

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ONTARIO (ATTORNEY GENERAL)

(Appellant)

- and -

FARRAH SHAW (LITIGATION GUARDIAN)

(Respondent)

RESPONDENT'S FACTUM

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PART I: INTRODUCTION

1. This case is about the issue regarding whether or not parents or guardians can withdraw their child from high school sexual health classes, despite the wishes and/or intentions of the child. The prior verdict made by Justice Mezody, for the reasons outlined in Court File No. 20737-06, was that the parents or guardians cannot.
2. Farrah Shaw, a mature minor, determined that the ability for her parents to opt her out of her sexual education classes was not in her best interest. She classifies herself as a sexually curious individual, and as a result, understands the choices she has made in relation to her sexual practices. She believes that she should be allowed to make her own decision as to whether she receives her education, as she finds it to be in her best interests to do so.

PART II: SUMMARY OF THE FACTS

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

Notice to parent or guardian

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

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

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

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

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

4. 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".
5. 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.
6. 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.
7. 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.

8. 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.
9. 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.
10. 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.

11. At trial, Mezody 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*.

12. Justice Mezody stated that one's status as a dependent child of their parents is an analogous ground. The first portion of section 15(1) is not met, therefore there is no need to evaluate the second branch of the section. As a result, Mezody concluded that Section 17.1 of the *Ontario Human Rights Act* is not in violation of Farrah's Section 15 rights. Section 17.1 does, however, deprive Farrah of her section 7 interests in regards to life. Farrah's parents' decision to deny her reliable sexual health information greatly affects her ability to safeguard her bodily integrity. Mezody also stated that section 17.1 violates Farrah's best interests, which are identified as principles of fundamental justice. Furthermore, Farrah possesses the ability to demonstrate her own view on the necessity of sexual health education. Finally, the negative effects of section 17.1 overshadow the positive effects. Denying Farrah access to sexual health education that could influence the health and well-being could result in a greater possibility of the contraction of a life-threatening illness. In conclusion, 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 HUMAN RIGHTS ACT* INFRINGE FARRAH'S RIGHT TO EQUALITY UNDER S. 15(1) OF THE *CHARTER*?

13. Section 15(1) of the Canadian Charter of Human Rights and Freedoms 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]

DIFFERENTIAL TREATMENT/ANALOGOUS GROUND

14. The first case regarding this matter decided that section 17.1 of the *Ontario Human Rights Act* did not infringe section 15(1) of the *Charter* as the law did not create a distinction based on analogous ground. However, section 17.1 does infringe section 15(1) based on dependency. Farrah is dependent on her parents due to her status as a minor, which results from age; something that is enumerated under section 15(1). She is unable to receive the same education as the rest of her classmates, and she feels deprived of a complete education. Farrah's age is an immutable personal characteristic, as she cannot change the fact that she is fourteen years old. At this age, Farrah has already engaged in various sexual practices, such as oral and vaginal sex, with her current boyfriend, and describes herself as “sexually curious”. 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.

Her principal, Ms. Bauer, explained that permitting Farrah to participate in this class against her parents objections may violate their human and parental rights, however, depriving her of this information, deprives her of valuable material that is beneficial to her own sexual health. This creates a distinction between Farrah and her peers.

Shaw v. Canada (Attorney General), 2014, 20737-06, 5-6(11)

IS THE PURPOSE OR EFFECT DISCRIMINATORY?

15. Section 17.1 of the *Act* prevents Farrah from obtaining information that benefits her overall health and her sexual integrity. Thames River is an extremely small town, and as a result, lacks privacy. There are not many sources for Farrah to obtain information regarding sexual health within the town; therefore, Thames River Collegiate is her primary source for obtaining information regarding this issue. Furthermore, as Thames River is a small, non-urban town, the information that Farrah may acquire outside of Thames River Collegiate may not be completely accurate and could potentially cause further problems. Previously, Farrah contracted chlamydia due to her sexual practices, and learning about methods to save her bodily integrity could benefit her immensely. Section 17.1 of the *Act* prevents her from acquiring this accurate information, from her primary resource, and is discriminatory against her age and her dependent status. Farrah is not being protected equally, nor is she benefiting equally from this law. This is not fair to Farrah, nor is it just.
16. The distinction made by section 17.1 of the *Act* has a direct impact on Farrah, as it discriminates against those of dependent status. Section 17.1 of the *Act* holds that those of dependent status do not have the capacity of making decisions for themselves as they are too young, which is stereotyping based on age. Farrah is facing discrimination due to the assumption that she is unable to make decisions for

herself in result of her dependent status. Farrah is a fourteen-year-old woman who has already made decisions for her own self and has proved herself to be responsible, as she is seeking to expand her knowledge of sexual health by attending sexual education classes in order to better protect herself, and her sexual health.

17. Farrah has made it clear that she does not intend on ending her sexual practices because she is prohibited from attending sexual education classes. She will continue to engage in oral and vaginal sex, however, she wants to be able to engage in these practices with the required knowledge in order to better protect herself. Sexual education classes are in Farrah's best interest and section 17.1 prohibits this. Prohibition due to dependent status goes against the intention of section 15 of the *Charter*, which is to advance the principles of equality.
18. Many stereotypes can be found in section 17.1 of the *Ontario Human Rights Act*. Not only do they result from this section, but they are endorsed by it as well. This section supports the stereotype that youth need to be protected and sheltered from sex and that they should not know about sex related matters. However, many teens start to experiment with sex when they reach their teens. Believing that they wait to have sexual encounters is ignoring a huge issue. It also supports the belief that sexual education encourages sex among youth, and that they will become sexually active due to the class. In the facts of the case, it is stated 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.

Young women made up approximately sixty per cent of the reported cases. These facts clearly demonstrate that the stereotypes previously mentioned are, in fact, stereotypes. Youth are engaging in sexual practices and are not sheltered on these issues. Additionally, facts stated in the case based on expert testimony demonstrated that youth who do not receive sexual education are more likely to engage in unprotected sexual acts than those who did receive comprehensive sexual health education. They are also more likely to contract a sexually transmitted infection, less likely to be aware of their legal rights, and less likely to seek treatment for sexually transmitted infections. Farrah, who has not received comprehensive sexual health education, has already contracted a sexually transmitted infection, and is at a higher risk to contract another one. Her health is at risk, and she is being put at risk due to section 17.1 of the *Act*.

Shaw v. Canada (Attorney General), 2014, 20737-06, 5(8)

19. The way to interpret section 15(1) of the *Canadian Charter of Rights and Freedoms*, is set out in *Law v. Canada (Minister of Employment and Immigration)*. Section 7 states that:

The contextual factors which determine whether legislation has the effect of demeaning a claimant's dignity must be construed and examined from the perspective of the claimant. The focus of the inquiry is both subjective and objective. The relevant point of view is that of the reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim.

In Farrah's eyes, her dignity is being compromised, as she is not able to access information that is readily available to her. Her parents exert more control over her education than she does herself. She is sexually active and is unable to broaden her knowledge of sexual health, which is demeaning and compromises her dignity. Any

reasonable person would be able to understand Farrah's point of view, it is only a matter of testing it. Section 9(A) of *Law v. Canada* states that important contextual factors that influence the determination of whether or not section 15(1) of the Charter has been infringed are: pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue. Furthermore, it states that:

The effects of a law as they relate to the important purpose of s. 15(1) in protecting individuals or groups who are vulnerable, disadvantaged, or members of "discrete and insular minorities" should always be a central consideration. Although the claimant's association with a historically more advantaged or disadvantaged group or groups is not *per se* determinative of an infringement, the existence of these pre-existing factors will favour a finding that s. 15(1) has been infringed.

Farrah's dignity is being demeaned, she is at a disadvantage in comparison to her peers, her age and dependent status are causing her to be discriminated against as well as stereotyped, and she is vulnerable, all because of section 17.1 of the *Act*.

Farrah's case demonstrates all of these pre-existing factors that favour a finding that section 15(1) has been infringed, and to deny that it has would be wrong.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 SCR 497, 1999 CanLII 675 (SCC)

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

20. Section 7 of the Charter States:

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

Charter, supra, para 19, at s. 7.

21. It can be established that the impugned law violates the liberty and security of the Respondent. By excluding Farah from her sexual health education class, not only is her autonomy being restricted, but it is also preventing her from acquiring valuable knowledge about her health and security of person, which could be detrimental to her bodily integrity.

22. The protection given to an individual under Section 7 of the *Charter* is not limited to criminal cases, and as demonstrated in the *Godbout* and *R v Morgentaler* cases, it can also be applied in a scenario in which the individual's liberty is at stake as a result of some government action or legislation. This applies in Farrah's Case, as her liberty is at stake as a result of Section 17.1 of the Ontario Human Rights Act.

Godbout v. Longueuil (City), [1997] 3 SCR 844, 1997 CanLII 335 (SCC)
R. v. Morgentaler, [1993] 1 SCR 462, 1993 CanLII 158 (SCC)

23. The Supreme Court of Canada (SCC) has also clarified that the same right applies to situations where “state compulsions or prohibitions affect important and fundamental life choices.”

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

24. In addition, it has been clarified by the SCC that the right to the security of the person “protects the psychological integrity of an individual. However, in order for this right to be triggered, the psychological harm must result from the actions of the state and it must be serious.”

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

25. In the Case *B (R) v. Children's Aid Society of Metropolitan Toronto*, parents who were Jehovah's Witnesses explicitly requested that doctors deny their child of a vital blood transfusion, on the basis that it was against their religion. The SCC's decision stated that the appellants held the right to decide whether or not their infant should receive the treatment, as denying them that choice would be an infringement on their parental liberties, as protected by Section 7 of the *Charter*.

B (R) v. Children's Aid Society of Metropolitan Toronto, [1995] 2 SCR 606

26. This decision, however, was made due to the fact that the deprivation was found to be in accordance with the principals of fundamental justice, and as a result, the child's protection and right to life remained intact.

B (R) v. Children's Aid Society of Metropolitan Toronto, [1995] 2 SCR 606

27. This is not the case in Farrah's situation, as section 17.1 of the *Act* is depriving her of her right to life and health – she has already contracted chlamydia in the past, a severely detrimental STI, showcasing the potential severity of her deprivation. If she is not allowed to partake in sexual education classes, she will not receive vital information that could potentially be crucial in preserving her health and wellbeing.

28. In addition, as stated in the case *A.C. v. Manitoba (Director of Child and Family Services)*, “the evolutionary and contextual character of maturity makes it difficult to define, let alone definitively identify. Yet the right of mature adolescents not to be unfairly deprived of their medical decision-making autonomy means that the assessment must be undertaken with respect and rigour.”, meaning that it is necessary to take into account the possibility that younger adolescents may be capable of making decisions for themselves that are evidently in their best interest.

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

29. This principle was not applied to Farrah’s case, as her maturity, regardless of her age, was not taken into account through a legal process. It is possible that Farrah understands what is in her best interests more than either of her parents, due to the fact that she is sexually active, and has already been exposed to sexual acts with her current boyfriend, as stated in the agreed facts of the case. As a result, her right to liberty is being infringed upon, as she is being denied the ability to make decisions in her own best interests due to her age.

30. The impugned law deprives Farrah of her fundamental rights, by jeopardizing her security of person, due to her parents’ unilateral decision to keep her from receiving the comprehensive sexual education she needs in order to remain equipped and well-versed in relation to the health and integrity of her body.

31. As a result of the limitations placed on Farrah in regards to her liberty, not only is she

being denied the freedom to choose to partake in sexual education classes, which would benefit her by keeping her informed, but her life is also being put at risk, as expert testimony suggests that those who do not receive comprehensive sexual education are more at risk for contracting an STI.

Shaw v. Canada (Attorney General), 2014, 20737-06

32. Farrah's security of person was already compromised in the past, as she engaged in sexual activities with her current boyfriend, resulting in the contraction of Chlamydia, a severely detrimental STI.

Shaw v. Canada (Attorney General), 2014, 20737-06

33. Farrah describes herself as sexually curious, implying she has intentions of continuing her sexual practices in the future. The detrimental impact this could have on her wellbeing, in a situation in which she was denied vital information about her sexual health, could potentially be life-threatening, as certain STIs pose serious health consequences.

34. Farrah demonstrates her maturity in regards to her best interests, as she had the capacity to go to both her teacher and her principle to argue that she should be allowed to participate in her sexual education classes. Furthermore, she took her case to court, as she understood her proposal had logical arguments to support it, demonstrating that she is a mature individual who understands what is best for her health and security.

Shaw v. Canada (Attorney General), 2014, 20737-06

35. Farrah's security of person had already been compromised in the past, due to

a lack of knowledge in regards to safe sexual practices, and she is being deprived of her liberty by not being able to make her own decision about receiving sexual education.

As a result, s. 17.1 of the Act infringes on her interests protected by s. 7 of the Charter.

Shaw v. Canada (Attorney General), 2014, 20737-06

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*?

36. Section 7 of the Charter States:

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

Charter, supra, para 19, at s. 7.

37. The government has the ability to deprive its citizens constitutionally protected rights as long as the limitation on those rights is in accordance with the principles of fundamental justice. These principles include gross disproportionality, arbitrariness and over breadth.

R.v Malmo-Levine, 2003 SCC 74 para 130

IS THE DEPRIVATION IN ACCORDANCE WITH THE PRINCIPLE GROSS DISPROPORTIONALITY ENSHRINED IN THE CHARTER?

38. Gross disproportionality in regards to Farrah Shaw’s case is prevalent due to the fact that she desires to participate in the course outlined. As stated before, “Youth located in non-urban settings such as the residents of Thames River, face increased difficulties in accessing accurate sexual health information outside of a school setting, as compared to their urban counterparts.” Since Farrah is readily unable to receive sexual health education that she believes is necessary for her own well-being in this stage of her life,

removing her from a class that will help to enhance her knowledge on ways to handle the situation that she has willingly put herself in is extreme.

Shaw v. Canada (Attorney General), 2014, 20737-06, 5-6(11) para 13

39. The parents may be utilizing their ability to take their child out of the class, but completely removing her from certain classes is grossly disproportionate to the goal of this law. The goal of the law is to increase the amount of control parents have in the education of their children, but not to completely deny them of it. Especially in a case where the child would greatly benefit from the course knowledge. By ensuring the parents of Farrah have the ability to remove her from the class, the law then fails to protect Farrah of her security.
40. In *Canada v. Bedford*, it was stated that “By preventing prostitutes from screening clients – an essential tool for enhancing their safety – it endangers them out of all proportion to the small social benefit it provides. By preventing Farrah from attending the class, it also endangers her safety more than providing a social benefit. Although against her parents’ wishes, it is deemed almost mandatory that Farrah exercise her ability to continue taking this sexual education class to not only protect her rights, but to prevent her from contracting another STI, or avoiding a different situation altogether such as unplanned pregnancy which is a possibility. The deprivation of her right to liberty and security of the person are in accordance with the principles of fundamental justice enshrined in section 7 of the *Charter*.”

Canada (Attorney General) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101 para 6

IS THE DEPRIVATION IN ACCORDANCE WITH THE PRINCIPLE ARBITRARINESS ENSHRINED IN THE CHARTER?

41. Arbitrariness is a principle of fundamental justice that declares the state cannot limit the

rights of an individual in which it bears no relation to, or is inconsistent with, the objective that lies behind it. The arbitrariness of this law plays an important part in signifying the irrelevance of section 17.1 of the Ontario Human Rights Act. This law not only disregards the child's opinion in the matter and gives ultimate control over to the parents, but it also does not regard any exceptions to this law.

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519

42. In this scenario, Farrah has already engaged in numerous sexual activities and she's contracted an STI. She also has no intention of stopping since she is 'sexually curious.' The information she would receive from the class would help to ensure her security when she participates in these sexual acts and she has no other means of gathering the required information. Therefore, it is unjust to assume that Farrah is a common fourteen year-old. She has experienced situations that make her position different than those of her age. The assumption behind this law is that children are unable and do not possess the capacity to make their own decisions, thus leaving ultimate power to the parents, but this law fails to identify with children who are mentally more mature than other students their age. In *Berg v. Berg*, although the child was technically still dependant on her mother, it was evident that she possessed the ability to make her own educated decisions. The same applies within this case, Farrah possesses the mental capacity to make her own decisions to ensure her security.

Berg v. Berg, 1995 CanLII 1963 (BC SC) para 5

43. As stated before, Farrah has encountered multiple experiences with sexual activity and to assume that she is unable to make her own decisions is incorrect. Thus, it is not only unjust to assume she is a common fourteen year-old, but also that she is not of age or

mental capacity to make her own decisions. In *Alberta (Child Youth and Family Enhancement Act, Director) v. S.F.* section 2(d) states:

d) A child who is capable of forming an opinion is entitled to an opportunity to express that opinion on matters affecting the child, and the child's opinion should be considered by those making decisions affecting that child.

Farrah is fully capable of forming an opinion and should also be entitled to an opportunity to express that opinion instead of being oppressed by Section 17.1 This in turn, violates her security and liberty, depriving her of these rights in accordance with the principles of fundamental justice.

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

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**IS THE DEPRIVATION IN ACCORDANCE WITH THE PRINCIPLE OVER BREADTH ENSHRINED
IN THE CHARTER?**

44. Over breadth is when the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that task. The individual's fundamental rights will have been violated since their rights will have been limited for no apparent reason. In regards to Farrah's case, the need for removal from the classroom is not required to deny her specific knowledge from the course, such as sex toys and anal sex that her parents feel are inappropriate for high school students. There are other means in which the government can go about sheltering Farrah from the things her parents feel are inappropriate but she still obtains the required information that she needs from the course. Therefore, in regards to Farrah's specific case, her security and liberty is

deprived in accordance with over breadth which is a principle of fundamental justice under section 7 of the *Charter*.

R. v. Heywood, [1994] 3 SCR 761, 1994 CanLII 34 (SCC) para 49

BEST INTERESTS OF THE CHILD

45. Also, the purpose of section 17.1 is to increase the amount of control the parents of children have and to help identify certain areas they feel are unnecessary to their child's development. Within this case, sexual education that Farrah wishes to receive is necessary considering she has already contracted an STI before and plans on continuing to be sexually active, therefore the knowledge from the course would greatly benefit the student. The fact that school is the primary source of education within Thames River is another factor in determining the importance of this class for Farrah. Denied the opportunity to participate, Farrah would have limited resources to gather the required knowledge necessary to ensure her security. Although her parents are gaining the control they are legally obligated to, it would be in Farrah's best interest to be involved in the sexual education class, thus limiting her liberty and her security as an individual.
46. A decision that must be made for one's own benefit should be instated as a fundamental principle of justice in accordance with life, liberty and security of the person. In Farrah's case, she requests to make a decision that will benefit her personal security in regards to sexual activities so she can take the appropriate steps to avoid contracting another STI. Although her parents request that she be removed from that class and are exercising section 17.1 of the Ontario Human Rights Act, Farrah's personal needs should override the wants of her parents in court, thus securing her safety but the law

can only be limited by Farrah's wishes if it's justified. Section 2(1) in *A.C. v. Manitoba* states: The best interests of the child shall be paramount consideration of the director, an authority, the children's advocate, an agency and a court in all proceedings under this Act affecting a child. In this case, Farrah's appeal to continue in the sexual education class to improve her knowledge in regards to sexual education should override her parents' wishes for her to drop the class because it is justified that her security of the person and liberty is being deprived.

A.C. v. Manitoba (Director of Child and Family Services), [2009] 2 SCR 181, 2009 SCC 30
(CanLII) para 25(9)

47. In *Young v. Young*, it states:

The power of the custodial parent is not a "right" with independent value granted by courts for the benefit of the parent. Rather, the child has a right to a parent who will look after his or her best interests and the custodial parent a duty to ensure, protect and promote the child's best interests. That duty includes the sole and primary responsibility to oversee all aspects of day-to-day life and long-term well-being, as well as major decisions with respect to education, religion, health and well-being. The non-custodial parent retains certain residual rights over the child as one of his or her two natural guardians.

The role of a parent is to ensure his or her child's best interests. In the case of Farrah, her parents blindly overlook the fact that her security, and potentially her life is at risk within this situation. Farrah has stated that she intends to continue in sexual relations with her current partner and without the necessary knowledge she will acquire from the sexual education class, there is a high possibility she may encounter problems in the future considering she has already contracted chlamydia. These problems not only affect her, but also put her partner's life at risk as well. Therefore, her biological parents fail to complete their role within their child's life, resulting in the deprivation of her security and life.

Young v. Young, [1993] 4 SCR 3, 1993 CanLII 34 (SCC) para

48. Section 17.1 gives parents and/or guardians control over what the child learns within the educational environment, but the parents are not always looking out for the best interests of the child. Parents may be unable to make, or do not have the capacity to make decisions and exercise their power as guardians because of lack of urgency, emergency, and understanding the complexity of the situation (*Alberta (Child, Youth and Family Enhancement Act, Director) v. S.W.*, 2012 ABPC 2 para 29). Therefore, one would be able to make the best possible decision for themselves considering that they know the situation the best since they are the one's going through it. If they are able to prove that they have the mental capacity to make their own decisions, it is important to identify with the individual and ensure their constitutional rights and protected.

Alberta (Child, Youth and Family Enhancement Act, Director) v. S.W., 2012 ABPC 2
para 29

49. Finally, in *Botticelli v. Botticelli* it stated that it is in the best interests of every child:

- a) To be safe from physical, psychological, and emotional harm;
- b) To have their ordinary and special needs addressed as effectively as possible;
- c) To be nurtured with a view to maximizing their potential.

There are some aspects of best interest which are age related:

- d) The younger the child, the greater the need to have frequent bonding opportunities;
- e) The wishes of older, more mature, children will be taken into account.

Within this case, depriving Farrah the opportunity to participate in the sexual education class will result in not only physical harm, but possibly psychological and emotional

harm. The information she requires will not be received which could result in the contraction of more STI's in the future and possibly child birth. This would then affect her ability to form closer bonds with people within her community as she will be shunned for getting pregnant at such a young age. This affects her opportunity to have frequent bonding experiences, since she still is a younger child. Lastly, although she may not be older, Farrah shows the signs of being a "more mature" individual than teenagers her age, which should result in the consideration of Farrah's request in regards to the sexual education class.

Botticelli v. Botticelli, 2009 ABQB 556 (CanLII)

50. Therefore, "individual jurisdiction for minors" should be instated as a principle of fundamental justice since personal needs overrides the wishes of the parents, and parents are at times unable to look out for the best interests of the child.
51. In conclusion, it is evident that section 17.1 of the Act deprives Farrah of her rights to liberty, security and life of the person in accordance with the principles of fundamental justice outlined above.

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

52. It is important to note that the onus belongs to the appellant to prove that section 1 of the *Canadian Charter of Rights and Freedoms* can justify section 17.1 of the *Ontario Human Rights Act's* infringement of human rights found in section 15.1 and section 7 *Canadian Charter of Rights and Freedoms*. It is not the respondent's responsibility to prove that

section 17.1 does not meet the requirements of section 1. Despite that fact, our law firm would like to point out some reasons why section 1 cannot save section 17.1.

CONCESSIONS

53. It is also important to note that parental rights are a pressing and substantial matter. It is important that parents be able to raise their children the way that they see fit with interference from the government occurring only in severe circumstances. Sadly, Farrah Shaw's is a severe circumstance and as such, it is important that the government step in on this matter. Parental rights are pressing and substantial, but that is just one part of the Oakes test and is not enough to justify a section 1 violation. The same goes for the fact that the limitation of Farrah's rights were prescribed by law. It is clear that any and all limitations of rights were carried out in accordance with the law.

RATIONAL CONNECTION

54. Section 17.1 does not meet the requirements of section 1 as its provisions are not rationally connected to its purpose. Parents have a right to teach their children whatever beliefs they want under the freedom of religion. This right is not endangered by allowing schools to teach sexual education. There is a difference between allowing parents to teach their children what they want and giving parents the right to stop their child from being educated. Section 17.1 does not protect parental rights because its provisions are not rationally connected to the impugned laws purpose.
55. The appellant may argue that section 17.1's provisions are rationally connected to its purpose because it limits interference from the state in the home. While this may be true, it seems a very strange place to draw the line when it comes to interference. The public school curriculum is filled with information that may interfere with views within the

home. As a result, parents have fought to have their children removed from these classes or even remove the classes from the curriculum altogether, yet the government has remained steadfast in the belief that these classes should be taught. It shouldn't be any different when it comes to sexual education. The distaste of some parents for books that do not conform with their personal beliefs cannot shape the policy of a pluralist education system that has proclaimed its commitment to accepting and celebrating diversity.

Chamberlain v. Surrey School District No. 36, [2002] 4 S.C.R. 710, 2002 SCC 86

56. The appellant may argue that Section 17.1's provisions are rationally connected to their purpose of protecting parental rights because it allows parents to control conflicting information. While this seems logical at first you have to consider what that means: Section 17.1 gives parents the power to provide completely one sided information on the matter of sexual education. This is a situation where conflicting information may actually be a good thing because it gives the child the opportunity to choose what they want to believe. By not allowing children to be taken out of sexual education classes, the government is acknowledging and respecting the mental capacity of youth. For these reasons limiting conflicting information, is not a valid reason for rationally connecting section 17.1 to its purpose.

MINIMAL IMPAIRMENT

57. Section 17.1 does not minimally impair the rights of those affected. There are many other methods the government could employ to achieve the same effect without impairing the rights of youth as severely. For example 17.1 could be altered to only allow students to be withdrawn from class if the child agrees to the decision. This ensures that the child's

rights to liberty are protected while still allowing parents to educate their children the way they want without giving parents unilateral control.

In summary, at common law a child is capable of consenting to medical treatment if he or she has sufficient intelligence and maturity to fully appreciate the nature and consequences of a medical procedure to be performed for his or her benefit. It appears that the medical practitioner is to make this determination. If the child is incapable of meeting this test then the parents' consent will be required for treatment. It is not clear whether parental control yields to the child's independence or whether there are concurrent powers of consent. But it is clear that the parents may not veto treatment to which a capable child consents, and that neither child nor parents can require a medical practitioner to treat. Apart from section 16, this rule is modified only to the extent that the decision of a child or parents may be overridden under the provisions of the *Family and Child Services Act* or by the court acting under its *parens patriae* jurisdiction. Although the authorities to which I have referred discuss only medical practitioners, the common law has never applied one standard for obtaining consent to medical practitioners and another to nurses or dentists. No argument was presented as to why the same principles should not govern all health care providers whose professions are regulated by statute.

While this court decision pertains to medical treatment this format would be ideal for protecting children like Farrah's rights. Another way to accomplish the impugned law's goal without restricting as many freedoms is to restrict parents from withdrawing their children from sexual education classes in cases involving areas where students would be in danger as a result. For example Thames River Collegiate would be identified a prime example of such an area.

Almost 100 cases of chlamydia or gonorrhoea had been reported from the schools population of about 300 students from 2008-2012.

In situations such as these restricting children from receiving sexual education could be potentially detrimental to their health.

Youth who do not receive comprehensive sexual education are more likely to contract a sexually transmitted infection or have an unplanned pregnancy than their peers who receive comprehensive sexual education.

Section 17.1 should not receive the protection of Section 1 as the government can achieve its legislative objective in a way that involves less impairment of a right.

Ney v. Canada (Attorney General), 1993 CanLII 1301 (BC SC), Pg. 2 at para 188

Shaw v. Canada (Attorney General), 2014, 20737-06, 7 para 8-13

PROPORTIONALITY

58. Section 17.1's provisions are not proportional to their objective. The benefits to parents do not outweigh the negatives that the youth have to deal with. While 17.1 does help to protect parental rights it also allows parents to restrict their children from potentially lifesaving information like in Farrah Shaw's case.

While some STI's may be cured with medications, potential long term effects of STI's – even those that have been treated – can include infertility, tubal pregnancy, fetal and infant demise, chronic pelvic pain, and cervical cancer.

On top of that, by allowing parents to remove their children from sexual education classes, the government is setting a bad precedent. Many parents in the past have shown interest in withdrawing children from classes other than sexual education such as biology and other science courses for religious, as well as other reasons. The curriculum is supposed to contain important information that all students should receive not something that parents can pick and choose what they want their children to learn. Section 17.1 sets a bad precedent for this reason. Just letting parents know that sexual education is being taught at the school is enough to protect parental rights. For example, if parents know that sexual education is being taught, they can work through it with their children just like any other topic taught in the curriculum that they might disagree with.

Shaw v. Canada (Attorney General), 2014, 20737-06, 7 para 13

59. The government should take a similar position as the court took in this case in regards to parents who want to warp the curriculum to fit their beliefs. If parents want to dismiss everything that their child has learned in class that's within their rights but if their child

wants to accept that information that's their right to freedom of thought. However, if children never have the opportunity to learn the information they cannot choose to use it.

60. The appellant may argue that impugned laws negative effects are proportional to its objective. They may cite the fact that this is the first case of its kind in Canada and argue that since problems with this law are so rare that it's hard to ignore the benefits. While it's true that this is the first time that a case like this has been brought to court, it's not surprising for one reason: Youths don't typically launch cases against the government. Youths are the ones whose rights are being violated by section 17.1. The fact that 17.1 is only being challenged now after all this time in effect should not be taken as a sign of success just that it's injustices are targeted at a group of people who are not in the best position to stand up for their rights. While Farrah was not the only person to be removed from sexual education class, she was the only one to stand up for herself. Just because those negatively affected by 17.1 suffer in silence does not mean that they do not suffer.

61. In conclusion Section 1 cannot save Section 17.1 because it does not pass the Oakes test. As demonstrated above, Section 17.1 does not pass the Oakes test because its limitation of rights is not rationally connected to its purpose, it does not minimally impair the rights it infringes upon and the infringements are not proportional to its objective.

APPLICATION TO THIS CASE

62. As a result of the discrimination she faced due to her dependant status, the compromisation of her liberty and security, failure to uphold her principles of

fundamental justice, and a failure to meet the requirements set forth in the Oakes test, it is clear that Farrah's rights as stated in the *Charter* have been violated, and it is requested that the Appellants be denied an exemption.

PART IV
ORDER REQUESTED

63. It is respectfully requested that the appeal be dismissed, and the decision of the trial judge be upheld. The impugned law should be struck down for a period of time, so as to allow the government the opportunity to rewrite Section 17.1 of the *Act*. The revised law should make exceptions for those individuals who can be deemed, through legal processes, mature youth, as they should be able to opt-out on their own accord, so long as they are acting in their own best interests.

ALL OF WHICH is respectfully submitted by

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Of Counsel for the Respondent

DATED AT HUMBERVIEW S.S. this 14th Day of November, 2014

APPENDIX A

AUTHORITIES TO BE CITED

PART V – LIST OF AUTHORTIES AND STATUES

LEGISLATION

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

JURISPRUDENCE

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

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

B (R) v. Children's Aid Society of Metropolitan Toronto, [1995] 2 SCR 606

Berg v. Berg, 1995 CanLII 1963 (BC SC) para 5

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

Botticelli v. Botticelli, 2009 ABQB 556 (CanLII)

Canada (Attorney General) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101 para 6

Chamberlain v. Surrey School District No. 36, [2002] 4 S.C.R. 710, 2002 SCC 86

Godbout v. Longueuil (City), [1997] 3 SCR 844, 1997 CanLII 335 (SCC)

Law v. Canada (Minister of Employment and Immigration), [1999] 1 SCR 497, 1999 CanLII 675 (SCC)

Ney v. Canada (Attorney General), 1993 CanLII 1301 (BC SC), Pg. 2 at para 188

R. v. Heywood, [1994] 3 SCR 761, 1994 CanLII 34 (SCC) para 49

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

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

R.v Malmo-Levine, 2003 SCC 74 para 130

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519

Young v. Young, [1993] 4 SCR 3, 1993 CanLII 34 (SCC) para

CHARTER CHALLENGE SOURCES

Shaw v. Canada (Attorney General), 2014, 20737-06, 5-6(11)