

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(DIVISIONAL COURT)**

B E T W E E N:

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

Applicants

- and -

MINISTER OF EDUCATION (ONTARIO)

Respondent

APPLICATION UNDER Rule 14.05(2) of the *Rules of Civil Procedure* and  
Sections 2(1) and 6(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1

**FACTUM OF THE APPLICANTS  
(APPLICATION FOR JUDICIAL REVIEW)  
(HEARING DATE: JANUARY 9-10, 2019)**

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## TABLE OF CONTENTS

<b>PART I – OVERVIEW .....</b>	<b>1</b>
<b>PART II – FACTS .....</b>	<b>5</b>
A. The Parties.....	5
B. The 2015 HPE Curriculum.....	6
C. The Directive.....	7
D. Differences Between the 2015 HPE Curriculum and the 2018 HPE Curriculum.....	8
E. The Social Science Evidence .....	10
<b>PART III – LAW AND ARGUMENT .....</b>	<b>11</b>
A. Overview .....	11
B. The Directive Is Subject to Judicial Review .....	12
C. Judicial Review of Administrative Decisions that Engage the <i>Charter</i> .....	13
D. Section 15(1) of the <i>Charter</i> .....	15
E. Section 7 of the <i>Charter</i> .....	17
F. The Directive Does Not Reflect a Proportionate Balancing .....	20
i. The Removal of the Material Creates an Adverse Impact .....	22
ii. The Charter Protects Rights and Values Even If They Are Unpopular.....	25
iii. The Directive Is Inconsistent with the Statutory Context.....	27
G. The Appropriate Remedy .....	29
H. No Award of Costs .....	29
<b>PART IV – ORDER REQUESTED .....</b>	<b>29</b>
<b>CERTIFICATE.....</b>	<b>1</b>
<b>SCHEDULE A – LIST OF AUTHORITIES.....</b>	<b>1</b>
<b>SCHEDULE B – STATUTES AND RULES.....</b>	<b>1</b>
A. <i>Judicial Review Procedure Act</i> , R.S.O. 1990, c. J.1 .....	1
B. <i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act, 1982</i> .....	2
C. <i>Education Act</i> , R.S.O. 1990, c. E.2 .....	2
D. <i>Human Rights Code</i> , R.S.O. 1990, c. H.19 .....	5
<b>SCHEDULE C – DIFFERENCES BETWEEN THE 2015 HPE CURRICULUM AND THE 2018 HPE CURRICULUM .....</b>	<b>1</b>
A. Grade 3 .....	1
B. Grade 6 .....	3
C. Grade 7 .....	6
D. Grade 8 .....	9

## **PART I – OVERVIEW**

1. The Applicants maintain that the Directive (as defined below) of the Minister of Education (the “Minister”) has a disproportionate and unreasonable adverse impact on rights and values protected under the *Canadian Charter of Rights and Freedoms* (the “Charter”), and is accordingly an impermissible exercise of statutory power under the *Education Act*, R.S.O. 1990, c. E.2 (the “*Education Act*”).
2. In 2015, the Province adopted an updated health and physical education curriculum (the “2015 HPE Curriculum”) for Grades 1-8 and 9-12. The 2015 HPE Curriculum includes information about sexual orientation, gender identity, same-sex relationships, consent, and online safety. It was used by Ontario school boards starting in September 2015 and continuing through the 2017-2018 school year.
3. On or around August 22, 2018, the Province released an interim health and physical education curriculum for Grades 1-8 (the “2018 HPE Curriculum”). The 2018 HPE Curriculum is based on a document that was first issued by the Province in 2010.
4. In a press release dated August 22, 2018, Premier Ford and the Minister announced that the Province would be undertaking a consultation process for the purpose of, among other things, developing a new health and physical education curriculum. In the press release, they announced the Province’s decision (the “Directive”) to require teachers in Ontario public schools to teach the 2018 HPE Curriculum starting in September 2018 – instead of teaching the 2015 HPE Curriculum for Grades 1-8 – pending the development and implementation of the new curriculum. The press release quoted Premier Ford as follows:

We expect our teachers, principals and school board officials to fulfill their obligations to parents and children when it comes to what our students learn in the classroom. We will not tolerate anybody using our children as pawns for grandstanding and political games. And, make no mistake, if we find somebody failing to do their job, we will act.<sup>1</sup>

5. With regard to sexual orientation, gender identity, same-sex relationships, consent, and online safety, there are material differences between the 2015 HPE Curriculum and the 2018 HPE Curriculum. As detailed below, content relating to those issues that was contained in the 2015 HPE Curriculum is absent from the 2018 HPE Curriculum. Instead, the 2018 HPE Curriculum contains “growth and development” content from a health and physical education curriculum that the Province issued in 1998 (the “1998 HPE Curriculum”).

6. The Applicants are not challenging the Province’s authority to undertake a curriculum consultation process or to develop a new curriculum. The Applicants are challenging the Directive – i.e., the Province’s decision to require that the 2018 HPE Curriculum be used in place of the 2015 HPE Curriculum while a new curriculum is developed. That decision has an adverse impact on the Applicants’ rights under the *Charter* that is neither proportional nor justified. For that reason, the Directive should be set aside.

7. The Supreme Court of Canada has held that, when an administrative decision limits *Charter* protections, that decision must reflect a proportionate balancing between the *Charter* rights and values engaged, on the one hand, and a legitimate governmental objective, on the other. In this case, the Directive limits protections under sections 15(1) and 7 of the *Charter* in the following ways:

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<sup>1</sup> Press Release, dated August 22, 2018, p. 2, Exhibit 17 to Affidavit of Cara Faith Zwibel, affirmed August 23, 2018 (“Zwibel Affidavit”), Joint Application Record (“JAR”), Vol. 4, Tab 8Q, p. 865.

- (a) by removing references to sexual orientation, gender identity, and same-sex relationships from the curriculum, the Directive stigmatizes, degrades, and alienates LGBTQ+ students and parents – contrary to their equality rights under section 15(1);
- (b) by removing information about the issue of consent from the curriculum, the Directive has a negative impact on women, girls, and LGBTQ+ individuals, all of whom are disproportionately affected by sexual assault, sexual violence, and harassment – contrary to their equality rights under section 15(1) and their right to security of the person under section 7; and
- (c) by reducing the amount of information about online safety, the Directive endangers the safety of all students and therefore infringes upon their right to security of the person under section 7.

8. The Minister bears the onus of establishing, with evidence, that the Directive reflects a proportionate balancing of those *Charter* rights and values with the purpose animating the Directive. In this case, the Minister has failed to meet that evidentiary burden.

9. Based on the evidence adduced by the Minister, the Applicants anticipate that she may advance the following arguments in response to this application:

- (a) The Directive leaves teachers with discretion as to how they deliver the 2018 HPE Curriculum. In that regard, it may be suggested that teachers can, if they choose, address material that has been removed from the curriculum.

- (b) The consultation process leading to the implementation of the 2015 HPE Curriculum was not sufficiently robust, and some people, including some parents, did not approve of the 2015 HPE Curriculum.
- (c) The 2018 HPE Curriculum – in conjunction with other laws and policies – still requires schools to provide an inclusive learning environment.

10. The Applicants submit that none of those arguments can succeed, and that the evidence provided by the Minister fails to meet her onus on this application, because:

- (a) A mandatory curricular document reflects the values that the Province is endorsing and promulgating through the public school system. It is the Province's statement of what it regards as valid and approved. The 2015 HPE Curriculum contained content that was expressly directed at protecting and advancing *Charter* rights and values. That material has been expunged from the 2018 HPE Curriculum. The eradication of that material sends a clear message to parents and students: that the removed material is invalid, unimportant, and no longer sanctioned by the government. It is not an answer for the Minister to say that teachers are not prohibited from addressing subjects referenced in the removed material. The removal of the material itself creates the adverse impact – by sending a state-sanctioned message of exclusion and disapproval.
- (b) The Applicants' challenge does not turn on the robustness of the consultation process that led to the development of the 2015 HPE Curriculum. The Applicants submit that, regardless of how it was developed, the 2015 HPE Curriculum protected and advanced *Charter* rights and values and, as a result, there needs to

be a good reason, supported by evidence, for the Province to remove that material. Evidence that the 2015 HPE Curriculum was unpopular among certain people does not assist the Minister in meeting her onus. The *Charter* protects rights and values that may be unpopular, even among a majority of people. Evidence that the protection of those rights and values may be unpopular does not justify infringement of those rights.

- (c) The fact that the Directive runs counter to other applicable laws and policies, including the Province's obligation under the *Education Act* to promote an inclusive and accepting school environment and its obligation under the *Human Rights Code* to ensure that all persons receive non-discriminatory treatment, provides further indication that the Directive is not only unconstitutional, but otherwise contrary to the law.

11. The Directive has an adverse impact on the Applicants' *Charter* rights and is contrary to the Minister's obligations under statute. The Minister has not adduced evidence capable of justifying the Directive. The Court should accordingly set the Directive aside and require the Minister to direct Ontario school boards to continue to use the 2015 HPE Curriculum until a new health and physical education curriculum has been implemented.

## **PART II – FACTS**

### **A. The Parties**

12. Becky McFarlane (“Becky”) is a queer parent. Her 10-year-old daughter (“L.M.”) started Grade 6 at a public school within the Toronto District School Board in September 2018. As far

as Becky is aware, L.M. is the only student at her school whose parents openly identify as queer.<sup>2</sup>

13. The Corporation of the Canadian Civil Liberties Association (the “Corporation”) is a non-profit Canadian corporation. The Corporation’s objectives are identical to those of the Canadian Civil Liberties Association (the “CCLA”), and its governance is closely linked to that of the CCLA.<sup>3</sup>

14. The Minister assumed office on June 29, 2018, following a 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.<sup>4</sup>

#### **B. The 2015 HPE Curriculum**

15. On February 23, 2015, the former Minister of Education, a member of the Liberal government led by former Premier Wynne, announced the release of the 2015 HPE Curriculum.<sup>5</sup>

16. The 2015 HPE Curriculum consists of a 239-page curriculum document for Grades 1-8<sup>6</sup> and a 218-page curriculum document for Grades 9-12.<sup>7</sup> It was used by Ontario school boards for the three school years starting in September 2015, September 2016, and September 2017.<sup>8</sup>

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<sup>2</sup> Affidavit of Becky McFarlane, sworn August 15, 2018 (“McFarlane Affidavit”), paras. 7-8, JAR, Vol. 1, Tab 7, p. 58.

<sup>3</sup> Zwibel Affidavit, para. 5, JAR, Vol. 1, Tab 8, p. 65.

<sup>4</sup> Zwibel Affidavit, para. 21, JAR, Vol. 1, Tab 8, p. 72.

<sup>5</sup> Zwibel Affidavit, para. 10, JAR, Vol. 1, Tab 8, p. 67.

<sup>6</sup> 2015 HPE Curriculum, Grades 1-8, Exhibit 5 to Zwibel Affidavit, JAR, Vol. 2, Tab 8E.

<sup>7</sup> 2015 HPE Curriculum, Grades 9-12, Exhibit 6 to Zwibel Affidavit, JAR, Vol. 3, Tab 8F.

<sup>8</sup> Press Release, dated February 23, 2015, p. 1, Exhibit 4 to the Zwibel Affidavit, JAR, Vol. 1, Tab 8D, p. 218.

17. The 2015 HPE Curriculum includes, among other things, three distinct but related content strands: the “Active Living,” “Movement Competence,” and “Healthy Living” strands. The Healthy Living strand includes four components: (1) healthy eating; (2) personal safety and injury prevention; (3) substance use, addictions, and related behaviours; and (4) human development and sexual health.

18. The 2015 HPE Curriculum – particularly the human development and sexual health component of the Healthy Living strand – includes information about, among other things, sexual orientation, gender identity, same-sex relationships, consent, and online safety.

### **C. The Directive**

19. Following the general election on June 7, 2018, the Lieutenant-Governor delivered the Speech from the Throne on July 12, 2018. In that speech, the Lieutenant-Governor announced the government’s intention to “replac[e] the current sex-education curriculum.”<sup>9</sup>

20. In a press release dated August 22, 2018,<sup>10</sup> Premier Ford and the Minister announced the Directive, which requires teachers in Ontario public schools to teach the 2018 HPE Curriculum<sup>11</sup> on an interim basis, instead of the 2015 HPE Curriculum for Grades 1-8. As noted above, the press release quoted Premier Ford as stating that, “if we find somebody failing to do their job, we will act.” The press release also stated that, “[a]s a first step to empowering parents, the

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<sup>9</sup> Speech from the Throne, Hansard Report (July 12, 2018), p. 4, Exhibit 12 to Zwibel Affidavit, JAR, Vol. 4, Tab 8L, p. 820.

<sup>10</sup> Press Release, dated August 22, 2018, Exhibit 17 to Zwibel Affidavit, JAR, Vol. 4, Tab 8Q.

<sup>11</sup> 2018 HPE Curriculum, Exhibit 18 to Zwibel Affidavit, JAR, Vol. 4, Tab 8R.

government is launching a dedicated submission platform – [Fortheparents.ca](http://Fortheparents.ca) – that parents can use to report any concerns.”<sup>12</sup>

21. The 2018 HPE Curriculum does not include the human development and sexual health component of the Healthy Living strand of the 2015 HPE Curriculum. In place of that component, the 2018 HPE Curriculum includes the “growth and development” component that was developed for and included in the 1998 HPE Curriculum released twenty years ago.<sup>13</sup>

**D. Differences Between the 2015 HPE Curriculum and the 2018 HPE Curriculum**

22. With regard to sexual orientation, gender identity, same-sex relationships, consent, and online safety, there are significant differences between the 2015 HPE Curriculum and the 2018 HPE Curriculum, particularly at the Grade 3, Grade 6, Grade 7, and Grade 8 levels.

23. Those differences are set out in the table at Schedule C to this factum. In summary, the differences are as follows:

- (a) The Grade 3 level of the 2015 HPE Curriculum introduces the concepts of gender identity, sexual orientation, and different family structures. The Grade 3 level of the 2018 HPE Curriculum does not contain content addressing those issues.
- (b) The Grade 6 level of the 2015 HPE Curriculum introduces the concept of consent and also provides information about the pernicious impact of stereotypes and assumptions, including in relation to sexual orientation, gender expression, and different family structures. The Grade 6 level of the 2018 HPE Curriculum does

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<sup>12</sup> Press Release, dated August 22, 2018, p. 2, Exhibit 17 to Zwibel Affidavit, JAR, Vol. 4, Tab 8Q, p. 865.

<sup>13</sup> 1998 HPE Curriculum, Exhibit 1 to Zwibel Affidavit, JAR, Vol. 1, Tab 8A.

not contain any information about consent, sexual orientation, gender expression, or different family structures.

- (c) The Grade 7 level of the 2015 HPE Curriculum contains information about consent. The Grade 7 level of the 2018 HPE Curriculum does not use the term “consent.” Instead, the Grade 7 level of the 2018 HPE Curriculum refers in a general manner to terms such as “interpersonal,” “communication,” and “refusal” skills. Further, although the Grade 7 levels of both the 2015 HPE Curriculum and the 2018 HPE Curriculum contain information about online safety, the 2018 HPE Curriculum is less comprehensive on that issue.
- (d) The Grade 8 level of the 2015 HPE Curriculum contains significant information about gender identity, gender expression, and sexual orientation, as well as information about consent. That information has largely been removed from the Grade 8 level of the 2018 HPE Curriculum, apart from general references to terms such as “assertiveness” and “refusal” skills.

24. The 2018 HPE Curriculum contains a few general references to inclusion, gender identity, and sexual orientation, particularly in the introductory sections of the document. For example, the 2018 HPE Curriculum states:

In an environment based on the principles of inclusive education, all students, parents, and other members of the school community – regardless of ancestry, culture, ethnicity, sex, physical or intellectual ability, race, religion, gender identity, sexual orientation, socio-economic status, or other similar factors – are welcomed, included, treated fairly, and respected. Diversity is valued, and all members of the school community feel safe, comfortable, and accepted. ...<sup>14</sup>

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<sup>14</sup> 2018 HPE Curriculum, p. 57, Exhibit 18 to Zwibel Affidavit, JAR, Vol. 4, Tab 8R, p. 925.

25. The 2018 HPE Curriculum does not, however, include detailed content regarding gender identity, sexual orientation, same-sex relationships, or different family structures in any of the Grade-specific sections. Likewise, the 2018 HPE Curriculum does not use the term “consent.” As noted above, the 2018 HPE Curriculum only contains general references to terms such as “interpersonal,” “communication,” and “refusal” skills – without providing the kind of detailed and practical information about what it means to seek and obtain consent as is found in the 2015 HPE Curriculum.

### **E. The Social Science Evidence**

26. In 2015, the Sex Information and Education Council of Canada (“SIECCAN”), a not-for-profit charitable organization, published a resource document (the “2015 SIECCAN Publication”) that provides statistical evidence with regard to many of the relationship- and sexuality-related issues covered in the human development and sexual health component of the 2015 HPE Curriculum. Among other things, the 2015 SIECCAN Publication states:

... 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 ...<sup>15</sup>

27. The 2015 SIECCAN Publication also states:

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<sup>15</sup> 2015 SIECCAN Publication, p. 13, Exhibit 9 to Zwibel Affidavit, JAR, Vol. 4, Tab 8I, p. 734.

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 ...<sup>16</sup>

28. Likewise, Status of Women Canada – a federal government organization – has published statistical evidence about gender-based violence that demonstrates that:

- (a) women are at a 20% higher risk of violence than men when all other risk factors are taken into account;
- (b) young women, aged 15-34 years, are at highest risk of experiencing violence; and
- (c) people self-identifying as homosexual or bisexual are three times more likely than heterosexuals to be victims of violence.<sup>17</sup>

### **PART III – LAW AND ARGUMENT**

#### **A. Overview**

29. The Applicants make the following three main submissions:

- (a) the Directive is subject to judicial review;
- (b) the Directive reflects an unreasonable and disproportionate balancing of the *Charter* protections at stake; and
- (c) the appropriate remedy is to set the Directive aside and to require the continued use of the 2015 HPE Curriculum pending the implementation of any new health and physical education curriculum.

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<sup>16</sup> 2015 SIECCAN Publication, p. 15, Exhibit 9 to Zwibel Affidavit, JAR, Vol. 4, Tab 8I, p. 736.

<sup>17</sup> Status of Women Canada, “About Gender-Based Violence,” pp. 1-2, Exhibit 11 to Zwibel Affidavit, JAR, Vol. 4, Tab 8K, pp. 809-810.

## B. The Directive Is Subject to Judicial Review

30. The Directive is judicially reviewable under section 2(1)1 and/or section 2(1)2 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (the “JRPA”).

31. With regard to section 2(1)1, the Directive is judicially reviewable because it is the kind of decision that is reached by public law.<sup>18</sup> It is a public decision, made by the Minister, that affects the rights, interests, and liberties of LGBTQ+ individuals, women, and girls, as further discussed below.

32. With regard to section 2(1)2, the Directive is judicially reviewable because it was made pursuant to section 8(1)(3)(a) of the *Education Act*, which provides:

The Minister may, ...

3. in respect of schools under the jurisdiction of a board,

(a) issue curriculum guidelines and require that courses of study be developed therefrom and establish procedures for the approval of courses of study that are not developed from such curriculum guidelines ...

33. Because the Directive is based on section 8(1)(3)(a) of the *Education Act*, it constitutes the exercise (or purported exercise) of a “statutory power,” as that term is defined in the JRPA.

34. Although courts have recognized that certain governmental decisions – i.e., “policy decisions or decisions that are highly political in nature”<sup>19</sup> – are non-justiciable and not subject to judicial review, it is noteworthy that “the law of judicial review has narrowed the class of non-

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<sup>18</sup> *Setia v. Appleby College*, [2013] O.J. No. 5736 (C.A.) at paras. 32, 34, Book of Authorities of the Applicants (“BOA”), Tab 1.

<sup>19</sup> *Tesla Motors Canada ULC v. Ontario (Ministry of Transportation)*, [2018] O.J. No. 4394 (S.C.J.) at para. 32, BOA, Tab 2.

justiciable decisions.”<sup>20</sup> As the Court of Appeal has held, a governmental decision “will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual.”<sup>21</sup> The Court of Appeal has also held that, “if an individual claims that the exercise of a [governmental] power violates that individual’s *Charter* rights, the court has a duty to decide the claim.”<sup>22</sup>

35. The Directive cannot be classified as a non-justiciable decision. It affects the rights and legitimate expectations of LGBTQ+ individuals, women, and girls, including specifically the *Charter* rights of the Applicants. As set out below, the Directive has a specific, adverse impact on those individuals. For that reason, the Directive is very different from a non-justiciable matter of “high policy” – “like a decision to sign a treaty, or to declare a war, or to cancel a subsidy program”<sup>23</sup> – that does not affect the rights or legitimate expectations of any person. Simply put, because the Applicants are claiming a violation of their *Charter* rights, their challenge to the Directive is justiciable and must be decided.

### **C. Judicial Review of Administrative Decisions that Engage the *Charter***

36. The Directive is an administrative decision that engages the *Charter*. It is therefore subject to the analytical framework most recently explained by the Supreme Court of Canada in *Law Society of British Columbia v. Trinity Western University* (“*Trinity Western*”):

... the preliminary question is whether the administrative decision engages the *Charter* by limiting *Charter* protections -- both rights and values ... If so, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual

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<sup>20</sup> *Ibid.* at para. 41.

<sup>21</sup> *Black v. Canada (Prime Minister)*, [2001] O.J. No. 1853 (C.A.) at para. 51, BOA, Tab 3.

<sup>22</sup> *Ibid.* at para. 46.

<sup>23</sup> *Tesla Motors Canada ULC v. Ontario (Ministry of Transportation)*, [2018] O.J. No. 4394 (S.C.J.) at para. 46, BOA, Tab 2.

contexts, the decision reflects a proportionate balancing of the *Charter* protections at play ... The extent of the impact on the *Charter* protection must be proportionate in light of the statutory objectives.<sup>24</sup>

37. With regard to what a “proportionate balancing” means, the Supreme Court of Canada provided the following guidance:

For a decision to be proportionate, it is not enough for the decision-maker to simply balance the statutory objectives with the *Charter* protection in making its decision. Rather, the reviewing court must be satisfied that the decision *proportionately* balances these factors, that is, that it gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate ... Put another way, the *Charter* protection must be affected as little as reasonably possible in light of the applicable statutory objectives ... When a decision engages the *Charter*, reasonableness and proportionality become synonymous. Simply put, a decision that has a disproportionate impact on *Charter* rights is not reasonable.<sup>25</sup>

38. In her concurring reasons in *Trinity Western*, McLachlin C.J. addressed the issue of which party bears the onus at the proportionate balancing stage:

[S]ince this is a matter of justification of a rights infringement under s. 1 of the *Charter*, the onus is on the state actor that made the rights-infringing decision ... to demonstrate that the limits their decisions impose on the rights of the claimants are reasonable and demonstrably justifiable in a free and democratic society.<sup>26</sup>

39. The Applicants submit that this is the appropriate legal framework to be applied in this application. As set out below, the Directive engages both section 15(1) and section 7 of the *Charter* and has a disproportionate and unreasonable impact on those *Charter* protections.

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<sup>24</sup> *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32 (S.C.C.) at para. 58 (internal quotation marks omitted), BOA, Tab 4.

<sup>25</sup> *Ibid.* at para. 80 (internal quotation marks omitted; emphasis in original).

<sup>26</sup> *Ibid.* at para. 117; see also the reasons of Rowe J., concurring in the result, at para. 197, and the dissenting reasons at para. 312.

**D. Section 15(1) of the *Charter***

40. Section 15(1) of the *Charter* provides as follows:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.<sup>27</sup>

41. The Supreme Court of Canada has explained that section 15(1) is focused on “substantive equality,” and that “[t]he focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group.”<sup>28</sup> The applicable analytical framework is as follows:

The substantive equality analysis under s. 15(1) ... proceeds in two stages: (i) Does the law create a distinction based on an enumerated or analogous ground? and (ii) Does the distinction create a disadvantage by perpetuating prejudice and stereotyping?<sup>29</sup>

42. With regard to the first stage of the analysis, a distinction may involve either direct discrimination – where “a law ..., on its face, make[s] a distinction on the basis of an enumerated or analogous ground” – or indirect discrimination – where, “although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds.”<sup>30</sup>

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<sup>27</sup> *Canadian Charter of Rights and Freedoms*, s. 15(1), Part I of the *Constitution Act, 1982*.

<sup>28</sup> *Withler v. Canada (Attorney General)*, [2011] S.C.J. No. 12 (S.C.C.) at para. 39, BOA, Tab 5; see also *Kahkewistahaw First Nation v. Taypotat*, [2015] S.C.J. No. 30 (S.C.C.) at para. 17, BOA, Tab 6.

<sup>29</sup> *Withler v. Canada (Attorney General)*, [2011] S.C.J. No. 12 (S.C.C.) at para. 61, BOA, Tab 5.

<sup>30</sup> *Ibid.* at para. 64; see also: *Kahkewistahaw First Nation v. Taypotat*, [2015] S.C.J. No. 30 (S.C.C.) at para. 19, BOA, Tab 6.

43. With regard to the second stage of the analysis, the question is “whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances.”<sup>31</sup>

44. In addition to the enumerated grounds that are expressly recognized in section 15(1), the analogous grounds that have been judicially recognized include sexual orientation,<sup>32</sup> gender identity,<sup>33</sup> and family status.<sup>34</sup>

45. The Applicants submit that the Directive has a disproportionately negative impact on the section 15(1) rights of LGBTQ+ individuals, women, girls, and members of families led by queer-identified parents – and on the rights of the Applicants in particular.

46. As set out above, the Directive has the effect of removing references to sexual orientation, gender identity, and same-sex relationships from the curriculum. Removing those references has a disproportionately negative impact on LGBTQ+ individuals and members of families with queer-identified parents and gives rise to substantive inequality by perpetuating the disadvantage and prejudice that those individuals have historically suffered. The Province is communicating through the Directive that those individuals are not entitled to equal treatment. The Directive leads to the conclusion that the Minister believes, and intends to convey through the Directive, that there is something wrong, abnormal, or shameful about LGBTQ+ individuals

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<sup>31</sup> *Withler v. Canada (Attorney General)*, [2011] S.C.J. No. 12 (S.C.C.) at para. 65, BOA, Tab 5; see also: *Kahkewistahaw First Nation v. Taypotat*, [2015] S.C.J. No. 30 (S.C.C.) at para. 20, BOA, Tab 6.

<sup>32</sup> *Vriend v. Alberta*, [1998] S.C.J. No. 29 (S.C.C.) at para. 90, BOA, Tab 7.

<sup>33</sup> *C.F. v. Alberta (Vital Statistics)*, [2014] A.J. No. 420 (Q.B.) at paras. 36-39, BOA, Tab 8.

<sup>34</sup> *Thibaudeau v. Canada*, [1995] S.C.J. No. 42 (S.C.C.) at paras. 42-53 and 204-212, BOA, Tab 9; see also: *B v. Ontario (Human Rights Commission)*, [2002] S.C.J. No. 67 (S.C.C.) at para. 46, BOA, Tab 10; and *Halsbury's Laws of Canada - Constitutional Law (Charter of Rights)* (2014 Reissue), HCHR-101, BOA, Tab 11.

and families led by queer-identified parents – something from which students must be protected or shielded. The notion that such “shielding” is either necessary or appropriate has been expressly rejected by the Supreme Court of Canada:

The number of different family models in the community means that some children will inevitably come from families of which certain parents disapprove. Giving these children an opportunity to discuss their family models may expose other children to some cognitive dissonance. But such dissonance is neither avoidable nor noxious. Children encounter it every day in the public school system as members of a diverse student body. ... The cognitive dissonance that results from such encounters is simply a part of living in a diverse society. It is also a part of growing up. Through such experiences, children come to realize that not all of their values are shared by others.

Exposure to some cognitive dissonance is arguably necessary if children are to be taught what tolerance itself involves. ...<sup>35</sup>

47. In addition, the Directive has the effect of removing material information about the issue of consent from the curriculum. Given that women, girls, and LGBTQ+ individuals are disproportionately affected by sexual assault, sexual violence, and harassment, reverting to a curriculum that does not expressly provide students with the knowledge and tools necessary to make and clearly communicate sound decisions about consent puts those persons at an enhanced risk of harm and therefore engages their equality rights under section 15(1) (as well as their right to security of the person under section 7, as addressed below).

#### **E. Section 7 of the *Charter***

48. Section 7 of the *Charter* provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.<sup>36</sup>

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<sup>35</sup> *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87 (S.C.C.) at paras. 65-66, BOA, Tab 12.

<sup>36</sup> *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*.

49. The Supreme Court of Canada has explained that the analytical framework under section 7 comprises two stages, as follows:

In order to demonstrate a violation of s. 7, the claimants must first show that the law interferes with, or deprives them of, their life, liberty or security of the person. Once they have established that s. 7 is engaged, they must then show that the deprivation in question is not in accordance with the principles of fundamental justice.<sup>37</sup>

50. An individual's "security of the person" is grounded on "a concern for the protection of individual autonomy and dignity."<sup>38</sup> As stated by the Supreme Court of Canada:

Security of the person encompasses a notion of personal autonomy involving ... control over one's bodily integrity free from state interference ... and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering ...<sup>39</sup>

51. The determination of whether section 7 is engaged should be made based on a "sufficient causal connection" standard. As explained by the Supreme Court of Canada:

A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities ...

... Although mere speculation will not suffice to establish causation, to set the bar too high risks barring meritorious claims. What is required is a sufficient connection, having regard to the context of the case.<sup>40</sup>

52. The Supreme Court of Canada has held that the causal connection under section 7 is not negated merely because the immediate source of the harm is a third party. In its 2013 decision

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<sup>37</sup> *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5 (S.C.C.) at para. 55, BOA, Tab 13.

<sup>38</sup> *Ibid.* at para. 64.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72 (S.C.C.) at paras. 76, 78, BOA, Tab 14.

striking down provisions in the *Criminal Code* relating to prostitution, the Supreme Court of Canada stated:

It makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against those risks. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence.<sup>41</sup>

53. With regard to the second stage of the section 7 analysis, recent jurisprudence focuses on three principles of fundamental justice: arbitrariness, overbreadth, and gross disproportionality.

The Supreme Court of Canada has explained those principles as follows:

All three principles -- arbitrariness, overbreadth, and gross disproportionality -- compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. ... The analysis is qualitative, not quantitative. The question under s. 7 is whether anyone's life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.<sup>42</sup>

54. A law is arbitrary "where there is no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person."<sup>43</sup> A law is overbroad where, although the law "takes away rights in a way that generally supports the object of the law, [it] goes too far by denying the rights of some individuals in a way that bears no relation to the object."<sup>44</sup> A law is grossly disproportionate where the "impact [on the claimant] is completely out of sync with the object of the law"<sup>45</sup> – i.e., where the "connection between the draconian

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<sup>41</sup> *Ibid.* at para. 89.

<sup>42</sup> *Ibid.* at para. 123.

<sup>43</sup> *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5 at para. 83, BOA, Tab 13.

<sup>44</sup> *Ibid.* at para. 85.

<sup>45</sup> *Ibid.* at para. 89.

impact of the law and its object [is] entirely outside the norms accepted in our free and democratic society.”<sup>46</sup>

55. Because the Directive has the effect of removing content about consent from the curriculum, it interferes with the security of the person of women, girls, and LGBTQ+ individuals. It can be reasonably inferred that reverting to a curriculum in which adequate instruction about consent is not required will expose those individuals to an enhanced risk of harm.

56. Likewise, the Directive reduces the amount of information about online safety, particularly at the Grade 7 level. The Directive thereby endangers the safety of all students and engages their right to security of the person under section 7.

57. The Directive’s interference with the section 7 rights of women, girls, and LGBTQ+ individuals is not consistent with the principles of fundamental justice. In particular, the Directive is grossly disproportionate. As discussed below, the Minister has not provided any evidence that the Directive is aimed at, let alone achieves, any legitimate objective. Even supposing, however, that the Directive were aimed at a legitimate pedagogical objective, its impact on the security of the affected individuals is completely out of sync with any such purpose and is outside the norms accepted in our free and democratic society.

#### **F. The Directive Does Not Reflect a Proportionate Balancing**

58. Once the Applicants establish that the Directive engages the *Charter*, the onus shifts to the Minister to establish that the Directive reflects a proportionate balancing of the *Charter*

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<sup>46</sup> *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72 at para. 120, BOA, Tab 14.

protections at issue with a legitimate governmental objective. The Minister has failed to meet that onus.

59. The Directive has the effect of replacing key content from the 2015 HPE Curriculum with the “growth and development” content from the 1998 HPE Curriculum – which was designed before the legal recognition of same-sex marriage; before the addition of gender identity and gender expression as protected categories under the Ontario *Human Rights Code*; and before the development of an enhanced public awareness of the dynamics of consent and the prevalence of sexual harassment and assault. There is no evidence that there was any analysis, consultation, or deliberation, of any kind, leading up to the decision to replace the 2015 HPE Curriculum with that 1998 material on an interim basis. Nor is there any evidence that other options or approaches – which might have had less of an impact on the *Charter* protections at stake – were considered before the Directive was announced fewer than three weeks before the start of the 2018-2019 school year.

60. Although the August 22, 2018 press release announcing the Directive stated that the scope of the consultation process being undertaken by the Province would include “[h]ow to build a new age-appropriate Health and Physical Education curriculum,”<sup>47</sup> the Minister has adduced no evidence that the 2015 HPE Education is age-inappropriate. To the contrary, Mr. Beckett, who is the Minister’s fact witness in this proceeding and who serves as the Assistant Deputy Minister of the Student Achievement Division of the Ministry of Education, testified on cross-examination that the Ministry made no determination of whether or not the 2015 HPE Curriculum or the 2018 HPE Curriculum were age appropriate – indeed, Mr. Beckett confirmed

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<sup>47</sup> Press Release, dated August 22, 2018, p. 1, Exhibit 17 to Zwibel Affidavit (emphasis added), JAR, Vol. 4, Tab 8Q, p. 864.

that the Ministry made no assessment whatsoever of the relative merits of the two curricular documents.<sup>48</sup> Dr. Brien, one of the Minister's expert witnesses, explained that:

Educational and pedagogical research has not yet determined the exact ages at which particular health topics should or must be taught. What is age appropriate is a judgment call, which may be based on differing good faith opinions about child development, the proper roles of schools, parental support, societal norms, etc., and may differ from place to place and over time. In my opinion, there is unlikely to be one right answer about the exact grade in which to teach or introduce particular sexual health education topics.<sup>49</sup>

61. Likewise, the affidavit of Dr. Van Pelt, filed by the Minister, states:

The research is not clear yet on which strategies and approaches can best be relied on to lead to the formation of healthy sexual lives. The research reveals mixed results of various instructional approaches in sexual health education. ...<sup>50</sup>

62. In the absence of any evidence that the 2015 HPE Curriculum is harmful or problematic in any way, the Minister relies on evidence that is characterized by three broad themes, as summarized above. None of the Minister's evidence, however, is sufficient to discharge her onus under the *Trinity Western* framework, for the reasons set out below.

**i. *The Removal of the Material Creates an Adverse Impact***

63. The Minister may suggest that teachers are free to use their individual judgment as to whether or not to address subjects that have been removed from the curriculum. However, there are serious questions as to whether – as a practical matter – teachers do have that latitude. As set out above, the August 22, 2018 press release announcing the Directive quoted Premier Ford as stating that, “if we find somebody failing to do their job, we will act.”<sup>51</sup> The press release also

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<sup>48</sup> Cross-Examination of Martyn Beckett, December 6, 2018, qq. 190-206, 214, Transcript 15.

<sup>49</sup> Affidavit of Dr. Ken Brien, affirmed November 5, 2018, para. 24, JAR, Vol. 45, Tab 31, p. 18934.

<sup>50</sup> Affidavit of Dr. Deani Van Pelt, affirmed November 5, 2018, para. 22, JAR, Vol. 45, Tab 32, p. 18994.

<sup>51</sup> Press Release, dated August 22, 2018, p. 2, Exhibit 17 to Zwibel Affidavit, JAR, Vol. 4, Tab 8Q, p. 865.

announced the launch of a “dedicated submission platform” that parents could use “to report any concerns.” The Applicants submit that the government’s clear threat of adverse job action against teachers has a strong chilling effect on teachers’ speech and will, in practice, make teachers reluctant to address those issues in the classroom.

64. In any event, the Minister’s invoking of teachers’ professional discretion and judgment misses the mark. The gravamen of the Applicants’ case is not the manner in which the 2018 HPE Curriculum is being delivered – it is the contention that the removal of curricular material that protects and advances *Charter* rights and freedoms, without any evidence that such removal is proportionate to a legitimate governmental objective, is unlawful.

65. The Minister downplays the significance of the material that has been removed. However, a careful, side-by-side comparison of the two curricular documents – as reflected in the table set out in Schedule C to this factum – shows that the 2015 HPE Curriculum contains detailed information about sexual orientation, gender identity, same-sex relationships, consent, and online safety at the Grade 3, Grade 6, Grade 7, and Grade 8 levels, and that that information is simply not present in the 2018 HPE Curriculum.

66. The Minister seeks to draw a distinction between the “learning expectations” in the curricular documents and the corresponding “teacher supports” (in the form of examples and teacher prompts). The learning expectations are described as “mandatory,” whereas the teacher supports are described as “not mandatory” and thus subject to the discretion of individual teachers.<sup>52</sup> The Minister may suggest that the curricular material at issue on this application is

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<sup>52</sup> Affidavit of Martyn Beckett, affirmed November 5, 2018 (“Beckett Affidavit”), paras. 24-25, 28, JAR, Vol. 27, Tab 29, pp. 8513-8514, 8516-8517.

contained in the non-mandatory sections of the 2015 HPE Curriculum, and that its removal therefore does not have a real impact.

67. The Applicants take issue with any such suggestion, for several reasons. Schedule C to this factum – which sets out the curricular material that has been eliminated – has been colour-coded to show the learning expectations in yellow and the teacher supports in green. As that colour-coding shows, some of the material from the 2015 HPE Curriculum that is not contained in the 2018 HPE Curriculum is in the learning expectations, and some is in the teacher supports.

68. Further, the Minister’s attempt to draw a bright line between learning expectations and teacher supports runs counter to the 2018 HPE Curriculum itself, which states that “[t]he examples and prompts help to clarify the requirements specified in the expectations ...”<sup>53</sup>

69. Most importantly, the removal of curricular material about sexual orientation, gender identity, same-sex relationships, consent, and online safety – regardless of whether it was located in learning expectations or in teacher supports – has an adverse impact on *Charter* rights and values. That impact stems from the fact that an official curricular document is a statement of what the Province values and sanctions. As stated in the affidavit of Professor Allison, filed by the Minister, “[i]n Canada, a provincial curriculum is the officially authorized program of studies for the public schools in that province” and “[g]enerally, the written documents that constitute a provincial curriculum are intended to frame, guide, direct, and legitimate what is learned in the public schools by providing direction to those who do the teaching and those who supervise and

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<sup>53</sup> 2018 HPE Curriculum, p. 16, Exhibit 18 to Zwibel Affidavit, JAR, Vol. 4, Tab 8R, p. 884.

guide the teachers.”<sup>54</sup> Mr. Beckett similarly testified on cross-examination that there is only one official HPE curriculum document in effect at any one time, and that the effect of the Directive was to replace the 2015 HPE Curriculum with the 2018 HPE Curriculum as the official HPE curriculum in this Province.<sup>55</sup>

70. The eradication of material from the official curriculum clearly signals that that material is no longer viewed by the government as authorized or legitimate. It is no answer for the Minister to say that teachers are not expressly prohibited from addressing subjects that have been deliberately eliminated from the official curriculum. The elimination of that material, and the government’s deliberate decision to make that change, communicates disapproval and generates and reinforces stigma and prejudice.

**ii. *The Charter Protects Rights and Values Even If They Are Unpopular***

71. The Minister has adduced some evidence suggesting that the 2015 HPE Curriculum was unpopular with some people when it was introduced. In addition, the Minister has led evidence suggesting that some people believed that the consultation process leading to the development of the 2015 HPE Curriculum was not adequate.

72. As a preliminary observation, the Applicants submit that the extent of the 2015 HPE Curriculum’s unpopularity has not been established on this record. The affidavit of Mr. Beckett attaches, as Exhibit 29, a list of “media reports, editorials, and publications or expressions of opinion” about the 2015 HPE Curriculum.<sup>56</sup> With one exception (dated May 24, 2016), all of

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<sup>54</sup> Affidavit of Professor Derek J. Allison, affirmed November 5, 2018, paras. 7, 10 (emphasis added), JAR, Vol. 45, Tab 30, pp. 18807-18808.

<sup>55</sup> Cross-Examination of Martyn Beckett, December 6, 2018, qq. 447-458, Transcript 15.

<sup>56</sup> Beckett Affidavit, para. 85, JAR, Vol. 27, Tab 29, pp. 8538-8539; Exhibit 29 to Beckett Affidavit, JAR, Vol. 31, Tab 29-29.

those documents are from the period from February 2015 to December 2015. No more recent news articles have been provided. Mr. Beckett admitted on cross-examination that he was not aware of any such reports for the 2016-2017 or 2017-2018 school years.<sup>57</sup>

73. Even supposing, however, that the 2015 HPE Curriculum was and remains unpopular in certain quarters, that cannot serve as a justification for infringing the Applicants' *Charter* rights. The purpose of the *Charter* is to protect the rights and values enshrined therein, even – indeed especially – when those rights and values are unpopular or run counter to the sentiments of the majority or a vocal segment of the populace. As the Supreme Court of Canada has stated:

The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the *Charter*. Undoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities.<sup>58</sup>

74. The consultation process that led to the development of the 2015 HPE Curriculum is not at issue in this proceeding. The crux of this case is that the 2015 HPE Curriculum protected and advanced *Charter* rights and values and that there needs to be a good reason, supported by evidence, for the Province to remove that material. No such evidence has been provided by the Minister. Given that the 2015 HPE Curriculum served as the Province's official sex education curriculum for the prior three school years, the Minister would have had to adduce more than a modest amount of evidence showing that there was some initial resistance to that curriculum when it was introduced in 2015 to meet her substantial burden under *Trinity Western*.

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<sup>57</sup> Cross-Examination of Martyn Beckett, December 6, 2018, qq. 144-149, Transcript 15.

<sup>58</sup> *Reference re Secession of Quebec*, [1998] S.C.J. No. 61 (S.C.C.) at para. 81, BOA, Tab 15.

**iii. *The Directive Is Inconsistent with the Statutory Context***

75. The Minister has led evidence highlighting certain passages from the 2018 HPE Curriculum that refer to providing an inclusive learning environment, as well as evidence that other laws and policies likewise speak to the importance of inclusion. The Minister may rely on that evidence to argue that, even in the face of the Directive, schools are still required to promote inclusion.

76. That evidence and argument miss the mark. Although (as noted above) the 2018 HPE Curriculum contains some references to gender identity and sexual orientation, particularly in the introductory sections of the document, it does not contain detailed information about gender identity, sexual orientation, same-sex relationships, or different family structures in any of the Grade-specific sections. That material has been eradicated.

77. The fact that other laws and policies mandate inclusion and equality undermines the Minister's position, rather than supporting it. As noted above, *Trinity Western* provides that "the *Charter* protection must be affected as little as reasonably possible in light of the applicable statutory objectives."<sup>59</sup> Other laws and policies that require an inclusive school environment do not provide support for the Directive, which cuts in the opposite direction. To the contrary, those laws and policies provide an additional basis for finding the Directive to be an impermissible exercise of authority that runs counter to the Minister's legal obligations.

78. Section 169.1(1)(a.1) of the *Education Act* requires that every school board "shall ... promote a positive school climate that is inclusive and accepting of all pupils, including pupils of

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<sup>59</sup> *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32 (S.C.C.) at para. 80, BOA, Tab 4.

any race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability”.<sup>60</sup> Section 300.0.1 of the *Education Act* provides that one purpose of Part XIII of that statute is to “encourage a positive school climate and prevent inappropriate behaviour, including bullying, sexual assault, gender-based violence and incidents based on homophobia, transphobia or biphobia.”<sup>61</sup> Stigmatizing LGBTQ+ individuals and putting LGBTQ+ and female students at an enhanced risk of harm – as the Directive does – runs directly counter to that statutory mandate.

79. In addition, the Ontario *Human Rights Code* requires that services be provided in a non-discriminatory manner. The Supreme Court of Canada has long recognized that the *Code* has a quasi-constitutional status.<sup>62</sup> The *Code* reflects the Province’s commitment to protecting the rights of all individuals and, in that regard, was amended in 2012 to add “gender identity” and “gender expression” as expressly protected grounds.<sup>63</sup>

80. The stigmatizing and harmful impact that the Directive has on LGBTQ+ individuals, women, girls, and those who are part of a family that does not fit a two-parent, heterosexual model stands in stark contrast with the Province’s public policy, as expressed in the preamble to the *Code*, “to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law.”<sup>64</sup>

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<sup>60</sup> *Education Act*, R.S.O. 1990, c. E.2, s. 169.1(1)(a.1).

<sup>61</sup> *Ibid.*, s. 300.0.1.

<sup>62</sup> *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] S.C.J. No. 74 (S.C.C.) at para. 12, BOA, Tab 16.

<sup>63</sup> *Browne v. Sudbury Integrated Nickel Operations*, [2016] O.H.R.T.D. No. 101 at paras. 34-35, BOA, Tab 17.

<sup>64</sup> *Toronto (City) Police Service v. Phipps*, [2012] O.J. No. 2601 (C.A.) at paras. 14-15, BOA, Tab 18; *Peel Law Assn. v. Pieters*, [2013] O.J. No. 2695 (C.A.) at para. 126, BOA, Tab 19.

### **G. The Appropriate Remedy**

81. The Applicants are seeking an order setting the Directive aside and requiring the Minister to direct school boards to continue to use the 2015 HPE Curriculum until any new health and physical education curriculum is implemented. The relief being sought is comparable to that granted by the Ontario Court of Appeal in a 1990 case, in which the court enjoined the use of a curriculum that was found to violate the guarantee of freedom of conscience and religion provided for in section 2(a) of the *Charter*.<sup>65</sup>

### **H. No Award of Costs**

82. The Applicants request that, in any event of the cause, no costs be awarded to or against them. Becky has brought this proceeding in the public interest, in order to protect and vindicate her rights, the rights of her minor daughter, and the rights of other Ontario residents. The Corporation is a non-profit entity dedicated to the protection of constitutional and human rights in the public interest. The Applicants have nothing to gain financially from this proceeding. They have brought this case solely for the purpose of addressing an issue of profound importance to the public. It is therefore appropriate not to award costs to or against them in this case.<sup>66</sup>

## **PART IV – ORDER REQUESTED**

83. For the reasons described above, the Applicants respectfully request:

- (a) a declaration that the Directive is an unreasonable and disproportionate exercise of the Minister's statutory power under section 8(1) of the *Education Act* and has

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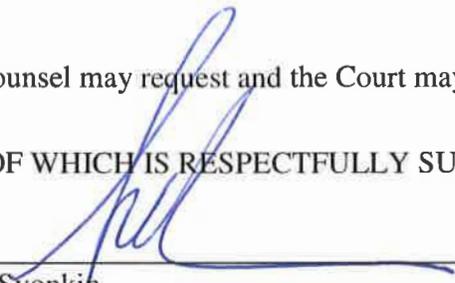
<sup>65</sup> *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)*, [1990] O.J. No. 104 (C.A.) at para. 131, BOA, Tab 20.

<sup>66</sup> *St. James' Preservation Society v. Toronto (City)*, [2007] O.J. No. 3293 (C.A.) at para. 23, BOA, Tab 21; *Cardinal v. Windmill Green Fund LPV*, [2017] O.J. No. 96 (Div. Ct.) at para. 4, BOA, Tab 22.

an impermissible and disproportionate impact on the Applicants' rights under sections 7 and 15(1) of the *Charter*;

- (b) an order setting the Directive aside;
- (c) an injunction requiring the Minister to direct school boards in Ontario to continue to use the 2015 HPE Curriculum until any new health and physical education curriculum has been implemented;
- (d) an order, in any event of the cause, that no costs be awarded to or against the Applicants; and
- (e) such further and other relief as counsel may request and the Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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Stuart Svonkin



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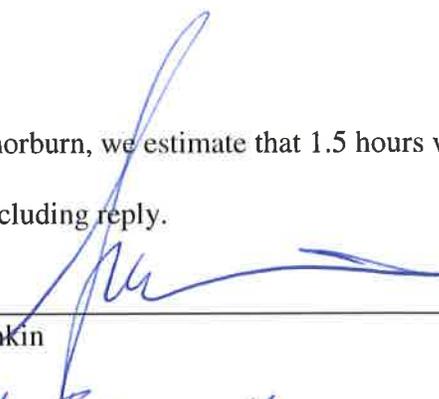
Brendan Brammall

Lawyers for the Applicants

**CERTIFICATE**

We, Stuart Svonkin and Brendan Brammall, lawyers for the Applicants, hereby certify pursuant to Rule 68.04(3)(d.1) the following:

- i. pursuant to the direction of Justice Thorburn, we estimate that 1.5 hours will be required for our oral argument, not including reply.



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Stuart Svonkin



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Brendan Brammall

Lawyers for the Applicants

## SCHEDULE A – LIST OF AUTHORITIES

1. *Setia v. Appleby College*, [2013] O.J. No. 5736 (C.A.).
2. *Tesla Motors Canada ULC v. Ontario (Ministry of Transportation)*, [2018] O.J. No. 4394 (S.C.J.).
3. *Black v. Canada (Prime Minister)*, [2001] O.J. No. 1853 (C.A.).
4. *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32 (S.C.C.).
5. *Withler v. Canada (Attorney General)*, [2011] S.C.J. No. 12 (S.C.C.).
6. *Kahkewistahaw First Nation v. Taypotat*, [2015] S.C.J. No. 30 (S.C.C.).
7. *Vriend v. Alberta*, [1998] S.C.J. No. 29 (S.C.C.).
8. *C.F. v. Alberta (Vital Statistics)*, [2014] A.J. No. 420 (Q.B.).
9. *Thibaudeau v. Canada*, [1995] S.C.J. No. 42 (S.C.C.).
10. *B v. Ontario (Human Rights Commission)*, [2002] S.C.J. No. 67 (S.C.C.).
11. *Halsbury's Laws of Canada - Constitutional Law (Charter of Rights)* (2014 Reissue), HCHR-101.
12. *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87 (S.C.C.).
13. *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5 (S.C.C.).
14. *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72 (S.C.C.).
15. *Reference re Secession of Quebec*, [1998] S.C.J. No. 61 (S.C.C.).
16. *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] S.C.J. No. 74 (S.C.C.).
17. *Browne v. Sudbury Integrated Nickel Operations*, [2016] O.H.R.T.D. No. 101.
18. *Toronto (City) Police Service v. Phipps*, [2012] O.J. No. 2601 (C.A.).
19. *Peel Law Assn. v. Pieters*, [2013] O.J. No. 2695 (C.A.).
20. *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)*, [1990] O.J. No. 104 (C.A.).
21. *St. James' Preservation Society v. Toronto (City)*, [2007] O.J. No. 3293 (C.A.).
22. *Cardinal v. Windmill Green Fund LPV*, [2017] O.J. No. 96 (Div. Ct.).

## SCHEDULE B – STATUTES AND RULES

### A. *Judicial Review Procedure Act, R.S.O. 1990, c. J.1*

#### **Definitions**

1 In this Act,

...

“statutory power” means a power or right conferred by or under a statute,

(a) to make any regulation, rule, by-law or order, or to give any other direction having force as subordinate legislation,

(b) to exercise a statutory power of decision,

(c) to require any person or party to do or to refrain from doing any act or thing that, but for such requirement, such person or party would not be required by law to do or to refrain from doing,

(d) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party;

“statutory power of decision” means a power or right conferred by or under a statute to make a decision deciding or prescribing,

(a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

(b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not, and includes the powers of an inferior court.

#### **Applications for judicial review**

2(1) On an application by way of originating notice, which may be styled “Notice of Application for Judicial Review”, the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.

2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

#### **Error of law**

(2) The power of the court to set aside a decision for error of law on the face of the record on an application for an order in the nature of certiorari is extended so as to apply on an application for

judicial review in relation to any decision made in the exercise of any statutory power of decision to the extent it is not limited or precluded by the Act conferring such power of decision.

...

### **Power to set aside**

(4) Where the applicant on an application for judicial review is entitled to a judgment declaring that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, the court may, in the place of such declaration, set aside the decision.

### **Sufficiency of application**

9(1) It is sufficient in an application for judicial review if an applicant sets out in the notice the grounds upon which he is seeking relief and the nature of the relief that he seeks without specifying the proceedings enumerated in subsection 2(1) in which the claim would have been made before the 17th day of April, 1972.

## **B. *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982***

1. *The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

## **C. *Education Act, R.S.O. 1990, c. E.2***

### **Strong public education system**

0.1(1) A strong public education system is the foundation of a prosperous, caring and civil society.

### **Purpose of education**

(2) The purpose of education is to provide students with the opportunity to realize their potential and develop into highly skilled, knowledgeable, caring citizens who contribute to their society.

### **Partners in education sector**

(3) All partners in the education sector, including the Minister, the Ministry and the boards, have a role to play in enhancing student achievement and well-being, closing gaps in student achievement and maintaining confidence in the province's publicly funded education systems.

**Powers of Minister**

8(1) The Minister may,

...

**courses of study**

2. prescribe the courses of study that shall be taught and the courses of study that may be taught in the primary, junior, intermediate and senior divisions;

**courses and areas of study**

3. in respect of schools under the jurisdiction of a board,

(a) issue curriculum guidelines and require that courses of study be developed therefrom and establish procedures for the approval of courses of study that are not developed from such curriculum guidelines,

(b) prescribe areas of study and require that courses of study be grouped thereunder and establish procedures for the approval of alternative areas of study under which courses of study shall be grouped, and

(c) approve or permit boards to approve,

(i) courses of study that are not developed from such curriculum guidelines, and

(ii) alternative areas of study under which courses of study shall be grouped,

and authorize such courses of study and areas of study to be used in lieu of or in addition to any prescribed course of study or area of study;

**Board responsibility for student achievement and effective stewardship of resources**

169.1(1) Every board shall,

(a) promote student achievement and well-being;

(a.1) promote a positive school climate that is inclusive and accepting of all pupils, including pupils of any race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability;

(a.2) promote the prevention of bullying;

(b) ensure effective stewardship of the board's resources;

(c) deliver effective and appropriate education programs to its pupils;

(d) develop and maintain policies and organizational structures that,

- (i) promote the goals referred to in clauses (a) to (c), and
  - (ii) encourage pupils to pursue their educational goals;
- (e) monitor and evaluate the effectiveness of policies developed by the board under clause (d) in achieving the board's goals and the efficiency of the implementation of those policies;
- (f) develop a multi-year plan aimed at achieving the goals referred to in clauses (a) to (c);
- (g) annually review the plan referred to in clause (f) with the board's director of education or the supervisory officer acting as the board's director of education; and
- (h) monitor and evaluate the performance of the board's director of education, or the supervisory officer acting as the board's director of education, in meeting,
- (i) his or her duties under this Act or any policy, guideline or regulation made under this Act, including duties under the plan referred to in clause (f), and
  - (ii) any other duties assigned by the board.

### **Purpose**

300.0.1 The purposes of this Part [XIII: Behaviour, Discipline and Safety] include the following:

1. To create schools in Ontario that are safe, inclusive and accepting of all pupils.
2. To encourage a positive school climate and prevent inappropriate behaviour, including bullying, sexual assault, gender-based violence and incidents based on homophobia, transphobia or biphobia.
3. To address inappropriate pupil behaviour and promote early intervention.
4. To provide support to pupils who are impacted by inappropriate behaviour of other pupils.
5. To establish disciplinary approaches that promote positive behaviour and use measures that include appropriate consequences and supports for pupils to address inappropriate behaviour.
6. To provide pupils with a safe learning environment.

**D. *Human Rights Code, R.S.O. 1990, c. H.19*****Preamble**

Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

And Whereas it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;

And Whereas these principles have been confirmed in Ontario by a number of enactments of the Legislature and it is desirable to revise and extend the protection of human rights in Ontario ...

**Services**

1 Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

## SCHEDULE C – DIFFERENCES BETWEEN THE 2015 HPE CURRICULUM AND THE 2018 HPE CURRICULUM

\*\*\* Note: In the 2015 HPE Curriculum column below, the language on which the Applicants rely from the Grade 3, Grade 6, Grade 7, and Grade 8 levels has been excerpted, with some of the key language underlined for emphasis. Learning expectations are highlighted in yellow, and examples, teacher prompts, and student responses are highlighted in green.

\*\*\* Note: In the 2018 HPE Curriculum column below, the entirety of the “Growth and Development” content for those Grade levels has been included. No highlighting has been added to the “Growth and Development” content, because it is not based on the same distinction between learning expectations (on the one hand) and examples, teacher prompts, and student responses (on the other hand).

### A. Grade 3

2015 HPE Curriculum	2018 HPE Curriculum
<p><b>Human Development and Sexual Health</b></p> <p><b>C3.3</b> describe how visible differences (<i>e.g., skin, hair, and eye colour, facial features, body size and shape, physical aids or different physical abilities, clothing, possessions</i>) and invisible differences (<i>e.g., learning abilities, skills and talents, personal or cultural values and beliefs, gender identity, sexual orientation, family background, personal preferences, allergies and sensitivities</i>) make each person unique, and identify ways of showing respect for differences in others [PS, IS]</p> <p><b>Teacher prompt:</b> “Sometimes we are different in ways you can see. Sometimes we are different in ways you cannot see – such as how we learn, what we think, and what we are able to do. Give me some examples of things that make each person unique.”</p>	<p><b>GROWTH AND DEVELOPMENT (1998)</b></p> <p><b>OVERALL EXPECTATIONS</b></p> <p>By the end of Grade 3, students will:</p> <ul style="list-style-type: none"> <li>• describe the relationship among healthy eating practices, healthy active living, and healthy bodies;</li> <li>• outline characteristics in the development and growth of humans from birth to childhood.</li> </ul> <p><b>SPECIFIC EXPECTATIONS</b></p> <p>By the end of Grade 3, students will:</p>

2015 HPE Curriculum	2018 HPE Curriculum
<p><b><i>Student:</i></b> “We all come from different families. Some students live with two parents. Some live with one parent. <u>Some have two mothers or two fathers.</u> Some live with grandparents or with caregivers. We may come from different cultures. We also have different talents and abilities and different things that we find difficult to do.” ...<sup>67</sup></p>	<ul style="list-style-type: none"> <li>• outline the basic human and animal reproductive processes (e.g., the union of egg and sperm);</li> <li>• describe basic changes in growth and development from birth to childhood (e.g., changes to teeth, hair, feet, and height).<sup>68</sup></li> </ul>

<sup>67</sup> 2015 HPE Curriculum, Grades 1-8, p. 124 (bold and italics in original; underlining added), Exhibit 5 to Zwibel Affidavit, JAR, Vol. 2, Tab 8E, p. 370.

<sup>68</sup> 2018 HPE Curriculum, p. 112 (bold in original), Exhibit 18 to Zwibel Affidavit, JAR, Vol. 4, Tab 8R, p. 980; see also: 1998 HPE Curriculum, p. 14, Exhibit 1 to Zwibel Affidavit, JAR, Vol. 1, Tab 8A, p. 90.

## B. Grade 6

2015 HPE Curriculum	2018 HPE Curriculum
<p><b>Human Development and Sexual Health</b></p> <p>...</p> <p><b>C2.6</b> make informed decisions that demonstrate respect for themselves and others and help to build healthier relationships, using a variety of living skills (<i>e.g., personal and interpersonal skills; critical and creative thinking skills; skills based on First Nation, Métis, and Inuit cultural teachings, such as medicine wheel teachings connected to the four colour or seven grandfather teachings, or other cultural teachings</i>) [IS, CT]</p> <p>...</p> <p><b>Teacher:</b> “What communication skills can help you send information, receive information, and interpret information in an effective way in a relationship?”</p> <p><b>Student:</b> “Being respectful but clear about your ideas and feelings; listening actively; interpreting body language, tone of voice, and facial expressions; <u>respecting signals of agreement or disagreement and consent or lack of consent</u>; and negotiating – all these are important skills. A clear “yes” is a signal of consent. A response of “no”, an uncertain response, or silence <u>needs to be understood as no consent.</u>” ...<sup>69</sup></p>	<p><b>GROWTH AND DEVELOPMENT (1998)</b></p> <p><b>OVERALL EXPECTATION</b></p> <p>By the end of Grade 6, students will:</p> <ul style="list-style-type: none"> <li>• identify the major parts of the reproductive system and their functions and relate them to puberty.</li> </ul> <p><b>SPECIFIC EXPECTATIONS</b></p> <p>By the end of Grade 6, students will:</p> <ul style="list-style-type: none"> <li>• relate the changes at puberty to the reproductive organs and their functions;</li> <li>• apply a problem-solving/decision-making process to address issues related to friends, peers, and family relationships.<sup>70</sup></li> </ul>

<sup>69</sup> 2015 HPE Curriculum, Grades 1-8, p. 175 (bold and italics in original; underlining added), Exhibit 5 to Zwibel Affidavit, JAR, Vol. 2, Tab 8E, p. 421.

<sup>70</sup> 2018 HPE Curriculum, p. 163 (bold in original), Exhibit 18 to Zwibel Affidavit, JAR, Vol. 4, Tab 8R, p. 1031; see also: 1998 HPE Curriculum, p. 17, Exhibit 1 to Zwibel Affidavit, JAR, Vol. 1, Tab 8A, p. 93.

2015 HPE Curriculum	2018 HPE Curriculum
<p data-bbox="201 235 751 264"><b>Human Development and Sexual Health</b></p> <p data-bbox="201 269 1031 521"><b>C3.3</b> assess the effects of stereotypes, including homophobia and assumptions regarding gender roles and expectations, sexual orientation, gender expression, race, ethnicity or culture, mental health, and abilities, on an individual’s self-concept, social inclusion, and relationships with others, and propose appropriate ways of responding to and changing assumptions and stereotypes [PS, CT]</p> <p data-bbox="201 578 233 594">...</p> <p data-bbox="201 638 1031 1214"><b>Teacher prompt:</b> “Assumptions are often made about what is ‘normal’ or expected for males and females – for example, men take out the garbage; nursing is a woman’s job; boys play soccer at recess and girls skip rope or stand around and talk; boys are good at weightlifting and girls are good at dancing. Assumptions like these are usually untrue, and they can be harmful. They can make people who do not fit into the expected norms feel confused or bad about themselves, damaging their self-concept, and they can cause people to discriminate against and exclude those who are seen as ‘different’. Assumptions about different sexual orientations or about people with learning disabilities or mental illness or about people from other cultures are harmful in similar ways. Everyone needs to feel accepted in school and in the community. Why do you think these stereotyped assumptions occur? What can be done to change or challenge them?”</p> <p data-bbox="201 1260 1031 1398"><b>Students:</b> “Stereotypes are usually formed when we do not have enough information. We can get rid of a lot of stereotypes just by finding out more about people who seem different. By being open-minded, observing and listening, asking questions, getting</p>	

2015 HPE Curriculum	2018 HPE Curriculum
<p>more information, and considering different perspectives, we can work to change stereotypes. <u>We can understand people’s sexual orientations better, for example, by reading books that describe various types of families and relationships. Not everyone has a mother and a father – someone might have two mothers or two fathers (or just one parent or a grandparent, a caregiver, or a guardian). We need to make sure that we don’t assume that all couples are of the opposite sex, and show this by the words we use. For example, we could use a word like ‘partner’ instead of ‘husband’ or ‘wife’. We need to be inclusive and welcoming.”</u> “If we have newcomers from another country in our class, we can try to find out more about them, their culture, and their interests.” “If we hear things that are sexist, homophobic, or racist, we can show our support for those who are being disrespected.” “If we hear someone using words like ‘crazy’ or ‘nuts’ to describe a person who has a mental illness, we can explain that mental illness is no different from other illnesses, and that we wouldn’t call someone names if they were suffering from any other illness.”<sup>71</sup></p>	

<sup>71</sup> 2015 HPE Curriculum, Grades 1-8, p. 177 (bold and italics in original; underlining added), Exhibit 5 to Zwibel Affidavit, JAR, Vol. 2, Tab 8E, p. 423.

## C. Grade 7

2015 HPE Curriculum	2018 HPE Curriculum
<p><b>Human Development and Sexual Health</b></p> <p><b>C1.3</b> explain the importance of having a shared understanding with a partner about the following: delaying sexual activity until they are older (e.g., choosing to abstain from any genital contact; choosing to abstain from having vaginal or anal intercourse; choosing to abstain from having oral-genital contact); the reasons for not engaging in sexual activity; the concept of consent and how consent is communicated; and, in general, the need to communicate clearly with each other when making decisions about sexual activity in the relationship</p> <p><b>Teacher prompt:</b> “The term <i>abstinence</i> can mean different things to different people. People can also have different understandings of what is meant by having or not having sex. Be clear in your own mind about what you are comfortable or uncomfortable with. Being able to talk about this with a partner is an important part of sexual health. Having sex can be an enjoyable experience and can be an important part of a close relationship when you are older. But having sex has risks too, including physical risks like sexually transmitted infections – which are common and which can hurt you – and getting pregnant when you don’t want to. What are some of the emotional considerations to think about?”</p> <p><b>Student:</b> “It’s best to wait until you are older to have sex because you need to be emotionally ready, which includes being able to talk with your partner about how you feel, being prepared to talk about and use protection against STIs or pregnancy, and being prepared to handle the emotional ups and downs of a relationship, including the ending of a relationship, which can</p>	<p><b>GROWTH AND DEVELOPMENT (1998)</b></p> <p><b>OVERALL EXPECTATION</b></p> <p>By the end of Grade 7, students will:</p> <ul style="list-style-type: none"> <li>• describe age-appropriate matters related to sexuality (e.g., the need to develop good interpersonal skills, such as the ability to communicate effectively with the opposite sex).</li> </ul> <p><b>SPECIFIC EXPECTATIONS</b></p> <p>By the end of Grade 7, students will:</p> <ul style="list-style-type: none"> <li>• explain the male and female reproductive systems as they relate to fertilization;</li> <li>• distinguish between the facts and myths associated with menstruation, spermatogenesis, and fertilization;</li> <li>• identify the methods of transmission and the symptoms of sexually transmitted diseases (STDs), and ways to prevent them;</li> <li>• use effective communication skills (e.g., refusal skills, active listening) to deal with various relationships and situations;</li> <li>• explain the term <i>abstinence</i> as it applies to healthy sexuality;</li> </ul>

2015 HPE Curriculum	2018 HPE Curriculum
<p>hurt a lot. Personal values, family values, and religious beliefs can influence how you think about sexuality and sexual activity. <u>A person should not have sex if their partner is not ready or has not given consent, if they are feeling pressured, if they are unsure, or if they are under the influence of drugs or alcohol.</u><sup>72</sup></p>	<ul style="list-style-type: none"> <li>• identify sources of support with regard to issues related to healthy sexuality (e.g., parents/guardians, doctors).<sup>73</sup></li> </ul>
<p><b>Personal Safety and Injury Prevention</b>  <b>C1.1</b> describe benefits and dangers, for themselves and others, that are associated with the use of computers and other technologies (<i>e.g., <b>benefits:</b> saving time; increased access to information; improved communication, including global access; <b>dangers:</b> misuse of private information; identity theft; cyberstalking; hearing damage and/or traffic injuries from earphone use; financial losses from online gambling; potential for addiction</i>), and identify protective responses</p> <p>...</p> <p><b>Teacher prompt:</b> “Sexting – or the practice of sending explicit sexual messages or photos electronically, predominantly by cell phone – is a practice that has significant risks. What are some of those risks? What can you do to minimize those risks and treat others with respect?”</p> <p><b>Students:</b> “Photos and messages can become public even if shared for only a second. They can be manipulated or</p>	<p><b>Personal Safety and Injury Prevention</b>  <b>C1.1</b> describe benefits and dangers, for themselves and others, that are associated with the use of computers and other technologies (<i>e.g., <b>benefits:</b> saving time; increased access to information; improved communication, including global access; <b>dangers:</b> misuse of private information; identity theft; cyberstalking; hearing damage and/or traffic injuries from earphone use; financial losses from online gambling; potential for addiction</i>), and identify protective responses</p> <p>...</p> <p><b>Teacher prompt:</b> “The practice of sending explicit sexual messages or photos electronically, predominantly by cell phone, is a practice that has significant risks. What are some of those risks?”</p> <p><b>Student:</b> “Photos and messages can become public. They can be manipulated or misinterpreted. If they become public, they can have an impact on future relationships and even jobs.”<sup>75</sup></p>

<sup>72</sup> 2015 HPE Curriculum, Grades 1-8, pp. 195-196 (bold and italics in original; underlining added), Exhibit 5 to Zwibel Affidavit, JAR, Vol. 2, Tab 8E, pp. 441-442.

<sup>73</sup> 2018 HPE Curriculum, p. 184 (bold and italics in original), Exhibit 18 to Zwibel Affidavit, JAR, Vol. 4, Tab 8R, p. 1052; see also: 1998 HPE Curriculum, p. 18, Exhibit 1 to Zwibel Affidavit, JAR, Vol. 1, Tab 8A, p. 94.

<sup>75</sup> 2018 HPE Curriculum, pp. 180-181 (bold and italics in original), Exhibit 18 to Zwibel Affidavit, JAR, Vol. 4, Tab 8R, pp. 1048-1049.

2015 HPE Curriculum	2018 HPE Curriculum
<p>misinterpreted. If they become public, they can have an impact on the well-being of the persons involved, their future relationships, and even their jobs. <u>There are also legal penalties for anyone sharing images without consent.</u> “You shouldn’t pressure people to send photos of themselves. If someone does send you a photo, you should not send it to anyone else or share it online, because respecting privacy and treating others with respect are just as important with online technology as with face-to-face interactions.”<sup>74</sup></p>	

<sup>74</sup> 2015 HPE Curriculum, Grades 1-8, pp. 194-195 (bold and italics in original; underlining added), Exhibit 5 to Zwibel Affidavit, JAR, Vol. 2, Tab 8E, pp. 440-441.

## D. Grade 8

2015 HPE Curriculum	2018 HPE Curriculum
<p><b>Human Development and Sexual Health</b></p> <p>...</p> <p><b>C1.5</b> demonstrate an understanding of gender identity (e.g., male, female, two-spirited, transgender, transsexual, intersex), gender expression, and sexual orientation (e.g., heterosexual, gay, lesbian, bisexual) and identify factors that can help individuals of all identities and orientations develop a positive self-concept [PS]</p> <p><b>Teacher prompt:</b> “Gender identity refers to a person’s internal sense or feeling of being male or female, which may or may not be the same as the person’s biological sex. It is different from and does not determine a person’s sexual orientation. Sexual orientation refers to a person’s sense of affection and sexual attraction for people of the same sex, the opposite sex, or both sexes. Gender expression refers to how you demonstrate your gender (based on traditional gender roles) through the ways you act, dress, and behave. Gender identity, gender expression, and sexual orientation are connected to the way you see yourself and to your interactions with others. Understanding and accepting your gender identity and your sexual orientation can have a strong impact on the development of your self-concept. A person’s self-concept can develop positively if the person understands and accepts their gender identity and sexual orientation and is accepted by family and community. It is harder to develop a positive self-concept, however, if the way a person feels or identifies does not meet perceived or real societal norms and expectations or is not what they want, or if they do not feel supported by their family, friends, school, or community. A person’s self-concept can be harmed if a person</p>	<p><b>GROWTH AND DEVELOPMENT (1998)</b></p> <p><b>OVERALL EXPECTATIONS</b></p> <p>By the end of Grade 8, students will:</p> <ul style="list-style-type: none"> <li>• identify the physical, emotional, interpersonal, and spiritual aspects of healthy sexuality (e.g., respect for life, ethical questions in relationships, contraception);</li> <li>• identify local support groups and community organizations (e.g., public health offices) that provide information or services related to health and well-being;</li> <li>• apply living skills (e.g., decision-making, problem-solving, and refusal skills) to respond to matters related to sexuality, drug use, and healthy eating habits.</li> </ul> <p><b>SPECIFIC EXPECTATIONS</b></p> <p>By the end of Grade 8, students will:</p> <ul style="list-style-type: none"> <li>• explain the importance of abstinence as a positive choice for adolescents;</li> <li>• identify symptoms, methods of transmission, prevention, and high-risk behaviours related to common STDs, HIV, and AIDS;</li> <li>• identify methods used to prevent pregnancy;</li> </ul>

2015 HPE Curriculum	2018 HPE Curriculum
<p><u>is questioning their gender identity or sexual orientation and does not have support in dealing with their feelings of uncertainty. What kind of support do people need to help them understand and accept their gender identity and sexual orientation?"</u></p> <p><i>Student:</i> <u>"Having role models that you can relate to – for example, people of similar ages or cultures – is important. So is having all gender identities and sexual orientations portrayed positively in the media, in literature, and in materials we use at school. Family, school, and community support are crucial. Additional help can come from trusted adults, community organizations, and school support groups such as gay-straight alliances."</u><sup>76</sup></p>	<ul style="list-style-type: none"> <li>• apply living skills (e.g., decision-making, assertiveness, and refusal skills) in making informed decisions, and analyse the consequences of engaging in sexual activities and using drugs;</li> <li>• identify sources of support (e.g., parents/guardians, doctors) related to healthy sexuality issues.<sup>77</sup></li> </ul>
<p><b>Human Development and Sexual Health</b></p> <p><b>C2.4</b> demonstrate an understanding of aspects of sexual health and safety, including contraception and condom use for pregnancy and STI prevention, <u>the concept of consent, and matters they need to consider and skills they need to use in order to make safe and healthy decisions about sexual activity</u> (e.g., <u>self-knowledge; abstinence; delaying first intercourse; establishing, discussing, and respecting boundaries; showing respect; need for additional information and support; safer sex and pleasure; communication, assertiveness, and refusal skills</u>)</p> <p>[IS, CT]</p>	

<sup>76</sup> 2015 HPE Curriculum, Grades 1-8, p. 216 (bold and italics in original; underlining added), Exhibit 5 to Zwibel Affidavit, JAR, Vol. 2, Tab 8E, p. 462.

<sup>77</sup> 2018 HPE Curriculum, p. 201, Exhibit 18 to Zwibel Affidavit, JAR, Vol. 4, Tab 8R, p. 1069; see also: 1998 HPE Curriculum, p. 19, Exhibit 1 to Zwibel Affidavit, JAR, Vol. 1, Tab 8A, p. 95.

2015 HPE Curriculum	2018 HPE Curriculum
<p><b>Teacher prompt:</b> “What do teenagers need to know about contraception and safer sex in order to protect their sexual health and set appropriate personal limits?”</p> <p><b>Student:</b> “Teenagers need to know about the benefits and risks of different types of contraception. They need to understand that the only 100 per cent sure way of not becoming pregnant or getting an STI, including HIV, is not having sexual contact. Those who choose to be sexually active also need to know which contraceptive methods provide a protective barrier against disease as well as pregnancy. Condoms provide protection against both pregnancy and STIs – but to be effective, they need to be used properly and used every time. Teenagers need to understand how important it is to talk with their partners about sexual health choices, consent, and keeping safe. They have to develop the skills to communicate their thoughts effectively, listen respectfully, and read body cues in these conversations. This takes practice.”<sup>78</sup></p>	
<p><b>Human Development and Sexual Health</b></p> <p><b>C3.3</b> analyse the attractions and benefits associated with being in a relationship (<i>e.g., support, understanding, camaraderie, pleasure</i>), as well as the benefits, risks, and drawbacks, for themselves and others, of relationships involving different degrees of sexual intimacy (<i>e.g., hurt when relationships end or trust is broken; in more sexually intimate relationships, risk of STIs and related risk to future fertility, unintended pregnancy, sexual harassment and exploitation; potential for dating violence</i>) [IS, CT]</p>	

<sup>78</sup> 2015 HPE Curriculum, Grades 1-8, pp. 218-219 (bold and italics in original; underlining added), Exhibit 5 to Zwibel Affidavit, JAR, Vol. 2, Tab 8E, pp. 464-465.

2015 HPE Curriculum	2018 HPE Curriculum
<p>...</p> <p><i>Teacher:</i> <u>“Being intimate with someone includes having a good understanding of the concept of consent. What are some of the important things that we need to understand about consent?”</u></p> <p><i>Student:</i> <u>“Consent to one activity doesn’t imply consent to all sexual activity. It is important to ask for consent at every stage. Consent is communicated, not assumed. You can ask your partner simple questions to be sure that they want to continue: ‘Do you want to do this?’ or ‘Do you want to stop?’ A ‘no’ at any stage does not need any further explanation.”</u> ...<sup>79</sup></p>	

<sup>79</sup> 2015 HPE Curriculum, Grades 1-8, p. 220 (bold and italics in original; underlining added), Exhibit 5 to Zwibel Affidavit, JAR, Vol. 2, Tab 8E, p. 466.

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

Court File No. 526/18

Applicants

Respondent

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(DIVISIONAL COURT)**

Proceeding commenced at TORONTO

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