

Bound for Glory: Bill-18, The Public Schools Amendment Act (Safe and Inclusive Schools)

D O N N S H O R T *

I. INTRODUCTION

Scholars, activists, students and their allies who are committed to safe and equal access to education argue in favour of inclusive, anti-oppressive policies and pedagogies which accommodate but also celebrate diversity, including sexual minority youth.¹ They argue that policies intended to make schools safer for queer students must specifically mention this particular “at risk” group. However, notwithstanding that more and more schools are governed by anti-bullying or safe school policies which, in some cases, specifically mention sexual orientation as an “at risk” group, bullying is common in schools.

Since the early 1980s, there has been significant academic attention to bullying as an important focus of study. Bullying is no longer viewed as

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¹ See *Respectful and Responsible Relationships: There's No App for That: The Report of the Nova Scotia Task Force on Bullying and Cyberbullying*, (Halifax: Task Force on Bullying and Cyberbullying, 2012) (Chair Wayne Mackay); *Playgrounds and Prejudice: Elementary School Climate in the United States – A Report from the Gay, Lesbian and Straight Education Network* (New York: GLSEN and Harris Interactive, 2012); and see C Taylor & T Peter, *Every Class in Every School: The First National Climate Survey on Homophobia, Biphobia, and Transphobia in Canadian Schools; Final Report* (Toronto: Egale Canada Human Rights Trust, 2011), online: Egale Canada <<http://www.egale.ca>>. The researchers surveyed approximately 3,700 students throughout Canada through individual online participation and in-school sessions conducted at twenty school boards. See also Donn Short, *Don't Be So Gay! Queers, Bullying, and Making Schools Safe* (Vancouver: UBC Press, 2013) and Kevin K Kumashiro “Theories and Practices of Antioppressive Education” in *Troubling Education: Queer Activism and Antioppressive Pedagogy* (New York: RoutledgeFalmer, 2002).

unassailable — an inevitable if unpleasant part of “growing up” with which all students must learn to cope. That traditional view has let parents, educators and policy-makers ‘off the hook’. To the extent that bullying was addressed in schools, students were often told to “stand up” for themselves because “bullies” were really just “cowards”.² Bullying is now commonly regarded as a damaging experience in the lives of students with on-going repercussions.³

On December 4, 2012, Manitoba’s provincial government introduced *The Public Schools Amendment Act (Safe and Inclusive Schools)*⁴ better known as Bill-18, in the Manitoba Legislature, to amend the provinces *Public Schools Act*.⁵ At the time, Nancy Allan, Minister of Education, placed the bill in this context:

The bill ... requires each school board to establish a respect-for-human-diversity policy. The policy is to promote the acceptance of and respect for others in a safe, caring and inclusive school environment. The policy must accommodate student activity that promotes the school environment as being inclusive of all students, including student activities and organizations that use the name gay-straight alliance.⁶

Since its introduction, Bill-18 has received a significant amount of public attention and comment. Bill-18 introduced a long-absent definition of bullying in Manitoba. The definition recognizes that bullying can occur in different forms, including cyberbullying. Most significantly, in terms of how the Bill has been received and discussed, particularly in the media, Bill-18 ensures that students who wish to form a gay-straight alliance (GSA) in their school must be allowed to do so. The bill further provides that students have a right to use the name, “gay-straight alliance” in the group’s name. In other words, a school cannot insist that a GSA be called something else – like the Freedom Club or the Rainbow Club.

Most, if not all, of the criticism aimed at Bill-18 can be traced to fears that the bill conflicts with religious freedoms, particularly as such

² See for example the Elmer the Safety Elephant campaigns in the 1960s, etc.

³ C Taylor & T Peter, *supra* note 1.

⁴ Bill-18, *The Public Schools Amendment Act (Safe and Inclusive Schools)*, 2nd Sess, 40th Leg, Manitoba, 2012 [Bill-18].

⁵ *The Public Schools Act*, RSM 1987, c P250; CCSM, c P250.

⁶ Manitoba, Legislative Assembly, *Debates and Proceedings*, 40th Leg, 2nd Sess, No 11 B (4 December 2012) at 369.

freedoms are guaranteed under section 2(b) of the *Charter*.⁷ This article will argue that such concerns are without a sound legal basis, that Bill-18 is, therefore, in my view, *Charter*-proof, and that fears that accepting equality claims based on sexual orientation in any context result in interference with religious worship are alarmist and grounded not in law, but in a moral panic.

II. RELATED LEGISLATION

A. The Origins of Bill-18

During an interview with the media, Nancy Allan, Minister of Education, explained that Bill-18 owed its origins “in part” to the story of the suicide of Amanda Todd in British Columbia:

We know the Amanda Todd story. ... She was a young, bright student who was a victim of cyber-bullying. She put something on Facebook, and once you put something on Facebook it is forever. You can't take it back. Her tragic story shows us that bullying is not only in schools but on social media and the Internet.⁸

A few points to note. First, educators and researchers have been calling upon lawmakers to develop policies to deal more effectively with bullying and cyberbullying, and to move away from conceptions of bullying in terms only of generic bullying, for some time.⁹ Second, in 2011, Ontario introduced and passed legislation that was similar to Manitoba's Bill-18.

B. Bill 13, *Accepting Schools Act*, 2012, Ontario

Prior to the introduction of Bill-18 in Manitoba, Ontario Premier Dalton McGuinty introduced *Bill 13*¹⁰ in order to deal with bullying, and

⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [*Charter*].

⁸ Bruce Owen, “Bill-18: The anatomy of a controversy”, *Winnipeg Free Press*, (11 March 2013) online: *Winnipeg Free Press* <<http://www.winnipegfreepress.com/local/the-anatomy-of-a-controversy-196810921.html>>.

⁹ See Gerald Walton, “‘Bullying Widespread’: A Critical Analysis of Research and Public Discourse on Bullying” (2005) 4:1 *Journal of School Violence* 91; and Donn Short, “Conversations in Equity and Social Justice: Constructing Safe Schools for Queer Youth” (2010) 8:2 *Journal for Critical Education Policy Studies* 330.

¹⁰ Bill 13, *An Act to amend the Education Act with respect to bullying and other matters*, 1st

particularly homophobic bullying, in that province. *Bill 13* was introduced in November, 2011, shortly after fifteen year-old Ottawa student Jamie Hubley committed suicide as a result of homophobic bullying.

In Ontario, as happened subsequently in Manitoba, the initial reaction to *Bill 13*, included criticism based on the belief that *Bill 13* was in conflict with religious rights. As well, most of the opposition related to the particular clause of the bill that enabled students to call anti-bullying groups formed in schools a "gay-straight alliance".

However, unlike Manitoba, Ontario's school system is governed by section 93 of the *Constitution Act*.¹¹ Historically, section 93 has permitted faith-based schools in Ontario (Catholic) as part of the constitutional compromise that encouraged Ontario (as well as three other provinces) to enter Confederation. I do not propose to analyze *Bill 13* in relation to the *Constitution Act*; suffice to say, that the legal situations in Manitoba and Ontario are different. Having made that distinction, it is my assessment and I have argued elsewhere that the *Accepting Schools Act* was on solid legal ground and did not conflict with section 93 or any other claims grounded in religious freedoms.¹² The opposition to *Bill 13* came primarily from the Assembly of Catholic Bishops in Ontario and the Ontario Catholic School Trustees Association.¹³ It is interesting to observe that the Ontario English Catholic Teachers' Association, representing 43,000 teachers in the province, supported *Bill 13* in particular, the provisions in the bill regarding GSAs.¹⁴

Sess, 40th Leg, Ontario 2012 (assented to June 19, 2012), SO 2012, c 5 [*Bill 13* or the *Accepting Schools Act*].

¹¹ *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, ss 91-92, reprinted in RSC 1985, App II, No 5.

¹² See Donn Short, "Queering Schools, GSAs and the Law" in Gerald Walton, ed, *The Gay Agenda: Claiming Space, Identity & Justice* (New York: Peter Lang, 2013).

¹³ See statement of Assembly of Catholic Bishops of Ontario, May 28, 2012, *Observations on a recent change in government policy re: proposed anti-bullying legislation*, online: <www.archtoronto.org/pdf/statementantibullyingmay2812.pdf>.

¹⁴ Karen Howlett, "Catholic teachers support Ontario's gay-straight alliance initiative", *Globe and Mail* (5 June, 2012) online: *Globe and Mail* <<http://www.theglobeandmail.com/news/politics/catholic-teachers-support-ontarios-gay-straight-alliance-initiative/article4234347/>>.

C. Bill 14, An act to designate Bullying Awareness and Prevention Week in Schools and to provide for bullying prevention curricula, policies and administrative accountability in schools - Ontario

At the same time as the McGuinty Liberal government introduced *Bill 13*, Progressive Conservative Elizabeth Witmer, MPP for Kitchener-Waterloo, introduced a private member's bill in response to *Bill 13*. *Bill 14*¹⁵ contained some useful accountability and compliance reporting mechanisms. However, I have criticized *Bill 14* elsewhere on the ground, *inter alia*, that the bill failed to interrogate bullying in anything other than generic terms.¹⁶ *Bill 14* was referred to Standing Committee on Social Policy, but motions to include portions of *Bill 14* in the final amendments of *Bill 13* were defeated.

At the time *Bill 13* received Royal Assent in Ontario, and before the Manitoba government introduced *Bill-18*, it was reported that Quebec, Alberta, New Brunswick and Newfoundland were readying anti-bullying legislation.

III. SUMMARY OF BILL-18

The main objectives of *Bill-18* are threefold. First, the bill defined bullying. Previously, the *Public Schools Act* defined only cyberbullying. Second, the Bill requires school boards to "expand their policies about the appropriate use of the Internet to include social media, text messaging and instant messaging." Third, the bill requires each school board in the province to create a "respect for human diversity policy" if one had not already been established. From this third requirement came the most controversial language in the bill:

The policy is to promote the acceptance of and respect for others in a safe, caring and inclusive school environment. The policy must accommodate student activity that promotes the school environment as being inclusive of all pupils,

¹⁵ Bill 14, *An act to designate Bullying Awareness and Prevention Week in Schools and to provide for bullying prevention curricula, policies and administrative accountability in schools*, 1st Sess, 40th Leg, Ontario (March 19, 2012 referred to Standing Committee on Social Policy) [*Anti-Bullying Act*].

¹⁶ Short, *supra* note 12.

including student activities and organizations that use the name “gay-straight alliance”.¹⁷

The bill should be praised for creating these substantive requirements and for bestowing rights upon students.

IV. ANALYSIS

A. Media Coverage and Reaction

Initially, when Bill-18 was introduced in the legislature at the end of 2012, media coverage was sparse and public reaction muted. The opposition Progressive Conservatives raised no widespread objections. Then, as 2013 arrived and rolled on, public reaction in some quarters, much of it negative and most of it outside the city of Winnipeg,¹⁸ often in southeastern Manitoba, grew and the media covered the objections to the Bill as headline news.

On January 30, 2013, Scott Wiebe, principal of Steinbach Christian High School (SCHS) issued a statement underscoring the school's concerns about Bill 18 and how the bill might impact religious freedoms of the faith-based school:

The all-inclusive wording currently proposed in the legislation might limit SCHS's faith-distinctive teachings and restrict the school's ability to direct student-led activities and groups.¹⁹

Brian Pallister, leader of the Progressive Conservatives, and other opposition MPPs began to criticize and broadly oppose Bill-18. Mr. Pallister characterized the bill as “sloppy legislation that defines bullying too broadly”.²⁰ The CBC reported that leader of the Opposition warned that “even normal interactions between students and teachers or coaches would fall under the definition of bullying.”²¹

¹⁷ Bill-18, *supra* note 4, explanatory note [emphasis added].

¹⁸ Nick Martin, “Division OK with anti-bully bill”, *Winnipeg Free Press* (28 February 2013) online: Winnipeg Free Press <<http://www.winnipegfreepress.com/local/division-ok-with-anti-bully-bill-193767451.html>>.

¹⁹ Bruce Owen, *supra* note 8.

²⁰ “Anti-bullying bill like ‘persecution’ in Steinbach”, *CBC News* (7 March, 2013) online: CBC News <<http://www.cbc.ca/news/canada/manitoba/story/2013/03/07/mb-steinbach-oppose-anti-bullying-bill-manitoba.html>>.

²¹ *Ibid.*

A protest meeting against Bill-18 was held in Steinbach on February 24, 2013. The Winnipeg Free Press reported that over twelve hundred people attended what it characterized as an “information meeting and prayers session” at Steinbach Christian High School.²² On the same day, Pastor Roy Duerksen cautioned in a sermon that “God [would] judge those who don’t oppose the anti-bullying bill”.²³

On March 15, the Winnipeg Sun reported that “three religious groups have joined the push to press the NDP government to amend Bill-18.”²⁴ Quoting Adel Shenoda, an Egyptian Orthodox church member and Coptic Heritage Society of Manitoba secretary, this typical complaint was put forward in opposition to Bill-18.

If we have to accept it, where is our freedom of religion? It’s not there. We don’t want them to start their life taught homosexuality is normal.²⁵

In the same article, Winnipeg South MP, Rod Bruinoooge, echoed the kinds of religious-freedom based concerns that have been common in the media coverage of Bill-18:

All these individuals speak for themselves. My viewpoint is gay people clearly have rights in Canada. What I’m personally contesting is the infringement on religious rights.²⁶

The same article observed that Manitoba Sikh Cultural and Seniors Centre president, Amarjeet Warraich, and Manitoba Islamic Association president, Ismael Mukhtar, and Shenoda “shared letters opposing Bill-18 through Bruinoooge’s office”.²⁷

Others have defended Bill-18. Fort Garry-Riverview MLA James Allum characterized Bill-18 this way:

Bill 18 is part of a broad anti-bullying action plan that includes supports for parents, resources for teachers, and a new provincial code of conduct on the

²² Nick Martin, *supra* note 18.

²³ *Ibid.*

²⁴ Joyanne Pursaga, “Religious Groups join in opposition to anti-bullying bill”, *Winnipeg Sun* (15 March 2013) online: *Winnipeg Sun* <<http://www.winnipegsun.com/2013/03/15/religious-groups-join-in-opposition-to-anti-bullying-bill>>.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

disciplinary consequences of bullying. We know that students can't learn if they feel threatened or intimidated at school.²⁸

This author wrote an op-ed piece in the *Winnipeg Free Press* demonstrating the legality of Bill-18.²⁹

On April 13, 2013 the Humanists, Atheists & Agnostics of Manitoba (HAAM) presented a panel of speakers who spoke in support of Bill-18 and led a public discussion around the bill. The speakers included Jim Rondeau, NDP MLA for Assiniboia; Chad Smith, Executive Director, Rainbow Resource Centre; Dr. Sharon Wilson, Chairperson, Winnipeg Presbytery of the United Church; Dr. Donn Short, Faculty of Law, University of Manitoba; Jeff Olsson, Humanist and member of The Clergy Project; and Donna Harris, HAAM president, panel moderator.

The Evangelical Fellowship of Canada (EFC) issued a critical analysis of Bill-18 on May 1, 2013.³⁰ I will deal, below, with salient points raised in the EFC's publication; however, two aspects of the analysis deserve immediate comment. First, the document gives the impression that its authors regard "rights" as absolute. I do not wish to dismiss the EFC's publication out of hand, yet I have to say that the absolutism of the tone of the document is striking. Rights and philosophical statements about rights are boldly asserted in broad strokes lacking context. In any competing rights scenario, the rights asserted may not extend as far as they are claimed. Rights must be assessed in context in order to resolve conflicts between them. Mr. Justice Iacobucci put the matter this way

The key to rights reconciliation, in my view, lies in a fundamental appreciation for context. Charter rights are not defined in abstraction, but rather in the particular factual matrix in which they arise.³¹

²⁸ "Pallister PCs Continue to Block New Anti-Bullying Legislation: Allum", Manitoba NDP Caucus, online: <<http://yourmanitoba.ca/caucus2010/mla?q=mla+NewsPage&articlePageID=1131&constituency=Fort+Garry+-+Riverview>>.

²⁹ Donn Short, "Bill-18's infringements on religious belief are 'reasonable'", *Winnipeg Free Press* (19 March 2013) online: *Winnipeg Free Press* <<http://www.winnipegfreepress.com/opinion/analysis/bill-18s-infringements-on-religious-belief-are-reasonable-198912371.html>>.

³⁰ *Falling Short: Manitoba's Bill-18, The Safe and Inclusive Schools Act* (The Evangelical Fellowship of Canada Centre for Faith and Public Life, May 2013) [*Falling Short*].

³¹ Frank Iacobucci, "Reconciling Rights' The Supreme Court of Canada's Approach to Competing Charter Rights," *Supreme Court Law Rev* (2003), 20 SCLR (2d) 137 at 140.

Second, nowhere in the 19 pages of the analysis are sexual orientation rights under the *Charter* acknowledged, although there is a brief mention of sexual orientation as a protected ground under human rights legislation. The EFC appears to believe that a legal challenge to Bill-18 is inevitable. If that is so (it has not yet happened in Ontario with respect to the very similar *Bill 13*), any analysis of competing rights, if, indeed, a competing rights situation is engaged, will be highly contextual. This analysis must take into account not only the constitutional rights of queer students, but also their acute “at risk” status in schools: the well-documented ways in which queer students negotiate heteronormative hallways, face unsafe and threatening school climates on a daily basis³² and disproportionately die by suicide.

B. Arguments Against Bill-18

City councillors in Steinbach passed a motion requesting a provincial reconsideration of the bill on the grounds that the bill infringed upon religious beliefs. Again, the most frequently voiced objection was the provision in the bill that compelled schools to accommodate students initiating anti-bullying groups, particularly gay-straight alliances.

The full text of the motion, entitled “Support for Safe Schools and Religious Freedom” is worth quoting at length since in many ways, the motion encapsulates much of the public argument that has been raised in protest of Bill-18, namely that Bill-18 infringes freedom of religion guaranteed by the *Charter*

Whereas: Bullying is a serious problem in schools that needs to be addressed;

Whereas: Representatives of Steinbach Christian High School have expressed concern that Bill 18 (The Public Schools Amendment Act) is not an effective measure to reduce bullying and will, if passed in its current form, undermine their ability to uphold their faith perspective;

Whereas: The Canadian Charter of Rights and Freedoms affirms freedom of conscience and religion as a fundamental freedom for all Canadians;

³² Ironically, and perhaps predictably, Evan Wiens, 16, of Steinbach Regional Secondary School, is verbally bullied twice by passing students (called a “faggot”) in the middle of his interview with the CBC about the need for Bill-18 and his plans to start a GSA. See “Steinbach student starting gay-straight alliance” CBC News: Winnipeg at 6:00, (28 February 2013) online: CBC Player <<http://www.cbc.ca/player/News/Canada/Manitoba/ID/2339551487/?page=10&sort=MostPopular>>.

Whereas: Some education experts have expressed concern that the definition of bullying contained in Bill 18 is too loosely worded;

Therefore, be it resolved that the City of Steinbach express support for the principle that every student deserves a safe and caring learning environment that is free from bullying;

Be it further resolved that the City of Steinbach express its citizens' concerns over Bill 18 in its current form. The city officially requests that the Minister of Education review Bill 18 as it pertains to the definition of bullying and also ensure that freedom of conscience and religion for students and staff is safeguarded in all schools;

Be it further resolved that copies of this resolution be sent to the Premier, Minister of Education, Leader of the Official Opposition, Leader of the Liberal Party, Steinbach MLA, and all other municipalities in Manitoba.³³

In *Falling Short*, the EFC sets out a number of concerns and arguments, one of which is that parents have the rights to educate their children according to their religious faith:

Parents choosing to have their children instructed at institutions that teach their religious beliefs is an expression of religious freedom, and not an insignificant one. They often send their children to these schools because they believe they have a religious obligation to do so. Therefore religious schools and their autonomy are a vehicle by which parents express their right to parental authority and religious freedom. To limit the capacity of religious schools to teach and administer their schools in a manner consistent with their religious beliefs would seriously infringe on the parents' freedom to educate their children according to the tenets of their faith.³⁴

As well, the EFC relies upon the landmark decision in *Big M Drug Mart*:

The Supreme Court of Canada has recognized in the seminal decision in *Big M Drug Mart* that freedom of religion protected by s. 2(a) of the *Charter* encompasses not only the right to hold and declare religious beliefs and values openly, but also the right to "manifest religious belief by worship and practice".³⁵

The EFC also asserts a collective aspect to freedom of religion. To be fair to them, I would like to quote their concern as fully as possible:

Freedom of religion is not only expressed by an individual, but also includes a collective aspect. In the 1986 Supreme Court of Canada decision, *R. v. Edwards*

³³ City of Steinbach, Resolution 13-73 (5 March 2013).

³⁴ *Falling Short*, *supra* note 30 at 14.

³⁵ *Ibid.*

Books, then Chief Justice Brian Dickson, writing for the majority of the court, stated that “freedom of religion, perhaps unlike freedom of conscience, has both individual and collective aspects.”

This collective right affirms that people gather together to share their faith and pass on their beliefs to the next generation. The Supreme Court of Canada recently expanded on this principle in the 2009 decision, *Alberta v. Hutterian Brethren of Wilson Colony*.

And while cases like *R. v. Jones* have established that even religious schools must conform to the educational requirements of the state, those requirements should be respectful of religious beliefs, including differing beliefs on sexuality, recognizing that the goal of the instruction is acceptance (“love your neighbour”) but does not require agreement (“your neighbour is right and you – or your religious beliefs – are wrong”).³⁶

Public discussion of Bill-18 has continued in mainstream media, on the internet, in academia, and in social media.

C. Current Status of the Bill

Bill-18 received First Reading on December 4, 2012. The opposition party in the Manitoba legislature has prevented the bill from proceeding to Second Reading and subsequent consideration in Committee.

V. BILL-18 AND THE *CHARTER*

A. Arguments Against Bill-18

It is clear from the mischaracterizations by some in making arguments in opposition to Bill-18 that certain fundamental principles from the Supreme Court of Canada’s *Charter* jurisprudence, in relation to section 2(a), need to be restated.

Constructing safe schools for sexual minority students ensures that these students have access to education the way all other students do. For example, permitting students to form a GSA, a gay-straight alliance, in fact, making a school obligated to permit such a group in any school, has no impact on the belief systems of other students, their parents, or anyone else.

This was the same argument that was raised nine or ten years ago in relation to same-sex marriage. The argument was misguided then and it is

³⁶ *Ibid* at 14-15 [original citations omitted].

misguided now. The Supreme Court of Canada made it very clear in the *Reference Re: Same Sex Marriage*³⁷ that merely recognizing the equality rights of one group, sexual minority students in this instance, does not in itself constitute an infringement of the equality rights of another – those asserting religious freedom rights. It is a non-issue.

To put the issue in terms of Bill-18, the purpose of which is to address the pervasive problem of bullying in schools, including permitting students to establish Gay-Straight Alliances (GSAs), the bill does not infringe freedom of religion, under section 2(a) of the *Charter*, because its provisions do not impose religious beliefs on anyone.

1. *Freedom of Religion*

In *Falling Short*, the ERC argues that Bill-18 will interfere with freedoms protected by section 2(a) of the *Charter* which declares:

2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion³⁸

In *Big M Drug Mart*, the Supreme Court of Canada, indeed, interpreted the right broadly:

The essence of the concept of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination.³⁹

The Supreme Court of Canada has recognized a broad interpretation of and given a broad protection to religious belief and practice. In *Syndicat Northcrest v Amselem*,⁴⁰ the Court made clear that a “sincerely held belief” was what was subject to *Charter* protection. Specifically, there is no requirement on a person asserting the protection of the *Charter* under s2(a) to establish that his or her belief is an obligatory part of religious doctrine or required religious practice. A sincere belief is a belief the claimant holds “in order to connect with the divine”⁴¹ whether or not co-religionists, other followers of that religion, share that belief. In other

³⁷ *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698 [*Re Same-Sex Marriage*].

³⁸ *Charter*, *supra* note 7 s 2(a).

³⁹ *R v Big M Drug Mart*, [1985] 1 SCR 295 at 336, 18 DLR (4th) 321 [*Big M Drug Mart*].

⁴⁰ 2004 SCC 47 at paras 46-49, [2004] 2 SCR 551 [*Amselem*].

⁴¹ *Ibid* at para 46.

words, the test of whether or not someone holds a sincere, religious belief is purely subjective and it is a very broad recognition.

The purpose of section 2(a) protection is to safeguard against state action that would infringe upon the freedom to hold and express religious beliefs and to engage in religious practices and manifestations of religious beliefs. In *Big M Drug Mart*, however, the Supreme Court of Canada qualified freedom of religion, acknowledging that there were limitations and considerations that must be taken into account when determining the content or limits of section 2(a):

Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or conscience.⁴²

La Forest J confirmed this approach in *Ross v New Brunswick School District No 15*:

Indeed, this Court has affirmed that freedom of religion ensures that every individual must be free to hold and to manifest without State interference those beliefs and opinions dictated by one's conscience. This freedom is not unlimited, however, and is restricted by the right of others to hold and to manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of religion of others. Freedom of religion is subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others.⁴³

That *Charter* rights are not absolute is clear. In *R v Crawford* the Court stated the proposition in this way:

Charter rights are not absolute in the sense that they cannot be applied to their full extent regardless of the context. Application of Charter values must take into account other interests and in particular other Charter values which may conflict with their unrestricted and literal enforcement.⁴⁴

Another fundamental principle of *Charter* interpretation is that there is no hierarchy of rights in the *Charter*. This influential principle was expressed in *Dagenais v Canadian Broadcasting Corp* by Lamer CJ:

A hierarchical approach to rights, which places some [rights] over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict, as can

⁴² *Big M Drug Mart*, *supra* note 39 at 337 [emphasis added].

⁴³ [1996] 1 SCR 825 at para 72, 133 DLR (4th) 1 [Ross].

⁴⁴ [1995] 1 SCR 858 at para 34, 22 OR (3d) 288.

occur ... Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.⁴⁵

B. Infringement Must Be Significant

While the Court will not rule on the validity of a religious belief or practice, the Court will, if it is in dispute, inquire into the sincerity of a belief if sincerity is at issue.⁴⁶ The Court will also, once an individual has demonstrated that her religious freedom has been engaged, determine whether or not there has been sufficient interference to constitute an infringement of freedom of religion under section 2(a).

Wilson J writing in dissent in *Jones* put the matter this way:

[s]ection 2(a) does not require the legislature to refrain from imposing any burdens on the practice of religion. Legislative or administrative action whose effect on religion is trivial or insubstantial is not, in my view, a breach of freedom of religion.⁴⁷

The Court made clear in *Amselem* that section 2(a) of the *Charter* “prohibits only burdens or impositions on religious practice that are non-trivial”, going on to say:

[i]t consequently suffices that a claimant show that the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial.⁴⁸

However, while the establishment of a sincerely held religious belief is largely a subjective inquiry, when it comes to establishing that a claimant’s religious freedoms under section 2(a) have been infringed, the Court requires objective evidence. In *SL v Commission*, the Supreme Court emphasized the point that “objective evidence” would be required.

According to the approach adopted by this Court in *Amselem*, an applicant must first establish the sincerity of his or her belief in a religious doctrine, practice or obligation. In this area, the courts do not search an applicant’s soul or conscience and do not seek to become theologians. They ascertain whether there is a sincere subjective belief. The courts then determine whether the applicant

⁴⁵ [1994] 3 SCR 835 at 877, 120 DLR (4th) 12.

⁴⁶ *Ross*, *supra* note 43.

⁴⁷ *R v Jones*, [1986] 2 SCR 284 at 313-14, 31 DLR (4th) 569 [emphasis added].

⁴⁸ *Amselem*, *supra* note 40 at para 59 [emphasis in original].

has demonstrated significant infringement to that belief as a result of state action. This second part of the analysis must remain objective in nature.⁴⁹

In other words, religious belief may be subjective and personal and may vary from one individual to the next, even among co-religionists, but where it is alleged that religious freedoms have been infringed, the courts will ask if a reasonable person believe would agree.

To put the matter in terms of Bill-18, it is not enough for someone to claim their religious rights have been infringed. Would a reasonable person believe that constructing safe schools constitutes an infringement of freedom of religion when no religious beliefs are being imposed on anyone? It is only actual, objectively established burdens on *Charter* rights that trigger interference, not professed infringements.

It is also significant, that in *SL v Commission*, the Supreme Court appears to have stated the standard somewhat more vigorously beyond the degree required in *Amselem* that a burden must not be merely “trivial” or “insubstantial” in order to be prohibited under section 2(a) of the *Charter*. In *SL v Commission scolaire des Chênes*, the Supreme Court asserts that the claimant must show significant infringement to a sincerely held religious belief as a result of state action.⁵⁰

C. *Whatcott* Decision

In February, 2013, the Supreme Court of Canada released its decision in *Whatcott*⁵¹ a case dealing with the limits of hate speech. The Court made it very clear that “freedom of religious speech and the freedom to teach or share religious beliefs”⁵² is limited by the requirement that this not be done through hate speech. The Court held that hate speech is language that delegitimizes through vilification and rejects a group of citizens and risks resulting in discrimination or other harmful effects.⁵³

In early March, Steinbach MP and former Minister of Public Safety, Vic Toews waded into the public discourse surrounding the introduction

⁴⁹ *SL v Commission scolaire des Chênes*, 2012 SCC 7 at para 49, [2012] 1 SCR 235 [original citations omitted] [*SL v Commission scolaire des Chênes*].

⁵⁰ *Ibid* at para 49.

⁵¹ *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] SCJ No 11 [*Whatcott*].

⁵² *Ibid* at para 97.

⁵³ *Ibid* at paras 41-43.

of the bill.⁵⁴ The EFC's *Falling Short* reiterates the argument. Mr. Toews argued that *Whatcott*⁵⁵ was authority for Bill-18's unconstitutionality on the ground that Bill-18 violates freedom of expression. The analogy and analysis is flawed and inappropriate.

Their argument as I understand it is that *Whatcott* stands for the proposition that any critique or condemnation short of delegitimizing vile language or hate speech would be permitted and that Bill-18 seeks to restrict expression that would not be designated hate speech. In other words, *Whatcott* permits a person, presumably a student, and possibly a teacher or administrator, to practice his or her religious beliefs to the point of engaging in hate speech. That would be a misreading of *Whatcott*.

Whatcott is a decision that deals with conversations in the media, in public and other similar places; it pertains, for example, to language used on flyers that you might want to hand out on the street – in other words, the case deals with the regulation of expression in the general marketplace of ideas. A school, like the workplace is a closed environment. Rules can be different in a closed environment. In specific environments, we have the right to be free from “harassment, belittlement and ridicule”. There is no doubt that this is especially true of schools where students are less developed and more vulnerable than adults in the workplace.

D. Competing Rights

A number of people have criticized Bill-18 as a threat to religious freedoms and argued that it is, in fact, nothing less than an unconstitutional infringement upon freedom of religion. There are some who have called for a reference question with respect to the bill – which means that some are calling on the provincial government to ask the Court of Appeal if Bill-18 is compliant with the *Charter*. *Falling Short* supports this action and the *Winnipeg Free Press* reported that Mr. Toews made that suggestion in a letter mailed to his constituents,

If the provincial legislature does not amend Bill 18 to address concerns of faith-based organizations, schools and communities, the only remedy may be an

⁵⁴ Deveryn Ross, “Allan should refer Bill-18 to Manitoba Appeal Court”, *Winnipeg Free Press* (13 March 2013) online: Winnipeg Free Press <<http://www.winnipegfreepress.com/opinion/analysis/allan-should-refer-bill-18-to-manitoba-appeal-court-197725501.html>>.

⁵⁵ *Whatcott*, *supra* note 51.

application to the courts to decide if the legislation is compliant with Canada's Charter of Rights and Freedoms.⁵⁶

From my perspective, I disagree that there are serious constitutional issues around Bill-18 and I do not see any reason or basis for the government to question the Court of Appeal about it in advance. At most, Bill-18 raises the potential for a collision of rights or competing rights claims. A competing rights claim exists when legally protected rights are present in claims made by two individuals or groups and does not necessarily create a conflict with the *Charter* or result in unconstitutionality.⁵⁷ The Supreme Court of Canada has developed a framework for dealing with competing rights.⁵⁸ The Court has said that competing rights claims should first be reconciled if possible through accommodation and, if a competition is inevitable, through balancing.⁵⁹ The impact on both rights must be discerned and balancing competing rights claims must be approached on a case-by-case base. The analysis is deeply contextual, looking at the facts of actual conflicts and the *Charter* and constitutional values at stake. There is no 'one-size-fits-all' solution to responding to conflicting rights claims. The analysis acknowledges that no rights are absolute and that there is no hierarchy of rights – something that the EFC fails to acknowledge adequately if really at all in *Falling Short*.

Overall, the courts will endeavour to respect both sets of rights. If what brings a student or teacher closer to the divine is a sincerely held religious belief that a claimant must speak out against sexual minority students, then rights would be in conflict. If rights are held to be in collision and there were no way to accommodate both rights, the conflict between the two rights claims would come down to one question. Do the benefits of Bill-18, including the benefits of addressing bullying generally, homophobic bullying specifically and the presence of GSAs in schools if requested by students, outweigh any negative effects on freedom of religion and expression?

⁵⁶ "Vic Toews against Bill-18", *Winnipeg Free Press* (9 March 2013) online: Winnipeg Free Press <<http://www.winnipegfreepress.com/local/vic-toews-against-bill-18-196659401.html>>.

⁵⁷ *re Same-Sex Marriage*, *supra* note 37 at 50-52.

⁵⁸ See *re Same-Sex Marriage*, *supra* note 37; *Dagenais v Canadian Broadcasting Corp*, *supra* note 45; *R v Mentuck*, 2001 SCC 76, [2001] 3 SCR 442; and *R v NS* 2012 SCC 72, [2012] SCJ No 72.

⁵⁹ *R v NS*, *ibid*.

What are the facts surrounding Bill-18? There is the need to do something about the pressing and substantial problem of widespread bullying in schools, generally, and the issue of homophobic, transphobic and gender-based bullying, specifically, is by now a given.⁶⁰ The provincial government has a constitutional responsibility to deliver education in the province and to ensure that the ability of students to access education is free from burdens based on differential treatment. Homophobic, transphobic and gender-based bullying would certainly qualify. Bullying of any kind is based upon a desire to vilify difference and often to establish the victimizer as a member of the privileged class of what is normal, dominant, and desirable. In truth, most school boards and schools throughout Canada are decades behind the progress made outside the context of schools in larger Canadian society where great strides have been made in addressing discrimination based upon sexual orientation as well as the achievement of full citizenship of sexual minorities in present day, complex, multicultural Canada.

On the other hand, what is the impact on religious freedoms? If students are holding a GSA meeting in their school, that gathering has absolutely no impact on the belief systems of other students or teachers or anyone else in the school. Other students are free to walk the hallways or sit in other rooms in the school holding whatever disapproving view or belief they wish to hold. No religious beliefs are being imposed on anyone. There is no interference with anyone else's religious beliefs merely by permitting GSAs in schools. If a staff member or teacher in a school were required to perform an administrative task in relation to a gay-straight alliance, such as booking a room or bringing in a guest speaker for the group, or photocopying posters, such requirements would be at most a "trivial" or "insubstantial" intrusion and certainly not significant. A requirement that students not speak out in condemnation of each other would hardly constitute an infringement and at most is a reasonable limitation. Rather than undermine *Bill 18*, *Whatcott*, *SL v Commission scolaire des Chênes*, and other decisions that make up the equality jurisprudence of the Supreme Court of Canada merely confirm that Bill-18 is on solid legal ground and achieves an appropriate balance between the two rights claims. Any argument that Bill-18 infringes religious freedom, either of students or of a school division, is weak and would, in

⁶⁰ *Supra* note 1.

my opinion, have to give way to a *Charter* equality rights claim grounded in sexual orientation of an individual based upon their right to be safe at school and to have equal access to education.

I find these words from *SL v Commission scolaire des Chênes*, highly relevant and an answer to EFC's collective rights argument. In *SL v Commission scolaire des Chênes*, parents brought a claim on the basis that their section 2(a) *Charter* rights, which included the "obligation to pass on the precepts of the Catholic religion to their children", had been infringed by the state's mandatory ethics and religious culture program. The ethics and religious culture program replaced all Protestant and Catholic programs of religious and moral instruction in Québec. The Court accepted the sincerity of the parents' beliefs regarding their religious obligations as parents, that belief was not challenged. However, the Court made this forceful statement with regard to an allegation of infringement that I believe is prescient of how a legal challenge to Bill-18 is likely to be met:

Parents are free to pass their personal beliefs on to their children if they so wish. However, the early exposure of children to realities that differ from those in their immediate family environment is a fact of life in society. The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society and ignores the Québec government's obligations with regard to public education. Although such exposure can be a source of friction, it does not in itself constitute an infringement s. 2(a) of the Canadian Charter...⁶¹

While the protection extended to the core content of section 2(a) rights is broad, nonetheless, where the assertion of the right tends to deny equal recognition and respect to another marginalized group in society that also sees protection of the *Charter*, the limit of the section 2(a) will have been reached. The Supreme Court's decision in *Ross* is also relevant. In that case, a school board was ordered by a human rights inquiry to terminate a teacher for making anti-Semitic comments who claimed, in response, an infringement of his section 2(a) and 2(b) *Charter* rights:

[C]ourts must take into account both the nature of the infringed right and the specific values the state relies on to justify the infringement. This involves a close attention to context.

...

⁶¹ *SL v Commission scolaire des Chênes*, *supra* note 4949 at para 40 [emphasis added].

It is this context that must be invoked when balancing the respondent's freedom to make discriminatory statements against the right of the children in the School Board "to be educated in a school system that is free from bias, prejudice and intolerance".

In my view the objectives of preventing and remedying the discrimination in the provision of educational services to the public outweigh any negative effects on the respondent produced by [the order].⁶²

VI. CONCLUSION

Some people would be happy if Bill-18, and other legislative proposals like it, failed to specifically address bullying based on sexual orientation. The refusal to acknowledge homophobic and transphobic bullying is a way for us as a culture to refuse to confront our fears, generally, and more specifically, it is a continuation of the oppression of queer people by rendering them culturally invisible and absent. Historically, we have criminalized and pathologized homosexuality in order to remove queer citizens from our midst and at the same time refused to acknowledge those who remain except in derogatory terms. In short, the cultural machinery has been adept at rendering queer people invisible and allowing them no culturally validated space or citizenship.

An insistence on "generic bullying" and a refusal to acknowledge the acute problem of homophobic and transphobic bullying in schools is a mere continuation of that oppression. It is precisely because many societies, including our own, have moved against its queer citizens by bringing the power of the state to bear against them through criminalizing their behaviours, judging them medically diseased and by regarding them at various times in history as security threats, that specific mention of this group must be made. Such movement of the power of the state against its citizens has not been brought to bear in the past with respect to people with glasses, tall people, short people, people or other "geeks and nerds" that are also subject to bullying in schools. There is a historical basis and justification why sexual minority students require the protection and proactive support of the state now. Most families, so far as I know, do not throw their children out on the street for being "geeks" or singing in Glee club. Many queer kids face just such a fate as undesirable throwaways.⁶³

⁶² Ross, *supra* note 43 at paras 78, 83 & 108 [emphasis added].

⁶³ See Nicholas Ray, *Lesbian, Gay, Bisexual and Transgender Youth: An Epidemic of*

Some people fear discussion of GLBT rights in schools. Some parents do not want their children to be aware of queer people or queer issues. Their children are already aware and engaging in or listening to these conversations. The concept of a hidden curriculum operating in schools lies in its contradistinction to a manifest curriculum.⁶⁴ The manifest or official curriculum is the proscribed curriculum of subjects and official teachings that occur in any school. A hidden or unofficial curriculum refers to the “unofficial” ways that knowledge is transmitted in schools, functioning outside the proscribed course of study for any school. The subject of homosexuality is an excellent example. While in many schools the topic of homosexuality appears nowhere in the official or proscribed curriculum, the hidden curriculum directs us to consider that the subject of homosexuality is very much present and discussed among students. In the locker rooms, on the playing fields, in hallways, in the smoking areas and, in the past decade, in social media, homosexuality is a thriving subject or topic of discourse among students – even in the very early grades. I have argued⁶⁵ that in order to address the problem of homophobic bullying, the manifest curriculum or official spaces of schools must catch up with, indeed displace, the treatment of queer students and the topic of homosexuality in the hidden curriculum. Bill-18 takes schools closer to what many researchers have suggested is required.⁶⁶

Finally, it is useful to consider these words cited by the Ontario Court of Appeal in a different context, but relevant to an assessment of the benefits of Bill-18:

[C]ontrary to popular belief, discrimination is not the problem of those who are discriminated against, but of the “smug majority” who permit the practice, and who alone have the power to end it.⁶⁷

The public schools must surely be kept free of prejudices if society as a whole is to advance towards their elimination. Every course or program in the public school should be designed to be acceptable to all reasonable

Homelessness (New York: National Gay & Lesbian Task Force Policy Institute and the National Coalition for the Homeless: 2006).

⁶⁴ Philip W Jackson, *Life in Classrooms* (New York: Holt, Rinehart and Winston, 1968).

⁶⁵ Short, *supra* note 1.

⁶⁶ Short, *supra* note 12.

⁶⁷ *Zylberberg v Sudbury Board of Education*, (1988) 65 OR (2d) 641 at 656; 52 DLR (4th) 577 (Ont CA).

persons and, consequently, leave no justification for requiring discriminatory exemptions.

The direction of the jurisprudence of the Supreme Court of Canada is clear. While the equality jurisprudence of the Court may not be going in a direction some like, and while Bill-18 may cause a few jolts; nonetheless, in its early analysis of protected religious beliefs and practices, *Big M Drug Mart*, the Supreme Court of Canada signaled this journey, predicted the space that Bill-18 now fills and that makes inevitable its passage. As for the jolts, they are precisely what is needed to transform the climate of schools. These cases underscore that freedom of religion is not absolute and beliefs and practices must give way to the fundamental freedoms of others and the necessary protections needed to keep safe those whose safety is threatened. Bill-18 is a ship that has sailed; we are all passengers on it, including queers – above decks, not below – and it is bound for glory.