



Justice Centre
for Constitutional Freedoms

Unconstitutional: How Bill 24 violates our *Charter* freedoms

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Introduction

Bill 24, *An Act to Support Gay-Straight Alliances*, introduced on November 2, 2017, amends the *Alberta School Act* by, *inter alia*:

1. Prohibiting any parental (or other) notification concerning Gay-Straight Alliances (GSAs) or a student-requested “activity,” other than notice of the establishment of a GSA or the holding of such “activity” generally¹;
2. Requiring independent religious schools (as opposed to only public schools, as currently required by the *School Act*) to create a “welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging”²;
3. Requiring a principal at a religious school, if a request for a GSA is made, to “immediately grant permission for the establishment of the school organization or the activity at the school” without board consultation or consideration of parental rights or the school’s religious character³;
4. Requiring independent schools to create internal school policies which use and repeat exact language from the *School Act*,⁴ stating that students can create a club “respecting diversity and fostering a sense of belonging”; that “The students may select a respectful and inclusive name for the organization, including the name “gay-straight alliance” or “queer-straight alliance”⁵; that “for greater certainty, the principal shall not prohibit or discourage the students from choosing a name that includes ‘gay-straight alliance’ or ‘queer-straight alliance’⁶;
5. Requiring independent schools to post their internal school policies publicly;⁷
6. Bypassing the *School Act* requirement⁸ for parents to be informed of any classes or activities which include sexual content and allowing them to opt out. Bill 24 would remove the ability of parents to inform the school that they do not want their children to participate in a GSA or GSA related-activity on the basis of sexual content. Parents would not be able to opt out of their children’s involvement in school plays, assemblies, etc. on the basis of sexual content, if that content is homosexual or transgender in nature);⁹

¹ See Bill 24, s. 2(d): “Section 16.1 is amended[:] (d) by adding the following after subsection (5):

(6) The principal is responsible for ensuring that notification, if any, respecting a voluntary student organization or an activity referred to in subsection (1) is limited to the fact of the establishment of the organization or the holding of the activity”; see also Bill 24, section 9: “For greater certainty, this section [50.1 requiring parental notification where the “subject-matter deals primarily or explicitly with religion or human sexuality”] does not apply with respect to the establishment or operation of a voluntary student organization referred to in section 16.1 or the organizing or holding of an activity referred to in section 16.1.”

² *School Act*, RSA 2000, c S-3, s. 45.1. See *Bill 24*, s. 5.

³ See Bill 24, s. 2(a)(i)

⁴ See Bill 24, s. 7.

⁵ *School Act*, s. 16.1(3)

⁶ See Bill 24, s. 2(c)

⁷ See Bill 24, s. 7(6)

⁸ Section 50.1 of the *School Act*.

⁹ *School Act*, s. 50.1; See Bill 24, s. 9

7. Allowing the government to rewrite school policies if the Minister of Education deems them not to conform to the *School Act*, as amended by Bill 24¹⁰;
8. Imposing new obligations on private schools to behave as though they are government, by requiring private schools to be bound by *Charter* as if they were not private associations.¹¹

A threat to parental rights

Bill 24 will prohibit parents from being informed about whether their child has joined a GSA club, attended a GSA meeting, or participated in a GSA-related “activity” at school. Bill 24 will prevent parents from knowing who has had access to their child, what material of a sexual nature has been presented to their child, whether their child is being indoctrinated into a belief system that the parents consider harmful, who their child is associating with, or what activities their child is participating in. Bill 24 will render parents unaware if sexual bullying or exploitation occurred within the GSA, because it would be unlawful to inform parents of the involvement of their children in such a club.

While parental rights are subject to limits, especially in relation to the curriculum taught at a public school rather than a private one,¹² the right to determine all aspects of a child’s education manifests itself most strongly in the ***right to school choice*** and the ***right to be informed***. Bill 24 renders the choice of a religious school for religious parents irrelevant when it comes to the education of their children about Biblical views on marriage and sexuality, and prevents parents from being informed in regard to their children’s education on these subjects.

Bill 24 purports to compel all private schools to conform to the government’s obligations under the *Charter*. This contradicts section 32 of the *Charter*, which states that only government is bound by the *Charter*.¹³ In contrast, private schools are protected by the *Charter* (protected from government infringement). The *Charter*’s protection means that private schools can exercise their freedoms of expression, religion and association, and that private schools can use the *Charter* to defend themselves against government action. In other words, free citizens and their voluntary associations are allowed to behave like free citizens and voluntary associations, without government coercion into the state’s ideology. Part of the freedom that the *Charter* protects is the freedom of individuals and groups to believe in, and teach, their own convictions (popular or not) about sexuality and marriage. The requirement that schools parrot the words in legislation they do not agree with is an infringement of freedom of expression protected by section 2(b) of the *Charter*.

If Bill 24 is passed, it will remove the *Charter*’s protection of independent schools and instead impose the *Charter*’s obligations on these schools, to behave like government. This will result in independent religious schools losing their freedom to pursue the purpose for their existence: to

¹⁰ Bill 24, s. 7

¹¹ Bill 24, s. 7

¹² See *L. (S.) c. Des Chênes (Commission scolaire)*, 2012 SCC 7.

¹³ *Charter*, section 32: 1) “This *Charter* applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.”

educate children based on moral and religious principles. Bill 24 means that independent schools will no longer be able to insist on hiring only those who share the moral convictions and religious practices of the school. These schools will be unable to terminate employment based on the violation of religious requirements, or have religious requirements as a condition of employment at all. They will be unable to maintain the religious nature of the school because they will be unable to associate around a common creed, teach it, and exclude those who reject the school's beliefs, mission and purpose. Bill 24 has both the purpose and effect of reducing or removing the religious character from religious schools.

Under Bill 24, it is foreseeable that GSAs could become the perfect cover for clandestine sexual education, as well as abuse, bullying and exploitation, not because GSAs are necessarily worse than others, but simply because parents are not kept apprised of their children's involvement in such clubs.

The legal foundation for parental rights

The *Universal Declaration of Human Rights*¹⁴ states in Article 26(3):

Parents have a prior right to choose the kind of education that shall be given to their children.

Article 16(3) of the *Universal Declaration* also states:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The *International Covenant on Civil and Political Rights*,¹⁵ to which Canada is a signatory, states in Article 18(4):

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure **the religious and moral education of their children in conformity with their own convictions**. [Emphasis added]

As with the *Universal Declaration*, the *International Covenant* states in Article 23(1):

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

¹⁴ G.A. Res. 217 A (III), U.N. Doc. A/810 (1948) [*Universal Declaration*].

¹⁵ 999 U.N.T.S. 171 [*International Covenant*].

The Supreme Court of Canada in *Loyola* affirmed that Article 18(4) of the *International Covenant on Civil and Political Rights* is applicable in Canada.¹⁶

Bill 24 directly contradicts the *Alberta Bill of Rights*, which establishes that “the right of parents to make informed decisions respecting the education of their children” is a human right and a fundamental freedom in Alberta.¹⁷ All laws in Alberta must conform to the *Alberta Bill of Rights*.

Bill 24 also contradicts the *Alberta Family Law Act*¹⁸ and the rights of guardians (including natural parents) in that statute. Section 21(4)(a) states that “...each guardian is entitled to be informed of and consulted about and to make all significant decisions affecting the child in the exercise of the powers and responsibilities of guardianship...”

Section 21(6) states that...each guardian may exercise the following powers:

- (a) to make day-to-day decisions affecting the child, including having the day-to-day care and control of the child and supervising the child’s daily activities;
- (c) to make decisions about the child’s education, including the nature, extent and place of education and any participation in extracurricular school activities;
- (e) to decide with whom the child is to live and with whom the child is to associate;
- (i) to receive and respond to any notice that a parent or guardian is entitled or required by law to receive;
- (l) to receive from third parties health, education or other information that may significantly affect the child.¹⁹

The *Charter* calls the following freedoms “fundamental”: freedom of conscience and religion; freedom of expression; freedom of peaceful assembly; and freedom of association.²⁰ Compelling religious parents and religious schools to create, establish and facilitate clubs which are profoundly antithetical to religious views is an infringement of the fundamental freedoms of Canadians.

The Supreme Court of Canada has held that religious schools have a right to associate around a common creed, teach in accordance with that creed, and exclude those who are unwilling to comply with the requirements of said creed.²¹ Further, the Supreme Court of Canada has held, in regard to section 7 of the *Charter*, that it should be “plain that the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters... are part of the liberty interest of a parent.” The Court has stated that “the common law has long recognized that parents

¹⁶ *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*], at para 65.

¹⁷ *Alberta Bill of Rights*, RSA 2000, c A-14, s. 1(g)

¹⁸ *Family Law Act*, SA 2003, c F-4.5

¹⁹ *Ibid*, s. 24(6)

²⁰ *Charter*, s. 2(a), 2(b), 2(c) and 2(d).

²¹ *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*]; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 [*TWU v BCCT*].

are in the best position to take care of their children and make all the decisions necessary to ensure their well-being.”²²

Writing for the majority in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 (*B. R.*), La Forest J. noted that the Courts have shown reluctance to interfere with parental rights, and that state interference is tolerated only in cases of necessity.²³ In regard to a parent’s *Charter* section 7 right to educate, he stated that “the parental interest in bringing up, nurturing and caring for a child, including medical care and **moral upbringing**, is an individual interest of fundamental importance to our society.”²⁴

In *Re: Baby-Duffell Martin v. Duffell*, the Supreme Court of Canada stated:

In determining welfare, we must keep in mind what Bowen, L.J., in the case of *In re Agar-Ellis*, (1883) 24 Ch.D. 317, as quoted by Scrutton, L.J. in *In. re J.M. Carroll*, [1931] 1 K.B. 317 at 334, he states: “... it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can.”²⁵

According to the Alberta Court of Appeal, it is not the state’s role to determine what is best for a child.²⁶ In that case, the Court said that, without an issue of “fitness” to a parent arising under the law in a specific instance, parents are presumed to know what is best for a child, not government.²⁷ Otherwise, warned the Court, “there is a very real risk that only the fittest of the fit in our society would be permitted to parent.” The Court declared: “That cannot be.”²⁸

In *AC v Manitoba*,²⁹ the Supreme Court of Canada explained that “Parental rights (and obligations) clearly do exist and they do not wholly disappear until the age of majority.”³⁰ In the absence of evidence that parents are actually unfit, there has never been a precedent from any court that parents should generally be excluded from the decision-making process in regard to their own children.

The Supreme Court of Canada’s decision in *Loyola High School v Quebec (Attorney General)* is instructive as to how government must accommodate religious schools when their religious beliefs conflict with government requirements. The Court stated:

²² *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 1995 CanLII 115 (SCC) [*B.R.*] at para. 206.

²³ *Ibid.*

²⁴ *Ibid* [emphasis added].

²⁵ *Re: Baby-Duffell Martin v. Duffell*, [1950] SCR 737, 747, per Rand J.

²⁶ *W(KV) v Alberta*, 2006 ABCA 404 [*W(KV)*].

²⁷ *Ibid.*

²⁸ *Ibid*, at para 35.

²⁹ [2009] 2 SCR 181

³⁰ *Ibid*, at para 58.

In order to respect values of religious freedom in this context, as well as to cohere with the larger regulatory scheme, a reasonable interpretation of the process for granting exemptions from the mandatory curriculum would leave at least some room for the religious character of those schools. The regulation providing for such exemptions would otherwise operate to prevent what the *Act respecting private education* itself allows — a private school being denominational.³¹

The GSA ideology opposes moral and religious beliefs of parents

GSAs are not merely informal peer support groups, but are ideological clubs which espouse particular beliefs about human sexuality and gender.³² Since 2015, section 16.1 of Alberta’s *School Act* has required schools to establish a GSA upon the request of one or more students, and purports to apply to all schools, including independent schools. The constitutionality of this provision has not yet been challenged.³³

GSAs are political clubs³⁴ which promote progressive, secular and libertine beliefs and attitudes about human sexuality.³⁵ The ideology promoted by GSAs is contrary to the teachings of Islam, Christianity, Orthodox Judaism and other religions. Many religious parents believe that sexuality is to be expressed only within a monogamous marriage relationship between a man and a woman, to the exclusion of all other relationships. Many non-religious parents share these beliefs in part, and reject sexual expression by teenagers, and sexual expression outside of a serious, committed relationship between two adults. Further, most parents reject the idea that there are more than two genders, or that gender is based on “identity” rather than biology. Many parents oppose GSAs not because they object to peer support for struggling students, but because they object to the ideology promoted by GSAs.

Section 16.1 of the *School Act* does not require schools to provide appropriate peer support to struggling teenagers, but rather, this law specifically requires “diversity” clubs that promote LGBTQ ideology. GSA material, for example, teaches female children how to “bind” their breasts to their chests so that they look more masculine, and “hide” the outline of male genitalia by “binding” – utilizing articles of clothing that will hide male genitalia between a male’s legs.

³¹ *Loyola*, at para 55.

³² <https://www.teachers.ab.ca/SiteCollectionDocuments/ATA/Publications/Human-Rights-Issues/PD-80-6%20GSA-QSA%20Guide%202016.pdf>.

³³ The position of the authors is that section 16.1 of the *School Act* **in its current form** is an unconstitutional infringement of freedom of religion and conscience under section 2(a) of the *Charter* when rendered operative by a request in a religious school (for example, with Biblical beliefs in regard to marriage and sexuality).

³⁴ <https://www.teachers.ab.ca/SiteCollectionDocuments/ATA/Publications/Human-Rights-Issues/PD-80-6%20GSA-QSA%20Guide%202016.pdf>

³⁵ http://www.parentchoice.ca/bill_24_ndp_seeks_to_control_schools_and_isolate_children

How Bill 24 violates parental rights

Bill 24 requires teachers, principals and other school staff to withhold information from all parents, without exception, about whether their child attends a GSA. The claimed justification for prohibiting parental notification is to protect children from being “outed” to their own parents without the child’s consent. This assumes that schools and the government are better equipped to aid childhood development than parents. This assumption is not supported by the *Charter*, which courts have interpreted as upholding the right of parents to raise their own children without government interference, absent exceptional individual circumstances. In circumstances where a teacher suspects that a child is at risk of harm, physically or emotionally, the teacher already has a legal obligation to inform the director of Child and Family Services.³⁶ Failing to report harm is an offence punishable by a fine of up to \$2,000 and up to six months in jail.³⁷

To force GSAs on religious schools (be they Jewish, Muslim etc.) that object to them on religious grounds does not leave any room for the “religious character of those schools.” The Court in *Loyola* recognized and protected the right to religious freedom, and its particularly important application in the context of religious schools.³⁸

Bill 24’s inclusion of a possible exemption for religious schools from the onerous requirements of the new section 45.1 is misleading.³⁹ The government of Alberta is required to respect the Constitution. Bill 24 widely removes constitutional rights, and then proposes to give a few of them back to arbitrarily selected parties through an exception. This is unacceptable and unlawful. Minister Eggen emailed the school boards on November 2, 2017 to indicate any exemption may be limited to schools “that are largely not publicly funded due to the age of the learner or where they have chosen to opt out of education program accountability requirements.”

No justification for a complete ban on informing parents

In order to lawfully infringe parental rights to be informed concerning their children, the government is required to pass a stringent test:

1. the law infringing the right must be supported by a **pressing and substantial purpose**,
2. the government infringement must be **rationaly connected** to that interest,
3. the law must be **minimally impairing**, and
4. the law’s **benefits must outweigh the harm** caused by the law.⁴⁰

³⁶ *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, s. 4(1),

³⁷ *Ibid*, s. 4(6)

³⁸ For a fuller analysis of this point see “Mandatory Gay-Straight Alliances versus *Charter* Freedoms: An analysis of Alberta’s Bill 10 in light of the Supreme Court of Canada ruling in *Loyola v Quebec*”, available at <https://www.jccf.ca/wp-content/uploads/2015/04/Mandatory-Gay-Straight-Alliances-versus-Charter-Freedoms-April-2015.pdf>.

³⁹ Bill 24, s. 8: “45.2 The Lieutenant Governor in Council may exempt an accredited private school or a class of accredited private schools from the operation of all or part of section 45.1.”

⁴⁰ See *R v Oakes*, [1986] 1 SCR 103.

Prohibiting parental notice regarding their children’s activity is unlawful. **First**, a school is the agent of parents. Parents are the legal guardians of children, not schools. Parents are the ones ultimately responsible for the education of their children, not schools. **Second**, preventing parents from being informed as to their child’s attendance at a GSA (a club where sexual information, sometimes of a graphic nature, will be presented or discussed) or “activity” is to remove parents from a key developmental component of their children’s progress toward adulthood. **Third**, attending a GSA or related “activity” does not identify a student gay or straight, or otherwise. Such clubs, and presumably any related “activity”, are open to all students, regardless of sexual orientation or gender identity. Preventing parents from knowing if their children are attending a GSA has the effect of preventing valuable conversations that should take place between parents and children in regard to sexuality, morality and other important topics. **Fourth**, in those comparatively rare circumstances where there are legitimate concerns of harm or abuse, teachers are already permitted not to inform parents. Frontline educators regularly exercise their discretion as to how to appropriately keep parents informed concerning their children on all issues.

A law universally barring *all* parents from being informed concerning their child’s involvement in a GSA or “activity” therefore does not serve a **pressing and substantial purpose**.

Similarly, preventing all parents from knowing if their child is involved with a GSA or “activity” is certainly not **minimally impairing** of parental rights. The vast majority of parents are caring and supportive, and love their children unconditionally. Bill 24 violates the rights of *all* parents based on concerns about only *a very small number* of parents. Apart from Bill 24, existing law already provides teachers and principals with the tools and resources to deal with the very small number of cases where parents are actually abusive.

Finally, and of import, the **benefits** of prohibiting parental notification must be balanced against the **harm** caused by barring all parents from being informed concerning the information (sexual, ideological, or otherwise) that their child is exposed to by attending a GSA or “activity”. There is no real benefit to be realized from the blanket prohibition of all parental notification, since the few children whose parents may in fact pose a risk to them will continue to be protected as they already are, absent Bill 24.

Conclusion

Bill 24 respects neither the Constitution nor the rule of law.

The Supreme Court of Canada has ruled that government may not interfere with parental rights to make all decisions for their children, including children between ages 13 and 18, unless the government first proves that the parents’ decisions are harmful to the child, or that the child is a mature minor and has made a fully informed decision contrary to parental views. Government may only interfere on a case-by-case basis, and government must bear the onus of proving or justifying its interference in a court of law, upon notice to the parents, who can dispute the government’s claims. The infringement of parental rights is justified only on a case-by-case basis, not by broad or blanket laws which remove rights from all parents. Schools and teachers are not judges, and the contention that they must, by law, withhold information from all parents without exception is contrary to the Constitution, contrary to Canada’s legal obligations under international

law, contrary to the *Alberta Bill of Rights*, and contrary to other Alberta legislation such as the *Family Law Act*.

Section 7 of the *Charter* only permits interference with a parent's role after due process, on a case by case basis, in accordance with the principles of fundamental justice. Section 2 of the *Charter* protects a parent's right to educate based on parents' own conscience and religious beliefs.

The prohibition on parental notification concerning a GSA or "activity" violates the fundamental right of parents to be informed concerning their children's education.

Bill 24 evidences the government's intention to control and change the religious character of independent schools. In so doing, the government undermines or effectively negates the exercise of parental rights in education, through the choices of parents to opt out of the public schools and enrol their children in schools consistent with their beliefs, religious and conscientious. Rather than respecting parents' choices, Bill 24 instead compels independent schools to adopt policy positions in support of the government's preferred LGBTQ ideology. This requirement violates parents' and private schools' fundamental freedoms of conscience and religion, thought, belief, opinion and expression, and association, guaranteed under section 2 of the *Charter*.

Bill 24 is unconstitutional, as both its purpose and effect is to deny the rights of parents under section 7 and section 2 of the *Charter*, and to do so without the requisite justification.