No. S-79991
Nanaimo Registry

In the Supreme Court of British Columbia

Between:

CANDICE SERVATIUS

Petitioner

And

SCHOOL DISTRICT 70 (ALBERNI) and ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondents

And

THE NUU-CHAH-NULTH TRIBAL COUNCIL

Intervenor

WRITTEN SUBMISSIONS OF THE INTERVENOR THE NUU-CHAH-NULTH TRIBAL COUNCIL

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I. Overview

1. The Nuu-chah-nulth Tribal Council ("NTC") represents approximately 10,000 people of fourteen Nuu-chah-nulth First Nations. The NTC enters into agreements with the School Districts, including the Respondent School District 70 (Alberni), to advocate for cultural inclusion in schools and "to include holistic and culturally relevant teachings in school and provide day-to-day support for the Nuu-chah-nulth students from K-12" and to create conditions necessary to help Nuu-chah-nulth students graduate.[1]

2. The NTC was added as an Intervener to this proceeding by way of an application and order dated 31 May 2018.

3. The NTC takes no position on the first order sought, a declaration that the impugned actions of the 2015-16 school year violate the Petitioner's s. 2(a) *Charter*[2] rights, nor about any of the adjudicative facts.

4. The NTC opposes the cultural prohibition order sought by the Petitioner:

> "(b) an order prohibiting the School District from facilitating or allowing religious practices (as distinct from including religious content as part of the curriculum), during mandatory instructional time, at mandatory student assemblies, or during any other time when student attendance is mandatory. Such practices include, but are not limited to, religious or spiritual rituals, "cleansings", ceremonies, and prayer."

5. The Petitioner asks this Court to define the practice of smudging as religious, then they seek an order to curtail smudging in schools, asserting that exposing children to smudging infringes their religious rights.

6. To the NTC, smudging is a cultural practice and not a religious one. The Supreme Court of Canada has clearly said that defining a practice or belief as religious is a subjective test, defined by those who assert a religious right. Freedom of religion incorporates the ability to define for oneself what one's own religious practice is. Conversely, a right to freedom of religion must include the right to define what a religious practice is not. The approach the Petitioner urges on this Court is to allow a third party to arbitrarily categorize Indigenous

[1] Dr. Sayers 1st Affidavit, at paras. 2, 7, 9 and 11.
[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ("*Charter*").

cultural practices as "religious" contrary to the view of the Indigenous Peoples and for the purpose of prohibiting the practice, thus labelled, from schools. There is absolutely no authority for this approach, and decisions of the Supreme Court of Canada stand against it.

7. The proper perspective to be employed must be that of the purported holder of the rights in issue. This would be the case for any religious right held by any person or group within Canadian society entitled to *Charter* protection. Further, the facts of this case attract the interpretive framework set out by the Supreme Court of Canada for rights under s. 35(1) of the *Constitution Act, 1982*.[3] The Supreme Court of Canada has directed that it is imperative for the Court to consider the Indigenous perspective on the definitions of any rights which are tied to Indigenous cultural practices. The right of Indigenous Peoples to self-define their cultural and religious practices is also embodied in an international human rights framework, endorsed by Canada, within the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP").[4]

8. If the practice of smudging is found to be a religious practice, the cultural prohibition order sought would preclude the exercise of this Indigenous cultural activity in School District 70 (Alberni) schools. The test for infringement of a *Charter* right in an administrative context is set out in the *Doré v Barreau du Québec*[5] */ Loyola High School v Quebec (Attorney General)*[6] ("*Doré/Loyola*") framework, which requires a balanced consideration of the rights at stake in a broader factual and statutory context. In this case, such balancing must take into account the benefits of having Indigenous cultures represented in schools, and be interpreted in a context in which reconciliation with Indigenous Peoples is an important constitutional value.

II. Definition of a Section 2(a) Right to Freedom of Religion

9. The Petitioner defines the events in dispute in this way: A "state-compelled participation of public school children in a ceremony to "cleanse" themselves, their belongings and a school classroom of "energy" using smoke, invocations and ritualistic ceremony (the

[3] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, at s. 35(1) ("s. 35(1)").
[4] *United Nations General Assembly, United Nations Declaration on the Rights of Indigenous Peoples*, 61st Session, 107th Meeting, UN Document: A/RES/61/295 (2007).
[5] [2012] 1 SCR 395 ("*Doré*").
[6] [2015] 1 SCR 613 ("*Loyola*").

"Cleansing")."[7] The Petitioner further argues that "Ceremonies such as the Cleansing derive from, incorporate, and are reliant upon, creed or religious dogma."[8] The Petitioner's submissions repeatedly refer to the act of smudging as a "ritual" or "ritualistic".[9]

a. Subjective Definition is Required

10. The law is clear that under s. 2(a) of the *Charter* the definition of what is religious is a subjective test. The NTC gave evidence that the impugned events are not, in fact, religious. NTC provided evidence that the smudging more broadly relates to a Nuu-chah-nulth way of life, or worldview, and should be understood as a cultural, rather than religious, practice.

11. In *R v Big M Drug Mart Ltd.,*[10] the Supreme Court of Canada defined freedom of religion as: "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief…"

12. In *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*[11] the Supreme Court of Canada outlined the two-step analysis required to establish an infringement of a s. 2(a) right "the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief."[12] Justifiable interference of the subjectively defined right must be measured objectively according to how a reasonable person might assess the situation.[13] (Discussed in Section III *Doré/Loyola* framework below.)

13. The Court in *Ktunaxa* cited *Syndicat Northcrest v Amselem*,[14] for the proposition that: "the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid juridically interpreting and thus determining, either

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[7] Petitioner's Social Fact Submissions, at 1.
[8] Petitioner's Social Fact Submissions, at 5.
[9] Petitioner's Social Fact Submissions, at 1, 8, 9, 21, and 47.
[10] [1985] 1 SCR 295 ("*Big M Drug Mart*"), at 94.
[11] [2017] 2 SCR 386 ("*Ktunaxa*").
[12] *Ktunaxa,* at 68, citing *Multani,* at 34.
[13] *S.L. v Commission scolaire des Chênes,* [2012] 1 SCR 235 ("*S.L.*"), at 24.
[14] [2004] 2 SCR 551 ("*Amselem*").

explicitly or implicitly, the context of a subjective understanding of religious requirement."[15] Thus framed, the caution in *Amselem* is for courts to avoid forcing their own definitions and understandings on the religious practices or beliefs of others.

14. The Supreme Court of Canada in *Big M Drug Mart* said that the scope of interpretation should be "a generous rather than legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection".[16] This generosity of interpretation should not be wielded to allow an applicant to define as "religious" the practices and activities of third parties for the purpose of curtailing those third party activities. The purpose of the Supreme Court of Canada's direction in *Big M Drug Mart* was not to empower a "generous interpretation" that runs contrary to the experience and perspective of those whose "religious" practice is said to be at stake.

15. In essence, the Petitioner argues that their religious freedom encompasses both the right to define their own practice and the right to arbitrarily assign the label of "religious" on activities and cultural practices of Indigenous Peoples, particularly the Nuu-chah-nulth. Arbitrarily assigning Indigenous cultural practices a "religious" status or categorization at the behest of a third party – and for the purpose of curtailing that activity – is an abuse of the s. 2(a) *Charter* framework.

b. Need to Consider the Indigenous Perspective

16. Where the rights of Indigenous Peoples are at stake, the Canadian constitutional framework adds a further level of protection against the position advanced by the Petitioner. Section 35 is equally part of the jurisprudence and constitutional fabric.

17. The Supreme Court of Canada has emphasized the need to take the Indigenous perspective into account in defining the contents of the rights at stake, evidencing a profound notion of self-identification in assessing Indigenous Peoples' rights and reflecting the collective nature of those rights. For example: *Delgamuukw v British Columbia:*[17] "This appeal requires us to…adapt the laws of evidence so that the aboriginal perspective on their practices, customs

[15] *Ktunaxa,* at 72, citing *Amselem,* at 50.
[16] *Big M Drug Mart,* at 117.
[17] [1997] 3 SCR 1010 ("*Delgamuukw*"), at 84. [Emphasis added.]

and traditions and on their relationship with the land, are given due weight by the courts."; *Mitchell v M.N.R.*:[18] "[O]ral histories may provide the aboriginal perspective on the right claimed. Without such evidence, it might be impossible to gain a true picture of the aboriginal practice relied on or its significance to the society in question."; *R v Van der Peet*:[19] "In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right."; *R v Marshall*; *R v Bernard*:[20] "The evidence, oral and documentary, must be evaluated from the aboriginal perspective. What would a certain practice or event have signified in their world and value system?"; and, *R v Sparrow*:[21] "[I]t is crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."

18. In *Tsilhqot'in Nation v British Columbia,*[22] McLachlin, CJ (as she then was) noted "…the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights." Smudging does not fit into the categorization of a religious practice, nor should it be made to. To attempt to do so, is to attempt to force "ancestral practices into square boxes," precisely the endeavour CJ McLachlin cautioned against.

19. If the NTC wanted to assert a right to have a smudging practice protected (as they would define it, according to their Indigenous perspective, under s. 35), they would be put to an extensive process of proof.[23] If the NTC wanted to rely on protection of smudging as an aspect of religious freedom protected under s. 2(a), they would have to declare those subjective religious beliefs. It stretches credibility to assume that the asserted rights definitions from an Indigenous perspective should be collapsed because the subject matter is a s.2(a) *Charter* right being asserted by a third party.

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[18] [2001] 1 SCR 911, at 32. [Emphasis added.]
[19] [1996] 2 SCR 507 ("*Van der Peet*"), at 49. [Emphasis added.]
[20] [2005] 2 SCR 220, at 69.
[21] [1990] 1 SCR 1075 ("*Sparrow*"), at p 1112. See also: *Mitchell v Peguis Indian Band,* [1990] 2 SCR 85 where the Supreme Court of Canada said: "In my opinion, reference to the notion of "aboriginal understanding", which respects the unique culture and history of Canada's aboriginal peoples, is an appropriate part of that approach."
[22] [2014] 2 SCR 257 ("*Tsilhqot'in*"), at 32.
[23] See for example, *Van der Peet, Tsilhqot'in*.

20. Justice Lance Finch talked about the duty of the courts to take Indigenous perspectives into account as an obligation which "engages the principle of the rule of law. If the rights of all Canadians, including Aboriginal Canadians, are to be articulated and guarded by the courts, the courts must necessarily be capable of understanding the nature of those interests."[24] Justice Finch urged an openness to being willing to know that we do not know as a starting point: "this awareness is not restricted to recognizing simply that there is much we don't know. It is that we don't know just how much we don't know."[25] This is the same approach the NTC urges this Court to take.

c. Smudging is Not Properly Defined as a Religious Act

21. Dr. Judith Sayers, Kekinusuqs, is a member of the Hupacasath First Nation of the Nuu-chah-nulth. She is a member of the Order of Canada, a former Chief of the Hupacasath First Nation, and current President of the NTC. She is an adjunct professor at the Peter Gustavson School of Business and Environmental Studies at the University of Victoria, a former Chief Negotiator for the Hupacasath First Nation, with degrees in business and law, and an honourary Doctor of Laws degree from Queen's University. She practiced law for over 18 years.[26] Dr. Sayers gave testimony that the NTC perspective is that Nuu-chah-nulth do not see smudging as a religious practice, but rather as part of their spiritual and cultural traditions. Dr. Sayers said the NTC's decision to intervene in this case was motivated because the Nuu-chah-nulth Chiefs "wanted to ensure that the message was given that smudging is part of our culture; it is not a religion."[27]

> "For Nuu-chah-nulth, culture is a way of life. I do not see Nuu-chah-nulth culture and spirituality as a religion. For example, it would not be possible to convert to becoming of a Nuu-chah-nulth religion, and Nuu-chah-nulth people can and do participate as members of religions (such as Catholic or Anglican) while being actively involved in Nuu-chah-nulth cultural and spiritual traditions. I see Nuu-chah-nulth culture as a reflection of our worldviews and beliefs, and smudging as one expression of that."[28]

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[24] Finch, Chief Justice Lance. "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" *Indigenous Legal Orders and the Common Law*. (November 2012) CLE BC ("Duty to Learn"), at 15.
[25] Duty to Learn, at 45.
[26] Dr. Sayers 1st Affidavit, at para 1.
[27] Dr. Sayers Cross-Examination, at p 44, lines 20-22.
[28] Dr. Sayers 1st Affidavit, at mistakenly indented part of para 15. See also para 17.

22. When asked about the assertion that Nuu-chah-nulth practices, including smudging, are part of culture, not part of religion, Dr. Sayers agreed with the assertion, "it's part of who they [Nuu-chah-nulth] are, as opposed to a formal observation of some religious creed."[29]

23. Dr. Sayers described the activity of smudging as a spiritual practice "done by creating sacred smoke from burning medicinal or sacred plants/tree branches such as cedar or spruce,"[30] and explained that the purpose of smudging includes "cleaning our thoughts, our spirits and places of spirits of negative energies."[31] Dr. Sayers talked about a "spiritual world" in which living things have a spirit, including trees and medicines.[32] Dr. Sayers described smudging as a way of "cleansing the area," "making it positive, taking out anything that could be negative,"[33] and as a way "to cleanse, to prepare yourself, to protect yourself."[34] Dr. Sayers said smudging was a fairly common activity for many Nuu-chah-nulth, "when you get up in the morning, a lot of people smudge just to prepare their minds, prepare their thoughts, to make sure that anything that might have – you know, it's just you're just cleansing and preparing for your day."[35]

24. Dr. Sayers pointed to the fact that Nuu-chah-nulth concepts of math and science are now incorporated into the curriculum, and drew the analogy to smudging, pointing out that there are areas of Indigenous knowledge that have been historically misunderstood and excluded from the curriculum.[36] Dr. Sayers further explored this concept by challenging the dismissal of smudging as a "belief": "it's not just our beliefs; it's our knowledge that's taught us."[37] She gave the example of Nuu-chah-nulth knowledge of the salmon cycles. At one time, this knowledge, which talks about interrelationships of fish, was dismissed, but now is taught as science. Similarly, Dr. Sayers argued, smudging is a method of cleaning, including in its medicinal and spiritual aspects, and this is an area of Indigenous knowledge poorly understood outside of Indigenous contexts.

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[29] Dr. Sayers Cross-Examination, at p 59, lines 11-21.
[30] Dr. Sayers 1st Affidavit, at para 16.
[31] Dr. Sayers 1st Affidavit, at para 17. See also, Dr. Sayers Cross-Examination, at p 16, lines 11-20.
[32] Dr. Sayers Cross-Examination, at p 10, lines 4-12 and 15-21.
[33] Dr. Sayers Cross-Examination, at p 19, lines 18-20.
[34] Dr. Sayers Cross-Examination, at p 22, lines 19-21.
[35] Dr. Sayers Cross-Examination, at p 23, lines 3-8.
[36] Dr. Sayers Cross-Examination, at p 37, lines 20-23.
[37] Dr. Sayers Cross-Examination, at p 39, lines 2-9.

25. Seeing the world as inherently either "religious" or "secular" is a Western and non-Indigenous dichotomy. A sense of interconnection with the lived environment is a part of the Nuu-chah-nulth identity, as described by Dr. Sayers. Dr. Sayers outlined a worldview which was deeply spiritual, but not, per her definition, religious. To cast this interconnectivity as "religious" imposes a definition for the sake of seeking exclusion, rather than actively engaging with the purpose of understanding the practice in its own right. This understanding may be far outside of the realm of understanding for many non-Indigenous Canadians. For example, Dr. Sayers spoke of the reality of beings such as sasquatch, thunderbirds and sea serpents, even though most people will have not seen them.[38] In the Nuu-chah-nulth worldview, these beings are real. Where these beings are not seen as real, for example, in a non-Indigenous Canadian context, they might instead be understood as manifestations of a spiritual or religious belief. This is a subtle, but profound, difference.

26. The Petitioner suggests that this is a question of semantics. That, in fact, the actual practice of smudging is a religious practice, and not cultural as Dr. Sayers suggests. The Petitioner argues that the way Dr. Sayers described smudging reflects "common beliefs associated with spirituality, religion and creeds in various parts of the world."[39] The Petitioner cites *Ktunaxa* for the proposition that Indigenous spiritual beliefs may fall within s. 2(a) of the *Charter*. The NTC would agree that there are Indigenous beliefs that should fall within and be entitled to the protection of s. 2(a). The NTC argues that, for the Nuu-chah-nulth people in this instance, this is not a proper characterization of the practice or activity of smudging.

27. Dr. Sayers gave evidence that there are distinct Nuu-chah-nulth practices that are private and generally not made public which more closely accord with the definition of practices that might be protected by s. 2(a): "Many spiritual practices, and areas, are private to an individual, or family, and I will not discuss them here. Our deeply spiritual practices and beliefs are private, not shared in public."[40] Those practices are distinct from smudging.

[38] Dr. Sayers Cross-Examination, at p 13, lines 21-25, and p 14, lines 1-14.
[39] Petitioner's Social Fact Submissions, at 70, citing Dr. Sayers Cross-Examination at p 59, lines 22-25, and p 23, line 13.
[40] Dr. Sayers 1st Affidavit, at para 19.

III. *Doré/Loyola* Test

28. In the event that this Court accepts the characterization of smudging as a religious practice, or further accepts that the Petitioner has established a religious practice which is interfered with by smudging, then the NTC submits that the Petitioner's request for the cultural prohibition order must fail on the justificatory analysis as it fails to meet the proportionality test set out in the *Doré/Loyola* framework. The social milieu of this request must be taken into account. In deciding whether to grant the relief sought, this Court should consider the constitutional imperative of reconciliation and the costs of excluding Indigenous cultural expression from schools, seen through the lens of consequences that such a decision may have on Indigenous students, including NTC members.

a. The Truth and Reconciliation Commission and the Indian Residential School Legacy

29. There was considerable evidence advanced about the ongoing impact of the Indian Residential School System ("IRS"). As part of a class action settlement between IRS survivors and governments and church groups, the Truth and Reconciliation Commission ("TRC") was formed, tasked with hearing the stories of IRS survivors and sharing this experience so that Canadian society could begin a process of healing. The TRC spoke of the policy and social beliefs underpinning the IRS, and of the ongoing intergenerational impacts of IRS within schools and the education system:

> "For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as "cultural genocide"."[41]

30. The TRC offered a relationship-based definition of reconciliation, requiring an "awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and

[41] *Honouring the Truth, Reconciling for the Future*, *Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Winnipeg, MB: Truth and Reconciliation Commission of Canada, 2015), ("TRC Summary"), at p 1.

action to change behaviour."[42] The TRC expressed the view that "Reconciliation must inspire Aboriginal and non-Aboriginal peoples to transform Canadian society so that our children and grandchildren can live together in dignity, peace, and prosperity on these lands we now share."[43]

31. Jo-Anne Chrona is Curriculum Coordinator at the First Nations Education Steering Committee ("FNESC"). She has a master's degree in Educational Technology and several teaching degrees. She has worked as a teacher, and in policy development working with both the FNESC and the Province to develop "strategies to help teachers incorporate Indigenous knowledge and ways of learning into the classroom." She is a member of the Ts'msyan Nation, of the Kitsumkalum community.[44]

32. Jo-Anne Chrona gave evidence about the mandate of the FNESC to address the lower graduation rates of Indigenous students: "Historically, Indigenous learners have a higher dropout rate than other students. FNESC was, in part, founded by First Nation education coordinators and others involved in the education system who wanted to create conditions for better outcomes for Indigenous learners."[45] Jo-Anne Chrona assisted in developing the "Guide (Grade 5)" to address "the TRC's observations that reconciliation between Canada's diverse population and Indigenous Peoples starts with education about the residential school system and the Indigenous cultures they were designed to extinguish."[46] The "Guide for Grade 5" states (at page 3):

> "The colonial foundations of our country resulted in a relationship between Aboriginal and non-Aboriginal people that was always unbalanced and unjust. This relationship manifested itself in many ways, including the ... banning of cultural practices that had sustained the diverse First Nations for millennia.
>
> A key component in this relationship was the imposition of the residential school system which the dominant culture hoped would bring about its goals of "civilizing and Christian-izing." Only in recent years has mainstream society acknowledged the extreme unjustness of the

[42] TRC Summary, at p 6-7.
[43] TRC Summary, at p 8.
[44] J. Chrona 1st Affidavit, at para 1.
[45] J. Chrona 1st Affidavit, at para 3.
[46] J. Chrona 1st Affidavit, at 12 and Exhibit "G".

> residential school system and the harm it caused to multiple generations of First Nations families and communities."[47]

33. Jo-Anne Chrona gave evidence that Indigenous learners continue to face race-based bullying within British Columbia's education system. She provided a copy of a report, "BC Antiracism Research" submitted to the British Columbia Ministry of Education and FNESC. The report recommended that one way to address racism and race-based bullying of Indigenous students is through "the respectful inclusion of Indigenous content and perspectives into classrooms."[48]

34. Jo-Anne Chrona gave evidence about the need to develop curriculum with an "emphasis on the integration of Indigenous knowledge and perspectives" so that the education system is "culturally relevant for both Indigenous and non-Indigenous learners."[49] Jo-Anne Chrona's evidence was that "one of the elements that helps learners be successful in the K-12 system is that they see themselves reflected in the curriculum."[50] In the past, Indigenous Peoples have been largely absent from the curriculum or referenced in ways that were "in passing, disrespectful or inaccurate. There was an absence of Indigenous Peoples and the Indigenous Peoples' perspective."[51]

35. The absence of Indigenous content leads to poor outcomes for Indigenous learners. "An education system that does not reflect Indigenous cultures or knowledge will continue to not serve the needs of Indigenous learners"[52]:

> "[W]hen students do not see themselves reflected in their school life, they do not see it as relevant to their lives, and there is a tendency for them to disassociate, leading to poorer outcomes. Conversely, in my knowledge and experience as an educator, when students see themselves reflected in the curriculum, I have seen a marked improvement in their outcomes."[53]

36. Jo-Anne Chrona gave evidence about the ongoing legacy of IRS reflected in BC's schools and curriculum and noted the crucial role education and schools play: "For all learners to

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[47] As cited in J. Chrona 1st Affidavit, at para 13. [Emphasis added.]
[48] J. Chrona 1st Affidavit, at para 28, and Exhibit "J": "BC Antiracism Research" submitted to the British Columbia Ministry of Education and FNESC by the Directions Evidence and Policy Research Group, LLP in June of 2016.
[49] J. Chrona 1st Affidavit, at para 14.
[50] J. Chrona 1st Affidavit, at para 15.
[51] J. Chrona 1st Affidavit, at para 16.
[52] J. Chrona 1st Affidavit, at para 19.
[53] J. Chrona 1st Affidavit, at para 18.

move ahead and contemplate their role in reconciliation moving forward, an understanding of Indigenous history, culture and worldviews is needed. When schools do not provide this information, we miss an opportunity to help learners to decide what their own role in reconciliation could be."[54]

37. The Court can take judicial notice of the facts set out in the TRC and of the importance to Indigenous students in seeing their cultures reflected in schools. In *R v Ipeelee*,[55] the Supreme Court of Canada directed: "courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples."

b. Constitutional Values to be Considered

38. In *Loyola*, the Supreme Court of Canada noted that "the purpose of a constitutional right is the realization of constitutional values."[56] Under a *Doré* proportionality analysis, *Charter* values serve as a guide for determining "when limitations on [a] right are proportionate in light of the applicable statutory objectives."[57] The *Charter* must be interpreted consistent with the entire constitutional framework including s. 35(1), and with Canada's obligations as set out in UNDRIP.

39. *Doré* requires proportionate balancing of the right allegedly infringed with the objectives of the statutory scheme, here, the *School Act*.[58] In *Chamberlain v. Surrey School District No. 36*,[59] the Supreme Court of Canada considered the *School Act* in the context of a challenge to teaching LGBTQ inclusive books, and opined that the *School Act* evinced a framework protecting diversity within schools: "The *School Act*'s emphasis on secularism reflects the fact that Canada is a diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity." These constitutional values were said to

[54] J. Chrona 1st Affidavit, at para 23.
[55] [2012] 1 SCR 433, at 60.
[56] *Loyola,* at 36.
[57] *Loyola,* at 36.
[58] RSBC 1996, c 412.
[59] [2002] 4 SCR 710, at 21.

be "explicitly incorporated into the British Columbia public school system by the preamble to the *School Act* and by the curriculum established by regulation under the Act."

40. In *Van der Peet*, the Supreme Court of Canada discussed the underlying legal basis for Indigenous rights protected in s. 35:

> "…the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status."[60]

41. The Supreme Court of Canada, in *Haida Nation v British Columbia (Minister of Forests),* outlined an approach where reconciliation with Indigenous Peoples is a constitutional value:

> "Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.,* … at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation."[61]

42. Where an interpretation of domestic law that conforms with UNDRIP is possible, that interpretation will be preferred over one that does not.[62] UNDRIP Article 12(1) mandates protection of Indigenous Peoples' "right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies." Article 34 mandates protection of Indigenous Peoples' "distinctive customs, spirituality, traditions, procedures, practices." Article 8(1) speaks about freedom from assimilation and destruction of Indigenous Peoples' culture and articulates that "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture." Collectively, these provisions of UNDRIP point to a right of self-determination of Indigenous Peoples to choose their own

[60] *Van der Peet*, at 30.
[61] [2004] 3 SCR 511, at 32. [Emphasis added.]
[62] *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817, at 69-71; and *R v Hape,* [2007] 2 SCR 292, esp. 53-56.

spiritual and cultural paths. A right to manifest, practice and develop spiritual and religious practices must include the right to define what those are, but also what they are not. The British Columbia government has announced it plans to implement UNDRIP through Bill 41-2019 *Declaration on the Rights of Indigenous Peoples Act* introduced to the BC Legislature in October 2019.[63]

43. The Petitioner, in asking this Court to make a finding that the impugned activity (the smudging) is in fact a religious practice, urges an interpretation upon this Court, expressly against the subjective self-definition of the Nuu-chah-nulth belief. The approached urged by the Petitioner is contrary to the interpretation framework set out in UNDRIP, and of the reconciliation principles required by the Supreme Court of Canada jurisprudence echoed by the direction of the TRC. Abella, J writing for the majority in *Loyola* observed:

> "These shared values — equality, human rights and democracy — are values the state always has a legitimate interest in promoting and protecting. They enhance the conditions for integration and points of civic solidarity by helping connect us despite our differences: …Religious freedom must therefore be understood in the context of a secular, multicultural and democratic society with a strong interest in protecting dignity and diversity, promoting equality, and ensuring the vitality of a common belief in human rights."[64]

44. This is the position the NTC advances here. A right of religious freedom is not absolute, it must be understood in the social context. Equally, values of reconciliation and preservation of the collective rights of Indigenous Peoples form a crucial part of the constitutional fabric. The cultural prohibition order that the Petitioner seeks would prohibit Indigenous cultural expression in schools, and risk further harming and marginalizing vulnerable Indigenous students. It would send a message to those students that they are not welcome, that their cultures are not welcome, and risk irrevocable damage to their feelings of self-worth, dignity and safety in the public school system. The higher dropout rates of Indigenous students and lack of feelings of safety that Indigenous students experience will be exacerbated if the cultural prohibition order the Petitioner seeks is made.

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[63] Bill 41-2019, *Declaration on the Rights of Indigenous Peoples Act,* 4th Session, 41st Parliament, British Columbia, 2019.
[64] *Loyola*, at 47.

c. NTC Seeking Reconciliation in Public Schools

45. Dr. Sayers offered this description of her understanding of the impact of IRS and need for a reconciliation-based approach:

> "As current NTC president, a former Chief, a first generation survivor, and a community member, I have seen the legacy of [IRS] over generations in parents and children who are alienated from schools and the education process. For intergenerational survivors of IRS, schools and education are associated with abuse and trauma. As a result of the legacy of the IRS, Nuu-chah-nulth learners have struggled in school, and have lower rates of success and graduation. Some Nuu-chah-nulth people shared their experience through the [TRC] which was created as part of the settlement of the class action brought by IRS survivors against governments and churches who created and operated IRS."[65]

46. Dr. Sayers discussed an approach involving Nuu-chah-nulth Education Workers ("NEWs"), whose duties include "to expand awareness with respect to cultural teachings and holistic approaches to education" to "develop and implement learning support opportunities to contribute to student success, retention and wellbeing, and support culturally appropriate teaching strategies and supports."[66] The overriding purpose of the Local Education Agreements and Education Enhancement Agreements is to make "schools a place where Nuu-chah-nulth students could see themselves and their culture reflected, to make the schools our children attend a culturally safe space."[67]

47. The NTC has entered into agreements with the Respondent, wherein they direct funds to School District 70 (Alberni) to provide education to address the historic under-inclusion of Nuu-chah-nulth learners. Dr. Sayers gave evidence that "we [NTC] feel it's important for non-Nuu-chah-nulth students to learn about Nuu-chah-nulth culture and history, and so there's a lot of things we incorporated into the curriculum that reflect that."[68] Dr. Sayers gave evidence about the NTC's ongoing and longer-term efforts to promote reconciliation within schools: "for us it's … important to have that working relationship with the school district,

[65] Dr. Sayers 1st Affidavit, at para 5.
[66] Dr. Sayers 1st Affidavit, at para 11.
[67] Dr. Sayers 1st Affidavit, at para 12.
[68] Dr. Sayers Cross-Examination, at p 46, lines 9-14; Dr. Sayers 1st Affidavit, at paras 7, 9-15.

have our input into what is being taught in the schools, and how it's being taught, and how can our children succeed where they haven't in the past."[69]

48. Dr. Sayers described the objectives of local education agreements whereby NTC provides funding to the School Districts:

> "In return for that, we enter into this agreement on what we expect, and also we lay out what we will do, as Nuu-chah-nulth Tribal Council. We try and set broad overall goals, such as this one, where we will improve education, increasing knowledge and understanding of our culture and the history, for non-First Nations, or the history is our culture."[70]
>
> "The NTC advocates education for cultural inclusiveness in schools because all young people have to be taught about cultural differences. This is a crucial part of reconciliation and changing the relationship between Indigenous and non-Indigenous Canadians. People cannot honour difference if they cannot understand it."[71]

49. Dr. Sayers' Affidavit attached the "Maatmaas k'itacinkst'at?in kukuuttaq (Tribes, nations walking hand in hand together doing good work) School District 70 (Alberni) Aboriginal Education Enhancement Agreement" from the year 2005 to date, which lists as its "Vision":

> "Understanding "hiisukis c'awaak" (everything is connected as one), "usma" (our children are precious), and "lisaak" (respect, for self, for others and for the world around us), we will integrate traditional and contemporary teachings to ensure that all our students are attaining their highest levels of academic, cultural and individual success, empowered with the tools of knowledge, skill and experience to compete on any level, anywhere, to meet the challenges of today's world."[72]

d. Nuu-chah-nulth Learners and the Impacts of Discriminatory Treatment

50. Dr. Sayers expressed concern about the potential impact on Nuu-chah-nulth students of excluding cultural practices from schools:

> "Nuu-chah-nulth worldviews see us, as people, closely connected to our own natural worlds. Excluding Nuu-chah-nulth (or other Indigenous) cultural practices from schools will make it more likely that our students

[69] Dr. Sayers Cross-Examination, at p 31, lines 20-25, and p 32, lines 1-3.
[70] Dr. Sayers Cross-Examination, at p 36, lines 2-19. See also, Dr. Sayers Cross-Examination, at p 43, lines 7-14.
[71] Dr. Sayers 1st Affidavit, at para 7.
[72] Dr. Sayers 1st Affidavit, at para 15 and Exhibit "E".

> feel excluded and alienated. It will also be a curtailment on our education of non-Nuu-chah-nulth people on an important part of our culture."[73]

51. A *Doré/Loyola* analysis cannot proceed without looking at the history and ongoing impacts of IRS on Nuu-chah-nulth (indeed, all Indigenous children) within School District 70 (Alberni). The risk of the Petitioner's request is that the cultural representations of Indigenous culture in classrooms will be further restricted and limited. Where Indigenous learners do not see themselves, and their cultures, reflected in their schools, their level of success diminishes.[74] This exclusion would send a damaging message to Indigenous students in School District 70 (Alberni) about who is protected by the *Charter* and who the *Charter* assigns value or worth to.

52. The costs to Indigenous Peoples of the history of assimilation evidenced through IRS are well known. The ongoing impact of the legacy of IRS and exclusionary policies are considerable and continue to be experienced by the membership of NTC. Despite concerted efforts, the evidence is that Indigenous students do not feel as safe as their non-Indigenous counterparts. They are at increased risk of bullying and drop out at higher levels. The evidence is that Indigenous learners' needs are not being met within School District 70 (Alberni):

    (i) The level of graduates "in 2016/17 in SD 070 was only 30% compared with a 57% rate for non-Aboriginal learners."[75]

    (ii) Indigenous students were "more likely than non-Aboriginal students to not feel safe at schools and to report being bullied, teased or picked on."[76]

    (iii) The "respectful inclusion of Indigenous content and perspectives into classrooms"[77] can be one way of reducing racism and race-based bullying at schools.

53. The Petitioner argues in hyperbole, seeking to equate smudging at schools as "an echo of the gross abuses of the residential school days where First Nation's children were taken from their homes, deprived of family support, and compelled by the state to participate in religious

[73] Dr. Sayers 1st Affidavit, at para 20.
[74] J. Chrona 1st Affidavit, at paras 18-19.
[75] J. Chrona 1st Affidavit, at para 26.
[76] J. Chrona 1st Affidavit, at para 27.
[77] J. Chrona 1st Affidavit, at para 28.

practices against their will."[78] This characterization is a gross misrepresentation of the damages done to Indigenous children and families through the IRS, and this characterization is more inflammatory and likely to cause division rather than encourage reconciliation.

IV. Summary

54. Dr. Sayers reflected on the importance of smudging demonstrations in schools:

> "The demonstration of smudging in the school shows Nuu-chah-nulth children that their culture is welcome in the schools. It demonstrates to Indigenous students – whose cultures were historically excluded from the education system – that schools are a place they are welcomed. Differences in and across cultures are important for all students to learn, Nuu-chah-nulth and non-Nuu-chah-nulth alike. Nuu-chah-nulth respect other Peoples' practices, culture and traditions and ask the same in return."[79]

55. A policy of exclusion, such as the one the Petitioner urges this Court to adopt, does not further a process of reconciliation. More inclusion and cultural safety is needed, not less. The cultural prohibition order sought risks further alienation of Indigenous students who are already marginalized and vulnerable in schools.

[78] Petitioner's Social Fact Submissions, at 79.
[79] Dr. Sayers 1st Affidavit, at para 16.

56. The ability of Indigenous learners to flourish to find place and welcome in the classrooms and schools requires that they see themselves and their Peoples' forms of cultural expression reflected in schools. Prohibiting the cultural practice of smudging in schools is a sharp step away from, rather than toward, reconciliation.

All of which is respectfully submitted, this 8th day of November 2019.

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