



Court File No. 526 / 18

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

B E T W E E N:

BECKY MCFARLANE, in her personal capacity and as litigation guardian for L [REDACTED] M [REDACTED],
and

THE CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicants

- and -

MINISTER OF EDUCATION (ONTARIO)

Respondent

APPLICATION UNDER Rule 14.05(2) of the *Rules of Civil Procedure* and
Sections 2(1) and 6(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1

NOTICE OF APPLICATION FOR JUDICIAL REVIEW

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicants. The claim made by the applicant appears on the following pages.

THIS APPLICATION will come on for a hearing on a date to be fixed by the Registrar before a Panel of the Divisional Court at the Court House at 130 Queen Street West, Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date August 23, 2018

Issued by Jeremie Sawball
Local Registrar

Address of court office: 130 Queen Street West
Toronto, ON

TO: The Honourable Lisa M. Thompson
Minister of Education (Ontario)
Ministry of Education
Mowat Block
22nd Floor
900 Bay Street
Toronto, ON M7A 1L2

AND TO: Attorney General of Ontario
Crown Law Office – Civil
720 Bay Street
8th Floor
Toronto, ON M7A 2S9

AND TO: Ministry of the Attorney General of Ontario
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, Ontario M7A 2S9
Attention: S. Zachary Green and Hayley Pitcher

APPLICATION

1. The Applicants make application for:
 - (a) a declaration that the Directive (as defined below) of the Ontario Minister of Education (the “Minister”) is an unreasonable, disproportionate, arbitrary, and capricious exercise of her statutory power under section 8(1) of the *Education Act*, R.S.O. 1990, c. E.2 (the “*Education Act*”) or otherwise;
 - (b) an order setting aside the Directive;
 - (c) an interim, interlocutory, and permanent injunction requiring the Minister to direct school boards in Ontario to continue to use the 2015 HPE Curriculum (as defined below) until such time as appropriate and adequate consultation has been completed and any proposed new health and physical education curriculum has been developed and disseminated;
 - (d) an order granting leave under section 6(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (the “JRPA”) to have this application heard by a Judge of the Superior Court of Justice;
 - (e) an interim, interlocutory, and permanent order allowing the minor Applicant to proceed anonymously by using her initials or a pseudonym rather than her full name in all court materials, including the style of cause, and banning the publication of her name and any identifying information;
 - (f) if required, an order abridging the time for service of any materials required for the hearing of this application;

- (g) if required, an order imposing a schedule allowing for this application to be heard and decided on an expedited basis, if possible prior to the start of the new school year in September 2018;
- (h) an order, in any event of the cause, that no costs shall be awarded to or against the Applicants; and
- (i) such further and other relief as this Court may deem just.

2. The grounds for the application are:

The Parties

- (a) Becky McFarlane is a queer parent whose 10-year-old daughter will be starting Grade 6 in a public school within the Toronto District School Board in September 2018;
- (b) the Corporation of the Canadian Civil Liberties Association is a non-profit corporation established pursuant to the laws of Canada. The Corporation's objects are identical to those of the Canadian Civil Liberties Association ("CCLA") and its governance is closely linked to that of the CCLA;
- (c) the Minister assumed office on June 29, 2018, following the general election on June 7, 2018 in which the Ontario Progressive Conservative Party won a majority of the seats in the Legislative Assembly of Ontario;

The 2015 HPE Curriculum

- (d) on February 23, 2015, the then-Minister, a member of the Liberal government led by Premier Wynne, announced the release of an updated health and physical education curriculum (the "2015 HPE Curriculum");
- (e) the then-Minister's press release dated February 23, 2015 stated in part:

The revision of the Health and Physical Education curriculum is the result of work done through the curriculum consultation, which began in 2007. The review was the most extensive curriculum consultation process ever undertaken by the ministry and involved parents, students, teachers, faculties of education, universities, colleges and numerous stakeholder groups including the Centre for Addiction and Mental Health, The Ontario Public Health Association and the Ontario Healthy Schools Coalition. More than 70 health-related organizations submitted reports for consideration and thousands of people provided feedback.

- (f) the 2015 HPE Curriculum consists of a 239-page curriculum document for Grades 1-8 and a 218-page curriculum document for Grades 9-12;
- (g) the 2015 HPE Curriculum includes, among other things, three distinct but related content strands – namely, the “Active Living,” “Movement Competence,” and “Healthy Living” strands;
- (h) the Healthy Living strand includes four content areas: (i) healthy eating; (ii) personal safety and injury prevention; (iii) substance use, addictions, and related behaviours; and (iv) human development and sexual health;
- (i) the 2015 HPE Curriculum – and particularly the human development and sexual health component of the Healthy Living strand – includes information about, among other things, sexual orientation, gender identity, same-sex relationships, consent, and online safety;
- (j) the 2015 HPE Curriculum has been used by Ontario school boards since September 2015 (i.e., for the past three school years);

The Directive

- (k) on or around August 22, 2018, the Province released an interim sex-education curriculum and announced its decision to require teachers in schools within

Ontario school boards to teach that interim curriculum starting in September (the “Directive”);

- (l) the Directive requires Ontario school boards to stop using the 2015 HPE Curriculum and, in its place, to revert to a health and physical education curriculum for grades 1-8 that was released by the Province in 2010 and reissued in 2018 (the “Old HPE Curriculum”);
- (m) in the Old HPE Curriculum, the human development and sexual health component of the Healthy Living strand has been deleted, and replaced with content from the 1998 Health and Physical Education curriculum;

The Charter, the Code, and the Promotion of an Inclusive School Climate

- (n) under section 15(1) of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”), sex, mental or physical disability, sexual orientation, gender identity, and family status are all prohibited grounds of discrimination;
- (o) under section 7 of the *Charter*, everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice;
- (p) under the *Human Rights Code*, R.S.O. 1990, c. H.19 (the “*Code*”), sex, sexual orientation, gender identity, gender expression, family status, and disability are all prohibited grounds of discrimination;
- (q) section 169.1(1)(a.1) of the *Education Act* requires every school board to:
 - 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;

The Directive Should be Set Aside

- (r) the Directive is an unreasonable, disproportionate, arbitrary, and capricious exercise of the Minister's statutory power and should be set aside;
- (s) the applicable legal framework was recently summarized by the Supreme Court of Canada in *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at paragraph 58:

... the preliminary question is whether the administrative decision engages the *Charter* by limiting *Charter* protections -- both rights and values ... If so, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play ... The extent of the impact on the *Charter* protection must be proportionate in light of the statutory objectives. [Internal quotation marks omitted]

- (t) with regard to the preliminary question, the Directive clearly engages the *Charter* by limiting *Charter* protections under both section 15(1) and section 7 in the following ways:
 - (i) by removing references to sexual orientation, gender identity, and same-sex relationships from the curriculum, the Directive stigmatizes, degrades, and alienates LGBTQ+ students and parents. The Directive leads to the conclusion that the Minister believes, and intends to convey through the Directive, that there is something wrong or abnormal about LGBTQ+ students and parents -- something from which other students must be protected or shielded. Such a message is directly contrary to the equality rights of LGBTQ+ individuals under section 15(1) *Charter*. It creates a

distinction on prohibited grounds that perpetuates the prejudice and stereotyping that LGBTQ+ individuals have historically suffered;

- (ii) by removing information about the issue of consent from the curriculum, the Directive has a pernicious impact on individuals whose rights are protected under the *Charter*. Given that women, girls, LGBTQ+ people, and people with disabilities are disproportionately affected by sexual assault, sexual violence, and harassment, reverting to a curriculum in which students are not provided with the knowledge and tools necessary to make and clearly communicate sound decisions about consent puts those persons at an enhanced risk of harm and therefore engages their right to security of the person under section 7 of the *Charter* and their equality rights under section 15(1) of the *Charter*; and
- (iii) by reducing the amount of information about online safety, the Directive endangers the safety of all students and therefore engages their right to security of the person under section 7 of the *Charter*;
- (u) in light of the statutory and factual contexts, the Directive does not reflect a proportionate balancing of those *Charter* protections for the following reasons:
 - (i) with regard to the statutory context, there is no basis or justification in the *Education Act* for the exercise of the Minister's statutory power in a manner that adversely impacts LGBTQ+ individuals, women, girls, the disabled, and the general safety of all students. To the contrary, section 169.1(1)(a.1) of the *Education Act*, as excerpted above, clearly mandates that the school climate is to be inclusive and is not to be discriminatory on

the basis of, among other grounds, sex, sexual orientation, gender identity, gender expression, family status, or disability. Furthermore, section 0.1(2) of the *Education Act* states 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.” Stigmatizing LGBTQ+ individuals and putting women, girls, the disabled, and all students at an enhanced risk of harm cannot be reconciled with that statutory mandate;

- (ii) with regard to the factual context, the 2015 HPE Curriculum is the product of a wide-ranging consultation involving all stakeholders, including parents, students, and teachers, and many subject-matter experts. As noted in the then-Minister’s February 23, 2015 press release, it was the most extensive curriculum consultation process ever undertaken by the Ministry of Education. The Directive, if implemented, would instead put in place a curriculum that contains key components that were designed many years ago – without the benefit of such an extensive consultation process and prior to significant social and legal developments that have taken place since then, including, among other things, the legal recognition of same-sex marriage; an expanded commitment to protecting the rights of all individuals including by expanding the protected grounds under the *Code*; and an enhanced recognition of the dynamics of consent and the prevalence of sexual harassment and assault;

- (iii) in addition, the Directive would, if implemented, cause significant logistical and practical difficulties. The fact is that the 2015 HPE Curriculum has been used across Ontario for the past three school years. Teachers – including many new teachers who have started their teaching careers within the past three school years – are familiar with the 2015 HPE Curriculum and are ready to teach it again beginning in September 2018. Reverting to an entirely different curriculum at this late stage – just weeks before classes are scheduled to resume – would create significant difficulties for school boards and for teachers, who would have to rush to prepare new course materials and to familiarize themselves with a curriculum that many new teachers have never taught before;
- (iv) the Minister has put forward no sound pedagogical reason for not continuing to use the 2015 HPE Curriculum pending the development of any proposed new health and physical education curriculum. The Minister has adduced no evidence that the 2015 HPE Curriculum has caused harm or has otherwise been unsuccessful over the past three school years. The Applicants are seeking to preserve the *status quo* pending the development of any proposed new health and physical education curriculum, whereas the Directive would result in a drastic and harmful change in the absence of appropriate consultation; and
- (v) the importance of teaching students about, among other things, sexual orientation, gender identity, same-sex relationships, consent, and online

safety has a solid evidentiary foundation and is consistent with the development of the laws of Canada and Ontario in the past two decades;

- (v) for those reasons, the Directive does not reflect a proportionate balancing of the very important *Charter* protections that are at stake and should be set aside;

Application to a Judge

- (w) pursuant to section 6(2) of the JRPA, it is appropriate for this application to be heard on an expedited basis by a Judge of the Superior Court of Justice, instead of by the Divisional Court, because the new school year is scheduled to start within weeks and the case is therefore one of great urgency;

Interim and/or Interlocutory Injunction

- (x) in the event that this application cannot be finally determined on its merits prior to the start of the new school year, it is appropriate for the Court to grant an interim and/or interlocutory injunction preserving the *status quo* and requiring the 2015 HPE Curriculum to continue to be used pending the final determination of this application;
- (y) the Applicants have satisfied the test for an interim and/or interlocutory injunction:
 - (i) the Applicants have shown a strong *prima facie* case;
 - (ii) not granting an interim and/or interlocutory injunction would result in irreparable harm, as material information about vitally important issues – including sexual orientation, gender identity, same-sex relationships,

consent, and online safety – would be removed from the mandatory curriculum that must be addressed in schools across Ontario; and

- (iii) the balance of convenience strongly favours granting an interim and/or interlocutory injunction, particularly because the 2015 HPE Curriculum has been successfully used for the past three school years without any evidence of harm, and its continued use does not require any change to the *status quo*;

No Costs

- (z) the Applicants have requested, in any event of the cause, that no costs be awarded to or against them;
- (aa) the individual Applicant is a parent who brings this proceeding in the public interest, in order to protect her rights, the rights of her minor daughter, and the rights of other Ontario residents;
- (bb) the Corporation of the CCLA is a non-profit corporation dedicated to the protection of constitutional and human rights in the public interest;
- (cc) the Applicants have brought this case for the purpose of addressing a legal question that is of profound importance to the public;
- (dd) the Applicants have nothing to gain financially from this case;
- (ee) it is therefore appropriate not to award costs in this case;

Rules and Other Grounds

- (ff) Rules 2.03, 3.02(1), 7.02(2), 14.05(2), 14.06, 38, 57, and 68 of the *Rules of Civil Procedure*;
 - (gg) sections 1, 2, 4, 6, and 9 of the JRPA;
 - (hh) sections 7 and 15(1) of the *Charter*;
 - (ii) sections 1, 7, 11, 12, and 13 of the *Code*;
 - (jj) sections 0.1, 8, 169.1, and 300.0.1 of the *Education Act*; and
 - (kk) such further and other grounds as counsel may advise and this Court may permit.
3. The following documentary evidence will be used at the hearing of the application:
- (a) the Affidavit of Becky McFarlane, sworn August 15, 2018;
 - (b) the Affidavit of Cara Faith Zwibel, sworn August 23, 2018, and the Exhibits thereto; and
 - (c) such other evidence as counsel may advise and this Court may permit.

Dated: August 23, 2018

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M [REDACTED], and the Corporation of the
Canadian Civil Liberties Association

BECKY MCFARLANE et al. v. MINISTER OF EDUCATION (ONTARIO) et al.

Court File No. 526/18

Applicants

Respondent

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

Proceeding commenced at TORONTO

**NOTICE OF APPLICATION
FOR JUDICIAL REVIEW**

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