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 – LEGAL SUBMISSIONS IN REPLY

The University's Interpretation of Section 38(2) of FIPPA is Illogical and Circular, and Would Render Section 38(2) Meaningless

1. Collection of students' personal medical information is mandated by the University's Policy 3.1.1. Section 1 of that policy states:

> (1)(i) Subject to (ii) and (iii) below, all Individuals who attend on Campus must:
>
> (a) Be Vaccinated and **have provided Proof of Vaccination to the University** as directed by the University (emphasis added).

2. The University maintains that Policy 3.1.1 is the "activity" under section 38(2) of the *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31 ("FIPPA"). Paragraph 36 of the University's Factum states:

> *The "lawfully authorized activity" in this case is Western's vaccination policy.*

3. The University's logic is circular. Collecting personal information is the policy and the policy is the activity, the University says. Therefore, the University argues, collection of students' proof of vaccination is necessary to the activity within the meaning of s. 38(2). The University has attempted to frame the case so that collecting personal information is part of the "activity" itself.

4. This logic would render section 38(2) meaningless. Under this interpretation, any institution subject to s. 38(2) could collect personal information by making a policy that falls within its broad statutory mandate, and then calling the policy its "activity". The University describes its authority under the *UWO Act* in the broadest terms: "a statutory mandate to act for the good of the University and consistent with the public interest." In effect, the University maintains that it has the authority to enact policies to collect personal information "for the good of the University and consistent with the public interest" without interference from s. 38(2).

5. The University's interpretation of s. 38(2) cannot be correct. Section 64(1) of the Ontario *Legislation Act* provides that legislation "shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects." No legislative provision should be interpreted as to render it mere surplusage,[1] meaningless, pointless, or redundant.[2] Specific provisions override general legislation: *generalia specialibus non derogant*.[3] Section 38(2) exists to remedy the erosion of individual privacy at the hands of institutions eager to collect personal information. The University's proposed interpretation of section 38(2) would render the provision moot and prevent the attainment of its remedial objective. Instead, the specific prohibition in section 38(2) limits the University's broad authority in the *UWO Act*.

6. The University's policy is not the University's "activity". The University misconstrues *Cash Converters*.[4] In *Cash Converters*, the Ontario Court of Appeal found that a bylaw of the City of Oshawa was validly enacted and within the powers of the City. Under the Court's section 38(2) analysis, however, the validity of the bylaw was not the issue. The Court recognized that the City's "lawfully authorized activity" was not the bylaw but "consumer protection",[5] and the issue was whether the collection of personal information pursuant to the bylaw was necessary to the activity of consumer protection. The Court found that it was not.

7. An institution's "lawfully authorized activities" are the services or programs for which the institution exists to provide to the community, such as consumer protection provided by the municipality in *Cash Converters.*[6] Institutions may be empowered to create policies

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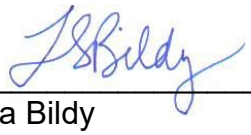
[1] *R. v. Proulx*, 2000 SCC 5 at para 28 < https://canlii.ca/t/527b>.
[2] *Winters v. Legal Services Society* [1999] 3 SCR 160 at para 47 < https://canlii.ca/t/1fqjr>; *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 SCR 27 at para 27 < https://canlii.ca/t/1fqwt>; *Medovarski v. Canada*, 2003 FCT 634 at para 41 < https://canlii.ca/t/gt7>.
[3] *R v Greenshield*, [1958] SCR 216 < https://canlii.ca/t/22vb3>; *R v Greenwood* (1992), 7 O.R. (3d) 1 (OCA) < https://canlii.ca/t/g126s>; *Ottawa Senators Hockey Club Corp. (Re)* (2003), 68 O.R. (3d) 603 at para 31 < https://canlii.ca/t/1g4hk>.
[4] *Cash Converters Canada Inc. v. Oshawa (City),* 2007 ONCA 502, 86 O.R. (3d) 401 ("*Cash Converters*") <https://canlii.ca/t/1rxpx>.
[5] Ibid at paras 6, 22, 46, 52.
[6] Also see *Liquor Control Board of Ontario v Vin De Garde Wine Club*, 2015 ONSC 2537 <https://canlii.ca/t/ghft7>; *Toronto Community Housing Corporation (Re),* 2004 CanLII 56175 (ON IPC) <https://canlii.ca/t/1r18p>; *Transportation (Ontario) (Re),* 2022 CanLII 3814 (ON IPC) <https://canlii.ca/t/jm0d4>.

to manage their affairs and further their objectives, but these policies are not their "lawfully authorized activities" under section 38(2).

8. The University's "activity" is post-secondary education, not its vaccination policy. Like the bylaw in *Cash Converters*, the University's Policy 3.1.1. may be validly enacted, but that is not the question. In section 38(2), "activity" means a program or service for which the institution exists to provide to the community. In this case, post-secondary education is the program or service for which the University exists to provide to its students.

9. The issue in this case is whether collection of proof of vaccination is necessary to the proper administration of post-secondary education. As in *Cash Converters*, collection of personal information is prohibited unless the University can show that its activity of post-secondary education cannot be undertaken without the information.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of September, 2022



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APPENDIX A - LIST OF AUTHORITIES

1. *R. v. Proulx*, 2000 SCC 5 <https://canlii.ca/t/527b>

2. *Winters v. Legal Services Society* [1999] 3 SCR 160 <https://canlii.ca/t/1fqjr>

3. *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 SCR 27 <https://canlii.ca/t/1fqwt>

4. *Medovarski v. Canada*, 2003 FCT 634 <https://canlii.ca/t/gt7>

5. *R v Greenshield*, [1958] SCR 216 <https://canlii.ca/t/22vb3>

6. *R v Greenwood* (1992), 7 O.R. (3d) 1 (OCA) <https://canlii.ca/t/g126s>

7. *Ottawa Senators Hockey Club Corp. (Re)* (2003), 68 O.R. (3d) 603 <https://canlii.ca/t/1g4hk>

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

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

10. *Toronto Community Housing Corporation (Re),* 2004 CanLII 56175 (ON IPC) <https://canlii.ca/t/1r18p>

11. *Transportation (Ontario) (Re),* 2022 CanLII 3814 (ON IPC) <https://canlii.ca/t/jm0d4>

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. 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. *Legislation Act, 2006,* S.O. 2006, c. 21, Sched. F <https://www.ontario.ca/laws/statute/06l21>

> s. 64(1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

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Proceeding commenced at London

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