COURT OF APPEAL OF ALBERTA

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STATUS ON APPEAL: APPELLANTS

RESPONDENT: HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

STATUS ON APPEAL: RESPONDENT

INTERVENORS: CALGARY SEXUAL HEALTH CENTRE;
THE EVANGELICAL FELLOWSHIP OF CANADA

STATUS ON APPEAL: INTERVENORS

DOCUMENT: **FACTUM OF THE INTERVENOR,
THE EVANGELICAL FELLOWSHIP OF CANADA**

Appeal from the Decision of
The Honourable Madam Justice J.C. Kubik
Dated the 27th day of June, 2018
Filed the 27th day of June, 2018

FACTUM OF THE INTERVENOR, THE EVANGELICAL FELLOWSHIP OF CANADA

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Schedule "A"
Full Style of Cause

PLAINTIFF/APPLICANT:	P.T., D.T., F.R., K.R., P.H., M.T., J.V., A.S., R.M., UNIVERSAL EDUCATION INSTITUTE OF CANADA, HEADWAY SCHOOL SOCIETY OF ALBERTA, THE CANADIAN REFORMED SCHOOL SOCIETY OF CALGARY, GOBIND MARG CHARITABLE TRUST FOUNDATION, CONGREGATION HOUSE OF JACOB MIKVEH ISRAEL, KHALSA SCHOOL CALGARY EDUCATION FOUNDATION, CENTRAL ALBERTA CHRISTIAN HIGH SCHOOL SOCIETY, SADDLELAKE INDIAN FULL GOSPEL MISSION, ST. MATTHEW EVANGELICAL LUTHERAN CHURCH OF STONY PLAIN, ALBERTA, CALVIN CHRISTIAN SCHOOL SOCIETY, CANADIAN REFORMED SCHOOL SOCIETY OF EDMONTON, COALDALE CANADIAN REFORMED SCHOOL SOCIETY, AIRDRIE KOINONIA CHRISTIAN SCHOOL SOCIETY, DESTINY CHRISTIAN SCHOOL SOCIETY, KOINONIA CHRISTIAN SCHOOL-RED DEER SOCIETY,COVENANT CANADIAN REFORMED SCHOOL SOCIETY, LACOMBE CHRISTIAN SCHOOLSOCIETY, PONOKA CHRISTIAN SCHOOL, PROVIDENCE CHRISTIAN SCHOOL SOCIETY, LIVING WATERS CHRISTIAN ACADEMY, NEWELL CHRISTIAN SCHOOL SOCIETY, SLAVE LAKE KOINONIA CHRISTIAN SCHOOL, YELLOWHEAD KOINONIA CHRISTIAN SCHOOL SOCIETY, THE RIMBEY CHRISTIAN SCHOOL SOCIETY, LIVING TRUTH CHRISTIAN SCHOOL SOCIETY LIGHTHOUSE CHRISTIAN SCHOOL SOCIETY, DEVON CHRISTIAN SCHOOL SOCIETY, LAKELAND CHRISTIAN SCHOOL SOCIETY, 40 MILE CHRISTIAN EDUCATION SOCIETY, HIGH LEVEL CHRISTIAN EDUCATION SOCIETY, PARENTS FOR CHOICE IN EDUCATION, and ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL – WESTERN CANADA
STATUS ON APPEAL:	APPELLANTS
DEFENDANT/RESPONDENT:	HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA
STATUS ON APPEAL:	RESPONDENT
INTERVENORS:	CALGARY SEXUAL HEALTH CENTRE; THE EVANGELICAL FELLOWSHIP OF CANADA
STATUS ON APPEAL:	INTERVENORS

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PART I – FACTS

1. The Evangelical Fellowship of Canada (the "EFC") was granted leave to intervene in this appeal by order of the Honourable Mr. Justice B. O'Ferrall dated October 24, 2018.

2. The EFC takes no position on the facts.

3. The EFC's position is that freedom of religion is broad and to be jealously guarded and that infringements on religious freedom are serious and can have important and potentially irreparable implications. Such implications must be considered when Courts engage religious freedom, even in procedural determinations.

PART II – ISSUES

4. This appeal presents an opportunity for the Court to clarify the role of the *Charter* in requests for interim injunctive relief.

5. The EFC will make submissions on the following issues:

    a) If interim injunctive relief is sought to stop purported religious freedom violations, must the Court consider the implications of prolonged and continued religious freedom violations?
    b) If so, what is the appropriate framework?

6. The EFC will focus its submissions on the second and third branches of the test for injunctive relief, which requires the party seeking injunctive relief to show that they will suffer irreparable harm if the relief is not granted and that the balance of convenience favours granting the injunction.[1]

PART III – STANDARD OF REVIEW

7. Whether the Chamber's judge properly considered and applied the *Charter* is a question of law and is subject to the *correctness* standard.

8. As the supreme law of Canada, the *Charter* is not to be discretionarily applied or adhered to.

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[1] *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, **Book of Authorities of the Appellants ["Appellants' Authorities"], Vol. 3, Tab 28,** at p. 341 ["*RJR*"].

PART IV – ARGUMENT

a) Must the Court consider the implications of prolonged and continued religious freedom violations when determining whether or not to grant injunctive relief?

9. Injunctive relief is mostly sought in private law cases. In constitutional cases however, where the injunctive relief is sought to prevent pending or ongoing *Charter* violations, the Court's analysis must differ.

10. Indeed, in its seminal decision on injunctive relief, the Supreme Court of Canada recognized that injunctive relief sought in a constitutional case is different than in a private law case:

> The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.[2]
>
> […]
>
> In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.[3]

11. The appellants allege that the impugned legislation violates their *Charter* rights. They do not however, seek monetary damages pursuant to section 24 of the *Charter.* Instead, they seek declarative relief, including injunctive relief, so that the alleged *Charter* violations cease.

12. The Supreme Court recognized the role of injunctive relief in *Charter* cases and the implications of not temporarily suspending the application of certain portions of legislation pending a constitutional challenge:

> On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.[4]

13. The appellants allege, *inter alia*, that their *Charter* right to religious freedom under section 2(a) of the *Charter* and their parental rights in education under section 7 of the *Charter* are or will be

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2 *RJR, supra,* **Appellants' Authorities, Vol. 3, Tab 28,** at p. 341.
3 *RJR, supra,* **Appellants' Authorities, Vol. 3, Tab 28,** at p. 342.
4 *RJR, supra,* **Appellants' Authorities, Vol. 3, Tab 28,** at p. 333

violated by certain provisions of the impugned legislation. The issue the Chambers judge ought to have considered, when going through the test set out by the Supreme Court in *RJR*, is what the harm to the appellants' freedom of religion and parental rights would be and whether such harm was irreparable:

> 'Irreparable' refers to the nature of the harm rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.[5]

14. Then, the Chambers' judge ought to have considered the implications for the appellants' *Charter* rights when determining the balance of convenience.

15. The question before this Honourable Court then, is what the nature of the alleged *Charter* violations are and whether those violations constitute "irreparable harm" which "could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application" and "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits."[6] Here, the appellant schools did not propose to bully, intimidate, harass or otherwise malign any student from any sexual orientation or gender identity and so the Chambers' judge had to weigh the harm caused to the appellants or the State, not the students of the school.

Contextualizing the 2(a) and 7 violations

16. Although freedom of religion and parental rights to determine their children's education are two separate *Charter* rights, the EFC approaches them, at least for the purposes of this appeal, as related. For Evangelical Christians, the decision to send one's child to a faith-based school is a religious decision made in the exercise of one's faith.[7] Indeed Canadian jurisprudence has been clear that the exercise of one's religion includes:

    a. Choosing children's education;[8]
    b. Providing education;[9]

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5 *RJR, supra,* **Appellants' Authorities, Vol. 3, Tab 28,** at p. 341.

6 *RJR, supra,* **Appellants' Authorities, Vol. 3, Tab 28,** at p. 341.

7 The Bible: Jeremiah 31:33: "This is the covenant I will make with the people of Israel after that time," declares the LORD. "I will put my law in their minds and write it on their hearts. I will be their God, and they will be my people." (NIV) (see also Mathew 28:19-20, John 14:15, Romans 2:13, Ephesians 6:4 and 1 John 2:3-6).

8 *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, **Appellants' Authorities, Vol. 1, Tab 2,** at p. 345 [*B.(R.)*]; *The Queen v. Jones,* [1986] 2 S.C.R. 284, **Book of Authorities of the Evangelical Fellowship of Canada ["EFC Authorities"], Vol. 1, Tab 1**, at para. 21 [*Jones*]; and *Adler v. Ontario* [1996] 3 SCR 609, **EFC Authorities, Vol. 1, Tab 2,** at para. 2.

c. Studying and learning;[10] and,

d. Moral upbringing.[11]

17. In *R v. Big M Drug Mart Ltd.*, Dickson C.J. defined freedom of religion as follows:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.[12]

18. *R. v. Edwards Books*, Dickson C.J. defined the purpose of section 2(a) of the *Charter*, and freedom of religion as follows:

> The purpose of s. 2(a) is <u>to ensure that society does not interfere with profoundly personal beliefs</u> that govern one's perception of oneself, human nature, and in some cases, a higher or different order of being. <u>These beliefs, in turn, govern one's conduct and practices.</u>[13] [Emphasis added]

19. A review of Canadian jurisprudence demonstrates that the nature and scope of freedom of religion includes the right to manifest those beliefs without societal or State interference, including the right to ensure religious education for one's children.

20. The EFC submits that in addition to considering the nature and scope of the *Charter* right in question, Courts must also consider the context in which that particular *Charter* right exists and is exercised. Indeed, this type of approach was recommended by Lebel J. in his dissenting reasons in *Hutterian Brethren of Wilson Colony v. Alberta.*[14]

21. *Charter* rights exist in related but different contexts. In this appeal, the right to freedom of religion for the Appellants, educational institutions, parents who send their children to such institutions and the children who attend them, exist in a very specific context which must be considered, understood and appreciated in order to properly define the nature and scope of the Appellants' respective right to freedom of religion.

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9 *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, **EFC Authorities, Vol. 1, Tab 3,** at para. 94 ["*Big M*"]; *Loyola High School v. Quebec (Attorney General)*, [2015] 1 SCR 613, **Appellants' Authorities, Vol. 2, Tab 13,** at para. 95 ["*Loyola*"]; *Trinity Western University v. Nova Scotia Barristers' Society,* 2015 NSSC 25, **EFC Authorities, Vol 1, Tab 4,** at paras. 10, 245 **["***TWU v. NSBS***"].**

10 *TWU v. NSBS, supra*, **EFC Authorities, Vol. 1, Tab 4,** at para. 230.

11 *B. (R.), supra*, **Appellants' Authorities, Vol. 1, Tab 2,** at p. 318.

12 *Big M, supra,* **EFC Authorities, Vol. 1, Tab 3,** at para. 94.

13 *R. v. Edwards Books* [1986] 2 S.C.R. 713, **EFC Authorities, Vol. 1, Tab 5,** at para. 97 [*Edwards Books*].

14 *Hutterian Brethren of Wilson Colony v. Alberta*, [2009] 2 SCR 567, **EFC Authorities, Vol. 2, Tab 6,** at para. 187 [*Hutterian Brethren*].

The context of freedom of religion in this appeal

22. The specific context of the exercise of freedom of religion in this appeal is important. The appellants are independent faith-based schools; parents who, for religious reasons chose such schools to educate their children; and, the children who attend the schools in question.

23. The EFC acknowledges the State's interest in setting curricula, promoting learning outcomes for students and even instilling civic virtues in students.[15] Each of those interests, however, are secondary to the rights of parents, as recently noted by the Court of Appeal for Ontario:

> Education of the young is bound to be formative; if the state educates the young, it also forms them, at least in part, and perhaps the major part. However, 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.[16]

24. In the context of this litigation then, the issue that must be considered is whether the alleged violation of the appellants' freedom of religion and parental rights constitutes irreparable harm.

Irreparable Harm

25. In her reasons however, the Chamber's judge dedicates 20 paragraphs to the question of irreparable harm (paras. 19-38). The appellants' religious freedom, parental rights or the impact of not granting the injunctive relief on those *Charter* rights is never mentioned.

26. The Chambers judge considered "ideological information about sexuality and gender identity" (paras. 26-38) but failed to appreciate (or even acknowledge) that the "ideological" view of the appellants was protected by 2(a) of the *Charter.* Indeed, she referred to the affidavits from parents setting out their children's experiences as well as how those experiences conflict with their sincerely held religious beliefs as "anecdotal" or "hearsay".[17]

27. The Chamber's judge acknowledges the evidence of a number of parents that their children were exposed to information or material that caused them concern, but fails to consider the implications, *vis-à-vis* their sincerely held religious beliefs, obligations and practices:

> While I accept that children have received information about sexual orientation and gender identity in the context of GSAs, and accept at face value the deep

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15 *R. v. M. (M.R.)*, [1998] 3 SCR 393, **EFC Authorities, Vol. 2, Tab 7,** at para. 3; *E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893, **Appellants' Authorities, Vol. 1, Tab 5,** at para. 52 ["*E.T.*"].

16 *E.T., supra,* **Appellants' Authorities, Vol. 1, Tab 5,** at para. 65.

17 *PT v. Alberta*, 2018 ABQB 496, **Appellants' Authorities, Vol. 2, Tab 17,** at paras. 26, 28.

> concern expressed by parents over their children's exposure to that information, I cannot form any reliable conclusion that the events as described occurred in the context of a GSA or that the harm described is directly attributable to participation in a GSA or a lack of notification to parents.[18]

28. Indeed, with this acknowledgement, the Chamber's judge goes on to consider the evidence of medical practitioners addressing the psychological or physiological impacts of having children exposed to such materials or information.[19]

29. Not once however, does the Chambers' judge consider the effect such exposure would have on the children's freedom of religion, the schools' freedom of religion or the parents' freedom of religion and parental rights.

30. That is a question that was crucial to determining whether or not failure to grant the injunctive relief sought would result in irreparable harm. The injunctive relief sought was to prevent alleged pending and/or ongoing *Charter* violations.

Balance of Convenience

31. When considering whether the balance of convenience favoured granting the injunctive relief or not, the Chamber's judge devoted three paragraphs in her reasons to explaining why she concluded it did not (paras. 39-41). As with her reasons on irreparable harm, the Chambers' judge made no mention of the religious freedom or parental rights implications. Instead, the Chambers' judge focused solely on statistics related to LGBT children.[20]

32. Here, the Chambers' judge had multiple parents stating that having their children attend or participate in certain activities and be exposed to certain material or information would result in a violation of their and their children's religious freedom. The Chambers' judge was required to take that at face value.[21] The Court is not equipped (or even permitted) to engage in an analysis about whether or not a religious belief is reasonable, appropriate or doctrinally or theologically supported:

> In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept,

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18 *PT, supra,* **Appellants' Authorities, Vol. 2, Tab 17,** at para. 28.
19 *PT, supra,* **Appellants' Authorities, Vol. 2, Tab 17,** at paras. 29-33, 36-37.
20 *PT, supra,* **Appellants' Authorities, Vol. 2, Tab 17,** at paras. 39-41.
21 *Syndicat Northcrest v. Amselem,* [2004] 2 SCR 551, **EFC Authorities, Vol. 2, Tab 8,** at para. 50 ["*Amselem*"].

> "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.[22]

33. The only appropriate response would have been for the Chambers' judge to consider the sincerity of the appellants' religious belief.[23] She did not do so and the sincerity of the appellants' religious beliefs have not been challenged.

34. Nevertheless, that a parent might want to shield their children from certain materials or information in order to discharge their religious obligations and/or practice their faith, has already been recognized as a valid exercise of the rights guaranteed by section 2(a) of the *Charter*.[24]

35. Context matters. And the Chamber's judge failed to consider and appreciate the context of the request for injunctive relief.

b) What is the appropriate framework?

36. If courts are required to consider the 2(a) implications of pending or ongoing *Charter* violations when considering whether failure to grant injunctive relief which would stop the alleged violation would result in irreparable harm, what is the appropriate framework Courts should follow?

37. The EFC submits that the appropriate analytical framework would require the Courts to go through three steps.

Step One: The need to first assess sincerity of belief & interference

38. The EFC submits that the first stage to be followed is to determine the sincerity of the belief being violated and the nature of the interference in question.

39. As the Supreme Court of Canada set out in *Hutterian Brethren*, a claimant must establish sincere belief in a belief or practice that has a nexus with religion and that the challenged measure interferes with the claimant's religious beliefs in a manner that is more than trivial or insubstantial.[25]

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22 *Amselem, supra,* **EFC Authorities, Vol. 2, Tab 8,** at para. 50.
23 *Amselem, supra,* **EFC Authorities, Vol. 2, Tab 8,** at para. 51.
24 *E.T. v Hamilton-Wentworth District School Board*, 2016 ONSC 7313, **EFC Authorities, Vol. 2, Tab 9,** at paras. 77-82
25 *Hutterian Brethren, supra,* **EFC Authorities, Vol. 2, Tab 6,** at para 32.

40. To prove the infringement, a claimant must present objectively established facts on a balance of probabilities using any legal form of proof. However, proving an infringement and proving the absence of other interests are not one and the same. *Charter* claimants need prove only the former. Infringements that are more than trivial or insubstantial exist even in the presence of other interests.

41. In this case, the appellants assert that compelling them (either the institutions, the parents, or the students) to engage in certain activities and make certain declarations is a course of action that is fundamentally inconsistent with a preeminent exercise of their faith.[26] So long as objective facts meeting the standard of a balance of probabilities support the assertion, there exists a *Charter* violation. At this stage, the belief and/or proposed course of action are *prima facie* entitled to protection.

42. In this case, there was no evidence to suggest that the appellants' stated religious beliefs, obligations and practices are not sincere. The Chambers' judge also acknowledged that the secrecy provisions of the legislation resulted in at least some parents' wishes not being honoured.[27] The section 2(a) and 7 *Charter* violations were therefore proved for the purposes of obtaining injunctive relief.

Step Two: The need to assess the context and nature of the harm caused by the alleged *Charter* violation

43. Once a *Charter* infringement is established, the context and nature of harm caused by not granting the injunctive relief must be considered.

44. As noted above, the alleged *Charter* violations here result in:

    a. Parents' religious freedom being violated in that their obligation to raise their children according to their sincerely held religious beliefs is not met;

    b. Parental rights in education being violated in that parents are not aware or in control of their children's education;

    c. Children's religious freedom being violated in that they may be engaged in activities or practices or exposed to materials which are considered, in their religious views, violate their sincerely held religious beliefs and obligations.

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26 Appellants' Factum, at para. 75.

27 *PT, supra,* **Appellants' Authorities, Vol. 2, Tab 17**, at para. 18.

45. The religious and spiritual implications are serious, as noted by the Court of Appeal for Ontario:

> Parents know that the world in general and education in particular can defeat them in transmitting their religious faith to their children, so the stakes are high. It is therefore especially important for the court to attend to the appellant's reasons for believing that his right to freedom of religion has been infringed. In particular, the court must attend to the nature of the interest he is trying to protect and advance – the formation of the character and religious faith of his children.[28]

Step Three: Consideration of the how the *Charter* rights might be protected while maintaining the competing interest

46. The third step is that the Court ought to consider whether the competing interest or objective could still be achieved if the injunctive relief were granted. As Justice Abella observed in *Hutterian Brethren*: "Freedom of religion is a core, constitutionally protected democratic value. To justify its impairment, therefore, the government must demonstrate that the benefits of the infringement outweigh the harm it imposes."[29]

47. The Chambers' judge ought to have considered whether the State's objectives could still be met if she granted the appellants the injunctive relief they sought.

48. The EFC submits that the answer to this question is clear: granting an interim injunction affecting a minority of faith-based schools in the province would have ensured their *Charter* rights are protected, pending the trial on the merits of their *Charter* challenge, while not interfering, in any material way, with the State's objectives. Such a conclusion would not only have been consistent with the facts before her, but also with *Charter* jurisprudence. Again, there was no evidence before the Chambers' judge that the appellant schools sought to bully, intimidate, harass or otherwise malign any student from any sexual orientation or gender identity.

49. The Crown is tasked with regulating and developing policy affecting the provision of education in Alberta. This power however, is still subject to (not paramount to) the *Charter* and must not be used as a *carte blanche* mechanism to limit, restrict and infringe protected religious belief, unless it can be shown to be demonstrably justified in a free and democratic society.[30]

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28 *E.T., supra,* **Appellants' Authorities, Vol. 1, Tab 5,** at para. 78.

29 *Hutterian Brethren, supra,* **EFC Authorities, Vol. 2, Tab 6,** at para. 110.

30 *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11,* at s. 1.

50. Public policy interests must be examined to determine what is actually meant by the public interest on the particular set of facts, whether the nature of that interest should be permitted to infringe a *Charter* right/freedom, and whether the infringement is minimally impairing. In the context of freedom of religion, the broader societal harms of infringing that right must also be considered.[31]

51. As the supreme law of Canada, the *Charter* is not to be discretionarily applied or adhered to. No *Charter* right is absolute, but no *Charter* right should be circumscribed for lack of analysis or for importing balancing considerations as threshold matters.

52. Granting the injunctive relief would have had, at best, minimal impact on the State's ability to achieve the objectives it seeks to achieve with the impugned legislation. At the same time, granting the injunctive relief would have ensured that the appellants' *Charter* rights to freedom of religion under section 2(a) of the *Charter* and parental rights under section 7 of the *Charter* would have been protected pending the adjudication of their *Charter* challenge.

53. Instead, by not granting the injunctive relief, the Chambers' judge produced a scenario where potentially unconstitutional legislation could continue to violate the *Charter* rights of individuals, organizations and communities.

54. The EFC submits that the appropriate analytical framework, when considering whether or not granting injunctive relief which would temporarily eliminate *Charter* violations, is as follows:

    a. The Court determines whether there is a serious issue to be tried;
    b. The Court determines whether not granting the injunctive relief would result in irreparable harm to the applicant;

        i. Here, the Court must consider the nature of the harm and the context in which the *Charter* right at issue is being exercised;

        ii. If the violation centers on freedom of religion, it is appropriate for the Court to consider the sincerity of the applicant's belief, but not the reasonableness or theological or doctrinal foundation of it;

        iii. Can the *Charter* violation be remediated financially? If not, the harm is deemed to be irreparable;

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31 *R. v. N.S.*, [2012] 3 SCR 726, **EFC Authorities, Vol. 2, Tab 10,** at paras 36-37.

c. The Court determines whether the balance of convenience balances granting the injunctive relief or not;

    i. Here, the Court must consider the nature of the *Charter* violation(s) and the impact on the applicant of having their *Charter* right(s) violated continuously until the issue is adjudicated on the merits.

55. The EFC submits that in the case of a pending and/or ongoing *Charter* violation, particularly of a serious religious freedom violation, the harm caused by not granting the injunctive relief would be irreparable to the appellants and the balance of convenience ought to favour the granting of the injunctive relief.

    a. If the applicant seeking the injunctive relief obtains it and is successful at trial, the *Charter* will have been honoured throughout;

    b. If the applicant seeking the injunctive relief obtains it and is unsuccessful at trial, the *Charter* will have been honoured throughout and the State objective will ultimately be reached;

    c. However, if the applicant seeking the injunctive relief does not obtain it and is successful at trial, his or her *Charter* rights will have been unnecessarily violated and in the case of religious freedom and parental rights violations, as is alleged here, there is no way to compensate the applicant for the harm suffered.

56. The default position of the Court must be to preserve and protect the *Charter*. In the same way as an accused in criminal proceedings has the presumption of innocence, the presumption in *Charter* cases must be to that *Charter* violations are presumed to be irreparable, inconvenient and impermissible.

57. Indeed, once faced with a religious freedom claim, the Chambers' judge was required to consider how to best protect it.[32]

58. Unlike the recent cases of *Law Society of British Columbia v. Trinity Western University* and *Ktunaxa*, the Chambers' judge here was not faced with only two options: to either uphold the

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[32] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations),* [2017] 2 SCR 386, **EFC Authorities, Vol. 2, Tab 11,** at para. 60 ["*Ktunaxa*"].

State's objective or preserve the appellants' *Charter* rights.[33] She had an option available which would have preserved the statutory objectives and preserve the appellants' *Charter* rights by granting a temporary injunction suspending few portions of the legislation from application to a small number of schools in the province.

59. The EFC submits that this appeal is analogous to *Loyola* where the Quebec government instituted a curriculum which required a private Catholic school to teach Catholicism from a "neutral" perspective. Loyola argued that doing so violated its freedom of religion and sought an accommodation allowing it to teach world religions in a neutral manner and Catholicism in a catholic manner. In that case, the Supreme Court concluded that the Minister of Education had an obligation to accommodate Loyola's religious freedom and permit the proposed alternative.[34]

60. This case is analogous. The appellant schools do not propose to bully, intimidate, harass or otherwise malign any student from any sexual orientation or gender identity. The Chambers' judge, like the Minister of Education in *Loyola*, ought to have addressed the request for injunctive relief in a manner that accommodated the appellants' *Charter* rights without completely abandoning the legislative objective. In other words, the temporary injunction should have been granted to safeguard the *Charter* rights at issue.

PART V – RELIEF SOUGHT

61. The EFC takes no position on the outcome of the appeal.

62. The EFC asks for leave to make oral arguments not exceeding 10 minutes at the hearing of the appeal.

63. The EFC does not seek costs and asks that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of November 2018.

VINCENT DAGENAIS GIBSON LLP/s.r.l.

Albertos Polizogopoulos
Counsel for the Intervenor,
The Evangelical Fellowship of Canada

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33 *Ktunaxa, supra,* **EFC Authorities, Vol. 2, Tab 11,** at para. 119; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 **Appellants' Authorities, Vol. 2, Tab 12,** at para. 84.

34 *Loyola, supra,* **Appellants' Authorities, Vol. 2, Tab 13,** at paras. 56-58, 62-64, 68-71, 79.

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