In the Court of Appeal of Alberta

Citation: PT v Alberta, 2019 ABCA 158

Date: 20190429
Docket: 1801-0239-AC
Registry: Calgary

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, Devon Christian School Society, Lakeland Christian School Society, 40 Mile Christian Education Society, High Level Christian Education Society, Parents for Choice in Education, and Association of Christian Schools International – Western Canada

Appellants
(Applicants)

- and -

Her Majesty the Queen In Right of Alberta

Respondent
(Respondent)

- and -

Calgary Sexual Health Centre

Intervenor

- and -

The Evangelical Fellowship of Canada

Intervenor

Restriction on Publication

Identification Ban - See Rule 6.28 of the *Alberta Rules of Court*.

By Court Order, there is a confidentiality order and publication ban on any information that would identify a parent, student, teacher, staff member, school or school location.

NOTE: This judgment is intended to comply with the ban so that it may be published.

The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Frederica Schutz
The Honourable Madam Justice Dawn Pentelechuk

Memorandum of Judgment of the Honourable Madam Justice Schutz and the Honourable Madam Justice Pentelechuk

Memorandum of Judgment of the Honourable Mr. Justice McDonald Dissenting in Part

Appeal from the Decision by
The Honourable Madam Justice J.C. Kubik
Dated the 27th day of June, 2018
(2018 ABQB 496, Docket: 1808 00144)

Memorandum of Judgment

The Majority:

I. Introduction

[1] The appellants are parents, private schools and school boards who challenge the constitutional validity of ss 16.1(1)(a), 16.1(3.1), 16.1(6), 28(8) and (9), 45.1(3) to (10), 45.3, and 50.1(4) of the *School Act*, RSA 2000, c S-3. That constitutional validity hearing has not taken place.

[2] In the Court of Queen's Bench of Alberta, the appellants brought two applications, one for "an interim injunction staying the operation of the provisions of s 16.1 of the *School Act*, and the second for an interim injunction prohibiting the Minister of Education from defunding or de-accrediting their schools for non-compliance with the provisions of section 45.1": ***PT v Alberta***, 2018 ABQB 496 at para 2 ("Decision").

[3] The chambers judge dismissed both interim injunction applications: Decision at para 54.

[4] The appellants appeal the dismissals. Additionally, they have now filed two applications to adduce new evidence, one application for leave to late file more evidence and a related third application to adduce new evidence.

[5] Except for the r 6.28 applications on behalf of appellants and the Calgary Board of Education, on which rulings were given at the outset of the oral hearing, the appellants' applications to admit new evidence were heard and decided with the appeal as is the normal practice of this Court.

[6] For the reasons that follow, the appeal is dismissed.

II. Background

A. The *School Act*

[7] On March 19, 2015, the Legislative Assembly of Alberta enacted Bill 10, *An Act to Amend the Alberta Bill of Rights to Protect our Children*, 3rd Sess, 28th Leg, Alberta, 2014.

[8] As found by the chambers judge, Bill 10 amended the *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.
>
> Decision at para 1

[9] On December 15, 2017, the Legislative Assembly of Alberta enacted Bill 24, *An Act to Support Gay-Straight Alliances*, 3rd Sess, 29th Leg, Alberta, 2017. Bill 24 amended the *School Act*; its objective was to implement greater "protections for LGBTQ+ students, including prohibitions on exposing children to their parents or peers, who participate in 'gay-straight alliances' and 'queer-straight alliances,'" collectively referred to in the Decision (para 1), and here, as "GSAs".

[10] The following provisions of the *School Act*, as amended by Bill 24, are relevant:

(a) Under s 16.1(1)(a), a student may request, and the principal of the school shall "immediately grant permission," "to establish a voluntary student organization, or to lead an activity intended to promote a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging."

(b) Section 16.1(6) requires principals to ensure that notification respecting a voluntary student organization or activity, such as a GSA, "is limited to the fact of the establishment of the organization or the holding of the activity."

(c) Under section 16.1(3.1), a principal shall not prohibit or discourage students from using a name which may include "gay-straight alliance" or "queer-straight alliance."

(d) Section 45.1(4) requires a school board to demonstrate compliance with s 16.1 by establishing a policy that addresses its responsibilities under s 16.1. Section 45.1(4)(c)(i) provides that a distinct portion of the policy "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)" is "limited to the fact of the establishment of the organization or the holding of the activity."

(e) Section 50.1(4) exempts "the establishment or operation of a voluntary student organization referred to in section 16.1" from the requirement in s 50.1(1) that a board must notify a parent of a student "where courses of study, educational programs or instructional materials, or instruction or exercises, include subject-matter that deals primarily and explicitly with religion or human sexuality."

[11] In Alberta, private schools must submit annual declarations to the Minister of Education in order to receive continued funding and maintain accreditation. For some years, the Minister has required private schools to confirm that they will comply with the relevant legislation and policies governing schools, including the *School Act* and *Private Schools Regulation*, Alta Reg 190/2000.

[12] As part of the annual declaration for the 2018-2019 school year, the Minister introduced a new requirement: declarants must provide an attestation of compliance with the *School Act*, including s 45.1 of the *Act*: Decision at para 45. Section 45.1 of the *Act* governs a school board's responsibility to establish, implement and maintain a policy respecting its obligation to provide a welcome, caring, respectful and safe learning environment:

> **Board responsibility**
>
> 45.1(1) A board has the responsibility to ensure that each student enrolled in a school operated by the board and each staff member employed by the board is provided with a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging.
>
> (2) A board shall establish, implement and maintain a policy respecting the board's obligation under subsection (1) 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.
>
> . . .
>
> (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.

. . .

(8) If a board does not establish a policy or a code of conduct under subsection (2), or in the opinion of the Minister a policy or a code of conduct established under subsection (2) does not meet the requirements under subsections (3), (4), (5) or (6), as applicable, the Minister may, by order, do one or both of the following:

(a) establish a policy or code of conduct for, or add to or replace a part of a policy or code of conduct of, a board;

(b) impose any additional terms or conditions the Minister considers appropriate.

B. Proceedings in the Court of Queen's Bench

[13] In the Court of Queen's Bench, the appellants contended that the legislation infringed their rights under ss 2 and 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982 [*Charter*], s 1(g) of the *Alberta Bill of Rights*, RSA 2000, c A-14, and the *Family Law Act*, SA 2003, c F-4.5. The appellant parents submitted that the legislation undermined the protection of children, deprived them of choice in the education of their children, and interfered with their right to be fully informed of their children's activities, contrary to s 7 of the *Charter* and the *Alberta Bill of Rights*. Collectively, the appellants contended that their parental and institutional rights to religious freedom, expression, and association, as protected by s 2 of the *Charter*, were infringed because the legislation interfered with the ability to educate children in accordance with their moral and religious values: Decision at para 11.

[14] The chambers judge reviewed a volume of evidence tendered by the parties, including evidence from parents, current and former educators, teachers, school administrators, school board members, medical doctors, staff from the Ministry of Education, and experts: Decision at paras 21, 23-24, 28, 30-33.

[15] The parents generally expressed concerns about the legislation's impact on their ability to monitor and protect their children. Two parents said that their children were convinced to believe that they were transgender, were encouraged to behave in an opposite gender role, and experienced notable distress. Concern was also expressed about the potential dissemination of sexually explicit

materials through GSAs and related websites. School administrators and board members associated with several Alberta private schools tendered affidavits setting out the nature of their religious beliefs, including those concerning sexuality and gender, the genuineness of which beliefs is not in dispute. They explained that the schools could not adopt the policies required by the *School Act*, as amended by Bill 24, or submit the attestation required as part of the annual declaration, because to do so would be contrary to their beliefs. Further, they stated that the failure to attest would jeopardize their schools' funding or accreditation: Decision at paras 10-11, 21, 28, 45.

[16] The appellants' experts, Dr Quentin Van Meter (a pediatric endocrinologist), and Dr Miriam Grossman (a child and adolescent psychiatrist) gave their opinions about the challenges faced by LGBTQ+ youth, the impact of school GSAs, biomedical approaches to sex and gender identity, and the benefits and harms of GSAs to children: Decision at paras 30-33.

[17] The respondent tendered evidence from the Assistant Deputy Minister of the Strategic Services and Governance Division for the Department of Education of the Alberta Government, concerning the addition of the s 45.1 attestation to the annual declarations, and about the Government of Alberta's financial support for the development of a provincial GSA Network website. The website was intended to host information, resources, webinars and networking opportunities that support GSAs. In addition, the respondent's expert, Dr Kevin Alderson (a psychologist) gave his opinions arising from his research on LGBTQ+ matters.

[18] The Calgary Sexual Health Centre intervened and presented evidence through its CEO and its Calgary GSA Network Coordinator, that described the Centre's role in hosting the Calgary GSA Network, the information that it makes available to youth about sexuality, gender identity, and transitioning, and provided information about the first-hand experience of the Centre's staff relating the impact of GSAs in Alberta.

[19] The chambers judge identified two primary issues arising from the injunction applications, which framed her analysis. First, the appellants contended that s 16.1(6) of the *School Act* limited the information that a principal may disclose to parents regarding a child's involvement in a GSA. Second, the appellant schools challenged the requirement to attest compliance with s 45.1, and thereby the obligations set out in s 16.1 of the *School Act*.

[20] The chambers judge correctly cited ***RJR-MacDonald Inc v Canada (Attorney General)***, [1994] 1 SCR 311 at 334-335, 341, 111 DLR (4th) 385 [***RJR-MacDonald***], for the test for granting an interim injunction: (1) is there a serious question to be tried; (2) will the applicant suffer irreparable harm if the application is refused; and (3) does the balance of convenience favour granting the relief sought?

[21] With respect to ss 16.1(1)(a) and 16.1(3.1), the chambers judge found that there was no serious issue to be tried. Those provisions require, respectively, a principal not to delay the establishment of a GSA and not to prohibit or discourage the use of the names "gay-straight

alliance" or "queer-straight alliance" in describing a voluntary student organization. Because GSAs are voluntary student organizations, the *School Act* did not require children to participate in them. In her view, those provisions, therefore, did not infringe the applicants' religious freedoms. In support of this conclusion, the chambers judge relied on ***Chamberlain v Surrey School District No 36***, 2002 SCC 86, [2002] 4 SCR 710; ***SL v Commission scolaire des Chênes***, 2012 SCC 7, [2012] 1 SCR 235 [***SL***]; and ***Loyola High School v Quebec (Attorney General)***, 2015 SCC 12, [2015] 1 SCR 613 [***Loyola***]: Decision at paras 15-16.

[22] In relation to s 16.1(6), which limits notification respecting a voluntary student organization to the fact "of the establishment of the organization or the holding of the activity", the chambers judge stated 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." She found that these competing rights gave rise to a serious issue to be tried: Decision at para 18.

[23] As part of the irreparable harm analysis in respect of the various components of s 16.1, the chambers judge considered all of the evidence tendered by the parties and the intervenor, the Calgary Sexual Health Centre. The appellants contended that sexually explicit material was being disseminated at GSAs, and GSAs were imparting to children ideological, unscientific theories of human sexuality and gender identity. The chambers judge summarized the appellants' assertions in this way: "[t]he 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": Decision at para 21.

[24] The chambers judge determined that the appellants had "failed to prove a degree of irreparable harm, which outweighs the public good in maintaining the legislation": Decision at para 38. Accordingly, the test for the granting of an interim injunction was not met because:

(a) The applicants showed that a variety of sexually explicit materials were, at one point, linked through the Alberta GSA Network; however, the chambers judge found no evidence that such materials were promoted by the respondent or were disseminated to students through a GSA: Decision at para 25.

(b) After considering the evidence of the parents and the Calgary Sexual Health Centre, the chambers judge concluded that there was no evidence that GSAs encourage gender transitioning, the use of medical or surgical options, or provide medical advice; further, that the parents' affidavits were largely hearsay. While the chambers judge accepted that children received information about sexual orientation and gender identity in the context of GSAs, she was unable to form a reliable conclusion that the particular harms alleged to the children were directly attributable to the children's participation in a GSA, or to a lack of parental notification: Decision at paras 27-28.

(c) The chambers judge rejected the expert opinions tendered by the appellants. First, the court held that Dr Van Meter's evidence about the harmful effects of GSAs in promoting unscientific theories and encouraging children to keep secrets from their parents was premised on the affidavits of parents alleging these activities were taking place in GSAs, an unproven factual premise. Dr Van Meter's opinion that GSAs cause harm was also rejected. Second, the chambers judge expressed concerns about Dr Grossman's objectivity as an expert; for that reason, she rejected Dr Grossman's opinion that GSAs cause harm: Decision at paras 30-33.

(d) The chambers judge accepted the evidence of the Calgary Sexual Health Centre, and the expert opinion of Dr Alderson, finding that the presence of GSAs in schools resulted in positive effects for both LGBTQ+ students and others, including an increased sense of safety and belonging in school and enhanced psychological well-being: Decision at paras 35-37.

[25] In the chambers judge's view, the appellants had failed to demonstrate that the public benefit resulting from a suspension of the legislation outweighed the legal presumption that validly enacted legislation serves the public good. As found by the court, this presumed good is the safe and supportive climate that GSAs are intended to provide to LGBTQ+ students, as well as the overall benefits to schools generally: Decision at para 41.

[26] Assessing the statistical evidence adduced through Dr Alderson, the chambers judge found that there was a risk of harm to LGBTQ+ students in the absence of legislation and concluded that the balance of convenience militated in favour of maintaining its operation: Decision at paras 39-40.

[27] In relation to s 45.1 of the *School Act*, the chambers judge found no serious issue to be tried because the attestation of compliance with s 45.1, and the requirement to post a policy that included the provisions of s 16.1, did not require the appellants to forsake their religious beliefs. Rather, this provision merely required the appellants to signify their compliance with common public interest values, including those reflected in the *Alberta Human Rights Act*, RSA 2000, c A-25.5, and the *Charter*. Even if the act of attesting engaged the appellants' *Charter* rights, the chambers judge was of the view that those rights would be minimally impaired in the context of a multicultural, democratic society, adopting the reasoning of the majority of the Supreme Court of Canada in ***Law Society of British Columbia v Trinity Western University***, 2018 SCC 32, 423 DLR (4th) 197 [***TWU 2018***]: Decision at paras 48-49.

[28] The chambers judge found there was no real risk of irreparable harm to the appellant schools because the respondent's evidence indicated that remedial options existed for non-compliance with s 45.1 short of the respondent terminating funding for, or accreditation of, appellant schools. Similarly, the court held that the balance of convenience favoured the respondent, given that the public interest in promoting basic equality for staff and students would not be served by staying s 45.1 on the basis of an unproven risk to funding or accreditation: Decision at paras 50-53.

[29] The appellants appeal the chambers judge's order dismissing the injunction applications in relation to ss 16.1(1), 16.1(6), 45.1(4)(c)(i), and 50.1(4) of the *School Act*. The appellants also appeal the dismissal of their application for injunctive relief that would prevent the respondent from taking action to terminate funding or accreditation of appellant schools for their failure to attest compliance with the *School Act*, specifically s 45.1 of the *Act*.

[30] Pre-hearing, this Court granted intervenor status to the Calgary Sexual Health Centre and the Evangelical Fellowship of Canada.

III. Issues on Appeal

[31] The appellants advanced numerous grounds of appeal that may be condensed into two questions:

1. Did the chambers judge err in declining to grant injunctive relief in respect of s 16.1(1)(a) and ss 16.1(6), 45.1(4)(c)(i), and 50.1(4) (the "notification limitation provisions") of the *School Act*?

2. Did the chambers judge err in declining to grant injunctive relief to prevent the respondent from taking any action to terminate funding for, or accreditation of, appellant schools for failure to attest their compliance with the *School Act*, specifically s 45.1?

IV. Analysis

[32] Generally, the moving party seeking interim injunctive relief must demonstrate (1) on a preliminary assessment of the merits of the case, that there is a serious question to be tried, that is, the application is not frivolous or vexatious; (2) the applicant will suffer irreparable harm if the application is refused, "irreparable" referring to the nature of the harm and not its magnitude; and (3) the balance of convenience favours granting the relief: ***RJR-MacDonald*** at 334-335, 341.

[33] Since legislation can be understood as expressing a reasoned choice by the legislature, "only in *clear cases* will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed" [emphasis added]; "[i]t follows that in assessing the balance of convenience," the court must proceed on the assumption that the law "is directed toward the public good and serves a valid public purpose": ***Harper v Canada (Attorney General)***, 2000 SCC 57 at para 9, [2000] 2 SCR 764 [***Harper***].

[34] As said in ***RJR-MacDonald*** at 342: "In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined [at the balance of convenience] stage."

[35] The factors which must be considered in assessing the balance of convenience are numerous and will vary in each individual case, but in all constitutional cases the public interest is a "special factor" which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry": ***Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd***, [1987] 1 SCR 110 at 149, 38 DLR (4th) 321 [***Metropolitan Stores***].

[36] An interim injunction is a discretionary order; the standard of review on appeal deferential. This Court must not interfere with the decision below unless the chambers judge committed an error of law, or the decision is unreasonable, or manifestly unjust: ***Unifor, Local 707A v Suncor Energy Inc***, 2018 ABCA 75 at paras 7, 27, 64 Alta LR (6th) 227; ***Clark v Laser Clean Ltd (Don's Power Vac)***, 2016 ABCA 4 at para 7, 609 AR 209; ***Globex Foreign Exchange Corp v Kelcher***, 2005 ABCA 419 at para 18, 262 DLR (4th) 752.

A. Did the chambers judge err in declining to grant injunctive relief in respect of sections 16.1(1)(a), 16.1(6), 45.1(4)(c)(i), and 50.1(4) (the notification limitation provisions) of the *School Act*?

1. Serious question to be tried

[37] The appellants agree that the chambers judge correctly found that the s 7 *Charter* rights of parents were engaged by s 16.1(6) of the *School Act*. In oral submissions, however, they forcefully challenge the court's conclusion that the notification limitation provisions do not infringe the appellants' freedom of religion rights under s 2(a) of the *Charter*.

[38] This is an appeal from an interlocutory decision. Whether the chambers judge applied the correct principles and reasonably concluded that there was no "serious question to be tried" arising from the appellants' claims under s 2(a) of the *Charter*, is limited to "a preliminary assessment . . . of the merits of the case", and does *not* decide the underlying constitutional claim: ***RJR-MacDonald*** at 334, 337, 340.

[39] The appellants submit that the notification limitation provisions withhold critical information from all parents about their children regarding GSAs and related activities. The appellant parents trust the appellant schools to care for and educate their children in accordance with shared religious values. They contend that the impugned provisions disrupt the right of parents and schools to impart religious values to children. Further, they assert that parents have the right to be informed about what sexual or ideological content their children might be exposed to, by whom, and under what circumstances. The notification limitation provisions are said to interfere with the vital link between parents and children, interference that is permitted only where necessary to safeguard a child's autonomy or health: ***B(R) v Children's Aid Society of Metropolitan Toronto***, [1995] 1 SCR 315 at 371-72, 122 DLR (4th) 1 [***B(R)***]. In reliance on these arguments the appellants submit, therefore, that the chambers judge erred in determining that there was no serious question to be tried in relation to the constitutionality of s 16.1(1)(a) of the *School Act*.

[40] An intervenor, the Evangelical Fellowship of Canada, submits that the chambers judge did not fully appreciate that the appellants' religious freedom and parental rights, as protected by ss 2(a) and 7 of the *Charter*, were implicated in the application for injunctive relief. These rights, it contends, encompass choice over the education and moral upbringing of one's own children. The Evangelical Fellowship of Canada acknowledges that the state has an interest in setting curricula, promoting learning outcomes for students, and even instilling civic virtues in students; however, those interests are secondary to the rights of parents to care for their children, including making decisions about education: ***ET v Hamilton-Wentworth District School Board***, 2017 ONCA 893 at para 65, 420 DLR (4th) 240.

[41] The respondent submits, to the contrary, that the chambers judge reasonably found that neither s 16.1(1)(a) nor the notification limitation provisions raised a serious issue to be tried on the basis of alleged unconstitutionality, on several bases. First, s 16.1(1)(a) affirms the appellant schools' long-standing obligations under the *Alberta Human Rights Act*. Second, the right to freedom of religion does not give schools or parents a right to dictate what children are exposed to at school: ***Chamberlain v Surrey School District No 36***, 2002 SCC 86, [2002] 4 SCR 710; ***SL***; ***Loyola.*** Third, parents do not have a constitutional right to know exactly who their child is interacting with at every moment, nor to prohibit their children from joining school clubs, including GSAs. Fourth, the state may override a parent's religious beliefs when it is in the child's best interests to do so. Fifth, in a conflict of rights between parents and children, the best interests of the child prevail: ***B (R)***; ***AR v Alberta (Child, Youth and Family Enhancement Act, Director)***, 2014 ABCA 148 at para 17, 11 Alta LR (6th) 392.

[42] The Calgary Sexual Health Centre made no submissions on whether there was a serious issue to be tried, confining its submissions to the questions of irreparable harm and balance of convenience.

[43] The threshold for showing a serious question is low, merely requiring the court to be satisfied that the application is "neither frivolous nor vexatious": ***RJR-MacDonald*** at 337. In our view, the chambers judge reasonably concluded that s 16.1(6) of *School Act* could potentially engage the s 7 *Charter* rights of parents; thus, the constitutional question is neither frivolous nor vexatious. Given that ss 45.1(4)(c)(i) and 50.1(4) of the *Act* also bear upon aspects of notification of parents, however, it is our view that a serious question is raised in relation to all of these provisions.

[44] We note that some of the cases upon which the chambers judge relied did, in fact, involve the finding of a *prima facie* infringement of s 2(a) of the *Charter*: ***Loyola*** at para 58; ***TWU*** 2018 at para 75. Further, at this juncture in the proceedings, an inquiry under s 1 of the *Charter* ought to be avoided because it is a normative and highly contextual inquiry, and neither the chambers judge nor this Court have the benefit of a full record and argument: ***R v KRJ***, 2016 SCC 31 at para 58, [2016] 1 SCR 906; ***TWU 2018*** at para 81. Additionally, any determination in relation to s 1 of the *Charter* ought to be avoided because such a determination "essentially addresses the merits of the case": ***Metropolitan Stores*** at 130-132; see also, ***RJR-MacDonald*** at 340.

[45] In light of the very low bar required to meet the first stage of ***RJR-MacDonald***, on the first question, the appellants' claims relating to s 2(a) of the *Charter* also raise a serious question to be tried.

[46] Having concluded that the appellants' claims relating to ss 2(a) and 7 of the *Charter* raise serious questions to be tried, we now turn to the second part of the test for injunctive relief.

2. Irreparable Harm

[47] The appellants submit that the chambers judge incorrectly applied a presumption in favour of validly enacted legislation at the irreparable harm stage, rather than at the balance of convenience stage. By doing so, they assert that the court erroneously found that the legislation gave rise to a presumed good in the form of the safe and supportive climate fostered by GSAs, a finding that contradicts the principle that state intervention with parental rights is permitted only where necessity is demonstrated. The appellants further contend that the legislation contains no parameters around GSAs, that there is no requirement that the GSAs and related activities remain on school property, and that the legislation makes no distinction with respect to children of different ages and states of maturity, or between children with, and without, disabilities or mental health issues. In essence, they argue the legislation mandates secrecy but abdicates government responsibility.

[48] In reply, the respondent submits that the chambers judge reasonably found that the appellants had not established irreparable harm because they failed to adduce any credible evidence to prove that sexually explicit material has been disseminated in a GSA. The respondent's evidence was to the contrary: upon being notified, the Province promptly addressed concerns about explicit material being linked to the Alberta GSA Network website, and the evidentiary record revealed that GSAs typically involve activities such as permitting students to openly discuss challenges they are facing and participating in activities aimed at reducing the stigmatization of LGBTQ+ persons.

[49] As intervenor, the Calgary Sexual Health Centre submits that GSAs and the impugned legislative provisions have a helpful, not harmful, impact on students, schools, and families because they serve to protect the privacy of GSA participants, which is essential to their safety and security. In the Calgary Sexual Health Centre's experience, GSAs have the effect of increasing the sense of personal empowerment and well-being of students; thus, to the extent that the harms relied upon by the appellants exist, these "are attributable to a lack of proper training amongst schools and teachers, not the [notification limitation provisions]."

[50] "Harm is generally viewed from the standpoint of the person seeking to benefit from the interlocutory relief," and it is preferable to consider harm *to others* "when the balance of convenience is being determined": ***143471 Canada Inc v Quebec (Attorney General); Tabah v Quebec (Attorney General)***, [1994] 2 SCR 339 at 360, 90 CCC (3d) 1, per La Forest J in dissent but not on this point; ***RJR-MacDonald*** at 340-341. The weight of judicial authority mandates that it is

only at the last stage of the ***RJR-MacDonald*** test that the presumption that validly enacted legislation serves the public good arises: ***Harper*** at para 9.

[51] If the appellants are correct that the chambers judge erred in misapplying this presumption at the irreparable harm stage, they have nonetheless failed in our view to demonstrate that this error tainted the court's crucial findings that there was no evidence that the respondent promoted explicit materials through GSAs, that GSAs encourage gender transitioning, or that GSAs provide any medical treatment advice. The chambers judge's findings were supported by the evidence accepted; this Court owes deference to those findings and appellate intervention is not warranted.

[52] The court's rejection of the opinions given by Drs Grossman and Van Meter is similarly entitled to deference, as are most judicial decisions about whether to accept or reject expert evidence, particularly when it has been determined that the assumptions underpinning the opinion are unproven. In relation to the expert evidence, no error has been demonstrated. Nor are we persuaded by the appellants' submissions to the effect that the court improperly resorted to majoritarian views.

[53] The appellants' specific objection about the chambers judge's disregard of certain evidence as hearsay is addressed in the context of the new evidence tendered.

a. New Evidence

[54] In two applications to admit new evidence, the appellants seek to introduce:

(a) affidavits from two children ("AA" and "BB"), recounting their personal experiences at an Alberta school GSA and at a GSA conference off the school grounds; and

(b) two recent studies on the topics of "Transgender Adolescent Suicide Behaviour" and "rapid-onset gender dysphoria", plus a recent report published by the University of Calgary on the mental health of Canadian children.

[55] AA (the child of PT) was diagnosed with autism at an early age. In AA's affidavit, AA describes experiencing gender and sexuality issues, deposing that when participating in a school-based GSA beginning in grade 7, AA felt pressure to transition genders. An exhibit to AA's affidavit contains a psychological assessment, which elaborates on AA's diagnosis, and social and behavioural difficulties. In PT's affidavit in support of admitting AA's affidavit, PT states that although PT knew about and referred to AA's experiences at the time of the initial injunction application, AA was then recovering from the experiences and PT was not prepared to permit AA to participate in the court proceedings.

[56] BB (a child of a person not a party to these proceedings) is fifteen. Apparently, sometime after the chambers judge rendered the decision under appeal, one of BB's parents invited contact with the appellants' counsel. BB's affidavit recounts attending what is described as a "GSA

Conference" that was held at a community hall, not on school grounds. BB says, among other things, that this conference provided participants with give-away bags which contained a substantial number of condoms and a flip book with pictorial drawings illustrating proper condom use during male-to-male sexual activity.

[57] Whether to admit new evidence is governed by the test set down in ***R v Palmer***, [1980] 1 SCR 759 at 775, 106 DLR (3d) 212 [***Palmer***]: (1) the evidence must not have been previously available through due diligence; (2) the evidence must be relevant; (3) the evidence must be credible; and (4) the evidence must be such that if believed it could reasonably, when taken with the other evidence adduced, be expected to have affected the result.

[58] The appellants state that AA's and BB's affidavits meet the ***Palmer*** criteria; furthermore, "all evidence which bears on what is in the best interest of the child should be before the Court": ***L (JL), Re***, 2002 SKCA 78 at para 8, 27 RFL (5th) 337 [***L (JL), Re***].

[59] The respondent opposes the applications to admit the affidavits on the basis the evidence was previously available but the appellants chose not to tender it. It is further argued that AA's psychological assessment, and the cross-examinations of AA and PT, call into question AA's ability to accurately convey what transpired due to AA's poor social judgment, poor reading of social cues, and difficulties with interpersonal relationships. The respondent also opposes admitting BB's evidence because mere lack of prior knowledge of BB's evidence does not satisfy the ***Palmer*** due diligence criterion.

[60] The respondent submits, in any event, that the content of the affidavits would not have affected the result below. This is because one child's belief in the alleged failure of a particular school to appropriately oversee GSA activities, and one child's accounting of being given free condoms and pictographic advice on their use at one conference, if believed, could not reasonably when taken with the other evidence adduced, be expected to have affected the result.

[61] We are prepared to assume a flexible and generous approach when considering whether to admit the evidence of AA and BB, given that the interests of children are implicated in the challenged legislation. Generally, all cogent evidence bearing on the issue of a child's best interests should be admitted; however, a flexible approach does not displace the requirements of relevance and materiality: see for example ***Brill v Brill***, 2010 ABCA 229 at para 21, 86 RFL (6th) 266; ***Doncaster v Field***, 2014 NSCA 39 at paras 47-50, 373 DLR (4th) 75.

[62] Nonetheless, we are not persuaded that AA's description of a reaction to information claimed to have been conveyed in a GSA ought to be imputed solely to the operation of the impugned legislation. Similarly, the evidence of BB relating to an off-site event does not disclose how the materials were promoted or endorsed by the respondent.

[63] In our view, the evidence of AA and BB is not such that, if believed, and when taken with the other evidence adduced, be reasonably expected to have affected the result.

[64] The studies sought to be admitted may provide up-to-date information about the best interests of children, as the appellants asserts, but they do not address the effects of GSAs on children, which is a core controversy in these proceedings. Accordingly, the publications fail to meet the requisite ***Palmer*** relevance criterion.

[65] In the alternative, and in any event, the ***Palmer*** criteria reflect a judicial policy of finality, which militates against applications that would "if allowed, broaden the field of combat": ***Public School Boards' Assn of Alberta v Alberta (Attorney General)***, 2000 SCC 2 at para 10, [2000] 1 SCR 44. The respondent submits that should this Court admit the studies, it would seek to rely on a recently sworn affidavit of its own expert that is highly critical of the methodology used and findings made in these studies. Therefore, coupled with the relevance problem mentioned above, admitting the publication may unduly "broaden the field of combat".

[66] Finally, the appellants submit that the violation of constitutionally-protected rights is sufficient to constitute irreparable harm, and infringement of *Charter* rights of children and parents is not compensable by monetary damages. Intervening in support of this position, the Evangelical Fellowship of Canada submits that the chambers judge did not consider the appellants' religious freedom and parental rights as part of the irreparable harm analysis; unless injunctive relief is granted suspending the operation of the legislation, these rights will continue to be violated by depriving the appellant parents of knowledge and control over their children's education.

[67] To these contentions, the respondent submits that simply alleging a *Charter* breach does not entitle a party to injunctive relief; rather, the default position presumes that the challenged law will produce a public good and that harm will result from staying or suspending operation of the law.

[68] There is presently case law supporting and opposing the position taken by the appellants: see Robert J Sharpe, *Injunctions and Specific Performance* (Aurora: Canada Law Book, 1992) (loose-leaf updated 2018, revision 27) at §§ 3.1285-87. From this Court, ***Whitecourt Roman Catholic Separate School District No 94 v Alberta***, 1995 ABCA 260, 30 Alta LR (3d) 225 [***Whitecourt***], held that harm can arise from the dissolution of school boards and their reconstitution by boards which "do not necessarily share the same religious philosophy"; finding that "[h]arm arising from the effects of changes in policy or philosophy is not fully reversible". In ***Whitecourt*** at paras 27, 29, this Court accepted in that case that "students and parents whose religious philosophy may be compromised, even on a temporary basis, would all suffer harm of the sort which is not compensable". Distinguishing ***Whitecourt*** on the premise that no school board in these proceedings will be dissolved or reconstituted does not readily extinguish the force of the proposition that if religious philosophy is compromised, even temporary harm suffered may not be compensable.

[69] In our view, however, it is not necessary for this Court to attempt to resolve that which remains unresolved. First, as the Supreme Court of Canada noted, assessing irreparable harm in the second stage of an ***RJR-MacDonald*** constitutional interim injunction review is exceedingly difficult, and fraught with unknowns and uncertainties. Second, we are of the view that an assessment and determination of irreparable harm, in the circumstances of this case, is not dispositive. Rather, the answer to the first question as to whether the chambers judge erred in declining to grant injunctive relief in respect of the notification limitation provisions, falls to be determined at the balance of convenience stage.

3. Balance of Convenience

[70] The appellants submit that the balance of convenience does not favour maintaining privacy for other GSA participants by jeopardizing the safety and emotional well-being of younger or disabled children, and by interfering with full and open communication between parent and child that is essential to the well-being of children. They also contend that the *Alberta Bill of Rights* supersedes, so as to protect the right of parents to be informed about GSAs and GSA-related activities. Additionally, the appellants assert there is no evidence that GSAs would cease to exist if the enforcement of the impugned provisions were temporarily stayed. The appellants rely on ***Winnipeg Child and Family Services v KLW***, 2000 SCC 48 at para 72, [2000] 2 SCR 519 [***KLW***] for the proposition that "[t]he mutual bond of love and support between parents and their children is a crucial one and deserves great respect. Unnecessary disruptions of this bond by the state have the potential to cause significant trauma to both the parent and the child."

[71] The appellants' assertions are broadly cast. ***KLW*** involved the constitutionality of legislation permitting the warrantless apprehension of a child by the state; compare ***KLW*** at para 87: "the removal of a child from parental care by way of apprehension may give rise to great emotional and psychological distress for parents and constitutes a serious intrusion into the family sphere." ***KLW*** is not analogous to this case.

[72] Consistent with its position on irreparable harm, the Evangelical Fellowship of Canada submits that the chambers judge did not expressly consider the religious freedom or parental rights implications when assessing the balance of convenience. This intervenor asserts that because the chambers judge was not equipped to scrutinize the theological underpinnings of an individual's religious beliefs, the court ought to have accepted at face value the affiant parents' expressed concerns that exposing their children to certain materials amounted to interference with their religious freedom, citing ***Syndicat Northcrest v Amselem***, 2004 SCC 47 at para 50, [2004] 2 SCR 551. The Evangelical Fellowship of Canada further asserts that the parental right to shield children from materials inconsistent with their religious faith is protected under s 2(a) of the *Charter*, and therefore should form part of the balance of convenience analysis.

[73] In reply, the respondent submits that the chambers judge's conclusions on the balance of convenience were reasonable. Specifically, the evidence on the record shows that LGBTQ+ and

other youth would suffer harm if an injunction is granted, noting that LGBTQ+ students face challenges including high rates of school drop-outs and suicides, self-destructive behaviour, violence, and intimidation. Because supportive and safe spaces, such as GSAs, help to protect youth from these harms and have a number of benefits for students, the balance of convenience rightly favours the denial of injunctive relief. Moreover, the respondent states that the *Alberta Bill of Rights* does not pertain to participation in a GSA, since it protects only the right of parents to be informed in relation to "education": s 1(g). In the respondent's view, GSAs or related activities are not "education" within the meaning of the *School Act*, since they are not curricula, courses of study, or educational or instructional programs.

[74] The Calgary Sexual Health Centre submits that grave harms would result from an injunction suspending the privacy protections afforded by the notification limitation provisions, noting that many Alberta students will have joined GSAs in reliance on these enhanced privacy protections. It submits these children will suffer significant fear and anxiety arising from the possibility of "being outed" before they are ready. Again, the Calgary Sexual Health Centre contends that these protections have a helpful, not harmful, impact on students, schools, and families, and that without the assurance of such protections, new GSAs could be prevented from forming and existing GSAs could dissolve. Further, this intervenor urges that the balance of convenience analysis must be informed by the constitutional dimension of the interests of LGBTQ+ youth, including *their* rights to freedom of association, liberty and security of the person, and equality.

[75] As the Court explained in ***RJR-MacDonald*** at 348-49, in an application to stay legislation, the assessment of the balance of convenience imposes a higher burden on a private applicant:

> . . . When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. *In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of* the legislation would itself provide a public benefit. [Emphasis added]

[76] Accordingly, the appellants bore the burden of rebutting the presumption in this manner. The court must take into account that "[t]he assumption of the public interest in enforcing the law weighs heavily in the balance": ***Harper*** at para 9; ***Toronto (City) v Ontario (Attorney General)***, 2018 ONCA 761 at para 21, 296 ACWS (3d) 300.

[77] The chambers judge found that the evidence adduced by the respondent and the Calgary Sexual Health Centre showed that the presence of GSAs in schools, and the safe and supportive climate they are intended to provide, result in positive effects for LGBTQ+ and other students. These benefits include providing youth with the ability to come to terms with their sexuality and gender identity, an enhanced ability to share this information with their families, improved school performance, an increased sense of safety and belonging, and enhanced psychological well-being:

Decision at paras 35-38. In our view, the chambers judge reasonably concluded that these benefits constitute the presumed good of the legislation.

[78] The weighing of the balance of convenience in applications involving *Charter* rights "is always a complex and difficult matter"; courts "will not lightly" render inoperable the legislature's reasoned choices: ***Harper*** at para 9.

[79] We decline to interfere with the chambers judge's balancing because we discern no error of law, and the decision was not unreasonable, or manifestly unjust.

[80] It follows that the answer to the first question, did the chambers judge err in declining to grant injunctive relief in respect of s 16.1(1)(a) and ss 16.1(6), 45.1(4)(c)(i), and 50.1(4) of the *School Act*, is: no.

B. Did the chambers judge err in declining to grant injunctive relief to prevent the respondent from taking any action to terminate funding for, or accreditation of, appellant schools for failure to attest their compliance with the *School Act*, specifically s 45.1?

[81] The appellants also appeal the chambers judge's dismissal of their application for injunctive relief to prevent the respondent from taking any action to discontinue their funding or accreditation by reason of their non-compliance with s 45.1 of the *School Act*, see para 12 *supra.* In essence, the appellant schools seek an exemption from, as opposed to the suspension of, the operation of s 45.1 of the *Act* and the requirement to attest compliance with s 45.1 in their annual declaration to the Minister.

1. Serious question to be tried

[82] The appellants submit that unless they attest to their compliance in the annual declaration, then funding and accreditation of their schools are both at risk. The boards and schools state that they cannot make the required attestation as it is inconsistent with their religious beliefs, and compliance with s 45.1 would require them to betray their relationship of trust with parents, which is grounded in shared religious values. Accordingly, the appellants submit that the chambers judge erred in concluding that there is no serious question to be tried in relation to s 45.1 of the *School Act.*

[83] The respondent submits that the appellants' objections under s 45.1 are subsumed by their challenge to the constitutionality of s 16.1 of the *School Act*; therefore, if it is constitutional to require the appellant schools to comply with the underlying requirements of s 16.1, then it is necessarily constitutional to require them to attest to such compliance.

[84] While we agree that the issues raised in relation to s 16.1 and the notification limitation provisions of the *School Act*, on the one hand, and s 45.1 and the attestation requirement, on the

other, are substantively similar, for the reasons mentioned above we are satisfied that the appellants' claims are not frivolous or vexatious. Accordingly, for the limited purpose of an appeal involving interim injunctive relief, s 45.1 raises a serious question that is not frivolous or vexatious. In so deciding, we do not engage the merits of the constitutional validity challenge.

2. Irreparable Harm

[85] The appellants urge that being required to attest in their annual declaration and otherwise comply with the impugned legislation forces them to contravene their fundamental beliefs. Further, they state that the consequences of termination of governmental funding, suspension of accreditation, or both would harm their ability to serve the appellants' student populations.

[86] The Evangelical Fellowship of Canada states that the *Charter* violations identified by the appellants have serious religious and spiritual implications, which would result in irreparable harm to the appellants. Therefore, this intervenor contends that granting an interim injunction affecting a minority of faith-based schools in Alberta would ensure that the appellants' *Charter* rights are protected pending the outcome of the constitutional challenge, while not materially interfering with the state's objectives.

[87] In contrast, the respondent takes the position that the chambers judge reasonably found that the appellants had not established irreparable harm; moreover, case law supports the public benefit objectives of the legislation and the perceived or predicted harms claimed have been greatly overstated. The respondent maintains that there is no harm in requiring schools to teach students, as part of the curriculum, about other religions or about same-sex relationships. To the contrary, it contends that the chambers judge reasonably found that having to respect the rights of LGBTQ+ students in *all* Alberta schools does not constitute irreparable harm to the appellants.

a. New Evidence

[88] The appellants applied to admit new evidence comprising:

(a) email correspondence since August 2018 between Alberta Education and the appellant schools in relation to consequences for non-compliance with s 45.1 of the *School Act*, as well as providing feedback to various appellant schools on the policies they have submitted to Alberta Education to comply with the requirements of s 45.1; and

(b) affidavits sworn on November 21, 2018 by Keith Penner, the principal of the appellant Living Waters Christian Academy and by Michelle Gusdal, office administrator for the appellants' counsel, with the following exhibits attached:

> i) several Ministerial Orders (#038/2018, #040/2018, #041/2018, #043/2018, #052/2018, #058/2018) dated November 1, 2018 and issued pursuant to s 45.1(8) of the *School Act*, establishing a policy and code of conduct compliant with s 45.1 for six of the appellant schools; and
>
> ii) email correspondence from the Minister of Education dated November 14, 2018 to representatives of the six schools that accompanied the Ministerial Orders, which set out the consequences for non-compliance therewith.

[89] The appellants assert that this evidence is new, credible, reliable and relevant, bearing directly on whether appellant schools ought to be exempted from the operation of s 45.1 of the *School Act* pending determination of the constitutional question. That is, the appellants state the evidence, if believed, and when taken with the other evidence adduced, could reasonably be expected to have affected the outcome of the Decision.

[90] Specifically, the correspondence accompanying the Ministerial Orders states that "[c]onsequences for failing to comply with the Ministerial Order in its entirety will include funding being withheld for the 2019-2020 school year". In the appellants' view, this now makes clear that which was not clear before the chambers judge: the Minister of Education will terminate funding for the appellants' schools and boards, unless they comply with and adopt the Minister's policies.

[91] The respondent points out that since the appellants have not shown that *compliance* with s 45.1 of the *School Act* will cause irreparable harm, and termination of funding is simply the natural and predictable consequence of the appellants' failure to comply with the *School Act*, in fact, the evidence does not meet the ***Palmer*** criteria.

[92] In our view, the freshly-communicated consequences of non-compliance are relevant to "whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm": ***Metropolitan Stores*** at 128.

[93] Further, we note that the chambers judge found that irreparable harm had not been established because "there [was] no evidence to suggest that the schools will be defunded or de-accredited for the upcoming school year": Decision at 51. We are satisfied that the affidavits of Keith Penner and Michelle Gusdal dated November 21, 2018, provide evidence, which post-dates the Decision by several months, to suggest that "the schools will be defunded or de-accredited" for the 2019-2020 school year.

[94] To that extent, the Ministerial Orders dated November 1, 2018 and the accompanying correspondence from the Minister must be construed as reflecting what amounts to a new development of which the chambers judge could not have been aware.

[95] The pivotal issue is whether the new affidavit evidence is such that if believed it could reasonably, when taken with the other evidence adduced, be expected to have affected the result.

[96] Funding for the 2019-2020 school year is to be in place by August 31, 2019. The Minister's stated intention to withhold funding is cogent evidence that there is now a real and non-speculative risk that at least some appellant schools will lose funding: see ***Bowden Institution v Khadr***, 2015 ABCA 159 at paras 30-32, 600 AR 214.

[97] At the irreparable harm stage, it is the nature of the harm suffered rather than its magnitude, that is to be assessed: ***RJR-MacDonald*** at 341. "Harm in the form of administrative disruption and inconvenience may not be recoverable even though quantifiable, because the Crown may not be liable for its unconstitutional acts. That includes re-negotiation of collective agreements, re-assignment of staff, travelling time of staff, and changes to school programs": ***Whitecourt*** at para 30. If the Minister terminates funding, similar problems may be suffered by the appellant schools.

[98] For the purposes of this aspect of the appeal, once again it is not essential to categorically determine irreparable harm for the reasons previously given at para 69 *supra*. Moreover, if the appellants' focus is on harm to school children, it is preferable to consider harm *to others* when the balance of convenience is being determined, see para 50 *supra*.

[99] It is preferable to determine this aspect of the appeal upon the balance of convenience; that is, at the third stage of the ***RJR-MacDonald*** test, with added constitutional factors.

3. Balance of convenience

[100] In the appellants' view, the balance of convenience favours, at minimum, an exemption of the appellant schools from the operation of s 45.1, especially with the 2018-2019 school year now underway. Otherwise, they contend, the interests of children, families, and staff of affected appellant schools will be seriously compromised.

[101] The Evangelical Fellowship of Canada observes that the appellant schools do not propose to bully, intimidate, harass, or otherwise malign students for their sexual orientation or gender identity. Accordingly, it submits, the chambers judge was required to weigh the harm caused to the appellants or the state, rather than to the students of the school.

[102] The respondent maintains that granting any form of injunctive relief would lead to harm to LGBTQ+ students at the appellant schools, as they would no longer be permitted to form GSAs. It relies on evidence that GSAs have various benefits for LGBTQ+ students, and argues that the appellant schools have not demonstrated that the balance of convenience weighs against the presumed public good that the impugned provisions provide.

[103] The Calgary Sexual Health Centre suggests that the heightened sense of safety and well-being fostered by GSAs extends to the school environment more broadly. It states that all students, not merely those participating in a GSA, benefit from the operation of the impugned provisions. Further, it argues that exempting the appellant schools from compliance with the impugned provisions would provide those schools with enhanced powers to interfere with the freedom of association of students.

[104] The appellants present new, compelling evidence that if injunctive relief is not granted to prevent the respondent from terminating funding pending a determination of the constitutional validity of the legislation, they may have to close their school doors. This evidence was not before the chambers judge. The appellant schools and boards serve a not insignificant population of students. Termination of funding would doubtless negatively impact the schools' operations. Thus, in our view, there is a public interest in the continued operation of the schools.

[105] We are unable to accept the submission of the Evangelical Fellowship of Canada to the effect that that the harm to students of the schools is not relevant to the balance of convenience analysis. The respondent correctly points out that "the concept of inconvenience should be widely construed in *Charter* cases," and at the balance of convenience stage the court may properly assess both the harms to the parties and "any harm not directly suffered by a party to the application": ***RJR-MacDonald*** at 344-46.

[106] It is worth repeating that in cases involving constitutional challenges to properly enacted legislation, the legislation is *presumed* to produce a public good.

> . . . The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed: ***Harper*** at para 9.

[107] As between suspension cases and exemption cases, principles governing the granting of interlocutory injunctive relief are generally alike: ***Metropolitan Stores*** at 140. It is clear that the presumption the impugned legislation is in the public interest applies equally when the applicant seeks an exemption, as opposed to a stay of its operation. But, because the public interest is less likely to be detrimentally affected by an exemption, the "public interest considerations will carry less weight in exemption cases than in suspension cases": ***RJR-MacDonald*** at 348; ***Baier v Alberta***, 2006 SCC 38 at paras 16(c)-17, [2006] 2 SCR 311 [***Baier***].

[108] However, as was aptly said in ***RJR-MacDonald*** at 351-352:

> The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in ***Metropolitan Stores***:
>
> > Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically-elected legislatures and are generally passed for the common good, for instance: ... the protection of public health ... . It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added]

[109] Here, at the third stage of the test for injunctive relief on a constitutional question, the public interest in the continued operation of the appellant schools must be balanced against the purpose of the legislation from which the appellants seek to be exempt, and the assumed benefit to the public interest arising from the legislation's continued application: ***RJR-MacDonald*** at 350-351. The legislation has been enacted to protect the privacy interests of all children in Alberta schools, including all children in the appellant schools, by allowing for the formation and operation of GSAs in their schools. The legislation supporting GSAs is aimed at ensuring that all schools provide a safe and open space for all students, including LGBTQ+ children who may be especially vulnerable.

[110] Attendance at a GSA is not compulsory. Attendance is voluntary. Nothing prevents an individual student from disclosing and discussing their attendance with their parents, if and when they so choose. Nothing prevents a parent from engaging in an open dialogue about GSAs in their child's school. Nor is a parent precluded from inquiring as to the existence of a GSA, who acts as the student liaison and whether the GSA participates in activities off school property.

[111] In the meantime, the legislation puts the choice of disclosure of a child's attendance at a voluntary GSA in the child's hands, not in the control of their parents, their school or its school board. The public good presumed in protecting the safety and privacy interests of these individual children, as well as promoting an inclusive school environment generally, is extremely high. In our view, even a temporary exemption for non-compliant appellant schools does not constitute a public interest benefit that outweighs the presumed good from the continued enforcement of s 45.1 of the *School Act* in all Alberta schools: ***Baier*** at paras 17-18. We are of the view that the balance of convenience militates in favour of maintaining the legislation: this is not a clear case and granting injunctive relief "is susceptible temporarily to frustrate the pursuit of the common good."

[112] The evidence of the good achieved by GSAs in protecting the safety and privacy interests of individual children is more compelling than the new evidence of schools' termination of funding for non-compliance with the legislation. In this instance, the balance of convenience tips in favour of

upholding the legislation pending a full hearing on the merits of its constitutionality, not granting an interim injunction.

[113] It follows that the answer to the second question, did the chambers judge err in declining to grant injunctive relief to prevent the respondent from taking any action to terminate funding for, or accreditation of, appellant schools for failure to attest their compliance with the *School Act*, specifically s 45.1, is: no.

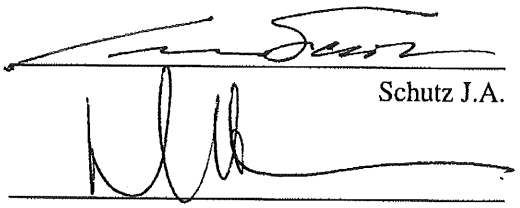
V. Disposition

[114] The appeals from the denial of the interlocutory injunctions are dismissed. It is of course axiomatic that the dismissal of these appeals does not in principle preclude the court when dealing with these matters on their merits from granting substantive relief to the appellants. As referenced in paragraphs 44 and 84, an application for an interim injunction does not and should not address the merits of the case: see ***Talbot v Pan Ocean Oil Corp*** (1977), 5 AR 361 at para 4, 3 Alta LR (2d) 354.

[115] The constitutional validity question is to be expedited; the parties shall seek the further direction of Miller, J, Judicial District of Medicine Hat, forthwith.

Appeal heard on December 3, 2018

Memorandum filed at Calgary, Alberta
this 29th day of April, 2019



Schutz J.A.

Pentelechuk J.A.

McDonald J.A. (dissenting in part):

[116] I agree with paragraphs 1 through 109 and the first three sentences only of paragraph 110 of my colleagues' Memorandum of Judgment. However, and for the reasons that follow, I would allow the appeal from the dismissal of the second application and would enjoin the respondent from withholding or reducing from the current levels, the funding for the schools in question for the academic year 2019 - 2020 and further to enjoin the respondent from de-accrediting these same schools (the schools in question) until further order of this Court.[1]

[117] In dismissing the second application for an interim injunction, namely for an order to prohibit the Minister of Education from defunding or de-accrediting the schools in question for non-compliance with the provisions of section 45.1 of the *School Act*, the chambers judge seems to have relied upon representations of respondent's counsel when she wrote "...there is no immediate risk of losing funding or accreditation as the *Act* itself provides multiple steps for dealing with non-compliance, including investigation, enquiries, and the imposition of a policy consistent with the *Act*.": Decision at para 47.

[118] Similarly, in holding that there was no irreparable harm demonstrated, the chambers judge observed "There is no evidence which demonstrates a real, concrete and unavoidable risk that the schools will lose funding or accreditation ... This suggests that the Minister has considered options short of defunding or de-accreditation to address issues of non-compliance": Decision at para 51.

[119] Similarly, in considering the balance of convenience, the chambers judge wrote at para 53:

> 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. [emphasis added]

[120] To my mind, in the face of these statements of the chambers judge, the respondent's subsequent conduct in issuing the various Ministerial Orders referred to in paragraph 88 above is troubling.

[121] The chambers judge's decision to dismiss the two applications was issued on June 27, 2018. The appellants' appealed in a timely fashion and filed their factum on September 17, 2018. The respondent then filed its factum on October 15, 2018. The date for hearing the appeals had previously been set for Monday, December 3, 2018.

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1 Living Waters Christian Academy, Universal Educational Institute of Canada, St. Matthew Evangelical Lutheran Church of Stony Plain Alberta, Ponoka Christian School Society, Lighthouse Christian School Society and Koinonia Christian School – Red Deer Society.

[122] On November 14, 2018 (after the factums had been filed and less than three weeks before the appeals were to be argued) the Minister informed the schools in question of the Ministerial Orders and then went on to issue this warning:

> Consequences for failing to comply with the Ministerial Order in its entirety will include funding being withheld for the 2019 - 2020 school year.

[123] At the time the applications were argued before the chambers judge in June 2018, the focus had been upon the upcoming academic school year, namely 2018 - 2019.

[124] Realistically, it does not appear likely that this complex constitutional challenge will be determined on its merits for many months and accordingly the parties will find themselves, come June 2019, in the same position that they had been when the applications for the interim injunctions were argued before the chambers judge last June. Except now the respondent has made it abundantly clear that the schools in question will lose their funding for the upcoming academic year should they not adhere to the Ministerial Order that is applicable to each school.

[125] Given the timing of the Minister's advices to the subject schools, it is not surprising that their factums did not specifically deal with the issue of irreparable harm in the context of these recent developments.

[126] In my view, the reasoning of this Court in ***Whitecourt*** is germane. That decision involved an appeal from the refusal to grant an interlocutory injunction. The appellants, the Board of Trustees of Whitecourt Roman Catholic Separate School District No. 44, had sought an interim injunction to exempt their separate school districts from the implementation of five Orders in Council until the trial of the matter was concluded. They contended that the enactments were unconstitutional and that they would be irreparably harmed if compelled to comply on an interim basis.

[127] The central issue in that appeal was whether the chambers judge had erred in finding that any harm from dissolving the school boards was completely curable since the boards could be re-established if the appellants succeeded at trial. In the opinion of the chambers judge the mere possibility of a change of policy did not constitute the level of irreparable harm required by the tripartite test.

[128] On appeal the appellants contended that the mere fact that the school boards would be dissolved constituted harm simply because others would make decisions in their stead and may not share a community of interest.

[129] Addressing the issue of irreparable harm, this Court stated in ***Whitecourt*** at para 29 in part:

> In our view, evidence of actual harm is unnecessary where the alleged harm relates to the abolition of the entity alleging it, and the substitution of another administrative body.

This Court then went on to deal with the issue of balance of convenience which had not been considered by the chambers judge in light of his ruling of no irreparable harm.

[130] This Court further noted at para 35 that this aspect of the test involves a weighing of the harm that will be suffered by the parties from the granting or refusal of the injunction. The key factor in constitutional cases is the consideration of the public interest.

[131] This Court then went on to state at para 40 of ***Whitecourt***:

> Both the Appellants and the Respondent represent a public interest in the outcome of this application. Though the public interest in allowing the Government to implement its legislative commitments is of considerable import, so too is the public interest in avoiding a costly and potentially invalid disruption of part of the educational system.

[132] Similarly, it is in the public interest that the schools in question not be closed pending a determination of the constitutionality of the impugned legislation. I acknowledge that any such closure would not be as a result of complying with the legislation, but rather from not complying with it. I am prepared to find that there will be irreparable harm done to the schools in question if they are forced to comply with the legislation that impinges their religious beliefs in order to keep open pending a determination of its constitutionality. I am prepared to find that this irreparable harm tips the balance of convenience in their favour only in so far as to allow a limited exemption from the legislation. The public interest, in my view, militates in favour of not requiring the schools in question to violate their religious beliefs, pending the outcome of the challenge to the constitutionality of the provisions at issue.

[133] In this instance, the respondent has not yet acted upon the Ministerial Orders and therefore to grant an interim injunction which is limited only to the schools in question would not disrupt the *status quo*.

[134] A broadly similar result was rendered in the recent British Columbia Supreme Court decision in ***Cambie Surgeries Corporation v British Columbia (Attorney General)***, 2018 BCSC 2084. The case involved a constitutional challenge to certain provisions of the *Medicare Protection Act (BC)*. In ***Cambie*** the chambers judge granted the alternate relief sought by issuing an interim injunction enjoining enforcement by the provincial government of sections 17, 18 and 45 of the *Medicare Protection Act (BC)* until June 1, 2019 or further order of the Court.

[135] In the course of reaching his conclusion the chambers judge stated in part:

> The Plaintiffs have established that the balance of convenience tips on their favour. This is so despite the Court's conclusion that the *MPA* Amendments are directed to the public good and serve a valid public purpose.

[136] Accordingly, I would have allowed the second appeal to the limited extent to order as follows:

(a) the respondent is hereby enjoined from withholding or reducing from the current levels, the funding for the schools in question for the academic year 2019-2020; and

(b) the respondent is hereby enjoined from de-accrediting the schools in question

until further Order of this Court.

This limited injunction would not suspend any of the impugned legislation and would only apply to the schools in question and in the limited manner as set forth herein.

Appeal heard on December 3, 2018

Memorandum filed at Calgary, Alberta
this 29th day of April, 2019

McDonald J.A.

Appearances:

R.J. Cameron
M.R. Moore
for the Appellants

K.A. Mcleod
V.A. Cosco
J. Schweda
for the Respondent

E.J. Cox
R.D. Bell
B.J. Macarthur-Stevens
for the Calgary Sexual Health Centre

A. Polizogopoulos
for The Evangelical Fellowship of Canada

K. Millar
S.E.D. Fairhurst
for The Calgary Board of Education

S.E. Ward
for CBC and others