

# Wedge Issue Politics in Manitoba: Bill 18-The Public Schools Amendment Act (Safe and Inclusive Schools)

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ZACHARY KINAHAN, STACY  
SENKBEIL & MATTHEW CARVELL \*

## I. INTRODUCTION

Bullying continues to be a well-recognized problem for children, youth, and adults.<sup>1</sup> However, the appearance of bullying has evolved and presents in forms which rival traditional schoolyard bullying. In the wake of prominent suicides of victims of bullying including Amanda Todd and Rehtaeh Parsons, there has been an unprecedented call for resolution against bullying from citizens and governments.

In response, many provinces have enacted new bullying and cyberbullying laws.<sup>2</sup> Furthermore, the federal government has implemented new legislation,<sup>3</sup> funding for anti-bullying programs and launched a national awareness campaign about the impact on young

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\* The authors would like to thank Bryan P. Schwartz for his assistance and contribution in the preparation of this manuscript.

<sup>1</sup> *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).

<sup>2</sup> See: *Cyber-safety Act*, SNS 2013, c 2; Bill 13-*Accepting Schools Act (An Act to amend the Education Act with respect to bullying and other matters)* 1st Sess, 40th Leg, Ontario, 2012 (SO 2012, c 5).

<sup>3</sup> Bill C-13, *Protecting Canadians from Online Crime Act*, 2nd Sess, 41st Parl, 2014. See also Andre Mayer, "New cyberbullying law has 'larger agenda,' expands police powers" *CBC News*, (22 November 2013) online: CBC News <<http://www.cbc.ca/news/>>.

people of words and photos posted online.<sup>4</sup> Given Canada's constitutional design, education is regulated provincially, with the public school curriculum decided by the provincial Ministry of Education.<sup>5</sup> In Manitoba, two laws *The Public Schools Act* and *The Education Administration Act*, principally regulate education.<sup>6</sup>

Bill 18, *The Public Schools Amendment Act (Safe and Inclusive Schools)* was introduced in 2012.<sup>7</sup> Bill 18 gives principals, teachers and others the ability to intervene whether or not the bullying or cyberbullying is happening on school property or during school hours and empowers students to gather in school sanctioned groups to support each other.<sup>8</sup> The Bill was included in an announcement about a broader provincial anti-bullying action plan that included three core components aimed at improving teachers and parents' ability to recognize and deal with school age bullying.<sup>9</sup>

This paper will examine the passage of Bill 18 through the Manitoba Legislature and discuss the key strategies and tactics employed for and against this bill by the New Democratic Party (NDP) and Progressive Conservative parties, respectively. Bill 18 raised competing interests of religious and private schools, who by majority do

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<sup>4</sup> "Campaign will raise awareness of cyberbullying and the non-consensual distribution of intimate images", (January 9, 2014, Halifax, NS) online: <[www.publicsafety.gc.ca/cnt/nws/nws-rlss/2014/20140109-eng.aspx](http://www.publicsafety.gc.ca/cnt/nws/nws-rlss/2014/20140109-eng.aspx)>.

<sup>5</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 reprinted in RSC 1985, App II, No 5, s 93.

<sup>6</sup> *The Public Schools Act*, RSM 1987, c P250, CCSM c P250; *The Education Administration Act*, RSM 1987, c E10, CCSM c E10.

<sup>7</sup> Bill 18, *The Public Schools Amendment Act (Safe and Inclusive Schools)*, 2nd Sess, 40th Leg, Manitoba, 2013 (assented to 13 September 2013) SM 2013, c 6 [Bill 18 or The Bill].

<sup>8</sup> Manitoba, Legislative Assembly, *Debates and Proceedings*, 40th Legs, 2nd Sess, Vol 108 (13 September 2013) 5108 at 5159 (Hon Andrew Swan) [Third Reading].

<sup>9</sup> Government of Manitoba, News Release, "Province Supporting Safe and Inclusive Schools by Introducing Strong Anti-Bullying Action Plan: Allan," (4 December, 2012), online: <<http://news.gov.mb.ca/news/print,index.html?item=15793>>.

Three core components: "(1) Help for teachers including expanded training supports, workshops and other professional learning opportunities, and ongoing support for the Respect in School initiative; (2) help for parents including new online information and resources online on how to recognize, deal with and report bullying; (3) and help for students including strengthened anti-bullying legislation and the Tell Them From Me Survey to allow schools to hear directly from students about bullying."

not want to be required to support Gay-Straight Alliances (GSAs)<sup>10</sup> in their schools, and initiated a public discussion of conflicting rights between religion, sexual orientation, and identity.<sup>11</sup>

Firstly, the issue of increased bullying and cyberbullying amongst school age children, particularly gay<sup>12</sup> students will be addressed in brief. Secondly, the authors provide a snapshot of similar legislation in other jurisdictions. Thirdly, an overview of Bill 18 and its passage through the legislature is provided. Finally, the authors consider the potential strategic political purposes behind the NDP's vigorous support for Bill 18 and the Progressive Conservative reaction, criticism, and response against it.

A principal focus of this paper analyzes the wedge issue created by the NDP Caucus to distinguish themselves from their Progressive Conservative critics on the protection of GSAs in Manitoban schools. While some rural voters initially attached to the ostensible anti-GSA push from the Progressive Conservatives, urban constituents in commanding numbers were already firmly aligned with the NDP position. Most likely, in order to achieve an electoral victory in 2015 by gaining seats within the perimeter of Winnipeg, the Progressive Conservatives purposefully altered their strategy and shifted away from an anti-GSA attack on Bill 18 and drew focus toward other weaknesses of the Bill.

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<sup>10</sup> Gay-straight alliances (GSAs) are described by Egale Canada as "a student-run group that provides a safe place for any and all students to meet and learn about all different orientations, to support each other while working together to end homophobia, and to raise awareness and promote equality for all human beings [that] strives to educate the surrounding areas and the community on different gender and equality issues", Egale Canada, "Why have a GSA?" *My GSA.com* online: <<http://mygsa.ca/why-have-gsa/why-have-gsa>>. It is important to emphasize that members of a GSA may include gay students, those that have friends or family that are gay, those who want to be allies, and those interested in social justice.

<sup>11</sup> There exists a larger constitutional context in which this issue must be addressed. However, considering the breadth and depth of these complex issues, it is these authors' opinion that the discussion should be reserved for a separate article. But for one perspective, see: Donn Short, *Don't be so Gay: Queers, Bullying, and Making Schools Safe* (Vancouver: UBC Press, 2013).

<sup>12</sup> This paper uses the term "gay" when referring to sexual orientation or identity to accord with the language of the legislation. The term, as used in this paper, is meant to be inclusive of any and all who identify as lesbian, bisexual, gay, transsexual, transgendered, or queer (LBGTQTQ).

## II. BACKGROUND

### A. Bullying

Bullying was once dismissed as a childhood rite of passage and not considered to have serious ill-effects.<sup>13</sup> It was often said “teasing and rough-and-tumble play are part of growing up”.<sup>14</sup> Today bullying is understood to be “a damaging experience in the lives of students”<sup>15</sup> and is taken more seriously. Internationally, Canada is ranked as having between the ninth and eleventh highest rate of bullying.<sup>16</sup> Of those children reported as bullied, the conduct is generally delivered by classmate (40%) or a friend (20%).<sup>17</sup> Many students who are bullied avoid school as a result, and of those missing class, between six and eight percent cite bullying as the reason.<sup>18</sup> Generally, bullied students are also more likely to “drop out of school [...] report difficulties in concentrating on their school work and obtain lower levels of academic achievement than their non-bullied peers”.<sup>19</sup> It is clear that bullying has a negative impact on the school experience.

The World Health Organization (WHO) describes bullying as a low-level form of violence; bullying can have a profound negative effect on the learning environment in the school and can also have long-term

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<sup>13</sup> Rodney Clifton, Michael Zwaagstra, and John Long of the Frontier Centre for Public Policy, “Is Manitoba’s anti-bullying legislation an act of a bully?”, *Troy Media* (15 February 2013), online: Troy Media <<http://www.troymedia.com/2013/02/15/is-manitobas-anti-bullying-legislation-an-act-of-a-bully/>>.

<sup>14</sup> Canadian Council on Learning, “Lessons in Learning: Bullying in Canada: How intimidation affects learning” (2008), online: CCL <<http://www.ccl-cca.ca/pdfs/LessonsInLearning/Mar-20-08-Bullying-in-Canada.pdf>> at 2.

<sup>15</sup> Donn Short, *Don’t be so Gay: Queers, Bullying, and Making Schools Safe* (Vancouver: UBC Press, 2013) at 2.

<sup>16</sup> Tonya Nansel, Wendy Craig, Mary Overpeck, Gitanjali Saluja, June Raun, & The Health Behaviour in School-aged Children Bullying Analyses Working Group, “Cross-national consistency in the relationship between bullying behaviours and psychosocial adjustment” (2004) 158 at 731. Forty-seven percent of parents indicate that they have a child that had been bullied, and 16% described it as “a frequent occurrence”.

<sup>17</sup> Samuel Perreault, “Self-Reported Internet victimization in Canada, 2009” (2011) 85-002-X *Statistics Canada Juristat*, online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11530-eng.htm#a2>> at 11.

<sup>18</sup> *Ibid* at 3.

<sup>19</sup> *Ibid*.

psychological and physical results on both the bullies and bullied.<sup>20</sup> The WHO calls for a concentrated effort to address the psychological hazards resulting from bullying, with special emphasis towards mortality.<sup>21</sup> Bullying in general carries “steep social and economic costs to society”<sup>22</sup> whether in the form of additional costs to the health system, increased criminal activity, poor self-esteem, and heightened risk of suicide.

Reports show that both bullies and those that are the target of bullying experience “greater health problems and poorer emotional and social adjustment”.<sup>23</sup> Based on an international comparative cross sectional study in 2005, increased bullying was associated with increased health symptoms including, but not limited to irritability/bad temper (43% and 49% for boys and girls respectively), feelings of nervousness (35% and 43%), headache (24% and 38%), difficulty sleeping (28% and 32%), and stomach aches (15% and 25%).<sup>24</sup>

Researchers have found that children who display bullying behaviors “often grow up to become perpetrators of violence, specifically, domestic violence, child abuse, sexual assault, and hate crimes”.<sup>25</sup> Statistically, they are six times more likely to be convicted of a crime and five times more likely to have a criminal record.<sup>26</sup> Results show that victimization is most strongly related to depression for both

<sup>20</sup> Kathryn Whitted & David Dupper, “Best Practices for preventing or reducing bullying in schools” (2005) 27:3 *Children & Schools* 167 at 167.

<sup>21</sup> Manitoba, Legislative Assembly, *Standing Committee on Human Resources*, 48th Leg, 2nd Sess, Vol 2 (3 September 2013) at 66 (Chris Dsovza) [SCHR, 3 September 2013]; World Health Organization, *Bulletin*, 88:403-403, Jorge C Sraabstein & Bennet L Leventhal, “Prevention of bullying-related morbidity and mortality: a call for public health policies” (2010) online: World Health Organization <<http://www.who.int/bulletin/volumes/88/6/10-077123/en/>>.

<sup>22</sup> Canadian Council on Learning, “Lessons in Learning: Bullying in Canada: How intimidation affects learning” (2008) at 2 online: CCL <<http://www.ccl-cca.ca/pdfs/LessonsInLearning/Mar-20-08-Bullying-in-Canad.pdf>>.

<sup>23</sup> Nansel et al, *supra* note 16 at 730.

<sup>24</sup> Pernille Due, Bjorn Holstein, John Lynch, Finn Diderichsen, Saoirse Nic Gabhain, Peter Scheidt, Candace Currie, & The Health Behaviour in School-Aged Children Bullying Working Group, “Bullying and symptoms among school-aged children: international comparative cross sectional study in 28 countries” 15:2 *European Journal of Public Health* 128 at 131; also see: Canadian Council on Learning, *supra* note 14 at 2.

<sup>25</sup> Geoff Colvin, Tary Tobin, Kelli Beard, Shanna Hagan, & Jeffrey Sprague, “The school bully: Assessing the problem of developing interventions and future research directions” (1998) 8:3 *Journal of Behavioral Education* 293 at 295.

<sup>26</sup> *Ibid* at 296.

bullies and victims.<sup>27</sup> The onset of depression can be preceded by severe life events, which create vulnerability, and therefore continued provocation can be less severe in order to maintain the depression.<sup>28</sup> It has been noted the negative effects of bullying exposure is less for those from more affluent backgrounds.<sup>29</sup>

### *Cyberbullying*

Cyberbullying allows bullies to operate at any hour of the day and to target victims from anywhere with an internet connection. Bullying incidents often come in the form of e-mail, instant messages, or posts on websites. Through this medium, bullies may be more brutal than they ever would dare to be in person; this phenomenon of cyberbullying is “attracting more participants at a higher degree of cruelty than traditional schoolyard bullying”.<sup>30</sup> Online behaviour has come to the forefront of public consciousness as several high-profile teen suicides have stemmed from internet harassment. The physical distance between those who bully via the internet and their targets allow “bullies to feel more confident and act more aggressive behind the shield of a computer screen”.<sup>31</sup>

### *Bullying of Gay Students*

Government policies, popular media, and literature are just a few of the areas that have seen dramatic changes in the past decade around ideas of sexual identity and orientation. However, the response to Bill 18 by a large segment of the public demonstrates an enduring lack of acceptance and understanding. Gay students report higher levels of bullying than heterosexual students: six times as much verbal harassment related to sexual orientation, five times as much related to gender identity, and twice as much about gender and gender expression

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<sup>27</sup> David Hawker & Michael Boulton, “Twenty Years’ Research on Peer Victimization and Psychosocial Maladjustment: A Meta-analytic Review of Cross-sectional Studies” (2000) 41 *The Journal of Child Psychology and Psychiatry and Allied Disciplines* 441 at 441.

<sup>28</sup> Colvin et al, *supra* note 25 at 467.

<sup>29</sup> Due et al, *supra* note 24 at 467.

<sup>30</sup> Usha Munukutla-Parker, “Unsolicited Commercial E-mail, Privacy Concerns Related to Social Network Services, Online Protection of Children, and Cyberbullying” (2006) *J L & Pol’y for the Info Soc’y*, 2:3 at 645.

<sup>31</sup> Farley Andersen, “Pacifism in a Dog-Eat-Dog World: Potential Solutions to School Bullying” (2013) 64 *Mercer L Rev* 753 at 756.

of masculinity and femininity.<sup>32</sup> Furthermore, gay students are twice as likely to be physically harassed.<sup>33</sup> Studies show that 70% of students hear terms such as “that’s gay”, “faggot”, and “lezbo” every day at school, and that, “[i]t’s the air they breathe, the sea of language they swim in... It’s the day-in, day-out saturation of school culture with such language that undermines the spirits of LGBTQ kids”.<sup>34</sup> The most startling figure coming out of a British Columbia report showed that 46 percent of homosexual youth had attempted suicide at least once.<sup>35</sup> Moreover, bullying manifests beyond verbal and physical harassment.

In response to relentless and repeated bullying, gay students in some Manitoban schools have come together to provide mutual support in the form of anti-bullying student clubs and GSAs.<sup>36</sup> In 2012, there were more than 30 GSAs in Manitoba schools.<sup>37</sup> The Winnipeg School Division (WSD) was one of the first school divisions in the province to address homophobic culture in their policies. They added “sexual orientation” to their policies on harassment, implemented an anti-homophobia initiative<sup>38</sup>, and its Code of Conduct Policy requires that students be respectful of sexual orientation.<sup>39</sup> Furthermore, WSD’s Diversity and Equity Education Policy indicates:

The purpose of this policy is (a) to promote and enhance a safe and inclusive learning environment, the acceptance of and respect for others, and the creation of a positive school environment... (b) address the training for

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<sup>32</sup> Catherine Taylor & Tracey Peter, “We Are Not Aliens, We’re People, and We Have Rights” (2011) 48(3) Canadian Rev of Sociology 275.

<sup>33</sup> *Ibid* at 285.

<sup>34</sup> Catherine Taylor and Tracey Peter, “Every Class in Every School: Egale’s Final Report on Homophobia, Biphobia, and Transphobia in Canadian Schools” (Toronto: Egale Canada Human Rights Trust, 2011) at 10.

<sup>35</sup> *Trinity Western University v College of Teachers*, 2001 SCC 31 at para 85, [2001] 1 SCR 772 [Trinity Western].

<sup>36</sup> SCHR, 3 September 2013, *supra* note 21 at 24 (Kevin Rebeck, Manitoba Federation of Labour).

<sup>37</sup> *Ibid* at 61 (Paul Olson, Manitoba Teachers’ Society).

<sup>38</sup> Catherine Taylor “A Canadian Thaw? Sign of Progress in the Struggle for LGBTQ-Inclusive Schools” *Manitoba Association of School Superintendents Journal* (Fall 2012) 16 at 16, online: MASS <[http://www.mass.mb.ca/documents/mass\\_journal\\_fall2012.pdf](http://www.mass.mb.ca/documents/mass_journal_fall2012.pdf)> at 16 [Taylor, “A Canadian Thaw”].

<sup>39</sup> Winnipeg School Division, *Code of Conduct* (2006) at 2 online: Winnipeg School Division.

teachers and other staff about bullying prevention and strategies for promoting respect for human diversity and a positive school environment.<sup>40</sup>

The WSD has also implemented workshops on human rights for all staff. As of November 2012, there are nine schools in the WSD that have established GSAs, and many have established clubs called People Understanding Love Suits Everyone (PULSE), which is a place for students, staff, families and friends of the gay community to come together in a safe environment.<sup>41</sup>

### ***Potential for Overbreadth***

There exists a concern for the need to distinguish bullying resulting in serious harm and conduct that may or may not be construed as bullying. In Bill 18, despite the discussion over the appropriate definition of “bullying”, the threshold for bullying which resulting in serious harm is absent. According to the definition, being picked last for the recess soccer team could result in “distress” to “feelings” or “self-esteem”.<sup>42</sup> There is nothing in the legislation that distinguishes between serious incidents of bullying from over-sensitivities of students. The forum for candid and sometimes tough discussions in the classroom setting ought to be protected and concern has been raised that overbreadth of the definition of bullying could subjugate important class discussion. Over-scrupulous anti-bullying measures run the risk of undermining and consequently devaluing the importance of free expression in the classroom.

Political scientist Donald Downs explains that since the late 1980s, institutions of higher education in the United States have enacted campus speech codes designed to curb offensive expression, “particularly that which offends on the basis of race, sex, sexual orientation, religion, or other ascriptive human traits”.<sup>43</sup> Downs suggests heightened cultural sensitivity on the part of school administrators as the primary impetus for campus speech codes.<sup>44</sup> School administrators are often more willing to punish speech that might offend minority-status individuals even though such suppression

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<sup>40</sup> SCHR, 3 September 2013, *supra* note 21 at 51 (Rita Hildahl, Winnipeg School Division).

<sup>41</sup> *Ibid.*

<sup>42</sup> Bill 18, *supra* note 7 (See Definition at s. 1.2(1)).

<sup>43</sup> Kemper, Mark. “Restoring Free Speech and Liberty on Campus.” *Political Science Quarterly* (Academy Of Political Science) 121, no. 2 (2006) EBSCOhost at 356.

<sup>44</sup> Tucker, Patrick. “Speech Codes and the Future of Education.” *Futurist* 40, no. 2 (March 2006), EBSCOhost (accessed October 7, 2014) at 11.



is contrary to the valuable principle of open debate, not to mention American first amendment rights.<sup>45</sup>

Those who believe in free speech and uninhibited debate on campus should not necessarily be made to feel the need to qualify or apologize for those essential beliefs, “The messy, loud, chaotic and, yes, sometimes-offensive nature of a college campus is what makes the college experience compelling and unique. College administrators’ time would be far better spent preparing students for how to dive in and take full advantage of this chaotic paradise.”<sup>46</sup>

One recurrent problem is that speech codes are often “ambiguous and unclear, thus imposing a serious chilling effect on campus discourse”.<sup>47</sup> Students report fearing Speech Code retribution and begin to hold back on expressing their views on issues pertaining to race, religion, sex, gender, sexual orientation, and other controversial social and political topics.<sup>48</sup> Speech codes have been criticized as “paternalistic attempts to shelter traditionally oppressed groups from offensive speech, and thus are demeaning to the individual integrity of members of those groups”.<sup>49</sup> The concern is that Bill 18 will have a chilling effect on open debate in public schools and may serve to undermine the very mission of higher education.

### III. COMPARATIVE LEGISLATION

#### *Ontario*

Ontario introduced Bill 81, the *Safe Schools Act*<sup>50</sup> in 2000 to address bullying; however, the legislation made no mention however of sexual orientation. Amendments were made in 2007 under the umbrella of Bill 212, *An Act to amend the Education Act in respect to Behavior, Discipline and Safety*.<sup>51</sup> Some of the key changes in Bill 212 were the removal of mandatory framework for student discipline, the removal of teacher authority to suspend students, the granting of an appeal process to suspensions, and the procedure for expulsions being transferred from

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> Kemper, *supra* note 43.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *The Safe Schools Act*, RS O 2000, c 12.

<sup>51</sup> *An Act to amend the Education Act in respect to behavior, discipline and safety*, RS O 2007, c 14.

the principal to a discipline committee of the school board.<sup>52</sup> The details of policy were to be developed by each school board as directed through guidelines provided by government memoranda.<sup>53</sup> In 2012, Ontario went further to introduce Bill 13 – *An Act to amend the Education Act with respect to bullying and other matters*, which enabled students to form GSAs in schools.<sup>54</sup> The noticeable similarity is that Ontario's Bill 13 would also mandate that schools accept the presence of GSAs:

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.<sup>55</sup>

The debate that occurred in the Ontario legislation mirrored the debate in Manitoba. Unlike Manitoba, Ontario has a separate public school board for its Catholic schools arising from historical protections for Catholic communities set out in the *Constitution Act of 1867*.<sup>56</sup> Schools under the jurisdiction of the Catholic School Board are not exempted from Bill 13. Then, Premier of Ontario Dalton McGuinty stated that the goal of the bill was:

To send a strong signal to all Ontarians of all faiths, of all backgrounds, all places of origin, all culture, all traditions, all ethnicities: in our province and in our publicly funded schools, schools are going to be warm, welcoming, and accepting of all our children — regardless of their sexual orientation.<sup>57</sup>

One of the main arguments put forth by opponents of Bill 13 was that it was unfairly providing protection to one group on the basis of gender identity while not providing the appropriate protection for other groups, such as religious minority groups:

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<sup>52</sup> Michael G Hill, *Step By Step to a Safer School* (Markham: LexisNexis, 2010) at 7.

<sup>53</sup> *Ibid.*, for examples refer to Memorandum No 141 at 195-204, Memorandum No 141 at 204-217, Memorandum No 142 at 219-233, Memorandum No 144 at 235-252.

<sup>54</sup> Bill 13–*An Act to amend the Education Act with respect to bullying and other matters*, 1st Sess, 40th Leg, Ontario, 2012 (assented to 19 June 2012), SO 2012, c 5 [Bill 13].

<sup>55</sup> *Ibid.*, cl 12.

<sup>56</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 93.

<sup>57</sup> Charles Lewis, "Anti-bullying bill subverts Catholic curriculum: group", *The National Post* (December 13, 2011) online: National Post <<http://life.nationalpost.com/2011/12/13/anti-bullying-bill-subverts-catholic-curriculum-group/>>.

Ontario is a diverse province, and each citizen – and identifiable minorities that have suffered discrimination and bullying themselves—deserves to have their concerns heard and addressed by their elected officials.<sup>58</sup>

Despite the strong opposition to the bill, since its passing, there have been no court challenges on issues regarding religious freedoms, Catholic schools, or GSAs. Recognizing a lack of challenge is not indicative of the constitutionality of Bill 13, however it is noteworthy that despite the strong backlash in Ontario no one has come forward to challenge the bill. Similar to the situation in Manitoba, cynics have suggested that Bill 13 might have been “yet another attempt by the Liberals to create a wedge issue and paint the Tories as homophobic”.<sup>59</sup>

### ***Western Canada***

In British Columbia, twenty school districts have homosexually sensitive education policies for both curriculum and staff training.<sup>60</sup> *Correns v British Columbia (Ministry of Education)* is a specific example of change initiated by a human rights complaint on the grounds of discrimination against homosexual students because the curriculum was not inclusive of them.<sup>61</sup> The issue was settled out of court, but included the establishment of a Grade 12 Social Justice Course reflecting gay realities.<sup>62</sup> In *North Vancouver School District No. 44 v Jurbran*<sup>63</sup> the court found that school boards were liable for failing to create an environment in which discrimination would not be tolerated.

In 2009 Alberta passed the *Bill 44-Human Rights, Citizenship and Multiculturalism Amendment Act*,<sup>64</sup> a bill that specifically permits parents to remove children from any class that involves homosexually-inclusive

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<sup>58</sup> “Bill 13 and a Response to Bullying in Ontario’s Schools”, online: The Evangelical Fellowship of Canada <<http://www.evangelicalfellowship.ca/acceptingschoolsact>>.

<sup>59</sup> Christina Blizzard, “Time to Compromise on Anti-Bullying Bills”, *Toronto Sun*, online: *Toronto Sun* <[www.torontosun.com/2012/03/29/time-to-compromise-on-anti-bullying-bills](http://www.torontosun.com/2012/03/29/time-to-compromise-on-anti-bullying-bills)>.

<sup>60</sup> Catherine Taylor “A Canadian Thaw” *supra* note 38 at 17.

<sup>61</sup> *Correns v British Columbia (Ministry of Education)* (No 2), 2005 BCHRT 497.

<sup>62</sup> *Ibid*, also see: Short, *supra* note 15 at 42.

<sup>63</sup> *North Vancouver School District No 44 v Jubran*, 2005 BCCA 201, 253 DLR (4th) 294.

<sup>64</sup> *Bill 44-Human Rights, Citizenship and Multiculturalism Amendment Act*, 2nd Sess, 27th Leg, Alberta, 2009 (assented to 4 June 2009) SA 2009, c 26.

topics, despite protections for sexual and gender identity under the human rights laws in that province.<sup>65</sup>

### *United States*

In the United States, the first National Bullying Summit was held in 2010,<sup>66</sup> followed by the White House Conference on Bullying Prevention in 2011.<sup>67</sup> Some jurisdictions, including New Jersey, New Hampshire, Georgia, Iowa, and Kansas, prohibit single acts of bullying.<sup>68</sup> Other states require repeated actions to be described as bullying.<sup>69</sup> For example, Florida describes repeated bullying as “systematically and chronically inflicting hurt or psychological distress”.<sup>70</sup>

In terms of protection for gay students, there are few safeguards in place for students as legislation is currently limited to only three states. In California, the *Penal Code* describes hate crimes as, “[c]riminal acts including those against sexual orientation”<sup>71</sup> and the *Education Code* determines that no person shall be discriminated “on the basis of disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic”.<sup>72</sup> New Mexico also includes sexual orientation in its definition of bullying<sup>73</sup> and New York includes sexual orientation under its definition of harassment.<sup>74</sup> In the United States, free speech has been used to justify actions of bullying and have ensured that limitations are placed on the abilities of school administrators to censor students.<sup>75</sup> For example, in *Tinker v Des Moines Independent Community School District* it was held a school could only punish a student for his/her speech if that speech “substantially

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<sup>65</sup> Corren, *supra* note 61 at 17.

<sup>66</sup> James Hank, *School Bullying: How Long is the Arm of the Law* (American Bar Association, 2012) at xiv.

<sup>67</sup> *Ibid* at xv.

<sup>68</sup> *Ibid* at 11.

<sup>69</sup> *Ibid* at 11-12, for example: US, HB, 1465 *Relating to the Prevention of Bullying in Schools*, 62th Leg, Reg Sess, N Dak, 2011 (enacted).

<sup>70</sup> K-20 Education Code, tit 48, FlaC §1006.147.

<sup>71</sup> Cal Penal Code tit 11.6 §422.55 (a(6)).

<sup>72</sup> Cal Ed C, tit 1 §220.

<sup>73</sup> New Mexico Administrative Code tit 6 §6.12.7.7.

<sup>74</sup> New York Education Code tit 1 §11.7.

<sup>75</sup> *JC ex rel RC v Beverly Hills Unified School District* 711 F Supp (2d) 1094 (CD Cal 2010).

interfere[d] with the work of the school or impinge[d] upon the rights of other students”.<sup>76</sup> The bullying action must create a reasonable fear that the action would materially or substantially interfere with school discipline or has the potential to disrupt the educational process.<sup>77</sup>

## A. Bill 18

The Bill addressed four issues in particular: (1) defining bullying; (2) amendments to pre-existing reporting requirements for witnessed acts of bullying or “unacceptable conduct”; (3) policies on social media and appropriate internet use including electronic communication and technology; and (4) requiring school boards to “establish a written policy concerning respect for human diversity”. The human diversity policy was set out to support students who want to establish organizations or events on issues of gender equality, racism, disability, sexual orientation and gender identities,<sup>78</sup> and allow the creation of groups using names consistent with ‘Gay-Straight Alliance’.<sup>79</sup> The language utilized in the amendment act aims to ensure that the public can understand the bill and its goals.

The legislation was sent to the Manitoba Human Resources Committee for public presentations and lasted for eight sessions. Over two hundred private citizens, twenty-five representatives of groups (organizations, unions, school boards, municipalities), seven churches or religious institutions, and eight schools gave presentations.<sup>80</sup> Reviewing these submissions and associated media coverage (including both

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<sup>76</sup> *Tinker v Des Moines School District* 393 US 503 at 509 (1969).

<sup>77</sup> *Ibid.*

<sup>78</sup> *Public Schools Act*, *supra* note 6, s 41(1.8)(a).

<sup>79</sup> *Ibid.*, s 41(1.8)(b).

<sup>80</sup> SCHR, 3 September 2013, *supra* note 21; Manitoba, Legislative Assembly, *Standing Committee on Human Resources*, 40th Leg, 2nd Sess, Vol 3 (4 September 2013) [SCHR, 4 September 2013]; Manitoba, Legislative Assembly, *Standing Committee on Human Resources*, 40th Leg, 2nd Sess, Vol 4 (5 September 2013) [SCHR, 5 September 2013]; Manitoba, Legislative Assembly, *Standing Committee on Human Resources*, 40th Leg, 2nd Sess, Vol 5 (6 September 2013) [SCHR, 6 September 2013]; Manitoba, Legislative Assembly, *Standing Committee on Human Resources*, 40th Leg, 2nd Sess, Vol 6 (7 September 2013) [SCHR, 7 September 2013]; Manitoba, Legislative Assembly, *Standing Committee on Human Resources*, 40th Leg, 2nd Sess, Vol 7 (9 September 2013) [SCHR, 9 September 2013]; Manitoba, Legislative Assembly, *Standing Committee on Human Resources*, 40th Leg, 2nd Sess, Vol 8 (10 September 2013) [SCHR, 10 September 2013]; Manitoba, Legislative Assembly, *Standing Committee on Human Resources*, 40th Leg, 2nd Sess, Vol 9 (11 September 2013) [SCHR, 11 September 2013].

articles and letters to the editor) is an opportunity to understand both potential benefits and theoretical perils of the legislation. The issues raised about the legislation were wide ranging, but the most prominent were: (1) concerns regarding the definition of bullying not being sufficiently narrow;<sup>81</sup> (2) religious beliefs also needing to be listed as a group specifically protected by the legislation;<sup>82</sup> (3) how effective the legislation will be in preventing bullying; (4) provisions that could be added to make the consequences of bullying clearer and more effective;<sup>83</sup> and (5) undefined reporting mechanisms and protections in place.

For instance, a concern was raised that the stigma associated with bullying is severe and this legislation would further stigmatize respondent bullies. Even so much as a bullying accusation, without proper legislative safeguards, could leave a lasting stigma on the purported bully. Another concern was raised regarding potential over-policing and due to the increased awareness drawn to issue of bullying which has the potential to result in “reverse bullying”.<sup>84</sup> The Bill does not make mention of constructive resolution processes and views

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<sup>81</sup> For arguments against the vague definition of bullying, see Rodney Clifton, Michael Zwaagstra, and John Long, “Is Manitoba’s anti-bullying legislation an act of a bully?”, *Troy Media* (15 February 2013), online: Troy Media <<http://www.troymedia.com/2013/02/15/is-manitobas-anti-bullying-legislation-an-act-of-a-bully/>>; Steve Lambert, “Proposed Manitoba anti-bullying law so vague it could make anyone guilty: critics”, *National Post* (4 September 2013), online: National Post: <<http://news.nationalpost.com/2013/09/04/proposed-manitoba-anti-bullying-law-so-vague-it-could-make-anyone-a-bully-critics/>>.

<sup>82</sup> Arguments around inclusion of religion in the definition of bullying was cited in many private citizen presentations. In many instances, they cited a Toronto District School Board study in which they looked at the reasons why students were bullied which showed that sexual orientation/gender and religion both at 5%; see presentations: SCHR, 5 September 2013, *supra* note 80 at 185 (Bill Remple, Private Citizen); SCHR, 5 September 2013, *supra* note 80 at 150 (Bryan Schroeder, Christian Heritage School)

<sup>83</sup> For criteria and recommendations to ensure effective policies and programs to reduce policies, see: Geoff Colvin, Tary Tobin, Kelli Beard, Shanna Hagan, & Jeffrey Sprague, “The school bully: Assessing the problem of developing interventions and future research directions” (1998) 8(3) *Journal of Behavioral Education* 293.

<sup>84</sup> “Reverse Bullying” refers to the heightened attention to bullying by teachers and parents causing overreaction, oversensitivity, and scrutiny to anything that may be construed as “bullying”. Furthermore, instances of “reverse bullying” exist where students are over-reporting each other as bullies and using the seriousness of the accusation itself to, in effect, bully another student. In circumstances of “reverse bullying” students perceived as bullying are dealt with overly harshly and their actions

bullying as offence deserving of punitive sanctions, despite the fact that the bullies themselves are generally young and vulnerable members of our society as well.

## IV. LEGISLATIVE PROCESS

### A. First Reading

The Honourable Minister of Education Nancy Allan introduced Bill 18 for First Reading on December 4, 2012 during the 2nd session of the 40th Legislature of Manitoba.<sup>85</sup> Minister Allan laid out the foundation of the Bill, affirming the Bill would amend the definition of bullying and made special mention of cyberbullying in her opening remarks.<sup>86</sup> Minister Allan stated that a “respect for human diversity policy” would need to be implemented by each school board to ensure an inclusive school environment for all students.<sup>87</sup> As this was a first reading, the motion was not debatable.

### B. Second Reading

During the Second Reading of the Bill on August 29, 2013 the Minister made reference to tragic stories of youth suicide as a result of bullying, suggesting that such instances need to be prevented.<sup>88</sup> The Minister indicated that there would be new resources available to teachers, students, and parents including an online survey “where young people can tell us truthfully how they are feeling and we will learn from that data... and take action”.<sup>89</sup> The legislation was considered by the government as a piece in the puzzle to address bullying of gay youth and the first of many steps to curtail the problem of bullying in Manitoban schools.

The Manitoba Progressive Conservatives seized this opportunity to contrast themselves with the NDP, drawing a picture that the NDP favored ‘minority groups’ at the expense of the majority of Manitobans

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<sup>85</sup> Seconded by Honourable Minister of Children and Youth Opportunities Kevin Chief, Manitoba, Legislative Assembly, *Debates and Proceedings*, 40th Leg, 2nd Sess, Vol 11B (4 December 2012) at 369 (Hon Nancy Allan, Minister of Education).

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> Manitoba, Legislative Assembly, *Official Debates and Proceedings*, 40th Leg, 2nd Sess, Vol 13B (6 December 2012) (Hon Nancy Allan) [Second Reading].

<sup>89</sup> *Ibid.*

whereas the Progressive Conservatives supported freedom of religion, freedom of association, and dissenting parents.

The Honourable Dr. Jon Gerrard, sole member of the Liberal Party of Manitoba, spoke in favor of Bill 18. Bullying, safe space, and suicide were three issues that Gerrard said Bill 18 would help address, pointing to a study published in the *Journal of Preventive Medicine* that GSAs helped both homosexual and heterosexual students decrease their level of binge drinking.<sup>90</sup> The NDP did not speak to Bill 18 during the Second Reading or debate any of its merits. After the Second Reading concluded the Bill progressed to a Committee hearing.

### C. Committee Hearings

Manitoba is the only province that mandates open public hearings for its citizens during the committee stage of a bill. The majority of the time these hearings are held on one evening and bring in a handful of people to put forth their opinion on any given matter. However, due to the sensitive nature of Bill 18 there was an astounding amount of people who came forward to voice their opinions before the committee. The public hearings took place from September 3, 2013 through to September 11, 2013 and amount to over 40 hours of presentations. Members of the Canadian Federation of Students-Manitoba, the Manitoba Federation of Labour, constituents from a variety of school divisions, and many private citizens voiced their opinion before the committee. A diverse range of demographics were represented during the 250 presentations at the committee hearing.

### D. Third Reading and Amendments

The Third Reading for Bill 18 took place on September 13, 2013. It began with Progressive Conservatives proposing numerous amendments to change the definition of bullying in Bill 18.

In Bill 18 bullying is defined as:

intended to cause, or should be known to cause, fear, intimidation, humiliation, distress or other forms of harm to another person's body, feelings, self-esteem, reputation or property.<sup>91</sup>

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<sup>90</sup> Manitoba, Legislative Assembly, *Official Debates and Proceedings*, 40th Leg, 2nd Sess, Vol 100B (29 August 2013) at 4686 [Second Reading, 29 August].

<sup>91</sup> Bill 18, *supra* note 7, cl 3.



One of the amendments put forward by the Progressive Conservatives would have defined areas that would not be considered bullying:

What is not bullying?

1.2(4) Bullying does not include any action or behaviour of staff or a school volunteer that is necessary for the performance of the person's responsibilities, such as

- (a) selecting sports team participants;
- (b) speaking to the faith principles of an independent faith-based school;
- (c) issuing normal classroom instruction; and
- (d) making a comment where there is no intent or reasonable expectation that a pupil's feelings could be distressed.<sup>92</sup>

This amendment addresses “reverse bullying” which essentially protects students and teachers from wanton and unreasonable bullying claims. The NDP voted against this amendment.

Certain other amendments appeared not only constructive, but also within the spirit of Bill 18. Nonetheless, the amendment that would include an anonymous reporting mechanism was also rejected.

*THAT Bill 18 be amended in Clause 4(1) by adding the following after clause (b):*

*(c) by adding the following after clause (t):*

(t.1) in consultation with the minister, create an online and anonymous mechanism for the reporting of bullying in schools within six months after this clause comes into force;<sup>93</sup>

Considering the sensitive nature of bullying incidents, an anonymous reporting mechanism might have strengthened the bill. No more than one week after this amendment was rejected, it was reported that the NDP was looking into introducing an anonymous tip line.<sup>94</sup> The Progressive Conservatives criticized the NDP for not having these ideas in Bill 18 from the start, “I’m not sure why the ground work wasn’t done ahead of time,” said Tory member Wayne Ewasko, a former teacher and guidance counsellor.<sup>95</sup>

A further amendment referenced student activities and organizations. Language in the legislation refers to a “respect from

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<sup>92</sup> Third Reading, *supra* note 8 at 5115 (Kelvin Goertzen).

<sup>93</sup> *Ibid* at 5115.

<sup>94</sup> “Manitoba Considers Anonymous Tip Line for Cyberbullying”, The Canadian Press, online: <<http://www.macleans.ca/news/manitoba-considers-anonymous-tip-line-for-cyberbullying/>>

<sup>95</sup> *Ibid*.

human diversity policy” which must accommodate pupils who want to establish and lead activities and organizations. Bill 18 included:

- 41(1.8) A respect from human diversity policy must accommodate pupils who want to establish and lead activities and organizations that
- (a) promote
    - (i) gender equity,
    - (ii) antiracism,
    - (iii) the awareness and understanding of, and respect for, people who are disabled by barriers, or
    - (iv) the awareness and understanding of, and respect for, people of all sexual orientations and gender identities; and
  - (b) use the name "Gay-Straight Alliance" or any other name that is consistent with the promotion of a positive school environment that is inclusive and accepting of all pupils.<sup>96</sup>

The Progressive Conservatives put forward an amendment that would promote groups formed on the basis of ‘ethnicity’, distinctive from ‘antiracism’ which was specified in Bill 18. The Progressive Conservatives also sought to protect the formation of religious groups in the ‘respect for human diversity policy’:

- THAT Bill 18 be amended in Clause 4(2) in the proposed clause 41(1.8)(a) by striking out "or" at the end of subclause (iii), striking out "and" at the end of subclause (iv) and adding the following after subclause (iv):
- (v) ethnicity,
  - (vi) the awareness and understanding of, and respect for, people living with social disadvantage, or
  - (vii) religion or creed, or religious belief; and<sup>97</sup>

Such groups have the potential to create unnecessary division between students. However, other amendments put forward by the Progressive Conservatives had potential benefits:

- THAT Bill 18 be amended by adding the following after Clause 5:
- 5.1 The following is added after section 47.1.1 as section 47.1.1.1:
- No retaliation for reporting
- 47.1.1.1(1) No person shall take or threaten reprisal or retaliatory action against a person for reporting unacceptable conduct, as defined in section 47.1.1, to the principal or to other school staff.
- Protection extends to anyone who reports
- 47.1.1.1(2) Subsection (1) applies to protect a person who must report unacceptable conduct under subsection 47.1.1(1), and to any other person who reports unacceptable conduct.<sup>98</sup>

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<sup>96</sup> Bill 18, *supra* note 7.

<sup>97</sup> Third Reading, *supra* note 8 at 5117 (Kelvin Goertzen).

<sup>98</sup> *Ibid* at 5123.

All nine amendments put forward by the Progressive Conservatives were voted down during the report stage. The rest of the time allocated to Progressive Conservatives speakers during the Third Reading was spent criticizing the NDP's unresponsiveness to the complaints from Manitobans.<sup>99</sup> Numerous comments by Progressive Conservatives indicated the NDP's majority created a situation where committee hearings or house debate could be ignored; the Conservatives suggested the NDP could essentially do as they wished as the majority government.<sup>100</sup>

As for the NDP, they spent their time trumpeting how the law will aid children who are bullied; pointing to specific instances such as Evan Wiens, a 17-year-old proponent of GSAs, being called homosexual slurs during a CBC interview.<sup>101</sup> The main theme for the NDP was promoting a safe school. Minister of Education Nancy Allan stated that all of the amendments put forward by the Progressive Conservatives would weaken Bill 18 and make schools a less safe environment.<sup>102</sup>

Gerrard spoke in favor of Bill 18 once again. The general message from Gerrard was that Bill 18 was a step in the right direction to help stop bullying, especially bullying that is targeted toward LGBTTTQ\* students.<sup>103</sup> Gerrard commented on the polarization between the NDP and Progressive Conservatives, "I think it's fair that some of the approach taken on both sides by the NDP and the Conservatives toward this bill has been more divisive than it needed to be."<sup>104</sup>

## E. Royal Assent

Bill 18 received Royal Assent on September 13<sup>th</sup>, 2013.<sup>105</sup> The Act came into force on a date of fixed by proclamation.

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<sup>99</sup> *Ibid.*

<sup>100</sup> Second Reading, August 29, *supra* note 90 at 4685 (Kelvin Goertzen).

<sup>101</sup> Third Reading, *supra* note 8 at 5144 (Hon Steve Ashton); Josh Wingrove, "Gay Teen Holds the Line for Manitoba Bullying Bill", *The Globe and Mail*, (17 March 2013) online: Globe and Mail <<http://www.theglobeandmail.com/news/national/gay-teen-holds-the-line-for-manitoba-bullying-bill/article9863497/>>.

<sup>102</sup> Third Reading, *supra* note 8 at 5109, 5116-5117, 5118, 5121-5122, 5124.

<sup>103</sup> *Ibid* at 5152 (Jon Gerrard).

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid* at 5166.

## F. Recommendations

Some groups felt that Bill 18 did not go far enough to protect students. The Manitoba School Boards Association<sup>106</sup> and the Manitoba Teachers Society<sup>107</sup> suggested that there were concerns over student “outing themselves” by the act of requesting a GSA and that:

Some LGBTQ students come from families that are, frankly, unsupportive of their sexual orientation or identity, and often these students will not come out unless they feel their school is a safe environment or, sadly, long after they've left their home communities for safer places.<sup>108</sup>

In their eyes, to make the legislation more effective, they would like to see the onus of creating each GSA to fall directly on the school. In the same light, the Manitoba Superintendents Association wanted to see student vulnerability addressed by explicitly stating that both students and staff could initiate GSAs in schools.<sup>109</sup> And lastly, the WSD recommended that creation of GSAs should be protected in the legislation as being confidential, where and when necessary.<sup>110</sup>

The Bill does not prevent from preaching religious beliefs in schools and churches, however, if students “still wish to have a Gay-Straight Alliance then they need and have a right to a safe place where they can deal with those questions”.<sup>111</sup> School boards are not required to promote student groups that are in contradiction of their beliefs, but they must accommodate those students that want to “lead activities and organizations that promote gender equity, anti-racism, respect for the disabled and/or respect for people of all sexual orientations and gender identities”.<sup>112</sup> Attendance at GSA meetings would not be mandatory, and therefore only those students interested in attending will participate. For those students who do not want to participate in GSAs,

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<sup>106</sup> Manitoba School Boards Association, Presentation on Bill 18, The Public Schools Amendment Act (Safe and Inclusive Schools), 2012 at 1, online: <<http://www.mbschoolboards.ca/documents/Bill%2018%20Presentation.pdf>>; SCHR, 3 September 2013, *supra* note 21 at 17 (Robert Rivard, Manitoba School Boards Association).

<sup>107</sup> SCHR, 3 September 2013, *supra* note 21 at 62 (Paul Olson, Manitoba Teachers' Society).

<sup>108</sup> *Ibid* at 62 (Paul Olson, Manitoba Teachers' Society).

<sup>109</sup> SCHR, 5 September 2013, *supra* note 80 at 142 (Reg Klassen, Manitoba Association of School Superintendents).

<sup>110</sup> SCHR, 3 September 2013, *supra* note 21 at 51 (Rita Hildahl, Winnipeg School Division).

<sup>111</sup> *Ibid* at 48 (Ken DeLisle, Private Citizen).

<sup>112</sup> Second Reading, *supra* note 88 (Nancy Allan).

their existence will impact them minimally. Ultimately the legislation does not require everyone to be accepting or involved, but rather, the expectation is tolerance.

## V. THE NDP'S 'WEDGE' ISSUE

Commentators contend the NDP government's decision to enact anti-bullying legislation had more to do with political posturing and less with creating good public policy.<sup>113</sup> It is common for American political strategists to exploit 'wedge' social issues such as same-sex marriage or abortion to garner social conservative support of Republican platforms.<sup>114</sup> Often voters will be inadvertently supporting policies that might threaten their own economic and political interests.<sup>115</sup> In the opinion of these authors, the NDP government attempted a variation of the wedge strategy by using progressive social issues to persuade moderate urban residents to support NDP candidates to the detriment of their economic self-interest.

This tactic is exemplified in elements of this bill as simple as its media handle. For instance, Bill 18's official name is *The Public Schools Amendment Act (Safe and Inclusive Schools)*, but has become known as "the anti-bullying bill". It is likely the NDP strategy was to align their party to sensitive issues that Manitobans care about and create a 'wedge' between themselves and their conservative rivals.<sup>116</sup> Strong political stances on progressive social issues will likely gain and retain NDP supporters and simultaneously deter Progressive Conservative swing voters who consider increased anti-bullying measures (including anti-bullying measures protecting sexual orientation) to be good public policy.

The inclusion of the GSAs in Bill 18 was a clear effort to provoke the Progressive Conservatives into taking an extreme position by triggering a strong reaction in their support base. This extreme

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<sup>113</sup> See generally: Holly Brasher, "Capitalizing on Contention: Issue Agendas in US Senate Campaigns" (2010) 20:4 Political Communication 453; D Sunshine Hillygus & Todd G. Shields, *The Persuadable Voter: Wedge Issues in Presidential Campaigns* (New Jersey: Princeton University Press, 2009).

<sup>114</sup> Deveryn Ross, "The 2015 Election Has Already Begun", *Winnipeg Free Press* (21 March, 2013), Winnipeg Free Press, online: Winnipeg Free Press <[www.winnipegfreepress.com/opinion/analysis/the-2015-election-has-already-begun-199303931.html](http://www.winnipegfreepress.com/opinion/analysis/the-2015-election-has-already-begun-199303931.html)>.

<sup>115</sup> *Ibid.*

<sup>116</sup> Broadbeck, *supra* note 113.

position would offend moderate Manitobans, particularly in the urban centre of Winnipeg.<sup>117</sup> Though Bill 18 could accomplish its anti-bullying objectives “without specific reference to Gay-Straight Alliances, the phrase is included for tactical reasons”.<sup>118</sup> Curtis Brown of Probe Research suggests Bill 18 appears to be a political trap for the Opposition, “[i]t catches them between their base and their need to appear moderate to voters in suburban Winnipeg—which they have largely failed to do in the past three elections.”<sup>119</sup> Whether or not the Progressive Conservatives and people of faith like it, “much of society has moved on from these debates and has become progressively in favour of protecting the rights of gay, lesbian, and transgendered people”.<sup>120</sup>

Kelly McCrae, former Progressive Conservative caucus staffer suggests the strong opposition to the bill is advantageous to the NDP, “[t]he more battles that are fought over social issues, issues which the NDP clearly think they’re on the right side of, the less time is spent focusing on the government’s deficits and tax increases.”<sup>121</sup> The argument is based on the notion that the government would much rather have public attention drawn towards Progressive Conservative opposition to gay rights than focus on a lackluster fiscal policy.<sup>122</sup> Furthermore, the NDP will try to promulgate their message that the Tories are generally against all anti-bullying measures in schools.<sup>123</sup>

Minister of Education, Nancy Allan must have been well aware of the prospective conflict between the Progressive Conservatives and the NDP on this legislation. In reaction to the criticism, the government has shown it is absolutely unwilling to compromise on the bill. The NDP inflexibility bodes well for tactical positioning as the NDP appeared to the public to be unwavering on the issue of bullying. In regard to the rigidity of NDP’s stance on the bill Mr. Goertzen shed light on the materiality of the wedge issue, “as legislators, we can have

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<sup>117</sup> Ross, *supra* note 114.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> Kelly J McCrae, “Bill 18: Manitoba Tories championing old ideas while world moves on”, *Spectator Tribune* (15 March, 2013) online: *Spectator Tribune* <[spectatortribune.com/article/bill-18-manitoba-tories-championing-old-ideas-while-world-moves-on](http://spectatortribune.com/article/bill-18-manitoba-tories-championing-old-ideas-while-world-moves-on)>.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> Broadbent, *supra* note 113.

this division between them and us, and the minister can try to play her politics of division, but at the end of the day ... she knows they [students] are still going to be bullied".<sup>124</sup> NDP government believed its position is in line with public opinion on the issue, as evidenced by its disregard of Progressive Conservative opposition.<sup>125</sup>

If the Progressive Conservative Party desires to appeal to a broader base, particularly within Winnipeg, it should consider re-evaluating how strongly it stands on these types of social issues. However, critics who claim this bill is about politics and not anti-bullying in schools suggest "it's a shame government would use such a sensitive and serious issue purely for political gain".<sup>126</sup>

## VI. PROGRESSIVE CONSERVATIVE STRATEGY

As Bill 18 moved through the Legislative Assembly, the Progressive Conservative party notably altered their criticism of the Bill. This section discusses why the Progressive Conservatives changed direction away from a faith-based attack and towards a more electorally neutral challenge. Despite winning 43% of the popular vote in the 2011 Provincial Election, the Progressive Conservatives did not gain any seats, and had a very poor showing within Winnipeg.<sup>127</sup> In order to have an opportunity in the 2015 election to form government, the Progressive Conservatives need to improve their standing in Winnipeg and not expend political capital on what appeared to be a heteronormative agenda.

In a province such as Manitoba, where seats are concentrated very strongly in one civic area, namely Winnipeg, it is extremely important to not politically alienate that voting base with hard lines on issues contrary to public sentiment. It would have been simple for the Progressive Conservatives to trumpet an anti-GSA agenda throughout the Bill 18 debates. However, the Progressive Conservatives would have been wasting political resources on an issue that goes against the opinions of a majority of Manitobans. This is why despite such strong opposition to Bill 18 from their core constituents for reasons

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<sup>124</sup> Third Reading, *supra* note 8 at 5158 (Kelvin Goertzen).

<sup>125</sup> McCrae, *supra* note 120.

<sup>126</sup> Broadbent, *supra* note 113

<sup>127</sup> Elections Manitoba, News Release, "Summary of Results, Manitoba's Fortieth General Election" (2011) online: Elections Manitoba <[http://www.electionsmanitoba.ca/downloads/PDF\\_Summary\\_GE2011.pdf](http://www.electionsmanitoba.ca/downloads/PDF_Summary_GE2011.pdf)>.

conceivably connected to GSAs, the Progressive Conservatives were forced to change their attack strategy against Bill 18. A religious response to an issue like Bill 18 might retain loyal Progressive Conservatives supporters and mobilize the existing voter base, but will do nothing to convince and re-claim NDP or Liberal 'Fortress Winnipeg' voters.

According to Dr. Jared Wesley, Manitoba politics has long been characterized by moderation.<sup>128</sup> This notion of moderation is crucial when attempting to understand the Progressive Conservatives shift away from an anti-GSA focus on Bill 18 to a more broad based attack. A plausible explanation for abandoning their original ideologically driven tactic regarding Bill 18 was the concern that campaigning against GSAs might negatively impact voters and the Progressive Conservative Party itself chanced appearing as a homophobic political party.

The Progressive Conservatives began their initial attack regarding Bill 18 on religious grounds, specifically, the mandating of Gay-Straight Alliances. Their tactics soon changed when they realized that this type of argument would not gain favour with voters outside of their core base. The Progressive Conservatives began to focus more on the possible overbreadth of the legislation and its definition of bullying, "[t]hey were concerned, obviously, that it is a broad definition, that it could include hurt feelings, one-time hurt feelings".<sup>129</sup> The new attack focused on how Bill 18 might impact a range of unintended activities such as a single mistake, or a lapse of judgment which could be interpreted as bullying under the legislation.

During the Second and Third Readings Mr. Goertzen spoke not against the GSA aspect of Bill 18, but the scope of the definition of bullying in Bill 18. Mr. Goertzen brought forward an amendment narrowing the definition of bullying.<sup>130</sup> The Progressive Conservatives eliminated specific mention of GSAs in their amendment and inserted a religious exception, but during the debate this was not the focus. Their focus remained on creating a manageable definition of bullying; a definition that would be specific enough to ensure educators understood what constitutes bullying.

Mr. Cameron Friesen, Member of the Legislative Assembly (MLA) for Morden Winkler also spoke up in favor of the amendment put

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<sup>128</sup> Jared Wesley, *Code Politic: Campaigns and Cultures on the Canadian Prairies* (Vancouver: UBC Press, 2011) at 175.

<sup>129</sup> Third Reading, *supra* note 8 at 5109 (Kelvin Goertzen).

<sup>130</sup> *Ibid* at 5108.



forward by the Progressive Conservatives, and against the original definition of bullying in Bill 18.<sup>131</sup> Mr. Friesen's time was spent primarily talking about how teachers may be hesitant to get involved with extracurricular activities because under the definition of bullying in Bill 18 (behavior that causes humiliation) cutting a student from an extracurricular could cause humiliation.

The constant theme for the Progressive Conservatives was protecting children and empowering teachers. No parent wants to see their child suspended for calling someone stupid; the Progressive Conservatives were exploiting this potential concern of parents and shifting away from the anti-GSA aspect of Bill 18.<sup>132</sup> No teacher wants to be at the forefront of media frenzy because they cut a student from the volleyball team.<sup>133</sup> By promoting themselves as the protectors of children and teachers the Progressive Conservatives would be able to reach a much wider range of voters than if they had continued focus on the GSA element of Bill 18.

### ***Cyberbullying Prevention Act***

The *Cyberbullying Prevention Act*<sup>134</sup> was the Progressive Conservative Party's answer to *The Public School Amendment Act (Safe and Inclusive Schools)*. While Bill 18 was designed to fit within the structure of the *Public Schools Act* by following the same enforcement and punishment procedures, the *Cyberbullying Prevention Act* created a new legal mechanism outside the bounds *The Public School Act*. The NDP interpreted the *Cyberbullying Prevention Act* as another Progressive Conservative tool to stifle the progress of Bill 18, which had been tabled for eight months due to opposition stalling.<sup>135</sup> The clear intention behind Bill 214 was to offer an alternative to Bill 18 that would be more palpable to Progressive Conservative supporters and moderate urban voters.

Too often in cases of cyberbullying, including those cases that result in the loss of life, a parent or guardian is aware that their child is

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<sup>131</sup> *Ibid* at 5110 (Cameron Friesen).

<sup>132</sup> *Ibid* at 5111.

<sup>133</sup> *Ibid*.

<sup>134</sup> Bill 214–*Cyberbullying Prevention Act*, 2nd Sess, 40th Leg, Manitoba, 2013.

<sup>135</sup> Manitoba, Legislative Assembly, Official Debates and Proceedings, 40th Leg, 2nd Sess, Vol 73A (11 July 2013) at 3360 (Hon Jennifer Howard) [Second Reading, Bill 214].

engaging in cyberbullying.<sup>136</sup> The *Cyberbullying Prevention Act* created a special civil tort of cyberbullying.<sup>137</sup> The legislation also places an onus on parents to act when they know that a child in their care is engaged in cyberbullying.<sup>138</sup> Under the legislation, parents aware that cyberbullying activity is taking place and fail to act can be found jointly and severally liable for damages to the plaintiff.<sup>139</sup> Furthermore, the legislation considers the parent to be cyberbullying if they are aware of activity reasonably expected to cause harm and takes no positive action to prevent it. The parent can be relieved of liability if deemed to be exercising ‘reasonable supervision’ over the defendant at the time of the harmful activity and made reasonable efforts to prevent or discourage the defendant from engaging in the activity.<sup>140</sup> Furthermore, Bill 214 has outlined a set of factors for consideration in meeting the ‘reasonable supervision’ standard.<sup>141</sup>

The *Cyberbullying Prevention Act* would allow youth as young as 16 to apply for a protection order and those younger than 16 could apply with the assistance of a parent or guardian.<sup>142</sup> Similar to conventional protection orders in Manitoba, evidence must be adduced in support of an application for a protection order and must be given under oath.<sup>143</sup> Under the legislation, a court may grant an order prohibiting the individual deemed to be cyberbullying from access to electronics through police power to remove devices attached to internet service providers.<sup>144</sup> Currently in Manitoba, protection orders are granted for

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<sup>136</sup> *Ibid* at 3358 (Kelvin Goertzen).

<sup>137</sup> Bill 214, *supra* note 134, cls 19-20.

<sup>138</sup> *Ibid*, cls 20(3-4).

<sup>139</sup> *Ibid*.

<sup>140</sup> *Ibid*, cl 20 (4).

<sup>141</sup> *Ibid*, in considering whether supervisor was reasonable the court was to consider: the age of the defendant; the prior conduct of the defendant; the physical and mental capacity of the defendant; any psychological or other medical disorders of the defendant; whether the defendant used an electronic device for the activity that was supplied by the parent; any conditions imposed by the parent on the use by the defendant of an electronic device; whether the defendant was under the direct supervision of the parent when the defendant engaged in the activity etc.

<sup>142</sup> *Ibid*, cl 8 (1)(c) allows a judge to ban a kid from “directly or indirectly communicating about the subject or a person.”

<sup>143</sup> *Ibid*, cl 4 (1).

<sup>144</sup> *Ibid*, cl 8 (1)(d) allows a judge to forbid a student from using cellphones or the Internet, for any purpose, at all. Also, cl 8 (1)(e) allows the seizure of any cellphone or computer — the child’s or his parents’ or even the school’s.

domestic violence and stalking,<sup>145</sup> and recently, human trafficking.<sup>146</sup> Granting protection orders against cyberbullies is a novel addition to the current protection order regime. It is unclear whether these protection orders would be considered true 'protection orders' or 'prevention orders' as they have been referred to in Nova Scotia.<sup>147</sup>

In short, the aim of *The Cyberbullying Prevention Act* is empowering victims of cyberbullying by creating a process to file protection orders, providing police the tools to take action by removing electronic devices and ensuring that there is parental responsibility by the ability to seek damages in civil court. These are fundamental elements of Bill 214 absent from Bill 18.

Evident in the existence of the Nova Scotia legislation, it was possible the competing parties could have worked together to develop a more comprehensive bill. However, there are foundational incongruences that prevent this alignment. The bills are fundamentally different, targeting different people and different behavior. Bill 18 is directed at bullying within schools while Bill 214 is aimed at creating legal awareness of bullying and fear of legal reprisal for cyberbullies and the public at large.

Under Bill 18, aside from the increased duty to report cyberbullying, the *Public Schools Act* would be amended, granting powers to apply disciplinary consequences to bullying outside school hours and off school property. This may be useful for when schoolyard bullying is transformed into online bullying, but does not protect against malicious strangers and online harassment. The *Cyberbullying Prevention Act* is not designed to be integrated within the school system and would have targeted a broader range of online activity creating legal protection for both adults and young Manitobans from online harassment.

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<sup>145</sup> Manitoba, Manitoba Justice, "Legal Options for Protection from Domestic Violence and Stalking – Protection Orders" online: Manitoba Justice <[http://www.gov.mb.ca/justice/domestic/pdf/protection\\_orders.pdf](http://www.gov.mb.ca/justice/domestic/pdf/protection_orders.pdf)>.

<sup>146</sup> *The Child Sexual Exploitation and Human Trafficking Act*, SM 2012, 19, ss 2-17, CCSM c 94.

<sup>147</sup> "Nova Scotia court issues first cyberbullying prevention order", *The Globe and Mail* (20 February 2014), online: The Globe and Mail <<http://www.theglobeandmail.com/news/national/nova-scotia-court-issues-first-cyberbullying-prevention-order/article16798864/>>.

## VII. THE DELIBERATIVE AND REFINEMENT PROCESSES

During the refinement process elected officials consider comments from members of the public brought forward at the committee stage and introduce new amendments. After considering comments of members of the public and elected officials, amendments can shape the impact of the legislation on constituents by adding balance and clarity. The deliberative process is intended to constructively enhance the legislation by including the public to create a historical record of public reaction to the proposed legislation. Not only does the process take a snapshot of the community's thought on the issues, but the record itself serves as a resource to enlighten decision makers for refinements or future amendments. Records of public presentations and MLA's comments in the Legislature are the basis on which an overarching understanding of government and public opinion is formed. After forty hours of public presentations, there was no shortage of resources to garner a fundamental understanding of government and public opinion on Bill 18.

In this instance, the functional elements of the deliberative process granted the public the cathartic and therapeutic effects of speaking to legislation that they felt was important. The cathartic effects include the ability for presenters to communicate their strongly held views in a public forum. The therapeutic nature of public presentations allow citizens to recognize where others are coming from. In some cases, the public comments produce a more refined product and augment the legislation before the bill is passed. However, the refinement process appeared practically unheeded as the NDP did not accede to any amendment. It is uncertain whether the proposed amendments truly fell on deaf ears or the rejections were a product of political posturing. Some amendments which were rejected may become new bills in the future, but it remains unknown whether accepting one or more of the proposed amendments could have produced a superior final product.

It is difficult to theorize why the NDP refused to entertain any amendment regarding Bill 18. It is possible the NDP believed Bill 18 was a well drafted policy that met their goals, or perhaps the NDP might have wanted to paint the Progressive Conservatives as a party stuck in the past—one that did not support gay rights. Critically, considering the disparate opinions regarding Bill 18, in both the Legislature and public committee hearings, it might have been constructive for the NDP to include at least one amendment to demonstrate they were listening to the people they represent.

Nonetheless, there was a call from the opposition and the public to make the legislation stronger and to make it less constrictive, however the NDP did not present or approve a single amendment to the legislation.

## VIII. CONCLUSION

Both parties recognized the reality that urban Manitobans supported the bill en masse. The NDP attempted to use this fact to their advantage by emphasizing the importance of the GSA provision and refusing amendments on the basis the policy might appear watered down. The Progressive Conservative's electoral base in rural communities largely spoke out about Bill 18's GSA provision, but the party shied away from the controversy once it was apparent that their ability to gain new voters was jeopardized. It would appear that both parties structured their response to Bill 18 in order to attract urban votes in Winnipeg with an eye to the electoral reality that whoever wins Winnipeg will likely form government.

The debate surrounding Bill 18 is one of competing rights and since the court has ruled there is no hierarchy of rights, it can be very difficult to determine which side is correct. This paper examined the assent of Bill 18 through the First, Second and Third Readings and chronicled the refinement and deliberative processes through Committee Hearings and proposed amendments. After assessing comparative legislation there is no doubt that bullying generally, and particularly the bullying of gay students is a prevalent and contemporary issue in legislative spheres across North America. Bill 18 was also considered in its political context as a wedge issue between the NDP and Progressive Conservative parties. Although no proposed amendments to Bill 18 were accepted in Legislature at the time, the opportunity for the public and Members of the Legislative Assembly alike to support as well as share concerns regarding the proposed law is invaluable. The Manitoba Legislature will likely see further legislation related to bullying with regard to concerns evoked during the legislative process of Bill 18. Although it remains the status quo, it is doubtful that Bill 18 will be the final word on bullying in the Manitoba Legislature.

