

Court File No.: CV-20-643451

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

- 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, Her Majesty the Queen in Right of Canada, Her Majesty the Queen 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

STATEMENT OF DEFENCE

1. The Defendant, Nicola Mercer (hereinafter referred to as "Dr. Mercer"), admits the allegations contained in paragraphs 46, 47, 48, 49, 51, 52, 53, 56, 57, 58 and 59 of the Amended Statement of Claim.
2. The Defendant, Nicola Mercer (hereinafter referred to as "Dr. Mercer"), has no knowledge of the allegations contained in paragraphs 22, 23, 29-33 of the Amended Statement of Claim pertaining to those of the individual Plaintiffs who allege that they have been affected by Dr. Mercer's Orders.

3. Except as expressly hereinafter stated to the contrary, Dr. Mercer denies the allegations contained in all other paragraphs of the Amended Statement of Claim.
4. Even if accurate, which is denied, the allegations contained in all paragraphs except portions of paragraphs 9(f), 22-25 and 29-32, are entirely irrelevant to the claim against Dr. Mercer.
5. In particular, claims by Dr. Sheppard and other individual Plaintiffs regarding the manner in which conduct by third parties, including but not limited to the Ontario Ministry of Health, the College of Chiropractors of Ontario or any of the other Defendants, have affected them or their children are entirely irrelevant to the claim against Dr. Mercer.
6. Dr. Mercer states that pursuant to her responsibilities as Medical Officer of Health for Wellington-Dufferin-Guelph Public Health, she made Orders relating to the pandemic which required various persons or classes of persons to comply with various requirements that in her opinion were necessary in order to decrease or eliminate the risk to health presented by COVID-19 which, pursuant to the provisions of s. 1 of *Ontario Reg. 135/18*, is a communicable disease.
7. Such Orders were made pursuant to her statutory authority under s. 22 of the *Health Promotion and Protection Act* RSO 1990, c H.7 (the "HPPA") which provides inter alia 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).

8. All such Orders were made in good faith, were consistent with the precautionary principle and were based on Dr. Mercer's opinion that the criteria required under s. 22 (2) of the HPPA were met.

9. All such Orders were consistent with the scientific consensus at the time the Orders were made:

a) That COVID-19 is caused by SARS-CoV-2, a communicable and highly contagious virus which has resulted in the deaths of millions of people and caused illness, in many cases life threatening illness, in many millions more;

- b) That COVID-19 has resulted in a significant number of deaths and serious illness throughout Canada and the province of Ontario;
 - c) That COVID-19 affects people of all ages and is particularly dangerous to older people and those with certain medical pre-conditions;
 - d) That left unchecked the virus threatened to overwhelm the medical system leading to deaths and serious consequences, not only for persons infected by COVID- 19, but also for persons in need of medical care for other reasons;
 - e) That personal protective equipment, including masks and social distancing were critical tools in reducing the spread of the virus, particularly among unvaccinated people;
 - f) That COVID-19 is transmitted predominantly through respiratory droplets released from the nose and mouth and transmitted to the other person's nose, mouth, or eyes; and
 - g) That the virus transmits easily when people are unmasked and in close spaces.
10. The scientific consensus was reflected as well by the legal consensus of judges, arbitrators and administrative tribunals, including most notably the Health Services Appeal and Review Board, that the types of preventative measures set out in Dr. Mercer's Orders, which included hygiene and masks, were consistent with the precautionary principle and were necessary and reasonable in the circumstances.
11. By contrast, the various opinions and conspiracy theories quoted by the Plaintiffs in support of their claim, were at all material times contrary to the scientific consensus

regarding the seriousness of the pandemic, and the necessity and efficacy of preventative measures.

12. Those opinions and conspiracy theories regarding the seriousness of the pandemic, the infectiousness of asymptomatic individuals, the likelihood of future waves and the necessity and efficacy of preventative measures were contrary to the actual course of events as the COVID 19 virus evolved and the pandemic developed following its outset in early 2020.
13. The Amended Statement of Claim does not give rise to a cause of action against Dr. Mercer in her personal capacity or in her capacity as Medical Officer of Health and in this respect Dr. Mercer pleads and relies upon the provisions s. 95(1) of the *HPPA* which 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.

14. In the circumstance that pertain herein, there is no reasonable basis to conclude that Dr. Mercer's Orders were not made in good faith or were not reasonable in the circumstances and therefore s. 95(1) of the *HPPA* is a full and complete answer and defense to the claim.
15. Without prejudice to that position, we will now address the particular allegations of the individual Plaintiffs insofar as they relate to Dr. Mercer's Orders.

16. The allegation that that Dr. Mercer's Orders subjected individual members of the public to a fine for entering an establishment unmasked is untrue.
17. Dr. Mercer's Orders were directed at persons who owned or operated certain establishments in the jurisdiction of Wellington-Dufferin Guelph Public Health and required them to prohibit certain persons from entering or remaining in certain portions of the establishment if they were not wearing a face covering except to the extent that it was reasonably required to temporarily remove the face covering for services provided by the establishment or unless the person was exempt from wearing a face covering. Only the owners and operators were governed by the Order and only they were subject to a fine for non-compliance.
18. The allegation that children under the age of 5 were required to be masked is not accurate. Dr. Mercer's Orders exempted a child under the age of two years or a child under the age of 5 years, either chronologically or developmentally, if the child refuses to wear a face covering and cannot be persuaded to do so by their caregiver.
19. Dr. Mercer's Orders pertaining to face coverings did not apply to day care centres and schools.
20. Dr. Mercer's Orders also exempted a person from wearing a face covering if:
 - a. Wearing a face covering would inhibit a person's ability to breath in any way;
 - b. For any other reason, the person cannot safely wear a face covering such as, but limited to, respiratory disease, cognitive difficulties or difficulties in hearing or processing information.
21. By Order dated July 14, 2020, effective at 12:01 am on July 17, 2020, Dr. Mercer's previous Order was amended to clarify that:

- a. persons would be also exempted if the obligation to provide reasonable accommodation under the *Ontario Human Right Code* requires exemption from this requirement; and
- b. an establishment falling within the scope of the Order is required to make best efforts in respect of the requirements of the Order. In complying with the best-efforts requirement, owners and operators shall not require employees or members of the public to provide proof that they qualify for any of the exemptions set out in Section 1 of the Order.

22. Any allegation to the effect that Dr. Mercer's Orders required owners and operator to require members of the public to use hand sanitizers is untrue.

23. Dr. Mercer's Orders required the owners and operators of certain commercial establishments 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. The Orders did not direct owners and operators to require members of the public to use hand sanitizers as a condition of being permitted to enter the establishment.

24. In light of the above, Dr. Mercer denies that her Orders have affected the individual Plaintiffs in any material way in the manner alleged or at all.

25. All of Dr. Mercer's Orders in respect of the pandemic have now expired or been withdrawn.

26. Accordingly, Dr. Mercer pleads that the Plaintiffs' requests for a declaratory Order or an injunction are moot.

27. As regards the allegations pertaining to the Canadian Charter of Rights and Freedoms, Dr. Mercer denies that her Orders infringe the Charter Rights of any of the Plaintiffs who were affected by her Orders in any material way, and in any event states that her Orders were justified under section 1 of the Charter.
28. Having regard to the magnitude of the risks to the medical system and to the health and safety of the persons for which she was responsible as Medical Officer of Health, Dr. Mercer's Orders served a pressing and substantial objective, were rationally connected to the objective, were minimally impairing, and were not disproportionate in their effects.
29. The damages claimed by the Plaintiffs in the Amended Statement of Claim are wholly inordinate, excessive, and remote.
30. Dr. Mercer therefore denies that the Plaintiffs are entitled to the relief claimed or to any relief and requests that the Plaintiffs' claim be dismissed, and that the Plaintiffs be ordered to pay Dr. Mercer's costs on a substantial indemnity scale.

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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

Mark D. Contini LSO No.: 19819H
mcontini@mathewsdinsdale.com
Tel: 416.869.8536
Fax: 416.862.8247

Lawyers for the Defendant,
Nicola Mercer

TO: ROCCO GALATI LAW FIRM
PROFESSIONAL CORPORATION
1062 College Street, Lower Level
Toronto, ON M6H 1A9

Rocco Galati LSO No.: 29488Q
rocco@idirect.com
Tel: 416.530.9684
Fax: 416.530.8129

Lawyers for the Plaintiffs

AND TO: NATIONAL LITIGATION SECTOR
Department of Justice / Ontario Regional Office / Government of Canada
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

Sadian Campbell LSO No.: 35800T
sadian.campbell@justice.gc.ca
Tel: 647.256.7480
Fax: 416.973.5004

James Schneider
james.schneider@justice.gc.ca
Tel: 647.256.7545
Fax: 416.973.5004

Elizabeth Cunningham
elizabeth.cunningham @justice.gc.ca
Tel: 416.580.9452
Fax: 416.973.5004

Lawyers for the Defendants
Justin TRUDEAU, Prime Minister of Canada, Dr. Theresa TAM, Chief Medical Officer
for Canada, Marc GARNEAU, Canadian Transport Minister, AG of Canada

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

Daniel Guttman LSO No.: 43748E
daniel.guttman@ontario.ca
Tel: 416.892.2684
Fax: 416.326.4015

S. Zachary Green
zachary.green@ontario.ca

Savitri Gordian

savitri.gordian@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, AG 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 No.: 40392F

glenn.chu@toronto.ca

Tel: 416.397.5407

Fax: 416.397.5624

Fred Fischer

fred.fischer@toronto.ca

Tel. 416.397.7224

Fax 416.397.5624

Penelope Ma

penelope.ma@toronto.ca

Tel. 416.397.7690

Fax 416.397.5624

Lawyers for 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 No.: 64097E

jpkaram@willislawfirm.ca

Tel: 1.226.526.9954

Fax: 1.519.945.5479

Becca Pilon

bpillon@willislawfirm.ca

Lawyers for the Defendants

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

Vaccine Choice Canada (VCC) et al.
Plaintiffs

and

Dr. Nicola Mercer et al.
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Proceeding commenced at TORONTO

STATEMENT OF DEFENCE

MATHEWS, DINSDALE & CLARK LLP
The Well, 35th Floor
8 Spadina Avenue
Toronto, ON 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