

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 (Applicants)

and

**HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF
ONTARIO**

Respondent

FACTUM OF THE RESPONDENT

April 28, 2023

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PART I – OVERVIEW

1. In order to reduce the harms caused by a once-in-a-century pandemic, Ontario implemented a temporary requirement that certain non-essential businesses and organizations that involved people congregating indoors (e.g., restaurants, bars, sporting events, movie theatres, fitness facilities) verify proof of COVID-19 vaccination as a condition of entry (the “POV Requirement”). The Application Judge correctly held that there is no *Charter* right to dine in a restaurant or attend a sporting event. Even if there were, Ontario submits that the POV Requirement was a justified measure intended to protect the health and safety of vulnerable Ontarians.

2. The Appellants have not identified any reviewable errors in the Application Judge’s analysis that would justify granting the remedies sought on appeal. The Application Judge correctly dismissed the Appellants’ claims that the POV Requirement infringed their ss. 2(a), 7 and 15 *Charter* rights on the following grounds:

- The POV Requirement did not infringe the Appellants’ *Charter* s. 2(a) right to freedom of religion. It did not require the Appellants to become vaccinated contrary to their beliefs, and restrictions on attending certain establishments did not interfere with their ability to observe or practice their religion.
- The POV Requirement did not infringe the Appellants’ *Charter* s. 7 rights. It did not interfere with their ability to make fundamental life choices and they were not required to undergo any form of medical procedure. Rather, the Appellants remained at all times in control of their bodily integrity, free from state interference, and able to maintain their choice to remain unvaccinated. The Appellants also did not establish

that the POV Requirement had a serious impact on their psychological integrity.

- The POV Requirement did not infringe the Appellants' *Charter* s. 15 rights. They failed to establish that the POV Requirement created a distinction on the grounds of either religion or disability, or that it had the effect of reinforcing, perpetuating, or exacerbating disadvantage.

3. In the alternative, if this Honourable Court finds that the POV Requirement did limit any of the Appellants' *Charter* rights, which is denied, any such limitation was justified under s. 1. The Application Judge correctly observed that vaccination against COVID-19 was effective in preventing hospitalization and dire medical outcomes, including death. There is further evidence that a high rate of vaccination against COVID-19 was effective in preventing surging transmission of the Delta variant, as well as intensive care unit ("ICU") admission and death from COVID-19, which threatened to overwhelm Ontario hospitals in the Fall of 2021. Any temporary adverse impact of the POV Requirement on the Appellants was clearly outweighed by the broader public good resulting from the POV Requirement, which was revoked once it was no longer necessary.

4. In any event, and in the further alternative, a declaration, not damages, would be the just and appropriate remedy for any finding that the POV Requirement unjustifiably infringed any of the Appellants' *Charter* rights. Even if the Appellants could establish an otherwise viable claim for *Charter* damages, there is no basis for lifting the government's

presumptive immunity in this case.

PART II – FACTS

A. The Appellants

5. The nine Appellants elected not to be vaccinated against COVID-19 and challenged the constitutional validity of the POV Requirement. They express doubt about the safety and effectiveness of COVID-19 vaccines and, in some cases, assert a religious objection to vaccination or claim to have natural immunity through prior infection. None of the Appellants adduced any medical evidence from physicians or other health care providers that COVID-19 vaccination would place them at unwarranted risk.¹

B. The Application Judge’s Findings

6. The Application Judge described the factual background to the POV Requirement and made findings regarding COVID-19 and vaccines which were consistent with Ontario’s evidence, and which are entitled to deference on this appeal:²

- a. COVID-19 is caused by the Sars-CoV-2 virus and its variants. The virus spreads between people via respiratory particles of varying sizes, mainly when an infected person is in close contact with another person.³ Transmission risk is highest prior to symptoms appearing, meaning that most infected people will unknowingly infect others before they themselves have symptoms. Many people infected with COVID-

¹ *Harjee v Ontario*, 2022 ONSC 7033, [paras. 30-51](#) [*Reasons for Judgement*].

² *Ibid* at [para. 8](#).

³ *Ibid* at [para. 9](#); Affidavit of Dr. Matthew Hodge, affirmed March 21, 2022 [Hodge Affidavit], at para. 11, Respondent’s Compendium [RCOM] at Tab 2, p. 9.

19 show no symptoms (asymptomatic) or experience several days between when they are infected and when they develop symptoms (pre-symptomatic).⁴

- b. COVID-19 infection causes symptoms of upper respiratory tract infection including cough, fever, and sore throat. There is a loss of taste and smell for many infected people. Complications include respiratory failure, acute respiratory distress syndrome, sepsis, and septic shock, thromboembolism, and/or multiorgan failure, including injury of the heart, liver, or kidneys. COVID-19 can kill.⁵
- c. On March 11, 2020, the World Health Organization declared the COVID-19 outbreak a pandemic.⁶
- d. On March 17, 2020, Ontario's Lieutenant Governor in Council declared an emergency pursuant to the provisions of section 7.0.1 of the *Emergency Management and Civil Protection Act* ("EMCPA").⁷
- e. During this declared emergency, Ontario issued various Orders under the EMCPA, many of which were continued under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*⁸ ("ROA") when that Act came into force on July 24, 2020. These regulations and their amendments, which were authorized by statute, provided for a variety of public health measures to address the COVID-19 pandemic, such as restrictions on public gatherings, the temporary closure of certain businesses or

⁴ *Reasons for Judgement*, *supra* at [para. 9](#); Hodge Affidavit, *supra* at para. 13, RCOM, Tab 2, p. 9.

⁵ *Reasons for Judgement*, *supra* at [para. 10](#); Hodge Affidavit, *supra* at para. 14, RCOM, Tab 2, p. 10.

⁶ *Reasons for Judgement*, *supra* at [para. 11](#); Hodge Affidavit, *supra* at paras. 13, 15, RCOM, Tab 2, pp. 9-10.

⁷ *Emergency Management and Civil Protection Act*, RSO 1990, c E.9, [s 7.0.1](#); *Declaration of Emergency*, [O Reg 50/20](#); *Reasons for Judgement* at [para. 12](#).

⁸ *Reasons of Judgement*, *supra* at [para. 13](#); *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, [SO 2020, c 17](#).

places, and the POV Requirement.⁹

- f. In the second year of the pandemic, vaccines became available. The vaccines were approved for use in Canada by Health Canada. The vaccines were acquired by the federal and provincial governments, and then distributed as a part of Ontario's public health response to the pandemic.¹⁰
- g. Being vaccinated decreased hospitalizations due to COVID-19 as well as the likelihood of dire medical outcomes, including death.¹¹
- h. Vaccines are not experimental. They have been proven effective in reducing infections and reducing transmission of the disease, but vaccine effectiveness varies based on a number of factors.¹²
- i. On May 20, 2021, Ontario announced a staged plan to end the province-wide Stay-At-Home Order. One indicator for proceeding to the next step of the plan was the percentage of adults who were vaccinated.¹³
- j. In the fall of 2021, the province entered into the fourth wave of the pandemic associated with the Delta variant of the virus. The scientific modelling predicted a substantial wave of infections with the potential of exceeding hospital ICU capacity. Ontario determined that public health measures had to be implemented or re-

⁹ *Reasons for Judgement, supra* at [para. 13](#); Affidavit of Richard Stubbings sworn March 21, 2022 [Stubbings Affidavit] at para. 5, RCOM, Tab 3, p. 25.

¹⁰ *Reasons for Judgement, supra* at [para. 14](#); Stubbings Affidavit, *supra*, RCOM, Tab 3.

¹¹ *Reasons for Judgement, supra* at [para. 14](#); Hodge Affidavit, *supra* at paras. 18-19, RCOM, Tab 2, p0. 12-13.

¹² *Reasons for Judgement, supra* at [para. 15](#); Affidavit of Jeff Kwong affirmed March 21, 2022 [Kwong Affidavit] at para. 17, RCOM, Tab 4, pp. 110-111.

¹³ *Reasons for Judgement, supra* at [para. 16](#); Stubbings Affidavit, *supra* at para. 7, RCOM, Tab 3, p. 25.

implemented and vaccination uptake had to accelerate substantially. Accordingly, Ontario decided to implement policies to accelerate vaccination uptake.¹⁴

- k. On September 1, 2021, Ontario announced that starting September 22, 2021 it would require people to be fully vaccinated (two doses) and provide proof of their vaccination status to access certain businesses and organizations. Based on the advice provided by Ontario’s Chief Medical Officer of Health, the government decided that the COVID-19 POV Requirement would provide the best chance to slow the spread of the virus while helping to avoid lockdowns and protect the province’s hospital capacity.¹⁵
- l. The POV Requirement applied to higher-risk indoor public settings where face coverings cannot always be worn, including restaurants, bars, banquet halls, casinos, theatres, and gyms. The POV Requirements did not apply to outdoor settings or settings where people receive medical care, food from grocery stores, and medical supplies.¹⁶
- m. The POV Requirement was established by ss. 2(2.1) and 2.1 of Schedule 1 of O. Reg 364/20 (the “Regulation”) and came into effect on September 22, 2021.¹⁷ It ceased to have effect less than six months later, on March 1, 2022.¹⁸

¹⁴ *Reasons for Judgement*, *supra* at [para. 17](#); Stubbings Affidavit, *supra* at para. 12, RCOM, Tab 3, p. 27.

¹⁵ *Reasons for Judgement*, *supra* at [para. 18](#); Stubbings Affidavit, *supra* at para. 13, RCOM, Tab 3, pp. 27-28.

¹⁶ *Reasons for Judgement*, *supra* at [para. 19](#); Stubbings Affidavit, *supra* at para. 13, RCOM, Tab 3, pp. 27-28.

¹⁷ *Rules for Areas at Step 3 and at the Roadmap Exit Step*, [O Reg 364/20](#).

¹⁸ *Reasons for Judgement*, *supra* at [para. 22](#); Stubbings Affidavit, *supra* at para. 63, RCOM, Tab 3, p. 40.

- n. On April 27, 2022, Ont. Reg. 364/20, and all the other remaining orders made under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* were revoked.¹⁹

C. Expert medical evidence in support of the POV Requirement

7. Having found no infringement of the *Charter*, the Application Judge did not find it necessary to discuss the expert evidence tendered to determine whether a potential infringement was justified under s. 1 of the *Charter*. Ontario submits that the expert evidence nevertheless provides important context regarding the gravity of the COVID-19 pandemic and the importance of vaccination as a safe and effective tool to mitigate risk to public health and safety as well as hospital capacity, and is relevant should this Court find it necessary to consider s. 1 of the *Charter*.

8. Ontario tendered two experts in public health to support the constitutionality of the POV Requirement. **Dr. Matthew Hodge** is a certified specialist in public health and preventative medicine and an emergency physician at Scarborough General Hospital. He has a Ph.D. in epidemiology and biostatistics from McGill University and a Master's degree in Health Care Management from Harvard University. Dr. Hodge has over 20 years of experience in public health and preventative medicine.²⁰

9. **Dr. Jeffrey Kwong** is an epidemiologist, public health and preventative medicine specialist and practicing physician. He is a Professor in the University of Toronto Faculty of

¹⁹ *Reasons for Judgement*, *supra* at [para. 22](#); *Revoking Various Regulations*, [O Reg 346/22](#).

²⁰ Hodge Affidavit, *supra* at paras. 1-2, RCOM, Tab 2, pp. 5-6. See also: *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344 at [para. 40](#) where the Superior Court found Dr. Hodge's evidence to "best reflect what was known and understood by Ontario when it made its decisions" which the CA did not disturb (*Ontario v. Trinity Bible Chapel*, 2023 ONCA 134 at [paras. 49-50](#)).

Medicine and Dalla Lana School of Public Health. Dr. Kwong has led or collaborated on many studies evaluating vaccine coverage, safety, and effectiveness in connection to COVID-19 and other vaccine-preventable diseases. Such studies have led to over 230 peer-reviewed publications in scientific journals. Dr. Kwong has presented his research at the provincial and federal level in Canada, at the US Center for Disease Control and Prevention and at the World Health Organization.²¹

10. At the time the Respondent's expert evidence was adduced, COVID-19 had infected at least 1 in 14 people in Ontario, driven hospitals to the edge of their capacity had killed more than 1 in every 100 people who tested positive for COVID-19.²² The Superior Court has noted in litigation challenging other government measures adopted to reduce harms stemming from the pandemic that: "New variants of concern have increased mortality rates among young and healthy individuals. COVID-19 has threatened the viability of health care systems by consuming medical resources, leaving other illnesses untreated, and stretching hospitals and ICUs to their limits."²³

11. Based on Ontario's COVID-19 experience through March 13, 2022, 3.8% of people with COVID-19 required hospital-based care, typically for oxygen at a minimum, and often ICU-level care. As of March 13, 2022, in Ontario 1,126,456 cases of COVID-19 had been reported and 12,256 (approximately 1.1%) people had died.²⁴ The number of cumulative cases of COVID-19 in the province is likely higher than the number of recorded cases since

²¹ Kwong Affidavit, *supra* at paras. 1-2, 5, RCOM, Tab 4, pp. 102-103.

²² Hodge Affidavit, *supra* at para. 15, RCOM, Tab 2, p. 10.

²³ *Ontario v. Trinity Bible Chapel et al*, 2022 ONSC 1344 at [para. 1](#) [*Trinity Bible Chapel* ONSC], *aff'd* in *Ontario v. Trinity Bible Chapel*, 2023 ONCA 134 [*Trinity Bible Chapel* ONCA].

²⁴ Hodge Affidavit at para. 14, RCOM, Tab 2, p. 10.

some individuals who acquire COVID-19 are not tested and diagnosed.²⁵

12. There is abundant evidence from many countries on the effectiveness of COVID-19 vaccines against SARS-CoV-2-related outcomes.²⁶ Dr. Kwong also explained that persons previously infected by COVID-19 would benefit from receiving two (or more) doses of the COVID-19 vaccine.²⁷

13. Being unvaccinated increases one's chances of hospitalization due to COVID-19 for all age groups,²⁸ ranging from a 3.56-fold increase (ages 50-59) to more than a 14-fold increase (ages 70 and up). Adding a booster dose provides even more protection, particularly at older ages, as compared to those who have received a booster dose, unvaccinated persons' risk of hospitalization is over 66-fold greater among persons over age 70.²⁹

14. COVID-19 vaccines are extremely safe and, contrary to the Appellants' allegations, are not experimental.³⁰ COVID-19 vaccination is associated with far fewer serious side effects than those associated with infection from the SARS-CoV-2 virus.³¹ Research showed that the risks of blood-clotting events such as strokes and heart attacks, myocarditis and other cardiac conditions were nearly always higher (and often substantially so) after SARS-CoV-2 infection than after COVID-19 vaccination.³² The evidence supported a higher risk of certain side effects for particular individuals receiving the COVID-19 vaccine,³³ which was

²⁵ Hodge Affidavit, *supra* at para. 14, RCOM, Tab 2, p. 10.

²⁶ Kwong Affidavit, *supra* at para. 17, RCOM, Tab 4, pp. 110-111.

²⁷ Kwong Affidavit, *supra* at para. 27, RCOM, Tab 4, pp. 119-120; *Reasons for Judgement*, *supra* at [para. 15](#).

²⁸ Kwong Affidavit, *supra* at para. 19, RCOM, Tab 4, p. 112; *Reasons for Judgement*, *supra* at [para. 14](#).

²⁹ Hodge Affidavit, *supra* at para. 19, RCOM, Tab 2, p. 13; *Reasons for Judgement*, *supra* at [para. 15](#).

³⁰ Kwong Affidavit, *supra* at paras. 21-26, RCOM, Tab 4, pp. 114-119; Hodge Affidavit, *supra* at paras. 27-30, RCOM, Tab 2, pp. 16-17; *Reasons for Judgement*, *supra* at [para. 15](#).

³¹ Kwong Affidavit, *supra* at para. 21, RCOM, Tab 4, pp. 114-115.

³² Kwong Affidavit, *supra* at para. 22, RCOM, Tab 4, pp. 116-117.

³³ *Ibid.*

reflected in the tailored exemptions to the POV Requirement.³⁴ The introduction of the POV Requirement was followed by a marked increase in vaccination rates in Ontario³⁵ and is credited by Ontario's expert, based on comparative data, with saving at least hundreds of lives and averting thousands of hospitalizations.³⁶ Evidence from various jurisdictions also shows that requiring vaccination to attend certain settings boosted vaccine uptake significantly.³⁷

15. The introduction of the POV Requirement helped spur hesitant Ontarians to get vaccinated. Before the POV Requirement was announced, approximately 76% of Ontarians over age 12 had received two doses of COVID-19 vaccine.³⁸ In just five months, the POV Requirement helped increase the number of vaccinated Ontarians to approximately 90% of those over age 12.³⁹ The beneficial impact of the POV Requirement was reduced when the Omicron variant became the dominant strain in Ontario, in that both vaccinated and unvaccinated persons were more likely to be infected and to transmit the virus than was the case with previous variants. The Omicron variant further tended to result in less serious illness among Ontario's highly vaccinated population. With the POV Requirement having largely served its purpose,⁴⁰ as of March 1, 2022, the impugned provisions ceased to have effect.⁴¹ On April 27, 2022, the Regulation and all other remaining ROA Orders were

³⁴ Stubbings Affidavit, *supra* at para. 20 (Ex. "R"), RCOM, Tab 3, p. 30.

³⁵ Hodge Affidavit, *supra* at para. 34-40, RCOM, Tab 2, pp. 19-21; Stubbings Affidavit, *supra* at paras. 15 (Ex. "M"), 26 (Ex. "X"), 31 (Ex. "CC"), RCOM, Tab 3, pp. 28, 31, 33.

³⁶ Hodge Affidavit, *supra* at para. 39, RCOM, Tab 2, p. 21.

³⁷ Hodge Affidavit, *supra* at para. 35, RCOM, Tab 2, p. 19.

³⁸ Stubbings Affidavit, *supra* at para. 12 (Ex. "J"), RCOM, Tab 3, p. 27.

³⁹ Kwong Affidavit, *supra* at para. 19, RCOM, Tab 4, p. 112.

⁴⁰ Stubbings Affidavit, *supra* at para. 60 (Ex. "FFF"), RCOM, Tab 3, pp. 39-40.

⁴¹ Stubbings Affidavit, *supra* at para. 63 (Ex. "GGG"), RCOM, Tab 3, p. 40.

revoked.⁴²

D. The Appellants' Expert Evidence

16. The only physician expert witness called by the Appellants was Dr. Joel Kettner. He admitted on cross-examination that he volunteered to be a vaccinator for the Manitoba First Nations Community COVID-19 Vaccine Project. He stated he would never agree to administer COVID-19 vaccines if he was of the opinion that the harm of vaccination outweighed the benefit for the individual or population as a whole.⁴³ The other two experts proffered by the Appellants, Drs. Byram Bridle and Stephen Pelech, are advocates who are vocally opposed to COVID-19 vaccination requirements.⁴⁴ While both are scientists, neither are physicians. Their position against vaccination has also been rejected by many of their academic peers.⁴⁵

PART III – ISSUES AND THE LAW

17. The Respondent takes the following positions on the issues raised by the Appellants on appeal:

- a) The Application Judge did not err in finding that the POV Requirement did not

⁴² *Revoking Various Regulations*, [O Reg 346/22](#); *Reasons for Judgement*, *supra* at [para. 1](#).

⁴³ Cross-Examination of Joel Kettner, pp. 10, 13-15, qq. 18-19, 25, RCOM, Tab 5, pp. 123, 126-127; Note: while Dr. Kettner volunteered to be a vaccinator, he was not ultimately selected to administer vaccines.

⁴⁴ Cross-Examination of Dr. Byram Bridle ("Bridle Cross"), at pp. 109-110, 122, qq. 285, 317-319, RCOM, Tab 6, pp. 129-130, 133; Cross-Examination of Dr. Steven Pelech, pp. 10, 64-65, qq. 30, 263, 265, RCOM, Tab 7, pp. 141, 146-147.

⁴⁵ Bridle Cross, *supra* at Ex. 3, RCOM, Tab 6, p. 134; The Ontario Superior Court has cautioned that Dr. Bridle "expresses opinion well outside the parameters of his expertise and apparently at odds with the prevailing state of medical and scientific knowledge." *Costa, Love, Badowich and Mandekic v. Seneca College*, 2022 ONSC 5111 (SCJ) at [paras 18-37, 96-102](#). See also: *L.A v. E.S.*, [2022 QCCS 2118](#), *B.C.J.B. v. E.R.R.*, [2022] O.J. No. 4826 at [para 265](#); *Canadian Society for the Advancement of Science in Public Policy v. British Columbia (Provincial Health Officer)*, 2023 BCSC 284, at [paras. 88-96](#); *O.M.S. v. E.J.S.*, 2023 SKCA 8 at [para. 97](#).

infringe the Appellants' freedom of religion as protected by *Charter* s. 2(a);

- b) The Application Judge did not err in finding that the POV Requirement did not infringe the Appellants' s. 7 *Charter* rights to liberty and security of the person;
- c) The Application Judge did not err in finding that the POV Requirement was not discriminatory as against the Appellants contrary to *Charter* s. 15; and
- d) The Application Judge did not err by taking judicial notice of the safety and efficacy of vaccines.

18. Ontario respectfully submits that the Application Judge did not commit any of the errors alleged by the Appellants for the reasons set out below. Ontario agrees that the standard of review on questions of law is correctness.⁴⁶ However, the Application Judge's findings of fact are entitled to deference and should not be overturned absent palpable and overriding error.⁴⁷

A. No *Charter* infringements

1. The POV Requirement did not infringe Freedom of Religion (*Charter* s. 2(a))

B. The Application Judge correctly determined that the POV Requirement did not infringe the Appellants' *Charter* s. 2(a) right to freedom of religion because there was no legislative or administrative action which could reasonably be said to have interfered with their beliefs.⁴⁸

⁴⁶ *Housen v Nikolaisen*, 2022 SCC 33, at [para. 8](#).

⁴⁷ *Ibid* at [paras. 10-18](#); *Hacopian-Armen Estate v Mahmoud*, 2021 ONCA 545 at [para. 71](#).

⁴⁸ *Reasons for Judgement*, *supra* at [para. 62](#).

C. The Application Judge accurately set out the test for finding a s. 2(a) infringement, which requires claimants to show (i) that they sincerely believe in a practice or belief that has a nexus with religion, and (ii) that the impugned state conduct interferes, in a manner that is more than trivial or insubstantial, with their ability to act in accordance with that practice or belief.⁴⁹ Trivial or insubstantial interference is interference that does not threaten actual religious beliefs or conduct,⁵⁰ and a law that merely creates an inconvenience for, or imposes a cost on, religious adherence will not infringe s. 2(a).⁵¹ Section 2(a) does not require the legislature to refrain from imposing any burdens on the practice of religion”⁵²

D. The POV Requirement mandated that operators of specified businesses or organizations deny entry to those who could not provide proof of COVID-19 vaccination. Crucially, as recognized by the Application Judge, it did not require the Appellants to receive the COVID-19 vaccine or any other medical treatment, which they submit would be contrary to their beliefs.⁵³ The Appellants remained unvaccinated and were not deprived “of a meaningful choice to follow or not follow the edicts of their religion.”⁵⁴

⁴⁹ *Reasons for Judgement*, supra at [para. 58](#); *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at [para. 32](#) [*Hutterian Brethren*]; *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at [p. 336](#); *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at [para. 72](#); *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at [para. 40](#) [*Amselem*]; *Reference re Same-Sex Marriage*, 2004 SCC 79 at [para. 57](#); *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at [para. 32](#); *Bruker v. Marcovitz*, 2007 SCC 54 at [para. 71](#); *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at [para. 63](#).

⁵⁰ *Hutterian Brethren*, supra at [para. 32](#); *Reasons for Judgement*, supra at [para. 58](#).

⁵¹ *Hutterian Brethren*, supra at [para. 95](#). *Trinity Bible Chapel ONSC*, supra at [para. 90](#); *Amselem*, supra at [para. 58](#).

⁵² *Amselem*, supra at [para. 58](#).

⁵³ *Reasons for Judgement*, supra at [para. 62](#).

⁵⁴ *Trinity Bible Chapel ONSC*, supra at [para. 94](#).

E. The analogy to the photo identification requirement in *Hutterian Brethren* is apt. The driver's licence photo identification requirement in that case created a financial cost for the claimants as well as departure from being self-sufficient in terms of transport. Their resulting inability to drive due to their religious objection to being photographed, however, was found not to "seriously [affect their] right to pursue their religion."⁵⁵ Similarly, the Appellants' inability to attend a restaurant or other venue governed by the POV Requirement due to their objection to being vaccinated does not substantially interfere with their "right to pursue their religion."⁵⁶ Unlike the ability to gather in church for collective worship, which was the basis for finding a freedom of religion infringement in *Trinity Bible Chapel*,⁵⁷ the Appellants neither asserted nor established that attending a restaurant, gym or sporting event, which they could not do without proof of vaccination, was fundamental to their religious practice.⁵⁸ The Application Judge correctly held that there was no evidence that the POV Requirement constrained the Appellants' ability to hold or observe their religious beliefs.⁵⁹

F. The Appellants rely on *Freitag v Penetanguishene*,⁶⁰ which concerned the recital of the Lord's Prayer before City Council meetings, to argue that the Application Judge erred by finding that their s. 2(a) rights were not violated by the POV Requirement. However, the purpose of the POV Requirement was not to impose any specific religious practice on

⁵⁵ *Hutterian Brethren*, *supra* at [para. 99](#). While this finding was made by the majority of the Court in the context of s. 1, because a s. 2(a) breach had been conceded, it is likewise applicable to a discussion of whether s. 2(a) is engaged. See, for example, *Trinity Bible Chapel ONCA*, *supra*, at [para. 94](#).

⁵⁶ *Reasons for Judgement*, *supra* at [para. 64](#).

⁵⁷ *Trinity Bible Chapel ONSC*, *supra* at [para. 113](#).

⁵⁸ *Reasons for Judgement*, *supra* at [para. 64](#).

⁵⁹ *Reasons for Judgement*, *supra* at [paras. 58](#) and [61](#); *E.T. v. Hamilton-Wentworth District School Board*, [2017 ONCA 893](#); *S.L. v. Commission scolaire des Chênes*, [2012 SCC 7](#); *Amselem*, *supra*.

⁶⁰ *Freitag v. Penetanguishene*, [\[1999\] OJ No 3524](#).

people, and its effect was not to coerce or pressure individuals into adhering to any specific religious practice, as was the case with the recital of the Lord's Prayer. *Freitag* has no application to the Appellants' s. 2(a) claim.

2. The POV Requirement did not infringe the right to Liberty/Security of the Person (Charter s. 7)

G. The Application Judge correctly held that the temporary POV requirement did not engage the Appellants' rights under *Charter* s. 7. This finding is consistent with multiple decisions of Courts in Ontario and elsewhere holding that proof of vaccination requirements do not infringe s. 7 of the *Charter*, even when the consequences of deciding not to become vaccinated include loss of one's job, restricted access to educational institutions, or ineligibility for medical treatment.⁶¹

H. To establish an infringement of s. 7 of the *Charter*, one must show (i) a deprivation of life, liberty, or security of the person, and (ii) that the deprivation is not in accordance with principles of fundamental justice. The onus remains on the claimant at both steps. If they cannot meet the first part of the test, the "analysis stops there."⁶²

i. The Liberty Interest is not engaged

I. The Application Judge correctly determined that the Appellants' liberty interests were not engaged by the POV Requirement. The s. 7 liberty interest includes only

⁶¹ *United Steelworkers, Local 2008 v Canada (Attorney General)*, [2022 QCCS 2455](#); *Canadian Society for the Advancement of Science in Public Policy v British Columbia*, [2022 BCSC 1606](#); *Amalgamated Transit Union, Local 113 et al v. Sinai Health System*, [2021 ONSC 7658](#); *Toronto District School Board v. CUPE, Local 4400*, [2022 CanLII 22110](#); *Costa, Love, Badowich and Mandekic v. Seneca College*, [2022 ONSC 5111](#); *Banas v HMTQ*, [2022 ONSC 999](#); *Lewis v. Alberta Health Services*, [2022 ABCA 359](#) [Lewis].

⁶² *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at [para. 47](#) [Blencoe].

fundamental personal decisions like the right to refuse medical treatment⁶³ and to make “reasonable medical choices” without threat of criminal prosecution.⁶⁴ The POV Requirement “did not require the [Appellants] to undergo any form of medical procedure,”⁶⁵ and the Appellants were not “coerced” by the POV Requirement to receive the COVID-19 vaccine. Rather, they were all able to exercise their choice to remain unvaccinated.⁶⁶ The consequential temporary restriction on their choice to enter a restaurant, theatre or gym so long as they remained unvaccinated did not engage their liberty interests under s. 7.⁶⁷

J. The Appellants appear to accept that the Application Judge reached the correct finding based on the current s. 7 jurisprudence,⁶⁸ but ask this Court to expand the definition of liberty to protect the choice to enter restaurants, theatres and gyms.⁶⁹ Such an interpretation would be inconsistent with the express and repeated guidance from this Court and the Supreme Court of Canada that the threshold of fundamental life choices protected by *Charter* s. 7 “is not synonymous with unconstrained freedom.”⁷⁰ Recently, a five-judge panel of this Court confirmed s. 7's limitation to fundamental personal decisions, observing

⁶³ *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at [paras. 100-102, 136](#).

⁶⁴ *R. v. Smith*, 2015 SCC 34 at [para. 18](#).

⁶⁵ *Reasons for Judgement*, *supra* at [para. 70](#).

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Appellants Factum at para. 24, RCOM, Tab 1, p. 1.

⁶⁹ Appellants Factum at paras. 24-28, RCOM, Tab 1, pp. 1-3.

⁷⁰ *Blencoe*, *supra* at [para. 54](#), *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46 at [para. 117](#) [*G. (J.)*]; *R. v. Schmidt*, 2014 ONCA 188 at [paras. 37-38](#), leave to appeal refused [*Schmidt*]; *Mussani v. College of Physicians and Surgeons of Ontario*, [2004] OJ No 5176 at [para. 46](#), *Lewis*, *supra* at [para. 55](#); *R. v. Malmo-Levine*, 2003 SCC 74, at [para. 86](#) [*Malmo-Levine*].

that “the right to liberty is not to be understood as a *prima facie* freedom from any restraints on action – as though it protects a right to do whatever one wants.”⁷¹

K. The temporary restriction on the Appellants’ ability to enter restaurants, theatres, gyms etc. is analogous to public health laws “preventing an individual from drinking unpasteurized milk” which this Court has held “does not fall within the irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference.”⁷² Similarly, the Supreme Court of Canada has confirmed that other analogous interests, such as smoking marijuana, eating fatty foods, golfing or gambling are not afforded constitutional protection.⁷³ Nor is the unfettered ability of individuals to “spend time with their children and families”⁷⁴ or “to attend operas or piano lessons, or to train for a triathlon without having to keep a pager nearby”⁷⁵ protected by s. 7.

ii. *The Security of the Person interest is not engaged*

L. The Application Judge correctly determined that the Appellants’ security of the person interests were not engaged because the POV Requirement did not interfere with their bodily integrity or autonomy or cause severe psychological suffering.⁷⁶ The POV Requirement did not prohibit or deny any form of medical treatment,⁷⁷ nor did it “require

⁷¹ *Tanase v College of Dental Hygienists of Ontario*, [2021 ONCA 482](#).

⁷² *Schmidt*, *supra* at [paras. 37-38](#).

⁷³ *Malmo-Levine*, *supra* at [para. 86](#); *Association of Justice Counsel v Canada (Attorney General)*, 2017 SCC 55 at [para. 50](#).

⁷⁴ *Association of Justice Counsel v Canada (Attorney General)*, 2017 SCC 55 at [para. 51](#).

⁷⁵ *Ibid* at [para. 50](#).

⁷⁶ *Reasons for Judgement*, *supra* at [para. 73](#); *G. (J.)*, *supra* at [paras. 58, 60](#); *Blencoe*, *supra* at [para. 81](#).

⁷⁷ *Reasons for Judgement*, *supra* at [paras. 71](#) and [75](#); *R. v. Morgentaler*, [1988] 1 SCR 30, *Chaoulli v. Quebec*, 2005 SCC 35, *Canada (AG) v. PHS Community Services Society*, 2011 SCC 44; and *Carter v. Canada (Attorney General)*, 2015 SCC 5; *Maddock v. British Columbia*, 2022 BCSC 1605.

the Appellants to undergo any form of medical procedure, and they remained at all times in control of their bodily integrity, free from state interference, as a result of their choice to remain unvaccinated.”⁷⁸

M. Further, the Application Judge appropriately determined that the Appellants’ evidence did not demonstrate that the impact of temporarily not being able to enter restaurants, theatres or gyms reached the high threshold of severe physical or psychological suffering needed to engage security of the person.⁷⁹ The Application Judge followed well-established jurisprudence that this aspect of s. 7 does not protect one from “the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action.”⁸⁰

N. Finally, the Application judge was not required to consider the Appellants’ evidence, which they claimed cast doubt on the safety and effectiveness of vaccines, in order to determine that their security of the person interests were not engaged by the POV Requirement. The POV Requirement restricted access to certain venues based on vaccination status; it did not require any of the Appellants to receive a vaccine. There was no need for the Application Judge to respond to every argument raised during the proceeding, or “to recite all the evidence or to articulate all the relevant inferences or principles of law.”⁸¹

⁷⁸ *Reasons for Judgement*, *supra* at [para. 70](#).

⁷⁹ *Reasons for Judgement*, *supra* at [para. 73](#).

⁸⁰ *G. (J.)*, *supra* at [para. 59](#); *Reasons for Judgement*, *supra* at [para. 73](#).

⁸¹ *Sandhu v Singh and Sikh Heritage Centre*, 2022 ONSC 1604 at [para. 61](#); *Trillium Motor World Ltd v Cassels Brock & Blackwell LLP*, 2017 ONCA 544 at [para. 354](#); *Welton v United Lands Corporation Limited*, 2020 ONCA 322 at [paras. 60-61](#); *Muise v Mark Wilson’s Better Used Cars Limited*, 2021 ONSC 151 at [para. 12](#), citing *Papp v Stokes*, [2018 ONSC 1598](#) (Div Ct),

Judicial intervention is not warranted to reassess specific aspects of the case that were not resolved (or not needed to be resolved) by the Application Judge.⁸²

O. In any event, as outlined above, Drs. Byram Bridle and Steven Pelech, whose evidence questions COVID-19 vaccine safety and effectiveness, are advocates against the use of these approved vaccines. Their evidence is at odds with the settled scientific consensus and has been ruled inadmissible or discounted in several legal proceedings.⁸³

P. The Application Judge considered the relevant evidence that the Appellants presented about the impact that the POV Requirement had on them and, in line with the governing jurisprudence, appropriately determined that their evidence did not establish that it interfered with an interest of fundamental importance (as attendance at restaurants, theatres, gyms, etc. was not such an interest), or that it had a serious and profound effect on their physical or psychological integrity.

iii. *No principles of fundamental justice were infringed*

Q. Even if the Appellants were able to establish that the Application Judge erred in determining that there was no s. 7 deprivation, which is denied, they fail to demonstrate that

⁸² *Bruno v Dacosta*, 2020 ONCA 602 at [para. 24](#), leave to appeal to SCC ref'd [2021 CanLII 22784](#).

⁸³ *Costa v. Seneca College of Applied Arts and Technology*, 2022 ONSC 5111 at [paras. 18-37](#); *B.C.J.B. v. E.R.R.*, 2022 ONCJ 500 at [para. 265](#); *Canadian Society for the Advancement of Science in Public Policy v. British Columbia (Provincial Health Officer)*, 2023 BCSC 284, at [paras. 88-96](#); see also *O.M.S. v. E.J.S.*, 2023 SKCA 8 at [para. 97](#).

any such deprivation was inconsistent with the principles of fundamental justice.⁸⁴ The POV Requirement was neither arbitrary nor overbroad.

R. As detailed below in Ontario’s submissions on s. 1 of the *Charter*, the purpose of the POV Requirement was to seek the highest achievable rate of vaccination against COVID-19 among the population to (i) protect the public against hospitalization and death due to COVID-19 and (ii) prevent Ontario’s hospitals and ICUs from being overwhelmed by patients in need of urgent COVID-19 treatment.⁸⁵ Incentivising persons to receive a vaccine which, as accepted by the Application Judge and courts across the country,⁸⁶ has been proven to reduce the spread and severity of COVID-19⁸⁷ was clearly connected to this purpose. In this regard, the Divisional Court has observed:

Too many COVID-19 cases can overwhelm medical resources, thereby putting medical personnel in the position of having to decide who gets access to the resources and who does not. Those who do not get access to proper medical care may die. Any steps that may reduce that risk are not arbitrary.⁸⁸

S. Overbreadth concerns government action that overreaches and captures conduct that bears no relation to the legislative objective.⁸⁹ The fact that the POV Requirement applied to all persons over the age of 12, subject to specific exemptions, did not overreach the legislative objective. Being unvaccinated increases chances of hospitalization and death due

⁸⁴ *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at [para. 19](#); *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras. [111](#), [123](#), [125](#) [*Bedford*].

⁸⁵ Stubbings Affidavit, *supra* at para. 2, RCOM, Tab 3, p. 24; *Reasons for Judgement*, *supra* at [para. 18](#).

⁸⁶ *Lavergne-Poitras v. Canada*, 2021 FC 1232 at [para. 69](#) [*Lavergne-Poitras*].

⁸⁷ Hodge Affidavit, paras. 19, 22, 25, 34-40, RCOM, Tab 2, pp. 13, 14-16, 19-21; Stubbings Affidavit, paras. 15 (Ex. “M”), 26 (Ex. “X”), 31 (Ex. “CC”), RCOM, Tab 3, pp. 28, 31, 33; Kwong Affidavit, para. 19, RCOM, Tab 4, p. 112; *Reasons for Judgement*, *supra* at [paras. 14-15](#).

⁸⁸ *Schuyler Farms Limited v. Dr. Nesathurai*, 2020 ONSC 4711 at [para. 101](#).

⁸⁹ *Bedford*, *supra* at [paras. 112-113](#); *R v Heywood*, [1994] 3 SCR 761 at [792-93](#); *R v Clay*, 2003 SCC 75 at [paras. 37-40](#); *R v Demers*, 2004 SCC 46 at [paras. 39-43](#); *Carter*, *supra* at [para. 85](#).

to COVID-19 for all age groups,⁹⁰ so the POV Requirement’s application did not overshoot its purpose of incentivizing vaccination to protect public health and the capacity of Ontario hospitals.

T. Further, it was neither overbroad nor arbitrary to require proof of vaccination for persons previously infected with COVID-19. Proof of vaccination can be readily ascertained, while the same cannot be said with respect to immunity due to prior infection. Moreover, as outlined above, Dr. Kwong’s evidence is that individuals previously infected with SARS-CoV-2 still benefit from receiving two (or more) doses of COVID-19 vaccines.⁹¹

3. The POV Requirement did not infringe Equality Rights (Charter s. 15)

U. The Application Judge correctly determined that the POV Requirement did not discriminate against the Appellants on the basis of disability or religion.⁹² As the Application Judge recognized, the Appellants did not establish that the POV Requirement created a distinction on either of these grounds, or that it had the effect of reinforcing, perpetuating, or exacerbating disadvantage.⁹³

V. To prove a violation under s. 15 of the *Charter*, a “claimant must present sufficient evidence to prove the impugned law, in its impact, creates or contributes to a disproportionate impact on the basis of a protected ground.”⁹⁴ None of the Appellants adduced any qualified medical evidence showing that they had a disability that prevented

⁹⁰ *Reasons for Judgement*, *supra* at [para. 14](#); Hodge Affidavit, *supra* para. 19, RCOM, Tab 2, p. 13.

⁹¹ Kwong Affidavit, *supra* at para. 27, RCOM, Tab 4, pp. 119-120.

⁹² *Reasons for Judgement*, *supra* at [para. 84](#).

⁹³ *Ibid*; *R. v. Sharma*, 2022 SCC 39 at [para. 28](#) [Sharma]; *Fraser v. Ontario*, 2011 SCC 20 at [para. 116](#).

⁹⁴ *Sharma*, *supra* at [para. 42](#).

them from becoming vaccinated for which they could not obtain an exemption to the POV Requirement. Rather, they provided evidence that they, themselves, were apprehensive about the safety and efficacy of vaccines and the potential side effects.⁹⁵

W. The Appellants also did not establish that the POV Requirement had a disproportionate impact on individuals who follow a particular religious doctrine as compared to non-group members. As was the case in *Hutterian Brethren*, many of the reasons for dismissing the Appellants' freedom of religion claims, as outlined above, also apply to their claim of religious discrimination.⁹⁶ The Appellants were not excluded from the designated businesses or organizations because of their religious beliefs, but because they did not comply with public health eligibility requirements for entry.⁹⁷

X. Finally, the impact of the POV Requirement, having regard to the circumstances of the persons impacted and the objects of the scheme, was not to reinforce, perpetuate or exacerbate disadvantage or demeaning stereotypes of a protected group.⁹⁸ Rather, it was to further a neutral, rational and scientifically defensible policy choice to protect public health and safety in the context of a pandemic that has killed over 13,000 Ontarians and routinely strained and threatened to overwhelm the province's hospital capacity.⁹⁹

⁹⁵ See, e.g. Affidavit of Hibah Aoun, sworn January 13, 2022, RCOM, Tab 9; Affidavit of Jackie Ramnauth, sworn January 13, 2022, RCOM, Tab 10; Affidavit of Sam Sabourin, sworn January 13, 2022, RCOM, Tab 11; Affidavit of Sarah Lamb, sworn January 13, 2022, RCOM, Tab 12; Affidavit of Sarah Harjee, sworn January 14, 2022, RCOM, Tab 13; Affidavit of Evan Kraayenbrink, sworn January 14, 2022, RCOM, Tab 14; Affidavit of Linda McDonough, sworn January 14, 2022, RCOM, Tab 15; Affidavit of Mark McDonough, sworn January 14, 2022, RCOM, Tab 16; Affidavit of David Cohen, sworn January 17, 2022, RCOM, Tab 17.

⁹⁶ *Hutterian Brethren*, *supra* at [para. 106](#). See also *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at [paras. 76-78](#).

⁹⁷ *Hutterian Brethren*, *supra* at [para. 107](#).

⁹⁸ *Sharma*, *supra* at [paras. 52-53](#).

⁹⁹ *Hutterian Brethren*, *supra* at [para. 108](#); *R. v. C.P.*, 2021 SCC 19 at [para. 145](#); *Withler v Canada (Attorney General)*, 2011 SCC 12 at [paras. 73, 76, 79](#).

4. The Application Judge did not err by taking judicial notice of the safety and efficacy of vaccines

Y. The Application Judge made no reviewable error with respect to his factual findings. As outlined above, in order to describe the factual background to the POV Requirement, the Application Judge made “findings about the background science of the disease and about vaccines.”¹⁰⁰ He explained, consistent with Ontario’s expert evidence, that the COVID-19 vaccines were approved for use in Canada by Health Canada, are safe and effective, and are not regarded as experimental.¹⁰¹ He noted that being unvaccinated increases the likelihood of serious adverse medical outcomes, while being vaccinated decreases the likelihood of adverse medical outcomes.¹⁰²

Z. This Court has accepted that taking judicial notice of a fact is “highly discretionary,” and that several courts have taken judicial notice of the safety, efficacy and importance of COVID-19 vaccines.¹⁰³ As this Court has also confirmed, “judicial notice *should* be taken of regulatory approval, and regulatory approval is a strong indicator of safety and effectiveness.”¹⁰⁴

AA. In any event, having found no infringement of the *Charter*, the Application Judge was not required to consider the expert evidence on the safety and efficacy of vaccines in

¹⁰⁰ *Reasons for Judgement*, *supra* at [para. 8](#).

¹⁰¹ *Reasons for Judgement*, *supra* at [para. 15](#).

¹⁰² *Ibid.*

¹⁰³ *J.N v C.G.*, 2023 ONCA 77 at [paras. 20](#) and [45](#) [*J.N.*], *Lavergne-Poitras*, *supra* at [para. 69](#); *I.S. v. J.W.*, [2021 ONSC 1194](#); *A.B.S. v. S.S.*, [2022 ONSC 1368](#); *Warren v. Charlton*, [2022 ONSC 1088](#); *Campbell v. Heffern*, [2021 ONSC 5870](#); *Dyquiangco Jr. v. Tipay*, [2022 ONSC 1441](#); *Rashid v. Ayanesov*, [2022 ONSC 3401](#); *Davies v. Todd*, [2022 ONCJ 178](#); *R. v. Frampton*, [2021 ONSC 5733](#); *R. v. Aiello*, [2021 ABQB 772](#); *R. v. Smith*, [2021 NSSC 333](#); *R. v. C.D.*, [2021 SKQB 268](#).

¹⁰⁴ *J.N.*, *supra* at [para. 45](#) (emphasis added).

order to conduct a justification analysis under s. 1. Nevertheless, as outlined above at paragraph 6, the Application Judge’s factual findings were all supported by the evidence before the Court. The Appellants have not pointed to any palpable and overriding error that would justify this Court revisiting those factual findings.

B. In The Alternative, Any Infringements Would Be Justified Under s. 1 of the *Charter*

BB. Even if this Court determines that the Application Judge erred in finding that the Appellants’ *Charter* rights were not infringed by the POV Requirement, the POV Requirement was plainly justified by the province’s need to address an extraordinary public health situation caused by a global pandemic which has killed millions of people.¹⁰⁵ The POV Requirement served a pressing and substantial objective, was rationally connected to that objective, was minimally impairing, and was not disproportionate in its effects.

1. Deference is owed to Ontario’s response to global pandemic

CC. In *Trinity Bible Chapel*, this Court recognized that “the COVID-19 pandemic required Ontario to act on an urgent basis, without scientific certainty, on a broad range of public health fronts.”¹⁰⁶ In this context, “thoughtful deference that recognizes the complexity of the problem presented to public officials, and the challenges associated with crafting a solution” is required.¹⁰⁷ As the Ontario Divisional Court has also explained, it is not the role of courts to engage in “a re-weighing of the complex and often difficult factors,

¹⁰⁵ Hodge Affidavit, *supra* at para. 14, RCOM, Tab 2, p. 10; *Trinity Bible Chapel* ONSC, *supra* at [para. 1](#); *FCA Canada Inc. v. Unifor, Locals 195, 444, 1285*, [2022 CanLII 52913](#) [Unifor].

¹⁰⁶ *Trinity Bible Chapel* ONCA, *supra* at [para. 102](#).

¹⁰⁷ *Trinity Bible Chapel* ONCA, *supra* at [paras. 124-125](#), citing *Beaudoin v. British Columbia*, [2022 BCCA 427](#), citing *Trinity Bible Chapel* ONSC, *supra*.

considerations and choices that must be evaluated by [authorities] during a pandemic.”¹⁰⁸ Given the potentially catastrophic results of being insufficiently cautious, Ontario should be afforded a substantial margin of appreciation in assessing what measures were necessary to combat the pandemic.

DD. Deference is particularly important where a discrete group of claimants seeks to invalidate health measures designed to protect the public at large. As this Court held in *Williams*, “the public officials charged with the responsibility for imposing and lifting [public health] measures must weigh and balance the advantages and disadvantages and strive to act in a manner that best meets the overall interests of the public at large” rather than any particular “narrow class of individuals.”¹⁰⁹

2. POV Requirement served a pressing and substantive objective

EE. The POV Requirement was clearly informed by a pressing and substantial objective. Ontario’s goal was to seek the highest achievable rate of vaccination against COVID-19 among the population so as to (i) protect the public against hospitalization and death due to COVID-19 and (ii) prevent Ontario’s hospitals and ICUs from being overwhelmed by patients urgently needing treatment for COVID-19.¹¹⁰

FF. As the Superior Court in *Trinity Bible Chapel* observed, “it is difficult to quarrel with the importance of these objectives” and “[not] surprisingly, courts across Canada have

¹⁰⁸ *Sprague v. Her Majesty the Queen in right of Ontario*, 2020 ONSC 2335 at [para. 45](#). See also *The Fit Effect v. Brant County Board of Health*, 2021 ONSC 3651 at [para. 88](#).

¹⁰⁹ *Williams v Ontario*, 2009 ONCA 378 at [para. 31](#). See also *Abarquez v Ontario*, 2009 ONCA 374 at [para. 49](#).

¹¹⁰ *Stubbings Affidavit*, *supra* at para. 2, RCOM, Tab 3, p. 24.

held that ‘containing the spread of the virus and the protection of public health is a legitimate objective that can support limits on Charter rights under s. 1.’¹¹¹ On appeal, this Court found no error in the Superior Court’s identification of this objective or the conclusion that it was pressing and substantial.¹¹²

3. Rational connection

GG. The rational connection step of the s. 1 analysis is “not particularly onerous.”¹¹³ Ontario is “not required to scientifically prove that the challenged regulations in fact reduced the spread of COVID-19”¹¹⁴ and need only establish that “it is reasonable to suppose that the limit may further the goal, not that it will do so”.¹¹⁵ Where there exists an “absence of determinative scientific evidence,” the court may rely on “logic, reason and some social science evidence in the course of the justification analysis.”¹¹⁶

HH. There is ample, unequivocal evidence in the record that, when the POV Requirement was introduced, being unvaccinated increased the risk of COVID-19 transmission¹¹⁷ and the risk of severe illness, hospitalization and death caused by COVID-19 infection.¹¹⁸ Choosing to forego vaccination increased the likelihood of harm both to the individual and to Ontarians

¹¹¹ *Trinity Bible Chapel* ONSC, *supra* at [para. 132](#).

¹¹² *Trinity Bible Chapel* ONCA, *supra* at [para. 92](#).

¹¹³ *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at [para. 228](#). See also *Canada v. JTI-MacDonald Corp.*, 2007 SCC 30 at [para. 40](#) [*JTI-MacDonald*].

¹¹⁴ *Trinity Bible Chapel* ONCA, *supra* at [para. 96](#).

¹¹⁵ *Hutterian Brethren*, *supra* at [para. 48](#). See also *Trinity Bible Chapel* ONCA, *supra* at [para. 94](#).

¹¹⁶ *Harper v. Canada*, 2004 SCC 33 at [para. 78](#). See also *R v Michaud*, 2014 ONCA 585 at [para. 102](#); *RJR-Macdonald Inc v Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 SCR 3 199 at [para. 66](#) [*RJR-Macdonald*].

¹¹⁷ The effectiveness of two-dose vaccination against transmission was shown to decline with the Omicron variant, although effectiveness against serious illness and death continued.

¹¹⁸ See above at paras. 7-15.

generally by tying up hospital resources for COVID-19 care that could otherwise be redirected for other pressing health care needs. Such health care harms caused by the decision to forego vaccination were reflected in the growing wait lists for non-COVID-19 treatments.¹¹⁹ The POV Requirement, which incentivized vaccination¹²⁰ and therefore reduced the risk of harms caused by COVID-19 was rationally connected to Ontario's goals.

4. Minimal impairment

II. Minimal impairment does not literally translate into the least intrusive choice imaginable.¹²¹ The Supreme Court of Canada has instead stated that the question is whether the measures chosen by government “fall within a range of reasonable alternatives.”¹²² In setting COVID-19 restrictions in the face of a global pandemic, “Ontario was not required to choose the least ambitious means of protecting the public” and restrictions are “not overbroad simply because Ontario could have chosen from other alternatives.”¹²³

JJ. The POV Requirement was minimally impairing in that it did not apply to outdoor settings or indoor settings where people received medical care, food from grocery stores or medical supplies, among other necessities. It also did not apply to retail shopping, which typically involves shorter periods of congregation and was subject to mask mandates at all

¹¹⁹ Office of the Auditor General of Ontario, “[Value-for-Money Audit: Outpatient Surgeries](#)” (December 2021), *Office of the Auditor General of Ontario*.

¹²⁰ Stubbings Affidavit, *supra* at paras. 15-16 (Ex. “M”, Ex. “N”), RCOM, Tab 3 pp. 28-29.

¹²¹ *JTI-Macdonald*, *supra* at [para. 43](#).

¹²² *JTI-Macdonald*, *supra* at [para. 137](#).

¹²³ *Trinity Bible Chapel ONCA*, *supra* at [para. 125](#). See also *Frank v Canada (Attorney General)*, 2019 SCC 1 at [para. 66](#); *Hutterian Brethren*, *supra* at [para. 37](#); *RJR-Macdonald*, *supra* at [para. 160](#); *JTI-Macdonald*, *supra* at [para. 43](#); and *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 at [para. 96](#).

times. The POV Requirement was also temporary and was lifted once it had served its purpose.¹²⁴

KK. Moreover, exemptions were available on the basis of age and specific conditions presenting a heightened medical risk relating to vaccination.¹²⁵ Further exemptions were outlined at ss. 2.1(6) of Schedule 1 of the Regulation.¹²⁶ Granting further exemptions would have undermined the government's objective of achieving the highest achievable rate of vaccination to protect the public against hospitalization and death due to COVID-19 and prevent hospitals and ICUs from being overwhelmed.¹²⁷

LL. The Appellants argue that the POV Requirement was not minimally impairing because Ontario should instead have "improved the health care system."¹²⁸ They also advocate for various unproven COVID-19 treatments, including ivermectin and vitamin D. However, treatment cannot stop transmission, particularly as SARS-CoV-2 is often transmitted before symptoms are present.¹²⁹ Furthermore, neither ivermectin nor vitamin D were approved by Health Canada or Ontario's COVID-19 Science Table as treatments for COVID-19,¹³⁰ and ivermectin has not been shown to reduce hospitalization risk from COVID-19.¹³¹

¹²⁴ Stubbings Affidavit, *supra* at para. 63 (Ex. "GGG"), RCOM, Tab 3, p. 40.

¹²⁵ Stubbings Affidavit, *supra* at para. 20 (Ex. "R"), RCOM, Tab 3, p. 30.

¹²⁶ *Rules for Areas at Step 3 and at The Roadmap Exit Step*, [O. Reg. 364/20](#).

¹²⁷ *Hutterian Brethren*, *supra* at [paras. 59-60](#).

¹²⁸ Applicants Factum at para. 75, RCOM, Tab 1, p. 4.

¹²⁹ Hodge Affidavit, *supra* at para. 7, RCOM, Tab 2, pp. 7-8.

¹³⁰ Kwong Affidavit, *supra* at para. 28, RCOM, Tab 4, pp. 120-121.

¹³¹ Cross-examination of Dr. Jeff Kwong, p. 152, q. 520; pp. 159-160, q. 546, RCOM, Tab 8, pp. 148, 150-151.

5. Proportionality

MM. The final proportionality stage of the Oakes analysis requires a “broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitations.”¹³²

COVID-19 is a highly transmissible disease that has infected over a million, and killed over 13,000 Ontarians.¹³³ As the Superior Court explained in *Trinity Bible Chapel*, the COVID-19 pandemic constituted a “crisis of the highest order, requiring early and effective intervention by public officials,” and any burden imposed on the Appellants “must be understood within the broader context of the pandemic and the burdens experienced by all residents of Ontario.”¹³⁴

NN. Viewed in this context, as compared to the salutary public health benefits of reducing COVID-19-related harms for individuals and the Ontario healthcare system, the deleterious impact on the Appellants of not being able to dine in a restaurant or attend a sporting event as a result of their choice to remain unvaccinated was wholly negligible and temporary.

PART IV – REMEDY

OO. Should the Court find that the POV Requirement unjustifiably infringed any *Charter* rights of the Appellants, which Ontario denies, the violation would be properly characterized as one stemming from the regulatory scheme itself. As a result, the *Mackin* immunity principle would apply¹³⁵ and the appropriate remedy would fall under s. 52 of the

¹³² *Hutterian Brethren*, *supra* at [para. 77](#).

¹³³ Hodge Affidavit, *supra* para. 14, RCOM, Tab 2, p. 10; *Unifor*, *supra*.

¹³⁴ *Trinity Bible Chapel* ONSC, *supra* at [paras. 160](#) and [169](#). These findings were not disturbed on appeal, *Trinity Bible Chapel* ONCA, *supra*.

¹³⁵ *Mackin v. New Brunswick (Minister of Finance)*, [2002 SCC 13](#) [*Mackin*].

Constitution Act, 1982, not s. 24(1) of the Charter.¹³⁶ This is not a case where maladministration of a law by government officials is at issue and an award of Charter damages in conjunction with a declaration would not be available since there is no basis to find that the government engaged in “conduct that is clearly wrong, in bad faith or an abuse of power”.¹³⁷

PART V – ORDER REQUESTED

PP. Ontario submits that the appeal should be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 28, 2023



Sean Hanley / Emily Owens / Sean Kissick
Of Counsel for the Respondent,
His Majesty the King in Right of Ontario

¹³⁶ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13 at para [275](#); *Vancouver v. Ward*, 2010 SCC 27 at [paras. 1](#) and [34](#); *Henry v British Columbia (Attorney General)*, 2015 SCC 24 at para [38](#); *R v Demers*, *supra* at para [63](#); *Carter v Canada*, *supra* at para [129](#); *Mackin*, *supra*, at para [78](#); *R. v. Ferguson*, 2008 SCC 6 at [para. 63](#); *Schachter v. Canada*, [1992] 2 SCR 679 at [720](#).

¹³⁷ *R v Demers*, *supra* at para [63](#); *Carter v Canada (Attorney General)*, *supra* at para [129](#); *Mackin*, *supra*, at para [78](#).

RESPONDENT'S CERTIFICATE RESPECTING TIME

We estimate that 2.0 hours will be needed for the Respondent's oral argument of the appeal. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario, this 28th day of April, 2023



**Per Sean Hanley, Emily Owens, and Sean
Kissick**

Counsel for the Respondent, His Majesty the
King in Right of Ontario

SCHEDULE “A”

Authorities

1. *Abarquez v Ontario*, [2009 ONCA 374](#).
2. *A.B.S. v. S.S.*, [2022 ONSC 1368](#).
3. *A.C. v. Manitoba (Director of Child and Family Services)*, [2009 SCC 30](#).
4. *Alberta v Hutterian Brethren of Wilson Colony*, [2009 SCC 37](#).
5. *Association of Justice Counsel v Canada (Attorney General)*, [2017 SCC 55](#).
6. *Banas v HMTQ*, [2022 ONSC 999](#).
7. *B.C.J.B. v. E.R.R.*, [\[2022\] O.J. No. 4826](#).
8. *Beaudoin v. British Columbia*, [2022 BCCA 427](#).
9. *Blencoe v British Columbia (Human Rights Commission)*, [2000 SCC 44](#).
10. *Bruker v. Marcovitz*, [2007 SCC 54](#).
11. *Bruno v Dacosta*, [2020 ONCA 602](#).
12. *Campbell v. Heffern*, [2021 ONSC 5870](#).
13. *Canada (Attorney General) v Bedford*, [2013 SCC 72](#).
14. *Canada (Attorney General) v JTI-Macdonald Corp*, [2007 SCC 30](#).
15. *Canada (AG) v. PHS Community Services Society*, [2011 SCC 44](#).
16. *Canadian Society for the Advancement of Science in Public Policy v British Columbia*, [2022 BCSC 1606](#).
17. *Canadian Society for the Advancement of Science in Public Policy v. British Columbia (Provincial Health Officer)*, [2023 BCSC 284](#).
18. *Carter v. Canada (Attorney General)*, [2015 SCC 5](#).

19. *Chaoulli v. Quebec*, [2005 SCC 35](#).
20. *Charkaoui v Canada (Citizenship and Immigration)*, [2007 SCC 9](#).
21. *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2020 SCC 13](#).
22. *Costa, Love, Badowich and Mandekic v. Seneca College*, [2022 ONSC 5111](#).
23. *Davies v. Todd*, [2022 ONCJ 178](#).
24. *Dyquiangco Jr. v. Tipay*, [2022 ONSC 1441](#).
25. *E.T. v. Hamilton-Wentworth District School Board*, [2017 ONCA 893](#).
26. *FCA Canada Inc. v. Unifor, Locals 195, 444, 1285*, [2022 CanLII 52913](#).
27. *Frank v Canada (Attorney General)*, [2019 SCC 1](#).
28. *Fraser v. Ontario*, [2011 SCC 20](#).
29. *Freitag v. Penetanguishene*, [\[1999\] OJ No 3524](#).
30. *Hacopian-Armen Estate v. Mahmoud*, [2021 ONCA 545](#).
31. *Harjee v Ontario*, [2022 ONSC 7033](#).
32. *Harper v Canada (Attorney General)*, [2004 SCC 33](#).
33. *Henry v British Columbia (Attorney General)*, [2015 SCC 24](#).
34. *Housen v Nikolaisen*, [2022 SCC 33](#).
35. *I.S. v. J.W.*, [2021 ONSC 1194](#).
36. *J.N v C.G.*, [2023 ONCA 77](#).
37. *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017 SCC 54](#).
38. *L.A v. E.S.*, [2022 QCCS 2118](#).

39. *Law Society of British Columbia v Trinity Western University*, [2018 SCC 32](#).
40. *Lavergne-Poitras v. Canada*, [2021 FC 1232](#).
41. *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000 SCC 69](#).
42. *Lewis v. Alberta Health Services*, [2022 ABCA 359](#).
43. *Mackin v. New Brunswick (Minister of Finance)*, [2002 SCC 13](#).
44. *Maddock v. British Columbia*, [2022 BCSC 1605](#).
45. *Muise v Mark Wilson's Better Used Cars Limited*, [2021 ONSC 151](#).
46. *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006 SCC 6](#).
47. *Mussani v. College of Physicians and Surgeons of Ontario*, [\[2004\] OJ No 5176](#).
48. *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999 CanLII 653 \(SCC\)](#), [1999] 3 SCR 46.
49. *Newfoundland (Treasury Board) v NAPE*, [2004 SCC 66](#).
50. *O.M.S. v. E.J.S.*, [2023 SKCA 8](#).
51. *Ontario v Trinity Bible Chapel et al*, [2022 ONSC 1344](#).
52. *Ontario v. Trinity Bible Chapel*, [2023 ONCA 134](#).
53. *Papp v Stokes*, [2018 ONSC 1598](#).
54. *R. v. Aiello*, [2021 ABQB 772](#).
55. *R. v. Big M Drug Mart Ltd.*, [\[1985\] 1 SCR 295](#).
56. *R. v. Clay*, [2003 SCC 75](#).
57. *R. v. C.D.*, [2021 SKQB 268](#).
58. *R. v. C.P.*, [2021 SCC 19](#).

59. *R v. Demers*, [2004 SCC 46](#).
60. *R. v. Ferguson*, [2008 SCC 6](#).
61. *R. v. Frampton*, [2021 ONSC 5733](#).
62. *R. v. Heywood*, [1994 CanLII 34 \(SCC\)](#), [1994] 3 SCR 761.
63. *R. v. Malmö-Levine*, [2003 SCC 74](#).
64. *R. v. Michaud*, [2015 ONCA 585](#).
65. *R. v. Morgentaler*, [\[1988\] 1 SCR 30](#).
66. *R. v. Schmidt*, [2014 ONCA 188](#).
67. *R. v. Sharma*, [2022 SCC 39](#).
68. *R. v. Smith*, [2015 SCC 34](#).
69. *R. v. Smith*, [2021 NSSC 333](#).
70. *Rashid v. Ayanesov*, [2022 ONSC 3401](#).
71. *RJR-Macdonald Inc v Canada (Attorney General)*, [1995 CanLII 64 \(SCC\)](#), [1995] 3 SCR 3 199.
72. *Reference re Same-Sex Marriage*, [2004 SCC 79](#).
73. *Sandhu v Singh and Sikh Heritage Centre*, [2022 ONSC 1604](#).
74. *Schachter v. Canada*, [\[1992\] 2 SCR 679](#).
75. *Schuyler Farms Limited v Dr. Nesathurai*, [2020 ONSC 4711](#).
76. *S.L. v. Commission scolaire des Chênes*, [2012 SCC 7](#).
77. *Sprague v Her Majesty the Queen in right of Ontario*, [2020 ONSC 2335](#).
78. *Syndicat Northcrest v. Amselem*, [2004 SCC 47](#).
79. *Tanase v College of Dental Hygienists of Ontario*, [2021 ONCA 482](#).

80. *The Fit Effect v Brant County Board of Health*, [2021 ONSC 3651](#).
81. *Trillium Motor World Ltd v Cassels Brock & Blackwell LLP*, [2017 ONCA 544](#).
82. *United Steelworkers, Local 2008 v Canada (Attorney General)*, [2022 QCCS 2455](#).
83. *Warren v. Charlton*, [2022 ONSC 1088](#).
84. *Welton v United Lands Corporation Limited*, [2020 ONCA 322](#).
85. *Williams v Ontario*, [2009 ONCA 378](#).
86. *Withler v Canada (Attorney General)*, [2011 SCC 12](#).

SCHEDULE “B”

| Authorities | Page |
|---|------|
| <i>Emergency Management and Civil Protection Act</i> , RSO 1990 , c E.9, ss 1, 7.0.1 | 37 |
| <i>Declaration of Emergency</i> , O Reg 50/20 | 39 |
| <i>Reopening Ontario (A Flexible Response to COVID-19) Act</i> , 2020, SO 2020, c 17 | 40 |
| <i>Rules for Areas at Step 3 and at the Roadmap Exit Step</i> , O Reg 364/20 , Schedule 1, ss 2(2.1), 2.1 | 47 |
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Emergency Management and Civil Protection Act, [RSO 1990](#), c E.9, s 1, s 7.0.1.

Definitions

1 In this Act,

“emergency” means a situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise; (“situation d’urgence”)

...

Declaration of emergency

7.0.1 (1) Subject to subsection (3), the Lieutenant Governor in Council or the Premier, if in the Premier’s opinion the urgency of the situation requires that an order be made immediately, may by order declare that an emergency exists throughout Ontario or in any part of Ontario. 2006, c. 13, s. 1 (4).

Confirmation of urgent declaration

(2) An order of the Premier that declares an emergency is terminated after 72 hours unless the order is confirmed by order of the Lieutenant Governor in Council before it terminates. 2006, c. 13, s. 1 (4).

Criteria for declaration

(3) An order declaring that an emergency exists throughout Ontario or any part of it may be made under this section if, in the opinion of the Lieutenant Governor in Council or the Premier, as the case may be, the following criteria are satisfied:

1. There is an emergency that requires immediate action to prevent, reduce or mitigate a danger of major proportions that could result in serious harm to persons or substantial damage to property.
2. One of the following circumstances exists:
 - i. The resources normally available to a ministry of the Government of Ontario or an agency, board or commission or other branch of the government, including existing legislation, cannot be relied upon without the risk of serious delay.

- ii. The resources referred to in subparagraph i may be insufficiently effective to address the emergency.
- iii. It is not possible, without the risk of serious delay, to ascertain whether the resources referred to in subparagraph i can be relied upon. 2006, c. 13, s. 1 (4).

Declaration of Emergency, [O Reg 50/20](#)

ONTARIO REGULATION 50/20

made under the

EMERGENCY MANAGEMENT AND CIVIL PROTECTION ACT

Made: March 17, 2020 (7:30 am) Filed: March 18, 2020

Published on e-Laws: March 19, 2020

Printed in The Ontario Gazette: April 4, 2020

DECLARATION OF EMERGENCY

WHEREAS the outbreak of a communicable disease namely COVID-19 coronavirus disease constitutes a danger of major proportions that could result in serious harm to persons;

AND WHEREAS the criteria set out in subsection 7.0.1(3) of the *Emergency Management and Civil Protection Act*, R.S.O. 1990, chapter E.9 (the “Act”) have been satisfied;

NOW THEREFORE, an emergency is hereby declared pursuant to section 7.0.1 of the Act in **the whole of the Province of Ontario**.

Reopening Ontario (A Flexible Response to COVID-19) Act, [2020 S.O. 2020,](#)
[CHAPTER 17](#)

Interpretation

Definitions

1. In this Act,

“continued section 7.0.2 order” means an order continued under section 2 that was made under section 7.0.2 of the *Emergency Management and Civil Protection Act*; (“décret pris en vertu de l’article 7.0.2 et maintenu”)

“COVID-19 declared emergency” means the emergency declared pursuant to Order in Council 518/2020 (Ontario Regulation 50/20) on March 17, 2020 pursuant to section 7.0.1 of the *Emergency Management and Civil Protection Act*. (“situation d’urgence déclarée en raison de la COVID-19”)

“occupier” has the same meaning as in the *Trespass to Property Act*; (“occupant”)

“premises” has the same meaning as in the *Trespass to Property Act*. (“lieux”) 2020, c. 17, s. 1; 2020, c. 23, Sched. 6, s. 1.

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

[2020, c. 23, Sched. 6, s. 1](#) - 01/10/2020

Orders

Orders continued

2 (1) The orders made under section 7.0.2 or 7.1 of the *Emergency Management and Civil Protection Act* that have not been revoked as of the day this subsection comes into force are continued as valid and effective orders under this Act and cease to be orders under the *Emergency Management and Civil Protection Act*.

Exception

(2) Subsection (1) does not apply to the order filed as Ontario Regulation 106/20 (Order Made Under the Act — Extensions and Renewals of Orders).

Clarification

(3) For greater certainty, an order that is in force is continued under subsection (1) even if, on the day that subsection comes into force, the order does not apply to any area of the Province.

Time limit on application of orders

3 (1) An order continued under section 2 ceases to apply 30 days after it is continued under section 2, subject to extension under subsection (2).

Extension of orders

(2) The Lieutenant Governor in Council may by order, before it ceases to apply, extend the effective period of an order for periods of no more than 30 days.

Power to amend orders

4 (1) The Lieutenant Governor in Council may, by order,

(a) subject to subsections (2) and (5), amend a continued section 7.0.2 order in a way that would have been authorized under section 7.0.2 of the *Emergency Management and Civil Protection Act* if the COVID-19 declared emergency were still in effect and

references in that section to the emergency were references to the COVID-19 pandemic and its effects;

(b) amend an order continued under section 2 to address transitional matters relating to the termination of the COVID-19 declared emergency, the enactment of this Act or the continuation of orders under section 2.

Limitation on amendments

(2) An amendment may be made under clause (1) (a) only if,

(a) the amendment relates to one or more of the subject matters listed in subsection (3); or

(b) the amendment requires persons to act in compliance with any advice, recommendation or instruction of a public health official.

Same

(3) The subject matters referred to in clause (2) (a) are the following:

1. Closing or regulating any place, whether public or private, including any business, office, school, hospital or other establishment or institution.

2. Providing for rules or practices that relate to workplaces or the management of workplaces, or authorizing the person responsible for a workplace to identify staffing priorities or to develop, modify and implement redeployment plans or rules or practices that relate to the workplace or the management of the workplace, including credentialing processes in a health care facility.

3. Prohibiting or regulating gatherings or organized public events.

Definition of “credentialing process”

(4) In paragraph 2 of subsection (3),

“credentialing process” means the activities, processes, procedures and proceedings for appointing and reappointing health care staff and determining the nature and scope of privileges assigned to them.

Orders that may not be amended

(5) Amendments may not be made under clause (1) (a) to the following orders:

1. Ontario Regulation 75/20 (Drinking Water Systems and Sewage Works).
2. Ontario Regulation 76/20 (Electronic Service).
3. Ontario Regulation 80/20 (Electricity Price for RPP Consumers).
4. Ontario Regulation 114/20 (Enforcement of Orders).
5. Ontario Regulation 120/20 (Order Under Subsection 7.0.2 (4) of the Act — Access to COVID-19 Status Information by Specified Persons).
6. Ontario Regulation 129/20 (Signatures in Wills and Powers of Attorney).
7. Ontario Regulation 132/20 (Use of Force and Firearms in Policing Services).
8. Ontario Regulation 141/20 (Temporary Health or Residential Facilities).
9. Ontario Regulation 190/20 (Access to Personal Health Information by Means of the Electronic Health Record).
10. Ontario Regulation 192/20 (Certain Persons Enabled to Issue Medical Certificates of Death).

11. Ontario Regulation 210/20 (Management of Long-Term Care Homes in Outbreak).
12. Ontario Regulation 240/20 (Management of Retirement Homes in Outbreak).
13. Ontario Regulation 241/20 (Special Rules Re Temporary Pandemic Pay).
14. Ontario Regulation 345/20 (Patios).

Amendments may change requirements, extend application

(6) For greater certainty, an amendment made under clause (1) (a) may do the following, subject to subsection (2):

1. Impose more onerous or different requirements, including in different parts of the Province.
2. Extend the application of the order being amended, including the geographic scope of the order and the persons it applies to.

Amendments may be retroactive

(7) An amendment, if it so provides, may be retroactive to a date specified in the amending order that is on or after the day subsection (1) came into force.

Regulations to define “public health official”

(8) The Lieutenant Governor in Council may make regulations defining “public health official” for the purposes of clause (2) (b).

Power to revoke orders

5 The Lieutenant Governor in Council may by order revoke an order continued under section 2.

Delegation of powers

6 The Lieutenant Governor in Council may by order delegate to a minister of the Crown any of the powers of the Lieutenant Governor in Council under section 3, 4 or 5.

Provisions applying with respect to orders

7 (1) Subsections 7.2 (3) to (8) of the *Emergency Management and Civil Protection Act* continue to apply, with necessary modifications, with respect to orders continued under section 2, including any amendments to such orders made under this Act.

Same

(2) Subsections 7.0.2 (6) to (9) of the *Emergency Management and Civil Protection Act* continue to apply, with necessary modifications and the modifications specified in subsection (3), with respect to continued section 7.0.2 orders, including any amendments to such orders made under this Act.

Modifications

(3) The modifications referred to in subsection (2) are the following:

1. The reference, in paragraph 1 of subsection 7.0.2 (7) of the *Emergency Management and Civil Protection Act*, to the emergency is deemed to be a reference to the COVID-19 pandemic and its effects.
2. The reference, in paragraph 2 of subsection 7.0.2 (7) of the *Emergency Management and Civil Protection Act*, to when the declared emergency is terminated is deemed to be a reference to when the order in relation to which that paragraph applies is revoked or ceases to apply.

Expiry of power to amend, extend orders

8 (1) The following powers cease to apply on the first anniversary of the day orders are continued under section 2:

1. The power under subsection 3 (2) to extend orders.
2. The power under section 4 to amend orders.

Extension by Assembly resolution

(2) The Assembly, on the recommendation of the Premier, may by resolution extend the expiry date mentioned in subsection (1) for additional periods of no more than one year.

Same

(3) If there is a resolution before the Assembly to extend the expiry date, the powers listed in subsection (1) shall continue until the resolution is voted on.

Effect of orders after expiry of power to amend, extend

(4) An order extended under subsection 3 (2) continues in effect until the date to which it was extended, even if that date is after the time the powers listed in subsection (1) cease to apply, unless it is revoked before that date.

Enforcement

Proceedings to restrain contravention of order

9 Despite any other remedy or any penalty, the contravention by any person of a continued section 7.0.2 order may be restrained by order of a judge of the Superior Court of Justice upon application without notice by the Crown in right of Ontario or a member of the Executive Council and the judge may make the order and it may be enforced in the same manner as any other order or judgment of the Superior Court of Justice.

Temporary closure by police, etc.

9.1 (1) A police officer, special constable or First Nations Constable may order that premises be temporarily closed if the police officer, special constable or First Nations Constable has reasonable grounds to believe that an organized public event or other gathering is occurring at the premises and that the number of people in attendance exceeds the number permitted under a continued section 7.0.2 order. 2020, c. 23, Sched. 6, s. 2.

Compliance with order

(2) Every individual who is on the premises shall comply with the order to temporarily close the premises by promptly vacating the premises after being informed of the order. 2020, c. 23, Sched. 6, s. 2.

Same

(3) No individual shall re-enter the premises on the same day that the premises were temporarily closed under subsection (1) unless a police officer, special constable or First Nations Constable authorizes the re-entry. 2020, c. 23, Sched. 6, s. 2.

Exception for residents

(4) Subsections (2) and (3) do not apply to individuals residing in the premises. 2020, c. 23, Sched. 6, s. 2.

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

[2020, c. 23, Sched. 6, s. 2](#) - 01/10/2020

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.

Separate offence

(2) A person is guilty of a separate offence on each day that an offence under subsection (1) occurs or continues. 2020, c. 17, s. 10 (2).

Increased penalty

(3) Despite the maximum fines set out in subsection (1), the court that convicts a person of an offence may increase a fine imposed on the person by an amount equal to the financial benefit that was acquired by or that accrued to the person as a result of the commission of the offence. 2020, c. 17, s. 10 (3).

Exception

(4) No person shall be charged with an offence under subsection (1) for failing to comply with or interference or obstruction in respect of an order that has been amended retroactive to a date that is specified in the amendment, if the failure to comply, interference or obstruction is in respect of conduct to which the retroactive amendment applies and the conduct occurred before the retroactive amendment was made but after the retroactive date specified in the amendment. 2020, c. 17, s. 10 (4).

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

[2020, c. 23, Sched. 6, s. 3](#) - 01/10/2020

Offence for occupier of premises

10.1 (1) A person is guilty of an offence if the person hosts or organizes a public event or other gathering at residential premises or other prescribed premises and the number of people in attendance exceeds the number permitted under a continued section 7.0.2 order. 2020, c. 23, Sched. 6, s. 4.

Presumption that owner, etc. is hosting or organizing

(2) If the owner or occupier of premises at which a public event or other gathering is held is present at the event or gathering, the owner or occupier is presumed, in the absence of evidence to the contrary, to be hosting or organizing the event or gathering. 2020, c. 23, Sched. 6, s. 4.

Penalties

(3) A person who is convicted of an offence under subsection (1) is liable,

(a) in the case of an individual, subject to clause (b), to a fine of not less than \$10,000 and 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 less than \$10,000 and 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 less than \$10,000 and not more than \$10,000,000. 2020, c. 23, Sched. 6, s. 4.

Applicable provisions

(4) Subsections 10 (2) to (4) apply, with necessary modifications, with respect to offences under subsection (1). 2020, c. 23, Sched. 6, s. 4.

Regulations

(5) The Lieutenant Governor in Council may make regulations prescribing premises for the purposes of subsection (1). 2020, c. 23, Sched. 6, s. 4.

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

[2020, c. 23, Sched. 6, s. 4](#) - 01/10/2020

Reporting

Reports to public

11 The Premier, or a Minister to whom the Premier delegates the responsibility, shall regularly report to the public with respect to the orders continued under section 2 that continue to apply.

Reports to Assembly committee at 30-day intervals

12 At least once every 30 days, the Premier, or a Minister to whom the Premier delegates the responsibility, shall appear before, and report to, a standing or select committee designated by the Assembly concerning,

- (a) orders that were extended during the reporting period; and
- (b) the rationale for those extensions.

Report to Assembly after one year

13 (1) Within 120 days after the first anniversary of the day orders are continued under section 2, the Premier shall table a report in the Assembly concerning,

- (a) orders that were amended under this Act;
- (b) orders that were extended under this Act; and
- (c) the rationale for those amendments and extensions, including how any applicable conditions and limitations on the making of the amendments were satisfied.

Report, if extension under s. 8

(2) If the expiry date mentioned in subsection 8 (1) is extended under section 8, the Premier shall, within 120 days after the end of each extension period, table an additional report in the Assembly concerning,

- (a) the rationale for recommending the extension;
- (b) orders that were amended during the extension period;
- (c) orders that were extended during the extension period; and
- (d) the rationale for those amendments and extensions, including how any applicable conditions and limitations on the making of the amendments were satisfied.

General

Protection from action

14 Section 11 of the *Emergency Management and Civil Protection Act* applies, with necessary modifications, with respect to orders continued, amended, extended or revoked under this Act.

Action not an expropriation

15 (1) Section 13.1 of the *Emergency Management and Civil Protection Act* applies, with necessary modifications and the modification specified in subsection (2), with respect to this Act and orders continued, amended, extended or revoked under this Act.

Modification

(2) The modification referred to in subsection (1) is the following:

1. The reference, in subsection 13.1 (2) of the *Emergency Management and Civil Protection Act*, to the emergency is deemed to be a reference to the COVID-19 pandemic and its effects.

Crown bound

16 This Act binds the Crown.

Termination of COVID-19 declared emergency

17 Unless it has been terminated before this section comes into force, the COVID-19 declared emergency is terminated and Ontario Regulation 50/20 (Declaration of Emergency) is revoked.

18 Omitted (provides for coming into force of provisions of this Act).

19 Omitted (enacts short title of this Act).

Rules For Areas at Step 3 and at the Roadmap Exit Step: [O Reg 364/20](#) (As existed on September 22, 2021), Schedule 1, ss 2(2.1), 2.1

STEP 3

SCHEDULE 1

GENERAL RULES AT STEP 3

General compliance

2.(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.

...

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.

Revoking Various Regulations, [O Reg 346/22](#)

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

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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.

SARAH HARJEE ET AL. -and - HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ONTARIO
Applicants

Respondent

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| | COURT OF APPEAL FOR ONTARIO Proceedings Commenced at Toronto |
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