

Legal Factum for the Coalition For Marc Hall

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Introduction

1. The Coalition in Support of Marc Hall (“Coalition”) is composed of the Canadian AIDS Society (CAS), Canadian Auto Workers Union, Canadian Federation of Students, Canadian Gay and Lesbian Archives, Canadian Unitarian Council, Catholics for Free Choice, Challenge the Church, Coalition for Lesbian and Gay Rights in Ontario (CLGRO), EGALE Canada, Equal Marriage for Same Sex Couples, Foundation for Equal Families, Liberals for Equality Rights, Metropolitan Community Church of Toronto (MCCT), Ontario Division of the Canadian Union of Public Employees (CUPE), Ontario Federation Of Labour, Parents Family & Friends of Lesbians and Gays (PFLAG), PRIDE York Region, Public Service Alliance of Canada (PSAC), and Windsor Pride Committee.
2. These organizations have been active in the promotion of equality for gays and lesbians in Canada, through public education, political activity and judicial interventions. These organizations came together to form the Coalition in response to the Durham Catholic District School Board’s (“Board”) decision not to allow Marc Hall (“Hall”) to attend his high school prom with his same-sex partner (“Decision”).

3. The Coalition accepts the Statement of Facts as set out in the Plaintiff's factum.
4. In deciding this injunction, the Coalition submits that it is important to bear in mind the broader social implications and potential impact of the larger underlying issue in this litigation. This case presents the challenge of upholding Canada's public policy that forbids discrimination on the basis of sexual orientation while respecting its commitment to religious freedom.
5. The Coalition submits that the Court's decision in this case will have a significant impact on gays and lesbians in Canadian society, and in fact will impact society as a whole. The Coalition is especially concerned with the impact the decision may have on gay and lesbian youth in Canada. Gay and lesbian students in their final years of high school are about to embark on their adult life in the workplace or in post-secondary education. In our society, these young people are assuming legal and practical responsibility for making their own relationship and other personal choices.
6. In determining the matters in issue, the Coalition proposes to establish the following five points:
 - (i) contrary to the assertion of the Board that it is treating Hall equally and with love and acceptance in accordance with Catholic teaching, the Board has discriminated against Hall in violation of his rights under the *Charter*

to freedom of religion (s. 2(a)), freedom of expression and thought (s. 2(b)), freedom of peaceable assembly (s. 2(c)), freedom of association (s. 2(d)), and freedom from discrimination on the grounds of sexual orientation (s. 15(1));

(ii) the Board's rights as a separate school under section 93 the *Constitution Act, 1867* do not immunize its activities from Charter scrutiny, nor does its right to freedom of religion "trump" Hall's rights under the *Canadian Charter of Rights and Freedoms*;

(iii) the Court must examine the allegation that the decision of the Board is based on an exercise of its religious freedom both subjectively and objectively;

(iv) if the forgoing analysis is properly conducted, the decision of the Board will be found to be arbitrary;

(v) in balancing the rights of the Board and the rights of Hall, the balance must be struck in favour of Hall and the relief sought granted.

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (the "Charter");

Constitution Act, 1867, 30 and 31 Victoria, c.3 (U.K.) ("*Constitution Act, 1867*")

Context: Impact on gay and lesbian youth and students in schools

7. In considering any *Charter* case, regard must be had to the wider historical, social and political context of the legal and factual matrix.

R. v. Big M Drug Mart Ltd., [1985] S.C.R. 295 at 344 ("*Big M*").

8. The context of this case demands that the Court consider the historic vulnerability of gays and lesbians, especially gay and lesbian youth, in Canadian society.
9. The Courts have long recognized the discrimination faced by lesbians and gays in Canada. Lesbians and gays have faced “public harassment and verbal abuse”, have often been “victims of crimes of violence” because of their sexual orientation and have experienced discrimination in employment and access to services.

Egan v. Canada, [1995] 2 S.C.R. 513 at 600-601 (“*Egan*”);
M.v. H. & Ontario, [1999] 1 S.C.R. 2 (“*M. v. H.*”);
Vriend v. Alberta, [1988] 1 S.C.R. 493 (“*Vriend*”).

10. This discrimination against gays and lesbians has been recognized as systemic, based on “value assumptions that are hidden and unconscious”. Systemic discrimination results from a history of oppression that becomes institutionalized in the laws, customs and prevailing attitudes of society.

Egan, per L’Heureux-Dube J. at 544;
Public Service Alliance of Canada v. Treasury Board (1991), 14 C.H.R.R. D/341 at D/349 (C.H.R.T.);
P.S.A.C. v. Staff of the Non-Public Funds, Canadian Forces (1996), 27 C.H.R.R. D/488 (F.C.A.).

11. One example of this systemic discrimination is the Board’s statement that allowing Hall to attend the prom with his partner would condone a gay “lifestyle”. Hall himself says, “I do not have a gay ‘lifestyle’ ”. There is no

such thing as a gay “lifestyle”. Hall has a homosexual orientation, and it is an orientation that he is entitled to express.

*Affidavit of Marc Hall sworn April 9, 2002, (“Hall”) at para. 23.
Affidavit of Bishop Anthony G. Meagher sworn April 23, 2002
 (“Meagher”), at para. 15, 17.*

12. In the educational context, the achievements and contributions of gays and lesbians to Canadian society are often ignored or devalued. Young people coming to terms with their sexual orientation may be torn between risking rejection, discrimination and abuse by coming out, or concealing their identity and feelings, leading to loneliness, alienation and shame. Isolation is one of the most important features in the lives of most gay, lesbian and bisexual youth.

*Affidavit of Janis Purdy, sworn April 10, 2002 (“Purdy”), at para. 5.
And see B. MacDougall, “Silence in the Classroom”, (1998) 61 Sask. L. Rev.*

13. A study by the National Health and Research Development Program indicates that healthy self-esteem is critical to exercising responsible sexual choices. Other studies indicate that although HIV does not discriminate, recent trends point to a renewed threat to the health of the young.

*AIDS Committee of Toronto, Men Who Have Sex With Men (MSM) and Rising HIV Infection Rates in Toronto, June 18, 2001.
National Health and Research Development Program, Atlantic community based study of the determinants of sexual risk behaviours for men who have sex with men, March 31, 1999. (“the Atlantic Study”)*

14. The Atlantic Study was created to explore the factors related to the sexual choices and risk behaviours of men who have sex with men. The Study found that the strategy used to limit risks, was influenced by the man's access to role models, his personal sense of worth and the support from his social environment for his sense of identity.

Atlantic Study, at 4.

15. The Atlantic Study identified several stages through which these men moved as they progressed toward a higher level of trust in themselves and others. Hall would appear to be at the "integrating" stage, in which "the men developed a sense of acceptance (trust) of themselves. They had a sense of community and were able to contribute to and trust others and serve as mentors for others as they began their journey."

Atlantic Study, at 4.

16. Preventing Hall from attending his high school prom with his same-sex partner is likely to threaten his psychological well-being and that of other gay and lesbian youth. In *Vriend*, Justice Cory stated:

Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection.

Vriend at 428

17. When the Board rejected Hall's request to attend the prom with his partner, he stated that he felt excluded and marginalized, and that his relationship was somehow inferior to those of his heterosexual peers. The Decision sends a message to all lesbian, gay and bisexual students that they are not worthy of equal concern, respect and consideration, that their identity should be hidden or repressed, that they are not welcome as openly lesbian, gay or bisexual students within the school environment.

18. Schools are an important secondary support system for students dealing with issues of sexuality, and can counter the effect of a hostile family environment often experienced by gay and lesbian young people. On the other hand, schools can exacerbate the problem. As Professor MacDougall noted:

The most important factor in the perpetuation of homophobia and the marginalization of homosexuals, including self-hatred in homosexuals is the intense indoctrination in heterosexism that children experience. A great deal of this indoctrination occurs in educational institutions.

Silence in the classroom (1998) 61 Sask. L. Rev. 41 ("MacDougall").

19. It is important for Canadian students to be exposed to the diversity which exists in broader Canadian society, so that they may grow up as adults who are socially aware, who understand the consequences of their behaviour and who are tolerant of others. We would do our children a disservice by not exposing them to the marketplace of ideas that makes up our society. In *Ross v. New Brunswick*, the Supreme Court of Canada noted:

The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate.

Ross v. New Brunswick, [1996] 1 S.C.R. 825 at 857.

20. The Supreme Court of Canada has recognized that invisibility, isolation and concealment of their identities has been a central component of the history of discrimination experienced by lesbians and gay men.

Egan, at 593-95 and 600-601

Vriend, at 428

M. v. H., at 621

21. In considering these issues, it is also important to note that the proposed activity in issue:

(a) is not a religious act or part of a religious service in a Church, such as a Mass;

(b) is not part of the religious education component of the Board's activities, and in fact, it involves an extra-curricular activity that does not take place on school property and which is purely social and not educational in nature;

(c) is a joyous and harmless group activity involving bonding between classmates at a particular high school who are nearing the end of their high school years, and which therefore will have unique positive benefits for Hall;

(d) consists primarily of dancing fully clothed publicly in the company of a group of similar unmarried heterosexual couples, with supervision by Catholic teachers employed by the Board to prevent “inappropriate behaviour.”

Supplementary Affidavit of Michael Powers, sworn April 29, 2002 (“Powers”).

ISSUES

(i) Infringement of Marc Hall’s Rights and freedoms

22. As a gay male, Hall has a right to protection from discrimination based on his sexual orientation under the *Ontario Human Rights Code* and under section 15 (1) of the *Charter*. He also has a right to his own freedom of religion, the right to express his sexual orientation, a right of peaceable assembly and a right to freedom of association that extends to accompanying his boyfriend to the prom and dancing with him.

Egan;
Human Rights Code;
Charter, ss. 2(a), 2(b), 2(d), 15(1);

23. The *Charter*’s underlying theory is one of liberty, freedom of choice and respect for the dignity of all human beings. As Madam Justice Wilson said in *R. v. Morgentaler*:

The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent

possible, will avoid subordinating these choices to any one conception of the good life.

Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

R. v. Morgentaler, [1988] 1 S.C.R. 30 at 169 at 166 (“*Morgentaler*”).

24. Official Catholic doctrine appears to provide that homosexual genital activity is sinful, but that homosexuals are entitled to equal concern, care and respect from all members of the community

Hall at para. 17;
Catechism of the Catholic Church, (“*Catechism*”) at para. 2358;
Meagher at para. 15.
Affidavit of Mary Ann Martin (“*Martin*”).

25. Hall is a Catholic and has been educated in the Catholic school system. He is familiar with the Catholic teachings regarding homosexuality, and believes his actions do not violate Catholic teaching. Hall asserts that he believes that he has a right as a gay Catholic to equal treatment based on the *Catechism*. That belief is not arbitrary or irrational, and appears to be well founded on the clear language of the *Catechism*. His religious freedom under section 2(a) of the *Charter* is infringed by the Decision.

Hall at para. 17.

26. While the Catholic Church is hierarchical, it is not a homogenous monolith. All religious belief and consequent moral choices must, by their fundamental

nature, be personal exercises of free will and not the result of collective coercion. Hall does not challenge the truth of Catholic doctrine in this case, but seeks to be true to the Catholic doctrine that promises him love and acceptance. His application of Catholic doctrine to his conduct is worthy of respect and is protected under the *Charter*.

See *Big M*.

27. The Courts have rejected the notion that a distinction can be made between “identity” and “conduct” in relation to sexual orientation. As stated by Cory J. in *Egan*:

Sexual orientation is more than simply a “status” that an individual possesses. It is something that is demonstrated in an individual’s conduct by the choice of a partner. The Charter protects religious beliefs and religious practice as aspects of religious freedom. So, too, should it be recognized that sexual orientation encompasses aspects of “status” and “conduct” and that both should receive protection.

Egan, at 601

28. Being gay, lesbian or bisexual is a core aspect of an individual’s identity/personhood. The denial or rejection of homosexuality cannot be separated from a rejection of that person’s fundamental identity.

29. Hall has a right to express both his religious beliefs and his sexual orientation by taking his boyfriend to the prom. These expression rights are also expressly protected under section 2(b) of the *Charter*. Hall also has a right of peaceable assembly under section 2(c) and a right of freedom of association

under section 2(d) that are infringed by the Decision. The Supreme Court of Canada has recently reaffirmed the fundamental importance of the right to freedom of association.

Hall;
Dunmore v. Ontario (Attorney General), 2001 SCC 94;
Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., 2002 SCC 8.

30. The Board contends that the distinction that is made in this case is based on the distinction in the *Catechism* between “unjust” and “just” discrimination. This is the discredited legal concept of “relevant” discrimination in another guise, a concept that has been categorically rejected by the Supreme Court of Canada in cases such as *M. v H.* As Justice L’Heureux-Dube noted in *obiter* in the *Trinity Western University* case, the religious concept of distinguishing between the sinner and the sin requires someone to refrain from acting in accordance with their identity and is harmful and cruel. Her Ladyship noted that “There can no longer be any doubt that sexual orientation discrimination in education violates deeply held and widely accepted views of elementary justice.”

Meagher at para. 18;
Martin;
M. v. H.;
Trinity Western University v. British Columbia College of Teachers, [2001] 1 S.C.R. 772 (“*Trinity Western*”) at 835.

31. The suggestions that the Decision may have been made for other reasons, such as concerns for Hall’s safety are not credible. If this was the true reason for the denial, the school should have investigated what measures could be taken in order to ensure that the prom would be safe for all in attendance. The proposed activity is objectively harmless. At its heart, the reason for the objection is that the same activity that the Board characterizes as morally innocent activity by unmarried heterosexual couples is forbidden as morally wrong when engaged in by an unmarried same sex couple. The distinction is clearly made on the grounds of sexual orientation, and is offensive to Hall’s dignity from his perspective. Hall’s is the only relevant perspective in a section 15 analysis. Indeed, the Board Chair acknowledges that she knew in advance that her decision would upset Hall.

Hall, at para. 16;
Law v. Canada (Minister of Employment and Immigration), [1999] 1
 S.C.R. 497 (“*Law*”) at 532 ;
Martin at para. 12.

32. The freedom to hold religious beliefs is broad. However, the right to act upon them is restricted in law.

The proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society. Acting on those beliefs, however, is a very different matter.

Trinity Western at 30-34

33. The Catholic District School Board is free to hold whatever religious beliefs it wishes, and, in fact, Hall professes that he is acting consistent with Catholic teaching. However, while the School Board may propound its interpretation it cannot impose its own interpretation of Catholic doctrine on Hall.

Trinity Western at para. 36

34. The question of whether the infringement is justified and whether the infringement warrants the court's interference is best considered by analyzing the rights of the Board under section 93 of the *Constitution Act, 1867*, and under *Charter*, section 1 analysis, where the Board bears the burden of proof. It may also be appropriate to consider the Board's rights under remedy.

(ii) The special rights of Separate school boards

35. It has been suggested that the presence of an infringement of Hall's *Charter* rights is irrelevant because separate schools have rights under section 93 of the *Constitution Act 1867* that are exempt from *Charter* scrutiny.

36. This position rests on an overly broad and incorrect interpretation of the Supreme Court's decision in *Adler v. Ontario*. In that case, the Supreme Court decided that other types of denominational schools could not complain under the *Charter* about the exclusivity of public funding enjoyed by Catholic schools in Ontario.

Adler v. Ontario, [1996] 3 S.C.R. 609 ("*Adler*").

37. The *Adler* case is not founded on the notion that the separate school system is an emanation of the Catholic Church that is somehow outside of the public education system or exempt from the laws of the land. The creation and funding of public schools guaranteed in section 93 of the *Constitution Act 1867* was clearly situated by the Supreme Court as being part of the province of Ontario's plenary power over education. While the Catholic Church is free to view separate schools as an emanation of the Catholic Church, the law views them as one aspect of our public and publicly funded education system.

Adler at para. 41 to 43.

38. Far from being a private and internal debate within the Catholic Church, this case involves the treatment of a student in our publicly funded education system. The people of Ontario always have a legitimate interest in the welfare of all students, and especially those in the publicly funded system. As the U.S. Supreme Court noted in the *Bob Jones University* case, the state clearly has a right to insist on respect for public policy against discrimination despite contrary religious beliefs, especially where a religious educator is receiving taxpayer support.

Bob Jones University v. United States, 461 U.S. 574 (“*Bob Jones*”)

39. In *Adler*, Justice Iacobucci expressly cautioned that the Court's decision did not mean a blanket exemption of separate schools from *Charter* scrutiny, but only an exemption from *Charter* scrutiny of the constitutional right of

separate schools to public funding. The earlier decision of the Supreme Court of Canada in *Protestant School Board of Greater Montreal v. Quebec* was affirmed.

Adler at para. 49-50.
Protestant School Board of Greater Montreal v. Quebec (Attorney General), [1989] 1 S.C.R. 377 (“*Protestant School Board*”).

40. The *Protestant School Board* case establishes that the onus is on the school board to establish that the decision would violate its rights under s. 93(1) of the Constitution.

Protestant School Board, at para. 11 per Wilson J.

41. The *Protestant School Board* case also makes it clear that Ontario has the power to regulate Separate Schools, provided that it does not infringe on the denominational guarantee under s. 93. The historic protection under s.93 is to protect the rights of denominational schools to provide religious education in their faith. The Courts have interpreted this provision primarily by reference to the historical right of Catholic trustees to control the hiring of teachers and the content of the curriculum, especially the religious curriculum itself. There is no evidence before the court in this case of any historical power of Catholic school trustees in 1867 to regulate school dances including restricting attendance at school dances on religious grounds.

Protestant School Board, supra.

(iii) The right to test the assertion of infringement of the Board’s religious belief

42. Under the section 1 analysis the Court must consider whether the restriction in question evidences a rational connection to a pressing and substantial objective, whether it minimally impairs Hall's rights and whether it is proportionate. The Decision is not insulated from scrutiny under section 93 (1), but may be said to rest on the Board's right to operate schools in accordance with its religious beliefs. This involves a consideration of the extent to which the Court is entitled to scrutinize the assertion that the infringement is justified as a result of the reasonable legitimate exercise of the Board's religious authority and its rights to its religious beliefs about homosexuality. This assertion must be examined to determine if there is a conflict of rights, and if so, to determine whether the section 1 onus has been made out. If there is no section 1 defence made out, this question may also be relevant to remedy.

Vriend; M.v.H.; Trinity Western;
R. v. Oakes, [1986] 1 S.C.R. 103 ("*Oakes*");
Brockie

43. The Courts have found repeatedly that discrimination against homosexuals is a pervasive phenomenon in our society and is contrary to the fundamental law of Canada as reflected in the *Charter* and public policy in Ontario. This public policy has been expressly reflected in the quasi-constitutional *Human Rights Code* for almost 20 years.

44. Notwithstanding this fundamental public policy, the Supreme Court in the *Trinity Western* case has recognized that many religious faiths teach that

homosexual acts are sinful. As a result, our laws recognize a right to hold whatever beliefs you wish and , subject to certain reasonable limitations, to express those beliefs. The Supreme Court has, however, recognized that those holding such beliefs do not necessarily have the right to act upon them, or to impose those beliefs on others.

Trinity Western

Egan; Vriend; M.v.H.; Human Rights Code.

45. There is a danger in accepting a bald assertion of religious belief as a defence to anti-gay or any other type of discrimination. As was recognized in the *Brillinger v. Brockie* case, if a mere assertion of religious objection allowed anyone exemption from this public policy, gays and lesbians and other minorities would find their human rights protection eroded if not eliminated. Therefore, the assertion of religious belief should be tested both subjectively, that is, does a fair examination of the person's alleged religious precepts reveal that the discrimination is in fact reasonably based on their religious faith, and objectively, if so, does the activity in question appear to constitute a violation of those religious precepts.

Brillinger v. Brockie, [2000] O.H.R.B.I.D. No. 3, Decision no. 00-003-R (“*Brockie*”).

(iv) The Decision appears arbitrary

46. Superficially, Catholic teaching is not in conflict with Hall’s rights but in harmony. The Catholic Catechism, the *Charter* and the *Ontario Human Rights Code* all forbid discrimination on the basis of sexual orientation.

Egan;
Charter, s. 15(1);
Human Rights Code, R.S.O. 1990, c. H.19;
Catechism at para. 2358;
Meagher at para. 15;
Martin at para. 9.

47. Given the affidavits filed in support of the Board’s position, the Court must accept that the Board believes that it is acting *bona fide* in furtherance of the Catholic doctrine that homosexual behaviour is sinful. This does not end the inquiry, for the Board’s interpretation of Catholic doctrine rests on their assertion that the activities at the prom constitute “sexual behaviour” and that this “sexual behaviour” is permitted to unmarried heterosexuals and forbidden to homosexuals.

Powers;
Meagher at para. 16;
Martin at para. 9, page 5.
Caldwell v. St. Thomas Aquinas High School, [1984] 2 S.C.R. 603
(“*Caldwell*”)

48. Dealing with the assertion that same-sex dancing is proscribed by the Church, the Board has filed no evidence that in the *Catechism*, the Bible or any Papal encyclical or other authoritative document, dancing has been defined as “sexual behaviour”. To date the Catholic Church has defined forbidden homosexual behaviour in genital terms only. There appears to be an objective

logical inconsistency in this case. Given the Catholic ban on sexual behaviour between all unmarried persons, there is an apparent logical inconsistency between the Board's decision to permit dancing between unmarried heterosexuals and the Board's assertion that dancing is "sexual behaviour".

National Conference of Catholic Bishops, *Always Our Children*, at p. 9
Catechism at para. 2357
 Washington State Catholic Conference, *The Prejudice Against Homosexuals and the Ministry of the Church*, April 28, 1983 cited in Gramick and Nugent, *Voices of Hope* (New York: C.H.E. Publications) at 91-92.

49. The words "sexual behaviour" should be given their ordinary English meaning. The ordinary meaning of "sexual behaviour" does not extend to dancing. As a matter of law, the Supreme Court of Canada has held that even nude dancing does not in itself constitute sexual behaviour. Similarly, the Supreme Court has recently held that even hugging and kissing is not necessarily "sexual behaviour".

R. v Johnson, [1975] 2 S.C.R. 160;
R. v. Sharpe, [2001] 1 S.C.R. 45.

50. The Board asserts that permitting Hall to attend the prom would be "endorsing" a "gay lifestyle" contrary to Church doctrine. This assertion is also difficult to reconcile both with documented Church teaching and the objective facts.

51. This is not a case of reversing or condemning dogma, but applying dogma to a particular fact situation, an essentially administrative decision. According to

Canon law, “An administrative act must not be extended to cases other than those actually expressed in it”. It is clear that even in the case of the Church itself, such administrative decisions are not binding precedents. Nothing in the relief sought will require the Church or the Board to change Church teaching about homosexual acts. Given the position that the Board has so publicly taken in this case, no one could reasonably interpret the Board’s decision as an endorsement of homosexual acts. Even at the time of Michael Powers’ original decision, permission could have been granted to attend the dance as requested, coupled with an admonition about Church teaching on the lifelong celibacy required of homosexuals.

Can. 16, ss. 1-2, Can. 36, ss. 1-2 in The Code of Canon Law: A Text and Commentary Commissioned by the Canon Law Society of America. Ed. James A. Gordon, Thomas J. Green, and Donald E. Heintschel. (Mahwah, NJ: Paulist Press, 1985), pp. 34-35 and 49.

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52. Having a committed and loving relationship with a person of the same sex, shopping at the mall together, attending church services together, attending mass, taking the sacraments, becoming a priest and dancing are examples of activities that do not appear to be prohibited under official Catholic doctrine. The Catholic Church does not prohibit dancing, kissing, hugging or holding hands between unmarried persons or between a married person and someone to whom they are not married. Sexual intercourse between unmarried high school students is equally prohibited whether gay or straight.

53. If the case is resolved in Hall's favour, it will be a vindication of his legal rights without any effect on Catholic doctrine.

(v) Balancing rights

54. Assuming that there is a conflict of rights, the question raised is whether the Board's rights as a separate school must take precedence over the rights of Hall. It is the position of the Coalition that they do not. While the Board does have the right to teach and maintain Catholic doctrine within the school, that right does not confer on the Board unlimited freedom to disregard the rights of others.

55. The Supreme Court has made clear in cases such as *Trinity Western* that there is no hierarchy of rights under the *Charter*. Rather, the rights of different groups must be balanced so as to ensure equality for all members of society in Canada.

Trinity Western

56. The Coalition submits that the right to freedom of religion and the right to equality co-exist in Canadian society. All *Charter* rights must be interpreted in accordance with the core values underpinning the *Charter*, which include respect for human dignity, enhancing diversity, the promotion of equality and the accommodation of a wide variety of beliefs.

Oakes at 225;
R. v. Keegstra, [1990] 3 S.C.R. 697 at 736 and 756;

Big M at 353;
Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143
 (“*Andrews*”) at 171;
Morgentaler at 164-167 and 161.

57. Like all other freedoms, freedom of religion is not absolute. As Chief Justice

Dickson observed in *Big M*, it is subject to

“such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

Big M at 337.

58. Limits for the purposes of “protecting the fundamental rights and freedoms of

others” does not mean that the state may compel observance of a particular

religious doctrine on a minority because of the importance of those religious

beliefs to the majority. On the contrary, as Chief Justice Dickson said in *Big*

M:

In my view, the guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others. The element of religious compulsion is perhaps somewhat more difficult to perceive (especially for those whose beliefs are being enforced) when, as here, it is non-action rather than action that is being decreed, but in my view compulsion is nevertheless what it amounts to.

Big M at 350.

59. The Supreme Court has recognized in *Trinity Western* that those who hold the

belief that homosexuality is sinful are entitled to those beliefs. However, they

must accept constraints on those beliefs when they enter the public realm. Our

society and our law recognizes as a matter of public policy and of our fundamental constitutional law that gays and lesbians, and their relationships, are entitled to equality. However offensive that principle may be to some persons of sincere religious faith, that is the law.

Trinity Western at para. 31.

60. The Supreme Court in *Vriend* has ruled that the religious beliefs of some, even the majority, may not be relied upon by government actors to justify infringing the equality rights of gays and lesbians.

Vriend; Big M at 353.

61. The Board's decision is arbitrary and heavy-handed, and directed exclusively at gay, lesbian and bisexual students. The Board should not be entitled to create the policies and teachings arbitrarily, and for the specific purpose of excluding gay and lesbian couples from its activities.

62. The Supreme Court of Canada has stated that people who object to homosexuality on religious grounds "are free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others". The Courts have also held that "there are limits to the scope of s.2(a), especially when this provision is called upon to protect activity that threatens the physical or psychological well-being of others."

Trinity Western at 30

B.(R.) v. Children's Aid Society of Metropolitan Toronto (1995), 122 D.L.R. (4th) 1 at 89
Big M. at 317 (S.C.C.)
Young v. Young [1993] 4 S.C.R. 3

63. In the words of the National Conference of Catholic Bishops, “[i]t is also important to recognize that neither a homosexual orientation, nor a heterosexual one, leads inevitably to sexual activity. One’s total personhood is not reducible to sexual orientation or behavior [sic].” The Board is failing to see Marc Hall as a whole person; it is seeking to deny him one of the most significant events in a young person’s life. Hall’s recollection of his high school graduation will necessarily forever be marred by feelings of confusion, anger, and self-doubt.

Always Our Children, at 9.

64. In balancing the rights of the Board and the rights of Hall, the balance clearly favours Hall. The reasons for striking the balance this way include the following factors:

- (a) permitting this activity will not force the Board to change its position on unmarried sexual behaviour, but simply to apply it equally to homosexual and heterosexual couples;
- (b) there is no evidence of harm to the Board or others by the activity, since the Board retains the right to teach its values and the activity is not inconsistent with those values ;
- (c) there is evidence of harm to Hall and other gay and lesbian youth if this type of discrimination is permitted;
- (d) the evidence shows that the likely harm to gay, lesbian and bisexual youth generally is of a very serious nature, where low self-esteem and

a lack of support may lead youth to drop out of school or engage in other self-endangering behaviours, including suicide.

- (e) this situation involves a publicly funded school, and must therefore be respectful of the public policy that protects Hall from discrimination;
- (f) on an objective consideration, it is not clear that the activity infringes Catholic dogma in a significant manner given the Catechism's commitment to equality and the ordinary and legal meaning of sexual behaviour;
- (g) given that this is a social activity that is to occur outside of the school, there is no intrusion on the Board's ability to teach Catholic doctrine or maintain a Catholic environment in its school;
- (h) a prom is a unique moment in a young adult's life and has great emotional and psychological significance to them.

Conclusion

64. For the foregoing reasons, the Coalition respectfully submits that the Court should grant the relief sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Submitted this 30th day of April, 2002.

R. Douglas Elliott (LSUC #23685L1A)

Victoria Paris (LSUC #45761T)