



Court File No. 554/18

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

BETWEEN:

**THE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO and CINDY
GANGARAM**

Applicants

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE
MINISTER OF EDUCATION**

Respondent

APPLICATION UNDER Rule 14.05(2) of the *Rules of Civil Procedure*, RRO 1990, Reg 194
and Sections 2(1) and 6(2) of the *Judicial Review Procedure Act*, RSO 1990, c J.1

NOTICE OF APPLICATION FOR JUDICIAL REVIEW

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar at the place of hearing requested by the applicant. The applicant requests that this application be heard at Toronto, *130 Queen Street W.*

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does

not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the applicant's application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN TO IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: September 4 2018

Issue by Jasmine Jawal
Local Registrar

Address of 130 Queen Street West
Court office: Toronto, ON M5H 2N6

TO: **MINISTRY OF EDUCATION**
Mowat Block
900 Bay Street, 22nd Floor
Toronto, ON M7A 1L2

AND TO: **ATTORNEY GENERAL OF ONTARIO**
Crown Law Office – Civil
720 Bay Street
8th Floor
Toronto, ON M7A 2S9

APPLICATION

1. The Applicants makes application for:
 - a. an order in the nature of certiorari quashing the directive issued by the Respondent, communicated August 22, 2018, requiring elementary teachers in Ontario to use the *Ontario Curriculum, Grades 1-8: Health and Physical Education, Interim Edition, 2010* (the “Old Curriculum”);
 - b. a declaration that the Respondent, in cancelling the use of the *Ontario Curriculum, Grades 1-8: Health and Physical Education, 2015 Revised* (the “New Curriculum”) and requiring the use of the old HPE Curriculum was unreasonable and infringed rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*, including section 2(b), 7 and 15;
 - c. a declaration that the Respondent, in cancelling the use of the New Curriculum and requiring the use of the old HPE Curriculum without consulting the Respondent or members of the teaching profession violated the principles of natural justice and procedural fairness;
 - d. an order in the nature of certiorari quashing the decision to create the “Reporting Line” (described more fully below);
 - e. a declaration that the Respondent, in creating the Reporting Line, acted unreasonably and infringed rights guaranteed by the *Canadian Charter of Rights and Freedoms*, including sections 2(b), 7 and 15;

- f. a declaration that the Respondent, in creating the “Reporting Line” without consulting the Respondent or members of the teaching profession violated the principles of natural justice and procedural fairness;
- g. injunctive relief requiring the Respondent to direct teachers in Ontario to use the New Curriculum;
- h. an order in the nature of prohibition or, in the alternative, injunctive relief requiring the Respondent to cease operating the Reporting Line;
- i. an order granting leave pursuant to section 6(2) of the *Judicial Review Procedure Act*, RSO 1990, c J.1 to have this application heard by a Judge of the Superior Court of Justice;
- j. an order, if required, abridging the time for service of any materials required for the hearing of this application;
- k. costs of this application; and
- l. such further and other relief as counsel may advise and this Honourable Court may deem just.

2. The grounds for the application are:

The Parties

- a. The Applicant Elementary Teachers’ Federation of Ontario (“ETFO”) is the bargaining agent designated by s. 10(2) of the *School Boards Collective Bargaining Act, 2014*, SO 2014, c 5 as the exclusive bargaining agent for public English-language elementary teachers in the province of Ontario;

- b. ETFO represents over 80,000 teachers, as well as designated early childhood educators, and other educational professionals.
- c. Teachers represented by ETFO are professionals who have ethical and professional obligations to their students, their parents and colleagues which include using their professional judgment in delivering programmes and adhering to the standards of the teaching profession under the *Ontario College of Teachers Act, 1996*, SO 1996, c 12;
- d. ETFO's members are responsible for the delivery of the Health and Physical Education curriculum to elementary students in the province of Ontario;
- e. The Applicant Cindy Gangaram ("Gangaram") is a teacher employed by the Hamilton Wentworth District School Board, and teaches grades 6, 7 and 8 at Ryerson Middle School. Gangaram has taught Health and Physical Education to her students using the 1998, 2010 and 2015 versions of the applicable curriculum, which are described in more detail below;
- f. Gangaram is a member of ETFO, and a member of the Ontario College of Teachers. She has been a full-time teacher since the 2005/2006 school year;
- g. Gangaram teaches within the Sage Quest program, an innovative specialized learning program that has the goal of fostering a culture of inquiry amidst a community of care, with particular focus on critical thinking and the global issues facing our world today;
- h. Providing evidence-based, state of the art, equity-promoting education for her students is central to Gangaram's sense of self as a member of the teaching

profession as well as a member of her community. Gangaram believes that she is ethically and professionally obligated to provide a safe and inclusive learning environment for her students, some of whom identify as LGBTQ+;

- i. Gangaram believes that the Respondent's conduct, as described below, is an attempt to prohibit and/or coerce her and her teaching colleagues from providing instruction to her students in accordance with her professional judgment and ethical and professional obligations;
- j. The Respondent is the Minister of the Crown responsible for the administration of the *Education Act*, RSO 1990, c E.2 and related educational legislation. Her duties include prescribing the course of study taught in the primary, junior, intermediate and senior divisions within Ontario schools. The Applicant ETFO's members teach in all but the senior divisions;

The New Curriculum

- k. In 2007, the Respondent began the process of revising and updating the Health and Physical Education curriculum, which had last been updated in 1998;
- l. In 2010, an updated curriculum was published. While the majority of this updated curriculum came into effect at that time, the Government of Ontario elected not to implement a portion of curriculum related to sex education. In this respect, the contents of the 1998 curriculum continued to be taught;
- m. On February 23, 2015, the Respondent announced the release of the New Curriculum, a 239-page document that included a new content area known as "human development and sexual health". This component was contemplated for

the 2010 version of the Curriculum, but as noted above, was not implemented at that time;

- n. Unlike prior versions of the HPE curriculum, the New Curriculum's human development and sexual health component provided up to date and relevant information related to sexual orientation, gender identity, same-sex relationships (including same-sex marriage, which did not exist in 1998), consent to sexual activity, HIV, and online safety;
- o. The process of developing the New Curriculum's human development and sexual health component involved the most extensive consultation process in the history of the Ministry of Education, and included input from parents, students, teachers, faculties of education, universities, colleges and numerous stakeholder groups. More than 70 health-related organizations provided reports for consideration, and thousands of individuals provided feedback;
- p. In the 2015, 2016 and 2017 the New Curriculum was used successfully in Ontario's elementary schools;

The Directive

- q. On August 22, 2018, the Respondent through the Deputy Minister of Education, and pursuant to her authority under s. 8(1)(2) of the *Education Act* communicated to all Directors of Education in Ontario that they were required to ensure that the Old Curriculum was used for instruction in Elementary Schools in the 2018 school year.

- r. Prior to issuing this directive, the Minister did not consult with members of the teaching profession to obtain their views on the impact that this change would have on their rights and interests or those of their pupils;
- s. The Old Curriculum does not contain a human development and sexual health component. Rather, it contains something styled the “Growth and Development component”. While styled as a 2010 document, the Old Curriculum’s Growth and Development component derives from the 1998 version of the HPE curriculum.
As the Old Curriculum states at page 3:

This interim edition was originally issued in 2010, was last used in 2014, and is now being re-issued. It comprises curriculum content updated to 2010 for all strands and topics except the Growth and Development component of the Healthy Living strand, which is taken from the 1998 curriculum.
- t. The directive had the effect of removing or substantially reducing content related to sexual orientation, gender identity, same-sex relationships, HIV, consent to sexual activity, and online safety from the HPE curriculum;
- u. It was the intention of the Respondent that the Applicant’s members be prohibited from teaching these above-noted topics as part of the HPE curriculum;

The Reporting Line

- v. On August 22, 2018 the Office of the Premier of Ontario issued a press-release entitled “Ontario’s Government for the People Respecting Parents by Holding Unprecedented Consultation into Education Reform”. As part of this press release, the Government announced the creation of a website www.fortheparents.ca;

- w. The press-release stated that the Respondent had exercised her powers to ensure that “curriculum-based misconduct issues are fairly dealt with by the college [of Teachers].” The press-release further noted that the website was a “dedicated submission platform... that parents can use to report any concerns.”
- x. The website contains a statement that “All provincial education professionals, including teachers, are expected to abide by [the Old Curriculum]” and includes a two links that comprise the Reporting Line: one to the complaints page for the Ontario College of Teachers, and one that links to a form where parents may “express concerns about the curriculum *currently* being taught in [their] child’s classroom” [emphasis added];
- y. The creation of the Reporting Line came as a complete surprise to the Respondent and its members. No notice of such a decision was provided, nor were teachers consulted about the impact of the reporting line on their own rights and interests, or those of their pupils;

The Consequences of the Directive & the Reporting Line

- z. The purpose and effect of the Directive was to prohibit teachers from teaching those components of the New Curriculum that were not included in the Old Curriculum, and to prevent students from being exposed to this information as part of their course of education;
- aa. The purpose and effect of creating the Reporting Line was to intimidate teachers from engaging in expressive activity related to teaching topics included in the New Curriculum but omitted from the Old Curriculum, to keep them from abiding

by their professional and ethical responsibilities as members of the teaching profession, and to prevent them from providing pupils with information critical to protecting their safety, bodily integrity, emotional wellbeing and equality;

- bb. These Directive and the Reporting line and the decisions to issue and implement them, both on their own and taken together, violate:
- i. Section 2(b) of the *Charter of Rights and Freedoms* by intentionally restricting the expressive freedom of teachers *inter alia* by prohibiting them from fulfilling their role as educators, and preventing them from communicating accurate information that is critical to student's health, safety, development, and participation in a modern, diverse and pluralistic society;
 - ii. Section 7 of the *Charter of Rights and Freedoms* by increasing the risk of physical and sexual violence, transmission of sexually transmitted infections, cyberbullying, and online child exploitation committed against Ontario's children in a manner that is arbitrary, overly broad and grossly disproportionate to any legitimate governmental objective;
 - iii. Section 15 of the *Charter of Rights* by perpetuating substantive discrimination against LGBTQ+ students, parents and members of society by excluding topics related to sexuality, gender identity and same-sex marriage from the approved school curriculum. This exclusion denies LGBTQ+ persons recognition, dignity and acceptance, and designates topics related to their realities and lived experiences as problematic, abnormal, inappropriate and worthy of exclusion from discussion. Further

the removal of information related to HIV/AIDS further perpetuates stigma against persons, including pupils, who are HIV+ or are associated with persons, such as parents or siblings, who are HIV+;

- cc. The violation of these *Charter* rights is inter-sectional and overlapping. For example, women, girls, and members of the LGBTQ+ community are at a greater risk of physical, psychological and sexual violence, and the removal of key information designed to both promote personal safety as well as acceptance of sexual and gender minorities compounds the harm to members of these groups. Similarly, a key component of the teaching profession is to promote diversity and inclusion, and by restricting and coercing teachers from providing up to date, accurate and inclusive information related to sexual orientation, same-sex marriage, gender identity, and other LGBTQ+ topics, the decisions undermine a key aspect of teacher's sense of self: living up to the standards of their profession, and supporting their students;
- dd. The impugned Directive and Reporting Line cannot be demonstrably justified in a free and democratic society;
- ee. The impugned decisions do not represent a proportionate balance between these *Charter* rights and the legislative objectives that the Respondent is required to pursue, and in fact are in direct conflict with said objectives;
- ff. The impugned decisions are also unreasonable insofar as they require and/or coerce teachers into violating their legal, moral, ethical and professional obligations under the *Education Act, supra*, the *Ontario College of Teachers Act, 1996*, SO 1996, c 12; the *Ethical Standards and Standards of Practice* promulgated by the

Ontario College of Teachers; and Policy/Program Memoranda promulgated by the Respondent;

- gg. The impugned decisions are also unreasonable because they lack a rational or objectively justifiable purpose. Rather, their purported purpose – ensuring greater consultation – is irrational given that the process employed by the Respondent to develop the New Curriculum was by any objective measure comprehensive, and the Respondent has not articulated any credible critique of that process. In reality, greater consultation is a colourable attempt to prevent the teaching of its curriculum due to its content;
- hh. The impugned decisions are also unreasonable because they were taken for an improper purpose, namely reasons that go beyond the purpose of education in Ontario as set out in the *Education Act*;
- ii. The impugned decisions are also unreasonable and/or arrived at in violation of principles of natural justice and procedural fairness because the Respondent did not consult with members of the teaching profession before directing teachers to use the Old Curriculum in the interim period while broader consultations on the HPE curriculum were taking place and creating the Reporting Line;
- jj. The decision to create the Reporting Line was unreasonable because it conflicts with or is inconsistent with the process for members of the public to bring complaints to the Ontario College of Teachers under the *Ontario College of Teachers' Act, 1996*;
- kk. The *Constitution Act, 1982*, ss. 1, 2(b), 7, 15, 24(1), 52(1);

- ll. The *Education Act*, RSO 1990, c E.2;
 - mm. The *Ontario College of Teachers Act, 1996*, SO 1996, c 12;
 - nn. The *Rules of Civil Procedure*, RRO 1990, Reg 194, rr. 2.03, 14.05, 39, 38 and 68;
and
 - oo. Such further and other grounds as counsel may advise and this Honourable Court may permit.
3. The following documentary evidence will be used at the hearing of the application:
- a. The affidavit of Jason Johnston, to be sworn;
 - b. The affidavit of Cindy Gangaram, to be sworn;
 - c. Affidavits from educators and expert witnesses, to be determined; and
 - d. Such further evidence as counsel may advise and this Honourable Court may permit.

Dated: September 4, 2018

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The Elementary Teachers' Federation of Ontario et al. and Her Majesty the Queen as Represented by the Minister of Education

Applicants

Respondent

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
(Proceedings Commenced at Toronto)**

**NOTICE OF APPLICATION FOR
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