IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Servatius v. Alberni School District No. 70*, 2020 BCSC 15

Date: 20200108
Docket: S79991
Registry: Nanaimo

Between:

Candice Servatius

Petitioner

And

Board of Education of School District No. 70 (Alberni)
Attorney General of British Columbia

Respondents

And

Nuu-chah-nulth Tribal Council

Intervenor

Publication Restriction: The given names of the petitioner's children shall not be published in any document or broadcast or transmitted in any way. This publication restriction applies indefinitely unless otherwise ordered. These reasons for judgment comply with the publication restriction.

Before: The Honourable Mr. Justice Thompson

Reasons for Judgment

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Counsel for the Respondent, Board of Education of School District No. 70 (Alberni):	K. Mitchell R. Amit
Counsel for the Respondent, Attorney General of British Columbia:	K. Webber K. Chewka

Counsel for the Intervenor, Nuu-chah-nulth Tribal Council:	A. Walkem, Q.C.
Place and Dates of Hearing:	Nanaimo, B.C. November 18-22, 2019
Place and Date of Judgment:	Nanaimo, B.C. January 8, 2020

[1] As part of an effort to acquaint students with Indigenous culture and to promote a sense of belonging in Indigenous children, a Nuu-chah-nulth Elder visited a Port Alberni elementary school and demonstrated the practice of smudging. A few months later, an assembly at this public school witnessed an Indigenous dance performance, in the midst of which the dancer said a prayer. The petitioner is an evangelical Christian. Her nine-year-old daughter and seven-year-old son were enrolled in the school and witnessed these demonstrations of Indigenous culture and spirituality.

[2] The petitioner's arguments centred on the smudging event, but she submits that both the smudging and the prayer that accompanied the dance interfered with the religious freedoms of herself and her children guaranteed by the *Charter of Rights*. She seeks a declaration to this effect and an order in the nature of prohibition enjoining further events of this nature in the school district. For the reasons that follow, I conclude that the petitioner has not established any infringement of religious freedoms.

Parties and Procedure

[3] As an evangelical Christian, the petitioner believes that "the Bible is the infallible Word of God and the sole authority for religious life" and that "there is no other spiritual authority, spirit, or god worthy of worship, or that should be prayed to." She deposes that her beliefs require her to abstain from participating in "religious, spiritual, or supernatural ceremonies" of any kind that are not part of her faith, including smudging, and this is the belief in which she and her husband have raised their children. She believes that attributing spiritual energy to plants, animals, or other gods is "unbiblical," and to "partake in practices connected to such ideas is forbidden" to her as a Christian. She deposes that her beliefs are "in direct contradiction to the practice of smudging, and the ideas that underlie it," and that it is against her conscience and her family's religious beliefs to be present during a smudging ceremony. The sincerity of the beliefs of the petitioner and her family, including their non-belief in Indigenous spirituality, is not in issue.

[4] The events under examination in this case took place during the 2015/2016 school year at John Howitt Elementary School ("JHES") in Port Alberni, a small city on the west coast of Vancouver Island. JHES is administered by the respondent Board of Education of School District No. 70 (Alberni) (the "School District"). There are approximately 250 students enrolled in JHES, from kindergarten through to grade 7. The School District is responsible for K to 12 public education in four communities on the west coast of Vancouver Island: Port Alberni, Tofino, Ucluelet, and Bamfield. Each of these communities is within traditional Nuu-chah-nulth territories.

[5] Approximately one-third of the students in the School District are Indigenous. Consistent with the provincial education curriculum, the School District's position is that it strives to increase student awareness and understanding of Nuu-chah-nulth culture, history, and language. Activities relating to culture, traditions, or religions are to be designed and implemented as educational experiences, without in any way advocating the supremacy of one belief over another, because the School District is statutorily obliged to operate on secular, non-sectarian principles.

[6] The School District argues that the issues central to this petition must be considered in the context of the traumatic history and legacy of residential schools and the pressing need for reconciliation efforts. The School District submits that the petitioner's children were observing Indigenous demonstrations — they were not smudged, and were not engaged in the hoop dance or the prayer said by the dancer — and the petitioner has not established any infringement of religious freedoms.

[7] The respondent Attorney General of British Columbia (the "AGBC") is a party to this proceeding pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. The AGBC does not take a position on the facts surrounding the school events, or on the issue of whether the events infringed s. 2(a) of the *Charter*. The AGBC's position is that exposure to different worldviews and beliefs within the public education system is permitted by s. 2(a), and that freedom of religion must be

interpreted in the context of the regrettable history of mistreatment of Indigenous children and antagonism toward Indigenous beliefs.

[8] At the Court's direction, the Nuu-chah-nulth Tribal Council (the "NTC") was invited to apply to intervene in this proceeding. The NTC represents approximately 10,000 members of 14 different Nuu-chah-nulth nations: the Ditidaht, Huu-ay-aht, Hupacasath, Tse-shaht, Uchucklesaht, Ahousaht, Hesquiaht, Tla-o-qui-aht, Toquaht, Yuu-cluth-aht, Ehattesaht, Kyuquot/Cheklesaht, Mowachaht/Muchalaht, and Nuchatlaht. The Nuu-chah-nulth traditional territories include most of the west coast of Vancouver Island.

[9] The NTC enters into agreements with school districts to advocate for culturally relevant teaching and to provide day-to-day support for Nuu-chah-nulth students. While the evidence marshalled by the NTC has enriched the record by providing valuable background to the JHES events, the NTC takes no position on the facts surrounding the smudging and hoop dancing at JHES. Its position is that smudging is a cultural practice, not a religious one, and that it is a constitutional imperative to consider Indigenous perspectives on the definition of any rights tied to Indigenous practices.

[10] The focused cooperation of counsel, a series of case management conferences, and some procedural flexibility allowed this case to be heard in five days. Evidence was prepared in affidavit form. Witnesses who gave "adjudicative fact" evidence (i.e., evidence bearing directly on the events at JHES) were cross-examined on their affidavits at the hearing. These witnesses included the petitioner and her daughter; the Nuu-chah-nulth education worker at JHES; the three classroom teachers that hosted the smudging demonstrations; the JHES principal; and the superintendent of the School District. After a ruling in favour of admissibility of his report, the petitioner's expert on evangelical Christianity was also cross-examined at the hearing. The reasons for this ruling, and my reasons for admitting a late affidavit sworn by the petitioner, are included in the latter part of these reasons for judgment.

[11] Witnesses who prepared affidavits containing “social fact” evidence were cross-examined in advance of the hearing. These witnesses included: a psychologist with expertise in Indigenous mental health and education; a professor emerita of Indigenous Education; three Ministry of Education officials who gave evidence about curriculum and educational outcomes for Indigenous students; the curriculum coordinator at a First Nations organization focused on advancing quality education for Indigenous students; and the president of the NTC. Transcripts of these cross-examinations were filed and form part of the record.

[12] In argument, the School District took a procedural point, arguing that the petition was an abuse of process because the petitioner had not exhausted the School District’s administrative process for appealing decisions of its employees. The appeal procedure was established by a policy enacted pursuant to s. 11(3) of the *School Act*, R.S.B.C. 1996, c. 412. In the result, the School District submits that there is no final decision available for review.

[13] The petitioner responds that she does not oppose the incorporation of Indigenous worldviews into the curriculum and does not seek to review any decision made to teach her children about Indigenous culture and spirituality. She looks to this Court to adjudicate on the constitutionality of the School District’s actions, which she characterizes as compelled participation in state-sponsored religious exercises.

[14] In the reasons that follow, I have addressed the petition on its merits and conclude that the petitioner has not established an infringement of religious freedoms. Accordingly, it is unnecessary to decide this procedural issue.

Backdrop of Social Facts

[15] In his reasons for the majority in *R. v. Ipeelee*, 2012 SCC 13, Justice LeBel instructed courts to take judicial notice of relevant history in order to understand how aspects of that history have affected Indigenous people in Canadian society:

> [60] Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190). To be

> clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.

Historical background is necessary in this case to understand why Indigenous visitors were smudging and hoop dancing in a Port Alberni school.

[16] The first encounter between Nuu-chah-nulth and Europeans was brief. It occurred in 1774, when the Spanish ship *Santiago* under the command of Juan Pérez anchored near the entrance to Nootka Sound. Nuu-chah-nulth paddled canoes out to the ship to trade items such as sea otter skins and woven hats for iron knives and abalone shells from California. (Alan D. McMillan, *Since the Time of the Transformers: The Ancient History of the Nuu-chah-nulth, Ditidaht, and Makah* (Vancouver: UBC Press, 1999), at pp. 178-179.)

[17] The first intensive encounter with Europeans was in 1778 when British mariner James Cook was in the midst of his third voyage. Cook and his men spent nearly a month in Nootka Sound. Chief Maquinna and other Nuu-chah-nulth met these visitors when they anchored in the harbour at Yuquot, an important Mowachaht settlement that had been continuously occupied for thousands of years. Cook encountered skilled and enthusiastic traders, and in the decades that followed, Yuquot continued to be a focal point of trade and diplomacy in the region. (McMillan, at pp. 53-54 and 179-181.)

[18] For non-Indigenous residents of Vancouver Island, our good fortune to live here is, at least in part measure, traceable to Captain Cook’s landing at Yuquot. For the Nuu-chah-nulth, however, Cook’s landing was the beginning of a process that would bring population decimation from epidemics of smallpox, measles, influenza, and tuberculosis. (McMillan, at pp. 191-195.)

[19] Battling headwinds of disease and cultural disruption after European contact, Indigenous peoples in this region demonstrated considerable resilience and adaptability in the late eighteenth and nineteenth centuries. In fact, Indigenous

economies grew in the nineteenth century, and Indigenous people — who remained, for the most part, independent and prosperous — were essential to development of new industries in what would become British Columbia. (John S. Lutz, *Makúk: A New History of Aboriginal-White Relations* (Vancouver: UBC Press, 2008), at pp. 278-279.) Professor Lutz emphasizes the indispensable and central role played by Indigenous people in this region's nineteenth-century economy:

> Aboriginal People were, in fact, essential to the development of new industries and to the spread of capitalism in the province-to-be. Coal would not have been mined in British Columbia in the 1840s and 1850s, export sawmills would have been unable to function in the 1860s and 1870s, and canneries would have had neither fishing fleet nor fish processors in the 1870s and 1880s without widespread participation of Aboriginal People. Until the late 1880s, Aboriginal People constituted the majority of BC's population, and it was their labour that allowed the rapid creation of an economic base, from the fur trade, to coal mining, sawmilling, and salmon canning. This was the regional economy that kept the Hudson's Bay Company on the Pacific coast, that persuaded Britain that its colonies could be profitable as well as strategic, and that ultimately ensured that British Columbia would be *British* Columbia.
>
> The Aboriginal population did not succumb to the assault of capitalism, Christianity, or a technologically superior culture. They used or adapted parts of European culture, incorporating various aspects of it into their own societies.

[20] Notwithstanding widespread Indigenous participation in new industries that sprung up in British Columbia in the first century after contact, in time the Indigenous peoples in this region, including the Nuu-chah-nulth, have become impoverished. This decline in economic wellbeing corresponded with a period of assimilationist federal government policy that began in the late nineteenth century and lasted well into the twentieth century. (Lutz, at pp. 282-288.) The Truth and Reconciliation Commission (the "TRC") identified the goal of this assimilationist policy. Its aim was to cause Indigenous peoples "to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada": *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Toronto: James Lorimer & Company, 2015), at p. 1.

[21] An understanding of the role that residential schools played in this assimilationist policy helps place the JHES smudging and hoop dancing events in

context. The TRC labelled this assimilationist policy as "cultural genocide," and identified residential schools as one of the policy's central elements (pp. 1-2):

> . . . *Cultural genocide* is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next.
> . . .
>
> Canada outlawed Aboriginal spiritual practices, jailed Aboriginal spiritual leaders, and confiscated sacred objects.
>
> 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.
>
> [Footnotes omitted.]

The TRC report proceeds to quote from Sir John A. Macdonald's remarks to the House of Commons in 1883 in support of a residential school policy:

> 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 the 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 modes of thought of white men . . .
>
> *House of Commons Debates*, 5th Parl., 1st Sess., Vol. 2 (9 May 1883) at 1107-1108.

The TRC report continues, at pp. 3-5:

> 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.
> . . .
>
> The residential school system was based on an assumption that European civilization and Christian religions were superior to Aboriginal culture, which was seen as being savage and brutal. Government officials also were insistent that children be discouraged — and often prohibited — from speaking their own languages. The missionaries who ran the schools played prominent roles in the church-led campaigns to ban Aboriginal spiritual practices such as the Potlatch and the Sun Dance (more properly called the

> "Thirst Dance"), and to end traditional Aboriginal marriage practices. Although, in most of their official pronouncements, government and church officials took the position that Aboriginal people could be civilized, it is clear that many believed that Aboriginal culture was inherently inferior.
>
> This hostility to Aboriginal cultural and spiritual practice continued well into the twentieth century.
>
> [Footnotes omitted.]

[22] The Alberni Indian Residential School operated from 1891 to 1973 on property adjacent to Tse-shaht reserve lands, about four kilometres from JHES. This residential school was described in *Blackwater v. Plint*, 2005 SCC 58:

> [2] The appeal arises from four actions commenced in 1996 by 27 former residents of the Alberni Indian Residential School ("AIRS") claiming damages for sexual abuse and other harm. The children had been taken from their families pursuant to the *Indian Act*, S.C. 1951, c. 29, and sent to the school, which had been established by the [United Church of Canada's] predecessor, the Presbyterian Church of Canada, in 1891 to provide elementary and high school education to Aboriginal children whose families resided in remote locations on the west coast of Vancouver Island. The children were cut off from their families and culture and made to speak English. They were disciplined by corporal punishment. Some…were repeatedly and brutally sexually assaulted.
>
> . . .
>
> [34] . . . [T]he incontrovertible reality is that the [United Church of Canada] played a significant role in the running of the school. It hired, fired and supervised the employees. It did so for the government of Canada, but also for its own end of promoting Christian education to Aboriginal children.

[23] The last of the residential schools closed in the 1990s, but the history of Indigenous peoples in British Columbia since European contact makes it easy to understand why Nuu-chah-nulth children have not thrived in the public school system. The TRC found that the residential school system "degraded Aboriginal culture and subjected students to humiliating discipline," and that residential schools "must bear a portion of responsibility for the current gap between the educational success of Aboriginal and non-Aboriginal Canadians" (p. 132). The evidence in our case establishes that a substantial gap continues to exist in the Alberni School District.

[24] Judith Sayers is a member of the Hupacasath First Nation. She served as its elected chief for 14 years, and as its chief negotiator for 15 years. She is the current

president of the NTC. Her mother attended the Alberni Indian Residential School. She deposes that in her various roles she has seen the legacy of residential schools in the alienation of parents and children from the education process: “For intergenerational survivors of [Indian Residential Schools], schools and education are associated with abuse and trauma.”

[25] The NTC advocates for cultural inclusiveness in schools as a crucial part of changing the relationship between Indigenous and non-Indigenous Canadians on the basis that “people cannot honour difference if they cannot understand it.” The NTC created an education team over 20 years ago. The team is responsible for advocating for Nuu-chah-nulth learners, and includes managers as well as Nuu-chah-nulth education workers who model Nuu-chah-nulth ways and liaise directly and frequently with school staff, students, and parents. The education workers also help develop and implement culturally appropriate teaching strategies. To help address the lingering impacts of forced attendance at residential schools, the education team aims to make schools in Nuu-chah-nulth territories places where Nuu-chah-nulth students “could see themselves and their culture reflected” and to make school “a culturally safe space.”

[26] The NTC has agreements with school districts, including the respondent, to enhance programming and support for Nuu-chah-nulth students. The intention of the parties to these education agreements is to “cooperate in the development of an inclusive relationship that will enhance and improve all aspects of education for First Nations students” and “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.”

[27] Professor Lorna Williams attended a residential school, and has been involved in Indigenous education in British Columbia for 45 years. In the 1960s, she and fellow activists began lobbying the British Columbia government to include Indigenous peoples in the public school curriculum. In 1979 they met with some success when Indigenous peoples were expressly included in the social studies

curriculum for grades 4, 8, and 10, although the curriculum had a colonial perspective:

> The curriculum focused on how Indigenous peoples served the settlers, explorers, and fur traders. As a result, the image of Indigenous peoples represented in the curriculum was one where we were seen to have no governance structure, no ability to care for ourselves, and we were depicted as survivors who were "saved" when the European settlers arrived.

[28] In 2003, the first textbook with an Indigenous perspective was published. It was used in First Nations 12, an optional and not-for-credit course for high school students. The course was not available in all school districts. At the time this textbook was published and the First Nations 12 course was launched, Professor Williams was director of the Aboriginal Education Enhancement Branch of the Ministry of Education. She continued work with others in the Ministry and with Indigenous education activists and teachers to develop new courses and new prescribed learning outcomes that would incorporate Indigenous knowledge. By the time she left the Ministry in 2004, she had the commitment of the Deputy Minister to begin discussions on the development of a new curriculum that would include Indigenous knowledge, worldviews, and perspectives.

[29] In 2010, the Ministry began a process to reform the K to 12 curriculum. An advisory group was formed, composed of educators, academics, and individuals from the First Nations Education Steering Committee ("FNESC"). FNESC is a First Nations controlled organization focused on advancing quality education for Indigenous students. The advisory group developed eight guiding principles for the curriculum redesign, one of which was to incorporate Indigenous knowledge and worldviews. The purposes of integrating Indigenous knowledge and worldviews into the K to 12 curriculum included recognizing that British Columbia schools serve students from diverse cultures and backgrounds; reflecting the fact that Indigenous knowledge and worldviews are part of the historical and contemporary foundation of British Columbia and Canada; beginning to address misunderstanding of Indigenous cultures; improving school success for Indigenous students; and encouraging mutual understanding and respect amongst all students.

[30] The new curriculum was the product of much consultation and revision, and the Ministry worked closely with FNESC and the First Nations Schools Association. The Ministry announced the new curriculum in September 2015. The K to 9 curriculum was in place for the 2016/2017 academic year. The grade 10 curriculum was implemented for 2018/2019, and the curriculum for grades 11 and 12 was scheduled to be implemented during 2019/2020.

[31] The first draft of the new curriculum had been posted online in 2014. A prominent theme emerged in the feedback from teachers. They were uncertain about what was meant by and how to best implement "Aboriginal worldviews and perspectives" (as it was referred to in the draft curriculum). Ted Cadwallader was the director of the Aboriginal Education Enhancement Branch at the time. He helped coordinate a series of workshops with Indigenous communities and educators to define what was meant by incorporating Indigenous worldviews and perspectives, and how this might be accomplished in practice. The result of this work was the publication by the Ministry in 2015 of a resource for teachers, *Aboriginal Worldviews and Perspectives in the Classroom: Moving Forward*. This 88-page document has a section titled "Indicators of Success" that collects workshop participant suggestions for how to assess whether progress is being made (in addition to existing measures such as grades, and graduation rates of Indigenous students). At the classroom level, the indicators of success include "schools are more experiential and learner-centred"; "classrooms are more co-operative, comfortable and inclusive places for Aboriginal students"; "Indigenous languages are heard/seen on school announcements, on newsletters, on the school website, in blogs and at celebrations"; "traditional Aboriginal practices occur in schools (e.g., smudging, circle meetings)"; and "there is an increase in how many times Aboriginal Elders are coming into schools."

[32] Jo-Anne Chrona is the curriculum coordinator at FNESC, which has a mandate to help create conditions for better outcomes for British Columbia's Indigenous learners. In 2018, FNESC entered into an agreement with the federal and provincial governments. The purpose of this tripartite agreement is to support

Indigenous student success, and it contains a commitment that these students must have access to educational opportunities that ensure "they are confident in their self-identity, their families, their communities and traditional values, languages and cultures."

[33] Through her work as a classroom teacher, and her work with FNESC and other organizations, Ms. Chrona is knowledgeable about development of the new curriculum and about factors that help Indigenous learners succeed. Based on her years of experience working in schools, she endorses the TRC's observation that the relationship between Indigenous peoples and the education system is "at best strained." The increased emphasis on integration of Indigenous knowledge and perspectives into the curriculum was made to move toward an education system that is culturally relevant for both Indigenous and non-Indigenous learners. I accept Ms. Chrona's evidence that educators are coming to understand, as she does, that "one of the elements that helps learners be successful in the K-12 system is that they see themselves reflected in the curriculum," and that "teaching Indigenous culture through experiences which authentically represent that culture in schools and classrooms is a more effective teaching tool than from the study of Indigenous culture only from a textbook." She notes that the number of Indigenous learners obtaining their grade 12 diploma has risen at the same time that Indigenous curriculum content and approaches to education have increased — although completion rates for Indigenous students both province-wide and in the Alberni School District continue to markedly lag behind the rates for non-Indigenous students.

[34] The body of evidence about curriculum development and production of new resources for teachers must be understood in the context of the scheme of the *School Act*. The Ministry of Education establishes the curriculum, which is mandatory, but teachers have much professional leeway in deciding how to go about teaching the curriculum including, if they choose, making use of Ministry-produced resources such as *Aboriginal Worldviews and Perspectives in the Classroom: Moving Forward*.

[35] My sense of the evidence is that much hard work has been done in British Columbia to begin to incorporate Indigenous knowledge and learning about Indigenous cultures into the K to 12 curriculum. The curriculum is written at a high level, with the expectation that teachers will use their professional judgment about how to best achieve the learning standards associated with the curriculum. It is the curriculum that must be taught and it is recognized that there are different methods of teaching it. Because the curriculum is written at a high level, it does not prescribe particular teaching methods such as demonstrations of smudging or hoop dancing.

[36] Of course, teaching methods must comply with the requirement to operate schools on strictly secular principles. By way of example in relation to this secular requirement, Mr. Cadwallader agreed with the proposition that teaching on the subject of Indigenous beliefs about supernatural beings would be appropriate, but teaching these beliefs as fact would be inappropriate.

[37] In its summary report, the TRC issued “calls to action” in order to redress the legacy of residential schools and advance the reconciliation process, including a call to build student capacity for intercultural understanding, empathy, and mutual respect, and a call for implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* [*UNDRIP*]. In the week following the completion of the hearing of this case, the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44, received royal assent. Section 3 of this *Act* provides that in consultation and cooperation with the Indigenous peoples of British Columbia, the government must take all measures necessary to ensure the laws of the province are consistent with *UNDRIP.* For the purposes of our case, it is notable that *UNDRIP* includes the right for Indigenous peoples to “manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies” (Article 12(1)); the right to “the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information” (Article 15(1)); and the right to “promote, develop and maintain their institutional structures and distinctive customs, spirituality, traditions, procedures, [and] practices” (Article 34).

Adjudicative Facts: What Happened at JHES?

[38] Sherri Cook was employed for 14 years by the NTC as a Nuu-chah-nulth education worker. She is a member of the Huu-ay-aht First Nation, one of the Nuu-chah-nulth nations. As part of her work supporting Indigenous cultural education, she arranged a variety of activities and presentations. She gave as examples bringing in community members to read Indigenous stories, or to demonstrate cedar bark weaving and beading. Ms. Cook deposes that as the daughter of a hereditary Huu-ay-aht chief, she treats cultural practices with care and respect and brings Nuu-chah-nulth culture into the classroom with caution and thought.

[39] Ms. Cook was assigned to JHES full-time during the 2015/2016 school year, and she arranged to have Margaret Eaton, an Elder with knowledge of smudging, come to JHES. At the first staff meeting of the year in September 2015, Ms. Cook raised the possibility of conducting smudging in JHES classrooms. Three teachers took up this invitation: Geraldine Dekoninck (grade 6 class); Jelena Dyer (grade 5/6 split class); and Sonia Iacuzzo (grade 3 class). The petitioner's daughter was a grade 5 student in Ms. Dyer's class, and her son was in Ms. Iacuzzo's class.

[40] Ms. Dekoninck is Indigenous and holds a degree in First Nations Studies. She is an experienced teacher, and has been involved in Indigenous education throughout her career. She took up the opportunity to have the Elder visit her class because she was trying to work more Indigenous culture into her teaching practice. She was able to tie the smudging activity directly into the classroom work that was being done at that time: a unit on residential schools, using *Fatty Legs: A True Story*, a book about the experiences of a young girl in a residential school. The students were learning that one of the losses suffered during the residential school era was the disappearance of cultural ceremonies and rituals.

[41] Ms. Dyer is also an experienced teacher that recognized an opportunity to integrate Indigenous culture and history into the curriculum. Ms. Dyer had just finished a masters program, a component of which involved studying Indigenous

experiences with emphasis on Indigenous peoples having been deprived of their culture.

[42] Ms. Iacuzzo is a teacher of long experience. She decided that her grade 3 students should witness this local Indigenous practice. Not only was it an opportunity to embrace Indigenous culture and integrate it into her classroom, but Ms. Iacuzzo's evidence is that the demonstration fit nicely with some of the main themes of the grade 3 social studies program: community, and learning to respect cultural diversity.

[43] In the course of about an hour on 16 September 2015, the Elder, Ms. Eaton, visited the three classrooms. In each classroom, the teacher introduced Ms. Cook, who told the students that the Nuu-chah-nulth tradition includes *Hii-Shuuk-Tsawalk* — the belief that everything is one, everything is connected — and that cleansing via smudging is part of this belief. Ms. Cook then introduced Ms. Eaton.

[44] The petitioner's daughter is adamant that Ms. Eaton was accompanied by Gina Sutherland and not by Ms. Cook. The petitioner's daughter's memory of this and other important details is not accurate. Each of the teachers recall that it was Ms. Cook who organized the event, and that it was Ms. Cook who accompanied Ms. Eaton. And, Ms. Cook is able to recount what she saw and heard in the classrooms after she introduced Ms. Eaton.

[45] Ms. Eaton spoke to the students about her background and how she had learned the practice of smudging from an Elder in her family. She also spoke about the items she brought with her: an abalone shell, sage, and an eagle feather. She explained what she was going to do before she did it. Ms. Cook describes what happened:

> She lit the sage in the abalone shell and it created smoke. She then walked the perimeter of the room, along the walls, fanning smoke with the eagle feather onto the walls. She stopped at each door and fanned smoke on the frame of each door four times, representing the North, South, East and West.
> . . .
>
> There was no smudging or cleansing of students or of any person. At no point was smoke fanned over a student, nor did any student touch the eagle

> feather. Contrary to what was in my letter, there was no cedar bough involved at all. Students simply listened to me and to Margaret and observed what Margaret was doing. They did not participate in any way.

[46] The petitioner's daughter, who was nine years old at the time of the event (and 11 when she swore her affidavit), describes the smudging event very differently. She recalls so much smoke that she had difficulty seeing, and she says that smoke was waved onto her desk while she was sitting in it:

> The Elder held a large shell with grass that she had brought with her. She lit the grass in the bowl and it began to smoke a lot. The Elder began to move about the classroom. She used her hand to wave smoke from the bowl onto our backpacks, the doorframes, and every part of the class. The Elder sometimes bent down and waved the smoke onto things that were on the ground. Then the Elder walked up and down the [aisles] between the students' desks, waving smoke onto the desks of my classmates and I while we sat in them.
>
> While the Elder was waving the smoke, she spoke in English to tell the students that the smoke would give us good luck and that everything would be fine with us. The Elder also spoke many things in a different language that was strange to me. I did not like that I did not know what she was saying. I understood the language she used was the Nuu-chah-nulth language.
>
> The smell of the smoke was really strong and smelled bad. I could see the smoke all around me and it filled the classroom quickly. There was so much smoke that I had difficulty seeing.

[47] The amount of smoke is not important to the ultimate issues, but the point tells against the reliability of the petitioner's daughter's evidence. I reject her evidence that the smoke filled the classroom and that there was so much smoke in the classroom that she had difficulty seeing. It is not in harmony with the surrounding probabilities. I accept the evidence of Ms. Dyer, her teacher, that she had in mind the fire suppression equipment in the classroom while the demonstration was occurring. The smoke alarm was not activated by the smudging, and it stands to reason that Ms. Dyer would monitor the event to ensure that the amount of smoke was minimal so as to avoid the alarm or fire sprinklers being activated.

[48] I reject the evidence of the petitioner's daughter about the Elder smudging her backpack or her desk. The smudging was restricted to the classroom's perimeter walls and door frames. This is Ms. Cook's evidence, which I accept. It aligns with the evidence of each of the teachers, which I accept. Ms. Dyer's evidence is that there

was a very small amount of smoke, and that her students did not participate in the smudging — no student held onto the feather or had smoked fanned or wafted onto them. She estimates that the closest the shell came to any of her students was about one metre. Ms. Dyer describes the Elder's demonstration this way:

> The Elder held a large clamshell in her hands and lit sage leaves in it. She held the clamshell in one hand while with the other she had a feather which she used to fan smoke over and around doorways and as she walked around the perimeter of the room. As she was doing so, she told stories about collecting sage and clam shells as a child and speaking about what Nuu-chah-nulth people's traditions are. I in particular remember her saying something about the Nuu-chah-nulth tradition being to respect objects around you and that all things are connected. She spoke about how the cleansing was a traditional practice to provide a fresh start within their culture.
> . . .
>
> There is no way that the smudging of the doorways or anything that the Elder said could be construed as trying to make someone else believe what she believed. When she spoke, the Elder spoke using words like "our tradition is" or "we believe".

[49] Ms. Dekoninck's evidence is to the same effect. She was cross-examined on what the smudging entailed. She says that the Elder spoke English, but may have spoken a few words using Nuu-chah-nulth language. The desks were in the centre of the classroom, and when the sage was lit the Elder walked around the perimeter with smoke trailing behind her. There was very little smoke. The students were not smudged. Neither their desks nor their backpacks were smudged. The students watched and listened respectfully. They asked a few questions and the Elder answered.

[50] Ms. Iaccuzzo's grade 3 class had the same experience. The Elder explained what she was going to do, then she lit the sage in the shell and walked around the room, fanning the smoke outward with a feather, paying particular attention to the doorways. The children were sitting on a carpet, in their "cosy corner" of the classroom.

[51] I conclude that the smudging in each classroom followed the same format. I find that Ms. Cook, the Nuu-chah-nulth education worker, introduced the Elder, who described the smudging tradition and beliefs connected with it and in doing so

sprinkled in a few key words in a Nuu-chah-nulth dialect. In each room, the Elder smudged the perimeter walls and doorways, making use of the sage burning in an abalone shell and an eagle feather. In no classroom were the students, their desks, or their belongings smudged. In each classroom, the students' participation was limited to learning: observing, listening, and taking in the smell of the burning sage.

[52] The petitioner's position is that her daughter was subjected to being present at the smudging against her will. Her daughter deposes to having told Ms. Dyer that she wanted to leave the classroom after she heard the Elder describe what was about to take place, and that Ms. Dyer refused permission:

> I had seen First Nations Elders before because they had come into my classes to talk about First Nations beliefs. At first, I thought the Elder was only going to talk about her beliefs because that is what they had done all the other times.
>
> The Elder said she was there to perform a ceremony that would bring the students good luck and help us to stay safe. The Elder talked about how eagles bring good luck and about spirits and energy. The Elder told the students that she was going to cleanse the classroom using smoke (the "Ritual"). We were told that there were things in our classroom that were dirty and that the smoke would clean them.
>
> Immediately after I heard this, I got out of my seat and went up to see Mrs. Dyer. I told Mrs. Dyer that I did not want to be in the classroom while the Elder performed the Ritual. I do not mind being taught about the things other people believe as part of a class, but I did not want to be a participant in other people's ceremonies in any way. Mrs. Dyer told me that it would be disrespectful to leave, that all students must participate, and that I must go sit back down in my seat. I wanted to leave before the Ritual started, but I felt forced to obey my teacher.

[53] Ms. Dyer's version of events, which I prefer, directly contradicts much of this evidence. Because there was expected to be smoke, Ms. Dyer says she made it clear that students could go outside if they wished, and about five of her 30 students did so. Other students looked disengaged and Ms. Dyer says she offered these students the opportunity to leave in order to preserve a respectful atmosphere. Ms. Dyer says that the petitioner's daughter took in the demonstration with enthusiasm. Ms. Dyer denied in forceful terms the petitioner's daughter's evidence that she asked permission to leave and that permission was denied.

[54] Two days before the smudging, the JHES principal, Stacey Manson, signed a letter to parents about the smudging that the teachers were to have sent home with their students. Ms. Cook, the Nuu-chah-nulth education worker drafted the letter for Ms. Manson's signature. At the time Ms. Cook drafted the letter, she had been in contact with two Elders with knowledge of smudging — each of these Elders used a different method, and Ms. Cook did not know which elder would attend. She drafted the letter for the principal so that it would describe what might take place in the classroom regardless which Elder conducted the smudging.

[55] The petitioner argues that the smudging occurred as it was described in the school principal's letter. I find that it did not. However, I think the content of the letter explains, at least in part, the petitioner's strong feelings about the smudging. I have underscored the most problematic aspects of this letter:

> A great welcome to 2015/2016 opportunity has been offered to our class. It is a Traditional Nuu-chah-nulth Classroom/Student Cleansing. We will have a guest Nuu-chah-nulth Member, along with our Nuu-chah-nulth Education Worker, Sherri Cook, in our classroom to teach us about Nuu-chah-nulth Culture and History.
>
> Nuu-chah-nulth People believe strongly that "Hii-Shuukish-Tsawalk" (everything is one; all is connected). Everything has a spirit and energy exists beyond the end of school one year and into the next. This will be our opportunity to learn about Nuu-chah-nulth Traditions and experience cleansing of energy from previous students in our classroom, previous energy in our classroom and cleanse our own spirits to allow GREAT new experiences to occur for all of us.
>
> All participants will hold on to cedar branches (each student will feel the bristles of each branch to remind them that they are alive and well to embrace life and all that it offers) and/or "Smudged" (smoke from Sage will be fanned over the body and spirit).
>
> Classroom and furniture will also be cleansed to allow any previous energy from: falls, bad energy, bullying, accidents, sad circumstances, etc. to be released and ensure the room is safe for all and only good things will happen.
>
> If you have any questions about the "Cleansing" or would like to observe please contact Sherri Cook [telephone number and email address].
>
> Thanks for your time and consideration, we look forward to this teaching and experience with your child.

[56] As it turned out, the students witnessed a smudging demonstration but they did not hold cedar branches, and they were not smudged or otherwise "cleansed."

However, given the petitioner's religious beliefs, I can well understand her unease when she received the principal's letter on September 15. John Cox prepared an expert report and was cross-examined on his opinions. He has been an ordained minister for 25 years, and was at one time the pastor at the church attended by the petitioner and her family. His qualifications to opine on evangelical Christian doctrine also include a Certificate of Theology from Wycliffe Hall, Oxford University, and a Bachelor of Divinity degree from London University. I accept Pastor Cox's evidence that adherents of Protestant Evangelicalism — such as the petitioner and her family — "cannot accept the 'cleansing' of their spirits by anything other than the blood of Jesus, nor can they participate in rituals or ceremonies that are predicated on the belief that 'everything has a spirit'." Pastor Cox made it clear, however, that participation in the religious, spiritual, or supernatural ceremonies is what is prohibited — as opposed to learning about others' beliefs, whether inside or outside of a classroom.

[57] The petitioner decided to go to JHES the next day to discuss her concerns arising from the September 15 letter. When she arrived on the afternoon of September 16, the petitioner learned that the smudging had already occurred in her children's classrooms that morning. The petitioner deposes to what she was told by her daughter when they arrived home that afternoon:

> After my children and I arrived home on September 16, my daughter told me that she had been coerced by her teacher to participate in the Cleansing Ritual. My daughter described to me how uncomfortable she felt about the Cleansing Ritual, and how she had told her teacher that she did not want to participate. The teacher told my daughter that "it would be rude" if she did not participate in the Cleansing Ritual, and that "all students are required to participate". My daughter was unwillingly subjected to being fanned by smoke, and she was told that her "spirit" needed to be "cleaned" of negative "energies."

[58] The petitioner's report of what her daughter said about the smudging tracks what was written in the principal's letter, but I find that the smudging did not happen that way. The petitioner's daughter was not "coerced by her teacher to participate," was not uncomfortable during the demonstration, and did not have the conversation with her teacher referred to by the petitioner. The petitioner's daughter was not

"fanned by smoke," and she was not told that her spirit needed to be cleaned of negative energies.

[59] The petitioner and her husband wrote the superintendent of the School District, Greg Smyth, to express their concerns. They relayed their daughter's description of how she had been treated by her teacher, and described how upsetting the smudging experience was for the entire family. They enclosed and quoted from the principal's letter, and questioned why this spiritual ceremony took place in the School District's classrooms given the statutory requirement for schools to be conducted on strictly secular principles. Their letter emphasized that they support their children learning about other cultures and traditions, but that they do not agree with "forced participation in spiritual/religious practices."

[60] Mr. Smyth telephoned the petitioner on September 22, after receiving this letter. It seems that the petitioner was satisfied with assurances she received about advance notification of anything planned that might raise concerns. However, on 7 January 2016, the petitioner's children came home from school and told her about an Indigenous prayer at a school assembly. The petitioner deposes:

> The prayer was strange and foreign to my children, and was directed to an unspecified "god". No parental notice of the prayer was issued by JHES. The prayer caused my children to feel very uncomfortable.
>
> I was again shocked and frustrated to find out that explicitly religious activities were taking place at JHES.

[61] The petitioner and her husband wrote another letter, this time addressed to both Mr. Smyth and the School District's board. The letter reiterated support for learning about other cultures and traditions. They said that their children "really enjoyed the hoop dancing cultural aspect, and had that been the only part that took place we would have no issue at all." They characterized the dancer's prayer as resulting in "forced participation in spiritual/religious practices." They sought written assurances that this would not happen again, and that written consent be required before anything of a spiritual/religious nature takes place in any School District classrooms.

[62] I am satisfied that what occurred at the January 2016 school assembly did not result in the participation of students in a spiritual or religious practice. The petitioner's daughter describes the prayer as follows:

> After the dance, [a First Nations] man used the microphone to say a prayer to a 'god'. I was surprised because I thought it was strange to have a prayer at school assemblies. I was also confused and upset because I did not know what the man was praying to. It felt strange and wrong to be there while the man prayed to his god.

In her *viva voce* evidence, she described the dance performance as "really good until the end when they made me participate in a form of praying, as they called it." She testified that the dancer said he would be saying a prayer and that he wanted everyone to participate. She testified that she was told — she did not say by whom — to bow her head and close her eyes or she would be in trouble. This evidence that the dancer wanted the students to participate and that she was directed to bow her head and close her eyes was not included in her affidavit. I find that these details are embellishments, and I reject them as untrue.

[63] Other witnesses gave evidence about the hoop dancing and prayer. The JHES principal, Ms. Manson, was responsible for inviting the dancer, Teddy Anderson, to the school. Ms. Manson deposes that the students observed the dancer say an Indigenous prayer during the performance, but nothing in the performance encouraged the children to believe in or adopt the culture or religion of the performer; at no time did the students participate in the prayer. Teachers Dekoninck and Iacuzzo were present at the hoop dance, and they also depose that the students did not participate in the dancer's prayer. I accept this body of evidence.

[64] After receiving the second letter from the petitioner and her husband, Mr. Smyth again telephoned the petitioner. During this conversation, Mr. Smyth agreed to provide the petitioner with the written assurances sought by the end of April 2016. The assurances did not arrive, and this led to the petitioner meeting with Mr. Smyth in June 2016. At this meeting, Mr. Smyth said that any written commitments would have to wait until at least September 2016 because the document would be legal in

nature and take a long time to prepare. The petitioner deposes that Mr. Smyth told her that "there is more tolerance for Aboriginal religion than your religion" in the school system. Mr. Smyth denies saying this; he deposes:

> I never said, or would say, in our pluralistic multicultural society that there is more tolerance for one religion than another within the school system. As repeatedly noted, the school system operates on a secular and non-sectarian basis. I believe I did say that the education system goals include seeking a greater understanding and awareness of aboriginal history, culture and traditions, and I also reiterated to Ms. Servatius that the School District did not agree that what occurred was involving students in "religious" activities.

I accept Mr. Smyth's evidence on this point. I think the petitioner mistook what Mr. Smyth told her as amounting to a statement that there is more tolerance for Indigenous religion than for evangelical Christian beliefs. Indeed, this is the petitioner's essential point in this litigation: she argues that the School District privileges Indigenous spirituality over her family's beliefs.

[65] In the days following this meeting with Mr. Smyth, the petitioner contacted the Justice Centre for Constitutional Freedoms. Counsel for the petitioner are affiliated with this organization, and this proceeding was commenced on 1 November 2016.

The *Charter* Right to Freedom of Conscience and Religion

[66] Section 2(a) of the *Charter* provides that everyone has the fundamental freedoms of conscience and religion. The purpose of s. 2(a) is to prevent interference with profoundly held personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 759; *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para. 41; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 32.

[67] In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, Dickson J., as he then was, described freedom as the absence of coercion or constraint. In relation to freedom from coercion, he said: "Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his

beliefs or his conscience" (p. 337). Government may not coerce individuals into affirming specific religious beliefs or manifesting religious practices, and it may not compel individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others (pp. 347, 350). It is the right of every Canadian to work out for herself what her religious obligations, if any, should be and the state cannot dictate otherwise (p. 351).

[68] The petitioner has the burden of proving an infringement of s. 2(a), and the *Amselem* case, at paras. 56-59, establishes that in order to do so she must prove that:

1. She or her children have a sincere belief that has a nexus with religion; and
2. The impugned events interfered — in a manner that was more than trivial or insubstantial — with their ability to act in accordance with this religious belief.

With reference to the first part of the test, both sincerity of belief and a nexus with religion were admitted by the School District in closing argument. As to the second stage, it requires objective proof. It is not enough for a person to say that her rights have been infringed. An objective analysis of the events that are alleged to interfere with religious freedoms is required. See *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 at paras. 2 and 23-24.

[69] One route to establishing a s. 2(a) infringement is to show a breach of "state neutrality" with respect to religion. This concept of state neutrality is an expression of secularism, and was described by Justice Gascon in *Mouvement laïque québécois v. Saguenay (City),* 2015 SCC 16 at para. 74, as helping to preserve and promote the multicultural nature of Canadian society:

> 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 [citations omitted].

This duty of neutrality is reflected in s. 76 of the *School Act*, which provides that all schools must be operated on strictly secular and non-sectarian principles, and that no religious dogma or creed is to be taught.

[70] The duty of state neutrality is fulfilled "when the state neither favours nor hinders any particular religious belief": *S.L.*, at para. 32. A breach of state neutrality is established by proving that the state professed, adopted, or favoured one belief to the exclusion of all others and that the exclusion resulted in interference with the complainant's freedom of conscience and religion: *Saguenay*, at para. 83.

[71] If a non-trivial interference with religious beliefs is established, the next question is whether the limitation on freedom is justified under s. 1 of the *Charter*. In this case, in accordance with the framework outlined in *Doré v. Barreau du Québec*, 2012 SCC 12, and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, the question would be whether the discretionary JHES decisions to host the smudging and hoop dancing events reflected a proportionate balance of the *Charter* value of freedom of religion with the objectives of the *School Act*.

Discussion and Analysis

[72] In historical context, there is some irony in the petitioner's stated position that the events at JHES amounted to "religious indoctrination." However, I agree with the proposition that regardless of the role played by the churches in the residential schools calamity and the pressing need for reconciliation, the petitioner is entitled to send her children to public schools that comply with the secular duty of neutrality.

[73] The petitioner complains that the School District's written argument displays "hostility regarding Christianity" and that the School District's argument attempts to "justify the breach of its duty of neutrality by denigrating Christianity and its history." I do not agree. The respondents and the intervenor have done no more than point to the disquieting history of the roles played by government and the churches in the mission to eradicate Indigenous languages and culture. As unsettling as facing these facts might be, they provide important context for what happened during the 2015/2016 school year at JHES.

[74] My last comment before addressing the substance of the arguments is with regard to the petitioner's submission that the School District's position is "in a certain way, an echo of the gross abuses of the residential school days where First Nations children were taken from their homes, deprived of family support, and compelled by the state to participate in religious practices against their will." I agree with the respondents and the NTC that this aspect of the petitioner's argument is insensitive and regrettable hyperbole, especially considering the magnitude of what occurred a few kilometres down the road during the 82 years that the Alberni Indian Residential School was open. The petitioner's provocative assertion tends to underscore the irony in her complaint that the events at JHES, against the historical backdrop, amount to religious indoctrination. This argument also detracts from the restrained tone and content of most of the petitioner's submissions.

[75] I now turn to the substance of the arguments. Because it is conceded that the petitioner's beliefs are sincere and that they have a nexus with religion, the question of whether a s. 2(a) infringement has been established reduces to whether the petitioner has proved on an objective basis that either the classroom smudging or the prayer associated with the hoop dancing interfered — in a manner that was more than trivial or insubstantial — with her or her children's ability to act in accordance with their religious beliefs.

[76] The petitioner submits that there are two paths to a finding that the School District has interfered with their ability to act in accordance with their religious

beliefs. First, and principally, the petitioner argues that interference is established by the School District hosting spiritual events and thus breaching the state's duty of neutrality. The petitioner's secondary argument is rooted in the principles expounded in *Big M Drug Mart* in relation to freedom from being coerced into affirming a specific religious belief or manifesting a specific religious practice. The petitioner argues that it is an infringement of religious freedoms for the School District to compel her children to participate in Indigenous practices that conflict with their faith.

The Duty of Neutrality Argument

[77] The petitioner contends that the state, in the form of the School District, has sponsored or promoted a particular religious belief — i.e., Indigenous spirituality associated with smudging and hoop dancing. Relying on the duty of neutrality jurisprudence, she submits that a religious exercise in a public school classroom or assembly is a violation of the state's duty of neutrality and infringes the s. 2(a) rights of non-believers in that religion. The petitioner submits that state sponsorship of one religious tradition amounts to discrimination against all other such traditions; there can be no hierarchy if equality and freedom are to be maintained. The state's duty of religious neutrality precludes state sponsorship of any religion, and it cannot justify its breach of neutrality by appealing to the fact that it is propagating a religious belief that was formerly suppressed.

[78] It follows from Supreme Court of Canada pronouncements on the duty of neutrality that for the petitioner to succeed in establishing a breach of neutrality contrary to section 2(a) of the *Charter,* she must show that (1) the School District professed, adopted, or favoured one belief to the exclusion of all others; and (2) the exclusion resulted in interference with the petitioner's or her children's freedom of conscience and religion. For reasons that follow, I conclude that the petitioner's argument fails to clear the first hurdle: she has not established that the School District has professed, adopted, or favoured one belief to the exclusion of all others.

[79] The petitioner's neutrality argument leans heavily on the Supreme Court of Canada's decision in *Saguenay*, and the Ontario Court of Appeal's decision in

Zylberberg v. Sudbury Board of Education (Director) (1988), 65 O.R. (2d) 641 (C.A.). For its part, the School District submits that the Supreme Court of Canada's decision in *S.L.* is the authority that points the way to the correct result.

[80] The facts in *Saguenay* centred on a prayer said at municipal council meetings. At the start of each meeting, the mayor recited a prayer after making the sign of the cross. The mayor also made the sign of the cross at the end of the prayer. Councillors and municipal officials crossed themselves before and after the prayer. Religious symbols such as a Sacred Heart statue and a crucifix were also displayed. A citizen who regularly attended council meetings complained that as an atheist he felt uncomfortable with this ceremony. The City responded by adopting a bylaw which provided for the saying of a prayer, but instituted a two-minute delay between the end of the prayer and the start of council proceedings to allow those who did not wish to attend the recitation of the prayer to be absent without missing the start of the meeting. The Quebec Human Rights Tribunal found that the bylaw, the prayer recitation, and the display of religious symbols were at odds with the freedom of conscience and religion provisions of the *Quebec Charter*. The Quebec Court of Appeal overturned the Tribunal, concluding that there had been no infringement. The Supreme Court of Canada allowed the further appeal, finding a breach of the state's duty of neutrality.

[81] Some of the language Justice Gascon used in *Saguenay* was keyed to the text of s. 10 of the *Quebec Charter* which addresses discrimination based on religion, among other grounds. Nevertheless, much of what Gascon J. said about the duty of neutrality plainly applies to s. 3 of the *Quebec Charter* and thus to s. 2(a) of the *Charter of Rights* — he referred to these two provisions as "constitutional counterpart[s]" (para. 67).

[82] The issue faced by a five-judge division of the Ontario Court of Appeal in *Zylberberg* was whether the regulation providing for the daily saying of the Lord's Prayer in the public schools infringed s. 2(a). The prayer was led by classroom teachers or recited over the schools' public address systems. Pursuant to the

regulation, upon a parent's request, a student could be excused from the classroom during the prayer. The school board argued that this process for exemption saved what it conceded was otherwise unconstitutional. The majority of the Court of Appeal disagreed, concluding that all religious exercises in the public school system ought to be designed to be acceptable to all reasonable persons and designed so as not to require exemptions that compel students and parents to, in effect, make a religious statement (pp. 655-656). The majority also summarily rejected the suggestion that any infringement was so trivial and insubstantial that it did not merit *Charter* protection (p. 657).

[83] Similar British Columbia provisions for daily religious exercises were successfully challenged in *Russow v. B.C. (A.G.)* (1989), 35 B.C.L.R. (2d) 29 (S.C.). The *School Act* at the time required that public school days be opened by the reading of a passage of Scripture followed by the recitation of the Lord's Prayer. A regulation provided for excusing a pupil from attendance during the reading and prayer upon written notice from a parent or guardian. Justice Hollinrake, then of this Court, adopted the reasons of the majority of the Ontario Court of Appeal in *Zylberberg* and found that the legislation infringed s. 2(a) of the *Charter*.

[84] The petitioner argues that there is no principled difference between the occurrence of state-mandated Christian prayers in public spaces and the smudging and dance/prayer that took place at JHES. Relying on the requirement for state neutrality, she submits that the sponsorship of Indigenous spiritual events in public schools is an interference with religious freedoms. On my appreciation of what occurred at JHES, viewed in historical context, I cannot agree.

[85] When arrangements are made for Indigenous events in its schools, even events with elements of spirituality, the School District is not professing or favouring Indigenous beliefs. Educators are holding these events to teach about Indigenous culture, and to introduce students to Indigenous perspectives and worldviews. If the students were in their classrooms learning about Indigenous beliefs or ceremonies by reading textbooks or watching films, this would plainly not compromise state

neutrality. Nor would state neutrality be jeopardized if the students took a field trip to a local Tse-shaht or Hupacasath big house to see dancing, a potlatch, or smudging. I reject any suggestion that if the Elder that does the smudging comes to the school class instead of the school class travelling to the Elder, the boundary between state neutrality and state partiality is crossed.

[86] In oral argument, counsel for the petitioner sought to support the idea that there is a critical distinction between a field trip and a classroom experience on the basis that the classroom is a special place, and that classroom walls are there to "keep the students safe." This submission highlights why context matters so much in this case, and is an illustration of why it is important to heed the caution in *Saguenay* that the state's duty of neutrality must 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" (para. 74). Recall the evidence that one legacy of the residential schools policy is that intergenerational survivors associate schools and education with abuse and trauma. To help address this lingering impact, the NTC have set out to make schools in Nuu-chah-nulth territories places where Nuu-chah-nulth students "could see themselves and their culture reflected, to make the schools . . . a culturally safe space." By way of the curriculum redesign, the Ministry of Education has strongly endorsed this line of thinking, and it is evident that the School District supports this goal. One practical way to help make schools culturally safe spaces is to have students learn — in their classrooms — from Indigenous people. On the evidence, I am satisfied that the classroom is rendered a safer place by having a Nuu-chah-nulth Elder visit the classroom, show students how a smudging is conducted, and explain the significance of smudging in Nuu-chah-nulth culture.

[87] It might be argued that one distinction between a classroom and hypothetical field trip venues like a mosque or a big house is that these field trip venues are not public spaces that are subject to the state duty of neutrality. This line of argument does not stand up to scrutiny. When a school class takes a field trip, it is the metaphorical space that matters, not the physical space. The duty of state neutrality

would not evaporate because the students left the classroom to visit a mosque or a big house. It is what happens when the class is at the venue that matters. If the students were learning about Islam by observing Muslims at prayer, and were being told of the significance of certain Koran verses being spoken, neutrality would remain intact. On the other hand, if the students were issued prayer rugs and directed to take part in the prayers, state neutrality would be compromised even though the student prayers were taking place in a "non-public space." Essentially, the field trip venue becomes the classroom.

[88] On the facts as I have found them, the petitioner's duty of state neutrality argument is hobbled by the principles explained by the Supreme Court of Canada in the *S.L.* case, which considered a mandatory course in Quebec schools called the "Ethics and Religious Culture Program." The new course replaced Catholic and Protestant programs of religious and moral instruction, and included a comprehensive presentation of various religions. Some parents approached their school board and sought exemption of their children from the course. The parents' argument that this new program infringed freedoms of conscience and religion failed, notwithstanding the concession of the sincerity of the parents' belief in their obligation, as a religious practice, to pass on the precepts of the Catholic religion to their children. The majority judgment, written by Justice Deschamps, concluded that the parents had not discharged their burden of proving an infringement because they had not, from an objective standpoint, made the case that the new course interfered with their ability pass on their faith to their children (para. 27).

[89] The parents argued that the new course was not in fact neutral because their children would be exposed to a form of relativism, which would interfere with the parents' ability to pass on their faith, and because of the "disruption" that would result from exposing the children to different religious beliefs (para. 29). After making observations about the challenges in achieving religious neutrality in the public sphere and asserting that absolute neutrality does not exist from a philosophical standpoint, Deschamps J. stated the principle adverted to earlier in my reasons: "[S]tate neutrality is assured when the state neither favours nor hinders any

particular religious belief, that is, when it shows respect for all postures towards religion including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the individuals affected" (paras. 30-32).

[90] The majority judgment in *S.L.* squarely addressed the parents' submission that exposing children to other belief systems is disruptive and confusing. Notice was taken of Chief Justice McLachlin's treatment of a similar argument made in *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, a case that considered whether a school board acted reasonably in refusing to authorize books for classroom instruction on the ground they depicted same-sex parented families. Although *Chamberlain* was not a s. 2(a) case, the discussion on "cognitive dissonance" in a tolerant and diverse society is instructive:

> [33] Moreover, although parental involvement is important, it cannot come at the expense of respect for the values and practices of all members of the school community. The requirement of secularism in s. 76 of the *School Act*, the emphasis on tolerance in the preamble, and the insistence of the curriculum on increasing awareness of a broad array of family types, all show, in my view, that parental concerns must be accommodated in a way that respects diversity. Parental views, however important, cannot override the imperative placed upon the British Columbia public schools to mirror the diversity of the community and teach tolerance and understanding of difference.
>
> . . .
>
> [65] The number of different family models in the community means that some children will inevitably come from families of which certain parents disapprove. Giving these children an opportunity to discuss their family models may expose other children to some cognitive dissonance. But such dissonance is neither avoidable nor noxious. Children encounter it 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.
>
> [66] Exposure to some cognitive dissonance is arguably necessary if children are to be taught what tolerance itself involves. As my colleague

> points out, the demand for tolerance cannot be interpreted as the demand to approve of another person's beliefs or practices. When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right. Learning about tolerance is therefore learning that other people's entitlement to respect from us does not depend on whether their views accord with our own. Children cannot learn this unless they are exposed to views that differ from those they are taught at home.

[91] Returning to *S.L.*, the majority judgment drew a conclusion that directly impacts the petitioner's ability to establish, on an objective basis, that the events at JHES constitute an infringement of religious freedoms:

> [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* . . .

[92] The minority reasons of LeBel J. in *S.L.* expressed agreement with the result but sounded a note of caution on the basis that it is possible that the ethics and religious culture program, depending on how it is taught, might infringe s. 2(a). Unlike the situation in the case at bar, which in effect challenges teaching methods, the judicial review in *S.L.* was based on the contents of a course outline and textbook of a course that had not yet been taught.

[93] The issue of whether the School District professed, adopted, or favoured Indigenous spirituality turns on the facts. The petitioner argues that the School District's purpose in arranging the smudging is disclosed in the JHES principal's letter, and the letter reflects an attitude of favouritism toward and profession of Indigenous spirituality. I think the focus of this argument is too narrow. The whole context of why the School District sponsors such events must be examined, and a misstatement of the School District's intentions by an individual educator is not determinative of the purpose behind the events under examination. In this

connection, it is important to remember that it is not the principal's letter but the smudging and the hoop dancer's prayer that are alleged to have infringed the *Charter*.

[94] I conclude that these smudging and hoop dancing demonstrations were in no way — either by design or in their execution — an expression of the School District's beliefs or an expression of religious favouritism. Rather, the organization of these events reflected a gathering momentum to incorporate the teaching of Indigenous worldviews and perspectives. I accept the evidence of Ms. Dyer, the petitioner's daughter's teacher, that the smudging or anything that the Elder said could not be construed as trying to make someone else believe what the Elder believed — when the Elder spoke, she used words like "our tradition is" or "we believe." And, arranging for students to observe hoop dancing, even if the dancing is accompanied by an Indigenous prayer, cannot reasonably be interpreted as the School District professing, adopting, or promoting religious beliefs.

[95] The *S.L.* case establishes that the duty of state neutrality is met "when the state neither favours nor hinders any particular religious belief" (para. 32). As Gascon J. said in *Saguenay*, at para. 74, what is required is neutral public space free from coercion, pressure, and judgment on the part of public authorities in matters of spirituality, but not the homogenization of this space. The exhortation of Gascon J. to locate the boundaries of the state's duty of neutrality not only in a manner consistent with the protective objectives of the *Charter*, but also with a view to promoting and enhancing diversity is an important instruction in the matter at hand. The facts in this case do not permit any reasonable conclusion other than that the School District and its representatives neither favoured nor hindered any particular religious belief, and that the JHES events did not violate the state's duty of neutrality.

[96] Before moving on to the petitioner's compelled participation/affirmation argument, I will acknowledge two additional arguments that were put against the petitioner's breach of state neutrality submission. The first of these is the argument

by the School District that if the intention of the School District was not to profess, adopt, or favour Indigenous spirituality to the exclusion of all other beliefs, then the actual effect of the events is irrelevant. The AGBC supports this submission as correct in law. The argument is based on what Gascon J. said at para. 88 in *Saguenay*:

> 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.]

[97] I have concluded that the intention of the School District was not to profess, adopt, or favour Indigenous spirituality, but to teach about Indigenous culture and to help make Indigenous students feel like they belong at JHES. Given this finding on the intention of School District representatives, if the School District and AGBC are correct on this point of law about intention then this would end the duty of neutrality analysis. It is not necessary for me to decide the point, because I have found that the events at JHES as they were in fact conducted did not breach the duty of neutrality. However, I am skeptical about whether the submission is correct.

[98] First, para. 88 of *Saguenay* cannot be read in isolation from the rest of the judgment. When outlining the two-part duty of neutrality analysis earlier in his judgment, Gascon J. did not reference an intention requirement. Specifically in addressing the first step of the duty of neutrality analysis at para. 83, Gascon J. said that "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)." In nearly identical language at para. 84, Gascon J. said, "the state may not profess, adopt or favour one belief to the exclusion of all others." Later in his judgment at para. 113, Gascon J. said, "[t]he evidence shows that . . . the state professed, adopted or favoured one belief to the exclusion of all others." Read in its entirety, the Gascon J. judgment in *Saguenay* indicates that the first question to ask when applying the duty of neutrality analysis is whether the state professed,

adopted, or favoured one belief to the exclusion of all others. Proving an intention to profess, adopt, or favour one belief may help establish the facts necessary to clear this first hurdle in the analysis. However, it does not follow that a lack of malign intention resolves the question of whether the state professed, adopted, or favoured one belief to the exclusion of all others. Gascon J. surely would have incorporated intention as a requirement in the duty of neutrality framework in paras. 83, 84, and 113, if he intended this result.

[99] Second, and relatedly, this is a case about conduct that is alleged to be *Charter* infringing, and the primary focus must be on whether the impugned conduct interfered with the petitioner's or her children's religious freedoms, regardless of what the School District's intention may have been. In the context of an examination of whether the accused's s. 8 *Charter* right to freedom from unreasonable search was violated, Justice Abella, writing for the majority in *R. v. Clayton*, 2007 SCC 32 at para. 48, issued a reminder that I consider to be applicable, *mutatis mutandis*, to the matter at hand:

> Intention alone does not attract a finding of unconstitutionality. It is not until that subjective intent is accompanied by actual conduct that it becomes relevant. We would otherwise have the Orwellian result that *Charter* breaches are determined on the basis of what police officers intend to do, or think they can do, not on what they actually do. The *Charter* protects us from conduct, not imagination, and even a benign motive may not justify objectively unreasonable police conduct.
>
> [Emphasis added.]

[100] This is not to say that evidence of intention is irrelevant. In an inquiry into whether state neutrality was compromised, evidence of intention behind a policy or conduct may well provide an important clue on the issue of whether the state professed, adopted, or favoured one belief to the exclusion of all others. However, I fail to understand how a finding of benign motive could end the analysis — because even a benign motive may not justify objectively infringing conduct.

[101] I acknowledge a second additional argument: the NTC submission that the Nuu-chah-nulth practice of smudging, while it may have spiritual aspects, is not a "religious" ceremony or rite. The argument continues that if Nuu-chah-nulth

smudging is not religious, conducting a smudging in school cannot result in a breach of state neutrality because a religion is not being professed, adopted, or favoured. It is not necessary to the outcome of this case for me to resolve this issue, and I respectfully decline to do so. It ought not to be inferred from these reasons that I have made a finding that Nuu-chah-nulth smudging is or is not a religious practice.

The Compelled Participation Argument

[102] The petitioner submits that the right to not believe in Indigenous spirituality, the ability to refuse to participate in these practices, and the freedom from government coercion to affirm a specific religious belief are all protected under s. 2(a) of the *Charter*, citing the Supreme Court of Canada's decisions in *Big M Drug Mart* and *Saguenay*. The petitioner argues that it is no more lawful for the state to compel participation in practices rooted in Indigenous spirituality than it is in relation to Christian practices. She maintains that her children were compelled to participate in Indigenous spiritual practices, or affirm spiritual beliefs associated with those practices, and this constituted non-trivial interference with her and her children's ability to act in accordance with their religious beliefs. For reasons that follow, I cannot accept this argument.

[103] In *Big M Drug Mart*, the Supreme Court of Canada found Alberta legislation prohibiting Sunday store openings to be contrary to s. 2(a) because the purpose of the legislation was to compel observance of the Christian Sabbath (p. 351). The law was found to have the effect of forbidding the pursuit of otherwise lawful activities on Sundays (p. 337). "[T]he guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others" (p. 350).

[104] Pastor Cox's evidence is that adherents to the petitioner's faith are not to participate in rituals or ceremonies that are predicated on the belief that "everything has a spirit," but they are not obliged in any way to avoid learning about other belief systems. And, in fact, the petitioner supports her children being taught about

Indigenous culture. She concedes, as she must in light of the Supreme Court of Canada's decision in *S.L.*, that teaching about spiritual practices other than those of her faith does not, *per se*, compel participation in this other practice or compel affirmation of beliefs associated with it. The petitioner's position, however, is that the manner in which the smudging was carried out — even on the School District's version of what occurred in the classroom, which my findings endorse — resulted in her children either directly or indirectly participating in the smudging, or affirming directly or indirectly the beliefs associated with the smudging that are not consonant with the family's religious beliefs. She argues that even if her children or their belongings were not smudged, her children's presence in the classroom at close quarters with the Elder such that they could see and smell the sage smoke amounts to sufficient participation in the smudging to trigger s. 2(a) protection. And, she submits that the compelled or coerced aspect of the participation is made out by the reality that children are obliged to be at school and in class.

[105] The petitioner deposes that mere presence at this event would be contrary to her family's religious beliefs. However, proof that the smudging interfered with the petitioner's or her children's ability to act in accordance with their religious beliefs requires more than the petitioner's assertion. She must establish the proposition on an objective basis. In his report, Pastor Cox wrote: "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." However, I have found as a fact that the smudging was not carried out in this manner: the smoke was not advertently wafted or fanned over the students or their belongings, as described by the petitioner's daughter in her affidavit (which was provided to Pastor Cox).

[106] The petitioner points to the facts in *Saguenay* and *Zylberberg* in support of her submission that her children's mere presence at the smudging and the dancer's prayer is sufficient interference with her and her children's ability to act in

accordance with their religious beliefs — in both *Saguenay* and *Zylberberg*, the individuals hearing the prayers were passive. There is no doubt that mere presence is sufficient involvement to establish a non-trivial interference when the petitioner is making use of the breach of state duty of neutrality route to proof of an interference with ability to act in accordance with beliefs. The petitioner argues, however, that even in a case where the state is not professing or adopting beliefs to the exclusion of others, and thus the duty of neutrality route is not available, mere presence can be sufficient proof of non-trivial interference. In this case, she submits that her children's presence during the smudging and prayer amounts to manifesting these practices under compulsion. The problem with this argument is that it ignores context. In *Saguenay* and *Zylberberg*, the prayers were not teaching demonstrations. In the context of children in school being taught about beliefs, we know from the Supreme Court of Canada's decision in *S.L.* that mere presence does not constitute proof on an objective basis of interference with the ability to act in accordance with religious beliefs.

[107] I conclude that proof on an objective basis of interference with the ability of the petitioner or her children to act in accordance with their religious beliefs requires more than the children being in the presence of an Elder demonstrating a custom with spiritual overtones or being in the presence of a dancer who said a brief prayer. In most instances, it is not difficult to recognize the boundary between a student learning about different beliefs and being made to participate in spiritual rituals. A field trip to a mosque to watch prayers would be learning about Islam; an Imam coming to the classroom and demonstrating prayer rituals would likewise not be problematic. However, in either of these cases, if the involvement of the students progressed to being called upon to pray or read from the Koran then it might well be said that educators have compelled the manifestation of a specific religious practice or the affirmation of a specific religious belief. If a Catholic priest came to school with alter candles and a censer containing incense to acquaint the students with the sights and scents of Church rites, this would seem to be well within the bounds of what the *S.L.* case stands for: religious freedom is not compromised when students

are taught about other beliefs. If, however, the children underwent a baptism, this would be far over the line.

[108] I am not satisfied, on an objective standard, that being in a classroom containing smoke produced by an Elder setting sage alight, or being in the presence of a dancer saying a prayer, interferes with the ability to act in accordance with religious beliefs. To my mind, these are admirable and admissible efforts to teach, in a memorable way, about Indigenous beliefs. It is surely proper, and advisable in light of the historical circumstances, that the School District organize such events. Being taught about beliefs is not an infringement of religious freedom — even when this teaching is done by an Elder at close range and in a manner that engages a student's sense of smell as well as her senses of sight and sound, and even if this teaching results in some "cognitive dissonance."

Reasons for Evidentiary Rulings

Ruling Admitting the Petitioner's Second Affidavit

[109] On the first day of hearing, I admitted the petitioner's second affidavit with reasons to follow.

[110] The petitioner's second affidavit was sworn on 6 November 2019. It speaks to the religious beliefs of the petitioner and her family. This affidavit is an important part of the petitioner's case. The School District objected to this affidavit forming part of the record, on two bases. First, it submitted that the petitioner is splitting her case: the affidavit ought to have been filed with the petition and its late appearance is an attempt to fill a critical gap in her case. Second, the School District argued that the 31 July 2018 deadline (set during a May 2018 case management conference) for any further evidence to be adduced by the petitioner has come and gone, and the application to admit this late evidence amounts to a collateral attack on the May 2018 case management order.

[111] I rejected these arguments and admitted this late affidavit. A discretion to do so is provided by Rule 16-1(7) of the *Supreme Court Civil Rules*:

> **No additional affidavits**
>
> (7) Unless all parties of record consent or the court otherwise orders, a party must not serve any affidavits additional to those served under subrules (3), (4) and (6).

The object of the *Rules* is to secure the just, speedy and inexpensive determination of every proceeding on its merits: Rule 1-3(1). A proceeding ought to be decided on its merits if this can be accomplished fairly.

[112] The first stage of the s. 2(a) *Anselem* test requires proof of a belief with a nexus to religion, and that the belief be sincere. These are not high hurdles in this case, but the late affidavit is necessary to meet these requirements. By the beginning of August 2018, the School District was acquainted with the nature of the petitioner's evangelical Christian beliefs because counsel for the School District had received Pastor Cox's report in which he referred to her beliefs in some detail. In these circumstances, fairness required that the Rule 16-1(7) discretion be exercised to admit the petitioner's late affidavit swearing to her and her family's religious beliefs, and that the May 2018 case management order be varied to extend time to file this affidavit.

Ruling Admitting the Petitioner's Expert's Report

[113] On the first day of hearing, I admitted Pastor Cox's expert report with reasons to follow.

[114] Pastor Cox was asked to opine on four matters: (1) evangelical Christians' beliefs about the supernatural realm and human interactions with it; (2) evangelical Christianity's teachings about Christian participation in non-Christian exercises or ceremonies that invoke the spiritual or supernatural; (3) the importance of evangelical Christians avoiding participation in non-Christian exercises that invoke the spiritual or supernatural; and (4) the importance to evangelical Christian parents of being able to raise their children according to their faith, including non-participation in spiritual or supernatural ceremonies that contradict the teachings of the Bible and Christianity.

[115] In his report of 27 July 2018, Pastor Cox begins by setting out his qualifications and summarizing the affidavit evidence that he was provided with. He carries on to express the following opinions, and with respect to each explains why he holds these opinions:

1. The version of Christianity adhered to by the petitioner does not "discourage learning about other faiths, whether in a classroom or outside of it."
2. "For Mrs. Servatius or her daughter to express agreement with the concepts that 'everything has a spirit,' and that our own spirits can be 'cleansed' apart from the atoning death of Christ, amounts to a serious denial of the Lordship of Jesus Christ. . . . It is entirely contrary to Protestant Evangelicalism to assert that a human being conducting a ceremony with sage smoke can rid people and objects of impurity or negative energy, or that such a thing should be attempted."
3. "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."
4. "With the increasing secularization of western society, Christians are increasingly challenged regarding how to raise their children with a solid grasp of their Christian faith . . . . Within Christianity, children are encouraged to think, discuss, and question in order to understand the Christian faith and eventually make it their own. Parents will discuss the merits of Christianity as well as consider why other expressions, including First Nation spirituality, are not consistent with the teachings of Jesus and the Bible."

[116] Counsel for the School District wrote to counsel for the petitioner and outlined a long list of objections to the admissibility of this report, some technical (e.g., “Mr. Cox has failed to list his address in breach of Rule 11-6(1)(a)”) and some substantive (e.g., “Mr. Cox is not an independent expert, is personally involved in the subject matter of the Petition, has personal ties to the Petitioner, and is biased”). Further objections were advanced at the hearing.

[117] I begin with the framework outlined in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23. The admissibility inquiry has two stages. At the first stage, the petitioner must establish the threshold requirements of admissibility: logical relevance, necessity for the evidence, the absence of an exclusionary rule, and a properly qualified expert. If the evidence survives the first stage, then there is a gatekeeping function at the second stage — a balancing of potential risks versus benefits of admitting the evidence.

[118] Are Pastor Cox’s opinions logically relevant? From the petitioner’s perspective, this case is about the collision of evangelical Christian beliefs with the Nuu-chah-nulth smudging practice. The opinions in the report are clearly relevant to these issues. This evidence assists the petitioner in proving that her beliefs are consistent with the beliefs of other adherents of her faith: *Anselem*, at para. 54. And, the opinions are necessary to assist the trier of fact. The Cox report provides detailed information about evangelical Christianity, much of which is outside a trier of fact’s knowledge and range of experience. (It is important to note that at the time I ruled the Cox report admissible, the issue of the petitioner’s belief having a nexus with religion was a live issue; the School District’s concession on nexus with religion was made during closing argument.)

[119] Is there an exclusionary rule that catches the opinions in this report? The School District submits that Pastor Cox has made findings of fact, made argument in the guise of opinion, and failed to comply in other respects with the requirements of Rule 11(6)(1). These arguments are without merit. In his eight-page report and brief covering affidavit, the expert detailed his qualifications, listed the material he was

provided with, summarized his understanding of the facts, outlined relevant aspects of evangelical Christian doctrine, set out his opinions on the issues left to him in the instruction letter from counsel, and provided reasons for those opinions. In all of this, the expert did not run afoul of any exclusionary rules.

[120] Is Pastor Cox properly qualified to express the opinions on evangelical Christian beliefs that are set out in his report, including the ability to give fair, objective and non-partisan evidence? First, the expert is by dint of education and experience well-qualified to give opinion evidence on evangelical Christian beliefs, including those aspects of evangelical Christian doctrine set out in the report. I summarized Pastor Cox's qualifications earlier in these reasons. Second, I do not accept the submission that bias is demonstrated by the fact that the expert served in the recent past as pastor of the church attended by the petitioner and her family. Trial judges often hear the opinion evidence of litigants' former (and even current) doctors and accountants. The question is whether the relationship results in the expert being "unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance": *White Burgess*, at para. 50. Pastor Cox has certified that he is aware of his duty to assist the Court and not assume the role of advocate. No realistic concern about failing to comply with these duties has been shown. In *White Burgess*, at para. 49, the Court provided guidance that anything less than clear unwillingness or inability to comply with these duties will not lead to exclusion at the first stage of the analysis.

[121] At the gatekeeper stage, I considered the costs and benefits of admitting the Cox report. This second stage has been described as an application of the general exclusionary rule, i.e., whether the probative value of the evidence exceeds its potential for prejudice: *R. v. Bingley*, 2017 SCC 12 at para. 16. Relevance, reliability, and necessity is weighed against consumption of time, prejudice, and confusion: *R. v. J.-L.J.*, 2000 SCC 51 at para. 47; *White Burgess*, at para. 24. I was satisfied that the evidence has sufficient reliability and utility to be capable of carrying probative value, especially on the issue of whether the beliefs of the petitioner and her children have a nexus with religion. On the other side of the scale, there was

little to consider by way of potential consumption of time, prejudice, or confusion. On balance, I exercised my discretion to admit the evidence. (As it transpired, the cross-examination of Pastor Cox occupied less than an hour of court time, and very little time was spent in closing argument addressing this expert's evidence.)

Summary and Order

[122] The petitioner has failed to establish that the Nuu-chah-nulth smudging in her children's classrooms or the prayer said by the hoop dancer at the school assembly interfered with her or her children's ability to act in accordance with their religious beliefs. Accordingly, no infringement of the petitioner's or her children's freedom of religion has been proved, and it is unnecessary to consider the question of whether the alleged limitation on freedom is justified under s. 1 of the *Charter*. The petition is dismissed.

[123] I have not heard submissions on costs; my tentative view is that costs ought to follow the event such that the petitioner pay the School District's costs on Scale B. I am inclined to make no order as to costs in relation to the AGBC or the NTC. If any party or the intervenor seeks a different costs order, they have liberty to apply provided that Supreme Court Scheduling is notified of such intention by 7 February 2020.

"Thompson J."