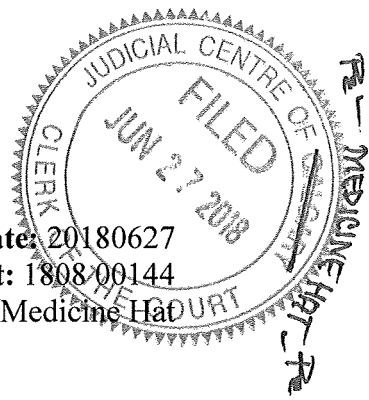
Court of Queen's Bench of Alberta



Citation: PT v Alberta, 2018 ABQB 496

Date: 20180627
Docket: 1808 00144
Registry: Medicine Hat

Between:

PT, DT, FR, KR, PH, MT, JV, AS, RM, Universal Education Institute of Canada, Headway School Society of Alberta, The Canadian Reformed School Society of Calgary, Gobind Marg Charitable Trust Foundation, Congregation House of Jacob Mikveh Israel, Khalsa School Calgary Education Foundation, Central Alberta Christian High School Society, Saddle Lake Indian Full Gospel Mission, St. Matthew Evangelical Lutheran Church of Stony Plain, Alberta, Calvin Christian School Society, Canadian Reformed School Society of Edmonton, Coaldale Canadian Reformed School Society, Airdrie Koinonia Christian School Society, Destiny Christian School Society, Koinonia Christian School – Red Deer Society, Covenant Canadian Reformed School Society, Lacombe Christian School Society, Providence Christian School Society, Living Waters Christian Academy, Newell Christian School Society, Slave Lake Koinonia Christian School, Ponoka Christian School Society, Yellowhead Koinonia Christian School Society, The Rimbey Christian School Society, Living Truth Christian School Society, Lighthouse Christian School Society, Parents for Choice in Education, and Association of Christian Schools International – Western Canada.

Applicants

- and -

Her Majesty the Queen in Right of Alberta

Respondent

- and -

Calgary Sexual Health Centre

Intervenor

Reasons for Decision
of the
Honourable Madam Justice J.C. Kubik

Introduction

[1] In 2015 the Government of Alberta enacted *Bill 10: An Act to Amend the Alberta Bill of Rights to Protect our Children* (*"Bill 10"*). Bill 10 amended the *School Act,* RSA 2000 c S-3, (*"School Act"*) to empower students to create voluntary student organizations and lead activities which promote a welcoming, caring, respectful, and safe learning environment that respects diversity and fosters a sense of belonging. Those organizations and activities can include any one of a number of laudable goals including the promotion of equality and non-discrimination with respect to race, religious belief, colour, gender, gender identity, gender expression, physical disability, mental disability, family status, or sexual orientation. The purpose of the legislation was to create safe spaces for children in school, but in particular to protect vulnerable minorities, including LGBTQ+ students. The amendments to the *Act* in 2017 by *Bill 24: An Act to Support Gay-Straight Alliances ("Bill 24")* brought about enhanced protections for LGBTQ+ students, including prohibitions on exposing children to their parents or peers, who participate in "gay-straight alliances" and "queer-straight alliances" (throughout this decision both alliances will be collectively referred to as "GSAs").

Issue

[2] The applicants in these proceedings are individual parents, various private schools as defined in the *School Act*, and two public interest litigants which advocate for parental rights in education. The issue raised by the applicants in these proceedings is the constitutional validity of the legislation as it relates to those clubs or activities known as GSAs. The applicant parents argue that the legislation infringes their rights under section 7 of the *Canadian Charter of Rights and Freedoms* (the *"Charter"*) by undermining the protection of children and depriving them choice in education of their children. All of the applicants assert that the conscience and religious freedom, expression, and association rights of schools and parents as protected by section 2 of the *Charter* are violated by the legislation, as it prohibits them from accessing education consistent with their religious and moral values. They seek an interim injunction staying the operation of the provisions of section 16.1 of the *School Act,* and prohibiting the Minister of Education from defunding or de-accrediting their schools for non-compliance with the provisions of section 45.1. There are two primary issues being argued by the applicants:

1. The first issue relates primarily to section 16.1(6) which limits the information a principal may disclose to parents regarding their child's involvement in a GSA.
2. The second issue turns largely on the requirement that the schools make an attestation as to their compliance with section 45.1 and the impugned provisions in section 16.1.

The Test for Injunctive Relief

[3] The test for injunctive relief is as set out in ***RJR-MacDonald Inc v Canada (Attorney General)***, [1994] 1 SCR 311 ("***RJR***"). The applicants have the burden of proving three things:

1. That there is a serious constitutional issue to be tried;
2. That compliance with the constitutional provisions would result in irreparable harm; and
3. That the balance of convenience favours not enforcing the legislative provisions until the constitutionality of the provisions has been determined.

[4] In assessing whether there is a serious constitutional issue to be tried, the Court is not required to do an in depth assessment of the merits or strength of the case. It simply need be satisfied that there is an issue, which is neither frivolous nor vexatious.

[5] There is a presumption that validly enacted legislation is in the public good. In circumstances where an injunction is sought to restrain the effect of legislation, the test for an interim injunction is higher, and requires the applicants to show that the public benefit resulting from a suspension of the legislation outweighs the presumed public good arising from maintaining the law: ***Harper v Canada (Attorney General)***, 2000 SCC 57. This presumption is considered as part of the irreparable harm analysis.

[6] In analyzing the balance of convenience, the Court must weigh the competing harms and the seriousness of the issue to be tried to determine whether an injunction should be granted.

Analysis

Section 16.1

1. Serious issue to be tried

[7] The application for injunctive relief seeks a stay of all of the key components of s. 16.1 of the *School Act*, which enable the establishment of voluntary student organizations and activities which promote a welcoming, caring, respectful, and safe learning environment and respect diversity and foster a sense of belonging. This includes the establishment of "gay-straight alliances" and "queer-straight alliances", and the right to call them such.

[8] At the hearing of the matter, the focus of the applicants arguments were with respect to those amendments to s. 16.1 of the *School Act*, brought into effect by *Bill 24.*

[9] Those amendments require that a principal:

- Not delay the establishment of a GSA: s. 16.1(1)(a);
- Not prohibit or discourage the use of the names GSA or QSA in describing a voluntary student organization: s. 16.1(3.1); and
- Limit notification, if any, about a voluntary student organization or activity to the fact of the establishment of the organization or the holding of the activity: s. 16.1(6).

[10] In relation to s. 16.1(1)(a) and s. 16.1(3.1) the applicants allege that GSAs are harmful and that children in GSAs are exposed to inappropriate, sexually explicit information, as well as information about gender and sexuality, which is either harmful in its own right, ideological in nature, or contrary to the parents' and schools beliefs regarding such matters. They say that the

requirement for immediate formation of the clubs upon student request, and the use of the names gay-straight alliances and queer-straight alliances violate the parents and schools right to freedom of religion and conscience as well as association based on common moral values and beliefs.

[11] The applicants contend that s. 16.1(6) keeps parents in the dark, not only about what GSAs are and what activities take place at GSAs, but also about their children's participation in these activities. They argue that the notification limitation, coupled with the fact that parents are not entitled to opt their children out of GSAs, results in an infringement of their rights under the *Canadian Charter of Rights and Freedoms*; specifically, the s. 7 liberty interests associated with the protection, rearing, and education of their children, and their rights under s. 2(a) – freedom of religion and conscience. Further, they state that s. 16.1(6) of the *School Act* infringes their rights under the *Alberta Bill of Rights,* RSA 2000 C a-14*; Family Law Act,* SA 2003 c F-4.5; and *School Act* in relation to the education of their children.

[12] In relation to ss. 16.1(1) (a) and 16.1(3.1) the respondents argue that GSAs are not harmful and exist to protect the safety and security of LGBTQ+ students. The general legislative provisions for establishing GSAs and calling them such have been in effect since 2015, without challenge. As such, they submit there is no urgency which would justify injunctive relief in relation to those provisions. The amendments, they argue, simply function to prevent a principal from delaying the creation of the organization and discouraging use of the names GSA and/or QSA, thereby recognizing and affirming the dignity of LGBTQ+ students. While they acknowledge that information about gender and sexuality may be discussed in GSAs, they point out that the parental opt out provisions of s. 50.1(4) of the *School Act* do not apply to clubs or voluntary student organizations. This in no way fetters the right of a parent to remove their child from the classroom when subjects of religion or human sexuality are the primary topic of curriculum or educational activities. Based on all of this, the respondent argues that the *Charter* rights of parents and schools are not engaged, as they continue to be free to believe and teach their religious and moral values to the children; they simply cannot prevent the formation and naming of GSAs.

[13] The respondent states that the intention of the notification limitation is to protect the privacy of LGBTQ+ and allied students who choose to participate in GSAs and to prevent exposing their participation to their peers or parents, without their consent. They argue that the provisions of s. 16.1(6), must be read in conjunction with s. 45.1(4)(c) which states:

> "… that the principal is responsible for ensuring that notification, if any, respecting a voluntary student organization or an activity referred to in s. 16.1(1) is limited to the fact of the establishment of the organization or the holding of the activity..." and "...is otherwise consistent with the usual practices relating to notifications of other student organizations and activities".

[14] Accordingly, the respondent says that individual schools are not limited from providing information to parents about GSAs, provided it is consistent with the level of disclosure provided about other school activities and organizations; they are simply prevented from disclosing a child's participation in the organization without the child's consent. Further, the respondent argues that the provisions of the *Freedom of Information and Protection of Privacy Act,* RSA 2000 c F-25, (*"FOIP")* and the *Personal Information Protection Act*, SA 2003 c P-6.5, (*"PIPA")* prevent disclosure of personal and private information by public and private schools alike to

parents. Both pieces of legislation are paramount. Both require schools to assess the nature of the information to be disclosed to determine whether the disclosure is necessary to protect the life, health, safety, and security of the child, and is in the best interests of the child.

[15] With respect to s. 16.1(1)(a) and s.16.1(3.1) and the alleged infringements on the applicants religious freedoms, I am satisfied that there is no serious constitutional issue to be tried. GSAs are voluntary student organizations. Children are not required to participate in them. The *Act* in no way restricts the right of parents or schools to continue to impart their religious and moral values to their children.

[16] There is an abundance of Supreme Court of Canada jurisprudence which addresses the religious rights of parents, educators, and schools in relation to the information children are exposed to at school:

- In ***Chamberlain v. Surrey School District No 36***, 2002 SCC 86, the Court held that the school board had violated the British Columbia *School Act* in refusing to approve same sex parenting books for use in career and personal planning classes. In concluding that parents do not have an unfettered right to control what their children are exposed to in school, the Court stated:

  > "...the cognitive dissonance that results from such encounters [with different people, clothing, family models and ways of being] is simply a part of living in a diverse society. ...Through such experiences, children come to realize that not all of their values are shared by others. When children encounter people with values different from their own, this does not violate freedom of religion as they are not being asked to abandon their own convictions; rather "[w]e merely ask them to respect the rights, values and ways of being of those who may not share those convictions."

- In ***S.L. v. Commission scolaire des Chenes***, 2012 SCC 7, the Court held the requirement for children to participate in mandatory ethics and religious culture classes in Quebec schools did not violate their parents' religious rights. The Court stated:

  > "...the suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society..."

- Finally, in ***Loyola High School v. Quebec (Attorney General)***, 2015 SCC 12, the Court rejected the notion that requiring Catholic teachers to neutrally teach the ethics of other religions violated their freedom of religion. The Court held that

  > "...it is not a breach of anyone's freedom of religion to be required to learn (or teach) about the doctrines and ethics of other world religions in a neutral and respectful way."

[17] In addition, there is an absence of urgency in relation to injunctive relief from ss. 16.1(1)(a) and 16.1(3.1). The legislative provisions allowing the formation of GSAs and calling

them such have been in effect since 2015. The amendments requiring the immediate formation of such groups and preventing a principal from prohibiting the use of the name GSA do not change the substance of what has been authorized by law for the last three years.

[18] With respect to s. 16.1(6), while I agree with the respondent's interpretation that the legislation simply attempts to protect the privacy and personal information of students who participate in GSAs, and that *FOIP* and *PIPA* provide additional protection in that regard, I cannot conclude that the s. 7 liberty rights of the parents are not engaged. Certainly, parents do have the right to make fundamental decisions for their children, but those decisions must also be in the children's best interests. In this case, it is clear, that the *Charter* rights of parents come into direct conflict with the *Charter* rights of children, and in particular, those rights to free expression, association, life, liberty, security, and equality. I am satisfied that these competing interests give rise to a serious issue to be tried.

2. Irreparable harm

[19] Having found a serious issue to be tried in relation to s. 16.1(6) it is necessary to analyze whether irreparable harm would result to the applicants if that provision is not stayed pending the constitutional challenge. This irreparable harm analysis applies equally to ss. 16.1(1)(a) and 16.1(3.1), despite my finding that there was no serious issue to be tried.

[20] There is an obligation on the applicant to show that, absent an injunction, real harm will occur. That harm must be "detailed and concrete...real, definite, unavoidable...": ***Abbvie Corp v Janssen Inc***, 2014 FCA 112.

[21] A significant volume of evidence has been filed in relation to the harms arising from s. 16.1. The applicants allege that inappropriate, sexually explicit material is being disseminated at GSAs. In addition to this they allege that GSAs are teaching a particular ideology with respect to sexuality and gender identity which is harmful to students, particularly young and emotionally vulnerable students. They take the position that one's sex is an immutable characteristic, and reject the notion of gender fluidity. It is their position that any information about gender fluidity, dysphoria, affirmation of a child's gender identity, or gender transitioning in the context of a GSA is unsupported by scientific evidence, false, and should not be a subject for discussion without parental consent. Further, they allege that children are either being encouraged to keep their participation in a GSA secret from their parents or it is being implied to them that they cannot trust their parents. The information provided, coupled with the limitations on disclosure have, in their submission, resulted in harm to at least two children and represent a risk of harm to other children.

[22] I will assess the evidence of harm by topic, and in doing so will consider all of the competing evidence tendered by the applicants, respondent and intervener.

2 (a) Evidence as to irreparable harm

i) Sexually explicit material

[23] The affidavit of Theresa Ng attaches a variety of sexually explicit material, which includes documents on a private Facebook page, which was inadvertently linked back through the GSA Network and the Alberta Education website. When Alberta Education was informed in 2017 that this content was accessible through their website, they immediately removed any links to the page. When Pamela Krause of the Calgary Sexual Health Centre ("Centre") was questioned in these proceedings, the offending material was put to her. In her capacity as CEO of

the Centre, which coordinates the Calgary GSA Network, she testified that the material was inappropriate and would not be disseminated in a GSA, as it would not provide a welcoming, respectful environment to students. She had no knowledge of such information ever having been disseminated in any GSAs with which the Centre was affiliated.

[24] The affidavit of Ms. Ng also attached a survey from Camp fYrefly participants which contained sexually explicit comments. The camp has nothing to do with GSAs although it is currently being run by the Calgary Sexual Health Centre.

[25] There is no evidence that any of these materials were ever promoted by the respondent or GSAs generally, or that the materials ever came into the hands of any students through a GSA. There is no evidence that there is a risk of the material being disseminated to students in GSAs.

ii) Ideological information about sexuality and gender identity

[26] Several affidavits are filed by the named parent applicants in these proceedings. These provide anecdotal evidence of information about sexuality, gender identity, and gender transitioning being provided at GSAs.

[27] The evidence of Pamela Krause and Hilary Mutch detail the Calgary Sexual Health Centre's role in relation to hosting the Calgary GSA Network and also the information the Centre makes available to youth about sexuality, gender identity, and transitioning. Their goal is to promote healthy sexuality, and affirmation of sexuality and gender, which may fall outside of that of the heterosexual majority. The Centre provides resources and support to youth and GSA facilitators who are dealing with these issues. Their evidence is that every GSA is unique and responds to the needs of its student members. This could include providing information about sexuality and gender. I am satisfied that sexual orientation and gender identity information may well be provided to children at some GSAs and that affirmation of a child's expressed gender identity may take place a some GSAs. There is no evidence to support the contention that GSAs encourage transitioning, the use of medication or surgical options, or provide medical treatment advice.

[28] The anecdotal evidence of the parent affiants describes the negative experiences their children have had in GSAs. In particular, two affiants have described their children being convinced to believe that they were transgender and encouraged to behave in an opposite gender role at school. This encouragement is said to have to lead to psychological distress and suicidal ideation and attempts. According to the parent affiants, upon removal from the GSAs, their children were able to return to behaviours consistent with their birth sex. These affidavits are largely hearsay in nature and I am unable to determine the reliability of these accounts, particularly in light of an absence of direct evidence from the children or clear corroboration. While at least one affidavit appends email exchanges between the parents and teacher, those documents do not provide corroboration for the hearsay statements about what occurred in the context of a GSA and raise more questions than they answer about how and why the child's psychological distress developed. While I accept that children have received information about sexual orientation and gender identity in the context of GSAs, and accept at face value the deep concern expressed by parents over their children's exposure to that information, I cannot form any reliable conclusion that the events as described occurred in the context of a GSA or that the harm described is directly attributable to participation in a GSA or a lack of notification to parents.

[29] This leaves the expert evidence tendered by the applicants in relation to harm which focuses largely on the harm arising from providing information about and affirmation of gender identity.

[30] Dr. Quentin van Meter is a pediatric endocrinologist, practicing in Atlanta, Georgia. In his practice he has provided counselling and treatment to children suffering endocrine disorders and associated mental health concerns. Dr. van Meter's evidence is that sex is binary and gender identity is a social construct. He views transgenderism as a delusional disorder (contrary to its current classification in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, published by the American Psychiatric Association, ("DSM-V") as a disorder of gender dysphoria) and rejects recommendations from the American Academy of Pediatrics relating to affirmation of gender identity and the use of puberty blockers in children experiencing gender dysphoria. It is his opinion that if GSAs are affirming expressions of gender identity, or recommending the use of puberty blockers, or sexual reassignment surgery then they are doing harm to children. Further, it is his opinion that if GSAs are encouraging children to keep secrets from their parents they are harmful. His opinion is largely premised on the affidavit evidence of the parents. Given my findings as to the reliability of this evidence, the underlying factual premise of his opinion is not proven. To the extent that his medical opinion is in direct contradiction with the recommended and accepted diagnostic and treatment standards as established by the American Psychiatric Association and American Academy of Pediatrics, it must be treated cautiously.

[31] Interestingly, when Dr. van Meter was questioned on his affidavit he conceded that GSAs provide a positive benefit to Lesbian, Bisexual, and Gay students, and that they also had a wider positive impact with respect to bullying of all students in schools where they exist. He also testified that he would never out an LGBTQ+ youth patient to family, and discussed the importance of providing a support system to LGBTQ+ youth to facilitate their coming out to their families in a safe manner. In doing so, Dr. van Meter acknowledged the exact harm to LGBTQ+ students that the limitations on notification contained in the *School Act* were designed to prevent. In light of this, and the other concerns I have outlined above, I reject his opinion that GSAs cause harm.

[32] Doctor Miriam Grossman is a medical doctor and board certified psychiatrist with a sub-specialty in child and adolescent psychiatry. She practices in the State of New York. Doctor Grossman's evidence as to harm is premised on assumptions that GSAs disseminate false information to children about sex and gender, are actively encouraging children to use puberty blockers and transition, and telling them not to trust their parents. Again, there is no factual basis to those assumptions.

[33] Dr. Grossman's opinion gives me pause for another reason, and that relates to her duty as an expert to provide an objective opinion for the purposes of assisting the Court. While I have no doubt she has strongly held beliefs regarding the health and safety issues surrounding medical transitioning, her affidavit references GSAs in the context of activism, the phenomenon of political correctness, and the facilitation of a particular narrative or ideology. This characterization fails to recognize the legal reality in Alberta and Canada: concepts of gender identity and the right to freely express the same are not radical ideologies, promoted by activists. They are individual rights, recognized and protected by law. Based on all of the above I reject Dr. Grossman's opinion that GSAs cause harm.

[34] As noted previously in these reasons, there is a presumption that validly enacted legislation serves the public good. As a result, the applicants must demonstrate that the public benefit resulting from a suspension of the legislation outweighs the presumed good arising from maintaining the law.

[35] The presumed good arising from maintaining the law is the safe and supportive climate that GSAs are intended to provide to LGBTQ+ students, and the overall benefits to schools generally. Evidence was tendered by both the Calgary Sexual Health Centre and the respondent as to benefits of the legislation. That evidence is uncontroverted.

[36] Hilary Mutch and Pamela Krause provided direct affidavit evidence as to the work of the Calgary Sexual Health Centre with GSAs both before and after the legislative changes. According to their evidence, the legislative changes have contributed to an increased number of GSAs in all areas of the province, increased student involvement in GSAs, and an increased ability to sustain GSAs. This is particularly so in schools where there might be resistance to such organizations. In addition, they note that the privacy protections afforded by s. 16.1(6) have provided LGBTQ+ youth with a safe space to come to terms with their sexuality and gender identity, enhancing their ability to share this information with their families, in their own time and on their own terms.

[37] Dr. Kevin Alderson holds a Ph.D in psychology and has done extensive research in relation to LGBTQ+ issues, including as to the acquisition of a positive gay identity amongst gay men living in Alberta. While he has not been qualified as an expert in prior Court proceedings, the purpose of his affidavit was to provide the Court with a collection of studies reflecting the experiences of LGBTQ+ youth in Canada and the effect of GSAs on youth and in schools. This information is probative of the issue of the public good associated with the legislation and bears out the anecdotal evidence provided by Ms. Mutch and Ms. Krause. I accept the data and conclusions of those studies which demonstrate that the presence of GSAs in schools result in positive effects for both LGBTQ+ students and their allies. These include:

- Improved school performance;
- Increased sense of safety and sense of belonging at school;
- Enhanced psychological wellbeing;
- Reduced casual sex; and
- Reduced drug use and abuse.

[38] I find that the applicants have failed to prove a degree of irreparable harm, which outweighs the public good in maintaining the legislation. As I have found that the applicants have failed to prove irreparable harm, the test for the granting of an injunction is not met. If I am wrong, however, I will consider the balance of convenience.

3. Balance of Convenience

[39] The statistical evidence bears out that there is a risk of harm to LGBTQ+ students in the absence of legislation. Those studies appended to Dr. Kevin Alderson's affidavit found that:

- 70% of all participating students LGBTQ+ and non-LGBTQ+, reported hearing epithets every day in school, such as "that's so gay", and nearly half (48%) heard pejorative comments daily, such as "faggot", "lezbo", and "dyke".
- Nearly 10% of all LGBTQ+ students reported hearing homo-negative comments from teachers daily or weekly.

- 74% of transgender students, 55% of sexual minority students, and 26% of non-LGBTQ+ students reported experiencing verbal harassment regarding their gender expression.
- 68% of transgender students, 55% of female sexual minority students, and 42% of male sexual minority students reported experiencing verbal harassment regarding their perceived gender or sexual orientation.
- 21% of LGBTQ+ students reported being physically harassed or assaulted due to their sexual orientation.
- 64% of LGBTQ+ students and 61% of students with LGBTQ+ parents reported that they felt unsafe in Canadian schools.

[40] Additionally, studies have shown that homophobia results in LGBTQ+ students having higher rates of suicidal ideation than heterosexual students, lower grades, lower progress to post-secondary education, higher rates of skipping school because of safety concerns, higher rates of risky behaviour, and higher rates of depression and suicidal ideations than non-LGBTQ+ students. The direct anecdotal evidence of teachers and LGBTQ+ youth who participated in GSAs bears out these statistics.

[41] The balance of convenience weighs in favour of maintaining the legislation. The effect on LGBTQ+ students in granting an injunction, which would result in both the loss of supportive GSAs in their schools and send the message that their diverse identities are less worthy of protection, would be considerably more harmful than temporarily limiting a parents right to know and make decisions about their child's involvement in a GSA.

Section 45.1

1. Serious issue to be tried

[42] S. 45.1 requires all schools to demonstrate compliance with s. 16.1 of the *School Act* as well as the *Alberta Human Rights Act,* RSA 2000 c A-25.5 (*"Alberta Human Rights Act"*) and the *Charter*. Prior to the enactment of *Bill 24*, schools were required to create, and file with the Minister, a plan reflecting a welcoming, caring, respectful, and safe learning environment that respects diversity, and fosters a sense of belonging. The applicant schools did so.

[43] The amendments impose additional requirements under s. 45.1(3) and (4), as follows:

> 3. A policy established under subsection (2) and a code of conduct established under subsection (2) must:
>   a) affirm the rights, as provided for in the *Alberta Human Rights Act* and the *Canadian Charter of Rights and Freedoms*, of each staff member employed by the board and each student enrolled in a school operated by the board, and
>   b) contain one or more statements that staff members employed by the board and students enrolled in a school operated by the board will not be discriminated against as provided for in the *Alberta Human Rights Act* or the *Canadian Charter of Rights and Freedoms*.
> 4. A policy established under subsection (2) must contain a distinct portion that addresses the board's responsibilities under section 16.1, and the distinct portion of the policy:

a) must not contain provisions that conflict with or are inconsistent with this section or section 16.1, and in particular must not contain provisions that would
    i. undermine the promotion of a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging, or
    ii. require a principal to obtain the approval of the superintendent or board or to follow other administrative processes before carrying out functions under section 16.1,
b) must include the text of section 16.1(1), (3), (3.1), (4) and (6),
c) must provide that the principal is responsible for ensuring that notification, if any, respecting a voluntary student organization or an activity referred to in section 16.1(1)
    i. is limited to the fact of the establishment of the organization or the holding of the activity, and
    ii. is otherwise consistent with the usual practices relating to notifications of other student organizations and activities,

    and

d) must set out the name of the legislation that governs the disclosure of personal information by the board.

[44] That policy must be displayed in a prominent location visible to students and staff, and also be publicly accessible by website. In the absence of the board establishing a policy, or establishing a policy that does not comply with s. 45.1, the Minister may, by order, establish a policy or code of conduct, add or replace a part of the policy or code of conduct, or impose any additional terms or conditions the Minister considers appropriate.

[45] In order to have continued funding and accreditation, private schools must submit annual declarations. The annual declaration for the 2018/2019 school year is in an online format. Along with regular proof of compliance documents (including health and fire inspections, proof of insurance, school information, etc.) schools must click an attestation box on the form. The attestation indicates compliance with the *School Act*, including s. 45.1, as well as numerous regulations relevant to operation. The form cannot be submitted online unless the attestation box is clicked.

[46] The applicant schools state that they cannot attest, because compliance with the *Act* is contrary to their religious beliefs, including beliefs about the binary nature of sex, that marriage is an institution between one man and one woman, that all sexual orientations are not equal, or that their Christian faith requires them to look beyond diversity in others. They further state that by not attesting they are at risk of losing funding or accreditation, which would in turn harm their student population.

[47] The respondents argue that the act of attesting is not an infringement of religious freedom. Rather, it is a demonstration that schools recognize the coexistent rights of others, and that, in exchange for public funding, they respect the public interest values reflected in the *Alberta Human Rights Act*, the *Charter*, and the *School Act.* Further, the respondents argue that there is no immediate risk of losing funding or accreditation as the *Act* itself provides multiple

steps for dealing with non-compliance, including investigations, inquiries, and the imposition of a policy consistent with the *Act*.

[48] Religious beliefs can coexist alongside respect and tolerance for others. The Supreme Court of Canada in ***Law Society of British Columba v Trinity Western University,*** 2018 SCC 32, ("***Law Society of British Columbia v Trinity Western University***") stated, the following at para 100 through para105:

> The limitation on religious freedom in this case must be understood in light of the reality that conflict between the pursuit of statutory objectives and individual freedoms may be inevitable. As this Court has held, state interferences with religious freedom "must be considered in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs" (*Hutterian Brethren*, at para. 90; see also *Loyola*, at para. 47). Accordingly, minor limits on religious freedom are often an unavoidable reality of a decision-maker's pursuit of its statutory mandate in a multicultural and democratic society.
>
> In saying this, we do not dispute that "[d]isagreement and discomfort with the views of others is unavoidable in a free and democratic society" (C.A. reasons, at para. 188), and that a secular state cannot interfere with religious freedom unless it conflicts with or harms overriding public interests (para. 131, citing *Loyola*, at para. 43). But more is at stake here than simply "disagreement and discomfort" with views that some will find offensive. This Court has held that religious freedom can be limited where an individual's religious beliefs or practices have the effect of "injur[ing] his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own" (*Big M,* at p. 346). Likewise, in *Multani*, the Court held that state interference with religious freedom can be justified "when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others" (para. 26). Being required by someone else's religious beliefs to behave contrary to one's sexual identity is degrading and disrespectful. Being required to do so offends the public perception that freedom of religion includes freedom from religion.
>
> In the end, it cannot be said that the denial of approval is a serious limitation on the religious rights of members of the TWU community. The LSBC's decision does not suppress TWU's religious difference. Except for the limitation we have identified, no evangelical Christian is denied the right to practise his or her religion as and where they choose.
>
> The refusal to approve the proposed law school means that members of the TWU religious community are not free to impose those religious beliefs on fellow law students, since they have an inequitable impact and can cause significant harm. The LSBC chose an interpretation of the public interest in the administration of justice which mandates access to law schools based on merit and diversity, not exclusionary religious practices. The refusal to approve TWU's proposed law school prevents *concrete*, not abstract, harms to LGBTQ people and to the public in general. The LSBC's decision ensures that equal access to the legal profession is not undermined and prevents the risk of significant harm to LGBTQ people

> who feel they have no choice but to attend TWU's proposed law school. It also maintains public confidence in the legal profession, which could be undermined by the LSBC's decision to approve a law school that forces LGBTQ people to deny who they are for three years to receive a legal education.
>
> Given the significant benefits to the relevant statutory objectives and the minor significance of the limitation on the *Charter* rights at issue on the facts of this case, and given the absence of any reasonable alternative that would reduce the impact on *Charter* protections while sufficiently furthering those same objectives, the decision to refuse to approve TWU's proposed law school represents a proportionate balance. In other circumstances, a more serious limitation may be entitled to greater weight in the balance and change the outcome. But that is not this case.
>
> In our view, the decision made by the LSBC "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (*Loyola*, at para. 39). Therefore, the decision amounted to a proportionate balancing and was reasonable.
>
> [emphasis in original]

[49] In relation to s. 45.1 I find there is no serious issue to be tried. Neither the attestation, nor the requirements to publicly post a policy which includes the provisions of s. 16.1 require schools to forsake their religious principles or teachings; it merely requires them to evidence their compliance with common public interest values, honour the *Alberta Human Rights Act* by not discriminating, treat people in accordance with *Charter* values, and publicly state that they will provide all students, including LGBTQ+ students with a welcoming, caring, respectful, and safe learning environment that respects diversity and fosters a sense of belonging.

2. Irreparable Harm

[50] Even if the act of attesting engages the applicants' *Charter* rights, giving rise to a serious issue to be tried, based on the reasoning in ***Law Society of British Columbia v Trinity Western University***, those rights are minimally impaired when considered in the context of the government's duty to legislate in a multicultural and democratic society. I have taken this into account in my analysis of irreparable harm when considering both the presumed public good intended by the legislation and the high threshold for injunctive relief.

[51] There is no evidence which demonstrates a real, concrete and unavoidable risk that the schools will lose funding or accreditation. This is expressed as a possibility by the applicants. The respondent tendered affidavit of evidence from Wendy Boje, Assistant Deputy Minister of the Strategic Services and Governance Division for the Department of Education. Ms. Boje was questioned on her affidavit. While the Minister does have the power to revoke funding, her evidence was that there are numerous remedial and solutions-orientated steps between non-compliance and the loss of funding or accreditation. These would include a dialogue to discuss issues around non-compliance, a potential investigation or inquiry by the Minister's office, or reliance on the provisions of the *Act* which would allow the Minister to impose a policy on schools which refused to create such a policy themselves. It was her evidence that the deeming provision was built into the *Act* in order to deal with schools which would not comply with s. 45.1. This suggests that the Minister has considered options short of defunding or de-

accreditation to address issues of non-compliance. While she acknowledged that loss of funding and accreditation was a possible outcome, she further stated that it would be difficult for her to predict whether all due process reviews will been completed prior to the start of the September 2018 school year. As a result there is no evidence to suggest that the schools will be defunded or de-accredited for the upcoming school year, and there is no reason to take prohibitive steps to prevent defunding or de-accreditation.

3. Balance of Convenience

[52] In ***Right to Life Association of Toronto and Area, Blaise Alleyne and Matthew Battista v Canada (Minister of Employment, Workforce, and Labour)***, 2018 FC 102, the Federal Court of Canada declined an interim injunction staying the attestation requirements of the 2018 Canada Summer Jobs Program. The attestation is similar in nature to the one at issue here and requires organizations to attest that the summer job and the organization's core mandate respect human rights, *Charter* values, and other enumerated rights. While the Court found that the applicants had not proven irreparable harm (including in relation to funding) in its balance of convenience analysis, the Court considered the role of public authorities in protecting the public interest, and concluded that there would be irreparable harm to the public interest if an injunction was granted.

[53] In this case, regardless of the requirement for attestation, the *School Act* still requires the applicant schools to demonstrate compliance with section 45.1 of the *Act* in furtherance of public policy goals, including the recognition and protection of LGBTQ+ rights. The public interest in promoting basic equality for staff and students of institutions supported by public funding would not be served by staying the provisions of s. 45.1 or otherwise ratifying the schools' decision not to attest on the basis of an unproven risk to funding or accreditation. As such the balance of convenience favours the respondent.

Conclusion

[54] The applications for injunctive relief are dismissed.

[55] Costs follow the event and are hereby awarded to the respondent.

Heard on the 20th day of June, 2018.
Dated at the City of Medicine Hat, Alberta this 27st day of June, 2018.

J.C. Kubik
J.C.Q.B.A.

Appearances:

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