

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

**YORK REGION DISTRICT SCHOOL BOARD**

**Appellant**  
(Respondent)

- and -

**ELEMENTARY TEACHERS' FEDERATION OF ONTARIO**

**Respondent**  
(Appellant)

- and -

**THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF ONTARIO, THE ATTORNEY GENERAL OF QUEBEC, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, THE BRITISH COLUMBIA TEACHERS' FEDERATION, THE CENTRE FOR FREE EXPRESSION, THE ONTARIO COLLEGE OF TEACHERS, THE POWER WORKERS' UNION AND THE SOCIETY OF UNITED PROFESSIONALS (JOINTLY), THE NATIONAL POLICE FEDERATION, THE ONTARIO PRINCIPALS' COUNCIL, THE CANADIAN ASSOCIATION OF COUNSEL TO EMPLOYERS, EGALE CANADA, THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, THE CANADIAN CIVIL LIBERTIES ASSOCIATION, THE CENTRALE DES SYNDICATS DU QUÉBEC, AND THE QUEEN'S PRISON LAW CLINIC**

**Interveners**

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**FACTUM OF THE INTERVENER, EGALE CANADA**

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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## **PART I – OVERVIEW AND STATEMENT OF FACTS**

1. School boards—and the powers they wield—play a critical role in fostering the wellbeing of young people. A child spends approximately “half their waking hours at school.”<sup>1</sup> It is at school where many students build self-confidence, explore their identities, and learn foundational skills and life lessons. Through the exercise of their statutory powers, including significant statutory *powers of compulsion*, school boards directly affect the quality, safety, and inclusiveness of schools across this country.

2. Although school is often a force for good in the life of a young person, school environments can also be extremely challenging. These challenges are often particularly acute for 2SLGBTQI<sup>2</sup> students and teachers. While progress has been made, homophobia, biphobia, and transphobia are still unfortunate facts of life at many schools across Canada.

3. It is for this reason that many 2SLGBTQI students and teachers understandably choose to not come out at school—or choose to come out to only their closest friends and allies. If that fundamental personal choice is not respected, “outing” a queer person can have devastating consequences for their safety and wellbeing. Accordingly, 2SLGBTQI students and teachers have unique and substantial privacy interests deserving of significant protection.

4. A key question in this appeal is whether school boards are a component of “government” such that their acts are subject to the *Charter*.<sup>3</sup> This appeal also asks this Court to consider the nature and protection of privacy rights and interests within schools. As the Court considers these

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<sup>1</sup> New Brunswick. Office of the Child and Youth Advocate, *On Balance, Choose Kindness: The Advocate’s Review of Changes to Policy 713 and Recommendations for a Fair and Compassionate Policy*, August 15, 2023 at 44 (online: [https://www.legnb.ca/content/house\\_business/60/2/tables\\_documents/2023-08-15%20EN.pdf](https://www.legnb.ca/content/house_business/60/2/tables_documents/2023-08-15%20EN.pdf)). [*Report of the Office of Child and Youth Advocate*].

<sup>2</sup> Egale uses the acronym “2SLGBTQI” as inclusive of all sexual orientations and gender identities other than straight and cisgender, including but not limited to lesbian, gay, bisexual, trans, two spirit, genderqueer, gender non-conforming, intersex, and queer. At the same time, Egale recognizes and affirms the diversity of experience within the 2SLGBTQI community and strives to ensure that it works effectively to advance the equality rights and interests of all members.

<sup>3</sup> *Canadian Charter of Rights and Freedoms* [*Charter*].

important issues, Egale Canada respectfully submits that, in any comprehensive assessment of privacy within schools and whether the *Charter* applies to school boards, meaningful consideration should be given to the rights, interests, and vulnerabilities of students, including 2SLGBTQI students.

5. Under the umbrella of this overarching submission, Egale offers three more specific points:

- (a) **First**, school boards are “government” under the *Charter* because they possess statutory powers of compulsion over students, including powers to enforce attendance, pursue penalties for non-attendance, and set the curriculum. The mandatory nature of school attendance highlights the importance of ensuring that schools are not *Charter*-free zones.
- (b) **Second**, 2SLGBTQI students and teachers have unique privacy interests within schools that are deserving of protection under the *Charter*. A person’s sexuality or gender identity is undoubtedly at the very heart of their “biographical core”.<sup>4</sup> The value of applying s. 8 of the *Charter* to school boards is significant when considering that, without robust privacy protections, students and teachers could be “outed” without their consent.
- (c) **Third**, in part due to their unique privacy interests, 2SLGBTQI students and teachers are acutely vulnerable to the statutory powers of compulsion exercised by school boards. School boards and principals may make decisions relating to specific 2SLGBTQI-focused learning materials, Pride programming, and how to support trans students, including whether and how to respect chosen names and pronouns. These decisions have a profound impact on 2SLGBTQI students and teachers.

6. Put simply, the example of 2SLGBTQI students and teachers illustrates how the coercive power of school boards is exactly the kind of state power that the *Charter* was intended to govern.

7. Egale takes no position on the facts of this appeal.

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<sup>4</sup> *R. v. Cole*, 2012 SCC 53 [*Cole*] at paras. [45-48](#).

## **PART II – POSITION ON THE QUESTIONS IN ISSUE**

8. Egale confines its submissions to the second question raised by the Appellant, namely, whether and how the *Charter* applies to school boards.

9. When answering this question, Egale urges this Court to consider the coercive power of school boards and the example of 2SLGBTQI students and teachers within schools. Both of these considerations demonstrate that school boards play a foundational role in Canadian society and are part of “government” for the purposes of s. 32(1) of the *Charter*.

## **PART III – STATEMENT OF ARGUMENT**

### **A. School Boards are “Government” Because They Possess Statutory Powers of Compulsion Over Students**

10. When the relationship between school boards and students is considered, it is clear that school boards are part of “government” and subject to the *Charter*.

11. This Court’s jurisprudence establishes two bases on which the *Charter* can be found to apply to an entity. First, the entity itself can be considered part of “government” under s. 32(1) of the *Charter*. This requires examining the governmental “nature” or “degree of government control” exercised over the entity.<sup>5</sup> If the entity is classified as “government” on these grounds, all of its activities will attract *Charter* scrutiny. Second, even if the entity is not considered “government”, certain of its actions—if truly “governmental in nature”—could be found to fall under the *Charter*.<sup>6</sup>

12. In considering the “nature” of the entity under the first *Eldridge* basis, Egale submits that a key factor should be whether the entity possesses a broad “power of compulsion” or “coercive power of governance”, both of which the *Charter* is intended to govern.<sup>7</sup> In *McKinney*, this Court noted that municipalities “perform a quintessentially government function” because they “enact

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<sup>5</sup> *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at p. 876; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at p. 270 [*McKinney*].

<sup>6</sup> *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at p. 661-662 [*Eldridge*].

<sup>7</sup> Hogg, Peter W., and Wright, Wade K. *Constitutional Law of Canada*, 5th ed. Supp. Toronto: Thomson Reuters, 2021 (updated 2022, release 1), at § 37:8.

coercive laws binding on the public”.<sup>8</sup> And in *Blencoe*, this Court concluded that the Human Rights Commission must comply with the *Charter* in part because “[t]he Commission in this case is ... exercising powers of statutory compulsion”.<sup>9</sup> If an entity’s statutory powers of compulsion are fundamental to its role and permeate most of its functions, this should be a key factor in assessing the entity’s governmental nature. This is because only governmental entities can truly coerce people.

13. Ontario school boards are responsible for the operation of all publicly funded schools in the province. To discharge that responsibility, the Ontario legislature has granted to school boards significant statutory powers of compulsion over students. Among the responsibilities of school boards is ensuring that schools adhere to the provisions of the *Education Act*<sup>10</sup> and its regulations, including enforcing the student attendance provisions of the *Education Act*. Children ages six to 17 in Ontario do not have the choice to attend school or not; rather, their attendance is mandated by the *Education Act*.<sup>11</sup> Should students fail to attend, they are “guilty of an offence” and school boards are empowered to punish the students in the form of fines and other penalties.<sup>12</sup>

14. Children and youth similarly do not have a choice about what they learn in class once they arrive at school<sup>13</sup>—the province develops the curriculum and school boards determine what specific textbooks and learning materials will be offered. In addition, students aged 17 and younger do not control what policies govern the schools they attend, the teachers that are hired, or how students are supervised or disciplined. Each of these important functions lies with the school board.

15. In sum, school boards hold coercive powers of governance over students: school boards hold the statutory authority and power to mandate school attendance and then they dictate what happens in school once the students arrive. Much like the municipalities discussed by this Court

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<sup>8</sup> *McKinney* at p. [270](#) (emphasis added).

<sup>9</sup> *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras. [35-37](#) [*Blencoe*] (emphasis added).

<sup>10</sup> *Education Act*, R.S.O. 1990, c. E.2 [*Education Act*].

<sup>11</sup> *Education Act*, s. [21](#).

<sup>12</sup> *Education Act*, s. [30\(5\)](#).

<sup>13</sup> While students can select courses at more senior grades, the content of all courses is established generally by provincial curriculum and then by school boards and teachers.

in *McKinney*, school boards “perform a quintessentially government function” because they “enact coercive” policies “binding on [students] generally”, for which students “may be punished”.<sup>14</sup> Given the importance of school to the wellbeing of young people, these coercive powers are incredibly important. These powers make clear that, by their very “nature”, school boards are “government” for the purposes of s. 32(1) and that all actions taken by school boards should be subject to the *Charter*.

**B. 2SLGBTQI Students and Teachers Have Unique Privacy Interests that are Deserving of Protection Under the Charter**

16. Although school environments engage numerous constitutional interests of students and teachers, this appeal highlights s. 8 of the *Charter* and the importance of privacy rights and interests within schools. For 2SLGBTQI students and teachers in particular, respect for privacy is critical.

17. Growing up queer is often sadly marked by a period of secrecy and a pressing concern for privacy before “coming out”. These concerns are especially serious at school, where students may discover their sexuality or gender identity and confide in select friends or teachers who, in many cases, are the only people in the student’s life that they can fully trust. Understandably, students may choose to not share this part of themselves with other, less trusted members of the school. If a student or teacher is “outed” before they are ready, it is no overstatement to say that this could compromise their health and safety, and ultimately ruin their school experience.

18. This Court has held that s. 8 of the *Charter* protects a “biographical core” of personal information, including information “which tends to reveal intimate details of the lifestyle and personal choices of the individual.”<sup>15</sup> As this Court wrote in *Thomson Newspapers*, “privacy concerns are at their strongest where aspects of one’s individual identity are at stake, such as in the context of information about one’s lifestyle, intimate relations or political or religious opinions”.<sup>16</sup> This is information that, if revealed, would impact an individual’s “dignity, integrity,

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<sup>14</sup> *McKinney* at p. 270.

<sup>15</sup> *Cole* at paras. 45-48; *R. v. Plant*, [1993] 3 S.C.R. 281 at p. 293.

<sup>16</sup> *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at p. 517 [*Thomson Newspapers*].

and autonomy.”<sup>17</sup> And “[s]tudents are no less deserving” of a right to “being left alone by the government” than adults.<sup>18</sup>

19. Sexuality and gender identity are at the heart of a person’s biographical core. Indeed, Ontario’s *Freedom of Information and Protection of Privacy Act* provides that “personal information” includes “information relating to ... sexual orientation” and “the individual’s name”—which, for trans and gender-diverse individuals, takes on a special significance since official school records may contain the individual’s dead name, rather than their chosen name.<sup>19</sup> As a result, preserving a zone of privacy for queer people in these areas is very important. Courts, tribunals, and commentators have started to recognize this. For example:

- (a) In *P.T. v. Alberta*, the Court of Appeal for Alberta cited evidence about the significant fear and anxiety that students face “from the possibility of “being outed” before they are ready” and held that “[t]he public good presumed in protecting the safety and privacy interests of [children who attend Gay-Straight Alliances in schools] ... is extremely high.”<sup>20</sup>
- (b) In a 2015 decision, a Michigan District Court concluded that the state of Michigan’s restrictive policy for changing gender markers on driver’s licenses violated transgender people’s constitutional rights to privacy under the 14<sup>th</sup> Amendment to the US Constitution as it forced transgender people to be “outed” any time they needed to show their driver’s license, often to complete strangers.<sup>21</sup>
- (c) In *E.N. v. Gallagher’s Bar and Lounge*, the Human Rights Tribunal of Ontario recognized “the unique vulnerabilities and privacy concerns of trans or gender queer applicants” and their interest in not “being publicly outed as trans or gender

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<sup>17</sup> *Plant* at p. [293](#); *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. [56-85](#).

<sup>18</sup> *R. v. A.M.*, 2008 SCC 19 at paras. [33](#), [35](#), [136](#).

<sup>19</sup> *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 at s. [2](#).

<sup>20</sup> *P.T. v. Alberta*, 2019 ABCA 158 at paras. [74](#), [111](#).

<sup>21</sup> *Love v. Johnson*, 146 F.3d 848 (2015).

non-conforming without their consent, and the safety risks and/or risk of discrimination that they feared as a consequence of that action.”<sup>22</sup>

- (d) In its recent report about the New Brunswick government’s policy directive for schools and teachers to refer to students only by the name that appears on the official register rather than the name or pronouns of a student’s choice, the New Brunswick Office of the Child and Youth Advocate highlighted that the “ability to confide in other trusted adults, even if those trusted adults are not their parents, is an important bulwark against the feelings of isolation and alienation that put many trans children at risk.”<sup>23</sup> In response to concerns about “keeping secrets” from parents, the report powerfully noted that “a professional respecting the privacy rights of someone to whom they have a professional responsibility is not keeping secrets from others. They are acknowledging that it is not their secret to share.”<sup>24</sup>

20. Turning to the circumstances in this appeal, imagine if “the log” at issue had contained personal and private details about the gender identity or sexuality of the teachers involved or their students. These fundamental personal details are precisely the kind of information that individuals have a substantial interest in protecting from unwanted government intrusion, including intrusion by school boards. The *Charter* can and should play an important role in protecting this information.

**C. 2SLGBTQI Students and Teachers are Uniquely Vulnerable to the Statutory Powers of Compulsion Exercised by School Boards**

21. Due to their pressing privacy interests and their enhanced vulnerability, 2SLGBTQI students and teachers are acutely affected by the statutory powers of compulsion that school boards wield. This underscores the importance of subjecting the work of school boards to *Charter* scrutiny.

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<sup>22</sup> *E.N. v Gallagher’s Bar and Lounge*, 2021 HRTO 240 at para. 9.

<sup>23</sup> *Report of the Office of Child and Youth Advocate* at 44.

<sup>24</sup> *Report of the Office of Child and Youth Advocate* at 44.

22. This Court has recognized the challenges that queer youth face. For example, in her 2001 dissenting opinion in *Trinity Western*, Justice L’Heureux-Dubé highlighted the unique vulnerability of lesbian, gay, and bisexual youth in Canadian schools:

Because lesbian, gay, and bisexual youth are almost always ‘minorities’ in their own families, they do not enter the school environment with the same level of family support and understanding that other members of minority groups do. Thus, schools are an important second line of support for students dealing with issues of sexuality, and can counter the effect of a hostile family environment.<sup>25</sup> [Emphasis added.]

23. And earlier this year, this Court recognized that “transgender people occupy a unique position of disadvantage in our society” and affirmed the significant public interest in “protect[ing] transgender youth in schools” given their vulnerability.<sup>26</sup>

24. The statutory powers of compulsion that school boards possess have a direct effect on the quality of life for 2SLGBTQI students and teachers. For example, the *Education Act* mandates that school boards shall support students who want to establish and lead activities and organizations that promote the awareness of, and respect for, people of all sexual orientations and gender identities, including Gay-Straight Alliances.<sup>27</sup> School boards also have the responsibility to promote a positive school climate that is inclusive and accepting of all pupils, including pupils of any sexual orientation, gender identity, or gender expression.<sup>28</sup> School principals are further empowered to suspend students if they engage in harmful activity motivated by bias, prejudice, or hate.<sup>29</sup>

25. When school boards (and school principals, who possess delegated authority to perform certain duties under the *Education Act* and its regulations)<sup>30</sup> exercise these powers, they should be subject to *Charter* scrutiny in order to increase protections for vulnerable students. As this Court has recognized, “children are one of the most vulnerable groups in society.”<sup>31</sup> Similarly, this Court

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<sup>25</sup> *Trinity Western University v. College of Teachers (British Columbia)*, 2001 SCC 31 at para. [81](#) [*Trinity Western*], quoting from intervenor submissions of Egale Canada.

<sup>26</sup> *Hansman v. Neufeld*, 2023 SCC 14 at paras. [85](#), [93](#).

<sup>27</sup> *Education Act*, s. [303.1\(1\)\(d\)](#).

<sup>28</sup> *Education Act*, s. [169.1\(a.1\)](#).

<sup>29</sup> *Education Act*, s. [310\(1\)\(7.2\)](#).

<sup>30</sup> *Education Act*, s. [265](#).

<sup>31</sup> *R. v. Sharpe*, 2001 SCC 2 at para. [169](#).

has recognized that focusing on the interests and needs of children—who are part of a “vulnerable segment of society”—aligns with the “articulated values and underlying concerns of the *Charter*”.<sup>32</sup> This Court has also recognized that school boards have a significant impact on students’ rights and on either alleviating or exacerbating this vulnerability. In *Multani*, for example, this Court applied the *Charter* to find that a school board could not prohibit a Sikh student from wearing a kirpan while at school.<sup>33</sup> And in *Chamberlain*, this Court held that a school board’s decision to refuse to authorize the use of books depicting same-sex couples as educational resources was unreasonable.<sup>34</sup>

26. In addition to making decisions about 2SLGBTQI-focused learning materials (as in *Chamberlain*), school boards and principals make decisions about what kind of Pride programming is permitted, how to support trans students, whether to respect the privacy of students who wish to attend Gay-Straight Alliances, how to sanction improper student behaviour that specifically targets 2SLGBTQI students, and what resources to provide to queer teachers. These are precisely the kinds of decisions that can make or break a queer person’s experience in school—and, when combined with the coercive powers of school boards discussed above, these are precisely the kinds of decisions that the *Charter* was intended to govern.

#### **PARTS IV AND V – COSTS AND ORDER SOUGHT**

27. Egale respectfully requests that there be no order of costs for or against them, and that these submissions be considered in the determination of the appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 8<sup>th</sup> day of September, 2023.



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**Bennett Jensen / Brendan MacArthur-Stevens  
Gregory Sheppard**

*Counsel for the Intervener, Egale Canada*

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<sup>32</sup> *Young v. Young*, [1993] 4 S.C.R. 3 at p. 71 per Justice L’Heureux-Dubé in dissent.

<sup>33</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 2 [*Multani*].

<sup>34</sup> *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 at paras. 1-2 [*Chamberlain*].

**PART IV – TABLE OF AUTHORITIES**

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1.	<a href="#"><i>Blencoe v. British Columbia (Human Rights Commission)</i></a> , 2000 SCC 44, [2000] 2 S.C.R. 307	12
2.	<a href="#"><i>Chamberlain v. Surrey School District No. 36</i></a> , 2002 SCC 86, [2002] 4 S.C.R. 710	25
3.	<a href="#"><i>Eldridge v. British Columbia (Attorney General)</i></a> , [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577	11
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14.	<a href="#"><i>R. v. Sharpe</i></a> , 2001 SCC 2, [2001] 1 S.C.R. 45	25
15.	<a href="#"><i>Sherman Estate v. Donovan</i></a> , 2021 SCC 25, 458 D.L.R. (4th) 361	18
16.	<a href="#"><i>Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)</i></a> , [1990] 1 S.C.R. 425, 67 D.L.R. (4th) 161	18

17.	<a href="#"><i>Trinity Western University v. College of Teachers (British Columbia)</i></a> , 2001 SCC 31, [2001] 1 S.C.R. 772	22
18.	<a href="#"><i>Young v. Young</i></a> , [1993] 4 S.C.R. 3, 108 D.L.R. (4th) 193	25

## SECONDARY SOURCES

	Authority	Paragraph References
19.	New Brunswick. Office of the Child and Youth Advocate, <a href="#"><i>On Balance, Choose Kindness: The Advocate's Review of Changes to Policy 713 and Recommendations for a Fair and Compassionate Policy</i></a> , August 15, 2023	1, 19(d)
20.	Hogg, Peter W., and Wright, Wade K. <i>Constitutional Law of Canada</i> , 5th ed. Supp. Toronto: Thomson Reuters, 2021 (updated 2022, release 1)	12

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22.	<a href="#"><i>Education Act</i></a> , R.S.O. 1990, c. E.2, s. <a href="#">21</a> , <a href="#">30(5)</a> , <a href="#">303.1(1)(d)</a> , <a href="#">169.1(a.1)</a> , <a href="#">310(1)(7.2)</a> , <a href="#">265</a> <a href="#"><i>Loi sur l'éducation</i></a> , L.R.O. 1990, c. E.2, s. <a href="#">21</a> , <a href="#">30(5)</a> , <a href="#">303.1(1)(d)</a> , <a href="#">169.1(a.1)</a> , <a href="#">310(1)(7.2)</a> , <a href="#">265</a>	13, 24, 25
23.	<a href="#"><i>Freedom of Information and Protection of Privacy Act</i></a> , R.S.O. 1990, c. F.31, s. <a href="#">2</a> . <a href="#"><i>Loi sur l'accès à l'information et la protection de la vie privée</i></a> , L.R.O. 1990, c. F.31, s. <a href="#">2</a> .	19