

# The Queer Child Deserves Protection: Bill 18 and the Justifiable Infringement of Denominational Schools' Freedom of Religion

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## I. ABSTRACT

The Province of Manitoba's *The Public Schools Amendment Act (Safe and Inclusive Schools)*<sup>1</sup>, also known as Bill 18, obligates all Manitoban school boards to create anti-bullying policies that incorporate principles of human rights. This includes, most contentiously, the support of Gay-Straight Alliances (GSAs), which are shown to improve the well-being of lesbian, gay, and bisexual (LGB) children. The language used in the Act suggests the obligation extends to private schools, including denominational schools that are run privately in the province. Despite the defensible objective of curtailing bullying of LGB children, if the means chosen come at a cost to religious freedom, it might be that Bill 18 is unconstitutional. It becomes imperative to inquire into the justification of Bill 18 and to determine whether it strikes the right balance in the context

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**Author's note:** It is my hope that what I have set out above shows an analysis sensitive to the importance of religious, group, and LGB rights. I have decided to focus specifically on sexual orientation and not conflate the experiences of transgender youth with those of LGB youth. While there is significant overlap in the experience of oppression and marginalization, and many of the comments made here could be applied to the experience of transgender youth as well, gender identity and sexual orientation should be analyzed separately, as each is categorically distinct.

<sup>1</sup> Bill 18, *The Public Schools Amendment Act (Safe and Inclusive Schools)*, 2<sup>nd</sup> Sess, 40<sup>th</sup> Leg, Manitoba, 2012 [Bill 18].

of the competing rights. The resulting analysis must be cognizant of the context and the fact that when rights collide often one or both rights must be limited to allow for their coexistence. The author suggests the relevant factors are: (1) a legal framework that encourages plural values; (2) group right to collective self-determination; and (3) the opposing rights and interests of LGB children. This contextual analysis may assist us as we balance rights under s. 1 of the *Canadian Charter of Rights and Freedoms*<sup>2</sup>.

## II. INTRODUCTION

Bullying is damaging to students, especially if the students identify as or are perceived to be lesbian, gay, or bisexual (LGB).<sup>3</sup> In particular, LGB students have a greater likelihood of being bullied in rural areas, where traditional, religious values tend to flourish.<sup>4</sup> The mental anguish of being bullied is correlated to significant costs to functioning, such as academic performance, psychological integrity, and health.<sup>5</sup> Moreover, due to the continued prevalence of prejudice against non-traditional forms of sexuality, family support can often be diminished, further exacerbating the distress. Despite the severity of symptoms manifest from the experience of bullying, schools still seem inadequate at addressing the issue, with a greater proportion of the activities extending beyond the eyes of teachers. With the proliferation of Internet use among children, especially in the form of Twitter, Facebook, Instagram, and Snapchat, there is an increase in the range of potential instruments that can be used to bully. Moreover, the ubiquitous nature of cyberbullying means there is often limited

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<sup>2</sup> *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [Charter].

<sup>3</sup> Ian Rivers & Nathalie Noret, "Well-Being Among Same-Sex- and Opposite-Sex- Attracted Youth At School" (2008) 37:2 *School Psych Rev* 174; Susan M Swearer et al, "'You're So Gay!': Do Different Forms of Bullying Matter for Adolescent Males?" (2008) 37:2 *School Psych Rev* 160.

<sup>4</sup> Holly N Bishop & Heather Casida, "Preventing Bullying and Harassment of Sexual Minority Students in Schools" (2011) 84:4 *The Clearing House* 134.

<sup>5</sup> Paul Gibson, "Gay male and lesbian youth suicide" in Gary Remafedi, ed, *Death by Denial: Studies of Suicide in Gay and Lesbian Teenagers* (Boston: Alyson, 1994) 15; I Ortiz-Hernandez, B Gomez Tello, & J Valdes, "The association of sexual orientation with self-rated health, and cigarette and alcohol use in Mexican adolescents and youths" (2009) 69:1 *Soc Sci Med* 85; C Davis, "School's out for bullying" (2006) 20:21 *Nurs Stand* 24.

possibility for escape. The painful result has been documented in several highly public suicides, highlighting the human cost of this modern form of bullying.

In September 2013, Her Majesty proclaimed the Province of Manitoba's *The Public Schools Amendment Act (Safe and Inclusive Schools)*<sup>6</sup>, often referred to as Bill 18. The Bill was significant in that it defined the act of bullying, including cyberbullying, and required policies that would reduce it in the context of Manitoban schools.<sup>7</sup> This included provisions detailing the requirements of a "respect for human diversity" policy<sup>8</sup>, which obligated every school board in Manitoba to create and enforce policy that concerned the promotion of an inclusive learning environment in which persons were to be accepted and respected despite difference.<sup>9</sup> These policies were to be drafted with regard to principles of human rights found within *The Human Rights Code*,<sup>10</sup> and included training for teachers and other staff to promote respect for human diversity in the classroom. Lastly, and most contentiously, it required accommodation of students who desired to assemble in groups and lead activities dedicated to promoting: "gender equity; antiracism; the awareness and understanding of, and respect for, people who are disabled by barriers; or the awareness and understanding of, and respect for, people of all sexual orientations and gender identities".<sup>11</sup> This included accommodating the students' use of any group name that was consistent with the objective of promoting inclusivity among all pupils, such as Gay-Straight Alliances (GSAs).<sup>12</sup>

Provisions of *The Public Schools Act* generally do not apply to private schools;<sup>13</sup> however, some amendments in Bill 18 will apply to a portion of them. Section 41 of the *Act* requires *every* school board in the province to carry out its human rights obligations.<sup>14</sup> Some private schools, namely Funded Independent Schools, have school boards to qualify for government support, which means these provisions ostensibly apply to

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<sup>6</sup> Bill 18, *supra* note 1.

<sup>7</sup> *Ibid* at s 1.2.

<sup>8</sup> *Ibid* at s 41(1.6).

<sup>9</sup> *Ibid*.

<sup>10</sup> *The Human Rights Code*, CCSM, c H175.

<sup>11</sup> Bill 18, *supra* note 1 at s 41(1.8).

<sup>12</sup> *Ibid* at s 41(1.7)(b).

<sup>13</sup> *Ibid* at s 1.

<sup>14</sup> *Ibid* at s 41.

those school boards, as well. There are sixty-three Funded Independent Schools in Manitoba, nearly all of which are based in some religious denomination.<sup>15</sup> Therefore, not only does the Act ostensibly require Funded Independent Schools to implement human rights policies within its schools, including GSAs, it also ostensibly imposes a burden on the religious freedom of those participating in these Funded Independent Schools.

While a person might be inclined to think this is good for it advances the interests of human rights, especially in extending protection to homosexuals who have historically faced prejudice and discrimination, it is important to remember that the religious right is a fundamental right constitutionally protected by the *Charter*.<sup>16</sup> The Supreme Court of Canada has stated that the religious right is engaged whenever:

...an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.<sup>17</sup>

As Donn Short documented, the perceived burden Bill 18 would have on denominational schools sparked an incandescing debate among Manitobans.<sup>18</sup> Many were worried about the requirement to accommodate LGB student groups, viewing it as an affront to religious freedom. This is

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<sup>15</sup> “Schools in Manitoba: Funded Independent Schools”, online: Government of Manitoba <<http://www.edu.gov.mb.ca/k12/schools/ind/funded/>>; Author’s note: Some examples in Winnipeg, the provincial capital of Manitoba, include the St. Mary’s Academy, St. Paul’s High School, and the Gray Academy of Jewish Education. There are also forty-six Non-Funded Independent schools. Similarly, most of these schools have a religious culture. The distinction between Funded and Non-Funded Independent Schools is that “[a] Funded Independent School must hire Manitoba certified teachers, implement the provincially mandated curriculum, and meet other provincial requirements. A Non-Funded Independent School is not required to meet these conditions.” The requirements to obtain funding are set out by s. 60(5) of *The Public Schools Act*, which shows that these provincial requirements are administrative or curriculum based, including the legal incorporation of a board of directors for the school.

<sup>16</sup> *Charter*, *supra* note 2 at s 2(a).

<sup>17</sup> *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 46 [*Syndicat Northcrest*].

<sup>18</sup> Donn Short, “Bound for Glory: Bill 18, The Public Schools Amendment Act (Safe and Inclusive Schools)” (2013) 36:2 Man LJ 115.

summarized well by Evangelical Fellowship of Canada's (EFC) analysis of Bill 18 issued on May 1, 2013. Portions of that analysis are provided below:

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."

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 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 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").<sup>19</sup>

To an extent, this is true. It places a burden on the religious freedom of stakeholders in denominational schools. It requires accommodation of sexual minorities at academic institutions that are privately operated as centres of religious affiliation and education. If pluralism is in fact a governing moral ideal, defended by government policy and jurisprudence on judicial interpretation of the Canadian Constitution, at first blush it seems unjustifiable to impose obligations on denominational schools to support interests that are in contrast to their religious beliefs. Additionally, Canadian jurisprudence shows a widespread recognition of the rights of groups to internally regulate to promote collective interests in group self-determination. However, as Short explains, the position of EFC and others against Bill 18 has largely been insensitive to the context in

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<sup>19</sup> *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) cited in *ibid* at 124-125.

which equality and religious rights are at conflict and suggests, erroneously, that rights are absolute.<sup>20</sup>

Consideration of other rights is critical. As mentioned above, the right to religious freedom protects those beliefs or practices that are sincere and have a nexus with religion. This protection insulates the person against burdens imposed on that belief or practice that are more than trivial or non-insubstantial.<sup>21</sup> Examining the context determines the triviality of the burden and it is clear that intruding upon the religious upbringing within denominational schools can potentially cause a burden that is more than trivial.<sup>22</sup> While this protection has been given a broad interpretation by the courts, the Supreme Court of Canada circumscribes the limits of the right in relation to other rights that are in conflict:

Freedom of religion...reflects a broad and expansive approach to religious freedom... and should not be prematurely narrowly construed. However, our jurisprudence does not allow individuals to do absolutely anything in the name of that freedom. Even if individuals demonstrate that they sincerely believe in the religious essence of an action, for example, that a particular practice will subjectively engender a genuine connection with the divine or with the subject or object of their faith, and even if they successfully demonstrate non-trivial or non-insubstantial interference with that practice, they will still have to consider how

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<sup>20</sup> *Supra* note 18.

<sup>21</sup> *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at p 759; affirmed in *Syndicat Northcrest*, *supra* note 17 at para 58.

<sup>22</sup> *Syndicat Northcrest*, *supra* note 17 at para 60. For example, in para 75 of *Syndicat Northcrest*, the condominium bylaw was held to burden the religious practice of the Jewish property owners in a way that subjectively distressed them, “thus impermissibly detracting from the joyous celebration of [Succot].” This constituted a more than trivial deprivation. If the standard were objective, the court would not have phrased its application of the triviality analysis in the following manner (paras 75-77):

If, however, they sincerely believed that they must build a succah of their own because the alternatives, of either imposing on friends and family or celebrating in a communal succah as proposed by the respondent, will subjectively lead to extreme distress... then they must prove that these alternatives would result in more than trivial or insubstantial interferences and non-trivial distress...

In my opinion, that has been successfully proven. At trial, the appellants testified as to the substantially distressing nature of the burden imposed upon them by the prohibition and the available alternatives...

Such distress is even objectively substantial and would undoubtedly, as the appellants assert, detract from the joyous celebration of the holiday and thus constitute a non-trivial interference with and an infringement of the rights to religious freedom. [Emphasis added]

the exercise of their right impacts upon the rights of others in the context of the competing rights of private individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular Charter right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.<sup>23</sup>

The opposing rights are considered while determining whether the infringement is justified pursuant to s. 1 of the *Charter*.<sup>24</sup> Section 1 allows the government or government actor to violate a *Charter*-protected right where: (1) the objective of the legislation relates to societal concerns that are both pressing and substantial; and (2) the means are reasonable and demonstrably justified, assessing whether the law is rationally connected to its objective, impairs the right in question as minimally as possible, and the salutary effects outweigh deleterious effects.<sup>25</sup> For example, in *Syndicat Northcrest* the Supreme Court weighed the religious practice of Jewish owners of a unit in a condominium complex to erect a succah on their balcony for the Jewish holiday of Succot against the property interest of co-owners to peacefully enjoy a common aesthetic for the whole complex.<sup>26</sup>

While the s. 1 *Oakes* test is not merely concerned with competing rights, competing rights are nonetheless considered at the third step of the proportionality test.<sup>27</sup> Justice Bastarache explains the purpose of the third step as:

... [Performing] a fundamentally distinct role. ... The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed. Although the minimal impairment stage of the proportionality test necessarily takes into account the extent to which a *Charter* value is infringed, the ultimate standard is whether the *Charter* right is impaired as little as possible given the validity of the legislative purpose. The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are

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<sup>23</sup> *Ibid* at para 62.

<sup>24</sup> *Ibid* at paras 62-63.

<sup>25</sup> *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].

<sup>26</sup> *Syndicat Northcrest*, *supra* note 17 at paras 82-83.

<sup>27</sup> *Ibid*. Also see: The Honourable Justice Frank Iacobucci, "Reconciling Rights' The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) 20:2 SCLR 137.

proportional to its deleterious effects as measured by the values underlying the Charter.<sup>28</sup> [Emphasis in original]

The third step involves, according to the Supreme Court in *Hutterian Brethren of Wilson Colony v Alberta*, an analysis of the salutary and deleterious effects associated with the legislative action.<sup>29</sup> The question to be resolved is whether the “deleterious effects of a measure on individuals or groups’ outweigh the public benefit that may be gained from the measure.”<sup>30</sup> The consideration of salutary and deleterious effects can include the competing rights at stake. An example is *R v. Dagenais*, where the court considered the competing rights during the proportionality test.<sup>31</sup> This included the constitutional rights to a fair trial and freedom of expression that were at conflict due to a publication ban during a criminal trial:

Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.<sup>32</sup>

With greater relevance to the issue of religious freedom, the majority in *B. (R.) v. Children’s Aid Society of Metropolitan Toronto* balanced the right of the child to life, liberty, and security of the person and the parents’ religious freedom under the proportionality test.<sup>33</sup>

Therefore, the question that must be asked is whether: (1) The salutary effects of Bill 18 on the interests of the LGB child, including the child’s right to equal treatment and right to life, liberty, and security of the person arising due to his or her sexual minority status (2) outweigh the deleterious effects on the religious freedom of stakeholders in the denominational school to assemble and practice their religious beliefs. The objective of this manuscript is to examine this critical question.

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<sup>28</sup> *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at para 125 [*Thompson Newspapers*].

<sup>29</sup> *Hutterian Brethren of Wilson Colony v Alberta*, 2009 SCC 37, [2009] 2 SCR 567 [*Hutterian*].

<sup>30</sup> *Ibid* at para 78.

<sup>31</sup> *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835 [*Dagenais*].

<sup>32</sup> *Ibid* at 878.

<sup>33</sup> *B (R) v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 [*B.(R.)*].



I assert that the right balance is sensitive to the context in which the rights collide and the nature of persons whose rights are potentially affected. To do so, I first set out the legal tenets of our multicultural society, which frames our analysis. Secondly, I argue that the legal framework has interpreted multiculturalism to mean that cultural groups have the right to self-determination, even if this means permitting discriminatory practices to persist that show preference to members of that cultural group. Thirdly, I argue that the contest of rights affects the rights of children, which critically informs our contextual analysis of competing rights in the case of Bill 18. In light of these propositions, I conclude the burden imposed by Bill 18 is far outweighed by the good.

### III. MULTICULTURALISM IN THE CHARTER

Multiculturalism sets out to create an institutional framework that provides for a pluralistic society that accommodates the interests and needs of the panoply of cultures that exist in parallel, including the corresponding beliefs, practices, and values.<sup>34</sup> As John W. Berry explains: “All groups in such a conception of a larger society are ethnocultural groups (rather than ‘minorities’), who possess cultures and who have equal cultural and other rights, regardless of their size or power. In such complex plural societies, there is no assumption that some groups should assimilate or become absorbed into another group.” Berry notes that this multicultural model was first implemented in Canada in 1971 to “break down discriminatory attitudes and cultural jealousies”<sup>35</sup> by “[enhancing] mutual acceptance among all cultural groups in order to improve intercultural relations.”<sup>36</sup> This was accomplished in a programme with three components: (1) the provision of support to all cultural groups to maintain distinct cultural identities; (2) the promotion of cultural expression between ethnocultural groups and removal of barriers that prevent equal participation in the larger society; and (3) learning a common language to facilitate participation among all groups, but which

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<sup>34</sup> John W. Berry, “Intercultural Relations in Plural Societies: Research Derived from Canadian Multiculturalism Policy” (2011) 43 *Can Ethnic Stud* 5 at 7.

<sup>35</sup> *Ibid* at 7.

<sup>36</sup> *Ibid* at 7.

does not displace language with cultural heritage.<sup>37</sup> Put in other words, the basis underlying this policy was “that only when people are secure in their identities will they be in a position to accept those who differ from them; conversely, when people feel threatened, they will develop prejudice and engage in discrimination.”<sup>38</sup>

The multicultural model of Canadian society is constitutionally recognized under s. 27 of the *Charter*, which declares that “[the] Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”<sup>39</sup> Chief Justice Dickson of the Supreme Court of Canada affirmed this principle in *R. v. Big M Drug Mart*:

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality respect to the enjoyment of fundamental freedoms and I say this without reliance upon s. 15 [the equality provision] of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom 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 religious belief by worship and practice or by teaching and dissemination.

...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.

What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of “the tyranny of the majority.”<sup>40</sup>

By affirming this principle it meant that in the case of *Big M Drug Mart*, the Supreme Court of Canada decided the Province of Alberta could not compel its citizens to observe Christian Sabbath through the *Lord's Day Act*<sup>41</sup>. The Court reasoned that the Act imposed a religious practice onto citizens of Alberta, which violated the constitutional

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<sup>37</sup> *Ibid* at 7.

<sup>38</sup> *Ibid* at 12-13.

<sup>39</sup> *Charter*, *supra* note 2 at s 27.

<sup>40</sup> *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at paras 94-96 [*Big M*].

<sup>41</sup> *Lord's Day (Saskatchewan) Act*, RSS 1978, c L-34, cited in *ibid* note 40.

protection of conscience and religion provided by s. 2(a) of the Charter: “to the extent that it binds all to a sectarian Christian ideal, the *Lord’s Day Act* works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians.”<sup>42</sup> The Court also said this State-established observance of a religious practice was contrary to the multicultural ideal described in s. 27.<sup>43</sup>

The question of pluralism was addressed more recently in *Chamberlain v Surrey School District No. 36*<sup>44</sup> which involved a school board rejecting the proposed inclusion of three books into the public school curriculum. The books depicted homosexuals, which the school board found problematic due to the religious beliefs of a majority of the students and the parents of those students. Parents as stakeholders in the school district sought judicial review and the Supreme Court of Canada ultimately heard the case. The Supreme Court held that the school board acted outside the mandate provided by British Columbia’s *School Act*<sup>45</sup>, and consequently it did not have to consider principles under the *Charter*; however, Chief Justice McLachlin provided her thoughts on the existence of pluralism in the context of schools:

The number of different family models in the community means that some children will inevitably come from families of which certain parents disapprove. Giving these children an opportunity to discuss their family models may expose other children to some cognitive dissonance. But such dissonance is neither avoidable nor noxious. Children encounter it every day in the public school system as members of a diverse student body. They see their classmates, and perhaps also their teachers, eating foods at lunch that they themselves are not permitted to eat, whether because of their parents’ religious strictures or because of other moral beliefs. They see their classmates wearing clothing with features or brand labels which their parents have forbidden them to wear. And they see their classmates engaging in behaviour on the playground that their parents have told them not to engage in. The cognitive dissonance that results from such encounters is simply a part of living in a diverse society. It is also a part of growing up. Through such experiences, children come to realize that not all of their values are shared by others.<sup>46</sup>

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<sup>42</sup> *Ibid* at para 97.

<sup>43</sup> *Ibid* at para 99.

<sup>44</sup> *Chamberlain v Surrey School District No 36*, 2002 SCC 86 [*Chamberlain*].

<sup>45</sup> *School Act*, RS BC 1996, c 412.

<sup>46</sup> *Supra* note 44 at para 65.

In determining that the school board acted outside its mandate, the Supreme Court of Canada made it clear that the public school board could not impose a particular set of views on its curriculum. While the school board could consider the religious beliefs of its students and community, there existed an obligation to avoid being “dominated by one religious or moral point of view”.<sup>47</sup>

Similarly, in *L. (S.) c. Des Chênes (Commission scolaire)*, the Supreme Court of Canada affirmed what is meant by a pluralistic society.<sup>48</sup> Public schools in Quebec instated an Ethics and Religious Culture program in 2008.<sup>49</sup> The parents of children attending a school affected by the program attempted to exempt their children from the program by using s. 222 of the *Education Act*, stating the program would present serious harm to the children.<sup>50</sup> The director of educational resources denied the exemptions and judicial review was sought. The parents challenged its implementation as violating their religious right under both the Canadian *Charter* and Quebec *Charter of Human Rights and Freedoms*<sup>51</sup> to pass on their beliefs to their children.<sup>52</sup> The Supreme Court of Canada denied the parents’ claim.<sup>53</sup> Justice Deschamps, writing on behalf of the majority of the Court, held that the addition of the Ethics and Religious Culture program to Quebec public school curricula was respectful of pluralism.<sup>54</sup> The program exposed students to a variety of religious and moral points of view, without obligating the adoption of any particular one.<sup>55</sup> Justice Deschamps affirms that: “state neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the affected [sic] individuals affected.”<sup>56</sup>

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<sup>47</sup> *Ibid* at para 28.

<sup>48</sup> *L (S) c Des Chênes (Commission scolaire)*, 2012 SCC 7, [2012] 1 SCR 235 [*Des Chênes*].

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

<sup>50</sup> *Education Act*, RSQ, c I-13.3 cited in *supra* note 48.

<sup>51</sup> *Charter of Human Rights and Freedoms*, CQLR c C-12 [*Quebec Charter*].

<sup>52</sup> *Supra* note 48.

<sup>53</sup> *Ibid*.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid*.

<sup>56</sup> *Ibid* at para 32.

#### IV. THE GROUP RIGHT AND THE DELETERIOUS EFFECTS

If we can accept pluralism as a starting point for legal discourse, the question that follows in a discussion of Bill 18 is the issue of group rights. In particular, what is of interest is the right of a group created by cultural, religious, or ethnic origin to regulate membership. Christine Boyle notes that the right to group self-identification has been successfully defended in a number of cases,<sup>57</sup> including (although not exhaustively): the exclusive publication of female authors with a women's newspaper;<sup>58</sup> barring men from participating in a self-defence group for women;<sup>59</sup> barring men from women's health clubs and gyms;<sup>60</sup> bars on the participation of non-Aboriginals in organizations committed to the interests of Aboriginal and Indigenous peoples;<sup>61</sup> and the right of an evangelical Christian university to eject students and faculty when there was violation of a stated Christian norm.<sup>62</sup> The legal basis for these claims varies. While there is no general constitutional group or cultural right found in the *Charter*, provincial human rights statutes have afforded some groups to regulate membership. For example, s. 41 of British Columbia's *Human Rights Code* provides that:

If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.<sup>63</sup>

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<sup>57</sup> Christine Boyle, "A Human Right to Group Self-Identification?: Reflections on *Nixon v Vancouver Rape Relief Society*" (2011) 23:2 CJWL 488.

<sup>58</sup> *Keyes v Pandora Publishing Association* (No 2) (1992), 16 CHRR D/148 (Nova Scotia Board of Inquiry).

<sup>59</sup> *Celik v WEN-DO Women's Self-Defence Corp*, OHRC 60-991A (1991) [Celik].

<sup>60</sup> *Stopps v Just Ladies Fitness (Metrotown) Ltd.*, 2006 BCHRT 557 [Stopps].

<sup>61</sup> *Gillis v United Native Nations Society*, 2005 BCHRT 301 [Gillis].

<sup>62</sup> *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 [Trinity Western University].

<sup>63</sup> *Human Rights Code*, RSBC 1996, c 210, s 41.

Section 41 was used in *Nixon v Vancouver Rape Relief Society*<sup>64</sup>, where the British Columbia Court of Appeal upheld a non-profit feminist organization's decision to bar a transgender woman from volunteering at its shelter for female victims of rape. The organization refused the woman based on the fact that she was born male with the explanation that the service was for those women who have been female for the entirety of their lives. The Court of Appeal affirmed the claim to group rights, explaining that while the bar was discriminatory, it was exempted under s. 41 of British Columbia's *Human Rights Act*.<sup>65</sup> The decision fell under s. 41 given the nature of the group and the "rational connection between the preference and the entity's work, or purpose."<sup>66</sup> The Court referred to Justice McIntyre who expressed his thoughts on an earlier version of the provision in *Caldwell v. Stuart* at p. 626:

This section, while indeed imposing a limitation on rights in cases where it applies, also confers and protects rights. I agree with Seaton J.A. in the Court of Appeal where he expressed his thoughts in these words:

This is the only section in the Act that specifically preserves the right to associate. Without it the denominational schools that have always been accepted as a right of each denomination in a free society, would be eliminated. In a negative sense s. 22 is a limitation on the rights referred to in other parts of the Code. But in another sense it is a protection of the right to associate. Other sections ban religious discrimination: this section permits the promotion of the religion.<sup>67</sup>

*Caldwell* involved a teacher at a Roman Catholic Church.<sup>68</sup> She married a divorced man through a civil ceremony, violating two rules of the Catholic Church: marriage can only occur in the Church, and the prohibition of marriage to a divorced person.<sup>69</sup> The school refused to rehire the appellant when her contract was up for renewal and she challenged the decision under s. 22 of British Columbia's *Human Rights Code* (similar to today's s. 41 of the *Human Rights Act*).<sup>70</sup> The Supreme

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<sup>64</sup> *Nixon v Vancouver Rape Relief Society*, 2005 BCCA 601 [Nixon].

<sup>65</sup> *Ibid* at paras 7, 9, 43.

<sup>66</sup> *Ibid* at para 58.

<sup>67</sup> *Human Rights Code*, RSBC 1973, c 186, s 22 cited in *Caldwell v Stuart*, [1984] 2 SCR 603 ("*Caldwell*") at 626; quoted in *Nixon v Vancouver Rape Relief Society*, *ibid* at para 51.

<sup>68</sup> *Caldwell*, *ibid*.

<sup>69</sup> *Ibid*.

<sup>70</sup> *Ibid*.

Court of Canada dismissed the appeal, upholding the school's decision given the statutory protection offered by s. 22. The Court stated:

In my opinion the board made no error in law in these dispositions of the question. The purpose of the section is to preserve for the Catholic members of this and other groups the right to the continuance of denominational schools. This, because of the nature of the schools, means the right to preserve the religious basis of the schools and in so doing to engage teachers who by religion and by the acceptance of the Church's rules are competent to teach within the requirements of the school. This involves and justifies a policy of preferring Roman Catholic teachers who accept and practice the teachings of the Church. In failing to renew the contract of Mrs. Caldwell, the school authorities were exercising a preference for the benefit of the members of the community served by the school and forming the identifiable group by preserving a teaching staff whose Catholic members all accepted and practised the doctrines of the Church.<sup>71</sup>

From both these cases it is apparent that where it is established that the organization primarily serves the interests of an identifiable group characterized by the enumerated factors under s. 41, the court must look to the nature of the group and the whether the discrimination was rationally connected to a purpose related to the nature of the group. Only with this connection, that is determined both subjectively and objectively, can there exist a bona fide justification for the discriminatory treatment. *Heintz v. Christian Horizons*<sup>72</sup> is illustrative. The case asks whether a religious organization providing care to persons with disabilities could terminate a support worker who was homosexual. The support workers assisted clients with cooking, cleaning, errands, and might pray and read the Bible with them. However, support workers were not expected to evangelize clients. Given the work the support workers were and were not expected to do, the Ontario Superior Court of Justice held that the nature of the employment could not make it "a necessary qualification of the job that support workers be prohibited from engaging in a same sex relationship."<sup>73</sup>

Similarly in *Trinity Western University v British Columbia College of Teachers*, the Supreme Court effectively affirmed a denominational university's self-governance. Trinity Western University (TWU) had a

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<sup>71</sup> *Ibid* at para 38.

<sup>72</sup> *Heintz v Christian Horizons*, 2010 ONSC 2105, [2010] O.J. No. 2059 [*Heintz*].

<sup>73</sup> *Ibid* at para 105.

“community covenant” that prevented students and faculty from engaging in an assortment of behaviour that was seen to contravene the Christian Bible.<sup>74</sup> This included any sexual intimacy that fell outside the definition of traditional marriage between a man and a woman, including homosexual relations.<sup>75</sup> TWU established a program for a Bachelor of Education and applied for accreditation to the then newly-founded British Columbia College of Teachers.<sup>76</sup> The College of Teachers denied the university accreditation on grounds of public policy. The Supreme Court of Canada overturned the College of Teachers’ decision and affirmed the group right of TWU.<sup>77</sup>

The majority of the Court held that the College of Teachers acted outside its jurisdiction.<sup>78</sup> While the *Charter* did not apply, the Court engaged in a contextual, purposive analysis of the competing rights at stake with the *Charter* values in mind.<sup>79</sup> It was held that the context was highly informative to the determination that TWU could legally obligate its students and faculty to heterosexual norms. Factors such as the private nature of the university, the degree of choice involved in an adult’s choice to attend or teach at the university, the existence of other teaching colleges that will admit overt homosexuals, the statutory exception pursuant to s. 41 of the *Human Rights Act*, and the importance of protecting the religious belief through state neutrality informed the majority opinion.<sup>80</sup> These factors buttressed the conclusion that the College of Teachers wrongly refused TWU.<sup>81</sup>

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<sup>74</sup> *Supra* note 62 at paras 3-10.

<sup>75</sup> *Ibid* at para 4.

<sup>76</sup> *Ibid* at para 2.

<sup>77</sup> *Ibid* at paras 43-46.

<sup>78</sup> *Ibid* at para 38.

<sup>79</sup> *Ibid*.

<sup>80</sup> *Ibid*.

<sup>81</sup> *Ibid*. The Court was not exclusively concerned with the discrimination that occurred to the students or faculty at the university. There was also concern that the policy might have an impact on the public, because the graduates of the program would eventually teach in the classroom. Given that teachers are accepted as serving an important societal role in the shaping the beliefs and cognition of Canadian citizens, the Court weighed whether the policy potentially put the public at risk by exposing children to the discriminatory beliefs of TWU’s graduates once they entered the classroom as teachers. The dissent accepted the respondents’ argument that the covenant impaired the ability of its graduates to affirm beliefs of equality as teachers,



With the matter at hand, denominational schools can be said to play an important function in Manitoba; at least, in providing an educational context for members of faith to gather and affirm their belief systems. Due to a prevailing interest in separating the state and religion, denominational schools are privately operated.<sup>82</sup> This usually places the

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posing a risk to students, especially LGB students. The majority of the court held that this argument was not substantiated without empirical support, although it did concede that the decision would be different with evidence that graduates of the program acted with prejudice.

- <sup>82</sup> For summary of the historical issue see: "The Manitoba School Questions: 1890 to 1897", online: Manitoba: Digital Resources on Manitoba History <<http://manitobia.ca/content/en/themes/msq/1>>. Religious schools exist in some provinces by virtue of s. 93 of the *Constitution Act 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 93. The provision requires the legislature of each province to respect any rights or privileges that denominational schools may have had at time of Union of 1867. This would entail the public support of the denominational school through government funds, among other special protections. The denominations that are given this special status are mostly Roman Catholic, however, some are Protestant. No other religious education obtains such special protections in Canada. By passing *The Public Schools Act*, SM 1890, c 38, Manitoba ceased its financial support of denominational schools in 1890. The resulting disappearance of the separate school jurisdiction caused great controversy. Pope Leo XIII described it in his Encyclical, the *Affari Vos*, ("Affaris Vos: Encyclical of Pope Leo XIII on the Manitoba School Question", online: The Vatican <[http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_08121897\\_affari-vos\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_08121897_affari-vos_en.html)>) by stating:

The question at issue is assuredly one of the highest and most serious importance. The decisions arrived at seven years ago on the school question by the Parliament of the province of Manitoba must be remembered. The Act of Union of the Confederation had secured to Catholics the right to be educated in the public schools according to their consciences; and yet this right the Parliament of Manitoba abolished by a contrary law. This is a noxious law. For our children cannot go for instruction to schools which either ignore or of set purpose combat the Catholic religion, or in which its teachings are despised and its fundamental principles repudiated...

The constitutionality of *The Public Schools Act* was challenged in court in and was ultimately appealed to the highest appellate court at the time, the Judicial Committee of the Privy Council in Britain. In *City of Winnipeg v Barrett*, [1892] AC 445 [Barrett], the Privy Council emphasized that at 1870, the time the *Manitoba Act* was passed and the Province of Manitoba formed part of the Dominion of Canada, there was no public taxation that supported schools in Manitoba. Religious groups funded schools

schools outside the ambit of government concern and renders the situation distinct from public schools. The infusion of contrary sexual mores or worldviews by the promotion of GSAs directly opposes significant tenets of the religious belief, potentially causing severe distress. This becomes all the more relevant when considering the plural framework of society and the right of groups to collective self-determination. Pluralism suggests that religious values should be permitted to exist and that identities derived from those cultural or religious backgrounds should be encouraged and promoted. Denominational schools fit into this societal framework by promoting a group affinity to values and knowledge derived from spiritual faith. It imparts religious values to newer generations in an environment that is free of external influences or contrary identities.

The right of denominational schools to regulate the school environment to reduce external influences to the education of their students is shown in *Caldwell* and in *Trinity Western University*.<sup>83</sup> It allows for religious communities to assemble together and propagate their spiritual beliefs and practices, which is critical to the continued existence of their social identity. Infusion of a set of values that is contrary to the group identity risks destabilizing that calibrated environment, which cannot be easily characterized as trivial or unsubstantial, especially from the subjective perspective of the group's adherents, if pluralism is in fact our governing principle legally and morally.

## V. THE QUEER CHILD AND THE SALUTARY EFFECTS

The contextual analysis is not complete without looking to the rights and interests of LGB students. The amendments provided in Bill 18 are endeavoured for the socially desirable purpose of curtailing the dangers of school-aged bullying. Specifically, the amendments are patently mindful of

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in the region. Therefore, the Privy Council determined that the Act did not violate the constitutional protection of denominational schools, and public funding of denominational schools could not be considered a right "by Law or practice in the Province at the Union" [*Barrett*, para 4]. This legal history means that in the Province of Manitoba at this contemporary time, primary and secondary educations that reflect a particular religious denomination are run privately, although the schools can receive some funding as a "Funded Independent School."

<sup>83</sup> *Caldwell*, *supra* note 67; *Trinity Western University*, *supra* note 62.

the prejudice directed at LGB children, and the unique vulnerability LGB children to that prejudice given diminished support systems from family, school, and peers. The Supreme Court of Canada recognized this historic disadvantage in *Egan v Canada* [1995]<sup>84</sup>, when Justices Cory and Iacobucci stated:

The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation... For example, a study by the Quebec Human Rights Commission has indicated that the isolation, harassment and violence imposed by the public and the rejection by their families has caused young homosexuals to have a higher rate of attempted and successful suicide than heterosexual youths.<sup>85</sup>

Others have noted that opposition to homosexuality and any rights accruing to homosexuals is often religious in nature. For example, with particular relevance to the Christian heritage of many in Manitoba, chapters 18 and 20 of Leviticus contain the following verses: “Thou shalt not lie with mankind, as with womankind: it is abomination”<sup>86</sup>; “If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: They shall surely be put to death; their blood shall be upon them.”<sup>87</sup> The opposition of religious conservatism to homosexuality is characterized by the literalistic interpretation of these sacred texts. This is evidenced by cases involving religiously motivated hate speech, such as that in *Saskatchewan Human Rights Commission v William Whatcott et al*, where Mr. Whatcott published four leaflets attributing various societal failures to the acceptance of LGB individuals in the community.<sup>88</sup> Whatcott based his harangue of homosexuality on Holy Scripture.<sup>89</sup> This is relevant given the fact that religious belief proliferates daily lives of Manitobans. The 2011 National Household Survey Profile for Manitoba reported that approximately 75% of the population

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<sup>84</sup> *Egan v Canada*, [1995] 2 SCR 513 [Egan].

<sup>85</sup> *Ibid* at paras 182-183.

<sup>86</sup> King James Bible, *Book of Leviticus* at 18:22.

<sup>87</sup> King James Bible, *Book of Leviticus* at 20:13.

<sup>88</sup> *Saskatchewan Human Rights Commission v William Whatcott et al*, 2013 SCC 11, [2013] 1 SCR 467 [Whatcott].

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

identified as having religious beliefs.<sup>90</sup> While adhering to religious belief does not necessarily result in anti-gay attitudes, it does demonstrate that religiosity is high.

The problem facing LGB children is multiplied in rural areas, where the availability of LGB resources is diminished and homosexuality is typically and characteristically held in low regard.<sup>91</sup> This is evidenced by social science that shows a greater frequency bullying victims in rural areas are LGB children.<sup>92</sup> The authors of this study explained the correlation by suggesting it was connected to the greater incidence of religious conservatism.<sup>93</sup> Further, Alexis Annes and Meredith Redlin surveyed French and American homosexual men from rural regions in France and South Dakota, respectively, and found that both groups of men adopted hetero-normative ideas of masculinity. What results is an “effeminophobia” that is borne by these homosexual men, “strongly differentiating themselves from effeminate gay men and concurrently emphasizing their similarities with straight men.”<sup>94</sup> Many of the case studies analyzed by Annes and Redlin show such hetero-normative identities were adopted in response to the discriminatory treatment received or observed due to homosexuality, which Annes and Redlin attribute to the rural environment.<sup>95</sup> This is especially relevant given the 2011 Census shows 55% of the population of Manitoba lived outside of Winnipeg.<sup>96</sup> Moreover, 13% of the population lived outside of Winnipeg and were school age.<sup>97</sup> While problems facing LGB students are significant in both urban and rural regions, it is critical to note that a critical minority face a double jeopardy of rural and religious factors.

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<sup>90</sup> “NHS Profile, 2011”, online: Statistics Canada <<https://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/prof/index.cfm?Lang=E>>.

<sup>91</sup> I Rivers & N Noret, *supra* note 3.

<sup>92</sup> *Ibid.*

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

<sup>94</sup> Alexis Annes & Meredith Redlin, “The Careful Balance of Gender and Sexuality: Rural Gay Men, the Heterosexual Matrix, and ‘Effeminophobia’” (2012) 59:2 J Homosex 256 at 257.

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

<sup>96</sup> “Population, urban and rural, by province and territory (Manitoba)”, online: Statistics Canada <<http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/demo62h-eng.htm>>.

<sup>97</sup> *Ibid.* Note: Numbers calculated from 2011 Census (154,920 Manitobans between 5 - 18 y.o. / 1,208,270 total pop. = .128).

To make matters worse, LGB children often face rejection by family and friends once they publicly identify with their sexual orientation.<sup>98</sup> Even in circumstances where rejection might not happen or ultimately be temporary, the child might refrain from disclosing his or her identity due to the mere anticipation that identifying as LGB would lead to rejection.<sup>99</sup> The isolating-capacity of anticipation developed in a culture that has historically devalued expressions of homosexuality while concurrently assuming heterosexuality in children<sup>100</sup> is what Bruce MacDougall has characterized as society's assumption of nascent heterosexuality.<sup>101</sup> The nascent heterosexuality is embodied in various social practices that are committed in society, modelled in the media by representations of normal sexual behaviour and the exclusive encouragement of opposite-sex relationships. The homosexual child is invisible to the community, media, and larger society – these pressures discourage the child from publicly identifying as LGB, potentially isolating him or her from critical support networks. Without sufficient support networks, LGB children are vulnerable to many health risks. For example, it has been shown that LGB adolescents are more likely to use illicit drugs than heterosexual adolescents,<sup>102</sup> especially amphetamine, cocaine, ecstasy, hallucinogens, and heroin.<sup>103</sup> They are also more likely to misuse prescription

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<sup>98</sup> P Gibson, *supra* note 5; Paul Clarke & Bruce MacDougall, "The Case for Gay-Straight Alliances (GSAs) in Canada's Public Schools: An Educational Perspective" (2012) 21 *Educ & LJ* 143.

<sup>99</sup> Author's note: This happened to the author for over a decade – ultimately, once he did come out, it was to a very warm and loving family and friends; however, the mere expectation was enough to feel displaced and isolated from peers and family. This made the experience of bullying much worse.

<sup>100</sup> Paul Clarke & Bruce MacDougall, *supra* note 98; Donn Short, "Conversations in Equity and Social Justice Constructing Safe Schools for Queer Youth" (2009) 8:2 *JCEPS* 330; Gerald Walton, "Bullying and Homophobia in Canadian Schools: The Politics of Policies, Programs, and Educational Leadership" (2004) 1:4 *J Gay Lesbian Issues Educ* 23.

<sup>101</sup> Paul Clarke & Bruce MacDougall, *ibid*; Bruce MacDougall, "The Legally Queer Child" (2004) 49 *McGill LJ* 1057.

<sup>102</sup> Daniel E Bontempo & Anthony D'Augelli, "Effects of At-School Victimization and Sexual Orientation on Lesbian, Gay, or Bisexual Youths' Health Risk Behaviour" (2002) 30:5 *J Adolesc Health* 364.

<sup>103</sup> Heather L Corliss et al, "Sexual Orientation and drug use in longitudinal cohort study of U.S. adolescents" (2010) 35:5 *Addict Behav* 517.

medication.<sup>104</sup> There are also increases in anxiety disorders, incidences of depression, and attempted and successful suicides.

This danger is multiplied by the child's reduced agency. Choices pertaining to the child's education, location, and formal activities are largely determined by the preferences of guardians. While LGB adults have the requisite agency to uproot and escape noxious environments, perhaps finding alternate environments that can provide affirming support, the choices of LGB children are culturally, legally, and economically constrained. Especially in rural or smaller urban centres in Manitoba where religiosity and conservatism is highest, this could mean that a child has no other choice but to attend a religious school at the request (or demand) of his or her parents. Even if the child musters the courage to request a different school to escape the onslaught of bullies or find a supportive network, parents might be unwilling to accommodate the child if the source of conflict relates to the child's sexual minority status; either because the information provided to parents is incomplete and does not allow the parents to accurately appraise the significance of the problem, or the parents reject the child's sexual orientation and see the religious school as a means to remedy the child's "sexual deviance." What results is the child is put in and/or remains at a school that is incompatible with his or her interests or identity.

In the face of this adversity, GSAs can serve a vital purpose to LGB students. Paul Clarke and Bruce MacDougall describe the advantages of GSA as the following:

Normally, the clubs are created by students themselves. Students exercise agency and take the initiative to set up GSAs because somebody recognizes a problem with bullying or that discrimination exists and decides to do something about. Typically, these clubs are not the brain child of some adult teacher or administrator imposing his or her will on some unsuspecting students. GSAs are voluntary in nature; students are free to join them and may do so without self-identifying. This openness and flexibility allow all students of all sexual orientation to come together to show support and concern for one another. This sense of community, solidarity, and alliance building permits students to promote a caring and inclusive school community.<sup>105</sup>

Empirical evidence shows GSAs are associated with: (1) greater engagement in school and community activities; (2) positive social

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

<sup>105</sup> Paul Clarke & Bruce MacDougall, *supra* note 98 at 155.

relationships; (3) improved academic performance; and (4) empowerment of children to challenge homophobic conduct of peers;<sup>106</sup> (5) decreasing incidence of bullying in samples;<sup>107</sup> and (6) having various health benefits, such as reduced illicit drug use,<sup>108</sup> suicidal behaviour,<sup>109</sup> and anxiety.<sup>110</sup> Conway and Crawford-Fisher also show that GSAs challenge prevailing norms of sexuality:

Our society is perpetuated by the power structures of heterosexism, heteronormativity, where the norm is heterosexuality (citations omitted). Students have to deal with these restrictive norms in every environment that they encounter. LGBTQ students sometimes have to either accept heterosexism or confront it anew in each homophobic encounter. This confrontation will often mean the decision to out oneself and deal with the fact that, as an individual, they are not considered the “norm”. By introducing students to feminist frameworks, and providing them a lens through which to interrogate the oppression of LGBTQ people, we can help them to examine and understand empowerment issues regarding sexual orientation and gender identity. From our perspective, some LGBTQ students have faced a stunted school experience, as a result of this pervasive heteronormative environment. Not all students will have this stunted experience, but for those students who do, GSAs can provide the opportunity to face these issues. From proms to other social events, some

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<sup>106</sup> Sean Currie, Maralee Mayberry, & Tiffany Chenneville, “Destabilizing Anti-Gay Environments through Gay Straight Alliances: Possibilities and Limitations through Shifting Discourses” (2012) 85:2 *The Clearing House* 56; Russell B Toomey & Stephen T Russell, “Gay-Straight Alliances, Social Justice Involvement, and Victimization of Lesbian, Gay, Bisexual, and Queer Youth: Implications For School Well-Being and Plans to Vote” (2013) 45:4 *Youth Soc* 500.

<sup>107</sup> Joseph G Kosciw et al, *The National School Climate Survey: The experiences of lesbian, gay, bisexual and transgender youth in our nation’s schools*. (2010) New York: GLSEN.

<sup>108</sup> Nicholas C Heck et al, “Reducing Risk for Illicit Drug Use and Prescription Drug Use Misuse: High School Gay-Straight Alliances and Lesbian, Gay, Bisexual, and Transgender Youth” (2014) 39:4 *Addict Behav* 824.

<sup>109</sup> Carol Goodenow, Laura Szalacha, & Kim Westheimer, “School support groups, other school factors, and the safety of sexual minority adolescents” (2006) 43:5 *Psychology in the Schools* 573.

<sup>110</sup> Molly O’Shaughnessy et al, *Safe place to learn: Consequences of harassment based on actual or perceived sexual orientation and gender non-conformity and steps for making schools safer* (San Francisco: California Safe Schools Coalition, 2004); LA Szalacha, “Safer sexual diversity climates: Lessons learned from an evaluation of Massachusetts safe schools program for gay and lesbian students” (2003) 110:1 *Am J Educ* 58; N Eugene Walls, Sarah B Kane, & Hope Wisneski, “Gay-straight alliances and school experiences of sexual minority youth” (2010) 41:3 *Youth Soc* 307.

LGBTQ students feel pressured to fit with the norm and not be true to themselves.<sup>111</sup>

Therefore, there are a number of factors that militate in favour of and against the changes made by Bill 18. Accepting pluralism as a governing legal principle necessitates the equal status of human rights to ensure parallel existence of many different people. This is best accomplished, as our Supreme Court has shown, by carefully balancing the rights involved. The ensuing analysis must scrutinize each of those factors carefully with constant reflection on the context in which the opposing rights collide. The religious right cannot be understood in isolation, nor can the right to equality. Moreover, neither right is absolute.

Accepting pluralism as a governing legal principle, it becomes important that the government refrains from carrying out legislative practices that restrict the private individual's freedom to form, adopt, and practice religious beliefs. We also must recognize that there exists a legitimate objective and positive effect on cultural and religious identity by permitting groups to internally regulate. The legislative remedy offered by Bill 18 imbues policies of private, denominational schools with constitutional norms of equality. This potentially disrupts the ability of the denominational schools to promote a shared religious identity integral to the transmission of religious values to children. These two factors militate strongly against Bill 18 for much of the same reasons why the burdens imposed can be characterized as more than trivial.

However, we must remember the competing interests of LGB children. LGB children face significant disadvantage compared to heterosexual children. Further, children do not have the same power as adults to escape an aversive environment. Bill 18 recognizes this indisputable fact and attempts to remedy the disadvantaged position of LGB children by obligating all schools to provide support to them. As Justice Iacobucci notes, justifying the infringement of a constitutionally protected right under s. 1 is broad in its scope. It is looking to justify the infringement by "tak[ing] into account various societal factors, rather than just a countervailing Charter [sic] right."<sup>112</sup> In this way, the religious right can potentially be balanced with competing rights and other

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<sup>111</sup> Thomas R Conway & Ruthann Crawford-Fisher, "The Need for Continued Research on Gay-Straight Alliances" (2007) 4:2 J Curric Pedagogy 125 at 126.

<sup>112</sup> The Honourable Justice Frank Iacobucci, *supra* note 27 at 142.



countervailing purposes.<sup>113</sup> Justice Iacobucci explains that “[balancing], which connotes assigning primacy to one right over another right or interest after having weighed the relevant considerations, is customarily used in section 1 *Oakes* test jurisprudence...”.<sup>114</sup>

While there exist factors that strongly suggest the religious freedom of stakeholders at denominational schools is seriously infringed, it cannot outweigh the dangers faced by LGB children. As discussed above, the queer child experiences a uniquely disadvantageous life. The queer child is more likely, due to his or her sexual minority status, to be excluded by peers, family, and social institutions, resulting in diminished support. Additionally, that child is vulnerable to bullying and active discrimination. The result can be disastrous on the psychological and physical health of the child. The systemic discrimination and prejudice faced by LGB children aptly demands solution and the means chosen by Bill 18 work toward that goal appositely. Bill 18 addresses the social exclusion of LGB children and promotes an education environment that is free of discrimination. This can lead to marked improvements in the queer child’s psychological and physical health. It recognizes that many of these ills occur in the context of schools, especially schools that espouse religious values that oppose homosexual norms. Further, it recognizes that LGB children often lack the option to escape the aversive environment and are subjected to religious education, notwithstanding its potential faults for a queer child, due to parental beliefs or geographical limitations. This recognition takes the form of obligating all school boards, regardless of denomination, to form and enforce policies that respect LGB children, so that LGB children need not fear that their difference will mean they will be pummelled, ridiculed, or hated.

It is the fact that children are exceptionally vulnerable that renders this Act overwhelmingly positive notwithstanding its deleterious effects on the freedom of religious. Yes, a society that recognizes plurality in the way that Canada has should mean denominational schools could exist, such as Trinity Western University.<sup>115</sup> Yes, a society that recognizes plurality in the way that Canada has should mean that denominational schools could oblige its attendees to adopt particular practices or views in the

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<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid* at 141.

<sup>115</sup> *Trinity Western University*, *supra* note 62.

promotion of that faith, such as Trinity Western University. However, when that obligation comes at the significant cost of children, who lack the legal, cultural, and economic capacity to choose different environments and withstand opposing views, it cannot be said that the deleterious effects on the religious freedom outweigh the Act's salutary effects. This is distinguishable from *Trinity Western University* because the policies of denominational primary and secondary schools directly and demonstrably affect the lives of children. In the case of *Trinity Western University*, the policies only affected adults who voluntarily entered a private institution. Any potential harm to society at large was speculative.<sup>116</sup> For that reason, assuming Bill 18 is rationally connected to its purpose and minimally impairing, it appears that the infringement that Bill 18 has on the religious freedom is justified in a free and democratic society.

## VI. CONCLUSION

There cannot exist a Canada where rights are viewed simplistically, and yet there exists a battleground in public discourse that appears to bear remarkable singularity in its approach. Rights are viewed concretely. Rights are viewed in isolation. Rights are viewed as absolute and impermissible to trespass. Yet this is irreconcilable with the empirical fact that the world is far more complicated than these accounts could possibly allow, and human diversity is capacious and impossible to limit. There will exist religiosity notwithstanding negative evaluations of it. There will exist homosexuality and bisexuality notwithstanding negative evaluations.

It would be imprudent to suggest that the solution to this diversity is to always change how we evaluate one another. It is idealistic without regard to the impossibility of this feat. Rather, we must accept that there will continue to exist difference and respect that that difference entails something positive in society. This does not mean that groups cannot associate and exclude others. Rather, as I set out above, it entails a complicated framework in which sometimes rights can be discriminated against and sometimes discrimination is impermissible. What is critical to

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<sup>116</sup> *Ibid* at paras 35, 36, 38.

this nuanced approach is the context in which those rights collide. There will never be simple answers.

Bill 18 is replete with controversy. The exegesis provided above should clarify that while there are legal and moral reasons why cultural and religious groups can and should assemble and regulate the conduct and beliefs of one another, there exist countervailing interests that justify government intrusion on that religious and group right. Specifically, when that regulation potentially causes great psychological and physical harm to children, there are compelling societal reasons to obligate changes to religious education. This should not necessarily be taken to impugn denominational institutions designed for adults, like Trinity Western University, and their internal policies that obligate students to adhere to heterosexual, Christian sexual mores. Nor should this be taken to suggest that private schools share the mandate of public schools to confer all civic virtues onto our children. Rather, what should be taken away from this analysis is that one must be aware of what the context demands. In this case, the context demanded is that the interests of LGB children be taken seriously given the exceptional dangers they face from social exclusion and bullying, thus justifying the proclamation of Bill 18 as it currently stands.

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## Underneath the Golden Boy

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