



COURT OF APPEAL FILE NO. CA46683

COURT OF APPEAL

ON APPEAL FROM the order of Mr. Justice Thompson of the Supreme Court of B.C.
pronounced on the 8th day of January, 2020

BETWEEN:

CANDICE SERVATIUS

Appellant
(Petitioner)

AND:

**SCHOOL DISTRICT 70 (ALBERNI) and
ATTORNEY GENERAL OF BRITISH COLUMBIA**

(Respondent)

APPELLANT'S FACTUM

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CHRONOLOGY

Date	Event
September 8, 2015	First staff meeting of the 2015-2016 school year is held at John Howitt Elementary School (“ JHES ”), “cleansing” ceremony (smudging) proposed to remove negative energy from students’ spirits and classrooms/furniture (the “Cleansings”).
September 14, 2015	Letter prepared and signed advising parents and guardians of the Cleansings (the “Parent Letter”).
September 15, 2015	Parent Letter sent to parents at end of school day. Mrs. Servatius receives the Parent Letter from her seven year old son M.S., which had been sent home with the Grade 3 class of Ms. Iacuzzo. Mrs. Servatius tells her children that she will speak with Principal Manson to opt them out of being present for the Cleansings.
September 16, 2015	In the morning, Cleansings occur in the Grade 3 class of Ms. Iacuzzo, the Grade 5/6 split class of Ms. Dyer, and the Grade 6 class of Ms. Dekoninck. Mrs. Servatius attends at JHES that afternoon, and learns the Cleansings have already occurred.
September 16, 2015 - January 7, 2016	<p>Mrs. Servatius takes her concerns regarding the Cleansings to Greg Smyth, Superintendent of the School District (“Superintendent Smyth”). She and her husband also send a letter asserting that their rights under the Canadian Charter of Rights and Freedoms (the “Charter”) had been violated, as well as stating their expectation “that from now on written consent will be required before anything of a spiritual/religious nature takes places in any of the classrooms in the” School District.</p> <p>Superintendent Smyth makes commitments that he will provide her with the policies and procedures relied on in allowing the Cleansings, and that no spiritual or religious exercise will again occur at JHES without notice to parents and parental consent to participate.</p>

January 7, 2016	Mandatory school assembly is held at JHES. Assembly features an Indigenous hoop dance (the “Hoop Dance”), described by its performer, Teddy Anderson (“Mr. Anderson”) as “deeply spiritual”. At assembly, Mr. Anderson recites a prayer to an unspecified god (the “Prayer”). Without any prior notice or warning to Mrs. Servatius, both E.S. and M.S. are required to be present.
January 7, 2016 - June 9, 2016	After weeks of unreturned calls to Superintendent Smyth, Mrs. Servatius sends another letter, requesting—among other things—“written assurance that this will not happen yet again” in any of the School District’s schools.
June 9, 2016	According to Mrs. Servatius, Superintendent Smyth informs her “there is more tolerance for Aboriginal religion than your religion”. Mr. Smyth denies making this statement. Superintendent Smyth also informs Mrs. Servatius that no documents will be provided until at least September 2016, as they will be “legal” in nature.
June 10, 2016	Mrs. Servatius retains legal counsel.
July 12, 2016	Counsel for Mrs. Servatius sends a letter to Pam Craig—Chair of the School District’s Board—demanding that the School District cease its Charter-infringing conduct, as well as seeking a detailed response by July 29, 2016. No such response will be received until late October.
October 25, 2016	Counsel for the School District sends a letter denying that Mrs. Servatius’ constitutional rights had been violated.
November 1, 2016	Mrs. Servatius files a Petition in the BC Supreme Court seeking declaratory relief for a section 2(a) Charter infringement and an order prohibiting similar conduct.
January 8, 2020	Mr. Justice Thompson dismisses the Petition, holding that “no infringement of [Mrs. Servatius’s] or her children’s freedom of religion has been proved”.

OPENING STATEMENT

By imposing spiritual practices during mandatory school time, the School District infringed the religious freedom of Mrs. Servatius and her children as protected by section 2(a) of the *Charter*, and breached its duty of state neutrality in matters of spirituality.

Mrs. Servatius and her husband are Protestant Evangelical Christians, and have raised their children in accordance with these beliefs, which prohibit involvement in non-Christian spiritual practices, including presence for non-Christian prayers and the Indigenous spiritual practice of smudging: a Biblical imperative with a clear nexus to Christianity.

In the 2015-2016 school year, Mrs. Servatius's children were enrolled in John Howitt Elementary School ("JHES"). At the outset of the school year, "cleansing" ceremonies (the "Cleansings")—in reference to the practice of smudging—were conducted in JHES classrooms—including in the classrooms of Mrs. Servatius's children. Neither adequate notice nor an explicit opportunity to opt her children out of the Cleansings were provided.

The Cleansings were performed for an explicitly spiritual and supernatural purpose: cleansing classrooms and the spirits of students of negative energies from past negative events: a purpose in direct contradiction to the Servatius family's beliefs, which recognize the blood atonement of Jesus Christ as the exclusive means of spiritual cleansing.

After Mrs. Servatius had received assurance that no further spiritual or religious practices would occur at JHES without parental consent to participate, Mrs. Servatius's children were required to be present at a JHES assembly featuring an indigenous hoop dance, a spiritual practice accompanied by a prayer to an unspecified "god". This time, Mrs. Servatius was given no prior notice at all, let alone an opportunity to withhold consent.

The School District's conduct severely interfered and overrode the ability of Mrs. Servatius and her children to act in accordance with the religious beliefs engaged.

This conduct is not justifiable under the *Charter*: it is not prescribed by law, is prohibited by the *School Act*, and was engaged in for a forbidden religious purpose. Alternatively, the School District's conduct cannot be justified. Its decision-makers neither considered reasonable options to pursue the asserted objectives with a lesser impact on the rights engaged, nor did they explore the potential for accommodations to address that impact. In either case, the School District's conduct is irrevocably unconstitutional.

PART 1 – STATEMENT OF FACTS

A. The Parties

1. The Appellant, Candice Servatius (“Mrs. Servatius”), is a resident of Port Alberni.¹ At all material times, Mrs. Servatius’ children were students at John Howitt Elementary School (“JHES”), within the Respondent School District 70 (Alberni) (the “School District”). During the 2015-16 school year, Mrs. Servatius’s daughter E.S. was enrolled in the Grade 5/6 class of Jelena Dyer (“Ms. Dyer”),² and her son M.S. was enrolled in the Grade 3 class of Sonia Iacuzzo (“Ms. Iacuzzo”).³ M.S. was seven⁴ at the time of these events and suffers from autism.⁵
2. Mrs. Servatius is a Protestant Evangelical Christian. Foundational to her beliefs is that Jesus Christ—by means of His spotless life and crucifixion—“became the ultimate sacrifice for the forgiveness of sin for all humanity.”⁶ Because of her belief in the efficacy of the atonement of Christ alone, Mrs. Servatius believes that there is “no other spiritual authority, spirit or god worthy of worship or that should be prayed to”, and that the blood of Christ “is the only means of purification for sin, defilement and impurity.”⁷
3. These beliefs are in direct contradiction to the Indigenous spiritual cleansing practice known as smudging. Mrs. Servatius does “not believe [...] spiritual energy [...] can be cleansed [by] smoke”, and her religion strictly prohibits involvement in such practices.⁸

¹ Affidavit of Candice Servatius, sworn November 1, 2016 (“First Affidavit of Candice Servatius”).

² Affidavit of E.S. at paras. 2, 5; Affidavit of Jelena Dyer at para. 2.

³ Affidavit of Sonia Iacuzzo at para. 2.

⁴ [*Servatius v. Alberni School District No. 70, 2020 BCSC 15*](#) [Reasons for Judgment] at para. 1.

⁵ Servatius Hearing Transcript, starting at Line 40 of Page 171.

⁶ Affidavit of Candice Servatius, sworn November 6, 2019 (“Second Affidavit of Candice Servatius”) at paras. 2, 4; Affidavit of John Cox, Exhibit “C” (“Cox Report”) at p. 3.

⁷ Second Affidavit of Candice Servatius at para. 2.

⁸ Second Affidavit of Candice Servatius at paras. 7-8.

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It is thus “against [Mrs. Servatius’s] conscience and [her] family’s beliefs to be present during” smudging.⁹ Further, Mrs. Servatius’ beliefs require her to “abstain from participation in” all other “religious, spiritual, or supernatural ceremonies [...] that are not part of” her faith.¹⁰ Mrs. Servatius and her husband are raising their children with these beliefs,¹¹ and it is without contention that they are sincerely held.¹²

4. The School District is subject to the [Canadian Charter of Rights and Freedoms](#)¹³ and to the [School Act](#).¹⁴

B. The Cleansings

5. At the first JHES staff meeting of the 2015-2016 school year, Nuu-chah-nulth Education Worker Sherri Cook (“Ms. Cook”) proposed holding a “cleansing” (the “Cleansings”) at JHES, referring to smudging:¹⁵ a *spiritual* practice used “as a way of cleaning” one’s “thoughts”, one’s “spirits”, and “places” of “negative energies.”¹⁶ Ms. Cook testified that the Cleansings were *actual supernatural events performed for the express purpose of interacting with the unseen world*,¹⁷ and that the cleaning and purifying which occurs during a Cleansing takes place invisibly in the unseen world.¹⁸ Ms. Cook testified that smudging was only adopted by some Nuu-chah-nulth within the

⁹ Second Affidavit of Candice Servatius at para. 8.

¹⁰ Second Affidavit of Candice Servatius at para. 6.

¹¹ Second Affidavit of Candice Servatius at para. 6.

¹² [Reasons for Judgment](#) at para. 3.

¹³ [Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 \(UK\), 1982, c. 11 \(the “Charter”\).](#)

¹⁴ [R.S.B.C., c. 412.](#)

¹⁵ Affidavit of Stacey Manson at para 6; Affidavit of Sonia Iacuzzo at para 5; Affidavit of Jelena Dyer at para. 3.

¹⁶ Affidavit of Dr. Judith Sayers at para. 17.

¹⁷ Servatius Hearing Transcript, starting at Line 42 of Page 117, Line 21 of Page 118, and Line 36 of Page 139.

¹⁸ *Ibid*, Starting at Line 42 of Page 117.

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last one hundred years.¹⁹ She testified she personally began smudging voluntarily at the age of 20, and that the specific reason she smudges is because *it is “a safe way for [her] to communicate with spirits and ancestors and the creator of things”*.²⁰

6. On September 15, 2015, Mrs. Servatius received a letter concerning the Cleansings which her son brought home from the class of Ms. Iacuzzo (the “Parent Letter”).²¹ The letter was drafted by Ms. Cook and signed by JHES Principal Stacey Manson (“Principal Manson”).²² It includes the following assertions regarding Nuu-chah-nulth beliefs and the Cleansings which were to occur at an unspecified date:

- “Nuu-chah-nulth People believe strongly that ‘Hii-Shuukish-Tsawalk’ (everything is one; all is connected). Everything has a spirit and energy exists beyond the end of school one year and into the next”;
- “This will be **our opportunity to [...] experience cleansing of energy** from previous students in our classroom, previous energy in **our** classroom and **cleanse our own spirits** to allow GREAT new experiences to occur **for all of us**”;
- “All participants will hold on to cedar branches [...] and/or [be] “Smudged” (smoke from sage will be fanned over the body and spirit”); and
- “**Classroom and furniture will [...] be cleansed** to allow any previous energy from: falls, bad energy, bullying, accidents, sad circumstances, etc. to be released and ensure the room is **safe for all** and only good things will happen.”²³

7. Witnesses for the Attorney General of BC—who helped craft the public school curriculum and oversee it—confirmed that holding Cleansing ceremonies in public school classrooms is **not** required to fulfill or teach the curriculum²⁴ or learning

¹⁹ *Ibid*, Starting at Lines 18 and 43, Page 113.

²⁰ *Ibid*, Lines 20-23.

²¹ First Affidavit of Candice Servatius, para. 6 and Exhibit B. The Parent Letter was dated September 14, it was seen by Mrs. Servatius September 15, and the Cleansings occurred September 16.

²² Affidavit of Sherri Cook at para. 7; Affidavit of Stacey Manson at para. 7.

²³ First Affidavit of Candice Servatius, Exhibit B. [emphasis added]

²⁴ Cross-Examination on Affidavit of Nancy Walt, starting at Line 24 on Page 15; Cross-Examination on Affidavit of Harry (Ted) Cadwallader, starting at Line 6 of Page 16.

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standards.²⁵ They never envisioned mandatory classroom smudging in schools,²⁶ and had never heard of an elementary school classroom holding a Cleansing before the events in this case.²⁷

8. First Nations witnesses for the Attorney General and the Intervener Nuu-chah-nulth Tribal Council testified that smudging ought to always be voluntary, that the consent of all is essential, that the right to opt out must always be presented, and that the First Nations Education Steering Committee does not take the position there should be smudging in classrooms.²⁸ Dr. Lorna Williams also testified that attendance at hoop dances ought also to be voluntary.²⁹
9. Upon receiving the Parent Letter, Mrs. Servatius discussed the Cleansings with her family on the evening of September 15, 2015.³⁰ She told her children she would speak with Principal Manson the next day to opt them out of being present for them.³¹
10. Unbeknownst to Mrs. Servatius, the Cleansings occurred the following day—prior to her arrival at JHES that afternoon—including in the classrooms of Ms. Dyer³² and

²⁵ Cross-Examination on Affidavit of Nancy Walt, starting at Line 11 on Page 18, and starting at Line 110 of Page 24; Cross-Examination on Affidavit of Harry (Ted) Cadwallader, starting at Line 12 of Page 9, and starting at Line 6 of Page 14.

²⁶ Cross-examination on Affidavit of Nancy Walt, starting at Line 11 of Page 26; Cross-examination on Affidavit of Harry (Ted) Cadwallader, starting at Line 22 of Page 14.

²⁷ Cross-examination on Affidavit of Nancy Walt, starting at Line 21 of Page 14; Cross-examination on Affidavit of Harry (Ted) Cadwallader, starting Line 9 on Page 16.

²⁸ See Cross-examination of Dr. Lorna Williams, starting at Line 15 of Page 32, starting at Line 20, p. 44; Cross-examination of Dr. Judith Sayers, starting at Line 3 of Page 27; Cross-examination of Jo-Anne Chrona, starting at Line 38 of Page 8.

²⁹ Cross-examination of Dr. Lorna Williams, starting at Line 19 of Page 35.

³⁰ Affidavit of E.S. at para. 4; 2019-11-19; Servatius Hearing Transcript, starting at Line 13 of Page 94; First Affidavit of Candice Servatius at para. 6.

³¹ Servatius Hearing Transcript, starting at Line 13 of Page 94.

³² Affidavit of E.S. at paras. 5-7; Affidavit of Jelena Dyer at paras. 6-9.

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Ms. Iacuzzo, in the presence of Mrs. Servatius's children.³³

11. The Cleansings featured a First Nations elder (the "Elder")³⁴ explaining to each class that *she was going to cleanse* the students' classroom with smoke,³⁵ followed by the Elder lighting sage in a shell³⁶ and walking around the perimeter of the room³⁷ waving the smoke with a feather along the walls³⁸ and doorways.³⁹

12. In Ms. Dyer's classroom, this included the back wall where the students' backpacks were stored.⁴⁰ The Elder spoke of spirits and informed the class that the smoke would cleanse the room of energy.⁴¹ Ms. Cook states that a student was permitted to leave to observe from outside because the smoke was "too strong".⁴²

13. Ms. Cook (who is Nuu-chah-nulth)⁴³ testified that the Cleansings were conducted for the purpose of *actually* cleansing energy from prior negative events.⁴⁴ She stated that people who are well-trained in the practice of Cleansing, such as the Elder who

³³ Affidavit of Sonia Iacuzzo at para. 7.

³⁴ Identified by Ms. Cook as Margaret Eaton: see Affidavit of Sherri Cook at para. 8.

³⁵ Affidavit of Sonia Iacuzzo at para. 8; Affidavit of E.S. at para. 7; Servatius Hearing Transcript, starting at Line 33 of Page 197.

³⁶ Affidavit of Sherri Cook at para. 11; Affidavit of Jelena Dyer at para. 9; Affidavit of Sonia Iacuzzo at para. 8.

³⁷ Affidavit of Sherri Cook at para. 11; Affidavit of Jelena Dyer at para. 9; Affidavit of Sonia Iacuzzo at para. 8.

³⁸ Affidavit of Sherri Cook at para. 11; Servatius Hearing Transcript, starting at Line 21 of Page 195.

³⁹ Affidavit of Sherri Cook at para. 11; Affidavit of Jelena Dyer at para. 9; Affidavit of Sonia Iacuzzo at para. 8; Affidavit of E.S. at para. 11.

⁴⁰ Servatius Hearing Transcript, starting at Line 28 of Page 194.

⁴¹ Affidavit of E.S. at paras, 7, 10; Servatius Hearing Transcript, starting at Line 33 of Page 197.

⁴² Servatius Hearing Transcript, Lines 27, 28, Page 120.

⁴³ Affidavit of Sherri Cook at para. 2.

⁴⁴ Servatius Hearing Transcript, stating at Line 23 of Page 139.

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conducted the Cleansings on September 16, 2015, sometimes see the spirits of the ancestors during Cleansings, but that she does not know if the Elder saw the ancestors on these occasions.⁴⁵ The Elder did not testify in these proceedings.

14. Ms. Cook testified that the Cleansings each took approximately 15-20 minutes per classroom to complete.⁴⁶ Ms. Cook testified that she believes the smoke during the Cleansings *was interacting* with the spirits and energy in the unseen world at the Cleansings.⁴⁷ She stated that the Cleansings were not for her,⁴⁸ but for the people in the room who had been harmed, bullied, teased, and that *those people* felt something different – they felt better because the spirit world, among others, heard them.⁴⁹ Ms. Cook testified that each classroom had specific “needs”:⁵⁰ the Cleansings were *necessary* to cleanse⁵¹ residual energy in the unseen world from prior bullying and physical injuries.⁵²

15. Ms. Cook also testified that she had authored notice letters concerning cleansing ceremonies “many times”, and that these others letters communicated that parents could opt their children out if they did not want them to participate; she had moved students to other rooms to do school work in such circumstances.⁵³ No such opt out opportunity was communicated in the Parent Letter.

16. Ms. Iacuzzo provided less than 24 hours’ notice of the Cleansings to parents, and Ms. Dyer provided no notice to parents at all,⁵⁴ opining that parents had no right to notice

⁴⁵ *Ibid*, Lines 13-27 of Page 116.

⁴⁶ *Ibid*, Lines 29-36 of Page 120.

⁴⁷ *Ibid*, Lines 21-37, Page 118.

⁴⁸ *Ibid*, Lines 43-45

⁴⁹ *Ibid*, Lines 45-48 and Lines 1-6 of pages 118 and 119 respectively.

⁵⁰ *Ibid*, Lines 4-16 of Page 140; Lines 1-17 of Page 141.

⁵¹ Lines 9, 10 of Page 119. Lines 21-24, 31-33 of Page 118.

⁵² *Supra*, note 55.

⁵³ Servatius Hearing Transcript, Lines 13-23 of Page 134.

⁵⁴ *Ibid*, starting at Line 39 of Page 187.

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of the Cleansings.⁵⁵ In stark contrast, Ms. Cook testified that she intended the Parent Letter to be provided to parents *days before* the Cleansings⁵⁶ because she wanted to have the opportunity to opt their children out.⁵⁷

C. Events Following the Cleansings

17. Mrs. Servatius was shocked and alarmed to learn when she attended at JHES that afternoon that the Cleansings had already occurred in her children's classrooms. She subsequently called Greg Smyth, Superintendent of the School District ("Superintendent Smyth"). She and her husband also sent a letter asserting that their Charter rights had been violated, and stating their expectation that "written consent will be required before anything of a spiritual/religious nature takes place" again.⁵⁸
18. By Mrs. Servatius's account, Superintendent Smyth made commitments which he failed to honour: that he would provide her with the policies and procedures relied on in allowing the Cleansings, and that no spiritual or religious exercise would again occur at JHES without notice to parents and parental consent to participate.⁵⁹
19. On January 7, 2016, JHES held a mandatory school assembly that featured an Indigenous hoop dance (the "Hoop Dance"),⁶⁰ described by its performer, Teddy Anderson ("Mr. Anderson"), as "deeply spiritual".⁶¹ Mr. Anderson recited a prayer to an unspecified god (the "Prayer").⁶² E.S. and M.S. were required to be present.
20. Mrs. Servatius was upset when she learned of the Prayer. After more unreturned calls to Superintendent Smyth,⁶³ she sent a letter requesting—among other things—

⁵⁵ *Ibid*, Starting at Line 24 of Page 188. Ms. Dyer says the Cleansings are "curriculum standards".

⁵⁶ *Ibid*, Line 41 of Page 137.

⁵⁷ *Ibid*, Line 47 of Page 137; Line 1 of Page 138.

⁵⁸ First Affidavit of Candice Servatius at paras. 10-13 and Exhibit C.

⁵⁹ First Affidavit of Candice Servatius at paras. 10-13.

⁶⁰ Affidavit of E.S. at para. 19; Affidavit of Stacey Manson at para. 17.

⁶¹ Affidavit of Stacey Manson at para. 13 and p. 04 of Exhibit "C".

⁶² Affidavit of E.S. at para. 20; Affidavit of Stacey Manson at para. 17.

⁶³ First Affidavit of Candice Servatius at para. 15.

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“written assurance that [it would] not happen again”.⁶⁴ She deposed that Superintendent Smyth agreed to provide the requested documents by the end of April 2016.⁶⁵ These documents were never received.⁶⁶

21. On June 9, 2016, and after significant difficulty, Mrs. Servatius succeeded in meeting Superintendent Smyth.⁶⁷ She says he told her “there is more tolerance for Aboriginal religion than your religion,” a statement he denies.⁶⁸ He said that no documents would be provided until at least September 2016, as they would be “legal” in nature.⁶⁹

22. On June 10, 2016, Mrs. Servatius retained legal counsel.⁷⁰

23. On July 12, 2016, counsel sent a letter addressed to Pam Craig—Chair of the School District’s Board—demanding the School District cease its infringing conduct, as well as seeking a detailed response by July 29, 2016.⁷¹ No such response was received until October 25, 2016, when counsel for the School District sent a letter denying that Mrs. Servatius’s constitutional rights had been violated.⁷²

24. On November 1, 2016, Mrs. Servatius filed a Petition in the BC Supreme Court seeking declaratory relief for a section 2(a) [Charter](#) infringement and an order prohibiting similar conduct.

25. On January 8, 2020, Mr. Justice Thompson dismissed the Petition, holding “that no infringement of [Mrs. Servatius’s] or her children’s freedom of religion [had] been proved.”⁷³

⁶⁴ First Affidavit of Candice Servatius, Exhibit C.

⁶⁵ First Affidavit of Candice Servatius at para. 17.

⁶⁶ First Affidavit of Candice Servatius at para. 18.

⁶⁷ First Affidavit of Candice Servatius at paras 18-19.

⁶⁸ First Affidavit of Candice Servatius at para. 19; Affidavit of Greg Smyth at para. 14.

⁶⁹ First Affidavit of Candice Servatius at para. 19.

⁷⁰ First Affidavit of Candice Servatius at paras. 20-21.

⁷¹ First Affidavit of Candice Servatius at para. 21 and Exhibit E.

⁷² First Affidavit of Candice Servatius at para. 26 and Exhibit K.

⁷³ [Reasons for Judgment](#) at para. 122.

PART 2 – ERRORS IN JUDGMENT

26. It is respectfully submitted that the Learned Justice Thompson erred in concluding:
- a. the holding of the Cleansings at JHES did not constitute a non-trivial interference with Mrs. Servatius’s and her children’s ability to act in accordance with their religious beliefs, as prohibited by section 2(a) of the [Charter](#);
 - b. the Cleansings did not constitute a breach of the School District’s Duty of State Neutrality, as prohibited by section 2(a) of the [Charter](#);
 - c. the holding of the Prayer at the Hoop Dance did not constitute a non-trivial interference with Mrs. Servatius’s and her children’s ability to act in accordance with their religious beliefs, as prohibited by section 2(a) of the [Charter](#); and
 - d. the Prayer at the Hoop Dance did not constitute a breach of the School District’s Duty of State Neutrality, as prohibited by section 2(a) of the [Charter](#).

PART 3 - ARGUMENT

A. Introduction

27. Section 2(a) of the [Charter](#) protects the freedom of conscience and religion, shielding the right not “to be forced to act in a way contrary to [one’s] beliefs or [...] conscience.”⁷⁴ This right extends from parent to child.⁷⁵
28. *Per* section 2(a) of the *Charter*, the state has a duty of neutrality in matters involving religion.⁷⁶ The School District’s schools must be neutral public spaces “free from coercion, pressure, and judgment [...] in matters of spirituality.”⁷⁷

B. The Applicable Standards of Review

29. In *Housen v Nikolaisen*,⁷⁸ the Supreme Court of Canada outlined the standard of review in civil appeals.

⁷⁴ [R v. Big M Drug Mart Ltd., \[1985\] 1 S.C.R. 295, 1 RCS 295](#) at para. 95.

⁷⁵ [B. \(R.\) v. Children's Aid Society of Metropolitan Toronto, \[1995\] 1 S.C.R. 315, 1 RCS 315](#) at p. 434 (*per* Iacobucci and Major JJ.).

⁷⁶ [Movement laïque québécois v. Saguenay \(City\), 2015 SCC 16](#) [“Saguenay”] at para 1.

⁷⁷ [Saguenay](#) at para. 74.

⁷⁸ [Housen v. Nikolaisen, 2002 SCC 33, \[2002\] 2 SCR 235](#) [“Housen”].

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For findings or inferences of fact and for questions of mixed fact and law, the standard is that of a “palpable and overriding error”.⁷⁹

30. Findings of mixed fact and law occur where a legal standard is applied to a set of facts.⁸⁰ A standard of palpable and overriding error is applied when “the legal principle is not readily extractible”⁸¹, or “where the issue on appeal involves the trial judge’s interpretation of the evidence as a whole.”⁸²
31. For questions of law, the standard of review is correctness.⁸³ The Supreme Court of Canada recognized that “Matters of mixed fact and law lie along a spectrum”:⁸⁴ with some errors, the legal question can be extracted from the factual question and be subject to the correctness standard as an error of law. This occurs when “an incorrect [legal] standard” is applied or there has been “a failure to consider a required element of a legal test, or similar error in principle.”⁸⁵

C. The Cleansings infringe Mrs. Servatius’ Section 2(a) Charter rights

The Test for a Section 2(a) Infringement

32. An infringement of section 2(a) is made out when the claimant shows:

“(1) that he or she sincerely believes in a belief or practice that has a nexus with religion”; and

“(2) that the impugned conduct interferes with the claimant’s ability to act in accordance with that belief or practice in a manner that is more than trivial or insubstantial”.⁸⁶

⁷⁹ [Housen](#) at paras 10, 21, 25, 37; see also [Mouvement laïque québécois v Saguenay \(City\)](#), 2015 SCC 16, [2015] 2 SCR 3 at para 33.

⁸⁰ [Housen](#) at para 26 citing [Canada \(Director of Investigation and Research\) v Southam Inc.](#), 1997 CanLII 385 (SCC), [1997] 1 SCR 748 at para 35.

⁸¹ [Housen](#) at para 36.

⁸² [Housen](#) at para 36.

⁸³ [Housen](#) at para 8.

⁸⁴ [Housen](#) at para 36.

⁸⁵ [Housen](#) at para 36.

⁸⁶ [Ktunaxa Nation v. British Columbia \(Forests, Lands and Natural Resource Operations\)](#), 2016 SCC 54 at para. 122, citing [Syndicat Northcrest v. Amselem](#), 2004 SCC 47

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33. The first part of this test is subjective: the “claimant need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion.”⁸⁷

34. Once this part is met, the claimant must prove on a balance of probabilities that “a religious belief exists that has been infringed”, requiring “an objective analysis of the rules, events, or acts that interfere with the exercise of the freedom.”⁸⁸

Application of the Test: a Section 2(a) Infringement Is Made Out

35. As stated, Mrs. Servatius and her husband are Christians, and are raising their children in the Christian faith. Their right to do so is fundamental in Canadian society and zealously protected by section 2(a) of the *Charter*.⁸⁹ At the material time, Mrs. Servatius’ children were aged seven and nine, and mandated by law to attend school.⁹⁰ Both were separated from their parents on the day of the Cleansings.

36. The evidence regarding the religious beliefs of Mrs. Servatius is unambiguous: it is her religious belief that purification from sin and impurity comes *only* through faith in the atoning sacrifice of Jesus Christ.⁹¹ Mrs. Servatius’ religion teaches, and she believes, that personal presence and involvement at supernatural ceremonies such as the Cleansings is forbidden⁹² because they attempt to interact with elements in

[“*Amselem*”] at para. 59; [Multani v. Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6](#) at para. 34; and [Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37](#) [“*Hutterian Brethren*”] at para. 32.

⁸⁷ [Amselem](#) at para. 48.

⁸⁸ [S.L. v. Commission scolaire des Chênes, 2012 SCC 7](#) at para. 24.

⁸⁹ [B. \(R.\) v. Children's Aid Society of Metropolitan Toronto, \[1995\] 1 S.C.R. 315, 1 RCS 315](#)

⁹⁰ [School Act, s. 3](#)

⁹¹ Affidavit of John Cox, Exhibit “C”, p. 3.

⁹² *Ibid*, “For Mrs. Servatius or her daughter to express agreement with the concepts that “everything has a spirit” and that our spirits can be “cleansed” apart from the atoning death of Christ, amounts to a serious denial of the Lordship of Jesus Christ.” Also see Second Affidavit of Candice Servatius at paras. 6-8.

the unseen world, and in a manner, which is forbidden to Christians.⁹³ Mrs. Servatius believes purification and cleansing come only from the atoning sacrifice of Jesus, the Passover Lamb of God,⁹⁴ and her religion forbids involvement with other gods and powers, a prohibition which comes from the Ten Commandments.⁹⁵ It should also be noted that Mrs. Servatius believes she has a religious imperative to bring up her child in the Christian faith, including the aforesaid beliefs.⁹⁶

37. Mrs. Servatius' beliefs have a clear nexus with the Christian religion and are common in Evangelical Christianity. According to Pastor Cox this common belief system is not surprising, as Evangelical Christian beliefs are based on the teachings of the Bible. Pastor Cox cited many Biblical passages to evidence the source of the beliefs.⁹⁷

⁹³ Second Affidavit of Candice Servatius at paras. 6-8; Cox Report at pp. 4-7. See Cox Report p. 5 that "...in the Christian understanding of the supernatural realm, nothing is regarded as neutral, harmless, or without impact. The historic foundation of Christianity is Judaism, as recorded in the Old Testament", which state that Israel is to have no other gods (Exodus 20:3-4). "Just as smudging is considered by indigenous individuals as spiritual and supernatural in nature", so is it to a Christian like Mrs. Servatius. As Nuuchahnulth Elder Randy Fred observed, "smudging is a religious practice."

⁹⁴ Affidavit of Candice Servatius, sworn November 6, 2019 ("Second Affidavit of Candice Servatius") at paras. 2-4; Affidavit of John Cox, Exhibit "C", p. 3.

⁹⁵ Affidavit of John Cox, Exhibit "C", p. 5: "...in the Christian understanding of the supernatural realm, nothing is regarded as neutral, harmless, or without impact. The historic foundation of Christianity is Judaism, as recorded in the Old Testament", which state that Israel is to have no other gods (Exodus 20:3-4). "Just as smudging is considered by indigenous individuals as spiritual and supernatural in nature", so is it to a Christian like Mrs. Servatius. As Nuuchahnulth Elder Randy Fred observed, "smudging is a religious practice."

⁹⁶ Cox Report, Exhibit "C" p. 6: "It is important for Christian parents to raise their children according to their faith. This includes from refraining from participation in spiritual or supernatural ceremonies that contradict the Bible and Christianity."

⁹⁷ *Ibid*, pages 4 and 5.

38. The Appellant submits the first part of the 2(a) test is met. Mrs. Servatius holds sincere beliefs which have a nexus with religion. These beliefs include the exclusive worship of the God of the Bible, faith in the atoning sacrifice of Christ alone and in no other supernatural power or mediator, and non-participation in spiritual practices which are not in accordance with Biblical teachings: they forbid “participation in [non-Christian] spiritual ceremonies”,⁹⁸ including presence during smudging.⁹⁹
39. The imposition by the School District of the Cleansings thus substantially and non-trivially interfered Mrs. Servatius’s freedom of religion: her ability to act in accordance with these beliefs was **obliterated**.
40. Mrs. Servatius purposeful rearing of her children in a specific religious paradigm was disdained and disrespected by the School District. The School District knows the diverse public holds constitutionally protected and diverse views on religious and spiritual matters. The School District knows that many of the children who attend its schools come from overtly religious homes. Mrs. Servatius entrusted her children to the School District’s care during the day, trusting in the government to honour its legal obligations to respect her family’s section 2(a) right to be free from state interference with their religious convictions. This trust was betrayed.
41. When the School District gathered the public’s diverse children in its care and held a ritual for them, the express purpose of which was to interact with the supernatural and unseen world, the School District crossed a forbidden line. Contacting the unseen world to mystically purify the public’s children and their classrooms is not a lawful state objective. The School District has no mandate to compel the spiritual Cleansing of Mrs. Servatius’ children, the space where they are sitting, or the secular classroom where they are mandated to receive an education. Holding a ceremony to Cleanse the classrooms’ small children, especially with them in it, is nothing less than an abuse of state authority and a betrayal of the trust of parents.
42. Both Evangelical Christians and First Nations’ people believe (from differing perspectives) that interacting with the spirit world is capable of impacting people in

⁹⁸ Second Affidavit of Candice Servatius at para. 6.

⁹⁹ Second Affidavit of Candice Servatius at para. 8, Cox Report, Exhibit “C”, p.

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significant ways.¹⁰⁰ During smudging, request is made in the supernatural realm of spirits and to the spirit of the sage for spiritual cleansing.¹⁰¹ Evangelical Christians believe that the Bible teaches that ceremonies such as the Cleansings are not sanctioned by God,¹⁰² but rather constitute a request to powers which are antithetical and antagonistic to God, and must not be attended. Pastor Cox deposed that Christians do not “have to be [...] actively interacting with [a ceremony] to be participating in it.”¹⁰³ The record shows that the state’s imposition of the Cleansings on the Servatius children in their classroom was a profound violation.

43. Given the foregoing, it is respectfully submitted that the Honourable Lower Court Judge committed a palpable and overriding error in mixed fact and law in disregarding the testimony of Pastor Cox and Mrs. Servatius on this point and concluding that physical presence at a supernatural ceremony cannot equate to participation,¹⁰⁴ and concluding that any interference with Mrs. Servatius religious freedoms was trivial.
44. From the perspective of Mrs. Servatius, abstaining from presence at the Cleansings is not merely “optional or a matter of personal choice.”¹⁰⁵ Avoiding supernatural ceremonies in conflict with the teachings of the Bible is an imperative. It is not akin to Evangelical Christian students merely preferring to study law in their “*optimal* religious learning environment”.¹⁰⁶ It is instead akin to the Orthodox Jewish obligation at issue in the [Amselem](#) case: the religious imperative to dwell in a succah on one’s balcony during the Feast of Tabernacles.
45. The declaration of co-ownership in the condominium complex in *Amselem* prevented Mr. Amselem from acting in accordance with this imperative, which served

¹⁰⁰ Affidavit of John Cox, Exhibit “C” (“Cox Report”), Exhibit “C”, p. 5

¹⁰¹ Cox Report, p. 4-5.

¹⁰² Cox Report at p. 4.

¹⁰³ Cox Report at p. 7; Servatius Hearing Transcript, starting at Line 9 of Page 59.

¹⁰⁴ [Reasons for Judgment](#) at paras. 56, 104-106; Cox Report at p. 7.

¹⁰⁵ [Hutterian Brethren](#) at para. 89.

¹⁰⁶ [Law Society of British Columbia v. Trinity Western University, 2018 SCC 32](#) [TWU SCC] at para. 87. [Emphasis in original].

to “obliterate the substance of his right, let alone interfere with it in a non-trivial fashion.”¹⁰⁷ This did not prevent Mr. Amselem from *continuing to be* an orthodox Jew; it prevented him from *acting in accordance with* an obligation of his Jewish faith.

46. This is the same effect that the Cleansings had on the belief of Mrs. Servatius and her children. The state’s imposition of the Cleansings did not prevent the Servatius children from being Christians: it compelled them to be present for spiritual practices as prohibited by their family’s deeply held religious beliefs, thereby obliterating the substance of their right to act in accordance with these beliefs.

47. The Cleansings were performed for a spiritual purpose: cleansing negative energies from people’s spirits and classrooms. Mr. Justice Thompson’s misapprehension of the evidence on this point was a palpable and overriding error in fact.¹⁰⁸

48. E.S. deposed that the Elder spoke of spirits and energy, and said she was going to cleanse the room with smoke.¹⁰⁹ Ms. Dyer agreed that the Elder spoke about spirits and energy, stating that she was going to use smoke to cleanse the room of “negative energies.”¹¹⁰ Ms. Iacuzzo described what occurred as a “space cleansing”:¹¹¹ smoke was fanned over the doors to “cleanse the space.”¹¹²

49. Ms. Cook’s evidence repeatedly contradicts Mr. Justice Thompson’s finding that the Cleansings were a mere abstract demonstration. As the organizer of the Cleansings, she testified that they were held for the *purpose* of cleansing the classrooms of invisible energy resulting from prior negative events,¹¹³ that the classrooms had specific “needs” that required metaphysical/supernatural remediation, and that this

¹⁰⁷ [Amselem](#) at para. 74.

¹⁰⁸ [Reasons for Judgment](#) at para. 93.

¹⁰⁹ Affidavit of E.S. at para. 7.

¹¹⁰ Servatius Hearing Transcript, starting at Line 33 of Page 197.

¹¹¹ Affidavit of Sonia Iacuzzo at para. 6.

¹¹² Affidavit of Sonia Iacuzzo at para. 8.

¹¹³ Servatius Hearing Transcript, starting at Line 23 of Page 139; Lines 4-16 of Page 140; Lines 1-17, Page 141.

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cleaning/cleansing occurred in the invisible world.¹¹⁴ She stated that negative energy was lingering, unseen, in specific classrooms from prior events in prior school years and that Cleansing would remove it,¹¹⁵ and also that the Cleansings' purpose was to impact the people in the room (children aged 7-9) themselves on a spiritual level.¹¹⁶

50. Given the foregoing detailed and very specific evidence from Ms. Cook, it is submitted that Mr. Justice Thompson made a clear palpable and overriding error on the facts pertaining to the purpose and actual events of the Cleansings. Moreover, Ms. Cook's detailed testimony on these key points is conspicuously absent from Mr. Justice Thompson's analysis. Ms. Cook's evidence that an actual supernatural ceremony was purposed and carried out directly contradicts the Lower Court's finding that the Cleansings were some abstract theoretical demonstration.

51. As Pastor Cox explained, Historic Christianity "believes all [non-biblically prescribed] spiritual activity" to be strictly and solemnly prohibited because it involves a source of power which is not from God.¹¹⁷ This is the lens through which Mrs. Servatius views the Cleansings, even if they are claimed to present some collateral educational opportunity. They are no trivial matter.

Presence during the Cleansings was Compulsory

52. Presence during the Cleansings was compulsory. The Parent Letter did not seek permission from parents, nor was it intended to do so.¹¹⁸ Principal Manson compared the Cleansings to something as neutral, innocuous, and **compulsory** as presence to learn about mathematics: "[w]e do not send out permissions slips to families saying we are going to do fractions tomorrow, long division on Friday."¹¹⁹

53. Frankly, Principal Manson's justification is concerning. Public schools have a lawful mandate to teach math. Public schools have no mandate to teach or engage the

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, starting at Line 27 of Page 118.

¹¹⁷ Cox Report at p. 4.

¹¹⁸ Servatius Hearing Transcript, starting at Line 3 of Page 220.

¹¹⁹ Servatius Hearing Transcript, starting at Line 26 of Page 221.

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invisible supernatural realm. The School District has no mandate to gather seven year olds together and try to contact the “great beyond”. The legal authority of the state stops at the borders of this world, this dimension, and this corporeal paradigm with its established constitutional and legal borders. The School District can lawfully inform children that the Nuu-chah-nulth believe in an unseen world, but they cannot try to take them there or make contact with it in the children’s presence.

Servatius is Not Seeking to Shield Her Children From Differing Beliefs

54. Mr. Justice Thompson committed a palpable and overriding error in mixed fact and law in concluding that [S.L.](#) impacts Mrs. Servatius’s ability to establish a section 2(a) infringement.¹²⁰ She has established that the events in question infringe her section 2(a) rights.
55. In support of his conclusion, Mr. Justice Thompson referenced a passage in [S.L.](#) stating that “exposing children to a variety of religious facts [...] does not in itself constitute an infringement of [section] 2(a).”
56. Mrs. Servatius has not alleged that these events infringed section 2(a) because the Cleansings exposed her children in the abstract to the existence of differing beliefs or practices, or by threatening her ability to pass on her beliefs to her children.
57. She has instead established that the School District subjected her children to being present during spiritual practices, contrary to her constitutionally-protected fundamental religious freedoms. It is the right to act in accordance with these beliefs—as protected by section 2(a) of the [Charter](#)—that has been infringed.
58. Finally, the recognition and protection of Mrs. Servatius’ religious beliefs by this Honourable Appellate Court in these circumstances properly protects Mrs. Servatius and her children, but harms no collateral party.¹²¹ The recognition and protection of Mrs. Servatius’ 2(a) rights does not prevent JHES from teaching *about* aboriginal culture or spirituality, only from imposing ceremonies using the power of the state.

¹²⁰ [Reasons for Judgment](#) at para. 91 citing [S.L.](#) at para. 40.

¹²¹ [Amselem](#) at para. 62.

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D. The Cleansings Constitute a Breach of the School District's Duty of State Neutrality under Section 2(a) of the [Charter](#)

59. For the purposes of making out the 2(a) *Charter* infringement in this case it is immaterial whether Cleansings are classified as “religion”, or “spirituality”, or “culture”. The Cleansings embody principles and purposes forbidden to Mrs. Servatius, no matter how the Cleansings are categorized. This Court does not have to conclude that the Cleansings constituted “religion” to find an infringement of Mrs. Servatius’ rights.
60. However, section 2(a) of the *Charter* has also been held to require a duty of state neutrality in all matters pertaining to religion. In hosting supernatural ceremonies in an elementary school, the School District clearly breached its duty of neutrality.

The Test for a Breach of the Duty of State Neutrality in Relation to a State Practice

61. A state practice constitutes a breach of the Duty of State Neutrality under section 2(a) of the *Charter* when the claimant shows:
- (1) that “the state is professing, adopting or favouring one belief to the exclusion of all others”; and
 - (2) that “the exclusion has resulted in interference with the complainant’s freedom of conscience and religion”.¹²²
62. This duty requires the School District to not “promote the participation of certain believers or non-believers in public life to the detriment of others”,¹²³ Its breach is not cured by offering an exemption from presence to practices that are religious in nature.
63. In [Saguenay](#), the Supreme Court of Canada upheld a Quebec Human Rights Tribunal (the “Quebec Tribunal”) decision that a prayer at municipal council meetings breached this duty, resulting “in a distinction, exclusion and preference based on religion.”¹²⁴
64. The claimant—an atheist who regularly attended the council’s meetings—was forced

¹²² [Saguenay](#) at para. 83.

¹²³ [Saguenay](#) at para. 76.

¹²⁴ [Saguenay](#) at para 120.

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...to choose between remaining in the chamber and conforming to the City's religious practice, excluding himself by refusing to participate in it, and physically excluding himself for the duration of the prayer.¹²⁵

65. After the case had been taken to the Quebec Tribunal,¹²⁶ a two minute gap between the prayer and the meetings was provided.¹²⁷ The Supreme Court of Canada held that this accommodation, "far from tempering the discrimination, exacerbated it."¹²⁸
66. State-mandating of a religious practice or event can thus breach the duty of neutrality even if an opportunity is presented for an objecting or uncomfortable party to leave, and presence or attendance is claimed to be voluntary. This is all the more so in relation to children in the school setting.¹²⁹
67. In [Zylberberg](#), the Ontario Court of Appeal struck down a requirement for schools to be opened with religious practices as an unjustifiable infringement of section 2(a). A statutory right of exemption did not cure the infringement. In reaching this conclusion, the Court cited the following passage from Brennan J. in [Abington](#):

[b]y requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity, [an exemption] procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience from exercising an indisputably constitutional right to be excused. Thus, the excusal provision in its operation subjects them to a cruel dilemma. In consequence, even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request.¹³⁰

¹²⁵ [Saguenay](#) at para 121.

¹²⁶ [Saguenay](#) at para 11.

¹²⁷ [Saguenay](#) at para. 12.

¹²⁸ [Saguenay](#) at para. 122.

¹²⁹ See the discussion in [Freitag v. Penetanguishene \(Town\), 1999 CanLII 2786 \(ONCA\), 47 O.R. \(3d\) 301](#) at paras. 33-39.

¹³⁰ [Abington](#) at pp. 289-290, as cited in [Zylberberg](#). See also [Russow v. B.C. \(A.G.\), 1989 CanLII 2688 \(BCSC\), 35 BCLR \(2d\) 29](#) at paras. 1-12.

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Protection of State Neutrality Applies to Christians

68. Although these cases concern practices identified with Christianity, the duty of state neutrality does not protect only non-Christians or apply only to majoritarian practices.
69. First, the [Charter](#) is a purposive document, to be given a large and liberal interpretation.¹³¹ Section 2(a)'s purpose is to ensure that "society does not interfere with profoundly personal beliefs",¹³² "founded in respect for the inherent dignity and the inviolable rights of the human person."¹³³ True justice cannot limit the benefit of the protection of state neutrality solely on the basis of one's religious identity.
70. Second, Evangelical Christian beliefs can conflict with an increasingly secular society. The BC Supreme Court has found that "approximately 11-12%" of Canadians are "associated with communities reflecting [E]vangelical Christian beliefs".¹³⁴
71. Thirdly, protection must extend to children raised with such beliefs. There is no reason to believe that the impermissible pressures referred to in [Abington](#) are not equally brought to bear on Evangelical Christian students, including Mrs. Servatius' children.

Application of the Test: a Breach of the Duty of State Neutrality Has Been Proven

72. Both parts of this test are met. The Cleansings amount to professing and favouring one belief to the exclusion of all others, resulting in non-trivial interference with the beliefs of Mrs. Servatius and her children. A breach of the duty has been proven.

¹³¹ [Hunter v. Southam Inc., \[1984\] 2 SCR 145, 1984 CanLII 33 \(SCC\)](#) at pp. 155-157.

¹³² [R v. Edwards Books and Art Ltd., \[1986\] 2 SCR 713, 2 RCS 713](#) ["Edward Books"] at para. 97.

¹³³ [R v. Big M Drug Mart Ltd., \[1985\] 1 SCR 295, 1 RCS 295](#) at para. 94.

¹³⁴ [Trinity Western University v. The Law Society of British Columbia, 2015 BCSC 2326](#) at para 24.

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The First Part of the Test is Met: The Cleansings Constitute the Professing and Favouring of One Belief to the Exclusion of All Others

73. The Cleansings constitute the professing and favouring of one belief to the exclusion of all others, as prohibited by the School District's Duty of State Neutrality. It is respectfully submitted that Mr. Justice Thompson committed a palpable and overriding error of mixed fact and law in his conclusion to the contrary.¹³⁵

The Parent Letter Constitutes Professing Spiritual Beliefs

74. JHES' Parent Letter professes such beliefs as "[e]verything has a spirit and energy exists beyond the end of the school year and into the next", describing the Cleansings as an "opportunity to [...] experience cleansing of energy" and to "cleanse our own spirits."¹³⁶

75. The record is clear: the Cleansings were carried out for the spiritual purpose of cleansing classrooms and children of negative energy, consistent with the Parent Letter. Further, the Cleansings are—in legal substance—supernatural and properly classified as religious in nature. This does not cease to be so due to traditional or cultural aspects,¹³⁷ or a mere denial that they are religious.¹³⁸

76. The testimony of Nuu-chah-nulth Tribal Council President Dr. Judith Sayers, and other witnesses, situates smudging within a broader matrix of Nuu-chah-nulth beliefs, of a "spiritual world", of "Mother Earth",¹³⁹ beings such as "thunderbirds", "sea serpents," and a "creator",¹⁴⁰ and the practice of prayer.¹⁴¹

¹³⁵ [Reasons for Judgment](#) at paras. 94-95.

¹³⁶ First Affidavit of Candice Servatius, Exhibit B.

¹³⁷ [Saguenay](#) at paras. 78, 87-88, 118, 134.

¹³⁸ [Saguenay](#) at paras. 94-97.

¹³⁹ Cross-Examination of Dr. Judith Sayers at Question 48 and Answer (Starting at Line 15 of Page 13).

¹⁴⁰ Cross-Examination of Dr. Judith Sayers at Question 220 And Answer (Starting a Line 20 of Page 60).

¹⁴¹ Cross-Examination of Dr. Judith Sayers at Question 220 And Answer (Starting a Line 20 of Page 60).

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77. In [Edwards Books](#), the Court referred to religion as the “perception of oneself, humankind, nature, and, in some cases, a higher or different order of being,”¹⁴² and in [Amselem](#) noted that religion is “about freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith”, including practices which allow individuals to foster a connection with the divine etc.¹⁴³
78. In [Ktunaxa](#), a form of Indigenous spirituality was found to engage section 2(a): the belief “in the existence and importance of Grizzly Bear Spirit.”¹⁴⁴
79. In [Smith v. Mohan \(No. 2\)](#),¹⁴⁵ the BCHRT found an attempt to evict an Indigenous tenant for smudging constituted discrimination on the basis of religion.¹⁴⁶ The complainant described smudging as a “spiritual practice”¹⁴⁷ using sage, an abalone shell and a feather¹⁴⁸ to cleanse “negative energy from a person or space.”¹⁴⁹
80. In [Kelly v. B.C. \(Minister of Public Safety and Solicitor General \(No. 3\)\)](#),¹⁵⁰ the BC Tribunal likewise found that failing to facilitate access for Indigenous prison inmates to Indigenous spiritual advisors for smudging constituted religious discrimination.¹⁵¹
81. The effect of holding the Cleansings was exclusionary. The Cleansings favour one spiritual belief (Nuu-chah-nulth spirituality) to the exclusion of other belief systems. Non-adherents of aboriginal spirituality are forced into a constitutionally impermissible choice between remaining present in spite of religious objection or being exposed as dissenters by seeking an exemption. Even with an exemption, the coercive power of the state and peer pressure create a toxic choice with adverse consequences.

¹⁴² [Edwards Books](#) at para. 97.

¹⁴³ [Amselem](#) at para. 39.

¹⁴⁴ [Ktunaxa](#) at para. 69.

¹⁴⁵ [2020 BCHRT 52](#).

¹⁴⁶ [Smith v. Mohan, 2020 BCHRT 52](#) [“Smith”] at paras. 1, 248-250.

¹⁴⁷ [Smith](#) at para. 1.

¹⁴⁸ [Smith](#) at para. 49.

¹⁴⁹ [Smith](#) at para. 50.

¹⁵⁰ [2011 BCHRT 183](#).

¹⁵¹ [Kelly v. British Columbia \(Ministry of Public Safety and Solicitor General\), 2011 BCHRT 183](#) at paras. 405, 429.

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82. Further, Mr. Justice Thompson committed a palpable and overriding error in mixed fact and law in concluding that Mrs. Servatius’s argument “is hobbled by [...] the [S.L.](#) case.”¹⁵² There are large distinguishing differences and a clear contrast between the Cleansings on the one hand, and the “Ethics and Religious Culture” (“ERC”) course at issue in [S.L.](#)
83. In [S.L.](#), the ERC course was described as making a “comprehensive presentation of various religions.”¹⁵³ In [Loyola High School v. Quebec \(AG\)](#),¹⁵⁴ the Court explained:
- [t]he purpose of the religious culture component [of the ERC program] is to help students understand the main elements of religion by exploring the socio-cultural contexts in which different religions take root and develop.
...[I]t accords a prominent role to Catholicism and Protestantism, but teachers are also required to discuss Judaism, Islam, Hinduism, Buddhism, and Aboriginal belief systems.¹⁵⁵
84. The ERC program is not even remotely comparable to the Cleansings. [S.L.](#) involved neutral teaching about aspects of differing religious beliefs, not state compulsion to immerse children in the performance of an actual supernatural ceremony.
85. Further, Mr. Justice Thompson committed a palpable and overriding error in mixed fact and law, or alternatively a pure error of law, in misapprehending the [S.L.](#) case and the Duty of State Neutrality itself: a Catholic priest filling a classroom “with the sights and scents” of Catholic rites is not “within the bounds of what [S.L.](#) stands for”.¹⁵⁶ If this hypothetical included a parent who had a sincere religious objection to being present for this practice, it would have much the same effect as the Cleansings have had in this case, especially if this practice was conducted for a Catholic spiritual purpose and professed as such by a public school official.

¹⁵² [Reasons for Judgment](#) at para. 88, citing [S.L.](#) at para. 27.

¹⁵³ [S.L.](#) at para. 36. [S.L.](#) at paras. 57-58. [Reasons for Judgment](#) at para. 92.

¹⁵⁴ [2015 SCC 12](#).

¹⁵⁵ [Loyola High School v. Quebec \(Attorney General\), 2015 SCC 12](#) at para. 13.

¹⁵⁶ [Reasons for Judgment](#) at para. 107.

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The Second Part of the Test is Met: The Exclusionary Effect

86. The second part of the test is also met: the exclusionary effect of the Cleansings resulted in non-trivial interference with the ability of Mrs. Servatius and her children to act in accordance with their beliefs.
87. The interference in this case was even more acute than in [Saguenay](#), which concerned an adult man whose presence during a prayer was entirely voluntary. The instant facts concern young and vulnerable children (one of whom is autistic) during mandatory school time forced to either mark themselves as non-conforming dissenters, or passively accept the Cleansings as forbidden by their beliefs.¹⁵⁷ On these facts the choice to dissent, if there was one, was never provided to the children's mother. Such a decision is not a child's.
88. The Cleansings consequently are a breach of the School District's duty of neutrality.
89. The holding of the Prayer at the hoop dance constituted an infringement of the section 2(a) rights of Mrs. Servatius and her children. This is so regardless of which witnesses' evidence is preferred.¹⁵⁸
90. Both the Hoop Dance and the accompanying Prayer are spiritual. Mr. Anderson's website describes the Hoop Dance as "deeply spiritual".¹⁵⁹ His "Study Guide for Schools" describes it as having historically been used "as a way to pray, meditate and become stronger in spirit", as well as to "help facilitate spiritual healing."¹⁶⁰
91. Mrs. Servatius's beliefs require her to "abstain from participation" in non-Christian spiritual practices, including presence during non-Christian prayers.¹⁶¹
92. Presence at the Hoop Dance was mandatory. No prior notice or opportunity to refuse consent was given.¹⁶²

¹⁵⁷ [Abington](#) at pp. 289-290.

¹⁵⁸ [Reasons for Judgment](#) at paras. 62-63.

¹⁵⁹ Affidavit of Stacey Manson, Exhibit "B" at p. 04.

¹⁶⁰ Affidavit of Stacey Manson, Exhibit "C" at p. 18.

¹⁶¹ Second Affidavit of Candice Servatius at paras. 2, 6; See also the testimony of Pastor Cox at Servatius Hearing Transcript, starting at Line 9 of Page 59.

¹⁶² First Affidavit of Candice Servatius at paras. 14-15.

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93. Mr. Justice Thompson committed a palpable and overriding error in mixed fact and law in concluding that the Servatius children were not subjected to “participation” in the prayer in question.¹⁶³

94. Their presence amounts to another non-trivial interference with the rights engaged.

E. The Prayer Constitutes a Breach of the School District’s Duty of State Neutrality under Section 2(a) of the [Charter](#)

95. The Prayer at the Hoop Dance also constitutes a breach of the duty of state neutrality under section 2(a). It is religious in nature. By providing an exclusionary forum for it, the School District favoured one belief to the exclusion of all others. This resulted in an a non-trivial interference with the section 2(a) rights engaged.

F. The School District’s Conduct is Unjustifiable, and thus Irrevocably Unconstitutional

96. The School District’s conduct is unjustifiable, and thus irrevocably unconstitutional. The School District’s [Charter](#) infringements are not “prescribed by law”, and are thus incapable of justification under section 1.¹⁶⁴

97. The [School Act](#) (the “[Act](#)”) is the ultimate legislative authority for the operation of the School District. Its purposes are set out in its preamble, which—as interpreted by the Supreme Court of Canada in [Chamberlain v. Surrey School District No. 36](#)¹⁶⁵ — conveys the message that the school system is “open to all children of all cultures and all family backgrounds”,¹⁶⁶ “premised upon principles of tolerance and impartiality”.¹⁶⁷

¹⁶³ [Reasons for Judgment](#) at paras. 62-63; Cox Report at Servatius Hearing Transcript, starting at Line 9 of Page 59.

¹⁶⁴ *Per* section 1, [Charter](#) rights and freedoms are guaranteed, “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

¹⁶⁵ [2002 SCC 86](#).

¹⁶⁶ [Chamberlain v. Surrey School District No. 36, 2002 SCC 86](#) at para. 23.

¹⁶⁷ [Ross v. New Brunswick School District, \[1996\] 1 S.C.R. 825, 1 RCS 825](#) at para. 42 (per La Forest J.), as cited in [Chamberlain](#) at para. 23.

98. Reflecting the constitutional ideal of “a neutral public space free from coercion, pressure and judgment [...] in matters of spirituality”¹⁶⁸—section 76 of the [Act](#) mandates that all BC public schools “be conducted on strictly secular and non-sectarian principles,”¹⁶⁹ and prohibits the teaching of any “religious dogma or creed”.¹⁷⁰
99. These neutral and secular protections serve to prevent government abuse and must extend to children of all religious backgrounds, including Evangelical Christians. The [Act](#) cannot be read as prescribing the School District’s conduct in this case. On the contrary, it **prohibits** it.
100. *Per* [Chamberlain](#), the [Act](#) prohibits the accommodation of any part of the community to the exclusion of consideration of the values of another.¹⁷¹ Imposing presence for the spiritual practices of any part of the community, without regard to its effect on others, is inherently contrary to the [Act](#), let alone section 2(a) of the [Charter](#).
101. That is precisely what the School District has done in this case, regardless of the specific religious identity of the parent and children whose values it has disregarded.
102. The School District’s conduct amounts to government action for a prohibited religious purpose, and is therefore unjustifiable under section 1 for this reason, as well.
103. In [Big M Drug Mart](#), the Supreme Court of Canada held that legislation whose purpose is compulsory religious observance cannot be justified under section 1.¹⁷²
104. In [Zylberberg](#), the Ontario Court of Appeal applied [Big M Drug Mart](#), holding that legislation mandating religious exercises in public schools—for a religious purpose—is likewise unjustifiable, even with the existence of a statutory right of exemption.

¹⁶⁸ [Saguenay](#) at para. 74.

¹⁶⁹ [School Act, s. 76\(1\)](#).

¹⁷⁰ [School Act, s. 76\(2\)](#).

¹⁷¹ [Chamberlain](#) at para. 19.

¹⁷² [Big M Drug Mart](#) at paras. 140-143.

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105. In [Russow](#), the BC Supreme Court applied [Zylberberg](#), invalidating a portion of the [School Act](#) then mandating comparable religious exercises, also accompanied by a right of exemption.¹⁷³ The Court did not see fit to engage in a section 1 analysis.
106. In [Freitag](#), the Ontario Court of Appeal applied this principal to government action, holding that a mayor's practice of reciting the Lord's Prayer at council meetings was unjustifiable: it was not prescribed by law and was pursuant to a religious purpose.¹⁷⁴
107. In this case, the School District held overtly supernatural and spiritual ceremonies that can properly be described as religious or spiritual in nature, without any true opportunity for dissenters to be exempted. The School District acted for a spiritual purpose in facilitating these practices: such conduct is unconstitutional.

G. The School District's Conduct is Unjustified – It Does Not Represent a Proportionate Balance Between a Valid Statutory Objective and the Rights Engaged

108. In the alternative, even if the School District is able to establish that its conduct is prescribed by law and pursuant to a valid secular purpose, it cannot meet its section 1 burden. Its conduct is consequently unjustified.
109. The applicable “*Doré/Loyola* framework” provides that administrative decisions which infringe [Charter](#) rights are justified only if they reflect “a proportionate balance between the [Charter](#) protections at play and the relevant statutory mandate.”¹⁷⁵
110. The reviewing court must thus be satisfied that the decisions give “effect, as fully as possible, to the [Charter](#) protections at stake given the particular statutory mandate”,¹⁷⁶ and must also consider “whether there were other reasonable possibilities that would give effect to [the] [Charter](#) protections more fully in light of the objectives.”¹⁷⁷

¹⁷³ [Russow](#) at paras. 1-3, 26.

¹⁷⁴ [Freitag](#) at paras. 48-52.

¹⁷⁵ [TWU SCC](#) at paras. 58-59, citing [Doré v. Barreau du Québec, 2012 SCC 12](#) at para. 57 and [Loyola](#) at para. 39.

¹⁷⁶ [TWU SCC](#) at para. 80, citing [Loyola](#) at para. 39.

¹⁷⁷ [TWU SCC](#) at para. 81.

111. Although the Court in [TWU SCC](#) added that “[t]his does not mean that the decision-maker must choose the option that limits the [Charter](#) protection *least*”,¹⁷⁸ it has also made clear that this analysis “works the same justificatory muscles” as the *Oakes* framework which applies to justification of legislation, finding “analytical harmony with the final stages of that framework”, including “minimal impairment”.¹⁷⁹
112. In [UAlberta Pro-Life v. Governors of the University of Alberta](#),¹⁸⁰ the Alberta Court of Appeal, in reference to the *Doré/Loyola* framework, rightly noted that:
- ...[t]o be consistent with the [Charter](#), the limitation must [...] be demonstrably justified in a free and democratic society. Although that expression about demonstrable justification does not figure prominently in the cases from [[Doré](#)] onward, it is not erased from the [Charter](#) as linguistic frill.¹⁸¹
113. The record demonstrates that the School District’s decision-makers never even turned their minds to reasonable options to pursue its asserted objectives with a lesser impact on the rights engaged, or accommodations to effectively address that impact.
114. The School District could have considered having the Elder come to JHES to explain Nuu-chah-nulth beliefs about smudging and its spiritual effects, display the materials used and answer students’ questions. It could have considered having Mr. Anderson do the same in relation to hoop dances and Indigenous prayers. It could have considered hosting these practices outside of mandatory school time. It could have utilized instructional videos or textbooks.
115. The School District cannot be said to have given effect, as fully as possible, to the [Charter](#) protections at stake. Its decision-making in relation to these matters does not represent proportionate balancing, is unjustified, and is therefore unconstitutional.

¹⁷⁸ [TWU SCC](#) at para. 81. [Emphasis in original].

¹⁷⁹ [TWU SCC](#) at para. 82, citing [Doré](#) at para. 5 and [Loyola](#) at para. 40.

¹⁸⁰ [2020 ABCA 1](#).

¹⁸¹ [UAlberta](#) at para. 161.

H. Remedy

116. “[W]here there is a right, there must be a remedy.”¹⁸² The appropriate remedies for the rights engaged are a declaration *per* section 24(1) of the [Charter](#) that the section 2(a) rights of Mrs. Servatius have been infringed by the School District, and an order prohibiting the School District from again facilitating such practices during mandatory school time—the very conduct that precipitated the infringement of these rights.
117. Section 24(1) of the [Charter](#) authorizes “a court of competent jurisdiction” to grant such remedies as it considers “just and appropriate in the circumstances.” This Court is likewise empowered by the [Court of Appeal Act](#)¹⁸³ to “make or give any that could have been given” by the BC Supreme Court, and “make or give any additional order that it considers just,”¹⁸⁴ and is required by the [Law and Equity Act](#)¹⁸⁵ to
- ...grant all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter [...].¹⁸⁶
118. The Supreme Court of Canada has stated that section 24(1) must be “construed generously, in a manner that best ensures the attainment of its object”,¹⁸⁷ and McIntyre J. observed in [Mills v. The Queen](#)¹⁸⁸ that “[i]t is difficult to imagine language that which could give the court a wider and less fettered discretion.”¹⁸⁹ The scope of remedies available “falls squarely within the expertise of the Court and is not susceptible to legislative or executive pronouncement.”¹⁹⁰
119. Mrs. Servatius’s children continue to be students within the School District, and both she and her children have an ongoing interest in the protection of their freedom of

¹⁸² [Doucet-Boudrea v. Nova Scotia \(Minister of Education\), 2003 SCC 62](#) at para. 25.

¹⁸³ [R.S.B.C. 1996, c. 77](#).

¹⁸⁴ [Court of Appeal Act, s. 9\(1\)\(a\) and \(c\)](#).

¹⁸⁵ [R.S.B.C. 1996, c. 253](#).

¹⁸⁶ [Law and Equity Act, s. 10](#).

¹⁸⁷ [Doucet-Boudreau](#) at para. 24, citing [R. v. 974649 Ontario Inc., 2001 SCC 81](#) at para 18

¹⁸⁸ [1986 CanLII 17](#).

¹⁸⁹ [Mills](#) at para. 278.

¹⁹⁰ [Doucet-Boudreau](#) at para. 22.

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religion and respect for the duty of the state neutrality in relation to the School District's conduct concerning the practices of the nature at issue.

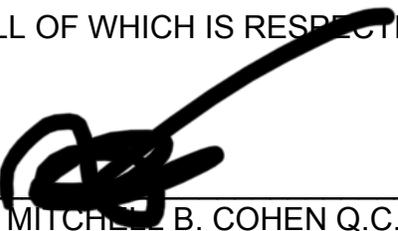
120. The declaration sought would vindicate the rights engaged, but it may be unsafe to assume that the School District will comply with it "promptly and fully."¹⁹¹
121. The prohibition order sought is thus an appropriate remedy. It is narrowly tailored to allow for the pursuit of valid educational objectives within the bounds of the School District's constitutional obligations, ensuring respect for the freedoms of conscience and religion, secularism, and state neutrality in matters of spirituality.

PART 4 – NATURE OF ORDER SOUGHT

122. Mrs. Servatius seeks

- a. an order quashing the decision of Mr. Justice Thompson;
- b. a declaration, pursuant to section 24(1) of the [Charter](#), that the School District's conduct in imposing mandatory presence during spiritual practices of a religious nature infringed the rights of Mrs. Servatius and her children to the freedoms of conscience and religion, as prohibited by section 2(a) of the [Charter](#);
- c. an order prohibiting the School District from engaging in or facilitating practices that are religious in nature (as distinct from spiritual and religious content as part of the curriculum) during any time when student attendance is mandatory;
- d. costs; and
- e. such further and other relief and directions as this Court considers necessary.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31th day of July, 2020.



MITCHELL B. COHEN Q.C.
JAY CAMERON
BRANDON LANGHJELM

Counsel for the Appellant, Candice Servatius

¹⁹¹ [Doucet-Boudreau](#) at para. 62.

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