C.A. № C-141-18

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ONTARIO (MINISTER OF EDUCATION)

(Appellant)

- and -

CHRISSIE PERSAD (LITIGATION GUARDIAN)

(Respondent)

RESPONDENT'S FACTUM

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PART I:
INTRODUCTION

1. This case is about whether or not s. 17. 1 of the *Ontario Schools Act* (hereinafter referred to as "*The Act*"), regarding parental rights to veto whether or not their child receives instruction from a specific course of study, is discriminatory in nature and whether it infringes upon equality rights and the right to life of the person under Section 15 (1) and Section 7 of the *Canadian Charter of Rights and Freedoms* (hereinafter referred to as the "*Charter*"), respectively, as promised to Chrissie Persad. The decision of Justice Bester deemed that Chrissie's exclusion from the educational program and any further instructional material, as a result of s. 17. 1, was a violation of Section 7 of the *Charter*, which could not be saved by Section 1. Moreover, Justice Bester held that s. 17. 1 does not infringe Section 15 (1) of the *Charter*.

2. Chrissie Persad, a 14-year-old student attending ninth grade at Central Hastings Collegiate in eastern Ontario, was denied the right to participate in the comprehensive sexual education classes her school had to offer. Chrissie Persad's parents exercised their right under s. 17. 1 of *The Act* and informed the school the Chrissie would not be participating in the classes. Despite expressing her wishes to remain in the classes to her teacher and the principal, Chrissie was informed that she was not allowed to participate over her parents' objections. The respondent submits that by upholding s. 17. 1, the newly amended legislation of *The Act* would be undermining the rights of Chrissie and other students, based on the recognition of their dependent status. *The Act* deprives the overall right to life by posing the risk of having uninformed teenagers participate in sexual activities without having the knowledge of basic safety precautions, which can be detrimental to Chrissie's health.

3. The onus to prove that s. 17. 1 of the *Ontario Schools Act* is not a violation of the rights found under Section 15 (1) and Section 7 of the *Canadian Charter of Rights and Freedoms* and that any potential infringement of the Charter can be demonstrably justified under Section 1 of the Charter, lies with the Appellant. However, the respondent submits:

   a) Given the personal circumstances surrounding Chrissie Persad and her parents, s. 17. 1 of the *Ontario Schools Act* is discriminatory in nature and consequently further perpetuates the marginalization of dependents in society, violating Section 15 (1) of the *Charter*.

   b) The deprivation of Chrissie's own autonomy regarding her ability to attend the sexual education classes her school offers, caused by s. 17. 1, exacerbates the problem that Central Hastings Public Health Department is having with the significant outbreak of sexually transmitted infections (STIs), violating Chrissie's right to life under Section 7 of the *Charter*.

   c) The deprivation experienced by Chrissie Persad is not in accordance with the principles of fundamental justice enshrined in Section 7 of the *Charter*.

   d) The aforementioned infringements cannot be saved under Section 1 of the Charter.

PART II:
SUMMARY OF THE FACTS

4. 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.

5. 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".

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. Through a litigation guardian, Chrissie 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.

12. 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*.

TRIAL DECISION

At trial, Chrissie's rights were to found to be violated.

13. Justice Bester did not agree with the Minister that section 17.1 of the *Ontario Schools Act* infringed Chrissie's right to equality under section 15(1) of the *Charter.* He summarized the foundation of previous cases used to determine violations specific to section 15(1) in order to justify his decision.

> 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 reaffirmed in *Quebec (Attorney General) v. A.*, 2013 SCC 5 at para. 324 and clarified in *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at paras. 16-23.
>
> Trial Decision, para. 16

For the purposes of section 15(1) of the *Charter*, Justice Bester could not accept Chrissie's "dependent status" as an analogous ground.

> The Charter provision itself, and this approach, as stated at para. 17 in Taypotat "…recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages."
>
> Trial Decision, para. 17

Chrissie's "dependent" status was not concluded to be an analogous ground that has been subject to persistent systemic disadvantages, and because the first part of the section 15 test was not met, Justice Bester did not deem it necessary to further analyze

the second portion. He concluded that section 17.1 does not discriminate against Chrissie.

14. Due to Chrissie's deprivation of a comprehensive sexual health education, Justice Bester found that s. 17. 1 infringed the best interests of the child. A real or imminent deprivation of life, liberty, security of the person, or a combination of these interests was indicated by Justice Bester - Chrissie's health and indeed her life, are to be considered at risk.

> This is particularly so given the prevalence of STIs in Chrissie's community and the fact that she is sexually active.
>
> Trial Decision, para. 21

A multitude of additional risks were posed to Chrissie as a result of her parents' prohibiting her access to the only available source of reliable sexual health information. Justice Bester deemed this point alone to be a sufficient reason to engage Section 7 of the Charter. Section 17. 1 of the Act deprives Chrissie of her Section 7 interest in life.

15. Justice Bester found that the "best interests of the child" meets the three requirements for being considered a principle of fundamental justice, and is thus worthy for consideration in this particular case. Section 17.1 does not conform to the goals set out by the legal system and is incredibly harmful to the child because it deprives her of access to sexual health education that could improve her health.

16. Consequently, the infringement of Chrissie's right to life was found to not be in accordance with the principles of fundamental justice enshrined in Section 7 of the *Charter*. Justice Bester analyzed the principles of fundamental justice to determine the objective of Section 17. 1.

> I accept the Minister's argument that section 17.1 protects the interest of parents in directing their children's education.
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> Trial Decision, para. 24

It was found by Justice Bester that s. 17. 1 of *The Act* violates two principles of fundamental justice: the novel principle of the "best interests of the child" and and the settled principle of "gross disportionality."

> In other words, the endangerment of Chrissie's health far outweighs the government's objective to protect parental rights.
>
> Trial Decision, para. 26

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 religion. For this reason, courts must exercise extreme caution before interfering with parental rights – or, more importantly, parental decisions.

17. Justice Bester found that the infringement on Chrissie's section 7 and 15(1) rights could not be justified under section 1 of the *Charter*. He considered the two-stage test for "reasonable limits." When considering the extent to which the infringement is reasonable

and rationally connected, he stated:

> 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.

Trial Decision, para. 33

He believed, however, that the deleterious consequences of denying Chrissie's comprehensive sexual health education, far outweigh the salutary benefits that come with her parents' ability to override Chrissie's views on the topic. As such, he determined that section 17.1 cannot be saved by section 1 of the *Charter.*

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*?

APPLICATION OF SECTION 15(1) OF THE CHARTER

18. Section 15(1) of the *Canadian Charter of Human Rights and Freedoms* protects against discrimination. It states:

> 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.

Canadian Charter of Rights and Freedoms Schedule B, Constitution Act, 1982, s. 15(1)

[Charter]

19. In order to determine whether any law of government action is discriminatory, both the purpose and the effects of the law must be analyzed for differential treatment on the claimant as opposed to others. To do so, the test outlined in the case *Quebec (Attorney General) v. A.* must be applied:

> Kapp, and later Withler v. Canada (Attorney General), [2011] 1 S.C.R. 396, restated these principles as follows: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (Kapp, at para. 17; Withler, at para. 30). As the Court stated in Withler:
>
> > The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. [para. 39]
>
> *Quebec (Attorney General) v. A.*, 2013 SCC 5 at para. 324

Section 17.1 of the *Ontario Schools Act* states that any board defined by *the Act* must inform the parents or guardians of a student where educational classes, programs or instructional material regarding the subject matter of religion, human sexuality and/or sexual orientation are taught or used. Should the parents or guardians choose to remove their child from these classes, programs or instructional material, the board must act in accordance with their wishes without any academic penalty for the student.

Trial Decision, para. 2

While the face of s. 17.1 does not display any direct discrimination, constructive discrimination is evident as a result of the law, which is still undeniably prohibited by section 15(1) of the *Charter.* Section 17.1 of *the Act* renders 14-year old Chrissie unable to make independent decisions regarding her own sexual education and safety. Thus,

this serves as a clear indication of the differential treatment between Chrissie and the rest of the students at her school, who are over the age of 18 and able to make independent decisions regarding their education. Although not explicitly stated in s. 17.1, this differential treatment stemmed from her dependent status as a child of her parents. Lastly, because of this distinction ultimately caused by perpetuated prejudice, Chrissie was put at a significant disadvantage that put her personal health at risk.

20. While section 15(2) of the *Charter* allows for positive discrimination in cases that need affirmative action, it is important to note that the discrimination experienced in Chrissie's case does not apply. The nature of section 17.1 of *the Act* is to protect the interests of parents in directing their children's education. "Parenthood" is *not* recognized as an enumerated or analogous ground as they do not meet the requirements. Therefore, section 17.1 does *not* target a specifically disadvantaged group for the purpose of substantive equality and amelioration, so the second branch of section 15 of the *Charter* does not need to be applied or investigated.

DISTINCTIONS DRAWN BY S. 17.1

21. Specifically due to her dependent status as a 14-year old student, Chrissie was unable to make a decision independent from that of her parents' regarding her sexual education. Although the distinction and therefore discrimination is not directly or explicitly stated written the provision, it is clear that the protection of parental rights in regards to a child's education has a significant impact on Chrissie, and targets young students as a whole. Mr. Imran, who is the teacher responsible for Chrissie's sexual health education, stated

that STIs are a prevalent issue amongst youth and even more so at Central Hastings Collegiate:

> 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.
>
> *Trial Decision,* para. 8

With nearly a third of the school's population at risk, Chrissie is undoubtedly at risk. Although Chrissie's parents believe the sexual health curriculum is not appropriate for high school students, expert testimonies have stated that students even younger than Chrissie have been impacted by the outbreaks within the Central Hastings area:

> In 2016, there was an outbreak of STIs in the student population of Central Hastings 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 Central Hastings Collegiate outbreak.
>
> *Trial Decision,* para. 13

Despite the large number of students between the ages of 13 and 17 that are not only sexually active but also at risk of STIs, only 18 year old students have the legal capacity to sign their own consent forms. This draws a clear distinction between students who are legally dependent and those who are no longer dependent due to age, regardless if both groups are participating in the same level of sexual activity which is ultimately problematic and discriminatory.

DEPENDENT STATUS AS ANALOGOUS GROUND

22. The distinctions mentioned above have been drawn on the grounds of Chrissie's dependent status and age. Despite the court's initial rejection of recognizing "dependent status" as an analogous ground, the courts in the past have held that something is analogous if it is a personal characteristic that one cannot change at all, or cannot change without great personal cost and difficulty. Although Chrissie's dependent status will *eventually* change with time, in the present moment she is unable to do so. Not only is it physically impossible to speed up an individual's aging process, but it is also impossible in legal matters. Emancipation is illegal in Canada, but even if it were legal, choosing to become emancipated would be at the expense of not only losing one's parents as financial supporters but emotional supporters as well. This would cause any child extreme distress and therefore it would be unjust to subject them to such arbitrary treatment.

23. Not recognizing Chrissie's dependent status as an analogous ground would be comparable to not recognizing old age as an enumerated ground, especially in matters regarding an individual's health, safety and livelihood. More specifically, her case can be compared to the case of *MacKinnon v. Celtech Plastics Ltd.*

> The applicant has alleged, and the respondent has accepted, that his employers attempted to replace him with less-experienced workers. He also alleges that at age 67 and with 35 years of employment with the respondent, he was recalled from lay-off, subjected to an unusually heavy workload, and held to an unreasonably high standard in respect of clean-up. He was subjected a level of surveillance by his foreman that included yelling

> and was harassing in nature. He submits that the motivation behind these actions was to make work so unpleasant that he would quit, and that the corporate respondent would save money by replacing him with less-experienced workers who would be paid a lower salary, and by avoiding the requirement to provide severance pay to an employee with considerable seniority.
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> *MacKinnon v. Celtech Plastics Ltd.,* 2012 HRTO 2372 at para. 21

Although Judge J. Keene acknowledged that seniority within a workplace is dependent on an individual's years or service rather than age, he stated that while a small number of years of experience may have little or no connection to age, a high number does indeed have a strong connection to age. This particular case of seniority and old age draws parallels to Chrissie's case of dependency and young age, and further proves the similar negative implications of restricting an individual's right to employment and therefore education. Dependency is ultimately defined by one's age, and since age has been previously recognized as an enumerated ground by the courts when the *Charter* was drafted, dependent status should be as well.

24. Although this dependent status does not actively provide a basis for discrimination against the majority of students, measures of equality should not be generalized to the impacts of the majority. Rather, minority groups that experience discrimination should be acknowledged and appropriately ameliorated. Even so, it is important to note that Chrissie was not the only student that had to be pulled out of the sexual health class at her school: three other students also had to leave at the request of their parents, meaning a total of four students within a single class were not given the opportunity to decide for themselves the education they receive in respects to their own safety and wellbeing. It is clear that many dependent children with concerned, conservative parents

are impacted by s.17.1 and should therefore be recognized.

25. This particular issue of moral sexual education teaching can also be compared to the previous controversial issue of moral religious tenets. In 2012, a case regarding the religious beliefs of Catholic parents and the mandatory Ethics and Religious Culture ("ERC") Program of Quebec schools outlined the issues of religious tenets and its connection to education in Canada.

> To discharge their burden at the stage of proving an infringement, the appellants had to show that, from an objective standpoint, the ERC Program interfered with their ability to pass their faith on to their children. This is not the approach they took. Instead, they argued that it was enough for them to say that the program infringed their right (A.F., at para. 126). As I have already explained, it is not enough for the appellants to say that they had religious reasons for objecting to their children's participation in the ERC course. Dubois J. of the Superior Court was therefore correct in rejecting that interpretation. He stated the following: [translation] "To claim that the general presentation of various religions may have an adverse effect on the religion one practises, it is not enough to state with sincerity that one is a practising Catholic" (para. 51).

S.L. v. Commision scolaire des Chênes, [2012] 1 SCR 235, 2012 SCC 7 at para. 27

In this particular case, S.L. and D.J.'s religious values were not able to dismiss the ERC course as they were not able to prove that their freedom of religion was infringed upon by the school board's refusal to exempt their children from the course. Although all parents should have rights in regards to the upbringing of their children, the courts have stated that these rights are limited if it does not bring harm to the parents themselves, or their children. Although Chrissie's parents' beliefs are not religious in nature, the overall impacts of the sexual education course does not infringe upon their rights to freedom of thought, nor does it harm Chrissie in any way. Parents have the right to

practice any religion or act based on their own unique set of moral values, but it is clear that an exposure of different religion or lifestyle does *not* prevent them from doing so.

DISADVANTAGE CREATED BY PERPETUATED PREJUDICE

26. S.17.1 of the *Ontario Schools Act* prevents Chrissie from receiving the proper sexual education that would not only benefit her own health but also the health of her potential sexual partners. The sexual-education curriculum at Central Hastings Collegiate was created for the purpose of keeping students well informed and safe against sexually transmitted infections ("STIs"), which became a relevant issue in the Central Hastings area after the significant outbreak of STIs. In particular, it had been reported that young women were disproportionately affected in these outbreaks by the Central Hastings Public Health Department, accounting for about 60% of the reported cases. In addition to the cases of Central Hastings, an expert provided a testimony in which it was made clear that youth who receive "abstinence-only" or no sexual health education are more likely to engage in unprotected sexual acts and thus more likely to contract a STI or have an unplanned pregnancy than their peers who receive comprehensive sexual health education.

Trial Decision, para. 13

Furthermore, the expert testimony reveals the risks and dangers of youth not receiving a comprehensive sexual health education. As a young, sexually-active woman who has previously been treated for chlamydia in 2015, Chrissie is undeniably at risk of contracting a number of STIs, some of which can be life threatening.

27. As this issue of dependency continues to impact not only the health of dependent children themselves but their partners as well, it is evident that this specific distinction will create room for further prejudices. Young age alone and the moral values of parents should not dictate the lifestyle nor the health education of dependent children. Such prejudices that are related to conservative ideologies that young children should not know about or practice sexual acts can ultimately harm dependent children and potentially cause a group of people to be disadvantaged for a significant part of history.

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

NOTICE

28. Section 7 of the Charter guarantees:

> ...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.

Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act, 1982 s.7

SECTION 7 RIGHTS VIOLATED

29. The rights to life, liberty and security are the most basic rights that humans are granted. Life means the right to live, liberty means the right to make decisions and have personal autonomy, and security means the right to feel safe and preserve dignity. The deprivation of instructional materials that Chrissie receives pertaining to themes of

human sexuality, sexual orientation, and sexual health is a threat to her life because she is at risk of potentially not knowing the effect that some sexual activities could have on her health, and consequently her life. It is also a serious infringement on her autonomy because despite making her wishes known regarding wanting to remain in the classes, her parents exercised their rights under s. 17. 1 of the Act and Chrissie was not allowed to participate over her parents' objections.

30. As outlined in B. (R.) v. Children's Aid Society of Metropolitan Toronto, the protection of a child's health and right to life is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice, so long as it also meets the requirements of fair procedure.

> The child's right to life must not be so completely subsumed to the parental liberty to make decisions regarding that child. Although an individual may refuse any medical procedures upon her own person, it is quite another matter to speak for another separate individual.
>
> B. (R.) v. Children's Aid Society of Metropolitan Toronto, 1995 CanLII 115

31. Section 17.1 violates Chrissie's right to life because of the risks posed to her as a result of her parents' refusal to permit her to access one of the only available sources of reliable sexual health information.

32. 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. In some cases, HIV, or

complications related thereto, can be fatal.

33. In Chrissie's case specifically, the right to life is further violated in comparison to other students at Central Hastings Collegiate because her health is put at a substantially greater risk. This is due to the fact that without permission to attend the sexual health education lessons, Chrissie is left deprived of a full education that, she should be entitled to. Her knowledge is no longer comparable to that of her peers. The school curriculum does a terrific job at identifying the health risks of being sexually active. There has reportedly been an outbreak of STIs in the Central Hastings area with 63% of those affected being young women between the ages of 13 and 18.

Trial Decision, para. 13

34. Chrissie's dependent status prevents her from attending the comprehensive sexual health education classes thus parental rights should be re-evaluated. When parents make the decision to remove their children from those educational classes, the school has no choice but to act in accordance with the amended state-legislation under the *Ontario Schools Act*, requiring the students to leave. This state-legislated policy was implemented to place the burden of decision-making in the caregiver's hands when it comes to matters of religion, human sexuality, or sexual orientation in a course of study.

35. The appellant may argue that these limitations are in the best interest of the child; because youth who do not receive comprehensive sexual health education, participate in sexual intercourse 3 months later. This argument overlooks the fact that teens tend to be "sexually curious". Chrissie is already sexually active and has had several different

partners. She has also expressed an intent to continue to engage in these activities (oral and vaginal sex).

Trial Decision, para. 12

36. They may also argue that the classes that the school is offering, are not the only available source of reliable sexual health information, as the parents can be held responsible for teaching the child. Factual findings based on the expert testimony states that school is the main source of sexual health information for youth between grades 7 and 11. Except for young students, parental relationships are not correlated with higher or lower levels of sexual activity. This demonstrates the minimal influence that parents actually have on their children and information should not be coming solely from them.

Trial Decision, para. 41

37. Chrissie's deprivation of the sexual health education already prevents her from enjoying life as an individual, which also infringes on her right to security of person. The focus on protecting parental rights should not be at the forefront of the policy: when the parent chooses to exclude their child from the classroom teaching and the school forces them to report to the library or the principal's office, the child loses the ability to feel safe and their personal dignity is no longer preserved. Chrissie is no longer receiving the same information as her classmates, leaving her with a sense of feeling 'less protected', and is being socially isolated for the time it takes to go through each lesson. The state implements this policy because it thinks that parents will make the most beneficial decision on behalf of their children, but ignores all other factors that come with handing the definitive say to the parents. A child should still be able to attend an educational

class despite having a dependent status.

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*?

38. There are three criteria that an issue must fulfill before being considered a principle of fundamental justice. If a policy is implemented that contradicts a principle that is thus determined, then the policy is not a justified limitation of the rights that individuals are entitled to under the Constitution. As outlined in *R. v. Malmo-Levine; R. v. Caine*:

> The requirement of "general acceptance among reasonable people" enhances the legitimacy of judicial review of state action, and ensures that the values against which state action is measured are not just fundamental "in the eye of the beholder only": Rodriguez, at pp. 607 and 590 (emphasis in original). In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s.7 it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

R. v. Malmo-Levine; R. v. Caine 2003 SCC 74 para. 113

a) The first principle is the legality of the situation and has to do with whether or not it is something that the legal system can regulate. The provisions are prescribed in the *Ontario Schools Act* and require the student to leave the classroom or place of instruction, in accordance with the request of the parent or guardian.

b) The second condition is whether the principle is important to society. There needs to be a consensus that having the principle is important to preserve societal values: in

the case of the comprehensive sexual health education classes, which is fundamental to the development of a child, society cares about the reliability of the information in which a child receives because it has an impact in how comfortable the child is in expressing themselves. It also educates them on the correct precautionary measures they must take when engaging in various sexual practices later on in its life.

c) The third principle is whether the principle has already been applied enough in the justice system that it can be determined specifically. Parental rights are already applied in many legal contexts, such as a parents' rights to discipline their child; It is clear that this is a relevant issue to society.

If the best interests of the child are considered principles of fundamental justice, then a violation of those principles would need to be justified under three grounds. As found in *Canada (Attorney General) v. Bedford*:

a) First, the issue cannot be overbroad or arbitrary. This section will outline that the policy is imposed irresponsibly as a blanket onto all children based on their dependent status, rather than considering differences between individual cases and making sure that all students that are capable, be given a chance to participate in the course of study or educational program.

b) Second, the issue cannot be grossly disproportionate to the endangerment of Chrissie's health. This section will prove that the removal of a student from a place

of learning, and leaving them at a comparative disadvantage to their peers when it comes to information regarding sexual health, is cruel and far outweighs the government's objective to protect parental rights.

c) Third, the state should seek to promote the best interests of the child, as earlier established to be a legal principle. This section will prove that the policy not only deprives her of access to sexual health education that could improve her health, it also increases the likelihood for them to contract a sexually transmitted infection or have an unplanned pregnancy.

Trial Decision, para. 27
Canada (Attorney General) v. Bedford, 2013 SCC 72, para. 96

INFRINGEMENT NOT IN ACCORDANCE WITH THE PRINCIPLES OF FUNDAMENTAL JUSTICE

39. The infringement is overbroad, grossly disproportionate to the endangerment of Chrissie's health, and does not advance the best interests of the child. Because it is in the interest of the state to create the best situation for all involved parties, this limitation cannot be justified.

OVERBREADTH

40. In order for a policy to be considered overbroad, it must affect groups that are not its focus. This section will prove that a better solution exists for the problem that the courts are trying to solve: instead of grouping all children into the same group based on their dependent status, exclusion from the classes should be considered on an individual basis so that those who wish to attend against their parents' wishes, are still left with an

option to participate in the learning.

a) The problem is with the focus on a particular group which consists of all individuals under 22 years of age, who because of their age and dependence on their parents for financial support, have a dependent status. As discussed in earlier sections, Chrissie is a 14-year-old student, attending ninth grade. Removing a child from an environment of learning and creating an unnecessary educational disadvantage is terrifying because of how much control parents have over their children - to the point where fundamental rights are beginning to be denied. The policy is completely unnecessary when these children are using the majority of this information to learn how to protect themselves sexually which will decrease the amount of potential health complications that may arise in the future.

41. Thus, because it generalizes a group of children based on their dependent status and affects students who would otherwise benefit from receiving the sexual health education, this policy is overbroad and not connected to its objective. The content of s.17.1 is having an overreaching impact towards students who are disadvantaged because they are caught under the policy's umbrella due to their dependent status.

GROSS DISPROPORTIONALITY

42. A policy that is grossly disproportionate would place the protection of parental rights above an individual's health; this section will prove that the removal of Chrissie from the sexual health class is not only harsh because despite her wishes to stay, she is bound by her parents' decisions, but also because she would not have essential information,

leaving her own personal health in danger and others she may interact with.

Trial Decision, para. 10

a) The appellant may argue that the policy is not grossly disproportionate because it leaves the decision-making ability to the individuals you would expect to make the best decision for the children - parents and caregivers: the state made the incorrect assumption that the significance of the material, would lead parents into not removing their children from the learning environment. Despite being made aware for the need of the information being taught in the course of study, Chrissie's parents still elected to exercise their right under s. 17. 1 of the Act. The first problem is that the courts have to exercise extreme caution when interfering with the decision-making ability of parents. Parents are obliged to act in the best interest of the children, which is not always in line with the child's wishes. Unfortunately, with the current policy, the school cannot interfere with the parent's ultimate decision and therefore the state is unsuccessful at balancing the rights of parents and their children's health. There is no justification for implementing this unreasonable policy as the amended legislation is leaving at risk, the life of children, by trying to secure parental rights. Parental rights should begin to be limited to something that is more natural and should not come from a policy that is unjust: even if the subject of interest includes religious themes, human sexuality or sexual orientation. The policy harms individuals and should not pass because it is not in accordance with the principles of fundamental justice. The state does not give the ability to parents to exclude their children from the schooling system entirely, even

though the deprivation of education that comes about as a result this policy, would be very similar in nature.

43. The potential health risk is grossly disproportionate to the protection of parental rights.

BEST INTERESTS OF THE CHILD

44. The best interest of the child was established to be a principle of fundamental justice earlier in the factum because of the three criteria it fulfills: First, it is a legal principle because the law has a role in regulating it. Second, much consideration should be given to the child's best interest because social consensus is fundamental to the fair operation of the legal system. Third, the best interest of the child and how that may be achieved can be precisely identified because it has already been applied in many legal contexts. Section 17.1 does not conform to the goals set out by the legal system and is incredibly harmful to the child because it deprives her of access to sexual health education that could improve her health. Section 7 of the Canadian Charter of Rights and Freedoms cannot be limited unless it conforms to this principle.

a) In this case, the best interests of the child are not preserved: First, the child is more likely to contract a sexually transmitted infection or have an unplanned pregnancy in the future. Children who grow up without the sexual health education may feel uncomfortable asking questions that they may be uninformed about regarding sexual orientation; Because an absence of comprehensive sexual health education has an increased negative impact on gay, lesbian, bisexual, and transgendered youth. Future sexual experiences that an individual may have within a relationship will feel unorthodox, as they have little to no blueprint as to what to expect: the child may

grow up with issues socializing, as well as problems involving sexuality. It is in the state's interest to make sure this does not happen.

Trial Decision, para. 13

b) The child is impressionable in its early years, so anything that they learn at a young age will be remembered and applied in everyday life, as if it is the truth. The deprivation of a child from receiving the education will impact them in the long run and should not be considered a temporary action. Instead, the child will not be able to form a judgement as to what is right, rather than wrong. In today's society, the internet has become a primary agent of socialization where many children are spending their time online asking questions they may have. Unfortunately, there is a lot of inaccurate information from unreliable sources that are readily available to children. School is the main source of reliable, sexual health information for youth. Mr. Imran encouraged Chrissie's parents request to exclude their daughter from the classes, but to no avail.

c) The Central Hastings Health department had confirmed that there had been 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. It would be significantly safer for the child to remain in the classes while receiving the instructional material. Youth

who receive so-called "abstinence-only" or no sexual health education are more likely to engage in unprotected sexual acts than their peers.

Trial Decision, para. 8

> Properly construed to take an adolescent's maturity into account, the statutory scheme strikes a constitutional balance between what the law has consistently seen as an individual's fundamental right to autonomous decision making in connection with his or her body, and the law's equally persistent attempts to protect vulnerable children from harm. The "best interests" standard 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.

A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30

45. The severity of the impact on Chrissie's life has been proved to be life-threatening and the decision was made by her parents, when they chose to exercise their rights under section 17.1 of the *Ontario Schools Act*. Particularly because of the potential impact to Chrissie's life, the amendments to the *Act* should be re-evaluated with a greater degree of scrutiny.

CONCLUSION

46. The best interest of a child has been established to be a principle of fundamental justice. This section has proven that there have been significant infringements on the rights guaranteed in section 7 of the Charter of Rights and Freedoms, and that these infringements are not in accordance with the principles of fundamental justice. They are overbroad. They are grossly disproportionate as it has been demonstrated that the endangerment of

Chrissie's health far outweighs the government's objective to protect parental rights. They are counterproductive in preserving the rights of dependent children because of the health risk that has been imposed on them. There has also been presented a harm to the social development of the child, due to the lack of familiarity with the topic and the alienation that occurs at the time of discussion and learning. Thus, there has been an infringement on basic human liberties that cannot be justified.

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*?

NOTICE

47. It must be understood that the onus of proving the measures used to limit any Charter right is reasonable and justifiable rests upon the party seeking to uphold the limitation. It is not on the respondent's behalf to disprove the violations of section 15 (1) and section 7 of the Canadian Charter of Rights and Freedoms.

OAKES TEST

48. There are two standards that must be met in order to justify that the limitation is both reasonable and demonstrably justified in a free and democratic society as established in R v. Oakes:

> First, the objective… must be "of sufficient importance to [override] a… right or freedom." Second, … 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. 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.

R. v. Oakes, [1986] 1 SCR 103, 1986 CanLII 46, para. 6970

PRESSING AND SUBSTANTIAL

49. When considering the objective of the limiting measure set out by s. 17(1) of the *Ontario Schools Act*, the parental rights it aims to protect with specific regards to parents' ability to override their child's desires regarding whether they receive instruction from a specific course of study, is a pressing need to society. Ultimately, the *Act* strives to protect parents' ability to direct their child's education which as a whole, is a substantive objective.

50. It is important to note that beyond having established that "protecting the interests of parents in directing their children's education is a pressing and substantial objective," an underlying objective is also to protect parents' ability to override any decision made by their child, which in itself is a pressing and substantial issue at hand.

Trial Decision, para 33

RATIONALLY CONNECTED

51. Although it was previously determined that the enforcement of section 17.1 of the *Ontario Schools Act* is rationally connected to the substantial purpose of protecting parental rights in determining their child's education, this objective previously explored was not the specific issue at hand.

52. Previously, the objective of section 17 (1) of the Ontario Schools Act was determined to be that parental rights were protected regarding their child's education. However, when this stage of the Oakes test was considered, the main objective was disregarded. Rather than viewing the protection of parental rights as the core objective of section 17 (1) of the Ontario Schools Act, it should be viewed as a **medium** through which the child can obtain an adequate state of health and well-being. When parents are given the right to determine their child's participation in sexual education classes, the underlying purpose

remains that parents are better able to determine what is best for their child's health and well-being, all in the best interest of the child. Therefore, it can be concluded that the ultimate purpose of section 17 (1) of the *Act* is not to protect parental rights, rather, to protect the child's best interests.

53. With the reaffirmed objective determined, it is evident that the infringement on Chrissie's section 7 and 15 Charter rights are not rationally connected to the substantive underlying objective at hand.

MINIMALLY IMPAIRING

54. The infringement on Chrissie's section 7 right was not minimally impairing on Chrissie's section 7 rights.

55. Section 23 (1) of the Personal Health Information Protection Act states:

> If the individual is a child who is less than 16 years of age, a parent of the child or a children's aid society or other person who is lawfully entitled to give or refuse consent in the place of the parent unless the information relates to,
>
> I. treatment within the meaning of the Health Care Consent Act, 1996, about which the child has made a decision on his or her own in accordance with that Act, or
> II. counselling in which the child has participated on his or her own under the Child and Family Services Act.
>
> Personal Health Information Protection Act, 2004, SO 2004, c 3, Sch A

56. Although the above is with regards to a child's desires in the medical treatment and counselling they receive, the core rationale that can be drawn from this is any child, even less than 16 years of age, should have veto decision making powers regarding their own health and well-being, and what they feel is best for them.

57. In A.C. v. Manitoba (Director of Child and Family Services), the argument regarding whether children under 16 have the right to make legal medical decisions is similar in nature with Chrissie's ability to determine whether she can participate in sexual health classes despite her parent's desires. The argument states:

> There is, in essence, an irrebuttable presumption of incapacity in the Act for those under 16, and that this renders ss. 25(8) and 25(9) of the Child and Family Services Act contrary to ss. 2 (a), 7 and 15 of the Charter. She does not challenge the constitutionality of a cut-off age of 16; she challenges the constitutionality of depriving those under 16 of an opportunity to prove that they too have sufficient maturity to direct the course of their medical treatment. Her submission is that at common law, mature minors, similar to adults, have the capacity to decide their own medical care. In failing to recognize this "deeply rooted" right, the statutory scheme, she argues, infringes the Charter.

A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 25

The argument Chrissie has in nature, is very similar to that of A.C.'s. Chrissie was deprived an opportunity to prove she has the maturity to direct the course of her educational studies. The nature of sexual education classes above any other class is undeniable more personal, and involves aspects of a student's life that is not as explicitly talked about among peers and parents. Given that many students may not be comfortable discussing their sexual life with their parents, Chrissie is in a much more qualified position to decide what is best for her health and safety. In these circumstances, failure to allow for the opportunity to prove their "sufficient maturity" have limited Chrissie's capacity to direct her educational studies that have a direct toll on her health.

58. Section 4 (1) of the Health Care Consent Act states:

> 4 (1) A person is capable with respect to a treatment, admission to or confining in a care facility or a personal assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission, confining or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. 2017, c. 25, Sched. 5, s. 56.
>
> Health Care Consent Act, 1996, S.O. 1996, c. 2, Sched. A

59. Given that Chrissie was permitted to receive medical treatment for Chlamydia in 2015 under this section, it can be concluded that Chrissie is qualified to judge whether attending sexual education classes is in the benefit of her own health and well-being. Having determined that parents' may not be as well informed of the sexual activities that occur in their child's life given the personal nature of the sexual education classes, it is crucial to note that the student is in a more qualified position to determine whether receiving this education is best for their respective health and well-being.

60. While the appellant may argue that the Health Care Consent Act is with regards to treatment or medical services, not education, it is fair to note that when professional medical staff facilitate treatment, it does not only apply to physical treatment and medicine given. Rather, treatment also refers to the instruction and care given to the patient by the attending medical staff. In the same manner, teachers who facilitate the sexual education classes are also offering the instruction and care to students in a similar nature. Sexual education acts as an effective deterrent for sexually transmitted

infections, the same way treatment for these infections also act as a protective measure against the infections. In this sense, a rational connection can be drawn between the services outlined by this Act and the educational component of this case.

61. To summarize, it is established that the nature of medical "treatment," as outlined in both the Personal Health Information Protection Act, and the Health Care Consent Act is to be viewed in a similar manner to sexual education classes offered. Given that children are able to make their own medical decisions regarding their treatment and counselling independent of their parent(s), the same principal — in that the child should be able to decide what is best for their health and well-being — should be upheld when determining whether children have the veto decision in their participation in sexual education classes. Thus, a parents' ability to override their child's wishes to remain in this course of study is not minimally impairing of Chrissie's rights.

PROPORTIONALITY TEST

62. Section 17 (1) limitations of the Ontario Schools Act are not proportional to its explicit objective of protecting parental rights with the underlying purpose of protecting the child's health and well-being in their best interest.

63. The deleterious repercussions of excluding Chrissie from the sexual education classes offered at Central Hastings Collegiate encompasses a vast amount of medical concerns that can occur, including not being informed of the risks of being sexually active, and no exposure to the preventive measure that can be taken.

64. Knowing that Chrissie is sexually active and was treated for Chlamydia once in 2015, she is without a doubt prone to contracting sexually transmitted diseases. Especially given that this year alone, there were three cases of HIV, one of which in the school Chrissie attends, the infectious nature of this infection puts Chrissie among all her other classmates at extreme risk. That 63% of the students affected in the outbreak at Chrissie's school were female between 13 and 18 years old, illustrates the extent of which Chrissie is susceptible. In the expert testimony, it was stated that HIV among other complications could be fatal.

Trial Decision, para 13

65. Knowing that the outbreak of sexually transmitted diseases in her area directly targets the young demographic Chrissie is a part of, by denying her the right to be informed on this issue that is so relevant to Chrissie specifically, is not only risking her physically, socially, and emotionally, but it is risking her life in its entirety. There would rarely ever exist a reason that justifies denying a child's education, which an absence of would result in jeopardizing the child's life, for the objective of protecting parental rights.

66. Despite Chrissie's parents feeling as though the curriculum may be inappropriate for her age group, it is important to note that for a course to have been approved by Ontario's Ministry of Education, it means the curriculum was strategically designed and deemed to be of importance and relevance to the respective age group, and demographic in that population. Ontario's Ministry for Education states that, "the focus [of sexual health classes] is getting accurate information and learning skills to make healthy choices for

students' everyday lives." Thus, it can be determined that this course's purpose is sufficient enough to be recognized in the same manner, and to the same extent as any other mandated course.

67. In conclusion, it is evident that the limiting measure is both pressing and substantial. However, the infringement is not proven to be rationally connected to the objective at hand, nor is it minimally impairing of Chrissie's section 7 and 15 rights. The deleterious effects of denying Chrissie the right to veto her parents' decision in participating in the sexual education classes far outweigh the salutary effects that comes with being able to protect her parents' ability to override her educational wishes. Therefore, the infringement on Chrissie's section 7 and 15 (1) rights in the *Charter* cannot be saved by section 1 of the *Charter*.

APPLICATION TO THIS CASE

68. It is clear that due to s.17.1 of the *Ontario Schools Act*, Chrissie Persad's rights have been violated as a result of the damage inflicted on her equality rights, the failure to uphold her rights to life, and the failure to meet the requirements set forth in the Oakes test. Thus, it is requested for the amendments to s.17.1 be read down or declared inoperative.

PART IV

ORDER REQUESTED

69. It is respectfully requested that the appeal be dismissed and the decision of Justice Bester be upheld. The impugned law is requested to be read down from the *Ontario Schools Act*, as it has been proved to be ineffective in upholding the principles of justice and the rights of individuals, so that all dependent students have an equal opportunity to receive instruction from a specific course of study.

ALL OF WHICH is respectfully submitted by

_____
Jessie Kim, Shayan Mostajelin, Jolene Zheng
Of Counsel for the Respondent

DATED AT RICHMOND HILL H.S. this **24**th Day of **April**, **2018**

APPENDIX A

AUTHORITIES TO BE CITED

LEGISLATION

Canadian Charter of Rights and Freedoms Schedule B, Constitution Act, 1982, s. 7 [Charter]

Canadian Charter of Rights and Freedoms Schedule B, Constitution Act, 1982, s. 15(1) [Charter]

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