No. 233427
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JASON BALDWIN

Plaintiff

AND:

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA and DR. BONNIE HENRY IN HER CAPACITY AS PROVINCIAL HEALTH OFFICER FOR THE PROVINCE OF BRITISH COLUMBIA

Defendants

Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50

PLAINTIFF WRITTEN SUBMISSIONS

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WRITTEN SUBMISSIONS

Part 1: Introduction and Overview

1. The Plaintiff has filed an Amended Statement of Claim (the "Claim") seeking certification of this class proceeding on behalf of current and former unionized employees of the British Columbia Public Service (the "BCPS").[1] BCPS employees were mandated to receive the COVID-19 vaccination and disclose their private medical information, by operation of an Order in Council made by the Lieutenant Governor in Council; Order in Council No. 627/2021 (the "Order"), enacting the *Public Service COVID-19 Vaccination Regulation* (the "Regulation"), making *Human Resources Policy 25 – COVID-19 Vaccination* (the "Policy") a term and condition of employment for all BCPS employees. For clarity, by enacting the Regulation which made the Policy a term and condition of employment, the Defendant, His Majesty the King in Right of the Province of British Columbia (the "Crown"), has removed the Policy from that which is simply covered by normal employer/employee labour relations justiciable though grievances, and made the Policy a legislative act/law ("Law"). As a result, any challenge brought under the relevant collective agreements is incapable of providing redress. The Plaintiff will elaborate on this point further in these submissions.

2. The Plaintiff seeks to advance three causes of action which he alleges arose as a result of the Policy and Law. First, that the Provincial Health Officer ("PHO"), acting under authority of the *Public Health Act,* SBC 2008, C 28, provided information, data, and advice to the Crown, stating that being fully vaccinated against COVID-19 is the most effective way to safeguard employee health and reduce the risk of transmission of COVID-19 (the "PHO Action"). The PHO Action informed and was the impetus for Policy and Law. In so doing, the PHO has committed misfeasance in public office. Second, the Law infringed on the Plaintiff's right under S. 2d of the *Charter of Rights and*

[1] Amended Notice of Civil Claim, October 22, 2024.

*Freedom*s (the "*Charter*"). Third, a statutory breach of privacy occurred by operation of the Law.[2]

3. The Plaintiff has advanced the proposed class proceeding consistent with the requirements of the *Class Proceeding Act* (the "CPA").[3] This submission will examine the requirements for certification under the CPA and demonstrate that the Plaintiff has met the requisite test.

Part 2: Factual Basis:

4. The Plaintiff relies upon the facts as stated in the Claim. However, given the Defendants' position that these facts are insufficient and/or do not support any cause of action, the Plaintiff seeks to clarify his position by restating the facts found in the Claim (albeit in a more summary form) below. Note that the restated facts below have been edited to reflect the definitions provided above. The Plaintiff has done so for consistency and flow of these submissions. The substance of the facts remains the same as stated in the Claim.

The Order, Regulation, and Policy (The Law)

5. On November 1, 2021, the British Columbia Public Service Agency implemented the Policy. The Policy was developed based on reliance upon information and data provided by the PHO acting under the authority of the *Public Health Act*.[4]

6. The stated objective of the Policy was:

> *"The BC Public Service (BCPS) is committed to the health, safety, and wellbeing of employees. In accordance with information and data provided by British Columbia's Provincial Health Office (PHO), being fully vaccinated against COVID-19 is the most effective way to safeguard employee health and* ***reduce the risk of transmission*** *[emphasis added]".*[5]

7. The Policy set out, *inter alia*, the following details:

   (a) The Policy applies to any government organization with BCPS employees hired under the Public Service Act;

   (b) The Policy applies to all employees working for BCPS, regardless of whether the employees work remotely or onsite;

   (c) New employees would be required to be vaccinated as a condition of their employment, effective November 8, 2021; and

   (d) Employees who did not have at least one dose of a Health Canada approved COVID-19 vaccine by November 22, 2021, or those who did not disclose their vaccination status to their manager or supervisor by that date, would be placed

[2] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 a.
[3] *Class Proceedings Act,* R.S.B.C. 1996 C.50.
[4] Amended Notice of Civil Claim, para 12-13.
[5] Amended Notice of Civil Claim, para 14.

on an unpaid leave of absence, effectively suspension, until they show proof of vaccination. The unpaid leave will last for three months, at which time the employee's employment may be terminated.[6]

8. On November 19, 2021, two days prior to the deadline imposed in the Policy, the Lieutenant Governor in Council issued Order in Council No. 627/2021 enacting the *Public Service COVID-19 Vaccination Regulation*.[7]

9. The Regulation set out the following details:

   (a) In this regulation, "COVID-19 Vaccination Policy" means the policy entitled "Human Resources Policy 25 – COVID-19 Vaccination" that was issued under section 5 (4) of the *Public Service Act* on November 1, 2021;

   (b) The COVID-19 Vaccination Policy is a term and condition of employment for employees; and,

   (c) If an employee is terminated under the COVID-19 Vaccination Policy, the employee is deemed to have been dismissed for just cause.[8]

10. Section 4(2) of the British Columbia *Public Service Act* requires the BCPS to consult with the British Columbia General Employees' Union (the "BCGEU") regarding all regulations intended to be recommended to the Lieutenant Governor in Council under Section 25 of the *Public Service Act*.[9]

11. The BCGEU was not consulted prior to the enactment of the Policy. The Defendants have not pled that the BCGEU or any public service union was consulted prior to the Regulation.[10]

12. The Law was in force until April 3, 2023, when the Minister of Finance rescinded the Policy and Cabinet repealed the Regulation.[11]

The Consequences to the Plaintiff

13. The Plaintiff was a unionized employee of the BCPS and served as a compliance Analyst 2 for the Ministry of Finance. The terms and conditions of his employment were covered by the BCGEU collective agreement.[12] He had been an employee of the BCPS since 2015 and was put on leave without pay on January 10, 2022, pursuant to the Law. On October 5, 2022, he was terminated for just cause pursuant to the Law.[13]

14. The effects of the Law on the Plaintiff have caused personal injury and damage disproportionate to any threat posed by COVID-19, including but not limited to the following:

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[6] Amended Notice of Civil Claim, para 15.
[7] Amended Notice of Civil Claim, para 16.
[8] Amended Notice of Civil Claim, para 17.
[9] Affidavit # 2 of Jason Baldwin, para 5, Exhibit A.
[10] Affidavit # 2 of Jason Baldwin, para 5, Exhibit B.
[11] Defendants Application Response, para 16.
[12] Affidavit # 1 of Jason Baldwin.
[13] Amended Notice of Civil Claim, para 1.

(a) Imposition of a term and condition of employment absent collective bargaining, consultation, agreement, or compensation;

(b) Suspension from employment;

(c) Termination from employment;

(d) Loss of income;

(e) Loss of medical benefits;

(f) Loss of pension contributions, service, and expected retirement age;

(g) Loss of employment insurance benefits;

(h) Loss of primary residences; and,

(i) Increased depression and mental illness.[14]

15. The Plaintiff asserts that the Law created new terms and condition of employment which were not negotiated, subject to meaningful consultation, or agreed upon. The result was an infringement on his right under s. 2d of the *Charter*.[15]

16. The Plaintiff asserts that the PHO in providing incorrect information and data to create and enact the Policy and enact the Law committed misfeasance in public office and he suffered harm as a result.[16]

17. The Plaintiff asserts that requiring disclosure of his COVID-19 vaccination status to his employer was a statutory breach of his privacy rights.[17]

The PHO's Knowledge and Motivations (Alleged by the Plaintiff)

18. The PHO was aware that:

(a) the scientific information underlying each of the approved COVID-19 vaccines did not reference or support the proposition that the vaccines prevented transmission of COVID-19;

(b) there was evidence of a significant potential risk of adverse side effects arising from the majority of the approved vaccines; and

(c) there was no information regarding long-term safety data of the approved vaccines, which was relevant information required prior to mandating vaccination.[18]

19. The PHO had knowledge both that the information and data she provided with respect to the creation and enactment of the Policy as well as the enactment of the Law was

[14] Plaintiff's Notice of Application, para 25.
[15] Amended Notice of Civil Claim, para 42.
[16] Amended Notice of Civil Claim, paras 25-25, 37, 39.
[17] Amended Notice of Civil Claim, para 45.
[18] Amended Notice of Civil Claim, para 37.

contrary to the evidence available to her and therefore inaccurate. As such this was an improper exercise of her function under the *Public Health Act.* The PHO was aware that her conduct would likely cause injury to the Plaintiff. The Plaintiff asserts that the PHO's actions did not serve to prevent transmission of COVID-19 and posed a substantial risk of harm to the Plaintiff's health. In providing inaccurate information and data, the PHO acted in bad faith with reckless disregard or willful blindness to the authority granted to her under the *Public Health Act*.[19]

20. The Plaintiff further asserts that the PHO was acting in furtherance of an objective which supplanted the stated objectives of the PHO Action, as opposed to acting within her statutory grant of authority under the *Public Health Act*.[20]

Part 3: Legal Basis:

The Purpose of Class Actions

21. The three goals of class action legislation are to promote: (1) access to justice; (2) judicial economy; and (3) behaviour modification. The Supreme Court of Canada stated these goals as follows:

> [26] The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega- corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated *vis- à-vis* the Defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.
>
> [27] Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for Plaintiffs (who can share litigation costs) and for Defendants (who need litigate the disputed issue only once, rather than numerous times). *Report on Class Actions* (1982), at pp. 118-

[19] Amended Notice of Civil Claim, para 37.
[20] Amended Notice of Civil Claim, para 37.

19.

> [28] Second, by allowing fixed litigation costs to be divided over a large number of Plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some Plaintiff, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied.
>
> [29] Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one Plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential Defendants who might otherwise assume that minor wrongs would not result in litigation.[21]

22. These stated purposes have been endorsed by courts in many decisions since the earliest days of class actions in Canada. The Supreme Court of Canada has repeatedly affirmed that these are the principal advantages, aims, and goals of class proceedings. Moreover, the interpretation of class actions legislation and the application of certification criteria must be done through the lens of these three objects.[22]

23. In the context of widescale *Charter* breaches, the class action vehicle is particularly well suited in addressing the main barriers to *Charter* grievances, namely that such claims are costly, time consuming, and offer little in financial relief.

The Test for Class Certification

24. The requirements for the certification of an action as a class proceeding are set out in the CPA at section 4:

> **4**(1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
> (b) there is an identifiable class of 2 or more persons;
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
> (d) a class proceeding would be the preferable procedure for the

[21] *Western Canadian Shopping Centers Inc. v. Dutton*, 2001 SCC 46, at para 26-29.
[22] *AIC Limited v. Fischer*, 2013 SCC 69, at para 16.

fair and efficient resolution of the common issues;

(e) there is a representative Plaintiff who:

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have on the common issues, an interest that is in conflict with the interests of other class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient; and,

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

25. The provisions of s. 4(1) are mandatory: "The court must certify an action as a class proceeding if all of the criteria of s. 4(1) of the *Class Proceedings Act* are met and if there is no other reason to refuse to make the order."[23]

26. The test set out in s. 4 establishes a low threshold for class certification. Canadian courts have held that class proceedings legislation should be construed generously to ensure that the policy goals are realized. Courts should be mindful not to impose undue technical requirements on plaintiffs. As the Court of Appeal held in *Knight v. Imperial Tobacco Canada*:

> [20] The Supreme Court of Canada has discussed the approach that ought to be taken by a court to certification issues in a number of recent cases, including *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68 [*Hollick*]; *Rumley, supra*; and *Western Canadian Shopping Centres*

[23] *Sun-Rype Products Ltd. v. Archer Daniels Midland*, 2010 BCSC 472, at para. 19.

> *Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46. What I distill from those cases is that class proceedings legislation ought to be construed generously. **Class actions serve judicial economy by avoiding unnecessary duplication in a multiplicity of actions, improve access to justice and serve to modify wrongful behaviour**. It is necessary that the statement of claim disclose a cause of action, but the certification stage is not a test of the merits of the action. What the certification stage focuses on is the form of the action. The key question is whether the suit or portions of it are appropriate for the trial of common issues [emphasis added].[24]

27. Class certification does not concern the merits of the action, but merely its form. The certification motion is not a trial. It is not a summary judgment motion. It is entirely procedural.

28. Section 5(7) of the CPA makes it clear that a certification hearing is <u>not</u> a forum for dealing with the merits of the action.

> 5(7) An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding.[25]

29. The Supreme Court of Canada has also held that:

> [16] …The certification stage is decidedly not meant to be a test of the merits of the action: see *Class Proceedings Act*, 1992, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also *Caputo v. Imperial Tobacco Ltd*., (1997), 34 O.R. (3d) 314 (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: see generally Report of the Attorney General's Advisory Committee on Class Action Reform, at pp. 30-33.[26]

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[24] *Knight v. Imperial Tobacco Canada Ltd.,* 2006 BCCA 235. See also *Hollick v. Toronto (City of),* 2001 SCC 68, at paras 14 and 21; *Cloud v. Canada (Attorney General)*, 2004 CanLII 45444 (Ont. C.A.), at paras 37-38, leave to appeal to S.C.C. denied.

[25] *Class Proceedings Act*, RSBC, 1996, c 50, s.5(7).

[26] *Hollick*, *supra*, para 16. See also *Jones v. Zimmer,* 2010 BCSC 1504, at para 1, aff'd *Jones v. Zimmer,* 2013 BCCA 21.

30. The fact that a defendant attempts to lead evidence at certification that goes to the merits does not change this. As the court noted in *Tiboni v. Merck Frosst Canada Ltd*:

> It follows that, when, as here, the Defendants deliver affidavit evidence that is relevant only to the merits of the Plaintiffs' claims – as, for example, expert opinions that Merck's scientific study and testing of Vioxx was "rigorous", that Merck did everything a responsible company could be expected to do, and that, given the benefits of the drug, the risks involved in its use are tolerable – the Plaintiffs have no obligation to challenge the accuracy of such opinions on this motion. Statements by Defendants counsel that such evidence is "undisputed" may be literally correct for the present purposes. They are also of no significance.[27]

31. The evidentiary burden on the Plaintiff on a certification motion is a low one. The Plaintiff need only show "some basis in fact" for each of the certification requirements, other than the existence of a cause of action, which is decided on the pleadings alone. In *Hollick*, the Supreme Court of Canada held:

> [25] ... In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirements of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists.[28]

32. The Supreme Court of Canada addressed the standard emerging from *Hollick* and clarified that the standard of proof to meet the certification requirements falls below the "balance of probabilities":

> [102] … Had McLachlin C.J. intended that the standard of proof to meet the certification requirements was a "balance of probabilities", that is what she would have stated. There is nothing obscure here. The *Hollick* standard has never been judicially interpreted to require evidence on a balance of probabilities. Further, Microsoft's reliance on U.S. law is novel and departs from the *Hollick* standard. The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the

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[27] *Tiboni v. Merck Frosst Canada Ltd.*, 2008 CanLII 37911 (ONSC), at para. 53. Followed in *Miller v. Merck Frosst*, 2013 BCSC 544, paras 48, 159, 160, 197, 207, aff'd 2015 BCCA 353. See also the comments in *Rooney v. ArcelorMittal*, 2018 ONSC 1878 (CanLII), at para.31 ("One has to wonder why it is necessary to file this volume of material and also occupy three days of court time for oral submissions -- all for a motion that is supposed to be about the suitability of a class action from a procedural standpoint rather than a merits evaluation").

[28] *Hollick*, *supra*, para 25.

> court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight." The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; "rather, [it] focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding."[29]

33. As stated by Doherty J.A. of the Ontario Court of Appeal:

> If the question gives rise to genuine legal or factual uncertainties, it cannot be answered at this stage and the answer must await a trial and a complete record.[30]

34. The Plaintiff has met the evidentiary threshold for class certification. The Plaintiff pleads reasonable causes of action satisfying s. 4(1) of the CPA and provides some basis in fact for the certification requirements of ss. 4(1)(b) to (e).

A. CPA s.4(1)(a) – The Pleadings Disclose Causes of Action

35. The test under s. 4(1)(a) of the CPA is the same as the test for striking pleadings under R.9-5(1)(a) of the Supreme Court Civil Rules.[31] The relevant principles to an application brought under Rule 9-5(1)(a) are as follows: assume the facts in the pleading can be proven;

    (a) Is it "plain and obvious" that the claim discloses no reasonable cause of action; in the sense that it contains a radical defect;

    (b) If there is a chance that the Plaintiff might succeed, the Plaintiff should not be driven from the judgment seat;

    (c) The length and complexity of the issues, the novelty of the cause of action and the potential strength of the defendant's case should not prevent the claim from proceeding.[32]

36. An important consideration on any application under Rule 9-5(1)(a) is whether a pleading can be preserved by amendment.[33]

37. If an amendment could cure the defect, the Plaintiff should not be driven from the "judgment seat" even with the potential for the defendant to present a strong defence.[34]

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[29] *Pro-Sys Consultants Ltd. V. Microsoft Corporation*, 2013 SCC 57, at para 102.
[30] *Taylor v. Canada (Attorney General),* 2012 ONCA 479, at para. 22.
[31] *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198, at para 55.
[32] *Hunt v. Carey Canada Inc.*, 1990 CANLII 90 (SCC).
[33] *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited,* 2011 BCCA 140, at para 28; *Johnson v. British Columbia (Attorney General),* 2022 BCCA 92, at paras 120-122.
[34] *James v. Johnson & Johnson Inc.,* 2021 BCSC 488, at para 63.

38. A party who seeks to amend deficiencies in the pleadings should do so in the trial court before an order is made striking the pleadings.[35]

It is plain and obvious that the Claim discloses reasonable causes of action

39. In the Claim, the Plaintiff has alleged and pled sufficient facts to advance three causes of action: misfeasance in public office, an infringement of s. 2d of the *Charter*, and a statutory breach of privacy.

The Claim Contains a Sufficient and Arguable Claim for Misfeasance in Public Office.

40. To prove misfeasance in public office the Plaintiff must show "(i) deliberate, unlawful conduct in the exercise of public functions; (ii) awareness that the conduct is unlawful and likely to injure the Plaintiff; (iii) harm; (iv) a legal causal link between the tortious conduct and the harm suffered; and (v) an injury that is compensable in tort law."[36]

41. The PHO acting under authority of the *Public Health Act* provided information, data, and advice to the Crown, stating that being fully vaccinated against COVID-19 is the most effective way to safeguard employee health and to reduce the risk of transmission of COVID-19, which informed and was the impetus for the Policy and Law. The Plaintiff has pled that the PHO acted in bad faith with reckless indifference or willful blindness. Such actions included:

    (a) The PHO had no basis in fact to justify the information, data, and advice provided to the Crown that COVID-19 vaccination was an effective measure to prevent transmission of COVID-19. As such the Plaintiff and putative Class Members plead that the Provincial Health Officer acted in bad faith by either recklessly or willfully ignoring the reality of the vaccine in exercising her authority under the *Public Health Act* with foreseeable losses to the Plaintiff and putative Class Members;

    (b) Known potential risk of adverse events associated with the COVID-19 vaccination were either recklessly or willfully ignored and omitted by the PHO in the information, data, and advice provided to the Crown, with foreseeable losses to the Plaintiff; and

    (c) The PHO acted in furtherance of an objective which supplanted the stated objectives of the Policy and Law as those objectives were known or should have been known to be unachievable by virtue of the information and data available to the PHO.[37]

42. The Plaintiff has pled that as a result of the PHO Action he suffered significant economic deprivation and emotional trauma and that such harm was foreseeable by the PHO.[38]

[35] *Jones v. Bank of Nova Scotia,* 2018 BCCA 381, at para 36.
[36] *Anglehart v Canada,* 2018 FCA 115, at para 52.
[37] Amended Notice of Civil Claim, at para 37.
[38] Amended Notice of Civil Claim, at para 37.

43. The Plaintiff has plead that the PHO, in exercising her statutory authority under the *Public Health Act* with reckless indifference or willful blindness, acted in bad faith and committed the tort of misfeasance in public office.[39]

44. In the Claim the Plaintiff has stated:

    (a) clinical reports, product monographs, studies, and observational data existed which demonstrated that the vaccines did not prevent transmission of COVID-19 to other people; and

    (b) safety studies, clinical data, manufacturer studies, and reported quality control issues, demonstrated significant risk from the vaccines on the Plaintiff's health.[40]

45. The material facts alleging misfeasance in public office can be found at paras 37-39, 13. of the Claim.

46. The evidence providing "some basis of fact" for the Plaintiff's allegations can be found in:

    (a) Affidavit #1 of Alan Cassels. For example, in his affidavit Mr. Cassels states, inter alia:

        (i) COVID-19 vaccinations do not prevent transmission of COVID-19;[41] and,

        (ii) COVID-19 vaccinations pose a serious risk of adverse events.[42]

    (b) Affidavit #1 of Jason Baldwin.

    (c) Affidavit #2 of Jason Baldwin.

47. These are sufficient allegations to show both knowledge and conduct for an improper purpose. As the PHO knew or should have known, the data and information she provided was incorrect and her conduct under the *Public Health Act* cannot be in reliance "on considerations that are irrelevant, capricious or foreign to the purpose of the statute."[43] Misfeasance may be found when a PHO "could have discharged his or her public obligations"—here, basing any order upon a proper scientific and medical foundation and/or with sufficient exceptions as to protect *Charter* rights—"yet wilfully chose to do otherwise."[44]

48. Pleadings with similar allegations have withstood motions to strike. For instance, in *Canada (Attorney General) v Whaling*,[45] the court found that the Plaintiff sufficiently claimed that the Defendants unlawfully and in bad faith enacted unconstitutional legislation while "motivated by political self-interest."[46]

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[39] Amended Notice of Civil Claim, at para 38.
[40] Amended Notice of Civil Claim, at paras 22 and 25.
[41] Affidavit #1 of Alan Cassels, at paras 32-51, 56.
[42] Affidavit #1 of Alan Cassels, at paras 52-55.
[43] *Anglehart v Canada,* 2018 FCA 115 at par at para 73.
[44] *Odhavji Estate v Woodhouse,* 2003 SCC 69 at para 26.
[45] *Canada (Attorney General) v Whaling*, 2018 FCA 38.
[46] *Ibid*, at paras 4, 12 (albeit in the context of *Charter* damages).

49. In *Trillium Power Wind Corp v Ontario (Natural Resources)*,[47] the court reasoned that "political/electoral expediency" and political considerations generally are an accepted and expected part of the policymaking process, and therefore could not, by themselves, constitute an allegation of bad faith.[48] However, the regulatory regime at issue in *Trillium* granted extremely broad discretion: decisions needed only to be made "in the public interest."[49]

50. It bears repeating that, in the early stages of a proceeding, a pleading may lack detail but still may establish "'a narrow window of opportunity' to make out a misfeasance claim at trial."[50] Further, the Claim must be assessed not only by reference to its explicit wording but also to "common sense inferences that can reasonably be made."[51] As in *Trillium*, the Claim "is detailed and as fact-specific as the appellant can be at this stage of the proceeding," particularly since "many of the necessary supporting facts would be within [the government's] knowledge and control, and there has been no document production or discovery."[52] Here, the Claim particularizes the specific official (the PHO); her unlawful actions and "circumstances, particulars, or facts" sufficient to infer knowledge of the impropriety of her actions.[53] This is a more than arguable basis upon which the Plaintiff can claim and recover against the PHO for misfeasance in public office.

The Claim Contains a Sufficient and Arguable Claim for Infringement of s.2d of the *Charter*.

51. As stated in the seminal case *Health Services and Support -- Facilities Subsector Bargaining Assn v British Columbia*,[54] s. 2d does not protect any particular outcome, but rather protects the ability of employees to "unite, to present demands… collectively and to engage in discussions in an attempt to achieve workplace-related goals."[55] It also protects these rights by imposing upon employers the duty to meet and discuss these goals with employees.[56] Consequently, even though a legislative provision may not expressly curtail employees' right to unite and negotiate future terms in a collective agreement, it may still infringe s. 2d to the extent that it was imposed in a manner contrary to this process.[57] As stated in *British Columbia Teachers' Federation v British Columbia (BCTF)*,

> [285] The act of associating for the purpose of collective bargaining can also be rendered futile by unilateral nullification of previous agreements, because it discourages

[47] *Trillium Power Wind Corp v Ontario (Natural Resources),*2013 ONCA 683
[48] *Ibid*, at paras 52-54.
[49] *Ibid*, at paras 7-8.
[50] *Carducci v Canada (AG),* 2022 ONSC 6232, at para 22.
[51] *Sunderland v Toronto Regional Real Estate Board*, 2023 FC 1293 at para 135 (citing *Eurocopter v Bell Helicopter Textron Canada Limitée*, 2009 FC 1141, at para 19 (finding allegation that infringement was done "knowingly" to be sufficient under the *Rules*).
[52] *Trillium*, *supra,* at paras 60-61.
[53] *Carducci v Canada (AG),* 2022 ONSC 6232, at para 25.
[54] *Health Services and Support -- Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27.
[55] *Ibid*, at para 89.
[56] *Ibid*, at para 90; see also para 99 (duties to bargain in good faith under the *Canada Labour Code*).
[57] *See, e.g., ibid*, at para 113.

> collective bargaining in the future by rendering all previous efforts nugatory…[58]

52. Here, the Claim alleges that the Law unilaterally imposed terms into the Plaintiff's "existing and freely negotiated employment agreements."[59] Specifically, the Law mandated the Policy as a fundamental condition of employment, absent which the employee could not continue employment. The Law required that there be "consequences" for the failure to follow this mandate. It is indisputable that the types of terms imposed— concerning the ability of an employee to perform their job requirements and governing disciplinary consequences— are some of the "most essential protections provided to workers" and are "central to the freedom of association."[60] The Law substantially altered previously-agreed upon terms that reflected the employees' core interests in collective bargaining.

53. Next, the Claim alleges that this unilateral imposition was done "absent collective bargaining, consultation, memoranda of agreement, consideration, or consent."[61]

54. In order to pass muster with the protections afforded by s. 2d, the government must engage in pre-legislative consultation that includes "the exchange of information, explanation of positions or relatively equal bargaining power that is necessary to make consultations" "a meaningful substitution" for the traditional collective bargaining process.[62] The government in fact has a positive duty to engage in good faith consultations wherein employees are given "the opportunity to meaningfully influence the changes made, on bargaining terms of approximate equality."[63] As alleged in the Claim, no consultation occurred prior the issuance of the Law and notably, the Defendants have not pled that any such consultations occurred."[64]

55. Further, laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements.[65]

56. The Claim alleges that the Law unilaterally imposed/required conditions of employment contrary to those found in the Plaintiff's employment agreement, without holding the necessary consultations required to preserve and vindicate the Plaintiff's rights to collective bargaining.[66] This clearly meets the threshold for a reasonable cause of action in a violation of s. 2d.

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[58] *British Columbia Teachers' Federation v British Columbia*, 2015 BCCA 184 (aff'd 2016 SCC 49) at para 285
[59] Amended Notice of Civil Claim, at para 42.
[60] *Health Services and Support*, *supra*, at para 130.
[61] Amended Notice of Civil Claim, at para 42.
[62] *Ontario English Catholic Teachers Assoc v His Majesty,* 2022 ONSC 6658, at para 198; *BCTF*, *supra*, at para 291.
[63] *BCTF*, *supra*, at para 287; see also *Ontario (Attorney General) v Fraser,* 2011 SCC 20, at paras 68, 73.
[64] Amended Notice of Civil Claim, at para. 42.
[65] *Health Services and Support*, *supra*, at para 96.
[66] Amended Notice of Civil Claim, at para. 42.

57. The Claim states that the infringements of the Plaintiff's *Charter* rights cannot be justified pursuant to the criteria under s. 1 of the *Charter*, as they are not minimally impairing, proportionate, and the deleterious effects outweigh any salutary benefits.[67]

58. The Claim cannot be deficient for failure to further particularize any arguments under s. 1 because "[t]he Plaintiff [was] not required to so plead, and the Defendants have the burden on that issue."[68] Rather, the Plaintiff must sufficiently particularize—and has done so—the elements to establish an infringement of his s. 2d rights. Lack of justification is not an element of this test.

59. The material facts alleging a violation of s. 2d of the *Charter* can be found at paras 1-2, 16-17, 40-44 of the Claim.

60. The evidence providing "some basis in fact" for the violation of s. 2d of the *Charter* can be found in the following affidavits:

    (a) Affidavit #1 of Jason Baldwin;

    (b) Affidavit #2 of Jason Baldwin

    (c) Affidavit #3 of Jason Baldwin; and,

    (d) Affidavit #1 of Alan Cassels.

The Claim Contains a Sufficient and Arguable Claim for Breach of Privacy

61. The British Columbia *Privacy Act*, RSBC 1996, c. 373, s 1, provides:

    (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

    (2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

    (3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

62. The focus is on providing an individual with some measure of control over his or her personal information: The ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of a democracy. As this Supreme Court of Canada has previously recognized, legislation which aims to protect control over

[67] Amended Notice of Civil Claim at para. 41
[68] *Henry v Canada (Attorney General)*, 2009 BCSC 213 at para 43

personal information should be characterized as "quasi-constitutional" because of the fundamental role privacy plays in the preservation of a free and democratic society.[69]

63. The determination of liability for breach of privacy under the *Privacy Act* depends on the particular facts of each case. The Court must decide whether the Plaintiff was entitled to privacy in the circumstances and, if so, whether the Defendant breached the Plaintiff's privacy. The trial judge has "a high degree of discretion" to determine what is a reasonable expectation of privacy in the circumstances.[70]

64. The *Privacy Act* expressly does not require the Plaintiff to show that the privacy breach caused damage in the sense of actual harm.[71]

65. The Claim pleads that in requiring the Plaintiff to disclose private medical information to the BCPS, the Law intentionally, recklessly, or willfully, and without claim of right, intruded upon the Plaintiff's private affairs such that a reasonable person would regard this intrusion as highly offensive and causative of distress, humiliation, or anguish. Further, the Plaintiff has pled that:

    (a) Collection of personal medical information relating to their COVID-19 vaccination status or medical history represents an unreasonable infringement of their privacy rights; and,

    (b) Dissemination of personal medical information relating to their COVID-19 vaccination status or medical history represents an unreasonable infringement of and intrusion on their privacy rights.[72]

66. The Plaintiff has pled that the Law violated his privacy rights by mandating disclosure of private medical information to the BCPS and thus was a breach of privacy.[73]

67. The material facts alleging a breach of privacy can be found at paras 12,16-17, 44-45. of the Claim.

68. The evidence providing "some basis in fact" for the breach of privacy can be found in the following affidavits:

    (a) Affidavit #1 of Jason Baldwin

    (b) Affidavit #2 of Jason Baldwin; and

    (c) Affidavit #3 of Jason Baldwin.

<u>PHO Immunity</u>

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[69] *Lavigne v. Canada (Office of the Commissioner of Official Languages),* [2002] 2 S.C.R. 773, at para 24*. Dagg v. Canada (Minister of Finance)* [1997] 2 S.C.R. 403, at paras 65-66*. H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General),* [2006] 1 S.C.R. 441, at para 28.

[70] *Milner v. Manufactures Life Insurance Company*, 2005 BCSC 1661, at paras 74-75.
[71] *Davis v. McArthur*, 1970 CanLII 813, at para 13.
[72] Amended Notice of Civil Claim, at para 44-45.
[73] *Ibid*.

69. The Defendants contend that the misfeasance claim is statutorily barred in whole or in part by operation of s.92 of the *Public Heath Act*.

70. The immunity conferred by s.92 (1) of the *Public Health Act* does not apply to a person in that subsection in relation to anything done or omitted in bad faith.[74]

71. The Plaintiff has plead that the PHO acted in bad faith when issuing the in exercising her statutory authority under the *Public Health Act* with reckless indifference or willful blindness, acted in bad faith as the PHO knew or could have reasonably discovered that COVID-19 vaccinations were not effective at preventing viral transmission of COVID-19 to other people.

72. The Plaintiff has pled that the PHO acted in bad faith when she exercised her statutory authority under the *Public Health Act* with reckless indifference or willful blindness. The PHO knew or could have reasonably discovered that the vaccines did not prevent transmission of COVID-19, were not safe and posed significant risks for potential side effects.

73. Comparable pleadings have withstood judicial scrutiny on a motion to strike. For instance, in *Farrell v Attorney General of Canada*,[75] the court found that the Plaintiff pled sufficient material facts of bad faith, abuse of power, or disregard for *Charter* rights to set aside any potential governmental immunity.[76] Specifically, the Plaintiff pled that the government "knew or was willfully blind" to the unconstitutional infringements brought about by their acts and, notably, that their conduct was "not necessary for safety or security reasons nor proportionate."[77]

74. Similarly, in *Paradis Honey Ltd. v Canada (Attorney General)*,[78] the Plaintiff pled that the governmental guideline at issue was unreasonable because it was "not supported by any scientific evidence of a risk of harm" and that it was enacted for an improper purpose because it was induced by a faction motivated by their own financial advantage.[79] Stratas J.A. overturned the Federal Court's decision to strike these pleadings, writing that these allegations of bad faith and improper purpose "can succeed in law."[80]

75. The Claim sufficiently pleads that the PHO acted in bad faith. The determination of the Plaintiff's claims of bad faith should not be made without the consideration of evidence which is yet to be adduced in this matter. At this stage of the proceeding the decision to be made by the court is procedural and the facts plead by the Plaintiff regarding bad faith, taken as true, are sufficient to overcome the Defendants claim of statutory immunity.

B. CPA s.4(1)(a) – There is an Identifiable Class

[74] *Public Health Act*, SBC 2008, c 28, s. 92(2).
[75] *Farrell v Attorney General of Canada*, 2023 ONSC 1474.
[76] *Ibid*, at paras 161-62.
[77] Ibid, at para 163.
[78] *Paradis Honey Ltd. v Canada (Attorney General)*, 2015 FCA 89.
[79] *Ibid*, at para 85.
[80] *Ibid*, at para 87.

76. Section 4(1)(b) of the CPA requires that there be an identifiable class of "two or more persons." The class definition must be objective; that is, the definition cannot be tied to the outcome of the proceeding. Further, the definition should be sufficiently clear so that Class Members can determine whether they are in the class and decide whether they wish to participate in the case.

77. The Supreme Court of Canada describes the requirement for an identifiable class as follows:

> First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria [footnotes omitted].[81]

78. The Plaintiff need only provide some evidence that a class exists. The Plaintiff is not required to show that Class Members are likely to succeed with their individual claims or to prove that those individual Class Members have damages. To do so would impermissibly delve into the merits. Thus, a class definition will not be overly broad even if it includes class members who have no claims. In *LeFrancois v. Guidant Corp*. Mr. Justice Cullity held:

> [65] …In *Hollick*, the Supreme Court of Canada required only some basis in fact - described as a minimum evidential burden - for the existence of a class with the claims asserted by the Plaintiff on their behalf. The evidence here is that the alleged defects in the devices are capable of causing – and in the United States have caused – injuries of various degrees of severity. The evidence includes that contained in a product report of the FDA as of June 16, 2005. Mr. Heron has deposed to the severe anxiety, depression and loss of enjoyment of life he has suffered since learning of the potential defects of the device he relied on the proper functioning of his hear. The evidence is, in, my judgment, sufficient to permit the court to infer at this state of the proceeding that there are members of the class with claims as asserted by the Plaintiff.

[81] *Western Canadian Shopping Centers v. Dutton*, 2001 SCC 46 at para 38.

> [66] The question whether any particular member of the class has suffered damage as a result of the Defendants' conduct is, in cases of this kind, essentially an individual issue that, in addition, may raise questions of causation: see, for example Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. G.D.), at pages 176 and 178. To require further evidence at this stage would cause the court to stray too far into the merits of the claims asserted on behalf of the class. For this reason, it was held in *Bywater* and *Chadha v. Bayer Inc.*, (2003), 63 O.R. (3d) 22 (C.A.) that it is not permissible to define the class in terms of those who suffered damages from the Defendants' conduct. If I were to accept the submission of Defendants' counsel, I would, in effect, be treating the class definition as including such a requirement. It follows, moreover, from the prohibition of merits-based class criteria that class definitions will very often and I think probably most often - be over-inclusive to the extent that they will include persons who cannot establish that they suffered damages; see, for example, *Markson v. MBNA Canada Bank*, (2007), 85 O.R. (3d) 321 (C.A.) where such a class was accepted and the possibility of an aggregate assessment recognized.[82]

79. The following principles apply to the identifiable class criterion:

    (a) The class definition should not be merits based;

    (b) Membership in the class should be determinable by objective criteria;

    (c) Not every class member need have a provable claim or recover to the same degree;

    (d) There must be a rational relationship between the class, the causes of action and common issues; and,

    (e) The class definition must not be unnecessarily broad or over-inclusive.[83]

80. An identifiable class serves to give individual members notice so that they can exercise their willingness to be a member and to claim relief.[84]

81. It is not necessary that every class member be named or known.[85]

82. It is not necessary that all members share a common cause of action. The Ontario Court of Appeal found that the motions judge erred by requiring all residential school

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[82] *LeFrancois v. Guidant Corporation*, 2008 CanLII 15770 (Ont. S.C.J), at paras 65-66.
[83] *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, at paras 20-21; *Cloud v. Canada (Attorney General)* (2004), 2004 CanLII 45444 (ON CA), at paras 45-46; *Das v. George Weston Limited*, 2017 ONSC 4129 at para 610; *Tiboni v. Merck Frosst Canada Ltd.*, 2008 CanLII 37911 (ON SC), at para 78.
[84] *Sun-Rype Products Ltd. v. Archer Daniels Midland*, 2010 BCSC 472, at para 98.
[85] *Western Canadian Shopping Centers Inc. v. Dutton*, 2001 SCC 46, at para 38.

students to "fully share a cause of action." The shared interest need only extend to the resolution of the common issues.[86]

83. The fact that particular persons may have difficulty in proving that they satisfy the conditions for membership is often the case in class proceedings and is not, by itself, a reason for a finding that the class is not identifiable.[87]

84. An acceptable class definition must not be confined to persons who have valid claims, as that would beg the question of the merits of the litigation, which is usually not permissible.[88]

85. The majority in *Sun-Rype Products Ltd. v. Archer Daniels Midland* emphasized that what the Plaintiff must do to demonstrate some basis in fact that there was an identifiable class was to show that at least two people fit within the class definition:

> [57] I agree with the courts that have found that the purpose of the class definition is to (i) identify those persons who have a potential claim for relief against the Defendants; (ii) define the parameters of the lawsuit so as to identify those persons who are bound by its result; (iii) describe who is entitled to notice of the action (*Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (Ont. S.C.J.), at paras. 26 and 30; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. J. (Gen. Div.), at para. 10; Eizenga et al., at §3.31). *Dutton* states that "[i]t is necessary . . . that any particular person's claim to membership in the class be determinable by stated, objective criteria" (para. 38). According to Eizenga et al., "[t]he general principle is that the class must simply be defined in a way that will allow for a later determination of class membership" (§ 3.33) [emphasis added].[89]

86. In *Rumley v. British Columbia*, the Court of Appeal reformulated the proposed class definition from:

> . . . all students of Jericho Hill School (the "Students") and their family members (the "Family Members"), who suffered damage resulting from the operation and management of Jericho Hill School (the "School") from 1950 to 1992 and who reside in British Columbia.

to:

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[86] *Cloud v. Canada (Attorney General)*, 2004 CanLII 45444 (ON CA), at para 46.

[87] *Risorto v. State Farm Mutual Automobile Insurance Co. (2007), 38 C.P.C. (6th) 373 (Ont. S.C.J.), at para. 31. See also, Serhan Estate v. Johnson & Johnson, 2004 CanLII 1533 (ON SC)*

[88] *Dumoulin v. Ontario (Cullity J.) at para. 13*

[89] *Sun-Rype Products Ltd. v. Archer Daniels Midland, 2010 BCSC 472 at para. 57, see also Jiang v. Peoples Trust Company, 2017 BCCA 119 at para. 74*

> Students at the Jericho Hill School between 1950 and 1992 who reside in British Columbia and claim to have suffered injury, loss or damage as a result of misconduct of a sexual nature occurring at the school.[90]

87. The proposed class definition as stated in the Claim is:

> All unionized employees of the Provincial Government in British Columbia ("Public Servants") who have been subject to the Regulation [enacted by Order in Council No. 627/2021 and *HR Policy 25: COVID-19 Vaccination Policy*. (the "Class Definition").

88. The statutory conditions are satisfied by the proposed Class Definition. The Class Definition states objective criteria by which membership in the class can be determined. In order to be a class member, a person must (a) be a unionized employee of the British Columbia Provincial Government (b) they were subject to the Regulation [enacted by Order in Council No. 627/2021 and *HR Policy 25: COVID-19 Vaccination Policy*.

89. Whether a person meets those criteria can be determined easily and objectively. Class membership does not depend on the outcome of any claim.

90. The Class Definition does not require legal judgment, or opinion nor is it vague and subjective.

91. The Class Definition is not overinclusive. Some unionized putative Class Members have filled grievances, those grievances were incapable of advancing or adjudicating the claims advanced in this proceeding.

    (a) An action for misfeasance in public office against the PHO is neither contemplated nor within the jurisdiction of the Plaintiff's collective agreement.

    (b) An action challenging discipline and statutory breach of privacy as a result of Law is not within the jurisdiction of a labour arbitrator. In fact, the Plaintiff attempted to file a grievance to redress the discipline and the BCGEU withdrew the grievance noting: "The *Regulation* made the COVID-19 Policy a term and condition of employment, this means that an arbitrator would be required to treat it as such. An arbitrator would not have the ability or jurisdiction to evaluate the Regulation because that would have to be done through the courts. Because of this it would not be possible to challenge the COVID-19 Policy or it's ramifications to you through the grievance process".

    (c) An action challenging infringement of s. 2d of the *Charter* on the basis of associative rights to collective bargaining does not arise under the collective agreement and is therefore not within the jurisdiction of a labour arbitrator. As noted in *AUPE v Alberta*, 2014 ABCA 43 at para 37 , the "true character" of dispute "is about exclusion from the bargaining unit due to an allegedly unconstitutional statutory provision" and therefore does not arise under the collective agreement. See also *British Columbia Teachers' Federation v British*

[90] *L.R v. British Columbia*, 1999 BCCA 689 paras. 2 and 51.

> *Columbia*, 2015 BCCA 184 at para 32 (affirmed and adopted 2016 SCC 49) ("the issue here is whether legislation which interfered with terms of a collective agreement and temporarily prohibited collective bargaining on certain topics substantially interfered with workers' freedom of association").

92. Contrary to the Defendants' assertions, this action is not an abuse of process nor a collateral attack on the basis of grievances filed which were incapable of advancing or adjudicating the claims raised in this proceeding. Notably, as the Provincial Government is also the Plaintiff's employer, they could have simply enacted an employment policy, like many other employers. Had they done so, unionized members could have brought grievances which would have been justiciable on the relevant labour policy test (purpose, proportionality and reasonableness). The Provincial Government chose however to use the legislative process to mandate the Policy by Regulation. The practical effect of this choice was to immunize themselves from any challenge arising from any grievances, policy or individual, brought under the public service collective agreements. Ironically, now that the Plaintiff has challenged the Regulation in court, the only avenue available to the Plaintiff based on the Provincial Government's own choice to legislate employment terms and conditions versus utilizing employer policy, the Defendants argue that the action is an abuse of process, *res judicata*, and a collateral attack, stating that the Plaintiff has or should go though the grievance process.

93. The Plaintiff has provided evidence of the existence that the putative class consists of two or more persons.

C. CPA s.4(1)(c) – The claims raise common issues

94. To satisfy s. 4(1)(c) of the CPA, the action must raise common issues of fact or law. Such issues do not have to be determinative of liability. It is sufficient that these issues, if decided in a single trial, will help to advance the litigation in some material way for the benefit of Class Members.

95. The essence of a common issue is that it is a substantial ingredient of each class member's claim and that the resolution of the issue in respect of the representative Plaintiff's claim will be capable of extrapolation to each class member.[91]

96. In *Campbell v. Flexwatt Corp*., the Court of Appeal held:

> [53] When examining the existence of common issues, it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every Plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible.[92]

[91] *Harrington v. Dow Corning Corp., 2000 BCCA 605, at para 24.*
[92] *Campbell v. Flexwatt Corp.,* 1997 CanLII 4111; leave to appeal to S.C.C. denied [1998] S.C.C.A. No.13.

97. The commonality requirement is described by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton* as follows:

> [39] ... there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus, an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over noncommon issues or that the resolution of the common issues would be determinative of each class member's claim.[93]

98. The Plaintiff need not show that everyone in the class shares the same interest in the resolution of the common issue or that the issue will be answered in the same way for each class member. Furthermore, the possibility that there may be differences between Class Members does not represent a barrier to finding that common issues exist.[94]

99. To be considered common, issues need not be dispositive of the litigation. In *McDougall v. Collinson,* the court noted:

> A resolution of the common issues does not have to be determinative of liability or supportive of the relief sought. It need not produce the same result for all members of the class. It must, however, advance the litigation forward. If it does not, then certification is inappropriate.[95]

100. The Plaintiff need only provide some evidence to support the existence of common issues. In *Andersen v. St. Jude Medical Inc.*, the court held:

> [46] …Although it is established that the Plaintiff must provide some evidential foundation for the common issues they propose, this is, I believe, a significantly different requirement than the obligation imposed on a respondent on a motion for summary judgment. "Some basis in fact" (*Hollick* at p. 175) is all that is required of the Plaintiff when attempting to demonstrate the existence of common issues. The court is

[93] *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46.
[94] *Hollick v. Toronto (City)*, 2001 SCC 68, at para 21, *Rumley v. British Columbia*, 2001 SCC 69, at para 33. See also *Endean v. Canadian Red Cross Society*,1997 CanLII 2079 (BCSC) rev'd on other grounds (1998) 48 B.C.L.R. (3d) 90 (C.A.).
[95] *McDougall v. Collinson*, 2000 BCSC 398 (CanLII), at para 86.

> not concerned with whether there is "a genuine issue for trial" in the sense in which those words have been interpreted in rule 20.04(1) [Rules of Civil Procedure, R.R.O. 1990, Reg. 194]. On this essentially procedural motion, the question whether one party, or the other, would, or even might, be successful at trial is not in issue. If that were not correct, a full evidential record would be required on every motion for certification where the existence of common issues might be contested.[96]

101. When a systemic wrong causes harm to an undifferentiated class of individuals, it can be entirely proper to use a class proceeding that focuses on the alleged wrong.[97]

102. Though the Plaintiff proposes common issues, it is for the court to determine and frame the issues. At the certification stage, the common issues should be framed in general terms. As the action proceeds, the court may determine that the common issues need to be more particularized. In *Cloud v. Canada (Attorney General)* the Ontario Court of Appeal (*Cloud*) wrote:

> [72] As the class action proceeds, the judge managing it may well determine that the common issues should be restated with greater particularity in light of his or her experience with the class proceeding. To permit that process to unfold with flexibility, at this stage, I would state the common issues in general terms….[98]

103. In *Cloud,* the Court emphasized that an issue can constitute a substantial ingredient of the claims and therefore satisfy the commonality requirement even though many individual issues of causation remain to be decided noting:

> "The respondents also say that the affidavit material shows that many of the appellants and other class members did not suffer much of the harm alleged, such as loss of language and culture. They argue that this underlines the individual nature of these claims and negates any commonality. Again, I disagree. There is no doubt that causation of harm will have to be decided individual by individual if and when it is found in the common trial that the respondents owed legal duties to all class members which they breached. However, this does not undermine the conclusion that whether such duties were owed, what the standard of care was, and whether the respondents breached those duties constitute common issues for the purposed of s.5(1)(c)."[99]

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[96] *Andersen v. St. Jude Medical Inc.*,2003 CanLII 5686, para 46.
[97] *Dennis v. Ontario Lottery and Gaming Corp.*, [2013] O.J. No. 3468, 2013 ONCA 501, at para. 53 (Ont. C.A.).
[98] *Cloud v. Canada (Attorney General),* 2004 CanLII 45444 (Ont.C. A).
[99] *Ibid*, at para 416.

104. The Plaintiff proposes the common issues attached to these submissions as Schedule A, with changes underlined if they vary from the Notice of Application.

105. There is sufficient evidence of commonality: The material conduct by the Defendants has essentially the same effect on the putative class:

    (a) misfeasance in public office;

    (b) their privacy rights were violated as a result of the Regulation and Policy; and,

    (c) their *Charter* rights were breached;

106. Questions 1-5 – Misfeasance and Beach of Privacy. These are questions common to all putative Class Members. The determination of these questions does not depend on the evidence of individual putative Class Members. Rather, the determination of these questions is based solely on the Defendant PHO's conduct. These questions are a substantial ingredient in the determination of each putative Class Members claim. The fact that some putative Class Members complied with the Regulation and Policy does not impact the determination of the questions. The degree of harm suffered within the putative class may vary. However, that does not preclude a determination of the Defendant PHO's conduct. These are suitable common questions,

107. Questions 6-9 – s. 2d of the *Charter.* These questions are common to all putative Class Members. *Charter* breaches caused by policies, rules or blanket orders are capable of class treatment because they focus on the conduct of the defendant. There exists a base commonality on how each putative Class Member was impacted. These questions are a substantial ingredient in the determination of each putative Class Members claim. The fact that some putative Class Members complied with the Law does not impact the determination of the questions. The degree of harm suffered within the putative class may vary. However, that does not preclude a determination of the Defendants' conduct. These are suitable common questions.

108. Questions 13-23 are appropriate common questions.

109. Section 29 of the CPA permits the court to make an aggregate award of monetary relief in respect of all or any part of a defendant's liability if:

    (a) monetary relief is claimed on behalf of some or all class members,

    (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and

    (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

110. Statistical evidence may be used for this purpose, and the court may make a distribution on an average or proportional basis.[100]

[100] *Class Proceedings Act*, RSBC 1996, c 50, ss. 30-31.

111. In *Daniells v. McLellan*, the Ontario Superior Court certified aggregate damages as a common issue noting at para 70, "it is possible to assess in the aggregate at least part of the damages with respect to the claims that sound in negligence, breach of fiduciary duty, and breach of contract."[101]

112. Similarly in *Brazeau v. Attorney General (Canada)*, the court noted that *Charter* damages serve the function of vindicating not only class members' interest in the protection of *Charter* rights and freedoms but also vindicate the public's interest in compliance with the *Charter*. [102] *Charter* damages for vindication and deterrence can reasonably be determined without proof by of individual Class Members' claims for compensatory losses. A base amount can be aggregated to be distributed across the class.

113. Following discovery and trial, the Court will be in a position to determine an aggregate award that reflects the nature and degree of the Defendants' disregard for the putative Class Members' rights.

D. Section 4(1)(d) – A Class Action is the Preferable Procedure for the Fair and Efficient Resolution of the Common Issues

114. The common issues in this litigation are best resolved through a class action.

115. Subsection 4(1)(d) of the CPA requires that a class proceeding be the preferable procedure for the resolution of the common issues.

116. Section 4(2) of the CPA provides a non-exhaustive list of considerations that inform the analysis under s.4(1)(d) to determine whether a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. In this case, each consideration militates in favour of certification.

117. Section 4(2) provides:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;

[101] *Daniells v. McLellan,* 2017 ONSC 3466, at paras 68-70. See also paras. 42-67 on the "baseline assessment of common experience damages"; See also *Johnson v Ontario,* 2016 ONSC 5314, at para 122.
[102] *Brazeau v. Attorney General (Canada),* 2019 ONSC 1888 (CanLII), at para 440. See also *Good v. Toronto (City) Police Services Board*, 2016 ONCA 250.

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

118. The requirement that a class proceeding be the preferable procedure for resolution of issues is premised on the existence of common issues. The preferability analysis considers the advantages of class proceedings – judicial economy, access to justice, and behaviour modification, and the particular factors of s. 4(2). In *Jiang v. Vancouver City Savings Credit Union*, Justice Hunter observed that the focus of a preferability analysis is "on comparing the procedure of a class proceeding with any alternative means to resolve the claims of the class members."[103]

119. In determining whether a class action is the preferable procedure, the court must review the factors in s. 4(2) collectively. No single factor is determinative. The inquiry into preferable procedure "should be conducted through the lens of the three principle procedural advantages of class actions: judicial economy, access to justice, and behavioural modification".[104]

120. The preferability requirement has two concepts at its core: first, whether the class action would be a fair, efficient and manageable method of advancing the claim; second, whether the class action would be preferable to other reasonably available means of resolving the claims of Class Members.[105]

121. Class proceedings will still remain the only practical and efficient means of resolution for Class Members whose claims have modest damage potential and for whom separate proceedings would not be feasible. Greater difficulties would be experienced in administering separate proceedings for modest claims unless those claims were simply not pursued at all, which would defeat the whole purpose of class proceedings. For those prospective Class Members, the common issue should be the predominant issue.[106]

122. A consideration of the factors under s. 4(2) of the CPA suggests that a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues in this case.

The Common Issues Predominate – s. 4(2)(a)

123. The common issues predominate over any individual issues that may remain after resolution of the common issues.

124. Section 7 of the CPA provides that the court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:

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[103] *Jiang v. Vancouver City Savings Credit Union*, 2019 BCCA 149, at para 33.
[104] *AIC Limited v. Fischer*, 2013 SCC 69, at para 16. See also *Hollick*, *supra*, at paras 27-31.
[105] *Toronto Community Housing Corporation v. Thyssenkrupp Elevator (Canada) Limited*, 2011 ONSC 4914 (CanLII).
[106] *Harrington v. Dow Corning Corp.*, 1996 CanLII 3118 (BC SC).

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

(d) the number of class members or the identity of each class member is not known;

(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

There is No Evidence of Individual Interest in Control – s. 4(2)(b)

125. There is no evidence that any putative Class Members wish to pursue these claims on an individual basis.

These Claims are not the Subject of Other Proceedings – s. 4(2)(c)

126. The existence of labour grievances filled by putative Class Members against the BCPS does not create an overlap or serve to relitigate the causes of action in this proceeding. The Plaintiff restates submissions on this point made in paragraphs 92 and 93 above.

127. The Plaintiff is not aware of any proceedings in which unionized BCPS employees have brought forward claims, against the present Defendants, which would be duplicative of the causes of action asserted in this claim.

Other Means of Resolving the Claims are Impractical and Inefficient– s. 4(2)(d)

128. Individual litigation of these claims would be expensive and repetitive, and in many cases impossible.

129. There are thousands of putative Class Members who could bring individual claims advancing the claims raised in this proceeding. Litigation of these claims is prohibitively expensive for public servants and can take multiple years to resolve. Contrary to the Defendants' assertions, these clams are not capable of being brought though collective agreement arbitration with the corresponding financial burden being borne by large unions.

130. Additionally, the quantum of damages for putative Class Members will necessarily vary in an individualized damage assessment. Regardless of 'moderate' or 'minimal' damages, the financial burden of a case such as this would consume all or almost all proceeds of the judgment of any single Plaintiff. These claims involve complex and novel issues relating to torts, privacy, and the *Charter*. The claims require substantial resources to prosecute through the courts and necessitate the use of experts to establish underlying causes of action. It is extremely unlikely that an individual public servant would have the resources to prosecute such a claim.

131. In *Nantais v. Telectronics Proprietary (Canada) Ltd*., the Court concluded that in cases with a "stupendous financial burden of a case such as this would consume

all or almost all of the proceeds of the judgement of any single Plaintiff. The Defendants (if responsible) would likely therefore be insulated from any of these claims because of financial consequences alone. It is only by spreading out the cost that members of the class have any chance of success. Not only is the class proceeding preferable, it is the only procedure whereby members of the class will have any real access to the courts."[107]

132. *Endean v. Canadian Red Cross Society* involved considerable expert evidence and other expenses in establishing liability. The Court noted: "The controlling consideration here is that the complexity and cost of establishing liability are such as to effectively preclude the large majority of class members from access to the court in individual actions. The likelihood that they will recover only modest damages if successful would militate against the expenditure necessary to prove their claims."[108]

133. The cost of bringing individual claims in Supreme Court is prohibitive, especially since awards for *Charter* damages are relatively low compared to litigation costs. Unlike in the United States, even when Plaintiffs can successfully prove infringements of their constitutional rights, unless they can also prove that lasting personal injury resulted, the damages awarded by Canadian courts are low. For example, in *Vancouver (City) v Ward*, Mr. Ward's eight-year legal battle resulted in an award of only $5,000 under section 24(1) of the *Charter*.[109] Mr. Ward was a lawyer and was represented pro bono at all levels of court.

134. In *R v 974649 Ontario Inc*, the Court noted: Considering that "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach."[110] If the Defendants are to take *Charter* rights seriously, the Court should consider the innovative opportunities presented by the procedural vehicle of class actions to ensure the state cannot infringe *Charter* rights with impunity.

The Administration of a Class Action Will Conserve Judicial Resources – s. 4(2)(e)

135. There is no reason to presume that the administration of this case as a class action would be unduly burdensome to judicial resources. On the contrary, the class action procedure is ideally suited to deal with this case. If every public servant, meeting the Class Definition, was to commence a Supreme Court action alleging tort and *Charter* claims, the Court would be overrun by these claims. Proceeding on a class wide basis is the most efficient and least expensive way to proceed for the judicial system.

E. CPA s.4(1)(e) – The Representative Plaintiff

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[107] *Nantais v. Telectronics Proprietary (Canada) Ltd,* 1995, O.J. No. 2592 (Gen. Div), at para 349.
[108] *Endean v. Canadian Red Cross Society,* 1997 B.C.J. No.158, at para 63.
[109] *Vancouver (City) v Ward,* [2010] 2 S.C.R. 28.
[110] *R v 974649 Ontario Inc,* 2001 SCC 81, at para 20.

136. Section 4(1)(e) of the CPA requires that there be a representative Plaintiff who:

(a) would fairly and adequately represent the interests of the class,

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying Class Members of the proceeding, and

(c) does not have on the common issues, an interest that is in conflict with the interests of other Class Members.

137. The proposed representative Plaintiff need not be "typical" of the class, nor the "best" possible representative.[111]

138. *In Endean v. The Canadian Red Cross Society*, the Court considered the representative plaintiff requirements and held that the two most important considerations in determining whether a plaintiff was appropriate were whether there was a common interest with other class members and whether the representatives would "vigorously prosecute" the claim.[112]

139. The proposed representative Plaintiff meets these stated criteria. He has a common interest with other Class Members and would vigorously prosecute the claim. The proposed representative Plaintiff has taken all necessary action to move this proceeding forward. There is no reason to believe that he would cease vigorously prosecuting this claim following certification.

140. The proposed representative Plaintiff has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying putative Class Members of the proceeding.

141. In his affidavits, the Plaintiff deposes that he will do his best to fairly and adequately represent the interests of Class Members. The proposed representative Plaintiff does not, on the common issues, have an interest that conflicts with the interests of other putative Class Members.[113]

<u>Class Counsel</u>

142. Class Counsel is experienced in handling large and complex litigation files. For example, Lead Counsel has extensive experience handling large disputes consisting of several thousand union workers which involved handling thousands of documents.

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[111] *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46, at para 41.
[112] *Endean v. The Canadian Red Cross Society*, (1997), 148 D.L.R. (4th) 158 (B.C.S.C.).
[113] Affidavit # 1 of Jason Baldwin.

143. Lead Counsel also has extensive experience as lead counsel on all files consisting of union and labour disputes often requiring a regular review of administrative decisions and challenging the provincial government.

144. Lead Counsel served as Director of Labour Relations for the British Columbia Ministry of Health, General Counsel of the British Columbia Nurses Union and later as Chief Executive Officer and chair of the Nurses Bargaining Association. As such, he has extensive experience and insight into matters concerning union members and their associative rights.

145. Counsel has been involved in a number of complex, high volume, and high-profile cases which have included leading a 48,000-member union through successful bargaining and various successful large-scale, industry-wide application disputes involving health policies for healthcare workers challenging actions of the Government of British Columbia and Office of the Provincial Health Officer.

146. Large volumes of documents are handled with the assistance of staff and various software applications. If additional staff are required, Counsel has a wide network of lawyers with established relationships, including OnPoint Legal Research, and can hire or contract with additional lawyers. Class Counsel is fully prepared to contract with additional class counsel as required.

Litigation Plan

147. The Plaintiff has produced a suitable Litigation Plan, in a form similar to plans that have previously been approved by this Court. The Litigation Plan will take this case to trial.

148. While the Plaintiff does submit a Litigation Plan at the certification stage, it is not immutable. In practice, upon certification, the plan of proceeding is developed as a collaborative effort between the representative Plaintiff and the Defendants, with the court having a supervisory role, and is modified as the action progresses.[114]

149. The certification of this action as a class proceeding ought to be approved.

[114] *Chippewas of Sarnia Band v. Canada (Attorney General*),1996 CanLII 8015 (ON SC); *McLaren v. Stratford (City)*, 2005 CanLII 19801 (ON SC), at para 55; *Gregg v. Freightliner Ltd.*, 2003 BCSC 241 (CanLII), at para 85. See also *Carom v. Bre-X Minerals Ltd.,* [1999] OJ No 1662 where the court agreed to certify subject to litigation plan.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: December 5, 2024,

US

Umar A. Sheikh
Lawyer for the Plaintiff

SCHEDULE "A" - PROPOSED COMMON ISSUES

Misfeasance in Public Office

1. Was the Provincial Health Officer aware that COVID-19 vaccinations did not prevent transmission of COVID-19 and had serious risks of adverse side effects?

2. If yes, did the Provincial Health Officer have an obligation to disclose that information to the British Columbia Public Service, the Minister of Finance, and the Lieutenant Governor in Council?

3. Did the Provincial Health Officer act reasonably and lawfully in advising the British Columbia Public Service, the Minister of Finance, and the Lieutenant Governor in Council that mandating vaccinations for COVID-19 was a reasonable and proportional approach to prevent transmission of COVID-19 within the British Columbia Public Service?

4. Was the Provincial Health Officer aware that her conduct in advising mandatory vaccinations for COVID-19 was likely to injure the Plaintiff and putative Class Members?

The British Columbia *Privacy Act*

5. Did the Defendants breach the Plaintiff and putative Class Members' privacy pursuant to the *Privacy Act* when they required disclosure of COVID-19 vaccination status?

Canadian Charter of Rights and Freedoms

6. Do the Order and Regulation create and impose a new term and condition of employment for unionized employees of the British Columbia Public Service?

7. If yes, did the Lieutenant Governor in Council or the British Columbia Public Service Agency engage in the required consultations under s. 4(1) of the *Public Service Act*?

8. Do the Order and Regulation infringe the Plaintiff's and putative Class Members' s. 2d *Charter* right to freedom of association?

9. If the Order and Regulation listed in question 8 of this Schedule A violate the *Charter,* can such violations be saved by section 1 of the *Charter*?

Damages

10. Are damages pursuant to s. 24 of the *Charter* an appropriate and just remedy for the breaches of *Charter* rights?

11. Are the Plaintiff and putative Class Members entitled to general damages based on the breach of the *Privacy Act*?

12. Are the Plaintiff and putative Class Members entitled to general damages based on the tort of Misfeasance of Public Office?

13. If the Defendants are liable to the Plaintiff and putative Class Members for damages, what is the appropriate quantum of damages?

14. Should the court make an aggregate damages award for all or part of the damages? If so, in what amount?

15. If awarding aggregate damages is not appropriate in the circumstances, what is the appropriate method of assessing damages?

16. Should the Defendants pay the cost of administering and distributing the Plaintiff and Class Member's recovery? If so, in what amount?

17. Would damages fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches?

18. Have the Defendants demonstrated countervailing factors that defeat the functional considerations that support a damage award and render damages inappropriate or unjust?

19. What is the appropriate quantum of damages?