

**CITATION:** ETFO et al. v. Her Majesty the Queen, 2019 ONSC 1308  
**DIVISIONAL COURT FILE NOS.:** 526/18 and 554/18  
**DATE:** 20190228

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT**

**WARKENTIN R.S.J., HACKLAND and THORBURN JJ.**

**BETWEEN:** )  
THE ELEMENTARY ) *Howard Goldblatt, Dan Sheppard, Adriel*  
TEACHERS' FEDERATION OF ) *Weaver and Kiran Kang* for the Applicants,  
ONTARIO and CINDY ) The Elementary Teachers' Federation of  
GANGARAM ) Ontario and Cindy Gangaram  
 )  
Applicants )  
- and - )  
HER MAJESTY THE QUEEN IN RIGHT ) *S. Zachary Green, Andrea Bolieiro, Emily*  
OF ONTARIO AS REPRESENTED BY ) *Bala and Sara Weinrib* for the Respondent,  
THE MINISTER OF EDUCATION ) Her Majesty the Queen in Right of Ontario  
Respondent )  
 )  
**AND BETWEEN:** )  
 )  
BECKY MCFARLANE, in her personal ) *Stuart Svonkin and Brendan Brammall*, for  
capacity and as litigation guardian for L.M. ) the Applicants Becky McFarlane in her  
and THE CORPORATION OF THE ) personal capacity and as litigation guardian  
CANADIAN CIVIL LIBERTIES ) for L.M. and the Corporation of the  
ASSOCIATION ) Canadian Civil Liberties Association  
Applicants )  
 )  
- and - ) *S. Zachary Green, Andrea Bolieiro, Emily*  
HER MAJESTY THE QUEEN IN RIGHT ) *Bala and Sara Weinrib* for the Respondent,  
OF ONTARIO AS REPRESENTED BY ) Her Majesty the Queen in Right of Ontario  
THE MINISTER OF EDUCATION )  
Respondent ) *Claire Millgate and Andrea Luey* for the  
 ) **Intervenor**, Justice for Children and Youth  
 )  
 ) *Khalil Janmohamed and Amy Wah* for the  
 ) **Intervenor**, HIV Aids Legal Clinic of  
 ) Ontario and the Canadian HIV/Aids Legal  
 ) Network  
 )  
 ) *John Adair and Stephanie Bishop Hall* for  
 ) the **Intervenor**, Grand Council Treaty 3  
 )

**BY THE COURT**

**REASONS FOR DECISION**

**OVERVIEW**

[1] The Ontario *Education Act*, R.S.O. 1990, c. E.2 (the “*Act*”), provides that students in Ontario public schools have a right to learn in an environment that is positive, inclusive, and accepting of difference.

[2] The central question to be decided on these two applications for judicial review is whether the Directive requiring teachers in Ontario’s publicly funded elementary schools, to teach the sex education Curriculum in place from 2010 to 2015 (“the 2010 Curriculum”) and the events surrounding that decision, infringe the *Charter* rights of teachers, students, and/or parents.

[3] On August 22, 2018, Ontario’s Minister of Education issued a Directive requiring all elementary public school teachers, (grades 1 through 8) to teach the 2010 Curriculum for the 2018-2019 school year. This is an interim measure pending further consultations and the creation of a new sex education Curriculum for elementary public schools for the school year 2019-2020.

[4] The 2010 Curriculum does not include topics that were in the sex education curriculum in place between 2015 and 2018 (“the 2015 Curriculum”). Those topics include: consent, the specific names for body parts, gender identity and sexual orientation, online behaviour and cyberbullying, and sexually transmitted infections.

[5] The 2010 Curriculum is taught to elementary school students. The 2015 Curriculum remains in place for secondary school students (grades 9 through 12).

[6] Various elected officials made public statements about the change in the sex education curriculum and the Directive to teachers requiring them to follow the 2010 Curriculum.

[7] A reporting line on the website ForTheParents.ca solicited feedback from parents in respect of the curriculum being taught and advised that complaints would be collected and shared with the Ontario College of Teachers, the disciplinary body governing teachers.

**THE POSITIONS OF THE PARTIES**

**A. The ETFO Application**

[8] The First Application for judicial review is brought by the Elementary Teachers Federation of Ontario and Cindy Gangaram. The Elementary Teachers Federation of Ontario is the bargaining agent for English-language elementary public school teachers in Ontario. Cindy Gangaram is an elementary public school teacher.

[9] These Applicants are collectively referred to as “ETFO”.

[10] ETFO does not dispute that as legislators, the government has the right to make policy changes including the right to change the sex education curriculum.

[11] However, ETFO submits that the combined effect of the changes to the sex education curriculum, the Directive requiring teachers to teach the 2010 Curriculum, statements made by various elected officials, and the website ForTheParents.ca, put a “chill” on teachers and their ability and responsibility to teach in a way that is positive, inclusive, and respectful of diversity.

[12] ETFO claims that on a fair reading of the Minister’s actions, the purpose was to restrict what teachers teach inside their classrooms by preventing them from teaching certain topics about sexual health and sex education that were covered in the 2015 Curriculum.

[13] The Applicant Gangaram claims that pursuing equity and inclusion is of central importance to her life and the Minister’s actions interfere with her ability to do so. She asserted that those actions strike at the heart of her understanding of herself as an educator and member of her community.

[14] ETFO claims the Minister’s actions infringe elementary teachers’ section 2(b) *Charter* right to freedom of expression.

[15] Secondly, ETFO also claims that as a result of the chilling effect on teachers and their failure to teach the topics missing from the 2015 Curriculum, some students in Ontario schools will be taught sex education in a manner that reflects a cautious and conservative interpretation of the 2010 Curriculum. ETFO claims this infringes students’ right to security of the person and life as guaranteed by section 7 of the *Charter*.

[16] Thirdly, ETFO claims the Directive infringes section 15(1) of the *Charter* by adversely affecting students’ equality rights based on age, disability, being a member of a First Nations community, sex, family status, gender identity/expression, and sexual orientation.

[17] ETFO submits that this is particularly harmful to vulnerable groups such as the LGBTQ+ community, women and girls, Indigenous youth and those with or associated with persons with HIV/AIDS.

[18] ETFO seeks an order to quash the Directive withdrawing the 2015 Curriculum and replacing it with the reissued 2010 Curriculum. ETFO also seeks a declaration that the Minister’s creation of the reporting line ForThePeople.ca violated teachers’ right to freedom of expression.

## **B. The CCLA Application**

[19] The Second Application is brought by Becky McFarlane, a queer mother on her own behalf (as a parent) and on behalf of her daughter L.M., a grade six student in an Ontario public school. It is also brought by the Canadian Civil Liberties Association. The Canadian Civil Liberties Association is a national non-governmental organization whose mandate is to protect constitutional rights in Canada. These Applicants are together referred to as “CCLA”.

[20] CCLA claims the Minister’s Directive requiring the 2010 Curriculum to be used instead of the 2015 Curriculum during the 2018-2019 school year, prevents certain topics about sexual

health and sex education from being covered. They say this decision has an adverse effect on the Applicants' rights under the *Charter* that is neither proportional nor justified.

[21] CCLA specifically identifies discrimination against LGBTQ+ individuals, women, and girls.

[22] CCLA takes the position that the Minister's Directive infringes the rights of elementary students and their parents to security of the person and their equality rights set out in sections 7 and 15 of the *Charter* and contravenes the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19 ("the *Code*").

[23] CCLA seeks judicial review of the decision, a declaration that the Applicant's section 7 and 15 *Charter* rights have been infringed, an order setting aside the Directive, and an injunction requiring the Minister to direct school boards to use the 2015 not the 2010 Curriculum.

### **C. The Intervenors**

#### **a. Grand Council of Treaty 3**

[24] The Intervenor, Grand Council of Treaty 3 ("GCT#3"). GCT#3 comprises an area of approximately 55,000 square miles in Northwestern Ontario and Manitoba that includes 28 First Nations communities and is the historic home of the Anishinaabe Nation.

[25] The GCT#3 submissions provided insight into the unique vulnerabilities faced by many First Nations students.

[26] Counsel for GCT#3 observed that as a result of the long lasting and ongoing effects of the residential school system and the results of the "sixties scoop", it is critical for First Nations children to receive sexual education regarding issues of consent, bodily integrity and sexual assault in elementary school as set out in the 2015 Curriculum.

[27] GCT#3 pointed to the fact that First Nations children are subject to substantially higher rates of sexual violence and abuse and will be disproportionately affected by the curriculum changes in a manner that will exacerbate the existing disadvantage.

[28] Sexual education, as in the 2015 Curriculum, is particularly important for Indigenous elementary school students because some of these children do not grow up in homes where parents are providing that information to them, contrary to the Minister's submission that parents expect to and perform a primary role in their children's education.

[29] Counsel for GCT#3 also noted that Indigenous youth are uniquely dependent on the elementary school system because of the increased barriers in many of their communities to achieving a secondary school education.

[30] GCT#3 submitted that the failure to consider the disproportionate risks to Indigenous children by the curriculum change violated their *Charter* protected rights. GCT#3 argued that the particular vulnerability of First Nations children is important to the section 7 analysis of whether the curriculum changes at issue have a causal connection to putting those children's

psychological security at risk; and that the historical disadvantage of First Nations people is directly relevant to the section 15 analysis.

#### **b. Justice for Children and Youth**

[31] It was the position of the Intervenor, Justice for Children and Youth, that the directive to quash the 2015 Curriculum fundamentally infringes upon elementary school students' right to education. They argued that the Directive arbitrarily deprives them of sexual health education that is inclusive, relevant and vital to protect their health and safety and violates section 15 of the *Charter* on the basis of age and unreasonably frustrates the *Act* and related policies.

[32] Counsel for Justice for Children and Youth noted that elementary school students are recognized as a highly vulnerable group as a result of their age, developing abilities and capacity to learn.

[33] The focus of their argument was the Minister's concern about the age-appropriateness of the 2015 Curriculum for elementary school children. Counsel for Justice for Children and Youth argued that the Minister failed to consider the best interests of elementary school children and instead based her decision to change the curriculum on arbitrary and non-defined concepts of "age-appropriateness".

[34] Counsel for Justice for Children and Youth referenced similar concerns as GCT#3 regarding the need to protect elementary school children from abuse, in particular the need for children to have an early and robust understanding of "consent", how to protect themselves from cyber-bullying and to ensure that LGBTQ+ children have positive and supportive environments outside the home.

[35] Justice for Children and Youth maintained that it is the students who hold the right to an inclusive and diverse education regardless of their age and that the views of parents should not be the basis upon which to develop education policy and curricula.

#### **c. Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario**

[36] The Intervenor, Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario ("HIV") focused on the continuing HIV related stigma that exists notwithstanding the significant advances in treatment and understanding of HIV infection.

[37] Counsel for HIV submitted that the 2015 Curriculum was a significant positive step towards reducing HIV-related stigma and corresponding harms because it contained, at the elementary school level, comprehensive content about HIV transmission risks, prevention and effectiveness of treatment. It also challenged stereotypes and harmful attitudes about HIV stigma and infection.

[38] Counsel for HIV argued that the curriculum change violates the rights of people living with, at risk of, or affected by HIV under sections 7 and 15 of the *Charter*. They submitted that the curriculum change has widened the gap between these individuals, who often come from

historically disadvantaged groups, and the rest of society rather than narrowing it and as such the curriculum change is discriminatory.

[39] ETFO relied upon the evidence submitted and adopted the submissions made by the Intervenor, GCT#3, Justice for Children and Youth and HIV with respect to the unique vulnerabilities of these groups.

#### **D. The Minister’s Response**

[40] The Respondent, Her Majesty the Queen in Right of Ontario as represented by the Minister of Education (“the Minister”), claims the ETFO and CCLA have no standing and in any event, no section 2, 7 or 15 *Charter* rights have been infringed.

[41] There are legislative provisions in the *Act* and the *Code* that require teachers to teach in a way that is inclusive and respects the diversity of the student population.

[42] According to the Deputy Minister of Education a curriculum “describes in broad terms, the desired outcomes of the teaching and learning process” for a given grade level. A curriculum is not law.

[43] In his oral submissions, the Minister’s counsel stated that teachers’ freedom of expression is not constrained as it is up to teachers to decide how to teach the 2010 Curriculum. Moreover, none of the statements made by elected representatives or information on the website ForTheParents.ca address how the 2010 Curriculum is to be taught.

[44] Thus, while teachers must teach and evaluate students on the curriculum advanced by legislators, they are free to use the 2015 Curriculum as a resource to amplify the basic requirements in the 2010 Curriculum as the need arises in their classroom and for their students.

[45] This is consistent with the legislative requirement to teach in a way that is inclusive and respectful of the diversity of the community.

[46] The Minister therefore seeks an order dismissing both Applications.

#### **JURISDICTION**

[47] Sections 2 and 6(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (the “JRPA”) provide that this court may grant relief in the nature of mandamus, prohibition, certiorari, declaratory or injunctive relief. In accordance with section 2(1)1 of the JRPA, matters of public law are subject to judicial review.

[48] The Directive is a public decision made pursuant to the Minister’s statutory power under section 8(1)(3)(a) of the *Act* and must conform to the *Charter*. It is an administrative decision that engages the *Charter*.

[49] This court therefore has jurisdiction to hear these Applications for judicial review: See *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32 (S.C.C.) at para. 58.

## **STANDING**

[50] The Minister takes the position that the ETFO and the CCLA have no standing to advance these claims.

[51] Standing refers to the ability of an individual, corporation, or group to participate as a party and apply for relief in a legal proceeding. The JRPA is silent as to standing. As such, it is determined according to the common law.

[52] The Applicants must demonstrate that they have standing to assert their claims. To do so they must satisfy the court that they have either a direct personal legal interest at stake or public interest standing: See *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675 at 688.

[53] The ETFO and the CCLA are not individuals and therefore have no direct personal interest.

[54] Public interest standing is granted where the court concludes, in its discretion, that it is in the public interest that the case proceed. Three factors must be considered:

- (a) whether the case raises a serious justiciable issue;
- (b) whether the plaintiff has a real stake or a genuine interest; and
- (c) whether the proceeding is a reasonable and effective way to bring the issue before the courts.

See: *Landau v Ontario*, 2013 ONSC 6152, at para. 21 and *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45, at para 2.

[55] These factors should be assessed and weighed cumulatively, in light of the underlying purpose of limiting standing and should be applied in a flexible and generous manner that best serves those underlying purposes: See *Downtown East Side*, *supra*, at paras. 20-37.

[56] To constitute a serious justiciable issue, the question raised must be a "substantial constitutional issue" or an "important one" that is "far from frivolous". Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually not be necessary to examine every pleaded claim for the purpose of the standing question: See *Downtown Eastside*, *supra*, at para. 42.

[57] Determining the level of constitutional protection in a particular elementary school curriculum is a matter of public importance that has province-wide implications.

[58] This case therefore raises a serious justiciable issue and the first factor has been satisfied.

[59] The ETFO is a statutory bargaining agent for public English-language elementary teachers. The CCLA's mandate is to defend and promote respect for fundamental human rights and civil liberties. The CCLA is an experienced and qualified public interest litigant. See *Landau v. Ontario (AG)*, 2013 ONSC 6152, at para. 22.

[60] The issues on these applications, therefore, fall within these Applicants' expertise and both have a continuing interest in the outcome. The second factor is therefore satisfied.

[61] In addressing the third factor, that is, whether this is a "reasonable and effective" way to bring the issue before the court, the court must take a practical and pragmatic approach: See *Downtown Eastside*, paras. 47, 60.

[62] These Applicants brought claims with and on behalf of students, teachers, and parents. Allowing standing for a challenge of this nature prevents a multiplicity of potential individual challenges and reflects an economical use of judicial resources: See *Downtown Eastside*, para. 51.

[63] For these reasons, we find that the Applicants have met the test for public interest standing.

## **ANALYSIS AND CONCLUSION**

[64] We will first outline the *Charter* rights asserted by the Applicants, the legislative context, and the evidence in respect of the Directive, public statements about the Directive, and the website ForThePeople.ca.

[65] We will then provide our analysis and conclusions in respect of the section 2(b), 7 and 15 *Charter* claims.

### **A. THE CHARTER RIGHTS ASSERTED**

#### **Section 2(b) of the *Charter***

[66] Section 2(b) of the *Charter* provides that, "Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication..."

[67] Teachers have a *Charter* right to freedom of expression while working inside the classroom subject to reasonable limits as set out in section 1 of the *Charter*.

#### **Section 7 of the *Charter***

[68] Section 7 of the *Charter* provides that, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[69] The Supreme Court of Canada in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, at para. 81, noted however that,

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, section 7 has been interpreted as restricting the state's ability to deprive people of these.

[70] A change in the law or government policy alone does not constitute a deprivation of a right even if the previous law provided greater life, liberty or security of the person. Nor does section 7 grant a right to a particular elementary curriculum. It means the curriculum must not deprive an individual of a *Charter* right: See *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538, and *Barbara Schlifer Commemorative Clinic v. Canada*, 2014 ONSC 5140.

[71] In order to meet the threshold for engaging section 7 of the *Charter*, a party must show a sufficient real causal connection between the state action and the prejudice suffered. Scientific proof is not required; it is enough to draw a reasonable inference on a balance of probabilities. A sufficient causal connection is made where the state action contributes to the harm: See *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at para 76.

### **Section 15 of the *Charter* and the *Ontario Human Rights Code***

[72] Section 15(1) of the *Charter* provides that, “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

[73] Section 1 of the *Ontario Human Rights Code* reads as follows:

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

[74] The court in *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134, held that where a law creates a risk to health by preventing access to a right (health care), a deprivation of the right to security of the person is made out.

[75] The Applicants argue that there is a causal connection between the curriculum change and a reduced ability to deal with sexual health and safety issues.

## **B. THE LEGISLATIVE CONTEXT**

### **Legislative Requirements**

[76] The *Education Act* articulates the respective responsibilities of the Minister of Education, school boards, principals, teachers, parents, and students. The purpose of the *Act* is to “provide students with the opportunity to realize their potential and develop into highly skilled, knowledgeable, caring citizens who contribute to society.” The Minister’s actions must aim to meet these objectives.

[77] Section 8(1) of the *Act* provides that the Minister of Education has the statutory responsibility to set educational priorities for all of Ontario’s publicly-funded schools which

includes “issu[ing] Curriculum guidelines and requir[ing] that courses of study be developed therefrom.”

[78] Section 169.1 of the *Act* provides that every public school board shall:

... **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...**  
[Emphasis added]

[79] Section 300.0.1 of the *Act* deals with behaviour, discipline and safety. It provides as follows:

**300.0.1** The purposes of this Part include the following:

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

[80] The Ministry directs school boards through the issuance of Policy/Program Memoranda.

[81] 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*. Boards must embed “equity and inclusive education in all their other policies, programs, guidelines, and practices, so that an equity and inclusive education focus is an integral part of every board’s operations and permeates everything that happens in its schools.”

[82] PPM 144: *Bullying Prevention and Intervention*, PPM 145: *Progressive Discipline and Promoting Positive Student Behaviour*, and PPM 128: *The Provincial Code of Conduct and School Board Codes of Conduct*, provides additional direction to help ensure a safe, positive and

inclusive school climate. Boards have also developed guides on topics including gender identity and gender expression.

[83] The *Ontario College of Teachers Act*, S.O. 1996, c. 12 and Ontario College of Teachers Ethical Standards set professional obligations to ensure the well-being of students. Section 3.8 of this Act provides that one of the College’s objects is to investigate complaints against teachers.

[84] The *Code* has quasi-constitutional status: See *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] S.C.J. No. 74, at para. 12.

[85] The *Code* was amended in 2012 to specifically protect gender identity and gender expression. The purpose of adding these grounds to the Code was to address a perceived gap in the protection afforded to transgendered or other gender non-conforming persons: See *Browne v. Sudbury Integrate Nickel Operations*, [2016] O.H.R.T.D. No. 101, at para 34.

[86] Teachers and school boards are required to comply with the *Code*.

### **C. THE EVIDENCE REGARDING THE 2010 CURRICULUM TO BE FOLLOWED, PUBLIC STATEMENTS ABOUT THE DIRECTIVE AND THE WEBSITE**

#### **A. The 2010 Curriculum**

[87] A curriculum sets out, in broad terms, the list 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.”

[88] A curriculum is not an exhaustive script to be used by teachers to recite, nor does it contain a list of mandatory or prohibited words. 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, and that “the level of detail can vary substantially across different provincial curricula and between the official curricula in place at different times in the same province.”

[89] The 2010 Curriculum does not prescribe lesson plans, educational resources, classroom activities, or teaching strategies.

[90] The 2010 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.**

[...]

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. [Emphasis added]

[91] Classroom programs must be designed so that the expectations for each grade are met in those grades, and students are assessed and evaluated on the expectations for their grade level.

[92] The Minister’s counsel confirmed however, that how students are taught to meet these expectations is a matter of teachers’ professional judgment and discretion. Teachers can choose 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.

[93] Curriculum guidelines include sample teacher prompts and student responses. They are intended to “suggest the intended depth and level of complexity” of the learning that students are expected to achieve. The 2010 Curriculum provides that “the examples are illustrations only, not requirements.”

[94] In the 2010 Curriculum, some mandatory expectations are articulated more generally than in 2015 Curriculum. The 2010 Curriculum also contains fewer and less detailed examples, teacher prompts and student responses, and some Curriculum expectations are placed in higher grades than they were in the 2015 Curriculum.

[95] The Minister confirmed that:

- i. While consent is not a required part of the 2010 Curriculum for elementary school students, consent can be addressed in elementary school;
- ii. Elementary school teachers may develop lesson plans that teach the correct names for genitalia;
- iii. While gender identity is not listed as an example of “differences” in the 2010 Curriculum, teachers may “teach the gender identity concept in the class” and students in Grade 5 will learn to “explain how a person’s actions (including making homophobic remarks), can affect a person’s feelings, self-concept, emotional well-being, and reputation;
- iv. At least two Ontario school boards, the Toronto District School Board and Limestone District School Board, have expressly stated that they support teaching about gender identity and sexual orientation in their elementary public schools;

- v. The 2010 Curriculum contains learning expectations that address the risks associated with the use of technology and teachers are free to amplify using relevant examples; and
- vi. While the Applicants and Interveners object to the use of the “outdated” term “sexually transmitted disease” in the 2010 Curriculum and prefer the words “sexually transmitted infection”, preferring instead the term STI, STD is the term used by the US Centres for Disease Control and Prevention, Planned Parenthood, and is the title of *The International Journal of STD and AIDS* that ETFO’s expert, Dr. Logie published in May 2018. STD is the term used by the Kindergarten – Grade 9 curricula in many other Canadian provinces and territories.

[96] The Public Health Agency of Canada’s *Canadian Guidelines for Sexual Health Education* notes that effective sexual health education should be “age-appropriate” but do not define age-appropriate or the grades when given topics should be taught.

### **B. The Minister’s Public Statements**

[97] In her July 11, 2018 letter, Lisa Thompson, the Education Minister indicated her intention to “restore” the 2010 sex-education Curriculum.

[98] In the Throne Speech on July 12, 2018, the Government committed to “replacing the current sex-education Curriculum”. It provided that, “you count on your government to respect parents, teachers, and students by getting back to basics and replacing failed ideological experiments in the classroom – with tried and true methods. It will also include ... replacing the current sex-education Curriculum – with a new age appropriate one.”

[99] On July 16, 2018, the Minister stated that the government was,

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

[100] On August 13, 2018, ETFO issued a media release entitled, “ETFO denounces government Sex Ed decision, will advise teachers to teach all sections of the current Curriculum.”

[101] ETFO’s media release stated that,

The 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 judgment when it comes to teaching all sections of the current curriculum.

...

ETFO will vigorously defend members who continue to follow the 2015 Health Curriculum.”

[102] On August 22, 2018, the Government issued a press release and backgrounder regarding parental consultation on Ontario’s Curriculum. In the press release, Premier Doug Ford stated 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. ... We will not tolerate anybody using our children as pawns for grandstanding and political games. And make no mistake: if we find somebody failing to do their job, we will act.

### **The Reporting Line in the Website ForTheParents.ca**

[103] The Backgrounder on *Consultation into Education Reform in respect of the Reporting Line* dated August 22, 2018 provides that, “any parent who believes that their child’s teacher is jeopardizing their child’s education by deliberately ignoring Ontario’s Curriculum should contact the Ontario College of Teachers” (the “College”) and refer “any concerns” to the Reporting Line. The Reporting line on the ForTheParents.ca website solicited complaints about the “Curriculum currently being taught” and stated that those complaints would be collected and shared with the College.

[104] The ForTheParents.ca website provides that the website 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.”

[105] 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 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 College webpage explaining the Complaints Process. The website stated that information submitted would be used “for the purpose of consultations regarding children’s Curriculum in Ontario.”

[106] ForTheParents.ca stated that, during the parental consultation process “fundamental lessons will be restored to classrooms.”

[107] 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.

[108] The updated website included links for parents and others to provide comments. The link “I want to express concerns about the curriculum currently being taught in my child’s classroom” took the user to an online submission form where the user could provide feedback and comments to the Ministry. 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. 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.

[109] 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.

[110] No submission to the website or information about any individual teacher, was ever forwarded to the College.

[111] On December 17, 2018, the consultation was closed and the website updated. It now states “The telephone town hall sessions, open submission form and online survey are now closed.”

[112] Links to the submission forms and survey have been removed.

[113] Both the Applicant Gangaram and another teacher, Jennifer Peace, a mother of a trans child, swore in their affidavits that they believe the Minister’s statements to be threats that teaching the content that was part of the 2015 Curriculum could result in professional sanctions.

#### **D. ANALYSIS AND CONCLUSION RE THE ALLEGATION OF SECTION 2(b) CHARTER INFRINGEMENT**

[114] ETFO claims elementary teachers’ *Charter* right to freedom of expression has been infringed by restricting their ability to decide what to teach in their classrooms.

[115] The ETFO relies on the case of *British Columbia Public School Employers’ Association v. British Columbia Teachers’ Federation*, 2005 BCCA 393, at paras. 27-38, where the court held that teachers have s. 2(b) *Charter* rights while inside the classroom and that a policy prohibiting teachers from discussing certain issues related to their collective bargaining activities inside classrooms was unconstitutional.

[116] There was some confusion in this case in respect of the Minister’s position as to what a teacher can and cannot do in teaching the 2010 Curriculum. This was clarified by the Minister’s counsel at the hearing of these Applications and is addressed below.

[117] The respective functions of a curriculum and a teacher are as follows:

- a. **The WHAT:** A curriculum is a broadly worded set of objectives of what a student is expected to learn and on what they will be graded. A curriculum

serves as a general outline of what is to be taught to students of a given age.

- b. **The HOW:** A teacher is to be guided by the objectives in the curriculum, and by the provisions in the *Education Act* and Guidelines. A teacher is the expert in the classroom who decides how the curriculum will be taught. Various legislative requirements stipulate that a teacher must act in a way that promotes tolerance and inclusion and respects diversity.

[118] A curriculum does not prescribe how the objectives in a curriculum are to be met.

[119] The Minister's Directive to follow the 2010 Curriculum is an exercise of statutory power pursuant to s. 8(1)(3)(a) of the *Act*.

[120] Teachers must therefore evaluate their students on the 2010 Curriculum.

[121] However, nothing in the 2010 Curriculum prohibits a teacher from teaching any of the topics in question, which include: consent, use of proper names to describe body parts, gender identity and sexual orientation, online behaviour and cyberbullying, sexually transmitted diseases and infections.

[122] The Minister's counsel confirmed in his oral submissions that, as long as a teacher meets the learning objectives set out for that grade in the 2010 Curriculum, a teacher may address topics that go beyond those expressly set out in the 2010 Curriculum to meet the needs of a given class or student. Those topics include the topics in the 2015 Curriculum that are not found in the 2010 Curriculum. The 2015 Curriculum can be used as resource in so doing.

[123] We find there is no infringement of section 2(b) of the *Charter* for the following reasons:

- a. The Minister's counsel submitted that as long as a teacher meets the learning objectives in the 2010 Curriculum, a teacher may address topics that go beyond those expressly set out in the 2010 Curriculum to meet the needs of a given class or student. Those topics may include the topics in the 2015 Curriculum that are not in the 2010 Curriculum;
- b. The *Education Act*, the Ontario *Human Rights Code*, and the *Ministry Policy/Program Memoranda*, all require teachers and school environments to be inclusive, tolerant and respect diversity;
- c. The provision in the 2010 Curriculum requires that, to the extent possible, the implementation of the 2010 Curriculum be "inclusive and reflect the diversity of the student population....regardless of ancestry, culture, ethnicity, sex, physical or intellectual ability, race religion, gender identity, sexual orientation, socio-economic status or other similar factors..."; and
- d. The 2010 Curriculum contains no provision preventing teachers from addressing the topics of consent, use of proper names to describe body parts, gender identity and sexual orientation, online behaviour and cyberbullying,

sexually transmitted diseases or infections, in the elementary school classroom;

- e. The Minister confirmed that:
- i. While consent is not a required part of the 2010 Curriculum for elementary school students, consent can be addressed in elementary school classrooms;
  - ii. Elementary school teachers may develop lesson plans that teach the correct names for genitalia;
  - iii. While gender identity is not listed as an example of “differences” in the 2010 Curriculum, teachers may “teach the gender identity concept in the class” and students in Grade 5 will learn to “explain how a person’s actions (such as making homophobic remarks), can affect a person’s feelings, self-concept, emotional well-being, and reputation;
  - iv. At least two Ontario School Boards, the Toronto District School Board and Limestone District School Board have expressly stated that they support teaching about gender identity and sexual orientation in their elementary public schools;
  - v. The 2010 Curriculum contains learning expectations that address the risks associated with the use of technology and teachers are free to amplify using relevant examples; and
  - vi. While the Applicants and Interveners object to the use of the “outdated” term “sexually transmitted disease” in the 2010 Curriculum and prefer the words “sexually transmitted infection”, preferring instead the term STI, STD is the term used by the US Centres for Disease Control and Prevention, Planned Parenthood, and is the title of *The International Journal of STD and AIDS* that ETFO’s expert, Dr. Logie published in May 2018. STD is the term used by the kindergarten to grade 9 curricula in many other Canadian provinces and territories.

[124] We note that there was no evidence before us of any teacher being referred to the Ontario College of Teachers and/or sanctioned for making reference to issues addressed in the 2015 Curriculum (although there was evidence before us that Ms. Gangaram and others continued to teach topics from the 2015 Curriculum in their classrooms.)

[125] Some of the public statements made were ill-considered. However, in the context of the legal protections in the *Act* and the *Code*, and the clarifications provided by counsel for the

Minister in oral submissions, they do not alone or together with the Directive, constitute an infringement of section 2(b) of the *Charter*.

[126] Lastly, the reporting line ForTheParents.ca is now shut down. 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. As these were the very components of the website that ETFO considered objectionable, their removal has rendered these concerns moot: See *Borowski v. Canada*, [1989] 1 S.C.R. 342, at p. 353.

[127] The case of *British Columbia Public School Employers' Association v British Columbia Teachers' Federation* relied on by ETFO is distinguishable from the case before us, as the policy in the British Columbia case prohibited teachers from discussing certain issues related to their collective bargaining activities inside classrooms. This was deemed unconstitutional.

[128] In this case, there is no such prohibition.

[129] Finally, we note that it is the role of legislators as elected officials, not the courts, to enact legislation and make policy decisions.

[130] Courts should not interfere with the exercise of a discretion by a statutory authority simply because the court might have acted differently or finds that a decision may be ill-advised: See *Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R. 2, at p. 7-8; *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, at para. 36, Brown and Evans, *Judicial Review of Administrative Action in Canada*, 2nd ed. (Toronto: Thomson Reuters, 2009), at para. 15:1212, *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 and *Tesla Motors Canada ULC v. Ontario (Ministry of Transportation)*, 2018 ONSC 5062, at para. 32.

[131] Similarly, the Court should not inquire into the underlying “political, economic, social or partisan considerations” provided there is no *Charter* infringement: See *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at p. 112-13.

[132] For these reasons, we find that the ETFO has not established that the Directive requiring teachers to follow the 2010 Curriculum and accompanying communications constitutes “a substantial interference with their freedom of expression” such that there was an infringement of section 2(b) of the *Charter*.

### **E. ANALYSIS AND CONCLUSIONS RE THE ALLEGATION OF SECTION 7 CHARTER INFRINGEMENT**

[133] The Applicants submit that the Minister’s Directive requiring the temporary reversion to the use of the 2010 curriculum effectively means that significant content in the 2015 Curriculum will no longer be taught. They argue that the removal from the curriculum of topics such as consent, online safety, HIV related topics, gender identity, sexual orientation and family structures will adversely affect certain groups such as women and girls, LGBTQ+ individuals and members of the Indigenous community, so as to deprive them of their right to life and

security of the person as protected by section 7 of the *Charter*. This, they say, is because certain subjects being taught in the 2015 curriculum will no longer be emphasized or perhaps, taught at all.

[134] The Applicants' concerns are supported by thoughtful and carefully articulated policy arguments, including those of the Intervenors. On the other hand, notwithstanding the 2010 Curriculum was in use for five years there is no empirical evidence before the Court of any harm causally related to the curriculum content.

[135] In order to establish a section 7 *Charter* breach, the Applicants must prove that the state has deprived them of their right to life, liberty or security of the person. If a claimant fails to establish a deprivation of life, liberty, or security of the person, "the s. 7 analysis stops there." See: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, at para. 47.

[136] If deprivation is established, then the Applicants must also prove that this deprivation is contrary to the principles of fundamental justice. *Bedford*, at para. 93; *Carter v. Canada*, 2015 SCC, 5 at paras. 54-55, 70.

### **No deprivation of life, liberty or security of the person**

[137] The Supreme Court of Canada in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, at para. 81, observed that,

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, sec. 7 has been interpreted as restricting the state's ability to deprive people of these.

[138] Unless there is a constitutional obligation to enact a provision, the legislature is free to return the provision to what it was before the enactment of a new provision: See *Ferrel v. Ontario (Attorney General)* (1998), 42 O.R. (3d) 97, (C.A.), Morden A.C.J.O. and *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505 (C.A.), at para. 94.

[139] A change in the law or government policy alone does not constitute deprivation of a right even if the previous law provided greater life, liberty or security of the person: See *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538, and *Barbara Schliefer Commemorative Clinic v. Canada*, 2014 ONSC 5140.

[140] The absence of measures aimed at reducing an existing risk of harm does not amount to deprivation within the meaning of section 7 of the *Charter*: See *Barbara Schliefer*. The court in *Schliefer* referred with approval to the statement of Sharpe J. (as he then was) in *Dunmore v. Ontario (Attorney General)* [1997], 37 O.R. (3d) 287 (Gen. Div.), at 301:

“[I]f 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 existence of a *Charter* right, it deprives itself of the right to change policies and repeal the protective scheme.”

[141] However, legislation will be struck down in situations where, for example, legislation that is enacted increases the risk of disease, violence, and death, thereby infringing the security of the person. See *Bedford*, at para 88.

[142] The question we must address is whether the government action in issuing the Directive implementing the 2010 Curriculum for the 2018-2019 school year only, results in deprivation that breached the Applicants’ section 7 *Charter* right to security of the person.

[143] The Applicants acknowledge that:

- a. Section 7 does not grant a right to a particular elementary curriculum; and
- b. The fact that the curriculum was changed *per se*, does not breach section 7 of the *Charter*.

[144] The jurisprudence under section 7 of the *Charter* does not support imposing positive obligations on the Minister to provide particular course content. Although McLachlin C.J.C., stated in *Gosselin* that, “I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances”, to date, the case law has not imposed any such positive duty.

[145] In any event, the following points:

- a. The obligation of school boards to promote a school climate that is inclusive and accepting of all pupils pursuant to section 169.1 of the *Act*;
- b. The provisions of the *Code* to protect gender identity and gender expression;
- c. The role of the teacher in the classroom to determine how to meet the objective in the curriculum while ensuring the protections set out above;
- d. The circumstances we have outlined, at para. 123 above, provide the Minister’s clarification during oral submissions that all of the above subjects can be addressed by teachers in elementary school classrooms; and
- e. There is no evidence of actual harm,

taken together, lead us to conclude that in this case, the imposition of such a duty is not warranted.

[146] We note that the evidentiary record in this case is more speculative than the record in *PHS*, relied on by the Intervenor GCT#3. In *PHS*, the Supreme Court ordered the extension of an exemption in order to allow the continued operation of a safe injection site. In so doing, 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. No such factual findings were available in this case: See *PHS*, at para. 93.

[147] We therefore conclude that the Minister’s Directive to replace the 2015 Curriculum with the 2010 Curriculum, does not give rise to a deprivation under section 7 of the *Charter*. Similarly, the absence of particular curriculum content in the 2010 Curriculum does not amount to a deprivation of the right to life and/or security of the person. As such, we find no breach of section 7 of the *Charter*.

#### **F. ANALYSIS AND CONCLUSIONS RE THE ALLEGATION OF SECTION 15(1) CHARTER INFRINGEMENT**

[148] The Applicants argue that the imposition of the 2010 Curriculum constitutes a violation of the equality rights of certain groups guaranteed by section 15(1) of the *Charter*. CCLA adds that it discriminates contrary to the *Code*. They do not suggest the 2010 Curriculum discriminates on its face, rather the omission of subject matter previously included in the 2015 Curriculum disadvantages or creates a distinction on enumerated or analogous grounds that adversely affects those groups.

[149] In particular, because the 2010 Curriculum no longer specifically addresses issues of consent, gender identity or sexually transmitted infections it is said to discriminate against younger children, girls, Indigenous students, students who are HIV+, and transgender diverse students. On this view of the issue, the curriculum is seen as a benefit that, due to the omission of certain subject matter has an unequal and discriminatory effect on these persons or groups. Put somewhat differently, the Applicants say that there is a causal connection between the curriculum changes and a reduced ability to deal with health and safety issues of particular importance to these groups.

[150] In a challenge to a law or policy of general application, the test for discrimination under the *Charter* and the *Code* is the same: See *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593, at para. 84 and *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).

[151] The Applicants must demonstrate that (a) the law or policy creates a distinction on the basis of a ground protected under section 15 of the *Charter* or the *Code*; and (b) the distinction is substantively discriminatory because it perpetuates arbitrary disadvantage, prejudice or stereotyping: See *Taypotat*, at paras. 16-21.

[152] A section 15(1) *Charter* challenge cannot be based on the removal or omission of learning objectives referable to the 2015 Curriculum. As we have noted previously, that curriculum does not enjoy *Charter* protection: See *Lalonde*, at para. 94. A *Charter* infringement cannot be grounded on a mere change in the law nor on a change of curriculum, even a change that no longer provides a benefit from the earlier curriculum.

[153] We accept as accurate the following summary of the well-established case law on this point, in the Minister’s Factum:

[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.” These *Charter* s. 15 cases include *Ferrel* (repeal of employment equity statute), *Lalonde* (closing a Francophone hospital), *Barbra Schlifer* (repeal of long-gun registry), *Tanudjaja* (reduction in housing programs), and *Irshad* (restricting OHIP eligibility). 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.

[154] The Applicants’ submissions are similar to those advanced in *Ferrel*. *Ferrel* involved a section 15 *Charter* challenge to the repeal of the *Employment Equity Act* (“*EEA*”) that required employers to take affirmative measures to promote workplace equity. In that case, the repeal of the *EEA* was said to be discriminatory because it had the effect of reinforcing negative stereotypes and was contrary to the requirement that the government take proactive measures to remedy systemic discrimination in the workplace.

[155] In *Ferrel*, the Court of Appeal rejected these arguments, holding that section 15(1) of the *Charter* did not impose an obligation on government to maintain particular statutes or policies even if they were originally enacted to combat discrimination. The court held that the right to equality is not a generalized one to have equality interests advanced or to require the continuation of measures to advance equality.

[156] In *Ferrel*, as in the case before us, the continued operation of the *Code* was another reason to reject the discrimination claim, as employees in *Ferrel* remain subject to its protections.

[157] Furthermore the 2010 Curriculum does not draw any distinctions or require differential treatment of students on the basis of protected grounds. To the extent that the omission of certain topics in the curriculum could be said to negatively affect certain groups, the statutory context applicable to the teaching of this curriculum and the circumstances we have listed in para 123 of these reasons serves to satisfy the Court that the subject matter content in the 2010 Curriculum is not substantively discriminatory.

## **G. DISPOSITION**

[158] While this is a justiciable issue, the Minister has the authority to replace the curriculum pursuant to her discretion under s. 8 of the *Education Act*

[159] We find there is no infringement of section 2(b) of the *Charter* because the Minister's counsel submitted at the hearing that, as long as a teacher meets the learning objectives in the 2010 Curriculum, a teacher may address any of the topics in the 2015 Curriculum that are not included in the 2010 Curriculum. Moreover, the *Education Act*, the *Human Rights Code*, and the *Ministry Policy/Program Memoranda*, all require teachers and school environments to be inclusive, tolerant and respect diversity. The 2010 Curriculum itself requires that, to the extent possible, the implementation of the 2010 Curriculum be "inclusive and reflect the diversity of the student population....regardless of ancestry, culture, ethnicity, sex, physical or intellectual ability, race religion, gender identity, sexual orientation, socio-economic status or other similar factors...". Lastly, there is nothing in the 2010 Curriculum that prevents teachers from addressing the topics of consent, use of proper names to describe body parts, gender identity and sexual orientation, online behaviour and cyberbullying, and sexually transmitted diseases or infections, in the elementary school classroom.

[160] Teachers have a constitutional right to free expression under s. 2(b), but this does not translate into a right to teach a particular curriculum.

[161] Moreover, because the Applicants have no legal right to the form and content of a particular curriculum, replacing the 2015 Curriculum does not give rise to a deprivation under s. 7 of the *Charter*.

[162] Nor does the 2010 Curriculum require differential treatment of students on the basis of protected grounds. To the extent that the omission of certain topics in the curriculum could be said to negatively affect certain groups, the statutory context applicable to the teaching of this curriculum and the circumstances we have listed in para 123 of these reasons serves to satisfy the court that the subject matter content in the 2010 curriculum is not substantively discriminatory.

[163] As we are of the opinion that the Applicants have failed to prove a breach of section 2(b), 7 or 15(1) of the *Charter* in respect of the Minister's Directive implementing the 2010 Health and Physical Education Curriculum, the applications for judicial review are dismissed.

[164] If the parties are unable to resolve the question of costs they may seek further direction from the court.

DATED at Toronto, this 28<sup>th</sup> day of February, 2019.

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Warkentin R.S.J.

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Hackland J.

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Thorburn J.

**CITATION:** ETFO et al. v. Her Majesty the Queen, 2019 ONSC 1308  
**DIVISIONAL COURT FILE NOS.:** 526/18 and 554/18  
**DATE:** 20190228

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT**

**WARKENTIN R.S.J., HACKLAND and  
THORBURN JJ.**

**BETWEEN:**

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

**AND BETWEEN:**

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

Applicants

– and –

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

Respondent

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**REASONS FOR DECISION**

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**BY THE COURT**