

CITATION: Ontario Teacher Candidates’ Council v. The Queen, 2021 ONSC 7386
DIVISIONAL COURT FILE NO.: 20-2584
DATE: 20211217

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
Backhouse, Tzimas, Nishikawa JJ.

BETWEEN:)	
)	
Ontario Teacher Candidates’ Council and)	
Sara Petrucci)	
)	
Applicants)	<i>Matthew S. Estabrooks</i> , Counsel for the
)	Applicants
– and –)	
)	
Her Majesty the Queen in Right of Ontario)	
as Represented by the Minister of Education)	
and Education Quality and Accountability)	<i>Yashoda Ranganathan, Ravi Amarnath and</i>
Office)	<i>Maia Stevenson</i> , Counsel for Respondents
)	
Respondents)	
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)	
)	
)	
)	HEARD by videoconference in Toronto
)	on October 12, 2021

Backhouse and Nishikawa JJ.

REASONS FOR JUDGMENT

Overview

- [1] The Applicants seek judicial review of Ontario’s Mathematics Proficiency Test (“MPT”), a standardized math test that all teacher candidates must pass to become certified as teachers in Ontario. The Applicants seek a declaration that the MPT and the provisions requiring it violate s. 15 of the *Canadian Charter of Rights and Freedoms* (the “Charter”).

- [2] The question on this application is whether the MPT has a disproportionate adverse impact on entry to the teaching profession for racialized teacher candidates and if so, whether it can be justified under s. 1 of the *Charter*.
- [3] The evidence points to significant disparities in success rates of standardized testing based on race, including statistical evidence of racial disparities with respect to the MPT specifically. The deleterious effect on diversity is somewhat ameliorated by subsequent attempts available to retake the MPT.
- [4] The MPT infringes s. 15 of the *Charter* and cannot be justified under s. 1. The Respondent has not discharged its burden of showing that the MPT minimally impairs the rights of racialized teacher candidates. There were reasonably available alternatives to the MPT that on their face appear to be less impairing and at least as effective in achieving the goal of improving student achievement in math. These include requiring a minimum number of hours of math instruction or a math course in B.Ed. programs, requiring an undergraduate math course as an admissions requirement for B.Ed. programs or waiting to see the effects of the other parts of the Respondent's four-year math strategy.
- [5] The Respondent's efforts to address equity issues related to the MPT do not meet the minimal impairment requirement where there are other options available that would not impair anyone's rights. Racialized teacher candidates who have been disproportionately unsuccessful on the MPT should not have to keep retaking the test. There is a cost to retaking the test in time and money for those who are least likely to be able to afford this and there is no undertaking that going forward, teacher candidates will not have to pay to retake the MPT.
- [6] There is an under-representation of racialized teachers in Ontario schools. Racialized students benefit from being taught by racialized teachers. The deleterious effects of the MPT on racialized teacher candidates who have been disproportionately unsuccessful on the test outweigh its benefits.
- [7] A declaration shall issue that the legislative provisions that created the MPT are of no force and effect.

Facts

Teacher Certification in Ontario

- [8] In order to teach in a publicly-funded elementary or secondary school in Ontario, teachers must have a certificate of qualification from the Ontario College of Teachers (the "College"). The structure and responsibilities of the College are set out in the *Ontario College of Teachers Act* ("OCTA").¹ The College has established academic, professional, language proficiency and professional suitability requirements for teacher certification.

¹ *Ontario College of Teachers Act, 1996*, S.O. 1996, c. 12.

These certification requirements are set out in the regulations promulgated under the *OCTA*.

- [9] Subsection 18(1) of the *OCTA* sets out the conditions under which the Registrar of the College will issue a certificate of qualification. Paragraph 18(1)(c) is a recent amendment and is the subject of the present challenge. Subsection 18(1) provides:

18 (1) The Registrar shall issue a certificate of qualification and registration to a person who,

- (a) applies for the certificate in accordance with the regulations;
- (b) fulfils the requirements specified in the regulations for the issuance of the certificate; and
- (c) successfully completes any prescribed examinations relating to proficiency in mathematics that are required for the issuance of the certificate.

- [10] For a typical teacher candidate, the path to certification as a teacher involves completing a three- or four-year undergraduate degree and then completing a two-year initial teacher education (“ITE”) program. The typical ITE takes the form of a Bachelor of Education (“B.Ed.”).
- [11] The Accreditation Committee of the College is responsible for accrediting ITE programs. The Accreditation Committee is created by s. 28 of O. Reg. 563/21, the *General* regulation under the *OCTA*. The regulation, *Accreditation of Teacher Education Programs*, O. Reg. 347/02, sets out the criteria that the Accreditation Committee will consider when accrediting an ITE. Section 9 of this regulation (along with Schedule 1) sets out the requirements that a teacher education program must fulfil in order to be accredited.
- [12] There are core program requirements for ITE programs but no common math education curriculum is required to be taught. Some faculties require their candidates to demonstrate math proficiency in order to complete their initial teacher education program, while others do not.
- [13] All certified teachers in Ontario may be assigned to teach math up to Grade 6. In order to be qualified to teach math beyond Grade 6, a teacher must have a certificate with qualifications in Intermediate Division Mathematics and/or Senior Division Mathematics. However, under s. 19 of *Operation of Schools – General*, R.R.O. 1990, Reg. 298, a principal may assign a teacher to teach in a division or subject not listed on their certificate by agreement of the teacher and principal and with the approval of a supervisory officer. Therefore, even a teacher without a qualification in Intermediate or Senior Division Mathematics can be asked to teach math in those divisions.
- [14] The Respondent’s evidence is that due to the competitive nature of teaching positions, newly certified teachers may find that the only positions available to them are positions that require them to teach math, whether or not this was their intention. When few teaching

positions are available, new teachers will often take positions outside of the subjects or divisions on their teaching certificate.

Student Math Scores in Ontario

- [15] The Ontario Education Quality and Accountability Office (“EQAO”) is a Crown agency charged with creating, administering and reporting on the province’s literacy and mathematics standardized assessments. Starting in 2015, Ontario elementary students’ mathematics scores – as measured by the EQAO – began to decline. From the 2015-16 school year to the 2018-19 school year, the percentage of students achieving at or above the provincial standard decreased from 63 percent to 58 percent for Grade 3 students and from 50 percent to 48 percent for Grade 6 students.
- [16] The Organization for Economic Co-operation and Development (“OECD”) is an international organization of 30 countries including Canada that conducts periodic assessments of 15-year-olds throughout the OECD nations. These assessments, known as the “Programme for International Student Assessment” (“PISA”), are conducted every three years and focus on reading, mathematics and science. Ontario students continue to perform favourably in mathematics when compared to the rest of Canada and to the rest of the developed world. Ontario consistently performs in the top tier of OECD countries. Ontario’s 2018 PISA mathematics score placed it 13th among OECD countries, above the Canadian average and second only to Quebec among Canadian provinces. There has been a decline in PISA scores since 2003 but this aligns with a global decline in math scores during this time. Both the Canadian average score and the overall OECD average score declined by a similar amount during this period. Only Quebec’s PISA math score has remained relatively constant since 2003.
- [17] In February 2017, the Ontario Ministry of Education conducted an opinion poll of Ontario parents to determine parents’ attitudes toward the decline in EQAO mathematics test scores. The survey revealed that Ontario parents believed that “more focus on the basics and better trained teachers” was the measure most likely to improve Ontario elementary students’ EQAO mathematics scores.

Bill 48

- [18] On October 18, 2018, the Ontario government tabled Bill 48, the *Safe and Supportive Classrooms Act, 2018*. The portion of Bill 48 that is relevant to this application amended s. 18(1) of the *OCTA* to add a requirement that teacher candidates “successfully complete any prescribed examinations relating to proficiency in mathematics.”
- [19] After Bill 48 passed and received Royal Assent on April 3, 2019, the Minister of Education filed two regulations on August 20, 2019. O. Reg. 272/19, *Objects of the Office*, under the *Education Quality and Accountability Office Act*, 1996, S.O. 1996, c. 11, adds developing and marking the MPT to the EQAO mandate. O. Reg. 271/19, *Proficiency in Mathematics*, under the *OCTA*, prescribed the math test that Bill 48 added to the requirements for teacher certification. O. Reg. 271/19 requires all teacher candidates who apply to the College for

certification after March 31, 2020 to pass the mathematics proficiency test described in s. 3 of the regulation. The regulation also requires the EQAO to develop the test.

Formation of the Ontario Teacher Candidates' Council

- [20] The Ontario Teachers Candidates' Council ("OTCC") was formed in response to the Ministry's introduction of the MPT. The OTCC is an organization made up of students in ITE programs across the province who are candidates for qualification by the College and who will be required to pass the MPT in order to be certified. The OTCC was established – with the help of the Ontario Teacher's Federation – to advocate for the interests of Ontario teacher candidates, with a particular focus on the MPT.

The Development of the MPT

The EQAO Literature Review

- [21] In response to this new mandate, the EQAO conducted a social science literature review on teacher licensure exams. This literature review was completed in August 2019 and arrived at the following conclusions:
- (a) There is some positive correlation between teacher competency scores in mathematics and student outcomes, but this correlation is weak, with small effect sizes, and is not universal. Standardized test scores are much less related to student outcomes than are teacher certification (both general and subject-specific), teacher experience, and other contributors to teacher effectiveness.
 - (b) Increasing the quality and quantity of required mathematics courses at the pre-service (ITE) level was one of the most helpful steps toward improving student outcomes. Research from the province of Quebec, where student math test scores are high relative to the rest of Canada, attributes that province's student achievement to "a uniquely strong emphasis on requiring trainee teachers to undertake more courses in both mathematics methodology and mathematics content."
 - (c) Standardized teacher testing has a serious impact on racial diversity within the teacher pool. Mandated assessments take the role of a biased barrier rather than a screen for quality. Multiple studies have found that people of colour have a significantly lower pass rate on common teacher competency tests compared to White applicants.
- [22] The EQAO Literature Review concluded that creating a restrictive pathway to becoming a teacher may cause more harm than good. The EQAO concluded that the research shows the fundamental goal of teacher licensure tests – to improve student learning – is often not met. The EQAO cautioned that current research did not support the widespread implementation of standardized teacher testing at this time, in part because of bias against marginalized groups.

Jurisdictional Scan

- [23] The Ministry conducted a jurisdictional scan to consider different options for strengthening teacher and student math skills. The jurisdictional scan revealed that various jurisdictions, including the United Kingdom, New Zealand, Australia, several states in the United States, Japan, Singapore and China, use a universal math test or a universal test with math components, as a pre-admission, graduation or teacher certification requirement.

Development of the Content of the MPT

- [24] In the summer of 2019, the EQAO engaged a committee of math specialists from Faculties of Education in Ontario to aid in the development of an assessment “Blueprint” for the MPT. The EQAO relied on its bank of math questions used for Grade 3, 6, and 9 assessments in both French and English and created new questions based on Ministry policy documents for the pedagogy component.
- [25] The EQAO undertook a further review of the MPT questions in response to its Literature Review. Because the math questions were sourced from the pre-existing Grades 3, 6 and 9 EQAO math assessments, these questions had already gone through a first review against a rubric that factored in identity, social justice and equity issues. The EQAO also engaged a committee of external members of the College as well as internal EQAO staff to conduct a second review of all MPT questions for bias and sensitivity to equity issues. The test questions were reviewed to determine whether demographic indicators or knowledge of culturally specific information would predict reduced performance on questions.
- [26] Since September 2019, the EQAO has also been guided in the development of the MPT by a Governance Steering Committee (the “Steering Committee”). The Steering Committee consists of representatives from various organizations, including the College, the EQAO, the Ontario Association of Deans of Education, the Independent Ontario Deans of Education, the Council of Ontario Universities, and the Ministry of Education.
- [27] To date, the Steering Committee has aided in making substantive changes and recommendations regarding exemptions to the MPT that have been adopted by the Ministry such as amending the MPT to test up to Grade 9 math (as opposed to Grade 11 math) and creating an exemption for applicants who are entitled to become teachers of Native Languages.

The MPT Field Test

- [28] The MPT assesses teacher candidates for a wide range of foundational math skills common throughout Grades 3 to 9. It is designed as a two-hour test but teacher candidates are given three hours to write it. It has 75 multiple choice questions,² with a mathematics content component (70 percent) and a pedagogy component (30 percent).

² Four questions are for trial/testing purposes (i.e. only 71 questions count).

- [29] The EQAO led a field test between February 18 and March 7, 2020 to monitor, assess, and refine the implementation of the MPT before it was launched. A total of 4,065 applicants participated in the field test, with 81 percent successfully completing the MPT. The field test allowed the EQAO to test MPT items with the applicant population and collect data to establish items as valid and defensible.
- [30] As a result of data gathered from the field test, the EQAO revised both the substantive content of the MPT as well as how it tracked demographic data.
- [31] Prior to and following the field test, all items were reviewed for bias and sensitivity and to determine whether demographic indicators would predict reduced performance. The EQAO also developed a demographic questionnaire to actively monitor the results on specific test items for equity-seeking groups and to revise the MPT accordingly. After field testing the demographic questionnaire itself, the EQAO revised it to better align with Ontario's Race-based Data Collection Framework and Anti-Racism Data Standards.

Significant Disparities in Success Rates

- [32] The EQAO collected demographic information about Field Test takers through the voluntary demographic questionnaire which revealed significant disparities in success rates based on test-takers' race, language and disabilities.
- [33] In particular, the Field Test demographic data showed that non-White candidates writing in French were only successful 55 percent of the time, whereas White candidates writing in French were successful 84 percent of the time. Candidates who identified as belonging to non-White ethno-racial groups (such as African, Indigenous, Latino and Middle Eastern) failed at a significantly higher rate than White candidates. Candidates who indicated they had a cognitive disability failed the Field Test at over twice the rate of candidates without a disability.

The First Administration of the MPT

- [34] After field testing, the Ministry began administering the official MPT on May 10, 2021. Similar to the Field Test, candidates who write the MPT are asked to complete a voluntary demographic questionnaire. Data gathered from this demographic questionnaire continues to show disparities in results based on race/ethnicity and language.
- [35] The demographic data from the First Administration of the MPT between May 10 and June 26, 2021 continues to show that success rates differ significantly across race categories. Candidates who identify as Indigenous and Black have success rates that are 20 percentage points lower than those of White candidates. French-speaking candidates have a significantly lower success rate than English-speaking candidates. Candidates who speak a language other than English or French ("Allophones") have an even lower rate of success. Allophones continue to perform poorly on subsequent attempts to write the MPT. The majority of the French-speaking candidates who were not successful on the MPT were unsuccessful on the pedagogy component of the MPT.

- [36] All individuals who do not pass the MPT can retake the test an unlimited number of times. As of January 1, 2022, there will continue to be no fee for first attempts of the MPT, but there will be a fee (of an amount yet to be determined) for subsequent attempts.
- [37] The first window of the MPT in 2021 started on May 10, 2021. The second window in 2021 runs from September 27 to December 11.
- [38] There is a dispute between the parties about whether there is a process to monitor the equity effects of the MPT. The Applicants point to the advance warnings from the EQAO about bias against marginalized groups in standardized teachers' tests and the fact that nothing has been done since the Field Test to address the disparity in results. Ontario relies upon any disparity in success rates of equity-seeking groups being attenuated by their success on subsequent attempts. It further refers to building upon initiatives to date by working to hire an equity expert to review all policies, practices, procedures and activities of the EQAO, including the MPT, from an equity, diversity, inclusion and anti-racism perspective.

Other Aspects of Ontario's Four-Year Math Strategy

- [39] The imposition of the MPT was part of the Respondent's four-year math strategy to ensure students and educators have the math skills and resources to succeed, which includes:
- Providing over \$40 million in funding per year so that all school boards in the province can hire math-learning leads to coordinate and support board and school level improvement efforts. This includes investments in training and coaching in over 700 targeted elementary and secondary schools;
 - Providing \$8 million towards expanding Summer Learning Programs in mathematics for students in the summers of 2019 and 2020;
 - Providing over \$4 million per year towards expanding online tutoring programs for students;
 - Ensuring new teachers entering the profession have the skills to teach math, and involve math in their teaching where appropriate, through providing supports for teacher candidates (e.g. through the Ministry's Professional Development Program for Teacher Candidates), supports for new teachers (e.g. through the New Teacher Induction Program), and investments in professional development for educators dealing with math proficiency;
 - Contributing \$4 million per year to subsidize Additional Qualification math courses for teachers, which will further build skills and confidence for educators at the front of the classroom;

- Contributing over \$2 million to support a pilot program focused on early interventions in math education for students with special education needs in grades 4- 6 in 2021-22; and
- Providing \$325,000 to continue the Math Knowledge Network in 2021-22.

The Respondent's Explanation for Rejecting Other Options

- [40] The Respondent's evidence is that it considered imposing a math test as an admission requirement for B.Ed. programs or a requirement of a stand-alone course in mathematics as part of the B.Ed. program. These options were rejected on the basis that they would interfere with the independence and flexibility of Faculties of Education, which have their own governance structures and set their own program and admission requirements.

Expert Evidence on the Application

Evidence of Dr. Reid

- [41] The Applicants proffered the expert opinion of Dr. Mary Reid, a professor at the Ontario Institute for Studies in Education whose doctoral thesis was on mathematics teacher efficacy and pedagogy.³ Her report addresses two questions: (1) is the MPT likely to result in fewer minorities and people of colour being certified as teachers in Ontario; and (2) is the MPT likely to accomplish its stated goal of improving student math scores?
- [42] Dr. Reid's report describes how the literature she reviewed overwhelmingly concludes that high stakes teacher testing has detrimental effects on racial diversity within the teaching population. She concluded that "it is highly probable that Ontario's MPT will have a similar negative impact on diversification efforts, resulting in minorities and people of colour being treated differentially due to the barriers that the MPT will impose."
- [43] On the second question, Dr. Reid concluded that "the literature demonstrates little connection between teacher testing and teacher quality." There is empirical data that points to an association between teacher test scores and student performance, but that association is limited and does not demonstrate a causal relationship between teacher test scores and student test scores. Dr. Reid raises the following question: if testing teachers were to improve student math scores, then why have the U.S. and U.K., with the most prevalent teacher testing policies, not achieved greater results than Ontario?

Evidence of Dr. Kajander

- [44] The Respondent proffered the expert evidence of Dr. Kajander, an expert in math pedagogy who deposes that there is a correlation between teacher competence and confidence in math and student performance. She testified on cross-examination that it is highly desirable to offer more mathematics content in a B.Ed. program because the additional support in terms

³ Dr. Reid also worked for the EQAO as a contractor and developed the blueprint and sample questions for the MPT.

of education and training is the real key to improving teachers' math competence. Dr. Kajander notes that not all universities had or have math courses. She deposes that a key benefit of the MPT is that it encourages math-avoidant teacher candidates to sign up for a mathematics course, whereas they would simply avoid taking math courses altogether if there were not a "bar" at the end of the teacher certification process.

- [45] While supporting the MPT, Dr. Kajander states that she is one of a group of mathematics education researchers who, based on their research and experience, have agreed upon the need for consistent minimum mathematics requirements in university faculties of education, without which faculties of education and math-avoidant students will not be motivated to engage in courses that improve mathematics proficiency.

Fields Brief Recommendations, 2013

- [46] Dr. Kajander, along with faculty members in mathematics and mathematicians across Ontario, undertook a study of countries that achieve high standards in mathematics and made recommendations in 2013 for best practices in Ontario's B.Ed. programs in what is referred to as the Fields Brief. The recommendations were aimed at ensuring that teachers have the requisite mathematical understanding to be effective in the classroom. This included requiring a minimum number of hours of math instruction in B.Ed. programs and requiring all entrants to B.Ed. programs to have at least one undergraduate math course. The Fields Brief did not recommend implementing a standardized math licensing test.
- [47] The Respondent submits that the recommendations of Dr. Kajander and the other authors of the Fields Brief are irrelevant to the issue of whether a governmental licensure exam should exist because they were directed to Faculties of Education as measures to improve math education within B.Ed. programs.

Evidence of Dr. Vigdor

- [48] The Respondent also relies on the evidence of Dr. Jacob Vigdor, an expert in determining the statistical impact of education policy interventions on student achievement. His opinion is that there is a statistically significant positive relationship between teacher licensure test scores and student achievement, particularly in the field of mathematics. However, Dr. Vigdor acknowledges that the effect of this positive association is smaller than other factors such as teacher experience or pedagogical approach.

Issues

- [49] This application raises the following issues:

1. Does the MPT infringe s. 15 of the *Charter*?
 - (a) Does the MPT have a disproportionate adverse impact on entry to the teaching profession for racialized teacher candidates?

- (b) Does the MPT impose burdens or deny benefits in a manner that has the effect of reinforcing, exacerbating or perpetuating disadvantage?
- 2. Is the MPT a reasonable limit under s. 1 of the *Charter*?
 - (a) Does the MPT further a pressing and substantial objective?
 - (b) Is there proportionality between that goal and the means used to achieve it?
 - (i) Is the MPT rationally connected to the objective?
 - (ii) Does the MPT minimally impair the rights of racialized teacher candidates?
 - (iii) Do the benefits of the MPT outweigh any deleterious effects?
- 3. Does the Respondent owe the Applicants a duty of procedural fairness? If so, has the duty of procedural fairness been breached?
- 4. What is the appropriate remedy?
- 5. Is this an appropriate case to award special costs?

Law and Analysis

Standard of Review

- [50] Pursuant to the Supreme Court's decision in *Canada (Minister of Immigration and Citizenship) v. Vavilov*, 2019 SCC 65, [2019] S.C.J. No. 65, constitutional questions are reviewed on a standard of correctness: at para. 55.
- [51] There is no standard of review applicable to questions of procedural fairness. Rather, the reviewing court is to determine whether the rules of procedural fairness were adhered to.

Does the MPT Infringe Section 15 of the *Charter*?

The Parties' Positions

- [52] The Applicants' position is that the MPT has an adverse impact on teacher candidates from racialized groups and perpetuates the historic disadvantage racialized individuals have experienced in the Ontario education system. They rely on the demographic data from the Field Test and First Administration of the MPT, which show statistically significant differences in success rate based on race. These results are consistent with the academic literature on teacher licensure tests and their negative impacts on diversity.
- [53] The Respondent submits that there is no evidence of a distinction and that the record does not support the allegation that the MPT negatively impacts entry into the profession. The Respondent submits that the MPT does not prevent racialized teacher candidates from becoming teachers because they can take the MPT an unlimited number of times. While

racialized teacher candidates may have a lower pass rate than other candidates on their first attempt at the MPT, Ontario maintains that there is no disproportionate burden because those who do not pass on their first attempt are highly likely to pass on a subsequent attempt.

- [54] The Respondent further submits that it is not discriminatory to require teacher candidates to show competency in Grade 3 to 9 math, as this competence is important to their ability to carry out their professional responsibilities.

The Applicable Principles

- [55] Section 15 of the *Charter* provides:

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

- [56] To show a *prima facie* breach of s. 15, the Applicants must show that the law or state action: (i) on its face or in its impact creates a distinction based on enumerated or analogous grounds; and (ii) imposes burdens or denies benefits in a manner that has the effect of reinforcing, exacerbating or perpetuating disadvantage. Once a *prima facie* violation of s. 15(1) is made out, the onus shifts to the Respondent to establish that the violation is justified pursuant to s. 1: *Fraser v. Canada (Attorney General)*, 2020 SCC 28, [2020] S.C.J. No. 28, at para. 27.

- [57] In *Fraser*, the Supreme Court of Canada confirmed that s. 15 protects against adverse impact discrimination, which occurs when neutral laws have a disproportionate impact on members of enumerated or analogous groups. Abella J., writing for the majority, identified the principles from the equality jurisprudence under s. 15 and under both U.K. and U.S. case law. It is helpful to summarize those principles here:

- Whether the legislature intended to create a disparate impact is irrelevant;
- If claimants successfully demonstrate that a law has a disproportionate impact on members of a protected group, they need not independently prove that the protected characteristic “caused” the disproportionate impact;
- It is also unnecessary to inquire into whether the law itself was responsible for creating the background social or physical barriers which made a particular rule, requirement or criterion disadvantageous for the claimant group; and
- Claimants need not show that the criteria, characteristics or other factors used in the impugned law affect all members of a protected group in the same way.

Fraser, at paras. 69-72.

- [58] On the second part of the test, there is no “rigid template” of factors relevant to the inquiry into whether the law has the effect of reinforcing, perpetuating or exacerbating disadvantage: *Fraser*, at para. 76, citing *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 331. The harm may include economic exclusion or disadvantage, social exclusion, psychological harms, physical harms or political exclusion and must be viewed in light of any systemic or historical disadvantages faced by the claimant group: *Fraser*, at para. 76.
- [59] Abella J. went on to find that “[p]erpetuation of disadvantage does not become less serious under s. 15(1) because it was relevant to a legitimate state objective”: *Fraser*, at para. 79. The test for a *prima facie* breach of s. 15(1) is concerned with the discriminatory impact of legislation on disadvantaged groups. The question of whether the distinction is justified is “an inquiry properly left to s. 1”: *Fraser*, at para. 79.
- [60] In *Fraser*, the majority of the Supreme Court provided guidance as to the type of evidence that would be helpful in proving a disproportionate impact on members of a protected group. The two types of evidence are: (i) evidence about the circumstances of the claimant group; and (ii) evidence about the results produced by the challenged law: *Fraser*, at para. 56.
- [61] On the first type, evidence about the physical, social, cultural or other barriers faced by the claimant group will be helpful to provide the court with the full context of the claimant group’s situation. The evidence may come from the claimant, expert witnesses, or through judicial notice and would show that membership in a certain group is associated with characteristics that have disadvantaged group members: *Fraser*, at para. 57.
- [62] In terms of evidence about the results produced by the challenged law or state action, courts will benefit from evidence about the outcomes produced by the impugned law or policy. This may include statistical evidence which is helpful to establishing “a disparate pattern of exclusion or harm that is statistically significant and not simply the result of chance”: *Fraser*, at para. 59. There is, however, no universal measure for what level of statistical disparity is necessary to demonstrate disproportionate impact and the court should not craft rigid rules on this issue: *Fraser*, at para. 59.
- [63] Ideally, evidence of both group circumstances and statistics would be provided. However, both are not necessarily required. The majority nonetheless cautioned that evidence of group circumstances alone could amount to no more than a “web of instinct” if too far removed from the institution, community or other circumstances subject to the discrimination claim: *Fraser*, at para. 60.

Does the MPT Have an Adverse Impact on Entry to the Profession for Racialized Candidates?

Circumstances of the claimant group

- [64] The education system in Ontario has historically imposed disadvantages on Black and Indigenous students. The detrimental and lasting effects of the residential school system

on the province's Indigenous peoples is well-documented. In addition, the *Common School Act* of 1850 established segregated schools for Black children.

- [65] Recent studies support that Black and Indigenous students continue to face adverse circumstances in the education system. Black and Indigenous students tend to be over-represented in less challenging, basic and general level courses, and under-represented in advanced courses. Consequently, Black and Indigenous students are under-represented in post-secondary institutions in Ontario. A recent review of the Peel District School Board identified widespread anti-Black racism throughout schools in the Board. For example, Black students are more likely to be disciplined than other students.
- [66] In respect of internationally-trained teachers, a 2006 study commissioned by the College found that their job prospects are significantly hampered, despite having passed the province's licensing requirements. Internationally-trained teachers are ten times more likely than Canadian-trained teachers to be unemployed because they could not find a teaching job and three times more likely to be underemployed. Almost all of the internationally-trained teachers who participated in the study (96 percent) had prior teaching experience in another jurisdiction. Despite the high demand for French teachers, the unemployment rate for internationally-trained teachers specializing in French was 43 percent, compared to 3 percent for Ontario graduates who specialized in French.
- [67] Not surprisingly, the evidence demonstrates a "diversity gap" in the teaching profession in Ontario. Twenty-six percent of Ontario students are racialized. However, only thirteen percent of teachers are racialized. Social science evidence shows that racialized students, in particular, Black and Indigenous students, benefit and perform better when they have racialized teachers. A lack of role models in the education system creates a vicious cycle – because students do not see themselves represented, they do not aspire to become teachers.
- [68] Studies from the United States have also shown that African American students are less likely to receive positive feedback and interactions in the classroom than their White counterparts. Similarly, non-Black teachers had significantly lower expectations of educational attainment for Black students than Black teachers.
- [69] The experience of racialized students is relevant because it is those students, or a portion of them, who go on to attend university and teacher's college, and then form the pool of teacher candidates who are now required to take the MPT in order to be licensed. There is thus a significant amount of social science evidence that shows that the claimant group experiences disadvantage associated with their race at all stages of their education. This is especially pronounced in respect of Black and Indigenous teacher candidates.

The impact of standardized testing generally

- [70] The EQAO Literature Review and the evidence of Dr. Reid highlight the social science research about the disproportionate impact of standardized exams generally.
- [71] The Literature Review found evidence that mandatory teacher competency testing impacts the teacher workforce pipeline, workforce, teacher training and the diversity of the teacher

population. The Literature Review cited various studies conducted over the past 20 years which found that mandatory standardized teacher testing has a “serious impact” on racial diversity within the teacher pool, as follows:

- Multiple studies have found that the pass rates on common standardized teacher competency tests are significantly lower for “people of colour”⁴ than for White applicants;
- Black and Latinx teacher candidates are much more likely to fail standardized teacher tests than their White peers;
- The U.S. Praxis test is, “more than any other criterion, single-handedly reducing the number of minorities who enter the teaching profession”;
- A “high stakes” system of standardized examinations prejudices weaker social groups or minorities;
- Standardized tests are biased against almost all vulnerable classes of potential teachers other than women; and
- Standardized testing has the unintended consequence of an unequal distribution of qualified teachers such that average teacher quality in vulnerable, high-poverty or rural districts is lower.

[72] The Literature Review touched only briefly on the potential reasons for the disproportionate results and found that there were no definitive conclusions. The Literature Review theorized that “transaction costs” resulting from mandatory standardized testing may prevent competent individuals from considering a career in teaching.

[73] The focus of the EQAO Literature Review was not the potential impact of standardized teacher testing on diversity in the profession but, rather, on the relationship between mandatory standardized testing and student performance. That research is more relevant to the s. 1 analysis than it is here, however, it is worth noting at this stage that the EQAO found that:

Current research demonstrates that standardized teacher tests [are] not linked with a level of performance consistency that justifies widespread implementation at this time. The use of caution with these tests is advised by many researchers on the basis that these tests are not consistently associated with the positive benefits that are often claimed. Furthermore, the potential negative impacts of these programs, including bias against marginalized groups and the decrease in the availability of qualified teachers, are more consistent impacts of these test.

⁴ The terms reflect those used in the particular study.

The impact of the MPT

(a) Quantitative evidence

- [74] The quantitative evidence on the record in this application consists of the testing data from the Field Test in February to March 2020, when the MPT was first tested, and the First Administration of the test in May to June 2021.
- [75] As noted earlier, the results of the Field Test and First Administration of the MPT show significant disparities in success rates and correspond to the social science research. On the Field Test, Black teacher candidates had a significantly lower pass rate than White teacher candidates. The pass rate for teacher candidates who self-identified as “African” was 58 percent. The pass rate of teacher candidates who self-identified as “Caribbean” was 71 percent. In comparison, the pass rate of teacher candidates who self-identified as “White” was 87 percent.
- [76] The results of the First Administration of the MPT showed similar results. The pass rate of Black⁵ teacher candidates was 70.3 percent, as compared to the pass rate of White teacher candidates of 90.5 percent. The pass rate of Indigenous teacher candidates was 71.43 percent. Put more starkly, the failure rate of Black or Indigenous teacher candidates to White teacher candidates was three to one. It is also worth noting that test-takers were disproportionately White, at 62.8 percent, as compared to 5.9 percent of test-takers who were Black. There were more than 10 times as many White test-takers as Black. Less than 0.5 percent of test-takers were Indigenous.
- [77] Tables showing the results of both the Field Test and the First Administration, as broken down by various groups, are attached as Appendices “A” and “B” to these reasons.
- [78] The Respondent’s position is that it is misleading to look only at the pass rates on candidates’ first attempt at the MPT because the pass rate, once second and third attempts are accounted for, is 92 percent. “Preliminary data” shows that candidates who retake the MPT have a 76 percent chance of passing on their second attempt and a 75 percent of passing on their third attempt. The Respondent further submits that teacher candidates can write the MPT an unlimited number of times and are not currently required to pay for the MPT. After January 1, 2022, first attempts will remain free of charge. The Respondent has not advised what the cost of subsequent attempts will be.
- [79] The Respondent’s position does not take into account that, aside from entry into the profession, having to retake the test multiple times imposes additional burdens in terms of time, money, and energy, as further detailed below, that will be disproportionately experienced by racialized teacher candidates, even if they pass in the end.

⁵ The results on the First Administration were not broken down into “African” and “Caribbean” as was done with the Field Test.

- [80] Moreover, the data does not provide a complete picture. As of the hearing of the application, of the 474 teacher candidates who were unsuccessful on the First Administration of the MPT, 215 candidates have retaken the test. Of the 215 candidates who retook the MPT, only 121 completed the demographic survey. Of those candidates, 45 percent were White (55 candidates), 15 percent were Black, Indigenous or Latinx (18 candidates).
- [81] Based on the available demographic information, the results show that 2.4 percent of Black, Indigenous and Latinx candidates were unsuccessful in passing the MPT after a third attempt, while only 0.34 percent of White candidates were unsuccessful after a third attempt. In other words, racialized candidates were seven times more likely than White candidates to be unsuccessful after the third attempt at the MPT. Given the low rate of self-identification, the sample size is small, and the figure may not be reliable. It is not possible to know whether the success rate of racialized candidates would be lower or higher if the demographic information was available.
- [82] Of the 16 candidates who did not pass after subsequent attempts at the MPT, six self-identified as Black, Indigenous, Latinx, or Middle Eastern and six self-identified as White. The remaining four candidates were either mixed race or preferred not to self-identify.
- [83] Perhaps more significantly, a larger proportion of candidates (259) did not retake the test. There is no data about those candidates. There is no breakdown, by racial group or otherwise. That leaves more than half of the teacher candidates who participated in the First Administration of the MPT unaccounted for. Since there is an over-representation in Black and Indigenous teacher candidates who were unsuccessful on their first attempt at the MPT, it is likely that a non-negligible proportion of the Black and Indigenous candidates are among the 259 who did not retake the test.
- [84] In fact, the testimony of the Respondent's expert, Dr. Jacob Vigdor, suggests that disadvantaged candidates would be less likely to retake the MPT. On cross-examination, Dr. Vigdor testified that socioeconomically advantaged students, that is White or Asian American students whose parents have a higher income and are more educated, retake the SAT more than disadvantaged students. While it is possible that some of those candidates have since attempted the MPT again, that evidence was not available for the hearing. The fact that the Respondent has not conceived of a means to follow-up with the significant proportion of teacher candidates who have not rewritten the MPT also causes substantial concern, especially because of the higher failure rate of racialized candidates.
- [85] Because there was only one administration of the MPT (in addition to the Field Test) before the hearing of the application, the available data on the results is somewhat limited. The discrepancies in the test results are nonetheless significant. While Ontario submits that further time is required to assess whether the MPT has an adverse impact on racialized teacher candidates, this is akin to suggesting that more racialized candidates must attempt and fail the MPT to accumulate the data necessary to show a disproportionate impact. The fact that a greater adverse impact could be demonstrated over time does not mean that there is no adverse impact now. While evidence is necessary, it cannot be that a claimant group

must wait years before it is in a position to challenge a regulation that it alleges is discriminatory. In any event, we find that the data from the Field Test, the First Administration, and the pass rate for racialized candidates on subsequent attempts represent “clear and consistent statistical disparities in how a law affects a claimant group”: *Fraser*, at para. 63.

- [86] Based on the foregoing, both the evidence of the circumstances of the claimant group and the results produced by the MPT show a disproportionate impact on the claimant group.

(b) Qualitative evidence (The Nyelade affidavit)

- [87] In support of the application, OTCC relies on the affidavit of Richard Nyelade, among others.⁶ Mr. Nyelade, who is Black and whose first language is French, wrote the MPT in French. Mr. Nyelade scored well above 70 percent on the math component all three times. However, he was only able to pass the pedagogy component on his third attempt.
- [88] Mr. Nyelade is a sociologist/anthropologist who immigrated to Ontario in 2018 under the Federal Skilled Work Program. He has master’s degrees from Cameroon and Norway and began a Ph.D. program in China. He is multilingual. Mr. Nyelade has three young children. Upon arriving in Canada, he decided to pursue teaching to have job stability to support his family. Mr. Nyelade enrolled in the B.Ed. program at the University of Ottawa, Toronto Campus. The MPT was not in place when he decided to pursue teaching as a profession.
- [89] Mr. Nyelade is concerned that the MPT will discourage candidates like himself, who are newcomers to Ontario and learned math in other countries, from becoming teachers. One issue that Mr. Nyelade has identified is that the MPT is taken on a computer. He has never used a computer or calculator for math and has never taken a computer-based math test. Mr. Nyelade believes that candidates educated outside of Canada are less equipped to take such tests.
- [90] Further, when the MPT was first implemented, the University of Ottawa, Toronto Campus, did not have a course on the math content of the Ontario curriculum. The faculty had one pedagogy course for teaching math up to Grade 6 for primary/junior teacher candidates. Because there was no substantive math course at the faculty and the substantive math component of the MPT is based on the Ontario curriculum, University of Ottawa candidates who were not educated in Ontario would be at a disadvantage. Moreover, when the MPT was first announced, there were no study materials that would allow teacher candidates, especially those educated outside of Ontario, to review and prepare.
- [91] Mr. Nyelade believes that the MPT will pose an obstacle or be burdensome to individuals with backgrounds similar to his, in particular, Francophone candidates from African countries. A teacher candidate like Mr. Nyelade, however, would have much to offer students in Ontario and the Ontario education system as a whole. The Ontario French

⁶ The other affiants are the Applicant, Sara Petrucci, and another teacher candidate, Bella Lewkowicz. Neither of the affiants has self-identified in their affidavit as racialized.

curriculum includes learning about French cultures beyond Canada. Having studied on three continents, Mr. Nyelade is multilingual with an upbringing in the French language and African culture, Mr. Nyelade is uniquely qualified to broaden students' awareness and understanding of Franco-African culture and cross-cultural world views.

- [92] Once subsequent attempts at the MPT are no longer free of charge, teacher candidates will be required to bear the financial burden of rewriting the test.⁷ They will not be able to work as teachers until certified. MPT fees, tutoring, and study time will add to their expenses, resulting in an additional burden after having foregone paid employment to pursue a B.Ed. in the hope of becoming a teacher. This will disproportionately impact candidates who lack financial resources, who have to support their families, and who have caregiving responsibilities. Mr. Nyelade expresses concern that similarly-situated candidates will be discouraged from trying to become teachers. This concern is echoed in the EQAO Literature Review, which cited research that “transaction costs” may discourage competent individuals from becoming teachers. Those individuals are more likely to be members of under-represented groups, such as Black and Indigenous persons.
- [93] While it would have been helpful to have more evidence from teacher candidates, particularly Black and Indigenous candidates, about their experiences with the MPT and the financial and other burdens posed by it, the fact that there is only one such affiant may reflect the stigma of disclosing in a public forum that they did not pass the MPT on their first or second attempt.

Does the MPT Impose Burdens or Deny Benefits in a Manner that Has the Effect of Reinforcing, Exacerbating or Perpetuating Disadvantage?

- [94] Based on the discrepancy in the pass rate on the MPT for Black and Indigenous teacher candidates in particular and racialized candidates generally, we find that the MPT imposes burdens on those candidates that have the effect of reinforcing, exacerbating or perpetuating disadvantage.
- [95] The significantly lower pass rate for racialized teacher candidates means that fewer racialized, especially Black and Indigenous, candidates will be able to become teachers and enter the profession. While the ability to retake the test multiple times alleviates the burden to some degree, ensuring that some of those candidates do ultimately become teachers, the burden of having to retake the MPT, with the attendant financial burden, time, stress and stigma remain.
- [96] In our view, the effect of the MPT is to reinforce or to exacerbate disadvantage. As detailed above, racialized teacher candidates have gone through an education system in which they have suffered discrimination and disadvantage. The candidates are then required to take a “high-stakes” standardized test which the available data shows they are more likely to fail. They either cannot become licensed as teachers or, if they choose to, they must sit out and

⁷ While Ontario's evidence was that a regulation would have to be passed to charge a fee for the MPT, this does not appear to be a significant impediment.

take the test again. They may have to take the test multiple times or wait for the next opportunity, unable to work as teachers in the meantime.

- [97] As noted at the outset, there is a significant under-representation of racialized teachers, as compared to the proportion of racialized students in Ontario. In fact, the proportion of racialized teachers has not only failed to increase with the proportion of racialized Canadians, but decreased from 2001 to 2006, relative to the proportion of visible minority citizens.
- [98] It is not only the individual teacher candidates who are disadvantaged by their inability to enter the profession. The MPT will negatively impact upon the diversity of the teaching population. The students who suffer most from the lack of racialized teachers in the classroom are racialized students. The social science research demonstrates that racialized students perform at a higher level and with greater self-efficacy with racialized teachers, who hold higher expectations of them. Non-racialized students are also positively impacted by greater diversity in the classroom. As noted above, if racialized students do not see themselves represented among their teachers, they become less likely to see teaching as a possible career, thus creating a vicious cycle. For good reason, Ontario's Education Equity and Inclusive Education Strategy identifies the need for greater teacher diversity.
- [99] The negative impact of mandatory standardized testing on diversity is demonstrated by the research in both the U.S. and U.K. where standardized tests have long been in use. The U.S. studies show a significant discrepancy in the pass rate on the Praxis tests for Black teacher candidates (38 percent from 2014 to 2017) and White teacher candidates (88 percent for the same time period). A 1999 study reported a 46 percent pass rate for Black candidates and 82 percent for White teacher candidates through the 1990s. Dr. Reid cites numerous U.S. studies that find that the Praxis tests act as a barrier to the teaching profession and result in a decrease in racial diversity of teachers. Dr. Reid also cited studies that have found a decrease in the number of Black teachers from 2003 to 2012 and the widening gap between the proportion of Black and Latinx students and Black and Latinx teachers from 2005 to 2015.
- [100] Ontario submits that the ability to rewrite the MPT an unlimited number of times, including during the same test cycle, means that there is no significant delay in becoming a teacher. In reality, while test results are available in ten days, a teacher candidate who did not pass the MPT may not be prepared to retake it during the same test cycle. In addition, the delay of waiting until the next test cycle could result in hardship, depending on a candidate's circumstances, as they might be unable to earn an income in the interim. Further, a delay of even a few months might cause a teacher candidate to miss out on employment opportunities. For example, the second testing cycle in 2021 was after the academic year had already started.
- [101] As noted above, the ability to retake the test does not address the candidates who opt not to retake the test.

- [102] The Respondent further submits any potential bias in the MPT will be addressed through the mechanisms established by the Ministry, such as the demographic questionnaire, which has been revised in accordance with the Race-based Data Collection Framework and Anti-Racism Data Standards; the equity review of the test questions; and ongoing monitoring through the EQAO. The prospective mechanisms are best addressed in the context of whether the MPT minimally impairs the claimant group's equality rights. At this stage, we note that the evidentiary record does not support that the test questions were reviewed for equity concerns, both after the Field Test and the First Administration. Ontario's affiant, Laurie McNelles, admitted that as of August 2021, no input was sought from stakeholders on the MPT questions from an equity perspective.
- [103] The Respondent argues that the MPT has already had a positive impact because, in response to the MPT, Ontario Faculties of Education have developed math courses and study materials. However, those are not benefits of the MPT but, rather, initiatives developed by third parties to address the burden imposed by the MPT. The fact that those initiatives may assist racialized or other teacher candidates to pass the MPT does not lessen the burdens imposed by the test itself. It is worth noting that requiring math courses or math instruction at the Faculties of Education is consistent with the recommendation of the Fields Brief and Ontario's own expert, Dr. Kajander, and the approach taken in Quebec. However, that was not the approach adopted by the Respondent, who instead chose to implement a mandatory standardized test.
- [104] The MPT, by virtue of the fact that it acts as a barrier to entry into the teaching profession and places additional burdens on racialized teaching candidates, imposes burdens and denies benefits in a manner that has the effect of reinforcing or perpetuating disadvantage. As a result, the Applicants have satisfied both parts of the test and have established a *prima facie* breach of s. 15.

Is the MPT a Reasonable Limit Under Section 1 of the *Charter*?

- [105] Section 1 of the *Charter* allows a law or state action to limit a right guaranteed under the *Charter* if the law or state action is a "reasonable limit prescribed by law" that can be "demonstrably justified in a free and democratic society." As the Supreme Court of Canada has stated, it is the limitation on equality rights that must be justified, not the legislative scheme as a whole: *Fraser*, at para. 125.
- [106] The test for a s. 1 justification is that established by *R. v. Oakes*, [1986] 1 S.C.R. 103. The *Oakes* test has two components: (1) is the legislative goal pressing and substantial; and (2) is there proportionality between that goal and the means used to achieve it? The second component of the test has three parts: (a) is there a "rational connection" between the impugned measure and the pressing and substantial objective; (b) does the limit impair the right or freedom no more than is reasonably necessary to accomplish the objective; and (c) is there proportionality between the deleterious and salutary effects of the law?
- [107] The Respondent bears the onus of satisfying all the parts of the *Oakes* test. It is the Applicants' submission that none of the components of the *Oakes* test can be satisfied on

the record. The Respondent submits that all of the components are met. We have concluded that the MPT furthers a pressing and substantial objective and is rationally connected to the objective. However, we find that the MPT does not minimally impair the rights of racialized teacher candidates and that the benefits of the MPT do not outweigh the deleterious effects. Therefore, the Respondent has not met its burden and the MPT cannot be justified under s. 1 as a reasonable limit prescribed by law.

Is There a Pressing and Substantial Objective for Limiting the Charter Rights?

- [108] The Applicants submit that there was no pressing and substantial purpose for instituting the MPT because the record does not support that there was a crisis in Ontario students' math test scores. Further, it is submitted that there is insufficient evidence to establish that the single metric – the EQAO mathematics score – is an accurate measure of Ontario students' math abilities. Ontario's PISA scores are above the Canadian average and any decline in Ontario's PISA scores aligns with a global decline in math scores during the same period. The Applicants argue that the MPT was imposed largely in response to political pressure from Ontario parents, who perceived student math competence to be an issue and teacher math competence as the reason.
- [109] The Respondent submits that the court should adopt a deferential approach, as increasing student achievement and improving diversity in the teaching profession are complex social issues. The Respondent argues that the fact that improving math education is politically popular does not detract from the objective of improving student math achievement being pressing and substantial.
- [110] Having formed the view that the objective of improving student math achievement is pressing and substantial, we do not consider it necessary to determine whether or not the MPT was imposed in response to political pressure.
- [111] The threshold for what constitutes a pressing and substantial objective is relatively low and appears to have remained consistent since the original articulation of the test set out in *R. v. Oakes*. The objective must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom”: *Oakes*, at para. 69, quoting *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at para. 139. To be capable of justifying limits on *Charter* rights, the objective must not be “trivial” and must not be “discordant with the principles integral to a free and democratic society”: *Sauvé v. Canada*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 20, citing *Oakes*, at para. 69. This standard has sometimes been framed as whether the objectives are “directed to the realization of collective goals of fundamental importance:” *Sauvé*, at para. 137, citing *Oakes*, at para. 65; see also *Gordon v. Canada (Attorney General)*, 2016 ONCA 625, 404 D.L.R. (4th) 590, at para. 195, leave to appeal to S.C.C. refused, 2017 CanLII 6740 (S.C.C.). Courts have held that a measure of deference is appropriate in determining whether the infringing measure is directed towards a pressing and substantial objective: *Galganov v. Russell (Township)*, 2012 ONCA 409, 350 D.L.R. (4th) 645, at para. 65, leave to appeal to S.C.C. refused, 2012 CanLII 76983 (S.C.C.); see also *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

- [112] Evidence is not typically required at this stage and courts may make this determination on the basis of common sense alone: *R. v. Sullivan*; *R. v. Chan*, 2020 ONCA 333, 151 O.R. (3d) 353, at para. 109; *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 25, McLachlin C.J. and Major J., dissenting on other grounds. It is not necessary for the government to prove the existence of the alleged problem for the objective to be found pressing and substantial. The failure to demonstrate the existence or scale of the alleged problem targeted by the legislature has generally been a consideration for the proportionality analysis, rather than the assessment of the objective.
- [113] On its face, improving the educational attainment of students in Ontario’s public education system appears to be an unobjectionable and broadly beneficial goal of more than trivial importance, consistent with the principles of a free and democratic society. The Respondent is not required to demonstrate, through evidence, that there was a significant decline or problem in Ontario students’ math scores in the period leading up to the imposition of the MPT requirement to meet the burden for establishing “pressing and substantial objectives”. Although there is conflicting evidence on the existence and scale of the alleged problem with Ontario students’ math scores, these considerations are more appropriately dealt with in the proportionality stage of the analysis.
- [114] Accordingly, the Respondent has met the threshold for establishing that the MPT furthers a pressing and substantial objective.

Are the Means Used Proportionate to the Objective?

Is the MPT rationally connected to the objective of improving student achievement in math?

- [115] To meet this step of the s.1 analysis, it need only be “reasonable to suppose that the limit may further the goal, not that it will do so”: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 49. The Supreme Court has described this test as “not particularly onerous”: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 228; see also *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 40.
- [116] The Respondent asserts that the unchallenged expert evidence filed in this proceeding establishes three important positive links between: (1) teachers’ mathematical knowledge and student achievement in mathematics; (2) teacher candidates’ mathematical knowledge and their confidence in themselves as effective future teachers of mathematics; and (3) teacher licensure test scores and student achievement, particularly in the field of mathematics.
- [117] The Applicants do not take issue with the first two assertions. However, with respect to the third assertion, they submit that there is only a weak correlation between teacher licensure scores and student performance. The Applicants rely on the conclusion of Ontario’s EQAO that the likelihood of the MPT improving student math scores across Ontario is extremely low, given the extant research that shows limited association between teacher testing and student achievement.

- [118] The Applicants further rely upon the expert opinion of Dr. Reid that the MPT is likely to result in fewer racialized candidates being certified as teachers in Ontario and is not likely to accomplish its stated goal of improving student math scores. The Respondent asserts that the conclusions of Dr. Reid can be given no weight because she is not an expert on the impact of large-scale assessments, nor has she conducted her own empirical research on the impact of standardized tests for teacher candidates on student achievement.
- [119] We begin our analysis by accepting as common sense the connection between teacher candidates' mathematical knowledge and student performance. The issue at the stage of rational connection is simply whether there is a rational link between the infringing measure and the government goal. The balance between positive and negative effects of the measure falls to be considered at the final stage of the s. 1 analysis: *Hutterian Brethren*, at para. 51.
- [120] Even the Applicants' expert, Dr. Reid, acknowledges that there is a link, albeit a weak one, between teacher licensing test scores and increasing teacher candidates' mathematical knowledge. Dr. Kajander's evidence is that part of the MPT's value is in encouraging teacher candidates to pursue math courses prior to licensing to encourage math-avoidant teacher candidates to improve their confidence in math before entering the profession and encouraging Faculties of Education to strengthen learning opportunities in math. We conclude that there is a link between the MPT and the goal of increasing teacher candidates' mathematical knowledge. The low threshold to meet this step of the s. 1 analysis has been met. It is reasonable to suppose that the MPT may further the goal of improving student achievement in math, not that it will do so. We go on to consider the balance of the proportionality analysis.

Does the MPT minimally impair the Applicants' rights?

(a) General Principles Regarding Alternatives at the Minimal Impairment Stage

- [121] At the minimal impairment stage, the Respondent must show that the limit impairs the right or freedom as little as reasonably possible in order to achieve the legislative objective: *Oakes*, at para. 70; *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199, at para. 160. Recent cases continue to rely on the following passage from *RJR-MacDonald* as setting the applicable standard:

As the second step in the proportionality analysis, the government must show that the measures at issue impair the right ... as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement: see *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990 CanLII 105 \(SCC\)](#), [1990]

1 S.C.R. 1123, at pp. 1196-97; *R. v. Chaulk*, [1990 CanLII 34 \(SCC\)](#), [1990] 3 S.C.R. 1303, at pp. 1340-41; *Ramsden v. Peterborough (City)*, [1993 CanLII 60 \(SCC\)](#), [1993] 2 S.C.R. 1084, at pp. 1105-06. On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail: *RJR-MacDonald*, at para. 160, cited in *Frank v. Canada*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 66; *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 68; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 454, at para. 50 [*Quebec v. Alliance*].

- [122] The question at this stage is not whether it is possible for the court, with the full benefit of hindsight, to imagine an alternative that is slightly less impairing than the government’s chosen means. Indeed, it may not be possible to assess the impacts of social policies with a high degree of specificity, and evidence will often not be available in such matters: *College of Midwives of British Columbia v. Mary Moon*, 2020 BCCA 224, 40 B.C.L.R. (6th) 151, at para. 108, citing *Sauvé*, at para. 18. It is only where alternatives are “clearly superior” that the law would fail on this basis: *Gordon*, at para. 260; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 62, citing Wilson J. in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, at para. 173.
- [123] Despite the language in *RJR-MacDonald* that suggests less impairing alternatives must be “equally effective,” the majority in *Hutterian Brethren* has clarified this standard and held that alternatives do not need to satisfy the pressing and substantial objective to exactly the same degree as the government’s chosen means. Rather, this standard includes measures that give sufficient protection, in all the circumstances, to the government’s goal. Accordingly, the test at the minimal impairment stage can be rephrased as “whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner”: *Hutterian Brethren*, at para. 55.
- [124] For the purposes of the minimal impairment stage, the Respondent is not required to accept a less impairing alternative that does not sufficiently achieve its goal. However, this does not necessarily mean the limit on the right will be justified because it may still be the case that notwithstanding that the infringing measure is the “only” means of achieving the pressing and substantial objective, its deleterious effects may outweigh its salutary effects at the final balancing stage.

Deference at the Minimal Impairment Stage

- [125] A deferential approach is appropriate where the government is addressing a complex social problem with many potential solutions, as compared to contexts where the government acts as the “singular antagonist” of the affected individual, such as in the case of penal laws. Where the legislature is mediating between the competing claims of different groups in society, the choice of means will often involve assessing conflicting scientific or social science evidence and differing demands on scarce resources which cannot be evaluated by the courts with the same degree of certainty: *Irwin Toy Ltd. v. Quebec (Attorney General)*,

[1989] 1 S.C.R. 927, at para. 81; *Hutterian Brethren*, at para. 53. In these circumstances, the question is “whether the government had a reasonable basis, on the evidence tendered” for concluding that its chosen means impaired the right as little as possible given the government’s pressing and substantial objective: *Irwin Toy*, at para. 82.

- [126] While financial considerations alone are not sufficient to justify an infringement of *Charter* rights, courts have held that they are relevant to determining the standard of deference owed at the minimal impairment stage: *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, at para. 283.

Evidence at the Minimal Impairment Stage

- [127] Although some deference to the legislature will be warranted, evidence will “generally” be required in order to justify an infringement under s. 1 of the *Charter*: *Oakes*, at para. 68. Common sense and logical inferences can supplement the evidence, but as the Court has cautioned, deference must not be substituted for the “reasoned demonstration” required by s. 1: *Sauvé*, at para. 18.
- [128] Courts will typically look to evidence that the government explored options other than the impugned measure and evidence supporting its reasons for rejecting those alternatives. The government may adduce evidence that it consulted with affected parties in order to demonstrate that it explored a range of options, though there is no requirement that the government engage in consultation before legislating: *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 157. The government might also adduce evidence to show that the less impairing alternatives proposed are not likely to achieve the government’s objectives or are otherwise not workable, or that the proposed alternatives are not in fact less impairing.
- [129] Although claimants will typically argue for particular alternatives, the burden remains on the government, and claimants do not necessarily need to definitely prove the effectiveness of proposed alternatives: *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 119.
- [130] Where the infringing measure is predicated on the existence of a specific problem, the court may look to evidence that the problem exists or that existing tools are ineffective in order to justify the imposition of the infringing measure. For example, in *Quebec v. Alliance*, a majority of the Supreme Court held that amendments to Quebec’s pay equity legislation were not minimally impairing. The objective of the new provisions was to encourage employer compliance, but the Court held that Quebec had failed to adduce evidence of meaningful efforts to enforce compliance, such as through stricter enforcement of the existing offence provisions in the legislation, without resorting to a rights infringement. Without evidence that enforcement efforts had been ineffective, the government failed to discharge its burden at that stage.
- [131] Overall, while the approach to the minimal impairment stage is deferential, the government is typically required to demonstrate a reasonable basis, on the evidence, for concluding that

its chosen means were minimally impairing and that it had sound reasons for rejecting proposed alternatives.

(b) Is the MPT Minimally Impairing of the Applicants' Section 15 Rights?

(i) *A high degree of deference is appropriate*

- [132] Several factors support taking a highly deferential approach to Ontario's choice of the MPT requirement as its chosen means to address student achievement in math. This objective is a somewhat complex social issue and it could be said that the legislature was mediating between competing societal interests, namely, the interests of students and broader society in the quality of the public education system and the equality rights of teacher candidates. In respect of some of the proposed alternatives, as the Respondent has suggested, it has also taken into account the interests of school administrators and their need for flexibility, and the interests of Faculties of Education in their autonomy. The government's approach also rests on complex social science evidence regarding math pedagogy and the impacts of standardized testing on student achievement. These factors all point towards deference to the legislature's choices.

(ii) *There is a reasonable basis for the existence of a problem*

- [133] The Applicants argued at the pressing and substantial objective stage that the Respondent has not established the existence of a problem or "crisis" with Ontario students' math scores. As noted above, where there is no demonstrated problem or evidence that existing means have proven ineffective, it may be difficult for the government to justify an infringement of *Charter* rights: *Quebec v. Alliance*, at paras. 50-51.
- [134] In this case, the government's conclusion that declining EQAO scores provided sufficient cause for concern is entitled to deference. Although there is some evidence to the contrary, such as that Ontario students have continued to perform reasonably well on PISA assessments compared to other OECD countries, there is still a reasonable basis, supported by evidence, to conclude that scores were declining and some response was necessary.

(iii) *There was some effort to mitigate the impact of the MPT*

- [135] The Respondent is making efforts to respond to the negative impacts of the MPT on diversity, such as screening questions for bias and allowing unlimited rewrites. Those efforts weigh in its favour. While the parties disagree about whether the government has gone far enough, overall, the record suggests that the government was alive to equity issues.
- [136] However, the Respondent's efforts to address equity issues related to the MPT fail to address the Applicants' argument that there are less impairing means that do not adversely impact racialized teacher candidates. The Respondent cannot discharge its burden by imposing an option which breaches equality rights, and then make some effort to mitigate the negative effects, if options are available that would not breach equality rights in the first place.

(iv) An admissions test is unlikely to be less impairing

- [137] The Respondent's argument that alternatives such as imposing an admissions test to enter B.Ed. programs would not impair equality rights any less is a constitutionally valid reason for rejecting this option. While the bulk of the evidence focuses on the diversity impacts of standardized testing at the licensure stage, it would be reasonable to extend those findings to standardized testing at the admissions stage to conclude that such tests would be no less impairing than the MPT.

(v) A math course requirement is likely effective and less impairing

- [138] The Applicants submit that mandating math courses in B.Ed. programs would be a more effective measure that would also be less impairing of equality rights. The evidentiary record supports the Applicants' assertion.
- [139] The EQAO recommended that increasing the quality and quantity of required mathematics courses at the pre-service (ITE) level would be one of the most helpful steps toward improving student outcomes, whereas standardized teacher testing could have a negative impact on racial diversity within the teacher pool.
- [140] Requiring a math course during the B.Ed. program was also one of the recommendations in the Fields Brief, authored by a number of experts including the Respondents' expert, Dr. Kajander. We disagree with the Respondent's position that the recommendations of the Fields Brief are irrelevant. The recommendations were aimed at ensuring that teachers have the requisite mathematical understanding to be effective in the classroom – the very objective of the MPT. Moreover, Dr. Kajander's evidence was that to improve teachers' mathematical competence, it was necessary to impose consistency in the mathematical requirements at the B.Ed. level. At the very least, the burden on the Respondent required that it give evidence as to why this less impairing option would not meet the objective of improving student math achievement. The data shows that in Quebec, where students receive more instruction in mathematics and where there are higher math requirements for entry to the B.Ed. program, students outperform all other Canadian provinces in mathematics.
- [141] The Respondent relies on the likelihood that the MPT requirement will encourage teacher candidates to pursue math courses prior to licensing to justify adopting the MPT. We would agree that, if candidates take math courses in order to be able to pass the MPT, it is rationally connected to the goal of enhancing teacher mathematical knowledge and confidence as effective teachers of mathematics. However, the same goal would be more directly served by introducing a math course requirement in B.Ed. programs. Dr. Kajander's opinion that the MPT enhances teacher mathematics competence and confidence is predicated on the likelihood that teacher candidates, especially math-avoidant candidates, will take math courses to prepare for the test. If a math course was required at the ITE level, the same would be achieved without the MPT, thus undermining the basis for her support of the MPT.

- [142] Compared to the MPT requirement, requiring a math course for B.Ed. programs would be significantly less impairing of equality rights. There is a plethora of evidence in the record highlighting the disproportionate impacts of standardized testing based on race, including statistical evidence to this effect with respect to the MPT specifically. In contrast, there is no evidence to suggest that these negative diversity impacts would exist in the context of a mandatory math course (i.e. that racialized teacher candidates might disproportionately fail these math courses), and we do not think such an inference can be made on the basis of logic or common sense.
- [143] The Respondent relies upon supports at the B.Ed. level (“as each institution sees fit”) to remediate disadvantages for racialized candidates taking the MPT. There is no explanation for why those supports would not also be available if math was required and taught during the B.Ed. or during the 3 to 4 years of university required to qualify to enter the B.Ed.
- [144] The Respondent has adduced some evidence that a math course requirement was not pursued out of concern that it would interfere with the institutional autonomy of universities’ Faculties of Education. While some deference is owed to the government in balancing the competing interests of stakeholders, some loss of autonomy for Faculties of Education by mandating a math course is not a concern that should outweigh the equality rights of teacher candidates. This is not a case where pursuing an alternative that is less impairing of the claimants’ rights would have negative consequences for the *Charter* rights of another group in society.
- [145] The affidavit of Dr. Kajander points out that not all universities have a suitable math course, and that courses take time and resources to develop and implement. The case law has confirmed that the allocation of scarce resources can be an appropriate consideration and that when considering less impairing alternatives, courts should be mindful that the legislature does not have unlimited funds to pursue its objectives: *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, at para. 283. Practical and resource-based barriers to implementing a math course requirement could in theory justify disregarding this as an alternative, but we do not find these are established on the record in this case. The evidence is that Faculties of Education are being required to add math courses and supports to address the MPT in any event. Overall, we find the Respondent’s explanation for rejecting this less impairing alternative to be vague and insufficiently supported by the record.
- [146] Another option proposed by the Applicants is to wait to see the effect of the other parts of the four-year math strategy set out above. The Respondent has not offered a reason for not doing this.
- [147] We have concluded that Ontario has not discharged its burden of showing the MPT to be minimally impairing. There were reasonably available alternatives that on their face appear to be less impairing and at least as effective as the MPT in achieving the goal of improving student achievement in math. These alternatives include requiring a minimum number of hours of math instruction or a math course in B.Ed. programs, requiring an undergraduate

math course as an admissions requirement for B.Ed. programs or waiting to see the effect of the other parts of the four-year math strategy.

- [148] The MPT requirement accordingly fails on the basis that it is not minimally impairing. We nonetheless go on to consider the final balancing stage.

Do the benefits of the MPT outweigh any deleterious effects?

- [149] The final stage of *Oakes* requires that the salutary effects of the impugned law – typically with reference to the anticipated attainment of the asserted legislative objective – outweigh its deleterious effects. This allows for a broader assessment of whether the benefits of the impugned law in terms of public good are worth the costs of the rights limitation. In *JTI-Macdonald*, the Court stated, at para. 45:

This inquiry focuses on the practical impact of the law. What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?

(a) Salutary Effects

- [150] While there is no evidence of a crisis with Ontario students' math scores, EQAO scores have declined, which the Respondent sought to address by the imposition of the standardized licensing test, the MPT. Whether there is a positive correlation between teacher competency scores and student performance or a weak correlation only, a key benefit of the MPT relied upon by the Respondent is that it encourages math-avoidant teacher candidates to sign up for a mathematics course and to improve their confidence in math. This in turn encourages Faculties of Education to strengthen learning opportunities in math. We accept this as a salutary effect towards the goal of improving Ontario students' math performance.

(b) Deleterious effects

- [151] The academic literature consistently sets out the serious impacts of teacher licensure testing on diversity. The finding of the EQAO was that standardized teacher testing has a serious impact on racial diversity within the teacher pool. The literature review concluded that mandated assessments take the role of a biased barrier rather than a screen for quality. It noted that multiple studies have found that the pass rate on common teacher competency tests are significantly lower for people of colour than for White applicants. The EQAO posited that reducing the pool of diverse teacher applicants has the unintended consequence of lowering average teacher quality in vulnerable, high-poverty and rural districts.
- [152] Canadian schools have proportionally many more students of colour than there are educators of colour, and the gap between the groups appears to be widening: J. Ryan, K. Pollock & F. Antonelli, "Teacher Diversity in Canada: Leaky Pipelines, Bottlenecks and Glass Ceilings" (2009) 32:3 Can. J. Education 591, at p. 599. Racialized students benefit from being taught by racialized teachers, according to the unchallenged evidence in the

EQAO Literature Review and Dr. Reid's report. The concern is that the effect of the MPT will be to exclude racialized teacher candidates and exacerbate the trend of de-diversification that has been occurring in Ontario schools.

- [153] The EQAO Literature Review found that teacher licensure tests may cause more harm than good and often do not meet their goal of improving student learning. The Respondent's experts do not dispute the existence of racial disparities in the rates at which teacher candidates pass or fail standardized tests.
- [154] The data from the MPT confirms these studies. The demographic data from both the Field Test and the official MPT results show statistically significant differences in success rates based on race.
- [155] The deleterious effect on diversity is somewhat ameliorated by the success rate on second and third attempts at the MPT. However, the cost of retaking the MPT, in time and money, will impact those who are least likely to be able to afford it. The Respondent has given no undertaking that, going forward, students will not have to pay to retake the MPT. Moreover, racialized teacher candidates should not have to keep retaking the MPT when other options exist that would achieve the objective without impairing anyone's rights.
- [156] In conclusion, the MPT's deleterious effect of the breach of equality rights outweighs the salutary effect of encouraging teacher candidates and Faculties of Education to focus more on math skills. The objective could be achieved directly by introducing math course requirements for admissions to B.Ed programs or in B.Ed programs themselves. This would be significantly less impairing of equality rights and at least as efficacious in furthering the objective of improving student achievement in math.
- [157] Accordingly, the Respondent has failed to demonstrate that the MPT is a reasonable and justifiable limit on the Applicants' equality rights under s. 1.

Does Ontario Owe the Applicants a Duty of Procedural Fairness?

- [158] The Applicants submit that the duty of procedural fairness was breached because the consultations with stakeholders did not include teacher candidates. The Applicants provide no case law to support a duty of procedural fairness in the context of professional certification requirements imposed by regulation.
- [159] The case law clearly supports the conclusion that the duty of procedural fairness only accords participation rights in respect of certain administrative decisions that are not legislative in nature: *Greenpeace Canada (2471256 Canada Inc.) v. Ontario (Minister of the Environment, Conservation and Parks)*, 2021 ONSC 4521 (Div. Ct.), 157 O.R. (3d) 497, at para. 84. First, there is no duty of procedural fairness in respect of legislative processes. The government is under no obligation to provide participatory rights in the creation of an instrument mandated by regulation unless a statute so requires: *Martineau v. Matsqui Institution (No. 2)*, [1980] 1 S.C.R. 602, at p. 628. Second, in the administrative law context, a right to consultation arises only when a legitimate expectation of consultation has been created by an unambiguous representation that a specific process will

be followed: *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 68. There is no such representation in the evidence here.

- [160] Accordingly, while consultation with teacher candidates would have been desirable, there is no duty of procedural fairness owed in these circumstances.

What Is the Appropriate Remedy?

- [161] A declaration will issue that the Mathematics Proficiency Test and the legislative provisions that create it infringe s. 15 of the *Canadian Charter of Rights and Freedoms* and the infringement cannot be justified under s. 1. Specifically, the *Proficiency in Mathematics* regulation (O. Reg 271/19), as amended, and s. 18(1)(c) of the *Ontario College of Teachers Act*, 1996, S.O. 1996, c.12 are of no force or effect.

- [162] A declaration will issue that the Ontario College of Teachers shall grant certification to teacher candidates who have not passed the Mathematics Proficiency Test (or shall grant full certification in the case of teacher candidates whose certification is conditional on passing the Mathematics Proficiency Test) but have otherwise met all other certification requirements.

Is This An Appropriate Case to Award Special Costs?

- [163] The Applicants seek an award of \$150,000 in special costs. The criteria for special costs is set out in *Carter v. Canada (Attorney General)*, at para. 140:

[140] In our view, with appropriate modifications, this test serves as a useful guide to the exercise of a judge's discretion on a motion for special costs in a case involving public interest litigants. First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not previously been resolved or that they transcend the individual interests of the successful litigant: they must also have a significant and widespread societal impact. Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding. In those rare cases, it will be contrary to the interests of justice to ask the individual litigants (or, more likely, pro bono counsel) to bear the majority of the financial burden associated with pursuing the claim.

- [164] The Respondent opposes the award of special costs on the basis that none of the factors set out by the Supreme Court in *Carter* to award special costs are met. Other than submitting that the factors for special costs have not been met and that the application should be dismissed with no costs, the Respondent makes no submissions on the quantum of costs that should be awarded to the Applicants as the successful party.

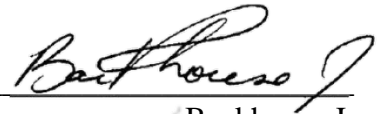
[165] We agree that the criteria set out in *Carter* is not met in this case. While there are issues of public importance in this case, the matters do not rise to the level of being truly exceptional or of having a significant and widespread societal impact. Further, it cannot be said that the Applicants have no pecuniary interest in the litigation or that it would not have been possible to effectively pursue the litigation with private funding.

[166] As the successful party, the Applicants are entitled to their costs. The Applicants' cost outline shows partial indemnity costs of approximately \$90,000. We consider that a reasonable amount for the unsuccessful party to pay, proportionate to the complexity and importance of the issues, and fix costs accordingly.

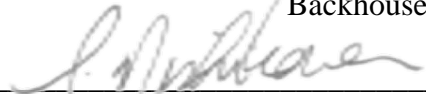
Conclusion

[167] The application for judicial review is granted. The following relief is ordered:

- (a) The Mathematics Proficiency Test violates s. 15(1) of the *Charter*, is not justified under s. 1, and is unconstitutional;
- (b) O. Reg. 271/19, Proficiency in Mathematics, as amended, under the *Ontario College of Teachers Act, 1996*, S.O. 1996, c.12 is unconstitutional and of no force and effect;
- (c) Paragraph s. 18(1)(c) of the *Ontario College of Teachers Act, 1996*, S.O. 1996, c.12 is unconstitutional and of no force or effect;
- (d) The Ontario College of Teachers shall grant certification to teacher candidates who have not passed the Mathematics Proficiency Test (or shall grant full certification in the case of teacher candidates whose certification is conditional on passing the Mathematics Proficiency Test) but who have otherwise met all other certification requirements; and
- (e) The Respondent shall pay the Applicants \$90,000 in costs of the application.

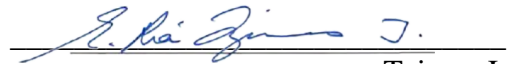


Backhouse J.



Nishikawa J.

I agree



Tzimas J.

Appendix “A” – EQAO Summary of Demographic Data for the MPT Field Test

The following data is excerpted from the EQAO’s summary of the demographic questionnaire results for the MPT Field Test, administered between February 18 and March 7, 2020, and consists of those portions involving ethno-racial data.

6.1 Relationship between Ethno-Racial Identity and Outcome

Outcome	Freq/%	Ethno-racial identity											Row Total
		Choose not to answer	African	Asian	Carib-bean	Not listed	European	Indige nous	Latino	Middle-east	Multi-ple	White	
Not yet successful	Count	48	37	51	5	2	79	10	8	10	22	167	439
	Column %	16%	42%	13%	29%	17%	16%	30%	28%	26%	24%	13%	16%
Successful	Count	244	52	352	12	10	400	23	21	28	71	1,075	2,288
	Column %	84%	58%	87%	71%	83%	84%	70%	72%	74%	76%	87%	84%
Column total		292	89	403	17	12	479	33	29	38	93	1,242	2,727

Frequency Missing = 9

$\chi^2 = 68.8249$ (df=9, $p < 0.0001$); Cramer's V=0.1589

Note: Includes only those field-test takers who responded to the identity-based questionnaire. Category 'African' includes those who responded as having a Black, African-Northern, African-Eastern, African-Western, African-Middle ethno-racial identities. 'Caribbean' includes those with African-Caribbean and Indo-Caribbean identities. 'Asian' includes those who responded as having an Asian, Asia-Eastern, Asia-Central, Asia-Southern, Asia-South Eastern ethno-racial identities. 'European' includes those with Europe-Eastern, Europe-Northern, Europe-Southern, and Europe-eastern ethno-racial identities. 'Middle east' includes those with Asia-Western identities.

6.2 Relationship between Ethno-Racial Identity, Language and Outcome

Ethno-racial identity	English					French					English + French				
	Successful		Not yet successful		Total	Successful		Not yet successful		Total	Successful		Not yet successful		Total
	#	%	#	%	#	#	%	#	%	#	#	%	#	%	#
White	1,410	86%	234	14%	1,644	65	84%	12	16%	77	1,475	86%	246	14%	1,721
Non-White	526	82%	116	18%	642	33	55%	27	45%	60	559	80%	143	20%	702
No Response	244	85%	44	15%	288	10	63%	6	38%	16	254	84%	50	16%	304
Total	2,180	85%	394	15%	2,574	108	71%	45	29%	153	2,288	84%	439	16%	2,727

Note: Includes only those field-test takers who responded to the identity-based questionnaire. Category 'White' includes those who responded as having a White or European ethno-racial identity. 'Non-White' includes those with African, Asian, Caribbean, Latino, Middle Eastern and Multiple identities. 'No Response' includes those who responded having an ethno-racial identity not listed, and those who chose not to answer.

Appendix “B” – EQAO Summary of Demographic Data for the MPT First Administration

The following data and notes are excerpted from the EQAO’s summary of the demographic questionnaire results from the First Administration of the MPT and consist of those portions that deal with race-based data.

Math Proficiency Test—2021:

Analyses are based on the number of applicants who took the MPT between May 10 and June 26, 2021.

Part 1 - Overall success rates by demographic characteristics

Table 7: MPT success rate by Race:

Outcome		Race								I prefer not to answer	Mix	Row Total
		Black	East/South-east Asian	Indigenous	Latinx	Middle Eastern	South Asian	White	Another race category			
Successful	Count	116	170	10	26	70	118	1593	29	238	83	2453
	Column %	70.3	92.39	71.43	76.47	83.33	84.89	90.51	78.38	80.95	91.21	
Not yet successful	Count	49	14	4	8	14	21	167	8	56	8	349
	Column %	29.7	7.61	28.57	23.53	16.67	15.11	9.49	21.62	19.05	8.79	
Column total		165	184	14	34	84	139	1760	37	294	91	2802

$\chi^2 = 88.2642$ (df=9, p= .0001); Cramer's V=0.1775

- Success rates differ significantly across race categories, χ^2 (9, N=2802) = 88.2642, p= .0001.
- The majority of the MPT test takers identify as white (63%).
- Those who identify as East/Southeast Asian had the highest success rate (92%) on the MPT; while those who identify as Black or Indigenous had lower success rates (70% and 71%, for Black and Indigenous test takers, respectively).
- Differences need to be interpreted with caution given small numbers of some groups, for example, Indigenous and Latinx test takers.

Part 2 - Summary for applicants who were unsuccessful and subsequently re-attempted the MPT

Table 9: Summary of numbers of applicants who were unsuccessful and re-attempted the MPT from May 10 to June 26, 2021 and their success rates

	English-language MPT test takers				French-language MPT test takers				All MPT test takers			
Attempts	Success-ful	Not success-ful	Total	Success rates	Success-ful	Not success-ful	Total	Success rates	Success-ful	Not success-ful	Total	Success rates
1	0	171	171	0%	0	44	44	0%	0	215	215	0%
2	134	36	170	79%	29	16	45	64%	163	52	215	76%
3	15	2	17	88%	3	4	7	43%	18	6	24	75%
4	NA	NA	NA	NA	1	1	2	50%	1	1	2	50%

- Of the 474 test-takers who have been unsuccessful on the MPT since May 10 (Table 1), 215 have attempted it again. Of these 215 retakers, 26 (12%) have attempted it more than twice.
- Overall success rates are 76% and 75% on second and third attempts, respectively, showing that achievement on the MPT improves when unsuccessful test takers attempt the test again.

CITATION: Ontario Teacher Candidates' Council v. The Queen, 2021 ONSC 7386

DIVISIONAL COURT FILE NO.: 20-2584

DATE: 20211217

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Backhouse, Tzimas, Nishikawa JJ.

BETWEEN:

Ontario Teacher Candidates' Council and Sara Petrucci

Applicants

– and –

Her Majesty the Queen in Right of Ontario as
Represented by the Minister of Education and Education
Quality and Accountability Office

Respondents

REASONS FOR JUDGMENT

Backhouse, J.

Released: December 17, 2021