Alberta Doctors' Digest

Protecting under-18s from themselves?

In February, the Government of Alberta advised that by the fall of this year various guideline and policy changes would be carried out to prevent, among other things, hormone therapies, top and bottom surgeries and puberty blockers for children under 18 years of age. These changes will also affect schools by requiring them to notify parents and obtain consent if a child 15 and under wishes to alter their name or pronouns. Students 16 or older would not need permission, but schools nonetheless would be required to notify their parents.

The government's justification stems from scientific opinions relating to the safety concerning gender-modification and follows similar political trends in Saskatchewan and New Brunswick. Last year, Saskatchewan introduced *Bill 137*, also known as the *Parents' Bill of Rights*, which has already legislated many of the same policies Alberta seeks to implement.

Naturally, such actions do not come without controversy. A body of scientific evidence contradicts the studies relied upon by Alberta's government, which makes it far from clear that preventing hormone therapies, top and bottom surgeries and puberty blockers is, in fact, in the best interests of young persons seeking gender identity. So the initiative may, in fact, cause more harm than good.

Towards that end, in September 2023, the Saskatchewan UR Pride Centre for Sexuality and Gender Diversity commenced an action challenging the constitutionality of *Bill 137* and was granted an interlocutory injunction enjoining the Government of Saskatchewan from implementing and enforcing the bill until the charter challenge was resolved. A similar course of action already appears imminent in Alberta.

The majority of the battle surrounds the constitutionality of such legislation and whether such policies infringe a child's right to life, liberty and security of person under section 7 of the charter or a child's right to equal protection and benefit of the law without discrimination under section 15.

Of course, legal scholars in Alberta are all too familiar with charter challenges regarding legislation surrounding sexual orientation. In 1991, Delwin Vriend, a laboratory coordinator, was fired from a Christian College in Edmonton after the college became aware of Mr. Vriend's sexual orientation.

At the time, Alberta's human rights legislation, the *Individual's Rights Protection Act*, did not include sexual orientation as a protected ground. Prevented from filing a human rights complaint, Mr. Vriend instead sought a declaration from the court that the *act* violated his equality rights under section 15 of the charter.

Under section 15, the court may rule that a law is discriminatory and in violation of the charter if a claimant can show that the impugned law creates a distinction based on an enumerated or analogous ground, and the impugned law imposes burdens or denies a benefit in a matter that has the effect of reinforcing, perpetuating or exacerbating the disadvantage of a group.

Seven years later, Vriend's case came to the Supreme Court of Canada, where the court concluded that the exclusion of sexual orientation from the *Individual's Rights Protection Act* created a distinction between homosexuals and other disadvantaged groups and a distinction between homosexuals and heterosexuals. This lack of inclusion created a distinction that resulted in a denial of equal benefit and protection of the law.

In other words, the Supreme Court noted that the exclusion of sexual orientation from the act meant that homosexuals who experienced discrimination on the basis of their sexual orientation were denied any recourse through Alberta's human rights legislation (as was the case with Mr. Vriend). As stated by the court, the exclusion sent "a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation." Based on this discrimination, the Supreme Court of Canada concluded that the exclusion violated the charter. In 2000, the *Alberta Human Rights Act* replaced the *Individual Rights Protection Act* and explicitly included sexual orientation as a protected ground against discrimination.

Despite such direction and guidance from the court and legislation, the Alberta government has chosen to move forward with their plans. While a charter challenge can certainly proceed, the government has also not ruled out invoking the charter "notwithstanding clause" pursuant to section 33. (Section 33 states that a province may "… expressly declare in an act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this charter.")

While seldomly used, the notwithstanding clause permits provincial and federal governments to override parts of the charter for a five-year period. The clause's ultimate purpose is to provide final say to elected officials rather than unelected judges. While reference to use of the clause at this time may be political posturing, it is nonetheless a tool available to Alberta's government should the Court intervene in the upcoming legislative changes.

Regardless, Alberta's announcement and the interplay between parental and children's rights has reached centre stage as a topic for the next federal election, where both Prime Minister Justin Trudeau and Conservative Leader Pierre Poilievre have made their stance on the topic clear. While the battle in *Vriend* concluded over 25 years ago, the war of gender politics appears far from over.

With publication of the Alberta legislation expected over the spring, we will provide an update as the situation unfolds.

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