

Court File No. CV-20-00643451-0000

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

Vaccine Choice Canada (VCC), Josee Anne McMAHON, Melina LEPE, Petronela GROZA, Carla SPIZZIRRI, _____, Alysa SHEPHERD, Scott Daniel COOKE (by his litigation guardian Denise Adele COOKE), and Denis RANCOURT

Plaintiffs/Responding Parties

- and -

Justin TRUDEAU, Prime Minister of Canada, Dr. Theresa TAM, Chief Medical Officer for Canada, Marc GARNEAU, Canadian Transport Minister, Doug FORD, Premier of Ontario, Christine ELLIOT, Minister of Health and Long-Term Care for Ontario, Stephen LECCE, Minister of Education for Ontario, Dr. David WILLIAMS, Ontario Chief Medical Officer, CITY OF TORONTO, John TORY, Mayor City of Toronto, Dr. Eileen DE VILLA, Toronto Chief Medical Officer, The County of WELLINGTON-DUFFERIN-GUELPH ("CWDG"), Nicola MERCER (Chief) Medical Officer for CWDG, WINDSOR-ESSEX COUNTY, Dr. Wajid AHMED (Chief) Medical Officer for Windsor-Essex County, His Majesty the King in Right of Canada, His Majesty the King in Right of Ontario, Attorney General of Canada, Attorney General of Ontario, The Canadian Broadcasting Corporation ("CBC"), Johns and James DOE, officials and employees of the above-noted Defendants

Defendants/Moving Parties

**FACTUM OF THE DEFENDANT/ MOVING PARTY DR. NICOLA MERCER
(returnable January 30, 2023)**

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PART I – OVERVIEW

1. An action was commenced by seven Plaintiffs who are individuals and a not-for profit organization called Vaccine Choice Canada (“VCC”) (collectively the “Plaintiffs”) against several defendants including Dr. Nicola Mercer.
2. Dr. Mercer (improperly named (Chief) Medical Officer of Health for the County of Wellington-Dufferin-Guelph) is the Medical Officer of Health for Wellington-Dufferin-Guelph Public Health.
3. Although the Plaintiffs have named the County of Wellington-Dufferin-Guelph as a Defendant, no such entity exists.
4. The action seeks declarations that the imposition of COVID measures by Dr. Mercer, in particular measures pertaining to the mandatory wearing of face-masks, are *ultra vires*, unconstitutional, and an abuse and in excess of her authority.
5. The allegations in the Amended Statement of Claim in issue do not disclose a specific cause of action as against Dr. Mercer and are scandalous, frivolous and vexatious or are otherwise an abuse of process. For these reasons, all claims against Dr. Mercer should be struck or dismissed in whole or in part, with no leave to amend.
6. Further, Dr. Mercer is immune from personal liability pursuant to section 95 of the *Health Protection and Promotion Act*, and for this reason, all claims against her should be struck, for disclosing no reasonable cause of action, with no leave to amend.
7. In the alternative, even if the Plaintiffs’ pleadings have disclosed a specific cause of action as against Dr. Mercer, all claims against Dr. Mercer should be dismissed as all Orders and Letters of Instruction made by Dr. Mercer have expired or been revoked. Therefore, the issues in the pleadings are moot and the Court should not exercise its discretion to hear them.
8. Dr. Mercer seeks leave to file evidence in support of the issue of mootness as well as relief in accordance with the above by way of this motion.

PART II – THE FACTS

9. During the COVID-19 pandemic and in an effort to decrease or eliminate the risks to health associated with same, Dr. Mercer issued five Class Orders pursuant to section 22 of the *Health Protection and Promotion Act* which addressed wearing of masks and face coverings. One of the Orders addressed to all persons who own or operate a Commercial Establishment or other Establishment, or Multi-unit Dwelling or a vehicle providing private commercial transportation, also required such persons to ensure the availability of alcohol based hand rub at all entrances and exits for the use of all Persons entering or exiting the Establishment or Private Commercial Vehicle.

Affidavit of Heather Power, Tab 3 of the Moving Party's Motion Record, at para. 2.

10. In addition to the foregoing:
- (a) Dr. Mercer issued one class order directed to owners and operators of driver instruction or driver examination vehicles addressing wearing of masks and face coverings as well as covid screening and eye protection requirements and availability of alcohol based hand rub.
 - (b) Dr. Mercer issued one Class Order to persons who identify as Old Order Mennonites dealing with self-isolation.
 - (c) Dr. Mercer issued two Class Orders to persons who own or operate Places of Worship, buildings or Structures offering services to Old Order Mennonites directing the closure of such premises.
 - (d) Dr. Mercer issued one Class Order to all Chairs and Directors of Education who operate or administer schools within the boundaries of Wellington-Dufferin-Guelph Public Health dealing with suspension of in-person student learning.

Affidavit of Heather Power, Tab 3 of the Moving Party's Motion Record, at paras 4 and 6.

11. Dr. Mercer also issued two Letters of Instruction Section 2(2) of Schedule 1 to Ontario Regulation 364/20: Rules for Areas at Step 3 And At The Roadmap Exit Step, both made under the *Reopening Ontario (A Flexible Response to COVID-19)*. One Letter of

Instruction required remote work where possible. The second required proof of vaccination for persons entering facilities used for sport and recreation activities within the within the boundaries of the geographic area served by Wellington-Dufferin-Guelph Public Health.

Affidavit of Heather Power, Tab 3 of the Moving Party's Motion Record, at para. 8.

12. All such Class Orders and Letters of Instruction related to COVID-19 have expired or been revoked since at latest March 2022 and have not subsequently been reinstated or replaced. There are currently no active COVID-19 related Class Orders or Letters of Instruction issued by Dr. Mercer or Wellington-Dufferin-Guelph Public Health.

Affidavit of Heather Power, Tab 3 of the Moving Party's Motion Record, at paras 3, 5, 7, 9, 10 and 11.

13. On July 6, 2020, the action was commenced by way of a Statement of Claim which was subsequently amended to remove one of the named individual Plaintiffs. The action was also discontinued as against The Canadian Broadcasting Corporation in July 2022.

- Notice of Motion dated June 29, 2023, of the Moving Party's Motion Record, at pg. 16.**

The Remedies Sought

14. The Plaintiffs have made numerous allegations and seek various declarations in respect of various federal, provincial and Municipal governments and officials and against various non-parties including Bill Gates and the World Health Organization (WHO).
15. With limited exceptions as noted below, the Plaintiffs' allegations do not refer to any conduct by Dr. Mercer.
16. As regards the allegations and remedies sought against Dr. Mercer in her capacity as Medical Officer of Health in paragraph 1(g) of the Amended Statement of Claim the Plaintiffs seek a declaration that, "*...in the imposition of COVID measures, Trudeau, Ford, and Tory and all the named medical officer defendants, have engaged in ultra vires and unconstitutional conduct and have acted in, abuse and excess of their authority.*" However,

the specific statutes of which the “COVID measures” imposed by Dr. Mercer are *ultra vires* are not identified.

17. The Plaintiff’s also seek a declaration in paragraph 1(i) (i) of the Amended Statement of Claim that, “... *the orders from the medical Officers from the Counties of Wellington-Dufferin Guelph [sic] and Winsor-Essex [sic], and any and all County or Municipal By-law or Health officers and orders, respecting mandatory wearing face-masks, is [sic] unconstitutional*”.
18. Although, the Plaintiffs have requested in paragraph 1(r) of the Amended Statement of Claim a “*Declaration that any and/ all Municipal /County By-Laws and/or orders, with respect to compulsory face masks, are ultra vires the Provincial legislation in that the Province has expressly refused to make face-masking compulsory*”, no such request or allegation was made in respect of or Orders made by Medical Officers of Health pursuant to s. 22 of the HPPA or Letters of Instruction issued pursuant to Schedule 1, Section 2(2) of Ontario Reg. 364/20: Rules for Areas in Step 3 and at the Roadmap Exit Step of the Reopening Ontario Act.
19. Similarly, although at paragraph 3 of the Amended Statement of Claim the Plaintiffs seek as against the Crown and Municipal Defendants, interim and/or final injunctive relief, from any mandatory vaccine, or compelled use of face masks, Dr. Mercer is neither the Crown nor a Municipal Defendant and no such relief is sought in respect of Orders made by Dr. Mercer in her capacity as Medical Officer of Health pursuant to s. 22 of the *Health Promotion and Protection Act* or Letters of Instruction issued pursuant to Schedule 1, Section 2(2) of Ontario Reg. 364/20: Rules for Areas in Step 3 and at the Roadmap Exit Step of the *Reopening Ontario Act*.
20. Additionally, the Plaintiffs seek declarations that several public health principles, including self-isolation, social distancing, and the compulsory wearing of face masks, are not medically effective, and that they violate several sections of the *Charter*.
21. Finally, while at paragraph 3 of the Amended Statement of Claim the Plaintiffs seek as against the Crown and Municipal Defendants, interim and/or final injunctive relief, from any mandatory vaccine, or compelled use of face-masks. No such relief is sought in respect of Orders made by Dr. Mercer in her capacity as Medical Officer of Health pursuant to s. 22 of the *Health Promotion and Protection Act* or Letters of Instruction issued

pursuant to Schedule 1, Section 2(2) of Ontario Reg. 364/20: Rules for Areas in Step 3 and at the Roadmap Exit Step of the *Reopening Ontario Act*.

The Individual Plaintiffs' Allegations

22. The individual plaintiffs plead facts on the alleged damages they have suffered as a result of the COVID-19 pandemic.
23. With the exception of the Plaintiffs, Josee Anne McMahon, Melina Lepe and Alysa Shepherd,
 - i. none of the individual Plaintiffs reside in the area subject to the jurisdiction of Dr. Mercer in her capacity as the Medical Officer of Wellington-Dufferin Guelph Public Health or claim to have resided in, visited, or operated a business or event in that area at the relevant time;
 - ii. have pleaded that any of the orders, directives made by Dr. Mercer have had any impact on their personal Charter rights or deprived the Plaintiffs of their constitutional rights in light of them all residing outside of the area over which Dr. Mercer has jurisdiction.
24. The Plaintiffs Petronella Groza, Carla Spizzeri, Daniel Cookeby by his litigation Guardian Denise Adelle Cooke and Denis Rancourt make no mention of Dr. Mercer.
25. The only reference made by Ms. McMahan in respect of any conduct or Order by Dr. Mercer in the facts section of the Amended Statement of Claim is found at paragraph 9(f) where, although she is stated in paragraph 7 to be a resident of Mississauga, she pleads that she "... *cannot do groceries as she would normally in Wellington County because of the mandatory mask order*".

Moving Party's Motion Record, Tab 1 p 38

26. In paragraph 9(d) of the Amended Statement of Claim Ms. McMahon alleges that some stores required the use of hand sanitizer as a condition of entry. No facts are plead to indicate that any such stores were located in the geographic area subject to Dr. Mercer's Orders or that any Order made by Dr. Mercer obliged stores to make the use of hand sanitizer a condition of entry.

Moving Party's Motion Record, Tab 1 p 37

27. The only reference made by Ms. Lepe in respect of any conduct by Dr. Mercer in the facts section of the Amended Statement of Claim is located at paragraph 24(c) where the Plaintiffs refer to a "*mandatory mask order by Dr. Mercer.*"

Moving Party's Motion Record, Tab 1 p 45

28. The only specific reference made by Ms. Shepherd in respect of any conduct by Dr. Mercer in the facts section of the Amended Statement of Claim is located at paragraph 33(g) of the Amended Statement of Claim where she refers to an "*order for mandatory masking.*"

Moving Party's Motion Record, Tab 1 p 55

29. The only other reference to conduct by Dr. Mercer is in paragraph 136 (a) of the Amended Statement of Claim and likewise is in respect of an order pertaining to masking by customers and employees of businesses.

Moving Party's Motion Record, Tab 1 p 76

30. Although the Amended Statement of Claim contains numerous allegations regarding the adverse effect of measures imposed by various levels of government or by third parties and regulatory bodies that are not named as defendants to this action, none of the Plaintiffs have pleaded that Dr. Mercer made Orders other than in relation to masks or that they were adversely affected by any conduct on the part of Dr. Mercer other than with respect to orders pertaining to masks (McMahon paragraph 9(f) ; Lepe paragraph 24; and Shepherd 31(c) and (g)).
31. Pages 46 to 190 of the Amended Statement of Claim, describe at length how the COVID-19 pandemic was created by "Billionaire, Corporate, and Organizational Oligarchs" with the goal of installing a "New World (Economic) Order."

Moving Party's Motion Record, Tab 1 p 63

PART III – THE ISSUES

32. The issues to be determined on this motion are:

- (i) Should this Court strike the Plaintiffs' pleading as against the Defendant, Dr. Mercer, with no leave to amend, because it discloses no reasonable cause of action?
- (ii) Alternatively, should this Court strike the Plaintiffs' pleading as against the Defendant, Dr. Mercer, with no leave to amend, because it discloses no reasonable cause of action as she is immune from personal liability?
- (iii) Alternatively, should this Court strike or dismiss the Plaintiffs' pleading as against the Defendant, Dr. Mercer, with no leave to amend, because it is scandalous, frivolous and vexatious or is otherwise an abuse of process?
- (iv) Alternatively, should this Court dismiss the Plaintiffs' pleading as against the Defendant, Dr. Mercer, with no leave to amend, because the pleading is moot?
- (v) Should this Court grant leave, if required, to file evidence in support of the argument of mootness?

PART IV – THE LAW

33. The Defendant, Dr. Mercer repeats and relies upon the following:

- i. the Law section regarding pleadings that are scandalous, frivolous, vexatious and are otherwise an abuse of process as set out in the Factum of the Defendants, Justin Trudeau, Prime Minister of Canada, Dr. Theresa Tam, Chief Medical Officer for Canada, Marc Garneau, Canadian Transport Minister, His Majesty the King in Right of Canada and the Attorney General of Canada;
- ii. the Law section regarding mootness as set out in the Factum of the Defendants, Doug Ford, Premier of Ontario, Christine Elliot, Minister of Health and Long-Term Care for Ontario, Stephen Lecce, Minister of Education for Ontario, Dr. David Williams, Ontario Chief Medical Officer, Attorney General of Ontario; and
- iii. the Law section regarding leave to file evidence as set out in the Factum of the Defendants, City of Toronto, John Tory, Mayor City of Toronto, Dr. Eileen De Villa, Toronto Chief Medical Officer.
- iv. the Law section regarding no reasonable cause of action as set out in the Factum of the Defendants, Windsor-Essex County (properly known as the Windsor

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Essex County Health Unit) and Dr. Wajid Ahmed (Chief) Medical Officer for Windsor-Essex County (properly known as Medical Officer of Health Windsor-Essex County)

v. This Factum will set out the law as it relates to immunity from personal liability.

Immunity from Personal Liability

34. S. 95(1) of the Health Promotion and Protection Act RSO 1990, c H.7 (HPPA) provides as follows:

Protection from personal liability

95 (1) No action or other proceeding for damages or otherwise shall be instituted against the Chief Medical Officer of Health or an Associate Chief Medical Officer of Health, a member of a board of health, a medical officer of health, an associate medical officer of health of a board of health, an acting medical officer of health of a board of health or a public health inspector or an employee of a board of health or of a municipality who is working under the direction of a medical officer of health for any act done in good faith in the execution or the intended execution of any duty or power under this Act or for any alleged neglect or default in the execution in good faith of any such duty or power.

35. Section 2 of the HPPA defines the purpose of the Act:

Purpose

2 The purpose of this Act is to provide for the organization and delivery of public health programs and services, the prevention of the spread of disease and the promotion and protection of the health of the people of Ontario.

36. The Orders pertaining to masks and other public health measures, were entirely consistent with the purposes of the HPPA as set out in s. 2 and fell squarely within scope of the grant of authority under Section 22 of the HPPA which provides as follows:

Order by M.O.H. re communicable disease

22 (1) A medical officer of health, in the circumstances mentioned in subsection (2), by a written order may require a person to take or to refrain from taking any action that is specified in the order in respect of a communicable disease. R.S.O. 1990, c. H.7, s. 22 (1).

Condition precedent to order

(2) A medical officer of health may make an order under this section where he or she is of the opinion, upon reasonable and probable grounds,

- (a) that a communicable disease exists or may exist or that there is an immediate risk of an outbreak of a communicable disease in the health unit served by the medical officer of health;
- (b) that the communicable disease presents a risk to the health of persons in the health unit served by the medical officer of health; and
- (c) that the requirements specified in the order are necessary in order to decrease or eliminate the risk to health presented by the communicable disease. R.S.O. 1990, c. H.7, s. 22 (2); 1997, c. 30, Sched. D, s. 3 (1).

Time

(3) In an order under this section, a medical officer of health may specify the time or times when or the period or periods of time within which the person to whom the order is directed must comply with the order. R.S.O. 1990, c. H.7, s. 22 (3).

What may be included in order

(4) An order under this section may include, but is not limited to,

- (a) requiring the owner or occupier of premises to close the premises or a specific part of the premises;
- (b) requiring the placarding of premises to give notice of an order requiring the closing of the premises;
- (c) requiring any person that the order states has or may have a communicable disease or is or may be infected with an agent of a communicable disease to isolate himself or herself and remain in isolation from other persons;
- (d) requiring the cleaning or disinfecting, or both, of the premises or the thing specified in the order;
- (e) requiring the destruction of the matter or thing specified in the order;
- (f) requiring the person to whom the order is directed to submit to an examination by a physician and to deliver to the medical officer of health a report by the physician as to whether or not the person has a communicable disease or is or is not infected with an agent of a communicable disease;
- (g) requiring the person to whom the order is directed in respect of a communicable disease that is a virulent disease to place himself or herself forthwith under the care and treatment of a physician;
- (h) requiring the person to whom the order is directed to conduct himself or herself in such a manner as not to expose another person to infection. R.S.O. 1990, c. H.7, s. 22 (4); 1997, c. 30, Sched. D, s. 3 (2).

Person directed

- (5) An order under this section may be directed to a person,
- (a) who resides or is present;
 - (b) who owns or is the occupier of any premises;
 - (c) who owns or is in charge of any thing; or
 - (d) who is engaged in or administers an enterprise or activity,

in the health unit served by the medical officer of health. R.S.O. 1990, c. H.7, s. 22 (5).

Class orders

(5.0.1) An order under this section may be directed to a class of persons who reside or are present in the health unit served by the medical officer of health. 2003, c. 1, s. 15 (1).

37. In *Schuyler Farms Limited v. Dr. Nesathurai*, 2020 ONSC 4711 the Divisional Court held as follows:

8 Among the specific powers granted to a MOH is the power under s. 22(1) of the *HPPA* to make mandatory orders for the purpose of controlling outbreaks of communicable diseases. Subsection 22(2) sets out certain conditions precedent which must be fulfilled before a MOH may make such an order:

Condition precedent to order

22(2) A medical officer of health may make an order under this section where he or she is of the opinion, upon reasonable and probable grounds,

(a) that a communicable disease exists or may exist or that there is an immediate risk of an outbreak of a communicable disease in the health unit served by the medical officer of health;

(b) that the communicable disease presents a risk to the health of persons in the health unit served by the medical officer of health; and

(c) that the requirements specified in the order are necessary in order to decrease or eliminate the risk to health presented by the communicable disease.

9 Subsection 22(4) sets out a **non-exhaustive** list of specific orders which may be made under s. 22(1) of the *HPPA*. The list includes orders requiring persons who may have a communicable disease to self-isolate; requiring the cleaning or disinfecting of specified premises; and requiring a person to conduct himself or

herself in such a manner as not to expose another person to infection.
[emphasis added]

38. In *Spencer v. Canada (Health)*, 2021 FC 621 the Federal Court set out the following principles in considering whether particular public health measures were ultra vires an enabling statute:

224 The assessment of whether the promulgation of a particular measure was *ultra vires* (beyond the scope of) delegated authority typically begins by scrutinizing the governing statutory scheme and the decision-maker's reasons: *Vavilov*, above, at paras 108-109.

225 In situations where the process of making an impugned measure does not lend itself to producing a set of "reasons", the reviewing court must holistically consider all relevant circumstances, including the overall context and the record as a whole, to understand the measure and attempt to ascertain its underlying rationale: *Vavilov*, above, at para 137.

226 To successfully challenge the *vires* of an impugned measure, the burden is on the challenging party to demonstrate that it is inconsistent with *either* the objective of the enabling statute *or* the scope of the statutory mandate: *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at para 24 [**Katz**]. In the absence of such a demonstration, the measure will benefit from a presumption of validity: *Katz*, above, at para 25.

227 Before a measure will be found to be inconsistent with its statutory purpose, it must be shown to be irrelevant, extraneous or completely unrelated to that purpose: *Katz*, above, at para 28.

228 In conducting its assessment, the Court will take a broad and purposive approach, without considering whether the measure was "necessary, wise or effective in practice": *Katz*, above, at paras 26-27.

39. It is submitted that in the context of the Covid -19 pandemic the public health measures imposed by Medical Officers of Health were entirely consistent with both the objectives of the HPPA *and* the scope of the statutory mandate under s. 22. They were also consistent with the precautionary principle.

40. In *Schuyler Farms Limited v. Dr. Nesathurai* the Divisional Court held as follows:

108 The precautionary approach embodies the principle that reasonable action to reduce risk should not await scientific certainty or proof. It is and should be at the core of public health practice when dealing with a new disease such as COVID-19. Underlying the *HPPA* and particularly s. 22 thereof is a focus on

preventing public health problems, rather than dealing with them after the fact. As the Honourable Justice Archie Campbell stated in the SARS Commission Report:

The challenge of this new disease overcame the extent of their current scientific understanding...That is why it is better to follow the precautionary principle that reasonable action to reduce risk should not await scientific certainty...If the Commission has one single take-home message it is the precautionary principle that safety comes first, that reasonable efforts to reduce risk need not await scientific proof.

41. In the absence of bad faith, s. 95 (1) confers complete immunity from personal liability on Medical Officers of Health,
42. In *Salehi v. Association of Professional Engineers of Ontario*, 2016 ONCA 438, application for leave to appeal dismissed [2016] S.C.C.A. No. 369, the Ontario Court of Appeal considered the issue of bad faith under an analogous statutory immunity provision in the *Professional Engineers Act* and held as follows:

6 In the alternative, the motion judge held that if the APEO owed the appellant a duty of care, the appellant would nevertheless have to demonstrate that the APEO acted in bad faith in processing his application, because s. 45(1) of the *Professional Engineers Act*, R.S.O. 1990, c. P.28, provides statutory immunity to the APEO for the good faith performance of its duties:

No action or other proceeding for damages shall be instituted against the Association, a committee of the Association or a member of the Association or committee of the Association, or an officer, employee, agent or appointee of the Association for any act done in good faith in the performance or intended performance of a duty or in the exercise or the intended exercise of a power under this Act, a regulation or a by-law, or for any neglect or default in the performance or exercise in good faith of such duty or power.

...

8 In *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 39, the Supreme Court held that bad faith conduct includes not only intentional fault, but also serious carelessness or recklessness amounting to a "fundamental breakdown of the orderly exercise of authority" or "an actual abuse of power".

9 The party claiming bad faith must provide specific allegations of it. For example, he or she must allege conduct founded upon fraud or oppression, or an improper purpose or motive, such as an intention to mislead or deceive or to deliberately cause harm: see e.g. *Sampogna v. Smithies*, 2012 ONSC 610, 94

M.P.L.R. (4th) 320, at para. 16; and *Burns v. Johnston*, 2003 CanLII 44408(Ont. S.C.), at paras. 29-34. A mere error or omission is not evidence of bad faith: *Burns v. Johnston*, at para. 32. See also *Toronto Sun Wah Trading Inc. v. Canada (Canadian Food Inspection Agency)*, 2014 ONCA 803; and *Deep v. Massel*, 2007 CanLII 27969 (Ont S.C.), aff'd 2008 ONCA 4.

10 We agree with the motion judge that none of the acts the appellant complains of can be said to constitute bad faith. There was no evidence of malice or intent to harm on the part of the APEO, nor was there a fundamental breakdown in the orderly exercise of its authority or any abuse of power.

43. In *Gratton-Masuy Environmental Technologies Inc. v. Ontario*, 2010 ONCA 501, the Court of Appeal held as follows regarding the immunity from suit provision in the Building Code Act, 1992 S.O. 1992, CHAPTER 23:

[87] Second, the immunity from suit provision embodied in [s. 31\(1\)](#) of the [Act](#) precludes any action or other proceeding for damages against the Subcommittee Members, as brought in this case, "for any act done in good faith in the execution or intended execution of any power or duty under [the] [Act](#) . . . or for any alleged neglect or default in the execution in good faith of that power or duty". Thus, to avoid the protective ambit of [s. 31\(1\)](#) of the [Act](#), sufficient facts must be pleaded to support assertions of bad faith or malice against the Subcommittee Members.

[88] This requirement is enhanced by the rules of pleading in Ontario. Under the Rules, every pleading must contain "a concise statement of the material facts on which the party relies for the claim": rule 25.06(1). Moreover, in cases involving allegations of malice or intent, as in this case, rule 25.06(8) requires that "full particulars" be pleaded, although knowledge "may be alleged as a fact without pleading the circumstances from which it is to be inferred".

44. In *Oglaza v. J.A.K.K. Tuesdays Sports Pub Inc.*, 2021 ONSC 7473, in the context of an application to restrain future contraventions of a s. 22 Order, the Court considered the extent to which Ontario courts have taken judicial notice of various facts pertaining to the pandemic and public health measures and stated as follows:

6 The applicant's evidence is consistent with the following facts which Ontario courts have taken judicial notice of in other cases that have considered the COVID-19 pandemic, its impacts on public health, and measures to control the spread of the virus, which Gibson J. helpfully summarised in *Halton Condominium Corp. No. 77 v. Mitrovic*, 2021 ONSC 2071, at para. 17:

Canada is currently confronted with a grave public health crisis without parallel in recent decades. Courts have taken judicial notice of this in a number of ways:

(a)"There is currently a global pandemic which has resulted in a significant number of deaths and serious illness throughout Canada and the province of Ontario. The virus affects people of all ages and is particularly dangerous to older people and those with certain medical pre-conditions": *Solanki v. Reilly*, 2020 ONSC 8031 at para. 4;

(b)"The fact of the COVID-19 pandemic, its impact on Canadians generally, and the current state of medical knowledge of the virus, including its mode of transmission and recommended methods to avoid its transmission": *R. v. Morgan*, 2020 ONCA 279 at para. 8;

(c)"The fact that COVID-19 is caused by SARS-CoV-2, a communicable and highly contagious virus [and] that people who are infected with the virus can be asymptomatic yet still contagious": *Manzon v. Carruthers*, 2020 ONSC 6511 at para. 18; and,

(d)"The pandemic has wreaked untold death and destruction worldwide; COVID-19 is extremely infectious and can spread rapidly in any location; the main mitigatory steps recommended to "flatten the curve" of infection are **i) social distancing, ii) the wearing of personal protective equipment (PPE), and iii) regular testing of the population**": *R. v. Grant*, 2020 ONSC 3062 at para. 25.

[emphasis added]

PART V – APPLICATION OF THE LAW TO THE FACTS

Immunity From Personal Liability

45. Although the Plaintiffs have taken issue with the efficacy of mask requirements and other public health measures imposed by Medical Officers of Health as a response to the pandemic:

- (i) no facts are plead to indicate that Dr. Mercer and the other Medical Officers of Health did not have statutory authority to make such orders pursuant to s. 22 of the Health Protection and Promotion Act, RSO 1990, c H.7 (HPPA) or that such orders were ultra vires the general grant of authority conferred under paragraph 22(1) of the HPPA.
- (ii) no facts are plead to indicate that Dr. Mercer and the other Medical Officers of Health did not have statutory authority to issue the Letters of Instruction pursuant to Schedule 1, Section 2(2) of Ontario Reg. 364/20: Rules for

Areas in Step 3 and at the Roadmap Exit Step of the *Reopening Ontario Act*.

46. The assertion in paragraph 1 (r) of the Amended Statement of Claim, that “orders, with respect to compulsory face masks are ultra vires the Provincial Legislature in that the Province has expressly refused to make face masking compulsory”, is irrelevant because it ignores the fact that section 22 of the HPPA confers independent statutory authority on individual Medical Officers of Health to make such orders whether or not the Province chooses to act.
47. In the context of the pandemic and in accordance with the approach taken by the Court of Appeal in *Salehi v Assn of Professional Engineers of Ontario*, and *Gratton-Masuy Environmental Technologies Inc. v. Ontario*, it is submitted that a party alleging bad faith must plead specific facts in order to challenge the protection from personal liability conferred by s. 95 of the HPPA.
48. The Plaintiffs’ Claim does not contain any sufficiently particularized allegations of bad faith as against Dr. Mercer to survive the statutory immunity provisions. Rather, the Plaintiffs’ Claim challenges the constitutional validity of the HPPA s. 22 Class orders and LOIs issued by Dr. Mercer. All of those measures were issued in the good faith execution of her duties under the HPPA.
49. To the extent that the almost two-hundred-page Claim contains any allegations of bad faith against Dr. Mercer, they are bald allegations that are devoid of any particulars.
50. As indicated, the only actions particularized in the pleading are her Class Orders pertaining to masks. Such Class Orders were made pursuant to her authority under section 22 of the *Health Protection and Promotion Act*. Given the existence of COVID-19 at the time and its designation as a disease of public health significance causing respiratory illness and death in humans (of which, as noted above in *Oglaza v JAKK Tuesdays Sports Pub Inc (cob JAKK Tuesdays Sports Pub)* the Courts have taken judicial notice) the Class Orders made by Dr. Mercer were made in good faith in order to decrease or eliminate the risk of health to the residents in the area served by Wellington-Dufferin-Guelph Public Health.

51. The Plaintiffs have pleaded no facts to indicate that Dr. Mercer was acting dishonestly or in bad faith for an improper purpose when she issued Orders and Letters of Instruction to impose mask requirements and other public health measures.
52. The Claim ought to be struck in its entirety as against Dr. Mercer.

Scandalous, Frivolous, Vexatious and Abuse of Process

53. In the alternative, this Court should strike or dismiss the Plaintiffs' pleading in its entirety on the grounds that the pleadings are scandalous, frivolous, vexatious and otherwise an abuse of process as it contains many hallmarks of litigant behaviour as identified in the jurisprudence. As already indicated, the pleading is 190 pages in length, misnames defendants, contains 235 footers, includes rambling discourse, repeated misuse of legal, medical and other technical terms and makes discerning a legitimate cause of action very difficult. The pleading is unintelligible and is indicative of litigant behaviour resulting in five separate motions to strike before this Court.
54. The courts have recognized that scarce resources should not be devoted to proceedings that are clearly frivolous and vexatious. They take away from meritorious cases and there is no benefit served in allowing them to continue. Scarce resources have already been devoted to this matter by the numerous counsel and parties involved as well as two days of valuable court time. The Plaintiffs' pleading should be strike in its entirety with no leave to amend. The pleading cannot be partially struck or mended to fix the multiplicity of signposts of a vexatious proceeding. Any attempt to do so would only result in the consumption of more time and limited resources. It is "bad beyond argument".

Mootness

55. In the alternative, the Court should dismiss the Plaintiffs' pleading because it is moot as none of the Orders, Letters of Instruction or otherwise issued by Dr. Mercer regarding COVID-19 remain in effect. Therefore, this action raises merely a hypothetical or abstract question as there is no live controversy that currently impacts the rights of the Plaintiffs and Dr. Mercer. Since there is no dispute between the parties, the declaratory relief sought by the Plaintiffs will serve no practical utility; therefore, it is moot and ought not be granted.
56. While this Court retains the discretion to hear a moot issue, there is no reason for the Court to exercise such discretion to consider this matter, for the following reasons:

- i. There are no collateral consequences of the outcome of this litigation that would impact any of the Plaintiffs' rights. There currently are no Orders, Letters of Instruction or otherwise regarding COVID-19 in place.
- ii. There is no judicial economy to proceed with this action as it will have no practical effect for the Plaintiffs or any member of the public. There is no injustice if this matter is left undecided.
- iii. A judgment in this action in the absence of a dispute would not be consistent with the Court's traditional role as the adjudicative branch of our political system.

Leave to File Evidence

57. Leave should be granted to Dr. Mercer to file evidence on this motion. While affidavits are generally not admissible on a motion to strike per Rule 21.01(2)(a), in this case an exception should be made as the justification for the general rule is not undercut and it is in the interests of justice. One of the bases for this motion to strike is that the issues raised in the pleading have become moot. The issue of mootness has arisen in this case because of intervening developments in relation to the facts giving rise to the pleading being issued, in that the COVID-19 Orders and Letters of Instruction issued by Dr. Mercer are no longer in effect. If the Defendant, Dr. Mercer is unable to put such COVID-19 developments before this Court, then the Court could be forced to proceed with a full hearing in relation to a case in which a live controversy no longer exists.
58. Furthermore, unlike federal and provincial legislation and regulations, the Court cannot take judicial notice of the Orders and Letters of Instruction issued by Dr. Mercer.

PART VI – ORDER REQUESTED

59. Dr. Mercer requests an Order striking out all of the Amended Statement Claim without leave to amend.
60. Dr. Mercer requests her costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of November, 2023.



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Lawyer for the Defendant, Dr. Nicola Mercer

SCHEDULE "A" – AUTHORITIES CITED

1. [Schuyler Farms Limited v. Dr. Nesathurai, 2020 ONSC 4711 \(CanLII\).](#)
2. [Spencer v. Canada \(Health\), 2021 FC 621 \(CanLII\).](#)
3. [Salehi v. Association of Professional Engineers of Ontario, 2016 ONCA 438 \(CanLII\).](#)
4. [Gratton-Masuy Environmental Technologies Inc. v. Ontario, 2010 ONCA 501 \(CanLII\).](#)
5. [Oglaza v. J.A.K.K. Tuesdays Sports Pub Inc., 2021 ONSC 7473 \(CanLII\).](#)

**SCHEDULE “B”
RELEVANT STATUTES**

1. ***Rules of Civil Procedure, RRO 1990, Reg 194, Rules 21.01(1)(b), 25.06(1), 25.06(8), 25.10, 25.11***

21.01 (1) A party may move before a judge,

...

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly.

25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. 25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.

25.06 (8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.

25.10 Where a party demands particulars of an allegation in the pleading of an opposite party, and the opposite party fails to supply them within seven days, the court may order particulars to be delivered within a specified time.

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

2. Health Promotion and Protection Act RSO 1990, c H.7

Purpose

2 The purpose of this Act is to provide for the organization and delivery of public health programs and services, the prevention of the spread of disease and the promotion and protection of the health of the people of Ontario.

Protection from personal liability

95 (1) No action or other proceeding for damages or otherwise shall be instituted against the Chief Medical Officer of Health or an Associate Chief Medical Officer of Health, a member of a board of health, a medical officer of health, an associate medical officer of health of a board of health, an acting medical officer of health of a board of health or a public health inspector or an employee of a board of health or of a municipality who is working under the direction of a medical officer of health for any act done in good faith in the execution or the intended execution of any duty or power under this Act or for any alleged neglect or default in the execution in good faith of any such duty or power.

Order by M.O.H. re communicable disease

22 (1) A medical officer of health, in the circumstances mentioned in subsection (2), by a written order may require a person to take or to refrain from taking any action that is specified in the order in respect of a communicable disease. R.S.O. 1990, c. H.7, s. 22 (1).

Condition precedent to order

(2) A medical officer of health may make an order under this section where he or she is of the opinion, upon reasonable and probable grounds,

- (a) that a communicable disease exists or may exist or that there is an immediate risk of an outbreak of a communicable disease in the health unit served by the medical officer of health;
- (b) that the communicable disease presents a risk to the health of persons in the health unit served by the medical officer of health; and

- (c) that the requirements specified in the order are necessary in order to decrease or eliminate the risk to health presented by the communicable disease. R.S.O. 1990, c. H.7, s. 22 (2); 1997, c. 30, Sched. D, s. 3 (1).

Time

- (3) In an order under this section, a medical officer of health may specify the time or times when or the period or periods of time within which the person to whom the order is directed must comply with the order. R.S.O. 1990, c. H.7, s. 22 (3).

What may be included in order

- (4) An order under this section may include, but is not limited to,
- (a) requiring the owner or occupier of premises to close the premises or a specific part of the premises;
 - (b) requiring the placarding of premises to give notice of an order requiring the closing of the premises;
 - (c) requiring any person that the order states has or may have a communicable disease or is or may be infected with an agent of a communicable disease to isolate himself or herself and remain in isolation from other persons;
 - (d) requiring the cleaning or disinfecting, or both, of the premises or the thing specified in the order;
 - (e) requiring the destruction of the matter or thing specified in the order;
 - (f) requiring the person to whom the order is directed to submit to an examination by a physician and to deliver to the medical officer of health a report by the physician as to whether or not the person has a communicable disease or is or is not infected with an agent of a communicable disease;
 - (g) requiring the person to whom the order is directed in respect of a communicable disease that is a virulent disease to place himself or herself forthwith under the care and treatment of a physician;

- (h) requiring the person to whom the order is directed to conduct himself or herself in such a manner as not to expose another person to infection. R.S.O. 1990, c. H.7, s. 22 (4); 1997, c. 30, Sched. D, s. 3 (2).

Person directed

(5) An order under this section may be directed to a person,

- (a) who resides or is present;
- (b) who owns or is the occupier of any premises;
- (c) who owns or is in charge of any thing; or
- (d) who is engaged in or administers an enterprise or activity,

in the health unit served by the medical officer of health. R.S.O. 1990, c. H.7, s. 22 (5).

Class orders

(5.0.1) An order under this section may be directed to a class of persons who reside or are present in the health unit served by the medical officer of health. 2003, c. 1, s. 15 (1).

Vaccine Choice Canada
(VCC) et al. -and- Dr. Nicola Mercer et al.
Plaintiffs Defendants

Court File No. CV-20-00643451-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

**FACTUM OF THE MOVING DEFENDANT DR.
NICOLA MERCER (returnable January 30, 2024)**

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