ONTARIO GSA COALITION

Brief on Bill 13 and 14
To the Standing Committee on Social Policy

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A. BACKGROUND

(i) Who we are

The Ontario Gay-Straight Alliance Coalition (the "Coalition") first formed to assist Marc Hall in his successful battle to take a same sex date to his high school prom at his Catholic school in Oshawa.[1] The Coalition contains a diverse range of national, provincial and local organizations representing over one million Ontarians.

Our Coalition's organizations are made up of Canadians from all walks of life and from a diverse range of ethnocultural backgrounds. We represent people of faith and atheists, working men and women, parents and students. We represent LGBT[2] persons and their families as well as concerned heterosexuals. In short, we include the full diversity of humanity that enriches Ontario society.

Our member organizations share a commitment to a secular society that respects freedom of and freedom from religion, and the human rights of all Ontarians as

[1] *George Smitherman, in his capacity as litigation guardian of Marc Hall* v *Michael Powers and the Durham Catholic District School Board* [2002] O.J. No. 1803

[2] Lesbian gay bisexual and trans. Longer acronyms are used for persons who are vulnerable to discrimination because of their sexual orientation, gender identity or gender expression, including the one found in Bill13. We do not criticize the use of longer and more inclusive acronyms, but we have chosen to use this shorter form in this brief as the shortest one in most common use and the one best understood.

reflected in the *Ontario Human Rights Code* (the "Code") and the Canadian *Charter of Rights and Freedoms* (the "Charter"). Our Coalition formed because of our shared concern in ensuring that all Ontario youth have access to a safe public education, including the full range of extracurricular activities, without discrimination because of sexual orientation, gender identity or gender expression.

The Coalition has once again retained prominent human rights lawyer Douglas Elliott of Roy Elliott O'Connor LLP to advise us.

A full description of our members is set out at Appendix A.

(ii) Our position on Bill 13 and 14

Our goal in connection with these Bills is to support LGBT students in their efforts to overcome the serious problem of bullying in Ontario schools.

A strong anti-bullying law is important. It will help protect LGBT students, their families and their straight allies from years of physical assaults and psychological distress associated with bullying. A strong law will help save lives.

Two elements are critical in any good law. First, students must have the right to form clubs focused on LGBT issues. Second, students must have the right to choose the name they want to use for any such clubs.

We believe that Bill 13 is a good Bill, but it can be improved. We believe that some of those improvements can and should be found in Bill 14. We outline our detailed position later in this Brief.

As the Committee members may know, we have also made it very clear that Ontario needs to have a new law addressing bullying in place in time for the new school year in September.

(iii) Some myths: what we do **not** stand for

We want to make clear up front what we do **not** stand for.

We do not condone bullying of any form in our schools. We know that some kids are bullied for other objectionable reasons besides sexual orientation and gender identity, such as physical disability. However, our focus is on LGBT students because the evidence makes it clear that the focus of bullies is most often on LGBT kids, or those perceived to be LGBT. Most LGBT students report that they do not feel safe at school. That is not true of straight students.

We do not believe that GSA's should be imposed on schools if no students want a GSA. We respect the students' right to choose.

We do not believe that students should be forced to name their LGBT clubs “Gay-Straight Alliance.” We recognize that for many students “Gay-Straight Alliance” has become a kind of “brand name” for this type of club. Some students want to use that name, and they have a right to do so. Other students do not like this name, because it is not inclusive, is too controversial or simply for reasons of personal taste. We respect the students’ right to choose.

The Coalition takes no position on the continuation of funding for Catholic schools as mandated by section 93(1) of the *Constitution Act, 1867*.

B. WHAT IS A GAY-STRAIGHT ALLIANCE?

A Gay-Straight Alliance (GSA) is a student-initiated and student-run club in a public or private school. The goal of a GSA is to provide a safe and supportive environment for LGBT and straight ally youth to meet and discuss sexual orientation and gender identity issues, and to work to create a school environment free of discrimination, harassment, and intolerance.

Gay-Straight Alliances (“GSAs”) are official student clubs with LGBT and heterosexual student membership and typically one or two teachers who serve as faculty advisors. Students in a school with a GSA know that they have at least one or two adults they can talk to about LGBT matters. The purpose of GSAs is to provide a much-needed safe space in which LGBT students and allies can work together on making their schools more welcoming for sexual and gender minority students. Such groups also function as safe havens and supports for youths with LGBT parents, other family members and friends.

GSAs provide safer community spaces where students can promote human rights for all people and build safer and more accepting school environments. Safer spaces within schools are extremely important for LGBT youth and their allies because they may be the only place for youth to access authentic peer support without danger or the threat of non-acceptance. Furthermore, having a GSA in a school can benefit all students (LGBT or otherwise) by addressing multiple kinds of discrimination while promoting diversity and inclusivity among the student body and school community as a whole.

C. WHY LEGISLATION IS NEEDED

(i) LGBT Youth are at high risk of being bullied

Our Coalition believes that the problems experienced by LGBT youth are serious and deserve special attention. Bullying of LGBT youth is widespread, and can result in assaults, depression and suicide.

The problems experienced by LGBT youth are part of the larger phenomenon of bullying, but they are also part of the larger phenomenon of harassment and violence experienced by LGBT persons of all ages. This was recognized by Justice Cory of the Supreme Court of Canada in Egan, where he wrote:

"The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation."[3]

Youth are coming out as LGBT at younger and younger ages, in middle schools and high schools across the country. Far too many face pervasive harassment and violence at school because of their actual or perceived sexual orientation or gender identity.

Some people, including some witnesses to this committee, deny that there is a problem of bullying of LGBT kids. Others suggest that the problem is no worse than the bullying that kids experience for other reasons. The evidence establishes that they are wrong.

Coalition member Egale Canada commissioned the first comprehensive national climate survey on homophobia, biphobia, and transphobia in Canadian schools, published in 2011, entitled *Every Class in Every School*[4]. The report documents the forms and extent of students' experiences of homophobic and transphobic incidents at school, the impact of those experiences, and the efficacy of measures being taken by schools to combat these common forms of bullying. The study involved surveying over 3700 students from across Canada between December 2007 and June 2009.

Key findings of the report include:

1. **Almost two thirds (64%) of LGBT students reported that they feel unsafe at school.**
2. LGBT students are exposed to language that insults their dignity as part of their every day school experience, and youth with LGBT family members are constantly hearing their loved ones being denigrated.
3. LGBT students and students with LGBT parents experience much higher levels of verbal, physical, sexual, and other forms of discrimination, harassment, and abuse than other students.

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[3] Egan v. Canada, [1995] 2 S.C.R. 513, page 600

[4] Taylor, C. & Peter, T., with McMinn, T.L., Elliott, T., Beldom, S., Ferry, A., Gross, Z., Paquin, S., & Schachter, K. (2011). Every class in every school: The first national climate survey on homophobia, biphobia, and transphobia in Canadian schools. Final report. Toronto, ON: Egale Canada Human Rights Trust.

4. Many schools have a well-developed human rights curriculum that espouses respect and dignity for every identity group protected in the *Canadian Charter of Rights and Freedoms* except for LGBT people.
5. Teachers often look the other way when they hear homophobic and transphobic comments and some of them even make these kinds of comments themselves.
6. Many students, especially youth of colour, do not have even one person they can talk to about LGBT matters.

The study found that GSA's have a positive impact on the lives of LGBT youth:

1. In schools that have made efforts to introduce LGBT-inclusive policies, GSAs, and even some LGBT-inclusive curriculum, the climate is significantly more positive for sexual and gender minority students.
2. Students from schools with GSAs are much more likely to agree that their school communities are supportive of LGBT people, are much more likely to be open with some or all of their peers about their sexual orientation and/or gender identity, and are more likely to see their school climate as becoming less homophobic.
3. Students from schools with anti-homophobia policies are significantly more likely to agree that their school administration is supportive of LGBT students.

The Ontario Ministry of Education has acknowledged that a safe and supportive environment for learning and working is one of the most important factors that influence the quality of student learning and achievement[5].

A Ministry of Education report found that:

> "Students who experience a positive school culture feel supported and accepted by peers and school staff and tend to develop a strong sense of school membership. Feelings of belonging enhance students' self-esteem and can contribute both directly and indirectly to improvements in academic and behavioural functioning and overall mental health. Students who feel accepted are more likely to develop strong literacy skills and make a positive contribution to the school culture and are less likely to commit infractions. Conversely, a low sense of school engagement in students appears to be correlated to a higher incidence of emotional and behavioural disorders (Canadian Public Health Association, 2003). This suggests that an approach to dealing with inappropriate student behaviour which enables students to feel supported and accepted at school may contribute to improved student learning and behaviour and help students stay in school[6]."

While this report was specifically in reference to students with special education needs, the principles articulated above apply equally to LGBT students.

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[5] (Safe Schools Action Team, 2008), cited in Caring and Safe Schools in Ontario' – supporting students with special education needs through progressive discipline, K-12.

[6] *Caring and Safe Schools in Ontario*, Supporting students with special education needs through progressive discipline, Kindergarten to Grade 12.

We believe that we need to single out LGBT kids for attention in this new law because bullies single out LGBT kids for the wrong kind of attention.

GSAs are necessary to ensure student safety, engagement and academic success. Unfortunately, the EGALE study shows that, without government intervention, some schools are unwilling to permit these important clubs to exist.

(ii) The name of the club matters to students

We believe that students have a constitutional right to choose the name of their clubs. This is discussed in the legal section below. In this section, we will discuss why this issue is critical for our Coalition.

One of the features of traditional discrimination against the LGBT population has been the social phenomenon known as living "in the closet". Justice Cory writing in *Egan* also recognized this as a social evil:

"The stigmatization of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexuals to conceal their orientation. This imposes its own associated costs in the work place, the community and in private life."

Much of the controversy that has surrounded these bills is the use of the name "gay-straight alliance". This term, which originated in the USA, has become a kind of "brand name" for these types of student clubs. Some students want to use this term, and others do not, and we respect the right of students to decide. No one suggests that the Legislature should impose a name on the clubs. However, some suggest that the Legislature should ban or permit the banning of the name "gay-straight alliance".

It is clear that the words "straight" or "alliance" offend no one. The problem is with the use of the word "gay."

Words matter. Like many marginalized groups, LGBT persons are subjected to hateful epithets every day. Historically, we were condemned by the Christian Church and the law as "sodomites". We have resisted this form of discrimination by developing our own terms that were not negative, beginning with the word "homosexual" that was coined in the 19th century. The word "gay" to describe homosexuals began to be adopted widely in our community beginning in the 1960's, and the first organization to bear the name in Canada was formed in 1971, the Gay Alliance Toward Equality.

Initially there was considerable social resistance to our use of the term "gay" to describe ourselves. Major newspapers such as the New York Times at first insisted that the word must guard its traditional meaning of "happy." The English language has evolved, and the word gay is now the word most commonly used in everyday life referring to homosexuals. It is heard on television, on radio, in our movies and our newspapers. The

argument seems to be that parents or schools can and should somehow insulate their children from hearing this word, or from encountering sexual minorities, simply by banning the use of the word gay in connection with school clubs. In our modern society that is impossible.

Sadly, the word gay is used in a hurtful way in schools. “That’s so gay” is a common enough insult. That is reason enough in our view to insist that it appropriate to use the word in its usual and more positive sense.

The word “gay” is not obscene. So what is the basis of the objection to the word? It seems to be twofold.

First, our opponents seem to suggest we might be tolerated by them so long as we remain invisible. This is forcing us back into the closet, and it is unacceptable. Would it be acceptable to any of your political parties if you were allowed to operate but had to do so under a different name? Would the Roman Catholic Church consider it acceptable if it were allowed to operate on condition that it changed its name? The propositions are absurd. It is just as absurd to our students that they might not be allowed to choose the name of their club. It is deeply offensive to us that they would be refused the right to use the name “gay”, a name we have fought to use openly for decades.

Second, the objection seems to be that the use of the word “gay” implies a tolerance of gay people which is contrary to some persons’ religious beliefs. It is not really the word that is objectionable; it is homosexuality itself that is objectionable. In fact, many people who are very intolerant of LGBT persons still commonly use the term, as in the popular use by anti-gay bigots of the expression “Gay Agenda”. However, if we accept that allowing the use of the word “gay” does imply tolerance of gay people, there can be no legitimate objection to teaching tolerance of LGBT persons in our public schools. Only intolerance should be objectionable.

Allowing the school board the right to choose the name is not acceptable. There is no evidence that any school board has banned the name of any school club, expect for “gay- straight alliance” or similar names for LGBT clubs. There is no evidence that efforts have been made to control the content of discussion at any school clubs, except gay- straight alliances. Conferring this power on the boards would lend legislative endorsement to such restrictions and bans, and would tend to legitimize and endorse the discrimination being suffered by LGBT youth.

Simply put, forcing us to call our LGBT clubs “Respecting Differences” clubs is not respectful.

When the LGBT community fought for equal marriage, many of the same opponents we face now said that we should not be allowed to use the term to describe our unions. We refused to accept the second class status implicit in settling for a label chosen by someone else. The Courts agreed with us. We will not accept second class status for the cubs organized for LGBT youth.

D. Bill 13 and 14

Except as set out in this section, we do not take issue with any of the clauses in Bill 13. We believe the best approach is to use Bill 13 as a foundation and to amend it, including adding key elements from Bill 14.There are some elements from Bill 14 that may be unobjectionable but that we do not consider essential. Finally, there are some elements of Bill 14 that cause concern for us and that we would not want added unchanged into Bill13.

(i) Preamble

Issue: The third paragraph of the preamble lists the current grounds of the Code. This creates inflexibility as grounds to the Code may be added, especially gender identity and gender expression.

Recommendation: replace the words beginning with “regardless” with the following “without discrimination on any ground prohibited by the Ontario Human Rights Code or the Canadian Charter of Rights and Freedoms;”

(ii) Definition (Bill Section 1)

There are several problems with this section, especially when contrasted with Bill 14. The focus of the definition is on intent, rather than effect as it is in Bill 14. Canadian human rights law has been clear that, while discriminatory intent is unlawful, it is not necessary to prove discriminatory intent. Discriminatory effect is a human rights violation, whether or not intended.[7]

Since the word “and” appears in proposed 1(1)(a), this will make clauses (a) and (b) “conjunctive”. This will make it harder to establish that bullying has occurred, because it will have to meet the criteria in both (a) and (b) to constitute bullying.

Bill 14 also refers expressly to physical harm, which is desirable.

Bill 14 refers to damage to property. “Trashing” lockers and defacing them with graffiti are well known forms of bullying, and deserve attention.

Bill 14 helpfully refers to creation of a “hostile environment.” This is consistent with existing human rights law dealing with racist teachers in schools.[8]

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[7] See *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143.
[8] *Ross* v *New Brunswick School District No. 15*, [1996] 1 S.C.R. 825. See also *R. v. Keegstra*, [1990] 3 S.C.R. 697.

Bill 14 contains an entire section dealing with cyber-bullying which is absent from Bill 13. Cyber-bullying is one of the most pernicious forms of school bullying today. It should be included.

Recommendation: Broaden the definition by including effect, as in Bill 14. Remove the word “and from proposed 1(1)(a), and add the word “generally” to modify the verb “occurs” in (b). Add express references to physical harm, damage to property, creating a hostile environment and cyber-bullying as forms of bullying, as proposed in Bill 14.

Caution on Bill 14: While we commend many of the features of the definition section of Bill 14, we do not recommend the provisions set out in (d) and (e). The concept of “legal rights” is too broad. The focus in (e) is on the management of the school, rather on the student victims.

(iii) Section 3(1)

Issue: This section again lists the prohibited grounds of discrimination contained in the Code. As with the preamble, we are concerned that this creates inflexibility as new grounds in the Code may be added, especially gender identity and gender expression.

Recommendation: replace the language beginning “including pupils…” with the following “including all pupils without discrimination on any ground prohibited by the Ontario Human Rights Code or the Canadian Charter of Rights and Freedoms;”

(iv) Section 4

Issue: Proposed clause 3001.01.4 in paragraph 2 refers to “homophobia.” We view this as underinclusive.

Recommendation: Add to paragraph 2 the words “biphobia and transphobia.”

(v) Section 7(3)

Issue: Similar to section 4, proposed clause 301(6)(a)(i) refers to “homophobia.” We view this as underinclusive.

Recommendation: Add to the proposed 301(6)(a)(i) the words “biphobia and transphobia.”

(vi) Section 9

Issue: Two issues are raised by this section.

A general problem is posed by the use of a “closed list.” This list is more problematic because it does not include all of the grounds listed in the Code.

Concerns have also been expressed about (d). Supporters of gay-straight alliances have found the language ambiguous. Critics of gay-straight alliances allege that this clause will mandate such clubs in the absence of student demand, and will impose the use of the name “gay-straight alliance.”

Although the language is ambiguous, we believe that it will be interpreted to mean that students will have the right to choose to form such clubs or not. We also believe that the clause will be interpreted to mean that students can choose the name gay-straight alliance or not. This is the interpretation that is consistent with the students’ Charter rights to freedom of association and expression.

Accordingly, while we might prefer language that was stronger in clarifying the right of students to choose the names of these clubs, we believe that such a change is not essential. However, it may be helpful to add language to ensure no incorrect interpretation.

Recommendation: The opening language of proposed section 303.1 should be expanded to read “establish and lead activities and organizations promoting equality and combating discrimination based on the grounds of discrimination prohibited by the Ontario Human Rights Code and the Canadian Charter of Rights and Freedoms, including, without limiting the generality of the forgoing, “.

Rather than amend the language of (d), we suggest adding a new clause (e) as follows: “Nothing in this section shall be interpreted to require a school to hold an activity or create an organization unless requested by pupils, and nothing in this section shall be interpreted to restrict the freedom of expression of pupils in selecting the name of their choice for any of their activities or organizations.”

(vii) Section 10

Similar to the concerns raised by us in connection with the preamble and other sections above, the proposed section 7.2 makes use of a list enumerating the current grounds in the Code. This problem is mitigated in this case by the use of the language “or any similar factor”, creating an open ended list similar to section 15(1) of the Charter. However, there is still a risk of inflexibility or inconsistency as grounds to the Code may be added, especially gender identity and gender expression.

Recommendation: replace “or any other similar factor” with “or on any ground of discrimination prohibited by the Ontario Human Rights Code or the Canadian Charter of Rights and Freedoms;”

(viii) Bill 14 – other clauses

We have indicated above our views on those elements of Bill 14 that should be added to Bill 13, and expressed concern about a couple of provisions that we do not recommend.

There are other provisions in Bill 14 that do not cause our Coalition great concern, such as provisions that in general call for an active leadership role by the Ministry. Creating model policies, training and reporting may all be desirable to monitor progress and in the interests of transparency, although it is not clear that it is necessary that this be mandated in a statute.

There is one section of Bill 14 involving reporting that is clearly well-intentioned but that we think needs to be approached with great caution.

There is no doubt that there can be a problem in connection with bullying when school officials ignore the problem. Worse still, school officials who are either indifferent to the problem or incapable of addressing it may be tempted to cover up a problem at their school or board. This phenomenon can be seen in the recent American documentary film, *Bully*.

Bill 14 proposes one type of solution in its section 8. In general, the section envisions mandatory reporting of bullying to principals, mandatory investigations by principals and mandatory reporting to parents of the victim and the bully.

This structure may make sense in the context of other types of bullying, but it is extremely problematic in the case of LGBT youth. Unlike the pupil’s race or religion, which is often shared with his or her family, a pupil’s sexual orientation or gender identity may be unknown to his or her family.

“Coming out” is a difficult process. Each individual has to choose the pace and the manner in which he or she comes out. Frequently, the process is a gradual one, as the concerned person chooses one or two trusted friends or family members with whom they are willing to share the information. “Outing”, forced disclosure of sexual orientation or gender identity, is traumatic and can be a vicious form of bullying. Pupils should be able to confide in a trusted teacher, staff member, volunteer or principal without fear of being “outed.” Unfortunately, bullying may be the trigger for that conversation.

It may be appropriate to find other ways to address concerns about transparency. However, if the Committee is inclined to adopt any of these measures, these concerns need to be born in mind. Teachers, school officials and volunteers should be given other portions apart for reporting to a higher authority or notifying parents. The pupil's wishes about disclosure should be paramount. Consideration could be given to the option of notifying the school social worker or the Office of the Provincial Advocate for Youth and Children to ensure transparency, provided that those parties have the skills and the flexible mandate needed to respond.

E. LEGAL ISSUES

It has been suggested by some witness and others that Bill 13 is unlawful because it imposes GSA's on parents and boards, contrary to their religious or cultural values.

The Catholic Trustees have officially taken a position that suggests that they believe that they may not have to comply with any legislation that requires them to allow students to form GSAs.

This brief will show that these positions are unfounded. In fact, the Province of Ontario has every right to enact the legislation and require the boards to comply, including Catholic boards.

The issues this report will address include:

1. LGBT students have a right to a safe education without discrimination, including the right to form GSA's and call them "gay-straight alliance".

2. Mandating that schools permit and support GSAs does not infringe the freedom of religion of parents, trustees or anyone else, but banning the clubs infringes many of LGBT students' constitutionally protected rights.

3. Catholic trustees cannot rely on their special rights under s.93(1) of the *Constitution Act* to avoid compliance with Bill 13.The province has the constitutional competency to enact this legislation.

1. LGBT students have a right to a safe education without discrimination, including the right to form GSA's and to choose the names for their clubs.

(i) Legislative power

Some witnesses and others have argued that Bill 13 cannot or should not be enacted because this Legislature would be imposing its policies on parents and trustees against

their wishes. This position is unsustainable legally, and is indefensible in a modern democratic society.

Our laws touching on education are made for the general public good, and not to suit any one person or group's religious or cultural values. The legal authority to create those laws ultimately derives from the people of Ontario. However, that will is given effect in two ways. Our constitution was created and modified from time to time by our duly elected leaders. That Constitution gives this Legislature the competency to enact laws in relation to education. The people of Ontario elected representatives to this Legislature, and those representatives are authorized to create education laws on behalf of Ontarians subject only to the limits imposed by our Constitution.

Mandatory universal publicly funded education has been an activity of the Ontario government for so long that it predates Confederation. After years of effort that dated back to Governor Simcoe, our first public schools were built pursuant to the 1807 *Public Schools Act* enacted by the Upper Canada Legislature. At that time, the Legislature was authorized to legislate in this area by the Imperial Parliament.

The Confederation debates saw an important focus of on the question of education. It was considered sufficiently important that it was not simply added to the list of general provincial powers contained in section 92 of the *Constitution Act, 1867*. Rather, education was given its own special section, section 93.

Public education is mandatory in Ontario, despite the infringement this poses on the rights of parents and children. This reflects our social and legal concern about the societal good achieved by ensuring that all of Ontario's children receive a certain minimum standard of education.

(ii) The Charter's impact

This year marks the thirtieth anniversary of the Charter. Since the advent of the Charter, all laws must conform to the Charter, including the *Education Act*. Similarly, all government actors, including school boards, must conduct their activities in conformity with the Charter.

The Charter has already had a profound impact on our schools. For example, our Court of Appeal has ruled that the Charter requires our public schools to be a secular environment without imposing the religious conventions or practices of the majority.[9]

In our view, LGBT students already have a constitutionally guaranteed right to form gay-straight alliances and to name them as such. Bill 13 confirms and clarifies this situation.

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[9] *Zylberberg v. Sudbury Board of Education*, (1988), 65 O.R. (2d) 641; (1988), 52 D.L.R. (4th) 577; (1988), [1989] 34 C.R.R. 1; (1988), 29 O.A.C. 23

Charter rights are not limited to adults. Pupils in school have rights under the Charter. Education is a publicly funded service available to all Ontarians. In offering this service, Ontario may not discriminate based on any of the prohibited grounds in delivering that service.

Equal treatment of all pupils alone may not be enough to meet the requirements of the Charter. Government may be required to take additional steps make the service accessible by overcoming barriers experienced by minorities.[10]

Under s.15 (1) of the *Charter of Rights and Freedoms*, LGBT students share the same right to a safe education enjoyed by their straight counterparts:

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.

It is well established law that sexual orientation section is included in 15(1) as an analogous ground. Gender identity and expression are likely to be found to be included within the meaning of "sex" or to be identified as analogous grounds, as has occurred in our Code jurisprudence.[11]

Ontario must take reasonable steps to protect the safety of LGBT students to ensure access to this vital public service. Most LGBT students currently do not feel safe at school. They are constantly bullied, harassed and/or assaulted because of their sexual orientation or gender identity. This oppressive behavior too often leads to serious physical or psychological injury, and can even result in suicide. Allowing students to establish GSAs is one demonstrated way to effect school culture in such a way that LGBT students feel more welcome and safe at school.

This view is fortified by other relevant rights enjoyed by students under the Charter.

The students have a right to physical and psychological integrity guaranteed by section 7 of the Charter.

s.7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In creating GSA's, LGBT students are responding to bullying for the protection of their physical and psychological well-being. This Legislature and the Boards have a duty to protect those rights.

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[10] See *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624

[11] Under the Charter, the first in a long line of Supreme Court cases on the point was *Egan and Nesbit* v. *The Queen*. 1995] 2 S.C.R. 513. In the human rights context, see the recent ruling of the Ontario Human Rights Tribunal in *XY* v. *Ontario (Government and Consumer Services)*, 2012 HRTO 726

The students also have relevant fundamental freedoms under the Charter.

s. 2 Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) *freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;*

(c) *freedom of peaceful assembly; and*

(d) *freedom of association*

In our view, the students' freedom of association guarantees the right to form LGBT clubs. This freedom safeguards the individual's right to engage in associational activity, in this case forming extra-curricular clubs like other students. Laws or government action that substantially interfere with the ability to achieve collective goals have the effect of limiting freedom of association, by making it pointless.[12] In our view, banning gay-straight alliances or imposing suffocating restrictions on them as suggested in "Respecting Differences"[13] would violate the associational rights of LGBT youth under section 2(d).

The right to freedom of expression allows LGBT students the freedom to name those clubs. Freedom of expression is a very precious freedom for the LGBT community. In the past, the exercise of our freedom of expression has been deliberately attacked by our government itself, an attack condemned by the Supreme Court of Canada.[14] In the past efforts have been made to erase our existence and curtail images of LGBT families in schools by anti-gay school trustees and allied parents, who sought to justify their actions on religious grounds. In that case, our Supreme Court stepped in to defend the rights of the LGBT community. Confronting arguments that the school board in that case was simply protecting sensitive young children, Chief Justice McLachlin noted that LGBT people are a fact of life in modern society and that "tolerance is always age-appropriate."[15]

This Legislature and the Boards have a duty to protect the rights of LGBT students.

The justification that seems to be offered for imposing this restriction is that it offends the traditional religious beliefs of some segments of the population.

Three points need to be made in this regard.

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[12] See e.g. *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3
[13] "Respecting Differences", Ontario Catholic School Trustees Association, January 25, 2012
[14] *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120
[15] *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86

First, as discussed below, there is no evidence the existence of these clubs or the use of the name will actually interfere with anyone's religious beliefs or practices.

Second, as a matter of fact, the use of this name does not offend the religious beliefs of many people in Ontario. There are many people of faith in our Coalition, and two of our member organizations are faith based.[16]

Third, the promotion or enforcement of traditional religion can never be a justification for any law under section 1 of the Charter.[17] The desire of conservative religious persons to condemn homosexuality cannot justify refusing to extend the protection of the law to LGBT persons.[18]

Religiously justified hatred of LGBT persons has a tragic track record of going so far as endorsing violence toward and even killing LGBT persons. A North Carolina pastor has advocated beating boys who appear effeminate in the name of God[19], and another US pastor maintains a notorious anti-gay website www.godhatesfags.com. The LGBT community has been the target of violence "justified" in the name of traditional religious or cultural values. We recall the Middle Ages in Europe when gays were burned at the stake. We look with horror on the contemporary executions of LGBT persons in dozens of countries such as Iran, the proposed death penalty in Uganda and the mob murders of gays celebrated in song in Jamaica. Such actions have been roundly condemned by the UN Human Rights Commissioner, Ms. Navanethem Pillay, in her recent report, and by UN Secretary General Ban-Ki Moon.[20]

In our country, most people of faith condemn such violence. Unfortunately, from the fundamentalist end of the religious spectrum, we frequently hear condemnations of homosexuality, but all too rarely do we hear condemnations of violence against LGBT persons.

Canada has committed to the UN *Convention on the Rights of the Child*, which in article 19(1) commits Canada to protect children "from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse while in the care of parent(s), legal guardian(s) or any other person who has the care of the child." As the Supreme Court of Canada has noted in connection with reasonable legal limits on corporal punishment,

"Children need to be protected from abusive treatment. They are vulnerable members of Canadian society and Parliament and the Executive act admirably when they shield

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[16] Metropolitan Community Church of Toronto and Catholics for Choice.
[17] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295
[18] *Vriend v. Alberta* [1998] 1 S.C.R. 493
[19] http://pamshouseblend.firedoglake.com/2012/05/02/beat-your-gay-kids-n-c-pastor-sean-harris-cant-even-keep-his-excuses-straight/ accessed May 13, 2012
[20] http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx accessed May 13, 2012

children from psychological and physical harm. In so acting, the government responds to the critical need of all children for a safe environment."[21]

The Bible contains passages that have been interpreted by some fundamentalists to sanction beating their children. For example, Proverbs Chapter 13 verse 24 says: "*He that spareth his rod hateth his son: but he that loveth him chasteneth him betimes (diligently)*." However, beating with a rod is not permitted under Canadian law, regardless of the religious beliefs of the parents.[22]

The right to freedom of religion has always been limited by a fundamental principle, that is, that the exercise of freedom of religion by one person may not cause harm to another. As the Supreme Court said in the leading case of *Big M*,

"The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided, inter alia, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own."[23]

There is no religious right to engage in assaults. There is no cultural right to psychologically harass children.

We do not allow parents to mistreat their own children directly based on religion or culture. Why would we allow parents to rely on their religion or culture to indirectly mistreat the children of others by tolerating the bullying of LGBT kids?

2. Mandating that schools permit and support GSAs does not infringe the freedom of religion of parents, trustees or anyone else.

It has been asserted that, even if the Legislature might have the authority to enact laws regarding education, Bill 13 is nonetheless impermissible because it will infringe the religious beliefs or cultural values of boards or parents who view homosexuality as morally wrong. This position is legally unsustainable in light of well established Supreme Court of Canada authority.

Before turning to the legal issues, an important preliminary point of fact must be addressed. It is simply false to assert that all people of faith object to Bill 13: our Coalition includes people of faith. Similarly, it is simply false to assert that all persons belonging to any given racial, ethnic or cultural group oppose Bill 13. We represent persons belonging to a wide diversity of such communities who support Bill 13.

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[21] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4, para 58.
[22] Ibid.
[23] *R. v. Big M Drug Mart*, 1985] 1 S.C.R. 295 at 346

As noted above, the Charter protects freedom of religion.

The protection of the freedom of conscience and religion, like all rights and freedoms, is limited by s.1:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

There is no right in parents or boards to avoid a provincial law mandating the teaching of tolerance or creating an atmosphere of tolerance for LGBT students, in this case through the formation of GSA's.

This has been made very clear by the Supreme Court of Canada's recent decision *S.L. v. Commission scolaire des Chênes*, [2012] S.C.J. No. 7 ("Commission scolaire").

In *S.L.*, parents of certain public school students in Quebec alleged that refusal of the Board of Education to exempt their children from a mandatory Ethics and Religious Culture course infringed their freedom of religion. That course taught students about other types of religions and beliefs. The parents believed that exposing children to various religious facts was confusing for children, and that the ERC Program interfered with their ability to pass their faith on to their children.

Writing for a 7 member majority, Deschamps J. wrote:

> **23** At the stage of establishing an infringement, however, it is not enough for a person to say that his or her rights have been infringed. The person must prove the infringement on a balance of probabilities. This may of course involve any legal form of proof, but it must nonetheless be based on facts that can be established objectively. For example, in *Edwards Books*, the legislation required retainers who were Saturday observers to close a day more than Sunday observers. In *Amselem*, the infringement resulted from a prohibition against erecting any structure on the balconies of a building held in co-ownership, while the appellants believed that their religion required them to dwell in their own succahs.
>
> **24.** It follows that when considering an infringement of freedom of religion, the question is not whether the person sincerely believes that a religious practice or belief has been infringed, but whether a religious practice or belief exists that has been infringed. The subjective part of the analysis is limited to establishing that there is a sincere belief that has a nexus with religion, including the belief in an obligation to conform to a religious practice. As with any other right or freedom protected by the *Canadian Charter* and the *Quebec Charter*, proving the infringement requires an objective analysis of the rules, events or acts that

> interfere with the exercise of the freedom. To decide otherwise would allow persons to conclude themselves that their rights had been infringed and thus supplant the courts in this role.
>
> **25.** Furthermore, the following comment of Wilson J. in *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 314, which Iacobucci J. quoted in *Amselem*, para 58, bears repeating: s.2(a) of the *Canadian Charter* "does not require the legislature to refrain from imposing any burdens on the practice of religion" (emphasis omitted; see also *Edwards Books*). "The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises" (*Amselem*, at para. 62). No right is absolute.

The court then concluded that mandatory attendance in the ERC program did not violate the parent's freedom of religion because it did not interfere with the practice of passing their belief on to their children. Attending the ERP course did not amount to an indoctrination of students that would infringe the parent's freedom of religion.

Furthermore, the court also that in our society we must always take the rights of others into account. It added "[t]he suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multi-cultural reality of Canadian society and ignores the Quebec government's obligations with regard to public education. Although such exposure can be a source of friction, it does not in itself constitute an infringement of s.2(a) of the *Canadian Charter*".

Therefore, parents or trustees would have to show with objective evidence that allowing students to form, join and be exposed to GSAs actually interferes with their freedom to pass their religion onto their children.

A public policy of tolerance in our education system is laudable. It is also constitutionally valid.

In a B.C. case, the Supreme Court found that it was impermissible for a Board to ban books about same sex relationships from school in reliance on the religious beliefs of parents or board members. The Court in that case was confronted with similar arguments about the school interfering with the parents' rights to teach their children their own moral views on homosexuality, especially young children. Chief Justice McLachlin wrote this for the majority:

"When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right. Learning about tolerance is therefore learning that other people's entitlement to respect from us

does not depend on whether their views accord with our own. Children cannot learn this unless they are exposed to views that differ from those they are taught at home."[24]

a) *There is no objective evidence that GSAs will infringe a religious practice or belief*

A number of religions condemn the homosexual act, but do not condemn homosexual persons. Many such faith groups are not monolithic, but contain a diverse range of opinion on this topic. A good example is traditional Catholic teaching. In *Hall (Litigation Guardian of) v. Powers*[25], where a Catholic school board was ordered to permit a gay student to bring his boyfriend to the prom, Justice MacKinnon noted that "The Church's Catechism, in three paragraphs, first declares that homosexuality is contrary to natural law and can under no circumstances be approved, but goes on to direct both that homosexuals should be accepted with respect, compassion, and sensitivity and also that every sign of unjust discrimination should be avoided." His Honour also found that there was a wide range of beliefs among Catholics about the appropriate response to LGBT individuals.

There is no evidence that permitting students to establish, lead, join or be exposed to GSAs will infringe any religious beliefs or the ability of parents to pass their religion onto their children. For example, all Catholic students will still be exposed to official Catholic teaching.

In fact, in our view, allowing GSAs would be consistent with the Catholic faith as understood by our Catholic members. It would ensure that "homosexuals [are] accepted with respect, compassion, and sensitivity", as well as "avoid signs of unjust discrimination." This is particularly true given the evidence of discrimination faced by LGBT people at school every day and the impact GSAs have on their physical and psychological safety.

There is no evidence that allowing students to form, join and be exposed to GSAs interferes with the freedom of their parents or any faith group's freedom to pass on their religion to their children. Although it might be a source of friction, that in and of itself is insufficient to found an infringement of s.2a of the *Charter of Rights and Freedoms.*

However, even if there were such an infringement it would be justified under s.1 of the *Charter of Rights and Freedoms*.

b) *The protection of the religious rights of parents is outweighed by the protection of many other Charter rights of LGBT students.*

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[24] *Chamberlain v*. Surrey School District No. 36, [2002] 4 S.C.R. 710, 2002 SCC 86
[25] Supra, footnote 1.

Any infringement on the freedom of religion of parents and Boards imposed by the clause in Bill 13 that allows students to form GSAs is permissible because it is reasonably justified in a free and democratic society.

The protection of the freedom of conscience and religion is limited by s.1:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In *R. v. Oakes*, the Supreme Court articulated a test for determining if a law that infringes a Charter Right is saved by S.1 of the *Charter*. The Court identified a two-step test. First, there must be "an objective related to concerns which are pressing and substantial in a free and democratic society", and second, it must be shown that the "means chosen are reasonable and demonstrably justified".

The second branch of the test is described as a "proportionality test", which will require the Province to show:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

In *Dagenais v. Canadian Broadcasting Corporation*, the Supreme Court clarified the third part of the proportionality test:

> While the third step of the Oakes proportionality test has often been expressed in terms of the proportionality of the objective to the deleterious effects, this Court has recognized that in appropriate cases it is necessary to measure the actual salutary effects of impugned legislation against its deleterious effects, rather than merely considering the proportionality of the objective itself[26].

In *S.L.*, supra, the Supreme Court reiterated that "the protection of any Charter right must be measured in relation to other rights with a view to the underlying context in which the apparent conflict arises".

The Province clearly has a pressing and substantial objective in this case: the protection of the health and safety LGBT students, and ensuring they have access to a publicly funded education. The law is rationally connected to that objective because there is objective evidence proving that schools with GSAs improve the school climate for LGBT

[26] [1994] S.C.J. No. 104 at para 93.

students, thereby decreasing the psychological and physical violence they are subjected to. Finally, the law is minimally impairing because it does not require school boards to form GSAs. Instead, the law only requires the schools to allow students to form GSAs if the students take the initiative to do so and wish to name the club as such. The clubs do not form part of the school's curriculum, and students participate in club activity outside of class time. There is no restriction on religious curriculum of Catholic schools.

Lastly, the benefits of the law are far out of proportion with the effects of the law on the freedom of religion. A court must measure any infringement of the freedom of religion in the context of the Charter rights of LGBT students. The consequences of not having GSAs are more severe to LGBT students – it infringes their life and liberty interests because they experience increased harassment, assault, suicide, isolation, depression and worse academic performance – than the consequences of any breach on a freedom of religion – open respect for LGBT persons.

The law might expose students to the issues LGBT people face, and to expressions of equality rights within the school. The students would, however, would not be required to join a club. Students are also not required to listen to or approve of any activities undertaken by the clubs.

On the other hand, if students are not allowed to form GSAs, LGBT students would be left without a safe haven. They would continue to be exposed to discrimination without a way to help effect acceptance and understanding within the school community. Furthermore, several of their *Charter* rights will be infringed:

1. Freedom of conscience and religion[27];
2. Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;[28]
3. Freedom of association[29];
4. Right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice[30];
5. Equality before and under the law, and the right of equal protection and equal benefit of the law without discrimination based on sexual orientation[31].

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[27] S.2a of the *Charter of Rights and Freedoms.* Justice MacKinnon found in *Hall (Litigation guardian of) v. Powers* that persons of Catholic faith hold a wide variety of views on "pastoral care regarding homosexuality such that, it is not clear what conduct is necessary to ensure that rights with respect to denominational schools are not prejudicially affected". Many LGBT students sincerely believe that their Catholic faith accepts them as who they are, regardless of their sexual preferences. GSAs are a safe place to "come out" and have support of other people in the school community. By preventing them from having GSAs, the Catholic School is preventing LGBT from safely practicing the Catholic faith as a LGBT person. It is also preventing some non-LGBT students from accepting and supporting LGBT students.

[28] S.2b of the *Charter of Rights and Freedoms.* This is an infringement on the ability of students to express who they are and beliefs about the appropriate response to LGBT students.

[29] S.2d of the *Charter of Rights and Freedoms.* This is an infringement on the ability of students to associate with themselves and others as a GSA.

[30] S.7 of the *Charter of Rights and Freedoms.* Since GSAs are proven to reduce violence, harassment and trauma of LGBT students, disallowing them are an infringement of their life, liberty and security of the person.

Protecting a right to pass ones religion onto one's children would cause putting LGBT student lives in danger, infringing their freedom of religion, expression, association, and to equal treatment in front of the law. Therefore, measured in relation to other rights with a view to the underlying context in which the apparent conflict arises, any infringement of the freedom of religion caused by allowing GSA's in schools, including Catholic schools, would be reasonably justified in a free and democratic society.

3. Catholic trustees cannot rely on s.93(1) of the Constitution Act 1867 to avoid compliance with Bill 13.

A unique situation arises in the case of Catholic boards. They have special rights guaranteed under our 1867 Constitution. However, these rights to not amount to a wholesale exemption from regulation by Ontario. On the contrary, those rights are limited in scope.

S.93 of the *Constitution Act* states that the Provincial Legislature may make Laws about Education except for certain provisions, including the rights and privileges Catholic Trustees and Schools enjoyed at the time of the Union, or 1867:

> **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 Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:
>
> (3) Where in any Province a System of Separate or Dissentient 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 Execution of the Provisions of this Section is not made, or in case any Decision of the Governor

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[31] S.15 of the *Charter of Rights and Freedoms*. LGBT students have a right to a safe education without discrimination.

> 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 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.

a. *Did Catholic Schools and Trustees have the right to manage extra-curricular activities in 1867?*

The initial inquiry under section 93(1) is historical: what rights did Catholic Schools have in 1867? The proper approach is to look at the rights as they existed in 1867 but then to apply present-day common sense.

Catholic Boards do not have the constitutional right to override provincial authority and to dictate the nature or name of extra-curricular activities unless the Catholic Boards enjoyed the right to do so in 1867.

Did school boards regulate extra-curricular activities in 1867? At the time of the Union, no such right existed. Moreover, there were no such things as extra-curricular activities in 1867.

The Act that governed the rights of the Catholic Schools and Trustees in 1867 was *An Act to restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools*, c.15, commonly referred to as the "Scott Act". The Scott Act was the culmination of a long struggle to establish Catholic schools in a socially hostile Protestant environment. Two key concerns were at the forefront: the ability to assign of tax revenue collected from Catholics to fund Catholic schools, and the ability of the Catholic schools to control the content of the religion classes that were mandatory in all publicly funded schools (in public schools the religion curriculum was based on a Protestant version of Christianity).

The Scott Act made it easier for Catholics to form their own school boards, especially in rural areas where they could establish consolidated schools, and to direct their local rates toward separate schools. As well, the Scott Act entitled separate schools to share in municipal grants in addition to the provincial grants they had been receiving. The Scott Act also provides that Catholic School trustees share the same responsibilities as "common" school trustees. However, the schools were subject to inspection and the ultimate regulation of the Department of Public Instruction for Upper Canada, which assumed control over curriculum and teacher training.

The Scott Act limits the authority of Catholic School trustees to be the same as the authority of Common School Trustees:

> **4.** The Trustees of Separate Schools forming a body corporate under this Act, shall have the power to impose, levy and collect School rates or subscriptions, upon

and from persons sending children to, or subscribing towards the support of such Schools, and shall have all the powers in respect of Separate Schools, that the Trustees of Common Schools have and possess under the provisions of the Act relating to Common Schools.

9. The Trustees of Separate schools …..shall perform the same duties and be subject to the same penalties as Trustees of Common Schools; and teachers of Separate Schools shall be liable to the same obligations and penalties as teachers of Common Schools.

The Scott Act also provides that the Government of Upper Canada is charged with overall authority of Catholic Separate Schools:

> **s.26** The Roman Catholic Separate Schools, (with their Registers), shall be subject to such inspection, as may be directed from time to time, by the Chief Superintendent of Education, and shall be subject also, to such regulations, as may be imposed, from time to time, by the Counsel of Public Instruction for Upper Canada.
>
> **s.27** In the event of any disagreement between Trustees of Roman Catholic Separate Schools, and Local Superintendents of Common Schools, or other municipal authorities, the case in dispute shall be referred to the equitable arbitrament of the Chief Superintendent of Education in Upper Canada; subject, nevertheless, to an appeal to the Governor in Council, whose award shall be final in all cases.

The Chief Superintendent was not the Catholic Archbishop of Toronto but rather the renowned Methodist minister and educator, Egerton Ryerson. Today's equivalent would be the Deputy Minister of Education, with an appeal to the provincial cabinet. Accordingly, not only were Catholic Boards subject to the regulatory authority of the province, any dispute about the scope of their authority was to be resolved by the province itself.

Catholic boards only had power over extra-curricular activities if Common School trustees had that power. Since, as may be seen below, neither the government nor the common school trustees are explicitly provided authority over extra-curricular activities, the question may arise as to who was given implicit authority over extra-curricular activities.

b. Did Common School Trustees have the right to manage Extra-Curricular Activities in 1867?

The *An Act respecting Common Schools in Upper Canada*, Cap. 64, 22 Vict. (the "Common School Act"), outlines the duties of Common School trustees and boards of trustees. It did not explicitly provide for Extra-Curricular activities. However, residual authority and control was enjoyed by the Government and not by the trustees:

27. It shall be the duty of the Trustees of each school section, and they are hereby empowered:

4. To do whatever they may judge expedient with regard to the building, repairing, renting, warming, furnishing and keeping in order the section School house, and its furniture and appendages, and the school lands and enclosures held by them, and for procuring apparatus and text-books for their school.

18. To see that no unauthorized books are used in the school, and that the pupils are duly supplied with a uniform series of authorized text-books, sanctioned and recommended by the Council of Public Instruction, and to procure annually, for the benefit of their school section, some periodical devoted to education.

79. It shall be the duty of the Board of School Trustees of every City, Town and Village respectively, and they are hereby authorized:

4. To take possession of all Common School property, and to accept and hold as a Corporation all property acquired or given for Common School purposes in the City, Town or Village, by any title whatsoever;
5. To manage or dispose of such property, and all moneys or income for Common School purposes
6. To apply the same, or the proceeds, to the objects for which they have been given or acquired

Therefore, trustees were provided with the authority to manage school property and money for School purposes in accordance with the “objects for which they have been given or acquired” – in other words, in accordance with the guidance set out by the government.

The governments duties were also set out in the Common Schools Act, including:

119. It shall be the duty of [the Council of Public Instruction] and they are hereby empowered:

1. To make such regulations from time to time, as it deems expedient, for the organization, government and discipline of Common Schools, for the classification of Schools and Teachers, and for School Libraries throughout Upper Canada
2. To examine, and at its discretion, recommend or disapprove of text-books for the use of schools, or books for School Libraries.

91. It shall be the duty of each Local Superintendent, and he is hereby empowered –

4. To examine at each half yearly visit the state and condition of the School, as respects the progress of the pupils in learning, - the order and discipline

observed, - the system of instruction pursued, - the mode of keeping the School Registers, - the average attendance of pupils, - the character and condition of the building and premises, - and to give such advice as he may judge proper;

5. To deliver in each of his School sections, at least once a year, a public lecture on some subject connected with the objects, principles and means of practical education; and to do all in his power to persuade and animate Parents, Guardians, Trustees and Teachers, to improve the character and efficiency of the Common Schools, and to secure the sound education of the young generally;
6. To see that all the Schools are managed and conducted according to law, - to prevent the use of unauthorized, and to recommend the use of authorized books in each School, - and to acquire and give information as to the manner in which such authorized books can be obtained, and the economy and advantage of using them.

The government, through the Council of Public Instruction, maintained the residual authority to make regulations for the **organization, government and discipline** of Common Schools. It also maintained the authority to set the curriculum by setting the curriculum for the Common Schools by approving a list of textbooks the trustees could choose from for use in their schools. The residual authority of organization of Common Schools probably included how Common Schools were to organize and manage both curricular and extra-curricular activities, although no extra-curricular activities existed in 1867.

Further evidence for that conclusion is that trustees were given little authority. They were “kept on a short leash”, so to speak. They could not set the curriculum. They could not choose their budget. They could not choose how their teachers were trained or qualified. All trustees could do was make decisions within the overarching parameters set by the government, like manage their budget or property, or choose from a set list of approved text books. Although the overarching parameters generally set and controlled by the government did not explicitly include extra-curricular activities, had the government of the day turned their mind to it, there can be no doubt that extra-curricular activities would have been treated the same way as virtually everything else – under provincial control.

This was the case for both Common School trustees and Separate Catholic School trustees, since Catholic School trustees had the same powers as Common School trustees. However, s.26 of the Scott Act, above, made the over-arching authority of the government explicit so there is no confusion about who had the overriding control over the Catholic schools. In 1867, that control over extra-curricular activities was not enjoyed by Catholic schools or its trustees, but by the government of the day.

Therefore, since s.93(1) of the *Constitution Act* only protects the rights of Catholic Schools and Trustees that were enshrined in 1867, it does not protect the right of Catholic Boards to manage or control extra-curricular activities. Accordingly, s.93 (1) does not give the Catholic School trustees the right to prohibit students from forming GSAs, especially if otherwise so directed by law or by the Ministry of Education.

This conclusion is strengthened by *Hall (Litigation guardian of) v. Powers*[32], where a Catholic school board forbade Marc Hall, a gay man, to bring his boyfriend as a date to the prom. The school board argued that its authority to regulate school dances was protected by s.93(1) of the *Constitution Act*. The court said:

"….it is my view that Principal Powers' decision was not justified under section 93, both because the specific right in question was not in effect at the time of the Union in 1867 and because, objectively viewed, it cannot be said that the conduct in question in this case goes to the essential denominational nature of the school".

Therefore, the ability of Catholic Schools and trustees to prohibit students from establishing, leading, joining or being exposed to GSAs is not protected by s.93 (1) of the *Constitution Act*.

F. CONCLUSION

Every day in Ontario schools, LGBT students in Ontario are exposed to verbal harassment, physical assault, and isolation because of their actual or perceived sexual orientation or gender identity. This bullying sometimes leads to serious physical injury. It often leads to serious psychological injury. Too often, it leads to suicide. LGBT students who are bullied do not feel safe at school, and often do not perform to their academic potential.

GSAs are a proven solution. GSAs may not solve the entire problem, but they at least a step forward that may lead to a cultural shift in the direction of respect for the dignity of all persons in our schools. Unfortunately, evidence shows that, left to their own devices, too many schools resist the formation of these important safe havens.

It is therefore critical to enact legislation that requires schools to permit students to form and lead GSAs.

The Catholic Schools and Trustees do not have a legal right to resist compliance with this legislation. Permitting students to establish, lead, join or be exposed to a GSA does not infringe s.93(1) of the *Constitution Act* because extra-curricular activities were not regulated at the time of the Union in 1867. Catholic schools did not have the right to stop GSAs in 1867, so Catholic Schools do not have the right to stop GSAs today.

In addition, extra-curricular activities and school clubs are not activities that go to "the essential denominational nature" of the Catholic schools. It is a student-run club, not a religion class.

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[32] Supra, footnote 1

Permitting students to establish, lead, join or be exposed to a GSA also does not infringe the freedom of religion of parents and trustees. Even if it did, however, this infringement has to be regarded in the context of other rights enjoyed by other individuals, especially LGBT students. To that end, any infringement of the freedom religion would be saved by s.1 as a reasonable limit in a free and democratic society.

Prohibiting students from establishing, leading, joining, being exposed to or naming a GSA, infringes multiple constitutionally-protected rights of LGBT students, including the right to life, liberty and protection of property, their freedom of religion, their freedom of expression, their freedom of association, and their freedom of equality before and under the law. The infringements of these rights, particularly the right to life, liberty and security of the person, outweigh any infringement of religion that may be taking place, if any.

Finally, the boards are providing a public service when they use public money to provide extra-curricular activities to their students. Since they are spending public money on an activity that in this context is not protected by s.93(1) of the *Constitution Act*, when providing that public service they are not permitted to discriminate against those students. Instead, the government can set the rules and impose our constitutional values to ensure a free and democratic society without unjustified discrimination.

Bill 13 is an excellent example of life-saving legislation. It is legal. It is within the Province's legislative authority. It is necessary. However, time is of the essence.

It is more important that LGBT students are protected than that any one political party gets a "win". Parties should work together to pass sound legislation that will allow students to form GSAs within the current legislative session.

Lives depend on it.

This brief is respectfully submitted by the Ontario GSA Coalition on May 13, 2012.

Marilyn Byers
Chair

R. Douglas Elliott, LSM
Counsel

APPENDIX A

List of Coalition Members

The Canadian AIDS Society

Registered as a charity since 1988, the Canadian AIDS Society (CAS) is a national coalition of over 120 community-based AIDS organizations across Canada. CAS is dedicated to strengthening the response to HIV/AIDS across all sectors of society, and to enriching the lives of people and communities living with HIV/AIDS.

The Canadian Auto Workers Union

The Canadian Auto Workers' union (CAW) is the largest private sector union in Canada with over 200,000 members from coast to coast. Since the CAW's founding convention in 1985 the CAW has continued to grow through organizing and mergers with other unions into a diverse and progressive organization representing workers throughout virtually every sector of the Canadian economy. CAW members work in aerospace, mining, fishing, auto and specialty vehicle assembly, auto parts, hotels, airlines, rail, education, hospitality, retail, road transportation, health care, manufacturing, shipbuilding and other sectors of the economy. The CAW is not only dedicated to fighting for workers rights at the bargaining table, it's equally committed to taking on economic, political and social issues that affect its members and their families in the broader community.

The Canadian Federation of Students

The Canadian Federation of Students and the Canadian Federation of Students-Services (CFS) were formed in 1981 to provide students with an effective and united voice, provincially and nationally. At the time, it was recognized that for students to be truly effective in representing their collective interests to the federal and provincial governments, it was vital to unite under one banner. Today, over one-half million students from more than 80 university and college students' unions across Canada belong to CFS.

The Canadian Secular Alliance

The Canadian Secular Alliance (CSA) is a non-profit, public policy research organization advancing church-state separation and the neutrality of government in matters of religion. The CSA believes in church-state separation - the idea that the government of Canada should not favour one religion over others or religious belief over non-belief. The CSA goal is not to promote atheism - rather, the commitment of CSA is to liberal-democratic principles of equality, fairness, and justice for all under the law, regardless of religious belief or lack thereof.

Canadian Union of Public Employees – Ontario

CUPE Ontario is the political wing of the Canadian Union of Public Employees—Canada's largest union—in the country's most populated province. With more than 200,000 members, CUPE Ontario is a formidable political voice. We campaign at the provincial level for legislative, policy and political change on issues affecting public services and our dedicated members who deliver them. We are proud to partner with labour and community groups to build strong communities and the kind of province that we all want.

Catholics for Choice

Catholics for Choice (CFC), formerly Catholics for a Free Choice (CFFC), is a Catholic pro-choice organization which began in the USA and was founded "to serve as a voice for Catholics who believe that the Catholic tradition supports a woman's moral and legal right to follow her conscience in matters of sexuality and reproductive health."

Center for Inquiry Canada

Center for Inquiry Canada is a Canadian Charity that is part of an international movement that began in the USA. The mission of the Center for Inquiry is to foster a secular society based on science, reason, freedom of inquiry, and humanist values.

Egale Canada

Egale Canada is Canada's LGBT human rights organization advancing equality and justice for lesbian, gay, bisexual, and trans individuals and their families across Canada. Egale is a registered not-for-profit organization that was founded in 1986 and was incorporated as a federal not-for-profit organization in 1995. Egale Canada has intervened before the Supreme Court of Canada in every LGBT rights case that has reached the Court, including Egan v. Canada, Mossop v. Canada, Vriend v. Alberta, M v. H & Ontario, Little Sister's Book and Art Emporium v. Canada Customs, B.C. College of Teachers v. Trinity Western University, Chamberlain v. Surrey School Board,the Marriage Reference and Hislop v Canada. Egale has also participated in numerous lower court cases, including the marriage cases in BC, Ontario, and Quebec. Egale Canada has played a leadership role in tackling the problem of bullying of LGBT youth, through studies, training and through its MyGSA website.

Metropolitan Community Church of Toronto

Metropolitan Community Church of Toronto (MCC Toronto) is a Christian Church, established on July 17, 1973 as part of the denomination known as the Universal

Fellowship of Metropolitan Community Churches (UFMCC). Under the leadership of Sneiro Pastor Rev. Dr. Brent Hawkes, C.M., it has grown to become one of the largest congregations within UFMCC. MCC Toronto has played a leadership role in the struggle of human rights for LGBT Ontarians, including the fight for equal marriage. MCC Toronto houses and financially supports Canada's only and North America's first alternative high school for at-risk LGBT youth. A joint partnership with the Toronto District School Board, it provides a safe space for LGBT teenagers to learn and pursue their education, free from the homophobia, biphobia, transphobia and bullying experienced in their former school settings. The program has helped more than 500 students since its inception in 1995.

The Ontario Federation of Labour

The Ontario Federation of Labour (OFL) represents 54 unions and one million workers. It is Canada's largest provincial labour federation. The OFL partners with labour and other social justice organizations to build an economy and strong communities that meet people's needs. The OFL pushes for legislative change in every area that affects people's daily lives, including health, education, workplace safety, minimum wage and other employment standards, human rights, women's rights, workers' compensation, and pensions. The OFL regularly makes presentations and submissions to the Ontario government and mount internal and public information and education campaigns.

Ontario Public Service Employees Union – Rainbow Alliance

The Ontario Public Service Union (OPSEU) began as the Civil Service Association of Ontario in 1911, and is the largest union representing Ontario's civil servants. OPSEU's Rainbow Alliance provides representation and support to our lesbian, gay, bisexual, transsexual and transgendered and queer (LGBTTQ) members. The Rainbow Alliance promotes equality and a harassment-free work environment. Tackling discrimination in the workplace means addressing and tackling discrimination in our communities, unions and homes.

PFLAG Canada

PFLAG Canada is a registered charity that is part of an international movement that began in the USA and was originally known as "Parents and Friends of Lesbians and Gays". PFLAG Canada is a national organization that helps all Canadians who are struggling with issues of sexual orientation and gender identity. PFLAG supports, educates and provides resources to parents, families, friends and colleagues with questions or concerns, 24 hours a day, 7 days a week.

Registered Nurses Association of Ontario

The Registered Nurses' Association of Ontario (RNAO) is the professional association representing registered nurses in Ontario. RNAO is the strong credible voice leading the nursing profession to influence and promote healthy public policy.