Court of Appeal File No. CA48578

COURT OF APPEAL

BETWEEN:

Action4Canada, Linda **Morken**, Gary **Morken**, Jane **Doe #1**, Brian **Edgar**, Amy **Muranetz**, Jane **Doe #2**, Ilona **Zink**, Federico **Fuoco**, **Fire Productions Limited**, **F2 Productions Incorporated**, Valerie Ann **Foley**, Pastor Randy **Beatty**, Michael **Martinz**, Makhan S. **Parhar, North Delta Real Hot Yoga Limited,** Melissa Anne **Neubauer,** Jane **Doe #3**

Appellants

AND:

His Majesty the King in right British Columbia, Prime Minister **Justin Trudeau,** Chief Public Health Officer **Theresa Tam**, Dr. Bonnie **Henry**, Premier John **Horgan**, Adrian **Dix**, Minister of Health, Jennifer **Whiteside**, Minister of Education, Mable **Elmore**, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike **Farnworth**, Minister of Public Safety and Solicitor General, **British Columbia Ferry Services Inc**. (operating as British Columbia Ferries), Omar **Alghabra**, Minister of Transport, **Vancouver Island Health Authority**, **The Royal Canadian Mounted Police** (RCMP), and the **Attorney General of Canada,** Brittney **Sylvester,** Peter **Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia**

Respondents

APPELLANT'S FACTUM

Lawrence Wong
Barrister & Solicitor
210-2695 Granville Street
Vancouver, B.C.
TEL:604-739-0118
FAX:604-739-0117

ROCCO GALATI LAW FIRM
PROFESSIONAL CORPORATION
Rocco Galati, B.A., LL.B., LL.M.
1062 College Street, Lower Level
Toronto, Ontario M6H 1A9
TEL: (416) 530-9684
FAX: (416) 530-8129
Email: rocco@idirect.com

Lawyer for the Appellants

TO:

Andrea Gatti/Olivia French
British Columbia Region
National Litigation Sector
900-840 Howe Street
Vancouver, B.C. V6Z 2S9
Andrea.Gatti@justice.gc.ca
Olivia.French@justice.gc.ca

Lawyers for The Attorney General of
Canada,Prime Minister Justin Trudeau,
the Royal Canadian Mounted Police (RCMP),
Chief Public Health Officer Dr. Theresa Tam,
and Omar Alghabra Minister of Transport

AND TO :

Mark Witten
Ministry of Attorney General
Legal Services Branch
1301-865 Hornby Street
Vancouver, B.C. V6Z 2G3
Mark.Witten@gov.bc.ca

Lawyer for His Majesty the King in right British Columbia,
Dr. Bonnie Henry, Premier John Horgan, Minister of Health,
Jennifer Whiteside, Minister of Education, Mike Farnworth,
Minister of Public Safety and Solicitor

AND TO:

Timothy Wedge/Laura Miller
Carfra Lawton LLO
6th Floor, 395 Eaterfront Crescent
Victoria, BC V8T 5K7
twedge@carlaw.ca

Lawyers for Vancouver Island Health
Authority and Providence Health Care

AND TO :

Tim Delaney
Lindsay Kenney LLP 1800, 401 West Georgia Street
Vancouver, BC V6B 5A1
TDelaney@lklaw.ca

Lawyer for Peter Kwok and Translink

AND TO:

Connor Bildfell
McCarthy Tétrault LLP Suite 2400
745 Thurlow Street
Vancouver BC V6E 0C5
cbildfell@mccarthy.ca

Lawyer for British Columbia Ferry Services Inc.,
Brittney Sylvester

TABLE OF CONTENTS

v

CHRONOLOGY

Date	Event
August 17th, 2021	Statement of Claim, in # VLC-S-S-217586 issued.
January 12,13th 2022. April 14, 28th 2022.	Defendants Province of British Columbia, Attorney General of Canada, Peter Kwok and Translink, bring motion to dismiss action outright, or in the alternative, strike the action with prejudice.
May 30th, 2022	Motion argued in the British Columbia Supreme Court
August 29th, 2022	Judgment issued by Justice Ross, refusing to dismiss action, but striking it in its entirety with leave to serve and file a fresh pleading, as amending the Notice of Civil Claim.
September 28th, 2022	Appellants file Notice of Appeal on judgement of Justice Ross, including his order of costs.

OPENING STATEMENT

This is an appeal from the Judgment of Justice Ross, dated August 29th, 2022, in which he:

(a) refused to dismiss the Appellants' action;
(b) struck the entirety of the claim, without prejudice, with leave to file a fresh as amended Notice of Civil Claim;
(c) ordered costs of the motion(s) to the Defendants; and
(d) stayed the action until such time as the Plaintiff served and filed a fresh Notice of Civil Claim.

In striking the claim, Justice Ross relied on the following grounds:

(a) that the claim was too prolix;
(b) that certain Declaratory Relief could not be sought;
(c) that the rules were contravened by setting out the actual monetary damages sought;
(d) ordered cost against the Appellants

The Appellants take issue with the following in the judgment:

(a) that the claim is too prolix;
(b) that the Declaratory relief sought cannot be sought;
(c) ordering costs against the Appellants;
(d) the Application judge's misapplication of the test and binding jurisprudence on a motion to strike;
(e) the Applications Judge's exceeding jurisdiction in usurping the trial judge's function, by making findings of fact.

1

PART 1 – STATEMENT OF FACTS

1. The facts of the case are as set out in the Notice of Civil Claim.

   - ***Appellants Appeal Record,*** p. 6-397.

PART 2 - ERRORS IN JUDGMENT

2. The Application Judge erred, and exceeded jurisdiction when he ruled:

> [27] To be clear, in these reasons, I have not attempted any weighing, limited or otherwise, in respect of the facts alleged by the plaintiffs. I have undertaken my assessment on the assumption that the plaintiffs' allegations, if properly pleaded, are capable of being proven at trial.

Yet, contradictorily premises his analysis by stating:

> [26] **Many of the allegations contained in the NOCC do not accord with**, and specifically challenge, **the mainstream understanding** of the science underlying both the existence of, and the government's responses to the COVID-19 pandemic…

(a) The learned Justice exceeded his jurisdiction in making a global finding of what the "mainstream understanding of the science underlying both existence of, and the government's response to the COVID-19 pandemic", is.

(b) This is one of the main issues at the crux of this action. Moreover, the constitutional violations going to these measures, as well as any potential s.1 ***Charter*** analysis, which would inescapably involve the scientific understanding".

3. The learned motions judge further errs when he states that the claim:

> [45] It seeks rulings of the court on issues of science.

Which misses the point that the scientific and medical facts pleaded are facts going to the COVID-19 measures and overly broad constitutional violations inflicted by them. Moreover, Courts across the country, on an almost daily basis, make rulings on science, medicine, engineering, etc, in the context of medical malpractice and negligence in which science is involved, in **accordance with the evidence at trial**, and not nebulous incantations of what the "science" is, on a motion to strike.

4. The learned motion judge further erred in ruling:

> [52] The defendants submit that the NOCC pleads to a number of claims that are improper in a civil action. In part, the defendants point to the following elements of the NOCC as inappropriate:
>
> a) alleging criminal conduct;
>
> b) seeking a declaration that the preponderance of the scientific community is of the view that masks are ineffective in preventing transmission;
>
> c) seeking a declaration that the motive and execution of the COVID-19 prevention measures by the World Health Organization are not related to a *bona fide* “pandemic”;
>
> d) seeking a declaration that administering medical treatment without informed consent constitutes experimental medical treatment which is contrary to the Nuremberg Code, the Helsinki Declaration and is a crime against humanity under the *Criminal Code* of Canada;
>
> e) seeking a declaration that the unjustified, irrational, and arbitrary decisions of which businesses would remain open, and which would close, as being “essential”, or not, was designed and implemented to favour mega-corporations and to *de facto* put most small businesses out of business; and
>
> f) seeking a declaration that the measures of masking, social distancing, PCR testing, and lockdowns are not scientifically based, and are based on a false and fraudulent use of the PCR test.

And further erred in ruling:

> [55] A significant underlying theme of the NOCC is the pursuit **of rulings from this court on the proper interpretation of scientific data**. As such, much of the NOCC relates to non-justiciable issues. I note the extract from (the second) paragraph 289 of the NOCC quoted above (at paragraph 41). It is beyond doubt that the plaintiffs seek to turn this court into an academy of science wherein a judge will be asked to prefer their science over the government’s science. Alternatively, the plaintiffs hope that this court will act as a further legislative chamber to review, criticize or overturn the policies of the legislative and executive branches of government. That is not the proper role of this court except in circumstances where those actions infringe on protected Charter rights or exceed the bounds of delegated authority.

And further erred in ruling that Declaratory relief is “discretionary” at large:

- **Paragraph 56 of the Judgement**

which is true at Administrative, common law, but not so for Declaratory relief on Constitutional grounds.

5. The learned application judge further erred in granting costs of the application to the Defendants in light of his ruling that:

> [59] The defendants urge upon me that the problems with the NOCC are sufficient grounds for me to conclude that this entire action is an abuse of process and should be dismissed on the basis that it is clearly frivolous and vexatious.
>
> [60] **I do not accept that submission on behalf of the defendants**. For the reasons set out below, I decline to dismiss the action.

In that the result was thus "split" in that most of the Defendants sought to dismiss the claim outright and, in the alternative to strike it without leave to amend, neither of which was granted.

6. The learned application judge further erred, in mis categorizing the Indian Supreme Court decision in ***Puliyel***:

> [65] I note that cases from the Indian Supreme Court are very rarely referenced in this jurisdiction. I accept that the judge in the Puliyel case engaged in a review of vaccine mandates and their impact on constitutionally protected rights. However, in my opinion, the Puliyel case provides limited assistance to the plaintiffs. In very brief overview, the highest level of intervention by the court consisted of directions that:
>
> a) the government could not force vaccinations on the populace. But, the court was clear to note that the government was not forcing vaccines on the populace. At the same time, the court confirmed that, given the pandemic, the government could restrict the activities of unvaccinated persons and is "entitled to regulate issues of public health concern by imposing certain limitations on individual rights…"
> b) required the government to release statistics to the public relating to vaccination programs; and
> c) in addition, the court made a "suggestion", that in the context of the rapidly-evolving situation presented by the COVID-19 pandemic, the government should review the vaccine mandates.

in that, in ***Puliyel***, the Court examined, **in detail, the scientific and medical evidence** for its determination that transmission of the COVID-19 virus was not prevented by the vaccine and therefore distinctions of treatment of the vaccinated versus the unvaccinated was discriminatory and unconstitutional as

unequal treatment. This error by Justice Ross, goes to the misapplication of the test of on a motion to strike.

PART 3 – ARGUMENT

A/ Motion to Strike – The Jurisprudence – General Principles

1. It is submitted and tritely held, by the Supreme Court of Canada, and the Appellate Courts, that:

(a) the facts pleaded by the Plaintiffs must be taken as proven and fact:[1]

(b) it has been further held, that on a motion to strike, the test is a rather high one, namely that,

> "A Court should strike a pleading under Rule 126 **only in plain and obvious cases where the pleading is bad beyond argument.**
>
> **Furthermore, I am of the view that the rules of civil procedure should not act as obstacles to a just and expeditious resolution of a case.** Rule1.04(1) of the Rules of Civil Procedure in Ontario, O. Reg 560/84, confirms this principle in stating that "these rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."
>
> - ***Nelles, supra,* p. 627**

and rephrased, re-iterated by the Supreme Court of Canada, in ***Dumont***, wherein the Court stated that,

> "***It cannot be said that the outcome of the case is 'plain and obvious' or 'beyond doubt'***.
>
> Issues as to the proper interpretation of relevant provisions…and the effect…upon them would appear to be better determined at trial where a proper factual base can be laid."

---

[1] ***A.G. Canada v. Inuit Tapirasat of Canada [1980] 2 S.C.R. 735; Nelles v. Ontario (1989) 60 DLR (4th) 609 (SCC); Operation Dismantle Inc. v. The Queen [1985] 1 S.C.R. 441; Hunt v. Carey Canada Inc [1990] 2 S.C.R. 959; Dumont v. A.G. Canada [1990] 1 S.C.R. 279; Trendsetter Ltd. v. Ottawa Financial Corp. (1989)32 O.A.C. 327 (C.A.); Nash v. Ontario (1995) 27 O.R. (3d) 1 (Ont. C. A.). Canada v. Arsenault 2009 FCA 242; B.C. v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473***

5

- ***Dumont, supra.*** **p. 280**

and further, that:

> "It is not for this Court on a motion to strike to reach a decision as to the Plaintiff's chance of success."

- ***Hunt, supra (SCC)***

and further that:

> **The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.**
>
> …
> This brings me to the second difficulty I have with the defendants' submission. **It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the Plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel.** If the Plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the Plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.

- ***Hunt, supra*** **p. 14**

and further that:

> [21] Valuable as it is, the Motion to Strike **is a tool that must be used with care.** The Law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedly Byrne & Co. v. Heller & Partners*, Ltd., [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like that one at issue in *Donoghue v. Stevenson**.*** therefore, on a Motion to Strike, it is not determinative that the law has not yet recognized the particular claim. **The Court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.**
>
> - ***R. v. Imperial Tobacco Canada Ltd., supra at para 21.***

and that "the court should make an order only in ***plain and obvious cases*** which it is satisfied to be beyond doubt";

- ***Trendsetter Ltd***, ***supra,*** **(Ont. C.A.)*.***

(c) (i) and that a statement of claim should not be struck just because it is "novel";

- ***Nash v. Ontario (1995) 27 O.R. (3d) (C.A.)***
- ***Hanson v. Bank of Nova Scotia (1994) 19 O.R .(3d) 142 (C.A.)***
- ***Adams-Smith v. Christian Horizons (1997)14 C.P.C.(4th)78 (Ont. Gen. Div.)***
- ***Miller (Litigation Guardian of) v. Wiwchairyk (1997) 34 O.R. (3d) 640 (Ont.Gen.Div)***
-

(ii) that "matters law not ***fully settled*** by the jurisprudence should not be disposed of at this stage of the proceedings";

- ***R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.*** (1991) 5 O.R. (3d) 778 (C.A.)

(iii) and that to strike, the Defendants must produce a "decided case ***directly on point*** from the same jurisdiction demonstrating that the very same issue has been ***squarely dealt with and rejected***";

- ***Dalex Co. v. Schawartz Levitsky Feldman*** (1994) 19 O.R. (3d) 463 (Gen. Div).

(d) and that, in fact, the Court ought to be generous in the drafting of pleadings and not strike but allow amendment before striking.

- ***Grant v. Cormier*** – ***Grant, et. al*** (2001) 56 O.R. (3d) 215 (Ont. C.A.)
- ***TD Bank v. Delloitte Hoskins & Sells*** (1991) 5 O.R. (3d) 417 (Gen. Div.)

B/ Constitutional Principles Applicable to Claim

2. It is further submitted that virtually all of the declaratory relief sought as well as much of the damages sought in tort, is constitutional. It is submitted that the Constitution delineates both legislative and executive limits, and does not belong to either the Federal or Provincial legislatures, as set out by the Supreme Court of Canada, in that:

> ***The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled***….
>
> ***- Nova Scotia (Attorney General) v. Canada (Attorney General)*** [1951] S.C.R. 31

and has been further held that the Executive, and every other government actor, and institution is bound by the terms of constitutional norms.

- ***Reference re Secession of Quebec,*** [1988] 2 S.C.R. 217

3. It has also been held, by the Supreme Court of Canada, that legislative **omission** can also lead to constitutional breaches.

- ***Vriend v. Alberta*** [1998] 1 S.C.R. 493

4. It is further submitted, and long-held that, pre-***Charter***, as well as post-***Charter,*** that all executive ***action*** and ***inaction*** requires conformity with constitutional norms.

- ***Air Canada v. British Columbia (Attorney General)*** [1986] 2 S.C.R. 539
- ***Vriend v. Canada [1998] 1 SCR 493***
- ***Canada (Prime Minister) v. Khadr***, [2010] 1 S.C.R. 44

C/ Nature of Defendant's Claim

5. The Plaintiffs, in their claim, seek the following:

(a) monetary damages;

(b) Declaratory relief as to jurisdiction, legislation, regulations and executive action and inaction;

(c) injunctive relief or relief in the nature of **mandamus**;

All based on constitutional violations.

D/ The Constitutional Right to Judicial Review and Declaratory Relief

6. The Plaintiffs submit that Declaratory relief goes to the crux of the constitutional right to judicial review, which right the Supreme Court of Canada has re-affirmed in ***Dunsmuir:***

> **31** The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, at p. 127 [page213]). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". ***In short, judicial review is constitutionally guaranteed in Canada,*** particularly with regard to the definition and enforcement of jurisdictional limits..,.
>
> - ***Dunsmuir v. New Brunswick, 2008 SCC 9, at Paragraph 31***

7. Substantive Constitutional judicial review can be sought procedurally, either by way of application or by way of action.

8. The Federal Court, in ***Singh v. Canada (Citizenship and Immigration), 2010 FC 757,*** re-affirmed the ample and broad right to seek declaratory relief, in quoting the Supreme Court of Canada in ***Solosky***:

> Declaratory relief is a remedy **neither constrained by form nor bounded by substantive content**, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined.
>
> - ***Canada v. Solosky, [1980] 1 S.C.R. 821, @ p. 830***

9. More recently, the Supreme Court of Canada, in the ***Manitoba Metis*** case reaffirmed the breadth of the right to declaratory relief to rule that it cannot be statute-barred:

> [134] This Court has held that although claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period, courts retain the power to rule on the constitutionality of the underlying statute: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181. ***The constitutionality of legislation has always been a justiciable question:*** *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 151. ***The "right of the citizenry to constitutional behaviour by Parliament" can be vindicated by a declaration that legislation is invalid, or that a public act is ultra vires:*** *Canadian Bar Assn. v. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, at paras. 23 and 91, citing *Thorson*, at p. 163 (emphasis added). **An "issue [that is] constitutional is always justiciable**": *Waddell v. Schreyer* (1981), 126 D.L.R. (3d) 431 (B.C.S.C.), at p. 437, aff'd (1982), 142 D.L.R. (3d) 177 (B.C.C.A.), leave to appeal refused [1982] 2 S.C.R. vii (*sub nom. Foothills Pipe Lines (Yukon) Ltd. v. Waddell*).
>
> …
>
> [140] ***The courts are the guardians of the Constitution and, as in Ravndahl and Kingstreet, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less:*** see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72.
>
> …
>
> [143] ***Furthermore, the remedy available under this analysis is of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or***

10

not any consequential relief is available. As argued by the intervener Assembly of First Nations, it is not awarded against the defendant in the same sense as coercive relief: factum, at para. 29, citing *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 193 D.L.R. (4th) 344, at paras. 11-16.

- ***Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14***

10. And it has been long-stated, by the Supreme Court of Canada that "The constitutionality of legislation has always been a justiciable issue".

- ***Thorson v. AG of Canada [1975] 1 SCR 138, @ p. 151***

- Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14, @ paragraph 134

11. It is thus submitted that the learned motions judge erred, at paragraph 56 of his decision, stating that the declaratory relief sought cannot be sought. By doing so, the learned applications Judge gutted the core of the claim, and exceeded jurisdiction in usurping the trial judge's function.

E/Jurisprudence on Covid-19 measures mitigating against striking claim

12. It is further submitted that jurisprudence, both in Canada and abroad, to the same claims and issues set out in the within claim, clearly weighs against striking this claim, whether in whole or in part.

13. Thus, the United States Supreme Court, struck, as unconstitutional measures against barring church gatherings on constitutional provisions indistinguishable from s.2 of the Canadian ***Charter***.

- 592 U. S. ____ (2020)

14. Recently, the Indian Supreme Court struck as unconstitutional, the Covid-vaccine, **coercive measures** as unconstitutional for offending a provision of their constitution protecting bodily integrity, indistinguishable from s.7 of the Canadian ***Charter***:

- Jacob Puliyel Vs. Union of India & Ors.

15. Moreover, it has already been established, in Canadian jurisprudence that any medical treatment without the informed, voluntary, consent violates s.7 of the ***Charter*** and not saved by s.1:

- Fleming v. Reid (1991), 48 O.A.C. 46 (CA)
- Carter v. Canada (Attorney General), 2015 SCC 5, [2015] 1 S.C.R. 331

Wherein, the Supreme Court of Canada, in ***inter alia, Carter*** ruled:

> [67] The law has long protected patient autonomy in medical decision-making. In A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30, [2009] 2 S.C.R. 181, a majority of this Court, per Abella J. (the dissent not disagreeing on this point), endorsed the "tenacious relevance in our legal system of the principle that competent individuals are — and should be — free to make decisions about their bodily integrity" (para. 39). This right to "decide one's own fate" entitles adults to direct the course of their own medical care (para. 40): it is this principle that underlies the concept of "informed consent" and is protected by s. 7's guarantee of liberty and security of the person (para. 100; see also R. v. Parker (2000), 2000 CanLII 5762 (ON CA), 49 O.R. (3d) 481 (C.A.)). As noted in Fleming v. Reid (1991), 1991 CanLII 2728 (ON CA), 4 O.R. (3d) 74 (C.A.), the right of medical self-determination is not vitiated by the fact that serious risks or consequences, **including death, may flow from the patient's decision. It is this same principle that is at work in the cases dealing with the right to refuse consent to medical treatment, or to demand that treatment be withdrawn or discontinued**: see, e.g., Ciarlariello v. Schacter, 1993 CanLII 138 (SCC), [1993] 2 S.C.R. 119; Malette v. Shulman (1990), 1990 CanLII 6868 (ON CA), 72 O.R. (2d) 417 (C.A.); and Nancy B. v. Hôtel-Dieu de Québec (1992), 1992 CanLII 8511 (QC CS), 86 D.L.R. (4th) 385 (Que. Sup. Ct.).

Moreover, the Indian Supreme Court, ruled, under their equality provision, indistinguishable from s.15 of the ***Charter***, that, based on the scientific evidence, drawing a distinction or discriminating as between "vaccinated" and "unvaccinated" individuals is unconstitutional because the vaccinated could equally transmit and receive the Covid-19 virus. In fact, this Indian Supreme Court decision heavily relies on jurisprudence from other common-law jurisdictions including the USA, Australia and New Zealand.

- Jacob Puliyel Vs. Union of India & Ors.

12

16. In Ontario, attempts at moving to strike applications, ***in limine***, challenging the Covid-measures, have been dismissed.

- Sgt. Julie Evans et al. v. AG Ontario et al.
- M.A. v. De Villa, 2021 ONSC 3828

17. The Ontario Superior Court has also recently ruled that these issues of Covid-measures are not to be dealt with on a perfumatory basis, assuming and adopting the baldly-stated positions of public health officials, but to be dealt with, like any other case, on the available evidence and material bearing on the issue(s) before the Court.

- ***J.N. v. C.G., 2022 ONSC 1198***

18. It is further submitted that the B.C. Supreme Court recently dismissed a motion to strike B.C's Covid-measures, **albeit** on standing, pointing out the complexity of the issues that the Covid-measures present.

- Canadian Society for the Advancement of Science in Public Policy v. Henry, 2022 BCSC 724

19. Furthermore, with respect to the Defendants' bald and baseless assertion that the vaccine mandates are not "mandatory" but a "choice", albeit coercive in that the choice is "be vaxxed or be fired", the caselaw on this point defies the Defendant's postulation in that:

(a) the Indian Supreme Court ruled that coercive measures are as unconstitutional as mandating measures: and

- Jacob Puliyel Vs. Union of India & Ors.

(b) the California Court of Appeal Fourth Appellate District recently ruled that a "choice" of vaccination or staying away from school was **not** a choice but a coercive, **de facto**, mandatory measure.

- Let Them Choose et al. v. San Diego Unified School District (2022)

F/Errors of Learned Applications Judge

20. It is submitted that in his misapplication of the test on a motion to strike, the Applications Judge erred, in law, by:

(a) making global findings of fact, contrary to the jurisprudence and without evidence;

(b) erred on the law of Declaratory relief in confusing the discretionary nature of Declaratory relief at common, administrative law, with that of constitutional relief in that:

(i) the Courts are under ***a duty*** to review legislation for constitutional compliance[2];

(ii) the Courts are under ***a duty*** to review executive action for constitutional compliance.[3]; and

(iii) the Courts are under ***a duty*** to review even the common law of the Courts for constitutional compliance, both in the criminal context[4], as well as the civil context[5].

(iv) And further erred in that there is no right without remedy as set out in ***Mills***[6] and further endorsed it in ***Nelles*** [7]and ***Doucet-Boudreau v. NS***[8]:

> **55** First, an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied***. An ineffective remedy, or one which was "smothered in procedural delays and***

---

[2] R. v. Morgentaler, 1988 CanLII 90 (SCC), [1988] 1 SCR 30

[3] Operation Dismantle v. The Queen, 1985 CanLII 74 (SCC), [1985] 1 SCR 441
Air Canada v. British Columbia, 1989 CanLII 95 (SCC), [1989] 1 SCR 1161
Canada (Prime Minister) v. Khadr, 2010 SCC 3 (CanLII), [2010] 1 SCR 44

[4] R. v. Salituro, 1991 CanLII 17 (SCC), [1991] 3 SCR 654

[5] RWDSU v. Dolphin Delivery Ltd., 1986 CanLII 5 (SCC), [1986] 2 SCR 573

6 R. v. Mills [1986] 1 SCR 863 at p. 971 – 2

7 Nelles v. Ontario [1989] 2 S.C.R. 170 (per Lamer, C.J.)

8 *Doucet-Boudreau v. NS* [2003] SCJ 63 at paragraph 5

> ***difficulties", is not a meaningful vindication of the right and therefore not appropriate and just*** (see *Dunedin*, *supra*, at para. 20, McLachlin C.J. citing *Mills*, *supra*, at p. 882, *per* Lamer J. (as he was then)).

(c) erred in setting and, in the absence of evidence, and ignoring that the facts pleaded must be taken as proven, in ordering what can and cannot be sought as relief on any fresh as amended claim in that the applications judge stated:

> [50] In my discussion below, I have indicated that there may be legitimate claims that a plaintiff could advance against one or more of the defendants. However, I wish to be clear that:
>
> a) as noted above, I have assumed that allegations are capable of being proved;
>
> b) hence, by ruling that there may be claims that might properly be brought, I make no finding on the prospect of success of such claims;
>
> c) **although I have specifically noted certain types of claims that are improperly included in the current NOCC, the absence of any comment by me should not be considered an endorsement of any specific cause of action that is in the NOCC but omitted in my discussion**; and
>
> d) I make no ruling on the proper plaintiffs, or the proper defendants, in this action. Those will be issues for the plaintiffs to decide, in line with the proper tenets of pleading. In turn, the defendants will be at liberty to make an application, if necessary, to determine the proper parties.

Which constitutes an excess, and refusal, to exercise his jurisdiction on a motion to strike.

(d) And further that, a concrete remedy, is not necessary where a constitutional declaration is sought.

> -***Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14***

PART 4 - NATURE OF ORDER SOUGHT

7. The appellant seeks an Order:
   (a) Setting aside the judgment of Justice Ross and allowing the matter to proceed to trial on the original Notice of Civil Claim.
   (b) In the alternative, correcting the judgment setting aside the prohibitions on what can and cannot be sought by the Plaintiffs in their freshly amended claim with respect to declaratory relief, a matter to be dealt to the trial judge following a trial;
   (c) In any event setting aside the cost order; and
   (d) Any further or other relief as counsel may advise and this Honourable Court grant.

8. All of which is respectfully submitted.

Dated at the City of Toronto , this 23rd day of December, 2022.

ROCCO GALATI LAW FIRM
PROFESSIONAL CORPORATION
Rocco Galati, B.A., LL.B., LL.M.
1062 College Street, Lower Level
Toronto, Ontario M6H 1A9

TEL: (416) 530-9684
FAX: (416) 530-8129

Email: rocco@idirect.com

Lawrence Wong
210-2695 Granville Street
Vancouver, B.C.
TEL:604-739-0118
FAX:604-739-0117

Lawyers for the Appellants

APPENDICES: LIST OF AUTHORITIES

Authorities	Page # in factum	Para # in Factum
592 U. S. ____ (2020)	***10***	***13***
A.G. Canada v. Inuit Tapirasat of Canada [1980] 2 S.C.R. 735;	***4***	***1(b)***
Adams-Smith v. Christian Horizons (1997)14 C.P.C.(4th)78 (Ont. Gen. Div.)	***6***	***1(c)***
Air Canada v. British Columbia (Attorney General) [1986] 2 S.C.R. 539	***8, 13***	***4, 20(b)***
B.C. v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473	***4***	***1(b)***
Canada (Prime Minister) v. Khadr, [2010] 1 S.C.R. 44	***8, 13***	***4, 20(b)***
Canada v. Arsenault 2009 FCA 242;	***4***	***1(b)***
Canada v. Solosky, [1980] 1 S.C.R. 821, @ p. 830	***9***	***8***
Canadian Society for the Advancement of Science in Public Policy v. Henry, 2022 BCSC 724	***12***	***18***
Carter v. Canada (Attorney General), 2015 SCC 5, [2015] 1 S.C.R. 331	***11***	***15***
Dalex Co. v. Schawartz Levitsky Feldman (1994) 19 O.R. (3d) 463 (Gen. Div).	***7***	***1(c)***
Doucet-Boudreau v. NS [2003] SCJ 63	***13***	***20(c)***
Dumont v. A.G. Canada [1990] 1 S.C.R. 279;	***4***	***1(b)***
Dunsmuir v. New Brunswick, 2008 SCC 9, at Paragraph 31	***8***	***6***
Fleming v. Reid (1991), 48 O.A.C. 46 (CA)	***11***	***15***
Grant v. Cormier – ***Grant, et. al*** (2001) 56 O.R. (3d) 215 (Ont. C.A.)	***7***	***1(d)***
Hanson v. Bank of Nova Scotia (1994) 19 O.R .(3d) 142 (C.A.)	***8***	***1(c)***
Hunt v. Carey Canada Inc [1990] 2 S.C.R. 959;	***4,5***	***1(b)***
J.N. v. C.G., 2022 ONSC 1198	***12***	***17***
Jacob Puliyel Vs. Union of India & Ors.	***3, 10, 11, 12***	***6, 14,15, 19(a)***
Let Them Choose et al. v. San Diego Unified School District (2022)	***12***	***19(b)***
M.A. v. De Villa, 2021 ONSC 3828	***12***	***16***
Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14	***9,10, 13***	***9, 10, 20(d)***
Miller (Litigation Guardian of) v. Wiwchairyk (1997) 34 O.R. (3d) 640 (Ont.Gen.Div)	***6***	***1(c)***
Nash v. Ontario (1995) 27 O.R. (3d) (C.A.)	***6***	***1(c)***
Nelles v. Ontario (1989) 60 DLR (4th) 609 (SCC);	***4, 13***	***1(b), 20(c)***

Nova Scotia (Attorney General) v. Canada (Attorney General) [1951] S.C.R. 31	***7***	***2***
Operation Dismantle Inc. v. The Queen [1985] 1 S.C.R. 441;	***13***	***20(b)***
R. v. Imperial Tobacco Canada Ltd	***6***	***1(b)***
R. v. Mills [1986] 1 SCR 863	***13***	***19(c)***
R. v. Morgentaler, 1988 CanLII 90 (SCC), [1988] 1 SCR 30	***13***	***20(b)***
R. v. Salituro, 1991 CanLII 17 (SCC), [1991] 3 SCR 654	***13***	***20(b)***
R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd. (1991) 5 O.R. (3d) 778 (C.A.)	***6***	***1(c)***
Reference re Secession of Quebec, [1988] 2 S.C.R. 217	***7***	***2***
RWDSU v. Dolphin Delivery Ltd., 1986 CanLII 5 (SCC), [1986] 2 SCR 573	***13***	***20(b)***
Sgt. Julie Evans et al. v. AG Ontario et al.	***12***	***16***
Singh v. Canada (Citizenship and Immigration), 2010 FC 757	***9***	***8***
TD Bank v. Delloitte Hoskins & Sells (1991) 5 O.R. (3d) 417 (Gen. Div.)	***7***	***1(d)***
Thorson v. AG of Canada [1975] 1 SCR 138, @ p. 151	***10***	***9***
Trendsetter Ltd. v. Ottawa Financial Corp. (1989)32 O.A.C. 327 (C.A.);	***6***	***1(b)***
Vriend v. Canada [1998] 1 SCR 493	***7,8***	***3,4***