FORM 66
RULES 16-1(2) and 16-1(19)(b)(ii)

File No.
Chilliwack Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

LYNDA DI ARMANI

Petitioner

and

THE BOARD OF SCHOOL TRUSTEES OF
SCHOOL DISTRICT NO. 33 (CHILLIWACK)

Respondent

WRITTEN ARGUMENT OF THE PETITIONER

Marty Moore
Counsel for the Petitioner
Lynda Di Armani

Lindsie M. Thomson
Counsel for the Respondent
Board of School Trustees of School District No. 33 (Chilliwack)

INDEX

PART I: FACTUAL BASIS

The Parties

1. Lynda di Armani ("**Ms. di Armani**") is a resident of Chilliwack, BC and a grandmother of two children in the BC education system.[1] Ms. di Armani worked for the Chilliwack School District for approximately 10 years concluding in 2017, primarily as an educational assistant for students with special needs.[2] She maintains a sincere concern for the well-being of children, which has led her to regularly seek to provide input to the Board of School Trustees of School District No. 33 (Chilliwack) (the "**Board**") at its public Board meetings.[3] Ms. Di Armani continues to attend and seek to participate at Board meetings.[4]

2. The Board is established pursuant to section 30 of the *School Act*, R.S.B.C. 1996, c. 412 (the "***School Act***") with trustees elected every four years pursuant to section 35(1) of the *School Act*. In June 2023, the Chair of the Board was Trustee Willow Reichelt (the "**Chair**") and she remains the Chair to this date.[5] Likewise, in June 2023, the Vice-Chair of the Board was Trustee Carin Bondar (the "**Vice-Chair**") and she remains the Vice-Chair to this date.[6]

Context of Public Board Meetings

3. Section 69 of the *School Act* provides that "meetings of the board are open to the public" unless "in the opinion of the board, the public interest so requires, persons other than trustees may be excluded from a meeting."[7]

4. Pursuant to the *School Act*, including section 69, the Board adopted "BYLAW 5 Board Meeting Procedures" ("***Bylaw 5***") which provides at section 5 for "Public Participation in the Public Meeting."[8]

5. Section 5 of Bylaw 5 provides as follows:

> **5. Public Participation in the Public Meeting**

---

[1] Affidavit of Lynda di Armani sworn on October 6, 2023 ("First di Armani Affidavit") at para 2.
[2] First di Armani Affidavit at para 3.
[3] First di Armani Affidavit at para 4.
[4] Second Affidavit of Lynda di Armani sworn on December 6, 2024 (Second di Armani Affidavit) at para 16.
[5] First di Armani Affidavit at para 17. Second di Armani Affidavit at para 2
[6] First di Armani Affidavit at para 18. Second di Armani Affidavit at para 3.
[7] *School Act*, [RSBC 1996] c 412, s 69(1) and (2).
[8] First di Armani Affidavit, Exhibit "A".

5.1. Communication with the public is extremely important. The public Board meeting is the formally designated means of transacting Board business. Two public participation periods are therefore provided solely as a means for ensuring that community members who are present in the audience have an opportunity to provide comments and/or ask questions about business or issues pertaining to the Board agenda.

5.2. The public participation periods are open to comments and/or questions from the public concerning the agenda.
- 5.2.1. Each public participation period will generally be allotted fifteen minutes.
- 5.2.2. Speakers must identify themselves before speaking.
- 5.2.3. Individuals will be limited to a total of two minutes per speaker.
- 5.2.4. Persons addressing the Board are reminded that, when requests or questions are directed to the Board, actions or answers to many questions may be deferred pending Board consideration.
- 5.2.5. The Chair may indicate another means of response if question cannot be answered at the time.

5.3. Community members who have other comments or questions are encouraged to contact Trustees or the Superintendent or, if desired, to appear as a formal delegation on the Board agenda in accordance with section six of this Bylaw.

5.4. Matters currently under negotiation or litigation, or related to personnel or student circumstances, are not permitted and will not be addressed in the public participation periods.

5.5. The Chair shall have the authority to terminate the remarks of any individual who does not adhere to this Bylaw.

June 13, 2023 Board Meeting

6. On June 13, 2023 the Board held a "Regular Public Board Meeting" (the "**Meeting**").

7. The Board published an agenda for the Meeting (the "**Agenda**").[9] Item 5.3 on the Agenda was described as, "Board Support for National Pride Month in Canada." A report titled, "Board of Education Decision Report" dated June 13, 2023 from Trustee Teri Westerby was included as part of the Trustee Written Reports on the Agenda,[10] in which Trustee Westerby recommended that the Chilliwack School District post a message in recognition of National Pride Month and install a third flagpole to fly the Pride flag for the month of June.

[9] *Ibid.* at Exhibit "D".
[10] *Ibid*. at Exhibit "D" see item 3.5 and Board of Education Decision Report.

8. During the Meeting, the public was given the opportunity to address the Board, which is provided for on the Agenda at item 7, "Public Participation – Comments/Questions Concerning The Agenda" (the "**Public Participation**").

9. Ms. di Armani was the first speaker to give remarks during the Public Participation.[11] Ms. di Armani sought to address Trustee Westerby's recommendation that the Board support Pride month.[12] She sought to raise a concern about what she perceived as a conflict of interest since Trustee Westerby was also the Director of Marketing for the local Pride Society.[13]

10. Ms. di Armani opened by stating her name and identifying the agenda item she was speaking to, before starting to make her first point that a school trustee must never use their position for personal benefit.[14] When she mentioned that Trustee Westerby was bringing forward a motion to put up a new flag pole, she was immediately interrupted by the Vice-Chair raising a purported point of order.[15] Ms. di Armani was then cut off by the Chair and her microphone was muted, preventing Ms. di Armani from completing her statement.[16]

11. The Vice-Chair's purported point of order was that Ms. di Armani was allegedly being discriminatory towards a member of the Board.[17] Ms. di Armani attempted to respond; however, her microphone remained muted.[18]

12. The Chair upheld the point of order and advised Ms. di Armani that she was not permitted to refer to a trustee by name during the Meeting, despite the facts that (i) Trustee Westerby's name appeared on the Agenda numerous times; (ii) Trustee Westerby was the one who had put forward the Agenda item that Ms. di Armani was attempting to address in her statement; and (iii) Ms. di Armani was raising a concern about Trustee Westerby's dual responsibilities as a Trustee and also as Director of Marketing for the Chilliwack Pride Society.[19]

---

[11] First di Armani Affidavit at para 18.
[12] First di Armani Affidavit at para 18.
[13] First di Armani Affidavit at para 14 and Exhibit "E".
[14] First di Armani Affidavit at para 18.
[15] First di Armani Affidavit at para 18.
[16] First di Armani Affidavit at para 19.
[17] First di Armani Affidavit at para 19.
[18] First di Armani Affidavit at para 19.
[19] First di Armani Affidavit at para 19-21.

13. The Chair further stated her view that there was no conflict of interest.[20] Ms. di Armani attempted to respond; however, her microphone was still muted.[21] The Chair then proceeded to mute the entire recording of the Meeting, preventing anyone listening to the Meeting electronically to hear Ms. di Armani's response.[22]

14. The Chair advised Ms. di Armani that she could speak to her own feelings about Pride, but if she called out a trustee by name again, she would "have to have a seat."[23]

15. Ms. di Armani's microphone was then turned back on and she attempted in her statement to raise the issue of whether other trustees (without naming them) were also members of the Pride society, hence presenting other perceived conflicts of interest.[24] She was again abruptly cut off by the Vice-Chair, who again raised a purported point of order.[25] Ms. di Armani's microphone was immediately muted for a second time.[26]

16. The Vice-Chair's alleged point of order was that there can be no conflict of interest when discussing a human right.[27] Without any substantiation of this claim, the Chair agreed with the Vice-Chair on this point and upheld the claimed point of order.[28]

17. Ms. di Armani's microphone was then turned back on. She then moved on with her statement, attempting to raise another concern, being that the Board, by supporting the concept of raising flags for special interests, would violate the state duty of neutrality. She was again (for a third time) abruptly cut off when another point of order was asserted by the Vice-Chair. Ms. di Armani's microphone was silenced again, for the third time.[29] The Vice-Chair stated that "*basic human rights include reflection of basic human rights*" [*sic*] and that she didn't feel that there was a point to what Ms. di Armani was saying.[30] The Chair upheld

[20] First di Armani Affidavit at para 19.
[21] First di Armani Affidavit at para 19.
[22] First di Armani Affidavit at para 19.
[23] First di Armani Affidavit at para 20.
[24] First di Armani Affidavit at para 22.
[25] First di Armani Affidavit at para 22.
[26] First di Armani Affidavit at para 22.
[27] First di Armani Affidavit at para 23.
[28] First di Armani Affidavit at para 23.
[29] First di Armani Affidavit at para 24.
[30] First di Armani Affidavit at para 25; Bedford Affidavit at Exhibit "A", page 5, lines 14-15.

the claimed point of order and further took issue with the term "special interests" stating that LGBTQ people are not special interest groups but rather are members of society.[31]

18. When Ms. di Armani's microphone was turned back on, she attempted to explain her concern by saying that both non-government and special interest flags create segregation, discrimination and discontent (all statements made by Ms. Di Armani during the Public Participation are referred to herein collectively as the "**Silenced Statements**").[32] Subsequently, the Chair interrupted Ms. di Armani, claiming: "that was a point of order, you can sit down now."[33]

19. The Chair silenced Ms. di Armani's microphone for a fourth time within a time span of 2 minutes and 30 seconds, and again silenced the entire recording (all such interrupting, silencing, muting and ultimate termination of Ms. di Armani's remakrs are referred to herein collectively as the "**Termination Decision**"), preventing anyone listening to the recording from hearing Ms. di Armani's response.[34] The audio on the recording was not restored until another speaker gained the podium to address the Board.

Recording Prohibition

20. Prior to being permitted to enter the Meeting, members of the public, including Ms. di Armani, were required by the Board to sign a form acknowledging that "no video/audio recordings are permitted, with the exception of authorized media."[35] After contesting this prohibition and being denied entry by the Board's security personnel, Ms. di Armani was compelled to adhere to the prohibition to gain entry to the public Meeting.[36]

21. The Board Superintendent, Rohan Arul-Pragasam (the "**Superintendent**") deposes that he "assist[s] the Board in carrying out its duties by implementing safety, security and other measures applicable to those entering the Board offices for the purpose of attending board meetings".[37] He admits to implementing forms that prohibited recordings at both the June

[31] First di Armani Affidavit at para 26.
[32] First di Armani Affidavit at para 27.
[33] First di Armani Affidavit at para 27.
[34] First di Armani Affidavit at para 27.
[35] First di Armani Affidavit at Exhibit "B".
[36] First di Armani Affidavit at para 8-11.
[37] Second Arul-Pragasam Affidavit at para 9.

13, 2023 Board meeting[38] and the February 21, 2023 Board meeting.[39] The Superintendent claims that he prohibited recording at those meetings for reasons specific to those particular meetings and then concludes his affidavit by stating that he has not used the forms prohibiting recording at the June 13, 2023 and February 21, 2023 meetings for any other meetings.

22. What is not noted by the Superintendent in his October 2024 affidavit is that sometime after the June 2023 meeting in the second half of 2023, a sign strictly prohibiting recording was posted on the front doors of the Board office where the Board meetings are held (the "**2023 Recording Prohibition Sign"**).[40] The 2023 Recording Prohibition Sign specifically stated: "We take the privacy of our…trustees seriously and for that reason no outside video or audio recording is permitted under any circumstance in the Board Office"; it also noted that "any person attending a Board meeting and causing a disturbance will be asked to vacate the premises".[41]

23. The prohibition on recording on Board property including at public Board meetings was formalized on May 13, 2024, in "Administrative Procedure 481 Audio / Video Recordings, Photography, and Live Streaming" ("**AP 481**").[42] AP 481 states in part:

> Audio / Video recording, photography, and live streaming is NOT permitted at non-authorized District events and/or circumstances. These may include, but are not limited to:
>
> • Meetings of the Board of Education

24. The 2023 Recording Prohibition Sign was replaced in 2024 by an updated sign in accordance with AP 481 which prohibited recording, including at Board meetings (the "**2024 Recording Prohibition Sign**"), which states in part:

> NO AUDIO / VIDEO RECORDINGS, PHOTOGRAPHY or LIVE STREAMING
>
> Outside audio / video recordings, photos and / or live streaming is NOT permitted on School District Property.[43]

---

[38] *Ibid* at para 11.
[39] *Ibid* at para 18.
[40] Second di Armani Affidavit at para 8, Exhibit "A".
[41] *Ibid*
[42] Second di Armani Affidavit at para 5, Exhibit "C"
[43] Second di Armani Affidavit at para 9, Exhibit "B"

25. The recording prohibitions described above at paragraphs 20-24 are referred to herein collectively at the "**Recording Prohibition**".

26. Ms. di Armani states: "I understand that recording is still strictly prohibited at public Board meetings."[44]

Context of censorship at Board meetings

27. Ms. di Armani attests to a pattern of censorship at Board meetings both before and after the June 13, 2023 meeting, which motivates her to advance this case challenging Board censorship in the public interest.[45]

PART II: ISSUES

28. Ms. di Armani submits that the following are raised by the Amended Petition and the Amended Response to Petition of the Board:
    A. What is the appropriate standard of review?
    B. Is the *Charter* section 2(b) issue in relation to the Termination Decision moot?
    C. Was the Termination Decision *ultra vires* the authority of the Board Chair?
    D. Did the Termination Decision unreasonably violate *Charter* freedoms of Ms. di Armani and members of the listening public?
    E. Does the Recording Prohibition violate the *Charter* without demonstrable justification?
    F. What are the appropriate remedies?

PART IV: LEGAL ANALYSIS

A. What is the appropriate standard of review?

29. In review of administrative decisions, *Canada (Minister of Citizenship and Immigration) v Vavilov*[46] announced a presumption that the standard of review is reasonableness. While this standard applies even in the review of whether the decision maker had the authority to act as it did, reasonableness review is "robust and responsive to context."[47] In this context,

---

[44] Second di Armani Affidavit at para 11.
[45] Second di Armani Affidavit at paras 16, 26.
[46] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23.
[47] *Vavilov* at para 65-68.

"precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker — perhaps limiting it to one."[48]

30. The Supreme Court of Canada has recently provided clarity on when the presumption of reasonableness review is rebutted concerning constitutional questions. The correctness standard applies to the questions of: 1) whether the *Charter* applies[49]; and 2) whether a *Charter* right arises, the scope of its protection and the appropriate framework of analysis.[50] The Court explained:

> The determination of constitutionality calls on the court to exercise its unique role as the interpreter and guardian of the Constitution. Courts must provide the last word on the issue because the delimitation of the scope of constitutional guarantees that Canadians enjoy cannot vary "depending on how the state has chosen to delegate and wield its power"[.][51]

31. Failure of a decision maker to account for a *Charter* protection or value[52] engaged by its decision is a "fatal error."[53]

32. Therefore, in reviewing the Termination Decision, the correctness standard of review applies to: 1) whether the *Charter* applies; 2) whether a *Charter* protection is engaged; 3) the scope of the *Charter* protections; and 4) the appropriate framework to analyze the *Charter* protections. The reasonableness standard applies to: 1) whether the Chair exceeded her authority; and 2) whether the Termination Decision proportionately balanced the *Charter* protections engaged with the applicable statutory objectives.

33. In reviewing whether the Recording Prohibition is constitutional, the *Oakes* framework applies on a correctness standard, but the Recoding Prohibition is a rule of general application applying to all persons attending Board meetings.

---

[48] *Vavilov* at para 68.
[49] *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22 [*York Region*] at para 62.
[50] *York Region* at para 63.
[51] *York Region* at para 64 [internal citation omitted].
[52] *See Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 [*CSFTNO*].
[53] See *York Region* at paras 69, 94; *Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority*, 2018 BCCA 344, at paras 54-55; *Guelph and Area Right to Life v City of Guelph*, 2022 ONSC 43, at para 78-79.

B. Is the Charter section 2(b) issue in relation to the Termination Decision moot?

34. The Respondent claims that "[t]he issue of the Petitioner's freedom of expression in relation to the Decision is Moot" and then asserts that "the Court should not depart from the ordinary rule to decline to hear a moot petition."[54]

35. The *Charter* section 2(b) issue with the Board's termination of di Armani's presentation at the Meeting is not moot. Even if this issue were moot, consideration of the genuine adversarial context, the interests of judicial economy and the court's appropriate adjudicative role weigh in favour of adjudicating this issue, which will also have a broad potential impact for the participation of the public at large in Board meetings.

36. Whether a *Charter* claim related to a past occurrence is moot was addressed by the Saskatchewan Court of Appeal in the *Dubois* case,[55] where the Court ruled that a claim by the appellants that the respondents had violated their freedom of expression was not moot. There the respondents had ordered the appellants to cease their symbolic protest in front of the Saskatchewan legislature. When they refused to comply, the appellants were detained by police and removed. The appellants sought, among other things, "a declaration that the actions taken by the respondents on June 18, 2018, violated their freedom of expression as guaranteed by s. 2(b) of the *Charter*".[56] Although bylaws relied on in part to justify the government's actions in *Dubois* had been repealed, the other regulatory basis relied on for the government's *Charter*-infringing actions remained in force and Chief Justice Richards found that therefore he was "obliged to conclude" that "the freedom of expression aspect of this appeal is not moot."[57]

37. The issue of whether the Termination Decision unreasonably infringed Ms. di Armani's *Charter* rights is not moot. The substratum of this issue still exists, including the same Bylaw provisions governing public participation in Board meetings, the same Chair, the same Vice-Chair and Ms. di Armani's continued exercise of her *Charter* rights by participating at Board meetings. Ms. di Armani's *Charter* freedom of expression was directly and significantly infringed by the Termination Decision. The Board maintains that

---

[54] Amended Response to Petition, at paras 26-39.
[55] *Dubois v Saskatchewan*, 2022 SKCA 15 [*Dubois*]
[56] *Dubois* at para 51.
[57] *Dubois* at para 59-61.

its Termination Decision was justified.[58] This Court ought to find that Ms. di Armani's claim seeking a declaration that the Board violated her freedom of expression is not moot.[59]

38. Ms. di Armani does not seek to have the Termination Decision remitted to the Board, because seeking an order remitting the Termination Decision to the Board would be pointless: Ms. di Armani was attempting to raise concerns about an agenda item that passed on June 13th after she was silenced. For the same reason, Ms. di Armani did not choose to give her June 13th presentation at the December 2023 meeting as the Board offered: the resolution passed by Board on June 13th was not up for debate in December 2023—her speaking would have been, in her opinion, an inappropriate use of Board meeting time, speaking to an issue that was not on the agenda for decision, and potentially in violation of the Board's own Bylaw 5.[60] Ms. di Armani seeks to participate in the Board's democratic decision-making processes at Board meetings, not in a mere simulation of democracy.[61]

39. The ineffectiveness of remitting a matter to the decision maker does not render a substantive *Charter* issue moot. If it did, then the issue of the Termination Decision's infringement of Ms. di Armani's *Charter* rights would have been moot on June 13th as soon as the Board voted on the agenda item on which Ms. di Armani sought to raise her concerns for Board consideration. All challenges to Board decisions censoring presentations from the public at Board meetings would likewise be moot, unless those cases could be heard and decided before the Board made decisions on those agenda items addressed by the censored presentations.[62]

40. This Court should rely on *Trang v Alberta*, where the Court of Appeal in Alberta held:

> In our view, the proceedings are not moot. There is clearly a live controversy between the parties as to whether or not the respondents' charter rights were breached while they were incarcerated. An action for a declaration may proceed in the absence of a claim for any other remedy.[63] In the face of Ms. di Armani's claim for a *Charter* declaration that its actions unjustifiably

---

[58] Response to Petition at para 11.
[59] *See Elementary Teachers Federation of Ontario v. York Region District School Board*, 2020 ONSC 3685 at para 63 ("there remains a live controversy over the question of the reasonable expectation of privacy of teachers in the circumstances. The issue is not moot.")
[60] Second di Armani Affidavit at paras 12-15.
[61] See First di Armani Affidavit at para 4; Second di Armani Affidavit at para 13
[62] See Bylaw 5.
[63] 2005 ABCA 66 at para 5

breached her freedom of expression, the Board maintains that its actions were justified. There is clearly a live controversy on that issue. Whether or not it is appropriate to grant Ms. di Armani the declaration she seeks is a related but different question than whether her claim is moot.[64]

41. The practical utility of the declaration Ms. di Armani seeks is manifold. Ms. di Armani continues to speak at public Board meetings, and the Board continues to periodically censor her comments and questions.[65] Ms. di Armani is not alone in experiencing this censorship, as the Board also regularly censors the comments of other members of the public. The Board, including the Chair, continues to act on the basis that it has authority to censor based, not on those grounds outlined in section 5 of its Bylaw 5, but rather on whether one or more Board members disagree with the censored comments. In short, the Board continues to deny or ignore its *Charter* obligations to respect freedom of expression at public Board meetings, including both the right to speak at public participation periods and the right to hear such speech.

42. This case is readily distinguishable from the 2023 Court of Appeal decision in *Kassian v British Columbia*.[66] In that case, Justice Groberman explained how the claims seeking *Charter* declarations were moot because, "the declaration is not sought as redress for past actions alleged to have been unlawful. Rather, the only issue is whether a law that has long since been rescinded was constitutional."[67] In contrast, Ms. di Armani specifically seeks a *Charter* declaration that the Board's past actions were unlawful and unconstitutional.

43. Alternatively, if the Court were to find the issues are moot, it should exercise its discretion and hear the judicial review in consideration of the *Borowski* factors:

    i. Whether there is an adversarial context;

    ii. Whether judicial economy favours hearing the matter; and

---

[64] See *Trang v. Alberta (Edmonton Remand Centre)*, 2007 ABCA 263, 412 A.R. 215, at para. 15. The test for whether a declaration should be granted is stated by the Supreme Court of Canada as follows:

> The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties[.]

Daniels v. Canada (Indian Affairs and Northern Development), 2016 SCC 12, at para 11.

[65] See Second di Armani Affidavit at paras 16 and 26.

[66] 2023 BCCA 383 [*Kassian*].

[67] *Kassian* at para 33.

iii. That the Court is within its proper role.[68]

44. The parties' pleadings, arguments and evidence before the Court in this matter demonstrate an adversarial context necessary and appropriate for the thorough consideration and determination of an issue. There is benefit for the Court to address a matter that is already the subject of a full record and argument.

45. Further, as discussed above, if the ineffectiveness of remitting a censorship decision back to the Board for reconsideration renders the matter moot, then every Board censorship decision becomes moot as soon as the Board votes on the agenda item on which the censored comment was directed. This would put Board censorship decisions squarely within the category of matters of a "recurring nature but brief duration" warranting the expenditure of judicial resources even on a moot matter.[69] Otherwise, such censorship decisions of the Board would effectively be immune from review and *Charter* scrutiny.

46. Finally, as a section 96 Court with inherent jurisdiction and the constitutional responsibility to sit in judicial review over statutory delegates, it is the proper role of this Court to review the impugned decision making of the Board, especially in determining whether *Charter* freedoms are engaged, which question "calls on the court to exercise its unique role as the interpreter and guardian of the Constitution."[70]

C. The Termination Decision exceeded the authority of the Board Chair

47. The legal foundation for Ms. di Armani's argument on this point is outlined in *Dunsmuir*:

> Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. **A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law.** Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; also *Dr. Q v.*

[68] *Borowski v. Canada*, [1989] 1 SCR 342 [*Borowski*]at pp. 358-364.
[69] *See Borowski* at p 360.
[70] *York Region* at para 64.

> *College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21.[71]

48. The BC legislature has delegated to the Board the statutory authority to establish procedures governing the conduct of its meetings at section 67(5) of the *School Act*:

> A board must establish procedures governing the conduct of its meetings and must permit any person to inspect those procedures.

Pursuant to this authority, the Board adopted Bylaw 5 Board Meeting Procedures, including section 5, for "Public Participation in the Public Meeting". The Board has further delineated particular parameters and specific limits on such participation:

a. Speakers must identify themselves before speaking[72];
b. Speakers are limited to a total of two minutes[73];
c. Matters currently under negotiation or litigation, or related to personnel or student circumstances are not permitted and will not be addressed.[74]

49. The Board delegated limited authority to the Chair in overseeing this public participation:

> 5.5. The Chair shall have the authority to terminate the remarks of any individual who does not adhere to this Bylaw.

(the "**Termination Authority**").

50. In making the Termination Decision however, the Chair terminated Ms. di Armani's remarks not for failing to adhere to Bylaw 5—for which the Chair had authority to terminate remarks—but rather based on extraneous considerations irrelevant to the Chair's Termination Authority under Bylaw 5.

51. The *general* reference in Board Policy 121[75] and its recognition of a Chair's authority to enforce "appropriate procedures and parliamentary processes" at Board meetings does not supplant the *specific* authority under which the Chair may terminate the remarks of individuals during the public participation portion of Board meetings for not adhering to Bylaw 5.

---

[71] *Dunsmuir* at para 29 [emphasis added]. While *Dunsmuir*'s standard of review analysis has been overruled by *Vavilov*, *Dunsmuir* remains good law as to the substantive elements of the rule of law. See *Vavilov* at para 82, citing *Dunsmuir*.
[72] Bylaw 5 s 5.2.2.
[73] Bylaw 5 s 5.2.3.
[74] Bylaw 5 s 5.4
[75] Arul-Pragasam Affidavit 1, Exhibit "D".

52. It was unreasonable for the Chair to exercise her Termination Authority on the grounds that Ms. di Armani's remarks allegedly transgressed certain "requirements" that are not in reality found in Bylaw 5 or other Board-adopted procedures, namely:

    a. a "prohibition" on naming individual Board Trustees;
    b. a "prohibition" on raising a potential conflict of interest in relation to a matter viewed by the Chair as being about human rights; and
    c. a "prohibition" on implying that the Pride flag is a special interest flag;

. (the "**Arbitrary Restrictions**").

53. These Arbitrary Restrictions imposed by the Chair at the June 2023 meeting, along with the urging of the Vice-Chair, could not possibly have been inspected, and therefore known, by a person, as required by section 67(5) of the *School Act*.

54. It was unreasonable for the Chair to interpret her Termination Authority as encompassing the power to terminate Ms. di Armani's remarks on the basis of her alleged non-compliance with the Arbitrary Restrictions. To hold otherwise, would be to interpret the Termination Authority as allowing that action to "be taken on any ground or for any reason that can be suggested to the mind of the administrator"; Canadian jurisprudence has long held that delegates cannot exercise their authority arbitrarily.[76]

55. A recent example of this Court holding a delegate's action to be *ultra vires* is *Blueleader Enterprises Ltd. v Director of Commercial Vehicle Safety,* 2024 BCSC 850. There, the Manager of Vehicle Inspection and Standards had issued guidance bulletins prohibiting the inspection of certain vehicles in order to close a perceived loophole being utilized to permit ex-military vehicles to be driven on highways. While Justice Elwood noted that the Manager's view "may well be a reasonable interpretation of the regulations", the Manager "did not have statutory authority to prohibit the inspection of utility vehicles or any other vehicles" and "could not create such a prohibition on inspection without the appropriate statutory authority."[77]

---

[76] *Roncarelli v Duplessis*, [1959] SCR 121 at p 140.
[77] *Blueleader Enterprises Ltd. v Director of Commercial Vehicle Safety*, 2024 BCSC 850 [Blueleader] at paras 74, 76 and 81.

56. To reach this conclusion, Justice Elwood reviewed the authority of the Manager under the regulations and the guidance bulletins issued by the Manager. Justice Elwood had noted earlier that, "[w]hile some parts of the Bulletins are properly understood as interpretive guidance, other parts purport to establish rules as to what constitutes a proper inspection under the regulatory regime that do not derive directly from the regulations themselves."[78] In regard to the regulations, Justice Elwood noted that:

> The existing regulations restrict the use of a utility vehicle on a highway; however, they no [*sic*] not prohibit the inspection of a utility vehicle. Instead, they exempt utility vehicles from the inspection requirement for imported vehicles. An exemption from inspection cannot be relied on as the source of a prohibition on inspection.[79]

57. Justice Elwood found that if the loophole was to be closed, "it must be closed by regulation or a valid exercise of the power delegated to the Director in the [regulations]. It cannot be closed with an information bulletin from the Manager."[80]

58. Likewise, in the present case, the Chair had no power to exercise her Termination Authority for alleged failures to comply with the Arbitrary Restrictions. The Chair's Termination Authority is limited to situations where speakers fail to follow the requirements of Bylaw 5. Should the Board desire to expand the Chair's Termination Authority, it is open to the Board—which has the statutory authority to establish procedures governing the conduct of its meetings—to amend Bylaw 5 as desired, provided of course that such amendments are legally and constitutionally valid.

59. The Board is well aware of this option, and in fact the Vice-Chair did propose amendments to Bylaw 5 to impose more expression restrictions during public participation periods at Board meetings, which would have increased the Chair's Termination Authority.[81] Despite getting Trustee Westerby to second her motion, the Vice-Chair withdrew her motion, and section 5 of Bylaw 5 has consequently remained unchanged.[82]

---

[78] *Blueleader* at para 64.
[79] Ibid at para 76.
[80] Ibid at para 77.
[81] See Board Agenda, December 5, 2023, attached as Exhibit "D" to the Second di Armani Affidavit.
[82] See Section 5.2, Board Minutes, December 5, 2023, attached as Exhibit "E" to the Second di Armani Affidavit.

60. Because the Termination Decision was made without the appropriate statutory authority, the Termination Decision should be declared *ultra vires*.

D. The Termination Decision unreasonably violated Charter freedoms of Ms. Di Armani and members of the listening public

Application of the Charter

61. As a creature of statute, the Board is a state-actor administrative body, carrying out its statutory mandate pursuant to the *School Act*, whose conduct including the Termination Decision, must meet *Charter* scrutiny.

62. It has long been acknowledged that the *Charter* applies to public school boards in British Columbia.[83] In *York Region*, the Supreme Court of Canada definitively held that the *Charter* applies to Ontario public schools, because they are, "in effect, an arm of government, in that they 'exercise powers conferred on them by provincial legislatures, powers and functions which they would otherwise have to perform themselves'".[84] This conclusion for Ontario public school boards applies with equal force to BC public school boards. The preamble of the *School Act* highlights the crucial government objective for, and role of, the BC school system to BC society. The *School Act* sets out the extensive powers the Minister of Education[85] and the Lieutenant Governor in Council[86] have over BC public school boards.

What *Charter* protections are engaged

63. Justice Côté, writing for the unanimous Court in *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*,[87] stated that "[u]nder the *Doré* approach, a reviewing court must begin by determining whether the administrative decision at issue engages the *Charter* by

---

[83] *British Columbia Public School Employers' Assn. v. B.C.T.F.*, 2005 BCCA 393, 257 D.L.R. (4th) 385, at paras 18-19; *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710, Gonthier J., dissenting (Bastarache J. concurring) at para 121: "Although the issue does not appear to have been expressly considered by this Court in the past, in my view, there can be no doubt that the School Board is a branch of government and thus subject to the *Charter* by operation of s. 32"; see also *York Region* at para 75.
[84] *York Region*, at para 79 (quoting *Chamberlain*, at para 121, which in turn was *quoting Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at para 51).
[85] See especially *School Act*, ss 168-168.04.
[86] See *School Act*, ss 172-176.
[87] 2023 SCC 31.

limiting *Charter* protections — both rights and values".[88] Justice Côté noted that "it has consistently been held that the *Doré* framework applies not only where an administrative decision *directly* infringes *Charter* rights but also in cases where it simply engages a value underlying one or more *Charter* rights, without limiting these rights".[89] She continued:

> [65] This is the case because **administrative decision makers have an obligation to consider the values relevant to the exercise of their discretion, in addition to respecting *Charter* rights**. There can be no doubt about this, because "[t]he Constitution — both written and unwritten — dictates the limits of all state action" (*Vavilov*, at para. 56). As L'Heureux-Dubé J. clearly stated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, **a discretionary decision, to be reasonable, must be made in accordance with the "fundamental values of Canadian society"** as reflected in the *Charter* (para. 56). Relying on this statement, **Abella J. held in *Doré* that discretionary decisions must "*always*" take *Charter* values into consideration** (para. 35 (emphasis in original)).
>
> [66] **An administrative decision maker must consider the *relevant* values embodied in the *Charter***, which act as constraints on the exercise of the powers delegated to the decision maker. I refer in this regard to the considerations identified by this Court in *Vavilov*: ". . . a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision . . ." (para. 105). In practice, it will often be evident that a value must be considered, whether because of the nature of the governing statutory scheme (at para. 108), because the parties raised the value before the administrative decision maker (at paras. 127-28), or because of the link between the value and the matter under consideration (P. Daly, "The *Doré* Duty: Fundamental Rights in Public Administration" (2023), 101 *Can. Bar Rev.* 297, at p. 309). For example, it is obvious that the development of policies and the making of decisions that are likely to have an impact on a minority language educational environment require consideration of the values underlying s. 23 of the *Charter* (p. 309). A decision cannot be unreasonable because the decision maker failed to consider a *Charter* value that was not relevant for the purposes of its decision. However, if the decision maker takes a relevant value into account in its decision while opting to prioritize another objective, it must be concluded that the decision engages the *Charter*.
>
> [67] Once the reviewing court has determined that the impugned administrative decision infringes *Charter* rights or limits the values underlying them, the court must, under the approach laid down in *Doré*, determine whether the decision is reasonable through an analysis of its proportionality. This involves assessing whether the exercise of discretion reflects a "proportionate balancing" of *Charter* rights and the values underlying them, on the one hand, with the statutory objectives in respect of which the discretion was granted, on the other (para. 57; *Loyola*, at paras. 37 and 39; *Trinity Western University*, at para. 58).

[88] *CSFTNO* at para 61 [internal cites omitted].
[89] *CSFTNO* at para 64.

64. In determining whether a decision engages *Charter* rights or the values underlying them, it is not necessary that those *Charter* rights or values belong to the petitioner: the focus is on whether the decision limited a *Charter* right or its underlying values, not on whether the petitioner's own *Charter* interests were engaged. [90]

65. To determine whether freedom of expression is infringed, a court must ask:

> (1) Does the activity in question have expressive content, thereby bringing it, *prima facie*, within the scope of s. 2(*b*) protection? (2) Is the activity excluded from that protection as a result of either the location or the method of expression? (3) If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action?[91]

66. Ms. di Armani's comments to the Board, including the Silenced Statements, unquestionably have expressive content. The setting of the expression, during a specifically designated public participation period during the public Board meeting, was expressly designed so the Board could hear Ms. di Armani's questions and concerns. Yet, the very purpose of the Termination Decision was to stop Ms. di Armani from further sharing her concerns with the Board. The repeated interrupting, muting, and ruling against her on spurious "points of order," leading to the termination of Ms. di Armani's presentation had the effect of infringing her *Charter* freedom of expression.

67. Likewise, by denying Ms. di Armani's ability discuss what she believed to be a conflict of interest, the Board infringed her freedom of thought, opinion and belief. In specific regard to freedom of thought, but relevant as well to opinion and belief, Prof. Dwight Newman explains:

> Freedom of thought will be infringed when state action infringes upon the fundamental interest that it protects, such as when (1) the state or state actors engage in overly intrusive investigation of an individual's thoughts, with

---

[90] See *CSFTNO* at para 74: "**While no infringement of the right** guaranteed by s. 23 of the *Charter* **can be established with respect to the appellant parents** in this case, **the *Doré* framework is still applicable in reviewing the Minister's decisions if the relevant values underlying this right were limited by those decisions**." [Emphasis added] See also *Loyola* at para 34: "As the subject of the administrative decision, **Loyola is entitled to apply for judicial review and to argue that the Minister failed to respect the values underlying the grant of her discretion as part of its challenge of the merits of the decision**. In my view, as a result, **it is not necessary to decide whether Loyola itself, as a corporation, enjoys the benefit of s. 2(*a*) rights**, since **the Minister is bound in any event to exercise her discretion in a way that respects the values underlying the grant of her decision-making authority**, including the *Charter*-protected religious freedom of the members of the Loyola community who seek to offer and wish to receive a Catholic education: *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, at para. 71." [Emphasis added]

[91] *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2 at para 38; see also *The Redeemed Christian Church of God v New Westminster (City)*, 2021 BCSC 1401 at para 93 [*Redeemed*].

> that threshold to be considered relative to what degree of investigatory step will hamper the process of thought either directly as a result of the investigation itself or indirectly through chilling individuals from engaging in thought or certain lines of thought; (2) the state or state actors take steps that could unduly influence an individual's thoughts, with "undue" influence being understood relative to the legitimate purposes of governments and the delicate balance between acceptable persuasion on some matters versus unacceptable interference in individual thought; or (3) the state or state actors punish an individual for holding certain thoughts, with the concept of "punishment" rising above an allocation of natural consequences to the imposition of consequences designed to disincentivize certain thoughts and/or having a substantial disincentivizing effect.[92]

68. It is worth noting that the Termination Decision, and related silencing of the Board recording of the Meeting, also engaged the right to hear of the listening public, most of whom observe these meetings via the live streamed video recording rather than in person at the Board Office. As stated by the Supreme Court of Canada in *Harper*:

> Freedom of expression protects not only the individual who speaks the message, but also the recipient. Members of the public — as viewers, listeners and readers — have a right to information on public governance, absent which they cannot cast an informed vote; see *Journal*, *supra*, at pp. 1339-40. Thus the *Charter* protects listeners as well as speakers; see *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at pp. 766-67

Section 1 – *Doré-Vavilov* Review

69. In reviewing decisions that limit *Charter* protections, courts are exercising their crucial role as "guardians of the Constitution."[93] Courts' approach "must reflect the particular importance of justification in decisions that engage *Charter* protections."[94] The Supreme Court of Canada recently summarized the approach as follows:

> a reviewing court must first determine whether the discretionary decision limits Charter protections. If this is the case, the reviewing court must then examine the decision maker's reasoning process to assess whether, given the relevant factual and legal constraints, the decision reflects a proportionate balancing of Charter rights or the values underlying them.[95]

---

[92] Newman, Dwight G., Interpreting Freedom of Thought in the Canadian Charter of Rights and Freedoms, (2019) 91 SCLR (2d) 107 at page 8. Available at SSRN: https://ssrn.com/abstract=3291586.
[93] See *CSFTNO* at para 70.
[94] *CSFTNO*, para 70.
[95] *CSFTNO*, para 73.

70. The values underlying "the vigilant protection of free expression in a society such as ours" are as follows:

    (1) seeking and attaining the truth is an inherently good activity;
    (2) participation in social and political decision-making is to be fostered and encouraged; and
    (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed."[96]

    The closer the expression rests with these core values, the greater the protection afforded to that expressive content.[97]

71. The burden of proving that a decision reflects a proportionate balancing of the Charter rights it engages is on the decision maker.[98] Administrative decision makers must consider the *Charter* values relevant to their decisions, which constrain the exercise of their powers.[99]

72. It is not sufficient for a decision maker to claim that, in effect, its decision and reasons performed the necessary *Charter* analysis. When a *Charter* right applies, it is fatal to the decision for there not be "a clear acknowledgement and analysis of that right."[100] In the case of *McCarthy v Whitefish Lake First Nation*, Justice Favel applied this standard to an administrative decision of an election appeal committee on a First Nation, where a candidate was disqualified for being in a common law marriage:

> …if an individual's *Charter* rights are engaged, an administrative body must consider those rights and attempt to proportionately balance any limitations on those rights against the relevant statutory objective. The second step in the *Doré*/*Loyola* is not satisfied because the Committee failed to do so. This fatal error is another reason why this Court must quash and set aside the Common Law Marriage Prohibition Decision.[101]

---

[96] *Irwin Toy Ltd. V. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p 976.
[97] *Groia v. Law Society of Upper Canada*, [2018] 1 SCR 772 at para 117.
[98] See *Doré* at para 66 ("Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion."); *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para 38 ("The Charter enumerates a series of guarantees that can only be limited if the government can justify those limitations as proportionate."); *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at paras 80, 162; *Lethbridge and District Pro-Life Association v Lethbridge (City)*, 2020 ABQB 654 [*Lethbridge*]at para 89; *Baars v. Children's Aid Society of Hamilton*, 2018 ONSC 1487 at para 122 [Baars]; *Canadian Centre for Bio-Ethical Reform v City of Peterborough*, 2016 ONSC 1972 at para 15.
[99] *CSFTNO*, para 66.
[100] *York*, para 94.
[101] *McCarthy v Whitefish Lake First Nation #128*, 2023 FC 220

73. Likewise, it is not sufficient for a decision maker to merely give lip service to the *Charter*; rather, the decision maker must be able to prove to a reviewing court that it actually engaged in the required *Charter* analysis and proportionately balanced and minimally impaired *Charter* protections.[102] The decision must show that the decision maker meaningfully addressed the *Charter* protections to reflect the impact the decision would have on the affected people.[103]

74. If a decision maker did engage in the required *Charter* analysis, courts are then required to review "the weight accorded by the decision maker to the relevant considerations in order to assess whether a proportionate balancing was conducted by the decision maker" and consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives.[104]

75. A reviewing court must be satisfied that the decision gives effect, as fully as possible, to the *Charter* protections at stake in light of the decision maker's statutory objectives.[105] This properly involves an inquiry in the decision maker's statutory framework.[106]

76. Both a decision's outcome and its reasoning process must be justified and defensible in relation to the law and facts.[107] In *Vavilov*, the Court posits that "some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning[.]"[108] Also, some reasoning is so improper that an otherwise reasonable decision cannot stand.[109]

77. Decisions that fail to meet the above constitutional requirements will be struck down, as explained by Professor Paul Daly, University Research Chair in Administrative Law & Governance at the University of Ottawa, in an illuminating article on this subject.[110]

---

[102] *Lethbridge* at paras 108-109, 112; *Guelph and Area Right to Life v. City of Guelph*, 2022 ONSC 43 at paras 61, 87.
[103] *CSFTNO*, para 68.
[104] *CSFTNO*, para 72.
[105] *CSFTNO*, para 92; *LSBC v TWU* at para 80; *Loyola* at para 39; *Doré* at paras 55-56, 58.
[106] *See Lethbridge* at paras 70, 111; *LSBC v TWU* at paras 29-47.
[107] CSFTNO at para 66.
[108] *Vavilov* at para 86.
[109] *Vavilov* at paras 86 and 105.
[110] Daly, Paul, *The Doré Duty: Fundamental Rights in Public Administration*, 2023 CanLIIDocs 1256 at p 14.

The Termination Decision's violation of *Charter* freedoms was not justified

78. While the Ms. di Armani's comments at the Meeting were entirely anodyne, including the Silenced Statements, Ms. di Armani was accused of being "discriminatory" and somehow engaging "human rights" concerns of the Chair and Vice-Chair.[111]

79. The Supreme Court of Canada's decision in *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 is apposite in this regard. There the Court held that in fact "freedom of expression flows from the concept of human dignity":

> …all human beings are equal in worth and dignity; this equality would be hollow if some people were silenced because of their opinions. The purpose of protecting freedom of expression is therefore to "ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream" (*Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at p. 968).
>
> As McLachlin J. (as she then was) wrote in *R. v. Zundel*, 1992 CanLII 75 (SCC), [1992] 2 S.C.R. 731, "[t]he view of the majority has no need of constitutional protection" (p. 753). In fact, the exercise of freedom of expression presupposes, at the same time that it fosters, society's tolerance of expression that is unpopular, offensive or repugnant (*Irwin Toy*, at pp. 969-71; *Montréal (Ville de) v. Cabaret Sex Appeal inc.*, 1994 CanLII 5918 (QC CA), [1994] R.J.Q. 2133 (C.A.)). Freedom to express harmless opinions that reflect a consensus is not freedom (R. Moon, "What happens when the assumptions underlying our commitment to free speech no longer hold?" (2019), 28:1 *Const. Forum* 1, at p. 4). This is why freedom of expression does not truly begin until it gives rise to a duty to tolerate what other people say (L. C. Bollinger, *The Tolerant Society* (1986); Dworkin (2009), at p. vii). It thus ensures the development of a democratic, open and pluralistic society. Understood in this sense, "a person's right to free expression is protected not in order to protect him, but in order to protect a public good, a benefit which respect for the right of free expression brings to all those who live in the society in which it is respected, even those who have no personal interest in their own freedom" (J. Raz, "Free Expression and Personal Identification" (1991), 11 *Oxford J. Leg. Stud.* 303, at p. 305).[112]

80. In light of the importance of freedom of expression to our society, the Court held that

> Limits on freedom of expression are justified where, in a given context, there are serious reasons to fear harm that is sufficiently specific and cannot be prevented by the discernment and critical judgment of the audience (*Whatcott*, at paras. 129-35; Moon, at pp. 1-2 and 4).[113]

81. The Court in *Ward* held that the Quebec Court of Appeal had errored in failing to apply the *Whatcott* precedent to the case of a comedian facing financial penalties for making an

---

[111] *See* First di Armani Affidavit, paras 19, 23, 25.
[112] *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 [*Ward*] at paras 59-60.
[113] *Ward* at para 61.

allegedly discriminatory joke against teenage singer who had a disability.[114] Chief Justice Wagner and Justice Côté, writing for the majority, then described its holding in *Whatcott*, which description in part is copied below for ease of reference:

> [73] Writing for the Court in that case, Rothstein J. began by determining the scope of s. 14(1)(b) by defining the concept of "hatred". In his view, minimizing subjectivity and overbreadth required prohibiting only expression that was likely to cause the harm the legislature was seeking to address, that is, "the most extreme type of expression that has the potential to incite or inspire discriminatory treatment against protected groups on the basis of a prohibited ground" (para. 48). **This category did not include "hurt feelings, humiliation or offensiveness"** (para. 47). The objective of s. 14(1)(b) was to prevent discriminatory effects (at para. 54), **not to "discourag[e] repugnant or offensive ideas" or to "censor ideas or to compel anyone to think 'correctly'"** (paras. 51 and 58). The intent of the author of the expression was therefore irrelevant, as was the content or nature of the ideas expressed (paras. 49 and 58). The analysis had to be focused on the "mode of expression [of those ideas] in public and the effect that this mode of expression may have" (para. 51). Even if repugnant and offensive, expression that did not incite abhorrence, delegitimization or rejection did not risk causing socially harmful effects such as discrimination; it was therefore not likely to expose anyone to "hatred" within the meaning of s. 14(1)(b) of *The Saskatchewan Human Rights Code* (para. 57). Determining whether expression met that definition required an objective assessment based on the reasonable person standard (paras. 52, 56 and 59).
>
> [74] Having established the scope of s. 14(1)(b), Rothstein J. then turned to the constitutional aspect. Given that hate speech may lay the groundwork for later attacks on the members of a vulnerable group, attacks that may involve discrimination and violence, he had no difficulty in determining that its suppression is a pressing and substantial objective (para. 77). He noted that, to satisfy the rational connection requirement, the hate speech to be suppressed must "rise to a level beyond merely impugning individuals: it must seek to marginalize the group by affecting its social status and acceptance in the eyes of the majority" (para. 80 (emphasis added)). However, "**protecting the emotions of an individual group member is not rationally connected to the overall purpose of reducing discrimination**" (para. 82). **This was why, in his view, the prohibition against any representation that "ridicules", "belittles" or "affronts . . . dignity" was not justified under s. 1 of the *Canadian Charter***. These words refer to "**expression which is derogatory and insensitive, such as representations criticizing or making fun of protected groups on the basis of their commonly shared characteristics and practices, or on stereotypes**" (para. 89). **A democratic society concerned about preserving freedom of expression must make space for that kind of discourse** given that it typically does not lead to the systemic discrimination against vulnerable groups that the legislature was seeking to eradicate (paras. 89-92 and 109). Finding that the words "ridicules, belittles or otherwise affronts the dignity of" could be severed from s. 14(1)(b) without contravening the legislative intent, Rothstein J. determined that that part of s. 14(1)(b) was unconstitutional (paras. 93-95 and 99). However, he

[114] *Ward* at para 71.

> was of the view that the remainder of s. 14(1)(b) was justified under s. 1 of the *Canadian Charter*.[115]

82. In the *Ward* case, the Court cautioned against giving the right to dignity such "a scope so broad that it would neutralize freedom of expression, or so vague that it would be inconsistent with the principles laid down by this Court in *Taylor* and *Whatcott*."[116] The Court stated that "a right not to be offended…has no place in a democratic society".[117] The Court then heightened the test for resolving a conflict between the right to dignity and expression, in favour of expression, requiring:

> It must first be asked whether a reasonable person, aware of the relevant context and circumstances, would view the expression targeting Mr. Gabriel as inciting others to vilify him or to detest his humanity on the basis of a prohibited ground of discrimination. It must then be asked whether this reasonable person would view the expression, considered in its context, as likely to lead to discriminatory treatment of Mr. Gabriel. In our opinion, the comments made by Mr. Ward meet neither of these two requirements.[118]

83. The *Ward* decision builds on a deep history of Canadian jurisprudence upholding the values of freedom of expression (and inferentially the freedoms of thought, opinion and belief as well). The "linchpin" of this *Charter* section 2(b) freedom is its connection to the political process:

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(*b*) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.[119]

84. In an early case, Justice Cory J.A (as he was then) outlined the importance of freedom of expression to the proper function of public institutions, stating:

> Considering now the purpose of s. 2(b), it is difficult to imagine a more important guarantee of freedom to a democratic society than that of freedom of expression. A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. These opinions may

---

[115] *Ward* at paras 73-74 [emphasis added in bold]: see also *Strom v. Saskatchewan Registered Nurses' Association,* 2020 SKCA 112 [*Strom*].
[116] *Ward* at para 80.
[117] *Ward* at para 82.
[118] *Ward* at para 104; see also paras 83-84.
[119] *Keegstra* at pp 763-764; see also *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827 at para 84.

> be critical of existing practices in public institutions and of the institutions themselves. However, change for the better is dependent upon constructive criticism. Nor can it be expected that criticism will always be muted by restraint. Frustration with outmoded practices will often lead to vigorous and unpropitious complaints. Hyperbole and colourful, perhaps even disrespectful, language may be the necessary touchstone to fire the interest and imagination of the public to the need for reform and to suggest the manner in which that reform may be achieved.[120]

85. Freedom of expression must not be unduly constrained in a vain attempt to avoid offending others. Criticism indeed tends to upset the target of criticism but even blunt criticism, is essential to healthy debate.[121]

86. The Termination Decision is unreasonable and cannot be justified:

a. Despite the fact that i) public school boards in BC have long been acknowledged to be subject to *Charter* obligations, and ii) the Termination Decision directly targeted and ultimately terminated Ms. di Armani's expression, neither the Chair nor any other Board member acknowledged that the Termination Decision engaged *Charter* protections, a fatal error.[122]

b. There is no evidence whatsoever showing that the Termination Decision was made with any thought given to *Charter* rights, much less with any attempt to achieve a proportionate balance between the *Charter* protections of Ms. di Armani and members of the listening public and any legitimate Board objectives.

c. The Board's own objectives for section 5 of Bylaw, which outlines the Chair's Termination Authority support, rather than detract from, Ms. di Armani's freedom of expression at public Board meetings:

> **Communication with the public is extremely important**. . . . Two public participation periods are therefore provided solely as a means for **ensuring that community members who are present in the audience have an opportunity to provide comments** and/or ask questions about business or issues pertaining to the Board agenda.[123]

d. No legitimate basis for the Termination Decision is identifiable from the reasons provided for it at the Meeting, and it is inappropriate for the Board to now attempt

---

[120] *R v. Kopyto* (1987), 47 DLR (4th) 213 (WL) (Ont CA) at para 194 [*Kopyto*].
[121] *Strom* at para 138.
[122] *See York Region* at paras 69, 94.
[123] Bylaw 5, s 5.1.

to come up with coherent reasons to justify the Termination Decision before this Court.[124]

e. The reasons stated for the Termination Decision contain "fundamental gaps" which cannot be overlooked by the Court, including:

   i. How can prohibiting the naming of Trustees be reasonable when Trustees are public actors whose names are repeatedly and publicly published, including on the Meeting agenda, and speakers like Ms. di Armani are required to publicly identify themselves while speaking at the Board Meeting?

   ii. How can claiming "human rights" alleviate or void a concern that there is a conflict of interest?

   iii. How does claiming that certain persons are members of our society preclude those people from also being part of special interest groups?

   iv. How can a government Board validly censor discussion of perceived conflicts of interest?

   v. More fundamentally, there is no identification of harm from the Silenced Statements that could possibly justify their censorship.

f. Even if the Board had correctly identified that the Termination Decision engaged the *Charter* section 2(b) protections of Ms. di Armani and the listening public, correctly had delineated those protections, and had actually engaged in a real attempt to balance those *Charter* protections against identified statutory objectives,

---

[124] *See Vavilov* at paras 83 ("the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome."), para 86 ("an otherwise reasonable outcome also cannot stand if it was reached on an improper basis"), 87 and 96:

> Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision.

the *outcome* of the Termination Decision is indefensible as it fails to proportionately balance *Charter* protections and infringe them as little as possible.

87. As the Silenced Statements are forms of expression guaranteed by section 2(b) of the *Charter*, the Termination Decision is a clear violation of such rights, and inconsistent with the function of an elected body in a free and democratic society pursuant to section 1. On the facts, such justification is not only impossible, but it was also not even attempted by the Board at the Meeting in coming to the Termination Decision.

88. Consequently, the Termination Decision unjustifiably violated Ms. di Armani's *Charter* freedoms of thought, opinion, belief and expression protected under section 2(b), and failed to reasonably respect the *Charter* value protecting the listening public's right to hear.

E. The Recording Prohibition violates the Charter without demonstrable justification

89. To recap from the facts, the Board had initially required members of the public to sign a form acknowledging its prohibition of recording at the meeting before permitting entry to the June 13th (and Feb 21st), 2023 meetings. Thereafter, the Board made use of the 2023 Recording Prohibition Sign, followed by its adoption of AP 481 and use of the 2024 Recording Prohibition Sign (all such recording prohibitions hereafter collectively referred to as the "**Recording Prohibition**"). The "apparent policy of the Board to prohibit members of the public from recording its public meetings"[125] is in fact an established practice and policy.

90. As discussed above, *Charter* section 2(b) protects the right to hear as well as the right to speak. Further, *Charter* section 2(b) specifically protects "other media of communication." Use of recording devices to record for the purpose of sharing is expressive activity protected under section 2(b) of the *Charter*. Given the fact that the Board makes recordings (albeit incomplete ones) at meetings, recording at Board meetings held at the Board office does not warrant exclusion from section 2(b) protection. The Recording Prohibition restricts all methods of recordings, so determining whether a particular method of recording at Board meetings is excluded from 2(b) protection is not relevant or necessary. By prohibiting use

[125] Amended Petition, para 38; see also paras 1.d, 1.e, 1.f, 39, 40.

of recording devices at Board meetings, the Recording Prohibition infringed section 2(b) both in purpose and effect.[126]

Approach to determine the constitutionality of the Recording Prohibition

91. Charter remedies can be pursued alongside a petition for judicial review.[127] Ms. di Armani submits that the Recording Prohibition is not an administrative decision, but rather a rule of general application to all persons attending Board property that unjustifiably infringes *Charter* section 2(b) protections.

92. As set out in *Greater Vancouver*, "[a] binding rule of general application is not an individualized form of government action like an adjudicator's decision or a decision by a government agency concerning a particular individual or a particular set of circumstances."[128] In *Greater Vancouver*, the Supreme Court of Canada found that it was appropriate to view a transit authority's advertising policies—which it described as "binding rules of general application that establish the rights of members of the public who seek to advertise on the transit authorities' buses"[129] — as "law" subject to section 52 of the *Constitution Act, 1982*. This Court should follow that approach in considering the constitutional validity of the Recording Prohibitions.

Oakes Analysis

93. The *Oakes* test has been set out as follows:

(1) Is the objective of the legislation pressing and substantial?
(2) Is there a rational connection between the government's legislation and its objective?
(3) Does the government's legislation minimally impair the *Charter* right or freedom at stake?
(4) Is the deleterious effect of the *Charter* breach outweighed by the salutary effect of the legislation?[130]

---

[126] *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2 at para 38.
[127] *L'Association des parents de l'école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique*, 2011 BCSC 89, at para 28 (Wilcock J, as he then was): "It is permissible to seek both declaratory relief under s. 24 of the *Charter* and a remedy under the *JRPA* in the same petition."; see also *The Redeemed Christian Church of God v. New Westminster (City)*, 2022 BCCA 224 [*Redeemed Appeal*], at paras 47-48.
[128] *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 [*Greater* Vancouver] at para 88.
[129] *Greater Vancouver* at para 90.
[130] *Canada (Attorney General) v. Hislop*, 2007 SCC 10, at para 44.

94. There is no "pressing and substantial objective" for the Recording Prohibition at Board meetings. The Second Arul-Pragasam Affidavit shows that in particular circumstances, including an alleged credible threat and the Board debate of a particularly controversial policy placing menstruation products in all bathrooms, the Superintendent formed the view that prohibiting recording was appropriate. But outside those specific circumstances, the Superintendent does not attempt to explain a pressing and substantial Board objectives supporting a general prohibition on recording at all Board meetings.

95. AP 481 itself however claims the objectives of "privacy and safety of our students, staff, visitors, and trustees" and "maintaining a safe and respectful environment".[131] Ms. di Armani does not dispute that these objectives, in the proper context can be pressing and substantial. But the context is relevant. It is hard to say that the "privacy . . . of . . . trustees" is a pressing and substantial objective supporting the Recording Prohibition at *public* Board meetings, where the Trustees are ordinarily on camera, with their comments recorded by microphones (unless Chair mutes the mics and/or the recording as is not infrequently the case).

96. Similarly, prohibiting recording at a public Board meeting, which is otherwise recorded and livestreamed does not appear rationally connected to each of the aforementioned objectives.

97. It cannot be reasonably argued that allowing members of the public sitting in the gallery to record at Board meetings interferes more with the privacy of Trustees than the Board recording which is livestreamed and posted on YouTube. Video and audio recordings serve as a deterrent to violence, not a threat to safety. Recordings could also encourage people to be more respectful, knowing that others may subsequently review and consider their comments and actions.

98. If the object is the privacy of persons other than Trustees, restrictions could be imposed., For example, cameras are only permitted to be pointed at speakers or those Trustees and staff who already appear on the Board's video recording. To promote respectful recording, the requirement that any recorder remain respectful in doing so could be imposed, as could specific requirements like prohibiting persons other than presenting staff or trustees from

[131] Second di Armani Affidavit at Exhibit "C".

being video recorded in the public Board meeting without their consent. These kinds of more narrow limits would meet the listed objectives in a much more minimally-impairing manner. The Recording Prohibition is not minimally impairing of *Charter* 2(b) protections.

99. Finally, the salutary effects of the Recording Prohibition do not outweigh its deleterious effects. Board meetings are required generally to be open to the public.[132] The vast majority of people attending Board meetings do so virtually.[133] While the Board does record meetings, the Chair regularly mutes speakers' mics and even the entire recording, so the virtually-attending or observing public are unable to hear (and in some cases see) those portions of the meetings.

100. The harm of the Recording Prohibition falls on the members of the public seeking to gain a fuller understanding. The potential benefit of the broad Recording Prohibition (and not lesser-infringing recording restrictions discussed above) is that Trustees, particularly the Chair, can avoid or reduce public scrutiny by muting what others say, or even stopping the recording entirely for portions of Board meetings, knowing that no other person is permitted to record those more likely unflattering portions of Board meetings. Ultimately, this harms democratically accountable governance at the Board.

101. In light of the context of Board recordings of public Board meetings being regularly censored, the Recording Prohibition is not a reasonable and justifiable limit on the public's *Charter* section 2(b) freedoms.

F. What are the appropriate remedies?

102. "A court which has found a violation of a Charter right has a duty to provide an effective remedy."[134]

103. In regard to the Recording Prohibition, if it is found to unreasonably and unjustifiably limit *Charter* section 2(b) freedoms, it must declared to be "of no force and effect" pursuant to section 52 of the *Constitution Act, 1982.*

---

[132] *School Act* at section 69(1).
[133] Second di Armani Affidavit at para 6.
[134] *R v Ferguson*, 2008 SCC 6 at para 34.

104. Section 24(1) is relied on for all other declarations requested, with the exception of the *ultra vires* declaration. Section 24(1) provides the Court with a very broad scope to provide what remedies it "considers appropriate and just in the circumstances." In some cases, it is appropriate to grant a section 24(1) remedy to a person in effect on behalf of others affected by the unconstitutional state conduct.[135]

Declaration

105. The test for declaratory relief involves up to the following five principles:

a) the court has jurisdiction to hear the issue;
b) the party raising the issue has a genuine interest in the resolution of the issue;
c) the responding party has an interest in opposing the declaration sought;
d) the dispute is real and not theoretical; and
e) the declaration will be of practical utility.[136]

106. These requirements are all met in this case, for reasons outlined above in Part II.B.

107. As described in the late Professor Hogg's work, "[t]he declaration is especially appropriate if the court is not sure what would be the appropriate remedial action by government, and is content to leave that choice to the government—informed, obviously, by the court's reasons for holding the government is in breach of the *Charter*."[137]

108. Subject to the need for a prohibition against censoring expression at public Board meetings arbitrarily and without authority as described below, the declarations sought by Ms. di Armani should be an effective remedy of the Board's *Charter* violations.

109. In cases where remitting an unreasonable decision that infringes *Charter* rights would serve no practical purpose, contrary to the Board's claim,[138] it is appropriate for a Court, applying the *Doré/Loyola* framework, to issue remedial declarations. In *Baars v Children's Aid Society of Hamilton*, the Children's Aid Society had removed children from the care of the Baars and closed their foster home.[139] The Baars had subsequently left the Province but sued

---

[135] See *British Columbia/Yukon Association of Drug War Survivors v. Abbotsford (City)*, 2015 BCCA 142, at paras 16-19, citing *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15, *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, and *Fédération des parents francophones de Colombie-Britannique v. British Columbia (Attorney General)*, 2012 BCCA 422.
[136] *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 at para 61.
[137] Ibid.
[138] Amended Response to the Petition, at para 27.
[139] *Baars* at para 15.

for *Charter* declarations relating to the closure of their foster home in the Hamilton area.[140] The Baars "challenge[d] the decisions of administrative actors," and Justice Goodman consequently applied the *Doré/Loyola* framework, before granting the Baars the remedy of *Charter* declarations.[141]

Prohibition

110. The relief of prohibition pursuant to s.2.(2)(a) *JRPA* is a remedy which prohibits the making of a decision.[142] For prohibition to be claimed, the state activity must have "public character".[143]

111. The remedy of prohibition, along with *certiorari* and *mandamus*, "comprise the core of the superior courts' inherent supervisory jurisdiction over inferior tribunals. Modern developments in administrative law have given these remedies very broad scope."[144] They are "important elements of the inherent jurisdiction of a superior court to 'ensure that public authorities do not overreach their lawful power."[145]

112. While prohibition is a drastic and discretionary remedy,[146] the Termination Decision and the course of conduct engaged in by the Board both before and after the Termination Decision show a concerning willingness of the Board, including the Chair and Vice-Chair, to act without authority to censor comments with which they personally disagree. A narrow prohibition stopping the Board from making such *ultra vires* decisions to censor is warranted.

Public interest

---

[140] *Baars* at paras 3, 5.
[141] *Baars* at paras 27, 179, 200-202.
[142] *Eshghabadi v. British Columbia (Minister of Public Safety)*, 2011 BCSC 434 at para 40.
[143] *Redeemed* at para 32; see also *Strauss v. North Fraser Pretrial Centre (Deputy Warden of Operations)*, 2019 BCCA 207 at para 22-24; *Redeemed Appeal* at para 10; *Wise v. Legal Services Society*, 2008 BCSC 255 at para 16;
[144] *Western Stevedoring Co. Ltd. V. W.C.B.*, 2005 BCSC 1650 at para 21.
[145] *Independent Contractors and Business Association v. British Columbia (Transportation and Infrastructure)*, 2020 BCCA 243 at para 27.
[146] *Majithia v Residential Tenancy Branch*, 2021 BCSC 737, at para 23; citing *Psychologist Y v. Nova Scotia Board of Examiners in Psychology*, 2005 NSCA 116 at para 21.

113. Mr. Justice Bauman outlined the following consideration that "may lead a judge to rule the parties should bear their own costs" as Ms. di Armani has requested in this case:

(a) The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved.

(b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically.

(c) The issues have not been previously determined by a court in a proceeding against the same defendant.

(d) The defendant has a clearly superior capacity to bear the costs of the proceeding.

(e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct.[147]

114. Ms. di Armani is not the only member of the public who has been censored by the Board.[148] The pattern of censorship by the Board has motivated her to commence[149] and continue to advance this case for the "benefit of the public including better governance at the Board."[150]

115. Ms. di Armani is not seeking any damages or costs. Ms. di Armani does have a personal interest in this matter, but that interest does not economically justify this case.

116. The issues raised, including the scope of the Chair's termination authority, the unreasonable infringement of *Charter* protections during public Board meetings, and the prohibition of recordings at Board meetings, has not previously been raised or adjudicated against the Board or a similar set of circumstances in BC.

117. The Board unquestionably has the superior capacity to bear its own costs in this matter.

118. Ms. di Armani for her part has not engaged in frivolous, vexatious or abusive conduct in this proceeding.

PART III: ORDERS SOUGHT

---

[147] *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*, 2005 BCCA 368 at para 8.
[148] First di Armani Affidavit at paras 32-37, 42; Second di Armani Affidavit at paras16,19-23, 25.
[149] First di Armani Affidavit at para 43.
[150] Second di Armani Affidavit at para 26.

119. Ms. di Armani asks this Court to provide the following relief:

A. a Declaration, pursuant to section 2(2)(b) of the *Judicial Review Procedure Act*, RSBC 1996, c. 241 ("*JRPA*"), that the Board's decision (the "Termination Decision") to repeatedly interrupt, interfere with, mute and ultimately terminate Ms. di Armani's remarks at the Board's June 13, 2023 meeting (the "Meeting") was *ultra vires* the Board's authority and powers delegated to the Board pursuant to the *School Act*, RSBC 1996, c. 412 (the "*Act*");

B. a Declaration, pursuant to section 2(2)(b) of the *JRPA* and section 24(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), that the Board's actions to repeatedly interrupt, interfere with, mute and ultimately terminate Ms. di Armani's remarks during the Meeting unjustifiably infringed Ms. di Armani's freedoms of thought, belief, opinion, expression and other media of communication, protected by section 2(b) of the *Charter*;

C. an Order, pursuant to section 2(2)(a) of the *JRPA* and section 24(1) of the *Charter*, prohibiting the Board (including its Chair, Vice-Chair(s) and Trustees) at future Board meetings, from interrupting, raising points of order, muting and silencing Ms. di Armani or other members of the public seeking to participate in the public participation portions of such meetings, solely on the basis of the Chair's, the Vice-Chair's or any other Trustee's disagreement with the contents of the presenters' remarks;

D. a Declaration pursuant to section 52(1) of the *Constitution Act, 1982* that the Board's prohibition of recording at Board meetings that are open to the public violates section 2(b) and is of no force and effect;

E. in the alternative, an Order, pursuant to section 2(2)(a) of the *JRPA* and section 24(1) of the *Charter*, prohibiting the Board from preventing Ms. di Armani and other members of the public from recording future Board meetings that are open to the public;

F. in the alternative, a Declaration, pursuant to section 2(2)(b) of the *JRPA* and section 24(1) of the *Charter*, that the Board, by

    i. preventing Ms. di Armani and other attending members of the public from taking audio and/or video recordings of the Meeting, and then

ii. muting, first Ms. di Armani's microphone, and then the entire audio recording,

violated Ms. di Armani's freedom of expression and other media communication as protected by section 2(b) of the *Charter*, as well as that of other interested members of the public;

G. an Order that given the public interests engaged in this matter, no costs should be awarded for or against Ms. di Armani; and

H. such further and other relief as the Court considers appropriate.

Date: December 9, 2024

Marty Moore
Counsel for the Petitioner