COURT OF APPEAL

ON APPEAL FROM the order of Justice Ross of the Supreme Court of British Columbia pronounced on August 29, 2022.

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

(Plaintiffs/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)

(Defendants/Respondents)

RESPONDENTS' FACTUM

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CHRONOLOGY

Date	Event
17 August 2021	The appellants file a 391 page notice of civil claim (the “NOCC”).
14 October 2021	Vancouver Island Health Authority and Providence Health Care (the “Health Authority Respondents”) file their response to civil claim denying liability and asserting that the notice of civil claim is frivolous, vexatious, prolix and fails to disclose a cause of action.
12 January 2022	Her Majesty the Queen in right British Columbia (the "Province"); Dr. Bonnie Henry, Premier John Horgan, Minister of Health, Jennifer Whiteside, Minister of Education, Mike Farnworth, Minister of Public Safety and Solicitor General (collectively, the "Provincial Respondents") file an application seeking to have the claims against them struck.
17 January 2022	The Health Authority Respondents file a notice of application seeking to have the claims against them struck.
14 April 2022	Peter Kwok and TransLink (British Columbia) file a notice of application seeking to have the claims against them struck.
28 April 2022	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 (collectively, the “Canada Respondents”) file a notice of application seeking to have the claims against them struck.
18 May 2022	The appellants file a single application response to all defense applications to have the NOCC struck.
25 May 2022	Kimberly Woolman and the Estate of Jaqueline Woolman file a notice of discontinuance for their claims against all defendants.

	This appears to end the claim against the Vancouver Island Health Authority.
31 May 2022	The applications are heard before the Honourable Justice A. Ross. Justice Ross reserved his decision.
29 August 2022	Justice Ross renders judgment on the applications and makes the following orders: the NOCC is struck in its entirety as it is prolix, the appellants have leave to amend the NOCC, the action is stayed pending filing of a fresh pleading, and the defendants are awarded costs for the proceeding to date in any event of the cause payable forthwith. Indexed as: *Action4Canada v British Columbia (Attorney General)*, 2022 BCSC 1507.

OPENING STATEMENT

This appeal is premised on a misunderstanding of the reasons for judgment by, and order of, Justice Ross.

The appellants ignore that the notice of civil claim was struck due to its prolix and confusing nature, and focus on challenging the obiter of Justice Ross in respect of which claims are properly included in the notice of civil claim. Justice Ross did not specifically strike any of the claims in the notice of civil claim, but rather sought to provide guidance on which claims could be properly included in the next iteration of the appellants' notice of civil claim. These issues are irrelevant to the issue of whether or not Justice Ross' order ought to be overturned. Rather, this appeal ought to address the serious defects in the notice of civil claim which render it prolix, scandalous, embarrassing, and confusing to the point where it is impossible to properly respond to.

The appellants further state they are appealing the costs order of Justice Ross, then provide no argument beyond asserting that they achieved a spilt decision on the underlying applications. They provide no basis to interfere with the discretionary decision to award costs by Justice Ross. This order is clearly warranted considering the significant defects which were found with the form and content of the appellants' pleading.

In the underlying decision of *Action4Canada v. British Columbia (Attorney General)*, 2022 BCSC 1506, Justice Ross correctly found that the appellants' notice of civil claim is clearly prolix, embarrassing, and cannot properly be answered by a responsive pleading, and struck it pursuant to subrules 9-5(1)(b) and 9-5(1)(c) of the *Supreme Court Civil Rules*. The respondents respectfully submit that Justice Ross' determination should be upheld by this Court.

PART 1 - STATEMENT OF FACTS

1. On 17 August 2021, the appellants filed their 391 page notice of civil claim (the “NOCC”).

2. The NOCC attempts to challenge the scientific and legal basis for the entirety of British Columbia and Canada's response to the COVID-19 pandemic. Part 1 of the NOCC contains over 1,300 paragraphs and sub-paragraphs.

3. The NOCC is a prolix and convoluted document that is replete with groundless accusations against public bodies and public officials, inflammatory language, and conspiracy theories.

4. The NOCC characterises the COVID-19 pandemic as a "false pandemic" that was "designed and implemented for improper and ulterior purposes, at the behest of the World Health Organization, controlled and directed by Billionaire, Corporate, and Organizational Global Oligarchs" such as Bill Gates in order to "install a New World (Economic) Order" (Part 1, paras. 155, 283). Bill Gates is not a party to this proceeding.

5. For example, the appellants petition the Supreme Court for declarations pertaining to questions of science, public health, and conspiracy theories that are not justiciable, including, but not limited to:

    a. "A Declaration that the science, and preponderance of the scientific world community, is of the consensus that: a) masks are completely ineffective in avoiding or preventing transmission of an airborne, respiratory virus such as SARSCoV-2 which leads to COVID-19" (Part 2, para. 312(1));
    b. "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" (Part 2, para. 302);

c. "A Declaration that administrating medical treatment without informed consent constitutes experimental medical treatment" (Part 2, para. 321);
d. "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 favor mega-corporations and to de facto put most small businesses and activities out of business" (Part 2, para. 307); and
e. "A Declaration that the measures of masking, social distancing, PCR testing, and lockdowns of schools in British Columbia, by the Respondents, are: a) not scientifically, or medically, based; b) based on a false, and fraudulent, use of the PCR test, using a threshold cycle of 43-45 cycles in that once used above the 35 threshold cycles, of all the positives it registers, 96.5%, are "false positives", resulting in an accuracy rate, as a mere screening test, of 3.5% accuracy" (Part 2, para. 311).

6. The appellants allege numerous violations (and non-violations) of the *Criminal Code* including, but not limited to:

a. "Crime[s] against humanity under the Criminal Code of Canada" (Part 1, para. 299; Part 3, para. 333);
b. "Medical experimentation" that constitute "Criminal act[s] ... pursuant to the War Crime and Crimes against Humanity Act" (Part 2, para. 292(a));
c. "Criminal extortion" (Part 1, para. 261);
d. "The 'extra' suicides and drug over-doses undisputedly tied to Covid-measures constitutes criminal negligence causing death" (Part 1, para. 264);
e. "Criminal vaccine experiments causing horrific damage to innocent children in India, Pakistan, Africa and other developing countries" (Part 1, para. 21 l(a));
f. A Declaration that failure and/ or refusal to comply with Provincial Covid Measures does not constitute a "common nuisance" contrary to s.180 of the

Criminal Code or constitute "obstruct peace officer" contrary to s. 129 of the Criminal Code (Part 2, para. 323(f)).

7. The appellants allege numerous violations of international legal instruments, unwritten constitutional principles, and causes of action unknown to law that are not actionable in Canadian courts including the following:

   a. "Vaccine mandates violate 'The Universal Declaration of Bioethics and Human Rights', the Nuremberg Code, professional codes of ethics, and all provincial health Acts." (Part 1, para. 260);
   b. "Administering medical treatment without informed consent constitutes experimental medical treatment contrary to the Nuremberg Code and Helsinki Declaration of 1960" (Part 1, para. 299; Part 3, para. 333);
   c. "Vesting an indefinite emergency power in [various defendants] constitutes constitutional violation of 'dispensing with Parliament, under the pretense of Royal Prerogative', contrary to the English Bill of Rights (1689) as read into our unwritten constitutional rights through the Pre-Amble of the Constitution Act, 1867" (Part 2, para. 295; Part 3, para. 336);
   d. "The declared state of emergency, and measures implemented thereunder contravene" … "the same parallel unwritten constitutional rights, enshrined through the Pre-Amble of the Constitution Act, 1867" (Part 1, para. 283(c)(iv);
   e. "[T]hat (solitary confinement) isolation/quarantine of asymptomatic children" violates the "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") and the Convention on the Rights of the Child" (Part 2, para. 311 (e); and
   f. "The COVID Measures taken by both Trudeau, Horgan, Farnworth, Dix, Whiteside, and Henry, and their respective governments, … constitute a constitutional violation of the abdication of the duty to govern" (Part 2, para. 296; Part 3, para. 326).

8. Many of the declarations sought are intermingled and appear to be against all of the respondents. It is not clear to the Health Authority Respondents which declarations are sought against them as opposed to other respondents. With respect to the monetary relief sought in Part 2 paragraph 324, this again does not specify the respondent(s) from whom the relief is sought.

9. On 14 October 2021, the Health Authority Respondents filed their response to civil claim denying liability and asserting that the notice of civil claim is frivolous, vexatious, prolix and fails to disclose a cause of action.

10. On 12 January 2022, Her Majesty the Queen in right British Columbia (the "Province"); Dr. Bonnie Henry, Premier John Horgan, Minister of Health, Jennifer Whiteside, Minister of Education, Mike Farnworth, Minister of Public Safety and Solicitor General (collectively, the "Provincial Respondents") filed an application seeking to have the claims against them struck.

11. On 17 January 2021, the Health Authority Respondents filed a notice of application seeking to have the claims against them struck pursuant to Rule 9-5(1)(a)-(d).

12. On 14 April 2022 Peter Kwok and TransLink (British Columbia) filed a notice of application seeking to have the claims against them struck.

13. On 28 April 2022, 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 (collectively, the “Canada Respondents”) filed a notice of application seeking to have the claims against them struck.

14. On 18 May 2022, the appellants filed a single application response to all defense applications to have the NOCC struck. There is no specific response to the application of the Health Authority Respondents. Rather the response focuses on

the ability to challenge the constitutionality of legislation. This would appear to only address the applications of the Province Respondents and Canada Respondents.

15. On 25 May 2022, Kimberly Woolman and the Estate of Jaqueline Woolman filed a notice of discontinuance for their claims against all defendants. This appears to end the claim against the Vancouver Island Health Authority.

16. On 31 May 2022, the applications to strike were heard together before the Honourable Justice A. Ross. Justice Ross reserved his decision.

17. On 29 August 2022, Justice Ross rendered judgment on the applications and made the following orders: the NOCC is struck in its entirety as it is prolix, the appellants have leave to amend the NOCC, the action is stayed pending filing of a fresh pleading, and the defendants are awarded costs for the proceeding to date in any even of the cause payable forthwith.

Action4Canada v British Columbia (Attorney General), 2022 BCSC 1507 at paras. 74- 76

18. In striking the NOCC for being prolix, Justice Ross sought to provide guidance as to the re-drafting of the claim:

> [51] To put those points another way, I have indicated above that the prolix nature of the NOCC makes it impossible for the defendants to respond to it. For the same reason, I am not able to parse the 391 pages of the improperly drafted NOCC and 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.*
>
> [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.

[53] I agree with the defendants that these are improper claims.

[54] I note the remarkably apposite comments of Strayer J. in *Vancouver Island Peace Society v. Canada,* 1992 CanLII 14767 (FC), [1992] 3 F.C. 42 at 51:

> … It is not the role of the Court in these proceedings to become an academy of science to arbitrate conflicting scientific predictions, or to act as a kind of legislative upper chamber to weigh expressions of public concern and determine which ones should be respected. Whether society would be well served by the Court performing either of these functions, which I gravely doubt, they are not roles conferred upon it in the exercise of judicial review ...

[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.

[56] An additional issue, related to justiciability, is that the NOCC seeks a number of declarations of fact. In *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 at para. 312, the Court of Appeal reviewed the law

concerning the propriety of declaratory relief. The Court noted that even when the requirements set out in *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 at para. 60 are met, declaratory relief remains discretionary:

> [310] Where these factors are met, a court looks at the practical value of the declaration in assessing if it should exercise its discretion to grant such a remedy:
>
> > A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties: see also *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821; *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342.
> >
> > *Daniels* at para. 11; see also *S.A.* at para. 61.
>
> [311] This Court has also phrased the question as "whether a 'useful purpose' would be served by granting the order": *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 at para. 71; see also *Greater Vancouver Regional District v. British Columbia (Attorney General)*, 2011 BCCA 345 at para. 52 [*GVRD*].
>
> [312] An assessment of the practical utility of a declaration necessarily looks at the effect of the requested remedy on the parties' rights. Declarations must be connected to legal rights, rather than, for example, facts "detached" from those rights or "law generally": *1472292 Ontario Inc. (Rosen Express) v. Northbridge General Insurance Company*, 2019 ONCA 753 at para. 30; *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435 at 501. Detached facts and general pronouncements of law have little utility.
>
> [Emphasis added.]

[57] A good example of a proposed declaration of fact is set out at (the second) para. 302 of the NOCC where the plaintiffs seek:

> 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

[58] This is just one example, among many, of a declaration that is detached from law generally. It has little to do with the rights of the parties and instead seeks a declaration of fact about the motives of a non-party international organization. Pleading declaratory relief of this nature is improper.

19. These comments are not binding orders and are not appealable. In any event, Justice Ross is correct in his comments about the NOCC.

PART 2 - ISSUES ON APPEAL

20. Whether Justice Ross erred by striking the appellants' notice of civil claim as prolix.

21. Whether Justice Ross erred by awarding costs to the respondents.

PART 3 - ARGUMENT

22. The appellants have appealed the obiter of Justice Ross' decision, and not the actual basis on which he struck the notice of civil claim. The issue in this appeal ought to be whether the NOCC was properly struck as being prolix.

23. The Health Authority Respondents say the notice of civil claim is clearly prolix, scandalous, embarrassing, and is not a proper pleading that can be answered by any of the respondents. The notice of civil claim was properly struck in accordance with principles underlying *Supreme Court Civil Rules* 9-5(1)(b) and 9-5(1)(c).

Standard of Review

24. The appellants have not provided an analysis of the appropriate standard of review and instead proceed as if it is correctness. This error permeates all arguments in their factum.

25. The standard of review in respect of the strike of a notice of civil claim pursuant to *Supreme Court Civil Rules* 9-5(1)(b) and 9-5(1)(c) is palpable and overriding error, whether it is clear that insufficient weight was given to relevant considerations, or whether the decision may result in injustice.

26. This Court has recently rendered a decision discussing the standard of review in *FORCOMP Forestry Consulting Ltd. v. British Columbia,* 2021 BCCA 465 (leave for appeal dismissed with costs at 2022 CanLII 56487 (SCC)). This Court wrote:

> [14] The different parts of R. 9-5(1) attract different standards of review. The question of whether a pleading discloses a reasonable claim or defence under R. 9-5(1)(a) is generally considered to be a question of law that is reviewed on the correctness standard.
>
> [15] Conversely, applications brought under R. 9-5(1)(b), (c) or (d) are discretionary and determined by contextual and factual considerations. A decision involving the exercise of judicial discretion is owed 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.
>
> [16] The question to permit an amendment, rather than strike the pleading, also involves the exercise of judicial discretion.
>
> [internal citations omitted, underlining added by the Health Authority Respondents].

27. The Health Authority Respondents say that Justice Ross stated the correct test and applied the correct legal standard in exercising his discretion in striking the notice of civil claim. His decision is entitled to deference by this Court, and can only be overturned if the appellants demonstrate that the decision clearly did not give sufficient weight to relevant considerations, there is a palpable and overriding error, or it is shown that the decision may result in injustice. Given that the appellants were granted leave to amend the NOCC, it is challenging to see how the third factor could be at play in this appeal.

28. The Health Authority Respondents say that the appellants have not identified or alleged any error on the part of Justice Ross.

29. The Health Authority Respondents say further Justice Ross made no such palpable or overriding errors, there are no relevant considerations which were not given sufficient weight, there is no injustice, and his decision to strike the notice of civil claim should be upheld.

30. For an appeal of the costs award, costs awards are discretionary and the standard of review is whether there was an error of principle or if the costs award is clearly wrong.

Nolan v. Kerry (Canada) Inc., 2009 SCC 39;
Hamilton v. Open Window Bakery Ltd., 2004 SCC 9

31. This was recently confirmed by this Court in the decision of *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, 2018 BCCA 423 at para 6 [“*Conseil scolaire*”].

32. The Health Authority Respondents say Justice Ross made no error in principal and his costs award is not clearly wrong, and his order for costs should be afforded deference.

Prolixity

33. The NOCC is clearly prolix, confusing, contains irrelevant facts, argument and evidence, and it is not possible to identify the claims the Health Authority Respondents have to meet, or for them to provide a reasonable and concise response. Justice Ross was correct to strike the NOCC. In the alternative, Justice Ross did not make a palpable and overriding error.

34. Rule 9-5 of the Supreme Court Civil Rules states:

> **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.

35. The recent case of *Andreasen v. Malahat Nation,* 2022 BCSC 363 ("*Andreasen*") sets out the judicial interpretations regarding applications to strike claims under Rule 9-5(1):

> [60] On an application pursuant to R. 9-5(1)(a) to strike a claim on the basis that it discloses no cause of action, the question is whether it is plain and obvious that

> the claims, as pleaded, cannot succeed- assuming the facts as stated in the pleading can be proved: *Shaw Cablesystems [Limited v. Concord Pacific Group Inc.,* 2009 BCSC 203] at paras. 11-12.
>
> [61] Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case: *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959, 1990 CanLII 90 at 980.
>
> [62] With respect to an application to strike pursuant to R. 9-5(1)(b), (c), and (d), the applicable test has been summarized as follows in *Dempsey et al. v. Envision Credit Union et al.,* 2006 BCSC 750 at para. 17:
>
> > [17] In summary, a pleading will be struck out if:
> >
> > a. the pleadings are unintelligible, confusing, and difficult to understand;
> >
> > b. the pleadings do not establish a cause of action and do not advance a claim known in law;
> >
> > c. the pleadings are without substance in that they are groundless, fanciful and trifle with the Court's time;
> >
> > d. the pleadings are not bona fides and are designed to cause the Defendants anxiety, trouble, and expense;
> >
> > e. the action is brought for an improper purpose, particularly the harassment and oppression of the Defendants.

36. In accordance with the principles set out in *Andreasen*, Justice Ross struck the notice of civil claim because it was prolix, rendering it unintelligible, confusing, and difficult to understand.

37. The object of a notice of civil claim is to serve the ultimate function of pleadings, namely, the clear definition of issues of fact and law to be determined by the court and the material facts (succinctly stated) of each cause of action relied upon.

Andreasen at para. 63,

citing *Sahyoun v. Ho,* 2013 BCSC 1143 ("*Sahyoun*") at paras. 16-18

38. A proper notice of civil claim is efficient and facilitates fairness in that it enables a defendant to identify the claim they must meet, will confine the ambit of examinations for discovery and for trial, and allow parties to focus their resources on those matters that are of import and to ignore those that are not. The role of pleadings are to serve as the frame for the action, by precisely defining the issues the court will be asked to decide, by advising the court of what it will be asked to decide, by advising the other side of the case to be met, by determining the extent of pre-trial procedures, and by guiding the trial process.

Sahyoun, para. 18 and *Lu v. Shen,* 2020 BCSC at para. 42
cited in *Andreasen* at para. 65

39. Regarding Rule 9-5(1)(b), a pleading may be characterized as unnecessary, frivolous or vexatious where it is so confusing that it is difficult to understand what is pleaded.

Hutchenson v. British Columbia, 2020 BCSC 1986 ("*Hutchenson*") at para. 22
citing *Sahyoun* at para. 58

40. Regarding Rule 9-5(1)(c), pleadings are embarrassing when they are prolix, confusing, and unintelligible. When pleadings are constructed in such a way that it is impossible to provide a reasonable and concise response, or where they contain irrelevant facts, argument, or evidence, they are embarrassing.

Hutchenson, para. 23, citing *Sahyoun* at para. 62

41. In some cases, deficient pleadings do not easily lend themselves to an obvious application a particular subrule. This exact problem was commented on in *Sahyoun:*

> [62] A pleading can be embarrassing if it does not state the real issue in an intelligible form. It can also be embarrassing if it is prolix, includes irrelevant facts, argument or evidence. It can be prejudicial if it is designed to or has the

> effect of confusing the defendant, making it difficult, if not impossible, to answer: *Virk v. Brar,* 2012 BCSC 1004 at para. 75.
>
> …
>
> [64] In this case, the Amended Pleading is so overwhelmed with difficulty that it is simply not possible to fully identify all of the specific inadequacies that exist, or to categorize those difficulties into the specific subparagraphs of R. 9-5(1). It is also not possible to deal with the deficiencies in the Amended Pleading that relate to individual defendants, as often multiple causes of action are advanced against a single defendant. I am, however, satisfied that most of the Amended Pleading does not comply with R. 9-5(1), and that very significant portions of the Amended Pleading offend one more or of the subparagraphs in the rule.

42. At paragraph 48 in the decision under appeal, Justice Ross found "the NOCC is prolix. It is not a proper pleading that can be answered by the defendants. It cannot be mended. Given that finding, I have no hesitation in ruling that it must be struck as a whole." The NOCC was struck in its entirety, with leave to amend.

43. This Court has stated that pleadings are required and expected to demonstrate clear thinking and clear writing, and those qualities are the standard against which the adequacy of pleadings are measured when prolix and confusing pleadings are before the court.

Pyper v. The Law Society of British Columbia, 2017 BCCA 410 at para. 51 citing *The Owners, Strata Plan LMS3259 v. Sze Hang Holding Inc.,* 2012 BCCA 196 at para. 88

44. A number of cases have provided informative discussion on prolix pleadings, including but not limited to:

    a. *Andreasen*: A self-represented plaintiff filed an amended notice of civil claim, which was 72 pages in length, with Part 1 being 62 pages and 680 paragraphs long. (para. 4). The court described the amended notice of civil claim as prolix, being highly repetitive, with multiple paragraphs connecting causes of action that appear regularly throughout the pleading, and with many paragraphs pleading evidence rather than material facts. (para. 83). The

amended notice of civil claim was struck, with a leave to file an amended notice of civil claim. (para. 154).

b. *Sahyoun*: Self-represented plaintiffs filed an original pleading that was described as “extremely prolix” at 49 pages and 191 paragraphs long, with an amendment made to make it 86 pages and more than 300 paragraphs. (para. 76). The court described the amended pleading as “impenetrable and often incomprehensible” where it was difficult to understand which claims were made against which defendants. (para. 79). The pleading was struck without leave to amend.

c. *Hutchensen*: The pleadings were struck under Rule 9-5(b)-(d) because they were prolix, confusing, and unintelligible. (para. 42). The court described the pleadings as vexatious, unnecessary and frivolous, wherein a “complex web of bare assertions, legal conclusion and argument make it impossible for the defendants to discern what the claim is against them..” (para. 43). The pleadings were also described as embarrassing under Rule 9-5(1)(c) because they did not allow the defendants to know the case to be met, or to provide any form of concise or reasonable response. (para. 44). The pleadings were struck without leave to amend.

d. *Johnston v. Rykon Construction Management Ltd.,* 2020 BCSC 752: The notice of claim contained 155 paragraphs under Part 1. The court wrote “to describe amended notice of civil claim as prolix would be an understatement”, containing evidence, argument, legal conclusions, and rhetorical statements. (para. 25). In result, the court ordered the amended notice of civil claim struck, with liberty to apply for leave to amend. (para. 40). Costs were awarded against the plaintiff in the cause.

45. In this case, the notice of civil claim exceeds the length and prolix nature of the pleadings discussed in the cases referenced above. It is 391 pages. “THE FACTS”

in the NOCC comprises 316 paragraphs set out over 226 pages. This section of the NOCC also includes 399 footnotes, the majority of which contain links to websites. The “RELIEF SOUGHT” section of the NOCC comprises 40 paragraphs, most with multiple subparagraphs, set out over 43 pages.

46. Many of the claims in the NOCC do not clearly identify the defendant at which they are directed, and there are expansive claims directed at many or all of the defendants. This makes it impossible to the Health Authority Respondents to know which claims are bring brought against them, and which claims they have to meet. It is not possible to plead in defence of such claims.

47. Additionally, vast majorities of the NOCC focus on non-parties such as Bill Gates and the World Health Organization.

48. The Health Authority Respondents say that Justice Ross correctly described the notice of civil claim as prolix, that this decision was a discretionary decision subject to deference on appeal. No injustice arises from the strike of such a pleading.

Case Law Considering COVID Restrictions

49. The Health Authority Respondents note that British Columbia courts have decided a number of constitutional challenges and other challenges to COVID restrictions (both private and public).

50. It is also worth noting that none of the pleadings in the COVID cases set out below have been described as or were struck for being prolix in nature. However, they give rise to no inconsistencies with the comments and order made by Justice Ross.

51. These cases also provide a counterpoint to the highly selective examples of international case law included by the appellants in their factum. There is no need to search out American or Indian cases. The Courts in British Columbia have addressed many such issues, just not in the manner the appellants would like.

52. This Court upheld the decision of Chief Justice Hinkson in *Beaudoin v. British Columbia (Attorney General),* 2022 BCCA 427. In that case two sets of appellants appealed this decision as it applied to them.

53. The court found that the appellant Beaudoin's section 2(c) and (d) *Charter* rights were infringed by outdoor gathering restrictions in that they infringed his right to peacefully protest. The Provincial Health Officer ("PHO") issued a clarifying order that allowed for peaceful protest so long as a protest complied with social distancing requirements. This Court upheld that decision that the clarifying order continued to infringe Beaudoin's s.2 rights, but that the infringements were reasonably justified.

54. The second appeal involved several religious leaders that challenged PHO restrictions involving religious ceremonies. The court found that restrictions on gatherings did infringe the religious appellants' s.2 *Charter* rights, but that these restrictions were reasonably justified. Again, this Court upheld that decision.

55. The BC Supreme Court also heard a number of cases that challenged PHO restrictions, including:

    a. *Kassian v. British Columbia,* 2022 BCSC 1603 and *Eliason v. British Columbia,* 2022 BCSC 1604, wherein the petitioners sought to challenge the vaccine requirements on the grounds of discrimination. In most cases, Hinkson C.J. did not decide the ultimate issue as the petitioners had not exhausted their legislative remedies, and this judicial review was premature.

    b. *Maddock v. British Columbia,* 2022 BCSC 1605 the petitioner sought to challenge the vaccine passport system as violating his section 7 *Charter* rights. Hinkson C.J. held that access to private establishments was not protected by section 7, and there were many options available to the

petitioner to ameliorate the economic impact of the restrictions on his business.

c. *Canadian Society for the Advancement of Science in Public Policy v. British Columbia,* 2022 BCSC 1606, the petitioner had worked through the legislative framework and was therefore entitled to review that administrative decision. The petitioners alleged the impugned Orders violated their ss. 2(a)-(d), 7, and 15 *Charter* rights. Hinkson C.J. found that the ss.2 and 15 claims failed for lack of evidence. In addressing the petitioners' s.7 argument, Hinkson C.J. held that s.7 did not protect a right of unfettered access to private property, and dismissed the claim. Despite finding no *Charter* breaches, Hinkson C.J. went on to opine that the administrative decisions were reasonable (para. 180).

56. In the case of *Parmar v. Tribe Management Inc.,* 2022 BCSC 1675, Justice MacNaughton decided on summary trial that a private company's mandatory vaccine requirements for their employees was an unwritten term of the employment contract. The plaintiff was placed on an unpaid leave of absence, and she sought damages. MacNaighton J. dismissed the claim (para. 144).

57. Finally, the case of *Vancouver Island Health Authority v. Giannikos,* 2021 BCSC 957 involved a number of public health and safety violations, including COVID restrictions. The respondent operated a pub in Ladysmith. For reasons that are unclear, an RV encampment became established on this property. The encampment tied in water and sewer services that contravened various water, health, and safety regulations. Upon inspection by public health officers, it was found that the respondent was also violating various Covid-19 measures. She was ordered to remedy these issues. She refused, and ultimately, VIHA applied for and was granted an injunction.

58. The above decisions are wholly consistent with the order and reasons given by Justice Ross. While decided on the merits, rather than pursuant to Rule 9-5, they

demonstrate how the courts in this province have address claims surrounding the restrictions resulting from the COVID-19 pandemic.

Costs

59. Justice Ross ordered costs payable to the defendants in any event of the cause payable forthwith. In doing so he explained:

> [75] On the issue of costs, I note that each plaintiff is pursuing this action seeking money damages from one or more defendant. In responding to those claims each defendant has been put to the expense of answering (if not filing a response) to the NOCC. In addition, the defendants have all been required to prepare for and conduct this application. None of those steps would have been necessary if the matter was properly pleaded.
>
> [76] On that basis, I find it appropriate to award each defendant the costs for the necessary steps of "defending a proceeding", and for preparing for and attending an application (opposed). Those costs are payable forthwith in any event of the cause.

60. This reasoning is consistent with the *Supreme Court Civil Rules* and the law surrounding an award of costs.

61. The *Rules* state:

> **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.
>
> …
>
> **Costs arising from improper act or omission**
>
> (14) If anything is done or omitted improperly or unnecessarily, by or on behalf of a party, the court or a registrar may order

(a) that any costs arising from or associated with any matter related to the act or omission not be allowed to the party, or

(b)that the party pay the costs incurred by any other party by reason of the act or omission.

Costs of whole or part of proceeding

(15) The court may award costs

(a) of a proceeding,

(b) that relate to some particular application, step or matter in or related to the proceeding, or

(c) except so far as they relate to some particular application, step or matter in or related to the proceeding

and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

62. Further Rule 9-5 notes that costs made pursuant to an application under that Rule can be paid as special costs.

63. While Justice Ross did not refer to any particular Rule in making his costs award it is clearly consistent with Rules 9-5 and 14-1. He in fact could have gone further to order special costs but chose not to.

64. Turning to past judicial commentary on costs awards, in the case of *Conseil scolaire* this Court considered an appeal on the issue of costs from the Supreme Court stating:

[4] The plaintiffs ask that the trial judge's costs order be set aside and that we award them costs. They submit the trial judge erred in principle by not finding them substantially successful at trial. The plaintiffs also seek special costs as public interest litigants.

[5] The Province submits that the trial judge's costs order should be maintained.

[6] Costs awards are "quintessentially discretionary": *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 at para. 126. A costs order may be set aside on appeal only if the trial judge has made an error in principle or if the costs order is plainly

> wrong: *British Columbia v. Salt Spring Ventures Inc.*, 2015 BCCA 343 at para. 14.
>
> [7] We see no reason to disturb the trial judge's order that each party bear their own costs. The trial judge is best placed to determine the relative success of the parties in this complicated and protracted litigation. In making that determination, the judge committed no error in principle and was not clearly wrong.
>
> [8] On appeal before this Court, the Province was wholly successful. However, the Province suggests in its written submissions that because the main parties are all public entities, each party should bear their own costs on the appeal. We agree. For the appeal before this Court, each party will bear its own costs.

65. In *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329 this court set out the principles governing the exercise of a judge's discretion in ordering costs:

> *General Principles*
>
> [34] At common law, costs and disbursements incurred in civil proceedings were not recoverable. However, beginning in the late 13th century in England the court was empowered by statute to award them to a successful party. In British Columbia, the statutory right to recover costs has existed since the late 19th century and is currently conferred by Rule 14-1 of the *Supreme Court Civil Rules*. Under Rule 14-1(9), unless the court orders otherwise, costs in a proceeding must be awarded to the successful party: *MacKenzie* at paras. 29, 64; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 19.
>
> [35] The court's power to order costs serves as a tool to further the efficient, fair and orderly administration of justice. The traditional purpose of a costs award is to indemnify the successful party to some degree for allowable expenses and services incurred in a civil proceeding. While the indemnification principle is a cornerstone of a costs award, in the ordinary course the costs regime provides only partial, not full, indemnity. The general objective is to reallocate some of the successful party's litigation costs to the loser, not to make the successful party whole. Without more, a discrepancy between actual costs and a costs award does not amount to an injustice or contravene the principle of indemnification: *Okanagan Indian Band* at paras. 20–21; *MacKenzie* at para. 81; *Asselstine* at paras. 4–6.
>
> [36] Costs awards also serve other purposes and objectives. For example, they may encourage settlement, deter frivolous actions or defences and sanction unreasonable conduct committed in the course of litigation. In addition, on occasion costs may be awarded to enhance access to justice, mitigate severe inequality between litigants and encourage socially desirable conduct. In other words, costs awards may be used as an instrument of policy to accomplish

> purposes and objectives the law seeks to foster and promote: *Okanagan Indian Band* at paras. 20–31; *MacKenzie* at para. 83; *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 2006 CanLII 35819 (ON CA), 82 O.R. (3d) 757 (C.A.); *Furtney v. Furtney*, 2014 ONSC 3774 at para. 33.

66. The above clearly applies to this appeal as well. Justice Ross made no error in principle. The appellants view on substantial success is insufficient to ground an appeal.

67. There is no basis to disrupt the costs award made in favour of the respondents.

Conclusion

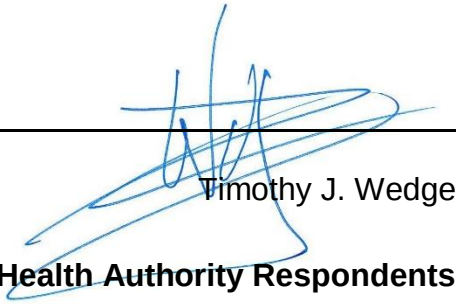
68. The orders made by Justice Ross in *Action4Canada v British Columbia (Attorney General)*, 2022 BCSC 1507 do not give rise to any appealable errors. This appeal should be dismissed with costs payable to the respondents.

PART 4 - NATURE OF ORDER SOUGHT

69. The Health Authority Respondents seek an Order that this appeal be dismissed with costs payable to the respondents.

All of which is respectfully submitted.

Dated at the City of Victoria, Province of British Columbia, this January 13 of 2023.



Timothy J. Wedge

Counsel for the Health Authority Respondents

APPENDICES: LIST OF AUTHORITIES

Authorities	**Page # in factum**	**Para # in factum**
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APPENDICES: ENACTMENTS

SUPREME COURT CIVIL RULES

BC REG 168/2009

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

Rule 3-1 — Notice of Civil Claim

Notice of civil claim

(1) To start a proceeding under this Part, a person must file a notice of civil claim in Form 1.

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 3-7 — Pleadings Generally

Content of Pleadings

Pleading must not contain evidence

(1) A pleading must not contain the evidence by which the facts alleged in it are to be proved.

Documents and conversations

(2) The effect of any document or the purport of any conversation referred to in a pleading, if material, must be stated briefly and the precise words of the documents or

conversation must not be stated, except insofar as those words are themselves material.

…

Part 9 — Pre-Trial Resolution Procedures

…

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.

Admissibility of evidence

(2) No evidence is admissible on an application under subrule (1) (a).