attenuated form, or that it is appropriate to infer that the *Doré* analysis was indeed applied when there is no actual evidence of its application.

14. In response to the Board's submission at paragraph 46 of its factum, it is important to keep in mind that in *Trinity Western,* the Supreme Court of Canada accepted that the LSBC Benchers had debated the issues raised in that case and fully considered the balancing between *Charter* values and statutory objectives:

> It is clear from the speeches that the LSBC Benchers made during the April 11, 2014 and September 26, 2014 meetings that they were alive to the question of the balance to be struck between freedom of religion and their statutory duties.[4]

In contrast, in the case at bar, there is nothing on the record to demonstrate any serious debate or consideration of Burjowski's *Charter* rights. The Chair – whose initial decision is what gave rise to this entire matter – did not mention Burjoski's Charter rights *at all*. The fact the Vice-Chair was cognizant of Burjowski's right to speak says very little, if anything, about the balancing exercise required by *Doré*.[5] Recognizing a right exists and seriously grappling with the *Doré* balancing exercise are two different things.

15. **Second,** there is no support for the notion that because a given decision is pronounced orally as opposed to in writing, there is no need for a decision-maker to follow *Doré*, or that his or her duty is lessened. None of the cases cited by the Board stand for such a proposition.

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[4] *Trinity Western* at para 55.

[5] Transcript of excerpt of Video of Committee of the Whole Meeting dated January 17, 2022 (20:48 – 38:32 of video), at pages 12-13; **MPMR, Tab E - Record of Proceedings, Tab 6, pages 12-13.**

16. **Third,** the Board's suggestion that this case arises in the "education context" and is therefore somehow different on that basis is similarly without merit. The *Doré* analysis obviously applies to administrative decisions made by school boards; that is all that matters in this case. But in any event, the decision at issue in this case relates to the proper functioning of a school board meeting and really has nothing to do with "education".

17. Thus, nothing helpful is to be gleaned from *Bonitto v. Halifax Regional School Board*,[6] as cited by the Board at paragraph 47 of its factum, simply because that case arose in the "education context". *Bonitto* dealt with actual school operations, which has nothing to do with the situation in Burjoski's case.

**Conflicting Lines of Authority**

18. The Board's reliance on cases like *Bonitto* and (in Ontario) *Gillies v. Bluewater District School Board*[7] indicate a troubling development in the jurisprudence, which represents another reason - of significant public importance - for this Court to grant leave to appeal in this case.

19. Burjoski relies in her main factum on the approach to the *Doré* analysis applied in such cases as *Canadian Broadcasting Corporation v. Ferrier*,[8] *McCarthy v. Whitefish Lake First Nation #128*,[9] *Canadian Centre for Bio-Ethical Reform v. Peterborough (City)*,[10] and *Guelph and Area Right to Life v. City of Guelph*.[11] The rule in those cases was that decision

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[6] *Bonitto v. Halifax Regional School Board*, 2015 NSCA 80 (NCSA).
[7] *Gillies v. Bluewater District School Board,* 2023 ONSC 1625 (Div Ct.).
[8] *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025 (CA).
[9] *McCarthy v. Whitefish Lake First Nation #128*, 2023 FC 220 (FC).
[10] *Canadian Centre for Bio-Ethical Reform v. Peterborough (City)*, 2016 ONSC 1972 (Div Ct.).
[11] *Guelph and Area Right to Life v. City of Guelph*, 2022 ONSC 43 (Div Ct).

makers must conduct a balancing analysis and that a failure to do so renders a decision unreasonable.

20. By contrast, the Panel's Decision in this case appears to stand for the proposition that a reviewing court may infer an appropriate *Doré* analysis from the outcome of a discretionary administrative decision or the context in which it was made. There are also other Ontario cases where the Divisional Court took a similar (erroneous) approach, such as *Gillies* and *Ramsay v. Waterloo Region District School Board*.[12]

21. With great respect to the Divisional Court, such an approach is contrary to the *Peterborough - Guelph* line of cases and the Supreme Court of Canada's guidance in cases as recently as *Commission scolaire francophone des Territoires du Nord Ouest c. Territoires du Nord-Ouest (Education, Culture et Formation)*.[13] It is also at odds with this Court's holding in *Canadian Broadcasting Corporation v. Ferrier*.

22. This Court's duty, among others, is to resolve conflicting lines of authority to promote uniformity in the law. Burjoski submits that leave to appeal ought to be granted in this case in order to permit this Court to address the divergent lines of reasoning that are developing in Ontario on the issue of whether (and if so, to what extent) a reviewing court may infer that a given administrative decision-maker conducted a proper *Doré* analysis, despite the absence of any actual evidence of their having done so.

**The Board mischaracterizes Burjoski's presentation**

23. The Board mischaracterizes Burjoski's presentation at paragraph 64 of its factum by stating that she perpetuated harmful stereotypes about transgendered persons. Burjoski

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[12] *Ramsay v. Waterloo Region District School Board*, 2023 ONSC 6508 (Div Ct.).
[13] *Commission scolaire francophone des Territoires du Nord Ouest c. Territoires du Nord-Ouest (Education, Culture et Formation)*, 2023 SCC 31 (SCC).

in no way said transpersons do not exist, and she certainly did not say they ought to be "cured." She stated that the books were suggesting that irreversible treatments, such as hormone replacement therapy is promoted as a cure "*...for emotional and social distress...*"[14] The problem Burjoski highlights is not being transgendered, but rather emotional and social distress. She in no way suggested that being transgendered people should be cured.

24. Thus, any reference to the Human Rights Commission or the *Human Rights Code* is irrelevant. Burjoski in no way violated the *Code,* nor did she engage in hate speech. In this regard, Ramsay J. agreed in *Burjoski (Anti-SLAPP)*.[15]

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

Date: February 23, 2024

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[14] Transcript of excerpt of Video of Committee of the Whole Meeting dated January 17, 2022 (20:48 – 38:32 of video), at page 5; **MPMR, Tab E - Record of Proceedings, Tab 6, page 5.**
[15] *Burjowski (Anti-SLAPP),* at para 11.

**SCHEDULE "A" – LIST OF AUTHORITIES**

| | |
|---|---|
| | **Case Law:** |
| 1. | *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 |
| 2. | *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 |
| 3. | *Bonitto v. Halifax Regional School Board*, 2015 NSCA 80 |
| 4. | *Gillies v. Bluewater District School Board,* 2023 ONSC 1625 |
| 5. | *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025 |
| 6. | *McCarthy v. Whitefish Lake First Nation #128*, 2023 FC 220 |
| 7. | *Canadian Centre for Bio-Ethical Reform v. Peterborough (City)*, 2016 ONSC 1972 |
| 8. | *Guelph and Area Right to Life v. City of Guelph*, 2022 ONSC 43 |
| 9. | *Ramsay v. Waterloo Region District School Board*, 2023 ONSC 6508 |
| 10. | *Commission scolaire francophone des Territoires du Nord Ouest c. Territoires du Nord-Ouest (Education, Culture et Formation)*, 2023 SCC 31 |
| | **Secondary Sources:** |
| 11. | Geoff R. Hall, "Applications for Leave to Appeal: The Paramount Importance of Public Importance" (1999) 22 Adv. Q 87, at page 96. |

## SCHEDULE "B" – RELEVANT LEGISLATIVE PROVISIONS

| | **Legislation and Regulations Cited:** |
|---|---|
| 1. | *Courts of Justice Act*, RSO 1990, c. C.43. |
| 2. | *Education Act*, RSO 1990, c. E.2. |