IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTION

***The Canadian Civil Liberties Association v. The Province of New Brunswick, as Represented by The Minister of Education and Early Childhood Development***
***2023 NBKB 234*** ***FM/76/2023***

BETWEEN:

**THE CANADIAN CIVIL LIBERTIES ASSOCIATION,**

– and –

**THE PROVINCE OF NEW BRUNSWICK, AS REPRESENTED BY THE MINISTER OF EDUCATION AND EARLY CHILDHOOD DEVELOPMENT**



**DECISION**

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| BEFORE: | Justice Robert M. Dysart |
| AT: | Moncton, New Brunswick |
| DATE OF DECISION: | December 21, 2023 |
| APPEARANCES: | Benjamin Perryman and Sheree Conlon, K.C., for the Canadian Civil Liberties Association |
| | Stephen J. Hutchison, K.C. and Lara Greenough, for the Province of New Brunswick |

**DYSART, J.**

## INTRODUCTION

[1] The Canadian Civil Liberties Association brings the within motion seeking public interest standing to bring an application which challenges a decision by the Minister of Education and Early Childhood Development to make changes to Policy 713 which governs, among other things, sexual orientation and gender in New Brunswick schools.

[2] Specifically, the CCLA alleges that the Minister's decision to amend Policy 713 to require school staff, with regard to students under the age of 16 years, to obtain parental consent before using a student's preferred name or pronoun, was the result of a flawed process and is inconsistent with the ***Charter of Rights and Freedoms*** and human rights legislation.

[3] The CCLA argues that it has the resources and the experience to bring this application, and that it meets the test for public interest standing.

[4] The Court convened a case management call with the parties, at which time counsel for the Minister indicated that the Minister does not oppose the CCLA's motion for public interest standing and suggested that a hearing was not required. It was therefore agreed by both parties that the issue of the CCLA's request for public interest standing would be

determined solely on the basis of the written materials submitted by the CCLA, which included an Affidavit sworn by Harini Sivalingham, Director of the CCLA's Equality Program, and the CCLA's Brief on Law.

**THE EVIDENCE**

[5] According to Ms. Sivalingham's evidence, the CCLA was established in 1964 as a national, independent, not-for-profit, non-governmental organization dedicated to the advancement and protection of civil liberties and human rights in Canada. The CCLA has been involved, either as a public interest standing party or as an intervenor, in some 330 cases across Canada. Those cases have involved, among other issues, cases involving marginalized communities, such as those who are discriminated against due to their sexual orientation or gender identity or expression.

[6] The CCLA has extensive experience in advocating on behalf of those whose Charter and human rights have been impacted by government action, and the CCLA maintains that it has the resources, the experience and the necessary expertise to properly bring such actions before the Court.

[7] Specifically, the CCLA notes that, if it is not granted public interest standing to challenge the changes to Policy 713, then it would be left to those directly affected by these changes to do so, which would be both

impractical and unfair, given that the policy most directly impacts transgender and gender diverse students under the age of 16. In order for those students to mount a legal challenge of the Policy, they require a Litigation Guardian, meaning they would need to disclose their gender identity and their preferred name or pronouns to a parent or guardian. That, it is argued, is precisely the harm which the CCLA points to in its challenge of the changes to Policy 713 – that it forces transgender and gender diverse students under the age of 16 to obtain their parents' or guardians' consent to use their preferred names and pronouns in school. Thus, to require their assistance to mount a court challenge would be self-defeating.

[8] The CCLA also maintains that to require affected children to bring the court challenge would potentially subject them to public bullying and harassment, which could traumatize members of an already marginalized community.

[9] Again, the Minister does not oppose the motion.

**THE LAW**

[10] The modern test for public interest standing was set out by the Supreme Court of Canada in ***Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society***, 2012 SCC 45 (CanLII),

a decision penned by Justice Cromwell. As he stated in the opening paragraphs of the decision:

> [1] This appeal is concerned with the law of public interest standing in constitutional cases. The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government: Finlay v. Canada (Minister of Finance), 1986 CanLII 6 (SCC), [1986] 2 S.C.R. 607, at p. 631. The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.
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> [2] In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: Canadian Council of Churches v. Canada (Minister of Employment and Immigration), 1992 CanLII 116 (SCC), [1992] 1 S.C.R. 236, at p. 253. The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).

[11] That test has been adopted and applied in this Province in the very recent ***CCLA v. PNB***, 2021 NBQB 119 (CanLII), per DeWare, CJ.

## SERIOUS JUSTICIABLE ISSUE

[12] Justice Cromwell had this to say regarding the first part of the analysis:

> [42] To constitute a "serious issue", the question raised must be a "substantial constitutional issue" (McNeil, at p. 268) or an "important one" (Borowski, at p. 589). The claim must be "far from frivolous" (Finlay, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner.

[13] Without delving into a close examination of the application sought to be brought by the CCLA, it is clear that the issues raised are not frivolous. The CCLA alleges that these changes were instituted by the Minister following a flawed process and that they discriminate against transgender and gender-diverse children under the age of 16 years. The application alleges breaches of the ***Human Rights Act*** and the Charter.

[14] In ***UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Education),*** 2023 SKKB 204 (CanLII), the Saskatchewan Court of King's Bench considered a similar challenge to a policy in that province that is nearly identical to Policy 713. In that case, the Court was asked to grant standing to the applicant, UR Pride, and to issue an interlocutory injunction, preventing the implementation of the policy pending the final outcome of the action. The Court, in framing the issues, stated as follows in the opening paragraphs of its reasons to grant the injunction:

> [1] This action concerns a constitutional challenge to the government policy in force August 22, 2023, and entitled "Use of Preferred First Name and Pronouns by Students" [Policy]. The applicant has commenced this litigation by way of originating application pursuant to the provisions of The Queen's Bench Rules. The applicant seeks an order declaring the Policy to be in violation of ss. 7 and 15 of the Canadian Charter of Rights and Freedoms [Charter] and that such violation cannot be justified in a free and democratic society pursuant to s. 1 of the Charter. It seeks to have the Policy declared to be of no force and effect pursuant to s. 52(1) of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
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> [2] At this preliminary stage, the applicant seeks an order granting an interlocutory injunction to prohibit the implementation of the Policy pending a final determination of the constitutional issues which have been raised. The Government of Saskatchewan [Government] opposes

> the injunction application and further opposes the applicant being granted public interest standing to bring this litigation.
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> [3] I have determined the applicant should be granted public interest standing. I have further determined that this is an appropriate case in which to grant an interlocutory injunction prohibiting the implementation of the Policy pending a final decision by this Court on the constitutional issues raised by the action. I decline to consider the issue of costs on this interlocutory application.

[15] On the issue of UR Pride's request for public interest standing and the first consideration — "Serious Issue to be Tried" — the Court wrote:

> [28] This aspect of the test does not appear to be disputed by the Government. That lack of dispute is for good reason because the Government has indicated, while it opposes the application, that the constitutional issues presented by this action are significant, complex, and novel. The pleadings in this matter are well drafted to ensure that these issues are properly framed by UR Pride for determination by the court (Downtown Eastside at para 98).
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> [29] The originating application sets out the material facts to be relied upon in support of the submission that the Policy is in violation of the Charter. But what is more here, UR Pride has provided a detailed brief setting out precisely how it intends to argue that the Policy offends s. 7 and s. 15 of the Charter and that such violation cannot be reasonably justified pursuant to s. 1 of the Charter. A review of all of this confirms that there is a serious issue to be tried.

[16] Similarly, in the present case, the CCLA has set out in its pleadings, in the Affidavit of Ms. Sivalingham and in its Brief on Law, precisely why and in what manner it alleges that the Minister's decision to enact these changes to Policy 713 was procedurally unfair and how the current version of Policy 713 violates the ***Human Rights Act***, as well as sections 15, 7 and 2 of the Charter. It also lays out the evidence it intends to lead with respect to the harms they say will result from the implementation of these changes, including evidence from the Canadian Paediatric Society, the New Brunswick Association of School Psychiatrists, the New Brunswick

Association of Social Workers and the New Brunswick Child and Youth Advocate.

[17] In my view, there is no doubt that the application which the CCLA seeks to bring against the Minister indeed raises serious justiciable issues, and there is nothing to suggest the legal challenge is frivolous. While the outcome is far from certain, the threshold is a low one, and the CCLA easily meets that first branch of the analysis.

## A REAL STAKE OR GENUINE INTEREST

[18] In ***CCLA v. PNB***, supra, Chief Justice DeWare had the following comments regarding the CCLA's genuine interest in matters involving the civil liberties and Charter rights of Canadians:

> [20] The CCLA points out that Canadian courts have for decades now recognized its experience and qualifications as a public interest litigant. The Ontario Court of Appeal in Tedros v. Peel Regional Police Service, 2008 ONCA 77, para 3, noted that the CCLA has "substantial experience in promoting and defending the civil liberties of Canadians." The CCLA points out that it has demonstrated strong engagement with the issues raised in the present action and have established a proven track record as a credible and qualified public interest litigant. The CCLA presents with a long-standing dedication to the protection of civil rights and the financial ability to prosecute such actions.
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> [...]
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> [23] The CCLA has demonstrated a genuine interest in the issue before the Court as well as the capacity to adequately prosecute the action. The CCLA is not "mere busybodies" as identified by Justice Cromwell in Downtown Eastside as presenting challenges for the justice system. The CCLA has filed the present action as a genuine means to address the concerns raised – the constitutionality of the regulation in question and the Province's compliance within the Canada Health Act.

[19] In the present case, the Affidavit sworn by Ms. Sivalingham sets out the CCLA's past experience, both as a public interest party and as an intervenor, with respect to matters involving the rights of young people and marginalized groups, including: whether students could be exempted from a particular educational curriculum on the basis of freedom of expression (***S.L. Commission scolaire des Chênes***, 2012 SCC 7); the balance between the rights and privacy of children versus the open court principle (***A.B. v. Bragg Communications***, 2012 SCC 46); alleged discrimination against children by under-funding child welfare services for on-reserve indigenous children (***Canadian Human Rights Commission v. Canada (Attorney General)***, 2013 FCA 75); matters involving the deportation of individuals who had formerly been the ward of the state (***Abdi v. Canada (Public Safety and Emergency Preparedness)***, 2018 FC 733); as well as several others.

[20] As well, the CCLA has published a number of blog posts and articles relating to discrimination against gender non-conforming individuals and has publicly spoken out against the changes to Policy 713 which are the subject of this litigation.

[21] I accept Ms. Sivalingham's evidence that: "The CCLA has a direct public interest in the validity and constitutionality of the revised Policy 713 [and has] a long history of holding governments to account and advocating for

the protection of the rights of young people and marginalized groups, including ensuring their Charter rights to equality, security of the person, and freedom of expression are not compromised or undermined."

[22] The Court is satisfied that the CCLA has demonstrated a genuine interest in matters involving children's rights and the rights of the 2SLGBTQIA+ community in this country, and therefore satisfies the second stage of the analysis.

**REASONABLE AND EFFECTIVE MEANS OF BRINGING THE ISSUE BEFORE THE COURT**

[23] Justice Cromwell stated that this third factor requires,

> "...consideration of whether the proposed suit is, in all of the circumstances, and in light of a number of considerations I will address shortly, a reasonable and effective means to bring the challenge to court. This approach to the third factor better reflects the flexible, discretionary and purposive approach to public interest standing that underpins all of the Court's decisions in this area."

[24] The CCLA maintains that it should be granted public interest standing to advance this application for review of the Minister's decision because it is uniquely positioned to bring the matter before the Court in an efficient and effective manner.

[25] Firstly, the CCLA maintains that it has the legal resources and experience necessary to bring this application, ensuring that the Court is presented

with a complete evidentiary record upon which to render a fair and just decision.

[26] Secondly, and perhaps more importantly, the CCLA argues that the individuals who are most directly affected by these changes to Policy 713 are the very persons who cannot bring this court challenge without being asked to disclose their gender identity and their preferred names and pronouns to their parents, creating a "catch-22."

[27] Thirdly, the CCLA points to the stigma which continues to be associated with matters of gender identity, and the risk that any individual plaintiff/applicant who brings such a court challenge could be subject to public bullying, harassment, and threats. The CCLA has led evidence of some of the public discourse on social media in response to its "tweets" on the platform formerly known as Twitter. Some of the responses were aggressive and equated disagreement with the Minister's changes to Policy 713 with psychological abuse of children and indoctrination. It seems unlikely that any affected person – whether a child or a parent of a child under the age of 16 who might be affected by these changes – would be inclined to assume that type of scrutiny and potential abuse in order to bring the matter before the Court.

[28] This was the same rationale in both ***Province of New Brunswick v. Morgentaler***, 2009 NBCA 26 (CanLII) and ***CCLA v. PNB***, supra.

[29] In ***Morgentaler***, a case involving access to abortion services outside of hospitals in New Brunswick, then Chief Justice Drapeau adopted the reasoning of former Chief Justice Jenkins in Prince Edward Island for why those who are directly affected by government actions might not bring a court challenge and why it might be better to allow a public interest party with experience and resources to bring the matter before the court, writing:

> [59] In my respectful judgment, the record offers ample support for the motion judge's negative answer to the final question posed by the governing test for public interest standing. In addition to the events described in Ms. Liebowitch's uncontradicted affidavit, the record reveals another pertinent fact: none of the many women who availed themselves of the Clinic's services in the past 15 years or so has initiated proceedings for the declaratory relief Dr. Morgentaler solicits. That state of affairs is likely the product of two factors operating in tandem: the prohibitive cost of litigation and the "intimate and private nature" of the decision to terminate a pregnancy: Morgentaler v. Prince Edward Island (Minister of Health and Social Services) (1994), 1994 CanLII 3412 (PE SCTD), 117 Nfld. & P.E.I.R. 181 (P.E.I.S.C. (T.D.), [1994] P.E.I.J. No. 16 (QL)), Jenkins J. (now Chief Justice of Prince Edward Island). It is, as well, worth bearing in mind that Dr. Morgentaler brings to the judicial arena financial resources and legal expertise which will undoubtedly help level the playing field and greatly improve the chances that any judicial decision on the merits is fully informed both factually and legally. At the end of the day, I can find no fault whatsoever with the motion judge's conclusion that Dr. Morgentaler's action is the only reasonable and effective way to litigate the constitutionality of the regulatory provision at issue.

[30] Chief Justice DeWare echoed that sentiment in ***CCLA v. PNB***, writing:

> [29] I need not restate the law which is set out in Morgantaler v. PEI and Morgentaler v. New Brunswick. It is not reasonable, nor appropriate, to suggest that the only way an issue of this nature can be brought before the courts is by a woman seeking an abortion. In my view, for the same reasons set out by Chief Justice Drapeau in Morgentaler v. New Brunswick, 2009 and Justice Jenkins in Morgentaler v. PEI (1994), it is "not reasonable to expect a woman to assume the role of plaintiff" in this matter.

[31] Surely, gender identity is among the most "intimate and private" matters for anyone to deal with, especially children under the age of 16. To deny the CCLA's motion would, in effect, require those children who are affected by these changes to Policy 713 to bring a court challenge, with the necessary assistance of a parent or guardian and with the public scrutiny that would likely accompany it. Otherwise, the matter would not be heard.

[32] So, to paraphrase Justice Megaw in the ***UP Pride*** case from Saskatchewan involving substantially similar issues to the present matter: *If not the CCLA, then who?*

[33] The importance of ensuring that legitimate court challenges of legislation and government policy are heard was addressed by Justice Megaw, and I can do no better than to quote him:

> [59] The principle of legality and supremacy of the rule of law, means specifically that governmental action must not be either immunized or hidden from constitutional challenge. As well, artificial barriers cannot be constructed to defeat legitimate questioning of government action. The ability, in a legitimately framed proceeding, to challenge such constitutionality is what permits governmental action to be scrutinized and properly evaluated. It is that very principle upon which our free and democratic society is based and which permits the rule of law to operate. If the governmental action is determined to be constitutionally correct, the Policy will remain. However, if the governmental action is determined to be unconstitutional it must be struck down. The ability to mount such a challenge should be considered to be a critical component of our ability to function in our society. The ability through proceedings such as these to engage in a full and free debate is a hallmark of our democracy and that which ensures all in society have a voice and are heard.

[34] I wholeheartedly adopt that same reasoning.

[35] I am satisfied that if the CCLA is not granted public interest standing to bring this application, it is unlikely that any affected citizen of this province will do so given the significant financial and legal barriers facing them, let alone the public scrutiny and potential for harassment.

[36] Taking onto consideration the three factors identified by Justice Cromwell and weighing them in light of the evidence before the Court, I am satisfied that the Canadian Civil Liberties Association should be granted public interest standing to bring its application for a review of the Minister's decision. The motion is therefore granted.

[37] In the circumstances, there is no order as to costs.

**DATED** at Moncton, New Brunswick this 21st day of December 2023.

Robert M. Dysart,
Judge of the Court of King's Bench
of New Brunswick