No. S79991
Nanaimo Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CANDICE SERVATIUS

PETITIONER

AND:

SCHOOL DISTRICT 70 (ALBERNI)

RESPONDENT

Written Submissions of the Respondent

Harris & Company LLP
Barristers and Solicitors
1400 - 550 Burrard Street
Vancouver, BC V6C 2B5
Tel: 604. 684 6633
Fax: 604. 684 6632

Keith E. W. Mitchell
Reut Amit
Lawyers for the Respondent

Justice Centre for Constitutional Freedoms
#253, 7620 Elbow Drive SW.
Calgary, Alberta T2V 1K2
Tel: 403-475-3622
Fax: 587-747-5310

Jay Cameron
Lawyer for the Petitioner

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I. Introduction

1. The Petitioner seeks the following remedies:

    a. a Declaration pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") that the Board of Education of School District No. 70 (Alberni) (the "Board") violated the Petitioner's freedom of religion protected under s. 2(a) of the *Charter*, by the imposition of prayer and religious rituals on students at John Howitt Elementary School ("John Howitt Elementary" or "JHES") in the 2015-2016 school year (the "Declaratory Order"); and

    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 (the "Prohibition Order").

Amended Petition filed January 6, 2017.

2. The Board opposes the relief sought in the Petition.

II. Statement of Facts

Background

3. The Board is properly named the Board of Education of School District No. 70 (Alberni) and is responsible for kindergarten to grade 12 public education in the geographic area of the Alberni School District (the "School District"). The District serves approximately 3700 students in the communities of Port Alberni, Tofino, Ucluelet and Bamfield. It has eight elementary schools, two secondary schools and one elementary-junior secondary school, in addition to offering alternate programs and distributed learning to support home school students. John Howitt Elementary is a school within the School District.

Affidavit of Greg Smyth, para. 2.

4. Approximately one third of the School District's students are of Aboriginal ancestry. Approximately 15% of students enrolled at John Howitt Elementary are of Aboriginal ancestry.

Affidavit of Greg Smyth, para. 4.

5. The School District is situated on the traditional territories of the Nuu-chah-nulth First Nations.

Affidavit of Greg Smyth, para. 3.

6. Consistent with the expectations of the provincial curriculum for kindergarten to grade 12 students, the Board strives to increase awareness, understanding and integration of Nuu-chah-nulth culture, history and language in all District schools. It is a focus of the British

Columbia public education system to integrate First Nations world views and perspectives in the classroom.

Affidavit of Greg Smyth, paras. 5, 7 and Ex B.

7. Section 76 of the *School Act* mandates that the School District operate on a strictly secular and non-sectarian basis. The School District does so. While teachers teach about the history, culture and religious beliefs of different peoples, the School District does not teach or advocate in any way the supremacy of one belief over another.

Affidavit of Greg Smyth, para. 9.

8. As the School District operates on secular, non-sectarian principles, any activities relating to the culture, traditions or religion of a group are done as educational matters, consistent with the law that teaching about such matters is permissible, while favoring one view over another is not. Particularly given the demographic makeup of the School District and the provincial focus on integrating First Nations culture and perspective into the learning environment, teaching about First Nations culture and traditions is critical in the School District.

Affidavit of Greg Smyth, para. 12.

Events at John Howitt Elementary School

The Cleansing Demonstration

9. On or about September 8, 2015, at the first staff meeting of the school year at JHES, Sherri Cook ("Ms. Cook"), a Nuu-chah-nulth Education Worker assigned to JHES by the Nuu-chah-nulth Tribal Council, suggested having a "smudging" or "cleansing" demonstration by a Nuu-chah-nulth Elder take place in the classrooms of those teachers who were interested. Smudging or cleansing, in this case, would involve the act of creating smoke from sage lit in an abalone shell and fanning it over walls and doorways (the "Cleansing Demonstration").

The purpose of the Cleansing Demonstration was to teach students about Nuu-chah-nulth culture and history. Three teachers indicated they were interested in holding the Cleansing Demonstration in their classrooms.

Affidavit of Stacey Manson, paras. 6, 8.
Affidavit of Sonia Iacuzzo, para. 5.
Affidavit of Jelena Dyer, para. 3.
Affidavit of Sherri Cook, para. 11.

10. On September 14, 2015, the Principal of JHES, Stacey Manson ("Principal Manson"), provided a letter to teachers to send out to parents, including the Petitioner, informing them about the Cleansing Demonstration, what would occur during the Cleansing Demonstration and inviting them to ask questions about, or observe the Cleansing Demonstration (the "September 14th Letter"). Ultimately, the Cleansing Demonstration was not carried out as described in the September 14th Letter.

Affidavit of Candace Servatius, para. 6, Exhibit B.
Affidavit of Stacey Manson, para. 7.
Affidavit of Sherri Cook, paras. 7-8, 11, 13.

11. On September 16, 2015, Ms. Cook attended JHES with a Nuu-chah-nulth Elder. The Elder conducted the Cleansing Demonstration in three classrooms. The Cleansing Demonstration involved an explanation of Nuu-chah-nulth beliefs, including the belief that everything is connected. The Elder explained the purpose of smudging for Nuu-chah-nulth people and demonstrated smudging by creating smoke from sage lit in an abalone shell and fanning it over walls and doorways.

Affidavit of Sherri Cook, paras. 8-9, 11.
Affidavit of Geraldine Dekoninck, para. 3.
Affidavit of Jelena Dyer, para. 9.
Affidavit of Sonia Iacuzzo, paras. 7-8.

12. At no time was any student directly involved in the act of smudging or cleansing either by having smoke fanned over them, by holding a cedar bough or eagle feather, or otherwise. Rather, students were invited to observe the Cleansing Demonstration and to ask questions.

Affidavit of Sherri Cook, para. 13.
Affidavit of Sonia Iacuzzo, para. 9.
Affidavit of Geraldine Dekoninck, para. 3.
Affidavit of Jelena Dyer, para. 10.

13. At no time was any student told that "it would be rude" if they did not participate in the Cleansing Demonstration. Similarly, no student was told that any student's "spirit" needed to be "cleaned" of negative "energies".

Affidavit of Jelena Dyer, para. 13.

14. At no time was the Petitioner's daughter, ("E.S."), told by her teacher, Ms. Jelena Dyer ("Ms. Dyer"), that she was required to participate in the Cleansing Demonstration. In fact, prior to the Cleansing Demonstration, Ms. Dyer told all students in her classroom that they could choose to go outside if the smoke bothered them and a number of students, in fact, did so. E.S. did not advise Ms. Dyer that she did not want to remain in the classroom during the Cleansing Demonstration.

Affidavit of Jelena Dyer, para. 13.

15. Following the Cleansing Demonstration on September 16, 2015, the Petitioner arrived at JHES to attend a meeting with Principal Manson and Sonia Iacuzzo ("Ms. Iacuzzo"), who teaches the Petitioner's son ("M.S."). The purpose of the meeting was to discuss M.S.'s placement and learning needs. After the meeting concluded, the Petitioner raised concerns regarding the September 14th Letter. At that time, it became apparent to Principal Manson and Ms. Iacuzzo that the Petitioner was unaware that the Cleansing Demonstration had already taken place.

Affidavit of Candice Servatius, para. 8.
Affidavit of Stacey Manson, para. 9.
Affidavit of Sonia Iacuzzo, para. 13.

16. Mistakenly, the September 14th Letter was sent home on September 15, 2015 in M.S.'s class, and not at all in E.S.'s class. At the meeting with the Petitioner, Principal Manson apologized to the Petitioner for that oversight, and for the fact that the letter did not specify a date and time for when the Cleansing Demonstration would occur. Principal Manson confirmed that she would provide advance notice to the Petitioner in the future so that she would be aware of exceptional activities in the classroom that the Petitioner may find objectionable. Principal Manson did not advise the Petitioner of any such activity because no such activity arose thereafter that would require such notice.

Affidavit of Candice Servatius, para. 8.
Affidavit of Stacey Manson, para. 9.
Affidavit of Sonia Iacuzzo, para. 13.

17. Following the meeting that took place on September 16, 2015, the Petitioner called the Superintendent of Schools for School District No. 70, Greg Smyth ("Mr. Smyth"), to express her concerns in respect of the Cleansing Demonstration, and requested Board policies and procedures regarding the practice of cleansing. In fact, the Board does not have any policies or procedures regarding the practice of cleansing.

Affidavit of Candice Servatius, paras. 10-11.
Affidavit of Greg Smyth, para. 11.

18. Some time after the Petitioner called Mr. Smyth, the Petitioner wrote a letter to Mr. Smyth and the Board expressing her concerns (the "First Letter").

Affidavit of Candice Servatius, para. 12, Exhibit C.

19. Following receipt of the First Letter, Mr. Smyth telephoned the Petitioner. Contrary to paragraph 11 of the Petition and paragraph 13 of the Affidavit of Candace Servatius, in the course of that telephone call, Mr. Smyth did not assure the Petitioner that "no religious or spiritual exercise would again occur at JHES without giving adequate notice to parents and

requiring parental consent to participate". Rather, Mr. Smyth agreed with the Petitioner that the Board should provide advance notification to parents of any practices which may raise concern, and clarify that student participation is optional therein. Mr. Smyth was unaware, as he made these comments, that students at JHES did not, in fact, participate in the Cleansing Demonstration and were only observing and learning about its history and purposes.

Affidavit of Candice Servatius, para. 12-13, Exhibit C.
Affidavit of Greg Smyth, para. 13, Exhibit E.

The Hoop Dance

20. Each year, a program called "ArtStarts", sponsored by the British Columbia Arts Council and funded through the Government of British Columbia's Creative Futures Initiative, provides funding for artistic activities planned for the School District during the school year. ArtStarts provides a catalogue of educational activities to select from. Principal Manson reviewed the catalogue and, having regard to the Aboriginal focus of the British Columbia curriculum, selected a performance by First Nations performer, Teddy Anderson ("Mr. Anderson").

Affidavit of Stacey Manson, paras. 12-13, Exhibits A, B, C.

21. On or about January 7, 2016, Mr. Anderson performed a hoop dance for the students at John Howitt Elementary during an assembly of all students (the "Hoop Dance"). The Hoop Dance included Mr. Anderson reciting a native prayer to himself, performing the Hoop Dance and a song on the native flute, and providing detailed explanations about the stories in each dance.

Affidavit of Candice Servatius, para. 14.
Affidavit of Stacey Manson, paras. 13-17, Exhibits B, C, D.
Affidavit of Sonia Iacuzzo, para. 15.
Affidavit of Geraldine Dekoninck, para. 5.

22. Students did not participate in any way in the reciting or confirming of a prayer during the Hoop Dance. Nothing in the performance of the Hoop Dance encouraged students to

believe in, or adopt the culture or religion of Mr. Anderson as demonstrated through his performance.

Affidavit of Stacey Manson, para. 17.
Affidavit of Sonia Iacuzzo, para. 15.
Affidavit of Geraldine Dekoninck, para. 5.

23. After hearing from her children about the Hoop Dance, the Petitioner wrote a letter to Mr. Smyth and the Board expressing her concerns regarding the facilitation of "religious practices" at JHES (the "Second Letter").

Affidavit of Candice Servatius, paras. 15-17, Exhibit D.

24. On June 9, 2016, the Petitioner attended the office of the School District, without an appointment, to speak to Mr. Smyth. Mr. Smyth met with the Petitioner to discuss her concerns (the "June 9th Meeting"). Mr. Smyth unequivocally denies stating to the Petitioner that "there is more tolerance for Aboriginal religion than your religion" as sworn at paragraph 19 of the Affidavit of Candace Servatius, at the June 9th Meeting, or at all. In fact, during the June 9th Meeting with the Petitioner, Mr. Smyth expressed that he disagreed with the Petitioner that what had occurred during the Cleansing Demonstration and the Hoop Dance amounted to involving students in "religious" activities. Mr. Smyth further affirmed the broader educational goals of seeking a greater understanding and awareness of Aboriginal history, culture and traditions in the public school system. Mr. Smyth anticipated the Petitioner would pursue the matter further, and therefore confirmed that the School District would not be responding further until it had been able to undertake a review of its position.

Affidavit of Greg Smyth, paras. 14-15.

History and Legacy of Indian Residential Schools

25. The issues central to this Petition cannot be considered in a vacuum; that is, without regard to the traumatic history and legacy of Indian Residential Schools ("IRS") in Canada and the

efforts of reconciliation with First Nations. It is critical to view these issues with the understanding that the horrors of IRS were facilitated and implemented through the mechanisms of the education system and the Christian church. In communities such as John Howitt Elementary, this legacy is not mere historical narrative, but rather an open wound that continues to afflict its members.

26. Though First Nations carry the trauma and pain of this legacy, its effects are not restricted to First Nations. Rather, the legacy of IRS and colonialism continues to impact and inform the relationship between First Nations and non-First Nations in communities. As a result, teaching the history of Indigenous-Canadian relationships, including First Nations cultural traditions and differences, is fundamental to the ongoing endeavour of reconciliation and its goal of changing the relationship between Indigenous and non-Indigenous Canadians.

Affidavit of Dr. Judith Sayers, paras. 6-7.

Affidavit of Jo-Anne L. Chrona, paras. 22-23.

27. The Truth and Reconciliation Commission ("TRC") detailed in its Summary Report, "Honouring the Truth, Reconciling for the Future" ("TRC Summary Report"), the history of IRS and outlines the purpose of IRS as follows at pages 2-3:

> And, Canada separated children from their parents, sending them to residential schools. This was done not to educate them, but primarily to break their link to their culture and identity. In justifying the government's residential school policy, Canada's first prime minister, Sir John A. Macdonald, told the House of Commons in 1883:
>
> > When the school is on the reserve the child lives with its parents, who are savages; he is surrounded by savages, and though he may learn to read and write his habits, and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed on myself, as the head of the Department, that Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and mode of thought of white men.
>
> These measures were part of a coherent policy to eliminate Aboriginal people as distinct peoples and to assimilate them into the Canadian mainstream against their

> will. Deputy Minister of Indian Affairs Duncan Campbell Scott outlined the goals of that policy in 1920, when he told a parliamentary committee that "our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic."

Affidavit of Dr. Judith Sayers, para. 6, Exhibit A.

28. For many of the parents and children of the John Howitt Elementary community, the legacy of IRS is a lived experience and it is a legacy that is, among other things, one of alienation from schools and the public education system. For intergenerational survivors of IRS, schools and education are associated with unfathomable abuse and trauma. As a result of this legacy and persistent systemic prejudice, Aboriginal learners have struggled to succeed in the school system, evident by the lower rates of success in school and graduation from the education system.

Affidavit of Dr. Judith Sayers, para. 5.
Affidavit of Jo-Anne L. Chrona, paras. 3-4, 19, 22-27, Exhibits B, I.

29. With respect to the School District specifically, a recent report highlighting features of the educational experience of First Nations learners, entitled "Aboriginal Report 2012/13 - 2016-17 How Are We Doing? School District No. 70 (Alberni)", indicates that the School District is not fully meeting the needs of Aboriginal learners. The report demonstrates that Aboriginal students have lower rates of success in Foundation Skills Assessments in the areas of reading comprehension, writing and numeracy, and have significantly lower rates of graduation than did non-Aboriginal students. The level of Aboriginal students graduating with a certificate of graduation (a "Dogwood" diploma) in 2016/17 in the School District was only 30% compared with a rate of 57% for non-Aboriginal students.

Affidavit of Jo-Anne L. Chrona, paras. 24-26, Exhibit I.

30. Additionally, the British Columbia Student Satisfaction Survey shows that Aboriginal students are more likely than non-Aboriginal students to feel unsafe at schools and to report being bullied, teased or picked on.

Affidavit of Jo-Anne L. Chrona, para. 27.

31. The inclusion of Indigenous perspectives and culture is routinely pointed to as an effective way of bridging the divide between Indigenous and non-Indigenous learners by developing an understanding of First Nations culture, history and perspectives.

32. A report titled "BC Antiracism Research" submitted to the BC Ministry of Education ("Ministry") and the First Nations Education Steering Committee ("FNESC") by the Directions Evidence and Policy Research Group in 2016 examines racism and race-based bullying against Aboriginal students in BC's education system. The report discusses ways to address racism in the education system including options such as the respectful inclusion of Indigenous content and perspectives into classrooms.

Affidavit of Jo-Anne L. Chrona, para. 28, Exhibit J.

33. Indigenous perspectives and knowledge are not only expressions of multiculturalism, but are also integral aspects of Canada's history, and the contemporary foundation of relations between Indigenous and non-Indigenous Canadians.

Affidavit of Jo-Anne L. Chrona, para. 29.

34. The TRC called upon the Government of Canada in the TRC Summary Report to take action to repair the harms of IRS, particularly as they relate to Aboriginal success in education. Specifically, the TRC made the following Calls to Action:

> 7. We call upon the federal government to develop with Aboriginal groups a joint strategy to eliminate educational and employment gaps between Aboriginal and non-Aboriginal Canadians.
>
> ...
>
> 10. We call on the federal government to draft new Aboriginal education legislation with the full participation and informed consent of Aboriginal peoples. The new legislation would include a commitment to sufficient funding and would incorporate the following principles:

...

ii. Improving education attainment levels and success rates.

iii. Developing culturally appropriate curricula.

...

62. We call upon the federal, provincial, and territorial governments, in consultation and collaboration with Survivors, Aboriginal peoples, and educators to:

i. Make age-appropriate curriculum on residential schools, Treaties, and Aboriginal peoples' historical and contemporary contributions to Canada a mandatory education requirement for Kindergarten to Grade Twelve students.

...

63. We call upon the Council of Ministers of Education, Canada to maintain an annual commitment to Aboriginal education issues, including:

i. Developing and implementing Kindergarten to Grade Twelve curriculum and learning resources on Aboriginal peoples in Canadian history, and the history and legacy of residential schools.

ii. Sharing information and best practices on teaching curriculum related to residential schools and Aboriginal history.

iii. Building student capacity for intercultural understanding, empathy and mutual respect.

iv. Identifying teacher-training needs relating to the above.

TRC Summary Report, at pp. 320-321, 331.

35. The legacy of IRS means that positive steps must be taken to change the way that schools and education are understood and experienced by Aboriginal learners. In order to succeed, Aboriginal learners need to feel welcome. At the same time, non-Aboriginal learners must be educated about the culture and history of their Aboriginal peers to foster an understanding, accepting school community. The integration of aspects of Aboriginal culture in public education, particularly in the School District, is fundamental to these aims.

Affidavit of Dr. Judith Sayers, paras. 7, 16, 20.
Affidavit of Jo-Anne L. Chrona, paras. 18-19, 23.

III. Issues

36. The following issues arise from the Petition:

a. The Petition is an abuse of process and ought to be struck, as:

   i. The Petitioner has failed to exhaust her administrative remedies;

   ii. There is no legal basis for the Prohibition Order;

b. The Petitioner's right to religious freedom pursuant to section 2 of the *Charter* has not been violated;

   i. The duty of neutrality has not been violated and the section 2 analysis has not been triggered;

   ii. The Petitioner has failed to establish a sincere belief;

   iii. The Petitioner has failed to establish interference with a sincere belief that is more than trivial or insubstantial;

   iv. The Board properly balanced the statutory objectives and the *Charter* values; and

c. The Prohibition Order sought is overly broad and requires the Court to engage in law-making.

IV. Argument

Abuse of Process

37. This Petition is an abuse of process, and ought to be struck:

a. First, the Petitioner has not exhausted her administrative remedies under section 11 of the *School Act,* RSBC 1996, c. 412 ("*School Act*");

b. Second, as a consequence of this failure by the Petitioner, there has been no final decision or record for this Court to review; and

c. Third, the relief of prohibition sought by the Petitioner may only be sought pursuant to the *Judicial Review Procedures Act,* RSBC 1996, c. 241 ("*JRPA*"). The Petitioner has not plead the *JRPA* and further, cannot seek relief pursuant to the *JRPA* because there is no final administrative decision that may form the basis of a judicial review proceeding in the instant case.

The Petitioner Has Failed to Exhaust Her Administrative Remedies Under the School Act

38. The law is clear that where Parliament has created a legislative scheme that provides for an administrative appeal process, it is not open to an individual to bypass the administrative process, and instead opt to initiate a proceeding in court. The process set out in the legislative scheme should not be jeopardized by permitting parallel access to the courts.

Vaughan v. Canada, 2005 SCC 11 ("*Vaughan*"), at paras. 29, 33-35, 39, and 42.

39. In *Vaughan,* the appellant was a federal public servant who was rejected in his application for early retirement incentive benefits following a layoff. The relevant statutory scheme, the *Public Service Staff Relations Act,* R.S.C. 1985 C. P-35 ("*PSSRA*"), contained a grievance procedure which the appellant declined to pursue, instead initiating a negligence claim against the Crown in Federal Court.

40. The Supreme Court of Canada explained that in some circumstances, the language and context of a statutory scheme will amount to an explicit ousting of the jurisdiction of the courts. Although the Court concluded that this type of exclusive jurisdiction did not exist

under the *PSSRA,* the Court nevertheless determined that judicial restraint should, at times, be exercised, even when it is not strictly mandatory under the legislative scheme:

> 21 In *Pleau*, Cromwell J.A. concluded that Parliament's intent in ss. 91 and 92 of the PSSRA, unlike the Ontario Legislature's intent in the *Labour Relations Act*, R.S.O. 1990, c. L.2 (now 1995, c. 1, Sch. A), at issue in *Weber*, was not to oust the jurisdiction of the courts, at least not in those cases where no independent arbitration was provided for. He relied on the statement in *Weber*, at para. 54, that courts "possess residual jurisdiction based on their special powers" (p. 403). He also stated, at p. 381:
>
> > While it takes very clear language to oust the jurisdiction of the superior courts as a matter of law, courts properly decline to exercise their inherent jurisdiction where there are strong policy reasons for doing so.
>
> Cromwell J.A. acknowledged at pp. 387-88 that "an express grant of exclusive jurisdiction is not necessary to sustain judicial deference to the statutory dispute resolution process", citing *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, 1990 CanLII 110 (SCC), [1990] 1 S.C.R. 1298.
>
> 22 In the course of his reasons, however, Cromwell J.A. deduced from *Weber* the principle that "the capacity of the scheme to afford *effective redress* must be considered. Simply put, the concern is that where there is a right, there ought to be a remedy" (p. 391 (emphasis in original)). I agree (as did Evans J.A. in the courts below) that this feature is a factor for consideration, but I do not agree with the appellant that the absence of independent adjudication is conclusive. The task of the court is still to determine whether, looking at the legislative scheme as a whole, Parliament intended workplace disputes to be decided by the courts or under the grievance procedure established by the PSSRA.
>
> [Emphasis added.]

Vaughan, at paras. 21-22.

41. The Court concluded that the appellant's claim could have been remedied through the grievance procedure enumerated within the legislation, and explained why it declined to exercise its jurisdiction in that instance:

> ... the appellant's legal position should not be improved by his failure to grieve the ERI issue. The dispute resolution machinery under s. 91 was there to be utilized. Efficient labour relations is undermined when the courts set themselves up in competition with

> the statutory scheme (*St. Anne Nackawic,* at p. 718*; Weber*, at para. 41; *Regina Police* at para. 26).

And that:

> ... where Parliament has clearly created a scheme for dealing with labour disputes, as it has done in this case, courts should not jeopardize the comprehensive dispute resolution process contained in the legislation by permitting routine access to the courts. While the absence of independent third-party adjudication may in certain circumstances impact on the court's exercise of its residual discretion (as in the whistler-blower cases) the general rule of deference in matters arising out of labour relations should prevail.
>
> [Emphasis added.]

Vaughan, at paras. 37, 39.

42. In this case, the Petitioner has failed to exhaust her administrative remedies under section 11 of the *School Act.*

43. A comprehensive appeal process is set out by the legislature in s. 11-11.8 of the *School Act.*

44. S. 11(3) of the *School Act* requires a board to establish, by bylaw, an appeal procedure. The Board established an appeal procedure in Policy 115: Appeal of Decision by an Employee, approved March 6, 1990, amended November 18, 2008 ("Policy 115").

45. Policy 115 requires that parents, *inter alia*, resolve concerns informally at the school level. If such an informal dispute resolution process does not resolve the issue, a parent may make a formal appeal to the Board under the appeal procedure set out in Policy 115.

46. If a parent is not satisfied with the formal decision of the Board, only then, under s. 11 and s. 11.1 of the *School Act,* a parent may appeal a decision of a school board to the superintendent of appeals. This right of appeal is generally stated in s. 11(2), which provides:

> If a decision of an employee of a board significantly affects the education, health or safety of a student, the parent of the student or the student may, within a reasonable

time from the date that the parent was informed of the decision, appeal that decision to the board.

47. Under section 11.1 of the *School Act*, the superintendent of appeals may hear appeals from a decision of the Board.

48. On receipt of an appeal under section 11.1, a superintendent of appeals has the discretionary power to refer the matter to mediation or adjudication, or summarily dismiss all or part of the appeal.

49. A decision of a superintendent of appeals under section 11.2 (1) (b) is protected by a privative clause in s. 11.6 of the *School Act*, providing:

> Decision final
>
> 11.6 A decision of a superintendent of appeals under section 11.2 (1) (b), or of an adjudicator under section 11.4 (1), is final and binding on the parties.

50. Policy 115 provides the following:

> The Board of Education recognizes that a student or parent/guardian of the student has the right to appeal the decision by an employee where a decision significantly affects the education, health or safety of the student. Failure to make a decision where a decision is warranted, is deemed to be a decision.
>
> The Board accepts its obligation to inform members of its public of the statutory right of appeal under the School Act, and where necessary, a subsequent appeal to the Superintendent of Achievement.
>
> Where a decision is in question, the Board expects that all reasonable efforts will be made to resolve the matter at the school/department level. Failing the resolution of the matter, the concerned party shall be advised of their right to appeal.
>
> Appeals on decisions shall be made to the Board and shall be dealt with in accordance with the Regulations to this policy.
>
> ...
>
> **2.0 NATURE OF THE APPEAL**

The following decisions or failure to make decisions, by an employee shall be deemed appropriate for appeal:

...

2.5 other decisions that significantly affects the education, health and safety of a student.

3.0 REQUEST FOR APPEAL

3.1 The student or the parent/guardian of the student making the appeal must complete the appropriate "Appeal of Decision" form, stating their reasons for the appeal (included with this policy).

3.2 A student making an appeal has the right to be accompanied and/or supported by a parent, advocate, support person or interpreter/translator.

4.0 APPEAL DISPOSITION

4.1 As soon as practical after receipt of the request for appeal, the Superintendent shall cause to have the matter investigated and to seek immediate resolution of the matter at the school/department level.

4.2 Where a student's interests may be jeopardized while awaiting the hearing of an appeal (such as in a suspension), the Superintendent, after consultation with the Board Chairman, may postpone the suspension until the appeal process is completed.

4.3 If resolution at the school/department level is not possible to the mutual satisfaction of the appellant and/or the employee, the superintendent shall convene a meeting of the Appeal Committee to hear the reasons for the dispute from the appellant and from the employee(s).

4.4 The Appeal Committee shall be composed of the Superintendent and a minimum of three Trustees.

4.5 The Appeal Committee shall hear from the appellant(s) and the employee(s), review the investigator's report, and receive input from staff.

The appellant(s) and employee(s) shall be excused, and the Appeal Committee shall prepare a written recommendation for the resolution of the appeal to the Board at the next regular or special meeting of the Board.

5.0 DECISION ON APPEAL

> 5.1 The Board shall consider the recommendation of the Appeal Committee and based on relevant information provided, shall;
>
> 5.1.1 provide a decision on the recommendation including reasons for the decision, or
>
> 5.1.2 require further investigation and/or information; or
>
> 5.1.3 require other dispute resolution processes, including mediation; and/or
>
> 5.1.4 convene a special meeting to hear the appeal before the entire Board.
>
> ...
>
> **7.0 REFERRAL TO THE SUPERINTENDENT OF ACHIEVEMENT**
>
> In the event where the Board cannot support the appellant's position or where the Board refuses to hear an appeal, the Board shall ensure that the concerned individual(s) is informed of the right to refer the matter to the Superintendent of Achievement.

51. The *School Act* and Policy 115 thus form an administrative scheme that provides a dispute resolution machinery, and an internal appeal process in relation to the education, health or safety of a student.

52. Together, they provide a thorough process available to the Petitioner to: (1) seek an answer from the Board regarding its decision to integrate Aboriginal worldviews and perspectives into public education; (2) if dissatisfied, file an appeal to the Superintendent of Appeals; and (3) if still dissatisfied, pursue judicial review of that decision. The Petitioner has failed to take any of these steps.

53. While the court's jurisdiction is not explicitly ousted by a full privative clause in the *School Act*, the Board submits that the court should decline to exercise jurisdiction because the legislature has, within the *School Act*, created a comprehensive dispute resolution process that is owed deference. It is not open to the Petitioner to ignore the process outlined in the *Act* in favour of a Petition proceeding.

Vaughan, at paras. 21-22.

54. This Court ought not set itself up in competition with the statutory scheme, nor jeopardize the comprehensive dispute resolution process contained in the *School Act* and Policy 115, by permitting the Petitioner to access the Court and circumvent the administrative process.

Vaughan.

There is No Final Decision to Review

55. In addition to concerns of efficiency and legislative intent, where a claimant fails to exhaust their administrative remedies pursuant to a legislative scheme, there is no final decision to be judicially reviewed.

56. In this regard, the decision of the BC Court of Appeal in *Denton v British Columbia (Workers' Compensation Appeal Tribunal)*, 2017 BCCA 403 ("*Denton*") is of aid. In *Denton*, the petitioner had sought judicial review of decisions related to a worker's compensation claim. The petition was dismissed on the basis it was filed late, and the reviewing court also found that the petition improperly introduced *Charter* claims that had not been raised earlier in the appeal process. The petitioner appealed. The Court explained:

> 37 ...judicial review is inherently a review of the record before an administrative tribunal, not an appeal or a hearing de novo. He applied the principle that a reviewing court should proceed on the basis of a record containing the necessary adjudicative and legislative facts created before the administrative tribunal and should have the benefit of an informed view of the specialized and expert administrative adjudicator. He also was aware that attempting to raise issues for the first time on judicial review risks circumventing the legislative intent to grant the Review Division the jurisdiction to hear Charter issues in the first instance...In brief, all of these were relevant and appropriate considerations to take into account and it cannot be said that the judge erred in doing so.
>
> [Emphasis added.]

57. Even where there is a final reviewable decision, which there is not in this case, it is well established that a court may decline to permit judicial review where an applicant has failed to exhaust adequate alternative remedies.

Denton at para. 36.

58. In respect of the issues raised in this Petition, the superintendent of appeals has the jurisdiction to, and is in fact, required to consider and conduct an analysis under the framework outlined in *Doré v Barreau du Québec ("Dore")*, 2012 SCC 12 and *Loyola High School v Quebec (Attorney General) ("Loyola")*, 2015 SCC 12, that is, an analysis that involves balancing *Charter* values, in exercising their discretion under the *School Act.*

School Act, s. 11.1 (0.1).

59. As a consequence of the Petitioner's failure to exhaust her administrative remedies under the *School Act,* no reviewable decision of the superintendent of appeals exists.

60. Further, by failing to exhaust her administrative remedies and seeking a decision of the superintendent of appeals, the Petitioner has deprived this Court of the ability to proceed on the basis of a record containing the necessary adjudicative and legislative facts created before the superintendent of appeals. Such facts, if capable of being established in a summary manner in this proceeding, would be established without the benefit of an informed view of the specialized and expert adjudicator on matters involving the education, health or safety of a student.

Denton, at para. 37.

61. In this regard, any decision of this Court on the instant deficient record would risk circumventing the legislative intent to grant the superintendent of appeals the jurisdiction to hear the issues of this Petition in the first instance.

Denton, at para. 37.

62. If this matter is to be heard by this Court, it should be by way of judicial review which is inherently a review of the record before an administrative tribunal, not an appeal or a hearing *de novo*.

Denton, at para. 37.

63. A review of the record before the administrative decision-maker is particularly necessary in circumstances such as these where the court is required to review whether the administrative decision-maker exercised their discretion in a manner that properly balanced the government's statutory objectives and *Charter* values. In the absence of the record before the decision-maker, the court will not be able to assess the decision-maker's considerations which is precisely the subject matter under review under the *Dore/Loyola* Framework, or under the reasonableness standard on judicial review.

64. Further, if the Petitioner had properly exhausted her administrative remedies, and then sought judicial review of a decision of the superintendent of appeals, the Petitioner would have had to overcome the deference this Court owes to the superintendent of appeals' exercise of discretion. In the circumvention of her administrative remedies, the Petitioner asks this Court to ignore the legislative intent that deference be shown to the administrative decision-maker and to conduct a trial *de novo*, making findings on a balance of probabilities, rather than a review of the superintendent of appeals' decision on a reasonableness standard.

Denton, at para. 36.

An Order for Prohibition Must be Brought Pursuant to the JRPA

65. In the absence of a final decision by the superintendent of appeals, the Petitioner is unable to seek judicial review under the *JRPA,* and in the absence of an application for judicial review, an order for prohibition, as sought by the Petitioner in her prayer for relief, cannot lie.

66. Most challenges to acts done under the authority of a statute are considered to be properly brought under the *JRPA.*

L'Association des parents de l'école Rose-des-Vents v Conseil scolaire francophone de la Colombie-Britannique, 2011 BCSC 89 ("*Conseil scolaire*") at para. 24.

67. While the *Charter* protects the constitutional rights of all Canadians as described in the *Charter* itself, the *JRPA* protects the common law rights of Canadians. These rights include such things as the right to natural justice on any judicial or quasi-judicial hearing and the right to be heard before an unbiased tribunal. Enforcement of these rights is often pursued by the common law writs of *certiorari*, prohibition and *mandamus* in accordance with the provisions of the *JRPA*.

Conseil scolaire, at para 28, citing *Noyes v. South Cariboo School District No. 30* (1985), 64 B.C.L.R. 287 (S.C.), 33 A.C.W.S. (2d) 221, at paras. 5-6.

68. An application for judicial review must be brought by way of a petition proceeding under the *JRPA* and on such application, the Court may order, *inter alia*, relief in the nature of prohibition.

JRPA, s.2.

69. In the absence of an application for judicial review, an order for prohibition, such as the one sought in the Prohibition Order, cannot lie.

70. While true that declaratory relief under section 24 of the *Charter* may be set by way of petition without reliance on the *JRPA,* an order of prohibition arises from section 2 of the *JRPA* and cannot be made out without reliance thereon.

71. In *Conseil scolaire,* the proceedings were brought pursuant to the *JRPA,* as a challenge to ministerial funding decisions, and pursuant to s. 24 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") for relief. The plaintiffs sought injunctive and declaratory relief, said to arise as a result of a breach of the Province's constitutional obligation to afford

minority language education to francophone children. The court undertook an analysis of the categories of proceedings which may be brought by petition under the *Supreme Court Civil Rules* as follows:

> 20 The enumerated cases in Rule 2-1(2) fall into four categories. First among these are proceedings in which only one party is interested: Rule 2-1(2)(a) and potentially (c) [particularly in relation to construction of a will or deed]; (d) [particularly in relation to administration of an estate or the execution of a trust]; and (e) [in relation to maintenance, guardianship or property of infants].
>
> 21 Second, the rule identifies certain proceedings where only declaratory relief is sought: Rule 2-1(2)(g) and (h).
>
> 22 Third, the rule identifies cases where the relief sought is summary in nature: Rule 2-1(2)(d) [construction of a document]; (f) [payment of funds out of court]' and (g) [partition and sale of property].
>
> 23 Finally, Rule 2-1(2)(b) specifically provides for the initiation of proceedings by petition where an application is authorized by an enactment to be made to the court. The Rose-des-Vents Proceedings for judicial review of the Minister's funding decisions were required by enactment to be commenced by petition. The *Judicial Review Procedures Act,* RSBC 1996, c. 241 (*"JRPA"*)] states:
>
> > 2 (1) An application for judicial review must be brought by way of a petition proceeding.
> >
> > (2)On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
> >
> > (a)relief in the nature of mandamus, prohibition or certiorari;

> (b)a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.
>
> [Emphasis Added.]

24 Most challenges to ministerial acts are considered to be properly brought under the *JRPA*.

72. In *Conseil scolaire*, the declaratory relief was sought appropriately by petition under the *Charter* while the injunctive relief, in that case, was appropriately brought under the *JRPA*. The court explained:

> 28 It is permissible to seek both declaratory relief under s. 24 of the *Charter* and a remedy under the *JRPA* in the same petition. In *Noyes v. South Cariboo School District No. 30* (1985), 64 B.C.L.R. 287 (S.C.), the petitioner might have sought relief under the *JRPA* but did not do so, confining his claim to a plea for a *Charter* remedy. Bouck J. nevertheless commented on the alternative procedural routes that might have been taken at pp. 288-89:
>
> > The Canadian *Charter of Rights and Freedoms* protects the constitutional rights of all Canadians as described in the *Charter* itself. They include such things as the right to life, liberty and security of the person (s. 7). Remedies to enforce the breach of the rights of this *Charter* are contained in s. 24(1). It reads:
> >
> > > 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
> >
> > On the other hand, the *Judicial Review Procedure Act* protects the common law rights of Canadians. These rights include such things as the right to natural justice on any judicial or quasi-judicial hearing and the right to an unbiased tribunal.

> Enforcement of these rights is often pursued by the common law writs of certiorari, prohibition and mandamus in accordance with the provisions of the *Judicial Review Procedure Act*.
>
> Hence, a person complaining about interference with his legal rights may take one of three steps:
>
> > (1)He may petition the court under the *Judicial Review Procedure Act* in which event the court is confined to an examination of any breaches of his common law rights and the remedies available thereunder, or
> >
> > (2)He may petition the court under the *Charter* in which event the court is confined to an examination of a breach of his constitutional rights and the remedies available thereunder, or
> >
> > (3)He may combine his petition under the Canadian *Charter of Rights and Freedoms* with a complimentary request for relief under the *Judicial Review Procedure Act*. In that event, both common law rights and constitutional rights may be looked at and the remedies available invoked.
>
> [Emphasis added.]

73. The decision to include the Cleansing Demonstration and the Hoop Dance was taken by Principal Manson pursuant to her duty to administer and supervise the school under section 5 (7) of the *School Regulation,* BC Reg 265/89, which includes:

> (7) The principal of a school is responsible for administering and supervising the school including
> (a) the implementation of educational programs,
> (b) the placing and programming of students in the school,
> ...
> (d) the program of teaching and learning activities...

74. Given the importance and obligation to include student learning about First Nations culture, history and education in schools, Principal Manson made the decision that it was important

and relevant to allow the Cleansing Demonstration and Hoop Dance to facilitate student learning about First Nations education and culture.

Affidavit of Stacey Manson, paras. 4, 7, 8.

75. A challenge to Principal Manson's decision to have the Cleansing Demonstration and the Hoop Dance is properly brought under the appeal process set out in the *School Act* and thereafter pursuant to the *Judicial Review Procedures Act,* RSBC 1996, c. 241 ("*JRPA*").

L'Association des parents de l'école Rose-des-Vents v Conseil scolaire francophone de la Colombie-Britannique, 2011 BCSC 89 ("*Conseil scolaire*") at para. 24.

76. A proceeding brought under the *JRPA* would result in a judicial hearing where all aspects of the exercise of the superintendent of appeals' statutory power can be fully, directly and promptly engaged.

77. However, the Petitioner has not plead the *JRPA.* Rather, unlike *Conseil scolaire* and the cases cited therein, she has based her claim on a breach of the *Charter* and apparently, the *BC Human Rights Code.*

78. On the Petitioner's reliance on the *BC Human Rights Code,* the Respondent says only that it is trite law that the BC Human Rights Tribunal has exclusive jurisdiction to determine whether there has been a breach of the *BC Human Rights Code* at first instance and forecloses any civil action based directly upon a breach thereof.

Seneca College v. Bhadauria, [1981] 2 SCR 181, 1981 CanLII 29 (SCC), p.195.
Potter v Vancouver East Cooperative Housing Assn, 2019 BCSC 871, para.223.

79. Notwithstanding that she has not plead the *JRPA*, the Petitioner seeks enforcement of a common law right that arises under the *JRPA* by way of the Prohibition Order under paragraph 2 of Part 1 of the Petition. The Board submits that an order for prohibition cannot be made under the *Charter,* without reliance on the *JRPA,* by way of petition.

80. Although appropriate to commence a proceeding by petition for a declaratory order under s.24(1) of the *Charter*, the Prohibition Order cannot be sought by petition under the *Charter* pursuant to the *Rules* as it does not fall under the categories enunciated in Rule 2-1(2), namely:

    a. it does not fall among the proceedings in which only one party is interested (Rule 2-1(2)(a)(c)(d)or(e));

    b. it does not fall among the proceedings where only declaratory relief is sought (Rule 2-1(2)(g) or (h));

    c. it does not fall among the cases where the relief sought is summary in nature as there are significant factual disputes involved in the Petition (Rule 2-1(2)(d)(f) or (g)); and

    d. it does not fall among the cases where an application is authorized by an enactment to be made to the court (Rule 2-1(2)(b)).

Conseil scolaire, at paras. 20-24.

81. The Board submits that the relief sought in the form of the Prohibition Order under paragraph 2 of Part 1 of the Petition should be denied on the basis that it has been improperly brought by Petition.

The Petitioner's Right to Freedom of Religion Under S.2 of the *Charter* has Not Been Violated

The Legal Test

82. In *Mouvement laique québécois v Saguenay (City)*, 2015 SCC 16 (*"Saguenay"),* the Supreme Court of Canada set out a two-part test for cases in which a complaint of discrimination based on religion concerns a state practice. The Court explained that in circumstances

where the state's duty of neutrality is purported to be breached, the section 2(a) analysis is triggered in the following way:

> 83 In a case like this one in which a complaint of discrimination based on religion concerns a state practice, the alleged breach of the duty of neutrality must be established by proving that the state is professing, adopting or favouring one belief to the exclusion of all others (*S.L.*, at para. 32) and that the exclusion has resulted in interference with the complainant's freedom of conscience and religion (see *Boisbriand*, at para. 85; *Bergevin*, at p. 538; *Forget*, at p. 98).
>
> 84 ...Where state officials, in the performance of their functions, profess, adopt or favour one belief to the exclusion of all others, the first two criteria for discrimination mentioned above, namely that there be an exclusion, distinction or preference and that it be based on religion, are met.
>
> [Emphasis added.]

Saguenay, at paras. 83-84.

83. Where the Petitioner proves that the duty of neutrality has been breached, the court must then determine whether there has been interference with an appellant's rights under s.2(a) of the *Charter.*

84. In order to determine if an infringement has occurred, the Court must:

    a. be satisfied that the claimant has a sincere belief, having a nexus with religion, which calls for a particular line of conduct; and

    b. find that the complainant's ability to act in accordance with his or her belief has been interfered with in a manner that is more than trivial or insubstantial.

Saguenay, at para. 86

Syndicat Northcrest v. Amselem, 2004 SCC 47 ("*Amselem*"), at paras. 56-57

85. The Court in *SL v Commission scolaire des Chênes*, 2012 SCC 7 ("*SL*") provided further instruction on how the section 2(a) test is to be applied. Citing from its decision *Amselem,* the Court explained:

> 22 ...In [*Amselem*], Iacobucci J. explained that a person does not have to show that the practice the person sincerely believes he or she must observe or the belief the person endorses corresponds to a religious precept recognized by other followers. If the person believes that he or she has an obligation to act in accordance with a practice or endorses a belief "having a nexus with religion", the court is limited to assessing the sincerity of the person's belief (paras. 39, 43, 46 and 54).
>
> 23 At the stage of establishing an infringement, however, it is not enough for a person to say that his or her rights have been infringed. The person must prove the infringement on a balance of probabilities. This may of course involve any legal form of proof, but it must nonetheless be based on facts that can be established objectively. For example, in *Edwards Books*, the legislation required retailers who were Saturday observers to close a day more than Sunday observers. In *Amselem*, the infringement resulted from a prohibition against erecting any structure on the balconies of a building held in co-ownership, while the appellants believed that their religion required them to dwell in their own succahs.
>
> 24 It follows that when considering an infringement of freedom of religion, the question is not whether the person sincerely believes that a religious practice or belief has been infringed, but whether a religious practice or belief exists that has been infringed. The subjective part of the analysis is limited to establishing that there is a sincere belief that has a nexus with religion, including the belief in an obligation to conform to a religious practice. As with any other right or freedom protected by the *Canadian Charter* and the *Quebec Charter*, proving the infringement requires an objective analysis of the rules, events or acts that interfere with the exercise of the freedom. To decide otherwise would allow persons to conclude themselves that their rights had been infringed and thus to supplant the courts in this role.
>
> 25 Furthermore, the following comment of Wilson J. in *R. v. Jones*, [1986] 2 S.C.R. 284, at pp. 313-14, which Iacobucci J. quoted in *Amselem*, para. 58, bears repeating: s. 2(a) of the *Canadian Charter* "does not require the legislature to refrain from imposing any burdens on the practice of religion" (emphasis omitted; see also *Edwards Books*). "The ultimate protection of any particular Charter right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises" (*Amselem*, at para. 62). No right is absolute.
>
> [Emphasis added.]

86. In applying this test to the facts of the case in *SL*, the Court accepted that the parents held a sincere belief that they had an obligation to pass on Catholic teachings to their children. However, the Court rejected the parents' argument that the school had interfered with their ability to do so, explaining:

> 37 ...Having adopted a policy of neutrality, the Quebec government cannot set up an education system that favours or hinders any one religion or a particular vision of religion. Nevertheless, it is up to the government to choose educational programs within its constitutional framework. In light of this context, I cannot conclude that exposing children to "a comprehensive presentation of various religions without forcing the children to join them" constitutes in itself an indoctrination of students that would infringe the appellants' freedom of religion.
>
> ...
>
> 40 Parents are free to pass their personal beliefs on to their children if they so wish. However, the early exposure of children to realities that differ from those in their immediate family environment is a fact of life in society. The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society and ignores the Quebec government's obligations with regard to public education. Although such exposure can be a source of friction, it does not in itself constitute an infringement of s. 2(a) of the *Canadian Charter* and of s. 3 of the *Quebec Charter.*

87. Citing from its decision in *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 ("*Chamberlain*"), the Court in *SL* relied on the following passage by the Chief Justice:

> Children encounter [some cognitive dissonance] every day in the public school system as members of a diverse student body. They see their classmates, and perhaps also their teachers, eating foods at lunch that they themselves are not permitted to eat, whether because of their parents' religious strictures or because of other moral beliefs. They see their classmates wearing clothing with features or brand labels which their parents have forbidden them to wear. And they see their classmates engaging in behaviour on the playground that their parents have told them not to engage in. The cognitive dissonance that results from such encounters is simply a part of living in a diverse society. It is also a part of growing up. Through such experiences, children come to realize that not all of their values are shared by others.
>
> Exposure to some cognitive dissonance is arguably necessary if children are to be taught what tolerance itself involves.
>
> *SL,* at para. 39, citing *Chamberlain,* at paras. 65-66.

88. In summary, the Petitioner has the onus of proving that:

a. the Cleansing Demonstration and/or the Hoop Dance constituted the Board's professing, adopting or favouring one belief to the exclusion of all others. This requires a finding of fact about the nature of the Cleansing Demonstration and/or the Hoop Dance and specifically, whether each 1) involved student participation as opposed to mere observation; and 2) were religious in nature;

b. if proven that the Cleansing Demonstration and/or the Hoop Dance constituted a breach of the Board's duty of neutrality, the Petitioner must then prove that she sincerely believes that she has an obligation to ensure that her children follow the tenets of her faith and that these tenets require that they do not participate in the act of smudging or observing the recitation of a First Nation prayer; and

c. that, from an objective standpoint, the Board interfered with the Petitioner's ability to observe that belief in a way that was not trivial or insubstantial.

SL, at paras. 26-27.

The Duty of Neutrality has Not Been Violated and the Section 2 Analysis Has Not Been Triggered

89. In a case such as this, where the state's impugned conduct is alleged to favour one belief system over another, the state's duty of neutrality is engaged. The duty of neutrality, at its roots, was born of the need to protect minorities from the influence of the Christian Church over the state; an influence that has historically been imposing, proselytizing, and at times, horrific, as is evident by the legacy of IRS in Canada. The nature, history, and context in which the duty of neutrality has emerged and its purpose is thus critical to an analysis of its application. An analysis devoid of this context is in danger of producing a result that contradicts the very purpose for which the duty of neutrality emerged.

90. The Supreme Court of Canada recently considered and summarized the duty of neutrality in *Saguenay*. In that case, the Plaintiff regularly attended municipal council meetings in which

city officials would recite a prayer and make the sign of the cross at every meeting. Religious symbols such as a Sacred Heart statue and a crucifix were also present in some meetings. After the plaintiff's initial complaint, the city also adopted a by-law, the purpose of which was to regulate and require the recitation of the prayer. The plaintiff, who considered himself an atheist, brought a complaint on the basis that his freedom of conscience and religion was being infringed, contrary to s. 3 and 10 of the Quebec *Charter*.

91. Citing Dickson J., Gascon J. began his analysis in *Saguenay* by adopting the definition of freedom of conscience and religion guaranteed by the *Charter* as enunciated by the Court in its seminal decision, *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295, [1985] S.C.J. No.17 ("*Big M Drug Mart*"):

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is 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 by worship and practice or by teaching and dissemination... .
>
> ...
>
> What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny of the majority". [Emphasis added; pp. 336-37.]

Saguenay, at para. 68, citing *Big M Drug Mart.*

92. Gascon J. went on to survey the nature and history of the duty of neutrality. He explained:

> 71 Neither the *Quebec Charter* nor the *Canadian Charter* expressly imposes a duty of religious neutrality on the state. This duty results from an evolving interpretation of freedom of conscience and religion. I will reproduce the following comments made by LeBel J. in *Lafontaine* in which he described the evolution of the concept of religious

neutrality (although he was dissenting, the majority did not contradict him on this point either):

> The duty of neutrality appeared at the end of a long evolutionary process that is part of the history of many countries that now share Western democratic traditions. Canada's history provides one example of this experience, which made it possible for the ties between church and state to be loosened, if not dissolved. There were, of course, periods when there was a close union of ecclesiastical and secular authorities in Canada. European settlers introduced to Canada a political theory according to which the social order was based on an intimate alliance of the state and a single church, which the state was expected to promote within its borders. Throughout the history of New France, the Catholic church enjoyed the status of sole state religion. After the Conquest and the Treaty of Paris, the Anglican church became the official state religion, although social realities prompted governments to give official recognition to the status and role of the Catholic church and various Protestant denominations. This sometimes official, sometimes tacit recognition, which reflected the make-up of and trends in the society of the period, often inspired legislative solutions and certain policy choices. Thus, at the time of Confederation in 1867, the concept of religious neutrality implied primarily respect for Christian denominations. One [page40] illustration of this can be seen in the constitutional rules relating to educational rights originally found, inter alia, in s. 93 of the Constitution Act, 1867.
>
> Since then, the appearance and growing influence of new philosophical, political and legal theories on the organization and bases of civil society have gradually led to a dissociation of the functions of church and state; Canada's demographic evolution has also had an impact on this process, as have the urbanization and industrialization of the country. Although it has not excluded religions and churches from the realm of public debate, this evolution has led us to consider the practice of religion and the choices it implies to relate more to individuals' private lives or to voluntary associations (M. H. Ogilvie, Religious Institutions and the Law in Canada (2nd ed. 2003), at pp. 27 and 56). These societal changes have tended to create a clear distinction between churches and public authorities, placing the state under a duty of neutrality. Our Court has recognized this aspect of freedom of religion in its decisions, although it has in so doing not disregarded the various sources of our country's historical heritage. The concept of neutrality allows churches and their members to play an important role in the public space where societal debates take place, while the state acts as an essentially neutral intermediary in relations between the various denominations and between those denominations and civil society. [Emphasis added; paras. 66-67.]

72 As LeBel J. noted, the evolution of Canadian society has given rise to a concept of neutrality according to which the state must not interfere in religion and beliefs. The

state must instead remain neutral in this regard. This neutrality requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief (*S.L.*, at para. 32). It requires that the state abstain from taking any position and thus avoid adhering to a particular belief.

73 ...When the state adheres to a belief, it is not merely expressing an opinion on the subject. It is creating a hierarchy of beliefs and casting doubt on the value of those it does not share. It is also ranking the individuals who hold such beliefs...

...

74 By expressing no preference, the state ensures that it preserves a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally. I note that a neutral public space does not mean the homogenization of private players in that space. Neutrality is required of institutions and the state, not individuals (see *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at paras. 31 and 50-51). On the contrary, a neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person's freedom and dignity. The neutrality of the public space therefore helps preserve and promote the multicultural nature of Canadian society enshrined in s. 27 of the Canadian Charter. Section 27 requires that the state's duty of neutrality be interpreted not only in a manner consistent with the protective objectives of the *Canadian Charter*, but also with a view to promoting and enhancing diversity...

75 I would add that, in addition to its role in promoting diversity and multiculturalism, the state's duty of religious neutrality is based on a democratic imperative. The rights and freedoms set out in the *Quebec Charter* and the *Canadian Charter* reflect the pursuit of an ideal: a free and democratic society. This pursuit requires the state to encourage everyone to participate freely in public life regardless of their beliefs...The state may not act in such a way as to create a preferential public space that favours certain religious groups and is hostile to others. It follows that the state may not, by expressing its own religious preference, promote the participation of believers to the exclusion of non-believers or vice versa.

76 When all is said and done, the state's duty to protect every person's freedom of conscience and religion means that it may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others. It is prohibited from adhering to one religion to the exclusion of all others...

93. In 2012, the Supreme Court of Canada ruled in *SL* that education about religion taught in a non-indoctrinating manner is constitutionally protected. In that case, parents who identified

as Roman Catholic objected to the mandatory Ethics and Religious Culture ("ERC") curriculum mandated by the public schools in Quebec. They claimed the program violated their freedom of religion because it would expose their children to a form of relativism which would interfere with the parents' ability to pass their faith on to their children.

94. Deschamps J. began her analysis with a review of the evolution of the duty of neutrality in the jurisprudence, which is reproduced below:

> 17 The historical, political and social context of the late 20th century, the enactment of the *Quebec* and *Canadian Charters,* and the interpretation of freedom of religion by Canadian courts have played an important role in the Quebec government's decision to remain neutral in religious matters. While it is true that the *Canadian Charter*, unlike the U.S. Constitution, does not explicitly limit the support the state can give to a religion, Canadian courts have held that state sponsorship of one religious tradition amounts to discrimination against others.
>
> 18 In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, this Court held that the Lord's Day Act, R.S.C. 1970, c. L-13, whose acknowledged purpose was the compulsion of religious observance on Sunday, infringed the freedom of religion of non-Christians. Dickson J. (as he then was) concluded that "[t]he protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity" (p. 337). The issue of state neutrality came before the Court again a short time later in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. The majority held that, although the selection of Sunday as a pause day significantly infringed on the freedom of religion of those who observed a day of rest on Saturday for religious reasons, the legislation was justifiable as a reasonable limit under s. 1 of the *Canadian Charter*. A majority of the Court's judges found that the purpose of the *Retail Business Holidays Act*, R.S.O. 1980, c. 453, was valid because of its secular aspect: "The title and text of the Act, the legislative debates and the Ontario Law Reform Commission's Report on Sunday Observance Legislation (1970), all point to the secular purposes underlying the Act" (p. 744).
>
> 19 In two important decisions in the years that followed, the Ontario Court of Appeal also stressed how important it was for the state to remain neutral in matters of religion. In *Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641, a majority of the court struck down a regulation under the *Education Act*, R.S.O. 1980, c. 129, which made the recitation of Christian prayers compulsory in public schools unless an exemption was granted (p. 654):

> On its face, [the regulation] infringes the freedom of conscience and religion guaranteed by s. 2(a) of the Charter... . The recitation of the Lord's Prayer, which is a Christian prayer, and the reading of Scriptures from the Christian Bible impose Christian observances upon non-Christian pupils and religious observances on non-believers.

> 20 In *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341, the Ontario Court of Appeal considered a regulation that made periods of religious education a compulsory part of the public school curriculum. The court held unanimously that the purpose and effect of the regulation were to provide for religious indoctrination, which the *Canadian Charter* does not authorize. Such indoctrination was not rationally connected to the educational objective of inculcating proper moral standards in elementary school students. The Court of Appeal noted that a program that taught about religion and moral values without indoctrination in a particular faith would not breach the Canadian Charter (p. 344).

> 21 The concept of state religious neutrality in Canadian case law has developed alongside a growing sensitivity to the multicultural makeup of Canada and the protection of minorities. Already in *Big M Drug Mart*, Dickson J. had stated that "the diversity of belief and non-belief, the diverse socio-cultural backgrounds of Canadians make it constitutionally incompetent for the federal Parliament to provide legislative preference for any one religion at the expense of those of another religious persuasion" (p. 351). In the same way, the Ontario Court of Appeal held in *Canadian Civil Liberties Assn.* that imposing a religious practice of the majority had the effect of infringing the freedom of religion of the minority and was incompatible with the multicultural reality of Canadian society (p. 363).

95. The concept of religious neutrality in Canadian law was thus born of a need to protect minorities from the imposition of the dominant religion through the arm of the state. A consideration of whether the state has breached its duty of neutrality must be informed by the history and nature of the duty, and the purpose for which it arose.

96. The union between the state and the dominant religion has historically resulted in tragedy for religious minorities. There is no better example of this in Canadian history than the legacy of IRS in which the Christian Church and the state worked in tandem through the institutions of education to control and suppress First Nation culture and religion. A section 2 analysis that is not informed by this contextual lens will produce a confusing result that is

inconsistent with the history and evolution of the jurisprudence and the reality of those affected.

97. A review of the case law elucidates the link between the harm that arises from a breach of the state's duty of neutrality and the impact on minorities. In *Zylberberg v Sudbury Board of Education (Director)* (Ont CA), 65 OR (2d) 641, [1988] O.J. No. 1488 ("*Zylberberg*"), school regulations required that students begin and close each school day with the reading of Christian religious text and the recitation of a Christian prayer. Those who objected to participating on religious grounds could be excused but were forced to alienate themselves by exercising that right. The Ontario Court of Appeal held in a passage quoted by the Supreme Court of Canada in *Saguenay:*

> the exemption provision imposes a penalty on pupils from religious minorities who utilize it by stigmatizing them as non-conformists and setting them apart from their fellow students who are members of the dominant religion.

98. Similarly, in *Saguenay*, the Court explained:

> 121...If he chose to exclude himself from the prayer either by refusing to participate in it or by leaving the chamber, he would be forced to reveal that he is a non-believer (para. 266). According to the Tribunal's findings, Mr. Simoneau had experienced a strong feeling of isolation and exclusion (paras. 265-66). This led the Tribunal to conclude that the interference caused by this situation was more than trivial or insubstantial (para. 262). Such interference constitutes an infringement of the complainant's freedom of conscience and religion.

99. The harm that is caused by a breach of the duty of neutrality thus emerges as a result of being identified as a non-conformist, or non-believer, which stigmatizes and alienates the individual from the majority who conform with the dominant religion. It is the alienation from the dominant societal group that gives rise to the harm.

100. Precisely for this reason, courts have found it insufficient for institutions to provide an exemption or simply allow an individual to leave the room while the religious act takes place. An exemption does not remedy the harm of alienation for a member of a religious minority. Similarly, a court will consider the impact of coercion or compulsion to participate in a religious act in a section 2(a) analysis because of the natural inclination of individuals, particularly children, to seek to be accepted by the dominant group, rather than be identified as an outsider. Coercion and compulsion in these circumstances are necessarily about conformity and assimilation with the dominant religious group.

Zylberberg.

Saguenay.

Exclusion, Distinction or Preference Based on Religion

101. In order for the duty of neutrality to be breached, the Petitioner must demonstrate that the Board has made an exclusion, distinction or preference based on religion.

Saguenay, at paras. 83-84.

102. In *Saguenay,* in addressing the respondent's argument that the city's practice of prayer prior to municipal council meetings was not religious in nature, Gascon J. explained the primary question in this regard was whether the context or background facts supported the conclusion that the practice challenged by the appellants was religious in nature. This is part of the preliminary question of whether the duty of neutrality is engaged at all:

> 88 Thus, it is essential to review the circumstances carefully. If they reveal an intention to profess, adopt or favour one belief to the exclusion of all others, and if the practice at issue interferes with the freedom of conscience and religion of one or more individuals, it must be concluded that the state has breached its duty of religious neutrality. This is true regardless of whether the practice has a traditional character.
>
> [Emphasis added.]

Saguenay, at paras. 88, 97, 113-114.

103. The circumstances in the instant case do not reveal an intention of the Board to profess, adopt or favour one belief to the exclusion of all others.

104. Firstly, in respect of the Hoop Dance, at no time was any student asked to recite a prayer or confirm a prayer by saying "amen" or equivalent word of confirmation, at the Hoop Dance, or at all. In that regard, the Hoop Dance was a learning about in which students were learning about a cultural tradition.

105. Section 76 of the *School Act* mandates that the School District operate on a strictly secular and non-sectarian basis. The School District does so. While teachers teach about the history, culture and religious beliefs of different peoples, the School District does not teach or advocate in any way the supremacy of one belief over another.

School Act.

Affidavit of Greg Smyth, para. 9.

106. The Board disputes that demonstrations and performances such as the Cleansing Demonstration and the Hoop Dance are prohibited by section 76 of the *School Act*, or that in facilitating them, the Board has breached its duty of neutrality.

107. Unlike *Zylberberg* and *Saguenay,* the Cleansing Demonstration and Hoop Dance were not, and are not a part of students' daily schedule at JHES. Rather, they were a unique learning opportunity. Evidencing this, in respect of the Cleansing Demonstration, the Board sent a letter to parents advising them of the opportunity, and a First Nation elder visited the classroom in order to conduct the Cleansing Demonstration. In respect of the Hoop Dance, special funding was required in order to bring in Mr. Anderson, and a special assembly was held. These events were not in any way analogous to daily Christian prayer in school, or at public council meetings as was the case in *Zylberberg* and *Saguenay*.

108. Similarly, the Petitioner's children did not, in fact, participate in the Cleansing Demonstration nor the Hoop Dance, but merely observed them. The law is clear that mere education about religion, culture, or tradition that is different than one's own does not violate the Petitioner's right to freedom of religion under the *Charter.*

SL.

109. Further, unlike the regular Christian prayer at issue in *Zylberberg* and *Saguenay,* the Cleansing Demonstration and the Hoop Dance are not religious in nature. The Board submits these are cultural practices that appropriately form part of the curriculum.

110. For the Nuu-chah-nulth people, culture is a way of life. Nuu-chah-nulth culture is a reflection of Nuu-chah-nulth worldviews and beliefs. It is a culture and spirituality but it is not a religion nor a missionary practice. This is evidenced by the fact that it is not possible to convert to become a part of a Nuu-chah-nulth "religion", and Nuu-chah-nulth people may identify and in fact, do participate as members of Judeo-Christian and other religions, while being actively involved in Nuu-chah-nulth cultural and spiritual traditions. Further, many spiritual practices are kept private to an individual or within family and are not shared in public. Accordingly, it would not be possible to indoctrinate and proselytize students to a Nuu-chah-nulth "religion".

Affidavit of Dr. Judith Sayers, paras. 15, 19.

111. Smudging, in particular, is a Nuu-chah-nulth spiritual practice, done by creating sacred smoke from burning medicinal or sacred plants or tree branches such as cedar or spruce. Smudging is not a religious practice. Nuu-chah-nulth people use smudging for various purposes, including as a way of cleansing one's thoughts, spirit, and places, of negative energy.

Affidavit of Dr. Judith Sayers, paras. 16-17.

112. The Cleansing Demonstration was one methodology used by certain teachers to meet the Calls to Action in the TRC Summary Report requiring public education to include and be informed by Aboriginal worldviews and beliefs. It was an effective methodology that met a number of objectives. It showed Nuu-chah-nulth students that their culture is welcome in their community, that is, their school. It demonstrated to Aboriginal students – whose cultures were historically excluded from the education system – that schools are a place they are welcomed.

Affidavit of Dr. Judith Sayers, para. 16.

113. The Cleansing Demonstration and demonstrations like it are a way to start healing the community from the trauma of IRS, and transforming schools from a place where Nuu-chah-nulth students are bullied or degraded, to a place where they are celebrated and accepted.

114. The hoop dancer who performed the Hoop Dance at JHES, Mr. Anderson, was not Nuu-chah-nulth. Mr. Anderson is not First Nations by blood, but has been adopted into the Tagish/Carcross First Nation as a proven ally to the Red Deer community. Mr. Anderson was practicing his own culture in saying a prayer before the Hoop Dance. This was part of his own preparation for performing the dance and was not a religious expression and in any event, no student was invited to participate in the saying of the prayer.

Affidavit of Stacey Manson, paras. 13-17, Exhibits B, C and D.
Affidavit of Sonia Iacuzzo, para. 15.
Affidavit of Geraldine Dekoninck, para. 5.

115. The Board submits, and the fact is, that neither the Cleansing Demonstration nor the Hoop Dance can be accurately characterized as a "religious ritual," nor as communal "prayer" and thus, the Board did not breach the duty of neutrality. Further, the Declaratory Order should be dismissed on its wording.

116. In the alternative, if the Court determines that the smudging involved in the Cleansing Demonstration and the Hoop Dance were in fact, religious rituals, the Board submits that

they were, in any event, in the nature of a demonstration for students to learn about the traditional practices of Nuu-chah-nulth people and did not require or permit student participation therein.

117. At no point were students invited to participate in the ceremonial activities of smudging by having smoke wafted over them during the Cleansing Demonstration nor in the hoop dancing or native prayer spoken by Mr. Anderson during the Hoop Dance.

Affidavit of Sherri Cook, para. 13.
Affidavit of Sonia Iacuzzo, paras. 9 and 15.
Affidavit of Geraldine Dekoninck, paras. 3 and 5.
Affidavit of Jelena Dyer, para. 10.
Affidavit of Stacey Manson, para. 17.

118. The Petitioner has argued that the line of conduct required by her religious beliefs prohibits her (or her children) from participating in the Cleansing Demonstration and the Hoop Dance. However, the Petitioner has not taken the position that her religious beliefs prohibit her from merely observing the rituals of others. This is a meaningful distinction which goes to the core of the analysis.

119. The question of whether students were required to participate in, or merely observe the Cleansing Demonstration and Hoop Dance is a question of fact, not a matter of subjective belief, that must be determined before engaging in the s. 2(a) analysis set out in *Amselem.*

120. Thus, the first arm of the threshold test requires the Petitioner to establish that she subjectively hold a religious belief that requires her (or her children) not to observe smudging or hoop dancing as they had, during the Cleansing Demonstration and the Hoop Dance.

The Petitioner has Failed to Establish a Sincere Belief

121. In the alternative, if the Board did violate the duty of neutrality, the Board submits that the Petitioner has failed to establish a sincere practice or belief that has a nexus with religion, "which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith".

Amselem, at para. 56

122. The subjective part of the analysis is limited to establishing that there is a sincere belief that has a nexus with religion, including the belief in an obligation to conform to a religious practice. Proving infringement requires an objective analysis of the rules, events or acts that interfere with the exercise of the freedom. To decide otherwise would allow persons to conclude themselves that their rights had been infringed and thus to supplant the courts in this role.

SL, at para. 24.

123. For similar reasons, the Court has held that it is not appropriate to adduce expert evidence showing sincerity or lack thereof. In *Amselem,* the Supreme Court of Canada described the means by which sincerity may be assessed at paras. 53-54:

> Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony (see Woehrling, *supra* at p. 394), as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices ...
>
> A claimant may choose to adduce expert evidence to demonstrate that his or her belief is consistent with the practices and beliefs of other adherents of the faith. While such evidence may be relevant to a demonstration of sincerity, it is not necessary. Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but rather what the claimant views these personal religious "obligations" to be, it is inappropriate to require expert opinions to show sincerity of belief. An "expert" or an authority on religious law is not the surrogate for an

> individual's affirmation of what his or her religious beliefs are. Religious belief is intensely personal and can easily vary from one individual to another. ...
>
> [Emphasis added.]

Amselem, at paras. 53-54

124. The court will generally decline to consider issues where doing so requires it to put the contents and merits of deeply held personal beliefs under judicial scrutiny, contrary to *Amselem*.

Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations), 2017 SCC 54 at paras. 71-72

125. The Supreme Court of Canada in *Amselem* explained the importance of the subjective nature of the test in respect of the complainant's sincere belief:

> 49 To require a person to prove that his or her religious practices are supported by a mandatory doctrine of faith, leaving it for judges to determine what those mandatory doctrines of faith are, would require courts to interfere with profoundly personal beliefs in a manner inconsistent with the principles set out by Dickson C.J. in *Edwards Books, supra*, at p. 759:
>
> > The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. [Emphasis added.]
>
> 50 In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.

126. The Petitioner has not, neither in her pleadings nor her own Affidavit, set out or described her or her children's religious beliefs, in any manner. She has neither identified the religion

or faith to which she belongs, nor the beliefs which are associated with that religion or faith, including any particular line of conduct with which she is required to act in accordance. To establish a subjective, sincerely-held belief, this material information is essential.

127. In the expert report of John Cox (the "Cox Report"), the former Senior Pastor at Jericho Road Church in Port Alberni, John Cox, swore to his own belief that the Petitioner and her children are a part of the Christian faith and more specifically, identify with that belief system at the "overlap between Pentecostalism and a broad Protestant evangelicalism." The Cox Report provides the following information with respect to the religious beliefs of the Petitioner and her children:

> Neither historic Christianity, nor the beliefs held by Mrs. Servatius, preclude or discourage learning about other faiths, whether in a classroom or outside of it.
>
> However, Mrs. Servatius and her daughter's Christian beliefs require that they abstain from participating in religious, spiritual, or supernatural ceremonies that are contrary to, or not part of, their Christian faith.
>
> As with most religious and spiritual affiliations and expressions, there is a broad spectrum of understanding, perception and conviction within the Christian Faith. Historic Christianity is strongly rooted in a personal relationship with Jesus Christ, the value and importance of the Bible in daily living, and in the belief that Jesus is Lord of all the earth. One strand of historic Christianity is found in the more formal and sacramental Catholic expression, while that arising from the Reformation (16th century and onward) as taught by persons such as Martin Luther, John Calvin and William Tyndale, could loosely be described today as Protestant evangelicalism. Yet another expression arising in the late 20th century is Pentecostalism with a focus on the power, gifts, and work of the Holy Spirit. These various expressions overlap. Mrs. Servatius' family identifies most strongly with the overlap between Pentecostalism and a broad Protestant evangelicalism. (At p. 2-3)
>
> [Emphasis added.]

128. The Cox Report further refers, in general terms, to historic Christian beliefs regarding the supernatural, and human interaction with it, and historic Christian teachings regarding the participation of Christians in non-Christian exercises or ceremonies that invoke the spiritual

or supernatural. Having reviewed these general historic beliefs and teachings, Mr. Cox ultimately concludes:

> For Christians, one does not have to be conducting a ceremony or actively interacting with the components of a ceremony to be participating in it. A Christian would view the act of sitting passively while smoke is wafted over them and their belongings to "cleanse" negative energy or spirits as participation, because of the Christian's belief in the supernatural. This is consistent with the request from the Servatius girl to leave the room during the ceremony. Christians believe that Christ alone can cleanse a person.
>
> From my review of the materials already filed in this case, as well as the description of smudging contained in the articles I have cited, it is clear that the purpose of the ceremony which took place in the classroom was intended to interact on some level with the unseen, supernatural world. A Christian like Mrs. Servatius or her daughter would not wish to participate in this ceremony because doing so is contrary to their religious beliefs.

129. The assertions of Mr. Cox in the Cox Report as they relate to the religious beliefs and practices of the Petitioner and her children are not supported by the facts set out in the Petition, nor in the Affidavit of the Petitioner. There is no pleading or Affidavit evidence from the Petitioner confirming Mr. Cox's assertions, nor so much as mentioning the religious beliefs or practices of the Petitioner or her children.

130. The Cox Report does not establish that the Petitioner sincerely holds any particular subjective beliefs. Rather, the Cox Report merely establishes the nature of Mr. Cox's beliefs about the Petitioner, a fact that is neither helpful nor relevant in these proceedings.

131. Further, the Cox Report description of broad "historic Christian beliefs" and "historic Christian teachings" in general terms cannot be understood to represent the specific beliefs of the Petitioner or her children. Without evidence from the Petitioner or her children, one cannot assume that their subjective, personally-held beliefs conform with any or all "historic Christian beliefs" or "teachings" as those are defined by Mr. Cox.

132. In considering an individual's beliefs for the purposes of triggering the freedom of religion analysis, it is the individual's subjective belief that must be established.

Amselem,at para. 56.

133. The Court in *Amselem*, explained that objective sources concerning the validity of religious tenets or practices are not required, and that it is not for the court to inquire as to the content of religious dogma. Iacobucci J. further explained:

> "An "expert" or an authority on religious law is not the surrogate for an individual's affirmation of what his or her religious beliefs are. Religious belief is intensely personal and can easily vary from one individual to another."

Amselem, supra at para. 54.

134. In the instant case, the Petitioner has not articulated the religious interest at stake in any way that would allow the Court to discern the nature of her belief or her sincerity therein. In the absence of evidence from the Petitioner or her children regarding their own religious beliefs, there is no evidence in this proceeding which is capable of establishing a subjective belief.

135. The only purported source of evidence regarding the Petitioner's religious beliefs is the Cox Report, which identifies particular aspects of the Christian belief system, and assumes that the Petitioner and her children are "Christians" and hold the specific beliefs which he identifies. This assertion cannot be sustained by the evidence of the Petitioner.

The Petitioner Has Failed to Establish Interference with a Sincere Belief that is not Trivial or Insubstantial

136. Directly compelling religious belief or practice clearly infringes section 2(a) as it deprives the individual of the fundamental right to choose his or her mode of religious experience, or lack thereof.

Alberta v Hutterian Brethren of Wilson Colony ("Hutterian"),
2009 SCC 37, at para. 92.

137. However, the Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. Trivial or insubstantial interference has been described as interference that does not threaten actual religious beliefs or conduct. Claimants must, therefore, provide objective proof of interference, not just cite subjective belief of interference

SL, at paras. 2 and 24.
Hutterian, at para. 32.

138. The Court in *Saguenay* emphasized that not every effect of legislation on religious beliefs or practices is offensive to the guarantee of freedom of religion, and the *Charter* does not require the legislature to refrain from imposing any burdens on the practice of religion:

> 85 ...the state practice must have the effect of interfering with the individual's freedom of conscience and religion, that is, impeding the individual's ability to act in accordance with his or her beliefs. On the other hand, it is not the case that every burden on an individual's freedom, even the most insignificant, constitutes discriminatory interference:
>
> > This does not mean, however, that every burden on religious practices is offensive to the constitutional guarantee of freedom of religion. It means only that indirect or unintentional burdens will not be held to be outside the scope of Charter protection on that account alone. Section 2(a) does not require the legislatures to eliminate every miniscule state-imposed cost associated with the practice of religion... . <u>The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened.</u> For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice. <u>In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial</u> ...
>
> (*Edwards Books*, at p. 759)
>
> [Emphasis added and in original.]

Saguenay, at para. 85.

139. In *Zylberberg*, the Ontario Court of Appeal citing *Big M Drug Mart* summarized the nature of the freedom of religion, emphasizing that the freedom can be conceived of in terms of freedom from coercion or compulsion, and freedom from conformity:

> Chief Justice Dickson (then Dickson J.), speaking for the court, eloquently described the meaning of the words "freedom of conscience and religion". In its most traditional sense, freedom of religion means the unimpeded freedom to hold, profess and manifest religious beliefs, as he said at p. 353 D.L.R., p. 336 S.C.R.:
>
> > The essence of the concept of freedom of religion is 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 by worship and practice or by teaching and dissemination.
>
> He continued by saying that "the concept means more than that" and stated that the freedom can "be characterized by the absence of coercion or restraint". He went on to say at p. 354 D.L.R., p. 336 S.C.R.:
>
> > Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices.
>
> Another aspect of the Charter freedom of conscience and religion, which is of particular significance in this case, is freedom from conformity. The practices of a majoritarian religion cannot be imposed on religious minorities. The minorities should not be subject to the "tyranny of the majority", as Chief Justice Dickson said at p. 354 D.L.R., p. 337 S.C.R.:
>
> > What may appear good and true to a majoritarian religious group, or the State acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny of the majority".
>
> [Emphasis added.]

Zylberberg, at paras. 27-29.

Freedom from Conformity

140. It is clear from the above passages that freedom from conformity has traditionally been understood in relation to the majoritarian religion, and with the aim of protecting minorities. In the instant circumstances, the Petitioner is asking the Court to conceive of freedom in a manner contrary to this aim.

141. In *Zylberberg,* the respondents argued that the right to claim an exemption from participating in Christian prayer in school eliminated any compulsion. The Court observed the following in this regard:

> From the majoritarian standpoint, the respondent's argument is understandable but, in our opinion, it does not reflect the reality of the situation faced by members of religious minorities. Whether or not there is pressure or compulsion must be assessed from their standpoint and, in particular, from the standpoint of pupils in the sensitive setting of a public school. In saying this, we approve the analysis of Reid J. in the Divisional Court at p. 769 O.R., p. 729 D.L.R. where he said:
>
> > It may be that a control or limitation indirectly imposed is not readily appreciable to those who are not affected by it. It may be difficult for members of a majoritarian religious group, as I am, to appreciate the feelings of members of what, in our society, are minority religions. It may be difficult for religious people to appreciate the feelings of agnostics and atheists. Yet nevertheless those feelings exist. No one has suggested that the feelings expressed by applicants are not real, or that they do not run deep.
>
> Later on the same page, he refers to the pressure operating on members of religious minorities in deciding whether to participate in or seek exemption from religious exercises:
>
> > [I]f most of the pupils willingly conform, might not a few whose family faith is Moslem, or Hebraic or Buddhist, feel awkward about seeking exemption? Peer pressures, and the desire to conform, are notoriously effective with children. Does common experience not tell us that these things are so, and that such feelings might easily, and reasonably, lead some not to seek exemption, and unwillingly conform, or others to seek it, and be forced to suffer the consequences to their feelings and convictions?
>
> ...

> the exemption provision imposes a penalty on pupils from religious minorities who utilize it by stigmatizing them as non-conformists and setting them apart from their fellow students who are members of the dominant religion. In our opinion, the conclusion is inescapable that the exemption provision fails to mitigate the infringement of freedom of conscience and religion by s. 28(1).
>
> *Zylberberg*, at paras. 37, 40.

142. The Respondent submits that it is impossible and inappropriate to sever the notions of protection from coercion and compulsion to conform, from the reality of religious minorities. The concept of coercion and compulsion to participate in religious rituals does not arise in a vacuum. Rather, it is born of a reality lived by many Canadians in which they have faced direct and indirect pressure to assimilate with the majority, particularly where government institutions are used as a mechanism to advance or maintain the influence of the dominant religion. Applying these very concepts in a vacuum without considering the purpose of their origins, and further using them to silence a minority group that has historically been oppressed by the dominant religion, is a cynical and inappropriate application of the law.

143. The cynicism of this application of the law is illuminated in Counsel for the Petitioner's cross-examination of Dr. Lorna Williams about her personal experience in IRS. Counsel for the Petitioner engaged in extensive questioning of Dr. William's experience as a child with the state-mandated isolation from her parents, and forced submission to the cultural, religious and linguistic paradigms of the Christian majority, including by forcing her to practice the Catholic faith by having to attend church, pray to a Christian god, and do rosary. It is clear that this line of questioning by Counsel for the Petitioner was done in a purported effort to equate the Cleansing Demonstration and the Hoop Dance with the horrors of IRS. The Respondent submits that such a line of argument is not only absurd in its inaccuracy but also serves to demonstrate the dire need for education around First Nations history, beliefs and way of life, of which many Canadians remain painfully and dangerously ignorant.

Cross examination transcript of Dr. Lorna Williams, p.10.

Argument of the Petitioner, para. 79.

144. In Canada, public schools and the education system are fundamentally based in the majoritarian religion, Christianity. IRS were operated by white settlers, with the goals of "civilizing and Christian-izing" Aboriginal peoples. Until the early 1960s, Aboriginal children were prohibited from enrolling in public schools in British Columbia. When public school curriculum included education around Aboriginal history, it was from a colonial, anthropological perspective, representing Aboriginal people only in relation to the settlers.

Affidavit of Dr. Lorna Williams, paras. 49-50.
Affidavit of Jo-Anne L. Chrona, para. 20.

145. The legacy of IRS means that generations of Aboriginal people are alienated from schools and the education system, as institutions which represent shame and trauma. To change the way that Aboriginal people relate to the education system, positive steps, including the integration of Aboriginal world views and perspectives into classrooms, are required. More specifically, introducing aspects of Aboriginal culture, including practices such as smudging and hoop dancing, is essential for Aboriginal students to see themselves reflected in schools, to feel welcome, and to heal from past cultural harm.

Affidavit of Dr. Judith Sayers, paras. 7 and 16.
Affidavit of Jo-Anne L. Chrona, paras. 15 and 18, Exhibit H.

146. The religious beliefs of the Petitioner and her children are presumed to be consistent with that of the majority, and that which underlie the Canadian school and education system. The demonstrations which the Petitioner seeks to enjoin the Board from holding have been introduced as a means of educating, welcoming, integrating, and healing both Aboriginal and non-Aboriginal learners. The Board submits that there was not, nor could there have been a violation of the freedom from conformity of the Petitioner or her children in this context.

Affidavit of Dr. Judith Sayers, para. 16.
Affidavit of Jo-Anne L. Chrona, para. 30.

Freedom from Compulsion

147. Contrary to the evidence of the Petitioner, no student was "coerced" to "participate" in any Aboriginal demonstration at John Howitt Elementary.

148. The Cleansing Demonstration which took place in three classrooms did not involve the participation of any students. No student touched the feather. No smoke was fanned over students in any way. The students were present in the classroom and only observed the practice. Further, prior to the Cleansing Demonstration in the E.S.'s classroom, the teacher explained the nature of the demonstration, and offered that the children could stand outside if they wished if the smoke bothered them. Approximately five students did so.

Affidavit of Sherri Cook, para. 13.
Affidavit of Sonia Iacuzzo, para. 9.
Affidavit of Geraldine Dekoninck, para. 3.
Affidavit of Jelena Dyer, paras. 8, 10 and 13.

149. When Mr. Anderson performed the Hoop Dance for all students at the school, the students were merely present and observed. Mr. Anderson's prayer in preparation for the Hoop Dance was personal. No student was invited to recite the prayer, or otherwise participate in Mr. Anderson's prayer or performance and none did.

Affidavit of Stacey Manson, para. 17.
Affidavit of Sonia Iacuzzo, para. 15.
Affidavit of Geraldine Dekoninck, para. 5.

The Interference is Trivial or Insubstantial

150. In the alternative, if the Petitioner has established a sincere belief with a nexus to religion that would prohibit her children from observing the Cleansing Demonstration and the Hoop Dance, then any such interference is trivial or insubstantial.

151. Unlike the situation in *Zylberberg* or *Saguenay,* the Cleansing Demonstration and the Hoop Dance are not state-mandated religious exercises that occur on a daily basis throughout the school year. Rather, these were exceptional and unique events. The infrequency and uniqueness of the events in themselves suggest that any interference with the Petitioner and or her children's religious freedom, if proven, is trivial and insubstantial.

152. Likewise, if a student sought to be exempt therefrom, which the Petitioner's children did not do, any exemption provision would not impose "a penalty on pupils from religious minorities who utilize it by stigmatizing them as non-conformists and setting them apart from their fellow students who are members of the dominant religion". There is no pleading or evidence filed in this Petition, nor other indication that a dominant religion or belief is being imposed upon students through the Cleansing Demonstration and the Hoop Dance.

Zylberberg, at para. 40.

153. In this vein, it is important to consider the purpose of section 2(a) of the *Charter* is to safeguard religious minorities from the threat of "the tyranny of the majority". In light of this purpose, it is difficult to conclude that a singular event such as the Cleansing Demonstration or the Hoop Dance posed a threat to the religious freedom of members of the dominant religion beyond what is trivial and insubstantial.

Saguenay, at para. 68, citing *Big M Drug Mart*.

154. The *Charter* shelters individuals only to the extent that religious beliefs or conduct might reasonably or actually be threatened. The Petitioner has not provided objective proof of interference beyond what is trivial or insubstantial, or at all.

R v Edwards Books and Art Ltd, [1986] 2 SCR 713, [1986] A.C.S. no. 70 ("*Edwards Books*").

The Board Properly Balanced the Statutory Objectives and *Charter* Values

Section 1 of the Charter

155. The *Charter* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The *Charter,* s.1.

156. The rights and freedoms guaranteed by the *Charter* are not absolute. It may become necessary to limit them in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.

R. v. Oakes, [1986] 1 S.C.R. 103, [1986] S.C.J. No.7 ("*Oakes*"), at para. 65.

157. The values and principles which guide the Court in applying section 1 include the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

Oakes, at para. 64

158. Section 1 is engaged only after a finding has been made that a right or freedom has been infringed. The onus of proof under section 1 is on the person seeking to justify the limit while the standard of proof is the civil standard or balance of probabilities.

Oakes, at paras. 66-67.

A Distinct Administrative Framework

159. The Supreme Court of Canada has developed a distinct and more flexible framework for determining whether discretionary administrative decisions comply with the *Charter*. The Court developed this framework in recognition of the difficulty of applying the *Oakes*

framework beyond the context of reviewing a law or other rule of general application, specifically, when exercising discretion under a statutory scheme whose constitutionality itself is not impugned. The better framework, it held, was that provided by administrative-law principles, which in the case of a discretionary decision by an expert tribunal would simply call for judicial review of the decision for reasonableness.

Doré at paras. 37-39.

Loyola.

160. Under the *Doré/Loyola* framework, where an administrative decision engages a *Charter* right, the reviewing court should apply "a robust proportionality analysis consistent with administrative law principles instead of "a literal s. 1 approach". The administrative decision will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the statutory objectives or mandate.

Doré, at para. 7

Loyola, at paras. 3, 32.

Law Society of British Columbia v. Trinity Western University, 2018 SCC 32 ("*Trinity Western*"), at para. 79.

161. In *Dore,* Abella J. observed that in order to give effect to this balancing, the decision-maker ought to first consider the statutory objectives and the factual context.

Doré, at paras. 55 and 57.

162. Second, the decision-maker should ask how the *Charter* value in question would best be protected in light of the statutory objectives. In respect of this step, Abella J. observed:

> 56...This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision

> for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir,* "falls within a range of possible, acceptable outcomes" (para. 47).
>
> *Doré*, at para. 56.

163. When an administrative decision engages the *Charter*, reasonableness and proportionality become synonymous.

Trinity Western, at para. 35.

164. In conducting the proportionality test, the reviewing court should consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives, always asking whether the decision falls within a range of reasonable outcomes, rather than which option limits the *Charter* protection least.

Trinity Western, at para. 81.

Loyola, at para. 41

165. The reviewing court should also consider how substantial the limitation on the *Charter* protection was, compared to the benefits to the furtherance of the statutory objectives in this context. In the context of a challenge to an administrative decision where the constitutionality of the statutory mandate itself is not at issue, the proper inquiry is whether the decision-maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right.

Trinity Western, at para. 82.

166. The balancing test must be considered in light of the shared values of equality, human rights and democracy, which 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. The state, therefore, has a legitimate interest in ensuring that students are capable, as adults, of conducting themselves with openness and respect as they confront cultural and religious differences. A pluralist, multicultural democracy depends on the capacity of its citizens to engage in thoughtful and inclusive forms of deliberation amidst, and enriched by, different religious worldviews and practices.

Loyola, at paras. 47-48

The Statutory Objective

First Nations Education Steering Committee - Provincial Aboriginal Education Initiatives

167. The FNSEC is a First Nations run collective organization founded in 1992, which focused on advancing quality education for all Aboriginal learners in British Columbia. FNESC provides research, communications, information dissemination, advocacy, program administration and networking about education issues that impact Aboriginal learners. Each First Nation in British Columbia is entitled to apply for membership in FNESC, and FNESC currently has approximately 122 members. FNESC advocates for Aboriginal learners in both First Nation (Band operated) schools, and the public education system.

Affidavit of Jo-Anne L. Chrona, para. 2.

168. FNESC's involvement in advocating for Aboriginal learners has included entering into a set of agreements with Canada and British Columbia with the goal of working collectively to improve learning outcomes for Aboriginal learners.

Affidavit of Jo-Anne L. Chrona, para. 5.

169. In 2012, FNESC negotiated the Tripartite Education Framework Agreement with Canada (as represented by the Minister of Indian Affairs and Northern Development) and British Columbia (as represented by the Minister of Education) which provided a new funding

model for First Nations school funding and core second-level services to support Aboriginal learners.

Affidavit of Jo-Anne Chrona, para. 6, Exhibit "C".

170. In 2015, FNESC entered into a Bilateral Protocol with the Ministry.

Affidavit of Jo-Anne Chrona, para. 7, Exhibit "D".

171. FNESC has achieved legal recognition of its authority to be decision-makers in the education of Aboriginal children, protected in federal legislation (2006) and provincial legislation (2007).

Affidavit of Jo-Anne Chrona, para. 8, Exhibit "E".

172. In 2018, the FNESC entered a BC Tripartite Education Agreement: Supporting First Nation Student Success (the "2018 Tripartite Agreement") with Canada (as represented by the Minister of Indian Affairs and Northern Development) and British Columbia (as represented by the Minister of Education). The 2018 Tripartite Agreement lists a joint commitment that:

> First Nations Students, at all levels of education, must have access to educational opportunities that:
>
> i. Ensure that they are confident in their self-identity, their families, their communities and traditional values, languages and cultures;
>
> ii. Give them the skills they need to thrive in contemporary society, including 21st century technological skills; and
>
> iii. Prepare them to access any opportunities they choose for higher learning, employment and life choices.

Affidavit of Jo-Anne L. Chrona, para. 9, Exhibit F.

173. In response to the TRC recommendation that schools develop age appropriate educational materials about residential schools for use in public education, the FNSEC partnered with

the First Nations Schools Association (the "FNSA") to develop the Indian Residential Schools and Reconciliation Teacher Resource Guides for Grades 5, 10, 11, and 12. The goal of the Guide for Grade 5, which is adjustable for grades 3 to 7, is to help all learners participate in a renewed relation based on principles of reconciliation, and incorporating Aboriginal worldviews. The background to the Guide for Grade 5 states:

> The colonial background 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 residential school system and the harm it caused to multiple generations of First Nations families and communities.

Affidavit of Jo-Anne L. Chrona, paras. 11-13, Exhibit G.

174. The FNESC does not call for smudging as a specific delivery method for the principles and educational goals set out in the 2018 Tripartite Agreement or the Indian Residential Schools and Reconciliation Teacher Resource Guides because the FNESC does not have a position on how education is delivered within the classroom or on pedagogical approaches in general, which is left to the professional discretion of teachers in classrooms.

Cross-examination on Affidavit of Jo-Anne L. Chrona,
questions 38-39 and answers at p.8.
Argument of the Petitioner at paras. 43-46.

Nuu-chah-nulth Tribal Council – Local Aboriginal Education Initiatives

175. The Nuu-chah-nulth Tribal Council (the "NTC") is a not-for-profit society that provides services and political support to 14 Nuu-chah-nulth First Nations with approximately 10,000 members. Member First Nations are Ditidaht, Huu-ay-aht, Hupacasath, Tse-shaht, Uchucklesaht, Ahousaht, Hesquiaht, Tla-o-qui-aht, Toquaht, Yuu-cluth-aht, Ehattesaht, Kyuquot/Cheklesaht, Mowachat/Muchalaht, and Nuhchatlaht.

Affidavit of Dr. Judith Sayers, para. 2.

176. The goals of the NTC are to advance and protect the territories of the Nuu-chah-nulth Hereditary Chiefs; pursue self-determination; promote the betterment, prosperity and well-being of the Nuu-chah-nulth people; advance Nuu-chah-nulth culture, language, beliefs and way of life; and deliver programs and services for members, including in the areas of education and child and family services.

Affidavit Dr. Judith Sayers, para. 3.

177. As a result of the legacy of IRS, some Nuu-chah-nulth learners have struggled in school and have lower rates of success and graduation. Some Nuu-chah-nulth people have shared their experiences in IRS through the TRC.

Affidavit of Dr. Judith Sayers, para. 5.

178. As a crucial part of reconciliation and changing the relationship between Aboriginal and non-Aboriginal Canadians, the NTC advocates education for cultural inclusiveness in schools on the premise that all young people must be taught about cultural differences, and that people cannot honour difference if they cannot understand it.

Affidavit of Dr. Judith Sayers, para. 7.

179. Over 20 years ago, the NTC created an Education Team which is responsible for advocating for Nuu-chah-nulth learners, including at kindergarten to grade 12, and post secondary levels. Over the years, the role of the Education Team has evolved with more cooperation with the School Districts to further the aim of ensuring the success of Nuu-chah-nulth learners in public schools.

Affidavit of Dr. Judith Sayers, para. 9.

180. The Education Team attends negotiations for Local Education Agreements, Enhancement Agreements, and attends Committee meetings with the Aboriginal Education Advisory Committees, which include the NTC, schools which have Nuu-chah-nulth students, and the School District. The Education Team works closely with the School District's Aboriginal Team on curriculum development.

Affidavit Dr. Judith Sayers, para. 9.

181. The NTC education philosophy is described as the Pathways to Success Approach and it is summarized as follows:

> Pathways to Success (Our Educational Philosophy)
>
> We have a vision of all Nuu-chah-nulth children as happy, healthy and whole. We believe that a successful and rewarding educational experience is an important part of realizing that vision
>
> The Nuu-chah-nulth Education Team was created to help Nuu-chah-nulth students of all ages achieve their full potential by supporting them academically, culturally and socially on their educational path from kindergarten through post-secondary.
>
> We believe Nuu-chah-nulth students will be empowered by:
> - Focusing on each individual's unique interests and dreams and supporting their educational journey of self discovery
> - Creating a welcoming and culturally enriching learning environment
> - Focusing on individual instruction and support
> - Encouraging a strong self of self and pride in their heritage
> - Preparing them for the many transitions that will take place over their academic career
> - Promoting relationships with role models early in their educational journey

Affidavit Dr. Judith Sayers, para. 10.

182. As part of the Pathways to Success Approach, the Education Team and education staff work closely with schools, parents and communities to include holistic and culturally relevant teachings in schools and provide day-to-day support for Nuu-chah-nulth students from kindergarten to grade 12. Part of this approach involves Nuu-Chah-nulth Education

Workers ("NEW") who work in School District 70 and School District 84 schools. NEW model Nuu-chah-nulth ways and provide daily support to the students. Some of the duties of NEW are to expand awareness with respect to cultural teachings and holistic approaches to education. NEW help to develop and implement learning support opportunities to contribute to student success, retention and wellbeing, and support culturally appropriate teaching strategies and supports.

Affidavit of Dr. Judith Sayers, para. 11.

183. NEW are key contacts between Nuu-chah-nulth parents and school staff, and they help Nuu-chah-nulth families cope with their experience and the impacts of forced IRS attendance both personally, and as a community. Given the intergenerational and direct trauma that many Nuu-chah-nulth experienced as a result of IRS, NEW help to make schools culturally safe and accessible to Nuu-chah-nulth families. They do so by providing academic support, cultural support and education, and by acting as a liaison between Nuu-chah-Nulth families and schools. NEWs liaise with the teachers, school psychologists, student support services team, First Nations Liaisons, and school-based team members.

Affidavit of Dr. Judith Sayers, para. 13.
Affidavit of Sherri Cook, para. 4.

184. NEW's also arrange a variety of activities or presentations in schools, which further the goal of providing culturally relevant education for Nuu-chah-nulth students, while teaching non-Aboriginal students about Aboriginal culture and history. For instance, a First Nations community member with expertise in cedar bark weaving or beading may attend to demonstrate to students traditional First Nations arts. Similarly, through the elders reading program, NEW's bring elders into the classroom to read First Nations stories with the children. The Cleansing Demonstration facilitated by Ms. Cook, a NEW assigned to John Howitt Elementary, is an example of this kind of effort, designed to make schools a place where Nuu-chah-nulth students can see themselves and their culture reflected.

Affidavit of Dr. Judith Sayers, para. 16.
Affidavit of Sherri Cook, para. 5.

185. The NTC has Local Education Agreements ("LEA") with three school districts, including School District No. 70 to enhance programming and support for Nuu-chah-nulth students. The LEAs define the relationship between the School District and the NTC.

186. Section 2.1 and 2.1.1 in the School District's 2011-2016 LEA state:

> 2.1 It is the intention of the parties to:
>
> 2.1.1 cooperate in the development of an inclusive relationship that will enhance and improve all aspects of education for First Nations students and will also increase the knowledge and understanding of the First Nations culture and history for non-First Nations staff, students, and others working in association with the schools

Affidavit of Dr. Judith Sayers, para. 14, Exhibits C and D.

187. Education Enhancement Agreements are also developed in partnership with the NTC. The NTC and the School District are currently negotiating a new Enhancement Agreement. The Education Enhancement Agreement currently in effect in the School District is the Maatmass k'itacinkst'at?in kukuuttaq (Tribes, nations walking hand in hand together doing good work), School District No. 70, Aboriginal Education Enhancement Agreement, which has been in effect since 2005 (the "2005 EEA").

Affidavit of Dr. Judith Sayers, para. 15, Exhibit E.

188. The 2005 EEA reflects Nuu-chah-nulth worldviews and cultural understandings, and in particular understanding "hiisukis c'awaak" (everything is connected as one), "usma" (our children are precious), and "iisaak" (respect for self, for others, and for the world around us). In doing so, the NTC and the School District work together to integrate traditional and contemporary teachings to ensure that all learners are attaining their highest levels of academic, cultural and individual success.

Affidavit of Dr. Judith Sayers, para. 15, Exhibit E.

Incorporating Aboriginal Worldviews and Perspectives Into Curriculum

189. As part of a province-wide curriculum transformation in 2010, the Ministry formed the Curriculum and Assessment Framework Advisory Group ("Advisory Group") composed of BC educators, including superintendents, principals, academics from various universities, and individuals from the FNESC. The Advisory Group developed eight guiding principles for the development of new provincial curricula, including, "Integrate Aboriginal worldviews and knowledge."

Affidavit of Nancy Walt, paras. 3-5.

190. In furtherance of the above principle, Harry Cadwallader, the Director of the Aboriginal Education Enhancement Branch within the Ministry, sought out funding for, and facilitated a dialogue with five regional communities, to help define what is meant by "Aboriginal worldviews and perspectives," and how they can be embedded into practice in the classroom. The work done in these meetings was ultimately summarized in a document titled *Aboriginal Worldviews and Perspectives in the Classroom*. The Ministry's rationale for and commitment to introducing Aboriginal worldviews and perspectives into the classroom is outlined on page 5 of that document as follows:

> ... Canada's former assimilationist policy of residential schooling has not only harmed those individuals who were required to attend; it has profoundly damaged communities, weakened traditional languages and cultures, and engendered a deep distrust of formal education among many Aboriginal people. At the same time, the portrayal of Aboriginal peoples, traditions, and cultures in "mainstream" education has given rise to diverse negative stereotypes and attitudes among non-Aboriginal Canadians.
>
> The Province of BC is committed to meeting these evident challenges. As part of its broader education transformation process currently underway, the BC Ministry of Education is embedding Aboriginal perspectives into all parts of the curriculum in a meaningful and authentic manner. This includes extending Aboriginal perspectives into the entire learning journey. From Kindergarten to graduation, students will

experience Aboriginal perspectives and understandings as an integrated part of what they are learning.

Affidavit of Harry Cadwallader, paras. 5-6, Exhibit A.

191. Throughout the *Aboriginal Worldviews and Perspectives in the Classroom* document, the Ministry describes "Characteristics of Aboriginal Worldviews and Perspectives" including:

- Connectedness and relationship;
- Awareness of history;
- Local focus;
- Engagement with the land, nature, the outdoors;
- Emphasis on identity;
- Community involvement;
- The power of story;
- Traditional teaching;
- Language and culture; and
- Experiential learning.

Affidavit of Harry Cadwallader, Exhibit A.

192. In answer to Paragraphs 47-53 of the Argument of the Petitioner, the BC curriculum does not "compel children to be smudged against their will" in classrooms. The Petitioner's children were not, at any time, "smudged against their will".

193. Reconciliation education is important for all Canadians, and opportunities to observe and learn about smudging and other fundamental aspects of First Nations culture is critical for fostering understanding and empathy in ways that learning from books or stories about smudging simply cannot. A demonstration such as the Cleansing Demonstration and the Hoop Dance are a way to engage students on a visceral and experiential level which will stay with them and inform the way in which they engage with First Nations in future encounters. The method by which to deliver educational goals is a decision made by individual teachers in their classrooms.

194. The joint steps taken by government, (at both the provincial and federal levels) and Indigenous leaders demonstrate a fundamental recognition by policymakers of the need for Indigenous control of Indigenous identity, language and culture through education, as a response to the assimilation policies most powerfully and tragically enacted through the education system by IRS.

195. Aspects of Aboriginal culture, including the Cleansing Demonstration and the Hoop Dance, must be present in schools in order for the curriculum to reflect the above characteristics. In Aboriginal worldviews, there is no separation between the concept of education and the rest of a person's experience. In Aboriginal cultures, learning is not viewed as an action separate from any other part of life. The ongoing development of the whole person, which includes the mental (cognitive), physical, social/emotional and spiritual aspects, is often emphasized in Aboriginal perspectives of education.

Affidavit of Jo-Anne L. Chrona, para. 31.

196. It follows that the very notion of separation between the spiritual being- as opposed to the religious being- and the student is contrary to reconciliation. That is, teaching about First Nations culture and history cannot be severed from teaching about First Nations spirituality. The separation is itself a colonialist construct. However, teaching about First Nations spirituality is not akin to an imposition of First Nations spirituality or belief, which itself is not missionary, and thus cannot be imposed in a manner analogous to institutional religion.

197. In that regard, silencing or denying the teaching of First Nations culture, including spirituality, becomes a mechanism for assimilation.

The Proportionality Analysis

198. The statutory objective of reconciliation education, which includes the Cleansing Demonstration and the Hoop Dance, is thus to begin to heal Canada's colonial, racist and assimilationist policies and practices in respect of Indigenous Peoples. It is an answer to the

call to educate all Canadians about First Nations culture, way of life and way of being, of which ceremonies and practices such as smudging are a critical component. The Board hopes that teaching about the First Nations experience, not only as survivors, but also in their celebration and ritual, will affect greater tolerance, knowledge and respectful coexistence between First Nations and non-Indigenous Canadians.

199. The Board also recognizes that relationships between First Nations and non-Indigenous Canadians remain fractured and are often characterized by mistrust and underlying racism. The objective of reconciliation education is to heal some of those fractures by fostering understanding and familiarity, as well as embracing First Nations communities in the classroom to heal the mistrust of the institutions that had previously caused harm.

200. Reconciliation education is important for all Canadians, and opportunities to observe and learn about smudging and other fundamental aspects of First Nations culture is critical for fostering understanding and empathy. The Petitioner has acknowledged that a demonstration is an appropriate way to deliver educational goals.

201. The Board submits that facilitating student learning about Indigenous history and culture is part of the Board's mandate under the *School Act,* and smudging is an important part of that educational objective.

202. The Board submits that permitting smudging and other performances of First Nations heritage in public schools as an educational experience without active participation of students, as it was carried out during the Cleansing Demonstration and the Hoop Dance, is a proportionate and reasonable decision. In reaching that decision, the Board properly balanced the *Charter* value of freedom of religion and the duty to educate students as mandated by the *School Act* and pursuant to the objectives of reconciliation education.

203. The Board, through its staff at JHES, properly balanced the above statutory objectives with *Charter* values in the following ways:

a. Principal Manson or her staff prepared a letter for teachers to send out to parents prior to the Cleansing Demonstration, informing them about the Cleansing Demonstration, what would occur during the Cleansing Demonstration and inviting them to ask questions about or observe the Cleansing Demonstration in the September 14th Letter. Although there was an unfortunate mistake made whereby the letter was sent out only a day, rather than two days, prior to the Cleansing Demonstration in one class and not at all in another, the intention of the Board was clearly to provide parents of students with advance notice and information about the Cleansing Demonstration.

Affidavit of Candace Servatius, para. 6, Exhibit B.
Affidavit of Stacey Manson, para. 7.
Affidavit of Sherri Cook, paras. 7-8, 11, 13.

b. The Board ensured that the Cleansing Demonstration which took place in three classrooms did not involve the participation of any students. Rather, that students only observe and learn about the practice.

Affidavit of Sherri Cook, para. 13.
Affidavit of Sonia Iacuzzo, para. 9.
Affidavit of Geraldine Dekoninck, para. 3.
Affidavit of Jelena Dyer, paras. 8, 10 and 13.

c. Likewise, the Board ensured that when Mr. Anderson performed the Hoop Dance at an assembly of students at the school, the students were merely present and observed. No student was invited, encouraged or in any way subject to suggestion to recite a prayer with Mr. Anderson or otherwise participate in Mr. Anderson's prayer and the fact is, no student did so.

Affidavit of Stacey Manson, para. 17.
Affidavit of Sonia Iacuzzo, para. 15.
Affidavit of Geraldine Dekoninck, para. 5.

204. The Board submits the above reflects the Board's proportionate balancing of the *Charter* protection with the statutory objectives or mandate, including the inclusion of reconciliation education in the curriculum.

The Relief Sought is Overbroad

205. The relief sought in the Prohibition Order is overly broad in that it captures all "religious practices", without limitation.

206. The term "religious practices," is undefined.

207. The term "religious practice," could potentially capture any number of activities regularly carried out in a school, so long as there is a nebulous nexus to a religious belief system. By way of example, the Prohibitive Order would prohibit the practice of yoga and meditation which are associated with the Vedic tradition which forms the foundation of Hinduism and Buddhism. Indeed, most sports, particularly those associated with track and field, derive from the ancient Olympic games which were a celebration held in honour of the Greek god, Zeus. These too, would be prohibited by the wording of the Prohibition Order.

208. An order in the nature of prohibition is an order that prohibits a lower court or adjudicator from exercising its powers under statute. In seeking the Prohibition Order, the Petitioner is seeking an order that extinguishes the legislator's ability, through its delegate, to exercise any of its decision-making powers under the *School Act* as they relate to any activities in schools that have even a peripheral connection to religiosity, without temporal limitation, and as they relate to all students, not merely the individual Petitioner and her children.

209. The Prohibition Order is thus an overly broad remedy that involves fact patterns that have not yet come before the Court. If the Court were to make such an order, it would limit the ability of administrative decision-makers to conduct a proportionality analysis on any factual matrix in order to balance competing interests, *Charter* values and statutory objectives.

210. The Prohibition Order would likewise foreclose any *Charter* analysis by a reviewing court as it pertains to religion and the public school system, by barring any analysis of whether a

Charter claim is trivial or insubstantial, and whether a violation of *Charter* values is nevertheless proportionate in light of statutory objectives.

211. If the Petitioner is, in fact, seeking injunctive relief,-despite the deficiencies in the pleadings seeking such relief, the Board says the Petitioner fails to meet the test for a permanent injunction.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: 7 November 2019

Signature of lawyers for the Respondent
Keith Mitchell
Reut Amit