FM-76-2023

Citation: 2024 NBKB 091
Date: May 1st, 2024

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

CANADIAN CIVIL LIBERTIES ASSOCIATION

APPLICANT

- AND –

PROVINCE OF NEW BRUNSWICK AS REPRESENTED BY THE MINISTER OF EDUCATION AND EARLY CHILDHOOD DEVELOPMENT

RESPONDENT

MOTIONS FOR LEAVE TO INTERVENE AS A "PARTY" UNDER RULE 15.02

Date of Decision:	May 1st, 2024
Date of Hearings:	April 18th and 22nd, 2024
Before:	Justice Richard G. Petrie
At:	Fredericton, New Brunswick
Appearances:	Sheree Conlon, K.C., and Benjamin Perryman, for the Canadian Civil Liberties Association (CCLA)
	Clarence Bennett, K.C. , and Mark Heighton, for the Province

Glen Gallant, for the Proposed Intervenors, The Canadian Union of Public Employees (CUPE)

Hatim Kheir, and Marty Moore, for the Proposed Intervenors, Gender Dysphoria Alliance (GDA), and Our Duty Canada (ODC)

Douglas Elliott, and Abigail Herrington, for the Proposed Intervenors, Equality New Brunswick (ENB), and Wabanaki Two-Spirit Alliance (W2SA)

Joel Michaud, K.C., and John MacCormick, for the Proposed Intervenors, The New Brunswick Teachers' Federation (NBTF), and the New Brunswick Union of Public and Private Employees (NBU)

Adam Goldenberg, and Ljiljana Stanic, for the Proposed Intervenors, Egale Canada; Alter Acadie Nouveau-Brunswick Inc.; Chroma: Pride, Inclusion, Equality, Inc.; and Imprint Youth Association Inc.

Petrie, J

1. This decision concerns six (6) motions for leave to intervene as an "added party" pursuant to Rule 15.02 and only alternatively, to be added as a "friend of the court", pursuant to Rule 15.03. These six (6) motions were heard over the course of two days, April 18 & 22nd.
2. The Court will address, in chambers, and by way of a separate decision, three (3) motions seeking leave to intervene in this proceeding as only a "friend of the court" pursuant to Rule 15.03.
3. For purposes of my decision, I will set out the proposed intervenors on the six (6) motions into two groupings: "Party Intervenors" and "Union Intervenors". Each of the motions under the "Party Intervenors" grouping have been brought by multiple organizations on a joint intervenor basis. Each of the motions under the "Union Intervenors" groups are brought by a single public sector union.

PARTY INTERVENORS

1. Egale Canada, Alter Acadie Nouveau Brunswick Inc., Chroma: Pride, Inclusion, Equality Inc. and Imprint Youth Association Inc. (Community Intervenors) – filed jointly October 19, 2023.

2. Gender Dysphoria Alliance and Our Duty Canada – filed jointly November 30, 2023.

3. Equality New Brunswick and Wabanaki 2 Spirit Alliance – filed jointly November 30, 2024.

UNION INTERVENORS

1. NB Teacher's Federation (NBTF) – filed October 11, 2023.

2. Canadian Union of Public Employees Local 2745 (CUPE Local 2745) - filed November 29, 2023

3. New Brunswick Union of Public & Private Employees (NBU) – filed November 30, 2023.

4. The proceeding for which all of the proposed intervenors seek to be added is an Application for Judicial Review and Declaratory Relief which was filed by the Canadian Civil Liberties Association, (CCLA) on September 6, 2023, against the Province of New Brunswick as represented by the Minister of Education and Early Childhood Development (Province), FM-76-2023, (the "proceeding").

5. At issue in the proceeding is the Minister of Education and Early Childhood Development's ("Minister") decisions to revise/amend the self-identification provisions of its Policy 713 – Sexual Orientation and Gender Identity (Policy 713) effective July 21, 2023, and subsequently, effective August 17, 2023. Policy 713 governs, among other things, sexual orientation and gender in New Brunswick public schools.

6. In essence, the amendments require parental consent before "school personnel" are permitted to formally use gender diverse students preferred names and pronouns other than their legal name, if the students are under 16 years of age.

7. By way of the proceeding, the CCLA purports to challenge, indeed quash, the Minister's decision(s) to amend Policy 713 on several grounds including: being in breach of the duty of procedural fairness; outside of the Minister's authority, and contrary to both the *New Brunswick Education Act* and the *Human Rights Act*. Further the CCLA seeks a determination and declaration that the Policy 713 amendments violate the rights of

gender diverse students under the age of 16, under the *Canadian Charter of Rights and Freedoms* ("The *Charter*"), including sections 2(b), 7 and 15. Further it is alleged that any such limits cannot be justified under s. 1 of the *Charter*.

8. All of the prospective Party Intervenors on these six motions, are seeking party status with an interest to have input into the formation of the record including the ability to file either, or both, fact and expert affidavits.

PARTY INTERVENORS

COMMUNITY INTERVENORS

9. The proposed parties, Egale Canada (Egale), Alter Acadie Nouveau-Brunswick (Alter Acadie), Chroma: Pride Inclusion, Equality Inc. (Chroma) and Imprint Youth Association Inc. (Imprint)(together the "Community Intervenors") filed a joint application to be added as a joint party.

10. The proposed Community Intervenors are self-described at page 2 of their factum:

> The Community Interveners serve and promote the rights of gender diverse young people in New Brunswick and across Canada. Collectively, their work includes providing services to, and advocating on behalf of, gender diverse students under the age of 16 who are affected by the 2023 amendments to Policy 713.

11. Each of these organizations are further described at paragraph 18 and 19 of their factum.

> 18. Egale Canada is the leading organization in Canada working to advance the rights of, and toward equality and justice for, 2SLGBTQI persons, including young people. Egale Canada is an independent non-governmental organization. It has considerable expertise in analyzing and articulating the impact of laws and policies on the rights of gender diverse people, including in legal

> proceedings and has previously been granted leave to intervene dozens of times, including as an added party.
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> 19. Imprint, Chroma NB, and Alter Acadie provide services and work with 2SLGBTQI young people — including gender diverse young people under 16 — and their families across New Brunswick:
>
> (a) Imprint provides support to 2SLGBTQI young people, including those under 16, in the greater Fredericton area. Youth are the heart of Imprint's mission, and it provides programming and opportunities for 2SLGBTQI youth to foster safe, healthy, and empowering connections. Among other services, Imprint hosts local drop-ins for youth (including those under 16) and young adults, as well as all-ages and family events throughout the year.
>
> (b) Chroma NB provides support to 2SLGBTQI persons, including young people, in the Saint John area. It promotes initiatives to build safe spaces in the community, conducts research to identify gaps in government policies, and encourages positive change for 2SLGBTQI young people in the region. Among other services, Chroma NB hosts a drop-in space four days a week for 2SLGBTQI youth (including those under 16) and allies, as well as a free lunch program.
>
> (c) Alter Acadie is the only queer-focused Francophone organization in New Brunswick with a province-wide mandate.

12. According to Mr. Goldenberg, Counsel for the Community Intervenors, the organizations Imprint, Chroma NB, and Alter Acadie directly serve and represent the community of gender diverse youth in the Province. They serve on the "front lines" with these gender diverse youth, have a genuine interest and, thus, are directly affected by the Minister's policy decisions. The Community Intervenors offer "first-hand" and special perspectives. In particular, through Egale, a national organization known to have considerable experience in litigation in gender diversity and Charter issues, the Community Intervenors offer an expertise not otherwise available to the Court. Even the CCLA acknowledges that while they have extensive experience and expertise in civil liberty

matters more generally, they do not purport to speak "directly" for the gender diverse community in issue as do the Community Intervenors.

13. Mr. Goldenberg makes the forceful argument that it would unfair and be, indeed, prejudicial to the gender diverse young people most affected, if a Court were to decide the important issues without due consideration of the young students' interests and perspectives. This can most effectively be accomplished if the Community Intervenors are added as parties and with an opportunity to lead evidence on the gender diverse youth experiences along with relevant expert evidence and argument. Furthermore, Mr. Goldenberg submits that their involvement will not burden the parties.

14. Mr. Goldenberg notes that, in an ongoing challenge to a similar school related policy in Saskatchewan, a similarly situated community organization with the support of Egale, represented by Mr. Goldenberg, were granted standing to commence the legal challenge there. This decision is *U.R. Pride Centre for Sexuality and Gender Diversity v. Saskatchewan*, 2023 SKKB 204 (*U.R. Pride*) . Indeed, the CCLA was (only) added as an intervenor in *U.R. Pride*.

15. The Community Intervenors have requested no order of costs be made against them but that a cost award in their favour not be ruled out at this time. They were the only intervenor party who made such request with all others indicating simply that no costs be awarded either way.

GENDER DIVERSITY ALLIANCE (GDA) AND OUR DUTY CANADA (ODC)

16. These two joint applicants describe themselves, in part, at paragraph 5 and 6 of their factum:

> 5. GDA represents people who struggle with gender dysphoria and advocates for evidence- based care. Its leadership is comprised of transsexual individuals. GDA's collective experience is that many people with gender dysphoria do not find relief from medical intervention and can even be harmed by it. GDA supports the involvement of parents where interventions, including social transitions, are being considered. GDA has recently intervened in Saskatchewan in *UR Pride Centre for Sexuality and Gender Diversity v. Saskatchewan.*
>
> 6. ODC is primarily a support network for parents with children with gender dysphoria and transgender ideation. Many of ODC's members have witnessed negative physical and emotional outcomes in their children who have undergone social transitions without being notified. ODC supports the importance of parental notification to uphold the best interests and rights of children with gender dysphoria or transgender ideation and their parents. In addition to the effect on ODC's members within New Brunswick, ODC would be adversely affected if Policy 713 were struck down in this case because parents who would otherwise seek out ODC's resources, support, and assistance, may be left uninformed that their children are undergoing a formal transition in school.

17. GDA takes the position that the interests of children with gender dysphoria are best served when their parents are informed and involved in decisions regarding interventions.

18. ODC purports to have a direct interest as its members, it argues, were negatively affected by the absence of a parental notification requirement found in the *prior* version of the policy 713 and before the impugned modifications.

19. GDA was granted intervenor status in the Saskatchewan *U.R. Pride* matter. Justice Megaw determined that, while this organization did not possess any special expertise on the constitutional issues, it had a sufficient interest in the outcome of the litigation and brought a particular perspective to it. Justice Megaw granted intervenor status to GDA limited to the constitutional issues and to be made by way of oral and written submissions only. It appears that the intervenors in *U.R. Pride* did not seek to be added as "parties".

20. Mr. Kheir, on behalf of the two joint entities, argues that while both organizations are not necessarily "front-line" service organizations, nor do they simply serve an advocacy role. They are also a support group, including for parents of gender diverse children, and, as Mr. Kheir suggested, there is "no one more front-line then a parent". These organizations seek to jointly support the continued adoption of the impugned policy amendments.

21. These joint intervenors propose to put forward the affidavit evidence filed to date following the March 5th case management conference, including of a parent's experience with a child going through gender identity issues. They also have proposed expert evidence in relation to the necessity of parental and professional involvement.

22. Mr. Kheir asked for there to be "generally equal treatment" with respect to consideration of his clients' participation with other party intervenors such as in the balancing of any witnesses and any opportunity to cross examine among other issues.

<u>EQUALITY NEW BRUNSWICK (ENB) AND WABANAKI 2 SPIRIT ALLIANCE (W2SA)</u>

23. These two joint applicants are self-described at paragraph 6, 8 and 9 of their brief:

> 6. ENB is a not-for-profit organization incorporated pursuant to the *Canada Not-for-Profit Corporations Act,* S.C. 2009, c C-32. ENB was incorporated on or about September 12, 2023 by its members the purposes of:
>
> a) Promoting the best interests of the citizens of New Brunswick, generally;
>
> b) Supporting and educating the citizens of New Brunswick by providing funding to address social issues that they are facing; and
>
> c) Other complementary purposes not inconsistent with the above-stated purposes.

> 8. The Wabanaki Two-Spirit Alliance ("W2SA") is a not-for-profit organization incorporated pursuant to the *Canada Not-for-Profit Corporations Act*, S.C. 2009, c C-32, having been incorporated on or about March 15, 2018.
>
> 9. The W2SA was formed for the purposes of providing physical, emotional, mental and spiritual support to Wabanaki Communities after a rash of suicides among Two-Spirited people in those same communities. To further this goal, W2SA 's stated purposes are to:
>
> a) represent the emotional, spiritual, mental, and physical well-being and interests of Two Spirited and Indigenous LGBTQI+ individuals and groups in Wabanaki Territory (Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland/Labrador, Gaspe region of Quebec, and Maine) based on its beliefs and values in the framework contained in the Wabanaki Confederacy and the Peace and Friendship Treaties; and
>
> b) provide equitable and safe environments for Two Spirits and Indigenous LGBTQI+ to live and thrive spiritually, mentally, physically, and emotionally within the Wabanaki territory.

24. Counsel for the proposed joint intervenors, Mr. Elliott, mostly focused on the important perspectives these two organizations wish to contribute for the Court's consideration. These joint parties wish to offer evidence and submissions in regards to the unique and distinct cultural impacts that gender identity issues carry for aboriginal two-spirit youth directly touching upon the impact of the impugned policy amendments.

25. Beyond that perspective, Mr. Elliott, also identified both organizations' intent to explore constitutional principles about freedom of, and from, religion. He argues that such issues are integral to appreciate how and where the concept of "parental rights" arose.

26. Mr. Elliott identified a s. 2(a) Charter analysis as being necessary and relevant to their perspectives. He argued that such analysis would amount to only a small but tolerable expansion of the grounds or scope of the proceeding.

27. The joint parties have proposed expert evidence from two theologians that purport to explain historical religious values and beliefs that they wish to argue, explains, in part, the genesis of the Minister's policy decision. In this regard they also wish to put forward their perspective on "Christian Nationalism" and "Far-Right activism" as a relevant issue before the Court.

28. As Mr. Elliott made the point clearly, these two organizations propose to put forward evidence and argument on what they view as the historical and current, socio-political context connecting "parental rights" and the "anti-gender" movement. In addition, their proposed expert evidence from Dr. Robinson, purports to include her assessment of the "cultural appropriateness and likely impact" of the revision of Policy 713 to two spirit youth and families. Her proposed analysis would include concepts of colonization and assimilation of First Nations Peoples.

29. In all other respects Mr. Elliott, an experienced constitutional lawyer, confirmed his clients' appreciation for all intervenor parties in order to have this matter proceed expeditiously and to ensure duplication of evidence and submissions are avoided.

THE PARTIES' (CCLA AND PROVINCE) POSITION:

30. Neither of the current parties to the proceeding (CCLA or Province) expressly objected to, nor consented to, these proposed party intervenors from being added as parties under Rule 15.02 but both asked that reasonable conditions be attached to their participation. Their request for conditions arise generally from concerns over the proceeding being heard efficiently, expeditiously and cost effectively. The potential concerns include whether any proposed intervenors would change the issues or expand the scope of the

proceeding beyond something as it currently stands. This has the real potential of placing an undue burden on the parties.

31. At the case management conference held March 5, and largely at the request of the Province, I had ordered all prospective party intervenors to file affidavits and/or detailed will-say statements prior to the hearing on the merits of the intervenor motions. This was largely to obtain a greater appreciation of what might be contemplated by the addition of each of the prospective intervenors.

32. Both of the CCLA and Province have, understandably, asked that intervenor parties be largely limited to the evidence and/or will-says filed to date.

33. The Province also expressed particular reservations over the potential overlapping and repetitive nature of some of the proposed evidence even from within the individual organizations constituting each of the joint party intervenors. In addition, the Province wished to ensure that each individual organization constituting the respective collective intervenor parties be only allowed to participate as a *joint* intervenor party.

34. The Province took significant issue with the joint intervenors', ENB and W2SA, stated intention to rely upon s. 2(a) and s. 35 of the *Charter.* Mr. Bennett emphasized that neither of those *Charter* issues are raised in the proceeding brought by the CCLA.

35. These joint intervenors had, at the April 18th hearing, and in their pre-hearing brief, made it clear they were withdrawing their intention to further rely upon any issue over s. 35 of *the Charter.* They were much less definitive with respect to any s. 2(a) claim. Indeed, in questioning from the Court, Mr. Elliott confirmed their intention to pursue a s. 2(a),

(freedom of religion) issue as being "necessary" for the Court to properly analyse the relevant constitutional issues from his clients' unique perspective.

36. The Province also raised a particular concern over the intended expert evidence identified by ENB and W2SNB. The Province maintains that much of that evidence would appear related to a "non-issue" under s. 2(a) of the *Charter,* as well as other "irrelevant" issues such as state religious issues and the Crown's fiduciary obligations to aboriginal peoples. All of this, the Province maintains, would represent an unwarranted expansion of the litigation, all to the prejudice of the Province.

37. The CCLA also pushed back against, in particular, some of the positions and evidence proffered by the joint GDA and ODC applicants. The CCLA concerns include these joint intervenors positions being irrelevant to, or beyond the scope of the proceeding. For instance, Ms. Conlon emphasized the nature of the CCLA application being a "children's rights" case. While acknowledging parental "interests" may be relevant to the proceeding, Ms. Conlon urged the Court to be most cautious in considering this distinction. Whether a consideration of parental rights or interests informed the Minister's decision will await production of the record and the Province's formal response. Ms. Conlon also raised other evidentiary admissibility type issues, interestingly, only for these joint applicants.

38. While I share some of the parties' concerns over the nature of and relevance of some of the proposed evidence, at this stage, and subject to a few exceptions, I do not intend to, nor can I, definitively rule on the admissibility of particular evidence. All of the proposed Party Intervenors are seeking status at the stage of this proceeding where the record is still in flux and indeed is still being formed. If added as intervenor parties, each of the

identified joint intervenor parties should have some right to participate in and comment on the material properly constituting the record.

39. In the context of any application or action, parties are generally entitled to present all relevant evidence. The final scope of the record is left to be decided and will likely be a necessary next step in this litigation. As a result, I will not yet determine the precise evidence each of the intervenor parties will be allowed to bring forward. However, subject to my determinations in this decision and subject to any unforeseen developments, the Party Intervenors' proposed evidence will not go beyond that to which they have filed to date.

UNION INTERVENORS

40. The three (3) proposed Union Intervenors are each bargaining agent representatives of members who work in NB schools (and in some instances, school district offices). It is not contested that Policy 713 applies to some (or all) of their members as "school personnel" and governs their conduct with students and parents.

CUPE LOCAL 2745

41. CUPE Local 2745 represents approximately 4,000 members who work as educational and clerical support staff in New Brunswick schools and school district offices. They are said to have regular, frequent and direct dealings with students including young gender diverse students.

42. The members of CUPE Local 2745 work in various classifications, including Educational Assistant, Speech Therapy Assistant, School Intervention Worker, Student Attendant,

School Library Worker and School Administrative Assistant. They interact with students before, during and after school hours.

NBTF

43. The NBTF is the statutory bargaining agent for schoolteachers within the Province of New Brunswick.

NBU

44. The NBU is the statutory bargaining agent for all employees in the Professional Support Occupation Group Part II of the NB Public Service. As a result, it represents a number of classifications for members working in the NB Public school system including Behaviour Intervention Mentors; School Psychologists and Psychiatrists, residents in Psychology; School Social Workers or Speech Language Pathologists. The members of the NBU bargaining unit are said to frequently interact with students in classroom, group and one-on-one settings.

45. For the sake of completeness, it is not disputed that s. 92 of the *Public Service Labour Relations Act* (*PSLRA*) requires the unions and employer in this case, i.e., the Province or its delegate, to have, and, in fact, they do each have, a collective agreement with a mandatory final and binding adjudication clause.

NBTF and NBU

46. At the hearing on April 22, Mr. MacCormick appeared as counsel for both NBTF and NBU. He indicated that both of these unions intend to be represented by one lawyer and make a single joint submission if granted party status.

47. Mr. MacCormick did not shy away from characterizing the underlying proceeding to concern a challenge to a "unilateral workplace policy in a unionized workplace". He noted that the policy, on its face applies to union members and that they are the "conduit" on how the policy is actually implemented. He acknowledged that both Unions have filed grievances against their employer (Province) in regards to the implementation of Policy 713 as being clearly unreasonable; contrary to their collective agreements; and contrary to the *New Brunswick Human Rights Act*.

48. He emphasized it would thus be unfair to the unions to not have a voice in this proceeding. The unions, he argued, can be affected by this Court's decision. He explained that should Policy 713 revisions be quashed, his members would not have to follow it, but if upheld the issue will be, for all intents and purposes, decided by the court before the unions could proceed to any adjudication.

49. Mr. MacCormick also emphasized the policy to represent an unjustified limit on their members freedom of expression, under s. 2(b) of the Charter. He characterized the underlying Application, at paragraph 100, to actually contemplate this issue to be "in play". He also views the overall lawfulness of this policy to be an issue in common with any grievance/adjudication dispute.

50. He clarified that these two the unions are seeking a rather limited involvement in this matter to make submissions on how this policy affects its members.

51. In direct response to this Court's inquiry as to any legal precedent concerning a union seeking leave to intervene and the employer raising an objection on the basis of the exclusive jurisdiction of a labour arbitrator/adjudicator, Mr. MacCormick offered the

decision *Elementary Teachers' Federation of Ontario et al. v. Her Majesty the Queen*, 2019 ONSC 1308 (*ETFO*).

CUPE LOCAL 2745

52. Mr. Gallant, on behalf of CUPE Local 2745, made a number of similar submissions to that of Mr. MacCormick. In answer to the Court, Mr. Gallant noted that his client had not filed any grievances against its employer as a result of the Policy 713 amendments. On the issue of the appropriate forum, Mr. Gallant argued that this proceeding will not only affect their members implicated by the policy as employees, but also in regards to the unions' representational advice to its members.

53. Mr. Gallant likewise referred the court to the *ETFO* decision as a "complete answer" to the provinces objection on exclusive jurisdiction and appropriate forum.

54. Mr. Gallant encouraged the Court to maintain its focus on the core principles set out in Rule 15.02 and indicated that CUPE met all of them. In essence he argued that to consider this policy and this proceeding to only be about students is too narrow. The unions can offer a different perspective than the parties to the proceedings.

55. It is in support of their "direct" interest in the proceeding and corresponding right to apply to intervene in this matter, that all three (3) Unions have emphasized the Policy 713 amendments to apply to their members. They argue their members may even face discipline should they fail to follow the policy.

56. At the risk of repetition, the prospective Union Intervenors have, before me, emphasized the concern that the Policy 713 amendments violate their own members freedoms of expression under S2(b) of the Charter. They all refer to, in particular, paragraph 100 of

the CCLA's Judicial Review Application, which expressly asserts that the revised policy now prevents "teachers" from affirming their students under the age of 16 in the classroom and as a result the policy will now limit "their" expressions "not just about gender but about any other topic". While paragraph 100 refers expressly to only "teachers", each of the unions suggest, and in my view, reasonably so ,that such reference could be read to include all "school personnel" interacting with these school children.

57. In short, the unions argue that the CCLA judicial review application directly puts the issue of their members rights under s. 2(b) of the *Charter* in play and that they are each directly implicated. Thus, any decision made by this Court could negatively affect their interests.

58. During the hearing I noted that from my review of the *U.R. Pride* decision on intervenors, there was no indication the school unions there had sought to or been added as intervenors. In reply to the Court's questioning of both counsel for the Union Intervenors, neither was aware if any of these presumably similarly situated public sector unions in Saskatchewan had asked to intervene in the *U.R. Pride* proceeding, and if not, why? Both counsel were simply unaware.

THE PARTIES (CCLA AND PROVINCE) POSITION:

59. The CCLA takes a similar position, as it did with respect to the Party Intervenors, and neither objected to, nor consented, to the addition of the three (3) unions as parties to the proceeding.

60. The Province takes serious issue with the prospective Union Intervenors seeking leave to intervene on the basis that this proceeding is not an "appropriate forum". The Province argues that in regards to all of the Unions, the Policy 713 amendments dispute has its "essential character" arise from their respective collective agreements and thus falls within the exclusive jurisdiction of a labour arbitrator/adjudicator. (*Weber v Ontario Hydro* [1995] 2 SCR 929 (*Weber*) and *New Brunswick v. O'Leary* [1995] 2 SCR 967 (*O'Leary*).

61. As noted by the Province, the "exclusive jurisdiction" model has been confirmed on many occasions by the Supreme Court of Canada, including more recently in *Northern Regional Hospital Authority v. Horrocks*, [2021] SCC 42 (*Horrocks*).

62. The Province suggests that while the Unions have put forward only a hypothetical issue such as "possible discipline", such a matter would be the very epitome of a workplace dispute for which the courts do not retain jurisdiction, and labour arbitration/adjudication would be the *only* appropriate forum. The Province also asserts that the hypothetical nature of the argument advanced by the Unions underscores their lack of sufficient interest in the proceeding in order to be granted the status they seek.

63. To the extent that this proceeding does not concern a workplace issue, Mr. Bennett argues the unions have not established any special interest and have nothing significant to contribute.

LAW

64. Rule 15 governs interventions in Court proceedings and provides for two different types of interventions: leave to intervene as an added party (15.02); and leave to intervene as a

"friend of the court" (15.03). As can be seen from the rule itself, A "friend of the court" type intervention, typically represents much more limited participatory rights for that class of intervenors.

RULE 15:

15.02 Leave to Intervene as Added Party

(1)Where a person who is not a party claims
(a) an interest in the subject matter of a proceeding,
(b) that he may be adversely affected by a judgment in a proceeding, or
(c) that there exists between him and one or more of the parties a question of law or fact in common with a question in issue in a proceeding,
he may apply to the court by notice of motion for leave to intervene as an added party.
(2)On a motion under paragraph (1), the court shall consider whether or not the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as to pleadings, production and discovery and impose such conditions as to costs or otherwise as may be just.

15.03 Leave to Intervene as Friend of the Court

Any person may, with leave of the court or at the invitation of the court, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

ADDED PARTY (Rule 15.02)

65. Importantly, the decision as to whether to grant intervenor status and on what, if any, conditions, is purely discretionary [See *Allsco Building Products Ltd. v. U.F.C.W., Local 1288P* 1998, 207 N.B.R.(2d)346 (NBCA) (Allsco)]. The Allsco decision establishes that

party intervention should not impede the proceeding and must add "something important" such as unique evidence or expertise.

66. In *Allsco* , the Court of Appeal confirmed that the test for intervention is as follows:

> **[4] The granting of leave to be added as a party is purely discretionary. The litigants must not be impeded in their lawsuit and the applicant must have something important to add to the issue before the Court, for example a special expertise not otherwise available to the Court.** In addition, the application must be made in a timely manner, a consideration of this case. **The applicant will be in a strong position if the applicant has a genuine and significant interest in the subject matter or will be adversely affected by the judgment; a serious preoccupation with the subject matter is insufficient.**
>
> **[EMPHASIS NOTED]**
>
> [And see more recently MacQueen v. Town of Grand Bay-Westfield etal., 2017 NBCA 61, in paragraph 2.]

67. As all of the proposed intervenors covered by this decision are primarily seeking intervenor party status under Rule 15.02, I wish to, first, reiterate the criteria in order to permit a proposed intervenor to move for leave to intervene as an added party:

    a) *An interest in the subject matter of the proceeding.*

    b) *That the person (organization) may be adversely affected by a judgement/decision in the proceeding.*

    c) *That there exists between the person (organization) and one of the parties to the proceeding, a question of law or fact in common with one or more of the issues arising in the proceeding.*

68. All of the proposed intervenor organizations argue that they have a "direct interest" in the proceeding and/or may be adversely affected by any resulting decision.

69. In New Brunswick, the courts have shown more flexibility. A prospective intervenor seeking leave to become an added party need not necessarily establish that this interest is "direct".

70. In *Allsco*, the Court of Appeal broadened the test with respect to "direct interest" as had been previously suggested by Justice Stevenson in *Morgentaler v. New Brunswick (Attorney General)* et al. (1994) 150 NBR (2^{nd}) 195. The Court stated at paragraph 6:

> **Nowhere in Rule 15.02 is there an indication that the interest in the subject matter of the proceeding must be a direct interest. I think that Mr. Justice Stevenson's finding in this regard is too narrow. I hold that the interest in the subject matter can also be an indirect interest. Since the matter of granting intervention is discretionary, I would not confine the discretion of a superior court judge in deciding whether to grant status to an applicant as an added party.** When the interest of the applicant in the subject matter of the proceeding is a direct interest, a court may well be persuaded to grant intervention; an indirect interest may be less persuasive unless supported by a secondary argument such as an assistance in resolving the issues in the proceeding. **I would therefore expand the position taken by Stevenson J. in Morgentaler.**
>
> **[Emphasis added]**

71. As confirmed by the Court of Appeal in *Allsco*, an applicant for leave to intervene will be in a "strong position" to be added as a party when they ***(a)*** possess a genuine and significant interest in the subject matter of the proceeding or will be adversely affected by a judgment, and ***(b)*** will contribute "something important", such as a special expertise not otherwise available to the Court, to the proceeding, at paragraphs 3 and 4:

> Under Rule 15.02, a court of first instance or the Court of Appeal may grant intervenor status to a non-party applicant where the applicant claims an interest in the subject matter of a proceeding, may be adversely affected by a judgment or there are common questions of fact or law in issue….

> The granting of leave to be added as a party is purely discretionary. The litigants must not be impeded in their lawsuit and **the applicant must have something important to add to the issue before the court, for example a special expertise not otherwise available to the court**. In addition, the application must be made in a timely manner, a consideration in this case. **The applicant will be in a strong position if the applicant has a genuine and significant interest in the subject matter or will be adversely affected by the judgment**; a serious preoccupation with the subject matter is insufficient.
>
> [EMPHASIS ADDED]

72. Simply repeating issues and arguments already advanced by the parties would not be particularly helpful nor be contributing anything important.

73. Even where a proposed intervenor party establishes any one of the S. 15.02 (1) (a), (b) or (c) criteria above, the Court may still refuse such an order based upon a consideration of whether such intervention will unduly delay or prejudice the determination of the rights of the parties.

74. To that end, generally, no intervenor is entitled to raise new grounds or such other relief than that already advanced in the originating proceeding. (See *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174); *and Hydro One Networks v. Ontario Energy Board*, 2019 ONSC 3763 (Ont. Gen. Div.).

75. It would seem that "greater latitude" is given to proposed intervenors in cases involving constitutional challenges because such challenges often, as in this case, touch upon a greater public interest. [See *Bedford v. Canada (Attorney General)* 2009 ONCA 669 (ONCA); *Elementary Teachers Federation et al. v. Ontario (Minister of Education)* 2018 ONSC 6318 at paragraph 9; and see paragraph 7 of *Allsco*]

FRIEND OF THE COURT (Rule 15.03)

76. Intervention under Rule 15.03 is mostly applicable to a party who has no connection to the underlying dispute but can offer expertise in a relevant area of law.

77. As stated by the New Brunswick Court of Appeal in *Bransen Construction Ltd. v. CJA, Local 1386:*

> I recognize that the typical "friend of the court" has no connection to the underlying dispute. In theory, this class of intervener seeks only to enrich the legal debate because of its demonstrated expertise in a limited but relevant area of the law. A true friend of the court is a disinterested non-party whose intended participation is motivated principally by the precedential significance of a case, not its temporal effect on the litigants. In theory, the true friend can offer a perspective beyond that expected of the parties.
>
> [Emphasis added]

ANALYSIS

PARTY INTERVENORS

78. After consideration of the materials before this court and the excellent submissions of all counsel I have determined that the court should exercise its discretion to grant party intervenor status to all of the "Party Intervenors" under Rule 15.02 and on a joint basis. This proceeding is an example of "public interest" litigation. The public interest stems from determining the legality of governmental policy which has province-wide implications.

79. While the CCLA was granted public interest standing to commence the litigation, I am not convinced that the field is fully occupied by the decision of Justice Dysart on

CCLA's standing. I am convinced in these circumstances that these three (3) joint Party Intervenors should have a "seat at the table".

80. Each of these joint Party Intervenors have an identifiable interest and a different perspective. Parts of this litigation involve the Charter and thus the threshold may well be somewhat lower.

81. More specifically, in regards to the Community Intervenors, I am convinced that collectively they have a genuine and compelling interest in the proceeding, and could be affected by any decision made in this proceeding. They will bring an important and different perspective to the issues before me. They bring ,in particular, through Egale, deep institutional knowledge and experience on the material legal issues .They, as a collective, will be able to speak for those directly impacted by the Minister's impugned decision(s). It is evident that while they are supportive of the Applicant's position, they will be able to add to and not simply echo those submissions. I am also convinced that their joint participation will not hinder or interfere with the proceeding in a way that might prejudice the parties.

82. In regards, to the GDA & ODC, I am equally convinced. Important to me is the fact that these two joint intervenors will almost certainly bring a perspective in support of the Minister's decision(s) and the policy amendments. While it is the Province who will bear the obligation to support its position, the GDA and ODC will be also able to provide a different and additional perspective, including from a parent's perspective. In this regard, I note Justice Dysart, in his standing decision, characterized any affected person in this way - "whether a child or parent of a child under the age of 16 who might be affected by the changes".

83. I also confess to considering some measure of balancing the apparent perspectives of the Community Intervenors with the GDA and ODC. It is not a mathematical equation by any means, but it is a consideration. Perhaps it amounts to some equal treatment on both sides of the expected debate on children's rights and parental interests as a result of the policy amendments.

84. As for the ENB and W2SA, and while hesitant given my concerns over, in particular, their stated continued intention to expand the issues I will address that concern directly below. I view the ENB and W2SA joint parties to bring a separate and discrete perspective as to how the policy decision(s) may uniquely impact Indigenous 2 spirit youth and families. While a narrow and discrete interest it would seem a consideration that would not necessarily be adequately represented, if at all, by the other parties herein. At this stage, I feel such a perspective to be *potentially* useful and could assist the Court. It deserves some voice in this proceeding.

85. However, I remain very concerned about the overly broad scope of their proposed evidence and argument on issues such as "Far-Right activism" and "white nationalism". I remain unconvinced that these are anything but distracting, collateral, and quite likely amount to nothing more than political activism. I will not allow for that to take over this proceeding. I find these issues could disrupt the proceeding and potentially prejudice the parties. As a result, I will not allow these joint party intervenors to enter and refer to the proposed expert evidence (will-say) of Dr. Amarasingam.

86. At this stage, the will-say and report of Dr. Robinson, to be confirmed in an affidavit format, may be put forward, subject to any future required evidentiary ruling, and subject

to my concerns above. Their evidence and any submissions need to be focused on aboriginal two spirit youth and the impact, if any, from the policy amendments.

87. Furthermore, to be clear, these joint intervenors will *not* advance any issues or seek relief under s. 2(a) nor s. 35 of the *Charter* in this proceeding.

Conditions for Intervenor Parties' participation:

88. While I am granting intervenor party status to the above Party Intervenors, it is important to recognize that there will be several additional conditions that attach to their participation beyond my comments above. I am convinced that these are necessary and appropriate in the circumstances. They arise from the tension that exists between ensuring that the public interest litigation proceed in both a broadly comprehensive manner, with a fulsome appreciation of the many issues required to be addressed, and, at the same time, in an efficient and effective way. Many, if not all, of these conditions were addressed by counsel and I would suggest that a consensus of sorts was reached on some of the conditions, but not all.

CONDTIONS :

1. All of the individual organization constituting each of the three (3) Party Intervenors, have sought to be added as a joint party by way of their motions. The grant of intervenor party status will be conditional on such joint intervention. As such, the three (3) (joint) Party Intervenor groups will be limited to one brief of law and one set of oral submissions per group.

2. The Party Interveners will not advance new, substantive issues. They will not seek to amend the pleading or add to the existing pleaded issues. There will be no right of remedial relief separate from the relief sought in the underlying application.

3. The Party Intervenors shall not unnecessarily duplicate the submissions of the parties or other intervenors.

4. Motions by Party Intervenors may only be made with leave of the Court.

5. Cross-examination on affidavits is subject to leave of the Court, per the Rules. The Party Intervenors will avoid duplication in any cross examination for which leave may be granted.

6. Nothing herein waives or limits the right of the Party Intervenors to raise objections to admissibility of proposed evidence at the hearing on the merits.

7. It is imperative that all counsel communicate with each other and cooperate with the goal of having this matter proceed to a hearing on the merits as soon as possible.

8. The Party Intervenors will not seek costs nor have costs be payable by them in this proceeding.

9. Counsel for the Province and for CCLA have convinced me to be circumspect over allowing the Party Intervenors free rein from submitting added evidence, i.e., evidence beyond what they have filed to date. Guard rails are required.

However, given the uncertainty over the appropriate record to be placed before the court I believe it satisfactory to say, at this stage ,and subject to any further order, that the Party Intervenors will be limited to the evidence or will-says submitted and identified

by them to date. Leave of the court would be required by Party Intervenors for any further evidence to be filed. Any applicable will-says statements will be put into affidavit form within 21 days of this decision.

89. The ultimate admission of, and weight given to any "evidence" is yet to be determined and can only be dealt with at the hearing on the merits, if not a separate evidential hearing in advance. I believe this will serve to somewhat reduce the potential for the proceeding from being bogged down in endless disputes over the necessity of and benefit of such further evidence.

UNION INTERVENORS

90. It is not without some hesitation, that I have determined the Union Intervenors, in these circumstances, to not have established a sufficient basis to be added as intervenor parties, under Rule 15.02. In the main, the Province's objections are valid and have influenced my exercise of discretion.

91. The Union Intervenors seek party status, in part, because they maintain they have a real identifiable interest in the application of the Policy 713 amendments. It is, after all, their respective members who constitute the "school personnel" which carry out the Minister's policy.

92. While it is true the policy in question, on its face, implicates "school personnel", in my view that alone, and importantly, in context, is not a sufficient interest. To the extent that "school personnel" are involved it is only that they do so at the direction of their employer (The Province). It is for this reason, as acknowledged by both counsel for the Union Intervenors, a "workplace issue". In my view the impugned policy amendments

and this proceeding are substantively directed at gender diverse school children under the age of 16 and their parents.

93. Understandably the Unions feel "caught in the middle" between the Policy revisions and the affected students and parents. However, the three (3) Unions make it clear that they wish to press their own members freedom of expression rights under s. 2(b) of the *Charter*. They also wish to contribute to whether the Policy "forces" their members to violate the students' *Charter* rights.

94. In my view, to the extent the unions wish to pursue their own members' *Charter* rights in this proceeding, it would represent both a significant and unwarranted expansion of the proceeding, but also run afoul of the principles of exclusive jurisdiction of labour adjudicators. Therefore, this Court would not be an appropriate forum for their issues. It is not open to the unions to argue before me that the policy revisions violate the same *Charter* sections but in an entirely different way, and for an entirely different group of people.

95. To the extent the unions wish to pursue the effects of the policy as impacting these school children's rights, the unions have not convinced me of any particular unique or important perspective they would bring forward which the CCLA would not be able to advance. Simply for instance, they have not offered any evidence outlining their members' actual experiences with students under the Policy.

96. The principles of exclusive jurisdiction of labour adjudicators in regards to unionized workplace disputes is well-entrenched in Canadian law i.e., see *Weber* at paragraph 46. The exclusive jurisdiction model revolves around the respective jurisdiction of labour

arbitrators/ adjudicators vis-à-vis the courts (and /or other statutory tribunals) in regards to workplace disputes.

97. In *Weber* the Supreme Court held the scope of exclusive arbitral jurisdiction extended to *Charter* and tort claims arising from the collective agreement.

98. More recently in *Northern Regional Health Authority v. Harrocks* 2021 SCC 42, the Supreme Court confirmed, at paragraph 13:

> It is settled law that the scope of a labour arbitrator's jurisdiction precludes curial recourse in disputes that arise from a collective agreement, even where such disputes also give rise to common law or statutory claims

99. Both counsel for the unions emphasised the fact that it was not the unions who commenced this litigation, i.e., the unions did not choose this forum. While true, nor should the unions be able to simply circumvent exclusive jurisdiction through the back door of a third party's proceeding. In that sense this matter is entirely distinguishable from the circumstances before Justice Christie in *Murray et. al. v. Attorney General of New Brunswick*, 2022 NBQB 27.

100. In that case, a group of provincial unionized employees sought to challenge a provincial directive requiring proof of COVID vaccination in the workplace through an application to the Court. The Province, as employer, moved to strike the application on the grounds that the issues it raised fell within the exclusive jurisdiction of an adjudicator under the *PSLRA.* Two unions, the New Brunswick Teacher's Federation and the New Brunswick Nurses Union, moved to intervene in the court process in order to support the Province's

motion to strike, and in order to protect the grievance adjudication scheme in their respective collective agreements.

101. The unions supported the Province's arguments that the applicants were covered by a legislated adjudication scheme designed to resolve all disputes whose essential character arises from the employment relationship. Because the application fell within this ambit, allowing the application to proceed would undermine the Unions' exclusive bargaining rights. Justice Christie accepted that the "essential character of the dispute" was employment-related, including the employees' *Charter*-related claims, and granted the unions' application to intervene on that basis. In the final result Justice Christie also granted the motion to strike.

102. This proceeding is entirely unlike *Murray*. In the underlying proceeding before this court, in many respects the unions are taking an opposite position.

103. While before me, this Court's jurisdiction over the CCLA's application is not questioned, nor should the unions be able to circumvent the exclusive jurisdiction principle by simply asking to join an otherwise valid proceeding in order to pursue their own relief or determinations that they would not otherwise be entitled to pursue on their own in the courts.

104. In direct response to the Court's comment concerning a seeming lack of any precedents on union interventions in the face of the exclusive jurisdiction objection, both counsel relied upon the *ETFO* decision. *ETFO* is, admittedly, an interesting decision from the Ontario Superior Court, and it did give me pause.

105. *ETFO* is a case with some similarities, both, to the subject matter of the dispute before me but even on procedural issues as the present case. At issue there were changes to the Ontario sex education school curriculum that removed topics relating to the diversity of gender identity. In that case, two applications for judicial review were heard together: one had been brought by the CCLA, and the other by the Elementary Teachers' Federation of Ontario, the statutory bargaining agent for Ontario teachers.

106. Part of the decision addressed the Teacher's Federation standing to bring the application. In the course of this analysis, at paragraphs 59–60, the Court noted that, as the bargaining agent for elementary teachers in Ontario's public education system, the Elementary Teacher's Federation of Ontario had a continuing interest in the outcome of the application.

107. As, understandably, advanced by the three prospective Union Intervenors before me: If the union's interest in the *ETFO*'s matter was sufficient to warrant a grant of public interest standing allowing it to initiate the application for judicial review as a whole, then ,in essence the three (3) unions' interest in the present matter should also be sufficient to warrant a grant of leave to intervene on issues affecting teachers and other implicated school personnel.

108. However, it is most noteworthy to me that there was a complete absence of discussion regarding the exclusive jurisdiction issue. While this Court is left to only surmise, it may be that the issue was simply not raised, or that, in that particular context, there was no ability for the Ontario Teacher's Federation to have, in fact, grieved or proceeded to adjudication.

109. Furthermore, the proceeding before me, brought by the CCLA, is focused on children's rights. In my view even the most generous reading of their Judicial Review Application, at paragraph 100 or otherwise, simply does not put "into play" the school personnel's (Union members) own Charter right, of freedom of expression under s. 2(b) or otherwise. To the extent the policy represents a restriction on school personnel's discretion to affirm under age 16 children, as a violation of their own freedom of expression, this is a dispute whose essential character arises from their respective collective agreement and for which they may have an available alternative remedy by grievance adjudication.

110. In addition, the unions have not identified by evidence or submissions, any useful contributions to the very issues before me. Their focus is clearly, and understandably, on their members. Having regard to the existing participants, in my view, the unions' participation in this proceeding is not necessary in order to resolve the application. In fact, it threatens to expand and hinder the process.

111. I am not convinced that this circumstance is one of those rare exceptions to the exclusive jurisdiction principles, so firmly entrenched in Canadian law for unionized workplaces (See *Harrocks*).

112. In addition, to say the unions' exclusive rights to represent their members are impacted by an outcome in this proceeding is much too broad a characterization. Context matters. In my view, the impugned policy amendments are substantively directed at gender diverse children under the age of 16 and their parents. The pith and substance of CCLA's proceeding is only in regards to the rights of these children. A decision in this proceeding will not affect the unions or their members legal interests in any material way.

113. To repeat, there is undoubtably an adequate alternative remedy available to each of the unions to seek redress under their collective agreements. The decision sought in this proceeding, as framed, simply will not and cannot address matters in dispute under a collective agreement.

114. The proposed Union Intervenors have not demonstrated that this court's ability to determine the legal questions in issue will be enhanced by their intervention as a party.

115. The Province also urges against the unions being allowed to intervene as a "friend of the Court" given that they are "not a disinterested party and have no expertise" to assist the Court by way of argument.

116. The unions were given the opportunity, following the case management conference, to file additional affidavit evidence they may wish to rely upon should they be granted intervenor status. By and large their proposed evidence is very much focused on their members and the existence of their collective agreements with the Province. They have offered little, if anything, on their members' experience with students under the policy, for instance.

117. As in *Allsco,* the unions here are private interest groups. At best, they have only a personal interest. They have not shown that they can, or intend, to bring anything important or unique to this proceeding beyond advocacy for their own members' interests. In no way is this intended to reflect poorly on those organizations and indeed it may well be expected. However, I fear it would have the necessary result of unreasonably expanding the litigation and burdening the parties. As a result, I also see no basis or benefit of granting them "friend of the court", intervenor status under Rule 15.03.

118. As a result the Union Intervenors' motions are hereby dismissed.

CONCLUSION

119. For the foregoing reasons the motions brought by the Party Intervenors are each allowed, subject to the Court's determinations and conditions above. The Union Intervenors' motions are each dismissed.

120. In the circumstances, there will be no order of costs on any of the motions.

Justice Richard G. Petrie
Court of King's Bench of New Brunswick, Trial Division