Ontario Court Upholds Return to 2010 Sex Education Curriculum

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In coming to its decision in *ETFO et al. v. Her Majesty the Queen (ETFO)*, the Court considered the *Education Act*, provided important commentary on the role of a curriculum generally and clarified that Ontario teachers are expected to include all of their students in sex education and can use the 2015 curriculum as a resource to do so.

The Return to the 2010 Curriculum

On August 22, 2018, Ontario's Minister of Education (Minister) issued a directive requiring all public elementary school teachers (grades 1 through 8) to revert from the sex education curriculum that was introduced in 2015 by the Liberal government to a previous version of the curriculum from 2010 (the Directive). The return to the 2010 curriculum was implemented as an interim measure pending further consultations and the creation of a new sex education curriculum. The 2015 curriculum has remained in place for secondary school students (grades 9 through 12).

The Directive sparked concerns from teachers, parents and students, that the 2010 curriculum did not address certain topics that were introduced in the 2015 curriculum, including: consent, the specific names for body parts, gender identity and sexual orientation, online behaviour and cyberbullying, and sexually transmitted infections. This decision was challenged in the Ontario courts by a number of parties.

Litigation

On August 23, 2018, the Canadian Civil Liberties Association (CCLA) brought an application for judicial review of the Directive. The application was also brought by Becky McFarlane, a queer mother of a grade six student in an Ontario public school. The CCLA and Ms. McFarlane took the position that the Directive infringed on the rights of elementary students and their parents to security of the person and equality under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the Charter) and the Ontario *Human Rights Code* (the Code).

On September 4, 2018, the Elementary Teachers' Federation of Ontario (ETFO) filed their own application for judicial review of the Directive. The ETFO argued that the

Directive requiring teachers to teach the 2010 curriculum put a "chill" on teachers and their ability to teach that infringed their section 2(b) Charter right to freedom of expression and students' rights to security of the person and equality under sections 7 and 15 of the Charter.

Both the CCLA and ETFO argued that the Directive is particularly harmful to vulnerable groups such as the LGBTQ2+ community, women and girls, Indigenous youth and those with or associated with persons with HIV/AIDS.

The Court's Decision

On February 28, 2019, a panel of three judges at the Ontario Superior Court of Justice (Divisional Court) unanimously held that the Directive did not infringe the Charter rights of students, parents, or teachers.

The Court held that the 2010 curriculum was not discriminatory for a number of reasons, including:

- Teachers may go beyond the 2010 curriculum to meet the needs of a given class or student, as the curriculum contains no provision preventing teachers from addressing issues from the 2015 curriculum that are not in the 2010 curriculum. This includes topics such as consent, online behaviour, gender identity and sexual orientation, STIs and the proper named of body parts.
- The *Education Act (*the Act*)*, the Code, and Ministry Policy/Program Memoranda (PPM) all require teachers and school environments to be inclusive, tolerant and respect diversity.
- The 2010 curriculum requires that, to the extent possible, the implementation of the 2010 curriculum be "inclusive and reflect the diversity of the student population… regardless of ancestry, culture, ethnicity, sex, physical or intellectual ability, race religion, gender identity, sexual orientation, socio-economic status or other similar factors.
- The Minister confirmed that while gender identity is not listed as an example of "differences" in the 2010 curriculum, teachers may "teach the gender identity concept in the class."[1]

In coming to its decision, the Court considered provisions of the Act dealing with safety, inclusivity and school climate.[2] The Court commented that the purpose of the Act is to "provide students with the opportunity to realize their potential and develop into highly skilled, knowledgeable, caring citizens who contribute to society"[3] and that the Minister's actions must aim to meet these objectives.

The Court further noted that section 8(1) of the Act provides that the Minister of Education has the statutory responsibility to set educational priorities for all of Ontario's publicly-funded schools which includes "issu[ing] Curriculum guidelines and requir[ing] that courses of study be developed there from".[4] As such, the Court found that the Directive was a legitimate exercise of the Minister's responsibilities. In discussing these responsibilities, the Court stated that, while a curriculum dictates *what* is to be taught in a broadly worded set of objectives and grading scheme, teachers are responsible for *how* the material is to be taught, guided by the objectives in the curriculum and the provisions in the Act and Ministry guidelines.[5] The Court commented:

“A curriculum is not an exhaustive script to be used by teachers to recite, nor does it contain a list of mandatory or prohibited words […]. [C]urriculum documents generally provide only ‘conceptual frameworks for the design and delivery of lesson plans’ by teachers.”[6]

It was important to the Court that the Minister’s counsel had confirmed that although the curriculum provides certain expectations for students to meet, how students are taught to meet these expectations is a matter of teachers' professional judgment and discretion. Teachers can choose how to design classroom programs to achieve the expectations in each grade, and how to implement those programs for a diverse class of individual students, allowing educators to use their judgment and understanding of their classroom to structure their lessons. The Court confirmed that this includes teaching any of the topics or using the resources included in the 2015 curriculum.[7]

Aftermath and Appeal

Following the release of the Divisional Court's decision, ETFO issued a press release saying that the Court’s decision “gave teachers an important victory by establishing that teachers and schools are required, under the *Education Act* and the Ontario *Human Rights Code*, ‘to be inclusive, tolerant and [to] respect diversity’”.

The CCLA was not satisfied with the result, and is now seeking leave to appeal the decision to the Ontario Court of Appeal. [8] In its Notice of Motion for Leave to Appeal, the CCLA argued that the Court erred in its analysis under sections 15 and 7 of the Charter and in particular, that it erred by considering the “statutory context” provided by the Code and the Act to justify state action that infringes upon Charter rights.

The Court of Appeal has not yet made a decision on whether or not to grant leave to appeal.

Application at the Human Rights Tribunal

Also recently released was the Human Rights Tribunal of Ontario’s (HRTO) decision in *AB v. Ontario (Education)*,9(*AB*), a decision that operates in tandem with the ONSC’s holding in *ETFO*. In *AB*, the HRTO dismissed the application of a grade 6 transgender girl who attended public school. In doing so, the Tribunal provided further commentary on the obligation of Ontario teachers to teach the sex education curriculum in an inclusive manner.

A.B.’s application alleged that the Directive discriminated against her by removing the requirement that teachers teach the applicant and her peers about LGBTQ2+ people and identities as part of sexual health. The Tribunal found that the Court’s decision in *ETF O*rendered A.B.’s application moot because, in confirming that teachers are required to include all students in their sex education curriculum and that they can use the 2015 curriculum to meet that requirement, the Court addressed the harms the student relied on to prove her discrimination claim. The Tribunal held that following the Court’s decision, A.B’s teachers must include her in the sex education curriculum because the Code and Charter require them to teach in an inclusive manner and that, if the teachers failed to do so, the applicant’s complaint would lie with the school board, not the Minister.10

Introduction of a New Curriculum

On Friday March 15, 2019, the Minister announced Ontario's new sex education program to be implemented for grades 1-8 starting September 2019. [11] The new curriculum pushes back education on gender expression to grade 8, but will teach the concept of consent at an earlier age, with grade 3 students deemed capable of handling this topic.

Personal safety, anti-bullying, and the proper names for genitalia will be taught beginning in grade 1 under the new curriculum. Beginning in grades 2 and 3, students will be instructed on the issue of body image, and online safety.

Comment

The decisions of the Divisional Court and the Tribunal confirm that the Ontario government's Directive to return to the 2010 curriculum for grades 1-8 does not infringe upon the rights of students, parents, or teachers under the Charter or the Code. The Court and the Tribunal decisions further clarify that:

- the *Education Act* and Ministry PPMs can be used to inform the interpretation of curriculum;
- while a curriculum broadly dictates *what* is to be taught, teachers are responsible for *how* the material is to be taught, guided by the objectives in the curriculum, the *Education Act,* and Ministry guidelines;
- a curriculum is not an "exhaustive script" to be used by teachers to recite, but a "conceptual frameworks for the design and delivery of lesson plans";
- the Code and the Charter impose a duty on teachers to include all students in their classrooms, including LGBTQ2+ students, in the sex education curriculum;
- teachers are free to use the 2015 curriculum as a resource in adapting to meet the needs of a given class or student;
- the failure of a teacher to include all students in their classrooms in the sex education curriculum could lead to liability on the part of the school board.

It remains to be seen whether the CCLA will be successful in seeking leave to appeal the Divisional Court's decision to the Ontario Court of Appeal. If leave is granted, the Court of Appeal may provide further clarification on the role of a curriculum and the obligations of teachers in teaching inclusive, Ministry-approved sex education.

1 *ETFO et al. v. Her Majesty the Queen*, 2019 ONSC 130 at para 123.

2 *Education Act*, R.S.O. 1990, c. E.2, ss. 169.1, 300.0.1.

3 *Education Act*, R.S.O. 1990, c. E.2, s. 0.1(2).

4 *Education Act*, R.S.O. 1990, c. E.2, s. 8(1).

5 *ETFO et al. v. Her Majesty the Queen*, 2019 ONSC 130 at para 117.

6 *ETFO et al. v. Her Majesty the Queen*, 2019 ONSC 130 at para 88.

7 *ETFO et al. v. Her Majesty the Queen*, 2019 ONSC 130 at paras 122, 159.

8 CCLA v. Min. Education (Sex Ed) Notice of Motion for Leave to Appeal.

9 *AB v. Ontario (Education)*, 2019 HRTO 685.

10 *AB v. Ontario (Education)*, 2019 HRTO 685 at para 50.

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