Amended pursuant to Rule 16-1(19)(a)
Original filed November 17, 2023

No. CHI-S-S-40035
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

Amended Response to Petition

FILED BY: THE BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 33 (CHILLIWACK)
(the "Petition Respondent")

THIS IS A RESPONSE TO the Petition filed 06/10/23 and Amended Petition filed 11/07/24.

The Petition Respondent estimates that the application will take one day.

Part 1: ORDERS CONSENTED TO

The Petition Respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the Petition: NIL.

Part 2: ORDERS OPPOSED

The Petition Respondent opposes the granting of the orders set out in the following paragraphs of Part 1 of the Petition: ALL.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Petition Respondent takes no position on the granting of the orders set out in the following paragraphs of Part 1 of the Petition: NIL.

Part 4: FACTUAL BASIS

1. Lynda di Armani (the "**Petitioner**"), is a member of the public. The Petition Respondent is the Board of Education of School District No. 33 (Chilliwack), (the "**Board**").

2. On June 13, 2023, the Board held a Board meeting (the "**Board Meeting**"). Pursuant to s. 4.5 of Bylaw 5 Board Meeting Procedures ("**Bylaw 5**") of the Board, on the agenda of every public Board meeting, there are two public participation periods for comments and questions concerning the agenda. The Board Meeting was recorded by the Board pursuant to Board Policy 170.

3. The Superintendent of Schools arranged for a form to be completed by attendees as they entered the Board offices with their name, their relationship to the school district and which asked them to acknowledge that the Board meeting was being recorded for public viewing and that no other video/audio recordings were permitted, with the exception of authorized media (the "Form").

Affidavit #2 of Rohan Arul-Pragasam, made October 2, 2024 ("**Arul-Pragasam Affidavit #2**"), para. 11 Exhibit "F"

4. The Form was implemented by the Superintendent at the June 13, 2023 Board meeting in furtherance of his responsibilities under the *School Act*, RSBC 1996 c. 412 (the "***School Act***"), School Regulation, B.C. Reg. 265/89, and Board policies relating to safety, security and privacy.

Arul-Pragasam Affidavit #2, paras 3-9, Exhibits "A"-"E"

5. In the Superintendent's opinion the Form was designed to decrease the likelihood of a disturbance at the meeting, make attendees aware that the Board was recording the meeting and would post the recording publicly, and protect attendees at the meeting who did not wish to be recorded from being recorded without consent and potentially being subject to intimidation through the prospect of negative social media posts.

Arul-Pragasam Affidavit #2, paras 13-15

6. The Superintendent considered the Form was needed because there was an item on the agenda of the June 13, 2023 Board meeting relating to an amendment to a Board policy which would require the supply of menstruation products in all school washrooms regardless of age or gender. Prior to the meeting, the Superintendent was aware of a social media campaign urging those opposed to the amendment to attend the June 13, 2023 Board meeting. He also anticipated there could be students, including students protected by Administrative Procedure 356 Safe and Caring Schools: Sexual Orientation and Gender Identity or Expression ("AP 356") in attendance at the meeting in support of the amendment. Based on his experience at two Board meetings in February 2023, the Superintendent considered there to be a risk that a large crowd was likely to attend the June 13, 2023 Board meeting which could result in disorderly conduct, and that persons in attendance may make video recordings of other participants, including students protected by AP 356, and potentially use their image in negative social media posts.

Arul-Pragasam Affidavit #2, paras 16-17

7. The Form was not used at any other Board meeting. A similar form was used at the February 21, 2023 Board meeting. The Board did not direct the Superintendent in respect of the Form.

Arul-Pragasam Affidavit #2, paras 18 & 20

~~3~~8. The Agenda of the Board Meeting also included item 5.3 "Board Support for National Pride Month in Canada" and was supported by a report from Trustee Westerby which included a

recommendation that the Board adopt two motions. The first motion was that the School District publish a message of support each June in recognition of National Pride Month in Canada. The second motion was that the Board direct staff to install a third flagpole at the board office for special event flags. Trustee Westerby's report requested that if permitted by the B.C. Government Office of Protocol, the pride flag be raised at the board office for the month of June.

Affidavit of Lynda di Armani, sworn October 6, 2023, Exhibit "D"

~~4~~9. The Petitioner was present at the Board Meeting and rose to comment on Agenda Item 5.3 and Trustee Westerby's proposed motions during the first public participation period at Item 4 of the Agenda. The Petitioner began her comments by alleging that Trustee Westerby was in violation of Board Policy 131 – Trustee Conflict of interest in relation to the proposed motions, noting that Trustee Westerby was a director of the Chilliwack Pride Society and Policy 131 says that a trustee "must never use their position for personal benefit". The Board Chair advised the Petitioner that there was no pecuniary conflict of interest. The Board Chair invited the Petitioner to speak to her own feelings about "pride" if she wished. The Petitioner then asked if other Trustees were members of the Chilliwack Pride Society "because it makes them into a conflict of interest too". The Board Chair advised the Petitioner that there is no conflict of interest for other Trustees either. The Petitioner then made comments expressing her view that raising flags of what she described as "special interest groups" is a violation of the duty of state neutrality as in section 15(1) of the *Charter of Rights and Freedoms*. The Board Chair then made the decision to stop the Petitioner from making further comments.

Affidavit of Holly Bedford, affirmed November 17, 2023 ("**Bedford Affidavit**") at Exhibit "A", p. 2-4.

~~5~~10. Each speaker at a public board meeting has a microphone which is activated by a button. When the chair presiding over the meeting speaks, their microphone overrides the

speaker's microphone and the speaker must then reactivate their microphone. This was the case at the Board Meeting.

Affidavit of Rohan Arul-Pragasam, affirmed November 17, 2023 ("**Arul-Pragasam Affidavit**"), Exhibit "A"

~~6~~11. On September 26, 2023, the Petitioner wrote to the Superintendent of Schools to make a complaint about being disregarded at the Board Meeting. The Superintendent of Schools responded on September 28, 2023.

Arul-Pragasam Affidavit, Exhibit "A"

~~7~~12. On November 14, 2023, the Board Chair wrote to the Petitioner to acknowledge that she was not provided an opportunity to fully address her comments on June 13, 2023 and to advise that the Board was extending an invitation to the Petitioner to provide any further comments she had planned to make at the Board Meeting at the Board's public meeting occurring in December 2023.

Arul-Pragasam Affidavit, Exhibit "B"

13. Neither the Form nor any similar form were used at the Board's public meeting in December 2023.

Arul-Pragasam Affidavit #2, para 21

Part 5: LEGAL BASIS

~~8~~14. The judicial review should be dismissed on the basis that the Petitioner seeks Orders that are not appropriate or are moot.

~~9~~15. The Petition Respondent characterizes the issues on this judicial review as:

a. Is the Form a law to which s. 52 applies?

~~a~~b. Was the Board Chair's decision to interrupt, temporarily mute, and ultimately terminate the comments of the Petitioner at the Board Meeting (the "Decision") *ultra vires*?

~~b~~c. Is the issue of the Petitioner's freedom of expression in relation to the Decision moot?

~~c~~d. Is the issue of the Petitioner's freedom of expression in relation to the prohibition on recording Board meetings properly before the Court?

~~d~~e. Are the orders prohibiting future Board action appropriate?

Framework of Judicial Review

~~10~~16. The Supreme Court of Canada has repeatedly emphasized that on judicial review, Courts have a limited, supervisory role. Judicial review is not a hearing *de novo*. As stated in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 ("*Vavilov*") at paragraph 83, the Court does not "conduct a *de novo* analysis or seek to determine the 'correct' solution to the problem."

~~11~~17. In *Vavilov* at paragraph 13 states "reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality, and fairness of the administrative process. (emphasis added)" *Vavilov* also states, "a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified".

Vavilov at para 15.

~~12~~18. When the standard of review is reasonableness ~~T~~the court~~, on judicial review,~~ does not sit as an appellate court. ~~The court's role on judicial review was~~ As summarized by ~~Madame~~ Justice Wedge in *Kinexus Bioinformatics Corp v Asad*, 2010 BCSC 33 at paras 12-14:

> 12 In an application for judicial review, the court determines whether relief under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 ("*JRPA*") is warranted. The court assesses, on the applicable standard of review, whether a tribunal has made a reviewable error justifying the court's intervention. The court is not permitted to set aside a decision of a statutory tribunal merely because it would have reached a different conclusion: *McInnes v. Simon Fraser University* (1982), 140 D.L.R. (3d) 694 (B.C. S.C.), aff'd (1983), 3 D.L.R. (4th) 708 (B.C. C.A.).
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> 13 The court on judicial review does not sit as an appellate court. It does not retry the matters decided by the tribunal. It is not the court's role to review the wisdom of the tribunal's decision. The court cannot re-weigh the evidence, make findings of credibility or substitute its view of the merits for that of the tribunal. The court's role is limited to determining whether the tribunal has acted, and made its decision, within its statutory authority or jurisdiction: *Ross v. British Columbia Human Rights Tribunal* (May 1, 2009), Doc. Vancouver L042211 (B.C. S.C.); *Tse v. Quilchena Golf & Country Club*, [1991] B.C.J. No. 275 (B.C. S.C.).
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> 14 Further, relief under the *JRPA* is discretionary. The court must determine whether its intervention is warranted having regard to the applicable principles, including the principle of restraint concerning judicial intervention in administrative matters.

~~13~~19. The Court on a judicial review is exercising a limited, supervisory role that is discretionary.

The Decision was not *Ultra Vires*

~~14~~20. The Petitioner challenges the Decision on the basis it was *ultra vires* the Board's authority and powers delegated to the Board pursuant to the *School Act*~~, RSBC 1996, c. 412 (the "*Act*")~~.

~~15~~21. Decisions of the Board can only be *ultra vires* if the Board acts in a manner that is outside of the authority conferred to a Board by the *School Act*~~, RSBC 1996, c. 412 (the "*School Act*")~~. As stated in *Chamberlain v Surrey School District No. 36,* 2022 SCC 86 at paragraph 28:

> […] It is true that, like legislatures and municipal counsels, school boards are elected bodies endowed with rule-making and decision making powers through which they are intended to further the interests of their constituents. However, school boards possess only those powers their statute confers on them…

~~16~~22. The *School Act* clearly confers on the Board the power to create policies governing the conduct of its meetings. Pursuant to section 67(5) of the *School Act,* "a board must establish procedures governing the conduct of its meetings." It is not beyond the scope of the Board's authority to create policies and procedures concerning board meetings. In fact, under the *School Act,* a board must create procedures governing its meetings.

~~17~~23. The Board has adopted Bylaw 5 addressing Board Meeting procedures, including the election of a board chair. The Board has also adopted Policy 121 - Duties of the Chair and Vice Chair ("Policy 121") which that "specific responsibilities of the Chair include…presid[ing] over the Board's deliberations, and enforce[ing] appropriate procedures and parliamentary processes for all regular and special meetings of the Board.

Arul-Pragasam Affidavit, Exhibit "D"

~~18~~24. The Chair is the presiding officer at board meetings and as such has the authority under board policy, Bylaw 5 and the *School Act*, to make decisions regarding procedures and processes on behalf of the Board while presiding over a board meeting.

~~19~~25. The Decision falls squarely within the Chair's lawful authority to preside over board meetings and is not *ultra vires*. This does not mean that the Decision is not reviewable, it simply means that the Board had the authority to make the decision. Whether the Decision is defensible on review is a separate question from the *vires* issue.

The issue of the Petitioner's freedom of expression in relation to the Decision is Moot

~~20~~26. The Petitioner seeks a declaration from this Court pursuant to section 2(2)(b) of the *Judicial Review Procedure Act*, RSBC 1996, c. 241 ("*JRPA*") and s. 24(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") that the Decision "unjustifiably infringed" and "violated" her freedom of expression protected by section 2(b) of the *Charter*.

~~21~~27. The Decision is an administrative decision relating to procedure at the Board Meeting which the Petitioner alleges engages her freedom of expression protected by the *Charter*.

~~22~~28. As the Supreme Court of Canada described in *Trinity Western University v Law Society of Upper Canada,* 2018 SCC 33 at paragraph 30,

> "administrative decisions that engage the *Charter* are reviewed based on the framework set out in *Dore* and *Loyola.* The *Doré/Loyola* framework is concerned with ensuring that *Charter* protections are upheld to the fullest extent possible given the statutory objectives within a particular administrative context."

~~23~~29. The preliminary question under this analysis is whether the decision engages the *Charter* by limiting *Charter* protections. If the answer is "yes", the next question is:

> "whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play."

~~24~~30. If the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable. If not, the decision will be found to be unreasonable.

~~25~~31. A court therefore does not determine whether a *Charter* right is "infringed", "violated" or "denied" under the *Doré/Loyola* analysis; rather, if the *Charter* right is found to be "engaged" it then determines whether, based on a balancing analysis, the administrative decision is reasonable or unreasonable.

~~26~~32. ~~*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*")~~ at paragraph 141 states:

> [141] Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines,* at paras. 30-31.
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> [142] However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167, at paras. 18-19. An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. **Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose**: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 S.C.R. 202, at pp. 228-30; *Renaud v. Quebec (Commission des affaires*

sociales), 1999 CanLII 642 (SCC), [1999] 3 S.C.R. 855; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1, at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175, at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52, at paras. 54 and 88. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at paras. 45-51; *Alberta Teachers*, at para. 55.

~~27~~33. Since the result of the *Doré/Loyola* analysis is a determination of the reasonableness of the Decision, the appropriate remedial framework, if the decision is found to be unreasonable, is not whether to issue a "declaration" of an "infringement" or "violation" of a *Charter* right but rather consideration of whether to remit the matter back to the decision maker.

~~28~~34. On November 14, 2023, the Board extended an invitation to the Petitioner to provide any further comments she had planned to make at the June 13, 2023 Board meeting at the public board meeting in December 2023, which is also subject to Board Policy 170 and at which the Form was not used.

~~29~~35. Therefore, the Petitioner has already been granted the remedy that would flow from a finding that the Decision failed the *Doré/Loyola* test, and the matter is moot.

~~30~~36. The doctrine of mootness was recently described in *Independent Contractors and Businesses Association v British Columbia (Attorney General),* 2020 BCCA 245 at paragraph 7:

> [7] This appeal concerns the doctrine of mootness which, in the interests of judicial economy and consistent with the approach that courts are not required to give declaratory relief or opine on issues absent a live dispute, allows a court, in the management of its own process, to decline to hear a moot case. In *Cowling v. Brown* (1990), 1990 CanLII 777 (BC CA), 48 B.C.L.R. (2d) 63 (C.A.), Mr. Justice Lambert for this court explained at 66, "The general rule is that if the matter is moot the Court should not deal with it", but said "exceptions arise in special cases" and referred to the reasons for the exceptions discussed in *Borowski v. Canada (Attorney General*), 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342.
>
> [8] The governing expression of this doctrine was provided by Justice Sopinka in Borowski, in addressing a challenge to portions of s. 251 of the Criminal Code relating to abortion. The challenge had been launched before s. 251 was struck down in its entirety by *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30. In determining that the appeal was moot and that the court should not exercise its discretion to hear the appeal, Justice Sopinka said at 353:
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> > The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the

parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

~~31~~37. The Petitioner has been offered the opportunity to provide any further comments to the Board that she was unable to provide due to the Decision. She has already been offered what the Court could order if she successfully argued that the Decision was unreasonable under the *Doré/Loyola* test. No live controversy exists between the parties and the decision of the Court will have no practical effect on the rights of the Petitioner.

~~32~~38. The Court may depart from the ordinary rule. In *University of Victoria*, the Court of Appeal states the following:

> [53] As a general policy or practice, abstract, hypothetical or contingent questions will not be heard unless the court exercises its discretion to depart from that policy or practice: *Borowski* at 353. The relevant factors relating to the exercise of the court's discretion to do so include:
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> a) whether there are still adversaries who can suitably put the question to the court;
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> b) whether it is in the interests of judicial economy to consider the questions; and,
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> c) whether the question should be considered in light of the court's appropriate adjudicative role.

~~33~~39. It is not in the interest of judicial economy for the Court to exercise its discretion on this judicial review. The Court has a limited, supervisory role on judicial review. Thus, the Court should not depart from the ordinary rule to decline to hear a moot petition.

The issue of the Petitioner's freedom of expression in relation to the prohibition on recording Board meetings is not properly before the Court

Declaration pursuant to s. 52(1) not available

40. The Petitioner seeks a declaration pursuant to s. 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".

41. Section 52(1) is not applicable to the facts arising in these proceedings.

42. The Petitioner asserts the Form amounts to an "apparent policy of the Board to prohibit members of the public from recording its public meetings".

43. There is no board policy which prohibits members of the public from recording its meetings. Policy 170 does not express such a prohibition.

44. The Form sought the participants' acknowledgement that the Board would be recording the meeting and that no other video or audio recordings were permitted, with the exception of authorized media. The Form is not referred to in Policy 170 nor is it required by Policy 170. The Form was implemented as a result of an individualized decision by the Superintendent based on certain facts arising in relation to the June 13, 2023 Board meeting. The Form was instituted by the Superintendent for the June 13, 2023 meeting only, and in response to the Superintendent's concerns regarding safety, security and privacy of attendees at that meeting based on certain facts arising prior to the Board meeting.

45. In *Greater Vancouver Transit Authority v. Canadian Federation of Students – British Columbia Componen*t, 2009 SCC 31, at paragraph 88, the majority found that an individualized decision concerning a particular set of facts is not the kind of government action to which a broad remedy such as s. 52 applies.

46. The Superintendent's implementation of the Form is not "law" for the purposes of s. 52 of the *Constitution Act, 1982* or s. 1 of the *Charter* and is, rather, more appropriately viewed as an administrative decision made pursuant to statutory authority.

Remedies pursuant to s. 24 of the *Charter*

~~34~~47. The Petitioner seeks a declaration pursuant to s. 24 of the *Charter* that the Board "violated" her *Charter* right to freedom of expression, and others' right to freedom of expression by:

a. preventing her from making her own recording of the meeting, *and then*

b. muting her microphone used to amplify her voice for the Board's recording of the meeting.

~~35~~48. First, the Petitioner has no standing to seek a declaration that another person's *Charter* right has been violated.

~~36~~49. Further, as stated above, the question of whether the Decision, which involved muting the Petitioner's microphone, appropriately balanced the Petitioner's freedom of expression is moot. Therefore, one of the two "legs of the stool" used by the Petitioner to support this requested order falls away and it can be denied on this basis.

~~37~~50. Further, and in any event, the issue of a prohibition on recording Board meetings is not properly before the Court in these proceedings.

~~38~~51. The Petitioner ought first to have raised her objection to the ~~prohibition~~ Form with the Board which would then provide the Board the opportunity to consider her objection and respond to it with reasons, if appropriate. The Board's decision could then be the subject of judicial review. This would give the reviewing court a record and a factual matrix within which to apply the appropriate legal framework, which is particularly important in cases

involving assertions of a *Charter* right. No such factual matrix concerning the Board's alleged prohibition of recordings by attendees is before this Court.

~~39~~52. The Court of Appeal has held that "…I accept that judicial review is just that: judicial review. At its core, judicial review involves a supervisory review by the court, generally on the record before the tribunal. Judicial review is not an appeal. There are good policy reasons, well reflected in the case law, that courts generally ought not to entertain arguments for the first time on judicial review without the benefit of their consideration first by the tribunal" (*Jalloh v Insurance Council of British Columbia,* 2016 BCCA 501 at para 21). A "tribunal" is defined in s. 1 of *JRPA* as "one or more persons, whether or not incorporated and however described, on whom a statutory power of decision is conferred."

~~40~~53. Similarly, in *Denton v British Columbia (Workers' Compensation Appeal Tribunal),* 2017 BCCA 403, the Court considered a judicial review where a *Charter* argument was not advanced before the tribunal. The Court described the chamber's judge's reasons stating:

> [37] In his reasons, the judge explained why he considered it inappropriate to raise constitutional issues for the first time on judicial review. His analysis was informed by his recognition that judicial review is inherently a review of the record before an administrative tribunal, not an appeal or a hearing *de novo.* He applied the principle that a reviewing court should proceed on the basis of a record containing the necessary adjudicative and legislative facts created before the administrative tribunal[…]

~~41~~54. The Court affirmed the chamber judge's reasoning at paragraphs 48-49:

> [48] In this context, I return to comment on the approach taken by the judge. As I have said, the principles he applied were sound an well supported by authority.[…]
>
> [49] This approach coheres with the preferred approach to a court's review of constitutional claims calling for a complete factual context and a developed record. The point here is both that such claims should be considered in the context of a developed

record, and that the views of the administrative tribunal on those matters in respect of which it is expert are invaluable to a reviewing court.

~~42~~55. Requiring the Petitioner to first raise her objection before the Board would provide the Board with the opportunity to consider her objection, including whether any *Charter* right has been engaged, and then conduct the required balancing exercise. The Board would have the opportunity to consider the Petitioner's claim within the applicable statutory framework in which it operates, its policies and bylaws in applying the appropriate legal framework. Assessing whether a statutory decision maker has engaged in a reasonable balancing under the *Doré/Loyola* test requires a factual matrix which is not before this Court.

56. In the further alternative, if this Court determines the Superintendent's decision to implement the Form is properly the subject of judicial review in these proceedings and engages a *Charter* right, the Superintendent engaged in a reasonable balancing under the *Doré/Loyola* test.

~~43~~57. The Petitioner seeks a review of a matter not properly before the Court. The Petitioner also raises a *Charter* argument and complaint regarding recording for the first time on this judicial review. Neither of these are permissible.

Prohibitory Orders Sought are Not Appropriate

~~44~~58. The Petitioner seeks the following prohibitive Orders:

a. 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 the Petitioner or other members of the public seeking to participate in the public participation portion 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;

b. an Order, pursuant to section 2(2)(a) and section 24(1) of the *Charter*, prohibiting the Board from preventing the Petitioner and other members of the public from recording future Board meetings that are open to the public.

~~45~~59. Orders prohibiting a statutory decision maker's future actions are drastic and broad and are not appropriate in this case. As stated above, the Board has statutory authority over its own proceedings.

~~46~~60. As stated by the Court of Appeal in *Servatius v Alberni School District, No. 70,* 2022 BCCA 421 at paragraph 277:

> Ms. Servatius's petition sought not only a declaration that her religious freedom was violated, but she also sought an order prohibiting the school from "facilitating or allowing religious practices"[…] This very broad and vague relief seeking to restrict unknown future actions of the School District from ever hosting Indigenous cultural events was not supported by any version of the facts or interpretation of the law and was untenable from the start[…]

~~47~~61. As stated by the Nova Scotia Court of Appeal in *Nova Scotia Human Rights Commission v. Halifax (Regional Municipality),* 2010 NSCA 8, upheld on appeal in 2010 SCCA No. 132:

> [20] This Court has also confirmed the need for restraint when it comes to prohibiting the important work of administrative tribunals. For example, in *Psychologist Y v. Nova Scotia Board of Examiners in Psychology,* 2005 NSCA 116, 236 N.S.R. (2d) 273, the applicant psychologist sought to prohibit a disciplinary proceeding from continuing, arguing that the Board had no jurisdiction. Yet Cromwell J.A. (as he then was) cautioned (at § 21):
>
> > Prohibition is a drastic remedy. It is to be used only when a tribunal has no authority to undertake (or to continue with) the matter before it. Unless a lack of jurisdiction or a denial of natural justice is clear on the record, prohibition is also a discretionary remedy. As Sara Blake says in her text, *Administrative Law in Canada*,

3rd ed. (Butterworths, 2001) at 200, it may be refused if the existence of jurisdiction is debatable or turns on findings of fact that have yet to be made. It must be clear and beyond doubt, she writes, that the tribunal lacks authority to proceed. Or as 11 Halsbury's Laws of England (3rd ed., 1955) p. 115 puts it, prohibition cannot be claimed as of right unless the defect of jurisdiction is clear. (See also *R. v. Ashby*, 1934 CanLII 87 (ON CA), [1934] O.R. 421 (C.A.); *Re Lilly and Gairdner* (1973), 1973 CanLII 572 (ON SC), 2 O.R. (2d) 74 (Div. Ct.).) Prohibition is not a substitute for an appeal: *R. v. Jones* (1974), 1974 CanLII 486 (ON CA), 2 O.R. (2d) 741 (C.A.) application for leave to appeal dismissed (1974), 2 O.R. (2d) 741n (S.C.C.).

~~48~~62. The Petitioner seeks drastic, broad and vague relief to restrict future actions of the Board regarding the administration and procedural decisions of future Board meetings, the factual matrix of which cannot be known in advance. Future decisions concerning whether to interrupt, mute or terminate the remarks of a speaker in a board meeting, or whether to allow recordings by attendees, will turn on the application of specific facts of the case in the context of the appropriate legal framework.

~~49~~63. These prohibitive orders are therefore inappropriate. Should the Court grant these broad orders, this would significantly interfere with the decision making of the Board which is an elected public body with powers delegated to it by the legislature.

Conclusion

~~50~~64. The Court should decline to exercise its discretion in granting the orders sought in this judicial review.

~~51~~65. The petition should be dismissed.

Part 6: MATERIAL TO BE RELIED ON

~~52~~1. Affidavit of Holly Bedford, affirmed on November 17, 2023

~~53~~2. Affidavit of Rohan Arul-Pragasam, affirmed on November 17, 2023; ~~and~~

3. Affidavit #2 of Rohan Arul-Pragasam, affirmed on October 2, 2024; and

~~54~~4. Such further and other material as counsel may advise.

~~The Petition Respondent estimates that the application will take one day.~~

Dated: ~~17 November 2023~~ 3 October 2024

Signature of lawyer for Petition Respondent
Lindsie M. Thomson

Petition Respondent's for service:

[redacted]

Email address for service:

[redacted]