No. S-79991
Nanaimo Registry

In the Supreme Court of British Columbia

Between

CANDICE SERVATIUS

Petitioner

and

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

Respondents

and

THE NUU-CHAH-NULTH TRIBAL COUNCIL

Intervenor

WRITTEN ARGUMENT OF THE ATTORNEY GENERAL OF BRITISH COLUMBIA

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I. Overview

1. For more than a century, the government of Canada employed an explicitly assimilationist approach to schooling for Indigenous children. This approach was most notoriously exemplified in the residential school system. Even once that system was dismantled and Indigenous students admitted to public schools, the curricula—including in British Columbia—continued to reflect Christian, colonialist worldviews to the exclusion of Indigenous perspectives. These practices contribute to Indigenous students' continued experience of alienation from the public school system and poorer educational outcomes compared with non-Indigenous students.

2. From 2010 to 2015, the British Columbia Ministry of Education, working closely with Indigenous partners, redesigned the Kindergarten to grade 9 (**"K-9"**) and grade 9 to 12 public school curricula to incorporate Indigenous knowledge and worldviews across subject-matter areas. This was a direct response to the legacy of the earlier assimilationist and colonialist education practices. It is against this backdrop that the events under review in this proceeding took place.

3. The scope of this petition is narrow. It concerns the discretionary decision of teachers and the principal of John Howitt Elementary School (the **"School"**), interpreting the K-9 curriculum, to incorporate an Indigenous smudging ceremony and hoop dance performance into the classroom (the **"Impugned Events"**) in 2015/2016. The petitioner asserts that the Impugned Events infringed her freedom of religion under section 2(a) of the *Canadian Charter of Rights and Freedoms*.[1]

4. The petitioner does not challenge the constitutionality of any law or policy, including the curriculum or the *School Act*.[2] While the petitioner asserts in her written argument that the Impugned Events were contrary to section 76 of the *School Act*, the petition does not seek any relief to that effect. The sole issue properly before the Court is whether the petitioner is entitled to a declaration that the Impugned Events infringed her *Charter* rights.

5. The respondent Attorney General of British Columbia (**"AGBC"**) does not take a position on the facts surrounding the Impugned Events, or on the question of whether they constituted a breach of section 2(a) of the *Charter*. The AGBC sets out the legal principles that govern the section 2(a) analysis in the context of a case such as this one. In particular, the AGBC emphasizes that exposure to different worldviews and beliefs within the public education system is permitted under section 2(a) of the *Charter*, that freedom of religion must be interpreted contextually, and that the *Doré* approach to section 1 of the *Charter* (rather than the *Oakes* test) applies here, so that the question is whether the discretionary decisions to hold the Impugned Events reflect a proportionate balance between any *Charter* values that

[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[2] RSBC 1996, c 412.

are engaged and the statutory objectives of the *School Act*.

6. The AGBC opposes the second order sought by the petitioner, which would prohibit the respondent School District 70 (Alberni) (the **"School District"**) from "facilitating or allowing religious practices" during mandatory school time.[3] Relief of this nature is not available for speculative, future harms. Moreover, the proposed order is overbroad and therefore not "appropriate and just" under section 24(1) of the *Charter*, whatever the Court may conclude about the Impugned Events.

II. Factual Background

A. AGBC participation in this proceeding

7. In January 2017, the petitioner served a notice of constitutional question on the AGBC. The AGBC appears as of right pursuant to section 8(6) of the *Constitutional Question Act*.[4]

B. History of colonialist and assimilationist schooling for Indigenous children in Canada

8. For more than a century, the government of Canada's educational policy explicitly sought to assimilate Indigenous children into settler society. The policy was founded on colonialist, Eurocentric views that Indigenous peoples had to be "civilized" and converted to Christianity.

9. The assimilationist approach to education of Indigenous students was most notoriously exemplified by the residential school system. From the early 1800s, residential schools were operated by Christian churches and missions. After Confederation, residential schools were funded (and, beginning in the late 1960s for southern residential schools, operated) by the Canadian government.[5] Most residential schools were located in the northern and western regions of Canada, including British Columbia.[6]

10. From the 1950s onwards, the federal government entered into agreements with provincial governments and school boards to have Indigenous children educated in public schools.[7] In the late 1960s, the federal government started the process of closing the residential school

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[3] See Amended Petition filed 6 January 2017, Part 1, para 2.

[4] RSBC 1996, c 68.

[5] *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg, MB: Truth and Reconciliation Commission of Canada, 2015) at 55-60, 63, 69 [TRC Summary].

[6] TRC Summary at 63.

[7] TRC Summary at 68.

system down.[8] The last residential schools were closed in the 1990s.[9]

11. The residential school system, and the trauma it caused to Indigenous persons throughout Canada and across generations, is documented in the final report of the Truth and Reconciliation Commission (**"TRC"**).[10] The TRC found that "[t]he establishment and operation of residential schools were a central element of this policy [of assimilation], which can best be described as 'cultural genocide'."[11]

12. In this case, the contents of the TRC Summary may be treated in the same manner as legislative facts. The TRC Summary provides the requisite factual context to understand the redesign of British Columbia's public school curricula (described in more detail below). As the Supreme Court of Canada explained in *Danson*:

> Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements.[12]

13. The AGBC asks this Court to take judicial notice of the history of the residential school system in Canada and the devastating effects it has had on Indigenous communities, as documented in the TRC Summary.[13] This is consistent with the Supreme Court of Canada's guidance in *R v Ipeelee* and the jurisprudence in British Columbia:

> Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190). To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary

[8] TRC Summary at 69-70.

[9] TRC Summary at 3.

[10] In this proceeding, the AGBC relies principally on the TRC Summary report (a summarized version of the TRC's six-volume final report) as well as the TRC Calls to Action.

[11] TRC Summary at 1.

[12] *Danson v Ontario (Attorney General),* [1990] 2 SCR 1086 at 1099 [*Danson*].

[13] See *Public School Boards' Assn. of Alberta v Alberta (Attorney General)*, 2000 SCC 2 at para 5.

context for understanding and evaluating the case-specific information presented by counsel.[14]

a) Attendance at the residential school system

14. Canada's residential school system was a central element of the federal government's Indigenous policy. Although attendance at a residential school was not compulsory for all Indigenous children in Canada, various legislative measures authorized federal agents to compel individual Indigenous children to attend.[15]

15. In 1894, for example, the federal government passed regulations authorizing Indian agents or justices of the peace to place any child between six and 16 years of age in an industrial or boarding school if they were "not being properly cared for or educated, and … the parent, guardian or other person having charge or control of such child, is unfit or unwilling to provide for the child's education."[16] In 1920, the federal government amended the *Indian Act* to allow it to compel any Indigenous child to attend residential school.[17]

16. The federal government also implemented several policies which had the effect of compelling Indigenous children's attendance. For example, the Department of Indian Affairs implemented a policy, without legal authority, "that no child could be discharged from a residential school without governmental approval – even if the parents had enrolled the child voluntarily."[18]

17. The combined effect of the federal legislative and policy frameworks was that at least 150,000 First Nations, Metis, and Inuit students passed through the residential school system.[19]

b) Severance of familial and community connections, abuse, deprivation, and child labour

18. Under the residential school system, Indigenous children were forcibly removed from their homes and placed for much of their childhoods in schools outside of their home communities. Familial connections were also severed within residential schools—siblings were separated, traditional clothing was removed, and students were assigned numbers—in

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[14] *R v Ipeelee*, 2012 SCC 13 at para 60 (emphasis added) [*Ipeelee*]. See also *Daniels v Canada (Indian Affairs and Northern Development),* 2016 SCC 12; *R v Wilson,* 2018 BCSC 1405 at paras 79-80; *R v Elliott*, 2015 BCCA 295 at para 10; *R v Gladue,* [1999] 1 SCR 688 at para 83.

[15] TRC Summary at 62.

[16] TRC Summary at 60.

[17] TRC Summary at 62.

[18] TRC Summary at 61.

[19] TRC Summary at 3.

order to advance Canada's policy of assimilation.[20]

19. Separated from their families and communities, Indigenous children were particularly vulnerable to deprivation, abuse, and mistreatment, the full extent of which is only now beginning to be understood.[21] By the end of 2014, the Independent Assessment Process, which was established under the Indian Residential Schools Settlement Agreement, had resolved 30,939 claims for injuries resulting from physical and sexual abuse at residential schools, awarding $2,690,000,000 in compensation.[22]

20. The rampant sexual, physical, and psychological abuse that occurred within the residential school system had immediate and devastating effects on Indigenous children. Students were fearful, confused, and isolated.[23] The abuse destroyed their ability to function in school and resulted in self-destructive behaviours, including students victimizing other students.[24]

21. Indigenous children were also subject to significant physical hardship within the residential school system. The schools were badly constructed, poorly maintained, overcrowded, and represented serious fire hazards.[25] The students often had no access to clean water, good sanitation, or adequate ventilation.[26] During the TRC process, many former students reported experiences with starvation, child labour, and significant health issues, including the spread of infectious diseases.[27] As a result of these conditions, many Indigenous children died while in the system; due to the destruction of many health records, and the incompleteness of records that survived, the precise number of children who died is unknown.[28]

22. The residential school system was not simply a failed example of an educational program: as the TRC found, it was "institutionalized child neglect"[29] and an "integral part of a conscious policy of cultural genocide."[30]

c) Language and cultural suppression in residential school systems

23. From its inception, the residential school system furthered a policy of suppressing, casting

[20] TRC Summary at 40.

[21] TRC Summary at 107.

[22] TRC Summary at 106.

[23] TRC Summary at 107-108.

[24] TRC Summary at 108.

[25] TRC Summary at 43.

[26] TRC Summary at 94.

[27] TRC Summary at 85-90, 77-80, 90-99.

[28] TRC Summary at 90.

[29] TRC Summary at 43.

[30] TRC Summary at 55.

shame upon, and attempting to replace Indigenous languages and cultures. Indigenous children, including those who could not speak English or French, were prohibited from speaking Indigenous languages. If they failed to comply, students faced physical punishment.[31]

24. The residential school system denigrated and oppressed Indigenous cultures. It was premised on "the assumption that European civilization and Christian religions were superior to Aboriginal culture."[32] As a result, students were actively discouraged from participating in traditional cultural activities, such as potlaches or dance ceremonies.[33]

25. The policy of suppressing Indigenous languages and cultures had significant impacts on Indigenous communities. Many children lost the ability to speak their languages and, as a result, their ability to communicate with family members. This created a barrier between many Indigenous children and their parents, which further alienated the children and protected abusers who worked within the residential school system.[34]

26. As the TRC explained, Canada's policy of assimilation "sought to break the chain of memory that connected the hearts, minds, and spirits of Aboriginal children to their families, communities and nations."[35]

d) The imposition of a learning program that reflected Christian, settler knowledge and perspectives

27. The assimilationist policy underlying the residential school system manifested itself not only through the suppression of Indigenous languages and cultures, but also through the imposition of a learning program that reflected Christian, settler knowledge and perspectives.

28. Since the 1920s, the federal department of Indian Affairs required residential schools to adopt provincial curricula, a decision which negatively impacted Indigenous students.[36] As the TRC explained:

> The decision to leave curriculum to provincial education departments meant that Aboriginal students were subjected to an education that demeaned their history, ignored their current situation, and did not even recognize them or their families as citizens. This was one of the reasons for the growing Aboriginal hostility to the Indian Affairs integration policy. An examination of the

[31] TRC Summary at 81-82.

[32] TRC Summary at 4.

[33] TRC Summary at 4.

[34] TRC Summary at 83.

[35] TRC Summary at 267.

[36] TRC Summary at 74.

> treatment of Aboriginal people in provincially approved textbooks reveals a serious and deep-rooted problem. In response to a 1956 recommendation that textbooks be developed that were relevant to Aboriginal students, Indian Affairs official R.F. Davey commented, "The preparation of school texts is an extremely difficult matter." It was his opinion that "there are other needs which can be met more easily and should be undertaken first." In the following years, assessments of public school textbooks showed that they continued to perpetuate racist stereotypes of Aboriginal people. A 1968 survey pointed out that in some books, the word squaw was being used to describe Aboriginal women, and the word redskins used to describe Aboriginal people.[37]

C. The legacy of an assimilation-driven education system

29. Although the last residential schools were closed in the 1990s, the repercussions of the assimilation-driven education system for Indigenous children are profound and ongoing.

30. While we are only beginning to understand the intergenerational effects of residential schools on Indigenous peoples, the evidence shows that they continue to suffer disproportionately from low employment, health and mental health problems, and violent victimization and suicide. As Dr Jeffrey Ansloos opined:

> In my opinion, the relationship between Indigenous peoples' experiences with negative mental health issues and other negative life outcomes (for example, in the areas of employment, health, violence, and/or suicide) is significant and multidimensional. While there is not a single causal factor in the prevalence of low employment rates, health disparities, high rates of violent victimization, or high suicide rates among Indigenous peoples, it is exceedingly clear that the historical and intergenerational trauma of colonialism – the colonial policies, practices, and institutions (e.g. the Indian Residential Schools) – have had far reaching effects and negative consequences of Indigenous peoples and have resulted in substantial social inequalities.
>
> In my opinion negative mental health issues are meaningfully correlated with these social inequalities. This is sometimes referred to as social dimensions/determinants of mental health. That is to say, where there is greater social inequality, there is a higher risk for the development of negative mental health issues. In particular, the complex trauma of colonization has resulted in substantial social inequalities in regards to socioeconomic status of Indigenous peoples (i.e. unemployment rates, poor housing, and lower educational attainment). Lower socioeconomic status is associated with higher risks in terms of health and mental health.
>
> Further, it is the case that increased negative mental health issues are correlated with higher risk of violent victimization and suicide. While these factors make Indigenous populations at risk, distal factors, such as experiences with

[37] TRC Summary at 75 [citations omitted].

> colonialism, and the resulting disruptions and loss of culture, uniquely add to the overall risk of violent victimization and suicide.[38]

31. Dr Ansloos' findings are reflected in the TRC Summary:

> There should be little wonder that Aboriginal health status remains far below that of the general population. The over-incarceration and over-victimization of Aboriginal people also have links to a system that subjected Aboriginal children to punitive discipline and exposed them to physical and sexual abuse.[39]

32. Despite the closure of the residential school system, there remains a significant gap between the proportion of Indigenous and non-Indigenous students in the British Columbia public school system who graduate from high school. While that gap is narrowing, it is still unacceptable. As Gerald Morton deposed:

> There is both a significant gap between Indigenous and non-Indigenous students in the six-year completion rate, and significant progress in reducing that gap. The gap has decreased significantly since we began tracking it for the 2007/08 Cohort (i.e., the students who had enrolled in Grade 8 six years before in school year 2001/02). For the first cohort, the non-Indigenous completion rate was 83.4%, while the Indigenous completion rate was 47.0%. For the 2016/17 cohort, the non-Indigenous completion rate was 90.3%, an improvement of approximately 7 percentage points. By contrast, the Indigenous completion rate had risen to 66.2%, an improvement of almost 20 percentage points. These results are based on Open Data.[40]

33. Again, this is reflected in the TRC Summary. According to the TRC, there is a relationship between the residential school system and the current gap between Indigenous and non-Indigenous students: "[a]n educational system that degraded Aboriginal culture and subjected students to humiliating discipline must bear a portion of responsibility for the current gap between the educational success of Aboriginal and non-Aboriginal Canadians."[41]

D. Early reforms to British Columbia public school curricula

34. When Indigenous students began to enter the public school system in British Columbia in the 1960s, Indigenous peoples were notably absent from the curriculum.[42] However, First Nations education activists lobbied the provincial government to include Indigenous peoples

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[38] Expert report of Dr Jeffrey Ansloos made 25 September 2018 at paras 4.2.1-4.2.3 [Ansloos #1].

[39] TRC Summary at 132.

[40] Affidavit #1 of Gerald Morton made 26 September 2018 at para 6 [Morton #1].

[41] TRC Summary at 132.

[42] Affidavit #1 of Dr Lorna Williams made 24 September 2018 at para 48 [Williams #1].

in the public school system curriculum.[43] The activists met with some success in 1979 when Indigenous peoples were first included in parts of the British Columbia public school curriculum. As Dr Lorna Williams explained, the inclusion of Indigenous peoples in 1979:

> was through a Western settler perspective. Indigenous peoples were seen as objects. The curriculum was anthropological in nature. For example, the social studies curriculum would discuss the food we ate, the clothing we wore, and the dwellings we lived in. The curriculum depicted Indigenous peoples as a homogenous group. …
>
> The curriculum was not about Indigenous peoples ourselves. Rather, it was based on a colonial perspective of Indigenous peoples. The curriculum focused on how Indigenous peoples served the settlers, explorers, and fur traders. As a result, the image of Indigenous peoples represented in the curriculum was one where we were seen to have no governance structure, no ability to care for ourselves, and we were depicted as survivors who were "saved" when the European settlers arrived.[44]

35. It was not until 2003 that "B.C. First Nations Studies", the first Indigenous-perspective based textbook, was published and included in the provincial curriculum. This textbook was used in the First Nations 12 course, an optional social studies course for grade 12 students in British Columbia.

36. Following on the heels of this textbook, the Curriculum Branch of the British Columbia Ministry of Education (the **"Ministry"**) began to work with Indigenous education activists and teachers to develop new prescribed learning outcomes that would incorporate Indigenous knowledge and worldviews.[45]

37. At the time, teachers largely did not support the inclusion of Indigenous knowledge and worldviews in the curriculum; however, the Deputy Minister of Education made a commitment to begin to discuss the development of new curricula in British Columbia that would include Indigenous knowledge and worldviews.[46]

E. K-12 curricula redesign in British Columbia

38. In 2010, the Ministry began a process to reform the curricula for K-12 public education in the province.[47] In so doing, the Ministry formed a Curriculum and Assessment Framework Advisory Group (the **"Advisory Group"**), composed of BC educators, academics from various universities, as well as the First Nations Education Steering Committee. The

[43] Williams #1 at paras 9, 10, 12.

[44] Williams #1 at paras 49-50.

[45] Williams #1 at para 52.

[46] Williams #1 at para 54.

[47] Affidavit #1 of Nancy Walt made 27 September 2018 at para 2 [Walt #1].

Advisory Group, in consultation with regional working session participants, developed eight guiding principles for the development of a new provincial curricula that would be concept-based and competency driven. One of the eight guiding principles of the redesign was to incorporate Indigenous knowledge and worldviews into the curricula.[48]

39. The purposes of integrating Indigenous knowledge and worldviews into the K-12 curricula included: to recognize that British Columbia schools serve students from diverse cultures and backgrounds; to reflect the fact that Indigenous knowledge and worldviews are part of the historical and contemporary foundation of British Columbia and Canada; to begin to address misunderstanding of Indigenous cultures; to improve school success for Indigenous students; and to encourage mutual understanding and respect amongst all students.[49]

40. Another guiding principle of the curricula redesign was to reduce the prescriptive nature of the curricula, promoting flexibility for teachers while ensuring a focus on a required amount of essential learning.[50]

41. In developing the new curricula, the Ministry worked closely with Indigenous education stakeholders, including the First Nations Education Steering Committee and the First Nations Schools Association, to ensure each curriculum team had at least one Indigenous person as a member.[51] With each draft, the new curricula underwent several public review sessions and revisions.[52]

42. In September 2015, the Ministry introduced the new K-9 curriculum, and it was fully implemented by 2016/2017.[53]

F. Truth and Reconciliation Commission Report and Calls to Action

43. As part of its Summary Report, the TRC issued 94 Calls to Action in order to "redress the legacy of residential schools and advance the process of Canadian reconciliation."[54] They call on all levels of government to work together to repair the harm caused by the residential school system.

44. With respect to educational reform, the TRC calls upon federal, provincial, and territorial governments, in consultation and collaboration with Survivors, Aboriginal peoples, and educators, to:

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[48] Walt #1 at para 5(f).

[49] Walt #1 at para 6, ex B at 16. See also *ibid*, ex G at 86.

[50] Walt #1 at para 5(b), ex B at 15.

[51] Walt #1 at para 12.

[52] Walt #1 at paras 13-16.

[53] Walt #1 at para 17.

[54] TRC Summary at 319.

i. Make age-appropriate curriculum on residential schools, Treaties, and Aboriginal peoples' historical and contemporary contributions to Canada a mandatory education requirement for Kindergarten to Grade Twelve students;

ii. Provide the necessary funding to post-secondary institutions to educate teachers on how to integrate Indigenous knowledge and teaching methods into classrooms;

iii. Provide the necessary funding to Aboriginal schools to utilize Indigenous knowledge and teaching methods in classrooms;

iv. Establish senior-level positions in government at the assistant deputy minister level or higher dedicated to Aboriginal content in education.[55]

45. The TRC also calls upon the Council of Ministers of Education, Canada to maintain an annual commitment to Aboriginal education issues, including:

i. Developing and implementing Kindergarten to Grade Twelve curriculum and learning resources on Aboriginal peoples in Canadian history, and the history and legacy of residential schools;

ii. Sharing information and best practices on teaching curriculum related to residential schools and Aboriginal history;

iii. Building student capacity for intercultural understanding, empathy, and mutual respect;

iv. Identifying teacher-training needs relating to the above.[56]

46. From a more systemic perspective, the TRC calls upon "federal, provincial, territorial, and municipal governments to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation."[57]

G. The petitioner's reliance on transcripts of cross-examinations of AGBC witnesses

47. The petitioner's written submissions comprise essentially of excerpts from the transcripts of the cross-examination of the witnesses of the AGBC and the Nuu-Chah-Nulth Tribal Council.

48. The AGBC responds to select aspects of the petitioner's written submissions below. However, all transcript excerpts, even those not addressed in this argument, must be read in context and with reference to the underlying affidavit or expert report filed in this proceeding.

[55] TRC Summary, Call to Action 62 at 238.

[56] TRC Summary, Call to Action 63 at 331.

[57] TRC Summary, Call to Action 43 at 325.

49. The petitioner relies on the cross-examination transcripts to advance four propositions:

a. The "cleansing" ceremony, or the underpinning spiritual beliefs, are not required under British Columbia's public school curricula, the learning standards, or by provincial government policy;

b. The Aboriginal Worldviews and Perspectives in the Classroom document is not a mandatory part of British Columbia's public school curricula;

c. The spiritual beliefs expressed in the "First Peoples Principles of Learning" are not part of British Columbia's public school curricula or provincial government policy; and

d. Compulsory participation in Indigenous ceremonies is not necessary to educate students on Indigenous worldviews and perspectives.

50. In advancing these evidentiary propositions, the petitioner fails to refer to other portions of the evidence of the witnesses which provide important context.

51. First, the evidence of the AGBC witnesses regarding smudging ceremonies is consistent: smudging ceremonies are not required under British Columbia's public school curriculum, the learning standards, or any provincial governmental policy.[58] However, the AGBC witnesses also provided more detailed information about what *is* considered mandatory learning in British Columbia's new curricula.

52. In cross-examination, counsel for the petitioner and Ms Walt, Executive Director for Curriculum and Assessment for the Ministry, had the following exchange:

> Q: Okay. And is the curriculum mandatory?
>
> A: At a certain level, yes. The learning standards are the mandatory portion of the curriculum.
>
> Q: Learning standards?
>
> A: Mm-hmm.
>
> Q: Could you explain that to me?
>
> A: The learning standards are - - at a provincial level, what we describe, it's what students should learn and, in particular, know, understand, and be able to do.
>
> Q: And the learning standards all deal with one of the 10 or 11 portions of the curriculum?

[58] Transcript, cross-examination of Harry Tennyson Cadwallader at pp 29-31 [Cadwallader Transcript]; Transcript, cross-examination of Nancy Walt at pp 15-17 [Walt Transcript].

A: Yes.

Q: But the learning standards are mandatory and they're testable; is that correct?

A: They're assessable.[59]

53. Further, when petitioner's counsel specifically asked whether smudging is part of the learning standards, Ms Walt deposed:

> A: Learning standards are really setting, at a very broad level, the provincial framework, provincial requirements. Teachers, schools, districts, et cetera, they determine how they're going to deliver that curriculum. So, something like that is very unlikely to be in the curriculum, because to me it starts to get a little bit more into the "how" than the "what". Curriculum is really about the "what", what students will know and understand and be able to do.[60]
>
> …
>
> Q: Those last two words there, "essential learning". In your capacity as executive director of Curriculum, would you say that personally experienced ritual cleansing by smudging is part of a student's essential learning?
>
> A: It's not in the curriculum, so it's not - - it's not a - - it's not part of the learning standard. It might have been - - it might be a way somebody is interpreting how to get at a knowledge piece that's in the curriculum, but you're not going to find that kind of thing in the provincial curriculum as stated like that.[61]

54. The evidence of Mr Cadwallader, District Principal for Aboriginal Programs in the Nanaimo School District, on cross-examination, is consistent with that of Ms Walt. In an exchange with petitioner's counsel, Mr Cadwallader deposed:

> Q: Okay. What are they compelled to teach?
>
> A: The curriculum, as it stands, from the Ministry of Education.
>
> Q: And are there any portions of the curriculum which are optional or is the curriculum mandatory?
>
> A: The curriculum is mandatory.
>
> Q: 100 percent?
>
> A: Well, there are choice points within the curriculum on how a teacher chooses

[59] Walt Transcript at p 13, lines 1-17.

[60] Walt Transcript at p 16, lines 19-25, p 17, lines 1-4.

[61] Walt Transcript at p 18, lines 11-23.

to implement it.

Q: But the curriculum itself is mandatory?

A: Correct.[62]

55. Accordingly, the AGBC agrees that smudging ceremonies are not mandatory under British Columbia's pubic school curricula, learning standards, or any provincial government policy. The content learning standards (what students are expected to know), curricular competency learning standards (what students are expected to be able to do), and the big ideas (what students are expected to understand) are the mandatory elements of British Columbia's curricula.[63] These three elements "provide the basis for teachers to plan learning experiences, teach, assess and communicate about student learning."[64]

56. The second proposition advanced by the petitioner is also not contentious: the evidence from Mr Cadwallader and Ms Walt is that the Aboriginal Worldviews and Perspectives in the Classroom document is not a mandatory part of British Columbia's public school curricula.[65]

57. In the course of cross-examination, Mr Cadwallader provided more information about the document:

> Q: What is it?
>
> A: It's a guide for teachers, as they go through the curriculum, to bring aboriginal worldviews and perspective to the classroom.
>
> Q: Teachers are intended to look at this, though, and use it as a guidelines for teaching, are they not?
>
> A: Teachers have the choice of whether they're going to use that or not, because they have professional autonomy on how they implement the curriculum and make decisions around it.
>
> Q: I see. So if a teacher decides to use this, that's an exercise of their decision? There's nothing compelling them to use this?
>
> A: Correct.[66]
>
> …

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[62] Cadwallader Transcript at p 25, lines 3-15.

[63] See Walt #1, ex A at p 6: learning standards "describe what students are expected to know, understand, and be able to do." They are "high-level, rigorous, and fewer in number, allowing teachers more space to add learning activities based on student needs and interests." See also Walt #1, ex G at 91.

[64] Walt #1, ex I at 122-123.

[65] Cadwallader Transcript at p 24, lines 11-12; Walt Transcript at p 26, lines 16-25, p 27, lines 1-16.

[66] Cadwallader Transcript at p 24, lines 13-25, p 25, lines 1-2.

> A: The document is meant to guide teachers in their understanding of aboriginal worldviews and perspectives, to choose components of it that they think matches best the implementation of the required curriculum. So to choose specific components of it, I, as a teacher, could go through the document and choose titled like "Connections to Land" and implement that component of it in a wide variety of ways that may or may not have anything to do with indigenous people, but allow me to teach in such a way that indigenous students might be familiar with the way that I'm doing that.[67]

58. Accordingly, the AGBC agrees that the Aboriginal Worldviews and Perspectives in the Classroom document is not a mandatory part of British Columbia's public school curricula. It is a resource that teachers may use to guide them in their understanding of Indigenous knowledge and worldviews.

59. With respect to the petitioner's third proposition, the evidence of the AGBC witnesses is that the "First Peoples Principles of Learning" informed the curricula redesign, but were not directly incorporated into the curricula.

60. In her affidavit, Ms Walt deposed that the "First Peoples Principles of Learning were a key tool used to inform this [redesign] work."[68] The Handbook for Development teams dated January 2015 explained: "The First Peoples Principles of Learning are affirmed within First Peoples communities and are being reflected in the development of all K-12 curriculum and assessment."[69]

61. Moreover, the evidence of Mr Cadwallader was that the First Peoples Principles of Learning may be used as a resource in the classroom. In cross-examination, Mr Cadwallader had the following exchange with petitioner's counsel:

> Q: Okay. Do you see on the right side there, it says "First Peoples Principles of Learning"?
>
> A: Yes.
>
> Q: Are you familiar with these principles of learning?
>
> A: I'm familiar with it, yes.
>
> Q: And do you agree that that is a beneficial thing for the classroom in British Columbia?
>
> …
>
> Q: The utilization of first peoples principles of learning, is that beneficial to

[67] Cadwallader Transcript at p 55, lines 13-25.

[68] Walt #1 at para 6.

[69] Walt #1, ex G at 86.

British Columbia classrooms?

A: Yes.

Q: Is that something that teachers should use?

A: That's a different question. It's beneficial, yes.[70]

62. The evidence of the AGBC witnesses does not suggest that, to the extent that Indigenous spiritual beliefs are articulated in the First Peoples Principles of Learning, the Ministry adopted those beliefs as dogma or sought to inculcate them in students.

63. Last, the evidence of the AGBC witnesses with respect to the fourth proposition advanced by the petitioner is that compulsory participation in Indigenous ceremonies is not necessary to educate students on Indigenous knowledge and worldviews.

64. In cross-examination, Mr Cadwallader had the following exchange with petitioner's counsel:

> Q: Okay. Why was the old curriculum revamped? Was there a problem with the old curriculum?
>
> A: I'm not in a position to answer that. Those are decisions that were - - I was not part of, why it was revamped.
>
> Q: What was your purpose in assisting with the creation of the new curriculum? What was the broad purpose?
>
> A: The broad purpose of my involvement was to, to the best of my ability, support the infusion of aboriginal culture, content, language, history, ways of understanding, as a methodology to improve the success of aboriginal students and raise awareness of all students about aboriginal people.
>
> Q: Okay. And can that purpose be accomplished without compelling children to be smudged against their will.
>
> A: Yes.[71]

65. When petitioner's counsel asked Ms Walt about compelling someone to participate in a smudging ceremony the following exchange occurred:

> Q: Well, you're in a classroom, and somebody comes in and started to do a smudging. You ask to leave, and you're told that you can't leave or that you have to stay. Would that be respectful of you?
>
> A: Probably not.
>
> Q: Okay. So it would not be your position, as the executive director of

[70] Cadwallader Transcript at p 42, lines 5-22.

[71] Cadwallader Transcript at p 61, lines 18-25, p 62, lines 1-11. See also Walt Transcript at p 50, lines 12-25.

> Curriculum, that the Province of British Columbia can impose smudging on people contrary to their will?
>
> A: We don't get into anything around the ways and how one delivers the curriculum, so we would not weigh in to that at all. That's really someone else's responsibility, and that's really where teachers, principals, and everything that happens in boards come in.[72]

66. The evidence of the AGBC witnesses is consistent: compelling students to participate in Indigenous ceremonies is not necessary to introduce students to Indigenous knowledge and worldviews. Nor does British Columbia's curricula compel participation in Indigenous ceremonies. Decisions about how to deliver the curricula are made at the level of teachers, principals, and school boards.

III. Statutory Scheme

67. The Minister of Education (the **"Minister"**) is empowered under section 168(2) of the *School Act* to make orders governing the provision of educational programs, determining the general nature of educational programs for use in schools, specifying educational program guides, and governing educational resource materials.

68. Section 2 of Ministerial Order M333/99 ("Educational Program Guide Order"), made pursuant to section 168(2) of the *School Act*, prescribes curriculum documents for K-9 education in the province. Section 1(2) of the *School Regulation*[73] defines "educational resource materials" as:

> (a) information, represented or stored in a variety of media and formats, that is used for instruction in an educational program including, without limitation, the materials referred to in section 3 of Ministerial Order 333/99, the Educational Program Guide Order, and
> (b) materials and equipment necessary to meet the learning outcomes or assessment requirements of an educational program provided by a board …

69. Pursuant to section 20(1) of the *School Act* and section 5(6)(d) of the *School Regulation*, the principal of a school is responsible for assisting in carrying out a system of education in conformity with the orders of the Minister.

70. The responsibilities of teachers are set out in section 17 of the *School Act*, which provides:

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[72] Walt Transcript at p 28, lines 15-25, p 29, lines 1-5.

[73] BC Reg 62/2016.

17(1) A teacher's responsibilities include designing, supervising and assessing educational programs and instructing, assessing and evaluating individual students and groups of students.
(2) Teachers must perform the duties set out in the regulations.

71. Section 4(1) of the *School Regulation* provides a non-exhaustive list of the duties of teachers:

4(1) The duties of a teacher include the following:
(a) providing teaching and other educational services, including advice and instructional assistance, to the students assigned to the teacher, as required or assigned by the board or the minister;
(b) providing such assistance as the board or principal considers necessary for the supervision of students on school premises and at school functions, whenever and wherever held;
(c) ensuring that students understand and comply with the codes of conduct governing their behaviour and with the rules and policies governing the operation of the school;
(d) assisting to provide programs to promote students' intellectual development, human and social development and career development;
(e) maintaining the records required by the minister, the board and the school principal;
(f) encouraging the regular attendance of students assigned to the teacher;
(g) evaluating educational programs for students as required by the minister or the board;
(g.1) evaluating each student's intellectual development, human and social development and career development, including, as required by the minister, administering and grading Required Graduation Program Examinations;
(g.2) ensuring the security of Provincial examinations, including retaining completed Provincial examinations for any period of time set by the minister;
(h) providing the information in respect to students assigned to the teacher as required by the minister, board or, subject to the approval of the board, by a parent;
(h.1) advising the school principal regarding the organization of classes in the school and the placement of students with special needs in those classes;
(i) when required to do so by the minister, verifying the accuracy of the information provided to the minister under paragraph (h);
(j) regularly providing the parents or guardians of a student with reports in respect of the student's school progress;
(k) attending all meetings or conferences called by the principal or superintendent of schools for the district to discuss matters the principal or superintendent of schools considers necessary unless excused from attending the meeting or conference by the principal or superintendent of schools;
(l)admitting to his or her classroom, to observe tuition and practise teaching, student teachers enrolled in a university established under the University Act or in an institution for training teachers established under any other Act, and

rendering the assistance to the student teachers, and submitting the reports on their teaching ability or on other matters relating to them or to their work, considered necessary for the training of teachers by the university or institution.

IV. Submissions on Legal Issues

72. The petition seeks two orders:

    a. a declaration pursuant to section 24(1) of the *Charter* that the actions of the School District, by imposing prayer and religious rituals on the students at the School during the 2015-16 school year, violated the freedom of religion of the Petitioner as protected under section 2(a) of the *Charter*; and

    b. an order prohibiting the School District from facilitating or allowing religious practices (as distinct from including religious content as part of the curriculum), during mandatory instructional time, at mandatory student assemblies, or during any other time when student attendance is mandatory. Such practices include, but are not limited to, religious or spiritual rituals, "cleansings", ceremonies, and prayer.

73. The AGBC does not take a position with respect to the first order sought. More specifically, the AGBC does not take a position on whether the Impugned Events infringed section 2(a) of the *Charter*, or whether any such infringement was justified under section 1. However, the applicable legal principles are set out below.

74. While the petitioner does not challenge the constitutionality of the public school curricula of British Columbia, the AGBC submits that the requirement to incorporate Indigenous knowledge and worldviews is, in any event, permitted by section 2(a) of the *Charter*.

75. The AGBC opposes the second order sought on the grounds that relief for speculative, future harm is not available, and because the proposed order is not tailored to the specific *Charter* breach that the petitioner alleges in this case.

A. Legal Principles Applicable to Sections 2(a) and 1 of the *Charter*

a) Section 2(a) of the *Charter*

76. The first question is whether the decision of the teachers and the principal to hold the Impugned Events engaged the petitioner's right to freedom of religion under section 2(a) of the *Charter*. That section provides: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion…".

77. The applicable analytical framework is described below.

i) Petitioner must prove alleged limitation on her freedom of religion

78. The petitioner bears the burden of demonstrating that the decision to hold the Impugned Events limited her freedom of religion under section 2(a) of the *Charter*. To the extent the petitioner asserts that the alleged infringement arises from a breach of the state's duty of neutrality, she must establish three elements.[74]

79. First, the petitioner must prove that the Impugned Events "reveal an intention to profess, adopt or favour one belief to the exclusion of others."[75] It is not enough to show that the Impugned Events were in some respect religious or spiritual. A breach of the duty of neutrality only arises if the state *intended* to indoctrinate students with one belief, "to the exclusion of all others."[76] This requirement is consistent with the Supreme Court of Canada's recognition (discussed in more detail below) that section 2(a) of the *Charter* permits exposure to diverse religious practices and beliefs.

80. The factual circumstances before the Ontario Court of Appeal in *Zylberberg*[77] and the British Columbia Supreme Court in *Russow*[78] are in this respect distinguishable. Both of those cases involved the recitation of a Christian prayer (and, in *Russow*, reading from the Bible) at the opening or close of *every* school day. In *Zylberberg*, the court explicitly found that "the exercises mandated by the Regulation were intended to be religious exercises."[79] In this case, the Impugned Events were not daily occurrences. Moreover, even assuming that the Impugned Events are properly be characterized as "religious" (the AGBC takes no position on this issue), there is no evidence that Indigenous knowledge and worldviews were promulgated to the exclusion of other beliefs, or that this was the underlying intent.

81. Second, the petitioner must establish that she holds a sincere belief that has a nexus with religion.[80] More specifically, the petitioner "must show the court that … she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct" and that

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[74] See *Mouvement Laïque Québécois v Saguenay (City)*, 2015 SCC 16 at paras 83-86 [*Saguenay*].

[75] *Saguenay* at para 88 (emphasis added). See also *ibid* at para 83.

[76] *Saguenay* at para 84.

[77] *Zylberberg v Sudbury Board of Education (Director)* (1988), 65 OR (2d) 641, [1988] OJ No 1488 (CA) [*Zylberberg*]. It is also notable that in this case, the respondents conceded that the impugned regulation infringed section 2(a) of the *Charter*: see *ibid* at page 10 (QL).

[78] *Russow v British Columbia (Attorney General)* (1989), 35 BCLR (2d) 29, 62 DLR (4th) 98 (SC) [*Russow*]. The decision in this case relies entirely on *Zylberberg*.

[79] *Zylberberg* at page 14 (QL) (emphasis added).

[80] *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 63 [*TWU*].

she is in sincere in her belief.[81] In *Amselem*, the majority of the Supreme Court of Canada clarified that:

> An "expert" or an authority on religious law is not the surrogate for an individual's affirmation of what his or her religious beliefs are. Religious belief is intensely personal and can easily vary from one individual to another.[82]

82. The Court must assess the sincerity of the petitioner's asserted belief and satisfy itself that the "belief is in good faith, neither fictitious nor capricious, and that it is not an artifice."[83] The Supreme Court of Canada has described this assessment as

> [A] question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony … as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices.[84]

83. In this case, the petition does not plead any material facts about the religious beliefs of the petitioner or her children, nor does the petition articulate a particular line of conduct that the petitioner believes she must follow.[85]

84. Third, the petitioner must prove that, from an objective standpoint, the Impugned Events interfered with her religious belief.[86] The alleged interference must be more than trivial or insubstantial.[87] It is not enough for a claimant to say that her rights have been infringed: she must prove the infringement on a balance of probabilities, based on facts that can be established objectively.[88]

ii) Section 2(a) permits exposure to diverse cultures and religions

85. It is well established that freedom of religion is not an absolute guarantee,[89] but rather must be interpreted contextually. In *Amselem*, the majority of the Supreme Court of Canada confirmed that the scope of what is protected under section 2(a) of the *Charter* "must be

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[81] *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 56 [*Amselem*].

[82] *Ibid* at para 54.

[83] *Ibid* at para 52.

[84] *Ibid* at para 53.

[85] On the requirement to plead all material facts on which the petition is based, see *Supreme Court Civil Rules*, r 16-1(2) with reference to Form 66; *Polson v British Columbia (Superintendent of Motor Vehicles)*, 2014 BCSC 700 at paras 57-60.

[86] *S.L. v Commission scolaire des Chênes*, 2012 SCC 7 at paras 2, 24, 27 [*S.L.*]; *Amselem* at paras 56-58; *TWU* at para 63; *E.T. v Hamilton-Wentworth District School Board*, 2017 ONCA 893 at paras 26, 33 [*E.T.*].

[87] *Amselem* at paras 58, 74.

[88] *S.L.* at paras 23, 27.

[89] *Amselem* at para 61.

measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises."[90]

86. Three contextual factors are particularly relevant here.

87. First, the Impugned Events took place in a public, non-denominational school with a mandate to incorporate Indigenous knowledge and worldviews into the educational program. The petitioner does not challenge the constitutionality of the provincial curricula and "does not oppose the abstract teaching about various beliefs, including those of the [Nuu-chah-nulth]."[91] The AGBC submits that the incorporation of Indigenous knowledge and worldviews in the curricula is, in any event, permitted by section 2(a) of the *Charter*.

88. The Supreme Court of Canada has explicitly held that, in the context of public education, exposure to diverse religions and cultural practices does not constitute an infringement of section 2(a) of the *Charter*.[92] This is so even if the exposure amounts to a "source of friction" that causes some "cognitive dissonance" for students. Such experiences are, in the words of the Supreme Court of Canada, part of the "multicultural reality of Canadian society."[93]

89. By integrating Indigenous knowledge and worldviews into the K-12 curricula, the Ministry sought to develop awareness amongst Indigenous and non-Indigenous students alike.[94] It did not seek to exclude other perspectives. This was plainly expressed in the 2013 update on the curricula redesign process:

> It is recognized that British Columbia schools serve students from diverse cultures and backgrounds. The multicultural nature of the BC school system is highly valued, and all students' heritages and cultures are valued. The inclusion of Aboriginal perspectives and knowledge specifically in the Guiding Principles for New Curriculum is based on the understanding that Aboriginal perspectives and knowledge are a part of the historical and contemporary foundation of BC and Canada. The integration of Aboriginal perspectives and knowledge in the curriculum serves as an important step to begin to address misunderstanding of Aboriginal cultures. With a more in-depth knowledge of Aboriginal people and their history, all students in British Columbia will have

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[90] *Amselem* at para 62. This principle was reiterated in *S.L.* at para 25. See also *E.T.* at paras 36, 40.

[91] Written Argument of the Petitioner at para 32. To the extent that the petitioner suggests that section 2(a) only permits "passive" exposure (e.g. through books or videos) to other cultures (see *ibid* at para 6), that distinction is not supported in the case law. In *Loyola* at para 48, for example, the Supreme Court of Canada recognized the importance of exposure to "different worldviews and practices" (emphasis added).

[92] *S.L.* at para 40; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 71 [*Loyola*]; *E.T.* at para 28.

[93] *S.L.* at paras 39-40. See also *Chamberlain v School District No. 36*, 2002 SCC 86 at paras 64-66 [*Chamberlain*].

[94] Walt #1 at para 6.

a foundation for developing mutual understanding and respect.[95]

90. The second important contextual factor is the history of assimilationist educational policy toward Indigenous children in Canada, including but not limited to the residential school system.[96] Residential schools not only excluded Indigenous cultures and knowledge, but reflected a "government-sponsored attempt to destroy Aboriginal cultures and languages."[97] In the context of sentencing of Aboriginal offenders, the Supreme Court of Canada has confirmed that courts must "take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society."[98]

91. The legacy of the residential school system is palpable in British Columbia.[99] The evidence is that Indigenous students have poorer educational outcomes (including lower graduation rates) than non-Indigenous students,[100] although the gap is narrowing,[101] and that they experience alienation from the public school system.[102] This is reflected in the conclusions of the TRC:

> In addition to the emotional and psychological damage they inflicted, one of the most far-reaching and devastating legacies of residential schools has been their impact on the educational and economic success of Aboriginal people. The lack of role models and mentors, insufficient funds for the schools, inadequate teachers, and unsuitable curricula generally taught in a foreign language—and sometimes by teachers who were not proficient in the language of instruction—have all contributed to dismal success rates for Aboriginal education. …
>
> Poor educational achievement has led to the chronic unemployment or under-employment, poverty, poor housing, substance abuse, family violence, and ill

[95] Walt #1, ex B at 16. See also *ibid*, ex G at 86.

[96] See Williams #1 at paras 2-12.

[97] TRC Summary at 145, 153.

[98] *Ipeelee* at para 60.

[99] The AGBC takes no position on how the Impugned Events transpired. Nevertheless, the assertion at paragraph 79 of the Written Argument of the Petitioner that the Impugned Events represent an "echo of the gross abuses of the residential school days" is false and must be unequivocally rejected. Even if the Impugned Events are found to have been contrary to section 2(a) of the *Charter*, the proposed comparison with the experience of Indigenous children in residential schools—including the fact that residential schools were an explicit state-sponsored attempt to eliminate Indigenous culture and language from Canadian society, that the profoundly damaging effects of the schools are experienced by Indigenous peoples across generations, and that the schools fundamentally represented the subjugation of Indigenous peoples by the majority, settler population—is gratuitous and unsustainable.

[100] Affidavit #1 of Jo-Anne L Chrona made 27 September 2018 at paras 25-26, ex B [Chrona #1]; Williams #1 exs C-T. See also TRC Summary at 146.

[101] See Morton #1 at para 6.

[102] Chrona #1 at paras 19, 27.

> health that many former students of the schools have suffered as adults. Although educational success rates are slowly improving, Aboriginal Canadians still have dramatically lower educational and economic achievements than other Canadians.[103]

92. Indigenous students make up about one third of students in the School District,[104] and about 14-15% of students at the School.[105] Inclusion of Indigenous knowledge and worldviews in the educational program promotes a more inclusive educational experience and improved educational outcomes.[106]

93. The third contextual factor is the TRC Calls to Action, which seek "to redress the legacy of residential schools and advance the process of Canadian reconciliation."[107] A number of calls to action concern "education for reconciliation," including:

> **62.** We call upon the federal, provincial, and territorial governments, in consultation and collaboration with Survivors, Aboriginal peoples, and educators, to:
> i. Make age-appropriate curriculum on residential schools, Treaties, and Aboriginal peoples' historical and contemporary contributions to Canada a mandatory education requirement for Kindergarten to Grade Twelve students.
> …
> **63.** We call upon the Council of Ministers of Education, Canada to maintain an annual commitment to Aboriginal education issues, including:
> i. Developing and implementing Kindergarten to Grade Twelve curriculum and learning resources on Aboriginal peoples in Canadian history, and the history and legacy of residential schools. …
> iii. Building student capacity for intercultural understanding, empathy, and mutual respect. …

94. The TRC Summary, including the Calls to Action, was released in June 2015. It increased public awareness of the legacy of the residential school system at the same time as the redesigned British Columbia school curricula were being rolled out, and only a few months before the first of the Impugned Events took place in September 2015. The decision of the School teachers and principal to organize the Impugned Events must be reviewed in light of this factual backdrop.

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[103] TRC Summary at 145. See also Ansloos #1 at pages 12-14.

[104] Chrona #1 at paras 24-25, ex I.

[105] Affidavit #1 of Greg Smyth made 17 January 2017 at para 4 [Smyth #1]; Affidavit of Stacey Manson made 18 January 2017 at para 3.

[106] Chrona #1 at paras 15-18; Walt #1 at para 6; Ansloos #1 at pages 7, 14-16.

[107] TRC Summary at 319.

iii) UNDRIP may be used to inform the interpretation of freedom of religion

95. Canada has endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* (**"UNDRIP"**).[108] As a resolution adopted by the United Nations General Assembly that has not been implemented in domestic legislation, UNDRIP does not, however, create binding substantive rights or enforceable obligations in Canada.[109]

96. Canadian courts have nevertheless accepted that UNDRIP may be used as an *interpretive* tool when considering domestic law.[110] In particular, where there is an interpretation of domestic law that conforms to non-binding international norms, it will generally be preferred over an interpretation that does not.[111]

97. The AGBC submits that the values enshrined in UNDRIP may be used to interpret the values underlying section 2(a) of the *Charter*.[112] Therefore, in considering the scope of freedom of religion in this case (assuming that freedom of religion is even engaged), it is appropriate to favour an interpretation that is consistent with relevant principles set out in UNDRIP.

98. The following articles of UNDRIP are particularly relevant in this case:

> *Article 8*
>
> 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
>
> 2. States shall provide effective mechanisms for prevention of, and redress for:
>
> > (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; …
> >
> > (d) Any form of forced assimilation or integration; …

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[108] UNGAOR, 61st Sess, 107th Mtg, UN Doc A/RES/61/295 (2007) [UNDRIP].

[109] See *Ross River Dena Council v Canada (Attorney General)*, 2017 YKSC 59 at para 302; *Laliberte v Canada (Attorney General)*, 2019 FC 766 at paras 55-56; *R v Ewanchuk*, [1999] 1 SCR 330 at para 72.

[110] See *Nunatukavut Community Council Inc. v Canada (Attorney General)*, 2015 FC 981 at para 103, cited with approval in *Taku River Tlingit First Nation v Canada (Attorney General)*, 2016 YKSC 7 at para 100; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445, [2013] 4 FCR 545 at paras 353-355. See generally *R v Sharpe*, 2001 SCC 2 at paras 175, 178 (per L'Heureux-Dubé, Gonthier, Bastarache JJ).

The AGBC is not aware of any Canadian judgments that decide whether UNDRIP can be used to inform the interpretation of *Charter* rights, but see *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 46, in which the Court held that the values expressed in international instruments (including declarations) inform the content of "principles of fundamental justice" under section 7 of the *Charter*.

[111] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 69-71.

[112] The AGBC no longer relies on section 25 of the *Charter*, and resiles from its pleading to this effect at Part 5, paragraph 10 of the Response to Petition.

Article 11

1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. …

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains. …

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

99. Thus, in considering the scope of freedom of religion in this case (assuming it is engaged), this Court should favour an interpretation that furthers, rather than constrains, the principles set out in UNDRIP.

b) *Doré* approach to section 1 of the *Charter* applies

100. If this Court finds that the Impugned Events engaged the petitioner's freedom of religion under section 2(a) of the *Charter*, the next question is whether the limitation on the petitioner's freedom is justified under section 1.

101. The proper approach to the section 1 analysis in this case is the one mandated by the Supreme Court of Canada in *Doré*.[113] The question is whether the discretionary decision of the School teachers and principal to organize the Impugned Events reflects a proportionate balance of the *Charter* value of freedom of religion, and any other *Charter* values that were engaged, with the objectives of the *School Act*.

102. If the petitioner has not shown that her freedom of religion was limited in a non-trivial way, then it is not necessary to conduct this analysis. In the words of the Supreme Court of Canada,

[113] *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*].

if "s. 2(a) is not engaged, there is nothing to balance."[114]

103. While the AGBC does not take a position on whether the decision of the teachers and the principal reflects a proportionate balancing in this case, it sets out the relevant legal principles below.

i) Doré approach, not Oakes test, applies

104. The *Doré* approach (which is set out below) applies where a party alleges that an exercise of a decision maker's statutory discretion in relation to a particular set of facts limits *Charter* protections. That is, this approach applies where the *decision* (rather than legislation itself) may have the effect of limiting *Charter* rights.[115]

105. The decision of the Supreme Court of Canada in *Doré* resolved the debate about which approach administrative decision makers should take when considering whether the application of their governing statute might limit *Charter* rights.[116] The Court held that an "administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 [*Charter*] analysis an awkward fit."[117] Therefore, the Court conclusively rejected the view that the *Oakes* test should be applied in determining whether an administrative decision limits a *Charter* right in a manner that is justified under section 1.[118]

106. In this case, the petitioner does not challenge the constitutional validity of a law, regulation, or policy. The traditional *Oakes* analysis therefore does not apply.

107. Instead, the *Doré* approach applies because the decision to hold the Impugned Events reflects an exercise of the statutory discretion provided to teachers and principals. More specifically, teachers and principals have discretion under the *School Act* and *School Regulation* to interpret the provincial curricula prescribed by the Minister, including with respect to incorporating Indigenous knowledge and worldviews into learning activities.

ii) Doré approach requires balancing Charter values against statutory objectives

108. The *Doré* approach is a "highly contextual inquiry"[119] that involves two steps.

109. First, the Court must determine whether—on the particular facts of the case—the decision

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[114] *TWU* at para 63.

[115] See *Doré* at para 36.

[116] The Supreme Court of Canada has affirmed that *Doré* is the correct approach on a number of more recent occasions. See e.g. *Loyola* at para 3; *TWU* at para 59.

[117] *Doré* at para 4.

[118] *Doré* at para 35. See also *Loyola* at para 3: "The result in *Doré* was to eschew a literal s. 1 approach in favour of a *robust* proportionality analysis consistent with administrative law principles."

[119] *TWU* at para 81.

to hold the Impugned Events engages any *Charter* values. *Charter* values include "the *Charter*'s guarantees and the foundational values they reflect."[120] Thus, *Charter* values include explicit rights (e.g. freedom of religion) as well as values that underlie more than one *Charter* right (e.g. respect for human dignity, equality, liberty).[121]

110. Section 1 of the *Charter* supports an understanding of *Charter* values as those which arise from the "free and democratic" nature of our society. As Chief Justice Dickson explained in *R v Oakes*:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[122]

111. Second, if *Charter* values are engaged, the Court must consider whether the decision reflects a proportionate balance between those values and the objectives of the decision maker's governing statute, in light of the nature of the decision and the factual context.[123] The question is whether the decision protects the *Charter* value(s) to the fullest extent possible while still achieving the statutory objectives.[124] The Supreme Court of Canada explained that "[t]his does not mean that the decision-maker must choose the option that limits the *Charter* protection *least*."[125]

112. If only one option available to the decision maker would further the applicable statutory objectives, even if that option would limit *Charter* values, then that is the only reasonable option.[126] As the majority of the Supreme Court of Canada observed in *TWU*, "minor limits on religious freedom are often an unavoidable reality of a decision-maker's pursuit of its statutory mandate in a multicultural and democratic society."[127]

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[120] *Loyola* at para 4.

[121] *TWU* at para 58.

[122] [1986] 1 SCR 103 at 136.

[123] *TWU* at para 58.

[124] *Loyola* at para 4.

[125] *TWU* at para 80.

[126] *TWU* at para 84.

[127] *TWU* at para 100.

113. An administrative decision maker "typically brings expertise to the balancing of a *Charter* protection with the statutory objectives at stake." It follows that his or her decision is entitled to deference on review.[128]

iii) Statutory objectives of the School Act

114. The objectives of the *School Act* are set out in the preamble: i) to ensure that all members of our democratic society receive an education that enables them to become literate, personally fulfilled and publicly useful, thereby increasing the strength and contributions to the health and stability of that society; and ii) to enable all learners to become literate, to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy.

115. The incorporation of Indigenous knowledge and worldviews into the K-9 curriculum furthers these objectives. In particular, it is designed to improve educational outcomes for Indigenous students; to expose all students to British Columbia's pluralistic society; and to contribute to reconciliation between settler Canadians and Indigenous peoples.

iv) Overlapping Charter values

116. As public actors, teachers and principals have an overarching interest in protecting all *Charter* values, including equality, human rights, and respect for Indigenous peoples, in carrying out their duties.[129] To the extent that multiple *Charter* values are engaged in this case, they must all be considered in the balance:

> A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected right of two individuals comes into conflict … *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.[130]

117. Teachers and principals in British Columbia's public education system have a statutory mandate to develop the ability of children to contribute to our democratic, pluralistic society. In this sense, their role is analogous to that of the Law Society of British Columbia (**"LSBC"**), which has a statutory mandate to promote the competence of lawyers, understood broadly. In the recent *TWU* decision, the Supreme Court of Canada held that it was reasonable for LSBC, in deciding whether to approve Trinity Western University's proposed law school, to consider equality values and to choose a decision that eliminated inequitable

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[128] *TWU* at para 79.

[129] See *Loyola* at para 47; *TWU* at para 41.

[130] *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835 at 877. See also *TWU* at para 59; *R v N.S.*, 2012 SCC 72 at para 32 (although this case was not decided within the *Doré* framework).

barriers to legal education.[131]

118. Similarly, teachers and principals are entitled to interpret the K-9 curriculum in British Columbia in a way that eliminates inequitable barriers to education for Indigenous students. This is particularly so in light of the contextual factors identified above,[132] including the legacy of residential schools in Canada and the TRC Calls to Action.

B. No Relief Sought under Section 76 of the *School Act*

119. In her written argument, the petitioner asserts that the Impugned Events constitute a "*prima facie* breach of section 76 of the *School Act*."[133] This argument is not pleaded in the petition. Nor does the petition seek any relief with respect to this newly alleged breach. It is therefore not properly before the Court.

120. In any event, the principles enshrined in section 76 are essentially coterminous with the duty of neutrality under section 2(a) of the *Charter*. In particular, the Supreme Court of Canada has held that secularism under section 76 of the *School Act* does not mean that religion must be shut out of the classroom; rather, it precludes "any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community."[134]

121. With reference to the discussion of section 2(a), above, it is plain that the meaning of "secular" in section 76 mirrors the "duty of neutrality" under the *Charter*. A distinct analysis of section 76 of the *School Act* is therefore not required. The correct analysis is the *Charter* values approach outlined above.

122. Should this Court nevertheless decide to consider the impact of section 76,[135] the AGBC takes no position on whether the Impugned Events constitute "religion" such that section 76 of the *School Act* is even engaged.

123. If this Court finds that section 76 is engaged, and proceeds to conduct a distinct analysis, section 76 must be read in the context of the act as a whole.[136] More specifically, section 76

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[131] See *TWU* at paras 42, 46.

[132] *TWU* at para 58.

[133] Written Argument of the Petitioner at para 2.

[134] *Chamberlain* at para 19 (emphasis added).

[135] The AGBC reiterates that it takes no position on whether the Impugned Events constitute "religion" such that section 76 of the *School Act* is even engaged.

[136] It should be noted that the personal understandings of section 76 of the *School Act* expressed by witnesses in this proceeding, including Ms Walt and Mr Cadwallader, during cross-examination, have no bearing on this Court's interpretation of that provision, which is a question of law.

must not be interpreted in isolation from the governing principles set out in the preamble.[137] In this sense, the analysis again mirrors the *Doré* approach, which is concerned with balancing *Charter* values with the statutory objectives. The preamble and section 76 provide:

> **Preamble**
>
> WHEREAS it is the goal of a democratic society to ensure that all its members receive an education that enables them to become literate, personally fulfilled and publicly useful, thereby increasing the strength and contributions to the health and stability of that society;
>
> AND WHEREAS the purpose of the British Columbia school system is to enable all learners to become literate, to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy;
>
> THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:
>
> …
>
> **Conduct**
>
> **76** (1)All schools and Provincial schools must be conducted on strictly secular and non-sectarian principles.
>
> (2)The highest morality must be inculcated, but no religious dogma or creed is to be taught in a school or Provincial school. …

124. This is consistent with the modern approach to statutory interpretation: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[138] It also reflects the approach set out in sections 8 and 9 of the *Interpretation Act*,[139] which provide:

> **8.** Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.
>
> **9.** The title and preamble of an enactment are part of it and are intended to assist in explaining its meaning and object.

125. It is also the approach the Supreme Court of Canada adopted in *Chamberlain*, which also

[137] On the role of a preamble in interpreting statutory provisions, see e.g. *Alberta Union of Provincial Employees v Lethbridge Community College*, 2004 SCC 28 at paras 26, 32, 35, 47.

[138] *Ibid* at para 25 (emphasis added).

[139] RSBC 1996, c 238.

concerned section 76 of the *School Act*. At issue was the reasonableness of the school board's decision to deny authorization for a teacher to use three books, which depicted same-sex couples as parents, as supplementary materials. Chief Justice McLachlin, writing for the majority, held:

> The *School Act*'s emphasis on secularism reflects the fact that Canada is a diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity. These values are reflected in our Constitution's commitment to equality and minority rights, and are explicitly incorporated into the British Columbia public school system by the preamble to the *School Act* and by the curriculum established by regulation under the Act.
>
> …
>
> The message of the preamble is clear. The British Columbia public school system is open to all children of all cultures and family backgrounds. All are to be valued and respected.[140]

126. The decision of the Supreme Court in *Chamberlain* confirms that exposure to a variety of practices within the public education system *promotes* secularism, rather than detracts from it.[141] It is only when certain values are presented to the *exclusion* of others that secularism is undermined. The following findings of Chief Justice McLachlin are apposite:

> [W]here the school curriculum requires that a board array of family models be taught in the classroom, a secular school system cannot exclude certain lawful family models simply on the ground that one group of parents finds them morally questionable.[142]
>
> …
>
> Parental views, however important, cannot override the imperative placed upon the British Columbia public schools to mirror the diversity of the community and teach tolerance and understanding of difference.[143]

127. Similarly, the fact that the petitioner in this case may disagree with Indigenous practices or worldviews does not mean that they should be excluded from the classroom. So long as the

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[140] *Chamberlain* at paras 21, 23.

[141] See *Loyola* at para 45: "Because it allows communities with different values and practices to peacefully co-exist, a secular state also supports pluralism." See also *Loyola* at para 48: "The state, therefore has a legitimate interest in ensuring that students in *all* schools are capable, as adults, of conducting themselves with openness and respect as they confront cultural and religious differences. A pluralist, multicultural democracy depends on the capacity of its citizens 'to engage in thoughtful and inclusive forms of deliberation amidst, and enriched by,' different religious worldviews and practices" (citation omitted).

[142] *Chamberlain* at para 20.

[143] *Ibid* at para 33.

presentation of Indigenous values is not done with the intention of excluding other values, it is consistent with secularism and with the objective of the *School Act* "to contribute to a healthy, democratic and pluralistic society." As Chief Justice McLachlin observed in *Chamberlain*, "[e]xposure to some cognitive dissonance is arguably necessary if children are to be taught what tolerance itself involves."[144]

C. Remedies

a) Prohibition order not available

128. The AGBC opposes the prohibition order sought by the petitioner at paragraph 2 of Part 1 of the amended petition. If this Court finds that the Impugned Events were not consistent with section 2(a) of the *Charter*, the appropriate remedy is the declaration sought by the petitioner. This is consistent with the well-established preference for declaratory, rather than injunctive relief under section 24(1) of the *Charter*.[145]

i) No remedy available for speculative future harm

129. Section 24(1) of the *Charter* only authorizes remedies for *actual* infringements of *Charter* rights. It does not empower courts to grant remedies for hypothetical future infringements, such as the ones implicitly envisaged by the petitioner's proposed order.[146]

130. In *Operation Dismantle*, Justice Dickson (as he then was), writing for the majority, observed:

> The principles governing remedial action by the courts on the basis of allegations of future harm are illustrative of the more general principle that there is no legal duty to refrain from actions which do not prejudice the legal rights of others. A person, whether the government or a private individual, cannot be held liable under the law for an action unless that action causes the deprivation, or threat of deprivation, of legal rights. And an action cannot be said to cause such deprivation where it is not provable that the deprivation will occur as a result of the challenged action.
>
> …
>
> It is clearly illustrated by the rules governing declaratory and injunctive relief that the courts will not take remedial action where the occurrence of future harm is not probable. This unwillingness to act in the absence of probable future harm demonstrates the courts' reluctance to grant relief where it cannot be shown that the impugned action will cause a violation of rights.[147]

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[144] *Ibid* at para 66.

[145] See e.g. *Mahe v Alberta*, [1990] 1 SCR 342 at 392-393.

[146] See Peter W Hogg, *Constitutional Law of Canada* (5th ed Supplemented) (Toronto: Thomson Reuters Canada, 2016) at 40.2(e).

[147] *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 456-458 (emphasis added) [*Operation Dismantle*].

131. In this case, the petitioner has neither asserted that any future harm will result from the challenged action (namely, the Impugned Events), nor adduced any evidence that could prove that any such harm is highly probable. A prohibitive injunction is therefore not available.

ii) Prohibition order is not "appropriate and just" under section 24(1) of the Charter

132. The prohibition order is, in any event, not an "appropriate and just" remedy under section 24(1) of the *Charter*: it is not tailored to the actual *Charter* breach the petitioner alleges, and is so vague as to be unenforceable.

133. In *Doucet-Boudreau*,[148] the Supreme Court of Canada established four criteria for determining whether a proposed remedy is "appropriate and just" under section 24(1) of the *Charter*. In particular, an appropriate and just remedy:

    a. "is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied."[149]

    b. "must employ means that are legitimate within the framework of our constitutional democracy. … a court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary. … The essential point is that courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes."[150]

    c. "is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited."[151]

    d. "is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made."[152]

134. In this case, the prohibition order sought by the petitioner is not appropriate and just because it does not satisfy the *Doucet-Boudreau* criteria.

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[148] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 [*Doucet-Boudreau*].

[149] *Ibid* at para 55 (emphasis added).

[150] *Ibid* at para 56.

[151] *Ibid* at para 57.

[152] *Ibid* at para 58.

135. With reference to the first criterion, the proposed prohibition order is not tailored to the "experience of the claimant." The order would bind not only the teachers and principal of the School, but all schools in the School District. Moreover, the proposed order would ban the School District from both "facilitating or allowing religious practices" during mandatory school times: not only is the phrase "religious practices" so vague as to provide no guidance to the School District, but it is not clear how such an order would be enforced in circumstances where the School District merely "allowed" such practices to occur.

136. With respect to the second and third criteria, the proposed order would unduly limit the statutory discretion of teachers and principals who are charged with interpreting and implementing the provincial curriculum under the *School Act*. In this sense, it would reflect an inappropriate interference with the institutional role of the executive branch of government.

137. On the fourth criterion, there is a palpable risk that the proposed order would be in conflict with aspects of the provincial curricula requiring the incorporation of Indigenous knowledge and worldviews, and exposure to diverse religious beliefs and practices. Because the petitioner has not challenged the constitutionality of the curricula more broadly, the potential risks have not been explored in this proceeding. It would therefore be inappropriate and unfair for this Court to make an order that could implicitly undermine aspects of the provincial curricula in the absence of a direct challenge to the constitutional validity of those instruments.

138. For these reasons, the prohibition order sought by the petitioner is not an available remedy under section 24(1) of the *Charter* or otherwise.

b) Order of costs against AGBC is not appropriate

139. In *Carter*, the Supreme Court of Canada stressed "that it will be unusual for a court to award costs against Attorneys General appearing before the court as of right."[153] A cost award against the AGBC is not appropriate in this proceeding. The AGBC does not seek its own costs.

140. The AGBC participates in this proceeding as of right, pursuant to a notice of constitutional question. The role of the AGBC is largely limited to adducing contextual evidence concerning the provincial public school curricula and the educational outcomes of Indigenous students in BC, and to setting out the applicable legal framework for this Court's analysis of the constitutional issue. The AGBC takes no position on the facts surrounding the Impugned Events or the first order sought by the petitioner. Counsel for the AGBC did not cross-examine any witnesses.

141. The AGBC only takes a position on the second order sought by the petitioner, on grounds

[153] *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 146 [*Carter*].

that that relief is not available under section 24(1) of the *Charter*.

142. There is therefore no basis for an award of costs against the AGBC in this proceeding. In the alternative, if this Court decides to award costs, the award should be proportionate to the limited role of the AGBC in this proceeding.

All of which is respectfully submitted in Victoria, British Columbia, this 25th day of October, 2019.

Katherine Webber and Kaitlyn Chewka
Counsel for the respondent,
The Attorney General of British Columbia