

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(Divisional Court)**

BETWEEN:

**CAROLYN BURJOSKI**

Applicant

-and-

**WATERLOO REGION DISTRICT SCHOOL BOARD**

Respondent

**FACTUM OF THE RESPONDENT**

December 13, 2022

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## TABLE OF CONTENTS

<b>PART I - OVERVIEW .....</b>	<b>1</b>
<b>PART II - SUMMARY OF FACTS .....</b>	<b>1</b>
The Parties.....	1
Delegation Request .....	2
<b>PART III - STATEMENT OF ISSUES, LAW &amp; AUTHORITIES .....</b>	<b>6</b>
Statement of Issues.....	6
Issue #1: The Decision was Reasonable .....	6
Issue Two: Ms. Burjoski was Afforded Appropriate Procedural Fairness .....	19
Issue Three: The Decision Was Made Without Bias .....	22
Issue Four: The Relief Sought Is Untenable .....	24
<b>PART IV - ORDER REQUESTED.....</b>	<b>26</b>

## **PART I - OVERVIEW**

1. This judicial review arises out of a decision made during a Committee of the Whole Meeting of the Waterloo Region District School Board (“WRDSB”) on January 17, 2022 (the “Meeting”). The Applicant, Carolyn Burjoski (“Ms. Burjoski”), appeared as a delegate at the Meeting to discuss the Library Collection Review. During her delegation, she began criticizing some books and resources available in WRDSB libraries which discuss gender identity. The Chair of the Board of Trustees of the WRDSB cautioned Ms. Burjoski not to say “anything that would violate the Human Rights Code.” Ms. Burjoski’s delegation continued, wherein she suggested that youth who are exploring their gender identity are experiencing “emotional and social distress.” At this point, Ms. Burjoski’s delegation was stopped by the Chair.

2. After a point of order, the trustees voted 5-4 to uphold the Chair’s decision to stop Ms. Burjoski’s delegation (the “Decision”). It is this Decision which forms the subject of this application for judicial review.

3. Ms. Burjoski now seeks to quash the decision and seeks a variety of declaratory relief. The application ought to be dismissed. Despite Ms. Burjoski’s framing, this is a judicial review of a decision of an elected Board of Trustees. Ms. Burjoski has not demonstrated any substantive or procedural errors that justify judicial intervention.

## **PART II - SUMMARY OF FACTS**

### **The Parties**

4. The Applicant, Ms. Burjoski, is a former elementary school teacher with the WRDSB who taught English as a second language to students until her retirement on January 31, 2022.

5. The WRDSB is a school board constituted as a corporate body under Ontario's *Education Act* (the "*Education Act*").<sup>1</sup> Under the *Education Act*, the WRDSB "has all the powers and shall perform all the duties that are conferred or imposed on it under this or any other Act."<sup>2</sup>

6. The WRDSB is composed of eleven trustees.<sup>3</sup> The trustees are responsible for serving the interests and needs of the general public, articulating the WRDSB's vision for education, and for advocating for a "strong and vigorous public education system that benefits the learners and communities served within the Region."<sup>4</sup>

7. As recognized by the WRDSB's Bylaws, the Chair of the Meeting was responsible for maintaining order and seeing that appropriate decorum of the Meeting was maintained.<sup>5</sup> He also held a discretionary power to expel or exclude from any meeting any persons who engaged in any form of improper conduct, in support of upholding a standard of courtesy and respect for others.<sup>6</sup>

### **Delegation Request**

8. On November 21, 2021, Ms. Burjoski requested to make a delegation before the WRDSB as follows:

I would like to address the Board on issues of transparency regarding the library and classroom teacher's collections culling project. I would also like to express my concern regarding Board Policy 1235 Section 4 which states that we teachers must not disclose a student's transgender status to their parents.<sup>7</sup>

9. With respect to her "Recommendation(s) for resolution of issue," Ms. Burjoski stated as follows:

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<sup>1</sup> *Education Act*, [RSO 1990, c E2](#), s 58.5(1) [*Education Act*].

<sup>2</sup> *Education Act*, *supra*, s 58.5(1); *In the Matter of s. 10 of the Education Act*, [2016 ONSC 2361](#) at paras 46, 55-58 (Div Ct) [*S. 10 of the Education Act*].

<sup>3</sup> Bylaws- Board of Trustees- Waterloo Region District School Board at s 2.3 ["WRDSB Bylaws"], Amended Amended Record of Proceedings ["ARP"] Tab 7.

<sup>4</sup> WRDSB Bylaws, *supra* at s 4.2, ARP Tab 7.

<sup>5</sup> WRDSB Bylaws, *supra* at s 9.16, ARP Tab 7.

<sup>6</sup> WRDSB Bylaws, *supra* at s 14.9, ARP Tab 7.

<sup>7</sup> Delegation Request dated November 21, 2021 submitted by Carolyn Burjoski ["Delegation Request"], ARP Tab 1.

Be more transparent in general. The Board should have been ready to answer the reporter's questions about criteria for the library cull for the National Post's October 8, 2021 article.

From the subsequent November 8 memo "Reviewing Our Library Collections", the Board listed the CREW method and the MUSTIE criteria for reviewing collections. Be transparent about the criteria for titles that will be considered "Misleading, Superseded, Trivial or Irrelevant" when using the CREW method, or keep lists of titles that are being removed from the library.

Do not cull teacher collections.

Create committees which include diverse thinkers when making decisions. Be ready to share how the Board arrived at decisions and explain why the people who were on the committee were chosen. Include people from both within and outside of the LGBT banner when you create committees and include diversity of thought in your criteria.

Strike a committee that properly represents parents and teachers to discuss the intersection of biology and gender and clarify which direction teachers should follow. For example, the Living Things strand of the Science curriculum teaches children to classify living things based on physical characteristics of their bodies. This differs from the Gender Lessons which teach children that they can choose if they are a boy or a girl or something in between.

Demonstrate more respect for the role of parents when making policy decisions. Change policy 1235 to state that schools must inform parents if their child asks to be called a different name, pronoun, etc. It is their right to know this information.<sup>8</sup>

10. Notably absent from Ms. Burjoski's request for a delegation was any suggestion that she would be making a delegation about any specific books. On December 20, 2021, Ms. Burjoski was advised that while her delegation request was for two separate topics, only her request for a delegation regarding the library review was approved. Accordingly, Ms. Burjoski was permitted to appear at the Meeting to solely address her first issue,<sup>9</sup> which she described as addressing the Board "on issues of transparency regarding the library and classroom teacher's collections culling project."<sup>10</sup>

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<sup>8</sup> Delegation Request, *supra*, ARP Tab 1.

<sup>9</sup> Email exchange between S. Reidel and C. Burjoski dated November 24, 2021 – January 13, 2022 regarding Delegation Request ["Email re Delegation Request"], ARP Tab 2.

<sup>10</sup> Delegation Request, *supra*, ARP Tab 1.

11. Ms. Burjoski’s delegation was scheduled to take place during the Committee of the Whole Meeting on January 17, 2022, when a trustee’s motion regarding “Library Review” was scheduled to be voted on. The Library Review motion recommended as follows:

That a written report be presented at a regular Committee of the Whole outlining the criteria, framework and the process for the 2-3 year library and classroom library review by the end of January 2022; and

That a consultation process be developed that would include students, staff , parents and community members participation in the library and classroom library review; and

That the Waterloo Region District School Board develop a “Library Resource Review” policy that would include criteria, framework, process and a consultation process for students, parents, staff and community members.<sup>11</sup>

### **The Meeting**

12. Before commencing the portion of the Meeting with delegations, the Chair reminded all delegates that their remarks were to be confined to the issue that they were addressing. The Chair further confirmed that “any discourteous language referenced to personalities or statements contravening the Ontario *Human Rights Code* or the *Charter of Rights and Freedoms* [would] not be tolerated.”<sup>12</sup>

13. Ms. Burjoski was the second speaker making a delegation about the library review process. Ms. Burjoski began her delegation by commenting on the WRDSB’s intent to “cull” books from schools which are “deemed harmful.” Ms. Burjoski commented that no information had been shared with teachers about the “philosophy” by which books would be judged.<sup>13</sup> However, the theme of Ms. Burjoski’s delegation rapidly changed towards criticizing books currently available in school libraries, as opposed to the “transparency” of the Library Review as outlined in her request for delegation.

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<sup>11</sup> Notice and Agenda for Committee of the Whole Meeting, ARP Tab 11, p. 106.

<sup>12</sup> Transcript of excerpt of Video of Committee of the Whole Meeting dated January 17, 2022 (10:00-11:30 of video at Tab 4) [“Transcript 1”], ARP Tab 5.

<sup>13</sup> Transcript 1, *supra*, ARP Tab 5.

14. Ms. Burjoski opined that some of the books in the school libraries “are inappropriate for young children.”<sup>14</sup> Ms. Burjoski began speaking about a book titled “Rick” where the protagonist “ends up declaring an asexual identity.”<sup>15</sup> Ms. Burjoski’s comments included statements such as “some of the books filling our libraries make it seem simple or even cool to take puberty blockers or opposite sex hormones.” At this stage, the Chair expressed his concern that the contents of Ms. Burjoski’s delegation “may be problematic” and cautioned her to “make sure that [she was] not saying anything that would violate the *Human Rights Code*.”<sup>16</sup>

15. Upon being permitted to continue her delegation, Ms. Burjoski persisted with voicing her opinion regarding the appropriateness of another book centered on transgender issues as opposed to speaking on the topic for which her delegation was approved: being the procedure surrounding the library review. She described the book as “misleading” and criticized a character’s decision to undergo a medical transition to identify as male after being born female. She stated that the “book makes very serious medical interventions seem like an easy cure for emotional and social distress...”<sup>17</sup>

16. At this point, the Chair stopped Ms. Burjoski’s presentation out of concern for it being a violation of the *Human Rights Code* and the WRDSB delegation policies. The Chair specifically noted that gender identity and gender expression are protected under the *Human Rights Code*.<sup>18</sup>

17. A trustee challenged the Chair’s decision. In accordance with the WRDSB’s Board Meeting procedures,<sup>19</sup> the Vice Chair presided over a vote of the Trustees with respect to whether the Chair’s decision should be sustained. The Chair explained his reasons for stopping Ms. Burjoski’s delegation.<sup>20</sup> In response, Trustee Ramsay disagreed on the basis that there had not been any personal attacks made by Ms. Burjoski.<sup>21</sup> The vote was 5-4 in favour of sustaining the decision to

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<sup>14</sup> Transcript of excerpt of Video of Committee of the Whole Meeting dated January 17, 2022 (20:48-38:32 of video at Tab 4) at 3 [“Transcript 2”], ARP Tab 6.

<sup>15</sup> Transcript 2, *supra* at 3-4, ARP Tab 6.

<sup>16</sup> Transcript 2, *supra* at 4-5, ARP Tab 6.

<sup>17</sup> Transcript 2, *supra* at 5, ARP Tab 6.

<sup>18</sup> Transcript 2, *supra* at 6, ARP Tab 6.

<sup>19</sup> WRDSB Bylaws, *supra* at s 9.7, ARP Tab 7.

<sup>20</sup> Transcript 2, *supra* at 8, ARP Tab 6.

<sup>21</sup> Transcript 2, *supra* at 8-9, ARP Tab 6.

end Ms. Burjoski's delegation. It is this Decision which forms the subject of this application for judicial review.

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

#### **Statement of Issues**

18. This judicial review application raises three issues:
- a) Was the Decision unreasonable?
  - b) Was there a breach of procedural fairness?
  - c) Was there a reasonable apprehension of bias in the Decision?

#### **Issue #1: The Decision was Reasonable**

##### ***A. The Doré/Loyola Framework***

19. The standard of review for the Decision is reasonableness. The starting point for this analysis is a presumption that the legislature intended the standard of review to be reasonableness, and there is no "clear indication of legislative intent" or any rule of law concerns that warrant a departure from this standard.<sup>22</sup> The party challenging a decision bears the onus of showing that the decision is unreasonable.<sup>23</sup>

20. The reasonableness of the Decision is reviewable under the *Doré/Loyola*<sup>24</sup> framework which proceeds in two stages:

- i. First, this Court must ask whether the Decision engaged the *Charter* by limiting *Charter* protections – both rights and values<sup>25</sup>;

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<sup>22</sup> *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65](#) at para 10 [Vavilov].

<sup>23</sup> *Vavilov*, *supra* at para 100.

<sup>24</sup> *Doré v Barreau du Québec*, [2012 SCC 12](#) [Doré]; *Loyola High School v Quebec (Attorney General)*, [2015 SCC 12](#) [Loyola].

<sup>25</sup> *Law Society of British Columbia v Trinity Western University*, [2018 SCC 32](#) at para 58 [TWU]; *Loyola*, *supra* at para 39.

- ii. Second, if the answer to the first question is “yes”, this Court must ask whether in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the Decision reflects a proportionate balancing of the *Charter* protections at play.<sup>26</sup>

21. The proportional balancing does not require that the Decision be the option that limits interference with the *Charter*-protected interest the least. The question before the Court is whether the Decision “falls within a range of reasonable outcomes”.<sup>27</sup> The analysis is therefore a “highly contextual inquiry”.<sup>28</sup> Finally, the reviewing court is to assess “how substantial the limitation on the *Charter* protection was compared to the benefits of the furtherance of the statutory objectives in this context”.<sup>29</sup>

22. When reviewing an administrative decision for reasonableness, the Court’s role is to review the decision before it, not to decide the matter anew. In other words, this Court must not reweigh the information that was before the WRDSB.<sup>30</sup> As explained in *Vavilov*, judicial review “finds its starting point in the principle of judicial restraint”.

23. In the matter at hand, the WDRSB’s Decision to end Ms. Burjoski’s presentation engages her freedom of expression and is to be balanced against the WRDSB’s statutory mandates and policies to govern meetings and maintain an inclusive environment.

## ***B. The Statutory and Administrative Scheme***

### **a. WRDSB Bylaws**

24. WRDSB has codified certain operational matters in its Bylaws for the Waterloo Region District School Board of Trustees (the “Bylaws”). These include the procedures for delegations, for its committees and committee members, for public meetings and for Board Meetings. The Bylaws set out the Rules of Order, including the procedure for addressing points of order as they are raised:

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<sup>26</sup> *TWU*, *supra* at para 58; *Doré*, *supra* at para 57.

<sup>27</sup> *TWU*, *supra* at para 81; *Doré*, *supra* at para 57.

<sup>28</sup> *TWU*, *supra* at para 81.

<sup>29</sup> *TWU*, *supra* at para 82.

<sup>30</sup> *Vavilov*, *supra* at para 125.

“The decision of the Chair on the point of order shall be overruled only by a majority vote of the Trustees present in favour thereof.”<sup>31</sup>

25. The Bylaws also identify various duties of the Chair to maintain order in Board meetings. In particular, they are to “preserve order and decorum and decide upon all questions of order subject to an appeal to the Board.”<sup>32</sup> The Chair is also “responsible for maintaining order and seeing that appropriate decorum of the Board meeting is maintained...”<sup>33</sup>

26. The Bylaws also contain delegation procedures that outline how delegates may make submissions at meetings. Those wishing to appear are to register in advance of the meeting.<sup>34</sup> Delegates are invited to make written submissions ahead of time including a brief summary of the issue being presented and any relevant recommendations.<sup>35</sup> Not unlike the responsibilities of Trustees<sup>36</sup>, delegates also have expectations that align with WRDSB’s goals of promoting respect and inclusivity, which can be enforced by the Chair’s discretionary powers. The Bylaws specifically set out that:

Delegates are expected to refrain from the use of abusive or derogatory language at all times and **the Chair may expel or exclude from any meeting any person(s) who engage in this or any other form of improper conduct.** Applause, booing or other audible or visual demonstrations of support or opposition are discouraged because they may be intimidating for those with opposing views. **Courtesy and respect for others must be displayed at all times.** [Emphasis added]<sup>37</sup>

b. WRDSB Policies

27. Pursuant to the WRDSB’s Human Rights Policy, which applies to students, employees, trustees, parents and anyone who works with the WRDSB, there is a general commitment “to providing working and learning environments that are free of discrimination and harassment, where

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<sup>31</sup> WRDSB Bylaws, *supra* at s 9.15, ARP Tab 7.

<sup>32</sup> WRDSB Bylaws, *supra* at s 9.4, ARP Tab 7.

<sup>33</sup> WRDSB Bylaws, *supra* at s 9.16, ARP Tab 7.

<sup>34</sup> WRDSB Bylaws, *supra* at s 14.2, ARP Tab 7.

<sup>35</sup> WRDSB Bylaws, *supra* at s 14.3, ARP Tab 7.

<sup>36</sup> WRDSB Bylaws, *supra* at s 5, ARP Tab 7.

<sup>37</sup> WRDSB Bylaws, *supra* at s 14.9, ARP Tab 7.

all individuals are treated with respect and dignity, and can thrive and fully contribute.”<sup>38</sup> The policy defines a “poisoned environment” as one

created by comments or conduct that create a discriminatory work environment. The comments or conduct need not be directed at a specific person, and may be from any person, regardless of position or status. A single comment or action, if sufficiently serious, may create a poisoned environment.<sup>39</sup>

28. Board Policy 1008: Equity and Inclusion (the “Equity and Inclusion Policy”) recognizes that WRDSB “is committed to the principles of equity through inclusive programs, curriculum, services, and operations in accordance with the Ontario Human Rights Code (the Code), the Education Act, and the Canadian Charter of Rights and Freedoms.”<sup>40</sup> Furthermore, it identifies the WRDSB’s mandate to “identify and remove systemic and attitudinal barriers and biases to learning and employment opportunities that have a discriminatory effect on any individual.”<sup>41</sup> The Equity and Inclusion Policy emphasizes the WRDSB’s duty to “provide a safe, inclusive environment free from inequity, discrimination and harassment...”<sup>42</sup> including by incorporating “the principles of equity and inclusive education into all aspects of its operations...”<sup>43</sup> The Policy further acknowledges that all “partners in education” “have a critical role to play in leading the identification and removal of bias [and] discrimination.”<sup>44</sup> The Policy commits to “the principle that every person within the school community is entitled to a respectful, positive school climate... free from all forms of discrimination and harassment.”<sup>45</sup>

c. The Education Act

29. Section 169.1 of the *Education Act* imposes a number of statutory duties on school boards. These include duties to: “promote a positive school climate that is inclusive and accepting of all pupils, including pupils of any ... sex, sexual orientation, gender identity, gender expression, age,

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<sup>38</sup> Board Policy 1017: Human Rights, dated April 26, 2021, at s 1 [“Human Rights Policy”], ARP Tab 10.

<sup>39</sup> Human Rights Policy, *supra* at s 5.4, ARP Tab 10.

<sup>40</sup> Board Policy 1008: Equity and Inclusion, dated April 2019, at s 1.1 [“Equity and Inclusion Policy”], ARP Tab 8.

<sup>41</sup> Equity and Inclusion Policy, *supra* at s 1.3, ARP Tab 8.

<sup>42</sup> Equity and Inclusion Policy, *supra* at s 2.1, ARP Tab 8.

<sup>43</sup> Equity and Inclusion Policy, *supra* at s 2.1.1, ARP Tab 8.

<sup>44</sup> Equity and Inclusion Policy, *supra* at s 2.1.2, ARP Tab 8.

<sup>45</sup> Equity and Inclusion Policy, *supra* at s 2.1.6, ARP Tab 8.

marital status, family status or disability”; and to “develop and maintain policies and organizational structures that promote” these goals.<sup>46</sup>

30. Section 218.1 imposes certain statutory duties on school board trustees. These include duties to: (i) carry out their responsibilities “in a manner that assists the board in fulfilling its duties under this Act, the regulations and the guidelines issued under this Act, including, but not limited, to the board’s duties under section 169.1”; (ii) uphold the implementation of any board resolution after it is passed by the board; and (iii) “maintain focus on student achievement and well-being”.<sup>47</sup>

### *C. Deference*

31. Deference to the decision-maker is warranted where the impugned administrative decision is a discretionary one.<sup>48</sup> *Doré*’s approach recognizes that an administrative decision-maker, exercising a discretionary power under his or her home statute, typically brings expertise to the balancing of a *Charter* protection with the statutory objectives at stake.<sup>49</sup> Consequently, the decision-maker is generally in the best position to weigh the *Charter* protections with his or her statutory mandate in light of the specific facts of the case.<sup>50</sup> It follows that deference is warranted when a reviewing court is determining whether the decision reflects a proportionate balance. *Doré* recognizes that there may be more than one outcome that strikes a proportionate balance between *Charter* protections and statutory objectives.<sup>51</sup>

32. In the context of decisions made by elected decision-makers, a high degree of deference must be given.<sup>52</sup> The WRDSB is democratically accountable and represents its community. The Chair and Trustees are elected representatives, not tribunal appointees, and are well-versed in the goals of its education system as well as the boundaries of proper debate at meetings. “As elected representatives,

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<sup>46</sup> *Education Act*, *supra* at s 169.1(1).

<sup>47</sup> *Education Act*, *supra* at s 218.1(a,e,g).

<sup>48</sup> *Loyola*, *supra* at para 42.

<sup>49</sup> *Loyola*, *supra* at para 42; *Doré*, *supra* at para 54.

<sup>50</sup> *Doré*, *supra* at para 54.

<sup>51</sup> *Loyola*, *supra* at para 41.

<sup>52</sup> *Rocky Point Metalcraft Ltd v Cowichan Valley (Regional District)*, [2012 BCSC 756](#) at para 29.

it is their job to bring community views into the educational decision-making process,” as a school board like the WRDSB is “better placed to understand community concerns than the court.”<sup>53</sup>

33. The Decision is entitled to deference in accordance with its legislative scheme. The *Education Act* demonstrates the Legislature’s intent to empower school boards to develop and enforce their own policies and procedures. As this Court recently explained: “school boards should be free to act as modern, democratic, dynamic legal personalities, provided only that there be some statutory foundation for, and no express statutory prohibition of, their conduct.”<sup>54</sup> The *Education Act* empowers and requires the WRDSB to regulate its own board meetings by providing it with the discretion to establish procedures for conducting meetings which “include the order of business, arrangements for the hearing of public delegations, and rules of order.”<sup>55</sup> Akin to a city council disciplining one of its own council-members, the Board “can be presumed to have expertise with respect to its own processes and standards for behaviour.”<sup>56</sup>

34. In *Radio CHUM 1050 Ltd v Toronto (City) Board of Education*, the Ontario Court of Appeal confirmed that a school board “has inherent jurisdiction to regulate its meetings within the scope of the jurisdiction granted to it by the statute.”<sup>57</sup> The resolution in question excluded the use of recording equipment from meetings. At trial, the judge found it “within the powers of the Board in the performance of its duty... to regulate the mode of the conduct of its meetings to pass a resolution which deals with matters which may distract or interfere with the conduct of such meetings.”<sup>58</sup> Affirming this decision, the Ontario Court of Appeal added:

[T]he Board has inherent jurisdiction to regulate its meetings within the scope of the jurisdiction granted to it by the statute... and in regulating its meetings to provide for what might be described as decorous conduct by all attending the meeting. It was reasonable for the Board to conclude that the use of electronic equipment to record the voices and words used at a meeting of the Board might very well detract from the effectiveness of

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<sup>53</sup> *Chamberlain v Surrey School District No 36*, [2002 SCC 86](#) at para 10.

<sup>54</sup> *S. 10 of the Education Act*, *supra* at para 56.

<sup>55</sup> *Education Act*, *supra* at s 170(1)4.; see also Anthony F Brown & Marvin A Zucker, *Education Law*, 4th ed (Toronto: Thomson Carswell, 2007) at 80.

<sup>56</sup> *Dupont v Port Coquitlam (City)*, [2021 BCSC 728](#) at para 42.

<sup>57</sup> *Radio CHUM 1050 Ltd et al v Board of Education for City of Toronto* (1964), [44 DLR \(2d\) 671 \(ONCA\)](#) at para 2 [*Radio CHUM ONCA*].

<sup>58</sup> *Radio CHUM 1050 Ltd et al v Toronto Board of Education*, [\[1964\] 1 OR 598 \(ONSC\)](#) at para 14 [*Radio CHUM ONSC*].

the meeting and have an adverse effect on the free and uninhibited discussion that is advisable at such meetings, either by and between members of the Board or by and between members of the Board and those attending who desire to make representations to the Board.<sup>59</sup>

35. Moreover, as the Supreme Court of Canada recognized over forty years ago:

[P]ublic bodies, such as municipal councils and school commissions have broad discretion in the regulation of their procedures. It is not for the courts to dictate the manner in which such bodies shall manage their internal affairs ... in the absence of statutory obligation, or misconduct, the internal regulation of their affairs by municipal bodies is a matter for such bodies and for them alone[.]<sup>60</sup>

36. Contrary to the submissions made by the Applicant, the Board did not make a finding that Ms. Burjoski had breached the Human Rights Code. The Chair merely referenced the Human Rights Code and expressed his concerns that Ms. Burjoski's comments were problematic.<sup>61</sup> In light of the statutory duties imposed on school boards and their trustees under the *Education Act*, the Decision to end Ms. Burjoski's presentation was not *ultra vires* as alleged by the Applicant. Those in attendance, namely the Chair and Trustees, had a unique perspective on Ms. Burjoski's comments. They best understood the undertones of Ms. Burjoski's comments, including the fact that she had also requested to make a delegation about a Board policy which requires teachers not to disclose a student's transgender status to their parents. The Chair and the Trustees were best positioned to anticipate the impact of her presentation on the school community.

#### ***D. The Decision Represents a Reasonable Balance***

37. The Supreme Court has held that there is "no duty to give formal reasons in a context where the decision was made by elected representatives pursuant to a democratic process."<sup>62</sup> A school board's reasoning may be "deduced from the debate, deliberations and the statements of policy"<sup>63</sup> that gave rise to the decision in question. Accordingly, given that the Decision was reached through

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<sup>59</sup> *Radio CHUM ONCA*, *supra* at para 2.

<sup>60</sup> *Houde v Quebec Catholic School Commn.*, [1978] 1 SCR 937 at 940 [*Houde*].

<sup>61</sup> Transcript 2, *supra* at 8, ARP Tab 6.

<sup>62</sup> *TWU*, *supra* at para 53; *Catalyst Paper Corp v North Cowichan*, 2012 SCC 2 at paras 29, 33 [*Catalyst*].

<sup>63</sup> *Catalyst*, *supra* at para 29.

a democratic process by elected trustees, it was not necessary for the WRDSB to give formal reasons for the Decision.

38. On reasonableness review, a Court considers whether the decision is internally coherent, with a rational chain of analysis that is justified in relation to the facts and law that constrain the decision-maker.<sup>64</sup> This requires attention to the specialized knowledge or expertise of the decision-maker that may illuminate underlying practical realities of the administrative scheme.<sup>65</sup> A reviewing court must remember that: “Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case.”<sup>66</sup> Whether a decision is reasonable is informed by the decision’s context and the reasons, if any.<sup>67</sup>

39. The context within which Ms. Burjoski’s comments were made included the fact that as part of her request for a delegation, she raised her “concern regarding Board Policy 1235 Section 4 which states that we teachers must not disclose a student’s transgender status to their parents.”<sup>68</sup> The Chair was aware of this other delegation request made by Ms. Burjoski at the time of the Meeting.<sup>69</sup>

40. In making its Decision, the WRDSB considered its own governing Bylaws and policies and its statutory objectives, including *Charter* rights inclusive of freedom of expression. The WRDSB was alive to *Charter* rights as indicated by Board policy 1008 and the Chair’s opening comments. While presiding over the vote about the Decision, the Vice-Chair expressly stated that she was “cognizant of the delegation’s right to speak.”<sup>70</sup> The Board was also aware of its obligations to enforce its Bylaws and policies, and to abide by the Human Rights Code and to the objectives of the *Education Act*.<sup>71</sup>

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<sup>64</sup> *Vavilov*, *supra* at paras 84-85.

<sup>65</sup> *Vavilov*, *supra* at paras 92-93.

<sup>66</sup> *Vavilov*, *supra* at para 119.

<sup>67</sup> *Vavilov*, *supra* at paras 84, 89, 108.

<sup>68</sup> Delegation Request, *supra*, ARP Tab 1.

<sup>69</sup> Email exchange between S. Reidel and S. Piatkowski dated December 13, 2021 – December 20, 2021, ARP Tab 3.

<sup>70</sup> Transcript 2, *supra* at 13, ARP Tab 6.

<sup>71</sup> *TWU*, *supra* at paras 57-59.

41. Balanced against the objectives of the WRDSB’s enabling legislation, any limitation on Ms. Burjoski’s *Charter* rights by the Board’s decision is proportionate. The limitation on Ms. Burjoski’s rights was minimal.

42. Ms. Burjoski submitted written materials in advance of her delegation. The written materials she submitted expressed her concerns about the Board being transparent in how the “library cull” is to be conducted.<sup>72</sup> That was the topic before the Meeting. Her written materials did not indicate she intended to address the Board about specific books within the WRDSB collection. She was permitted to continue with her presentation after receiving a warning, and there is nothing preventing Ms. Burjoski from voicing her opinion on these library books in other forums. As noted in the Library Services presentation which occurred subsequent to Ms. Burjoski’s delegation, the WRDSB has a detailed reconsideration process if a member of the school community has a concern about any library materials.<sup>73</sup> During the Library Services presentation it was expressly stated by WRDSB staff that they “would like to remind all audience members and trustees that parents, students, caregivers, staff and community members can be part of the selection deselection process. There’s many avenues that we have described this evening for that participation.”<sup>74</sup> Any “infringement on the Applicants’ expression is mitigated by other expressive activities available to [her].”<sup>75</sup> She was permitted to express her opinion on the library review process itself, which is what her written request for a delegation indicated she wished to express her opinion about.

43. As compared with the minimal limitation on Ms. Burjoski’s rights, the WRDSB not only has a statutory duty to maintain a decorous meeting environment through the regulation of meeting conduct, but is also mandated to abide by the Ontario *Human Rights Code* and promote an inclusive and welcoming environment for people of all gender identities and expressions. This duty of an entire school community goes well beyond the individual rights of expression of a single individual at a school board meeting. As noted by the Court of Appeal, “The Board has a statutory mandate to

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<sup>72</sup> Delegation Request, *supra*, ARP Tab 1.

<sup>73</sup> Video of Committee of the Whole Meeting dated January 17, 2022 at 1:37:00 [“Video of Committee of the Whole Meeting”], ARP Tab 4

<sup>74</sup> Video of Committee of the Whole Meeting at 1:40:15, ARP Tab 4.

<sup>75</sup> *Alberta March for Life Association v Edmonton (City)*, [2021 ABQB 802](#) at para 149.

provide an inclusive and tolerant educational environment, one that respects the principles of equality enshrined in s. 15 of the *Charter*.”<sup>76</sup>

44. The Supreme Court dealt with a similar situation in *Ross v. New Brunswick School District No. 15*. A teacher made racist and discriminatory comments against the Jewish community. A parent complained and the Human Rights Commission found that the teacher’s actions amounted to discrimination. The Commission also found that the school board discriminated in failing to discipline the teacher. The Supreme Court agreed that the school board’s failure to censure the teacher constituted discrimination, and the order against the teacher was justified under section 1 of the *Charter*, despite finding infringing section 2(b). In doing so, the Supreme Court noted as follows:

In order to ensure a discrimination-free educational environment, the school environment must be one where all are treated equally and all are encouraged to fully participate. Teachers must ensure that their conduct transmits this message of equality to the community at large, and are expected to maintain these high standards both in and out of the classroom.<sup>77</sup>

45. The Decision was ultimately about Ms. Burjoski’s choice of words, which were, in the opinion of the WRDSB, derogatory and contrary to its Bylaws, the objectives of the *Education Act*, and potentially the Ontario *Human Rights Code*. Gender identity and expression are both explicitly listed as protected grounds under both the *Education Act* and the Ontario *Human Rights Code*. Ms. Burjoski’s comments amounted to attacking puberty blockers for transgender youths and suggesting that youth who are questioning their gender identity are simply suffering from “emotional and social distress.”<sup>78</sup> These types of comments perpetuate a harmful narrative that members of the transgender community are merely suffering from “emotional and social distress” which can be “cured.” Significantly, the Ontario Human Rights Commission has recognized that such comments can amount to false and harmful stereotypes about trans people that contribute to their discrimination:

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<sup>76</sup> *ET v Hamilton-Wentworth District School Board*, [2017 ONCA 893](#) at para 40.

<sup>77</sup> *Ross v New Brunswick School District No 15*, [\[1996\] 1 SCR 825](#) at para 100.

<sup>78</sup> Transcript 2, *supra* at 5, ARP Tab 6.

There are widespread stereotypes about trans people in society that often go unquestioned. These include wrong ideas that trans people are ‘abnormal’ or ‘unnatural,’ that they are ‘frauds,’ deceptive and or misrepresent themselves. They may be seen as more likely to take part in criminal activity, be pedophiles, or have mental health problems.<sup>79</sup>

46. On this basis, Ms. Burjoski’s comments are problematic as they perpetuate stereotypes about people who are trans or gender non-conforming, as they are based on “unfounded generalizations that come from misconceptions and incomplete or false information about people.”<sup>80</sup> To allow such stereotypes to perpetuate through comments like Ms. Burjoski’s would be to allow discrimination against trans people because of their gender identity or expression. Notably, the Supreme Court has acknowledged that it is not “possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood.”<sup>81</sup>

47. The applicant has suggested that the Board made a finding that Ms. Buroski breached the *Human Rights Code*, and that such a finding is ultra vires the Board’s authority. No such finding was made. The Chair expressed his **concern** that Ms. Burjoski’s comments may be violating the *Human Rights Code* as well as the WRDSB policies.<sup>82</sup> The Equity and Inclusion Policy recognizes that WRDSB “is committed to the principles of equity through inclusive programs, curriculum, services, and operations in accordance with the Ontario Human Rights Code (the Code), the Education Act, and the Canadian Charter of Rights and Freedoms.”<sup>83</sup> It is within this context that the Chair’s comments were made.

48. Given that the WRDSB has been statutorily empowered to follow its own procedures and exercise certain discretions when making decisions about internal regulations, it should not now be faulted for doing just that in these circumstances. In making its Decision with respect to ending Ms. Burjoski’s presentation, the WRDSB achieved a reasonable balance between her *Charter* rights and

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<sup>79</sup> Ontario Human Rights Commission, “[Policy on preventing discrimination because of gender identity and gender expression](#)” (31 January 2014) at 8-9, s 4.1, online (pdf) [“OHRC Gender Discrimination Prevention Policy”].

<sup>80</sup> [OHRC Gender Discrimination Prevention Policy](#), *supra* at s 4.1.

<sup>81</sup> *Saskatchewan (Human Rights Commission) v Whatcott*, [2013 SCC 11](#) at para 123, citing L’Heureux-Dubé J in *Trinity Western University v British Columbia College of Teachers*, [2001 SCC 31](#) at para 69 in dissent (though not on this point).

<sup>82</sup> Transcript 2, *supra* at 6-7, ARP Tab 6.

<sup>83</sup> Equity and Inclusion Policy, *supra* at s 1.1, ARP Tab 8.

the objectives of its Bylaws, its Equity and Inclusion Policy, the *Education Act*, and prioritized the maintenance of a safe and inclusive school environment for its community members over Ms. Burjoski's ten minute opportunity to opine on the content of two books in the context of a delegation purportedly about the library culling process.

49. With respect to the decision to end Ms. Burjoski's presentation, the Chair considered the WRDSB's responsibility for maintaining a safe and inclusive learning environment. One part of this responsibility is informed by the *Education Act*'s statutory mandate for a school board to support student achievement and well-being by developing and maintaining policies and organizational structures which "promote a positive school climate that is inclusive and accepting of all pupils, including pupils of any... gender identity [or] gender expression."<sup>84</sup> Another part of this responsibility is informed by the WRDSB's own Bylaws, which detail its "responsibility to serve the interests and needs of the general public rather than groups of the population or professionals whom the board employs."<sup>85</sup> Its responsibilities also include nurturing a culture that "provides an environment that promotes well-being" and providing "a safe environment to promote student learning."<sup>86</sup>

50. With respect to the decision to have Ms. Burjoski removed from the Meeting, a school board is statutorily authorized to exclude persons from meetings for improper conduct. The *Education Act* provides that the "presiding officer may expel or exclude from any meeting any person who has been guilty of improper conduct at the meeting."<sup>87</sup> What precisely constitutes improper conduct, however, is left to the board.<sup>88</sup> Even so, Ontario courts have recognized that breaching a resolution passed by the school board would amount to improper conduct.<sup>89</sup> As an exception to the general rule that board and committee meetings be open to the public, the power to exclude persons from meetings speaks

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<sup>84</sup> *Education Act*, *supra* at s 169.1(a.1).

<sup>85</sup> WRDSB Bylaws, *supra* at s 4.2(a), ARP Tab 7.

<sup>86</sup> WRDSB Bylaws, *supra* at s 5.1, ARP Tab 7.

<sup>87</sup> *Education Act*, *supra* at s 207(3).

<sup>88</sup> W Alejandro Muñoz, *The 2022 Annotated Ontario Education Act* (Toronto: Thomson Reuters, 2022) at 336.

<sup>89</sup> In *Radio CHUM ONSC*, *supra* at para 15, after finding that the Board's resolution to ban electronic recording equipment from meetings was within its competence, the Court explained that "a breach thereof would amount to "improper conduct"" under the *Schools Administration Act* – the *Education Act*'s predecessor.

to the breadth of authority school boards may exercise in conducting their meetings in an orderly or decorous fashion.

51. The pre-*Doré* decision of the British Columbia Court of Appeal in *Kempling v. College of Teachers (British Columbia)* [*Kempling*] is illustrative of this balancing act in the context of school settings. In *Kempling*, the Court upheld a suspension of a secondary schoolteacher who published, in an off-duty capacity, a newspaper article and several letters to the editor that “associated homosexuals with immorality, abnormality, perversion and promiscuity”.<sup>90</sup> In upholding the decision of the College of Teachers to suspend the teacher, the Court explained: “the deleterious effects of the [*Charter*] infringement are, nonetheless, relatively limited when compared to the salutary effects; namely, restoring the integrity of the school system and removing any obstacles preventing access for students to a tolerant school environment.”<sup>91</sup> This reasoning resonates in Ms. Burjoski’s case, especially given that she made her comments not just in her capacity as a delegate and public attendee at the Meeting, but also in her capacity as a school teacher, a position of some authority within the WRDSB school community.

52. In *Bryden v. Hamilton-Wenworth District School Board*, this Court considered an application for judicial review of a school board’s decision to close a public school. Here, the Court emphasized that this sort of decision “is an administrative or management function that is being considered” rather than a judicial or quasi-judicial one. “The decision of such a body should not be quashed unless real and substantial prejudice has been shown by the way in which matters have been conducted or for some other substantial reason.”<sup>92</sup>

53. On this basis, the Decision in these circumstances may be seen as more administrative than judicial in nature, given that it too is policy-driven and informed by a consideration of competing concerns, namely, educational objectives and community concerns. It is not for a Court to decide whether it agrees with the WRDSB’s Decision, to consider the merits of the decision, or to focus on

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<sup>90</sup> *Kempling v British Columbia College of Teachers*, [2005 BCCA 327](#) at paras 3, 81 [*Kempling*].

<sup>91</sup> *Kempling*, *supra* at para 82.

<sup>92</sup> *Bryden v Hamilton-Wentworth District School Board*, [2003] OJ No 3469 at para 24 [*Bryden*].

technicalities or formalities more than on the substance of the decision-making process that took place at the Meeting.

### **Issue Two: Ms. Burjoski was Afforded Appropriate Procedural Fairness**

46. Like every administrative body, a school board such as WRDSB is “the master of its own procedure and need not assume the trappings of a court.”<sup>93</sup> As explained in *Baker*, “important weight must be given to the choice of procedures made by the agency itself and its institutional constraints”.<sup>94</sup>

47. Notably, not all decisions or processes will have the same requirements for procedural fairness. For decisions of a purely administrative nature, where a board is not acting as a “tribunal” which must deliberate and decide upon the rights of others, minimal, if any procedural fairness is required.<sup>95</sup> Decisions related to delegations and the orderly conduct of those attending board meetings, not unlike the Decision of the WRDSB at the Meeting, are administrative in nature.

48. In *Baker v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court set out a list of non-exhaustive factors to determine the content of the duty of procedural fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself.<sup>96</sup>

49. Procedural fairness is not assessed on a standard of perfection.<sup>97</sup> An administrative proceeding that is “perhaps imperfect” and involves “flaws in the application of the procedural rules” can nevertheless be “on balance fair, reasonable and appropriate in the circumstances.”<sup>98</sup>

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<sup>93</sup> *Knight v Indian Head School Division No 19*, [\[1990\] 1 SCR 653](#) at 685.

<sup>94</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [\[1999\] 2 SCR 817](#) at para 27 [*Baker*].

<sup>95</sup> *Brown & Zucker*, *supra* at 45.

<sup>96</sup> *Baker*, *supra* at paras 23-27.

<sup>97</sup> *Canadian Pacific Railway Co v Vancouver (City)*, [2006 SCC 5](#) at para 46.

<sup>98</sup> *Uniboard Surfaces Inc v Kronotex Fussboden GmbH and Co KG*, [2006 FCA 398](#) at para 48.

50. If any procedural fairness was owed to Ms. Burjoski, it was on the low end of the spectrum. The impact of the Decision on Ms. Burjoski is relatively minimal. The Meeting took place on January 17, 2022. Ms. Burjoski already had a planned retirement date of January 31, 2022.<sup>99</sup> She was given an opportunity to speak about the library review process itself, as she requested to do in her request for delegation. It was only when she began to speak of topics irrelevant to those outlined in her request for a delegation that her presentation was interrupted with a warning. When she continued expressing her opinion about the content of books, and not the library review process, she was stopped. In these circumstances, any restriction on her freedom of expression was minimal.

51. The decision of this Court in *Citizens for Accountable and Responsible Education Niagara Inc. v. Niagara District School Board* [*Citizens*] is particularly illustrative of how courts assess school boards' duties of fairness. Here, a school closure was decided by a majority vote of Trustees at a board meeting and community members brought an application for judicial review of their decision. The Court helpfully summarized various principles that had emerged from the case law defining procedural fairness owed to members of the community in this context, including that:

- It is not the Court's role to second guess the financial and political decisions of elected officials acting within their legal jurisdiction.
- The Court's mandate is limited to inquiring whether the school closing was authorized by law, whether there was adequate public consultation as required by law, and whether the decision has been taken through a process that is procedurally fair.
- Deference is owed to the choice of procedures by the decision maker.<sup>100</sup>

52. Additionally, the Court in *Citizens* addressed an argument by the applicants that "the time limit placed upon members of the public [breached] the applicants' rights to be heard and their

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<sup>99</sup> Notice of Application to Divisional Court for Judicial Review, dated February 16, 2022 at para 1; Application Record of the Applicant, Tab 1.

<sup>100</sup> *Citizens for Accountable and Responsible Education Niagara Inc v Niagara District School Board*, [2015 ONSC 2058](#) at para 51 [*Citizens*].

legitimate expectations that they would have an opportunity to present their case.”<sup>101</sup> The Court found that “there is no evidence that the five-minute limit to an individual delegate’s representation undermined the public’s right to be heard.”<sup>102</sup> Among the Court’s considerations was its recognition that the delegates had the right to file written materials and that the applicants effectively informed the Trustees as to their position. This is not unlike the opportunity afforded to Ms. Burjoski when she submitted her delegation request in writing to the WRDSB in advance of the Meeting, and was essentially given a comparable amount of time to give her delegation at the Meeting itself.

53. Any procedural fairness owed to Ms. Burjoski was not compromised in relation to the WRDSB’s decision to end her delegation. Ms. Burjoski was invited to submit her delegation in writing beforehand, and indeed did so on November 21, 2021 via email. As such, Ms. Burjoski “was accorded an adequate opportunity to be heard” and to inform the WRDSB of her position with respect to the issues she raised in advance.<sup>103</sup>

54. The WRDSB followed its own procedures in coming to a resolution to end Ms. Burjoski’s presentation. Although the WRDSB’s own Bylaws do not specify how a board may stop a delegation, even where a mode of procedure is not prescribed by statute, the Supreme Court has held that “any reasonable mode not expressly forbidden by law may be adopted.”<sup>104</sup> This is due to the broad discretion school boards enjoy, and because “in the absence of statutory obligation, or misconduct, the internal regulation of their affairs by [public] bodies is a matter for such bodies and for them alone.”<sup>105</sup>

55. Further, the procedure the Chair followed to interrupt and warn Ms. Burjoski about his concerns, before resolving to end her presentation, closely mirrors the policies, procedures and bylaws of other public bodies. For example, the Toronto Catholic District School Board’s delegations policy states that:

During a deputation, should the delegate use offensive language or the name/title/position of any person in a negative, critical, or derogatory fashion, directly

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<sup>101</sup> *Citizens*, *supra* at para 92.

<sup>102</sup> *Citizens*, *supra* at para 97.

<sup>103</sup> *Roozbuilt Ltd v Jamieson*, [2022 ONSC 2029](#) at paras 29-30.

<sup>104</sup> *Houde*, *supra* at 940.

<sup>105</sup> *Houde*, *supra* at 940.

or indirectly, the Chair of the meeting shall advise the delegate to cease using offensive language or refrain from negative or derogatory personal references. Should derogatory language or personal references continue to be made, the Chair has the authority to stop the delegate from proceeding.<sup>106</sup>

56. A similar provision is included in the City of Kingston’s Bylaw concerning council procedures.<sup>107</sup>

57. The Chair provided reasons for his decision albeit brief: he referenced the delegation procedure, and expressed his concern that Ms. Burjoski’s comments may have violated the Ontario *Human Rights Code*, which includes gender identity and gender expression as protected grounds of discrimination.<sup>108</sup> When the Chair’s decision was challenged by a Trustee, the Chair stepped down so that the matter could be put to a vote. Following a vote, the Decision was upheld by a majority of 5-4.<sup>109</sup> The WRDSB followed the procedure outlined in its Bylaws in making the Decision to stop Ms. Burjoski’s presentation.

### **Issue Three: The Decision Was Made Without Bias**

58. “[T]here is a spectrum of what may constitute a reasonable apprehension of bias depending upon context, taking into account the role of the decision-maker and the decision at issue.”<sup>110</sup> A decision made by elected board members “is at one end of the spectrum engaging the more permissive application of the reasonable apprehension of bias, that being the closed mind test, compared to adjudicative functions of a judge or an administrative tribunal in a hearing engaging the more stringent test of a reasonable apprehension of bias.”<sup>111</sup>

59. The test for bias is objective.<sup>112</sup> In this case, “the question that must be answered is whether a reasonable, informed and right-minded person viewing all of the facts would believe that the

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<sup>106</sup> Toronto Catholic District School Board, “[Policy No T.14: Delegations and Public Participation](#)” (24 March 2022) at s 20, online (pdf).

<sup>107</sup> City of Kingston, “[By-law No 2021-41: Council Procedural By-Law](#)” (21 June 2022) at s 3.17, online (pdf).

<sup>108</sup> Transcript 2, *supra* at 6, **ARP Tab 6**.

<sup>109</sup> WRDSB Bylaws, *supra* at s 9.7, **ARP Tab 7**.

<sup>110</sup> *Citizens*, *supra* at para 111, citing *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 at para 27 [Newfoundland].

<sup>111</sup> *Citizens*, *supra* at para 111, citing *Newfoundland*, *supra* at para 27.

<sup>112</sup> *Citizens*, *supra* at para 114.

Trustees [collectively] had a closed mind before the Decision ... because they were not amenable to persuasion.”<sup>113</sup>

60. In *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, the Supreme Court acknowledged that judges “should not and *cannot* be expected to leave their identities at the courtroom door. What they *can* be expected to do, however, is remain, in fact and in appearance, open in spite of them.”<sup>114</sup> Decision-makers come into their role with lived experiences, identities, and even political opinions. However, the key requirement for impartiality is merely that they do not make prejudgments, and retain an open mind.<sup>115</sup>

61. The only evidence of alleged bias raised by the applicant are in respect of statements made **after** the Meeting. The comments the Applicant takes issue with merely support the Decision made by the Board. They do not in any way leave a reasonable person to believe that the Chair had a “closed mind” before he voted in support of the Decision. Whatever the Chair’s beliefs were outside of the Meeting, he kept an open mind during the delegation. He initially allowed Ms. Burjoski’s delegation to continue after giving a warning. It was only after, on the evidence presented to him by Ms. Burjoski herself, that he was convinced that allowing the presentation to occur could be a source of harm for members of the school community.

62. In addition, the Decision was ultimately made by 5 members of the elected Board. The comments made by the Chair upon which the Applicant relies reflect 1 one of those 5 votes. The Chair specifically passed the chair position to the Vice-Chair to preside over the vote.<sup>116</sup> The comments merely provide the Chair’s reason for voting the way that he did. Having a reason for voting is not the same as being biased before the vote was cast. Finally, the statement of the WRDSB dated January 20, 2022 which is relied upon by the Applicant was a statement made by the WRDSB, not a statement made by the Board of Trustees. It is the Board of Trustees who made the Decision that the Applicant takes issue with, not the WRDSB.

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<sup>113</sup> *Citizens*, *supra* at para 114.

<sup>114</sup> *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, [2015 SCC 25](#) at para 59 [*Yukon*].

<sup>115</sup> *Yukon*, *supra* at para 33.

<sup>116</sup> Transcript 2, *supra* at 7, ARP Tab 6.

#### **Issue Four: The Relief Sought Is Untenable**

63. Among the Orders Sought in the Applicant’s Factum, Ms. Burjoski seeks a declaration that the WRDSB’s Decision “unreasonably violated Ms. Burjoski’s right, and the rights of those attending the public meeting, to freedom of expression” protected under Section 2(b) of the *Charter*.<sup>117</sup> However, this type of relief should not be granted.

64. With respect, the Respondents submit that even if this Court finds that the WRDSB’s Decision was unreasonable, the type of declaration sought by Ms. Burjoski is not appropriate in the circumstances, as this Court has previously declined to grant it for the following reasons, even when it found the decision in question to be unreasonable:

We have considerable unease with the Applicant’s request for a declaration that the limit on its freedom of expression caused by the Respondent’s decision was unconstitutional. To do so would require us to have a full understanding of the statutory objectives being pursued by the Respondent and the ability to analyze whether the Applicant’s freedom of expression was being limited as little as possible in all of the circumstances.<sup>118</sup>

65. The Applicant’s factum also indicates that *Charter* damages in the amount of \$2,000 are being sought. No such request was made in the Notice of Application. In the event that a claim for *Charter* damages were properly pleaded, the Supreme Court has set out a four-step framework for considering claims for damages for the breach of Charter rights:

- a. Proof of a *Charter* breach;
- b. Functional justification of damages: show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation for the personal loss caused by a breach, vindication of the *Charter* right, and/or deterrence of future breaches;

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<sup>117</sup> Factum of the Applicant, dated October 28, 2022, at para 83(d).

<sup>118</sup> *Canadian Centre for Bio-Ethical Reform v. City of Peterborough*, [2016 ONSC 1972](#) at para 25.

- c. Countervailing factors: Considering any demonstration by the state that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust; and
- d. Quantum: Assessing the quantum of damages.<sup>119</sup>

66. Even if there was a sufficient record for the Court to find a *Charter* breach in the circumstances of this claim (which is denied), there is an insufficient record to satisfy the remaining components of the test. “[A]ny claim for compensatory damages must be supported by evidence of the loss suffered.”<sup>120</sup> No such evidence has been put forward by the Applicant.

67. *Mandamus* is also not an appropriate remedy. It is well-settled law that an order in the nature of *mandamus* prescribing a specific outcome is not typically available when the impugned decision is discretionary.<sup>121</sup> In *Apotex Inc. v Canada*, the Federal Court of Appeal (affirmed by the Supreme Court) noted that *mandamus* can only direct the exercise of discretionary statutory duties in the following scenarios: (a) to require that discretion not be exercised unfairly, oppressively, with flagrant impropriety, or in bad faith; (b) to ensure that fettered discretion is exercised in accordance with the requirements that fetter it; and (c) where the discretion is spent.<sup>122</sup> This Court has adopted the test in *Apotex* in the cases of *Dolan v Ontario Civilian Commission on Police Services*<sup>123</sup> and more recently in *Mundulai v Law Society of Ontario*.<sup>124</sup>

68. The Decision here was discretionary. This was not a situation where there is one right answer and the Court can substitute its decision for that of the decision-maker. If the Court deems that the Decision did not reasonably balance the *Charter* protections with the WRDSB’s policies and statutory objectives, then this Court should send the matter back to the Board with direction on the proper balancing.

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<sup>119</sup> *Vancouver (City) v Ward*, [2010 SCC 27](#) at para 4 [*Vancouver*].

<sup>120</sup> *Vancouver*, *supra* at para 48.

<sup>121</sup> *Canada (Chief Electoral Officer) v Callaghan*, [2011 FCA 74](#) at para 126.

<sup>122</sup> *Apotex Inc v Canada (Attorney General)*, [\[1994\] 1 FC 742](#) at 359.

<sup>123</sup> *Dolan v Ontario (Civilian Commission on Police Services)*, [2011 ONSC 1376](#) at para 75.

<sup>124</sup> *Mundulai v Law Society of Ontario*, [2018 ONSC 6965](#) at para 26.

**PART IV - ORDER REQUESTED**

69. The Board respectfully requests an order:
- a) Dismissing Ms. Burjoski's application for judicial review; and
  - b) Awarding the costs of this application.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 13<sup>th</sup> day of December, 2022.



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

## SCHEDULE A – LIST OF AUTHORITIES CITED

1. [\*In the Matter of s. 10 of the Education Act\*](#), 2016 ONSC 2361
2. [\*Canada \(Minister of Citizenship and Immigration\) v Vavilov\*](#), 2019 SCC 65
3. [\*Doré v Barreau du Québec\*](#), 2012 SCC 12
4. [\*Loyola High School v Quebec \(Attorney General\)\*](#), 2015 SCC 12
5. [\*Law Society of British Columbia v Trinity Western University\*](#), 2018 SCC 32
6. [\*Rocky Point Metalcraft Ltd v Cowichan Valley \(Regional District\)\*](#), 2012 BCSC 756
7. [\*Chamberlain v Surrey School District No 36\*](#), 2002 SCC 86
8. [\*Dupont v Port Coquitlam \(City\)\*](#), 2021 BCSC 728
9. [\*Radio CHUM 1050 Ltd et al v Board of Education for City of Toronto\*](#) (1964), 44 DLR (2d) 671 (ONCA)
10. [\*Radio CHUM 1050 Ltd et al v Toronto Board of Education\*](#), [1964] 1 OR 598 (ONSC)
11. [\*Houde v Quebec Catholic School Commn.\*](#), [1978] 1 SCR 937
12. [\*Catalyst Paper Corp v North Cowichan\*](#), 2012 SCC 2
13. [\*Alberta March for Life Association v Edmonton \(City\)\*](#), 2021 ABQB 802
14. [\*ET v Hamilton-Wentworth District School Board\*](#), 2017 ONCA 893
15. [\*Ross v New Brunswick School District No 15\*](#), [1996] 1 SCR 825
16. [\*Saskatchewan \(Human Rights Commission\) v Whatcott\*](#), 2013 SCC 11
17. [\*Trinity Western University v British Columbia College of Teachers\*](#), 2001 SCC 31
18. [\*Kempling v British Columbia College of Teachers\*](#), 2005 BCCA 327
19. [\*Knight v Indian Head School Division No 19\*](#), [1990] 1 SCR 653
20. [\*Baker v Canada \(Minister of Citizenship and Immigration\)\*](#), [1999] 2 SCR 817
21. [\*Canadian Pacific Railway Co v Vancouver \(City\)\*](#), 2006 SCC 5
22. [\*Uniboard Surfaces Inc v Kronotex Fussboden GmbH and Co KG\*](#), 2006 FCA 398
23. [\*Citizens for Accountable and Responsible Education Niagara Inc v Niagara District School Board\*](#), 2015 ONSC 2058

24. [\*Roobuilt Ltd v Jamieson\*](#), 2022 ONSC 2029
25. [\*Newfoundland Telephone Co v Newfoundland \(Board of Commissioners of Public Utilities\)\*](#), [1992] 1 SCR 623
26. [\*Yukon Francophone School Board, Education Area #23 v Yukon \(Attorney General\)\*](#), 2015 SCC 25
27. [\*Canadian Centre for Bio-Ethical Reform v. City of Peterborough\*](#), 2016 ONSC 1972
28. [\*Vancouver \(City\) v Ward\*](#), 2010 SCC 27
29. [\*Canada \(Chief Electoral Officer\) v Callaghan\*](#), 2011 FCA 74
30. [\*Apotex Inc v Canada \(Attorney General\)\*](#), [1994] 1 FC 742
31. [\*Dolan v Ontario \(Civilian Commission on Police Services\)\*](#), 2011 ONSC 1376
32. [\*Mundulai v Law Society of Ontario\*](#), 2018 ONSC 6965

## SCHEDULE B – STATUTORY REFERENCES

### 1. [Education Act, RSO 1990, c E2](#)

#### DISTRICT SCHOOL BOARDS

[...]

##### Corporate status

**58.5 (1)** Every district school board is a corporation and has all the powers and shall perform all the duties that are conferred or imposed on it under this or any other Act. 1997, c. 31, s. 32.

[...]

#### BOARDS

##### Duties and Powers

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

**169.1 (1)** Every board shall,

- (a) promote student achievement and well-being;
- (a.1) promote a positive school climate that is inclusive and accepting of all pupils, including pupils of any race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability;
- (a.2) promote the prevention of bullying;
- (b) ensure effective stewardship of the board's resources;
- (c) deliver effective and appropriate education programs to its pupils;
- (d) develop and maintain policies and organizational structures that,
  - (i) promote the goals referred to in clauses (a) to (c), and
  - (ii) encourage pupils to pursue their educational goals;
- (e) monitor and evaluate the effectiveness of policies developed by the board under clause (d) in achieving the board's goals and the efficiency of the implementation of those policies;
- (f) develop a multi-year plan aimed at achieving the goals referred to in clauses (a) to (c);
- (g) annually review the plan referred to in clause (f) with the board's director of education or the supervisory officer acting as the board's director of education; and
- (h) monitor and evaluate the performance of the board's director of education, or the supervisory officer acting as the board's director of education, in meeting,

- (i) his or her duties under this Act or any policy, guideline or regulation made under this Act, including duties under the plan referred to in clause (f), and
- (ii) any other duties assigned by the board. 2009, c. 25, s. 15; 2012, c. 5, s. 3 (1).

### **Duties of boards**

**170 (1)** Every board shall,

[...]

#### **meetings**

4. fix the times and places for the meetings of the board and the mode of calling and conducting them, and ensure that a full and correct account of the proceedings thereat is kept; R.S.O. 1990, c. E.2, s. 170 (1), par. 4.

[...]

### **Access to Meetings and Records**

#### **Open meetings of boards**

##### **Exclusion of persons**

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

[...]

### **Conduct of Members of School Boards**

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

**218.1** A member of a board shall,

- (a) carry out his or her responsibilities in a manner that assists the board in fulfilling its duties under this Act, the regulations and the guidelines issued under this Act, including but not limited to the board's duties under section 169.1;
- ...
- (e) uphold the implementation of any board resolution after it is passed by the board;
- ...
- (g) maintain focus on student achievement and well-being [. 2009, c. 25, s. 25.]

CAROLYN BURJOSKI  
Applicant

-and-

Court File No.: DC-22-126-JR1  
WATERLOO REGION DISTRICT SCHOOL BOARD  
Respondent

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**  
**(Divisional Court)**

**FACTUM OF THE RESPONDENT,  
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