COURT FILE NUMBER	1808-00144
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	MEDICINE HAT
APPLICANTS	P.T., D.T., F.R., K.R., AND OTHERS
RESPONDENT	HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA
DOCUMENT	**BRIEF OF THE RESPONDENT**
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I. Summary

1. In 1994, Justice Russell took judicial notice that discrimination based on sexual orientation was a "historical, universal, notorious, and indisputable social reality" (*Vriend v Alberta*, [1994] AJ no 272 at para 28 (QB) (**TAB 1**)). Twenty-four years later, LGBTQ[1] students continue to face physical violence and mental abuse, often at school and within their families, with grave consequences for their physical and mental well-being.

2. In response, in 2015 the Respondent ("Alberta") amended the *School Act*, RSA 2000, c S-3, to support students who, of their own initiative, wish to establish an LGBTQ supportive group or activity. By statutory definition, such a group or activity must "promote a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging" (*School Act*, s.16.1 (Applicant's **Tab 16**)). Contrary to the Applicants' assertions, groups or activities that expose children to pornographic materials, encourage children to engage in sexual activity, or allow children to be bullied or preyed upon, would not meet this definition.

3. Although long-standing privacy legislation protects such students' privacy, in 2017 Alberta affirmed this privacy and required schools to carefully consider what information can and should be disclosed about such a group or activity; students will not be "outed", either as LGBTQ or as allies of their LGBTQ friends, without their consent. Nothing prevents students from talking to their parents about such a club or activity or from "coming out" to their parents, and nothing prevents parents from directing their children not to participate in such clubs or activities and from condemning such clubs and activities in the privacy of their own homes.

4. Nevertheless, the Applicants seek an interim injunction staying portions of the *School Act* as amended by *Bill 24: an Act to Support Gay-Straight Alliances* ("Bill 24"). Below, Alberta, submits

- the Applicants have a high threshold to meet given the presumption of legislative validity;

[1] Lesbian, gay, bisexual, transgender, questioning, and/or queer

- there is no serious issue to be tried as the impugned sections do not have the effect the Applicants allege and the Applicants have failed to show their constitutional rights are engaged;

- the Applicants have failed to prove they will suffer irreparable harm if an interim injunction is denied prior to a hearing on the merits of their Application; and

- with respect to the balance of convenience, irreparable harm to students, both LGBTQ students and their supporters, will result if the injunction is granted.

II. Background Facts Regarding Bill 24

5. By way of background, the *School Act* defines a "school" as follows:

> 1(1)(y) "school" means a structured learning environment through which an education program is offered to a student by
>
> (i) a board,
>
> (ii) an operator of a private school,
>
> (iii) an early childhood services program private operator,
>
> (iv) a parent giving a home education program, or
>
> (v) the Minister

6. The *School Act* creates public school boards, private schools, and charter schools, each of which is described below.

7. Boards (which include public, separate and Francophone Regional Authorities) are created as corporations under the *School Act* (see sections 246 and 255 (Applicant's **Tab 16**)) and derive their authority from it. They are operated by publicly-elected boards of trustees and are publicly funded. The province provides funding support for boards' capital infrastructure.

8. Private schools must be registered under s. 28 of the *School Act* (Applicant's **Tab 16**). The majority are accredited and funded by Alberta Education, and those that receive funding must be a society, Part 9 (non-profit) company, or other non-profit corporation. Funded private

schools receive approximately 60-70% of the per-student instruction grant as compared to boards and can also charge tuition (whereas boards and charter schools cannot). The province does not fund capital infrastructure for private schools. The Minister may cancel or suspend registration or accreditation of a private school (s. 28).

9. Charter schools are established by the Minister under s. 32 of the *School Act*. They must be operated by a society or Part 9 (non-profit) company, which must restrict its purposes to the operation of that charter school. In most respects, charter schools are treated similarly to boards under the *School Act*, and are only established after a board refuses to establish an alternative program not currently being offered in the area.

10. In 2015, the Alberta Legislature passed *Bill 10: An Act to Amend the Alberta Bill of Rights to Protect our Children*. In particular, Bill 10 added s. 16.1 to the *School Act* which, among other things, requires all boards and the operators of private and charter schools to allow students to establish clubs or activities which "promote a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging" (s. 16.1) (Applicant's **Tab 16**). The amendments also provide that students may call their club a gay-straight alliance ("GSA") or a queer-straight alliance ("QSA"). In this way, the *School Act* has supported the formation of GSAs for almost three years.

11. As well, the Bill 10 amendments added s. 45.1 to the *School Act* which requires boards and the operators of charter schools, but not the operators of private schools, to establish a policy regarding their obligation "to provide a welcoming, caring, respectful and safe learning environment that includes the establishment of a code of conduct for students that addresses bullying behaviour" (Applicant's **Tab 16**).

12. The Alberta Legislature further amended the *School Act* through Bill 24, which was introduced in the Alberta Legislature on November 2, 2017 and received Royal Assent on December 15, 2017. Bill 24's amendments to the *School Act* are reflected in red in the attached version of the *School Act* (**TAB 2**) and are addressed in more detail below. Essentially, the amendments:

- require schools, including private schools, to create welcoming, caring and respectful policies and to make those policies publicly available,
- strengthen the Minister of Education's ability to ensure every school complies with the law,
- highlights the need to protect the privacy of students that join a GSA, and
- ensure principals allow students to create a GSA or QSA in a timely manner.

13. The Bill 24 amendments came into force on April 1, 2018, however school authorities have until June 30, 2018 to make publicly available their policies created pursuant to s. 45.1 of the *School Act*.

III. The Nature of GSAs

14. The Applicants do not provide the Court with evidence as to what kinds of activities students organize through GSAs. Instead, they speculate that GSAs are clubs aimed at providing children with sexually explicit material and at making children vulnerable to being preyed upon. In fact, GSAs focus on creating a safe space where students can socialize, be themselves, make friends, and "help other students understand the importance of being respectful to LGBTQ+ people" (Story Affidavit, para 20; Soetaert Affidavit, para 15).

15. As part of a GSA, students do such things as discuss their week, current events, and challenges LGBTQ people face; plan community events; create art; play cards; colour; participate in activities aimed at reducing the stigmatization of LGBTQ people; make bracelets; paint their fingernails; meet with other young people from local GSAs; play games; and host presentations (Story Affidavit, para 17; Francis Affidavit, paras 6, 17; Soetaert Affidavit, paras 12, 13, 21, 22). These are student-led activities that are supervised by a responsible adult (Francis Affidavit, para 17, 20-25).

IV. The Test for an Interlocutory Injunction Against the Crown

16. The test for injunctive relief is the oft-cited tripartite test from *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 (Applicant's **Tab 16**):

- there is a serious constitutional issue to be determined,
- compliance with the provisions will cause irreparable harm, and
- the balance of convenience favours not enforcing the new provisions until this Court has disposed of the legal issues.

17. However, the test for an interim injunction is higher when the injunction is sought to restrain the effect of legislation. In such circumstances, only in clear cases will an injunction be granted. Weighed heavily in the balance are the presumptions that the challenged law will produce a public good and that harm will result from the suspension of that law (*Harper v Canada (Attorney General)*, 2000 SCC 57 ("*Harper*") at paras 6-7, 9 (**TAB 3**)).

18. Thus, to obtain an interlocutory injunction, it is not enough for the Applicants to show that there is a serious issue to be tried or that they could suffer irreparable harm if the injunction is denied. Rather, to succeed they would have to show that the suspension of the legislation would provide a public benefit sufficient to override the presumed public benefit arising from the maintenance of the law (*Harper*, para 9, quoting *RJR-MacDonald*, pp. 348-49 (Applicant's Authorities, **Tab 7**)). As Justice Slatter observed, "[t]he *de facto* temporary denial of a right resulting from the time inherent in due process is one of the prices we pay for the rule of law" (*R v Lefthand*, 2007 ABCA 206 at para 32 (**TAB 4**)).

19. Below, Alberta submits the Applicants have failed to meet this test.

V. The Applicants Have Failed to Establish a Basis for an Injunction

A. No Serious Issue to be Tried

20. In light of the presumed public interest in enforcing the *School Act*, Alberta submits the Applicants have failed to establish that there is a serious issue to be tried. Below, Alberta submits that the impugned provisions do not have the effect the Applicants allege and that the Applicants have failed to show that their legal or constitutional rights are engaged. This weakness in their case is relevant not just at the first stage of the RJR test, but also when considering the balance of convenience.

i. The Impugned Provisions Do Not Have the Effect the Applicants Claim

21. To begin, the Applicants misstate the effect of the two provisions they primarily challenge: s. 16.1(6) and s. 50.1(4) of the *School Act* (Applicant's **Tab 16**).

22. Section 16.1(6) provides that once a GSA is formed or an activity organized, "the principal is responsible for ensuring that notification, if any, ... is limited to the fact of the establishment of the organization or the holding of the activity". Section 45.1 requires school boards, charter and private schools to develop inclusive policies and s. 45.1(4) affirms that notification regarding a GSA or related activity is limited to the fact of the establishment of the organization or the holding of the activity. However, s. 45.1(4) also provides that the school's policies with respect to such a group or activity must be "otherwise consistent with the usual practices relating to notifications of other student organizations and activities" (s. 45.1(4)(c)(ii)). Read together, these provisions provide that schools are not to disclose more information to parents about GSAs or related activities than they would regarding any other student organization or activity. Schools will not routinely "out" LGBTQ students and their friends, and students are trusted to decide for themselves whether it is safe to tell their parents about their involvement in a GSA or related activity.

23. However, contrary to the Applicants' arguments, a principal can tell parents a great deal about a GSA or related activity, provided doing so is consistent with the school's practices regarding other student organizations and activities. A principal can inform parents that a GSA

has been formed at the school or that a related activity will be held, which teacher is responsible for the group or activity, and which grades the GSA or activity is for. Thus, Bill 24 did not create "secret spaces and secret places" as the Applicants allege. GSAs are school clubs that occur on school property and are supervised by a teacher, principal, or other staff member. In other words, the spaces and individuals are already familiar to GSA members and their parents.

24. The information withheld from parents is relatively narrow: principals do not "out" students to each other or to parents by identifying them as having joined a GSA or as having participated in a related activity. Nothing precludes parents from asking their child whether they are part of a GSA, telling their child not to attend a GSA, or characterizing GSAs negatively in the privacy of their own homes.

25. Contrary to the Applicants' argument, this is not the "first time in the history of Alberta, or Canada" that legislation prevents the transmission of information to parents about their children (Applicants' brief, para 26). Rather, prior to Bill 24, legislation already protected minors' privacy. Both 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*) protect minors' privacy and are paramount over other legislation in the case of conflict (*FOIP,* s.5 (**TAB 5**) and *PIPA*, s. 4(6) (**TAB 6**)).

26. *FOIP* governs the kinds of information public schools can disclose about a student, even to the student's parents. While ss. 17(2)(a) and 40(1)(d) of *FOIP* allow a school to disclose a student's personal information with the student's consent, absent such consent, the school can only disclose the student's personal information to his or her parents if the disclosure would not be an unreasonable invasion of the student's privacy (s. 40(1)(b) of *FOIP* (**TAB 5**)). Likewise, while s. 84(1)(e) authorizes parents to exercise their child's rights under *FOIP*, they may only do so if, in the public body's view, doing so would not constitute an unreasonable invasion of the child's privacy (**TAB 5**). When determining whether a disclosure of a student's personal information would constitute an unreasonable invasion of his or her privacy, the school must consider all the relevant circumstances, including whether the personal information was supplied

in confidence (s. 17(5)(f) of *FOIP* (**TAB 5**)). The protections for privacy in *FOIP* are available to everyone, adult and minor alike.

27. Thus, irrespective of anything in Bill 24, unless one of the exceptions summarized below applies, *FOIP* already prohibits a school from "outing" a student to his or her parents, as this would constitute an unreasonable invasion of the student's privacy. Likewise, if the student does not want his or her parents to know that he or she joined a GSA or participated in a related activity, then *FOIP* prohibits a school from disclosing this information to the student's parents as this information would have been supplied in confidence.

28. However, *FOIP* allows a school to disclose a student's personal information to a parent, including his or her attendance at a GSA or related activity, if:

- the student consents to the disclosure (s. 40(1)(b)),
- there are compelling circumstances affecting anyone's health or safety and written notice of the disclosure is given to the student (ss. 17(2)(b)),
- an Act of Alberta authorizes or requires the disclosure (ss.17(2)(c))
- the student has identified their involvement in the GSA and consented to the school telling their parent (s. 40(1)(d)),
- disclosure is necessary to comply with an enactment of Alberta (s. 40(1)(e)),
- disclosure is in accordance with an enactment of Alberta that authorizes the disclosure, such as the *Children First Act* (s.40(1)(f)),
- the parent obtains a Court Order compelling the disclosure (s. 40(1)(g), or
- the school reasonably believes that the disclosure will avert or minimize: a risk of harm to the health or safety of a minor, or an imminent danger to the health or safety of any person (s. 40(1)(ee)).

(TAB 5)

29. Thus, even if the Applicants convinced a Court to strike down the notification provision in s. 16.1(6) of the *School Act*, that would not give the Applicant parents the unlimited access to

their children's personal information that they seek. *FOIP* would still protect students' privacy unless one of the enumerated exceptions applied.

30. *PIPA,* which governs private schools, has a similar effect and is also paramount over other legislation to the extent of any conflict (s. 4(6) (**TAB 6**)). Section 61(b) provides that an individual under the age of 18 may exercise any right or power conferred on an individual by *PIPA*, provided he or she "understands the nature of the right or power and the consequences of exercising the right or power" (**TAB 6**). With respect to such a student, *PIPA* prohibits private schools from disclosing the student's personal information without the student's consent, even to the student's parents, unless one of the enumerated exceptions applies (ss. 7(1)(d), 20 (**TAB 6**)). That is, *PIPA* generally prohibits a private school from "outing" a student to his or her parents.

31. However, *PIPA* allows a private school to disclose a student's involvement in a GSA or related activity, without the student's consent, if:

- the disclosure is authorized or required by a statute of Alberta (s. 20(b)(1)),
- the disclosure is necessary to respond to an emergency that threatens the life, health or security of an individual or the public (s. 20(g)), or
- a reasonable person would consider the disclosure clearly in the student's interests, and the student's consent either cannot be obtained in a timely way, or the student would not reasonably be expected to withhold consent (s. 20(a)).

(**TAB 6**)

32. Thus, s. 16.1(6) of the *School Act* does not have the effect the Applicants allege. Regardless of anything in Bill 24, *FOIP* and *PIPA* already restrict the information the principals and teachers at both public and private schools can disclose about students, even to their parents, unless one of the enumerated exceptions applies.

33. Indeed, if parents had an unfettered right to information about their children, there would be no need for the *School Act* to explicitly state that a parent will be notified if a student is expelled or suspended (s. 25(3)(5) (**TAB 2**)).

34. In several cases, the Office of the Information and Privacy Commissioner of Alberta ("OIPC") has affirmed minors' privacy relative to their parents. In Order F2005-017, *Calgary Health Region* (**TAB 7**), an OIPC Adjudicator found that the *Health Information Act* (which contains provisions similar to those reviewed above), did not allow a parent to obtain from the Calgary Health Region information pertaining to psychological questionnaires in her daughter's hospital records (paras 82-83).

35. In Order F2006-006, *Calgary and Area Child and Family Services Authority* (**TAB 8**), an OIPC Adjudicator confirmed a public body's decision to deny a parent access to personal information about his son which the son had supplied in confidence (paras 103-108). Likewise, in Order F2012-21, *High Prairie School Division No. 48* (**TAB 9**), an OIPC Adjudicator upheld a School Division's decision not to disclose to a parent his daughter's school counselling records on the grounds that to do so would unreasonably invade the daughter's privacy (para 57).

36. Thus, contrary to the Applicants' arguments, the notification provision in s. 16.1(6) of the *School Act* did not substantially change the law. Rather, it highlights how that law applies in relation to GSAs, particularly for youth who would be unfamiliar with both *FOIP* and *PIPA* and would be concerned about being outed to their parents.

37. The Applicants similarly misstate the effect of s. 50.1(4) of the *School Act* (Applicant's **Tab 16**). It does not remove parents' ability to ask that their child be able to leave the classroom when certain topics are discussed. To begin, s. 50.1 addresses curriculum, not clubs or activities. It directs that a parent shall be notified when the subject-matter of religion or human sexuality will be primarily or explicitly included in:

- courses of study,
- educational programs or instructional materials,
- instruction, or
- exercises.

It is through s. 39 of the *School Act* that the Minister prescribes, authorizes, approves, or prohibits courses of study, education programs, and instructional materials (Applicant's **Tab 16**). Section 50.1(2) provides that, upon a parent's request, a student may be permitted "to leave the

classroom" "without academic penalty" when the above materials will primarily or explicitly address religion or human sexuality.

38. By definition, GSAs and related activities are not curriculum; they are not a course of study, an educational program, instructional material, instruction, nor an exercise. It is not mandatory that students participate in GSAs, there is no academic credit or penalty from participating or not participating in a GSA, and GSAs are "intended to promote a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging", not to primarily and explicitly address religion or human sexuality.

39. Section 50.1(3) of the *School Act* goes on to provide that, "This section does not apply to incidental or indirect references to religion, religious themes or human sexuality" (Applicant's **Tab 16**). That is, parents can only request that their child be able to leave the classroom if the curriculum will *primarily and explicitly* deal with religion or human sexuality. In this context, s. 50.1(4) adds that, "*For greater certainty*, this section does not apply with respect to the establishment or operation" of a GSA or related activity (emphasis added) (Applicant's **Tab 16**). That is, because such clubs or activities are not part of the curriculum, the opt-out provision in s. 50.1(2) would not apply, even if s. 50.1(4) did not explicitly say so. For these reasons, Alberta submits that s. 50.1(4) does not have the effect the Applicants claim.

40. Thus, the Applicants' constitutional proclamations, addressed below, are made in the context of their misstatements regarding the effect of the two provisions they primarily challenge: ss. 16.1(6) and 50.1(4). As these provisions do not have the effect the Applicants allege, there is no serious issue for this Honourable Court to consider.

ii. The Applicants' Constitutional Rights are Not Engaged

41. The Applicants make a bald assertion that the impugned provisions violate the *Canadian Charter of Rights and Freedoms* ("*Charter*"), the *Alberta Bill of Rights*, RSA 2000, c A-14, and the *Family Law Act*, SA 2003, F-4.5.

42. With respect to the *Alberta Bill of Rights*, to the extent the rights it protects are also protected in the *Charter*, any arguments the Applicants may have under it are subsumed by their *Charter* arguments. While s. 1(g) of the *Alberta Bill of Rights* is unique in that it protects, "the right of parents to make informed decisions respecting the education of their children" (Applicant's **Tab 16**), as was set out above, a GSA or related activity is not education.

43. With respect to the *Family Law Act*, the Applicants fail to articulate how it is engaged. Parents' guardianship responsibilities and entitlements are not absolute and can be limited by law (*Family Law Act*, ss. 21(5) and (6) (**TAB 10**)). Guardians must act in the best interests of the child and consistent with the child's evolving capacity, and a court may reverse a guardian's significant decisions with respect to a child (*Family Law Act*, ss. 21(1)(7), 30 (**TAB 10**)). The *Family Law Act* does not give parents the right to know everything about their children, dictate who they associate with, or control their every movement. Children are not chattels subject to parental ownership and control. They are human beings, entitled to their own rights and privacy.

44. Because the Applicants only make substantive arguments with respect to the *Charter*, only the *Charter* is addressed below. The below review of their arguments with respect to the seven sections of the *School Act* they challenge reflect that they have failed to establish that there is a serious issue to be tried sufficient to override the presumption of legislative validity.

16.1(1)(a): the requirement to establish a club or activity upon a student's request

45. The Applicants ask for an interim injunction with respect to s. 16.1(1)(a). Since 2015, this section has required a principal to establish a GSA or related activity upon a student's request. By definition, the student organization or activity must be one that is "intended to promote a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging". Such organizations and activities are also voluntary; students are not required to participate. The only addition Bill 24 made to this section is to require the principal to "immediately" grant permission for the establishment of the student organization or the holding of the activity.

46. Beyond a bald assertion that s. 16.1(1)(a) breaches their rights, the Applicants make no submissions explaining this claim. There is no evidence that there are GSAs at any of the Applicant schools, or that a student at any of the Applicant Schools has requested a GSA. Moreover, nothing in this section restricts the Applicants from educating their children and students in accordance with their moral and religious beliefs. Nor does it compel or restrain the practice of their faith, either individually or collectively.

47. The Supreme Court has already held that neither school boards nor parents have an unfettered right to dictate what children are exposed to at school. For instance, in *Chamberlain v Surrey School District No 36*, 2002 SCC 86 (**TAB 11**), the Court held that the school board violated the British Columbia *School Act* when it refused to approve three same-sex parenting books for use in career and personal planning classes. In finding the board's decision unreasonable, the Court found that it is unavoidable that children will be exposed to people, clothing, family models, and ways of being of which their parents disapprove. As the Court explained, "[t]he cognitive dissonance that results from such encounters 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" (para 65). 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" (para 66).

48. The Supreme Court made similar observations in *S.L. v Commission scolaire des Chênes*, 2012 SCC 7 (**TAB 12**). In that case, parents argued that it violated their right to freedom of religion for their children to have to take mandatory ethics and religious culture classes at Quebec schools. They argued that the mandatory classes interfered with their right to pass their faith onto their children. In rejecting this claim, the Court held that parents are free to pass their beliefs onto their children, but "[t]he 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 and ignores the Quebec government's obligations with regard to public education" (para 40).

49. The Supreme Court again considered Quebec's mandatory ethics and religious culture classes in *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (**TAB 13**). In that case, a private Catholic school argued that it violated the right to freedom of religion for its teachers to have to teach about the ethics of other religions from a neutral perspective. A majority of the Court disagreed and 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" (para 71). Given this, Alberta submits that an optional GSA, which does not involve curriculum, cannot violate freedom of religion.

50. Thus, the mere fact that s. 16.1 allows students to establish GSAs or related activities does not infringe the Applicant's freedom of religion. Moreover, even if this provision engaged the Applicants' constitutional rights, it has done so since 2015; there is no urgency to justify the request for an interim injunction.

16.1(3.1): the club's name may be "gay-straight alliance" or "queer-straight alliance"

51. Section 16.1(3.1) provides that, "for greater certainty", principals are prohibited from prohibiting or discouraging students from choosing the names "gay-straight alliance" or "queer-straight alliance." Again, beyond a bald assertion, the Applicants do not explain how this breaches their freedom of religion.

52. Moreover, since 2015, the *School Act* has stated that "students may select a respectful and inclusive name for the organization or activity, including the name "gay-straight alliance" or "queer-straight alliance", after consulting with the principal" (s. 16.1(3) (**TAB 2**)). Thus, for almost three years students have had the statutory right to choose such a name. All the addition of s. 16.1(3.1) did was to reinforce, "for greater certainty", that the principal cannot oppose such a name. The Applicants do not explain how this addition has created an urgency justifying an interim injunction.

16.1(6): notification is limited to the fact of the establishment of the organization or the holding of the activity

53. The Applicants primarily challenge s. 16.1(6) of the *School Act* which limits what a principal can tell parents about a GSA or related activity. As was set out above, read in the context of s. 45.1(4), there is a great deal of information principals may tell parents about such a club or activity, but principals cannot share students' private information by outing students without their consent.

54. The Applicants make sweeping assertions regarding their rights under s. 7 of the *Charter*. In essence, they argue that they have a parental right under s. 7 of the *Charter* to notification regarding everything about their child, including who speaks to their child throughout the day and what "suggestions" that person might make (Brief, para 10). This is a substantial overstatement.

55. The only case the Applicants cite regarding parental rights is *B.(R.) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 ("*Children's Aid Society*") (Applicants' Authorities, **Tab 1**). In that case, the Court affirmed a parent's right "to nurture a child, to care for its development, and to make decisions for it in *fundamental matters* such as medical care" (emphasis added). There is no constitutional right to know a child's whereabouts at all times, who exactly the child is interacting with at every moment, which teachers spoke to the child, or which children the child spoke with and what they said. Moreover, in *Children's Aid Society*, the Court upheld legislation allowing the state to override a parent's wishes and religious beliefs regarding a fundamental matter when it was in the child's best interests to do so.

56. The Applicants also do not acknowledge their children's own rights under s. 7 of the *Charter*. In *Children's Aid Society*, the Court commented that, in a case in which a child's right to security of the person conflicted with a parental right, the child's right would prevail (para 117). In *A.R. v Alberta (Child, Youth and Family Enhancement Act, Director*, 2014 ABCA 148 (**TAB 14**), the Alberta Court of Appeal more recently affirmed that the best interests of the child prevail over any parental rights under s. 7 (para 17).

57. The Appellants also argue that s. 16.1(6) violates freedom of religion as protected in s. 2(b) of the *Charter*, and freedom of association as protected in s. 2(d) of the *Charter*. However, they cite no law to support this. Nothing in Bill 24 affects parents' ability to impose their religious views on their children, regardless of how exclusionary, and nothing affects their ability to associate for the purpose of educating their children.

58. Moreover, as was set out above, an interim injunction would not have the effect the Applicants seek. Temporarily reading s. 16.1(6) out of the *School Act* would not require principals to disclose students' personal information to parents; *FOIP* and *PIPA* already protects students' privacy.

28(8)(9): a private school must provide a respectful learning environment and this must be reflected in policy

59. Bill 24 added s. 28(8) and (9) to the *School Act* which made the following sections, summarized below, apply to private schools: 20(a), 45.1, 45.2, and 45.3 (Applicant's **Tab 16**).

60. Section 20(a) requires a school principal to "provide a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging" (Applicant's **Tab 16**).

61. The key subsections of s. 45.1 are summarized below:

- s. 45.1(1): requires a school to provide students and staff "with a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging".
- s. 45.1(2): requires a school to have a policy regarding the obligation under (1) "to provide a welcoming, caring, respectful and safe learning environment" and that policy must establish a code of conduct for students that addresses bullying.
- s. 45.1(3): requires a policy and a code of conduct to affirm the rights protected in the *Alberta Human Rights Act* and the *Canadian Charter of Rights and Freedoms*.
- s. 45.1(4): the policy must address the school's responsibilities under s. 16.1 and not undermine those responsibilities.

- s. 45.1(5): a code of conduct must state its rationale with a focus on welcoming, caring, respectful and safe learning environments, state what is acceptable and unacceptable behaviour, and state the consequences for unacceptable behavior.

- s. 45.1(6): the school shall make the policy and code of conduct publicly accessible in a prominent location on a board website, display the url for the policy and code of conduct in a place clearly visible to students, provide the policy or code of conduct to an individual on request, review the policy and code of conduct by June 30 each year, and comply with any further requirements established by the Minister.

- s. 45.1(8): If a board does not establish a policy or a code of conduct as outlined above, the Minister may establish the board's policy or code of conduct and/or impose any terms or conditions the Minister considers appropriate.

62. The Applicants state that making these provisions apply to private school extends the power the province has over the operation of private schools. However, they fail to acknowledge that Alberta has a constitutional right to legislate regarding education within the province. That right includes the right to determine what kinds of schools will be permitted to operate within the province, the curriculum of such schools, and which schools will receive public funding. The Applicant Schools do not have a constitutional right to funding, or even to operate. The Applicants have failed to articulate any legal basis for their challenge to the above provisions.

45.3: The Minister may appoint a person to conduct an inquiry regarding a school or to examine the management, administration or operation of a school, and on receipt of such a person's report the Minister may make an order

63. Sections 40 and 41 of the *School Act* allow the Minister to appoint a person to investigate and report on the affairs of a school, including a private school. Bill 24 did not amend these sections. However, Bill 24 added s. 45.3, which states that, "For greater certainty, sections 40 and 41 apply in respect of a contravention of, or failure to comply with, section 45.1" (Applicant's **Tab 16**). The Minister has broad powers under ss. 40 and 41 and thus s. 45.3 was not strictly necessary. However, the addition of s. 45.3 did alert schools that the Minister will take seriously any breach of s. 45.1. The Applicants do not raise a legal issue with respect to this section or explain how it breaches a constitutional right.

50.1(4): the "sex-ed" opt-out provisions do not apply to GSAs

64. As was set out above, s. 50.1(2) of the *School Act* addresses curriculum, not clubs or activities, and allows a parent to request that their child be permitted to leave the classroom when "courses of study, educational programs or instructional materials, or instruction or exercises, include a subject matter that deals primarily and explicitly with religion or human sexuality" (Applicant's **Tab 16**). By definition, GSAs and related activities are not curriculum, it is not mandatory that students participate in them, and they are "intended to promote a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging", not to primarily and explicitly address religion or human sexuality in a course of study or instruction. Thus, the Applicants have failed to establish that there is a serious issue with respect to the constitutionality of this section.

iii. Conclusion Regarding the Lack of a Serious Issue to be Tried

65. As was set out above, the Applicants have a high threshold to meet to justify the granting of an interim injunction. They have not established that there is a serious issue to be tried, and even if they did, that alone is an insufficient basis on which to grant an interim injunction restraining the effect of legislation; legislation is presumed to be validly enacted and to have a public good.

66. In this case, the Applicants have failed to clearly articulate their legal arguments. What they have expressed reflects that there are no serious issues to be tried that are sufficient to override the presumption of legislative validity before there is a full constitutional hearing on the merits.

B. No Evidence of Irreparable Harm

67. The irreparable harm an applicant alleges would occur without an injunction must be "detailed and concrete … real, definite, unavoidable"; vague assumptions and bald assertions are insufficient (*Abbvie Corp v Janssen Inc.*, 2014 FCA 112 at para 24 (**TAB 15**)).

68. Below, Alberta submits the Applicants have failed to meet this test. Not only do the Applicants' Affidavits fail to establish irreparable harm, they are misinformed and inflammatory.

69. The Applicants' affidavits are reviewed below.

i. The Affidavits

Affidavits of David Joseph Rose, Sukhvinder Malhotra and Paul Neels (April 3, 2018)

70. These Affidavits do not provide evidence of irreparable harm. The affiants are not experts regarding LGBTQ youth, and do not identify as having been LGBTQ youth or as having attended a GSA personally. Moreover, parts of these three affidavits are argument, not evidence.

Affidavit of Paul Neels (April 25, 2018)

71. This Affidavit addresses the submission of the Annual operating plans. The deadline for submission was extended by Ministerial Order to June 30, 2018.

The Affidavit of P.T.

72. Through P.T.'s affidavit, the Applicants state that P.T.'s daughter was harmed by the withholding of information from P.T. Only an expert or P.T.'s daughter herself could give such evidence.

73. There is also no evidence that P.T.'s daughter was exposed to explicit materials or suggestions through a GSA. P.T. did not know about his daughter's struggles because his daughter decided not to tell him.

Affidavit of Theresa Ng

74. Ms. Ng's affidavit is grossly misinformed. It does not provide evidence of irreparable harm if the impugned provisions remain in force while the Court determines their validity.

75. Ms. Ng references the iSMISS web links controversy, described in more detail below (Exhibits D-F and L-O). Presumably, this material was added for its shock value and in the hope that it would create a visceral reaction against Alberta, notwithstanding that the links had nothing to do with government.

76. Each of the Exhibits in Ms. Ng's Affidavit are addressed below:

- **Exhibit A**: This is said to be a compilation of teacher's concerns but concerns about what is not identified. In fact, the exhibit is a transcript of a rally speech Ms. Ng gave about the notification provisions of Bill 24 and is thus irrelevant.

- **Exhibits B and C**: This is a Fraser Institute publication on choice in education and blog posts about the importance of educational choice. They do not address GSAs, LGBTQ students, student privacy, sexual orientation, or gender identity. They are irrelevant.

- **Exhibit D**: This is a screen shot from the Alberta Education website describing how students can find a staff liaison for their GSA, and makes the point that if no staff are available the Minister will appoint a responsible adult. This Exhibit reinforces that the GSA facilitator is a responsible adult, either directly employed or closely supervised by, the school board.

- **Exhibit E**: This Exhibit notes that Alberta partly funded the Alberta GSA Network website.

- **Exhibit F**: This Exhibit shows a link to the Alberta GSA Network from the Alberta Education website.

- **Exhibit G**: This is an excerpt from the PRISM toolkit the Alberta Teachers' Association developed with Alberta's funding support. It is a resource "to use in support of creating welcoming, caring, respectful and safe learning environments for children and youth". The Exhibit states that gender is a "deeply personal and complex experience" and calls on teachers to "protect and support the child's self-esteem, saying it is ok for the child to be who he or she is". Contrary to Ms. Ng's statements, Exhibit G has neither lesson plans nor activities.

- **Exhibits H, J, and K**: These Exhibits reinforce the complexity of the issues LGBTQ youth face. Ms. Ng's comments regarding these documents show the disconnect in some families between what parents believe and what their children might be feeling.

- **Exhibit K**: This Exhibit cites statistics which indicate the majority of youth identify as LGBTQ and over half of Gen Z's do not identify as strictly heterosexual. This supports Alberta's view that Bill 24 is relevant for a lot of students, not a few.

- **Exhibit I**: This Exhibit is an excerpt from Alberta's Guide to Education and notes that student-led organizations such as GSAs fall outside the parameters of s. 50.1 notification and that the legislation is not intended to disrupt instruction or discussion of controversial issues in the classroom. Teachers are to continue to respectfully handle decisions and parents' perspectives when providing instruction and to exercise their professional judgment (page 87). In attaching this Exhibit, Ms. Ng has confused GSAs with classroom instruction.

- **Exhibits L-O**: These are inflammatory and were presumably included for shock value. To get to the offending material, a student would have to start on the Education website, then go to Alberta GSA Network (Exhibit F), then Community Supports (Exhibit L), then the Central Alberta Tab (Exhibit L), then Fruit Loop (Exhibit L), where the student would land on Fruit Loop's Facebook page – which of course is constantly changing and can be accessed by anyone with an internet connection. The material at Exhibit N was available from the CHEW Project, located in the same place as the Fruit Loop link (Affidavit para 32). This situation was raised in March 2017 and within hours the links to Fruit Loop were removed (Boje Affidavit, para 4). A few weeks later the whole "Community Supports" tab was removed from the Alberta GSA Network website (as noted in Exhibit L and Ng Affidavit para 31). Ironically, the only way a student would now come upon these documents is through Ms. Ng's blog (Exhibit L).

There is no evidence that Alberta or GSAs promote such pornographic materials or that any students ever encountered these materials through a GSA. The Applicants' assertion

that children have been or will be exposed to such materials through GSAs is simply wrong. Moreover, a group which provided such materials to students or allowed students to share such materials would not meet the statutory definition of a GSA.

- **Exhibit P**: This Exhibit contains excerpts from a survey of Camp fYrefly participants. This camp is for LGBTQ youth and the only survey question included in the Exhibit asks camp participants about their favorite workshop. This material is incomplete and also likely included for shock value as it plays into the fear that youth are overly sexualized. The Camp has nothing to do with GSAs.

- **Exhibit Q**: This is a screenshot showing how clubs can join the Alberta GSA Network.

- **Exhibit R**: This is a GSA Guide for Teachers and notes four main roles for GSAs: counselling and support, providing safe spaces, raising visibility and awareness, and effecting educational and social change. The Exhibit notes that it is helpful to build a strong coalition of support that includes students, teachers, administrators, and parents (page 31). The ATA produced this document, not Alberta.

- **Exhibits S and T**: These are letters to the Minister of Education and blog posts complaining about the web links controversy and Bill 24. They illustrate the hysteria and misinformation in the public sphere.

- **Exhibit U**: This is a transcript of an address to the European Union Parliament about raising children. It focuses on the attachment theory of parenting and does not mention LGBTQ youth, GSAs, or privacy.

- **Exhibit V**: This article about parental involvement in schools highlights the importance of parents monitoring homework and attendance and spending time at the school. The parts of the article that have been provided are irrelevant to the issues facing the Court.

- **Exhibit W and X**: These are digital letter templates and a blog post and are irrelevant.

- **Exhibit Y**: This is the "Being Safe, Being Me: Canadian Trans Youth Health Survey" and explains the importance of supporting transgender youth.

ii. Conclusion on Irreparable Harm

77. The Applicants' affidavits reflect that they are hostile to students forming GSAs. They do not establish that irreparable harm will result unless an interim injunction is granted before their claim can be adjudicated.

C. The Balance of Convenience Favours Refusing the Injunction

78. At the balance of convenience stage, the issues are the potential harm to both parties and the strength of the applicant's case (*Lubicon Lake Indian Band v Norcen Energy Resources Ltd.*, [1985] AJ no 650 at para 34 (CA) (**TAB 16**)).

79. Below, Alberta submits that youth will suffer irreparable harm if the injunction is granted, not just LGBTQ youth, but also youth who identify as heterosexual and gender normative. This harm takes precedence over any harm the Applicant parents or schools allege they may experience as a result of Bill 24.

80. Research has exposed the extent of homophobia and transphobia at schools. In his expert affidavit, Dr. Kevin Alderson notes that one Canadian study 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 LGBTQ students reported hearing homo-negative comments from teachers daily or weekly.
- 74% of trans students, 55% of sexual minority students, and 26% of non-LGBTQ students reported experiencing verbal harassment regarding their gender expression.
- 68% of trans 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,

(Alderson Affidavit, paras 13, 14)

81. This research is consistent with the evidence from Alberta's lay affiants. Former student Matthew Story notes that at his Lethbridge High School in 2012, before that school had a GSA, students said things like "that's so gay" in a pejorative sense; used words such as "fag", "dyke", "tranny", and "he/she" to insult each other; and spread rumours about students being LGBTQ. Teachers did not intervene when students insulted or denigrated LGBTQ students (Story Affidavit, para 9). Mr. Story endured one particularly difficult incident when his classmates posted a video of him on Instagram and accompanied it with derogatory and homophobic comments (Story Affidavit, para 11).

82. Such experiences do grave and irreparable harm to LGBTQ youth. At school in particular, 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 ideation than non-LGBTQ students" (Alderson Affidavit, Exhibit B, *Every Class in Every School: Final Report on the First National Climate Survey on Homophobia Biphobia, and Transphobia in Canadian Schools*, pp 56-57).

83. For Mr. Story, such daily insults wore down his self-confidence. He felt scared for the LGBTQ students at the school who did not have a supportive family to talk to about what they were hearing (Story Affidavit, para 10).

84. For Barbara Hamilton, the effects of such discrimination were particularly pronounced during the 2016-2017 school year, when she was a Principal at a Catholic school for approximately 450 students in grades kindergarten to grade nine. That year, she learned that 10 students had engaged in self-harm or attempted suicide, all of whom identified as LGBTQ. Some

faced homophobic slurs in the school's hallways, some were tormented by the Church's teachings, and others said their families had told them they would go to hell if they were gay (Hamilton Affidavit, paras 5, 6).

85. This evidence is consistent with evidence adduced in other cases. In *Jubran v Board of Trustees*, 2002 BCHRT 10 (**TAB 17**) (aff'd 2005 BCCA 201, leave to appeal to SCC denied), a human rights tribunal heard evidence regarding the problems faced by LGBTQ students, such as homophobia in schools, higher rates of school drop-outs and suicides, fear of disclosure of sexual identities, violence, intimidation, physical assaults at school, isolation, a lack of support in schools, and vulnerability to violent attacks, abuse and self-destructive behaviour (para 210)

86. In *Trinity Western University v College of Teachers (British Columbia)*, 2001 SCC 31 (**TAB 18**), Justice L'Heureux-Dubé (in dissent but not on this point) found that the evidence demonstrated "an acute need for improvement in the experiences of homosexual and bisexual students in Canadian classrooms" (para 82). She also referred to evidence that "almost 40 percent of gay and lesbian youth have dramatically low self-esteem", "two-thirds often hear homophobic remarks made by other students at school", and one in five had been physically assaulted at school in the past year (para 84).

87. Supportive and safe spaces, such as those created through GSAs, are a positive step in protecting youth from such irreparable harm. In summarizing the academic research regarding GSAs, Dr. Alderson observes that GSAs have the following benefits:

- improved school performance,
- increased sense of safety and sense of belonging at school,
- enhanced psychological well-being,
- reduced casual sex, and
- reduced drug use and abuse

(Alderson Affidavit, para 34)

88. Alberta's affiants experienced similar benefits from GSAs. For Mr. Story, a GSA provided him with a safe space to be himself, helped him make friends, and improved his self-confidence. It gave him a greater attachment to his school and positively benefited his attendance and academic career (Story Affidavit, para 22). For many of his classmates, the GSA was the only place where they could be themselves without being judged (Story Affidavit, para 24). Former student Mia Soetaert is likewise of the view that the GSAs she participated in provided a safe place where LGBTQ students could feel accepted and respected; without a GSA, these students would have been significantly sadder, more isolated, and more likely to consider suicide (Soetaert Affidavit, para 25).

89. Alberta's affiants also note the importance of privacy to LGBTQ students. Former teacher and guidance counsellor for Edmonton Public Schools, Mary Francis, found that students never found it easy to come out to their parents (Francis Affidavit, para 9). Mr. Story observes that other students in his GSA had heard their parents making denigrating comments about LGBTQ individuals and had concluded that coming out to them was unthinkable (Story Affidavit, para 24). For this reason, he believes that if parents had been notified when their child joined the GSA, the GSA would have ceased to exist or, at the very least, it would have failed to accomplish its mission (Story Affidavit, para 26). Ms. Soetaert is likewise of the view that many of her fellow students would not have joined a GSA if doing so would have led to their parents being notified (Soetaert Affidavit, paras 11, 26). Indeed, Catholic school teacher Erin Boppre notes that, in early 2015, when students at her school required parental permission to join the Spectrum Club (an equivalent to a GSA), students who desperately needed a safe space were devastated because they felt that asking their parents for permission would "out" them and they were not ready to come out to their parents (Hamilton Affidavit, Exhibit B).

90. As Ms. Soetaert explains:

> for many, parental notification would have forced them to choose between attending a safe and supportive space at school and risking anger, rejection, homelessness, and violence at home. I believe that mandatory parental notification would have prevented the GSAs … from reaching the vulnerable LGBTQ students who most needed to be told that they were accepted for who they were.

(Soetaert Affidavit, para 26)

91. As was set out above, at the balance of convenience stage the issues are the potential irreparable harm to both parties and the strength of the Applicants' case. Here, the Applicants have provided the Court with misinformation regarding GSAs and their opinions regarding GSAs. They have not adduced evidence that youth, parents or schools would suffer irreparable harm unless an interim injunction is granted.

92. In contrast, Alberta has put evidence before the Court that LGBTQ youth experience grave threats to their physical and mental well-being at school, and that GSAs, including the privacy protections in relation to GSAs, help protect them, as well as heterosexual and gender normative students, from such irreparable harm. This harm outweighs any speculative harm that could result to the Applicants' parental rights from the denial of the interim injunction.

93. Moreover, as was set out above, the Applicants have failed to establish that there is a serious issue to be tried that is sufficient to override the presumption of legislative validity. Indeed, there is a presumption that legislation has a public good. The Applicants' challenge to Bill 24 is not clearly articulated and is based on a misunderstanding of the effect of the provisions they challenge.

VI. Conclusion

94. It was only twenty years ago that Delwin Vriend had to fight for discrimination based on sexual orientation to be included in Alberta's human rights legislation. In doing so, he was the target of hostile and misinformed comments. While much has changed since then, the Applicants' arguments and evidence harken back to a time when such blatant discrimination was largely socially acceptable.

95. It is clear the Applicants refuse to see the benefits of GSAs, would like LGBTQ youth to remain closeted and silent, and do not want their children exposed to people with views that differ from their own. However, Bill 24 does not require the Applicants or their children to

participate in GSAs or to befriend LGBTQ youth; it only requires them to tolerate them. The Applicants have failed to show that doing so while their claim is adjudicated would cause irreparable harm. Nor have they raised a compelling legal issue regarding Bill 24's validity.

96. The evidence shows that GSAs reduce the rate of suicides, depression, and anxiety among youth, and that outing youth without their consent can expose them to violence, mental abuse, and homelessness. Denying youth access to GSAs before the Applicants' claim is adjudicated would cause irreparable harm.

97. For these, reasons, Alberta respectfully requests an order denying the injunction application and granting it costs.

All of which is respectfully submitted this 25th day of May, 2018.

Chivers Carpenter

Per: V Cosco for :
John Carpenter, Kristan McLeod and Vanessa Cosco
Counsel for Her Majesty the Queen in Right of Alberta