COURT OF APPEAL

ON APPEAL FROM the order of Ross J. of the British Columbia Supreme Court pronounced on the 28th day of September, 2022.

BETWEEN

ACTION4CANADA, LINDA MORKEN, GARY MORKEN, JANE DOE #1, BRIAN EDGAR, JANE DOE #2, ILONA ZINK, VALERIE ANN FOLEY, PASTOR RANDY BEATTY, MICHAEL MARTINZ, 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)

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CHRONOLOGY

Date	Event
August 17, 2021	Appellants file notice of civil claim
January 12, 2022	The defendants, Her Majesty the Queen in Right of British Columbia, Dr. Bonnie Henry, Premier John Horgan, Minister of Health, Jennifer Whiteside, Minister of Education, Mike Farnworth, Minister of Public Safety and Solicitor General file notice of application to strike the claim
January 13, 2022	Canada files Notice of Application to strike the claim
January 17, 2022	The defendants, Vancouver Health Authority and Providence Health Care file notice of application to strike the claim
April 14, 2022	The defendants Peter Kwok and TransLink (British Columbia) file notice of application to strike the claim
April 28, 2022	Canada files amended notice of application to strike the claim
May 18, 2022	Appellants file response to the defendants' applications to strike
May 30, 2022	Chambers judge hears the application to strike
August 29, 2022	Reasons for judgment released
September 28, 2022	Appellants file notice of appeal

OPENING STATEMENT

This appeal should be dismissed. The Honourable Justice Ross made no reviewable errors in striking the 391-page notice of civil claim on the basis that it is prolix, with leave to file a fresh claim. The chambers judge's decision upholds the requirement for conformity to the boundaries of proper pleadings, while maintaining the appellants' opportunity to advance properly pleaded claims.

Rule 9-5(1) of the *Supreme Court Civil Rules* is intended to halt attempts to do precisely what the appellants did in this case: commence a legal proceeding with a pleading that is so improper that it is incapable of a response, let alone fulfilling the object of a pleading to guide the litigation to trial. These circumstances do not warrant reversing the chambers judge's decision to restrain the appellants from advancing such an unworkable claim.

The appellants propose the chambers decision be reversed and their omnibus pleading proceed to trial. However, they offer no justification as to why they cannot conform to the *Rules*. The volume of the pleading is unnecessary. The chambers judge granted leave to file a fresh pleading. It is the appellants' counsel's obligation to draft so as to not offend the mandatory requirements governing the substance and form of pleadings. They offer no explanation as to why they could not do so in the first instance and cannot do so now.

The appellants point to the potential underlying merits of their constitutional claims. Canada says that if proper allegations of *Charter* infringements exist, they can and should be properly litigated and not barely discernible in a 391-page pleading. The chambers judge did not err in exercising his discretion in concluding that in order for the litigation to proceed, a fresh claim that conforms with the rules of court is necessary. Similarly, he did not err in exercising his discretion to award costs to the respondents.

PART 1 - STATEMENT OF FACTS

A. Characteristics of the Notice of Civil Claim[1]

1. For the purpose of this appeal the relevant facts are those alleged in the claim.

2. It is impossible to summarize the facts pled. According to the claim's table of contents, the facts alleged begin on page five and end on page 309. While the paragraphs are enumerated, the enumeration is not entirely sequential. The factual allegations are wide-ranging. The drafting irregularities of the claim render the facts alleged difficult to isolate and hard to read.

B. The Chambers Judge Decision

3. The chambers judge's decision results from his adjudication of the Attorney General of Canada's and other co-defendants' strike applications. The applications to strike the appellants' claim were made under Rule 9-5(1) of the *Supreme Court Rules*, BC Reg 168/2009 ("*Rules*"), without limiting the application to a particular sub-paragraph. The applications primarily advocated that the claim is unnecessary, scandalous, frivolous or vexations pursuant to Rule 9-5(1)(b).

4. In the result, the chambers judge awarded costs to the defendants and found that:

    a. the claim in its current form is prolix and must be struck in its entirety;

    b. liberty to amend the claim is granted; and

    c. the action is stayed pending the filing of a fresh pleading.

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[1] Notice of Civil Claim filed August 29, 2021, Appellants' Appeal Book, Tab 1, pp. 7-397 [Claim].

5. In so concluding, the chambers judge reasoned that the length of the claim, in addition to its wide-ranging, often improper pleadings render it prolix in a manner offensive to the *Rule*s.[2]

6. The chambers judge decided that the claim was prolix under *Rules* 9-5(1)(b) (unnecessary, scandalous, frivolous or vexatious matters), and (c) (matters that may prejudice, embarrass or delay the fair trial or hearing of the proceeding). The chambers judge declined any weighing, limited or otherwise, in respect of the facts alleged.[3] The reasons for judgment ("Reasons") note that the claim improperly pleads declaratory relief for detached facts and general pronouncements of law.[4]

7. The chambers judge considered and declined to permit an amendment because a piecemeal striking and amending would invite more confusion and greater expenditure of resources.[5]

PART 2 - ISSUES ON APPEAL – THE TRIAL JUDGE DID NOT ERR

8. This appeal should be dismissed because the chambers judge correctly determined that the claim should be struck in its entirety.

9. The chambers judge did not make any reviewable errors when he:

    a. Allowed the application, and

        i. exercised his discretion to strike the claim on the basis that it is prolix, confusing, and fails to satisfy the *Rules;*

        ii. provided leave to file an amended claim consistent with the *Rules*;

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[2] *Action4Canada v. British Columbia (A.G.)*, 2022 BCSC 1507 at para. 45 [Chambers Judgment].
[3] Chambers Judgment at para. 27.
[4] Chambers Judgment at para. 53-58.
[5] *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at paras. 14-16 [*FORCOMP]*.

b. Found that the claim improperly seeks findings on detached facts and general pronouncements of law; and,

c. Exercised his direction in awarding costs to the respondents.

PART 3 - ARGUMENT

Standard of Review

10. The different parts of *Rule* 9-5(1) attract different standards of review.[6] Applications brought under *Rule* 9-5(b), (c) or (d) are discretionary and determined by contextual and factual considerations and are entitled to significant deference on appeal.[7]

11. The question of whether a pleading discloses a reasonable claim under *Rule* 9-5(1)(a) is generally considered to be a question of law that is reviewed on a correctness standard.[8] Questions of jurisdiction also raise questions of law and are reviewed on a standard of correctness.[9]

12. The chambers judge decided that the claim was prolix under *Rules* 9-5(1)(b) and (c). This was an exercise of discretion. The chambers judge considered and declined to permit an amendment, which also involved the exercise of judicial discretion.[10] Such decisions involving the exercise of judicial discretion are owed

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[6] *FORCOMP* at paras. 14-16. Leave to appeal to SCC refused, 40051 (30 June 2022).
[7] *FORCOMP* at paras. 14-16, citing: *Krist v. British Columbia*, 2017 BCCA 78 at para. 24.
[8] *FORCOMP* at paras. 14-16, citing: *E.B. v. British Columbia (Child, Family and Community Services)*, 2021 BCCA 47 at para. 31 [*E.B. v. B.C.*]; *Kindylides v. Does*, 2020 BCCA 330 at paras. 18–20 [*Kindylides*], leave to appeal to SCC refused, 39728 (14 October 2021). See also the discussion in *Scott v. Canada (A.G.)*, 2017 BCCA 422 at paras. 38–44 [*Scott*], leave to appeal to SCC refused, 37930 (30 August 2018), which acknowledges some inconsistency in the relevant authorities.
[9] *Watchel v. British Columbia*, 2020 BCCA 100 at para. 28; *Quinn v. British Columbia*, 2018 BCCA 320 at paras. 42-43; *Levy v. British Columbia (Crime Victim Assistance Program)*, 2018 BCCA 36 at para. 37; *Scott* at paras. 42-44.
[10] *FORCOMP* at paras. 14-16.

deference on appeal, unless it is clear that insufficient weight was given to relevant considerations, the decision involves a palpable and overriding error, or it appears that the decision may result in injustice.[11] None of these apply here. As emphasized by this Court: "It is well settled that this Court will hesitate long before interfering with a discretionary order of a judge of the Supreme Court of British Columbia."[12]

13. The chambers judge considered whether the claim failed to disclose a reasonable cause of action and should be struck under *Rule* 9-5(a) and/or as such was an abuse of process that should be struck under 9-5(d). He considered those rules with respect to a specific and narrow group of deficiencies in the claim, such as pleading evidence, non-justiciable claims, seeking declarations of fact and alleging criminal conduct by the defendants. Whether a pleading discloses a cause of action is a question of law that is reviewed on a correctness standard.[13] Whether a pleading is an abuse of process is discretionary.[14]

14. Ultimately, the chambers judge did not dismiss *any* of the claim or issue any order under the authority of either of Rule 9-5(1)(a) or (d). His commentary on all such matters is therefore not at the core or determinative of this appeal.

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[11] *FORCOMP*, at paras. 14-16*,* citing: *Timberwolf Log Trading Ltd. v. British Columbia (Forests, Lands and Natural Resources Operations)*, 2013 BCCA 24 at para. 19, citing: *Stone v. Ellerman*, 2009 BCCA 294 at para. 94, leave to appeal to SCC refused, 33333 (17 December 2009); *Hirji v. The Owners Strata Corporation Plan VR 44*, 2020 BCCA 285 at para. 23; *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at para. 6 [*Mercantile*].

[12] *Casa Roma Pizza, Spaghetti & Steak House Ltd. v. Gerling Global Insurance Company*, 1994 CanLII 1724 (BCCA) at para. 15.

[13] *FORCOMP* at paras. 14-16, citing: *E.B. v. B.C.* at para. 31; *Kindylides* at paras. 18–20, leave to appeal to SCC refused, 39728 (14 October 2021). See also the discussion in *Scott* at paras. 38–44, leave to appeal to SCC refused, 37930 (30 August 2018), which acknowledges some inconsistency in the relevant authorities.

[14] *FORCOMP* at paras. 14-16, citing: *Krist v. British Columbia*, 2017 BCCA 78 at para. 24.

15. The chambers judge's decision on costs is entitled to significant deference, as discussed in more detail under the costs argument further below.

A. The Claim is Prolix and Violates the Basic Tenets of Pleadings

16. The chambers judge's decision to strike the claim because it is prolix is a factually driven exercise of discretion. The chambers judge applied the correct test, noting that the Court should only strike a pleading where it is plain and obvious that the claim cannot succeed and where it is "bad beyond argument."[15] The appellants have not identified any reason to interfere with the finding that the claim met this threshold.[16]

17. As stated by the chambers judge: "The Oxford English Dictionary defines 'prolix' as writing that is 'tediously lengthy.' At 391 pages, the [claim] is clearly prolix."[17] The chambers judge correctly found that prolixity may fall under subsection (b), (c) or (d) of *Rule* 9-5(1). Depending on the circumstances, prolixity may cause the pleading to be embarrassing,[18] scandalous,[19] vexatious,[20] prejudicial[21] and/or an abuse of process.[22] In this case, the chambers judge held that the claim's prolixity violated subsections (b) and (c) of *Rule* 9-5(1).

18. The structure and content requirements of pleadings are meticulously set out in the *Rules*. The *Rules* are comprehensive and prescriptive. The pleadings offend the *Rules* in several ways. The length is a gross violation of *Rule* 3-1(2), which

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[15] *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at 176.
[16] Chambers Judgment at para. 45.
[17] Chambers Judgment at para. 32.
[18] *Sahyoun v. Ho*, 2015 BCSC 392 at para. 62.
[19] *Keddie v. Dumas Hotels Ltd. (1985),* 1985 CanLII 417 (BC CA), 62 B.C.L.R. 145 at paras. 7-8 *[Keddie];* as applied in *Fowler v. Canada (A.G.)*, 2012 BCSC 367 at para. 40-41.
[20] *Simon v. Canada (A.G.)*, 2015 BCSC 924 at para. 97, aff'd 2016 BCCA 52.
[21] *Camp Development Corporation v. Greater Vancouver (Transportation Authority)*, 2009 BCSC 819 at para. 27, aff'd 2010 BCCA 284.
[22] *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 37.

provides that a notice of civil claim must be concise.[23] The jurisprudence from this Court is clear that such offences to the mandatory requirements are sufficient to justify a decision to strike.[24]

19. The significant departure of the claim from the ordinary requirement for concise pleadings. As stated by this Court in *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362, and properly relied on by the chambers judge

> **[n]one of a notice of claim, a response to civil claim, and a counterclaim is a story**. Each pleading contemplates and requires a reasonably disciplined exercise that is governed, in many instances in mandatory terms, by the *Rules* and the relevant authorities. Each requires the drafting party to "concisely" set out the "material facts" that give rise to the claim or that relate to the matters raised by the claim. None of these pleadings are permitted to contain evidence or argument.[25] [emphasis added]

20. If a story is to be told, then it should be reserved for trial where evidence can be adduced and properly weighed.

21. Striking the claim prevents the parties from being drawn into unfocused and meandering litigation. Extensive historical, background and scientific facts can and should be brought out and weighed only at trial. Otherwise, the important issues that the Court will be called upon to decide are unclear.[26] Material facts are overwhelmed by details inserted only to provide colour, plausibility or rhetorical

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[23] *Supreme Court Civil Rules*, R. 3-1(2) A notice of civil claim must do the following:
(a)set out **a concise** statement of the material facts giving rise to the claim;
(b)set out the relief sought by the plaintiff against each named defendant;
(c)set out **a concise** summary of the legal basis for the relief sought;
(d)set out the proposed place of trial;
(e)if the plaintiff sues or a defendant is sued in a representative capacity, show in what capacity the plaintiff sues or the defendant is sued;
(f)provide the data collection information required in the appendix to the form;
(g)otherwise comply with Rule 3-7. [emphasis added]

[24] *Mercantile* at paras. 58-59.

[25] *Mercantile* at para. 44.

[26] *Mercantile* at paras. 23, 51-52.

value. In turn, the parties are distracted into useless discovery and unnecessary pre-trial processes that are avoided by pleadings that effectively guide the litigation to trial.[27] The practical approach of the chambers judge results in no injustice to the parties and serves them well going forward.

22. The chambers judge gave proper weight to relevant considerations. He considered and dismissed the possibility that the length and scope of the claim was somehow proportionate to the size and the complexity of the issues at hand.[28]

23. The chambers judge found that in addition to length, the claim failed to comply with the *Rules* and the basic tenets of pleadings.[29] He correctly found it is not a proper pleading that can be answered by the respondents.

24. Just as significantly, he correctly found that it was not for him to attempt to parse through it to indicate whether paragraphs, categories, or claims should remain in or should be struck: "That is not the proper role of this court. It is counsel's obligation to draft pleadings that do not offend the mandatory requirements of the Rules."[30]

B. The Claim Pleads Improper Content

25. While not determinative, the chambers judge considered and found that the claim includes non-justiciable claims which are improper for a civil action. Such findings are included in the Reasons. They are not proper grounds for an appeal.

26. For example, the claim:[31]

- describes wide-ranging global conspiracies that may, or may not, have influenced the federal or the provincial government;

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[27] *Mercantile* at paras. 42-50*; Keddie* at para. 7.
[28] Chambers Judgment at para. 43(e).
[29] Chambers Judgment at para. 35.
[30] Chambers Judgment at para. 51.
[31] Chambers Judgment at paras. 45 and 52.

- alleges criminal conduct;
- seeks a declaration that the preponderance of the scientific community is of the view that masks are ineffective in preventing transmission;
- seeks 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”;
- seeks 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;
- seeks 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
- seeks 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.

27. The chambers judge found those pleadings above to be improper. However he did not dismiss those or any parts of the action. He did not conduct an exhaustive review of the claim. He determined that he was unable to parse the claim to indicate whether paragraphs, categories, or claims should remain in or should be struck, stating: “[t]hat is not the proper role of this court.”[32]

28. The chambers judge considered and correctly found that the claim could not be mended by striking portions. Citing by comparison *Homalco Indian Band v. British*

[32] Chambers Judgment at para. 51.

Columbia:[33] "[t]he statement of claim is an embarrassing pleading…Any attempt to reform it by striking out portions and by amending other portions is likely to result in more confusion as to the real issues."

29. The chambers judge correctly found that the claim seeks declarations of fact that do not resolve the relative legal interests of the appellants.[34] Such relief sought is unobtainable from the Court. The chambers judge was asked to refuse such relief outright as an abuse of process. However, he declined to do so, stating that "it is possible that other valid claims exist" if "framed in a manner that is intelligible" and that "it would be improper for me, at this stage, to foreclose upon the plaintiffs' right to bring their claims."[35] The chambers judge set out the correct test for declaratory relief, and one example of how the relief sought in the claim is offensive to the test, but ultimately stayed the action pending the filing of a fresh pleading.[36]

30. The chambers judge correctly identified that the following specific declaration sought in the second paragraph numbered 302 of the claim is not within the Court's capacity or jurisdiction to grant:

    a. Declaration that the declared rationales and motives, and execution of COVID Measures, by the WHO, are not related to a bona fide, nor an actual 'pandemic', and declaration of a bona fide pandemic, but for other political and socio-economic reasons, motives and measures at the behest of global Billionaire, Corporate and Organizational Oligarchs.[37]

31. The "political and socio-economic reasons, motives and measures" of the WHO are not capable of a declaration. These could potentially be subject to a finding of fact at trial. However, as a relief sought, it is of no use to the appellants. It makes

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[33] *Harry v. British Columbia*, 1998 CanLII 6658, [1998] BCJ No 2703 (QL) at para. 11; Chambers Judgment at para. 46.
[34] Chambers Judgment at paras. 56-58.
[35] Chambers Judgment at paras. 71-73.
[36] Chambers Judgment at paras. 56-57 and 72.
[37] Chambers Judgment at para. 57, citing to para. 302 of the Claim, Appeal Book, Tab 1, p. 336.

no determination of their legal interests. The chambers judge made no errors in his application of the test. Courts do not have jurisdiction to make declarations pertaining solely to findings of facts.

32. The chambers judge correctly relied on *West Moberly First Nation v. British Columbia* citing *S.A. v. Metro Vancouver Housing Corp* to describe how to determine the boundaries of available declaratory relief.[38] A declaration can only be granted if it settles a "live controversy" between the parties.[39] This is a practical question: what is the effect of the requested remedy on the parties' rights? Declarations must be connected to legal rights, rather than facts detached from those rights or law generally.[40]

33. Declaratory relief on all grounds, including constitutional grounds, must meet that same threshold for practical utility. The jurisprudence is clear that where a party seeks declarations such as Constitutional remedies, the declarations must resolve contested legal rights.[41] Constitutional declarations opine on the invalidity of legislation or the rights of individuals, and in either case, they are a discretionary remedy that allows the court to be flexible in its determination of the type of solution warranted.

34. The chambers judge identified the following as improper to a civil action. He may have equally noted that such declaratory relief is not capable of being granted for the reasons articulated above. It is impossible to see how the declaratory relief

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[38] Chambers Judgment at para. 56; *West Moberly First Nations v. British Columbia,* 2020 BCCA 138 at para. 308 [*West Moberly First Nations]* citing *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 at para. 60.
[39] *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821 [*Solosky*]; *Borowski v. Canada (A.G.)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342 cited in *West Moberly First Nations* at para. 310.
[40] *1472292 Ontario Inc. (Rosen Express) v. Northbridge General Insurance Company*, 2019 ONCA 753 at para. 30 as cited in *West Moberly First Nations* at para. 312.
[41] *Operation Dismantle Inc. v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441.

requested below determines any of the appellants' rights or reflects the questions of constitutional infringement that the appellants say is the core of their claim:[42]

a. a Declaration that administering medical treatment without informed consent constitutes experimental medial treatment which is contrary to the Nuremburg Code, the Helsinki Declaration and is a crime against humanity under the *Criminal Code* of Canada;[43]

b. a Declaration that the unjustified, irrational, and arbitrary decisions of which business 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;[44] and

c. 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.[45]

35. The appellants rely on *Singh v. Canada*,[46] *Canada v. Solosky*,[47] and *Manitoba Metis Federation Inc v. Canada*,[48] to support their appeal. These cases do not assist the appellants; the chambers judge's decision is entirely consistent with them. These cases say declarations must confirm or deny a legal right.[49] In *Singh*, the Court references *Solosky*, noting the preconditions to be met for declaratory relief.[50] In *Solosky,* the Court imposed a two-stage test for granting declaratory relief: (1) the dispute must be real and substantial, such that it is not moot,

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[42] Appellants' factum at para. 11.
[43] Chambers Judgment at para. 52, Claim at para. 333, Appeal Book, Tab 1, p. 375.
[44] Chambers Judgment at para. 52, Claim at para. 307, Appeal Book, Tab 1, p. 341.
[45] Chambers Judgment at para. 52, Claim at para. 311, Appeal Book, Tab 1, p. 342.
[46] *Singh v. Canada (Citizenship and Immigration)*, 2010 FC 757 [*Singh*]; Appellant's Factum at para. 8.
[47] *Solosky*; Appellant's Factum at para. 8.
[48] *Manitoba Metis Federation Inc. v. Canada (A.G.)*, 2013 SCC 14 [*Manitoba Metis*].
[49] *R. v. Armstrong*, 2012 BCCA 242 at para. 38.
[50] *Singh***,** at para. 38.

academic, or may not arise; and (2) if the dispute is real, the court must determine whether granting the declaration requested would have **any practical effect** of resolving the issues in the case.[51] It is clear from these authorities that while the subject matter of government action that can be addressed by a declaration should not be limited, the declaration itself must still hinge on a real legal issue before the court.

36. The appellants' cite *Manitoba Metis*: "The courts are the guardians of the Constitution and cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter."[52] This citation explicitly confirms that while the range of topics for declarations cannot be barred by statute, the nature of declaratory relief requires and implies an interpretation of a constitutional right at issue.

37. In the alternative, the appellants argue that the chambers judgment must be corrected, asking this Court to set aside findings on whether certain relief can be sought. Canada says the jurisprudence is clear and was properly applied by the chambers judge: a declaration can only be granted if it will have practical utility in interpreting legal rights. If in a subsequent iteration of the claim the appellants seek declarations that are detached from their legal rights or the law generally, it is not the chambers judge that precludes them from doing so. Indeed, it is the law.

38. If the Court agrees with the appellants regarding certain declarations, it would be open to the appellants to plead it in a fresh claim.

C. The Chambers Judge Made No Improper Findings

39. The chambers judge properly does not weigh the alleged facts and correctly assumes that the appellants' allegations, if properly pleaded, are true.[53] Any argument that the appellants advance regarding improper findings of fact made by

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[51] *Solosky* at 822 [emphasis added].
[52] *Manitoba Metis* at para. 140; appellant's factum at para. 9.
[53] Chambers Judgment at para. 27.

the chambers judge are simply not borne out by a careful reading of the decision. Nonetheless, it is not fundamentally wrong to look behind the allegations in some cases. The case law expressly allows for cautious skepticism, and that allegations must be taken to be true does not extend to facts manifestly incapable of being proven.[54]

40. For example, the appellants raise whether it was inaccurate or improper for the chambers judge to describe the claim as challenging the "mainstream understanding of the science underlying both the existence of, and the government's responses to the COVID-19 pandemic."[55] The appellants take issue with the use of the term "mainstream understanding."

41. The term used by the chambers judge is not improper. Canadian Courts have taken judicial notice of the understanding that COVID-19 is caused by the SARS-CoV-2 Virus,[56] thus the designation of the view as "mainstream" is fair and proper. The chambers judge made no findings of fact on the content of mainstream understanding.

42. To say that the appellants challenge "mainstream understanding" is not inaccurate. The appellants describes the COVID-19 pandemic as "a false pandemic."[57] Further examples in the claim include the section entitled "The Covid -Measures Unscientific, Non-Medical, Ineffective, and Extreme" followed by a chapter titled,

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[54] *Young v. Borzoni et al*, 2007 BCCA 16 at para. 30 [*Young*]*; R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 22.
[55] Appellants' Factum at para. 2.
[56] *Khodeir v. Canada (A.G.)*, 2022 FC 44 at para. 62, citing: *R. v. Morgan*, 2020 ONCA 279 at para. 8; *Manson v. Carruthers*, 2020 ONSC 6511 at para. 18; *TRB. v. KWPB*, 2021 ABQB 997 at para. 12; *OMS v. EJS*, 2021 SKQB 243 at paras. 112-114; *BTK v. JNS*, 2020 NBQB at paras. 19-22; *R. v. Pruden*, 2021 ABPC 266 at para. 54; *Halton Condominium Corp. No. 77 v. Mitrovic*, 2021 ONSC 2071 at para. 17.
[57] Submissions for the Plaintiffs by Counsel R. Galati, May 31, 2022, Transcript 47:19, Appeal Book Tab 5, p. 2560; See for example, Claim, Appeal Book, Tab 1, p. 323.

"HYPER – INFLATED, DISTORDETED [*sic*] TOTAL NUMBER OF CV-19 'CASES' & 'DEATHS'."[58]

43. As to the scope of the jurisdiction of the chambers judge, it is settled law that where the facts pleaded are based purely on assumptions or wild speculations or are incapable of proof, they may be subject to scrutiny by the court, albeit with great caution.[59] The chambers judge would have been well within his jurisdiction to subject any of the wide-sweeping, inflammatory allegations made in the claim to some cautious scrutiny.

D. The Chambers Judge Properly Awarded Costs

44. Costs are discretionary.[60] Pursuant to *Rule* 14-1(9)[61], the standard for review of a trial judge's order for costs is high. The Court of Appeal is justified in interfering with the trial judge's exercise of discretion only if the trial judge misdirects himself, or his decision is so clearly wrong as to amount to an injustice.[62] Misdirection may include making an error as to the facts of the case, taking into consideration irrelevant factors or failing to take into account relevant factors, all of which would amount to an error in principle.[63] None of those factors apply here.

45. The respondents were successful in their applications. 'Success' means "substantial success" and that is measured objectively by looking at the issues and their importance and determining whether a party achieved success on seventy-five percent of the matter in dispute.[64] The chambers judge found it appropriate to award each defendant the costs for the necessary steps of preparing for and

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[58] Claim, Appeal Book, Tab 1, pp. 175 – 201.
[59] *Young* at paras. 25-31; *McDaniel v. McDaniel*, 2009 BCCA 53 at para. 22.
[60] *Sutherland v. A.G.*, 2008 BCCA 27 at para. 24.
[61] *Supreme Court Civil Rules*, R. 14-1(9).
[62] *Fraser River v. Can-Dive*, 2002 BCCA 219 at para. 7 citing to *Laurin v. Ford Credit Canada Ltd.*, 1992 CanLII 1752 (BC CA) at para. 7.
[63] *Elsom v. Elsom*, 1989 CanLII 100 (SCC), [1989] 1 S.C.R. 1367 at 1377.
[64] *Fotheringham v. Fotheringham*, 2001 BCSC 1321.

attending the successful strike application – noting that none of those steps would have been necessary if the matter was properly pleaded.[65]

E. Conclusion

46. This appeal should be dismissed.

PART 4 - NATURE OF ORDER SOUGHT

47. Canada asks that this appeal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, this 20th of January, 2023.

COUNSEL FOR THE ATTORNEY GENERAL OF CANADA

Andrea Gatti
Olivia French

Counsels for the Respondent,
Attorney General Of Canada

[65] Chambers Judgment, at para. 75.

APPENDICES: LIST OF AUTHORITIES

Authorities	**Paragraph Reference in factum**
Caselaw	
Action4Canada v. British Columbia (A.G.), 2022 BCSC 1507	5, 6, 16, 17, 22-24, 26-30, 32, 34, 39, 45
Borowski v. Canada (A.G.), 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342	32
Camp Development Corporation v. Greater Vancouver (Transportation Authority), 2009 BCSC 819, aff'd 2010 BCCA 284	17
Casa Roma Pizza, Spaghetti & Steak House Ltd. v. Gerling Global Insurance Company, 1994 CanLII 1724 (BCCA)	12
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Harry v. British Columbia, 1998 CanLII 6658, [1998] BCJ No 2703 (QL)	28
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McDaniel v. McDaniel, 2009 BCCA 53	43
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Authorities	**Paragraph Reference in factum**
Operation Dismantle Inc. v. The Queen, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441	33
Quinn v. British Columbia, 2018 BCCA 320	11
R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42	39
R. v. Armstrong, 2012 BCCA 242	35
Sahyoun v. Ho, 2015 BCSC 392	17
Simon v. Canada (A.G.), 2015 BCSC 924 at para. 97, aff'd 2016 BCCA 52	17
Singh v. Canada (Citizenship and Immigration), 2010 FC 757	35
Solosky v. The Queen, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821	32, 35
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Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63	17
Watchel v. British Columbia, 2020 BCCA 100	11
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APPENDICES: ENACTMENTS

Court Rules Act

SUPREME COURT CIVIL RULES

B.C. Reg. 168/2009
O.C. 302/2009

Part 3 — Proceedings Started by Filing a Notice of Civil Claim

Rule 3-1 — Notice of Civil Claim

Contents of notice of civil claim

(2)A notice of civil claim must do the following:

(a)set out a concise statement of the material facts giving rise to the claim;

(b)set out the relief sought by the plaintiff against each named defendant;

(c)set out a concise summary of the legal basis for the relief sought;

(d)set out the proposed place of trial;

(e)if the plaintiff sues or a defendant is sued in a representative capacity, show in what capacity the plaintiff sues or the defendant is sued;

(f)provide the data collection information required in the appendix to the form;

(g)otherwise comply with Rule 3-7.

Rule 9-5 — Striking Pleadings

Scandalous, frivolous or vexatious matters

(1)At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a)it discloses no reasonable claim or defence, as the case may be,

(b)it is unnecessary, scandalous, frivolous or vexatious,

(c)it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or

(d)it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[am. B.C. Reg. 119/2010, Sch. A, s. 22.]

Rule 14-1 — Costs

Costs to follow event

(9)Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.