IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

Citation: Anglophone East v. PNB, 2024 NBKB 138
Date: 2024/07/05

MC-231-2024

BETWEEN:

ANGLOPHONE EAST DISTRICT EDUCATION COUNCIL, HARRY DOYLE, and DOMINIC VAUTOUR

Plaintiffs and
Moving Parties on Motion

– and –

THE PROVINCE OF NEW BRUNSWICK and the MINISTER OF EDUCATION AND EARLY CHILDHOOD DEVELOPMENT

Defendants and
Responding Parties on Motion

DECISION ON MOTION #2 AND MOTION #3

BEFORE:	Chief Justice Tracey K. DeWare
AT:	Moncton, New Brunswick
DATE OF HEARING:	June 18 and 19, 2024
DATE OF DECISION:	July 5th, 2024
APPEARANCES:	Darius Bossé, Mark Power, Madelaine Mackenzie, and Perri Ravon, on behalf of the Plaintiffs
	Clarence L. Bennett, K.C. and Sacha D. Morisset, on behalf of the Defendants

DeWare, C.J.

INTRODUCTION

[1] This decision responds to motion #2 and motion #3 as defined in the Court's decision of May 29, 2024 (motion #1).

[2] In the recent decision of ***Hak v. Québec (Procureur général)***, 2024 QCCA 254 (CanLII), the Quebec Court of Appeal commenced their decision concerning the constitutionality of provisions of the *Act respecting the laicity of the State*, with the following general observations at paragraphs [13] and [14]:

> [13] One can certainly have many different views on the Act and its appropriateness, whether from a political, sociological or moral perspective. This judgment, however, will evidently consider only the legal aspect of the debate. Like the Superior Court before it, the Court here is acting as part of a process — one initiated by various groups of litigants — to examine the legality of the Act, and it is not ruling on the wisdom of enacting it. The Court's scope of intervention is therefore limited.
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> [14] Of course, one cannot overlook the fact that legal issues often have a political connotation (in the broadest sense) or are inseparable from the political context (in the same broad sense). This is not unusual: after all, laws, like charters that protect rights and freedoms, are themselves the legal expression of a political will, that of legislatures or constitutional framers. At times, therefore, the law is not far removed from politics. **Nonetheless, it is through the legal lens alone that the many questions submitted to the Court in this file will be decided**.
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> [Emphasis mine]

[3] This Court, like the Quebec Court of Appeal in ***Hak***, is tasked with answering the legal question of standing in this decision. It is not this Court's role to consider the social, political or moral questions which have arisen in the public debate concerning Policy 713. This decision deals solely with the legal issues as framed in Motion #2 and Motion #3.

FACTS

[4] Despite the significant dispute between the parties, the underlying facts are straightforward. The crux of this matter is the assertion by the Plaintiffs that the Defendants' changes made to Policy 713: Sexual Orientation and Gender Identity ("Policy 713") in the summer of 2023 are unconstitutional and pose a threat to the wellbeing of students as well as volunteers and the community as a whole within the Anglophone East School District. The Plaintiffs maintain the revisions to Policy 713 are unconstitutional. The Plaintiffs filed a preliminary motion on April 2, 2024, requesting an injunction to stay the enforcement of Policy 713 pending an adjudication on the constitutionality of the provisions.

[5] The procedural events in this litigation leading up to the hearing of June 18 and 19, 2024, to determine the issues of amendments and standing are set out in the decision dated May 29, 2024, and need not be repeated here.

ISSUES

[6] There are several substantial issues outlined in Motions #2 and #3 to be resolved in this decision:

(a) amendment of the Plaintiffs' pleadings pursuant to Rules 5.04 and 27.10 of the *Rules of Court*;

(b) admissibility of certain portions of the affidavit evidence submitted by all parties and contested by the others;

(c) determination of the standing of the proposed Plaintiffs:

(i) standing as of right;

(ii) public interest standing;

(d) consideration of the Defendants' request to dismiss the preliminary motion as well as the underlying action on the basis the Plaintiffs do not have standing to bring the action pursuant to Rule 23.01(2); and

(e) the path forward.

Position of the Parties

[7] The positions of the parties in this matter are diametrically opposed. There is no common ground. The parties differ even on the interpretation of the jurisprudence submitted to the Court in support of their respective positions.

Position of the Plaintiffs

[8] The Plaintiffs maintain the right of a District Education Council to come to court and seek protection of the *Charter* rights of the students they are statute-bound to protect could not be any clearer. The Plaintiffs point to a long line of case law in Canada, both prior and subsequent to the arrival of the *Charter* where school boards have solicited the assistance of the courts to ensure the recognition and protection of the constitutional rights of academic communities. The Plaintiffs note the suggestion that they cannot bring forth claims to protect the rights of individuals within their school community "*would be news*" to the Supreme Court of Canada. The Plaintiffs suggest the Defendants have approached the matter in an unnecessarily adversarial manner and have refused to discuss the resolution of any issues on a collaborative basis. The Plaintiffs argue the Defendants' refusal to consent to the amendments to their pleadings at

this early stage of the proceedings is unreasonable and untenable given the well-established legal test for the amendment of pleadings.

Position of the Defendants

[9] The Defendants argue the Plaintiffs' action as well as their request for an injunction in this case is unreasonable. The Defendants suggest the Plaintiffs' action as currently drafted is fatally flawed and amendments should not be granted to breathe life into a pleading that is otherwise dead on arrival. The Defendants further submit that granting the DEC standing in this case would result in one agent of government suing the government it serves, which would amount to a "*perversion of the law of standing and the rule of law*".

Amendment of Pleadings

[10] I will first deal with the issue of the amendment to the pleadings and then the remainder of the decision will deal with the parties as amended. In their Second Amended Notice of Preliminary Motion, the Plaintiffs request leave of the Court to amend and file the Second Amended Motion and the Second Amended Notice of Action with Statement of Claim Attached. The significant aspect of the amendment is the identification of the Plaintiffs from "*Anglophone East School District and Harry Doyle*" to the "*District Education Council of Anglophone East School District and Harry Doyle and Dominic Vautour*". The requested amended identification of the Plaintiffs is as set out in paragraph #1 of the Amended Notice of Action with Statement of Claim Attached, dated June 7, 2024 as follows:

> 1. The Plaintiff Anglophone East District Education Council (the "DEC") brings this action on its own behalf, on behalf of the Anglophone East School District ("Anglophone East") and in the

> public interest. The Plaintiffs Harry Doyle and Dominic Vautour brings this action on ~~his~~ their own behalf and in the public interest.

[11] The pertinent rules for the Court's consideration on the amendment of pleadings are Rules 5.04(2) and 27.10(1):

> **5.04 Misjoinder, Non-Joinder and Parties Named Incorrectly**
>
> (...)
>
> (2) At any stage of a proceeding the court may grant leave to add, delete or substitute a party or to correct the name of a party and such leave shall be given, on such terms as may be just, unless prejudice will result which cannot be compensated for by costs or an adjournment
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> **27.10 Amendment of Pleadings**
>
> *General Power of Court*
>
> (1) Unless prejudice will result which cannot be compensated for by costs or an adjournment, the court may, at any stage of an action, grant leave to amend any pleading on such terms as may be just and all such amendments shall be made which are necessary for the purpose of determining the real questions in issue.

[12] Despite the extremely early stages of these proceedings, the Defendants remain steadfast to allow the amendments would "*compound*" the prejudice already suffered by the Province. I disagree. The Defendants suggest that Plaintiffs' counsel made an intentional choice to bring the action on behalf of the "Anglophone East School District" as opposed to the "District Educational Council" which was a substantive and meaningful error which should not be remedied by the Court in the absence of evidence of the reason for the error. I disagree.

[13] In fairness to the Defendants, they highlight the fact the request for the amendments in this case must be considered in the context of these proceedings. While we are at an extremely early stage in the proceedings – a statement of defense has yet to be filed – this is not a typical proceeding. The Defendants have been required to file responding documents on a very condensed timeline dealing with complex and significant constitutional issues and they were required to do so with an understanding that the parties were those as identified in the original pleading. The Defendants' opposition to the requested amendments cannot be perceived as purely obstructionist or merely tactical given the challenge placed upon them in responding in a fulsome manner to evolving parties.

[14] While the Court appreciates the Defendants' initial position regarding amendments given the original constrained timeline in this case, the situation did and has changed. In order to determine if it is reasonable to accord the amendments requested by the Plaintiffs, it is necessary to return to the spirit that informs the applicable rules of court.

[15] The Defendants refer the Court to Chief Justice Drapeau's comments in ***LeBlanc v. Boisvert***, 2005 NBCA 115 at paragraph [25]:

> Applications under Rule 23.01(1)(a) are presented by way of Notice of Motion. Rule 37.03(b) requires that the Notice of Motion state, *inter alia*, the grounds to be argued in support of the relief sought and this Court has repeatedly underscored the need for compliance with the content requirements of Rule 37.03: see *Waugh v. Canadian Broadcasting Corp.* (2000), 2000 CanLII 46815 (NB CA), 224 N.B.R. (2d) 391 (C.A.) and the cases cited therein. Unless non-compliance is manifestly inconsequential, it ought not to be tolerated by motion judges and counsel should be turned away until they produce *Rules*-compliant documents for the

> court's consideration. In the case at bar, counsel for Ms. Boisvert might well have proceeded differently, and more economically and efficiently, had he been compelled to explain in his client's Notice of Motion how the sought-after determination satisfied the conditions precedent laid out in Rule 23.01(1)(a).

[16] The Defendants further note the comments of Justice Young in ***Thériault v. Charette***, 2001 NBBR 46 at paragraph [36]:

> On the contrary, I am satisfied that it was the plaintiff's solicitor's intention that the proposed defendants, Randal Taylor and Ace Leasing (Bathurst) Ltd., be the defendants, but that they were incorrectly named due to a *bone fide* error. In my opinion, I think that the defendants, Léo S. Charette and Wayne Michaud, were named instead of the proposed defendants, Randal Taylor and Ace Leasing (Bathurst) Ltd., not because of a deliberate choice, but rather due to Jean-Claude Thériault's solicitor's negligence. Consequently, it is a simple misnomer, and not a request to substitute the defendants in order to rectify a previous decision after realizing that this was not a good choice.

[17] The Defendants suggest the Plaintiffs have failed to adduce evidence on the reason for the error and that this is a factor in determining whether or not the amendments ought to be allowed. The Defendants assert the Plaintiffs are simply amending their pleadings in response to the Defendants' arguments presented in opposition to their preliminary motion. The Plaintiffs acknowledge and accept their requested amendment to the named Plaintiffs is in response to the concerns raised by the Defendants. The Plaintiffs suggest they are simply being responsive and addressing the Defendants' concerns to ensure all appropriate parties and issues are before the Court.

[18] The Plaintiffs refer the Court to Rule 1.03(2) as relevant in the consideration for the request to amend:

1.03 Interpretation

(1) Except where a contrary intention appears, the Interpretation Act and the interpretation section of the Judicature Act apply to these rules.

(2) **These rules shall be liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on its merits**.

(3) The arrangement of these rules and their title headings are primarily intended for convenience, but may be used to assist in their interpretation.

[Emphasis mine.]

[19] The Plaintiffs also refer the Court to Justice Young's consideration of amendments in ***Thériault*** (*supra*), in particular paragraphs 41, 42 and 43 as follows:

> [41] In my opinion, it would be preferable, in these circumstances, to determine if the adverse party has shown that it would be injured in defending on the merits if the requested amendments were allowed.
>
> [42] **No evidence was presented to the effect that the proposed defendants would be injured, in terms of evidence not being available**, because of the delay in naming them as defendants. This is not surprising given that they were aware that the accident in which they were involved had already been the subject of claims. Consequently, the interests to be protected by limitation periods were not violated. I find that, with the exception of the right to raise the limitation period as a defence, no evidence of actual prejudice sustained by the proposed defendants was presented. In addition, given the information that the insurer possessed, the proposed defendants were not mislead, nor substantially injured, by what was clearly a misnomer.
>
> [43] To conclude, in my opinion, whether the approach taken is analytical or functional, the motion should be granted. **There is no need for the plaintiff to issue another originating process**. However, the amended Notice of Action and Statement of Claim must be served on the defendants, Randal Taylor and Ace Leasing (Bathurst) Ltd., within thirty (30) days.
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> [Emphasis mine]

[20] Justice Ferguson had the opportunity to consider the various factors to be weighed by the Court in the exercise of discretion to grant amendments pursuant to Rule 27.10 in ***Roach v. L.M.W.*** *Pharmacy Ltd.*, 2022 NBQB 9 (CanLII) at paragraphs 31 to 33 as follows:

> [31] **A denial by me of the requested amendment could see Ms. Roach then file a separate action against SDMI and then move to consolidate the two actions into one pursuant to Rule 6.01. That, of course, would not be the least expensive or most expeditious way to deal with that issue**. See, in this regard and to much the same effect: *Optimal Structural Formwork Inc. v. Hannan*, 2019 NBQB 136 (N.B.Q.B.) per D. Leblanc J. at para. 19.
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> [32] Two judgments, one of the Court of Appeal and one of this court help complete the framing of the issue to be determined. In *Triathlon Leasing Inc. v. Juniberry Corp.*, 1995 CanLII 6225 (NB CA), [1995] N.B.J. No. 36 (N.B.C.A.) Ryan J.A. writing for the majority said this about Rule 27.10 at para. 30:
>
> > These are rules of procedure as opposed to the substantive law which defines substantial legal rights and claims. The rules are the vehicle that enables rights to be delivered and claims to be enforced. **As such, a Court should interpret and apply the rules to ensure, to the greatest extent possible, that there is a determination of the substantive law unless the application of the rules would result in a serious prejudice or injustice. Accordingly, amendments to pleadings are generally allowed**. That is the reason for the use of such phrases as "determining the real questions in dispute" in Rule 27.10 and "just determination of the matters in dispute" in Rule 2.02. As a general principle, therefore, the rules of procedure should not be used to prevent the delivery of rights; nor should they be used to preclude the enforcement of claims which are derived from the substantive law.
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> [33] To this can be added the well chosen words of Walsh J. in *Algo Enterprises Ltd. v. Repap New Brunswick Inc.*, 2013 NBQB 176 (N.B.Q.B.) at paras. 34-35:
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> > In my respectful opinion, prejudice cannot be equated with the other side's disappointment that the claim originally advanced (or was perceived to be advanced) was more readily defended in the law, or because of the expense, inconvenience and delay now caused, or, indeed, because of this Court's frustration with the bifurcation of these proceedings and the loss of valuable court time brought on by the inexcusable

> timing of the Motion. These "unfairness" concerns can be addressed by costs and adjournments. **Rather, it seems to me that the concept of prejudice must mean more than that; it must in some way relate to the ability or, more accurately, the inability to fairly meet the case against them, regardless of when or why advanced**. This point is made by Carthy J.A. for the Ontario Court of Appeal in *Kings Gate Developments Inc. v. Colangelo*, interpreting a similar provision to that of New Brunswick's:
>
> > The unfairness and prejudice to the respondent is manifest. The frustration of a judge, when faced with such a last-minute application, is understandable. Yet rule 26.01 requires that amendments be permitted unless the prejudice cannot be compensated for in costs. The reasons of Chapnik J. speak eloquently as to why it is unfair to request relief, but do not address any item of non-compensable prejudice, such as death of a material witness or destruction of essential files. (Emphasis added)
> >
> > (1994 CanLII 416 (ON CA), [1994] O.J. No. 633 (Ont. C.A.) at para. 5)
>
> **The *raison d'être* of the modern law on amending pleadings is to procedurally facilitate, to ensure as much as possible that claims made under the substantive law are heard and decided**; *a fortiori*, prejudice in the context of amendments sought by plaintiffs and applicants must mean serious impairment of the right and ability of defendants and respondents to defend against any such substantive law claims. I hearken back to *Triathlon Leasing Inc. v. Juniberry Corp.*, *supra*:
>
> > ... a Court should interpret and apply the rules to ensure, to the greatest extent possible, that there is a determination of the substantive law unless the application of the rules would result in a serious prejudice or injustice. ... (*supra*, at para. 30)
> >
> > [Emphasis mine.]

[21] In the present matter, the Plaintiffs have confirmed they would refile a new action in the event their request for amendments was refused. This would simply further delay these proceedings and increase the cost for everyone. Given the early stages of the proceedings and the fact that Defendants have now fully responded to the Plaintiffs' proposed amended pleading, the Court is left to

ponder what possible prejudice remains for the Defendants in allowing the amendments to proceed.

[22] The Defendants argue the Plaintiffs should have got it right the first time and any prejudice they suffer as a result of an amendment cannot be cured by costs. The issue of costs or, more particularly, the funding of this litigation was a recurrent theme in many of the Defendants' arguments on many of the different issues. While the manner with which the Plaintiffs are funding the litigation may be an issue for someone, some day, it is not, in my view, a pertinent factor to consider in analyzing any of the issues currently before the Court.

[23] The Defendants argued strenuously the Plaintiffs were not authorized to spend public funds to support this litigation as a factor the Court must consider both on the issues of amendments as well as standing. The Defendants refer the Court to Justice Karakatsanis' comments in ***Ontario v. Criminal Lawyers' Association of Ontario***, 2013 SCC 43 at paragraph 28:

> Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. **The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds**. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.
>
> [Emphasis mine]

[24] The Defendants are quite right that the legislative branch of government holds the purse strings. The judicial branch of government plays no role in the development of policy, the enactment of laws, or the management of public funds. However, the judicial branch is tasked with the role of maintaining the rule of law and protecting fundamental liberties and freedoms guaranteed under the *Charter*. Whenever one branch of government is brought to task over a potential *Charter* infringement, the appetite of the government actor whose actions have been called into question to directly fund or see public funds used to support the challenge, cannot be a dispositive factor. Democracy is messy and it is expensive.

[25] The prejudice experienced by the Defendants in initially responding to the Plaintiffs' original pleading has been cured by the expanded timeline set by the Court in the May 29, 2024 decision to address those very concerns. The Defendants have had every opportunity to present arguments on all issues set out in the amended pleading. The Plaintiffs' request to amend their pleadings including the addition of Dominic Vautour as a party is granted.

Admissibility of Evidence

[26] Both parties take umbrage with the affidavit evidence of the other. The Defendants refer the Court to ***Stevens v. Associated Lodges of the Village of Douglastown Trust***, 2018 NBQB 82 at paragraph [13]:

> **There is no doubt that the Court must execute its role as a gatekeeper to rule on preliminary objections which question the admissibility of statements or evidence contained in affidavits filed in support of or response to a motion**. This task is frequently cumbersome and at times, such as in this case, can

> result in delays in the proceedings. However, the *Rules of Court* mandate that the evidence contained in an affidavit be admissible. As pointed out by Justice Shaughnessy in *Chopik*, when the content of an affidavit offends the Rules by containing hearsay, argument, innuendo, legal opinion or unsourced information, the offending portions of the affidavit must be struck. In the present matter, several of the objections of the Respondent are appropriate and several paragraphs as well as portions of paragraphs must therefore be struck to allow for a fair hearing on the merits of the motion.
>
> [Emphasis mine]

[27] The manner by which to deal with objections to affidavit evidence was also considered in ***Tidd v. New Brunswick***, 2021 NBQB 208 (CanLII) at paragraphs 40 to 42:

> [40] The Defendants suggest that the affidavits filed by the litigation guardians on behalf of the representative Plaintiffs contain inadmissible content, including hearsay and argument. The Defendants refer the Court to *Stevens v. The Associated Lodges of the Village of Douglastown Trust*, 2018 NBQB 82 [NBQB], where I had the opportunity to canvass the law on admissibility of affidavits at paragraph 12 as follows:
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> > [12.] The Ontario *Rules of Court* essentially mirror the wording of the New Brunswick Rules in regards to the admissibility of statements set out in affidavits. In *Chopik v. Mitsubishi Paper Mills Ltd.*, 2002 CarswellOnt 2236, Justice Shaughnessy of the Ontario Superior Court of Justice provides a succinct but comprehensive review of the admissibility of certain types of statements contained in affidavits at paragraphs 25 and 26:
> >
> > > 25 The rules relevant to a review of both Affidavits are Rule 4.06(2) and Rule 39.01(4) of the Rules of Civil Procedure. Rule 4.06(2) provides that "an affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that that deponent could give if testifying as a witness in court ...". Rule 39.01(4) provides that an affidavit for use in a motion "may contain statements of the deponent's information and belief if the source of the information and the fact of belief are specified in the Affidavit."
> > >
> > > 26 The case law that is relevant to this part of the motion is as follows:

1. Affidavits on a motion that fail to state the source of the deponent's information and belief will be struck if the paragraph deals with a contentious matter; but it may be saved by Rule 1.04 if it deals with non-contentious matters and the exhibits to the affidavit or other evidence filed on the motion reveal the source of the information and belief. (*Cameron v. Taylor* (1992), 1992 CanLII 7575 (ON SC), 10 O.R. (3d) 277 Ont. Ct. (Gen. Div.).

2. Improper hearsay, argument and irrelevant information should not be contained in an affidavit. Similarly, legal argument belongs in a factum or brief, not an affidavit. Legal submissions contained in affidavits are superfluous and should be struck. (*Canada Post Corp. v. Smith* (1994), 1994 CanLII 10544 (ON SC), 20 O.R. (3d) 173 at 188 (Div. Ct.) and *Czak v. Mokos* (1995), 1995 CanLII 17861 (ON SC), 18 R.F.L. (4th) 161 at 165 (Master).

3. Offensive allegations made for the purposes of prejudicing another party and inflammatory rhetoric directed at a party are scandalous and should also be struck. (*Ontario (Ministry of Natural Resources) v. Ontario Federation of Anglers and Hunters* (2001), 143 O.A.C. 103 at 111-112 (S.C.J.) aff'd. [2001] O.J. No. 5320 (Div. Ct.).

4. Where it is clear in law that evidence is inadmissible, to leave the evidence on the record is embarrassing and prejudicial to the fair hearing of the motion or application. A party should not be put to the needless expenditure of time and resources in responding to evidence which can have no impact on the outcome of the proceeding. (*Noble China Inc. v. Lei*) (1998), 1998 CanLII 14708 (ON SC), 42 O.R. (3d) 69 at 94-95 (Gen. Div.).

5. The fact that this action is a proposed class proceeding has no bearing on the analysis. It is not an objective of the Class Proceeding Act, 1992 to modify or abridge the traditional rules of practice and pleading. (*Edwards v. Law Society of Upper Canada*) (1995), 40 C.P.C. (3d) 316 at 321 (Gen. Div.).

[41] The Defendants further refer the Court to *Kennedy v. Kennedy*, 2006 BCSC 190 [BCSC], where Justice Ross was considering a summary judgment application in the context of a matrimonial proceeding. Justice Ross discusses the available remedies for deficient affidavits at para 10 as follows:

> [10] In the result, I have concluded that the objections are well founded. The next question then is how to respond to these affidavits. One possibility, where the material before a court is riddled with inadmissible evidence, hearsay and argument dressed as evidence is that the court will conclude that the matter is inappropriate for summary determination pursuant to Rule 18A on the basis that the facts cannot be found: see *Grifone v. Moline* (2004), 2004 BCSC 844 (CanLII), 33 B.C.L.R. (4th) 170 (S.C.) and *Sermeno*. **A court also has the discretion to strike inadmissible portions from affidavits or, where the admissible and inadmissible portions are interwoven, to strike the whole affidavit. In the alternative, a court may elect merely to ignore assertions of fact in the affidavit which offend the rule**: see *Chamberlain v. Surrey School District No. 36* (1998), 1998 CanLII 6723 (BC SC), 60 B.C.L.R. (3d) 311 (S.C.). That is the course that I have decided to follow in the present case. Therefore, the offending portions of the affidavits will be ignored.
>
> [42] The jurisprudence invoked by the Defendants in this matter as authority for the option of striking portions of the plaintiffs' affidavits is distinguishable from the case currently before the Court. *Stevens v. Associated Lodges of the Village of Douglastown Trust* involved an application for the removal of trustees while *Kennedy v. Kennedy* is a summary judgment application. These proceedings, by their nature, require a far more fulsome evidentiary basis than the "some basis in fact" test to be considered by a court on a motion for certification of a Class proceeding. While the Court will disregard comments in the affidavits which are clearly hearsay, the affidavits are appropriately before the Court in the context of this certification hearing.
>
> [Emphasis mine]

[28] There are 38 pages of enumerated objections presented by the parties as offending the rules of evidence and submitting to the Court inadmissible affidavit evidence. The vast majority of these objections are legitimate. Inadmissible evidence should not be considered by a court when adjudicating contentious issues between parties. However, context is everything. At the stage of the proceedings where the constitutionality of legislative provisions or policies are to be determined, the Court must be vigilant to ensure the evidentiary record is

reliable, capable of being tested, and fully transparent. In the context of the proceedings where an injunction would be considered, there will be as well a heightened requirement of the Court to act as a gatekeeper and filter only admissible evidence through the ***RJR MacDonald*** test.

[29] The Court is currently tasked with the determination of the question of standing. The opinion, arguments, or even inuendo submitted by parties or involved deponents is of little, if no, consequence to the Court's analysis of the standing issues. The over 75 requested rulings on the evidentiary issues contained in the affidavits is not an exercise the Court is compelled to do at this juncture nor, frankly, does the Court have the time to do. That said, there are admissibility issues with the affidavit evidence submitted by both parties. While the Court cannot shy away from evidentiary rulings on inadmissible affidavit evidence, it can defer those rulings if they are not necessary to determine the pressing issue before the Court. In my view, this is one situation where deferring rulings on those issues will not hinder the Court's ability to consider the current questions to be determined and will expedite the issuance of this time sensitive decision. That said, there will be many cases where issues of standing will require strict adherence to the rules of evidence to fairly adjudicate the issue. This is not one of those cases.

Standing Issues

[30] The Plaintiffs have framed the issues of standing in the following paragraphs of the Amended Notice of Action with Statement of Claim Attached dated June 7, 2024, at paragraphs 9, 9.1, 21, and 22 as follows:

9. Harry Doyle is the elected Chair of the DEC and resides in Lower Coverdale. Mr. Doyle is a member of the English-linguistic community of Southeast New Brunswick. Mr. Doyle has standing as of right in the present case.

9.1 Dominic Vautour is the Vice-Chair of the DEC. Mr. Vautour is the parent of a child under 16 attending an elementary school of Anglophone East. Mr. Vautour is a volunteer at his child's school, as well as other elementary schools, and is therefore "school personnel" pursuant to Policy 713. He has volunteered at elementary schools of Anglophone East, in extra curricular activities and school outings. In his capacity as volunteer, Mr. Vautour interacts directly with students in Anglophone East schools. Mr. Vautour has standing as of right in the persent case.

(...)

21. The DEC ~~Anglophone East~~ has a direct interest in the outcome of this litigation and has standing as of right in the present case.~~:~~ ~~i~~It represents ~~is~~ one of the seven school districts that Policy 713 applies to, and the DEC is the elected body representing the English linguistic community which, together with elected members of the DEC and members of the community, ~~Anglophone East~~ exercises the s. 16.1 *Charter* rights invoked ~~, on its own behalf and on behalf of the community cate it represents,~~ to invalidate the self-identification measures. ~~Anglophone East~~ The DEC has legal obligations to uphold the ss. 7 and 15 *Charter* rights of its gender diverse students, and ~~is the employer of the school personnel whose~~ the s. 2(b) rights of teachers and other school personnel ~~are breached~~. Section 36.9(5)(b) of the *Education Act* requires the DEC to ensure that provincial policies are followed by the superintendent of the school district. The Minister has threatened corrective action against the DEC ~~Anglophone East~~ if it does not implement Policy 713 in its schools and agree to violate the rights of its students, teachers, and other employees. The DEC and Anglophone East are exceptionally prejudiced by Policy 713 and the Minister's actions.

22. ~~Anglophone East~~ The DEC also has public interest standing to challenge the validity of the self-identification provisions: (a) the case raises a serious justiciable issue; (b) Anglophone East the DEC has a genuine interest in the matter; and (c) this suit is a reasonable and effective means of bringing the case to court, it would be unreasonable to require individual students and teachers whose rights are violated to do so, and ~~Anglophone East's~~ the DEC was elected to represent the interests of its community.

[31] In order to assess the viability of the requests for standing, it is necessary to consider the underlying Amended Notice of Action with Statement of Claim Attached, which grounds the action and sets out the framework for the issues in dispute. It is extremely important to consider the issues that <u>are</u> properly before the Court as set out in the pleadings and the issues that <u>are not</u> properly before the Court.

[32] These legal proceedings arise out of the Defendants' adoption of Policy 713 in the summer of 2023. The particular sections of Policy 713 which the Plaintiffs seek to challenge in their action are set out in paragraphs 14 and 40 of the Amended Notice of Action with Statement of Claim Attached dated June 7, 2024:

> 14. In this Action, Anglophone East the Plaintiffs challenges ss. 6.3.1, 6.3.2 and 6.3.3 of Policy 713: Sexual Orientation and Gender Identity ("Policy 713"), together with the definition of "formal use of preferred name" of Policy 713 (referred to collectively in this pleading as the "self-identification provisions").
>
> (...)
>
> 41. Sections 6.3.1, 6.3.2 and 6.3.3 of Policy 713, together with Policy 713's definition of "formal use of preferred name", will collectively be referred t as the "self-identification provisions", and read as follows:

6.3.1	School personnel will consult with a transgender or non-binary student who is 16 and over to determine their preferred first name and pronoun(s). the preferred first name and pronoun(s) will be used consistently in ways that the student has requested.	**6.3.1**	Le personnel scolaire consultera l'élève au genre non binaire ou transgenre de 16 ans ou plus pour connaître son prénom préféré et le(s) pronom(s) de son choix. Ce prénom préféré et ce(s) pronom(s) seront utilisés dans le respect du choix de l'élève et de façon cohérente.
6.3.2	Formal use of preferred first name for transgender or non-binary students under the age of	**6.3.2**	L'utilisation officielle du prénom préféré et/ou des pronoms d'un élève de genre non binaire ou

16 will require parental consent.

If it is not possible to obtain consent to talk to the parent, the student will be encouraged to communicate with the appropriate professionals to develop a plan to speak with their parents when they are ready to do so.

If it is not in the best interest of the student or could cause harm to them (physically or mentally) to talk with their parents, they will be encouraged to communicate with professionals for support.

6.3.3 The use of preferred first name for transgender or non-binary students under the age of 16 may be used without parental consent if the student is:

- communicating with appropriate professionals in the development of a plan to speak to their parents; or
- when communicating one on one with school professionals for support.

Formal use of preferred first name refers to the preferred first name and/or pronoun(s) that has been identified by a transgender or non-binary student to be used for record-keeping purposes, daily management (school software applications, report cards, class lists, etc.), classroom interactions and extracurricular and co-curricular activities (by staff, teachers and coaches).

transgenre âgé de moins de 16 ans nécessitera le consentement parental.

S'il n'est pas possible d'obtenir l'autorisation de parler aux parents, l'élève sera encouragé à communiquer avec les professionnels appropriés pour développer un plan lui permettant de parler à ses parents lorsque l'élève sera prêt à le faire.

S'il n'est pas dans l'intérêt supérieur de l'élève ou que cela risque de lui nuire physiquement ou mentalement), l'élève sera encouragé à communiquer avec un professionnel pour obtenir son soutien.

6.3.3 Le prénom préféré et/ou les pronoms d'un élève de genre non binaire ou transgenre âgé de moins de 16 ans peut être utilisé sans le consentement parental s'il :

- communique avec les professionnels compétents pour élaborer un plan qui lui permettra d'en parler avec ses parents; ou
- communique avec les professionnels de l'école pour obtenir du soutien en un à un.

Utilisation officielle du prénom préféré désigne l'utilisation du prénom et/ou des pronoms préférés qui ont été choisis par un élève de genre non binaire ou transgenre pour la tenue de dossiers, la gestion quotidienne (p. ex. : d'applications logicielles de l'école, de bulletins scolaires et de listes de classe), les interactions en classe, ainsi que les activités périscolaires et parascolaires (par le personnel scolaire, le personnel

enseignant et les entraîneurs).

[33] The Plaintiffs' Amended Notice of Action with Statement of Claim Attached dated June 7, 2024, contains 116 paragraphs and is 37 pages long. In carefully reviewing this pleading, the only paragraphs which are material to the determination of the standing question of the Plaintiffs, not previously set out in this decision, are paragraphs 17, 18, 19, 42, 101, 102, 103-113 as follows:

> 17. The self-identification provisions violate the *Charter* rights of gender diverse students to equality (s. 15), and to life, liberty and security of the person (s. 7). The provisions single out gender diverse students, a uniquely disadvantaged minority group, and exacerbate the disadvantage they face. The provisions force some gender diverse youth to choose between, on the one hand, being outed to their parents before they are ready to do so and/or despite the risk of harm associated with doing so (including psychological, emotional, and physical harm), and on the other hand, being deadnamed and misgendered in the school environment, with the host of harms this leads to, including increased rates of depression, anxiety, and suicidality (I.e. risk of suicide, usually indicated by suicidal ideation or intent).
>
> 18. The self-identification provisions violate the freedom of expression of teachers and other school personnel under s. 2(b) of the *Charter*. The provisions prohibit teachers and other school personnel from affirming students' gender identify in the school environment.
>
> 19. The self-identification provisions violate the collective rights of ~~Anglophone East and~~ the DEC and the English linguistic community it represents pursuant to s. 16.1 of the *Charter*. ~~Anglophone East~~ The DEC has rejected the self-identification provisions since becoming aware of them in or about May of 2023. The provisions force the DEC and school personnel at Anglophone East to discriminate against vulnerable members of its community – gender diverse students under 16 years of age – contrary to its values and practices. They force the DEC and school personnel at Anglophone East to participate in practices that will further disempower and harm ~~it's~~ the more vulnerable members of Anglophone East's community rather than contribute to their success and enhance the vitality of the community.
>
> (...)

42. Policy 713 uses the definition for "School Personnel" as found in the *Education Act*, which defines the term to include: superintendents, directors of education and other administrative and supervisory personnel, school bus drivers, building maintenance personnel, including custodians, secretaries and clerks, teachers, persons other than teachers engaged to assist in the deliver of programs and services to pupils, and other persons engaged in support areas such as social services, health services, psychology and guidance. Policy 713 adds "volunteers" to the definition of "School Personnel" for the purpose of the policy.

(...)

101. The self-identification provisions limit the freedom of expression of teachers and other school personnel (which includes volunteers according to Policy 713) under s. 2(b) of the *Charter*, including the freedom of expression of Mr. Vautour.

102. Section 2(b) of the *Charter* provides that:

Everyone has the following fundamental freedoms:	Chacun a les libertés fondamentales suivantes :
[...]	[...]
b. freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.	b. liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication.

103. The self-identification provisions constitute a serious interference with the freedom of expression of teachers and other school personnel. The self-identification provisions prohibit teachers and other school personnel from using the "preferred" names and pronouns of gender diverse students under 16 years of age absent parental consent, and thus prohibits them from affirming students' gender identity in the school environment. The self-identification provisions require teachers and school personnel to deadname and misgender gender diverse students under 16 years of age in certain situations despite the significant harms associated with doing so.

104. Respect for and recognition of a student's chosen name and pronoun(s) by teachers and other school personnel has expressive content that falls within the sphere of activity protected by s. 2(b). the use of a student's chosen name and pronoun, amongst other things: communicates affirmation of an individual's gender expression and identity; demonstrates equal recognition, respect and treatment of students regardless of gender identity; contributes to the creation of a safe and welcoming school

environment for all students; and denounces transphobic and discriminatory language, behaviour and discrimination.

105. Thus, the self-identification provisions restrict the freedom of expression of teachers and other school personnel. The limits on the s. 2(b) *Charter* right of teachers and other school personnel are not reasonable and cannot be demonstrably justified in a free and democratic society. The self-identification provisions therefore cannot be saved by s. 1 of the *Charter*.

106. Conversely, it is not a restriction of freedom of expression to require teachers and other school personnel to respect the gender identity and expression of gender diverse students, including by requiring them to use the chosen names and pronouns of gender diverse students. If teachers and other school personnel do not use gender diverse students' chosen names and pronouns, they are, by default, deadnaming and misgendering those students. This type of expression, if found to have expressive content, is not protected by s. 2(b) because it amounts to violent expression and/or hate propaganda and/or a direct attack on the physical integrity and liberty of gender diverse students, or otherwise undermines values that s. 2(b) seeks to protect (including that it prevents dialogue rather than fostering it, it presents the self-fulfillment of gender diverse students rather than enhancing it, and it stands in the way of finding truth rather than furthering it). Section 28 of the *Charter* further bolsters the conclusion that it is not a restriction of freedom of expression to require teachers and school personnel to respect the gender identity and expression of gender diverse students.

107. Policy 713 deprives Anglophone East's DEC of its right to ensure the preservation and promotion of New Brunswick's English linguistic community.

108. Section 2 of *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, RSNB 2011, c 198, provides:

2 The Government of New Brunswick shall ensure protection of the equality of status and the equal rights and privileges of the official linguistic communities and in particular their right to distinct institutions within which cultural, educational and social activities may be carried on.	**2** Le gouvernement du Nouveau-Brunswick assure la protection de l'égalité de statut et de l'égalité des droits et privilèges des communautés linguistiques officielles et en particulier de leurs droits à des institutions distinctes où peuvent se dérouler des activités culturelles, éducationnelles et sociales.

109. Section 16.1 of the *Charter* provides:

16.1(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.	16.1(1) La communauté linguistique française et la communauté linguistique anglaise du Nouveau-Brunswick ont un statut et des droits et privilèges égaux, notamment le droit des institutions d'enseignement distinctes et aux institutions culturelles distinctes nécessaires à leur protection et à leur promotion.
(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.	(2) Le rôle de la législature et du gouvernement du Nouveau-Brunswick de protéger et de promouvoir le statut, les droits et les privilèges visés au paragraphe (1) est confirmé.

110. ~~Anglophone East~~ The DEC seeks to actively promote the inclusion, integration, safety, and success of its more marginalized students, including gender diverse students of all ages.

111. The self-identification provisions frustrate the DEC ~~Anglophone East's~~ ability to promote the vitality of the English linguistic community it serves. The self-identification provisions force the DEC and Anglophone East school personnel to discriminate against vulnerable members of ~~it's~~ the school community – gender diverse students under 16 years of age – contrary to its values and practices. They force the DEC and Anglophone East to participate in practices that will disempower and harm its more vulnerable members, and worsen their educational outcomes, rather than contribute to their success and enhance the vitality of the community.

112.1 The self-identification provisions of Policy 713 violate the s. 16.1 rights of members of the DEC, including Mr. Doyle and Mr. Vautour, and members of the English linguistic community for the same reasons.

112. Section 16.1 is not subject to the notwithstanding clause.

113. The limit on the s. 16.1 *Charter* right of Anglophone East is not reasonable and cannot be demonstrably justified in a free and democratic society. The self-identification provisions therefore cannot be saved by s. 1 of the *Charter*.

[34] In their Amended Notice of Action with Statement of Claim Attached dated June 7, 2024, the Plaintiffs have pled that Policy 713 violates the substantive equality rights of gender diverse youth. Paragraphs 81-100 of the Statement of Claim plead the infringements of gender diverse youth's *Charter* rights as provided by section 7 and section 15(1) of the *Charter* which state:

> **7** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **15(1)** Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[35] The Plaintiffs cannot advance claims pursuant to section 7 or 15 of the *Charter* in the absence of an order of public interest standing as such claims are those of the gender diverse youth or students potentially impacted by the adoption and implementation of Policy 713. This is an important point and an important distinction. The Plaintiffs request from this Court an order of standing as of right to advance this action on the basis of the alleged infringement of Dominic Vautour's section 2(b) *Charter* rights as well as Harry Doyle and the District Education Council's *Charter* rights pursuant to section 16.1. The Court has been asked to consider whether Mr. Vautour has standing to maintain the action given the potential infringement of his right to expression under section 2(b) and whether Harry Doyle and/or the District Education Council has standing on the basis of an alleged infringement of their language rights pursuant to section 16.1. The Plaintiffs also request an order of public interest standing to

advance the claims pursuant to sections 7 and 15 of the *Charter* on behalf o the gender diverse youth.

[36] In their written submissions, the Plaintiffs summarize their position as to why they have standing as of right at paragraphs 32 and 33 as follows:

> [32] Each of the following reasons, developed below, is sufficient to grant the Plaintiffs standing as of right in this case.
>
> a. The DEC is the primary target of Policy 713, is exceptionally prejudiced by Policy 713, and has a personal stake in the outcome of this case beyond merely righting a wrong or upholding a principle;
>
> b. The Plaintiffs' own rights (ss. 16.1 and s 2(b)) are violated and the violation of ss. 16.1 and 2(b) are intertwined with the ss. 7 and 15 violations asserted;
>
> c. The Plaintiffs are challenging provisions that force them to violate the rights of children within their care; and
>
> d. The Plaintiffs assert that the self-identification provisions of Policy 713 violate the *Human Rights Act* and the *Education Act*.
>
> [33] The fact that all these circumstances are present makes this an obvious case of private interest standing. The Plaintiffs are not advocating for the rights of disconnected third parties; they are asserting their own *Charter*-protected rights, and those pertaining to children under their care, as mandated by the *Education Act*. Further, they are challenging a law that directly applies to them, and no other groups or organizations in New Brunswick, to ensure that they do not violate the rights and freedoms of children by enforcing the self-identification provisions contained in Policy 713.

[37] In their grounds set out in support of the Defendants' motion to strike the Plaintiffs' action on the grounds they do not have standing, the Defendants note at paragraphs 16 to 20 of the Notice of Motion dated May 14th, 2024 the following:

> 16. The DEC is established as a body corporate under s. 36.11(1) of the *Education Act*. As such, the DEC does not have rights under the *Charter* and cannot claim a direct or

personal interest in whether Policy 713 infringes sections 2(b), 7, 15, or 16.1 of the *Charter*.

17. The DEC does not have private interest standing to allege an infringement of the *Charter* rights of students, teachers, and other school personnel, because litigants can only allege an infringement of their own *Charter* rights. Therefore, the DEC does not have a personal or direct interest in the *Charter* rights of third parties.

18. The DEC cannot claim such an interest by virtue of being the employer of teachers and school personnel, or the statutory body tasked with delivering education to the students of the District.

19. Harry Doyle is the Chair of the DEC and is a private individual. The Statement of Claim does not assert Mr. Doyle's own *Charter* rights have been violated but as explained above asks this Court to adjudicate on the *Charter* rights of third parties. Mr. Doyle is not sufficiently affected, exceptionally prejudiced, or otherwise specifically impacted by the self-identification provisions of Policy 713.

20. Furthermore, neither the DEC, the District, or Harry Doyle, benefit from the protection of s. 2(b), 7, 15, or 16.1 in relation to the self-identification provisions of Policy 713.

[38] The Defendants refer the Court to Chief Justice Drapeau's (as he then was) guidance on the concept of standing as set out in ***The Province of New Brunswick v. Morgentaler***, 2009 NBCA 26 (CA) at paragraphs 35-38 as follows:

> [35] **A party seeking to vindicate a private right has standing to sue if that party is "sufficiently affected by the matter that gives rise to the cause of action"** (see Linda S. Abrams and Kevin P. McGuinness, *Canadian Civil Procedure*, 1st ed. (Markham: Lexis Nexis Inc.: 2008), § 2.33). In those situations, it is said the claimant has standing as of right. Generally speaking, that will be the case if the party in question has a personal stake in the outcome of the controversy or, put another way, if the harm giving rise to the claim is traceable to "some invasion of a legally protected, concrete and particularized interest belonging" to the claimant (§ 2.33). The party so aggrieved has the legal right to challenge in a judicial forum the conduct of another and may do so without being at the mercy of the court's indulgence.
>
> [36] A private claimant in a proceeding that challenges the validity of a legislative provision of general application, whether in a

statute or subordinate legislation, on grounds unrelated to *Charter* rights or freedoms, will generally have standing as of right if the impugned provision visits upon that claimant exceptional prejudice in the sense that it applies to him or her differently from the public at large (see Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp., Vol. 2, (Toronto: Carswell, 2007) at 59.2(b)). A real or artificial person, such as a corporation, whose *Charter* rights or freedoms are infringed or denied by a legislative provision, may apply for an order declaring it unconstitutional pursuant to s. 24(1) (for an insightful discussion on point, see June M. Ross, "Standing in Charter Declaratory Actions", (1995) 33 *Osgoode Hall L. J.* 151, at 191-194). **However, anyone who is exceptionally prejudiced by legislation without suffering a personal infringement or denial of *Charter* rights or freedoms will not have standing as of right to prosecute an application for a declaration of unconstitutionality based upon the impugned legislation's breach of another person's *Charter* rights.**

[37] In *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36 (QL), a corporation applied for a declaration of unconstitutionality in respect of a provincial law on the ground that it infringed s. 7 of the *Charter*. The Court held the corporation could not invoke s. 7 in support of its application because the *Charter* provision in question confers rights and freedoms upon human beings only. A few years later, in *Hy and Zel's Inc. v. Ontario (Attorney General)*; Paul Madger Furs Ltd. v. Ontario (Attorney General), 1993 CanLII 30 (SCC), [1993] 3 S.C.R. 675, [1993] S.C.J. No. 113 (QL), the Court extended the *Irwin Toy* rule to cover individuals as well. In that case, both the corporate and individual applicants were without standing as of right to challenge a Sunday closing law because their complaint rested upon a breach of *Charter* rights inuring to others.

[38] The law on point may be in need of reform, but there is no denying that its current state is correctly summarized by Professor Hogg in *Constitutional Law of Canada*:

> [...] unless and until the Supreme Court of Canada repents of its ruling in *Irwin Toy*, the position seems to be as follows. **The general rule of *Irwin Toy* is that a *Charter* right that invalidates a law may be invoked by a person affected by the law only if the person affected by the law is also a person entitled to the benefit of the *Charter* right. If the person affected by the law is not entitled to the benefit of the *Charter* right, then the general rule will preclude the person from challenging the law, except where the person is the defendant in criminal or civil proceedings brought to enforce the law**. In those cases, the *Big M Drug Mart* [1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, [1985] S.C.J. No. 17 (QL)]

> exception to the general rule will apply to prevent the person from suffering criminal or civil sanctions under the unconstitutional law. [p. 59-17]
>
> [Emphasis mine]

Standing as of Right

[39] The Plaintiffs suggest each of the distinct plaintiffs in this matter have standing as of right. The Plaintiffs submit the test for direct interest standing remains as articulated in the pre-*Charter* decision of ***Smith v. Ontario (Attorney General)***, [1924] S.C.R. 331 at 337. The passage in ***Smith***, which discusses the notion of standing, is as follows:

> Much may be said, no doubt, for the view that an individual in the position of the appellant ought, without subjecting himself to a prosecution for a criminal offence, to have some means of raising the question of the legality of official acts imposing constraint upon him in his daily conduct which, on grounds not unreasonable, he thinks are unauthorized and illegal. We think, however, that to accede to appellant's contention upon this point would involve the consequence that virtually every resident of Ontario could maintain a similar action; and we can discover no firm ground on which the appellant's claim can be supported which would not be equally available to sustain the right of any citizen of a province to initiate proceedings impeaching the constitutional validity of any legislation directly affecting him, along with other citizens, in a similar way in his business or in his personal life.
>
> We think the recognition of such a principle would lead to grave inconvenience and analogy is against it. (**An individual, for example, has no status to maintain an action restraining a wrongful violation of a public right unless he is exceptionally prejudiced by the wrongful act**. It is true that in this court this rule has been relaxed in order to admit actions by ratepayers for restraining *ultra vires* ex-
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> [Page 338]
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> penditures by the governing bodies of municipalities; *MacIlraith v. Hart* [1908 CanLII 64 (SCC), [1907] 39 Can. S.C.R. 657]. **We are not sure that the reasons capable of being advanced in support of this exception would not be just as pertinent as arguments in favour of the appellant's contention, but this**

> **exception does not rest upon any clearly defined principle, and we think it ought not to be extended**.
>
> [Emphasis mine.]

[40] In my view, the Plaintiffs have stretched the reasoning in ***Smith*** beyond its scope. The Supreme Court of Canada in ***Smith*** did not allow the Appellant standing and while recognizing the principle that an individual may have a right to maintain an action restraining a public violation of a public right if the individual is "*exceptionally prejudiced*" by the wrongful act, they clearly acknowledged the limits of such exceptions.

[41] The Plaintiffs rely upon ***Benner v. Canada***, [1997] 1 S.C.R. 358, in support of their assertion there exists a line of Canadian jurisprudence where standing as of right has been recognized by the Court based on the Plaintiffs' "*connection*" to the *Charter* violation. The Defendants interpret the Supreme Court's ruling in ***Benner*** as supportive of their position that the *Charter* rights actually at issue in this matter are those of the gender diverse students and none of the named Plaintiffs may assert an action in regards to the third party rights of these students.

[42] In ***Benner***, the Supreme Court considered the ability of Benner to challenge whether the requirements for citizenship under the ***Citizenship Act***, which applied to him because he was born abroad to a Canadian mother offended section 15(1) of the *Charter*. The citizenship of a person born abroad before February 15, 1977 could be granted if they had a Canadian father, but if they had a Canadian mother, they were first required to undergo a security

check. Benner had several criminal offences and as a result of his mandatory security check was denied citizenship.

[43] In considering the ability of a child to assert a violation of a *Charter* right of their mother, the Supreme Court of Canada discusses the standing question in ***Benner*** at paragraphs 77, 78 and 80 as follows:

> 77 The respondent also submits that any discrimination imposed by the Act is really imposed upon the appellant's mother, not upon him. No reference whatsoever to the sex of applicants themselves is made in the impugned provisions – only the sex of the applicant's parent is important. **As a result, the respondent claims, the appellant is attempting to raise the infringement of someone else's rights for his own benefit.** This argument was accepted by Marceau J.A. in the Federal Court of Appeal. With respect, I cannot agree. As I will now discuss, **the appellant is the primary target of the sex-based discrimination mandated by the legislation, and in my opinion possesses the necessary standing to raise it before us**.
>
> 78 **It now appears to be settled law that a party cannot generally rely upon the violation of a third party's Charter rights**: *R. v. Edwards*, 1996 CanLII 255 (SCC), [1996] 1 S.C.R. 128, at p. 145; *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342, at p. 367. **If the appellant were truly attempting to raise his mother's s. 15 rights, he would not have the requisite standing. I am not convinced, however, that he is attempting to do so. The impugned provisions of the *Citizenship Act* are not aimed at the parents of applicants but at applicants themselves. That is, they do not determine the rights of the appellant's mother to citizenship, only those of the appellant himself.** His mother is implicated only because the extent of his rights is made dependent on the gender of his Canadian parent.
>
> (...)
>
> 80 In this case, on the other hand, there is a connection between the appellant's rights and the differentiation made by the legislation between men and women. The impugned provisions clearly make Mr. Benner's citizenship rights dependent upon whether his Canadian parent was male or female. **In these circumstances, I do not believe permitting s. 15 scrutiny of the respondent's treatment of his citizenship application amounts to allowing him to raise the violation of another's *Charter* rights. Rather, it is simply allowing the protection**

> **against discrimination guaranteed to him by s. 15 to extend to the full range of the discrimination. This is precisely the "purposive" interpretation of *Charter* rights mandated by this Court in many earlier decisions**: see, e.g., *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 344; *Andrews*, *supra*, at p. 169. If it were not so, applicants would be unable to challenge a law which prevented them from acquiring citizenship, not because, for example, they were Italian, but because their parents were Italian. A Parliament or legislature intent on circumventing the protections of s. 15 could insulate legislation from *Charter* review by providing for this kind of indirect discrimination rather than mentioning its targets directly. I draw support for this view from several other courts that have reached similar conclusions, both in Canada and in the United States.
>
> [Emphasis mine.]

[44] The Supreme Court of Canada in ***Benner*** did qualify their analysis confirming they did not intend to create a doctrine of "*discrimination by association*", setting out at paragraph 82 the following:

> 82 **I hasten to add that I do not intend by these reasons to create a general doctrine of "discrimination by association". I expressly leave this question to another day**, since it is not necessary to address it in order to deal with this appeal. The link between child and parent is of a particularly unique and intimate nature. A child has no choice who his or her parents are. Their nationality, skin colour, or race is as personal and immutable to a child as his or her own. In *Miron*, *supra*, McLachlin J. wrote at p. 495 that the fundamental consideration in identifying analogous grounds under s. 15 is:
>
> > . . . whether the characteristic may serve as an irrelevant basis of exclusion and a denial of essential human dignity in the human rights tradition. In other words, may it serve as a basis for unequal treatment based on stereotypical attributes ascribed to the group, rather than on the true worth and ability or circumstances of the individual?
>
> [Emphasis mine]

[45] The Court was also directed to the consideration of the Prince Edward Island Court of Appeal's decision in ***Charlottetown v. PEI***, 1998 CanLII 19473 (PESCAD) where it determined the City of Charlottetown had standing to

advance a claim alleging a violation of the City's citizens section 3 *Charter* rights. In determining that the City of Charlottetown had standing, Justice Mitchell commented at paragraphs 4, 5 and 8 as follows:

> [4] At the outset of the appeal hearing, this court questioned the standing of the appellant to pursue the matter since it is a corporation and only individual citizens can exercise the right to vote. However, having heard the submissions of counsel, and after considering the nature of the right guaranteed by s. 3 of the *Charter* as defined by the Supreme Court of Canada, **I have concluded that the appellant does have standing to proceed. Furthermore, the appellant's right to proceed does not depend upon a discretionary grant of public interest standing.**
>
> [5] According to the Supreme Court of Canada, a corporation has standing to invoke a *Charter* right if it has an interest which fails within the scope of the guarantee and accords with the purpose of the right: *R. v. CIP Inc.*, 1992 CanLII 95 (SCC), [1992] 1 S.C.R. 843, per Stevenson J. at pp. 851-858. In *Reference re: Electoral Boundaries Commission Act*, ss. 14, 20 (Sask.) (1991), 1991 CanLII 61 (SCC), 81 D.L.R. (4th) 16 (S.C.C.) at p. 39, per McLachlin J., the Supreme Court defined the right to vote in s. 3 as guaranteeing effective representation. In this case, the appellant makes its claim on the basis that as a community, it is inadequately represented in the Legislature of the Province because the voting rights of its residents have been unjustly diminished. In my view, the appellant has an interest in ensuring effective representation for its populace that fits within the scope and purpose of s. 3 as defined by the Supreme Court.
>
> (...)
>
> [8] In this context some deviance from voter equality may be tolerated for the greater good of all. On the other hand, unjustly diminishing the voting rights of any group of individuals, such as urban voters, would obviously have an adverse impact on effective representation for their community as a whole and thus would weaken the democratic process that s. 3, as defined by the Supreme Court, was meant to protect and support. **Accordingly, the City of Charlottetown as the local authority for its population has standing in this case to invoke s. 3 based on such a claim because it has an interest that fails within the scope and purpose of the right thereby guaranteed**.
>
> [Emphasis mine]

[46] Both parties argued the applicability of the decision of Chief Justice Hinkson of the Supreme Court of British Columbia in ***Harm Reduction Nurses Association (HRNA) v. British Columbia (Attorney General)***, 2023 BCSC 2290 to the issues currently before this Court. In the ***HRNA*** matter, the Plaintiff requested an injunction to stay the coming into force of legislation, the *Restricting Public Consumption of Illegal Substances Act*, SBC 2023, c. 40, on an interim basis arguing the enforcement of the legislation could lead to the violation of *Charter* rights of drug users, Indigenous people and the nurses themselves. Chief Justice Hinkson confirmed the Plaintiff had both direct and public interest standing in the matter explaining his decision on standing at paragraphs 43 to 46 as follows:

> [43] I am satisfied that the plaintiff has both a direct and a public interest in the application before me.
>
> [44] **The plaintiff's direct interest is based upon the difficulties that its members may face if the *Act* comes in to force**. HRNA's members work in various health and community care settings, including community outreach, OPS, supervised consumption sites ("SCS"), emergency rooms and hospitals, and medical clinics. Some of HRNA's members have lived experience of drug use, and most of HRNA's members have close family or friends who use drugs.
>
> [45] **The plaintiff argued that its members' security of the person is engaged in light of the serious psychological harm the *Act* will invite upon them.** As Chief Justice Lamer wrote in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, 1999 CanLII 653 (SCC), a restriction on a person's security of a person may be made out where there is "a serious and profound effect on a person's psychological integrity": at para. 60. **The plaintiff also suggested that its members' job will potentially be made more dangerous by the *Act* insofar as outreach will have to be conducted in more isolated and hidden locations.**
>
> [46] The plaintiff's public interest stems from the circumstances of those who its members serve, who I accept are largely unable to advocate for themselves. On this basis, the plaintiff meets the test

> set out in *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27. The decision to grant or deny public interest standing is discretionary, and legality and access to justice underly the exercise of that discretion. Moreover, in exercising this discretion, I have turned my mind to the seriousness and justiciability of the instant issues, the genuineness of the plaintiff's interest in the matter, and the reasonableness and effectiveness of this suit as a means of bringing the instant issues to this Court.
>
> [Emphasis mine.]

[47] The question this Court must resolve is whether or not Harry Doyle, Dominic Vautour and/or the District Education Council have standing to prosecute the claims as set out in the Amended Notice of Action with Statement of Claim Attached dated June 7, 2024 forward. The Plaintiffs maintain that they have a sufficient connection to assert the *Charter* rights of the third parties, the gender diverse youths in their school district. The Plaintiffs equate the position of the District Education Council to that of the Nurses Association in the ***HRNA*** matter. Chief Justice Hinkson determined the Nurses Association had direct standing to bring the case forward and assert the third party rights of the drug users. However, the members of the Nurses Association's own working conditions were impacted, and the Court had concluded the nurses' own section 7 security of the person rights were engaged. The members of the Nurses Association were not granted standing simply because they worked with or had a connection to the drug users; their own section 7 *Charter* rights were directly impacted.

[48] In my view, the situations in both ***Benner*** and ***HRNA*** are distinguishable from the situation currently before the Court. In ***Benner***, the appellant was

directly impacted by the Act. He faced direct discrimination as a result of the wording of the *Citizenship Act*. It was Benner himself who was the "primary target" of the alleged discrimination pursuant to section 15 of the *Charter*. It was Benner whose ability to seek citizenship was thwarted by the application of the legislative provisions. Similary, the nurses *Charter* rights in ***HRNA*** were directly impacted. They were not just engaged and supportive of the drug users, their wellbeing and security were also in peril. In this case, with the potential exception of Dominic Vautour's claims under section 2(b), these Plaintiffs are not directly impacted nor discriminated against as a result of the implementation or enforcement of the revisions to Policy 713.

[49] The Plaintiffs suggest that ***Charlottetown v. PEI*** supports their assertion of standing as of right in these circumstances. However, in my view, this case is as well distinguishable from the issues currently before the Court. The *Charter* provisions in the ***Charlottetown*** decision are of narrow scope. It is difficult to glean a principle of an expanded concept of standing from the Court's conclusion in that case. The ***Charlottetown v. PEI*** case considered the provisions of section 3 of the *Charter* which states as follows:

> **3** Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Standing as of Right – Harry Doyle

[50] Harry Doyle is a named Plaintiff in this action and chair of the DEC. Harry Doyle's obvious keen interest in the adjudication of these issues does not

necessarily equate with a legal capacity to prosecute the claims set out in the Amended Notice of Action with Statement of Claim Attached dated June 7th, 2024. None of the allegations set out in the Statement of Claim purport to advance a violation of Harry Doyle's *Charter* rights. Paragraph 9 of the Statement of Claim confirms that Harry Doyle is a member of the English-linguistic community of southeast New Brunswick. The paragraph states Harry Doyle has standing as of right without expanding upon what claims or evidence anchors the claim of standing as of right. Following paragraph #9, there is absolutely nothing pled which could further illuminate the Court on the basis for which Harry Doyle has standing to advance these various claims. The Court cannot find a coherent reason to conclude Harry Doyle has standing as of right.

Standing as of Right – Dominic Vautour

[51] The Court has now agreed to the addition of Dominic Vautour as a Plaintiff to these proceedings. While the Defendants did not set out their arguments concerning Mr. Vautour in their Notice of Motion, they did in both their written and oral submissions. The Defendants argue Dominic Vautour does not meet the test for standing as of right and there is no evidence that Policy 713 has limited his right to expression. The Defendants suggest Mr. Vautour's claim is entirely hypothetical and this is insufficient to demonstrate the necessary "actual infringement" of a *Charter* right in order to ground a claim pursuant to section 2(b) or any other provision of the *Charter*.

[52] Dominic Vautour, like all Canadians, is granted rights pursuant to section 2(b) of the *Charter*. Section 2(b) states:

> 2 Everyone has the following fundamental freedoms:
>
> (...)
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (...)

[53] The Plaintiffs suggest Dominic Vautour has standing as of right as his own section 2(b) *Charter* rights are engaged. Mr. Vautour is not simply alleging Policy 713 violates the section 7 and 15 *Charter* rights of gender diverse students, but rather he points out his own individual right to expression is violated by Policy 713. The Plaintiffs point out that as a volunteer, Mr. Vautour is bound by Policy 713 and is therefore prevented from using students' chosen names and pronouns in violation of his freedom of expression. The Plaintiffs suggest that Mr. Vautour's rights pursuant to section 2(b) are intertwined with the claims advanced pursuant to section 7 and section 15 of the *Charter* on behalf of the gender diverse youth.

[54] The Defendants suggest there is absolutely no evidence before this Court that Dominic Vautour has experienced an actual infringement of his section 2(b) *Charter* rights. Dominic Vautour has filed two affidavits in this matter, both of them in the French language. I have carefully reviewed the entirety of the affidavit of evidence of Dominic Vautour. There are no facts or situations alleged which confirm an incident where his section 2(b) *Charter* rights have been

affidavit of evidence of Dominic Vautour. There are no facts or situations alleged which confirm an incident where his section 2(b) *Charter* rights have been challenged or at issue. Mr. Vautour never mentions his freedom of expression once in his affidavit evidence. The Defendants refer to the evidentiary record and point out that, at this stage, Mr. Vautour's claim is entirely hypothetical.

[55] The Defendants suggest that Dominic Vautour's claim is not yet "ripe", but rather is based upon future events that may not occur. The Defendants refer the Court to ***CDN Broadcasting Corp. v. Attorney General***, 2011 ONSC 2281 at paragraph 9:

> [9] **A court will not grant a constitutional declaration if an issue is purely academic or hypothetical**: see Smith v. Ontario (Attorney General), 1924 CanLII 3 (SCC), [1924] S.C.R. 331, [1924] S.C.J. No. 15. As Peter Hogg states in Constitutional Law of Canada, 5th ed. (Scarborough, Ont.: Thomson Carswell, 2007) at vol. 2, p. 791:
>
> > A case is not "ripe" for decision if it depends upon future events that may or may not occur. **In that situation, the case would involve a premature determination of what is still only a hypothetical question**. For example, a challenge to the constitutionality of a bill that has not been enacted would not be ripe: the bill may never be enacted or may be significantly amended before enactment.
> >
> > [Emphasis mine]

[56] The Defendants refer the Court to ***Baier v. Alberta***, 2007 SCC 31 where the Court considered an alleged infringement on school employees' section 2(b) *Charter* rights. In determining the legislation in question did not infringe the school employees *Charter* rights, the Court stated at paragraph 48 as follows:

> 48 In my view, the appellants have not established that their practical exclusion from school trusteeship substantially interferes

> with their ability to express themselves on matters relating to the education system. The LAEA Amendments may deprive them of one particular means of expression, but it has not been demonstrated that absent inclusion in this statutory scheme, they are unable to express themselves on education issues. As Bastarache J. noted in Delisle at para. 41, diminished effectiveness in the conveyance of a message does not mean that s. 2(b) is violated. **There must be substantial interference with the fundamental freedom.** School employees may express themselves in many ways other than through running for election as, and serving as, a school trustee.
>
> [Emphasis mine]

[57] The Defendants further submit that members of the public do not have a right to volunteer. The Defendants suggest that Mr. Vautour has not suffered an actual infringement or a denial of his own *Charter* rights, and as such, does not have standing as of right to challenge Policy 713. The Defendants maintain that Dominic Vautour does not have a right to volunteer, nor does he have an unqualified right to express himself while volunteering.

[58] There is nothing set out in the Amended Notice of Action with Statement of Claim Attached dated June 7th, 2023, nor in the affidavit evidence of Dominic Vautour dated April 2nd, 2024 and May 17th, 2024 confirming or alleging an "actual" infringement of his section 2(b) *Charter* rights as a result of his required compliance with the revisions to Policy 713. While the Court accepts Dominic Vautour's section 2(b) *Charter* rights "*could*" be potentially infringed by the revised Policy 713, the Court shares the Defendants' concerns that such a claim at this juncture is hypothetical. It is certainly conceivable that Dominic Vautour's section 2(b) *Charter* rights could be engaged, and he certainly has standing to

assert his own rights pursuant to section 2(b), but there is nothing the Court can point to at this juncture to suggest such an infringement has or is likely to occur.

Standing as of Right – Anglophone East District Education Council

[59] In explaining their position as to why the DEC has standing as of right, the Plaintiffs note at paragraphs 46 and 47 of their written brief as follows:

> [46] Here, the DEC is established by statute to give effect to the right to distinct educational institutions provided under s. 16.1; it is statutorily mandated to represent the English-speaking community in the Anglophone East School District (elected by members of the English-speaking community in that district) and to ensure "the preservation and promotion of the language and culture of the official linguistic community for which the school district is organized". It cannot seriously be asserted that the DEC does not have standing as of right to put forward a claim under s. 16.1 for the Anglophone East School District.

> [47] The self-identification provisions of Policy 713 prevent trans and non-binary students from succeeding at school. If applied at Anglophone East, they would harm student achievement, prevent the delivery of the DEC's educational objectives, and they would undermine the long-standing culture that exists at Anglophone East of celebrating and promoting the success of the district's LGBT community. These are violations of s. 16.1, which will be made out on the merits of this case. The DEC has standing as of right to assert these violations, and to seek to prevent such harms to its school community, as the body created by statute to represent the English-linguistic community in the district and ensure its promotion.

[60] The Anglophone East District Education Council is a body corporate established by statute with the recognized capacity to sue and be sued. As a corporation, the DEC does not have, nor can it claim a direct or personal interest in whether Policy 713 infringes section 2(b), 7, or 15 of the *Charter*. Given the case law previously cited, and in particular Chief Justice Drapeau's analysis in

Morgentaler, the DEC does not have standing as of right to advance these claims. The question then remains, does the DEC have standing as of right to bring its claims pursuant to section 16.1 of the *Charter*?

[61] The Plaintiffs point to their statutory mandate which specifically requires they preserve and promote the language and culture of their community. The Plaintiffs note section 36.9(2) of the Education Act:

> 36.9(2)A district education plan shall be consistent with the provincial education plan and shall include
>
> (a) a vision, including a mission statement, goals and values,
>
> (b) a strategy respecting the delivery and evaluation of educational programs and services within the school district, including educational priorities, objectives and a work plan,
>
> (c) accountability measures for evaluating pupil achievement, monitoring school district performance and monitoring the achievement of strategic objectives, and
>
> (d) **strategies to ensure the preservation and promotion of the language and culture of the official linguistic community for which the school district is organized**.
>
> [Emphasis mine]

[62] In the present matter, the Plaintiffs allege it is their section 16.1 *Charter* rights that are engaged as a result of the adoption and implementation of the gender-identification provisions of Policy 713. Section 16.1 of the *Charter* states as follows:

> **English and French linguistic communities in New Brunswick**
>
> 16.1(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed

[63] The Quebec Court of Appeal's decision in ***Hak*** is helpful to the Court's current analysis. The *Charter* provision considered in ***Hak*** was section 23, which states as follows:

Minority Language Educational Rights

Language of instruction

23(1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

> (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

[64] The Quebec Court of Appeal in ***Hak v. Attorney General of Quebec***, 2024 QCCA 254 (CanLII), began their consideration of alleged violations of section 23 of the *Charter* with the following overview of Canadian jurisprudence on minority language rights at paragraphs 603 and 604:

> [603] If we summarize the guidelines provided in the foregoing cases, we first note that, of all the various remedial measures considered mandatory by the courts in the enforcement of s. 23, **every one of them without exception attaches to the core characteristics of minority language rights in an educational context**. In particular, such measures pertain to:
>
> i. the physical, pedagogical and administrative conditions under which minority language instruction is offered (the right to minority language instruction, the right to separate classes where such instruction is offered, the right to proportional representation of the minority on the linguistic majority's school councils and school boards, the right to "homogenous" minority language schools, the right to separate school councils and school boards to administer one or more homogenous schools, the right to manage these facilities and to exercise exclusive control over them);
>
> ii. the arrangements for school-related support activities (such as transportation to and from school, or extracurricular sporting and cultural activities); and
>
> iii. the potentially deterrent effects on right holders of certain measures taken under s. 23, measures that might hasten the assimilation or cultural erosion of the linguistic minority due to the impact of various pedagogical choices (a limited number of hours of minority language instruction, or the teaching of that language in immersion classes where it is taught as a second language rather than as a first language in a minority language school).
>
> [604] For linguistic and cultural minorities in Canada, whether anglophone or francophone, s. 23 serves as a bulwark against their own decline. The desire to avoid assimilation caused by the delays often associated with government inaction in this field is therefore an important aspect frequently taken into account by the

> courts. This particular factor, however, is entirely absent in the case now before this Court.
>
> [Emphasis mine]

[65] In ***Hak***, the Quebec Court of Appeal held the trial judge erred in expanding the scope of section 23 language rights. In explaining this conclusion, the Court stated at paragraphs 607, 608 and 614 as follows:

> [607] If accepted in its current form, the argument of the parties opposed to the *Act* would artificially constitutionalize a practice, one that emerged only recently, at that, and has absolutely nothing to do with the English language as it is taught and used by Quebec's linguistic minority in the primary and secondary schools. **The justification so offered amounts at best to an extrapolation from well-settled rules: it is premised on the alleged possibility for educational facilities governed by s. 23 to protect and promote the distinct "culture" which is said to prevail in the English schooling system, a culture that, it is claimed, fosters diversity and, in particular, religious diversity**.
>
> [608] "Culture", understood as an ethnological or sociological concept, takes many different forms, and the concept certainly extends well beyond the notion of "language of the minority". It can stretch in many directions and apply to all sorts of concepts that have little or nothing to do with language as such. For example, one speaks of general, ancient or modern culture, political, legal, Indigenous, religious, literary, musical or gastronomic culture, or Mediterranean or Asian culture. These various heterogeneous or homogenous entities may evolve and prosper without being tied to and dependent upon one language only, be it the language of the minority or the majority. Moreover, such entities often coexist in parallel in many languages, which they all transcend. In that sense, one thing cannot be doubted — language and culture are not merged into one and the same thing.
>
> (...)
>
> [614] **Such is not the case here. Instead, the argument of the parties opposed to the Act attempts to take elements that are unrelated to language, sharing no characteristics with it, and glue them together around the notion of "culture". At best, according to this argument, such elements are entirely peripheral to the notion of culture, and even this remains to be shown. Under this guise, applications have been presented to the Court which, in light of the relevant jurisprudence, have nothing in common with claims that, in**

> **the last 35- or 40 years, were successfully argued under s. 23 of the *Canadian Charter***. In other words, the Trial Judgment gives s. 23 a scope it does not have. In so doing, it erroneously concludes that the *Act* infringes this provision of the *Canadian Charter*. It therefore follows that the Court must reverse the Trial Judgment on that point.
>
> [Emphasis mine]

[66] In ***Charlebois v. Mowat et Ville de Moncton***, 2001 NBCA 117, Chief Justice Daigle, as he then was, clarified the purpose and scope of section 16.1 of the Charter in paragraphs 79 and 80 as follows:

> [79] **As I have already noted, section 16.1 includes, as opposed to subsection 16(2), a collective and community component as it seeks the equality of communities**. Equally, it expressly acknowledges the role of the legislature and government to preserve and promote the equality of official language communities. As a result, it is a unique set of constitutional provisions quite peculiar to New Brunswick which places the province on a unique plane among Canadian provinces.
>
> [80] In my opinion, the interpretation of section 16.1 is related to the interpretation of subsection 16(2) and the conclusions set out by the Supreme Court in Beaulac as to the nature and scope of the principle of equality are applicable to section 16.1. Its purpose seems clear to me. While different rights flow from the collective aspect of the equality guaranteed, its purpose is similar to that which the courts have ascribed to section 16. **The purpose of this provision is to maintain the two official languages, as well as the cultures that they represent, and to encourage the flourishing and development of the two official language communities. It is remedial in nature and has concrete consequences. It imposes on the provincial government an obligation to take positive measures to ensure that the minority official language community has equality of status and equal rights and privileges with the majority official language community**. The obligation imposed on the government derives both from the remedial nature of subsection 16.1(1), in recognition of past inequalities that have gone unredressed, and the constitutional commitment made by the government to preserve and promote the equality of official language communities. The principle of the equality of the two language communities is a dynamic concept. It implies provincial government intervention which requires at a minimum that the two communities receive equal treatment but that in some situations

> where it would be necessary to achieve equality, that the minority language community be treated differently in order to fulfill both the collective and individual dimensions of a substantive equality of status. This last requirement derives from the underpinning of the principle of equality itself.
>
> [Emphasis mine]

[67] Michel Doucet, in his text, Les droits linguistiques au Nouveau-Brunswick, comments on the interpretation of section 16.1 following ***Charlebois v. Moncton*** at pages 250-251 as follows:

> Cette interprétation de l'article 16.1 nous ramène à l'époque de la trilogie de 1986, quand les droits linguistiques étaient interprétés restrictivement. Bien que cette interprétation des droits linguistiques fût celle qui prévalait à l'époque e l'adoption de la modification constitutionnelle en 1993 et qu'elle pût avoir influencé la décision du constituant lorsqu'il a accepté d'inscrire le principe de l'égalité des communautés linguistiques dans la *Charte*, elle n'est plus acceptable à la lumière de la décision rendue dans l'arrêt *Beaulac* et de celle que la Cour d'appel du Nouveau-Brunswick a rendue dans l'arrêt *Charlebois c. Moncton*. L'arrêt *Charlebois c. Moncton* représente un excellent indicateur de la portée de cette disposition. La Cour d'appel y indique notamment que, comme tous les autres droits linguistiques que reconnaît la *Charte*, l'article 16.1 revêt un caractère réparateur et impose des obligations positives à l'État. Il ne constitue donc pas l'énoncé d'un principe abstrait; il véhicule un droit substantiel qui exige une mise en œuvre concrète :
>
> (...)
>
> À la lumière de ces précisions, il est clair que l'objet de l'article 16.1 est similaire à ceux des autres droits linguistiques constitutionnels. **Il s'agit d'un droit positif et réparateur qui vise à instaurer l'égalité réelle entre la communauté linguistique française et la communauté linguistique anglaise du Nouveau-Brunswick**.
>
> [Emphasis mine]

[68] The Court accepts that following ***Charlebois v. Moncton***, there has been an acknowledgement that "culture" forms an important part of the rights accorded to the linguistic communities in section 16.1 of the *Charter*. The notion of culture

clearly denotes an expanded view of section 16.1 which goes beyond merely the notion of language in the traditional sense. However, the importance of culture in the cases that have interpreted section 16.1 has been directly tied to the culture of the linguistic community in question. Policy 713 is not directed towards anglophone gender diverse youth, nor francophone gender diverse youth, but rather towards this student population province wide. While acknowledging the expansive role of "culture" in interpreting section 16.1 *Charter* rights since ***Charlebois v. Moncton***, there remains a requirement that the culture at issue be connected to the linguistic community.

[69] Justice Bourque had the opportunity to consider the questions of culture and values in the context of an alleged infringement of language rights in ***Forum des maires de la Péninsule acadienne Inc. v. Minister of Justice and Public Safety***, 2024 NBKB 58 (CanLII), noting at paragraph 77 as follows:

> [77] Courts have written much on language rights, particularly with respect to the guarantees set out in section 23 of the Charter, namely the right of members of the linguistic minority to instruction in their own language. **The values underlying the rights set out in section 23 are similar to those that underlie the rights under subsections 16(2) and (3) and section 16.1 of the Charter**. Addressing the connection between a people's language and identity, the Supreme Court stated as follows in Mahe v. Alberta, 1990 CanLII 133 (SCC), at page 362:
>
> > **My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language.** Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them. The cultural importance of language was recognized by this Court in Ford v. Quebec (Attorney General), 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at pp. 748-49:

> Language is not merely a means or medium of expression; it colors the content and meaning of expression. It is, as the preamble of the Charter of the French Language itself indicates, a means by which a people may express its cultural identity.
>
> [Emphasis mine]

[70] Justice Bourque highlighted the ever-evolving nature of constitutional interpretation in ***Forum des maires*** at paragraph 69 as follows:

> [69] Over the course of many years, courts have often compared our Constitution to a living tree, highlighting its ability to evolve and to adapt to society's changing needs and values over time. **This expression illustrates the dynamic nature of constitutional interpretation, which ensures that it remains relevant and effective in responding to modern legal and social challenges** (see Hunter et al. v. Southam Inc., 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145; R. v. Gaudet, 2010 NBQB 27 (CanLII); Charlebois v. Mowat et ville de Moncton, 2001 NBCA 117). The Canadian Charter of Rights and Freedoms is an integral part of the Canadian Constitution, and the rights entrenched therein are constantly evolving.
>
> [Emphasis mine]

[71] While I endorse completely Justice Bourque's observation that constitutional interpretation is dynamic and must be relevant to modern legal and social challenges, the interpretation requested by the Plaintiffs of section 16.1 in this case stretches the flexibility of constitutional interpretation beyond reason. In my view, the Plaintiffs in this case are attempting to argue the same suggested infringement of section 16.1 as the suggested infringement of section 23 advanced by the Plaintiffs in ***Hak***. The Plaintiffs explain their reasoning why section 16.1 of the *Charter* is appropriately invoked in these circumstances at paragraph s 74 and 75 of their written submission as follows:

> [74] Section 16.1 provides that the English linguistic community of New Brunswick has the right to distinct institutions that are

> necessary for the preservation and promotion of that community. The DEC, through the District Policy, is striving to ensure the protection of its vulnerable minority students and the preservation and promotion of its community. As indicated above, the evidence will show that the self-identification provisions of Policy 713 prevent trans and non-binary students from succeeding at school. If applied at Anglophone East, they would harm student achievement, prevent the delivery of the DEC's educational objectives, and they would undermine the long-standing culture that exists at Anglophone East of celebrating and promoting the success of the district's LGBT community. These are violations of s. 16.1, which will be made out on the merits of this case.
>
> [75] As addressed above, the Defendants' suggestion, at this preliminary stage, that s. 16.1 cannot be invoked to defend against a policy that harms student success and the flourishing of the community is without merit: in fact, the Supreme Court is expected to rule on this precise issue in the coming year in the context of s. 23. In the challenge to Bill 21 in Québec, the Superior Court of Québec found a violation of s. 23 based in part on the harm caused to students and students' success. The argument that a policy imposed on the DEC that harms students infringes s. 16.1 is much stronger than the analogous argument in the s. 23 context, given that s. 16.1 explicitly protects community rights; its purpose, according to the Court of Appeal, "is to maintain the two official languages, as well as the cultures that they represent, and to encourage the flourishing and development of the two official language communities.

[72] Just as in ***Hak***, the Plaintiffs in this case are attempting to take elements unrelated to language as a backstop to advance a *Charter* claim pursuant to section 16.1. There is absolutely nothing in Policy 713 that deals with language, impacts the language rights of gender diverse students nor school personnel. Gender diversity is certainly an element of culture in a general sense; however, it is not, in the circumstances of this policy, connected to language.

[73] Further, while perhaps unnecessary to analyze in the context of this case, to the extent that language rights are being invoked by the Plaintiffs – it is the languages rights of the English-speaking majority which are potentially at risk.

This is in and of itself a divergence from the significant jurisprudence considering the implications of section 16.1 of the *Charter* on the Canadian constitutional landscape. The need for the Court to intervene pursuant to section 16.1 to protect the linguistic rights of a majority linguistic community is in and of itself quite novel. Added to this, the parent volunteer who has been added as a Plaintiff to this action filed his affidavit evidence uniquely in the French language.

[74] For all the aforementioned reasons, I find myself coming to the same conclusions as the Quebec Court of Appeal in ***Hak***, there is no role for a *Charter* claim pursuant to section 16.1 in the current analysis of the constitutionality of the self-identification provisions of Policy 713. The Plaintiffs do not have standing to advance the claims as pled pursuant to section 16.1 of the *Charter*. The Court understands that a leave request to the Supreme Court of Canada in ***Hak*** is pending. However, at the time of the writing of this decision, the law remains as set out by the Quebec Court of Appeal.

Public Interest Standing

[75] In ***Morgentaler***, Chief Justice Drapeau succinctly set out the test for public interest standing at paragraph 53 as follows:

> The parties agreed in the court below that *Borowski's* articulation of the test for public interest standing remains authoritative, subject, of course, to the clarifications provided in *Canadian Council of Churches*. In *Borowski*, Martland J., writing for the majority, framed the test as follows:
>
> > I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, **if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in**

> **the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court**. [p. 598]
>
> In *Canadian Council of Churches*, Cory J., who delivered the judgment of the Court, concluded no expansion – or contraction for that matter – of the *Borowski* test was advisable. He did, however, **emphasize that the decision to grant status is a discretionary one** "with all that that designation implies" before urging judges to interpret the principles incorporated in the *Borowski* test "in a liberal and generous manner" (see para. 36).
>
> [Emphasis mine]

[76] In ***Verge v. New Brunswick***, 2020 NBQB 224 (CanLII), the Court set out the approach in determining public interest standing as follows at paragraphs 9-11:

> [9.] The applicants are seeking a declaration from the Court confirming that they have public interest standing. Standing is a preliminary issue that requires a ruling by the Court. In *Province of New Brunswick v. Morgentaler*, 2009 NBCA 26, the Court of Appeal of New Brunswick indicated that public interest standing is a status that only the court can grant. This power to rule on the preliminary issue of the standing to sue involves the inherent jurisdiction of superior courts. **It is important for superior courts to ascertain that the parties that appear before them have public interest standing in order to ensure the observance of the due process of law and prevent frivolous or vexatious actions**.
>
> [10.] The Supreme Court of Canada discussed the criteria that are required to establish public interest standing in *Downtown Eastside*, at paras. 35-36:
>
> > 35 From the beginning of our modern public interest standing jurisprudence, the question of standing has been viewed as one to be resolved through the wise exercise of judicial discretion. **As Laskin J. put it in *Thorson*, public interest standing "is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process"** (p. 161); see also pp. 147 and 163; *Nova Scotia Board of Censors v. McNeil*, 1975 CanLII 14 (SCC), [1976] 2 S.C.R. 265, at pp. 269 and 271; *Borowski*, at p. 593; *Finlay*, at pp. 631-32 and 635. **The decision to grant or refuse standing involves the careful exercise of judicial discretion through the**

> **weighing of the three factors (serious justiciable issue, the nature of the plaintiff's interest, and other reasonable and effective means).** Cory J. emphasized this point in *Canadian Council of Churches* where he noted that the factors to be considered in exercising this discretion should not be treated as technical requirements and that the principles governing the exercise of this discretion should be interpreted in a liberal and generous manner (pp. 256 and 253).
>
> 36 It follows from this that the three factors should not be viewed as items on a checklist or as technical requirements. Instead, the factors should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes.

> [11.] In this case, the Court must determine whether or not the applicants meet the three criteria that were established by the Supreme Court in *Downtown Eastside*, namely:
>
> 1. the existence of a serious justiciable issue;
>
> 2. the interest of the applicants in its resolution; and
>
> 3. the absence of other reasonable means to bring it before the court.
>
> [Emphasis mine]

[77] In considering the factors set out by the Supreme Court in ***Downtown Eastside Sex Workers United Against Violent Society vs Canada***, 2012 SCC 45, the Defendants frame their opposition to the Plaintiffs obtaining public interest standing largely on the third ground. Is the current proceeding a reasonable and effective way to bring these issues before the court? The Plaintiffs assert they are the perfect parties to advance these claims given their proximity to the gender diverse youth impacted by the policy, and their statutory duty pursuant to the *Education Act* to care for the wellbeing of all the constituents of their academic community.

[78] In considering the three criteria set out in ***Downtown Eastside***, it cannot be seriously argued that there is not a serious justiciable issue. The potential impact of Policy 713 on the Charter rights of gender diverse youth is a live issue and an issue of importance to not only the students directly impacted, but also their families, school personnel, and the larger educational community. I accept that there exists a serious justiciable issue. However, I am skeptical that the current originating process as pled actually addresses that serious justiciable issue in an appropriate manner.

[79] The Plaintiffs maintain they have a direct interest in the resolution of this matter given the fact they are entrusted with the wellbeing of the educational community they serve whose many actors are directly impacted by Policy 713. The Defendants suggest the Plaintiffs have no background or experience in the field of gender diversity. The Defendants contrast the knowledge and exposure to gender diversity set out by the parties and various intervenors in ***CCLA v. Province of New Brunswick,*** FM-76-2023. In that case, the Court was furnished with detailed affidavits outlining significant expertise and long-term involvement in causes related to gender diversity by the party requesting public interest standing.

[80] It is important not to conflate the concept of "*interest*" in the second criteria with the third criteria of reasonable means under ***the Downtown Eastside*** test. It is clear that Harry Doyle, Dominic Vautour and the Anglophone East District Education Council are extremely interested in the legal issues that have erupted following the introduction of Policy 713 in the summer of 2023. The Court does

not question the Plaintiffs' commitment to these proceedings, nor their genuine concern for the impact of the self-identification provisions of Policy 713 on the gender diverse youth within their district. However, a genuine interest or sincere desire to advance a legal issue is not the basis upon which a court must resolve a question of standing.

[81] The Defendants maintain that granting public interest standing to the Plaintiffs in this mater will result in a multiplicity of proceedings and amount to an abuse of process. In ***CCLA v. PNB***, 2021 NBQB 119 (CanLII), the Court set out the issues to be considered in assessing the third factor at paragraph [24] as follows:

> In *Downtown Eastside*, Justice Cromwell was clear that in considering this third factor, Courts must examine the question from a practical and pragmatic point of view. In this particular case, that is of particular note. Justice Cromwell set out the following non-exhaustive list of issues a court should consider when assessing this third discretionary factor:
>
> > a) the plaintiff's capacity to bring forward a claim, such as the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting;
> >
> > b) whether the case is of the public interest in the sense that it transcends the interest of those most directly affected by the challenge, law or action and;
> >
> > c) 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

[82] In ***Downtown Eastside***, Justice Cromwell explained the flexible and purposive approach to the analysis of this third factor at paragraphs 50-52 as follows:

[50] The Court's jurisprudence to date does not have much to say about how to assess whether a particular means of bringing a matter to court is "reasonable and effective". However, by taking a purposive approach to the issue, **courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality**. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.

[51] It may be helpful to give some examples of the types of interrelated matters that courts may find useful to take into account when assessing the third discretionary factor. This list, of course, is not exhaustive but illustrative.

- The court should consider the plaintiff's capacity to bring forward a claim. In doing so, it should examine amongst other things, the plaintiff's resources, expertise and **whether the issue will be presented in a sufficiently concrete and well-developed factual setting.**

- The court should consider whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action. Courts should take into account that **one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected**. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.

- **The court should turn its mind to 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**. Courts should take a practical and pragmatic approach. The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities. Where there are other actual plaintiffs in the sense that other proceedings in relation to the

> matter are under way, the court should assess from a practical perspective what, if anything, is to be gained by having parallel proceedings and whether the other proceedings will resolve the issues in an equally or more reasonable and effective manner. In doing so, the court should consider not only the particular legal issues or issues raised, but whether the plaintiff brings any particularly useful or distinctive perspective to the resolution of those issues. As, for example, in *McNeil*, even where there may be persons with a more direct interest in the issue, the plaintiff may have a distinctive and important interest different from them and this may support granting discretionary standing.
>
> • The potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account. Indeed, courts should pay special attention where private and public interests may come into conflict. As was noted in *Danson v. Ontario (Attorney General)*, 1990 CanLII 93 (SCC), [1990] 2 S.C.R. 1086, at p. 1093, the court should consider, for example, whether "the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and factually established complaints". The converse is also true. If those with a more direct and personal stake in the matter have deliberately refrained from suing, this may argue against exercising discretion in favour of standing.
>
> (iv) Conclusion
>
> [52] I conclude that the third factor in the public interest standing analysis should be expressed as: **whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court**. This factor, like the other two, must be assessed in a flexible and purposive manner and weighed in light of the other factors.
>
> [Emphasis mine]

[83] In considering the third factor under ***Downtown Eastside***, one of the Court's serious preoccupations is the manner in which this case has been pled. The Plaintiffs have pled extensive issues related to the infringement of the section 7 and section 15 *Charter* rights of gender diverse youth. The gender diverse youth are third parties and the Plaintiffs, in these circumstances, are unable to advance these claims on their behalf. The Amended Statement of

Claim further alleges the infringement of the 16.1 *Charter* rights of all the Plaintiffs. The provisions of section 16.1 of the *Charter* are not applicable to the issues surrounding Policy 713 and cannot be advanced in the context of this action. The remaining issue is that of Dominic Vautour's rights to expression under section 2(b).

[84] The most concrete manner in which to advance a claim of an infringement of Dominic Vautour's section 2(b) *Charter* rights is not in an action which is directed towards allegations of third parties infringed rights pursuant to section 7 and 15 of the *Charter*. This pleading as currently before the Court is neither sufficiently concrete nor well developed factually to survive the Court's scrutiny.

[85] The ability of potentially vulnerable students to access the courts in a meaningful manner to challenge the alleged infringement of their *Charter* rights is of significant concern. While the Court struggles with the viability of the structure, intent and scope of the action currently before the Court, the importance of the underlying issues are not in question, nor is the acknowledgement an accessible and efficient forum for their adjudication must be provided.

[86] In the present matter, there are realistic and alternative means which favour a more efficient and effective use of judicial resources. On September 6th, 2023, the Canadian Civil Liberties Association filed an Application for Judicial Review, ***CCLA v. Province of New Brunswick***, seeking the following relief:

> 1. The applicant seeks:
>
> a. a declaration of public interest standing to bring this Application;

b. an order for production, pursuant to Rule 69.10, requiring the respondent to produce:

   i. the whole of the record that led to the development of Policy 713 dated August 17, 2020, including any reasons for the development of the policy, advice provided to the respondent by the Department of Education and Early Childhood Development (Department), consultations with District Education Councils, and consultations with other interested people or groups;

   ii. the whole of the record that led to the amendment of Policy 713 by revisions dated June 8, 2023 (effective July 1, 2023), including reasons for the decision to amend the policy, advice provided to the respondent by the Department, reviews conducted of the policy, complaints received concerning the policy, consultations with District Education Councils, and consultations with other interested people or groups; and

   iii. the whole of the record that led to the amendment of Policy 713 by revisions dated August 23, 2023 (effective August 17, 2023), including reasons for the decision to amend the policy, advice provided to the respondent by the Department, reviews conducted of the policy, complaints received concerning the policy, consultations with District Education Councils, and consultations with other interested people or groups; and

c. an order in the nature of *certiorari* quashing the self-identification revisions to Policy 713 dated June 8 and August 23, 2023, and remitting the matter to the respondent for determination;

d. a declaration that the self-identification provisions in the revised Policy 713 are contrary to the rights of 2SLGBTQIA+ students to inclusion in school and to a safe and positive learning environment as guaranteed by the *Education Act*, SNB 1997, c E-1.12 and *ultra vires* the Minister to the extent that the policy prohibits the use of a child's preferred name or preferred pronoun without parental consent;

e. a declaration that the self-identification provisions in the revised Policy 713 are contrary to the *Human Rights Act*, RSNB 2011, c 171 and *ultra vires* the Minister to the extent that the policy adversely impacts

> students based on their "gender identity" or "gender expression";
>
> f. a declaration that the self-identification provisions in the revised Policy 713 are contrary to sections 15, 7 and 2 of the *Canadian Charter of Rights and Freedoms*, part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 and cannot be demonstrably justified (as required under section 1 of the *Charter*) to the extent that the policy prohibits the use of a child's preferred name or preferred pronoun without parental consent;
>
> g. a declaration under section 52(1) of the *Constitution Act, 1982* that the self-identification provisions in the revised Policy 713 are of no force and effect to the extent that the policy prohibits the use of a child's preferred name or preferred pronoun without parental consent;
>
> h. interim and interlocutory relief as may be requested by the applicant;
>
> i. an order requiring each party to bear their own costs of this Application regardless of either party's success in this Application; and
>
> (...)

[87] The relief requested in the ***CCLA*** action seeks the exact same constitutional scrutiny of Policy 713 as is at the heart of the current action. Justice Dysart granted the ***CCLA*** standing to advance these constitutional arguments in his decision dated December 21st, 2023. Justice Dysart in setting out the context within which the ***CCLA*** sought standing stated at paragraphs 1 and 2 as follows:

> [1] The Canadian Civil Liberties Association brings the within motion seeking public interest standing to bring an application which challenges a decision by the Minister of Education and Early Childhood Development to make changes to Policy 713 which governs, among other things, sexual orientation and gender in New Brunswick schools.

> [2] Specifically, the CCLA alleges that the Minister's decision to amend Policy 713 to require school staff, with regard to students under the age of 16 years, to obtain parental consent before using a student's preferred name or pronoun, was the result of a flawed process and is inconsistent with the Charter of Rights and Freedoms and human rights legislation.

[88] The issues that Justice Dysart set out succinctly in the introduction of the ***CCLA*** standing decision are exactly the same issues which are at the heart of this dispute. While the Plaintiffs have alleged infringements of additional *Charter* rights in this action, were it not for the Defendants' decision to revise Policy 713 in the summer of 2023, we would not be here. To suggest otherwise defies logic.

[89] In granting standing to the ***CCLA***, Justice Dysart commented at paragraphs 35 and 36 as follows:

> [35] I am satisfied that if the CCLA is not granted public interest standing to bring this application, it is unlikely that any affected citizen of this province will do so given the significant financial and legal barriers facing them, let alone the public scrutiny and potential for harassment.
>
> [36] Taking onto consideration the three factors identified by Justice Cromwell and weighing them in light of the evidence before the Court, I am satisfied that the Canadian Civil Liberties Association should be granted public interest standing to bring its application for a review of the Minister's decision. The motion is therefore granted.

[90] Justice Petrie granted intervenor status to several additional parties in the ***CCLA*** matter following two days of oral submissions. Justice Petrie explained his decision to grant party intervenor status to several groups in his May 1st, 2024 decision at paragraphs 78 – 81 as follows:

> 78. After consideration of the materials before this court and the excellent submissions of all counsel I have determined that the court should exercise its discretion to grant party intervenor status to all of the "Party Intervenors" under Rule 15.02 and on a joint basis. **This proceeding is an example**

> **of "public interest" litigation. The public interest stems from determining the legality of governmental policy which has province-wide implications**.
>
> 79. While the CCLA was granted public interest standing to commence the litigation, I am not convinced that the field is fully occupied by the decision of Justice Dysart on CCLA's standing. I am convinced in these circumstances that these three (3) joint Party Intervenors should have a "seat at the table".
>
> 80. Each of these joint Party Intervenors have an identifiable interest and a different perspective. Parts of this litigation involve the Charter and thus the threshold may well be somewhat lower.
>
> 81. More specifically, in regards to the Community Intervenors, I am convinced that collectively they have a genuine and compelling interest in the proceeding, and could be affected by any decision made in this proceeding. They will bring an important and different perspective to the issues before me. They bring, in particular, through Egale, deep institutional knowledge and experience on the material legal issues. They, as a collective, will be able to speak for those directly impacted by the Minister's impugned decision(s). It is evidence that while they are supportive of the Applicant's position, they will be able to add to and not simply echo those submission. I am also convinced that their joint participation will not hinder or interfere with the proceeding in a way that might prejudice the parties.
>
> [Emphasis mine]

[91] The ***CCLA*** matter is well underway with additional hearings occurring in early July on procedural questions. This judicial proceeding is the appropriate means to bring the important constitutional questions which have arisen following the revisions made to Policy 713 in August of 2023. In this case, there is clearly a realistic alternative manner to efficiently and effectively adjudicate the constitutional validity of Policy 713 and that is the ***CCLA*** action. The primary concern of the Court to ensure vulnerable or potentially disadvantaged persons have access to adjudication of their affected *Charter* rights has already been

addressed by granting standing to the CCLA. In my view, the Plaintiffs do not meet the criteria as set out in ***Downtown Eastside*** for public interest standing.

[92] None of the Plaintiffs have standing as of right to advance claims under section 7 and 15 of the *Charter* on behalf of gender diverse youth. The Court has determined that none of Harry Doyle, Dominic Vautour or the Anglophone East District Education Council has standing as of right to challenge Policy 713, on the grounds that the self-identification provisions violate the Plaintiffs' rights pursuant to section 16(1) of the *Charter*. The Plaintiffs request for public interest is denied. The only claim which remains is Dominic Vautour's ability to advance a claim that Policy 713 has infringed his section 2(b) *Charter* rights.

The Path Forward

[93] This Court has concluded that none of the Plaintiffs' individually nor collectively have standing, either as of right or public interest standing to advance a claim that the adoption and implementation of Policy 713 infringes their section 16.1 *Charter* rights. None of the Plaintiffs have standing as of right to advance the potential infringement of the section 7 or section 15 *Charter* rights of gender diverse youth. The Court has further concluded this is not a case where it would be appropriate to exercise its discretion and grant the Plaintiffs public interest standing to advance these claims.

[94] Following the Court's conclusion on the standing questions, the potential claim that remains viable is Dominic Vautour's claim pursuant to section 2(b) of the *Charter*. However, the Amended Notice of Action with Statement of Claim

Attached dated June 7th, 2024 before the Court is overwhelmingly directed towards the other issues pled. This is not a situation where certain paragraphs can be struck or amended, and the pleading can proceed as amended, addressing only the section 2(b) claim of Dominic Vautour. Further, the significant expert evidence previously filed by the Plaintiffs pertains uniquely to the issues surrounding the health and wellbeing of gender diverse youth. This expertise and this evidence has no correlation to a potential claim to be advanced by Dominic Vautour pursuant to section 2(b).

[95] In my view, the only viable solution at this juncture is to order the dismissal of the Amended Notice of Action with Statement of Claim dated June 7th, 2024 providing full opportunity for Dominic Vautour to refile a new action where the alleged infringement of his section 2(b) *Charter* rights could be laid out in a clear, concrete and fact-based pleading. The Defendants request the Plaintiffs' action be struck pursuant to Rule 23.01(2) of the *Rules of Court*, which provide:

> 23.01 Where available
>
> (...)
>
> (2) A defendant may, at any time before the action is set down for trial, apply to the court to have the action stayed or dismissed on the ground that
>
> (a) the court does not have jurisdiction to try the action,
>
> (b) the plaintiff does not have legal capacity to commence or continue the action, or
>
> (c) another action is pending in the same or another jurisdiction between the same parties and in respect of the same claim.
>
> (d) New Brunswick is not a convenient forum for the trial or hearing of the proceeding.

[96] In all of the circumstances given the Plaintiffs inability to establish standing for the bulk of allegations set out in the pleadings, the Court concludes a dismissal of the current action pursuant to Rule 23.01(2)(b) is the only reasonable option. For clarity, nothing in this decision purports to preclude the District Education Council from returning to the Court for assistance, if necessary, pursuant to sections 40.3 or 41 of the *Education Act* should the Defendants seek to dissolve the District Education Council or impose corrective action. Similarly, nothing in this decision shall act as a bar to Dominic Vautour's ability to advance an action alleging potential infringement of his section 2(b) *Charter* rights. As the underlying action is now dismissed, so is the request for injunctive relief as set out in the Second Amended Preliminary Motion. The additional court dates scheduled in this matter for the adjudication of Motions #4, #5 and #6 will no longer proceed.

CONCLUSION AND DISPOSITION

[97] For all the aforementioned reasons, the Court determines the issues as set out in Motion #2 and Motion #3 as follows:

(a) The Plaintiffs' request to file their Amended Notice of Action with Statement of Claim Attached dated June 7, 2024 pursuant to Rules 5.04 and 27.10 is granted;

(b) The Plaintiffs' request to file their Second Amended Notice of Preliminary Motion dated May 17th, 2024 is granted;

(c) The Plaintiffs' request to add Dominic Vautour as a named Plaintiff pursuant to Rules 5.04 and 27.10 is granted;

(d) The Plaintiffs' request for a declaration that they have standing as of right pursuant to section 16.1 of the *Charter* to advance the claims set out in the Amended Notice of Action with Statement of Claim Attached dated June 7, 2023 is denied;

(e) The Plaintiffs' assertion that they may proceed with claims concerning the possible infringement of gender diverse youths' rights pursuant to section 7 and 15 of the Charter, as they are exceptionally prejudiced by the implementation and enforcement of Policy 713 is rejected;

(f) The Plaintiffs' request for public interest standing to advance the claims as set out in the Amended Notice of Action with Statement of Claim dated June 7, 2024 is denied;

(g) The Amended Notice of Action with Statement of Claim dated June 7, 2024 is struck pursuant to Rule 23.01(2) with leave granted to Dominic Vautour to refile a new originating process setting out his claim pursuant to section 2(b) of the *Charter*;

(h) The future hearing dates that were scheduled for hearings in this matter in Motions #4, #5 and #6 on July 25th and 26th, as well as September 9th to 13th are no longer necessary and will be released by the Court accordingly; and

(i) For clarity, this decision shall in no way hamper the District Education Council's ability to seek the assistance of the Court, if necessary, pursuant to sections 40.3 and 41 of the *Education Act*.

DATED at Moncton, N.B., this 5th day of July 2024.

Tracey K. DeWare
Chief Justice of the Court of King's Bench
of New Brunswick