Ontario Supreme Court
Hall (Litigation guardian of) v. Powers
Date: 2002-05-10

David L. Corbett and Jonathan W. Strug, for plaintiff.

Peter D. Lauwers, for defendants.

Cheryl Milne and Sara Copley, for intervenors Canadian Foundation for Children, Youth and the Law.

R. Douglas Elliott and Victoria Paris, for intervenors The Coalition in Support of Marc Hall.

Paul Rouleau and David Stratas, for intervenors Ontario Catholic School Trustees' Association.

Paul J.J. Cavalluzzo, for intervenor Ontario English Catholic Teachers' Association.

[1] R. MACKINNON J.:—The plaintiff seeks an interlocutory injunction restraining the defendants from preventing his attendance with his boyfriend at his high school prom on May 10, 2002.

The Parties/Background

[2] The plaintiff is a Roman Catholic 17-year-old Oshawa high school student currently attending Grade 12 at Monsignor John Pereyma Catholic Secondary School. This has been his school since Grade 9 and, prior to that, he attended a Catholic elementary and junior high school. Mr. Hall has identified himself to his parents, his friends and his school peers as having a homosexual orientation.

[3] The school holds an annual prom, which is an off-site party and dance held for and in honour of the Grade 12 students. It is a significant social event in the lives of those students as it marks the end of their formal education at that school. It is a school event, organized by a committee of students but supervised by school teachers who ensure security. The Grade 12 students this year range in age from 16 to 18 years, and none are married. All students wishing to buy tickets to the prom must submit for school approval the names of those with whom they intend to attend. The school requires this information for the purposes of knowing who is present at the function, of having contact information for those in attendance and of preventing known troublemakers from attending.

[4] About a year ago, Mr. Hall first raised with one of his teachers his wish to bring his boyfriend to the prom this spring. He understood that his teacher would be discussing his request with the school principal. His teacher counselled him that he must follow the Church's teachings guided by his individual conscience. His teacher did not tell him whether he should or should not bring Mr. Dumond, who has been his boyfriend for about one year, as his date. On February 25, 2002, Principal Powers denied Mr. Hall permission to attend the prom with his boyfriend. The principal reasoned that interaction at a prom between romantic partners is a form of sexual activity and that, if permission were granted to Mr. Hall to attend the prom with his boyfriend as a same-sex couple, this would be seen both as an endorsement and condonation of conduct which is contrary to Catholic church teachings. On April 8, 2002, the School Board refused to reverse the principal's decision.

[5] The defendant Board exists to provide education in its schools in a manner consistent with the teaching of the Roman Catholic Church. The defendants argue that, charged as they are with the statutory responsibility of managing this Catholic school, their approval of Mr. Hall's request would have been contrary to their understanding of Catholic beliefs. They also submit that the plaintiff's motion should be dismissed because their decisions are both protected by s. 93 of the *Constitution Act, 1867* and an appropriate exercise of freedom of religion under s. 2(*a*) of the *Canadian Charter of Rights and Freedoms.*

The Intervenors

[6] The intervenor Canadian Foundation for Children, Youth and the Law is an organization promoting the rights of children and youth. It supports Mr. Hall in his position, arguing that children and youth in Canada hold rights as individuals in and of themselves, not at the discretion or through the benevolence of their parents or those standing in their place. It points out both that schools have a duty to foster a respect in their students for the constitutional rights of all members of society and that *The Ontario Schools Code of Conduct* (promulgated under s. 301 of the *Education Act,* R.S.O. 1990, c. E.2) mandates that all school members treat others fairly regardless of "…religion, gender sexual orientation, age or disability".

[7] The Coalition in Support of Marc Hall is a large and diverse group of organizations including the Public Service Alliance of Canada, Canadian Auto Workers Union, Canadian Aids Society, Canadian Federation of Students, and The Coalition for Lesbian and Gay Rights

in Ontario. It supports Mr. Hall, arguing, *inter alia,* both that the Board has clearly discriminated against him in violation of his s. 15 *Charter* rights and that the Board's actions are not justified under s. 93 of the *Constitution Act, 1867.*

[8] The Ontario Catholic School Trustees' Association is a group comprised of members from 29 Catholic Ontario Separate School Boards responsible for educating over 600,000 Ontario students. It supports the Board's position, arguing, *inter alia,* that the principal's decision was not personally targeted against the applicant or against homosexuals. It analogizes that if a student in the school tried to bring a married person as a date to the prom, that activity would not be permitted either as it is considered immoral in the eyes of the church and could not under any circumstances culminate in the sacrament of marriage. It urges that it is in the public interest to uphold the decisions of the principal made in the exercise of his statutory duties.

[9] The Ontario English Catholic Teachers' Association is a professional association which has, since 1944, represented separate school teachers in Ontario. This Association's members are responsible for the front line work in ensuring, among other matters, that all students, including those with gay and lesbian orientation, are treated with respect, dignity and fairness. It does not take a position on the ultimate granting of an injunction but rather confines its participation to the first step of the legal test for an injunction—the question of whether there is a substantial legal issue to be tried. It supports Mr. Hall in this regard.

[10] The submissions of all intervenors were at all times full, fair, focused and of considerable assistance to the court.

The Test for Granting an Interlocutory Injunction

[11] The Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311 at pp. 333-34, 111 D.L.R. (4th) 385 at p. 400 mandated a three-stage test to apply when considering whether to grant an interlocutory injunction. As applied to the case at bar, that test can be summarized as follows:

A. Is there a serious issue to be tried? The court must be satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of the court in making the order sought prior to trial.

B. Will the applicant suffer irreparable harm if the interlocutory injunction is not granted?

C. Does the balance of convenience favour granting the relief. This can also be stated as follows—which party will suffer greater harm from the court granting or refusing to grant the interlocutory remedy pending a trial decision on the merits?

[12] The test should not be considered as a step-by-step formula where each factor is to be considered as an obstacle which must be overcome before moving on to the next obstacle. Rather, the preferable approach is for all three factors to be considered, and the collective impact of those factors determines the result.

[13] In both his written and oral submissions, counsel for the plaintiff has demonstrated to me that Mr. Hall's case is neither frivolous nor vexatious. There is Ontario authority for a proposition that a plaintiff bears a higher onus in cases where the granting of the injunction in effect gives him the ultimate relief which is sought. This is not the case at bar. It is true that Mr. Hall's immediate interest is in being permitted to attend this Friday's prom with his boyfriend. However, the substantive thrust of his claims for trial, as pleaded, are for trial court declarations that his *Charter* rights have been violated. Included among the matters in issue for an eventual trial, if pursued, will be the question of whether the School Board's decision falls within its power to make decisions with respect to denominational matters and thus is protected under s. 93(1) of the *Constitution Act, 1867* and whether the Board's decision violates individual human rights protected under the *Canadian Charter of Rights and Freedoms,* including the right to be free of discrimination on the basis of sexual orientation and age.

Applying the Injunctive Test

A. Serious issue

[14] For reasons that follow, I am satisfied that the applicant has demonstrated that there is a serious issue to be tried—in the sense of a case with sufficient legal merit to justify the extraordinary intervention of this court in making the order sought before trial. In my review I was required to consider in a preliminary way many of the issues that may ultimately be for determination by the trial court after argument and in much greater detail and with much greater time for reflective thought.

Section 15 of the Charter

[15] School is a fundamental institution in the lives of young people. It often provides the context for their social lives both in and outside of school hours. Recreational activities such as sports, clubs and dances, which are important in the development of a student's development, are often experienced within the school setting. Exclusion of a student from a significant occasion of school life, like the school prom, constitutes a restriction in access to a fundamental social institution.

[16] When, as here, a publicly funded School Board establishes and implements policies of general application, it is subject to the *Charter.* Both the principal and the Board purported to act on a matter of policy to enforce Roman Catholic teachings and, in doing so, have promulgated a policy of general application applicable to any students wishing to bring a same-sex date to the prom. This engages s. 15 of the *Charter* which provides that:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on… religion, sex, age…

[17] The Supreme Court of Canada held in *Egan v. Canada,* [1995] 2 S.C.R. 513 at pp. 600-01, 124 D.L.R. (4th) 609 that:

> The historic disadvantage suffered by homosexual persons has been widely recognized and documented… They have been discriminated against in their employment and their access to services… [T]he hatred which some members of the public have expressed towards them has forced many homosexuals to conceal their orientation.

[18] The social history evidence before me clearly discloses that gay men and lesbian women have been treated as less worthy and less valued than other members of society. Canadian law has accepted that homosexuality is not a mental illness or a crime but rather an innate characteristic not easily susceptible to change. Stigmatization of gay men rests largely on acceptance of inaccurate stereotypes—that gay men are mentally ill, emotionally unstable, incapable of enduring or committed relationships, incapable of working effectively and prone to abuse children. Scientific studies in the last 50 years have discredited these stereotypes.

[19] In my view, the clear purpose of s. 15 is to value human dignity in a free society where difference is respected and equality is valued. The praiseworthy object of s. 15 of the *Charter* is to prevent discrimination and promote a society in which all are secure in the knowledge

that they are recognized as human beings equally deserving of concern, respect and consideration.

[20] In *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497 at p. 529, 170 D.L.R. (4th) 1, Iacobucci J. summarized the purpose of s. 15(1) as follows:

> It may be said that the purpose of section 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, *or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society.*

[Emphasis added]

[21] In *Miron v. Trudel,* [1995] 2 S.C.R. 418 at pp. 486-87, 124 D.L.R. (4th) 693, McLachlin J. (as she then was) wrote:

> These grounds (of discrimination) serve as a filter to separate trivial inequities from those worthy of constitutional protection. They reflect the overarching purpose of the equality guarantee in the *Charter*—to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity or circumstance.

[22] Counsel for Mr. Hall argues that one's right to be protected from discrimination means the right to be different, to be accepted as different, and to have equality of treatment that embraces and honours that difference.

[23] The Church's Catechism, in three paragraphs, first declares that homosexuality is contrary to natural law and can under no circumstances be approved, but goes on to direct both that homosexuals should be accepted with respect, compassion, and sensitivity and also that every sign of unjust discrimination should be avoided. There is, on the material before me, a substantial diversity of opinion within the Catholic community regarding the appropriate pastoral care and the practical application of [the] Church's teachings on homosexuality. This is apparent from various initiatives to develop resources: to provide Catholic educators with appropriate responses to gay and lesbian youth; to educate both Catholic students and the

broader school community about difficulties faced by homosexual youth in Catholic high schools; and to develop discussion themes to build respect for homosexuals. There is no evidence of a single position within the Catholic faith community about what constitutes the most appropriate pastoral response to this issue. Although the Catechism states that "homosexual acts are intrinsically disordered", the material before me demonstrates a significant range of Catholic opinion both on what constitutes a homosexual act and also on whether only homosexual genital contact is prohibited or whether other kinds of physical acts are also prohibited.

[24] "Dating" is an accepted aspect of social interaction whether it be for fun, for romance, for personal growth, for interaction skills, or for seeing oneself as an individual accepted in the social milieu of other persons. Mr. Hall is clear that he and Mr. Dumond are partners in a relationship of some duration, just as some of the others at the dance will be there with their partners in a relationship of some duration.

[25] There is clearly a courtship aspect to the prom but that event is not solely about physical intimacy leading to sex. Many students, some without regular boyfriends or girlfriends, attend a prom to have fun with their friends and to dance. They are at differing phases of sexual experience. The school does not inquire into whether those students attending the prom have had sex with their dates in the past, whether they intend to do so on prom night, or whether they intend so thereafter. These are private matters appropriately left to the students themselves. Future decisions about marriage and children will have no connection with attendance at the Grade 12 prom. The prom is not a transition into marriage or pre-married life. Rather, it is clearly a celebratory cultural and social event of passage from high school.

[26] It is important to note that the prom in question is not part of a religious service (such as a mass), is not part of the religious education component of the Board's activity, is not held on school property, and is not educational in nature.

[27] The Supreme Court of Canada in *Trinity Western University v. British Columbia College of Teachers,* [2001] 1 S.C.R. 772, 199 D.L.R. (4th) 1 held that "[t]he freedom to hold beliefs is broader than the freedom to act on them" and that "[n]either freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute" (p. 775 S.C.R.). At the heart of the *Trinity Western (supra)* decision lies a distinction between holding a discriminatory view and actively discriminating against someone. In Canada we are permitted

to hold views that are in conflict with public policy, but we are not permitted to act upon discriminatory views in prescribed fields of endeavour when the result is discriminatory treatment of others. Counsel for Mr. Hall argues that it is inconsistent to accept people as homosexuals and, at the same time, to suppress all activity connected to their homosexuality. He characterizes the position of Mr. Hall's church as "It's okay to be gay—just don't act gay."

[28] The School Board points out that Catholic schools are not the same as non-denominational public schools. The education that takes place there is one of the central means by which the Roman Catholic Church accomplishes its mission—the nurturing and development of young persons in a Christian community so that Catholic values, Catholic life and Catholic faith become integrated in their students' lives. The material demonstrates that a Catholic education involves the development and inculcation of knowledge and values as viewed from the perspective of the religious believer. Publicly funded Catholic schools both develop particular guidelines, texts and curricula and also employ teachers who are expected to teach the Catholic faith. Religious celebrations take place at these schools. Catholic School Boards are exclusively composed of Catholic trustees elected by Roman Catholic School supporters and are permitted to take matters of religious faith into account in hiring teachers and in setting and enforcing policy. A principal's duties under the *Education Act,* including the duty to maintain discipline are carried out with a Catholic orientation. But does this constitutionally protected activity permit a principal to impinge on a student's freedom of expression and equality rights?

[29] The evidence filed by the defendants demonstrates that the sacrament of marriage in the Roman Catholic Church is central to a Roman Catholic understanding of sexual bonding and sexual conduct. Courtship and romantic liaisons progressing towards marriage are permitted but premarital sex is not approved. The Board argues that in developing and applying policy, Catholic schools must apply the basic convictions of their faith, including those concerning courtship and romantic liaisons. But is dancing a sexual conduct? Is dancing at the prom a form of sexual activity leading to marriage?

[30] Bishop Meagher has Archdiocese hierarchical responsibility, *inter alia,* for Durham Region. One of his designated religious duties is to interpret the teachings of the church. It was the Bishop's clear view that giving permission to a 17-year-old boy to take another male as his date to the prom would be giving a "clear and positive approval not just of the boy's

‘orientation’ but of his adopting a homosexual lifestyle”. In the Bishop’s view, matters had developed to a point where a “concerted effort” was being made in this case to influence the Catholic school system to approve of a homosexual lifestyle. His position was that “acceding to Marc Hall’s demand would have given his intended behaviour the imprimatur of both the principal and the School Board, contrary to the teachings of the Catholic Church.” He asserted that the Bishop’s view was authoritative and determinative of the matter. The Board’s decision was taken by those informed by Catholic principles and, it was argued, was well within the sphere of denominational decision-making protected by s. 93. The Bishop’s affidavit asserted that it was “an authentically Catholic position”. But the evidence before me indicates it is not the only Catholic position, nor is there any evidence that it is the majority position. Nevertheless, where such a decision is made *bona fide* and within [a] protected sphere, is it insulated from *Charter* scrutiny?

[31] It is not the task of a civil court to direct the principal, the Board, the Roman Catholic Church or its members, or indeed any member of the public as to what his or her religious beliefs ought to be. The separation of church and state is a fundamental principle of our Canadian democracy and our constitutional law. Debates as to what the Catholic faith should require on the issue of homosexuality ought generally to be resolved within the Roman Catholic Church and not in a court of law. But I find that Mr. Hall is entitled in this court to question the correctness of the statement in the defendant’s materials that Catholic teachings and Board policy in fact proscribe “homosexual behaviour” and a “homosexual lifestyle” so as to justify prohibiting Mr. Hall from attending his prom with Mr. Dumond. If individuals in Canada were permitted to simply assert that their religious beliefs require them to discriminate against homosexuals without objective scrutiny, there would be no protection at all from discrimination for gays and lesbians in Canada because everyone who wished to discriminate against them could make that assertion.

[32] It seems to me that it is clearly open to a trial court to find that, in coming to the decision that he did, Principal Powers unjustly discriminated against Mr. Hall in violation of his s. 15 *Charter* rights. It is open to a trial court to find that Mr. Hall was not treated equally because, unlike his heterosexual student peers, he is not free to bring the date of his choice and to dance with him at the prom.

[33] In coining to the conclusion that I have that there is a serious issue to be tried, I note that the Ontario Court of Appeal in *Reference re Act to Amend the Education Act (Ontario)* (1986), 53 O.R. (2d) 513 at p. 576, 25 D.L.R. (4th) 1 (C.A.) wrote:

> This conclusion does not mean, and must not be taken to mean that separate schools are exempt from the law or the Constitution. Laws and the Constitution, particularly the *Charter,* are excluded from application to separate schools only to the extent that they derogate from such schools as Catholic (or in Quebec, Protestant) institutions. It is this essential Catholic nature which is preserved and protected by s. 93 of the *Constitution Act, 1867* and by s. 29 of the *Charter. The courts must strike a balance, on a case-by-case basis, between conduct essential to the proper functioning of a Catholic school and conduct which contravenes such Charter rights as those of equality or s. 15 or of conscience and religion in s. 2(a).*

[Emphasis added]

Section 93 of The Constitution Act, 1867

[34] Ordinarily, a finding of a s. 15 *Charter* breach, or the likelihood of same, would be a sufficient basis to pass the first leg of the injunctive test. However, in the case at bar the defendants are a Catholic School principal and Board. Accordingly, the protections under s. 93 must be considered in order to determine whether the violations of the plaintiff's *Charter* rights were justified. The onus of demonstration is on the defendants.

[35] Section 93 provides as follows:

> 93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:
>
> > (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union.

[36] The Ontario Court of Appeal in *Ontario English Catholic Teachers Association (Branch Affiliates) v. Dufferin-Peel Roman Catholic Separate School Board,* [1999] O.J. No. 1382, 172 D.L.R. (4th) 260 held at para. 19, p. 268 D.L.R. that:

> There are two stages to the constitutional analysis of the interpretation of s. 93(1). Initially, one must determine whether there was a right or privilege enjoyed by a particular class of persons by law at the time of Confederation. If so, one must go on to the second stage of the analysis which is to determine whether the legislation at issue prejudicially affects this right or privilege: *Quebec Association of Protestant School Boards v. Attorney General of Quebec* (1993), 105 D.L.R. (4th) 266 (S.C.C.) at pp. 306-307. Within the first stage of the analysis concerning s. 93(1) one must answer two questions. First, what was the extent of the power of the Trustees at the time of

> Confederation? Second, in what measure is this power a "Right or Privilege with respect to Denominational Schools": *Greater Montreal Protestant School Board v. Quebec (Attorney General),* [1989] 1 S.C.R. 377 at p. 405.

[37] The clear purpose of s. 93 was to provide a firm protection both for Roman Catholic education in the Province of Ontario and for Protestant education in the Province of Quebec. This section was a fundamental part of the Confederation compromise.

[38] Section 29 of the *Charter* provides that:

> 29. Nothing in this *Charter* abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

[39] *Adler v. Ontario,* [1996] 3 S.C.R. 609, 140 D.L.R. (4th) 385 holds that it is only the right guaranteed under s. 93 and the existence of s. 93 itself which are immunized from *Charter* scrutiny. This does not mean that the *Charter* does not apply to separate schools generally. The Supreme Court of Canada endorsed a purposive approach to the s. 93 test, whereby the focus is on the broader purposes and intentions of both the legislature and legislation in 1867.

[40] In *Reference re Bill 30, Act to amend the Education Act (Ontario),* [1987] 1 S.C.R. 1148, 40 D.L.R. (4th) 18, Wilson J. held that s. 93 acted to freeze the protected rights of Catholic schools as at 1867. There was no explicit statutory right of either Catholic Boards or common school Boards in 1867 to hold school dances or to control those who could or could not attend those dances. The current *Education Act* of Ontario in its co-instructional activities sections now gives Boards that explicit authority.

[41] The defendant Board argues an implicit or inherent right to regulate those who can attend school dances based on denominational concerns under the generic umbrella of school management. "Management" in its ordinary sense is broad enough to encompass absolutely anything and everything that happens in a school system. If the Board's view was correct, then s. 93 would mean that Catholic schools had unfettered authority to do whatever they like on any matter. That is not the law. In the *Reference re Bill 30* case (*supra*) Wilson J. held that Catholic schools' powers of management included the duty to provide education to those of school age and the limited power to determine the subject matter taught. Catholic schools today remain subject to inspection by provincial officials and to direction from the Ministry of Education. "Management" within the meaning of the *Scott Act,* S. Prov. C. 1863, 26 Vict., c. 5 (the educational legislative statute in effect in Ontario in 1867) did not contemplate the

regulation of students in their extra-curricular activities. The current *Education Act* is highly detailed in that regard. In 1867, homosexual activity was viewed both as a crime and as a sickness. Today it is viewed as neither. Canadians' understanding of human behaviour and of its people has changed over the last 135 years.

[42] It is obvious that the educational system of this Province is not frozen in time. Educational methods change. There is clear authority for the proposition that s. 93 does not purport to stereotype the Ontario educational system as it existed in 1867—rather it expressly authorizes the provincial legislature to make laws regarding education, subject to the provisions of s. 93. It is difficult to imagine how the legislature of Ontario can effectively exercise that power unless it has a large measure of freedom to meet new circumstances and needs as they arise. Having said that, I keep in mind that courts must be cautious not to allow so much breadth so as to create ambiguity which can distort the true meaning of the Constitutional section. It is clear that the purposive approach to statutory interpretation is not to be used to expand the original purpose of the protecting section.

[43] The proper approach is to look at the rights as they existed in 1867 but then to apply 2002 common sense. In 2002, a School Board's legal authority (whether public or separate) is part of our provincial public educational system which is publicly funded by tax dollars and publicly regulated by the province. The United States Supreme Court in *Bob Jones University v. United States,* 461 U.S. 574 recognized that the state has a right to insist that public funds will not be used to subsidize discriminatory practices, even where it is asserted that those discriminatory practices are founded on sincere religious beliefs. In *Trinity Western (supra),* our Supreme Court acknowledged the right of provincial governments to insist on a policy of non-discrimination, including non-discrimination on the basis of sexual orientation, in provincially regulated schools in British Columbia. Unlike the private university in that case, the defendant Board is, in law, a religious government actor. Even schooling that is not funded by the government must still respect the right of the province to insist on certain minimal requirements in the education of all students.

[44] The question is this: Does allowing this gay student to attend this Catholic high school prom with a same-sex boyfriend prejudicially affect rights with respect to denominational schools under s. 93(1) of the *Constitution Act, 1867?*

[45] I find the answer to this question is “no” because, among other reasons, the evidence demonstrates a diversity of opinion within the Catholic community on pastoral care regarding homosexuality, such that it is not clear what conduct is necessary to ensure that rights with respect to denominational schools are not prejudicially affected.

[46] In addition, it is my view that Principal Powers’ decision was not justified under s. 93, both because the specific right in question was not in effect at the time of Union in 1867 and because, objectively viewed, it cannot be said that the conduct in question in this case goes to the essential denominational nature of the school.

[47] The defendants have not demonstrated to me that the s. 93 protection justifies a s. 15 *Charter* breach. I am not satisfied that regulation of this particular conduct is necessary for the preservation of the school’s denominational nature. I am not satisfied that the right was in effect at the time of Union in 1867.

Section 1 of the Charter

[48] This section guarantees our rights and freedoms as set out in the *Charter* subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Under the s. 1 analysis, the court must consider whether the school restriction on Mr. Hall evidences a rational connection to a pressing and substantial objective, whether it minimally impairs his rights, and whether it is proportionate.

[49] Nowhere in the materials do I find documentary evidence that establishes that same-sex dancing is sinful or sexual under Catholic dogma. Rather, the Catechism calls for non-discrimination and mentions nothing about same-sex dancing. In my view a fully informed ordinary citizen would consider public dancing, fully clothed under the supervision of teachers, to be chaste behaviour. At public events, family members often dance together with one another without religious objection. Though dancing can be sexually expressive, it is not necessarily so. It cannot fairly be equated with having sex. I keep in mind that the role of a school is to enlighten and guide students—not to control their private thoughts or behaviour. I am not persuaded by the courtship distinction made by Dr. Cere and, in my view, there is no demonstrated rational connection in law. Even if I were wrong and the Bishop does have authority to articulate new, previously undocumented doctrine, it has not been done here with minimal impairment to Mr. Hall’s rights. School rules against inappropriate behaviour can be

fairly enforced against all students without banning Mr. Dumond. The Board could have counselled Marc on his Church's teachings about the sinful nature of all premarital sexual activity (heterosexual or homosexual) and about the sinful nature of homosexual genital contact. Like the B.C. College of Teachers in the *Trinity Western* case (s*upra*), the Board failed to consider less restrictive options that would have given due weight to the plaintiff's rights. No objective observer would then have been confused about the Board's public position on homosexuality and no reasonable, fully informed Canadian would then have understood the Board to be condoning or promoting the proscribed activity. The Board's decision, therefore, does not just minimally impair Mr. Hall's rights.

[50] Finally there is the question of proportionality. In order to ensure that education is properly delivered in its schools, the Board has a number of measures at its disposal to immerse its students in the Catholic faith—including control over religious curriculum and over the Catholic character of its employed teachers. If Mr. Hall is permitted to attend the prom as he asks, it cannot fairly be said that any infringement of the Board's s. 93 and *Charter* rights and the rights of members of the Catholic faith community are permanent. By comparison, Marc Hall is permanently refused his choice of prom date outright on the grounds of his sexual orientation. The restriction on Mr. Hall's activities is not proportionate. There is no s. 1 defence made out.

B. *Irreparable harm*

[51] This term refers to harm that cannot be properly compensated in damages. If Mr. Hall is excluded from participation on May 10, 2002, he will forever lose that opportunity with his school peers. Although damages are theoretically possible in *Charter* cases, generally a *Charter* claimant is entitled to only a declaration or damages for breach.

[52] The record before me is rife with the effects of historic and continuing discrimination against gays. I take into account on this leg of the injunctive test not only the demonstrated harm to Mr. Hall but also the demonstrated compelling public interest in the granting or refusing of the relief sought. "Public interest" in this regard includes not only societal concerns but also the particular interests of the parties. I view this approach as consistent with that taken by Sopinka and Cory JJ. in *RJR-MacDonald v. Canada (supra)* at p. 344 S.C.R.

[53] The evidence in this record clearly demonstrates the impact of stigmatization on gay men in terms of denial of self, personal rejection, discrimination and exposure to violence. In Ontario, this stigma has been ameliorated by the inclusion of sexual orientation in the Ontario *Human Rights Code,* R.S.O. 1990, c. H.19 as a prohibited ground. The cultural and social significance of a high school prom is well established. Being excluded from it constitutes a serious and irreparable injury to Mr. Hall as well as a serious affront to his dignity.

C. *Balance of convenience*

[54] This third branch of the injunctive test considers relative hardship between the parties. My decision will finally determine whether in fact Mr. Hall goes to the prom but will not, as a matter of law, finally determine either whether he is entitled to trial declaratory relief under the *Charter* or whether the defendants are entitled to continue to permit same-sex couples to attend only selected school social events in the future. The focus at this stage of the injunctive test is on the balancing of risk of harm to the defendants inherent in granting remedial relief to the plaintiff before the merits of this dispute can be fully explored at trial—against the risk that the plaintiff's fights will be significantly impaired while awaiting trial. In this case a serious constitutional issue is involved, and, as such, the public interest is a special factor which I have considered in assessing the balance of convenience: *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832,* [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321.1 note that Mr. Hall first raised the prom issue with his teacher about a year ago and once he received a response from Principal Powers, he took reasonable steps to have the matter Board reviewed. Once the Board made its decision, he took immediate legal action.

[55] It seems to me that the effect of an injunction on the defendants and on other members of the Catholic faith community will be far less severe than the effect on Mr. Hall and on lesbian and gay students generally if an injunction is not granted. An injunction will not compel or restrain teachings within the school and will not restrain or compel any change or alteration to Roman Catholic beliefs. It seeks to restrain conduct and not beliefs. As such, it does not impair the defendants' freedom of religion. Neither the defendants nor any other Canadian need adjust their beliefs regarding lesbian women and/or gay men as a consequence of the order sought.

[56] However if the order is not granted, then until trial it will be acceptable for the defendant school to restrict gay and lesbian students from selected school activities on the basis of their

demonstrated sexual orientation. I have already observed that the effects of this sort of exclusion are pervasive, serious and contribute to an atmosphere of self-destructive behaviour among gay youth. The Board can always seek to have its ongoing rights thoroughly protected at trial. Mr. Hall will have no other opportunity to attend his prom after tonight.

Generally

[57] After a full consideration of the mandatory three-stage test and of the collective impact, my view is that an interlocutory injunction should issue. There is an obvious tension between the individual's free expression and equality rights when contrasted against the equality rights and the religious freedom of Catholic schools. In coming to the decision that I have, I have considered that the Board is, in law, a religiously oriented state actor and I have given respectful weight to the public interest in maintaining both the denominational nature of education in Catholic schools and a respect for school principal decision-making authority.

[58] Counsel for the plaintiff also urged me to consider the following issues on the injunctive test:

(a) That there has been a breach of the *Education Act:* A Catholic school is free to adapt documents issued by the Ministry to its use in order to account for its denominational nature. This submission is subsumed in the analysis under s. 93.

(b) That there has been a breach of the Ontario *Human Rights Code* that in turn represents a breach of the *Education Act:* Section 19(1) of the *Human Rights Code* provides that that Code is not to be construed so as to adversely affect any right or privilege respecting separate schools enjoyed by separate school Boards or their supporters under the *Constitution Act, 1867* and the *Education Act.* In any event, a civil action based on the violation of the Ontario *Human Rights Code* is not permitted, nor is injunctive relief available for a breach of the Code.

(c) That there has been a breach of fiduciary duty by the school: I am not at all persuaded, in the limited time available to me to consider it, that this concept has any application to the facts at bar.

(d) That there has been a breach of the plaintiff's freedoms of expression and association contrary to ss. 2(*b*) and (*d*) of the *Charter.* Both parties in this case assert a multiplicity of

reciprocal s. 2 rights. Having come to the conclusion that I have on the s. 15 issue, it is unnecessary for me to explore those matters at this time. The defendant has the right to assert its own s. 2 and other affirmative defences. It will be for a trial for court to consider both parties' arguable positions. However, for the reasons I have given, the defendants' position on these matters is not determinative of this motion.

Conclusion

[59] The idea of equality speaks to the conscience of all humanity—the dignity and worth that is due each human being. Marc Hall is a Roman Catholic Canadian trying to be himself. He is gay It is not an answer to his s. 15 *Charter* rights, on these facts, to deny him permission to attend his school's function with his classmates in order to celebrate his high school career. It is not an answer to him, on these facts, to suggest that he can exercise his freedom of disassociation and leave his school. He has not, in the words of the Board, "decided to make his homosexuality a public issue". Given what I have found to be a strong case for an unjustified s. 15 breach, he took the only rational and reasonable recourse available to him. He sought a legal ruling.

[60] There are stark positions at each end of the spectrum on this issue. It is one of the distinguishing strengths of Canada as a nation that we value tolerance and respect for others. All of us have fundamental rights including expression, association and religion. Sometimes, as in this case, our individual rights bump into those of our neighbours and of our institutions. When that occurs we, as individuals and as institutions, must acknowledge the duties that accompany our rights. Mr. Hall has a duty to accord to others who do not share his orientation the respect that they, with their religious values and beliefs, are due. Conversely for the reasons I have given, the principal and the Board have a duty to accord to Mr. Hall the respect that he is due as he attends the prom with his date, his classmates and their dates.

Result

[61] An interlocutory injunction will issue restraining the defendants and their agents and all persons having knowledge of this order from preventing or impeding Marc Hall from attending his high school prom with his boyfriend on May 10, 2002. The defendants have undertaken to the court not to cancel the prom in the event that I granted the plaintiffs request [for] relief and I accordingly make no further order. The defendants have also agreed that the plaintiff is not

required to enter into the usual injunction damages undertaking and accordingly none is ordered.

Application granted.