

GENDER TRANSITIONING, CANADIAN CATHOLIC SCHOOLS, AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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ABSTRACT

This paper looks at the relationship of Canada's constitutionally protected Catholic separate schools, private religious schools, and transgenderism. It finds that discrimination in refusing to employ teachers on the bases of transgenderism in Canada's constitutionally protected Catholic separate schools in the provinces of Ontario, Saskatchewan, and Alberta, is protected constitutionally as it is based on the bona fide religious belief that attempting to change one's biologically identified sex is religiously prohibited. The challenge for religious schools not constitutionally protected which face the same religious concerns with transgenderism is much more challenging.

I INTRODUCTION

Canadian school boards realize that they must respectfully and supportively attend to their students and teachers who are experiencing gender dysphoria. This can be a daunting task for some as it involves learning uncommon terms previously associated with the medical profession such as gender identity, transgender, cisgender, gender transitioning, and gender expression.¹ The task is even greater for private religious and Catholic separate schools,² which, for religious reasons, cannot accept that the terms male and female relate to any criterion other than biological sex. This paper sketches the legal implications religious schools face when encountering students and employees who are experiencing gender dysphoria and who demand institutional recognition and acceptance of their medical condition.³

Part I defines gender dysphoria and outlines the religious beliefs that prohibit the public manifestations and the undergoing of surgical procedures to address that condition. It then highlights recent human rights cases in which student and teacher claims to accommodate for gender dysphoria have led to conflict in Catholic schools. Part II examines the right of Catholic separate schools to demand, as a constitutional requirement and as a condition of employment, respectively, that an employee not act in public opposition to the institution's religious beliefs on gender dysphoria.

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II PART I

The American Psychiatric Association (APA) defines *gender* as “the public (and usually legally recognized) lived role as boy or girl, man or woman. Biological factors combined with social and psychological factors contribute to gender development.”⁴ It defines *gender dysphoria* as “a conflict between a person’s physical or assigned gender and the gender with which he/she/they identify.”⁵ Its diagnosis of gender dysphoria differs for children, adolescents, and adults, and its treatment involves a complex approach by medical practitioners.

The writers are unaware of any religion that denies that gender dysphoria is a medical condition suffered by individuals. However, due to a certain view of the anthropology of human sexuality, some religions⁶ do not accept the proposition that individuals may choose to be male or female, because it is a religious tenet that one’s sex is defined biologically. Moreover, some religions hold that it is immoral to attempt to change the biological sex of an individual.

A brief description of the Roman Catholic understanding of gender dysphoria follows. We have chosen the Catholic school example because that church has a clear religious understanding of gender dysphoria which suggests how that phenomenon would be administratively addressed in those schools.

A The Catholic Church and Transgenderism

Within Catholic media, the issue of transgenderism is a hot topic with conflicting opinions.⁷ In addressing this issue, Catholic schools may refer to the Catholic Health Alliance of Canada’s guidelines on gender reassignment:

36. All individuals suffering from any form of gender identification difficulties, especially gender dysphoria, are to be seen as children of God and treated with compassionate pastoral care. They are to receive objective counselling respecting the totality and integrity of their personhood in the complexity of their condition and of how they see themselves. Such counselling respects the value of the psychological and spiritual support needed to try to achieve integration in their being. *Surgical interventions, hormonal therapy and referrals for sexual reassignment are inconsistent with Catholic teaching regarding the principles of totality and integrity and thus should not be performed in Catholic facilities* (refer to article 16).⁸ (Emphasis added.)

In accordance with the above guidance, the Archbishop of the Catholic Diocese of Edmonton has stated:

- (a) a person’s sex is a God-given gift bestowed before birth;
- (b) a person’s sex is determined at birth and assessed using indisputable genetic criteria, for example the presence or absence of the Y chromosome in the one-cell zygote;
- (c) a person must live a life true to his or her sexual identity and must not change his or her gender;

- (d) a teacher in a Roman Catholic school discharges an important modelling role for students with whom he or she interacts; and
- (e) a teacher in a Roman Catholic school must witness and live in accordance with fundamental Roman Catholic beliefs and values.⁹

This religious belief greatly influences how transgenderism is dealt with in Catholic schools as evidenced by the following human rights cases.

B Catholic Schools and Transgenderism Human Rights Cases

In the spring of 2013, Tracey Wilson, a 10-year-old transgender student attending Sacred Heart Elementary in Vancouver, British Columbia, was transitioning from a boy to a girl when officials refused to let her use the school's girl's bathroom.¹⁰ As a result, her parents launched a human rights complaint against Catholic Independent Schools Vancouver (CISVA) and Sacred Heart Elementary School. After discussions between the parties, the CISVA issued a policy dealing with transgender issues. The joint press release said,

Doug Lauson, CISVA superintendent, said that Catholic teaching does not recognize that a student can change his or her sex/gender. However, the CISVA is committed to providing an inclusive school environment for its students and reasonable accommodation of students' forms of gender expression. "We expect that this policy will be a practical basis for accommodating students with gender dysphoria, or who express their gender in ways that are different from prevailing stereotypes," said Lauson. "This policy will ensure that Catholic schools are a safe and accepting place for all students." Lauson said that . . . "Had this policy been in place at that time, there would have been a framework to provide Tracey and her family with appropriate support," he said. "We have apologized to Tracey and her family for not being in a position to meet her needs," he said. "This policy will ensure her experience is not repeated."¹¹

In February 2018 a similar case involving a student in Edmonton's Roman Catholic school district came before Alberta's Human Rights Commission. Part of the resolution¹² included the release of the board's new document, "Commitment to Inclusive Communities in Edmonton Catholic Schools."¹³ The preferred course by Catholic schools in these cases was to negotiate a settlement, act pastorally to individual students, and ensure that a policy was in place acknowledging transgender students while providing for their protection and care.

The situation is very different for transgendering Catholic school teachers who publicly challenge the beliefs of the Catholic Church, as evidenced by the case of Jan Buterman (Buterman) and the Greater St. Albert Catholic School District in Alberta.¹⁴ Buterman, a member of the Lutheran faith and a substitute teacher in the district, claimed that because he had advised Catholic school authorities that he had been diagnosed with gender identity disorder and intended to undergo hormone therapy and sexual reassignment surgery, he was no longer eligible to teach in the Catholic school district.

Buterman complained to the Alberta Human Rights Commission that he had been discriminated against on the grounds of gender and disability. The school board denied Buterman's discrimination claim, answering that he was dismissed due to the fact that his decision to undergo gender reassignment was not consistent with the teachings of the Catholic faith. After negotiations between the parties a settlement was entered into which itself became a source of dispute, eventually being decided in favour of the Catholic school board at the Alberta Court of Appeal.¹⁵

In general, it is fair to say that members of the public with religious similar to those of the Catholic faith will have difficulty accepting a purely secular gender-based understanding of that condition being taught in their private religious schools. Indeed, they may claim that teaching gender, not biological sex, is determinative of such issues cannot allow to be taught to their children in schools. We believe that in so far as Canadian law is concerned, Catholic separate schools have a good case for this position, while religious schools which are not constitutionally protected have a much weaker case. We now turn to the legal arguments for Catholic schools and, as an aside, private religious schools.

III PART II

The issue of how to reconcile transgenderism with the Catholicity clause that teachers in Alberta must abide by in their contract is one of the most difficult challenges facing Alberta's Catholic Schools today.¹⁶ The Catholicity clause requires teachers to live and model a Catholic lifestyle which does not permit, among other things, cross-dressing, hormone therapy, or sexual reassignment surgery. The law is well established that the constitutionally protected right to establish a Catholic school necessarily includes the right to maintain the Catholic character of the school and, thus, includes the right to dismiss teachers for denominational cause. This right stems in part from the nature of the relationship between the teacher and the student.¹⁷ The issue engages the entire range of Catholic school constitutional rights, including the rights of management and control, the right to preferential hiring, promotion and dismissal for denominational cause, and the right for permeation of Catholicity in all aspects of the school system.

Catholic schools exist as separate and distinct from public schools because they espouse a fully permeated educational system, a conviction that the Canadian Constitution has recognized as authentic and protected. Thus, living a life in concert with the espoused beliefs of the Catholic Church is a bona fide requirement of the job of Catholic school teachers. They are expected to influence and lead, students by their example regarding the Church's interpretation of Gospel teachings.

To determine whether requiring teachers to follow the moral teachings of a church is a denominational right, the Supreme Court of Canada¹⁸ has established a three-part test known as the *Meiorin* test. First, employers must show that they adopted the standard for a purpose rationally connected to the performance of the job. Second, employers must establish that they adopted the particular standard in an honest and good faith belief that

it was necessary to the fulfilment of that legitimate work-related purpose. Third, employers must prove that the standard is reasonably necessary to accomplish that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

To particularize the above, we now examine the constitutional denominational rights of Catholic separate schools in Alberta, also analyzing in brief how such rights are established and protected in private religious institutions.

A Catholic Separate Schools, the Constitution and the Alberta Act

A foundational Canadian constitutional document is the Constitution Act, 1867,¹⁹ wherein Section 93 reads as follows in establishing constitutional rights in Alberta's separate schools:²⁰

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:

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

When Alberta gained provincial status in 1905, section 93(1) was replaced under the Alberta Act²¹ with three new provisions that read as follows:

17. Section 93 of The British North America Act, 1867, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph:

1. “Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-West Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.”

2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

3. Where the expression “by law” is employed in paragraph (3) of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30; and where the expression “at the Union” is employed, in the said paragraph (3), it shall be held to mean the date at which this Act comes into force.

Section 17(1) added specificity by including protection for both public and separate schools respecting “religious instruction.” In 1982, the advent of the Canadian Charter of Rights and Freedoms,²² by way of section 29, protected the above rights against Charter attack and provided constitutional rights to others.

B The Charter of Rights and Freedoms and the Alberta Human Rights Act

Sections 2(a), 15, and 29 of the Charter of Rights and Freedoms read as follows:

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion; ...

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 race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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.²³

In Alberta, further rights were granted under the Alberta Human Rights Act.²⁴ Section 4 of this Act prohibits discrimination in the area of employment based on the protected grounds of race, colour, ancestry, place of origin, religious beliefs, gender, gender identity, gender expression, age, physical disability, mental disability, marital status, family status, source of income, and sexual orientation.

Both the requirement that all staff follow the moral teachings of the Catholic Church and the ability to dismiss staff for being in breach of those moral teachings give rise to the same question of whether a Catholic school board's conduct would be considered to fall within the constitutional protections granted to separate schools or to be discriminatory under the Alberta Human Rights Act or section 15 of the Charter.

Pursuant to section 93 of the Constitution Act, 1867, and section 17 of the Alberta Act, 1905, separate schools are granted the constitutional right to be established. Section 29 of the Charter of Rights and Freedoms reaffirms and continues the constitutional rights granted to denominational schools, giving those rights precedence over the individual rights protected by other provisions of the Charter. The constitutional rights also render inapplicable any rights granted by the Alberta Human Rights Act to the extent that such rights conflict with the constitutional rights of a separate school board. However, any limitations on the individual rights granted by the Charter or the human rights legislation can only be permitted in cases where dismissals or terminations of employment are based on bona fide denominational causes.²⁵

The courts have determined that the constitutionally protected right to establish separate schools necessarily includes the right to maintain the denominational character of these school along with the right to dismiss teachers for denominational causes.²⁶ In arriving at this conclusion, the courts have examined what rights were available to separate schools as of 1867. As employers, school trustees had the power to hire and dismiss teachers. Because school boards could dismiss for cause, in the cases of denominational schools, cause must be taken to include denominational cause. Serious departures from denominational standards by teachers could not be isolated from their teaching duties.²⁷

In a 1999 case, the Ontario Court of Appeal stated:

In other words [*sic*] one of the means of ensuring the denominational status of education is through the power to hire teachers. In this regard, see the reasons of this Court in *Daly v. Ontario (Attorney General)*, released concurrently with these reasons. The constitutional protection in s. 93(1) applies to the power to hire teachers and, inferentially, the power to promote teachers to the extent that such power is related to maintaining the denominational character of Catholic schools and education. The power to promote teachers has been entrenched only in so far as this power is necessary to maintain the denominational status of education. While the right and privilege of Catholics to a denominational education in s. 93 obviously includes the means and framework in which the right is exercised, the means to achieve that end are not themselves constitutionally guaranteed. Gonthier J. made this clear when he stated in *Reference re Roman Catholic Separate High Schools Funding*, *supra* at 541-542 and at 579:

I note that in *G.M.P.S.B.*, *supra*, this Court has already held that rights of ownership, *powers to hire staff* and powers to use material resources are incidental rights that are only protected to the extent that they are necessary to preserve the denomination character of education.²⁸

Therefore, considering whether constitutionally established separate boards can require non-teaching staff to follow the moral teachings of the Church and have the right to dismiss for denominational causes requires an analysis of (a) whether those rights were available to separate schools as of 1867 as being necessary to preserve the essential and proper denominational character of a Catholic school, and if so, (b) whether the requirement or dismissal is based on a bona fide denominational cause. As such, the question needs to be decided on case-by-case bases, considering the specific positions in question and how those positions contribute to the maintenance of the Catholic philosophy.

In the 1984 case of *Caldwell v. Stuart*,²⁹ the Supreme Court of Canada recognized the special position of separate schools. The Court held that the unique character and positions of these schools allowed for the imposition of rules requiring teachers to adhere to specified religious and moral standards while permitting the dismissals of teacher for failing to adhere to those standards. In its decision, the Court noted the importance of the relationship of teachers to student as enabling teacher to mould the mindsets and attitudes of students. The Court pointed out that teachers were expected to be examples consistent with the teachings of the Church and must proclaim the Catholic philosophy by their conduct inside and outside of schools. As such, the Court found that the denominational cause could constitute a bona fide qualification for employment of a teacher in a separate school:

The religious or doctrinal aspect of the school lies at its very heart and colours all its activities and programs. The role of the teacher in this respect is fundamental to the whole effort of the school, as much in its spiritual nature as in the academic. It is my opinion that, objectively viewed, having in mind the special nature and objectives of the school, the requirement of religious conformance including the acceptance and observance of the Church's rules regarding marriage is reasonably necessary to assure the achievement of the objects of the school. It is my view that the *Etobicoke* test is thus met and that the requirement of conformance constitutes a bona fide qualification in respect of the occupation of a Catholic teacher employed in a Catholic school, the absence of which will deprive her of the protection of s. 8 of the Human Rights Code. *It will be only in rare circumstances that such a factor as religious conformance can pass the test of bona fide qualification. In the case at bar, the special nature of the school and the unique role played by the teachers in the attaining of the school's legitimate objects are essential to the finding that religious conformance is a bona fide qualification.*³⁰ (Emphasis added.)

In evaluating whether a specific requirement or condition of employment constitutes a bona fide occupational requirement, employers must satisfy the three-part *Meiorin* test identified above. Consequently, while denominational cause has been firmly established in relation to teachers, the same may not be the case for non-teaching staff who may lack the unique role recognized by the courts. For instance, in *Caldwell v. Stuart*, the Court referred to an earlier, unreported case involving a Catholic school board's refusal to hire a non-Catholic as a secretary. In that case, the adjudicator distinguished between the role of a teacher and that of a secretary:

Of more relevance are the words of then Professor W. S. Tarnopolsky, sitting as a board of inquiry under the Ontario Human Rights Code, 1961-62 (Ont.), c. 93, on the hearing of a complaint by one Bonnie Gore (*Re Ont. Human Rights Code, 1961-62 and Gore*, decision handed down 7th December 1971 (as yet unpublished)). The complaint arose from the refusal of the Catholic School Board of Ottawa to engage a non-Catholic as a secretary for clerical duties in the school administration. Professor Tarnopolsky sustained the complaint, but in so doing drew a clear distinction between the position of a teacher and that of a clerical worker. He said, at p. 8:

I think it would be reasonable for the Separate School Board to refuse to hire a secretary who is hostile to the Catholic faith or to the aims of the Separate School system, regardless of her religious upbringing, but I cannot see how a secretary can be expected to provide an example for the children. This is surely the responsibility of the teachers, and the religious aspect is the responsibility of the ecclesiastics as well as most of the teachers. The secretary performs secretarial and clerical functions (and only for half a day), under directions from, and subject to supervision by, the principal. Requiring that she be a Roman Catholic is not, in my opinion, a 'reasonable occupational qualification' within the meaning of s. 4(4)(b) of the Ontario Human Rights Code.

It is evident from the above that Professor Tarnopolsky recognized the special nature of the Catholic school but concluded that the clerical worker would not have that degree of contact with the pupils that would make it essential in the interest of the Church to have a Catholic in such position. The responsibilities for carrying out the Church's basic purposes he accorded to the teacher.³¹

It is well established that requiring teachers to follow the Catholic lifestyle is a denominational right and a bona fide occupational requirement that is part and parcel of section 93 of the Constitution which results in the section 29 Charter immunity. The outcome is to prohibit the application of section 15 of the Charter and provincial human rights legislation. To determine if such protections extend to non-teaching staff, we examine a variety of cases applying the bona fide occupational requirement test in other contexts, more specifically with private religious schools which are not constitutionally protected.

C Private Religious Schools

In a 1996 case with *Wild Rose School Division*, an Alberta Board of Arbitration dismissed a grievance alleging that two job postings by Drayton Christian School for teacher assistants were discriminatory as contrary to the collective agreement.³² The job postings invited applications from "persons able to work and live as positive Christian role models" and those who "will also be supportive of the educational creed and lifestyle expectations" of the school. The assistants were required to spend a lot of one-on-one time with students and were often called to pray with the family. Because school officials consistent enforced the policy, the Board of Arbitration found that the postings and interview process were clear on what was required of prospective employees. Ultimately the board decided that school authorities had demonstrated that the religious requirements for teacher assistants were a bona fide occupation qualification on which they were entitled to insist in advertising and selecting candidates.

One of the cases considered and distinguished by the board in *Wild Rose* was *Parks v. Christian Horizons*.³³ In *Parks*, the board heard two complaints alleging that Christian Horizons, which operated a group home, discriminated against support workers in their employment on the basis of marital status. Both complainants were in common-law relationships and had been employed by Christian Horizons. Their employment came to an end in different circumstances, but in both, the complainants alleged discrimination as Christian Horizons relied on the alleged breach of its policy dealing with common law relationships.

The board observed that officials of Christian Horizons failed to establish a bona fide denominational occupational requirement, basing its judgment on a variety of factors, including that no hiring procedure explicitly made it clear that only those whose lifestyles were compatible with the Evangelical Christian doctrinal principals would qualify as staff. In addition, the evidence did not reveal that the principal function of the group

homes was to promote an Evangelical Christian environment. At most, the evidence disclosed a minimal attempt to anchor mealtimes and other routines in a Christian ethos. The board also commented that in order to establish the bona fide occupational requirement test, Christian Horizons would need to demonstrate the following criteria:

1. That its hiring procedures showed a preference for those whose lifestyles were compatible with Evangelical Christian doctrinal principles;
2. That one of its primary functions was to foster an Evangelical Christian environment; and
3. That all employees were essential for fostering an Evangelical Christian environment.

Christian Horizons appears to have attempted to implement those comments and made changes to its policies as noted in a subsequent case, *Heintz v. Christian Horizons*.³⁴ Here the Commission indicated that all Christian Horizons' employment contracts were subject to lifestyle and morality standards which contained prohibitions against, among other things, same-sex relationships. The complainant was hired as a support worker who subsequently entered into a same-sex relationship. After admitting the relationship to her supervisor, the worker was offered counselling to restore her to a state of compliance. Still, she alleged that she was ultimately forced to resign as the work environment became poisoned, and subsequently filed a complaint of discrimination. Christian Horizons relied on the defence of bona fide occupational qualification.

The Board of Inquiry found that in adopting the qualifications imposed by the lifestyle and morality standards, Christian Horizons had not made a real effort to examine whether the requirements were, in fact, reasonably necessary or whether the employment could be performed without the discriminatory requirements.³⁵ The Court considered the issue to be whether the prohibition of involvement in a same-sex relationship was contrary to the human rights legislation. The Court asserted that in considering the test for a bona fide occupational qualification, a close examination of the nature of the employment, namely the employee's actual duties, functions, activities, and abilities, was critical. The employer must clearly demonstrate that the qualification at issue is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, fellow employees, and the general public.

Christian Horizons argued that because the support workers were the "face of the organization" to its individual residents and their families, the Christian aspect could not be separated from their tasks and religious conformance by support workers was critical to accomplish its goal of providing Christian ministry to people with disabilities.³⁶ However, the Court held that the evidence showed that the Christian environment provided by the support workers was mainly manifested through prayer, hymn singing, and Bible reading. There was no evidence the complainant refused to participate in those activities.

The Court upheld that the support worker was not engaged in actively promoting an Evangelical Christian way of life, that services were provided to people of all faiths and those without any faith.³⁷ The Court added that nothing about the performance of the complainant's job tasks required her to adhere to a lifestyle precluding same-sex relationships. As such, Christian Horizons had failed to show that the qualification that its support workers adhere to the lifestyle and morality standards by not participating in same-sex relationships was reasonable and bona fide, and thus the complaint was allowed.

The *Manitoba Board of Inquiry in Schroen v. Steinbach Bible College (SBC)*.³⁸ Reached a different conclusion in an earlier case. Here the Board considered a complaint of discrimination by an accounting clerk alleging that SBC unreasonably terminated her employment on the basis of her religious beliefs. SBC defended on the basis that her dismissal was based on a bona fide and reasonable requirement or qualification for employment. The Board considered the accounting clerk's job duties, acknowledging that

it was generally understood and a basic premise at SBC that all employees . . . would involve themselves and regularly attend chapel prayer meetings, attend the school retreat, have students at their homes for group Bible study sessions, attend the school cafeteria to have meals with students, and be available any time to discuss faith matters with students. In short, everyone employed at SBC was expected to share in a faithful way with students espousing the Christian faith, as that was what SBC was all about.³⁹

The Board explained that the complainant had not been hired for any specific ability relating to the technical part of the job, but rather, for her friendliness and the perception that she would contribute to SBC's environment. The Board ultimately dismissed the complaint, stating,

The special nature of the College, and both the external and internal forces that the students would be subject to, which would impinge on their consciousness, should not be jeopardized in the close, tight, focussed and interactive community that exists at SBC. Considering the unique role of an accounting clerk at SBC and that the unique culture of SBC including its philosophy, mission, faith, beliefs, ethics and the acceptance and observance of the Statement of Faith are reasonable and necessary to assure achievement of the religious objects of the College, it is my view that the Etobicoke test has been met. As a result, and under the circumstances of this case, the requirement that the accounting clerk be of the Mennonite faith to work at SBC constitutes a bona fide and reasonable requirement or qualification for that employment or occupation at SBC.⁴⁰

IV CONCLUSION

The difficult question of whether a separate Catholic Board can properly require employees to follow the moral teachings of the Catholic Church by dismissing a transgender employee for failure to do so will be resolved on a case by case basis. Canadian courts will consider the nature of the breaches in light of the positions, how

those positions contribute to the maintenance of Catholic schools, and whether the requirements are such that they would constitute bona fide occupational qualifications. It is likely a continuum such that for some positions, such as teachers, strict adherence to religious values is a bona fide occupational requirement, whereas for other jobs with little or no impact on the religious character of the schools, employers would not be able to impose such requirements.

It is important to note that being diagnosed with gender dysphoria or identifying as LGBTQ+ does not, in the Catholic Church's position, mean that persons are no longer Catholic or cannot continue to live a Catholic lifestyle. The Church has pastoral guidelines⁴¹ that offer care and counselling for those individuals to assist them in dealing with their gender dysphoria in a manner consistent with its values and principles. Thus, one can identify as a member of a sexual minority class and continue to follow the moral teachings of the Church.

If religious institutions, whether constitutionally protected separate schools or a private religious institutions, examined and considered their policies in light of their denominational rights with the intention of maintaining fully permeated religious environments by developing policies in line with such expectations for hiring, imposing conditions requiring staff to agree to follow the moral teachings of the Church, Courts are likely to uphold dismissals for reasons contrary to such policies.

Religious institutions in secular communities are often challenged to justify their values and decisions when they conflict with other societal values. In such cases, Courts have weighed competing but equal rights and freedoms by analyzing each right in its own context in order to determine whether one should prevail over the other. Perhaps this precedent has now changed with the *Trinity Western* decision citing "Charter values"⁴² whereby societal opinions regarding autonomy over one's identity appear to have trumped freedom of religion, and thus the religious beliefs of many citizens regarding the nature of the human person.

In respect of separate Catholic schools protecting their denominational hiring and dismissal rights, in order to get around the constitutional guarantees in sections 93 and 29 such that the Charter guarantees or provincial human rights codes might apply, the Court would first need to conclude (a) that the contractual Catholicity clause is against public order and of no force and effect and (b) that it was not a denominational aspect of the rights conferred to Catholic schools to require teachers to model the Catholic faith. It is unlikely that either argument would succeed given the long line of jurisprudence upholding the constitutional rights by recognizing that the religious character of Catholic schools includes a fully permeated curriculum and the corollary preferential hiring and dismissal rights. For independent private religious schools, the challenges are much greater because they are not constitutionally protected, and the zeitgeist of the times does not support religious freedom over issues which many consider to be matters of social justice.

ENDNOTES

- 1 The American Psychiatric Association defines these terms on its website: <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>
- 2 In Canada, three provinces have constitutionally protected Catholic schools: Ontario, Saskatchewan, and Alberta. The Canadian Constitution Act, 1867 the Alberta Act, Saskatchewan Act, and the Canadian Charter of Rights and Freedoms protect the state sanctioning of and financial support for Catholic separate school in the three provinces. The other provinces and territories have Catholic schools which may receive public funding at some level, but this funding is not constitutionally protected.
- 3 As an aside, we note that the issue of transgender rights and education has been addressed internationally: e.g., International Technical Guidance on Sexuality Education, United Nations Population Fund, 2018, <https://www.unfpa.org/publications/international-technical-guidance-sexuality-education>; “Born Free and Equal,” United Nations Office of the High Commissioner, 2012, <https://www.ohchr.org/en/issues/discrimination/pages/bornfreeequalbooklet.aspx>.
- 4 APA, “What is gender dysphoria,” 2016, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>.
- 5 APA, “What is gender dysphoria,” 2016, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>. Of note, the diagnosis of gender identity disorder, as defined in the Diagnostic and Statistical Manual of Mental Disorders (APA, 2013, <https://www.psychiatry.org/psychiatrists/practice/dsm>) is contentious within the academic world. See Stanley R. Vance, Jr., et al., “Opinions about the DSM gender identity disorder diagnosis: Results from an international survey administered to organizations concerned with the welfare of transgender people. *International Journal of Transgenderism* 12, no. 1 (2010): 1–14, <https://doi.org/10.1080/15532731003749087>.
- 6 The Catholic, Mormon, Baptist, and Islamic faiths all teach that although gender dysphoria exists, it is sinful to address the issue by way of a medical procedure: “Catechism of the Catholic Church,” article 2297, Libreria Editrice Vaticana, 2003, http://www.vatican.va/archive/ENG0015/_INDEX.HTM; Samantha Allen, “Mormon man risks excommunication by sharing his transition,” *Daily Beast*, March 16, 2016, <https://www.thedailybeast.com/mormon-man-risks-excommunication-by-sharing-his-transition>; The Church of Jesus Christ of Latter Day Saints, “Lesson 8: Gender and Eternal Identity,” Handbook 2, 2010, <https://www.churchofjesuschrist.org/study/manual/the-eternal-family-teacher-manual/lesson-8-gender-and-eternal-identity?lang=eng>; Southern Baptist Convention, “On Transgender Identity,” 2014, <http://www.sbc.net/resolutions/2250/on-transgender-identity>; Ani Amelia Zainuddin and Zahela Abdullah Mahdy, “The Islamic perspectives of gender-related issues in the management of patients with disorders of sex development,” *Archives of Sexual Behaviour* 46, no. 2 (2017): 353–360, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5272885/>. As Islam does not have an ultimate international hierarchical authority, it is difficult to reconcile a fatwa from Saudi Arabia, which prohibits medical surgery, with an Iranian fatwa, which provides for such surgery in certain cases. It appears that, as Zainuddin and Mahdy stated,

It goes without saying that both the religious authorities and medical experts need to cooperate with and educate each other about the various aspects of care of the patient with a DSD [disorder of sex development]. . . . In conclusion, to ensure holistic care of Muslim individuals with DSD and their families, the physicians and other care providers involved in their management need to be aware of the religious aspects of gender-related issues in Islamic jurisprudence and involve religious authorities in the counseling of these patients and their families. (Discussion section, para. 6)

- 7 Emilie Ng, “The transgender phenomenon: Three Catholic ethicists widen the debate,” *The Catholic Leader*, February 13, 2017, <http://catholicleader.com.au/analysis/the-transgender-phenomenon-three-catholic-ethicists-widen-the-debate>.
- 8 Catholic Health Alliance of Canada, *Health Ethics Guide*, 3rd ed. (2012), http://www.chac.ca/resources/ethics/ethicsguide_e.php.
- 9 Rev. Stephano Penna, personal communication, 2018.
- 10 Peter Meiszner, “Vancouver Catholic schools adopt transgender policy, a Canadian first,” *Global News*, July 16, 2014, <https://globalnews.ca/news/1454972/vancouver-catholic-schools-adopt-transgender-policy-a-canadian-first/>.
- 11 Abramo, “Catholic schools approve ‘gender dysphoria’ policy, *Gloria.tv*, July 16, 2014, <https://gloria.tv/post/DyHAJEf4rm3k4dxGR8Dk1ZTZ2>. As an aside, in the summer of 2016, the BC Human Rights Code (RSBC 1996 Chapter 10, http://www.bclaws.ca/Recon/document/ID/freeside/00_96210_01) was amended to include gender identity and gender expression as prohibited grounds of discrimination. For a discussion on the relationship between Catholic theology and transgenderism, see Lindsay Herriot and Tonya Callaghan, “Disrupting the trans-versus-Catholic dichotomy: An example from a Canadian elementary school policy,” *International Journal of Transgenderism* 19, no. 2 (2018): 170–183, <https://doi.org/10.1080/15532739.2017.1412377>.
- 12 Andrea Huncar, “Mom of transgender girl once banned from female washroom reaches deal with Edmonton Catholic board,” *CBC News*, February 8, 2018, <http://www.cbc.ca/news/canada/edmonton/mom-of-transgender-girl-once-banned-from-female-washroom-reaches-deal-with-edmonton-catholic-board-1.4525411>.
- 13 Edmonton Catholic Schools, “Administrative Procedure 160: Commitment to inclusive communities in Edmonton Catholic schools,” January 5, 2015, <https://www.ecsd.net/AboutUs/Overview/Administrative-Procedures-Manual/Administrative%20Procedures%20Manual/AP%20160.PDF>.
- 14 *Buterman v Board of Trustees of the Greater St. Albert Roman Catholic Separate School District No. 734*, 2016 ABQB 159 (CanLII), <https://www.canlii.org/en/ab/abqb/doc/2016/2016abqb159/2016abqb159.html>.
- 15 Janice Johnston, “Alberta transgender teacher fired in 2008 loses case in appeal court,” *CBC News*, June 23, 2017, <http://www.cbc.ca/news/canada/edmonton/transgender-teacher-fired-jan-buterman-1.4176026>; Janet French, “Fired transgender teacher loses appeal to have human rights complaint heard,” *Edmonton Journal*, June 23, 2017, <http://edmontonjournal.com/news/local-news/appeal-court-dismisses-trans-teachers-plight-for-human-rights-complaint-hearing>.
- 16 Note that Catholicity clauses are common throughout Canada’s Catholic school districts and indeed seem to be required.
- 17 Cardinal William Baum made this point clear in the Vatican document “Lay Catholics in Schools: Witnesses to Faith,” October 15, 1982, http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_19821015_lay-catholics_en.html.
- 18 *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3, 1999 CanLII 652 (SCC), <https://www.canlii.org/en/ca/scc/doc/1999/1999canlii652/1999canlii652.html>.
- 19 The Act can be viewed at <https://laws-lois.justice.gc.ca/eng/const/>.
- 20 In Canada, this section applies to Ontario, Saskatchewan, and Alberta, as these three provinces have constitutionally protected Catholic separate schools. Quebec and Newfoundland/Labrador both successfully sought to have constitutional protection removed from their Catholic schools.
- 21 The Alberta Act, 1905, 4-5 Edw. VII, c. 3 (Can.), [justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/pl1t121.html](https://laws-lois.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/pl1t121.html).

- 22 Part I of the Constitution Act, 1982, Canadian Charter of Rights and Freedoms, <https://laws-lois.justice.gc.ca/eng/const/page-15.html>.
- 23 Part I of the Constitution Act, 1982, Canadian Charter of Rights and Freedoms, <https://laws-lois.justice.gc.ca/eng/const/page-15.html>.
- 24 Revised Statutes of Alberta, 2000 Chapter A-25.5, <http://www.qp.alberta.ca/documents/Acts/A25P5.pdf>.
- 25 *Casagrande v. Hinton Roman Catholic Separate School District No. 155*, 1987 CanLII 3358 (AB QB), <https://www.canlii.org/en/ab/abqb/doc/1987/1987canlii3358/1987canlii3358.html>, paras. 34–35.
- 26 *Casagrande v. Hinton Roman Catholic Separate School District No. 155*, 1987 CanLII 3358 (AB QB), <https://www.canlii.org/en/ab/abqb/doc/1987/1987canlii3358/1987canlii3358.html>, para. 24.
- 27 *Re Essex County Roman Catholic Separate School Board and Porter et al.*, 1978 CanLII 1323 (ON CA), <https://www.canlii.org/en/on/onca/doc/1978/1978canlii1323/1978canlii1323.html>.
- 28 *Branch Affiliates Incorporating Secondary Teachers v. Dufferin-Peel Roman Catholic Separate School Board*, 1999 CanLII 2224 (ON CA), <https://www.canlii.org/en/on/onca/doc/1999/1999canlii2224/1999canlii2224.html>, para. 24.
- 29 *Caldwell et al. v. Stuart et al.*, 1984 CanLII 128 (SCC), 2 SCR 603, <https://www.canlii.org/en/ca/scc/doc/1984/1984canlii128/1984canlii128.html>.
- 30 *Caldwell et al. v. Stuart et al.*, 1984 CanLII 128 (SCC), 2 SCR 603, <https://www.canlii.org/en/ca/scc/doc/1984/1984canlii128/1984canlii128.html>, para. 34.
- 31 *Caldwell et al. v. Stuart et al.*, 1984 CanLII 128 (SCC), 2 SCR 603, <https://www.canlii.org/en/ca/scc/doc/1984/1984canlii128/1984canlii128.html>, para. 28.
- 32 Formal decision in *The Central Alberta Association of Municipal and School Employees and The Wild Rose School Division No. 66*; 1996 Alta. L.R.B.R. 221, http://www.alrb.gov.ab.ca/decisions/GE_02173.pdf.
- 33 Internet Archive, “Full text of ‘Parks v. Christian Horizons, Board of Inquiry, December 2, 1991 BOI 91-016,’” https://archive.org/stream/boi91_016/boi91_016_djvu.txt.
- 34 *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105 (CanLII), <https://www.canlii.org/en/on/onscdc/doc/2010/2010onsc2105/2010onsc2105.html>.
- 35 *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105 (CanLII), <https://www.canlii.org/en/on/onscdc/doc/2010/2010onsc2105/2010onsc2105.html>, para. 17.
- 36 *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105 (CanLII), <https://www.canlii.org/en/on/onscdc/doc/2010/2010onsc2105/2010onsc2105.html>, para. 93.
- 37 *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105 (CanLII), <https://www.canlii.org/en/on/onscdc/doc/2010/2010onsc2105/2010onsc2105.html>, para. 105.
- 38 *Manitoba Human Rights Board of Adjudication*, “Reasons for Decision [Schroen v Steinbach Bible College],” 1999, <http://www.manitobahumanrights.ca/v1/decisions/pubs/1999/1999-mhrbad-no-2-schroen-v-steinbach-bible-college.pdf>.
- 39 *Manitoba Human Rights Board of Adjudication*, “Reasons for Decision [Schroen v Steinbach Bible College],” 1999, <http://www.manitobahumanrights.ca/v1/decisions/pubs/1999/1999-mhrbad-no-2-schroen-v-steinbach-bible-college.pdf>, p. 15.
- 40 *Manitoba Human Rights Board of Adjudication*, “Reasons for Decision [Schroen v Steinbach Bible College],” 1999, <http://www.manitobahumanrights.ca/v1/decisions/pubs/1999/1999-mhrbad-no-2-schroen-v-steinbach-bible-college.pdf>, p. 16.
- 41 Institute for Catholic Education, “Supporting students who identify as transgender in our Catholic schools,” A Catholic Perspective, Fall 2019, <https://iceont.ca/wp-content/uploads/2019/12/ICE-Monograph-FINAL-Supporting-Transgender-Students-5.pdf>. See also Office of the Liaison for Catholic Education, Archdiocese of Toronto, “‘Speaking the truth in love’: Pastoral Guidelines for

Educators Concerning Students Experiencing Gender Incongruence,” 2019, <https://tcdsbpublishing.escribemeetings.com/filestream.ashx?DocumentId=19105>.

- 42 This is the import of the comment by Chief Justice McLachlin as stated in the headnote

To adequately protect the Charter right, the initial focus must be on whether the claimant’s constitutional right has been infringed. Charter values may play a role in defining the scope of rights; it is the right itself, however, that receives protection under the Charter. (Law Society of British Columbia v. Trinity Western University, 2018 SCC 32, [2018] 2 S.C.R. 293. <https://www.canlii.org/en/ca/scc/doc/2018/2018scc32/2018scc32.html?resultIndex=2>