

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ONTARIO (ATTORNEY GENERAL)

(Appellant)

- and -

FARRAH SHAW (LITIGATION GUARDIAN)

(Respondent)

APPELLANT'S FACTUM

**Jaws for Laws LLP
1998, Nogavel Court**

**Clara Miedzweidzka Issue 1
Maria Denk Issue 2
William Li Issue 3
Emily Walter Issue 4
Of Counsel for the Appellant**

**Telephone: 905-710-0010
Fax: 617-289-9837
Email: jawsforlaws@gmail.com**

PART I: INTRODUCTION

1. This case is about a conflict of interest between the parents and a child. In particular, it highlights the power of parental rights with regards to controlling the Respondent's education. The Respondent brings forth the notion that section 17.1 of the *Ontario Human Rights Act* violates Farrah Shaw's rights, highlighted under section 15(1) and section 7 of the *Canadian Charter of Rights and Freedoms* ("Charter") and cannot be saved by s. 1 of the *Charter*. We the Appellant oppose the claim that section 17.1 of the *Ontario Human Rights Act* ("Act") violates any rights brought forth by the Respondent. The Appellant believe that section 17.1 must stand because it protects parental rights and decisions.

PART II: SUMMARY OF THE FACTS

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

Notice to parent or guardian

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

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

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

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

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

3. In 2013, Farrah Shaw was 14 years old and attending ninth grade at Thames River Collegiate. In compliance with section 17.1 of the Act, Thames River Collegiate sent a notice to all parents on the first day of school in September 2013. The notice stated that all students in grades 9-12 would be receiving comprehensive sexual health education classes as part of their health and physical education class. A copy of the notice sent to parents is attached to these reasons at Schedule "A".
4. After receiving the notice, Farrah's parents filled in, signed and returned the request to excuse Farrah from the sexual health classes to the health teacher at the school, Aron Laval. In a discussion with Mr. Laval at the school's curriculum night, Farrah's parents explained that they thought the sexual health curriculum was not age-appropriate and touched on subjects – including sex toys and anal sex – which were inappropriate for high school students.
5. Mr. Laval explained to Farrah's parents that the Thames River Public Health Department had confirmed that there was a significant outbreak of sexually transmitted infections ("STIs") in Thames River, including an exceptionally high level of HIV infections. There had also been three outbreaks of STIs at Thames River Collegiate over the previous four years – almost 100 cases of chlamydia or gonorrhoea had been reported from the school's population of about 300 students from 2008-2012.
6. Mr. Laval further explained that young women were disproportionately affected in

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

7. On the day of the first sexual health education lesson, Mr. Laval asked Farrah (along with three other students whose parents had objected to their participation in the comprehensive sexual health classes) to leave the classroom and report to the library for independent study. Farrah told Mr. Laval that she wished to remain in class, as she disagreed with her parents' views on the matter. Mr. Laval told Farrah he was bound by her parents' request and that if she would not report to the library she would have to go to the principal's office.
8. Farrah went to speak with the principal, Lisette Bauer. In speaking with Ms. Bauer, Farrah explained that she felt she was entitled to a full education, comparable with her peers, and that sexual health classes were important for her overall health and well-being. Ms. Bauer reiterated that the school could not permit Farrah to participate over her parents' objections, as to do so would violate their human – and parental – rights.
9. Through a litigation guardian, Farrah 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 the trial Mezody J concluded that s. 17.1 of the Act does not violate section 15(1) of the *Charter*, but it does violate s. 7 of the *Charter* and that the violation was not in accordance with the principles of fundamental justice as well could not be saved under s.1 the *Charter*. Justice Mezody found that "by not receiving comprehensive sexual health education, Farrah's health, and indeed her life is at risk" (20). Furthermore, Justice Mezody found that the legislation was grossly disproportionate because

“Farrah’s health far outweighs the government’s objective to protect parental rights”(25) Additionally, Justice Mezody found that the concept of the best interests of the child is a principle of fundamental justice in the case and it violates this principle, “because it deprives her of access to sexual health education that could improve her health” (26) Justice Mezody concludes that section 17.1 cannot be saved under section 1 of the charter.

Reasons For Judgement, para 20, 25, 26

PART III

GROUND OF APPEAL

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

11. Section 15(1) of the *Canadian Charter of Rights and Freedoms* provides:

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

The Appellant agrees with the trial judge's decision that section 15(1) of The *Canadian Charter of Rights and Freedoms* is not violated by s. 17.1 of the *Ontario Human Rights Act*.

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

s.15.1

12. Under s. 15(1), a law that discriminates against a person or group can be identified through a two-part test, highlighted in the Supreme Court of Canada decision *R. v. Kapp* and *Quebec (Attorney General) v. A*.

(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?

R. v. Kapp, 2008 SCC 41 at para 17

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

13. Farrah Shaw claimed that she was being discriminated against under s. 15(1) of the *Canadian Charter of Rights and Freedoms* based on her dependent status.

14. Enumerated grounds is defined as, listed, prohibited grounds of discrimination. It includes all of the mentioned forms of discrimination under s.15(1) of the *Charter*. We the Appellant find that s. 17.1 of the *Act* does not create a distinction based on enumerated grounds because the Respondent's claim of dependent status isn't listed within s. 15(1) of the *Charter*.

15. Therefore, it must be determined if Farrah Shaw's claim of discrimination based on dependent status falls under the definition of analogous grounds.

16. Analogous grounds can be defined as discrimination that is similar to but not listed under s.15(1) of the *Charter*. As outlined in *Corbiere v. Canada (Minister of Indian & Northern Affairs)*:

This suggests that the thrust of identification of analogous grounds at the second stage of the Law analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law.

Corbiere v. Canada (Minister of Indian & Northern Affairs) para. 13

17. In the case, *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, all off-reserve Aboriginals were denied the right to vote under s. 77(1) of the *Indian Act*. The Supreme Court found this to be inconsistent with s. 15(1) of the *Charter*, as it discriminates against Aboriginals that were required to live off-reserve due to economic reasons. S.77 of the *Indian*

Act discriminated against a group of people that could not change their situation and thus, the Aborigines were protected under analogous grounds.

Corbiere v. Canada (Minister of Indian & Northern Affairs)

18. When compared to the case of *Farrah Shaw v. Attorney General (Ontario)*, Farrah Shaw's claim of discrimination based on dependent status is not supported under s.15 of the *Charter*. This is due to three requirements to prove discrimination, as defined by the Supreme Court of Canada in *Law v. Canada (Minister of Employment & Immigration)*:

First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage?

Law v. Canada (Minister of Employment & Immigration), 1999 CanLII para. 39

19. By using the guidelines provided in *Law v. Canada (Minister of Employment & Immigration)*, a test can be applied to determine if Farrah Shaw is being discriminated due to her dependent status. The first test would determine if it isolates Farrah through her dependent status. Using analogous grounds, the second test would identify if Farrah Shaw is being treated differently based on her dependent status. Finally, the last test would determine if there is any stereotyping against Farrah's dependent status.

20. Upon applying the first test, we the Appellant find that it fails because all dependent status individuals are treated equally under s.17.1 of the *Ontario Human Rights Act*. Farrah Shaw, as a child under dependent status, is not a targeted minority due to s.17.1, therefore, her claim does not pass the first test of discrimination.

21. The Appellant also finds that Farrah Shaw's claim fails to meet the second requirement because her inability to obtain the information from a course provided by school does not place her at a disadvantage. Farrah can receive sexual education from other sources and no academic penalty is applied if she is withdrawn from the course. Her dependent status does not preclude her from receiving the education and does not place her at a disadvantage based on her status as a dependent. Therefore, the dependent status is not analogous grounds for inclusion in s. 15(1) of the *Charter*.

22. Farrah Shaw's claim that, s. 17.1 of the *Act* violates s. 15(1) of the *Charter*, also failed to pass the final test. Section 17.1 does not imply any stereotyping or prejudice of children under dependent status, it simply respects the parents decision to choose when their child learns the explicit material provided in the sexual education course.

Conclusion

23. The Respondent's claim that Farrah is being discriminated against through s. 17.1 of the *Ontario Human Rights Act* is rejected because it fails to be recognized as a discrimination under analogous grounds under s.15(1) of the *Charter*. It fails to pass the first test of the two-part test highlighted in *R. v. Kapp* and it fails to pass the three step test found in *Law v. Canada (Minister of Employment & Immigration)*, to prove discrimination.

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

24. Section 7 of the *Charter* reads:

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

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

25. To determine if section 17.1 of the *Ontario Human Rights Act* deprives any of the claims the Respondent has made, the court must determine if section 17.1 of the *Act* infringes on one or more of the Respondent's right to Life, Liberty and Security of the Person guaranteed in s.7 of the *Charter*.

Section 17.1 of the *Ontario Human Rights Act* does not infringe Farrah's right to Life, Liberty and Security of the Person.

Does Section 17.1 of the *Ontario Human Rights Act* Infringe Farrah's right to Life?

26. Farrah claims that s.17.1 of the *Ontario Human Rights Act* deprives her from the right to life because parents can choose to exempt their children out of sexual education classes. The parent's right to withdraw their children out of a sexual education lesson does not mean that the child's life is at risk.

27. In the *B.(R.) v. Children's Aid Society of Metropolitan Toronto* the parents tried to refuse a blood transfusion for their child, who's health was in declining condition, for religious

reasons. In this case, the child's life was a matter of life or death, and the parents intended action of declining the blood transfusion, would have lead to the death of the child since there was no alternative way to treat the child's critical condition. In this case, the parents' actions of rejecting a blood transfusion is a risk to the child's health. Compared to this case, Farrah's parents denying her access to sexual education from school is not as extreme as a violation of right to life.

B.(R.) v. Children's Aid Society of Metropolitan Toronto, (1995) 1 SCR 31 (Supreme Court of Canada)

28. In *Farah Shaw v. Attorney General (Ontario)*, the Respondent claims that not receiving sexual education from school is a risk to her life. Not receiving sexual education does not mean that one's health will deteriorate. The Respondent only risks her life if she decides to engage in unprotected vaginal or oral sex. Additionally, sexual education is not a life necessity; one can survive without it unlike a blood transfusion, which if one decides not to have, will result in death.

29. Additionally, the purpose of the legislation is to give parents the choice to withdraw their children from sexual education classes in school. The legislation is not directly depriving Farrah of her life; the only possible way her health is at risk is if she decides to engage in unprotected sexual practices. Therefore since her right to life is not violated by the legislation, the right to life is not violated.

30. We the Appellant respectfully submit that the Mezdoy J. erred when they found that, "(Farrah's) parents' refusal to permit her access to the only available source of reliable sexual

health information...deprives Farrah of her section 7 interest in life.” The lack of sexual education does not mean that one will die from contracting a sexually transmitted infection (STI). Not every person who does not receive comprehensive sexual education will contract a STI, and contracting one is not directly related to death as even without sexual education people can still practice sex safely.

Reasons for Judgment, para.21

Does Section 17.1 of *The Ontario Human Rights Act* infringe Farrah’s right to Liberty?

31. The section that concerns the liberty of Farrah, s.17.1 sub. 2 states:

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

Ontario Human Rights Act, s.17

32. The purpose of the law is to protect the interests of parents in guiding their children’s education which allows them to withdraw their children from “touchy” subject areas such as religion, religious human sexuality or sexual orientation. This law only limits children from accessing information on these kinds of subjects in school if their parent signs a notice indicating that they do not want their child to attend that class.

33. However, this law does not limit children from accessing these subject areas from sources outside of school. Mezody J. stated: "(Farrah's) parents' refusal to permit her to access the only available source of reliable sexual health information" Mezody J. erred in this finding because sexual education in school is not the only reliable form of sexual education that is available. Parents, doctors and public health centers are other forms of sexual education that are available.

Reasons for Judgment, para.21

34. Although the facts state that youth that are residents of Thames River have increased difficulties in accessing accurate sexual education outside of school compared to their urban counterparts, this does not mean the Respondent has no access to accurate sexual health information as Farrah can still access this information through her doctor or websites that are made by professional physicians, and in the age of technology, anyone can have access to this information. Therefore, the Right to Liberty is not violated because the law does not limit her from access to sexual health information outside of school.

Does section 17.1 deprive Farrah's right of Security of the Person?

35. To determine if the right to the Security of the Person is violated, the psychological or physical harm must result from actions of the government and it must be serious. As outlined in the Supreme Court decision *Blencoe v. British Columbia (Human Rights Commission)*:

First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by government will lead to automatic s.7 violations. These two requirements will be examined in turn.

Blencoe v BC (Human Rights Commission), 2000 SCC 44 para. 57

1) Is Farrah Shaw's deprivation of the right to Security of the Person caused by government actions?

36. In this case, the Respondent claims that her right to life is deprived because she is unable to receive sexual education lessons in school, however what she claims can be also applied as "The deprivation of the right to the Security of the Person." For this claim to be made, the Respondent's right to Security of the Person must be a result of s.17.1 of the *Act*.

37. The only way the Respondent can claim that her right to the security of the person is violated is to engage in unprotected sexual acts and then contract an STD, which may cause psychological and physical insecurity.

38. In *R.v.Morgentaler*, Morgentaler fought that the abortion laws that were imposed by the state, violated women of their security of the person. Section 251 of the *Criminal Code* forced women to carry a fetus irrespective of their own "priorities and aspirations." The law was struck down because it violated the right of Security of the Person, which was a state imposed infringement of Security of the Person. However in the current case, the right of Security of the Person is only violated if the Respondent decides to engage in unprotected sex, which is not state imposed. Therefore since the deprivation of the right of Security of the

Person is not state imposed, the Respondent's security is not deprived.

R.v.Morgentaler (1988) 1 SCR 30 (Supreme Court of Canada) at p 32

2) Is the violation of the right of Security of the Person serious?

39. The violation of the right of Security of the Person is not serious because it is not state imposed and it happens frequently within society. It is the Respondent's responsibility to have protected or unprotected sex and because she has already contracted chlamydia once, if she does get a sexually transmitted infection again, it is a result of her actions and not of her parents actions for having unprotected sexual intercourse.

40. Furthermore, the right of security of the person only becomes serious if the Respondent decides to have unprotected sexual intercourse and results in getting a sexually transmitted infection. Since it is the Respondent's responsibility to choose whether to have protected or unprotected sex and not that of the government's, the violation of the right to Security of the Person is not serious.

Conclusion

41. In the case of *Farrah Shaw v. Attorney General (Ontario)*, Farrah's right to life is not deprived because her life is only risked if she decides to engage in unsafe sexual practices and engaging in sex does not directly relate to death. Her right to liberty is not violated

because she cannot access sexual health information at school. However; she can access doctors and public health clinics, which provides reliable information. Finally, her right of Security of the Person is not violated since it is not state imposed and it is not serious. Therefore, s.17.1 of the *Ontario Human Rights Act* shall remain standing because it does not violate any of the rights provided in Section 7.

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*?

42. In the case of *Farrah Shaw v. Attorney General (Ontario)*, the trial judge ruled that Farrah Shaw should be allowed to take sexual education classes under two violated Principles of Fundamental Justice, the best interests of the child and gross disproportionality.

Farrah Shaw v. Attorney General (Ontario) para. 24

43. We the Appellant submit that Mezody J. overlooked key points about the two Principles of Fundamental Justices that were outlined.

44. Principles of Fundamental Justice can be defined as, legal principles that demand a majority societal consensus as vital justices to our legal system. Principles of Fundamental Justice can be found used in many different tenets of our legal system as it sets the minimum requirements for the application of justice.

45. A Principles of Fundamental Justice must fulfill three requirements to be qualified as a

Principle of Fundamental Justice. As outlined by the Supreme Court of Canada in *R. v. Marmo-Levine*, a Principle of Fundamental Justice must be a legal principle, there must be a societal consensus that it follows what society defines as justice and lastly, the proposed principle must not be vague or arbitrary.

R. v. Marmo-Levine 2003 SCC 74 para. 113

The Best Interests of the Child

46. The best interests of the child is not a recognized Principle of Fundamental Justice as it does not fulfill all three requirements.

The 'best interests of the child' is widely supported in legislation and social policy, and is an important factor for consideration in many contexts. It is not, however, a foundational requirement for the dispensation of justice.

Canadian Foundation for Children, Youth and the Law v. Canada 2004 SCC 4 para. 10

Though the best interests of the child is cited in many different cases and should be consulted in this case, it should be applied as more of a consideration rather than a determining factor, as highlighted by the Supreme Court of Canada in *Canadian Foundation for Children, Youth and the Law v. Canada*.

47. While the best interests of the child is a legal principle and should be consulted when dealing with cases involving children, it is not part of what society defines as vital or fundamental to the societal notion of justice, causing the proposed Principle of Fundamental Justice to fail to fulfill the second requirement.

48. As the government argues in *Canadian Foundation for Children, Youth and the Law v. Canada*, the Supreme Court stated that,

Here, too, the 'best interests of the child' falls short. It function as a factor considered along with others. It's application is inevitably highly contextual and subject to dispute; reasonable people may well disagree about the result that its application will yield

Canadian Foundation for Children, Youth and the Law v. Canada, 2004 SCC 4 para. 11

The best interests of the child are interpreted differently based on cultural, social and economic values. As there are no parameters set as to what acts are within the broad scope of the best interests of the child, the best interests of the child is indisputably not a Principle of Fundamental Justice.

49. In *The Canadian Foundation for Children, Youth and the Law v. Canada*, the Appellant argued that section 43 of the *Criminal Code* violated the best interests of the child. In this case, s. 43 of the *Criminal Code* allowed parents and teachers to physically discipline their students/children. The court ruled that the best interests of the child were not recognized Principles of Fundamental Justice because of its failure to be recognized as vital and fundamental to our justice system in its vagueness.

50. If the Respondent argues that the best interests of the child is violated under s.17.1 of the *Ontario Human Rights Act* through a deprivation of Farrah Shaw's life interests, the Supreme Court decision delivered, in *The Canadian Foundation for Children, Youth and the Law v. Canada*, that it does not deprive Farrah Shaw of any of the Principles of Fundamental

Justice protected under s. 7 of the *Canadian Charter of Rights and Freedoms*. Farrah Shaw's request to decide on the courses she would like to take is not vital and fundamental to the justice system, comparative to the parental rights protected under s.17.1 of the *Act*.

51. As stated by the government in, *B.(R.) v. Children's Aid Society of Metropolitan Toronto*:

This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself.

B.(R.) v. Children's Aid Society of Metropolitan Toronto p.318

In this case the parents did not act in the best interests of the child because their decision was life- threatening to their child. This resulted in the justifiable loss of their parental rights. In relation to Farrah Shaw's case, failing to receive sexual education is not life- threatening and under the Supreme Court of Canada's decision in *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, section 17.1 of the *Ontario Human Rights Act* still applies.

52. Therefore, the proposed principle fails to be recognized as a Principle of Fundamental Justice due to its obscurity and inability to be identified within society's definition of justice. However, it is still a legal principle and can overrule parental rights in situations where the child's life is threatened. In this case, Farrah Shaw's life is not being threatened and thus, the best interests of the child does not rule over her parents' rights.

Gross- Disproportionality

53. In this case, the trial judge asserts that s.17.1 of the *Ontario Human Rights Act* is grossly disproportionate from its objective. In giving Farrah Shaw's parents authority with regards to Farrah Shaw's life and education, it endangers her health and thus is grossly disproportionate from the government's objective to protect parental rights.

54. Gross disproportionality can be defined as an action made by legislation that is too extreme to follow any government interest. It is a recognized Principle of Fundamental Justice, however, gross disproportionality cannot be applied to this case since the policies instituted by the government are not disproportionate from its objective.

55. Section 17.1 of the *Act* is in place so that parents can make a mature, informed decision about the education that their dependent child is receiving in the classroom. It respects the parents' rights to act for the greater good of the child, not necessarily in accordance with the child's wishes.

56. Farrah's parents are not making arbitrary decisions for her as they know her best. Farrah's parents know how she will react to the sexual education provided by the school, therefore, their parental rights need to be respected by the government.

57. It is evident that s.17.1 of the *Ontario Human Rights Act* is not grossly disproportionate from its intended objective because Farrah Shaw's situation is not life threatening. As a

minor, Farrah Shaw is under her parents "protected sphere of parental decision- making."

B.(R.) v. Children's Aid Society of Metropolitan Toronto p.318

Conclusion

58. In the case of *Farrah Shaw v. Attorney General (Ontario)*, the violated Principles of Fundamental Justice that were outlined by Mezdoy J. are gross disproportionality and the best interests of the child. However, the Appellant finds that Mezdoy J. failed to apply the proper tests to determine whether there was a deprivation of Farrah Shaw's rights. The best interests of the child is not a recognized Principle of Fundamental Justice as it is ambiguous and irrelevant to society's notion of justice. Furthermore, gross disproportionality is not recognized because Farrah Shaw's rights are not violated under s.7 of the *Canadian Rights and Freedoms* and thus, the parental rights under s. 17.1 of the *Ontario Human Rights Act* must be respected.

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?

59. Mezdoy J. found that section 17.1 of the *Ontario Human Rights Act* did not infringe Farrah Shaw's equality rights guaranteed under section 15(1) of the *Canadian Charter of Rights and Freedoms* as it is not discriminatory, and the Appellant agrees with this finding.

60. Mezdoy J. also found that s.17.1 of the *Act* infringes Farrah's rights to Life, Liberty and Security of the Person guaranteed under s.7 of the *Charter*. However, the Appellant submits that the limitation is prescribed by law, has a pressing and substantial objective and is

proportional to its objective. For these reasons, the infringement can be justified under s. 1 of the *Charter*.

Section One Analysis Regarding This Issue

61. Even if Farrah Shaw's parents' right to exclude her from participating in comprehensive sexual health education classes is an infringement of her rights under section 7 of the *Charter*, the infringement can be justified under section 1 of the *Charter*. Section 1 provides:

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

Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act, 1982, ss.1

In order to determine whether the proposed violations can be justified under this section, we must apply the *Oakes* test. The *Oakes* test is a three step test created by the Supreme Court of Canada in the case *R.v. Oakes* that is designed to determine if a law that infringes a *Charter* right can be saved under section 1.

R. v. Oakes, [1986] 1 SCR 103

The power of parents to exclude their children from comprehensive sexual education classes in school is prescribed by law under section 17.1 of the *Ontario Human Rights Act*.

62. The *Oakes* test requires that limitations on any *Charter* right must be prescribed by law. This means that the limitation must be part of a law or legal statute. It also requires that the law must be clear and accessible to every Canadian.

R. v. Oakes, [1986] 1 SCR 103

63. As accepted by Mezody J., section 17.1 of the *Act* is prescribed by law as it is duly enacted legislation. Section 17.1 of the *Act* provides that all parents receive a notice where the course of study of their child includes subject-matter that deals primarily and explicitly with sexuality, so that the parents can exercise their right under the *Act* to remove their child from the class. Therefore, the provision is clear and accessible to all parents and completely fulfills the criteria outlined in this stage of the *Oakes* test.

While Farrah Shaw's educational interests are pressing and substantial, protecting the interests of all parents is more pressing and substantial.

64. In order for an infringement to pass this stage of the *Oakes* test, the objective of section 17.1 of the *Act* must be pressing and substantial. The purpose of the law must not only be important to society but it must significantly impact the population.

R. v. Oakes, [1986] 1 SCR 103

65. Mezody J. found that "...protecting the interests of parents in directing their children's education is a pressing and substantial objective," and the Appellant submits that this finding

was correct.

Reasons for Judgment, at par. 32

66. The objective of protecting the interests of all parents in guiding their children's education is clearly pressing and substantial because parents know their children best and have the mature knowledge and experience required to make decisions that will have the best impact on their children's future.

67. Additionally, this provision is necessary in order to ensure that children are protected. Youth have less life experience and are less aware of the consequences of their actions. Furthermore, factors such as peer pressure or naïve curiosities, with regards to sexual education, may fog their good judgement. Therefore, the protection of the interests of parents in guiding their children's education is crucial in order to allow them to shape their children's future in the best manner possible.

The limits on Farrah's rights to Life, Liberty and Security of the Person outlined in s.7 of the *Charter* are proportional to the objective of s.17.1 of the *Ontario Human Rights Act*.

68. The Oakes test states that "...once a sufficiently significant objective is recognized, then the party invoking s.1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test'." The proportionality step of the Oakes test ensures that: (1) the limitation is rationally connected to its objective, (2) the Charter right is minimally impaired, and (3) The negative effects of the infringement must be

proportional to the positive effects of the law.

R. v. Oakes, [1986] 1 SCR 103

The infringement on Farrah's rights guaranteed under s.1 of the *Charter* is rationally connected to the objective of protecting the interests of parents in guiding their children's education.

69. This step of the *Oakes* test was designed to ensure that a limitation to any *Charter* right is not arbitrary or unrelated to the objective of the law. The infringement must have a rational connection to its purpose in order to be justified under s.1 of the *Charter*.

70. In this case, the infringement on Farrah's section 7 rights to Life, Liberty and Security of the Person is rationally connected to the objective of allowing all parents to guide their children's' education.

71. In order to maintain the objective of protecting the interests of parents in guiding their children's' education, there must be restrictions imposed on Farrah's rights to Life. Disallowing her from attending the sexual education classes that may benefit her health is rationally connected to the objective of the law. If she were permitted to receive the information about sexuality taught in school against her parents' wishes, the onus of guiding her education would be placed on the school and withdrawn from her parents.

72. There must be restrictions on Farrah's Liberty rights in order to fulfill the objective of the law. If Farrah had complete freedom and independence to choose her educational path

about sexual health, the goal of protecting the ability of her parents to guide her through her education would be struck down, as she would be making choices about her education alone, without the voice or valuable contributions of her parents.

73. The limitations on Farrah's rights to Security of the Person, by denying her the choice of attending sexual education classes and posing a risk of contracting a sexually transmitted infection, is rationally connected to the goal of the law. By posing a potential risk to Farrah's health, Farrah is encouraged to listen to her parents' advice and take their guidance to heart. If there was no risk factor associated with the purpose of the law, there would be no reason children would follow the teachings of their parents.

The permission of parents to exclude their children from comprehensive sexual education classes minimally impairs Farrah's rights granted under section 7 of the Charter.

74. A limitation on any *Charter* right must impair the right or freedom in question "as little as possible" in order to satisfy the proportionality quotient of the *Oakes* test.

75. Mezody J. found that s.17.1 of the *Act* more than minimally impairs Farrah's rights:

I am unable to conclude that a regime which totally silences the child in question from having a say in his or her education is minimally impairing of Farrah's rights.

Reasons for Judgment, at par. 32

76. However, the Appellant submits that the trial judge erred in this finding. Allowing

parents to steer their children's' sexual health education does not deteriorate the ability of a child to convey their opinion on this issue to their parents. It was noted by Mezody J. that, "Except for very young students, self-esteem and parental relationships are not correlated with higher or lower levels of sexual activity." However, by allowing parents to guide their children's education, children are encouraged to discuss this matter with their parents, which strengthens this relationship. A stronger relationship may encourage a child to consider their parents' mature judgement when making decisions about sexual behaviour and will benefit their health as a result, thus minimally impairing their rights.

Reasons for Judgment, at para. 13

77. Additionally, a child could seek alternative educational resources in order to fulfill their sexual curiosities. They could learn about sexual health from books, internet resources and from their doctor. In all cases, the material learned remains confidential from the children's' parents if the children choose.

78. As stated in *R. v. Marmo-Levine*; *R. v. Caine*, " 'Minimal impairment' asks whether the legislature could have designed a law that infringes rights to a lesser extent."

R. v. Marmo-Levine; *R. v. Caine* 2003 SCC 74 at par.126

79. Section 17.1 of the *Act* could not have been designed in a way that would infringe Farrah's rights to a lesser extent, without impairing her parents' right to direct their child's

education. If the *Act* provided the child with the choice to attend class or not, the law's purpose of protecting the interest of parents in directing their children's' education would be entirely dismissed.

The limitations on Farrah's section 7 *Charter* rights are proportional to their objective as they balance the interests of parents in guiding their children's' education.

80. This part of the proportionality test evaluates whether reasonable limits can be "demonstrably justified in a free and democratic society" and assesses the benefits and negative impacts of the law in question. In order for an infringement to pass this part of the test, its negative effects on an individual must not outweigh the positive effects of the law.

R. v. Oakes, [1986] 1 SCR 103

81. In this case, the benefits of the law to society greatly overpower the restrictions of one individual. As stated in *R. v. Marmo-Levine*; *R. v. Caine*:

At the final stage of the s.1 analysis, the court is required to weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good.

R. v. Marmo-Levine; *R. v. Caine* 2003 SCC 74 at par.126

82. Seeing as the health teacher at Thames River Collegiate asked several students in Farrah's class to be dismissed from the sexual health classes upon their parents' requests,

Farrah was not the only one in her class or in her school whose parents objected to the classes. It cannot be ignored that the *Act* is influential on society, as it affects more than one person or one group of people.

83. The goal of the *Act* for the greater public good is to protect the interests of parents in guiding their children's' education, one of the reasons being to protect their religious beliefs. As the Appellant submitted to Mezody J., "...such a provision is necessary in a pluralistic society where there are many distinct views – some of which are founded on religion – on appropriate sexual health education for minors". Seeing as s.17.1 is applied "where the courses of study include subject-matter that deals explicitly with religion, human sexuality or sexual orientation", the protection guaranteed under s.17.1 is crucial in protecting families who wish to exclude their children from the sexual education classes in the case that the learning material is inappropriate in relation to their beliefs.

Reasons for Judgment, at para. 33

84. Cultural diversity is significant in today's society and validates the argument that parents should have the right to guide their children's' education. As noted by Mezody J, "Farrah's parents explained that they thought the sexual health curriculum was not age-appropriate and touched on subjects – including sex toys and anal sex – which were inappropriate for high school students". As such, these classes do not coincide with the culture Farrah's parents wish their daughter be exposed to. Multiculturalism is one of Canada's core values as can be seen by analysing the "free and democratic society" criteria of s.1 of the *Charter*. To eliminate or amend s.17.1 of the *Act* would contradict a fundamental Canadian value and certainly would not contribute to the goal of protecting the interests of

parents in guiding their children's education and would not positively contribute to the future of their children.

Reasons for Judgment, at para. 7

85. As found by Mezody J., "Youth who do not receive comprehensive sexual health education are more likely to contract a sexually transmitted infection or have an unplanned pregnancy than their peers who receive comprehensive sexual health education". However, it is also true that if a parent is required to permit their child to attend these classes against their will, the child's overall health may still be equally impacted, as allowing the child to choose to attend these classes can encourage sexual behaviour that can negatively impact their health.

Reasons for Judgment, at para. 13

86. Mezody J. found that, "On average, youth who receive comprehensive sexual health education participate in sexual intercourse 3 months earlier than their peers who do not receive comprehensive sexual health education." Additionally, "knowledge among youth about sexual health declined between 1989 and 2003;" yet "the proportion of students reporting that they were virgins or abstained from sex increased between 1989-2003." Upon closer examination of the facts, the Appellant submits that the attendance of children in comprehensive sexual health classes poses risks, as their participation in sexual behaviour may be encouraged through the classes, and its increase elevates risks to their health.

Reasons for Judgment, at para. 13

87. The child is exposed to risk whether they attend the sexual education classes or not, however in the latter the well-being of the parents is also impacted as they are denied the opportunity of a voice in their child's education. Therefore, the benefits to both child and parents as a result of the law outweigh the potential risks of one child.

Conclusion

88. The Appellant submits that even if section 17.1 of the *Ontario Human Rights Act* infringes Farrah's rights to Life, Liberty and Security of the person guaranteed under s.7 of the *Charter*, the pressing and substantial objective of protecting the interests of parents in guiding their children's education is unobtainable if s.17.1 of the *Act* is not in place. Furthermore, the loss of benefits for children resulting from the achievement of this objective if this *Act* is dismissed would be detrimental. For these reasons it is very clear that s.17.1 of the *Ontario Human Rights Act* can be saved by s.1 of the *Charter*.

APPLICATION TO THIS CASE

1. The arguments presented in this case make it clear that Farrah's proposal would restrict the rights of all parents, in guiding their children's education, granted under section 17.1 of the *Ontario Human Rights Act*. Moreover, the alleged violations highlighted by the respondent, of section 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* are not recognized violations. This factum proves that section 17.1 of the *Ontario Human Rights Act* is constitutionally justified as parental rights protected under s. 17.1 of the Ontario Human Rights Act need to be respected.

PART IV ORDER REQUESTED

2. It is respectfully requested that the legislation be declared valid and that Justice Mezody's decision be overturned with the exception of their decision regarding issue one; which should withstand.

ALL OF WHICH is respectfully submitted by

Maria Denk, William Li, Clara Miedziedzka, Emily Walter

Jaws for Laws LLP of Counsel for the Appellant

DATED AT CAWTHRA PARK SECONDARY SCHOOL this 14th Day of November, 2014

APPENDIX A- Clara Miedzweidzka

AUTHORITIES TO BE CITED

STATUTES:

Canadian Charter of Rights and Freedoms

Ontario Human Rights Act

CASES:

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

Quebec (Attorney General) v. A, 2013 SCC 5, [2013] 1

Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 4097

SECONDARY RESOURCES:

"Analogous Grounds." *Centre for Constitutional Studies*. University of Alberta, n.d. Web. 14 Nov. 2014.

APPENDIX B- Maria Denk

STATUTES:

Canadian Charter of Rights and Freedoms

Ontario Human Rights Act

CASES:

B.(R.) v. Children's Aid Society of Metropolitan Toronto [1995] 1 SCR 315

Blencoe v BC (Human Rights Commission) 2000 SCC 44

R.v.Morgentaler (1988) 1 SCR 30

SECONDARY RESOURCES:

Graham Garton, *The Canadian Charter of Rights Decisions Digest*, Justice Canada,
Updated: April 2005 (CanLII), <<http://canlii.org/en/commentary/charterDigest/>>.

APPENDIX C- William Li

STATUTES:

Canadian Charter of Rights and Freedoms

Ontario Human Rights Act

Criminal Code, RSC 1985, c C-46

CASES:

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004]
1 S.C.R. 76, 2004 SCC 4

B.(R.) v. Children's Aid Society of Metropolitan Toronto [1995] 1 SCR 315

R. v. Malmo Levine [2003] 3 S.C.R. 571, 2003 SCC 74

SECONDARY RESOURCES:

Graham Garton, *The Canadian Charter of Rights Decisions Digest*, Justice Canada,
Updated: April 2005 (CanLII), <<http://canlii.org/en/commentary/charterDigest/>>.

APPENDIX D- Emily Walter

STATUTES:

Canadian Charter of Rights and Freedoms

Ontario Human Rights Act

CASES:

R. v. Oakes, [1986] 1 SCR 103

R. v. Malmo-Levine; R. v. Caine, 2003 SCC 74