Court File No. CV-22/1321

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

SIMON HAWKE, MICHAEL PUZZO, TIANA GLEASON, JAMES DONALDS and ASHANTÉ CAMARA

Applicants

and

THE UNIVERSITY OF WESTERN ONTARIO

Respondent

APPLICATION UNDER Rules 14.05(3)(d), 14.05(3)(g), 14.05(3)(h), 38.03(3.1) and 40 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194; and sections 96, 97 and 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

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PART I – INTRODUCTION

1. This is an application for declaratory and permanent injunctive relief pursuant to Rules 14.05(3)(d) and 14.05(3)(g) of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, and Sections 97 and 101 of the *Courts of Justice Act* R.S.O. 1990 c. C.43.

2. The Applicants, all of whom are students at the Respondent University, claim, *inter alia*:

   (a) a declaration that Policy 3.1.1 – Covid-19 Vaccination Policy of the University of Western Ontario (the "University") is an improper and unlawful violation of Section 38(2) of the *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31 ("FIPPA");

   (b) a permanent injunction preventing the University from requiring students to provide proof of, or attest to, their Covid-19 vaccination status to enroll in courses, attend campus or for any other purpose, and from collecting said personal vaccination and/or medical information, unless expressly authorized by statute.

3. This Application is based upon section 38(2) of FIPPA. Under that section, the University is prohibited from collecting personal medical information of its students.

4. What this Application is not:

   (a) **Not a judicial review of a "decision" in the administrative law sense:** This Application does not seek the judicial review of an administrative decision. The University is not a "statutory decision-maker" under FIPPA, and administrative standards of review ("reasonableness" or "correctness") that apply to statutory decision-makers administering a statutory scheme do not apply under section 38(2);

   (b) **Not a procedural complaint:** This Application does not allege a procedural defect. It does not raise issues of procedural fairness or natural justice. The University's collection of personal information is unlawful not because the University's process was flawed, or because the University gave notice of the

policy at the last minute after tuition was due, but because FIPPA prohibits the University from collecting personal information;

(c) **Not breach of contract:** This Application does not allege a breach of contract. The Applicants do not dispute that pursuant to their contract with the University, the University has the authority to make changes to its policies on various matters from time to time, as long as those policies are not prohibited by law, as in this case;

(d) **Not a constitutional challenge:** The Applicants do not base their case on the *Charter of Rights and Freedoms* or any other provision of the Canadian Constitution. The Applicants do not challenge the authority of the legislature to pass enactments that would authorize institutions to collect personal information. But no such enactments presently exist. Instead, in section 38(2) of FIPPA, the legislature has prohibited the University from collecting personal information; and

(e) **Not a claim for damages or compensation:** This Application seeks only to prevent the University from doing what it is prohibited by statute from doing.

5. In summary, this Application is simple. The legislature has spoken. Under section 38(2), institutions are prohibited from collecting personal information unless the information is "necessary to the proper administration of a lawfully authorized activity". Virtually every other university in the Province of Ontario is delivering its academic programs of study without requiring the collection of personal medical information from their students. Therefore, it is possible for the Respondent University to deliver its academic programs of study without collecting the Applicants' personal medical information. It logically follows that their personal medical information is not necessary to the University's lawfully authorized activities.

PART II - SUMMARY OF FACTS

The Parties

6. The Applicant, Simon Hawke, is a resident of London ON, and is a 4th year Neuroscience student at the University.[1]

7. The Applicant, Tiana Gleason, is a resident of London ON, and is a 1st year Law student at the University.[2]

8. The Applicant, Michael Puzzo, is a resident of Milton ON, and is a 3rd year Criminology student at the University.[3]

9. The Applicant, James Donalds, is a resident of London ON, and is a 1st year Nursing student at the University.[4]

10. The Applicant, Ashanté Camara, is a resident of London ON, and is a 3rd year Social Science student at the University.[5]

11. All of the Applicants decline to provide their personal medical and/or vaccination information to the Respondent University.

12. The Respondent, The University of Western Ontario, is a post-secondary educational institution operating pursuant to the *University of Western Ontario Act* (UWO Act), Bill Pr14, 1982, as amended. It offers academic programs of study and confers various degrees upon completion of a program of study.

The 2021-22 Academic Year Vaccination Policy

13. During the previous academic year (2021-22), the situation was substantially different. The Ontario government had passed the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020 ("*ROA*")* and, under its various regulations, businesses and

[1] Affidavit of Simon Hawke, affirmed Sept. 5, 2022, **Application Record**, Tab 3, page 134
[2] Affidavit of Tiana Gleason, affirmed Sept. 5, 2022, **Application Record**, Tab 4, page 137
[3] Affidavit of Michael Puzzo, affirmed Sept. 5, 2022, **Application Record**, Tab 5, page 140
[4] Affidavit of James Donalds, affirmed Sept. 5, 2022, **Application Record**, Tab 6, page 143
[5] Affidavit of Ashanté Camara, affirmed Sept. 5, 2022, **Application Record**, Tab 7, page 146

organizations were required to operate in compliance with any advice, recommendations and instructions issued by public health authorities: a) requiring the business or organization to establish, implement and ensure compliance with a COVID-19 vaccination policy; or b) setting out the precautions and procedures that the business or organization must include in its COVID-19 vaccination policy.[6]

14. On or about August 30, 2021, the Chief Medical Officer of Health for Ontario issued a Directive[7] to all post-secondary institutions, requiring them to implement a mandatory vaccination policy by no later than September 7, 2021. In accordance with this Directive, the University required students to disclose their vaccination status and upload proof of vaccination through a digital platform.

15. As of April 27, 2022, O. Reg. 364/20 has been repealed, as were all regulations made pursuant to the ROA. Any declared state of emergency under the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9 has long since been lifted.

16. Since on or about June 24, 2022[8], the Province of Ontario has ceased operation of its Verify Ontario app that allowed verification of an individual's vaccination status. The University operates its own digital portal, apparently accessed via each student's Student Centre account, to collect, copy, verify and store the digital copies of its students' proof of vaccination.

The Booster Policy

17. On or about August 22, 2022, the University published its Policy 3.1.1 - Covid-19 Vaccination Policy (the "Booster Policy")[9]. This Booster Policy requires that all described "Individuals" attending the University campus, including students, employees, and volunteers, receive an additional dose of a Health Canada authorized Covid-19 vaccine after completing the primary series of a Covid-19 vaccine (a "Booster").

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[6] Schedule 1 and Schedule 4 of O. Reg. 364/20: *Rules for Areas at Step 3 and at the Roadmap Exit Step* ("**O. Reg. 364/20**"), subsection 2(2.1)
[7] Exhibit "AA" to Affidavit of Carolyn McKeen Becker, affirmed September 6, 2022, **Application Record**, Tab AA, page 126 ("**Becker Affidavit**")
[8] Exhibit "BB" to the Becker Affidavit, **Application Record**, Tab BB, page 131
[9] Exhibit "X" to the Becker Affidavit, **Application Record**, Tab X, page 102

18. The Booster Policy requires that all Individuals provide proof of their Covid-19 vaccinations and booster to the University (the "Personal Information") by October 1, 2022, as directed by the University.

19. Under section B.1.0(vi) of the Booster Policy, proof of vaccination means a written vaccination record of an Individual's Covid-19 immunization date(s) issued by the government of the province, territory or country in which they were immunized.

20. The Booster Policy further states, at section C.1.0(v) that the University may require Individuals to provide proof of additional boosters in the future.

21. The Booster Policy provides at section C.3.0(ii) that Students who contravene the Booster Policy will be subject to discipline in accordance with the Code of Student Conduct.

22. Subsequent to the filing of the within Application, the University announced on September 6 that it was extending the deadline in its Booster Policy for the campus community to receive a booster shot to Jan. 9, 2023. However, the University continues to require those who are new to Western and/or have not submitted proof of vaccination for their primary series (two doses) to disclose their Personal Information as soon as possible.

23. Despite its position that the collection of personal health information is both lawful and necessary, the University has created 18 categories of exceptions, which categories include donors, prospect donors, visiting athletes, visiting research participants, patients receiving clinical care, persons accessing the legal aid clinic, and visiting alumni.[10]

The Respondent University Stands Alone

24. The policies for 22 other universities in the Province of Ontario are attached as exhibits to the Affidavit of Carolyn McKeen Becker. Not a single one of them is mandating proof of vaccination as a condition of undertaking their programs of study.

[10] *Ibid*, page 108

25. Only the University of Toronto is requiring that students living in residence provide proof of booster shots, but not the general campus community. Trent University is requiring proof that students living in residence have had the first two shots. Carleton University is not mandating vaccines at all, but still wants students to attest as to their status. Otherwise, in every instance, universities in Ontario are recommending but not mandating Covid-19 vaccinations and are not requiring disclosure of students' vaccination status.[11]

26. Even Fanshawe College, a community college located across town from the Respondent, advised its students that it is not mandating proof of Covid-19 vaccines, on the current advice from the Middlesex-London Health Unit.[12]

27. Closer still, Brescia College, an affiliated college of the Respondent, has announced that it will not be enforcing the Respondent University's requirement to provide proof of vaccination status with its students.[13]

28. The Respondent University is an outlier.

PART III – STATEMENT OF ISSUES, LAW & AUTHORITIES

29. The following are the issues to be determined:

    (a) Whether, under FIPPA section 38(2), the demand for and collection of the Applicants' Personal Information is necessary to the proper administration of the University's lawfully authorized activity. If not, it is prohibited.

    (b) If not, whether a declaration and a permanent injunction are appropriate remedies.

[11] Exhibits "A" to "V" to the Becker Affidavit, **Application Record**, Tabs A-V, pages 20-97
[12] Exhibit "W" to the Becker Affidavit, **Application Record**, Tab W, page 99
[13] Exhibits "Y" and "Z" to the Becker Affidavit, **Application Record**, Tabs Y and Z, pages 112 ff.

(a) Is the collection of Personal Information pursuant to the Booster Policy prohibited by section 38(2) of FIPPA?

30. Section 38(2) of *FIPPA* states that*:*

> "No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity."

31. When interpreting a statute, the court will look at the language of the provision, the context in which the language is used and the purpose of the legislation or statutory scheme in which the language is found.[14]

32. The purpose of FIPPA is outlined in s.1(b): to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information. The context of s.38(2) of FIPPA, occurring as it does in Part III "Protection of Individual Privacy", is that of the regulation of the collection and retention of personal information and the protection of individual privacy. The language used in s.38(2) is restrictive: the term "necessary", as it is defined in the Cambridge dictionary as "needed in order to achieve a particular result".

33. Personal medical and/or vaccination information constitutes "Personal Information" as defined in s. 2 of *FIPPA*. This was also confirmed in the *University of Guelph* case, discussed further below.

34. The University is a listed "institution" under the Schedule to the *General Regulation of FIPPA* R.R.O. 1990, Regulation 460, making it subject to the prohibition contained in section 38(2) of that Act.

35. To be clear, section 38(2) of FIPPA prohibits the collection of personal information unless one of three exceptions applies: (1) it is expressly authorized by statute; (2) it is used for

[14] Ayr Farmers Mutual Insurance Company v. Wright, 2016 ONCA 789 (CanLII) at para. 29 <https://canlii.ca/t/gvbm5>

the purposes of law enforcement; or (3) it is necessary to the proper administration of a lawfully authorized activity.

36. Collection of the information is clearly not "expressly authorized by statute". There are currently no statutory provisions, regulations, directives, or orders that authorize, require, direct, or order the University to collect personal medical information of its students.

37. The context of the past 2021-2022 academic year provided an entirely different environment for the analysis under s.38(2) of FIPPA. In the *University of Guelph (Re)* ("*Guelph*"), the university relied on regulations which are no longer in effect.[15]

38. The decision in *Guelph* was clear that in the previous academic year, the collection of the vaccination information was necessary to comply with the recommendations of public health officials, given that such compliance was required for the university to reopen under O. Reg. 364/20.[16]

39. That is not the case here.

40. The second exception under FIPPA 38(2) is that the personal information be "used for the purposes of law enforcement". This exception is not relevant to the present circumstances.

41. It is common ground that the first two exceptions in 38(2) do not apply. The core issue in this case is whether the collection of the Personal Information is "necessary to the proper administration of a lawfully authorized activity".

42. The Applicants submit that "necessary" means "cannot be done without". It means that the information is integral to the lawfully authorized activity, which is impossible to carry out without the information. If the activity is possible without the information, the collection of the information is not necessary.

43. The provision of post-secondary educational programs is the University's lawfully authorized activity, and these programs can be delivered without the Applicants'

[15] *University of Guelph (Re)*, 2022 CanLII 25559 (ON IPC) ("*University of Guelph*") <https://canlii.ca/t/jnjcv>
[16] Ibid at paras 61-62

Personal Information, as evidenced by the 22 other universities doing so in this province alone. Therefore, the Applicants' Personal Information is not necessary to the University's lawfully authorized activities.

44. The "necessity exception" is designed to prevent s. 38(2) from prohibiting institutions from carrying out their core functions where these core functions require the collection and retention of personal information. For example, hospitals provide health care. Health care cannot be properly administered without the patient's personal medical information. Therefore, hospitals must be permitted to collect such information, which is "necessary to the proper administration of a legally authorized activity."

45. To the extent that universities have the authority to run health clinics, the collection of personal medical information for the purpose of providing health care at the clinic (the "activities") will fall within the exception, because health care cannot be properly administered without it. But there is no such nexus between personal medical information and the delivery of educational programs of study.

46. The leading authority on this issue is the Ontario Court of Appeal's decision in *Cash Converters Canada Inc. v Oshawa (City).*[17] There, the Court held that "necessary" is a strict requirement. The Court stated:

> "…the institution must show that each item or class of personal information that is to be collected is necessary to properly administer the lawfully authorized activity. Consequently, where the personal information would be merely helpful to the activity, it is not 'necessary' within the meaning of the Act. Similarly, where the purpose can be accomplished in another way, the institution is obliged to choose the other route."[18]

47. "Necessary" does not mean "helpful", "appropriate", "desirable", "sensible", "justified", or "reasonably necessary". The decision in *Liquor Control Board of Ontario v. Vin De Garde*

[17] *Cash Converters Canada Inc. v. Oshawa (City),* 2007 ONCA 502, 86 O.R. (3d) 401 ("*Cash Converters*") <https://canlii.ca/t/1rxpx>
[18] Ibid at para 40

Wine Club reaffirmed that the test for necessity is stringent.[19] In order to satisfy the necessity test, the onus is on the University to identify the lawfully authorized activity in question, and then explain how the collection of personal information is necessary to its administration.[20] In agreeing that "necessary" should be strictly construed, the court in *Vin De Garde*[21] quoted the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. United Foods and Commercial Workers, Local 401*, where the Court stated:

> The ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of a democracy. As this Court has previously recognized, legislation which aims to protect control over personal information should be characterized as 'quasi-constitutional' because of the fundamental role privacy plays in the preservation of a free and democratic society.[22]

48. The meaning of "necessary" in s. 38(2) is a question of law for this Court, not a question that the University has the discretion or authority to decide for itself. Section 38(2) creates a prohibition. It is not a grant of authority to the University, and the University is not a statutory decision-maker under s. 38(2) entitled to deference.

49. Judicial review of an administrative decision requires "a decision" to review. The *Vavilov*[23] scheme of standards of review, wherein a court assesses an administrative body's decision either on a "reasonableness" or "correctness" standard, applies "where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme."[24]

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[19] Liquor Control Board of Ontario v. Vin de Garde Wine Club, 2015 ONSC 2537 (CanLII) ("*Vin De Garde*") at paras 45 and 49 <https://canlii.ca/t/ghft7>
[20] *Toronto (District School Board) (Re),* 2021 CanLII 71650 (ON IPC) at para 31 <https://canlii.ca/t/jhfs2>
[21] *Vin De Garde* at para 46
[22] *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62 (CanLII), at para 19 <https://canlii.ca/t/g1vf6>
[23] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 ("*Vavilov*") <https://canlii.ca/t/j46kb>
[24] Ibid at para 24.

50. This is not such a case. Western's board is broadly empowered to govern the University's affairs under the *UWO Act*, and in the course of the life of the University, there may be various kinds of decisions that could be subject to the kind of judicial review contemplated in *Vavilov*. For example, a decision to expel a student for academic misconduct could well be subject to *Vavilov* standards of review.

51. However, in this case, the University is not authorized to make a "decision" under section 38(2) of FIPPA. Instead, section 38(2) is a prohibition. It proscribes action. The University is no more entitled to interpret its way out of s. 38(2) of FIPPA than it is to place its own interpretation on prohibitions and standards to which it is subject in other statutes such as the *Employment Standards Act* and the *Criminal Code*. It would not make sense that the institutions subject to the prohibition in s. 38(2) should be able to interpret themselves out of the prohibition, which would make the prohibition toothless.

52. In the alternative, if this Court concludes, contrary to the approach adopted by the courts in previous cases under s. 38(2) including *Cash Converters* and *Vin De Garde*, that this proceeding constitutes a judicial review of an administrative decision that attracts a *Vavilov* analysis, then the Applicants submit that the University is subject to a correctness standard. As reflected in *Vavilov*, a correctness standard is appropriate here because the interpretation of s. 38(2) and the scope of the privacy that it protects is a general question of law that is of central importance to the legal system as a whole. It will not do to have different institutions give vastly different scope to the privacy protection that s. 38(2) purports to provide to the people of Ontario. Furthermore, FIPPA is not the University's home statute, the University has no particular expertise in privacy law, and s. 38(2) does not designate the University as an administrative decision maker for the specific purpose of administering a statutory scheme. A reasonableness standard is therefore not appropriate.

53. The specific ousts the general: The University derives its general authority from the *UWO Act*, while section 38(2) of FIPPA is a prohibition that specifically limits that authority. The prohibition in s. 38(2) takes precedence.

54. Section 38(2) says “necessary to the proper administration of a lawfully authorized *activity*”, not “a lawfully authorized *criterion*”. Under the *UWO Act*, the University’s authority is broad, including to govern its affairs in accordance with the “public interest”. But that does not give the University the authority to collect personal information for any purpose that it deems to be in the public interest. The public interest is not a lawfully authorized *activity* of the University.

55. The University’s process for developing its policy to collect private information is not relevant to whether it is prohibited from doing so under s. 38(2). Process cannot cure an action that is unlawful. The University may argue that it went through its normal process to develop the policy, that it consulted with experts and interested parties, that it gave notice in proper time, and so on. None of this changes anything. Collecting private information is unlawful not because the University’s process was flawed or because it gave notice of the policy at the last minute after tuition was due, but because s. 38(2) prohibits the University from collecting personal information. There is no “process” that can turn a prohibited act into an authorized act.

56. There is nothing unique about the educational programs and degrees that the University offers compared to all the other universities in Ontario. Therefore, the information that the University proposes to collect is not necessary to the proper administration of its lawfully authorized activities within the meaning of section 38(2).

57. It is submitted that, through application of the modern approach adopted by the courts in interpreting the relevant statutory provisions, the University is not authorized by FIPPA to collect or retain personal health information of the students.

58. Accordingly, despite Section C.4.0 of the Booster Policy referencing FIPPA as an authority, the University has no legal authority under FIPPA to require students to disclose their Personal Information, including vaccination and/or other medical information.

59. In summary, the Booster Policy is unlawful and must be suspended forthwith.

(b) Is a Permanent Injunction an Appropriate Remedy?

60. The test for a permanent injunction differs from the test for an interim or interlocutory injunction. [25] Irreparable harm and balance of convenience are not, *per se,* relevant to the granting of a permanent injunction.[26]

61. In 2017, the Supreme Court of Canada clarified the legal test for obtaining a permanent injunction.[27] In order to obtain a permanent injunction, a party must establish the following:

    (a) Its legal rights;

    (b) That damages are an inadequate remedy; and

    (c) That there is no impediment to the court's discretion to grant an injunction.

(i) The Legal Rights of the Applicants

62. We respectfully submit that it has been established above that the University is not lawfully permitted to collect the Applicants' personal medical and/or vaccination information. Accordingly, their legal right to the protection of their privacy is being violated by the University in its demand for the collection of the Personal Information, on threat of sanctions.

(ii) Damages are an Inadequate Remedy

63. The courts have held that the loss of an academic year is not compensable when it comes to damages, and may constitute irreparable harm.[28] A university student threatened with the loss of an academic year is entitled to a high standard of procedural justice because the consequences of failure can delay achievement, render valueless

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[25] *1711811 Ontario Ltd. (AdLine) v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125 at para 80 ("*AdLine v Buckley*") <https://canlii.ca/t/g34vr>
[26] *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission),* 2010 BCCA 396 (CanLII) at para 28 <https://canlii.ca/t/2chkc>
[27] *Google Inc. v. Equustek Solutions Inc.,* 2017 SCC 34 at para 66 <https://canlii.ca/t/h4jg2>
[28] *Dhillon v. University of Alberta*, 1999 ABQB 635 (CanLII) at para 9 <https://canlii.ca/t/5p04>

previous success and even foreclose further university education.[29] In the case of a graduate student who was in danger of losing an academic year, the court has stated that such deprivation would impede the progression of the student's study, and that such lost time cannot be compensated financially.[30]

64. The unlawful (and coercive) collection, retention and disclosure of personal health information is itself an uncompensable harm since it cannot be undone and is an egregious breach of fundamental privacy rights.

65. In the current case, the University announced its Booster Policy approximately one week after tuition was due and students had paid fees to the University for the semester, signed leases on accommodation, and otherwise committed financially to attending the University.

66. If the Applicants do not disclose their Covid-19 vaccination status to the University as mandated, they will face disciplinary action from the University, pursuant to the Booster Policy.

67. Each of the Applicants risks being removed from campus, unable to complete their program, unable to recover their losses, set back in their career goals and other harms.

(iii) There is no Impediment to the Court's Discretion to Grant an Injunction

68. This Court is a court of inherent jurisdiction, able to take jurisdiction over any subject matter except those matters over which legislation specifically assigns exclusive jurisdiction to another adjudicate body, explicitly or by implication. FIPPA does neither.[31] There is nothing explicit in FIPPA dealing with exclusivity. Elements to consider when determining if there is an implied legislative intent to exclude the jurisdiction of the courts were enunciated in *Pleau v Canada (Attorney General)* as the following:[32]

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[29] *Khan v. University of Ottawa (*1992) 1997 CanLII 941 (ON CA) <https://canlii.ca/t/6hd1>
[30] *Boon v. Newbound*, 1983 CarswellAlta 196 (Alta. Q.B.) at para 24 <https://canlii.ca/t/27rkk>
[31] *Hopkins v. Kay*, 2015 ONCA 112 at para 30 ("*Hopkins v. Kay*") <https://canlii.ca/t/ggbt6>
[32] *Pleau v. Canada (Attorney General),* [1999] N.S.J. No. 448, 1999 NSCA 159 at paras 50-52 <https://canlii.ca/t/1f8qn>

(a) Is the language of the process for dispute resolution established by the legislation consistent with exclusive jurisdiction?

(b) Is the nature of the dispute regulated by the legislative scheme, and to what extent would the court's assumption of jurisdiction be consistent with that scheme?

(c) What is the capacity of the scheme to afford effective redress?

69. These factors were considered by the Ontario Court of Appeal in *Hopkins v Kay*, a case which examined whether PHIPA constituted an exhaustive code ousting the court's jurisdiction.[33]

a) Is the language of the process for dispute resolution established by the legislation consistent with exclusive jurisdiction?

70. The court found that the language of PHIPA's dispute resolution process did not indicate an exhaustive code, despite PHIPA containing an "exhaustive set of rules", as "details regarding the procedure or mechanism for the resolution of disputes are sparse".[34] PHIPA's purposes include the "independent review and resolution of complaints with respect to personal health information" and the provision of "effective remedies for contraventions" of the Act.[35] PHIPA's purposes stretch far further into enforcement in comparison to FIPPA, as FIPPA purposes do not include providing effective remedies if it is contravened.[36] In fact, there is barely any information at all contained within *FIPPA* in regards to its review procedure.

b) Is the nature of the dispute regulated by the legislative scheme, and to what extent would the court's assumption of jurisdiction be consistent with that scheme?

71. While FIPPA is intended to provide guidance regarding privacy concerns, the court's assumption of jurisdiction in this case would be consistent with FIPPA's scheme, as the

[33] *Hopkins v. Kay,* supra note 31
[34] Ibid at para 37
[35] *Personal Health Information and Protection Act,* 2004, S.O. 2004, c.3, Sch. A, s. 1.
[36] *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F. 31, s.1.

provisions of FIPPA itself indicate that recourse to the courts is necessary for enforcement. FIPPA s.61(1) prescribes several offences, and s.61(2-5) lays out the process for prosecuting such offences in court. Additionally, s. 62(2-4) contemplates actions and liability against the IPC, Crown or institutions if there are damages claimed. As the IPC commissioner does not have the ability to prosecute offences or award damages, it is clear that the IPC was not intended to play a comprehensive or expansive role in dealing with FIPPA complaints. The nature of the dispute in the present case involves the unlawful collection of Personal Information on a near-immediate basis. FIPPA's regulations do not pertain to immediate and urgent concerns, and likewise FIPPA does not regulate methods of enforcement. As such, with regard to the second consideration in *Pleau*, it is similarly clear that FIPPA does not grant exclusive jurisdiction to any external adjudicative body and the court's assumption of jurisdiction is entirely consistent with the legislative scheme.

c) What is the capacity of the scheme to afford effective redress?

72. As discussed, FIPPA does not provide remedies that would allow for effective redress in the current case, where there are immediate and urgent concerns which require injunctive relief. The IPC does not have the power to enact urgent injunctions. Injunctive relief is required in the current case, as without such the Applicants' personal information will be unlawfully collected. Given that there is no right for the Applicants to obtain an urgent hearing with the IPC, and that the IPC cannot provide the injunctive remedy sought, consideration of the third element enunciated in *Pleau* also demonstrates that FIPPA cannot constitute an exhaustive code.

73. Even if FIPPA did lay out a clear method of enforcement via injunction, the courts are still empowered to grant injunctive relief.[37] In order to do so, the statutory provision must be shown to be inadequate in some respect, such as where serious harm or danger would result from the delay inherent in invoking a statutory remedy.[38] The IPC process

[37] *Supra* note 26 at para 34
[38] Ibid at 36

is inadequate for the remedies sought in this case. Serious harm to the Applicants will result if the University insists on its unlawful collection of the Personal Information.

PART IV - RELIEF SOUGHT

74. The Applicants seek a Declaration that Policy 3.1.1 - Covid-19 Vaccination Policy of the University of Western Ontario (the "University") is an improper and unlawful violation of Section 38(2) of the *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31.

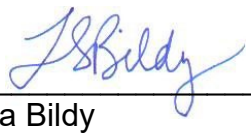
75. The Applicants seek a Declaration that the University has no lawful authority to collect, copy, store or use the personal vaccination and/or medical information of students attending its premises.

76. The Applicants seek a permanent injunction preventing the University from requiring students to provide proof of, or attest to, their Covid-19 vaccination status to enroll in courses, attend campus or for any other purpose, and from collecting said personal vaccination and/or medical information, unless expressly authorized by statute.

77. The Applicants seek an Order that the University dispose forthwith of the personal vaccination and/or medical information of its students which has already been collected, whether lawful at the time of collection or not.

78. The Applicants seek their costs in this application, together with applicable HST, payable forthwith by the Respondent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of September, 2022



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APPENDIX A - LIST OF AUTHORITIES

1. *Ayr Farmers Mutual Insurance Company v. Wright, 2016 ONCA 789 (CanLII)* <*https://canlii.ca/t/gvbm5*>

2. *University of Guelph (Re),* 2022 CanLII 25559 (ON IPC) <https://canlii.ca/t/jnjcv>

3. *Cash Converters Canada Inc. v. Oshawa (City),* 2007 ONCA 502, 86 O.R. (3d) 401 <https://canlii.ca/t/1rxpx>

4. *Liquor Control Board of Ontario v. Vin De Garde Wine Club*, 2015 ONSC 2537 <https://canlii.ca/t/ghft7>

5. *Toronto (District School Board) (Re),* 2021 CanLII 71650 (ON IPC) <https://canlii.ca/t/jhfs2>

6. *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62 (CanLII) <https://canlii.ca/t/g1vf6>

7. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 <https://canlii.ca/t/j46kb>

8. *1711811 Ontario Ltd. (AdLine) v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125 <https://canlii.ca/t/g34vr>

9. *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission),* 2010 BCCA 396 (CanLII) <https://canlii.ca/t/2chkc>

10. *Google Inc. v. Equustek Solutions Inc.,* 2017 SCC 34 <https://canlii.ca/t/h4jg2>

11. *Dhillon v. University of Alberta*, 1999 ABQB 635 (CanLII) <https://canlii.ca/t/5p04>

12. *Khan v. University of Ottawa (*1992) 1997 CanLII 941 (ON CA) <https://canlii.ca/t/6hd1>

13. *Boon v. Newbound*, 1983 CarswellAlta 196 (Alta. Q.B.) <https://canlii.ca/t/27rkk>

14. *Hopkins v. Kay*, 2015 ONCA 112 <https://canlii.ca/t/ggbt6>

15. *Pleau v. Canada (Attorney General),* [1999] N.S.J. No. 448, 1999 NSCA 159 <https://canlii.ca/t/1f8qn>

APPENDIX B – TEXT OF STATUTES AND REGULATIONS

1. *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 <https://www.ontario.ca/laws/statute/90f31>

s.1 Purposes

1 The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

s.2 Definitions

(1) In this Act,

"educational institution" means an institution that is a college of applied arts and technology or a university;

"institution" means,

(b) any agency, board, commission, corporation or other body designated as an institution in the regulations; ("institution")

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b);

"personal information" means recorded information about an identifiable individual, including,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(e) the personal opinions or views of the individual except where they relate to another individual,

s. 38(2) No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.

2. *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, Schedule to the Reg. 460 General Regulation <https://www.ontario.ca/laws/regulation/900460>

1. (1) The agencies, boards, commissions, corporations and other bodies listed in Column 1 of the Schedule are designated as institutions.

176.	The University of Western Ontario

3. *Personal Health Information and Protection Act*, 2004, S.O. 2004, c.3, Sch. A <https://www.ontario.ca/laws/statute/04p03>

1 The purposes of this Act are,

(a) to establish rules for the collection, use and disclosure of personal health information about individuals that protect the confidentiality of that information and the privacy of individuals with respect to that information, while facilitating the effective provision of health care;

(b) to provide individuals with a right of access to personal health information about themselves, subject to limited and specific exceptions set out in this Act;

(c) to provide individuals with a right to require the correction or amendment of personal health information about themselves, subject to limited and specific exceptions set out in this Act;

(d) to provide for independent review and resolution of complaints with respect to personal health information; and

(e) to provide effective remedies for contraventions of this Act.

4. *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*: O. Reg. 364/20: *Rules for Areas at Step 3 and at the Roadmap Exit Step* <https://www.ontario.ca/laws/regulation/200364>

Schedule 1

2(2.1) A person is fully vaccinated against COVID-19 if,

(a) they have received,

(i) the full series of a COVID-19 vaccine authorized by Health Canada, or any combination of such vaccines,

(ii) one or two doses of a COVID-19 vaccine not authorized by Health Canada, followed by one dose of a COVID-19 mRNA vaccine authorized by Health Canada, or

(iii) three doses of a COVID-19 vaccine not authorized by Health Canada; and

(b) they received their final dose of the COVID-19 vaccine at least 14 days before providing the proof of being fully vaccinated.

Schedule 4

Closures

2. (1) The person responsible for a business or organization that is open shall ensure that the business or organization operates in accordance with all applicable laws, including the Occupational Health and Safety Act and the regulations made under it.

(2) The person responsible for a business or organization that is open shall operate the business or organization in compliance with any advice, recommendations and instructions issued by the Office of the Chief Medical Officer of Health, including any advice, recommendations and instructions,

(a) on physical distancing, cleaning or disinfecting;

(b) requiring the business or organization to establish, implement and ensure compliance with a COVID-19 vaccination policy; or

(c) setting out the precautions and procedures that the business or organization must include in its COVID-19 vaccination policy.

5. *University of Western Ontario Act*, Bill Pr14, 1982, as amended <https://www.uwo.ca/univsec/pdf/about/university_act/University_of_Western_Ontario_Act_1982_as_amended_1988.pdf>

18. Except in such matters as are assigned by this Act to the Senate or other body, the government, conduct, management and control of the University and of its property and affairs are vested in the Board, and the Board may do such things as it considers to be for the good of the University and consistent with the public interest.

6. *Courts of Justice Act*, R.S.O. 1990, c. C.43 <https://www.ontario.ca/laws/statute/90c43>

Rules of law and equity

96 (1) Courts shall administer concurrently all rules of equity and the common law.

(2) Where a rule of equity conflicts with a rule of the common law, the rule of equity prevails.

(3) Only the Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise provided.

Declaratory orders

97 The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

(2) An order under subsection (1) may include such terms as are considered just.

Court File No: CV-22/1321

HAWKE, PUZZO, GLEASON, DONALDS and CAMARA ***and*** **THE UNIVERSITY OF WESTERN ONTARIO**

Applicants *Respondents*

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at London

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