

ONTARIO SUPERIOR COURT OF JUSTICE
OTTAWA SMALL CLAIMS COURT

BETWEEN:

Robin BROWNE and 613-819 BLACK HUB and Sam HERSH and OPIRG-GRIPO OTTAWA and
Joseph EASTHAM and OPIRG-CARLETON and COALITION AGIANST MORE SURVEILLANCE, and
CRIME AND PUNISHMENT EDUCATION PROJECT and Jeffrey BRADLEY and BLACK STUDENT
LEADERS ASSOCIATION

PLAINTIFFS

- and

ONTARIO POLICE SERVICES BOARD

DEFENDANT

Before: Deputy Judge Notturmo

Heard: May 20-21-22, 2025

TRIAL DECISION

Background and the Parties

1. Further to the motion heard September 4, 2024, before Deputy Judge Sheppard, the remaining Plaintiffs in this trial were Robin BROWNE, 613-819 BLACK HUB and Jeffrey BRADLEY. As such, there were two individuals and one not-for-profit corporation.
2. The Defendant, Ontario Police Services Board ("OPSB") is a police services board with responsibilities and public duties as set out in the then *Police Services Act* ("Act").

Claim before the Court

3. The Plaintiffs filed a Plaintiffs' Claim on August 9, 2023, in the amount of \$27,500.00 total damages pursuant to violations of sections 2, 7 and 24(1) of the *Charter of Rights and Freedoms* ("the Charter") for being deprived of meaningful and effective participation in public meetings.

4. The trial, however, proceeded only on the following Claims:
 - a. Section 7 *Charter* violation as against Mr. Browne;
 - b. Section 2 *Charter* violation as against Mr. Browne (\$5,000.00), Mr. Bradley (\$2,500.00) and 613-819 Black Hub (\$2,500.00).
5. The Defendant denies that the Plaintiffs are entitled to the relief sought. In January 2023 the OPSB passed a motion to amend section 31 the Procedure By-Law No. 3 of 2014 (“By-Law”), which sets out the procedure for hearings of delegations. It takes the position that the changes implemented by the OPSB were made in good faith and were within the statutory powers granted to the OPSB pursuant to the *Act*.

Evidence at Trial

6. This was a lengthy three day, six-witness trial, namely, Robin Browne, Jeffrey Bradley, Leo Alexander Smallwood (“Sandy”), Sam Hersh and Farnaz Farhang for the Plaintiffs and Martha Carr (“Marty”) for the Defendant.
7. Broadly speaking, the evidence presented by the Plaintiffs through their witnesses was that they were aware of the governance surrounding delegations and tried to work within its framework to participate. When listening to the oral evidence, this is about the frustration experienced with being able to delegate and they are trying to understand why the OPSB allows for public delegation on the one hand and then why the same OPSB creates selectively applied hoops to be jumped through with limits or encumbrances on the public delegation.
8. The witnesses presented on behalf of the Plaintiffs testified to their past delegations and/or submissions to the OPSB but express their frustrations in either their ability to do so or how they were impeded from doing so.
9. The witnesses for the Plaintiffs presented as credible and reliable witnesses.
10. Mr. Browne is a retired Federal Public Servant with his service having began in 1999. He is now the coordinator of 613-819 Black Hub and testified that the organization was co-created in December 2017 with Richard Sharp and addresses systemic anti-black racism. It has corporate status and is volunteer-driven, so activity fluctuates at any given time. For safety reasons, there is no membership list, but it has about 200 subscribers on its mailing list.

11. Mr. Browne testified that his first delegation was in November 2020 and for about four-and-a-half-years delegated to the OPSB almost monthly. He described his availability to do this as a “perk of retirement”.
12. Mr. Browne testified that when he delegates his interests are two-fold with the first being his affiliation with 613-819 Black Hub (which focuses on stopping anti-black racism) so the interest is the larger black community but secondly it is also personal. Mr. Browne has two sons, and their safety is on his mind indicating that “every time my sons walk out the door it is like spinning the wheel of fortune and hoping it doesn’t end up on *dead*.”
13. He testified to noticing the overall lack of interaction or almost no interaction with the OPSB stating that the delegates that are more “pro-police” get more questions and that in 4.5 years he can “count of two fingers” the questions asked of him and that was prior to February 2022 before the OPSB changed.
14. Mr. Bowne testified on the topics on which he delegates as being exclusively overall anti-black racism - reforms, community policing, issues identified by police data such as use of force and traffic stops getting worse over the past ten years.
15. Mr. Browne testified about oral versus written delegations and the importance of the oral ones since those are recorded and the media covers them. The written delegations are neither accessible on the OPSB website nor are they covered by the media. There was also testimony that there is no evidence whether the written ones are read. The Defendant’s witness, Martha Carr, testified that written submissions are circulated to the OPSB members and she believes that the written delegations have been mentioned but cannot say so definitively. She also testified that while the YouTube meetings are archived, the written delegations are not.
16. *Exhibits 1-3* are media coverage with respect to delegations. The November 13, 2023, Ottawa Citizen article (*Exhibit 3*) was referred to and Mr. Browne testified that it was written by the now former Chair of the OPBS as a rebuttal to the November 11, 2023, article (*Exhibit 2*). He testified that contrary to the article the “welcoming of public input” is not accurate.
17. This led to Mr. Browne testifying as to his frustrations on a at least 4 occasions with the process and how he was allowed to use the proxy process for 613-819 Black Hub once but on three other occasions he was refused to delegate all together. For 613-819 Black Hub, Mr. Browne spoke of the year 2022 (in the aftermath of the convoy) when *in person only*

was a requirement of delegation and he testified to the adverse impact on the 613-819 Black Hub delegation.

18. The modality of the meetings at the time of the trial were only virtual.
19. Mr. Browne testified about his objectives, concerns, and as mentioned, frustrations and key elements of the very detailed evidence of Mr. Browne is broken down as follows:
 - a. The importance of oral delegations;
 - b. Lack of interaction by the OPSB with delegates with critical perspectives;
 - c. Media coverage and its importance;
 - d. Process of creating delegation and changes that led to further restrictions;
 - e. “Disclaimer” or “preamble” being included by the Chair at the opening of the meetings under the guise of maintaining decorum;
 - f. Issues with delegating post amendment to the By-Law:
 - i. Getting a proxy to delegate - denial of request;
 - ii. June 26, 2023 - deemed out of order and the way it was done;
 - iii. Denial of July 24 and November 24, 2023 delegation requests; and
 - iv. Councillor Lo’s delegation and arbitrary use of discretion.
20. Mr. Browne was cross examined with nothing being added or taken away from his evidence in chief.
21. Mr. Bradley, (second remaining Plaintiff), who obtained his PhD in legal studies at Carleton University and part-time teacher in several universities testified virtually. His interest in delegations at the OPSB stemmed from the death of Mr. Floyd in May 2020 and seeing an increase in police violence in marginalized communities and being alarmed by the fact that systemic racism was becoming more prevalent.
22. Mr. Bradley delegated in several capacities; as a resident of the City of Ottawa and for the Criminalization and Punishment Education Project amongst others. Much like Mr. Browne, the importance of bringing forward items, concerns and observations in the form of a delegation was to generate awareness and for it to become part of the “public record”.
23. Mr. Bradley viewed the “preamble” prior to delegations when Mr. El Chantiry was Chair as controlling meetings from an overreach - a fear tactic so people would stop attending. He viewed this as trying to stifle freedom of expression. His personal impression was that

the OPSB was trying to limit critical commentary whereas this was to be a space where people could talk about the issues and action them.

24. As with the other Plaintiff witnesses, Mr. Bradley was similarly affected in 2022 by not being able to delegate in person while others were allowing for a hybrid option. He further spoke of his attempt to delegate in December 2023 but was refused by the OPSB because of late submissions (*Exhibits 17 and 18*). Leading up to this evidence, he testified to the process that had to be followed from receiving the agenda to getting to the point of delegation and the difficulties or less than forthcoming availability of information on the process.
25. Mr. Bradley, following the refusal to delegate at the December 18, 2023, delegation, was left with both the question “Did I waste my time?” and the disappointment of the inability to express himself given all the labour that went into the feedback he wished to provide at the time he wished to provide it.
26. The evidence on this point that the Plaintiffs and more specifically Mr. Bradley was putting forth to the court was to get to the crux of how the OPSB exercised its discretion when it came to refusing late submissions. The Plaintiffs contrasted this discretion with “higher powered individuals” whose delegations perhaps lined up more with the OPSB’s views. The evidence heard led to the question the Plaintiffs wanted answered being “Does the OPSB use its discretion to refuse late submissions in an even-handed and fair way, or does it use it to limit public participation generally?”
27. Mr. Bradley was cross examined with nothing being added or taken away from his evidence in chief.
28. Mr. Leo Alexander Smallwood (known as “Sandy”), a previous chair of the OPSB for approximately 10 years between 2012-2022 (*Exhibit 19*) testified virtually for the Plaintiffs. He spoke of the OPSB appointment process and testified about public participation being part of the core mandate of the OPSB and the importance of not raising obstacles or impediments that make participation by the public more difficult.
29. Mr. Smallwood testified that general disposition or attitude on receiving delegations of the public changed frequently and the level of enthusiasm for public participation varied depending on the make-up of the OPSB at the time in question. In his view and role as vice-chair, he was of the belief that public participation was critical and fundamental.

30. The two remaining witnesses, Ms. Farnaz Farhang and Mr. Sam Hersh, although no longer Plaintiffs, testified to their frustration and inability to testify before the OPSB.
31. Ms. Farhang whose educational background is both a BA and MA in Criminology did freelance research consulting and facilitating. Generally, her delegations were as an affiliate of the CAMS Ottawa group and she testified that although she first attended at a meeting in person in 2019, she began delegating in 2020 until 2023 when she attempted to delegate in October 2023 after an amendment to the OPSB's By-Law but was refused for submitting her delegation 27 minutes late (*Exhibit 24*). She further testified as to her request for reconsideration given this was her first delegation since the By-Law changes and thought the position being taken was unnecessarily rigid.
32. In cross examination she was shown an excerpt from a twitter account where handle *Nearnaz* outlined the noon deadline (*Exhibit 25*).
33. Mr. Hersh testified about the ways in which the OPSB's amended By-Law had a "chilling effect" on his ability to delegate almost completely after it was created in 2023. He was familiar with the Motion to amend (*Exhibit 4*) and the February 2023 amendment and viewed it as a restriction to delegations and the OPSB picking and choosing what to allow or disallow based on their own agenda.
34. The evidence heard by the Court was the contextualized lived experience of racialized citizens who were seeking an appropriate remedy for denial of expression in this important body.
35. The Defendant called one witness, Martha Carr (Marty) who was appointed to the Board in December 2022 and was the Vice Chair since January 2024. She explained the role of the OPSB and its mandate/strategic plan. She distinguished between the now *Community Safety and Policing Act* and how the requirement for public consultation is enshrined in it versus the OPSB and its meetings which are enshrined in By-Laws.
36. Ms. Carr agreed with the testimony of the Plaintiffs' witnesses on the current process to apply to delegate (prior to noon on the Friday before with a written copy of the delegation) and further testified that prior to the change in the By-Laws no information on the delegation content was needed and one could make the request by 4PM on the day of the meeting.

37. Ms. Carr spoke of the discretion of the OPSB and gave examples of denying a delegation based on it not being submitted on time and denying it in full or in part if the topic was not within the mandate of the OPSB. She testified that the deadline to apply was included to help the OPSB manage the meetings and conduct its business stating there were operational challenges without knowing the numbers of delegates preciously and being able to have substantive discussions. It is noted that this discretion was not applied/afforded to the specific examples given by the Plaintiffs during the trial.
38. When questioned on the “Disclaimer” or “preamble” being included by the Chair at the opening of the meetings, Ms. Carr testified that the Chair was simply interpreting section 31(6) now section 31(10).
39. In cross examination it was admitted that she was not on the Board at that time and that the verbal preamble was not in the above-noted sections of the By-Laws.
40. Ms. Carr testified on what she thought the involved OPSB members thought or did in response to the issues raised by Mr. Browne and some of the other Plaintiff witnesses with delegating post amendment, but she was not the one making the decisions or raising the issues (point of privilege) at the times in question.
41. Ms. Carr testified in cross examination that the Chair has the discretion to consider if a delegation was, for example, 27 minutes late and still accept it. She further testified that discretion should be applied consistently and ideally, they should practice discretion equally.

Analysis

42. The Plaintiffs’ positions are that they are entitled to modest damages sought claiming the evidence heard amounts to a non-trivial infringement on the rights of the three remaining Plaintiffs in terms of how they were either frustrated or prevented from delegating based on scrutiny or concern about the content of their message.
43. The Plaintiffs further state that the consistent failure of the OPSB to exercise discretion in favour of the Plaintiffs combined with their stated evidence that since the OPSB’s amendment of its By-Law the “remarkably and dramatically” decreased public participation led to misleading the public about it attempts to enhance and increase public participation.

Were the Plaintiff's deprived of meaningful and effective participation in public meetings? For the following reasons and only for the specific facts and circumstances of this case, the answer is "yes".

44. Ms. Beck (Chair in 2023) did not allow a delegation and raised a point of privilege. Not only did she did not afford Mr. Browne the same courtesy that was afforded to Councillor Plante (forwarding it to the OPS for a response) but Ms. Carr testified that the anchor points of the delegation by Mr. Browne were relevant to the mandate of the OPSB.
45. 613-819 Black Hub was denied the opportunity to send an alternate (a young lady member of the Hub) when the delegation had already been approved/registered but Mr. Browne was unavailable due to other, out of town, engagements where he would not even be able to attend online given scheduling. In cross examination, Ms. Carr testified (although from her evidence, it is likely the Executive Director would have been better placed to provide the information) that it was only limiting the number of delegates from within one organization that was considered but the OPSB opted not to include that. There was no rule against transferring a delegation, which in this case, would not have meant an additional delegation; simply the delegation being delivered by another member in the absence of the original delegate. It was admitted that for that month's meeting there was only one delegate and if an exception to allow the alternate were made, the delegation would not have gone over the one hour allocated. Without a rule against transferring a delegation, I am not sure that the language of "exception" to allow the alternate is even valid. It would not have been an exception as there was no rule disallowing it.
46. Mr. Bradley was not allowed to delegate when his late submission (but still before close of business on the Friday) was denied in December 2023 by the Board Assistant. Of note is that there was no indication that any discussions were had with the OPSB Chair or Executive Director for an exception or about the denial. Ms. Carr testifies that it would be her expectation that discretion is applied in an equal manner yet this submission that was not in favor of what the OPSB or police were looking to achieve was denied for being a few hours late yet the same day of meeting submissions of Councillor Lo were allowed by the Executive Director after discussion with the Chair. A review of that delegation showed praise and gratefulness to the OPSB and the OPS.
47. Ms. Carr could not offer clarification on the denial for Ms. Farhang's delegation that was minutes late.
48. The Defendant outlined its responsibilities as found in section 31 of the Act. It further states that a police services board is responsible for the provision of adequate and effective police services which was not denied during the trial by the Plaintiffs - in fact they confirmed it. The Defendant further states that among a police services board's responsibilities is that a police services board shall "generally determine, after

consultation with the Chief of Police, objectives and priorities with respect to police services in the municipality” but that although the OPSB is required to hold at least four meeting each year which are open to the public, (subject to some exceptions), the *Act* does not entitle members of the public to present or speak at the Board Meetings.

49. The Defendant states that even though the OPSB is not required to consult with the public, it recognizes the importance of community engagement and developed the practice of allowing members of the public to appear and speak at meetings and denies that delegates cannot publicly criticize either of the OPSB or the Ottawa Police Service. Based solely on the specific examples provided by the Plaintiffs in this case, I do not accept on a balance of probabilities that the delegates that are critical are granted exceptions when they don’t follow the letter of the By-Laws.
50. Ms. Carr presented as a defensive witness. She could not speak directly about some of the actions that brought this matter before the Court and although she did testify that a delegation critical of the police was not a factor for her in allowing a delegation, she could not speak for her colleagues who were behind the crux of the allegations before the court. It is unfortunate that none of the members (Chairs, Vice-Chairs etc.) directly involved in the email exchanges, documentation produced such as media excerpts, or testimony by the Plaintiffs were made available to testify. This would have been helpful to the Court.
51. A thorough review of the case law including the extensive case law and authorities provided by both parties was done. I agree with the Defendant that this Court has no jurisdiction to challenge the validity of the By-Laws of the OPSB. The Plaintiffs do not attack the constitutionality of the By-Law or that the OPSB cannot have its own requirements.
52. The standard of proof for fact-finding in a civil case is “balance of probabilities”. The Plaintiffs must show that the Defendant owes the amounts Claimed and that they are entitled to the remedies sought.
53. The issues to be decided are whether the OPSB breached the *Charter* rights of Mr. Browne (sections 2 and 7), Mr. Bradley (section 2) and 613-819 Black Hub (section 2) and whether, if breaches are found, they can be saved by section 1.
54. There is no doubt that the OPSB is a legislative body with an *Act* that allows it to create its own procedures and By-Laws as it is related to adequate and effective policing. While there were attempts in the evidence of the Defendant to persuade the Court that the discretion it exercises, although arbitrary, is fair; a review of the evidence presented does not support this. It appears that there is favoring towards discretion or going the “extra mile” for individuals or delegates who are in line with the OPSB agenda.

55. Where the Court diverges from the OPSB submissions is that it is of the view that the way it exercised its discretion with respect to the three remaining names Plaintiffs was arbitrary, unfair and a breach of their *Charter* rights. The evidence showed a pattern and/or selectiveness in the behavior of the OBSP towards the Plaintiffs that differed from their behavior towards “higher-powered” or “less scrutinizing” delegations.
56. I will now analyze each of the *Charter* breaches alleged.

Section 7 of the Charter

57. To establish an infringement of a section 7 *Charter* right, the Plaintiff must show that the OPSB’s actions have interfered with his physical or psychological integrity.
58. Mr. Browne testified that the “preamble” did not stop him from delegating or cause him to fear delegating and he was not dissuaded by it. He testified that it should not have been added to the beginning of the meetings and its effect on others to delegate.
59. He expressed frustrations with the other points raised but there is no evidence before the Court of specific interference with him such that his physical or mental health were impaired or likely to be impaired.
60. The case law on section 7 breaches uses terms like “serious state-imposed psychological stress” or “serious and profound effect”. I cannot conclude on the evidence before me that there was a deprivation or impact so important that it rose to such a level to establish a section 7 violation.
61. A section 7 breach has not been made out.

Section 2(b) of the Charter

62. The Plaintiffs allege that the OPSB has limited their participation (delegation) by the creation, implementation and operation of the By-Law which amounts to an infringement of their section 2(b) rights which reads:
2. Everyone has the following fundamental freedoms:
- b. freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. [Emphasis added]
63. The protection of freedom of expression is premised upon fundamental principles and values that promote the search for and attainment of truth, participation in social and political decision-making and the opportunity for individual self-fulfillment through expression (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at page 976; *Ford v. Quebec*, [1988] 2 S.C.R. 712 at pages 765-766).

64. Courts have interpreted section 2(b) very broadly, often finding a *prima facie* breach easily.

65. The Supreme Court has adopted the following three-part test for analyzing section 2(b):

1) Does the activity in question have expressive content, thereby bringing it within section 2(b) protection?;

The courts have applied the principle of content neutrality in defining the scope of section 2(b), such that the content of expression, no matter how offensive, unpopular or disturbing, cannot deprive it of section 2(b) protection.

2) Does the method or location of this expression remove that protection?; and

3) If the expression is protected by section 2(b), does the government action in question infringe that protection, either in purpose or effect? (*Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2); *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141; *Irwin Toy Ltd.*, *supra*.

Where the purpose of a government action is to restrict the content of expression, to control access to a certain message, or to limit the ability of a person who attempts to convey a message to express themselves, that purpose will infringe section 2(b).

66. The Defendant does not dispute that the first two prongs of the test have been met but submits that the third prong cannot be satisfied.

67. I disagree. The actions by the OPSB members on the specific facts being considered in this case were such that an infringement is found.

Section 2(b) - A requirement for positive government action?

68. The Defendant referred to cases on positive and negative obligations and submitted that the Plaintiffs continue to seek “positive entitlement to section 2b” and states that there is no protection except in limited circumstances.

69. Freedom of expression generally imposes on government a *negative* obligation not to interfere with expression, that is to say it is freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage (*Haig v. Canada*, [1993] 2 S.C.R. 995 at page 1035; *Baier v. Alberta*, [2007] 2 S.C.R.

673 at paragraph 20; *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at paragraph 16).

70. “The traditional view, in colloquial terms, is that the freedom of expression contained in section 2(b) prohibits gags but does not compel the distribution of megaphones” (*Haig, supra* at page 1035).
71. In general, it is up to the government to determine which forms of expression are entitled to special support; where the government chooses to provide a platform for expression it must do so in a manner consistent with the Charter.
72. However, section 2(b) may, in certain circumstances, impose *positive* obligations on government to facilitate expression by legislating or otherwise acting to provide persons with a platform for expression (*Baier v. Alberta, supra*; *Toronto (City), supra* at paragraphs 17-19).
73. To determine whether a claim is for a “positive right”, one must question whether the claim would require the government to act in order to support or enable an expressive activity, in contrast to a negative right that would require the government to refrain from restricting the content or meaning of expression or from acting in other ways (*Baier, supra* at paragraph 35; *Toronto (City)* at paragraph 20).
74. A positive claim does not become a claim for a negative right where the government reduces access to a platform for expression to which the claimants previously had access (*Baier, supra* at paragraph 36; *Toronto (City), supra* at paragraph 19).
75. A positive claim will be determined pursuant to the “single core question” set out in *Toronto (City)* (*supra* at paragraph 25): “is the claim grounded in the fundamental Charter freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression?” In this context “a substantial interference with freedom of expression occurs where lack of access to a statutory platform has the effect of radically frustrating expression to such an extent that meaningful expression is ‘effectively preclude[d]’” (*Toronto (City), supra* at paragraph 27).
76. Submissions from Defendants counsel on the *Baier* and *Haig* cases are not in line with the position of the Plaintiffs. The same analysis applies to several of the cases provided and relied on by the Defendant. This case is not about being the Plaintiffs saying that the OPSB owed them a constitutional obligation to speak or an obligation to provide a

platform to speak or even that since they previously delegated, they had an ongoing enshrined obligation owed to them by the OPSB. This case and again the specific facts of the case before the Court are about the way discretion was exercised and the perceived unfairness of that discretion.

77. The references to the cases submitted by the Defendant and the submissions keep circling back to the position that the amendments to the By-Law do not rise to the level of any interference let alone a substantial one but as reiterated the Plaintiffs are not arguing the unconstitutionality of the By-Law or the amendment. This is about discretion and its use.
78. I agree with the Defendant that the right to delegate is not protected by statute and that the OPSB has discretion to balance the ability of the delegations with the ability to fulfill its mandate but in this case, discretion was not fairly exercised and allowing the specific delegations would not have interfered with the OPSB's ability to fulfill its mandate.

Section 1 considerations

79. The broad scope of section 2(b) of the *Charter* means that in most cases the constitutionality of the legislation or the government action will depend on the section 1 analysis. Given my finding of a breach in this case, section 1 is engaged.
80. Section 1 reads as follows: 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. [Emphasis added]
81. "Most modern constitutions recognize that rights are not absolute and can be limited if this is necessary to achieve an important objective and if the limit is appropriately tailored, or proportionate." (*Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610, at paragraph 36).
82. The onus of proof under section 1 is on the person seeking to justify the limit, which in this case is the OPSB (*R. v. Oakes*, [1986] 1 S.C.R. 103 at page 136). The standard of proof is the civil standard or balance of probabilities.
83. "Demonstrably justified" connotes a strong evidentiary foundation. Cogent and persuasive evidence is generally required (*Oakes*, *supra*). Where scientific or social science evidence is available, it will be required; however, where such evidence is inconclusive, or does not exist and could not be developed, reason and logic may suffice (*Libman v. Quebec (A.G.)*, [1997] 3 S.C.R. 569; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Thomson Newspapers Co. v. Canada (A.G.)*, [1998] 1 S.C.R. 877; *R. v. Sharpe*, [2001] 1 S.C.R. 45; *Harper v. Canada (A.G.)*, [2004] 1 S.C.R. 827, at

paragraph 77; *R. v. Bryan*, [2007] 1 S.C.R. 527, at paragraphs 16-19, 29; *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3, at paragraphs 143-144). In some contexts, where the scope of the Charter infringement is minimal, social science evidence may not be necessary for a section 1 justification (*B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, [2017] 1 S.C.R. 93).

84. To be capable of justification under section 1, the limit on the right or freedom must be "prescribed by law".
85. Discretionary administrative decision-making limiting a right or freedom was previously regarded as a limit 'prescribed by law' under section 1, and subject to the traditional *Oakes* test (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Ross v. New Brunswick School Board No. 15*, [1996] 1 S.C.R. 825). The Supreme Court revisited its jurisprudence in 2012 and concluded that when reviewing the exercise of discretionary authority and its compliance with the Charter, an administrative law-based analysis is preferred over a traditional section 1 *Oakes* test (*Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, at paragraph 57).
86. Whether it is the *Oakes* test or the *Doré* test that applies as suggested by the Defendant (although I disagree that the present issue before me is a judicial review case), based on the above analysis, the Plaintiffs have proven, on a balance of probabilities, that their *Charter* rights were infringed and that infringement cannot be saved by section 1.
87. The Plaintiffs are seeking what they term "a nominal monetary amount" and I agree that an amount should be awarded. The OPSB did not make out the justification.

Section 24(1) of the *Charter*

88. Section 24(1) states: "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."
89. Out of an abundance of caution on behalf of the Plaintiffs, I was pointed to case law in case I had doubt about my jurisdiction to award damages. I have reviewed the case law on point and agree that I have jurisdiction to fashion an appropriate remedy for damages in this case.
90. The Plaintiffs are seeking proportionate damages to reflect the nature of the violations for the rights for 613-819 Black Hub, Mr. Browne and Mr. Bradley.
91. The facts before me differ from case law that deals with a damages award in the context of a constitutional argument or of a law declared invalid or of no force or effect.

92. It is “difficult to imagine language which could give the court a wider and less fettered discretion” in crafting remedies than section 24(1) but nonetheless, the discretion is not unfettered: “[w]hat is appropriate and just will depend on the facts and circumstances of the particular case” (*Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28 at paragraph 19).
93. Damages are available in appropriate cases where they would serve a “functional” purpose in remedying a Charter violation. This requires the Plaintiffs to demonstrate that damages would further one or more of the general objects of the Charter, including those of section 24(1), namely: compensation (for loss and suffering caused by the breach); vindication (importance of upholding Charter rights); and/or deterrence (of further breaches by state actors) (*Ward, supra*, at paragraphs 25-31).
94. I am guided by paragraph 37 of *Ward, supra* that reads:
- Declarations of *Charter* breach may provide an adequate remedy for the *Charter* breach, particularly where the claimant has suffered no personal damage. Considering declarations in *Taunoa*, at para. 368, McGrath J. writes:
- The court’s finding of a breach of rights and a declaration to that effect will often not only be appropriate relief but may also in itself be a sufficient remedy in the circumstances to vindicate a plaintiff’s right. That will often be the case where no damage has been suffered that would give rise to a claim under private causes of action and, in the circumstances, if there is no need to deter persons in the position of the public officials from behaving in a similar way in the future. If in all the circumstances the court’s pronouncement that there has been a breach of rights is a sufficiently appropriate remedy to vindicate the right and afford redress then, subject to any questions of costs, that will be sufficient to meet the primary remedial objective.* [Emphasis added]
95. The case law is clear that another consideration that may negate the appropriateness of damages is concern for effective governance. I do not find this a consideration for the circumstances of this case as it is not about enforcing the By-Law but rather the discretion used when enforcing it.
96. The Plaintiffs, having established breaches of their *Charter* rights and having shown that an award of damages would serve a functional purpose have shifted the onus to the OPSB to negate that an award is “appropriate and just”.
97. The OPSB has not established that other considerations render damages inappropriate or unjust.

98. The final step now becomes to determine the appropriate amount of damages.
99. Paragraph 46 of *Ward, supra* states that “The watchword of s. 24(1) is that the remedy must be “appropriate and just”. This applies to the amount, or quantum, of damages awarded as much as to the initial question of whether damages are a proper remedy.
100. The Plaintiffs did not suffer a financial loss however it appears that the Plaintiffs’ Claim has made it such that the OPSB is now trying to be more even-handed in its exercise of discretion. Awarding damages speaks to the value that the Court places on fairness in exercising discretion.
101. In this case, the losses are non-pecuniary and those are harder to measure. The amount of damages must reflect what is required to functionally serve the objects of compensation, vindication of the right and deterrence of future breaches, insofar as they are engaged, having regard to the impact of the breaches on the Plaintiffs and the seriousness of the OPSB conduct. The award must be appropriate and just from the perspective of both sides.

Conclusion

102. While I agree that the changes implemented by the OPSB were made in good faith and were within the statutory powers granted to the OPSB pursuant to the *Act*, it is the discretionary way in which delegations are allowed or refused that is improper. The arbitrary exercise of authority infringed on the Plaintiffs’ *Charter* rights.
103. Within the specific context of the fact scenarios before the Court, I find the Defendant liable for its actions towards the Plaintiffs.
104. 613-819 Black Hub: I conclude that a Declaration under section 24(1) that the refusal to transfer an already-approved delegation to another individual within the same organization violated the rights of 613-819 Black Hub under section 2b of the *Charter* adequately serves the need for vindication of the right and deterrence of future improper denials to transfer/proxy.
105. Mr. Robin Browne: There shall be an award of damages against the OPSB for the “June 26, 2023 - deemed out of order and the way it was done (\$750.00); and denial of the July 24 and November 24, 2023, delegation requests and the way they were handled (\$500.00 each)” in the amount of \$1750.00.
106. Mr. Jeffrey Bradley: There shall be an award of damages against the OPSB for the refusal to delegate at the December 18, 2023, meeting and the way it was done in contrast to others in the amount of \$750.00.

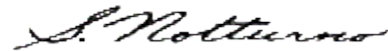
Order

107. For the reasons set out above, this Court orders:

- a. Judgment for the Plaintiff Mr. Browne in the amount of \$1,750.00.
- b. Judgment for the Plaintiff Mr. Bradley in the amount of \$750.00.
- c. A Declaration in favour of 613-819 Black Hub under section 24(1) against OPSB for the violation of its rights under section 2b of the *Charter*.
- d. Prejudgment interest between August 9, 2023, and May 22, 2025, is payable in accordance with the *Courts of Justice Act*.
- e. Post-judgment interest is payable on any of the awarded amounts that are not paid to the respective Plaintiffs within 30 days of the date of this Order, in accordance with the *Courts of Justice Act*.

108. If the parties are unable to agree on costs, the Plaintiffs may serve and file written cost submissions on or before November 21, 2025. The Defendant may serve and file responding cost submissions on or before December 5, 2025. The Plaintiffs may serve and file reply submissions, if any, on or before December 15, 2025. Submissions from each party shall not exceed 2 pages in length. The two-page limit does not apply to documents, such as offers to settle and/or receipts, which should be attached to the written submissions.

Dated at Ottawa on October 30, 2025.



S. Notturmo
Deputy Judge