KING'S BENCH FOR SASKATCHEWAN

Citation: **2023 SKKB 204**

Date: **2023 09 28**
Docket: KBG-RG-01978-2023
Judicial Centre: Regina

BETWEEN:

UR PRIDE CENTRE FOR SEXUALITY AND GENDER DIVERSITY

APPLICANT

- and -

GOVERNMENT OF SASKATCHEWAN AS REPRESENTED BY THE MINISTER OF EDUCATION, CONSEIL DES ÉCOLES FRANSASKOISES, CHINOOK SCHOOL DIVISION, CHRIST THE TEACHER CATHOLIC SCHOOL, CREIGHTON SCHOOL DIVISION NO. 111, GOOD SPIRIT SCHOOL DIVISION, GREATER SASKATOON CATHOLIC SCHOOLS, HOLY FAMILY ROMAN CATHOLICS SEPARATE SCHOOL DIVISION #140, HOLY TRINITY CATHOLIC SCHOOLS, HORIZON SCHOOL DIVISION, ILE-A-LA CROSSE SCHOOL DIVISION NO. 112, LIGHT OF CHRIST CATHOLIC SCHOOLS, LIVING SKY SCHOOL DIVISION NO. 202, LLOYDMINSTER CATHOLIC SCHOOL DIVISION, LLOYDMINSTER PUBLIC SCHOOL DIVISION, NORTH EAST SCHOOL DIVISION, NORTHERN LIGHTS SCHOOL DIVISION NO. 113, NORTHWEST SCHOOL DIVISION #203, PRAIRIE SOUTH SCHOOL DIVISION, PRAIRIE SPIRIT SCHOOL DIVISION, PRAIRIE VALLEY SCHOOL DIVISION, PRINCE ALBERT CATHOLIC SCHOOL DIVISION, REGINA CATHOLIC SCHOOLS, REGINA PUBLIC SCHOOLS, SASKATCHEWAN RIVERS SCHOOL DIVISION, SASKATOON PUBLIC SCHOOL, SOUTH EAST CORNERSTONE PUBLIC SCHOOL DIVISION #209, AND SUN WEST SCHOOL DIVISION

RESPONDENTS

Counsel:

Adam Goldenberg, Ljiljana Stanić, Eric Freeman Bennett Jensen and Sean Sinclair	for the applicant
Mitchell McAdam, K.C. and Katherine Roy	for the Government of Saskatchewan
Nicholas Cann, K.C., and Jolene Horejda	for the 27 named School Boards
Leif Jensen and Dan LeBlanc	for intervenor, Canadian Civil Liberties Association
Andre F. Memauri	for intervenors, Gender Dysphoria Alliance and Parents for Choice in Education
Morgan Camley	for intervenor, LEAF Women's Legal Education & Action Fund
Pierre E. Hawkins	for intervenor, John Howard Society of Saskatchewan

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JUDGMENT MEGAW J.
SEPTEMBER 28, 2023

INTRODUCTION

[1] This action concerns a constitutional challenge to the government policy in force August 22, 2023, and entitled "Use of Preferred First Name and Pronouns by Students" [Policy]. The applicant has commenced this litigation by way of originating application pursuant to the provisions of *The Queen's Bench Rules.* The applicant seeks an order declaring the Policy to be in violation of ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* [*Charter*] and that such violation cannot be justified in a free and democratic society pursuant to s. 1 of the *Charter*. It seeks to have the Policy declared to be of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[2] At this preliminary stage, the applicant seeks an order granting an interlocutory injunction to prohibit the implementation of the Policy pending a final

determination of the constitutional issues which have been raised. The Government of Saskatchewan [Government] opposes the injunction application and further opposes the applicant being granted public interest standing to bring this litigation.

[3] I have determined the applicant should be granted public interest standing. I have further determined that this is an appropriate case in which to grant an interlocutory injunction prohibiting the implementation of the Policy pending a final decision by this Court on the constitutional issues raised by the action. I decline to consider the issue of costs on this interlocutory application.

[4] My reasons follow.

BACKGROUND

[5] On August 22, 2023, the Government of Saskatchewan as represented by the Minister of Education [Ministry] introduced the Policy to be followed in the upcoming school year by all of the school divisions in the province as well as the Conseil des Écoles Fransaskoises. The Policy is entitled "Use of Preferred First Name and Pronouns by Students". That title does not describe the nature of the Policy because in fact, it puts in place a requirement that parental consent is required for students under 16 before they are entitled to use a "preferred" name, gender identity, and/or gender expression with school personnel. This requirement does not apply to students over 16. The specific wording is as follows:

> Given the sensitivity of gender identity disclosure, when a student requests that their preferred name, gender identity, and/or gender expression be used, parental/guardian consent will be required for students under the age of 16.
>
> For students 16 and over, parental consent is not required. The preferred first name and pronoun(s) will be used consistently in ways that the student has requested.

> In situations where it is reasonably expected that gaining parental consent could result in physical, mental or emotional harm to the student, the student will be directed to the appropriate school professional(s) for support. They will work with the student to develop a plan to speak with their parents when they are ready to do so.
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> [Policy at page 4]

[6] The title to the Policy, together with the title of para. 5, paras. 6, 7 and 9, thereof, and Form 1, "Authority for Use of Preferred Name or Pronoun(s)" all contain a reference to a student's use of pronouns. However, the actual Policy set forth above, does not impose any requirements concerning a student's decision to use a different pronoun for identification if that student is under the age of 16. On the issue of obtaining consent, the Policy provides:

> Change of Preferred Name or Pronouns
>
> 5. When a student requests that their preferred name, gender identity, and/or gender expression be used:
>
> 5.1 if the student is under the age of 16, school personnel will request parental/guardian consent using Form 1; or
>
> 5.2 if the student is 16 or older, school personnel will gain formal consent using Form 1.

It is noted that para. 5 itself does not contain any reference to pronouns again, aside from the title to that paragraph.

[7] The Government has filed the affidavit of Mr. Michael Walter (mis-entitled Dr. Michael Walter) to outline the steps taken by the Government, through the Ministry, in the development of the Policy. Mr. Walter is an Assistant Deputy Minister with the Saskatchewan Ministry of Education. He deposes between early June 2023 and early August 2023, the Ministry received 18 letters regarding a document known as the New Brunswick Sexual Orientation and Gender Identity Policy, and further that those

18 letters expressed support for a similar policy in Saskatchewan. Of the 18 letters, Mr. Walter deposes that 7 of the authors indicated they were parents of school aged children. The affiant has provided no indication whether any of the 18 writers were resident in Saskatchewan although the deponent refers to them as a "constituent." Of the seven who indicated they were parents of school aged children, there is no indication what age those children were nor, again, where those parents reside.

[8] Mr. Walter then describes that as part of the examination of policies and administrative procedures in the school divisions with respect to a student's indication that they wished to change their name or pronoun to accord with their "gender choice", there was a lack of consistency with respect to the policies in place. He does not specifically identify the policies studied, nor does he identify what those policies stated. Finally, he does not indicate whether there had been any difficulties or problems through the implementation of any such policies. It is not explained in the affidavit why the specifics in this regard are not set forth.

[9] The Policy now in place was developed between August 14 and 18, 2023, with the completed version being delivered to the Ministry on August 18, 2023. The final version was completed on August 21, 2023, and it was then distributed to the school divisions on August 22, 2023. The final Policy is as set forth above.

[10] There is no indication in Mr. Walter's affidavit that the Ministry discussed this new Policy with any potential interested parties such as teachers, parents, or students. There is further no indication any expert assistance was enlisted to assist in determining the effect of the Policy. Finally, there is no indication the Ministry sought any legal assistance to determine the constitutionality of the Policy with respect to any potential considerations regarding the *Charter*.

[11] On August 31, 2023, the applicant, UR Pride Centre for Sexuality and Gender Diversity [UR Pride] brought an originating application seeking a declaration that the Policy was in violation of s. 7 and s. 15(1) of the *Charter* and that such violations could not be reasonably and demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*. In addition, UR Pride brought an application without notice seeking an immediate interim injunction, together with a notice of application seeking an interim and interlocutory injunction.

[12] The matter originally came before the Chief Justice of this Court. Popescul, C.J.K.B. declined to grant the relief sought in the without notice application but rather set September 5, 2023 as the date to receive submissions concerning hearing dates for the application, the interlocutory injunction, and any intervenor applications. The Chief Justice established September 18, 2023 as the date to hear intervenor applications and September 19, 2023 as the date to hear the originating application and the interlocutory injunction application. In addition, filing deadlines were set to have the parties serve and file their supporting materials.

[13] On September 11, 2023, in accordance with the then direction of the Chief Justice of this Court, UR Pride filed all of the supporting materials with respect to its applications including affidavits and its complete brief of law. Prior to this date, the Government applied for, and was subsequently granted, an adjournment of the hearing date on the application. That hearing date for the originating application has now been set into November 2023. The Government filed its affidavits and brief with respect to its opposition to the injunction application but has not yet filed its brief on the substantive issues regarding constitutionality of the Policy and, perhaps as well, it has not yet filed all of the evidence it seeks to rely on with respect to the originating

application. The Government has filed the affidavits of Mr. Walter and that of an expert Dr. Erica Anderson.

[14] The evidence filed by the parties will be commented on in more detail within these reasons. For the purposes of background, it suffices to identify that UR Pride's materials illustrate that students who are unable to identify according to their name, pronouns, and sexual identity suffer harm with the affiants identifying the nature of the harm suffered. The affidavit of Dr. Anderson on behalf of the Government identifies that "social transitioning", the use of names, pronouns, or gender, other than those assigned at birth, can have significant psychological impact on a young person. She further identifies that professional medical support is required to assist a young person to deal with gender related issues. It is fair to recognize that all of the experts, and for that matter the lay witness affidavits submitted by UR Pride, recognize the importance of parental involvement and support in a young person's experience with their name, pronoun, and gender identification.

ISSUES

[15] Through the originating application, UR Pride seeks public interest standing to bring this proceeding. Through the notice of application, UR Pride seeks an interlocutory injunction restraining the Government from implementing the Policy until there has been a final disposition of the constitutional issues including the conclusion of any and all appeals.

[16] The Government opposes the granting of public interest standing to UR Pride. The Government further opposes the granting of an interlocutory injunction. The Government also seeks costs at this stage with respect to this application.

DECISION

A. Should the applicant be granted public interest standing?

[17] Before embarking on the specific discussion required to determine this issue, I take a few moments to discuss the purpose of considering public interest standing. The court in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 [*Downtown Eastside*] summarizes succinctly the rationale for the development of public interest standing and the important role it plays in allowing matters that impact the public to be brought before the court:

> [22] The courts have long recognized that limitations on standing are necessary; not everyone who may want to litigate an issue, regardless of whether it affects them or not, should be entitled to do so: *Canadian Council of Churches* [[1992] 1 SCR 236], at p. 252. On the other hand, the increase in governmental regulation and the coming into force of the *Charter* have led the courts to move away from a purely private law conception of their role. This has been reflected in some relaxation of the traditional private law rules relating to standing to sue: *Canadian Council of Churches*, at p. 249, and see generally, O. M. Fiss, "The Social and Political Foundations of Adjudication" (1982), 6 Law & Hum. Behav. 121. The Court has recognized that, in a constitutional democracy like Canada with a *Charter of Rights and Freedoms*, there are occasions when public interest litigation is an appropriate vehicle to bring matters of public interest and importance before the courts.

[18] While it is necessary to place limitations on anyone and everyone being able to litigate any particular governmental action or issue, the court must recognize the important constitutional role it has in determining whether governmental action is legally based or legally carried out. That constitutional role compels the court to examine the governmental action and ensures that the rule of law is carried out by that action. It is the rule of law upon which democracy in Canada finds its foundation.

[19] For clarification, as part of its constitutional function, the Court is not asked to opine on the appropriateness of a governmental action from a political perspective. That discussion is for the legislative and executive branches of government. The judicial branch, as evidenced by this judgment, is required to examine solely the issue of the legality of whatever action has been taken.

[20] The Government asserts that UR Pride should not be granted public interest standing. It is argued UR Pride does not have "a real stake in the proceedings" nor is it "sufficiently linked to the claim" being advanced. It is further argued UR Pride will not be able to "muster the evidence that is required to fairly and accurately decide this case." (Respondent's Brief at para. 16).

[21] The case now before the court is considerably different than other cases which have considered public interest standing early in the proceedings. Here, virtually all, if not all, of the customary guesswork in determining standing has been resolved by both the wealth of materials on the file and the obvious preparation and work already completed. Those observations render the decision of whether to grant status considerably easier than might otherwise be the situation.

1. The considerations for granting public interest standing

[22] The analytical framework for determining whether to grant public interest standing has been clearly set forth by the two governing authorities of the Supreme Court of Canada in *Downtown Eastside* and as further developed in *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27, 470 DLR (4th) 289 [*Council*]. In *Council*, the court identified again the three factors to be considered when determining whether to grant public interest status to a particular entity:

> [28] The decision to grant or deny public interest standing is discretionary (*Downtown Eastside*, at para. 20). In exercising its discretion, a court must cumulatively assess and weigh three factors purposively and with regard to the circumstances. These factors are: (i) whether the case raises a serious justiciable issue, (ii) whether the party bringing the action has a genuine interest in the matter, and (iii) whether the proposed suit is a reasonable and effective means of bringing the case to court (para. 2).

[23] Each of the factors are to be considered "purposively and with regard to the circumstances" before the court (para. 28). None of the factors are to be given particular scrutiny or weight. The ultimate decision on standing is a discretionary one which, as with all such decisions, must be exercised judicially having considered all of the necessary factors.

[24] From *Council* the purposes of granting standing are:

> [30] Courts must also consider the purposes that justify *granting* standing in their analyses (*Downtown Eastside*, at paras. 20, 23, 36, 39-43, 49-50 and 76). These purposes are twofold: (i) giving effect to the principle of legality and (ii) ensuring access to the courts, or more broadly, access to justice (paras. 20, 39-43 and 49). The goal, in every case, is to strike a meaningful balance between the purposes that favour granting standing and those that favour limiting it (para. 23).

[25] The purpose of limiting the availability of standing were also set forth:

> [29] In *Downtown Eastside*, this Court explained that each factor is to be "weighed . . . in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes" (para. 20). These purposes are threefold: (i) efficiently allocating scarce judicial resources and screening out "busybody" litigants; (ii) ensuring that courts have the benefit of the contending points of view of those most directly affected by the issues; and (iii) ensuring that courts play their proper role within our democratic system of government (para. 1).

[26] The legality principle is that which allows citizens to challenge governmental action to ensure such action complies with the law. In *Council* this proposition was explained eloquently as follows:

> [30] Courts must also consider the purposes that justify *granting* standing in their analyses (*Downtown Eastside*, at paras. 20, 23, 36, 39-43, 49-50 and 76). These purposes are twofold: (i) giving effect to the principle of legality and (ii) ensuring access to the courts, or more broadly, access to justice (paras. 20, 39-43 and 49). The goal, in every case, is to strike a meaningful balance between the purposes that favour granting standing and those that favour limiting it (para. 23).
>
> [Emphasis in original]

[27] Both access to justice and the legality principle are fundamental to the rule of law and therefore to *Charter* litigation specifically, and to ensuring there is an avenue for effective review of governmental action. Thus, it is not essential or even required that a proposed applicant have a personal stake in the matters in issue in the litigation. Were that the case, it would be difficult to ensure that the principle of legality remains effective, and it would further be the case that access to such constitutional challenge would be difficult, and in some cases perhaps even impossible.

2. A serious issue to be tried

[28] This aspect of the test does not appear to be disputed by the Government. That lack of dispute is for good reason because the Government has indicated, while it opposes the application, that the constitutional issues presented by this action are significant, complex, and novel. The pleadings in this matter are well drafted to ensure that these issues are properly framed by UR Pride for determination by the court (*Downtown Eastside* at para 98).

[29] The originating application sets out the material facts to be relied upon in support of the submission that the Policy is in violation of the *Charter*. But what is more

here, UR Pride has provided a detailed brief setting out precisely how it intends to argue that the Policy offends s. 7 and s. 15 of the *Charter* and that such violation cannot be reasonably justified pursuant to s. 1 of the *Charter*. A review of all of this confirms that there is a serious issue to be tried.

3. Genuine interest

[30] I take the wording of this heading directly from the discussion of this issue in *Council* at para 101. It appeared the argument being advanced by the Government in this regard, and accordingly why UR Pride should not be granted standing, was that UR Pride had no direct connection to the matters in issue in the litigation. If that was the argument, it was in error because this branch of the test specifically does not require such a direct connection. If it was being submitted that UR Pride must have direct involvement with those potentially impacted by the Policy, it was similarly in error. I explain these comments with the following discussion.

[31] In support of its submissions, the Government filed for the court's consideration, the decision in *Dykstra v Saskatchewan Power Corporation*, 2023 SKKB 118 [*Dykstra*]. In that case, seven individuals and one corporation commenced litigation challenging the constitutionality of certain government regulations concerning the reduction of greenhouse gases. One of the named plaintiffs was a minor who sought to conduct the action as an adult, without the need of a litigation guardian. The decision of Robertson J. in *Dykstra* dealt solely with the issue of whether the appointment of a litigation guardian was required.

[32] It is unclear what proposition was sought to be distilled from *Dykstra*. If the decision was presented to establish that there must be this direct connection with the litigation, as in perhaps a gender diverse student under the age of 16 being involved

in this litigation, this is not a requirement to acquire public interest standing. Indeed, as discussed *supra*, such a position is contrary to the very reasons why courts have considered the necessity of recognizing public interest standing: there does not need to be a private interest to allow challenges to the constitutionality of governmental policy.

[33] I turn then to what UR Pride actually is and does, to consider whether the genuine interest in these proceedings has been satisfied.

[34] UR Pride has filed the affidavit of Anita Giroux in support of this matter and with respect to the specific issue of standing. That affidavit sets out what UR Pride is, what it does, and its connection both to gender-diverse youth and gender-diverse individuals in society. The Government argued that this entity was a university organization with no connection to school aged youth and, moreover, was a Regina-centric organization. I am able to conclude from the evidence of Ms. Giroux that these assertions are in error and that UR Pride's interest in the matters in issue in this litigation extend beyond its immediate surroundings. UR Pride's extensive community involvement with youth, advocacy, and support, confirms this interest. The long standing nature of that interest confirms for the court that it is genuine.

[35] Ms. Giroux deposed to the following regarding UR Pride:

a) The entity has been in existence for 27 years and has been involved in the 2SLGBTQI+ community over the course of that time.

b) It deals with this community across the whole of Regina, Saskatchewan and has for the last 13 years. Specifically, those to whom services and support are provided are not limited to the university community.

c) UR Pride deals with all age groups including youth and provides social support groups, leadership, advocacy skill building camps, and province wide support for Gay Straight Alliance initiatives.

d) UR Pride deals with an undertaking called Camp fYrefly and fYerfly in school programs to assist youth in the community between the ages of 14 and 24. fYerfly is a program to assist students to deal with discrimination against 2SLGBTQ1+ youth and to assist those youth in advocating for diversity, equity, and human rights within their schools and communities.

e) UR Pride has operated community space for 2SLGBTQ1+ youth in the city and has operated events during annual Pride celebrations. In addition, it operates programs specifically aimed at youths in this community.

[36] I use the acronym 2SLGBTQ1+ in these reasons as that has been used by the affiants in these proceedings. I assign the same meaning to the acronym as does UR Pride in its brief, para. 9, footnote 7.

[37] The above summarizes the work that UR Pride has done both for the broader 2SLGBTQ1+ community but also specifically for the youth, who form part of that community. In addition, this organization has been involved in developing policy initiatives at the university and with Saskatchewan Health.

[38] The Government submits that UR Pride does not deal specifically with “elementary and high school aged children”. I respectfully observe that this submission is both incorrect and further, fails to recognize the work, and the specific nature of that

work, completed by the organization. But regardless, a similar argument was advanced in *Council* where the Chief Justice, Wagner C.J.C. stated:

> [102] The AGBC [Attorney General of British Columbia] argues that CCD's [Council of Canadians with Disabilities] work does not focus narrowly on people with "mental illness" (*A.F.*, at paras. 4, 92 and 98). This argument misses the point: a plaintiff seeking public interest standing has never been required to show that its interests are precisely as narrow as the litigation it seeks to bring. Instead, it must demonstrate a "link with the claim" and an "interest in the issues" (*Downtown Eastside*, at para. 43 (emphasis added)).

[39] I am satisfied that UR Pride has quite clearly demonstrated a link to the issue of gender-diversity and a genuine interest in that issue and has a lengthy resumé advocating for individuals' ability to disclose and discuss, with support, their gender identity issues. In the further words of Wagner C.J.C.:

> [103] I am therefore satisfied that CCD has "a real stake in the proceedings", "is engaged with the issues" and is no "mere busybody" (*Downtown Eastside*, at para. 43).

[40] The Government submitted that because UR Pride serves interests solely in the city of Regina, this should disqualify it from obtaining public interest status. I determine this argument is simply of no moment when considering constitutional challenges to governmental action.

[41] If it was somehow necessary that this applicant have reach beyond just the city of Regina, the evidence of Ms. Giroux establishes that, indeed, it does. The camps and other support initiatives are not confined to only those who reside in Regina. I am able to conclude that UR Pride through all of its various activities is not an exclusively Regina entity.

[42] But, more to the point, this litigation involves a challenge pursuant to the *Charter* to government policy implemented throughout the province. *Charter* issues do

not solely arise in one city or one area of the province. Rather, they are live issues anywhere that government policy is being implemented. That is to say that the issues raised in this litigation are not constrained by geography or location. The Government, of course, governs the entire province and therefore its actions have effect province wide. As a result, I reject the notion that where an entity operates somehow necessarily affects whether it can represent the broader interests at play in this litigation, or any other constitutionally driven actions.

4. Reasonable and effective means

[43] In *Council*, the court recognized that this aspect should be considered from the viewpoint of four constituent parts:

> [104] *Downtown Eastside* invites courts to consider a series of "interrelated matters" when assessing the reasonable and effective means factor, including (i) the plaintiff's capacity to bring the claim forward; (ii) whether the case is of public interest and what impact it will have on access to justice; (iii) whether there are alternative means to bring the claim forward, including parallel proceedings; and (iv) the potential impact of the proceedings on the rights of others.

(i) Applicant's Capacity to Bring the Claim Forward

[44] The Government submits that UR Pride does not have any track record of being involved in litigation of this nature, or, for that matter litigation of any nature. UR Pride concedes that it does not have this experience. However, while this is an accurate observation, it significantly misstates, or under-recognizes, the resources, expertise, and ability, which UR Pride possesses for purposes of this litigation. Moreover, the Court is compelled to review all of the factors from a purposive perspective and not from a strict analysis factor by factor. From the foregoing discussion, the experience and qualifications of UR Pride to deal with issues such as

those put forward in this litigation appear to be well-established. The discussion in *Downtown Eastside* is particularly *apropos* here:

> [73] I turn now to other considerations that should be taken into account in considering the reasonable and effective means factor. This case constitutes public interest litigation: the respondents have raised issues of public importance that transcend their immediate interests. Their challenge is comprehensive, relating as it does to nearly the entire legislative scheme. It provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it. A challenge of this nature may prevent a multiplicity of individual challenges in the context of criminal prosecutions. There is no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim. It is obvious that the claim is being pursued with thoroughness and skill. There is no suggestion that others who are more directly or personally affected have deliberately chosen not to challenge these provisions. The presence of the individual respondent, as well as the Society, will ensure that there is both an individual and collective dimension to the litigation.

[45] These comments apply directly, and with equal force, to that which is now before the court. As recognized appropriately by the Government, this litigation has raised matters of public interest. This challenge is comprehensive and allows consideration of the Policy's impact "on those most directly affected by it".

[46] Then, this is where the real "lived experience" of UR Pride with respect to this specific litigation becomes of significant importance. I begin with a further reference to *Council* and the Supreme Court of Canada's comments on that plaintiff's ability to bring the claim forward:

> [105] CCD boasts impressive resources and expertise. It is a sizeable, highly reputable public interest organization represented by excellent pro bono counsel and backed by a law firm that has already committed significant resources to this litigation. There is no doubt that CCD commands the necessary resources and expertise to advance the claim it asserts.

[47] I have little hesitation, given what has been done in the litigation to this stage of the proceedings, in concluding that those comments apply with equal force here. UR Pride is certainly pursuing this matter "with thoroughness and skill". UR Pride has marshalled its resources and channelled its efforts into preparing this case for adjudication. I have previously commented on the efforts in this regard as being significant. In an extremely short period of time, UR Pride has prepared detailed and complicated pleadings and obtained evidence in the form of three affidavits from experts and several affidavits from individuals who proffer relevant evidence to the matters in issue in the litigation. I use the terms "expert" and "relevant" advisedly. Both counsel for UR Pride and counsel for the Government acknowledged that those proposed experts who completed affidavits could be accepted by the court as experts and were therefore entitled to offer opinion evidence at this stage of the proceedings. Furthermore, neither party took any objection to the relevancy of any of the affidavits filed and accordingly, I am able to accept that the contents of the various affidavits are relevant to the issues presented by this litigation.

[48] In this matter the issues will be confronted by well experienced and capable counsel on both sides. On the issues of standing, UR Pride is represented by excellent *pro bono* counsel encompassing a large national law firm, a Saskatchewan law firm, and in-house counsel with the organization. In this regard, this entity has been able to attract the legal assistance of a minimum of five lawyers all apparently invested in the advancement of this litigation. It is clear that the national law firm has "committed significant resources to this litigation" and the clear indication is that it intends to continue with that level of commitment. The inclusion of the Saskatchewan law firm has, both added a provincial component and experience, and also enabled all counsel to comply fully and accurately with the applicable *Queen's Bench Rules* down to the filing of the requisite chambers' appearance memo in advance of the recent appearances in

court. I am left in no doubt that UR Pride has the ability at this time, the access to the necessary resources, and the presence of expertise, to advance the claim asserted in the application materials.

[49] Finally, on this aspect, counsel for UR Pride has indicated throughout this matter that the preparation of UR Pride for the litigation is ongoing and there is consideration being given to cross examination on affidavits filed (as Government counsel similarly indicated) and to the production of additional affidavits and briefs in response to that to be filed by the Government. This illustrates an ongoing commitment to the advancement of this litigation and an acceptance of the challenge that changing circumstances often present in litigation.

(ii) Whether the Case is of Public Interest and What Impact it Will Have on Access to Justice

[50] Counsel for the Government did not raise in argument any question but that this case raises issues of public interest. This litigation raises the possible adverse effect of a governmental policy on what has previously judicially been characterized as a marginalized and particularly vulnerable group in society. The Supreme Court of Canada in *Hansman v Neufeld*, 2023 SCC 14, 481 DLR (4th) 218 made that recognition of marginalization and vulnerability of transgender individuals and this litigation "will promote access to justice for a disadvantaged group who has historically faced serious barriers to bringing such litigation before the courts." (*Council* at para 110).

(iii) Realistic Alternative Means

[51] The court's consideration in this regard is directed in *Council* as follows:

> [111] I must also consider whether there are realistic alternative means which would favour a more efficient and effective use of

> judicial resources and would present a context more suitable for adversarial determination (*Downtown Eastside*, at para. 51). In this regard, the Court of Appeal took notice of an action that has been commenced under the *Class Proceedings Act* [RSBC 1996, c 50], to challenge the same statutory provisions that are at issue in this appeal. As of now, that class action has not yet been certified.

[52] It is interesting to note that here, unlike both *Council* and *Downtown Eastside*, there are absolutely no alternative means disclosed by the materials or put forward in any of the materials or argument. If it is accepted that this litigation raises matters of public interest and importance, and if it is accepted that the action advances a legitimate constitutional challenge to governmental action (both of which appear to have been conceded by the Government), and if it is accepted the community affected is already marginalized and particularly vulnerable, I pose the same question here that was put to counsel for the Government during submissions: if not UR Pride through this originating application, then who and by what alternative means? There were no alternative suggestions put forward. I do not mean by that to suggest that the Government must necessarily present alternative means or parties. But rather, in the absence of any alternative, I determine that there is no realistic alternative means to advance this public interest challenge to governmental action.

[53] Thus, a legitimate challenge to matters of public interest with respect to those most vulnerable in our society, would potentially go unadvanced. It is this precise scenario that public interest standing is designed to respect and encourage legal action.

[54] It is also noted that the Government did not raise any suggestion that an originating application is an inappropriate vehicle by which to have the issues in this litigation determined. Indeed, it appears to be accepted, by the lack of objection, that the pleadings are those which will allow for an adjudication on the issues necessary to resolve the dispute between the parties. I have previously indicated that the pleadings

in this matter are well drafted and succinctly set forth those matters to be considered by the court in determining both the interlocutory injunction application and the ultimate determination of the *Charter* issues.

[55] Specifically, *The Queen's Bench Rules* at Rule 3-49(1) set forth those actions which may be commenced by originating application. Specifically set forth is an action seeking a remedy pursuant to the *Charter*. That necessarily means this originating application is the exact method by which the challenge should be mounted.

[56] It would seem to necessarily follow from the foregoing discussion that if the selected method of proceeding is not available, there is no other means presently known by which these important, complex, and timely issues, can be determined. Further, the individuals indicated to be affected by this Policy will have no realistic means to access to justice. I emphasize again the Government's apparent acceptance of the characterization here of the issues in the litigation.

(iv) Potential Impact of the Proceeding on the Rights of Others

[57] I point out that I begin this aspect of the discussion by highlighting the comments of the Supreme Court of Canada in *Council*:

> [117] The AGBC argues that CCD's claim may prejudice people who support the impugned provisions. I would attach little weight to this concern. Support for a law should not immunize it from constitutional challenge. If the impugned provisions are unconstitutional, they should be struck down.

[58] I do not understand the Government to argue that advancing this claim may prejudice those who support the challenged Policy. Regardless, the comments of the Chief Justice of Canada quoted above provide a complete response to any such suggestion that might be made here.

[59] The principle of legality and supremacy of the rule of law, means specifically that governmental action must not be either immunized or hidden from constitutional challenge. As well, artificial barriers cannot be constructed to defeat legitimate questioning of government action. The ability, in a legitimately framed proceeding, to challenge such constitutionality is what permits governmental action to be scrutinized and properly evaluated. It is that very principle upon which our free and democratic society is based and which permits the rule of law to operate. If the governmental action is determined to be constitutionally correct, the Policy will remain. However, if the governmental action is determined to be unconstitutional it must be struck down. The ability to mount such a challenge should be considered to be a critical component of our ability to function in our society. The ability through proceedings such as these to engage in a full and free debate is a hallmark of our democracy and that which ensures all in society have a voice and are heard.

5. Conclusion on the issue of public standing

[60] Based on a consideration of all of the foregoing factors, I am satisfied that UR Pride is to be accorded public interest standing to advance this litigation. Indeed, if not this organization there is no other prospect put forward who could engage in the complexity of this matter and who could mount a legitimate challenge to the questioned governmental action.

B. Is the application for an injunction premature

[61] The Government submits that the application for an interlocutory injunction is premature because the various school divisions and the Conseil des Écoles Fransaskoises have yet to develop administrative procedures with respect to the Policy and accordingly, to use the phrase adopted by counsel for the Government, “there is no

meat on the bones" to properly consider how the Policy is being administered at the school level with respect to its students. In this regard, the Policy at page 3 provides as follows:

> All school divisions and the CÉF will develop and publish administrative procedure(s) for the implementation of this policy. A draft AP is provided for school divisions to use as a guide.

[62] The Government argues that without these administrative procedures in place, there are no harms occurring, and accordingly there is nothing to enjoin through an interlocutory injunction.

[63] I find, respectfully, that this aspect of the Government's argument is incorrect in fact and in effect. In fact, the Policy has been implemented in the Regina Public School Division since the beginning of the current school year. The affidavit of Nicolas Day in these proceedings confirms that is the case and the Government has not filed any evidence to suggest Mr. Day is mistaken or that something different is happening in this, or for that matter in any other school division. Mr. Day states:

> 11. On August 29, 2023, I attended an annual beginning-of-the-school year meeting at Balfour Collegiate. At this meeting, the principal informed teachers about the new expectations from the school district, Regina Public Schools. Pursuant to the Government of Saskatchewan's new policy. school staff in Regina Public Schools will be required to notify parent(s) and guardian(s) if any student under the age 16 wishes to be called by a name or pronoun that differs from what is recorded on official paperwork. From the principal's responses to questions, I understand that school staff will not be permitted to use the preferred name or pronoun of a student under the age of 16–even in a one-on-one conversation with that student-unless and until parental or guardian consent has been obtained.
>
> 12. In response to questions from staff, the principal confirmed that parental or guardian consent would not be required if a student under 16 wished to be referred to by their middle

> name, or by nickname commonly associated with their legal name (e.g. Alex for Alexander or Alexandra), even if that nickname were gender neutral.

[64] This uncontroverted evidence confirms that regardless of the absence of administrative procedures, the expectation of the Ministry, as carried through by the various school divisions, is that the Policy will be observed. In plain terms this means that the Policy is in place, it is being applied at the school level, and those students under the age of 16 seeking to have their gender-diversity expressed and being unable or unwilling to obtain parental consent, are being affected by it. There is no other reasonable conclusion to draw at this interim stage based on the evidence tendered.

[65] Moreover, counsel for UR Pride indicated that prior to the commencement of this action, a specific request had been made of the Ministry to pause implementation of the Policy pending a review and that request had not been accepted. During submissions, the court inquired of counsel for the Government whether the implementation of the Policy was to be held in abeyance pending determination of the constitutional issues in the litigation. The response to that query was that the Policy was not going to be interrupted. As a result, all indications are that the Policy is in place now; there is an expectation that those in the education system responsible for its implementation will abide by the requirements of the Policy; there is no willingness by the Government to suspend such implementation pending completion of the review sought in this Court action; and finally, there is no indication that development of administrative procedures will have any effect on the expectation of implementation of the Policy.

[66] In the result, accordingly, a suggestion that this interlocutory application is premature, is without any evidentiary support at best. It further appears to ignore the clear indications that the Policy is to be adhered to.

[67] In the result, I find I must determine that this application is not premature.

C. Should an interlocutory injunction be granted

[68] The parties do not dispute this Court's ability to grant injunctive relief in the circumstances of this action. As a result, the court's inherent jurisdiction to enjoin a party from acting is not in issue.

[69] The parties are *ad idem* regarding the test to be considered for granting an interlocutory injunction. That test, originally set forth in *Manitoba (A.G.) v Metropolitan Stores Ltd.*, [1987] 1 SCR 110 [*Metropolitan Stores*], was then adopted in *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR*]. The decision of Sopinka and Cory JJ. in *RJR* at 334 sets forth the elements of the test to be applied:

> *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

1. Serious question to be tried

[70] The first stage of the inquiry sets a threshold that is quite low. The court must be satisfied that the claim is neither frivolous or vexatious. It has been recently held that this low threshold is particularly appropriate in cases involving an alleged breach of *Charter* rights as a result of the application of legislation. In *A.C. and J.F. v*

Alberta, 2021 ABCA 24 at para 22, 456 DLR (4th) 183) [*A.C.*] the majority judgment stated:

> [22] In *Metropolitan Stores*, the Supreme Court expressly adopted this threshold in the context of applications for interlocutory relief where the underlying claim is the constitutionality of legislation said to breach the plaintiff's *Charter* rights. The threshold calls for the court to engage in a very limited way in assessing the merits of the case at the interlocutory stage. In rejecting a higher threshold, Beetz J recognized that fleshing out the contours of *Charter* rights will rarely be clear at an early stage of litigation. *Charter* rights are "evolutive" and claims should not be foreclosed at an interlocutory stage. The record will be thin and the complex factual matrix involved may only become clear when the entire panoply of evidence is marshaled and reviewed at the trial of the issue.

[71] I understand from the submissions of the Government that it concedes UR Pride has met the low bar for this first requirement. Nevertheless, some discussion is required to ensure this aspect is properly considered by the court. In this regard, *RJR* at 337 laid out the framework for considering whether there is a serious question to be tried:

> What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores, supra*, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

[72] As with the public interest standing discussion, the steps taken by UR Pride have largely resolved the answer with respect to this first issue at this preliminary stage. UR Pride has filed the evidence it seeks to rely upon (at this stage of the proceedings) and has filed its brief discussing the challenge being mounted to the Policy

on the grounds of a violation of specific *Charter* rights. Thus, unlike many, if not most, of the other authorities in this area, again there is little guesswork for the court to engage in. While the Government has not yet provided its complete material concerning its opposition to the challenge mounted by UR Pride, it is apparent that the litigation involves a serious issue to be tried and could not, in any context, be considered either frivolous or vexatious. Again, as earlier indicated, the Government accepts that this is the case.

2. Is there likelihood of irreparable harm to the applicant if the injunction is not granted?

[73] This aspect of the test requires the court to determine, at this preliminary stage and in the absence of any challenges to the evidence, whether UR Pride, or in this case, the individuals affected adversely by the Policy, would suffer irreparable harm should the injunction not be granted. In *RJR* at 340-341, Sopinka and Corry, JJ. stated:

> Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.
>
> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. …

[74] UR Pride has filed expert evidence concerning the potential harm suffered by gender diverse students if this Policy is not enjoined pending a full inquiry regarding the alleged *Charter* breaches of the Policy.

[75] UR Pride has filed an expert opinion affidavit of Dr. Travis Salway. Dr. Salway is an assistant professor in the Faculty of Health Sciences at Simon Fraser University. He has in excess of 20 years of public health research concentrating in the area of health of 2SLGBTQ1+ individuals. Specifically, his research deals with "identity invalidation" and the health consequences of that action specifically as it relates to school policies denying youth the ability to use their "chosen names and pronouns in the absence of parental or guardian consent." (Affidavit of Dr. Salway, para. 9).

[76] Studies conducted together with the research in this area, according to the opinion expressed by Dr. Salway, establish that identity invalidation causes psychological harm to the individual affected:

> 15. Rigorous studies from public health and psychology research further clarity the mechanism through which identity invalidation causes psychological harm. We have empirically tested this mechanism under a theory known as 'minority stress.' What we have learned is that, as identity invalidation and other forms of stigma accumulate, 2S/LGBTQ young people begin to develop negative opinions of themselves, often internalizing doubt, ruminating on invalidating messages, and eventually losing hope for their own futures. As negative self-schemas, rumination, doubt, and hopelessness grow, these psychological injuries can eventually lead to prolonged experiences of depression, anxiety, and in some cases, suicide; some will turn to drugs and alcohol to try to cope with the effects of minority stress, while others socially withdraw.
>
> [Affidavit of Dr. Salway]

[77] Dr. Salway further opines that identity invalidating messages are given when a teacher misgenders a student when they do not use the chosen name or pronoun of the student. According to the opinion expressed, the results of such identity invalidation are:

> 17. In this context, it is not surprising that 2S/LGBTQ youth who experience identity invalidation suffer an elevated burden of suicide-related outcomes. This is why the American Psychological Association supports the validation of adolescents' self-determined gender identities, in school and other social environments. On this basis, school-based policies that deviate from the practice of affirming trans students' gender identities-including personal names and pronouns-risk further contributing to the unjust and avoidable psychological distress caused by invalidating environments. Social epidemiological research from recent decades-particularly in the United States-has demonstrated greater levels of anxiety, suicidality, mood disorders, and substance use disorders in jurisdictions that have enacted sexual and gender minority-invalidating and marginalizing policies.
>
> [Affidavit of Dr. Salway]

[78] The expert opinion affidavit of Dr. Travers was filed by UR Pride. Dr. Travers is a professor of sociology at Simon Fraser University. Their opinion relates:

> 5. I have been asked to provide an expert opinion on the likely consequences for gender-diverse students of a policy that: (i) requires school personnel to seek parental/guardian consent when a student under the age of 16 requests that their "preferred" name, gender identity, and/or gender expression be used; or (ii) requires school personnel to deadname and misgender students under the age of 16 in the absence of parental/guardian consent.
>
> [Footnote omitted]

Their qualifications include extensive experience with respect to transgender children and youth in sport and transgender issues more broadly.

[79] As an aside here, I use the pronouns “they/them” with respect to Dr. Travers as the court was advised by counsel this is how this individual identifies themselves.

[80] They opine that the well-developed research, as set forth in the affidavit, illustrates the following:

> 13. Ultimately, both those who are visible and those who are invisible are vulnerable to high-risk behaviour, self-harm, and suicide. It is important to emphasize that it is not being transgender, *per se*, that increases the likelihood of self-harm and suicide but rather cultural and social prejudice that does the damage. The *2012 National Strategy for Suicide Prevention: Goals and Objectives for Action: A Report of the U.S. Surgeon General and of the National Action Alliance for Suicide Prevention* [U.S. Department of Health and Human Services, Office of the Surgeon General and National Action Alliance for Suicide Prevention, Washington, D.C.: HHS, September 2012] notes that suicidal behaviours in LGBT populations appear to be related to "minority stress", namely high levels of chronic stress which stem from the cultural and social prejudice and discrimination persons with minority sexual orientation and gender identity experience from the dominant group in society. This stress is caused by, among other things, individual experiences of prejudice or discrimination, such as family rejection, harassment, bullying, violence, and victimization.
>
> [Affidavit of Dr. Travers]

[81] Specifically related to the effect of this Policy, Dr. Travers states:

> 31. Trans youth with unsupportive parents and families are already exposed to high risk. Trans youth face an increased risk of depression, anxiety, and suicide when belonging to families who reject their gender identities. Experiences of violence, abuse, and pressure in the home can threaten mental health and belonging.
>
> 32. Deadnaming and misgendering by teachers harms already vulnerable kids. Public health literature outlines multiple significant psychological and other health-related harms that may occur if a trans student is unable to use their chosen name or pronouns (i.e. are not being affirmed in their identity) in multiple environments including schools.

> 33. Deadnaming and misgendering may also have the impact of "outing" a student (who, for example, presents as one gender) as transgender to their peers and/or reinforcing the social exclusion and harassment to which gender diverse students are frequently subject.
>
> 34. Several trans kids that I interviewed, or whose parents I interviewed, in the course of my work experienced verbal abuse, threats of violence, and physical violence at school that made it impossible for them to continue attending, either temporarily or indefinitely. Such interruptions to school attendance have negative mental health consequences and significantly lessen the likelihood of academic success and therefore increase the likelihood of future precarity. These interruptions become more likely when teachers are barred from recognizing and affirming gender-diverse students' identities.
>
> [Affidavit of Dr. Travers]

[82] They go on to opine that the ability to use a chosen name and pronoun in a school setting improves a youth's mental health situation:

> 38. Notably, use of chosen name in school settings is associated with improved depressive symptoms and self-esteem. The use of a student's "preferred" name and pronouns in any context is associated with lower depression, less suicidal ideation, and reduced suicidal behaviour. A supportive school environment and use of chosen name can help improve the psychological well-being of trans kids, as being out about gender identity in a school environment has been found to contribute positively to self-esteem, feelings of belonging, and overall well-being.
>
> [Affidavit of Dr. Travers]

[83] The third expert to provide opinion evidence in support of UR Pride is Dr. Saewyc. She is a professor in the school of nursing at the University of British Columbia. She has been intimately involved in research concerning adolescent health in the province of British Columbia. She has an international recognition for her research concerning "the health of marginalized youth" (Affidavit of Dr. Saewyc at para. 9).

[84] Dr. Saewyc opines on the positive effect of a gender diverse youth to have strong positive family support. Such support significantly reduces these youths' mental health difficulties including suicidal ideation. However, where that parental support is either not present or is not strong, gender-diverse youth suffer significantly more emotionally and mentally than do non-gender diverse youth:

> 21. Unfortunately, not all parents are nurturing and supportive of their children and adolescents. Our data from the 2018 BC AHS shows that while many gender diverse youth feel supported by their family, they were less likely to experience that support than their cisgender peers (that is, the majority of students in school, whose gender identity and sex assigned at birth align). More than half of cisgender girls, and two-thirds of cisgender boys felt their family understood them, but only 23% of trans boys, 25% of nonbinary students, 31% of questioning youth and 38% of trans girls felt their family understood them. Gender diverse youth were slightly more likely to report other elements of family connectedness: about half felt their family respected them quite a bit or very much, and a similar half felt their family paid attention to them, and that they had fun together – but these were all quite a bit lower than the percentages among cisgender boys and girls.
>
> 22. There is even more troubling evidence of negative or harmful responses from families to gender diverse youth. In the BC AHS, gender diverse youth were twice as likely to have run away in the past year than their cisgender peers (19% to 20% compared to fewer than 10% of cisgender boys or girls). They were also more than twice as likely to have been kicked out of their home in the past year (12-13% of gender diverse youth compared to 5-6% of cisgender youth). Also, nearly 1 in 3 gender diverse youth reported physical abuse, especially trans boys (39%) which was significantly higher than for cisgender youth.
>
> 23. In the 2019 CTYHS, almost 25% of trans and nonbinary youth reported they did not feel safe at home; in the 2014 CTYHS for the Prairie provinces, more than 1 in 3 younger youth (14-18) sometimes or rarely felt safe at home, which was higher than for other provinces. In the 2019 CTYHS, 10% had experienced physical violence in the past year by a family member, and approximately 14% had been sexually abused by an older or stronger family member.
>
> 24. These lower levels of family understanding and acceptance, and troublingly high levels of family violence experienced by gender

> diverse youth, including youth as young as 12 in BC and as young as 14 in the data from Saskatchewan, unfortunately contradict the assumption that all parents are safe and must give consent for gender diverse young people to have their identity supported at school.
>
> [Affidavit of Dr. Saewyc]

[85] With respect to the school environment, this expert opines that lack of support or ability to socially transition, including name and pronoun changes can increase mental health difficulties for such gender diverse youth:

> 26. Where schools do not support a child or adolescent's request for social transition including name and pronoun changes, research has shown that actions on the part of teachers and school staff can increase students' distress, social isolation, and even precipitate mental health problems such as suicidality. Schools that are not supportive may not have anti-bullying policies that explicitly call out gender-based or anti-trans bullying, or they may not enforce their policies, even if they have them. According to findings from the National Climate Survey of Homophobia and Transphobia in Canadian Schools students regularly hear transphobic remarks, and in some schools, even teachers make negative remarks about gender identity to trans and nonbinary young people. In the 2019 CTYHS, 16% of trans youth in the Saskatchewan and Manitoba reported they had changed schools or shifted to homeschooling at least once because their school was not supportive of their gender identity, a higher proportion than in other provinces.
>
> 27. In contrast, trans and gender diverse students in schools that have policies supporting students and affirming their gender identity and expression, including policies to support chosen names, report stronger school connectedness, and better mental health.
>
> [Affidavit of Dr. Saewyc]

[86] Dr. Saewyc refers to the extensive research which has been conducted establishing the concerns for violence, discrimination, and bullying, for gender-diverse youth at school. The statistics in this regard are provided by Dr. Saewyc and establish serious and significant concerns for these youth. To combat this significant concern regarding violence or discrimination, Dr. Saewyc opines:

> 31. Schools are not necessarily safe spaces for gender diverse youth who are out, and teachers and other school staff set the tone for supportive school environments to help prevent bullying and violence. When teachers and other school staff recognize and affirm the gender identities of trans, gender diverse, and gender non-conforming students, they make school environments more safe and prevent bullying and violence. When teachers and other school staff do not recognize and affirm the gender identities of these students – including as a matter of policy – they contribute to the physical and psychological dangers that trans, gender diverse, and gender non-conforming students experience in the school environment.
>
> [Affidavit of Dr. Saewyc]

[87] In response to these expert opinion materials, the Government has tendered the expert opinion affidavit of Dr. Anderson. Dr. Anderson is a clinical psychologist practicing in Berkeley, California. She indicates that her professional work focuses on youth dealing with gender-identity issues. She estimates that she has attended on hundreds of youth with respect to gender-identity issues with many, but not all, of those youths ultimately transitioning to a different gender identity from that assigned at birth.

[88] Dr. Anderson opines on the importance of a youth exhibiting gender-identity issues receiving professional medical assistance and guidance to cope with their gender dysphoria. The purpose of that professional assistance is summarized by Dr. Anderson as follows:

> 1. A summary of my opinion is as follows:
>
> > d. A careful assessment by professionals prior to transitioning is critical to understand the causes of the child's or adolescent's feelings of gender incongruence, the likelihood that those feelings will persist, to provide guidance about the implications of any kind of transition, to diagnose and treat any gender dysphoria or coexisting conditions, and

> to provide ongoing support during any transition (Section III.D).
>
> [Affidavit of Dr. Anderson, Exhibit B, at 1.d.]

[89] Dr. Anderson speaks specifically about the potential difficulty of reversing social transitioning should the youth determine not to follow through with the gender-identity issues expressed:

> 1. …
>
> > e. Social transition itself is an impactful psychotherapeutic intervention that has the potential to increase the likelihood of persistence of gender incongruence. Transitioning socially can also be psychologically hard to reverse for a child or adolescent. (Section IV).
>
> [Affidavit of Dr. Anderson, Exhibit B, at 1.e.]

[90] This expert speaks to parental involvement in youth gender-identity issues as being essential. This parental involvement allows for input into the professional assistance outlined above.

[91] Social transitioning is defined by Dr. Anderson as:

> II. …
>
> > 2. Throughout this report, I use the term "social transition" (and variations) to refer primarily to adopting a new name and/or pronouns that differ from one's natal sex. A social transition can include more than just name-and-pronoun changes–individuals adopting a transgender identity sometimes change their hairstyle, clothing, or their appearance in other ways, begin using opposite-sex facilities, and/or make other social changes. In the literature, however, the phase "social transition" is primarily used to refer to name-and-pronoun changes.
>
> [Affidavit of Dr. Anderson, Exhibit B, at II. 2]

[92] She describes her views of there being little substantive research on the ultimate effect of having begun the process of social transitioning and then the youth determining not to follow through with the gender-identity. This uncertainty causes Dr. Anderson to opine as follows:

> 31. Thus, while social transition is too often described as nothing more than a harmless "exploration" of gender and identity, at this time we cannot rule out that a social transition may have a causal effect on a child's or adolescent's future development of their internal sense of identity. On the contrary, the early research we have is consistent with the hypothesis that social transition causes some children to persist who otherwise might have desisted from experiencing gender dysphoria and transgender identification.
>
> [Affidavit of Dr. Anderson]

[93] Finally, Dr. Anderson opines that social transitioning without assessment and medical plan is not a practice that is endorsed by either medical or mental health organizations:

> 49. As far as I am aware, no medical or mental health organization recommends that adults facilitate a social transition upon a child or adolescent's request without a careful evaluation by an appropriately trained mental health professional. WPATH's SOC7 recommends a careful, psychological assessment and guidance from a mental health professional to help parents "weigh the potential benefits and challenges" of a social transition. The Endocrine Society's Guidelines "advise that decisions regarding the social transition of prepubertal youths with GD/gender incongruence are made with the assistance of an MHP or another experienced professional" (the guidelines do not say anything different about adolescents). The American Psychological Association recommends that "[p]sychologists are encouraged to complete a comprehensive evaluation and ensure the adolescent's and family's readiness to progress," to discuss "the advantages and disadvantages of social transition during childhood and adolescence" with parents and their children, and to assist parents and their children with "developmentally appropriate decision-making about their education, health care, and peer networks, as these relate to children's and adolescent's gender identity and gender expression."
>
> [Affidavit of Dr. Anderson]

[94] As submitted by counsel for UR Pride, it is noted that Dr. Anderson provides no comment regarding the rather potentially severe mental health and physical abuse which may be suffered by a gender-diverse youth in a home without supportive parents. Dr. Anderson, while providing critical comment on certain of the evidence tendered by UR Pride, does not comment on the extensive, and apparently peer supported, gender-diverse surveys and further extensive Canadian data on the risks faced by gender-diverse youth who are unable to express their gender identity through the use of a chosen name or pronoun.

[95] In particular, Dr. Anderson states as follows:

> 77. Likewise, numerous statements are made by Dr. Travers without professional or scientific papers or citations to justify them. These include, in paragraph 17 of their affidavit:
>
> > Only when young children are fearful of the reactions of their parents will have or feel that they may be unsafe in telling their parents do they tend to tell trusting adults such as close relatives or teachers.
>
> 78. Even if this statement is accepted, the focus on a small and unknown percentage of a minority population of gender questioning youth skews the approach to all children in an unfavorable way. We cannot assume that most parents will be unaccepting of their child's gender questioning.

[96] With respect to this opinion expressed, the very issue presented by UR Pride is the detrimental and concerning effects on gender-diverse youth who may not have supportive parents or, due to the wording of the Policy, a single parent who is not supportive. This is the "minority of the minority" referred to by counsel for UR Pride during the submissions advanced.

[97] At this stage of the inquiry, I am not asked to weigh the evidence submitted and determine which is to be accepted and which is to be rejected. It may be

the Court is asked to engage in that process when the substantive issues of the *Charter* challenge are considered. Rather, what the court is asked to do here is to determine whether on the whole of the evidence tendered, UR Pride has established a risk of irreparable harm to the individuals affected by this Policy.

[98] On the whole of the evidence, I am satisfied that those individuals affected by this Policy, youth under the age of 16 who are unable to have their name, pronouns, gender diversity, or gender identity, observed in the school will suffer irreparable harm. As indicated, counsel for UR Pride has identified that it is expected this is a "minority of a minority" of individuals. This identification was not disagreed with by counsel for the Government. That therefore means that a very limited number of individuals in the school system in Saskatchewan may be irreparably detrimentally affected by this Policy, and a further limitation of that number will be affected by an inability or an unwillingness to obtain parental consent to entertain these issues. The harms identified by the three experts tendered by UR Pride illustrate, quite forcefully, those risks of irreparable harm.

[99] Counsel for the Government made reference to an assertion that a lack of enforcement of the Policy would enable a 6 year old child beginning elementary school to ask and obtain the right to be identified by a name, pronoun, or identified by a gender other than that assigned at birth. Respectfully, I find this argument lacks persuasiveness and to be without foundation or basis on the materials that are before the court on this application.

[100] There is no indication in the materials that any students as young as 6 years old are looking to engage in this discussion. Furthermore, there is no indication that teachers or any other educational professionals either have been asked, or will be asked, to engage in this discussion. And, there is no indication these teachers and other

educational professionals, or other professionals within the school system such as nurses or guidance counsellors, would even consider engaging in the discussion with a child of such tender years. Counsel for UR Pride characterized such assertions as little more than "fear-mongering." I do not adopt that submission, but I do query why it has been raised in an evidentiary vacuum.

[101] As has been referred to previously in these reasons, I am also mindful that the Government appears to continue to advance a requirement restricting the use of pronouns for students under the age of 16 without parental consent, in the absence of any legislative or other legal authority. Again, the prohibition on the use of pronouns is not part of the actual wording of the Policy regarding these individuals. As a result, it would appear the Government is intent on restricting such an action in the absence of any legitimate authority in this regard. This observation will require further argument at the hearing on the substantive constitutional issues. At this stage the pronoun restriction does not appear to have governmental authority.

[102] This observation strengthens the concerns regarding irreparable harm. There was no indication given whether the word "pronoun" was either inadvertently missed by the drafters of the Policy, or somehow ought to be read into the wording of the Policy. Simply put, it is not there now. The attempts therefore to restrict or control a student's use of particular pronouns is unsupported, potentially, by any legitimate governmental action.

3. Balance of Convenience and Public Interest considerations

[103] It is at this stage that counsel for the Government directed the bulk of opposition to the granting of an interlocutory injunction in this case. It was fairly, and practically, observed that it is on this issue that injunction applications with respect to

the *Charter* issues are ultimately determined. In that regard, it was asserted that UR Pride has misunderstood, and therefore misrepresented, what the Policy does. It was asserted that the existing *status quo* was a hodgepodge of policies and approaches to gender diversity. He further submitted that UR Pride's *Charter* challenge was far from a "slam dunk" as he indicated UR Pride purports it to be. Finally, he submitted that the response to be accorded governmental action renders the granting of an interlocutory injunction inappropriate (perhaps unavailable) and the matter must await a final determination on the merits. Then, the Government argues, even if the governmental action is found to have been in breach of the *Charter*, the court can craft a specific and nuanced response to such a breach rather than simply impose the blunt remedy of a complete prohibition on such governmental activity.

[104] I first review the Government's position that UR Pride has misconstrued or misunderstood the Policy by arguing that it results in an "outing", "mis-gendering", "dead-naming" requirement. Rather, it is argued in support of the Policy that its overall tenor is to provide support to students who wish to engage in name, pronoun, or gender identity changes. That support involves the student's parents, and those parents will only be contacted once the student is ready for such contact to occur. It is further asserted that UR Pride has mis-stated the Policy by suggesting there cannot be one on one conversations between students and teachers on the issues raised by the Policy, when there is no such prohibition in those conversations contained in the Policy.

[105] I find that I am unable to accede to the Government's arguments that UR Pride has either misconstrued or misunderstood the Policy in advancing its arguments. UR Pride has not suggested in its materials or submissions that there cannot be one on one conversations between a teacher and a student regarding names or gender-identity. Rather, UR Pride has simply relied on the wording of the Policy to submit that the

teacher is unable to use the name or gender identity sought for by the student without first obtaining parental consent.

[106] In terms of the argument regarding "outing", I understand UR Pride to be submitting that a young person under the age of 16 must engage in the choice of electing between being "outed" to their parents in order to obtain the necessary consent, or remain closeted due to an inability or unwillingness to seek that parental consent. It is the choice the student must make due to the Policy and not to a mandatory "outing" requirement which UR Pride seeks to advance.

[107] It follows, that when considering the balance of convenience, I am unable to determine that UR Pride has mis-construed the Policy based on the material filed. It advances the constitutional arguments based on the alleged violations of the rights of the youth as a result of the impact, in its entirety, of the Policy.

[108] The Government then argues that the *status quo ante*, prior to the implementation of the Policy, was a mixture of different policies that was causing confusion with a cohesive approach to this very difficult issue. In support of this prong of the argument, reference is made to the affidavit of A.B. and the parental consent provided, as well as the affidavit of Corrine Pirot who speaks to her interaction with parents when dealing with a student presenting with this difficult and complicated issue. Reference is made similarly to the affidavit of Nicolas Day.

[109] However, the Government has made no attempt to explain what the actual policy of the Ministry was, nor what different policies were being enacted at the school division level. The affidavit of Mr. Walter would, presumably, have been the place to provide that explanation but it did not. To suggest that the examples support a *status quo ante* similar to or requiring the current Policy is not supported by the weight of the

evidence and, is not supported by the specific examples sought to be relied upon. In short, the argument advanced here did not appear to accord with any of the materials presented.

[110] The affidavit of Mr. Day sets forth the administrative policy of the Regina Public School Division prior to the implementation of the current Policy. That prior policy clearly permitted use of names and pronouns to accord with a student's gender identity:

> 9. Administrative procedure 353, also dated June 2022, is entitled *Students and Gender and Sexual Diversity (GSD)*. I have attached this administrative procedure as **Exhibit B** to this affidavit. Section 6 outlined of this administrative procedure outlined the requirements concerning privacy and confidentiality, while section 7 outlined specific procedures for accommodating Gender Diverse Student. These sections required, among other things:
>
> **6. Privacy and Confidentiality**
>
> 6.1 Division staff will respect confidentiality and privacy and not disclose sexual orientation, gender identity, and/or gender expression of students unless the student has given permission or there is an impending safety concern.
>
> 6.2 Confidentiality of student information is to be managed as outlined in Administrative Procedure 505 Confidentiality.
>
> **7. Specific Procedures for Accommodating Gender Diverse Students**
>
> 7.1. Self-Identification and Pronouns
>
> 7.1.1. <u>Every student has a right to be addressed by a name and pronoun that corresponds to their gender identity. A court-ordered name change or gender change is not required, and the student does not need to change their official record.</u>

> 7.1.2. Students must be addressed by the pronoun that reflects their gender identity regardless of their gender expression.
>
> 7.1.3. If a student's gender identity is blended, or fluid, or neither, the student may request to be referred to with a gender-neutral pronoun such as they/them/theirs. Once a student declares their pronouns, they must be respected to ensure the student's sense of well-being and security.
>
> 7.2. Official Records and Student Information
>
> 7.2.1. The school shall change a student's official records to reflect a change in legal name or gender upon receipt of documentation that such legal name or sex has been changed.
>
> 7.2.2. Whenever possible, at the request of a student or of a student's parent(s)/guardian, the student's preferred name and their pronouns will be included on class lists, timetables, student files, identification cars, etc.
>
> [Emphasis in original]

[111] But regardless of this part of the discussion, this Court is not entitled to simply examine prior policies in determining the appropriateness of the current Policy. The Government is entitled to change policy. It is the legal effect of the current Policy which is to be considered. As indicated at the outset of these reasons, the Court is not empowered to comment on the appropriateness of any particular action.

[112] I turn then to a further consideration of the relative strengths of the parties' cases. This is to be considered when governmental action is being challenged to ensure the public interest is validly considered and actions commenced are legitimate for judicial consideration. On this aspect, the Government asserts that while it concedes the branch of inquiry that there is a serious issue to be tried, it does not concede that

UR Pride's case will ultimately prevail and submits that the Government will advance a significant and serious defence to the claims being made by UR Pride. What was taken from the oral submissions in this regard is that the Government holds the view that its contrary arguments on the application of s. 7, s. 15, and s. 1 of the *Charter* will carry the day with the court and the application will ultimately be dismissed.

[113] As indicated, the Court has the benefit of reviewing the submissions to be made by UR Pride at the hearing on the substantive *Charter* issues. As well, the Court has the ability to review the summary opposition retorts made by the Government in its brief filed on this injunction application and during oral submissions. I do not suggest by these comments that either UR Pride will not file further material, or the Government will not file further developed legal and evidentiary submissions in support of their respective position. On the basis of what has been presented, at best, the sole determination the court can make at this stage of the inquiry is that ultimate success as between UR Pride and the Government is unknown. UR Pride has mounted a strong case and I have little doubt the Government will mount a strong case in rebutting the position being advanced in the litigation. I am not able to say UR Pride's case suffers from any obvious frailties as was the case in *A.C.* I am able to observe that UR Pride's efforts to date indicate a strong constitutional challenge has been undertaken. The Government recognizes the importance of the challenges, and has indicated its confidence in upholding the Policy. That confidence does not diminish the strong advance made by UR Pride to be considered on this application. That confidence does not diminish the strength of the applicant's case at this early stage.

[114] I refrain from making any further comment on the merits or the ultimate outcome in this regard. The parties will continue to marshal their evidence and their arguments. There may sought to be cross examination on some or all of the affidavits

filed. The ultimate determination of the legal issues must await all of those developments, and of course the oral submissions in support of the arguments being advanced.

[115] This then leaves for consideration whether granting the interlocutory injunction is in the public interest. This requires a review of the Government's apparent submission, during oral argument, that there is a virtual presumption of constitutionality when considering an interim attempt to restrain the Government from acting. Said differently, during oral submissions counsel for the Government submitted that I must assume the governmental action is made for the public good and that there will be irreparable harm to the public interest if the Policy is enjoined. In this regard, counsel referred the court to *RJR* at 346, *Harper v Canada*, 2000 SCC 57, [2000] 2 SCR 764 [*Harper*], and the concurring judgment in *A.C.*

[116] I accept that the Government Policy compels this Court to give it respect. I do not accept that there either is, or continues to be, a presumption of constitutional validity in those actions involving a challenge to the action based on a violation of the *Charter*. It follows that I do not accept the Government is legally entitled to simply and completely insulate its actions until a final judicial determination. In short, it does not simply get a free pass at this stage of the inquiry. To do such would see the Court not fulfilling its constitutional role and not ensuring governmental action is carried out legally and on a defendable basis.

[117] In making the above comments, it is essential to again bear in mind the distinct and separate roles occupied by the legislative branch and the judicial branch of the Canadian democracy. This has been commented in a general way earlier in these reasons. I now provide some direct comment to provide background and support to the conclusions reached on this aspect of the judgment. In *Ontario (Attorney General) v G*,

2020 SCC 38, 395 CCC (3d) 277, the court provided important comment on these differing roles:

> [128] Nonetheless, since the late 1990s, the general principle that courts and legislatures have different roles and competencies has informed how the Court exercises its jurisdiction to suspend the effect of its declarations for a period of time. No fewer than 10 decisions of this Court have relied on the differing capacities and roles of legislatures and courts when suspending declarations' effects.8 Roach has argued that the *dicta* in *Schachter* [*Schachter v Canada*, [1992] 2 SCR 679] quoted in the previous paragraph should be rejected or qualified in light of these decisions, and institutional roles should be explicitly recognized as a legitimate rationale for granting suspensions (Roach (2004) [K. Roach, "Principled Remedial Discretion Under the Charter" (2004), 25 S.C.L.R. (2d) 101], at p. 144). On the most expansive version of that view, suspensions allow the legislature to determine the remedy for its own breach of the Constitution, thereby "eliminat[ing] or dilut[ing] the counter-majoritarian objection to judicial review [of statutes]" (Choudhry and Roach [S. Choudhry and K. Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003), 21 S.C.L.R. (2d) 205], at p. 227). In my view, this presupposes an unduly narrow view of the role of courts. Respecting the legislature cannot come at the expense of the functions the Constitution assigns to the judiciary: giving effect to constitutional rights and making determinations of law.
>
> [Footnotes omitted] [Emphasis added]

[118] The constitutional duty of the court to evaluate and pronounce on the governmental actions imposing legislation or policy was aptly put in *A.C.* at para 118:

> [118] The source of these principles is, in any event, deeper than the burden of proof recognized in *Metropolitan Stores*. In any constitutional regime with entrenched provisions, one of the branches of government must have the final say on whether laws are constitutional or not. It is well established in the common law world that the superior courts have the final say: *Reference Re: Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 at para. 89, [2014] 1 SCR 433; *Ontario (Attorney General) v G.* at para. 88. This principle was first established in *Marbury v Madison* (1803), 1 Cranch 137 at p. 177 (USSC), and has been accepted without challenge in Canada. The court's mandate to enforce the Charter, however, exists parallel to the

> right of democratically elected governments to set public policy: *Ontario (Attorney General) v G.*, at paras. 97, 102, 128.
>
> [Emphasis added]

[119] The importance of not rigidly applying a presumption of constitutionality or of the Government presuming to have acted in the public interest was emphasized in *Alberta Union of Provincial Employees v Alberta*, 2019 ABCA 320, 438 DLR (4th) 465:

> [44] It is well established that courts have jurisdiction to grant the relief requested by the applicants, even if the result would be a suspension of the legislation (although, as AUPE points out, the relief requested in this case amounts to an exemption from the legislation, not a complete suspension of its operation). As was noted in *RJR-MacDonald* at p 331, the suspension power must be exercised sparingly, but that is achieved by applying the *Metropolitan Stores* criteria strictly and not by a restrictive interpretation of the courts' jurisdiction.

[120] That important background then assists in explaining why there may be no constitutional presumption of validity. It further explains why governmental action must be examined to determine where in the matrix the public interest in allowing the action to continue fits. The comments of Justice Sharpe, *Interim Remedies and Constitutional Rights* (2019), 69: Supp 1 UTLJ 9, Robert J. Sharpe at pages 16-17 and particularly instructive int his regard:

> When we move from private law and commercial disputes to cases involving constitutional rights, the risk of error in granting or withholding relief are not confined to the immediate parties, and they are difficult to measure and control precisely because they have a public dimension. The risks of harm are not commensurate, and there is no common scale to measure the competing claims of irreparable harm. There can be no doubt that, in principle, interim relief should be available in constitutional cases. Constitutional rights have priority over other legal rights, and if the courts are prepared to take the extraordinary step to protecting a private or commercial right without a full trial, surely they must do the same when a constitutional right is threatened. The legal system could not claim credibility if it promised

> that fundamental rights would be protected, yet failed to protect those rights from irreparable loss because it could not move quickly enough to deal with the case on the merits. On the other hand, where the interim remedy would interfere with the enforcement of a law enacted by the legislature, the interests of the public are plainly implicated. Injunctive relief will be perceived as a preliminary pronouncement on fundamental rights and the validity of the law or state action, yet the court lacks the information ordinarily required to justify making a definitive pronouncement. And even an interim order that a statute may be of no force of effect under the Charter can have grave consequences for the administration of the law. If the preliminary assessment of the fundamental right and its impact on the validity of the law is wrong, the orderly administration of the law will be disturbed, and harm will be caused to those members of the public who were entitled to the benefit of the law as enacted.
>
> [Footnote omitted]

[121] The relatively recent judgment of Paperny J.A. in *A.C.* reinforces this recognition of the availability of injunctive relief when governmental action is challenged and the leading authorities of *Metropolitan Stores* and *RJR* do not support reading in an inability to so order in this regard:

> [35] This brings me to a point of clarification with respect to the *RJR-MacDonald test*, and the reconsideration of this Court's decision in *AUPE* [2019 ABCA 320], which dealt with an interlocutory injunction in a case challenging the constitutionality of provincial legislation said to affect collective bargaining rights. The purpose of the reconsideration is to clarify whether a statement at para 7 of the majority decision in *AUPE*, to the effect that there is a "strong presumption" that legislation is constitutional, is a reformulation of the test for the granting of interlocutory injunctions. The chambers judge rejected the idea that such a presumption should impose a higher hurdle at the first stage of the test, but imported a presumption of constitutionality into her assessment of balance of convenience. A presumption of constitutionality is not supported by Supreme Court jurisprudence. There is no presumption of constitutionality anywhere in the test for interim relief, whether at the first or third stage, and any argument to the contrary was laid to rest by the Supreme Court in *Metropolitan Stores*.

[122] Counsel for the Government invited the court to consider the comments of Slatter J.A. in concurring reasons from the same case:

> [115] There may not be a presumption of constitutionality, but there is an assumption that governments act constitutionally. For example, in division of power cases there has long been an assumption that governments intend to act within their powers, an analytic tool that focuses the debate on the core constitutionality of the statute: *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at para. 33, [2003] 1 SCR 6; *Nova Scotia Board of Censors v McNeil*, [1978] 2 SCR 662 at pp. 687-88; *Laderoute v Alberta (Minister of Aboriginal Relations)*, 2019 ABCA 134 at para. 33, 84 Alta LR (6th) 223; *York (Regional Municipality) v Tsui*, 2017 ONCA 230 at para. 72.
>
> …
>
> [117] While there is not a threshold presumption of constitutionality, there is a powerful assumption found in the analysis in *Harper* [2000 SCC 57, [2000] 2 SCR 764] at para. 9 that the challenged law "is directed to the public good and serves a valid public purpose", and the "assumption of the public interest in enforcing the law weighs heavily in the balance", leading to the conclusion that the courts will not "lightly order that laws . . . duly enacted for the public good are inoperable in advance of complete constitutional review", and "only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed" (emphasis added). These principles were recently affirmed in *Ontario (Attorney General) v G.*, 2020 SCC 38 at para. 96.
>
> …
>
> [119] But just because the courts have the final say does not mean that the other branches of government have no responsibility with respect to the constitutionality of legislation. A guiding principle of the Canadian Constitution is the "rule of law". There is an expectation that the legislative and executive branches of government act in a constitutional manner, in accordance with the rule of law, and do not knowingly enact legislation which is not at least "defendable in Court": *Schmidt v Canada (Attorney General)*, 2018 FCA 55 at paras. 80-81, 88, [2019] 2 FCR 376, leave to appeal refused April 4, 2019, SCC #38179. As stated in Application under s 83.28 of the *Criminal Code (Re)*, 2004 SCC 42 at para. 35, [2004] 2 SCR 248 (admittedly in another context):

> 35 Underlying this approach [to statutory interpretation] is the presumption that legislation is enacted to comply with constitutional norms, including the rights and freedoms enshrined in the *Charter*: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 367. This presumption acknowledges the centrality of constitutional values in the legislative process, and more broadly, in the political and legal culture of Canada. . . .
>
> It follows that, in accordance with constitutional principles, the balance of convenience analysis should assume that the Legislature does not deliberately cross constitutional boundaries.

[123] I do not determine that these latter comments do anything to detract from those of Paperny J.A. for the majority of that court. Indeed, the conclusion is quite the contrary in that there is a clear recognition of an absence of a presumption of constitutionality. Rather, the focus is on an analysis of the governmental action serving the public good and a valid public purpose. Thus, in *Harper* the majority judgment stated:

> 9 Another principle set out in the cases is that in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed. As Sopinka and Cory JJ. stated in *RJR--MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at pp. 348-49:
>
> > When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.
>
> It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law -- in this case the spending limits imposed by s. 350 of the Act -- is directed to the public good and serves a valid public purpose. This applies to violations of

> the s. 2(b) right of freedom of expression; indeed, the violation at issue in *RJR--MacDonald* was of s. 2(b). The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.
>
> 10 Again, the trial judge appears not to have applied this principle in weighing the benefits of the law against its impact on free expression. Instead of assuming that the legislation has the effect of promoting the public interest as *RJR--MacDonald* directs, the trial judge based his conclusion on the fact that the Government "has not adduced any evidence to illustrate unfairness in any of these elections in Canada caused by third-party spending limits" (para. 33). He went on to repeat that the "Government simply asserts that third-party spending limits, if not controlled, may (and that is notional only) impact adversely on the fairness of elections" (para. 34), and moved directly from this to the conclusion that leaving the spending limits in place "would clearly cause more harm in the public interest than the notional unproven unfairness suggested by the Government" (para. 35). Moreover, the trial judge made no mention of the fact that the law may be seen not only as limiting free expression but as regulating it in order to permit all voices during an election to be heard fairly.

[124] And, also of importance, there was a determination by the majority judgement in *Harper* that if the injunction was permitted to stand, the applicant would have, in fact, obtained the ultimate relief at an interim stage:

> 7 We cannot, with respect, agree. This application is governed by the principles set forth in previous cases. On appeal the applicant Harper may seek alteration of these principles, but for the moment they govern. Applying these principles, the balance of convenience in this case favours granting the stay of the injunction. One of these principles is the rule against granting the equivalent of final relief in interlocutory challenges to electoral statutes, even in the course of elections governed by those statutes: *Gould v. Attorney General of Canada*, [1984] 2 S.C.R. 124; see also *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, per Beetz J., at p. 144; *Haig v. Canada*, [1993] 2 S.C.R. 995. In this case, allowing the injunction to stay in place will in effect give Mr. Harper the ultimate relief he seeks in his action, at least with respect to the current election.

> The trial judge, however, did not address this factor, nor the case law which addresses it.

[125] It was determined there that the granting of an injunction was not in accordance with the public interest. Instead, legislation of general application was presumed to be in the public interest and the balance of convenience weighed heavily in favour of allowing the legislation to continue to apply until the final determination by the court.

[126] At this stage of the inquiry, the court must weigh and consider the presumed public interest in the Government being entitled to legislate for a valid public purpose against the public interest of permitting governmental action to adversely affect a particular identified group, here that is gender diverse students under the age of 16, and specifically those who are unable or unwilling to obtain parental consent. In *Harper*, the majority put this consideration as follows:

> 5 Applications for interlocutory injunctions against enforcement of still-valid legislation under constitutional attack raise special considerations when it comes to determining the balance of convenience. On the one hand stands the benefit flowing from the law. On the other stand the rights that the law is alleged to infringe. An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying or staying the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough: R. J. Sharpe, *Injunctions and Specific Performance* (loose-leaf ed.), at para. 3.1220.

[127] And, much earlier in *RJR* at 343, the Supreme Court of Canada recognized the necessity of reviewing the competing public interests:

> Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores*. A few additional points may be made. It is the polycentric" nature of the *Charter* which requires a consideration of the public

> interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives*, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:
>
> > While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in Metropolitan Stores. The Attorney General is not the exclusive representative of a monolithic "public" in Charter disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

[128] In the case at bar, the public interest emphasized by the Government includes the intent of the Policy to ensure the parents of students under the age of 16 are part of the consideration when those students are seeking to engage gender-identity in the school. The Government then emphasizes its determination that an age division had to be made so as to treat more mature students (by age) different than their younger counterparts.

[129] It is noted that the Government does not appear to advance an argument that such treatment of the younger students is in their best interests or will, necessarily, lead to better outcomes for them from a mental health perspective. Nothing in the Policy recognizes the observations of Dr. Anderson or the need for professional assistance for those students with gender dysphoria.

[130] Furthermore, there is no sufficient basis set forth to allow for a conclusion that allowing the injunction will practically or permanently interfere with any such public interest goal(s) of the Government. While Dr. Anderson opines that the effects on backtracking from social transitioning is unknown, there is no sufficient material to

suggest the effects will be of the magnitude of irreparable harm set forth quite clearly in the opinions of those experts tendered by UR Pride.

[131] By way of observation, it might fairly be observed that the new Policy may well require a reversal of social transitioning for such students who had been referred to by a chosen name, pronoun, or gender-identity prior to August 22, 2023. There is no indication the Government considered this issue in conjunction with the concerns expressed by Dr. Anderson. This might reasonably lead to the conclusion, at this stage, that any issues regarding the reversal of social transitioning do not form a present concern for the Government or its view of the public interest.

[132] As a result of all of the foregoing, I determine, at this preliminary stage, the public interest in recognizing the importance of the governmental Policy is outweighed by the public interest of not exposing that minority of students to exposure to the potentially irreparable harm and mental health difficulty of being unable to find expression for their gender identity. The Government's expression of the public interest is reversible. UR Pride's expression of these students' public interest is, potentially, irreversible while possibly attracting irreparable harm. In summary, I determine the protection of these youth surpasses that interest expressed by the Government, pending a full and complete hearing into the constitutionality of this Policy. I find this to be one of those clear cases where injunctive relief is necessary to attempt to prevent the irreparable harm referred to pending a full hearing of this matter on its merits. See *Harper* at para 9.

[133] Throughout all of this, I am mindful as well of the potentially limited duration of any injunctive relief due to the efforts of the Chief Justice of the court, and the court itself, to allow this matter to proceed, and proceed on for hearing as expeditiously as possible.

[134] The Chief Justice took immediate steps to establish immediate timeliness to have procedural, interlocutory, and substantive issues, heard as quickly as possible. The court has then attempted to ensure any further required procedural steps can be accommodated expeditiously and in advance of the hearing on the constitutional challenge itself. This has included identifying time for applications concerning cross examinations on affidavits, and such cross examinations themselves should leave be granted in that regard.

[135] Furthermore, dates for hearing on all matters have been provided on a priority basis to allow this challenge to be heard and determined as expeditiously as possible.

[136] Due to all of these efforts, this matter will be heard quickly and well before the first semester at school is completed. This necessarily means that the injunction should have a limited duration and will not ultimately determine the action by default.

[137] As a result of all of the foregoing, I determine to grant the interlocutory injunction sought and enjoin the Government from implementing and enforcing the Policy pending this Court's adjudication of the constitutional challenge to the Policy. I decline to put in place injunctive relief until a complete and final resolution. The decision of whether to impose injunctive relief beyond this Court should be left to the Court of Appeal should it be requested to review this Court's determinations.

COSTS

[138] The Government, in its oral submissions, advanced a claim for costs from UR Pride on this application. In reply, the court indicated to counsel for UR Pride that he ought not spend much time on this issue in his further submissions.

[139] The Government did not identify in its written argument, or in any other correspondence, that it would be seeking costs of the application. I determined that to throw this issue in only at the oral submission stage was not appropriate given UR Pride's inability to properly consider it and be in a position to substantively respond. The issue of costs may be argued at the substantive hearing, should any party be so instructed.

[140] As well, given UR Pride's success on this interlocutory application, I would not have awarded costs against them in any event.

CONCLUSION

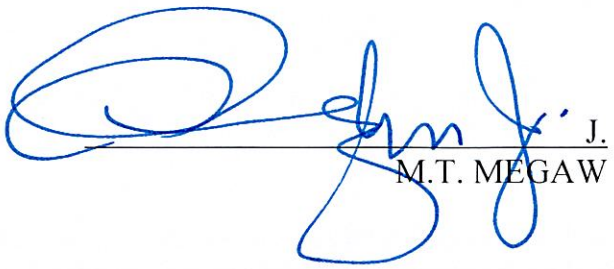
[141] There will be an order as follows:

(a) UR Pride is granted public interest standing in this proceeding;

(b) The application for an interlocutory injunction is not premature;

(c) An interlocutory injunction shall issue enjoining the Government from implementing and enforcing the Policy pending the final adjudication of this matter by this Court; and

(d) There will be no order as to costs.



J.
M.T. MEGAW