

CITATION: Hawke v. Western University, 2022 ONSC 5243
COURT FILE NO.: CV-22-1321
DATE: 20220923

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
SIMON HAWKE, MICHAEL PUZZO,)	
TIANA GLEASON, JAMES DONALDS)	Lisa D. Bilyd and Mark A. Josphe, for the
and ASHANTÉ CAMARA)	Applicants
)	
Applicants)	
)	
– and –)	
)	
THE UNIVERSITY OF WESTERN)	Nadia Effendi, Christine Muir, Daniel
ONTARIO)	Michaluk, Veronica Sjolin and Teagan
)	Markin, for the Respondent
Respondent)	
)	
)	
)	HEARD: September 19, 2022

TRANQUILLI J.

Introduction

- [1] The individual right to privacy plays a fundamental role in the preservation of a modern, free, and democratic society. The ability of individuals to control their personal information is intimately connected to their autonomy, dignity, and privacy.

- [2] At issue in this application is whether the respondent University of Western Ontario (“Western”) can lawfully collect proof of vaccination from its campus community in order to implement and enforce the university’s COVID-19 Vaccination Policy (the “Policy”). The provincial government no longer requires post-secondary institutions such as Western to impose a proof of vaccine requirement on its university population. However, on August 22, 2022, Western announced its decision to update and continue its vaccine mandate from last year and to require the university community to submit proof of vaccination for this 2022-2023 academic year. Unless they are subject to an accommodation, all those who are subject to the Policy must demonstrate they have received a complete primary series of the COVID-19 vaccine and a booster dose. A student who fails to submit proof of vaccination risks various sanctions, up to and including suspension or expulsion.

Overview

- [3] The applicants are Western students enrolled in for the 2022-2023 academic year in various programs and years of study. The applicants explain that their privacy is important to them. They do not wish to disclose their personal medical information to Western as a condition of continuing their post-secondary education. The applicants are also upset that Western announced its decision to continue the Policy after tuition was due and when students had already made other financial commitments for the school year. The applicants view the university's collection of proof of vaccine as no more than an unjustified collection scheme that is unlawful, coercive, and an egregious breach of their fundamental privacy rights.
- [4] The *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31 ("*FIPPA*") protects the privacy of individuals with respect to personal health information about themselves held by institutions. Pursuant to s. 38(2) of *FIPPA*, Western shall not collect personal information unless the collection is necessary to the proper administration of a lawfully authorized activity.
- [5] The applicants claim Western's collection of the proof of vaccine under the Policy is a violation of section 38(2) of *FIPPA*. The applicants contend that proof of vaccination is not necessary to Western's activities because the province no longer requires it. They contend that Western is an "outlier" in the post-secondary institutional community in this province through continuing a vaccine mandate with proof of vaccination.
- [6] The applicants seek declaratory and permanent injunctive relief in respect of the university's collection of their personal information under the Policy. The applicants ask the court to grant declarations that the Policy is a violation of s. 38(2) of *FIPPA* and that Western has no lawful authority to collect, copy, store, or use the personal vaccination and/or medical information of students attending its premises. They also seek a permanent injunction preventing Western from requiring students to provide proof of, or to attest to, their COVID-19 vaccination status as a condition of enrollment or attending campus. Finally, they seek an order requiring the university to dispose of personal vaccination and/or medical information already collected from students pursuant with the COVID-19 vaccine mandate.
- [7] Western submits that it has the legal authority to issue its Policy. It claims the Policy is the product of a considered process. The university argues that the proof of vaccine requirement is necessary for the implementation and enforcement of the Policy. Western submits the ability to deliver consistent in person education and campus services in the context of the pandemic is directly connected to the availability and efficacy of health and safety measures such as vaccinations.
- [8] The application turns on the narrow issue of whether Western can demonstrate that its collection of proof of vaccine in the enforcement of its COVID-19 Vaccination Policy complies with s. 38(2) of *FIPPA*. Is the university's collection of proof of vaccine necessary to the proper administration of a lawfully authorized activity by the university?

- [9] This application is not supposed to be about whether Western’s COVID-19 vaccination mandate itself is justified. The issues on this application do not examine the efficacy or safety of COVID-19 vaccines. The application does not involve a constitutional challenge of the mandate, a judicial review of either the reasonableness or correctness of Western’s policy decision to continue the vaccine mandate for the current school year.

The Application

- [10] The application was issued September 6, 2022, shortly after Western announced the continuation of its Policy. The application was heard on an urgent basis as the Policy has immediate application to the 2022-2023 academic year that is already under way. The applicants seek a prompt determination of the issues.
- [11] The application proceeded on a written record, with brief affidavits from each applicant. Western’s responding application record consists of the affidavit of its Associate Vice President, Human Resources, who was designated as Western’s “Incident Command” in respect of its Continuity of Education Plan during the pandemic. She was involved in the university’s review and update to the Policy. Her affidavit sets out the legal structure of the university, the history of Western’s response to COVID-19, and the process by which the university decided to update and continue the Policy for the current academic year.
- [12] There were no cross-examinations on the affidavits. The parties agreed it was appropriate for the court to determine the application based on the record before it.

The Issues

- [13] The parties agree that Western is subject to *FIPPA* and that Western bears the onus of establishing compliance with s. 38(2) of *FIPPA* in its collection of proof of vaccine from students. Although the Information and Privacy Commissioner of Ontario has primary responsibility for supervising compliance with *FIPPA*, the parties agree the court also has jurisdiction to determine the privacy issue raised on this application.
- [14] Section 38(2) of *FIPPA* provides:
- 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.*
- [15] There is no dispute that the collection of proof of vaccine by Western is not expressly authorized by statute and is not for the purposes of law enforcement. Accordingly, the question under s. 38(2) is whether the collection of the proof of vaccine is “necessary to the proper administration of a lawfully authorized activity.”

- [16] All parties agree the leading authority on the proper interpretation of s. 38(2) of *FIPPA* is the Court of Appeal's decision in *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502 (CanLII). First, the court must identify the "lawfully authorized activity" in question. Second, the court must determine whether the collection of personal information in question is necessary to that lawfully authorized activity: *Cash Converters* at para. 40. As I will discuss later in these reasons, while the parties agree that *Cash Converters* is the leading authority, they differ in their positions on its correct treatment in the circumstances of this application.
- [17] The issues on the application therefore require me to address the following issues:
1. What is the "lawfully authorized activity" for which Western is collecting proof of vaccine?
 2. Is the collection of proof of vaccine "necessary" to the proper administration of the "lawfully authorized activity"?
 3. What is the appropriate remedy in the circumstances?

Background

- [18] Given the narrow issue identified on this application, I do not propose to detail the extensive history of Western's response to the pandemic. For context, I outline Western's legal structure and the circumstances surrounding the creation and implementation of the COVID-19 Vaccination Policy in issue.

Western's Legal Structure

- [19] Western is a public research university located in London, Ontario. It consists of one main campus situated on 455 hectares in London. It has the second largest population of students in campus housing, with about 80% of first-year students living on campus in residence. As of August 29, 2022, Western has about 39,900 active students and employs thousands of people across 10 faculties and approximately 65 departments, as well as the school of graduate and postdoctoral studies.
- [20] Western's current governing legislation is *An act respecting the University of Western Ontario*, Bill Pr14, S.O. 1982, c. 92, as revised by Bill Pr37 S.O. 1988, c. Pr26 ("*Western University Act*"). The Act provides for a Board of Governors and a Senate. The Board of Governors is responsible for overall governance of the university, whereas the Senate is responsible for overall academic policy.
- [21] Section 18 of the Act provides as follows:

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. [emphasis added]

[22] Other powers of the Board specifically identified in the Act include:

- To create committees to exercise any of its powers and delegate authority to such committees or to individuals as necessary: s. 19(g).
- To establish and enforce regulations for the use of its buildings, grounds and ancillary operations, and for the orderly conduct of persons entering upon the lands and premises of the University: s. 19(k).

[23] To that end, the Board passed several policies relevant to the exercise of its statutory powers and the issues on this application. The Board delegated authority to the university President. The President is responsible to the Board and Senate for the overall integrity of the university, including the sound and effective management of the university's human, financial, and physical resources. Among other powers, the President has the authority to exercise general supervision over the use of university properties to promote the orderly conduct and safety of persons entering upon the lands and premises of the university. The President is also empowered to implement policies, including the approval of health and safety policies.

[24] The health and safety policy, effective November 26, 2009, provides that the university has an ethical as well as a legal responsibility to provide a safe environment for study and work. While the university will comply with all applicable federal, provincial, and municipal health and safety legislation, the university deems these to be "minimum standards". The university reserves the right to establish and enforce more stringent standards as may be considered appropriate, and such policies will be considered as binding upon all students, staff, and faculty.

COVID-19

[25] After the declaration of the pandemic in the spring 2020, classes at Western were conducted primarily online for the remainder of the 2019-20 academic year where practicable. Residences operated at limited capacity and most services were closed. For the 2020-2021 academic year, Western adopted a hybrid model of courses that allowed approximately 14% of classes to be offered in person, 5% to be held in a blended in person and online manner, and the balance delivered solely online. Vaccines then became widely available in the spring of 2021.

[26] In 2021, pursuant to a regulation under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, SO 2020, c17 ("*Reopening Ontario Act*") the Ontario government required post-secondary institutions to impose a vaccine mandate in accordance with the direction of the Chief Medical Officer of Health for Ontario ("CMHO"). Among other

provisions, the provincial vaccination mandate required post-secondary students to submit a proof of vaccine to the post-secondary institution to demonstrate compliance with the institution's mandated policy. Western was one of those post-secondary institutions that implemented such a mandate for the 2021-2022 academic year.

- [27] Effective March 1, 2022, the Ontario government lifted the proof of vaccine requirement for all settings as part of easing public health measures in response to improvements in key public health and health system indicators. The CMHO formally revoked his direction for proof of vaccine on March 1, 2022. In his communication to the Deputy Minister for the Ministry of Colleges and Universities on that same date, the CMHO stated:

I recognize that post-secondary institutions may wish to continue with COVID-19 vaccination policies for the remainder of the academic term and ongoing as part of overall health and safety requirements for their institutions. I wholeheartedly support that

- [28] Western did continue its Policy for the balance of the academic term. In June 2022, the university commenced its review of the Policy in anticipation of the 2022-2023 academic year. The review included consultation with internal and external subject-matter experts and university stakeholders such as employee groups, the joint occupational health and safety committee, and the faculty association. Western's Incident Command also consulted with the Medical Officer of Health for the Middlesex London Health Unit, who advised her that it was up to Western to determine what measures it deemed appropriate to put into place to protect the community from COVID-19. From this review, Western understood that Omicron is likely to increase in circulation this fall and that a second dose of COVID-19 vaccine has limited ability to prevent infection. It learned that the additional booster prevents severe outcomes and reduces infection but that it was likely there would be a low COVID-19 booster uptake with students. With this information, Western decided it would continue with various COVID-19 health and safety measures for the 2022-2023 school year, including the continuation of the Policy, updated to require one booster dose.
- [29] On August 22, 2022, Western publicly announced its decision to continue the updated Policy for the forthcoming academic year.

The Policy

- [30] Effective August 22, 2022, the updated COVID-19 Vaccination Policy requires that students and employees be fully vaccinated and boosted, and to provide proof of vaccination. The Policy requires these individuals to have received a complete primary series of a COVID-19 vaccine dose(s), and an additional dose of a Health Canada authorized COVID-19 vaccine after the primary series. Alternatively, the individual must have an accommodation granted by the University and comply with any testing program and other requirements established by the University from time to time. Students in residence had a two-week grace period after moving in if they were unable to get a booster before they arrived. All students and employees are required to submit current proof of vaccination to Western by October 1, 2022. Visitors to Western who will have indoor interactions on campus where physical distancing cannot be maintained must attest that

they are either vaccinated and boosted or have a medical condition that prevents them from being vaccinated.

- [31] Effective September 6, 2022, Western further updated the Policy to reflect Health Canada’s recent approval of the bivalent vaccine that targets the Omicron variant. The Policy is amended to extend the deadline to provide proof of vaccination of the booster dose by January 9, 2023.
- [32] The proof of vaccination must be a written 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. In general, the government-issued “Proof of Vaccination” sets out the following information: name, date of birth, the date and type of vaccination, and the vaccination lot number (if any). Western already has the names and dates of birth of the enrolled students. The additional new information collected pursuant to the policy is with respect to the administration of the vaccination(s).

Analysis

- [33] I now turn to address the issues identified in this application.

1. What is the “lawfully authorized activity” for which Western is collecting proof of vaccine?

- [34] The applicants submit that the provision of post-secondary educational programs is Western’s “lawfully authorized activity” under s. 38(2) of *FIPPA*. The lawfully authorized activity for which personal information can lawfully be collected is limited to those programs or services that exist for the university’s core function of providing post-secondary education. The collection of proof of vaccine has no connection to Western’s core function. The applicants acknowledge the *Western University Act* provides the university with broad powers to govern its affairs, including to do such things it considers to be consistent with the public interest. However, this authority cannot be construed to allow Western to collect personal information for any purpose it deems to be in the public interest. Those powers are limited by the specific privacy restrictions imposed by *FIPPA*. The authority for the university’s previous iteration of the vaccination policy for the 2021-2022 academic year was expressly authorized by regulation under the *Reopening Ontario Act*. That is no longer the case. Therefore, the current Policy does not fall within the scope of the university’s lawfully authorized activities.
- [35] Even if the court accepts that health and safety objectives fall within Western’s authority, the applicants contend that the vaccine mandate still fails to qualify as a “lawfully authorized activity” within the meaning of s. 38(2). Health and safety activities are incidental to the university’s core services. Further, collection of proof of vaccine is no longer clearly necessary to carrying out a health and safety mandate. The province lifted the proof of vaccine requirement, and Western has not demonstrated that the policy is necessary to keep the campus safe. Western is an “outlier” as it is ostensibly the sole

institution of 22 universities in the province that purports to carry on a vaccine mandate this year and to collect proof of vaccination.

- [36] Finally, the Applicants argue the Policy itself cannot be the “lawfully authorized activity.” This invites circular reasoning where the act of collecting the personal information itself becomes the activity that justifies the collection of personal information. Such an interpretation would defeat *FIPPA*’s express purpose to protect the privacy of individuals with respect to personal information about themselves held by institutions. This would allow Western to simply establish a policy in violation of *FIPPA* through its own interpretation of what is “necessary”. The applicants argue this leads to a slippery slope in Western’s exercise of its powers; will they be requiring disclosure of students’ sexual and mental health histories next?
- [37] I cannot give credit to these submissions. The applicants incorrectly characterize Western’s authority to pass and implement the Policy. The applicants’ interpretation of s. 38(2) conflates the requirements for an institution’s compliance with personal information collection. The institution is not required to demonstrate that the lawfully authorized activity is “necessary”.
- [38] The *Western University Act* does not limit the university’s governance to its “core services” of delivering educational programs. A plain reading of s. 18 demonstrates Western is expressly and broadly empowered to manage its affairs. It may do such things as it considers to be for the good of the University and consistent with the public interest. Without limiting the generality of those powers, s. 19(k) of the Act goes on to provide that it may establish and enforce regulations for the use of its buildings, grounds, and ancillary operations, as well as for the orderly conduct of persons entering upon the lands and premises of the university. There is a clear path from the Act to the Board’s delegation of its powers to executive officers and the promulgation of health and safety policies for the Western community. The express purpose of the Policy is: “*to provide all members of the University community with a safe and healthy work, living and learning environment consistent with the University’s legislative obligations.*”
- [39] In *Canadian Federation of Students v. Ontario (Colleges and Universities)*, 2021 ONCA 553, the Court of Appeal recently emphasized that it is well-settled that universities in this province have the authority to manage their own affairs. The *Western University Act* plainly establishes the university as an independent, autonomous, self-governing institution that is empowered to oversee its administrative and academic affairs: *Canadian Federation of Students* at paras. 51-56.
- [40] It is self-evident that Western’s enabling statute does not authorize it to act in an arbitrary, unreasonable, or unlawful manner. The broad scope of Western’s legislative authority is undoubtedly limited by *FIPPA*, other provincial and federal legislation, as well as the common law. Western must govern its affairs in a manner consistent with statutory and common law. But again, this application is not a judicial review or a constitutional challenge of the vaccination policy.

- [41] That the province no longer requires Western to impose a vaccine mandate, or that Western is reportedly the only university in Ontario to impose such a mandate, is of no consequence. Western is expressly permitted to govern its affairs. The university does not need to establish, as a fact, that the COVID-19 Vaccination Policy is necessary to maintain health and safety on its campus in order to demonstrate a “lawfully authorized activity”. To frame the issue in that manner essentially asks the court to determine if the vaccination policy is reasonable and justified; something this court is not supposed to be undertaking on this application.
- [42] In any event, the evidence on this application demonstrates that Western is not an “outlier” in the post-secondary institution community as represented by the applicants. There are a number of other institutions who are either asking, encouraging, or requiring students to stay up to date with the COVID-19 vaccinations, and those institutions are also still collecting proof of vaccine.
- [43] I accept that the right to privacy of personal information is quasi-constitutional, such that exceptions from the rights set out in the act should be interpreted narrowly: *Cash Converters* at para. 29. However, s. 38(2) of *FIPPA* makes it plain that the institution does not have to demonstrate that the lawfully authorized activity itself is “necessary”. It is the collection of personal information in connection with the lawfully authorized activity that must be shown to be “necessary”.
- [44] Based upon the broad wording of Western’s enabling statute, and the process that Western followed in promulgating its COVID-19 Vaccination Policy, I am satisfied the university has demonstrated that the Policy is a “lawfully authorized activity”. This is not circular reasoning as submitted by the applicants. The activity is the Policy. The collection of proof of vaccine is how the vaccination policy or mandate is implemented and enforced.
- [45] This conclusion is consistent with the approach to and interpretation of s. 38(2) by the Information and Privacy Commissioner of Ontario (“IPC”). The Court of Appeal has recognized the IPC has expertise in the interpretation and application of the statutes relating to personal information and the protection of privacy: *Cash Converters, supra* at paras. 27-28.
- [46] In *University of Guelph (Re)*, 2022 CanLII 25559 (ON IPC), the IPC considered a challenge to the University of Guelph’s vaccine mandate for students living in residence and the collection of proof of vaccination. The IPC referred to the broad wording of that university’s enabling statute. It was satisfied that the university’s powers to manage its affairs satisfied the “lawfully authorized activity” requirement within the meaning of s. 38(2) of *FIPPA*: *Re Guelph* at paras. 33-34. The IPC explained that while the “lawfully authorized activity”, is related to the activity of collecting personal information, the activity is not necessarily identical to the collection. The “lawfully authorized activity” forms the context within which the collection would occur: *Re Guelph* at para. 29. In explaining this approach, the IPC referred to its own Guidelines for the Use of Video Surveillance for an explanation of “lawfully authorized activity”. At page 6 of those guidelines the IPC explains:

“With respect to the phrase “lawfully authorized,” the authorization may come in different forms – for example, in a statute or regulation, but also in a bylaw, policy or order formally approved by a governing body with the lawful authority to enact such a bylaw, policy or order.”

[47] In conclusion, this court finds the Policy is the product of Western’s broad powers of self-government. The Policy is the context in which the collection of the proof of vaccine occurs. The Policy is a “lawfully authorized activity” pursuant to s. 38(2) of *FIPPA*.

2. *Is the collection of Proof of Vaccine “necessary” to the proper administration of the “lawfully authorized activity”?*

[48] There is no dispute that the necessity requirement in s. 38(2) is subject to a high threshold and strict application, consistent with the quasi-constitutional nature of the right to privacy. 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. Where the personal information would merely be helpful to the activity or where the purpose can be accomplished another way, the institution is obliged to choose the other route: *Cash Converters*, at para. 40; *Liquor Control Board of Ontario v. Vin De Garde Wine Club*, 2015 ONSC 2537 (Div. Ct.) at paras. 43-46.

[49] The applicants submit Western cannot demonstrate that the collection of proof of vaccine is necessary. They note that Western justifies the Policy and other measures as merely “reasonable precautions” to protect the health and safety of the Western community and to help to ensure continuity of in person education on campus. They argue this means the collection of proof of vaccine would be no more than “helpful” to the university’s vaccination mandate. The applicants also assert that the number of categories of individuals who are exempt from the Policy and the recent extension of time in which to receive the booster into the middle of the school year also shows that collection of the proof of vaccine is not “necessary” as required by s. 38(2).

[50] The applicants acknowledge that *Re Guelph* involved an unsuccessful challenge of the University of Guelph’s vaccination mandate, wherein the IPC found the collection of the proof of vaccine from students was necessary to the proper administration of the university’s affairs. However, they submit *Re Guelph* is distinguishable from this application because the university was subject to the *Reopening Ontario Act* and the directive from the CMHO for the imposition of a proof of vaccine mandate. That is no longer the situation. The regulation has been lifted; therefore, the proof of vaccine is not necessary and *Re Guelph* is therefore of no assistance to the respondent.

[51] I cannot give effect to the applicants’ position. The question is whether collection of proof of vaccine is necessary to the implementation and enforcement of the Policy.

[52] I accept Western’s submission that there is no alternative to collecting COVID-19 vaccination information from the university community in order to properly administer the

vaccine mandate. While compliance with a face-masking policy is easily detectable, this is not the case with vaccination status. The applicants are correct that the IPC cited the provincial regulation in its conclusion that proof of vaccination was necessary for the proper administration of the University of Guelph's vaccination policy: *Re Guelph* at para. 52. However, the IPC's analysis of the necessity of the collection of proof of vaccine did not stop there. The IPC also accepted the university's submissions that its collection of the vaccination information was necessary as a part of its ongoing health and safety efforts to protect its students in residences and elsewhere on campus by preventing the spread of COVID-19 and creating a safer space for everyone. The IPC expressly noted: "In my view, the university could only ensure that students living in the residences (or on campus), were fully vaccinated against COVID-19 by collecting the vaccination information": *Re Guelph, supra*, at para. 51.

- [53] I also accept Western's explanation that the proof of vaccination is necessary to the university's decision-making as it continues to offer in person educational programming and on-campus services during this phase of the pandemic. This is not simply "helpful" information to the university's purpose that can be achieved through an alternative route. It is the one way Western can make informed and evidence-based decisions regarding the continuity and extent of its in person operations throughout this phase of the pandemic.
- [54] I am not persuaded that the removal of the provincial mandate to require proof of vaccine informs the necessity analysis in these circumstances. The university need only establish that the collection of the personal information is necessary to the proper administration of its vaccination policy. It is an autonomous self-governing body. How other post-secondary institutions have decided to manage their operations in this phase of the pandemic is not determinative of the necessity of Western's proof of vaccine policy. The record on this application does not explain the nature of the programming being offered by those other institutions or how the programming is offered (in person or online). In any event, the uncontroverted evidence is that, in fact, many other post-secondary institutions in this province are still collecting proof of vaccine, irrespective of whether they "require", "encourage" or "ask" their communities stay current on the COVID-19 vaccinations. Even though some institutions are collecting the vaccine information on a voluntary basis, the collection still must comply with s. 38(2) of *FIPPA: Cash Converters, supra*, at para. 34.
- [55] Neither the exemption categories in the Policy nor the extension to the booster deadline inform the necessity analysis in s. 38(2). Western has explained that the exemption categories are based whether those classes of individuals will be indoors on campus where they will have interactions and cannot maintain physical distancing. The extension of the deadline to comply with providing proof of the booster vaccine is satisfactorily explained as arising from the recent approval of the bivalent vaccine that targets the Omicron variant, and which is just becoming available in this province. Again, the CMHO recently stated that the seventh wave continues and is primarily driven by the Omicron variant.
- [56] In my view, these findings dispose of this question on the application. As noted at the outset, this application is not supposed to be about the merits of a vaccine mandate itself.

However, the way in which some the applicants' arguments were framed seemed to invite such an assessment.

- [57] In fairness to the applicants, the court acknowledges that some comments by the IPC in *Re Guelph* seem to invite such considerations. The IPC expressly cautioned in a postscript to its reasons that its decision must be read in the context that existed at the beginning of the 2021-22 academic school year. The IPC advised that whether collection of students' vaccine information can continue to be justified in future school terms must be continually reassessed and re-evaluated in accordance with applicable Ontario regulations and public health advice as they exist at that time. The postscript also referenced the Privacy Commissioners' Joint Statement on this issue, which advised that the necessity, effectiveness, and proportionality of vaccine passports must be continually monitored to ensure that they continue to be justified.
- [58] It is unclear to the court as to how this advice from the IPC and the privacy commissioners is to inform the s. 38(2) analysis, if at all. To the extent that it is relevant to the issues on this application, the court finds that Western has justified the use of proof of vaccine for the current school year. Western undertook a formal review of its policy for the 2021-2022 school year. Its review included consultation with university stakeholders and other universities. Critically, Western sought the input of several internal and external subject-matter experts of various medical disciplines for advice on issues such as projections for COVID-19 transmission rates in the fall, recommended health and safety measures and vaccine effectiveness. Finally, the Policy is consistent with the current advice of the CMHO.
- [59] Although the province lifted the regulatory mandate, the CMHO expressly supported post-secondary institutions to decide to continue with COVID-19 vaccination policies as part of overall ongoing health and safety requirements for their institutions. To that end, the recent decision of *Costa, Love, Badowich and Mandekic v Seneca College of Applied Arts and Technology*, 2022 ONSC 5111 is relevant to the conclusion that Western's Policy for this year is justified in part due to the current advice of the CMHO.
- [60] *Seneca College* concerned an unsuccessful application by students for an interlocutory injunction restraining the college from enforcing a COVID-19 vaccine mandate. In dismissing the application, Justice Black observed that as of March 1, 2022, the CMHO continued to encourage mandatory vaccination policies as part of overall health and safety requirements for post-secondary institutions. The court concluded that the college's policy was consistent with the current public health guidance: *Seneca College* at paras. 42-43. Moreover, the Chief Medical Officer of Health recently reinforced this message in his recent briefing at Queens Park on August 31, 2022: universities and colleges can set up their response and parameters for returning to school. He observed that the measures taken at universities like Western concurs with the science table recommendations because the province expects an increase COVID-19 transmission as we move indoors.

[61] In conclusion, I find that Western has demonstrated that the proof of vaccine requirements within the COVID-19 Vaccination Policy are necessary for the proper administration of the Policy.

3. *What is the appropriate remedy in the circumstances?*

[62] I now deal with remedies in the event I am in error in my analysis of the relief sought by the applicants.

[63] The applicants seek declaratory and permanent injunctive relief restraining Western from collecting or storing any personal information in respect of the COVID-19 vaccine. They submit declaratory relief that Western's Policy is in contravention of s. 38(2) of *FIPPA* is insufficient on its own. The applicants seek permanent injunctive relief so they can be assured Western will not renew efforts to unlawfully collect their information. They also want the court to order Western to destroy all personal vaccine information collected to date.

[64] I assume for the purposes of this analysis that the court has jurisdiction for remedies in addition to those offered in *FIPPA: Hopkins v. Kay*, 2015 ONCA 112.

[65] I find that none of the remedies in the form sought in the application can issue. I accept the respondent's submission that remedies sought are either inappropriate or too broad in their wording.

[66] At most, the court would be persuaded to issue declaratory relief in respect of a s. 38(2) privacy breach by the university; however, not on the broad terms sought by the applicants. The declaration would have been specifically limited to identifying that Western had no authority to collect proof of vaccine in respect of the current Policy. There is no evidence to support a declaration that Western has no lawful authority to collect personal vaccination information at large, as sought in the application. This would seem to permanently prevent Western from ever collecting personal information, whereas it is clear *FIPPA* contemplates there will be situations where it is reasonable and justified.

[67] Of more concern is the permanent injunctive relief sought by the applicants. The applicants submitted injunctive relief is necessary as Western cannot be relied upon to comply with a declaration that their policy does not comply with *FIPPA*. That submission verges on being scandalous. There is no evidence on this record that suggests the university has blatantly disregarded the rights of those subject to the Policy or that it has ignored or summarily dismissed information relevant to the formation and implementation of its vaccination policy. There is no evidentiary basis on which to conclude there is a reason to be concerned that Western would not respect this court's declaration in the management and conduct of its affairs.

[68] Even if the court was persuaded that the Policy was in breach of *FIPPA*, these circumstances fall far short of the requirements to justify a permanent injunction and an injunction in the form sought by the applicants. The injunctive relief sought is extremely broad and would prevent the university from imposing any vaccine measures in the future

and without regard to any public health measures that may emerge in the future. Permanent injunctions constitute extraordinary relief that must be granted sparingly. In these circumstances, if the court had found a privacy breach, the appropriate remedy would begin with a declaration: *Labourers' Union of North America, Local 183 v. Castellano*, 2020 ONCA 71 at paras. 24-25.

- [69] In seeking to justify their request for a permanent injunction, the applicants emphasize what they characterize as the “coercive” nature of the Policy in forcing disclosure of their otherwise private health information. They raise concerns about the danger of losing their academic year if they do not provide their private information by way of proof of vaccination. They raise additional concerns of the fairness of this coercion, given the late timing of Western’s announcement of the continuation of the Policy, after tuition was due and the students had made living arrangements and other financial commitments for the year.
- [70] I acknowledge the applicants’ frustration; however, observe that the previous version of the Policy that applied to the 2021-2022 academic terms did notify the university community that the Policy was set to expire on September 7, 2022, and that it would be reviewed by no later than September 1, 2022. There was, in fact, a vaccine mandate and personal information collection policy in place before the ostensible “surprise” of Western’s announcement of the revised Policy on August 22, 2022.
- [71] I do not agree with the applicants’ characterization of the Policy as being “coercive” in nature. I do not accept the Policy will “force” members of the university community to disclose their personal information. The Policy forces individuals to choose between two alternatives, even if they like neither option. The choice is the individual’s to make. Each choice comes with its own consequences. That is the nature of choices: *Seneca College*, at para. 75; *Amalgamated Transit Union, Local 113 et al. v. Toronto Transit Commission and National Organized Workers Union v. Sinai Health System*, 2021 ONCA 7658 at para. 77.
- [72] I am also not persuaded that a disposal order is warranted in the circumstances. Again, the relief sought is broad. The applicants did not provide any authority in support of this relief. The applicants confirmed on the hearing of the application that they want all proof of vaccine information collected by Western to be destroyed. The court does not comprehend any reasonable basis for such a broad order. Among other issues, proof of vaccine information in the 2021-2022 year was collected pursuant to the province’s mandate.

Conclusion

- [73] The application is dismissed for the foregoing reasons.
- [74] If the parties cannot resolve costs, the respondent shall deliver written cost submissions by October 17, 2022, and the applicants shall deliver their cost submissions by November 1,

2022. There is no reply without leave. Submissions for both parties are limited to three (3) pages excluding any offers to settle and bills of cost.

[75] As noted at the hearing of this application, I thank all counsel for their courtesy, advocacy and their cooperative efforts in arguing the matter on an expedited basis.

A handwritten signature in blue ink that reads "K. Tranquilli J." with a stylized flourish at the end.

Justice K. Tranquilli

Released: September 23, 2022

CITATION: Hawke v. Western University, 2022 ONSC 5243
COURT FILE NO.: CV-22-1321
DATE: 20220923

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

AND

THE UNIVERSITY OF WESTERN ONTARIO

REASONS FOR JUDGMENT

Justice K. Tranquilli

Released: September 23, 2022