

**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 (Responding Party)

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**FACTUM OF THE RESPONDING PARTY  
WATERLOO REGION DISTRICT SCHOOL BOARD  
(Motion for Leave to Appeal)**

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February 13, 2024

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## PART I – OVERVIEW

1. The moving party Carolyn Burjoski seeks leave to appeal a decision of the Divisional Court. The Divisional Court dismissed Ms. Burjoski’s application for judicial review of a democratically rendered decision of the Waterloo Region District School Board (the **WRDSB**), which sustained the Chair’s ending of Ms. Burjoski’s delegation to a Committee of the Whole Meeting on January 17, 2022 (the **Meeting**).
2. Before commencing the delegation portion of the Meeting, the Chair reminded all delegates that their remarks were to be confined to the issue they were addressing. The Chair further advised that “any discourteous language referenced to personalities or statements contravening the Ontario *Human Rights Code* or the *Charter of Rights and Freedoms* [would] not be tolerated.”<sup>1</sup>
3. Ms. Burjoski appeared as a delegate at the Meeting to speak about the WRDSB’s library review process. During her delegation, she began criticizing specific books which discuss gender identity and are available in WRDSB libraries. The Chair of the WRDSB’s Board of Trustees (the **Chair**) cautioned Ms. Burjoski not to stray into problematic territory.<sup>2</sup> Following this caution, Ms. Burjoski was allowed to continue with her delegation. She then referenced a youth book character who was born female and now identifies as male and stated that this “book makes very serious medical interventions seem like an easy cure for

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<sup>1</sup> Transcript of excerpt of Video of Committee of the Whole Meeting dated January 17, 2022 (10:00-11:30 of video) [“Transcript 1”], Moving Party’s Motion Record [“MPMR”] Tab E-5.

<sup>2</sup> Transcript of excerpt of Video of Committee of the Whole Meeting dated January 17, 2022 (20:48-38:32 of video) [“Transcript 2”] at 4-5, MPMR Tab E-6.

emotional and social distress.”<sup>3</sup> At this point, the Chair intervened again to end her presentation.<sup>4</sup>

4. After a point of order, the WRDSB Trustees voted 5-4 to uphold the Chair’s ending of Ms. Burjoski’s delegation (the **Decision**). It is this Decision, made by democratically elected officials, determined by vote, that was upheld by the Divisional Court and now forms the subject of this motion for leave to appeal. While the Chair’s ending of Ms. Burjoski’s delegation was the subject of the Decision of the WRDSB, the two should not be conflated.
5. In dismissing Ms. Burjoski’s application for judicial review, the Divisional Court concluded that the WRDSB Decision “sought to achieve, and did achieve, a reasonable balance between Burjoski’s *Charter* right to free expression and the objectives of [the WRDSB’s] Bylaws, its Equity and Inclusion Policy, the *Education Act*.”<sup>5</sup>
6. The Divisional Court similarly found that “the process that was afforded to Burjoski was not unfair” in light of the procedures surrounding requests for delegation.<sup>6</sup> Applying the “closed mind” test, the Panel further held that there is “no basis...upon which any finding of a reasonable apprehension of bias, or any actual bias, on the part of the WRDSB could be justified”, as “having formed a reason for voting a certain way is not the same as being biased before the vote is cast.”<sup>7</sup>

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<sup>3</sup> Transcript 2, *supra* at 5, MPMR Tab E-6.

<sup>4</sup> Transcript 2, *supra* at 5-7, MPMR Tab E-6.

<sup>5</sup> Reasons for Decision of Justice E. Stewart, Justice Locono and Justice Williams dated November 29, 2023 [“Reasons”] at para 33, MPMR Tab C.

<sup>6</sup> Reasons, *supra* at paras 36-39, MPMR Tab C.

<sup>7</sup> Reasons, *supra* at para 43, MPMR Tab C.

7. Ms. Burjoski now seeks leave to appeal to this Court. Ms. Burjoski has failed to raise an arguable ground of appeal of sufficient public importance. Leave to appeal should be denied for the following reasons:

- a) The Divisional Court made no legal errors. None of Ms. Burjoski's proposed issues for appeal raise an arguable ground of appeal.
- b) The proposed appeal does not raise any legal issues of public importance. There is limited precedential value in the decision of the Divisional Court. The Divisional Court simply found that in the specific context of this case, the Decision to uphold the Chair's determination to stop Ms. Burjoski's delegation being made by elected officials by vote during a live, ongoing and public meeting, was reasonable. The decision of the Divisional Court does not purport to interpret, clarify, or settle a contentious point of law for the future.
- c) The Moving Party's reliance on Justice Ramsay's decision with respect to an anti-SLAPP motion is misplaced. Justice Ramsay's decision is irrelevant to this motion for leave to appeal, and is currently under appeal in this Court, as of right.<sup>8</sup> Among the grounds of appeal is Justice Ramsay's legal error in purporting to determine the reasonableness of the WRDSB's Decision,<sup>9</sup> despite the fact that this issue was not before him—it was before the Divisional Court panel alone.

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<sup>8</sup> *Courts of Justice Act*, RSO 1990, c C.43, s 137.3; Court File No. COA-23-CV-1382.

<sup>9</sup> *Burjoski v Waterloo Region District School Board*, 2023 ONSC 6528 at paras 16, 23, Moving Party's Book of Authorities Tab 1.

## PART II – STATEMENT OF FACTS

### A. Objectives, Powers, and Statutory Context of the WRDSB

#### a. The *Education Act*

8. The WRDSB is governed by Ontario’s *Education Act*, under which it “has all the powers and shall perform all the duties that are conferred or imposed on it under this or any other Act.”<sup>10</sup> Section 169.1 of the *Education Act* imposes a number of statutory duties on school boards. These include duties to: “promote a positive school climate that is inclusive and accepting of all pupils, including pupils of any ... sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability”; and to “develop and maintain policies and organizational structures that promote” these goals.<sup>11</sup>
9. Section 218.1 imposes certain statutory duties on school board trustees. These include duties to: (i) carry out their responsibilities “in a manner that assists the board in fulfilling its duties under this *Act*, the regulations and the guidelines issued under this *Act*, including, but not limited, to the board’s duties under section 169.1”; (ii) uphold the implementation of any board resolution after it is passed by the board; and (iii) “maintain focus on student achievement and well-being”.<sup>12</sup>

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<sup>10</sup> *Education Act*, RSO 1990, c E2, s 58.5(1) [*Education Act*]; *In the Matter of s. 10 of the Education Act*, 2016 ONSC 2361 at paras 46, 55-58 (Div Ct) [*S. 10 of the Education Act*].

<sup>11</sup> *Education Act*, *supra* at s 169.1(1).

<sup>12</sup> *Education Act*, *supra* at s 218.1(a,e,g).

## b. WRDSB Bylaws

10. The WRDSB is composed of eleven elected Trustees.<sup>13</sup> The Trustees are responsible for serving the interests and needs of the general public, articulating the WRDSB’s vision for education, and advocating for a “strong and vigorous public education system that benefits the learners and communities served within the Region.”<sup>14</sup>
11. The WRDSB has codified certain operational matters in its *Bylaws for the Waterloo Region District School Board of Trustees* (the **Bylaws**), including the procedures for: delegations, committees and committee members, public meetings, and Board meetings. The Bylaws set out the Rules of Order, including the procedure for addressing points of order as they are raised: “The decision of the Chair on the point of order shall be overruled only by a majority vote of the Trustees present in favour thereof.”<sup>15</sup>
12. The Bylaws also contain delegation procedures outlining how delegates may make submissions at meetings. Those wishing to delegate must register in advance of the meeting<sup>16</sup> and provide a brief summary of the issue being presented and any relevant recommendations.<sup>17</sup> Not unlike the responsibilities of Trustees,<sup>18</sup> delegates also have expectations that align with WRDSB’s goals of promoting respect and inclusivity:

Delegates are expected to refrain from the use of abusive or derogatory language at all times and the Chair may expel or exclude from any meeting

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<sup>13</sup> Bylaws- Board of Trustees- Waterloo Region District School Board at s 2.3 [“WRDSB Bylaws”], MPMR Tab E-7.

<sup>14</sup> WRDSB Bylaws, *supra* at s 4.2, MPMR Tab E-7.

<sup>15</sup> WRDSB Bylaws, *supra* at s 9.15, MPMR Tab E-7.

<sup>16</sup> WRDSB Bylaws, *supra* at s 14.2, MPMR Tab E-7.

<sup>17</sup> WRDSB Bylaws, *supra* at s 14.3, MPMR Tab E-7.

<sup>18</sup> WRDSB Bylaws, *supra* at s 5, MPMR Tab E-7.



any person(s) who engage in this or any other form of improper conduct...Courtesy and respect for others must be displayed at all times.<sup>19</sup>

13. The Chair of the Meeting is responsible for maintaining order and seeing that appropriate decorum is maintained.<sup>20</sup>

**c. WRDSB Policies**

14. Pursuant to the WRDSB’s Human Rights Policy—which applies to students, employees, trustees, parents, and anyone who works with the WRDSB—there is a general commitment “to providing working and learning environments that are free of discrimination and harassment, where all individuals are treated with respect and dignity, and can thrive and fully contribute.”<sup>21</sup> The Human Rights Policy defines a “poisoned environment” as one

created by comments or conduct that create a discriminatory work environment. The comments or conduct need not be directed at a specific person, and may be from any person, regardless of position or status. A single comment or action, if sufficiently serious, may create a poisoned environment.<sup>22</sup>

15. The WRDSB’s Equity and Inclusion Policy recognizes that the WRDSB “is committed to the principles of equity through inclusive programs, curriculum, services, and operations in accordance with the Ontario *Human Rights Code* (the Code), the *Education Act*, and the *Canadian Charter of Rights and Freedoms*.”<sup>23</sup> It mandates the WRDSB to “identify and remove systemic and attitudinal barriers and biases to learning and employment opportunities that have a discriminatory effect on any individual”;<sup>24</sup> and emphasizes the

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<sup>19</sup> WRDSB Bylaws, *supra* at s 14.9, MPMR Tab E-7.

<sup>20</sup> WRDSB Bylaws, *supra* at s 9.16, MPMR Tab E-7.

<sup>21</sup> WRDSB Board Policy 1017 - Human Rights, dated April 26, 2021, at s 1 [“Human Rights Policy”], MPMR Tab E-10.

<sup>22</sup> Human Rights Policy, *supra* at s 5.4, MPMR Tab E-10.

<sup>23</sup> WRDSB Board Policy 1008- Equity and Inclusion, dated April 2019, at s 1.1 [“Equity and Inclusion Policy”], MPMR Tab E-8.

<sup>24</sup> Equity and Inclusion Policy, *supra* at s 1.3, MPMR Tab E-8.

WRDSB’s duty to “provide a safe, inclusive environment free from inequity, discrimination and harassment...”,<sup>25</sup> including by incorporating “the principles of equity and inclusive education into all aspects of its operations...”.<sup>26</sup> Furthermore, the Equity and Inclusion Policy identifies that all “partners in education” “have a critical role to play in leading the identification and removal of bias [and] discrimination”,<sup>27</sup> and commits to “the principle that every person within the school community is entitled to a respectful, positive school climate... free from all forms of discrimination and harassment.”<sup>28</sup>

### **B. Ms. Burjoski’s Delegation Request**

16. On November 21, 2021, Ms. Burjoski requested to make a delegation before the WRDSB.<sup>29</sup> Notably absent in her request was any suggestion that she would be speaking about the content of specific books. On December 20, 2021, Ms. Burjoski was advised that only one of her two requested topics was approved—she would be permitted to speak on “transparency regarding the library and classroom teacher's collections culling project”,<sup>30</sup> but not on her request to address the WRDSB’s policy against teachers disclosing a student’s chosen pronouns to their parents.<sup>31</sup>

### **C. The Meeting and Decision**

17. Before commencing the delegation portion of the Meeting, the Chair reminded all delegates that their remarks were to be confined to the issue they were addressing. The Chair further

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<sup>25</sup> Equity and Inclusion Policy, *supra* at s 2.1, MPMR Tab E-8.

<sup>26</sup> Equity and Inclusion Policy, *supra* at s 2.1.1, MPMR Tab E-8.

<sup>27</sup> Equity and Inclusion Policy, *supra* at s 2.1.2, MPMR Tab E-8.

<sup>28</sup> Equity and Inclusion Policy, *supra* at s 2.1.6, MPMR Tab E-8.

<sup>29</sup> Delegation Request dated November 21, 2021 submitted by Carolyn Burjoski [“Delegation Request”], MPMR Tab E-1.

<sup>30</sup> Delegation Request, *supra*, MPMR Tab E-1.

<sup>31</sup> Email exchange between S. Reidel and C. Burjoski dated November 24, 2021 – January 13, 2022 regarding Delegation Request [“Email re Delegation Request”], MPMR Tab E-2.

advised that “any discourteous language referenced to personalities or statements contravening the Ontario *Human Rights Code* or the *Charter of Rights and Freedoms* [would] not be tolerated.”<sup>32</sup> This caution is not mentioned in the factum of the Moving Party.

18. Ms. Burjoski was the second speaker to make a delegation pursuant to a Trustee’s motion regarding library review. The Trustee’s motion recommended that “a consultation process be developed that would include students, staff, parents and community members participation in the library and classroom library review.”<sup>33</sup>
19. Ms. Burjoski began her delegation by commenting on the WRDSB’s intent to “cull” books that are “deemed harmful”. She noted that no information had been shared with teachers about the “philosophy” by which books would be judged.<sup>34</sup> However, the theme of Ms. Burjoski’s delegation rapidly changed towards criticizing books currently available in school libraries, as opposed to the “transparency” of the library review process as outlined in her delegation request.
20. Ms. Burjoski opined that some books in the school libraries “are inappropriate for young children.”<sup>35</sup> She further stated that “some of the books filling our libraries make it seem simple or even cool to take puberty blockers or opposite sex hormones.”<sup>36</sup> It was after this comment that the Chair expressed his concern, that he was “not sure exactly where [Ms. Burjoski was] headed”, and to keep in mind the *Human Rights Code*.<sup>37</sup>

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<sup>32</sup> Transcript 1, *supra*, MPMR Tab E-5.

<sup>33</sup> Notice and Agenda for Committee of the Whole Meeting January 17, 2022 at 106, MPMR Tab E-11.

<sup>34</sup> Transcript 2, *supra* at 2, MPMR Tab E-6.

<sup>35</sup> Transcript 2, *supra* at 3, MPMR Tab E-6.

<sup>36</sup> Transcript 2, *supra* at 4, MPMR Tab E-6.

<sup>37</sup> Transcript 2, *supra* at 4-5, MPMR Tab E-6.

21. Upon being permitted to continue her delegation following this warning, Ms. Burjoski persisted in voicing her opinion regarding the appropriateness of another book centered on transgender issues, as opposed to speaking on her approved topic of transparency in the library review process. She described the book as “misleading” and referenced a youth who was born female and now identifies as male and stated that this “book makes very serious medical interventions seem like an easy cure for emotional and social distress.”<sup>38</sup>
22. At this point, the Chair stopped Ms. Burjoski’s presentation out of concern about potential violation of the *Human Rights Code* and WRDSB delegation policies.<sup>39</sup> The Chair specifically noted that gender identity and gender expression are protected under the *Human Rights Code*.<sup>40</sup>
23. Trustee Mike Ramsay challenged the Chair’s determination to end Ms. Burjoski’s delegation and raised a point of order.<sup>41</sup> In accordance with the WRDSB’s Board Meeting procedures,<sup>42</sup> the Vice Chair presided over a vote of the Trustees with respect to whether the Chair’s decision to stop Ms. Burjoski’s delegation should be sustained. The Chair further explained his reasons for stopping Ms. Burjoski’s delegation, stating as follows:

We read the delegation procedure for a reason I don’t think in my three years on the Board we have ever had to stop a delegate from speaking, so 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.<sup>43</sup>

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<sup>38</sup> Transcript 2, *supra* at 5, MPMR Tab E-6.

<sup>39</sup> Transcript 2, *supra* at 5-7, MPMR Tab E-6.

<sup>40</sup> Transcript 2, *supra* at 6, MPMR Tab E-6.

<sup>41</sup> Transcript 2, *supra* at 6-7, MPMR Tab E-6.

<sup>42</sup> WRDSB Bylaws, *supra* at s 9.7, MPMR Tab E-7.

<sup>43</sup> Transcript 2, *supra* at 8, MPMR Tab E-6.

24. Trustee Ramsay responded with his argument about why he disagreed with the Chair's determination, and asked that Ms. Burjoski's delegation be permitted to continue.<sup>44</sup> The Trustees ultimately voted 5-4 in favour of sustaining the Chair's ending of Ms. Burjoski's delegation.<sup>45</sup> It is this Decision—the outcome of a vote—which forms the subject of the Application for Judicial Review.

#### **D. The Decision of the Divisional Court**

25. Ms. Burjoski brought an application for judicial review of the Decision before the Divisional Court. The Application was heard by the Divisional Court on June 5, 2023. In a unanimous decision released on November 29, 2023, the Divisional Court dismissed Ms. Burjoski's application in full.<sup>46</sup> The Panel rejected all of Ms. Burjoski's arguments:

- a) **Standard of Review:** The Divisional Court held that reasonableness applies as the standard of review for the Decision, whereas correctness applies to issues of procedural fairness.<sup>47</sup>
- b) **The reasonableness of the Decision:** The Divisional Court agreed with the WRDSB's submissions that, in light of the Chair's duty under the Bylaws to maintain order and decorum at meetings, the WRDSB policy on Equity and Inclusion, and the *Education Act*, the Decision "sought to achieve, and did achieve a reasonable balance between [the Moving Party's] *Charter* right to free expression" and these objectives.<sup>48</sup> The Decision was "ultimately about [Ms.]

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<sup>44</sup> Transcript 2, *supra* at 8-9, MPMR Tab E-6

<sup>45</sup> Transcript 2, *supra* at 16-17, MPMR Tab E-6.

<sup>46</sup> Reasons, *supra* at para 45, MPMR Tab C.

<sup>47</sup> Reasons, *supra* at para 21, MPMR Tab C.

<sup>48</sup> Reasons, *supra* at paras 27-28, 33, MPMR Tab C.

Burjoski’s choice of words”,<sup>49</sup> and was decided by democratic vote. The Divisional Court referred to Supreme Court of Canada jurisprudence which makes indisputably clear that there is no duty to give formal reasons for decisions made in these contexts.<sup>50</sup> The WRDSB was therefore not required to explain its *Doré* balancing, as such reasoning can be sufficiently deduced from the context of the Decision itself.<sup>51</sup>

- c) **Procedural Fairness:** The Divisional Court found that the process afforded to Ms. Burjoski was not unfair;<sup>52</sup> any procedural fairness owed to Ms. Burjoski was at the low end of the spectrum, given the relatively limited impact the Decision had on her.<sup>53</sup> The WRDSB ought to be given deference in both establishing and following its own procedures, such as requiring pre-approval of delegation topics and insisting that presenters stay within their approved scope.<sup>54</sup> Although the WRDSB does not prescribe a procedure for how to stop delegations that do not comport with its established process, it is permitted to do so in any manner not expressly forbidden by law.<sup>55</sup>
- d) **Reasonable Apprehension of Bias:** The Divisional Court applied the “closed mind” test to find that there was no basis upon which any finding of bias could be justified.<sup>56</sup> The Decision was made by five elected WRDSB members.<sup>57</sup> Statements

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<sup>49</sup> Reasons, *supra* at para 32, MPMR Tab C.

<sup>50</sup> Reasons, *supra* at paras 29, 31, MPMR Tab C.

<sup>51</sup> Reasons, *supra* at para 31, MPMR Tab C.

<sup>52</sup> Reasons, *supra* at para 39, MPMR Tab C.

<sup>53</sup> Reasons, *supra* at para 36, MPMR Tab C.

<sup>54</sup> Reasons, *supra* at paras 37-39, MPMR Tab C.

<sup>55</sup> Reasons, *supra* at para 38, MPMR Tab C.

<sup>56</sup> Reasons, *supra* at paras 42-44, MPMR Tab C.

<sup>57</sup> Reasons, *supra* at para 43, MPMR Tab C.

made after the fact may reflect a reason for voting a certain way, but this is not the same as being biased before a vote is cast.<sup>58</sup>

### PART III – ISSUES AND LAW

26. The sole issue on this motion is whether leave to appeal should be granted.

#### A. The Test for Leave to Appeal

27. Pursuant to s. 6(1)(a) of the *Courts of Justice Act*, an order of the Divisional Court can only be appealed to the Court of Appeal on a question of law or a question of mixed fact and law.<sup>59</sup>

28. The test for whether leave to appeal should be granted was set out by this Court in the well-known *Sault Dock* decision.<sup>60</sup> At the Court of Appeal, “[a]s at the Supreme Court, the primary focus is the public importance of the proposed appeal and not the underlying merits of the case.”<sup>61</sup> On a leave motion, the moving party must raise an arguable question of law or mixed fact and law dealing with (i) the interpretation of a statute or regulation, including its constitutionality; (ii) the interpretation, clarification or propounding on some general rule or principle of law; or (iii) the interpretation of an agreement or by-law that involves a question of public importance.<sup>62</sup>

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<sup>58</sup> Reasons, *supra* at para 43, MPMR Tab C.

<sup>59</sup> *Courts of Justice Act*, RSO 1990, c C.43, s. 6(1)(a).

<sup>60</sup> *Re Sault Dock Co. Ltd. and City of Sault Ste. Marie*, 1972 CanLII 572 (ON CA) [*Sault Dock*].

<sup>61</sup> Geoff R Hall, “Applications for Leave to Appeal: The Paramount Importance of Public Importance” (1999) 22 Adv Q 87 at 95, Respondent’s Book of Authorities [“RBOA”] Tab 1.

<sup>62</sup> *Ontario (Minister of Transportation) v. 1520658 Ontario Inc.*, 2010 ONCA 32 at para 12, citing *Sault Dock*, *supra*.

29. If the proposed issues are of primary significance to the parties alone and would not settle a question of general interest to the public, leave should not be granted.<sup>63</sup> The mere possibility that there may be error is not generally a ground in itself for granting leave to appeal.<sup>64</sup>
30. One factor that informs public importance is whether the court below applied existing legal principles or established new ones. Where a lower court is “not called upon nor purported to establish or extend any new proposition of law or practice or to modify or overturn any established one” and instead applies “existing propositions of law to the circumstances”, there is no broader public importance that justifies an appellate court granting leave to appeal.<sup>65</sup>

#### **B. The Proposed Appeal Does Not Raise Legal Issues of Public Importance**

31. On a motion for leave to appeal, the moving party must establish that the appeal itself would involve matters beyond the interests of the parties:

[T]he importance of the decision to the individual is not to be the sole or perhaps the paramount consideration. It is rather the impact which the decision on the question will have **on the development of the jurisprudence of Ontario**. If the resolution of the question would largely have significance only to the parties and would not settle for the future a question of general interest to the public or a broad segment of the public, the requirements to obtain leave will not have been met.<sup>66</sup> [emphasis added]

32. This case does not raise any jurisprudential issues. The law concerning all of the legal issues raised by Ms. Burjoski is well-established. The Divisional Court did not deviate

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<sup>63</sup> *Sault Dock, supra*.

<sup>64</sup> *Sault Dock, supra* at paras 9-10.

<sup>65</sup> *Rankin v McLeod, Young, Weir Ltd.* 1986 CanLII 2749 (ON SC). See also *Granite Insurance Company v Pembridge Insurance Company et al.*, 2015 ONSC 1251 (Div Ct) at para 35.

<sup>66</sup> *Sault Dock, supra*; see also *Optiva Inc. v Tbaytel*, 2021 CanLII 78438 (ON CA), at paras 12-13.



from well-established law, nor did it break any new jurisprudential ground. The Divisional Court applied well-established administrative law principles to the factual matrix before it and did so in a reasonable manner consistent with extant binding authorities from Canada's highest court. Further judicial intervention is therefore unwarranted.

33. There is no evidence that the legal issues raised here are prevalent matters of public importance, impacting anyone beyond Ms. Burjoski herself. In fact, the only evidence relating to prevalence is to the contrary: after stopping Ms. Burjoski's delegation, the Chair noted that in his three years on the WRDSB, he does not recall ever before having to stop a delegate from speaking.<sup>67</sup> There is no evidence that delegations at school board meetings are regularly ended.
34. The Moving Party was entitled to seek leave to file evidence regarding public importance. However, she chose not to do so, and her window of opportunity is now closed.<sup>68</sup> The factum delivered by the Moving Party is entirely silent on how the proposed appeal involves a question of public importance. The motion for leave to appeal ought to be dismissed on this basis alone.
35. The Moving Party relies on Justice Ramsay's decision (dismissing an anti-SLAPP motion in Ms. Burjoski's defamation action) to suggest that the test for leave to appeal is met, without articulating how Justice Ramsay's decision is relevant to a motion for leave to

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<sup>67</sup> Transcript 2, *supra* at 8, MPMR Tab E-6.

<sup>68</sup> *Iness v Canada Mortgage and Housing Corp.*, 2002 CanLII 15707 (ON CA) at para 15: "In the future, it seems to me that the party seeking to adduce evidence on the matter of public importance **should file a motion to admit evidence on the matter and a supporting affidavit with the application for leave to appeal**" [emphasis added]. See also *Ontario (Minister of Transportation) v. 1520658 Ontario Inc.*, 2010 ONCA 32 at paras 17-20.

appeal. Justice Ramsay’s decision is entirely irrelevant to whether leave to appeal should be granted in this case.

### C. The Divisional Court Made No Legal Errors

36. In her factum, Ms. Burjoski alleges that the Divisional Court made numerous errors of law. Ms. Burjoski has put forward three issues to be addressed if leave to appeal is granted.<sup>69</sup> None of these proposed issues meet the test for leave to appeal from *Sault Dock*, as they do not raise an arguable ground of appeal on an issue of public importance. Below, the WRDSB has responded to what appear to be the three main grounds of appeal raised by Ms. Burjoski in her factum for leave to appeal.

#### i. The Divisional Court properly determined that the WRDSB engaged in a *Doré* balancing appropriate to the circumstances (Moving Party’s Alleged Error #1)

37. The factum of the Moving Party suggests that the Divisional Court erred in failing to recognize that the WRDSB did not engage in a *Doré*<sup>70</sup> analysis.<sup>71</sup> Ms. Burjoski argues that, in circumstances where a decision maker refuses or fails to perform the *Doré* analysis required of them, a correctness standard of review applies, not a reasonableness standard.<sup>72</sup>

38. The Moving Party incorrectly asserts that the Divisional Court “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.”<sup>73</sup> The Divisional

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<sup>69</sup> Factum of the Moving Party (Motion for Leave to Appeal) at para 31 [“MP Factum”].

<sup>70</sup> *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*].

<sup>71</sup> MP Factum, *supra* at para 41.

<sup>72</sup> MP Factum, *supra* at paras 44-46, citing *Canadian Broadcasting Corporation v Ferrier*, 2019 ONCA 1025 at para 35.

<sup>73</sup> MP Factum, *supra* at para 3.

Court committed no such error. The Court recognized the applicability of *Doré* in paragraph 24 of its decision, and held at paragraph 33:

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 objectives 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*.<sup>74</sup>

39. In effect, the Moving Party is arguing that the Decision does not reflect a *Doré* analysis. The Decision under review is that of the WRDSB—as determined by a vote of democratically elected trustees. The Decision is informed by the entirety of the process that took place ahead of the vote, including the Chair’s explanation for ending the delegation. The context in which the Decision was made is important to consider when determining the necessity and/or formality of reasons required to justify the Decision. The Supreme Court of Canada held in *Trinity Western* that decisions which engage *Charter* values (which would therefore otherwise require more fulsome reasons illuminating a *Doré* analysis) do not require formal reasons if made via democratic process by elected officials.<sup>75</sup> Rather, the rationale may be “deduced from the debate, deliberations and the statements of policy”<sup>76</sup> that gave rise to the decision in question.
40. Considering the context in which the decision was made, the Divisional Court found that the WRDSB engaged in an appropriate consideration of Ms. Burjoski’s *Charter* right to free expression. A correctness standard of review would only be warranted if there had been no such consideration.

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<sup>74</sup> Reasons, *supra* at para 33, MPMR Tab C.

<sup>75</sup> *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, at paras 53-55 [*Trinity Western*].

<sup>76</sup> *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2 at para 29, cited with approval by *Trinity Western*, *supra* at para 53.

41. The Moving Party relies on several cases<sup>77</sup> to argue that the WRDSB failed to adequately engage in a *Doré* analysis (and in turn, that correctness review should apply). All of these cases—*McCarthy*, *Lethbridge*, *Guelph*, and *South Coast*—are readily distinguishable from the context presently before this Court, as they all involve insufficient **written** reasons given by an administrative decision-maker. Crucially, none of them contemplate a decision made by democratic vote, nor a decision made orally during a live public meeting.
42. While *McCarthy* is about an applicant’s ability to participate in an election, the decisions under review were not made by a democratic vote. Rather, the decisions under review (which decided that the applicant was ineligible to vote in an election) had been provided in writing to the applicant.<sup>78</sup> The decisions denying the applicant the ability to vote were ultimately found to be unlawful as they were based in unconstitutional policy, and did not attempt to balance the applicant’s *Charter* s. 15 rights. This context is clearly distinct from the context before this Court.
43. In *Lethbridge*, the respondent City’s solicitor issued extensive written reasons for rejecting the applicant’s proposed pro-life advertisements for display on public transit.<sup>79</sup> Missing from the Moving Party’s use of this case is the fact that the Court of Queen’s Bench of Alberta specifically noted that the “standard of review must be applied ‘having a realistic view of the decision maker involved’”.<sup>80</sup> Given that the decision maker in *Lethbridge* was

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<sup>77</sup> MP Factum, *supra* at paras 25-29, citing: *McCarthy v. Whitefish Lake First Nation #128*, 2023 FC 220 [*McCarthy*]; *Lethbridge and District Pro-Life Association v Lethbridge (City)*, 2020 ABQB 654 [*Lethbridge*]; *Guelph and Area Right to Life v. City of Guelph*, 2022 ONSC 43 [*Guelph*]; *Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority*, 2018 BCCA 344 [*South Coast*].

<sup>78</sup> *McCarthy*, *supra* at paras 25-29.

<sup>79</sup> *Lethbridge*, *supra* at paras 52-56.

<sup>80</sup> *Lethbridge*, *supra* at para 106, citing *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 154 at para 25 [*Grande Prairie*].

a solicitor providing written reasons, there was a heightened expectation for *Charter* analysis.<sup>81</sup> The Court in *Lethbridge* distinguished the Alberta Court of Appeal decision in *Grand Prairie* in which an administrator lacking a comparable degree of *Charter* knowledge decided to reject a pro-life transit advertisement.<sup>82</sup>

44. The Moving Party also relies on *Guelph* and *South Coast*, both of which similarly deal with pro-life advertisements rejected for display on public transit. Again, both cases are distinguishable as decisions made in writing,<sup>83</sup> rather than orally, by vote of democratically elected officials, and/or in the context of a live, ongoing, public meeting. In *South Coast*, the British Columbia Court of Appeal concluded that the decision-maker's rejection of the advertisement could not stand, as he "did not provide any meaningfully reviewable reasons."<sup>84</sup> Yet the BCCA acknowledged that the adequacy of reasons varies by context:

I am not suggesting a decision-maker such as Mr. Beaudoin is obligated to provide reasons comparable to those a judge might provide. However, the decision must allow an advertiser to understand why its advertisement has been rejected. "[A] handful of well-chosen words can suffice".<sup>85</sup>

45. In *Guelph*, the respondent City sought to rely on a determination by Advertising Standards Canada (referred to as "Ad Standards") that certain advertisements had breached the Canadian Code of Advertising Standards, as a reason not to permit the advertisements on City transit. The Divisional Court acknowledged that in "reviewing a decision for reasonableness, the Court should take account of the context in which the decision was made."<sup>86</sup> Unlike the decision of the Divisional Court in the present case, the Court held

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<sup>81</sup> *Lethbridge*, *supra* at para 107.

<sup>82</sup> *Lethbridge*, *supra* at paras 106-107, citing *Grande Prairie*, *supra* at paras 25, 38.

<sup>83</sup> *Guelph*, *supra* at paras 27, 33, 35-38; *South Coast* at para 15.

<sup>84</sup> *South Coast*, *supra* at para 60.

<sup>85</sup> *South Coast*, *supra* at para 55, citing *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158 at para 17(b).

<sup>86</sup> *Guelph*, *supra* at para 73.

that the respondent City had failed to engage in the necessary *Doré/Loyola* analysis by simply relying on a ruling by Ad Standards that the advertisements ought not be permitted.

46. None of the cases relied on by the Moving Party are at all analogous to the specific context presently before this Court: a decision made via democratic process by a group of elected officials. The Supreme Court of Canada addresses this context in *Trinity Western*, which is not mentioned in the Moving Party’s factum. In the present context of a decision made orally, by vote of elected officials, during a live, ongoing, and public meeting, it would be unrealistic and impractical to expect reasons beyond the commentary and deliberation that occurred—a reality supported by the Supreme Court of Canada’s decision in *Trinity Western*.
47. None of the authorities relied on by the Moving Party consider the application of *Doré* in the education context. The education context was considered by the Nova Scotia Court of Appeal in *Bonitto v Halifax Regional School Board*.<sup>87</sup> The Court held that a principal’s decision to prohibit a parent from distributing religious materials on school premises was reasonable under *Doré*, as it represented a proportionate balancing of the school’s objectives and of the appellant’s *Charter*-protected religious freedoms.<sup>88</sup>
48. Another authority which applied *Doré* in the education context is the decision in *Gillies v Bluewater District School Board*.<sup>89</sup> In *Gillies*, the respondent school board provided sparse written reasons in support of their decision to deny a delegation request in advance of a school board meeting.<sup>90</sup> The Divisional Court in *Gillies* characterized the proposed

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<sup>87</sup> *Bonitto v. Halifax Regional School Board*, 2015 NSCA 80 [*Bonitto*], leave to SCC denied (2016 CanLII 7596).

<sup>88</sup> *Bonitto*, *supra* at para 89.

<sup>89</sup> *Gillies v. Bluewater District School Board*, 2023 ONSC 1625 (Div Ct) [*Gillies*].

<sup>90</sup> *Gillies*, *supra* at paras 22-24.

delegation as “an attack on the Trans Movement,” advancing “the view that transgender children don’t exist.”<sup>91</sup> The Divisional Court emphasized the relationship between the institutional context, the nature of the decision, and the extent of reasons that can therefore be expected:

In considering the Board’s decision **within the institutional context in which it was made, one could not expect Ms. Sims to embark upon a nuanced consideration of the *Doré/Loyola* framework in her email** to the applicant. Furthermore, the decision itself did not demand such an exercise. It was an extremely simple, binary decision: permit the presentation to be made or not. The reasons why it would be contrary to the laws and policies that constrain the Board to do so are, as already observed, both overwhelming and self-evident.

[...]

Notwithstanding the sparse nature of the Board’s reasons, we are satisfied that the decision, **considered holistically and in its context**, “reflects a proportionate balancing of the *Charter* protections at play”. This is a situation, in our view, where **the dots may be readily connected**, and the direction in which those lines are headed is self-evident.<sup>92</sup>

49. Similar to *Gillies*, the Decision before the WRDSB was also binary: to stop Ms. Burjoski’s presentation or allow her to proceed. In determining whether the Decision was reasonable, the question before the Divisional Court was whether the Decision fell “within a range of reasonable outcomes” —a “highly contextual inquiry”.<sup>93</sup> The Divisional Court was tasked with assessing “how substantial the limitation on the *Charter* protection was compared to the benefits of the furtherance of the statutory objectives”.<sup>94</sup> In undertaking its review on a standard of reasonableness, Divisional Court was appropriately guided by the applicable principles from the Supreme Court of Canada in *Vavilov*<sup>95</sup> and *Trinity Western* alike.

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<sup>91</sup> *Gillies*, *supra* at para 21.

<sup>92</sup> *Gillies*, *supra* at paras 44, 46 [emphasis added].

<sup>93</sup> *Trinity Western*, *supra* at para 81.

<sup>94</sup> *Trinity Western*, *supra* at para 82.

<sup>95</sup> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

**ii. The Decision was reasonable (Moving Party's Alleged Error #3)**

50. The Moving Party suggests that the Divisional Court improperly substituted its own justification of the Decision for that of the WRDSB.<sup>96</sup> Specifically, the Moving Party suggests that the Divisional Court erred in finding the Decision reasonable due to the fact that Ms. Burjoski persisted in speaking off-topic.<sup>97</sup> Respectfully, this is a red herring, arising from a misreading of the Divisional Court's Reasons.
51. While the Divisional Court Reasons provide an overview of the WRDSB delegation procedures and the off-topic nature of the Ms. Burjoski's presentation, they do so primarily in the "Background Facts" section of the Reasons. They then return to this discussion under the heading of procedural fairness, to ground their analysis on that issue.<sup>98</sup> The Divisional Court's Reasons regarding the reasonableness of the Decision (found at paragraphs 23 – 34 of the Reasons) in no way reference the off-topic nature of Ms. Burjoski's delegation.
52. The Divisional Court's Reasons under the heading "Was the decision unreasonable"? were clearly grounded in their findings that the WRDSB balanced Ms. Burjoski's *Charter* rights with the WRDSB's own objectives as contained in its Bylaws, Equity and Inclusion Policy, and the *Education Act*.<sup>99</sup> The Panel clearly states its determination that the Decision "was ultimately about [Ms] Burjoski's choice of words",<sup>100</sup> not the off-topic nature of her delegation.

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<sup>96</sup> MP Factum, *supra* at paras 99-103.

<sup>97</sup> MP Factum, *supra* at paras 100-101.

<sup>98</sup> Reasons, *supra* at paras 5-17, 35-39, MPMR Tab C.

<sup>99</sup> Reasons, *supra* at para 33, MPMR Tab C.

<sup>100</sup> Reasons, *supra* at para 32, MPMR Tab C.



53. In any event, the Chair did in fact mention a violation of the delegation policy while terminating Ms. Burjoski’s presentation,<sup>101</sup> and alluded to concerns about “not knowing where [she was] headed” in his initial warning.<sup>102</sup>
54. In assessing the reasonableness of a decision for which reasons are not required, “a reviewing court must assess whether the outcome is reasonable in light of the relevant constellation of law and facts.”<sup>103</sup> The Supreme Court of Canada has endorsed the observation of Professor Dyzenhaus who has noted that a reasonable decision is one in which “the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them.”<sup>104</sup>
55. Reasonableness review requires attention to the specialized knowledge or expertise of the decision-maker that may illuminate underlying practical realities of the administrative scheme.<sup>105</sup> Whether a decision is reasonable is informed by a duly sensitive inquiry into the decision’s context, and the reasons—if any.<sup>106</sup> Considering the myriad contexts in which administrative decisions are made, *Vavilov* recognizes that formal reasons “will not always be necessary and may, where required, take different forms.”<sup>107</sup>

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<sup>101</sup> Transcript 2, *supra* at 7, MPMR Tab E-6.

<sup>102</sup> Transcript 2, *supra* at 4, MPMR Tab E-6.

<sup>103</sup> *1120732 B.C. Ltd. v Whistler (Resort Municipality)*, 2020 BCCA 101 at para 84, citing *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 12 [*Newfoundland Nurses*].

<sup>104</sup> *Newfoundland Nurses*, *supra* at para 12, referring to David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in Michael Taggart, ed., *The Province of Administrative Law* (1997) 279 at 304. See also *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 at para 32.

<sup>105</sup> *Vavilov*, *supra* at paras 92-93.

<sup>106</sup> *Vavilov*, *supra* at paras 84, 86, 89, 94, 97, 103, 108, 119.

<sup>107</sup> *Vavilov*, *supra* at paras 86, 119.

56. In the context of decisions made by elected decision-makers specifically, a high degree of deference must be given.<sup>108</sup> The WRDSB is democratically accountable and represents its community. The Chair and Trustees are elected representatives, not tribunal appointees, and are well-versed in the goals of its education system as well as the boundaries of proper debate at meetings. “As elected representatives, it is their job to bring community views into the educational decision-making process,” as a school board like the WRDSB is “better placed to understand community concerns than the court.”<sup>109</sup> The Divisional Court properly afforded such deference to the WRDSB.<sup>110</sup>
57. The Decision is also entitled to deference in accordance with its legislative scheme. The *Education Act* demonstrates the Legislature’s intent to empower school boards to develop and enforce their own policies and procedures. As acknowledged by the Divisional Court: “school boards should be free to act as modern, democratic, dynamic legal personalities, provided only that there be some statutory foundation for, and no express statutory prohibition of, their conduct.”<sup>111</sup> The *Education Act* empowers and requires the WRDSB to regulate its own meetings by providing it with the discretion to establish procedures including “the order of business, arrangements for the hearing of public delegations, and rules of order.”<sup>112</sup> Akin to a city council disciplining one of its own council-members, school boards “can be presumed to have expertise with respect to [their] own processes and standards for behaviour.”<sup>113</sup> The Divisional Court accordingly deferred to the Decision

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<sup>108</sup> *Rocky Point Metalcraft Ltd v Cowichan Valley (Regional District)*, 2012 BCSC 756 at para 29.

<sup>109</sup> *Chamberlain v Surrey School District No 36*, 2002 SCC 86 at para 10; see also *Houde v Quebec Catholic School Commn.*, [1978] 1 SCR 937 at 940.

<sup>110</sup> Reasons, *supra* at para 29, MPMR Tab C.

<sup>111</sup> *S. 10 of the Education Act*, *supra* at para 56.

<sup>112</sup> *Education Act*, *supra* at s 170(1)4.; see also Anthony F Brown & Marvin A Zucker, *Education Law*, 4th ed (Toronto: Thomson Carswell, 2007) at 80, RBOA Tab 2.

<sup>113</sup> *Dupont v Port Coquitlam (City)*, 2021 BCSC 728 at para 42.

made by the elected trustees as a reasonable expression of the WRDSB’s expertise in maintaining a safe and inclusive community.

58. In making its Decision, the WRDSB considered its own governing Bylaws and policies, and its statutory objectives, including *Charter* rights inclusive of freedom of expression. The WRDSB was alive to *Charter* rights, as indicated by the Equity and Inclusion Policy and the Chair’s opening comments.<sup>114</sup> The Chair, in explaining why he ended the delegation, noted the seriousness of his decision to stop a delegate from speaking.<sup>115</sup> While presiding over the vote about the Decision, the Vice-Chair expressly stated that she was “cognizant of the delegation’s right to speak.”<sup>116</sup> The WRDSB was also aware of its obligations to enforce its Bylaws and policies, and to abide by the Human Rights Code and the objectives of the *Education Act*.<sup>117</sup>
59. Moreover, the Trustees’ discussion on the point of order provided differing perspectives concerning whether the Chair’s decision should be upheld. While the 5-4 majority vote is a rejection of the Ms. Burjoski’s perspective, it is also evidence that her perspective—and the balancing of rights and interests affected—were properly considered. Consequently, this is a case in which the dots leading to the Decision (in other words: the votes, and the perspectives they reflect) may be readily connected.<sup>118</sup>
60. As found by the Divisional Court, the Decision minimally impaired Ms. Burjoski’s *Charter* rights, as she was free to express her views in another forum.<sup>119</sup> The Decision was an

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<sup>114</sup> Transcript 1, *supra*, MPMR Tab E-5.

<sup>115</sup> Transcript 2, *supra* at 8, MPMR Tab E-6.

<sup>116</sup> Transcript 2, *supra* at 13, MPMR Tab E-6.

<sup>117</sup> *Trinity Western*, *supra* at paras 57-59.

<sup>118</sup> *Gillies*, *supra* at paras 43, 46.

<sup>119</sup> Reasons, *supra* at paras 32, 36, MPMR Tab C.

isolated determination made in a specific context, rather than a blanket rejection.<sup>120</sup> As noted in the Library Services presentation following Ms. Burjoski’s delegation, the WRDSB has a detailed reconsideration process for members of the school community to voice concerns about any library materials and to participate in the selection/deselection process.<sup>121</sup> This is therefore a situation in which any “infringement on the Applicants’ expression is mitigated by other expressive activities available to [her].”<sup>122</sup>

61. As compared with this minimal limitation on Ms. Burjoski’s *Charter* rights, the WRDSB not only has a statutory duty to maintain a decorous meeting environment through the regulation of meeting conduct, but is also mandated to abide by the Ontario *Human Rights Code* and promote an inclusive and welcoming environment for people of all gender identities and expressions. This duty of an entire school community goes well beyond the individual rights of expression of a single individual at a school board meeting. As noted by this Court, school boards have “a statutory mandate to provide an inclusive and tolerant educational environment, one that respects the principles of equality enshrined in s. 15 of the *Charter*.”<sup>123</sup> The Divisional Court recognized that the Chair’s comments—and the WRDSB’s ensuing Decision—were motivated by concern for upholding these duties, given their foundational importance to the school community.

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<sup>120</sup> *Grande Prairie, supra* at para 93, citing *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31.

<sup>121</sup> Video of Committee of the Whole Meeting dated January 17, 2022 at 1:37:00-1:40:15, MPMR Tab E-4.

<sup>122</sup> *Alberta March for Life Association v Edmonton (City)*, 2021 ABQB 802 at para 149.

<sup>123</sup> *ET v Hamilton-Wentworth District School Board*, 2017 ONCA 893 at para 40; see also *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 in which the SCC found that a school board’s failure to censure a teacher who made discriminatory comments itself amounted to discrimination.

62. The Chair, concerned that Ms. Burjoski’s comments about “puberty blockers or opposite sex hormones”<sup>124</sup> could be headed in a problematic direction inconsistent with the WRDSB’s duties, appropriately cautioned her, referencing the *Human Rights Code*. This reflects that the Chair was alive to the balance at play between freedom of expression and WRDSB objectives.
63. Upon being permitted to continue her delegation following this warning, Ms. Burjoski persisted regarding the appropriateness of another book centered on transgender issues. She described the book as “misleading” and referenced the book’s discussion between a transgendered youth and a doctor as making “very serious medical interventions seem like an easy cure for emotional and social distress.”<sup>125</sup>
64. Ms. Burjoski’s comments perpetuated a harmful narrative that such youth can or should be “cured.” The Ontario Human Rights Commission has recognized that such comments can amount to false and harmful stereotypes about trans people that contribute to their discrimination.<sup>126</sup>
65. The Divisional Court was appropriately sensitive to this factual context in determining that the WRDSB’s ensuing Decision was reasonable.
66. The reasonableness of this highly context-specific Decision does not raise any issues of public importance calling for appellate intervention per *Sault Dock*. The Divisional Court did not interpret any point of law, nor make a precedential ruling that goes beyond existing

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<sup>124</sup> Transcript 2, *supra* at 4, MPMR Tab E-6.

<sup>125</sup> Transcript 2, *supra* at 5, MPMR Tab E-6.

<sup>126</sup> Ontario Human Rights Commission, “Policy on preventing discrimination because of gender identity and gender expression” (31 January 2014) at 8-9, s 4.1, online (pdf).

jurisprudence. Rather, the Divisional Court applied settled administrative law principles to particular facts, and made no error in doing so.

**iii. The Divisional Court correctly determined there was no reasonable apprehension of bias (Moving Party’s Alleged Error #2)**

67. Ms. Burjoski again relies on Justice Ramsay’s comments about the Chair (when dismissing an anti-SLAPP motion) as somehow supporting her position on the Board’s bias at the meeting. Justice Ramsay’s decision is irrelevant to issue of alleged bias and is currently under appeal in this Court.<sup>127</sup> Bias in respect of the Decision was not an issue before Justice Ramsay.
68. The Moving Party’s factum reflects a misunderstanding of the concept of bias, as well as a misplaced emphasis on the Chair’s views alone.<sup>128</sup> In this case, the question that must be answered is “whether a reasonable, informed and right-minded person viewing all of the facts would believe that the Trustees [collectively] had a closed mind before the Decision...because they were not amenable to persuasion.”<sup>129</sup>
69. The circumstances giving rise to the vote were spontaneous and unanticipated; in no way could any of the Trustees have pre-decided their vote such that they were closed minded.
70. The after-the-fact comments the Moving Party takes issue with by the Board Chair merely explain the Decision made by the Board.<sup>130</sup> They in no way lead a reasonable person to believe that the Chair, let alone the WRDSB trustees, had a “closed mind” before the

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<sup>127</sup> Court File No. COA-23-CV-1382

<sup>128</sup> MP Factum, *supra* at paras 68, 82-86.

<sup>129</sup> *Citizens for Accountable and Responsible Education Niagara Inc. v District School Board of Niagara*, 2015 ONSC 2058 at para 114.

<sup>130</sup> MP Factum, *supra* at paras 82-83.

decision to end Ms. Burjoski’s delegation. The Chair’s comments after the Meeting do not support any bias at the Meeting where he kept an open mind during the delegation. In fact, he allowed Ms. Burjoski’s delegation to continue after giving her a warning.

71. As correctly identified by the Divisional Court, the Chair’s comments after the Meeting merely provide the Chair’s reason for voting the way he did; providing an explanation after the fact is not the same as being biased before a determination was made.<sup>131</sup> As is borne out by jurisprudence from the Supreme Court of Canada, to hold otherwise would “distort the democratic process by discouraging [elected officials] from expressing their views openly”<sup>132</sup>:

Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard, **it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change.** The contrary conclusion would result in the disqualification of a majority of Council in respect of all matters that are decided at public meetings...<sup>133</sup>

72. Appellate intervention in this case is not warranted. The Chair and WRDSB acted appropriately, and the Divisional Court’s reasons for dismissing Ms. Burjoski’s Application for Judicial Review are in line with well-established legal principles from the Supreme Court of Canada.

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<sup>131</sup> Reasons, *supra* at para 43, MPMR Tab C.

<sup>132</sup> *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC) at 683, referring to its decision in *Save Richmond Farmland Society v. Richmond (Township)*, 1990 CanLII 1132 (SCC). See also see also *Know Your City Inc. v. The Corporation of the City of Brantford*, 2021 ONSC 154 (Div Ct) citing this passage with approval at para 40.

<sup>133</sup> *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC) at 1197; see also *Know Your City Inc. v. The Corporation of the City of Brantford*, 2021 ONSC 154 (Div Court) citing this passage with approval at para 35.

**PART IV – ORDER REQUESTED**

73. The WRDSB requests an order dismissing the motion for leave to appeal, with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Date: February 13, 2024



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Kevin McGivney/Natalie D. Kolos  
Lawyers for the Respondent/Responding  
Party Waterloo Region District School  
Board



## SCHEDULE “A” – AUTHORITIES

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2. David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279.
3. Geoff R Hall, “Applications for Leave to Appeal: The Paramount Importance of Public Importance” (1999) 22 Adv Q 87. [RBOA Tab 1]
4. Ontario Human Rights Commission, “Policy on preventing discrimination because of gender identity and gender expression” (31 January 2014) at 8-9, s 4.1, online (pdf).

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23. *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32
24. *Lethbridge and District Pro-Life Association v Lethbridge (City)*, 2020 ABQB 654
25. *McCarthy v. Whitefish Lake First Nation #128*, 2023 FC 220
26. *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62
27. *Ontario (Minister of Transportation) v 1520658 Ontario Inc.*, 2010 ONCA 32
28. *Rankin v McLeod, Young, Weir Ltd.* 1986 CanLII 2749 (ON SC)
29. *Re Sault Dock Co. Ltd. and City of Sault Ste. Marie*, 1972 CanLII 572 (ON CA)
30. *Rocky Point Metalcraft Ltd v Cowichan Valley (Regional District)*, 2012 BCSC 756
31. *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825
32. *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1
33. *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158
34. *1120732 B.C. Ltd. v Whistler (Resort Municipality)*, 2020 BCCA 101

## SCHEDULE “B” – STATUTES AND REGULATIONS

### Courts of Justice Act, RSO 1990, c C.43

#### **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;

#### **Appeal to be heard as soon as practicable**

- 137.3** An appeal of an order under section 137.1 shall be heard as soon as practicable after the appellant perfects the appeal.

### Education Act, RSO 1990, c E.2

#### **Corporate status**

- 58.5 (1)** Every district school board is a corporation and has all the powers and shall perform all the duties that are conferred or imposed on it under this or any other Act.

#### **Board responsibility for student achievement and effective stewardship of resources**

- 169.1 (1)** Every board shall,
- ...
- (d) develop and maintain policies and organizational structures that,
    - (i) promote the goals referred to in clauses (a) to (c), and
    - (ii) encourage pupils to pursue their educational goals;

#### **Duties of boards**

- 170 (1)** Every board shall,

...

#### **meetings**

- 4.** fix the times and places for the meetings of the board and the mode of calling and conducting them, and ensure that a full and correct account of the proceedings thereat is kept;

#### **Duties of board members**

- 218.1** A member of a board shall,
- (a) carry out his or her responsibilities in a manner that assists the board in fulfilling its duties under this Act, the regulations and the guidelines issued under this Act, including but not limited to the board’s duties under section 169.1;
  - (b) attend and participate in meetings of the board, including meetings of board committees of which he or she is a member;

- (c) consult with parents, students and supporters of the board on the board's multi-year plan under clause 169.1 (1) (f);
- (d) bring concerns of parents, students and supporters of the board to the attention of the board;
- (e) uphold the implementation of any board resolution after it is passed by the board;
- (f) entrust the day to day management of the board to its staff through the board's director of education;
- (g) maintain focus on student achievement and well-being; and
- (h) comply with the board's code of conduct. 2009, c. 25, s. 25.

**CAROLYN BURJOSKI**

-and-

**WATERLOO REGION DISTRICT SCHOOL BOARD**

Applicant

Respondent

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***ONTARIO***  
**COURT OF APPEAL**

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**FACTUM OF THE RESPONDENT**  
**(Motion for leave to appeal)**

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