

**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

A N D B E T W E E N:

**THE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO and CINDY
GANGARAM**

Applicants

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE
MINISTER OF EDUCATION**

Respondent

APPLICATIONS UNDER Rule 14.05(2) of the *Rules of Civil Procedure*, RRO 1990, Reg 194
and Sections 2(1) and 6(2) of the *Judicial Review Procedure Act*, RSO 1990, c J.1

**FACTUM OF THE RESPONDENT,
THE MINISTER OF EDUCATION**

(Applications for judicial review returnable January 9 and 10, 2019)

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OVERVIEW

1. On August 22, 2018, as an interim measure pending province-wide consultations on a new curriculum, the Respondent Minister of Education (Minister) re-issued the 2010 Health and Physical Education (HPE) Curriculum for Grades 1-8 as the 2018 HPE Curriculum. This is the same curriculum that was in place from September 2010 to June 2015. For the 2018-19 year, all HPE classroom programs for students in publicly-funded schools for Grades 1 to 8 (that is, for students aged 5 to 13) are to be developed based on this Curriculum.
2. The Applicants allege that the 2018 HPE Curriculum is unconstitutional. They prefer the previous HPE curriculum that was in place for three school years from September 2015 to June 2018 (the 2015 HPE Curriculum) and assert that the *Charter* requires that the 2015 HPE Curriculum be reinstated. Ontario submits that the applications should be dismissed.
3. The Constitution of Canada does not entrench any particular elementary school curriculum. It does not prescribe the sexual health topics that must be taught, the level of detail with which they must be articulated, or the particular grades in which they must be introduced. These are matters of educational policy and democratic decision-making, not constitutional law. They are also far removed from the institutional competence of courts.
4. The 2015 HPE Curriculum gave rise to widespread and well-publicized expressions of community and parental concern and disapproval, which included the withdrawal of students from publicly-funded schools across the province. Many Ontarians expressed concerns that there was insufficient parental consultation before the 2015 HPE Curriculum was issued. Without adequate parental and community acceptance and input into the curriculum, students may be withdrawn from publicly-funded schools, and will thereby lose the important educational and social benefits that come from public education. The Minister has concluded

that more consultation should have been undertaken before the 2015 HPE Curriculum was issued, and that, in the interim pending widespread consultation on a new curriculum, the previous HPE curriculum that had already been accepted by the community and used without public protest or complaint from September 2010 to June 2015 should continue to be used.

5. Ontario submits that the Applicants do not have standing to assert all of the claims they raise, and in any event, have not adduced an adequate factual foundation for their claims. The 2018 HPE Curriculum does not deprive anyone of life, liberty or security of the person. Nor is it discriminatory contrary to *Charter* s. 15 or the *Human Rights Code*. Indeed, the 2018 HPE Curriculum expressly states that “Whatever the specific ways in which the requirements outlined in the [Curriculum] are implemented in the classroom, they must, wherever possible, be inclusive and reflect the diversity of the student population and the population of the province.”¹ Teachers are obliged to implement the 2018 HPE curriculum in a manner that is inclusive and provides equal benefit to all students, including LGBTQ2S+ students.

6. The Divisional Court has no jurisdiction to grant the declaratory relief sought by ETFO in relation to ForTheParents.ca website, and in any event, the relief sought is moot. Nor does the 2018 HPE Curriculum infringe freedom of expression. The *Charter* does not give teachers in publicly-funded schools the freedom to choose whether to follow the provincial curriculum. In any event, the issuance of a curriculum is justified by the need for consistency across the province in terms of what students are expected to learn and in which grades.

7. The Applicants are in effect seeking to constitutionalize the previous 2015 HPE Curriculum. But the *Charter* does not constitutionally entrench the 2015 HPE Curriculum or

¹ 2018 HPE Curriculum, Beckett Affidavit Ex. 4 pp. 16 [Joint Application Record [JR] vol. 27 tab 29-4 pp. 8633; Respondent’s Compendium [RC] vol. 1 tab 1].

prevent it from being replaced or amended. If Ontario did not infringe the *Charter* before the 2015 HPE Curriculum was issued, it cannot be unconstitutional for Ontario to return to the same curriculum that was last in place in June 2015. The Court of Appeal for Ontario has held repeatedly that “in the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or enhance *Charter* values.”² This principle is a complete answer to the *Charter* claims in these applications.

8. The Legislature has given to the Minister, and not to the courts or the Applicants, the responsibility to set educational priorities and direction for all of Ontario’s publicly-funded schools. The Minister has determined that the public interest is best served by the issuance of the 2018 HPE Curriculum to replace the 2015 HPE Curriculum, pending further public consultations on the content of the next curriculum. This determination should be approached with deference by the Court, given the Minister’s democratic accountability and her greater institutional expertise in matters relating to education.

PART I - FACTS

9. Although the Applicants have filed voluminous affidavits, the factual record regarding the alleged *Charter* breaches that they have the onus to prove is sparse and speculative. None of the Applicants’ expert witnesses has conducted or cited any research investigating whether the differences between the 2015 and 2018 HPE Curriculums led to any different outcomes for student health or well-being. None of them has conducted or reviewed any research on classroom instruction or how curriculum is implemented. Their opinions proceed not from any

² *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505 (C.A.), at para. 94 [*Lalonde*]; see also *Ferrel v. Ontario* (1998), 42 O.R. (3d) 97 at para. 36 (C.A.) [*Ferrel*]; *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538 at paras. 103-104 [*Flora*].

empirical inquiry into whether differences between the curriculums result in any differences in student health or well-being, but from their minute parsing of the words of the two documents. As set out below, that is an artificial and misleading way to approach a provincial curriculum. It ignores the role of teachers in turning the broad language of the curriculum into actual instruction. It also ignores the responsibility of teachers to do so in a way that is up-to-date, inclusive and non-discriminatory.

10. All of the Applicants' expert witnesses who stated opinions about the 2018 HPE Curriculum were cross-examined, revealing significant limitations in their opinions and expertise as detailed below. By contrast, none of Ontario's expert witnesses were cross-examined. Their evidence must be taken as unchallenged. Where the Applicants' evidence differs from that of Ontario's expert witnesses, the latter should be preferred.

11. Ontario relies on the expert evidence of Dr. Deani Van Pelt, Prof. Ken Brien, and Prof. Derek Allison. All three are experts in education, with Ph.Ds in Education and extensive experience as educators. Prof. Allison's evidence was that there was no "obstacle to the content of the 2018 re-issue being taught in an up-to-date and inclusive way."³ Prof. Brien's evidence was that the 2018 curriculum would permit teaching about topics including consent, gender identity, and online safety.⁴ He disagreed with the contention "that teachers are prohibited from fulfilling their professional responsibilities with respect to their students and their students' parents by the requirements of the 2018 HPE curriculum document."⁵ Dr. Van Pelt's evidence was that "the government has shown sound judgment in seeking parent and community input" and that, in relation to sexual health education, "caution, a balancing of

³ Allison Affidavit para. 61 [JR vol. 45 tab 30 p. 18829; RC vol. 1 tab 4].

⁴ Brien Affidavit paras. 36-53 [JR vol. 45 tab 31 pp. 18939-18946; RC vol. 1 tab 5].

⁵ Brien Affidavit para. 40 [JR vol. 45 tab 31 p. 18941; RC vol. 1 tab 5].

interests and responsibilities, and widespread consultation are reasonable to encourage.”⁶

Ontario also relies on the evidence of Assistant Deputy Minister (ADM) Martyn Beckett, who leads the Ministry division that has responsibility for curriculum and who has extensive experience as an educator, school administrator, and school board Director.

A. The parties

12. The ETFO Applicants are the Elementary Teachers’ Federation of Ontario (ETFO) and Cindy Gangaram. ETFO is the statutory bargaining agent for public English-language elementary teachers in Ontario. Ms. Gangaram is a teacher in a publicly-funded school.

13. The CCLA Applicants are the Corporation of the Canadian Civil Liberties Association (CCLA), Becky McFarlane, and L.M. Ms. McFarlane identifies as a queer parent. Her ten-year-old daughter L.M. started Grade 6 in September 2018 at a publicly-funded school.

14. L.M. is the only party in either application who is a student. L.M. did not provide an affidavit in this proceeding, and Ms. McFarlane’s affidavit was sworn on August 15, 2018 – three weeks before the start of the school year, and one week before the Minister issued the 2018 HPE Curriculum. There is no evidence of the impact of the 2018 curriculum on L.M.

15. The Respondent in both applications is the Minister, who has the statutory responsibility to set educational priorities for all of Ontario’s publicly-funded schools. The *Education Act* provides that the Minister may “issue curriculum guidelines and require that courses of study be developed therefrom.”⁷

B. What are curriculum guidelines?

16. The curriculum is not a script for teachers to recite, or a list of mandatory or prohibited

⁶ Van Pelt Affidavit paras. 43 and 56 [JR vol. 45 tab 32 pp. 19006, 19010; RC vol. 1 tab 6].

⁷ *Education Act*, [R.S.O. 1990, c. E.2](#), s. 8(1).

words.⁸ It does not prescribe lesson plans, educational resources, classroom activities, or teaching strategies.⁹ Nor is the elementary curriculum intended to educate *teachers*; teachers have their own professional education, starting with a post-graduate university degree in Education¹⁰ and continuing with professional development throughout their careers.¹¹

17. A curriculum guideline does not regulate the conduct of students or alter the professional duties of teachers.¹² It does not affect the application of the *Human Rights Code*, the anti-discrimination and anti-bullying provisions of the *Education Act*, or the many provincial and school board policies in place to ensure that schools are safe, inclusive and accepting environments.¹³ Nor is a curriculum a law. The Court should resist the Applicants' invitation to parse the words of a curriculum as though every word were enacted in a statute.

18. The curriculum “describes in broad terms the desired outcomes of the teaching and learning process.”¹⁴ Ontario curriculum guidelines contain lists of “expectations” for each grade or course in each subject. These expectations “describe the knowledge and skills that students are expected to learn by the end of a grade or course.”¹⁵

a. Curriculum expectations are mandatory

19. There are two types of expectations in the Ontario curriculum: overall expectations and specific expectations. Overall expectations describe in general terms the knowledge and skills that students are expected to demonstrate by the end of each grade or course. Specific expectations describe the expected knowledge and skills in greater detail. Together, the

⁸ Beckett Affidavit paras. 32-36 [JR vol. 27 tab 29 pp. 8517-8520; RC vol. 1 tab 3].

⁹ Beckett Affidavit para. 30 [JR vol. 27 tab 29 p. 8517; RC vol. 1 tab 3].

¹⁰ Allison Affidavit para. 30: “Ontario teachers are now required to have completed an undergraduate degree before entry to a pre-service teacher education program” [JR vol. 45 tab 30 pp. 18815-18816; RC vol. 1 tab 4].

¹¹ Allison Affidavit paras. 30-31 [JR vol. 45 tab 30 pp. 18815-18816; RC vol. 1 tab 4].

¹² Allison Affidavit para. 75 [JR vol. 45 tab 30 p. 18833; RC vol. 1 tab 4].

¹³ Beckett Affidavit para. 150 [JR vol. 27 tab 29 pp. 8581-8582; RC vol. 1 tab 3].

¹⁴ Brien Affidavit para. 16 [JR vol. 45 tab 31 p. 18930; RC vol. 1 tab 5].

¹⁵ Beckett Affidavit para. 24 [JR vol. 27 tab 29 pp. 8513-8514; RC vol. 1 tab 3].

overall and specific expectations make up the mandatory Ontario curriculum.¹⁶

20. Curriculum expectations are mandatory in that classroom programs must be designed so that the expectations for each grade are taught in those grades, and students are assessed and evaluated on the expectations for their own grade level, rather than some other grade level. For example, teachers may not design classroom programs for Grade 5 students where the students are expected to learn and be evaluated and assessed on the Grade 6 expectations. Although teachers may refer to Grade 6 (or higher) expectations and content in teaching a Grade 5 program, they must nonetheless teach and assess students on the Grade 5 expectations. Whether in Math, HPE or any subject, teachers are not permitted to implement classroom programs in which students are assessed on the expectations prescribed for higher grades. For example, Grade 1 math students should not be assessed on Grade 8 expectations.¹⁷

21. These mandatory expectations ensure some consistency across the province in terms of what students can expect to learn and in which grades. They also reflect the growing abilities and maturity of students as they move through the grades.¹⁸ Expectations in the curriculum are “scaffolded”, meaning that expectations in each grade become increasingly complex as students move through grades, building on expectations from previous grades.¹⁹

22. Teachers are required to assess, evaluate, and report on students’ achievement of the expectations for their grade, and are required to cover the expectations as part of their teaching practice.²⁰ But *how* they teach students to achieve these expectations is a matter of teachers’ professional judgment. The HPE expectations are designed so that teachers have substantial

¹⁶ Beckett Affidavit para. 25 [JR vol. 27 tab 29 p. 8514; RC vol. 1 tab 3].

¹⁷ Beckett Affidavit para. 47 [JR vol. 27 tab 29 p. 8525; RC vol. 1 tab 3].

¹⁸ Beckett Affidavit para. 26 [JR vol. 27 tab 29 pp. 8514-8515; RC vol. 1 tab 3].

¹⁹ Beckett Affidavit para. 26 [JR vol. 27 tab 29 pp. 8514-8515; RC vol. 1 tab 3].

²⁰ Beckett Cross p. 9 q. 20 [BOT vol. 1 tab 1; RC vol. 2 tab 7].

discretion in deciding how to teach them. Teachers can choose, in the exercise of their professional judgment, how to design classroom programs to achieve the expectations in each grade, and how to implement those programs for a diverse class of individual students, all of whom will have their own individual strengths and abilities.²¹ ADM Beckett explained “there is a lot of latitude, because of the way that expectations are written, for a teacher to be able to bring the curriculum alive in their professional practice for their particular classroom.”²²

23. Teachers are free to discuss matters and answer questions that relate to topics taught in higher grades.²³ To some extent, this may be inevitable, as some of the expectations overlap across grades: for example, when Grade 5 students learn to “describe the processes of menstruation and spermatogenesis,” they may well discuss “the major parts of the reproductive system and their functions,” which is part of a Grade 6 expectation. Nothing in the curriculum prohibits this result.²⁴ What the HPE curriculum would *not* permit, however, is the design or implementation of a classroom program for a particular grade in which students were not taught and evaluated on the expectations specified for that grade, or in which students were evaluated on the expectations set out for a different grade.²⁵

24. Teachers are free to answer questions and address topics that are not expressly referred to in the curriculum document in the course of teaching the curriculum.²⁶ Such “teachable moments” are not prohibited: “there are some things that are going to be a teachable moment

²¹ Beckett Affidavit para. 45 [JR vol. 27 tab 29 p. 8524; RC vol. 1 tab 3]; Beckett Cross pp. 12-13 q. 34 [BOT vol. 1 tab 1; RC vol. 2 tab 7].

²² Beckett Cross pp. 12-13 q. 34 [BOT vol. 1 tab 1; RC vol. 2 tab 7].

²³ Beckett Affidavit paras. 39, 43, 46 [JR vol. 27 tab 29 pp. 8520-8521, 8522-8523, 8525; RC vol. 1 tab 3]; Brien Affidavit paras. 9-10 [JR vol. 45 tab 31 p. 18928; RC vol. 1 tab 5].

²⁴ Beckett Affidavit para. 46 [JR vol. 27 tab 29 p. 8525; RC vol. 1 tab 3].

²⁵ Beckett Affidavit para. 47 [JR vol. 27 tab 29 p. 8525; RC vol. 1 tab 3].

²⁶ Beckett Affidavit paras. 32-39 [JR vol. 27 tab 29 pp. 8517- 8521; RC vol. 1 tab 3]; Brien Affidavit paras. 39-40, 42-43, 45-48, 50-53 [JR vol. 45 tab 31 pp. 18941-18946; RC vol. 1 tab 5]; Allison Affidavit paras. 61, 72-74, 81-83 [JR vol. 45 tab 30 pp. 18828-18829, 18832-18833, 18835-18836; RC vol. 1 tab 4].

in the classroom. They are those magical moments when something comes up and you can cover a topic that wouldn't otherwise come up.”²⁷ Prof. Brien explained that “curriculum documents are not intended to include every possible question that could be considered in planning classroom and gym activities. The omission of any sentences or questions does not prohibit teachers from addressing them in their work.”²⁸ As Prof. Allison explained:

Students ask questions. Indeed, we want them to. They ask questions in class in response to working with and on learning material with their teacher, in conversations with teachers in all kinds of settings, from playgrounds to detention, and when seeking guidance. At times questions will be asked about topics that were included as expectations in the 2015 sexual health curriculum but are not in the current 2018 document, just as questions will be asked about topics included in neither.

Whether and how a teacher responds to any student question is quintessentially a matter of professional judgment....[T]he exchange can, and often should, be, “open, honest, and up to date” with full consideration given to a student’s well-being....[D]eciding how and when to respond to student questions is a matter of judgment which lies closer to the centre of teachers’ professional and ethical obligations than the more everyday activity of designing and delivering lesson plans based on the official curriculum.²⁹

b. Examples, teacher prompts and sample student responses are optional

25. Curriculum guidelines also include examples, teacher prompts and sample student responses. Unlike curriculum expectations, these are optional, not mandatory.³⁰ They are intended to “suggest the intended depth and level of complexity” of the learning that students are expected to achieve, as the 2018 HPE Curriculum states:

Teachers can choose to use the examples and teacher prompts that are appropriate for their students, or they may develop their own approaches that reflect a similar level of complexity...The examples are illustrations only, not requirements.³¹

26. The 2015 HPE Curriculum was even more explicit on this point:

The examples and prompts do not set out requirements for student learning; they are

²⁷ Beckett Cross pp. 141-142 q. 441 [BOT vol. 1 tab 1; RC vol. 2 tab 7].

²⁸ Brien Affidavit para. 46 [JR vol. 45 tab 31 p. 18944; RC vol. 1 tab 5].

²⁹ Allison Affidavit paras. 72-74 [JR vol. 45 tab 30 pp. 18832-18833; RC vol. 1 tab 4].

³⁰ Beckett Affidavit paras. 28, 32 [JR vol. 27 tab 29 pp. 8516-8518; RC vol. 1 tab 3].

³¹ 2018 HPE Curriculum pp. 16-17 [JR vol. 27 tab 29-4 pp. 8633-8634; RC vol. 1 tab 1].

*optional, not mandatory.*³²

27. Teachers can draw from a wide range of available resources and strategies, including sample lesson plans, activities, webpages, books, videos, posters, surveys, and other tools prepared by organizations, teacher associations, and school boards.³³ Ontario does not require teachers to use any particular teaching resources or strategies.³⁴ As stated by ADM Beckett, “Teachers as professionals can use any particular document they wish as a resource...That is part of their opportunity to exercise their professional judgment.”³⁵

c. Teachers are required to teach the curriculum in an inclusive way

28. However teachers implement the curriculum, they must do so in an inclusive way.³⁶

The 2018 HPE Curriculum states:

Whatever the specific ways in which the requirements outlined in the expectations are implemented in the classroom, they must, wherever possible, be inclusive and reflect the diversity of the student population and the population of the province. [...]

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. Every student is supported and inspired to succeed in a culture of high expectations for learning. In an inclusive education system, all students see themselves reflected in the curriculum, their physical surroundings, and the broader environment, so that they can feel engaged in and empowered by their learning experiences.³⁷

29. Teachers are therefore required to teach the 2018 HPE Curriculum in a way that

³² 2015 HPE Curriculum, Beckett Affidavit Ex. 18 p. 20 [JR vol. 31 tab 29-18 p. 10959] (italics in original).

³³ Beckett Affidavit para. 29 [JR vol. 27 tab 29 p. 8517; RC vol. 1 tab 3]; Brien Affidavit paras. 13, 37 [JR vol. 45 tab 31 pp. 18929-18930, 18940; RC vol. 1 tab 5]; Allison Affidavit paras. 29-30 [JR vol. 45 tab 30 pp. 18815-18816; RC vol. 1 tab 4].

³⁴ Beckett Affidavit para. 30 [JR vol. 27 tab 29 p. 8517; RC vol. 1 tab 3]; Beckett Cross p. 116 q. 362 [BOT vol. 1 tab 1; RC vol. 2 tab 7].

³⁵ Beckett Cross pp. 79, 153-54 qq. 251, 477-78 [BOT vol. 1 tab 1; RC vol. 2 tab 7].

³⁶ Beckett Affidavit para. 48 [JR vol. 27 tab 29 pp. 8525-8526; RC vol. 1 tab 3].

³⁷ 2018 HPE Curriculum pp. 16 and 57 [JR vol. 27 tab 29-4 pp. 8633 and 8674; RC vol. 1 tab 1].

reflects diversity, including LGBTQ2S+ diversity.³⁸ For example, in Grade 2 students are expected to learn to “distinguish the similarities and differences between themselves and others.” This learning expectation provides two non-mandatory examples of similarities and differences (e.g., in terms of body size or gender), but does not limit others that may be taught. Other inclusive examples could include similarities and differences in terms of sex, sexual orientation, gender identity, and gender expression.³⁹ The requirement to teach in an inclusive way is also found in laws and policies governing school boards and teachers, discussed below.

30. The topics of inclusion, diversity (including gender diversity) and healthy relationships are also addressed in the curriculum documents of other subjects, such as Social Studies, the Arts, and Language.⁴⁰ Teachers may combine expectations from different parts of the Ontario curriculum and teach them together,⁴¹ integrating the HPE curriculum with the rest of the Ontario curriculum to teach transferable knowledge and skills.⁴²

d. The 2018 curriculum is written at a relatively high level of generality

31. The curriculum is crafted at a high level of generality to give teachers flexibility to use contemporary content to achieve broadly-worded expectations.⁴³ For example, in the 2018 HPE Curriculum, Grade 4 students are expected to learn to “describe various types of bullying and abuse (*e.g. social, physical, verbal*), including bullying using technology (*e.g. via email*,

³⁸ Beckett Affidavit paras. 50-52 [JR vol. 27 tab 29 pp. 8526-8527; RC vol. 1 tab 3].

³⁹ Beckett Affidavit para. 52 [Record vol. 27 tab 29 p. 8529; RC vol. 1 tab 3]. See also the definition of “gender” in the glossary of the 2018 Interim HPE Curriculum, which is cross-referenced with “gender identity” and “sex”: 2018 HPE Curriculum pp. 212, 217 [Record vol. 27 tab 29 pp. 8829, 8834; RC vol. 1 tab 1].

⁴⁰ Beckett Affidavit paras. 142-144 [JR vol. 27 tab 29 pp. 8566-8571; RC vol. 1 tab 3]; Beckett Affidavit Ex. 6 [JR vol. 27 tab 29-6 pp. 8843-9054]; Beckett Affidavit Ex. 8 [JR vol. 28 tab 29-8 pp. 9378-9533]; Beckett Affidavit Ex. 12 [JR vol. 27 tab 29-12 pp. 9884-10114].

⁴¹ Beckett Affidavit para. 142 [JR vol. 27 tab 29 pp. 8566-8567; RC vol. 1 tab 3].

⁴² Beckett Affidavit paras. 56-58, 66, 142 [JR vol. 27 tab 29 pp. 8528-8530, 8533-8534, 8566-8567; RC vol. 1 tab 3].

⁴³ Beckett Affidavit paras. 31, 54-55 [JR vol. 27 tab 29 p. 8517, 8528; RC vol. 1 tab 3].

text messaging, chat rooms, websites), and identify appropriate ways of responding.”⁴⁴ While the optional examples refer to some specific forms of technology, such as e-mail and text messaging, the mandatory expectation is at a higher level of generality intended to capture the wide-ranging and changing nature of communications technology. Teachers can keep pace with evolving technology and terminology and use examples that are current and relevant.⁴⁵

32. Curriculums therefore provide a framework that can be implemented in a contemporary way for many years. If the curriculum required teachers to use particular examples of technology platforms (e.g. Facebook) or current slang (e.g. sexting), it could fail to keep pace with technology and terminology and quickly become out of date.⁴⁶

33. The curriculum is also written broadly to teach students transferable skills and approaches that can be adapted across a range of situations, rather than to train students to memorize prescribed responses to set questions. An example is the 2018 Grade 7 expectation requiring students to learn to “use effective communication skills (e.g. refusal skills, active listening) to deal with various relationships and situations.”⁴⁷ “Effective communication” is a set of transferable skills that can be adapted to circumstances faced by each student.⁴⁸

Students are encouraged to make connections between concepts in different content areas. If, for example, students learn refusal strategies when choosing not to smoke, they can learn to apply those same strategies when making choices about taking care of their bodies or choices connected to substance use, sexual health, physical activities, and personal safety.⁴⁹

34. This curriculum expectation also illustrates how teachers can and must teach the

⁴⁴ 2018 HPE Curriculum p. 128 [JR vol. 27 tab 29-4 p. 8745; RC vol. 1 tab 1].

⁴⁵ Beckett Affidavit paras. 54-55 [JR vol. 27 tab 29 p. 8528; RC vol. 1 tab 3]; Brien Affidavit paras. 37-40, 50 [JR vol. 45 tab 31 pp. 18940-18941, 18945; RC vol. 1 tab 5].

⁴⁶ Beckett Affidavit para. 54 [JR vol. 27 tab 29 p. 8528; RC vol. 1 tab 3]; Allison Affidavit paras. 61, 72-74, 81-83 [JR vol. 45 tab 30 pp. 18828-18829, 18832-18833, 18835-18836; RC vol. 1 tab 4].

⁴⁷ 2018 HPE Curriculum p. 184 [JR vol. 27 tab 29-4 p. 8801; RC vol. 1 tab 1].

⁴⁸ Beckett Affidavit para. 57 [JR vol. 27 tab 29 p. 8529; RC vol. 1 tab 3].

⁴⁹ 2018 HPE Curriculum p. 30 [JR vol. 27 tab 29-4 p. 8647; RC vol. 1 tab 1].

expectations in an inclusive way. All students, including all LGBTQ2S+ students, can benefit from learning effective communication skills to deal with relationships and situations, even though each student's own relationships and situations may differ from those of their peers.⁵⁰

C. History of the HPE curriculum changes

35. The first standardized comprehensive HPE curriculum document was issued in Ontario in 1998.⁵¹ Between November 2007 and November 2009, this HPE curriculum was reviewed. The Ministry engaged in consultation with school boards and stakeholder groups.⁵² A new HPE curriculum was released in February 2010.⁵³

36. Following the release of the new HPE curriculum in 2010, the Ministry became aware of parent concerns about the curriculum reported in the media.⁵⁴ The new curriculum was withdrawn, and in June 2010 another HPE curriculum was issued, which replaced the "Human Development and Sexual Health" component of the 2010 curriculum with the "Growth and Development" component from the previous 1998 curriculum document. This was the curriculum that was implemented in classrooms from September 2010 to June 2015.⁵⁵ It is substantively identical to the 2018 HPE Curriculum.

37. In February 2015, a new HPE curriculum was released, which took effect in September 2015. This was the 2015 HPE Curriculum. It proved to be controversial.

D. Controversy concerning the 2015 HPE Curriculum

38. Many Ontarians raised concerns regarding the sufficiency of parent consultation on the

⁵⁰ Beckett Affidavit para. 58 [JR vol. 27 tab 29 p. 8530; RC vol. 1 tab 3].

⁵¹ Beckett Affidavit para. 67 [JR vol. 27 tab 29 p. 8534; RC vol. 1 tab 3].

⁵² Answer to undertaking (Beckett) letter dated December 14, 2018, [BOT vol. 1 tab 1-B; RC vol. 3 tab 22].

⁵³ Beckett Affidavit para. 68 [JR vol. 27 tab 29 p. 8534; RC vol. 1 tab 3].

⁵⁴ Beckett Affidavit para. 69 [JR vol. 27 tab 29 p. 8534; RC vol. 1 tab 3].

⁵⁵ Beckett Affidavit paras. 69-70 [JR vol. 27 tab 29 p. 8534; RC vol. 1 tab 3].

2015 HPE Curriculum. These concerns were expressed through petitions in the Legislative Assembly, letters to the Minister, public protests, and withdrawals of students from school.

39. In none of the consultations on the 2010 or 2015 HPE curriculums were parents at large given an opportunity to provide feedback and make their views known. Instead, in 2014, principals from each elementary school were asked to select one parent from each school council to complete a survey about the proposed HPE curriculum. Parent Involvement Committees in each board were also asked to select one member to complete the survey.⁵⁶ The parents who were given an opportunity to complete the survey were those who were chosen by the principal or by the Parent Involvement Committee. Of the 4,000 parents given an opportunity to complete the survey, only 1,638 parents completed it. By contrast, there are approximately 1.4 million students enrolled in elementary schools in Ontario.⁵⁷

40. In November 2014, the Ministry invited four parent groups to meet.⁵⁸ No other parents were invited to these meetings. The only parents who provided feedback were parents selected by principals from the membership of school councils, parents who were chosen by Parent Involvement Committees, and parents who were in the four invited groups.⁵⁹

41. Many individuals and community groups raised concerns about the extent and sufficiency of the parental consultations on the 2015 curriculum. For example:

- a. On June 1, 2015, a petition signed by 185,000 people was presented to the Legislative Assembly, calling for the government to “repeal the sex education component of the health and physical education curriculum” and to “start over with a meaningful parental consultation process.”

⁵⁶ Beckett Affidavit paras. 74-78 [JR vol. 27 tab 29 pp. 8535-8536; RC vol. 1 tab 3].

⁵⁷ Beckett Affidavit paras. 72-76 [JR vol. 27 tab 29 pp. 8535-8536; RC vol. 1 tab 3].

⁵⁸ These four groups were the Ontario Association of Parents in Catholic Education, the Ontario Federation of Home and School Associations, People for Education, and Parents Partenaires en Éducation: see Beckett Affidavit para. 77 [JR vol. 27 tab 29 p. 8536; RC vol. 1 tab 3].

⁵⁹ Beckett Affidavit para. 78 [JR vol. 27 tab 29 p. 8536; RC vol. 1 tab 3].

- b. On January 27, 2015, the Peel District School Board wrote to the then Minister to “share [...] concerns raised by our parent communities and school councils regarding the recent parent survey.” The concerns raised in the letter included that the parent survey was based on “unrealistic timelines” and a “limited sample.” The board suggested “in the future, a longer, more comprehensive, more inclusive and transparent consultation process with parents.”
 - c. On July 17, 2015, the Muslim Parents Action Committee KW expressed concerns to their MPP that “there was not sufficient opportunity for parental consultation.”
 - d. On August 5, 2015, the MPP for Elgin-Middlesex-London wrote, “A large group of parents in my riding feel that the new curriculum is age-inappropriate and believe further consultation is necessary before implementation this coming September.”
 - e. The Ontario Association of Parents in Catholic Education (OAPCE) wrote a letter to the then Deputy Minister of Education to “express our concerns about the recent survey consultation”, noting that “the timelines, process and survey content may not have provided an accurate or inclusive result.” The letter stated that OAPCE parents “all have the same feeling of having been denied the opportunity to provide our input in this consultation process.”
 - f. On March 6, 2015, the Canadian Polish Congress wrote a letter to members of Provincial Parliament expressing their concern over curriculum changes and requesting “further input from all of Ontario’s constituents.”
 - g. On August 16, 2016, over 330 parents in the Waterloo region wrote to the then Minister expressing concerns that “Ontario families were never allowed the voice they were promised” in the consultation process.⁶⁰
42. The Government was also aware of media reports, editorials, and publicly-expressed opinions indicating concern with the 2015 HPE Curriculum. Between February 2015 and May 2016, there were approximately 250 media reports, editorials, and publications about the 2015 HPE Curriculum, including reports of public protests and withdrawals from public schools.⁶¹
43. Consistent with these reports, a survey of Ontario HPE teachers by ETFO’s own expert Dr. Bialystok found that “43 percent said that they had encountered opposition to the [2015]

⁶⁰ Beckett Affidavit paras. 82-84 [JR vol. 27 tab 29 pp. 8537-8538; RC vol. 1 tab 3].

⁶¹ Beckett Affidavit paras. 85-86 [JR vol. 27 tab 29 pp. 8538-8539; RC vol. 1 tab 3]; Beckett Affidavit Exs. 31-36 [JR vol. 31 tabs 29-31 – 29-33 pp. 11230-11245].

curriculum as teachers, mostly in the form of students being withdrawn from class.”⁶²

44. Enrolment in publicly-funded elementary schools declined in the 2015-2016 school year, after having increased in each of the previous four school years. By contrast, enrolment in private elementary schools increased in 2015.⁶³ Dr. Van Pelt, an expert in independent schools, gave unchallenged expert evidence that “the continued dramatic increases in independent school numbers over the recent three-year period, 2015/16 to 2018/19...could well be, in part, a reflection of parental dissatisfaction in the trends in the highly profiled changes in sexual health education which received extensive media attention in 2015.”⁶⁴

45. The significant community concerns expressed about the 2015 HPE Curriculum included: concerns about the age-appropriateness of certain learning expectations in certain grades; concerns that parents had not adequately been consulted; concerns that the curriculum interfered with religious beliefs; and concerns that the curriculum undermined the primary role of parents in educating their children in sensitive matters such as sexual health.⁶⁵

46. Experts for both the Applicants and the Respondent agreed that “[s]chool-based sexual health education is often if not always controversial.”⁶⁶ As Dr. Van Pelt explained, “it is not unexpected that parents and others would intervene when the content, scope, timing, and goals of sexual health education in schools do not match their priorities or beliefs.”⁶⁷ Sexual health education “touches identity in a manner unique from traditional core academic topics such as

⁶² Bialystok Affidavit Ex. E p. 10, [JR Vol. 8 Tab 14-E p. 2216].

⁶³ Beckett Affidavit para. 91-92 [JR vol. 27 tab 29 pp. 8542-8543; RC vol. 1 tab 3].

⁶⁴ Van Pelt Affidavit para. 30 [JR vol. 45 tab 32 p. 18997; RC vol. 1 tab 6].

⁶⁵ Beckett Affidavit para. 87 [JR vol. 27 tab 29 pp. 8539-8540; RC vol. 1 tab 3].

⁶⁶ Bialystok Affidavit para. 5 [JR vol. 8 tab 14 p. 2130]; Van Pelt Affidavit para. 56 [JR vol. 45 tab 32 p. 19010; RC vol. 1 tab 6].

⁶⁷ Van Pelt Affidavit para. 26 [JR vol. 45 tab 32 p. 18996; RC vol. 1 tab 6].

literacy and numeracy.”⁶⁸ Prof. Brien put it this way:

Where sexual health curriculum differs from other subjects is that there is greater sensitivity, increased potential for controversy, and less agreement about the merit or truth or relevance of messages associated with sex education topics and learning strategies in contrast with other subjects....It is also more likely for children, parents, and teachers to experience more personal impact related to sex education instruction compared to some other subjects, since matters related to sex, sexuality, sexual orientation, and gender identity have much more personal impact on people’s lives.⁶⁹

47. ETFO essentially argues that parents who were opposed to the 2015 HPE Curriculum were either misinformed or bigots.⁷⁰ This attitude is deeply dismissive of the *bona fide* concerns of parents wishing to be consulted on their children’s education. As Dr. Van Pelt noted:

there are many parents who are supportive of their children’s teachers and schools, but who may have concerns with when and how sexual health topics are taught in school, who seek to reconcile this instruction with their own values and perspectives, and who desire greater input into what their children are taught. Parents can be “supportive parents” without necessarily supporting every aspect of the 2015 curriculum.⁷¹

E. The 2018 consultation and the ForTheParents.ca website

48. In response to these concerns, the Government has announced that the next HPE curriculum, which is intended to come into effect in September 2019, will be age-appropriate and informed by thorough consultation open to all Ontarians. To this end, the Government has conducted a broad public consultation process that focused on engaging parents, guardians, and interested individuals.⁷² As an interim measure pending the next curriculum, the Minister replaced the 2015 elementary HPE curriculum with the re-issued 2010 elementary HPE

⁶⁸ Van Pelt Affidavit para. 43 [JR vol. 45 tab 32 pp. 19005-19006; RC vol. 1 tab 6].

⁶⁹ Brien Affidavit para. 34 [JR vol. 45 tab 31 p. 18939; RC vol. 1 tab 5].

⁷⁰ ETFO factum para. 57: “many of those who opposed the 2015 Curriculum were driven by misinformation about its contents (e.g. children being taught how to expose their genitals in Grade 1) or believing that it was the product of a “gay conspiracy” lead [sic] by Kathleen Wynne.” ETFO’s expert Dr. Bialystok went so far as to write that “It seems protesting parents prefer the alternative: that their children learn about their bodies during Frosh Week, on their wedding night, or not at all.” Bialystok Cross Ex. D [BOT vol. 1 tab 2-D].

⁷¹ Van Pelt Affidavit para. 50 [JR vol. 45 tab 32 pp. 19007-19008; RC vol. 1 tab 6].

⁷² Beckett Affidavit para. 93 [JR vol. 27 tab 29 p. 8543; RC vol. 1 tab 3].

curriculum last taught in the 2014-2015 school year. For 2018-19, all HPE classroom programs for Grades 1-8 are to be developed based on the 2018 HPE Curriculum.⁷³

49. On August 13, 2018, prior to the issuance of the 2018 HPE Curriculum, ETFO issued a media release titled “ETFO denounces government Sex Ed decision, will advise teachers to teach all sections of the current curriculum.” The media release stated that “The Elementary Teachers’ Federation of Ontario (ETFO) has strongly denounced the Ontario government’s decision to repeal the updated 2015 sexual health curriculum and will advise its members to continue to exercise their professional judgement when it comes to teaching all sections of the current curriculum.” The media release further stated that “ETFO will vigorously defend members who continue to follow the 2015 Health Curriculum.”⁷⁴

50. On August 22, 2018, the Government issued a press release and backgrounder regarding parental consultation on Ontario’s curriculum. The press release indicated that Ontario expected teachers to develop their instruction based on the 2018 HPE Curriculum, and that “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.”⁷⁵

51. The Government also launched the ForTheParents.ca website on August 22, 2018 to invite feedback on the education system in Ontario. When first launched, the website stated that it was “designed to give parents a portal to provide feedback about concerns related to the curriculum being taught in the classroom, while the consultation process is underway.” Initially, the website contained two links. The first link, “I want to express concerns about the curriculum currently being taught in my child’s classroom”, linked to an online submission

⁷³ Beckett Affidavit para. 114 [JR vol. 27 tab 29 p. 8550; RC vol. 1 tab 3].

⁷⁴ Beckett Affidavit para. 97 [JR vol. 27 tab 29 pp. 8544-8545; RC vol. 1 tab 3]; Beckett Affidavit Ex. 40 [JR vol. 31 tab 29-40 pp. 11265-11268; RC vol. 3 tab 23].

⁷⁵ Beckett Affidavit Ex. 41 [JR vol. 31 tab 29-41 pp. 11269-11271; RC vol. 3 tab 24].

form where the user could provide comments to the Ministry. The second link, “I have another issue I want to address”, took the user to the Ontario College of Teachers (the College) webpage explaining the Complaints Process.⁷⁶ The website stated that information submitted would be used “for the purpose of consultations regarding children’s curriculum in Ontario.”⁷⁷

52. Between August 22, 2018 and September 22, 2018, there were approximately 25,000 submissions received by the Ministry through the website. Of those 25,000 submissions, very few included allegations of professional misconduct against a teacher, and only 13 included the contact information of the person making the submission. On October 5, 2018, the Deputy Minister of Education wrote to the College advising that the Ministry would contact the 13 individuals who made allegations against a teacher and refer them to the College’s website for information about the complaints process. No submission made to the website and no information about any individual teacher was ever forwarded to the College.⁷⁸

53. On September 28, 2018, the Ministry updated the website to indicate that the consultations were now open and to identify the different ways parents and other interested individuals could participate. The website stated that “[w]e invite everyone – parents, students, educators and interested individuals or organizations – to provide feedback on the education system in Ontario.” The website was further updated on October 19, 2018 to launch the online survey and provide information on telephone town halls.⁷⁹

54. The updated website included multiple links for parents and others to provide

⁷⁶ Beckett Affidavit para. 100 [JR vol. 27 tab 29 pp. 8545-8546; RC vol. 1 tab 3]; Beckett Affidavit Ex. 42 [JR vol. 31 tab 29-31 pp. 11272-11278; RC vol. 3 tab 25].

⁷⁷ Beckett Affidavit Ex. 42 p. 2 [JR vol. 31 tab 29-31 p. 11276; RC vol. 3 tab 25].

⁷⁸ Beckett Affidavit para. 101 [JR vol. 27 tab 29 p. 8546; RC vol. 1 tab 3]; Beckett Affidavit Ex. 43 [JR vol. 31 tab 29-43 pp. 11279-11281; RC vol. 3 tab 26]; Beckett Affidavit Ex. 44 [JR vol. 31 tab 29-44 pp. 11282-11283; RC vol. 3 tab 27].

⁷⁹ Beckett Affidavit para. 102 [JR vol. 27 tab 29 p. 8546; RC vol. 1 tab 3]; Beckett Affidavit Ex. 45 [JR vol. 31 tab 29-45 pp. 11284-11286; RC vol. 3 tab 28].

comments while the consultation process was underway. The links “I want to express concerns about the curriculum currently being taught in my child’s classroom” and “I want to share a story about an educator who has gone above and beyond to support student performance” took the user to an online submission form where the user could provide feedback and comments to the Ministry.⁸⁰ The link “I have another issue I want to address” took the user to the College of Teachers webpage explaining the College’s complaints process.⁸¹ The website stated “All provincial education professionals (including teachers) in publicly funded or inspected private schools are expected to develop classroom programs based on the expectations outlined in these curriculum documents.” The website also included a link which took the user directly to the provincial curriculum documents.⁸²

55. The consultation was not restricted to HPE topics. Feedback from the consultations will help shape decisions on a variety of education topics, including improving student performance in science, technology, engineering and math, building a new HPE curriculum, and managing the use of technology such as cell phones in classrooms.⁸³

56. The website described different ways to participate in the consultations, including an Open Submission form that allowed users to provide feedback on any aspect of the education system. As of October 29, 2018, there were 9,657 individual submissions to the submission form, and 240 written submissions received via email. Users could also participate in the consultations through the Online Survey, where participants were asked their views on a number of topics, including math fundamentals, standardized testing, and sexual health

⁸⁰ Beckett Affidavit para. 112 [JR vol. 27 tab 29 p. 8549; RC vol. 1 tab 3]; Beckett Affidavit Ex. 49 [JR vol. 31 tab 29-49 pp. 11347-11351; RC vol. 3 tab 30].

⁸¹ Beckett Affidavit para. 112 [JR vol. 27 tab 29 p. 8549; RC vol. 1 tab 3]; Beckett Affidavit Ex. 50 [JR vol. 31 tab 29-50 pp. 11352-11354; RC vol. 3 tab 31].

⁸² Beckett Affidavit para. 113 [JR vol. 27 tab 29 p. 8549; RC vol. 1 tab 3].

⁸³ Beckett Affidavit para. 103 [JR vol. 27 tab 29 p. 8547; RC vol. 1 tab 3]; Beckett Affidavit Ex. 45 [JR vol. 31 tab 29-45 pp. 11284-11286; RC vol. 3 tab 28].

topics.⁸⁴ As of October 29, 2018, 6,523 individuals had completed the survey.⁸⁵ The Ministry also held multiple Telephone Town Halls in regions across Ontario.⁸⁶

57. On December 17, 2018, the consultation was closed and the website was updated. It now states “The telephone town hall sessions, open submission form and online survey are now closed.” Links to the submission forms and survey have been removed. There is no link to the College website and no reference to concerns or complaints about teachers.⁸⁷

58. Ontario’s expert witnesses supported the Province’s efforts at renewed and broader consultation that was not restricted to education professionals or parents hand-picked by school boards. Dr. Van Pelt’s unchallenged expert evidence was that:

When the focus of consultation is on experts and educational professionals, or professionals outside of education in health or community agencies (many of which would be government), the primacy of parents is neglected. In my opinion, on a topic of the contested nature of this one, widespread consultation with opportunity for all stakeholders to participate, is critical.⁸⁸

59. Dr. Van Pelt noted that “the consultations for the now revoked 2015 curriculum included consultations that largely did not include the general public or the individual parent, but rather only a few select parent groups which cannot be said to adequately represent the diversity of parents in the province.”⁸⁹ Her opinion was that “the government has shown sound judgment in seeking parent and community input,” given the primary role of parents in their children’s education, the contested nature of the curriculum, and the way that sexual

⁸⁴ Beckett Affidavit para. 105-106 [JR vol. 27 tab 29 p. 8547; RC vol. 1 tab 3]; Beckett Affidavit Ex. 47 [JR vol. 31 tab 29-47 pp. 11294-11321; RC vol. 3 tab 29].

⁸⁵ Beckett Affidavit para. 107 [JR vol. 27 tab 29 p. 8548; RC vol. 1 tab 3]; Beckett Affidavit Ex. 47 [JR vol. 31 tab 29-47 pp. 11294-11321; RC vol. 3 tab 29].

⁸⁶ Beckett Affidavit paras. 108-111 [JR vol. 27 tab 29 pp. 8548-8549; RC vol. 1 tab 3].

⁸⁷ <https://www.ontario.ca/page/for-the-parents>

⁸⁸ Van Pelt Affidavit para. 45 [JR vol. 45 tab 32 p. 19006; RC vol. 1 tab 6].

⁸⁹ Van Pelt Affidavit para. 43 [JR vol. 45 tab 32 pp. 19005-19006; RC vol. 1 tab 6].

education touches on identity in a way distinct from topics such as literacy and numeracy.⁹⁰

60. Prof. Brien expressed concern about “the ‘schoolcentric’ practices and views that often characterize and drive the ways parents are invited and expected to participate in school matters. If parents do not participate when, where, how, and on which topics that the schools choose, then their participation and involvement are viewed negatively by teachers and the school system.” Instead of parents providing input “exclusively on the schools’ terms,” there should be “authentic parental engagement” on all curricular topics, including sex education.⁹¹

61. Prof. Brien opined that “Teachers and parents have shared roles in educating school-age children about sexual health”⁹² and that “in the elementary years (and particularly for young children who have not yet entered middle school), parents legitimately expect to have more of a primary role.”⁹³ He concluded that it is “important that parent and community consultation, involvement, and relationships take place and exist on an ongoing basis in order to maintain their effectiveness and so that the curriculum remains up to date and relevant.”⁹⁴

62. Even ETFO’s expert Dr. McKay stated that curriculum authorities should “obviously” take into account the views of parents, recognizing “the central role that parents play.”⁹⁵

F. Similarities and differences between the 2018 HPE Curriculum and the 2015 HPE Curriculum

63. A side-by-side comparison of the relevant learning expectations from the 2015 HPE Curriculum and the 2018 HPE Curriculum reveals that many of the mandatory expectations

⁹⁰ Van Pelt Affidavit para. 43 [JR vol. 45 tab 32 pp. 19005-19006; RC vol. 1 tab 6].

⁹¹ Brien Affidavit para. 32-33 [JR vol. 45 tab 31 p. 18938; RC vol. 1 tab 5].

⁹² Brien Affidavit para. 25 [JR vol. 45 tab 31 p. 18934; RC vol. 1 tab 5].

⁹³ Brien Affidavit para. 30 [JR vol. 45 tab 31 p. 18815-18816; RC vol. 1 tab 5].

⁹⁴ Brien Affidavit para. 35 [JR vol. 45 tab 31 p. 18939; RC vol. 1 tab 5].

⁹⁵ McKay Cross pp. 236-38 q. 833 [BOT vol. 8 tab 9; RC vol. 2 tab 12].

are identical or substantively similar in both curriculums.⁹⁶ Where there are differences in the expectations, they generally fall into three categories:

- a) Some mandatory expectations are articulated with more generality in the 2018 HPE Curriculum than in 2015 HPE Curriculum;
- b) There are more optional examples, teacher prompts and sample student responses in the 2015 HPE Curriculum; and
- c) Some expectations are placed in different grades in the 2018 HPE Curriculum as compared to the 2015 HPE Curriculum.

a. Some mandatory expectations are articulated with more generality

64. The learning expectations in the sexual health component of the 2018 HPE Curriculum are generally articulated in broader terms than those in the 2015 HPE Curriculum.⁹⁷ As ADM Beckett explained, the 2018 HPE Curriculum is drafted at “a higher level” of generality.⁹⁸

65. Examples of the higher level of generality in the 2018 learning expectations are set out in the attached Schedule C. One example is the Grade 7 learning expectation that deals with the impact of different types of bullying or harassment:

2015 HPE Curriculum	2018 HPE Curriculum
assess the impact of different types of bullying or harassment, including the harassment and coercion that can occur with behaviours such as sexting, on themselves and others, and identify ways of preventing or resolving such incidents [examples omitted] ⁹⁹	assess the impact of different types of bullying or harassment [examples omitted] on themselves and others, and identify ways of preventing or resolving such incidents ¹⁰⁰

⁹⁶ Beckett Affidavit paras. 145-46 [JR vol. 27 tab 29 pp. 8571-8578; RC vol. 1 tab 3].

⁹⁷ Beckett Affidavit paras. 145-46 [JR vol. 27 tab 29 pp. 8571-8578; RC vol. 1 tab 3].

⁹⁸ Beckett Cross, pp. 124-25, 155-156 qq. 389, 482-483 [BOT vol. 1 tab 1; RC vol. 2 tab 7].

⁹⁹ 2015 HPE Curriculum, Beckett Affidavit Ex. 18 p. 198 [JR vol. 31 tab 29-18 p. 11137]. Examples have been omitted here for the purpose of comparing the mandatory language.

¹⁰⁰ 2018 HPE Curriculum p. 83 [JR vol. 27 tab 29-4 p. 8700; RC vol. 1 tab 1].

66. The broad language “bullying or harassment” is used in the mandatory content of both expectations. The 2015 expectation included the more specific words “including the harassment and coercion that can occur with behaviours such as sexting.” However, the Glossary to the 2018 HPE Curriculum states that “Bullying can occur in person or through the use of information and communication technologies” and that harassment can include messages and pictures.¹⁰¹

67. ETFO complains that the 2018 HPE Curriculum does not have the “high degree of specificity [found] in the 2015 Curriculum.”¹⁰² There is no evidence, however, that the level of specificity of a provincial elementary curriculum has any effect on student outcomes. No ETFO witness cited any study comparing provincial curriculums that differed in their level of specificity and measuring the impact of this difference on student outcomes.

68. Prof. Allison, an expert in curriculum, gave uncontradicted evidence that curriculum documents generally provide only “conceptual frameworks for the design and delivery of lesson plans” by teachers,¹⁰³ and that “the level of detail can vary substantially across different provincial curricula and between the official curriculum in place at different times in the same province.”¹⁰⁴ In fact, the curriculums of the various provinces vary widely in their level of detail; for example, Québec’s new elementary sexual education curriculum released in September 2018 is only ten pages long.¹⁰⁵ A number of provinces (including Alberta and Québec) have HPE curriculums that include no teacher prompts at all.¹⁰⁶

¹⁰¹ 2015 HPE Curriculum, Beckett Affidavit Ex. 18 p. 198 [JR vol. 31 tab 29-18 p. 11137]. Examples have been omitted here for the purpose of comparing the mandatory language.

¹⁰² ETFO factum para. 54.

¹⁰³ Allison Affidavit para. 81 [JR vol. 45 tab 30 p. 18835; RC vol. 1 tab 4].

¹⁰⁴ Allison Affidavit para. 9 [JR vol. 45 tab 30 p. 18808; RC vol. 1 tab 4].

¹⁰⁵ Beckett Affidavit Ex. 61 [JR vol. 43 tab 29-61 pp. 18066-18075; RC vol. 3 tab 58].

¹⁰⁶ Beckett Affidavit Ex. 61 [JR vol. 43 tab 29-61 pp. 18066-18075; RC vol. 3 tab 58]; Beckett Affidavit Ex. 53 [JR vol. 31 tab 29-53 pp. 11415-11442; RC vol. 3 tab 54].

69. The use of broad language in the curriculum does not prohibit teachers from developing lesson plans that address more specific concepts.¹⁰⁷ On the contrary, it provides teachers with “broad scope” to develop their lesson plans.¹⁰⁸ As ADM Beckett explained, the expectations in the 2018 HPE Curriculum “are written at a high enough level that it provides lots of scope and flexibility for teachers to be able to seek resources and include whatever they need to do in the classroom environment to bring that curriculum alive for their kids.”¹⁰⁹ In her unchallenged evidence, Dr. Van Pelt stated:

Given the high level of professionalism of contemporary teachers, it does not appear necessary to turn curriculum documents into highly prescriptive and didactic questions and answers, as opposed to more generally articulated educational goals... the 2018 curriculum gives space for teacher professional judgment and enough latitude to define terms as well as, and perhaps most importantly, to adapt to context and students being taught by giving goals rather than requirements.¹¹⁰

70. There are some instances where the 2018 HPE expectations contain more mandatory content than the corresponding 2015 expectations. One example is found in the Grade 7 and 8 learning expectations about sexually transmitted diseases. The 2018 learning expectations provide that students will learn to “identify the methods of transmission”, “symptoms”, and “ways to prevent” sexually transmitted diseases.¹¹¹ The 2015 learning expectations referred to symptoms and prevention, but did not expressly include “methods of transmission.”¹¹²

b. Some differences in optional examples, teacher prompts and student responses

71. The 2018 HPE Curriculum generally has fewer and less detailed optional examples, teacher prompts and student responses than the 2015 HPE Curriculum.¹¹³ Examples of this

¹⁰⁷ Allison Affidavit at para. 70 [JR vol. 45 tab 30 p. 18832; RC vol. 2 tab 4].

¹⁰⁸ Beckett Cross pp. 155-156 qq. 482-483 [BOT vol. 1 tab 1; RC vol. 2 tab 7].

¹⁰⁹ Beckett Cross pp. 10-11 q. 28 [BOT vol. 1 tab 1; RC vol. 2 tab 7].

¹¹⁰ Van Pelt Affidavit para. 46 [JR vol. 45 tab 32 p. 19006; RC vol. 1 tab 6].

¹¹¹ 2018 HPE Curriculum p. 83 [JR vol. 27 tab 29-4 p. 8700; RC vol. 1 tab 1].

¹¹² 2015 HPE Curriculum, Beckett Affidavit Ex. 18 p. 196, 218 [JR vol. 31 tab 29-18 pp. 11135, 11157].

¹¹³ Beckett Affidavit, paras. 145-46 [JR vol. 27 tab 29 pp. 8571-8578; RC vol. 1 tab 3].

difference are set out in the attached Schedule D.

72. One illustration is the learning expectation about recognizing individual differences, referred to above.¹¹⁴ Both curriculums provide that students will learn to recognize differences. The 2015 learning expectation further specifies “visible” and “invisible” differences, and provides optional examples of such differences, such as different physical abilities, personal values and beliefs, gender identity and sexual orientation.

73. ETFO asserts that this optional content in the 2015 curriculum was “critical for teacher understanding of the curriculum expectations,” citing Ms. Gangaram’s evidence.¹¹⁵ Ms. Gangaram, however, is not an expert in the professional learning of teachers.¹¹⁶ Prof. Brien, who is an expert in the professional learning of teachers and whose evidence was unchallenged, directly disagreed. He noted that “provincial curriculum materials are not typically intended to serve as detailed lesson plans for teachers,” particularly as teachers are now highly-educated professionals.¹¹⁷ Rather, “curriculum guidelines simply list expected outcomes by the end of each grade, but do not prevent [teachers] from using [their] professional expertise and judgment in choosing how to address these outcomes using updated information and resources.”¹¹⁸

74. Teachers can use the content in the 2015 curriculum as a resource in implementing the 2018 HPE Curriculum, just as they can use any other current and relevant resource.¹¹⁹

¹¹⁴ 2015 HPE Curriculum, Beckett Affidavit Ex. 18 p. 124 [JR vol. 31 tab 29-18 p. 11063]; 2018 HPE Curriculum p. 98 [JR vol. 27 tab 29-4 pp. 8715; RC vol. 1 tab 1].

¹¹⁵ ETFO factum at para. 17.

¹¹⁶ Gangaram Cross, pp. 8-9 qq. 36-39, 42 [BOT vol. 5 tab 5; RC vol. 2 tab 16]; Similarly, Prof. Logie, Prof. Pepler, Dr. McKay and Mx. Black are not experts in the professional learning of teachers, even though ETFO relies on their views about the level of specificity of the curriculum: see paras. 109, 113, 115, 118 and 122 below.

¹¹⁷ Brien Affidavit at paras. 36-37 [JR vol. 45 tab 31 p. 18939-18940; RC vol. 1 tab 5].

¹¹⁸ Brien Affidavit para. 40 [JR vol. 45 tab 31 p. 18941; RC vol. 1 tab 5].

¹¹⁹ Beckett Cross p. 12-13 q. 34 [BOT vol. 1 tab 1; RC vol. 2 tab 7]; Allison Affidavit paras. 81-83 [JR vol. 45 tab 30 p. 18835-18836; RC vol. 1 tab 4]; Brien Affidavit paras. 39 and 45-47 [JR vol. 45 tab 31 pp. 18941,

c. Some expectations are placed in different grades

75. In some cases, the expectations in the 2015 HPE Curriculum appear in the 2018 HPE Curriculum in similar form, but in a different grade.¹²⁰ The chart at Schedule C to CCLA’s factum, comparing only some expectations from Grades 3, 6, 7, and 8, is therefore of little assistance, because it omits corresponding expectations that occur in other grades in 2018.

76. Schedule E below sets out examples of expectations being placed in different grades in each curriculum. One example is the expectation about individual differences, discussed above. This expectation appears in Grade 3 in 2015 and in Grade 2 in 2018. Another is the expectation related to gender identity. In the 2015 HPE Curriculum, there was only one mandatory expectation that expressly used the term “gender identity”, which appeared in Grade 8.¹²¹ In 2018, a Grade 9 HPE expectation expressly includes gender identity.¹²²

G. Specific differences identified by the Applicants

77. The Applicants and Interveners focus on certain differences between the 2015 and 2018 curriculums that they allege will harm students. They overstate the differences and, in any event, fail to show that the differences that do exist will cause harm to anyone.

a. Consent

78. The 2018 HPE Curriculum is not, as the Applicants allege, “premised upon an outdated framework built around ‘refusal skills.’”¹²³ The 2018 expectations provide that students will learn to use “effective communication skills...to deal with various relationships and situations” in Grade 7. As ADM Beckett explained, “effective communication skills”

18943-18944; RC vol. 1 tab 5].

¹²⁰ Beckett Affidavit, para. 148 [JR vol. 27 tab 29 pp. 8579-8581; RC vol. 1 tab 3].

¹²¹ 2015 HPE Curriculum, Beckett Affidavit Ex. 18 p. 216 [JR vol. 31 tab 29-18 p. 11155].

¹²² Ontario Secondary School HPE Curriculum, Beckett Affidavit Ex. 62 p. 104 [JR vol. 43 tab 29-62 p. 18182; RC vol. 1 tab 2].

¹²³ ETFO Factum para. 31.

include “active listening...Making good eye contact, asking searching questions, paraphrasing for understanding,” all of which are “skills [that] speak to the concept of consent.”¹²⁴

79. In particular, “active listening” is defined in the 2018 HPE Curriculum as “A communication skill in which the listener focuses closely on the speaker’s verbal and nonverbal messages and summarizes these messages to confirm understanding.”¹²⁵ The 2018 Grade 8 expectations also require students to learn to “apply living skills...in making informed decisions, and analyse the consequences of engaging in sexual activities.”¹²⁶

80. “Refusal skills” is an *example* of “effective communication skills” in Grade 7 and of “living skills” in Grade 8. While the Applicants object to the term “refusal skills” as “outdated”, the 2015 HPE Curriculum they prefer referred to “refusal skills” nine times.¹²⁷

81. Prof. Brien explained that teaching about consent is “consistent with the currently prescribed outcomes” in the 2018 curriculum and that “it is reasonable for teachers to teach students both the needed decision-making, communication and refusal skills...whether they are the initiators or receivers of sexual advances.”¹²⁸ School boards including the Toronto District School Board (TDSB) and the Limestone District School Board have stated that their teachers will teach the topic of consent under the 2018 HPE Curriculum.¹²⁹

82. There is no evidence that including the word “consent” in a curriculum has any impact on student outcomes. The only jurisdictions in Canada whose K-9 HPE curriculums include the word “consent” are Ontario (in Grade 9), the Northwest Territories (NWT) and

¹²⁴ Beckett Cross, pp. 131-32, q. 409 [BOT vol. 1 tab 1; RC vol. 1 tab 7].

¹²⁵ 2018 HPE Curriculum p. 209 [JR vol. 27 tab 29-4 p. 8826; RC vol. 1 tab 1].

¹²⁶ 2018 HPE Curriculum p. 201 [JR vol. 27 tab 29-4 p. 8818; RC vol. 1 tab 1].

¹²⁷ 2015 HPE Curriculum, Beckett Affidavit Ex. 18 pp. 24, 61, 143, 147, 155, 157, 158, 218, 225 [JR vol. 31 tab 29-18 pp. 10962, 11000, 11082, 11086, 11094, 11096-11097, 11157, 11164].

¹²⁸ Brien Affidavit at paras. 39, 44, 51 [JR vol. 45 tab 31 pp. 18941, 18943, 18945; RC vol. 1 tab 5].

¹²⁹ Beckett Affidavit Ex. 82 [JR vol. 44 tab 29-82 pp. 18746-18748; RC vol. 3 tab 32]; Beckett Affidavit Ex. 84 [JR vol. 44 tab 29-84 pp. 18787-18790; RC vol. 3 tab 34].

Newfoundland. The word appears ten times in Ontario in the Grade 9 HPE curriculum (in the expectations and optional content), six times in the Grade 7 NWT curriculum (in teacher supports only), and once in the Grade 9 Newfoundland curriculum (in teacher supports only, in relation to the “age of consent”).¹³⁰

b. Abstinence

83. The definition of “abstinence” is identical in the 2018 and 2015 curriculums.¹³¹ Contrary to ETFO’s suggestion, abstinence is not defined in 2018 as the “total refraining from all sexual activities.” Both the 2018 and 2015 curriculums define “abstinence” broadly as a “conscious decision to refrain from a behaviour or activity,” including “all forms of sexual intercourse and other sexual activities.”¹³² The 2018 HPE Curriculum provides that in Grade 7 students will “explain the term *abstinence* as it applies to healthy sexuality.”¹³³ ADM Beckett explained that the 2018 learning expectation “offers wide latitude” to develop lesson plans addressing the specific concept of refraining from some or all sexual activities and having a shared understanding with a partner.¹³⁴ He did not see a difference between 2015 and 2018 in the content of what teachers are required to teach.¹³⁵ Prof. Brien also opined that a “detailed and nuanced” discussion of abstinence was “consistent with the 2018 expectations.”¹³⁶

c. Learning proper names for body parts

84. The 2018 Grade 1 expectation uses the broad term “major parts of the body,” while the

¹³⁰ Ontario Secondary School HPE Curriculum, Beckett Affidavit Ex. 62 pp. 101, 102, 105 and 108 [JR vol. 43 tab 29-62 pp. 18179-18180, 18183, 18186; RC vol. 1 tab 2]; NWT HPE Curriculum, Beckett Ex. 59 pp. FL9.64, FL88A, FL90 [JR vol. 39 tab 29-59 pp. 15894-15896, 15914; RC vol. 3 tab 57]; Newfoundland HPE Curriculum, Beckett Ex. 56 p. 84 [JR vol. 34 tab 29-56 p. 12768; RC vol. 3 tab 56].

¹³¹ 2015 HPE Curriculum, Beckett Affidavit Ex. 18 p. 227 [JR vol. 31 tab 29-18 p. 11166]; 2018 HPE Curriculum p. 209 [JR vol. 27 tab 29-4 p. 8826; RC vol. 1 tab 1].

¹³² 2015 HPE Curriculum, Beckett Affidavit Ex. 18 p. 227 [JR vol. 31 tab 29-18 p. 11166]; 2018 HPE Curriculum p. 209 [JR vol. 27 tab 29-4 p. 8826; RC vol. 1 tab 1].

¹³³ 2018 HPE Curriculum p. 184 [JR vol. 27 tab 29-4 p. 8801; RC vol. 1 tab 1].

¹³⁴ Beckett Cross, pp. 133-34, q. 416 [BOT vol. 1 tab 1; RC vol. 2 tab 7].

¹³⁵ Beckett Cross, pp. 133-34, q. 416 [BOT vol. 1 tab 1; RC vol. 2 tab 7].

¹³⁶ Brien Affidavit para. 53 [JR vol. 45 tab 31 p. 18946; RC vol. 1 tab 5].

2015 expectation adds the specific word “genitalia.” As explained by ADM Beckett, before the 2015 HPE Curriculum was issued, teachers developed lesson plans teaching the proper names for genitalia as a “major part of the body.”¹³⁷ Teachers “still have the ability” today to develop lesson plans that teach the correct names for genitalia.¹³⁸

d. Gender identity and sexual orientation

85. ETFO is incorrect to state that the 2018 HPE Curriculum “merely notes” that the topics of gender identity or sexual orientation “must be addressed with sensitivity.”¹³⁹ In fact, the 2018 curriculum provides expressly that it is “critical” to student success “to create an atmosphere in which students of all body shapes and sizes, abilities, gender identities and sexual orientations...can feel accepted, comfortable, and free from harassment.”¹⁴⁰ It also expressly states that “all students, parents, and other members of the school community – regardless of...sex...gender identity, sexual orientation...or other similar factors – are welcomed, included, treated fairly, and respected.”¹⁴¹

86. It should be noted that, except for one mandatory expectation in Grade 8, all express references to “gender identity” in the 2015 HPE Curriculum appear in optional examples or teacher prompts.¹⁴² In 2018, an HPE curriculum expectation about gender identity and sexual orientation appears in Grade 9.¹⁴³

87. The 2018 HPE Curriculum provides that in Grade 2, students will learn to “distinguish

¹³⁷ Beckett Cross, pp. 121-22 qq. 379-80 [BOT vol. 1 tab 1; RC vol. 2 tab 7].

¹³⁸ Beckett Cross, pp. 121-22 qq. 379-80 [BOT vol. 1 tab 1; RC vol. 2 tab 7].

¹³⁹ ETFO factum para. 42.

¹⁴⁰ 2018 HPE Curriculum p. 11 [JR vol. 27 tab 29-4 p. 8628; RC vol. 1 tab 1].

¹⁴¹ 2018 HPE Curriculum p. 57 [JR vol. 27 tab 29-4 p. 8674; RC vol. 1 tab 1].

¹⁴² 2015 HPE Curriculum, Beckett Affidavit Ex. 18 pp. 124, 157, 159, 172, 199, 215 (optional examples or teachers prompts), 216 (mandatory expectation) [JR vol. 31 tab 29-31 pp. 11063, 11096, 11098, 11111, 11138, 11154-11155].

¹⁴³ Ontario Secondary School HPE Curriculum, Beckett Affidavit Ex. 62 p. 104 [JR vol. 43 tab 29-62 p. 18182; RC vol. 1 tab 2]

the similarities and differences between themselves and others,” and “describe how to relate positively to others...and describe behaviours that can be harmful in relating to others.”¹⁴⁴ As explained by ADM Beckett, while gender identity is not listed as an example of “differences” in the 2018 HPE Curriculum, the learning expectation is articulated at a level that continues to provide “lots of opportunity” for teachers “to teach the gender identity concept in the class.”¹⁴⁵ The Ontario Physical and Health Education Association (Ophea), an organization that creates HPE teacher resources and lesson plans, has mapped one of its sample lesson plans from 2015 that includes gender identity and sexual orientation onto this 2018 Grade 2 expectation.¹⁴⁶

88. The 2018 HPE Curriculum also provides that students in Grade 5 will learn to “explain how a person’s actions (*e.g., negative actions such as name calling, making homophobic or racist remarks...positive actions such as praising, supporting, including*) can affect the feelings, self-concept, emotional well-being, and reputation of themselves and others.”¹⁴⁷ “Homophobia” is defined in the glossary as “[a] disparaging or hostile attitude or a negative bias, which may be overt or unspoken and which may exist at an individual and/or systemic level, towards people who are lesbian, gay, bisexual, or transgendered (LGBT).”¹⁴⁸

89. The fact that the words “gender identity” do not specifically appear in the 2018 learning expectations does not mean that teachers may not teach about this topic. ADM Beckett was clear on cross-examination that “yes, [students] can learn about gender identity.”¹⁴⁹ In his evidence, he also noted that teachers are required to teach in an inclusive

¹⁴⁴ 2018 HPE Curriculum pp. 97-98 [JR vol. 27 tab 29-4 pp. 8714-8715; RC vol. 1 tab 1].

¹⁴⁵ Beckett Cross, pp. 114-15, qq. 358-60 [BOT vol. 1 tab 1; RC vol. 2 tab 7].

¹⁴⁶ Ophea Program Planning Resource, Shubat Affidavit Ex. J [JR vol. 11 tab 18-J p. 2870; RC vol. 3 tab 37]; Ophea’s Curriculum Resource – Lesson Plan – Grade 3, Shubat Affidavit Ex. C [JR vol. 10 tab 18-C pp. 2620-2624; RC vol. 3 tab 38].

¹⁴⁷ 2018 HPE Curriculum p. 146 [JR vol. 27 tab 29-4 p. 8763; RC vol. 1 tab 1].

¹⁴⁸ 2018 HPE Curriculum p. 213 [JR vol. 27 tab 29-4 p. 8830; RC vol. 1 tab 1].

¹⁴⁹ Beckett Cross pp. 116-117 q. 365 [BOT vol. 1 tab 1; RC vol. 2 tab 7].

way, for example by ensuring that the Grade 5 learning expectation about the “physical, emotional, and interpersonal changes associated with puberty” is implemented in a manner that reflects the diversity of the student population.¹⁵⁰ Prof. Brien similarly opined that the broadly-worded 2018 expectations “would allow latitude for gender identity questions to be raised by teachers or students.”¹⁵¹

90. Both the TDSB and Limestone District School Boards have expressly stated that they will support teaching about gender identity and sexual orientation.¹⁵² The Peel and Ottawa District School Boards have also stated that they will continue to teach in an inclusive way, including with respect to students with diverse gender identities.¹⁵³

e. Online behaviour/cyber-bullying

91. Contrary to ETFO’s assertion, the 2015 HPE Curriculum did not include the word “cyber-bullying” in any curriculum expectation (whether as mandatory or as optional content). Nor is it true that the 2018 curriculum is “focus[ed] on the risk of exposure to ‘sexual predators.’”¹⁵⁴ Both the 2015 and 2018 curriculums contain learning expectations in the same grades (Grade 4, 5, and 7) dealing with various risks associated with the use of technology.¹⁵⁵ Three of these expectations are identical in the two documents, including the Grade 4 expectation that students will learn to “describe various types of bullying and abuse...including bullying using technology.”¹⁵⁶ The definition of “bullying” in the glossary

¹⁵⁰ Beckett Affidavit para. 51 [JR vol. 27 tab 29 p. 8526; RC vol. 1 tab 3].

¹⁵¹ Brien Affidavit para. 47 [JR vol. 45 tab 31 p. 18944; RC vol. 1 tab 5].

¹⁵² Beckett Affidavit Ex. 83 [JR vol. 44 tab 29-83 pp. 18749-18786; RC vol. 3 tab 33]; Beckett Affidavit Ex. 84 [JR vol. 44 tab 29-84 pp. 18787-18790; RC vol. 3 tab 34].

¹⁵³ Beckett Affidavit Ex. 85 [JR vol. 44 tab 29-85 pp. 18791-18802; RC vol. 3 tab 35]; Beckett Affidavit Ex. 86 [JR vol. 44 tab 29-86 pp. 18802-18803; RC vol. 3 tab 36].

¹⁵⁴ ETFO factum paras. 43-44.

¹⁵⁵ Black Cross p. 165 qq. 865-68 [BOT vol. 2 tab 3; RC vol. 2 tab 9]; 2018 HPE Curriculum pp. 110, 128, 146, 180, 184 [JR vol. 27 tab 29-4 pp. 8727, 8745, 8763 8797, 8801; RC vol. 1 tab 1]; 2015 HPE Curriculum, Beckett Affidavit Ex. 18 pp. 122, 140, 160, 194 [JR vol. 31 tab 29-18 pp. 11061, 11079, 11099, 11133].

¹⁵⁶ Black Cross, p. 166 q 873 [BOT vol. 2 tab 3; RC vol. 2 tab 9], 2018 HPE Curriculum p. 128 [JR vol. 27 tab

of the 2018 HPE Curriculum further provides that “[b]ullying can occur in person or through the use of information and communication technologies (e.g., spreading rumours or hurtful images or comments by means of e-mail or text messaging, or on social media sites or personal websites).”¹⁵⁷ Prof. Brien opined that information about non-consensual sharing of images is “information that teachers would be authorized to share as being consistent with the expected outcomes” in the 2018 curriculum.¹⁵⁸

92. The word “sexting” occurred only twice in the 2015 HPE Curriculum: once in a Grade 7 teacher prompt, and once in a Grade 7 learning expectation.¹⁵⁹ In 2018, Ontario includes the word “sexting” in Grade 9 in the HPE curriculum.¹⁶⁰ No other province includes the word “sexting” in its K-9 HPE curriculum at all.¹⁶¹

f. Sexually transmitted diseases/sexually transmitted infections

93. The Applicants and Interveners object to the use of the “outdated” term STD in the 2018 HPE Curriculum, preferring instead the term STI. However, STD is the term used by the US Centres for Disease Control and Prevention, Planned Parenthood, and the title of a “well-respected” international scholarly journal (*The International Journal of STD and AIDS*) that ETFO’s own expert Dr. Logie published in as recently as May 2018.¹⁶² STD is also the term used by the K-9 curriculums of Alberta, Manitoba, Newfoundland, and the NWT.¹⁶³

29-4 p. 8745; RC vol. 1 tab 1]; 2015 HPE Curriculum, Beckett Affidavit Ex. 18 p. 140 [JR vol. 31 tab 29-18 p. 11079].

¹⁵⁷ 2018 HPE Curriculum p. 210 [JR vol. 27 tab 29-4 p. 8827; RC vol. 1 tab 1].

¹⁵⁸ Brien Affidavit para. 50 [JR vol. 45 tab 31 p. 18945; RC vol. 1 tab 5].

¹⁵⁹ 2015 HPE Curriculum, Beckett Affidavit Ex. 18 pp. 195, 198 [JR vol. 31 tab 29-18 pp. 11134, 11137].

¹⁶⁰ Ontario Secondary School HPE Curriculum, Beckett Affidavit Ex. 62 p. 102 [JR vol. 43 tab 29-62 p. 18180; RC vol. 1 tab 2].

¹⁶¹ Beckett Affidavit Ex. 51 [JR vol. 31 tab 29-51, pp. 11355-11360; RC vol. 3 tab 52].

¹⁶² Logie Cross Exs. D, E, F, G [BOT vol. 7 tabs 7-C, 7-D, 7-E, 7-F, 7-G; RC vol. 3 tabs 39-42]; Logie Cross pp. 76-78 qq. 365-372 [BOT vol. 7 tab 8; RC vol. 2 tab 11].

¹⁶³ Alberta HPE Curriculum, Beckett Affidavit Ex. 53 pp. 7 (Grade 6), 12 (Grade 8) [JR vol. 31 tab. 29-53 pp. 11422, 11427; RC vol. 3 tab 54]; Manitoba HPE Curriculum, Beckett Ex. 55 p. 182 (“STD/STI”) [JR vol. 32 tab 29-55 p. 11870; RC vol. 3 tab 55]; Newfoundland HPE Curriculum, Ex. 56 pp. 41 (Grade 7), 50 (Grade 8) [JR

94. The other differences identified by the Applicants and Interveners are found in the optional teacher prompts and examples. Any teacher who believes that the examples and prompts in the 2018 HPE Curriculum are unhelpful is free to use others.¹⁶⁴

H. Laws and policies that require inclusivity and prohibit discrimination

95. In addition to the guidance in the curriculum itself, laws and policies are in place to ensure that all students are taught in a safe, equitable and inclusive learning environment free from discrimination. None of these laws or policies is affected by a change in curriculum. Teachers must deliver any curriculum in a manner consistent with these requirements.

96. The *Human Rights Code* protects students against discrimination based on sex, sexual orientation, gender identity and gender expression, among other grounds. Teachers and school boards are required to comply with the *Code*. The *Education Act* also requires boards to “promote a positive school climate that is inclusive and accepting of all pupils” including those of any “sex, sexual orientation, gender identity [or] gender expression.”¹⁶⁵

97. The Ministry directs boards through Policy/Program Memorandums.¹⁶⁶ PPM 119 “Developing and Implementing Equity and Inclusive Education Policies in Ontario Schools” requires boards to have an equity and inclusive education policy that is comprehensive and covers the grounds of discrimination in the *Code*.¹⁶⁷ Boards must embed “equity and inclusive education in all their other policies, programs, guidelines, and practices, so that an equity and

vol. 34 tab 29-56 pp. 12577, 12586; RC vol. 3 tab 56]; NWT HPE Curriculum, Beckett Ex. 59 p. FL8.55 [JR vol. 39 tab 29-59 pp. 15888; RC vol. 3 tab 57].

¹⁶⁴ 2018 HPE Curriculum pp. 16-17 [JR vol. 27 tab 29-4 pp. 8633-8634; RC vol. 1 tab 1].

¹⁶⁵ *Education Act*, [R.S.O. 1990, c. E.2](#), s. 169.1(1).

¹⁶⁶ Beckett Affidavit para. 154 [JR vol. 27 tab 29 p. 8583; RC vol. 1 tab 3]. These are referred to as “PPMs”.

¹⁶⁷ Beckett Affidavit Ex. 66 pp. 3-4 [JR vol. 44 tab 29-66 pp. 18474-18475; RC vol. 3 tab 43]; see also Ontario’s Equity and Inclusive Education Strategy, Beckett Affidavit Ex. 63 [JR vol. 43 tab 29-63 pp. 18300-18334]. See e.g. equity and inclusive education policies at Beckett Affidavit Exs. 67-73 [JR vol. 44 tabs 29-67 – 29-73 pp. 18481-18574].

inclusive education focus is an integral part of every board's operations and permeates everything that happens in its schools.”¹⁶⁸

98. Other PPMs provide additional direction to help ensure a safe, positive and inclusive school climate.¹⁶⁹ Boards have also developed guides on topics including gender identity and gender expression.¹⁷⁰ Teachers also have professional obligations to ensure the well-being of their students that arise under the *Ontario College of Teachers Act, 1996*.¹⁷¹

I. Many teaching resources are available to support teachers

99. Teachers have access to a variety of professional learning and supports, including resources on inclusivity for LGBTQ2S+ students. ETFO offers equity workshops this school year to assist members in supporting LGBTQ2S+ students and families.¹⁷² ETFO's website includes “ETFO Suggested Resources for Gender Independent Children and Transgender Youth,” linking to a variety of resources including “Creating Safe and Inclusive Schools for Gender-Independent Children” and “How to Become a Super Rad Gender Warrior Classroom Teacher.”¹⁷³ ETFO witness Dr. Pyne co-authored a 2018 publication identifying useful tools and resources for teachers teaching gender-diverse students.¹⁷⁴ The Native Youth Sexual

¹⁶⁸ Beckett Affidavit Ex. 66 pp. 1, 6, 7 [JR vol. 44 tab 29-66 pp. 18472, 18477-18478; RC vol. 3 tab 43]. See also Equity and Inclusive Education in Ontario Schools: Guidelines for Policy Development and Implementation – 2014, Beckett Affidavit Ex. 64 [JR vol. 43 tab 29-64 pp. 18335-18432].

¹⁶⁹ PPM 144: Bullying Prevention and Intervention, Beckett Affidavit Ex. 79 [JR vol. 44 tab 29-79 pp. 18693-18709] (see also *Education Act*, s. 302(3.4)); PPM 145: Progressive Discipline and Promoting Positive Student Behaviour, Beckett Affidavit Ex. 80 [JR vol. 44 tab 29-80 p. 18711-18736]; PPM 128: The Provincial Code of Conduct and School Board Codes of Conduct, Beckett Affidavit Ex. [JR vol. 44 tab 29-81 p. 18738-18745]

¹⁷⁰ Beckett Affidavit para. 159 [JR vol. 27 tab 29 pp. 8585-8586; RC vol. 1 tab 3]; Beckett Affidavit Exs. 74-78 [JR vol. 44 tabs 29-74 – 29-78 pp. 18575-18691].

¹⁷¹ *Ontario College of Teachers Act, 1996*, S.O. 1996, c. 12; Ontario College of Teachers Ethical Standards, Gangaram Cross Ex. V p. 2 [BOT vol. 6 tab 5-V]; Ontario College of Teachers Standards of Practice, Gangaram Cross Ex. U pp. 2-3 [BOT vol. 6 tab 5-U].

¹⁷² Dawson Cross pp. 50-51 qq. 238-245 [BOT vol. 3 tab 4; RC vol. 2 tab 21]; Dawson Cross Ex. S [BOT vol. 4 tab 4-S; RC vol. 3 tab 44]; Dawson Cross Ex. T [BOT vol. 4 tab 4-T].

¹⁷³ Dawson Cross Ex. A [BOT vol. 3 tab 4-A; RC vol. 3 tab 45]; Dawson Cross Ex. D [BOT vol. 3 tab 4-D; RC vol. 3 tab 46]; Dawson Cross Ex. F [BOT vol. 3 tab 4-F; RC vol. 3 tab 47].

¹⁷⁴ Teach Your Parents and Providers Well, Pyne Cross Ex. A [BOT vol. 10 tab 12-A]; Pyne Cross p. 69 qq. 355-

Health Network website links to a resource called “Safe and Caring Schools for Two Spirit Youth: A guide for teachers and students.”¹⁷⁵

100. Resources are also available on how to teach digital and media literacy. MediaSmarts, an organization cited by ETFO’s expert Dillon Black, creates resources such as lesson plans entitled “That’s Not Cool: Healthy and Respectful Relationships Online” and “Understanding Cyberbullying – Virtual vs. Physical Worlds.”¹⁷⁶

101. Teachers also have access to lesson plans linked to the 2018 HPE Curriculum, including 2015 Ophea lesson plans mapped to the 2018 learning expectations.¹⁷⁷

102. Prof. Brien, an expert in teachers’ professional learning, gave uncontested evidence that a variety of resources from external organizations are available to teachers “to assist them in taking the broad curriculum statements and developing courses of study, resource materials, unit plans, and weekly and daily lesson plans.”¹⁷⁸

J. The health curriculums in other provinces and territories

103. There is no authoritative educational standard across Canada that prescribes the particular content that should be included in a sexual health education curriculum, or the particular grade in which any particular content should be taught. While the Public Health Agency of Canada’s *Canadian Guidelines for Sexual Health Education* notes that effective sexual health education should be “age-appropriate” and “should be provided from the

358 [BOT vol. 10 tab 12; RC vol. 2 tab 14]. See also Pyne Cross Exs. B - G [BOT vol. 12 tabs 12-B – 12-G; RC vol. 3 tab 48].

¹⁷⁵ Williams Cross Ex. A [BOT vol. 11 tab 15-A]; Williams Cross p. 32 qq. 122-24 [BOT vol. 11 tab 15; RC vol. 2 tab 20].

¹⁷⁶ Black Cross pp. 91-92 qq. 475-480 [BOT vol. 2 tab 3; RC vol. 2 tab 9]; Black Cross Exs. N-O [BOT vol. 2 tabs 3-N – 3O; RC vol. 3 tab 49].

¹⁷⁷ Shubat Cross Ex. A [BOT vol. 11 tab 14-A]; Shubat Cross Ex. B [BOT vol. 11 tab 14-B]; Shubat Affidavit Ex. J [JR vol. 11 tab 18-J p. 2867; RC vol. 3 tab 37].

¹⁷⁸ Brien Affidavit para. 13-14 [JR vol. 45 tab 31 pp. 18929-18930; RC vol. 1 tab 5].

beginning of elementary school to the end of high school,” the Guidelines do not define age-appropriateness or set out a schedule of grades in which particular topics should be taught.¹⁷⁹

104. Each jurisdiction in Canada makes its own determinations on these issues, and these determinations change over time. There is considerable diversity in terms of what sexual health topics are addressed, the level of detail at which they are addressed, and the grade in which they are addressed across Canadian provinces today.¹⁸⁰ As Prof. Brien noted, “There is no single right answer to when and how sexual health education should be taught.”¹⁸¹

105. For example, human reproduction is introduced in the K-9 HPE curriculums in Grade 3 in Ontario, Grade 5 in Alberta, Grade 6 in PEI, and not at all in British Columbia. Online safety is introduced in Grade 4 in Ontario, Grade 5 in Québec, and not at all in the NWT. Sexual orientation is included in Grade 5 in Ontario (in an example), in Grade 9 in Newfoundland, and not at all in Alberta. Contraception is introduced in Grade 8 in Ontario, Grade 9 in Saskatchewan, and not at all in Québec. In 2018, gender identity is introduced in Ontario in Grade 9, but is not included at all in the K-9 HPE curriculums of British Columbia, Alberta, Manitoba, Newfoundland and NWT.¹⁸² As Prof. Brien noted upon examining the curriculum documents from other jurisdictions in Canada, “the sexual health topics in Ontario’s 2018 HPE curriculum are generally addressed at the middle of the grade ranges compared to the other jurisdictions.”¹⁸³

106. Studies of teachers’ and parents’ views show no agreement on the grades in which particular sexual health topics should be taught. ETFO’s witness Dr. Bialystok agreed that, in

¹⁷⁹ Brien Affidavit para. 17 [JR vol. 45 tab 31 p. 18931; RC vol. 1 tab 5]; See also McKay Cross pp. 31-32 qq. 124-127 [BOT vol. 8 tab 9; RC vol. 2 tab 12].

¹⁸⁰ Brien Affidavit para. 19-22 [JR vol. 45 tab 31 pp. 18931-18934; RC vol. 1 tab 5].

¹⁸¹ Brien Affidavit para. 17 [JR vol. 45 tab 31 p. 18931; RC vol. 1 tab 5].

¹⁸² Beckett Affidavit Ex. 51 [JR vol. 31 tab 29-51 pp. 11355-11359; RC vol. 3 tab 52].

¹⁸³ Brien Affidavit para. 23 [JR vol. 45 tab 31 p. 18934; RC vol. 1 tab 5].

a survey of teachers that she cited in her work, there was “definitely a difference of opinion” as to the right grade range in which to introduce sexual topics, with the majority of teachers indicating that all sexual health topics except for “Personal safety”, “Body image” and “Correct names for genitals” should be introduced no earlier than Grades 6-8.¹⁸⁴

107. Similarly, a survey of more than 4,200 parents cited by ETFO’s witness Dr. McKay concluded that “there was no consensus on what grade level various topics should be introduced.”¹⁸⁵ Of the 26 sexual health topics included in the survey, the only topic that a majority of parents thought should be introduced in Grades K-3 was “Personal safety.” A majority of parents thought that 22 of the 26 topics should be introduced no earlier than Grades 6-8.¹⁸⁶ Dr. McKay’s own survey of parents found “although nearly all parents in the current study wanted sexual orientation addressed at the upper grade levels, very few wanted it addressed before grade 7.”¹⁸⁷ Of the 15 topics included, the only ones a majority of parents wanted taught in Grades JK-4 were “Building equal, healthy relationships” and “Helping children and youth avoid sexual abuse.” Only 0-2% of parents thought that abstinence, reproduction, sexual orientation or birth control should be taught before Grade 7.¹⁸⁸

108. What this provincial diversity, expert evidence and survey research reveals is that there is no consensus – among teachers, parents or educational authorities – on when particular sexual health topics should be introduced in a curriculum. The Applicants proceed from the assumption that Ontario’s 2018 HPE Curriculum is deficient to the extent that it introduces certain topics in later grades than did the 2015 HPE Curriculum. This assumption is

¹⁸⁴ Bialystok Cross pp. 19-25 qq. 87-109 and Ex. A [BOT vol. 1 tab 2; RC vol. 2 tab 8, vol. 3 tab 62].

¹⁸⁵ McKay Cross pp. 92-93 q. 358 and Ex. B [BOT vol. 8 tabs 9 and 9-B; RC vol. 2 tab 12, vol. 3 tab 60].

¹⁸⁶ McKay Cross p. 100 qq. 390-391 and Ex. B [BOT vol. 8 tabs 9 and 9-B; RC vol. 2 tab 12, vol. 3 tab 60].

¹⁸⁷ McKay Cross Ex. A p. 9 [BOT vol. 8 tab 9-A; RC vol. 3 tab 59].

¹⁸⁸ McKay Cross Ex. A pp. 6-8 [BOT vol. 8 tab 9-A; RC vol. 3 tab 59].

contradicted by the diversity of HPE curriculums across Canada and the lack of societal and expert consensus on when to introduce particular topics. There is no fixed educational standard against which the placement of topics in particular grades in the 2018 HPE curriculum can be assessed. As Prof. Brien explained in his uncontested evidence:

Educational and pedagogical research has not 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 role 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.¹⁸⁹

K. Limitations of the Applicants' expert evidence

109. Much of ETFO's expert evidence is speculative and outside the scope of the witnesses' expertise. None of its witnesses are experts in curriculum or classroom instruction. Many have never examined classroom instruction by elementary school teachers.¹⁹⁰ Most do not have degrees in Education or experience as elementary teachers.¹⁹¹ None of ETFO's experts relied on or cited any publication examining whether changes to a provincial curriculum, or differences in curriculums of different provinces, lead to different outcomes in student health or well-being.¹⁹² None have published research connecting the content of an elementary

¹⁸⁹ Brien Affidavit para. 24 [JR vol. 45 tab 31 p. 18934; RC vol. 1 tab 5].

¹⁹⁰ Bialystok Cross p. 27 q. 123 [BOT vol. 1 tab 2; RC vol. 2 tab 8]; Black Cross pp. 87-89, 167-68, 173-74 qq. 457, 464, 878, 880, 907-908, 910 [BOT vol. 2 tab 3; RC vol. 2 tab 9]; Khan Cross pp. 20-21 qq. 96, 100-01 [BOT vol. 6 tab 7; RC vol. 2 tab 10]; Logie Cross pp. 49-51, 98 qq. 253, 256, 264-66, 269, 455 [BOT vol. 7 tab 8; RC vol. 2 tab 11]; McKay Cross pp. 177-79, 221-22 qq. 655-56, 658, 793 [BOT vol. 8 tab 9; RC vol. 2 tab 12]; Pepler Cross pp. 25-27 qq. 79-81, 85 [BOT vol. 9 tab 11; RC vol. 2 tab 13]; Pyne Cross pp. 66-67 q. 338, 344-51 [BOT vol. 10 tab 12; RC vol. 2 tab 14]; Senn Cross pp. 18-19 qq. 85-86, 89-92 [BOT vol. 11 tab 13; RC vol. 2 tab 15].

¹⁹¹ Bialystok Cross pp. 5-7 qq. 12-18 [BOT vol. 1 tab 2; RC vol. 2 tab 8]; Black Cross pp. 87-88 qq. 455-56, 458, 461, 463 [BOT vol. 2 tab 3; RC vol. 2 tab 9]; Khan Cross pp. 20-21 qq. 93, 99 [BOT vol. 6 tab 7; RC vol. 2 tab 10]; Logie Cross pp. 49-50, qq. 257-59 [BOT vol. 7 tab 8; RC vol. 2 tab 11]; McKay Cross p. 177 qq. 654-57 [BOT vol. 8 tab 9; RC vol. 2 tab 12]; Pepler Cross pp. 7, 19 qq. 15-19, 62 [BOT vol. 9 tab 11; RC vol. 2 tab 13]; Pyne Cross pp. 66 qq. 340-43 [BOT vol. 10 tab 12; RC vol. 2 tab 14]; Senn Cross p. 18 qq. 79-83 [BOT vol. 11 tab 13; RC vol. 2 tab 15].

¹⁹² Bialystok Cross pp. 26-27 qq. 118-123 [BOT vol. 1 tab 2; RC vol. 2 tab 8]; Black Cross pp. 85-86 qq. 446-50 [BOT vol. 2 tab 3; RC vol. 2 tab 9]; Khan Cross pp. 12, 14-20, qq. 39, 52, 54-57, 65, 68, 71, 76, 82-85, 90-92 [BOT vol. 6 tab 7; RC vol. 2 tab 10]; Logie Cross pp. 48-49, qq. 251-252 [BOT vol. 7 tab 8; RC vol. 2 tab 11];

school curriculum to the harms alleged.¹⁹³

a. Lauren Bialystok

110. Dr. Bialystok, a philosopher by training, has no degrees in education.¹⁹⁴ She has never been an elementary or secondary school teacher, and has never been employed by a school board.¹⁹⁵ None of Dr. Bialystok's papers surveyed or interviewed students or parents of elementary school students, or examined classroom instruction by elementary teachers.¹⁹⁶

111. The only survey of Ontario teachers that Dr. Bialystok has ever conducted is a 2017 survey of teacher attitudes towards the 2015 HPE curriculum.¹⁹⁷ She is not aware of any other surveys or studies about the attitudes of Ontario teachers to sexual education.¹⁹⁸ In cross-examination, Dr. Bialystok acknowledged that her comments in her affidavit about how teachers might react to the issuance of the 2018 HPE Curriculum are not based on any survey or empirical study of teachers conducted since the issuance of the 2018 HPE Curriculum; rather, she characterized these opinions as "extrapolative."¹⁹⁹

112. Dr. Bialystok believes that the 2015 HPE Curriculum should be compulsory for all students, including students who are privately schooled or home-schooled.²⁰⁰ She wrote that

McKay Cross pp. 174-75 qq. 640-45 [BOT vol. 8 tab 9; RC vol. 2 tab 12]; Pepler Cross p. 26 q. 84 [BOT vol. 9 tab 11; RC vol. 2 tab 13]; Pyne Cross pp. 64-65 qq. 331-35 [BOT vol. 10 tab 12; RC vol. 2 tab 14]; Senn Cross pp. 16-17 qq. 67, 70-72 [BOT vol. 11 tab 13; RC vol. 2 tab 15].

¹⁹³ Bialystok Cross pp. 26-27, qq. 118-120 [BOT vol. 1 tab 2; RC vol. 2 tab 8]; Black Cross pp. 86-87, 174-75 qq. 451-54, 910, 914 [BOT vol. 2 tab 3; RC vol. 2 tab 9]; Khan Cross pp. 21, 30-31 qq. 98, 152-53 [BOT vol. 6 tab 7; RC vol. 2 tab 10]; Logie Cross p. 49 qq. 253-255 [BOT vol. 7 tab 8; RC vol. 2 tab 11]; McKay Cross pp. 175-76, 226 qq. 648, 652, 802 [BOT vol. 8 tab 9; RC vol. 2 tab 12]; Pepler Cross pp. 15-17, 26, 97-98, 107-108 qq. 51-54, 84, 403-404, 406, 439-40 [BOT vol. 9 tab 11; RC vol. 2 tab 13]; Pyne Cross pp. 66, 106-107 qq. 337, 339, 498-99 [BOT vol. 10 tab 12; RC vol. 2 tab 14]; Senn Cross p. 19 q. 77 [BOT vol. 11 tab 13; RC vol. 2 tab 15]. See also Williams Cross pp. 59-60 qq. 288-293 [BOT vol. 11 tab 15; RC vol. 2 tab 20].

¹⁹⁴ Bialystok Cross pp. 5-6 qq. 12-13 [BOT vol. 1 tab 2; RC vol. 2 tab 8].

¹⁹⁵ Bialystok Cross pp. 6-7 qq. 14-18, 21 [BOT vol. 1 tab 2; RC vol. 2 tab 8].

¹⁹⁶ Bialystok Cross pp. 26-27 qq. 118-123 [BOT vol. 1 tab 2; RC vol. 2 tab 8].

¹⁹⁷ Bialystok Cross pp. 26, 62-63 qq. 117, 265, 271 [BOT vol. 1 tab 2; RC vol. 2 tab 8].

¹⁹⁸ Bialystok Cross p. 38 qq. 167-68 [BOT vol. 1 tab 2; RC vol. 2 tab 8].

¹⁹⁹ Bialystok Cross pp. 63-64 qq. 272-74 [BOT vol. 1 tab 2; RC vol. 2 tab 8].

²⁰⁰ Bialystok Cross pp. 68-69 qq. 293-95 [BOT vol. 1 tab 2; RC vol. 2 tab 8].

parents who protested the 2015 HPE Curriculum preferred that their children learn about their bodies “during Frosh Week, on their wedding night, or not at all.”²⁰¹ She did not agree that this statement trivializes the concerns that parents might have had about the curriculum.²⁰²

b. Dillon Black

113. Mx. Black has no degrees in education, is not a faculty member at any Department of Education, has never done research observing how teachers teach in elementary school classrooms, and has never published a study examining or comparing the contents of an elementary curriculum.²⁰³ They are not an expert in classroom instruction, how teachers “translate the curriculum expectations into classroom programming,” or how teachers obtain and update their professional knowledge.²⁰⁴ In cross-examination, they admitted that several statements in their affidavit, including that the incidence of bullying reported by children is “highest in the youngest grades,” were not supported by the studies cited or any other study.²⁰⁵

c. Farrah Khan

114. Ms. Khan is not an expert in curriculum or the training of teachers.²⁰⁶ She is not on the faculty of any department of Education.²⁰⁷ She has not conducted any studies on the relationship between the words of an elementary school curriculum and rates of sexual assault or sexual harassment.²⁰⁸ She has never published a study of any kind.²⁰⁹

²⁰¹ Misha Abarbanel and Lauren Bialystok, “Ontario Sex Ed Curriculum Infringes Parents’ Rights? Think Again” (Huffington Post) p. 2, Bialystok Cross Ex. D [BOT vol. 1 tab 2-D].

²⁰² Bialystok Cross pp. 71-74 qq. 306-308 [BOT vol. 1 tab 2; RC vol. 2 tab 8].

²⁰³ Black Cross pp. 87-88, 174, 175 qq. 451-56, 464, 910, 915 [BOT vol. 2 tab 3; RC vol. 2 tab 9].

²⁰⁴ Black Cross pp. 88, 167, 168, 173 qq. 457-60, 878, 880, 907 [BOT vol. 2 tab 3; RC vol. 2 tab 9].

²⁰⁵ Black Cross pp. 56-61, 80-81, 175 qq. 299, 303, 308-309, 315-20, 413, 915 [BOT vol. 2 tab 3; RC vol. 2 tab 9].

²⁰⁶ Khan Cross p. 21 qq. 100-01 [BOT vol. 6 tab 7; RC vol. 2 tab 10].

²⁰⁷ Khan Cross p. 20, 21 q. 93, 99 [BOT vol. 6 tab 7; RC vol. 2 tab 10].

²⁰⁸ Khan Cross pp. 30-31 qq. 152-53 [BOT vol. 6 tab 7; RC vol. 2 tab 10].

²⁰⁹ Khan Cross p. 21 q. 98 [BOT vol. 6 tab 7; RC vol. 2 tab 10].

d. Carmen Logie

115. Dr. Logie, whose evidence is relied on heavily by the Interveners HALCO and Canadian HIV/AIDS Legal Network, is not an expert in the curriculum, curriculum delivery, elementary classroom instruction or teachers' professional training.²¹⁰ She has never done research observing how teachers teach in elementary school classrooms.²¹¹

116. Instead of reading the 2018 HPE Curriculum in preparing her affidavit, Dr. Logie reviewed a chart prepared by counsel for HALCO.²¹² In cross-examination, Dr. Logie learned for the first time that this chart omitted some mandatory sexual health expectations included in the 2018 HPE Curriculum.²¹³ Dr. Logie could not explain why the chart was incomplete and could not answer questions about how the omitted expectations might affect her opinions.²¹⁴

117. In Dr. Logie's opinion, both the 2018 and 2015 HPE Curriculums could be improved with respect to content about HIV treatment, and the 2018 HPE Curriculum is in fact better than the 2015 one with respect to content about HIV transmission.²¹⁵ She agreed that the 2018 HPE Curriculum content has the potential to protect against stigma and reduce harm.²¹⁶ Dr. Logie was not aware of the grades in which students in other provinces learn about HIV and STIs.²¹⁷ She agreed that for more than 99% of the population who will eventually acquire HIV, chlamydia or gonorrhea, learning about these topics in Grade 7 (as the 2018 curriculum requires) means they learn about these topics before they face them in life.²¹⁸

²¹⁰ Logie Cross pp. 49-51, 98 qq. 256, 265, 266, 269, 455 [BOT vol. 7 tab 8; RC vol. 2 tab 11].

²¹¹ Logie Cross p. 50 q. 264 [BOT vol. 7 tab 8; RC vol. 2 tab 11].

²¹² Logie Cross pp. 177-78 qq. 838-45 [BOT vol. 7 tab 8; RC vol. 2 tab 11].

²¹³ Logie Cross pp. 184-85 q. 881 [BOT vol. 7 tab 8; RC vol. 2 tab 11].

²¹⁴ Logie Cross pp. 184-186 qq. 878-80, 883-85 [BOT vol. 7 tab 8; RC vol. 2 tab 11].

²¹⁵ Logie Cross pp. 112, 126-28 qq. 515-517, 588-89, 594-96 [BOT vol. 7 tab 8; RC vol. 2 tab 11].

²¹⁶ Logie Cross pp. 188-94 qq. 899-923 [BOT vol. 7 tab 8; RC vol. 2 tab 11].

²¹⁷ Logie Cross p. 167 q. 784 [BOT vol. 7 tab 8; RC vol. 2 tab 11].

²¹⁸ Logie Cross p. 167 q. 783 [BOT vol. 7 tab 8; RC vol. 2 tab 11].

e. Alexander McKay

118. Dr. McKay is not a faculty member in any department of Education at any university and has never published any study that examined the implementation of elementary school curriculum in the classroom.²¹⁹ Nor has he done any research observing how teachers teach in elementary classrooms in Ontario.²²⁰ None of the papers attached to his affidavit conclude that particular sexual health education topics must be taught at a particular grade level.²²¹

119. Dr. McKay's opinion relies on the *Canadian Guidelines for Sexual Health Education* and the draft Core Principles for the forthcoming, unreleased new *Guidelines*, but he agreed that neither document specifies any particular words that should be used in a curriculum expectation or the grade in which any particular topic should be introduced in a curriculum.²²²

120. Dr. McKay's 2014 survey of parents did not ask parents for their views on the grades in which particular sexual health topics should be introduced or taught.²²³ The three Canadian surveys examining parents' attitudes with respect to particular sexual health topics indicate that there is no clear consensus on which topics should be assigned to which grade levels.²²⁴

121. Dr. McKay's affidavit stated that 18% of boys and 14% of girls report having had sexual intercourse "by the time they have completed Grade 8...and are in Grade 9."²²⁵ In cross-examination, he agreed that the paper he relied on for this statement actually stated that the Grade 9 and 10 students surveyed reported only beginning to have sex recently, and that fewer than 4% of Grade 9 boys and fewer than 3% of Grade 9 girls reported first having sex at

²¹⁹ McKay Cross p. 177 qq. 653, 655-656 [BOT vol. 8 tab 9; RC vol. 2 tab 12].

²²⁰ McKay Cross pp. 177-178 q. 658 [BOT vol. 8 tab 9; RC vol. 2 tab 12].

²²¹ McKay Cross p. 174 qq. 640-41 [BOT vol. 8 tab 9; RC vol. 2 tab 12].

²²² McKay Cross pp. 227-228, 231 qq. 804-805, 814 [BOT vol. 8 tab 9; RC vol. 2 tab 12].

²²³ McKay Cross pp. 62, 64, 68-72, 75 qq. 248, 253, 265, 271-72, 280-81, 289 [BOT vol. 8 tab 9; RC vol. 2 tab 12].

²²⁴ McKay Cross pp. 80, 85-89, 93-94, 127-28, 132, 134-35 qq. 308, 330-32, 360-64, 481-83, 502, 510-12 and Exs. A, B, C [BOT vol. 8 tabs 9, 9-A, 9-B, 9-C; RC vol. 2 tab 12, vol. 3 tabs 59-61].

²²⁵ McKay Affidavit at para. 49 [JR vol. 11 tab 19 p. 2899].

age 13 or younger.²²⁶ He did not agree that his statement about students having sex “by the time they have completed Grade 8” was misleading.²²⁷ The Intervener JFCY, however, was evidently misled by his statement, because it cites this statement to make the incorrect claim that “one fifth of children report engaging in sexual intercourse during elementary school.”²²⁸

f. Debra Pepler

122. Dr. Pepler is not an expert in classroom instruction and is not a faculty member in any department of Education.²²⁹ She has never done a study that examines the role of curriculum in preventing bullying, how teachers deliver the curriculum to students, or whether differences in curriculums lead to different outcomes.²³⁰ Nor has she done a study that examines the ideal time to introduce particular sexual health topics to elementary school students in an age-appropriate way.²³¹ When asked about the basis of her belief that a more specific curriculum would better protect student safety, Dr. Pepler agreed she was “hypothesizing” and had never done a study to confirm a connection between school curriculum and safety outcomes.²³²

g. Jake Pyne

123. Dr. Pyne is not an expert in classroom instruction, the implementation of elementary school curriculum, resources that are available to teachers implementing the curriculum, or the professional training and education of teachers.²³³ He is not on the faculty of any department of education, has no degrees in education, and has never been a school or board

²²⁶ McKay Cross pp. 156-58, 160-61 qq. 585-89, 600 [BOT vol. 8 tab 9; RC vol. 2 tab 12].

²²⁷ McKay Cross pp. 161-62, 165-67 qq. 601-604, 611-17 [BOT vol. 8 tab 9; RC vol. 2 tab 12].

²²⁸ JFCY factum para. 37.

²²⁹ Pepler Cross pp. 7, 19, 26-27 qq. 15-19, 62, 85 [BOT vol. 9 tab 11; RC vol. 2 tab 13].

²³⁰ Pepler Cross pp. 15-17, 127-28, 131-32 qq. 51-54, 84, 527-29, 539 [BOT vol. 9 tab 11; RC vol. 2 tab 13].

²³¹ Pepler Cross pp. 107-108 qq. 439-40 [BOT vol. 9 tab 11; RC vol. 2 tab 13].

²³² Pepler Cross pp. 132-33 qq. 540-42 [BOT vol. 9 tab 11; RC vol. 2 tab 13].

²³³ Pyne Cross p. 67 qq. 344-348 [BOT vol. 10 tab 12; RC vol. 2 tab 14].

administrator.²³⁴ He has never studied how teachers implemented the 2015 curriculum or how they will implement the 2018 HPE Curriculum.²³⁵ None of the exhibits to Dr. Pyne’s affidavit examine differences between elementary school curriculums in different provinces, changes to school curriculum, how teachers implement curriculum, or teachers’ professional learning.²³⁶

124. Dr. Pyne had “looked through most” of the 2018 HPE Curriculum but had not reviewed the Grade 9-12 HPE curriculum.²³⁷ In preparing his affidavit, he did not review any teacher resources to assist in implementing the 2018 HPE Curriculum or any statements by school boards regarding how they intend to deliver the 2018 HPE Curriculum.²³⁸

125. Dr. Pyne agreed that it was an overstatement in his affidavit to state that the 2018 HPE Curriculum sends the message that transgender people are “non-existent.”²³⁹ He has concerns about the definition of “homophobia” in both the 2015 and 2018 HPE curriculums.²⁴⁰ He acknowledged that of the three examples he provides in his affidavit of “removing” information about gender identity from the curriculum, two of them were in fact non-mandatory, optional examples or teacher prompts in the 2015 HPE Curriculum.²⁴¹ He also agreed that he did not consider whether teachers could use gender identity as an optional example in teaching any expectations in the 2018 HPE Curriculum.²⁴²

h. Charlene Senn

126. Prof. Senn has never published a study on how teachers teach in elementary school

²³⁴ Pyne Cross pp. 66-67 qq. 340-343 [BOT vol. 10 tab 12; RC vol. 2 tab 14].

²³⁵ Pyne Cross pp. 106-107 qq. 498-499 [BOT vol. 10 tab 12; RC vol. 2 tab 14].

²³⁶ Pyne Cross pp. 64-65 qq. 331-335 [BOT vol. 10 tab 12; RC vol. 2 tab 14].

²³⁷ Pyne Cross pp. 77-79 qq. 395, 400 [BOT vol. 10 tab 12; RC vol. 2 tab 14].

²³⁸ Pyne Cross pp. 99-101 qq. 471-78 [BOT vol. 10 tab 12; RC vol. 2 tab 14].

²³⁹ Pyne Cross p. 94 qq. 452-54 [BOT vol. 10 tab 12; RC vol. 2 tab 14].

²⁴⁰ Pyne Cross p. 97 qq. 461-62 [BOT vol. 10 tab 12; RC vol. 2 tab 14].

²⁴¹ Pyne Cross pp. 98-99, 103-04 qq. 466-68, 484-88 [BOT vol. 10 tab 12; RC vol. 2 tab 14].

²⁴² Pyne Cross p. 99 qq. 468-70 [BOT vol. 10 tab 12; RC vol. 2 tab 14]; Pyne Affidavit para. 27 [JR vol. 18 tab 24 p. 5546].

classrooms or on the content of programs delivered by elementary school teachers in classrooms.²⁴³ She is not an expert in how teachers deliver curriculums in classrooms, or in elementary school education, instruction or curriculum.²⁴⁴ None of the exhibits attached to her affidavit examine the content of any elementary school curriculum, the impact of changes to the elementary school curriculum, or whether different elementary school curriculums lead to different outcomes.²⁴⁵ Prof. Senn’s affidavit makes no reference to the 2018 curriculum.²⁴⁶

L. Limitations of the Applicants’ non-expert witnesses

127. The Applicants also rely on the evidence of non-expert witnesses. Much of this evidence is speculative, overstated, contains improper opinion evidence, and is reliant on inadmissible hearsay statements from unnamed individuals who could not be cross-examined.

a. Cindy Gangaram

128. Ms. Gangaram has taught Grades 6 to 8 at one elementary school for her entire teaching career.²⁴⁷ She has never been a school administrator, held office at the College, or been on faculty in a university department of education.²⁴⁸

129. Ms. Gangaram believes that there is a “formal directive” that requires her to use only materials developed for the 1998 HPE Curriculum. She explained that this “directive” does not come from the words of the 2018 HPE Curriculum.²⁴⁹ Instead, in her view:

When I’m referring to directive I’m referring to my inferred understanding of what I have been directed to do, and I’m calling that a directive. That inferred directive has come from a variety of sources where I have divined what direction I’m being told to

²⁴³ Senn Cross pp. 18-19 qq. 79, 81, 85, 86 [BOT vol. 11 tab 13; RC vol. 2 tab 15].

²⁴⁴ Senn Cross p. 19 qq. 89, 90, 91, 92 [BOT vol. 11 tab 13; RC vol. 2 tab 15].

²⁴⁵ Senn Cross pp. 16-17 qq. 68-71 [BOT vol. 11 tab 13; RC vol. 2 tab 15].

²⁴⁶ Senn Affidavit [JR vol. 15 tab 21 pp. 4275-4284].

²⁴⁷ Gangaram Cross pp. 5-6 qq. 13-14, 22 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

²⁴⁸ Gangaram Cross pp. 7-8 qq. 29-36 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

²⁴⁹ Gangaram Cross p. 175 q. 731 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

act in as a professional.²⁵⁰

130. The sources from which Ms. Gangaram has inferred this “directive” are the ForTheParents.ca website as it appeared on August 22, 2018 and the press release of the same date.²⁵¹ Ms. Gangaram believes the website was seeking feedback about the 2015 HPE Curriculum taught in 2017-18.²⁵² She stated that a lot of her interpretation is “by implication,” that “the whole directive feels like a contextual inference,” and that her interpretation that teachers may not use up-to-date information in delivering the 2018 HPE Curriculum is an inference she drew from these sources and “other context in society.”²⁵³

131. Ms. Gangaram could not think of any interpretation of the “directive” other than the one she has inferred.²⁵⁴ She had not read the other affidavits filed in this case.²⁵⁵ She was not aware that the TDSB had issued a statement indicating that “our staff is committed to teaching the re-issued 2010 curriculum including topics such as online-safety, sexual orientation, mental health, gender identification and consent, with our continued comprehensive safety and well-being approach” using “current, credible, evidence-based information combined with a respect for individual rights.”²⁵⁶ When she was shown this statement, her counsel refused to let her answer questions about whether it changed her interpretation of the “directive.”²⁵⁷

132. In her affidavit, Ms. Gangaram expressed concern that lesson materials developed for the 1998 HPE Curriculum are unsuitable for use in 2018. She admitted, however, that teachers

²⁵⁰ Gangaram Cross pp. 160-61 q. 684 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

²⁵¹ Gangaram Cross pp. 169-70, 172, 174 qq. 710-13, 723, 728 [BOT vol. 5 tab 5; RC vol. 2 tab 16]; Gangaram Affidavit Ex. J [JR vol. 5 tab 9-J pp. 1262-1263]; Gangaram Affidavit Ex. K [JR vol. 5 tab 9-K p. 1264-1268]; Gangaram Affidavit Ex. M [JR vol. 5 tab 9-M p. 1276-1278].

²⁵² Gangaram Cross pp. 187-89 qq. 762-67 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

²⁵³ Gangaram Cross pp. 168, 186, 198 qq. 706, 761, 782 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

²⁵⁴ Gangaram Affidavit para. 43 [JR vol. 5 tab 9 pp. 1108-09].

²⁵⁵ Gangaram Cross pp. 139-40, 334 qq. 610-11, 1253 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

²⁵⁶ Gangaram Cross pp. 308-10 qq. 1145-1152 [BOT vol. 5 tab 5; RC vol. 2 tab 16]; Beckett Affidavit Ex. 83 pp. 2, 5 [JR vol. 44 tab 29-83 pp. 18751-54; RC vol. 3 tab 33].

²⁵⁷ Gangaram Cross pp. 308-313 qq. 1144-1161 [BOT vol. 5 tab 5; RC vol. 2 tab 16; RC vol. 2 tab 16].

were not required to use 1998 lesson materials in 2018.²⁵⁸ She was not aware that Ophea had mapped its 2015 teacher resources to the 2018 HPE Curriculum, and ultimately agreed she did not know one way or the other whether teachers were prohibited from using the 2015 Ophea materials.²⁵⁹

133. Ms. Gangaram taught the 2010 HPE Curriculum (which is identical to the 2018 HPE Curriculum) for several years between 2010 and 2015. Of those years she said “I have always done no harm. I have always made a goal of creating an atmosphere in which students of all types feel accepted, comfortable and free from harassment.”²⁶⁰ She does not believe that she was in a conflict with her ethical or professional duties when she taught the HPE curriculum from 2010 to 2014, but believes she is in a conflict teaching the same curriculum today, even though no-one from her College or school board has told her so.²⁶¹

134. Since she began teaching in 2005, when the original 1998 HPE curriculum was in place, Ms. Gangaram has taught her classes, including HPE, with an “equity focus.”²⁶² Since 2013 or 2014, when the 2010 curriculum was in place, she has asked students to share their pronouns to help all students feel acknowledged and included.²⁶³ She considers it important to use gender-inclusive learning resources in all subjects, and strives to use current and accurate sources free of bias and stereotyping.²⁶⁴ Ms. Gangaram complies with her school board’s Code of Conduct. She expects other teachers to do so as well; she would not sit silent if a

²⁵⁸ Gangaram Affidavit paras. 25-26 [JR vol. 5 tab 9 pp. 1102-03].

²⁵⁹ Gangaram Cross pp. 130-31, 140, 284-85 qq. 570-571, 612-614, 1057-60 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

²⁶⁰ Gangaram Cross p. 225 q. 848 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

²⁶¹ Gangaram Cross pp. 303-308 qq. 1118-1143 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

²⁶² Gangaram Affidavit paras. 6-7 [JR vol. 5 tab 9 p. 1095]; Gangaram Cross pp. 97-98, 106 qq. 425-29, 473 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

²⁶³ Gangaram Cross pp. 107-09 qq. 481, 484-85, 487-89 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

²⁶⁴ Gangaram Cross pp. 73-74 qq. 321-29 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

member of the school community engaged in inappropriate behaviour.²⁶⁵ She is not aware of any complaints about her conduct that have been made to her employer or to the College.²⁶⁶

135. This year, Ms. Gangaram will provide inclusive, supportive and accurate information in her teaching and believes she can do so under the 2018 HPE Curriculum.²⁶⁷ Her affidavit includes inadmissible hearsay statements from unnamed colleagues and her own speculations about other unnamed teachers, none of whom provided evidence in this proceeding.

136. Ms. Gangaram expressed fear that someone could complain anonymously about her to the College for exercising her professional judgment.²⁶⁸ However, in cross-examination she acknowledged that she knows that the College does not investigate anonymous complaints, that she had no knowledge about whether this practice would change, and that she was not aware of what if anything from the consultation website was being provided to the College.²⁶⁹ She had not read the affidavit of ADM Beckett in this proceeding explaining exactly what information had been conveyed from the Ministry to the College.²⁷⁰

137. While Ms. Gangaram understands that it is the College that governs teachers, not the Minister or the Premier's Office, she is concerned that the College "will exercise its mission and responsibility the way that the Premier's Office tells it to" and that "the College, in disciplining teachers, may take direction from the Premier's Office."²⁷¹ There is no evidence to support this speculation that the College will not fulfill its independent statutory mandate.

²⁶⁵ Gangaram Cross pp. 22, 25-30, 112-120 qq. 100, 112-120, 134-137 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

²⁶⁶ Gangaram Cross pp. 7, 336-37 qq. 24-26, 1262 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

²⁶⁷ Gangaram Affidavit para. 59 [JR vol. 5 tab 9 pp. 1113-14].

²⁶⁸ Gangaram Affidavit para. 61 [JR vol. 5 tab 9 p. 1114].

²⁶⁹ Gangaram Cross pp. 332-33, 336, 356-57 qq. 1244-45, 1260-61, 1340 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

²⁷⁰ Gangaram Cross pp. 140, 356-357 qq. 611, 1340-1345 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

²⁷¹ Gangaram Cross pp. 339-341 qq. 1271-1278 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

b. Grand Chief Ogichidaa Francis Kavanaugh

138. Grand Chief Kavanaugh did not read the 2018 HPE Curriculum before swearing his affidavit.²⁷² He is not registered with the College and has not taught in a classroom since approximately 1979.²⁷³ He has never published any studies of any kind.²⁷⁴

c. Becky McFarlane

139. Ms. McFarlane offers her opinion about the impact of the 2015 HPE Curriculum and speculates about the potential impact of the 2018 HPE Curriculum.²⁷⁵ Ms. McFarlane is not an expert witness. Her affidavit does not indicate that she has any experience teaching elementary school, or that she has ever studied the relationship between the words in an elementary school curriculum, the content of lessons delivered by teachers, and student well-being. Her affidavit was sworn three weeks prior to the 2018-2019 school year. She provides no evidence about anything that has happened in the current school year.

d. Gretel Meyer Odell

140. Ms. Meyer Odell's affidavit contains inadmissible hearsay regarding the alleged views of unnamed teachers and others.²⁷⁶ These individuals have not provided evidence in this proceeding and are not available for cross-examination. Ms. Meyer Odell states in her affidavit that based on her review of bookings at the theatre company where she works, there has been a notable decline in bookings of the company's equity-oriented performances this year compared to two other years in which the 2015 HPE Curriculum was in place.²⁷⁷ In cross-examination, she acknowledged that the bookings she compared were for different plays

²⁷² Kavanaugh Cross p. 6 q. 7 [BOT vol. 6 tab 6]; RC vol. 2 tab 17.

²⁷³ Kavanaugh Cross p. 10 q. 21 [BOT vol. 6 tab 6; RC vol. 2 tab 17].

²⁷⁴ Kavanaugh Cross pp. 17-18 qq. 53-55 [BOT vol. 6 tab 6; RC vol. 2 tab 17].

²⁷⁵ McFarlane Affidavit paras. 9, 11, 13-14 [JR vol. 1 tab 7 pp. 59-60].

²⁷⁶ Meyer Odell Affidavit para. 20 [JR vol. 8 tab 13 pp. 2125-26; RC vol. 2 tab 18].

²⁷⁷ Meyer Odell Affidavit para. 18 [JR vol. 8 tab 13 p. 2125].

aimed at different grades offered in different venues; that one of the plays was for high school students as well as elementary students; that the number of bookings at her company has declined not just this year but across each year she reviewed; and that of the plays she compared, this year's play is the only one playing for the second time in the same year.²⁷⁸

e. Jennifer Peace

141. Ms. Peace is a math coach, not an HPE teacher.²⁷⁹ Her affidavit includes no information about anything that has happened in the current school year. Instead, her affidavit speculates about what her daughter's experience in school may be in the coming years.

142. Ms. Peace described her daughter's transition in school during the 2014-15 school year, noting that "it could not have been a more positive experience."²⁸⁰ It should be noted that, during the 2014-15 school year, the HPE curriculum that was in place was the 2010 HPE Curriculum, which is substantively identical to the 2018 HPE Curriculum in place today.

f. Tammy Shubat

143. Ms. Shubat is the Director of Programs at Ophea. After the issuance of the 2018 HPE Curriculum, Ophea's website advised educators that its existing lesson plans and teacher resources "will remain available & include new content that maps our existing lesson plans to the re-issued 2018 curriculum expectations."²⁸¹ It promoted this content to its subscribers throughout the Fall of 2018. In her affidavit, Ms. Shubat raised concerns about limits on Ophea's ability to map its existing resources onto the 2018 curriculum. None of these

²⁷⁸ Meyer Odell Cross pp. 18-19, 24, 29-30, 34-35, 42-43, 46-47, 49-50, qq. 84-86, 117-18, 153, 179-83, 216-22, 241-248, 259-60 [BOT vol. 9 tab 10; RC vol. 2 tab 18].

²⁷⁹ Peace Affidavit para. 1 [JR vol. 5 tab 10 p. 1296].

²⁸⁰ Peace Affidavit para. 7 [JR vol. 5 tab 10 p. 1298].

²⁸¹ Shubat Cross Ex. A [BOT vol. 11 tab 14-A].

concerns are mentioned in Ophea's communications with the public or its subscribers.²⁸²

144. In any event, these concerns are overstated. For example, while her affidavit claimed that none of Ophea's lesson plans related to gender identity could be linked to a learning expectation in the 2018 HPE Curriculum,²⁸³ Ophea did in fact link a lesson about gender identity and sexual orientation to a 2018 Grade 3 expectation.²⁸⁴ She also admitted that her concerns did not apply to all of the Grades in the 2018 HPE Curriculum.²⁸⁵

145. Although the topic was not mentioned in her affidavit, Ms. Shubat speculated in cross-examination as to what teachers would feel comfortable teaching in 2018, citing her contact with "a significant number" of unnamed educators.²⁸⁶ Ms. Shubat is not an expert witness and did not attach any studies or surveys of teacher attitudes to her affidavit.²⁸⁷ She agreed she was not pretending to represent the voice of tens of thousands of teachers she has never met.²⁸⁸

g. Krysta Williams

146. Ms. Williams is not a teacher.²⁸⁹ She did not review the 2018 HPE Curriculum; she read excerpts provided to her.²⁹⁰ None of the exhibits to her affidavit examine whether differences between school curriculums in different provinces lead to differences in any measure of sexual victimization or reporting sexual abuse, or whether changes in a curriculum produce changes in any measure of sexual victimization or reporting sexual abuse.²⁹¹

²⁸² Shubat Cross pp. 63-70 qq. 241-245, 249-51, 254, 260-61 [BOT vol. 11 tab 14; RC vol. 2 tab 19].

²⁸³ Shubat Affidavit para. 52 [JR vol. 10 tab 18 p. 2537].

²⁸⁴ Shubat Cross p. 52 q. 208 [BOT vol. 11 tab 14; RC vol. 2 tab 19]; Ophea's Program Planning Resource, Shubat Affidavit Ex. J [JR vol. 11 tab J p. 2870; RC vol. 3 tab 37]; Ophea's Curriculum Resource – Lesson Plan – Grade 3, Shubat Affidavit Ex. C Lesson 2 p. 3 of 5 [JR vol. 10 tab 18C p. 2622; RC vol. 3 tab 38].

²⁸⁵ Shubat Cross pp. 35-37, 39-40, 43 qq. 153-56, 161-62, 172, 181-82 [BOT vol. 11 tab 14; RC vol. 2 tab 19].

²⁸⁶ Shubat Cross pp. 50-51, 57-58 qq. 206, 226 [BOT vol. 11 tab 14; RC vol. 2 tab 19].

²⁸⁷ Shubat Cross p. 55-56 qq. 218, 221 [BOT vol. 11 tab 14; RC vol. 2 tab 19].

²⁸⁸ Shubat Cross p. 57-58 q. 226 [BOT vol. 11 tab 14; RC vol. 2 tab 19].

²⁸⁹ Williams Cross pp. 6, 37 qq. 12, 157-58 [BOT vol. 11 tab 15; RC vol. 2 tab 20].

²⁹⁰ Williams Cross pp. 39-41 qq. 170-76 [BOT vol. 11 tab 15; RC vol. 2 tab 20].

²⁹¹ Williams Cross pp. 69-70 qq. 360-362 [BOT vol. 11 tab 15; RC vol. 2 tab 20].

PARTS II AND III – ISSUES AND THE LAW

147. CCLA seeks declaratory and injunctive relief in relation to the issuance of the 2018 HPE Curriculum.²⁹² ETFO seeks an order quashing the decision to issue the 2018 HPE Curriculum, declaratory relief in relation to the ForTheParents.ca website, and costs.²⁹³ While the ETFO Notice of Application for Judicial Review sought additional relief,²⁹⁴ ETFO did not pursue any of these remedies in its factum and should be deemed to have abandoned them.

148. Ontario submits that these applications raise the following issues:

- A. The Applicants do not have standing to assert all of the *Charter* claims they raise.
- B. The Applicants have not adduced an adequate factual foundation for their claims.
- C. *Charter* s. 7 is not engaged in this case. Alternatively, there is no violation of the principles of fundamental justice.
- D. There is no discrimination contrary to *Charter* s. 15 or the *Human Rights Code*.
- E. The Divisional Court has no jurisdiction to grant the relief sought by ETFO in relation to the ForTheParents.ca website. In any event, the relief sought is moot.
- F. There is no infringement of the *Charter* s. 2(b) freedom of expression.
- G. In the alternative, any infringement of the *Charter* is reasonably justified.

149. Ontario submits that, in considering these issues, the Court should review the 2018 HPE Curriculum with a high degree of judicial deference. The Minister’s issuance of the curriculum was made pursuant to her statutory authority to set educational priorities and provide direction to all of Ontario’s publicly-funded schools. It should be approached with deference by the Court, given the Minister’s accountability to the Legislature and her greater

²⁹² CCLA factum at para. 83.

²⁹³ ETFO factum at para. 176.

²⁹⁴ For example, the ETFO Notice of Application sought declarations that the Respondent “violated the principles of natural justice and procedural fairness”, injunctive relief, and an order in the nature of prohibition [JR vol. 1 tab 2 pp. 17-18]. None of these grounds of relief are mentioned in ETFO’s factum.

institutional expertise in matters relating to education policy.

150. The Supreme Court has held that it is “a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility.”²⁹⁵ This deferential approach is especially warranted here as the Minister is democratically accountable and in a better institutional position to take into account broad considerations of public policy.²⁹⁶ As the Superior Court recently held, the court “has no business assessing the wisdom of core government policy decisions.” If those decisions are unwise or unpopular, then the citizens can vote for a new government at the next election.²⁹⁷

151. In *Katz*, the Supreme Court held that review of regulations “does not involve assessing the policy merits of the regulations to determine whether they are ‘necessary, wise, or effective in practice.’”²⁹⁸ The Court should not inquire into the underlying “political, economic, social or partisan considerations.”²⁹⁹ The same approach should be adopted here.

152. This Court has no institutional expertise in matters of education policy or curriculum development for elementary schools. It should not lightly interfere with the Minister’s judgement in these matters. Equally, the Court has no basis to substitute its views for those of the Minister on the question of how much parental consultation or community consensus is advisable before a sexual education curriculum should be implemented in Ontario’s schools.

²⁹⁵ *Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R. 2 at 7-8; *Comeau’s Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12 at para. 36.

²⁹⁶ Brown and Evans, *Judicial Review of Administrative Action in Canada*, 2nd ed. (Toronto: Thomson Reuters, 2009) at para. 15:1212. See also *Kennedy v. New Brunswick (Minister of Education)*, 2015 NBCA 58 at para. 65, *Mr. Shredding Waste Management v. New Brunswick (Minister of Environment and Local Government)*, 2004 NBCA 69 at para. 50.

²⁹⁷ *Tesla Motors Canada ULC v. Ontario (Ministry of Transportation)*, 2018 ONSC 5062 at para. 32.

²⁹⁸ *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 at paras. 25-28.

²⁹⁹ *Thorne’s Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106 at 112-13.

153. In this case, the Minister has concluded that more consultation with parents should have been undertaken in 2015, and that, as an interim measure pending further consultation, the HPE curriculum that had been in place without incident or public controversy for several years up to September 2015 should continue to be used. Contrary to ETFO's contentions (at paras. 149-155 of its factum), there is nothing arbitrary or irrational about this conclusion. As the Court of Appeal for Ontario has held:

There is nothing inappropriate, let alone unlawful, about the government consulting with and considering the public's reaction to a policy measure. To be politically expedient is to be politically responsive to selected and discrete public concerns. This is what governments do.³⁰⁰

A. The Applicants do not have standing to assert all of the *Charter* claims they raise

154. The Applicants bear the burden to prove that they have standing arising from a "direct personal legal interest" to raise their various *Charter* claims.³⁰¹ They have not done so. The Court should dismiss for want of standing all of ETFO's and CCLA's ss. 7 and 15 claims, and all of L.M.'s claims except for discrimination on the basis of sex and family status.

155. ETFO is not a natural person and so has no *Charter* ss. 7 or 15 rights.³⁰² It has no standing to assert the rights of others, including students. Ms. Gangaram is a teacher and also has no standing to assert the rights of students. Nor is it asserted that Ms. Gangaram's own *Charter* ss. 7 or 15 rights are engaged; rather, these claims are raised solely on behalf of students. The only *Charter* claim that the ETFO Applicants have standing to raise is the

³⁰⁰ *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)*, [2002] O.J. No. 1445 at paras. 50, 54 and 59 per Abella J.A. (as she then was) (C.A.).

³⁰¹ *Landau v. Ontario (AG)*, 2013 ONSC 6152 at paras. 16-20; *Swearengen v. Ontario (Minister of Natural Resources)*, [2005] O.J. No. 3403 at paras. 6-10 (Div. Ct.). See also *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675 at 688: "A party's ability to attack a legislation's constitutional validity on *Charter* grounds is more difficult to establish in a civil suit than in a criminal prosecution. The appellants bear the burden to establish their standing to raise *Charter* issues."

³⁰² *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927 at 1002-1004; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at 28, 30; *Canada (AG) v. Hislop*, 2007 SCC 10 at para. 73.

freedom of expression claim on behalf of teachers.

156. Like ETFO, CCLA is not an individual and has no *Charter* ss. 7 or 15 rights. There is also no allegation that Ms. McFarlane’s own ss. 7 or 15 rights are implicated by the elementary school curriculum. The CCLA Applicants’ standing therefore depends on L.M.

157. L.M. is the only party to either of these applications who is a student. There is no evidence concerning her experience in school during the 2018-2019 school year. There is no evidence concerning the impact of the 2018 HPE Curriculum on L.M.’s s. 7 rights.

158. For the *Charter* s. 15 claim, L.M.’s standing turns on the grounds of discrimination she has pleaded. CCLA has pleaded the grounds of sex, sexual orientation, gender identity, and family status.³⁰³ In addition, ETFO purports to raise on behalf of students the grounds of age, disability, Indigeneity, and gender expression.³⁰⁴ However, the only facts alleged about L.M. are that she is a 10-year-old girl with a queer parent. There is no evidence that L.M. has been subject to differential treatment on the basis of sexual orientation, disability, Indigeneity, HIV status, or gender identity or expression, or that she has standing to assert these grounds.

159. Defects in the Applicants’ standing cannot be remedied by their witnesses and interveners. An applicant cannot borrow standing from a non-party. The Supreme Court “takes an unfavourable view of attempts to back up an appellant’s lack of standing by way of interveners. Such efforts to bootstrap flawed standing are to be discouraged.”³⁰⁵

160. Nor has any basis been made out to grant public interest standing to any of the Applicants. They have neither pleaded nor argued for public interest standing. Even if they

³⁰³ CCLA factum paras. 44-45.

³⁰⁴ ETFO factum para. 159.

³⁰⁵ *Ontario Home Builders Assn v. York Region Board of Education*, [1996] 2 S.C.R. 929 at para. 33.

had, they would not have met their burden of persuading the Court to grant it.³⁰⁶ In granting public interest standing, courts will consider whether the factual underpinning for the claims being advanced is adequate, given that the determination of the issue may impact many individuals who are not before the court.³⁰⁷ There is no explanation as to why these claims were not brought by students with direct standing to assert the grounds alleged.³⁰⁸

161. No matter how important they consider these issues to be, the Applicants cannot bring a private reference. Concern for the welfare of others³⁰⁹ or disdain for government action³¹⁰ is not sufficient to ground a party's standing. If the Applicants cannot establish standing to raise their *Charter* claims, then those claims must be dismissed.

B. The Applicants have not adduced an adequate factual foundation for their claims

162. Applicants who allege a *Charter* breach are required to prove that breach with evidence. Where a person challenging the constitutionality of a law or state action fails to provide an adequate factual basis to decide the challenge, the challenge must fail.³¹¹ As the Supreme Court held in *MacKay*, “the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants’ position”:

Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions... *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic

³⁰⁶ *Canada (AG) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para. 37.

³⁰⁷ *Campisi v. Ontario (AG)*, 2017 ONSC 2884 at paras. 15-18; *Marchand v. Ontario* (2006), 81 O.R. (3d) 172 at paras. 24-27; aff'd 2007 ONCA 787 at para. 14, leave to appeal to SCC ref'd [2008] S.C.C.A. No. 37.

³⁰⁸ *Campisi v. Ontario (AG)*, 2017 ONSC 2884 at paras. 11-14, aff'd 2018 ONCA 869 at para. 8; *Landau v. Ontario (AG)*, 2013 ONSC 6152 at paras. 23-24; *Bernard v. Close*, 2017 FCA 52 at paras. 6-7, leave to appeal to SCC ref'd [2017] S.C.C.A. No. 169.

³⁰⁹ *Campisi v. Ontario (AG)*, 2017 ONSC 2884 at paras. 7-8, aff'd 2018 ONCA 869 at para. 4.

³¹⁰ *Marchand v. Ontario* (2006), 81 O.R. (3d) 172 at para. 24; *Landau v. Ontario (AG)*, 2013 ONSC 6152 at para. 16; *R. v. Jayaraj*, 2014 ONSC 6367 (Div. Ct.), leave to appeal to SCC ref'd, [2015] S.C.C.A. No. 129; *Jamieson v. British Columbia (AG)*, [1971] B.C.J. No. 126 at para. 14 (Sup. Ct.).

³¹¹ *Ernst v. Alberta Energy Regulator*, 2017 SCC 1 at para. 22 per Cromwell J.

counsel.³¹²

163. An adequate evidentiary foundation is particularly critical where, as here, the Applicants' concern is with the alleged effects of an impugned action.³¹³

164. This requirement of sufficient evidence is not about volume. The question is not how many witnesses the Applicants have led, but whether their evidence is cogent and proves the harms alleged: "While the evidentiary burden need not be onerous, the evidence must amount to more than a web of instinct."³¹⁴ Unsupported hypotheses are no stronger for being echoed by multiple witnesses: "A repetition of conjecture does not constitute evidence."³¹⁵

165. Where courts find invalidity, they do so in response to cogent and credible evidence. In *Bedford*, for example, the expert evidence included studies demonstrating an increase in the rate of violence and murder of street prostitutes following the enactment of the criminal prohibition, and empirical research on street prostitution demonstrating that in-person public screening enhanced prostitutes' safety.³¹⁶ No similar evidence has been adduced here.

166. While the Applicants have filed many affidavits in these proceedings, the factual record regarding the alleged *Charter* breaches is sparse and speculative. The Applicants have not identified any study examining whether changes in any elementary curriculum impact student outcomes, or comparing whether differences in elementary curriculums in different jurisdictions result in different outcomes, or demonstrating a link between the contents of any

³¹² *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at 361-62 and 366 [*MacKay*]. See also *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 767-68 per Dickson CJ; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at 1100; *The Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 at para. 219 (Div. Ct.) [*Christian Medical*]; *Hamilton v. Attorney General of Ontario*, 2018 ONSC 3307 at para. 24.

³¹³ *MacKay* at 366; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at 1099, 1101.

³¹⁴ *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para. 34 [*Taypotat*].

³¹⁵ *Canadian Broadcasting Corp. v. Ontario (Attorney General)*, 2015 ONSC 3131 at para. 209.

³¹⁶ *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 154 [*Bedford SCC*]; *Bedford v. Canada*, 2010 ONSC 4264 at paras. 307-313, 333-341, 361.

curriculum and the harms alleged in this case. These are not questions that can be resolved by the application of common sense in a courtroom. They are empirical matters of critical importance to the Applicants’ case on which they have failed to lead reliable evidence.

167. None of the ETFO experts has conducted or reviewed research on classroom instruction or curriculum implementation. Their opinions proceed from the assumed but undemonstrated premise that even minor differences in the wording of a curriculum document translate directly into significant outcomes for the well-being of students. For example, Dillon Black, ETFO’s expert witness on cyber-violence, opined that the following difference between the mandatory content in the 2015 and 2018 curriculum expectations was a “significant difference”.³¹⁷

2015 HPE Curriculum	2018 HPE Curriculum
assess the impact of different types of bullying or harassment, including the harassment and coercion that can occur with behaviours such as sexting, on themselves and others, and identify ways of preventing or resolving such incidents [examples omitted]	assess the impact of different types of bullying or harassment [examples omitted] on themselves and others, and identify ways of preventing or resolving such incidents ³¹⁸

168. Mx. Black opined that they were “deeply concerned that the loss of the materials related to cyber safety in the new curriculum will increase the likelihood that youth, especially marginalized youth, will be subject to violence and exploitation,” even though they agreed that the mandatory expectations in the two curriculums differ by only a few words and that they were not an expert in how teachers translate the curriculum into classroom programming, did not know what resources teachers would use to implement curriculum, had never done a study observing how these two documents are translated into teacher programming, had never

³¹⁷ Black Cross p. 160 qq. 842-844 [BOT vol. 2 tab 3; RC vol. 2 tab 9]. See also p. 167 q. 877.

³¹⁸ 2018 HPE Curriculum p. 184 [JR vol. 27 tab 29-4 p. 8801; RC vol. 1 tab 1]. Note that Glossary to the 2018 HPE Curriculum states that “Bullying can occur in person or through the use of information and communication technologies” and that harassment can include messages and pictures: see pp. 210 and 212 [JR vol. 27 tab 29-4 pp. 8827, 8829; RC vol. 1 tab 1].

done a study of whether the incidence of cyber-violence changed when changes were made to the wording of the curriculum, and had never done a study about whether curriculum content affects the incidence of cyber-violence or technology-facilitated violence.³¹⁹

169. Because the Applicants' witnesses are not experts in classroom instruction or how teachers translate curriculums into practice, they assume without investigation that there is a clear and causal relationship between the words in the curriculum and the health and well-being of students. The real situation is more complicated. As Prof. Allison explained, an "unsophisticated understanding" of how curriculums translate into student learning "views the process as being analogous to a centrally-located pitcher pouring knowledge into the minds of students...Half a century of research has shown this to be an inadequate approach."³²⁰

170. Research literature on curriculums draws a distinction between the explicit curriculum (written documents imposed by a central authority) and the received curriculum that students actually experience. The received curriculum as experienced by students "is created in classrooms through interaction between teachers and classes of students."³²¹ In the construction of the received curriculum, "teachers are key actors."³²² It is artificial to subject the words of a curriculum to minute scrutiny without any assessment of how the document is actually employed in teaching practice. This examination is entirely missing from the opinions of ETFO's expert witnesses. For example, ETFO's experts do not consider the responsibility of teachers to implement the curriculum in an inclusive, up-to-date manner or the effect of the many anti-discrimination laws and policies that apply to teachers delivering instruction.

171. Neither do ETFO's experts consider the relatively small amount of school instruction

³¹⁹ Black Cross pp. 171-175 qq. 896-915 [BOT vol. 2 tab 3; RC vol. 2 tab 9].

³²⁰ Allison Affidavit para. 27 [JR vol. 45 tab 30 pp. 18814; RC vol. 1 tab 4].

³²¹ Allison Affidavit para. 29 [JR vol. 45 tab 30 pp. 18815; RC vol. 1 tab 4].

³²² Allison Affidavit para. 41 [JR vol. 45 tab 30 pp. 18819; RC vol. 1 tab 4].

reserved for health class.³²³ There are 39 weeks in a school year. In Ms. Gangaram's school, one 50-minute period each week is devoted to Health class, to address all health expectations in the HPE curriculum, of which the sexual health expectations are only one part.³²⁴

172. As Prof. Allison explained, the links between the contents of a curriculum document and what students are taught and ultimately learn are “notoriously loose, making actual learning outcomes far less predictable than curriculum designers may assume. If it were otherwise, current concerns over student performance on mathematic assessments could be confidently addressed by simply modifying the provincial curriculum.”³²⁵ For a variety of reasons, “what is actually taught in specific classrooms, let alone what is learned as a result, does not always fully correspond to what is specified in the explicit curriculum”:

A corollary of this is a loose link between the realization of social policy goals sometimes used to justify changes in the explicit curriculum. Even when good evidence appears to justify the inclusion of specific learning expectations in the explicit curriculum as a way of advancing desirable social policy objectives, the characteristic lack of direct responsiveness between the explicit and received curricula may call into question the realization of the expected outcomes. Healthy eating habits were incorporated into explicit curricula across North American decades before the current obesity crisis, for example.³²⁶

173. This is particularly true in sexual health education, where 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.”³²⁷ In his unchallenged evidence, Prof. Allison identified the principal shortcomings of the Applicant's expert evidence as follows:

...distributing a curriculum document to schools is not the same as drawing conclusions about and assessing its actual use in classrooms. As it is, we have no

³²³ Allison Affidavit para. 34 [JR vol. 45 tab 30 p. 18817; RC vol. 1 tab 4].

³²⁴ Gangaram Cross p. 213 q. 816 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

³²⁵ Allison Affidavit para. 40 [JR vol. 45 tab 30 pp. 18819; RC vol. 1 tab 4].

³²⁶ Allison Affidavit para. 23 [JR vol. 45 tab 30 pp. 18813; RC vol. 1 tab 4].

³²⁷ Van Pelt Affidavit para. 22 [JR vol. 45 tab 32 p. 18994; RC vol. 1 tab 6].

account as to how extensively the 2015 sexual health content was used, or the fidelity of the received curriculum to the specifications in the official document. Nor do we have any evidence on which to judge effects on students, not just what they may have learned from classes attended as could be measured through appropriate tests, but, more importantly, measures of their improved sexual health which might reasonably be attributed to the use of the 2015 curriculum. Ideally, such evidence would appear in changes in appropriate public health measures.

For example, given the statement at paragraph 51 in the affidavit of Carmen Logie that a removal of the 2015 curriculum content “will result in a higher risk of acquisition and subsequent transmission of HIV/STI infections among student populations” we might reasonably expect, for example, an examination of public health statistics to see whether there has been some decline in the infection rate among more vulnerable populations following the implementation of the 2015 curriculum, or comparisons of different jurisdictions where the elementary curriculum differs in some way materially relating to instruction about HIV/STIs. Other similar useful evidence could be provided by qualitative studies of any impact on students of the implementation of the 2015 curriculum in selected schools. However, no reports of the results from such studies are included in the affidavits and no accounts are given of any such studies that may be underway.

174. Instead of presenting the Court with evidence of the actual impact and effect in classrooms of the 2018 HPE Curriculum, the Applicants invite the Court to parse the curriculum as though it were a statute, employing lawyerly canons of construction like *expressio unius* (“if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly”)³²⁸ and the principle against redundant language (“Parliament does not speak in vain and includes every word in a statute for a purpose”).³²⁹ It is tempting for lawyers to read any document in this way. But in this case, the results would be artificial and misleading. A curriculum is not a statute, and the canons of statutory interpretation do not apply to it. A curriculum merely “describes in broad terms the desired outcomes of the teaching and learning process.”³³⁰ To know how or whether a curriculum impacts students, you have to know how it is taught.

³²⁸ *Fleming v. Massey*, 2016 ONCA 70 at para. 39, citing Ruth Sullivan in *Driedger on the Construction of Statutes* 3d ed. (Toronto: Butterworths, 1994) at 168.

³²⁹ *Solar Power Network Inc. v. ClearFlow Energy*, 2018 ONCA 727 at para. 49.

³³⁰ Brien Affidavit para. 16 [JR vol. 45 tab 31 p. 18930; RC vol. 1 tab 5].

175. Courts are not experts in interpreting curriculum documents, and neither are any of ETFO's expert witnesses. While the Applicants urge the Court to draw "reasoned inferences"³³¹ from words on a page, or assert that some outcome relating to student health or well-being "can reasonably be inferred"³³² from reading a curriculum document, the Court should be loath to do so absent reliable evidence of actual impacts on students. This Court has recently held that "Inferential gaps must be bridged by evidence, not speculation, assumptions, or creative advocacy...Supposition or conjecture is no substitute for evidence and cannot be relied upon as the basis for a reasonably drawn inference."³³³

C. No infringement of *Charter* s. 7

176. There is a two-step test to establish a violation of *Charter* s. 7.³³⁴ First, the Applicants must prove that the state has deprived them of their right to life, liberty or security of the person. Second, they must prove that this deprivation is contrary to the principles of fundamental justice. The Applicants cannot satisfy either step of this test.

a. No deprivation of life, liberty or security of the person

177. If a claimant fails to establish a deprivation of life, liberty, or security of the person, "the s. 7 analysis stops there."³³⁵ That is the result in this case. No deprivation has been made out. The curriculum does not prevent anyone from taking any steps to enhance their safety and does not prohibit the dissemination of safety-enhancing information. Nor does *Charter* s. 7 require the state to include particular safety-enhancing instruction in school.

178. The Applicants' reliance on *Bedford* is misplaced. *Bedford* was a challenge to criminal

³³¹ ETFO factum para. 86.

³³² CCLA factum para. 55.

³³³ *Fodor v. North Bay (City)*, 2018 ONSC 3722 (Div. Ct.) at paras. 19-22.

³³⁴ *Bedford* SCC at para. 93; *Carter v. Canada*, 2015 SCC 5 at paras. 54-55, 70 [*Carter*].

³³⁵ *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 47.

prohibitions. The Court found “the law prevented [sex workers] from taking steps to reduce the risks they face and negatively impacted their security of the person.”³³⁶ The claimants were “not asking the government to put into place measures making prostitution safe;” the question was “whether the impugned laws make this lawful activity more dangerous” than it would otherwise be.³³⁷ Here, there is no prohibition against anyone doing anything to make themselves safer. Rather, the Applicants want Ontario to adopt measures to enhance safety.

179. The *Charter* s. 7 claim in this case is really a positive rights claim. The Applicants assert that s. 7 requires Ontario to have in place a curriculum that (in their view) adequately protects against the risk of sexual assault, cyber-violence and other harms. Even if it were true that the 2018 HPE Curriculum offers inadequate protection against these harms, which is denied, that would not constitute a deprivation under s. 7. As the Court held in *Gosselin*:

Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state’s ability to deprive people of these.³³⁸

180. *Charter* s. 7 does not include a right to life-saving medical treatment,³³⁹ to a minimum level of social assistance,³⁴⁰ or to adequate shelter.³⁴¹ It would be anomalous if it included a right to a particular elementary curriculum that the Applicants prefer.

181. In *Wynberg*, the Court of Appeal rejected the argument that *Charter* s. 7 required the provision of autism services for school-age children. There was no “constitutional obligation on [Ontario] to ensure that every school-age autistic child has access to specific educational

³³⁶ *Bedford SCC* at paras. 66-67.

³³⁷ *Bedford SCC* at paras. 87-88.

³³⁸ *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 at para. 81 (emphasis in original) [*Gosselin*].

³³⁹ *Flora* at para. 108.

³⁴⁰ *Gosselin*; *Masse v. Ontario* (1996), 134 DLR (4th) 20 (Ont. Div. Ct.) at paras. 69-73 (O’Driscoll J.) and 165-173 (O’Brien J., concurring).

³⁴¹ *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 5410 at para. 59 [*Tanudjaja*].

services.”³⁴² Section 7 was not engaged as there was “no law restricting the respondents’ ability to spend their own money” to access the educational services sought:

As the *Education Act* neither compels attendance at public school nor creates an impediment to parents educating their children at home or at a private school, we conclude that the s. 7 rights of the respondents are not engaged.³⁴³

b. A change in the curriculum does not engage *Charter* s. 7

182. The Applicants contend that the change in curriculum amounts to a “deprivation” under s. 7 because the new curriculum is less protective than the old curriculum. Even if it were true that the 2018 HPE Curriculum was less protective than the one it replaced, which is denied as set out further below, that would not constitute a deprivation under *Charter* s. 7.

183. The Court of Appeal has held repeatedly that “in the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or enhance *Charter* values.”³⁴⁴ If there is no *Charter* obligation on the state to enact a measure in the first place, then “as far as the requirements of the constitution are concerned...the legislature is free to return the state of the statute book to what it was before the [repealed statute], without being obligated to justify the repealing statute under section 1 of the *Charter*.”³⁴⁵ If this is true of a statute, it must be all the more true of a non-statutory instrument such as a curriculum guideline.

184. There is a long and unbroken line of authority establishing that a change in the law or government policy does not itself constitute a “deprivation” under *Charter* s. 7, even if the previous law or policy was more enhancing of life, liberty or security of the person. In *Flora*,

³⁴² *Wynberg v. Ontario*, [2006] O.J. No. 2732 at para. 218 (C.A.) [*Wynberg*], leave to appeal ref’d [2006] S.C.C.A. No. 441.

³⁴³ *Wynberg* at paras. 220-231.

³⁴⁴ *Lalonde* at para. 94 (C.A.); *Flora* at paras. 103-104.

³⁴⁵ *Ferrel* at para. 66.

the Court of Appeal held that a restriction on a previously-available life-saving benefit was not a deprivation within the meaning of s. 7, holding that “a *Charter* violation cannot be grounded on a mere change in the law.”³⁴⁶ In *Barbra Schlifer*, the Superior Court held that the repeal of the long-gun registry was not a deprivation under s. 7, even though the repeal was said to remove “life-saving protections.”³⁴⁷ In *Canadian Doctors*, the Federal Court held that the elimination of a federal program providing health insurance to refugee claimants did not engage s. 7.³⁴⁸ In *Tanudjaja*, the Superior Court held that the reduction of affordable housing programs did not engage s. 7.³⁴⁹ In *Dunmore*, Sharpe J. (as he then was) held that “if the legislature is free to decide whether or not to act in the first place, it cannot be the case that once it has acted in a manner that enhances or encourages the exercise of a *Charter* right, it deprives itself of the right to change policies and repeal the protective scheme.”³⁵⁰

185. The Applicants cite none of these cases – even though the Court of Appeal’s decisions in *Flora*, *Lalonde* and *Ferrel* are binding on this Honourable Court. They make no attempt to distinguish them. Instead, they take it for granted that “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.”³⁵¹ That is not the law.

186. The Applicants’ arguments raise what Justice Morgan has called “the baseline problem”: a “prior piece of legislation cannot form a constitutional baseline for all further revisions and amendments to the legislative policy.”³⁵² The same is true of executive action, as was held in *Flora*, *Canadian Doctors* and *Tanudjaja*:

³⁴⁶ *Flora* at paras. 103-104.

³⁴⁷ *Barbra Schlifer Commemorative Clinic v. Canada*, 2014 ONSC 5140 at paras. 28 and 39-45 [*Barbra Schlifer*].

³⁴⁸ *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651 at paras. 552-563.

³⁴⁹ *Tanudjaja* at para. 38, aff’d 2014 ONCA 852, leave to appeal dismissed 2015 CanLII 36780.

³⁵⁰ *Dunmore v. Ontario (Attorney General)* (1997), 37 O.R. (3d) 287 (Gen. Div.) at 15, aff’d [1999] O.J. No. 1104 (C.A.), rev’d on other grounds 2001 SCC 94.

³⁵¹ CCLA factum para. 10(b).

³⁵² *Barbra Schlifer* at para. 39-45.

[G]overnment does not create [a *Charter*] obligation when it acts to ameliorate an apparent inequity in our society. The policy of one government to respond to such a situation may not be the policy of its successor. The program may be changed. The benefits extended may be lowered or removed without opening up the proposition that there has been a breach of s. 7 of the *Charter*...It cannot be that by acting where there is no obligation to do so the government creates a right that obtains protection under the *Charter* that otherwise would be unavailable.³⁵³

187. The Applicants seek in effect to constitutionalize the 2015 HPE Curriculum, such that its removal engages the *Charter* and requires state justification or *Doré* balancing. But the 2015 HPE Curriculum was not constitutionally entrenched. It was not in place in Ontario prior to 2015 and it is not in place in any of the other provinces in Canada, to which (needless to say) the *Charter* equally applies. Whatever its merits, the 2015 curriculum was a creature of government policy and is not immune from repeal. As the Supreme Court noted in *Baier*:

The appellants are asking this Court in effect to constitutionalize the prior regime. Although school boards play an important role in educational governance by carrying out the mandatory and discretionary duties prescribed to them in Alberta by the *School Act*, they are creatures of the provincial government, and their existence is not constitutionally protected.³⁵⁴

c. There is no actual evidence of the harms alleged

188. As set out above, there is no actual evidence that the 2018 curriculum exposes anyone to harm. There is no evidence that the HPE curriculum in place from September 2010 to June 2015 resulted in any harms, no evidence that the 2015 HPE curriculum prevented any harms, and no evidence at all about the experiences of actual students in the 2018-19 school year, including First Nations students.³⁵⁵ Nor is there empirical evidence that the change in curriculum will affect HIV stigma and corresponding harm.³⁵⁶ The only evidence from an

³⁵³ *Tanudjaja* at paras. 38 and 110.

³⁵⁴ *Baier v. Alberta*, 2007 SCC 31 at para. 38 [*Baier*].

³⁵⁵ Grand Council of Treaty 3 factum at paras. 36-38.

³⁵⁶ HALCO/CHALN factum at paras. 4-5. The Applicants' expert on HIV-related stigma acknowledged in cross-examination that the 2018 HPE Curriculum includes content that has the potential to protect against stigma and reduce harm, including content about HIV transmission that she considered better than that in the 2015 HPE Curriculum (see paras. 115-117 above).

HPE teacher in this case is from Ms. Gangaram, who testified that since she started teaching in 2005, “I have always done no harm. I have always made a goal of creating an atmosphere in which students of all types feel accepted, comfortable and free from harassment.”³⁵⁷

189. Given the lack of evidence about the harms alleged, the Applicants’ reliance on the “sufficient causal connection” standard articulated in *Bedford* is misplaced. The “sufficient causal connection” test does not obviate the need for reliable evidence. Rather, a sufficient causal connection “insists on a real, as opposed to a speculative, link.”³⁵⁸ As set out above, the evidentiary record in this case is much more speculative than the record in *Bedford*.

190. The evidentiary record in this case is also more speculative than the record in *PHS*, relied on by the Intervener Grand Council of Treaty 3.³⁵⁹ In *PHS*, the action at issue (a decision not to extend an exemption for a safe injection site) resulted in a reinstatement of criminal prohibitions.³⁶⁰ The Supreme Court accepted “crucial findings of fact” of the trial judge that these prohibitions impaired the ability of the claimants to take steps to address their health needs.³⁶¹ The 2018 HPE Curriculum does not prohibit anyone from taking steps to address their safety.

191. The Supreme Court has from the beginning insisted on non-speculative evidence of harm. In *Operation Dismantle*, Dickson J. held that a duty to refrain from government action “cannot arise on the basis of speculation and hypothesis about possible effects of government action. Such a duty only arises, in my view, where it can be said that a deprivation of life and

³⁵⁷ Gangaram Cross p. 225-227 q. 848 [BOT vol. 5 tab 5; RC vol. 1 tab 16].

³⁵⁸ *Bedford SCC* at para. 76; see also para. 78 (“[M]ere speculation will not suffice to establish causation.”).

³⁵⁹ Grand Council of Treaty 3 factum at para. 35.

³⁶⁰ *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para. 93 [*PHS*].

³⁶¹ *PHS* at paras. 75, 93 148, 154.

security of the person could be proven to result from the impugned government act.”³⁶²

192. This requirement that claimants provide real evidence of harm runs throughout the s. 7 case law and is unchanged by *Bedford*.³⁶³ In *Barbra Schlifer*, a case that raised similar issues to this one, the Superior Court held that the claimant challenging the repeal of the long-gun registry had to “demonstrate through credible and reliable evidence that the registry had positive measurable effects...[and] that the elimination of the registry will result in harm or an increased risk of harm.”³⁶⁴ The Court found that “This level of proof has eluded the Applicant. The upshot of the evidence is that the Act’s effects, especially the repeal of the registration requirement for non-restricted firearms, are debatable at best...There is no reliable evidence that the Act actually has, or will, increase the incidence of violence or death by firearms.”³⁶⁵

193. The Applicants here have failed to meet the same standard. They have neither demonstrated the “positive measurable effects” of the 2015 HPE Curriculum nor the harms that they allege will result from its replacement with the 2018 HPE Curriculum.

d. No arbitrariness or gross disproportionality

194. In any event, the curriculum is not contrary to the principles of fundamental justice. Those principles “do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system.”³⁶⁶ The 2018 HPE Curriculum is neither arbitrary nor grossly disproportionate.

195. The threshold for finding a law arbitrary is high: there must be “no rational connection between the object of the law and the limit it imposes on life, liberty or security of the

³⁶² *Operation Dismantle v. Canada*, [1985] 1 S.C.R. 441 at 455-456.

³⁶³ See *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 57-59, *Chaoulli v. Quebec (AG)*, 2005 SCC 35 at paras. 112-119, 123, *PHS* at para. 93, *Carter* at paras. 57-58, 65-66, 70.

³⁶⁴ *Barbra Schlifer* at para. 64.

³⁶⁵ *Barbra Schlifer* at paras. 63-66.

³⁶⁶ *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 503.

person.”³⁶⁷ An arbitrary law is “not capable of fulfilling its objectives.”³⁶⁸ The Court of Appeal has emphasized the “heavy onus on the party challenging the legislation to establish that there is no connection between the effect of the law and its purpose.”³⁶⁹

196. Even assuming these principles are applicable to a curriculum rather than a law, it cannot be said that the 2018 HPE curriculum is “not capable” of achieving its purposes.³⁷⁰ The curriculum’s purpose is to provide students with “the physical literacy and health literacy they need to lead healthy, active lives.”³⁷¹ To the extent that there is any dispute about how well this goal is achieved, that is a matter of educational policy and not of “the basic tenets of the legal system.”³⁷² It cannot be said that the learning expectations contained in the curriculum are “not capable” of achieving these purposes.

197. The rule against gross disproportionality “only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure”:

This idea is captured by the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk. The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society.³⁷³

198. The elementary school curriculum does not begin to approach the “draconian impact” of a law that imprisons people for life for spitting on the sidewalk. To hold otherwise would trivialize the important protections of the *Charter*.

³⁶⁷ *Carter* at para. 83, *Bedford SCC* at paras. 98-100, 108, 111, 119-120.

³⁶⁸ *Carter* at para. 83.

³⁶⁹ *R. v. Long*, 2018 ONCA 282 at para. 76.

³⁷⁰ See *Thompson v. Ontario (Attorney General)*, 2016 ONCA 676 at para. 42: “The mere fact that the law fails to fully *achieve* its purpose...in some instances does not establish that, in those instances, the liberty infringement was *unconnected* to the law’s purpose” (emphasis in original).

³⁷¹ 2018 HPE Curriculum pp. 3-4 [JR vol. 27 tab 29-4 pp. 8620-8621; RC vol. 1 tab 1].

³⁷² *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 499-500, 503.

³⁷³ *Bedford SCC* at para. 120.

D. No discrimination contrary to *Charter* s. 15 or the *Human Rights Code*

199. ETFO and CCLA allege that the 2018 HPE Curriculum discriminates contrary to *Charter* s. 15, and CCLA adds that it discriminates contrary to the *Code*.³⁷⁴ In a challenge to a law or policy of general application, the test for discrimination under the *Charter* and the *Code* is the same.³⁷⁵ The claimant must demonstrate that (a) the law or policy creates a distinction on the basis of a ground protected under the *Charter* or the *Code*; and (b) the distinction is substantively discriminatory because it perpetuates arbitrary disadvantage, prejudice or stereotyping.³⁷⁶ The onus is on the claimant to establish both steps of the test.³⁷⁷

a. The grounds of discrimination alleged

200. CCLA raises the protected grounds of sex, sexual orientation, disability, family status, gender identity and gender expression.³⁷⁸ ETFO's factum purports to also raise the grounds of age and Indigeneity,³⁷⁹ but ETFO did not plead these grounds.³⁸⁰ The Court should not consider grounds that were not pleaded or included in a Notice of Constitutional Question.

201. In any event, as noted above, L.M. (a CCLA Applicant) is the only party to either proceeding who is a student, and there are no facts in the record to support her standing to assert discrimination on the basis of sexual orientation, disability, Indigeneity, HIV status, gender identity or gender expression. The only grounds that appear to apply to L.M. are sex

³⁷⁴ See CCLA factum at paragraphs 10, 79-80.

³⁷⁵ *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 at para. 84 [*Tranchemontagne*]; *Peart v. Ontario (Community Safety and Correctional Services)*, 2014 HRTO 611 at paras. 268-269, aff'd 2017 ONSC 782 at paras. 51-54, leave to appeal to Court of Appeal refused May 12, 2017 (M47551).

³⁷⁶ *Taypotat* at paras. 16-21.

³⁷⁷ *Tranchemontagne* at para. 119; *Taypotat* at para. 34.

³⁷⁸ CCLA's Notice of Application at paras. 1(n), (p) [JR vol. 1 tab 1]; CCLA factum at paras. 10, 44-45, 79-80. While gender identity and gender expression have not been found by Ontario courts or the Supreme Court of Canada to be analogous grounds under the *Charter*, it is not necessary for the Court to determine this issue, as no distinction or substantive discrimination on the basis of either ground has been established in this case.

³⁷⁹ ETFO factum at para. 159.

³⁸⁰ ETFO Notice of Constitutional Question at paras. 2(t), 2(bb)(iii) [JR vol. 1 tab 4 pp. 36, 38]; ETFO Notice of Application at paras. 2(t), 2(bb)(iii) [JR vol. 1 tab 2 pp. 22, 24-25].

(she is identified as female), age (she is ten years old), and family status (to the extent that she has a queer parent). As CCLA and L.M. have not pleaded age, the only grounds that she pleads and has standing to raise are sex and family status.

b. A change in curriculum is not a distinction

202. ETFO and CCLA repeatedly but inaccurately characterize the Minister as having “removed” or even “eradicated” information from the curriculum.³⁸¹ It is more accurate to say that the Minister replaced one curriculum guideline (the 2015 HPE Curriculum) with another (the 2018 HPE Curriculum) that contains different content. The question is whether it is discriminatory to substitute the 2018 curriculum guideline for the 2015 one. It is not.

203. This question raises again the “baseline problem” identified by Justice Morgan in the *Barbra Schlifer* case discussed above: a “prior piece of legislation cannot form a constitutional baseline for all further revisions and amendments to the legislative policy.”³⁸² In other words, “it is inappropriate to compare the situation of a group under previous legislation whose repeal has adversely affected that situation.”³⁸³ A *Charter* infringement “cannot be grounded on a mere change in the law.”³⁸⁴ The same is true of a change in the provincial curriculum.

204. Section 15 is concerned with equal benefit of the law;³⁸⁵ accordingly, the s. 15 analysis focuses on whether the claimant is treated equally as compared with others in relation to the benefit provided – not to a benefit not provided or no longer provided. As the Supreme Court

³⁸¹ See e.g. CCLA’s factum at para. 10(a) (“the removal of the material itself creates the adverse impact”). See also Grand Council of Treaty 3’s factum at para. 46.

³⁸² *Barbra Schlifer* at para. 39-45.

³⁸³ *Irshad (Litigation of Guardian of) v. Ontario (Minister of Health)*, 1999 CanLII 14890 (Ont. Sup. Ct.) at para. 99, aff’d [2001] O.J. No. 648 (C.A.).

³⁸⁴ *Flora* at para. 104.

³⁸⁵ *R. v. Kapp*, 2008 SCC 41 at paras. 16, 25; *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 at para. 39; *Withler v. Canada (Attorney General)*, 2011 SCC 12 at paras. 31, 35-40, 43, 54, 62.

has stated, there “can be no administrative duty to distribute non-existent benefits equally.”³⁸⁶

205. In a long line of *Charter* s. 15 cases, Ontario courts have held that “in the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or enhance *Charter* values.”³⁸⁷ These *Charter* s. 15 cases include *Ferrel* (repeal of employment equity statute), *Lalonde* (closing of a Francophone hospital), *Barbra Schlifer* (repeal of long-gun registry), *Tanudjaja* (reduction in housing programs), and *Irshad* (restricting OHIP eligibility).³⁸⁸ In every case, persons who benefitted from the previous law or policy alleged that its removal or replacement had a discriminatory effect. In every case, the Court rejected this argument.

206. *Ferrel* is particularly apposite. In that case, the claimants challenged the repeal of the *Employment Equity Act*, which required employers to take affirmative measures to promote workplace equity. They argued the repeal was discriminatory because it “reinforc[ed] negative stereotypes and prejudicial attitudes that members of these groups are unqualified and lacked merit,” made it “more difficult for willing employers” to proceed with equity programs, and was contrary to the requirement that the government take proactive measures to remedy systemic discrimination.³⁸⁹ Equivalent claims are made in this proceeding.³⁹⁰

207. The Court of Appeal in *Ferrel* unanimously rejected these arguments, holding that *Charter* s. 15 did not impose an obligation on government to maintain a statute or policy, even

³⁸⁶ *Auton (Guardian ad litem) v. British Columbia (AG)*, 2004 SCC 78 at paras. 45-46; *Tanudjaja* at paras. 98-99.

³⁸⁷ See e.g. *Lalonde* at para. 94 (C.A.).

³⁸⁸ *Ferrel*; *Lalonde*; *Barbra Schlifer*; *Tanudjaja*; *Irshad (Litigation Guardian of) v. Ontario (Minister of Health)*, [1999] O.J. No. 301 at paras. 95-99, aff’d, [2001] O.J. No. 648 at para. 151 (C.A), leave to appeal ref’d [2001] S.C.C.A. No. 2018.

³⁸⁹ *Ferrel* at paras. 28-31.

³⁹⁰ ETFO factum at paras. 110 and 164-167; CCLA factum at paras. 10(a), 46, 63-64 and 69-70; see also JFCY factum at para. 44-45.

if it had been enacted to combat systemic discrimination. The right to equality in s. 15(1) “is not a generalized one to have equality interests advanced”³⁹¹ or to require the continuation of measures to advance equality. Otherwise, measures taken would “become frozen into provincial law and susceptible only of augmentation and immune from curtailing amendment or outright repeal without s. 1 justification. If such were the case, it could have an inhibiting effect on legislatures enacting tentative, experimental legislation in areas of complex social and economic relations.”³⁹² The same is true here. The continued operation of the *Human Rights Code* was another reason to reject the discrimination claim, as employees in *Ferrel* (like students in this case) remain subject to its protections.³⁹³

208. Nor can the Court resolve a question of discrimination by comparing two (or more) curriculum documents side by side to count which one has more, earlier or more detailed learning expectations about topics such as consent and gender identity. It would always be possible to find a curriculum that contained even more such content: the Québec curriculum, for example, introduces mandatory learning content about gender identity in Grade 6, which is even earlier than the 2015 Ontario HPE Curriculum did (in Grade 8) or than the 2018 curriculum does (in Grade 9). On the Applicants’ theory, that fact should make the 2015 Ontario curriculum discriminatory compared to Québec’s. Indeed, some of ETFO’s witnesses expressed concerns about content in the 2015 HPE Curriculum, including its definition of abstinence,³⁹⁴ its use of binary language about sex,³⁹⁵ and its definition of homophobia.³⁹⁶

209. The question is not whether the 2015 curriculum was preferable to the 2018

³⁹¹ *Ferrel* at para. 47 (C.A.).

³⁹² *Ferrel* at paras. 48-49 (C.A.).

³⁹³ *Ferrel* at paras. 30, 33-34 (C.A.).

³⁹⁴ McKay Cross pp. 224-26 qq. 796-800 [BOT vol. 8 tab 9; RC vol. 2 tab 12].

³⁹⁵ Gangaram Cross pp. 258-60 qq. 945, 951-52 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

³⁹⁶ Pyne Cross p. 97 qq. 461-62 [BOT vol. 10 tab 12; RC vol. 2 tab 14].

curriculum from the perspective of persons characterized by the grounds of discrimination asserted, or whether the 2015 curriculum contained more content or even did a better job of articulating issues important to LGBTQ2S+ students or others. The question is whether the 2018 HPE Curriculum, assessed on its own terms, draws a distinction based on protected grounds that perpetuates arbitrary disadvantage, prejudice or stereotyping. The answer is no.

c. No evidence of the discriminatory impact alleged

210. The Growth and Development component of the 2018 HPE Curriculum includes learning expectations such as the following:

- a. identify the stages in development of humans (Grade 1);
- b. describe parts of the human body, the functions of these parts, and behaviours that contribute to good health (Grade 2);
- c. outline characteristics in the development and growth of humans from birth to childhood (Grade 3);
- d. identify the characteristics of healthy relationships (Grade 4);
- e. identify strategies to deal positively with stress and pressures that result from relationships with family and friends; identify factors (e.g., trust, honesty, caring) that enhance healthy relationships with friends, family, and peers (Grade 5);
- f. apply a problem-solving/decision-making process to address issues related to friends, peers, and family relationships (Grade 6);
- g. use effective communication skills (e.g., refusal skills, active listening) to deal with various relationships and situations (Grade 7); and
- h. identify sources of support (e.g., parents/guardians, doctors) related to healthy sexuality issues (Grade 8).

211. All of these topics, along with the other Growth and Development expectations in the 2018 HPE Curriculum (see Schedule F below for a complete list), are valuable learning expectations for elementary students, whatever their sex, sexual orientation, gender identity or other personal characteristics. All of them can be taught in an inclusive manner that is appropriate and relevant to students of diverse genders, sexualities, families and

circumstances. Prof. Allison’s unchallenged expert evidence was that there was no “obstacle to the content of the 2018 [HPE Curriculum] being taught in an up-to-date and inclusive way.”³⁹⁷ The 2018 HPE Curriculum does not draw any distinctions or require any differential treatment of students on the basis of protected grounds.

212. Indeed, the 2018 HPE Curriculum itself expressly directs teachers to implement it in an inclusive way, consistent with the many laws and policies binding on schools that require them to provide the benefit of classroom instruction to their students in an equal and non-discriminatory manner.³⁹⁸ There is no actual evidence that schools will fail to do so, and substantial evidence (in the form of public statements by school boards) that they will.³⁹⁹

213. Even if it were true, as ETFO alleges about its own members, that some teachers will adopt a “conservative interpretation of the 2018 Curriculum” that infringes the rights of students, that would be a “failure at the implementation level...[that] can be addressed at the implementation level.”⁴⁰⁰ The Minister is entitled to issue a curriculum on the assumption that it will be implemented in a non-discriminatory way, consistent with the requirements of the *Code*, the *Education Act* and the language of the curriculum document itself.⁴⁰¹

214. CCLA asserts that the 2018 HPE Curriculum denies equal treatment to “those who are part of a family that does not fit a two-parent, heterosexual model.”⁴⁰² There is no basis for this allegation. Nothing in the 2018 HPE Curriculum asserts that families must fit a two-parent, heterosexual model or any other model (indeed, the word “heterosexual” does not

³⁹⁷ Allison Affidavit para. 61 [JR vol. 45 tab 30 p. 18830; RC vol. 1 tab 4].

³⁹⁸ 2018 HPE Curriculum p. 57 [JR vol. 27 tab 29-4 p. 8674; RC vol. 1 tab 1].

³⁹⁹ Beckett Affidavit Exs. 83-86 [JR vol. 44 tabs 29-83 – 29-86 pp. 18749-18803; RC vol. 3 tabs 33-36].

⁴⁰⁰ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 at para. 82.

⁴⁰¹ *Bracken v. Niagara Parks Police*, 2018 ONCA 261 at para. 83; *Little Sisters Book and Art Emporium v. Canada*, 2000 SCC 69 at para. 71; *R. v. Khawaja*, 2010 ONCA 862 at para. 134, aff’d 2012 SCC 69 at para. 83.

⁴⁰² CCLA factum at para. 80.

occur anywhere in the document). Where the 2018 HPE Curriculum refers to families, it does so broadly (e.g. the Grade 6 expectation that students will learn to “apply a problem-solving/decision-making process to address issues related to friends, peers, and family relationships”)⁴⁰³ in a way that is applicable to a wide variety of families. Moreover, the Ontario curriculum expressly requires students in Grade 2 to learn to “identify and describe different types of families (e.g., families with one parent, two parents, no children; same-sex families; blended and multigenerational families; immigrant families; families where parents come from different religious or ethnocultural groups).”⁴⁰⁴

215. JFCY asserts that the elementary HPE curriculum discriminates on the basis of age because it does not include the same content as the secondary HPE curriculum.⁴⁰⁵ If this result were discriminatory on the basis of age, then the curriculum for every subject (and not just HPE) would be discriminatory on the same basis, since elementary students do not learn the same content as secondary students in any subject. On JFCY’s argument, a non-discriminatory curriculum would require every student in every Grade to receive the same instruction.

216. In any event, nothing in the 2018 HPE Curriculum is substantively discriminatory in the sense of perpetuating arbitrary disadvantage, prejudice or stereotyping. The 2018 HPE Curriculum, like other articulations of provincial educational policy, requires that students should be taught in a manner that is inclusive and respectful of diversity. While CCLA contends that the existence of laws and educational policies promoting inclusivity and protecting against discrimination provides “a further indication” that the 2018 HPE

⁴⁰³ 2018 HPE Curriculum p. 163 [Record vol. 27 tab 29 p. 8780; RC vol. 1 tab 1] (emphasis added).

⁴⁰⁴ Beckett Affidavit Ex. 12 p. 80 [Record vol. 29 tab 12 p. 9966; RC vol. 3 tab 63]; see also Beckett Affidavit para. 143 [Record vol. 27 tab 29 p. 8567; RC vol. 1 tab 3].

⁴⁰⁵ JFCY factum at para. 20.

Curriculum is discriminatory,⁴⁰⁶ the opposite is true: the 2018 HPE Curriculum must be read, and its impact understood, in the context of the laws and equality-promoting policies that continue to apply in Ontario schools. That is what the Applicants have failed to do.

E. The Court has no jurisdiction to grant declaratory relief against the website

217. ETFO seeks a declaration that “the Government’s creation of the reporting line violated teachers’ right to freedom of expression.”⁴⁰⁷ The Divisional Court does not have jurisdiction to grant this declaration. This Court’s jurisdiction to grant declaratory relief is set out in s. 2(1)2 of the *Judicial Review Procedure Act* (the *JRPA*), which provides that the Court may grant relief in proceedings “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.”⁴⁰⁸ The creation of the website is not an exercise of a statutory power under the *JRPA*.

218. There is no question that this Court may review the Minister’s issuance of the 2018 HPE Curriculum. The Minister’s issuance of a curriculum is an exercise of statutory power pursuant to s. 8(1)(3)(a) of the *Education Act*. Accordingly, the declaratory and injunctive relief sought by the Applicants with respect to the curriculum is available under the *JRPA*. The declaratory relief sought with respect to the website is not.

219. In the *JRPA*, a “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,

⁴⁰⁶ CCLA factum at para. 10(c); see also JFCY factum at paras. 51-56.

⁴⁰⁷ ETFO factum at para. 176(b).

⁴⁰⁸ *Judicial Review Procedure Act*, [R.S.O. 1990, c. J.1](#) s. 2(1)2.

(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.”⁴⁰⁹

220. The creation of the ForTheParents.ca website falls within none of these categories. Nor has ETFO identified any “power or right conferred by or under a statute” that is said to authorize the creation of the website. As this Court recently held in *McLeod*, the power under review must “be conferred ‘by or under a statute’. The legislation must authorize the decision-maker to make the decision in question. It is this effecting of the will of the legislature by the decision-maker that gives a sufficient public character to this decision to warrant judicial review. There must be a specific power or right to make the very decision in issue.”⁴¹⁰

221. The ForTheParents.ca website was not established pursuant to statutory authority; nor was any such authority necessary. The website was established pursuant to the powers that the Crown possesses as a natural person, which indisputably include the ability to maintain a website, solicit comments from the public, and link to a third party’s website. Private entities routinely conduct such activities without statutory authorization, and so does the Crown. Maintaining a website is conceptually equivalent to renting a billboard, sending out a newsletter, and/or receiving messages or correspondence by phone, fax or ordinary mail. None of these activities is of a “sufficiently public character” to be amenable to judicial review.⁴¹¹

222. The only aspect of the ForTheParents.ca website that engaged any need for statutory authority was the collection of personal information from persons who choose to submit comments through the website.⁴¹² There is no challenge in this proceeding to the lawfulness of

⁴⁰⁹ *Judicial Review Procedure Act*, [R.S.O. 1990, c. J.1](#) s. 1.

⁴¹⁰ *McLeod v. City of Brantford*, 2018 ONSC 943 at paras. 9-12 (Div. Ct.).

⁴¹¹ *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para. 14.

⁴¹² Subsection 38(2) of the *Freedom of Information and Protection of Privacy Act (FIPPA)* provides in part that no person “shall collect personal information on behalf of an institution unless the collection is expressly

the Minister's collection of personal information from persons who chose to provide it. There is no reference to *FIPPA* or the collection of personal information in ETFO's pleadings or factum. Nor does ETFO have standing to raise any question about compliance with *FIPPA*.

223. ETFO's challenge to the website is not based on the exercise of any statutory power, but rather on the fact that it was created at all and that it provided a link to the College's website. These are not matters within the declaratory jurisdiction of the Divisional Court. As the Supreme Court has recognized, where a public body is not exercising "a power central to the administrative mandate given to it by Parliament," such activities "do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority."⁴¹³

224. The Divisional Court is a statutory court and does not have jurisdiction to grant declaratory relief in relation to every act by a public official. Rather, its jurisdiction on an application for judicial review is restricted to granting the relief set out in s. 2 of the *JRPA*.⁴¹⁴

225. Even if the Court did have jurisdiction to grant a declaration in relation to the ForTheParents.ca website, it should decline to exercise that jurisdiction on the grounds of mootness. Since the closing of the public consultation on December 17, 2018, the website no longer solicits any comments from the public and no longer includes any link to the College website (nor, in any event, was any information about teachers referred to the College during the period when the website did solicit comments). As these were the very components of the website that ETFO considered objectionable, their removal has rendered these concerns moot.

As the Supreme Court has held, the mootness principle:

authorized by statute," and ss. 8.1(1) of the *Education Act* provides that the Minister may collect personal information for specified purposes, including the administration of the Act and the implementation of policies and guidelines made under it.

⁴¹³ *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para. 14.

⁴¹⁴ *Coote v. Zellers Inc.*, 2008 CanLII 8260 at para. 8 (Div. Ct.); *Chol v. York University*, 2004 CanLII 12986 at para. 14 (Div. Ct.).

...applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.⁴¹⁵

226. Judicial review is a discretionary remedy. This Court has held that it will refuse a remedy where the public interest does not require judicial intervention, including where the remedy sought would serve no useful purpose because there is no live controversy between the parties.⁴¹⁶ Given the changes to the website, the relief sought “will not have the effect of resolving some controversy” affecting the rights of the parties and “will have no practical effect on such rights.” It would serve no useful purpose and should not now be entertained.

F. No infringement of *Charter* s. 2(b) freedom of expression

227. The 2018 HPE Curriculum does not infringe freedom of expression. The curriculum does not restrict or prohibit teachers’ expression, and *Charter* s. 2(b) does not give teachers in publicly-funded schools the freedom to choose whether or not to teach provincial learning expectations. Nor did the ForTheParents.ca website restrict or chill expression. To the contrary, the website furthered the core values of freedom of expression by providing a forum for public participation and input on matters of educational policy.

a. Issuing a curriculum does not restrict freedom of expression

228. ETFO alleges that the 2018 HPE Curriculum infringes s. 2(b) by preventing teachers from communicating information to students. This argument overstates the extent to which a curriculum impacts expression. As set out above, a curriculum is not a script or a list of

⁴¹⁵ *Borowski v. Canada*, [1989] 1 S.C.R. 342 at 353.

⁴¹⁶ *2122157 Ontario Inc. v. Tarion Warranty Corporation*, 2016 ONSC 851 at para. 11 (Div. Ct.).

prohibited words. It does not prohibit teachers from discussing topics or answering questions, including those relating to matters not included in the curriculum. It does not prescribe any lesson plans, teaching approaches, educational materials, or classroom activities. It does not prohibit teachers from communicating up-to-date or factually-accurate information. All that it requires is that teachers assess students on the expectations for their subject and grade and cover those expectations in teaching those subjects and grades. The 2018 HPE Curriculum therefore does not have “the purpose or the effect” of restricting expression.⁴¹⁷

229. No court has held that freedom of expression is infringed by requiring teachers in publicly-funded schools to follow a provincial curriculum. The cases relied on by ETFO are wholly distinguishable. *Keegstra* was a criminal prosecution against a high school teacher for the offence of wilfully promoting hatred.⁴¹⁸ The Supreme Court concluded that this criminal offence constituted a prohibition on expression.⁴¹⁹ It did not consider whether requiring Mr. *Keegstra* to follow the Alberta curriculum infringed *Charter* s. 2(b).

230. Nor does *Morin* assist ETFO. *Morin* involved a high school teacher’s challenge to a direction by his principal prohibiting the teacher from using particular resources and classroom activities (i.e., a religious film and related project) in delivering the provincial curriculum. A majority of the PEI Court of Appeal held that the principal’s direction infringed s. 2(b), as the teacher “was teaching in a manner consistent with the approved curriculum” and had a protected interest in “being able to teach the approved curriculum in a manner he felt

⁴¹⁷ *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2 at para. 38; *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23 at para. 32; *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, at paras. 27-28.

⁴¹⁸ *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 713-14.

⁴¹⁹ *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 730. A majority of the Court concluded that the infringement was justified under *Charter* s. 1.

was relevant and topical.”⁴²⁰ The dissent found no infringement of s. 2(b). *Morin* did not determine that the approved curriculum itself infringed s. 2(b), and did not hold that teachers in publicly-funded schools have a *Charter* right to disregard the approved curriculum.

231. Similarly, *BCTF* did not consider whether teachers may decline to teach the provincial curriculum. *BCTF* concerned a school board’s prohibition on extra-curricular communications in school, namely teachers engaging in political protest (political speech at the core of s. 2(b)) by posting flyers on school bulletin boards and discussing bargaining issues with parents.⁴²¹ By contrast, nothing in the 2018 HPE Curriculum would “prevent teachers from expressing opinions” either inside or outside the classroom.⁴²²

232. The tenor of ETFO’s position is that every individual teacher has a *Charter*-protected right to teach and assess students in publicly-funded schools on any topics in whatever grades they wish (or not to teach or assess them, if they so choose), subject only to the government’s ability to justify curriculum expectations under *Charter* s. 1. That proposition goes beyond anything decided in the cases relied on by ETFO and overshoots the purpose of s. 2(b).

233. The Supreme Court has held that “s. 2(b) is not without limits and not every expressive activity is accorded constitutional protection”:⁴²³ “governments should not be required to justify every exclusion or regulation of expression under s. 1...Otherwise, uncertainty will prevail and governments will be continually forced to justify restrictions which, viewed from

⁴²⁰ *Morin v. Prince Edward Island School Board, Regional Administrative Unit No. 3*, 2002 PESCAD 9 at paras. 53-54, 73, 76, leave to appeal to SCC ref’d [2002] S.C.C.A. No. 414.

⁴²¹ *British Columbia Public School Employers’ Association v. B.C.T.F.*, 2005 BCCA 393 at paras. 4, 11, 37-38; See also *Attis v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para. 66; *Kempling v. College of Teachers (British Columbia)*, 2005 BCCA 327 at para. 60, leave to appeal to SCC dismissed, [2005] S.C.C.A. No. 381.

⁴²² *British Columbia Public School Employers’ Association v. B.C.T.F.*, 2005 BCCA 393 at para. 65.

⁴²³ *Baier* at para. 34.

the perspective of history and common sense, are entirely appropriate.”⁴²⁴ Nor does the fact that an activity has expressive value automatically create a *Charter* right to engage in that activity, particularly in the context of professions such as teaching, law or medicine.⁴²⁵

234. The professional requirement on teachers “to teach diligently and faithfully the classes or subjects assigned to the teacher by the principal” does not infringe freedom of expression merely because teaching is expressive, any more than the other duties on teachers do (e.g. “to encourage the pupils in the pursuit of learning”).⁴²⁶ To the extent that teachers’ expression is engaged by fulfilling these public duties, teachers exercise their freedom when they choose to teach in publicly-funded schools. A teacher who does not wish to follow the provincial curriculum is free to teach in a private school. There is no legal compulsion on teachers to follow the provincial curriculum if they do not teach in publicly-funded schools.

235. Nor does the fact that teaching is an expressive activity give teachers a *Charter* right to teach and assess students in publicly-funded schools on any topic (or no topic) they wish, subject only to the government’s ability to justify the curriculum expectations for each grade and each class on a case-by-case basis under s. 1. If it were otherwise, any teacher could come to court and seek judicial intervention, arguing that the requirement to teach Mathematics instead of Language or to teach Grade 1 instead of Grade 7 infringed their freedom of expression. Such a result would render the publicly-funded school system ungovernable and turn the Court into an arbiter of countless educational and curricular disputes.

⁴²⁴ *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 at para. 79.

⁴²⁵ See e.g. *Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407; *Berge v. College of Audiologists and Speech-Language Pathologists of Ontario*, 2016 ONSC 7034, leave to appeal to the Court of Appeal dismissed September 22, 2017 (File No. M47786), leave to appeal to the SCC dismissed June 14, 2018 (File No. 37851); *Mussani v. College of Physicians and Surgeons of Ontario*, [2004] O.J. No. 5176 at paras. 41-43 (C.A.); *Re Institute of Edible Oil Foods et al. and The Queen*, [1989] O.J. No. 2308 (C.A.); *UL Canada Inc. v. Quebec (Attorney General)*, 2005 SCC 10; *Baier* at paras. 54-55; *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250 at paras. 139-140 (Div. Ct.), aff’d on other grounds 2016 ONCA 518, 2018 SCC 33.

⁴²⁶ *Education Act*, [R.S.O. 1990, c. E.2](#) ss. 264(1)(a)-(b).

236. ETFO’s argument amounts to the assertion of a positive *Charter* right to implement the 2015 HPE Curriculum in publicly-funded schools.⁴²⁷ ETFO is “asking this Court in effect to constitutionalize the prior regime.”⁴²⁸ However, the fact that teachers previously used the 2015 HPE Curriculum “cannot convert their claim into a negative one” protected by s. 2(b).⁴²⁹

237. Instead, ETFO is required to prove that the requirement to follow the 2018 HPE Curriculum constitutes “a substantial interference with their freedom of expression.”⁴³⁰ If the 2018 HPE Curriculum substantially interferes with teacher expression, then so too does every provincial curriculum, including the 2015 HPE Curriculum that ETFO prefers. The logical outcome of ETFO’s argument is that provincial curriculums are either unconstitutional or must be justified on a grade-by-grade, expectation-by-expectation basis in court. This result would massively expand the scope of judicial review of education policy, a matter on which courts have no expertise and one unsuited for adjudication in the adversarial litigation process.

238. If it were necessary to justify provincial curriculums under s. 1, they are justified by the need to “ensure a degree of consistency across the province in terms of what students can expect to learn and in which grades...[and to] reflect the growing abilities and maturity of students as they move through the grades.”⁴³¹ The *Charter* does not mandate any particular elementary sexual education curriculum. As discussed further below, “[t]here is no single right answer” to when and how sexual education should be taught, and more variety than uniformity among Canadian provinces in terms of which topics are addressed, the level of detail at which they are addressed, and the grade in which they are introduced. Courts should

⁴²⁷ ETFO factum at paras. 103-05; *Baier* at para. 35.

⁴²⁸ *Baier* at para. 38.

⁴²⁹ *Baier* at paras. 36-37.

⁴³⁰ *Baier* at para. 55.

⁴³¹ Beckett Affidavit para. 26 [JR vol. 27 tab 29 p. 8514-8515; RC vol. 1 tab 3].

not weigh into disputes about which curriculum is to be preferred, or in which grade a particular topic should be taught, or which words should be used to articulate an expectation in a curriculum document.

b. The ForTheParents.ca website does not restrict or chill expression

239. ETFO alleges that the ForTheParents.ca website chilled teachers' expression because it "solicited complaints" against teachers and made "threats of prosecution" to the College.⁴³² This is a mischaracterization. The website created a vehicle through which parents and the public could choose to submit comments, positive or negative, about educational matters including teachers and curriculum. The website also provided a link to the College's pre-existing website describing its complaints process. No information about individual teachers was ever sent from the government to the College.⁴³³

240. Nothing in the text of the ForTheParents.ca website can be reasonably construed as restricting or chilling expression. On the contrary, the website was designed to facilitate expression by inviting "everyone – parents, students, educators and interested individuals or organizations – to provide feedback on the education system in Ontario."⁴³⁴ This included providing feedback on student performance, managing the use of technology in classrooms, and building a new age-appropriate HPE curriculum.⁴³⁵ The website provided a forum for and fostered "participation in social and political decision-making," thereby furthering a core value of freedom of expression.⁴³⁶

⁴³² ETFO factum paras. 68, 112-115.

⁴³³ Beckett Affidavit para. 101 [JR vol. 27 tab 29 p. 8546; RC vol. 1 tab 3]; Beckett Affidavit Exs. 43, 44 [JR vol. 31 tabs 29-43, 29-44 pp. 11279-11282; RC vol. 3 tabs 26-27].

⁴³⁴ Beckett Affidavit Ex. 45 [JR vol. 31 tab 29-45 p. 11284-11286; RC vol. 3 tab 28].

⁴³⁵ Similarly, the August 22, 2018 version of the website stated that "This website is designed to give parents a portal to provide feedback about concerns related to the curriculum being taught in the classroom": Beckett Affidavit Ex. 42 [JR vol. 31 tab 29-42 pp. 11272-11278; RC vol. 3 tab 25].

⁴³⁶ *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927 at 976.

241. The Court should not find that the democratically-elected government infringes the *Charter* by giving the public an opportunity to submit its views and by providing the public with information about an existing regulatory complaints process. Teachers, like all individuals, do not have a constitutional right to be free from public scrutiny or even criticism. Moreover, teachers are regulated professionals and are properly subject to oversight. Like other professionals, they have “elected to accept the substantial privileges and significant responsibilities of being a member of a self-governing profession.”⁴³⁷

242. One of those responsibilities is the maintenance of public confidence and of accountability to the public that the profession serves.⁴³⁸ Teachers in publicly-funded schools work in important public institutions and are paid from the public purse. The public has a legitimate interest in how teachers conduct themselves in publicly-funded classrooms. In turn, the Government has a valid interest in knowing the public’s views on these matters, including knowing whether members of the public have concerns about the curriculum taught in school. The ability to freely communicate such concerns to the government is one of the benefits of living in a free and democratic society.

243. The College regulates teachers in the public interest, and one of its core functions is to review and investigate public complaints. Despite this important regulatory role, ETFO characterizes public awareness and information about the College in wholly negative terms.⁴³⁹ Ms. Gangaram does not think that information about the College’s role is “the type of information the average person needs to carry with them...I don’t think it’s important for

⁴³⁷ *Yazdanfar v. The College of Physicians and Surgeons*, 2013 ONSC 6420 at para. 113 (Div. Ct.).

⁴³⁸ *Ontario College of Teachers v. Wallace*, 2015 ONOCT 85 at p. 8: “The College, as a self-regulatory body, is accountable to the public and the teaching profession.”

⁴³⁹ ETFO factum paras. 114-15.

them to know it offhand.”⁴⁴⁰ This Court should not find that it is harmful or negative for the public to be made aware of how to raise concerns about the conduct of any regulated professional. As Prof. Allison opined in his unchallenged evidence:

Rather than being condemned, any webpage or other public information informing parents and citizens that they may legitimately file complaints against members of any professional body should be applauded. Indeed, we may wonder why more school and school board websites do not routinely include instructions and an active link for raising concerns and complaints about teachers”⁴⁴¹

244. If providing a link to the College’s complaints webpage chills teachers’ freedom of expression, then so too must the College’s own complaints webpage itself, and indeed the College’s very existence. It cannot be constitutionally permissible for the College to receive complaints about teachers, but constitutionally impermissible for the government to advise the public of that fact. The Court should not expand the ambit of freedom of expression to give regulated actors a s. 2(b) right to be free of criticism or complaint to their regulator.

245. In any event, as of December 17, 2018, with the end of the consultation, the website no longer accepts public submissions nor includes any link or reference to the College.⁴⁴²

246. ETFO’s theory of the alleged chilling effect of the ForTheParents.ca website is incoherent. ETFO asserts that the purpose of the website was to solicit concerns about the 2015 HPE Curriculum.⁴⁴³ Soliciting concerns about the curriculum taught *last* year is said to chill teachers’ expression in implementing a different curriculum *this* year. This incoherence is compounded by the fact that the website no longer solicits any comments, yet ETFO maintains that teachers will be chilled by it for the remaining six months of the school year.

247. Nor has ETFO provided any admissible evidence that a teacher has actually been

⁴⁴⁰ Gangaram Cross pp. 338-39 qq. 1266-70 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

⁴⁴¹ Allison Affidavit para. 85 [JR vol. 45 tab 30 p. 18836; RC vol. 1 tab 4].

⁴⁴² See <https://www.ontario.ca/page/for-the-parents>.

⁴⁴³ ETFO factum para. 68.

chilled from exercising their professional judgment or complying with their ethical and legal obligations by the ForTheParents.ca website or the 2018 HPE Curriculum.

248. Ms. Gangaram offered only inadmissible hearsay statements from unnamed colleagues and her own speculation on the supposed concerns of other unnamed teachers regarding how they may teach this year.⁴⁴⁴ For her own part, she agreed she *will* be able to provide inclusive, supporting and accurate information this year when teaching the 2018 curriculum.⁴⁴⁵ Ms. Shubat, who is not a teacher, speculated for the first time in cross-examination on what unnamed teachers might feel comfortable teaching in 2018.⁴⁴⁶ Ms. Meyer Odell similarly offered only hearsay statements regarding the alleged views of unnamed teachers.⁴⁴⁷ Dr. Bialystok’s comments about how teachers might teach the 2018 HPE curriculum were also speculative (or, to use her word, “extrapolative”) and not based on any survey or studies undertaken since the issuance of the 2018 HPE Curriculum.⁴⁴⁸

249. ETFO’s failure to adduce reliable and admissible evidence of a chilling effect must mean its claim fails. Nor is this case similar to *Vice Media*, relied on by ETFO to suggest that it should not be required to establish a chilling effect with cogent evidence.⁴⁴⁹ *Vice Media* concerned *ex parte* production orders compelling disclosure of journalists’ sources to police, a context very far removed from this case, and even then the Supreme Court held that the “law is not quick to make assumptions without a basis in the evidence in the particular case.”⁴⁵⁰

⁴⁴⁴ Gangaram Affidavit paras. 37, 60, 62-63 [JR vol. 5 tab 9 pp. 1106-07, 1114-15].

⁴⁴⁵ Gangaram Affidavit para. 59 [JR vol. 5 tab 9 pp. 1113-14].

⁴⁴⁶ Shubat Cross pp. 50-51, 57-58 qq. 206, 226 [BOT vol. 11 tab 14; RC vol. 2 tab 19].

⁴⁴⁷ Odell Affidavit para. 20 [JR vol. 8 tab 13 pp. 2125-26; RC vol. 2 tab 18].

⁴⁴⁸ Bialystok Cross pp. 63-64 qq. 272-74 [BOT vol. 1 tab 2; RC vol. 2 tab 8].

⁴⁴⁹ *R. v. Vice Media Canada Inc.*, 2018 SCC 53, discussed at ETFO factum para. 117.

⁴⁵⁰ *R. v. Vice Media Canada Inc.*, 2018 SCC 53 at para. 28.

c. The significance of press releases, ministers' statements and media articles

250. ETFO relies on public statements by government officials to establish a “chilling” effect on teachers. In particular, it points to the government’s press release of August 22, 2018, which states, “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” and “if we find somebody failing to do their job, we will act.”⁴⁵¹

251. The context for this statement is ETFO’s own press release of August 13, 2018, denouncing the government’s impending replacement of the 2015 HPE Curriculum and encouraging teachers to “continue to follow the 2015 Health Curriculum.”⁴⁵² As noted above, while the curriculum provides substantial leeway for teachers in terms of their classroom instruction, teachers are nonetheless required to follow the Ontario curriculum. They must teach and assess students on the expectations for their subject and grade as set out in the curriculum issued by the Minister. Teachers are no more free to “follow” the replaced 2015 HPE Curriculum than they are free to follow the curriculums of other provinces or of private schools. The statement that teachers, principals and school board officials are expected to fulfil their obligations says no more than what is true: that teachers and schools have professional responsibilities (including implementing the curriculum as issued by the Minister) and are accountable for the discharge of those responsibilities.

252. ETFO attributes various oblique and sinister meanings to the government’s press release, as well as to hearsay statements reported in inadmissible media reports. None of these

⁴⁵¹ See Beckett Affidavit Ex. 41 [JR vol. 31 tab 29-41 pp. 11269-11271; RC vol. 3 tab 24].

⁴⁵² Beckett Affidavit Ex. 40 [JR vol. 31 tab 29-40 pp. 11265-11268; RC vol. 3 tab 23]; Beckett Cross pp. 78-79 qq. 250-51 [BOT vol. 1 tab 1; RC vol. 2 tab 7].

meanings are found in the actual text of the statements.⁴⁵³ Nothing in these statements indicated that teachers may not teach the curriculum in an up-to-date and inclusive way.

253. In cross-examination, Ms. Gangaram admitted what she described as the “formal directive” telling teachers not to use up-to-date information in teaching the 2018 curriculum was not “formally stated” but was instead an “inferred understanding” that she had “divined” from a “variety of sources.”⁴⁵⁴ She acknowledged that her interpretation of these sources is “by implication”, that “the whole directive feels like a contextual inference,” and that her interpretation is an inference she draws from these sources and “other context in society.”⁴⁵⁵ She fears without any evidentiary basis that “the College, in disciplining teachers, may take direction from the Premier’s Office.”⁴⁵⁶ She had not read ADM Beckett’s affidavit setting out the Minister’s position and attaching the correspondence from the Ministry to the College.⁴⁵⁷

254. As the Supreme Court held in *Khawaja*, a chilling effect that results from an incorrect understanding cannot ground a finding of invalidity, nor can one based on an individual’s “cursory or incomplete knowledge.”⁴⁵⁸ While ETFO relies on *Zundel* to argue that the “mischief” of chill is that it may prevent speech that a law does not prohibit, the Court in *Zundel* concluded that the criminal law in that case created chill because it was overbroad in its statutory terms.⁴⁵⁹ There is no law restricting speech in this case, just the Applicant’s “inferred understanding” and “contextual inference” from a press release and media reports.

⁴⁵³ For example, ETFO characterizes the statement in the press release that consultations would address “[h]ow to build a new age-appropriate Health and Physical Education curriculum” as a statement that the 2015 Curriculum is therefore *not* age appropriate: ETFO Factum, para. 58. ADM Beckett was clear in cross-examination that “[t]here is no comment that I know of that says that the 2015 curriculum is or is not age appropriate”: Beckett Cross pp. 59, 65-66 qq. 190, 210-213 [BOT vol. 1 tab 1; RC vol. 2 tab 7].

⁴⁵⁴ Gangaram Cross, pp. 160, 186-187 qq. 684 and 761 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

⁴⁵⁵ Gangaram Cross pp. 168, 186, 198 qq. 706, 761, 782 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

⁴⁵⁶ Gangaram Cross pp. 339-341 qq. 1271-1278 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

⁴⁵⁷ Gangaram Cross pp. 140, 356-357 qq. 611, 1340-1345 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

⁴⁵⁸ *R. v. Khawaja*, 2012 SCC 69 at para. 82.

⁴⁵⁹ *R. v. Zundel*, [1992] 2 S.C.R. 731 at 771-72; ETFO factum para. 114. The same is true of *Iorfida*, also relied on by the ETFO Applicants at para. 114; *Iorfida v. MacIntyre* (1994), 21 O.R. (3d) 186 at paras. 25, 53-54.

255. In any event, ETFO cannot rely on news articles, statements by ministers, or press releases to prove that either the website or the 2018 HPE Curriculum infringe the *Charter*. Media reports are unreliable hearsay evidence and cannot be admitted for the truth of their contents, much less to ground a breach of the *Charter*.⁴⁶⁰ Ms. Gangaram admitted that her understanding of the so-called “directive” came in part from media reports she read in the summer prior to the 2018 HPE Curriculum being issued.⁴⁶¹ ETFO relies on such media reports in its factum, including a partial, de-contextualized quote from a Minister at a press scrum made weeks before the issuance of the 2018 HPE Curriculum.⁴⁶²

256. Statements made outside the Assembly by government officials are also not admissible to establish the intent or purpose of the government. In *Upper Churchill*, the Supreme Court explained that “speeches and public declarations by prominent figures in the public and political life of Newfoundland on this question should not be received as evidence.”⁴⁶³ Such statements “are political and are not credible sources of statutory or regulatory intention.”⁴⁶⁴

257. Even statements made within the Assembly “should be given little weight”, in that “the intent of particular members of Parliament is not the same” as the intent of the Government as a whole.⁴⁶⁵ In this case, where the 2018 HPE Curriculum was issued by the Minister pursuant to her statutory power, it is the words of the Minister herself that can provide the most relevant context:

...we are going to stand firmly in support of students and the realities they face in

⁴⁶⁰ *Public School Boards’ Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2 at para. 14.

⁴⁶¹ Article published on CBC website dated July 16, 2018, Gangaram Affidavit Ex. H [JR vol. 5 tab 9-H p. 1253]; Article published on CBC website dated July 30, 2018, Gangaram Affidavit Ex. I [JR vol. 5 tab 9-I p. 1258]; Gangaram Cross pp. 168-69 qq. 705-709 [BOT vol. 5 tab 5; RC vol. 2 tab 16].

⁴⁶² ETFO factum para. 61. ADM Beckett disagreed with ETFO’s interpretation: see Beckett Cross pp. 139-140 qq. 434-445 [BOT vol. 1 tab 1; RC vol. 2 tab 7].

⁴⁶³ *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297 at 319.

⁴⁶⁴ *Tesla Motors Canada ULC v. Ontario (Ministry of Transportation)*, 2018 ONSC 5062 at para. 58.

⁴⁶⁵ *R. v. Heywood*, [1994] 3 S.C.R. 761 at 788 per Cory J.

2018. We know they need to learn about consent. We know they need to learn about cyber safety. We know they need to learn about gender identity and appreciation. But we also know that the former Liberal government's consultation process was completely flawed, and that's where we're going to focus, and we're going to respect parents and allow them a chance to once and for all have their voices heard in a very fulsome, thoughtful, inclusive consultation.⁴⁶⁶

258. A conclusion that the 2018 HPE Curriculum is unconstitutional because of a press release or public communication that accompanied it would lead to the "absurd scenario" that the same curriculum could be validly re-issued tomorrow with a different press release:

Generally, the Court must not strike down an enactment which does not infringe the *Charter* in its meaning, form or effects, which would force Parliament to re-enact the same text, but with an extrinsic demonstration of a valid purpose. That would be an absurd scenario because it would ascribe a direct statutory effect to simple statements, internal reports and other external sources which, while they are useful when a judge must determine the meaning of an obscure provision, are not sufficient to strike down a statutory enactment which is otherwise consistent with the *Charter*.⁴⁶⁷

259. Rather than looking to extrinsic political statements to determine whether the *Charter* has been infringed, the Court should look to the text of the 2018 HPE Curriculum itself, in the full context of the legal framework that governs teachers in the classroom, including the *Education Act*, Ministry PPMs, the professional duties of teachers, and the *Human Rights Code*. Judicial review is not intended to supervise government press releases. Just as the ForTheParents.ca website is not an exercise of statutory power subject to the Divisional Court's declaratory or injunctive jurisdiction, neither are government communications. These matters relate to political debates, not legal rights, and the Court should not enter into them.

⁴⁶⁶ Ontario, Legislative Assembly, *Official Reports of Debate (Hansard)*, 42nd Parl., 1st Sess., No. 3 (16 July 2018) at 16-17, Beckett Affidavit Ex. 37 [JR vol. 31 tab 29-37 p. 11255-11256].

⁴⁶⁷ *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 at para. 17.

G. In the alternative, any infringement of the *Charter* is reasonably justified

a. The justification analysis should follow *Oakes*, not *Doré*

260. The Applicants proceed on the assumption that *Doré* provides the framework for the analysis of the constitutional claims in this case. This assumption is incorrect for two reasons. First, the Applicants must prove and not merely assume that a *Charter* infringement has been made out before the *Doré* test of “proportionate balancing” arises.⁴⁶⁸ If no infringement is established, there is nothing to balance and no proportionality stage is reached.⁴⁶⁹

261. Second, this Court has recently held in *Christian Medical* that where “the issues presented in the Applications is the constitutionality of particular provisions in policies of general application,” the justification analysis is *Oakes* and not *Doré*.⁴⁷⁰

262. The *Doré* analysis was developed to address *Charter* claims arising from “adjudicated administrative decisions” for which the *Oakes* test is an “awkward fit.”⁴⁷¹ It has been applied to the review of individualized decisions about whether and how to apply a general rule or policy to a particular person or entity.⁴⁷² The *Oakes* analysis, by contrast, is the appropriate framework for standards that are “prescribed by law,” meaning that “their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply.”⁴⁷³ The provincial curriculum is a non-adjudicative, non-individualized policy document of general application to all publicly-funded school boards in Ontario. Following *Christian Medical and Dental Society*, *Oakes* is the

⁴⁶⁸ *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 57 [*Doré*].

⁴⁶⁹ This was the result, for example, in the Supreme Court’s decision in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para. 75. See also *E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893 at para. 35 (per Sharpe J.A.) and para. 96 (per Lauwers J.A.).

⁴⁷⁰ *Christian Medical* at paras. 56-58 (Div. Ct.).

⁴⁷¹ *Christian Medical* at paras. 56-63, citing *Doré* at paras. 3-5 (Div. Ct.).

⁴⁷² *Doré*; *Loyola High School v. Québec (Attorney General)*, 2015 SCC 12 [*Loyola*]; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32.

⁴⁷³ *Doré* at para. 37, citing *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 at para. 53.

appropriate framework for considering whether any *Charter* infringement is justified.

263. In the alternative, if this Court concludes that it should follow the *Doré* framework, the same considerations and the same outcome would follow. The *Oakes* and *Doré* frameworks operate using the same “justificatory muscles” of minimal impairment and proportionality.⁴⁷⁴ On either approach, the Court must defer to the Minister’s authority to choose from a range of reasonable outcomes. Deference is important where, as here, the Minister is better positioned than the Court to choose between the available alternatives.⁴⁷⁵ Setting age-appropriate elementary school expectations that enjoy high levels of community support is a complex policy problem to which the Court’s “design and expertise are manifestly unsuited.”⁴⁷⁶

b. The 2018 HPE Curriculum is justified

264. If the 2018 HPE Curriculum infringes the *Charter*, any such infringement is justified as a reasonable and proportionate limit under either an *Oakes* or a *Doré* analysis.

265. To maintain confidence in the publicly-funded school system, it is critical that the curriculum enjoys a high degree of community acceptance and support. The HPE curriculum deals with topics that are sensitive, personal in nature, and deeply connected to family, religious or cultural values.⁴⁷⁷ Both the 2015 and 2018 curriculums recognize that “[p]arents are the primary educators of their children with respect to learning about values, appropriate behaviour, and ethnocultural, spiritual, and personal beliefs and traditions.”⁴⁷⁸

⁴⁷⁴ *Doré* at para. 5, *Loyola* at para. 40.

⁴⁷⁵ *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 53 [*Hutterian Brethren*].

⁴⁷⁶ *R. v. Michaud*, 2015 ONCA 585 at para. 108.

⁴⁷⁷ Beckett Affidavit at para. 88 [JR vol. 27 tab 29 p. 8540]; 2018 HPE Curriculum, Beckett Affidavit Ex. 4 pp. 30-31 [JR vol. 27 tab 29-4 pp. 8647-8648]; 2015 HPE Curriculum, Beckett Affidavit Ex. 18 p. 36 [JR vol. 31 tab 29-18 p. 10975]; Deani Van Pelt Affidavit, paras. 21-26 [JR vol. 45 tab 32 pp. 18994-18996].

⁴⁷⁸ Beckett Affidavit at para. 89 [JR vol. 27 tab 29 pp. 8540-8541]; 2015 HPE Curriculum, Beckett Affidavit Ex. 18 p. 13 [JR vol. 31 tab 29-18 p. 10952]; 2018 HPE Curriculum, Beckett Affidavit Ex. 4 p. 10 [JR vol. 27 tab 29-4 p. 8627].

266. The 2015 HPE Curriculum gave rise to expressions of parental concern, public protest, and student withdrawal across the province. Concerns were raised about age-appropriateness, inadequate consultation, that the curriculum interfered with religious beliefs, and that it undermined the role of parents in educating their children in matters of a moral dimension.⁴⁷⁹ Obtaining sufficient societal consensus on such matters is difficult: “The content and scope of topics in sexual health education, as well as at what developmental stage in a child’s life they will be taught, are contested by many stakeholders on the educational landscape.”⁴⁸⁰

267. The harms of maintaining a curriculum without adequate parental acceptance and input are real, and include the prospect that children will be withdrawn from publicly-funded schools and thereby lose the important educational and social benefits that come from public education.⁴⁸¹ This risk is reflected in the reports and student enrolment data discussed above. Where parental disapproval and student withdrawal is concentrated in Ontario communities characterized by faith, place of origin or newcomer status,⁴⁸² student withdrawal would leave Ontario’s publicly-funded schools less diverse and less representative of society as a whole.⁴⁸³

268. The issuance of the 2018 HPE curriculum is rationally connected to the purpose of enhancing public confidence in the curriculum. A rational connection can be established “on the basis of reason or logic.”⁴⁸⁴ It need only be “reasonable to suppose that the limit may further the goal, not that it will do so.”⁴⁸⁵ Returning to an already-accepted HPE curriculum pending widespread community consultation can reasonably be expected to advance public

⁴⁷⁹ Beckett Affidavit at paras. 79-87 [JR vol. 27 tab 29 pp. 8536-8540; RC vol. 1 tab 3].

⁴⁸⁰ Deani Van Pelt Affidavit, para. 19 [JR vol. 45 tab 32 pp. 10958; RC vol. 1 tab 6].

⁴⁸¹ Beckett Affidavit at paras. 85, 91-92 [JR vol. 27 tab 29 pp. 8538-8539, 8542-8543; RC vol. 1 tab 3].

⁴⁸² Beckett Affidavit at paras. 82, 86 [JR vol. 27 tab 29 pp. 5837, 8539; RC vol. 1 tab 3]; Beckett Affidavit Exs. 21, 33 [JR vol. 31 tabs 29-21, 29-33 pp. 11188-11190, 11236-11238]; Deani Van Pelt Affidavit, paras. 31-34 [JR vol. 45 tab 32 pp. 18997-18999; RC vol. 1 tab 6].

⁴⁸³ Beckett Affidavit at paras. 90 [JR vol. 27 tab 29 pp. 8541-8542; RC vol. 1 tab 3].

⁴⁸⁴ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 153-54.

⁴⁸⁵ *Hutterian Brethren* at para. 48.

confidence in and acceptance of the HPE curriculum.

269. The Minister’s issuance of the 2018 HPE Curriculum also addresses the risk that children will continue to be or will stay withdrawn from publicly-funded schools by parents who are concerned that the 2015 HPE Curriculum was introduced without sufficient parental consultation. The government “does not have to wait for the feared harm to occur before it can enact measures to prevent the possibility of the harm occurring or to remedy the harm, should it occur...a reasoned apprehension of harm is sufficient.”⁴⁸⁶

270. The 2018 HPE Curriculum falls within a range of reasonable alternatives and is entitled to deference.⁴⁸⁷ The questions of how much public consultation is necessary on the HPE curriculum, and the educational benefits of using the 2018 HPE Curriculum instead of the 2015 HPE Curriculum, are “complex social issues” that involve an “attempt to strike a balance between the claims of legitimate but competing social values.”⁴⁸⁸ These questions are best left to the Minister and the democratically-accountable branches of government, who have “[t]he primary responsibility for making the difficult choices involved in public governance” and are “better positioned than the court to choose among a range of alternatives.”⁴⁸⁹ As the Supreme Court has held, “Democratic institutions are meant to let us all share in the responsibility for these difficult choices.”⁴⁹⁰

271. There is no “single right answer” when it comes to the contents of a HPE curriculum, as demonstrated by Ontario’s unchallenged expert evidence and the considerable diversity

⁴⁸⁶ *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, at para. 98.

⁴⁸⁷ *Quebec (Attorney General) v. A*, 2013 SCC 5, at para. 439.

⁴⁸⁸ *Hutterian Brethren* at para. 53; *Quebec (Attorney General) v. A*, 2013 SCC 5, at para. 439.

⁴⁸⁹ *Hutterian Brethren* at paras. 35, 53.

⁴⁹⁰ *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927 at 993

among the HPE curriculums of provinces across Canada.⁴⁹¹ Provincial HPE curriculums differ widely in terms of the topics addressed, the level of detail at which they are addressed, and the grade in which they are addressed. Minimal impairment “must not be applied in a manner that amounts to identifying the Canadian province that has adopted the ‘preferable’ approach to a social issue and requiring that all other provinces follow suit.”⁴⁹² Nor can minimal impairment require an applicant’s preferred curriculum to be fixed at a particular point in time.

272. At the proportionality stage, governments must be allowed “a margin of appreciation on difficult social issues” and courts must be “sensitive to the constitutional responsibility of each province to legislate for its population.”⁴⁹³ Given the sparse and speculative evidence of any harm associated with the change in curriculum, the Minister’s issuance of the 2018 HPE Curriculum as an interim measure for this school year pending consultation with parents and the broader community is a proportionate response to the complex social issues at stake.

PART IV – ORDER SOUGHT

273. The Respondent requests that the applications be dismissed with costs.

274. Alternatively, in the event that this Court finds that the 2018 HPE Curriculum infringes the *Charter*, Ontario submits that the only appropriate and just remedy is a declaration, suspended for a period of 6 months. The Court of Appeal for Ontario has noted that a simple declaration is the usual remedy in constitutional cases:

[I]t is not appropriate for the Court to dictate the approach that should be taken in order to rectify the situation. Since there is more than one way to do so, it is the government’s task to determine which approach it prefers.⁴⁹⁴

⁴⁹¹ Brien Affidavit paras. 17-22, 24 [JR vol. 45 tab 31 pp. 18931-18934; RC vol. 1 tab 5]; Beckett Affidavit Ex. 51 [JR vol. 31 tab 29-51 pp. 11355-11360; RC vol. 3 tab 52].

⁴⁹² *Quebec (Attorney General) v. A*, 2013 SCC 5, at para. 440 per McLachlin C.J. (concurring in the result).

⁴⁹³ *Quebec (Attorney General) v. A*, 2013 SCC 5, at para. 449 per McLachlin C.J. (concurring in the result).

⁴⁹⁴ *Masters’ Association of Ontario v. Ontario*, 2011 ONCA 243 at para. 65, quoting from *Mackin v. New*

275. Assuming a *Charter* violation, there is a wide range of alternatives open to government to develop a curriculum that meets constitutional requirements. As the Supreme Court has affirmed, it is not the function of courts to make *ad hoc* policy choices from a variety of constitutionally valid options.⁴⁹⁵ Any remedy fashioned by the Court must allow the government to fully consider the options that are available to it. In cases where a wide range of policy options are available, courts will typically suspend declarations of invalidity to give the government an opportunity to determine which policy option to pursue.⁴⁹⁶

276. The Court should not grant an order imposing the 2015 HPE Curriculum. Such a remedy amounts to an order of *mandamus*, which is only appropriate where there is only one lawful course of action available to the Minister.⁴⁹⁷ That is plainly not the case here. Compelling the Minister to exercise her wide discretionary powers in a highly prescriptive way would upset the separation of powers, particularly in this area of contested social policy.

277. CCLA is incorrect to assert (at para. 81 of its factum) that the mandatory relief sought here is “comparable” to the remedy granted by the Court of Appeal in a 1990 case. In that case, the Court of Appeal held that a religious studies curriculum developed by a school board infringed *Charter* s. 2(a) and enjoined the board’s further use of it.⁴⁹⁸ The Court did not order the board to use a different curriculum in its place.

Brunswick (Minister of Finance), 2002 SCC 13 at para. 77.

⁴⁹⁵ *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 707, 717-719, 723-724 [*Schachter*]; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras. 95-96 [*Eldridge*]; *Gosselin* at paras. 291-293 and 298 (per Bastarache J) and at para. 332 (per Arbour J, dissenting); *Carter* at para. 125. See also *Ferrel* at paras. 48-49, *Tanudjaja v. Attorney General (Canada)*, 2014 ONCA 852 at paras. 34-35.

⁴⁹⁶ *Eldridge* at paras. 95-96; *Schachter* at 717-179, 721, 724-725; *Gosselin* at paras. 293-294; *Carter* at paras. 126-128; *Bedford SCC* at paras. 165-169.

⁴⁹⁷ *Doshi v. Canada (Attorney General)*, 2018 FC 710 at paras. 92-93; *PHS* at paras. 150-151.

⁴⁹⁸ *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)*, [1990] O.J. No. 104 at paras. 11, 131 (C.A.).

278. In *Wynberg*, the Court of Appeal held that, had it found that the Minister of Education had breached his duty under the *Education Act*, the “appropriate remedy for such a breach would be to direct the Minister to fulfill his duty.”⁴⁹⁹ A more prescriptive remedy would have been inappropriate, because Ontario would have had to “weigh multiple complex policy issues,” and it would have been speculative for the Court to assume how Ontario would have proceeded had it known that it could not proceed as it did.⁵⁰⁰ The same reasoning applies here.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 4, 2019

A handwritten signature in dark ink, consisting of several fluid, overlapping strokes that form a cursive-style name.

S. Zachary Green, Andrea Bolieiro, Sara Weinrib and Emily Bala
Of counsel for the Respondent, the Minister of Education

⁴⁹⁹ *Wynberg* at para. 202.

⁵⁰⁰ *Wynberg* at paras. 198-200.

**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

A N D B E T W E E N:

**THE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO and CINDY
GANGARAM**

Applicants

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY
THE MINISTER OF EDUCATION**

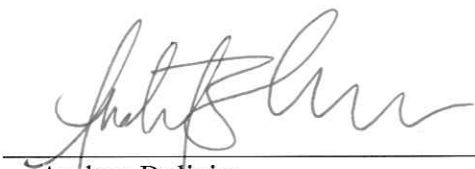
Respondent

APPLICATIONS UNDER Rule 14.05(2) of the *Rules of Civil Procedure*, RRO 1990, Reg 194 and Sections 2(1) and 6(2) of the *Judicial Review Procedure Act*, RSO 1990, c J.1

CERTIFICATE OF TIME OF THE RESPONDENT

1. I, Andrea Bolieiro, counsel for the Respondent, certify that no order under subrule 61.09(2) is required.
2. The Respondent, the Attorney General of Ontario, estimates 5 hours 30 minutes will be required for its oral argument.

January 4, 2019



Andrea Bolieiro
Of Counsel for the Respondent

SCHEDULE A

1	<i>2122157 Ontario Inc. v. Tarion Warranty Corporation</i> , 2016 ONSC 851 (Div. Ct.)
2	<i>Alberta (Aboriginal Affairs and Northern Development) v. Cunningham</i> , 2011 SCC 37
3	<i>Alberta v. Hutterian Brethren of Wilson Colony</i> , 2009 SCC 37
4	<i>Attis v. New Brunswick School District No. 15</i> , [1996] 1 S.C.R. 825
5	<i>Auton (Guardian ad litem of) v. British Columbia (Attorney General)</i> , 2004 SCC 78
6	<i>Baier v. Alberta</i> , 2007 SCC 31
7	<i>Barbra Schlifer Commemorative Clinic v. Canada</i> , 2014 ONSC 5140
8	<i>Bedford v. Canada</i> , 2010 ONSC 4264
9	<i>Berge v. College of Audiologists and Speech-Language Pathologists of Ontario</i> , 2016 ONSC 7034
10	<i>Berge v. College of Audiologists and Speech-Language Pathologists of Ontario</i> , SCC File No. 37851
11	<i>Bernard v. Close</i> , 2017 FCA 52
12	<i>Bernard v. Close</i> , [2017] S.C.C.A. No. 169
13	<i>Blencoe v. British Columbia (Human Rights Commission)</i> , 2000 SCC 44
14	<i>Borowski v. Canada</i> , [1989] 1 S.C.R. 342
15	<i>Bracken v. Niagara Parks Police</i> , 2018 ONCA 261
16	<i>British Columbia Public School Employers' Association v. B.C.T.F.</i> , 2005 BCCA 393
17	<i>British Columbia Securities Commission v. Branch</i> , [1995] 2 S.C.R. 3
18	<i>Campisi v. Ontario (AG)</i> , 2017 ONSC 2884
19	<i>Campisi v. Ontario (AG)</i> , 2018 ONCA 869
20	<i>Canada (AG) v. Downtown Eastside Sex Workers United Against Violence Society</i> , 2012 SCC 45
21	<i>Canada (AG) v. Hislop</i> , 2007 SCC 10
22	<i>Canada (Attorney General) v. Bedford</i> , 2013 SCC 72
23	<i>Canada (Attorney General) v. PHS Community Services Society</i> , 2011 SCC 44
24	<i>Canadian Broadcasting Corp. v. Canada (Attorney General)</i> , 2011 SCC 2
25	<i>Canadian Broadcasting Corp. v. Ontario (Attorney General)</i> , 2015 ONSC 3131

26	<i>Canadian Doctors for Refugee Care v. Canada (Attorney General)</i> , 2014 FC 651
27	<i>Carter v. Canada</i> , 2015 SCC 5
28	<i>Chaoulli v. Quebec (AG)</i> , 2005 SCC 35
29	<i>Chol v. York University</i> , 2004 CanLII 12986 (Div. Ct.)
30	<i>Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)</i> , [1997] 1 S.C.R. 12
31	<i>Coote v. Zellers Inc.</i> , 2008 CanLII 8260 (Div. Ct.)
32	<i>Danson v. Ontario (Attorney General)</i> , [1990] 2 S.C.R. 1086
33	<i>Delisle v. Canada (Deputy Attorney General)</i> , [1999] 2 S.C.R. 989
34	<i>Doré v. Barreau du Québec</i> , 2012 SCC 12
35	<i>Doshi v. Canada (Attorney General)</i> , 2018 FC 710
36	<i>Dunmore v. Ontario (Attorney General)</i> (1997), 37 O.R. (3d) 287 (Gen. Div.)
37	<i>Dunmore v. Ontario (Attorney General)</i> , [1999] O.J. No. 1104 (C.A.)
38	<i>Dunmore v. Ontario (Attorney General)</i> , 2001 SCC 94
39	<i>E.T. v. Hamilton-Wentworth District School Board</i> , 2017 ONCA 893
40	<i>Eldridge v. British Columbia (Attorney General)</i> , [1997] 3 S.C.R. 624
41	<i>Ernst v. Alberta Energy Regulator</i> , 2017 SCC 1
42	<i>Ferrel v. Ontario</i> (1998), 42 O.R. (3d) 97 (C.A.)
43	<i>Fleming v. Massey</i> , 2016 ONCA 70
44	<i>Flora v. Ontario Health Insurance Plan</i> , 2008 ONCA 538
45	<i>Fodor v. North Bay (City)</i> , 2018 ONSC 3722 (Div. Ct.)
46	<i>Gosselin v. Quebec (Attorney General)</i> , 2002 SCC 84
47	<i>Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component</i> , 2009 SCC 31
48	<i>Hamilton v. Attorney General of Ontario</i> , 2018 ONSC 3307
49	<i>Harper v. Canada (Attorney General)</i> , [2004] 1 S.C.R. 827
50	<i>Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall</i> , 2018 SCC 26
51	<i>Hy and Zel's Inc. v. Ontario (Attorney General)</i> , [1993] 3 S.C.R. 675
52	<i>Iorfida v. MacIntyre</i> (1994), 21 O.R. (3d) 186

53	<i>Irshad (Litigation Guardian of) v. Ontario (Minister of Health)</i> , 1999 CanLII 14890 (Ont. Sup. Ct.)
54	<i>Irshad (Litigation Guardian of) v. Ontario (Minister of Health)</i> , [2001] O.J. No. 648 (C.A.)
55	<i>Irshad (Litigation Guardian of) v. Ontario (Minister of Health)</i> , [2001] S.C.C.A. No. 2018
56	<i>Irwin Toy v. Quebec</i> , [1989] 1 S.C.R. 927
57	<i>Jamieson v. British Columbia (AG)</i> , [1971] B.C.J. No. 126 (Sup. Ct.)
58	<i>Jennifer Tanudjaja, et al. v. Attorney General of Canada, et al.</i> , 2015 CanLII 36780 (SCC)
59	<i>Kahkewistahaw First Nation v. Taypotat</i> , 2015 SCC 30
60	<i>Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)</i> , 2013 SCC 64
61	<i>Kempling v. College of Teachers (British Columbia)</i> , 2005 BCCA 327
62	<i>Kempling v. College of Teachers (British Columbia)</i> , [2005] S.C.C.A. No. 381
63	<i>Kennedy v. New Brunswick (Minister of Education)</i> , 2015 NBCA 58
64	<i>Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)</i> , 2017 SCC 54
65	<i>Lalonde v. Ontario (Commission de restructuration des services de santé)</i> , [2001] O.J. No. 4767 (C.A.)
66	<i>Landau v. Ontario (AG)</i> , 2013 ONSC 6152
67	<i>Law Society of British Columbia v. Trinity Western University</i> , 2018 SCC 32
68	<i>Little Sisters Book and Art Emporium v. Canada (Minister of Justice)</i> , 2000 SCC 69
69	<i>Loyola High School v. Québec (Attorney General)</i> , 2015 SCC 12
70	<i>MacKay v. Manitoba</i> , [1989] 2 S.C.R. 357
71	<i>Mackin v. New Brunswick (Minister of Finance)</i> , 2002 SCC 13
72	<i>Maple Lodge Farms v. Government of Canada</i> , [1982] 2 S.C.R. 2
73	<i>Marchand v. Ontario</i> (2006), 81 O.R. (3d) 172 (Sup. Ct.)
74	<i>Marchand v. Ontario</i> , 2007 ONCA 787
75	<i>Marchand v. Ontario</i> [2008] S.C.C.A. No. 37
76	<i>Masse v. Ontario</i> (1996), 134 DLR (4th) 20 (Ont. Div. Ct.)
77	<i>Masters' Association of Ontario v. Ontario</i> , 2011 ONCA 243

78	<i>Matthew Mernagh v. Her Majesty the Queen</i> , 2013 CanLII 45850
79	<i>McLeod v. City of Brantford</i> , 2018 ONSC 943 (Div. Ct.)
80	<i>Montréal (City) v. 2952-1366 Québec Inc.</i> , 2005 SCC 62
81	<i>Morin v. Prince Edward Island School Board, Regional Administrative Unit No. 3</i> , 2002 PESCAD 9
82	<i>Morin v. Prince Edward Island School Board, Regional Administrative Unit No. 3</i> , [2002] S.C.C.A. No. 414
83	<i>Mr. Shredding Waste Management v. New Brunswick (Minister of Environment and Local Government)</i> , 2004 NBCA 69
84	<i>Mussani v. College of Physicians and Surgeons of Ontario</i> , [2004] O.J. No. 5176 (C.A.)
85	<i>Ontario (Disability Support Program) v. Tranchemontagne</i> , 2010 ONCA 593
86	<i>Ontario (Public Safety and Security) v. Criminal Lawyers' Association</i> , 2010 SCC 23
87	<i>Ontario College of Teachers v Wallace</i> , 2015 ONOCT 85
88	<i>Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)</i> , [2002] O.J. No. 1445 (C.A.)
89	<i>Ontario Home Builders Assn v. York Region Board of Education</i> , [1996] 2 S.C.R. 929
90	<i>Operation Dismantle v. Canada</i> , [1985] 1 S.C.R. 441
91	<i>Peart v. Ontario (Community Safety and Correctional Services)</i> , 2014 HRTO 611
92	<i>Public School Boards' Assn. of Alberta v. Alberta (Attorney General)</i> , 2000 SCC 2
93	<i>Quebec (Attorney General) v. A</i> , 2013 SCC 5
94	<i>R. v. Edwards Books and Art Ltd.</i> , [1986] 2 S.C.R. 713
95	<i>R. v. Heywood</i> , [1994] 3 S.C.R. 761
96	<i>R. v. Jayaraj</i> , 2014 ONSC 6367
97	<i>R. v. Jayaraj</i> , [2015] S.C.C.A. No. 129
98	<i>R. v. Kapp</i> , 2008 SCC 41
99	<i>R. v. Keegstra</i> , [1990] 3 S.C.R. 697
100	<i>R. v. Khawaja</i> , 2010 ONCA 862
101	<i>R. v. Khawaja</i> , 2012 SCC 69
102	<i>R. v. Long</i> , 2018 ONCA 282

103	<i>R v. Michaud</i> , 2015 ONCA 585
104	<i>R. v. Morgentaler</i> , [1988] 1 S.C.R. 30
105	<i>R. v. Peart</i> , 2017 ONSC 782
106	<i>R. v. Vice Media Canada Inc.</i> , 2018 SCC 53
107	<i>R. v. Zundel</i> , [1992] 2 S.C.R. 731
108	<i>Re B.C. Motor Vehicle Act</i> , [1985] 2 S.C.R. 486
109	<i>Re Institute of Edible Oil Foods et al. and The Queen</i> , [1989] O.J. No. 2308 (C.A.)
110	<i>Reference re Upper Churchill Water Rights Reversion Act</i> , [1984] 1 S.C.R. 297
111	<i>RJR-MacDonald Inc. v. Canada (Attorney General)</i> , [1995] 3 S.C.R. 199
112	<i>Schachter v. Canada</i> , [1992] 2 S.C.R. 679
113	<i>Solar Power Network Inc. v. ClearFlow Energy</i> , 2018 ONCA 727
114	<i>Swearengen v. Ontario (Minister of Natural Resources)</i> , [2005] O.J. No 3403 (Div. Ct.)
115	<i>Tanudjaja v. Attorney General (Canada)</i> , 2013 ONSC 5410
116	<i>Tanudjaja v. Attorney General (Canada)</i> , 2014 ONCA 852
117	<i>The Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario</i> , 2018 ONSC 579 (Div. Ct.)
118	<i>Thompson v. Ontario (Attorney General)</i> , 2016 ONCA 676
119	<i>Thorne's Hardware Ltd. v. The Queen</i> , [1983] 1 S.C.R. 106
120	<i>Trinity Western University v. The Law Society of Upper Canada</i> , 2015 ONSC 4250 (Div. Ct.)
121	<i>Trinity Western University v. The Law Society of Upper Canada</i> , 2016 ONCA 518
122	<i>Trinity Western University v. Law Society of Upper Canada</i> , 2018 SCC 33
123	<i>UL Canada Inc. v. Quebec (Attorney General)</i> , 2005 SCC 10
124	<i>Walker v. Prince Edward Island</i> , [1995] 2 S.C.R. 407
125	<i>Wynberg v. Ontario</i> , [2006] O.J. No. 2732 (C.A.)
126	<i>Wynberg v. Ontario</i> , [2006] S.C.C.A. No. 441
127	<i>Yazdanfar v. The College of Physicians and Surgeons</i> , 2013 ONSC 6420 (Div. Ct.)

SCHEDULE B

***Education Act*, [R.S.O. 1990, c. E.2](#) s. 8(1)(3)(a), 8.1(1), 169.1(1), 264(1)(a)-(b), 302(3.4)**

Powers of Minister

8 (1) The Minister may, ...

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; R.S.O. 1990, c. E.2, s. 8 (1), par. 3.

Collection and use of personal information

8.1 (1) The Minister may collect personal information, directly or indirectly, for purposes related to the following matters, and may use it for those purposes:

1. Administering this Act and the regulations, and implementing the policies and guidelines made under this Act.
2. Ensuring compliance with this Act, the regulations, and the policies and guidelines made under this Act.
3. Planning or delivering programs or services that the Ministry provides or funds, in whole or in part, allocating resources to any of them, evaluating or monitoring any of them or detecting, monitoring and preventing fraud or any unauthorized receipt of services or benefits related to any of them.
- 3.1 Planning or delivering extended day programs, allocating resources to them, evaluating or monitoring them or detecting, monitoring and preventing fraud or any unauthorized receipt of services or benefits related to them.

- 3.2 Providing for financial assistance related to extended day programs, evaluating or monitoring the provision of the assistance or detecting, monitoring and preventing fraud or any unauthorized receipt of benefits related to the assistance.
- 4. Risk management, error management or activities to improve or maintain the quality of the programs or services that the Ministry provides or funds, in whole or in part.
 - 4.1 Risk management, error management or activities to improve or maintain the quality of extended day programs.
 - 4.2 Risk management, error management or activities to improve or maintain the provision of financial assistance related to extended day programs.
- 5. Research and statistical activities that relate to education and are conducted by or on behalf of the Ministry. 2006, c. 10, s. 1; 2010, c. 10, s. 3 (1, 2).

...

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. 2009, c. 25, s. 15; 2012, c. 5, s. 3 (1).

...

Duties of teacher

264 (1) It is the duty of a teacher and a temporary teacher,
teach

(a) to teach diligently and faithfully the classes or subjects assigned to the teacher by the principal;

learning

(b) to encourage the pupils in the pursuit of learning;

...

Same, governing bullying

302 (3.4) Every board shall establish policies and guidelines with respect to bullying prevention and intervention in schools, and the policies and guidelines must,

- (a) be consistent with those established by the Minister under section 301;
- (b) address every matter described in clauses 301 (7.1) (a) to (h); and
- (c) address any other matter and include any other requirement that the Minister may specify. 2012, c. 5, s. 11 (2).

***Judicial Review Procedure Act*, [R.S.O. 1990, c. J.1](#) s. 1, 2(1)2**

Definitions

1 In this Act,

“application for judicial review” means an application under subsection 2 (1); (“requête en révision judiciaire”)

“court” means the Superior Court of Justice; (“Cour”)

“licence” includes any permit, certificate, approval, registration or similar form of permission required by law; (“autorisation”)

“municipality” has the same meaning as in the *Municipal Affairs Act*; (“municipalité”)

“party” includes a municipality, association of employers, a trade union or council of trade unions which may be a party to any of the proceedings mentioned in subsection 2 (1); (“partie”)

“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; (“compétence légale”)

“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. (“compétence légale de décision”) R.S.O. 1990, c. J.1, s. 1; 2002, c. 17, Sched. F, Table; 2006, c. 19, Sched. C, s. 1 (1).

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. R.S.O. 1990, c. J.1, s. 2 (1).

Freedom of Information and Protection of Privacy Act, [R.S.O. 1990, c. F.31](#) s. 38

Personal information

38 (1) In this section and in [section 39](#),

“personal information” includes information that is not recorded and that is otherwise defined as “personal information” under this Act. R.S.O. 1990, c. F.31, s. 38 (1).

Collection of personal information

(2) No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.

SCHEDULE C

The chart below sets out a number of examples where the mandatory expectations are articulated with more generality in the 2018 HPE Curriculum than in the 2015 HPE Curriculum. The mandatory content (as opposed to the examples) is bolded.

<u>Grade</u>	<u>2015 HPE Curriculum</u>	<u>2018 HPE Curriculum</u>
By the end of Grade 1, students will:	identify body parts, including genitalia (e.g., <i>penis, testicles, vagina, vulva</i>), using correct terminology (page 93)	identify the major parts of the body by their proper names. (page 83)
By the end of Grade 3, students will:	identify factors (e.g., <i>sleep, food, physical activity, heredity, environment, support from a caring adult, sense of belonging, peer influence</i>) that affect physical development (e.g., <i>of hair, skin teeth, body size and shape</i>) and/or emotional development (e.g., <i>of self-awareness, adaptive skills, social skills</i>) (page 122)	describe basic changes in growth and development from birth to childhood (e.g., <i>changes to teeth, hair, feet, and height</i>) (page 112)
By the end of Grade 5, students will:	explain how a person's actions, either in person or online, can affect their own and others' feelings, self-concept, emotional well-being, and reputation (e.g., <i>negative actions such as name calling, making homophobic or racist remarks, mocking appearance or ability, excluding, bullying, sexual harassment [including online activities such as making sexual comments, sharing sexual pictures, or asking for such pictures to be sent]; positive actions such as praising, supporting, including, and advocating</i>) (page 160)	explain how a person's actions (e.g., <i>negative actions such as name calling, making homophobic or racist remarks, mocking appearance or ability, excluding, bullying, sexual harassment; positive actions such as praising, supporting, including</i>) can affect the feelings, self-concept, emotional well-being, and reputation of themselves and others (page 146)
	Identify the parts of the reproductive system, and describe how the body changes during	Describe the secondary physical changes at puberty (e.g., <i>growth of body</i>)

	puberty (page 156)	hair, changes in body shape); (page 147)
	Describe the processes of menstruation and spermatogenesis, and explain how these processes relate to reproduction and overall development (page 156)	Describe the processes of menstruation and spermatogenesis (page 147)
By the end of Grade 6, students will:	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, Metis and Inuit cultural teachings, such as medicine wheel teachings connected to the four colour or seven grandfather teachings, or other cultural teachings</i>) (page 175)	apply a problem-solving/decision-making process to address issues related to friends, peers, and family relationships (page 163)
By the end of Grade 7, students will:	assess the impact of different types of bullying or harassment, including the harassment and coercion that can occur with behaviours such as sexting, on themselves and others, and identify ways of preventing or resolving such incidents (<i>e.g., communicating feelings; reporting incidents involving themselves or others; encouraging others to understand the social responsibility to report incidents and support others rather than maintaining a code of silence or viewing reporting as “ratting”; seeking help from support services; learning skills for emotional regulation; using strategies for defusing tense or potentially violent situations</i>) (page 198)	assess the impact of different types of bullying or harassment (<i>e.g., intimidation, ostracism, pressure to conform, gang activities</i>) on themselves and others, and identify ways of preventing or resolving such incidents (<i>e.g., communicating feelings; reporting incidents involving themselves or others; encouraging others to understand the social responsibility to report incidents and support others rather than maintaining a code of silence or viewing reporting as “ratting”; seeking help from support services; learning skills for emotional regulation; using strategies for defusing tense or potentially violent situations</i>) (page 182)
	explain the importance of having a shared understanding with a partner about the following: delaying sexual activity until they are older (<i>e.g.,</i>	describe age-appropriate matters related to sexuality (<i>e.g., the need to develop good interpersonal skills, such as the ability to communicate effectively with</i>

	<p><i>choosing to abstain from any genital contact; choosing to abstain from having vaginal or anal intercourse; choosing to abstain from having oral-genital contact)</i></p> <p>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; (page 195)</p>	<p><i>the opposite sex)</i> (page 184)</p> <p>use effective communication skills (<i>e.g., refusal skills, active listening</i>) to deal with various relationships and situations (page 184)</p> <p>explain the term abstinence as it applies to healthy sexuality (page 184)</p>
	<p>identify common sexually transmitted infections (STIs), and describe their symptoms (page 196)</p> <p>identify ways of preventing STIs, including HIV, and/or unintended pregnancy, such as delaying first intercourse and other sexual activities until a person is older and using condoms consistently if and when a person becomes sexually active (page 196)</p>	<p>identify the methods of transmission and the symptoms of sexually transmitted diseases (STDs), and ways to prevent them (page 184)</p>
<p>By the end of Grade 8, students will:</p>	<p>demonstrate an understanding of aspects of sexual health and safety, including contraception and condom use for pregnancy and STI prevention, 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 (<i>e.g., 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</i>) (page 218)</p>	<p>identify symptoms, methods of transmission, prevention, and high-risk behaviours related to common STDs, HIV, and AIDS; (page 201)</p> <p>identify methods used to prevent pregnancy; (page 201)</p> <p>explain the importance of abstinence as a positive choice for adolescents (page 201)</p>

SCHEDULE D

The chart below sets out a number of examples where the 2015 HPE Curriculum contains more optional examples than the 2018 HPE Curriculum. The mandatory content (as opposed to the examples) is bolded.

<u>Grade</u>	<u>2015 HPE Curriculum</u>	<u>2018 HPE Curriculum</u>
By the end of Grade 1, students will:	identify body parts, including genitalia (e.g., <i>penis, testicles, vagina, vulva</i>), using correct terminology (page 93)	identify the major parts of the body by their proper names. (page 83)
By the end of Grade 2, students will:	explain the importance of standing up for themselves, and demonstrate the ability to apply behaviours that enhance their personal safety in threatening situations (e.g., <i>speaking confidently; stating boundaries; saying no; respecting the right of a person to say no and encouraging others to respect that right also; reporting exploitive behaviours, such as improper touching of their bodies or others' bodies</i>) (page 109)	explain the importance of standing up for themselves, and demonstrate the ability to apply behaviours that enhance their personal safety in threatening situations (e.g., <i>speaking confidently; stating boundaries; saying no; reporting exploitive behaviours, such as improper touching of their bodies or others' bodies</i>) (page 96)
	describe how to relate positively to others (e.g., <i>cooperate, show respect, smile, manage anger, pay attention to what people say and to their facial expressions and body language</i>), and describe behaviours that can be harmful in relating to others (e.g., <i>verbal abuse, including both online and face-to-face name calling, insults, and mocking; deliberately ignoring someone, or ignoring the feelings they express; physical violence, including pushing, kicking, and hitting</i>) (page 110)	describe how to relate positively to others (e.g., <i>cooperate, show respect, smile, manage anger</i>), and describe behaviours that can be harmful in relating to others (e.g., <i>verbal abuse, including name calling, insults, and mocking; deliberately ignoring someone; physical violence, including pushing, kicking, and hitting</i>) (page 97)
By the end of Grade 5, students	demonstrate the ability to deal with threatening situations by applying appropriate living skills (e.g., <i>personal skills, including self-monitoring and</i>	demonstrate the ability to deal with threatening situations by applying appropriate living skills (e.g., <i>personal</i>

will:	<p><i>anger management; interpersonal skills, including conflict resolution skills; communication skills, including assertiveness and refusal skills) and safety strategies (e.g., having a plan and thinking before acting; looking confident; being aware of their surroundings and of people's body language, tone of voice, or facial expressions; seeking help; drawing on cultural teachings, where appropriate, to analyse situations and develop responses) (page 157)</i></p>	<p><i>skills, including self-monitoring and anger management; interpersonal skills, including conflict resolution skills; communication skills, including assertiveness and refusal skills) and safety strategies (e.g., having a plan and thinking before acting; looking confident; being aware of surroundings; seeking help; drawing on cultural teachings, where appropriate, to analyse situations and develop responses) (page 145)</i></p>
	<p>explain how a person's actions, either in person or online, can affect their own and others' feelings, self-concept, emotional well-being, and reputation (e.g., negative actions such as name calling, making homophobic or racist remarks, mocking appearance or ability, excluding, bullying, sexual harassment [including online activities such as making sexual comments, sharing sexual pictures, or asking for such pictures to be sent]; positive actions such as praising, supporting, including, and advocating) (page 160)</p>	<p>explain how a person's actions (e.g., negative actions such as name calling, making homophobic or racist remarks, mocking appearance or ability, excluding, bullying, sexual harassment; positive actions such as praising, supporting, including) can affect the feelings, self-concept, emotional well-being, and reputation of themselves and others (page 146)</p>
	<p>describe emotional and interpersonal stresses related to puberty (e.g., questions about changing bodies and feelings, adjusting to changing relationships, crushes and more intense feelings, conflicts between personal desires and cultural teachings and practices), and identify strategies that they can apply to manage stress, build resilience, and enhance mental health and emotional well-being (e.g. being active, writing feelings in a journal, accessing information about their concerns, taking action on a concern,</p>	<p>describe physical, emotional, and interpersonal changes associated with puberty; (page 147)</p> <p>Identify factors (e.g., trust, honesty, caring) that enhance healthy relationships with friends, family, and peers; (page 147)</p> <p>Identify strategies to deal positively with stress and pressures that result from relationships with family and friends;</p>

	<i>talking to a trusted peer or adult, breathing deeply, meditating, seeking cultural advice from elders</i>) (page 158)	(page 147)
By the end of Grade 6, students will:	making informed decisions that demonstrate respect for themselves and others and help to build healthier relationships, using a variety of living skills (e.g., <i>personal and interpersonal skills; critical and creative thinking skills; skills based on First Nation, Metis and Inuit cultural teachings, such as medicine wheel teachings connected to the four colour or seven grandfather teachings, or other cultural teachings</i>) (page 175)	apply a problem-solving/decision-making process to address issues related to friends, peers, and family relationships (page 163)
By the end of Grade 7, students will:	explain the importance of having a shared understanding with a partner about the following: delaying sexual activity until they are older (e.g., <i>choosing to abstain from any genital contact; choosing to abstain from having vaginal or anal intercourse; choosing to abstain from having oral-genital contact</i>) 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 (page 195)	describe age-appropriate matters related to sexuality (e.g., <i>the need to develop good interpersonal skills, such as the ability to communicate effectively with the opposite sex</i>) (page 184) use effective communication skills (e.g., <i>refusal skills, active listening</i>) to deal with various relationships and situations (page 184) explain the term abstinence as it applies to healthy sexuality (page 184)
By the end of Grade 8, students will:	demonstrate the ability to assess situations for potential dangers (e.g., <i>getting into a car with a stranger or an impaired, unlicensed, or inexperienced driver; dependencies or coercion in dating relationships; joining gangs; participating in violence; attending a party where alcohol or drugs are being used; using cosmetic procedures or treatments such as piercing, tattooing, crash diets, or tanning that involve potential health risks; exposure to infectious diseases through direct contact, sneezing, or coughing</i>), and apply	demonstrate the ability to assess situations for potential dangers (e.g., <i>getting into a car with a stranger or an impaired, unlicensed, or inexperienced driver; dependencies or coercion in dating relationships; joining gangs; participating in violence; attending a party where alcohol or drugs are being used; using cosmetic procedures or treatments such as piercing, tattooing, crash diets, or artificial tanning that involve potential health risks</i>), and apply strategies for avoiding dangerous situations (page 198)

	strategies for avoiding dangerous situations (page 217)	
	analyse the impact of violent behaviours, including aggression, anger, swarming, dating violence, and gender-based or racially based violence, on the person being targeted, the perpetrator, and bystanders, and describe the role of support services in preventing violence (e.g., <i>help lines, school counsellors, social workers, youth programs, shelters, restorative justice pro-grams, gay-straight student alliances</i>) (page 219)	analyse the impact of violent behaviours, including aggression, anger, swarming, dating violence, and gender-based or racially based violence, on the person being targeted, the perpetrator, and bystanders, and describe the role of support services in preventing violence (e.g., <i>help lines, school counsellors, social workers, youth programs, shelters, restorative justice programs</i>) (page 200)
	demonstrate an understanding of aspects of sexual health and safety, including contraception and condom use for pregnancy and STI prevention, 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 (e.g., <i>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</i>) (page 218)	identify symptoms, methods of transmission, prevention, and high-risk behaviours related to common STDs, HIV, and AIDS; (page 201) identify methods used to prevent pregnancy; (page 201) explain the importance of abstinence as a positive choice for adolescents (page 201)
	identify and explain factors than can affect an individual's decisions about sexual activity (e.g., <i>previous thinking about reasons to wait, including making a choice to delay sexual activity and establishing personal limits; perceived personal readiness; peer pressure; desire; curiosity; self-concept; awareness and acceptance of gender identity and sexual orientation; physical or cognitive disabilities and possible associated assumptions; legal concerns; awareness of health risks, including risk of STIs and blood-borne infections; concerns about risk of pregnancy; use of alcohol or drugs; personal or family values; religious beliefs;</i>	identify the physical, emotional, interpersonal, and spiritual aspects of healthy sexuality (e.g., <i>respect for life, ethical questions in relationships, contraception</i>) (page 201) apply living skills (e.g., <i>decision-making, problem-solving, and refusal skills</i>) to respond to matters related to sexuality, drug use, and healthy eating habits (page 201) identify sources of support (e.g., <i>parents/guardians, doctors</i>) related to

	<i>cultural teachings; access to information; media messages), and identify sources of support (e.g., a health professional [doctor, nurse, public health practitioner], a community elder, a teacher, a religious leader, a parent or other trusted adult, a reputable website) (page 215)</i>	healthy sexuality issues (page 201) identify local support groups and community organizations (e.g., public health offices) that provide information or services related to health and well-being (page 201)
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SCHEDULE E

The chart below sets out a number of examples where the learning expectations in the 2015 HPE Curriculum appear in similar form, but are placed in a different grade in the 2018 HPE Curriculum. The mandatory content (as opposed to the examples) is bolded.

<u>2015 HPE Curriculum</u>	<u>2018 HPE Curriculum</u>
<p><u>Grade 2:</u> outline the basic stages of human development (<i>e.g., infant, child, adolescent, adult, older adult</i>) and related bodily changes, and identify factors that are important for healthy growth and living throughout life (page 108)</p>	<p><u>Grade 3:</u> outline characteristics in the development and growth of humans from birth to childhood (page 112)</p> <p><u>Grade 3:</u> describe basic changes in growth and development from birth to children (<i>e.g., change to teeth, hair, feet, and height</i>) (page 112)</p> <p><u>Grade 4:</u> describe the four stages of human development (infancy, childhood, adolescence, and adulthood) and identify the physical, interpersonal, and emotional changes appropriate to their current stage (page 132)</p>
<p><u>Grade 3:</u> 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, 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 (page 124)</p>	<p><u>Grade 2:</u> distinguish the similarities and differences between themselves and others (<i>e.g., in terms of body size or gender</i>) (page 98)</p> <p><u>Grade 2:</u> describe how to relate positively to others (<i>e.g., cooperate, show respect, smile, manage anger</i>), and describe behaviours that can be harmful in relating to others (<i>e.g., verbal abuse, including name calling, insults, and mocking; deliberately ignoring someone; physical violence, including pushing, kicking, and hitting</i>) (page 97)</p>
<p><u>Grade 3:</u> identify the characteristics of healthy relationships (<i>e.g., accepting differences, being inclusive, communicating openly, listening, showing mutual respect and caring, being honest</i>) and describe ways of</p>	<p><u>Grade 4:</u> identify the characteristics of healthy relationships (<i>e.g., showing consideration of others' feelings by avoiding negative communication</i>) (page 132)</p>

<p>overcoming challenges (<i>e.g., bullying, exclusion, peer pressure, abuse</i>) in a relationship (page 121)</p>	<p><u>Grade 5:</u> identify factors (<i>e.g., trust, honesty, caring</i>) that enhance healthy relationships with friends, family, and peers (page 147)</p> <p><u>Grade 5:</u> identify strategies to deal positively with stress and pressures that result from relationships with family and friends (page 147)</p>
<p><u>Grade 4:</u> describe the physical changes that occur in males and females at puberty (<i>e.g., growth of body hair, breast development, changes in voice and body size, production of body odour, skin changes</i>) and the emotional and social impacts that may result from these changes (page 141)</p>	<p><u>Grade 5:</u> describe physical, emotional, and interpersonal changes associated with puberty (page 147)</p>
<p><u>Grade 5:</u> identify the parts of the reproductive system, and describe how the body changes during puberty (page 156)</p>	<p><u>Grade 6:</u> identify the major parts of the reproductive system and their functions and relate them to puberty (page 163)</p> <p><u>Grade 6:</u> relate the changes at puberty to the reproductive organs and their functions (page 163)</p>
<p><u>Grade 6:</u> assess the effects of stereotypes, including homophobia and assumption 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 (page 177)</p>	<p><u>Grade 5:</u> explain how a person's actions (<i>e.g., negative actions such as name calling, making homophobic or racist remarks, mocking appearance or ability, excluding, bullying, sexual harassment; positive actions such as praising, supporting, including</i>) can affect the feelings, self-concept, emotional well-being, and reputation of themselves and others (page 146)</p> <p><u>Grade 9:</u> demonstrate an understanding of factors (<i>e.g., acceptance, stigma, culture, religion, media, stereotypes, homophobia, self-image, self-awareness</i>) that can influence a person's understanding of their gender identity (<i>e.g., male, female, two-spirited, transgender, transsexual, intersex</i>) and sexual orientation (<i>e.g., heterosexual, gay, lesbian,</i></p>

	<p><i>bisexual</i>), and identify sources of support for all students</p> <p>(page 104, 2015 Secondary HPE Curriculum, Beckett Affidavit Exhibit 62)</p>
<p><u>Grade 8:</u> 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 (page 216)</p>	<p><u>Grade 9:</u> demonstrate an understanding of factors (e.g., acceptance, stigma, culture, religion, media, stereotypes, homophobia, self-image, self-awareness) that can influence a person's understanding of their gender identity (e.g., male, female, two-spirited, transgender, transsexual, intersex) and sexual orientation (e.g., heterosexual, gay, lesbian, bisexual), and identify sources of support for all students</p> <p>(page 104, 2015 Secondary HPE Curriculum, Beckett Affidavit Exhibit 62)</p>

SCHEDULE F

The chart below sets out all of the learning expectations in the Growth and Development component of the 2018 HPE Curriculum.

2018 HPE LEARNING EXPECTATIONS	
By the end of Grade 1, students will:	<p>OVERALL EXPECTATION</p> <ul style="list-style-type: none"> identify the stages in development of humans (e.g., comparing physical changes from birth to childhood) and of other living things. (p 83) <p>SPECIFIC EXPECTATIONS</p> <ul style="list-style-type: none"> describe simple life cycles of plants and animals, including humans; (p 83) recognize that rest, food, and exercise affect growth; (p 83) identify the major parts of the body by their proper names. (p 83)
By the end of Grade 2, students will:	<p>OVERALL EXPECTATION</p> <ul style="list-style-type: none"> describe parts of the human body, the functions of these parts, and behaviours that contribute to good health. (p 98) <p>SPECIFIC EXPECTATIONS</p> <ul style="list-style-type: none"> distinguish the similarities and differences between themselves and others (e.g., in terms of body size or gender); (p 98) describe how germs are transmitted and how this relates to personal hygiene (e.g., using tissues, washing hands before eating); (p 98) identify the five senses and describe how each functions. (p 98)
By the end of Grade 3, students will:	<p>OVERALL EXPECTATIONS</p> <ul style="list-style-type: none"> describe the relationship among healthy eating practices, healthy active living, and healthy bodies; (p 112) outline characteristics in the development and growth of humans from birth to childhood. (p 112) <p>SPECIFIC EXPECTATIONS</p> <ul style="list-style-type: none"> outline the basic human and animal reproductive processes (e.g., the union of egg and sperm); (p 112) describe basic changes in growth and development from birth to childhood (e.g., changes to teeth, hair, feet, and height). (p 112)

2018 HPE LEARNING EXPECTATIONS	
By the end of Grade 4, students will:	<p>OVERALL EXPECTATIONS</p> <ul style="list-style-type: none"> • explain the role of healthy eating practices, physical activity, and heredity as they relate to body shape and size; (p 132) • identify the physical, interpersonal, and emotional aspects of healthy human beings. (p 132) <p>SPECIFIC EXPECTATIONS</p> <ul style="list-style-type: none"> • describe the four stages of human development (infancy, childhood, adolescence, and adulthood) and identify the physical, interpersonal, and emotional changes appropriate to their current stage; (p 132) • identify the characteristics of healthy relationships (e.g., showing consideration of others' feelings by avoiding negative communication); • identify the challenges (e.g., conflicting opinions) and responsibilities in their relationships with family and friends. (p 132)
By the end of Grade 5, students will:	<p>OVERALL EXPECTATION</p> <ul style="list-style-type: none"> • describe physical, emotional, and interpersonal changes associated with puberty (p 147) <p>SPECIFIC EXPECTATIONS</p> <ul style="list-style-type: none"> • identify strategies to deal positively with stress and pressures that result from relationships with family and friends; (p 147) • identify factors (e.g., trust, honesty, caring) that enhance healthy relationships with friends, family, and peers; (p 147) • describe the secondary physical changes at puberty (e.g., growth of body hair, changes in body shape); (p 147) • describe the processes of menstruation and spermatogenesis; (p 147) • describe the increasing importance of personal hygiene following puberty. (p 147)
By the end of Grade 6, students will:	<p>OVERALL EXPECTATION</p> <ul style="list-style-type: none"> • identify the major parts of the reproductive system and their functions and relate them to puberty. (p 163) <p>SPECIFIC EXPECTATIONS</p> <ul style="list-style-type: none"> • relate the changes at puberty to the reproductive organs and their functions; (p 163)

2018 HPE LEARNING EXPECTATIONS	
	<ul style="list-style-type: none"> • apply a problem-solving/decision-making process to address issues related to friends, peers, and family relationships. (p 163)
By the end of Grade 7, students will:	<p>OVERALL EXPECTATION</p> <ul style="list-style-type: none"> • 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). (p 184) <p>SPECIFIC EXPECTATIONS</p> <ul style="list-style-type: none"> • explain the male and female reproductive systems as they relate to fertilization; (p 184) • distinguish between the facts and myths associated with menstruation, spermatogenesis, and fertilization; (p 184) • identify the methods of transmission and the symptoms of sexually transmitted diseases (STDs), and ways to prevent them; (p 184) • use effective communication skills (e.g., refusal skills, active listening) to deal with various relationships and situations; (p 184) • explain the term abstinence as it applies to healthy sexuality; (p 184) • identify sources of support with regard to issues related to healthy sexuality (e.g., parents/guardians, doctors). (p 184)
By the end of Grade 8, students will:	<p>OVERALL EXPECTATIONS</p> <ul style="list-style-type: none"> • identify the physical, emotional, interpersonal, and spiritual aspects of healthy sexuality (e.g., respect for life, ethical questions in relationships, contraception); (p 201) • identify local support groups and community organizations (e.g., public health offices) that provide information or services related to health and well-being; (p 201) • 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. (p 201) <p>SPECIFIC EXPECTATIONS</p> <ul style="list-style-type: none"> • explain the importance of abstinence as a positive choice for adolescents; • identify symptoms, methods of transmission, prevention, and high-risk behaviours related to common STDs, HIV, and AIDS; (p 201) • identify methods used to prevent pregnancy; (p 201) • 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; (p 201) • identify sources of support (e.g., parents/guardians, doctors) related to healthy sexuality issues. (p 201)

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

- and -

MINISTER OF EDUCATION (ONTARIO)

**THE ELEMENTARY TEACHERS' FEDERATION
OF ONTARIO and CINDY GANGARAM**

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS
REPRESENTED BY THE MINISTER OF EDUCATION**

Applicant

Respondent

ONTARIO
**SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

Proceeding commenced at Toronto

**FACTUM OF THE RESPONDENT,
THE MINISTER OF EDUCATION**

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