OJEN ROEJ
ONTARIO JUSTICE EDUCATION NETWORK
RÉSEAU ONTARIEN D'ÉDUCATION JURIDIQUE

THE CHARTER CHALLENGE

Ontario Justice Education Network

CASE SCENARIO
Fall 2012

SEAN DOYLE

V.

MINTO DISTRICT CATHOLIC HIGH SCHOOL

Ontario Superior Court of Justice

Date: 20121015
Court File No: 1976-13

BETWEEN:

SEAN DOYLE

Applicant

and

MINTO DISTRICT CATHOLIC SCHOOL BOARD

Respondent

REASONS FOR ORDER

R.D. ELLIOTT J.

INTRODUCTION

1. The bullying of students in schools is a source of growing concern to all people in Ontario. Concerns about bullying in schools, including concerns about bullying of LGBT students, have been the subject of considerable debate and study in recent years. Tragically, there have been circumstances where young people have been driven to take their own lives. However, there are sincere disagreements about how to address this serious problem.

2. The Government of Ontario responded to this problem with the *Safe Schools for All Act ("Act")*. The *Act* was proposed in November 2010, passed final reading in June 2011, and came into force September 1, 2011.The legislation is controversial, especially as it expressly requires all schools to allow student-run clubs focused on issues related to sexual orientation and gender identity. Moreover, it explicitly mandates that students are allowed to choose the name of such clubs, including the use of the name Gay-Straight Alliance.

3. The Applicant Sean Doyle ("Sean") is a student at Saint Josemaría Escrivá High School ("School"), operated by the Respondent Minto District Catholic School Board ("Minto"). His principal, Francis Spellman ("Spellman"), refused a request from Sean to permit a Gay-Straight Alliance ("GSA") at the School. In response to inquiries from Sean, Spellman also denied

permission to allow Sister Mary McArthur ("McArthur") to be a guest speaker in his Family Life class.

4. Sean brings an application to this Court for a mandatory Order requiring Minto to permit him to operate a Gay-Straight Alliance Under one of three names: (a) Escrivá Gay-Straight Alliance, (b) Minto Gay-Straight Alliance, or (c) Oscar Wilde Society.

5. Sean also seeks a mandatory order requiring Minto to permit McArthur to be a guest speaker in his Family Life class.

6. Minto defends this application saying that the application must be rejected in its entirety, in reliance on their rights as a separate school under s. 93(1) of the *Constitution Act, 1867*. In the alternative, Minto raises their rights to freedom of religion under s. 2(a) of the *Canadian Charter and Rights and Freedoms* ("*Charter*"). The Respondent argues that the *Safe Schools of All Act* is a substantial infringement of their s. 2(a) *Charter* rights to foster a community of Catholic believers.

7. For the reasons given below, I grant the Application in part. I find that Minto has failed to establish that Separate School Boards had the right to school regulate clubs in 1867, and that this is fatal to their ability to invoke s. 93(1) of the *Constitution Act,1867* to bar the formation of this club. *The Safe Schools for All Act* is constitutional legislation, saved under s. 1 of the *Charter*. I find that Minto's refusal to permit the activities requested violates Sean's right to freedom of expression under s. 2(b) of the *Charter*, and the infringement is not justified under s. 1.

8. Regarding McArthur, I find that the proposed presentation by McArthur is subject to the protection of s. 93(1) of the *Constitution Act, 1867* and cannot be challenged under the *Charter*. If I am wrong in this, I find that her proposed presentation violates the s. 2(a) rights of Minto.

FACTS

9. The Applicant is 17 years old, and lives with his family in Newcastleton, Ontario, a mid-sized community in central Ontario. He is in grade 12 at Saint Josemaría Escrivá High School.

10. Sean was baptized in the Roman Catholic faith. He realized that he was gay around age 12. His understanding of the teachings of his Church is that he can be gay and Catholic, and that God loves him. He identifies strongly as a Catholic person. He acknowledges that the Church's current teaching is that homosexual acts are sinful, but hopes the Church will change its views on the subject one day. He has no interest in leaving the Church or attending a secular school.

11. The Applicant points out that he and other gay and lesbian students have been bullied based on their sexual orientation, and they will not feel safe unless they have a club focused on their issues. After the *Act* came into effect, he summoned student support for a GSA, and proposed it to his Principal in November 2011.

12. Spellman refused the request, but offered to permit an anti-bullying club or human rights club, suggesting the name "Open Arms Club."

13. Sean argues that being gay is as much a part of his identity as being Catholic, and that the name Minto Gay-Straight Alliance is vital to the identity and success of the proposed club.

14. As a matter of routine, students in Sean's Family Life class are encouraged to invite guest speakers. Sean eagerly invited McArthur, and was disappointed when he learned she would not be allowed to speak in his class.

EVIDENCE AT TRIAL

15. Professor Colin Davids is an expert on the history of education in Ontario. Professor Davids gave evidence about the background to the *Scott Act, 1863*. He noted that the two objectives of Catholics at the time were access to tax revenues and control over religious curriculum and that in all other respects Catholic schools were subject to provincial regulation in 1867. School clubs did not come into existence until after the First World War. Professor Davids also pointed out that full high school funding was not part of the Confederation compromise, and that when funding was extended to Catholic high schools they were required to accept persons of all faiths. He noted that at Minto, 20 % of the students are Muslims, 10 % are Sikhs and 10 % are Protestants.

16. Rt. Rev. Mila Crenshaw is the Anglican Bishop of Minto and a Professor of Theology at the University of Minto. She is an expert on Christianity and sexuality. Bishop Crenshaw pointed out that Christ said nothing on the topic of homosexuality. Her Grace opined that the Christian hostility to all forms of sex outside marriage, including homosexual acts, has been the historical exception, rather than the rule. She argued that today many Christians do not view homosexuality as sinful. Bishop Crenshaw gave evidence that until this controversy, the use of the word "gay" had never been proscribed by the Catholic Church. Moreover, the Catholic and other Christian Churches that condemn homosexuality only proscribe the homosexual act. There is nothing in the teachings of the Catholic Church or any of the major Christian denominations that equates socializing in a club with sexual acts, according to Bishop Crenshaw.

17. Dr. Peter Ianuzzi is an expert on the subject of bullying in schools. He gave evidence about reports by Egale Canada and others of the special effect of bullying on LGBT students. He noted that the evidence showed the majority of LGBT students did not feel safe in schools, and that the LGBT students reported the problems abated when GSAs were permitted. He observed that the problem of bullying was part of a larger pattern of discrimination and violence toward LGBT persons.

18. Sister Mary McArthur, the proposed guest speaker, is a Catholic nun of the order the Sisters of Perpetual Indulgence. She is also a Professor of Theology, although she is no longer permitted to teach in the Catholic seminary at the University of Minto. Sister McArthur is a liberal theologian who has advocated for healthy debate and reform in certain Catholic teachings. She

has spoken in many Catholic schools over the years. She acknowledged that her order had been recently admonished by the Pope for its lack of zeal in denouncing abortion, but asserts that healthy debate on the Church's teachings is an important part of the Catholic tradition.

19. His Eminence Cardinal Philip St. John gave evidence that the Catholic Church is a hierarchical organization. The Pope is infallible on matters of doctrine, and has made it clear that homosexual acts are sinful. While he respects Bishop Crenshaw as a scholar, as a Protestant her views on Catholic teaching are irrelevant in his opinion. His Eminence views the schooling as an important extension of the Church itself. The rights to Catholic education guaranteed under the Constitution are vital to the preservation of the faith in a social environment that remains hostile to Catholics. His Eminence advised Spellman that the use of the word "gay" is a political term implying advocacy for acceptance of homosexual acts as normal, and that this cannot be accepted in an authentic Catholic environment. The association of this word with the name of a saint is particularly offensive and demeaning. He finds McArthur and her Order misguided in matters of Church teaching on sexuality, and opined that it would be unfair to the young people to expose them to her dangerously confusing opinions.

20. Professor Michelle Lynch is an expert on the history of Catholic education in Ontario. She gave evidence that Catholic schools are viewed as essential to the survival of the Catholic faith. In 19th century Ontario the problem was the dominance of the Protestant faith, and in modern times it is the threat of both secularism and the growth of non-Christian faiths. It was essential to nourish young people in a community of believers. She noted that in 19th century Ontario, schools were usually located adjacent to churches and school life and parish life overlapped significantly. She acknowledges that school clubs are not known to have existed in 1867, but says that these matters would be covered under the rubric of "management" of schools. It would have been unthinkable in 1867 to compel Catholic to permit homosexual clubs. She says that the problem of bullying in Catholic schools is no worse than in other schools, and that the Open Arms model has not been given an opportunity to work.

21. Dr. David Southgate is an expert on Catholic teaching on sexuality. He expressed the opinion that Catholic teaching about family life is central to the Catholic faith. This core teaching has been unchanging for centuries, stipulating that sex is acceptable only for the purposes of procreation within a Catholic marriage. Doctrinal purity is vital to the Catholic faith, and deviant views such as those of McArthur must be lovingly but firmly corrected. Bullying of homosexual students is the type of unfair discrimination that is condemned by the Church; however, allowing "gay" clubs implies support of a homosexual lifestyle that is fundamentally incompatible with core Catholic teaching.

LEGAL ISSUES

22. The parties agree that there are four legal issues before me:

i) **Is the *Safe Schools for All Act* valid legislation under section 93(1) of the *Constitution Act, 1867*?**

ii) Does the *Safe Schools for All Act* infringe Minto's freedom of religion under s. 2(a) of the *Charter*, and if so, is that infringement justified under s. 1 of the *Charter*?

iii) Does Minto's rejection of the proposed names for the school club infringe Sean's freedom of expression under s. 2(b) of the *Charter*, and if so, is that infringement justified under s. 1 of the *Charter*?

iv) Does the invitation to Sister Mary McArthur to speak in the Family Life class engage the rights of the school under s. 93(1) of the *Constitution Act, 1867* and/or s. 2(a) of the *Charter*, or of Sean under s. 15 of the *Charter*, and if so, how should the "clash of rights" be resolved?

ANALYSIS

Issue 1: Is the *Safe Schools for All Act* valid legislation under section 93(1) of the *Constitution Act, 1867*?

23. A unique situation arises in Ontario the case of Catholic boards. They have special rights guaranteed under the 1867 *Constitution*.

24. Section 93 of the *Constitution Act* states that the Provincial Legislature may make laws about education except for certain provisions, including the rights and privileges Catholic Trustees and Schools enjoyed at the time of the Union, or 1867:

> **93**. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:--
>
> (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;

25. The statute is clear in requiring all Boards to allow gay straight alliances and to allow students to use that name if they wish. Catholic Boards do not have the constitutional right to override provincial authority and to dictate the nature or name of extra-curricular activities unless the Catholic Boards enjoyed the right to do so in 1867.

a. Did Catholic Schools and Trustees have the right to manage extra-curricular activities in 1867?

26. Based on the evidence of Professor Davids, which I accept, and my interpretation of the law, at the time of the Union, no such right existed. Moreover, there were no such things as extra-curricular activities in 1867.

27. The legislation that governed the rights of the Catholic Schools and Trustees in 1867 was *An Act to restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools*, c.15, commonly referred to as the "*Scott Act*". The *Scott Act* was the culmination of a long struggle to establish Catholic schools in a socially hostile Protestant environment.

28. The *Scott Act* made it easier for Catholics to form their own school boards and to direct their local rates toward separate schools. As well, the *Scott Act* entitled separate schools to share in municipal grants in addition to the provincial grants they had been receiving. The *Scott Act* also provided that Catholic School trustees share the same responsibilities as Common School trustees. However, the schools were subject to inspection and the ultimate regulation of the Department of Public Instruction for Upper Canada, which assumed control over curriculum and teacher training.

29. The *Scott Act* also provided that the Government of Upper Canada was charged with overall authority of Catholic Separate Schools:

> **26**. The Roman Catholic Separate Schools, (with their Registers), shall be subject to such inspection, as may be directed from time to time, by the Chief Superintendent of Education, and shall be subject also, to such regulations, as may be imposed, from time to time, by the Counsel of Public Instruction for Upper Canada.

30. Catholic boards only had power over extra-curricular activities if Common School trustees had that power. Since, as may be seen below, neither the government nor the common school trustees are explicitly provided authority over extra-curricular activities, a question arises as to who was held implicit authority over extra-curricular activities.

b. Did Common School trustees have the right to manage Extra-Curricular Activities in 1867?

31. *An Act Respecting Common Schools in Upper Canada*, Cap. 64, 22 Vict. (the "*Common School Act*"), outlines the duties of Common School trustees and boards of trustees. It did not explicitly provide for extra-curricular activities. However, **residual authority and control was enjoyed by the Government and not by the trustees**:

> **27**. It shall be the duty of the Trustees of each school section, and they are hereby empowered:
>
> 4. To do whatever they may judge expedient with regard to the building, repairing, renting, warming, furnishing and keeping in order the section School house, and its furniture and appendages, and the school lands and enclosures held by them, and for procuring apparatus and text-books for their school.
>
> 18. To see that no unauthorized books are used in the school, and that the pupils are duly supplied with a uniform series of authorized text-books, sanctioned and recommended by the Council of Public Instruction, and to procure annually, for the benefit of their school section, some periodical devoted to education.
>
> **79**. It shall be the duty of the Board of School Trustees of every City, Town and Village respectively, and they are hereby authorized:

4. To take possession of all Common School property, and to accept and hold as a Corporation all property acquired or given for Common School purposes in the City, Town or Village, by any title whatsoever;
5. To manage or dispose of such property, and all moneys or income for Common School purposes
6. To apply the same, or the proceeds, to the objects for which they have been given or acquired

32. Therefore, trustees were provided with the authority to manage school property and money for School purposes in accordance with the "objects for which they have been given or acquired" – in other words, in accordance with the guidance set out by the government.

33. The government, through the Council of Public Instruction, maintained residual authority to regulate the organization, government and discipline of Common Schools. It also maintained the authority to set the curriculum for the Common Schools by approving a list of textbooks the trustees could choose from. The residual authority of organization of Common Schools probably included how Common Schools were to organize and manage both curricular and extra-curricular activities, although no extra-curricular activities existed in 1867.

34. Although the overarching parameters generally set and controlled by the government did not explicitly include extra-curricular activities, had the government of the day turned their mind to it, there can be no doubt that extra-curricular activities would have been treated the same way as virtually everything else – under provincial control.

35. Professor Lynch makes the observation that a Catholic School would never have been expected to allow a club for homosexuals in 1867. That observation is undoubtedly true. However, our society's attitudes towards homosexual persons have evolved, as have our laws. The power to manage the school property does not and cannot extend to an unfettered authority to regulate extra-curricular activities.

36. Therefore, since s. 93(1) of the *Constitution Act, 1867* only protects the rights of Catholic Schools and Trustees that were enshrined in 1867. It does not protect the right of Catholic Boards to manage or control extra-curricular activities. Accordingly, s. 93(1) does not give the Catholic School trustees the right to prohibit students from forming GSAs, especially if otherwise so directed by law or by the Ministry of Education.

37. This does not mean that Catholic Schools have no religious interests that are entitled to protection. They have rights under ss. 2(a) and 15(1) of the *Charter*. It simply means that they cannot rely on s. 93(1) to avoid any provincial regulation in the area of extra-curricular activities.

Issue 2: Does the *Safe Schools for All Act* infringe Minto's freedom of religion under s. 2(a) of the *Charter*, and if so, is that infringement justified under s. 1 of the *Charter*?

38. The *Charter* has already had a profound impact on our schools. For example, the Ontario Court of Appeal has ruled that the *Charter* requires our public schools to be a secular environment without imposing the religious conventions or practices of the majority.[1]

39. Minto is a Catholic school, and it also has rights under the *Charter*. Even if the Legislature has the authority to enact laws regarding education, Minto argues that the impugned sections of the *Act* are nonetheless impermissible because they will infringe the religious beliefs or cultural values of Minto, and of the parents it serves.

40. Concerns about bullying in schools, including concerns about bullying of LGBT students, have been the subject of considerable debate and study in recent years. The gravity of the issue is underscored by publicized instances of bullying in Canadian schools linked to extreme violence, public humiliation, suicide and even homicide.

41. All parties in the Ontario Legislature agreed that part of the solution to this problem was legislative reform. There was considerable debate about the form that legislation should take, and extensive public hearings. The preamble to the *Act* indicates the intent of legislature to protect students, acknowledging the that schools must be safe and inclusive places for all students, particularly LGBT students who experience disproportionate levels of bullying.

42. The sections of the *Safe Schools for All Act* pertaining to this application are as follows:

> **300.0.1** The purposes of this Part include the following:
>
> 1. To create schools in Ontario that are safe, inclusive and accepting of all pupils.
>
> **2. To encourage a positive school climate and prevent inappropriate behaviour, including bullying, sexual assault, gender-based violence and incidents based on homophobia, transphobia or biphobia.**
>
> 3. To address inappropriate pupil behaviour and promote early intervention.
>
> 4. To provide support to pupils who are impacted by inappropriate behaviour of other pupils.
>
> 5. To establish disciplinary approaches that promote positive behaviour and use measures that include appropriate consequences and supports for pupils to address inappropriate behaviour.
>
> 6. To provide pupils with a safe learning environment...

[1] *Zylberberg v. Sudbury Board of Education*, (1988), 65 O.R. (2d) 641; (1988), 52 D.L.R. (4th) 577; (1988), [1989] 34 C.R.R. 1; (1988), 29 O.A.C. 23

303.1 (1) Every board shall support pupils who want to establish and lead activities and organizations that promote a safe and inclusive learning environment, the acceptance of and respect for others and the creation of a positive school climate, including,

(a) activities or organizations that promote gender equity;
(b) activities or organizations that promote anti-racism;
(c) activities or organizations that promote the awareness and understanding of, and respect for, people with disabilities; or
(d) activities or organizations that promote the awareness and understanding of, and respect for, people of all sexual orientations and gender identities, including organizations with the name gay-straight alliance or another name.

Same, gay-straight alliance

(2) For greater certainty, neither the board nor the principal shall refuse to allow a pupil to use the name gay-straight alliance or a similar name for an organization described in clause (1) (d).

Inclusive and accepting name

(4) The name of an activity or organization described in subsection (1) must be consistent with the promotion of a positive school climate that is inclusive and accepting of all pupils.
(5) A board shall comply with this section in a way that does not adversely affect any right of a pupil guaranteed by the *Canadian Charter of Rights and Freedoms*...

(Emphasis added)

43. Minto relies on the evidence of Cardinal St. John that the presence of a gay straight alliance offends Catholic teaching. It points to the evidence of Professor Lynch that Catholics have been historically marginalized in Ontario, including in the education system, and that this has included a history of discriminatory laws. Relying on the decision of the Supreme Court of Canada in *Syndicat Northcrest v. Amselem* [2004] 2 S.C.R. 551, Minto argues that I must accept Cardinal St. John's evidence as to this religious belief and its infringement. They assert that the rights of homosexuals cannot trump the rights of religious educators, relying on *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31. They say forcing them to allow a gay straight alliance is not simply providing an education but rather is tantamount to forcing them endorse something which is contrary to their core religious beliefs: *Brockie* v. *Brillinger (No. 2)*, (2002), 43 C.H.R.R. D/90 (Ont. Sup.Ct.).

44. Canadian law has long recognized a right to freedom of religion, and to be free from religious discrimination. The *Charter* protects freedom of religion expressly in section 2(a):

2. Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion;

45. Both parties agree that Minto has the authority to forbid homosexual **acts** at the School. However, this student club is not formed for the purpose of engaging in sexual activity, but to provide a "safe haven" and mutual support for LGTB students.

46. A number of religions condemn the homosexual act, but do not condemn homosexual persons. Many such faith groups are not monolithic, but contain a diverse range of opinion on this topic. The Catholic faith is no exception. We must recognize that all of the Catholics participating in the Minto system, including Sean, have a freedom of religion and belief, and they may not agree with Cardinal St. John on this point.

47. In *Hall (Litigation Guardian of) v. Powers*[2], where a Catholic school board was ordered to permit a gay student to bring his boyfriend to the prom, Justice MacKinnon noted that "The Church's Catechism, in three paragraphs, first declares that homosexuality is contrary to natural law and can under no circumstances be approved, but goes on to direct both that homosexuals should be accepted with respect, compassion, and sensitivity and also that every sign of unjust discrimination should be avoided." His Honour also found that there was a wide range of beliefs among Catholics about the appropriate response to LGBT individuals.

48. In *Chamberlain v. Surrey School District No. 36*[3] a B.C. case, the Supreme Court found that it was impermissible for a Board to ban books about same sex relationships from school in reliance on the religious beliefs of parents or board members. The Court in that case was confronted with similar arguments about the school interfering with the parents' rights to teach their children their own moral views on homosexuality, especially young children. Chief Justice McLachlin wrote this for the majority:

> "When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right. Learning about tolerance is therefore learning that other people's entitlement to respect from us does not depend on whether their views accord with our own. Children cannot learn this unless they are exposed to views that differ from those they are taught at home."[4]

49. If students are not allowed to form a GSA, LGBT students are without a safe haven. They would continue to be exposed to discrimination without a way to help effect acceptance and understanding within the school community. Furthermore, several *Charter* rights of the LGBT students may be affected:

---

[2] [2002] 59 O.R. (3d) 423 (S.C.)
[3] [2002] 4 S.C.R. 710, 2002 SCC 86
[4], supra.

1. Freedom of conscience and religion[5];
2. Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;[6]
3. Freedom of association[7];
4. Right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice[8];
5. Equality before and under the law, and the right of equal protection and equal benefit of the law without discrimination based on sexual orientation[9].

50. *Charter* rights are not limited to adults. Pupils in school have rights under the *Charter*. Education is a publicly funded service available to all Ontarians. In offering this service, Ontario may not discriminate based on any of the prohibited grounds in delivering that service. Equal treatment of all pupils alone may not be enough to meet the requirements of the *Charter*. Government may be required to take additional steps make the service accessible by overcoming barriers experienced by minorities.[10]

51. There has been no argument made on the potential infringement of these *Charter* Rights, should the club be disallowed and therefore I cannot make any findings on whether or not the school's actions would constitute a violation of these rights. There has been no evidence on these points. I raise this issue only in the context of evaluating the government's efforts to balance the conflicting rights in the drafting of the legislation.

Conflicting Rights

52. Recognizing that this legislation could affect rights of students as well as the freedom of religion rights of Minto, I must consider these conflicting rights. This is an example of our law's recognition that there is no hierarchy of rights. When rights are said to clash, the Court must try to identify the scope of the rights, the true areas of conflict, and then seek to balance those rights. In this case I find that the inculcation of Catholic values to young people of the Catholic faith goes to the core of the s. 2(a) freedom of religion. It is a part of Canada's history and culture to

---

[5] S.2a of the *Charter of Rights and Freedoms*. Justice MacKinnon found in *Hall (Litigation guardian of) v. Powers* that "…it is not clear what conduct is necessary to ensure that rights with respect to denominational schools are not prejudicially affected". Many LGBT students sincerely believe that their Catholic faith accepts them as who they are, regardless of their sexual preferences. GSAs are a safe place to "come out" and have support of other people in the school community. By preventing them from having GSAs, the Catholic School is preventing LGBT from safely practicing the Catholic faith as a LGBT person. It is also preventing some non-LGBT students from accepting and supporting LGBT students.

[6] S.2b of the *Charter of Rights and Freedoms*. This is an infringement on the ability of students to express who they are and beliefs about the appropriate response to LGBT students.

[7] S.2d of the *Charter of Rights and Freedoms*. This is an infringement on the ability of students to associate with themselves and others as a GSA.

[8] S.7 of the *Charter of Rights and Freedoms*. Since GSAs are proven to reduce violence, harassment and trauma of LGBT students, disallowing them are an infringement of their life, liberty and security of the person.

[9] S.15 of the *Charter of Rights and Freedoms*. LGBT students have a right to a safe education without discrimination.

[10] See *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624

protect religious freedom. Therefore, I find that in the face of a potential conflict, the scope of the s. 2(a) right is predominant and that the balancing of conflicting rights must favour Minto. I find that the *Safe Schools for All Act* does infringe the s. 2(a) rights of the school.

53. Having found a *Charter* infringement, I must then turn to the question of reasonable justification. Any infringement of a *Charter* right can be saved if it demonstrated to be reasonably justified in a free and democratic society.

Section One Analysis

54. The protection of the freedom of conscience and religion is limited by s. 1:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

55. In *R. v. Oakes*, the Supreme Court articulated a test for determining if a law that infringes a *Charter* Right is saved by s. 1 of the *Charter*. The Court identified a three-step test. First, it must be prescribed by law. Second, there must be "an objective related to concerns which are pressing and substantial in a free and democratic society", and third, it must be shown that the "means chosen are reasonable and demonstrably justified".
The third branch of the test is a "proportionality test", requiring the Applicant to show:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

56. In *Dagenais v. Canadian Broadcasting Corporation*, the Supreme Court clarified the third part of the proportionality test:

> "While the third step of the Oakes proportionality test has often been expressed in terms of the proportionality of the objective to the deleterious effects, this Court has recognized that in appropriate cases it is necessary to measure the actual salutary effects of impugned legislation against its deleterious effects, rather than merely considering the proportionality of the objective itself"[11].

57. In *S.L.*, supra, the SCC reiterated that "the protection of any *Charter* right must be measured in relation to other rights with a view to the underlying context in which the apparent conflict arises".

[11] [1994] S.C.J. No. 104 at para 93.

Pressing and Substantial Objective

58. The preamble to the impugned legislation sets out the intention of the government in passing the legislation. It is evident that the legislation is a direct effort to combat bullying in schools, particularly of LGBT students.

59. The problem of bullying of LGBT students is a serious one. Dr. Ianuzzi gave evidence about a report by Egale Canada, the first comprehensive national climate survey on homophobia, biphobia, and transphobia in Canadian schools, published in 2011, entitled *Every Class in Every School*[12]. The report documents the forms and extent of students' experiences of relevant incidents at school, the impact of these, and the efficacy of measures being taken by schools to combat these common forms of bullying.

60. Key findings of the report include: Almost two thirds (64%) of LGBT students reported that they feel unsafe at school:

1. LGBT students are exposed to language that insults their dignity as part of their every day school experience, and youth with LGBT family members are constantly hearing their loved ones being denigrated.
2. LGBT students and students with LGBT parents experience much higher levels of verbal, physical, sexual, and other forms of discrimination, harassment, and abuse than other students.
3. Many schools have a well-developed human rights curriculum that espouses respect and dignity for every identity group protected in the *Canadian Charter of Rights and Freedoms* except for LGBT people.
4. Teachers often look the other way when they hear homophobic and transphobic comments and some of them even make these kinds of comments themselves.
5. Many students, especially youth of colour, do not have even one person they can talk to about LGBT matters.

61. The study found that GSA's have a positive impact on the lives of LGBT youth:

1. In schools that have made efforts to introduce LGBT-inclusive policies, GSAs, and even some LGBT-inclusive curriculum, the climate is significantly more positive for sexual and gender minority students.
2. Students from schools with GSAs are much more likely to agree that their school communities are supportive of LGBT people, are much more likely to be open with some or all of their peers about their sexual orientation and/or gender identity, and are more likely to see their school climate as becoming less homophobic.
3. Students from schools with anti-homophobia policies are significantly more likely to agree that their school administration is supportive of LGBT students.

[12] Taylor, C. & Peter, T., with McMinn, T.L., Elliott, T., Beldom, S., Ferry, A., Gross, Z., Paquin, S., & Schachter, K. (2011). Every class in every school: The first national climate survey on homophobia, biphobia, and transphobia in Canadian schools. Final report. Toronto, ON: Egale Canada Human Rights Trust.

62. The Ontario Ministry of Education has acknowledged that a safe and supportive environment for learning and working is one of the most important factors that influence the quality of student learning and achievement[13].

63. A Ministry of Education report found that:

> "Students who experience a positive school culture feel supported and accepted by peers and school staff and tend to develop a strong sense of school membership. Feelings of belonging enhance students' self-esteem and can contribute both directly and indirectly to improvements in academic and behavioural functioning and overall mental health. Students who feel accepted are more likely to develop strong literacy skills and make a positive contribution to the school culture and are less likely to commit infractions. Conversely, a low sense of school engagement in students appears to be correlated to a higher incidence of emotional and behavioural disorders (Canadian Public Health Association, 2003). This suggests that an approach to dealing with inappropriate student behaviour which enables students to feel supported and accepted at school may contribute to improved student learning and behaviour and help students stay in school[14]."

64. While this report was specifically in reference to students with special education needs, the principles articulated above apply equally to LGBT students.

65. I find that the government's objective in passing this legislation is pressing and substantial and so I now move onto the third branch of the Oakes test to consider the proportionality of the legislation.

Proportionality

66. It is presumed that the government was attempting to strike a balance that took actions to protect a vulnerable group of students and give full consideration to their rights while still being respectful of the rights of religious schools.

67. The question of proportionality requires considering whether the legislation is rationally connected to the objective, and minimally impairs the right in question.

68. While I agree that the rights of LGBT persons cannot trump freedom of religion, neither can freedom of religion be used as a license to treat LGBT persons in whatever manner suits that believer. Freedom of belief is not as wide as freedom to act on those beliefs. As Bishop Milne noted, religiously justified hatred of LGBT persons has a tragic track record of going so far as endorsing violence toward and even killing LGBT persons. The LGBT community has been the target of violence "justified" in the name of traditional religious or cultural values. Canadians look with horror on the contemporary executions of LGBT persons in dozens of countries such

[13] (Safe Schools Action Team, 2008), cited in Caring and Safe Schools in Ontario' – supporting students with special education needs through progressive discipline, K-12.
[14] *Caring and Safe Schools in Ontario*, Supporting students with special education needs through progressive discipline, Kindergarten to Grade 12.

as Iran, the proposed death penalty in Uganda and the mob murders of gays celebrated in song in Jamaica. Such actions have been roundly condemned by the UN Human Rights Commissioner, Ms. Navanethem Pillay, in her recent report, and by UN Secretary General Ban-Ki Moon.[15]

69. The right to freedom of religion has always been limited by a fundamental principle, that is, that the exercise of freedom of religion by one person may not cause harm to another. As the Supreme Court said in the leading case of *R v Big M Drug Mart*,

> "The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided, inter alia, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own."[16]

70. In this situation the legislation aims to address this climate of intolerance and hate by creating a safe haven in schools. I find that this is a rationally connected to the object of bullying of LGBT students. The legislation does not require schools to set up GSA's in the absence of a student request. It does not proscribe the involvement of the school in the activities of the club. Therefore, I find that the legislation minimally impairs the s. 2(a) rights of the school and is saved by section 1. In conclusion, on this issue, I find that while the legislation does infringe the freedom of religion of the school, that infringement is justified in a free and democratic society and is therefore constitutional.

Issue 3: Does Minto's rejection of the proposed names for the school club infringe Sean's freedom of expression under s. 2(b) of the *Charter*, and if so, is that infringement justified under s. 1 of the *Charter*?

71. Sean contends that the school's rejection of his proposed names for the club, and the insistence on the name "Open Arms Club" is an infringement of his freedom of expression guaranteed under s. 2(b).

> **2.** Everyone has the following fundamental freedoms:
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

72. Section 2(b) of the *Charter* guarantees the right to free speech. This must be given the widest protection and includes commercial statements and even repulsive comments, to a degree. But, expression is not unlimited. Even before considering whether a limit on free expression is a reasonable limit under s. 1 of the *Charter*, it must be determined if that particular expression falls within s. 2(b). Expression is protected when it conveys meaning and does so in a non-violent manner.

[15] http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx accessed May 13, 2012
[16] *R. v. Big M Drug Mart*, 1985] 1 S.C.R. 295 at 346

73. Much of the controversy that has surrounded the debate on the *Act* centered on the use of the name "gay-straight alliance". It is clear that the words "straight" or "alliance" offend no one. The problem is with the use of the word "gay."

74. Like many marginalized groups, LGBT persons are subjected to hateful epithets every day. I accept the evidence of Dr. Ianuzzi about the use of the word gay. The word "gay" to describe homosexuals began to be adopted widely in the LGBT community beginning in the 1960's, and the first organization to bear the name in Canada was formed in 1971, the Gay Alliance Toward Equality. Initially there was considerable social resistance to the use of the term "gay" to describe homosexuals. Major newspapers such as the New York Times at first insisted that the word must guard its traditional meaning of "happy." The English language has evolved, however and the word gay is now the word most commonly used in everyday life referring to homosexuals.

75. The term has become a kind of "brand name" for these types of student clubs. Some students want to use this term, others do not, and the legislation affords the students the right to decide.

76. There is no evidence that Minto has banned the name of any school club, expect for "gay-straight alliance" or similar names for LGBT clubs. The argument seems to be that parents or schools can and should somehow insulate their children from hearing this word, or from encountering sexual minorities, simply by banning the use of the word gay in connection with school clubs. In modern society that is impossible.

77. Sadly, the word gay is still used in a hurtful way in schools. "That's so gay" is a common enough insult. The prevalence of this hurtful and discriminatory use of the term may be reason enough to insist on a more visible and positive meaning in the school context.

78. The objection seems to be that the use of the word "gay" implies a tolerance of gay people, contrary to some persons' religious beliefs. However, even those who are very intolerant of LGBT persons still commonly use the term. I do accept that allowing the use of the word "gay" does imply a level of tolerance or respect toward homosexual persons.

79. An alternative name proposed by Sean references Oscar Wilde, a famous gay man, who became a Catholic on his death. He is a giant of literature, and a reference to him in an educational context raises no valid objections.

80. Given their freedom of expression, students have a constitutional right to choose the name of their clubs. In this context, it must include the use of the word "gay". It connotes both visibility, and a respectful attitude toward homosexual persons.

81. The use of the word gay overcomes this invisibility. It also implies an attitude of respect toward the homosexual person, and is thus consistent with the words of the Catechism and the public policy of Canada. If the language that had been chosen by Sean was obscene or openly attacked the teachings of the Church, a different conclusion might result. The mere fact that the

name is distasteful to some Catholics is no justification for restricting his rights of freedom of expression.

82. Based on this contextual analysis, it is clear that the use of either the name Gay Straight Alliance or Oscar Wilde Club would convey meaning and would do so in a non-violent manner. Therefore, I find that the rejection of either of these first two proposed names is an infringement of Sean's freedom of expression protected under s. 2(b) of the *Charter*.

83. The issue is more complicated in relation to the third name proposed by Sean: Escrivá Gay Straight Alliance. This name, incorporating the name of the high school itself, juxtaposes the name of a Catholic saint with the term 'gay'. This is not essential to the character of the proposed club and is not based on any historical or educational connection between the life of the saint and the promotion of tolerance of LGBT students. Catholics in the school community might be offended by the juxtaposition of the saint's name with the word gay on the premise that it objectively infringes Catholic teaching. This is a case of a conflict between a s. 2(b) right to freedom of expression and a s. 2(a) right to freedom of religion. On balance, Minto's rights much take precedence in this situation and therefore, I find that Minto's rejection of the club name Escrivá Gay Straight Alliance is justified on the basis of its s. 2(a) rights.

Section One Analysis

84. Having found that the balance of rights favours Sean, and that Minto has infringed his freedom of expression, I must consider whether that infringement is be justified under s. 1. I outlined the purpose and test to be used when applying section one in paragraphs [333-333] and so will not reiterate the test here.

Pressing and Substantial Objective

85. In this case, Minto's refusal of the GSA, named as Sean has proposed, is premised on the objective of protecting its right to inculcate the Catholic faith. There can be no doubt that religious freedoms constitution a pressing and substantial concern in a free and democratic society. The fact that this right is enshrined in the *Charter* is evidence enough of the legitimacy of the object.

Proportionality

86. I now turn to the third branch of the *Oakes* test – are the means chosen reasonable? Here I find that the actions of Minto cannot be saved under s. 1. There would be many ways to advance the goal of promoting Catholic values without infringing on Sean's freedom of expression. I find that the existence of a club, named either of Sean's first two proposed names, would have little to no effect on the school's ability to inculcate Catholic values in its students. In contrast, the rejection of the proposed names would have a serious effect on Sean's freedom of expression. The actions of the school are not proportionate to the objective and therefore not justified.

87. In summary, on the question of the GSA, I find that the school's rejection of the first two names proposed by Sean constitutes an infringement of his freedom of expression and cannot be saved under s. 1. The rejection of the third name is not an infringement of Sean's freedom of expression, but rather, resolved in balancing the conflict between the expression and religion rights at stake, in favour of the school.

Issue 4: Does the invitation to Sister Mary McArthur to speak in the Family Life class engage the rights of the School under s. 93(1) of the *Constitution Act, 1867* and/or s. 2(a) of the *Charter*, or of Sean under s. 15 of the *Charter*, and if so, how should the "clash of rights" be resolved?

88. The Applicant contends that the same analysis that I have undertaken above applies to McArthur. She was invited to be a guest speaker to the Family Life Class. Since the evidence establishes that neither a "Family Life" class nor guest speakers were part of school life in 1867, it is argued that her visit constitutes an extra-curricular activity that is not caught by s. 93(1) of the *Constitution Act, 1867*.

89. The Respondent argues that the content of Family Life is "curriculum". Minto further argues that the teaching on matters of sexuality and family life have not altered in their essentials since 1867, and are core to the Catholic faith. They argue that the true analogy is to Catholic teachers, as guest speakers are stepping into the shoes of teachers.

90. In my view, the content of Family Life is part of the curriculum. The fact that it is being presented by someone who is a guest speaker does not change its character. I accept the evidence of Dr. Southgate and Cardinal St. John that Catholic teaching on sexuality is core to the faith. While it may be true as Bishop Crenshaw suggests that individual Catholics are free to follow their own consciences and that there has been a history of debate over these issues in the Catholic Church, a school is unique setting.

91. The framers of our *Constitution* entrusted the separate school boards with certain guaranteed powers, which are not subject to review under the *Charter*. Control over religious curriculum was at the heart of those powers. I agree that in this context a guest speaker is in a position is analogous to a teacher. Although she is a Roman Catholic nun, the decision whether or not to invite her rests with Minto and is protected by s. 93(1).

92. If I am wrong in this conclusion, I find for the same reasons that requiring Minto to invite Sister McArthur as a guest speaker would infringe the s. 2(b) freedom of religion rights of Minto in a significant way.

93. Based on my findings that Minto's religious beliefs are legitimately held, and are directly connected to the act of inculcating Catholic values, it is obvious that interference in the classroom teachings would result in an infringement of those religious beliefs.

94. This is not to say that everything that takes place in the classroom is protected from government interference. In fact it is easy to imagine classroom content that would offend

Canadians if it promoted harm against another group, or incited others towards hateful and criminal activities. However, none of this is at issue in this case and I have heard no evidence to suggest that Minto is teaching hatred in the explicit curriculum. Instead, the question is simply whether Minto should be required to include an alternative interpretation of its faith to students.

95. McArthur challenges many core Church teachings about family life, including the use of condoms to guard against disease. While it may be as Bishop Crenshaw asserts that many ordinary Catholics agree with her, Minto is entitled to its orthodox views on the subject, which have the support of Cardinal St. John.

96. The decision to ban McArthur would have been made regardless of the sexual orientation of the inviting student. Therefore, I find that there is no discrimination against Sean in this decision. His rights of free expression do not imply a right to dictate guest speakers at his school.

97. This aspect of the application is dismissed.

CONCLUSION

98. In summary, I find:

Issue 1 – Section 93(1) of the *Constitution Act* of Canada does not result in a finding of unconstitutionality in relation to the *Safe Schools for All Act*.
Issue 2 – The *Safe Schools for All Act* does infringe the freedom of religion rights of the school, but that infringement is justified under s. 1 of the *Charter*.
Issue 3 – The actions of the school in rejecting the proposed names and insisting on another infringes Sean's freedom of expression and cannot be justified under s. 1 of the *Charter*.
Issue 4 – The selection of guest speakers is tied directly to the core activity of Catholic schools from 1867 on and therefore is protected under s. 93(1) of the *Constitution Act, 1867*.

ORDER

99. An Order will issue requiring Minto to cooperate with Sean in establishing a gay straight alliance at the school, and Sean may call the club the "Minto Gay Straight Alliance" or the "Oscar Wilde Club." This application fails on the other issues raised herein. I thank counsel for their submissions on a complex range of issues.

Dated at Minto, this 3rd day of October, 2012.

R.D. Elliott J.