

SUPPLEMENTAL REPORT

TO:	CHAIR AND MEMBERS STRATEGIC PRIORITIES AND POLICY COMMITTEE MEETING ON MONDAY, JULY 20, 2020
FROM:	AYNSLEY ANDERSON SOLICITOR
SUBJECT	MANDATORY WEARING OF FACE COVERINGS

RECOMMENDATION

That, on the recommendation of the City Solicitor’s Office, the following report **BE RECEIVED** for information.

LEGAL CONSIDERATIONS

This report was prepared to accompany the report dated July 20, 2020, titled “Additional Legislated Measures to Reduce the Risk of Further COVID-19 Infections in the City of London.” For additional factual context, please see accompanying report.

Jurisdiction

Throughout the COVID-19 Emergency, the City of London has been relying on, and following the direction of the Medical Officer of Health for the Middlesex London Health Unit (the “Medical Officer of Health”).

The *Health Protection and Promotion Act* provides the Board of Health with jurisdiction over the “control of infectious diseases and diseases of public health significance, ... health promotion, health protection and disease and injury prevention”¹ and the Medical Officer of Health with jurisdiction over matters of “issues relating to public health concerns and to public health programs.”²

Similarly, municipal council has jurisdiction over matters that are set out in the *Municipal Act, 2001*, namely as found in subsection 10(2), which includes

A single-tier municipality may pass by-laws respecting the following matters:

- 6. *Health, safety and well-being of persons.*

There is some overlap here.

Charter of Rights and Freedoms

Any government action, including the enactment of by-laws, is subject to the Charter, regardless of whether it is explicitly stated. A Charter challenge is typically assessed as a “two-step” test, and examples of grounds for identifying a breach of a Charter-protected right are outlined below.

Step 1 – Has there been a breach of a Charter-protected right?

Section 7 establishes that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Section 7 rights protect people from state intervention; do not impose positive obligations on the state. Principles of fundamental justice are not protected interests, but rather qualifications on the right not to be deprived of life, liberty and security. Principles of fundamental justice require a balancing of state and individual interests.

1 Subsection 5(2) and (3) HPPA

2 Subsection 67(1) HPPA

Section 8 establishes that everyone has the right to be secure against unreasonable search or seizure. To establish a violation, claimants must demonstrate: first, that a governmental act constituted a “search or seizure”; and second, that the search or seizure was “unreasonable”. The “search or seizure” question reduces to whether the act intruded on the claimant’s “reasonable expectation of privacy”.

Section 15 establishes that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Step 2: If there was a breach, is the breach justified?

Once a breach is established, the burden shifts to the government to demonstrate that the breach is justified through the Oakes Test. There are two parts to the Oakes test. The first part asks whether the purpose of the law is a significant (i.e. pressing and substantial) objective to society. The object must be of sufficient importance to warrant overriding of a constitutionally protected right or freedom. The object identified must be the original purpose of the legislation. The second part asks whether the breach is proportional. To be proportional, the considerations are threefold. First, there must be a rational connection (i.e. is the by-law connected to the end the government seeks to achieve). The by-law must not be unfair, arbitrary, or based on irrational factors. Second, there must be minimal impairment to the charter right. Third, there must be proportionality between means and effects.

Use of *Health Protection and Promotion Act* (“HPPA”) Orders

The HPPA Order, pursuant to section 22 of the HPPA, is a tool that has been used by the Medical Officer of Health in London with respect to mandatory face coverings on public transit, in commercial vehicles for hire, and in personal service establishments.

***Emergency Management and Civil Protection Act* (“EMCPA”) Plan and Orders**

The Municipality has actioned an Emergency Response Plan and declared a State of Emergency, in accordance with the provisions of the *Emergency Management and Civil Protection Act* (“EMCPA”). In accordance with that legislation, there exists an ability to make any order required to implement the emergency plan of the municipality and to protect the health, safety and welfare of the inhabitants of the emergency area. The City’s Emergency Response Plan does not describe the use of masks or face coverings as an action that could be implemented under the jurisdiction of the EMCPA. Any actions or decisions with respect to the City’s Emergency Response Plan occur in consultation with the City’s Emergency Operations Centre Policy Committee.

Occupier’s Liability Act

The City is an “occupier” for the purposes of this legislation on all City property, and as such owes the general public a reasonable duty of care regarding safe enjoyment of that property. The City has already taken steps to ensure the safety of the public on public property, including signage, self-checks, and physical distancing. A precondition to entry imposed by an occupier must be reasonable in itself and in its connection to protecting the safety of persons on the property.

Obligation to enforce By-laws

Generally, a municipality has broad discretion on the manner and extent of enforcement of by-laws, as long as it is acting in good faith and reasonably under the circumstances. However, once adopted as a by-law containing prohibitions with corresponding offence provisions, Council cannot specifically direct enforcement officers with respect to the manner in which they are enforced, or not enforced. Enforcement will occur in accordance with the Municipal Law Enforcement Services Standard Operating Guidelines, unless Council directs otherwise. The City also has an obligation to honour the terms of the Memorandum of Understanding, entered into between the City and the Attorney General with the respect to prosecution of municipal by-laws, for example, in section 2.1.7:

The entire justice process, from the laying of charges through to final disposition of appeals, shall continue to operate independently and free from political intervention.

The Medical Officer of Health has no jurisdiction with respect to the enforcement of the proposed by-law.

PREPARED AND RECOMMENDED BY:	
	AYNSLEY ANDERSON SOLICITOR II