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LEGAL OPINION HORSE RIDING LESSONS IN GREY ZONE/STAGE 1 AREAS

NOTE: This document sets forth a legal opinion on the issue of whether Regulation 82/20, as amended on 13 January 2021, prohibits riding lessons or the operation of riding schools in Grey Zone Areas. This document does not provide legal advice. The nature of the Regulation and its associated penalties make its operation quasi-criminal in nature. All persons subject to the potential of penalties under this Regulation are strongly encouraged to seek legal advice and/or to confer with their local Provincial Offences/Bylaw Enforcement Officer.

Overview

On the 17th of March 2020, Premier Ford declared a State of Emergency in Ontario. Ontario Regulation 82/20 was enacted to set out Rules for Areas in Stage 1 (as the Areas were then designated). During the course of the state of emergency, Stage 1 Areas were re-classified as Grey Zone Areas, although the government has used those terms interchangeably. Regulation 82/20 was amended on 26 December 2020 through Regulation 779/20. The Regulation was amended again on 13 January 2021 through Regulation 10/21. The consolidated Regulation 82/20 containing the amendments can be found at <https://www.ontario.ca/laws/regulation/200082>. The Order applies throughout Grey Zone/Stage 1 Areas.

Schedule 1 of Regulation 82/20 sets out General Rules for Grey Zone Areas. Section 1 of this Schedule mandates the closure of all businesses or parts of businesses that are not listed in Schedules 2 or 3. Schedule 2 identifies businesses that are permitted to remain open in Grey Zone Areas. Schedule 3 sets out conditions that must be met for certain types of Schedule 2 businesses to open. Schedule 4 set out rules for organized public events and certain gatherings including limits on gathering sizes.

Uncertainty has arisen in the equestrian community about whether horse riding lessons are prohibited at equestrian riding and training facilities in Grey Zone Areas. Equestrian riding and training facilities are addressed in two separate sections of Regulation 82/20: section 22 (Stables) and section 49 (businesses whose primary purpose is to operate an Outdoor Recreational

Amenity, which includes Horse Riding Facilities). It is the opinion of this writer that lessons are not prohibited at Stables or at Horse Riding Facilities.

Relevant Sections of the Regulation at issue

SCHEDULE 1 General Rules Closures

1. (1) Each person responsible for a business, or a part of a business, that is not listed in Schedule 2 or 3 shall ensure that the business, or part of the business, is closed.
 - (2) Each person responsible for a business, or part of a business, that is listed in Schedule 2 or 3 subject to conditions shall ensure that the business, or part of the business, either meets those conditions or is closed.
 - (4) Each person responsible for a place, or a part of a place, that is listed in Schedule 3 subject to conditions shall ensure that the place, or part of a place, either meets those conditions or is closed.
- 3.1** (5) No person shall use an indoor or outdoor recreational amenity that is required to close under this Order.

SCHEDULE 2 Businesses that May Open

Services

- 22.** (1) Veterinary services that are,
- (a) necessary for the immediate health and welfare of the animal; or
 - (b) provided through curbside pickup and drop-off of the animal.
- (2) Other businesses that provide services to animals that are necessary for their health and welfare, including farms, boarding kennels, stables, animal shelters and research facilities.
- (3) Nothing in this Order precludes a person responsible for a boarding kennel or stable from allowing an animal's owner or their representative to visit the animal, assist in the care or feeding of the animal or, as applicable, ride the animal where necessary for the health and welfare of the animal.

Facilities for indoor or outdoor sports and recreational fitness activities

48. (1) Facilities for indoor or outdoor sports and recreational fitness activities that meet the conditions set out in subsection (2) or the conditions set out in subsection (3), as applicable.

(2) A facility for indoor or outdoor sports and recreational fitness activities may open if it meets the following conditions:

1. The facility is,

i. operated by, or for the sole use of, persons who are athletes, coaches or officials training or competing to be a part of Team Canada at the next summer or winter Olympic Games or Paralympic Games, if the persons are,

A. identified by a national sport organization that is either funded by Sport Canada or recognized by the Canadian Olympic Committee or the Canadian Paralympic Committee, and

B. permitted to train, compete, coach or officiate under the safety protocols put in place by a national sport organization mentioned in sub-subparagraph A, or

ii. operated by a sports team in one of the following leagues:

A. Canadian Elite Basketball League.

B. Canadian Football League.

C. Major League Baseball.

D. Major League Soccer.

E. National Basketball Association.

F. National Hockey League.

G. National Lacrosse League.

2. If the facility is operated by a sports team, the team's league must have established a health and safety protocol for the use of training facilities, and the facility must be operated in compliance with the health and safety protocol.

3. The only persons permitted to enter and use the facility must be,

i. players, athletes, coaches or officials who are using the facility for the purposes of training or conditioning, and

- ii. such staff as are strictly necessary to operate the facility and support the training or conditioning of the players.

(3) A facility for indoor or outdoor sports and recreational fitness activities may open if it meets the following conditions:

1. The facility must open solely for the purpose of providing space for any, some or all of the following:

- i. Revoked: O. Reg. 779/20, s. 5 (13).
- ii. A child care centre or authorized recreational and skill building program within the meaning of the Child Care and Early Years Act, 2014.
- iii. Mental health support services or addictions support services, so long as no more than ten people are permitted to occupy the space.
- iv. The provision of social services.

2. The person responsible for the facility must,

- i. record the name and contact information of every member of the public who attends the space described in paragraph 1,
- ii. maintain the records for a period of at least one month, and
- iii. only disclose the records to a medical officer of health or an inspector under the Health Protection and Promotion Act on request for a purpose specified in section 2 of that Act or as otherwise required by law.

(4) For greater certainty, no indoor or outdoor sports or recreational classes are permitted at any indoor or outdoor sport and recreational facilities.

Recreation

49. Businesses whose primary purpose is to operate an outdoor recreational amenity that is permitted to open under section 4 of Schedule 3.

SCHEDULE 3

Places that Must Close or that are subject to Conditions

4. (1) Each person responsible for an indoor or outdoor recreational amenity that is not in compliance with this section, and that is not a facility for indoor or outdoor sports and recreational fitness activities that is permitted to open under section 48 of Schedule 2, must ensure that it is closed.

(2) The following outdoor recreational amenities may open if they are in compliance with subsection (3):

1. Parks and recreational areas.
2. Baseball diamonds.
3. Batting cages.
4. Soccer, football and sports fields.
5. Tennis, platform tennis, table tennis and pickleball courts.
6. Basketball courts.
7. BMX parks.
8. Skate parks.
9. ~~Golf courses and driving ranges.~~ REVOKED by 13 January 2021 amendments
10. Frisbee golf locations.
11. Cycling tracks and bike trails.
12. Horse riding facilities.
13. Shooting ranges, including those operated by rod and gun clubs.
14. Ice rinks.
15. Tobogganing hills.
16. Snowmobile, cross country ski, dogsledding, ice skating and snow shoe trails.
17. Playgrounds.
18. Portions of parks or recreational areas containing outdoor fitness equipment.

(3) An outdoor recreational amenity described in subsection (2) may only open if,

- (a) any person who enters or uses the amenity maintains a physical distance of at least two metres from any other person who is using the amenity;
- (b) team sports are not practised or played within the amenity;
- (c) other sports or games that are likely to result in individuals coming within two metres of each other are not practised or played within the amenity; and

(d) any locker rooms, change rooms, showers and clubhouses remain closed, except to the extent they provide access to equipment storage, a washroom or a portion of the amenity that is used to provide first aid.

SCHEDULE 4

ORGANIZED PUBLIC EVENTS, CERTAIN GATHERINGS

3. The prohibitions on attendance at an organized public event in subsection 1 (1) do not apply with respect to attendance at a business for a purpose related to providing or receiving the goods or services provided by the business if the business is not required to close under this Order. (NOTE subsection 1(1) sets gathering size limits for events and gatherings)

Equestrian Facilities versus Sports and Recreational Facilities

Schedule 2 of Regulation 82/20 specifies businesses that may open and places those businesses into categories. Each category of business that may open is dealt with in its own module in the Regulation. Each module begins with a header specifying the category of business to which the module pertains. Rules specific to each category of business, beyond the general rules set out in Schedule 1, are contained within the module for that business category. The categories of businesses permitted to open are as follows:

1. Supply chains (section 1)
2. Retailers (sections 2 through 10.1)
3. Services (sections 11 through 29)
4. Financial Services (sections 30 through 31)
5. Telecommunications and IT infrastructure/service providers (sections 32 through 34)
6. Maintenance (section 35)
7. Transportation services (sections 36 through 38)
8. Manufacturing (section 39)
9. Agriculture and food production (sections 40 through 42)
10. Construction (sections 43 through 44)
11. Resources and energy (sections 45 through 46)
12. Community services (section 47)
13. Facilities for indoor or outdoor sports and recreational fitness activities (section 48)
14. Recreation (sections 49 through 50)
15. Research (section 51)
16. Health care and social services (sections 52 through 61)
17. Media industries (sections 62 through 67)
18. Entertainment (section 68) (NOTE: Entertainment's status as a business that could open was entirely revoked by the 14 January 2021 amendments)

Equestrian riding facilities are entirely subsumed by two of the Regulation's categories:

1. Services, which include Stables in section 22
2. Recreation, which includes Horse Riding Facilities, in section 49 (in conjunction with Schedule 3, section 4) and Horse Racing Facilities in section 50.

On the face of the legislation, these distinct categories make it clear that neither, "Horse Riding Facilities," nor, "Stables", are contemplated by the Regulation to fall within the category of, "Sports and Recreational Facilities". If they were intended to be considered as such for the purpose of the Regulation, they would have been included in the Sports and Recreational Facilities Module and not categorized as separate entities in separate modules with separate operating conditions.

The distinction apparent on the face of the legislation is supported by rules of statutory interpretation. Statutory interpretation is an exercise in deciphering the intention of Parliament. To do this, one must examine the words of the provision, informed by its history, context, and purpose (see *R. v. Kelly*, 2017 ONCA 920 at paras. 30-38, *R. v. Hughes*, [1990] O.J. No. 3160 (S.C.J.) at para. 12, and *R. v. Ali*, [1979] S.C.J. No. 105 at para 38).

Historically, Regulation 82/20 has never classified Stables as a Sports and Recreation Facility. In its original version, the Regulation deemed Stables as an essential Service (Schedule 2, section 71). This was necessary because the legal obligations of horse owners and the legal liabilities of stable owners required owners to be able to continue to attend to and exercise their horses through the lock down. While Stables were permitted to open under the original version of Regulation 82/20, Sports and Recreation Facilities were not. Thus, historically, this legislation always drew a distinction between these two types of business and has never evidenced an intention to have Stables considered a Sports and Recreation Facility.

Horse Riding Facilities first appeared in the Regulation in the 18 May 2020 amendments. They were dealt with under the business category/module of, "Sports", and were classified as, "Sports and activities". This classification remained in effect until the 22 November 2020 amendments. Those amendments created a new category/module of, "Facilities for Indoor or Outdoor Sports and Recreational Fitness Activities". This category included some that had been classified in the earlier version under, "Sports and activities". However, the majority of activities previously categorized as, "Sports and activities", were re-categorized and moved to the, "Recreation" module which immediately followed the module for, "Facilities for Indoor or Outdoor Sports and Recreational Fitness Activities". Among the activities moved to the Recreation module and re-classified as an, "Outdoor Recreational Amenity", were Horse Riding Facilities. This distinction has been retained in subsequent amendments to the regulation including the 13 January 2021 amendments. There is only one conclusion that can be drawn from this: the government considered the issue of classification for Horse Riding Facilities and made a deliberate decision to not include them as Facilities for Indoor or Outdoor Sports and Recreational Fitness Activities for the purposes of the Regulation.

Contextually, the government's decision to deal with these entities in three different modules and to classify them as three separate entities, makes it indisputably clear that neither Stables nor Horse Riding Facilities are considered, for the purposes of the Grey Zone Area closures, as Sports and Recreational Facilities. The restrictions specific to Sports and Recreation Facilities no more apply to Stables or Horse Riding Facilities than do the restrictions specific to Community services or Transportation services.

In addition to being dealt with in separate sections and being given different categorizations, the legislation also sets out different conditions for each of the entities. For example, Sports and Recreational Fitness Activities Facilities may be open for the provision of child care, authorized recreational and skill building programs within the meaning of the *Child Care and Early Years Act*, mental health support services, addictions support services, and social support services. Neither Stables nor Outdoor Recreational Amenities are permitted to be open for any of those services. Sports and Recreational Fitness Facilities must keep a record of the names and contact information of everyone who attends the facility and must retain that record for at least one month. No similar duty is specified by the Regulation for Stables or for Horse Riding Facilities.

Examination of the purpose of the legislation also supports the position that neither Stables nor Horse Riding Facilities are considered by Regulation 82/20 as falling within the rubric of a Sports and Recreation Fitness Facility. The purpose of the legislation to reduce the risk of transmission of Covid-19. It is know well known that frequent hand washing, avoiding face touching, cleaning surfaces, social distancing, mask wearing, and appropriate ventilation greatly diminish the ability of the virus to spread. Activities that involve the forced exhalation of breath in a group setting, especially when those activities occur in a sealed building with artificial ventilation and re-circulated air, greatly increase the risk of transmission. This provides a rational basis for prohibiting classes for indoor sports and recreational fitness activities as well as for outdoor classes of the same nature. Such is not the case in either Stables or Horse Riding Facilities. Barns are not sealed, insulated buildings. They do not have artificial ventilation. They do not have re-circulated air. Barns have fresh air, even when the doors are closed. This, of course, is by design, because the respiratory health of horses requires it. The same is true of indoor riding arenas (which are legally classified in Ontario for land use purposes as agricultural facilities - see below). The respiratory exertion involved in riding horses does not approximate that involved in recreational fitness activities or other sports. There are no locker rooms, washrooms, or showers in which people may gather in groups and linger. Horse safety demands social distancing both while mounted and while working with a horse unmounted. Concerns about viral transmission present in structures designated to be Sports and Recreational Fitness Activities Facilities are not present to the same degree in barns housing horses. Nor are they present in indoor riding arenas.

In addition to the above, the Legislature's choice to use the term, "Stables", in Schedule 2, section 22 of Regulation 82/20 was a deliberate one. Legally, in Ontario, stables, indoor riding arenas, and outdoor riding arenas are defined as agricultural facilities for land use purposes, not as sports or recreational facilities. Use activities included as agricultural at these facilities include boarding, training, and maintaining (see *Guidelines on Permitted Uses in Ontario's Prime Agricultural Areas*). The decision to make Stables and their associated riding structures exempt from Stage 1/Grey Zone Area closures was a necessary one in light of other existing

legislative and legal duties imposed on horse owners and on stable operators. By the operation of law, Stables and their associated riding structures are not indoor or outdoor Sports and Recreational Facilities.

Horse Riding Facilities

Outdoor versus Indoor

Section 49 uses the word, “Outdoor”, in describing a class of businesses labelled, “Outdoor Recreational Amenity”. However, section 3.1(5) of Schedule 1 and section 4(1) of Schedule 3, the Regulation, when referring to the same business class, contemplate both indoor and outdoor Recreational Amenities. Rules of statutory interpretation provide a resolution to this apparent discrepancy.

It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. Absurdity occurs if the interpretation leads to ridiculous or frivolous consequences, is illogical or incoherent, or renders some aspect of the legislation pointless or futile. This is not reserved for cases of ambiguity, but must always be considered when interpreting a statute (*R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 20).

In the amending legislation of 26 December 2020, Parliament revoked the status of ski hills as an Outdoor Recreational Amenity permitted to open under Schedule 3, section 4. In the amending legislation of 13 January 2021, Parliament revoked the status of golf courses and driving ranges as Outdoor Recreational Amenities permitted to open under the same Schedule and section. This, by necessity, means the government examined the list of enumerated businesses on two separate occasions and made specific choices about which should remain. They did so knowing that the restrictions would apply in Grey Zone Areas through the winter months when operation outdoors would not be possible for some of the enumerated businesses. Knowing that, businesses such as batting cages (Schedule 3, section 4(2)(3)), tennis courts (Schedule 3, section 4(2)(5)), table tennis courts (Schedule 3, section 4(2)(5)), and Horse Riding Facilities (Schedule 3, section 4(2)(12)) were retained on the list of businesses permitted to open. Specifically designating a business as one that is permitted to be open, knowing it could not operate if required to do so outside, would be an absurdity as the consequence would be ridiculous, illogical, and would make futile the provision allowing these businesses to stay open. It would be as absurd to interpret the Regulation as requiring table tennis, or even regular tennis, to be played outside in January and February as it would be to interpret the Regulation as requiring riding lessons to occur only in outside arenas in the same time period. It would also be an absurd result to require riding lessons to be held outside when doing so would jeopardize the safety of horses due to poor footing conditions. The only reasonable conclusion is that Horse Riding Facilities may continue to operate and may do so in indoor riding arenas. The legal status of indoor riding arenas as agricultural facilities for use purposes, as opposed to Sports and Recreational Fitness Facilities, supports this conclusion.

Lessons at Horse Riding Facilities

The 26 December 2020 amendments to regulation 82/20 added a prohibition on, “classes”, at Sports and Recreational Fitness Facilities in Schedule 2, section 48(4) which reads:

(4) For greater certainty, no indoor or outdoor sports or recreational classes are permitted at any indoor or outdoor sport and recreational facilities.

As articulated above, restrictions specific to Sports and Recreational Fitness Facilities set out in section 48 do not apply to Horse Riding Facilities and therefore, on the face of the legislation, the prohibition against, “classes” set out in section 48(4) does not bar riding lessons at Horse Riding Facilities. None of the sections related to Horse Riding Facilities or Outdoor Recreational Amenities ban classes or lessons. The fact that the Legislature chose to add a prohibition on classes at Sports and Recreational Fitness Facilities in the 26 December 2020 amendments is a clear indication that Parliament turned its mind to this issue in drafting the amendments. Having done so, it chose not to restrict classes at Outdoor Recreational Amenities in general or at Horse Riding Facilities in particular. In making further amendments to the Regulation on 13 January 2021, the Legislature again chose to not expand to prohibition on, “classes”, to any Recreational Amenity.

The only reasonable conclusion that can be drawn from this is that Parliament intended lessons to continue at riding schools and lesson barns. Principles of statutory interpretation support this conclusion. The very business of a riding school or lesson barn is to generate income through the provision of lessons. Specifically enumerating a business as one permitted to open and then prohibiting that business from engaging in the only activity through which it generates income would be an absurdity.

This conclusion is supported by the existence of legislation mandating standards of care in relation to animals. Horse welfare is not just an aspirational goal, it is the law. Owners of horses are required by section 13 of the *Provincial Animal Welfare Services Act*, to comply with standards of care. Basic standards of care are specified in section 3 of Regulation 444/19 and include considerations of food, appropriate medical attention, and “the care necessary for...general welfare”. Violation of section 13 is punishable by a fine of up to \$75,000 and/or a jail term of up to six months for a first offence (section 49).

Section 15 of the *Provincial Animal Welfare Services Act* requires owners to ensure that every horse they are responsible for is neither in distress nor exposed to undue risk of distress. Distress is defined in section 1 as including being in need of proper care or being subject to physical or psychological hardship, privation, or neglect. Section 15(3) makes it an offence to knowingly or recklessly cause an animal to be exposed to undue risk of distress. Violation of section 15 is categorized by the legislation as a, “Major Offence”, with potential consequences for individuals of a fine of up to \$130,000 and/or a term of imprisonment of up to two years for a first offence. In certain cases, minimum fines of \$25,000 must be imposed (section 49).

The profit margins of Horse Riding Facilities are notoriously razor thin. An interpretation of Regulation 82/20 that requires owners and operators of these facilities to forgo their only source of income forces them into a position in which they are in jeopardy of violating their legal obligations under the *Provincial Animal Welfare Services Act*. The rules of statutory interpretation do not support such a result. Those rules instead support the interpretation that riding lessons may continue to be offered providing the facility meets the conditions set out in Schedule 1 and Schedule 3, section 4(3) of Regulation 82/20.

Stables

As with Horse Riding Facilities, the prohibition on, “classes”, set out in section 48(4) that is specific to Sports and Recreational Fitness Facilities does not apply to the separate, “Services”, category of Stables. Section 22 of Schedule 2, which deals with Stables, does not place any restriction on training or lessons. As outlined above, training is one of the activities anticipated to occur at Stables. Training in equestrian endeavours encompasses training of the horse either directly through a trainer or indirectly through a trainer instructing a rider on the horse. There being no restrictions placed on training or lessons at Stables in Regulation 82/20, the only reasonable conclusion is that training, including lessons, is permitted at, “Stables” in Grey Zone Areas. As articulated above, indoor riding arenas maybe used at Stables and, therefore, lessons may occur within them.

Impact of the Stay at Home Order

On the 13th of January 2021, a Stay at Home Order came into effect for the province of Ontario. There are multiple exceptions to this Order that permit riders to leave their homes to ride horses. The relevant sections of the Order are as follows:

SCHEDULE 1

1. (1) Every individual shall remain in their place of residence at all times unless leaving their place of residence is necessary for one or more of the following purposes:

6. Obtaining goods or services that are necessary for the health or safety of an individual, including health care services and medications. NOTE: health includes mental health.

9. Attending an appointment at a business or place that is permitted to be open by appointment under the Stage 1 Order. NOTE: This includes boarding barns, training barns, and horse riding facilities operating on appointments due to mandatory Covid safety protocol

14. Taking a member of the individual's household to any place the member of the household is permitted to go under this Order.

16. Exercising, including,
- i. walking or moving around outdoors using an assistive mobility device, or
 - ii. using an outdoor recreational amenity that is permitted to be open under the Stage 1 Order. NOTE Horse Riding Facilities have been specifically enumerated by the Government as falling within this category (see Regulation 82/20 Schedule 1, section 49 in combination with Schedule 3, section 4.)

29. Walking or otherwise exercising an animal (see Regulation 82/20 Schedule 1, section 22).

Although there are many applicable exceptions, the Stay at Home Order makes specific exceptions for attendance at Stables (Schedule 1, section 1(1)(29)) and at Horse Riding Facilities (Schedule 1, section 1(1)(16)(ii)). This is another indication from the Government, particularly in relation to Horse Riding Facilities, that they intend those facilities to continue to be able to operate. Given that Riding Schools cannot operate without providing lessons in indoor riding arenas, this Order in combination with Regulation 82/20 clearly contemplates that they will do so.

Conclusion

It is the opinion of the author that Regulation 82/20, as enacted pursuant to the 13 January 2021 amendments, contains no prohibition on the provision of lessons in boarding stables, training stables, riding schools, or lesson barns. However, these facilities and the lessons provided by them must conform with the general and business-category specific restrictions set out by the same Regulation. Those restrictions are detailed in a separate opinion paper.