Court of Appeal File No.: C70164
Superior Court File No.: CV-21-671579-00

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

NATIONAL ORGANIZED WORKERS UNION

Applicant/
Appellant

- and -

SINAI HEALTH SYSTEM

Respondent/
Respondent

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PART I - INTRODUCTION

1. The Appellant, National Organized Workers Union ("NOWU") appeals the final Order of the Honourable Justice Jasmine Akbarali (the "Application Judge"), dated November 20, 2021 (the "Injunctive Order" or "Order"). The Order dismissed the Appellant's application for injunctive relief. The injunction would have prevented the enforcement of the Respondent's mandatory COVID-19 vaccination policy while the Appellant's grievance of the policy was heard by the Ontario Labour Relations Board.

2. For the reasons set out herein, the Appellant submits that the justice of this case requires that the appeal be allowed. The Appellant asks that this Court set aside the Order of the Application Judge and grant the injunctive relief, preventing further enforcement of the Respondent's mandatory COVID-19 vaccination policy against the Appellant's bargaining members, but only until such time as the Ontario Labour Relations Board has rendered its Award over the grievance of the policy. In the alternative, the Appellant asks that the application be returned to the Ontario Superior Court of Justice to be heard by another judge on an urgent basis.

PART II - OVERVIEW

3. What protections should be afforded to employees when their rights to bodily integrity and informed consent to medical treatment are threatened by their employer's policies? What is to be done when the mechanisms for challenging such policies are inadequate, leaving those who submit to the medical treatment without a meaningful remedy if such policies are later found to be unlawful? The outcome of this appeal will define the answers to these important questions.

4. On October 26, 2021, the Respondent, Sinai Health Systems, announced that all of its 15,000 employees were to submit to COVID-19 vaccination no later than November 4th, 2021.[1] Any employee who failed to submit to vaccination on or before that date would be dismissed for cause.[2]

5. The Appellant, NOWU, represents approximately 550 bargaining members employed throughout Sinai Health Systems.[3] Upon the announcement of the mandatory vaccination policy, NOWU's members voiced grave concerns to NOWU's president. They felt the policy was compelling and coercing them into submitting to vaccination against their consent.[4] These members did not want to be vaccinated against COVID-19 but could not afford to lose their jobs. They felt they had little choice.

6. The Appellant filed a grievance of the policy almost immediately; however, there was insufficient time for the grievance to be heard by the Ontario Labour Relations Board

[1] Appeal Book and Compendium ("ABC"), Vol. 3 of 4 ("V3"), Tab 47, Affidavit of Susan Brown, para 54, pg. 1241.
[2] ABC, V3, Tab 63, Affidavit of Susan Brown, Exhibit "P", pg. 1444.
[3] ABC, Vol. 1 of 4 ("V1"), Tab 12, Affidavit of Tim Oribine, para 5, pg. 165.
[4] ABC, V1, Tab 12, Affidavit of Tim Oribine ("Oribine Affidavit"), para 11, pg. 166.

("OLRB") before the enforcement date of the policy.[5] The Appellant therefore filed an application before the Ontario Superior Court for injunctive relief, seeking to prevent the enforcement of the mandatory policy until the grievance could be heard by the OLRB.[6]

7. The Appellant filed affidavits from its impacted members, attesting to the fact that they saw no other real choice but to submit to vaccination to keep their employment.[7] For these employees, some future determination of a labour arbitrator finding that the policy was indeed unlawful would be meaningless. For those who submitted to vaccination against their consent, the vaccination could not later be undone. These members testified that they were being deprived of an ultimate remedy. The Appellant also filed expert evidence that spoke to the potential for adverse reactions from the newly developed COVID-19 vaccinations.[8]

8. The application came before the Application Judge for an urgent hearing on November 17, 2021. On November 20, 2021, the Application Judge released her reasons, which dismissed the Appellant's application.[9] In her reasons, the Application Judge declined to undertake the well-known *RJR* analysis and dismissed the Application outright for a want of jurisdiction.[10] In so doing, the Application Judge made several reversible errors, summarized below.

[5] ABC, V1, Tab 12, Oribine Affidavit, para 10, pg. 166.
[6] ABC, V1, Tab 10, Application Record, pg. 148.
[7] ABC, V1, Tab 22, Affidavit of Carla Carvalho, pg. 420 & Tab 23, Affidavit of Veniece Morgan, pg. 426.
[8] ABC, Vol. 2 of 4 ("V2"), Tab 37, Expert Report of Dr. Byram Bridle ("Bridle Report"), pg. 825.
[9] ABC, V1, Tab 3, Endorsement of Akbarali J. ("Reasons"), pg. 12.
[10] ABC, V1, Tab 3, Reasons, para. 9, pg. 13.

Application Judge Errors Warrant Appellate Intervention

9. The Application Judge erred by narrowing the harm facing the Appellant's bargaining members as only the loss of income that would result from termination. The Application Judge entirely disregarded the real and substantial concerns for violations of bodily autonomy raised by the evidence before her. The Application Judge erred in concluding that because no one was being "forced" to be vaccinated, those who did submit to vaccination were doing so of their own free will.[11] As will be shown in the Appellant's argument, physical force is not required to establish a violation of a person's consent. Such a strict interpretation does not accord with existing jurisprudence on informed consent. Consent to a medical treatment cannot be said to have occurred when a person is compelled through threat of job loss and duress to undergo such treatment.

10. Her Honour erred in not adopting the "highest order of protection" which should be deployed when bodily autonomy and informed consent to medical treatment are threatened.

11. The Application Judge's failure to accurately characterize the harm facing the Appellant's bargaining members was an error that infiltrated the remainder of Her Honour's analysis. It led to the mistaken conclusion that the OLRB provided an adequate remedy for the Appellant's members, because monetary losses could be rectified through a retroactive award.[12] This error informed Her Honour's decision to decline to exercise the Court's inherent jurisdiction and consider the request for injunctive relief, causing her

[11] ABC, V1, Tab 3, Reasons, para 50, pg. 20.
[12] ABC, V1, Tab 3, Reasons, para 58, pg. 22.

to disregard material evidence before her which favoured granting the injunctive relief, including:

i. The evidence of the affiants who testified that they had no other choice but to keep their jobs to support their families and would undergo vaccination in protest;[13]

ii. The evidence of the expert, Dr. Byram Bridle, who opined on the reasonable risk of adverse reactions that could result from undergoing COVID-19 vaccination;[14] and,

iii. The evidence of the Appellant's board members which confirmed that at the time the mandatory vaccination policy was implemented, the parties were under a "statutory freeze" in working conditions and the Respondent had no authority to impose any change in working conditions on the Appellant's members.[15]

12. As such, appellate intervention is warranted. It is respectfully submitted that the just result is to set aside the Application Judge's Order and grant the Appellant's injunction, or alternatively, return it for a new urgent hearing before a different judge of the Ontario Superior Court of Justice.

[13] ABC, V1, Tab 22, Affidavit of Carla Carvalho, pg. 420 & Tab 23, Affidavit of Veniece Morgan, pg. 426.
[14] ABC, V2, Tab 37, Bridle Report, pg. 825.
[15] ABC, V1, Tab 26, Affidavit of Michael Downes, paras. 15-17, pg. 449.

PART III – STATEMENT OF FACTS

The Parties

13. The Appellant, NOWU, is a trade union within the meaning of the *Labour Relations Act*, 1995, SO 1995, c. 1, Sch A (the "*LRA*"). NOWU represents healthcare workers in various healthcare institutions in Toronto, including the Humber River Hospital, the University Health Network, and Sinai Health System ("**SHS**").[16] SHS is the Respondent in this appeal.

14. SHS is a well-known healthcare institution. SHS is comprised of three campuses: Mount Sinai Hospital, Hennick Bridgepoint Hospital, and the Lunenfeld-Tanenbaum Research Institute.[17]

15. NOWU has been the bargaining agent for 550 part-time and full-time service employees at SHS since February 14th, 2018. The employees within NOWU's bargaining units at SHS include registered practical nurses, porters, service attendants, dietary aids, and other service personnel. [18]

The Mandatory COVID-19 Vaccination Policy

16. On October 26th, 2021, SHS announced an update to its COVID-19 Immunization & Surveillance Policy. The update required all employees who had not yet been vaccinated against COVID-19 to either submit to their first dose of vaccine or face immediate termination of employment.[19] The original deadline for all employees to have

[16] ABC, V1, Tab 12, Oribine Affidavit, para. 4, pg. 165.
[17] ABC, V3, Tab 47, Affidavit of Susan Brown ("Brown Affidavit"), para 2, pg. 1226.
[18] ABC, V1, Tab 12, Oribine Affidavit, paras. 5 and 6, pg. 165.
[19] ABC, V3, Tab 47, Brown Affidavit, para 54, pg. 1241. & Tab 63, Exhibit "P", Brown Affidavit, pg. 1444

their first dose of vaccination was November 4th, 2021.[20] This deadline was subsequently extended to November 11th, 2021 (the "Enforcement Date").[21] Those employees who did not submit to their first dose of COVID-19 vaccination by the Enforcement Date would be terminated for cause, without notice or pay in lieu of notice.[22]

17. The Mandatory Vaccination Policy came as a surprise to the Appellant and its members. Up to that point, respect for an employee's choice to be vaccinated had been a consistent theme throughout SHS's campaign to encourage vaccination among its staff.[23] SHS had been operating under a "vax or test" approach for approximately ten months at the time vaccination was made mandatory. Up to that point, SHS employees had the choice to either be vaccinated against COVID-19 or, if they chose not to be vaccinated, to undergo rapid antigen testing twice per week as a screening measure.[24]

A Statutory Freeze in Working Conditions

18. The Respondent's Mandatory Vaccination Policy was implemented while the Appellant union and the Respondent employer were under a "statutory freeze" in working conditions.

19. In June of 2018, the first full and part-time collective agreements between NOWU and SHS were ratified and entered into force. Both the full and part-time collective agreements expired on December 31st, 2020. In May of 2021, NOWU gave SHS notice

[20] ABC, V3, Tab 47, Brown Affidavit, para 57, pg. 1241.
[21] ABC, V3, Tab 47, Brown Affidavit, para 57, pg. 1242.
[22] ABC, V3, Tab 65, Exhibit "R", Brown Affidavit, pg. 1468.
[23] ABC, V3, Tab 57, Exhibit "J" Brown Affidavit, beginning at pg. 1397.
[24] ABC, V3, Tab 47, Brown Affidavit, para 22, pg. 1234.

to bargain pursuant section 59 of *LRA*[25], thereby activating the "statutory freeze" in working conditions as stipulated in section 13 of the *Hospital Labour Disputes Arbitration Act,* RSO 1990, c H.14 ("*HLDA*"), which reads:

> **Working conditions may not be altered**
> **13** Despite subsection 86 (1) of the *Labour Relations Act, 1995*, if notice has been given under section 16 or 59 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees and no collective agreement is in operation, **no such employer shall,** except with the consent of the trade union, **alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees**, and no such trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated. R.S.O. 1990, c. H.14, s. 13; 1997, c. 21, Sched. A, s. 4 (13).

20. The statutory freeze in working conditions that was in place at the time the Mandatory Vaccination Policy was implemented is relevant, and this fact will be revisited in argument.

The Union Files Grievance of the Policy

21. The Mandatory Vaccination Policy was announced on October 26, 2021.[26] On November 3, 2021, NOWU filed a grievance on behalf of its full and part-time members at SHS.[27] The policy grievance alleged that the Mandatory Vaccination Policy violated eleven different articles of the collective agreement, and violated the *LRA, HLDA,* the *Occupational Health and Safety Act*[28], the *Human Rights Code*[29], and the *Personal Health*

[25] ABC, V1, Affidavit of Michael Downes, paras. 15-17, pg. 449.
[26] ABC, V3, Tab 47, Brown Affidavit, para 54, pg. 1241.
[27] ABC, V1, Tab 17, Exhibit "E", Oribine Affidavit, pg. 318.
[28] R.S.O. 1990, c. O.1
[29] R.S.O. 1990, c. H. 19

Information Protection Act[30]*.* The grievance also particularized the union's concern for the undue coercion on its members and compelling them to submit to vaccination, denying them informed consent to medical treatment.

22. The sudden announcement of the Mandatory Vaccination Policy prevented the grievance from being heard by the OLRB before the Enforcement Date of November 13, 2021.[31] Before a hearing could be scheduled, a "Step 2" grievance meeting had to occur. The earliest the Step 2 meeting could be scheduled was November 19, 2021 (eight days too late). Even then, after the "Step 2" grievance meeting, an initial hearing was then to occur only within 21 days of November 20, 2021.[32] There was simply no time to challenge the Mandatory Vaccination Policy before the Enforcement Date.

23. The Appellant was deeply concerned about the preservation and protection of their members personal health and bodily autonomy. At the time the Mandatory Vaccination Policy was announced by SHS, at least 19 NOWU members were unvaccinated.[33] These members pleaded with their union representatives to oppose the policy. If nothing could be done by the Enforcement Date, the members feared they had no other choice but to submit to vaccination against their will. These members simply could not withstand the deprivation of a regular pay cheque and the uncertainty of waiting an untold number of weeks and months for the grievance to resolve. [34]

[30] 2004, S.O. 2004 c. 3, Sched. A
[31] ABC, V1, Tab 12, Oribine Affidavit, para. 10, pg. 166.
[32] ABC, V1, Tab 13, Exhibit "A" Oribine Affidavit , Collective Agreement, Article 8, pg. 183.
[33] ABC, V1, Tab 12, Oribine Affidavit, paras 11 and 15 pg. 166 and 168.
[34] ABC, V1, Tab 12, Oribine Affidavit, para. 14, pg. 167.

24. One such member who filed an affidavit in support of the injunctive relief was Carla Carvalho. Ms. Carvalho is a single mother with four dependent children.[35] She has a high-school education and has been employed at SHS in various capacities since 2007. Most recently, as a Nutrition Receiver. She did not encounter patients in the course of her duties.[36] Ms. Carvalho deposed that she, like many of her colleagues, had serious hesitations and her own personal reasons for not wanting to be vaccinated against COVID-19. However, she and her colleagues could not afford to be without a pay cheque. She saw no other feasible options available to her other than to submit to vaccination to keep her job. In Ms. Carvalho's own words:

> *As I have not been vaccinated, I now risk losing my career. I am deeply distraught to know that my 14 years of commitment to my work is being disregarded and that my employer is coercing me into making a substantial decision that could seriously impact both my life and the wellbeing of my family.*[37]
>
> *It is my sincerely held belief that I have not been fully informed of the adverse effects or risks resulting from the vaccines, as the current information available is insufficient. Moreover, [Mount Sinai Hospital] has failed to provide adequate data supporting and clarifying its stringent Policy. My position to not get the vaccine is based on the real and substantial concerns of adverse effects.*[38]
>
> *I have sought the assistance of my union, NOWU, in grieving this Policy. I have been informed by NOWU President, Mr. Tim Oribine, and do verily believe to be true, that the grievance process could take months or years to resolve.*[39]
>
> *I have a family to support and I cannot afford to lose my job. Despite my strong beliefs and convictions, if the Policy is not delayed and if I am faced with termination from my employment, I will have no choice but to submit to the vaccine. That is to say, it is likely that if confronted with termination on the basis of the Policy, I will have no choice but to submit under protest to the vaccine. Given my current financial situation and the needs of my family I will*

[35] ABC, V1, Tab 22, Affidavit of Carla Carvalho ("Carvalho Affidavit"), para 3, pg. 420.
[36] ABC, V1, Tab 22, Carvalho Affidavit, para 4, pg. 421.
[37] ABC, V1, Tab 22, Carvalho Affidavit, para 8, pg. 421.
[38] ABC, V1, Tab 22, Carvalho Affidavit, paras 9 and 10, pg. 422.
[39] ABC, V1, Tab 22, Carvalho Affidavit, para 11, pg. 422.

> *be unable to sustain unemployment. For the financial and social well-being of my family, I must continue to work.*[40]
>
> *…I have endured significant amounts of emotional and psychological stress as well as anxiety. It has increased exponentially as the imminent termination day approaches… I am aware of other staff who share my fears.*[41]

25. Another one of the Appellant's affiants was Ms. Veniece Morgan, a 49-year-old NOWU member employed by SHS as a Service Assistant. Ms. Morgan is a mother of three, and she is also the primary caregiver for her 12-year-old grandchild. Ms. Morgan described a similar peril to that of Ms. Carvalho. She too had concerns about submitting to the vaccine out of a fear of an adverse reaction.[42]

26. Ms. Morgan also testified that she had been previously infected with COVID-19 and filed proof of a 'DynaCare' test confirming that she possessed robust antibodies to the virus.[43] Ms. Morgan saw no benefit and only risk in receiving the COVID-19 vaccination, given her previous infection and antibodies. She had been denied a request to be exempt from the policy. Ms. Morgan plainly did not want to be vaccinated; yet, she needed her job to support her family. Ms. Morgan deposed that she too would submit to vaccination against her will if it meant she could keep her job.

Background and Litigation History

27. The unavoidable pace of the labour relations process risked depriving an ultimate remedy from the members who submitted to injection in protest. For these members, the future determination of a labour arbitrator that the vaccination policy was unlawful, or a

[40] ABC, V1, Tab 22, Carvalho Affidavit, para 13, pg. 422.
[41] ABC, V1, Tab 22, Carvalho Affidavit, paras 14 and 15, pg. 432
[42] ABC, V1, Tab 23, Affidavit of Veniece Morgan ("Morgan Affidavit"), paras 3, 4, 12-16, pg. 426.
[43] ABC, V1, Tab 24, Exhibit "A" Morgan Affidavit, pg. 432.

breach of the collective agreement, would be meaningless to those who had already submitted to vaccination. “No remedy exists to undue a vaccine once administered”.[44] The Appellants’ members were at risk of being deprived of an ultimate remedy after the Enforcement Date. The Appellant therefore turned to the Ontario Superior Court of Justice for injunctive relief.

28. On November 5, 2021, the Appellant served and filed an urgent motion with the Ontario Superior Court of Justice.[45] The motion was commenced without an originating process pursuant to Rule 37.17 of the *Rules of Civil Procedure*. In the Notice of Motion, the Appellant sought an urgent hearing for its application for injunctive relief.

29. On November 8, 2021, the matter came before the Honourable Justice Fred Myers for a case conference. The parties were present through counsel. After some discussion, the parties agreed to schedule and argue the application during a half-day hearing, which was to be heard on an expedited timetable. [46]

30. The hearing was scheduled for November 17, 2021. Coincidently, Justice Myers was aware of a near identical challenge being heard on that same day in which the Amalgamated Transit Union Local 113 (“*ATU 113*”) was a seeking a similar injunction against the Toronto Transit Commission. The matters were scheduled to be heard by the same judge, one after the other, with *ATU 113 v. TTC* being heard first and *NOWU v. SHS* being heard second.[47]

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[44] Book of Authorities (“BOA”), Tab 9, *Blake v. University Health Network,* 2021 ONSC 7139 (Canlii) at para 19.
[45] ABC, V1, Tab 8, Notice of Motion at pg. 135.
[46] ABC, V1, Tab 4, Endorsement of Justice Myers, pg. 32.
[47] ABC, V1, Tab 4, Endorsement of Justice Myers, pg. 32.

31. The expedited timetable allowed the Appellant to file an application record, the Respondent to file a responding record, and included deadlines for the exchange of factums and authorities. It was a condensed timetable spread out over nine days. SHS also voluntarily undertook to not enforce the Mandatory Vaccination Policy before the hearing date. The Ontario Hospital Association was also granted intervenor status at the first case conference.[48]

32. On November 11, 2021, the Appellant served its application record, which included the affidavits of Ms. Carvalho and Ms. Morgan, an affidavit of NOWU's President, Mr. Tim Oribine, an affidavit of NOWU's representative at SHS, Mr. Michael Downes, and an expert report of Dr. Byram Bridle, an associate professor from Guelph University who is an expert in virology and immunology.[49]

33. The Respondents served three affidavits in response to the Appellant's application. It included an affidavit of Ms. Susan Brown, Chief Human Resources Officer at SHS, an affidavit of Ms. Karen Thompson, a law clerk with the Respondent's lawyer's office, and a responding expert affidavit of Dr. Peter Juni, a Research Director from St. Michael's Hospital and member of the "Ontario Science Table". The Ontario Science Table is an independent COVID-19 advisory group with a prominence in local media.[50] The Ontario Science Table is best known for churning out worst-case scenario COVID-19 case modelling between 2020 and 2022, which then informed public health measures like indoor restrictions and lockdowns.

[48] ABC, V1, Tab 4, Endorsement of Justice Myers, pg. 33.
[49] ABC V1, Tabs 10-38, Application Record, beginning at pg. 148.
[50] ABC, V3, Tabs 46-83, Responding Record, beginning at pg. 1219.

34. The testimony of Dr. Juni conflicted with the testimony of Dr. Bridle. They had competing opinions on the safety and efficacy of the COVID-19 vaccines.

35. Dr. Bridle cautioned that the data coming out of still ongoing clinical trials suggested that vaccination against COVID-19 should only be performed on the most vulnerable individuals in society. Dr. Bridle pointed to scientific studies concluding that the "spike protein" in the vaccine, used to replicate the COVID-19 virus, was not staying at the injection site. The transfer of the spike protein posed a host of known and potential adverse events in clinical participants.[51]

36. For otherwise healthy individuals, COVID-19 posed no real threat and the symptoms often mimicked that of a common cold. Therefore, Dr. Bridle reasoned that it was prudent for vaccinations to be administered based on risk of the individual, not a "vaccinate all" approach. The vaccines posed a degree of risk, and it was reasonable for an individual to weigh those potential risks against the supposed protection offered against the virus.

37. In his brief responding affidavit, Dr. Juni stated that the vaccines "are safe for use by all persons" and that vaccines are the "most effective way" to combat transmission rates.[52] Dr. Juni's report is largely based on his testimony only. He filed little evidentiary support for his statements. It also came to light at the hearing that Dr. Juni failed to sign, serve, and file a Form 53 Acknowledgment of Expert's Duty[53].

[51] ABC, V2, Tab 37, Bridle Report, at pg. 856.
[52] ABC, Vol. 4 of 4 ("V4"), Tab 70, Affidavit of Peter Juni, para 8, pg. 1509.
[53] ABC, V1, Tab 7, Transcript of Hearing, pg. 74.

38. Ultimately, for reasons detailed in the next section, the Application Judge declined to consider the evidence of either expert.

39. The matter came before the Application Judge on November 17, 2021. *ATU 113 v. TTC* was heard first in the morning as intended. *NOWU v. SHS* was heard in the afternoon. The Application Judge released her decision on both matters in one endorsement.[54] The Application dismissed both applications for injunctive relief, but for different reasons. In the matter of *ATU 113,* Her Honour determined that an analysis of the *RJR* factors favoured dismissal.[55] In the Appellant's matter, however, the Application Judge declined to even undertake the *RJR* analysis. Instead, she characterized the peril faced by the employees who were being compelled to submit to vaccination as purely economic harm. The Application Judge disagreed that the Mandatory Vaccination Policy was coercive and stated that "no one is forced to get vaccinated". Purely economic losses, Her Honour reasoned, can be addressed through a retroactive award from the OLRB. Her Honour therefore found that an adequate remedy was available to the Appellant's members via the OLRB and the Court need not intervene.[56]

40. The Application Judge found that the circumstances faced by the Appellant's members did not warrant the Court's exercise of its "residual jurisdiction" to consider the injunction. She dismissed the Appellant's application for an injunction "as a threshold matter".[57]

[54] ABC, V1, Tab 3, Reasons, pg. 12.
[55] ABC, V1, Tab 3, Reasons, para 9, pg. 13.
[56] ABC, V1, Tab 3, Reasons, paras 50-53, pg. 20.
[57] ABC, V1, Tab 3, Reasons, para 18, pg. 15.

PART IV – STATEMENT OF ISSUES, LAW AND AUTHORITIES

A. Issues on this Appeal

i. Did the Application Judge err in characterizing the harm facing the Appellant's members as strictly monetary?

ii. Did the Application Judge err in concluding that irreparable harm which imparts a "subjective element" is "legally unworkable"?

iii. Did the Application Judge err in finding that the labour relations process provided the Appellant and its members with an adequate remedy?

iv. Did the Application Judge err in declining to undertake the *RJR* analysis and consider the evidence before her?

B. Standard of Review

41. The Application Judge's Order dismissing the Appellant's request for injunctive relief is a final order. An appeal from a final order of a judge lies to this Honourable Court, without leave, pursuant to section 6(1)(b) of the *Courts of Justice Act.*[58]

42. An appellate court should interfere with a discretionary order of a judge if there has been a palpable and overriding error of fact, or if the decision is made on the basis of an erroneous legal principle. Reversing a lower court's discretionary order is also appropriate where the lower court gives no or insufficient weight to relevant considerations.[59]

[58] BOA, Tab 1, Section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43
[59] BOA, Tab 13, *HB Fuller Company v Rogers (Rogers Law Office)*, 2015 ONCA 173 at para 19

43. The failure to take a contextual approach and weigh all the relevant factors constitutes an error in principle justifying appellate intervention.[60]

44. Appellate intervention is also warranted when the lower Court:

a) acted on a wrong principle;

b) disregarded or failed to appreciate material evidence; or

c) made findings not reasonably supported by the evidence or drew an unreasonable inference from the evidence.[61]

Issue 1: The Application Judge Erred in Characterizing the Harm Facing the Appellant's Members as Strictly Monetary and Reparable

45. In dismissing the Appellant's application for an injunction, the Application Judge erred in characterizing the peril facing the appellant's members as purely monetary. Her Honour also erred in finding that the policy did not violate informed consent. Her Honour disregarded the testimony of the Appellant's members, who deposed that they had no such choice of employment versus unemployment. That they would be compelled to undergo vaccination if faced with the prospect of job loss. In so doing, the Application Judge failed to endorse "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".[62]

[60] BOA, Tab 7, *Arvanitopoulos v. Florentino*, 2015 CanLII 13911 (Div. Ct.)
[61] BOA, Tab 24, *Skye Properties Ltd v Wu,* 2003 CanLII 75374 (ON SCDC) at para 16
[62] BOA, Tab 11, *Carter v. Canada (Attorney General)*, 2015 SCC 5 (CanLii) at para 67.

46. The Application Judge erred in not adopting the "highest order of protection" that this Honourable Court has previously called for when preserving personal choice and bodily autonomy. This Court's decision in *Fleming v. Reid* conveys the importance of protecting such principles. The immortal words of Justice Sydney Robins are particularly instructive:

> **The common law right to bodily integrity and personal autonomy is so entrenched in the traditions of our law as to be ranked as fundamental and deserving of the highest order of protection**. This right forms an essential part of an individual's security of the person and must be included in the liberty interests protected by s. 7. Indeed, in my view, the common law right to determine what shall be done with one's own body and the constitutional right to security of the person, both of which are founded on the belief in the dignity and autonomy of each individual, can be treated as co-extensive.[63]

47. The Application Judge erred in rejecting the Appellant's concerns for the bodily integrity of its members and should not have framed the hardships facing these employees as purely monetary. Paragraph 50 of the Application Judge's decision reads:

> [50] In my view, NOWU has mischaracterized the harm at issue. The harm which the employees may suffer is being placed on unpaid leave, or being terminated from employment, if they remain unvaccinated. They are not being forced to get vaccinated; they are being forced to choose between getting vaccinated and continuing to have an income on the one hand, or remaining unvaccinated and losing their income on the other.[64]

48. This unsympathetic characterization of the plight faced by the Appellant's members, who expressly did not want to be vaccinated but would do so solely because of the threat of job loss, completely disregards the violations of bodily autonomy and informed consent flowing from the enforcement of the policy.

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[63] BOA, Tab 12, *Fleming v. Reid*, 1991 CanLII 2728 (ON CA) at Part V, para 3.
[64] ABC, Tab 3, Reasons, para 50, pg. 20.

49. An individual's consent is vitiated in circumstances of compulsion. "To be effective, consent must be freely given".[65] Consent is "stripped of its defining characteristics when it is applied to the submission, non-resistance, non-objection, or even the agreement of a deceived, unconscious, or compelled will."[66]

50. The Application Judge failed to appreciate the material evidence before her and disregarded the violations of bodily integrity and personal autonomy deposed to in the testimony of the Appellant's members. It is an injustice to characterize someone who undergoes vaccination not out of a concern for their health but out of a fear of losing their livelihood as having "consented" to the treatment.

51. The Application Judge used caselaw that was not comparable to support her characterization of the harm as being purely economic. For example, the Application Judge pointed to *Kotsopoulos v North Bay General Hospital*[67], a decision in which the Ontario Superior Court of Justice dismissed a request for injunctive relief. The injunction was sought by a part-time paramedic who had already been terminated for failing to adhere to his employer's mandatory flu-shot policy. The part-time employee had flatly refused undergoing the flu-shot and there was an outstanding grievance of his termination. The employee sought an injunction reinstating his employment while his grievance was heard by the OLRB. The injunction was denied for a lack of irreparable harm and a balance of convenience that favoured the employer

[65] BOA, Tab 21, *R v. Ewanchuk* 1999 CanLII 711 (SCC), [1999] 1 SCR 330 at para 36.
[66] BOA, Tab 23, *Saint-Laurent v. Hetu* 1993 CanLII 4380 (QC CA), [1994] R.J.Q. 69 (C.A.), at p. 82.
[67] BOA, Tab 14, *Kotsopoulos v. North Bay General Hospital* [2002] OJ No 715 (ON SC).

52. The facts and findings in *Kotsopoulos* are distinguishable from the facts that were before the Application Judge in important ways. First, the part-time paramedic, Mr. Kotsopoulos, had plainly stated that under no circumstances would he submit to vaccination. He had proven his steadfast commitment to remain unvaccinated and, importantly, he was already terminated.[68] There was therefore no violation of bodily autonomy that would occur if an injunction was not granted, and therefore no irreparable harm on the record. Second, the requirement that paramedics receive the influenza shot was not an employer policy, but a legislated requirement under the *Ambulance Act*. This fact played a key role in the presiding judge finding that the balance of convenience favoured the employer.[69]

53. The Application Judge also relied on the Federal Court decision of *Lavergne-Poitras v. Canada*[70], a decision in which that court dismissed an injunction request of a federal employee who was challenging a mandatory vaccination policy in his workplace. Again, this case is distinguishable in that no irreparable harm was on record, because Mr. Lavergne-Poitras was committed to refusing vaccination. A portion of his testimony that quite clearly establishes this is excerpted at paragraph 35:

> *My knowledge of and concerns with these potential side effects and complications results in severe anxiety over being vaccinated for COVID-19, to the point that* ***if forced to choose between being vaccinated to remain employed with PMG, or losing my job and avoiding vaccination, I would likely choose the latter****.*[71]

[68] BOA, Tab 14, *Kotsopoulos v. North Bay General Hospital* [2002] OJ No 715 (ON SC) at para 18.
[69] BOA, Tab 14, Kotsopoulos v. North Bay General Hospital [2002] OJ No 715 (ON SC) at para 26.
[70] BOA, Tab 15, Lavergne-Poitras v. Canada 2021 FC 1232 (CanLII).
[71] BOA, Tab 15, Lavergne-Poitras v. Canada 2021 FC 1232 (CanLII).

54. Compare the above testimony of Mr. Lavergne-Poitras with the testimony of the Appellant's member affiant, Ms. Carvalho. She testified: "*I have a family to support and I cannot afford to lose my job. Despite my strong beliefs and convictions, if the Policy is not delayed and if I am faced with termination from my employment, I will have no choice but to submit to the vaccine.*"[72]

55. Two other decisions relied on by the Application Judge also contain material differences in the facts that were before her. There was the decision from the Superior Court of Quebec, *Michel Lachance c. P.G. du Québec*[73], and an earlier Ontario Superior Court decision in *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*. Neither decision presented circumstances in which risks of violations to bodily autonomy were engaged.[74]

56. Another glaring distinction from all four of the cases cited by the Application Judge is that in each of those cases, the Court still undertook careful analysis of the *RJR* factors before reaching its conclusion to dismiss the injunction. These matters were not dismissed for a lack of jurisdiction.

Issue 2: The Application Judge Imposed Too High of a Standard for Establishing Irreparable Harm

57. In addition to incorrectly framing the harm facing the Appellant's members as reparable, the Application Judge also imposed too high of a standard for the Appellant to succeed in establishing "irreparable harm".

[72] ABC, Tab 22, Carvalho Affidavit, para 13, pg. 422.
[73] BOA, Tab 17, *Michel Lachance c. P.G. du Québec* (not yet reported).
[74] BOA, Tab 5, *ATU Local 113 v. Toronto Transit Commission* 2017 ONSC 7658 (CanLII).

58. Even though the Application Judge declined to undertake the *RJR* analysis, she discusses whether irreparable harm was present in the facts before her. She states that because some—but not all—of the Appellant's members would be submitting to vaccination against their free will, a "subjective element" was present, which made irreparable harm "legally unworkable". Paragraphs 57 and 58 of her decision read:

> [57] NOWU has not proven that all of its unvaccinated members will get vaccinated if enforcement of the policy is not enjoined. It has proven that some of its unvaccinated members will likely get vaccinated rather than lose their income. If the harm in this case were characterized as the injury that results from getting vaccinated when one does not wish to be, then only those members who would get vaccinated as a result of the policy would suffer irreparable harm. On such an approach, the same policy would create irreparable harm to some people (those who will get vaccinated) and reparable harm to others (those who choose to remain unvaccinated and forego their income). This approach thus imports a subjective element into the question of irreparable harm.
>
> [58] Importing a subjective element to assess harm, as I am urged to do here, is legally unworkable. On such an analysis, the court would have residual jurisdiction to enjoin the implementation of the policy with respect to those who are susceptible to acceding to it to keep their income, because the powers of the labour arbitrator cannot extend to undoing a vaccination. At the same time, the court would have no residual jurisdiction to enjoin the implementation of the same policy with respect to those who will not get vaccinated, even if it means losing their income, because that harm is reparable and can be addressed through the labour arbitration process. Leaving aside the practical difficulties with determining which bargaining members fall into which camp, the court's residual jurisdiction cannot be engaged or not depending on how an individual member will respond to the policy. When a union seeks injunctive relief for the benefit of all of its members, jurisdiction cannot workably arise on a case-by-case basis.

59. The Application Judge cites no support for the conclusion that because the harm is subjective, it is disqualified from being considered irreparable. Such a view does not accord with established legal principles. Irreparable harm is harm that cannot adequately be compensated by damages, even if the law will otherwise resort to damages after the

fact. It is harm that "is not quantified in monetary terms or cannot be cured."[75] Irreparable harm refers to the nature of the harm suffered rather than its magnitude.[76]

60. This Honourable Court has previously found that taking a narrow view of irreparable harm should be avoided.[77] Clear proof of irreparable harm is not required.[78] According to the Saskatchewan Court of Appeal, it is sufficient that a party seeking an interlocutory injunction establish a meaningful risk of irreparable harm or, to put it another way, a meaningful doubt as to the adequacy of damages if the injunction is not granted.[79] The Court described this as a relatively low standard.[80] The Appellant submits that the Application Judge erred in concluding that subjective harm is "legally unworkable" in defining irreparable harm.

Issue 3: The "Application Judge" Erred in Ruling that the OLRB Provided an Adequate Remedy to the Appellant

61. The Application Judge erred in characterizing the harm facing employees who did not want to be vaccinated as strictly monetary. Yet, it was on this basis that the Application Judge found that the OLRB provided an adequate remedy to the impacted employees.

62. When the harm is framed correctly and the violations to bodily autonomy are appreciated, it becomes clear that the Court's intervention is required.

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[75] BOA, Tab 22, *RJR-MacDonald Inc. v Canada* ("*RJR*") 1994 CanLII 117 (SCC) at para 59.
[76] BOA, Tab 22, *RJR-MacDonald*, at para 79.
[77] BOA, Tab 16, *Livent Inc. v. Deloitte & Touche*, 2016 ONCA 395, at para 10.
[78] BOA, Tab 10, *British Columbia (Attorney General) v. Wale,* 1986 CanLII 171 (BCCA).
[79] BOA, Tab 20, Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership (2011), 341 D.L.R (4th) 407, (SKCA) ("*Potash*"). As Justice Sharpe also states at p. 2-40 of his seminal text, Injunctions and Specific Performance, "... Irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."
[80] BOA, Tab 20, *Potash* at para 60.

63. Though the *LRA* gives arbitrators and chairs of arbitrations limited authority to issue interim orders, this authority is only with respect to procedural matters in appropriate circumstances. Arbitrators and chairs of arbitration boards are only permitted to provide interim remedies as it relates to the process of the grievance or arbitration. Examples of such interim orders that an arbitrator could issue include, furnishing particulars; requiring the production of documents; fixing dates for the commencement or continuation of a hearing; summon witnesses; and mediate difference[81]. None of these powers have the necessary "teeth" of an injunction.

64. The question of what 'alternative remedies' exist in the context of labour relations was once unclear[82]. However, the Courts have since clarified and confirmed that under the *Labour Relations Act*, there are **no** powers for an arbitrator to issue interim injunctive orders with full coercive powers that restrain.[83] An arbitrator or the chair of an arbitration board does not have the authority to order an employer to reinstate an employee.[84] An arbitrator does not have powers or authority to prohibit an employer from taking action pending a final determination of an issue before the OLRB.[85]

65. Had the Application Judge correctly characterized the harm facing the Appellant's members, as that of the irreversible violations of bodily autonomy, she would have considered more than just financial compensation. Because "no remedy exists to undo a vaccine once administered"[86], Her Honour would have better appreciated that without the

[81] BOA, Tab 4, *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, s. 48(12)(a)-(e);
[82] BOA, Tab 18, *O.N.A. v. Toronto Hospital* 1996 CarswellOnt 4070, 17 O.T.C. 295, [1996] L.V.I. 2805-1
[83] BOA, Tab 6, *Aranas et al. v. Toronto East General Hospital Inc*., 2005 CanLII 1056 (ON SC)
[84] *Labour Relations Act,* 1995, S.O. 1995, c. 1, Sched. A, s. 48(13)
[85] BOA, Tab 4, *Ontario Labour Relations Act*, 1995 c. 1, section 48(12)(i)
[86] BOA, Tab 9, *Blake v. University Health Network,* 2021 ONSC 7139 (Canlii) at para 19

Court's intervention, any subsequent decisions of a labour arbitrator could never undo a vaccination that was later found to have been undergone in unlawful circumstances. Such a finding would be moot. The Appellants members would be deprived of an ultimate remedy.

Issue 4: The Application Judge Erred by Failing to Conduct the *RJR* Analysis and Failed to Consider Relevant Evidence Which Constituted Presumptive Grounds for the Injunctive Relief

66. The Application Judge erred in dismissing the Appellant's application for a lack of jurisdiction. This conclusion was reached because of the error in characterizing the harm facing the Appellant's members.

67. There is no question that the Court has inherent jurisdiction to grant injunctive relief, and to do so does not conflict with the statutory scheme devised for labour arbitrations. This was contemplated in the unanimous Supreme Court of Canada decision, *B.M.W.E. v. Canadian Pacific Ltd.*[87] In this case, the Court, relying on the previous SCC decision in *St. Anne Nackawic,* stated plainly,

> [W]here "no adequate alternative remedy exists" the courts retain a residual discretionary power to grant interlocutory relief such as injunctions, a power which flows from the inherent jurisdiction of the courts over interlocutory matters.

68. The Court also recognized that no matter how comprehensive a statutory scheme for the regulation of disputes may be**,** the possibility always remains that events will produce a difficulty which the scheme has not foreseen. The Court went on to recognize that in such circumstances, it is of paramount importance that there be a tribunal capable of resolving

[87] BOA, Tab 8, *B.M.W.E. v. Canadian Pacific Ltd.*, 1996 CanLii 215 (SCC).

the matter and “it is precisely for this reason that the common law developed the notion of the Courts of inherent jurisdiction”.

> If the rule of law is not to be reduced to a patchwork, sometime thing, there must be a body to which disputants may turn where statutes and statutory schemes offer no relief.[88]

69. Had the Application Judge correctly characterized the harm, the Court’s jurisdiction would have been engaged. Her Honour would have then undertaken the *RJR* analysis to assess whether an injunction was appropriate relief. The Appellant submits that had the *RJR* analysis been performed by the Application Judge, the analysis would have favoured granting and not dismissing the injunctive relief.

70. The test enunciated in the Supreme Court of Canada’s decision in *RJR-MacDonald Inc. v. Canada (Attorney General)* is trite law. It stipulates that to obtain an interlocutory injunction, the applicant must demonstrate that:

i. That there is a serious issue to be tried;

ii. That the irreparable harm will follow if the injunction is not granted;

iii. That the balance of convenience would favor granting the requested injunction.[89]

[88] BOA, Tab 8, *B.M.W.E. v. Canadian Ltd,* 1996 CanLii 216 (SCC) at para 8.
[89] BOA, Tab 22, *RJR-MacDonald*.

71. All parties, including the Application Judge, agreed there was a serious issue to be tried and Her Honour confirmed as much when addressing the injunction sought by *ATU 113* in her reasons.[90]

72. On the aspect of irreparable harm, the second branch of the *RJR* test had been established by the Appellant. Much has been already discussed herein about the irreparable violations of bodily autonomy facing those who were submitting to vaccination against their will to keep their jobs. The Appellant had also adduced an expert report of Dr. Byram Bridle that was completely ignored. Dr. Bridle had concluded that there was a moderate risk of adverse reactions in undergoing vaccination. Dr. Bridle opined on the known adverse reactions following COVID-19 vaccination, which included mild reactions like headaches and nausea, to the more severe, including neurological damage, heart attacks, strokes and even death.[91]

73. When reconciling the concept of irreparable harm in the *RJR* analysis with the prospect of personal injury, the courts have stated that a high degree of probability is not required. Instead, the standard of harm is flexible and depends on the severity of the harm raised by the facts. A reasonable probability of personal injury can constitute irreparable harm.[92] The Appellant submits that had the Application Judge performed the *RJR* analysis in the context of the evidence before her, she would have found the presence of irreparable harm sufficient to meet its threshold.

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[90] ABC, V1, Tab 3, Reasons, para 70, pg. 23.
[91] ABC, V2, Tab 37, Bridle Report, at pg. 856.
[92] BOA, Tab 19, *ONA et al. v Eatonville Care Centre Facility Inc. et al.,* 2020 ONSC 2467 (CanLII); BOA, Tab 25, *United Nurses of Alberta v. St. Michael's Health Centre*, 2003 ABCA 5 (CanLII)

74. Finally, on the balance of convenience between the parties, the Application Judge also failed to appreciate material evidence before her. The Application Judge failed to consider the "statutory freeze" in working conditions that existed between the parties at the time the Mandatory Vaccination Policy was implemented. Again, this "statutory freeze" is a legislated requirement endorsed by parliament and is an integral part of the collective bargaining rights of healthcare works. No such freeze was present in the *ATU 113* matter, nor any of the decisions relied upon by the Application Judge.

75. The Appellant submits that the consideration of the "statutory freeze" would have tipped the balance of convenience in favour of the Appellant's members. Parliamentary intent is often a determining factor in resolving the balance of convenience. Recall the case of the part-time paramedic who did not want to be vaccinated in *Kotsopoulos v North Bay General Hospital*. In that case, the requirement to be vaccinated was the result of an amendment to regulations in the *Ambulance Act* R.S.O. 1990, c. A.19. The legislative intentions of parliament played an integral role in Justice Karam's determination that the balance of convenience favoured the employer.[93] The legislative intent for the bargaining relations of the Appellant, however, endorsed a "freeze" in working conditions that should have been respected and should have informed the balance of convenience between the parties.

76. The Appellant submits that for these reasons and for the reasons submitted at the application hearing, the *RJR* analysis favours the Appellant and the injunctive relief ought to have been granted.

[93] BOA, Tab 14, *Kotsopoulos v. North Bay General Hospital* [2002] OJ No 715 (ON SC) at paras 24-26.

PART V – ORDER REQUESTED

77. The Appellant asks that the Order of the Application Judge be set aside and that an Order be granted as follows:

a) The Respondent, SHS, is restrained from taking any further action, disciplinary or otherwise, against the employment status of the members of the Appellant's bargaining units at SHS, based upon on their COVID-19 vaccination status, until the resolution of the Appellant's grievance of the Mandatory Vaccination Policy is resolved by the Ontario Labour Relations Board and impacted employees are to be reinstated pending the outcome.

b) In the alternative to a), an Order directing the Appellant's application for injunctive relief, which was ready for determination, proceed before a separate judge of the Ontario Superior Court of Justice on an urgent basis.

c) Awarding costs of the application and the appeal to the Appellant, fixed and payable forthwith.

d) Such further and other relief as counsel may advise and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of March, 2022.

PERRYS LLP
Ian J. Perry (LSO# 65670S)
Lawyer for the Applicant/Appellant

Court of Appeal File No.: C70164
Superior Court File No.: CV-21-671579-00

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

NATIONAL ORGANIZED WORKERS UNION

Applicant/
Appellant

- and -

SINAI HEALTH SYSTEM

Respondent/
Respondent

CERTIFICATE

I, IAN J. PERRY, of Perrys LLP, lawyer for the Appellant, certify that:

(a) An Order under subrule 61.09(2) (original record and exhibits) is not required; and,

(b) Three hours (180 minutes) are required for our oral arguments.

Dated: March 18, 2022

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SCHEDULE "A"
LIST OF AUTHORITIES (Hyperlinked)

1	*Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2021 ONSC 7658
2	*Aranas et al. v. Toronto East General & Orthopaedic Hospital Inc.*, 2005 CanLII 1056
3	*Arvanitopoulos v. Florentino*, 2015 CanLII 13911 (Div. Ct.)
4	*B.M.W.E. v. Canadian Pacific Ltd.,* 1996 CanLII 215 (SCC), [1996] 2 SCR 495
5	*Blake v. University Health Network*, 2021 ONSC 7139 (CanLII)
6	*British Columbia (Attorney General) v. Wale*, 1986 CanLII 171 (BCCA)
7	*Carter v. Canada (Attorney General)*, 2015 SCC 5 (CanLII), [2015] 1 SCR 331
8	*Fleming v. Reed*, 1991 CanLII 2728 (ON CA)
9	*HB Fuller Company v Rogers (Rogers Law Office)*, 2015 ONCA 173
10	*Kotsopoulos v North Bay General Hospital*, 2002 CarswellOnt 693
11	*Lavergne-Poitras v. Canada*, 2021 FC 1232 (CanLII)
12	*Livent Inc. v. Deloitte & Touche*, 2016 ONCA 395
13	*Michel Lachance c. P.G. du Quebec*, November 15, 2021 (not yet reported) (QSC)
14	*O.N.A. v. Toronto Hospital* 1996 CarswellOnt 4070, 17 O.T.C. 295, [1996] L.V.I. 2805-1
15	*O.N.A. et al. v Eatonville Care Centre Facility Inc. et al.*, 2020 ONSC 2467
16	P*otash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership,* 2011 SKCA 120
17	*R. v. Ewanchuk*,, 1999 CanLII 711 (SCC), [1999] 1 SCR 330
18	*RJR-MacDonald Inc. v. Canada (Attorney General)*, 1 S.C.R. 311, 1994 CanLII 117 (SCC)
19	*Saint-Laurent v. Hétu*, 1993 CanLII 4380
20	*Skye Properties Ltd v Wu,* 2003 CanLII 75374 (ON SCDC)
21	*United Nurses of Alberta v. St. Michael's Health Centre*, 2003 ABCA 5 (CanLII)

SCHEDULE "B"
RELEVANT STATUTES (Hyperlinked)

1 *Courts of Justice Act*, R.S.O. 1990, c. C.43, Section 6(1)(b)

2 *Health Care Consent Act*, 1996, S.O. 1996, c. 2, Sched. A

3 *Hospital Labour Disputes Arbitration Act,* RSO 1990, c H.14, Section 13

4 *Labour Relations Act*, 1995 c. 1, Sched. A, s. 48(12)(a)-(e)

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COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT **TORONTO**

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