

THE ROLE OF EDUCATION IN NURTURING EFFECTIVE CITIZENS: The “parental opt-out” should be removed from Alberta’s Human Rights Act

A position paper of the Sheldon Chumir Foundation for Ethics in Leadership

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I. Summary

The Alberta government undertook a much-needed review of provincial human rights legislation in 2009 and introduced changes meant to improve an outdated law. But Bill 44, which received royal assent on June 4, 2009, does serious harm by including a provision that gives parents the legal right to withdraw their children from classes where religion or human sexuality is discussed. The provision, which came into force on September 1, 2010, also grants parents the right to lodge formal complaints against teachers and school boards with the Alberta Human Rights Commission if advance written notice of such lessons is not provided. There was no public demand for the provision, which may cause considerable disruption in the schools and at the Commission and result in a circumscribed education for students. This parental opt-out is at best ill-considered and at worst an attack on the very idea of educating young Albertans to be critical thinkers capable of examining multiple points of view. It should be repealed.

II. Introduction

Alberta has more than once led Canada in the legal protection of human rights. In 1916, the provinces of Alberta, Manitoba and Saskatchewan were the first jurisdictions in Canada to give women the vote. Two years later, Albertans sent two women to the Alberta Legislature, making them the first females elected to public office in the British Empire.

However, any leadership on the protection of human rights evaporated long ago. The most glaring example of this is the protracted struggle to get the words “sexual orientation” added to provincial human rights law as a prohibited ground of discrimination. The government of Alberta resisted this change for eleven years, despite

a 1998 ruling by the Supreme Court of Canada (*Vriend v. Alberta*) that the absence of such protection violated the *Canadian Charter of Rights and Freedoms*. The court ruled that the words “sexual orientation” had to be understood as being part of, even though not explicitly stated in, provincial human rights law. Bill 44 finally remedied this omission by adding sexual orientation as a prohibited ground of discrimination in 2009.

But the provincial human rights statute required reform on more than that one front. Bill 44 did not represent a serious effort to come to grips with the pressing problems faced by what was then called the Alberta Human Rights and Citizenship Commission. Most changes, while helpful, were minor, such as giving the commission and the statute that governs it clearer names, by removing references to citizenship and multiculturalism. Yet Alberta took a giant step backward by conferring upon parents a legal right to prevent their children from receiving education on any topic touching on “religion, human sexuality and sexual orientation”.

There was no public demand for such a provision. The provincial government did not establish that any Albertans were asking for a parental opt-out to be enshrined in human rights law. Nor did anyone articulate such a need in the consultations on human rights reform that the Sheldon Chumir Foundation for Ethics in Leadership conducted across the province in 2008. Indeed, the response of Albertans to the inclusion of the opt-out in human rights legislation has been overwhelmingly negative.

Moreover, two attempts in 2006 by then backbench MLA Ted Morton (he was a cabinet minister when Bill 44 was introduced and adopted) to pass a private member’s bill with similar intent failed, despite the government’s strong majority. Not one key educational stakeholder, such as the Alberta Teachers’ Association, the College of Alberta School Superintendents, the Alberta School Councils’ Association, or the Alberta School Boards Association, supported putting the parental opt-out provision in the *Alberta Human Rights Act*. Nonetheless, the bill became law on June 4, 2009. It is not too late to correct this error. The legislature could and should repeal Section 11.1.

Section 11.1 of the *Alberta Human Rights Act*

11.1(1) A board as defined in the *School Act* shall provide notice to a parent or guardian of a student where courses of study, educational programs or instructional materials, or instruction or exercises, prescribed under that Act include subject-matter that deals primarily and explicitly with religion, human sexuality or sexual orientation.

(2) Where a teacher or other person providing instruction, teaching a course of study or educational program or using the instructional materials referred to in subsection (1) receives a written request signed by a parent or guardian of a student that the student be excluded from the instruction, course of study, educational program or use of instructional materials, the teacher or other person shall in accordance with the request of the parent or guardian and without academic penalty permit the student

- (a) to leave the classroom or place where the instruction, course of study or educational program is taking place or the instructional materials are being used for the duration of the part of the instruction, course of study or educational program, or the use of the instructional materials, that includes the subject-matter referred to in subsection (1), or
- (b) to remain in the classroom or place without taking part in the instruction, course of study or educational program or using the instructional materials.

(3) This section does not apply to incidental or indirect references to religion, religious themes, human sexuality or sexual orientation in a course of study, educational program, instruction or exercises or in the use of instructional materials.

See the *Alberta Human Rights Act*, R.S.A. 2000, c. A – 25.5, s. 11.1, emphasis added.

III. The government's position

Members of the government put forward a number of reasons why Alberta, alone among Canadian jurisdictions, should include this parental opt-out in its human rights legislation. None stands up to careful scrutiny.

Argument 1: The *Universal Declaration of Human Rights* supports a parent's right to choose

Government members and their officials have suggested that the *Universal Declaration of Human Rights* (UDHR), proclaimed by members of the United Nations in 1948, confers this kind of right on parents, making it appropriate to add it to the provincial human rights statute. At first glance, the section they have quoted appears to do so. Article 26(3) of the declaration says, "Parents have a prior right to choose the kind of education that shall be given to their children".

However, other parts of the UDHR talk of education being directed to "the strengthening of respect for human rights and fundamental freedoms" and of promoting "tolerance and friendship among all nations, racial or religious groups". Depriving children of knowledge about debates on and developments in human rights, including gay rights, runs counter to the Declaration's goal of strengthening their respect for these rights. It is also difficult to see how withdrawing children from material which one religious group finds objectionable gives those students the tools to understand, tolerate or become friends with people who differ with them on religious or other grounds.

Article 26 of the UDHR does not, on balance, support the addition of the parental opt-out to Alberta law. It militates against it. There are provisions in other international human rights documents, such as the *UN Convention on the Rights of the Child*, which are also incompatible with the parental opt-out. International law does not support the government's case.

Argument 2: The parental opt-out is narrow in scope and impact

The government has frequently declared that the provision is narrow in scope and will not result in substantive change. Such statements are misleading as they paint an unrealistically restricted picture of what could provoke a parental objection on religious grounds. In fact, the definition of religion in Canadian law is broad. In a 2004 decision the Supreme Court of Canada said that

Freedom of religion ... consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials. *This understanding is consistent with a personal or subjective understanding of freedom of religion.*

(Emphasis added)

It follows that parents could object to almost anything on religious grounds, including a history lesson on the Protestant Reformation or a literature course on that randy Shakespeare. During the debate prior to adoption of Bill 44, the Premier of Alberta admitted that parents could remove children from courses dealing with evolution. The Minister of Culture and Community Spirit, who introduced the legislation, later said that the opt-out did not extend to evolution, although it is clear it does.

The likely result of this confusion is that children's education will suffer. Teachers will shy away from material they fear may get them into trouble under this provision.

A last-minute change to the wording of the bill, adding the words "primarily" and "explicitly" in the section describing the material parents must be notified of, does not add more clarity to this murky question because the definition of religion used by the courts is so broad, or as the Supreme Court of Canada puts it "subjective and personal".

The contention that current practice will not change is equally problematic. It is true that

parents already have the right under the *School Act* to withdraw their children from religious instruction. It is also true that the “Guide to Education,” a provincial government publication, states that principals can exempt children from human sexuality instruction at the written request of the student’s parents. However, Section 11.1 requires teachers to give parents written notice when religion or human sexuality is to be addressed. Failure to do so exposes the teacher to the risk of having a complaint filed against them with the Alberta Human Rights Commission.

Section 11.1 puts a new burden on teachers to give notification to parents and represents a significant change to current practice, as does the possibility of teachers facing complaints to the Alberta Human Rights Commission.

The parental opt-out exposes School Boards to new visible costs, such as creating and administering a new notification process and the time and money spent by school officials to defend against a complaint before the commission. It also leads to invisible costs, such as self-censorship, as teachers avoid any subject that might be interpreted as touching on religion and human sexuality. Anecdotal evidence suggests this is already happening.

Those who suffer most from self-censorship are Alberta children, who as a result of the opt-out will now receive an incomplete and circumscribed education. This violates the values that are supposed to be paramount in Alberta education. Section 3 of the *School Act* explicitly states that all education programs and school materials “must reflect the diverse nature and heritage of society in Alberta, promote understanding and respect for others and honour and respect the common values and beliefs of all Albertans”. It goes on to say that these programs and materials “must not promote or foster doctrines of racial or ethnic superiority or persecution, religious intolerance or persecution, social change through violent action or disobedience of laws”.

People are entitled to believe what they want by way of religious conviction. But they are not entitled to shield their children from alternative views. Indeed, the state has an

obligation to offer students a rich and challenging education that prepares them to be effective citizens in a highly diverse province, country and world. We are now in the confusing position where the Government of Alberta subscribes to this philosophy of education in the *School Act* but not in the *Alberta Human Rights Act*.

IV. Sheldon Chumir Foundation position

In refuting the government's position above, we made the points that the parental opt-out is not required by international law, that it is so broad in scope to be virtually unmanageable and that it imposes extra burdens and costs on an already over-loaded education system. We would add to these the following arguments:

Argument 1: It complicates the mandate of the Alberta Human Rights Commission

When Canadian human rights commissions were created in the 1960s and 1970s, their mandate was quite clear: They were to administer and enforce legislation aimed at preventing and remedying discrimination in the areas of employment, rental accommodation and goods and services "customarily available to the public".

Prior to the introduction of Bill 44, there was growing consensus both in and outside of government that the Alberta Human Rights Commission needed to return to its core business. Why throw a monkey wrench into the works by giving the Commission a jurisdiction connected with religiously based concerns about curriculum in the schools? And if the Alberta Human Rights Commission is not to be involved in administration of the proposed parental opt-out, why is this section in legislation that is almost purely concerned with matters relating to it?

Argument 2: The parental opt-out was not carefully thought out and may have serious unintended consequences and costs

The opt-out provision could result in significant disruption at the Alberta Human Rights Commission and in the schools. Parents can now file human rights complaints against teachers, principals, school boards, or even the Minister of Education.

The opt-out seems premised on the naïve assumption that teachers have absolute control over when certain matters arise in class and thus can advise parents when something untoward, from the parents' point of view, is going to come up. Real life in the classroom is not amenable to any such thing. Many extemporaneous discussions in classrooms are stimulated by current events. How can teachers predict what is going to be in the news? To take one example: On April 2, 2009, it was reported that Sweden had become the fifth European country to legalize gay marriage. When a student raises that development in a current affairs discussion, what is the teacher to do? Refuse to enter into any such discussion, even for the purposes of clarifying what the news story is about? Surely not. So how is the opt-out to work in practice?

The argument that such discussions are not lessons that are “primarily and explicitly” about human sexuality or sexual orientation does nothing to stop teachers from self-censorship in the classroom. Even if a human rights complaint against such a discussion would not succeed, the threat of such a complaint and the need to respond to it is likely to cause teachers to shy away from controversial issues in the classroom. It is difficult to overstate the seriousness of this point.

Moreover, the opt-out contradicts the policy of the Ministry of Education on teaching controversial issues. The “Guide to Education,” the ministry’s core document, states that opportunities to deal with topics that are publicly sensitive and upon which there is no consensus of values or beliefs “are an integral part of student learning in Alberta”. The parental opt-out now makes learning about religion, human sexuality and sexual orientation, which are all controversial issues, optional for students whose parents demand that their children be exempted from such lessons.

The anecdotal evidence we have received since Section 11.1 went into effect on September 1, 2010 is that some teachers are censoring themselves in order to avoid trouble with parents and possible complaints to the Alberta Human Rights Commission. It has also become clear that some teachers have decided on civil disobedience. They are going to conduct their classes as if the section was not on the books and risk the

consequences. This is brave of them, but the government should never have adopted legislation that puts them in such a dilemma.

The issue of costs to introduce and administer the notification system and defend teachers when complaints are lodged has never been clarified. This money will have to come from somewhere in the education system. Shouldn't those dollars go to funding schools instead?

The Ministry of Education has indicated that schools with a religious orientation must offer notice at the start of the school year that their curriculum is imbued with religion. This makes it possible for a student in a publicly-funded Catholic school to demand exemption from the entire school year without academic penalty. It is unlikely that any parent or student will exercise the opt-out in this way. However, the creation of this absurd possibility is a further unintended consequence of the legislation.

Argument 3: The legislated parental opt-out is neither necessary nor appropriate

The opt-out concerns parental control over what their children are exposed to in school. Some would say that the most natural place for such a provision is in the *School Act*. If the government insists that the parental opt-out should remain, then it should be added to that statute. Our primary concern in this position paper is to argue against maintaining the parental opt-out in the *Alberta Human Rights Act*. However, we think the proposal is fundamentally ill considered and thus does not belong in the *School Act* either.

V. Precedents for repeal of legislation

Some readers may feel that nothing can be done to remedy the situation because Bill 44 is now law. Wrong-headed and abusive legislation can be repealed. The Alberta legislature has done it before and could do so again. In 1972, the newly elected Progressive Conservative government used its first legislative session to repeal two acts that violated human rights: the *Sexual Sterilization Act* of 1928 and the *Communal Property Act* of 1947. Under the infamous *Sexual Sterilization Act*, almost 3,000 Albertans were deemed

ineligible to reproduce by experts who said their limited intellects would be inherited by any offspring. They were operated on, often without any idea of what was happening to them, to ensure they would never have children. The *Communal Property Act* limited how much land groups could own to farm communally. The primary target of the restrictions was a particular religious group, the Hutterites.

VI. Conclusion

Adding the parental opt-out to the *Alberta Human Rights Act* was a bad idea. There was no need or public demand for it. Indeed, there was overwhelming public opposition to the provision. A small number of ideologically-driven government insiders pushed the proposal through a docile caucus and defeated a badly outnumbered opposition.

It was unwise to legislate such a poorly thought-out provision when there is a widespread desire that the Alberta Human Rights Commission get back to basics in its anti-discrimination work.

It is clear too that international law requires no such thing. Quite the opposite in fact: International law demands education that fosters respect for human rights and fundamental freedoms.

Nor does such an opt-out belong in the *School Act* instead of the *Alberta Human Rights Act*. The policy of the Ministry of Education is to prepare students to live successfully in our highly diverse society and to think critically about controversial topics. The opt-out is an obstacle to achieving these goals.

The parental opt-out is a backwards step with the potential to do great harm. The legislature has the power to correct this grave error. We urge the repeal of Section 11.1 of the *Alberta Human Rights Act*.