

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

BECKY MCFARLANE, in her personal capacity and as litigation guardian for L [REDACTED] M [REDACTED],
and
THE CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicants

- and -

MINISTER OF EDUCATION (ONTARIO)

Respondent

**AFFIDAVIT OF CARA FAITH ZWIBEL
(AFFIRMED AUGUST 23, 2018)**

I, Cara Faith Zwibel, of the City of Toronto, in the Province of Ontario, HEREBY
AFFIRM AND SAY:

Overview

1. I am the Director of the Fundamental Freedoms Program of the Canadian Civil Liberties Association (the "CCLA"). As such, I have knowledge of the matters to which I hereinafter depose.

2. I make this affidavit in support of the application for judicial review brought by Becky McFarlane, in her personal capacity and as the litigation guardian for her daughter, and the Corporation of the CCLA seeking, among other things, an order setting aside the Directive (as defined below) of the Ontario Minister of Education (the "Minister") and requiring the Minister

to direct school boards in Ontario to continue to teach the 2015 HPE Curriculum (as defined below) until such time as appropriate and adequate consultation has been completed and any proposed new health and physical education curriculum has been developed.

The CCLA and the Corporation

3. The CCLA, founded in 1964, is a national, independent, non-profit, and non-governmental organization dedicated to the furtherance of civil liberties in Canada. The CCLA has several thousand paid supporters drawn from diverse backgrounds. A wide variety of persons, occupations, and interests are represented in the national membership.

4. The CCLA was constituted to promote respect for fundamental human rights and civil liberties and to defend and foster their recognition. In every issue on which the CCLA advocates, it directs its attention to the critical reconciliation of civil liberties and competing public interests. The underlying purpose of its work is to promote and maintain a free and democratic society in Canada.

5. The Corporation of the Canadian Civil Liberties Association is a non-profit corporation established pursuant to the laws of Canada. The Corporation's objects are identical to those of the CCLA and its governance is closely linked to that of the CCLA.

The 1998 Health and Physical Education Curriculum

6. In 1998, the Ontario Ministry of Education and Training published a health and physical education curriculum (the "1998 HPE Curriculum"). The 1998 HPE Curriculum consists of a 40-page curriculum document for Grades 1-8. A copy of that document is attached to this affidavit as **Exhibit 1**.

The 2015 Health and Physical Education Curriculum

7. On October 30, 2014, the then-Minister, a member of the Liberal government led by Premier Wynne, issued a press release with regard to the consultations that were being carried out in developing an updated health and physical education curriculum to be introduced in Ontario schools in September 2015 (the “2015 HPE Curriculum”). Copies of the October 30, 2014 press release, and the attachments thereto, are attached to this affidavit as **Exhibit 2**.

8. The October 30, 2014 press release stated in part:

As part of extensive provincial Health and Physical Education curriculum consultations, Ontario is listening to more feedback from parents from across the province.

This fall, one parent from every elementary school across the province will have the opportunity to provide feedback to the government through a secure survey. The government will benefit from the perspective of approximately 4,000 parents regarding trusted sources for health information, as well as when certain information should be taught in schools.

As the new curriculum is finalized, the insights and advice provided through this process will be considered along with research and information from earlier consultations and focus groups with students, teachers, parents, faculties of education, universities and colleges, as well as other organizations and stakeholders.

...

- The Growth and Development section of the elementary Health and Physical Education curriculum has not been updated since 1998 – before the widespread use of social media and smartphones.

- This current round of consultations builds on the earlier consultations and focus groups with students, teachers, parents, faculties of education, universities and colleges, as well as other organizations and stakeholders. More than 70 health-related

organizations submitted reports for consideration and more than 2,400 people provided feedback on the draft curriculum.

9. Also on October 30, 2014, the then-Deputy Minister of Education issued a memorandum to various recipients with regard to the additional consultations that were being carried out. A copy of the memorandum is attached to this affidavit as **Exhibit 3**.

10. On February 23, 2015, the then-Minister issued a press release announcing the release of the 2015 HPE Curriculum. A copy of the February 23, 2015 press release, and the attachments thereto, are attached to this affidavit as **Exhibit 4**.

11. The February 23, 2015 press release stated in part:

Starting September 2015, the updated curriculum will reflect health, safety and well-being realities faced by today's students. Updates to the curriculum include healthy relationships, consent, mental health, online safety and the risks of "sexting." The curriculum has also been updated to be more reflective of Ontario's growing and diverse population.

...

The revision of the Health and Physical Education curriculum is the result of work done through the curriculum consultation, which began in 2007. The review was the most extensive curriculum consultation process ever undertaken by the ministry and involved parents, students, teachers, faculties of education, universities, colleges and numerous stakeholder groups including the Centre for Addiction and Mental Health, The Ontario Public Health Association and the Ontario Healthy Schools Coalition. More than 70 health-related organizations submitted reports for consideration and thousands of people provided feedback.

12. The 2015 HPE Curriculum consists of a 239-page curriculum document for Grades 1-8 and a 218-page curriculum document for Grades 9-12. Copies of those documents are attached to this affidavit as **Exhibits 5 and 6** respectively.

13. On February 25, 2015 and April 1, 2015, the then-Minister made statements to the Legislative Assembly of Ontario that related in part to the 2015 HPE Curriculum. Copies of those statements, as published by the Ontario Ministry of Education, are attached to this affidavit as **Exhibits 7 and 8** respectively.

14. In the February 25, 2015 statement, the then-Minister stated in part:

Mr. Speaker, on Monday [February 23, 2015], our government took further steps towards ending bullying by releasing the revised up-to-date Health and Physical Education curriculum.

We needed to update our curriculum so that students understand the importance of things like:

- Healthy relationships
- Having the confidence to say “no”
- Safe use of technology and the internet to help eliminate cyberbullying
- Developing inclusive communities, and
- Mental health

Mr. Speaker, as Ontarians, we must all work together.

Many schools and school communities are already demonstrating leadership in fostering and maintaining positive school climates through whole-school approaches that engage all members of the school community.

I want to thank our educators, students and school communities for their leadership and commitment in creating safe, inclusive and accepting school environments that are essential for student achievement and well-being.

The 2015 SIECCAN Publication

15. In 2015, the Sex Information and Education Council of Canada (“SIECCAN”) published a document entitled “Sexual health education in the schools: Questions & Answers (Updated 2015 Ontario Edition)” (the “2015 SIECCAN Publication”), a copy of which is attached to this affidavit as **Exhibit 9**. SIECCAN is a not-for-profit charitable organization established in 1964 that works with health professionals, educators, community organizations, governments, and corporate partners to promote sexual and reproductive health.

16. The 2015 SIECCAN Publication provides statistical evidence with regard to many of the relationship- and sexuality-related issues covered by the 2015 HPE Curriculum. Among other things, the 2015 SIECCAN Publication refers to the importance of addressing sexual orientation and same-sex relationships in the curriculum:

... Most school classrooms will have one or more students who are not heterosexual. In a demographic survey of junior and high school students by the Toronto District School Board (2013), 8% of Grade 9 to 12 students identified themselves as non-heterosexual (e.g., lesbian, gay, bisexual, queer) or “not sure/questioning” in relation to their sexual orientation. Similar percentages of youth identified as gay, lesbian, bisexual, questioning or “mostly straight” in a large sample survey of high school students in British Columbia ... Due to experiences of bullying, discrimination, and stigmatization, LGBT youth often remain an invisible population in schools ...

Surveys have repeatedly shown that a majority of Canadian parents ... want sexual orientation addressed in school-based sexual health education programs. [pp. 13-14]

17. The 2015 SIECCAN Publication also refers to the importance of addressing the issue of consent:

In Canada, sexual assault, including unwanted sexual touching, as well as violent sexual attacks, disproportionately affects young

women with young people aged 15 to 24 almost twice as likely to be sexually assaulted as those aged 25 to 34 ...

To reduce the likelihood of sexual assault and to promote equitable, healthy relationships, young people need to learn the communication skills to express non-consent (i.e., refusal) to engage in sexual activity and to ensure that mutual consent exists between partners if sexual activity does occur through the expression of affirmative consent ... [pp. 15-16]

18. In addition, the 2015 SIECCAN Publication provides information with regard to the use of modern communication technologies by students:

A national study of Canadian school students found that among Grade 10 and 11 students with a cell phone, 11% and 14% respectively reported that they had sent a sext of themselves to someone ... Young people need to be aware of the social, psychological, and legal consequences of sending sexts ... In particular, young people need to be aware that it is a criminal offense to distribute or share a photo or video of a sexual nature or that depicts nudity without the consent of the person in the photo or video ...

Research indicates that the percentage of Canadian young people accessing pornography on the Internet is increasing: A recent national survey of Canadian youth found that about a third of Grade 10 and 11 students reported looking for pornography online ... and smaller studies in Canada ... and the United States ... have found higher percentages of adolescents reporting exposure to sexually explicit websites. [pp. 16-17]

Public Health Agency of Canada Guidelines

19. In 2008, the Public Health Agency of Canada – an agency of the Government of Canada – published its revised *Canadian Guidelines for Sexual Health Education* (the “2008 Guidelines”), a copy of which is attached to this affidavit as **Exhibit 10**. Among other things, the 2008 Guidelines provide information about sexual diversity:

With respect to sexual diversity, contemporary research indicates that approximately 2 to 10% of individuals within Canadian

society self-identify as non-heterosexual. Due to a complex combination of circumstances (e.g., cultural and religious background; geographic location; peer pressure, etc.) even more individuals may engage in same-sex behaviour, yet not label themselves as a lesbian, gay, bisexual, trans-identified, two-spirited or queer (LGBTQQ) person. For example, a survey of 1358 Canadian youth (ages 13-29) found that while 3.5% self-identified as a sexual minority, 7.5% of the heterosexual youth surveyed acknowledged experimenting sexually with members of the same sex. Given these statistics, it is important to remember that in relation to education sexual behaviour is not always synonymous with sexual identity. This realization has important implications for educators and health care professionals when engaging in sexual health education and promotion for diverse populations. [p. 9; internal footnotes omitted]

Publication by Status of Women Canada

20. Status of Women Canada – a federal government organization – has published on its website a document entitled “About Gender-Based Violence,” a copy of which is attached to this affidavit as **Exhibit 11**. The document states in part:

Some populations are more likely to experience violence and may face unique barriers and challenges that put them at particular risk. For example:

- women are at a 20% higher risk of violent victimization than men when all other risk factors are taken into account;
- young women, aged 15-34 years, are at highest risk of experiencing violence;
- ...
- women living with physical and cognitive impairments experience violence two to three times more often than women living without impairments;
- people self-identifying as homosexual or bisexual are three times more likely than heterosexuals to be victims of violence ...

The Directive

21. Following the general election on June 7, 2018 in which the Ontario Progressive Conservative Party won a majority of the seats in the Legislative Assembly of Ontario, the Lieutenant-Governor delivered the Speech from the Throne on July 12, 2018. A copy of the Hansard report from July 12, 2018 is attached to this affidavit as **Exhibit 12**. In the Speech from the Throne, the Lieutenant-Governor stated in part:

You can also count on your government to respect parents, teachers and students by getting back to basics and replacing failed ideological experiments in the classroom—with tried and true methods that work.

...

It will also include respecting parents—by replacing the current sex-education curriculum—with a new age-appropriate one that is based on real consultation with parents. [p. 4]

22. On July 11, 2018, the Minister sent a letter to all trustee groups, chairs and directors of education, teacher federations, principal and vice principal groups, parent organizations, and child care stakeholder groups, a copy of which is attached to this affidavit as **Exhibit 13**.

23. On July 24, 2018, during Question Period, Premier Ford was asked about the contents of the curriculum that will be used in September 2018. A copy of an excerpt from the Hansard report from July 24, 2018 is attached to this affidavit as **Exhibit 14**. In response to the following question from the Leader of the Official Opposition, Premier Ford responded:

Ms. Andrea Horwath: Yesterday, the Deputy Premier said that issues related to self-identity and self-expression will be included in the curriculum this fall. Will the Premier confirm that all information about sexual orientation, gender identity and LGBTQ families from the updated health curriculum will be taught in Ontario schools this coming September?

Hon. Doug Ford: That's not up to us to decide in this chamber; it's up to the people—

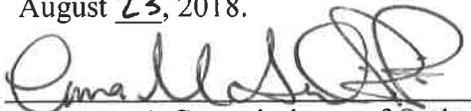
Interjections.

Hon. Doug Ford: I know you don't believe in consulting with the people. It's up to the people of this great province to give us the direction to make that decision.

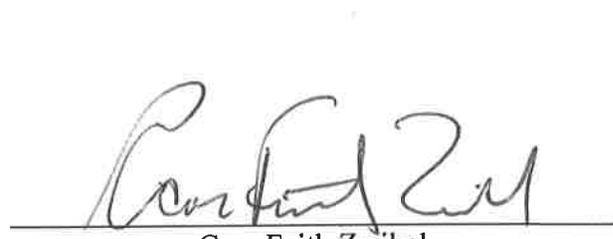
We ran a campaign for the people. It's not for the government or for the opposition or for the special interest groups; it's for the people. [p. 291]

24. On July 30, 2018, the CCLA sent a letter to the Minister on this issue, a copy of which is attached to this affidavit as **Exhibit 15**.
25. On August 20, 2018, the CCLA sent another letter to the Minister on this issue, a copy of which is attached to this affidavit as **Exhibit 16**.
26. On August 22, 2018, the Province released a revised interim sex-education curriculum and announced that teachers would be required to use that curriculum during the 2018-2019 school year. A copy of the news release from the Office of the Premier announcing that decision is attached to this affidavit as **Exhibit 17**. A copy of the revised interim curriculum referenced in that news release is attached to this affidavit as **Exhibit 18**. A copy of a report on the announcement published online by the CBC on August 22, 2018 is attached to this affidavit as **Exhibit 19**.

AFFIRMED BEFORE ME at the City of
Toronto, in the Province of Ontario on
August 23, 2018.



A Commissioner of Oaths
(or as may be)



Cara Faith Zwibel

65207D

BECKY MCFARLANE et al. v. MINISTER OF EDUCATION (ONTARIO) et al.

Court File No.

Applicants

Respondent

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

**AFFIDAVIT OF CARA FAITH
ZWIBEL
(AFFIRMED AUGUST 23, 2018)**

Chernos Flaherty Svonkin LLP
220 Bay Street, Suite 700
Toronto, ON M5J 2W4

Stuart Svonkin (LSUC#: 48796O)
Tel: 416.855.0404
Fax: 647.725.5440

Brendan Brammall (LSUC#: 54544M)
Tel: 416.855.0415
Fax: 647.725.5440

Lawyers for the Applicants,
Becky McFarlane, in her personal capacity and
as litigation guardian for L [REDACTED] M [REDACTED], and
the Corporation of the Canadian Civil Liberties
Association