Court File No. DC-24-00002846-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSHUA ALEXANDER

Applicant

-and-

RENFREW COUNTY CATHOLIC DISTRICT SCHOOL BOARD

Respondent

APPLICANT'S FACTUM

James SM Kitchen
Barrister and Solicitor

7070e Farrell Rd SE, #1063
Calgary, AB T2H 0T2
T: 587-330-0893
E: james@jsmklaw.ca

Counsel for the Applicant

Table of Contents

FACTS

Overview

1. The Applicant, Joshua Alexander, makes application for judicial review of a December 18, 2023 decision of a three-member committee of the Board of Trustees of the Respondent, Renfrew County Catholic District School Board (the "Board"), denying his appeals of a suspension and two exclusions imposed on him by the principal of St. Joseph's High School in Renfrew, Ontario (the "Decision").

Background

2. Mr. Alexander was, at all material times, a resident of Cobden, Ontario and between the ages of 16 and 18 years old. He was enrolled as a grade 11 student for the 2022-2023 school year at St. Joseph's High School, which is operated by the Respondent Board.

3. Mr. Alexander is a Christian. He holds many specific beliefs, informed by the Bible, regarding sex, sexuality, and sexual morality. In summary, these beliefs are that human beings are created by God as immutably male or female, persons cannot "change" their gender or sex from male to female or from female to male, and it is perverted and contrary to central Christian teaching, informed by the Bible, for biological males to enter the sex-segregated private spaces of females, such as washrooms and change rooms. Mr. Alexander believes he is called, along with all followers of Jesus Christ, to proclaim truth, which includes telling those around him about God's design for human sexuality and to openly oppose the Board's policy of permitting males to enter the girls' washrooms. He further believes he would commit a sin if he remained silent on the issues of transgenderism and males accessing the sex-segregated private spaces of females.[1]

4. The Respondent is a public Catholic school board. The Board has what it calls a "bathroom policy" that permits transgender students to use the bathroom "of their choosing", which, in

[1] Josh Alexander Will Say ("Will Say 1") at para 2, Application Record Part 1 ("AR1") at 17; Appeal Particulars ("AP") at paras 2, 38, 49, 55-80, AR1 at 269, 275-6, 278-86.

practice, means biologically male students who self-identify as girls are permitted to enter the girls' bathroom in schools such as St. Joseph's High School.

5. Beginning in October 2022, Mr. Alexander expressed his religious beliefs during various class discussions. In response, many students, and sometimes teachers, levelled various accusations at Mr. Alexander, such as publicly calling him "homophobic" and "transphobic", and harassed him based on his minority Christian beliefs.[2] Understanding that his beliefs were unpopular and considered by many to be offensive, Mr. Alexander absorbed the mistreatment and continued to express his beliefs that boys cannot become girls and should not be entering the girls' washrooms.

6. Mr. Alexander also advocated, by speaking to Principal Lennox, for girls who confided in him they had concerns with boys using their washroom, but were hesitant to bring their concerns to Principal Lennox.[3]

7. Principal Lennox became aware of the class discussions referred to above. He and Mr. Alexander met on October 20, 2022 to discuss the classroom discussions and the school's bathroom policy. In summary, Principal Lennox asked Mr. Alexander to be respectful, to which Mr. Alexander agreed.

8. Principal Lennox did not impose or threaten to impose any discipline upon Mr. Alexander for the beliefs he had expressed or for the alleged use by Mr. Alexander of the term "tranny".

9. Principal Lennox also made clear to Mr. Alexander that the policy of permitting boys to enter the girls' washrooms would not be altered, as was also made clear elsewhere.[4]

10. In early November 2022, Mr. Alexander decided to organize a student walk-out and protest to raise awareness about and oppose the St. Joseph's High School bathroom policy. The

[2] Will Say 1 at paras 11, 18, AR1 at 19, 20; Female Student Will Say ("Female Student") at paras 8, 10, AR1 at 40-1; Book of Documents of Principal Derek Lennox ("Lennox"), AR1 at 120.
[3] Lennox, AR1 at 109-10, 151; Will Say 1 at paras 3, 10, 16, 19, 20, 22, 23, AR1 at 17, 19, 20, 21, 22; Female Student at paras 1-4, 12-8, AR1 at 39-42.
[4] Lennox, AR1 at 155.

walk-out was scheduled to take place on November 25. Principal Lennox met with Mr. Alexander on November 4 to discuss the planned walk-out. He said he wanted to work with Mr. Alexander, not against him. No discipline or threat of discipline was discussed, except that Principal Lennox stated any student attending the walk-out would lose his or her transportation home for that day, as was also stated elsewhere.[5]

11. Two days before the walk-out, on November 23, Principal Lennox suddenly issued by way of email a 20-day suspension to Mr. Alexander, citing concerns about Mr. Alexander's social media posts. He also stated he would conduct an investigation regarding Mr. Alexander.

12. Principal Lennox issued a letter on December 20, 2022 in which he made several findings that Mr. Alexander had engaged in inappropriate behaviour that justified a suspension. Principal Lennox subsequently communicated to Mr. Alexander a number of conditions by which he would be required to abide in order to return to school in January 2023, including that he not "deadname" any transgender students and that he be excluded from two of his four classes because those two classes were attended by transgender students.

13. In late December 2022, Mr. Alexander withdrew from parental control and hired counsel. Through counsel, Mr. Alexander appealed the suspension; however, the Board refused to hear the appeal, claiming that Mr. Alexander had not, in fact, withdrawn from parental control.

14. Counsel for Mr. Alexander wrote to Principal Lennox on January 6, 2023, explaining that Mr. Alexander was unable to comply with the "deadname" condition due to his sincere Christian beliefs.[6] Counsel further explained that segregating Mr. Alexander from the classes he shared with transgender students amounted to religious discrimination because it was apparent the purpose of such segregation was to prevent transgender students from hearing Mr. Alexander express his religious beliefs.[7] Counsel reminded Principal Lennox

[5] Lennox, AR1 at 117.
[6] Lennox, AR1 at 173.
[7] Lennox, AR1 at 173.

that, on any objective standard, Mr. Alexander had not bullied and would not bully any transgender students.[8]

15. Principal Lennox responded by excluding Mr. Alexander from physically attending St. Joseph's High School until the end of January 2023, which was also the end of the first semester.

16. On January 23, 2023, counsel for Mr. Alexander wrote to the Board alleging that the exclusion and the conditions for Mr. Alexander's return to school were discriminatory and requesting that he be permitted to return to school in the second semester without discrimination on the basis of his religious beliefs. Again, counsel communicated Mr. Alexander's commitment to not bully transgender students.[9]

17. On January 26, counsel for the Board wrote to communicate that the exclusion would be extended to the end of the school year. The exclusion and the exclusion extension (collectively "Exclusions") were both appealed by Mr. Alexander, although the Board again refused to hear these appeals.

18. Mr. Alexander never returned to St. Joseph's High School. Following a successful application to the Superior Court of Justice for a declaration that Mr. Alexander had withdrawn from parental control,[10] the appeals of the Suspension and Exclusions were heard by the Board on November 15 and 17, 2023, *in camera*.

19. By way of a committee of trustees, the Board issued a 10-page decision denying Mr. Alexander's appeals on December 18, 2023. The Board purported to seal the Decision and ordered a complete publication ban on all materials submitted as part of the appeals.[11]

[8] Lennox, AR1 at 172-4.
[9] Lennox, AR1 at 201-3.
[10] *Alexander v Renfrew County Catholic District School Board*, 2023 ONSC 4962 (Appended).
[11] See **Schedule A**: Email correspondence between counsel for the Board and counsel for the Applicant.

ISSUE

20. The issue in the present application is whether the Board's Decision denying Mr. Alexander's appeals of the Suspension and Exclusions was unreasonable.

SUBMISSIONS

Standard of Review

21. In *Canada (Minister of Citizenship and Immigration) v Vavilov*[12], the Supreme Court of Canada settled on reasonableness as the standard of review in all but the narrowest of exceptions and made clear that reasonableness is a robust standard requiring reasons-first decision making because reasons are the means by which the decision maker communicates the rationale for its decision.[13]

22. If the decision "cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", it will be unreasonable.[14] In order to be reasonable on the *Vavilov* standard, a decision must bear the hallmarks of justification, transparency and intelligibility. Among other indicia and criteria, this means the decision must:

    a. be rational and logical, including free of logical fallacies;

    b. be justified in relation to the constellation of law and facts;

    c. be constrained by elements of the legal and factual contexts which operate as constraints on the decision maker in the exercise of its delegated powers;

    d. take account of the evidentiary record and the general factual matrix that bears on it;

    e. not adopt inferior interpretations for the sake of expediency;

    f. not engage in reverse-engineering;

[12] 2019 SCC 65 [*Vavilov*].
[13] *Vavilov* at para 84.
[14] *Vavilov* at para 100.

g. not fundamentally misapprehend or fail to account for the evidence before the decision maker;

h. not fail to consider relevant facts and evidence before the decision maker;

i. not follow an "irrational chain of analysis" or reach a "conclusion" that "cannot follow from the analysis undertaken";

j. meaningfully account for the central issues and concerns raised by the applicant;

k. demonstrate the decision maker actually listened to the applicant;

l. meaningfully grapple with the key issues and central arguments raised by the applicant;

m. demonstrate the decision maker was actually alert and sensitive to the matter before it; and

n. grapple with any particularly harsh consequences of a decision.[15]

Relevant Law

Amselem, Big M, Corbiere, Lavoie, Multani and Quebec

23. The SCC has defined religion, affirming its conduct-governing nature, and declared religion an immutable characteristic. The Court states in *Syndicat Northcrest v Amselem*[16] a person will establish a protected religious belief if the person

> has a **practice or belief**, having a **nexus with religion**, which **calls for a particular line of conduct**, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and…is **sincere** in his or her belief.[17]

[15] *Vavilov* at paras 99-135.
[16] 2004 SCC 47 [*Amselem*].
[17] *Amselem* at para 56. [Emphasis added.]

24. Religious belief **governs conduct**, and religious infringement is established when a condition or requirement interferes with conduct-governing beliefs in a way that is beyond trivial or insubstantial.[18] Such infringement triggers the duty to accommodate to the point of undue hardship.

25. The SCC stated in *Corbiere v Canada (Minister of Indian and Northern Affairs)*[19] that religion is "constructively immutable" because it is "changeable only at unacceptable cost to personal identity" and again affirms this principle in *Quebec (Attorney General) v A*.[20]

26. The SCC decided in *R. v Big M Drug Mart Ltd.*[21] that freedom of religion is "the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination".[22]

27. Further, the SCC observed in *Lavoie v Canada*[23] and subsequently affirmed in *Quebec* that "the fact that a person could avoid discrimination by modifying his or her behaviour does not negate the discriminatory effect".[24]

28. The SCC decided in *Multani v Commission scolaire Marguerite-Bourgeoys*[25] that any threat to any person who feels antipathy toward another's religious practice must be objectively real and "inherent danger" arguments must fail:

> [T]he existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified. Given the evidence in the record, it is my opinion that the respondents' argument in support of an absolute prohibition — namely that kirpans are inherently dangerous — must fail.[26]

---

[18] *Amselem* at paras 56, 74.
[19] [1999] 2 SCR 203, 1999 CanLII 687 [*Corbiere*] at para 13.
[20] 2013 SCC 5 [*Quebec*] at para 335.
[21] [1985] 1 SCR 295, 1985 CanLII 69 (SCC) [*Big M*].
[22] *Big M* at para 94.
[23] 2002 SCC 23 [*Lavoie*].
[24] *Lavoie* at para 5; *Quebec* at para 337.
[25] 2006 SCC 6 [*Multani*].
[26] *Multani* at para 67.

Ontario Human Rights Commission Policies

29. Human rights jurisprudence and policy make clear that freedom of religion as guaranteed in the *Charter* and the right to be free of religious discrimination as enumerated in human rights legislation protect the same thing: ***declarations of religious beliefs*** and ***manifestations of religious beliefs through practices and dissemination***, not merely the right to hold religious beliefs.

30. The Ontario *Human Rights Code*, which has primacy over all other provincial laws in Ontario, states in its first section: "Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of…creed".[27]

31. Discrimination will be established where a person shows he possesses a *Code*-protected characteristic; he has experienced negative treatment or an adverse impact in a *Code*-governed area; and the protected characteristic was a factor in the negative treatment or adverse impact. No intention to discriminate is necessary; acts or omissions which discriminate in effect are equally prohibited. Protection against discrimination applies in the area of services, including education.

32. Under the *Code*, discrimination because of religion or creed is unlawful. Since the *Code* does not define creed, the "Policy on preventing discrimination based on creed" ("Creed Policy")[28] of the Ontario Human Rights Commission (the "Commission" or "OHRC") is a useful tool for interpreting and clarifying the law in this area. While courts and tribunals have often referred to religious beliefs and practices, creed may also include non-religious belief systems that substantially influence a person's identity, worldview, and way of life.[29]

[27] RSO 1990, c H.19.
[28] Creed Policy, AR at 1-179.
[29] Creed Policy at section 4, note 72, AR2 at 141.

33. Although historically Christian minorities in Ontario often faced more intense creed-based prejudice and discrimination,[30] new forms of prejudice against religious people *in general* have recently emerged owing to an increasingly secular culture.[31]

34. People experience discrimination based on creed in many different ways and the Commission identifies "faithism" as one of the most common and problematic because it ascribes negative characteristics to people of faith based on their beliefs,[32] for example, backwardness, irrationality, misogyny, homophobia, and subversion.[33]

35. Faithism can be individual, institutional, or both.[34] Individual faithism involves the denigration of religious people who follow beliefs and ways of life that differ from what may be considered "normal" or "acceptable".[35] While critically engaging with or negatively evaluating a person's belief is not "faithist" in and of itself, a distortion of the belief that tends to stereotype the individual holding it is discriminatory.[36]

36. Systemic faithism may appear neutral on its surface, but has an "adverse effect" or exclusionary impact on people belonging to particular communities of belief. For example, a policy of inclusion for some may tend to incidentally exclude others.[37] The Commission has found if a creed belief differs from mainstream ways of life, it is more likely to be stigmatized and considered unworthy of accommodation.[38]

37. Faithism can also lead to creed harassment,[39] when acted upon or communicated in, for example, the education context.

38. The stated objective of the Commission's Creed Policy, "[i]n keeping with the Preamble to the *Code*" is to "provide equal rights and opportunities without discrimination and

[30] Creed Policy at section 3.1, AR2 at 16.
[31] Creed Policy at section 3.2, AR2 at 18. [Emphasis added.]
[32] Creed Policy at section 3.2, AR2 at 18.
[33] Creed Policy at section 3.2, AR2 at 18.
[34] Creed Policy at section 3.2, AR2 at 19.
[35] Creed Policy at section 3.2, AR2 at 17.
[36] Creed Policy at section 3.2, AR2 at 17-8.
[37] Creed Policy at section 3.2, AR2 at 18.
[38] Creed Policy at section 3.2, AR2 at 19.
[39] Creed Policy at section 3.2, AR2 at 18.

harassment because of creed" and "promote recognition of the inherent dignity and worth of people of diverse creed faiths, *whatever their creed* and create a climate of understanding and mutual respect, so that people of diverse creed faith *feel they belong* in the community and can *fully contribute* to it".[40]

39. While the Creed Policy states "Human rights protections for creed do not extend to practices and observances that are hateful or incite hatred or violence against other individuals or groups, or contravene criminal law",[41] it is equally clear on what that would mean: "[t]he use of religious claims to justify curtailing and violating people's rights"[42] such as the **criminalization** of lifestyles people desire to entertain or practice. The ***rightful non-interference*** with what people choose to do or how they choose to live is not an invitation to ***invent harm*** nowhere identified or materialized out of ***antipathy for another's religious beliefs about said lifestyles***.

40. Indeed, the OHRC's "Policy on competing human rights" ("Competing Rights Policy") states "When rights appear to be in conflict, a key consideration is to determine if there is an actual intrusion of one right on the other, and the extent of the interference. If the interference is minor or trivial, the right is not likely to receive much, if any, protection". The Competing Rights Policy goes on to state decision makers "[m]ust look at [the] extent of [the] interference"; "only *actual* burdens on rights trigger conflicts"; "[u]nless there is a substantial impact on other rights, there is no need to go further in the resolution process"; and "speculation that a rights violation may occur is not enough—there must be evidence, and not just an unsupported assumption, that the enjoyment of one right will have a harmful effect on another".[43] In other words, the harm to the competing right must be demonstrable, not merely asserted.

[40] Creed Policy at section 2, AR2 at 14. [Emphasis added.]
[41] Creed Policy Summary, AR2 at 11.
[42] Creed Policy at section 3.1, AR2 at 16.
[43] Competing Rights Policy.

41. The OHRC's Creed Policy is clear that there is no hierarchy of rights: "[T]he Supreme Court of Canada has confirmed that there is no hierarchy of rights, and creed deserves the same consideration, protection and respect as other human rights".[44]

42. The Commission continues:

> It is well-established in law that people protected under the ground of creed are entitled to the same level of protection as people protected under other *Code* grounds. **Arguments that a person can avoid discrimination or intolerance by modifying their** behaviours or **beliefs** and making different choices **has been rejected as a justification for discriminatory behaviour**.[45]

43. Additionally, "People who have a creed, or are discriminated against because of their creed or lack thereof, are also covered by the *Code* under section 8 if they experience reprisal or are threatened with reprisal for trying to exercise their human rights".[46]

44. The Commission continues, in its Creed Policy, "The *Code* includes specific defences and exceptions that allow behaviour that would otherwise be discriminatory" including "solemnization of marriage by religious officials (section 18.1), separate school rights (section 19), restriction of facilities by sex (section 20)".[47]

45. Also clear is the Commission's position on the enhancement of creed rights on the basis of *Charter* protections: "[D]epending on the circumstances, the right to equal treatment based on creed may be informed not only by the Section 15 equality provisions of the *Charter* (like other *Code* grounds) but also by a "fundamental freedom" under the Constitution (freedom of conscience and religion under s. 2(a) of the *Charter)*".[48] In addition, where ***expressing*** a creed enters as an issue, another *Charter* right is introduced: section 2(b).

46. The duty to accommodate arises where a person holding a sincere religious belief is adversely affected by a requirement, rule or standard implemented by an organization. An

[44] Creed Policy at section 5.1, AR2 at 28.
[45] Creed Policy at section 5, note 98, AR2 at 144. [Emphasis added.]
[46] Creed Policy at section 5.1, AR2 at 28.
[47] Creed Policy at section 5.1, AR2 at 28-9.
[48] Creed Policy at section 5.1, AR2 at 28.

appropriate accommodation is one wherein the organization has engaged in a meaningful way and followed a good faith process.[49] In other words, the accommodation process has two distinct components: substantive and procedural. Regardless of whether substantive accommodation turns out to be possible, discharging the **procedural** component of the duty is absolutely **required**. A failure to discharge the procedural duty is deemed an unlawful failure to accommodate regardless of whether a substantive accommodation could be implemented.

47. Offers of forced segregation of the individual holding the creed belief are not appropriate accommodation and accordingly do not fulfil the duty to accommodate. Appropriate accommodation is accommodation that respects dignity and autonomy while "allow[ing] for **integration** and full **participation**".[50]

48. Morale, third-party preferences, and inconvenience are insufficient reasons to limit accommodation of an individual's creed beliefs and practices,[51] and the duty to accommodate is not negated on the basis a belief or practice is unreasonable or objectionable.

49. The Commission's Creed Policy demands organizations develop "broader strategies to prevent and address discrimination based on creed" including: barrier prevention, review and removal; anti-harassment and anti-discrimination policies; training for dealing with creed diversity; an internal complaints procedure; and an accommodation policy and procedure, for the stated reason that "[a]ll of society benefits when people of diverse creed backgrounds are encouraged and empowered to take part at all levels".[52]

50. The Creed Policy exhorts, "[H]ow a society treats religious and creed minorities indicates its tolerance towards difference and diversity in general. Freedom and equality rights based on religion and creed are core elements of a free and democratic society".[53] This includes

[49] Creed Policy Summary, section 9, AR2 at 10, 59-88.
[50] Creed Policy at section 9.4, AR2 at 63-4. [Emphasis added.]
[51] Creed Policy at section 9.9, AR2 at 74.
[52] Creed Policy Summary, AR2 at 12.
[53] Creed Policy at section 1, AR2 at 13.

minority beliefs and the right to "manifest" them,[54] given that "more people of all faiths are understanding and practicing their faith in *individual* ways"—a trend "projected to accelerate in the future" in Ontario and Canada.[55]

51. The *Code* duty to accommodate extends to a wide variety of religious beliefs and practices, absent any test for reasonableness: "For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society".[56]

52. The Commission states in its Creed Policy, "Canada's highest Court has repeatedly affirmed the key place of religious freedom and equality rights based on creed at the centre of Canada's liberal democratic legal tradition".57

53. The Commission continues, invoking[58] *Loyola High School v Quebec (Attorney General)*[59] for these propositions: "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";[60] and "[A] multicultural multireligious society can only work…if people of *all* groups understand and *tolerate* each other".[61]

54. In its Creed Policy, the Commission also quotes with approval[62] part of what has become the Supreme Court of Canada's most famous passage regarding freedom of religion:

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct...If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free…What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The

[54] Creed Policy at section 1, AR2 at 13.
[55] Creed Policy at section 1, note 1, AR2 at 132. [Emphasis added.]
[56] *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 36.
[57] Creed Policy at section 1, note 5, AR2 at 132.
[58] Creed Policy at section 1, notes 8, 9, AR2 at 132-3.
[59] 2015 SCC 12 [*Loyola*].
[60] *Loyola* at para 48.
[61] *Loyola* at para 47. [Emphasis added.]
[62] Creed Policy at section 1, notes 5, 10, AR2 at 132-3.

> *Charter* safeguards religious minorities from the threat of "the tyranny of the majority".[63]

55. The Commission further quoted the Supreme Court of Canada,[64] which itself quotes approvingly the European Court of Human Rights decision in *Kokkinakis v Greece*:[65]

> Freedom of thought, conscience and religion…is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it" [p. 17].[66]

56. The Commission's choice to include in its policy[67] the following statement from the Supreme Court of Canada demonstrates its understanding that ***the goal is tolerance, not agreement***:

> When we ask people to be tolerant of others, **we do not ask them to abandon their personal convictions**. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. **The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right**.[68]

57. The Commission's Creed Policy reflects a deep and thorough understanding of the jurisprudence supporting the idea that tolerance of differing views, regardless of how uncomfortable, is the price to pay for a functioning democracy and the institutions that must function within it.

---

[63] *Big M* at paras 94-6.
[64] Creed Policy at section 1, note 8, AR2 at 132-3.
[65] Judgment of 25 May 1993, Series A No. 260-A [*Kokkinakis*].
[66] *Loyola* at para 45.
[67] Creed Policy at section 9.11.5, AR2 at 86.
[68] *Chamberlain v Surrey School District No. 36*, 2002 SCC 86 at para 66. [Emphasis added.]

Ontario Human Rights Commission Guidelines

58. The OHRC publication "Guidelines on Accessible Education" ("Education Guideline")[69] further elucidates the objectives of accommodation marked by inclusion and full participation, harassment prevention, and realistic assessments of actual risk.

59. The Education Guideline specifies that: "[p]reventing and removing barriers means all students should be able to access their environment and face the same duties and requirements with dignity and without impediment";[70] "before considering placing a student in a self-contained or specialized classroom, education providers must first consider inclusion in the regular classroom";[71] "[i]n most cases, appropriate accommodation will be accommodation in the regular classroom";[72] "[t]he principles of respect for dignity, individualization, inclusion and full participation apply both to the substance of an accommodation and to the accommodation process; and "[t]he manner in which an accommodation is provided and the methods by which it is implemented are subject to human rights standards".[73]

60. The Education Guideline further specifies:

> Part of an educational institution's duty to maintain a safe learning environment for students includes addressing bullying and harassing behaviour. Students who are being harassed are entitled to the Code's protection where the harassment creates a poisoned educational environment. This protection would apply to sanction: (i) education providers who themselves harass students based on Code grounds, and (ii) education providers who know or ought to know that a student is being harassed based on Code grounds, and who do not take effective individualized and systemic steps to remedy that harassment.[74]

61. When assessing accommodation for a student, according to the Education Guideline, "[i]t is important to substantiate the actual degree of risk in question, rather than acting on

[69] Education Guideline, AR2 at 180-218.
[70] Education Guideline at 8, AR2 at 187.
[71] Education Guideline at 22, AR2 at 201.
[72] Education Guideline at 22, AR2 at 201.
[73] Education Guideline at 16, AR2 at 195.
[74] Education Guideline at 11-2, AR2 at 190-1.

inaccurate or stereotypical perceptions that may have little to do with a student's actual limitations".[75]

62. The Education Guideline clarifies that "[t]he education provider must consider other types of risks assumed within the institution"; "[a] potential risk created by accommodation should be assessed in light of those other more common sources of risk in the educational institution"; and [t]he seriousness of the risk is to be judged based on taking suitable precautions to reduce it".[76]

63. Questions the education provider must ask, according to the Education Guideline, include: "What other types of risks are assumed within the institution or sector, and what types of risks are tolerated within society as a whole?"; "What could happen that would be harmful?"; "How serious would the harm be if it occurred?"; "How likely is it that the potential harm will actually occur? Is it a real risk, or merely hypothetical or speculative? Could it occur frequently?"; and "Who will be affected by the event if it occurs?".[77]

64. The Education Guideline discloses: "If the potential harm is minor and not very likely to occur, the risk should not be considered serious". The Education Guideline states further:

> [T]he seriousness of the risk will be evaluated only after accommodation has been provided and only after appropriate precautions have been taken to reduce the risk. It will be up to the education provider to provide **objective** and direct evidence of the risk. Suspicions or impressionistic beliefs about the degree of risk posed by a student, without supporting evidence, will not be sufficient. Additionally, training for staff, or further supports for the student which may resolve the issue must be fully explored before concluding an appropriate accommodation cannot be achieved.[78]

65. A claim of undue hardship must stem from a genuine interest in maintaining a safe learning environment for all students, rather than as a punitive action.[79]

---

[75] Education Guideline at 31, AR2 at 210.
[76] Education Guideline at 32, AR2 at 211.
[77] Education Guideline at 32, AR2 at 211.
[78] Education Guideline at 32-3, AR2 at 211-2. [Emphasis added.]
[79] Education Guideline at 33, AR2 at 212.

Jurisprudence on Procedural Accommodation

66. Irrespective of whether a protected characteristic is possible to accommodate substantively, a **procedural** accommodation **process** is requisite to discharging the duty.

67. Beyond the Commission's own specific guidance to service providers in Ontario, various courts have weighed in on the procedural component of the duty. The SCC discloses in the seminal case of *Meiorin*[80] that a standard cannot be deemed reasonably necessary unless and until the organization has fully considered alternative accommodations that might allow the affected individual to continue in the employment. The companion case of *Grismer*[81] imported the principles of *Meiorin*, an employment case, to the service provision context. The SCC has found that procedurally, an organization has a duty to inquire as to the specific circumstances of a person requiring accommodation before taking adverse action against him.[82]

68. The Ontario Divisional Court has held that a full exploration of the nature of the protected ground, consideration of the extent to which carefully managing the challenges around the protected ground and examination of the roles and responsibilities of various staff in monitoring the situation are required;[83] undue hardship cannot be established by relying on impressionistic or anecdotal evidence, or after-the-fact justifications;[84] and in assessing whether the organization has met the duty, its efforts must be assessed at the time of the alleged discrimination.[85]

---

[80] *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*].
[81] *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, 181 DLR (4th) 385 [*Grismer*].
[82] *Stewart v Elk Valley Coal Corp*., 2017 SCC 30 [*Stewart*] at paras 127, 133; *Canadian National Railway Company v Teamsters Canada Rail Conference*, 2018 ABQB 405 [*Teamsters*]. See also *Grismer*.
[83] *Adga Group Consultants Inc. v Lane*, [2008] OJ No 3076, 295 DLR (4th) 425 [*Adga*] at para 109.
[84] *Adga* at para 118.
[85] *Adga* at para 108. See also *Gourley v Hamilton Health Sciences*, 2010 HRTO 2168 at para 8, wherein the adjudicator stated: "It is the respondent who bears the onus of demonstrating what considerations, assessments, and steps were undertaken to accommodate…to the point of undue hardship…". See also *Lane v ADGA Group Consultants Inc.*, 2007 HRTO 34 at para 150, wherein the HRTO held that a failure to meet the procedural dimensions of the duty to accommodate is a form of discrimination in itself because it "denies the affected person the benefit of what the law requires: a recognition of the obligation not to discriminate and to act in such a way as to ensure that discrimination does not take place"—confirmed on appeal in *Adga*.

69. The Ontario Court of Appeal has described satisfaction of the procedural component of the duty thus:

> The procedural component typically involves the identification of the process or procedure to be adopted in providing accommodation to the person who would be subject to the discriminatory standard: see *Lane v. ADGA Group Consultants Inc.* (2008), 295 D.L.R. (4th) 425 (Ont. Div. Ct.), at para. 106; *Roosma v. Ford Motor Co. of Canada (2002)*, 164 O.A.C. 252 (Div. Ct), at para. 210, per Lax J. (dissenting, but not on this point). Because it requires an understanding of the person's needs, and requires the person to provide information, procedural accommodation is sometimes referred to as the "accommodation dialogue": see *Liu v. Carleton University*, 2015 HRTO 621, at para. 18. Once the institution has an understanding of the claimant's specific needs, it must ascertain and seriously consider possible accommodations that could be used to address those needs, including the option of undertaking an individualized assessment in the case of a discriminatory standard: see *Grismer*, at para. 42; *ADGA*, at para 106. The substantive component of accommodation can refer to the steps taken to implement the accommodation to the point of undue hardship. It involves the consideration of what was actually done in the accommodation process to meet the individual's needs: see *Roosma*, at para. 210.[86]

70. Where the organization has failed to take any of the steps it could have taken in order to assess and pursue the question of accommodation, and failed to learn what it could have learned had it only made appropriate enquiries, it will not have discharged its procedural duty to accommodate.[87]

Argument

71. The Board's Decision fails to be reasonable in the following ways: it fails to "meaningfully account for the central issues and concerns raised by [Mr. Alexander]",[88] thereby failing to "demonstrate the [Board] actually listened to [Mr. Alexander]";[89] it fails to "meaningfully grapple with the key issues and central arguments raised by [Mr. Alexander]",[90] thereby failing to demonstrate that "the decision maker was actually alert and sensitive to the

[86] *Longueépée v University of Waterloo*, 2020 ONCA 830 at para 70.
[87] *Adga* at paras 126-7.
[88] *Vavilov* at para 127.
[89] *Vavilov* at para 127.
[90] *Vavilov* at para 128.

matter before it";[91] it fails to "be justified in relation to the constellation of law and facts that are relevant to the [D]ecision;"[92] having failed to be constrained by "[e]lements of the legal and factual contexts" which "operate as constraints on the [Board] in the exercise of its delegated powers";[93] it "fundamentally misapprehend[s]…the evidence before [the Board]";[94] and it fails to grapple with the "particularly harsh consequences for the affected individual" by failing to "explain why [the] [D]ecision best reflects the legislature's intention" where the "consequences…threaten an individual's…dignity".[95]

The Board failed to attend to Mr. Alexander's central issues, concerns and arguments, reflecting its failure to "actually listen" and be "actually alert and sensitive to the matter"

72. The standard of reasonableness required the Board to meaningfully account for Mr. Alexander's central issues and concerns and to meaningfully grapple with Mr. Alexander's key issues and central arguments,[96] all of which are bound up in his sincerely held, conduct-governing religious beliefs.[97] The Board's reasons demonstrate that it opted to listen only to the issues, concerns and arguments raised by Principal Lennox regarding alleged "bullying".

73. The Board failed to engage in any analysis or provide any reasons for its conclusion that Mr. Alexander did not establish a *prima facie* case of discrimination on the basis of creed. In fact, concluding Mr. Alexander's case was exclusively about bullying required the Board not only to ignore Mr. Alexander's central issues, concerns and arguments, but also to ignore the established law relevant to Mr. Alexander's central issues, concerns and arguments: the law on religion and religious discrimination, which Mr. Alexander placed squarely before the Board.[98]

---

[91] *Vavilov* at para 128.
[92] *Vavilov* at para 105.
[93] *Vavilov* at para 105.
[94] *Vavilov* at para 126.
[95] *Vavilov* at para 133.
[96] AP at paras 125-47, AR1 at 297-302.
[97] Will Say 1 at paras 2, 38, 49, 57-83, AR1 at 17, 25, 27, 29-38; AP at paras 2, 38, 49, 55-80, AR1 at 269, 275-6, 278-86.
[98] AP at paras 81-116, AR1 at 286-95.

74. The leading case regarding religious beliefs, *Amselem*, was not once mentioned in the Board's reasons. In fact, the Board did not cite a single legal authority in its reasons. In addition to failing to engage with the case law on religious discrimination pleaded by Mr. Alexander, the Board also failed to grapple with the multiple Ontario Human Rights Commission policies relied on by Mr. Alexander, preferring to artificially confine its consideration to the single OHRC policy relied on by Principal Lennox.

75. Had the Board given due care and attention to its reasons, it may have realized the fatal errors it committed regarding religion and religious discrimination. The Board failed to even engage in a cursory analysis of Mr. Alexander's claims of religious discrimination in utter defiance of the law and its obligations to consider the law when rendering a decision.

The Board failed to justify its Decision in relation to the relevant law bearing on the central issue and to constrain itself accordingly

76. The Board's failure or refusal to address the Applicant's central argument led it to conclude, contrary to the clear direction of the SCC in *Amselem* and *Big M*, that individuals are only permitted by law to hold religious beliefs, not to declare or otherwise manifest those beliefs.

77. The Board embraced an impoverished, repugnant, and unreasonable view of the right to participate in society free of discrimination on the basis of religious belief. The Board acknowledged that individuals are free to hold religious beliefs, but pretended individuals are not free to act upon or publicly express those beliefs if someone subjectively feels disrespected, insulted, offended, *et cetera* when encountering those beliefs.

78. The law has repeatedly rejected such a notion, and rightfully so.[99]

79. Freedom of religion consists of the freedom to ***undertake practices***, not merely to hold beliefs quietly in one's head. This is what is meant by **"a practice or belief…<u>which calls</u>**

[99] See generally *Amselem* and *Big M*; see also *Big M* at para 94.

for a particular line of conduct".[100] That which the Board acknowledges—the belief—is ***conduct governing***. Religious belief is inseparable from the conduct it governs.

80. Neither is it any answer to say that Mr. Alexander could have or should have chosen not to express his religious beliefs. Not only does *Amselem* decide religion is conduct governing; *Lavoie* and *Quebec* decide that in the context of discrimination, "choice" is neither a "true choice" nor "[*relevant*] to the question of discrimination".[101]

81. Of course, establishing discrimination, often referred to as *prima facie* discrimination, is not the end of the legal analysis. Discrimination may be justified by the other party if it can show that the discrimination was unavoidable because of a *bona fide* requirement or because accommodation would impose undue hardship. However, the Board came nowhere near making out a reasonable justification because it came nowhere near realizing it needed to make out a reasonable justification because it failed to consider Mr. Alexander's central issue, concern and argument in the first place.

82. Mr. Alexander presented cogent evidence to the Board establishing *prima facie* discrimination based on his creed. That discrimination may or may not have been justified, but it cannot be credibly or reasonably denied Mr. Alexander experienced discrimination as a result of declaring and manifesting his sincere Christian beliefs. The Board erred in law by failing to find Principal Lennox discriminated against Mr. Alexander on the basis of creed.

83. Despite having been provided by Mr. Alexander with a comprehensive explanation of his religious beliefs and extensive submissions on both relevant case law and the OHRC's Creed Policy, the Board concluded, ***without performing any analysis or referring to any authorities***, that Mr. Alexander's appeal was not about his religious beliefs.

84. Such a conclusion on the facts of this case is astounding.

---

[100] *Amselem* at para 56.
[101] *Quebec* at para 336.

85. That Mr. Alexander's comments in class and elsewhere regarding sex, sexuality, transgenderism, and boys entering the girls' washroom were a manifestation of his sincere Christian beliefs is patently clear. That the Principal's adverse actions toward Mr. Alexander were in direct response to the latter's declaration and expression of his religious beliefs is also clear.

86. What is **not** at all clear is that Mr. Alexander engaged in anything that can objectively be called "bullying". What is **not** at all clear is that Mr. Alexander's religious expression is the result of "bias"—an accusation that smacks of what the OHRC calls "faithism". What is **not** at all clear is that Mr. Alexander's religious expression might objectively cause harm to any other person, as required by the SCC in *Multani* in order to infringe with impunity Mr. Alexander's religious freedom: "[T]he existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified".[102]

The Board fundamentally misapprehended the evidence before it

87. In conflating religious belief and expression with "bias", the Board fundamentally misapprehended the evidence, causing it to engage in a specific kind of religious discrimination known as "faithism". By ignoring the objective harm standard set out in the case law, the Board further errantly concluded that Mr. Alexander's religious expression—which the Board first conflated with "bias"—could legitimately be punished. Neither is true.

The Suspension

88. The Board's decision to uphold the 20-day suspension was unreasonable. The Board found not only that Mr. Alexander had bullied transgender students, but that such purported bullying was motivated by "bias", and even that Mr. Alexander's presence at St. Joseph's High School put transgendered students' safety at risk.

89. In support of these findings, the Board pointed to nothing other than statements made by Mr. Alexander that were clearly a declaration of his Christian beliefs and, while unpopular,

[102] *Multani* at para 67.

were objectively not hateful or threatening. The Board unreasonably ignored evidence that all of Mr. Alexander's comments found their source in his sincere religious beliefs, which is made all the more unreasonable—to the point of being disingenuous—given the Board is institutionally Catholic and therefore familiar with the beliefs to which Mr. Alexander adheres, many of which are identical to canonical Catholic doctrines.[103]

90. The Board was not able to identify any conduct that might reasonably substantiate a finding Mr. Alexander was biased against or posed a risk to transgender students. There was no evidence, for example, that Mr. Alexander ever attempted to prevent a male transgender student from accessing the girls' washroom, ever followed a transgender student, ever threatened to harm a transgender student, ever told a transgender student to self-harm, ever told a transgender student to commit suicide, ever said transgender students should be excluded from school or from classes that he was in, ever physically touched a transgender student in an unwanted way, or ever encouraged other students to threaten or hurt a transgender student or to block a transgender student from using the washroom of choice.

91. Ironically, the evidence before the Board is that the transgender students were the ones who wanted to exclude Mr. Alexander from classes because of his beliefs and mused about having weapons with them at school in the event they encountered Mr. Alexander.[104]

The Exclusion

92. The Board's Decision is also unreasonable as it relates to the January 8, 2023 exclusion.

93. Following the suspension, it was anticipated Mr. Alexander would return to school following the Christmas break, on January 9, 2023. As detailed above, counsel for Mr. Alexander wrote to Principal Lennox on January 6 stating Mr. Alexander's request that the conditions of his return, particularly the requirement he segregate himself from classes transgender students attended, be rescinded because they were discriminatory.

[103] Catechism of the Catholic Church, AR2 at 221.
[104] Lennox, AR at 195.

94. Principal Lennox and counsel for Mr. Alexander engaged in an email exchange on Sunday, January 8. Principal Lennox stated the conditions would not be varied. Counsel responded stating that an unfortunate and unnecessary conflict would result the next day because Mr. Alexander would not comply with a discriminatory condition he remove himself from classes. Principal Lennox then purported to exclude Mr. Alexander, claiming that, through counsel, Mr. Alexander had issued a threat and that his presence in the school or classroom would be detrimental to the physical or mental well-being of students.

95. In deciding to uphold the January 8 exclusion, the Board did not grapple with the Applicant's arguments that the conditions were unreasonable and discriminatory, did not identify any test for when exclusions are justified, and did not refer to any other cases where exclusions were or were not justified. Instead, the Board briefly concluded that a "conflict would ensue which would obviously negatively impact the school," without providing reasons for how or why this "obvious" negative impact justified an exclusion.

The Exclusion Extension

96. The Board's decision regarding the extension of the January 8 exclusion is also unreasonable.

97. The January 8 exclusion purported to completely prevent Mr. Alexander from physically attending St. Joseph's High School, which meant he could only receive his education either remotely or alone in an off-campus, segregated classroom. Principal Lennox decided to extend that exclusion for the entire remainder of the school year.

98. The Board provided almost no reasons as to why it found such an unprecedented exclusion to be reasonable. In addition to again failing to grapple with Mr. Alexander's central argument regarding religious discrimination, the Board failed to, for example, provide reasons as to how such a lengthy exclusion was reasonably not disciplinary in nature, how it did not contravene the OHRC's Education Guideline,[105] or how the exclusion was justified despite Principal Lennox having offered no explanation as to why Mr. Alexander

[105] AR2 at 180-218.

and the transgender students could not simply be placed in different classes from each other. The foregoing failures to justify the Decision are exacerbated by the failure to discharge the procedural duty to accommodate.

99. The Board blithely stated that "students had confirmed Mr. Alexander's behaviour made them feel unsafe" without any meaningful analysis as to whether these unidentified students' feelings had objective support in the evidence, or any reasoning as to how Mr. Alexander was sufficiently likely to engage in behaviour sufficiently serious so as to ground a semester-long exclusion. The SCC requires objectively ascertainable harm connected to an objectively ascertainable cause of harm before signing off on trenching religious manifestation.[106] The OHRC requires an entirely more rigorous consideration of factors before concluding a person with a protected characteristic must be segregated from the other pupils.[107]

The Board failed to grapple with the consequence of its Decision to Mr. Alexander's dignity and explain why its Decision best reflects the legislature's intention

100. The consequence of the Board's decision is exceedingly harsh. Imagine receiving the message that your protected characteristic is so odious, you must be ostracized and kept away from other people. That is the message the Decision of the Board sent, and the impact of that message on Mr. Alexander was in no way considered in the Board's reasons.

101. Failing to grapple with the particularly harsh consequences of its Decision to deny Mr. Alexander a basic education alongside his peers is contra-*Vavilov* and unreasonable in and of itself, read with nothing else. Even if the Board had some legitimate basis for infringing Mr. Alexander's right to be free of religious discrimination based on the belief Mr. Alexander objectively posed a threat to certain other students, which the Board did not, it was incumbent on the Board to explain why altogether segregating him like a leper, as opposed to exploring less drastic means of accomplishing its goal of keeping him away from certain students, was consistent with the legislature's intention. The Board did not

[106] *Multani* at para 67.
[107] AR2 at 187, 190-1, 195, 201, 210-12.

attempt even a cursory analysis in this regard, and due consideration is required on the *Vavilov* standard of reasonableness.

Conclusion

102. For the foregoing reasons, the Board failed in its duty to render a reasonable decision in accordance with the principles of *Vavilov*. Specifically, the Board's Decision failed to meaningfully account for or grapple with the central issues and arguments raised by the Applicant; failed to demonstrate the Board actually listened to the Applicant; failed to demonstrate that the Board was actually alert and sensitive to the matter before it; failed to be justified in relation to all of the law relevant to the Decision; failed to be constrained by elements of the legal and factual contexts operating as constraints on the Board's exercise of its delegated powers; fundamentally misapprehended the evidence placed before it; failed to grapple with the particularly harsh consequences of the Decision to the Applicant's dignity; and failed to explain why the Decision best reflects the legislature's intention.

RELIEF

103. The Applicant seeks relief in the form of an order of *certiorari* quashing the Board's unreasonable Decision to confirm:

a. A 20-day suspension imposed on November 23, 2022 and confirmed on December 20, 2022 by St. Joseph's Principal, Derek Lennox;

b. The exclusion imposed by Principal Lennox on January 8, 2023; and

c. The extension of the January 8 exclusion through to the end of the 2022-2023 school year, imposed by Principal Lennox and communicated through the Board's counsel on January 26, 2023.

104. The Applicant further seeks an order granting his appeal of the Suspension and Exclusions, because no other possible outcome would be capable of being reasonable or, in the

alternative, an order remitting the matter back to the Board to be decided in accordance with reasons delivered by this honourable Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of May, 2024.

James SM Kitchen

LIST OF AUTHORITIES

1. *Adga Group Consultants Inc. v Lane*, [2008] OJ No 3076, 295 DLR (4th) 425
2. *Alexander v Renfrew County Catholic District School Board*, 2023 ONSC 4962 (Appended)
3. *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) 1
4. *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, 181 DLR (4th) 385
5. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
6. *Canadian National Railway Company v Teamsters Canada Rail Conference*, 2018 ABQB 405
7. *Chamberlain v Surrey School District No. 36*, 2002 SCC 86
8. *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687
9. *Gourley v Hamilton Health Sciences*, 2010 HRTO 2168
10. *Kokkinakis v Greece*, Judgment of 25 May 1993, Series A No. 260-A
11. *Lane v ADGA Group Consultants Inc.*, 2007 HRTO 34
12. *Lavoie v Canada*, 2002 SCC 23
13. *Longueépée v University of Waterloo*, 2020 ONCA 830
14. *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12
15. *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6
16. OHRC "Policy on competing human rights"
17. OHRC "Policy on preventing discrimination based on creed"
18. *Ontario Human Rights Code*, RSO 1990, c H.19
19. *Quebec (Attorney General) v A*, 2013 SCC 5
20. *R. v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 1985 CanLII 69 (SCC)
21. *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30
22. *Syndicat Northcrest v Amselem*, 2004 SCC 47
23. *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31

OTHER MATERIALS:

Schedule A: Email correspondence between counsel for the Board and counsel for the Applicant

Joshua Alexander v Renfrew County Catholic District School Board

Court file no. DC-24-00002846-0000

Ontario
Superior Court of Justice

PROCEEDING COMMENCED AT **OTTAWA**

Factum

James SM Kitchen
Barrister & Solicitor
7070e Farrell Rd SE, #1063
Calgary, AB T2H 0T2
T: 587-330-0893
E: james@jsmklaw.ca
Counsel for the Applicant

Jennifer Birrell
jbirrell@ehlaw.ca
Counsel for the Respondent

RE: Josh Alexander Appeals

From james@jsmklaw.ca <james@jsmklaw.ca>

To John Summers<JSummers@bellbaker.com>

CC Jennifer Birrell<jbirrell@ehlaw.ca>, Patrick Twagirayezu<PTwagirayezu@ehlaw.ca>, Nancy Barton<nbarton@bellbaker.com>, Lexis Hagley-LeBlanc<Lhagley-leblanc@ehlaw.ca>, Rachel Dingman<rachel@jsmklaw.ca>

Date Tuesday, December 19th, 2023 at 1:00 PM

Hi John,

To be clear, you are telling me the panel has ordered that their Decision must not be provided to the public?

The Decision contains nothing that implicates the privacy of anyone preciously because the Panel directed at paragraph 10 of the Decision that all references to individuals would be arbitrarily initialized.

A direction to completely seal a decision on the merits in any legal proceeding is extremely exceptional. It is the type of thing reserved for cases involving serious national security concerns. Is it patently unlawful for the Panel to purport to order the Decision be sealed, especially without a request to do so from the Respondent supported with extensive evidence.

Regards,

James S.M. Kitchen
Barrister & Solicitor

203-304 Main St S, Suite 224
Airdrie, AB T4B 3C3
Direct: 587-330-0893
Office: 587-330-0892
Fax: 587-333-2321
Cell: 986-213-6321
Email: james@jsmklaw.ca

On Tuesday, December 19th, 2023 at 11:57 AM, John Summers <JSummers@bellbaker.com> wrote:

> James:

process as previously addressed remains and as such all publication bans remain in place which would extend to the Decision as well as Mr. Alexander's Will Say and your written submissions.

John E. Summers

Bell Baker LLP

700 - 116 Lisgar Street

Ottawa, Ontario

K2P 0C2

Tel.: (613) 237-3448 ext 340

Fax: (613) 237-1413

www.bellbaker.com

From: James S.M. Kitchen <james@jsmklaw.ca>
Sent: Tuesday, December 19, 2023 7:30 AM
To: John Summers <JSummers@bellbaker.com>
Cc: Jennifer Birrell <jbirrell@ehlaw.ca>; Patrick Twagirayezu <PTwagirayezu@ehlaw.ca>; Nancy Barton <nbarton@bellbaker.com>; Lexis Hagley-LeBlanc <Lhagley-leblanc@ehlaw.ca>; Rachel Dingman <rachel@jsmklaw.ca>
Subject: RE: Josh Alexander Appeals

Hi John,

As is my practice in cases where the decision maker has imposed a publican ban, I am providing notice to both the decision-maker and the opposing side that I intend to publish the Decision of the Panel regarding Mr. Alexander's appeals. I expect this publication to occur on Wednesday, December 18. I don't intend to apply any redactions as no individuals other than Mr. Alexander have been identified in the Decision.

the appeal has now been lifted in light of the Decision being released. Mr. Alexander wishes to publish his written submissions and his Will Say (attached for reference).

Regards,

James S.M. Kitchen

Barrister & Solicitor

203-304 Main St S, Suite 224

Airdrie, AB T4B 3C3

Direct: 587-330-0893

Office: 587-330-0892

Fax: 587-333-2321

Cell: 986-213-6321

Email: james@jsmklaw.ca

On Monday, December 18th, 2023 at 7:54 AM, John Summers <JSummers@bellbaker.com> wrote:

> Good morning.
>
> Please find attached the Decision of the Panel regarding Mr. Alexander's appeals. Would you kindly confirm receipt of this email. Thank you.

John E. Summers

Bell Baker LLP

700 - 116 Lisgar Street

Ottawa, Ontario

K2P 0C2

Tel.: (613) 237-3448 ext 340

Fax: (613) 237-1413

www.bellbaker.com

CITATION: *Alexander v. Renfrew County Catholic District School Board*, 2023 ONSC 4962
COURT FILE NO.: 23-25
DATE: August 31, 2023

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Josh Alexander, Applicant

AND:

Renfrew County Catholic District School Board, Respondent

BEFORE: Hooper J.

COUNSEL: James Kitchen and Jody Wells for Josh Alexander

Jennifer Birrell and Patrick Twagirayezu for RCCDSB

Antoine d'Ailly for Matt Alexander and Nicole Alexander

HEARD: June 5, 2023

REASONS FOR DECISION

HOOPER J.

[1] Josh Alexander is a 17-years old student at St. Joseph's Secondary School in Cobden. When he was 16-years old, the principal of St. Joseph's suspended and excluded Josh due to incidents of alleged bullying and harassment. Josh seeks to appeal the principal's suspension and exclusion decisions to the Renfrew County Catholic District School Board. While Josh's parents support his decision to appeal, they have chosen not to advance the appeal on his behalf. The *Education Act*, R.S.O. 1990, C. E.2 does not allow a student Josh's age to appeal as of right. Normally, that appeal lies with the parent or guardian unless the student has withdrawn from parental control.

[2] Josh asserts that he withdrew from parental control as of December 22, 2022. His parents agree with his position. The School Board, however, refused to grant Josh standing on the basis that there was insufficient objective evidence to support Josh's assertion. Accordingly, Josh has not been permitted to advance an appeal of the suspension and exclusion decisions independently from his parents.

[3] For the reasons that follow, I find that Josh has withdrawn from parental control as of December 22, 2022 and has standing to advance his appeals to the School Board.

Procedural History

[4] This matter was originally set to proceed on April 23, 2023; however, a preliminary issue was raised by the School Board regarding the role Josh's parents – Matt and Nicole Alexander –

should play in the proceeding. Josh's parents are not parties to this application, and while Matt is an affiant supporting his son's position, Nicole had not provided any evidence nor was she present at the original hearing. In addition, it was unclear as to whether Matt and Nicole were aware of the impact of the declaration being sought, as they had not been served with the material before the court.

[5] As a result, on consent, the matter was rescheduled for June 5, 2023. On that date, both Matt and Nicole were present, along with their legal counsel. Matt and Nicole orally advised the court that they are aware of the effect of the granting of this application and remain supportive of their son's position that he has withdrawn from their control and should be treated as an adult.

Issue before the Court

[6] Nothing in this decision should be taken as a comment, either way, on the underlying conduct by Josh or the validity of the suspensions and exclusion imposed by the principal. **The only issue before me at this time is whether Josh Alexander has withdrawn from parental control.**

Statutory Framework

[7] Section 309 (1) of the *Education Act* grants a parent or guardian the exclusive right to appeal a suspension or exclusion of their child from school unless the child is 18 years old or is 16 or 17 years old and has withdrawn from parental control. There is no definition of *"withdrawal from parental control"* under that statute.

[8] Section 65 of the *Children's Law Reform Act,* R.S.O. 1990, c. C.12, provides a statutory right to a child who is 16 or more years of age to withdraw from parental control. There is no formal process for this to occur; it is the right of the child: *R.G. v. K.G.,* 2017 ONCA 108 at para. 43.

[9] From an education standpoint, the effect of a child withdrawing from parental control includes the following:

a. The parents are no longer responsible for ensuring the child attends school;

b. The child is entitled to attend school where the child lives, regardless of the parents' address(es);

c. The child is entitled to privacy in their information; and

d. The child is entitled to be the sole point of contact for information and processes relating to disciplinary issues.

[10] Beyond the impact to a child's educational decisions, a finding that a child has withdrawn from parental control changes the legal relationship between the child and their parents. In effect, the child is declared to be an independent adult. The child would no longer be a dependent for insurance purposes, medical benefits, or income tax considerations.

[11] This is a permanent declaration.

Background Facts

[12] Josh is a resident of Cobden, Ontario. At the material time for this application, he was 16 years old. In the fall of 2022, Josh transferred from the local public school board to St. Joseph's, which is part of the Catholic school board system.

[13] On November 23, 2022, Josh was suspended pending an investigation by St. Joseph's principal to determine whether an expulsion should be recommended. On December 20, 2022, the principal wrote to Josh's parents confirming the twenty-day suspension for reasons including bullying and harassment towards other students. It is uncontested that up to December 20, 2022, Matt, Nicole, and Josh were actively involved in dealing with the school regarding these incidents and the suspension.

[14] Josh retained counsel regarding an appeal on December 22, 2022. Counsel served the School Board with a Notice of Intention to Appeal on January 5, 2023. The Notice of Intention to Appeal listed Josh as the sole Appellant. In his correspondence enclosing this Notice, counsel stated: *"For the purposes of this appeal, Mr. Alexander has withdrawn from parental control, is a mature minor, and is competent to instruct counsel in the conduct of the appeal."*

[15] A child cannot withdraw from parental control for a limited purpose. The School Board advised Josh's counsel of this.

[16] Josh was scheduled to return to school as of January 9, 2023 on certain conditions. He did not agree to those conditions. Following a further exchange of correspondence, the principal exercised his authority under s.265(1)(m) of the *Education Act*, and section 3(1) of Regulation 474/00 – *Access to School Premises*, and excluded Josh from school until the conditions of his return could be resolved. As with a suspension, there is a similar right of appeal of an exclusion.

[17] Josh attended school on January 9, 2023 in contravention of the principal's decision to exclude him. A second suspension was issued. Following this further suspension, the School Board sought documents to support Josh's withdrawal from parental control. The School Board provided a list of the types of evidence normally provided including a lease agreement with Josh listed as the tenant, employment information to support financial independence and/or written statements from Josh and/or his parents.

[18] Following this correspondence, the School Board received affidavits from both Josh and Matt. Josh's affidavit, sworn January 23, 2023, provided the following evidence:

- He has withdrawn from parental control as of December 22, 2022 when he hired a lawyer to appeal his suspension.
- He makes almost all decisions regarding his education for himself, without any control from his parents.

- He has chosen to still live at home as he has an excellent relationship with his parents, but he decides matters for himself. His parents no longer have control over his life.

- He makes his own medical and lifestyle choices. While most of his choices are with his parents' blessing, he is the ultimate decision maker.

[19] Matt's affidavit, sworn January 24, 2023, supports Josh's position of having withdrawn from parental control and includes the following evidence:

- He and Nicole have raised their son to be increasingly independent.

- Josh has his own stream of income of which he has complete control.

- Josh travels extensively without direct oversight of his parents

- Although Matt enjoys providing advice to his son when he seeks it, Josh has been encouraged to make almost all decisions regarding his life for himself without parental control. Josh is also expected to take responsibility for his decisions.

[20] There is no evidence of financial independence. As of December 2022, Josh lived rent-free at home with his parents. There is also no evidence of a break in the parental/child relationship. The position put forth in these affidavits is that Josh's independence evolved naturally, with the love and encouragement of his parents, and by December 22, 2022 had reached a point in which he had withdrawn from parental control and should be treated as an adult.

[21] Upon receiving these affidavits, the School Board took the position that they were insufficient. As a result, the School Board maintained its refusal to grant Josh standing in his appeals and the within application was commenced.

Law and Analysis

[22] As stated above, unlike other jurisdictions, Ontario does not have a formal procedure for a child withdrawing from parental control: *L.(N.) v. M.(R.R.)*, 2016 ONSC 809 at para. 123. The common law has also recognized the right of a child to withdraw from parental control once the child has reached the age of discretion: *R.G. v. K.G.,* 2017 ONCA 108 at para. 43. However, in determining whether to grant an order under s. 65 of the *CLRA*, the Ontario Court of Appeal in *R.G.* confirmed that more than the child's age and stated withdrawal should be considered. The court has a further responsibility to inquire as to the reasons for the withdrawal, the utility of the remedy, and whether the remedy is in the minor's best interest: see *R.G.* at para. 58.

[23] In *Gibson v. Gibson*, 2020 ONSC 5506, the mother sought disclosure of her son's address. The son was seventeen-year-old, living with his father, and had refused to tell his mother where he and the father were living. In maintaining his refusal to advise his address, the father argued that the seventeen-year-old had effectively withdrawn from parental control and the mother was no longer entitled to his personal information. The court disagreed stating the minor had not withdrawn from parental control as he was still living with his father. Before me, the School Board argues that this is indicative of the need for financial independence to meet the test of withdrawal

from parental control. I do not agree that *Gibson* stands for such a broad proposition. There was no evidence before the court in *Gibson* of the minor's position, nor was the court provided with any reason to make this type of declaration.

[24] In *Re Haskell and Letourneau*, 1979 CarswellOnt 101 (Ont. Sup. Ct.), the minor child brought an application for support from his parents. The parents had divorced and initially the child lived with his father. When his father remarried, and the second wife did not get along with the child, the father refused to continue to have custody. The situation at the mother's home was untenable. As a result, the minor moved in with another family. The parents refused to pay financial support to the child, claiming that he had withdrawn from parental control. In refusing to make such a finding, the court held:

> 69. In the view of this Court, the concept of the "withdrawal from parental control" at age 16 means a "voluntary" withdrawal, the free choice, indeed, of the child to cut the family bonds and strike out on a life of his own. On taking on this personal freedom, the child assumes the responsibility of maintaining or supporting himself. It is his choice, freely made, to cut himself away from the family unit. Once this choice is freely made and the responsibility accepted by the child, the family unit has, in effect, been severed and the responsibility of the parents to support the child thus ceases.

[25] In *Re Clegg* 2016 ONSC 5292, the sixteen-year-old minor left her father's residence and moved in with a friend from April 2016 for the balance of the school year. She delivered a letter to the principal indicating she had withdrawn from parental control and was asserting her rights pursuant to various sections of the *Education Act*. In confirming her right to do so, the application judge held:

> [13] Olivia had a common law right to withdraw from parental control and a statutory right to do so at age 16. Olivia exercised that right on April 13, 2016. She did not require a court order or a declaration permitting or enabling her to withdraw from parental control. She did not require a court order to protect her privacy at her school in Oakville because, after informing the principal in writing by letter dated April 22, 2016, the principal respected her instructions and did not provide information to her father. She did not require a court order to prevent the police from apprehending her and taking her back to her father's home because she informed the police that she had withdrawn from her father's control and the police respected her right to do so.
>
> [35] On the basis of that evidence, I draw the following conclusions. First, my impression of Olivia at the time of the hearing on April 28, 2016 is reinforced. She is articulate, thoughtful, and intelligent. She is a remarkable young woman of whom both parents should be proud. Second, she has sound reasons for wanting to accelerate her university entrance and to attend a university in Florida. Third, at age 17, her wishes and preferences must be respected. Going to university in Florida is in her best interests and her father would not permit that plan to unfold. I need

> not consider the father's request for a temporary or permanent custody order but on this record, I must dismiss it.

[26] There are also a series of cases in which the issue before the court is whether an adult child has withdrawn from parental control. In *Warner v. Warner,* 2017 ONCJ 920, the court faced the issue of whether an adult child remained under parental control. In finding that the child did, it held at para 54:

> I adopt and apply the maxim that economic dependency on at least one parent may be sufficient to ground a finding that a child remains under the parental control or charge. In my view, the foundation for such a finding is even stronger when the child also remains emotionally dependent on at least one parent.

[27] In *K.A.B. v. Ontario (Registrar General of Vital Statistics)*, 2013 ONCJ 684, the court considered a change of name application by a sixteen-year-old without the consent of her parent. The applicant was a transgender youth who identified as female. The only parent involved in her life was her mother who did not accept that her child was transgender. In granting the application absent parental consent, the court found that the mother no longer had lawful custody of K.A.B. and no longer made decisions about K.A.B.'s education or medical care.

[28] The above decisions highlight the seriousness of this declaration; however, they are of limited precedential assistance given the unique facts of this case. The parties have not referred to any authority where both parents and the minor all agree the minor has withdrawn from parental control yet an unrelated party, in this case the School Board, does not accept that position. I understand the School Board's skepticism. The usual hallmarks the court looks to in resolving disputes within the family as to whether a child has withdrawn from parental control are not present. Josh's residence remains with his parents. His parents are financially supporting him. Both his and his father's affidavits include language such as Josh makes "most" of his own decisions, not all.

[29] However, in my view, once Josh withdraws from parental control, there is no requirement for his parents to stop financially supporting him or to stop helping him make significant decisions. Parents support their independent adult children all the time. Major decisions are often discussed, with parental input sought. A declaration that the child has withdrawn from parental control ends the legal obligation of financial support, but financial support may still be given gratuitously.

[30] Unlike *Re Haskell, supra,* there is no suggestion Josh's decision to withdraw from parental control is anything but voluntary. The School Board does not argue that such a declaration is against Josh's best interest. Josh seeks this declaration for a legitimate reason. He and his parents understand the effect of this declaration and have accepted it. I do not believe a court has the right to overrule the manner in which a family decides to structure itself, just because it is outside the norm.

Conclusion

[31] I therefore find, based on the evidence before me, that Josh Alexander has withdrawn from parental control as of December 22, 2022. He has standing to bring the appeals of his suspensions and exclusion.

[32] If the parties cannot agree to costs, the applicant will have until September 15, 2023 to file cost submissions of no more than three pages excluding a bill of cost and any offer to settle. The respondent will have until September 22, 2023 to file responding submissions of equal length.

Justice J. Hooper

Date: August 31, 2023