

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON

B E T W E E N :

THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicant (Respondent on motion)

-and-

**THE PROVINCE OF NEW BRUNSWICK, as represented by the MINISTER OF
EDUCATION AND EARLY CHILDHOOD DEVELOPMENT**

Respondent (Respondent on motion)

-and-

GENDER DYSPHORIA ALLIANCE and OUR DUTY CANADA

Proposed Intervenors (Moving Parties)

IN THE MATTER of an application for judicial review and declaratory relief pursuant
to Rule 69 and Rule 38 of the New Brunswick *Rules of Court*

**REPLY BRIEF OF GENDER DYSPHORIA ALLIANCE AND OUR DUTY
CANADA**

(Motion for leave to intervene as an added party, April 18, 2024 at 9:30 am)

April 9, 2022

CHARTER ADVOCATES CANADA

Office 513, 180 John Street

Toronto, ON M5T 1X5

T: (289) 925-468 / F: (587) 352-3233

Hatim Kheir (LSO# # 79576J)

E: hkheir@charteradvocates.ca

**Counsel for the Proposed Intervenors,
Gender Dysphoria Alliance and Our Duty
Canada**

TO: BENJAMIN PERRYMAN
Barrister & Solicitor
287 Lacewood Drive, Suite 103
Halifax NS B3M 3Y7

Benjamin Perryman
T: 902-293-0479
E: ben@benjaminperryman.com

NIJHAWAN MCMILLAN & CONLON
5162 Duke St, Suite 200
Halifax NS B3J 1N7

Sheree Conlon KC
T: 902-407-5145
E: sheree@nmbarristers.com

Counsel for the Applicant

AND TO: STEWART MCKELVEY
44 côte Chipman Hill, Suite 1000
PO Box 20105 Brunswick Square
Saint John NB E2L 5B2

Stephen J. Hutchison KC
T: 506-632-2784
E: shutchison@stewartmckelvey.com

Lara J. Greenough
T: 506-443-0151
E: lgreenough@stewartmckelvey.com

Counsel for the Respondent

AND TO: McCARTHY TÊTRAULT LLP
Suite 5300, TD Bank Tower
Toronto ON M5K 1E6
T: 416-362-1812

Adam Goldenberg (E: agoldenberg@mccarthy.ca)
Ljiljana Stanic (E: lstanic@mccarthy.ca)
William Dandie (E: wdandie@mccarthy.ca)
Bennett Jensen (E: bjensen@egale.ca)

**Counsel for the Proposed Intervenor, Egale Canada, Alter
Acadie Nouveau-Brunswick Inc., Chroma: Pride, Inclusion,**

Equality Inc. and Imprint Youth Association Inc.

AND TO: LAWSON CREAMER
801 -133 Prince William Street
Saint John NB E2L2B5

Abigail J. Herrington
T: 506-633-3737
E: aherrington@lawsoncreamers.com

CAMBRIDGE LLP
31 Nova Scotia Walk, Suite 307
Elliot Lake ON P5A1Y9

R. Douglas Elliott
T: 705-578-5080
E: delliot@cambridgellp.com

Counsel for the Proposed Intervenor, Equality New Brunswick and Wabanaki Two-Spirit Alliance

AND TO: PINK LARKIN
210-1133 Regent Street
Fredericton NB E3B3Z2
T: 506-458-1989

Joël Michaud, K.C.
E: jmichaud@pinklarkin.com

John MacCormick
E: jmaccormick@pinklarkin.com

Counsel for the Proposed Intervenor, New Brunswick Teachers' Federation

AND TO: CANADIAN UNION OF PUBLIC EMPLOYEES
91 Woodside Lane
Fredericton NB E3C0C5

Glen S. Gallant
T: 506-458-8059
E: ggallant@cupe.ca

Counsel for the Proposed Intervenor, Canadian Union of Public Employees, Local 2745

**AND TO: NEW BRUNSWICK UNION OF PUBLIC AND PRIVATE
EMPOLYEEES**

217 Brunswick Street
Fredericton NB E3B1G8
T: 506-455-9455

Leigh Sprague
E: leigh@nbu.ca

Peter Ashfield
E: peter@nbu.ca

**Counsel for the Proposed Intervenor, New Brunswick Union
of Public and Private Employees**

1. The proposed intervenors, Gender Dysphoria Alliance and Our Duty Canada (“**GDA and ODC**”), make the following submissions in reply to the briefs tendered by the parties, The Canadian Civil Liberties Association (the “**Applicant**”) and the Province of New Brunswick (the “**Respondent**”), on this motion for leave to intervene.

A. GDA and ODC Do Not Seek to Expand the Scope of the Application

2. At paragraph 49 of its Pre-Hearing Brief, the Applicant alleges that GDA and ODC raise irrelevant issues which are outside the scope of the Application.¹

3. In response, GDA and ODC submit that the issues identified by the Applicant are not novel issues being raised. Rather, they are appropriate responses to constitutional questions put before the Court.

4. As a preliminary matter, the CCLA’s position fails to take into account the requirement that *Charter* issues not be decided in a factual vacuum. The Supreme Court held that to do so would “trivialize the *Charter*” and “result in ill-considered opinions.”² The proposed evidence of GDA and ODC, especially the proposed expert evidence, is an essential component to the factual context surrounding the constitutional questions before this Court. Whether formally changing a minor’s name(s) and pronouns in school with (or without) parental involvement violates sections 7 and 15(1) of the *Charter* must be considered in the broader context of that action’s effect on the child’s broader life, health and well-being.

5. **First**, the Applicant argues that the issues of (a) whether the Gender Affirming Model is appropriate; and (b) whether the adoption of chosen pronouns is a psycho-social

¹ *Applicant’s Pre-Hearing Brief* dated April 2, 2024 at para. 49.

² *Mackay v. Manitoba*, [1989] 2 S.C.R. 357 at 361-62.

intervention which may be harmful in itself or may lead to further harmful medical interventions, are both novel and separate issues being raised by GDA and ODC.³

6. GDA and ODC submit that these issues are engaged by the Notice of Application. At paragraphs 102-107, the Notice of Application pleads that the alleged limits on *Charter* rights and freedoms in the impugned Policy 713 are not demonstrably justified in a free and democratic society.⁴ The Applicant alleges that Policy 713 does not address any pressing or substantial objectives, and that it creates a disproportionately negative impact.

7. To decide whether the Applicant is correct on these issues, the Court will need to consider the impact on a minor's health and well-being when school authorities formally approve new name(s) and pronouns for a minor seeking to adopt them. The Court will have to determine if protecting the well-being of students by requiring parental involvement is a pressing and substantial objective and whether Policy 713 meets that objective in a proportional manner. Hence, these issues identified by GDA and ODC are in no way irrelevant to, or outside the scope of, the Application.

8. **Second**, similarly, the Applicant argues that the reference to parental alienation syndrome in the Affidavit of Karin Litzke raises an irrelevant issue.

9. GDA and ODC respond that this is not a discrete issue being raised for the Court to determine. However, the impact of Policy 713 on parent-child relationships is relevant to the issues raised in the Application since the Applicant pleads that the previous version of Policy 713 did not deprive parents of playing a fundamental and leading role in the lives of their children.⁵

³ *Applicant's Pre-Hearing Brief* dated April 2, 2024 at para. 49.

⁴ *Notice of Application* dated September 6, 2023 at paras 102-07.

⁵ *Notice of Application* dated September 6, 2023 at para 105.

10. GDA and ODC disagree with the Applicant’s suggestion. The best interests of children are served by a healthy parent-child relationship. In addition to children’s section 7 *Charter* right to the care and protection of their parents, parents themselves have *Charter*-protected rights to raise and bring up their children.⁶ This context should not be overlooked in the determination of this case. Balancing the protection for parent-child relationships with the alleged harms of Policy 713’s parental involvement requirement is relevant to considering whether the *Charter* infringements at issue have been made out and to any proportionality analysis under the *Oakes* test.⁷

11. **Third**, the Applicant takes issue with harms identified by Aaron Kimberly. Aaron Kimberly identified harms associated with the Gender Affirming Model of care including “institutionalizing the recruitment of children” and using those who have gender dysphoria to advance political agendas.⁸

12. GDA and ODC’s position is that these harms do not raise novel issues for the Court to determine. The harms identified must be read in light of the context, which was an affidavit submitted to support a motion for leave to intervene. One of the purposes of the affidavit is to demonstrate the perspective of the group seeking leave to intervene. The harms identified relate the criticisms that Aaron Kimberly and Gender Dysphoria Alliance have with respect to the approach to gender that is implicit in the previous version of Policy 713 and criticisms to the Minister’s amendments to that Policy.

B. The Proposed Evidence of GDA and ODC is Reliable, and Admissible

⁶ *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 371.

⁷ *R. v. Brown*, 2022 SCC 18 at paras. 68-70.

⁸ *Applicant's Pre-Hearing Brief* dated April 2, 2024 at paras. 49-50; *Affidavit of Aaron Kimberly* sworn November 28, 2023 at para. 30.

13. The Applicant raises concerns about the reliability of GDA and ODC's evidence where the identity of the proposed affiants is not known.⁹ This is perhaps due to a misunderstanding of GDA and ODC's proposed method of proceeding. If granted party status, GDA and ODC will seek leave to have unredacted copies of affidavits sealed with redacted copies provided for the Court's public record. If permitted to proceed this way, the Court and the parties would have unredacted affidavits with the affiants' identities for their own use. The affiants would also be available for cross-examination. The measures taken to protect the privacy of the affiants will not impact the ability of the parties or the Court to assess their reliability and credibility.

14. There is no issue with respect to the admissibility of evidence from a minor witness because the affiant A.A. is no longer a minor. Further, her attached affidavit from the Alberta proceeding is relevant as it reveals her experience going through a social transition at school which began without her parents' knowledge. Her experience is exemplary of the situation that is avoided by the inclusion of a parental involvement requirement in the revised version of Policy 713 which is challenged in the Application.

15. The Applicant also argues that GDA and ODC's evidence contains hearsay and inadmissible opinion evidence without identifying the impugned portions of the evidence.¹⁰ To the extent that the Applicant takes issue with the inclusion of opinions of Aaron Kimberly and Karin Litzcke in their respective affidavits, GDA and ODC submit that the evidence is admissible for the purpose of providing the Court with the positions and perspectives of GDA and ODC for use on the motion for leave to intervene. GDA and

⁹ *Applicant's Pre-Hearing Brief* dated April 2, 2024 at para. 50.

¹⁰ *Ibid.*

ODC will be relying on the expert evidence of Dr. Kenneth Zucker for opinion evidence relating to the issues raised in this Application.

DATED April 9, 2024



Hatim Kheir (LSO # 79576J)

CHARTER ADVOCATES CANADA

Office 513, 180 John Street
Toronto, ON M5T 1X5

T: (289) 925-4687 F: (587) 352-3233

E: hkheir@charteradvocates.ca

**Counsel for the Proposed Intervenors,
Gender Dysphoria Alliance and Our Duty
Canada**

LIST OF AUTHORITIES

B. (R.) v. Children's Aid Society of Metropolitan Toronto, [\[1995\] 1 SCR 315](#)

Mackay v. Manitoba, [\[1989\] 2 S.C.R. 357](#)

R. v. Brown, [2022 SCC 18](#)