Court File No. FM-76-23

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

B E T W E E N:

CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicant

- and –

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

Respondent

- and –

EGALE CANADA, ALTER ACADIE NOUVEAU-BRUNSWICK INC., CHROMA: PRIDE, INCLUSION, EQUALITY INC. and IMPRINT YOUTH ASSOCIATION INC., EQUALITY NEW BRUNSWICK and WABANAKI TWO SPIRIT ALLIANCE, and GENDER DYSPHORIA ALLIANCE and OUR DUTY CANADA

Party Interveners

APPLICANT'S PRE-HEARING BRIEF

(Motion for bifurcation, May 14-15, 2024 at 0930)

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PART I – OVERVIEW

1. The Respondent's request for bifurcation is without precedent and unsupported by the Rules. Even if bifurcation of a judicial review application was possible, the Respondent does not meet the applicable test for bifurcation.

2. There is substantial overlap between the administrative and constitutional issues raised by this application, both factually and legally. In this context, bifurcation will not make the hearing of this application more efficient.

3. Granting bifurcation will serve only to cause further delay that is antithetical to the "speedy process" intended for judicial review of government decisions. Such delay risks further harming vulnerable transgender and gender diverse students whose rights have been infringed.

PART II – FACTS

4. On June 8, 2023, the Minister of Education and Early Childhood Development (**"Minister"**) decided to change the chosen name and chosen pronoun provisions (the **"self-identification provisions"**) in a provincial sexual orientation and gender identity policy (**"Policy 713"**). He exercised his delegated authority under paragraph 6(b.2) of the *Education Act*, SNB 1997, c E-1.12 to effect these changes. On August 23, 2023, the Minister made further changes to the chosen name and chosen pronoun provisions in Policy 713.

5. On September 6, 2023, the Applicant, the Canadian Civil Liberties Association (**"CCLA"**), commenced this application for judicial review of the Minister's June 8, 2023 and August 23, 2023 decisions (the **"Application"**).

6. The Application alleges the following grounds:

   a. the process leading to the changes to the self-identification provisions in Policy 713 was procedurally unfair;
   b. the decisions were unreasonable and *ultra vires* the Minister;
   c. the Minister failed to exercise his discretion in accordance with the *Charter*; and
   d. the revised Policy 713 is contrary to sections 2(b), 7, and 15(1) of the *Charter*.

7. The Application seeks an order in the nature of *certiorari*, quashing the changes to the self-identification provisions and remitting the matter to the Minister for redetermination, as well as declaratory relief related to the

Education Act, the *Human Rights Act*, and the *Canadian Charter of Rights and Freedoms*.

8. Six months after the Application was started and three months after the Applicant was granted public interest standing, the Respondent filed a motion to bifurcate this Application. The Respondent asks that the "Administrative Issues" and the "Charter Issues" in the Application be severed and heard separately.[1]

PART III – ISSUES

9. The issue to be determined by this Honourable Court on this motion is whether the CCLA's application for judicial review should be bifurcated.

PART IV – LAW & ARGUMENT

A. Bifurcation is not available for judicial review applications

10. The Respondent's motion pleads no Rule and cites no precedent that supports bifurcation of a judicial review application. Bifurcation will cause further delay that is the antithesis of the speedy process at the heart of judicial review.

11. The New Brunswick *Rules of Court* do not authorize bifurcation of applications. Rule 47.03 authorizes only the severability of an action.[2] Rule 38.09(b) provides that a court may convert an application to an action and direct that the application or a particular issue proceed to trial.[3]

12. The Respondent's brief cites no case law where a court has ordered bifurcation of a judicial review application, and there appears to be no reported decision in Canada where such relief was granted.

13. In *Barlow v Canada*, the federal Minister of Fisheries and Oceans moved to bifurcate a judicial review application that raised factual and constitutional issues. The Federal Court found that there was nothing in its rules that would permit this request.[4] The Court rejected the request, stating:

> *With all due respect to the respondent, I am unable to see why it is necessary to bifurcate the two issues before the hearing of the*

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[1] Respondent's Notice of Motion, Grounds to be argued, para 1
[2] *Rules of Court*, NB Reg 82-73, Rule 47.01
[3] Rule 38.09
[4] *Barlow v Canada*, 2000 CanLII 15057 at para 68 (FC) [*Barlow*]

> *application. Judicial review is intended to be a speedy remedy and to separate issues can only delay the proceedings.*[5] [emphasis added]

14. Both the Supreme Court of Canada and the Court of Appeal have recognized that judicial review is intended to be a "speedy process" that is designed to quickly confront invalid government decisions.[6] The more stringent time frame for bringing a judicial review application is indicative of this speed.[7]

15. The Respondent relies on two decisions—*Taseko Mines Ltd v Canada (Environment)* and *Chamberlain v School District No 36*—for the proposition that pursuant to the principle of judicial restraint "Courts should not delve into *Charter* issues unless doing so is specifically necessary in order to resolve a dispute". It is on that basis that the Respondent argues bifurcation should be granted.[8]

16. The Applicant submits neither the principle of judicial restraint nor these cases provide support for the relief the Respondent seeks.

17. Neither *Taseko* nor *Chamberlain* are bifurcation cases. Neither decision mentions "bifurcation" at any point.[9] In both cases, the lower courts heard the administrative law and constitutional law issues together. Both decisions are examples of administrative and constitutional law issues *not* being bifurcated and instead being heard together at the same time and on the same evidence.

18. In *Taseko*, the constitutional challenge was based on division of powers grounds not the *Charter*. The applications judge found that the decision under review was made pursuant to a different statutory provision than was constitutionally challenged. Therefore, the Court concluded, "the factual matrix of this case does not lend itself to a robust analysis of the constitutionality of these provisions."[10]

19. *Taseko* does not stand for the proposition that a judicial review that engages the *Charter* ought to be bifurcated.

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[5] *Barlow* at para 69
[6] *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 at para 26; *Mourant v Town of Sackville*, 2014 NBCA 56 at para 23 [*Mourant*]
[7] *Mourant* at paras 27-29
[8] Respondent's Brief, paras 29-31
[9] *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 320 [*Taseko*]; *Chamberlain v Surrey School District No 36*, 2002 SCC 86 [*Chamberlain*]
[10] *Taseko Mines Limited v Canada (Environment)*, 2017 FC 1100 at para 139

20. *Chamberlain* involved a school board resolution prohibiting three books that depicted same sex parents. A judicial review was commenced, seeking an order quashing the resolution on the basis that it infringed the *School Act,* RSBS 1996, c. 412 and the *Charter.* The applications judge observed that evidence related to the *Charter* can be central to understanding related administrative law claims:

> *In cases concerning the constitutional validity of state action or cases under the Canadian Charter of Rights and Freedoms … a broad scope of evidence should be considered to elucidate the legislative framework, the factual context and purpose of the impugned provision, the ill the Act was intended to remedy, the institutional framework within which the provision will operate and the effect of the provision.*[11]

21. The applications judge then relied on this *Charter* evidence and submissions to make findings about the meaning of an impugned provision of the *School Act* at issue in that case.[12] *Chamberlain* shows that administrative and constitutional issues can be interwoven to such an extent that evidence and submissions related to the latter are crucial for the former.

22. While *Taseko* and *Chamberlain* do not support the Respondent's bifurcation request, they may support the proposition that an applications judge, hearing the merits of an application, has discretion based on the judicial policy of restraint not to address constitutional issues where the case can be decided on non-constitutional grounds.

23. However, that is not the same thing as bifurcation. And, more recently, the Supreme Court of Canada observed in reference to judicial restraint that: "[T]hese judicial policy considerations are not always determinative."[13] As such, the Respondent's submissions are premature and may properly be addressed at the merits hearing.

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[11] *Chamberlain v School District #36 (Surrey)*, 1998 CanLII 6723 at para 19 (BC SC)
[12] *Chamberlain v School District #36 (Surrey)*, 1998 CanLII 6723 at paras 81-83 (BC SC)
[13] *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17 at para 181

B. The test for bifurcation is not met

24. Even if bifurcation was available for an application, the test for bifurcation is not met.

25. Bifurcation of an action is only granted where it is "just and convenient."[14]

26. In *Cochrane v Steeves,* Justice Dysart summarized the principles established in *Shanks:*[15]

> *26 The leading decision with respect to severance of issues in New Brunswick is* ***Shanks v. Shay****, 2015 NBCA 2 (CanLII), a decision written by Justice Larlee. In that decision, our Court of Appeal clarified a number of issues pertaining to this form of relief, including:*
>
> - *The determination to sever is a matter of judicial discretion;*
> - *A liberal approach should be adopted by the courts in respect of severance motions and should not be too strictly limited;*
> - *The test to be applied is whether severance of the issues is "just and convenient";*
> - *There need not be exceptional or special circumstances in order to bifurcate the issues;*
> - *The test does not involve the rigid application of an enumerated list of criteria which the judge must weigh; and*
> - *From an access to justice perspective, the courts should interpret the Rules of Court in a manner which favours the resolution of the issues in the most efficient, expedient and least onerous manner possible.*
>
> *[see paragraphs 14 through 23]*

27. Justice Dysart went on to note that while there is not a specific list of criteria to consider, the following are considerations the court may consider in determining whether it is "just and convenient" to bifurcate a proceeding:

(a) there are valid and compassionate reasons warranting separate trials;

(b) no adverse party will be harassed or inconvenienced by a series of trials;

(c) separate trials will probably put an end to the action;

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[14] *Shanks v Shay*, 2015 NBCA 2 at para 23

[15] *Cochrane v Steeves*, 2020 NBQB 116 at para 26 [*Cochrane*]

(d) severance of the issues will ensure a real saving of resources and is not likely to increase the time required for the disposition of all the issues;

(e) severance of the issues will simplify the matters to be disposed of;

…

(g) the issues to be tried are simple;

(h) the issues to be tried separately are not interwoven;

(i) the credibility of witnesses who could be called to testify at the various trials is not in issue;

(j) if the order is requested by a plaintiff, the defendant does not object.[16]

28. The Respondent relies heavily on the resources and simplification factors (d + e) as well as the possibility that if the Court allows the administrative law grounds for review, a hearing on the *Charter* grounds will be unnecessary (c).[17]

29. However, the Applicant submits that, on proper application of administrative and *Charter* principles, there is considerable overlap in both the law and the evidence between the two issues and it is not "just and convenient" to bifurcate. Otherwise, the Court risks hearing the same evidence and making the same or similar decisions twice.

30. There is considerable overlap in both the evidence required, and the findings the Court must make, between what the Respondent defines as the "administrative law" and *"Charter"* issues. The Supreme Court of Canada has provided repeated instruction on the various and interwoven functions of the *Charter* in administrative law analysis. Put simply, similar evidence, and similar findings, will be required at both stages.

31. *Charter* values are integral to interpreting the enabling provisions of administrative decision-makers, including in the context of school-related legislation, policies, and decisions.[18]

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[16] *Cochrane,* at para 21

[17] Respondent's Notice of Motion, para 7

[18] See *Chamberlain v School District #36 (Surrey)*, 1998 CanLII 6723 at paras 81-83 (BC SC) aff'd in *Chamberlain* at para 58; See also *Commission scolaire*

32. The interpretation and application of "health and well-being of pupils" in s. 6(b.2)(ii) of the *Education Act*—the enabling provision in the statute that authorized the decision—will involve evidence about how transgender and gender diverse students are impacted by misgendering or deadnaming.

33. This impact is also relevant to the analysis of inclusion in s. 1.1 purpose provision of the *Education Act*[19] and to an "adverse effects" analysis under the prohibition against discrimination in services in s. 6 *Human Rights Act*.[20]

34. Finally, it is well-established that the *Charter* informs an administrative law analysis of whether exercises of discretion were reasonable, including decisions made by provincial Ministers of Education. In *Commission scolaire*, a case concerning policy-related decisions by a provincial Minister of Education, a unanimous Supreme Court of Canada held:

> *An administrative decision maker must consider the relevant values embodied in the Charter, which act as constraints on the exercise of the powers delegated to the decision maker. I refer in this regard to the considerations identified by this Court in Vavilov: '. . . a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision . . .'. In practice, it will often be evident that a value must be considered, whether because of the nature of the governing statutory scheme, because the parties raised the value before the administrative decision maker, or because of the link between the value and the matter under consideration. For example, it is obvious that the development of policies and the making of decisions that are likely to have an impact on a minority language educational environment require consideration of the values underlying s. 23 of the Charter. A decision cannot be unreasonable because the decision maker failed to consider a Charter value that was not relevant for the purposes of its decision. However, if the decision maker takes a relevant value into account in its decision while opting to prioritize another objective, it must be concluded that the decision engages the Charter.*[21] [emphasis added; citations omitted]

35. If a Minister of Education developing policies that impact a minority group *must* consider *Charter* values, as the Supreme Court of Canada makes clear, it follows that the *Charter* cannot be separated from the administrative law analysis where *Charter* values related to that minority group are engaged.

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francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment), 2023 SCC 31 at paras 76-77 [*Commission scolaire*]

[19] *Education Act*, s 1.1

[20] *Human Rights Act*, s 6

[21] *Commission scolaire* at para 66

36. In addition, the Respondent's motion does not address the procedural fairness grounds of review in the Application other than to object to these grounds because "no relief is sought in relation to that allegation."[22] The Application expressly requests an order in the nature of *certiorari* and redetermination, which are the standard remedies for procedural fairness violations.[23]

37. The duty of fairness turns on the rights, privileges, and interests of students impacted by the decision.[24] As such, evidence and submissions related to those rights will also be needed to resolve the procedural fairness allegations, particularly evidence that establishes the importance of the decision to transgender and gender diverse students.

38. For these reasons, evidence and submissions related to the *Charter* will be applicable for the "administrative issues" that the Respondent seeks to bifurcate, precisely because the issues are interwoven.

39. If bifurcation is granted, the CCLA will be required to adduce evidence related to the *Charter* at both hearings. This will not save resources or simplify the matter. Instead, bifurcation will result in inefficiency and inconvenience.

C. The rights of transgender and gender diverse students require speedy justice

40. Beyond the competing claims of efficiency advanced by the parties, it is important not to lose sight of the transgender and gender diverse students who were negatively impacted and harmed by the decisions under review, including the Minister's decision to treat those students differently because of their gender identity and expression. It would not be "just and convenient" to delay adjudication of rights claims advanced on behalf of these students.

41. As the Supreme Court of Canada has recognized, transgender people are a uniquely vulnerable group who are often subject to discrimination in Canadian society:

> *[T]ransgender people occupy a unique position of disadvantage in our society, given the long history in psychiatry 'of conflating [transgender*

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[22] Respondent's Brief, para 11, footnote 1
[23] Notice of Application, Orders, para c
[24] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 20-28

> *and other 2SLGBTQ+] identities with mental illness' and even resorting to harmful 'conversion therapy' to 'resolve' gender dysphoria, and 'recondition' the individual to reduce 'cross-gender behavior'. … '[T]ransgender people often find their very existence the subject of public debate and condemnation'. … Transgender people have faced discrimination in many facets of Canadian society. Statistics Canada has concluded that they are at increased risk of violence, and report higher rates of poor mental health, suicidal ideation, and substance abuse as a means to cope with abuse or violence they have experienced. Studies have concluded that they are disadvantaged relative to the general public in housing, employment, and healthcare ….*[25] [citations omitted]

42. In granting CCLA public interest standing, the Honourable Justice Dysart observed: "Surely, gender identity is among the most 'intimate and private' matters for anyone to deal with, especially children under the age of 16."[26]

43. The Respondent argues the matter should be bifurcated because the second stage may not be needed. However, the corollary of that is what highlights the problem with the Respondent's position: if the Application is not allowed at the first stage, and a second hearing is required, the delay that would ensue in bringing this matter to a final hearing is not an acceptable outcome, particularly where the same evidence will have already been before the Court at the first stage. That cannot be said to be a good use of judicial resources, and delay to a final hearing is not in the interests of the students impacted and harmed by the decisions under review.

44. In these circumstances, particularly where the Application alleges violations of the right to a safe and positive learning environment, the prohibition against discrimination in the provision of education, and the constitutional protections of free expression, security of the person, and equality, it is important to move the matter forward without delay. Indeed, speedy justice is at the heart of judicial review applications raising these types of allegations.

45. It would not be just to foster further delay in this case by granting the Minister's request for bifurcation.

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[25] *Hansman v Neufeld*, 2023 SCC 14 at para 85-86

[26] *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 at para 31

PART V – RELIEF SOUGHT

46. CCLA respectfully requests the following relief:

a. The Respondent's motion for bifurcation be denied;

b. No costs be awarded for or against any party regardless of the outcome of this motion; and

c. Such further and other relief as this Honourable Court deems just and reasonable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated May 9, 2024

Sheree Conlon KC

Benjamin Perryman

Counsel for the Applicant, CCLA

PART VI – LIST OF AUTHORITIES

Schedule A: Statutes, regulations, case law, and secondary sources cited

Statutes and Regulations

1. *Canadian Charter of Rights and Freedoms*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss 2(b), 7, and 15

2. *Education Act*, SNB 1997, c E-1.12, ss 1, 1.1, 6(b.2), 27, 28, 48

3. *Human Rights Act*, RSNB 2011, c 171, ss 2.1, 3, 6

4. *Rules of Court*, NB Reg 82-73, Rules 38.09, 47.01

Jurisprudence

5. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817

6. *Barlow v Canada*, 2000 CanLII 15057 (FC)

7. *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62

8. *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17

9. *Chamberlain v Surrey School District No 36*, 2002 SCC 86

10. *Chamberlain v School District #36 (Surrey)*, 1998 CanLII 6723 (BC SC)

11. *Cochrane v Steeves*, 2020 NBQB 116

12. *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31

13. *Hansman v Neufeld*, 2023 SCC 14

14. *Marco Maritimes Limited v Intact Insurance Company*, 2012 NBQB 204

15. *Mourant v Town of Sackville*, 2014 NBCA 56

16. *Shanks v Shay*, 2015 NBCA 2

17. *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 320

18. *Taseko Mines Limited v Canada (Environment)*, 2017 FC 1100

19. *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

Schedule B: Excerpts of Statutes and Rules

Education Act, SNB 1997, c E-1.12

Purpose

1.1The purpose of this Act is to recognize

(a) that the school system is founded on the principles of free public education, linguistic duality and the inclusion of all pupils, and

(b) the importance of the cultures and languages of the Mi'kmaq and Wolastoqey peoples.

Objet

1.1 La présente loi a pour objet de reconnaître ce qui suit :

a) les principes fondamentaux du système scolaire, soit la gratuité de l'instruction publique, la dualité linguistique et l'inclusion de tous les élèves;

b) l'importance des cultures et des langues des peuples mi'kmaq et wolastoqey.

Powers and duties of the Minister

6 The Minister

(a) shall establish educational goals and standards and service goals and standards for public education in each of the education sectors established under subsection 4(1),

(a.1) shall, for each of the education sectors established under subsection 4(1), provide a provincial education plan,

(b) may prescribe or approve

(i) instructional organization, programs, services and courses, and evaluation procedures for such instructional organization, programs, services and courses,
(ii) pilot, experimental and summer programs, services and courses, and
(iii) instructional and other materials and equipment for use in the delivery of any program, service, course or evaluation procedure under this Act,

(b.1) may conduct tests and examinations in any grade or level,

Devoirs et pouvoirs du ministre

6 Le minister

a) doit établir des objectifs et des normes en matière d'éducation et en matière de prestation de services applicables à la prestation de l'instruction publique dans chacun des secteurs d'éducation établis au paragraphe 4(1),

a.1) doit, pour chacun des secteurs d'éducation établis en vertu du paragraphe 4(1), dresser un plan d'éducation provincial,

b) peut prescrire ou approuver

(i) l'organisation de l'enseignement, les programmes, les services et les cours, ainsi que les méthodes d'évaluation de l'organisation scolaire, des programmes, des services et des cours,
(ii) les programmes, les services et les cours pilotes, expérimentaux et d'été, et
(iii) le matériel pédagogique et autre matériel et équipement nécessaires à la prestation de tout programme, service, cours ou méthodes

(b.2) may establish, within the scope of this Act, provincial policies and guidelines related to
(i) public education,
(ii) the health and well-being of pupils and school personnel,
(iii) the transportation of pupils,
(iv) school infrastructure, and
(v) investigations with respect to allegations of serious professional misconduct, and

(c) may approve or recommend books and other learning resources for school libraries.

d'évaluation en vertu de la présente loi,

b.1) peut, à tous les niveaux scolaires, faire passer des évaluations et des examens,

b.2) peut, dans le cadre de la présente loi, établir des politiques et des lignes directives provinciales relatives
(i) à l'instruction publique,
(ii) à la santé et au bien-être des élèves et du personnel scolaire,
(iii) au transport des élèves,
(iv) aux infrastructures scolaires, et
(v) aux enquêtes portant sur des allégations d'inconduite professionnelle grave, et

c) peut approuver et recommander des manuels et autres ressources éducatives pour les bibliothèques scolaires.

Human Rights Act, RSNB 2011, c 171

Prohibited grounds of discrimination

2.1 For the purposes of this Act, the prohibited grounds of discrimination are

…

(m) sexual orientation,
(n) gender identity or expression,

…

Motifs de distinction illicite

2.1 Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur :

…

m) l'orientation sexuelle;
n) l'identité ou l'expression de genre;

…

This Act binds the Crown in right of the Province

3 This Act binds the Crown in right of the Province.

Obligation de la Couronne du chef de la province

3 La présente loi lie la Couronne du chef de la province.

Discrimination in accommodation and services

Discrimination en matière d'hébergement et de services

6(1) No person, directly or indirectly, alone or with another, by himself, herself or itself or by the interposition of another, shall, based on a prohibited ground of discrimination,

(a) deny to any person or class of persons any accommodation, services or facilities available to the public, or

(b) discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public.

6(1) Il est interdit à toute personne, directement ou indirectement, seule ou avec une autre personne, personnellement ou par l'intermédiaire d'une autre personne, pour un motif de distinction illicite :

a) de refuser à une personne ou à une catégorie de personnes l'hébergement, les services et les installations à la disposition du public;

b) de faire preuve de discrimination envers une personne ou une catégorie de personnes quant à l'hébergement, aux services et aux installations à la disposition du public.

***Rules of Court*, NB Reg 82-73**

38.09 Disposition of Application

On the hearing of an application, the court may

(a) allow or dismiss the application or adjourn the hearing, with or without terms, or

(b) where it is satisfied that there is a substantial dispute of fact, direct that the application proceed to trial or direct the trial of a particular issue or issues and, in either case, give such directions and impose such terms as may be just, subject to which the proceeding shall thereafter be treated as an action.

38.09 Décision

À l'audition d'une requête, la cour peut

a) accorder celle-ci, la rejeter ou ajourner l'audience avec ou sans conditions ou,

b) si elle constate qu'il y a une contestation importante des faits, prescrire l'instruction de la requête ou l'instruction d'une ou de plusieurs questions soulevées et, dans l'un ou l'autre cas, donner les directives et imposer les conditions qu'elle estime justes, après quoi l'instance sera conduite comme une action.

47.03 Severability of Trials

(1) Either before or after an action is set down for trial, the court may order that different issues be tried at different times and may give directions with respect to the conduct of such trials.

47.03 Procès séparés

(1) En tout temps avant ou après la mise au rôle d'une action, la cour peut ordonner que diverses questions en litige soient instruites séparément et donner des instructions quant à la conduite des procès.

(2) Where an order is made that a preliminary issue be tried, a party may set it down for trial.

(3) Where liability is established before damages are assessed, the court may direct advance payments of special damages and, for the purpose of giving such directions, may receive such preliminary evidence as it considers necessary.

(2) Lorsque la cour ordonne qu'une question préjudicielle soit jugée, une partie peut mettre cette question au rôle.

(3) Lorsque la responsabilité est établie avant l'évaluation des dommages-intérêts, la cour peut prescrire le paiement par anticipation de dommages-intérêts spéciaux et, à cette fin, recevoir les preuves préliminaires qu'elle estime nécessaires.

Schedule C: Authorities not available electronically at no cost

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

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.
>
> [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.
>
> [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.
>
> [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).
>
> [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.
>
> [...]
>
> [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