

J.J. (by her litigation guardian) v. Attorney General (Alberta)

In 2006, the Alberta Legislature amended its human rights legislation. The Alberta Human Rights Act, as amended, contains the following provision:

Notice to parent or guardian

11.1(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.¹

In compliance with the new law, Marksville Collegiate sent a notice to all parents on the first day of school in September 2006. The notice stated that all students in grades 9-12 would be receiving comprehensive sexual health education classes as a part of their health and physical education class. A copy of the notice sent to parents is attached at Schedule “A”.

¹ For the purposes of the Wilson Moot, the provision was proclaimed in force on August 31, 2006. For the purposes of the Wilson Moot, assume that there was no debate in the Legislature about this Act.

In 2006, Jasmine Jones was 14 years old and attending ninth grade at Marksville Collegiate. Her parents filled in, signed and returned the request to excuse Jasmine from the sexual health classes to the health teacher at the school, Matthew Mills. In a discussion with Mr. Mills following the school's curriculum night, Jasmine'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.

Mr. Mills explained to Jasmine's parents that the Marksville Public Health Department had confirmed that there was a significant outbreak of sexually transmitted infections (“STIs”) in Marksville, including an exceptionally high level of HIV infections. There had also been three outbreaks of STIs at Marksville 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 2002 – 2006.

Mr. Mills further explained that young women were disproportionately affected in these outbreaks, making up about 60% of the reported cases. Mr. Mills stated that Marksville Public Health had advised that the reported STIs had been linked to various forms of sexual conduct, including vaginal, oral and anal sex. Mr. Mills encouraged the Joneses to reconsider their request to exclude Jasmine from the classes, but they reiterated their concerns about the curriculum and required that she be excused.

On the day of the first sexual health education lesson, Mr. Mills asked Jasmine (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. Jasmine told Mr. Mills that she wished to remain in class, as she disagreed with her parents' view on the matter. Mr. Mills told Jasmine 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.

Jasmine went to speak with the principal, Susan Smith. In speaking with Ms. Smith, Jasmine explained that she felt that 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. Smith

reiterated that the school could not permit Jasmine to participate over her parents' objections, as to do so might violate their human – and parental – rights.

Jasmine is sexually active and has already been treated for chlamydia once. Jasmine has had several sexual partners and engages in various sexual practices.

Through a litigation guardian, Jasmine brought an application challenging s. 11.1 of the Alberta Human Rights Act under sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms*. Jasmine sought to have s. 11.1 struck down in its entirety.

At trial, Mohammed J. held that s. 11.1 of the Alberta Human Rights Act violates section 7 of the *Charter*. However, he held that there was no violation of section 15(1). In so holding, Mohammed J. wrote:

Despite counsel's able argument, I do not accept that "dependent status" is an analogous ground for the purposes of section 15(1) of the *Charter*.

...

However, the same cannot be said of Ms. Jones' claim based on section 7. Courts must exercise extreme caution before interfering with parental rights – or, more accurately in my view, parental decisions. Parents are expected, indeed obliged, to act in their children's best interests, which does not in all instances mean in accordance with a child's wishes. As the Supreme Court has observed, including in *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, state interference in balancing the rights of parents and children should only arise in exceptional circumstances. That said, it is well-recognized that parents do not have the right to endanger their children's health, or their life, even for compelling reasons such as a religious objection to a blood transfusion.

Mohammed J. went on to hold that section 11.1 of the Human Rights Act was not saved by section 1. He found that while the provision was aimed at a pressing and substantial objective and there was rational connection between the provision and the stated objective, the provision lacked proportionality as the deleterious effects far outweighed the salutary ones. In so holding, he wrote:

The Attorney-General argues that s. 11.1 protects the essential right of parents to direct their children's education. It argues that such a provision is necessary in our pluralist society where there are many distinct views, some of which are founded on religious grounds, on appropriate sexual health education for minors. However, allowing Ms. Jones to access information regarding sexual health does not diminish her parents' ability to convey their views on the topic to her. On the other hand, denying a child comprehensive sexual health education may well impact that child's overall health and well-being and, unfortunately, appears to expose that child to a greater risk of contracting a life-threatening illness.

In his decision, Mohammed J. made the following findings of fact:

- Marksville Collegiate is a public school governed by a school "board" as defined in the Alberta *Schools Act*
- Two major Canadian-wide studies on risk of HIV and STIs completed by the Council of Ministers of Education (CMEC), being the 1989 Canada Youth and AIDS Study (CYAS) and the 2003 Canadian Youth, Sexual Health and HIV/AIDS Study, demonstrated that:
 - knowledge amongst youth about sexual health declined between 1989 and 2003;
 - school is the main source of sexual health information for youth between grades 7 and 11;
 - fears about HIV, STIs or pregnancy are not cited by youth as reasons not to have sex;
 - the proportion of students reporting that they had multiple sexual partners declined between 1989-2003;
 - the proportion of students reporting that they were virgins or abstained from sex increased between 1989 – 2003;
 - six percent of grade 9 girls and eight per cent of grade 11 girls reported that they had been pregnant;
 - approximately 40% of youth in grade 11 are sexually active; and
 - except for very young students, self-esteem and parental relationships are not correlated with higher or lower levels of sexual activity.
- youth who receive so-called "abstinence-only" or no sexual health education are more likely to engage in unprotected sexual acts than their peers who receive comprehensive sexual health education

- 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
- youth who do not receive comprehensive sexual health education are less likely to be aware of their legal rights – including to health care and access to birth control without their parents’ knowledge or consent. They are also less likely to seek treatment for STIs than their peers who receive comprehensive sexual health education
- 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
- while some STIs may be cured with medications, potential long term effects of STIs – even those that have been treated – can include infertility, tubal pregnancy, fetal and infant demise, chronic pelvic pain, and cervical cancer
- HIV cannot be cured with medication but, at best, managed with drug therapies
- in some cases, HIV, or complications related thereto, can be fatal
- young men having sex with men and young heterosexual women are at an elevated risk of HIV infection
- youth located in non-urban settings, such as the residents of Marksville, face increased difficulties in accessing accurate sexual health information outside of a school setting, as compared to their urban counterparts
- an absence of comprehensive sexual health education has an increased negative impact on gay, lesbian, bisexual and transgendered youth
- in 2006, there was an outbreak of STIs in the Marksville area – including three newly reported cases of HIV
- in 2006, there was an outbreak of STIs in the student population of Marksville Collegiate. Of the students affected in the outbreak, 63% were young women between the ages of 13 and 18 and 37% were young men between the ages of 13-18. There was one reported case of HIV in the Marksville Collegiate outbreak
- Jasmine is sexually active and was treated for an STI in 2005
- Jasmine has engaged in, and expresses an intent to continue to engage in, oral and vaginal sex with her current boyfriend. She describes herself as “sexually curious”.

Mohammed J. also noted that the *UN Convention on the Rights of the Child* protects a child's right to the highest attainable standard of health, as well as access to information.

On appeal, Chan J.A. (writing for the majority) held that s. 11.1 of the Act violated both section 7 and section 15(1) of the *Charter*, and that such breaches were not saved by section 1. Chan J.A. wrote:

It is often said that one cannot choose one's family. One's status as a dependent child of their particular parents is, without doubt, a "personal characteristic that is immutable or changeable only at unacceptable cost to personal identity." "Dependent status" is arguably less mutable than the recognized analogous ground of "marital status".

I do not accept the Attorney General's argument that s. 11.1 has an ameliorative purpose. While religious minorities may indeed suffer disadvantage, s. 11.1 does not solely address objections to sexual health education on religious grounds. Moreover, I must reject an analysis which begins with a consideration of so-called "parental rights", particularly where it is not the parents but the child that appear before the Court. The view that children are the property of their parents is, thankfully, long gone. The rights which parents have are connected to their obligation to act in their children's best interests. And the child is equally entitled to the protection of the *Charter*.

Chan J.A. relied on the conclusions of the trial judge in respect of section 7, but also added:

While the Supreme Court was divided in its reasons in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, it was clear that if it was alleged that a child's rights had been violated "... other rights might be raised as reasonable limits, but if the right alleged was security of the child..., then the child's right would again prevail over a parent's rights." Of course, Jasmine's parents have not, like the parents in that case, declined to consent to a blood transfusion. However, I am satisfied, as was the trial judge, that the risks posed to Jasmine as a result of her parents' refusal to permit her to access the only available source of reliable sexual health information are sufficiently dire to warrant the Court's intervention. Further, acknowledging Jasmine's own view of the appropriateness of the sexual health classes for herself is also in line with the Supreme Court's recent discussion, although in a different context, of the concept of the "mature minor" (see *A.C. v. Manitoba (Director of Child and Family Services)*).

As stated above, with respect to section 15, to the extent that s. 11.1 leaves no room for consideration of a student's view – regardless of that student's maturity – it disregards the actual circumstances of the student in a manner that is violative of his or her equality rights.

* * *

I agree with Mohammed J. that the deleterious effects of s. 11.1 outweigh any salutary effects and therefore is not saved by s. 1, but I would add that, in my view, the connection between s. 11.1 and the objective of protecting parents' freedom of religion and conscience is tenuous at best.

In his dissent, Lopez J.A. adopted the trial judge's reasoning with respect to sections 7 and 15(1) of the *Charter*. Noting, among other things, the Supreme Court's comments in *B.(R.)* about a parent's role in directing their child's education, Lopez J.A. held that the breach of section 7 was saved by section 1.

The High Court of the Dominion of Canada² has granted the Attorney General leave to appeal on the following questions:

1. Does s. 11.1 of the *Alberta Human Rights Act* infringe the applicant's right to equality under s. 15(1) of the *Charter*?
2. Does s. 11.1 of the *Alberta Human Rights Act* infringe the applicant's right to life, liberty and security of the person under s. 7 of the *Charter*?
3. If the answer to (1) or (2) is yes, is the infringement reasonable and demonstrably justified in a free and democratic society?

² Note that the High Court of the Dominion of Canada will not consider any facts other than those found by the lower Court.

Schedule "A"

Marksville Collegiate
September 5, 2006

Dear Parent/Guardian:

Our school is teaching the official health curriculum that has been approved by the Ministry of Education and that is required for all students in the province.

The curriculum is intended to promote healthy, responsible choices for students by providing them information about health topics, teaching them skills such as decision-making and media literacy and by encouraging them to discuss their health concerns with their parents and qualified health professionals.

Sexual health education is part of that program and is offered at grades 9 through 12. The program is mandatory for all schools but parents have the right to exempt their child from the health classes that discuss sexuality.

The sexual health curriculum will include frank discussions of sexuality, birth control and sexually transmitted infection ("STI") prevention. Topics will include:

- Healthy and unhealthy relationships (What is a healthy relationship?)
- Negotiating what you want – in and out of the bedroom (How to talk about sexual relations, birth control and STIs with a partner and setting your limits on sexual practices)
- Mythbusting and safer sex (discussion about pregnancy and STI prevention and treatment)
- Body image and diversity (discussion of various forms of diversity, including religious, cultural, racial, sexual orientation and different abilities, in relation to sexuality)
- Pleasure centres and anatomy basics (The benefits of healthy sexual relationships and discussions of various forms of sexual stimulation: e.g. masturbation, kissing, fondling, vaginal, oral, and anal sex, as well as sexual aids)

Students will also be permitted to ask questions about topics of interest to them.

Please sign the slip below and return it to the school if you wish to exempt your child(ren) from the sexual health classes.

Parent Permission Slip about Sexual Health Education Classes
(Please copy or clip this permission slip and return it to the school.)

I, _____
(please print your name)

request that my child (_____) be excused from the sexual health education classes.

Signature: _____ (Date) _____