

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

B E T W E E N:

CAROLYN BURJOSKI

Applicant

and

WATERLOO REGION DISTRICT SCHOOL BOARD

Respondent

APPLICATION UNDER Rules 14.05(2), 37, and 68 of the *Rules of Civil Procedure*, RRO 1990, Reg194 and Sections 2(1) and 6(1) of the *Judicial Review Procedure Act*, RSO 1990, c J.1.

FACTUM OF THE APPLICANT

Dated October 28, 2022

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PART I: APPLICANT AND DECISION

1. The Applicant, Carolyn Burjoski, is a resident of Waterloo Region, who was an elementary school teacher with the Waterloo Region District School Board (“**WRDSB**”) until her retirement on January 31, 2022.
2. The WRDSB is a public school board exercising statutory authority under the *Education Act*, RSO 1990, c E.2 (the “**Education Act**”).
3. This is an Application for Judicial Review of a decision (the “**Decision**”) made on January 17, 2022, by the Waterloo Region District School Board (the “**WRDSB**” or “**Board**”) to end a public presentation (the “**Presentation**”) of the Applicant, Carolyn Burjoski, at the Committee of Whole Meeting of the Board (the “**Meeting**”), which was held by videoconference, and expel her from the Meeting.
4. The oral reasons for the Decision given at the meeting was that the content of Ms. Burjoski’s presentation breached the WRDSB’s policies relating to delegations (the “**Policy**”) because her speech breached the *Ontario Human Rights Code* (the “**Code**”).
5. The Boards reasons did not specify what conduct or statement(s) made by Ms. Burjoski allegedly violated the Policy and the *Code*. Ms. Burjoski was not provided the opportunity to address the alleged, but unspecified, breach(es) of the Policy and *Code*. Further, the Board did not consider Ms. Burjoski’s right to freedom of expression guaranteed under Section 2(b) of the *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (the “**Charter**”).

PART II: SUMMARY OF FACTS

6. The WRDSB is governed by the *Education Act* RSO 1990, c E.2 (the “**Act**”). Section 207 of the Act requires that Committee of the Whole meetings be “open to the public”.¹

7. WRDSB Bylaw 13.11 requires the Board to provide “an opportunity for the public to present a delegation to the Board regarding issues of concern/interest...” at all Committee of the Whole meetings.² The Bylaw’s section on “Delegation Procedures” permit presentations of up to ten (10) minutes.³

8. Ms. Burjoski registered as a delegate to the Meeting to speak to an agenda item identified as “Library Review”. Ms. Burjoski’s delegation request form indicated, in part, that she wished to speak “...on issues of transparency regarding the library and classroom teacher’s collections culling project...”⁴. Ms. Burjoski referred to a decision by the WRDSB to review library and classroom materials to remove materials deemed “harmful”. She also proposed to offer a number of recommendations relating to improving transparency on the part of the WRDSB.

9. On opening the Meeting, Chairperson Piatkowski made the following statement:

“In accordance with the Board's by-laws, delegations have up to 10 minutes to address the Board. Any exceptions to this rule require a majority vote. All remarks are to be confined to the issue that you are addressing. And any discourteous language referenced

¹ *Education Act*, RSO 1990, c E.2, Section 207

² Record of Proceedings, WDSB Bylaws, 13.11 - **Tab 7**

³ Record of Proceeding, WDSB Bylaws, 14.5 - **Tab 7**

⁴ Record of Proceeding, Delegation Request - **Tab 1**

to personalities or statements contravening the Ontario Human Rights Code or the Charter of Rights and Freedom will not be tolerated.”⁵

10. Though the Board does have By-law provisions relating to delegation procedures,⁶ Chairperson Piatkowski’s reference to the *Code* and the *Charter* do not appear there.

11. When the time came for her Presentation, Ms. Burjoski began by outlining her concerns over the Board's ongoing "cull" of books from classrooms, libraries, and teachers' personal classroom collections that are deemed “harmful”, which she viewed as being based on uncertain and unclear criteria.

12. Ms. Burjoski referenced WRDSB’s inclusion of certain school materials relating to issues of sex and gender in connection with Transgender Awareness Week. She argued that the contents of certain books that the WRDSB had introduced into classrooms and libraries might *also* be considered harmful under the WRDSB’s criteria for culling school materials.

13. Less than three minutes into her Presentation, Ms. Burjoski displayed a passage from a book found in WRDSB libraries, entitled “The Other Boy” by M.G. Hennesey, and made the following statement:

“In fact, some of the books filling our libraries make it seem simple or even cool to take puberty blockers and opposite sex hormones. The Other Boy, by MG Hennesey...”⁷

⁵ Record of Proceedings, Transcript of excerpt of Video of Committee of the Whole Meeting dated January 17, 2022 (10:00 – 11:30 of video)- **Tab 5**

⁶ Record of Proceedings, WRDSB Bylaws, 14 - **Tab 7**

⁷ Record of Proceedings, Transcript of excerpt of Video of Committee of the Whole Meeting dated January 17, 2022 (20:48 – 38:32 of video), at page 3 - **Tab 6**

14. Chairperson Piatkowski immediately interrupted Ms. Burjoski, and made the following statement:

“Ms. Burjoski? I’m getting a little concerned that your content may be problematic. I’m not sure exactly where you’re headed but I would caution you to make sure you are not saying anything that would violate the *Human Rights Code*”⁸

15. Chairperson Piatkowski did not explain what he meant by the term “problematic”, nor did he explain how it could be that Ms. Burjoski could violate any provisions of the *Human Rights Code*, RSO 1990, c H.19 [the “**Code**”] through her Presentation.

16. After Chairperson Piatkowski’s warning, Ms. Burjoski attempted to complete her Presentation. Chairperson Piatkowski once again interrupted her, immediately after she made the following statement as she read from WRDSB school material:

“...the other book by MG Hennessey chronicles the medical transition of Shane, who was born female and now identifies as a boy. Shane takes puberty blockers and is now excited to start testosterone. The doctor states that this hormone mixture will leave Shane infertile in the future. Shane's response is: "It's cool" - a very typical adolescent response. This book is misleading because it does not take into account how Shane might feel later in life about being infertile. This book makes very serious medical interventions seem like an easy cure for emotional and social distress ...”⁹

⁸ Transcript of excerpt of Video of Committee of the Whole Meeting dated January 17, 2022 (20:48 – 38:32 of video), at page 3

- **Tab 6**

⁹ *Ibid*, at page 5

17. At that point in the Presentation, Chairperson Piatkowski advised Ms. Burjoski that he was “concerned that [her] comments are in violation” of the Code’s prohibition against discrimination on the grounds of gender expression and gender identity and therefore he was “ending the presentation”.¹⁰ The Board did not allow Ms. Burjoski to continue her Presentation from that point due to the anticipated content of her speech, nor was she provided with an opportunity to discuss or address the Board’s unclear concerns.

18. The initial decision of Chairperson Piatkowski was appealed by another member of the Board, after which Chairperson Piatkowski stated he would “explain [his] ruling”. His explanation is as follows:

“Thank you very much. We read the delegation procedure for a reason, and, I don’t think in my three years on the Board we have ever had to stop a delegate from speaking, so I, I take, the issue very seriously. But, I was concerned that the, I cautioned the delegate, because it appeared that they were headed in a direction that, that was problematic. I deemed that their presentation did stray into that territory, and it was absolutely appropriate to stop their presentation when I did, and I’m hoping that you will uphold that ruling.”

19. Chairperson Piatkowski’s decision to end the Presentation was appealed by a member of the Board. That decision was then upheld by the Board, without debate of its merits, in a 5-4 vote.

¹⁰ Transcript of excerpt of Video of Committee of the Whole Meeting dated January 17, 2022 (20:48 – 38:32 of video), at page 6

20. The Board did not discuss or identify what it was that allegedly violated or could have violated its policies, or on what authority they were entitled to end the Presentation. It did not engage in a discussion on Chairperson Piatkowski's unexplained assertion that the Ms. Burjoski violated or could have violated the *Code*. In fact, it did not refer to either the WRSB policy nor the *Code*.

21. The Board did not consider Ms. Burjoski's right to freedom of expression.

22. Though potential alternative proposals were raised by a member of the Board, the potential alternative proposals were not moved, debated, nor brought to a vote.

23. Immediately after the vote, Chairperson Piatkowski removed Ms. Burjoski from the video conference meeting without explanation.

24. Further, in the days and weeks following the meeting, Mr. Piatkowski made numerous unfounded assertions about Ms. Burjoski and her brief and prematurely terminated Presentation, including:

- a. that Ms. Burjoski's comments were "transphobic";¹¹
- b. that Ms. Burjoski had "[questioned] the right to exist of trans people";¹²
- c. that after Ms. Burjoski was "cautioned" that she had "doubled down";¹³

¹¹ Supplementary Application Record, Affidavit of Carolyn Burjoski dated October 25, 2022, para. 3.

¹² *Ibid*

¹³ *Ibid* at para. 4.

- d. that Ms. Burjoski was not being “respectful or courteous to transgender people...”;¹⁴
- e. that Ms. Burjoski’s statements “would cause [transgender people] to be attacked...”;¹⁵ and
- f. that Ms. Burjoski caused “harm”, and “had she been allowed to continue, the harm may well have become more apparent to all”.¹⁶

describing Ms. Burjoski’s comments as “hate” and “derogatory speech”¹⁷

25. Shortly after the Meeting, WRDSB Trustee Jayne Herring, who voted in favour of the Decision, referred to Ms. Burjoski’s Presentation as “derogatory speech” and implied that it could have caused “harm”.¹⁸

26. On January 20, 2022, the Board published a statement expressing “deep regret for any harm caused to the transgender community” due to Ms. Burjoski’s presentation.¹⁹

PART III: ISSUES, LAW AND ARGUMENT

I. ISSUES

- A. The Board’s failure to consider Ms. Burjoski’s Charter right to free expression render the Decision unreasonable

¹⁴ *Ibid* at para. 5.

¹⁵ *Ibid*

¹⁶ *Ibid* at para. 11.

¹⁷ *Ibid* at para. 8.

¹⁸ *Ibid* at para. 8.

¹⁹ *Ibid* at para. 10.

- B. The Board's finding that Ms. Burjoski engaged in improper conduct, contrary to its policies, was unreasonable
- C. The Board's finding that Ms. Burjoski breached (or was about to breach) the Human Rights Code unreasonable and *ultra vires* its authority
- D. There is a reasonable apprehension that the Decision was influenced by bias
- E. Alternatively, the Decision breach Ms. Burjoski's Section 2(b) *Charter* right to freedom of expression

II. LAW AND ARGUMENT

A. The Board's decision failed to consider Ms. Burjoski's Charter right of free expression, and is therefore unreasonable

27. Reasonableness is the standard that is presumed to apply whenever a court reviews the merits of administrative decisions²⁰. It is the standard a Court applies when reviewing the substance of decisions.

28. Normally, it falls on an applicant for judicial review to show that an administrative decision is unreasonable. However, if *Charter*-protected rights, such as the right to freedom of expression, are limited by the Decision, it falls on the Respondent to show that her Decision is substantively reasonable:

"The onus is first on the Applicant to establish that its constitutionally enshrined freedom has been limited. The onus then shifts to the Respondent to establish that the limit was imposed in pursuit of its statutory objectives and that the Applicant's [*Charter*

²⁰ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, ["*Vavilov*"] at para. 23

freedom] was not limited more than reasonably necessary given those statutory objectives.”²¹

29. The freedom of expression which is guaranteed under Section 2(b) of the *Charter* encompasses any activity that attempts to convey meaning.²² This protection ensures that “everyone can manifest their thoughts, opinions, beliefs... however unpopular, distasteful or contrary to the mainstream.” It applies to information and ideas that may “shock or disturb the State or any sector of the population”.²³

30. There can be no doubt that Ms. Burjoski’s Presentation, and the message, ideas and perspective she conveyed, is protected under Section 2(b) of the *Charter*. In fact, one of the purposes underlying the guarantee of free expression is to promote participation in “social and political decision making.”²⁴ The encouragement of social and political decision-making recognizes the value of public discussion and debate on social and political matters.²⁵ Engage in public debate on social and political matters is precisely what Ms. Burjoski aimed to do.

31. Further, the Supreme Court of Canada has found that when “the government’s purpose is to restrict the content of expression”, such as was the case when the Board decided to silence and then eject Ms. Bujoski from the Meeting, “it necessarily limits the guarantee of free expression.”²⁶ In other words, where a restriction restricts content of expression, there is, as a matter of course, an infringement of Section 2(b) of the *Charter*.

²¹ *Canadian Centre for Bio-Ethical Reform v City of Peterborough (City)*, 2016 ONSC 1972, at para 15.

²² *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CarswellQue 115, [SCC] [“*Irwin Toy*”] para 42

²³ *Irwin Toy*, *supra*, at para. 42.

²⁴ *Committee for the Commonwealth of Canada v. Canada*, 1991 CarswellNat 1094, [SCC] [“*Committee for the Commonwealth*”] at para. 243

²⁵ *Ibid*, at para. 249.

²⁶ *Irwin Toy*, *supra*, para 50.

32. It is submitted that the preliminary question of whether the administrative decision engages the *Charter* by limiting *Charter* protections²⁷ is met. The Applicant has met her onus.

33. The question then becomes "whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of *the Charter* protections at play."²⁸

34. The Court must consider whether the Decision proportionately balances the *Charter* protections it impairs with the applicable statutory objectives. A "[f]ailure to balance said interests will, by definition, render a decision unreasonable as per *Doré v. Barreau du Québec*."²⁹

35. A failure to give effect as fully as possible to the *Charter* protections at stake³⁰ constitutes a failure to engage in the required proportionate balancing, thereby demonstrating that the limitation of those *Charter* protections is not "demonstrably justified in a free and democratic society."³¹

36. When an administrative decision maker engages in the proper balancing exercises when their decision limit *Charter* rights, the standard of reasonableness applies. However, the "refusal or failure to consider an applicable *Charter* right should... attract a correctness standard of review."³²

37. In other words, the Board's failure to consider Ms. Burjoski's *Charter* rights, alone renders the Decision unreasonable. Not only was the board required to consider Ms. Burjoski's

²⁷ *Loyola High School v. Québec (Attorney General)*, 2015 SCC 12 ["*Loyola*"], at para. 39.

²⁸ *Doré c. Québec (Tribunal de professions)*, 2021 SCC 12, ["*Doré*"] at para. 57.

²⁹ *CHP v. City of Hamilton*, 2018 ONSC 3690 ["*CHP v Hamilton*"], at para. 57.

³⁰ *Doré, supra*, at paras 57-58.

³¹ *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, Section 1.

³² *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025, ["*CBC v. Ferrier*"] at para 34.

Charter right to freedom of expression, but they were required to engage in a *robust* balancing exercise.³³ Nothing of the sort occurred in rendering the Decision.

38. When a government decision-maker acts to limit *Charter*-protected rights and freedoms, it bears the burden of showing that the decision strikes a proportionate balance between statutory goals and *Charter* protections, and thus constitutes a reasonable limit on those rights and freedoms.

39. Though the Applicant's factum herein expounds on the applicable law, it is not to suggest that any reasons, or balancing, by the Board could have justified the censorship of Ms. Burjoski based on the facts of this case. It is submitted that the Board's assertion that Ms. Burjoski breached the *Code* is baseless and nothing more than a brazen attempt to justify censorship of expression that Chairperson Piatkowski and other trustees disagree with.

40. Nonetheless, the nature of the Decision, which muzzled Ms. Burjoski and removed her from the Meeting based on the substance of what she said (or was feared that she *might* say), required a robust explanation as a prerequisite for it to be fair.³⁴ A decision cannot be reasonable if the Board did not engage in the balancing exercise required in *Doré /Loyola*.³⁵

41. This conclusion follows regardless of whether the WRDSB now intends to come up with other or better reasons for limiting *Charter* rights and freedoms. The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov* makes clear that judicial

³³ *Guelph and Area Right to Life v. City of Guelph*, 2022 ONSC 43 [“*GARL v. Guelph*”], at para. 87.

³⁴ *CHP v Hamilton*, *supra*, at para 60.

³⁵ *GARL v Guelph*, *supra*, paras 78-79.

review of a decision by a statutory decision-maker is concerned with the decision that was actually made,³⁶ not with reasons that might be constructed or adduced after the fact.

42. In determining whether the Board met its burden, the Court must consider whether the Decision proportionately balances the *Charter* protections it impairs with the applicable statutory objectives: “[f]ailure to balance said interests will, by definition, render a decision unreasonable as per *Doré v. Barreau du Québec*.”³⁷

43. the Decision’s failure to consider the *Charter* protections it limited attracts a correctness standard of review.³⁸

44. The Decision’s reasons therefore “contain a fundamental gap”.³⁹ It would not be appropriate for the Court to “fashion its own reasons in order to buttress” the Decision, even if the Decision “could be reasonable under different circumstances.”⁴⁰ This Court is not required or permitted “to guess what findings might have been made or to speculate as to what the tribunal might have been thinking.”⁴¹

45. Rather, the Court “must be able to trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that there is a line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived”.⁴²

³⁶ *Vavilov, supra*, at para 15..

³⁷ *CHP v Hamilton, supra*, at para. 58.

³⁸ *CBC v. Ferrier, supra*, at para. 34.

³⁹ *Vavilov, supra* at para 96.

⁴⁰ *Ibid.*

⁴¹ *Ibid*, at para. 97.

⁴² *Vavilov, supra*, at para. 102

46. The Decision is therefore an unreasonable limitation of the *Charter* freedoms of expression.

B. The Board's finding that Ms. Burjoski engaged in improper conduct was unreasonable and ultra vires its authority under the *Education Act*

47. The governing statutory scheme constrains administrative decision makers and limits their authority. Though administrative decision makers must interpret their own statutes, they do not have license to "enlarge their powers beyond what the legislature intended"⁴³ Where a specific power is given in a statute, other than as an instance of a more general power, it cannot be applied arbitrarily with a broader and more general effect.⁴⁴

48. The Applicant submits that the Board does not have authority to end a presentation, or censor a presenter, that it deems or perceives to be a violation of the *Code*. The only option available to the Board, pursuant to the Act, and WRDSB By-Law, in dealing with improper conduct by a member of the public, is their removal from a meeting.

49. The Act provides that in open meetings "no person shall be excluded...except for improper conduct."⁴⁵ The intent of the legislation is to empower the Board to deal with unruly and disruptive behaviour by members of the public, and the tool they granted to the board was the blunt tool of exclusion from a meeting. The Act does not provide the Board authority to censor or curtail speech on the basis that such speech is misconduct. On that basis alone, the Decision to end the presentation is a nullity.

⁴³ *Ibid*, at para. 68

⁴⁴ *Gammie v South Bruce Peninsula*, 2014 ONSC 6209 [*"Gammie v. SBP"*], at para. 67.

⁴⁵ Section 207

50. Improper conduct is not defined in the Act, but the language is not so ambiguous as to permit the removal of a member of the public for ideas or positions they express.

51. Improper conduct must be something that interferes with the Board's ability to conduct a proper meeting and carry out its functions. In fact, a similar provision to Section 207(3) of the Act is found in Section 241(2) of the *Municipal Act*, SO 2001, c 25 which provides that "the head of council...may expel any person for improper conduct from a meeting". A similar provision was considered by the Saskatchewan Court of Queen's Bench, which found that expulsion powers for "improper conduct" in the context of a meeting is meant to "maintain orderly decorum" at a meeting.⁴⁶ In essence, improper conduct refers to conduct that obstructs the deliberation and proper functioning of the meeting.

52. It is submitted that a school board council meeting is a close analogue to municipal council meeting. Similarly to a municipal council meeting, "council is... that very place where one would expect to debate and hear debate openly and publicly."⁴⁷ It is one of the most basic local institutions of democratic government.

53. The power to expel individuals for misconduct cannot reasonably support the proposition that it permits the Board to expel individuals based on the content or perspective they express. This is particularly so in light of the basic democratic function intended for board meetings. The Board has the right to "regulate its debate in an orderly fashion in an appropriately solemn forum" but this "does not exclude debate and it does not exclude dissent."⁴⁸

⁴⁶ *Bruno (Town) v Scheiser*, 2004 SKQB 207, at para 25.

⁴⁷ *R v. Hammer*, 1982 CarswellOnt 2226, [Ont. P.C.] at para 20.

⁴⁸ *Ibid*, at para. 19.

54. The WRDSB By-Law 14.9 states that “Delegates are expected to refrain from the use of abusive or derogatory language at all times and the Chair may expel or exclude from any meeting any person(s) who engage in this or any other form of improper conduct.”

55. It is submitted that “abuse or derogatory language” in the By-law constitutes only that which would obstruct the proper functioning of a meeting, or otherwise the By-Law would be *ultra vires* the Act. Ms. Burjoski remained respectful in both her language, tone and demeanour at all times. Nothing she said can be reasonably interpreted as a violation of By-Law 14.9.

56. Notably, By-Law 14.9 also states that “Applause, booing or other audible or visual demonstrations of support or opposition are discouraged because they may be intimidating for those with opposing views. Courtesy and respect for others must be displayed at all times.” This part appears consistent with the interpretation of “improper conduct” as conduct that disrupts the democratic process.

57. Further, By-Laws 4.3.3(a) and (c) provide that Trustees must approach “all Board issues with an open mind” and must “[Respect] different points of view”, respectively. Again, this is consistent with an understanding of “improper conduct” that does not inhibit robust disagreement and debate.

58. A statutory scheme requiring local governments to hold meeting in the open intend to imbue such government with democratic legitimacy. This legitimacy does not simply spring from period elections, but depends upon transparency and public access to the decision making process.⁴⁹

⁴⁹ Fortin v Sudbury (City), 2020 ONSC 5300, at para 63.

59. An interpretation of the Board's powers to expel someone from a public meeting which would allow expulsion of a delegate for criticizing library and classroom materials or their content is unreasonable as it is antithetical to the statutory scheme, which intends to promote an open and democratic process.

C. The Board's finding that Ms. Burjoski breached the *Code* was unreasonable and *ultra vires* its authority

60. Relevant elements in evaluating whether a given decision is reasonable include the governing statutory scheme; other relevant statutory or common law rules; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; and the potential impact of the decision on the individual to whom it applies.⁵⁰

61. A court conducting a reasonableness review:

"... must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. [...] a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for

⁵⁰ *Vavilov, supra*, at para. 106

it, and not on the conclusion the court itself would have reached in the administrative decision maker's place."⁵¹

[emphasis added]

62. Where reasons are provided, they are means by which the decision maker communicates the rationale for its decision, and reasonableness review must focus on those reasons.⁵²

63. A reasonable decision must be "internally coherent" with "rational chain of analysis". It must be "justified in relation to the facts and law that constrain the decision maker..."⁵³ A reasonable outcome is not sufficient, the decision must be justified by way of the reasons.⁵⁴

64. The exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it.⁵⁵ Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.⁵⁶

65. Further, a decision that fails to consider an essential element of its conclusion is unreasonable, for that reason alone.: Vavilov, para 98.

"Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will

⁵¹ *Vavilov, supra*, at para. 15

⁵² *Vavilov, supra*, at para. 84

⁵³ *Vavilov, supra*, at para. 85-86

⁵⁴ *Vavilov, supra*, at para. 85-86

⁵⁵ *Vavilov, supra*, at para. 95

⁵⁶ *Vavilov, supra*, at para. 98

generally fail to meet the requisite standard of justification, transparency and intelligibility”.⁵⁷

66. The Board failed to indicate how it could have been that Ms. Burjoski breached the *Code*. It is completely obscure, as a matter of law, what the *Code* has to say about what someone might say at a public meeting. The mystifying conclusion is untenable in light of the relevant facts.⁵⁸ This flaw alone renders the decision unreasonable.

D. There is a reasonable apprehension that the Board’s decision was influenced by personal bias and partiality with respect to the issues being discussed

67. There is no doubt that the Board owed Ms. Burjoski a duty of procedural fairness. An administrative decision which “affects ‘the rights, privileges or interests’” of individuals “is sufficient to trigger the duty of fairness.”⁵⁹

68. Review of procedural fairness aspects of a decision-making process requires a different approach than a review of the merits of a decision. As this Court put it in *Moore v. The Estate of Lou Ferro*:

“On the issue of denial of procedural fairness, there is no standard of review.

Rather, the court must decide if the requisite level of procedural fairness has been

met considering the factors in Baker v. Canada”⁶⁰

⁵⁷ *Vavilov, supra*, at para 98

⁵⁸ *Vavilov, supra*, at para. 101

⁵⁹ *Baker v. Canada* (Minister of Citizenship & Immigration), 1999 SCC 699, [“**Baker**”] at paras 22-27
⁶⁰ *Moore v. The Estate of Lou Ferro et al*, 2022 ONSC 1343, at para. 64.

69. Depending on the context and circumstances, a duty of procedural fairness might - to varying degrees - require that a decision-maker: (1) notify affected people;⁶¹ (2) provide sufficient disclosure to allow them to understand the process and the case they have to meet;⁶² (3) hear (or read) and consider their views and evidence;⁶³ (4) make the decision without undue delay;⁶⁴ (5) provide written reasons for her decision;⁶⁵ and/or (6) be impartial, avoid pre-judging the case and give open-minded consideration to evidence and argument presented⁶⁶, and free from a reasonable apprehension of bias.⁶⁷ This is a non-exhaustive list.

70. The test for reasonable apprehension was set forth in *Baker* as follows:

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly." - baker para 46

61 *Baker, supra*, at para. 30.

62 See *Khan v. Ottawa (University of)*, 1997 CanLII 941 (ON CA), ["*Khan*"]

63 *Baker, supra*, at para. 22.

64 *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, at paras. 101-02.

65 *Baker, supra*, at para. 43.

66 *Knapp v. ICR Commercial Real Estate*, 2019 SKQB 59, at paras 102-104.

67 *Baker, supra*, at para. 45.

71. The Applicant need not demonstrate actual prejudice in order for the Decisions to be quashed for breach of procedural fairness, including a finding of bias. The Court need only be satisfied that prejudice might have reasonably resulted from the breach.⁶⁸

72. The Applicant submits that the Board was required to provide some explanation beyond the mere assertion that she made comments that were “problematic”.

73. The Board's decision raises the prospect that the mere fact that Ms. Burjoski voiced opposition to the school materials obviated any need to engage in deliberation or analysis. If there was anything more to the Decision than mere censorship of Ms. Burjoski's disapproval of the WRDSB materials, the offending comment or comments would have at the very least been identified, but they were not.

74. The lack of impartiality on the part of the Board raises real concerns about a serious violation of the state duty of neutrality, which requires that the “state neither favour nor hinder any particular belief.”⁶⁹

75. The statements made by Chairperson Piatkowski, subsequent to the Meeting, can leave no doubt that that the decision was motivated by bias. The Chairperson disparaged Ms. Burjoski's comments as “transphobic”; inexplicably stated that she “questioned the right to exist of trans people”; claimed he had not been “respectful and courteous”; that she engaged in “hate” and “derogatory speech”; and that she had in fact caused “harm”. These harsh and incendiary statements are untethered from what, in fact, occurred at the Meeting. They are not reflective of a sober and impartial decision maker. A reasonable person would perceive that the

⁶⁸ *Khan, supra*, at para. 34.

⁶⁹ *Mouvement laïque Québécois v. Saguenay (City)*, 2015 SCC 16, at para. 72.

decision maker in this case formed a biased opinion against Mr. Burjoski based on the decision makers own personal perspective on the issue.

76. On January 20, 2022, the Board published a statement expressing “deep regret for any harm caused to the transgender community” due to Ms. Burjoski’s Presentation. The assertion that Ms. Burjoski’s tempered, reasonable and brief presentation could have caused “harm”, is further evidence of a biased decision maker. The Board, whether consciously or unconsciously, did not decide fairly,⁷⁰ and for that reason the Decision should be quashed.

E. Further, the Decision was a breach of Ms. Burjoski’s Charter Right to Freedom of Expression

77. In *Irwin Toy* the Supreme Court confirmed that there is a “bold line” between restricting the “content of expression” as opposed to the “restricting the time, place or manner of expression regardless of content”. Though the state is usually justified in its desire to secure the interest against “interference from the noise and physical intrusions that accompany speech”, the state’s attempt to suppress ideas or information it deems “harmful”, are usually impermissible.⁷¹

78. Further, In *Commonwealth*, the Supreme Court stated that:

⁷⁰ See *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25, at para 20.

⁷¹ *Irwin Toy, supra*, at para. 50

“Restrictions on content may be capable of being justified on the basis that certain messages are incompatible with the purpose or function of a particular government institution. Pornography or literature promoting drug use, for example, might be legitimately banned at a school or a children's festival in a government park.”⁷²

79. It perhaps need not be said that democracy requires free and open debate on issues of public importance, and freedom to criticize those who exercise authority⁷³ and their decisions. Freedom of expression promotes “tolerance of expression that is unpopular, offensive and repugnant”; It “gives rise to a duty to tolerate what other people say”.⁷⁴ There is no Policy of the Board, or provision of the *Code* that can extinguish section 2 of the *Charter*.

80. The onus is on state to establish that the Boards silencing and removal of Burjoski was "reasonable" and "demonstrably justified in a free and democratic society."⁷⁵

81. The Board was required to proportionately balance Ms. Burjoski's Section 2(b) *Charter* rights to ensure they were limited no more than necessary given the applicable statutory objectives.⁷⁶

82. A failure to give effect as fully as possible to the *Charter* protections at stake⁷⁷ constitutes a failure to engage in the required proportionate balancing, thereby demonstrating that the limitation of those *Charter* protections is not “demonstrably justified in a free and democratic

⁷² *Committee of the Commonwealth, supra*, at para. 275.

⁷³ *Bracken v Fort Erie (Town)*, 2017 ONCA 668, at para. 58.

⁷⁴ *Ward v. Quebec*, 2021 SCC 43, at para. 60.

⁷⁵ *Committee of the Commonwealth, supra*, at para. 267.

⁷⁶ *Loyola, supra* at para. 4.

⁷⁷ *Dore, supra* at paras 57-58.

society.”⁷⁸ In this case, the Board did not attempt to engage in the required balancing exercise, and on that basis alone the infringement cannot be justified.

83. The Board’s Decision is uniquely egregious, in that the content and meaning which the government authority has restricted is criticism of that same government authority’s decisions, in a public forum that is intended to provide an airing to that very form of expression.

PART IV: ORDERS SOUGHT

- a) An Order in the nature of *certiorari* quashing the Decision;
- b) A Declaration that the Decision was unreasonable, breached the duty of fairness and violated principles of natural justice;
- c) An Order in the nature of mandamus requiring the WRDSB to allow Ms. Burjoski to make her Presentation in full at a future public WRDSB Committee of the Whole meeting of the Applicant's choosing. Or, in the alternative, an Order remitting the Decision to the Board to be determined in accordance with this Court's reasons for judgment;
- d) Further, a Declaration pursuant to Section 24(1) of the *Charter* that the Decision unreasonably violated Ms. Burjoski’s right, and the rights of those attending the public meeting, to freedom of expression protected under Section 2(b); and

⁷⁸ *Charter*, supra s. 1.

- e) An order for Charter damages in the amount of \$2,000 payable to Ms. Burjoski by WRDSB, forthwith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 28, 2022

Jorge Pineda (LSO # [REDACTED])
Counsel for the Applicant

SCHEDULE A

1.	<i>Canada (Minister of Citizenship and Immigration) v. Vavilov</i> , 2019 SCC 65
2.	<i>Canadian Centre for Bio-Ethical Reform v City of Peterborough</i> , 2016 ONSC 1972
3.	<i>Doré v. Barreau du Québec</i> , 2012 SCC 12, [2012] 1 SCR 395
4.	<i>Irwin Toy Ltd. c. Québec (Procureur Général)</i> [1989] 1 S.C.R. 927 (S.C.C.)
5.	<i>Committee for the Commonwealth of Canada v. Canada</i> , [1991] 1 S.C.R. 139
6.	<i>Loyola High School v. Quebec (Attorney General)</i> , 2015 SCC 12
7.	<i>CHP v. City of Hamilton</i> , 2018 ONSC 3690
8.	<i>Canadian Broadcasting Corporation v. Ferrier</i> , 2019 ONCA 1025
9.	<i>Guelph and Area Right to Life v. City of Guelph</i> , 2022 ONSC 43
10.	<i>Bruno (Town) v Scheiser</i> , 2004 SKQB 207
11.	<i>Gammie v. Town of South Bruce Peninsula</i> , 2014 ONSC 6209
12.	<i>R v. Hammer</i> , 1982 CarswellOnt 2226 [Ont. P.C.]
13.	<i>Fortin v Sudbury (City)</i> , 2020 ONSC 5300
14.	<i>Baker v. Canada (Minister of Citizenship and Immigration)</i> , 1999 CanLII 699 (SCC), [1999] 2 SCR 817
15.	<i>Moore v. The Estate of Lou Ferro et al</i> , 2022 ONSC 1343
16.	<i>Khan v. Ottawa (University of)</i> , 1997 CanLII 941 (ON CA)
17.	<i>Blencoe v. British Columbia (Human Rights Commission)</i> , 2000 SCC 44
18.	<i>Knapp v. ICR Commercial Real Estate</i> , 2019 SKQB 59
19.	<i>Mouvement laïque québécois v. Saguenay (City)</i> , 2015 SCC 16 (CanLII), [2015] 2 SCR
20.	<i>Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)</i> , 2015 SCC 25

21.	<i>Committee for the Commonwealth of Canada v. Canada</i> , [1991] 1 S.C.R. 139
22.	<i>Bracken v. Fort Erie (Town)</i> , 2017 ONCA 668
23.	<i>Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)</i> , 2021 SCC 43

SCHEDULE B

1. EDUCATION ACT, RSO 1990, C E.2

207 (1) Subject to subsections (2) and (2.1), the meetings of a board and the meetings of a committee of the board, including a committee of the whole board, shall be open to the public, and no person shall be excluded from a meeting that is open to the public except for improper conduct. R.S.O. 1990, c. E.2, s. 207 (1); 2014, c. 13, Sched. 9, s. 19 (1).

Closing of certain committee meetings

(2) A meeting of a committee of a board, including a committee of the whole board, may be closed to the public when the subject-matter under consideration involves,

- (a) the security of the property of the board;
- (b) the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board or a pupil or his or her parent or guardian;
- (c) the acquisition or disposal of a school site;
- (d) decisions in respect of negotiations with employees of the board; or
- (e) litigation affecting the board. R.S.O. 1990, c. E.2, s. 207 (2); 2021, c. 4, Sched. 11, s. 7 (1).

Closing of meetings re certain investigations

(2.1) A meeting of a board or of a committee of a board, including a committee of the whole board, shall be closed to the public when the subject-matter under consideration involves an ongoing investigation under the *Ombudsman Act* respecting the board. 2014, c. 13, Sched. 9, s. 19 (2).

Exclusion of persons

(3) The presiding officer may expel or exclude from any meeting any person who has been guilty of improper conduct at the meeting. R.S.O. 1990, c. E.2, s. 207 (3).

Inspection of books and accounts

(4) Any person may, at all reasonable hours, at the head office of the board inspect the minute book, the audited annual financial report and the current accounts of a board, and, upon the written request of any person and upon the payment to the board at the rate of 25 cents for every 100 words or at such lower rate as the board may fix, the secretary shall furnish copies of them or extracts therefrom certified under the secretary's hand. R.S.O. 1990, c. E.2, s. 207 (4).

Board meetings

208 (1) A board shall be deemed to be constituted when a majority of the members to be elected or appointed has been elected or appointed. R.S.O. 1990, c. E.2, s. 208 (1).

First meeting

(2) A board that is elected at a regular election under the [Municipal Elections Act, 1996](#) and a board that is appointed or elected other than at a regular election under the [Municipal Elections Act, 1996](#) shall hold its first meeting not later than seven days after the day on which the term of office of the board commences on such date and at such time and place as the board determines and, failing such determination, at 8 p.m. at the head office of the board on the first Wednesday following the commencement of the term of office. R.S.O. 1990, c. E.2, s. 208 (2); 1997, c. 31, s. 106 (1).

Supervisory officer may provide for calling first meeting

(3) Despite subsection (2), on the petition of a majority of the members of a newly elected or appointed board, the appropriate supervisory officer may provide for calling the first meeting of the board at some other time and date. R.S.O. 1990, c. E.2, s. 208 (3).

Election of chair

(4) The members shall elect one of themselves to be chair,

- (a) at the first meeting referred to in subsection (2) or (3);
- (b) in each following year, at the first meeting on or after the anniversary of the date the term of office of the board began; and
- (c) at the first meeting after a vacancy occurs in the office of chair. 2021, c. 34, Sched. 8, [s. 2](#).

Presiding officer

(5) At a meeting referred to in clause (4) (a) or (b), the chief executive officer shall preside until the election of the chair or, if there is no chief executive officer or in his or her absence, the members present shall designate who shall preside at the election of the chair and if a member of the board is so designated, he or she may vote at the election of the chair. 2021, c. 34, Sched. 8, [s. 2](#).

(5.1) Repealed: 2006, c. 10, s. 17.

Subsequent meetings

(6) Subsequent meetings of the board shall be held at such time and place as the board considers expedient. R.S.O. 1990, c. E.2, s. 208 (6).

Vice-chair

(7) The members of the board may also elect one of themselves to be vice-chair and he or she shall preside in the absence of the chair. R.S.O. 1990, c. E.2, s. 208 (7).

Where equality of votes

(8) In the case of an equality of votes at the election of a chair or vice-chair, the candidates shall draw lots to fill the position of chair or vice-chair, as the case may be. R.S.O. 1990, c. E.2, s. 208 (8).

Temporary chair

(9) If at any meeting there is no chair or vice-chair present, the members present may elect one of themselves to be chair for that meeting. R.S.O. 1990, c. E.2, s. 208 (9).

Temporary secretary

(10) In the absence of the secretary from any meeting, the chair or other member presiding may appoint any member or other person to act as secretary for that meeting. R.S.O. 1990, c. E.2, s. 208 (10).

Quorum

(11) The presence of a majority of all the members constituting a board is necessary to form a quorum. 1997, c. 31, s. 106 (3).

Chair, voting; equality of votes

(12) The presiding officer, except where he or she is the chief executive officer of the board and is not a member, may vote with the other members of the board upon all motions, and any motion on which there is an equality of votes is lost. R.S.O. 1990, c. E.2, s. 208 (12); 1997, c. 31, s. 106 (4).

Special meetings

(13) Special meetings of the board may be called by the chair and in such other manner as the board may determine. R.S.O. 1990, c. E.2, s. 208 (13).

Regulations: electronic meetings

208.1 (1) The Lieutenant Governor in Council may make regulations,

- (a) respecting the use of electronic means for the holding of meetings of a board and meetings of a committee of a board, including a committee of the whole board;
- (b) prescribing the circumstances in which a member of a board is required to be physically present in the meeting room of a board for meetings of the board;
- (c) authorizing or requiring a board to develop and implement policies with respect to any matter referred to in clause (a) and governing the content of such policies. 2020, c. 7, Sched. 9, [s. 1](#).

Same

(2) A regulation under clause (1) (a) may provide that a board member who participates in a meeting through electronic means shall be deemed to be present at the meeting for the purposes of this and every other Act, subject to such conditions or limitations as may be provided for in the regulation. 2020, c. 7, Sched. 9, [s. 1](#).

Same

(3) A regulation under clause (1) (a) may provide for participation in meetings through electronic means by members of the board, student trustees and members of the public. 2020, c. 7, Sched. 9, [s. 1](#).

Same

(4) A regulation under clause (1) (b) may set out rules with respect to periods of time before the regulation is filed. 2020, c. 7, Sched. 9, [s. 1](#).

2. CONSTITUTION ACT 1982 - PART I CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;

- **(b)** freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- **(c)** freedom of peaceful assembly; and
- **(d)** freedom of association.

Enforcement of guaranteed 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.
- **Exclusion of evidence bringing administration of justice into disrepute**
(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

3. BYLAWS - BOARD OF TRUSTEES WATERLOO REGION DISTRICT SCHOOL BOARD

4.3.3. Trustees shall be expected to model ethical practices which include:

- a. Making decisions in a manner which is open, accessible and equitable;
- b. Approaching all Board issues with an open mind, and be prepared to make the best decisions for stakeholders as a whole;
- c. Respecting different points of view;
- d. Conducting Board business through appropriate channels;
- e. Ensuring that public office is not used for personal gain;
- f. Protecting the integrity of the Board.

13.11. An opportunity for the public to present as a delegation to the Board regarding issues of concern/interest will be included on the agenda of the Board and Standing Committee meetings.

14. Delegation Procedures

14.1. The Waterloo Region District School Board recognizes the need to foster effective communication between the educational system and the community.

14.2. Delegations wishing to appear before the Waterloo Region District School Board at a Board or Committee of the Whole meeting should register with the Manager of Corporate Services by noon on the Thursday prior to the meeting. Delegations not making prior arrangements by noon on Thursday may speak at the following Monday meeting

only on the approval of a majority vote of the trustees, up to a maximum of eight (8) delegates.

14.3. Delegations are asked to make submissions in writing which contain the speaker's full name, contact information (including telephone number[s] and home address), a brief summary of the issue being presented, and recommendation(s) for resolving the matter. A Delegation Submission Template can be accessed via the Board's website (<https://www.wrdsb.ca/trustees/become-a-delegate/>) and can be completed online, or a hard copy can be submitted to the Manager of Corporate Services.

14.4. At regular Board meetings, delegations may speak only to matters relevant to those items listed on the agenda. All other presentations will be referred to the Committee of the Whole meetings.

14.5. Delegations will be permitted to address Trustees for a period of up to ten minutes. Exceptions to this rule will be permitted only by a majority vote of the Trustees present.

14.6. Delegations will be scheduled to appear at the beginning of the Board or Committee of the Whole meetings. A maximum of eight (8) delegates will be scheduled per meeting.

14.7. The Committee of the Whole will consider or act on any request from a delegation during the same meeting at which the delegation is made only if approved by a vote of two-thirds (2/3) of the Trustees present at the meeting, or if consideration of the matter was included on the meeting agenda.

14.8. At Board meetings, the Board, if approved by a vote of two-thirds (2/3) of the Trustees present at the meeting, may refer the topic to Agenda Development Committee for scheduling.

14.9. Delegates are expected to refrain from the use of abusive or derogatory language at all times and the Chair may expel or exclude from any meeting any person(s) who engage in this or any other form of improper conduct. Applause, booing or other audible or visual demonstrations of support or opposition are discouraged because they may be intimidating for those with opposing views. Courtesy and respect for others must be displayed at all times.

14.10. A delegate cannot register for more than one place on the agenda, and that place is not transferable to another party unless extenuating circumstances exist (e.g. illness of delegate).

14.11. Delegations may be received at Committee of the Whole in camera meetings as per the Education Act. The procedures for delegations, as set out in Article 14 will apply. September 2020 17 Bylaws - Board of Trustees WRDSB Special Delegation Meetings

14.12. Special meetings to hear delegations may be scheduled, when warranted (e.g. accommodation reviews, budget). 14.13. Delegations wishing to appear before the

WRDSB at a Special Delegation Meeting must register with the Manager of Corporate Services two working days prior to the meeting.

14.14. Delegations are asked to make submissions in writing which contain the speaker's full name, contact information (including telephone number[s] and home address), a brief summary of the issue being presented. A Delegation Submission Template can be accessed via the Board's website at (<https://www.wrdsb.ca/trustees/become-a-delegate/register-delegation/>) and can be completed online, or a hard copy can be submitted to the Manager of Corporate Services.

14.15. Delegations who have submitted their delegation submission two working days prior to the meeting who wish to speak for the first time on a topic will be given precedence over those who wish to speak a second time on the same topic and have submitted their delegation submission by two working days prior to the meeting. Delegations who wish to speak for a second time on the same topic, or those who have not submitted their delegation submission two working days prior to the meeting, will be placed on a waiting list. The Manager of Corporate Services will review the list of delegations two working days prior to the meeting and will contact the delegations on the waiting list to advise them if they will be scheduled on the agenda.

14.16. Delegates are expected to refrain from the use of abusive or derogatory language at all times and the Chair may expel or exclude from any meeting any person(s) who engage in this or any other form of improper conduct. Applause, booing or other audible or visual (e.g. props, placards) demonstrations of support or opposition are discouraged because they may be intimidating for those with opposing views. Courtesy and respect for others must be displayed at all times.

14.17. A delegate cannot register for more than one place on the agenda, and that place is not transferable to another party unless extenuating circumstances exist (e.g. illness of delegate).

3. SECTION 241(2) OF *THE MUNICIPAL ACT*, SO 2001, C 25

Power to expel

241(2) The head of council or other presiding officer may expel any person for improper conduct at a meeting.

CAROLYN BURJOSKI

and

**WATERLOO REGION DISTRICT SCHOOL
BOARD**

Applicant

Respondent

Court File No.: DC-22-126-JR

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Proceeding commenced at London

**FACTUM OF THE APPLICANT
(JUDICIAL REVIEW)**

Jorge Pineda
LSO

Rob Kittredge

Lawyers for the Applicant Carolyn Burjoski