

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

MADLINE WELD

Moving Party/Applicant

-and-

OTTAWA PUBLIC LIBRARY

Respondent

**FACTUM OF THE MOVING PARTY
(Motion for Leave to Appeal)**

Dated: October 29, 2019

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MOTION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

| | Page No. |
|--|-----------------|
| PART I – OVERVIEW | 4 |
| PART II – THE FACTS | 5 |
| PART III – QUESTIONS TO BE ANSWERED ON APPEAL | 10 |
| PART IV – ISSUES AND THE LAW | 10 |
| PART V – ORDER REQUESTED | 18 |
| SCHEDULE “A” | 20 |
| SCHEDULE “B” | 21 |

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PART I – OVERVIEW

1. This is a motion brought by the Applicant Madeline Weld, seeking leave to appeal from the Order of the Divisional Court dated September 11, 2019 (the “Order”) and the Reasons dated September 16, 2019 (the “Reasons”), denying her application for judicial review of a decision of the Respondent, the Ottawa Public Library.

Order of the Divisional Court, dated September 11, 2019: Motion Record of the Moving Party (“MR”), Tab 2;

Reasons for Judgment of the Divisional Court, dated September 16, 2019: MR, Tab 3

2. The Divisional Court heard preliminary submissions on the question of whether this matter was properly brought as an application for judicial review. Without

considering whether the decision of the Ottawa Public Library (“OPL”) engaged the *Canadian Charter of Rights and Freedoms* (“the *Charter*”) and attracted public law remedies, the Court held that the decision was not of a sufficient public character to warrant review.

Reasons, paragraphs 1 and 19: MR, Tab 3

PART II – THE FACTS

3. On October 27, 2017, Madeline Weld entered into an agreement with the OPL to book the auditorium at the main branch of the OPL to screen a documentary called “Killing Europe”. The proposed screening date was November 25, 2017. The documentary details the return of the producer to Europe after a fifteen-year absence, and describes the changes that he witnessed. He interviews several people about changes which include an increase in terrorist attacks, no-go zones, riots and gang rapes. The film is critical of European immigration policies.

Affidavit of Madeline Weld, paragraphs 8, 13-14: MR, Tab 4, pages 22 & 25;
Affidavit of Valerie Thomas, paragraph 8: MR, Tab 5, page 86

4. Ms. Weld was acting on behalf of the group ACT! For Canada, a registered non-profit organization with a mandate to promote national security, democracy and the constitutional values of Canadians. The group is opposed to certain political ideologies, and to the establishment of particular practices it associates with Sharia law, but it does not advocate discrimination of any kind and it condemns all forms of hate speech. Membership in ACT is open to people of all faiths and backgrounds.

Affidavit of Valerie Thomas, paragraphs 3-6: MR, Tab 5, page 85;
Affidavit of Madeline Weld, paragraph 11: MR, Tab 4, page 23

5. At her cross-examination, Danielle McDonald, CEO of the Ottawa Public Library, testified that ACT had booked events at the OPL in the past, and to her knowledge there were never any issues with the group, although sometimes there were protests outside the library during ACT events. She confirmed that protests in themselves are not a reason for the OPL to cancel an event.

Transcript from the Cross-Examination of Danielle McDonald: MR, Tab 7, pages 151, 154-155, 178-180

6. Prior to the screening, the OPL received some complaints from members of the public, including persons connected to “anti-fascist” organizations, regarding the content of the movie. Some of the complaints were critical of ACT as an organization and describe some of its past speakers, such as University of Toronto professor Dr. Jordan Peterson, as “fascists”. The complaints describe the documentary in conclusory terms as being controversial, anti-immigrant, Islamophobic, and hateful.

Undertakings Brief of the Respondent: MR, Tab 8, pages 246-280

7. On November 23, 2017, Richard Warman, a local lawyer, submitted an open letter to Ottawa City Council and the Senior Management of the Ottawa Public Library.

This letter was also provided to various media outlets. The letter stated, in part:

I urge you in the strongest possible terms to correct the media’s mistaken impression that the rental by ‘Act For Canada’ to show ‘KILLING EUROPE’ on Saturday at the main Ottawa public library will be allowed to happen there, or anywhere else on City of Ottawa property. I am deeply concerned that if the event is permitted to proceed, it would constitute a breach of s. 1 of the Ontario Human Rights Code.

Exhibit K to the Affidavit of Madeline Weld 23: MR, Tab 4, page 74

8. Mr. Warman and the complaining members of the public succeeded in ‘deplatforming’ the Applicants. On November 23, 2017, two days before the scheduled screening of the documentary, senior management of the OPL met and decided to cancel the screening of the documentary on the grounds that it violated a provision of the rental agreement which deals with human rights and prohibitions against hate speech. Madeline Weld was informed of this decision the next day when she received an e-mail from the OPL’s Chief Executive Officer advising her that the booking was cancelled because its “content falls within the category of material that the Library is not prepared to have displayed or screened on its property.”

Affidavit of Danielle McDonald, paragraph 21: MR, Tab 6, page 91;
Cross Examination of Danielle McDonald: MR Tab 7, pages 199-200;
Affidavit of Madeline Weld, paragraph 18: MR, Tab 4, page 26

9. The Applicants brought an Application to Divisional Court for judicial review of the OPL’s decision to cancel the booking, seeking orders of certiorari and mandamus, as well as a Declaration pursuant to section 24(1) of the *Charter* that the decision unjustifiably violated the Applicants’ freedom of expression as protected by section 2(b) of the *Charter*.

Notice of Application to Divisional Court for Judicial Review, dated June 11, 2018: MR, Tab 9, page 333

10. The grounds for the Application for Judicial Review alleged, among other things, that the *Charter* applies to the OPL’s policies and decisions. By cancelling the booking to show the documentary, the Respondent infringed the Applicants’ *Charter* right to free expression.

Notice of Application for Judicial Review, page 8: MR, Tab 9, page 339

11. The Application was heard before a panel of the Divisional Court on September 11, 2019. After hearing submissions from the parties on the preliminary question of whether the issues raised were of a sufficient public character to permit judicial review, the Court dismissed the Application.

Reasons, paragraphs 1 and 19: MR, Tab 3, pages 12 and 16

12. The Court held that the determination of whether a decision made by a public body was of a public or private character must be considered as a preliminary step. If, and only if, the decision was amenable to judicial review by being sufficiently public, would the Court then consider the application of the *Charter*.

Reasons, paragraph 18: MR, Tab 3, page 16

13. The Court concluded that, even if they accepted that the Ottawa Public Library is a public body, a contractual dispute over an auditorium rental was not of a sufficiently public character that a public law remedy could be applied.

Reasons, paragraph 11: MR, Tab 3, page 14

14. It weighed the factors identified by the Federal Court of Appeal in *Air Canada v. Toronto Port Authority* as being relevant to determining whether a dispute falls within the scope of public law, and concluded on balance that the OPL was not acting in a public capacity when it cancelled its agreement with Ms. Weld.

Reasons, paragraphs 12 and 15: MR, Tab 3, pages 14-16
***Air Canada v. Toronto Port Authority and Porter Airlines Inc.*, 2011 FCA 347 at para 60:** Book of Authorities of the Moving Party (“BoA”), Tab 1

15. Having concluded that this was not an appropriate case for a judicial review, the Divisional Court declined to consider whether OPL had infringed the Applicant's fundamental *Charter* freedoms.

18 Finally, the applicants' counsel argued that the Ottawa Public Library is subject to the *Charter*, and therefore its decisions are reviewable by this Court. However, the preliminary issue on this application is not whether the Library is subject to the *Charter* but whether the subject matter of the application is properly brought as an application for judicial review. **If the decision was amenable to judicial review, then the next question would be the application of the *Charter*.** However, given our conclusion that the decision at issue was not made pursuant to the exercise of a statutory power and that it does not have a public character, the application of the *Charter* does not arise [emphasis added].

Reasons, paragraph 18: MR, Tab3, page 16

16. This was a fundamental error. Crucially, the Court did not consider that the Applicants' constitutional right to freedom of expression, and the remedies sought in the application, are protected and available under section 24(1) of the *Charter* and make the whole of the application a matter of public law. We say that:

- a) the *Charter* applies to the decision to cancel the event, as it was a discretionary decision taken under delegated statutory authority, which limited the Applicants' *Charter* right to freedom of expression, and
- b) orders of certiorari and mandamus, and the Declaration sought by the Applicants, are public law remedies available pursuant to section 24(1) of the *Charter* and appropriate in the circumstances.

PART III – QUESTIONS TO BE ANSWERED ON APPEAL

17. The proposed appeal raises the following questions:
- a) Was the decision to cancel the event a discretionary decision, limiting *Charter* rights and freedoms and taken under delegated statutory authority, to which the *Charter* applies?
 - b) Did the Divisional Court err in determining that public law remedies are not suitable to this dispute?

PART IV – ISSUES AND THE LAW

A. What is the test for granting leave to appeal?

18. Factors considered in granting leave to appeal from the Divisional Court include:
- a) whether the Divisional Court exercised appellate jurisdiction or was sitting as a court of original jurisdiction;
 - b) whether the matter will present an arguable question of law or mixed law and fact requiring the Court's consideration of matters such as:
 - i) the interpretation, clarification or propounding of some general rule or principle of law;
 - ii) whether the issue under appeal is of general interest.

Ontario (Minister of Transportation) v. 1520658 Ontario Inc., 2010 ONCA 32 (In Chambers), at paragraph 12: BoA, Tab 2

19. Leave to appeal from the Divisional Court to the Court of Appeal will be granted more readily where the judgment appealed from, as here, was an exercise of original jurisdiction rather than appellate jurisdiction.

20. In the present case, the proposed questions for the Court of Appeal:
- a) are questions of law, or mixed law and fact, which will determine whether a body exercising statutory authority is able, by giving itself discretionary contractual power to limit access to public facilities intended to be used for expressive purposes based on the content of that expression, to avoid the application of the *Charter* and the availability of public law *Charter* remedies for how its discretion is exercised;
 - b) are matters of public importance, namely, whether *Charter*-bound public entities making decisions that engage *Charter* rights can escape judicial scrutiny and, specifically, whether a body exercising statutory powers may acquiesce in the “deplatforming” of members of the public by putting its power to do so in a contract of adhesion; and

there is good reason to doubt the correctness of the decision of the Divisional Court.

B. Was the decision to cancel the event a discretionary decision, limiting Charter rights and freedoms and taken under delegated statutory authority, to which the Charter applies?

21. The Divisional Court held that cancellation by the Ottawa Public Library of the auditorium rental was not a proper subject for judicial review since, even if it is a public body, the decision was a matter of private rights under contract. It was not “the kind of decision that is reached by public law and therefore a decision to which a public law remedy can be applied,” as stated in *Settia v. Appleby College*. The Divisional Court further held that “the Library’s decision to cancel its agreement with Ms. Weld was not

based on any legal obligation or on the exercise of statutory power. Rather, the decision was the exercise of discretion in accordance with the terms of the agreement.”

Reasons, paragraphs 9, 15(c): MR, Tab 3, pages 13 and 15;
Settia v. Appleby College, 2013 ONCA 753, paragraph 32: BoA, Tab 4

22. The OPL was created pursuant to the *Public Libraries Act* and is governed by that *Act*. The *Act* confers special powers on OPL’s Board of Trustees to regulate “all matters connected with the management of the library and library property,” a power which the Board of Trustees delegates to its CEO. This includes the service of renting out rooms.

Public Libraries Act, R.S.O. 1990, c.P.44, ss. 23(3)(b), 23(4)(f);
Affidavit of Danielle McDonald, paragraphs 5-7: MR, Tab 6, page 89

23. The legislation reveals that the OPL is a creature of statute, that its powers are entirely derived from statute, that its board is heavily regulated by the law, and that the Lieutenant Governor has residual power to make regulations about its management. The OPL is not truly independent of the government; rather, it is a public body that is substantially controlled by government. It cannot escape *Charter* scrutiny when making decisions that affect the public and restrict the constitutional rights to express and receive lawful expressive content.

City of Ottawa Act, 1999 S.O. 1999, c. 14 Schedule E at s. 7(1);
Public Libraries Act, R.S.O. 1990, c. P.44 at s. 20(f), 24(1) and 39

24. Pursuant to its discretionary statutory authority, OPL decided to make rooms available to be used by the public for expressive purposes. It further opted to use a mandatory rental contract to govern the rental of its rooms by the public.

The contract provides that:

The Library will not provide public space, facilities, and/or properties within its jurisdiction to an individual or group that supports or promotes views, ideas or presentations which promote or are likely to promote discrimination, contempt or hatred to any person on the basis of race, national or ethnic origin, colour, religion, age, sex marital status, family status, sexual preference, or disability, gratuitous sex and violence or denigration of the human condition. The Library reserves the right to cancel a contract if any of the above-circumstances arise.

The mandatory contract, created through an exercise of delegated authority, thus gives OPL discretionary power to cancel a booking based on the content of expression, and affect the *Charter* rights of those who might wish to book meeting space at the library.

Exhibit H to Affidavit of Danielle McDonald: MR, Tab 6, page 115

25. Since the explicit purpose of Ottawa Public Library's restrictions as set out above is to limit access to facilities based on the content of expression, a decision to cancel a booking for those reasons must be reasonable, meaning it must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, and it must properly balance the relevant *Charter* values with its statutory objectives. The OPL's own policies indicate that it conceives of itself as a body which defends "the rights of library users to freedom of thought, belief, opinion and expression as the basis of a democratic society as embodied in the Canadian Charter of Rights and Freedoms."

Exhibit B to Affidavit of Madeline Weld: MR, Tab 4, page 37
Dunsmuir v. New Brunswick, 2008 SCC 9, paragraph 47: BoA, Tab 5

26. Determining *Charter* issues within the administrative law framework requires the reviewing court to determine if, in exercising its statutory discretion, the decision-maker properly balanced the relevant *Charter* values with its statutory objectives. In this instance, there is no evidence that the OPL considered the implication of *Charter*

protections at all. As was held in *Doré v. Barreau Du Québec*, “It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values” and “administrative decisions are *always* required to consider fundamental values” (emphasis in original).

***Doré v. Barreau Du Québec*, 2012 SCC 12, paragraphs 24 and 35, 57-58: BoA, Tab 6**

27. The case at bar is similar to the various public transit advertising cases which have implicated the *Charter*, despite the existence, in most cases, of a contract between the member of the public seeking access to the advertising space, and the transit company or the advertising company acting as its agent. The Ottawa Public Library, likewise, offers public access to space which is engaged by the completion of a form or contract. Members of the public booking library space would expect constitutional protection of their expression in that government-owned and controlled space, just as they do in the public transit advertising and personalized licence plate cases.

***Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2009 SCC 31 (SCC), at paragraph 43: BoA, Tab 7
Troller v Manitoba Public Insurance Corporation, 2019 MBQB 157 at paragraph 75: BoA, Tab 8**

28. Since the decision in *Canadian Federation of Students v. Greater Vancouver Transportation Authority* (“GVTA”), it is clear that, while there may be no private right to advertise on the sides of buses, a refusal by a subordinate decision maker to permit or refuse an advertisement based on its expressive contents implicates the *Charter*.

29. The fact that OPL implemented an anti-discrimination policy through a provision in its Meeting Room Booking Terms and Conditions does not avoid a constitutional

analysis. The existence of an application or contract which might trigger those Terms and Conditions does not remove the transaction from the public law sphere to the private contractual sphere.

30. As in *GVTA*, the enabling statute in the case at bar confers broad discretionary powers to adopt rules regulating the conduct of its affairs. *GVTA* holds that policies and contracts set by the Transportation Authority were “prescribed by law” and might therefore satisfy s.1 of the *Charter*. *It cannot be* that policies and contracts set under statutory authority, as in *GVTA*, are “prescribed by law” yet not be subject to the *Charter*. As Deschamps J held:

70 The enabling statutes thus confer broad discretionary powers on each entity's board of directors to adopt rules regulating the conduct of its affairs, including the generation of revenue for the public transportation system through advertising sales. Further, according to documents filed in the record, the policies were "reviewed and adopted" by the boards of both entities (A.R., at pp. 179 and 326). The policies therefore appear to have been adopted in a formal manner.

71 Where a legislature has empowered a government entity to make rules, it seems only logical, absent evidence to the contrary, that it also intended those rules to be binding. In this case, TransLink is empowered to "establish rules" and to "enter into contracts", "adopt bylaws" and "pass resolutions". Bylaws and contracts are intended to bind. In the context of the enabling provisions, it follows that resolutions have the same binding effect as the other enumerated instruments.

72 The policies are not administrative in nature, as they are not meant for internal use as an interpretive aid for "rules" laid down in the legislative scheme. Rather, the policies are themselves rules that establish the rights of the individuals to whom they apply. Moreover, the policies can be said to be general in scope, since they establish standards which are applicable to all who want to take advantage of the advertising service rather than to a specific case. They therefore fall within the meaning of the word "law" for the purposes of s. 1 and will satisfy the "prescribed by law" requirement provided that they are sufficiently accessible and precise.

73 In my view, the transit authorities' advertising policies are both accessible and precise. They are made available to members of the general public who wish to advertise on the transit authorities' buses, and they clearly outline the types of advertisements that will or will not be accepted. Thus, the limits on expression are accessible and are worded precisely enough to enable potential advertisers to understand what is prohibited. The limits resulting from the policies are therefore legislative in nature and are "limits prescribed by law" within the meaning of s. 1 of the *Charter*.

***Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2009 SCC 31 (SCC), at paragraphs 67-73: BoA, Tab 7**

31. The Court's discussion of that statutory scheme makes it very difficult to avoid the conclusion that OPL's standard form Terms and Conditions are set through an exercise of delegated authority and that they affect the rights of those who might wish to book meeting space at the library.

32. As a public entity that is a creature of statute and government-controlled, Ottawa Public Library is bound by the *Charter of Rights and Freedoms*. OPL has a duty to proportionately balance the relevant *Charter* protections with its statutory objectives in making its decision when those decisions involve the *Charter*-protected rights and freedoms of members of the public, and a remedy is available under s. 24(1) of the *Charter* if the decision can be shown to be unreasonable under a *Doré* analysis.

***Doré v. Barreau Du Québec*, 2012 SCC 12, paragraphs 24 and 35, 57-58: BoA, Tab 6**

D. Did the Divisional Court err in determining that public law remedies are not suitable to this dispute?

33. Section 24(1) of the *Charter* provides:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Where a statutory decision-maker does not properly balance the relevant *Charter* values with its statutory objectives, orders in the nature of certiorari and mandamus are available if a court determines them to be “appropriate and just” in response to the *Charter* infringement.

34. Accordingly, the decision made by the OPL is precisely the kind of decision that is reached by public law, and therefore a decision to which a public law remedy can be applied, contrary to the decision of the Divisional Court. The *Charter’s* constraints on administrative decision-making engage public rather than private law. A common approach has been developed in the law for the review of discretionary administrative decisions, like that of the OPL, which affect *Charter*-protected rights and freedoms under administrative and constitutional law.

***Doré v. Barreau Du Québec*, 2012 SCC 12, paragraphs 24 and 35, 57-58:**
BoA, Tab 6;
***Loyola High School v. Quebec (Attorney General)* 2015 SCC 12 at paragraphs 37-39:** BoA Tab 9;
***Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47:** BoA Tab 5

35. The Divisional Court incorrectly applied the 8-prong test in *Air Canada v. Toronto Port Authority and Porter Airlines Inc.* (“Air Canada”), to determine if the OPL’s decision was private in nature, and therefore not reviewable by the Court, or public in nature, and therefore subject to judicial scrutiny. The test applies differently to a dispute or decision that primarily concerns freedom of expression under the *Charter*, even if it

happens to involve a contract, and that concerns a public body which directly affects the public through its decisions regarding space and expressive content.

***Air Canada v. Toronto Port Authority and Porter Airlines Inc.*, 2011 FCA 347, para 60: BoA, Tab 1**

36. The Divisional Court erred in failing to consider that the OPL's discretionary decision to cancel the Applicants' auditorium booking is a decision governed by the *Charter*. While it is appropriate to identify private decisions of public bodies which are not subject to judicial review, the Court explicitly rejected the relevance of the *Charter* to its determination of whether the decision was properly considered as a matter of public law.

Reasons at paragraph 18: MR, Tab 3, page 16

37. The proposed appeal raises issues of public importance and its determination will transcend the interests of the parties involved. It will have implications for all citizens of Ontario, and for similar cases nationally. Where, as in the case at bar, motivated groups and individuals seek to shut down discussion of controversial issues, it is of critical importance that the state, and its administrative extensions like public libraries, understand their obligation to recognize, balance, and unless otherwise justifiable, uphold freedom of expression, which is a fundamental pillar of democracy and civil society.

PART V – ORDER REQUESTED

38. The Moving Party, Madeline Weld, respectfully requests an order granting leave to appeal from the decision of the Divisional Court dated September 16, 2019.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of October, 2019.

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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Air Canada v. Toronto Port Authority and Porter Airlines Inc.*, 2011 FCA 347
2. *Ontario (Minister of Transportation) v. 1520658 Ontario Inc.*, 2010 ONCA 32
3. *Re United Glass & Ceramic Workers v. Dominion Glass Co.*, [1973] 2 O.R. 763 (C.A.)
4. *Settia v. Appleby College*, 2013 ONCA 753
5. *Dunsmuir v. New Brunswick*, 2008 SCC 9
6. *Doré v. Barreau Du Québec*, 2012 SCC 12
7. *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2009 SCC 31 (SCC)
8. *Troller v Manitoba Public Insurance Corporation*, 2019 MBQB 157
9. *Loyola High School v. Quebec (Attorney General)* 2015 SCC 12

SCHEDULE "B"

TEXT OF STATUTES

Canadian Charter of Rights and Freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Public Libraries Act, R.S.O. 1990, c.P.44

Powers and duties of board

20 A board,

- (a) shall seek to provide, in co-operation with other boards, a comprehensive and efficient public library service that reflects the community's unique needs;
- (b) shall seek to provide library services in the French language, where appropriate;
- (c) shall operate one or more libraries and ensure that they are conducted in accordance with this Act and the regulations;
- (d) may operate special services in connection with a library as it considers necessary;
- (e) shall fix the times and places for board meetings and the mode of calling and conducting them, and ensure that full and correct minutes are kept;
- (f) shall make an annual report to the Minister and make any other reports or provide any other information required by this Act and the regulations or requested by the Minister from time to time;
- (g) shall make provision for insuring the board's real and personal property;

(h) shall take proper security for the treasurer; and

(i) may appoint such committees as it considers expedient. R.S.O. 1990, c. P.44, s. 20; 2009, c. 33, Sched. 11, s. 7 (3)23(4)

Estimates

24 (1) A public library board, county library board or county library co-operative board shall submit to the appointing council, annually on or before the date and in the form specified by the council, estimates of all sums required during the year for the purposes of the board. R.S.O. 1990, c. P.44, s. 24 (1).

Regulations

39 The Lieutenant Governor in Council may make regulations,

(a) providing for the distribution of all money appropriated by the Legislature for library purposes;

(b) prescribing the conditions governing the payments of grants;

(c) respecting the establishment, organization, management, premises and rules of public libraries;

(d) prescribing circulating materials or classes of circulating materials for the purpose of clause 23 (2) (a). R.S.O. 1990, c. P.44, s. 39.

City of Ottawa Act, 1999 S.O. 1999, c. 14 Schedule E

Public library board

7 (1) On January 1, 2001, a library board for the city is established under the name “Ottawa Public Library Board” in English and “Conseil des bibliothèques publiques d’Ottawa” in French. 1999, c. 14, Sched. E, s. 7 (1).