

IN THE COURT OF KING'S BENCH OF
NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF
FREDERICTON

IN THE MATTER of an application for
judicial review and declaratory relief
pursuant to Rule 69 and Rule 38 of the
New Brunswick Rules of Court

BETWEEN:

**THE CANADIAN CIVIL LIBERTIES
ASSOCIATION**

Applicant

- and -

**THE PROVINCE OF NEW
BRUNSWICK, as represented by the
MINISTER OF EDUCATION AND
EARLY CHILDHOOD DEVELOPMENT**

Respondent

**NOTICE OF MOTION
(FORM 37A)**

**AVIS DE MOTION
(FORMULE 37A)**

TO:

**THE MINISTER OF EDUCATION AND
EARLY CHILDHOOD DEVELOPMENT**
c/o Steve Hutchison, K.C.
STEWART McKelvey
44 Chipman Hill, Suite 1000
Saint John NB E2L 2A9

DANS LA COUR DU BANC DU ROI DU
NOUVEAU-BRUNSWICK

DIVISION DE

CIRCONSCRIPTION JUDICIAIRE DE
FREDERICTON

CONFORMÉMENT À

ENTRE:



DESTINATAIRE:

The applicant will make a motion to the Court at The Justice Bldg, 427 Queen St. Fredericton, New Brunswick, on the 14+15 day of May, 2024 at 9:30 a.m./~~p.m.~~ for an order that:

Le le requérant demandera à la Cour du Banc de la Roi du Nouveau-Brunswick au _____, Nouveau-Brunswick, le _____ 2024 à _____ h _____, d'ordonner:

- a) an order requiring the Respondent to produce a further and better record of the proceeding below, pursuant to Rule 69.10, specifically:
- i. an unredacted copy of the Premier's email to Bill Hogan dated March 1, 2022;
 - ii. an unredacted copy of the briefing note on Policy 713 and name changes referenced by the Acting Executive Director of Policy and Planning in her February 24, 2022 email to Minister Cardy and bureaucrats in the Department and Office of the Premier;
 - iii. any other briefing notes regarding Policy 713 not itemized in Schedule D of the Record;
 - iv. all records regarding the "concerns" with Policy 713 referenced by Deputy Minister Ryan Donaghy and Acting Deputy Minister Robert Penney in their May 5, 2023 letter to the Child and Youth Advocate including all correspondence or documents that particularize or discuss these concerns (Record, Vol. 1, Tab A. Material Before Minister, Tab 7, Correspondence from Ryan Donaghy to CYA);
 - v. all records regarding who decided that a review of Policy 713 was required and the reasons for this decision;
 - vi. the name(s) and email address(es) of the government of New Brunswick employee(s) or official(s) who received correspondence from members of the public dated October 31, 2022, December 6, 2022, and April 4, 2023 that was included in the Child and Youth Advocate's review of the Department's decision to review Policy 713 and copies of any reply correspondence that was sent on behalf of the Department or Minister (Record, Vol. 1, Tab A. Material Before Minister, Tab 10, Conclusions and recommendations from the CYA);
 - vii. the name of the person(s) who prepared the "Review of Policy 713 Scoping Document," the date this document was created, and all departmental or ministerial correspondence related to the proposed amendments to Policy 713 that are identified in the document (Record, Vol. 1, Tab A. Material Before Minister, Tab 11, Review of Policy 713 Scoping Document);
 - viii. the name of the person(s) who prepared the document entitled "Proposed changes to policy 713 – Sexual Orientation and Gender Identity" that was sent to the Minister on May 23, 2023, the date this document was created, and all departmental and ministerial correspondence related to the development of this document (Record, Vol. 1, Tab A. Material Before Minister, Tab 13, Email correspondence from Ryan Donaghy to Minister Hogan);

- ix. an unredacted copy of the undated letter from a member of the public (with personally identifying information removed) to the Child & Youth Advocate that was placed before the Minister (Record, Vol. 1, Tab A. Material Before Minister, Tab 24, Partially redacted letter from member of the public to the CYA); and
 - x. unredacted copies of the briefing notes (5) and email correspondence plus attachments (4) in the record that were withheld on grounds of Crown or public interest privilege (Record, Vol. 5, Tab D. List of Privileged Documents, Items 1-5, 12, 14-15, and 19);
- b) an order that the time for service and filing of the Notice of Motion and materials filed on this motion be abridged, if necessary;
 - c) an order requiring the Respondent to file sealed copies of the materials referenced in this motion over which confidentiality or privilege is asserted to permit the Court to inspect those materials and determine if they should be produced;
 - d) an order permitting the Applicant to file the record of the proceeding below that was produced by the Respondent;
 - e) an order that no costs be awarded on this motion for production; and
 - f) such further and other relief as this Honourable Court may deem just.

The grounds to be argued in support of the motion are:

Background

1. In winter 2022, the Premier of New Brunswick raised concerns about Policy 713 with Bill Hogan, who at that time was not the Minister Education and Early Childhood Development (“**Minister**”). The Premier was provided a briefing note on Policy 713 and its name change provisions at that time.
2. In spring 2023, the Department of Education and Early Childhood Development (“**Department**”) announced that it was reviewing Policy 713. The review was not in accordance with the Department’s normal process for reviewing existing policies and not in response to a problem with the policy identified by the Department. The identity of the person(s) who decided to review Policy 713 and their reasons for decision remain unknown.
3. Unknown person(s) developed proposed changes to Policy 713 that were shared with the Minister at the beginning of the review process. These proposed changes were not shared publicly, and it is unclear how they were developed.
4. On June 8, 2023, the Minister decided to make changes to the self-identification provisions in Policy 713 pursuant to s. 6(b.2) of the *Education Act*, SNB 1997, c E-1.12. No reasons for this decision have been provided.
5. On August 23, 2023, the Minister decided to make further changes to the self-identification provisions in Policy 713. No reasons for this decision have been provided.

6. On September 6, 2023, the Applicant, the Canadian Civil Liberties Association, commenced this application for judicial review of the Minister's June 8, 2023 and August 23, 2023 decisions ("**Application**"). The Application alleges:

- a. the process leading to the changes to the self-identification provisions in Policy 713 was procedurally unfair;
- b. the decisions were unreasonable and *ultra vires* the Minister;
- c. the Minister failed to exercise his discretion in accordance with the *Charter*, and
- d. the revised Policy 713 is contrary to sections 2(b), 7, and 15(1) of the *Charter*.

7. On April 18, 2024, the Respondent produced what they consider to be the record of the proceeding below. That record contains documents that were redacted by the Respondent and asserts privilege over documents that were not produced by the Respondent.

Scope of judicial review of delegated legislation

8. Judicial review is constitutionally guaranteed in Canada. All holders of public power, including Ministers exercising delegated legislative discretion, are accountable for their exercises of power.

9. A reviewing court cannot fulfill its constitutionally guaranteed role if the record is deficient. Courts are alive to the potential for a deficient record to effectively immunize an administrative decision from review.

10. The record on judicial review generally consists of the evidence that was before the decision-maker.

11. The record is broader where the application raises procedural fairness grounds, including allegations that the decision-maker exhibited a closed mind, an apprehension of bias, and/or bad faith.

12. The record is also broader where the decision is more legislative in nature, the decision-making process did not provide sufficient opportunity for parties to provide evidence or make submissions, or where the decision engages the *Charter*.

13. Documents that were not before the decision-maker may nonetheless be relevant and producible if they would be useful and connected to a procedural fairness, *vires*, or *Charter* ground of review or if they provide necessary context to understand the decisions under review.

14. Where a decision is reached through a stepwise process or following several related decisions, the entirety of the process and the underlying decisions are within the scope of judicial review.

Records related to the review process for Policy 713

15. The decisions under review in this Application were made following a "review process" initiated by an unknown individual within an unknown time period.

16. The review process was the catalyst and purported basis for the Minister's decisions. But the process did not follow the Department's normal practices for reviewing policies and had several defects, including that this process did not clearly identify a problem to which it was

responding, did not particularize who had instigated the review and why, lacked terms of reference for the review, promised a change before the review was completed, identified prospective changes before the review was completed, and forwarded potential amendments through the Executive Council Office and Premier's Office to ensure that "we [the Department] move in an intended direction."

17. The Application raises procedural fairness grounds related to the review process. As such, documentation related to the review process and the steps leading to the review process are relevant and producible.

Confidentiality of documents contained in the record

18. The record produced by the Respondent contains several documents for which the Respondent has redacted information as "irrelevant" or "private".

19. The Rules and the open court principle do not authorize the Respondent to unilaterally redact portions of the record on grounds of relevancy or privacy. Judicial review is different than a freedom of information request.

20. Judicial review is a public process. All claims of confidentiality must be approved by the reviewing court absent consent from the opposing party and subject to the media being provided an opportunity to contest claims of confidentiality.

21. Where documents from members of the public were treated differently and placed before the Minister in support of his decisions, the importance of transparency and openness increases. Such documents were not required and are not the same as general correspondence from the public. While aspects of these letters may warrant confidentiality, particularly if they reference identifiable students, there needs to be sufficient information revealed for the reviewing Court to understand and evaluate the reasonableness of the Minister's reliance on these letters.

22. There is a presumption that justice should proceed in public view and the onus is on the party asserting a claim of confidentiality to rebut that presumption.

23. The Respondent has not established that court openness poses a serious risk to an important public interest, confidentiality is not necessary in the circumstances, and the benefits of confidentiality do not outweigh the serious concerns related to limiting transparency and openness.

Minister's claims of Crown/public interest privilege

24. The briefing notes that were before the Minister constitute his reasons for decision because he did not provide independent reasons. Maintaining confidentiality of these reasons will immunize the Minister's decision from review to the prejudice of the Applicant and the administration of justice.

25. The onus is on the Minister to prove his claims of Crown or public interest privilege, which are case-by-case forms of privilege.

26. The briefing notes were not prepared for cabinet but rather for the exercise of delegated administrative discretion under the *Education Act*. The briefing notes concern decisions that

negatively impact an identifiable and vulnerable group that was known to the Minister: transgender and gender diverse students. There is an allegation of improper conduct by the executive branch against this group.

27. Production of the briefing notes is important for the administration of justice and will not cause harm to the public. The public interest in revealing this information greatly outweighs the public interest in secrecy. The public interest in disclosure in this case warrants access to the relevant information required to produce a complete record.

Implied undertaking and filing the record

28. The Respondent's position that the record is subject to an implied undertaking is not correct in law. The implied undertaking rule does not apply to the record of the proceeding below in a judicial review application.

29. Judicial review applications are public processes between an applicant and the state. There is no principled basis to apply the implied undertaking rule that applies between two private parties as a quid pro quo for one party being compelled to provide information as part of discovery.

30. Rules 38.06 and 69.10 contemplate an Applicant filing the record of the proceeding below. This can be done before the application record is finalized.

Other grounds, legislation, and rules to be relied on

31. Such further and other grounds as counsel may advise and this Honourable Court may permit.

32. The Applicant intends to rely on the following statutes and rules:

- a. *Canadian Charter of Rights and Freedoms*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss 2(b), 7, and 15;
- b. *Education Act*, SNB 1997, c E-1.12, ss 1, 1.1 6(b.2), 27, 28, 48;
- c. *Human Rights Act*, RSNB, c 171, ss 2.1, 3, 6; and
- d. *Rules of Court*, NB Reg 82-73, Rules 1.02.1, 38.06, 69.10.

Upon the hearing of the motion the following affidavits or other documentary evidence will be presented:

A l'audition de la motion, les affidavits ou les autres preuves littérales suivantes seront présentées:

(a) Affidavit of Olivia Raiche-Tanner, paralegal, affirmed April 29, 2024; and

(b) Such further and other affidavits and other documentary evidence as counsel for the CCLA may advise and this Honourable Court may permit.

You are advised that:

(a) you are entitled to issue documents and present evidence at the hearing in English or French or both;

(b) the applicant intends to proceed in the English language; and

(c) if you intend to proceed in the other official language, an interpreter may be required and you must so advise the clerk at least 7 days before the hearing.

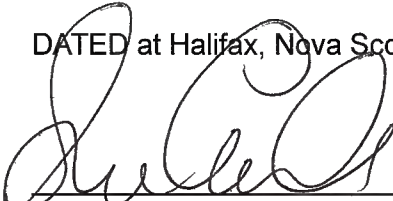

Sachez que :

a) vous avez le droit d'émettre des documents et de présenter votre preuve à l'audience en français, en anglais ou dans les deux langues;

b) le requérant a l'intention d'utiliser la langue anglais; et

c) si vous avez l'intention d'utiliser l'autre langue officielle, les services d'un interprète pourront être requis et vous devrez en aviser le greffier au moins 7 jours avant l'audience.

DATED at Halifax, Nova Scotia on April 29, 2024.

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