C.A. № C-141-18

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ONTARIO (MINISTER OF EDUCATION)

(Appellant)

- and -

CHRISSIE PERSAD (LITIGATION GUARDIAN)

(Respondent)

APPELLANT'S FACTUM

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PART I:

INTRODUCTION

1. This case is about the the balance between the rights of students to receive an unencumbered educational experience and the rights of parents to pass on their values and beliefs to their children. In this case, the appellant is arguing to uphold the parental rights stated within the *Ontario Schools Act,* as amended, that allow parents to have decision making power over sensitive material that their children may be exposed to in classes. This is a case about protecting the fundamental right of parents to raise their children and pass on their values and beliefs.

PART II:

SUMMARY OF THE FACTS

2. In early 2016, the Government of Ontario amended its education legislation. The Ontario Schools Act (the "Act"), as amended, contains the following provision:

> **Notice to parent or guardian**
>
> **17.1(1)** A board as defined in this *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 require the student 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).

(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 2016, Chrissie Persad was 14 years old and attending ninth grade at Central Hastings Collegiate. In compliance with section 17.1 of the *Act*, Central Hastings Collegiate sent a notice to all parents on the first day of school in September 2016. 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”.

4. After receiving the notice, Chrissie’s parents filled in, signed and returned the request to excuse Chrissie from the sexual health classes to the health teacher at the school, Ken Imran. In a discussion with Mr. Imran at the school’s curriculum night, Chrissie’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.

5. Mr. Imran explained to Chrissie’s parents that the Central Hastings Public Health Department had confirmed that there was a significant outbreak of sexually transmitted infections (“STIs”) in Central Hastings, including an exceptionally high level of HIV infections. There had also been three outbreaks of STIs at Central Hastings 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 2012-2016.

6. Mr. Imran further explained that young women were disproportionately affected in these outbreaks, making up about 60% of the reported cases. Mr. Imran stated that Central Hastings Public Health had advised that the reported STIs had been linked to various forms of sexual conduct, including vaginal, oral and anal sex. Mr. Imran encouraged Chrissie’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.

7. On the day of the first sexual health education lesson, Mr. Imran asked Chrissie (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. Chrissie told Mr. Imran that she wished to remain in class, as she disagreed with her parents' views on the matter. Mr. Imran told Chrissie 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.

8. Chrissie went to speak with the principal, Lydia Wong. In speaking with Ms. Wong, Chrissie 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. Wong reiterated that the school could not permit Chrissie to participate over her parents' objections, as to do so would violate their human – and parental – rights.

9. Through a litigation guardian, Chrissie brought an application against the Attorney General of Ontario seeking declarations that:

    i. (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. (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.

10. At trial, Bester J granted the application. She found that while s. 17.1 of the *Act* does not violate section 15(1) of the *Charter*, it does violate s. 7 of the *Charter* and that this violation is not in accordance with the principles of fundamental justice. She found further that this violation cannot be justified under s. 1 of the *Charter*.

11. First, Justice Bester decided that "one's status as a dependant child" is not analogous grounds for the purposes of section 15 (1) of the *Charter.* Therefore, the first branch of the section 15(1) test is not met, leading to the conclusion that section 17.1 does not discriminate against Chrissie. Secondly, the risks posed to Chrissie, as "a result of her parents' refusal to permit her to access reliable sexual health information", are ruled to be in tension with section 7 of the Charter. Justice Bester ruled that Section 17.1 deprives Chrissie of her section 7 interest in life. Thirdly, it is concluded that Section 17.1 violates the principle of fundamental justice of proportionality — deciding that its effects on Chrissie's life are incommensurable with the section's objective of protecting parental rights. Additionally, it is found that Section 17.1 runs counter to the best interest of the child, a principle of fundamental justice deemed relevant to this case. Finally, Justice Bester decides that section 17.1 cannot be saved by section 1 of the Charter, citing the potential long term damage to Chrissie's health and the failure to complete its purpose in the most minimally invasive way.

PART III

GROUNDS OF APPEAL

ISSUE ONE: DOES S. 17.1 OF THE *ONTARIO SCHOOLS ACT* INFRINGE CHRISSIE'S RIGHT TO EQUALITY UNDER S. 15(1) OF THE *CHARTER*?

12. Section 17.1 of the Ontario Schools Act does not directly infringe upon Chrissie's equality rights as defined by s. 15 (1) of the Canadian Charter of Rights and Freedoms. The Charter guarantees individuals the freedom to not be subjected to discrimination on a number of factors including age.

13. The Trial Judge found that s. 17.1 of the Ontario Schools Act did not violate the Equality rights outlined in the Charter. There are a number of reasons why the trial judge was accurate in this particular decision:

14. The Ontario Schools Act discriminates on the basis of a child's dependant status, which is not a protected status under Section 15 of the Charter. However, the court is likely to acknowledge that in effect this component of the law *de facto* acts as if age was a discriminating factor. Given this fact, an application of *R. v. Kapp* is necessary to analyze whether the age specification outlined in the law is a violation of Chrissie's Section 15(1) rights. *R v. Kapp* outlines two questions in determining whether there has been a violation of Section 15(1):

    a) Does the law create a distinction based on an enumerated or analogous ground?

b) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? [para. 17]

15. With respect to the first test, the law does create a distinction based on an enumerated ground — age. The judge in *Persad v. Ontario* also agreed with this particular section of the test. The law does make a distinction between Parent and Child, which *de facto* is a distinction based on age. Given that the law makes that distinction, the second part of the test must be applied to determine whether or not a violation of Section 15 has occurred.

16. In the second portion of the test is must be determined whether or not the Distinction creates a disadvantage by perpetuating prejudice or stereotype, and in this situation we would argue that it does not.

a) Age is widely agreed as being an acceptable factor for drawing distinctions between members of society, and the assumption that a minor is less capable of making full and informed decisions is one which is widely and acceptably held by society. This idea is upheld most primarily through set minimum ages for voting, as well as minimum ages to be sued in court, or to be held fully criminally responsible for your actions. All of these are common facets of our criminal and democratic systems, and are all underpinned by allowing for age discrimination against those below a certain age.

b) This particular distinction on the basis of age is not furthering any current prejudice. The definition of prejudice is that it is making an unfair assumption about someone based on an arbitrary characteristic. In this situation the

distinction on the basis of age is being made with the interests of the children in mind. Given that children are still developing their full cognitive capabilities, it is reasonable — not prejudiced — to say that they are not fully capable of being able to make decisions about important issues: for example, educational, social and values-based issues.

c) This section does not further existing stereotypes about young people. The law does not encourage society to view young people in any negative light, but instead simply portrays young people, as individuals who are still in development and who are still within the sphere of influence of their parents. This is a viewpoint that we would argue is perfectly in line and congruent with current societal perception and expectations.

17. Even though the tests outlined in *R. v. Kapp are* sufficient to show that the *Ontario Schools Act*, as amended, does not violate the Section 15(1) rights of Chrissie, *AC v Manitoba* is analyzed for additional context and preceden

18. In that case, the court found that the Province could mandate a blood transfusion because the minor's (AC) equality rights under Section 15(1) were being justifiably infringed on the basis of AC's status as a minor of 14 years of age. In this case Chrissie is also a minor of 14 years of age. While the *Ontario Schools Act* already passed the Section 15(1) test outlined in *R. v. Kapp* the situation in this case and *AC v Manitoba* share certain highly relevant similarities.

19. Both cases focus on when the rights of a minor can be violated. In the case of *AC v*

Manitoba the minor's rights were violated for the highly compelling reason of keeping her alive for as long as possible. There is also a compelling reason in this case to override any apparent rights of the minor. In this case there is a large question about the role of parental guidance and influence over the development of a child. Protecting the individual freedoms of a parent is essential to the livelihood and vitality of our democracy, and in order to protect this, sometimes, any apparent rights of minor may have to be infringed.

20. That said, any application of *AC v Manitoba* is not necessary to support the conclusion of the trial judge in this case. What is needed to help bolster the opinion of the trial judge in an application of *R. v. Kapp. T*he application of that test will show that as the trial judge stated there is no violation of Christie's Section 15(1) rights in this particular case, and as such the Section 15(1) should not be applicable in determining whether the applicable section of the *Ontario Schools Act* is upheld or struck down.

ISSUE TWO: DOES S.17.1 OF THE *ACT* DEPRIVE CHRISSIE OF ANY OF THE INTERESTS PROTECTED UNDER S. 7 OF THE *CHARTER*?

21. Section 7 of the *Charter of Rights and Freedoms* provides that:

> "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."
>
> *Charter of Rights and Freedoms*, s. 7.

22. The evidence does not support the contention that Chrissie's parents wish to deprive her of vital information relating to STDs and/or HIV. Rather, Chrissie's parents take issue with sex education relating to anal sex and sex toys. Although her parents have

elected to exclude her from the sex education at school, the trial judge erred by finding that Chrissie's health and life were at risk. Although s. 17.1 does engage Chrissie's interest in life, the conclusion that she will not be receiving a comprehensive sexual health education is erroneous. Chrissie's parents do not object to their daughter receiving sex education relating to STDs and HIV.

23. Sex education has no direct benefit on child's health. The benefits are hinged on a subsequent change in the child's behavior. The improvement of health comes when students begin to practice safer sexual intercourse, for example through the use of contraception, as a result of their education. Or, for example, if students practice abstinence as a result of their sexual education classes.

24. Yet, it's conceivable for a child to participate in all the curricular sexual education classes, but not change their behaviors or attitudes towards safer sexual activity. In such a scenario, a child's health would be no better off as a result of the sexual education classes. Arguably, at least in the eyes of many parents, including Chrissie's, a child may be worse off.

25. With respect to Chrissie's liberty interests, "the evolutionary and contextual character of maturity makes it difficult to define, let alone definitively identify. Yet the right of mature adolescents not to be unfairly deprived of their medical decision-making autonomy means that the assessment must be undertaken with respect and rigour.", meaning that it is necessary to take into account the possibility that younger adolescents may be capable of making decisions for themselves that are evidently in their best interest.

A.C. v. Manitoba (Director of Child and Family Services), [2009] 2 SCR 181, 2009 SCC 30

(CanLII)

26. However, consent to treatment is not analogous to consent to sex education. With respect to treatment, the life, liberty and security of the person are directly engaged. With respect to sex education, alternative options for sex education outside of the classroom exist. For example, Chrissie's parents may elect to provide their daughter with sex education through self-study at home or other formats or forums.

27. The right to security of the person guaranteed by s. 7 protects the psychological integrity of an individual. However, in order for this right to be triggered, the psychological harm must result from the actions of the state and it must be serious." *Blencoe v BC (HRC)*, [2000] 2 SCR 307 (SCC)

28. There is no evidence proving that Chrissie would suffer serious psychological harm as a result of state action. By providing notice to her parents, the Board is affording Chrissie's parents the opportunity to inquire about the proposed subject matter and evaluate whether or not she should be excluded from the instruction containing references to sexuality.

29. The evidence suggests Chrissie's parents have her best interests in mind — they do not wish to deprive her of *all* sex education. Rather, Chrissie's parents claim their right to choose the developmentally appropriate timeframe for their daughter's sex education in specific subject areas. They wish to enforce their right to determine what is developmentally appropriate and consistent with their personal beliefs.

ISSUE THREE: IF THE ANSWER TO QUESTION (2) IS YES, IS THE DEPRIVATION IN ACCORDANCE WITH THE PRINCIPLES OF FUNDAMENTAL JUSTICE ENSHRINED IN THE *CHARTER*?

30. The lower court found that sexual education decreases the chances that children would practice unprotected sex, engaging their life interest of s.7. Even if this finding is accepted, there are numerous sources of reliable sexual education that would teach Chrissie how to protect herself — including her parents.

a) It's important to note that Chrissie's parents in this case object to specific portions of the curriculum that have little medical benefit -- for example, education on the use of sex toys. Her parents raised no objection to teachings on the subject of contraception and prevention of sexually transmitted infections.

31. If the court finds, as the lower court did, that sexual education classes are essential to Chrissie's right to life, the precedent would be set such that any form of education that has the potential to change children's behaviors or attitudes towards their health would be protected -- from gym classes, to public service announcements reminding students to wash their hands prior to eating.

32. Chrissie's parents and others who share their objections to sexual education have many reasons for their objections: including moral/religious reasons and health reasons.

33. The lower court erred in their analysis of the proportionality of the parents rights and those of Chrissie.

a) As previously established, Chrissie's s7. right to life should not be considered

as her life is not in question.

b) Nonetheless, even if considering Chrissie's right to life, this must be weighed against both the extensive precedent that upholds parental decision-making, as well as the parent's section 2 fundamental freedoms of conscience and religion.

c) If part of a parent's religion includes teaching their children 'religiously appropriate' sexual attitudes, these sexual education classes interfere with parents' section 2 freedom to practice their religion.

d) If parents feel that subjects in the sexual education curriculum — specifically anal sex and sex toys — are innapropirate for children Chrissie's age, they have the right to make that determination under their section 2 freedom of conscience.

e) The lower court erred by excluding the section 2 freedoms of the parents in their analysis of proportionality.

34. When weighing the endangerment to Chrissie's health with the parental rights and parental decisions, the court should consider the following additional points:

a) Numerous alternatives exist to protect Chrissie's health, such as:

   i. Sex-ed classes that don't include discussion of anal sex and sex toys

   ii. Individualized written educational materials prepared by teachers, that exclude discussion of topics that parents deem to be inappropriate

   iii. Discussion of the practice of safe-sex with parents at home

   iv. Reading of educational materials that parents find to be appropriate

b) Given the alternatives, there is no necessity to override parental rights to protect the child's health — there are ways to protect both the parents' and the

child’s rights.

c) The parents also have a s7. concern of liberty, which the court includes the liberty to make decisions without interference. These s.7 protected decisions also include a parent’s decision-making rights over their child.

35. With regards to the principle of fundamental justice of the best interests of the child, we agree with the lower court's view that it is a relevant principle in this case. However, we disagree with the court's application of the principle.

36. We disagree, chiefly, with the view that Chrissie, being a "mature minor" can determine what is in her best interests, by indicating she wishes to attend these classes.

a) Conversely, teenagers often lack the self-awareness, judgement, and maturity to make this determination; not to mention that a child's brain is generally less developed than that of their parents. Its for these reasons and others that children are not afforded many freedoms offered to their parents, including many decision making abilities. Teenagers often overestimate their own readiness for a subject, and teenagers are still discovering their own relationship with their sexuality. At the same time, teenagers often suffer from a poor, perhaps spiteful, relationship with their parents. It's conceivable that a child may wish to attend sexual education classes, against the wishes of their parents, purely in the spirit of rebellion. Teenagers often lack the maturity to put this aside and evaluate the advice or opinion of their parents. Hence, taking a child's expression of interest into account would lead the court astray from an objective evaluation of the best interests of the child.

b) The lower court also erred in their application and analysis of the “mature

minor" precedent, which, in *A.C. v. Manitoba (Director of Child and Family Services),* outlines a test to determine the maturity of the minor and their "decisional capacity," before deciding whether allowing the child to exercise their autonomy will be in the child's "best interests."

i. "In assessing an adolescent's maturity in a s. 25(8) 'best interests' analysis, a judge should take into account … the adolescent's intellectual capacity and the degree of sophistication to understand the information relevant to making the decision and to appreciate the potential consequences; the stability of the adolescent's views and whether they are a true reflection of his or her core values and beliefs; the potential impact of the adolescent's lifestyle, family relationships and broader social affiliations on his or her ability to exercise independent judgment; the existence of any emotional or psychiatric vulnerabilities and the impact of the adolescent's illness on his or her decision‑making ability." *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30.

c) Chrissie's counsel were required to "demonstrate mature … decisional capacity." They made no effort to do so, and the lower court failed to thoroughly analyze this issue — they didn't attempt to understand Chrissie's "decisional capacity."

d) The respondents cannot have their cake and eat it too: they cannot argue that this is a serious decision, with a grave threat to a child's health, while also arguing that the child's personal autonomy should be respected. This is clear from *A.C. v. Manitoba (Director of Child and Family Services),* 2009 SCC 30:

i. “The ‘best interests’ standard in s. 25(8) operates as a sliding scale of scrutiny, with the child’s views becoming increasingly determinative depending on his or her maturity. The more serious the nature of the decision and the more severe its potential impact on life or health, the greater the degree of scrutiny required.”

e) Hence, even if this court finds that Chrissie’s health was seriously at risk, they should give even more weight to the parent’s decision, and less weight to Chrissie’s expression of interest. In *A.C v. Manitoba Director of Child and Family Services)*, the court specifies specifically that “Any relevant information from adults who know the adolescent may also factor into the assessment.”

37. Furthermore, Chrissie's parents may have a fair objection the sexual education classes based on the “best interests” of the child.

a) They can fairly believe that their child will not learn positive, safe behaviors from the sexual education classes, but in fact may become more likely to engage in frequent, less cautious sexual activity.

b) They may feel that introducing their child to different kinds of sexual activity, like the use of sex toys and anal sex, may make their child more likely to engage in these activities. They can reasonably opine that in a school with high rates of Sexually Transmitted Infections, engaging in these activities can be dangerous. They certainly can opine that their child requires tailored delivery of the curriculum around these particular subjects — best delivered by parents — to achieve the desired shift in behaviors and attitudes towards sexual health.

c) The parents —- not the court, the board of education, the teachers or the child

— can best reflect on the child's development to predict how their child will react to sex education classes of this nature. Noting, importantly, that the child's reaction to the classes, and not the classes themselves, affect a child's health risks, the parent's are best positioned to evaluate whether the classes will be in the "best [health] interests" of their child.

ISSUE FOUR: IF S. 17.1 OF THE *ACT* INFRINGES EITHER S. 15(1) OR S. 7, IS THE INFRINGEMENT JUSTIFIED UNDER S. 1 OF THE *CHARTER*?

38. As established above, Section 17.1 of the Ontario Schools Act does not infringe upon Chrissie's rights as defined by s. 15 (1) or s. 7 of the *Canadian Charter of Rights and Freedoms.* However, even if the court was to rule that the *Act* infringes on s. 7, the infringement would be justified under s. 1 of the Charter.

a) Section 1 provides:
    i. 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.
b) According to the wording of s. 1, the limitation of any Charter right must be "prescribed by law;" criteria that Section 17.1 of the *Act* unarguably falls under as a legislative statute that is within the jurisdiction of the level of government

that passed it. The more pertinent question is regarding whether such infringement is a “reasonable limit” on Chrissie's rights.

39. The case of *R. v Oakes* (1986) helped the Supreme Court establish a two part legal test to determine whether a *Charter* violation can be justified under s. 1:

a) There are two central criteria that must be satisfied in order for a limit to be considered justified in a free and democratic society.
    i. First, if such limitation is necessary and the objective is pressing and substantial. That is, if the purpose of the restriction is important to society.
    ii. Second, once an objective is found to be pressing and substantial, the means chosen to address the objective are found to be proportional and reasonable. The concept of proportionality refers to whether, in the course of achieving its legislative objectives, the legislator has chosen proportional, or relative, ways to achieve those objectives.

40. The pressing and substantial objective of Section 17.1 is to protect the interests of parents to have control of their own children’s education. Parents are obliged to provide meaningful education to their children. The *Act* is necessary to meet that objective, as indicated by 17. (1) and 17.1 (2): which mandate that parents be informed about controversial issues their children are taught and that parents must have active input as to whether such studies are in the best interests of their children. This is a pressing and substantial objective that is of concern to parents directing their children's education.

41. Furthermore, the limitation in place is a critical provision in a pluralistic society like Canada. With many diverse opinions on sexual education for minors that may be rooted in

religion and culture, minorities ought to be given the ability to teach their own set of values to their children. In allowing parents to pull their children out of classes they object to this limitation is in line with and is rationally connected to its purpose.

42. The respondent argues that denying a child comprehensive sexual health education is a disproportionate legislative action to achieve the ends we find vital. However, this is precisely the sort of decision we ought to let parents make. Parents — not the court, the board of education, the teachers or the child — can best reflect on the child's development to predict how their child will react to sex education classes of this nature. This is particularly pertinent given the multiplicity of health threats sexual education classes may pose to the child (reference Issue 3). Thus, it is a proportional action in maintaining the status quo, where parents have the ultimate say over their own children's wellbeing. Critically, there is no real alternative to the Act if we accept that parents have a right to direct their child's education.

43. Hence, even if section 17.1 does infringe upon section 7 of the Charter, the limitations were reasonable under section 1 of the *Charter*.

APPLICATION TO THIS CASE

44. Chrissie's right to equality under s. 15(1) of the Charter was not violated since distinction of Chrissie's age does not perpetuate any form of prejudice or stereotype, and there is an absence of a direct link between her sexual education class and liberty and security. Thus, there is no deprivation of any of Chrissie's rights. However, even if there were, this deprivation would be in accordance with the principles of fundamental

justice, and would be justifiable under s.1 of the Charter given that Chrissie's parents have a pressing and substantial objective to direct their child's education and the infringement is proportional to maintaining this objective. In light of these arguments, it is requested that the Appeal be granted.

PART IV

ORDER REQUESTED

45. The Appellant respectfully requested that you grant this appeal, upholding the decision-making authority of parents over their children's education.

ALL OF WHICH is respectfully submitted by

Ben Jones, Evan Kanter, Jonathan Liu and Nicole Richmond

Of Counsel for the Appellant

DATED AT 371 Bloor St. W, Toronto this 4th Day of May, 2018

APPENDIX A

AUTHORITIES TO BE CITED

LEGISLATION

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

JURISPRUDENCE

A.C. v. Manitoba (Director of Child and Family Services), [2009] 2 SCR 181, 2009 SCC 30 (CanLII)

Alberta (Child Youth and Family Enhancement Act, Director) v. S.F., 2008 ABPC 180 para 24

Blencoe v BC (HRC), [2000] 2 SCR 307

R. v. Oakes, [1986] 1 SCR 103, 1986 CanLII 46 SCC para 42

R. v. Morgentaler, [1993] 1 SCR 462, 1993 CanLII 158 (SCC)

R. v. Kapp, [2008] 2 SCR 483, 2008 SCC 41