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LAW MATTERS

LGBTQ Youth, Parental Rights, and Religious Freedom

Education, Family Autonomy, and Freedom of Belief

Gay-Straight Alliances in Alberta: A Forum for Safety and Support

Trusting Transgender Youth

THE CANADIAN BAR ASSOCIATION
Alberta Branch

EDITORS' **NOTE**

BY **JESSICA ROBERTSHAW & JOSHUA SEALY-HARRINGTON**

It is an exciting time for all of us at *Law Matters*. For the first time in our magazine's history, we were cited by the Supreme Court of Canada this summer. Professor Ummni Khan's fantastic article ("Hot for Kink, Bothered by the Law"),[1] which was published in our Summer 2016 Edition, was cited in *R v Goldfinch*,[2] 2019 SCC 38 at para 185. Further, after two years of serving as the Editor-in-Chief of *Law Matters*, Joshua Sealy-Harrington will, over the course of the next year, be passing on the reins to the incomparable Jessica Robertshaw.[3] Jessica has worked with the magazine for the past year, is an accomplished writer and advocate (including as Top Oralist of the prestigious Jessup Moot), and is excited to continue pushing the magazine towards critical discourse on important issues confronting Albertans, and Canadians — and this edition is no exception. Questions relating to LGBTQ youth are at the forefront of contemporary political controversy. So, in this edition, our contributors tackled various issues intersecting LGBTQ youth, including trans rights, sex education, religious freedom, and parental autonomy.

We begin with two articles on trans issues authored, importantly, by trans jurists. First, Pat Shannon, a non-binary jurist, opens this edition by analyzing a recent decision[4] from the Supreme Court of British Columbia concerning a trans boy's access to medical care for gender dysphoria. Pat notes how the Court's decision — to permit the boy's access to medical care — is cause for mostly celebration (in terms of trans recognition, safety, and autonomy), but also some concern (given the Court's affirmation of clinical gatekeeping). Second, Florence Ashley, a transfeminine jurist, provides a blueprint for legal action against conversion therapy practices. Florence acknowledges the many benefits of legislation against conversion therapy, but they also explain how, even without such legislation, alternate legal avenues may also be pursued to curtail such practices.

Next, this edition explores the conflict between LGBTQ youth, parental autonomy, and religious freedom. First, Derek Ross and Deina Warren discuss the interplay between parental and state authority with respect to children's moral education. Second, Pamela Krause and Hilary Mutch discuss Gay-Straight Alliances ("GSAs"), and the critical role they play in ameliorating the difficulties faced by LGBTQ students — in their words, GSAs "literally save lives." Third, Marcus McCann criticizes Ontario's recent repeal of its inclusive sex ed curriculum. He summarizes recent efforts to legally challenge the repeal, and emphasizes the importance of centring LGBTQ voices in the fight for their equality.

Lastly, for this edition's "Unsung Hero" column, Beth Aspinall profiled recent UCalgary Law graduate Jay Moch. Jay launched the University of Calgary chapter of OUTLaw, worked with Pro Bono Students Canada to create Trans ID Clinics in Alberta to assist trans youth in officially changing their name and gender-markers, and is now seeking out sponsors to provide funding to trans clients, and in turn, attenuate the burdensome costs associated with changing one's name and gender markers.

As these pieces make clear, issues relating to LGBTQ youth raise complex questions of equality, safety, and freedom. And it is our hope that the pieces included here help contribute to a productive conversation on the tensions between LGBTQ rights, parental rights, and religious freedom.

[1] https://www.cba-alberta.org/Publications-Resources/Resources/Law-Matters/Law-Matters-Summer-2016-Issue/Hot-for-Kink,-Bothered-by-the-Law-BDSM-and-the-Rig
[2] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17848/index.do
[3] https://www.fieldlaw.com/People/Jessica-Robertshaw
[4] https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc254/2019bcsc254.html?resultIndex=1

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In This Issue

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Florence Ashley
Elizabeth Aspinall
Frank Friesacher
Pamela Krause
Marcus McCann
Hilary Mutch
Derek Ross
Pat Shannon
Deina Warren

PRESIDENT'S **REPORT**

BY **FRANK FRIESACHER**

Where has the time gone? Unimaginably, my term as president comes to an end, countable in days by the time this goes to print. I was warned about this, but it is still hard to fathom. Much excitement for the future caps off what was an amazing and productive year. As the membership year winds up, here is my last report to you all, and a brief opportunity to reflect.

Without reservation, the biggest accomplishment in my mind for CBA Alberta in 2018-19 was the profile created for justice issues in Alberta. Our efforts were spurred on by a comment from our previous Justice Minister that no one had raised justice issues with her during the previous election campaign; we were determined that no one would be able to say the same this time! Our Agenda for Justice committee worked hard to refine the various issue backgrounders included in our Justice Matters: An Agenda for Justice document. We then worked with media consultants to sharpen the issues into an infographic on why the issues matter to Albertans. Once the provincial election writ dropped, we held a media event to raise the profile of justice issues. We received both primetime TV and morning radio coverage, and the media then followed up to elicit comments from major party leaders on our concerns raised over resources for the justice system. We also ensured that all parties and all lawyers running in the election had a copy of the Agenda for Justice. We strongly believe these efforts raised our credibility as an advocate on justice issues in Alberta, acknowledged by our meeting with the new Justice Minister within a week of his appointment. We are dedicated to continuous bold advocacy for justice in Alberta.

The CBA West conference, jointly hosted by Alberta and BC's Branches, was another success. Held in Penticton in April, the conference featured cutting-edge topics on emerging technologies, managing intellectual capital, and lawyers as leaders, plus a keynote from former SCC Justice, The Honourable Thomas Cromwell. The weekend was a win for those in attendance who, along with professional development, greatly appreciated the opportunity to sample quality BC wines.

CBA Alberta continued to move its governance restructuring forward this year. Our final Council meeting was held in May, where we thanked our volunteer Council members for their commitment over the years. We are looking forward to the new governance structure and the new possibilities for growth it will bring. Looking forward, our nimble Board of Directors will be constituted in the fall, and we can continue the challenges of both rowing and steering CBA Alberta forward, with an eye to increased and focused advocacy, continued high-quality PD, new and meaningful opportunities for member engagement, and improved and fresh forms of communication with the membership and beyond.

Upcoming events for CBA Alberta are Access to Justice Week (28 Sep – 5 Oct) and the Treaty 7 Blackfoot Crossing Field Trip on 23 Aug.

Special recognition to our outgoing Past President Jenny McMordie. Jenny's dedication and commitment to CBA and to the legal profession are unmatched. Her sense of humour, her kind spirit and her sage input have been invaluable… not to mention her eagle-eye at grammar and catching typos! Jenny has been a role model to me and on behalf of us all I thank her for her service to the Branch.

I leave the organization soon in the hands of my successor, incoming President Ola Malik. Do not expect tweets and selfies from Ola like you had from me: social media and self-recognition are both anathema to him. What you can expect is incredible enthusiasm for CBA, for awareness of the challenges facing our profession, and for a bold vision on implementing change. Ola has shown patience, insight and leadership on the executive, and I have strong confidence in him.

Join me in congratulating Amanda Lindberg, who was acclaimed as Secretary in the spring. Amanda will be joined on next year's executive by Ola, Vice-President David Hiebert, our exceptional and talented Executive Director Maureen Armitage, and myself as Past President. Of course the call is now underway for a Treasurer nomination to replace the Honourable Madam Justice Johanna Price, in whom we are proud after her recent appointment!

CBA Alberta is an amazing and exceptional organization. Our vibrant Sections North and South deliver nearly 500 unique PD events to our members every year. We create a home and a gathering place for lawyers across the province. We are part of CBA National and together we speak for the profession, we protect the integrity of our courts and our justice system.

I am proud to have served as your President, and I thank our members for their encouragement and support. I have travelled the country, I have made friends and met amazing people, I have been challenged and I have been rewarded. I am grateful for this opportunity, and I am excited for the future.

"Summer afternoon—summer afternoon; to me those have always been the two most beautiful words in the English language." — Henry James. Enjoy your summer, get energized and enthused, and then get ready for another exciting and transformational CBA year!

TRUSTING TRANSGENDER YOUTH: **A COMMENTARY ON *AB V CD AND EF***

BY **PAT SHANNON**

Background

A.B., assigned female at birth, and now 14 years old, has identified as a boy since age 11. He attended grade 9 under his chosen name and his teachers and peers referred to him as a boy and with male pronouns. As he grew older and entered puberty, the changes to his body began to worsen his symptoms of gender dysphoria. These are feelings of profound discomfort that may arise from the incongruity between body and gender identity. Because of these symptoms, in March 2018, A.B. attempted suicide.

With the help of his mother, A.B. sought medical care. This included sessions with a registered psychologist, who concluded that A.B. met the diagnostic criteria for gender dysphoria and made a referral to the Gender Clinic of the BC Children's Hospital.

There, a Pediatric Endocrinologist assessed A.B. and concluded that hormone therapy appeared reasonable and in A.B.'s best interests.

It is at this point that A.B.'s father informed the Gender Clinic that he did not consent to hormone therapy for his child. The Clinic responded that the father's consent was not needed. A.B. was mature enough to provide informed consent on his own. However, the clinic made efforts to provide the father with information and guidance, which he resisted.

A.B.'s father instead obtained an injunction from the Provincial Court of British Columbia, preventing his son from commencing treatment.

A.B. then applied to the Supreme Court of British Columbia, by way of a Family Claim, for a declaration that it would be in his best interests to undergo medical treatment for gender dysphoria, including hormone therapy. A.B.'s mother joined her son in this request.

The Court's Analysis

In support of his claim, A.B. provided the court with the Affidavits of his mother, his psychologist, his pediatric endocrinologist, and the assessment of a psychiatrist with the BC Children's Hospital, speaking to his capacity for informed consent. These experts all assessed A.B. as competent to consent to the hormone treatment proposed for him. It is worth noting that experts determined that A.B. had the cognitive abilities appropriate for his development stage. In other words, he was a typical 14-year-old boy.

The medical care team also maintained that delay of treatment was not a neutral option for him. A.B.'s body was undergoing permanent physical changes. Denying treatment could lead to needless suffering and the risk of victimization and bullying.

A.B.'s father responded with his own application to extend the injunction further. He pleaded for "the opportunity for a more fulsome hearing to shed more scientific light onto the implications of gender transition treatment for his adolescent child."[1]

In support of that position, A.B.'s father presented the Affidavits of Quentin L. Van Meter, MD and Dr. Miriam Grossman, American professionals who have spoken out against transgender identities and medical transition. Dr. Grossman's website describes her as "one hundred percent MD, zero percent PC."[2] Dr. Van Meter, president of the American College of Pediatricians, a conservative society of children's health care providers, has stated that "transgender [sic] is actually a delusional disorder [...] it's a state of mind with no biologic basis for it that can be found."[3]

In his analysis, the Honourable Mr. Justice Bowden found that A.B.'s father was being "somewhat disingenuous."[4] He suspected that the father's true motive was not to obtain a more fulsome hearing, but rather to prevent his son from transitioning now or in the future. In support of this statement, Justice Bowden outlined the various measures the father had taken over the procedural history of the case to delay proceedings and to frustrate good faith attempts to provide him with medical information about his son's condition and treatment.

With respect to the two American doctors, Grossman and Van Meter, Justice Bowden noted that their opinions were of a general nature and did not actually address the particular circumstances of A.B.

The Court, in assessing the totality of evidence before it, took the position that A.B.'s consent was sufficient for treatment to proceed without the father's consent, that waiting was not a neutral option in light of A.B.'s worsening gender dysphoria, and that there should be no further delay in treatment.

The court then issued a declaration that the father's attempts to persuade A.B. to abandon treatment for gender dysphoria, addressing A.B. by his birth name, and referring to A.B. as a girl or with female pronouns whether to him directly or to third

parties was "family violence" under s. 38 of the *Family Law Act.*

Cause for Celebration

This decision should be celebrated for three reasons.

The first is that it acknowledges the intense suffering transgender youth may experience as they enter and pass through puberty, and that postponing transition until adulthood is far from a neutral option. In cases like A.B.'s, which are by no means exceptional, affirmative treatment via hormone therapy may literally save their lives. The fact that the court appears to recognize this reality, already well known to the transgender community and their allies, is encouraging. That Justice Bowden conducts this analysis without shaming, and instead affirms the gender identity of A.B., is also meaningful.

The second reason for celebration is the declaration of the court that the father's refusal to respect his son's name, pronouns, and gender identity should be considered family violence. Family Violence has a specific meaning under British Columbia's *Family Law Act*. It is an inclusive term, defined at section 1 of the *Act*, and captures not just physical and sexual harm but also emotional and psychological abuse. This includes "unreasonable restrictions on, or prevention of, a family member's personal autonomy."[5]

Other notable findings of family violence include: (1) arguing that the actions of the other parent and the children are counter to scripture, influenced by Satan, and sinful;[6] (2) engaging in obstructive conduct or unnecessary litigation;[7] and (3) threatening to cause financial hardship and sending repetitive demanding emails.[8]

Sections 37 and 38 of the *Family Law Act* assert that this expansive concept of Family Violence must be applied in a "best interests of the child" analysis to determine guardianship, parenting arrangements, or contact with that child.

To return to the case before it, it would seem that the way parents choose to treat their queer and transgender children may have a bearing on the parenting arrangements and responsibilities they receive. If parents want to play a meaningful part in the life of their LGBTQ+ child, they may have to leave behind their intolerance on the courthouse steps.

The third and final cause for celebration is the Court's finding that a typical fourteen-year-old has the maturity to make decisions about their transition for themselves, even while contending with significant psychological distress. In British Columbia, any person under the age of 19 is considered a minor or an infant.[9]

Under ss. 17(2) and (3) of the *Infants Act*, a minor may consent to medical treatment only if:

> (a) the medical professional has explained to the infant and has been satisfied that the infant understands the nature and consequences and the reasonably foreseeable benefits and risks of the health care, and
>
> (b) the medical professional has made reasonable efforts to determine and has concluded that the health care is in the infant's best interests.[10]

Justice Bowden finds that both of these conditions are satisfied in A.B.'s case. This is an important decision, as many young transgender people face resistance and often outright opposition from one or both parents when seeking to transition. The door is open for other young people of A.B.'s age to apply for treatment, regardless of what their parent or parents believe.

It is also encouraging that the Court did not take a stigmatizing or critical view of A.B.'s mental distress and, in particular, his suicide attempt. Instead, Justice Bowden was able to see A.B.'s mental health status in the wider context of the challenges he faced as a young transgender person experiencing worsening dysphoria, in a world that is rarely accepting of gender minorities. Many transgender people fear that their mental health status will be used against them when seeking to transition. The Court's compassionate treatment of A.B. in this case offers some small comfort in that regard.

Cause for Concern

I do have one significant reservation about this decision, namely, the Court's focus on a clinical assessment of A.B.'s gender dysphoria by medical professionals. In particular, the Honourable Justice Bowden notes that A.B.'s treatment began with an assessment by a registered psychologist, who "concluded that A.B. met the diagnostic criteria in adolescents of DSM-5 and diagnosed him with gender dysphoria."[11] Here the Court refers to the Diagnostic and Statistical Manual of Mental Disorders or "DSM-5," a document published by the American Psychiatric Association that defines and classifies mental disorders. It is worth noting that the Standards of Care of the World Professional Association for Transgender Health or "WPATH" made use of the term gender dysphoria some years before the DSM-5 used it to replace the outdated and stigmatizing term "gender identity disorder."[12]

Many transgender people do not experience gender dysphoria as a mental illness or diagnosable condition (as contemplated in the DSM-5). Some transgender people do not experience gender dysphoria at all.

In their excellent article, "Gatekeeping hormone replacement therapy for transgender patients is dehumanizing," legal scholar, bioethicist, and cyborg witch Florence Ashley notes that transgender people may seek to transition in pursuit of "gender euphoria," the satisfaction arising from correspondence between gender identity and gendered features associated with a gender not assigned to them at birth.[13] This may occur with or without a corresponding experience of dysphoria. Ashley also mentions that some seek hormone therapy as an act of "creative transfiguration" that escapes the dysphoria/euphoria dichotomy entirely, dipping into the realm of

Continued from p.5

"creativity and aspirational aesthetics."[14] In short, the lived/felt experience of transgender people does not always fit neatly within the comfortable model of the illness framework.

Transgender identities are part of normal human diversity; they are neither inherently disordered nor a mental illness requiring assessment, referral, and fixing. Ashley puts it perfectly when they state that "treating gender dysphoria [as a mental flaw to fix] is pathologising and, because it pathologises normal human variance, dehumanising."[15]

What does this mean for young people like A.B.? The Informed Consent model, adopted in British Columbia for adults, should simply be applied as-is to youth who meet the capacity test under the *Infants Act*. A self-reported desire for medical transition, along with an informed consent process that ensures that the young person understands the effects and risks of Hormone Replacement Therapy, should be sufficient to commence treatment.

Any application of the "best interests" test, under s. 17 of the *Infants Act* and s. 37 of the *Family Law Act* should not require a dehumanizing assessment or a confirmatory diagnosis of gender dysphoria. Given that A.B. had the capacity and maturity to understand the effects and risks of Hormone Treatment, his own testimony about his embodied experience of being transgender should have been sufficient evidence that hormone therapy was in his best interests. Requiring medical experts to opine on A.B.'s own felt experience reveals a troubling mistrust of transgender voices. It was enough, in my view, to have expert evidence that he was mature enough to understand what he was asking for. For a more fulsome argument for the agency of transgender young people, I recommend Florence Ashley's article "Thinking an ethics of gender exploration: Against delaying transition for transgender and gender creative youth."[16]

Does this mean that the Court would have refused treatment to A.B. if he had not experienced severe distress? I do not believe we can say for sure (though I have my doubts). The emphasis placed by the court on A.B.'s medical assessments is at least somewhat a function of the evidence and submissions of A.B. and his counsel. This is not a criticism of their approach, of course. Counsel cannot be faulted for attempting to make the most compelling argument possible. The uncomfortable reality is that framing dysphoria as an illness that requires urgent treatment and emphasizing distress gets results. This is something the transgender community knows all too well, as many report having to emphasize and centre their pain and suffering to receive treatment.

But A.B. should not have had to offer up his distress to receive treatment, and I am concerned that this case will serve to amplify the common myth that being transgender is a disease to be fixed or solely a source of pain. As someone who identifies as non-binary, my gender is often a source of great happiness and its exploration is an aspect of my human quest for self-actualization. The narrative that shapes the core of A.B.'s position in this case may erase transgender voices who are already ignored and silenced in medicine and policy spheres. Perhaps more dangerously, the focus of the Court's analysis on A.B.'s assessment and diagnosis may lead to future gatekeeping of transition, particularly for youth.

[1] *AB v CD and EF*, 2019 BCSC 254 at para 45 ("*AB*")
[2] Miriam Grossman, MD, "Miriam Grossman MD" (July 15, 2019), online: <www.miriamgrossmanmd.com>
[3] Australian Associated Press, "US professor, who says being transgender is a 'delusion', to speak at WA university" (August 15, 2018), online (article): *The Guardian* <https://www.theguardian.com/australia-news/2018/aug/15/us-professor-who-says-being-transgender-is-a-delusion-to-speak-at-wa-university>
[4] *AB supra* at para 43.
[5] *Family Law Act*, SBC 2011 c 25, s1(d)(ii)
[6] *SAH v JJGV*, 2018 BCSC 2278
[7] *MWB v ARB*, 2013 BCSC 885
[8] *Hokhold v Gerbrandt*, 2014 BCSC 1875
[9] *Age of Majority Act*, RSBC 1996 c 7, s1
[10] *Infants Act*, RSBC 1996, c 223, ss17(2)–(3)
[11] *AB, supra* at para 14.
[12] Florence Ashley, "Gatekeeping hormone replacement therapy for transgender patients is dehumanizing" (2019) J of Med Ethics, Epub ahead of print July 13, 2019 <doi:10.1136/medethics-2018-105293> at p 2.
[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid.*
[16] Florence Ashley "Thinking an ethics of gender exploration: Against delaying transition for transgender and gender creative youth" (2019) Clinical Child Psychology and Psychiatry 24(2) sagepub.com/journals-permissions, <DOI: 10.1177/1359104519836462journals.sagepub.com/home/ccp>

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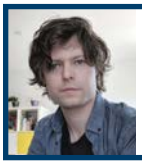

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SUING FOR CONVERSION THERAPY WITHOUT A STATUTE? **A BLUEPRINT**

BY **FLORENCE ASHLEY**

As trans youth have come to the fore of media attention in recent years, therapeutic approaches regarding them have been subject to much controversy. One line of progress has been the interest in prohibiting conversion therapy, which refers to a range of efforts to discourage or change a person's sexual orientation or gender identity. In 2015, Ontario passed Bill 77 banning the practice, followed by Nova Scotia in 2018. Recently, responding to a petition, the federal government declined to introduce a law criminalising the practices, suggesting that it was more appropriately seen as a matter of provincial jurisdiction—a position I partially agree with due to the blunter nature of criminal law. I have thrown my own Carmen Sandiego-style hat into the ring and dedicated my master's thesis to laws prohibiting conversion therapy, and writing a model law[1] that is being used for advocacy in some provinces.

Given the pressures in favour of legislative measures, I have had the opportunity to meet many a person who seemed to believe that the law provides no protection to those in provinces without a statute on the matter. Although a statute would certainly have many benefits, I suspect that it is not necessary for the prohibition of conversion therapy. In this short article, I will provide a rough sketch of how conversion therapy could be legally sanctioned. I encourage lawyers to consider representing victims of conversion therapy pro bono, as lawsuits bear the promise of discouraging ruthless clinicians.

Professionals cannot do as their heart desires. They have duties, and those duties are much stronger than those of laypersons by virtue of the authority granted by their license. Where they act unethically, recourse may be had either under professional regulations or through a professional liability suit. Both subareas of law set up responsibility around a similar core: professionals must act with competence, with due concern for such factors as the current state of scientific evidence, the dignity of patients, and their best interests. Where this standard is violated, the professional may be disciplined. And when causality and injury are added to the mix, the door to compensation by civil suit is opened. I won't bore us with the minute differences between disciplinary law and professional liability or their mutual relevance. I will instead focus on the latter for the rest of my analysis.

In professional liability, the golden standard is the reasonable person test—we are talking about torts, after all. The professional must show reasonable care, skill, and judgment. But perhaps most importantly, professional judgment is not reasonable if it is tainted by homophobia or transphobia by virtue of the interpretive function of *Charter* values. As the Supreme Court explained in *R v Tran* (2010 SCC 58 at para 34), "it would not be appropriate to ascribe to the ordinary person the characteristic of being homophobic if the accused were the recipient of a homosexual advance." If homophobia and transphobia cannot be ascribed to the ordinary person, it cannot be ascribed under the much more stringent reasonable professional standard.

Establishing whether conversion therapy amounts to professional negligence requires us to inquire into the existing practices within the profession as well as the available standards of care. Thankfully, trans health has a growing wealth of available documents establishing the (un)ethicality of certain practices. Thus far, I have noted around 48 professional associations[2] that have explicitly opposed conversion therapy targeting transgender youth. Among foreign and international associations are the American Academy of Child and Adolescent Psychiatry, American Academy of Pediatrics, American Medical Association, Australian and New Zealand Professional Association for Transgender Health, British Psychological Society, International Federation of Social Workers, Royal College of Psychiatrists, and World Professional Association for Transgender Health (WPATH). At the Canadian level, we find the Canadian Association of Social Workers, Canadian Professional Association for Transgender Health, Canadian Psychiatric Association, College of Registered Psychotherapists of Ontario, Ordre des travailleurs sociaux et thérapeutes conjugaux et familiaux du Québec, and Ordre professionel des sexologues du Québec.

The list is long, and I want to keep it long to highlight just how strong the consensus is among professional bodies that conversion therapies are unethical. We are not here in the presence of a therapeutic approach that has simply fallen out of favour and is no longer among the leading ones. We are here in the presence of an approach that faces an overwhelming consensus that it is unethical and may be harmful. This consensus includes a statement in the WPATH Standards of Care saying:

> Treatment aimed at trying to change a person's gender

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> identity and expression to become more congruent with sex assigned at birth has been attempted in the past without success [...], particularly in the long term [...]. Such treatment is no longer considered ethical.

Reviewing the vast number of relevant professional guidelines and standards of care, relevant scientific principles, and available scientific evidence is beyond the scope of this paper, and I will only note that the consensus is strengthened by various studies as well as the reclassification of transitude in the DSM-5 and ICD-11. Though even if there were no scientific evidence that conversion therapy leads to worse outcomes, I would argue that it remains unethical insofar as it is anti-egalitarian and fails to be salvaged by better outcomes. Between two choices, equal in outcomes but one of which is dehumanising, a reasonable person would always choose the one that is not dehumanising.

Once it has been established that the usual standards of care have not been respected, we must consider whether conversion therapy is a respectable minority practice in the meaning of ter *Neuzen v Korn* ([1995] 3 SCR 674). Here, the teachings of *R v Tran* are useful: would a practice be respectable if it sought to prevent people from being transgender under the belief that it is better to be cisgender and/or that being trans is a mental illness? I think not. To discourage transitude is repugnant to Canadian sensibilities, which have been touched by the *Charter*'s commitment to equality. (This is perhaps a bit of projecting and wishful thinking on my part.)

Though the sketch I have provided here is rough, I hope it helps readers realise the potential of laws of general application in curtailing conversion therapies. Legislative will is fickle, and though it would be best to have a clear and detailed law such as the one I proposed,[3] cause lawyering can provide a viable alternative to statutes. More than four years since the first law prohibiting conversion therapy was passed in Canada, and with only one province having followed suit, it is perhaps time for courts to have a go at it.

[1] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3398402
[2] https://www.florenceashley.com/resources.html
[3] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3398402

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EDUCATION, FAMILY AUTONOMY, AND **FREEDOM OF BELIEF**

BY **DEREK ROSS & DEINA WARREN**

Who should decide which beliefs will — and will not — be inculcated in children? Their parents or the State?

This is a central question underlying several recent education-related disputes.[1]

The general rule, from a legal perspective, is clear. As the Ontario Court of Appeal (ONCA) recently affirmed, parents, not the state, have primary authority to determine the moral education of their children: "the right of parents to care for their children and make decisions for their well-being, including decisions about education, is primary, and the state's authority is secondary to that parental right. This has been recognized in many different cases, statutes, and international instruments."[2]

Public education is not an authority inherent to the State, but an authority *delegated* to the government by parents. As Supreme Court Justice La Forest described it: "Parents delegate their parental authority to teachers and entrust them with the responsibility of instilling in their children a large part of the store of learning they will acquire during their development."[3]

That said, parental authority is not absolute. While the law presumes that "parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being," this presumption can be rebutted if there is evidence of harm to the child's welfare and best interests.[4] Otherwise, the parental right to direct the moral education of their children is paramount and "those who administer the Province's educational requirements may not do so in a manner that unreasonably infringes on the right of the parents to teach their children in accordance with their religious convictions."[5]

Education is Not Morally Neutral

It is widely accepted that compelling students to participate in religious exercises, or teaching religion itself in certain ways, can engage s. 2(a) of the *Charter*, but some argue that religious freedom is not implicated in other contexts.

Here it is important to recognize, as the majority did in *ET v Hamilton-Wentworth District School Board (ONCA)*, that "[p]ublic education has never been morally neutral."[6] Rather, "teachers play a critical role in **inculcating beliefs** in school children."[7] Much of education is inherently 'religious' — not necessarily in a deistic or theological sense, but in the sense that it is promoting a particular and authoritative vision of what is good and true. When students are taught certain virtues and ethics, educators necessarily adopt a normative position which prioritizes certain moral beliefs, judgments, and ideas above others. It is not accurate to describe such a framework as religiously-neutral. As lawyer John Sikkema has observed: "In a sense, all morality is religious, because all determinations of right and wrong are rooted in a view of the ultimate source and meaning of life."[8] This was reflected in the *Report of the Ministerial Inquiry on Religious Education in Ontario Public Elementary Schools* (cited by the majority in *ET*):

> **An educational system cannot be neutral.** If there is no religious education or any form of religion in the schools, then secular humanism, by default, becomes the basic belief system. Secular humanism does not represent a neutral position. [...]
>
> In every relationship, and especially in that between a teacher and a student, there is something that can be referred to as religious education. It is the transmission of ideas, or answers to significant life-related questions, or it is the exemplification of values by "precept and example."[9]

This reality does not, in itself, violate the *Charter* rights of families,[10] but it is important to recognize the value-laden nature of education in order to understand how the teaching of subjects considered "non-religious" can and does engage families' fundamental freedoms — particularly in relation to topics such as sexual ethics and marriage, on which reasonable people may hold diverse views "based on decent and honourable religious or philosophical premises."[11]

In *ET*, for example, the majority recognized that promoting certain moral positions without accommodation for families who wish to 'opt-out,' or at least be informed in advance, of such activities could, in some contexts, violate the *Charter*:

> "The mores contained in the [educational] program can conflict with parental religious views, particularly if it is premised on the proposition that true acceptance of another person can only be achieved by embracing all of their self-understandings [...] It would not be hard to imagine that a tweak to the program would pose a problem, or to imagine a teacher actively using both the force of personality and approved curriculum materials to undermine the faith commitments of students, which could make the provision of accommodation necessary."[12]

Religious Accommodation and Equality

Some argue, however, that while families may have a right to religious freedom, school authorities also have an interest in countering 'non-egalitarian' beliefs, and that the State, in the words of Justice Abella, "always has a legitimate interest in promoting and protecting" the "shared values" of "equality, human rights and democracy."[13]

School boards, for example, have sought to justify limits on religious freedom to advance such objectives as "encouraging a positive school climate."[14] But this goal "must reflect a two-way street."[15] Schools must provide positive environments for *all* families, not just those whose beliefs align with prevailing social mores. Further, the authority to promote a 'positive school environment' is not unlimited, and schools must "[m]aintain an environment that is free of pressure or compulsion in matters of religion and belief."[16]

Continued from p.9

It is also important to recognize that Justice Abella's comments above were made in the context of a decision which *affirmed* families' autonomy to determine their *own* moral and religious education for their children. Furthermore, freedom of thought, religion, and belief are themselves fundamental human rights. Allowing families with minority beliefs to preserve and maintain their own moral commitments *does* promote human rights, democracy, and equality.

Minority Communities and the New 'Majoritarian Sexual Morality'

Supreme Court Justice Russell Brown recently referred to the idea of a "majoritarian sexual morality."[17] While made in a different context, his caution against negatively treating those whose conceptions of sexual relationships are deemed "the 'wrong' kind" resonates here.[18]

Families who adhere to traditional conceptions of marriage and human sexuality are no longer aligned with 'majoritarian sexual morality' — to the contrary, they represent a new minority,[19] and their conception of sexual ethics is increasingly seen as "the 'wrong' kind." But their views are not necessarily harmful or contrary to the public interest, as Parliament affirmed in the *Civil Marriage Act* and the Supreme Court of the United States recently emphasized in *Obergefell v Hodges*.[20]

While many educational initiatives are well-meaning, there is danger in the government presuming to know better than a child's own family and community what they should believe and think, by trying to extinguish the 'wrong' kind of ideas in favour of the state's own moral ideology. Accommodating families with minority views is one way to safeguard against such dangers.

Human history has shown why it is harmful for the state to "interfere in the family to help children it consider[s] to be 'backward' and 'delinquent"[21] — many are extreme examples and distinguishable from the present context, but we would be remiss to ignore the historical context which led to international law's recognition of "a foundational principle of family integrity and a resulting commitment to parental control over education."[22] The *Universal Declaration of Human Rights*, for example, affirms that the "family is the natural and fundamental group unit of society and is entitled to protection" and that "parents have a prior right to choose the kind of education that shall be given to their children."[23] These protections, like others in the *UDHR*, were in response "to wrongs that had been committed, most dramatically in the wartime contexts to which [the *UDHR*] immediately responded, but to other wrongs as well."[24]

Canada has undergone a societal shift away from the previous 'dominant' morality in the name of autonomy and freedom. The true test of its liberal commitments, however, will be whether it allows space for all, or merely allows a new ideology to seize power and impose a 'tyranny of the majority' on those who think differently.[25]

[1] One such recent case was *ET v Hamilton-Wentworth District School Board*, 2017 ONCA 893 ["ET"] which involved a parent who requested that the School Board "provide him with advance notice of any classroom instruction or discussion" of certain issues which he believed would contradict his family's religious beliefs, including classes which promoted certain conceptions of marriage and human sexuality. The Board refused his request in part because of "the concern that if ET's children were required to leave the classroom every time one of these topics came up for discussion, the Board's policy of providing an inclusive and non-discriminatory program would be undermined" (para 3). The ONCA dismissed the claim for evidentiary reasons, with the majority (Lauwers and Miller JJ.A.) making a number of important observations about the relationship between provincial education, freedom of religion, and parental autonomy (as discussed further in this article). *The authors were co-counsel for Christian Legal Fellowship's intervention in ET.*

[2] *Ibid*, at para 65 per Lauwers and Miller JJ.A.

[3] *R v Audet*, [1996] 2 SCR 171, at p196, cited with approval in *ET* at para 67.

[4] *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at p 370. See also *Chamberlain v Surrey School District No. 36*, 2002 SCC 86 per Gonthier J (dissenting but not on this point) at paras 102-103 and 108.

[5] *R v Jones*, [1986] 2 SCR 284 at para 63 per La Forest J; cited with approval in *ET* at para 69 per Lauwers and Miller JJ.A.

[6] *ET* at para 51.

[7] *ET* at paras 46 and 64 (emphasis added).

[8] John Sikkema, "Ontario's Highest Court: Public Education is Not Neutral", ARPA Canada, online: https://arpacanada.ca/news/2017/11/28/ontarios-highest-court-public-education-is-not-neutral/

[9] Dr. Glenn Watson, *Report of the Ministerial Inquiry on Religious Education in Ontario Public Elementary Schools* (January, 1990) at p 57 and 50, cited in *ET* at paras 62-63 (emphasis added).

[10] See, for example, *SL v Commission scolaire des Chênes*, 2012 SCC 7.

[11] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) per Kennedy J. for a majority of the Supreme Court of the United States. See further discussion in Ryan Anderson, "Disagreement Is Not Always Discrimination: On Masterpiece Cakeshop and the Analogy to Interracial Marriage" (2018) 16 Georgetown J. Law & Pub. Poly 123. See also *Canada's Civil Marriage Act*, SC 2005, c 33 which affirms that "it is not against the public interest to hold and publicly express diverse views on marriage."

[12] *ET* at paras 92 and 100.

[13] *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, at para 47.

[14] See *ET*, supra.

[15] *Chamberlain v Surrey School District No. 36*, 2002 SCC 86, dissent at para 134: "Language appealing to "respect," "tolerance," "recognition," or "dignity," however, must reflect a two-way street in the context of conflicting beliefs, as to do otherwise fails to appreciate and respect the dignity of each person involved in any disagreement, and runs the risk of escaping the collision of dignities by saying "pick one." But this cannot be the answer."

[16] Ontario Human Rights Commission, "Policy statement on religious accommodation in schools," online: http://www.ohrc.on.ca/en/policy-statement-religious-accommodation-schools

[17] *R v Goldfinch*, 2019 SCC 38 at para 186, citing E. Craig, "Capacity to Consent to Sexual Risk" (2014), 17 *New Crim. L. Rev.* 103; J. Sealy-Harrington, "Tied Hands? A Doctrinal and Policy Argument for the Validity of Advance Consent" (2014), 18 *C.C.L.R.* 119, at p 145.

[18] *R v Goldfinch*, 2019 SCC 38 at para 185

[19] See *Trinity Western University v The Law Society of British Columbia*, 2016 BCCA 423 where the BC Court of Appeal observed that, in the context of their views regarding marriage, "the members of the TWU community constitute a minority" (para 178).

[20] *Supra* note 11.

[21] Amy Anderson, Dallas K. Miller, Dwight Newman, "Canada's Residential Schools and the Right to Family Integrity" (2018) 41 *Dalhousie L.J.* 301 at 320. The authors trace the development of legal and social perspectives of the state toward the parent-child relationship. They also point to international law treaties and declarations that help to inform a robust understanding of family integrity and its associated parental choice concerning education. While the authors go on to apply that framework to Indigenous communities in the context of residential schools, the "inherent human right to family integrity" they delineate recognizes important independent principles that can be applied to other contexts as well.

[22] *Ibid*. at 321.

[23] Article 16(3), 26(3) (emphasis added).

[24] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 ["UDHR"].

[25] *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at para 96.

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GAY-STRAIGHT ALLIANCES IN ALBERTA: **A FORUM FOR SAFETY AND SUPPORT**

BY **PAMELA KRAUSE & HILARY MUTCH**

Lesbian, Gay, Bisexual, Transgender, Queer, and Two-spirit ("LGBTQ2+") youth are some of the most vulnerable members of our community. Studies have repeatedly shown that these youth face unique challenges, including an enhanced risk of bullying, depression, suicide, and homelessness. Gay-Straight Alliances ("GSAs") — student groups aimed at fostering safety and support of LGBTQ2+ students — are a direct response to this unfortunate reality. Studies further show that GSAs significantly ameliorate the difficulties facing LGBTQ2+ youth and contribute to a more inclusive school environment.

GSAs have a proud and interesting history in Alberta. The first GSA was formed in this province in the 1990s in Red Deer, when two brave students approached their teacher to explore ways to make their school safer for members of LGBTQ2+ community.

Then, in 2014, the Alberta Government passed Bill 10 (*An Act to Amend the Alberta Bill of Rights to Protect Our Children*). Bill 10 requires schools in Alberta to allow students, upon request, to establish clubs or activities that "promote a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging." Bill 10 also allows students to name the club a GSA or queer-straight alliance.

In 2017, the Alberta Government — led by a different political party — passed Bill 24 (*An Act to Support Gay-Straight Alliances*). Bill 24 requires schools to establish GSAs "immediately" if a student requests one, as many students faced lengthy delays from their school administration after asking for a GSA. Bill 24 also extends the protections of Bill 10 to publicly-funded independent schools. Further, Bill 24 precludes schools from informing parents about their child's participation in a GSA without the child's consent. By doing so, Bill 24 recognizes the sensitive and deeply personal nature of sexual orientation and gender identity, and the risks that arise when students are not allowed to come out to their families in their own time and in their own way.

In April of last year, a group of parents and largely faith-based schools filed a constitutional challenge to Bill 10 and Bill 24. The applicants argue that the GSA legislation infringes their religious freedom to teach their children that same-sex relationships are sinful and that gender is solely determined by one's sex at birth. The applicants further argue that the prohibition on disclosing a child's participation in a GSA without the child's consent infringes parental rights. In addition to seeking a declaration that the GSA legislation is unconstitutional, the applicants sought an injunction to temporarily restrain the legislation pending the judicial determination of its constitutionality.

When we heard about the legal challenge to the GSA legislation, we grew concerned that no one in the courtroom would be there to directly represent the students who attend and benefit from GSAs. As a result, we sought leave to intervene on behalf of the Centre for Sexuality (the "Centre"), the organization where we work. The Centre is a not-for-profit organization that aims to improve and normalize sexual health in Alberta by providing evidence-informed, inclusive, and non-judgmental sexual and reproductive health programs and services. The Centre routinely works with LGBTQ2+ youth in a variety of channels, including through our work with the Calgary and area GSA Network — a group of schools, teachers, students, and community organizations that strive to create safe spaces for LGBTQ2+ students and staff. Through the GSA Network, the Centre has worked with literally hundreds of GSA participants.

In recognition of the Centre's expertise regarding GSAs and their impact on youth, the Centre was granted leave in the Court of Queen's Bench of Alberta and the Court of Appeal of Alberta. Although the applicants submitted to the Court that GSAs are "ideological sex clubs" that cause harm to students, the Centre submitted evidence about the tremendously positive impact GSAs have had in our experience working in Alberta schools. The Court accepted our evidence. In dismissing the applicants' request for an injunction, the Court of Queen's Bench wrote, "The effect on LGBTQ2+ students in granting an injunction, which would result in both the loss of supportive GSAs in their schools and send the message that their diverse identities are less worthy of protection, would be considerably more harmful than temporarily limiting a parents right to know and make decisions about their child's involvement in a GSA" *(PT v Alberta*, 2018 ABQB 496 at para 41). The Court of Appeal affirmed this decision and wrote the following (*PT v Alberta*, 2019 ABCA 158 at para 77):

> The chambers judge found that the evidence adduced by the respondent and the Calgary Sexual Health Centre [now the Centre for Sexuality] showed that the presence of GSAs in schools, and the safe and supportive climate they are intended to provide, result in positive effects for LGBTQ2+ and other students. These benefits include providing youth with the ability to come to terms with their sexuality and gender identity, an enhanced ability to share this information with their families, improved

> school performance, an increased sense of safety and belonging, and enhanced psychological well-being [...] In our view, the chambers judge reasonably concluded that these benefits constitute the presumed good of the legislation.

Since the injunction proceedings, we continue to gather information about the impact of GSAs in Alberta schools. For example, in April of this year, we surveyed the Alberta schools at which the Centre provides support for GSAs. Of the approximately 50 schools that responded to the survey, roughly 70% indicated that Bill 24 has had a positive impact on their GSA (the remaining schools indicated Bill 24 had no discernable impact on the GSA). The results of the survey also showed that 2016 and 2017 were the years in which the most GSAs were started amongst the respondent schools. This did not surprise us, as these years are close to the passage of Bill 24. In our experience, we have seen the number and vitality of GSAs that the Centre works with increase significantly over the past few years.

One teacher respondent to the survey wrote that "the attendance of [GSA] meetings went up from 2 to 24 in 2017 [after Bill 24 was passed]. Student privacy is crucial to students' ability to participate." Another teacher wrote that "Bill 24 has helped to ensure the continuation of our GSA. The student privacy provision created a safer environment for our students and our numbers for our GSA have grown since this time." Yet another teacher simply wrote that Bill 24 "allowed us to exist."

Clearly, Bill 10 and Bill 24 have had a significantly positive impact on GSAs and LGBTQ2+ youth in Alberta.

Sadly, the new Alberta Government has passed legislation to roll back many of the protections contained in Bill 24. As a result of this legislative change, we expect that the applicants will drop their legal challenge and the GSA litigation in Alberta will come to a close, at least in its current form.

However, we should be proud as Albertans that two consecutive provincial governments — each led by two different political parties — passed legislation (Bill 10 and Bill 24) intended to improve the lives of LGBTQ2+ youth. We should also be proud that both the Court of Queen's Bench of Alberta and the Court of Appeal of Alberta dismissed the applicants' injunction application and did not capitulate to the applicants' fear mongering and misinformation.

Although the most recent repeal of Bill 24 is an unfortunate development, we must still work to support and encourage GSAs and other similar groups in our schools. After all, the evidence is clear (and it was accepted by our courts) that GSAs ameliorate the difficulties facing LGBTQ2+ youth and literally save lives.

Photo: Sharon McCutcheon, Unsplash

PAM KRAUSE is the President/CEO of the Centre for Sexuality (formerly the Calgary Sexual Health Centre), the only non-profit organization in Calgary that provides comprehensive sexual health education programs & services to people across the lifespan. It is recognized as a leader for implementing innovative sexual health programs with meaningful results.

HILARY MUTCH (she/her) is the LGBTQ2S+ Community Engagement Coordinator at the Centre for Sexuality in Calgary. She coordinates the Calgary GSA Network and Camp fYrefly Calgary, an overnight retreat for LGBTQ2S+ youth. She was born and raised in Calgary, Alberta, and holds a B.A. from McGill University.

AMPLIFYING TRANS VOICES IN HUMAN RIGHTS LITIGATION: **ONTARIO'S SEX ED REPEAL**

BY **MARCUS MCCANN**

Everyone sensed that a legal challenge to the repeal of Ontario's inclusive sex ed curriculum was inevitable. This was in the summer of 2018.

Doug Ford and the Progressive Conservatives had been elected in May. Mr. Ford then embarked on a number of controversial changes which ended up in court, including changing the size of Toronto City Council and cancelling certain green tax credits. Ford mused publicly about insulating his decisions from review by using the notwithstanding clause.

In other words, the political climate was already heated when the Ontario government announced the repeal of the 2015 Grades K-8 curriculum and replaced it — at least temporarily — with an older curriculum that ignored the lives of lesbian, gay, bisexual, trans, and queer (LGBTQ) students. The older curriculum had been drafted in 1998, before same-sex marriage was legalized, and long before gender identity and gender expression were added to the *Human Rights Code*.

But who was the best party to challenge the change?

The repeal (and the associated rhetoric of protecting children from liberal ideology) caused spasms of worry in LGBTQ circles, and especially among parents of queer, trans or otherwise gender diverse young people.

Lawyer Mika Imai and I fielded calls in the early days with parents who were petrified to send their children back to school in September. Ultimately, an informal support group of parents of trans and gender diverse children reached out to us, and Ms. Imai and I began to plan a legal challenge in earnest.

When we were ultimately retained, it was by an 11-year-old trans girl and her mother, who we had met through that support group. Ms. Imai ad I filed an Application on her behalf at the Human Rights Tribunal in August of 2018.

A.B. (her real name is protected by a publication ban and a partial sealing order) was an incredibly wise client. She was the expert in her own story. And that story, as it turned out, set the course of our litigation.

In the fall of 2018, A.B. was going into Grade 6, which was important: there was material about gender identity in the Grade 6 curriculum, and it was being replaced with a curriculum with zero mention of gender identity.

A.B. was able to recount to us, and later recounted during her testimony, her story. No one told her that trans people existed until she was nine. At that point, she immediately recognized herself in the term. Her school's inclusive policies could only take her so far, and she was bullied both before and after her transition.

A.B.'s testimony was sassy, charming and ultimately very moving. Here is an example from our discussion of the period before she transitioned, when she was presenting in a more gender fluid way.

> *Me: How did your classmates react to you wearing your glittery hoodie, for example?*
>
> *A.B.: Well, some of them would ask me why I am wearing it and they would say that is a girl thing.*
>
> *Me: And how would you respond?*
>
> *A.B.: I would say, Are you just jealous because I look fabulous?*

A.B.'s testimony left no doubt about the necessity of a comprehensive, detailed, and inclusive sexual education. As she told us, people are afraid of what they don't understand. A.B. and her classmates needed to learn about gender identity and gender expression, and without that, she was at a disadvantage compared to her peers.

Not that we didn't also rely on experts — over the course of 10 hearing days, there were 11 witnesses called. The trial concluded in February of 2019.

Our case was ultimately derailed by a parallel proceeding, a judicial review application filed by the Canadian Civil Liberties Association after we announced the challenge in *AB*. Their judicial review challenged the sex ed repeal on a number of grounds, including on the basis that it was discriminatory toward trans students. The CCLA application was filed on the basis of a single affidavit, sworn by an LGBTQ parent. The CCLA filed its challenge without identifying a trans student as its client, and without any evidence from trans students.

A second judicial review was filed in September of 2018 and joined to the CCLA Application. This one was by the Elementary Teachers Federation of Ontario. The ETFO Application was by far the better papered — more than a dozen affiants and many volumes of material. Those two cases were joined, and by nature of the sheer size of the record, the ETFO case took centre stage in the judicial review.

ETFO's main concern was that the repeal of the curriculum (combined with the government's public statements and the introduction of a "snitch line" to report teachers) had created a chill on their ability to freely express themselves in the classroom. ETFO's secondary arguments, including that the decision was discriminatory toward students, flowed from this chill.

Ultimately, the Divisional Court found that teachers were still permitted to teach about important sexual health issues if they felt they should. There was therefore no chill, and their case

was dismissed.

The CCLA and ETFO decision was no answer to *AB* — the evidence in *AB* made it clear that students across the province need a curriculum that includes mandatory content on LGBTQ topics. But a two-person panel of the Human Rights Tribunal found that it was bound by the result of the judicial review and dismissed A.B.'s case.

The case nonetheless offers some important lessons. Chief among them: the importance of clients, evidence, and witnesses who can provide a direct, personal story. Neither the CCLA nor the ETFO application contained a single affidavit from a young person in Grades K-8. A.B.'s story, which was so important to the Tribunal case, was missing.

No one can say if the Tribunal would have ultimately sided with A.B., had it not been for the CCLA and ETFO decision. I like to think it would have. At the end of the day, the decision in the judicial review was — if I can use this term — decidedly bloodless. And that could certainly have been avoided if young people's voices were part of that record.

MARCUS MCCANN is a lawyer in private practice at Symes Street & Millard in Toronto, Ontario. He practices in the areas of employment, human rights, and not-for-profit governance.

JAY **MOCH**

BY **ELIZABETH ASPINALL**

Admired for courage and outstanding achievement. Someone who selflessly gives of themselves so that others can benefit. These are words that describe a hero, and they describe Jay Moch.

Jay is a 2019 University of Calgary law grad who is starting his articles at Lawson Lundell LLP. While that is a typical step in any lawyer's career, Jay is anything but typical. Those heroic qualities of achievement, courage and selflessness became clear early in Jay's membership in the legal community.

As a second-year law student, Jay worked with faculty member Saul Templeton and other students to launch the U of C chapter of OUTLaw, an organization that promotes the interests of and advocates for LGBTQ+ law students. U of C was the last common-law school to have an OUTLaw chapter. In Jay's words:

> OUTLaw speaks to people and increases visibility [of LGBTQ+ people within the legal profession]. OUTLaw creates a safe space to meet like-minded people where you don't have to worry that you're in a historically conservative city in a historically conservative profession. There are people like you and it's okay.

OUTLaw chapters exist across North America. They serve LGBTQ+ law students both during law school, and as they embark on their careers. They raise awareness of concerns and issues facing LGBTQ+ students, host social events, and increase the visibility of LGBTQ+ law students. For example, OUTLaw chapters across the country collaborated with other organizations to intervene at the Supreme Court of Canada in the *Trinity Western* case, arguing against Trinity Western University's application to accredit its proposed law school.

Jay served on the new Calgary OUTLaw Executive, first as the VP events/fundraising, and then as the President. The first event OUTLaw promoted was participation by the U of C law school in Calgary's Pride Parade. In 2016, the year before OUTLaw was formed, only seven people from the law school marched. That participation increased to 15 in OUTLaw's first year, and increased again to 28 this year.

JAY **MOCH**

The **Unsung Hero** column is intended to introduce a member of our profession who has demonstrated extraordinary leadership, innovation, commitment, or made significant contributions to social justice and community affairs.

In addition to establishing and working with OUTLaw, in August 2018, while in his third year of law school, Jay also began working with Pro Bono Students Canada to create and run Trans ID clinics in Calgary. These clinics establish a safe space where transgender people can get legal information and assistance to officially change their name and gender-marker.

Jay notes that changing one's name and gender-marker can be intimidating and expensive. He also notes that having identification that reflects one's gender identity is a matter of personal dignity, not just practicality. The Trans ID clinics strive to ensure that transgender people have that identification.

The clinics are run at locations that are safe and accessible to transgender people, places like The Alex, a self-described hub for vulnerable Calgarians, Mount Royal University and the Memorial Park Library. The Skipping Stone Foundation, a Calgary-based non-profit organization which supports trans and gender diverse youth and their families, also provides support for the clinics. Lawyers from Blake, Cassels & Graydon LLP volunteer to finalize documents and advise clients. U of C law students volunteer to assist at the clinics, providing information and support before the client meets with one of the lawyers.

Jay was involved at each step of the process: he identified the Skipping Stone Foundation as a partner, recruited student volunteers, prepared binders of materials used to train volunteers, identified and collected the necessary forms, and worked at the clinics. He quite modestly describes the clinics as going "really well." At only one clinic, 3 lawyer volunteers, 2 Skipping Stone volunteers and 4 student volunteers assisted approximately 33 people of various ages. Each client left the clinic with the paperwork necessary to submit their application to the government to change their name and gender-marker. So far there have been four clinics and the intention is to keep

running them not just in Calgary, but also in other centres, including Edmonton.

Jay describes the work as "heavy" and "work that it is important to do." As someone who is transgender himself, he is committed personally to the work. "I'm proud I'm trans. It made me who I am, and I want to be able to use my experiences to help others."

The next step for Jay may be to address the financial side of submitting the forms to the government. Possibilities include securing a sponsor or funding to help clients cover the cost of submitting the forms. The process is expensive and must be repaid each time the forms are submitted if they are returned because of an error. The cost also varies depending on which registry processes the forms. Jay notes that in Ontario, the government has waived the processing fees for people who go through Ontario's Trans ID clinics.

Jay says his parents inspired him to become a lawyer. He saw them giving to the community and saw his father's position as a lawyer as playing an important part in giving them the opportunity to give back. Jay has inherited that generous, community-minded spirit. He is working to make a better world.

ELIZABETH ASPINALL is a Practice Advisor and the Equity Ombudsperson at the Law Society of Alberta. Prior to joining the Law Society, she practiced at JSS Barristers in Calgary. Elizabeth is a member of the CBA Alberta Editorial and Equality, Diversity & Inclusion Committees.

Do you know an Unsung Hero? Tell us about them.
If you know a lawyer who deserves to be recognized, please send us an email to communications@cba-alberta.org with the lawyer's name and the reasons why you believe they are an "unsung hero". The only formal requirements for nomination are that our "unsung hero" be an Alberta Lawyer and a CBA member.

FALL NATIONAL CONFERENCES

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ETHICALLY MANAGING YOUR **ONLINE PRESENCE**

BY **ELIZABETH ASPINALL**

A lawyer's online presence can be an effective marketing boost and research tool, or an ethical trap, engaging the competence, professional responsibility and advertising provisions of the Code of Conduct.

The Code (Rule 3.1-1) stipulates that a competent lawyer has the knowledge, skills and attributes appropriate for each client file. Competent use of technology, including social media, is an implied element of the rule.

Social media is one element of a lawyer's online presence. *LSO v Guo*, 2019 ONLSTH 46 (*Guo*) and *LSO v Forte*, 2019 ONLSTH 9 (*Forte*) illustrate the dangers of using social media without heeding professional responsibility. *Guo*, a good character hearing for a student, arose from Guo's use of social media. In her posts, she was "insulting, impudent and rude," making offensive comments about lawyers, prosecutors, court clerks, the police, justices of the peace, clients and judges. Some of her posts contained confidential information about clients. Her principal, Forte, was found guilty of professional misconduct for failing to supervise her, and for engaging in improper marketing. The panel held Forte "should have taken steps to become conversant enough with social media to be able to effectively supervise his student's use of it in connection with his practice."

Client confidentiality, the cornerstone of the solicitor-client relationship, can easily be breached if a lawyer posts about individual cases. The Code states that, with limited exception, a lawyer must maintain client information in strict confidence (Rule 3.3-1). A lawyer who posts about clients on a firm-related or personal website risks breaching the client's confidentiality, even where the lawyer believes the post is adequately sanitized of information that may identify the client. A lawyer should not make public communications about a client for marketing purposes without client consent. Even posts only to "friends" can be public enough to breach confidentiality.

Social media also creates temptations for lawyers investigating opposing parties. Private social media accounts may contain a treasure trove of evidence, if only a lawyer could access it without risk of spoliation by the opposing party! That potential risk does not create an exception to the usual means by which lawyers access an opposing party's relevant and material records, namely, affidavits of records and if necessary an application for a further and better affidavit of records.

It may be tempting to create a fictional social media account and "friend" the opposing party to access their private postings (and thereby head-off any risk of spoliation). Where the opposing party is represented, this breaches the rule that

a lawyer must not approach, communicate or deal with an opposing party, except with their lawyer's consent (Rule 7.2-8). Using deception to communicate with an opposing party also breaches Rule 2.1, which specifies that "a lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity."

It is ethical to investigate facts on social media by an informal search for information in support of or in defence of a claim. Competence and the duty to resolutely pursue and protect a client's interests may require such investigation. It is permissible to access information on a party's public profile by "friending" a third party who is already a "friend" of that party. It is, however, impermissible to use a third party (e.g., a staff member or investigator) to directly "friend" the opposing party using a real or fake account — doing so is the lawyer indirectly doing what they cannot do directly.

Less clear is using a platform (e.g., LinkedIn) where notifications may be sent to the person whose profile has been viewed. A party has a lesser expectation of privacy with respect to social media content relevant to claims or defences, particularly when the content is public. However, knowledge that a lawyer has accessed an opposing party's account may have a chilling effect on the litigation. The lawyer engaging in social media research should set their preferences so that the opposing party does not receive a notice that the lawyer accessed their profile.

Accessing social media profiles is one side of the coin. The flip side is that, as with all material and relevant records, the lawyer has an obligation to advise their client to preserve the evidence and not destroy any evidence that may undermine the client's case. Deleting unhelpful social media information is spoliation.

In the American case *Lester v Allied Concrete Co*, 736 SE (2d) 699 (2013) (Va.Sup.Ct) a lawyer advised his client to "clean up" his Facebook account to destroy evidence detrimental to the claim. The client first deleted photographs, then deleted his Facebook account, and then swore that he did not have a Facebook account. The Court sanctioned the lawyer and client, ordering them to pay $542,000 and $180,000 respectively to cover the Defendant's attorney's fees and costs in addressing the spoliation. The lawyer was also suspended.

Lawyers must keep pace with the use of technology, including tools like social media, in their practices. However, using technology without regard to the broader ethical rules can make practice a mine field. Practice advisors are happy to speak with lawyers about the challenges which technology may pose.

ELIZABETH ASPINALL is a Practice Advisor and the Equity Ombudsperson at the Law Society of Alberta. Prior to joining the Law Society, she practiced at JSS Barristers in Calgary. Elizabeth is a member of the CBA Alberta Editorial and Equality, Diversity & Inclusion Committees.

CBA NEWS

2019-2020 SECTION REGISTRATION OPENS SOON

Section registration for the 2019-2020 membership year will open on Wednesday, August 21, 2019. Please note that CBA Alberta section memberships are contingent upon payment of your CBA National membership dues. Should you not renew your national membership, your section registrations may be terminated.

2019-2020 MEMBERSHIP RENEWAL

Your 2019-2020 CBA National membership renewal is due on August 31, 2019. If you have not already done so, you can renew your membership online at **www.cba.org/Membership/Join-Renew**.

Portfolio and Portfolio Plus membership enhancements are still available to CBA members this year! These packages provide members with CBA education credits, which can be used towards section registrations, CBA professional development opportunities, attending conferences, and more! Portfolio and Portfolio Plus packages also offer members up to three free materials-level section memberships with CBA Alberta and rebate rewards on approved CBA purchases (which will be taken off future years' membership fees). More information on these packages is available at **www.cba.org/Membership/Why-CBA/AB**.

CBA ALBERTA VOLUNTEER OPPORTUNITIES

We are now recruiting CBA members to participate in volunteer opportunities during the 2019-2020 membership year. Much of the work that the CBA does throughout the year is only possible with the assistance of a group of dedicated volunteers, and we encourage all members to find ways in which they can get involved.

There are a variety of committees that are always looking for new volunteer members, including Access to Justice, Editorial (Law Matters), Agenda for Justice & Advocacy, Equality, Law Day, Legislation & Law Reform, and Membership & Member Services. There are also opportunities to participate in Sections, either through Section leadership or as a speaker at one of our many Section meetings.

To indicate your interest in CBA Alberta volunteer opportunities, please visit **www.cba-alberta.org/Volunteer**.

ALBERTA ACCESS TO JUSTICE WEEK 2019

There are many groups and individuals who work hard every day to provide greater access to justice for Albertans. For one week this fall, from September 28 - October 5, they will be hosting events and activities across the province highlighting the importance of justice, the barriers to accessing it, and the ways we can work together to break down those barriers.

Edmonton and Calgary will be holding free legal Advice-A-Thons at their respective city halls on Saturday, September 28, from 10:00 am - 3:00 pm. Look for more event listings, blog posts, and more online at **www. albertaaccesstojustice.com**.

INTELLECTUAL PROPERTY. Let us work with you in protecting your clients. Patents, Trademarks, Copyright. Stemp & Company, Lawyers and Patent Agents, **www.stemp.com. P: 1-800-665-4447 or 403-777-1123. E: kari@stemp.com or bill@stemp.com.**

WILL SEARCH: MARY JANE SAILES, late of Peterborough, England, previously of Medicine Hat, AB, died March 7, 2017. **Please contact MacLean Wiedemann Lawyers LLP, Attn. Kenneth M. Lutes at 403-527-3343 or sandy@mwllp.ca.**

EXCLUSIVE MERCEDES-BENZ DISCOUNTS FOR CBA MEMBERS. For more information, **contact Rob at rob@mbdtyyc.com.**

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JUDICIAL **UPDATES**

COURT OF QUEEN'S BENCH

- **The Honourable Mr. Justice Kenneth G. Nielsen** has been appointed as Associate Chief Justice (Edmonton) of the Court of Queen's Bench of Alberta, effective May 21, 2019.
- **The Honourable Kevin Feth** has been appointed as a Justice of the Court of Queen's Bench of Alberta in Edmonton, effective May 22, 2019.
- **The Honourable Kent H. Davidson** has been appointed as a Justice of the Court of Queen's Bench of Alberta in Edmonton, effective May 22, 2019.
- **The Honourable Johanna C. Price** has been appointed as a Justice of the Court of Queen's Bench of Alberta in Calgary, effective May 22, 2019.
- **The Honourable Nicholas E. Devlin** has been appointed as a Justice of the Court of Queen's Bench of Alberta in Calgary, effective May 22, 2019.

PROVINCIAL COURT OF ALBERTA

- **Judge Lynn Cook-Stanhope** (Calgary Family & Youth) passed away on April 14, 2019.
- **Judge Karen Jordan** (Calgary Family & Youth) retired as a part-time judge effective April 29, 2019.
- **Honourable Judge Gerald R. DeBow** (Lethbridge) retired as a supernumerary judge, effective May 10, 2019.
- **Honourable Judge Gordon J. Burrell** (Calgary) has been appointed as a supernumerary judge, effective July 12, 2019.
- **The Honourable G.H. Cornfield** has been appointed as Assistant Chief Judge, Calgary Family and Youth Division of the Provincial Court of Alberta, effective July 2, 2019, for a five-year term.
- **The Honourable R.K. Bodnarek** has been appointed as Assistant Chief Judge, Edmonton Criminal Division of the Provincial Court of Alberta, effective July 2, 2019, for a five-year term.

WOMEN IN LAW LEADERSHIP

NOMINATION DEADLINE SEPTEMBER 4, 2019

9th Annual Leadership Awards

Join us to celebrate the distinguished achievements of our Alberta colleagues in the legal profession.

Consider whether you know a lawyer who has significantly contributed to the profession or community, or a law firm that exemplifies leadership in supporting female lawyers. Nominate her and/or a law firm for their outstanding efforts and achievements furthering the success of women in law.

Nominations can be made in seven categories:

- Leadership in the Profession (Private Practice)
- Leadership in the Profession (In-House)
- Leadership in the Profession (Government)
- Leadership in the Profession (Broader Roles)
- Leadership in the Community
- Tomorrow's Leader
- Law Firm Award

Nomination forms available at www.WILLawards.ca

The WILL Awards dinner will take place on Thursday, November 21, 2019 at the Fairmont Palliser, Calgary.

Tickets ares now available at willawards.ca

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CORPORATE / SECURITIES SENIOR ASSOCIATE OR PARTNER | 5-20 YEARS | EDMONTON

This top tier regional law firm is seeking a Corporate Commercial / Securities Lawyer to join their very busy and highly-regarded Corporate group. You will be a Senior Associate or a Partner (either with a full or partial book), and exceptional communication and organization skills coupled with a strong work ethic. This is a terrific opportunity to join a top performing local law firm with a strong entrepreneurial culture and outstanding profitability. The right candidate will have an opportunity to work with fantastic clients and be a key building block in the growth of this area within the firm. To learn more please contact Mike Race or Amrit Rai at **LegalAB@zsa.ca** quoting reference #AB29036.

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This successful independent legal practice based in Calgary is looking to grow with a mid-to-senior level employment lawyer with something of a book, as well as capacity to take on referral work in your space. This is a rare opportunity to practice autonomously and see the most out of your billings, with full downtown infrastructure, alongside a leading lawyer in corporate, commercial, and immigration law. Our client offers a beautiful office environment, a lot of administrative support, and no office politics. If you are interested in this great opportunity, please contact Mike Race or Amrit Rai at **LegalAB@zsa.ca** referencing number AB29059.

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The Calgary commercial litigation team of one of the country's top law firms is currently inundated with high quality work and seeking a strong litigator to join the team. It's a culturally cohesive group, which gets some of the best work in the market, as well as having the advantage of being a Calgary office which is still growing strongly. The firm offers terrific career development opportunities for the right person. The successful candidate will have between 2 to 5 years' experience in civil litigation at a reputable law firm. Our client is looking for someone who can really take a file and run with it, can work independently as well as part of a team, and is a driven, hard-working individual. For more information, or to apply, please contact Mike Race or Amrit Rai at **LegalAB@zsa.ca** referencing job number AB27067.

FAMILY LAW ASSOCIATE | 2-3 YEARS | CALGARY

Our client is a highly regarded smaller litigation—focused law firm in Calgary, now looking for a high-performing associate with ideally 2-3 years of family law experience and a real passion for that area. You will be joining an extremely collegiate team and working directly with the partner in the family law space. If you are curious to hear more, please contact Mike Race or Amrit Rai at **LegalAB@zsa.ca**. Ref. #AB29145.

CIVIL LITIGATION ASSOCIATE, BOUTIQUE FIRM | 3-4 YEARS | CALGARY

We are working with a successful high-end boutique litigation firm in Calgary that has grown strongly. They are now looking for a high-performing Associate lawyer with ideally 3-4 years of civil litigation experience to join their team. It's a broad practice that includes commercial and contract disputes, employment disputes, construction and builders liens matters, and civil fraud. A great opportunity to join a top level team of lawyers, working on complex and interesting litigation matters you'd expect from a national firm, but within a smaller and more casual environment. If this holds some interest for you, please contact Mike Race or Amrit Rai at **LegalAB@zsa.ca**. Ref. #AB28960.

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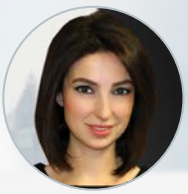

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