

Thinking about what ‘popped up’ at the pop-up teaching event:

Servatius v. Alberni School District No.70, 2022 BCCA 421

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Peter Olorundimu
CEO, Harvest Recycling

We're on it.


British Columbia

Mother who fought against smudging demonstration at Vancouver Island school loses appeal

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Court of Appeal also orders woman to pay the school district's court costs

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A child holds a bowl with burning sage in an Indigenous cleansing ritual known as smudging. (Martha Troian/CBC)

Citation: *Servatius v. Alberni School District No. 70*, 2022 BCCA 421

Date: 20221212
Docket: CA46683

Between:

Candice Servatius

Appellant/
Respondent on Cross Appeal
(Petitioner)

And

Board of Education of School District No. 70 (Alberni)

Respondent/
Appellant on Cross Appeal
(Respondent)

And

Attorney General of British Columbia

Respondent/
Respondent on Cross Appeal
(Respondent)

And

Nuu-chah-nulth Tribal Council

Intervener
(Intervener)

Restriction on publication: A publication ban has been imposed to restrict the publishing, broadcast, or transmission of the given names of the appellant's children. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Justice Dickson
The Honourable Justice Griffin
The Honourable Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated January 8, 2020 (*Servatius v. Alberni School District No. 70*, 2020 BCSC 15, Nanaimo Docket S79991).

Counsel for Candice Servatius: K.A. Bastow

Counsel for Board of Education of School District No. 70 (Alberni): R.W. Sieg

Counsel for Attorney General of British Columbia: K. Chewka
K.M. Fast

Counsel for Nuu-chah-nulth Tribal Council: L. George-Wilson
J. Walker

SERVATIUS v. ALBERNI SCHOOL DISTRICT NO 70.

2022 BCCA 421



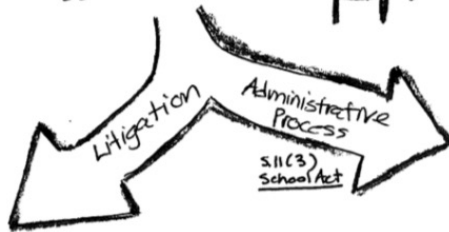
SD-70 Elementary School
1/3 Indigenous Students

Sept 2015 - smudging demonstration in classroom

Jan 2016 - Hoop Dance (and prayer) at assembly

I demand prayer not happen again!

These activities are OK!



SD-70

AGBC

Nuu-chah-nulth Tribal Council

PLEADINGS

- school is imposing prayer + religious rituals
- coerced to participate in cleansing ritual
- in facilitating religious activity, SD70 violated:
 - ① s. 2(a) Charter
 - ② it duty of religious neutrality

RELIEF SOUGHT

1. Declaration that these actions violated her Freedom of Religion
2. Order prohibiting schools from allowing religious practices
3. Costs

FIVE DAY TRIAL (Nov 19-22, 2019)

- 16 affidavits
- cross-examination
- facts and "social facts"

Servatius v. Alberni SD-70, 2020 BCSC 15

"Being taught about beliefs is not an infringement of religious freedom - even when this teaching is done by an Elder at close range in a manner that engages a student's sense of smell as well as her senses of sight and sound, and even if this teaching results in some dissonance." [para 108, trial decision]

S has failed to show that the smudging or prayer by hoop dancer interfered with her or her children's freedom of religion. ∴ no need to consider justification under s. 1 of the Charter

Given S's limited means, I will exercise discretion to order each side to bear its own costs



Thompson J.



Trial judge was wrong on merits

Trial judge was wrong on costs



SD 70

[para 22-97] Legal Framework for consideration of Religious Freedom ... in general

S has not shown the judge made a palpable and overriding error, or that he misapprehended the evidence. "She simply wishes this court to re-weight it. That is not this court's role." [240] ∴ No need for a proportionality analysis.

COSTS IS ANOTHER STORY! S to pay costs in both actions
"in litigation purporting to advance public interest arguments, it is generally not appropriate for 'ghost' parties to lurk in the background, providing extensive funding, evidence, advice or information." [para 274]



[249] ... Ms. Servatius also made written submissions to the judge that her family was of "limited means" and would "suffer hardship" if costs were awarded against her, arguing that the School District had a "superior capacity" to pay costs. The judge appeared to accept these submissions.

[277] Ms. Servatius's petition sought not only a declaration that her religious freedom was violated, but she also sought an order prohibiting the school from "facilitating or allowing religious practices". Ms. Servatius advanced the position before the judge that, by hosting two rather innocuous Indigenous cultural events, the school was favouring Indigenous spirituality, and, as a consequence, no such Indigenous cultural events should ever be hosted in schools. This very broad and vague relief seeking to restrict unknown future actions of the School District from ever hosting Indigenous cultural events was not supported by any version of the facts or interpretation of the law and was untenable from the start. However, its broad implications had to be defended by the School District.

[256] In her post-appeal written costs submission, Ms. Servatius disclosed, for the first time, that the JCCF was funding her fees and disbursements in the litigation, as well as agreeing to help her pay any award of costs by agreeing to fundraise for her if costs were awarded against her.

[257] I note that different counsel represented Ms. Servatius at trial than on appeal, although both were supported by the JCCF funding. It would have been preferable for Ms. Servatius to be transparent to the judge about the JCCF funding, as it is clearly relevant to the public interest analysis that a special interest group is funding the litigation, not the named petitioner. In my view, had the judge known this fact he would not have exercised his costs discretion in the way he did. He was clearly influenced by the misleading assertions about Ms. Servatius's capability of weathering the burden of paying a costs award.

[280] In the circumstances, the JCCF's involvement in effect insulated Ms. Servatius from normal costs consequences and put the School District on an uneven playing field in having to defend the very broad relief advanced in this litigation.

PC



RJ



KC



SR



JW



RJ



PP



PC



DL



♀ PC Intro

♀ RJ Images + Handout

♀ KC PP - Constitutional Pillars + Religion

♀ SR Law + Performance + Participation

♂ WE How to show respect, prayers in classroom

♀ RJ Children + Faith + Embedment

♀ PD Access to Justice Courts + Prof. Conduct

♀ PC Law + Creativity and Proportionality

♂ DL The heart of the matter: religious law + teachings

♀ RC wrapup

PC
♀

Intro

♀

RJ

Images +
Handout

♀

KC

PP - Constitutional
Pillars + Religion

♀

SR

Law + Performance
+ Participation

♂

JW

How to show
respect; prayers in
classroom

↑
applause

↑
intervention

♀

RJ

Children + Faith
+ Embedment

♀

PP

Access to Justice
Certs + Prof. Conduct

♀

PC

Law + Creativity
and Proportionality

♂

DL

the heart of the
matter; religious
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♀

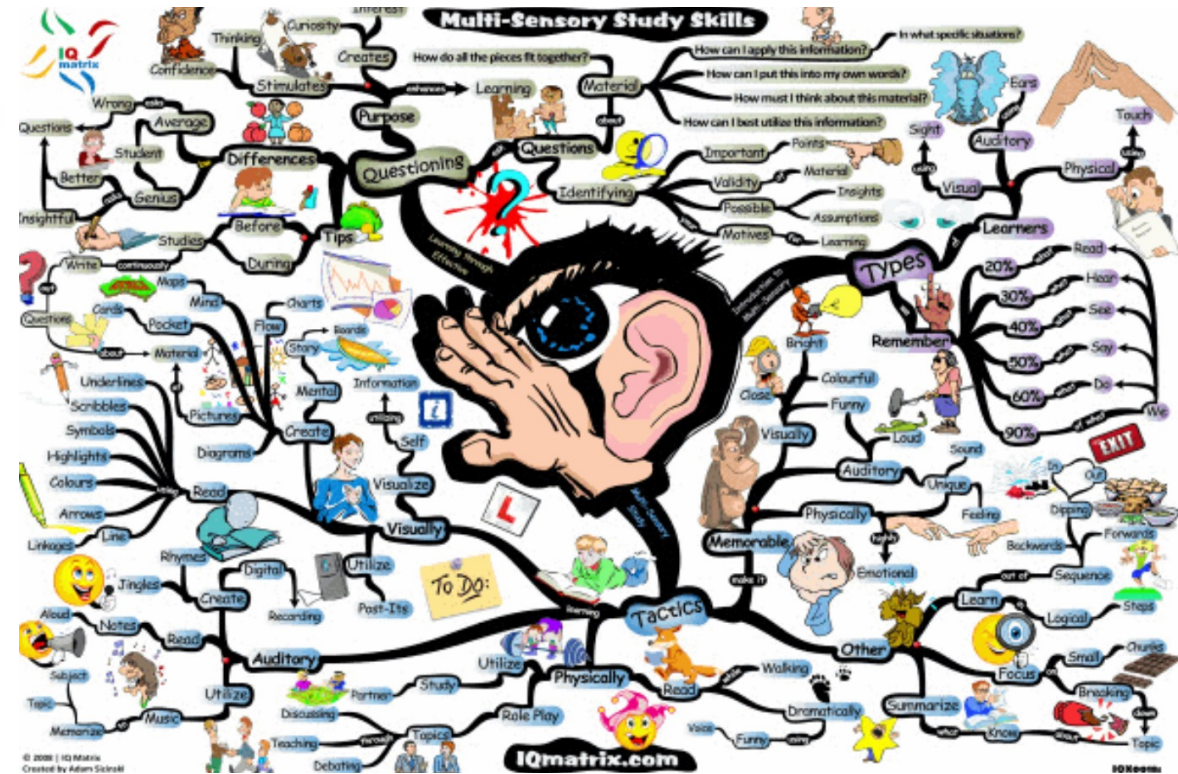
PC

wrapup

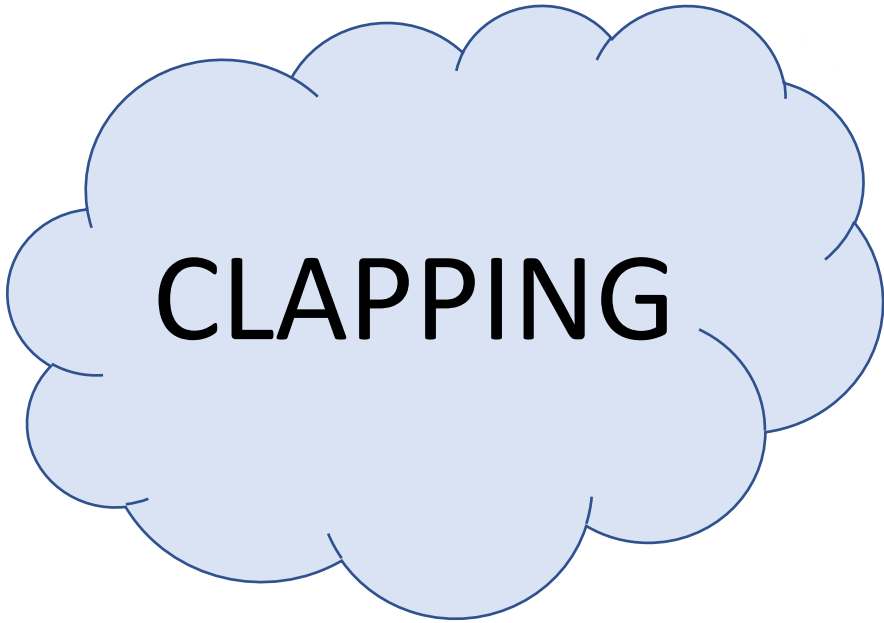
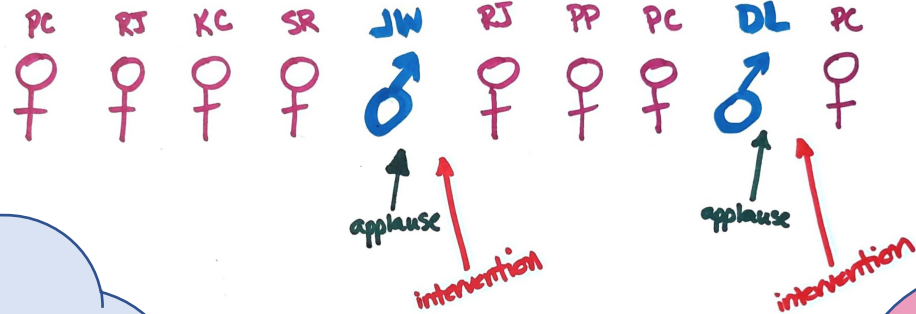
A Judging Mind?



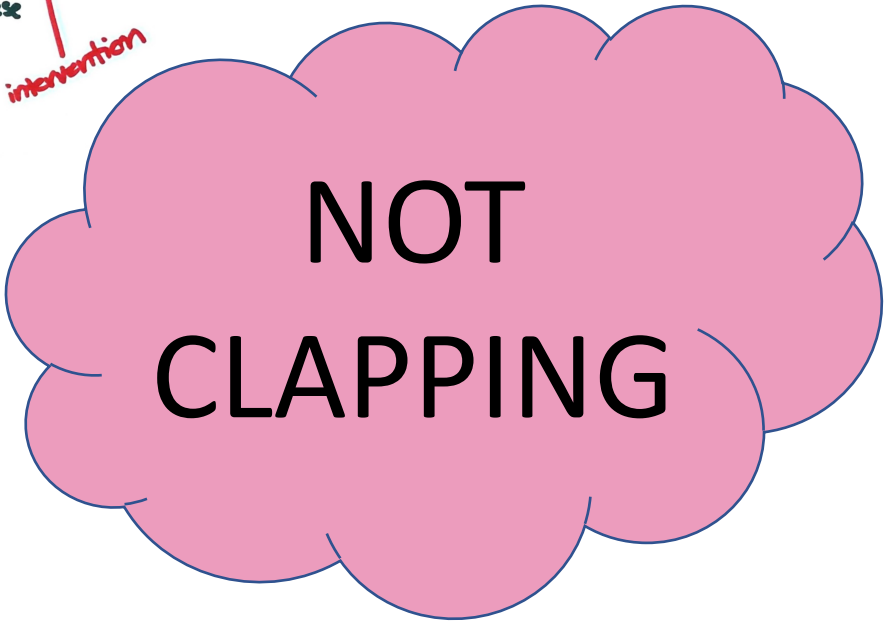
A Tasting Mind?



So...what's the problem?



**AN ACT?
(WHO IS SHOWN RESPECT?)**



**AN OMISSION?
(WHO IS NOT SHOWN RESPECT?)**

BUT WHAT ABOUT INTENTIONS?



CLAPPING



NOT
CLAPPING

- Clap to show we enjoyed the performance/speech?
- Clap to express gratitude to performer/speaker?
- Clap because it is convention to clap at the end?
- Clap because others are doing it?

- Is clapping and individual or a collective activity?
- What might clapping 'perform' independent of our individual intentions?

Might we think differently about collective responsibility in the face of some injuries or errors?



What might be learned from different Indigenous legal orders about identifying and responding to injury?

