



Education Law eBulletin

A newsletter for educators

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SHIBLEY RIGHTON LLP
Barristers & Solicitors
www.shibleyrighton.com

Toronto Office:
2510 University Avenue
Suite 700
Toronto, ON M5H 3E5
Tel.: (416) 214-5200
Toll free: 1-877-214-5200

Windsor Office:
2510 Ouellette Avenue
Suite 301
Windsor, ON N8X 1L4
Tel.: (519) 969-9844
Toll free: 1-866-422-7988

Education and Public Law Group

Brian P. Nolan
brian.nolan@shibleyrighton.com

Sheila M. MacKinnon
sheila.mackinnon@shibleyrighton.com

Thomas McRae
thomas.mcrae@shibleyrighton.com

Jessica Koper
jessica.koper@shibleyrighton.com

Gaynor J. Roger
gaynor.roger@shibleyrighton.com

John De Vellis
john.devellis@shibleyrighton.com

Megan Marrie
megan.marrie@shibleyrighton.com

Divisional Court dismisses applications to set aside Ministry's Directive requiring teachers to revert back to previous sex education curriculum

At the beginning of the 2018/2019 school year, The Elementary Federation of Ontario and the Canadian Civil Liberties Association brought respective applications for judicial review to set aside the directive of the Minister of Education instructing all school boards to revert back to the old sex education curriculum (the "Ministry Directive"). This previous curriculum, introduced in 2010 (the "2010 Curriculum"), was replaced by a new sex education curriculum introduced by the Liberal government in 2015 (the "2015 Curriculum") and was in place until the Ministry Directive was released prior to the start of the 2018-2019 school year. The applications were consolidated and heard together by the Court.¹

The applications claim that the Ministry Directive violated the following:

- 1) teachers' right to freedom of expression as protected by 2(b) of the *Charter*;
- 2) students' right to security of the person and life as protected by s. 7 of the *Charter*; and
- 3) students' equality rights based on age, disability, as a member of a First Nations community, sex, family status, gender identity/expression, and/or sexual orientation as protected by 15(1) of the *Charter*.

The Grand Council of Treaty 3 (comprised of several First Nations communities), Justice for Children and Youth and the Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario all intervened in the proceeding.

The Court reviewed the differences between the two curriculums and noted that the 2010 Curriculum had mandatory expectations that were more general than the 2015 Curriculum, and with fewer and less detailed examples, teacher prompts and student responses. Further, some expectations were in higher grades and the concept of consent was not a part of the 2010 Curriculum for elementary students.

At the hearing, the Minister argued that a curriculum is simply a "general outline of what is to be taught to students of given age" by using a "broadly worded set of objectives of what a student is expected to learn and on what they will be graded."² The Ministry confirmed there was nothing in the 2010 Curriculum that prevented teachers from addressing the concept of consent in elementary schools and teachers could also teach the concept of gender identity in classrooms within the 2010 Curriculum expectations. An expert witness in curriculum was also called and gave evidence that curriculum documents only provide "conceptual frameworks for the design and delivery of lesson plans" by teachers and the Court recognized that it

¹ *ETFO et al. v. Her Majesty the Queen*, 2019 ONSC 1308

² at para. 117.

does not provide a list of mandatory or prohibited words.³ The actual 2010 Curriculum does not put forth specific lesson plans, educational resources, classroom activities or teaching strategies and the Ministry confirmed that teachers can use their discretion and professional judgment to decide how students are taught the program in order to meet the expectations for their grade level, in consideration of a diverse class of individual students.

The Court recognized that there was nothing in the 2010 Curriculum that "prohibits a teacher from teaching any of the topics in question, which include: consent, use of proper names to describe body parts, gender identity and sexual orientation, online behaviour and cyberbullying, sexually transmitted diseases and infections."⁴

For the foregoing reasons and also given that the concepts of inclusivity, tolerance and respect for diversity are all required under the *Education Act*, the *Ontario Human Rights Code* (the "*Code*") and *Ministry Policy/Program Memoranda*, and is mentioned in the 2010 Curriculum in terms of how the curriculum is to be implemented, the Court found that the Ministry Directive does not infringe on teachers' freedom of expression under section 2(b) of the *Charter*.

In response to the claim that the Ministry Directive infringes on students' right to life and security of the person, as the 2010 Curriculum removes certain topics relating to consent, gender identity, sexual orientation etc., the Court found that there was no evidence of any harm related to the 2010 Curriculum content, given also that it had been in place for five years. The Court concluded that the reversion back to the 2010 Curriculum does not give rise to a deprivation under section 7 of the *Charter* and the absence of particular content does not amount to a breach of section 7 of the *Charter*.

The applications also alleged that the 2010 Curriculum violates equality rights under section 15(1) of the *Charter* and constitutes discrimination under the *Code*, as it lacks certain content that was previously included in the 2015 Curriculum. The Court confirmed that there is no general right to equality that would require to have equality interests advanced or to require the continuation of certain measures to advance equality. In other words, section 15(1) does not impose an obligation on the government to maintain certain policies or legislation. For the same reasons above, the Court found that the 2010 Curriculum is not substantively discriminatory and the applications were dismissed.

There is currently an ongoing application before the Human Rights Tribunal of Ontario brought on behalf of an Ontario sixth-grader alleging that the Ministry Directive breaches the *Code*. Given the Court's ruling in *ETFO v. Her Majesty the Queen*, depending on the evidence brought forth by the applicant, it is probable that the Tribunal will come to the same conclusion. ETFO is also an intervener in that proceeding.

Shibley Righton LLP partner **Sheila MacKinnon** and associate **Jessica Koper** will be speaking at the Ontario Public School Board Association's annual Education Labour Relations and Human Resources Symposium at the Sheraton Centre Hotel in Toronto on April 4-5th, 2019.

We welcome your comments and questions. Send them, and any updated contact information, to jessica.koper@shibleyrighton.com. If you wish to unsubscribe to this eBulletin, please send a blank e-mail to christen.broadbent@shibleyrighton.com

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³ at para. 88.

⁴ at para. 121.