

## CONFIDENTIAL ATTACHMENT #1

### CONFIDENTIAL INFORMATION OR ADVICE

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The option of continuing to strongly recommend the wearing of masks in settings where physical distancing is not possible would have the least risk of Charter or other jurisdictional legal challenges.

#### **Charter of Rights and Freedoms**

While the EMCPA makes it clear that province's emergency powers are subject to the Charter, this is in fact the case with any government action including municipal by-laws, TTC regulations and public health orders, regardless of whether this is explicitly stated. Likewise, the criteria and limitations stated in section 7.0.2 of the EMCPA are to ensure that any valid public health objective will be limited and balanced against reasonable alternatives. This includes ensuring that any measure is no more intrusive than is necessary, that it only applies in the areas of the Province where it is necessary, and that it should only be effective for as long as it is necessary.

The criteria and limitations set out in the EMCPA provide a principled and balanced framework for ensuring that such orders do not overreach in a manner that cannot be justified under the section 1 of the Charter.

In situations, where the province has declared an emergency, and the Province or the City is considering a particular measure as limiting on individual liberties as the mandatory wearing of non-medical masks, it would need to present a sufficiently compelling case of public health necessity, considering precautionary principles, based upon the risks present in a particular setting or area of the province and time limited to the particular risk in question.

#### **Use of HPPA Orders**

With respect to any proposed broad use of an order under the Health Protection and Promotion Act (HPPA), the courts have placed limits on this authority where it appears to have a disguised legislative effect otherwise reserved to the provincial or municipal governments. For that reason, it is generally advised that the use of section 22 orders be focused on issues relating to specific quarantine, isolation or disinfection situations.

Likewise, HPPA orders have been successfully challenged in the courts where they were deemed to conflict with other areas of Provincial authority, particularly in relation to workplace safety regulated under the Occupational Health and Safety Act.

## **Occupiers' Liability Act**

For City buildings and property, the City, like other owners of property, has a general duty to ensure that persons entering on its property are reasonably safe while on the property. This general duty is set out in the Occupiers' Liability Act.

The City has common law powers to establish conditions or limits on what people can do on its property. The City could likely rely upon those powers as well for establishing rules relating to mandatory mask wearing for persons entering on City property. The powers must be exercised reasonably and any measures taken must be motivated by legitimate concerns about the safety of persons on the property. If the public health advice evolves during the recovery phase, the City could consider exercising these powers.

## **Enforcement of Mandatory Measures**

Where a mandatory measure is adopted into law, it becomes enforceable as a provincial offence. The discretion on how to enforce the measure shifts to the police and to provincial offences officers, who are not subject to specific direction from the legislative branch of government or from City Council.

In particular, a police officer or any other provincial offences officer who has reasonable and probable grounds to believe that an individual has committed an offence under the EMCPA may require the individual to provide their identification, and such individuals shall promptly comply (Ontario Regulation 114/20 - Enforcement of orders).

Therefore, while there may be desire or intention to implement a mandatory measure as an education tool, City Council cannot mandate this as an enforcement approach. City Council may conclude that public education is best achieved through other channels such as through the work of Toronto Public Health.