Court of King's Bench of Alberta

Citation: Kerber v Alberta, 2025 ABKB 98

Date:
Docket: 2503 02170
Registry: Edmonton

Between:

Katherine Kerber, Litigation Guardian of A.B., Debbie Spears, Litigation Guardian of C.D., Martin Doyle, Litigation Guardian of Ryan Doyle, and Melissa Baker, Litigation Guardian of Jocelyn Baker

Plaintiffs/Applicants

- and -

His Majesty the King in Right of Alberta and the Minister of Education (Demetrios Nicolaides)

Defendants/Respondents

Reasons for Decision of the Honourable Justice A. Loparco

I. Introduction

[1] Approximately 3,700 complex-needs students have been advised by their schools that they must continue their education programs on an at-home or a rotating in-school basis because of the strike involving support workers at Edmonton Public Schools. This situation has persisted for over five weeks.

[2] The minor Plaintiffs/Applicants are students with disabilities currently enrolled in schools operated by the Board of Trustees of Edmonton School Division (ESD). Since January 13, 2025, the Applicants are either partially or fully engaged in at-home learning rather than the in-person learning required by the *In-Person Learning Regulation*, Alta Reg 226/2022. The basis for this exclusion from in-person learning is Ministerial Order #002/2025 (Ministerial Order).

[3] The Applicants submit that students with disabilities are being discriminated against by the Ministerial Order, which permits the ESD to change the in-person education requirement only for complex-needs students. They believe the Government has failed to provide equal access to education during the strike, that complex-needs students have not been accommodated to continue learning in-person along with their non-disabled peers, and that complex-needs students are exclusively bearing the burden of the strike, resulting in isolation, academic regression, and negative psychological effects.

[4] The Applicants, who are four complex-needs students affected by the Ministerial Order, seek an interlocutory injunction suspending the operation of the Ministerial Order or, alternatively, an exemption to the Ministerial Order, until the summary judgment or trial can be heard and determined on the *Charter* issue.

II. Brief Summary

[5] For the reasons that follow, the application for an interlocutory injunction is granted. The operation of the injunction is suspended until 4.30 pm on Thursday, February 27, 2025, to allow the Respondents to consider a new ministerial order that complies with this decision.

III. Background

[6] ESD and CUPE Local 3550 (CUPE 3550) have been engaged in collective bargaining. CUPE 3550 represents various support staff employed by the ESD, including educational assistants.

[7] On January 9, 2025, CUPE 3550 issued a notice that it would be going on strike as of January 13, 2025. A range of support staff, including administrative assistants, clerks, educational assistants, food preparers, interpreters, library technicians, licensed practical nurses, speech language pathology assistants, and technicians have been on strike since that date.

[8] On October 18, 2024, in anticipation of a strike, Darrel Robertson, Superintendent of Schools for ESD, requested an exemption from the obligation under the *In-person Learning Regulation* (October 18 Letter from Darrell Robertson, ESD Superintendent, to Lora Pillipow, Deputy Minister Alberta Education).

[9] On January 12, 2025, the day prior to the strike, the Minister of Education, Demetrios Nicolaides, signed Ministerial Order #002/2025. The Ministerial Order states:

> I, Demetrios Nicolaides, Minister of Education, pursuant to section 4 of the *In-person Learning Regulation*, exempt The Board of Trustees of Edmonton School Division from the application of section 2 of the regulation to provide an in-person learning option, at the schools under its authority, to students who require an educational assistant due to complex needs where the continued attendance of those students at in-person learning may risk the health and safety of the student

or other students or staff, subject to the terms and conditions in the attached Appendix.

IV. Plaintiffs/Applicants

[10] Since January 13, 2025, the minor Applicants, A.B., C.D. and Ryan Doyle, have been excluded from in-person learning on a rotational basis and minor Applicant, Jocelyn Baker, has been restricted to at-home learning on a full-time basis.

[11] The Plaintiff, Katherine Kerber, is the parent and litigation guardian of A.B. Kerber's child is 15 years old and has the following disabilities: epilepsy, narcolepsy, dyslexia, and a generalized learning disorder. A.B. requires an Education Assistant (EA) to attend school and to learn. Since January 13, 2025, A.B. has been on a rotational schedule. A.B.'s parents work full-time and cannot access Family Support for Children with Disabilities' funding since the policy does not permit contract hours during school hours as such support is the responsibility of the school.

[12] The Plaintiff, Debbie Spears, is the parent and litigation guardian of C.D. Spears' child is 16 years old and is diagnosed with autism spectrum disorder, separation anxiety disorder, mild intellectual disorder, and Tourette's syndrome. C.D. requires EA support. On January 25, 2025, C.D. was required to stay home three days per week. Debbie deposes that C.D.'s development, as well as their emotional, psychological and physical well-being has suffered because of the Ministerial Order.

[13] Martin Doyle is the parent and litigation guardian of Ryan Doyle. Ryan is an 11-year-old student in Grade 6 with ADHD and Level 3 autism (also known as profound autism). It is difficult for him to stay in one place for very long without support, structure, and routine. Between January 13 and January 20, 2025, Ryan was not permitted to attend school in person. Because of advocacy efforts by his parents, he was accommodated for in-person learning for two days per week. Martin Doyle has had to take an unpaid leave from work. Although Ryan cannot express his feelings, he is noted to be more anxious, dysregulated, and sad. The exclusion from school has been emotionally and mentally draining for the family. The sudden change in his schedule has had a significant impact on his learning, behaviour, and emotions.

[14] Melissa Baker is Jocelyn Baker's litigation guardian. Jocelyn is a Grade 5 student with Trisomy 21, a mental and physical disability known as Down syndrome. Jocelyn requires an EA or support worker to attend school. On January 10, 2025, Melissa was advised that Jocelyn would need to stay at home due to safety concerns. Jocelyn is unable to learn at home without an EA. She has received worksheets and the possibility to connect with a teacher by telephone. Her litigation guardian observes that Jocelyn is regressing, irritable, and sad about being kept home. Melissa tried to negotiate a support arrangement but was advised that Jocelyn could not be accommodated.

V. Position of the Parties

[15] The Applicants assert that the Ministerial Order and its resulting implementation, which applies only to complex-needs students, infringes their constitutional rights, specifically their *Charter* s 15 right to equality. They ask the Court to issue an interlocutory prohibitive injunction suspending the Ministerial Order or exempting them from the Ministerial Order,

which would allow the Applicants to attend school until the final determination of this proceeding. They argue that this is a clear case in which the tripartite test for an injunction is met.

[16] The Applicants' pleadings also discuss the effect of a wage cap directive issued by the Minister of Finance in the collective bargaining process. In oral argument, the Applicants have advised that they are not pursuing an injunction in respect of the wage cap.

[17] The Respondents (Alberta) submit that the application should fail since the Applicants have named the incorrect party. Alberta states that the ESD implemented the Ministerial Order and would therefore need to respond to the effect of any interlocutory injunction. Alberta further asserts that they are not able to provide the information about how the individualized student assessments for at-home learning were made because the ESD is a separate legal entity.

[18] Alberta concedes that the *Charter* rights infringement alleged raises a serious issue to be tried. However, they state that the Applicants have not demonstrated irreparable harm for two main reasons: Dr. Moore's report should be given little weight as she did not meet with any of the children impacted, and the guardians of the Applicants cannot provide opinion evidence of the impact of the Ministerial Order on their children. They argue that the balance of convenience favours denial of the interlocutory injunction.

[19] The questions in the present application are whether it is sufficiently clear on the record before the Court at this stage of the litigation that Alberta has infringed the Applicants' *Charter* rights, that they will suffer irreparable harm if the injunction is not issued, and that the balance of convenience weighs in favour of granting an interlocutory injunction to allow them to access in-person learning or be assessed for program modification on an equal footing with their peers who do not have complex needs until the case is decided on its merits.

[20] The Applicants recognize the impossibility of returning 3,700 complex-needs students immediately back to the classroom on a full-time basis during the strike, but state that the remedy sought would require Alberta to address the labour shortage in a more equitable manner by ensuring resources are redeployed fairly to all students.

[21] Alberta asks that if the interlocutory injunction is granted, the order be suspended for a period of time to permit Alberta and the ESD to comply with the Court's Order.

VI. Issues

[22] The issues on the application are as follows:

i) Were the Applicants required to name the Board of Trustees of Edmonton School Division?

ii) Should this Court exercise its discretion to grant injunctive relief?

Issue 1

i) Were the Applicants required to name the Board of Trustees of Edmonton School Division (ESD)?

[23] I disagree with Alberta's position that the application must fail because the Applicants did not name ESD as a party.

[24] The Minister's impugned decision is upstream of any individualized actions taken by the ESD.

[25] The Applicants take no issue with implementation of the Ministerial Order by the ESD; rather, they impugn the distinction created in the Ministerial Order, which applies only to complex-needs students.

a. Position of the Parties

[26] Alberta argues that the Ministerial Order does not *require* the ESD to stop providing in-person learning to particular students; it merely *permits* the ESD to make decisions about at-home learning considering the safety of all students and staff within its schools in light of the strike action.

[27] Accordingly, they state that the Applicants' complaint is misdirected; rather, they state that any issue with a decision to require a student be exempt from in-person learning should be directed at the ESD.

[28] The Applicants allege the Ministerial Order, which was enacted by the Minister of Education, violates the *Charter*. They state that it is therefore not the implementation of the Ministerial Order by the ESD that is at issue.

[29] Alberta argues that the ESD would be most affected by the suspension of the Ministerial Order and therefore, should have been named in this litigation. They further state that pursuant to 51(1) of the *Education Act*, the ESD is a separate entity and has the "rights, powers and privileges of a natural person".

b. Legislative Enactments

[30] Pursuant to the *Education Act*:

a. Students of certain ages are entitled to have access "to an education program in accordance with the *Act*." (s 3(1));

b. The exercise of any right under the *Act* is subject to limitations reasonable in the circumstances (s 2);

c. A board "has the capacity and, subject to the *Act* and the regulations, the rights, powers and privileges of a natural person." (s 51(1));

d. A board has certain responsibilities to students, including ensuring that each of its students is provided with an education program consistent with the requirements of the *Act* and ensuring that each student and staff member is provided with a safe learning environment (s 11(1) and s 33(1)(d));

e. A board may determine if a student is in need of specialized supports and services (s 11(3)).

[31] Pursuant to the *In-Person Learning Regulation*:

a. A board may offer or provide at-home learning if the board provides an option for in-person learning for each student at the students' regularly attended school (s 2(1));

b. b. The Minister of Education may exempt a board from the application of the requirement to provide in-person learning by order under any terms and conditions the Minister considers appropriate (s 4).

[32] The Ministerial Order exempts the ESD from the application of s 2 of the *In-Person Regulation* "to students who require an education assistant due to complex-needs where the continued attendance of those students at in-person learning may risk the health and safety of the student or other students or staff" subject to the terms and conditions contained with the Appendix of the Ministerial Order.

[33] The Ministerial Order commenced on January 13, 2025, and will expire the day after the termination of the CUPE 3550 labour strike or upon revocation of the Ministerial Order by the Minister of Education.

[34] The Ministerial Order requires the ESD to conduct an individualized analysis of students requiring EAs when determining whether continuing in-person learning for a particular student may risk the health and safety of the student, other students, and/or staff. The ESD is to do this by relying on existing educational, behavioural, medical or other assessments completed for the student. If the ESD determines that in-person learning for that student may risk the health and safety of the student, other students, and/or staff, the ESD Board may exempt the student from in-person learning, in which case it shall continue to provide an education program to the student through at-home learning.

[35] Prior to exempting a student from in-person learning, the ESD is required to make reasonable efforts to continue in-person learning for the student:

a. For part of a school day or school week;

b. By placing the student in a cohort with other students at the student's school, another school, or another location;

c. By making reasonable efforts to hire qualified staff or enter into contracts for services with qualified third-party providers to perform support or assistance for the student; and

d. By implementing any other option the ESD considers reasonable in the circumstances.

[36] According to the Ministerial Order, where the ESD provides at-home learning or part at-home/part in-person learning to a student, it shall:

a. Make reasonable efforts to provide synchronous instruction or engagement with the student;

b. Ensure a learning plan is completed for the student and revised as necessary;

c. Make reasonable efforts to communicate regularly with the parent or guardian of the student regarding implementation of the learning plan;

d. Conduct an ongoing review of the at-home learning provided.

[37] The *Education Amendment Act*, 2024 received Royal Assent on December 5, 2024. The amendments set out a right to education during emergencies declared under the *Public Health*

Act, the *Emergency Management Act*, or an emergency prescribed by order of the Minister. The amendments also allow the Minister to make regulations respecting in-person and at-home learning (ss 4-5).

[38] On January 27, 2025, the Minister issued another ministerial order that sets a new *In-person Learning Regulation.* The new *Regulation*: a.) Contains the same requirement for in-person learning with a provision that the Minister may, by order, exempt a board from the requirement to provide in-person learning; and b.) Contains a transitional provision that any former order under the *Regulation* that was in effect immediately before the coming into force of this new *In-person Learning Regulation* is deemed to be an order under the new *Regulation* and continues to have effect according to its terms and conditions.

[39] The new *In-Person Learning Regulation* comes into force on the coming into force of Section 5 of the *Education Amendment Act*, 2024. On January 29, 2025, the Lieutenant Governor in Council ordered that a Proclamation be issued proclaiming certain sections in force on March 1, 2025, including s 5 of the *Education Amendment Act*, 2024.

c. Analysis

[40] While Alberta is correct that the Ministerial Order does not require any student to learn at-home, the Ministerial Order is the permissive enabling enactment that grants the ESD the authority to make decisions about *which* students must switch to full or partial at-home learning. Alberta is the correct party to name in this application.

[41] Pursuant to the recommendations made by the ESD Superintendent in the October 18 Letter, the Minister of Education adopted a policy that would permit the ESD to use its resources during a labour strike in a manner that effectively would impact the least number of students without consideration of any alternatives: see Transcript of Mr. Freed, p 43-44 where he states: "the least amount would have to or would be learning at home full time or part time. It is that they would do everything that they could to ensure the majority of their students remained learning in person for those students who are learning in person.". He further stated:

> Q: [...] did the ministry ever require that Edmonton Public consider imposing at-home learning or rotational schedules for all students equally as opposed to singling out the complex-needs students?
>
> A: No, I don't think it --- I don't think any of our conversations were around – I think it was about – like, I think the principle here is that the one thing that needs to be considered is the safety of the student. p. 21

[42] Moreover, Alberta established the terms and conditions within which the ESD had to implement the Ministerial Order. Such terms and conditions are found in the Appendix to the Ministerial Order. A non-exhaustive list includes:

> 1 Subject to and in accordance with these terms and conditions, the Board of Trustees of Edmonton School Division (the "Board") shall continue to provide in-person learning to all students except where students who require the support or assistance of an educational assistant due to complex needs have been identified.
>
> 2 When determining whether a student continues in-person learning, without the support or assistance of an educational assistant or other staff, may risk the health and safety of the student or other students or staff, the Board shall engage in an

> individualized analysis and shall rely on prior educational, behavioural, medical or other assessments completed for each student.
>
> 3 In reliance on the prior educational, behavioural, medical or other assessments completed for each student, when selecting students for the exemption, the Board shall consider the health and safety of the student if the student continues to attend in-person learning without the support or assistance of an educational assistant or other staff.
>
> 4 In reliance on the prior educational, behavioural, medical or other assessments completed for each student, when selecting students for the exemption, the Board shall consider the health and safety of other students and staff if the student continues to attend in-person learning without the support or assistance of an educational assistant or other staff.
>
> 5 In accordance with clauses 2, 3 and 4, and subject to clauses 6, 7, 8 and 9, where the Board identifies a student who has complex needs and requires the support or assistance of an educational assistant, and that student's continued attendance at in-person learning without the support or assistance of an educational assistant or other staff may risk the health and safety of that student or other students or staff, the Board may exempt the student from in-person learning and shall provide at-home learning to the student.
>
> [...]

[43] Additionally, the Appendix to the Ministerial Order requires ESD to provide updates, when requested:

> 15. The Board shall provide updates to the Minister, or department staff, as requested, regarding the implementation of this Order.

[44] Finally, Alberta provides approximately 95% of the ESD funding; any other source of funding for the public schools would only represent a very small proportion: see Transcript of Mr. Freed, p 22-24 and 27. This would include funds available to implement a contingency plan and any reasonable accommodations as required by the Appendix to the Ministerial Order.

[45] Alberta Education does not assess students' needs for additional support. That role is fulfilled by the school authorities, including the ESD, pursuant to s 11(3) and s 11(4) of the *Education Act*, SA 2012, c E-0.3.

[46] Again, the Applicants take no issue with implementation of the Ministerial Order by the ESD; rather, they impugn the distinction created in the Ministerial Order as it applies only to complex-needs students.

[47] I conclude that Alberta is correctly named in this action as the decision impugned as discriminatory in violation of s 15 of the *Charter* is the Ministerial Order and not the individualized implementation decisions made by the ESD. Pursuant to the Appendix to the Ministerial Order, there is a strict set of rules within which the ESD has to operate, including reporting to Alberta Education, when requested.

[48] While it is acknowledged that the ESD "has the capacity and, subject to the *Act* and the regulations, the rights, powers and privileges of a natural person." (s 51(1) *Education Act*), this

does not preclude Alberta from being named in this lawsuit or accessing information to respond to the allegations: see ***LAPP Corporation v Alberta*****,** 2023 ABKB 566 at paras 16-26, 74-75.

[49] Here, by means of the legislative enactments, including the Ministerial Order, Alberta has issued directives that must be followed by the ESD in carrying out their powers and duties under the *Education Act*, the *In-Person Regulation*, and the Ministerial Order.

[50] Furthermore, while the ESD will be affected by a suspension of the Ministerial Order, it has no separate mandate; it can only act pursuant to Alberta's legislative enactments and directives, and as such, it can only act in accordance with Alberta's governing direction and delegation. The Applicants take no issue with the presumption of regularity. In other words, they accept at this stage that the ESD has complied with the authority delegated to it by Alberta.

[51] I note that additional information was disclosed by the ESD pursuant to a third-party order. At this stage, there is sufficient information available from Alberta alone to assess the criteria for the tripartite interlocutory injunction test. While a more complete record at trial may include the contingency plan used by the ESD to assess whether the actions taken were justifiable on a s 1 *Charter* analysis, this information is not required to determine whether the interlocutory injunction test is met.

[52] As the Supreme Court stated in ***Eldridge v British Columbia (Attorney General)***, [1997] 3 SCR 624 at para 20 [***Eldridge***]:

> There is no question, of course, that the *Charter* applies to provincial legislation; see ***RWDSU v Dolphin Delivery Ltd.***, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573. There are two ways, however, in which it can do so. First, legislation may be found to be unconstitutional on its face because it violates a *Charter* right and is not saved by s. 1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. Secondly, the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the *Charter*.

[53] ESD is specifically authorized by the Ministerial Order to limit in-person learning to the complex needs group, if required.

[54] The assessment engaged by this application is at the broader policy level set by the Ministerial Order and not at the level of the individual decisions made by the ESD. The remedy sought by the Applicants is upstream of the decisions made by the ESD such that the remedial action sought is at the policy level above their decision-making authority, i.e., a suspension of the Ministerial Order.

Issue 2

ii) Should this Court exercise its discretion to grant injunctive relief?

a. *Charter* Injunctions

[55] For the reasons that follow, the tripartite test for interlocutory prohibitive injunctive relief is met.

[56] In the absence of a full and complete record, interlocutory injunctions seek a temporary suspension of the operation of apparently validly enacted legislation pending a trial on the constitutionality of that legislation. Considerations of the public interest and the consequences of a continued breach of constitutional rights must be carefully balanced.

[57] The test for injunctive relief in *Charter* cases was set out by the Supreme Court of Canada in ***RJR-MacDonald Inc v Canada (Attorney General)***, [1994] 1 SCR 311 [***RJR-MacDonald***], and is well-settled law: ***AC and JF v Alberta*****,** 2021 ABCA 24 at para 4 [***AC and JF***].

[58] Where "rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied", courts are empowered by s 24(1) to grant "such remedy as the court considers appropriate and just in the circumstances...". Courts have interpreted this authority to include the power to grant interim relief prior to the final determination of whether rights or freedoms have been infringed or denied: ***RJR-MacDonald*** at 332.

[59] The Applicants must demonstrate that:

(a) There is a serious question to be tried;

(b) They will suffer irreparable harm if the injunction is not granted; and,

(c) The balance of convenience favours the granting of the injunction.

[60] The Court in ***AC and JF*** stated that the stages of the ***RJR-MacDonald*** test are not "water-tight compartments"; the relative strength of the plaintiff's claim is a relevant consideration in the overall assessment of whether to grant the requested relief, as is the nature of the harm the applicant will suffer if the interim relief is not granted: see ***AC and JF*** at para 27.

[61] Writing extrajudicially in his article "Interim Remedies and Constitutional Rights" (2019) 69:1 UTLJ 9 at p 14, Robert J Sharpe explains that a strength in one part of the test can compensate for a weakness in another part.

b. Serious Issue to be Tried

[62] The Applicants argue that the underlying action raises two strong *prima facie* issues. The first issue is based on a violation of s 15 of the *Charter* and the second based on the argument that the Ministerial Order is *ultra vires* the *Education Act*. Most of the Applicants' argument centered on the issue of the alleged *Charter* breach.

[63] The Respondents concede that there is a serious question raised in the underlying claim with respect to s 15 of the *Charter*. That said, they do not concede that the claim is meritorious or that the "*ultra vires*" issue meets the threshold of a serious issue to be tried.

[64] I conclude that there is a serious issue to be tried. On its face, the Ministerial Order creates a distinction on an enumerated ground (intellectual and physical disability), namely, between complex-needs students and all other students. Moreover, it imposes a burden on that group of students by denying the benefit of in-person learning offered to non-disabled students. This has the effect of isolating children with disabilities and reinforces, perpetuates, or exacerbates their disadvantages. Whether such a distinction is justifiable after a full and complete assessment of the record remains to be determined after a trial of the *Charter* issue.

[65] In ***Fraser v Canada (Attorney General)***, 2020 SCC 28 [***Fraser***], the Supreme Court indicated what must be demonstrated to prove a *prima facie* s 15 *Charter* violation:

> [27] Section 15(1) reflects a profound commitment to promote equality and prevent discrimination against disadvantaged groups (***Quebec (Attorney General) v A***, 2013 SCC 5 (CanLII), [2013] 1 S.C.R. 61, at para 332; ***Kahkewistahaw First Nation v Taypotat***, 2015 SCC 30 (CanLII), [2015] 2 S.C.R. 548, at paras 19-20). To prove a *prima facie* violation of s 15(1), a claimant must demonstrate that the impugned law or state action:
>
> - on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and
> - imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

[66] The adverse effects of discrimination are especially relevant in the case of disability. The government will rarely single out disabled persons for discriminatory treatment. More common are laws of general application that have a disparate impact on people with disabilities: see ***Eldridge*** at para 64.

[67] The first criterion in assessing whether to grant interlocutory relief requires a preliminary assessment of the merits of the plaintiff's case. The threshold is deliberately low: ***AC and JF*** at para 21.

[68] The court must be satisfied that the claim is not frivolous or vexatious, i.e., that there is a serious issue to be tried, or that there is a "real prospect of succeeding in his claim for a permanent injunction at the trial": ***American Cyanamid Co. v Ethicon Ltd.***, [1975] A.C. 396, [1975] 1 All E.R. 504 (HL) [***American Cyanamid***] at pp 407-408.

[69] The Supreme Court adopted this low threshold for *Charter* cases in ***Manitoba (AG) v Metropolitan Stores Ltd***, [1987] 1 SCR 110 [***Metropolitan Stores***]. There are two key principles that flow from this threshold: first, that there cannot be any presumption of constitutional validity; and, that the very "innovative and evolutive character" of the *Charter* may result in a thin record that "may only become clear when the entire panoply of evidence is marshaled and reviewed at the trial of the issue": see ***AC and JF*** at para 22.

[70] Further, the public consequences and interests should be considered at the balance of convenience stage, and not at the first stage of the test.

[71] While the low threshold of serious issue to be tried remains applicable at the first stage, an assessment of the public interest in the enforceability of validly enacted legislation is to be factored into the balance of convenience stage of the test.

[72] The Supreme Court emphasized that a "prolonged examination of the merits is generally neither necessary nor desirable" (emphasis added): see ***RJR-MacDonald***, at para 55.

[73] ESD serves more than 120,000 students in pre-Kindergarten to Grade 12 in 214 schools. The October 18 Letter provides the breakdown of students who need supports to learn:

- 10,274 students with moderate learning needs who frequently require the support of an Educational Assistant in the classroom
- 2,612 students with severe needs who are extensively dependent on adult support in the classroom

- 2,333 students with profound needs who are continually dependent on adult support

[74] The October 18 Letter further explains that EAs assist students with a range of needs, including those with moderate learning needs, severe needs, and profound needs. EAs also provide supports for students who are coded as English as an Additional Language learner, a refugee, or those who are coded with mild learning needs.

[75] The proposed contingency plan to support a Division-wide approach to a hybrid learning model included reasonably accommodating the following students in an at-home learning environment: students with severe or profound special needs; students with moderate special needs who require significant learning supports, and any student who requires the support of an EA in order for the student to be safe, including: tube feeding, catheterization, the necessary support for medically fragile students, medical safety concerns, and supporting students with severe behaviours.

[76] The Ministerial Order circumscribes the exemption "to students who require an educational assistant due to complex needs".

[77] Complex-needs children have been designated in the Ministerial Order, but not defined. According to the October 18 Letter, the students subject to a switch to full or partial at-home learning are those that require the assistance of the striking EAs and/or other support workers.

[78] The Appendix to the Ministerial Order requires that ESD comply with certain terms and conditions including, but not limited to:

- identify complex needs students who require the support or assistance of an EA;
- engage in individualized analyses;
- consider the health and safety of the student, other students, and staff;
- make reasonable efforts to continue in-person learning for part of a day or week, while providing at-home learning for the remainder of the time;
- make reasonable efforts to place the student in a cohort with other students at the school or another location;
- make reasonable efforts to hire qualified staff or enter into contracts for services with qualified third party providers;
- provide a learning plan to the student; and,
- provide updates to the Minister as requested regarding the implementation of the MO.

[79] The serious issue to be tried, which is neither frivolous nor vexatious, is whether the Applicants have an equal right to access education in the same manner (i.e., in-person) as their non-disabled peers as protected by the *Education Act*. I find guidance in seminal cases on discrimination in the provision of services.

[80] In ***Eldridge***, the Court stated at para 66:

> [...] [I]n the present case the adverse effects suffered by deaf persons stem not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that they benefit equally from a service offered to everyone. It is on this basis that the trial judge and the majority of the Court of Appeal found that the failure to provide medically related sign language interpretation was not discriminatory. Their analyses presuppose that there is a categorical distinction to be made between state-imposed burdens and benefits, and that the government is not obliged to ameliorate disadvantage that it has not helped to create or exacerbate. Before attempting to evaluate these assumptions, it will be helpful to relate the reasoning of the courts below in more detail.

[81] In ***Moore v British Columbia (Ministry of Education)***, 2012 SCC 61 [***Moore***], the Court stated:

> 52 More significantly, the Tribunal found, as previously noted, that the District undertook no assessment, financial or otherwise, of what alternatives were or could be reasonably available to accommodate special needs students if the Diagnostic Centre were closed. This was cogently summarized by Rowles J.A. as follows:
>
> > The Tribunal found that prior to making the decision to close [the] Diagnostic Centre, the District did not undertake a needs-based analysis, consider what might replace [the] Diagnostic Centre, or assess the effect of the closure on severely learning disabled students. The District had no specific plan in place to replace the services, and the eventual plan became learning assistance, which, by definition and purpose, was ill-suited for the task. The philosophy for the restructuring was not prepared until two months after the decision had been made (paras 380-382, 387-401, 895-899). *These findings of fact of the Tribunal are entitled to deference, and undermine the District's submission that it discharged its obligations to investigate and consider alternative means of accommodating severely learning disabled students before cutting services for them.* Further, there is no evidence that the District considered cost-reducing alternatives for the continued operation of [the] Diagnostic Centre.
> >
> > [Emphasis added; para 143]
>
> The failure to consider financial alternatives completely undermines what is, in essence, the District's argument, namely that it was justified in providing no meaningful access to an education for Jeffrey because it had no economic choice. In order to decide that it had no other choice, it had at least to consider what those other choices were.

[82] In ***Fraser***, the Court stated:

> 71 It is also unnecessary to inquire into whether the law itself was responsible for creating the background social or physical barriers which made a particular rule, requirement or criterion disadvantageous for the claimant group. Returning

> to ***Griggs***, this would amount to asking whether Duke Power Co. was responsible for lower rates of high school education among African Americans. Plainly, it was not — but this was entirely irrelevant to whether a disproportionate impact had been established. Section 15(1) has always required attention to the systemic disadvantages affecting members of protected groups, even if the state did not create them (***Alliance du personnel professionnel et technique de la santé et des services sociaux***, at para 41; ***Centrale des syndicats du Québec***, at para 32; ***Vriend***, at paras 84 and 97; ***Eldridge***, at paras 64-66; ***Eaton***, at para 67; ***R v Turpin***, [1989] 1 S.C.R. 1296(S.C.C.), at pp 1331-32).

[83] I conclude based on similar Canadian jurisprudence that the complex-needs distinction created by the Ministerial Order raises a serious issue to be tried. What is noteworthy is the absence of evidence as to any consideration or policy to reasonably accommodate all students in-person. This would have assisted in informing families about whether the students were being excluded after the consideration of resources globally.

[84] Per s 15 of the *Charter*, substantive equality is not achieved by a quantitative assessment of the use of resources, but a qualitative assessment of their use. Disrupting the least number of students from in-person learning does not meet the test. Once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner: see ***Eldridge*** at para 73. Alberta was required to use a broader lens when considering how to equitably continue providing education services to all students.

[85] While Alberta's intention in accepting the recommendation of the ESD may have been well-intentioned, i.e., to "accommodate complex-needs students in an at-home learning program" during the labour shortage so as to provide a safe learning environment for the student and/or other students and staff" – it did so by denying in-person learning only to a vulnerable group of students. In other words, by its Ministerial Order, it permitted ESD to curtail access to in-person learning by assessing the needs of the complex-needs students and moving them to full or partial at-home programs.

[86] However, there is no evidence to suggest that it would not have been possible to distribute those resources more equitably amongst all students, e.g., to consider whether non-disabled students could be part of the pool of students assessed when determining how to reshuffle and allocate remaining staff and replacement contractors. ***Moore*** requires that it had to at least consider what those other choices were.

[87] Alberta unquestionably adopted a distinction that excluded assessing the global resource needs of all students while requiring only the individualized assessment of students with disabilities (Appendix to Ministerial Order: "[....the "Board"] shall continue to provide in-person learning to all students except where students who require the support or assistance of an educational assistant due to complex needs have been identified").

[88] Finally, I agree with Alberta that the challenge to the *vires* of the Ministerial Order does not meet the serious question threshold. A challenge to the *vires* of delegated legislation is a determination of whether it is reasonably authorized by statute; it is not a review of whether the consequences of that legislation "are…necessary, desirable or wise.": ***Auer v Auer***, 2024 SCC 36 at para 58. The Applicants have not demonstrated a *prima facie* case of how the Ministerial Order exceeds the reasonable statutory authority of the *Education Act*.

c. Whether the Applicants will Suffer Irreparable Harm

[89] The second part of the injunction test is to determine whether the Applicants will suffer irreparable harm if the injunction is not granted. Irreparable harm refers to harm that cannot be quantified in monetary terms, that cannot be cured or matters that cannot be compensated in damages.

[90] The irreparable harm to be considered is that suffered by the applicants; any alleged harm to the respondents or to the public interest should be weighed in the balance of convenience: see ***RJR-MacDonald*** at para 62. In the context of *Charter* cases, it will often be impossible for a judge on an interlocutory application to determine whether adequate compensation could be obtained at trial: see ***AC and JF*** at para 31. Accordingly, it is "appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm": see ***RJR-MacDonald*** at para 66.

[91] Evidence of irreparable harm must be clear and not speculative: see ***Modry v Alberta Health Services***, 2015 ABCA 265 at para 82. The Applicants seek to rely on four affidavits from the guardians and litigation representatives of each named minor and an affidavit from Dr. Shelley Moore.

[92] Alberta takes issue with portions of the four affidavits from the guardians of the minor Plaintiffs on the basis that they consist of argument or legal conclusions. More specifically:

- In the affidavit of Debbie Spears, where it is stated that the child is suffering irreparable harm, including the impact to his dignity, emotional, and psychological well-being;
- In the affidavit of Katherine Kerber, where it is stated that the ongoing harm to the child's learning, development and social development cannot be remedied by monetary compensation;
- In the affidavit of Martin Doyle where it is stated that the exclusion of the child has had significant harm on his emotional, psychological, and developmental harm, which cannot be remedied by money

[93] Alberta submits that none of the above affidavits contain information from medical doctors, psychologists, teachers, or other professionals that have formally evaluated the impacts of the at-home learning on the children and that the parents are not qualified to provide opinion evidence.

[94] In ***CM v Alberta***, 2022 ABKB 716 at paras 18-20, Dunlop J. stated:

> 18 Five Children are Applicants. Each Child is represented in this litigation by a Parent. Four of the Parents filed affidavits. Each of the Parents' affidavits includes either what the Parent was told by their Child's treating physicians regarding their Child's vulnerability to COVID-19, or the Parent's understanding of their Child's vulnerability, without reference to advice from a physician. The Crown argues this is inadmissible hearsay. The Applicants respond that it is not tendered for its truth, but as evidence of each Parent's understanding regarding their Child's vulnerability to COVID-19.

> 19 I find that the Parents' understanding on this point is relevant to the *Charter* aspects of this action and admissible on that basis. The Children's physicians' advice is not admissible for its truth because those physicians have not provided affidavits and consequently the Crown had no opportunity to question them on their qualifications and their opinions. The Parents' understanding, where is it not attributed to a physician, is expert opinion evidence from a person who is not qualified to provide expert opinion evidence.
>
> 20 Consequently, there is no evidence before me that any of the Children are at heightened risk of severe complications should they contract COVID-19, although there is evidence that their Parents understand that to be the case.

[95] In this case, I accept that the parents can provide observations of the impact on their own children. The extension of the impact of those observations as it relates to emotional and psychological well-being is not the exclusive domain of medical and other professionals. Often the medical opinions are based on concerns and observations of the parents or others in the child's life. The two are often inextricably linked. It is not for the parents to draw the conclusions asserted e.g. that irreparable harm will be suffered here or that monetary damages would not be sufficient; however, it is open for them to offer their factual observations, from which I can draw those conclusions, as appropriate

[96] Moreover, at this stage of the litigation, a complete record with expert opinion on each aspect of the impact on a child is unrealistic. The threshold cannot be impossibly high to exclude an assessment based on personal observation of harm from the perspective of the Applicant (or in this case, the Applicant's guardian), particularly when dealing with vulnerable children.

[97] Further, as will be discussed below, the deleterious effects of at-home learning as observed by the guardians are further supported by the expert opinion of Dr. Moore. She provides greater clarity on the systemic impacts on children with complex-needs. For an interlocutory application, the combination of the personal observations of the parents along with the expert opinion of generalized impacts is sufficient to assist the Court in assessing whether irreparable harm is made out.

[98] Two additional affidavits from parents of other children not named in this action and an affidavit of a speech pathologist for one of the named minor Plaintiffs were submitted late. Alberta argues that the late affidavits should not be considered for two reasons: first, the affidavits are from parents of children not a party to this action; and second, they were deprived of the opportunity to cross-examine on affidavit by the speech pathologist.

[99] I agree. The affidavits from parents of children not named in this litigation cannot assist in the assessment of irreparable harm and the late affidavit by the speech pathologist should not be considered without the opportunity for cross-examination.

d. Is Dr. Moore's Affidavit Admissible and if so, What Weight Should it be Given?

[100] The legal framework for the admissibility of expert evidence is as set out in ***Burgess, Langille Inman v Abbott and Haliburton Co***, 2015 SCC 23 [***White Burgess***]. The Supreme Court set out a two-step test for the admissibility of expert evidence. At the first step, the opinion evidence must meet the threshold requirements of being relevant, necessary, not subject to

another exclusionary rule, and a properly qualified expert: ***White Burgess*** at para 19, see also ***R v Mohan***, 1994 SCC 80 at para 16 [***Mohan***].

[101] At the second step, the risks and benefits of the evidence must be weighed in determining whether the potential benefits of admitting the evidence outweighs the risks of its admission. If the proposed expert evidence is not sufficiently beneficial to warrant its admission, a court should exercise its discretion to exclude the evidence: ***White Burgess*** at para 24.

[102] Dr. Moore is tendered as an expert to provide opinion evidence on the impacts on students with disabilities being excluded from in-person education and from not being included with their non-disabled peers.

[103] Alberta conceded in oral argument that Dr. Moore's evidence could be admitted for the injunction application alone, but stated that little weight should be given to it because:

- Dr. Moore's expertise is in the area of inclusion of students with intellectual disabilities, i.e., in specific accommodations to support students, how to design curriculum in strategic ways, teacher professional development and special education;
- She has not been qualified as an expert in court previously;
- Her research does not include the effects of temporary changes from in-person learning to at-home learning or rotational learning for students with complex needs;
- The articles referenced by Dr. Moore are not her own studies;
- Dr. Moore did not meet with the parents or children and did not review the affidavits or the Ministerial Order; and
- Dr. Moore is not qualified to give opinion evidence on the effects of at-home learning or a rotational learning schedule on the Plaintiffs.

[104] The Applicants seek to have Dr. Moore qualified as an expert in "inclusion of students with intellectual and developmental disabilities in K-12 educational settings including academic contexts."

[105] Dr. Moore holds a PhD from the Faculty of Education at the University of British Columbia, a Masters in Education and Graduate Diploma from Simon Fraser University and a Baccalaureate Degree in Education from the University of Alberta. Dr. Moore has acted as a consultant with numerous different school boards through British Columbia, Alberta, Northwest Territories, Manitoba, Ontario and the United States. She has been the keynote speaker on the topic of inclusion at numerous events.

[106] Dr. Moore's Affidavit opines on three areas:

(a) Impacts on students with disabilities of not having access to in person learning

(b) Impacts, if any, on students with disabilities from not being included/being excluded from their nondisabled peers

(c) Impacts, if any, on non-disabled peers from students with disabilities not being included/being excluded in school

[107] The bulk of Alberta's argument in favour of the Court not giving any weight or little weight to the evidence of Dr. Moore relates to the argument that her research has not included the effects of a *temporary* change from in-person learning to at-home learning or the *rotational* learning schedules currently in place for students with complex-needs. I reject that argument. The strike has currently lasted five weeks. While in the overall scheme, the strike may be temporary, five weeks is a considerable amount of time, especially given the Applicants are school-aged and vulnerable minors. There is no evidence before the Court indicating the strike is nearing its end; any argument that the changes are temporary become less persuasive as the strike continues.

[108] I conclude that Dr. Moore's evidence is admissible as it meets the ***Mohan/White Burgess*** test and supports the guardians' observations of irreparable harm suffered by the Applicants.

[109] Dr. Moore opines that a disproportionate number of students with intellectual and developmental disabilities are challenged or unable to learn at home and that programs and platforms available do not meet the needs of these students. She also states that the impacts of exclusion from in-person learning are harmful to students with disabilities and that there are additional negative impacts on the non-disabled peers.

[110] Alberta argues that the Applicants have tendered no evidence that any losses in learning caused by a temporary switch to at-home learning or a rotational schedule cannot be made up through, for example, tutoring, summer school, or other programs.

[111] I reject this argument that such evidence is necessary for the assessment of irreparable harm. The right to an education is guaranteed by s 3 (1) of the *Education Act*. Alberta has not provided evidence of the availability of the remedial programs that might compensate the students for their loss, nor the costs associated with it. This is within their knowledge as the programs must be provided by them per the *Education Act*. The Applicants do not bear this burden of proof. They have proven the loss of equal right to education through in-person learning, which remains available to non-disabled students.

[112] It further ignores the uncertain duration of the strike and the feasibility of remedial programs for complex-needs students. Nor does it consider the ability of such programs, even if available, to remedy the psychological impact of the loss of time with their peers, social interactions, and psycho-social benefits of in-person learning. In addition, what cannot be measured is the impact on their dignity. The Affiants describe their children to be confused by the requirement that they stay home while their non-disabled peers continue to go to school. Moreover, the evidence recounts the challenges to learning experienced in an at-home learning environment by children with disabilities as well as the burden, cost, and frustration that is felt by the Applicants and their caregivers.

[113] I conclude that the Applicants have proven irreparable harm.

[114] The impact of at-home learning was also recognized by the Minister of Education. The *In-person Learning Regulation*, was enacted to prioritize in-person learning, arising from the situation flowing from the Covid-19 pandemic. Nathan Freed, Executive Director, Field Services at Alberta Education indicated (Transcript of Nathan Freed Cross-Examination on Affidavit dated February 12, 2025 (Transcript of Mr. Freed), p 54, lines 3-13):

> Q. [...] So what I would like to know is whether you have any knowledge of the reasons for the enactment of the *In-Person Learning Regulation* from 2022?
>
> A. Yeah, my understanding is it's -- you know, it came out of Covid to ensure that students -- you know, the -- a priority is placed on in-person learning because, yeah, I think, you know, that that's the best way -- probably that's an important way that students learn. Yeah.

e. Balance of Convenience

[115] It is in the assessment of balance of convenience that applications involving alleged breaches of *Charter* rights are often determined. The Court must ascertain whether the granting or withholding of interlocutory relief would occasion greater harm or inconvenience. Among the factors to be weighed in the balance are the nature of the relief sought, the nature of the harm which the parties contend they will suffer, the nature of the legislation under attack, and where the public interest lies: see ***RJR-MacDonald*** at para 90.

[116] The third part of the test, balance of convenience, requires "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits": ***Metropolitan Stores*** at para 36. The Court held in ***RJR*** at para 67 that, "[i]n light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage."

[117] As was stated in ***Metropolitan Stores***, the public interest is always engaged in a case involving a constitutional challenge to legislation: if interlocutory injunctions were granted too readily in constitutional cases, suspending the operation of duly enacted laws prior to a determination on the merits of their constitutional validity, the orderly functioning of government and the application of laws enacted by democratically elected legislatures for the common good could be disrupted.

[118] Beetz J stated at para 87 that "no interlocutory injunction or stay should issue to restrain that authority from performing its duties to the public unless, in the balance of convenience, the public interest is taken into consideration and given the weight it should carry". However, as noted in ***RJR-MacDonald*** at para 70, the government does not have a monopoly on the public interest: "Most often, the applicant can also claim to represent one vision of the 'public interest'. Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation." This aspect also weighs in the balance of convenience, as does the possibility that by refusing interim relief, the court may be permitting an ongoing breach of constitutional rights.

[119] In ***Harper v Canada (Attorney General)***, 2000 SCC 57 [***Harper***], the Supreme Court pointed out the significance of the public interest as represented by government. There is a presumption that governments act for the public benefit and in the public interest, and that legislation serves a valid public purpose. The public interest in the enforcement of validly enacted laws "weigh[s] heavily in the balance", and that only in "clear cases" will interlocutory injunctions against the enforcement of a law on the grounds of alleged unconstitutionality succeed: see ***Harper*** at para 9; see also ***Black v Alberta,*** 2023 ABKB 123 [***Black***] at paras 60-69 and ***AC and JF*** at paras 33, 64.

[120] In ***Moms Stop the Harm Society v Alberta***, 2022 ABCA 35, the Court emphasized at para 36 that "interlocutory judicial intervention is not warranted unless the decisions made by the

government are so obviously unreasonable that the *Charter* is engaged, and the challenged policy cannot be justified."

[121] The assessment of public interest can be complex. On the one hand, there is a presumption that the nature and declared purpose of legislation is to promote the public interest: ***RJR-MacDonald*** at para 85. The Supreme Court reaffirmed in ***Harper*** at para 9 that the chambers judge "must proceed on the assumption that the law ... is directed to the public good and serves a valid public purpose".

[122] On the other hand, the government "is not the exclusive representative of a monolithic 'public' in *Charter* disputes", and it may be that the applicant can also claim to represent the "public interest": ***RJR-MacDonald*** at para 70. Both the concerns of society generally and the particular interests of identifiable groups are relevant to the assessment.

[123] However, it is important to draw the distinction between a presumption of valid public purpose and a presumption of constitutionality. The latter is not found anywhere in the test for interim relief, whether at the first or third stage: ***AC and AF*** at para 35-36 (citing the dissenting judgement in ***AUPE***: "...when legislation is declared to promote the public interest, there is a presumption that it is in the public interest and has that effect. In my view, only one presumption is placed on the scales of balance of convenience, not two.")

[124] The crucial issue in *Charter* injunctions at the balance of convenience stage is often the public interest. Thus, a Court must presume that the government entity whose statute, regulation, or other action is challenged represents the public interest; the government is not required to provide evidence of that. However, as per ***RJR-MacDonald*** at 349, Sopinka and Cory JJ explained that a plaintiff may also be acting in the public interest but in comparison, it must demonstrate that interest with evidence.

[125] In practice, however, the public interest presumption can function as a backdoor presumption of constitutionality. In other words, "[t]here may not be a presumption of constitutionality, but there is an assumption that governments act constitutionally." ***AC and JF*** at paras 114-122.

[126] In ***PT v Alberta***, 2019 ABCA 158 at para 76, citing ***Harper***, the Court of Appeal explained that the public interest presumption is rebuttable. Sopinka and Cory JJ in ***RJR-MacDonald*** held at para 85: "[i]n order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit."

[127] As stated in ***Black*** at para 67 for an injunction to be granted, the balance of convenience must clearly favour the applicant. Moreover a "clear case" does not refer to the merits; that would mean that applicants have to show a clear case instead of a serious issue to be tried. As noted in ***AC and JF*** at para 30 "[e]ven weak cases may be entitled to interlocutory relief if the other aspects of the test weigh heavily in that direction[…]".

[128] As per the decision of the Court of Appeal in ***AC and JF*** and the decisions of the Supreme Court of Canada in ***Metropolitan Stores***, ***RJR-MacDonald***, and ***Harper***, I will apply the tripartite test set and, at the third stage of the test, will presume Alberta to be acting in the public interest and apply the clear case standard from ***Harper***.

[129] Even where governments are acting in the public interest, exclusion of vulnerable people in the delivery of service is contrary to that public interest. Canadian jurisprudence has recognized the long history of exclusion and marginalization experienced by persons with disabilities in Canada. In the 1997 seminal decision ***Eldridge***, the Supreme Court of Canada observed:

> 56. It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions; ... This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the *Charter* demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms.

[130] Values and principles within international treaties ratified by Canada provide further guidance in interpreting the *Charter*: ***Quebec (Attorney General) v 9147-0732 Québec inc***, 2020 SCC 32 at paras 22, 31. The United Nations General Assembly adopted *The Convention on the Rights of Persons with Disabilities* GA. Res. 61/106, 6 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) (CRPD), which Canada ratified on March 11, 2010. The *CRPD* elaborates universal human rights and freedoms in the context of disability. It provides for civil, political, economic, social, and cultural rights for persons with disabilities and establishes obligations that states must meet in order to ensure the full and equal enjoyment of these rights.

[131] Article 7 of the *CRPD* provides in part that State parties "shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children" and that in "all actions concerning children with disabilities, the best interests of the child shall be a primary consideration".

[132] The tripartite analysis outlined in case law such as ***RJR-MacDonald*** does not establish watertight hurdles which must be leapt over serially; rather, the three areas of focus serve to guide courts in determining whether the granting of an injunction is warranted, i.e. whether it is just and equitable in all the circumstances: see ***Ahmed v Alberta Health Services***, 2015 ABQB 825 at para 64.

[133] The crux of the issue is based on the distinction created by the Ministerial Order. It is not the fact that some students may have to be told to stay home; it is that only the complex-needs students are subject to such a Ministerial Order.

[134] Each student who requires an EA in order to access an education is considered a complex-needs student. However, the Ministerial Order is exempting some of them from in-person learning with an EA. Consequentially, unless they also have private supports or assistance at home, they cannot effectively access an education, which is a right owed to them.

[135] In weighing the balance of convenience, the number of people affected and how they are affected warrants consideration. In this case, approximately 2,500 students are on a rotational

schedule and 1,200 students are at-home full time. Given the evidence before the Court, I accept those numbers are approximations with some fluctuation.

[136] At the Court's request, the Affidavit of Shelley Metera was provided on February 19, 2025. It contained records indicating the number of students currently on modified schedules as a result of the Ministerial Order. The Affidavit also contained correspondence attaching the Contingency Plan prepared by the ESD in the event of a strike by either CUPE #3550 or CUPE Local #474 (generally custodial staff) or both. In the event of a strike by both CUPE #3550 and CUPE #474, the ESD would be shifting to an at-home learning model for all students. In the event of a strike solely by CUPE #3550 only students identified with severe or profound special needs would transition to an at-home learning environment.

[137] I must consider the strength of the case in this part of the analysis. As noted, the conclusion that the constitutional challenge raises a serious issue to be tried, and therefore passes the threshold hurdle at the first stage of the ***RJR-MacDonald*** test, does not preclude further consideration of the likelihood of the claim's success in the assessment of balance of convenience. To the contrary, the strength of the claim is a matter to be weighed in the balance; in ***Harper***, this exercise was described as enjoining the operation of legislation only in a "clear case".

[138] As previously stated, the tripartite test does not create watertight compartments; it is the holistic assessment of factors that determines the outcome. Thus, a strong serious case to be tried might tip the balance in favour of an injunction despite a weaker result on the balance of convenience branch.

[139] In addition to the finding of a serious case to be tried, and in light of Canadian jurisprudence on similar issues, I consider the Applicants' case to be strong. The strength of the case is also a factor in the balance of convenience branch of the test.

[140] Having found irreparable harm, I must also to consider the nature and extent of that harm in the assessment of balance of convenience. I have noted the psycho-social harm to the Applicants as supported by Dr. Moore and the parents of the Applicants, which I found to be irreparable.

[141] Conversely, the potential harm to Alberta is not substantial. If the Ministerial Order is suspended, Alberta would need to reassess its deployment of resources on an equitable basis for all students designated to at-home or rotational learning. This would not implicate a mandatory injunction requiring Alberta to spend additional money to hire replacement staff so that all complex-needs students can attend in-person. Rather, it would require a new ministerial exemption order with direction to the ESD to assess all remaining resources in a global manner that does not only target complex-needs students.

[142] The Applicants are not unrealistic or unreasonable in their demands. They do not seek to return all 3,700 students to full-time in-person learning without the necessary resources in place. Nor do they seek a mandatory injunction requiring Alberta to replace all striking EAs. They ask that the children with disabilities be assessed on an equal footing when considering how to redistribute resources. A clear direction that ESD must develop a strike contingency plan that is more inclusive could mean, for example, that some non-disabled students be designated to stay home so that more complex-needs students could be integrated in-person.

[143] In the reassessment of resources after the interlocutory injunction is in effect, the evidence may indicate that resources could not be redistributed in any other way such that more students with disabilities could share in a greater proportion of the in-school learning time during the strike. However, that would at least be after the distinction based on disability was eliminated.

[144] We do not know at this point how resources are being assigned to cover the demand and whether there is any margin that would allow a reshuffling of staff resources to include more students with disabilities. Where suitable, this may require retraining staff members, teachers, and contract workers to deliver the support services to students with disabilities, and temporary measures such as moving non-disabled students to other cohorts or locations, increasing class sizes for non-disabled students, reducing class sizes to increase the staff to student ratio, permitting at-home learning for autonomous or advanced learners, and rotating non-disabled students to at-home learning to share the proportion of in-person learning in a more inclusive manner. It may be the case that some students designated as complex-needs may require an EA for in-person learning, but not on a full-time basis.

[145] Without the Ministerial Order, if an EA was ill and no replacement was available, according to the *In-Person Regulation*, a school division would be required to allow the student access to in-person learning and provide alternate supports through the redeployment of existing resources.

[146] Whether the limits of the Ministerial Order are reasonable and demonstrably justified in a free and democratic society pursuant to s 1 of the *Charter* (***Oakes*** test) remains to be litigated at the trial of the issue on a full record.

[147] However, the purpose of the interlocutory injunction is to prevent the irreparable harm from continuing pending trial where the balance of convenience favours the Applicants.

[148] The public interest at play is the health and safety of all students and staff. The evidence indicates that choices have to be made to accommodate students with needs. However, as it currently stands, the Ministerial Order requires the complex-needs students to *ipso facto* bear the burden disproportionately since only they are subject to the Ministerial Order. Even if under colour of public interest-being the safety of all students and staff - the Ministerial Order narrowly circumscribes the affected group without justification.

[149] In this case the Applicants also represent the public interest, which necessitates the consideration of fairness and the equitable application of the strike contingency plans so as to integrate all students in the learning environment. They have also demonstrated through the expert evidence of Dr. Moore that: “The exclusion of students with disabilities from school settings has far-reaching implications for their non-disabled peers. It restricts opportunities for social interaction, diminishes academic benefits, and negatively affects the overall classroom environment.”

[150] Alberta’s decision to proceed with the recommended plan was myopic; it considered only the benefits of a convenient, cost-effective, and expeditious plan that would impact the least number of students. As the Court stated in ***Moore*** at para 52:

> The failure to consider financial alternatives completely undermines what is, in essence, the District’s argument, namely that it was justified in providing no meaningful access to an education for Jeffrey because it had no economic

> choice. In order to decide that it had *no* other choice, it had at least to consider what those other choices were.

[151] I have weighed the public interest in determining the balance of convenience. Put simply, the relative strength of the Applicants' case, considered in combination with the nature and extent of potential harm arising from the facial discrimination of the Ministerial Order outweighs the public interest in the enforcement of legislation in this case.

[152] The *Charter* guarantees equal access to education for all students; the corollary effect is that that the equitable principle must be applied in times of labour or resource shortages. Here, what is apparent is that there was no consideration of how the reduced resources could be redistributed among all students. It was assumed that minimal disruption to the system would result by targeting only a sub-set of students – those who use an EA. However, this approach failed to consider that non-disabled students might suffer the least amount of harm since they do not have the same disadvantages as the students with disabilities and could adapt to an at-home learning program more easily, i.e., some non-disabled students switch to at-home learning to free up more resources for complex-needs students, or some of them, to attend school in-person even with the EAs presently unavailable.

VII. Conclusion

[153] The Court must ascertain whether the granting or withholding of interlocutory relief would occasion greater harm or inconvenience. Among the factors to be weighed in the assessment, I have considered the nature of the relief sought, the nature of the harm which the parties contend they will suffer, the nature of the legislation under attack, and where the public interest lies: ***RJR-MacDonald*** at para 90.

[154] I conclude that the Applicants would suffer the greater harm. The nature of the relief sought – the suspension of the Ministerial Order – would require Alberta to reframe the Ministerial Order to "consider an all students and all resources" focus, i.e., not discriminate with respect to the complex needs or disabilities of students. I am not considering the relief of an exemption for the Applicants from the Ministerial Order as that would amount to a mandatory injunction that demands the hiring of replacement workers.

[155] The practical effect of a suspension of the Ministerial Order with a delay of one week would permit Alberta to take steps to ensure that no distinction based on disability is being made in the assessment of how to deploy existing and new resources in response to the strike. If more time is required, Alberta has leave to make additional submissions to me directly.

[156] The relief would allow for a global assessment on an equitable basis such that the use of resources is not governed solely by the desire to disrupt the least number of students. There are many permutations possible that would consider how to ensure a more inclusive integration of students with disabilities. In some cases, it may result in more non-disabled students being affected to accommodate additional students with disabilities in the in-person matrix.

[157] The nature of the harm that the Applicants would suffer is significant.

[158] The nature of the legislation under attack is the provision of education – a fundamental service owed to all young people.

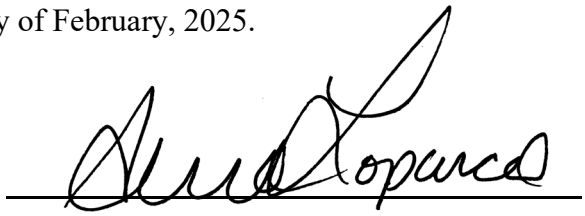
[159] The public interest lies in ensuring equitable treatment of all students during a labour shortage and a fair redistribution of available resources that does not discriminate based on a disability.

[160] Alberta has waived the required undertakings as to damages.

[161] I wish to thank counsel for their excellent submissions.

[162] I also wish to extend my gratitude to the parties and the families for their participation in this important issue.

Heard on the 14th day of February, 2025.
Dated at the City of Edmonton, Alberta this 20th day of February, 2025.



A. Loparco
J.C.K.B.A.

Appearances:

Orlagh O'Kelly/Anita Cardinal
O'Kelly Law
for the Plaintiffs/Applicants

Stephanie Bowes/Adam Ollenberger
Alberta Justice Government of Alberta
for the Defendants/Respondents