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

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

January 19, 2024

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PART I - OVERVIEW

1. The moving party, Carolyn Burjoski ("**Burjoski**"), seeks leave to appeal the decision rendered by a panel of the Divisional Court (Stewart, Lococo and Williams JJ.) (the "**Panel**") on November 29, 2023 (the "**Decision**").[1] Burjoski appeared before the Panel on June 5, 2023, seeking judicial review of a decision rendered on January 17, 2022 during a meeting of the Committee of the Whole of the respondent, Waterloo Region District School Board ("**WRDSB**") (the "**Meeting**"). At the Meeting, Chairperson Scott Piatkowski (the "**Chair**") first interrupted Burjoski without justification while she was making a delegation to the Board, as she had been previously authorized to do. The Chair then terminated her delegation entirely, also without justification, and removed her from the Meeting. The Board subsequently upheld the Chair's decision.

2. The Panel dismissed Burjoski's application in its entirety.

3. Leave to appeal should be granted in this case. Burjoski submits that the Panel made a number of legal errors of critical importance to the general public. **First**, the Panel committed a foundational constitutional error in failing to require the WRDSB to actually attempt to balance its infringement of Burjoski's *Charter* rights with its statutory objectives. This failure has obvious and grave implications for citizens seeking to engage in democratic discourse before governmental decision-makers across Ontario, including delegates at school board meetings, and raises an important question: when (if ever) is a reviewing court entitled to uphold a decision where the decision maker failed to even consider the *Charter* protections limited by that decision?

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[1] *Carolyn Burjoski v. Waterloo Region District School Board*, 2023 ONSC 6506 (Div Ct.), **Moving Party's Motion Record ("MPMR"), Tab C.**

4. **Second**, the Panel's failure to find that the Chair displayed a "closed mind", and hence a reasonable apprehension of bias, cannot be reconciled with a contemporaneous decision rendered by Justice Ramsay of the Superior Court of Justice,[2] who held: "*It is a ready inference that the chairman of the board acted with malice or at least, with a reckless disregard for the truth*."[3] Justice Ramsay went on to find that the Chair's and the Board's treatment of Burjoski "*should not happen in a democratic society*". This issue also raises very serious questions about how school board meetings are conducted in Ontario and is thus of profound significance to the general public.

5. **Third,** the Panel's Decision demonstrates a serious misapprehension of the *Vavilov* requirements that (a) to be reasonable, an administrative decision must bear the hallmarks of transparency, intelligibility and justifiability; and (b) a reviewing court is not entitled to substitute its own justification for a given decision for the erroneous or unreasonable justification of the administrative decision-maker. This issue invites this Court to clarify the application of these principles to decisions made at not only public school board meetings, but in other similar settings in Ontario.

PART II - FACTS

6. The WRDSB is governed by the *Education Act* RSO 1990, c E.2 (the "**Act**"). Section 207 of the Act requires that Committee of the Whole meetings be open to the public.[4] WRDSB Bylaw 13.11 requires the Board to provide "*an opportunity for the public to present a delegation to the Board regarding issues of concern/interest…*" at all

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[2] *Burjoski v. Waterloo Region District School Board*, 2023 ONSC 6528 (SCJ) [*Burjoski (Anti-SLAPP)*]. **Moving Party's Book of Authorities ("MPBOA"), Tab 1. *Note: this decision is not found on CanLii.**

[3] *Ibid.*, paragraph 16.

[4] *Education Act*, RSO 1990, c. E.2, at section 207.

Committee of the Whole meetings.[5] The Bylaw's section on "Delegation Procedures" permits delegate presentations of up to ten (10) minutes.[6]

7. Burjoski registered as a delegate to the Meeting to speak to an agenda item identified as "Library Review". Her delegation request form indicated, in part, that she wished to speak "*…on issues of transparency regarding the library and classroom teacher's collections culling project…*".[7] Burjoski referred to a WRDSB decision to review library and classroom materials to remove materials deemed "*harmful*". She also proposed a number of recommendations relating to improving transparency on the part of WRDSB.

12. At the outset of her presentation, Burjoski noted a memo from the Board listing criteria for removing books For example, a book that is "*misleading*" might be removed.[8]

13. Burjoski then referenced certain school materials relating to issues of sex and gender in connection with Transgender Awareness Week. She argued that certain such books that the WRDSB had introduced into classrooms and libraries might *also* be considered misleading under the WRDSB's criteria for culling school materials.[9]

14. Less than three minutes into her presentation, Burjoski displayed a passage from a book found in WRDSB libraries, entitled "The Other Boy" by M.G. Hennesey, and made

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[5] WRDSB Bylaws, section 13.11, MPMR, Tab E - Record of Proceedings, Tab 7, page 16, section 13.11.

[6] WRDSB Bylaws, section 14.5, MPMR, Tab E - Record of Proceedings, Tab 7, page 17, section 14.5.

[7] Delegation request dated November 21, 2021, submitted by Carolyn Burjoski, **MPMR, Tab E - Record of Proceedings, Tab 1.**

[8] Transcript of excerpt of Video of Committee of the Whole Meeting dated Jan. 17, 2022 (20:48 – 38:32 of video), at page 4; **MPMR, Tab E - Record of Proceedings, Tab 6, page 3.**

[9] Ibid.

the following statement:

> In fact, some of the books filling our libraries make it seem simple or even cool to take puberty blockers and opposite sex hormones. "The Other Boy", by MG Hennessey…[10]

15. The Chair immediately interrupted Burjoski, and made the following statement:

> Ms. Burjoski? I'm getting a little concerned that your content may be problematic. I'm not sure exactly where you're headed but I would caution you to make sure you are not saying anything that would violate the *Human Rights Code*.[11]

18. The Chair did not explain what he meant by the term "*problematic*", nor did he explain how it could be that Burjoski could violate any provisions of the *Human Rights Code*, RSO 1990, c H.19 (the "***Code***") through her presentation.

19. After the Chair's warning, Burjoski attempted to complete her presentation. She made the following statement as she read from WRDSB school material:

> …the other book by MG Hennessey chronicles the medical transition of Shane, who was born female and now identifies as a boy. Shane takes puberty blockers and is now excited to start testosterone. The doctor states that this hormone mixture will leave Shane infertile in the future. Shane's response is: "It's cool" - a very typical adolescent response. This book is misleading because it does not take into account how Shane might feel later in life about being infertile. This book makes very serious medical interventions seem like an easy cure for emotional and social distress ...[12]

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[10] Transcript of excerpt of Video of Committee of the Whole Meeting dated Jan. 17, 2022 (20:48 – 38:32 of video), at page 4; **MPMR, Tab E - Record of Proceedings, Tab 6, page 4.**

[11] Transcript of excerpt of Video of Committee of the Whole Meeting dated January 17, 2022 (20:48 – 38:32 of video), at page 4; **MPMR, Tab E - Record of Proceedings, Tab 6, page 4.**

[12] *Ibid.*, page 5; MPMR, Tab E – Record of Proceedings, Tab 6, page 5.

20. At that point in the presentation, the Chair again interrupted Burjoski and advised her that he was "*concerned that your comments are in violation*" of the *Code*'s prohibition against discrimination on the grounds of gender expression and gender identity and therefore he was "*ending the presentation*".[13] The Board did not allow Burjoski to continue her presentation from that point, due to the anticipated content of her speech, nor was she provided with an opportunity to discuss or address the Board's unclear concerns.

21. The Chair's initial decision was appealed by another member of the Board, after which the Chair stated he would "*explain [his] ruling*". His explanation was as follows:

> Thank you very much. We read the delegation procedure for a reason, and, I don't think in my three years on the Board we have ever had to stop a delegate from speaking, so I, I take, the issue very seriously. But, I was concerned that the, I cautioned the delegate, because it appeared that they were headed in a direction that, that was problematic. I deemed that their presentation did stray into that territory, and it was absolutely appropriate to stop their presentation when I did, and I'm hoping that you will uphold that ruling.[14]

22. The Chair's decision to end the presentation was appealed by a member of the Board. That decision was then upheld by the Board, without debate of its merits, in a 5-4 vote.[15] The Board did not discuss or identify what it was that allegedly violated or could have violated its policies, or on what authority they were entitled to end the presentation. It did not engage in a discussion on the Chair's assertion that Burjoski violated or could

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[13] Transcript of except of Video of Committee of the Whole Meeting dated January 17, 2022 (20:48 – 38:32 of video), at page 6; **MPMR, Tab E – Record of Proceedings, Tab 6, page 6.**
[14] Transcript of except of Video of Committee of the Whole Meeting dated January 17, 2022 (20:48 – 38:32 of video), at page 8; **MPMR, Tab E – Record of Proceedings, Tab 6, page 8.**
[15] Transcript of except of Video of Committee of the Whole Meeting dated January 17, 2022 (20:48 – 38:32 of video), at pages 11-17; **MPMR, Tab E – Record of Proceedings, Tab 6, pages 11-17.**

have violated the *Code*. In fact, it did not refer to either the WRSB policy *or* the *Code*.

23. Neither the Chair nor the Board considered Burjoski's right to freedom of expression at any time. Immediately after the vote, the Chair removed Burjoski from the video conference meeting without explanation.[16]

24. Further, in the days and weeks following the meeting, the Chair made numerous unfounded assertions about Burjoski and her brief and prematurely terminated presentation, including:

a) that Burjoski's comments were "*transphobic*";[17]

b) that Burjoski had "*[questioned] the right to exist of trans people*";[18]

c) that after Burjoski was "*cautioned"* that she had *"doubled down"*;[19]

d) that Burjoski was not being "*respectful or courteous to transgender people…*";[20]

e) that Burjoski's statements "*would cause [transgender people] to be attacked…*";[21] and

f) that Burjoski caused "*harm*", and "*had she been allowed to continue, the harm may well have become more apparent to all"*;[22] and

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[16] Transcript of except of Video of Committee of the Whole Meeting dated January 17, 2022 (20:48 – 38:32 of video), at page 17; **MPMR, Tab E – Record of Proceedings, Tab 6, page 17.**

[17] Affidavit of Carolyn Burjoski, sworn October 25, 2022 (the "**Burjoski Affidavit**"), paragraph 3 and Exhibit "A", **MPMR, Tab F - Supplementary Application Record, Tab 1, paragraph 3 and Exhibit "A"**.

[18] Ibid.

[19] *Ibid.*, at paragraph 4.

[20] *Ibid.*, at paragraph 5.

[21] *Ibid.*

[22] *Ibid.*, at paragraph 11 and Exhibit "F".

g) describing Ms. Burjoski's comments as "*hate*" and "*derogatory speech*".[23]

25. Shortly after the Meeting, WRDSB Trustee Jayne Herring, who voted in favour of the Decision, referred to Ms. Burjoski's Presentation as "*derogatory speech*" and implied that it could have caused "*harm*".[24]

26. On January 20, 2022, the Board published a statement expressing "*deep regret for any harm caused to the transgender community*" due to Ms. Burjoski's presentation.[25]

Proceedings in the Divisional Court

27. The Notice of Application was issued in this matter on February 16, 2022.[26]

28. The application was heard the Divisional Court on June 5, 2023.

29. On November 29, 2023, Justice E. Stewart, for the Panel, released the Court's Decision denying Burjoski's application for judicial review in its entirety.[27]

PART III – SPECIFIC QUESTIONS PROPOSED

30. The only issue for the Court's consideration on this motion is whether leave to appeal should be granted in this matter.

31. If leave is granted, Burjoski would raise the following issues on appeal, as set out in Burjoski's draft Notice of Appeal, attached to the Notice of Motion as **Schedule "A"**:

a) whether the Divisional Court erred by failing to identify and correctly apply the appropriate standards of review in its review of the Board's decision, in the following respects:

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[23] *Ibid.*, at paragraph 8 and Exhibit "C".
[24] *Ibid.*, at paragraph 8 and Exhibit "C".
[25] *Ibid.*, at paragraph 10 and Exhibit "E".
[26] Notice of Application, **MPMR, Tab 1 – Application Record, Tab 1.**
[27] Reasons for Decision and Order, *Carolyn Burjoski v. Waterloo Region District School Board*, 2023 ONSC 6506 (Div Ct.), **MPMR, Tabs B and C.**

i. whether the Divisional Court failed to recognize that the Chair's and Board's failure or refusal to consider the Appellant's freedom of expression under s. 2(b) of the *Charter* attracts a correctness standard of review;

ii. whether the Divisional Court failed to apply a correctness standard of review to the issue of whether or not the Chair and the Board had considered the Appellant's freedom of expression under s. 2(b) of the *Charter*, and balanced the Appellant's freedom against the statutory objectives of the operative legislation;

iii. whether the Divisional Court failed to recognize that in making its decision, the Board did not consider Appellant's freedom of expression under s. 2(b) of the *Charter*, and failed to balance Appellant's freedom against the statutory objectives of the operative legislation;

iv. whether the Divisional Court failed to recognize that the issue of whether or not the Chair had displayed a reasonable apprehension of bias towards the Appellant's Delegation attracts a correctness standard of review;

v. whether the Divisional Court failed to apply a correctness standard of review to the issue of whether or not the Chair displayed a reasonable apprehension of bias towards the Appellant's Delegation;

vi. whether the Divisional Court failed to recognize that the Chair had in fact displayed a reasonable apprehension of bias towards the Appellant's Delegation;

vii. whether the Divisional Court failed to recognize that the Board's decision was unreasonable, both in its outcome and in its reasoning process, in that:

1. the Chair's rationale for terminating the Appellant's Delegation was irrational. It was not based on an internally coherent and rational chain of analysis that was justified in relation to the facts and law constraining the Chair;

2. the Board's decision to uphold the Chair's decision to terminate the Appellant's Delegation was similarly not based on an internally coherent and rational chain of analysis that was justified in relation to the facts and law constraining the Board; and

3. taken together, the Chair's and the Board's decisions fail to demonstrate the degrees of justifiability, transparency and intelligibility that were required of them; and

b) whether the Divisional Court erred by improperly substituting its own reasons and justification for the Chair's decision to terminate the Appellant's Delegation and the Board's decision to uphold the Chair's decision;

PART IV – STATEMENT OF ISSUES & LAW

32. This motion is governed by section 6(1)(a) of the *Courts of Justice Act.*[28] The test for granting leave to appeal to this Court from an order of the Divisional Court was

[28] *Courts of Justice Act*, RSO 1990, c. C.43, section 6(1)(a).

originally set out in *Sault Dock Co. v. Sault Ste. Marie (City)*:[29]

a) **first**, leave will be granted where this Court is satisfied that the matter will present an arguable question of law or mixed law and fact requiring of the Court consideration of matters "such as" the following:

i. the interpretation of a statute or Regulation of Canada or Ontario including its constitutionality;

ii. the interpretation, clarification or propounding of some general rule or principle of law;

iii. the interpretation of a municipal by-law where the point in issue is a question of public importance;

iv. the interpretation of an agreement where the point in issue involves a question of public importance;[30]

b) **second**, this Court will also consider cases where special circumstances would make the matter sought to be brought before the Court a matter of public importance or would appear to require that in the interest of justice leave should be granted – such as the introduction of new evidence, obvious misapprehension of the Divisional Court of the relevant facts or a clear departure from the established principles of law resulting in a miscarriage of justice.[31]

33. While the mere possibility that there "may be" error in the judgment or order of the

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[29] *Sault Dock Co. v. Sault Ste. Marie (City)*, 1972 CarswellOnt 440, [1973] 2 OR 479 (CA) [*Sault Dock*].
[30] *Sault Dock*, cited to 1972 CarswellOnt 440 at paragraph 8.
[31] *Sault Dock*, at paragraph 9.

Divisional Court will not generally be a ground in itself for granting leave, it is nonetheless this Court's duty to grant leave and correct a clear error in a judgment or order.[32]

34. In *U.G.C.W., Local 246 v. Dominion Glass Co.*,[33] this Court confirmed that the above principles laid down in *Sault Dock* remained valid; however, it was also relevant that the proposed appeal was sought from a judgment of the Divisional Court sitting in its capacity as a court of original jurisdiction (in the context of a judicial review proceeding), as opposed to a court of appellate jurisdiction.[34]

35. See also *Canada Mortgage & Housing Corp. v. Iness*[35] and *Ontario (Minister of Transportation) v. 1520658 Ontario Inc.*[36] for similar restatements of the test.

The Test for Leave to Appeal is Met in This Case

36. At the outset, Burjoski relies on Justice Ramsay's related decision in *Burjoski v. Waterloo Region District School Board* (a defamation action brought by Burjoski against the WRDSB in response to the Chair's public statements about Burjoski following the Meeting, as described above),[37] rendered on November 23, 2023 – only six days before the Panel rendered its Decision in this matter.

37. In dismissing the WRSDB's anti-SLAPP motion, Justice Ramsay made the following observations about the Chair's conduct during the Meeting:

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[32] *Sault Dock*, at paragraph 10.

[33] *U.G.C.W., Local 246 v. Dominion Glass Co.*, 1973 CarswellOnt 981, [1973] 2 OR 763 (CA) [*Dominion Glass*].

[34] *Ibid.*, cited to 1973 CarswellOnt 981 at paragraph 2.

[35] *Canada Mortgage & Housing Corp. v. Iness* (2002), 220 DLR (4th) 682 at paragraph 4 (CA).

[36] *Ontario (Minister of Transportation) v. 1520658 Ontario Inc.*, 2010 ONCA 32 at paragraph 12 (CA) [*1520658*].

[37] *Burjoski v. Waterloo Region District School Board*, 2023 ONSC 6528 (SCJ) [*Burjoski (Anti-SLAPP)*]. **Moving Party's Book of Authorities ("MPBOA"), Tab 1. *Note: this decision is not found on CanLii.**

As counsel for the defendants correctly conceded, the *Human Rights Code* does not prohibit public discussion of issues related to transgenderism or minors and transgenderism. It does not prohibit public discission of anything.[38]

[…]

The chairman admitted in cross-examination that what the plaintiff had said to provoke his comments was, "this book makes very serious medical interventions seem like an easy cure for emotional and social distress." Members of the public could not check to see for themselves what she had said because the board removed the recording of the meeting from its website, although they might have found it on the CTV site.[39]

[…]

Why the chairman of the school board silenced a member of the public was a matter of public interest. The impugned comments of the chairman are expressions on a matter of public interest.[40]

[…]

The plaintiff's claims, however, have substantial merit. The comments of the board's agents were defamatory. For example, they accused her of breaching the *Human Rights Code*, questioning the right of trans persons to exist and engaging in speech that included hate. She did not do any of those things.[41]

[…]

It is a ready inference that the chairman of the board acted with malice or at least, with a reckless disregard for the truth. He had made an embarrassingly erroneous and arbitrary decision to silence a legitimate expression of opinion and he was widely criticized for it. It is not a stretch to infer that, realizing that, he tried to justify himself with the public by assassinating the plaintiff's character.[42]

[…]

I find it regrettable that the defendant who is trying to shut down debate is

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[38] *Burjoski (Anti-SLAPP)* at paragraph 3; **MPBOA, Tab 1, para. 3**.
[39] *Burjoski (Anti-SLAPP)* at paragraph 7; **MPBOA, Tab 1, para. 7**.
[40] *Burjoski (Anti-SLAPP)* at paragraph 10; **MPBOA, Tab 1, para. 10**.
[41] *Burjoski (Anti-SLAPP)* at paragraph 11; **MPBOA, Tab 1, para. 11**.
[42] *Burjoski (Anti-SLAPP)* at paragraph 16; **MPBOA, Tab 1, para. 16**.

> an arm of the government. Regard for the historical and present plight of the transgendered, as articulated in paragraph 85 of *Hansman*, does not negate section 2(b) of the Charter. What happened here should not happen in a democratic society.[43]

38. For the following reasons, and in light of Justice Ramsay's above comments, leave to appeal ought to be granted in this case.

39. **First**, Burjoski's proposed appeal would be from an order of the Divisional Court arising from a judicial review proceeding, and thus sitting in its capacity as a court of original jurisdiction rather than as an appellate court. Following *Dominion Glass*, *Iness* and *1520658*, above, this consideration militates in favour of granting leave. In light of the issues raised in this matter, and in light of Ramsay J.'s comments in *Burjoski (Anti-SLAPP)*, Burjoski deserves to have the Panel's Decision considered by this Court on appeal.

40. **Second**, as described in the following paragraphs, the Panel's decision contains a number of clear errors of law or mixed fact and law, which represent a clear departure from established principles of law. The result in this case has been an obvious miscarriage of justice. Burjoski should never have been silenced by the Chair and the Board as she was, as Justice Ramsay observed in *Burjoski (Anti-SLAPP)*. Unilateral actions taken by a school board, without justification, to silence a delegate during a school board meeting raise obvious and compelling issues concerning the protection of delegates' freedom of expression under section 2(b) of the *Charter*. Following *Sault Dock* at paragraphs 9 and 10, this engages this Court's duty to grant leave.

Error #1 – The Divisional Court Failed to Recognize that the Chair and the Board did not Employ the *Doré* Analysis

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[43] *Burjoski (Anti-SLAPP)* at paragraph 26; **MPBOA, Tab 1, para. 26**.

41. Burjoski submits that the Divisional Court erred in law, in the following related respects:

a) the Divisional Court did not recognize that in the course of making their Decision, the failure of both the Chair and the Board to consider Burjoski's freedom of expression under section 2(b) of the *Charter* _at all_ is reviewable on a correctness standard;

b) the Divisional Court did not review the Decision on the correctness standard; and

c) the Divisional Court failed to recognize that both the Chair and the Board did not consider Burjoski's freedom of expression under section 2(b) of the *Charter* in the course of making the Decision.

42. In the administrative tribunal context, including with respect to school board meetings and proceedings under the Act,[44] the well-known "*Doré* analysis" applies. That is, where a decision will have the effect of limiting an individual's *Charter* rights, then the decision maker (in this case, the Chair and the Board) must balance the severity of the interference with *Charter* values against the statutory objectives of the Act.[45]

43. The Ontario Divisional Court has described the required process as follows:

> The onus is first on the Applicant to establish that its constitutionally enshrined freedom has been limited. The onus then shifts to the Respondent to establish that the limit was imposed in pursuit of its statutory objectives and that the Applicant's freedom of expression was not limited more than

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[44] See, e.g., *Del Grande v. Toronto Catholic District School Board*, 2023 ONSC 349 (Div. Ct.); *E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893 at paragraph 45 (CA).

[45] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at paragraphs 3-4 (SCC). [*Loyola*] See also *Doré v. Barreau du Québec*, 2012 SCC 12 (SCC).

reasonably necessary given those statutory objectives.[46]

44. The Divisional Court has further stated that "*where the right to freedom of expression is limited by an administrative decision-maker's discretionary decision, the courts are to apply the test developed by the Supreme Court in Doré and Loyola.*"[47] The Court described the required analysis as follows:

> Under *Doré/Loyola*, the administrative decision-maker is first required to consider the statutory objectives at issue. The decision-maker must then consider how the *Charter* value at issue will best be protected in view of the statutory objectives. This is meant to be a proportionality analysis. The decision-maker is to balance the severity of the interference with *Charter* values against the statutory objective.[48]

45. Where a decision maker refuses or fails to perform the "*Doré* analysis", a correctness standard of review applies.[49]

46. Burjoski submits that both the Chair and the Board in this case failed to employ the *Doré* analysis. Therefore, the appropriate standard of review on this issue is correctness.

The Decision engaged Burjoski's Charter freedom of expression

47. The Decision to terminate Burjoski's presentation and remove her from the Meeting

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[46] *Canadian Centre for Bio-Ethical Reform v. Peterborough (City)*, 2016 ONSC 1972 at paragraph 15 (Div. Ct.). See also *E.T. Hamilton-Wentworth District School Board*, 2017 ONCA 893 (CA).

[47] *Guelph and Area Right to Life v. City of Guelph*, 2022 ONSC 43 at para 48 (Div Ct.) [*Guelph*].

[48] *Ibid.* at para 49.

[49] *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025 at paragraph 35 [*Ferrier*]; see also Paul Daly, "The Doré Duty: Fundamental Rights in Public Administration", 2023 CanLIIDocs 1256, [Daly, The Doré Duty] at p 11: "*Compliance with the Charter will typically—though not necessarily— constitute an extricable question of law, and thus, the question for the court will be whether the reasons and record reveal compliance with the Doré duty.*"

unquestionably limited Burjoski's *Charter* section 2(b) freedom of expression.[50] This cannot be seriously denied. As stated in *Irwin Toy Ltd. v. Quebec (Attorney General)*,[51] when "*the government's purpose is to restrict the content of expression*" – such as was the case when the Chair and the Board decided to silence and then eject Burjoski from the Meeting, "*it necessarily limits the guarantee of free expression*."[52] In other words, where a restriction restricts content of expression, there is, as a matter of course, an infringement of section 2(b) of the *Charter*.

48. Moreover, in *Burjoski (Anti-SLAPP)*, Justice Ramsay found that Burjoski had been unacceptably "silenced" by the Chair.[53]

The Chair and the Board ignored their duty to justify the Decision's infringement of Burjoski's Charter rights.

49. Since, following *Loyola*, "*[t]he Charter enumerates a series of guarantees that can only be limited if the government can justify those limitations as proportionate*",[54] and since the Decision limited Burjoski's *Charter* rights, the Chair and the Board were required to engage in the *Doré* balancing analysis.[55]

50. In this case, although the Chair interrupted Burjoski – twice – as she attempted to proceed with her delegation, and ultimately decided to "silence" her, he did not refer to Burjoski's freedom of expression under section 2(b) *Charter* <u>*at all*</u>. The only thing

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[50] *Canadian Broadcasting Corp. v. Canada (Attorney General), 2011 SCC 2* at paragraph 38 (SCC).
[51] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 (SCC).
[52] *Ibid*., paragraph 50.
[53] See *Burjoski* (*Anti-SLAPP*) at paras. 10, 16, 25, 26. **MPBOA, Tab 1, paras. 10, 16, 25, 26**.
[54] *Loyola* at paragraphs 3-4 (SCC). See also *Doré v. Barreau du Québec*, 2012 SCC 12 (SCC).
[55] *Loyola* at paragraph 38.

seemingly on the Chair's mind was that Burjoski had violated (or, more accurately, *might* violate) the *Code*. Moreover, while the Board ultimately voted 5-4 to confirm the Chair's ruling to silence Burjoski, there was likewise no mention whatsoever of Burjoski's section 2(b) *Charter* freedoms. A review of the entire Meeting transcript[56] fails to indicate even one instance where either the Chair or the Board even *recognized* (let alone considered) Burjoski's *Charter* rights.

51. These were clear errors of law. Both the Chair and the Board were obligated to perform the *Doré* analysis, and they both failed to do so.

52. This situation is analogous to a recent case where a First Nation committee excluded a woman from standing as a candidate for election because she was Common-Law with her spouse, and not married.[57] Justice Favel of the Federal Court found:

> In this case, however, there is no evidence whatsoever that the Committee considered Ms. Jackson-Littlewolfe's *Charter* rights or tried to balance any limitation on these rights against a statutory or government objective. Accordingly, I agree with the Ontario Court of Appeal that this question calls for a correctness review (*Ferrier* at para 35). The deference this Court can afford the Committee is limited.[58]

53. Justice Favel went on to quote the Supreme Court in *Law Society of British Columbia v Trinity Western University*[59] at paragraphs 57 and 59 where it states that "*[d]elegated authority* _must_ *be exercised 'in light of constitutional guarantees and the values they reflect'*" and that "*the reviewing court* _must_ *be satisfied that the decision reflects a proportionate balance between the Charter protections and play and the relevant*

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[56] **MPMR, Tab E – Record of Proceedings, Tab 6.**
[57] *McCarthy v. Whitefish Lake First Nation #128*, 2023 FC 220 [*McCarthy*].
[58] *Ibid.* at para 91.
[59] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (SCC).

statutory mandate…".[60]

54. Justice Favel then concluded:

> This language is not permissive. I agree with Ms. Jackson-Littlewolfe that if an individual's *Charter* rights are engaged, an administrative body must consider those rights and attempt to proportionately balance any limitations on those rights against the relevant statutory objective. The second step in the *Doré/Loyola* is not satisfied because the Committee failed to do so. This fatal error is another reason why this Court must quash and set aside the Common Law Marriage Prohibition Decision.[61]

55. Likewise in this proceeding, since the Chair and the Board failed to balance their infringement of Burjoski's *Charter* rights with relevant statutory objectives (and, by extension, provide an explanation of how the Decision reflected a proper such balancing), the Decision should have been set aside by the Divisional Court.[62] The failure of decision makers to acknowledge and explain how their decisions proportionately balance infringement of *Charter* rights and relevant objectives has been repeatedly held by courts to be grounds to set aside their decisions.[63]

56. A court (and, in Burjoski's submission, *any* reviewing body in an administrative context, including a school board) should be "*satisfied that a Charter analysis was actually undertaken*" in relation to the decisions being reviewed: lip service to the *Charter* without actually performing the *Charter* analysis is not sufficient.[64] As the Divisional Court stated

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[60] *McCarthy* at para 94 [emphasis in original] [internal cites omitted].
[61] *McCarthy* at para 95 [emphasis in original].
[62] Daly, *The Doré Duty,* 2023 CanLIIDocs 1256, https://canlii.ca/t/7n4jt at paragraph 14: "*Failure to take relevant Charter values into account before adopting a policy, exercising a discretion, making an individualized assessment or interpreting a statutory provision justifies invalidation of the decision.*"
[63] See *Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority*, 2018 BCCA 344 at paragraphs 54, 60, 71; *Lethbridge and District Pro-Life Association v Lethbridge (City)*, 2020 ABQB 654, at para 112
[64] *See Lethbridge* at paras 105, 108.

in *Guelph and Area Right to Life,* "*the Doré/Loyola analysis requires an actual balancing and minimal impairment analysis*."[65]

57. In *Guelph*, the Divisional Court addressed the same "*central issue on this application, namely whether the City undertook the analysis it was required to undertake*". There, the Court agreed "*that the decision is not reasonable because the City did not engage in the balancing exercise required by Doré/Loyola*."[66]

58. Professor Paul Daly, who holds the University Research Chair in Administrative law and Government at the University of Ottawa, has recently provided an insightful article precisely outlining the constitutional duty the Council failed to fulfill in issuing its Decision:

> The goal of the *Doré* duty is . . . to force administrative decision-makers—who may not be legally trained—to engage with the *Charter.*[67] [Emphasis added.]

59. This goal was regrettably not met in this case.

The Divisional Court's Treatment of this Issue

60. In light of the above, the Decision ought consequently to have been set aside. However, the Panel failed to do so. Instead, the Court dismissed Burjoski's application.

61. At paragraph 21 of the Decision,[68] the Panel fell into error by failing to recognize the appropriate standard of review when an administrative decision-maker fails or refuses to

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[65] *Guelph* at paragraph 61.
[66] *Guelph* at paragraph 78-79.
[67] Daly, *The Doré Duty,* 2023 CanLIIDocs 1256, https://canlii.ca/t/7n4jt at page 18.
[68] *Carolyn Burjoski v. Waterloo Region District School Board*, 2023 ONSC 6506 at para. 21 (Div Ct.), **Moving Party's Motion Record ("MPMR"), Tab C, para. 21.**

employ the *Doré* analysis *at all*. As stated above, in such circumstances a reviewing court is to review the administrative decision on a *correctness* standard.[69]

62. The Divisional Court misinformed itself on the appropriate standard of review. At paragraph 21, the Court wrote:

> The standard of review applicable to this submit matter for judicial review is that of reasonableness (see: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653). For an issue of procedural fairness, the standard is that of correctness (see: *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 SCR 502, at para. 79; *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, 470 DLR (4th) 328, at paras. 26-30).

63. The Divisional Court was clearly wrong in its view of, and did not apply, the proper standard of review on the *Doré* issue. Consequently, the Divisional Court failed to recognize that because the Chair and the Board failed to perform the *Doré* analysis in this case, the Chair's and Board's decisions ought to have been set aside.

Error #2 – The Divisional Court Failed to Recognize the Chair's Closed Mind

64. Burjoski submits that the Divisional Court further erred in law, in the following related respects:

a) the Divisional Court failed to recognize that the issue of whether or not the Chair's actions gave rise to a reasonable apprehension of bias against Burjoski attracts a correctness standard of review;

b) the Divisional Court failed to apply a correctness standard of review to the issue of whether the Chair's actions gave rise to a reasonable apprehension of bias against Burjoski; and

c) the Divisonal Court failed to recognize that the Chair's actions, in fact, gave

[69] See *Ferrier* at paragraph 35.

rise to a reasonable apprehension of bias against Burjoski;

65. The presence or absence of bias is a question of law.[70] Hence, it is open for this Court to grant leave to appeal on this issue.

66. Allegations of bias and "closed mind" are issues of procedural fairness that are reviewed on the standard of correctness;[71] however, in this context, "correctness" is not so much a standard of review as an assessment of whether the process was fair, having regard to all the circumstances.[72] In *Citizens for Accountable and Responsible Education Niagara Inc. v. Niagara District School Board*,[73] 2015 ONSC 2058, the Divisional Court stated the test this way:

> If an applicant meets the onus of proving a reasonable apprehension of bias due to a closed mind, there is no applicable standard of review, and the decision must be quashed.

67. In the same case, the Divisional Court also discussed the substantive elements of the "closed mind" test at paragraphs 106-114. Ultimately, the Court held that the test is "*whether a reasonable, informed and right-minded person viewing all of the facts would believe that a decision-maker had a closed mind before [making a given decision] because they were not amenable to persuasion.*"[74]

68. In this case, the Chair clearly demonstrated that he had a closed mind with respect

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[70] See *Schoelly v. College of Massage Therapists of Ontario*, 2020 ONSC 1348 at paragraph 14 (Div. Ct.). See also *Reilly v. Zacharuk*, 2017 ONSC 7216 at paragraph 66 (SCJ); *R. v. Brown* (2003), 2003 CanLii 52142 at paragraph 40 (CA).

[71] See *Right to Life Association of Toronto v. Canada (Employment, Workforce, and Labour)*, 2021 FC 1125 at paragraph 64 (FC); see also *Agnew v. The Manitoba Dental Association*, 2023 MBKB 98 at paragraph 43 (KB).

[72] *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at paragraphs. 54-55 (FCA).

[73] *Citizens for Accountable and Responsible Education Niagara Inc. v. Niagara District School Board*, 2015 ONSC 2058 at paragraph 9 (Div. Ct.) [*Citizens*].

[74] *Ibid.*, paragraph 114.

to the content of Burjoski's delegation. The reality is that the Chair was simply not prepared to hear anyone question or say anything related to students and transgenderism that was at odds with his own views on these matters.

69. In support of this assertion, Burjoski again refers to Justice Ramsay's findings and observations in *Burjoski (Anti-SLAPP)*.

70. Burjoski submits that Justice Ramsay's comments are well-founded, particularly when one considers how the interaction between Burjoski and the Chair during the Meeting actually transpired. At the beginning of her prepared remarks, Burjoski commented:

> On November 8th, we received a memo in which the Board listed criteria for removing books. For example, a book that is misleading might be removed. Well, that sounds perfectly reasonable.[75] [Emphasis added.]

71. Thus, from the outset, it is apparent that Burjoski was speaking about *misleading books*, which was one of the criteria by which books were to be culled from the school district's libraries.

72. Burjoski then continued her presentation:

> A case could be made that some of your new diverse materials are indeed misleading. We teachers received a long list of books and resources for Transgender Awareness Week. Some of these books are a positive addition because they show diverse families and represent a variety of ethnicities. However, I am very concerned that some of the resources in our elementary school libraries are inappropriate for young children. The resources I am now showing are all in K to six libraries. In the book "Rick" by Alex Gino, a boy named Jeff keeps talking to Rick about "naked girls". Rick is confused because he doesn't think about naked girls, so he wonders if something's wrong with him. Rick gets invited to the school's Rainbow Club, and he ends up declaring an asexual identity. While reading this book I was thinking, "Maybe Rick doesn't have sexual feelings yet because he is a child." It concerns me that this book leave young boys wondering if there is something wrong with them if they aren't thinking about naked girls all the time. Well, so what message does this book send to young girls who

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[75] **MPMR, Tab E - Record of Proceedings, Tab 6, page 3.**

> might be in grade three, four? They are children. Let them grow up in their own time and stop pressuring them to be sexual so soon. In fact, some of the books filling our libraries make it seem simple or even cool to take puberty blockers and opposite sex hormones. "The Other Boy" by M.G. Hennessey –[76] [Emphasis added.]

73. This was the point where the Chair interrupted Burjoski's presentation for the first time. Although Burjoski's presentation was clearly on topic, discussing the potential *misleading* nature of the books from which she was quoting, and although she had clearly made no disparaging remarks whatsoever – about transgender students or anything else – the Chair was clearly reticent to allow Burjoski to speak:

> Ms. Burjoski? I, I'm just getting a little concerned that your content, uh, may be problematic. Um, I'm not sure exactly where you're headed, but I, I would caution you to, uh, make sure that you are not saying anything that would violate the *Human Rights Code*.[77]

74. There was, objectively, no reason for the Chair to caution Burjoski. As Justice Ramsay held in *Burjoski (Anti-SLAPP)*, the *Human Rights Code* does not prohibit discussion of anything, including matters relating to transgenderism. Moreover, Burjoski had said nothing to warrant a caution of any kind.[78]

75. In any event, Burjoski replied that she was trying to explain why the books from which she was quoting were misleading:

> Um, I hope that, um, that I can be heard, because these are <u>misleading</u> books, and I'd like to tell you why. Um, the other book by M.G. Hennessey chronicles the medical transition of Shane, who is born female and now identifies as a boy. Shane takes puberty blockers and is now excited to start testosterone. The doctor states that this hormone mixture will leave Shane infertile in the future. Shane's response is, "It's cool,", a very typical adolescent response. This book is misleading because it does not take into account how Shane might feel later in life about being infertile. This book makes very serious medical interventions seem like an easy cure for

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[76] **MPMR, Tab E - Record of Proceedings, Tab 6, pages 3-4.**
[77] **MPMR, Tab E - Record of Proceedings, Tab 6, page 4.**
[78] *Burjoski (Anti-SLAPP)*, paras. 2, 3 and 11. **MPBOA, Tab 1, paras. 2, 3 and 11.**

emotional and social distress, any number –[79] [Emphasis added.]

76. At this point, Chairperson Piatkowski terminated Burjoski's presentation. Again, she had not made disparaging comments about anything. She had in no way violated (or even "possibly" violated) the *Code* in expressing her opinion that the two books from which she had quoted were misleading. Ostensibly, Burjoski's point is (or would have been) that, in her opinion, these books (and perhaps books like them) should be removed from the school libraries because of their misleading messages.

77. It cannot be denied that Burjoski had every right to provide her opinion about the books about which she was speaking. It also cannot be denied that Burjoski's comments were in no way discriminatory, rude, inappropriate or off-topic.

78. Yet, the Chair silenced Burjoski anyway. When challenged by the other Board members, the Chair provided the "explanation" described above at paragraph 21.[80]

79. It should not be lost on this Court that the Chair's explanation is in fact devoid of any actual rationale for stopping Burjoski's presentation, other than that "*it appeared*" that Burjoski "*was headed in a direction that, uh, that was problematic*." Without any actual reasons for doing so, the Chair "*deemed that their presentation did stray into that territory, and it was absolutely appropriate to stop their presentation*."

80. There was, objectively, no reason whatsoever for the Chair to silence Burjoski. She had said nothing wrong. Her remarks were not off topic at all.

81. In fact, it is important to recognize that the Chair did not end Burjoski's presentation for being *off topic* – rather, he ended it because he was of the view that Burjoski's remarks

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[79] **MPMR, Tab E - Record of Proceedings, Tab 6, page 5.**
[80] **MPMR, Tab E - Record of Proceedings, Tab 6, page 8.**

amounted to <u>*hate speech*</u>.

82. The Chair's mindset with respect to Burjoski's remarks was laid bare through the comments he made in the days following the Meeting. The Chair's comments are set out above at paragraphs 24-25. See also *Burjoski (Anti-SLAPP)* at paragraph 6.[81]

83. The Chair's comments were later characterized by Justice Ramsay in *Burjoski (Anti-SLAPP)* as "*defamatory*".[82] There was no basis for the Chair to have made any of them. Nonetheless, the Chair *did* make those comments, which illustrate his state of mind and his opinion of Burjoski's comments at the time she made them during the Meeting.

84. The only reasonable explanation for the Chair's decision to silence Burjoski and end her presentation is that his mind was <u>entirely closed</u> with respect to the prospect of anyone questioning anything about what he considered to be the "correct" way to think about transgenderism. The Chair simply was unable to contemplate that Burjoski (or anyone) should be able to express a different opinion on that issue.

85. In fact, the Chair's mind was so closed, he wasn't even able to allow Burjoski to continue her presentation to a point where he could be certain that she was making "problematic" remarks. Rather, he decided to silence Burjoski pre-emptively. This was objectively wrong. As Justice Ramsay stated in *Burjoski (Anti-SLAPP)*, "*what happened here should not happen in a democratic society*".[83]

86. Thus, the "closed mind" test was easily met in this case.

The Divisional Court's Treatment of this Issue

87. In light of the above, the Chair's decision ought to have been quashed by the Panel

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[81] *Burjoski (Anti-SLAPP)*, paragraph 6. **MPBOA, Tab 1, para. 6**.
[82] *Burjoski (Anti-SLAPP)*, paragraph 11. **MPBOA, Tab 1, para. 11.**
[83] *Burjoski (Anti-SLAPP)*, paragraph 26. **MPBOA, Tab 1, para. 26**.

on judicial review.

88. Nonetheless, the Panel failed to intervene.[84]

89. Burjoski submits that the Panel either failed to apply a correctness standard to this issue at all, or improperly applied it to the situation. No reasonable chairperson in the Chair's position would have ended Burjoski's presentation unless he or she had a closed mind with respect to what he or she was hearing. It was therefore an error for the Panel to fail to recognize – on the correctness standard – that the Chair's decision was wrong and should have been quashed.

Error #3 – The Decision to Terminate Burjoski's Presentation was Unreasonable

90. Burjoski submits that the Divisional Court further erred in law, in the following related respects:

a) the Panel failed to recognize that the decision to terminate Burjoski's presentation was not based on an internally coherent and rational chain of analysis that was justified in relation to the facts and law. The decision failed to demonstrate the requisite degrees of justifiability, transparency and intelligibility; and

b) the Panel erred by improperly substituting its own reasons and justification for the decision to terminate Burjoski's presentation.

91. On appeal from a judicial review decision, the role of an appellate court is to determine whether the lower court selected and applied the correct standard of review. The

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[84] *Carolyn Burjoski v. Waterloo Region District School Board*, 2023 ONSC 6506 at paragraph 44 (Div Ct.), **MPMR, Tab C, para. 44.**

selection of the appropriate standard of review, and the determination of whether it was met, are both questions of law to which no deference is owed.[85]

92. A reviewing court's selection and application of the standard of review is reviewable for correctness. The appellate court effectively steps into the shoes of the lower court and focuses on the administrative decision.[86]

93. Burjoski submits that for the following reasons, the Divisional Court erred in concluding that the Chair's decision to terminate her presentation was "not unreasonable". This amounts to an error of law, reviewable by this Court on the correctness standard.

94. **First**, as argued above, Chairperson Piatkowski's decision to terminate Burjoski's presentation did not bear the hallmarks of reasonableness – transparency, intelligibility and justifiability – and was not justified in relation to the relevant factual and legal constraints bearing on the decision.[87] There was no actual justification for the Chair's decision, nor did the Board attempt to justify the decision either.

95. Simply put, the Chair's decision to silence Burjoski was not rational. There is no way to trace his reasoning without encountering a "fatal flaw" in his logic. There is no reasonable way to be satisfied that there is a line of analysis within the given reasons (i.e. the Chair's explanation) that could reasonably lead him from the evidence before him to the conclusion at which he arrived.[88]

96. Further, the internal rationality of the Chair's decision ought to have been called

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[85] *British Columbia (Superintendent of Motor Vehicles) v. Datta*, 2023 BCCA 440 at paragraph 28 (CA).
[86] *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at paragraph 10 (SCC).
[87] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paragraph 99 (SCC). [*Vavilov*]
[88] *Ibid* at paragraph 102 (SCC).

into question by the Panel, since it exhibited logical fallacies and was not justified in relation to the constellation of law and facts that were relevant to the decision.[89] In short, there was no way for any reasonable person to have extrapolated, from the remarks that Burjoski had made up to the point that she was silenced, that she had violated or would violate the *Code*, and that therefore the only course of action was to terminate her presentation. Again, as Justice Ramsay observed in *Burjoski (Anti-SLAPP)*, Burjoski did not violate the *Code* during her remarks, since the *Human Rights Code* does not prohibit public discussion of anything.[90]

97. While the Divisional Court ought to have found that the decision to terminate Burjoski's presentation was unreasonable, it failed to do so. Justice Stewart held only, at paragraphs 30 and 33:

> The WRDSB made no finding that Burjoski breached the *Human Rights Code*. The Chair merely referenced that statute and expressed concerns that Burjoski's comments were becoming problematic. It was reasonable for him to do so.
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> […]
>
> In making its decision, the WRDSB sought to achieve, and did achieve, a reasonable balance between Burjoski's *Charter* right to free expression and the objective of its Bylaws, its Equity and Inclusion Policy, the *Education Act*. It prioritized the maintenance of a safe and inclusive school environment for its community members and was in accordance with the requirements of reasonableness as set out in *Vavilov*.

98. With respect, there is no support for these findings. There is no adequate rationale provided by the Divisional Court as to why or how the Chair was justified in terminating Burjoski's presentation on the strength of an unfounded "*concern*" that her comments

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[89] *Vavilov* at paragraphs 104 and 105 (SCC).
[90] *Burjoski (Anti-SLAPP)*, paragraph 3. **MPBOA, Tab 1, para. 3**.

"*were becoming problematic*". Moreover, there was no attempt made by the Panel to explain how the "*WRSDB sought to achieve, and did achieve, a reasonable balance between Burjoski's Charter right to free expression and the objective of its Bylaws, etc.*"

99. **Second**, the Divisional Court fell into error by substituting its own justification for the Chair's and the Board's decision to terminate Burjoski's presentation, in place of their own, flawed justification.

100. The Divisional Court's attempt to justify the decision by the Chair and the Board is found at paragraphs 36 and 39 of the Divisional Court's reasons, where Stewart J. wrote:

> The impact of the decision on Burjoski was relatively minimal. She was given an opportunity to speak about the library review process itself, as she requested to do in her request for delegation. It was only when she began to speak of topics irrelevant to those outlined in her request for a delegation that her presentation was interrupted with a warning. When she continued expressing her opinion about the content of books, and not the library review process, she was stopped by the Chair.
>
> […]
>
> I consider the process that was afforded to Burjoski was not unfair. She was given more than one opportunity to deliver her delegation on the topic approved in advance, but declined to do so even after she was reminded of its scope.[91]

101. With great respect, Justice Stewart's assessment was flawed. Stewart J. is clearly of the view that Burjoski's presentation was interrupted (and then ended) by the Chair only because she was *off topic*. This is simply not the case. The reality is that the Chair silenced Burjoski because he believed that she had violated or would violate the *Code*. This is a completely different rationale than the one provided by the Divisional Court to justify the termination of Burjoski's presentation.

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[91] *Carolyn Burjoski v. Waterloo Region District School Board*, 2023 ONSC 6506 at para. 36 and 39 (Div Ct.), **MPMR, Tab C, paras 36, 39.**

102. In *Vavilov*, at paragraph 96, the Supreme Court of Canada held:

> [I]t is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome.[92]

103. Ultimately, the Divisional Court fell into error by concluding that Burjoski's presentation was reasonably terminated by Chairperson Piatkowski because he had determined that she was *off topic*. However, this was simply not the case: rather, her presentation had been unreasonably terminated based on an unfounded concern that she had violated or might violate the *Human Rights Code*.

104. The Divisional Court's error in this regard clearly runs afoul of the Supreme Court of Canada's admonition in *Vavilov*, *Delta Airlines* and *A.T.A.* against "*disregarding the flawed basis for a decision and substituting its own justification for the outcome*", and warrants intervention by this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: January 19, 2024

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[92] *Vavilov* at paragraph 96. See also *Delta Air Lines Inc. v. Lukacs*, 2018 SCC 2 at paragraphs 26-28 (SCC) [*Delta Air Lines*]; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paragraphs 53-54 (SCC) [*A.T.A.*].

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)

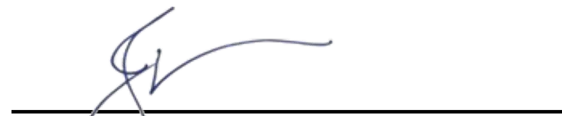
APPLICATION UNDER Rules 14.05(2), 37 and 68 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194 and sections 2(1) and 6(1) of the *Judicial Review Procedure Act*, RSO 1990, c, J.1

CERTIFICATE

Pursuant to Rule 61.03(2)(b) of the *Rules of Civil Procedure*, the moving party, Carolyn Burjoski, certifies that:

(a) the moving party's counsel estimates that 0 minutes will be required for his or her oral argument, not including any reply, as this motion is to be heard in writing.

Date: January 19, 2024



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SCHEDULE "A" – LIST OF AUTHORITIES

	Case Law:
1.	*A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61
2.	*Agnew v. The Manitoba Dental Association*, 2023 MBKB 98 at paragraph 43
3.	*British Columbia (Superintendent of Motor Vehicles) v. Datta*, 2023 BCCA 440
4.	*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65
5.	*Canada Mortgage & Housing Corp. v. Iness* (2002), 220 DLR
6.	*Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2
7.	*Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025
8.	*Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority*, 2018 BCCA 344
9.	*Canadian Centre for Bio-Ethical Reform v. Peterborough (City)*, 2016 ONSC 1972
10.	*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69
11.	*Carolyn Burjoski v. Waterloo Region District School Board*, 2023 ONSC 6506
12.	*Citizens for Accountable and Responsible Education Niagara Inc. v. Niagara District School Board*, 2015 ONSC 2058
13.	*Del Grande v. Toronto Catholic District School Board*, 2023 ONSC 349
14.	*Delta Air Lines Inc. v. Lukacs*, 2018 SCC 2
15.	*Doré v. Barreau du Québec*, 2012 SCC 12
16.	*E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893
17.	*Guelph and Area Right to Life v. City of Guelph*, 2022 ONSC 43 1025

18.	*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927
19.	*Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32
20.	*Lethbridge and District Pro-Life Association v Lethbridge (City)*, 2020 ABQB 654
21.	*Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12
22.	*McCarthy v. Whitefish Lake First Nation #128*, 2023 FC 220
23.	*Northern Regional Health Authority v. Horrocks*, 2021 SCC 42
24.	*Ontario (Minister of Transportation) v. 1520658 Ontario Inc.*, 2010 ONCA 32
25.	*R. v. Brown* (2003), 64 OR (3d) 161
26.	*Reilly v. Zacharuk*, 2017 ONSC 7216
27.	*Right to Life Association of Toronto v. Canada (Employment, Workforce, and Labour)*, 2021 FC 1125
28.	*Sault Dock Co. v. Sault Ste. Marie (City)*, [1973] 2 OR 479
29.	*Schoelly v. College of Massage Therapists of Ontario*, 2020 ONSC 1348
30.	*U.G.C.W., Local 246 v. Dominion Glass Co.*, [1973] 2 OR 763
	Secondary Sources:
31.	Paul Daly, "The Doré Duty: Fundamental Rights in Public Administration", 2023 CanLIIDocs 1256

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.

Excerpts from Schedule "B":

Courts of Justice Act

R.S.O. 1990, CHAPTER C.43

Consolidation Period: From June 8, 2023 to the e-Laws currency date.

Last amendment: 2023, c. 12, Sched. 3.

Section 6(1)(a)

Court of Appeal jurisdiction

6 (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

Education Act

R.S.O. 1990, CHAPTER E.2

Consolidation Period: From December 31, 2023 to the e-Laws currency date.

Last amendment: 2023, c. 11, Sched. 2, s. 1-33.

SECTION 207

ACCESS TO MEETINGS AND RECORDS

Open meetings of boards

207 (1) Subject to subsections (2) and (2.1), the meetings of a board and the meetings of a committee of the board, including a committee of the whole board, shall be open to the public, and no person shall be excluded from a meeting that is open to the public except for improper conduct. R.S.O. 1990, c. E.2, s. 207 (1); 2014, c. 13, Sched. 9, s. 19 (1).

Closing of certain committee meetings

(2) A meeting of a committee of a board, including a committee of the whole board, may be closed to the public when the subject-matter under consideration involves,

(a) the security of the property of the board;

(b) the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board or a pupil or his or her parent or guardian;

(c) the acquisition or disposal of a school site;

(d) decisions in respect of negotiations with employees of the board; or

(e) litigation affecting the board. R.S.O. 1990, c. E.2, s. 207 (2); 2021, c. 4, Sched. 11, s. 7 (1).

Closing of meetings re certain investigations

(2.1) A meeting of a board or of a committee of a board, including a committee of the whole board, shall be closed to the public when the subject-matter under consideration involves an ongoing investigation under the *Ombudsman Act* respecting the board. 2014, c. 13, Sched. 9, s. 19 (2).

Exclusion of persons

(3) The presiding officer may expel or exclude from any meeting any person who has been guilty of improper conduct at the meeting. R.S.O. 1990, c. E.2, s. 207 (3).

Inspection of books and accounts

(4) Any person may, at all reasonable hours, at the head office of the board inspect the minute book, the audited annual financial report and the current accounts of a board, and, upon the written request of any person and upon the payment to the board at the rate of 25 cents for every 100 words or at such lower rate as the board may fix, the secretary shall furnish copies of them or extracts therefrom certified under the secretary's hand. R.S.O. 1990, c. E.2, s. 207 (4).