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NB Child and Youth Advocate's Review of Policy 713

Submission of the Office of the Ombud

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Introduction

On June 15, 2023 the Legislative Assembly adopted a motion requesting that the Child and Youth Advocate (CYA) conduct a consultation on changes to the Department of Education and Early Childhood Development's Policy on Sexual Orientation and Gender Identity (Policy 713). The motion also requested that the CYA report publicly on the consultations and the impact of changes to Policy 713.

As part of his review into Policy 713, the CYA consulted this office regarding some of the privacy implications related to the Policy and its recent changes that came into force on July 1st, 2023.

More specifically, the CYA asked:

1. If a student wishes to use a name other than that in the official record, does non-consensual release of the name in the official record raise any privacy issues?
2. Whose consent matters when it comes to release – the student's, the parent's, or both? While there is language in our Act that a parent may consent for the student, it is silent on if and when that consent can override a student's express non-consent.
3. Are there any other privacy concerns regarding the issues raised by the changes in Policy 713?

In keeping with the questions framed by the CYA above, the critical issue addressed in Policy 713 is the question of a child's right to claim a right to privacy in relation to their own chosen name and gender identification as disclosed to school officials. More precisely, does a child who feels safe disclosing their chosen name and gender at school, but not safe about having the same conversation at home with their family or parents, have the right to insist upon the school's acknowledgment and use of their preferred name and gender identity, while excluding consultation or consideration of the views of the child's parents or legal guardians?

Overview of privacy rights protection in New Brunswick

The Legislative Assembly has enacted two laws to protect the privacy of New Brunswickers, the *Right to Information and Protection of Privacy Act* (RTIPPA) and the *Personal Health Information Privacy and Access Act (PHIPAA)*. Both of those laws establish privacy rights, the encroachment of which may be resolved through complaint mechanisms to the Ombud or to the courts. Access or privacy matters raised under RTIPPA or PHIPAA require careful consideration of the legislative scheme and the interpretation of exemptions provided for in these Acts, in keeping with their purpose or intent.

While there could be issues that arise from Policy 713 that may relate to PHIPAA provisions, for the purpose of this review, we will focus our attention on the relevant provisions of RTIPPA.

First, RTIPPA defines what constitutes personal information:

> "personal information" means recorded information about an identifiable individual, including but not limited to,*(renseignements personnels)*
>
> (a) the individual's name,
>
> […]
>
> (c) information about the individual's age, gender, sexual orientation, marital status or family status,
>
> […]
>
> (f) personal health information about the individual,
>
> […]
>
> (l) the individual's own personal views or opinions, except if they are about another person,
>
> […]
>
> (m) the views or opinions expressed about the individual by another person, and […]

As such, RTIPPA clearly contemplates that a child or young person's gender would constitute their personal information.

RTIPPA also describes protection of privacy provisions in Part 3 of the Act. There, we see that the Act establishes that a public body may not disclose personal information except as authorized by the Act itself.

> General duty of public bodies
> **43**(1) A public body shall not use or disclose personal information except as authorized under this Division.
>
> **43**(2) Every use and disclosure by a public body of personal information must be limited to the minimum amount of information necessary to accomplish the purpose for which it is used or disclosed.
>
> **43**(3) A public body shall limit the use and disclosure of personal information in its custody or under its control to those of its officers, directors, employees or agents who need to know the information to carry out the purpose for which the information was collected or received or to carry out a purpose authorized under section 44.

The Act then goes on to provide the circumstances under which a public body may use or disclose personal information.

> Use of personal information
> **44** A public body may use personal information only
> (b) if the individual the information is about has consented to the use,

Disclosure of personal information
46(1) A public body may disclose personal information only
(a) if the individual the information is about has consented to the disclosure,
[…]
(i) if necessary to protect the mental or physical health or the safety of any individual or group of individuals,

In situations where individuals have rights under the Act, it also contemplates that an individual's rights may be exercised by another person in certain circumstances.

Exercising rights of another person
79 Any right or power conferred on an individual by this Act may be exercised
(a) by any person, other than the Ombud, with written authorization from the individual to act on the individual's behalf,
[…]
(d) by the parent or guardian of a minor if, in the opinion of the head of the public body concerned, the exercise of the right or power by the parent or guardian would not constitute an unreasonable invasion of the minor's privacy, or […]

It is important to note that privacy rights under RTIPPA can only be superseded under the express authority of another Act of the Legislature. Generally, a government policy cannot relieve the public body from its obligations under RTIPPA.

Legislators in New Brunswick have enacted that certain provisions in the *Education Act* prevail over the application of RTIPPA. Therefore, sections 31.1 to 31.7 of the *Education Act* that deal with the mandatory reporting of non-professional conduct take precedence over RTIPPA protections. More notably, section 54 of the *Education Act* that deals with pupil records also takes precedence over RTIPPA protections.

Pupil records
54(0.1)A record shall be maintained in respect of each pupil and may contain personal information.
54(0.2)The superintendent concerned may use and disclose personal information contained in the record maintained in respect of a pupil for the purpose of delivering public education.
54(1)Subject to subsections (1.1) and (3), the parent of a pupil or a pupil is entitled to access to pupil records maintained in respect of the pupil.

54(1.1)Where a pupil has attained the age of nineteen years, a parent of the pupil is not entitled to access any record maintained in respect of the pupil without the consent of the pupil.

54(2)Where a person is given access to a record in accordance with subsection (1), the superintendent concerned shall, where the superintendent believes it is necessary, explain or interpret the information disclosed on the record.

54(3)Where the superintendent concerned believes that access to a record maintained in respect of a pupil would be detrimental to the well-being or future development of or the educational opportunities for the pupil, the superintendent may
(a) deny access to the record, and
(b) where the superintendent believes it is appropriate, describe or interpret such of the content of the record the knowledge of which, in the opinion of the superintendent, would not be detrimental to the well-being or future development of or the educational opportunities for the pupil.

54(4)Where the superintendent concerned, having denied a person access to a record in accordance with paragraph (3)(a), believes it is not appropriate to describe or interpret any of the contents of the record in accordance with paragraph (3)(b), the superintendent shall make known to that person, at the time of such denial, the existence and general nature of the record.

54(5)A person who has been denied access to any record in accordance with paragraph (3)(a) may, in accordance with the regulations, appeal the denial.

54(6)The parent of a pupil who has been denied access to any record in accordance with paragraph (3)(a) is, notwithstanding such denial, entitled to make inquiries to the superintendent concerned and to be given general verbal information by the superintendent in relation to the educational progress of the pupil.

54(7)A decision made by a superintendent under this section shall be made on behalf of and subject to any policies or directives of the District Education Council concerned.

As we can see, even when the Legislator has enacted parental rights to their child's personal information as contained in the pupil's record, it has nonetheless given the superintendent the authority to deny access to the record if it is believed that such access would be detrimental to the well-being or future development of the pupil. We will further explore this notion in the sections that follow.

Finally, RTIPPA's section 48.1(1) also establishes that public bodies have a duty to establish information practices to guard against unauthorized access and use of personal information.

Duty of public bodies to establish information practices
48.1(1)A public body shall establish information practices to ensure compliance with this Act and shall protect personal information by making reasonable security arrangements against unauthorized access, use, disclosure or disposal, in accordance with the regulations.

48.1(2)If a public body uses personal information about an individual to make decisions that directly affects the individual, the public body shall, subject to any other Act of the Legislature,
(a) retain the personal information for a reasonable period of time so that the individual to whom the information relates has a reasonable opportunity to obtain access to it, and
(b) establish a written information practice to that effect including any additional requirements prescribed by regulation.

Given this obligation, it is reasonable that the Department of Education and Early Childhood Development (the Department) would attempt to circumscribe how the personal information of a child or young person as it relates to their gender identity would be used or disclosed. In the sections that follow, we will examine the Department's overarching authorities, obligations and responsibilities as it does so.

Overview of privacy rights under the Canadian *Charter of Rights and Freedoms*

Following the adoption of the Canadian *Charter of Rights and Freedoms* (the Charter), the Supreme Court of Canada (SCC) first dealt with a section 8 Charter case in *Hunter et al. v. Southam Inc.*[1] and declared that "whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy".

After this decision, the SCC developed important jurisprudence detailing the scope of section 8 protected privacy rights. In *R. v. Dyment*[2], in dismissing a case where the accused's blood sample had been collected without consent or prior authorization, the SCC affirmed that "privacy is at the heart of liberty in a modern state":

> Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order.

In *R. v Duarte*[3], the SCC upheld the constitutional protection under section 8 against electronic surveillance without prior judicial warrant and suggested that "privacy may be defined as the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself". The SCC revisited this question in a decision released a few months later in *R. v. Wong*[4], a case of unauthorized video surveillance of a hotel room. The SCC's majority decision explained that the *Duarte* decision "approached the problem of determining whether a person had a reasonable expectation of privacy in given circumstances by attempting to assess whether, by the standards of privacy that persons can expect to enjoy in a free and democratic society, the agents of the state were bound to conform to the requirements of the Charter when effecting the intrusion in question". Following this jurisprudence, the SCC went on to protect elements of privacy under the section 7 guarantee of "life, liberty and security of the person".

R v Mills[5], is an important decision involving the Crown's access to and use of therapeutic counselling records of sexual assault victims appearing as complainants or witnesses in criminal trial. The case required the SCC to rule on the constitutionality of Bill C-46. That law brought in criminal code amendments aimed at addressing an earlier decision of the supreme court, *R. v. O'Connor,* on the same issue. The decision is often cited for the proposition that the security of the person guarantee in section 7 of the Charter provides a residual protection for privacy interests. The case is instructive for the matter under review because of the balancing of rights that the SCC had to engage in between an accused's right to make full answer and defence to a criminal charge, as a principle of fundamental

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[1] *Hunter et al. v. Southam Inc.* [1984] 2 SCR 145
[2] *R. v. Dyment [1988] 2 SCR 417, at 427-28*
[3] *R. v Duarte* [1990] 1 SCR 30
[4] *R. v. Wong* [1990] 3 SCR 36
[5] *R v Mills* [1999] 3 SCR 668

justice, and a complainant or witness' privacy right to keep confidential intimate counselling records. It is worth quoting in full key passages from the majority decision. The Justices began their analysis of section 8 privacy rights by recalling that the "interest in being left alone by the state includes the ability to control the dissemination of confidential information" and quoted with approval the affirmation in *Duarte* that ". . . it has long been recognized that this freedom not to be compelled to share our confidences with others is the very hallmark of a free society." The Court continues its analysis further as follows:

> These privacy concerns are at their strongest where aspects of one's individual identity are at stake, such as in the context of information "about one's lifestyle, intimate relations or political or religious opinions": *Thomson Newspapers*, *supra*, at p. 517, *per* La Forest J., cited with approval in *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at para. 62.
>
> 81 The significance of these privacy concerns should not be understated. Many commentators have noted that privacy is also necessarily related to many fundamental human relations. As C. Fried states in "Privacy" (1967-68), 77 *Yale L.J.* 475, at pp. 477-78:
>
> > To respect, love, trust, feel affection for others and to regard ourselves as the objects of love, trust and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion.
>
> See also D. Feldman, "Privacy-related Rights and their Social Value", in P. Birks, ed., *Privacy and Loyalty* (1997), 15, at pp. 26-27, and J. Rachels, "Why Privacy Is Important" (1975), 4 *Philosophy & Public Affairs* 323. This Court recognized these fundamental aspects of privacy in *R. v. Plant*, [1993] 3 S.C.R. 281, where Sopinka J., for the majority, stated, at p. 293:
>
> > In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s.8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual. [Emphasis added.]
>
> 82 That privacy is essential to maintaining relationships of trust was stressed to this Court by the eloquent submissions of many interveners in this case regarding counselling records. The therapeutic relationship is one that is characterized by trust, an element of which is confidentiality. Therefore, the protection of the complainant's reasonable expectation of privacy in her therapeutic records protects the therapeutic relationship.
> …
> 85 Many interveners in this case pointed out that the therapeutic relationship has important implications for the complainant's psychological integrity. Counselling helps an individual to recover from his or her trauma. Even the possibility that this confidentiality may be breached affects the therapeutic relationship. Furthermore, it can reduce the complainant's willingness to report crime or deter him or her from counselling altogether. In our view, such concerns indicate that the protection of the therapeutic relationship protects the mental integrity of complainants and witnesses. This Court has on several occasions recognized that security of the person is violated by state action interfering with an individual's mental integrity: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at paras. 58-60; *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 919-20, *per* Lamer J.; *Reference re ss. 193 and 195.1(1)(c) of the*

Criminal Code (Man.), [1990] 1 S.C.R. 1123, at p. 1177, *per* Lamer J.; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at pp. 55-56, *per* Dickson C.J., and p. 173, *per* Wilson J. Therefore, in cases where a therapeutic relationship is threatened by the disclosure of private records, security of the person and not just privacy is implicated.

Overview of privacy rights of the child in international law

The provisions of the Charter are to be interpreted in a manner consistent with Canada's international human rights obligations. The privacy rights of individuals under applicable human rights treaties ratified by Canada are more express and exigent than the inversed protection against unreasonable search and seizure in section 8 of the Charter. These rights include the right to privacy in Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR), Article 12 of the *Universal Declaration of Human Rights* and Article 16 of the *United Nations Convention on the Rights of the Child* (UNCRC).

Article 16 of the UNCRC is framed in precisely the same language as article 12 of the ICCPR, substituting the term "child" for "person", and provides as follows:

> Article 16
> 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
> 2. The child has the right to the protection of the law against such interference or attacks.

The Committee on the rights of the child has commented upon this privacy right in its general comment number 25 on Children's Rights in relation to the Digital Environment CRC/C/GC/25, of March 2, 2021. After commenting on the application of the general principles of child rights and other substantive rights of children in relation to the digital environment, the Committee provides significant guidance in relation to children's privacy rights as follows:

> 67. Privacy is vital to children's agency, dignity and safety and for the exercise of their rights. Children's personal data are processed to offer educational, health and other benefits to them. Threats to children's privacy may arise from data collection and processing by public institutions, businesses and other organizations, as well as from such criminal activities as identity theft. Threats may also arise from children's own activities and from the activities of family members, peers or others, for example, by parents sharing photographs online or a stranger sharing information about a child.
>
> …
>
> 69. Interference with a child's privacy is only permissible if it is neither arbitrary nor unlawful. Any such interference should therefore be provided for by law, intended to serve a legitimate purpose, uphold the principle of data minimization, be proportionate and designed to observe the best interests of the child and must not conflict with the provisions, aims or objectives of the Convention.
>
> 70. States parties should take legislative, administrative and other measures to ensure that children's privacy is respected and protected by all organizations and in all environments that process their data. Legislation should include strong

safeguards, transparency, independent oversight and access to remedy. States parties should require the integration of privacy-by-design into digital products and services that affect children. …

…

71. Where consent is sought to process a child's data, States parties should ensure that consent is informed and freely given by the child or, depending on the child's age and evolving capacity, by the parent or caregiver, and obtained prior to processing those data. Where a child's own consent is considered insufficient and parental consent is required to process a child's personal data, States parties should require that organizations processing such data verify that consent is informed, meaningful and given by the child's parent or caregiver.

72. States parties should ensure that children and their parents or caregivers can easily access stored data, rectify data that are inaccurate or outdated and delete data unlawfully or unnecessarily stored by public authorities, private individuals or other bodies, subject to reasonable and lawful limitations.[6] They should further ensure the right of children to withdraw their consent and object to personal data processing where the data controller does not demonstrate legitimate, overriding grounds for the processing. They should also provide information to children, parents and caregivers on such matters, in child-friendly language and accessible formats.

73. Children's personal data should be accessible only to the authorities, organizations and individuals designated under the law to process them in compliance with such due process guarantees as regular audits and accountability measures.[7]…

…

77. Many children use online avatars or pseudonyms that protect their identity, and such practices can be important in protecting children's privacy. States parties should require an approach integrating safety-by-design and privacy-by-design to anonymity, while ensuring that anonymous practices are not routinely used to hide harmful or illegal behaviour, such as cyberaggression, hate speech or sexual exploitation and abuse. Protecting a child's privacy in the digital environment may be vital in circumstances where parents or caregivers themselves pose a threat to the child's safety or where they are in conflict over the child's care. Such cases may require further intervention, as well as family counselling or other services, to safeguard the child's right to privacy.

78. Providers of preventive or counselling services to children in the digital environment should be exempt from any requirement for a child user to obtain parental consent in order to access such services.[8] Such services should be held to high standards of privacy and child protection.

It is helpful to note that when the UNCRC was being drafted, it initially did not have a privacy rights provision. It was the US government that suggested such a provision be included. Initially, the proposed language spoke of privacy rights of the child and their family. Eventually the drafting committee agreed to follow as closely as possible the language of the ICCPR in relation to privacy, but the caveat in relation to parental oversight was recast as article 5 of the UNCRC. Article 5 provides as follows:

[6] Human Rights Committee, general comment No. 16 (1988), para. 10.

[7] Ibid.; and Committee on the Rights of the Child, general comment No. 20 (2016), para. 46.

[8] General comment No. 20 (2016), para. 60.

> Article 5
> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

These rights of parents to provide appropriate direction and guidance in the exercise by the child of their rights are informed by all the other rights in the Convention, including the general principles guaranteeing the child's right to equality without discrimination, the protection of the child's best interests in all decision-making affecting the child, the protection of the child's right to life, survival and maximum development and the child's right to participate and express their views in decisions which affect them. Other rights that are significant in relation to the child's right to guidance and direction from their parents are the child's right to a name and nationality and to know their cultural origins as informed by articles 7 and 8 and the child's right under article 9 to not be separated from their parents unless it is necessary in their best interests to do so, subject to due process guarantees. Most significantly perhaps, is the nexus between article 5 and article 18 of the UNCRC which provides:

> Article 18
> 1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
> 2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
> 3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

The great advance of the *Convention on the Rights of the Child* has been its challenge to a centuries old legal tradition of paternalism which viewed the child as an object rather than as a subject of rights at law. Child rights-based analysis insists upon an exacting standard of parental care by affirming the best interests of the child as a parent's basic concern, but it protects the child's autonomy by insisting that the parent's role is to provide "appropriate direction and guidance" in the child's own exercise of their rights "in a manner consistent with the child's evolving capacities". This approach is reflected as well in Article 6 of the UNCRC which protects the child's "inherent right to life" and to the maximum extent possible "survival and development". Thus, the child's right to life, survival and development is materially distinct from their rights proclaimed under the ICCPR, or section 7 of the Canadian Charter to "life, liberty and security of the person". Essentially however these rights protect the very same interests. The child's immediate need at birth is for an environment that recognises their abject vulnerability and provides materially, emotionally, and safely for their survival and maximum development. Liberty and security of the person are the object and means of that

development. As the child's capacities evolve, their sense of autonomy, independence and dignity will grow as well.

Analysis of issues

The matter referred to the CYA is a challenging one because it juxtaposes the protection of equality and privacy interests of transgender or non-binary children in schools to the established tradition of parental authority in relation to the child as it intersects with educational policy. It presents a classic clash of rights since there are not only strong views, but principled reasons to support contradictory positions in relation to which normative rules should govern policy in this matter.

This office and its predecessors in New Brunswick have not directly addressed privacy issues like the ones which may arise under Policy 713. As is often the case with the interpretation of privacy rights and disclosure of personal information, though the Act is relatively prescriptive, individual fact patterns may also be relevant in arriving at a final determination on whether disclosure has been properly made or whether a breach of privacy has occurred. It is with this limitation in mind that we offer the following observations.

Collection, use and disclosure of personal information

As stated earlier, in New Brunswick the relevant provisions under RTIPPA are found in Part 3 of the Act - Protection of Privacy, where the Act sets the rules that public bodies must follow in regard to the collection, use, and disclosure of an individual's personal information in their day-to-day activities and functions.

Under s. 37(1) and (2), public bodies can collect an individual's personal information if the collection is authorized or required by an Act of the Legislature or an Act of the Parliament of Canada, or if:

> (a) the information relates directly to and is necessary for
> (i) a service, program or activity of the public body, or
> (ii) a common or integrated service, program or activity,
> (b) the information is collected for law enforcement purposes, or
> (c) the information is collected by or for the public body for the purpose for which the information was disclosed to it under a provision of section 46 or 46.1.

Section 44 of the Act explains that a public body may use personal information only for the purpose for which the information was collected or compiled under subsection 37(1) or (2) or for a use consistent with that purpose. It also explains that a public body may use the personal information if the individual the information is about has consented to the use.

Section 46 goes on to explain that a public body may disclose personal information only if the individual the information is about has consented to the disclosure. It may also disclose personal information for the purpose for which the information was collected or compiled under subsection 37(1) or (2) or for a use consistent with that purpose.

Here, the individual's personal information (i.e., their chosen name, gender identity, pronouns) would be collected by school officials directly by the transgender or non-binary students or by their parents, for the purpose of identification, attendance, etc., of the student at school. Therefore, as per sections 44(a) and 46(1)(b) of the Act, the school would be authorized to use and/or disclose the student's personal information for those same purposes.

Use and disclosure of the student's preferred name, gender identity, and/or pronouns to their parents would likely not be a use or disclosure consistent with the purpose of the collection (i.e. identification/attendance of the student at the school). Therefore, the Act would not necessarily authorize this use or disclosure as contemplated by section 6.3.2 of Policy 713.

Consent

With regard to consent, the Act does not specify at what age an individual can consent to the use or disclosure of their personal information. Therefore, it appears that all individuals, no matter the age, are afforded the protections of Part 3 of the Act regarding the safe handling of their personal information.

This raises the question as to whether parents have any rights under the Act to consent to the use and disclosure of their children's personal information.

Section 79 of the Act states that any right or power conferred on an individual by this Act may be exercised:

> (d) by the parent or guardian of a minor if, in the opinion of the head of the public body concerned, the exercise of the right or power by the parent or guardian would not constitute an unreasonable invasion of the minor's privacy, or […]

Section 79 clearly provides parents with certain rights with respect to their children. It is also apparent that such rights are not absolute. Therefore, the application of this section involves a two-step process. First, it must be determined that the individual seeking to exercise a right or power under RTIPPA is a parent or guardian of a minor. In the absence of a definition of "minor" in *RTIPPA*, the *Age of Majority Act,* which establishes that an individual under the age of 19 years is a minor provides some guidance.

> 1(1) a person attains the age of majority and ceases to be a minor on attaining the age of 19.
>
> 1(2) Subject to the provisions of this Act, this section applies with respect to every law that is within the legislative competence of the Legislature and in force in the Province on or after August 1, 1972.
>
> 8 A person who has not attained the age of 19 may be described as a minor.

The question then turns to the second step in this process, which is a determination of whether or not there exists an unreasonable invasion of the minor's privacy. In analysing this issue, we considered the words of our counterparts in British Columbia. In his Order 00-40, the Information and Privacy Commissioner for British Columbia dealt with the refusal of a school board to provide an Applicant with copies of a school counsellor's notes of interviews with the Applicant's children. He said, in part:

> *In Neilson, Dorgan J, in passing, raised the issue of whether s. 3 of the Freedom of Information and Protection of Privacy Regulation, B.C. Reg. 323/93 ("Regulation") adequately protects the privacy of children. Section 3 of the Regulation reads as follows:*
>
> > *3. The right to access a record under section 4 of the Act and the right to request correction of personal information under section 29 of the Act may be exercised as follows:*
> >
> > *(a) on behalf of an individual under 19 years of age, by the individual's parent or guardian if the individual is incapable of exercising those rights;*
> >
> > *(b) on behalf of an individual who has a committee, by the individual's committee;*
> >
> > *(c) on behalf of a deceased individual, by the deceased's nearest relative or personal representative. [emphasis added]*
>
> *Dorgan J.'s concern may have stemmed from her perception that a parent could, in a case such as this, purport to rely on s. 3(a) of the Regulation in order to, in effect, claim an unfettered right of access to his or her minor children's personal information.*
>
> *I acknowledge that concern, but note that s. 3(a) speaks of the exercise by a parent or guardian of the right to have access to a record where that right is exercised "on behalf of" someone who is under 19 years of age. As my predecessor said in Order No. 53-1995,* ***where an applicant is not truly acting "on behalf" of an individual described in s. 3 of the Regulation, the access request is to be treated as an ordinary, arm's-length request under the Act, by one individual for another's personal information****…*

As explained above, individuals, including minors, have the right to consent for a public body to use and disclose their personal information. In this context, this means that a student has the right to consent to the school's use and disclosure of their chosen name, gender identity, and/or pronouns. Therefore, according to section 79, this right could also be exercised by a parent or guardian of this student, if the following conditions are met:

- The student is a minor
- The individual wanting to exercise the right of another individual is a parent or guardian

- The exercise of this right/power by the parent or guardian would not, in the opinion of the head of the school, constitute an unreasonable invasion of the minor's privacy

Using the interpretation provided in the BC decision above, a fourth condition could be added: The parent is truly acting "on behalf" of the minor.

Unreasonable invasion of privacy

Section 79 of RTIPPA does not define what would be considered an unreasonable invasion of the minor's privacy, but s. 21(2) of RTIPPA, in the context of an access request, lists what would be deemed an unreasonable invasion of an individual's privacy, and the only portion most closely relevant to the issues at hand would be:

> 21(2) A disclosure of personal information about a third party shall be deemed to be an unreasonable invasion of the third party's privacy if
>
> (i) the personal information indicates the third party's racial or ethnic origin, religious or political beliefs or associations or sexual orientation.

However, as sexual orientation is not the same as gender identity, this provision is not completely helpful in determining what would be considered an unreasonable invasion of a minor student's privacy by the school. As expressed by Newfoundland and Labrador's Information and Privacy Commissioner Report 2006-012 on their similar provision to section 79:

> *[23] I find the arguments in these decisions to be relevant and compelling. While I fully appreciate the intent of section 65(d) in imparting specific rights on a parent or guardian, I believe the qualification imposed on this provision is an important one and not to be taken lightly. The legislation clearly recognizes the privacy rights of individuals, including the rights of a minor. As such, it is incumbent on a public body, and on me as the Commissioner, to consider the best interests of the individual whose privacy may be invaded and to exercise discretion in ensuring an appropriate level of protection in circumstances where it is warranted. The ATIPPA Policy and Procedures Manual, produced by the Access to Information and Protection of Privacy Coordinating Office with the Provincial Department of Justice, provides clear direction on this point. In describing section 65(d) of the ATIPPA, this Manual, on page 2-8, states:*
>
> > *A parent or legal guardian of a minor (an individual under 19 years of age) does not automatically have authority to exercise rights or powers on behalf of his or her minor child or ward under the Act. The head of the public body concerned must be satisfied that the exercise of the right or power by the parent or guardian would not constitute an unreasonable invation of the minor's privacy. this leaves discretion in the hands of the public body to ensure the minor's privacy rights are protected in appropriate circumstances.*

In its 2016 Order issued to the Edmonton Public School District no. 7, Alberta's Information and Privacy Commissioner found that the district had breached the privacy of a female transgender student by calling out for attendance her legal name at birth, which was a typically male name. The adjudicator found that the public body had disclosed the student's personal information (consisting of her legal name, sex, and the

fact that her gender identity was different than her sex at birth) in violation of Alberta's *Freedom of Information and Protection of Privacy Act*.

The facts of the case were that the student and her parents had accepted that the school administration, upon her transfer to the school that year, might inform staff that she was transgender, but they were requested to keep this information confidential and not disclose it to the student body and to use her preferred name and pronouns in class. Teachers were given an attendance sheet with this information. However, teachers in the school often use a program called Power Teacher to take attendance and supply teachers often used this system or asked students to take attendance from it for them. The system used the girls legal name registered at birth. She had not yet legally changed it. On six occasions her name was called out in this way by various teachers. On one occasion the teacher loudly requested the student to have her name changed legally.

The adjudicator found there was a breach of section 40 of the Act which provides that:

> 40(1) A public body may disclose personal information only
> (b) if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17,
> (c) for the purpose for which the information was collected or compiled or for a use consistent with that purpose
> …
> (4) A public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes described in subsections (1), (2) and (3) in a reasonable manner.

The adjudicator reasoned that disclosing the student's personal information in the manner described was an unreasonable invasion of her privacy in breach of paragraph 40(1)b). The Complainant conceded that the disclosure may have been for a consistent use with the purpose of collection (confirming attendance) but the adjudicator agreed there was also a breach of subsection 40(4) of the statute in that the public body did not disclose the information for the intended purposes in a reasonable manner. The School District also admitted to a breach of section 38 of the Act which requires it to "make reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction." The adjudicator noted the admission and then stated:

> I also note that I was provided with the School's draft "Guide to Supporting Transgender students and Families" which was developed subsequent to these breaches. The draft states, "Counsellor will inform students that their chosen name and gender can be changed confidentially in power school records (timetables, attendance, demographics, etc.) with signed parental consent of a District letter and a SOGI consultant/parent/counsellor discussion… This change in name and gender will also be reflected in PASI once an upload has been completed to reflect the name and gender change on the students Detailed Academic Report (DAR) from Alberta Education.
> …
> I agree that there were not proper safeguards in place at the time of the breaches. I believe that the draft policy I was provided, detailed above, may address some of the Complainant's concerns. While it does not address access to PowerTeacher it does limit its use in the classroom for all students, not just transgender students. That being said, I cannot order the Public Board to

> institute a particular policy. Though I can order it to its policies meet the legislation, and suggest what kinds of policies might achieve this. That being said, I believe that the draft policy it submitted shows that the Public Body is well on its way to developing and implementing an appropriate policy. The Public Body has repeatedly acknowledged its failings and appears to be attempting to rectify its weaknesses in this area.

Parental rights

It must be noted that the rights of parents in relation to their child's schooling are well recognized. They are also circumscribed by the duty to act in the child's best interest.

This notion is affirmed in the *Education Act* in relation to the right of a parent to access pupil records maintained in respect of the pupil without the pupil's consent, unless the pupil has attained the age of nineteen years. This gives an additional right to parents of being informed of their child's records while attending school, which records may include the student's personal information, including preferred name, gender identity and/or pronouns. The *Education Act* also states that this provision prevails over RTIPPA where it conflicts or is inconsistent with a provision of RTIPPA.

The right of a parent to access a pupil's record under the *Education Act*, however, is limited where the superintendent believes that access to a record maintained in respect of a pupil would be detrimental to the well-being or future development of or the educational opportunities for the pupil.

As a matter of fundamental human rights, a child rights-based analysis reserves to parents the responsibility of being the primary caregiver and to provide the child with appropriate direction and guidance in the exercise of their rights. School authorities, like other public bodies and state agents, should generally defer to parents in relation to decisions regarding the child's private sphere and development.

Whether it be with respect to a matter of health care, religious or spiritual development, culture or identity, including gender identity or sexual orientation, parents should normally be consulted and supported in their responsibility of child-rearing, including in relation to these important areas of development. The reason why the law insists in supporting parents in this way is premised on the view that it is in the child's best interest that parents be supported in this role.

Ultimately, the law has one object and it is squarely the child's optimal physical, emotional, spiritual, moral and social development. In other words, the basis for parental rights in this context is not predicated by parental autonomy or liberty interests, but by the child's best interests.

Other considerations relating to Policy 713

Age-based rule

What we can learn from privacy rights decisions is that where competing rights are in play, policies that infringe upon privacy interests must be proportional. They should try to avoid arbitrary standards and seek to support the least intrusive policy available to meet the legitimate aim of a given rule.

By establishing an age-based rule for the required consent as to when a student can request a name change or change of pronouns, the Province may not have chosen the least privacy intrusive approach. It also seems to exclude any parental involvement or role for students 16 and over in relation to these important questions in relation to a child's identity. Neither outcome seems to optimize the opportunity for best interests solutions. This is often the case with arbitrary age-based rules and is generally why they should be avoided in policy-making.

The question of a child's ability to affirm their identity at school safely, whether by wearing a hijab, or a turban, or a skirt, for example, is an important one if schools are to provide equal access to a supportive and inclusive learning environment. These defining aspects of a given person's identity are areas where the Supreme Court reminds us that "privacy concerns are at their strongest."

The bond between teacher and pupil is also a relationship of trust[9]. When a child confides in a teacher and finds a safe place at school to affirm their gender identity, the teacher is situated in the best place to use their professional judgment in supporting the child's further engagement of this important topic with the parents at home. The least intrusive policy choice in important areas of privacy protection such as this one would seemingly be to leave the matter to the professional judgment of the teacher and the education team.

In some cases, there may be a legitimate fear of harm to the child within their home environment. The school environment may provide an opportunity for the child to be affirmed in this aspect of their development. An arbitrary age-based rule may prevent a child from coming forward to their teacher or counsellor at school and unfairly infringe upon their privacy or security of the person. For children it is particularly important that schools always remain safe spaces where they can develop and mature in a positive learning environment. Respect for their fundamental privacy rights is an essential aspect in creating that environment.

Moreover, the age-based rule in Policy 713 raises the question as to whether a school could even collect gender identity information about a student who is less than 16 years of age. Policy 713 states that a transgender or non-binary student under the age of 16 will require parental consent in order for their preferred first name to be officially used for record keeping purposes and daily management. This appears to infer that parental

[9] *R. v. Audet* [1996] 2 RCS 171

consent is required for schools to collect their child's personal information, i.e., gender identity information.

However, as per s. 37 of RTIPPA, consent is not required for public bodies to collect an individual's personal information, from the student themselves or from their parent, if the collection is authorized by an Act of the Legislature or an Act of Parliament. Even where the collection is not authorized by one of those Acts, the collection can still occur if the information relates directly and its collection is necessary for a service, program or activity of the public body or for a common or integrated service, program or activity of the public body. Furthermore, RTIPPA states that the collection of an individual's personal information shall be collected directly from the individual the information is about, unless one of the circumstances listed in s. 38(1) is present.

Therefore, it appears that RTIPPA authorizes public bodies, such as schools, to collect an individual's personal information without anyone's consent if it is authorized or required by an Act or if it relates directly to and is necessary to one of its services, programs or activity of the school. In this sense, there appears to be a discrepancy between RTIPPA and Policy 713 provisions.

Relationship of trust with parents

Schools and teachers also have a relationship of trust with parents. When parents come and place their children in the school's care teachers are said to be *in loco parentis*. Parents expect that their child will be properly cared for with the same attention and prudence that a parent would reasonably provide. Maintaining the relationship of trust between parent and teacher is essential to the promotion of the child's best interests. Therefore, the aims in Policy 713 to support the child in engaging their parents in this important sphere are not without merit. A child privacy friendly policy that is least intrusive would retain those good elements without imposing arbitrary rules as to a given age when teachers can or cannot do certain things in a child's best interest.

The guidance from the case law and authorities above suggests that both the child and the parent's views matter in cases such as these and that policy choices which facilitate and encourage discussion and consensus-building around important aspects of child development will be preferred as proportionate, reasonable, and minimally intrusive.

It is clear also that parents' consent is to be exercised with the child's best interest as the basic concern and that the parents' views must over time give way to the child's, as the child matures, and their autonomous decision-making capacity evolves. The child's capacity will be different in every case. The younger the child, the more important and determinative the parents' views will be. But even very young children are capable of expressing their views and these should be taken into consideration. Some children, exceptionally, may have limited capacity for autonomous decision-making and may in fact require supported decision-making well into their adult life.

The hope for every child is that they develop to their full potential. Careful regard for the child's privacy particularly in relation to sensitive areas of development such as the child's gender identity and approaching these conversations with openness, acceptance, and affirmation, is critical in helping the child achieve that full potential. Schools, with appropriate training and policies in place, are ideally situated to offer every child the safe space they need to learn, and to help them broach that conversation at home, when doing so proves more difficult. Trusting the professional judgment of seasoned educators and professionals to navigate these waters would optimize children's best interests as well as privacy friendly solutions that recognize parents' fundamental responsibilities towards ensuring their children's overall well-being.

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