



THE CHARTER CHALLENGE

Ontario Justice Education Network

CASE SCENARIO Fall 2014

Farrah Shaw (by her litigation guardian)

v.

Attorney General (Ontario)

*This OJEN Charter Challenge Case Scenario has been adapted from the Official Problem used at the **2010 Wilson Moot**. The Wilson Moot was conceived to honour the outstanding contribution to Canadian law made by the late Honourable Bertha Wilson and, in the spirit of this contribution, to promote justice for those disempowered within the legal system. The goal of The Wilson Moot is to explore legal issues concerning women and minorities, and thereby promote the education of students and the legal profession in these areas of pressing concern. OJEN would like to thank the organizers of the Wilson Moot for letting it adapt this law school resource for a high school audience.*

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Ontario Superior Court of Justice

Date: 20141709

Court File No: 20737-06

BETWEEN:**Farrah Shaw (BY HER LITIGATION GUARDIAN)****Applicant****and****ATTORNEY GENERAL (ONTARIO)****Respondent****REASONS FOR DECISION****Mezody J.****Introduction**

[1] Can parents or guardians withdraw their child from high school sexual health classes against the child's wishes? For the reasons that follow, I conclude they cannot.

[2] In early 2012, the Ontario Legislature amended its human rights legislation. The *Ontario Human Rights Act* (the "Act"), as amended, contains the following provision:

Notice to parent or guardian

17.1(1) A board as defined in the *School Act* shall provide notice to a parent or guardian of a student where courses of study, educational programs or instructional materials, or instruction or exercises, prescribed under that Act include subject-matter that deals primarily and explicitly with religion, human sexuality or sexual orientation.

(2) Where a teacher or other person providing instruction, teaching a course of study or educational program or using the instructional materials referred to in subsection (1) receives a written request signed by a parent or guardian of a student that the student be excluded from the instruction, course of study, educational program or use of instructional materials, the teacher or other person shall in accordance with the request of the parent or guardian and without academic penalty permit the student

(a) to leave the classroom or place where the instruction, course of study or educational program is taking place or the instructional materials are being used for the duration of the part of the instruction, course of study or educational program, or the use of the instructional materials, that includes the subject-matter referred to in subsection (1), or

(b) to remain in the classroom or place without taking part in the instruction, course of study or educational program or using the instructional materials.

(3) This section does not apply to incidental or indirect references to religion, religious themes, human sexuality or sexual orientation in a course of study, educational program, instruction or exercises or in the use of instructional materials.

[3] In compliance with the new law, Thames River Collegiate sent out a notice to all parents on the first day of school in September 2013. The notice stated that all students in grades 9-12 would be receiving comprehensive sexual health education classes. Farrah Shaw's parents exercised their right under s. 17.1 of the Act and informed the school that Farrah would not be participating in the classes. Farrah told her teacher she wished to remain in the classes. Her teacher sent her to the principal's office. The principal told Farrah she was not allowed to participate over her parents' objections.

[4] Through a litigation guardian, Farrah brought an application against the Attorney General of Ontario seeking declarations that:

(i) section 17.1 of the Act infringes section 15(1) of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) because it discriminates against children based on their dependent status; and

(ii) section 17.1 of the Act infringes section 7 of the *Charter* because it deprives children of life in a manner not in accordance with the principles of fundamental justice.

[5] For the reasons that follow, I hold that section 17.1 does not infringe section 15(1) of the *Charter*. However, I hold that section 17.1 infringes section 7 of the *Charter* and cannot be saved by section 1.

Facts

[6] In 2013, Farrah Shaw, the applicant, was 14 years old and attending ninth grade at Thames River Collegiate. In compliance with section 17.1 of the Act, Thames River Collegiate sent a notice to all parents on the first day of school in September 2013. The notice stated that all students in grades 9-12 would be receiving comprehensive sexual health education classes as part of their health and physical education class. A copy of the notice sent to parents is attached to these reasons at Schedule “A”.

[7] After receiving the notice, Farrah’s parents filled in, signed and returned the request to excuse Farrah from the sexual health classes to the health teacher at the school, Aron Laval. In a discussion with Mr. Laval at the school’s curriculum night, Farrah’s parents explained that they thought the sexual health curriculum was not age-appropriate and touched on subjects – including sex toys and anal sex – which were inappropriate for high school students.

[8] Mr. Laval explained to Farrah's parents that the Thames River Public Health Department had confirmed that there was a significant outbreak of sexually transmitted infections ("STIs") in Thames River, including an exceptionally high level of HIV infections. There had also been three outbreaks of STIs at Thames River Collegiate over the previous four years – almost 100 cases of chlamydia or gonorrhoea had been reported from the school's population of about 300 students from 2008-2012.

[9] Mr. Laval further explained that young women were disproportionately affected in these outbreaks, making up about 60% of the reported cases. Mr. Laval stated that Thames River Public Health had advised that the reported STIs had been linked to various forms of sexual conduct, including vaginal, oral and anal sex. Mr. Laval encouraged Farrah's parents to reconsider their request to exclude their daughter from the classes, but they reiterated their concerns about the curriculum and required that she be excused.

[10] On the day of the first sexual health education lesson, Mr. Laval asked Farrah (along with three other students whose parents had objected to their participation in the comprehensive sexual health classes) to leave the classroom and report to the library for independent study. Farrah told Mr. Laval that she wished to remain in class, as she disagreed with her parents' views on the matter. Mr. Laval told Farrah he was bound by her parents' request and that if she would not report to the library she would have to go to the principal's office.

[11] Farrah went to speak with the principal, Lisette Bauer. In speaking with Ms. Bauer, Farrah explained that she felt she was entitled to a full education, comparable with her peers,

and that sexual health classes were important for her overall health and well-being. Ms. Bauer reiterated that the school could not permit Farrah to participate over her parents' objections, as to do so might violate their human – and parental – rights.

[12] Farrah is sexually active and was treated for chlamydia once in 2012. Farrah has had several sexual partners and engages in various sexual practices. Specifically, Farrah has engaged in, and expresses an intent to continue to engage in, oral and vaginal sex with her current boyfriend. She describes herself as “sexually curious”.

[13] In addition to the facts found above, I make the following factual findings based on the expert testimony I heard at trial:

- Thames River Collegiate is a public school governed by a school “board” as defined in the Ontario *Schools Act*.
- Two major Canadian-wide studies on risk of HIV and STIs completed by the Council of Ministers of Education (CMEC), being the 1989 Canada Youth and AIDS Study (CYAS) and the 2003 Canadian Youth, Sexual Health and HIV/AIDS Study, demonstrated that:
 - o knowledge among youth about sexual health declined between 1989 and 2003;
 - o school is the main source of sexual health information for youth between grades 7 and 11;
 - o fears about HIV, STIs or pregnancy are not cited by youth as reasons not to have sex;
 - o the proportion of students reporting that they had multiple sexual partners declined between 1989-2003;
 - o the proportion of students reporting that they were virgins or abstained from sex increased between 1989-2003;

- six percent of grade 9 girls and eight per cent of grade 11 girls reported that they had been pregnant;
 - approximately 40% of youth in grade 11 are sexually active; and
 - except for very young students, self-esteem and parental relationships are not correlated with higher or lower levels of sexual activity.
- Youth who receive so-called “abstinence-only” or no sexual health education are more likely to engage in unprotected sexual acts than their peers who receive comprehensive sexual health education.
 - Youth who do not receive comprehensive sexual health education are more likely to contract a sexually transmitted infection or have an unplanned pregnancy than their peers who receive comprehensive sexual health education.
 - Youth who do not receive comprehensive sexual health education are less likely to be aware of their legal rights – including to health care and access to birth control without their parents’ knowledge or consent. They are also less likely to seek treatment for STIs than their peers who receive comprehensive sexual health education.
 - On average, youth who receive comprehensive sexual health education participate in sexual intercourse 3 months earlier than their peers who do not receive comprehensive sexual health education.
 - While some STIs may be cured with medications, potential long term effects of STIs – even those that have been treated – can include infertility, tubal pregnancy, fetal and infant demise, chronic pelvic pain, and cervical cancer.
 - HIV is not considered curable, but can be managed with medication.
 - In some cases, HIV, or complications related thereto, can be fatal.
 - Young men having sex with men and young heterosexual women are at an elevated risk of HIV infection.
 - Youth located in non-urban settings, such as the residents of Thames River, face increased difficulties in accessing accurate sexual health information outside of a school setting, as compared to their urban counterparts.
 - An absence of comprehensive sexual health education has an increased negative impact on gay, lesbian, bisexual and transgendered youth.

- In 2012, there was an outbreak of STIs in the Thames River area – including three newly reported cases of HIV.
- In 2012, there was an outbreak of STIs in the student population of Thames River Collegiate. Of the students affected in the outbreak, 63% were young women between the ages of 13 and 18 and 37% were young men between the ages of 13-18. There was one reported case of HIV in the Thames River Collegiate outbreak.

Legal Issues

[14] The disposition of this case requires me to address four legal issues:

(1) Does section 17.1 of the Act infringe Farrah’s right to equality under section 15(1) of the *Charter*?

(2) Does section 17.1 of the Act deprive Farrah of any of the interests protected by section 7 of the *Charter*?

(3) If the answer to question (2) is yes, is the deprivation in accordance with the principles of fundamental justice enshrined in section 7 of the *Charter*?

(4) If section 17.1 of the Act infringes either section 15(1) or section 7, is the infringement justified under section 1 of the *Charter*?

Issue One: Does section 17.1 of the *Ontario Human Rights Act* infringe Farrah’s right to equality under section 15(1) of the *Charter*?

[15] Section 15(1) of the *Charter* protects against discrimination. It reads:

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

[16] The test for determining if there is a section 15(1) violation was set out by the Supreme Court of Canada (SCC) in *R. v. Kapp*, 2008 SCC 41 at paras. 40-41, and more recently re-

affirmed in *Quebec (Attorney General) v. A.*, 2013 SCC 5 at para. 324. To determine whether a law discriminates, two questions must be asked: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by, for example, perpetuating prejudice or stereotyping?^a

[17] Despite counsel's able argument, I do not accept that "dependent status" is an analogous ground for the purposes of section 15(1) of the *Charter*. In making this determination, I am to consider whether recognition of "dependent status" as an analogous ground would further the purposes of section 15(1): *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, 1999 CanLII 687 (SCC). These purposes are, as stated at para. 51 of the SCC decision in *Law v. Canada (Minister of Employment & Immigration)*, 1999 CanLII 675:

[T]o prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect, and consideration.

[18] I do not accept that one's status as a dependent child of their particular parents is an analogous ground. Therefore, the first branch of the section 15(1) test is not met, and I have no need to analyze the second branch. In my view, section 17.1 does not discriminate against Farrah.

Issue Two: Does section 17.1 of the *Ontario Human Rights Act* deprive Farrah of any of the interests protected by section 7 of the *Charter*?

^a In her judgment in *Quebec v. A.*, Justice Abella of the Supreme Court of Canada was clear, at paragraph 325 of her decision, that while prejudice and stereotyping are valuable indicia of discrimination, they are not discrete elements of the test that a claimant is required to prove in order to succeed on a section 15(1) claim.

[19] Section 7 of the *Charter* provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[20] The first step in the section 7 inquiry is to ask if the impugned law engages the applicant's life, liberty, or security of the person interest. To make this determination, I must assess whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests: *Blencoe v. B.C. (Human Rights Commission)*, 2000 SCC 44. I find that section 17.1 engages Farrah's interest in life: by not receiving comprehensive sexual health education, Farrah's health, and indeed her life, is at risk. This is particularly so given the prevalence of STIs in Farrah's community and the fact that she is sexually active.

[21] Although the actions of Farrah's parents are not as extreme in this case as the actions of the parents in *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 – a case in which the parents declined to consent, for religious reasons, to a life-saving blood transfusion – I am satisfied that the risks posed to Farrah as a result of her parents' refusal to permit her to access the only available source of reliable sexual health information are sufficiently dire to engage section 7 of the *Charter*. Section 17.1 deprives Farrah of her section 7 interest in life.

Issue Three: If the answer to question (2) is yes, is the deprivation in accordance with the principles of fundamental justice enshrined in section 7 of the *Charter*?

[22] Having found that section 17.1 of the *Ontario Human Rights Act* engages section 7, I turn to the second stage of the section 7 analysis. At this stage, I must identify and define the relevant principle or principles of fundamental justice and determine whether the deprivation respects the relevant principle or principles of fundamental justice: *Blencoe v. B.C. (Human Rights Commission)*, 2000 SCC 44.

[23] Analyzing the principles of fundamental justice requires me to determine the objective of section 17.1. I accept the Attorney General's argument that section 17.1 protects the interest of parents in directing their children's education.

[24] As I will explain, I find that section 17.1 violates two principles of fundamental justice: the settled principle of "gross disproportionality", and the novel principle of "the best interests of the child".

[25] Section 17.1 is grossly disproportionate because its effects on Farrah's life interest are "totally out of sync" with its objective: *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 120-121. In other words, the endangerment of Farrah's health far outweighs the government's objective to protect parental rights. Courts must exercise extreme caution before interfering with parental rights – or, more accurately in my view, parental decisions. Parents are expected, indeed obliged, to act in their children's best interests, which does not in all instances mean in accordance with a child's wishes. As the Supreme Court observed in *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115, state interference in

balancing the rights of parents and children should only arise in exceptional circumstances. That said, it is well-recognized that parents do not have the right to endanger their children's health, or their life, even for compelling reasons such as a religious objection to a blood transfusion.

[26] I also find that section 17.1 violates the best interests of the child, which I find to be a principle of fundamental justice in this case. In the context of proceedings directly involving the health of children, the best interests of the child meets the three requirements for recognition as a principle of fundamental justice as outlined by the Supreme Court of Canada decision in *R. v. Marmo-Levine; R. v. Caine*, 2003 SCC 74 at para. 113. First, it is a legal principle. Second, there is significant social consensus that it is fundamental to the fair operation of the legal system because, in this context, much consideration should be given to the child's best interests. Third, the best interests of the child can be identified with sufficient precision as it is already applied in many legal contexts. Section 17.1 violates the best interests of a child, Farrah, because it deprives her of access to sexual health education that could improve her health.

[27] Further, acknowledging Farrah's own view of the appropriateness of the sexual health classes for herself is in line with the Supreme Court's discussion, although in a different context, of the concept of the "mature minor" in *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30.

[28] To summarize: although I find that section 17.1 does not infringe section 15(1) of the *Charter*, I find that it does infringe section 7 of the *Charter*.

Issue Four: If section 17.1 of the *Ontario Human Rights Act* infringes section 15(1) or section 7, is the infringement justified under section 1 of the *Charter*?

[29] As I have found that section 17.1 of the *Ontario Human Rights Act* infringes Farrah's section 7 rights, I must now determine whether this infringement is justified under section 1 of the *Charter*. Section 1 provides:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[30] Section 17.1 is undoubtedly "prescribed by law" because it is a duly enacted legislative provision. What I must determine is whether this law is a reasonable limit on Farrah's section 7 rights. Had I determined that section 17.1 also breached section 15(1) of the *Charter*, I would have also analyzed if the law is a reasonable limit on Farrah's section 15(1) rights.

[31] The two-stage test for "reasonable limits" was established by the Supreme Court in *R. v. Oakes*, 1986 CanLII 46 at paras. 69-70:

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test"... Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three

important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".^b

[32] I accept that protecting the interests of parents in directing their children's education is a pressing and substantial objective, and that this infringement is rationally connected to that objective. Nevertheless, I am unable to conclude that a regime which totally silences the child in question from having a say in his or her education is minimally impairing of Farrah's rights.

[33] Further, the deleterious effects of section 17.1 outweigh its salutary effects. The Attorney General argues that such a provision is necessary in a pluralistic society where there are many distinct views – some of which are founded on religion – on appropriate sexual health education for minors. However, allowing Farrah to access information regarding sexual health does not diminish her parents' ability to convey their views on the topic to her. On the other hand, denying a child comprehensive sexual health education may well impact that child's overall health and well-being and, unfortunately, appears to expose that child to a greater risk of contracting a life-threatening illness. As such, section 17.1 cannot be saved by section 1 of the *Charter*.

^b The section 1 *Oakes* Test can be summarized as follows. Stage 1: Does section 17.1 have a pressing and substantial objective? Stage 2(a): Are the means chosen by the legislature in section 17.1 rationally connected to the objective of protecting the interests of parents in directing their children's education? Stage 2(b): Does section 17.1 minimally impair Farrah's rights? Stage 2(c): Are the positive effects of section 17.1 proportional to its negative effects?

Conclusion

[34] Section 17.1 of the Act does not offend section 15(1) of the *Charter*, but it does offend section 7 of the *Charter*. This violation cannot be justified under section 1. The provision is therefore of no force and effect and I order that Farrah Shaw be permitted to attend comprehensive sexual health education classes at Thames River Collegiate.

MEZODY, J.

Schedule "A"

Thames River Collegiate
September 9, 2013

Dear Parent/Guardian:

Our school is teaching the official health curriculum that has been approved by the Ministry of Education and that is required for all students in the province.

The curriculum is intended to promote healthy, responsible choices for students by providing them information about health topics, teaching them skills such as decision-making and media literacy and by encouraging them to discuss their health concerns with their parents and qualified health professionals.

Sexual health education is part of that program and is offered at grades 9 through 12. The program is mandatory for all schools but parents have the right to exempt their child from the health classes that discuss sexuality.

The sexual health curriculum will include frank discussions of sexuality, birth control and sexually transmitted infection ("STI") prevention. Topics will include:

- Healthy and unhealthy relationships (What is a healthy relationship?)
- Negotiating what you want – in and out of the bedroom (How to talk about sexual relations, birth control and STIs with a partner and setting your limits on sexual practices)
- Myth busting and safer sex (discussion about pregnancy and STI prevention and treatment)
- Body image and diversity (discussion of various forms of diversity, including religious, cultural, racial, sexual orientation and different abilities, in relation to sexuality)
- Pleasure centres and anatomy basics (The benefits of healthy sexual relationships and discussions of various forms of sexual stimulation: e.g. masturbation, kissing, fondling, vaginal, oral, and anal sex, as well as sexual aids)

Students will also be permitted to ask questions about topics of interest to them.

Please sign the slip below and return it to the school if you wish to exempt your child(ren) from the sexual health classes.

Schedule "A" Continued

Parent Permission Slip re: Sexual Health Education Classes

(Please copy or clip this permission slip and return it to the school.)

I, _____
(please print your name)

request that my child, _____, be excused from the sexual health education classes.

Signature: _____ (Date) _____