HRTO File No: 2019-36437-I

B E T W E E N:

NB as Represented by her Litigation Guardian, Pamela Buffone

(Applicant)

and

Ottawa-Carleton District School Board, Julie Derbyshire and Janine Blouin

(Respondents)

SCHEDULE "C" TO FORM 3

APPLICANT'S REPLY TO A RESPONSE

What is the new matter raised in the Response (page or paragraph number); and what is your reply to this new matter?

1. Paragraphs 56 and 63 of the Response to an Application: The Respondents state that the Applicant's father was "irate" in a telephone conversation with Principal Derbyshire. This is demonstrably false. The conversation was recorded and will be submitted as documentary evidence at the Hearing. As will be evident to anyone listening, Mr. Buffone was extremely patient and eminently fair-minded throughout the entire conversation – both with the Principal's frequent interruptions as he tried to speak, and with her lack of objectivity about this matter, bringing her personal experiences into the conversation and expressing that he was "really hurting her feelings" when he gently commented that gender fluidity teachings felt a bit like a social experiment.

Furthermore, it was Ms. Derbyshire who admitted that Ms. Blouin had used the term "non-binary." This was not suggested by Mr. Buffone at all.

2. Paragraph 58: The Respondents state that throughout the call the father was adamant that he did not want the Applicant to take part in discussions about gender fluidity. The Applicant's evidence is that he had asked that the teacher focus on kindness and tolerance rather than forcing complicated, controversial, and age-inappropriate concepts on 6-year old children.

3. Paragraphs 60-62: The Respondents state that Principal Derbyshire offered several options to help the Applicant feel more comfortable in the future. In fact, the only option presented was to remove NB from the classroom when this topic came up.

4. Paragraph 71: The Respondents allege that the Applicant's mother posed specific questions to Principal Derbyshire at a Parent Council meeting, including why she was refusing to inform parents about the classroom discussions on gender identity. In fact, Ms. Buffone did not pose any specific questions to Ms. Derbyshire. (The entire presentation at the meeting was recorded and will be provided through the disclosure process.) The Principal effectively shut down the conversation by stating that they do not teach gender expression or gender identity, but do address "teaching moments" as they arise. In this instance, Ms. Derbyshire stated, "It was not taught in a formal lesson – there was a moment" and accordingly this would not be communicated to parents of children in that classroom.

5. Paragraph 73: The Respondents state that they did not receive any complaints or concerns from any other parents in the class about the discussions in question. Yet, in the recording of the parent meeting, other parents can be heard expressing concern about the lack of communication over this and other issues affecting their children.

6. Paragraphs 83-84: The Respondents request the removal of the individual Respondents from the proceeding, leaving only the School Board as a responding party. The Applicant submits that the personal conduct of the individual Respondents is a central issue and that this would not be an appropriate case to discontinue against them. The

Applicant pleads and relies on the decision of the Tribunal in *Carasco v. University of Windsor*, 2011 HRTO 630 (CanLII), wherein proceedings were continued against an individual Respondent when his conduct was a central issue.

7. In the alternative, the Applicants reserve the right to seek an Order pursuant to Rule 19.3 of the *Rules of Procedure* that the individual Respondents, as non-parties, be produced as witnesses to give oral evidence at the Hearing, and be subject to cross examination.

8. Paragraph 89: The Respondents allege that the Applicant's mother's concerns were addressed immediately, and efforts were made to ensure that no further confusion or upset resulted. This is incorrect. Ms. Blouin continued to teach gender identity theory following her meeting with Ms. Buffone, including the idea that "girls are not real" and the gender-spectrum lesson.

9. Paragraphs 90-95: The Respondents deny that the Applicant, as a "cisgender" girl, can suffer disadvantage on the basis of sex, as compared to transgender or gender non-conforming children. The Applicant submits that this effectively means that only some people have rights under Ontario's *Human Rights Code*, and that being taught that one's entire sex category does not exist does not constitute discrimination. Indeed, all "gender-conforming" boys and girls in that classroom *were* discriminated against based on their protected characteristic of sex; however, NB, as a particularly curious and thoughtful child, experienced the adverse impact of distress and confusion which led to this Application.

10. Paragraphs 96-103: Similarly, the Respondents argue that there can be no discrimination on the basis of gender identity, because the Applicant, as a "cisgender" girl, does not have any protection under the *Code*. Pursuant to the Ontario Human Rights Commission's "*Policy on preventing discrimination because of gender identity and gender expression*", attached as Tab 3 to the Response, gender identity is defined as follows:

> Gender identity is **each person's internal and individual experience of gender**. It is their sense of being a woman, a man, both, neither, or anywhere along the gender

spectrum. A person's gender identity may be the same as or different from their birth-assigned sex. [Emphasis added.]

11. The Respondents' position, again, is tantamount to saying that only some people's human rights are worthy of protection: only those who have claimed special status for themselves on the basis of their "internal experience of gender" are entitled to legal protection against discrimination. In order for gender non-conforming people to have this special status, which exists only comparatively (to be non-conforming, others must be conforming), it is necessary to make the assumption that everyone else is "cisgender" and therefore not worthy of protection.

12. But if gender exists on a spectrum and, according to the definition above, each individual person's gender is uniquely experienced by them, there must be upwards of 15 million distinct gender identities in the Province of Ontario, the holders of which are each entitled not to be discriminated against on the basis of their internal experience of gender. It is therefore unreasonable to contend that anyone who is "cisgender" is not entitled to protection under the *Code*.

13. Paragraph 114: The Applicant's parents do not take issue with the idea of some children being gender-nonconforming, and nothing in their communications with the Respondents suggested that. In fact, they encouraged the Respondents to broadly and inclusively expand the notion of gender, so that all children could feel accepted regardless of whether their appearance or behaviours reflect some distinct masculine or feminine stereotypes. The concern they expressed repeatedly was with the practice of children, and particularly young children, being taught "gender identity" in a manner that communicates that some people, including their daughter, might be in the wrong body, or that girls or boys are not real.

14. Paragraph 116: Contrary to the Respondents' assertion, the Applicant's parents were not "satisfied with the outcome," although they resigned themselves to some degree that they would not be getting anywhere with the Respondents, and resolved to get their children through to the end of the school year before ultimately withdrawing them and placing them with another Board.

15. Paragraphs 118-121: The Applicant concurs that the Tribunal has not assumed jurisdiction to hear "stand alone" *Charter* challenges, and accordingly no *Charter* remedies were sought. Rather, the Tribunal has a duty, as does the School Board, to consider and apply the *Charter* in interpreting their legislation and exercising discretion. See *Taylor-Baptiste v. Ontario Public Service Employees Union*, 2013 HRTO 180, citing *Doré v. Barreau du Québec*, 2012 SCC 12 (CanLII), paragraph 35, where the Supreme Court stated as follows:

> Rather, administrative decisions are always required to consider fundamental values. The *Charter* simply acts as "a reminder that some values are clearly fundamental and ... cannot be violated lightly" (*Cartier*, at p. 86). The administrative law approach also recognizes the legitimacy that this Court has given to administrative decision-making in cases such as *Dunsmuir* and *Conway*. These cases emphasize that administrative bodies are empowered, and indeed required, to consider *Charter* values within their scope of expertise. Integrating *Charter* values into the administrative approach, and recognizing the expertise of these decision-makers, opens "an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship" (*Liston*, at p. 100).

16. Paragraphs 106-117: The Respondents have included their Reply to the Applicant's Summary Hearing Response (Amended Schedule "B") in these paragraphs. For greater clarity, the Applicant pleads and relies on the facts and arguments contained in her Summary Hearing Response, and incorporates same into her Application.

All of which is respectfully submitted this 11th day of December, 2019.

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