

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

BETWEEN:

**THE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO and CINDY
GANGARAM**

Applicants

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY
THE MINISTER OF EDUCATION**

Respondent

-and-

**JUSTICE FOR CHILDREN AND YOUTH, HIV/AIDS LEGAL CLINIC OF
ONTARIO and the CANADIAN HIV/AIDS LEGAL NETWORK, and GRAND
COUNCIL OF TREATY 3**

Intervenors

FACTUM OF JUSTICE FOR CHILDREN AND YOUTH

December 17, 2018

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PART I - OVERVIEW

1. Children are entitled to ‘meaningful access’ to education. This right imposes a corresponding obligation on Ontario to provide public education where children can “realise their potential” and develop into “caring citizens who contribute to their society”. To meet this mandate, public education must be equitable, inclusive, and expose children to a diversity of perspectives and values that reflect Ontario’s diversity. This right applies to all children, regardless of age.¹

2. The provincial curriculum is a defining feature of a child’s education. On August 22, 2018, the Office of the Premier announced both the release of a revised curriculum for use in elementary schools for the 2018/2019 school year, as well as the creation of a website where individuals could submit complaints about the curriculum in use in schools.² The effect of the announcement was that, for the 2018/2019 school year, elementary students would learn sexual health information from a curriculum first developed in 1998 (the “**Decision**”).³

3. The Decision fundamentally infringes upon the elementary students’ right to education. It arbitrarily deprives them of sexual health education that is inclusive, relevant, and vital to protect their health and safety. In doing so, it violates s.15 of the *Charter*⁴ on the basis of age and unreasonably frustrates the purposes of the *Act* and related policies.

¹ *Moore v. British Columbia (Education)*, [2012] 3 SCR 360 [“**Moore**”], at paras.5, 34-6; Book of Authorities of the Intervenor, Justice for Children and Youth [“**JFCY BOA**”], Tab 1; *Education Act* RSO 1990, c.E.2 (the “**Act**”), s.0.1.

² Press Release dated August 22, 2018, Joint Application Record (“**JAR**”), Vol. 5, Tab 9(M), p. 1277.

³ JFCY relies on the paragraphs of the Applicant’s factum under the heading “The 2018 Directive Changing the Curriculum and the Creation of the Reporting Line” to provide further detail the Decision.

⁴ *The Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [the “**Charter**”] s.15(1).

PART II- THE FACTS

4. JFCY takes no position on the facts and will reference the record.

PART III - ISSUES

5. JFCY will make submissions on the following issues:

- i. Whether the Decisions breach s.15 of the *Charter* on the basis of age; and
- ii. Whether the Decisions are contrary to the purpose, principles and protections in the *Act* and policies and is therefore unreasonable.

PART IV – THE LAW

A. Meaningful access to education is diverse, inclusive, and child-focused

6. A child’s right to access education is protected under both international and domestic law. The right to education is held by all children equally regardless of age.⁵

7. Under Ontario’s *Education Act* (“the *Act*”) and *Human Rights Code*, all students are entitled to “meaningful access” to education, meaning every child has the right to access education that meets this mandate and objective.⁶

8. The *Act* provides that the purpose of education is to provide students with “the opportunity to realize their potential and develop into highly skilled, knowledgeable, caring citizens who contribute to their society.”⁷

9. Public education is also essential to a prosperous and functioning democracy.⁸ Part of public education’s role is to expose students to a diversity of realities and values that may

⁵ See United Nations *Convention on the Rights of the Child* [“**UNCRC**”], Article 28; UNCRC General Comment No.1 (2001) “Article 29(1): The Aims of Education”, at para.10; JFCY BOA, Tab 9; The *Act*, s.32-33(1).

⁶ *Moore*, at paras.5, 34-6, JFCY BOA, Tab 1.

⁷ The *Act*, s. 0.1.

⁸ *Moore*, at para.5, JFCY BOA, Tab 1.

differ from those in their own home. The Supreme Court has recognised that this “dissonance” is an unavoidable - and vital - component of public education:⁹

But such dissonance is neither avoidable nor noxious. Children encounter it every day in the public school system as members of a diverse student body. The cognitive dissonance that results from such encounters is simply a part of living in a diverse society. It is also a part of growing up. Through such experiences, children come to realize that not all of their values are shared by others.

10. In considering schools’ role in exposing students to diversity, Professor Benjamin Berger writes:¹⁰

Education is the bridge between family or community and “the world.” It seeks to equip children with a picture of the world as they will find it. In so doing, education opens up new alternatives in their horizons of possibility for their lives, for ethical engagement with others, and for forms of a common world.

11. Inclusivity is another essential component of the right to education. The Court of Appeal for Ontario has found that the Provincial government has “a mandate to provide an open, accepting and inclusive educational experience for all children.” The Court further provides that equity and inclusion requires that students must “see themselves reflected in their curriculum, their physical surroundings, and the broader environment, in which diversity is honoured and all individuals are respected.”¹¹

12. Neither the *Act*, Ministry policy nor jurisprudence suggest that the right to inclusive education is less or differently applicable to younger children, or that the content of the right is dependent on the age of the child. All children attending public school are entitled to

⁹ *Chamberlain v. Surrey School District No.36*, 2002 SCC 86 [“*Chamberlain*”], at para.65, JFCY BOA Tab 2.

¹⁰ Benjamin L. Berger, “Religious Diversity, Education, and the “Crisis” in State Neutrality” (2014) 29:1 CJLS 108, at p. 108, JFCY BOA, Tab 10.

¹¹ *E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893 [“*ET*”], at paras. 6, 36-7, and 40, JFCY BOA, Tab 3.

inclusive, diverse and accessible education, regardless of age.¹²

13. For elementary students, inclusive and diverse education means acknowledging the reality that they are impacted by LGBTQ identities: they may come from families where members identify as LGBTQ, they may identify as LGBTQ themselves or be questioning their identity. The elementary curriculum needs to reflect these students' experience to ensure they learn relevant information, feel accepted and dignified, and can learn to their potential.

14. Furthermore, all elementary students have a right to learn relevant and updated content about their 2018 world, including issues regarding consent, online safety and LGBTQ identities. Removing this content from the curriculum means all students are less prepared to understand the diversity of the world around them and to meet the statutory objective of being "knowledgeable, caring citizens".¹³

15. Where children's right to sexual health education is concerned, the United Nations Committee on the Rights of the Child has advised that:¹⁴

Age-appropriate, comprehensive and inclusive sexual and reproductive health education, based on scientific evidence and human rights standards and developed with adolescents, should be part of the mandatory school curriculum and reach out-of-school adolescents. Attention should be given to gender equality, sexual diversity, sexual and reproductive health rights, responsible parenthood and sexual behaviour and violence prevention, as well as preventing early pregnancy and sexually transmitted infections.

16. As further outlined below, children need to learn up-to-date and inclusive sexual health information at an early age. As Alexander McKay, an expert sexual health educator, states:¹⁵

¹² The *Act*, s.49.1, 169.1(1), 300.0.1, and 303.1.

¹³ The *Act*, s.0.1; Affidavit of Debra Pepler, sworn October 2, 2018 ["**Pepler Affidavit**"], at para.39, JAR, at Vol. 12, Tab 20, p.3296.

¹⁴ UNCRC General Comment No.20 (2016) "The implementation of the rights of the child during adolescence", at para.61, JFCY BOA Tab 11. "Adolescence" is defined to start at age 10 (see para.5).

¹⁵ Affidavit of Alexander McKay, affirmed October 3, 2018 ["**McKay Affidavit**"], at para.55, JAR Vol.11, Tab 19, at p.2901.

[R]everting to a curriculum that provides less, not more, information about sexual health, results in information being purposely withheld from children which is fundamentally contrary to the fundamental principle that, in a democratic society all people, including children should have the right to information that is directly relevant to their health and well-being.

17. As further outlined below, a child’s right to inclusive education must not be limited by the views, opinions or bias of parents—be it their own parent or someone else’s. Our laws do not assure parents that their children will not be exposed to values that differ from their own. While parents certainly have an interest in their children’s education, the right to an inclusive education lies with the *child* and their interests must remain at the centre of education decision-making and curriculum development.

B. The Decision discriminates on the basis of age contrary to s.15 of the *Charter*

18. The *Charter* constitutional guarantee of equality is contained in s.15(1). It protects each individual’s right to “equal protection and equal benefit of the law without discrimination” on the basis of several listed grounds, including age.

19. In *Kapp*, the Supreme Court articulated two broad inquiries for claimants to establish discrimination: 1) Does the law create a distinction based on an enumerated or analogous ground?; and 2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?¹⁶

20. In response to the first inquiry, JFCY submits that the Decision creates a distinction based on age because it applies only to elementary students (grades 1-8). The relevant comparator group is high school students (grades 9-12) in Ontario publically funded schools.¹⁷ The Decision only changes the elementary curriculum: high school students continue to learn

¹⁶ *R. v. Kapp*, 2008 SCC 41, at para.17 [“*Kapp*”], JFCY BOA, Tab 4.

¹⁷ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, at paras.24 and 56-7 [“*Law*”], JFCY BOA, Tab 5.

under the 2015 Curriculum, which provides them with updated, inclusive and relevant content vital to their health and development. Elementary students are denied this content under the 1998 curriculum.¹⁸

21. The fundamental purpose of s.15 is to ensure substantive equality: an “equality of benefit and protection”. Differential treatment should not impose a burden or deny a benefit on the basis of the listed grounds. Here, elementary students are being unfairly denied the benefit of an inclusive, diverse and up-to-date curriculum, solely on the basis of their age.¹⁹

22. In establishing discrimination, the focus is on the impact of the distinction: whether every child is being afforded the right to benefit equally from the curriculum.²⁰ The principal value underlying s.15(1) is protection against the violation of essential “human dignity”, a term it describes as follows:²¹

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences.

23. The Court has established four contextual factors by which a claimant can identify impact amounting to discrimination. Not all four factors will be relevant in every case. Here, JFCY seeks to rely on the first two: (i) pre-existing disadvantage, stereotyping, prejudice or vulnerability; and (ii) the correspondence, or lack thereof, between the grounds on which the claim is based and the actual needs, capacity or circumstances of the claimant or those he or

¹⁸ For a description of the specific differences between the curricula, JFCY relies on the paragraphs of the Applicants’ factum under the heading “Differences Between the 1998 and 2015 Curricula”.

¹⁹ *Kapp*, at para.15, JFCY BOA, Tab 4.

²⁰ *Ibid.*

²¹ *Wynberg v. Ontario*, 2006 CanLII 22919 (ONCA), at para.16, JFCY BOA, Tab 6.

she is properly compared to.²²

i. Elementary students suffer disadvantage and stereotyping on the basis of age

24. The first contextual factor considers whether the claimant belongs to a group of persons suffering social, political and legal disadvantage in Canada and looks for the indicia of discrimination: stereotyping, historical disadvantage, and vulnerability to political and social prejudice.²³

25. The Supreme Court has recognised children as “a highly vulnerable group” that “face pre-existing disadvantage in our society”. Elementary students are a part of this vulnerable group. In the education context, their vulnerability arises as a result of their developing abilities and capacity to learn. It is further compounded when schools, parents and decision-makers fail to provide avenues for children’s voice to be heard on decisions that impact them.²⁴

26. Children’s vulnerability in the present case needs to be considered cautiously; it should not be relied on to perpetuate stereotypes that certain ideas are harmful or too controversial for children to be able to learn and understand. Such beliefs are not founded in the needs, abilities and circumstances of children but rather on a stereotype that children need to be protected from certain ideas and issues.

27. Furthermore, elementary students’ vulnerability should not be reason to assume that their parents can be relied upon to make decisions on their behalf and act in their best interest.

²² *Law*, at para.62, JFCY BOA Tab 5. These factors ought not to be applied rigidly, but rather require a full consideration of the context and the circumstances of the claimants: See *Kapp*, at paras. 24-5, JFCY BOA, Tab 4.

²³ *Kapp*, at para. 24, JFCY BOA Tab 4; *Law*, at para.43-4, JFCY BOA Tab 5.

²⁴ *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 [“*A.C.*”], at para.151, JFCY BOA, Tab 7.

This bias in favour of parents' views arises from the legal history of children being treated in law as the property of their parent or guardian. Its effect is to diminish the importance of children's input on decisions that impact them and overlook their rights and interests.²⁵

28. Here, the Respondent's concern about "age-appropriateness" uses children's age and their inherent vulnerability to perpetuate these exact stereotypes. The Respondent admits age-appropriateness is an imprecise and poorly defined concept, one that involves a "judgement call" and the weighing of very broad considerations.²⁶

29. Nonetheless, the Respondent relies on age-appropriateness as the basis for the Decisions. It makes no reference to objective standards of how this factor is to be defined and interpreted. It maintains it is addressing this concern by gathering the input of parents but does not have a clear idea of how it will use this input once it is received.²⁷

30. By failing to properly define the concept, the Decision improperly exploits children's vulnerability to perpetuate the idea child require protection from or are unable to learn about certain topics in the 2015 Curriculum. This is despite the reality that the curriculum is written address the evolving capacities of children.²⁸

31. In different circumstances, children's vulnerability has been relied upon as a reason to diminish children's *Charter* protections. In *A.C.*, the Supreme Court recognised children's vulnerability and the need for differential treatment on that basis. In doing so, it upheld a law which prevented a Jehovah's Witness child from making her own potentially life-ending

²⁵ *A.C.*, at para.151, JFCY BOA Tab 7.

²⁶ Affidavit of Dr. Ken Brien, affirmed November 5, 2018 ["**Brien Affidavit**"], at para.24, JAR Vol. 45 Tab 31, p.18934.

²⁷ Transcript of Cross-Examination of Martyn Beckett on December 6, 2018 ["**Beckett Cross**"], at 66:10-67:2 and 94:18-96:4, Joint Book of Transcripts [**JBT**], Tab 1.

²⁸ Affidavit of Martyn Beckett, sworn November 5, 2018 ["**Beckett Affidavit**"] para 26, JAR Vol. 27, Tab 29, p. 8514.

medical decisions until she was 16 years old. In doing so, it found the age distinction was justified as part of an ameliorative scheme. It noted that in making a decision on the child's behalf, the law required a court to weigh age and vulnerability as part of a mandatory and highly individualised "best interests" analysis. In this context, the Court upheld the child's vulnerability as a reason to diminish *Charter* protections based on age.²⁹

32. The decision under consideration here is entirely different: it is not part of an ameliorative scheme and children's vulnerability and age are not being considered and weighed against any "best interests" test in the same careful, individualised way. Rather, the Decision has broad impact and as noted above, is based on arbitrary and non-defined concepts of 'age-appropriateness'.

ii. *Elementary students need relevant and inclusive sexual health education*

33. The second contextual factor considers whether the Decision's differential treatment actually corresponds with the needs, capacity and circumstances of elementary students on the basis of their age. In making the distinction based on age, did the Decision take into account the actual situation of elementary students?³⁰

34. The Respondent claims the Decision removes content from the curriculum due to concerns about its 'age-appropriateness'. However, the evidence consistently supports the need for certain sexual health information to be delivered to students at an elementary age. The following paragraphs outline some but not all of this evidence.

35. Consider the following evidence regarding the prevalence of sexual violence in adolescent lives:

²⁹ *A.C.*, at para.143, JFCY BOA Tab 7.

³⁰ *Law*, at para.88(7). This question must be considered from the perspective of a reasonable person in the circumstance of the claimant, taking into account the broader contextual factors relevant to the claim.

- a) Sexual abuse for men predominantly happens to them under the age of 12.³¹
- b) A substantial number of Ontario elementary school students have reported either being victims of or perpetrating sexual harassment.³²
- c) 55% of all sexual assault claims reported to police in Canada are by children aged 0-17 years.³³
- d) Nearly half of all sexual assault victims are women aged 15 to 24 and 50% of all rapes experienced by women have occurred by the time they were 18.³⁴

36. To better protect children from abuse, they need the vocabulary to name what is happening to them; to name their body parts; and be able to recognise and describe abuse. They also need an early and robust understanding of consent and guidance on how to assert their wishes.³⁵

37. This information is often not available at home: only 1 in 3 adults understand what consent is. Prior to engaging in sexual activity, children need to learn about sexual harassment and inappropriate sexual behaviour. Considering one fifth of children report engaging in sexual intercourse during elementary school – and many more engage in sexual activities soon thereafter - it is essential that issues of consent, communication and safe sexual practices are covered in the elementary curriculum.³⁶

38. Elementary students’ use of technology and the issue of cyber-bullying is another source of vulnerability and need:

- a) 14%, 18% and 20% of Grades 6, 7, and 8 girls and 10%, 8%, and 10% of Grade

³¹ Affidavit of Farrah Khan, sworn October 5, 2018 [“**Khan Affidavit**”], at para 39, JAR Vol. 17, Tab 23, p. 5181.

³² Pepler Affidavit, at paras 33 and 36, JAR Vol. 12, Tab 20, pp. 3293-4.

³³ Khan Affidavit, at para 40, JAR Vol. 17, Tab 23, p. 5181.

³⁴ Khan Affidavit, at para 29, JAR Vol. 17, Tab 23, p. 5178; Affidavit of Charlene Y. Senn, sworn October 2, 2018 [“**Senn Affidavit**”], at para 24, JAR Vol. 15, Tab 21, pp. 4282-3.

³⁵ McKay Affidavit, at para 23, JAR Vol. 11, Tab 19, pp. 2889-90; Khan Affidavit, at paras.37-38, JAR Vol. 17, Tab 23, pp. 5180-1.

³⁶ McKay Affidavit, at para 49, JAR Vol. 11, Tab 19, p. 2889; Pepler Affidavit, at paras. 14-15 and 21, JAR Vol. 12, Tab 20, pp. 3285-6 and 3287-8; Khan Affidavit, at paras. 36-37, JAR Vol. 17, Tab 23, p. 5180.

6, 7 and 8 boys respectively reported that they had been cyber-bullied;³⁷

- b) In Ontario specifically, 20.5% of students in Grades 7-12 reported being cyber bullied;³⁸ and
- c) One quarter of young people report having been targets or victims of cyber-violence and technology facilitated violence.³⁹

39. Elementary students are native technology users: they are ‘growing up online’ and are using technology at increasingly younger ages. Parents are often a poor source of information and regulation of online activity due to their comparative lack of knowledge and experience. Students need access to current and relevant information to prevent them from the unique risks and harms arising from their use of new technologies and online activities.⁴⁰

40. Finally, the need for more inclusive sexual education is especially acute for elementary students with diverse gender and sexual identities:

- a) 64% of LGBTQ students and 61% of students with LGBTQ parents reported that they feel unsafe, shamed or bullied about their differences at school;⁴¹
- b) 49% of trans students, 33% of lesbian students, and 40% of gay male students reported being sexually harassed in the school year;⁴²
- c) Trans and gender diverse youth face many health and wellbeing challenges, including most notably a greatly increased risk of suicide.⁴³

41. Gender nonconforming children are also disproportionately targeted for abuse from their own family members. It is therefore especially important that young trans children have positive and supportive adults and environments outside the home, such as their school.

³⁷ Pepler Affidavit, at para 29, JAR Vol. 12, Tab 20, pp. 3291-2.

³⁸ Pepler Affidavit, at para 30, JAR Vol. 12, Tab 20, p. 3292.

³⁹ Affidavit of Dillon Black, sworn October 3, 2018 [“**Black Affidavit**”] at para 30, JAR Vol. 15, Tab 22, pp. 4440-1.

⁴⁰ Black Affidavit, at paras. 28 and 32, JAR Vol. 15, Tab 22, pp. 4440-1.

⁴¹ Khan Affidavit, at para 44, JAR Vol. 17, Tab 23, pp. 5182-3. See also Pepler Affidavit, at para 37, JAR Vol. 12, Tab 20, p. 3295.

⁴² Khan Affidavit, at para 43, JAR Vol. 17, Tab 23, p. 5182.

⁴³ Khan Affidavit, at para 43, JAR Vol. 17, Tab 23, p. 5182 and Affidavit of Jake Pyne, sworn October 5, 2018 [“**Pyne Affidavit**”] para 17, JAR Vol. 18, Tab 24, p. 5540.

Supportive school environments are strongly correlated to lower rates of victimisation, higher self-esteem and better academic outcomes for LGBTQ students.⁴⁴

42. Notwithstanding this evidence, by removing topics related to consent, online safety and LGBTQ identities from the curriculum, the Decision deprives elementary students of curriculum content that is relevant and vital to protect them from present and future harm as they enter high school.

43. Furthermore, the Decision incorrectly uses age as a proxy for ability. In fact, elementary students are very capable of learning and understanding the content contained in the 2015 Curriculum. Teacher prompts within the curricula, specific teaching resources and the principles of scaffolding allow for the curriculum expectations to be effectively taught to elementary students' age and abilities.⁴⁵

44. The Decision cannot be saved by relying on the discretion of each classroom teacher to assess students' needs on an individual case-by-case basis. As outlined above, the topics covered in the 2015 Curriculum address the needs of all students. Those especially impacted by the change, such as victims of sexual violence, bullying or LGBTQ2+ students, can not be expected to identify their own vulnerability and needs and openly express them to the teacher.

45. In addition to possibly feeling silenced for social reasons, children most impacted by the change may also lack the necessary vocabulary and insight to speak up and also risk being further exposed to violence, bullying and discrimination. Relying on teacher discretion places

⁴⁴ Pyne Affidavit, para 19, JAR Vol. 18, Tab 24, pp. 5541-2; Pepler Affidavit, para 39, JAR Vol. 12, Tab 20, p. 3296.

⁴⁵ Beckett Affidavit, at para 26, 51-52 and 115-119, JAR Vol. 27, Tab 29, pp. 8514-5, and 8526-7 and 8550-1; Affidavit of Tammy Shubat, sworn October 5, 2018 [“**Shubat Affidavit**”], at paras 30-47, JAR Vol. 10, Tab 18, pp. 2529-35.

some children at risk and leaves all students worse off.⁴⁶

C. The Decision fails to balance children’s needs with its statutory objectives

46. Should this Court determine the Decision infringes s.15(1) of the *Charter*, it must then consider whether the Decision was reasonable and proportionate by balancing the children’s right with the Respondent’s statutory objectives.⁴⁷

47. As outlined above, the evidence makes clear that children need information on consent, online safety and LGBTQ identities early. This information helps to protect children from abuse, understand consent, develop positive relationships, and engage safely in sexual activity. It also helps students form an early age to understand their own identities and the diversity of LGBTQ identities in society. Failing to include this content ignores the needs and lived reality of elementary students in 2018.⁴⁸

48. The Respondent claims the Decision upholds public confidence in education and was made in response to parent’s views. However, this concern unreasonably exaggerates the weight to be accorded to parental views in determining the content of the elementary curriculum.

49. The *Act* does not afford parents a right to control the curriculum that their own, or other children, are learning. It is students who hold the right to an inclusive and diverse education. This right applies to all students, regardless of age.

⁴⁶ Beckett Affidavit, at paras 30, 32 and 50, JAR Vol. 27, Tab 29, pp. 8517-8 and 8526; Khan Affidavit, at para.33 and 37, JAR Vol. 17, Tab 23, p. 5179 and 5180; Pyne Affidavit, at para.28, JAR Vol. 18, Tab 24, p. 5547. See also concerns regarding the ‘chilling effect’ discussed in the Applicant’s factum.

⁴⁷ *Doré v. Barreau du Québec*, 2012 SCC 12, at paras.6-7, JFCY BOA Tab 8.

⁴⁸ See, for e.g., Pepler Affidavit, at paras. 48 and 50, JAR Vol. 12, Tab 20, p. 3299 and 3300; Transcript of the Cross-Examination of Debra Pepler [“**Pepler Cross**”], dated November 26, 2018, 173:13-174:15, JBT Tab 11; Transcript of the Cross-Examination of Alexander McKay, dated November 30, 2018, 55:20-56:1, JBT Tab 9; Khan Affidavit, at paras. para.33 and 37, JAR Vol. 17, Tab 23, p. 5179 and 5180.

50. In effect, the Decision equates with the “exclusionary philosophy” that *Chamberlain* cautioned against – responding to the views of certain parents, rather than considering the rights of children.⁴⁹ It is not reasonable to permit the views of parents to determine the government’s decision on education policy, including curricula, at the expense of the legal rights of students.

D. The Decision impairs the rights and purposes of the *Act* and related policy

51. Removing a more inclusive curriculum doesn’t accord with the broader legislative purpose and policy scheme under the *Act*. In recent years, the Provincial government has amended the *Act* and developed policies targeted at greater equity and inclusion for all students. Nowhere in this scheme is there an indication that the equity and inclusion strategies differ as between elementary and high school students.⁵⁰

52. In 2012, the *Accepting Schools Act* was passed (“**Bill 13**”). Bill 13 was directed at creating “an inclusive classroom and an inclusive school system”. It did so by amending the *Act* to ensure the Ministry, boards and schools took steps to ensure an equitable, inclusive and safe environment for all students, particularly LGBTQ students.⁵¹

53. Meanwhile, the Ministry introduced PPM 119 which requires all schools to implement and monitor an equity and inclusive education policy. PPM 119 provides nine policy development areas for boards, including creating inclusive curriculum and assessment practices. With respect to curriculum development, PPM 119 provides:⁵²

Students need to feel engaged in and empowered by what they are learning, supported by teachers and staff, and welcome in their learning environment. To this end, boards and their schools will use inclusive curriculum and assessment

⁴⁹ *ET*, at para.31, JFCY BOA Tab 3; Chamberlain, at para. 58, JFCY BOA Tab.2. See also Bruce MacDougall & Paul Clarke, “The Case for Gay-Straight Alliances (GSAs) in Canada’s Public Schools: A Legal Perspective” (2012) 21 *Educ. & L.J.*, JFCY BOA Tab 12, pp.222-3.

⁵⁰ *ET*, at paras.9-11 and 35, JFCY BOA, Tab 2.

⁵¹ 2012, S.O. 2012, c. 5 - Bill 13, Preamble.

⁵² Beckett Affidavit, JAR Vol. 44, Tab 29 (66), p. 18477.

practices and effective instructional strategies that reflect the diverse needs of all students and the learning pathways that they are taking. Schools must provide students and staff with authentic and relevant opportunities to learn about diverse histories, cultures, and perspectives. Students should be able to see themselves represented in the curriculum, programs, and culture of the school.

54. Furthermore, PPM 128 sets out the Provincial Code of Conduct, which school boards are required to model. The focus is on showing respect for one another, creating and maintaining a safe, inclusive and accepting learning environment, empowering students' self-worth and helping all students achieve.⁵³

55. PPM 144 focuses on bullying prevention and intervention. It describes the characteristics of a positive school climate as requiring "open and on-going dialogue", feeling safe and included, and a learning environment that "reflects the diversity of all learners."⁵⁴

56. The above scheme provides that equity and inclusion is best achieved on a whole school approach where diversity is woven throughout the school environment and the curricula. It is incoherent to deliberately remove LGBTQ and other issues from the HPE curriculum, where the topics would be most sharply be in focus, most applicable to student need, and where the silencing of these topics speaks loudly *against* an inclusive school climate, and the value of diverse students within.

PART IV - ORDER SOUGHT

57. JFCY respectfully requests that the Decision be quashed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th day of December 2018.



Andrea Luey and Claire Millgate
Counsel for Justice for Children and Youth

⁵³ Beckett Affidavit, JAR Vol. 44, Tab 29 (81), p.18737.

⁵⁴ Beckett Affidavit, JAR Vol. 44, Tab 29 (79), p.18694. See also Ministry of Education, "Education Equity Action Plan" (2017), at pp.14, 16 and 22, JFCY BOA, Tab 13.

SCHEDULE A

Article 28; UNCRC General Comment No.1 (2001) “Article 29(1): The Aims of Education”

Moore v. British Columbia (Education), [2012] 3 SCR 360

Chamberlain v. Surrey School District No.36, 2002 SCC 86

Benjamin L. Berger, “Religious Diversity, Education, and the “Crisis” in State Neutrality” (2014) 29:1 CJLS 108

E.T. v. Hamilton-Wentworth District School Board, 2017 ONCA 893

UNCRC General Comment No.20 (2016) on the implementation of the rights of the child during adolescence

R. v. Kapp, 2008 SCC 41

Law v. Canada (Minister of Employment and Immigration), [1999] 1 SCR 497

Wynberg v. Ontario, 2006 CanLII 22919 (ONCA)

A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30

Doré v. Barreau du Québec, 2012 SCC 12

Bruce MacDougall & Paul Clarke, “The Case for Gay-Straight Alliances (GSAs) in Canada’s Public Schools: A Legal Perspective” (2012) 21 Educ. & L.J.

“Education Equity Action Plan” (2017), Ministry of Education, Available at http://www.edu.gov.on.ca/eng/about/education_equity_plan_en.pdf

SCHEDULE B

Education Act, R.S.O. 1990, c. E.2

Purpose

Strong public education system

0.1 (1) A strong public education system is the foundation of a prosperous, caring and civil society. 2009, c. 25, s. 1.

Purpose of education

(2) The purpose of education is to provide students with the opportunity to realize their potential and develop into highly skilled, knowledgeable, caring citizens who contribute to their society. 2009, c. 25, s. 1.

Partners in education sector

(3) All partners in the education sector, including the Minister, the Ministry and the boards, have a role to play in enhancing student achievement and well-being, closing gaps in student achievement and maintaining confidence in the province's publicly funded education systems. 2009, c. 25, s. 1.

Resident pupil right to attend school

32 (1) A person has the right, without payment of a fee, to attend a school in a school section, separate school zone or secondary school district, as the case may be, in which the person is qualified to be a resident pupil. 1997, c. 31, s. 13.

Admission without fee

(2) Despite the other provisions of this Part, but subject to subsection 49 (6), where it appears to a board that a person who resides in the area of jurisdiction of the board is denied the right to attend school without the payment of a fee, the board, at its discretion, may admit the person from year to year without the payment of a fee. 1997, c. 31, s. 13.

Section Amendments with date in force (d/m/y)

Resident pupil qualification, elementary

Resident pupil qualification: elementary English-language public district school boards and elementary public school authorities

33 (1) Subject to sections 44 and 46, a person who attains the age of six years in any year is, after September 1 in that year, qualified to be a resident pupil in respect of a school

section of an English-language public district school board or of a public school authority until the last school day in June in the year in which the person attains the age of 21 years if,

- (a) the person resides in the school section; and
- (b) the person's parent or guardian who is not a separate school supporter or a French-language district school board supporter resides in the school section. 1997, c. 31, s. 14.

Persons unlawfully in Canada

49.1 A person who is otherwise entitled to be admitted to a school and who is less than eighteen years of age shall not be refused admission because the person or the person's parent or guardian is unlawfully in Canada. 1993, c. 11, s. 21.

DUTIES AND POWERS

Board responsibility for student achievement and effective stewardship of resources

169.1 (1) Every board shall,

- (a) promote student achievement and well-being;
 - (a.1) promote a positive school climate that is inclusive and accepting of all pupils, including pupils of any race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability;
 - (a.2) promote the prevention of bullying;
- (b) ensure effective stewardship of the board's resources;
- (c) deliver effective and appropriate education programs to its pupils;
- (d) develop and maintain policies and organizational structures that,
 - (i) promote the goals referred to in clauses (a) to (c), and
 - (ii) encourage pupils to pursue their educational goals;
- (e) monitor and evaluate the effectiveness of policies developed by the board under clause (d) in achieving the board's goals and the efficiency of the implementation of those policies;
- (f) develop a multi-year plan aimed at achieving the goals referred to in clauses (a) to (c);
- (g) annually review the plan referred to in clause (f) with the board's director of education or the supervisory officer acting as the board's director of education; and

- (h) monitor and evaluate the performance of the board's director of education, or the supervisory officer acting as the board's director of education, in meeting,
- (i) his or her duties under this Act or any policy, guideline or regulation made under this Act, including duties under the plan referred to in clause (f), and
- (ii) any other duties assigned by the board. 2009, c. 25, s. 15; 2012, c. 5, s. 3 (1).

Purpose

300.0.1 The purposes of this Part include the following:

1. To create schools in Ontario that are safe, inclusive and accepting of all pupils.
2. To encourage a positive school climate and prevent inappropriate behaviour, including bullying, sexual assault, gender-based violence and incidents based on homophobia, transphobia or biphobia.
3. To address inappropriate pupil behaviour and promote early intervention.
4. To provide support to pupils who are impacted by inappropriate behaviour of other pupils.
5. To establish disciplinary approaches that promote positive behaviour and use measures that include appropriate consequences and supports for pupils to address inappropriate behaviour.
6. To provide pupils with a safe learning environment.

Board support for certain pupil activities and organizations

303.1 (1) Every board shall support pupils who want to establish and lead activities and organizations that promote a safe and inclusive learning environment, the acceptance of and respect for others and the creation of a positive school climate, including,

- (a) activities or organizations that promote gender equity;
- (b) activities or organizations that promote anti-racism;
- (c) activities or organizations that promote the awareness and understanding of, and respect for, persons with disabilities; or
- (d) activities or organizations that promote the awareness and understanding of, and respect for, people of all sexual orientations and gender identities, including organizations with the name gay-straight alliance or another name. 2012, c. 5, s. 12; 2016, c. 5, Sched. 8, s. 9.

Same, gay-straight alliance

(2) For greater certainty, neither the board nor the principal shall refuse to allow a pupil to use the name gay-straight alliance or a similar name for an organization described in clause (1) (d). 2012, c. 5, s. 12.

Same, interpretation

(3) Nothing in this section shall be interpreted to require a board to support the establishment of an activity or organization in a school unless there is at least one pupil who wants to establish and lead it. 2012, c. 5, s. 12.

Inclusive and accepting name

(4) The name of an activity or organization described in subsection (1) must be consistent with the promotion of a positive school climate that is inclusive and accepting of all pupils. 2012, c. 5, s. 12.

Same

(5) A board shall comply with this section in a way that does not adversely affect any right of a pupil guaranteed by the Canadian Charter of Rights and Freedoms. 2012, c. 5, s. 12.

The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s.15(1).

Equality Rights

Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Convention on the Rights of the Child

*Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989
entry into force 2 September 1990, in accordance with article 49*

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) Make primary education compulsory and available free to all;
 - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
 - (d) Make educational and vocational information and guidance available and accessible to all children;
 - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
 - (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
 - (e) The development of respect for the natural environment.
2. No part of the present article or Article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given
- 9
- in such institutions shall conform to such minimum standards as may be laid down by the State.

Accepting Schools Act, 2012, S.O. 2012, c. 5 - Bill 13

Preamble

The people of Ontario and the Legislative Assembly:

Believe that education plays a critical role in preparing young people to grow up as productive, contributing and constructive citizens in the diverse society of Ontario;

Believe that all students should feel safe at school and deserve a positive school climate that is inclusive and accepting, regardless of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability;

Believe that a healthy, safe and inclusive learning environment where all students feel accepted is a necessary condition for student success;

Understand that students cannot be expected to reach their full potential in an environment where they feel insecure or intimidated;

Believe that students need to be equipped with the knowledge, skills, attitude and values to engage the world and others critically, which means developing a critical consciousness that allows them to take action on making their schools and communities more equitable and inclusive for all people, including LGBTTIQ (lesbian, gay, bisexual, transgender, transsexual, two-spirited, intersex, queer and questioning) people;

Recognize that a whole-school approach is required, and that everyone — government, educators, school staff, parents, students and the wider community — has a role to play in creating a positive school climate and preventing inappropriate behaviour, such as bullying, sexual assault, gender-based violence and incidents based on homophobia, transphobia or biphobia;

Acknowledge that an open and ongoing dialogue among the principal, school staff, parents and students is an important component in creating a positive school climate in which everyone feels safe and respected;

Acknowledge that there is a need for stronger action to create a safe and inclusive environment in all schools, and to support all students, including both students who are impacted by and students who have engaged in inappropriate behavior, to assist them in developing healthy relationships, making good choices, continuing their learning and achieving success.

**THE ELEMENTARY TEACHERS' FEDERATION OF
ONTARIO and CINDY GANGARAM
Applicants**

-and-

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS
REPRESENTED BY THE MINISTER OF EDUCATION
Respondent**

***ONTARIO*
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

**FACTUM OF THE INTERVENOR,
JUSTICE FOR CHILDREN AND YOUTH**

JUSTICE FOR CHILDREN AND YOUTH

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