

Court File No.

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(DIVISIONAL COURT)**

IN THE MATTER OF the *Judicial Review Procedure Act*, R.S.O. 1990, c.J.1

B E T W E E N:

(Court Seal)

HUDSON'S BAY COMPANY ULC COMPAGNIE DE LA BAIE D'HUDSON  
SRI

Applicant

and

ONTARIO (ATTORNEY GENERAL)

Respondent

APPLICATION UNDER sections 2 and 6 of the *Judicial Review Procedure Act*, R.S.O. 1990,  
c.J.1

**NOTICE OF APPLICATION FOR JUDICIAL REVIEW**

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following page.

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar at the place of hearing requested by the Applicant. The Applicant requests that this application be heard at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer,

serve it on the Applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the Applicant's application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN TO IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date \_\_\_\_\_ Issued by \_\_\_\_\_  
Registrar

Address of court office: Divisional Court  
Osgoode Hall, 130 Queen Street West  
Toronto, Ontario  
M5H 2N5

TO: Attorney General of Ontario  
Crown Law Office – Civil  
720 Bay Street, 8th Floor  
Toronto, Ontario M7A 2S9

## APPLICATION

1. The Applicant make application for:
  - (a) A declaration that the November 22, 2020 exclusion of “Department Stores” or “Department Store-Type Retailers” from the list of retailers in Schedule 2, section 2 of O. Reg. 82/20: RULES FOR AREAS IN STAGE 1 (the “**Lockdown Regulations**”) promulgated pursuant to *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, S.O. 2020, c. 17, including, among others, “Supermarkets and grocery stores”, “Discount and big box retailers selling groceries”, “Hardware stores”, “Safety supply stores”, and “Pharmacies” (the “**Exempted Retailers**”), is unreasonable, inconsistent with the statutory purpose, irrational, arbitrary, and leads to results incompatible with the legislative scheme;
  - (b) A declaration that the Lockdown Regulations are *ultra vires* insofar as they exclude “Department Stores” or “Department Store-Type Retailers” from the list of Exempted Retailers in Schedule 2, section 2 and permit the large-scale sale of apparel and footwear, furniture, house and kitchenwares, bedding and linens, small appliances, cosmetics, health and beauty products, electronics, seasonal goods, accessories, flowers, books and magazines, candy and confection, among other products, by the Exempted Retailers while prohibiting their sale by the Applicant and other retailers;

- (c) An order in the nature of *certiorari* quashing the Lockdown Regulations insofar as they exclude “Department Stores” or “Department Store-Type Retailers” from the list of Exempted Retailers in Schedule 2, section 2;
- (d) In the alternative, a declaration that the Lockdown Regulations are *ultra vires* and/or unreasonable, inconsistent with the statutory purpose, irrational, arbitrary, and lead to results incompatible with the legislative scheme insofar as they permit the list of Exempted Retailers in Schedule 2, section 2, to offer for sale and perform in-store transactions with members of the public for the large-scale sale of goods entirely unrelated to groceries, hardware, pharmaceutical products, personal care products, and safety equipment, such goods which the Applicant and other retailers are prohibited from selling;
- (e) An order in the nature of *certiorari* quashing the Lockdown Regulations insofar as they permit the list of Exempted Retailers in Schedule 2, section 2 to offer for sale and perform in-store transactions with members of the public for the large-scale sale of goods entirely unrelated to groceries, hardware, pharmaceutical products, personal care products, and safety equipment, such goods which the Applicant and other retailers are prohibited from selling;
- (f) An order expediting the hearing of this Application pursuant to section 6 of the *Judicial Review Procedure Act*, R.S.O. 1990, c.J.1;
- (g) The costs of this proceeding, plus all applicable taxes; and
- (h) Such further and other relief as to this Honourable Court may seem just.

2. The grounds for the Application are:

### **The Hudson's Bay Company**

- (a) The Applicant Hudson's Bay Company ULC Compagnie de la Baie d'Hudson SRI ("**HBC**") operates Hudson's Bay department stores across Canada. It is a privately-held British Columbia unlimited liability company. Before March 3, 2020, it was a federally incorporated public company under the name Hudson's Bay Company Compagnie de la Baie D'Hudson.
- (b) Founded in 1670, HBC is the oldest company in North America. HBC has approximately 30,000 employees and approximately 120 stores in Canada.

### **HBC's Presence In The Toronto and Peel Regions**

- (c) HBC has 12 Hudson's Bay department stores in the Toronto and Peel regions, as follows:
  - (i) Downtown Toronto, located at the intersection of Yonge Street and Queen Street at 176 Yonge Street in Toronto;
  - (ii) Hudson's Bay Centre, located at the intersection of Yonge Street and Bloor Street at 44 Bloor Street East in Toronto;
  - (iii) Eglinton Square, located at 1 Eglinton Square in Toronto;
  - (iv) Centerpoint Mall, located at the intersection of Yonge Street and Steeles Avenue at 6464 Yonge Street in Toronto;

- (v) CF Fairview Mall, located at 1800 Sheppard Avenue East in Toronto;
  - (vi) Yorkdale Shopping Centre, located at 3401 Dufferin Street in Toronto;
  - (vii) Square One Shopping Centre, located at 100 City Centre Drive in Mississauga;
  - (viii) Erin Mills Town Centre, located at 5100 Erin Mills Parkway in Mississauga;
  - (ix) Bramalea City Centre, located at 25 Peel Centre Drive in Brampton;
  - (x) Scarborough Town Centre, located at 300 Borough Drive in Scarborough;
  - (xi) Woodbine Centre, located at 500 Rexdale Boulevard in Etobicoke; and
  - (xii) Sherway Gardens, located at 25 The West Mall in Etobicoke.
- (d) These 12 HBC retail stores sell a wide range of goods including apparel, baby clothing, cosmetics, footwear, jackets and outerwear, winter accessories and boots, housewares, kitchen supplies, small appliances, linens, towels, toys, confection, and seasonal items.
- (e) HBC and Wal-Mart are the only two “department store” retailers in Canada classified as such by Statistics Canada and in industry classifications of retailers. They have substantially similar product offerings.
- (f) In addition, HBC’s product offerings overlap considerably with other big box retailers like Canadian Tire and Costco.

## COVID-19 Pandemic and Ontario Government's Spring Lockdown

- (g) In early 2020, infection rates of COVID-19 began to rise. On March 11, 2020, the World Health Organization declared the outbreak of COVID-19 a global pandemic.
- (h) Governments across Canada followed shortly thereafter.
- (i) On March 17, 2020, the government of Ontario ("**Ontario**") declared an emergency under the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9 (the "*Emergency Act*"). Among other things, the *Emergency Act* grants the provincial Cabinet extraordinary powers to impose travel restrictions, mandate closures of businesses and public facilities, establish emergency facilities, and procure goods, services, and resources as the province deems necessary.
- (j) HBC was paying close attention to the developments around COVID-19. In March 2020, given the rising spread of the virus, HBC made the difficult but responsible decision to temporarily close to the public, on a voluntary basis, all of its stores in Canada, effective March 17, 2020.
- (k) On March 23, 2020, Ontario ordered all non-essential businesses to close as of March 25. Retailers such as HBC were not listed as essential businesses as part of these original regulations, which only allowed "Businesses engaged in the retail and wholesale sale of food, pet food and supplies, and household consumer products necessary to maintain the safety, sanitation and essential operations of residences and businesses, including grocery stores, supermarkets, convenience stores, markets and other similar retailers" to remain open.

- (1) The first lockdown in the spring had an immense impact on HBC's business. From March through May 2020, the 12 Hudson's Bay stores in the Toronto and Peel regions experienced a steep decline—up to 90%—in total sales from those same months in 2019.

### **Department Stores Permitted to Re-Open in May 2020**

- (a) On April 27, 2020, Ontario released “A Framework for Reopening our Province” designed to facilitate an exit from lockdown measures through various stages of reopening—with “Stage 1” being the most restrictive and Stages 2 and 3 allowing for further and gradual loosening of restrictions.
- (b) Ontario announced that “select workplaces that can immediately meet or modify operations to meet public health guidance and occupational health and safety requirements” would be included in an upcoming “Stage 1” reopening.
- (c) On May 18, 2020, the regulations for Stage 1 reopening were amended to include retail stores with external entrances to the public. Such stores were permitted to re-open if they implemented and were in compliance with physical distancing measures.
- (d) On May 22, 2020, HBC reopened its Ontario stores, using external entrances only and in strict compliance with public health guidance and occupational health and safety requirements. HBC developed and implemented a detailed set of practices and protocols designed to ensure that its stores were safe for employees and customers. These included mandatory face coverings for employees and measures to maintain physical distancing.



### **Toronto and Peel Regions Enter “Stage 2” Reopening and Retail Begins To Recover**

- (e) The Toronto and Peel regions entered Stage 2 on June 24, 2020. This permitted, among other things, indoor shopping centres to re-open.
- (f) Two weeks later, on July 7, 2020, the City of Toronto made masks mandatory in indoor spaces and on July 10, Peel region followed suit.
- (g) On July 31, 2020, Toronto and Peel entered Stage 3. Stage 3 permitted indoor dining, bars, gyms, and movie theatres, as well as indoor gatherings up to 50 people and outdoor gatherings up to 100 people.
- (h) Throughout the summer, HBC continued to carefully follow its reopening protocols. It monitored store entrances to prevent crowding and ensured that physical distancing measures were strictly observed and adhered to.
- (i) Although still substantially lower on a year-over-year basis, sales began to improve as customers slowly began to return to HBCs Toronto and Peel stores.

### **Ontario Enacts New Legislation to End State of Emergency and Transition to Reopening**

- (j) On July 7, 2020, the government tabled Bill 195, the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* (“**Bill 195**” or the “**Reopening Act**”). Bill 195 was presented as a transitional statute intended to facilitate the reopening of the province as much as possible, while recognizing that public health risks associated with COVID-19 would continue beyond Ontario’s declared state of emergency.

- (k) On July 21, 2020, Bill 195 was passed. It came into force three days later, coinciding with the termination of the province's state of emergency.
- (l) The *Reopening Act* provides that certain existing orders under the *Emergency Act* are to be continued as valid and effective orders under the new legislation. The orders were continued for an initial period of 30 days, but the *Act* allows for the extension by the Lieutenant Governor in Council for further periods of no more than 30 days at a time.
- (m) The *Reopening Act* does not allow for the creation of new emergency orders. It only permits Ontario to amend the continued orders if such amendment:
  - (i) requires persons to act in compliance with the advice, recommendations or instruction of a public health official; or
  - (ii) relates to one of three subject matters:
    - (1) closing or regulating any place, whether public or private, including any business, office, school, hospital or other establishment or institution;
    - (2) providing for rules or practices related to workplaces or the management of workplaces, or authorizing the person responsible for a workplace to identify staffing priorities or to develop, modify or implement redeployment plans or rules or practices that relate to the workplace or the management of the workplace, including credentialing processes in a health care facility; or

- (3) prohibiting or regulating gatherings and organized public events.

***Act's Purpose Is To Facilitate Reopening and Recovery Through Evidence-Based Approach***

- (n) At second reading in the legislature on July 14, 2020, Solicitor General Sylvia Jones stated that the “proposed legislation would bridge the gap between the public health measures that were necessary to respond to the initial and immediate threat of COVID-19 and those now needed to support Ontario’s safe recovery.” She confirmed that “evidence-based advice from public health experts would continue to guide our government in determining when it is safe to revoke certain emergency orders maintained under the proposed legislation.”
- (o) Parliamentary Secretary to the Solicitor General and Member of the Select Committee on Emergency Management Oversight Christine Hogarth emphasized the need for an “evidence-based” approach to reopening. She affirmed that a “prudent and deliberate decision-making process that has guided the government’s decisive actions to combat COVID-19 would continue with this new act.”
- (p) Read as a whole and in its proper context, the purpose of the *Reopening Act* is to allow for the safe reopening of the province through an evidence-based approach to public health risks. The intention is to transition Ontario to a recovery by ensuring that restrictions related to COVID-19 imposed on the public are justified based on scientific evidence and rationale.

### **Second Wave and Tightening of Restrictions**

- (q) In the fall of 2020, there was a resurgence of COVID-19 cases from the summer months. Rising case counts were confirmed as not attributable to retail but rather to large-scale gatherings and unauthorized events.
- (r) On September 28, 2020, Premier Doug Ford announced the province was officially in a “second wave”.
- (s) Two weeks later, Ottawa, Peel, and Toronto regions were placed in a “Modified Stage 2”, effective October 10, 2020.
- (t) This “Modified Stage 2” was to remain effective for a minimum of 28 days. The modifications prohibited indoor dining and shut down fitness centres. Stores and malls were permitted to remain open if they maintained social distancing, but mall food courts were required to move back to a take-out only model.
- (u) HBC continued to operate its stores through Modified Stage 2 with the necessary protocols in place to protect employees and customers.

### **COVID-19 Spread Not Attributable to Department Stores or Retail Sector Generally**

- (v) Ontario has confirmed that the retail sector is not a material cause of spread for COVID-19 infections. It is a negligible source of new infections, and department stores (as a subset of retail) represent a fraction of a fraction of COVID-19 cases. Ontario has acknowledged this fact, and scientific and public health evidence supports it.

- (w) At an Emergency Management Oversight Committee hearing on September 22, 2020, Solicitor General Sylvia Jones advised that “the fact that businesses have been able to amend how they serve people, how many they serve, the PPE that they offer their staff—the changes and the additional cleaning that they have put in place does drive some of the motivation to say that right now, we’re not seeing the outbreaks happening in the commercial sector. We’re seeing it in these unauthorized, unplanned, unorganized events.”
- (x) In recent weeks, since the end of October, weekly Epidemiologic Summaries have been published by Ontario to trace COVID-19 outbreaks on a granular level. The data confirms that retail stores, including grocery stores, account for only a small fraction of cases associated with COVID-19 outbreaks in the province—in most weeks, well under 1%.
- (y) The data make clear that retail/commercial sites present an extremely low risk of outbreak and transmission. Public Health Ontario’s Weekly Epidemiologic Summary for November 15-21, 2020 shows that:
- (i) only 0.6% of all confirmed COVID-19 cases associated with outbreaks in Ontario have been related to retail setting outbreaks (133 out of 24,051);  
and
  - (ii) only 3% of all COVID-19 outbreaks in Ontario (82 out of 2,723) have been attributed to “retail” settings.

- (z) Department stores are a narrow segment of the retail sector—they represent a fraction of a fraction of the low case counts reported in retail settings. Department stores have not been identified as sites for outbreaks and transmissions by any Ontario public health unit, including Peel Public Health and Toronto Public Health. There is simply no evidence that HBC stores are a source of COVID-19 infections.

### **Ontario Adopts New Framework With No Anticipated Shutdown of Retail**

- (aa) On November 3, 2020, Ontario announced the adoption of a new COVID-19 framework (the “**Colour-Coded Framework**”) designating regions based on five levels or stages: Green-Prevent, Yellow-Protect, Orange-Restrict, Red-Control, and Lockdown. The framework set out priorities, principles, information about transmission, the public health steps being taken (testing, tracing, etc.), as well as an explanation of the five stages. It also included specific health and safety measures for various sectors, including retail.
- (bb) The Colour-Coded Framework contained a breakdown of retail activity permitted at each stage:
- (i) In the Orange-Restrict and Red-Control stages, it provided the following potential restrictions: “For consideration during winter: Limited capacity in retail stores and in shopping malls.” Neither the Orange-Restrict nor Red-Control levels contemplated a shutdown of non-essential retail; rather, they contemplated restrictions on capacity and footfall.

- (ii) For the Lockdown level, it provided that retail restrictions would be akin to the previous “Stage 1”, permitting retailers with external entrances to the public (like HBC) to remain open so long as protocols on social distancing and masks were observed and adhered to.
- (cc) On November 6, Peel Region was placed into the Red-Control category effective November 7.
- (dd) Toronto joined Peel region in the Red-Control category on November 14.
- (ee) Throughout this time, HBC stores were open and operating in accordance with the new framework.

### **Ontario Warns of Potential Lockdown**

- (ff) On November 13, Premier Ford warned that the province was “staring down the barrel of another lockdown” as case counts climbed. There was no evidence put forward, or even a suggestion by health authorities, that higher case counts had any relation to retail activity.
- (gg) Under the Colour-Coded Framework, the imposition of a new lockdown would have allowed HBC stores with external entrances to remain open. HBC was planning accordingly.

### **Ontario Confirms Properly Operated Department Stores/Retail Not A Public Health Risk**

- (hh) On Friday, November 20, Ontario published an amended framework called “COVID Response Framework: Keeping Ontario Safe and Open – Lockdown

Measures” on its website (the “**November 20 Framework**”). This was a revision to the previous frameworks under which HBC had been continuously operating since it reopened its stores on May 22, 2020, including:

- (i) The 3-stage framework in place from May 18, 2020 onwards, which permitted “Businesses that engage in the retail sale, or rental, of items to the public, that have a public entrance that opens onto a street or exterior sidewalk” to operate if they ensured physical distancing, even under the most restrictive stage (Stage 1);
  - (ii) The 5-stage Colour-Coded Framework released November 3, 2020, which did not call for a closure of department stores at any of the five stages; and
  - (iii) An updated 5-stage Colour-Coded Framework released November 13, 2020, which again did not suggest a closure of department stores at any of the five stages.
- (ii) HBC was permitted to operate its stores in the Toronto and Peel regions under these frameworks.
- (jj) The November 20 Framework was no different. It listed the following retailers that could remain open so long as social distancing was ensured and “50% capacity limits” were maintained: “supermarkets, grocery stores, convenience stores, hardware stores, discount and department store-type retailers, beer and wine and liquor stores, pharmacies and safety supply stores”.
- (kk) As a department store, HBC was allowed to remain open.



### **Ontario Sows Further Confusion But HBC Continues To Be Among Exempted Retailers**

- (ll) The next day, Saturday, November 21, a new version of the November 20 Framework was uploaded to Ontario’s website. This time, and without any explanation, the reference to “department store-type retailers” was replaced with “other retailers selling groceries.”
- (mm) However, the document directed readers to O. Reg 82/2020 for a detailed list of businesses allowed to remain open. This list included retailers with external entrances, which captured HBC stores.
- (nn) In all the framework documents released by the government since May 22, 2020—including the one issued on that Friday—HBC was included among the categories of retailers permitted to remain open in a new lockdown situation.
- (oo) HBC and all other retailers with external entrances to the public had been permitted to open under a succession of frameworks which did not change for months. They were based on scientific evidence that department stores like HBC are not a source of COVID-19 cases so long as social distancing requirements are followed. That understanding was carried through, and reflected in, various iterations of Ontario’s policies over many weeks and months and was grounded in a robust public health rationale. There was no evidence to suggest, at any time, that HBC was unsafe to open.

**At the Eleventh Hour and Without Any Basis Ontario Excludes HBC**

- (pp) On Sunday night around 9:30 p.m., without notice or discussion, Ontario changed its framework and posted a new regulation to its COVID-19 response website. Under these new Lockdown Regulations, big-box or department store retailers were no longer permitted to open to the public unless they sold groceries. This definition excluded HBC from the lockdown framework, despite consistent communications from the government as late as Friday that “department store-type retailers” would be included, and confirmation on Saturday that retailers with external entrances were still exempted.
- (qq) The Sunday night regulations made it so that big-box retailers or department stores like HBC that do not sell groceries were restricted to “using an alternative method of sale that does not require patrons to enter the indoor area of the business, including curb side pick-up or delivery.” Businesses allowed to remain open included “Supermarkets,” “Hardware stores”, and “Discount and big box retailers selling groceries.”
- (rr) Ontario offered no explanation or justification for this about-face, which excluded HBC while allowing other big-box retailers like Wal-Mart, Costco, and Canadian Tire to remain open and to sell all of their non-essential goods including those sold by HBC and many other closed retailers, large and small.

### **Big-Box Retailers Are Permitted to Sell Entire Inventory of Non-Essential Goods**

- (ss) Under the Lockdown Regulations, the following categories of retailers are permitted to remain open: “Supermarkets and grocery stores”, “Discount and big box retailers selling groceries”, “Hardware stores”, and “Safety supply stores”—purportedly on the basis that they sell “essential goods” to the public.
- (tt) The reality is quite different. The Lockdown Regulations have created an absurd result that bears no relationship to the statutory purpose and is causing great harm to retailers deemed “non-essential” and their employees and suppliers. The Exempted Retailers that remain open can advertise and sell a wide variety of non-essential goods. These offerings substantially overlap with HBC’s and those of independent retailers, large and small, and include apparel and footwear, furniture, house and kitchenwares, bedding and linens, small appliances, cosmetics, health and beauty products, electronics, seasonal goods, accessories, flowers, books and magazines, candy and confection, among other products.
- (uu) **“Supermarkets and grocery stores”**: By way of example, Loblaw’s Real Canadian Superstore remains open under this exemption and continues to sell TVs, appliances, toys, and apparel.
- (vv) **“Discount and big box retailer selling groceries”**: Costco is open as a big box retailer selling groceries, but continues to sell apparel, toys, home décor products, and small appliances. Dollarama remains open under this exemption, but it does not sell fresh food. It only sells some pre-packaged food items and snacks which account for a small fraction of its floor space, while the rest of the store is devoted

to housewares and seasonal items. Wal-Mart, too, is permitted to be open under this exemption, but it devotes significant portions of its floor space to apparel, toys, bath and linen products, cosmetics, and seasonal items.

- (ww) **“Hardware stores” and “Safety supply stores”**: Canadian Tire stores are allowed to be open and continue to market appliances, seasonal goods, apparel, and other non-essential items. Mark’s Work Wearhouse states that it sells scrubs, safety apparel, and personal protective equipment, but ordinary apparel including dress shoes and fashion items makes up the majority of its in-store and online offerings.
- (xx) The North American Industrial Classification System, which has been adopted by Statistics Canada, groups retailers into categories. Each of HBC, Wal-Mart, Costco, Canadian Tire, Dollarama, Giant Tiger, and Dollar Tree falls under the subsector of “general merchandise”. Wal-Mart and HBC are the only two Canadian stores that fall into the “department store” sub-classification. Yet HBC’s competitors in the general merchandise industry and the only other department store Wal-Mart, are allowed to sell the very goods that HBC would sell if it were allowed to be open.
- (yy) This disparate treatment is not based on any difference in public health risks. It is irrational, arbitrary, and incoherent.

### **Lockdown Regulations Are Irrational, Arbitrary and Inconsistent with the *Reopening Act***

- (zz) The late Sunday night exclusion of HBC, without explanation or justification and despite repeated indications it would be included, is unreasonable and contrary to the statutory objectives of the *Reopening Act*.

- (aaa) The *Reopening Act* is intended to facilitate the reopening of the province as much as possible, while recognizing that COVID-19 public health risks will continue beyond the declaration of emergency. The purpose of the statute is to allow for the safe reopening and recovery utilizing a scientific, evidence-based approach to restrictions.
- (bbb) With the end of the state of emergency, the legislature recognized that continuing restrictions must be grounded in a public health rationale that is open, transparent, logical, and medically sound. The burden on Ontario is higher now that the emergency is no longer in effect. The public health imperatives for restrictions must be demonstrated—not simply assumed or asserted.
- (ccc) In light of the statutory objectives, the Lockdown Regulations are irrational and arbitrary in a number of respects:
- (i) **The regulations are a product of a late change for which no explanation or justification has been offered:** The purpose of the legislation is to facilitate the making of decisions about reopening and restrictions in a rational, fair manner that is logical and evidence-based. Ontario's late Sunday evening change to the regulations is none of these and no explanation has been given for it. This decision-making is inconsistent with the statutory scheme and the orderly exercise of government authority.
  - (ii) **The Sunday night change in the regulations is not tied to any medical or public health rationale.** The medical evidence is incontrovertible that there is no difference in the risk of spreading infection in HBC stores as

opposed to other big box retailers or department stores like Wal-Mart, Costco, and Canadian Tire, which have been allowed to remain open. All of these stores are large and allow for proper social distancing. If precautions are taken, the risk of infection is negligible. There is no evidence-based reason to exclude HBC from operating while permitting other big-box retailers to remain open. A recent Yale University study found that closing low-risk retail businesses actually has the unintended consequence of increasing COVID-19 fatalities, as it pushes citizens towards higher-risk activities.

(iii) **The regulations are incoherent and devoid of logic and consistency.**

Although purportedly designed to maintain the public's access to essential goods and keep non-essential retailers closed, the regulations do not do that. "Big box retailers selling groceries" are not restricted to the sale of groceries or other essential items. They sell their entire inventory of goods, including all non-essential items and these goods account for much more than essential goods such as grocery, hardware, pharmaceutical products, personal care products, or safety supplies. The same is true of "hardware stores" and "discount retailers". The effect of this is a massive transfer of customers from retailers that have been forced to close to big-box retailers like Wal-Mart, Costco, and Canadian Tire as well as pharmacies like Shoppers Drug Mart and discount stores like Dollarama—all of which continue to sell non-essential items in very large quantities. They do so at the direct expense of HBC and other retailers, large and small, that have

been barred from selling their product offerings and in the absence of any public health rationale to support this differential treatment.

- (iv) **The regulations give rise to the perverse consequence of increasing rather than limiting the risk of infections.** The regulations have driven a surge of traffic to big-box retailers and hardware stores like Wal-Mart, Canadian Tire, and Costco—customers that would otherwise have gone to HBC department stores or other retailers, large and small. As a result, many of the big-box retailers and hardware stores that are open have experienced massive crowds with little or no adherence to physical distancing rules. The regulations have thus heightened rather than reduced the public health risks.
- (v) **The regulations incentivize irresponsible behaviour.** To the extent the regulations permit exempted grocery stores, big-box retailers, pharmacies, and hardware stores to sell non-essential items, they encourage these stores to stock goods that they would not otherwise have on their shelves.
- (vi) **The regulations are manifestly unfair to “non-essential” retailers.** Ontario has acknowledged that allowing so-called “essential” retailers to sell non-essential goods while other retailers deemed “non-essential” have been sidelined is unfair. Premier Doug Ford has stated, “100% it’s not fair” but has defended the action on the basis that “after speaking to some of the big box stores, it’d be a logistical nightmare” to restrict those retailers to essential goods. These remarks are uninformed and unsubstantiated. Big box retailers regularly rotate and re-stock their shelves. Retailers in other

jurisdictions, such as Manitoba, have reorganized their stores to limit them to the sale of essentials goods. The admitted unfairness of Ontario's approach is only compounded by the unsupported justifications for its arbitrary actions.

### **Auditor General Criticizes Ontario for Lack of Evidence-Based Decision-Making**

- (ddd) On November 25, 2020, Ontario's Auditor General Bonnie Lysyk issued a Special Report on the Province's response to COVID-19.
- (eee) The report criticizes Ontario for its lack of evidence-based decision-making in response to the pandemic and for its continuing failure to properly communicate guidelines and restrictions to the public. The report lays bare fundamental structural problems with the province's decision-making processes.
- (fff) Among other things, the Auditor General observed that:
  - (i) "Expert advice was not always obtained or followed" and "there were instances where decisions were not made based on expert advice";
  - (ii) "Discussions were sometimes led by those participants with the loudest voice or strongest opinion on a subject, rather than by those with expertise";
  - (iii) "Public communication was more confusing and less co-ordinated than in other provinces"; and



(iv) “Criteria for Imposing or Relaxing Public Health Measures under New Provincial COVID-19 Response Framework Are Still Ambiguous and Create Confusion”.

(ggg) These problems are continuing. Ontario’s inclusion, and then sudden exclusion, of department store retailers from the Lockdown Regulations is a prime example of the serious breakdown in the orderly exercise of the government authority, consistent with the Auditor General’s findings.

### **Lockdown Causes HBC and Other “Non-Essential” Retailers Disproportionate Harm**

(hhh) As this lockdown continues, HBC will continue to suffer immeasurable and disproportionate harm. As will other retailers deemed by Ontario to be “non-essential.”

(iii) While HBC offers curbside pickup at its twelve stores in the Toronto and Peel regions, a significant part of its customer base has been transferred to big box retailers that sell groceries, discount stores, and supermarkets.

(jjj) December is by far the most significant month for HBC, typically resulting in 15% to 20% of HBC’s annual sales at its 12 Hudson’s Bay stores in Toronto and Peel. Of all months to impose a full lockdown, this is by far the most crippling for HBC.

(kkk) Beyond lost sales, there are significant impacts on the employees of these 12 stores. HBC employs 3,277 people at these stores, but it has already had to temporarily lay off 915 full-time staff (28% of its employees across these 12 stores) as a result of the new lockdown.

(lll) In addition to these layoffs, HBC's 1703 part-time associates (52% of HBC's workforce at these 12 stores) have received either no shifts or heavily reduced shifts, with part-time shifts scheduled on an "exception-only" basis.

(mmm) The impact on frontline workers is serious and damaging, especially during the holiday season.

### **Lockdown Results in Irrational Windfall to Some and Great Hardship to Many**

(nnn) In the six months that its stores were open—May 22 to November 22—HBC diligently complied with both public health advice and its own detailed policies.

(ooo) HBC's stores are safe, yet are being subjected to a lockdown that is crippling sales—like the many small and large retailers who have been deemed "non-essential". At the same time, competing retailers selling both essential and non-essential goods are absorbing retail customers who have nowhere else to shop, benefitting from a sudden drop in competition.

(ppp) Quite simply, the lockdown is having the effect of giving retailers who are permitted to remain open a source of additional revenue they would not normally have, at the expense of HBC and other retailers, large and small, who cannot open. It is also increasing the risk of infections by crowding a smaller number of stores with a much expanded customer base—during the busiest shopping season of the year.

(qqq) HBC has attempted to engage Ontario in a dialogue about public health solutions that are less drastic than a full retail lockdown. In an open letter circulated on

December 1, HBC and other retailers proposed a 25% capacity limit on “non-essential” retailers. This is consistent with the balanced, evidence-based approach taken in certain other provinces.

- (rrr) The Canadian Federation of Independent Business, Retail Council of Canada, and Ontario Chamber of Commerce also advocated for less extreme measures, but they received a response from Ontario’s Chief Medical Officer of Health stating that Ontario had considered the request but would not be permitting additional retailers to open. The letter did not meaningfully address any of the concerns raised.
- (sss) The lockdown is scheduled to remain in force until at least December 21 and may be extended further. For every day the lockdown remains in effect, HBC suffers heavy losses while its competitors experience an unfair windfall. The same is true for other retailers deemed to be “non-essential”.
- (ttt) This windfall is not based on any justifiable public health rationale and is entirely outside the statutory envelope. It is arbitrary, irrational, and goes well beyond what the *Reopening Act* intended.
- (uuu) The Applicant requests an urgent hearing;
- (vvv) The Applicant pleads and relies upon sections 2, 4, 6, 7, 9 and 10 of the *Judicial Review Procedure Act*; and
- (www) Such further and other grounds as the lawyers may advise and this Honourable Court permit.

3. The following documentary evidence will be used at the hearing of the application:
- (a) The Affidavit of Iain Nairn, sworn December 9, 2020;
  - (b) The Affidavit of James Tate, sworn December 9, 2020;
  - (c) The Expert Report of Dr. Pavani Das, sworn December 2, 2020; and
  - (d) Such further and other evidence as the lawyers may advise and this Honourable Court permit.

December 10, 2020

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Court File No.

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(DIVISIONAL COURT)**

PROCEEDING COMMENCED AT TORONTO

**NOTICE OF APPLICATION FOR JUDICIAL REVIEW**

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