CITATION: Costa, Love, Badowich and Mandekic v. Seneca College of Applied Arts and Technology, 2022 ONSC 5111
COURT FILE NO.: CV-22-00675035
DATE: 20220912

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Mariana Costa, Crystal Love, Alexandra Badowich and Angelina Mandekic, Applicants

AND:

Seneca College of Applied Arts and Technology, Respondent

BEFORE: W.D. Black J.

COUNSEL: *Andre Memauri,* for the Applicants and Moving Parties

Howard Levitt and Kathryn Marshall, for the Respondent

HEARD: August 24, 2022

ENDORSEMENT

Overview

[1] In this motion, the applicants Mariana Costa and Crystal Love seek an interlocutory injunction to prevent the respondent Seneca College of Applied Arts and Technology ("Seneca") from enforcing against them its policy requiring all students who attend Seneca's campus to be fully vaccinated for Covid-19 (the "Policy").

[2] Ms. Costa and Ms. Love are both students enrolled in educational/training programs at Seneca. Ms. Costa is a third-year student in Seneca's Fashion Arts Program, having completed two years of that three-year program. Ms. Love is in Seneca's two-year Veterinary Technician Program and has completed the first of two years. In the case of each of these programs, the final year (being the third year in Ms. Costa's case and the second year in Ms. Love's case), has to be completed in person, at least in part, inasmuch as some aspects of the programs cannot be undertaken online.

[3] By email dated June 18, 2021 from Seneca's President David Agnew, Seneca advised all of its students and employees that Seneca was making proof of vaccinations against Covid-19 a condition for all students and employees to come on Seneca's campus for the fall term commencing September 7, 2021. Seneca confirmed the Policy in a series of emails leading up to the start of the 2021 fall term.

[4] Neither Ms. Costa nor Ms. Love were vaccinated against Covid-19 at all let alone fully, and each expressed and continues to express unwillingness to receive Covid-19 vaccinations. Both

of them express fear of risks of Covid-19 vaccines, and concerns about the uncertainty of long-term consequences of these vaccinations. Both applicants maintain that they believe themselves to be at low risk of life-threatening illness from Covid-19, and both decry the unfairness of being "coerced" into taking the vaccine.

[5] In response to Seneca's implementation of the Policy for the fall 2021 semester, both applicants ultimately opted to take a one-year leave of absence from their respective programs.

[6] By email of June 29, 2022 to all Seneca students and employees, Mr. Agnew advised that the Policy would remain in place for the 2022 fall semester commencing September 6, 2022.

[7] The notice of application in this matter was first issued on January 10, 2022, and amended on March 7, 2022. The motion before me was commenced by notice of motion dated July 25, 2022, and was, I am told, prompted by Mr. Agnew's June 29, 2022 email, and the applicants' resulting realization that they would not be able, absent Covid-19 vaccinations, to resume their studies at Seneca in the fall of 2022.

[8] The applicants assert that the Policy and Seneca's refusal to offer alternative means of accessing Seneca's campus without proof of vaccination are contrary to instructions issued by Ontario's Chief Medical Officer of Health (the "CMOH"), and that the Policy violates various of the applicants' rights under the *Canadian Charter of Rights and Freedoms* (the "Charter").

[9] Specifically they allege that the Policy violates their rights to freedom of conscience, life, liberty, security of the person, privacy and equality under Sections 2(a), 7, 8 and 15 of the Charter.

[10] Seneca argues that the Policy is a necessary, appropriate and a reasonable measure to protect the health and safety of the almost 56,000 people who attend on Seneca's campuses, almost none of whom, Seneca advises, have expressed any objection to the Policy and many of whom have applauded the Policy for the feeling of comfort and safety it engenders.

[11] Seneca notes that the applicants remain, and can continue to be on leaves of absence until the Policy is lifted, and maintains that the applicants have not been "coerced" to take the vaccination(s), but rather have made a choice not to do so, and to accept the consequences of that choice.

Medical/Scientific Aspects of Evidence

[12] Beyond the broad description of the parties' positions set out above, I will, in discussing their respective arguments, touch on and consider aspects of the evidence offered on behalf of the parties. In addition to the affidavits of the applicants, and affidavit of Marianne Marando on Seneca's behalf (she is its Vice-President, Academic and Students) each side has proffered medical and/or scientific evidence.

Seneca's Expert Evidence

[13] Seneca has provided an affidavit and report from Dr. Jerome Leis, an Infectious Diseases physician holding a full-time academic appointment as an Associate Professor at the University of Toronto. Dr. Leis is the Medical Director of Infection Prevention and Control at Sunnybrook

Health Sciences Center in Toronto. In that capacity, Dr. Leis has been actively involved in institutional and societal responses to Covid-19, and has participated in public health investigations and analysis of the emerging information about the virus and vaccines.

[14] Dr. Leis is an impeccably qualified expert in quality and safety issues, and his curriculum vitae includes over 100 peer-reviewed publications related to infectious disease, infection prevention and antimicrobial stewardship.

[15] His report in this proceeding provides a helpful discussion of the current state of medical knowledge concerning the known variations of the Covid-19 virus, and the effect of vaccinations in combatting their spread and impact. As discussed below, Dr. Leis also responds in his report to certain aspects of the applicants' expert, Dr. Byram Bridle.

[16] Seneca also provides and relies on the affidavit and report of Dr. Alon Vaisman. Like Dr. Leis, Dr. Vaisman is an Infectious Diseases physician certified in that subspecialty by the Royal College of Physicians and Surgeons. He works as an Infection Control physician at University Health Network and holds the academic rank of Assistant Professor at the Temerty Faculty of Medicine at the University of Toronto.

[17] Like Dr. Leis, Dr. Vaisman has published and lectured extensively, including on topics related to Covid-19, and in addition, Dr. Vaisman has functioned as a front-line physician involved, as a consultant, in direct clinical care and management of Covid-19 patients.

Applicants' Expert Evidence (and Controversy re Expert)

[18] The applicants, for their part, rely on the opinion of Dr. Bridle.

[19] Dr. Bridle's qualifications to offer the opinion that he does, and the substance of that opinion, attract considerably more controversy than the qualifications and opinions of the physicians proffered by Seneca.

[20] Dr. Bridle is an Associate Professor of Viral Immunology in the Department of Pathobiology at the University of Guelph.

[21] Given his tenure at the University of Guelph, an appreciable component of Dr. Bridle's research activities over the years have been related to veterinary science, albeit his most significant academic focus appears to have been on cancer-related aspects of immunology.

[22] Dr. Bridle is neither a physician nor a veterinarian, and accordingly has had no experience in treating patients of any kind, including in relation to Covid-19. Dr. Leis describes Dr. Bridle as a "bench scientist" with expertise in "immunology focused mainly on the pre-clinical development of therapies that can stimulate the immune response to fight cancer," and observes that "during the Covid-19 pandemic [Dr. Bridle] has used his skills focused on cancer vaccines to broaden his interests in vaccines against Covid-19".

[23] Regardless of his pedigree to opine on Covid-19 and the provenance of those opinions, it is clear that Dr. Bridle has attracted controversy with his views.

[24] As a testament to that controversy, in the materials in the record there is a July 6, 2021 letter signed by over 80 of Dr. Bridle's colleagues on the faculty at the University of Guelph (the "Guelph letter"), at pains to distance themselves from Dr. Bridle and his views. Among other things, the Guelph letter says:

> Dr. Byram Bridle has stated on multiple platforms and numerous outlets that COVID-19 vaccines are unsafe. These statements are contrary to overwhelming scientific evidence.

[25] Dr. Bridle's Guelph colleagues go on to say:

> Many people have limited understanding of the complexities of immunization against infectious agents, and rely on scientists in epidemiology and immunology to share their knowledge and experience, especially at times such as these when fear is high. Misinformation spread by individuals such as Dr. Bridle targets uncertainty… Academic freedom is important but should not be a license to spread misinformation that has been clearly refuted, including by the authors of publications that Dr. Bridle cites in support of his statements… Therefore, we wish to state publicly that as scientists, faculty and/or staff of the University of Guelph we stand firmly against the continued spread of factually incorrect and misleading information that is being disseminated by Dr. Bridle. We have confidence that the SARS-CoV-2 vaccines approved for use in Canada are safe and effective, and we wish to reassure the public that as members of the University of Guelph community we fully support evidence-based public health, which includes vaccination against COVID-19.

[26] The reference in the Guelph letter to "academic freedom" is noteworthy.

[27] The backlash against Dr. Bridle's opinion, reflected in the Guelph letter and apparently played out in social media and elsewhere over a period of many months, seems to have in turn generated a responding backlash against a perceived attempt to suppress academic freedom.

[28] In that regard, also in the materials before me is an "Open Letter in Support of Academic Freedom and Professor Byram Bridle", also dated July of 2021 and signed, I am told, by over 800 people (the "Open letter"). The signatories, at a glance, appear to include a handful of physicians, other scientists and health providers including naturopaths and homeopaths, nurses, teachers, "holistic" practitioners in various areas, and numerous members of the public whose credentials are not described. They come from across Canada, from various American states, and from other countries.

[29] While the Open letter appears to support Dr. Bridle's apparent suggestion that the mass vaccination of children be paused, and purports to endorse the importance and credibility of various sources cited by Dr. Bridle in his expressions of his views, the letter is fundamentally a defence of academic freedom. For example, the Open letter says:

> Although [Dr. Bridle's] opinions might appear to be contrary to the prevailing narrative, we state emphatically that this is even more reason for him to be permitted to express his thoughts freely and without fear of official censure and abuse.

[30] The Open letter also deplores the apparent groundswell of attacks of Dr. Bridle's character and integrity on social media and elsewhere. It says:

> Although the type of criticism Professor Bridle is receiving is not unexpected, it is grossly unethical to take this opportunity to defame his character or to demand the removal of his funding from agencies by which he has been respected and closely aligned for years. This is in fact contemptible. As fellow scientists, we are appalled to see emails to funding agencies demanding the removal of Dr. Bridle's funding. Where would we be without courageous researchers willing to stand up for their ideas and debate the science openly?

[31] While as set out below the decision here may not turn on nuances of the scientific debate reflected in each sides' expert materials, a couple of threshold observations are apt.

[32] First, there can be no question that academic freedom is an important, even sacrosanct value. The freedom to express and exchange ideas, even seemingly extreme ideas, has long and appropriately been seen as a path to scientific and other advances.

[33] Second, when it comes to expert evidence in a court case, as a general proposition, courts rely, as a longstanding body of caselaw directs, on opinions firmly grounded in accepted standards in the fields from which they are offered. The notion of "standard of care" connotes exactly that; courts tend to most value opinions that reflect or emanate from well-established and reputable bodies of opinion.

[34] In other words, expert opinions, even those reflecting a minority view, may carry considerable weight in a courtroom if reflecting a reputable body of opinion within the field at issue. On the other hand, beliefs without a firm foundation in accepted and tested propositions within a given area of study or endeavor may have less traction in court. Academic freedom, while obviously a cherished goal, may not find the courtroom the most receptive place in which to have debates play out from extreme positions not yet firmly substantiated in the literature and thinking in a given area.

[35] That is not to say courts are hidebound or unreceptive to novel ideas. Indeed courts in this country have been at the vanguard of important social changes. Rather, it means, particularly in areas in which the court has no pre-existing expertise of its own, that caselaw compels us to hew closely to well-supported and well-accepted views.

[36] The caution relative to ideas without such surrounding assurances is redoubled in the case before me in light of comments by the defence experts about Dr. Bridle's opinion. In discussing Dr. Bridle's report in this case, Dr. Leis says, for example, that:

> In reviewing Dr. Bridle's report, there are numerous scientific inaccuracies throughout the document and it would simply not be possible to address all of them in a succinct report. However, before addressing the 16-points in the conclusion, a few major corrections should be noted that go against accepted medical science.

[37] This is a remarkable and singular kind of criticism to find in an expert report. While experts often vehemently disagree with one another's conclusions, it is rare to find an expert condemning

the opposite expert's basic scientific premises in such emphatic language. In the discussion below, accordingly, I approach Dr. Bridle's views with caution, and carefully consider them against the backdrop of what Drs. Leis and Vaisman characterize as well-founded and generally accepted scientific concepts.

The Arguments

[38] I turn now to consider the specific arguments of the applicants, and Seneca's responses.

Policy's Alleged Contravention of CMOH Guidance

[39] As an initial matter, the applicants allege that the Policy "contravenes" instructions issued by the CMOH on August 31, 2021. Specifically, the applicants say that these instructions required post-secondary institutions like Seneca "to design and implement mandatory vaccination policies with a testing or education session alternative", and that Seneca did not provide the applicants with these options.

[40] Seneca, in response to this allegation, points to the specific language of the instructions in issue, in which in paragraph two (following the requirement in paragraph one to provide proof of full vaccination, proof of a medical exemption, or proof of completing an educational system) the instructions provide that "despite paragraph one, a Covered Organization may decide to remove the option set out in paragraph 1(c) [educational sessions], and require all Required Individuals to either provide the proof required in paragraph 1(a) or (b) [vaccination or exemption]". In that scenario, the Covered Organization is obliged to make available to the Required Individuals an educational session that satisfies certain requirements.

[41] Seneca notes that it followed these instructions by requiring all campus attendees to provide proof of vaccination or exemption, and offering two educational sessions (on August 16 and 24, 2021).

[42] Moreover, in the materials, there is a memorandum from the CMOH dated March 1, 2022, from the CMOH to the Deputy Minister, Ministry of Colleges and Universities, in which, after confirming the revocation of the CMOH's mandatory proof of vaccination requirement, and noting that "approximately 98% of students, faculty and staff attending campus at colleges and universities… have provided proof or attestation of being fully vaccinated against COVID-19" the CMOH says:

> I recognize that post-secondary institutions may wish to continue with COVID-19 vaccination policies for the remainder of the academic term and ongoing as part of overall health and safety requirements for their institutions. I wholeheartedly support that.

[43] So, while the CMOH is no longer mandating vaccination policies for post-secondary institutions, he continues to encourage mandatory vaccination policies. In the circumstances, I do not find that Seneca's Policy contravenes the guidance from the CMOH.

Alleged Breaches of Charter and Preliminary Question about Charter's Applicability

[44] Turning to the alleged breaches of the applicants' Charter rights, the applicants start from the premise that Seneca is a "state actor bound by the Charter".

[45] They point to a provision within Seneca's constituent legislation, the *Ontario Colleges of Applied Arts and Technology Act, 2002*, S.O. 2002, c. 8, Sched. F, s. 2(4), stating that these institutions are "[agencies] of the Crown."

[46] In response to this premise, Seneca maintains, relying on the Supreme Court of Canada's decision in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, that, "although post-secondary institutions are statutory bodies performing a public service and receive public funds, this does not make them a part of "government" within the meaning of s. 32(1)". They note that "post-secondary institutions are legally autonomous and are not a government agency subject to control by government": *Lobo v. Carleton University*, 2012 ONCA 498, 265 C.R.R. (2d) 1 . Seneca points out that the applicants themselves have argued that Seneca's implementation of a vaccination policy is contrary to direction from the government of Ontario (as discussed above), and that as such the Policy cannot be ascribed to the government, nor Seneca described as an agent of the state relative to its mandatory vaccination policy.

[47] While in my view the application of the Charter to Seneca's actions is somewhat uncertain, I proceed below assuming, *arguendo,* that the Charter applies.

RJR-Macdonald Test

[48] Proceeding on that same premise, the applicants assert that they satisfy the well-established three-part test for an interlocutory injunction set out in the Supreme Court of Canada's decision in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, namely:

(a) whether there is a serious issue to be tried;

(b) whether irreparable harm would result to the applicants if the injunction is not granted; and

(c) whether the balance of convenience between the parties favors granting the injunction.

[49] Under the first part of the *RJR* test, the applicants argue, quoting from *RJR*, that the threshold is a low one, and all that is required is for the judge to undertake a sufficient review to determine whether the application is frivolous or vexatious, and, if it is not, should proceed to the second and third prongs of the test. While acknowledging that there are limited exceptions to the low threshold, including in cases in which allowing an injunction would effectively amount to a final determination of the action, the applicants argue that that and other exceptions do not apply, and that they easily surpass the "frivolous or vexatious" hurdle.

[50] Seneca disagrees. It argues, persuasively in my view, that granting an injunction would in effect amount to a final determination of the action. That is because, as the applicants themselves acknowledge in their material, "it is unlikely that a decision in this case will be rendered before

the start of the 2022-2023 school year" or for that matter, says Seneca "perhaps even the 2023-2024 school year". Accordingly, if the applicants obtain the injunction they seek, remembering that each is in the final year of her program, there would be no need for the applicants to pursue the matter at a hearing after the end of the upcoming school year. Succeeding in this motion for an injunction would give them all the relief they seek and render further adjudication moot.

[51] Seneca also argues that the injunction is properly understood as an interlocutory mandatory injunction, inasmuch as the applicants seek to have Seneca change the status quo to accommodate two students (the applicants). The Supreme Court of Canada explained, in R. v. Canadian Broadcasting Corp., 2018 SCC 5, [2018] 1 S.C.R. 196 at para. 16, the difference between a prohibitive interlocutory injunction and a mandatory interlocutory injunction (which attracts the higher standard) as follows:

> "Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, 'what the practical consequences of the …injunction are likely to be.' In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to do something, or to refrain from doing something."

The Policy has been in place for many months, and the uncontroverted evidence from Seneca is that a vast majority of attendees at Seneca's campus are happy to have the mandate in place. The upshot of an injunction, if granted, says Seneca, would be to allow the very few unvaccinated students to put a large majority of others at risk, at odds with the Policy. Seneca argues that in these circumstances the Court should require the applicants to show a strong *prima facie* case, and should in that determination consider the merits of the applicants' case, including the scientific evidence they offer and the relevant law.

[52] In a related vein, Seneca notes that the Supreme Court of Canada has confirmed that only in the clearest of cases will interlocutory injunctions against the enforcement of laws based on alleged unconstitutionality succeed. Courts are to assume that implied benefit to the public of an impugned policy, and "will not order lightly" such a policy inoperable without a complete constitutional review: *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764, at para. 9. Seneca argues that this limitation of Charter relief to the clearest of cases is an additional reason to take more than a cursory look at the question of "serious issue to be tried" in a case like this one.

[53] I should note here that the applicants' arguments, apart from the allegation discussed above that Seneca's Policy contravenes the guidance from the CMOH, are all based on alleged violations of the applicants' Charter rights, such that the consideration of the parts of the *RJR* test and the applicants' Charter claims are inextricably intertwined.

[54] I am persuaded by Seneca's arguments that I should require the applicants to demonstrate a strong case on the merits. In particular, I agree with Seneca's submission that granting the injunction sought would, as a practical matter, conclude the application.

[55] As such, I consider the applicants' arguments in that context and against that standard.

Alleged Breach of Section 2(a) of the Charter

[56] The applicants' first Charter-related submission is that, given their avowed conscientious objection to obeying the Policy, and their deep disturbance about being coerced to surrender their bodily autonomy and security, their rights protected by s. 2(a) of the Charter have been violated.

[57] Seneca points to *R. v. Locke*, 2004 ABPC 152, 375 A.R. 49, at para. 25, in which the Court held that the plaintiff's "belief that wearing a seatbelt may cause him more harm than good is not of the same order as the comprehensive value system protected by Section 2(a)", as analogous.

[58] At its core, says Seneca, the applicants base their objection to taking the Covid-19 vaccine on the belief that it could cause them more harm than good. While the applicants claim a "moral" objection to the vaccine, Seneca argues that, as in *Locke*, their assertion is not grounded in, or of the same order as a comprehensive value system.

[59] It is common ground that neither applicant claims a religious basis for an exemption from the Policy.

[60] During Ms. Love's cross-examination, her assertion that the Policy creates a "moral" problem was tested through questions about the morality of the Policy from the perspective of the vaccinated majority. The following exchange is representative:

> Q142: Well, is it morally wrong for you to be around vaccinated employees who find it objectionable to be around the unvaccinated. Is that morally wrong for you to be doing it?
>
> A: I don't know.
>
> Q143: I mean you agree with me that a lot more people in Ontario are vaccinated than unvaccinated; correct?
>
> A: I suppose so. And…
>
> Q144: And if we're talking about morality and the college wants to ensure that its people, its staff, faculty, and students are as safe as possible, presumably you wouldn't disagree with its rights to take health and safety measures, do you?
>
> A: I'm not sure.
>
> Q145: You don't think Colleges have a right to take health and safety measures? You're not sure if they do?
>
> A: They should take health and safety measures, of course.

[61] Indeed the thrust of the applicants' conscientious objection to the Policy, at least in terms of the preponderance of the evidence they each gave in cross-examination, appears to be their

individual concerns about potential dangers of the vaccine, and the fact that they perceive, by virtue of not being able to complete their programs, that they are being treated unfairly. They do not dispute, as the excerpt above reflects, that there is a legitimate point of view among the vast majority of Ontarians, evidently including a majority of those who attend on Seneca's campus, that prize the safety associated with vaccinations above the rights of a small minority of people to move among them in an unprotected and potentially infectious state.

[62] Fundamentally there is no evidence of, nor even an attempt to show a comprehensive moral code or value system yielding a foundational belief that requiring vaccinations is "wrong". Indeed, Ms. Love, as a pre-condition of entering her program, agreed to and received a vaccination for Rabies. The evidence shows that there are rare but serious risks of the Rabies vaccine, including the risk of death. Ms. Love does not articulate how it is that requiring her to take the Rabies vaccine, with its attendant risks, is not "coercive" whereas requiring a Covid-19 vaccination is. Indeed it appears to be the case that, if the applicants believed that the risks of Covid-19 vaccinations were known and limited – which neither of them appears to accept – their "conscientious" objections to being vaccinated would fall away.

[63] While I accept that refusal of certain medical procedures or treatments can be genuinely grounded in conscientious or religious beliefs, I do not find such a basis in the record before me and accordingly, I cannot find that the applicants' s. 2(a) rights have been violated.

Alleged Breach of Section 7 of the Charter

[64] The next, and clearly central aspect of the applicants' claim that their Charter rights have been violated rests, it appears, in the arguments they make under s.7.

[65] In that regard, the applicants say that the Policy "holds hostage their ability to complete their programs as a means of coercing them into accepting a medical treatment to which they otherwise would not have consented".

[66] In essence, they argue that the right to "refuse medical treatment is protected by the liberty and security rights under s.7" and that by reference to law with respect to informed consent, the coercion of the applicants under the Policy is "enough to vitiate any consent that they might give to the vaccination".

[67] In sum, say the applicants:

> "they are, being presented with the choice of either submitting to a medical procedure that they would otherwise refuse or being prevented from finishing their programs and pursuing their chosen careers and suffering the extreme personal and financial costs that would result. The choice to consent to vaccination under these circumstances would not be a truly voluntary one. By imposing such a coercive burden on the applicants' exercise of their bodily autonomy, the [Policy] vitiates any consent that they might give to vaccination, and thereby arguably infringes their rights to liberty and security".

[68] In terms of the related economic consequences of the Policy, the applicants say that by creating a scenario in which the applicants are "both earning significantly less than they were

expecting to if they had finished their programs", and burdening them with considerable student debt, the Policy causes "serious financial consequences" that "may interfere with the applicants' ability to support themselves and their children, thus implicating their right to life, liberty, and security of the person".

[69] The evidence in the record relative to the financial impact of the Policy on the applicants does not appear to support these allegations. It does not appear to confirm that the applicants are earning less in the work they are doing while on a leave of absence from Seneca than they would in their chosen fields if and when they graduate and find work. It also does not demonstrate that they have diligently pursued potentially available educational and employment options.

[70] Various excerpts from the transcripts of their respective cross-examinations show that, rather, the applicants have done little investigation of comparable programs available at other colleges (not requiring proof of vaccinations), have accepted and continued in employment that may pay less than other available alternatives (again without doing diligent searches for other or more lucrative jobs) and have not provided evidence to confirm that, if and when they finish their programs and find work in their fields, that work will be any more remunerative than what they are doing while on leaves of absence from Seneca.

[71] Moreover, and now turning to recent decisions of relevance, in *Amalgamated Transit Union, Local 113 et al v. Sinai Health System*, 2021 ONSC 7658, 2022 C.L.L.C. 220-020, Akbarali J. considered and rejected similar submissions (albeit in the case before her the alleged harms of the policy in issue do not appear to have been portrayed or pursued as Charter violations).

[72] In that case, Her Honour was dealing with a situation in which a number of employers, including the Toronto Transit Commission ("TTC") had enacted policies requiring their employees to be fully vaccinated against Covid-19. Some members of the applicant unions did not want to be vaccinated, and sought interim injunctive relief to restrain the employers from enforcing their mandatory vaccination policies pending the results of the unions' grievance of the policies.

[73] Deponents of affidavits filed on behalf of the moving parties contained very similar attestations to those of the applicants before me. They alleged, among other impacts, potential adverse health effects of the vaccinations, concerns about long-term effects thereof, the financial hardship that they and their families would experience if placed on unpaid leave or were terminated, and at least one affiant deposed to feeling "bullied and coerced into vaccination because they cannot afford to lose their job".

[74] In the context of her analysis of irreparable harm under the second prong of the *RJR* test, Her Honour focused on the argument of the unions before her that the employers' vaccination policies were coercive. In addressing an argument to distinguish the case before her from a previous decision (on the basis that in that other decision an individual had opted not to take a vaccine and was thus not coerced), Akbarali J. said at para. 76:

> In my view, it is fancy footwork to call a policy that mandates vaccines coercive if a person subject to it will get the vaccine, but not coercive if a person subject to it will continue to refuse the vaccine. That approach does not focus on the nature of the

> harm at issue or an objective assessment of the policy, but rather, is a problematic results-driven analysis that is individually dependent.

[75] Her Honour then comes to the crux of the matter, finding, at para. 77 that:

> Fundamentally, I do not accept that the TTC's vaccine mandate policy will force anyone to get vaccinated. It will force employees to choose between two alternatives when they do not like either of them. The choice is the individual's to make. Of course, each choice comes with its own consequences; that is the nature of choices.

[76] Akbarali J. then addressed the alleged psychological harm and stress alleged to be associated with the compelled choice. She said at para. 78:

> Nor do I accept that psychological stress and emotional harm amounts to irreparable harm. Any employee facing termination can be expected to suffer from stress and emotional harm. If that was sufficient to establish irreparable harm, the courts would routinely be asked to enjoin terminations of employment, both within and outside the unionized context.

[77] Her Honour also noted the potential harm were the injunction to be granted. She said, referencing the status of the pandemic at the time of the motion before her, at para. 109:

> Cases have recently begun to rise in the city, even if they still remain at levels much lower than we have seen previously. The TTC's ridership includes vulnerable people. The TTC has had experience with outbreaks. Four TTC employees have lost their lives to COVID-19. If even one TTC rider or worker dies or is seriously harmed after catching COVID-19 from an unvaccinated TTC employee, it will be one too many. That is harm that is truly irreparable.

[78] I agree with Her Honour's analysis, and find it applicable to the circumstance before me. While Akbarali J. was not dealing with alleged Charter breaches, the arguments before her were essentially the same as those before me, and I endorse and adopt Her Honour's conclusions.

[79] In terms of their allegations under Section 7 of the Charter, the applicants in fact have had and continue to have various options. The evidence confirms that they can extend their respective leaves of absence for another year if they wish to do so. In that scenario, it appears that both applicants could continue with their current employment. It also appears that there are other and potentially more lucrative employment opportunities available that the applicants have not yet explored. There are also education/training programs available at other colleges, similar to those in which the applicants are enrolled at Seneca, to which they could apply without facing a mandatory vaccination policy (and the evidence confirms that at least one or both of the applicants have now done so).

[80] I should note in passing that one of the applicants' other claims is that the harm to them arises because they have already "forgotten so much" of what they learned in prior years of their programs, and would, or might have to retake parts of the program already completed. In terms of options available to the applicants, the record confirms that nothing prevents the applicants from rereading textbooks from earlier years of study, and/or reviewing their notes. This seems

self-evident to me, and I dismiss this alleged harm out of hand. I find that it cannot possibly be appropriate for Charter-based protection.

[81] In sum, in my view, the evidence in the record before me shows that the applicants have made the choice that they have without exploring various options and mitigation strategies readily available to them.

[82] In addition to their limited efforts relative to alternative programs, and/or employment, there is no evidence that either applicant has spoken with a physician or undertaken any significant investigation as to the actual risks of the vaccines they refuse. Rather, the source of their information includes having watched online speeches on YouTube, including at the trucker blockade of Ottawa, and including by Dr. Bridle. The applicants have not considered evidence in studies, including those referenced in Seneca's experts' reports, which studies also underly and inform guidance from the CMOH, discussing the risks and benefits of vaccines and strongly advocating their use. While people are entitled to make choices, seeking injunctive protection for putative Charter rights on the basis of minimally informed views stemming from a superficial "investigation" of complex medical issues, does not in my opinion rise to the level of rigor and gravity required for the Court to intervene.

[83] In *Toronto District School Board v. CUPE, Local 4400*, 2022 CanLII 22110 (Ont. Arb.), a recent arbitration award, the arbitrator was dealing with circumstances in which TDSB employees were required to provide evidence of up-to-date vaccinations or proof of a valid medical exemption. By agreement of the parties, the arbitrator was to determine issues including whether mandatory vaccination infringes Section 7 of the Charter, and the overall reasonableness of the Policy including vaccine attestation and the requirement that employees be vaccinated to attend at work with the placing of non-compliant/unvaccinated employees on non-disciplinary leave without pay.

[84] In discussing his conclusion rejecting the union's arguments in reliance on Section 7 of the Charter, the arbitrator said:

> Section 7 of the Charter protects an individual's right to decide: whether or not to be vaccinated. The Policy does not require mandatory vaccination. The Policy does not violate anyone's life, liberty or security of the person. It does not mandate a medical procedure or seek to impose one without consent… The Policy had an impact on TDSB employees who decided not to attest and/or get vaccinated, but there is no basis to conclude that life, liberty or security of the person is in any manner impaired by the Policy and by the choices individuals make. Employees are not prevented in any way from making a fundamental life choice… The law is settled: Section 7 does not insulate a person who has chosen not to be vaccinated from the economic consequences of that decision… Individuals have no Charter right to pursue or maintain a chosen profession.

[85] While these conclusions are not binding on me, I find them apt and applicable to the claims before me.

[86] Again, I cannot find in the evidence before me a violation of the applicants' rights under Section 7 of the Charter.

Alleged Breach of Section 8 of the Charter

[87] Under Section 8 of the Charter, the applicants argue that the requirement that they divulge personal medical information by disclosing their vaccination status is "at the very heart of the 'biological core' protected by Section 8 of the Charter" and note that the Supreme Court of Canada has routinely recognized the strong privacy interest that individuals have in their personal medical information.

[88] To the extent that a voluntary disclosure of vaccination status constitutes a search for the purposes of Section 8 of the Charter (which is not self-evident), in my view it is nonetheless reasonable given the extraordinary circumstance of the global pandemic.

[89] Seneca relies on recent arbitration awards that have essentially confirmed employers' ability and obligation to compare and balance individual privacy rights against broader health and safety interests. In *Bunge Hamilton Canada, Hamilton, Ontario v. United Food and Commercial Workers Canada, Local 175*, 334 L.A.C. (4th) 225 (Ont. Arb.), at paras. 24-25, the arbitrator held that:

> Management can generally establish rules that require the production of employees' medical information if necessary to protect the health and welfare of other employees… [a]ny privacy rights in this context are considerably outweighed by the minimal intrusion on such rights and the enormous public health and safety interests at issue.

[90] I am inclined to find that the choice whether or not to provide required information about vaccination status is part of the overall decision that the applicants must make here, as set out in the discussion of the Section 7 argument above. As such, in my view, the requirement is not akin to the kind of illegal search that Section 8 is intended to protect against. But, if I am wrong in that inclination, I nonetheless have no trouble finding, as articulated in the *Bunge* award, that the requirement for proof of vaccination is easily justified in the balance between privacy rights on one hand and the concern for the health and safety of the majority on the other.

Alleged Breach of Section 15 of the Charter

[91] Finally, under Section 15 of the Charter, the applicants argue that vaccination status is a ground analogous to those grounds enumerated under Section 15, and that the Policy unfairly discriminates on the basis of vaccination status. The Policy, say the applicants, "clearly causes disadvantage by segregating the Applicants and other unvaccinated persons from [Seneca's] campus."

[92] In response, Seneca points out that vaccination status is not an enumerated ground protected by Section 15 of the Charter, and that analogous grounds must either be immutable or constructively immutable (characteristics that are changeable only at unacceptable cost to personal identity). They argue that personal preferences and singular beliefs are not appropriate

grounds for Section 15 protection, and that the applicants have not showed that the Policy imposes an unacceptable cost to their personal identity.

[93] Again, I agree.

[94] The applicants fall well short of showing that they cannot be safely vaccinated, or that the act of doing so would tear asunder immutable or even deeply held beliefs. Rather, their evidence amounts to expressing a preference, in light of risks they perceive based on minimal investigation of the relevant science, not to be vaccinated. Again, that is a choice they can make but not one which in my view, attracts or requires Charter-based protection.

[95] Again, therefore, I decline to give effect to the applicants' argument under Section 15.

Applicants' Argument re Effect of Vaccines on Omicron Variants

[96] I should mention here that part of the applicants' argument, both in relation to Section 7 and Section 15, relying on evidence from Dr. Bridle, is that the currently available vaccines were designed to target the original Wuhan strain of the virus and that these vaccines now have little efficacy against the substantially different Omicron variant.

[97] This means, the applicants say, that the Policy is arbitrary and cannot be demonstrated to bear sufficient connection to its objective. They also rely on Dr. Bridle to suggest that the Policy is overbroad inasmuch as it applies equally to Seneca campus attendees who "already have naturally acquired immunity from Covid-19".

[98] In my view, it is in relation to these claims, in particular, that the Court must consider Dr. Bridle's evidence with caution.

[99] His opinions on these notions are at odds with the views of Seneca's experts, which appear to fairly and accurately reflect the state of knowledge and viewpoints of the majority of the medical community.

[100] In particular, Seneca's experts, while acknowledging that the current vaccines are less effective against the Omicron strain of the virus than they were against the original strain, nonetheless maintain that there are significant preventative benefits of the current vaccines even against the Omicron variant. The vaccines prevent infection in a substantial percentage of people, and significantly reduce the risk and impact of the virus, if contracted, in the vast majority of vaccinated patients.

[101] More concerning, Seneca's experts note that there is no evidence that the vaccines potentially cause long term neurological damage, as Dr. Bridle alleges, and they observe that he overstates other risks of the vaccines and omits or ignores important studies in the area.

[102] Given the circumscribed nature and extent of Dr. Bridle's expertise, the fact that he expresses opinions well outside the parameters of his expertise and apparently at odds with the prevailing state of medical and scientific knowledge, I prefer the opinions of Drs. Leis and Vaisman, and cannot accept Dr. Bridle's opinions underpinning the applicants' arguments

described above. It follows that I cannot and do not accept the applicants' arguments which proceed from that foundation.

Conclusion on RJR-Macdonald Tests

[103] Returning to the *RJR* analysis, for the reasons set out above I find that the applicants have failed to establish a strong *prima facie* case, which as I have found they must do here in order to succeed on the first prong of *RJR*.

[104] With respect to irreparable harm, the evidence shows that the harms the applicants allege – diminishing memory of their courses, emotional distress, and earning a lower income while waiting to complete their courses – are exaggerated or misstated, are in large measure self-made, and are not in any event irreparable in that they are quantifiable in monetary terms or can be cured.

[105] As set out above, I agree with Akbarali J.'s comments on irreparable harm in the *Sinai Health* case, and adopt them in the matter before me.

[106] In addition, there is case law, including the *Lavergne-Poitras v. Canada (Attorney General)*, 2021 FC 1232, case cited by the applicants indicating that "the need to reorient [one's] career" does not constitute irreparable harm, "regardless of the degree of satisfaction [one] may take from [their] present occupation": at para. 86.

[107] Finally, in terms of balance of convenience, the Court must consider which party would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits of the overall case. In this regard, I must consider public interest, and the costs and benefits of preserving or setting aside the status quo.

[108] It is clear, and the applicants acknowledge in their evidence, that Seneca (like other public institutions), must take health and safety measures to protect people attending on its campus.

[109] In *Sinai Health*, Akbarali J. held that the balance of convenience and particularly the public interest weighed in favour of maintaining a mandatory vaccination policy and against the request for an injunction. Her Honour noted the medical evidence that the vaccines provide "a higher level of protection than regular antigen testing would afford" and accepted TTC's evidence that based on "its experience, and the best scientific and public health information available …it would face greater risk to the health and safety of its workforce and its riders if it is required to permit unvaccinated employees to continue to attend the workplace". Akbarali J. found, and I agree (substituting Seneca for the TTC), that by acting in compliance with public health guidance, TTC conducted itself in a fashion which the Court must assume is "in the public interest, especially in a pandemic": at para. 107.

[110] In my view, the public interest in minimizing the risk and consequences of Covid-19 by requiring attendees at Seneca's campus to show proof of vaccination substantially outweighs the interest of the applicants in avoiding the vaccinations in question, particularly given the difficulties in the applicants' evidence concerning their reasons for, and impact on them of the choice they have made.

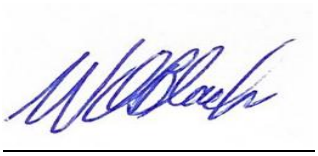
Overall Conclusion

[111] For these reasons I dismiss the applicants' motion.

Costs

[112] Neither party has filed a costs outline. I do not know if Seneca as the successful party, will be seeking its costs of the motion.

[113] If the parties do not agree on costs, I may be spoken to in order to deal with a mechanism for addressing that issue.



W.D. Black J.

Date: September 12, 2022