Court File No: COA-23-CV-0015

COURT OF APPEAL FOR ONTARIO
(*APPEAL IN AN APPLICATION*)

B E T W E E N :

SARAH HARJEE, EVAN KRAAYENBRINK, HIBAH AOUN, SARAH LAMB, SAM SABOURIN, JACKIE RAMNAUTH, MARK MCDONOUGH, LINDA MCDONOUGH and DAVID COHEN

Appellants
(Applicants)

and

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ONTARIO

Respondent

FACTUM OF THE APPELLANTS

Date: February 28, 2023

CHARTER ADVOCATES CANADA

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PART I –THE APPELLANTS AND THE DECISION

1. Sarah Harjee, Evan Kraayenbrink, Hibah Aoun, Sarah Lamb, Sam Sabourin, Jackie Ramnauth, David Cohen, Linda McDonough and Mark McDonough ("the Appellants") appeal the December 13, 2022, Ontario Superior Court of Justice decision ("the Decision") of Justice Perell, who held that the Ontario vaccine passports did not violate sections 2 (a),7 and 15 of the *Canadian Charter of Rights and Freedoms.*

Reasons for Judgement, Appeal Book, Tab 2

PART II - OVERVIEW

2. The Appellants are Ontarians who have adhered to all Covid-19 restrictions, including masking, social distancing, hand washing, or restricting travel and social gatherings. The Appellants have not received two doses of the Covid-19 vaccine for reasons ranging from serious adverse reactions to the first dose of the vaccine to having lab confirmed natural immunity. Some of the Appellants have not taken the vaccine due to their religious beliefs or pre-existing medical health conditions, others have concerns about the well-known and widely accepted adverse events including myocarditis. As a result, the Appellants have suffered widespread exclusion from society as the measures prohibited the Appellants from entering a vast array of public spaces in what is supposed to be a free and democratic society.

PART III – STATEMENT OF FACTS

3. On September 22, 2021, section 2(2.1) and 2.1 of Schedule 1 of O.Reg. 364/20 (entitled *Rules for Areas at Step 3 and at the Roadmap Exit Step)* came into effect in Ontario (the "vaccine passport" or "the measures"). The measures required persons operating enumerated businesses to deny access to patrons who failed to

provide proof that they had taken the prescribed series of Covid-19 vaccinations. The measures applied to community centres, indoor areas of restaurants, gyms, movie theatres, and indoor facilities for sports, among others. The measures did not apply to employees working at those same locations. There were no exemptions for Ontarians who had lab confirmed past infection(s) ("natural immunity"). There were no religious exemptions. There were limited medical exemptions.

Re-Opening Ontario Act, O. Reg. 364/20, s. 2(2.1) and 2.1 of Schedule 1

4. Failure to comply with the Measures could result in serious penal consequences of up to a $100,000 fine and up to one year in jail for individuals and severe penalties for corporations and directors of corporations.

Reopening Ontario (A Flexible Response to COVID-19) Act, 2020, S.O. 2020, c. 17, section 10(1)

5. The approved Covid-19 vaccines in Canada at the time of the measures were Pfizer, Moderna, AstraZeneca, and Johnson and Johnson with the first two using mRNA technology. The measures required two doses of the vaccine as a condition of obtaining a vaccine passport and one dose for Johnson and Johnson. Booster shots were not required.

Affidavit of Dr. Kwong, at para 10, Appeal Book, Tab 6A

6. Prior to the implementation of the measures, no studies were available concerning the effectiveness or ethics of vaccine passports. The Respondent has not produced any studies or data with respect to the effects of the measures on the Ontario population, other than a pre- print study indicating for a short period after the announcement of the Measures, there was a modest increase in uptake of the first dose of the vaccine.

Affidavit of Dr. Kettner, Exhibit C at pp. 66-67, Appeal Book, Tab 6B
Affidavit of Stubbings, at para 15, Appeal Book, Tab 6C

7. The measures no longer applied on March 1, 2022, and the Regulation and all other remaining *Re-Opening Ontario Act* orders were revoked on April 27, 2022.

Re-Opening Ontario Act, O. Reg. 346/22

8. On November 21 and 22, 2022, the Appellants appeared before Justice Perell at the Ontario Superior Court of Justice challenging the constitutionality of the vaccine passports on the basis that they unjustifiably infringe sections 2(a), 7, and 15 of the *Charter*. The Appellants also sought *Charter* damages.

Notice of Application, Appeal Book, Tab 4

9. On December 13, 2022, Justice Perell ("the Applications Judge") released his decision where he dismissed the Appellants Application, finding that the measures did not violate sections 2(a), 7 or 15 of the *Charter*. The Applications Judge also dismissed the Appellants claims for *Charter* damages.

PART IV – ISSUES AND ANALYSIS

Applications Judge Erred in Fact and Law in Failing to Properly Apply the Test for Section 2(a)

10. The Appellants respectfully submit that the Applications Judge erred by misapplying the legal test with respect to determining whether their religious freedom was infringed by the measures. He further erred by failing to consider the relevant evidence when assessing the impact that the proof of vaccination requirement had on the Appellants.

11. The test in determining whether a religious belief is infringed is found in *Amselem.* There is an infringement of freedom of religion where 1) there is a sincere religious

belief and 2) the state interferes with a person's ability to act in accordance with a practice or belief in a non-trivial manner.

Syndicat Northcrest v. Amselem, 2004 SCC 47 at paras 57-63
Reasons for Judgement, *supra* at para 56

12. In the case before this Court, the state's interference with the Appellants was in the form of serious social and psychological pressure resulting from social exclusion, for which there was ample evidence. Justice Perell accepted that the first part of the *Amselem* test was met but found that the Appellants failed to establish an interference with their religious freedom. Further, he found that the proof of vaccine requirement did not even "engage" the Appellants' right to freedom of religion.

Reasons for Judgement, supra at paras 62, 61

13. The Applications Judge cited *S.L. v. Commission Scolaire des Chenes* in finding that there was no "objective proof" of the interference with religious freedom. However, the Appellants submit that *Commission Scolaire* is clearly distinguishable and unhelpful in this case. In *Commission Scolaire*, the complainants made a bare assertion that their religious freedom was infringed by a government requirement, without providing evidence of any interference on their personal lives. *Commission Scolaire* was a case decided based on lack of evidence, which contrasts with the present case where there is detailed evidence of the burden imposed by the measures on the Appellants due to their manifesting and living out their religious tenets.

S.L. v. Commission Scolaire des Chenes, 2012 SCC 7 at paras 27, 55

14. The analytical error of the Applications Judge is evident when he found that the "consequence" of not being able to enter certain venues was not a "constraint", and therefore no infringement was proven:

> In the immediate case, the impugned provisions of Ont. Reg. 364/20 did not engage the Applicants' Charter s. 2(a) right to freedom of religion. While the proof of vaccination requirement imposes the consequence of not attending the specified businesses or organizations as a result of adherence to a religious objection to vaccination, it in no way constraints the Applicants' ability to hold or observe their religious beliefs. [emphasis added]

Reasons for Judgement, supra at para 61.

15. The Applications Judge's understanding of "constraint" only considers the direct effect of the requirement, which is to deny entry to certain venues. However, he incorrectly failed to consider the less direct but profound burden imposed on the Appellants by the measures, as a result of their sincere beliefs. In *Freitag v. Penetanguishene,* the Ontario Court of Appeal accepted that "pressure" to act contrary to one's beliefs, alone, can be a non-trivial effect that engages section 2(a). That finding was independent of the purpose of the impugned state action.

Freitag v. Penetanguishene (Town), 1999 CanLII 3786 at paras 24-25

16. The Applications Judge failed to grapple with the evidence of the Appellants relating to the costs imposed on them by the measures, which was directly connected to their religious convictions against taking the vaccine. This can be seen in Applications Judge finding that the proof of vaccination requirement "did not impose undue hardships or marginalize the Appellants which is an error. "Undue hardship" is not the applicable test, and the uncontroverted evidence was that the Appellants were in fact marginalized from friends, social groups and society generally. There was no basis on which to find otherwise.

Reasons for Judgement, supra at para 64
Affidavit of Evan Kraayenrbink at paras 47-52, Appeal Book, Tab 6D; *Affidavit of Sarah Harjee* at paras 55-66 Appeal Book, Tab 6E

17. In *Freitag*, the complainant's direct and unchallenged evidence was that he felt "singled out as not being part of the majority" as a result of state action. As in *Freitag*, the Appellants are minorities that either had to conform or accept exclusion. This is the prism through which the costs and burdens must be understood – as experienced by the Appellants. It is worth mentioning that the evidence of the psychological, social, and emotional pressure imposed by the measures on the Appellants is even more severe than what was described by the complainant in *Freitag*.

Freitag v. Penetanguishene (Town), supra at para 36

18. The Applications Judge also erroneously compared the impact of the vaccine passport on the Appellants to the imposition of a small monetary cost of having to obtain a license, referring to *Alberta v Hutterian Brethren of Wilson Colony*. First, a small monetary cost is not an analogous comparison. As in *Freitag*, this is a case of significant state-imposed pressure to act contrary to one's religious beliefs. Second, in *Hutterian Brethren*, the Supreme Court found that the imposition of a fee was not trivial and therefore engaged in the Section 1 analysis.

Reasons for Judgement, supra at para 64 citing *Alberta v Hutterian Brethren of Wilson Colony* 2009 SCC 27
Freitag, supra at para 30
Hutterian, supra at para 99

19. The Applications Judge's finding that the proof of vaccination requirement "does not interfere with the Applicant's religious belief or practice" is an error in fact and law. In *Edwards Books* at para 96-97, the Supreme Court held a court must assess whether "legislative … action which increases the cost of practicing or otherwise manifesting religious belief" is more than "trivial or insubstantial." If a law imposes

an indirect cost on one's religious practice, that law engages religious freedom if the burden is not trivial. The "cost" must be understood as the cost paid personally by the Appellants. The pressure, psychological distress, anxiety due to social exclusion and segregation are not trivial burdens to the person that must endure it.

Reasons for Judgement, supra at para 63
R. v. Edwards Books and Art Ltd., [1986] 2 SCR 713 at pp. 758-759

The Applications Judge Erred by Finding that the Appellants' Right to Liberty and Security of Person Under Section 7 of the *Charter* were not Infringed

20. The Applications The right to liberty protects an "*irreducible* sphere of personal autonomy" over "private choices" for matters that "are inherently personal" that go to the "core of what it means to enjoy individual dignity and independence." Liberty is not merely freedom from physical restraint. It encompasses the right for an individual to make decisions that "are of fundamental personal importance." As Justice Wilson held in *Morgentaler*, "state enforced medical or surgical treatment is an obvious invasion of physical integrity."

Godbout v Longueuil (City), [1997] 3 S.C.R. 844 at p. 893
R. v. Morgentaler, [1988] 1 S.C.R. 30 at p. 173

21. The Supreme Court of Canada has long recognized the right of an individual to make one's own medical decisions. The Court has found "tenacious relevance in our legal system of the principle that competent individuals are — and should be — free to make decisions about their bodily integrity."

A.C. v Manitoba (Director of Child and Family Services), 2009 SCC 30 at para 39

i. Liberty

22. Appellants have the right to choose which medical procedure they undergo and what they inject into their bodies without state interference. The vaccine

passports prohibited the Appellants from accessing a vast array of public spaces. Individuals living in a free Canadian society have a right not to be excluded from participation in society and marginalized based on an arbitrary requirement such as governmental imposition of a novel vaccine. The Appellants submit that the exclusion of the Appellants from these social spaces is a direct violation of section 7 right to liberty. The Appellants were coerced between submitting to medical treatment or facing exclusion from vast segments of civil society. In the recent *United Steelworkers, Local 2008* decision Justice Philips in finding that Covid-19 vaccine mandates do engage both s. 7 liberty and security of the person held:

> **[Translation]**[172] The right to consent or not to consent to any treatment is a very personal decision, as is the attitude that a person may adopt, more generally as a life choice, towards pharmacological treatments and prophylaxis [206]. This choice has been seriously compromised by the direct or indirect effect of ministerial decrees.
>
> [176] The problem here is the combined effect of the (non-absolute) requirement to be vaccinated and the related consequence to the individual of refusal, namely the loss of his or her job. **There is thus a definite coercion that weighs on the decision to consent or not to medical treatment.** It has already been recognized that even where compulsory vaccination remains subject to the consent of the individual, there is nevertheless an infringement of the rights provided for in section 7 if the refusal to be vaccinated leads to significant consequences [211]. As we have seen, where the infringement occurs outside the administration of justice, these consequences need not be criminal in nature either [212]. [emphasis added].

Morgentaler, supra
United Steelworkers, Local 2008 v Canada (Attorney General), 2022 QCCS 2455 at paras 172, 176, Schedule A, Tab 26

23. The Applications Judge found that the activities restricted by the vaccine passports did not engage section 7 liberty interests. The goal of the vaccine passports was to seek the highest achievable rate of vaccination, after 76% of Ontarians over the age

of 12 had voluntarily obtained the Covid-19 vaccine by September 21st, 2022. Stated another way, the goal was to coerce the remaining 24% into getting the vaccine or face vast social isolation. Never in the post *Charter* history has the government mandated measures that coerce Canadians to choose between a novel medical treatment or vast social isolation.

Affidavit of Richard Stubbings at para 12, Appeal Book, Tab 6C

24. In *United Steel Workers, Local 2008,* the Court held the interpretation of fundamental rights is susceptible to change given the permanent character of the *Charter.* While there is no current precedent to suggest the right to attend a vast array of public and private sphere is encompassed by section 7 liberty rights, this is because never in post *Charter* history has such a scenario presented itself, where Canadians are being deprived of participating in a vast range of social activities due to their medical choices.

United Steel Workers, Local 2008, supra at para 129

25. In *Metropolitan Stores Ltd* the Supreme Court stated that the rights in the *Charter* are not frozen and remain susceptible to evolve:

> 21. Thus, the setting out of certain rights and freedoms in the *Charter* has not frozen their content. The meaning of those rights and freedoms has in many cases evolved, and, given the nature of the *Charter*, must remain susceptible to evolve in the future…
>
> 22. The views of Le Dain J. reflect those of Dickson J., as he then was, in *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at p. 155:
>
> > The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by

> a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.

Manitoba (A.G.) v. Metropolitan Stores Ltd, 1987 CanLII 79 (SCC), at paras 21-22

26. Coercive government measures to override individual autonomy in the form of vaccine passports are a new fact scenario impacting personal freedoms, as contemplated by the Supreme Court in *Hunter v. Southam Inc*. Therefore, the Courts need to expand their definition of liberty to ensure that the *Charter* provides the broadest and most liberal interpretation for individual rights. As stated, these measures are unprecedented in post-*Charter* history, necessitating rigorous scrutiny by the courts.

27. In *Gosselin*, the Supreme Court reiterated the position that the *Charter* is forward looking and capable of growth and development to meet new realities:

> One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in Edwards v. Attorney-General for Canada, 1929 CanLII 438 (UK JCPC), [1930] A.C. 124 (P.C.), at p. 136, the Canadian Charter must be viewed as "a living tree capable of growth and expansion within its natural limits": see Reference re Provincial Electoral Boundaries (Sask.), 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158, at p. 180, per McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in *Blencoe, supra*, at para. 188 are apposite:
>
> > We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while

> yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.
>
> *Gosselin v. Québec (Attorney General),* 2002 SCC 84 at para 82.

28. The unprecedented vaccine passports engaged and violated s. 7 liberty rights of the Appellants and the Applications Judge's findings to the contrary are an error in law.

ii. Security of the Person

29. The right to security of the person protects against state interference "with an individual's physical or psychological integrity." The right of security of the person includes, "patient autonomy in medical decision-making" and the right to "informed consent". The measures were designed to, and in fact did, infringe upon these long-standing rights. "True consent" entails evaluating, knowledgeably, the options available and the associated risks.

Carter v Canada (Attorney General), 2015 SCC 5 at paras 64, 40, 100

30. There were two specific issues raised at the trial with respect to security of the person. One was the lack of long-term safety data and known side effects of the Covid-19 vaccines, and one was the right to informed consent. It is respectfully submitted that the Applications Judge was required to review the evidence on these two points and explain his analysis of them in his decision on whether vaccine passports engaged security rights under section 7. However, the judgement of the lower court contains no substantive engagement with these issues.

31. The Appellants had valid safety concerns given the lack of long-term safety data, well known and widely accepted risks of myocarditis especially in men under the age of 30 and blood clots. At the time these measures were implemented the

vaccines were still in their trial phase with a completion date of February 2024, with safety data continuing to be gathered.

Cross Examination of Dr. Kwong, at Q. 163-170, Appeal Book, Tab 5A

32. Dr. Kwong gave evidence that he administered mass vaccinations and that his patients were not provided individual consultation about the risks and benefits of the vaccine. Sarah Lamb who suffered severe adverse effects as a result of the first dose of the vaccine was provided with a one-page document before receiving the vaccine. Further, the possibility of informed consent was vitiated by the existence of government coercion via the threat of a loss of personal freedom and participation in society, in conjunction with the fact that the approved vaccines were still at stage 3 clinical trials, with unknown long-term effects.

Cross Examination of Dr. Kwong, at Q. 148 Appeal Book, Tab 5A
Affidavit of Sarah Lamb, at para 6-23 Appeal Book, Tab 6F
Affidavit of Sarah Lamb, Exhibit A*,* Appeal Book, Tab 6F*; Affidavit of Sarah Lamb,* Exhibit B*,* Appeal Book, Tab 6F

33. This was particularly striking for Appellant Ms. Lamb who despite suffering from serious adverse events was not granted an exemption under the measures but was advised by public health officials who had not treated her that it was safe for her to get the second dose and she should go ahead and do it.

Affidavit of Sarah Lamb, Exhibit D, Appeal Book, Tab 6F

34. In *United Steelworkers,* Justice Philips referred to the coercive nature of the Covid-19 vaccine mandates in the context of employment:

> On the other hand, the fact remains that the choice faced by the persons concerned necessarily brings into account similar considerations. Admittedly, they are not imposed the treatment and they theoretically retain the choice to

> accept it or not. But the consequences of a refusal are such that this choice is not really one.
>
> *United Steel Workers, supra* at para 174

35. The Applications Judge erred by not considering the evidence with respect to lack of long-term safety data, serious adverse events, lack of informed consent and Ms. Lamb's particular circumstances in his security of the person analysis. He further erred in finding that the Covid-19 vaccine passports did not engage section 7 security rights.

Deprivation not in Accordance with Principles of Fundamental Justice

The Measures are Arbitrary

i. The vaccines do not stop transmission of the virus

36. The Delta variant was the dominant strain at the time the Measures were introduced. The vaccines did not stop the spread of the Delta variant. The transmission rate was even higher for Omicron variant which was the dominant variant from December 2021 and evidence from the Respondent makes it clear that Covid-19 vaccines did not stop transmission of Omicron.

> *Affidavit of Dr. Kettner,* Exhibit C, at pp. 61-62 Appeal Book, Tab 6B
> *Cross Examination of Dr. Kwong,* at Q. 349-353 Appeal Book, Tab 5A

37. On November 10, 2021, the Respondent paused the lifting of capacity limits for locations where vaccine passports were required, a further example that the vaccines did not stop transmission in those places where only the vaccinated were allowed to attend.

> *Affidavit of Stubbings,* Exhibit Q, Appeal Book, Tab 6C

ii. The Measures restricts access to venues that are not significant vectors of transmission

38. The Respondent has failed to demonstrate that vaccination has any effect in reducing transmission in the settings targeted by the vaccine passport. The Respondent has not even provided estimates of their effectiveness on transmission reduction in the settings affected.

Affidavit of Dr. Kettner, Exhibit C, at pp. 61-62 , Appeal Book, Tab 6B
Cross Examination of Dr. Kettner, Appeal Book, Tab 5B at Q. 47-48

39. There is no rational connection between restricting access to restaurants, gyms, bars, and movie theaters and meeting the objectives of the measures, as the rate of infection in those places in the last two years had been minimal. Dr. Kettner's unchallenged evidence states that the estimated number of cases for restaurants, gyms, bars and night clubs was 1 in 300 and the daily count was 2 cases per 3 days. The infection numbers for recreational fitness settings was 1 in 1000 with a daily count of 1 case every five days. Further Dr. Kettner provided calculations unchallenged by the Respondent with respect to the extremely low numbers of hospitalization (0-1%) and deaths (0.005-0.03%) for those aged 12-39. Any potential benefit was minimal and not proportionate to the measures.

Affidavit of Dr. Kettner, Exhibit C, at pp. 64-65 Appeal Book, Tab 6B

iii. The Measures applied to the patrons but not employees and workers at the same premises.

40. The employees and patrons were both at the same location and posed the same hypothetical risk, yet the Measures only applied to the patrons and exempts the employees.

Affidavit of Stubbings, Exhibit Q, Appeal Book, Tab 6C.

The Measures were Overbroad and Arbitrary

i. The Measures applied to those with natural immunity

41. The impugned Measures "interfered with some conduct that bears no connection to its objective." The measures limited the rights of a class of individuals, those with natural immunity, who present a lower risk than vaccinated individuals.

Canada (Attorney General) v Bedford, 2013 SCC 72 at para 101.

ii. The government has used means which are broader than necessary to accomplish its objective

42. The legislation is arbitrary and disproportionate and therefore this Court should find the measures invalid. The Supreme Court of Canada has found that overbroad legislation infringing s. 7 of the *Charter* appears incapable of passing the minimal impairment branch of the s. 1 analysis.

R v Heywood, [1994] 3 SCR 761 at pp. 791-792.

43. The imposition of the Measures on those with natural immunity, such as Mr. Cohen who had natural antibodies in September of 2021 and had higher rate of protection than someone who had been vaccinated in March or April of 2021 makes these measures both overbroad and arbitrary.

Affidavit of Dr. Kwong at para 27*,* Appeal Book, Tab 6A
Cross Examination of Dr. Kwong, at Q. 481-482, Appeal Book, Tab 5A

iii. The Measures were imposed on the population without distinguishing those with vastly different risk profiles

44. Dr. Moore stated that Ontarians between the ages of 20-39 had the lowest rates of vaccination and that implementing the measures would "nudge" this age group into taking the vaccine since they were most likely to attend these settings.

Affidavit of Stubbings, Exhibit N, Appeal Book, Tab 6C

45. The Measures applied indiscriminately to all Ontarians over the age of 12 in the face of overwhelming evidence that younger populations are at minimal risk for severe adverse effects resulting from Covid-19 infection.

Affidavit of Dr. Hodge at para 18, Appeal Book, Tab 6G

46. Based on Respondents' own evidence, the rate of hospitalization for unvaccinated youth and young adults between the ages of 18-29 is 0.48/100,000 and 1.02/100,000 for young adults aged 30-39. Until early 2022, the Respondent defined unvaccinated as anyone who had received the second dose but was infected within 14 days, which skewed the data. The Respondents have not provided data with respect to the hospitalization of youth in the age bracket of 12-17. However, based on Dr. Ketner's unchallenged evidence, there was a total of 292 hospitalizations and 4 deaths in youth between the age of 12-19.

Affidavit of Dr. Hodge, Ibid
Cross Examination of Dr. Kwong at Q. 391, 394-402 , Appeal Book, Tab 5A
Affidavit of Dr. Kettner, Exhibit C, at pp. 62-63 Appeal Book, Tab 6B

47. The public health data made available by Ontario does not distinguish between youth who were in the hospital due to Covid-19 or those who merely tested positive for Covid-19 while in the hospital.

Affidavit of Dr. Bridle, Exhibit C, at p. 132, Appeal Book, Tab 6H

48. The Applicants, Ms. Aoun, Mr. Kraayenbrink, and Mr. Sabourin were in their 20's at the time of the Measures. They were a low-risk demographic with few hospitalizations, ICU admissions or deaths due to Covid-19. This fact renders the vaccine passports both overbroad and arbitrary insofar as it applied to adolescents

and young healthy adults with low risk of hospitalization, ICU admittance and death.

Affidavit of Evan Kraayenbrink at para 37, Appeal Book, Tab 6D; *Affidavit of Sam Sabourin* at paras 26-27, Appeal Book, Tab 6I; *Affidavit of Hibah Aoun* at para 14, Appeal Book, Tab 6J

The Applications Judge Erred in Law in finding that Measures do not Violate Section 15 of the Charter

49. The Applications Judge erred in law when he held that the measures did not violate the Appellants s.15 *Charter* rights. In *Housen*, the Supreme Court held the standard of review on a question of law is that of correctness. When an erroneous finding can be traced to an error in law, less deference to the trial judge is required. In *Housen,* the court held that "on a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own."

Reasons for Judgement, *supra* at para 84
Housen v. Nikolaisen, 2002 SCC 33 at paras 8, 34

50. Respectfully, the Applications Judge erred in three ways. The first, and perhaps the most significant error that the Applications Judge made was when he held that the measures were "not coercive and it did not impose undue hardships or marginalize the Applicants…in the immediate case, the Applicants could make their own medical decisions about vaccination. The Applications Judge further held "The Applicants retained their autonomy to make their own decisions about their personal health and welfare."

Reasons for Judgement, supra at para 84

51. The Applications Judge's finding that s.15 was not infringed because the Appellants had a choice to make their own medical decisions about vaccination (i.e., to get vaccinated or not), or because the measures were not coercive, goes against the fundamental principles of s.15 jurisprudence. Choice, coercion, and autonomy to make medical decisions have no place in s.15 analysis, and it is an error in law to rely on choice and absence of coercion to dismiss a s.15 claim of discrimination.

Reasons for Judgement, ibid.
Fraser v. Canada, 2020 SCC 28 at paras 84-92

52. S. 15 jurisprudence unambiguously holds that although a person could avoid discrimination by modifying their behaviour, that does not negate the discriminatory effect. The Supreme Court has "repeatedly rejected arguments that choice protects a distinction from a finding of discrimination." In *Fraser* at paras 86-87, Justice Abella held that:

> In relying on Ms. Fraser's "choice" to job-share as grounds for dismissing her claim, the Federal Court and Court of Appeal, with respect, misapprehended our s. 15(1)jurisprudence. This Court has consistently held that differential treatment can be discriminatory even if it is based on choices made by the affected individual or group.
>
> *Fraser, supra* at paras 84-92

53. The second error the Applications Judge made was holding that the measures did not perpetuate arbitrary disadvantage because "of their religious beliefs, which as noted above, were not being interfered with."

Reasons for Judgement, supra at para 84.

54. Respectfully, in dismissing the claim of discrimination on the basis that the Appellants religion "was not being interfered with" the Applications Judge conflated section s.2(a) with s.15. Interference with sincerely held religious beliefs

is a requirement for s.2(a). Although there is overlap between religious *freedom* pursuant to s.2(a), and religious *equality* pursuant to s.15, both sections have two separate tests and require two separate analyses. The framers of the *Charter* listed religion as an enumerated ground under section 15, despite having a section 2(a) and the common law has developed two separate tests for each. The Appellants should have their rights considered under each *Charter* ground. The measures adversely impacted Mr. Kraayenbrink and other Appellants, who could not take the vaccine due to their religious beliefs. As a result, they did not qualify for vaccine passport which would have given them access to wide range of indoor social settings in the province. In *Simpson-Sears* the Supreme Court held that the stores rules requiring employees to work Fridays and Saturdays inadvertently discriminated against employees who were members of the Seventh day- Adventist Church who had to keep Sabbath on Friday and Saturday.

Reasons for Judgement, supra para 84
R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 see also. *Hutterian Brethren, supra*
Affidavit of Evan Kraayenbrink at paras 5-6, 36-46, Appeal Book, Tab 6D
Ontario Human Rights Commission v. Simpson-Sears [1985] 2 SCR 536

55. Third, with respect to disability, the Applications Judge's finding that the measures did not perpetuate disadvantage based on disability because the Appellants "access to medical treatment remained unimpaired" is an error in law. Section 15 is not concerned with whether access to medical treatment is intact, instead it is concerned with whether there was discrimination. Having access to medical treatment does not, in this context, change the fact that they experienced discrimination.

Reasons for Judgement, *supra* para 84

56. In *R. v. Sharma*, the Supreme Court of Canada held that:

> s. 15(1) as the Charter's "most conceptually difficult provision" The development of its analytical framework is "daunting" and it has gone through multiple formulations since 1989. Academics have criticized the current framework from various perspectives, the common thread being that it is unclear and, thus, leads to inconsistent application. [citations omitted].
>
> *R. v. Sharma,* 2022 SCC 39 at para 34

The Appellants have Satisfied the s.15 Test Outlined in the Seminal Case Fraser

57. First, the claimant must demonstrate that the impugned law on its face or in its impact, creates a distinction based on enumerated or analogous grounds. Second, the claimant must demonstrate that the law imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. The burden at both steps is on the claimant. In *Fraser,* the Supreme Court recognized that "courts should be mindful where the evidence is under-documented, the courts will have to rely more heavily on the evidence of the applicants." In *Sharma*, the Supreme Court held that the evidentiary burden on the applicants cannot be unduly onerous, and the court is mindful of evidentiary hurdles and the asymmetry of knowledge (relative to the state) that claimants face. Since this is a novel and unprecedented issue, the evidence in this area is significantly under documented, however the Appellants have provided the Court with extensive evidence on the discrimination that they have faced.

Fraser, supra at paras 27, 57
Sharma, supra at paras 29, 49
Affidavit of Sarah Lamb at paras 46-48, Appeal Book, Tab 6F; *Affidavit of Evan Kraayenbrink* at para 51-52, Appeal Book, Tab 6D; *Affidavit of Linda McDonough* at para 41, 55-56, 62-63, Appeal Book, Tab 6K; *Affidavit of Mark McDonough* at paras 37, 39, Appeal Book, Tab 6L; *Affidavit of Jackie Ramnauth* at paras 15, 22, Appeal Book, Tab 6M

i. There is a Distinction Based on the Enumerated Grounds Religion and Disability

58. *Fraser* has held differential treatment does not have to be direct. Laws can be neutral on their face, but adversely discriminate in their effect. Although vaccine passports did not explicitly single out religious or disabled persons from entering certain venues, the law disproportionately caused an impact to historically disadvantaged groups who cannot get vaccinated without compromising their religious beliefs or their pre-existing medical conditions. As a result, they were denied access to, and excluded, from almost all indoor social settings. Ontarians who did not have pre-existing medical conditions, and Ontarians whose religious beliefs did not prevent them from getting the vaccine, were able to get vaccinated, participate in society, and were not excluded. In *Ontario Teacher Candidates*, the Court held that standardized math tests for teacher candidate qualification violate s.15 of the *Charter* because of adverse impact discrimination.

Fraser, supra at paras 28-54
British Columbia (Public Service Employee Relations) v. BCGSEU, [1990] 3 SCR 3
Ontario Teacher Candidates' Council v. The Queen, 2021 ONSC 7386

ii. The Measures Had the Effect of Reinforcing, Perpetuating, or Exacerbating Disadvantage and Did Not Provide Accommodation

59. The goal at this stage is to examine the impact of the harm caused to the affected group. In *Fraser,* and reaffirmed in *Sharma*, the court held that the harm can include social exclusion, psychological harm, physical harm, political exclusion or economic exclusion. The Appellants faced significant social harm by virtue of the measures, which caused them to be excluded from social settings. The Appellants also faced physical harm. Mrs. McDonough did not take the vaccine because she

was diagnosed with Complex Regional Pain Syndrome (CRPS). Her condition was not on the narrow list of exemptions provided by the government. As a result of the vaccine passport, Mrs. McDonough could not attend warm water therapy at the Gretzky Sports Complex which exacerbated her already debilitated medical condition.

Fraser, supra at paras 76-77
Sharma, supra at para 52
Affidavit of Linda McDonough at paras 38-43, 46-51, 55-56, 62-63, Appeal Book, Tab 6K; *Affidavit of Evan Kraayenbrink* at paras 47-53, Appeal book, Tab 6D; *Affidavit of Sarah Lamb* at paras 41-43, 45; *Affidavit of Mark McDonough* at paras 25-32, Appeal Book, Tab 6L; *Affidavit of Sarah Harjee* at paras 57-65, Appeal Book, Tab 6E; *Affidavit of Jackie Ramnauth* at paras 15-17, Appeal Book, Tab 6M
Affidavit of Linda McDonough at paras 17-37, 57-58, Appeal Book, Tab 6K

60. The Respondent did not cure the discriminatory effect of the measures. In *Eldridge*, the Supreme Court held lack of accommodation for protected groups is one way to demonstrate that s.15 has been breached. In *Sharma,* the Supreme Court held that when an impugned law fails to respond to the actual capacities and needs of the members of the group, that can support a claim of reinforcing, perpetuating, or exacerbating disadvantage. Chief Justice Lamer, in *Eldridge* held the government has an obligation to accommodate "for those adversely affected by a facially neutral policy to the extent of undue hardship."

Eldridge v. British Columbia (Attorney General) [1997] 3 SCR 624 see also Ontario (Attorney General) v. G, 2020 SCC 38
Sharma, supra at para 53
Eldridge, supra at para 79; see also *Simpsons Sears, supra*

61. The measures made ***no*** exemptions available for religious groups. The exemptions for medical disabilities were limited, narrow, and illusory because even if someone qualified for an exemption, they could still be denied an exemption. The College of

Physicians made it clear that "there are *very few* acceptable medical conditions to vaccination."

Re-Opening Ontario Act, O. Reg. 364/20, s. 2(2.1) and 2.1 of Schedule 1 *Affidavit of Richard Stubbings,* Exhibit R, Appeal Book, Tab 6C; *Affidavit of Sarah Lamb* at paras 24-31, 7-23 Appeal Book, Tab 6F; *Affidavit of Sarah Lamb,* Exhibit C, Appeal Book, Tab 6F; *Affidavit of Sarah Lamb,* Exhibit D, Appeal Book, Tab 6F "Covid-19 FAQs for Physicians" (December 1, 2022) online: *College of Physicians and Surgeons* https://www.cpso.on.ca/en/Physicians/Your-Practice/Physician-Advisory-Services/COVID-19-FAQs-for-Physiciansh

62. Mrs. McDonough could not even apply for an exemption because her condition was not on the list, despite being told by her doctor that getting the vaccine would exacerbate her pre-existing medical condition. Mrs. Lamb qualified for an exemption after suffering a severe adverse reaction from the first dose of the Pfizer vaccine. However, she was denied an exemption from the Associate Medical Officer of Health, Rabia Bana, before having an opportunity to complete her specialists' appointments and receive the benefit of a complete diagnosis from a specialist. Since there were no religious exemptions and limited medical exemptions, and because there were no alternatives such as testing for patrons, the effect was complete exclusion of the Appellants.

Affidavit of Linda McDonough at paras 23-24, Appeal Book, Tab 6K
Affidavit of Sarah Lamb, Exhibit C*, supra*
Affidavit of Sarah Lamb, Exhibit D, *supra*

63. The government exempted "workers, contractors, repair workers, delivery workers, students, volunteers, inspectors or others entering the business or organization for work purposes and not as patrons" inside those same locations captured by the measures. Yet the government did not create exemptions for *marginalized* groups attending those locations.

Affidavit of Richard Stubbings, Exhibit Q, Appeal Book, Tab 6C

64. Unlike the vaccine passports, the government has previously implemented a *Charter* compliant mandatory vaccination program, the *Immunization of Schools Pupils Act*, where the legislation itself has religious exemptions and broad medical exemptions to ensure accommodation for protected grounds. In *Eldridge,* Justice Lamer held that whether the government could accommodate to the point of undue hardship is an inquiry best left for s.1 and should "should not be employed to restrict the ambit of s. 15(1)."

Immunization of School Pupils Act, R.S.O. 1990, c. I.1
Eldridge, supra at para 79

The Applications Judge Erred in Relying on the Lewis Decision in Coming to his Findings on S.15

65. At para 87 of his Judgement, the Applications Judge held:

> Visualize, if the judgment in Lewis v. Alberta Health Services is correct that a restriction on access to medical treatment, which required an applicant for a life-saving transplant to be vaccinated for COVID-19 to be eligible to receive the treatment, does not contravene sections 2(a), 7, and 15 of the Charter, then a fortiori a requirement that a person seeking to enter a restaurant, bar, sporting arena, movie theatre, fitness facility, and certain other businesses must show proof of vaccination does not offend the Charter.

Reasons for Judgement, supra at para 87

66. Relying on the *Lewis* decision to dismiss the Appellants s.15 claim is an error. In the *Lewis* decision, the Alberta Court of Appeal rejected the Appellant's s.15 claim because the court found that vaccine status is not an analogous ground. The court held "Accordingly, "COVID-19 vaccination status" is not, in our view, an analogous ground under s 15(1) of the *Charter*…Such a finding is determinative of

Ms. Lewis' claim." In the case at bar, the Applications Judge acknowledged the Appellants were not relying on analogous grounds.

Lewis v. Alberta Health Services, 2022 ABCA 359 at paras 62-70.

The Applications Judge Erred in Law When He Took Judicial Notice Beyond Its Proper Limits

67. The Applications Judge erred in law when he took improper judicial notice of the safety and efficacy of the vaccines at the outset of his judgement. The findings that the Applications Judge made throughout his judgement do not meet the threshold articulated by the Supreme Court in *R v. Spence*. Judicial notice is a common law doctrine that allows a court to make factual findings without proof. It is permissible only for facts that are so well-known, notorious, or indisputable.

R. v. Spence, 2005 SCC 71 at paras 53-54

68. At para 15, the Applications Judge held that:

> mRNA vaccines, a recent medical miracle, for which Nobel prizes have been awarded. COVID-19 vaccines, including mRNA vaccines are regarded as safe. There are no longer regarded as experimental. They have been proven effective in reducing infections and reducing transmission of the disease.

Reasons for Judgement, *supra*

69. The Applications Judge was factually incorrect in stating that the mRNA vaccine was awarded a Nobel prize. The issue of whether the vaccine was effective in reducing transmission was explicitly disputed by the parties. The Applications Judge also stated that "The scientific modeling predicted a substantial wave of infections with the potential of exceeding hospital ICU capacity." Again, this evidence was copiously disputed by the parties. These were adjudicative issues, determinative of the Application. These findings also create incorrect and

misleading precedent which future cases can rely upon. It was an error in law for the Applications Judge to use judicial notice beyond its proper limits.

Reasons for Judgement, supra, para 17
R. v. Spence, supra at para 7.

The Measures Cannot be Saved by Section 1

70. The measures violated sections 2(a), 7, and 15 of the *Charter* in a way that cannot be justified by section 1.

i. There was no rational connection between the measures and the objectives

71. The Appellants rely on their section 7 submissions to demonstrate why there was no rational connection.

ii. The measures did not minimally impair the Charter rights that they breached

72. In *Chaouilli*, the Supreme Court held that prohibition on private health insurance was a violation of s.7 of the *Charter* and not saved by s.1. The Court looked at other provinces in Canada that did not have prohibitions on private health care and were still able to meet their objectives. Other Canadian provinces had alternative measures available like testing options, such as Alberta and Saskatchewan. This demonstrated that minimally impairing options existed, and the government did not discharge its burden to show why they were rejected.

Chaouilli v. Quebec (Attorney General) 2005 SCC 35 at paras 74-76

73. In *Chaouilli*, the Court held that the trial judge erred in placing the onus on the appellants to solve the problem of waiting list in hospitals and that the onus correctly rested on the Attorney General. Dr. Hodge stated that Ontario has the lowest beds per capita in Canada; surely this was not news to the Respondent. The Respondent has provided no information about any steps it may have taken to solve the problem of lack of beds in Ontario's health care system since March of 2020. The

government reduced ICU beds in July 2021 and through its vaccination mandates allowed hospitals to fire nurses and health care practitioners in Ontario.

Chaouilli, supra at paras 59-60
Affidavit of Dr. Hodge at para 20, Appeal Book, Tab 6G
Affidavit of Dr. Byram Bridle, Exhibit C, at p. 132, Appeal Book, Tab 6H

74. Further, a report by the Office of the Auditor General highlights the Government's shortcoming in relation to the healthcare system both before and during the pandemic. The report highlights that the Ministry and Ontario Health have not done enough to identify effective and cost-efficient practices that can be disseminated across Ontario for delivering outpatient surgeries.

Office of the Auditor General of Ontario*, Value-for-Monday Audit: Outpatient Surgeries* (December 2021)
https://www.auditor.on.ca/en/content/annualreports/arreports/en21/AR_Outpatient_en21.pdf at pp. 1-2

75. It is not the responsibility of Ontarians to protect the health care system as suggested by Dr. Hodge, but the responsibility of the Respondent to ensure the health care system is able to meet the needs of Ontarians. While in March of 2020 the Respondent may not have been able to make the immediate changes needed to our health care system, by September 2021, 1.5 years into the pandemic, there was ample time and opportunity for the Respondent to improve the health care system, instead of putting the burden and responsibilities on Ontarians.

Affidavit of Dr. Hodge at paras 22-26, Appeal Book, Tab 6G

76. The Respondent has failed to independently investigate and study the potential benefits of Vitamin D and Ivermectin as preventative and treatment options for Covid-19. Dr. Kwong who was presented as an independent expert was not knowledgeable about basic questions on vitamin D and its impact on immunity and

infection. Further, instead of providing independent opinion on effectiveness of vitamin D as a treatment to Covid-19, as he was required and expected to do, Dr. Kwong relied on the Ontario Science Table without reading and analyzing the four studies he referred to in his report as basis of his opinion on why vitamin D was not an effective treatment for Covid-19.

Cross Examination of Dr. Kwong at Q. 499-503*,* Appeal Book, Tab 5A
Cross Examination of Dr. Kwong at Q. 505-514*,* Appeal Book, Tab 5A

iii. The Severe Deleterious effects of Ontario Vaccine Passports outweigh any salutary effects

77. Demonstrably justified connotes a strong evidentiary foundation. Dr. Kettner's evidence unequivocally establishes that the government has not met their burden in demonstrating clear and cogent evidence that the measures achieve or are rationally connected to the objectives. The measures however have had a catastrophic impact on civil liberties and Canada's democracy.

R v Oakes, [1986] 1 S.C.R. 103 at p. 138.

PART V - ORDER SOUGHT

78. In light of the errors outlined above, the Appellants ask that the order of Justice Perell dated February 17, 2023, be set aside and that this Court grant the judgement as follows:

a) A declaration pursuant to section 52(1) of the *Constitution Act, 1982* that sections 2(2.1) and 2.1 of Schedule 1 of O. Reg 364/20 made pursuant to the *Re-Opening Ontario Act (A flexible response to COVID-19), 2020,* S.O. 2020, c 17 are of no force or effect as it infringes upon sections 2(a), 7 and 15 of the *Charter* and is not justified under section 1 of the *Charter.*

b) A declaration pursuant to section 24(1) of the *Charter* that sections 2(2.1) and 2.1 of Schedule 1 of O. Reg 364/20 made pursuant to the *Re-Opening Ontario Act (A flexible response to COVID-19), 2020,* S.O. 2020, c 17 are unconstitutional as it infringes upon sections 2(a), 7 and 15 of the *Charter* and is not justified under section 1 of the *Charter*.

c) An award of $1000 per Applicant, pursuant to section 24(1) of the *Charter* against Ontario for damages suffered because of a breach of their *Charter* rights.

d) Granting such further and other relief as counsel may advise and this Honourable Court may permit.

79. The Appellants do not seek costs, and in light of the public interest nature of this appeal, ask that no costs be awarded against them.

Dated this 28th day of February, 2023

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Counsel for the Appellants

Court File No: COA-23-CV-0015

COURT OF APPEAL FOR ONTARIO

(*APPEAL IN AN APPLICATION*)

BETWEEN:

SARAH HARJEE, EVAN KRAAYENBRINK, HIBAH AOUN, SARAH LAMB, SAM SABOURIN, JACKIE RAMNAUTH, MARK MCDONOUGH, LINDA MCDONOUGH and DAVID COHEN

Appellants

and

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ONTARIO

Respondent

APPELLANTS' CERTIFICATE

The Appellants do not require an order under subrule 61.09 (2).

The Appellants estimate that 3 hours will be required for oral argument, not including reply.

Sayeh Hassan (LSO No. 53406E)
Counsel for the Appellants
February 28, 2023

SCHEDULE A - LIST OF AUTHORITIES

Cases Cited:

1	*A.C. v Manitoba (Director of Child and Family Services)*, 2009 SCC 30
2	*Alberta v. Hutterian Brethren of Wislon Colony*, 2009 SCC 27
3	*British Columbia (Public Service Employee Relations) v. BCGSEU*, [1990] 3 SCR 3
4	*Canada (Attorney General) v Bedford*, 2013 SCC 72
5	*Carter v Canada (Attorney General)*, 2015 SCC 5
6	*Chaoulli v. Quebec (Attorney General)* 2005 SCC 35
7	*Eldridge v. British Columbia (Attorney General)* [1997] 3 SCR 624
8	*Fraser v. Canada* 2020 SCC 28
9	*Freitag v. Penetanguishene (Town)*, 1999 CanLII 3786
10	*Godbout v Longueuil (City)*, [1997] 3 S.C.R. 844
11	*Gosselin v. Québec (Attorney General)*, 2002 SCC
12	*Housen v. Nikolaisen* 2002 SCC 33
13	*Lewis v. Alberta Health Services*, 2022 ABCA 359
14	*Manitoba (A.G.) v. Metropolitan Stores Ltd*, 1987 CanLII 79 (SCC)
15	*Ontario (Attorney General) v. G*, 2020 SCC 38
16	*Ontario Human Rights Commission v. Simpson-Sears* [1985] 2 SCR 53
17	*Ontario Teacher Candidates' Council v. The Queen*, 2021 ONSC 7386
18	*R v Heywood*, [1994] 3 SCR 761
19	*R v Oakes*, [1986] 1 S.C.R. 103
20	*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295
21	*R. v. Edwards Books and Art Ltd.*, [1986] 2 SCR 713
22	*R. v. Morgentaler*, [1988] 1 S.C.R
23	*R. v. Sharma* 2022 SCC 39
24	*R. v. Spence* 2005 SCC 71
25	*S.L. v. Commission Scolaire des Chenes*, 2012 SCC 7
26	*Syndicat Northcrest v. Amselem*, 2004 SCC 47

27	*United Steelworkers, Local 2008 v Canada (Attorney General)*, 2022 QCCS 2455

SECONDARY SOURCES

28	"Covid-19 FAQs for Physicians" (December 1, 2022) online: College of Physicians and Surgeons
29	Office of the Auditor General of Ontario, Value-for-Monday Audit: Outpatient Surgeries (December 2021) - Value for Money Audit: Outpatient Surgeries (auditor.on.ca), Appendix B, pp1-2

SCHEDULE B - STATUTES & REGULATIONS

Legislation and Regulations Cited:

1	*Immunization of School Pupils Act*, R.S.O. 1990, c. I. 1
2	*Re-Opening Ontario Act,* S.O. 2020, c. 17.
3	*Re-Opening Ontario Act*, O. Reg. 346/22
4	*Re-Opening Ontario Act*, O. Reg. 364/20, s. 2(2.1) and 2.1 of Schedule 1
5	*The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11*

IMMUNIZATION OF SCHOOL PUPILS ACT

R.S.O. 1990, Chapter I.1

Consolidation Period: From April 19, 2021 to the e-Laws currency date.
Last amendment: 2021, c. 4, Sched. 11, s. 17.

Legislative History: 1997, c. 15, s. 9 (But see Table of Public Statute Provisions Repealed Under Section 10.1 of the Legislation Act, 2006); 1998, c. 18, Sched. G, s. 59; 2002, c. 18, Sched. I, s. 11; 2007, c. 10, Sched. E; 2009, c. 33, Sched. 18, s. 17 (2); 2010, c. 10, s. 32; 2017, c. 11, Sched. 2; CTS 5 SE 13 - 2; 2021, c. 4, Sched. 11, s. 17.

Definitions

1 In this Act,

"Board" means the Health Services Appeal and Review Board under the *Ministry of Health and Long-Term Care Appeal and Review Boards Act, 1998*; ("Commission")

"board" means a "board" as defined in the *Education Act*; ("conseil")

"designated diseases" means diphtheria, measles, mumps, poliomyelitis, rubella, tetanus and any other disease prescribed by the Minister of Health and Long-Term Care; ("maladies désignées")

"immunization record" means a record of immunization maintained by a medical officer of health under this Act; ("dossier d'immunisation")

"medical officer of health" means "medical officer of health" as defined in the *Health Protection and Promotion Act*; ("médecin-hygiéniste")

"nurse" means a member of the College of Nurses of Ontario; ("infirmière ou infirmier")

"parent" includes an individual or a corporation that has the responsibilities of a parent; ("parent")

"person" includes a board; ("personne")

"physician" means a member of the College of Physicians and Surgeons of Ontario; ("médecin")

"prescribed" means prescribed by the regulations; ("prescrit")

"pupil" means a pupil who is a minor; ("élève")

"registered nurse in the extended class" means a member of the College of Nurses of Ontario who is a registered nurse who holds an extended certificate of registration; ("infirmière autorisée ou infirmier autorisé de la catégorie supérieure")

"regulations" means regulations made under this Act; ("règlements")

"school" means a "private school" and a "school" as defined in subsection 1 (1) of the *Education Act* and includes a beginners class within the meaning of the *Education Act*; ("école")

"school day" means "school day" as defined in the *Education Act*; ("jour de classe")

"statement of conscience or religious belief" means a statement by affidavit in the prescribed form by a parent of the person named in the statement that immunization conflicts with the sincerely held convictions of the parent based on the parent's religion or conscience; ("déclaration de conscience ou de croyance religieuse")

"statement of medical exemption" means a statement in the prescribed form signed by a physician or registered nurse in the extended class stating that the prescribed program of immunization in relation to a designated disease or designated diseases,

(a) may be detrimental to the health of the person named in the statement, or

(b) is unnecessary in respect of the person named in the statement by reason of past infection or laboratory evidence of immunity. ("déclaration d'exemption médicale") R.S.O. 1990, c. I.1, s. 1; 1998, c. 18, Sched. G, s. 59 (1); 2002, c. 18, Sched. I, s. 11 (1); 2007, c. 10, Sched. E, s. 1; 2009, c. 33, Sched. 18, s. 17 (2); 2010, c. 10, s. 32; 2017, c. 11, Sched. 2, s. 1; 2021, c. 4, Sched. 11, s. 17 (2-4).

Section Amendments with date in force (d/m/y)

1998, c. 18, Sched. G, s. 59 (1) - 01/02/1999

2002, c. 18, Sched. I, s. 11 (1) - 26/11/2002

2007, c. 10, Sched. E, s. 1 (1, 2) - 01/10/2007

2009, c. 33, Sched. 18, s. 17 (2) - 15/12/2009

2010, c. 10, s. 32 - 03/06/2010

2017, c. 11, Sched. 2, s. 1 (1, 2) - 01/09/2017

2021, c. 4, Sched. 11, s. 17 (2-4) - 19/04/21

Purpose of Act

2 The purpose of this Act is to increase the protection of the health of children against the diseases that are designated diseases under this Act. R.S.O. 1990, c. I.1, s. 2.

Duty of parent

3 (1) The parent of a pupil shall cause the pupil to complete the prescribed program of immunization in relation to each of the designated diseases. R.S.O. 1990, c. I.1, s. 3 (1); 2021, c. 4, Sched. 11, s. 17 (1).

Exception

(2) Subsection (1) does not apply to the parent of a pupil in respect of the prescribed program of immunization in relation to a designated disease specified by a physician or a registered nurse in the extended class in a statement of medical exemption filed with the proper medical officer of health and, where the physician or registered nurse in the extended class has specified an effective time period, only during the effective time period. 2007, c. 10, Sched. E, s. 2; 2021, c. 4, Sched. 11, s. 17 (1).

Same, statement of conscience or religious belief

(3) Subsection (1) does not apply to a parent who has completed an immunization education session with a medical officer of health or with a medical officer of health's delegate that complies with the prescribed requirements, if any, and who has filed a statement of conscience or religious belief with the proper medical officer of health. 2017, c. 11, Sched. 2, s. 2; 2021, c. 4, Sched. 11, s. 17 (1).

Transitional

(4) Subsection (1) does not apply to a parent who, before the coming into force of section 2 of Schedule 2 to the *Protecting Patients Act, 2017*, filed a statement of conscience or religious belief with the proper medical officer of health. 2017, c. 11, Sched. 2, s. 2; 2021, c. 4, Sched. 11, s. 17 (1).

Section Amendments with date in force (d/m/y)

2007, c. 10, Sched. E, s. 2 - 01/10/2007

2017, c. 11, Sched. 2, s. 2 - 01/09/2017

2021, c. 4, Sched. 11, s. 17 (1) - 19/04/21

Offence

4 Every person who contravenes section 3 is guilty of an offence and on conviction is liable to a fine of not more than $1,000. R.S.O. 1990, c. I.1, s. 4.

Certificate by M.O.H. as evidence

5 In proceedings under section 4, a certificate by a medical officer of health as to whether or not he or she has received a statement of medical exemption, a statement of conscience or religious belief or a statement of religious belief is admissible in evidence as proof in the absence of evidence to the contrary of the facts stated therein without proof of the appointment or signature of the medical officer of health. R.S.O. 1990, c. I.1, s. 5.

Order for suspension re designated diseases

6 (1) A medical officer of health, in the circumstances mentioned in subsection (2), by a written order may require a person who operates a school in the area served by the medical officer of health to suspend from attendance at the school a pupil named in the order. R.S.O. 1990, c. I.1, s. 6 (1).

Grounds for order re designated diseases

(2) The circumstances mentioned in subsection (1) are,

(a) that the medical officer of health has not received,

(i) a statement from a physician, nurse or prescribed person showing that the pupil has completed the prescribed program of immunization in relation to the designated diseases,

(ii) an unexpired statement of medical exemption in respect of the pupil, or

(iii) a statement of conscience or religious belief in respect of the pupil and confirmation that the parent has completed the education session described in subsection 3 (3); and

(b) that the medical officer of health is not satisfied that the pupil has completed, has commenced and will complete or will commence and complete the prescribed program of immunization in relation to the designated diseases. R.S.O. 1990, c. I.1, s. 6 (2); 2007, c. 10, Sched. E, s. 3; 2017, c. 11, Sched. 2, s. 3; 2021, c. 4, Sched. 11, s. 17 (1).

Section Amendments with date in force (d/m/y)

2007, c. 10, Sched. E, s. 3 - 01/10/2007

2017, c. 11, Sched. 2, s. 3 - 01/09/2017

2021, c. 4, Sched. 11, s. 17 (1) - 19/04/2021

Term of suspension

7 A suspension under an order by a medical officer of health under section 6 is for a period of twenty school days. R.S.O. 1990, c. I.1, s. 7.

Service of copy of order upon parent

8 (1) A medical officer of health who makes an order under section 6 shall serve a copy of the order upon a parent of the pupil. R.S.O. 1990, c. I.1, s. 8 (1); 2021, c. 4, Sched. 11, s. 17 (1).

Written reasons

(2) An order under section 6 is not valid unless written reasons for the order are included in or attached to the order. R.S.O. 1990, c. I.1, s. 8 (2).

Repeated orders

(3) A medical officer of health may make orders under section 6 from time to time in respect of a pupil where the circumstances specified in the section for making the order continue to exist. R.S.O. 1990, c. I.1, s. 8 (3).

Section Amendments with date in force (d/m/y)

2021, c. 4, Sched. 11, s. 17 (1) - 19/04/2021

Rescission of order

9 A medical officer of health who has made an order under section 6 shall rescind the order where the circumstances for making the order no longer exist. R.S.O. 1990, c. I.1, s. 9.

Statement by physician or nurse

10 Every physician or member of the College of Nurses of Ontario who administers an immunizing agent to a child in relation to a designated disease shall furnish to a parent of the child a statement signed by the physician or member of the College of Nurses of Ontario showing that the physician or member of the College of Nurses of Ontario has administered the immunizing agent to the child. 2007, c. 10, Sched. E, s. 4; 2021, c. 4, Sched. 11, s. 17 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, section 10 of the Act is repealed and the following substituted: (See: 2017, c. 11, Sched. 2, s. 4)

Statements by providers of immunizing agents

10 (1) Every physician, nurse or prescribed person who administers an immunizing agent to a child in relation to a designated disease shall provide to a parent of the child a statement that shows that the immunizing agent has been administered. 2017, c. 11, Sched. 2, s. 4.

Note: On the day section 4 of Schedule 2 to the *Protecting Patients Act, 2017* comes into force, the French version of subsection 10 (1) of the Act is amended. (See: 2021, c. 4, Sched. 11, s. 17 (5))

Information for M.O.H.

(2) Every physician, nurse or prescribed person who administers an immunizing agent to a child in relation to a designated disease shall provide the prescribed information to the medical officer of health for the public health unit in which the immunizing agent was administered. 2017, c. 11, Sched. 2, s. 4.

Section Amendments with date in force (d/m/y)

2007, c. 10, Sched. E, s. 4 - 01/10/2007

2017, c. 11, Sched. 2, s. 4 - not in force

2021, c. 4, Sched. 11, s. 17 (1) - 19/04/2021; 2021, c. 4, Sched. 11, s. 17 (5) - not in force

Record of immunization

11 (1) Every medical officer of health shall maintain a record of immunization in the form and containing the information prescribed by the regulations in respect of each pupil attending school in the area served by the medical officer of health. R.S.O. 1990, c. I.1, s. 11 (1).

Review of record

(2) A medical officer of health shall keep under review the immunization record maintained by the medical officer of health in respect of a pupil who has not completed the prescribed program of immunization in relation to the designated diseases. R.S.O. 1990, c. I.1, s. 11 (2).

Order by M.O.H.

12 (1) A medical officer of health, in the circumstances mentioned in subsection (2), by a written order may require a person who operates a school located in the health unit served by the medical officer of health to exclude from the school a pupil named in the order. R.S.O. 1990, c. I.1, s. 12 (1).

Grounds for order

(2) The circumstances mentioned in subsection (1) are,

(a) that the medical officer of health is of the opinion, upon reasonable and probable grounds, that there is an outbreak or an immediate risk of an outbreak of a designated disease in the school at which the pupil attends; and

(b) that the medical officer of health has not received,

(i) either a statement from a physician, nurse or prescribed person showing that the pupil has completed the prescribed program of immunization in relation to the designated disease or other information satisfying the medical officer of health that the pupil has completed the prescribed program, or

(ii) a statement of medical exemption in the prescribed form signed by a physician or a registered nurse in the extended class stating that the prescribed program of immunization in relation to the designated disease is unnecessary in respect of the pupil by reason of past infection or laboratory evidence of immunity. R.S.O. 1990, c. I.1, s. 12 (2); 2007, c. 10, Sched. E, s. 5; 2017, c. 11, Sched. 2, s. 5.

Term of order

(3) An order under subsection (1) remains in force until rescinded in writing by the medical officer of health. R.S.O. 1990, c. I.1, s. 12 (3).

Rescission of order

(4) A medical officer of health who makes an order under subsection (1) shall rescind the order as soon as the medical officer of health is satisfied that the outbreak or the immediate risk of the outbreak of the designated disease has ended. R.S.O. 1990, c. I.1, s. 12 (4).

Service of copy of order

(5) The medical officer of health shall serve a copy of the order under subsection (1) upon a parent of the pupil and, where the pupil is sixteen or seventeen years of age, upon the pupil. R.S.O. 1990, c. I.1, s. 12 (5); 2021, c. 4, Sched. 11, s. 17 (1).

Service of copy of rescinding order

(6) The medical officer of health shall serve a rescinding order made under subsection (4) upon the person who operates the school and shall serve a copy of the order upon a parent of the pupil and, where the pupil is sixteen or seventeen years of age, upon the pupil. R.S.O. 1990, c. I.1, s. 12 (6); 2021, c. 4, Sched. 11, s. 17 (1).

Written reasons

(7) An order under subsection (1) shall include written reasons for the making of the order. R.S.O. 1990, c. I.1, s. 12 (7).

Section Amendments with date in force (d/m/y)

2007, c. 10, Sched. E, s. 5 - 01/10/2007

2017, c. 11, Sched. 2, s. 5 - 01/09/2017

2021, c. 4, Sched. 11, s. 17 (1) - 19/04/2021

Hearing and submissions

13 A medical officer of health need not hold or afford to any person an opportunity for a hearing or afford to any person an opportunity to make submissions before making an order under this Act. R.S.O. 1990, c. I.1, s. 13.

Notice of transfer of pupil

14 (1) Where a pupil transfers from a school, the person who operates the school shall give notice of the transfer in the prescribed form to the medical officer of health serving the area in which the school is located. R.S.O. 1990, c. I.1, s. 14 (1).

Transmittal of copy of immunization record

(2) Where the notice under subsection (1) states that the pupil is transferring to a school in an area under the jurisdiction of another medical officer of health, the medical officer of health shall send a copy of the immunization record of the pupil to the other medical officer of health. R.S.O. 1990, c. I.1, s. 14 (2).

Notice

15 (1) Where a medical officer of health makes an order under this Act requiring the suspension of a pupil or requiring that a pupil be excluded from a school due to an outbreak or an immediate risk of an outbreak of a designated disease, the medical officer of health shall serve upon a parent of the pupil or, where the pupil is sixteen or seventeen

years of age, upon the pupil a notice of entitlement to a hearing. R.S.O. 1990, c. I.1, s. 15 (1); 2021, c. 4, Sched. 11, s. 17 (1).

Idem

(2) A notice under subsection (1) shall inform the parent or pupil, as the case may be, that the parent or pupil is entitled to a hearing by the Board if the parent or pupil mails or delivers to the medical officer of health, to the Board and to the person who operates the school, within fifteen days after the notice is served on the parent or pupil, notice in writing requiring a hearing and the parent or pupil may so require such a hearing. R.S.O. 1990, c. I.1, s. 15 (2); 2021, c. 4, Sched. 11, s. 17 (6).

Opportunity to show compliance and to examine documents

(3) Where a hearing by the Board is required in accordance with this section, the medical officer of health shall afford to the parent or pupil requiring the hearing a reasonable opportunity before the hearing,

(a) to show or to achieve compliance with all lawful requirements concerning the subject-matter of the hearing; and

(b) to examine any written or documentary evidence that will be produced or any report the contents of which will be given in evidence at the hearing. R.S.O. 1990, c. I.1, s. 15 (3); 2021, c. 4, Sched. 11, s. 17 (7).

Powers of Board where hearing

(4) Where a hearing is required in accordance with this section, the Board shall appoint a time and place for and hold the hearing and the Board by order may confirm, alter or rescind the decision or order of the medical officer of health and for such purposes the Board may substitute its finding for that of the medical officer of health. R.S.O. 1990, c. I.1, s. 15 (4).

Time for hearing

(5) The Board shall hold a hearing under this section within fifteen days after receipt by the Board of the notice in writing requiring the hearing and the Board may, from time to time at the request or with the consent of the person requiring the hearing, extend the time for holding the hearing for such period or periods of time as the Board considers just. R.S.O. 1990, c. I.1, s. 15 (5).

Parties

(6) The medical officer of health, the parent or pupil who has required the hearing and such other persons as the Board may specify are parties to the proceedings before the Board. R.S.O. 1990, c. I.1, s. 15 (6); 2021, c. 4, Sched. 11, s. 17 (8).

Effect of order

(7) Despite the fact that a hearing is required in accordance with this section, an order under this Act by a medical officer of health takes effect when it is served on the person to whom it is directed. R.S.O. 1990, c. I.1, s. 15 (7).

Members holding hearing not to have taken part in investigation, etc.

(8) Members of the Board holding a hearing shall not have taken part before the hearing in any investigation or consideration of the subject-matter of the hearing and shall not communicate directly or indirectly in relation to the subject-matter of the hearing with any person or with any party or representative of the party except upon notice to and opportunity for all parties to participate, but the Board may seek legal advice from an adviser independent from the parties and in such case the nature of the advice shall be made known to the parties in order that they may make submissions as to the law. R.S.O. 1990, c. I.1, s. 15 (8).

Recording of evidence

(9) The oral evidence taken before the Board at a hearing shall be recorded and, if so required, copies or a transcript thereof shall be furnished upon the same terms as in the Superior Court of Justice. R.S.O. 1990, c. I.1, s. 15 (9); 2002, c. 18, Sched. I, s. 11 (2).

Findings of fact

(10) The findings of fact of the Board pursuant to a hearing shall be based exclusively on evidence admissible or matters that may be noticed under sections 15 and 16 of the *Statutory Powers Procedure Act*. R.S.O. 1990, c. I.1, s. 15 (10).

(11) REPEALED: 1998, c. 18, Sched. G, s. 59 (2).

Release of documentary evidence

(12) Documents and things put in evidence at a hearing shall, upon the request of the person who produced them, be released to the party by the Board within a reasonable time after the matter in issue has been finally determined. R.S.O. 1990, c. I.1, s. 15 (12).

Section Amendments with date in force (d/m/y)

1998, c. 18, Sched. G, s. 59 (2) - 01/02/1999

2002, c. 18, Sched. I, s. 11 (2) - 26/11/2002

2021, c. 4, Sched. 11, s. 17 (1, 6-8) - 19/04/2021

Appeal to court

16 (1) Any party to the proceedings before the Board under this Act may appeal from its decision or order to the Divisional Court in accordance with the rules of court. R.S.O. 1990, c. I.1, s. 16 (1).

Record to be filed in court

(2) Where any party appeals from a decision or order of the Board under this Act, the Board shall forthwith file in the Superior Court of Justice the record of the proceedings before it in which the decision was made, which, together with the transcript of evidence if it is not part of the Board's record, shall constitute the record in the appeal. R.S.O. 1990, c. I.1, s. 16 (2); 2002, c. 18, Sched. I, s. 11 (3).

Powers of court on appeal

(3) An appeal under this section may be made on questions of law or fact or both and the court may affirm or may rescind the decision of the Board and may exercise all powers of the Board to confirm, alter or rescind the order that is the subject of the appeal and to substitute its findings for that of the person who made the order as the court considers proper and for such purposes the court may substitute its opinion for that of the person who made the order or of the Board, or the court may refer the matter back to the Board for rehearing, in whole or in part, in accordance with such directions as the court considers proper. R.S.O. 1990, c. I.1, s. 16 (3).

Section Amendments with date in force (d/m/y)

2002, c. 18, Sched. I, s. 11 (3) - 26/11/2002

Regulations by Lieutenant Governor in Council

17 (1) The Lieutenant Governor in Council may make regulations,

(a) prescribing any matter referred to in this Act as prescribed by the regulations;

(b) prescribing forms and providing for their use and requiring that statements of conscience or religious belief be in the form of affidavits;

(c) governing the custody, recording, inspection and destruction of records in respect of immunizations in relation to designated diseases;

(d) prescribing programs of immunization in respect of designated diseases, including specifying immunizing agents and the number and timing of dosages of immunizing agents;

(e) classifying children, pupils or persons and exempting any such class from any provision of this Act or the regulations and prescribing conditions to which such exemption shall be subject;

(f) requiring and governing reports by persons who operate schools to medical officers of health in respect of records and documentation related to the immunization of children applying for admission to the schools and pupils and former pupils in the schools;

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 17 (1) of the Act is amended by adding the following clause: (See: 2017, c. 11, Sched. 2, s. 6)

(f.1) respecting and governing the information described in subsection 10 (2), including, without being limited to, specifying one or more methods by which the information is to be provided, and requiring the information to be provided by such a method;

(g) respecting any other matter that the Lieutenant Governor in Council considers necessary or advisable to carry out effectively the intent and purpose of this Act. R.S.O. 1990, c. I.1, s. 17.

Regulations by Minister

(2) The Minister of Health and Long-Term Care may make regulations prescribing designated diseases for the purposes of this Act. 2002, c. 18, Sched. I, s. 11 (4).

Section Amendments with date in force (d/m/y)

1997, c. 15, s. 9 (1, 2) - no effect - see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - 31/12/2011

2002, c. 18, Sched. I, s. 11 (4) - 26/11/2002

CTS 5 SE 13 - 2

2017, c. 11, Sched. 2, s. 6 - not in force

Service

18 (1) Any notice, order or other document under this Act or the regulations is sufficiently given, served or delivered if delivered personally or sent by ordinary mail addressed to the person to whom it is to be given, served or delivered at his or her last known address. R.S.O. 1990, c. I.1, s. 18 (1).

When service deemed made

(2) A notice, order or other document sent by ordinary mail in accordance with subsection (1) shall be deemed to be given, served or delivered on the seventh day after the day of mailing, unless the person to whom it is sent establishes that, acting in good faith, the person did not receive the notice, order or other document until a later date through absence, accident, illness or other cause beyond the person's control. R.S.O. 1990, c. I.1, s. 18 (2).

REOPENING ONTARIO (A FLEXIBLE RESPONSE TO COVID-19) ACT, 2020

S.O. 2020, CHAPTER 17

OFFENCES

10 (1) Every person who fails to comply with subsection 9.1 (2) or (3) or with a continued section 7.0.2 order or who interferes with or obstructs any person in the exercise of a power or the performance of a duty conferred by such an order is guilty of an offence and is liable on conviction,

(a) in the case of an individual, subject to clause (b), to a fine of not more than $100,000 and for a term of imprisonment of not more than one year;

(b) in the case of an individual who is a director or officer of a corporation, to a fine of not more than $500,000 and for a term of imprisonment of not more than one year; and

(c) in the case of a corporation, to a fine of not more than $10,000,000. 2020, c. 17, s. 10 (1); 2020, c. 23, Sched. 6, s. 3

ONTARIO REGULATION 346/22

made under the

REOPENING ONTARIO (A FLEXIBLE RESPONSE TO COVID-19) ACT, 2020

Made: April 14, 2022
Filed: April 14, 2022
Published on e-Laws: April 14, 2022
Printed in *The Ontario Gazette*: April 30, 2022

REVOKING VARIOUS REGULATIONS

Revocations

1. The following regulations are revoked:

1. **Ontario Regulation 74/20.**
2. **Ontario Regulation 76/20.**
3. **Ontario Regulation 77/20.**
4. **Ontario Regulation 95/20.**
5. **Ontario Regulation 114/20.**
6. **Ontario Regulation 116/20.**
7. **Ontario Regulation 118/20.**
8. **Ontario Regulation 121/20.**
9. **Ontario Regulation 141/20.**
10. **Ontario Regulation 145/20.**
11. **Ontario Regulation 154/20.**
12. **Ontario Regulation 157/20.**
13. **Ontario Regulation 195/20.**
14. **Ontario Regulation 345/20.**
15. **Ontario Regulation 363/20.**
16. **Ontario Regulation 364/20.**
17. **Ontario Regulation 458/20.**

Commencement

2. This Regulation comes into force on the later of April 27, 2022 and the day this Regulation is filed.

ONTARIO REGULATION 364/20

Formerly under Emergency Management and Civil Protection Act

RULES FOR AREAS AT STEP 3 AND THE ROADMAP EXIT STEP

Historical version for the period September 22, 2021 to September 23, 2021.

Last amendment: 659/21.

Legislative History: 415/20, 428/20, 453/20, 456/20, 501/20, 519/20, 529/20, 530/20, 531/20, 546/20, 574/20, 579/20, 588/20, 642/20, 655/20, 687/20, 4/21, 98/21, 105/21, 115/21, 119/21, 147/21, 164/21, 218/21, 223/21, 315/21, 346/21, 520/21, 524/21, 541/21, 577/21, 630/21, 645/21, 659/21.

General compliance

2. (1) The person responsible for a business or organization that is open shall ensure that the business or organization operates in accordance with all applicable laws, including the *Occupational Health and Safety Act* and the regulations made under it.

(2) The person responsible for a business or organization that is open shall operate the business or organization in compliance with the advice, recommendations and instructions of public health officials, including any advice, recommendations or instructions on physical distancing, cleaning or disinfecting.

(2.1) The person responsible for a business or organization that is open shall operate the business or organization in compliance with any advice, recommendations and instructions issued by the Office of the Chief Medical Officer of Health, or by a medical officer of health after consultation with the Office of the Chief Medical Officer of Health,

(a) requiring the business or organization to establish, implement and ensure compliance with a COVID-19 vaccination policy; or

(b) setting out the precautions and procedures that the business or organization must include in its COVID-19 vaccination policy.

(2.2) In subsection (2.1),

Proof of vaccination

2.1 (1) The person responsible for a business or an organization described in subsection (2) that is open shall require each patron who enters an area of the premises of the business or organization that is described in that subsection to provide, at the point of entry, proof of identification and of being fully vaccinated against COVID-19.

(2) Subsection (1) applies with respect to the following areas of the premises of the following businesses and organizations:

1. The indoor areas of restaurants, bars and other food or drink establishments where dance facilities are not provided, but not with respect to takeout and delivery service.
2. The indoor and outdoor areas of food or drink establishments where dance facilities are provided, including nightclubs, restoclubs and other similar establishments, but not with respect to takeout and delivery service.
3. The indoor areas of meeting and event spaces, including conference centres or convention centres, but not including places described in subsection 4 (2) of this Schedule.
4. The indoor areas of facilities used for sports and recreational fitness activities, including waterparks and personal physical fitness trainers, including, for greater certainty, the indoor areas of facilities where spectators watch events, but not including places described in subsection 16 (4) of Schedule 2.
5. The indoor areas of casinos, bingo halls and other gaming establishments.
6. The indoor areas of concert venues, theatres and cinemas.
7. The indoor areas of bathhouses, sex clubs and strip clubs.

8. The indoor areas of horse racing tracks, car racing tracks and other similar venues.

9. The indoor areas of places where commercial film and television production takes place, where there is a studio audience. For the purposes of this paragraph, a member of the studio audience is considered to be a patron of the production.

(3) Subsection (1) does not apply where a patron is entering an indoor area solely,

(a) to use a washroom;

(b) to access an outdoor area that can only be accessed through an indoor route;

(c) to make a retail purchase;

(d) while placing or picking up an order, including placing a bet or picking up winnings in the case of a horse racing track;

(e) while paying for an order;

(f) to purchase admission; or

(g) as may be necessary for the purposes of health and safety.

(3.1) Despite subsection (1), if a quick service restaurant or other establishment at which food or drink is sold requires all dine-in patrons to order or select their food or drink at a counter, food bar or cafeteria line and pay before receiving their order, the person responsible for the restaurant or establishment may require dine-in patrons to provide the information described in that subsection at the counter, food bar or cafeteria line.

(3.2) Subsection (3.1) does not apply to bars, nightclubs, restoclubs or other similar establishments.

(4) The person responsible for a business or an organization to which this section applies shall comply with guidance published by the Ministry of Health on its website specifying,

(a) what constitutes proof of identification and of being fully vaccinated against COVID-19; and

(b) the manner of confirming proof of vaccination.

(5) For the purpose of this section, a person is fully vaccinated against COVID-19 if,

(a) they have received,

(i) the full series of a COVID-19 vaccine authorized by Health Canada, or any combination of such vaccines,

(ii) one or two doses of a COVID-19 vaccine not authorized by Health Canada, followed by one dose of a COVID-19 mRNA vaccine authorized by Health Canada, or

(iii) three doses of a COVID-19 vaccine not authorized by Health Canada; and

(b) they received their final dose of the COVID-19 vaccine at least 14 days before providing the proof of being fully vaccinated.

(6) A business or an organization is exempt from the requirement under subsection (1) in respect of patrons,

(a) who are under 12 years of age;

(b) who are under 18 years of age, and who are entering the indoor premises of a facility used for sports and recreational fitness activities solely for the purpose of actively participating in an organized sport, in accordance with guidance published by the Ministry of Health on its website for the purposes of this provision;

(c) who provide a written document, completed and supplied by a physician or registered nurse in the extended class, that sets out, in accordance with the Ministry's guidance mentioned in subsection (4),

(i) a documented medical reason for not being fully vaccinated against COVID-19, and

(ii) the effective time-period for the medical reason;

(d) who are entering the indoor premises of a meeting or event space, including a conference centre or convention centre, solely for the purposes of attending a wedding service, rite or ceremony or a funeral service, rite or ceremony, but not an associated social gathering;

(e) who are entering the indoor premises of a meeting or event space that is located in a place of worship or in a funeral establishment, cemetery, crematorium or similar establishment that provides funeral, cemetery or cremation services and that is operated by a person licensed under the *Funeral, Burial and Cremation Services Act, 2002,* for the purposes of attending a social gathering associated with a funeral service, rite or ceremony; or

(f) who are entering the indoor premises of a meeting or event space other than a place described in clause (e), including a conference centre or convention centre, for the purposes of attending a social gathering associated with a wedding service, rite or ceremony or a social gathering associated with a funeral service, rite or ceremony, on or after September 22, 2021, but before October 13, 2021, as long as the patron produces the results of an antigen test administered within the previous 48 hours establishing that the person is negative for COVID-19 to the person responsible for the establishment.

(7) A person who is a patron shall not enter an area described in subsection (2) without providing the information required by subsection (1) except,

(a) for a purpose specified in subsection (3); or

(b) in the circumstances described in subsection (6).

(8) A person who provides any information to a business or an organization to satisfy a requirement under this section shall ensure that their information is complete and accurate.

(9) A business or an organization shall not retain any information provided pursuant to this section.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

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

Fundamental Freedoms

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

Legal Rights

Life, liberty and security of person

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

Equality Rights

Equality before and under law and equal protection and benefit of law

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.

Enforcement

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

General

Primacy of Constitution of Canada

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

COURT FILE NO: CAO-23-CV-0015

SARAH HARJEE, et al.	**HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ONTARI**
and	
APPELLANTS'	RESPONDENT

ONTARIO
COURT OF APPEAL

Proceeding commenced at TORONTO

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