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A Religious Belief in Inequality: No Injunction Against Bill 24

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Case Commented On: *PT v Alberta*, 2018 ABQB 496

PT v Alberta, is the decision of Justice Johnna Kubik on the interlocutory application by several parents and various private schools for an injunction against two provisions in *Bill-24: An Act to Support Gay Straight Alliances* (*Bill 24*). Their application to delay the legal effect of the challenged provisions until their constitutional challenge could be heard was denied.

Although *PT v Alberta* is a fairly brief decision determining an interlocutory application, it is interesting for several reasons: (1) counsel for the applicants was a non-profit entity, the Justice Centre for Constitutional Freedoms, who describes their mission as defending "the constitutional freedoms of Canadians through litigation and education" (JCCF); (2) the applicants brought experts whose evidence was in direct conflict with the legislated legal protections for sexuality and gender identity in Alberta; and (3) one of the religious beliefs that the applicants sought protection for was "that all sexual orientations are not equal" (at para 46). I begin with a summary of a decision, and then discuss these three issues in turn.

The Test for Injunctions

Since the JCCF challenged two provisions of *Bill 24*, Justice Kubik went through the injunction test for each challenged section. The law on injunctions is well established. The applicants needed to show:

> 1. That there is a serious constitutional question to be tried;
> 2. That compliance with the [legislative] provisions would result in irreparable harm; and
> 3. That the balance of convenience favours not enforcing the legislative provisions until the constitutionality of the provisions has been determined
> (at para 3, citing *RJR -- MacDonald Inc. v. Canada (Attorney General),* [1994] 1 SCR 311 (CanLII)).

There is a presumption that legislation is in the public good, so at the second "irreparable harm" stage the applicant must show the public benefit of suspending the legislation outweighs the presumed public good of implementing the legislative provisions (at para 5, citing *Harper v Canada (Attorney General)*, 2000 SCC 57 (CanLII)).

Bill 24 expands on 2015's *Bill 10, An Act To Amend The Alberta Bill Of Rights To Protect Our Children*. *Bill 10*, among other things, amended the *School Act*, RSA 2000, c S-3 by adding section 16.1, empowering students to create voluntary student organizations that promote

equality and non-discrimination "with respect to race, religious belief, colour, gender, gender identity, gender expression, physical disability, mental disability, family status, or sexual orientation" (at para 1).

Section 16.1: The GSA Provisions

1. Is there a serious constitutional question to be tried?

The three impugned changes to section 16.1 of the *School Act* made by *Bill 24* are:

> (a) require the immediate establishment of gay-straight alliances or queer-straight alliances (hereafter – GSA's) upon student request (section 16.1(1)(a));
> (b) prevent a school from discouraging the use of the names 'gay-straight alliance' or 'queer-straight alliance' (section 16.1(3.1)); and
> (c) prevent a school from informing parents their child was participating or attending a GSA or other non-discrimination student organization (section 16.1(6)) (at paras 8-9).

The applicants alleged that changes (a) and (b) are harmful because GSA's expose children to sexually explicit information and information about gender and sexuality "which is either harmful in its own right, ideological in nature, or contrary to the parents' and schools [*sic*] beliefs regarding such matters" (at para 10). They argue these changes violate their *Charter* rights to freedom of religion and association. The applicants alleged that change (c) prevents parents from being informed about what takes place at GSA's, and from removing their children from GSA's. They argue this change infringes their *Charter* rights to freedom of religion and their section 7 liberty rights "associated with the protection, rearing, and education of their children" (at para 11).

Justice Kubik found that changes (a) and (b) do not alter the substance of what has been permitted since Bill 10 was passed: parents and schools will remain free to teach their religious and moral values when changes (a) and (b) come into force. The applicants' right to freedom of religion does not produce a serious constitutional issue to be tried (at para 15-17). However, the section 7 liberty interest of the parents *are* engaged in relation to change (c), but those rights "come into direct conflict with the *Charter* rights of children, and in particular, those rights to free expression, association, life, liberty, security, and equality" (at para 18). Justice Kubik found these competing interests created a serious issue to be tried (at para 18). This was the only element of the two injunction tests the applicants succeeded on, and only in relation to change (c).

2. Would the legislative provisions result in irreparable harm?

At this second stage, the applicants had to prove "real harm will occur" if an injunction was not granted (at para 20). The applicants took the position that sex is an immutable characteristic and rejected gender fluidity as false and unsupported by scientific evidence (at para 21). They put forward three lay affidavits and two expert affidavits.

The first affidavit was from Mrs. Ng, a blogger who discovered in 2017 that a website affiliated with GSA's had links to websites with links that could lead to sexually explicit material – the links were removed after her discovery. Justice Kubik concluded this material was never promoted by GSA's generally and there was no risk GSA's would disseminate it (at paras 23-25). The affiants also put forward two affidavits from parents claiming that GSAs tricked their vulnerable children into believing, and behaving as though, they were transgender. Justice Kubik found that these affidavits were largely hearsay in nature, and due to the "absence of direct evidence from the children or clear corroboration" she could not rely on the affidavits (at para 28).

The first expert was Dr. Quentin van Meter from Atlanta, Georgia. He considers being transgender a delusional disorder. Justice Kubik noted that his evidence had to be treated cautiously as his professional opinion "is in direct contradiction with the recommended and accepted diagnostic standards as established by the American Psychiatric Association and the America Academy of Pediatrics" (at para 30). In contrast to his views about transgender individuals, Dr. Van Meter conceded GSAs benefit lesbian, bisexual and gay students, and testified he would never out an LGBTQ+ patient to family, instead supporting them to come out safely. Due to the rejection of his views by the larger expert community, and his mixed testimony about the impacts of GSAs, Justice Kubik rejected his opinion that GSAs cause harm (30-31).

Dr. Mirian Grossman is a doctor who runs a website with the slogan "one hundred percent MD – zero percent PC." She claimed GSAs disseminate false information and encourage children to distrust their parents. Her evidence focused on political correctness and the facilitation of narratives or ideologies, and was rejected as entirely without factual basis (at para 33). She failed "to recognize the legal reality in Alberta and Canada: concepts of gender identity and the right to freely express the same are not radical ideologies, promoted by activists. They are individual rights, recognized and protected by law" (at para 33).

The public good of GSAs and Bill 24 was accepted to be substantial based on a collection of studies reflecting the experience of LGBTQ+ youth in Canada and the effects of GSAs, which found GSAs enhanced psychological wellbeing and reduced drug abuse. As Justice Kubik rejected the applicant's evidence, and accepted the respondent's evidence, no irreparable harm was shown (at paras 37-38).

3. Does the balance of convenience favour not enforcing the legislative provisions until the constitutionality of the provisions has been determined?

On the balance of convenience, Justice Kubik found in favour of allowing *Bill 24* to come into force. The risks to LGBTQ+ students of harassment, assault and suicidal ideation are well established, while the applicant was unable to show serious risks to the rights of parents (at paras 39-41).

Section 45.1: The Attestation Requirements

The changes to section 45.1 of the *School Act* made by *Bill 24* require an affirmation of the rights of all staff and students under the *Alberta Human Rights Act*, RSA 2000, c A-25.5 and the *Canadian Charter of Rights and Freedoms*. These changes impact the annual declarations necessary for funding and accreditation, so that schools must attest to compliance with the new provisions, which the applicant schools argued were contrary to their religious beliefs (at paras 42-46).

1. Is there a serious constitutional question to be tried?

Justice Kubik found no serious issue to be tried here, concluding that "[r]eligious beliefs can coexist alongside respect and tolerance for others", citing paragraphs 100 through 105 of *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (CanLII) (described in an earlier post focusing on the actions of the law societies in that case). Justice Kubik found the changes did not infringe *Charter* rights to freedom of religion, because they did not:

> require schools to forsake their religious principles or teachings; it merely requires them to evidence their compliance with common public interest values, honour the *Alberta Human Rights Act* by not discriminating, treat people in accordance with *Charter* values, and publicly state that they will provide all students, including LGBTQ+ students with a welcoming, caring, respectful, and safe learning environment that respects diversity and fosters a sense of belonging (at para 49).

2. Would the legislative provisions result in irreparable harm?

At the second stage, Justice Kubik found that even if the applicants' freedom of religion entitlements were engaged, it was minimally impaired (at para 50). The applicants also failed to show there was a real risk they would lose funding or accreditation, so any harm was minor and not irreparable (at para 51).

3. Does the balance of convenience favour not enforcing the legislative provisions until the constitutionality of the provisions has been determined?

Justice Kubik found that the importance of promoting basic equality in institutions supported by public funding was greater than the unproven risk to funding or accreditation, so the balance of convenience favoured the respondent (at paras 53).

Commentary

PT as Public Interest Litigation

The JCCF describes their mission as "advancing and promoting the core principles of freedom and equality." The JCCF 2016 annual report (pages 1, 8) described their work, which includes:

- Protecting the speech rights of an anti-abortion group on University campuses;
- Assisting Trinity Western University with receiving accreditation for their law school;
- Protecting the free speech rights of someone setting up an anti-abortion display;

- Fighting for university recognition of a campus men's rights group;
- Assisting someone whose registration as a marriage commissioner was cancelled when he refused to marry same-sex couples as it violated his religious beliefs;
- Arguing that a school could not involve children in an Aboriginal spiritual ceremony without parental consent.

By their fruits you will know them; the JCCF exists to advance the interests of adherents to a particular socially conservative worldview. On costs applications they have argued that they act in the public interest (*Arriola v Ryerson Students' Union*, 2018 ONSC 2605 (CanLII) at paras 16, 20).

The JCCF's brief frames the issue as being about protecting the rights of parents to be informed and make choices for their children, as well as the protection of vulnerable children. This benign framing did not hold up in court. Justice Kubik found the religious beliefs the applicants were relying on to include "beliefs about the binary nature of sex, that marriage is an institution between one man and one woman, [and] that all sexual orientations are not equal" (at para 46). Justice Kubik described some common public interest values protected by *Bill 24*: "honour the *Alberta Human Rights Act* by not discriminating, treat people in accordance with *Charter* values, and publically state that [the applicants] will provide all students, including LGBTQ+ students with a welcoming, caring, respectful, and safe learning environment that respects diversity and fosters a sense of belonging" (at para 49). It is difficult to see how the position the JCCF was protecting as consistent with the understanding of the public interest expressed by Justice Kubik.

Anti-Human Rights Experts – Religious and 'Scientific' Arguments

Some of the evidence brought by the JCCF tried to show more than simply the incompatibility of transgender identities or homosexuality with the religious faith of the applicants, it tried to show that respect and equality for transgender identities and homosexuality is a factually and scientifically unfounded ideology. The applicants did not argue that legal protections for transgender identities are inappropriate; however, the applicants submitted evidence directed towards this conclusion. The applicants used this evidence to argue that having children participate in GSAs was harmful to the wellbeing of children in an attempt to meet the 'irreparable harm' requirement.

The balance of freedom of religion rights and equality rights is a complex question of policy. The expert evidence brought in this case did not address those questions – instead it attacked the factual and moral basis for *Charter* protections for transgender individuals. Justice Kubik rejected the opinions of both experts (at paras 29-33). Dr. van Meter rejected transgender identities and viewed 'transgenderism' as a mental disorder. Dr. Grossman described GSAs as part of an ideology related to the phenomenon of political correctness. Grossman's views are not described in detail in the decision, but a look at Dr. Grossman's blog gives you an idea of her perspective: she still describes 'reparative' anti-gay therapy in positive terms. She is involved in the campaign against Ontario's now cancelled sex education curriculum, a summary of one of her presentations on the subject says she believes "Ontario's sex curriculum uses the Marxist approach to human reality." Dr. Grossman is part of a contingent of reactionary experts opposed to the scientific consensus about gender and sexuality. This attempt to attack the consensus of the

medical community on gender and sexuality in court has echoes of the American court battles about evolution and creationism in classrooms.

The expert evidence in *PT* clashes directly with both the *Charter* and the *Alberta Human Rights Act*. Claiming that transgender, non-binary, two spirit, and queer individuals do not exist (or that their identities are a mental disorder) effectively argues that the *Alberta Human Rights Act*'s protections based on gender, gender identity, and gender expression are scientifically and morally misguided. The extremism of this kind of evidence and the degree to which it clashes with the equality provisions of Canadian human rights law can hardly be overstated. What was put before the court amounts to evidence that the rights of a number of *Charter* protected groups should not have been recognized. While the brief that the JCCF put before the court had a much less extreme tone, as it focused on the risks to children that Justice Kubik determined not to be realistic, much of the evidence described in the decision was deeply homophobic and transphobic.

Charter Protection for Religious Beliefs in Inequality

The Supreme Court decided *LSBC v TWU* in between *PT* being filed and the injunction application being heard, and despite the differences in legal context between the cases, the precedent from *LSBC v TWU* worked against the applicants' freedom of religion claims. Justice Kubik relied on *LSBC v TWU* to determine that the freedom of religion rights of the applicants are either not impaired (at para 48-49), or "minimally impaired when considered in the context of the government's duty to legislate in a multicultural and democratic society" (at para 50, paraphrasing *LSBC v TWU* at para 100). However, precisely when 'the government's duty to legislate in a multicultural and democratic society' will limit freedom of religion has not been very clearly articulated, most likely because an extensive balancing of *Charter* rights was not necessary in an injunction hearing, and *LSBC v TWU* addressed the balancing of *Charter* rights and values in the administrative law context rather than in a direct *Charter* challenge.

What part of the analysis the balancing or reconciling of *Charter* rights should take place in is not clearly settled. It has been used as part of the analysis for the scope of a *Charter* right: "freedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others" *(P. (D.) v S. (C.)*, [1993] 4 SCR 141 (CanLII) at 182), when determining if the infringement of a religious right is substantial enough to be protected and actionable (*Syndicat Northcrest v Amselem*, 2004 SCC 47 (CanLII) at paras 57-62), and in the *Charter* section 1 reasonable limits analysis (*Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 (CanLII) at para 26).

I suggest that the belief "that all sexual orientations are not equal" is a clear example of a belief that the *Charter* is unable to ever protect without creating an internal inconsistency in the law, and should be subject to the 'inherent limit' approach from *P. (D.) v S. (C.)*. The *Charter* protection for freedom of religion should not extend to beliefs in the inferiority or inequality of any group protected by the *Charter*, because the equality rights of the protected group limit the scope of freedom of religion. The right to discriminate against, or believe in the inferiority of, any class protected by the *Charter* should be cut out from the scope of freedom of religion at the

outset. This is basically a variant of Karl Popper's paradox of tolerance. The *Charter*, in the name of equality, should not protect beliefs in inequality. Where freedom of religion rights have adverse impacts on equality rights, balancing the rights later in the analysis remains appropriate.

As a final point, the 'serious issue to be tried' identified by Justice Kubik did not involve freedom of religion at all, but the balancing of the *Charter* section 7 liberty interest of parents against the *Charter* rights of their children: "in particular, those rights to free expression, association, life, liberty, security, and equality" (at para 18). That balancing, in relation to the provision preventing a school from informing parents their child was participating in a GSA will likely be the focus of the case if the Charter challenge to *Bill 24* proceeds.

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