Court File No. FM-76-23

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

B E T W E E N:

CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicant

- and –

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

Respondent

- and –

EGALE CANADA, ALTER ACADIE NOUVEAU-BRUNSWICK INC., CHROMA: PRIDE, INCLUSION, EQUALITY INC. and IMPRINT YOUTH ASSOCIATION INC., EQUALITY NEW BRUNSWICK and WABANAKI TWO SPIRIT ALLIANCE, and GENDER DYSPHORIA ALLIANCE and OUR DUTY CANADA

Party Interveners

APPLICANT'S PRE-HEARING BRIEF

(Motion for further and better production, May 14-15, 2024, 0930)

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PART I – OVERVIEW

1. Following an opaque "review process," the Minister of Education and Early Childhood Development made two decisions to change the chosen name and chosen pronoun provisions in a provincial sexual orientation and gender identity policy, namely Policy 713.

2. The record produced by the Respondent in relation to these decisions is deficient. Particularly, the Respondent has:

   a) withheld briefing notes that likely contain the Minister's reasons for the decisions, claiming they are protected by "Crown/Public Interest Privilege".
   b) redacted portions of the records that were before the Minister as "irrelevant", without further particulars, and without following the proper process for confidentiality claims in judicial review applications.
   c) withheld records related to the "review process" that led to the Minister's decisions, even though these records are relevant to analyzing the fairness and reasonableness of those decisions.

3. Judicial review is constitutionally guaranteed in Canada. The record produced by the Respondent to date effectively immunizes the Minister's decisions from meaningful judicial review.

4. This Honourable Court cannot fulfill its constitutionally mandated role without the Minister's reasons for decision, records related to the process leading to those decisions, and unredacted copies of records that by the Respondent's own admission were before the Minister and relied on by him when he made the decisions under review.

5. The Applicant, Canadian Civil Liberties Association, objects to the Respondent's withholding of relevant records on judicial review. Accordingly, the Applicant seeks an order for production of a further and better record. The Applicant further seeks direction to file the Record with the Court as contemplated by Rule 69.

PART II – FACTS

A. The decisions, Application, and record on judicial review

6. Section 6 of the *Education Act*, SNB 1997, c E-1.12 delegates authority to the Minister of Education and Early Childhood Development (**"Minister"**) to, within the scope of the *Act,* establish policies relating to the "health and well-being of pupils".

7. After years of study and consultation, on August 17, 2020, the Minister established Policy 713: Sexual Orientation and Gender Identity. Policy 713 is not a regulation and is not a Cabinet decision. Rather, it was established pursuant to the Minister's delegated authority under the *Education Act*.

8. There is nothing in the record that has been produced in this proceeding (the **"Record"**) indicating there were concerns with the original Policy 713 that would justify its review and ultimate amendment.

9. In April 2023, the Minister, for reasons that remain unclear, decided to review the chosen name and chosen pronoun provisions (the **"self-identification provisions"**) in Policy 713 that had been in place since August 17, 2020.[1]

10. The Child and Youth Advocate (**"CYA"**) described the Respondent's review process as "broken and incoherent". Department personnel implored the Minister to follow the usual process for amending 700 series policies, including but not limited to consultation with the District Education Councils (**"DECs"**). There is no evidence of any consultation in the Record.

11. Nonetheless, on June 8, 2023, the Minister amended the self-identification provisions in Policy 713. On August 23, 2023, the Minister made further changes to the self-identification provisions in Policy 713.

12. On September 6, 2023, the Applicant, the Canadian Civil Liberties Association (**"CCLA"**), commenced this application for judicial review of the Minister's June 8, 2023 and August 23, 2023 decisions (**"Application"**). The Application was timely with respect to both decisions.

13. The Application alleges:

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[1] Affidavit of Lisa Lacenaire-McHardie, sworn May 7, 2024, para 11 **[Motion Record (MR), pp 130-131]**

a) the process leading to the changes to the self-identification provisions in Policy 713 was procedurally unfair;[2]
b) the decisions were unreasonable and *ultra vires* the Minister;[3]
c) the Minister failed to exercise his discretion in accordance with the *Charter*;[4] and
d) the revised Policy 713 is contrary to sections 2(b), 7, and 15(1) of the *Charter*.[5]

14. The Application seeks an order in the nature of *certiorari*, quashing the changes to the self-identification provisions and remitting the matter to the Minister for redetermination, as well as declaratory relief related to the *Education Act*, the *Human Rights Act*, and the *Canadian Charter of Rights and Freedoms*.

15. On September 11, 2023, the CCLA filed a motion for public interest standing. The Respondent did not oppose this motion and it was heard in writing. On December 21, 2023, the Honourable Justice Dysart granted the CCLA public interest standing.

16. Between October 2023 and February 2024, counsel for the CCLA made several requests to the Respondent for production of the record on judicial review. At no point did the Respondent state the Record would not be produced without an order, but rather indicated they had teams of lawyers working on it.

17. On March 25, 2024, on the consent of the parties, the Honourable Justice Petrie issued an Order arising out of the March 5, 2024 case management conference, which provided:

> *With reasonable dispatch, the Respondent shall produce the record of the proceeding below that the Respondent believes is relevant and responsive to the Application for Judicial Review.*

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[2] Affidavit of Olivia Raiche-Tanner, affirmed April 29, 2024, Exhibit "K", Notice of Application, paras 53-56 **[MR, pp 119-120]**
[3] *Ibid*, paras 57-65 **[MR, pp 120-121]**
[4] *Ibid*, para 66 **[MR, p 121]**
[5] *Ibid*, paras 67-107 **[MR, p 122-127]**

18. On April 18, 2024, the Respondent produced the record of the proceeding below, consisting of approximately 3,100 pages (**"Record"**). The Record is organized into four (4) categories of documents:

a) Material Before the Minister;
b) Communication with Stakeholders/Organizations;
c) Bundle of correspondence from public; and
d) List of Privileged Documents.[6]

19. The Respondent has clarified that all four (4) categories of documents were before the Minister when he made the decisions that are under review.[7]

20. The Record produced by the Respondent does not include the reason the Minister decided to review and then amend Policy 713, nor does it explain the reasons for the amendments. The Record does, however, reveal that the established consultation process for amending 700 series policies was not followed.

21. The Record does not include any reasons for the Minister's decisions. Instead, the Record includes a list of privileged documents that were withheld, asserting "Crown/Public Interest Privilege".[8]

22. As a result, neither the Court nor the parties are any further ahead in understanding why the review of Policy 713 was undertaken, the process that was followed or the reasons for the amendments on June 8, 2023 and August 23, 2023.

23. On May 7, 2024, the Respondent filed the Record in advance of this motion.

B. Information in the Record regarding the Minister's review of Policy 713

24. On Thursday February 24, 2022, in response to a request from the Premier of New Brunswick's then Chief of Staff (Louis Leger) and a Deputy Minister of Strategic Initiatives and Communications in the Premier's Office (Nicolle Carlin), the Department of Education and Early Childhood Development's (**"Department"**) Acting Executive Director of Policy and

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[6] Raiche-Tanner Affidavit, para 3 **[MR, p 13]**
[7] Lisa Lacenaire-McHardie, para 16 **[MR, pp 132-133]**
[8] Raiche-Tanner Affidavit, Exhibit "D", Index of the Record **[MR, pp 30-32]**

Planning (Lisa Lacenaire) emailed the Premier's office with a link to the original Policy 713 as it then existed. The Acting Executive Director of Policy and Planning also promised to "follow up with a briefing note on Monday regarding name change." This email was forwarded to the Premier.[9]

25. A few days later, the Premier forwarded the email to the current Minister, who at the time was not the Minister of Education and Early Childhood Development, stating:

> *This is the actual education Policy 713. Have you seen it before? I would like to get your thoughts on some of the specifics in implementation [REDACTED].*[10]

26. A year later, a briefing note dated March 28, 2023 was prepared with "advice to the Minister regarding 2SLGBTQIA+ Inclusive Education in New Brunswick." The Respondent has asserted "Crown/Public Interest Privilege" over this document.[11] Shortly thereafter, the Minister directed the Department to initiate a "formal review" of Policy 713.[12]

27. In April 2023, two Department employees were scheduled to present on the original August 2020 Policy 713 at a New Brunswick Teachers' Association professional development day.

28. On April 20, 2023, the Department's Deputy Minister, Anglophone Sector, wrote the Premier as well as officials in the Premier's Office and Finance and Treasury Board, advising that the planned presentation on Policy 713 would not proceed because "why would we present a policy for which we inform them it will change/be amended."

29. The Deputy Minister for the Department also promised to "bring forward potential amendments to ECO/PO [Executive Council Office/Premier's Office] before anything leaves this building to ensure we move in an intended direction."

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[9] Raiche-Tanner Affidavit, Exhibit "B", Emails dated February 24, 2022 **[MR, p 21]**

[10] *Ibid*, Exhibit "B", Email dated March 1, 2022 **[MR, pp 20-21]**; reasons for the redaction have not been given

[11] *Ibid*, Exhibit "D", Index of the Record, Item 2 **[MR, p 29]**

[12] Lisa Lacenaire-McHardie, para 11 **[MR, pp 130-131]**

30. The Premier responded that same day: "[t]his looks good and a reasonable request and path forward."[13] The Respondent now indicates that the decision to review Policy 713 was made by the Minister in April 2023.[14]

31. There is nothing in the Record to indicate why the Minister made this decision, but the Deputy Minister's email appears to suggest the decision had already been made to amend it – prior to the review process being established, let alone completed.

32. The next day, April 21, 2023, the Deputy Minister, Anglophone Sector advised the New Brunswick Teacher's Association and Department staff:

> *It is government's intention to review the policy [Policy 713] given recent misinterpretations and concerns brought forward. … We will be undertaking the policy review process and thus your input will be sought at that time.*[15]

33. The CYA investigated the Department's subsequent announcement of a "review process" for Policy 713. The CYA observed:

> *"The decision to place this policy [Policy 713] under review at this time [April 28, 2023] and in this manner is a departure from established norms of policy development within the Department."*[16]

34. The CYA asked the Deputy Minister, Anglophone Sector for particulars of the "concerns" that led to the decision to review Policy 713 as well as any advice from the Department related to this decision.

35. In a letter dated May 5, 2023, the Deputy Minister, Anglophone Sector indicated that the DECs had not be consulted as part of the decision to review Policy 713 and that the Department had not provided any written advice "in the four weeks preceding the decision to review the policy."[17]

36. The CYA was also provided with three emails from members of the public related to his request for documents particularizing the "concerns" about Policy 713. None of these emails mention Policy 713. Instead, the emails raise concerns about:

a) "…curriculum in our schools regarding what is falsely being labeled anti-racism but is actually the very Marxist and racist

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[13] Raiche-Tanner Affidavit, Exhibit "C", Emails dated April 20, 2023 **[MR, p 23]**
[14] Lisa Lacenaire-McHardie, para 11 **[MR, pp 130-131]**
[15] Raiche-Tanner Affidavit, Exhibit "E", Email dated April 21, 2023 **[MR, p 35]**
[16] *Ibid*, Exhibit "F", Conclusions and recommendations from the CYA dated May 16, 2023 **[MR, p 57]**
[17] *Ibid*, Exhibit "E" **[MR, p 34]**

Critical Race Theory under a different name. ... Are our children being taught this completely unscientific nonsense that one can just pick their gender and that they aren't even necessarily a boy or a girl."[18]

b) "…material being recommended to teachers and staff to read and teach to children in the classrooms. ... The school system is instead teaching transgender and LGBTQ2+ in the schools."[19]

c) "…a grade 5 class of children at [REDACTED] school had a meeting with a transgender person who told the children that they could be whatever they want to be."[20]

37. Based on the information he received, the CYA raised serious concerns about the process. In a letter dated May 10, 2023, the CYA stated to the Deputy Ministers, Education and Early Childhood Development:[21]

> *The Department has a broken and incoherent process underway. That broken and incoherent process will lead to results that are inconsistent with the good intentions we know the Department has. It will not be good for children.*
>
> *I do not offer that assessment lightly …*
>
> *(1) Policy 713 is a document that defines the rights of a vulnerable group of children. It was developed with care. It should be reviewed with care.*
> *…*
> *(2) The Department is not reviewing Policy 713 with care or seriousness.*
> *…*
> *(3) The Department is being unclear as to what problem they are trying to address in the review of Policy 713, and that is creating a vacuum that can be filled by the worst assumptions.*
> *…*
> *(4) The Department needs to be clear on the status of Policy 713 during any review period. The actions of the Department have created a lack of clarity.*
> *…*
> *(5) Policy 713 still allows for the Department to ensure that materials and activities are age appropriate. However, it is important to remember that those standards should be the*

[18] Raiche-Tanner Affidavit, Email dated December 6, 2022 **[MR, p 61]**
[19] *Ibid*, Email dated October 31, 2022 **[MR, p 62]**
[20] *Ibid*, Email dated April 4, 2023 **[MR, p 64]**
[21] *Ibid*, Exhibit "F", Conclusions and recommendations from the CYA dated May 16, 2023 **[MR, p 50-55]**

> *same as those for material which depicts straight or cis-gendered relationships.*
> *…*

38. The CYA then recommended the review process be halted and made recommendations for a proper review process.

39. Unbeknownst to the CYA, the changes to Policy 713 had already been identified and determined by unknown person(s) at the Department "based on the Minister's ongoing direction and oversight."[22]

40. The Record contains an undated and unauthored document titled "Review of policy 713".[23] The document identifies when the "review process" would begin (May 22), who would be consulted, when the amended policy would be adopted (week of May 29), and what changes would be made to Policy 713 by the Minister.[24] The Respondent indicates this "document was prepared by Department staff, based on the Minister's ongoing direction and oversight."[25]

41. On May 8, 2023, the Deputy Minister, Anglophone Sector provided "advice to the Minister on the appropriate messaging to Caucus regarding Policy 713." On May 16, 2023, the Deputy Minister, Anglophone Sector and Deputy Minister, Francophone Sector, approved a briefing note "containing advice to the Minister regarding Motion 43." The Respondent has asserted "Crown/Public Interest Privilege" over both of these key documents.[26]

42. On May 23, 2023, the Deputy Minister, Anglophone Sector provided the Minister with a document titled "Proposed changes to policy 713 – Sexual Orientation and Gender Identity." The proposed changes in the document mirror what the Minister adopted in his June 8, 2023 decision.[27] The

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[22] Lacenaire-McHardie Affidavit, para 15; Raiche-Tanner Affidavit, Exhibit "G", An undated document entitled "Review of Policy 713 Scoping Document" **[MR, pp 66-67]**; *Ibid*, Exhibit "H", Correspondence dated May 23, 2023 from Ryan Donaghy to Minister Hogan **[MR, pp 69-70]**

[23] The index to the Record states the date is May 17, 2023

[24] Raiche-Tanner Affidavit, Exhibit "G", An undated document entitled "Review of Policy 713 Scoping Document" **[MR, pp 66-67]**

[25] Lacenaire-McHardie Affidavit, para 15(a) **[MR, p 132]**

[26] Raiche-Tanner Affidavit, Exhibit "D", Index of the Record, Items 3-4 **[MR, p 29]**

[27] *Ibid*, Exhibit "H", Correspondence dated May 23, 2023 from Ryan Donaghy to Minister Hogan **[MR, pp 69-70]**

Respondent indicates that the "document was prepared by Department staff, based on the Minister's ongoing direction and oversight" yet asserts that correspondence or material related to the creation of this document was not before the Minister.[28]

43. That same day, the Department's Deputy Minister, Francophone Sector wrote the Minister regarding the normal process ("processus normalisés") for making changes to policies in the 300 to 700 series. She indicated that it was normal to consult the DECs and a provincial advisory committee ("comite consultatif provincial"). She urged the Minister to respect these processes.[29]

44. The Respondent has redacted the reply to this email as "irrelevant" without further particulars. The Respondent has also asserted "Crown/Public Interest Privilege" over email correspondence between the Deputy Ministers and the Minister that same day "regarding consultations with the District Education Councils and Policy 713."

45. The Record does not show that the DECs or the provincial advisory committee were consulted.[30]

46. Between May 24, 2023 and June 2, 2023, the Minister received four legal opinions from the Attorney General regarding "Revisions to Policy 713," "proposed changes to Policy 713," and "liability for teachers." The Respondent has claimed solicitor/client privilege over these documents and the Applicant does not challenge these claims.[31]

47. On June 2, 2023, the Deputy Ministers approved a briefing note "containing advice to the Minister regarding Motion 47." The Respondent has asserted "Crown/Public Interest Privilege" over this document.[32]

48. A week later, on June 8, 2023, the Minister signed a revised Policy 713, making the changes to the self-identification provisions that were outlined in the scoping and proposed changes documents that were created under the

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[28] Lacenaire-McHardie Affidavit, para 15(b) **[MR, p 132]**
[29] Raiche-Tanner Affidavit, Exhibit "I", Correspondence dated May 23, 2023 from Julie Mason to Minister Hogan **[MR, p 72]**
[30] *Ibid*, Exhibit "D", Index of the Record, Item 5 **[MR, p 29]**
[31] *Ibid*, Exhibit "D", Index of the Record, Items 7-9, 13 **[MR, pp 29-30]**
[32] *Ibid*, Exhibit "D", Index of the Record, Item 13 **[MR, p 30]**

Minister's direction and oversight before the "review process" was initiated, announced, or completed.[33]

49. In the Legislature, the Minister indicated that the changes he made were responsive to provincewide consultations:

> *We consulted groups across the province, and students, parents, and teachers were present. There were a number of groups. We listened to them, we heard them, and we made the changes that were asked of us.*[34]

50. The Minister did not advise the Legislature that the specific changes he made were determined under his direction and oversight before the "review process" was initiated, announced, or completed. Nor is there evidence of such consultations in the unredacted portions of the Record.

C. The post-decision process and the Minister's second decision

51. On June 13, 2023, the Minister was briefed "regarding Motion 50." The Respondent has asserted "Crown/Public Interest Privilege" over this document.[35]

52. At the request of the Legislature, the CYA reviewed the Minister's changes to Policy 713. On August 15, 2023, the CYA tabled his findings in a report titled *On Balance, Choose Kindness: The Advocate's Review of Changes to Policy 713 and Recommendations for a Fair and Compassionate Policy*.

53. The CYA concluded that the changes were "pushed through to demonstrate rhetorical support for a principle, but failed to take the steps a government would take to approach a matter with competence and seriousness." He further concluded that the revised Policy 713 violated human rights and the *Canadian Charter of Rights and Freedoms*.[36]

54. The day before the CYA's report was tabled, the Deputy Minister, Anglophone Sector emailed the Minister a "Briefing Note containing advice to

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[33] *Ibid*, Exhibit "K", Notice of Application filed September 6, 2023, para 41 **[MR, pp 115-116]**
[34] Raiche-Tanner Affidavit, para 43 **[MR, p 116]**
[35] *Ibid*, Exhibit "D", Index of the Record, Item 14 **[MR, p 30]**
[36] *Ibid*, Exhibit "K", Notice of Application filed September 6, 2023, paras 46-47 **[MR, p 116]**

the Minister in response to recommendations made by the Child and Youth Advocate in response to the amendment of Policy 713." The Respondent has asserted "Crown/Public Interest Privilege" over this document.[37]

55. A few days later, the Minister was provided with legal advice and draft changes to Policy 713. The Respondent has claimed solicitor/client privilege over these documents and the Applicant does not challenge these claims.[38]

56. On August 18, 2023, the Deputy Minister, Anglophone Sector emailed the Minister a "Briefing Note containing advice to the Minister in response to recommendations made by the Child and Youth Advocate in response to the amendment to Policy 713" as well as a related "Draft chart with changes to Policy 713." The Respondent has asserted "Crown/Public Interest Privilege" privilege over this document.[39]

57. Three days later, the Minister was provided legal advice and opinion "regarding the changes to Policy 713 to be used for briefing the Minister." The Respondent has claimed solicitor/client privilege over these documents and the Applicant does not challenge these claims.[40]

58. On August 23, 2023, the Minister made further "clarifying" changes to the self-identification provisions in Policy 713. The Minister did not provide notice before making these further changes and did not solicit public input from subject-matter experts or those who would be directly affected by his decision.[41]

PART III – ISSUES

59. The issues to be determined by this Honourable Court on this motion are:

a) whether production of a further and better record should be required pursuant to Rule 69.10; and

b) whether the Applicant may file the Record with the Court.

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[37] *Ibid*, Exhibit "D", Index of the Record, Items 16-18 **[MR, p 31]**

[38] Raiche-Tanner Affidavit, Exhibit "D", Index of the Record, Items 7-9, 13 **[MR, pp 29-30]**

[39] *Ibid*, Exhibit "D", Index of the Record, Item 19 **[MR, p 31]**

[40] *Ibid*, Exhibit "D", Index of the Record, Items 20-21 **[MR, p 32**

[41] *Ibid*, para 49 **[MR, p 117]**

PART IV – LAW & ARGUMENT

A. The Court may order production to fix deficiencies in the Record

60. Rule 69.10 confers discretion to order production of a further and better record where that is required for the Court to fulfill its constitutionally guaranteed role on judicial review.[42] Rule 69.10 provides:

> The court may order that the person having custody or control of the record of the proceeding below or of any proceeding material to the review, produce at or before the hearing
>
> (a) the whole or any part of the record of that proceeding,
> (b) the whole or any part of the evidence in that proceeding, or
> (c) a certified copy of anything referred to in clauses (a) and (b).[43]

61. The record on judicial review normally consists of the evidence that was before the decision-maker.[44] The record varies with the context and may be broader where the application raises procedural unfairness or other grounds for review that require an expansion of the record. The general rule is that "what was before the decision maker is the record, and should be produced for judicial review, without a judge parsing the available grounds of judicial review to predetermine the potential relevance of certain material."[45]

62. The core question for completeness of the record is whether the reviewing court has the evidence needed to fulfill its constitutionally mandated supervisory role.[46] This role requires reviewing courts "to ensure that exercises of state power are subject to the rule of law" regardless of whether the decision

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[42] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 24, 67 [*Vavilov*]; *Dr MacMullin v Minister of Health*, 2022 NBQB 149 at para 15

[43] *Rules of Court*, NB Reg 82-73, Rule 69.10

[44] *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia,* 2020 SCC 20, para 52 [*BC Judges*]; *Nurses Association of New Brunswick v Commissioner of Official Languages for New Brunswick*, 2022 NBKB 242 at paras 63-64, citing *Mr. Shredding Waste Management Ltd. v. New Brunswick (Minister of Environment and Local Government),* 2004 NBCA 69; *New Brunswick Power Corporation v New Brunswick Energy and Utilities Board et al*, 2024 NBCA 44 at para 44 [*NB Power*]

[45] *British Columbia (Lieutenant Governor in Council) v Canada Mink Breeders Association*, 2023 BCCA 310 at paras 25, 76 [*Canada Mink Breeders*]; see also *Nurses Association of New Brunswick v Commissioner of Official Languages for New Brunswick*, 2022 NBKB 242 at paras 68-75

[46] *Canada Mink Breeders* at para 58

under review is adjudicative or legislative.[47] The rule of law includes "'executive accountability to legal authority' and protecting 'individuals from arbitrary [executive] action'".[48]

63. Courts are alive to the reality that withholding documents and limiting the record may effectively immunize a decision from meaningful judicial review and prevent the reviewing court from fulfilling its constitutional duty to enforce the rule of law.[49] Where the record is lacking an essential element, concerns about immunization of administrative decision-making arise:

> *In this Court, administrative decision-makers whose decisions cannot be fairly evaluated because of a complete lack of anything in the record on an essential element—situations where in effect the administrative decision-maker says on an essential element, "Trust us, we got it right"—have seen their decisions quashed: see, e.g., Leahy above at para. 137; Kabul Farms Inc. at paras. 31-39; Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada, 2006 FCA 337, 54 C.P.R. (4th) 15 at para. 17. The test would seem to be that if a particular evidentiary record—even if bolstered by permissible inferences and any evidentiary presumptions—disables the reviewing court from assessing reasonableness under an acceptable methodology (such as that contemplated in cases like Delios, above and Canada (Attorney General) v. Boogaard, 2015 FCA 150), the decision must be quashed.*[50]
>
> [emphasis added]

64. That duty, in this case, involves reviewing the entire process that led to the Minister's decisions (June 8, 2023 and August 23, 2023) as well as the preliminary decisions or recommendations that are subsumed by the final decision. These decisions are part of a continuing course of conduct linked by virtue of the *Education Act*, the Minister being responsible for each decision, the timing of the decisions, the commonality of facts and allegations related to each decision, and the relief sought.[51]

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[47] *Vavilov* at para 82; *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 10 [*Catalyst Paper*] (where the Court applied this principle to the judicial review of municipal bylaws)
[48] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128, at para 78 [*Tsleil-Waututh*]; see also *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72 at para 106 [*CCR*]
[49] *Tsleil-Waututh* para 79; see also *CCR* at para 106
[50] *Tsleil-Waututh* at para 79; see also *CCR* at para 106
[51] *China Mobile Communications Group Co, Ltd v Canada (Attorney General)*, 2023 FCA 202 at para 47

B. The briefing notes and related communication are the Minister's reasons for decision

65. As detailed, the Record does not include the Minister's rationale for initiating a review of a policy that had been passed in August 2020, following a years' long process of consultation and input, including from subject matter experts. Nor does the Record contain any reasons for the Minister's decisions amending the original August 2020 policy.

66. The Respondent has included several briefing notes and related communication in the List of Privileged Documents included in the Record.[52] In the absence of the production of reasons, the CCLA's position is that these documents are the Minister's reasons.[53]

67. Permitting the Minister to withhold his reasons would improperly immunize his decisions from meaningful judicial review.

68. Where a discretionary decision has the "potential for significant personal impact or harm" the duty of fairness will be greater along with the related requirement of responsive justification.[54] The extent to which a decision is important to an "affected person" influences the margin of appreciation reviewing courts afford the decision-maker and the intensity of the review process.[55]

69. For delegated legislative authority, at least in the context of municipal bylaws, formal reasons may not be required where the reasons for a decision can be "deduced from the debate, deliberations and the statements of policy that give rise to the bylaw."[56] Here, to the extent there was debate, deliberations or statements, the Respondent has insulated itself from review, asserting "Crown/Public Interest Privilege" over every briefing note.

70. Even if formal reasons were not required, there is an expectation that the "reasoning process that underlies the decision will not usually be opaque" and that allegations of "improper motive" or other "impermissible reason[s]" can

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[52] *Ibid*, Exhibit "D", Index of the Record **[MR, p 29]**
[53] See *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37
[54] *Vavilov* at para 133
[55] *Sharif v Canada (Attorney General)*, 2018 FCA 205 at para 11
[56] *Catalyst Paper* at para 29

be assessed based on the record.[57] This requires a "liberal approach" to the record on judicial review for legislative decisions.[58]

71. Regardless of whether the Minister was required to provide reasons, the Respondent's overly broad claims of "Crown/Public Interest Privilege", if left to stand, effectively insulate the Minister from this Court's constitutional supervisory duty. It is submitted that was never the intent of public interest immunity.

72. Further, even if these documents are not the Minister's reasons, the Respondent concedes they were before the Minister and part of the reasoning process that led to the decisions.[59] This makes them producible unless they are privileged.

C. Claims of "Crown/Public Interest Privilege"

73. The Respondent claims "Crown/Public Interest Privilege" over the briefing notes and related communication that constituted his reasons for decision. While it is often described as Crown privilege, it is not a class of privilege held by the Crown.[60] Rather, the Crown can resist production of otherwise compellable records where it establishes it is in the public interest to do so. It requires a "careful balancing of the competing public interests in confidentiality and disclosure" which "must be weighed with reference to a specific document in the context of a particular proceeding".[61]

74. The Applicant submits the Respondent does not meet the test for public interest immunity and the documents withheld on this basis must be produced.

Nature of public interest immunity

75. Where public interest immunity is asserted, the court must balance the competing interests, namely the particular public interest that the government

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[57] *Vavilov* at para 137
[58] *Ferguson Point Restaurants Inc v Vancouver Board of Parks and Recreation*, 2021 BCSC 1888 at para 62
[59] Lacenaire-McHardie Affidavit, para 16(d) **[MR, p 133]**
[60] See *Vancouver Airport Authority v. Commissioner of Competition,* 2018 FCA 24 at paras 42-62
[61] *BC Judges* at paras 99-100

seeks to protect against the need for full disclosure to ensure the proper administration of justice. Here, there is the added consideration that there is a public interest in the Court being able to properly perform its constitutionally mandated role in a judicial review of state action, particularly where *Charter* rights and human rights are engaged.

76. The two types of public interest immunity are explained in *The Law of Evidence in Canada*, 5th Edition:

> *15.50 Traditionally, government claims for immunity have fallen into two broad categories, which can be conveniently described as contents claims and class claims. In terms of evidentiary principles, there is no distinction between the two. The same balancing exercise is undertaken in each case. In practice, it is more likely that a contents claim for immunity will be successful than will a class claim, for it is with the former type of documents or information that more judicial deference will be accorded the executive's claim for immunity.*
>
> *15.51 Contents claims are based on the substance or actual content of the document or communication. A document may contain information that could compromise national security or detrimentally affect international intergovernmental relations if publicly disclosed …*[62]

77. For class claims, the claim of privilege is not based on the contents of the documents (as would be the case for documents affecting national security, for example), but rather it is based on the class to which they belong. A common class claim is Cabinet deliberations.[63] Originally, cabinet deliberations were considered to have absolute immunity once asserted, but that principle has long since eroded in favour of disclosure absent evidence it would interfere with the public interest.[64]

78. The onus is on the government to establish with evidence that the public interest in non-disclosure is so strong as to override the ordinary right and interest of a litigant to present a court with all relevant evidence.[65]

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[62] *The Law of Evidence in Canada*, 5th Edition, Sopinka, Lederman and Bryant, pp. 1133-1134
[63] *BC Judges* at paras 96-98
[64] *Carey v Ontario*, [1986] 2 SCR 637, at paras 51, 77 and 79 [*Carey*]; *Province of New Brunswick v. Enbridge Gas New Brunswick Limited Partnership et al*, 2016 NBCA 17 at para 53 [*Enbridge Gas*]; *BC Judges* at paras 99-100
[65] *BC Judges* at para 102

79. The Respondent's evidence on this motion does not articulate how the public interest would be harmed through the disclosure of relevant records. Instead, the Respondent advanced a generalized argument without particulars that a harm to the public would follow disclosure because the briefing notes were considered by the Minister before seeking the advice of Cabinet, the Minister's decisions were discussed by Executive Council, the briefing notes are relevant to other legal proceedings, and the changes to Policy 713 were contentious.[66]

80. The Applicant submits this is not sufficient. A similar argument was advanced – and rejected – by the Supreme Court of Canada in *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, the companion case to *BC Judges*:

> ***64*** *Here, the Secretary of the Executive Council's affidavit simply confirms the communication of the Attorney General's report to Cabinet and confirms that the Nova Scotia government was asserting public interest immunity over the entire report and solicitor-client privilege over parts of it. While it provides evidence that the Attorney General's report was provided to Cabinet, such an affidavit provides scant assistance in assessing a claim of public interest immunity.*[67]

81. There, the threshold was even higher as it arose in the context of a *Bodner* review (engaging principles of judicial independence). If such evidence was insufficient in that context to support a claim of public interest immunity, it falls well short in this context.

Procedure for assessing public interest immunity claims

82. The process for analyzing such claims normally involves the court reviewing each document at issue or proceeding on the basis of an affidavit describing the nature and relevance of each document. This arose in *Carey,* in which the Supreme Court of Canada considered a claim for class immunity over cabinet documents:[68]

> ***37*** *In assessing whether documents should be produced or not, the court could in some cases come to a decision one way or the other on*

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[66] Lacenaire-McHardie Affidavit, paras 29-34 **[MR, pp 138-139]**
[67] *(Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia,* 2020 SCC 21 at para 64
[68] *Carey,* at paras. 37-39, 109; see also *Enbridge Gas* at para 56; *M(A) v Ryan*, [1997] 1 SCR 157 at para 39; *Iser* at para 31

the basis of the Minister's statement alone, but in case of doubt the judge could inspect them.

38 *The public interest in the non-disclosure of a document is not, as Thorson J.A. noted in the Court of Appeal, a Crown privilege. Rather it is more properly called a public interest immunity, one that, in the final analysis, is for the court to weigh … The opinion of the Minister (or official) must be given due consideration, but its weight will vary with the nature of the public interest sought to be protected. And it must be weighed against the need of producing it in the particular case.*

39 *In the end, it is for the court and not the Crown to determine the issue. This was recently re-affirmed by this Court in Smallwood v. Sparling, [1982] 2 S.C.R. 686, to which I shall return. The opposite view would go against the spirit of the legislation enacted in every jurisdiction in Canada that the Crown may be sued like any other person. More fundamentally, it would be contrary to the constitutional relationship that ought to prevail between the executive and the courts in this country.*

…

109 *I am, therefore, of the view that the documents to be produced should be inspected by the trial judge to determine whether, on balancing the competing interests already described, they should be produced.*

[Emphasis added]

83. "[T]here may be situations where a court has an obligation to scrutinize documents if the judge feels disclosure of these might be harmful to the 'fabric of the state'…."[69]

84. In *BC Judges*, the Supreme Court of Canada considered the unique circumstances of that case, which involved compensation of provincial court judges. Principles of judicial independence required a more narrow review and thus a different test for when the reviewing court ought to inspect documents. However, the general principle was otherwise unchanged.[70] BC Courts also involved documents of Cabinet deliberations; the documents at issue here do not.

[69] *Enbridge Gas* at para 41 citing *Bennett v State Farm Fire and Casualty Company*, 2013 NBCA 4 at para 39
[70] *BC Courts* at para 102

85. The CCLA's position is that the Court should review the documents at issue given the nature of this case. Additionally, the Respondent has claimed public interest immunity over an entire briefing note even though the Respondent acknowledges that substantial portions of that document were released to the public.[71]

86. This type of overclaiming is concerning. The basis to claim public interest immunity for information already in the public realm is weak. Further, the contents of the document that are publicly available do not reveal a credible basis for public interest immunity. It is likely that same follows for the remaining withheld documents. At the very least, this demonstrates the need for the Court to review the documents and make an assessment as to whether they meet the criteria for a claim of public interest immunity.

Factors for analyzing public interest immunity claims

87. In *Enbridge,* the Court of Appeal distilled the factors for determining when the public interest in non-disclosure will override the ordinary right of a party to access relevant evidence:

a) The nature of the policy;

b) The contents of the documents;

c) The level of the decision-making process and the need to protect the confidences of Cabinet;

d) The importance of producing the documents to the administration of justice;

e) The time that has elapsed;

f) Any allegation of improper conduct by the executive branch of government towards a citizen (*Leeds*, at para. 25);

g) Whether the document relates to policy formation or implementation;

[71] Raiche-Tanner Affidavit, Exhibit "A", Briefing Note prepared by Beth Morrison dated October 22, 2019 **[MR, p 17];** Lacenaire-McHardie Affidavit, para 19 **[MR, p 134]**

h) Whether the document affects "present policy".[72]

88. This is not an exhaustive list, and depending on the circumstance, the Court may assign greater weight to some factors than others.

(a) The nature of the policy

89. Policy 713 was made pursuant to s. 6 of the *Education Act,* which allows the Minister to establish a policy related to the "health and well-being of pupils". According to the Respondent, the Minister was tasked with establishing "minimum standards" to ensure that students receive "a similar level of programs and services no matter where they live."[73] CCLA submits a policy affecting the health and well-being of students is of the nature where it is in the public interest to require disclosure. There is no public interest in non-disclosure in these circumstances.

90. This is not a case where the policy concerns "national security or diplomatic relations."[74] It is also not a case where the policy impacts "several sectors which affect the collective well-being of the Province and its citizens" or related economic and financial matters.[75] A general statement that education policy generally "affects the collective well-being of the Province and its citizens" is inadmissible argument and in any event, is insufficient to meet the Respondent's onus.[76]

91. In any event, in this case, the Minister was not making a general education policy. Rather, he was making decisions that were already contemplated by the *Act* and applied only to a vulnerable minority group: transgender and gender diverse students.[77] His decisions targeted students for differential treatment because of their enumerated and protected characteristics. It created a different a different level of services for these students than other students. The public interest in ensuring the Minister's

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[72] *Enbridge Gas* at para 47
[73] Lacenaire-McHardie Affidavit, para 32 **[MR p 138]**
[74] *Carey* at para 81
[75] *Enbridge Gas* at para 43
[76] Lacenaire-McHardie Affidavit, para 31 **[MR p 138]**
[77] See *Hansman v Neufeld*, 2023 SCC 14 at paras 84-89 (describing the "unique position of disadvantage" of transgender people in Canada)

decisions protect the health and well-being of those students strongly favours disclosure.

92. Further, on judicial review, the Minister is required to demonstrate that he considered the impact of the amendments on the *Charter* rights of those affected by policy.[78] In deciding whether the decisions were reasonable, the Court must determine if the Minister "'meaningfully' (*Vavilov*, at para. 128) addressed the *Charter* protections to 'reflect' the impact that its decision may have on the concerned group or individual (para. 133)."[79]

93. The Applicant submits the public interest in determining if the *Charter* rights of the students impacted by Policy 713 were adequately considered must outweigh any claim for class or content immunity, the nature of which is currently undefined.

(b) The contents of the documents

94. Neither the Court nor the Applicant has any information regarding the contents of the documents beyond the descriptions in the index to the Record and the one briefing note that was publicly released (albeit with redactions).

95. The documents at issue are not minutes of Cabinet meetings, or records of debate or policy discussion. They are briefing notes from Department staff.

96. The Respondent has indicated that the briefing notes were used by the Minister for planning the changes he decided to make to Policy 713 and in preparation for Cabinet discussions.[80] As such, the briefing notes cannot reveal the advice or opinions the Minister received from his Cabinet colleagues. Rather, the briefing notes are the very documents the Court must consider in determining if the decisions were reasonable.

97. There is no class privilege that applies to this type of advice. This strongly favours disclosure.

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[78] *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at paras 64-67
[79] *Commission scolaire* at para 68
[80] Lacenaire-McHardie Affidavit, para 28 **[MR, p 137]**

98. Further, publicly available documents show that the Respondent has previously disclosed parts of one document over which public interest immunity is now claimed.[81] A review of this partially disclosed document suggests that the Respondent is overclaiming privilege.

(c) The level of decision-making

99. Much of the case law on class claims deals with Cabinet privilege as a class. While the Minister may have consulted his Cabinet colleagues or the Executive Council, the decisions under review were not orders-in-council. The documents at issue are not Cabinet documents, they were prepared to assist the Minister in his decision-making process, which included consultation with Cabinet. As such, disclosure of the documents does not interfere with the working of Cabinet.

100. When the Minister made the decisions that are under review on this Application, he was exercising delegated authority conferred on him by the Legislature, namely s. 6 of the *Education Act*. He was not exercising a power held by the executive branch. If the Legislature wanted this delegated authority concerning the "health and well-being of pupils" to be exercised in confidence, it could have provided statutory guidance to that effect. This significantly reduces the "level" of decision-making.

101. The fact that the Minister consulted with his Cabinet colleagues, or the Executive Council, does not change the "level" of decision-making, nor are the documents withheld records of the Cabinet discussions. The *Act* delegated discretion for the decisions to the Minister *only* and while he could consult, he could not fetter that discretion by elevating the decision-making responsibility to Cabinet.

102. Assuming he was acting within the authority delegated to him by the *Education Act,* the Minister would have been asking for advice from the Department that would protect the "health and well-being of pupils," in this case, transgender and gender diverse students. It is difficult to conceive how

[81] Raiche-Tanner Affidavit, Exhibit "A", Briefing Note prepared by Beth Morrison dated October 22, 2019 **[MR, p 17];** Lacenaire-McHardie Affidavit, para 19 **[MR, p 134]**

disclosure of the documents creating “minimum standards” to support the “health and well-being of pupils” could detrimentally impact the public interest.

103. Department staff would be intent on providing candid and frank advice that protected the “health and well-being” of those students. It could not reasonably be argued that this advice would change if staff thought their advice would not be secret, nor is there evidence to support that conclusion.

104. Because these were decisions made by the Minister under authority delegated by legislation, not Cabinet decisions or regulations, this favours disclosure.

(d) The importance of the documents to the administration of justice

105. The Respondent acknowledges that the documents at issue were used by the Minister as part of his decision-making process.[82] As such, the documents at issue are central to this Application and the administration of justice. They are relevant to the procedural fairness, *vires*, and *Charter* grounds raised in the Application.

106. As argued above, judicial review is constitutionally guaranteed to protect the rule of law. Where there are no formal reasons, or when an administrative decision engages the Charter, as here, the Record becomes more important.

107. In addition, in *Commission scolaire,* the Supreme Court of Canada confirmed the nature of the evidence required when an administrative decision engages the *Charter:*

> ***68*** *The focus of judicial review is "on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (Vavilov, at para. 83). As is the case for any other decision, the context constrains "what will be reasonable for an administrative decision maker to decide" when it exercises its discretion in a manner that limits Charter protections (para. 89; Loyola, at para. 41; Trinity Western University, at para. 81). To be reasonable, a decision must reflect the fact that the decision maker considered the Charter values that were relevant to the exercise of its discretion (E. Fox-Decent and A. Pless, "The Charter and Administrative Law: Substantive Review", in C. M. Flood and P. Daly, eds., Administrative Law in Context (4th ed. 2022), 399, at p. 410). The decision must also show that the decision maker "meaningfully" (Vavilov, at para. 128)*

[82] Lacenaire-McHardie Affidavit, para 28 **[MR, p 137]**

addressed the Charter protections to "reflect" the impact that its decision may have on the concerned group or individual (para. 133).[83]

[emphasis added]

108. In this case, the Respondent is shielding important information about what gave rise to the Minister's decisions. While acknowledging that the documents related to that process were before the Minister when he made the decisions under review, the Respondent is attempting to keep the reasoning process secret from the CCLA, the Court, and the public.

109. If the Respondent's claim of secrecy is upheld, this Court will be prevented from fulfilling its constitutionally mandated supervisory role. The Court will not be able to properly determine if the Minister's decisions were consistent with the rule of law and properly informed by the *Charter*.

110. The Court will be unable to determine whether the rights and interests of affected transgender and gender diverse students were respected. The public will be left questioning if the Minister's decisions are consistent with the rule of law. This risks bringing the administration of justice into disrepute.

111. These are decisions that directly impact the health and well-being of a vulnerable group of students. The decisions engage their *Charter* and human rights on protected grounds. To effectively immunize the Minister's decision from judicial review by permitting the basis of those decisions to be withheld would seriously undermine the administration of justice.

(e) Time that has elapsed, (g) policy formation vs implementation, and (h) "present policy"

112. The CCLA acknowledges that only a short period of time has elapsed between when most of the documents were created and the Respondent's claim of privilege.

113. The Application concerns the Minister's decisions to change an existing policy that was established pursuant to authority delegated to him under the

[83] *Commission scolaire* at para 68

Education Act. This is not the exercise of policy formation by the executive branch.

114. The documents do relate to a "present policy". However, unlike in *Enbridge Gas*, there does not appear to be a "continuing evolution" of the policy.[84]

115. On balance, these factors do not outweigh the other considerations pointing strongly to disclosure, particularly where the Respondent has not identified any current public interest that will be affected by disclosure.

(f) Allegations of improper conduct

116. Public interest immunity is not a shield that protects wrongdoing by ministers in the execution of their office. It is also not designed to limit legal liability on the part of the Crown. Public interest immunity protects the *public* not the *government*. The existence of other legal proceedings where the documents at issue would be relevant is not a basis upon which to claim that the public interest would be injured by disclosure. Even if it was, disclosure of the documents in this proceeding does make them relevant and admissible in another. Nothing the Court does in this proceeding can or should change that.

117. As the Supreme Court of Canada explained in *Carey v Ontario*, allegations of improper conduct militate in favour of disclosure:

> *65 Gibbs A.C.J. made another significant point. He underlined that "a rule of evidence designed to serve the public interest" should not "become a shield to protect wrongdoing by ministers in the execution of their office" (p. 532). Stephen J. elaborated on this issue. In some cases, he observed, it is important that disclosure be given to support the very purpose that non-disclosure is intended to support, i.e., the proper functioning of government. In that case, the charge of misbehaviour in the conduct of government operations made it important in the public interest that the documents be revealed.*
>
> *…*
>
> *84 The appellant here alleges unconscionable behaviour on the part of the government. As I see it, it is important that this question be aired not only in the interests of the administration of justice but also for the purpose for which it is sought to withhold the documents, namely, the proper functioning of the executive branch of government. For if there*

[84] *Enbridge Gas* at para 50

> *has been harsh or improper conduct in the dealings of the executive with the citizen, it ought to be revealed. The purpose of secrecy in government is to promote its proper functioning, not to facilitate improper conduct by the government. This has been stated in relation to criminal accusations in Whitlam, and while the present case is of a civil nature, it is one where the behaviour of the government is alleged to have been tainted.*[85]
>
> [emphasis added]

118. The Application alleges three forms of improper conduct on the part of the Minister:

a) breach of the duty of fairness by failing to consult with subject-matter experts, displaying a closed mind, reasonable apprehension of bias, and/or bad faith, and engaging in a "review process" for improper purposes;
b) non-compliance with legislated rights in the *Education Act* and *Human Rights Act* that protect the "health and well-being" of students and prohibit discrimination; and
c) failure to consider applicable *Charter* rights when exercising delegated administrative discretion.

119. The Record reveals a foundation for these allegations. It shows that the decision to change the self-identification provisions in Policy 713 was made before the "review process" was initiated, announced, or completed and that at the Minister's direction and oversight predetermined policy changes were developed that he adopted.

120. It shows that the Minister did not follow the normal process for 700 series policies and did not consult with any subject matter experts in the health and well-being of transgender and gender diverse students. The CYA described the process as "broken and incoherent".

121. It shows a lack of consideration by the Minister of the *Education Act*, *Human Rights Act*, or *Charter*.

122. What makes this improper conduct even more concerning is that it was undertaken in the context of decisions that negatively impacted a highly vulnerable minority group. This strongly favours disclosure.

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[85] *Carey* at paras 65, 84

Summary on Enbridge Factors

123. The Applicant submits that pursuant to *Carey* and *Enbridge*, the proper process is for the Respondent to submit the withheld documents to the Court under seal, and the Court should review the documents to determine if the documents, or a portion of them, were properly withheld on the basis of public interest immunity.

124. To reach that conclusion, the Respondent must prove that the public interest being protected outweighs the presumption of full disclosure in the circumstances of this case.

125. The Applicant submits the proper application of the *Enbridge* factors clearly points to disclosure. The government has not identified any public interest that could be affected by disclosure, and the documents are not captured by Cabinet privilege, because they were not decisions of Cabinet.

126. On the other hand, the Minister was required to make the decisions in furtherance of the health and well-being of students. The decisions impact their *Charter* and human rights, as well as their rights under the *Education Act*.

127. In these circumstances, the public interest dictates disclosure, not the opposite. Where *Charter* and human rights are engaged, the public's interest can only be served by ensuring the Respondent produces the documents that go to the very core of the issues this Court must decide: did the Respondent properly consider the rights and interests of the students impacted by the decisions?

128. It cannot be said that the public interest is served by the decisions impacting the "health and well-being of pupils" being shielded from effective review by this Court.

D. Redactions to the Record

129. In addition to the documents that were withheld on the basis of privilege, the Record also includes documents where the Respondent has unilaterally redacted information on the basis that it is "irrelevant":

a) Correspondence dated May 23, 2023 from Julie Mason to Minister Hogan. The reply is redacted as "irrelevant", without further particulars.[86]
b) Undated letter from member of the public to the CYA, with a number of redactions marked "irrelevant", without further particulars.[87]

130. While the Respondent has not filed a motion for confidentiality in relation to these documents, or any portion of the Record, the Applicant does not oppose redaction of information that could identify a member of the public who is not writing in their capacity as a government official or employee.

131. However, the Applicant submits the production of the Record is not otherwise subject to a test for relevance, as might be the case for disclosure in a civil action for example.

132. To ensure the open court principle, the starting point is that any document that was before the Minister (and the Respondent's own index states it was), forms part of the Record and must be produced, unless it is the subject of a valid claim of privilege or immunity.

133. With the sole exception of personally identifying information of individuals who are not government employees or officials, the unredacted Record must be produced.

E. The "review process" parts of the Record are incomplete

134. The Application contends that the Minister breached the duty of fairness by, amongst other things: (1) failing to consult with subject-matter experts, and (2) displaying a closed mind, reasonable apprehension of bias, and/or bad faith, including by engaging in a "review process" for improper purposes.[88]

135. Where the Record on judicial review of an order-in-council results in allegations of bad faith or improper purpose, an applicant "can apply for additional production of evidence extraneous to the record in order to advance their argument" provided they can "point to some evidence extraneous to the

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[86] Raiche-Tanner Affidavit, Exhibit "I" **[MR, p 72]**
[87] *Ibid*, Exhibit "J", **[MR, pp 74-79]**
[88] *Ibid*, para 56 **[MR, p 120]**

record to substantiate their belief."[89]In this case, the Record reveals two documents that were before the Minister, which substantiate the CCLA's procedural fairness allegations and request for further and better production:

a) An undated and unauthored "Review of Policy 713 Scoping Document"; and
b) An undated and unauthored document titled "Proposed changes to policy 713 – Sexual Orientation and Gender Identity."[90]

136. The Respondent has indicated that these documents were prepared at the direction and oversight of the Minister.[91]The documents show that the Minister was provided with predetermined changes to the self-identification provisions in Policy 713 "as of May 17", before the "review process" was initiated, announced, or completed.[92]

137. But the Record does not show who developed these changes, when they were developed, why they were developed, or who was consulted as part of the development process.

138. The Record further reveals that the process leading to these predetermined changes was irregular. The Department had not received complaints from the public concerning Policy 713, had no benchmarks for evaluating whether Policy 713 required changing, and had not formally engaged the DECs. The Respondent did not follow its established review and consultation process for 700 series policy changes.[93]

139. But the Record does not show why the Minister decided to instigate this irregular "review process" or why the Respondent's normal process for reviewing 700 series policy changes was not followed.

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[89] *Canada Mink Breeders* at paras 76-77
[90] Raiche-Tanner Affidavit, Exhibit "G", An undated document entitled "Review of Policy 713 Scoping Document" **[MR, pp 66-67]**; *Ibid*, Exhibit "H", Correspondence dated May 23, 2023 from Ryan Donaghy to Minister Hogan **[MR, pp 69-70]**
[91] Lacenaire-McHardie Affidavit, para 15 **[MR p 132]**
[92] Raiche-Tanner Affidavit, Exhibit "G", An undated document entitled "Review of Policy 713 Scoping Document" **[MR, pp 66-67]**; *Ibid*, Exhibit "H", Correspondence dated May 23, 2023 from Ryan Donaghy to Minister Hogan **[MR, pp 69-70]**
[93] *Ibid*, Exhibit "I", Correspondence dated May 23, 2023 from Julie Mason to Minister Hogan **[MR, p 72]**

140. In these circumstances, documents related to the decision to "review" Policy 713, the "concerns" that prompted this "review," and the development of predetermined changes before the "review" was initiated, announced, or completed, are relevant and producible on this Application.

141. However, the Respondent appears to have only produced records "before him [the Minister] as part of his decision to amend the second version of Policy 713...."[94] This suggests there are withheld records related to the Minister's decision to instigate a "review process" for Policy 713 and his first decision to change Policy 713, both of which are relevant to the Application. Both the June 8, 2023 and August 23, 2023 decisions are under review in this Application. Any documents not produced in relation to the first decision must also be produced (or at least indexed such that the parties and Court determine if they ought to be disclosed).

142. Assuming they exist, such documents relate to the procedural fairness and *vires* grounds raised by the Application.

PART V – RELIEF SOUGHT

143. CCLA respectfully requests the following relief:

a) An Order for production of a further and better record as specified in the Notice of Motion;

b) An Order permitting the Applicant to file the Record that was produced by the Respondent;

c) No costs be awarded for or against any party regardless of the outcome of this motion; and

d) Such further and other relief as this Honourable Court deems just and reasonable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated May 8, 2024

Sheree Conlon KC

Benjamin Perryman

Counsel for the Applicant, CCLA

[94] Lacenaire-McHardie Affidavit, paras 13, 17 **[MR, pp 131-132]**

PART VI – LIST OF AUTHORITIES

Statutes and Regulations

1. *Canadian Charter of Rights and Freedoms*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss 2(b), 7, and 15

2. *Education Act*, SNB 1997, c E-1.12, ss 1, 1.1, 6(b.2), 27, 28, 48

3. *Human Rights Act*, RSNB 2011, c 171, ss 2.1, 3, 6

4. *Rules of Court*, NB Reg 82-73, Rules 69.10

Jurisprudence

5. *(Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia,* 2020 SCC 21

6. *Bennett v State Farm Fire and Casualty Company*, 2013 NBCA 4

7. *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia,* 2020 SCC 20

8. *British Columbia (Lieutenant Governor in Council) v Canada Mink Breeders Association*, 2023 BCCA 310

9. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

10. *Canada (Public Safety and Emergency Preparedness) v Khalil*, 2014 FCA 213

11. *Carey v Ontario*, [1986] 2 SCR 637

12. *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 10

13. *China Mobile Communications Group Co, Ltd v Canada (Attorney General)*, 2023 FCA 202 at para 47

14. *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at para 66

15. *Dr MacMullin v Minister of Health*, 2022 NBQB 149

16. *Ferguson Point Restaurants Inc v Vancouver Board of Parks and Recreation*, 2021 BCSC 1888

17. *Hansman v Neufeld*, 2023 SCC 14

18. *Hartwig v Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74

19. *Iser v Canada (Attorney General)*, 2017 BCCA 393

20. *M(A) v Ryan*, [1997] 1 SCR 157

21. *New Brunswick Power Corporation v New Brunswick Energy and Utilities Board et al*, 2024 NBCA 44

22. *Nurses Association of New Brunswick v Commissioner of Official Languages for New Brunswick*, 2022 NBKB 242

23. *Province of New Brunswick v. Enbridge Gas New Brunswick Limited Partnership et al*, 2016 NBCA 17

24. *Sharif v Canada (Attorney General)*, 2018 FCA 205

25. *Sketchley v Canada (Attorney General)*, 2005 FCA 404

26. *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128

27. *Vancouver Airport Authority v. Commissioner of Competition,* 2018 FCA 24

Secondary Sources

28. *The Law of Evidence in Canada*, 5th Edition, Sopinka, Lederman and Bryant, pp. 1133-1134

Excerpts of Statutes and Rules

Education Act, SNB 1997, c E-1.12

Purpose

1.1The purpose of this Act is to recognize

(a) that the school system is founded on the principles of free public education, linguistic duality and the inclusion of all pupils, and

(b) the importance of the cultures and languages of the Mi'kmaq and Wolastoqey peoples.

Objet

1.1 La présente loi a pour objet de reconnaître ce qui suit :

a) les principes fondamentaux du système scolaire, soit la gratuité de l'instruction publique, la dualité linguistique et l'inclusion de tous les élèves;

b) l'importance des cultures et des langues des peuples mi'kmaq et wolastoqey.

Powers and duties of the Minister

6 The Minister

(a) shall establish educational goals and standards and service goals and standards for public education in each of the education sectors established under subsection 4(1),

(a.1) shall, for each of the education sectors established under subsection 4(1), provide a provincial education plan,

(b) may prescribe or approve

(i) instructional organization, programs, services and courses, and evaluation procedures for such instructional organization, programs, services and courses,
(ii) pilot, experimental and summer programs, services and courses, and
(iii) instructional and other materials and equipment for use in the delivery of any program, service, course or evaluation procedure under this Act,

Devoirs et pouvoirs du ministre

6 Le minister

a) doit établir des objectifs et des normes en matière d'éducation et en matière de prestation de services applicables à la prestation de l'instruction publique dans chacun des secteurs d'éducation établis au paragraphe 4(1),

a.1) doit, pour chacun des secteurs d'éducation établis en vertu du paragraphe 4(1), dresser un plan d'éducation provincial,

b) peut prescrire ou approuver

(i) l'organisation de l'enseignement, les programmes, les services et les cours, ainsi que les méthodes d'évaluation de l'organisation scolaire, des programmes, des services et des cours,
(ii) les programmes, les services et les cours pilotes, expérimentaux et d'été, et
(iii) le matériel pédagogique et autre matériel et équipement nécessaires à la prestation de tout programme,

(b.1) may conduct tests and examinations in any grade or level,

(b.2) may establish, within the scope of this Act, provincial policies and guidelines related to
(i) public education,
(ii) the health and well-being of pupils and school personnel,
(iii) the transportation of pupils,
(iv) school infrastructure, and
(v) investigations with respect to allegations of serious professional misconduct, and

(c) may approve or recommend books and other learning resources for school libraries.

service, cours ou méthodes d'évaluation en vertu de la présente loi,

b.1) peut, à tous les niveaux scolaires, faire passer des évaluations et des examens,

b.2) peut, dans le cadre de la présente loi, établir des politiques et des lignes directives provinciales relatives
(i) à l'instruction publique,
(ii) à la santé et au bien-être des élèves et du personnel scolaire,
(iii) au transport des élèves,
(iv) aux infrastructures scolaires, et
(v) aux enquêtes portant sur des allégations d'inconduite professionnelle grave, et

c) peut approuver et recommander des manuels et autres ressources éducatives pour les bibliothèques scolaires.

Human Rights Act, RSNB 2011, c 171

Prohibited grounds of discrimination

2.1 For the purposes of this Act, the prohibited grounds of discrimination are

…

(m) sexual orientation,
(n) gender identity or expression,

…

Motifs de distinction illicite

2.1 Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur :

…

m) l'orientation sexuelle;
n) l'identité ou l'expression de genre;

…

This Act binds the Crown in right of the Province

3 This Act binds the Crown in right of the Province.

Obligation de la Couronne du chef de la province

3 La présente loi lie la Couronne du chef de la province.

Discrimination in accommodation and services

6(1) No person, directly or indirectly, alone or with another, by himself, herself or itself or by the interposition of another, shall, based on a prohibited ground of discrimination,

(a) deny to any person or class of persons any accommodation, services or facilities available to the public, or

(b) discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public.

Discrimination en matière d'hébergement et de services

6(1) Il est interdit à toute personne, directement ou indirectement, seule ou avec une autre personne, personnellement ou par l'intermédiaire d'une autre personne, pour un motif de distinction illicite :

a) de refuser à une personne ou à une catégorie de personnes l'hébergement, les services et les installations à la disposition du public;

b) de faire preuve de discrimination envers une personne ou une catégorie de personnes quant à l'hébergement, aux services et aux installations à la disposition du public.

***Rules of Court*, NB Reg 82-73**

69.10 **Order for Production**

The court may order that the person having custody or control of the record of the proceeding below or of any proceeding material to the review, produce at or before the hearing

(a) the whole or any part of the record of that proceeding,

(b) the whole or any part of the evidence in that proceeding, or

(c) a certified copy of anything referred to in clauses (a) and (b).

69.10 **Ordonnance de production**

La cour peut ordonner à la personne ayant en sa possession ou sous son contrôle le dossier de première instance ou de toute autre instance pertinente au recours en révision, de produire à l'audience ou avant celle-ci

a) la totalité ou une partie du dossier de cette instance,

b) la totalité ou une partie de la preuve présentée dans cette instance ou

c) une copie certifiée conforme de tout article visé aux alinéas a) et b).

THE LAW OF EVIDENCE IN CANADA

FIFTH EDITION

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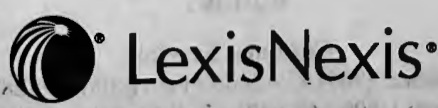

basis. I see no reason why the proper functioning of government may not include a public interest in maintaining the confidentiality of discussions between government lawyers and those government officials they advise.[88]

§15.49 In the criminal context, the accused's right to a fair hearing and to make full answer and defence can require the disclosure of the information.[89] In *R. v. Stinchcombe*,[90] the Supreme Court of Canada reviewed the policy considerations concerning disclosure in criminal cases and concluded that there was a duty on the Crown to disclose all relevant information to an accused. The Court recognized the "overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence".[91] This common law right to full disclosure is now guaranteed by s. 7 of the *Charter* as a principle of fundamental justice. A decision by the Crown not to disclose all relevant evidence to an accused is reviewable by the courts and the Crown must bring itself within any recognized exception, such as the identity of an informer.

B. Contents Claims

§15.50 Traditionally, government claims for immunity have fallen into two broad categories, which can be conveniently described as contents claims and class claims. In terms of the evidentiary principles, there is no distinction between the two. The same balancing exercise is undertaken in each case. In practice, it is more likely that a contents claim for immunity will be successful than will a class claim, for it is with the former type of documents or information that more judicial deference will be accorded the executive's claim for immunity.

§15.51 Contents claims are based on the substance or the actual content of the document or communication. A document may contain information that could compromise national security[92] or detrimentally affect international or

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88 *Ibid.*, at 462 (D.L.R.); see also *R. v. Gray* (1993), 79 C.C.C. (3d) 332, [1993] B.C.J. No. 265 (B.C.C.A.), leave to appeal refused [1993] S.C.C.A. No. 53, 83 C.C.C. (3d) vi (S.C.C.).

89 *R. v. Meuckon* (1990), 57 C.C.C. (3d) 193, [1990] B.C.J. No. 1552 (B.C.C.A.); *Tatham v. Canada (National Parole Board)* (1990), 77 C.R. (3d) 209, [1990] B.C.J. No. 989 (B.C.S.C.); *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, [1991] S.C.J. No. 83 (S.C.C.); *R. v. Chaplin*, [1995] 1 S.C.R. 727, [1994] S.C.J. No. 89 (S.C.C.).

90 *Ibid.*

91 *Ibid.*

92 As in *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624, [1942] 1 All E.R. 587 (H.L.), and *Goguen v. Gibson*, [1983] 2 F.C. 463, [1984] F.C.J. No. 13 (F.C.A.); *Asiatic Petroleum Co. v. Anglo Persian Oil Co.*, [1916] 1 K.B. 822, [1916-17] All E.R. 637 (C.A.); *R. v. Governor of Brixton Prison; Ex parte Soblen v. Secretary of State; Ex Parte Lees*, [1941] 1 K.B. 72 (C.A.); *Beatson v. Skene* (1860), 5 H. & N. 838; *Home v. Bentinck* (1820), 2 Brod. & Bing. 130 (Ex. Ch.); and see s. 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.

intergovernmental relations,[93] if publicly disclosed. In these types of cases, the court will generally give substantial weight to the opinion of the Minister or official.[94]

§15.52 An example of significant weight being given to the Minister's opinion is the case of *Goguen v. Gibson*.[95] The appellants sought disclosure from the Deputy Solicitor General to assist in their defence on charges of theft and breaking and entering to commit theft of information contained in documents and files of the security service of the RCMP. The appellants' defence was that they had been engaged on RCMP business in the taking of the tapes alleged to have been stolen. The Deputy Solicitor General's filed affidavit indicated that disclosure:

> ... would identify or tend to identify (a) human sources and technical sources of the Security Service; (b) targets of the Security Service; (c) methods of operation and the operational and administrative policies of the Security Service, including the specific methodology and techniques used in the operations of the Security Service and in the collection, assessment and reporting of security intelligence; and (d) relationships that the Security Service maintains with foreign security and intelligence agencies and information obtained from said foreign agencies.[96]

A secret affidavit explained in more detail how national security and international relations could be affected by the particular documents. The trial court refused to inspect the documents on the basis that it could make a decision that the public interest in immunity outweighed the public interest in disclosure without such an inspection. The appeal court agreed with this approach.

C. Class Claims

§15.53 The class claim for immunity does not depend on the actual content of the communication, but on the fact that it is a document or communication of a particular type, such as a report of Cabinet or other high-level official or a report of a police informer. Two rationales have been expressed to support the class claim, those being the candour argument and the interference or harassment argument.

1. The Candour Argument

§15.54 Government often argues that disclosure of a certain class of communications would have a chilling effect on the candour and frankness of discussion and debate between members of the government. Particularly at high

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93 *Goguen v. Gibson, ibid.*

94 See also *Carey v. R.*, [1986] 2 S.C.R. 637, at 653, [1986] S.C.J. No. 74 (S.C.C.).

95 [1983] 2 F.C. 463, [1984] F.C.J. No. 13 (F.C.A.).

96 *Ibid.*, at 467 (F.C.).