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 WELLINGTONDUFFERIN-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 (RESPONDING PARTIES) PLAINTIFFS
(For Motion to Strike Returnable January 30th, and February 1st, 2024)

ROCCO GALATI LAW FIRM
PROFESSIONAL CORPORATION
Rocco Galati, B.A., LL.B., LL.M.
1062 College Street, Lower Level
Toronto, Ontario M6H 1A9
TEL: (416) 530-9684
FAX: (416) 530-8129

Email: rglfpc@gmail.com

Lawyer for the Plaintiffs

TO:

MATHEWS, DINSDALE & CLARK LLP
The Well, 35th Floor 8 Spadina Avenue
TORONTO, ONTARIO, CANADA M5V 0S8

Neil A. Ornstein LSO No.: 25083J
nornstein@mathewsdinsdale.com
Tel: 416.869.8548 Fax: 416-862-8247

Mark D. Contini LSO No.: 19819H
mcontini@mathewsdinsdale.com
Tel: 416.869.8536 Fax: 416.862.8247
Lawyers for the Defendant, Nicola Mercer

AND TO:

ATTORNEY GENERAL OF CANADA
Department of Justice Canada, Ontario Region National Litigation Sector
120 Adelaide Street West, Suite #400
Toronto, ON M5H 1T1

Sadian Campbell (LSO # 35800T)
Tel: (647) 256-7480
Fax: (416) 973-0809
sadian.campbell@justice.gc.ca

James Schneider (LSO # 77470V)
Tel: (647) 256-7545
Fax: (416) 973-0809
james.schneider@justice.gc.ca

Lawyers for the Defendants, Justin Trudeau, Prime Minister of Canada, Dr. Theresa Tam, Chief Medical Officer for Canada, Marc Garneau, Canadian Transport Minister, Her Majesty the Queen in Right of Canada and the Attorney General of Canada

AND TO:

MINISTRY OF THE ATTORNEY GENERAL FOR ONTARIO
Civil Law Division, Constitutional Law Branch 720 Bay Street, 4th Floor
Toronto, Ontario M7A 2S9

Zachary Green (LSO No. 48066K)
Tel: (416) 992-2327
Zachary.Green@ontario.ca

Savitri Gordian (LSO. 66891Q)
Tel: (416) 894-3107
Savitri.Gordian@ontario.ca

Andrea Bolieiro (LSO 60034I)
Tel: 437-551-6263 Fax (416) 326-4015
Andrea.Bolieiro@ontario.ca

Lawyers for 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 TO: CITY OF TORONTO

Litigation Section, Legal Services
Station 1260,
Metro Hall 55 John Street, 26th Floor Toronto, ON M5V 3C6

Glenn K.L. Chu (LSO 40392F)
Tel: (416) 397-5407
glenn.chu@toronto.ca

Fred Fischer (LSO 51284I)
Tel: (416) 392-7224
fred.fischer@toronto.ca

Cara Davies
Tel: 416-397-7715
Fax: (416) 397-5624
cara.davies@toronto.ca

Lawyers for the Defendants, CITY OF TORONTO, John TORY, Mayor City of Toronto, Dr. Eileen DE VILLA, Toronto Chief Medical Officer

AND TO:

WILLIS BUSINESS LAW 1 Riverside Drive West, Suite 503 Windsor, ON N9A 5K3

J.P. Karam, Partner (LSO 64097E) Tel: 1.226.526.9954 Fax: 1.519.945.5479

jpkaram@willislawfirm.ca
Dina Mejalli- Willis (LSO No. 50822E)
Tel: 1.226.526.8490 Fax: 1.519.945.5479
dmwillis@willislawfirm.ca

Lawyers for the Defendants WINDSOR-ESSEX COUNTY, Dr. Wajid AHMED (Chief) Medical Officer for Windsor-Essex County

FACTUM

PART I - OVERVIEW

1. The Plaintiffs rely on the facts as set out in the statement of claim, which, for the purposes of this motion, are required to be taken as proven[1].

2. The Plaintiffs state that the Defendants, mischaracterize the pleadings into what the Defendants say they mean, rather than what the pleadings say, thus flying in the face of the clear Appellate jurisprudence:

> **10** In my view, for the purposes of Rule 221(1) of the *Federal Courts Rules,* SOR/98-10, the moving party must take the opposing party's pleadings as they find them, and cannot resort to reading into a claim something which is not there. The Crown cannot, by its construction of the respondents' claim, make it say something which it does not say.[2]

PART II - THE FACTS

3. The facts of this case are as set out in the facts pleaded in the (Amended) Statement of Claim which facts, for the purposes of this motion, must be taken as proven.[3]

PART III - THE ISSUES AND LAW AND ARGUMENT

4. Whether any portion of the statement of claim should be struck?

5. If the statement of claim is struck, in whole or in part, whether it should be struck without prejudice, with leave to the Plaintiffs to amend?

---

[1] ***A.G. Canada v. Inuit Tapirasat of Canada [1980] 2 S.C.R. 735; Nelles v. Ontario [1989] 2 S.C.R. 170 ; Operation Dismantle v. The Queen, 1985 CanLII 74 (SCC), [1985] 1 SCR441; Hunt v. Carey Canada Inc [1990] 2 S.C.R. 959; ; Dumont v. A.G. Canada [1990] 1 S.C.R. 279; Trendsetter Ltd. v. Ottawa Financial Corp. (1989)32 O.A.C. 327 (C.A.); Nash v. Ontario (1995) 27 O.R. (3d) 1 (Ont. C. A.).; Canada v. Arsenault 2009 FCA 242; ; B.C. v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473***

[2] ***Canada v. Arsenault 2009 FCA 242;*** @ paragraph 10

[3] See footnote 1

A/ Motion to Strike – The Jurisprudence – General Principles

6. It is submitted and tritely held, by the Supreme Court of Canada, and the Appellate Courts, that:

(a) the facts pleaded by the Plaintiffs must be taken as proven and fact:[4]

(b) it has been further held, that on a motion to strike, the test is a rather high one, namely that,

> "A Court should strike a pleading under Rule 126 **only in plain and obvious cases where the pleading is bad beyond argument.**
>
> **Furthermore, I am of the view that the rules of civil procedure should not act as obstacles to a just and expeditious resolution of a case.** Rule1.04(1) of the Rules of Civil Procedure in Ontario, O. Reg 560/84, confirms this principle in stating that "these rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."[5]

and rephrased, re-iterated by the Supreme Court of Canada, in ***Dumont***, wherein the Court stated that,

> "***It cannot be said that the outcome of the case is 'plain and obvious' or 'beyond doubt'***.
>
> **Issues as to the proper interpretation of relevant provisions…and the effect…upon them would appear to be better determined at trial where a proper factual base can be laid."[6]**

and further, that:

> "It is not for this Court on a motion to strike to reach a decision as to the Plaintiff's chance of success."[7]

and further that:

> **The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim**

---

[4] ***Ibid., at footnote #1***
[5] ***Nelles v. Ontario [1989] 2 S.C.R. 170, supra,*** **p. 627**
[6] ***Dumont v. A.G. Canada [1990] 1 S.C.R. 279;, supra.*** **p. 280**
[7] ***Hunt v. Carey Canada Inc [1990] 2 S.C.R. 959;, supra (SCC)***

> **reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.**
> …
> This brings me to the second difficulty I have with the defendants' submission. **It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the Plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel.** If the Plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the Plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.[8]

and further that:

> [21] Valuable as it is, the Motion to Strike **is a tool that must be used with care.** The Law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedly Byrne & Co. v. Heller & Partners*, Ltd., [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like that one at issue in *Donoghue v. Stevenson.* therefore, on a Motion to Strike, it is not determinative that the law has not yet recognized the particular claim. **The Court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.[9]**

---

[8] ***Hunt v. Carey Canada Inc [1990] 2 S.C.R. 959;,, supra* p. 14**
[9] ***R. v. Imperial Tobacco Canada Ltd; supra at para 21***

and that "the court should make an order only in ***plain and obvious cases*** which it is satisfied to be beyond doubt";[10]

(c) (i) and that a statement of claim should not be struck just because it is "novel";[11]

(ii) that "matters law not ***fully settled*** by the jurisprudence should not be disposed of at this stage of the proceedings";[12]

(iii) and that to strike, the Defendants must produce a "decided case ***directly on point*** from the same jurisdiction demonstrating that the very same issue has been ***squarely dealt with and rejected***";[13]

(d) and that, in fact, the Court ought to be generous in the drafting of pleadings and not strike but allow amendment before striking.[14]

C/ Constitutional Principles Applicable to Claim

7. It is further submitted that virtually all of the declaratory relief sought in this action is constitutional. It is submitted that the Constitution delineates both legislative and executive limits, and does not belong to either the Federal or Provincial legislatures, as set out by the Supreme Court of Canada, in that:

> ***The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled***….[15]

---

[10] ***Trendsetter Ltd. v. Ottawa Financial Corp. (1989)32 O.A.C. 327 (C.A.);*** , ***supra,*** **(Ont. C.A.).**
[11] ***Nash v. Ontario (1995) 27 O.R. (3d) 1 (Ont. C. A.).***; ***Hanson v. Bank of Nova Scotia (1994) 19 O.R .(3d) 142 (C.A.); Adams-Smith v. Christian Horizons (1997)14 C.P.C.(4th)78 (Ont. Gen. Div.); Miller (Litigation Guardian of) v. Wiwchairyk (1997) 34 O.R. (3d) 640 (Ont.Gen.Div)***
[12] ***R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.*** (1991) 5 O.R. (3d) 778 (C.A.)
[13] ***Dalex Co. v. Schawartz Levitsky Feldman*** (1994) 19 O.R. (3d) 463 (Gen. Div)
[14] ***Grant v. Cormier – Grant, et. al*** (2001) 56 O.R. (3d) 215 (Ont. C.A.), ***TD Bank v. Delloitte Hoskins & Sells*** (1991) 5 O.R. (3d) 417 (Gen. Div.)
[15] ***Nova Scotia (Attorney General) v. Canada (Attorney General)*** [1951] S.C.R. 31

and has been further held that the Executive, and every other government actor, and institution, is bound by the terms of constitutional norms.[16]

8. It has also been held, by the Supreme Court of Canada, that legislative **omission** can also lead to constitutional breaches.[17]

9. It is further submitted, and long-held that, pre-***Charter***, as well as post-***Charter,*** that all executive ***action*** and ***inaction*** requires conformity with constitutional norms.[18]

D/ Nature of Plaintiff's Claim

10. The Plaintiffs, in their claim, seek the following:

    (a) Declaratory relief as to jurisdiction, legislation, regulations and executive action and inaction as well as infliction of violations to **Charter** rights with respect to various Covid-19 measures;[19]

    (b) injunctive relief;[20]

11. Contrary to the Defendant, His Majesty the King and the Attorney General for Ontario's ("Ontario") claim, that the Plaintiffs seek to strike legislation on the basis of unwritten constitutional **principles**, the Plaintiffs do no such thing. They seek, pursuant to s.52, to declare unconstitutional based on unwritten unconstitutional **rights**, as well as under the **Charter**.[21] There is a schism of a difference between unwritten constitutional **principles,** from which both written and unwritten constitutional RIGHTS stem, and unwritten

---

[16] ***Reference re Secession of Quebec,*** [1988] 2 S.C.R. 217
[17] ***Vriend v. Alberta*** [1998] 1 S.C.R. 493
[18] ***Air Canada v. British Columbia (Attorney General)*** [1986] 2 S.C.R. 539, ***Vriend v. Canada [1998] 1 SCR 493***, ***Canada (Prime Minister) v. Khadr***, [2010] 1 S.C.R. 44
[19] ***Amended Statement of Claim., at paragraphs 1,3.***
[20] ***Amended Statement of Claim., at paragraphs 2, 4(d).***
[21] **Roncarelli v. Duplessis, 1959 CanLII 50 (SCC), [1959] SCR 121, Switzman v. Elbling, [1957] S.C.R. 285, Saumur v City of Quebec-[1953] 2 SCR 299,** ***Reference re Secession of Quebec,*** [1988] 2 S.C.R. 217

constitutional **RIGHTS** themselves, which were recognized prior to 1982. It is respectfully submitted that here, Ontario raises a straw man argument.

E/ The Constitutional Right to Judicial Review and Declaratory Relief

12. The Plaintiffs submit that Declaratory relief goes to the crux of the constitutional right to judicial oversight of Executive and Legislative unconformity with the constitution, which right the Supreme Court of Canada has re-affirmed in ***Dunsmuir:***

> **31** The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, at p. 127 [page213]). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". ***In short, judicial review is constitutionally guaranteed in Canada,*** particularly with regard to the definition and enforcement of jurisdictional limits..,.[22]

13. The Federal Court, in ***Singh v. Canada (Citizenship and Immigration), 2010 FC 757,*** re-affirmed the ample and broad right to seek declaratory relief, in quoting the Supreme Court of Canada in ***Canada v. Solosky, [1980] 1 S.C.R. 821, @ p. 830*** :

> Declaratory relief is a remedy **neither constrained by form nor bounded by substantive content**, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined.

14. This holding, pre-**Charter**, from the Supreme Court of Canada in **Thorson** which ruled:

> **[151] The question of the constitutionality of legislation has in this country always been a justiciable question**. Any attempt by Parliament or a Legislature to fix conditions precedent, as by way of requiring consent of some public officer or authority, to the determination of an issue of constitutionality of legislation cannot foreclose the Courts merely because the conditions remain

[22] ***Dunsmuir v. New Brunswick, 2008 SCC 9, at Paragraph 31***

> unsatisfied: *Electrical Development Co. of Ontario v. Attorney General of Ontario*[18], *B.C. Power Corp. Ltd. v. B.C. Electric Co*

15. More recently, the Supreme Court of Canada, in the ***Manitoba Metis*** case reaffirmed the breadth of the right to declaratory relief:

> [134] This Court has held that although claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period, courts retain the power to rule on the constitutionality of the underlying statute: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181. ***The constitutionality of legislation has always been a justiciable question:*** *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 151. ***The "right of the citizenry to constitutional behaviour by Parliament" can be vindicated by a declaration that legislation is invalid, or that a public act is ultra vires:*** *Canadian Bar Assn. v. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, at paras. 23 and 91, citing *Thorson*, at p. 163 (emphasis added). **An "issue [that is] constitutional is always justiciable**": *Waddell v. Schreyer* (1981), 126 D.L.R. (3d) 431 (B.C.S.C.), at p. 437, aff'd (1982), 142 D.L.R. (3d) 177 (B.C.C.A.), leave to appeal refused [1982] 2 S.C.R. vii (*sub nom. Foothills Pipe Lines (Yukon) Ltd. v. Waddell*).
>
> …
>
> [140] ***The courts are the guardians of the Constitution and, as in Ravndahl and Kingstreet, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less:*** see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72.[23]

16. The Supreme Court of Canada, in **Manitoba Metis** further ruled that the absence of a concrete, "practical", relief is not a bar to Declaratory Relief which, in itself, is a remedy:

> [143] **Furthermore, the remedy available under this analysis is of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available.** As argued by the intervener the Assembly of First Nations, it is not awarded against the defendant in the same sense as coercive relief: factum, at para. 29, citing *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 193 D.L.R. (4th) 344, at paras. 11-16. In some cases, declaratory relief may be the only way to give effect to the honour of the Crown: Assembly of First Nations' factum, at para. 31. Were the Métis in this action seeking personal remedies, the reasoning set out here would not be available. However, as acknowledged by Canada, the remedy sought here is

---

[23] ***Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14***

> clearly not a personal one: R.F., at para. 82. The principle of reconciliation demands that such declarations not be barred.[24]

17. It is further submitted that, the statutory right to seek declaratory relief, in the absence of consequential relief, has been codified ***albeit*** at times unenforceable wherein Rule 64 of the ***Federal Courts Rules*** reads:

> 64. Declaratory relief available —No proceeding is subject to challenge on the ground that only a declaratory order is sought, and the Court may make a binding declaration of right in a proceeding ***whether or not any consequential relief is or can be claimed.***[25]

and it has been held that Declaratory relief may be sought (in an action),[26] which is consistent with the Supreme Court jurisprudence,[27]

and it has been long-stated, by the Supreme Court of Canada that "The constitutionality of legislation has always been a justiciable issue".[28]

E/ Constitutional Right to (Refuse) Medical Treatment

18. Under s.7 of the ***Charter***, the Supreme Court of Canada, with respect to medical treatment/non-treatment, constitutionalized this Right in ***Carter*** when it ruled:

> [67] **The law has long protected patient autonomy in medical decision-making.** In A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30, [2009] 2 S.C.R. 181, a majority of this Court, per Abella J. (the dissent not disagreeing on this point), endorsed the "tenacious relevance in our legal system of the principle that competent individuals are — and should be — free to make decisions about their bodily integrity" (para. 39). **This right to "decide one's own fate" entitles adults to direct the course of their own medical care (para. 40): it is this principle that underlies the concept of "informed consent" and is protected by s. 7's guarantee of liberty and security of the person** (para. 100; see also R. v. Parker (2000), 49 O.R. (3d) 481 (C.A.)). As noted in Fleming v. Reid (1991), 4

---

[24] **Ibid, at paragraph 143**
[25] ***Federal Courts Rules, R. 64***
[26] ***Edwards v. Canada*** (2000) 181 F.T.R. 219
[27] ***Canada (Prime Minister) v. Khadr***, [2010] 1 S.C.R. 44
[28] ***Thorson v. AG of Canada [1975] 1 SCR 138, @ p. 151, Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14, @ paragraph 13.4***

> O.R. (3d) 74 (C.A.), **the right of medical self-determination is not vitiated by the fact that serious risks or consequences, including death, may flow from the patient's de**cision. It is this same principle that is at work in the cases dealing with the right to refuse consent to medical treatment, or to demand that treatment be withdrawn or discontinued: see, e.g., Ciarlariello v. Schacter, [1993] 2 S.C.R. 119; Malette v. Shulman (1990), 72 O.R. (2d) 417 (C.A.); and Nancy B. v. H.tel-Dieu de Qu.bec (1992), 86 D.L.R. (4th) 385 (Que. Sup. Ct.).[29]

Which constitutional rights had been established by the Ontario Court of Appeal in ***Fleming v. Reid (1991), 4 O.R. (3d) 74 (C.A.).***

F/ Position of Defendants

19. The Plaintiffs will globally respond to the dittoed submissions of the Defendants which are that:

(a) the action is moot and discretion to otherwise let it proceed should not be exercised;

(b) the action reveals no cause of action;

(c) the action is frivolous, vexatious, and an abuse process;

(d) the action, as against the Provincial, individual Health Officers named, as well as City of Toronto employees, is statute barred by virtue of statutory immunity.

[29] ***Carter v. Canada (Attorney General), 2015 SCC 5 (CanLII),*** at para 67

- **Mootness**

20. With respect to the Defendants' submissions that the action is moot on the basis that:

(a) the order and measures challenged, have been withdrawn or revoked; And

(b) that there is therefore no "practical" purpose for the declaratory relief:

the Plaintiffs state:

(c) that declaratory relief as to the constitutionality of, and parameters of, legislation and regulation, is never time limited **nor** moot, as it is a remedy in itself;[30]

(d) That even where the measures have been revoked, but may arise in the future, they are not moot and/or dissection to determine the legal issues should be exercised.[31]

21. The United States Supreme Court, in a COVID pandemic case, with respect to church closures, ruled[32]:

> "The dissenting opinions argue that we should withhold relief because the relevant circumstances have now changed. After the applicants asked this Court for relief, the Governor reclassified the areas in question from orange to yellow, and this change means that the applicants may hold services at 50% of their maximum occupancy. The dissents would deny relief at this time but allow the Diocese and Agudath Israel to renew their requests if this recent reclassification is reversed.
>
> There is no justification for that proposed course of action**. It is clear that this matter is not moot**. See *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449, 462 (2007); *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc*., 528 U. S. 167, 189 (2000)."

---

[30] ***Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14,***
[31] ***Roman Catholic Diocese of Brooklyn, New York V. Andrew M. Cuomo, Governor Of New York U.S. 592 (2020)***
[32] ***Roman Catholic Diocese of Brooklyn, New York V. Andrew M. Cuomo, Governor Of New York U.S. 592 (2020)***

Nor does it conform with the Canadian jurisprudence on mootness, in ***Borowski***,[33] **et seq**, given the constitutional Declaratory nature of the action, coupled with the "reasonable hypotheticals" doctrine in constitutional law,[34] the matter is not moot, particularly with respect to the challenge to legislative, regulatory provisions and parameters and Declaratory relief.

22. It is further submitted that, in the face of these Supreme Court rulings, the motion to strike on this basis is untenable in that, the argument has already prevailed in two Supreme Courts, it is impossible to conclude that the position of the plaintiffs is "bad beyond argument".

- ***Claim Discloses No Reasonable Cause of Action***

23. With respect to the Defendants' submissions that the Plaintiffs' claims discloses no reasonable cause of action, the Plaintiffs state that:

(a) when the facts pleaded are taken as proven, as is required on this motion; and

(b) when the constitutional causes of action, and constitutional Declaratory relief, are assessed on the facts pleaded;

the Plaintiffs state that reasonable causes of action are made out, on material facts pleaded, and the declaratory relief sought, is not "bad beyond argument", for the purposes of this motion to strike.

---

[33] ***Borowski v. Canada (Attorney General), 1989 CanLII 123 (SCC), [1989] 1 SCR 342***

[34] ***R. v. Nur, 2015 SCC 15 (CanLII), [2015] 1 SCR 773, <https://canlii.ca/t/gh5ms> R. v. Nur, 2013 ONCA 677; R. v. McDonald, 1998 CanLII 13327 (ON CA); Law Society Of Upper Canada v. Ernst & Young, 2003 CanLII14187 (ON CA); CanLII; R. v. Charles, 2013 ONCA 681 (CanLII); R. v. John, 2018 ONCA 702 (CanLII); R. v. Vu, 2018 ONCA 436 (CanLII); R. v. Plange, 2019 ONCA 646 (CanLII); R. v. M.R.M., 2020 ONCA 75 (CanLII); R. v. Safieh, 2021 ONCA 643 (CanLII); Baber v. Ontario (Attorney General), 2022 ONCA 345 (CanLII); R. v. N.S., 2022 ONCA 160 (CanLII); R. v. Abdelrazzaq, 2023 ONCA 112 (CanLII);***

- ***Action is an abuse of Process***

24. With respect to the Defendants' submissions and that the claim is an abuse of process, the Plaintiffs state:

(a) This action is not an abusive process in that:

(i) the facts;
(ii) causes of action constitutional Declaratory relief pleaded;
(iii) relief sought; and
(iv) jurisdiction under s.24(1) and s.52 of the ***Constitution Act 1982*** ground the action; and

(b) it is not strikable under **Rule** 221, or any other Rule on that basis.

- ***Action is Scandalous, Frivolous, and Vexatious***

25. With respect to the Defendants submissions and that the claim is scandalous, frivolous, and vexatious, the Plaintiffs state:

(a) This action is not and scandalous, frivolous, and vexatious in that:

(i) the facts;
(ii) causes of action constitutional Declaratory relief pleaded;
(iii) relief sought; and
(iv) jurisdiction under s.24(1) and s.52 of the ***Constitution Act 1982*** ground the action; and

(b) it is not strikable under **Rule** 221, or any other Rule on that basis.

F/ Specific and Focused Responses to Submissions of Defendants

- **With Respect to Ontario**

26. With respect to Ontario's red-herring, and strawman's, argument, at paragraph 27 of Ontario's factum, that the Plaintiffs are trying to use "unwritten constitutional **principles**", to invalidate legislation, the Plaintiffs state that they are relying on, above and beyond written constitutional **rights** set out in the ***Constitution Act, 1982***, also unwritten constitutional **RIGHTS**, recognized prior to, and post, the ***Constitution Acts,***

1982, as recognized by the Supreme Court of Canada. Constitutional **RIGHTS**, both written and UNWRITTEN **all** stem from unwritten constitutional principles and pillars as enunciated in ***Reference re Secession of Quebec, 1998 CanLII 793 (SCC), [1998] 2 SCR 217.*** What the Plaintiffs assert is written and **unwritten** constitutional **RIGHTS** already recognized, **not principles**.

- **With Respect to Canada**

27. With respect to Canada's submissions that any and all relief, as against Federal Executive Actors, is statutorily barred in the Ontario Courts by the ***Federal Courts Act***, the Plaintiffs state:

(a) The statutory bar only applies to common law and statutory relief by way of prerogative relief under administrative law, and not constitutional relief;

(b) where the remedy sought is constitutional relief, the Supreme Court of Canada has ruled, in ***Reza,***[35] that the Ontario Superior Court has **concurrent** jurisdiction, **albeit** a discretion exists in the Superior Court, on a case-by-case basis, to "defer" to the Federal Court **in its areas, and expertise, of exclusive jurisdiction**, and not hear the case.

28. With respect to any such discretion being exercised in this case the Plaintiffs state:

(a) this is an issue that can only be decided by a trial judge and/or motions judge on a **summary judgment** application, and **NOT** by a motions judge on a motion to strike;

[35] ***Reza v. Canada, [1994] 2 S.C.R. 394***

(b) the Federal Court does not have any particular exclusive jurisdiction nor expertise, such as immigration, etc. in a case involving a pandemic, and moreover which the Plaintiffs state infringe their constitutional rights: and

(c) given that the measures, and violations complained of, deal with the same matter, are integrated and inseparable, these factors further mitigate against bifurcation and splintering the litigation based on a "discretion to defer" part of the action.

29. With respect to Canada's misguided assertions, at paragraphs 41-43 of its factum, that the declarations do not relate to the "rights of the parties", they do relate to the constitutional rights of the parties, including the right to seek Declaratory relief from unconstitutional statutory and regulatory provisions.

30. With respect to Canada's references and reliance on the ***Action4Canada*** and ***Adelberg*** cases, both of which are under appeal, at the British Columbia Court of Appeal and Federal Court of Appeal, and **neither** case was "dismissed" but struck, in whole and in part, with **leave to amend** granted. The **portion** that was struck, with prejudice, in ***Adelberg*** was on the erroneous strict jurisdictional ground that the core federal employees must pursue the labour relations scheme.

- **With Respect former Mayor John Tory City of Toronto, Wajid Ahmed (Public Health Officer) and Nicola Mercer**

31. With respect to the ***City of Toronto Act***, and City of Toronto employees, ss.390 and s.391 of the ***City of Toronto Act*** reads:

> **390** No proceeding **based on negligence** in connection with the exercise or non-exercise of a **discretionary power** or the performance or non-performance of a **discretionary function**, if the action or inaction results from a policy decision of the City or a local board of the **City made in a good faith exercise of the discretion**, shall be commenced against,
>
> (a) the City or a local board of the City;

(b) a member of city council or a member of a local board of the City; or

(c) an officer, employee or agent of the City or an officer, employee or agent of a local board of the City. 2006, c. 11, Sched. A, s. 390.

391 (1) No proceeding **for damages** or otherwise shall be commenced against a member of city council, an officer, employee or agent of the City or a person acting under the instructions of the officer, employee or agent for any act done in good faith in the performance or intended performance of a duty or authority under this Act or a by-law passed under it or for **any alleged neglect** or default in the **performance in good faith** of the duty or authority. 2006, c. 11, Sched. A, s. 391 (1).

32. With respect to the provincial officers of Public Health, s.95 of the ***Health Protection and Promotion Act***, reads:

> **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.** 2007, c. 10, Sched. F, s. 18; 2009, c. 33, Sched. 18, s. 12 (11); 2011, c. 7, s. 4 (1).

33. It is submitted that both claims in s.390 of the ***City of Toronto Act,*** and s.95 of the ***Health Protection and Promotion Act***, for immunity do not apply, to either the City nor Provincial Defendants because:

(a) No claim in negligence is being advanced by the Plaintiffs; and

(b) The Plaintiffs allege bad faith, absence of good faith, conspiracy and abuse of authority and public misfeasance.

34. Section 391 refers to actions **for damages** for exercise of authority or duty, etc. **In good faith**. The Plaintiff states that this does not apply because:

(a) No claim for damages is being advanced by the Plaintiffs against the City employees and actors; and

(b) The Plaintiffs allege bad faith, absence of good faith, conspiracy and abuse of authority and public misfeasance.

35. It is submitted that, on a motion to strike, the motions judge is without jurisdiction to determine the absence or presence of good faith, and bad faith is pleaded, which must be taken as proven on a motion to strike and which determination can only be made by the trial judge, or an applications judge on a motion for summary judgement.

36. It is submitted that when read in their entirety, and generously, the pleadings plead and set out a bad faith/absence of good faith exception to the above statutory bar to the executive actions/inactions of the individual Defendants.

- ***No Leave to Amend***

37. With respect to the Defendants' submissions that the claim should be given no leave to amend, the Plaintiffs state that if struck, in whole or in part, the Plaintiffs should be granted leave to amend in accordance with the jurisprudence in this Court[36]:

[36] ***Collins v. Canada*** [2011] D.T.C. 5076; ***Simon v. Canada*** [2011] D.T.C. 5016; ***Spatling v. Canada*** 2003 CarswellNat 1013; ***Larden v. Canada*** (1998) 145 F.T.R. 140; ***Action4Canada v British Columbia (Attorney General), 2022 BCSC 1507 (CanLII); Adelberg v. Canada, 2023 FC 252 (CanLII),*** <https://canlii.ca/t/jvq68

PART IV - ORDER SOUGHT

38. The Plaintiffs respectfully request that:

(a) the Defendants' motion to strike be dismissed;

(b) in the alternative, if any portions are struck, that is to be without prejudice, to file an amended statement of claim in accordance with the jurisprudence[37]:

(c) costs and, in accordance with ***Native Women's Assn. of Canada vs. Canada [1994] 3 SCR 627***, such further and other relief as this Honourable Court deems just.

All of which is respectfully submitted

Dated this 7th day of December 2023.

ROCCO GALATI LAW FIRM
PROFESSIONAL CORPORATION
Rocco Galati, B.A., LL.B., LL.M.
1062 College Street, Lower Level
Toronto, Ontario M6H 1A9

TEL: (416) 530-9684
FAX: (416) 530-8129
Counsel for the Plaintiffs

[37] ***Collins v. Canada*** [2011] D.T.C. 5076; ***Simon v. Canada*** [2011] D.T.C. 5016; ***Spatling v. Canada*** 2003 CarswellNat 1013; ***Larden v. Canada*** (1998) 145 F.T.R. 140; ***Action4Canada v British Columbia (Attorney General), 2022 BCSC 1507 (CanLII); Adelberg v. Canada, 2023 FC 252 (CanLII), <https://canlii.ca/t/jvq68>***

PART V - AUTHORITIES

- **Statutory Provisions**

1. ***Constitution Act, 1982***

2. City of Toronto Act:

> **390** No proceeding **based on negligence** in connection with the exercise or non-exercise of a **discretionary power** or the performance or non-performance of a **discretionary function**, if the action or inaction results from a policy decision of the City or a local board of the **City made in a good faith exercise of the discretion**, shall be commenced against,
>
> (a) the City or a local board of the City;
>
> (b) a member of city council or a member of a local board of the City; or
>
> (c) an officer, employee or agent of the City or an officer, employee or agent of a local board of the City. 2006, c. 11, Sched. A, s. 390.
>
> **391** (1) No proceeding **for damages** or otherwise shall be commenced against a member of city council, an officer, employee or agent of the City or a person acting under the instructions of the officer, employee or agent for any act done in good faith in the performance or intended performance of a duty or authority under this Act or a by-law passed under it or for **any alleged neglect** or default in the **performance in good faith** of the duty or authority. 2006, c. 11, Sched. A, s. 391 (1).

3. ***Health Protection and Promotion Act***:

> **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.** 2007, c. 10, Sched. F, s. 18; 2009, c. 33, Sched. 18, s. 12 (11); 2011, c. 7, s. 4 (1).

- **Jurisprudence**

1. ***A.G. Canada v. Inuit Tapirasat of Canada [1980] 2 S.C.R. 735;***
2. ***Nelles v. Ontario [1989] 2 S.C.R. 170 ;***
3. ***Operation Dismantle v. The Queen, 1985 CanLII 74 (SCC), [1985] 1 SCR441;***
4. ***Hunt v. Carey Canada Inc [1990] 2 S.C.R. 959; ;***
5. ***Dumont v. A.G. Canada [1990] 1 S.C.R. 279;***
6. ***Trendsetter Ltd. v. Ottawa Financial Corp. (1989)32 O.A.C. 327 (C.A.);***
7. ***Nash v. Ontario (1995) 27 O.R. (3d) 1 (Ont. C. A.).***
8. ***Canada v. Arsenault 2009 FCA 242;***
9. ***B.C. v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473***
10. *R. v. Imperial Tobacco Canada Ltd*
11. ***Hanson v. Bank of Nova Scotia (1994) 19 O.R .(3d) 142 (C.A.);***
12. ***Adams-Smith v. Christian Horizons (1997)14 C.P.C.(4th)78 (Ont. Gen. Div.);***
13. ***Miller (Litigation Guardian of) v. Wiwchairyk (1997) 34 O.R. (3d) 640 (Ont.Gen.Div)***
14. ***R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.*** (1991) 5 O.R. (3d) 778 (C.A.)
15. ***Dalex Co. v. Schawartz Levitsky Feldman*** (1994) 19 O.R. (3d) 463 (Gen. Div)
16. ***Grant v. Cormier – Grant, et. al*** (2001) 56 O.R. (3d) 215 (Ont. C.A.),
17. ***TD Bank v. Delloitte Hoskins & Sells*** (1991) 5 O.R. (3d) 417 (Gen. Div.)
18. ***Nova Scotia (Attorney General) v. Canada (Attorney General)*** [1951] S.C.R. 31
19. ***Reference re Secession of Quebec,*** [1988] 2 S.C.R. 217
20. ***Vriend v. Alberta*** [1998] 1 S.C.R. 493
21. ***Air Canada v. British Columbia (Attorney General)*** [1986] 2 S.C.R. 539,

22. ***Canada (Prime Minister) v. Khadr***, [2010] 1 S.C.R. 44

23. **Roncarelli v. Duplessis, 1959 CanLII 50 (SCC), [1959] SCR 121**

24. **Switzman v. Elbling, [1957] S.C.R. 285,**

25. **Saumur v City of Quebec-[1953] 2 SCR 299,**

26. ***Singh v. Canada (Citizenship and Immigration), 2010 FC 757,***

27. ***Canada v. Solosky, [1980] 1 S.C.R. 821***

28. **Thorson**

29. ***Dunsmuir v. New Brunswick, 2008 SCC 9,***

30. ***Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14***

31. ***Fleming v. Reid (1991), 4 O.R. (3d) 74 (C.A.).***

32. ***Carter v. Canada (Attorney General), 2015 SCC 5 (CanLII),*** at para 67

33. ***Roman Catholic Diocese of Brooklyn, New York V. Andrew M. Cuomo, Governor Of New York U.S. 592 (2020)***

34. ***Borowski v. Canada (Attorney General), 1989 CanLII 123 (SCC), [1989] 1 SCR 342***

35. R. v. Nur, 2015 SCC 15 (CanLII), [2015] 1 SCR 773, <https://canlii.ca/t/gh5ms>

36. ***R. v. Nur, 2013 ONCA 677 (CanLII);***

37. ***R. v. McDonald, 1998 CanLII 13327 (ON CA);***

38. ***Law Society Of Upper Canada v. Ernst & Young, 2003 CanLII14187 (ON CA);***

39. ***R. v. Charles, 2013 ONCA 681 (CanLII); R. v. John, 2018 ONCA 702 (CanLII);***

40. ***R. v. Vu, 2018 ONCA 436 (CanLII);***

41. ***R. v. Plange, 2019 ONCA 646 (CanLII);***

42. ***R. v. M.R.M., 2020 ONCA 75 (CanLII);***

43. ***R. v. Safieh, 2021 ONCA 643 (CanLII);***

44. Baber v. Ontario (Attorney General), 2022 ONCA 345 (CanLII);

45. R. v. N.S., 2022 ONCA 160 (CanLII);

46. R. v. Abdelrazzaq, 2023 ONCA 112 (CanLII);

47. Reza v. Canada, [1994] 2 S.C.R. 394

48. Collins v. Canada [2011] D.T.C. 5076;

49. Simon v. Canada [2011] D.T.C. 5016;

50. Spatling v. Canada 2003 CarswellNat 1013;

51. Larden v. Canada (1998) 145 F.T.R. 140;

52. Action4Canada v British Columbia (Attorney General), 2022 BCSC 1507 (CanLII);

53. Adelberg v. Canada, 2023 FC 252 (CanLII), <https://canlii.ca/t/jvq68

Court File No.: CV-20-00643451-0000

VCC et al. -and- HMK et al.

Plaintiffs Defendants

.

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

FACTUM
(Returnable Jan. 30th, and Feb 1st, 2024)

Name: ROCCO GALATI LAW FIRM
PROFESSIONAL CORPORATION
Rocco Galati
Address: 1062 College Street
Lower Level
Toronto ON M6H 1A9

Telephone No.: 416-530-9684
Fax No.: 416-530-8129

Lawyer for the Plaintiff,