

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

B E T W E E N:

(Court Seal)

ABORIGINAL LEGAL SERVICES, BLACK LEGAL ACTION CENTRE, CANADIAN
CIVIL LIBERTIES ASSOCIATION, and HIV & AIDS LEGAL CLINIC ONTARIO
Applicants

and

ATTORNEY GENERAL OF ONTARIO, MINISTER OF HEALTH (ONTARIO) and
LIEUTENANT GOVERNOR IN COUNCIL
Respondents

APPLICATION UNDER Rule 14.05(2) of the *Rules of Civil Procedure*; Sections 2(1) and 6(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1; Sections 1, 7, 8 and 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*; and section 52(1) of the *Constitution Act, 1982*.

NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW

TO THE RESPONDENTS

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicants. The claim made by the Applicants appears on the following page.

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar at the place of hearing requested by the Applicants. The Applicants requests that this application be heard at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicants' lawyer or, where the Applicants do not have a lawyer,

serve it on the Applicants, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicants' lawyer or, where the Applicants does not have a lawyer, serve it on the Applicants, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the Applicants' application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN TO IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS APPLICATION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for hearing or terminated by any means within five years after the notice of application was filed with the court, unless otherwise ordered by the court.

Date _____ Issued by _____
Registrar

Address of
court office: Osgoode Hall, 130 Queen Street West
Toronto, Ontario M5H 2N5

TO: **MINISTRY OF THE ATTORNEY GENERAL**
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M5G 2K1

AND TO: **ATTORNEY GENERAL OF CANADA**
Ontario Regional Office
Department of Justice Canada
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

APPLICATION

This is an application for judicial review pursuant to section 2 of the *Judicial Review Procedure Act*, RSO 1990, c J1, as amended (the “**JRPA**”) in respect of the decisions of the Respondents that approved or led to the approval of *O Reg 120/20 Order Under Subsection 7.0.2 (4) Of The Act - Access To Covid-19 Status Information By Specified Persons* (the “**COVID-19 Status Order**”) and the use and disclosure of the COVID-19 Status Information, as that term is defined below (the “**Decision**”).

THE APPLICANTS MAKE THIS APPLICATION FOR:

1. The Applicants seek relief as follows:
 - (a) a declaration under section 2(1)(2) of the *Judicial Review Procedure Act*, RSO 1990, c J1, as amended (the “**JRPA**”) that the Decision is *ultra vires* the objects and powers under the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9 (the “**EMCPA**”) and is therefore invalid;
 - (b) a declaration that the Decision, as defined below, is unreasonable, disproportionate, arbitrary, and a capricious exercise of the Respondents’ statutory power under the *EMCPA*;
 - (c) a declaration that the Decision is inconsistent with, and contrary to, the *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sched. A (“**PHIPA**”);
 - (d) a declaration that the Decision must be compliant with the *Canadian Charter of Rights and Freedoms* (the “**Charter**”);

- (e) a declaration that the COVID-19 Status Order is inconsistent with and contrary to ss. 1, 7, 8 and 15(1) of the *Charter*;
- (f) an order under s. 52(1) of the *Constitution Act, 1982* that the COVID-19 Status Order is of no force or effect;
- (g) an order in the nature of *certiorari* quashing or setting aside the Decision;
- (h) in the alternative, an order in the nature of *mandamus* that the Respondents comply with their statutory duties and powers pursuant to the *EMCPA* and *PHIPA*;
- (i) an order requiring the application to proceed on an expedited and urgent basis;
- (j) if necessary, an order granting leave to make this application to a single judge of the Superior Court of Justice in accordance with section 6(2) of the *JRPA*;
- (k) such injunctive or interlocutory relief as may be sought by the Applicants, until such time as this application can be determined on its merits;
- (l) if required, an Order abridging the time prescribed for service of the application record, or alternatively, dispensing with service;
- (m) an order, in any event of the cause, that no costs be awarded to or against the Applicants; and
- (n) such further and other relief as counsel may advise and this Honourable Court may deem just.

THE GROUNDS FOR THE APPLICATION ARE:

Overview and Applicants

2. The Applicants, Aboriginal Legal Services, Black Legal Action Centre, Canadian Civil Liberties Association, and HIV & AIDS Legal Clinic Ontario, are a coalition of public interest organizations and legal aid clinics whose mandates include, *inter alia*, protecting and promoting the fundamental rights and freedoms of Canadians, including the individual right to privacy. This includes the privacy rights of historically marginalized people and groups in Ontario, including racialized, Black and Indigenous people, people living with disabilities and people receiving social assistance.

3. The Applicants have public interest standing to seek the relief described above from this Honourable Court because there are no reasonable alternative means available to bring the issues engaged on this application before the Court.

4. The Lieutenant Governor in Council made the impugned Decision at issue in this judicial review application.

5. The Minister of Health (Ontario) is responsible for the implementation of the Decision at issue in this judicial review application and/or for making the impugned Decision at issue in this judicial review application.

Ontario Declares a State of Emergency

6. On or about 17 March 2020 the Ontario Cabinet, by way of an Order in Council, declared a state of emergency as a result of the outbreak of a communicable disease, namely COVID-19, pursuant to ss. 7.0.1 (1) of the *EMCPA*.

7. Through successive Orders in Council, the declared state of emergency in Ontario has been continuously extended. As of the date of filing of this Notice of Application for Judicial Review, the state of emergency in Ontario has been extended to 15 July 2020.

Ontario Allows for the Use and Disclosure of COVID-19 Personal Health Information

8. On or about 3 April 2020, Ontario passed the COVID-19 Status Order. The COVID-19 Status Order purports to be made pursuant to s. 7.0.2 of the *EMCPA*, and specifically ss. 7.0.2(4) 8, 9, 10, 12, 13 and 14.

9. The COVID-19 Status Order provides that specific persons may make a request to a specified custodian for the disclosure of COVID-19 status information, which includes an individual's name, address, date of birth, and whether the individual has had a positive COVID-19 test result (the "**COVID-19 Status Information**").

10. The COVID-19 Status Order provides that specified persons are authorized to make a request to access COVID-19 Status Information about a specified individual (collectively referred to as a "**Requester**" or the "**Requesters**").

11. By way of a news release from the office of the Ministry of the Solicitor General on 6 April 2020 (the "**News Release**"), Ontarians were advised that the COVID-19 Status Order had been

made to “allow police, firefighters and paramedics to obtain COVID-19 positive status information about individuals with whom they are coming into contact.”

12. The stated purpose of the COVID-19 Status Order was to ensure that first responders had access to critical information when “preparing to respond to an emergency in order to protect themselves and the public and help stop the spread of this virus.” The news release confirmed that “[s]trict protocols will be enforced to limit access to this information and will only be used to allow first responders to take appropriate safety precautions to protect themselves and the communities they serve.” This purpose was set out in the News Release. There is no purpose set out in the COVID-19 Status Order.

13. Beyond the News Release, it is unknown how the Respondents, or any one of them, came to make the Decision, including what if any evidence, policies, or legislation were considered. It is also unclear whether any *Charter* rights or values were considered, given that all government action, including the passing of legislation, must comply with the *Charter*.

14. It is similarly unknown how the Ministry of Health has collected, used and/or disclosed COVID-19 Status Information. It is also unknown which Requesters have made requests for, and/or been provided access to, COVID-19 Status Information. The Ministry of Health appears to have made a “database” or “portal” to which Requesters can gain access. No information has been provided to the public about how this “database” or “portal” was created, accessed, or updated, among other things.

The Decision is Unreasonable and Must be Quashed

15. The Decision to use the COVID-19 Status Information and disclose it to Requesters and, more specifically, law enforcement, is an extraordinary invasion of privacy. The Decision is *ultra vires* the Respondents' statutory powers, is unreasonable and arbitrary, and ought to be set aside.

A. The Respondents Exceeded their Legal Authority

16. Any decision by the Respondents to purportedly authorize the use and disclosure of COVID-19 Status Information must be made pursuant to their statutory powers under the *EMCPA*. Specifically, once a state of emergency has been declared pursuant to s. 7.0.1 of the *EMCPA*, the Lieutenant Governor in Council may make orders that the Lieutenant Governor in Council believes are necessary and essential in the circumstances. Any such orders must meet the purpose and internal limiting provisions of s. 7.0.2 of the *EMCPA*:

Emergency powers and orders

Purpose

7.0.2 (1) The purpose of making orders under this section is to promote the public good by protecting the health, safety and welfare of the people of Ontario in times of declared emergencies in a manner that is subject to the *Canadian Charter of Rights and Freedoms*.

Criteria for emergency orders

(2) During a declared emergency, the Lieutenant Governor in Council may make orders that the Lieutenant Governor in Council believes are necessary and essential in the circumstances to prevent, reduce or mitigate serious harm to persons or substantial damage to property, if in the opinion of the Lieutenant Governor in Council it is reasonable to believe that,

- (a) the harm or damage will be alleviated by an order; and
- (b) making an order is a reasonable alternative to other measures that might be taken to address the emergency.

Limitations on emergency order

(3) Orders made under this section are subject to the following limitations:

- 1. The actions authorized by an order shall be exercised in a manner which, consistent with the objectives of the order, limits their intrusiveness.
- 2. An order shall only apply to the areas of the Province where it is necessary.

3. Subject to section 7.0.8, an order shall be effective only for as long as is necessary.

17. If the above-noted purpose and internal limiting provisions are met, the Lieutenant Governor in Council may make orders in accordance with ss. 7.0.2(4) of the *EMCPA*.

18. The Decision was purportedly made pursuant to ss. 7.0.2(4) 8, 9, 10, 12, 13 and 14 of the *EMCPA*, which state:

Emergency orders

7.02(4) In accordance with subsection (2) and subject to the limitations in subsection (3), the Lieutenant Governor in Council may make orders in respect of the following: [...]

8. Authorizing facilities, including electrical generating facilities, to operate as is necessary to respond to or alleviate the effects of the emergency.

9. Using any necessary goods, services and resources within any part of Ontario, distributing, and making available necessary goods, services and resources and establishing centres for their distribution.

10. Procuring necessary goods, services and resources.

12. Authorizing, but not requiring, any person, or any person of a class of persons, to render services of a type that that person, or a person of that class, is reasonably qualified to provide.

13. Subject to subsection (7), requiring that any person collect, use or disclose information that in the opinion of the Lieutenant Governor in Council may be necessary in order to prevent, respond to or alleviate the effects of the emergency.

14. Consistent with the powers authorized in this subsection, taking such other actions or implementing such other measures as the Lieutenant Governor in Council considers necessary in order to prevent, respond to or alleviate the effects of the emergency.

19. The Decision is *ultra vires* the Respondents' powers provided under the *EMCPA*. Namely:

- (a) it was made not reasonably believing that the COVID-19 Status Order was “necessary and essential in the circumstances” to prevent, reduce or mitigate “serious harm” to persons, being the Requesters;

- (b) it was made not reasonably believing that the COVID-19 Status Order would alleviate harm or damage;
- (c) it is not a reasonable alternative to other measures that might be taken to address the emergency;
- (d) it does not limit the intrusiveness of the actions authorized by the Decision. Specifically, the Decision does not set out any of the following requirements or limits in relation to actions authorized under the Decision:
 - (i) how the COVID-19 Status Information can be accessed;
 - (ii) how, and if, the Requester(s) ought to keep track of their requests for and access of COVID-19 Status Information;
 - (iii) how the COVID-19 Status Information can be used and for what purpose(s);
 - (iv) how the COVID-19 Status Information ought to be stored by the Requester(s);
 - (v) how and when, if at all, the COVID-19 Status Information ought to be destroyed by the Requester(s); and
 - (vi) how a complaint about misuse of COVID-19 Status Information can be brought.

20. The Decision is therefore *ultra vires* the Respondents' statutory powers.

B. The Decision is Inconsistent with and Contrary to PHIPA

Disclosure of COVID-19 Status Information is Regulated by PHIPA

21. COVID-19 Status Information – which includes an individual’s name, address, date of birth, and whether the individual has had a positive test for the COVID-19 coronavirus – is “personal health information” as that term is defined in s. 4(1)(a) of *PHIPA*.

22. Both “specified custodians”, as that term is defined in the COVID-19 Status Order, and the Ministry of Health itself are “health information custodians” pursuant to section 3 of *PHIPA*.

23. Consequently, the use and disclosure of COVID-19 Status Information is regulated by *PHIPA*.

Disclosure of COVID-19 Status Information is Contrary to the Provisions in PHIPA

24. Sections 37 and 38 of *PHIPA* limit the use and disclosure of personal health information. None of the permitted uses or disclosures of personal health information apply to the Decision or to the use or disclosure of COVID-19 Status Information.

25. In particular, the disclosure of COVID-19 Status Information is not necessary for the purpose of eliminating or reducing a significant risk of serious bodily harm to a person or group of persons, as provided for in s. 40(1) of *PHIPA*. Disclosing whether a person has had a positive test does not eliminate or reduce any significant risk of serious bodily harm to a Requesters.

26. Moreover, even where disclosure *is* permitted, such disclosure is subject to s. 30 of *PHIPA*:

Other information

30 (1) A health information custodian shall not collect, use or disclose personal health information if other information will serve the purpose of the collection, use or disclosure. 2004, c. 3, Sched. A, s. 30 (1).

Extent of information

(2) A health information custodian shall not collect, use or disclose more personal health information than is reasonably necessary to meet the purpose of the collection, use or disclosure, as the case may be. 2004, c. 3, Sched. A, s. 30 (2).

Exception

(3) This section does not apply to personal health information that a health information custodian is required by law to collect, use or disclose.

27. The disclosure of COVID-19 Status Information is not reasonably necessary to meet the purpose of the disclosure. There are a number of reasonable alternatives to the Decision that could be used to keep Requesters safe and ensure that individuals' personal health information is held strictly private. For instance:

- (a) all Requesters should treat everyone they encounter as potential carriers of COVID-19;
- (b) all Requesters should be provided with, and use, appropriate personal protective equipment (“**PPE**”) when responding to calls or interacting with the public; and
- (c) all Requesters should take measures, where appropriate, to physically distance themselves.

28. Finally, the disclosure is not permitted or required by law, as provided for in s. 43(h) of *PHIPA*. As set out above, the Decision is inconsistent with and contrary to the *EMCPA*, its own enabling statute.

C. The Decision is Contrary to the *Charter* and *Charter* Values

29. The Decision permits non-consensual, state-authorized and state-enabled mass-capture of Ontarians' personal health information, and as such is a governmental act that violates:

- (a) personal and collective privacy rights under section 7 (*liberty and security of the person*) and section 8 (*unreasonable search or seizure*) of the *Charter*;
- (b) equality rights under section 15 (*equality and equal protection under the law without discrimination*) of the *Charter*;

30. The non-consensual disclosure and use of personal health information by the state constitutes a gross intrusion on an individual's liberty to make private decisions free from state interference, and violates Ontarians' right to liberty and security of the person under section 7 of the *Charter* in a manner contrary to the principles of fundamental justice.

31. Section 8 guarantees Canadians, including Ontarians, the right to maintain reasonable expectations of privacy, including, and in particular, about personal health information. The COVID-19 Status Order violates Ontarians' reasonable expectations of privacy over their personal health information and constitutes an unreasonable search or seizure contrary to section 8 of the *Charter*.

32. By providing police officers with personal health information, the Decision risks worsening the health impacts of COVID-19 on marginalized and over-policed communities, who already face numerous barriers to health-care, are at increased statistical risk of contracting or suffering adverse health outcomes from COVID-19, and could be further deterred from seeking appropriate health care knowing their personal health information will be given to police officers and other state personnel. The COVID-19 Status Order therefore has a discriminatory impact on Ontarians on the enumerated grounds of race, national or ethnic origin, colour, and disability, and the analogous grounds of sexual orientation and gender identity. The COVID-19 Status Order is therefore contrary to section 15 of the *Charter*.

33. The infringements enumerated above are not reasonable limits on the rights of Ontarians in a manner that could be demonstrably justified in a free and democratic society. The COVID-19 Status Order is arbitrary and vague, impairs the rights of Ontarians more than is reasonably necessary to achieve its objective, and does not benefit the public good in such a way that can justify its deleterious impacts.

34. In the alternative, any ambiguities in the COVID-19 Status Order should be interpreted in accordance with the relevant *Charter* values, including the values of privacy, equality, autonomy, liberty, and human dignity. The COVID-19 Status Order, *inter alia*, disproportionately interferes with Ontarians' right to privacy, disproportionately affects communities already excessively targeted for criminalization who are also at increased risk for COVID-19, and inappropriately captures individuals who do not pose any health or safety risk to Requesters.

The Application is Urgent

35. The Respondents have had ample time to clarify or amend the Decision to ensure that it is not overly broad, and that it does not arbitrarily and unreasonably disclose personal health information. The Respondents have failed to do so, necessitating this application to this Honourable Court.

36. This application is urgent. Unprecedented power is being exercised by the government of Ontario over the citizens of this province, in direct violation of applicable legislation and *Charter* rights and values.

37. Urgent oversight of this Honourable Court is respectfully requested on an expedited basis.

38. Unless the application can be heard in an expedited manner, an interim injunction should issue against the Respondents enjoining them from disclosing COVID-19 Status Information until such time as this application can be determined on the merits for the following reasons:

- (a) there are serious issues to be determined in this application;
- (b) irreparable harm will occur if an interim injunction is not ordered; and
- (c) the balance of convenience favours issuing an interim injunction until such time as the application can be heard.

Costs

39. The Applicants request that, in any event of the cause, no costs be awarded to or against them. The Applicants have no financial interest in the outcome of this proceeding. They bring this application because of the important public interest issues raised.

Other Grounds

40. The Applicants rely on the following statutes and rules:

- (a) *Emergency Management and Civil Protection Act*, RSO 1990, c E9;
- (b) *O. Reg. 120/20: Order Under Subsection 7.0.2 (4) Of The Act - Access To Covid-19 Status Information By Specified Persons*;
- (c) *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sched. A;
- (d) *The Canadian Charter of Rights and Freedoms*, ss. 1, 7, 8, 15;
- (e) *Courts of Justice Act*, R.S.O. 1990, c. C. 43; and
- (f) *Judicial Review Procedure Act*, R.S.O. 1990.

41. Such further and other grounds as counsel may advise and this Honourable Court may permit.

42. The following documentary evidence will be used at the hearing of the Application:

- (a) Affidavit of Abby Deshman affirmed 2 July 2020;
- (b) Affidavit of Abby Deshman affirmed 2 July 2020;
- (c) Affidavit of Amanda Carling affirmed 6 July 2020;
- (d) Affidavit of Ruth Goba affirmed 6 July 2020;
- (e) Affidavit of Edward Carroll affirmed 2 July 2020;

- (f) Affidavit of Dr. O'Shea, to be sworn; and
- (g) Such further and other evidence as counsel may advise and this Honourable Court may permit.

July 7, 2020

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Respondents

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