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Bill 202 v Bill 10: A Battle of the Bills

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Bills Commented On: [Bill 202: *The Safe and Inclusive Schools Statutes Amendment Act, 2014*](#), 3rd Sess, 28th Leg, Alberta, 2014; [Bill 10: *An Act to Amend the Alberta Bill of Rights To Protect Our Children*](#), 3rd Sess, 28th Leg, 2014

The Alberta Legislature has been the subject of some controversy in recent weeks. On November 20, Liberal MLA Laurie Blakeman introduced Bill 202: *The Safe and Inclusive Schools Statutes Amendment Act, 2014*, 3rd Sess, 28th Leg, Alberta, 2014. A week later, in an abruptly called press conference, Premier Jim Prentice described Bill 202 as “[unnecessarily divisive](#)” and announced that his government would introduce its own bill dealing with the issues raised by Bill 202. On December 1, Bill 10: *An Act to Amend the Alberta Bill of Rights To Protect Our Children*, 3rd Sess, 28th Leg, 2014 was introduced by the Progressive Conservatives. After being subjected to widespread public scrutiny, Bill 10 was amended on December 3, 2014. By the next day, it was clear that the amendment did not quell the rising tide of opposition and on December 4, Premier Prentice announced he was deferring Bill 10’s Third Reading until 2015.

This post will examine the salient parts of both Bill 202 and Bill 10 and their impact on the human rights regime in Alberta. It particularly focuses on the heart of the controversy: how the creation of gay-straight alliances is treated under both Bills. Serious concerns that remain to be addressed by Bill 10 will also be identified. Given Premier Prentice’s apparent willingness to step back to examine his party’s Bill, we can only hope that these pressing concerns will be addressed in the new year.

Private Member’s Bill 202

Bill 202 aimed to promote safe, inclusive, and supportive learning environments for Alberta students regardless of sexuality, sexual orientation, or gender identity. To achieve this goal, it introduced the following changes to existing legislation (see Liberal Communications, “[Blakeman’s Bill 202 will make schools safer and more inclusive](#)”, (15 October 2014)):

- All school boards would be required to develop policies to support students who want to lead and establish gay-straight alliance activities and organizations.
- Section 11.1 of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (“AHRA”), which requires a parent or guardian to be notified if sexual orientation will be discussed in the classroom, would be repealed.

- The *Canadian Charter of Rights and Freedoms* and the *AHRA* would be referenced in Alberta's *Education Act*, SA 2012, c E-0.3.

Gay-Straight Alliances

At present, section 33(2) of the *Education Act* reads,

33(2) A board shall establish, implement and maintain a policy respecting the board's obligation under subsection (1)(d) to provide a welcoming, caring, respectful and safe learning environment that includes the establishment of a code of conduct for students that addresses bullying behaviour.

To further this anti-bullying goal, Bill 202 would have required section 33(2) policies to accommodate student-led organizations that promote a positive school environment for all students regardless of sexual orientation or gender identity. It also allowed the students who form these organizations to identify their group as a "gay-straight alliance" or any other name that is consistent with their group's purpose.

Section 11.1 of the AHRA

Bill 202 would also have repealed the controversial section 11.1 of the *AHRA*. Section 11.1 was introduced back in 2009, notably at the same time "sexual orientation" was added as a protected ground of discrimination. Section 11.1 gives parents the legal right to exclude their children from discussions primarily involving religion, human sexuality, or sexual orientation. Linda McKay-Panos discussed the concerning effects of this provision in this [post](#). Bill 202's removal of s. 11.1 sent a signal that sexual orientation should be treated no differently than any other ground of discrimination.

Reference to the Charter of Rights and Freedoms and Alberta Human Rights Act

Bill 202 would have amended section 16(1) of the *Education Act* to state that all programs of study in Alberta must respect "the *Canadian Charter of Rights and Freedoms* and the *Alberta Human Rights Act*." While the reference to the *Charter* and the *AHRA* is unnecessary given section 1(1) of the *AHRA* and section 32(1) of the *Charter*, which make it clear that other statutes operate subject to the *AHRA* and *Charter*, it still added clarification to this provision of the *Education Act*.

Progressive Conservative's Bill 10

On November 28, 2014, Premier Jim Prentice announced that the Conservative government would be introducing Bill 10: *An Act to Amend the Alberta Bill of Rights to Protect our Children*. While Bill 10 purports to deal with the same issues as Bill 202, it has some notable differences, particularly in relation to the creation of gay-straight alliances in schools.

Gay-Straight Alliances

Unlike Bill 202, Bill 10 does not give students a positive right to form student-led organizations that promote a welcoming and safe learning environment (including gay-straight alliances). Instead, a student must ask a school staff member for support creating such a club. That staff

member is entitled to refuse to support the student's initiative. The student is then permitted to appeal that refusal to the school board (see section 2(4) of Bill 10).

Up until December 2, 2014, Bill 10 stated that following a school board's rejection, a student could make an application for judicial review on issues of jurisdiction and unreasonableness. This onerous process came under severe scrutiny in the media because it raised serious access to justice concerns. Judicial review is a long, costly, and complicated process. In the event of a school board's refusal, students and their parents would, in all likelihood, be required to hire a lawyer and head to court. Not only would this impose a heavy financial burden on students and parents, it would also have subjected them to an unnecessarily laborious process. Appearing in court can be a very discouraging and intimidating prospect for any adult, let alone a young student. Furthermore, this appeal and judicial review process could be extremely lengthy. A student who was involved in the initiative may already have graduated before a final decision would be rendered.

After a lengthy debate on the evening of December 3, 2014, the Legislature amended Bill 10, purporting to address these concerns. As Bill 10 currently stands, the school board's decision to support or refuse a student-led gay-straight alliance is final. However, if the board rejects the student's initiative, that student can send a request to the Minister of Education. The Minister is obligated to facilitate and support the establishment of the organization (see section 2(4) of Bill 10 as amended).

This curious amendment appears to (or at least attempts to) shift the burden of resolving disputes from the student onto the Minister. While the reference to judicial review was removed from Bill 10, it cannot actually preclude a student from challenging the school board's decision in court. A human rights complaint against a school board that rejected a GSA would also be an option. However, because the Minister is obligated to support a student's initiative, any battle over the right to create a gay-straight alliance will now likely occur between the school board and the Minister. So while this amendment provides an avenue of support to the student, it does not remove the possibility that a student could end up before a judge asking to create a gay-straight alliance.

While this change may mitigate some of the more obvious problems with Bill 10, it falls short of addressing many other serious concerns. First and foremost, the new amendment does not change the fact that schools can prohibit the creation of gay-straight alliances. This implicates *Charter* issues relating to a student's freedom of expression, freedom of association, and equality rights. It maintains a separate regime for students who want to start a gay-straight alliance, because only clubs that fall under Bill 10 are subjected to this process. In doing so, it discredits these students' right to equal treatment. This is particularly vexing because, given Bill 10's anti-bullying agenda, it bears mentioning that these peer-support groups that have been shown to reduce bullying and lower suicide rates among youth (see Alberta, Legislative Assembly, [Alberta Hansard](#), 28th Leg, 3rd Sess, Issue 12e (3 December 2014) at 357 (Joe Anglin)).

As an additional concern, the Legislature is passing its responsibility to school boards to determine whether or not students have a right to form a gay-straight alliance. Bill 10 ignores the requirement that any legislation must be consistent with the *AHRA* and the *Charter*. On its face, that would require equal treatment in allowing student-led groups to address protected grounds of discrimination.

Repeal and Transfer of Section 11.1 of the Alberta Human Rights Act

Another controversial (yet less publicized) amendment included in Bill 10 is its treatment of section 11.1 of the *AHRA*. While it repeals section 11.1, it places a nearly identical provision into the *Education Act* and the *School Act*. Similar to the existing section 11.1 of the *AHRA*, section 58.1(1) of the *Education Act* and section 50.1(1) of the *School Act* will allow parents to exclude their children from discussions of religion or human sexuality. While the words “sexual orientation” have been removed from the new parental opt-out provision, absent a clear definition of “human sexuality,” one may argue that “sexual orientation” is subsumed under this category.

From the government’s perspective, this amendment is a smart way to keep a more acceptable form of section 11.1 without changing the status quo. In practice, section 11.1 of the *AHRA* is often dealt with by schools boards and not the Alberta Human Rights Commission in any case (See section 22(1.1)(a) of the *AHRA*). In a way then, this amendment merely codifies the existing state of affairs.

“Sexual Orientation” to be added to the Alberta Bill of Rights

Bill 10 also adds “sexual orientation” to section 1(2) of the *Alberta Bill of Rights*, RSA 2000, c A-14. While this addition may not have a new and ground-breaking legal effect, it is good to bring this legislation in line with the *AHRA*.

Conclusion

Gay-straight alliance members demand a reform of Bill 10 to make it more consistent with Bill 202 (Leah Holoiday and Jeremy Nolais, “[Prentice puts gay rights on hold](#)”, *Calgary Metro* (5-7 December 2014)). Whether the government will listen to these public demands remains to be seen. It will be very interesting to see how this contentious debate continues to unfold over the next few months. Despite the temporary ceasefire, the Alberta Legislature is still faced with the challenging task of balancing the interests of the LGBTQ students, their allies, parents, and school boards. Ultimately, the critical issue that needs to be addressed is whether or not students should have a positive right to form gay-straight alliances. Anything short of a definitive answer to this question will only perpetuate an already heated and protracted debate.

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