FORM 33


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

# APPLICATION RESPONSE

**Application response of:** Jason Baldwin, (the "Application Respondent")

THIS IS A RESPONSE TO the Notice of Application of 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 filed 28 Oct 2024.

The Plaintiffs estimate that the application will take 5 days, together with the other applications scheduled to be heard at the same time.

This matter is not within the jurisdiction of an associate judge.

**Part 1: ORDERS CONSENTED TO**

The Application Respondents consent to the granting of the Orders set out in the following paragraphs of Part 1 of the Notice of Application on the following terms: NONE

**Part 2: ORDERS OPPOSED**

The Application Respondents oppose the granting of the Orders set out in paragraphs 1, 2,3, 4 of Part 1 of the Notice of Application.

**Part 3: ORDERS ON WHICH NO POSITION IS TAKEN**

The Application Respondents take no position on the granting of the Orders set out in paragraphs NONE of Part 1 of the Notice of Application.

**Part 4: FACTUAL BASIS**

1. The Plaintiffs rely upon the facts as stated in the Amended Notice of Civil Claim filed April 2, 2024, ("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 their position by restating the facts found in the Claim (albeit in a more summary form) below.

**The Impugned Orders and resultant policies**

2. This case arises from the enactment by the British Columbia Provincial Government of Human Resources Policy 25 – COVID-19 Vaccination (the "Policy") and subsequent *Order in Council 627/2001* (the "Impugned Order"), enacting the *Public Service COVID-19 Vaccination Regulation* (the "*Regulation*"), which provided for the Policy to be a term and condition of employment with the BC Public Service (BCPS) and allowed for just cause terminations for non-compliance with the Policy.

*3.* The Policy and *Regulation* were enacted based upon the advice of the British Columbia Public Health Officer ("PHO") acting under the authority of the *Public Health Act*, SBC 2008, C 28.

**The consequences to the plaintiff**

4. The Plaintiff is a former employees of the BCPS. He was subject to—and seeks to represent a class of individuals that were also subject to—discipline, including suspension and termination, for failure to disclose their vaccination status and/or failure to become vaccinated as required by the Impugned Order and *Regulation* (the proposed class members, unless otherwise indicated, are referred to herein as the "Plaintiffs").

5. The Plaintiffs' employment with the BCPS (the "Employer") was comprehensively and exhaustively covered by collective agreements. These collective agreements contained terms that had been previously negotiated by and between the Employers and the Plaintiffs' bargaining units/unions.

6. None of the collective agreements between the Plaintiffs and the Employer contain terms stating, expressly or impliedly, that:

    (a) Vaccination status be disclosed prior to the Plaintiffs being able to perform their job duties;

(b) COVID-19 vaccination or other medical procedures be undertaken prior to the Plaintiffs being able to perform their job duties; or

(c) The Employer could discipline the Plaintiffs for failure to disclose vaccination status or failure to become vaccinated for COVID-19.

**The Defendants' Knowledge and Motivations**

7. The Defendants were or ought to have been aware of the existence of these terms within the collective agreements.

8. The Defendants were further aware that the collective agreements had been subject to extensive negotiations between the Employers and the Plaintiffs' respective bargaining units.

9. Nevertheless, the Defendants imposed the terms of the Impugned Order into the employment relationship between the Plaintiffs and their Employers without the protections afforded by collective bargaining and without the Plaintiffs' consideration or consent.

10. The PHO was also 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.

11. The Defendants' stated objective in enacting the Impugned Order and *Regulation* was to reduce the transmission of COVID-19, even though the PHO knew that mandatory vaccination would not further this objective.

12. In advising to enact the Impugned Order and *Regulation*, the PHO was responding to political pressures as opposed to acting within her statutory grant of authority—enacting measures to deal with safety—under the *Public Health Act*.

13. The PHO advised to enact the Impugned Order *Regulation* even though she was aware that the terms of the Impugned Order would pose a direct risk of substantial harm to the Plaintiffs.

14. The Plaintiffs were in fact harmed by the loss of pay and benefits pursuant to their valid collective agreements and the emotional harm arising from the loss of their ability to work and the coercive tactics employed by the PHO.

## Part 5: LEGAL BASIS

### Overview

15. The Defendants seek to dismiss the action as an abuse of process under Rule 9-5(1)(d), alternatively to strike the breach of privacy claim and all claims against the PHO under Rule 9-5(1)(a), the s. 2(d) *Charter* and breach of privacy claims should be dismissed under Rule 21-8(1)(a) and/or (b) for lack of jurisdiction and in further alternative to dismiss the misfeasance in public office claims under Rule 9-6.

### This Action is Not an Abuse of Process and the s.2(d) Charter Claim and Breach of Privacy are Not Within the Exclusive Jurisdiction of Board

16. Abuse of process is a broad and flexible doctrine that permits the court to prevent unfairness and oppressive treatment in the context of civil actions. The Proceedings must be so unfair as to bring the administration of justice into disrepute. A party invoking the doctrine of abuse of process bears a heavy onus and must show that the abuse is plain and obvious. *Rossner v. Nystrom,* 2019 BCSC 583, at para 43- 47. Courts should only strike pleadings as an abuse of process in the clearest of cases. *A.M. v. Dr. F.,* 2021 BCSC 32, at para 63.

17. The Defendants submit that this action is an abuse of process predicated on two arguments, first they submit that the action falls within the exclusive jurisdiction of the *British Columbia Labour Relations Code* RSC 1996, c. 244 ("the Code") and in so arguing invoke the doctrine of collateral attack. The arguments fail to establish abuse of process as this present action does not fall within the exclusive jurisdiction of the Code and the claims advanced in this action have not been adjudicated in any forum The Defendants have failed to meet the heavy onus that the present action constitutes an abuse of process.

18. The Defendants argue that, because the Plaintiffs are or were members of certified trade unions, they are obliged under their collective agreements and the Code to proceed with any dispute within the employment grievance process. The Defendants further state that the Plaintiffs filed grievances similar to this action. In so arguing, the Defendants fundamentally mischaracterized the nature of the Claim.

19. The Supreme Court of Canada has repeatedly warned not to overextend the jurisdiction of labour arbitration: the exclusivity of labour arbitration "does not close the door to all legal actions involving the employer and the unionized employee...

This is so because the exclusive jurisdiction of a labor arbitrator applies only to 'disputes which arise expressly or implicitly from the collective agreement.'"[1]

20. Here, the claims of, misfeasance in public office, breach of privacy and infringement of s.2(d) of the *Charter of Rights and Freedoms* do not concern "the interpretation, application, administration, or alleged contravention of a collective agreement" such that it must be exhausted through the grievance process.[2] Rather, this dispute arises out of the Defendants' implementation of the Impugned Order and *Regulation*. The Plaintiffs allege that the Impugned Order and *Regulation* imposed terms on the Plaintiffs' employment that were contrary to (and indeed uncontemplated by) the relevant collective agreements. Here, as in *Québec (Commission des Droits de la Personne et des Droits de la Jeunesse) v Québec (Attorney General),* 2004 SCC 39 ("*Morin*"):

> [24] … All parties agree on how the agreement, if valid, must be interpreted and applied. The only question that arises is whether the process leading to the adoption of the clause held to be discriminatory and the insertion of it in the collective agreement contravenes the *Quebec Charter*, thereby rendering the clause inapplicable.

21. As stated in the seminal case of *Health Services and Support- Facilities Subsector Bargaining Assn. v British Columbia,* 2007 SCC 27, s. 2(d) 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."[3] It also protects these rights by imposing upon employers the duty to meet and discuss these goals with employees.[4] 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. 2(d) to the extent that it was imposed in a manner contrary to this process.[5] As stated in *British Columbia Teachers' Federation v British Columbia, 2015 BCCA 184* (aff'd 2016 SCC 49):

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

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[1] *Northern Regional Health Authority v Horrocks,* 2021 SCC 42 at para 22.
[2] *Id* at para 25.
[3] *Health Services and Support- Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27 at para 89 [*Health*].
[4] *Id.* at para 90; *see also* para 99 (duties to bargain in good faith under *Canada Labour Code)*.
[5] *See, e.g., id.* at para 113,

22. Here, the Claim alleges that the Impugned Order and Regulation unilaterally imposed terms into the Plaintiffs' existing and freely negotiated employment agreements. Specifically, the Impugned Order and *Regulation* mandated vaccination as a fundamental condition of employment, absent which the employee could not access employer property. The Impugned Order and *Regulation* 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."[6] The Impugned Order and Regulation substantially altered previously-agreed upon terms that reflected the employees' core interests in collective bargaining.

23. As reiterated by the Supreme Court of Canada: "[b]ecause the nature of the dispute and the ambit of the collective agreement will vary from case to case, it is impossible to categorize the classes of case that will fall within the exclusive jurisdiction of the arbitrator."[7] Here, the lawfulness of the actions taken by the government is not grounded in the collective agreements.[8] Further the grievances filed by the Plaintiff relate to wrongful termination, not s.2d violations, misfeasance in public office or breach of privacy. As such, it cannot be within the exclusive purview of a labour arbitrator and is not an abuse of process.

**The Breach of Privacy and Claims against the PHO are not "bound to fail"**

24. A pleading will be stuck under Rule 9-5(1)(a) if it is "plain and obvious" that the claim has no reasonable prospect of success. The facts as pleaded are assumed to be true unless they are manifestly incapable of being proven[9]. Otherwise framed, even if the facts are accepted as true, the Claim must be:

> ..."so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, 1994 CanLII 3529 (FCA), [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013

[6] *Health* at para 130.
[7] *Morin* at para 11.
[8] *See also British Columbia Teachers' Federation v British Columbia,* 2015 BCCA 184 at para 32 (affirmed and adopted 2016 SCC 49) [*BCTF*] ("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"); *AUPE v Alberta*, 2014 ABCA 43 at para 37 ("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).
[9] *Nevsum Resources Ltd. v. Araya*, 2020 SCC 5, at para 64.

> FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf. Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959.[10]

25. The Defendants have an "onerous" burden in seeking to strike the Claim, particularly without leave to amend.[11] As stated by the Supreme Court of Canada, "the motion to strike is a tool that must be used with care."[12] Courts "must" take a "generous approach" and "err on the side of permitted a novel but arguable claim to proceed to trial."[13]

26. A claim shout not be struck where, if amended, it could disclose a reasonable cause of action[14]. The Defendants have a "heavy" burden in requesting that the Court deny the Plaintiffs leave to amend, as this should only be disallowed "in the clearest of cases" where "it is clear that the claim cannot be amended to show a proper cause of action" or "it is clear that the plaintiff cannot allege further material facts that [they know] to be true to support the allegations."[15] The general rule is that leave to amend should be granted "unless there is no scintilla of a cause of action."[16] Indeed, "however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without prejudice to the other side."[17]

27. Conversely, at this preliminary stage in the proceedings, the threshold in establishing a reasonable cause of action "is quite low, as the right of action must be protected."[18] The Claim must merely "contain a concise statement of the material facts on which the parties relies," must not "include evidence by which those facts are to be proved," and "may raise any point of law."

28. As stated in *Mancuso v Canada (National Health and Welfare*), 2015 FCA 227, at para 19, the "material facts" that must be pled must be determined "in light of the cause of action and the damages sought to be recovered":

> [18] There is no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence. They are points on a continuum,

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[10] *Id*.
[11] *Doan v Canada*, 2023 FC 968 at para 40 [*Doan*].
[12] *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 21.
[13] *Id*.
[14] *Olumide v. British Columbia (Human Rights Tribunal)*, 2019 BCCA 386 at para 10.
[15] *Al Omani* at para 34; *Yan v Daniel*, 2023 ONCA 863 at para 19.
[16] *Al Omani* at para 34.
[17] *Café Cimo Inc v Abruzzo Italian Imports Inc*, 2014 FC 810 at para 8 (internal emphasis omitted) (citing test to grant leave to amend, which—per *McCain Foods Limited v JR Simplot Company,* 2021 FCA 4 at para 20, mirrors the test applicable on a motion to strike).
[18] *Doan* at para 43 (considering motion to certify a class action which—as described at para 41—is the same test as on a motion to strike).

> and it is the responsibility of a motions judge, looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.

29. It should also be remembered that, for pleadings, "perfection is not the standard."[19] In essence, a statement of claim should "tell the defendant who, when, where, how and what gave rise to its liability."[20] This should be done "in a reasonably practical fashion;" "the court should only interfere with a party's organization of its pleading in the clearest of cases where the allegations are incapable of being understood."[21]

30. In particular, on a motion to strike, "[t]he court should not engage in a paragraph by paragraph examination of a pleading or insist on precise compliance with the rules of pleading."[22] Rather, the court "must read [the pleading] to get at its 'real essence' and 'essential character' by reading it 'holistically and practically without fastening onto matters of form.'"[23] As stated by the Supreme Court of Canada, in considering such a motion, the court is "obliged to read the statement of claim as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies."[24]

**Breach of Privacy**

31. In arguing that the breach of privacy claim should be struck, the Defendants proffer a legal conclusion that the Impugned Order and *Regulation* were authorized by law and thus no tortious breach of privacy has occurred.

32. The legal conclusion proffered by the Defendants that the Impugned Order and *Regulation* were validly enacted does not vitiate the Plaintiffs' pleading that their privacy rights were violated due to the required disclosure of their private medical information. In fact, the conclusion offered by the Defendants is, as drafted, a bald assertion which illustrates the need for evidence on this point to be adduced in the trial process.

33. The Plaintiffs' have plead that the Impugned Order and *Regulation* violated their s. 2d privacy rights by requiring disclosure of private medical information to their Employer and thus was a tortious breach of privacy.

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[19] *Ponnampalam v Thiravianathan*, 2019 ONSC 5008 (Ont SCJ) at para 14.
[20] *Mancuso* at para 19.
[21] *Ponnampalam v Thiravianathan*, 2019 ONSC 5008 (Ont SCJ) at para 14.
[22] *Id.* at para 19.
[23] *Canadian Frontline Nurses* at para 123.
[24] *Operation Dismantle v The Queen* (1985), 1985 CanLII 74 (SCC) at para 14.

34. As such, the breach of privacy claim should not be struck under Rule 9-5(1)(a) and in the alternative leave to amend should be granted.

**Claims Against the PHO**

35. In arguing that the claims against the PHO should be struck, the Defendants state that the claim is bound to fail because it is plain and obvious that s.92 of the *Public Health Act* immunizes the PHO from any claim for damages including damages under s.24(1) of the *Charter*. The Defendants further state that no factual or legal basis is pled to support a challenge to the constitutionality of s.92 of the *Public Health Act* and that the Plaintiffs' notice of application is silent on this point, which amounts to an abandonment of challenge of constitutionality of s. 92. In so arguing, the Defendants mischaracterize the nature of the claim.

36. 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.[25]

37. In the Amended Notice of Civil Claim at paragraph 23, the Plaintiffs plead that the Defendants, including the PHO, acted in bad faith when issuing the Impugned Order as she knew or could have reasonably discovered that the vaccines were not effective at preventing viral transmission of COVID-19 to other people.

38. In the Amended Notice of Civil Claim at paragraph 26, the Plaintiffs plead that the Defendants, including the PHO, acted in bad faith when issuing the Impugned Order as the PHO knew or could have reasonably discovered that the vaccines were not safe and posed significant risks for potential side effects.

39. In the Amended Notice of Civil Claim at paragraph 28, the Plaintiffs seek a declaration that s.92 of the *Public Health Act* be read so that its effects do not limit rights established under the *Charter*, with respect to *Charter* damages.

40. The facts pleaded by the Plaintiffs regarding bad faith, taken as true, establish a reasonable cause of action to proceed against the PHO as it is not plain and obvious that the claims against the PHO are doomed to fail. In the alternative, the Plaintiffs should be allowed to further amend the pleadings.

**The Misfeasance Clam Should not be Dismissed Under Rule 9-6**

41. Rule 9-6 is a challenge based upon a limited review of the evidence in which a defendant can succeed by showing that the plaintiff's case is unsound or by adducing sown evidence that gives a complete answer to the plaintiff's case. If the court is satisfied that the plaintiff is bound to lose or the claim has no chance of success, the defendant must succeed. Conversely, if the plaintiff submits evidence

[25] Public Health Act, [SBC 2008] s. 92(2).

that contradicts the defendant's evidence in some material respect or if the defendant's evidence fails to meet all of the causes of action raised by the plaintiff, the application must be dismissed. A judge cannot weigh evidence beyond determining whether it is incontrovertible. If it is oath against oath, it is unlikely that the application could succeed. A judge must conclude beyond a reasonable doubt. It must be manifestly clear that there was no genuine issue for trial. This is a high bar. If the evidence needs to be weighed and assessed, then the test of plain and obvious or beyond a doubt has not been satisfied and the application is bound to fail.[26]

42. To satisfy the application under Rule 9-6 the Defendants have proffered an expert report purporting to be the final authority on COVID-19 vaccine safety and efficacy. Notably, Dr. Kindrachuk relies upon and reports aggregate studies and clinical research done by third parties in formulating his opinion.[27]

43. One such external source used by Dr. Kindrachuk is the United States Food and Drug Administration's Emergency Use Authorization Guidelines which state, *inter alia*:[28]

    (a) Based on the totality of scientific evidence available, including data from adequate and well controlled trials, if available, it is reasonable to believe that the product <u>may be effective</u> to prevent, diagnose, or treat such serious or life-threatening disease or condition that can be caused by SARS-CoV-2 and;

    (b) *Ed. Note:* this clearly identifies that prevention and/or treatment is referring to disease caused by SARS-CoV-2 infection and <u>no</u>t the prevention of SARS-CoV-2 infection

44. Dr. Kindrachuk further reports that factors such as age, comorbidities, strain of the virus, and intervals between doses play a role in vaccine efficacy.[29] Dr. Kindrachuk also reports that, reviewing Delta variant breakthrough infections, there is a <u>reduced likelihood</u> of vial transmission per vaccination.

45. Similarly on the issue of vaccine safety, Dr. Kindrachuk reports, based largely on the Government of Canada's vaccine safety report, that serious side effects including thrombosis, myocarditis/pericarditis, and death have occurred as a result of the COVID-19 vaccination.[30]

46. Dr. Kindrachuk's expert report largely focuses on point in time studies conducted post-introduction of the COVID-19 vaccinations. However, Dr. Kindrachuk reports on

[26] *Beach Estate v. Beach*, 2019 BCCA 277 at paras. 48-49, 62-68.
[27] Kindrachuk Report, pp. 8-16.
[28] Kindrachuk Report, p. 9.
[29] Kindrachuk Report, p.10.
[30] Kindrachuk Report, pp. 16- 20.

studies conducted by the vaccine manufacturers during clinical trials (pre-introduction), which note[31]:

> The authors clearly noted that a limitation within this study was the protective effect of this vaccine against either asymptomatic infection and onwards transmission of virus. Similar study designs and reporting were provided for the ChAdOx1 vaccine (AstraZeneca) and for the mRNA-1273 vaccine (Moderna) [47, 48].

47. Conversely the Plaintiffs have produced an expert report of Alan Cassels dated June 2, 2024. Alan Cassels has 30 years of experience in reviewing and studying Canadian Pharmaceutical policy, reviewing and reporting on empirical studies on drug effects, including the safety and effectiveness of vaccines clinical trials, and the reporting of medical evidence. He has authored four books in the areas of evidence-based health, drug information and actuarial science. He has also lectured at universities and to professional regarding the same subject areas. Alan Cassels' work history has included, *inter alia*: evaluating the impacts of evidence based drug information to consumers in a clinical setting; advising medical associations, research, international study of Coverage with Evidence Development (CED), a method of conducting real-world safety and effectiveness studies on behalf of public drug insurance agencies; and investigating inappropriate polypharmacy, and Director of Communications at the Therapeutics Initiative for the Department of Anaesthesiology, Pharmacology and Therapeutics, Faculty of Medicine, at the University of British Columbia[32].

48. Two Supreme Court of Canada decisions govern the admissibility of expert evidence: *R v Mohan*, 1994 CanLII 80 (SCC), [1994] 2 SCR 9 [*Mohan*] and *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 SCR 182 [*White Burgess*]. The general test from *Mohan* is that expert evidence must satisfy the following criteria: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any exclusionary rule; and (4) a properly qualified expert (defined as a person shown to have acquired special or peculiar knowledge through study or experience in respect of the matters which he or she undertakes to testify).

49. Alan Cassels' expert evidence is relevant, necessary, not subject to exclusion, and he is a property qualified expert to provide testimony on clinical data, pharmaceutical research, and safety and efficacy of vaccinations.

50. As part of his expert evidence, Alan Cassels has reviewed submissions to Health Canada by the vaccine manufactures as well numerous studies on the effect of the COVID-19 vaccination on transmission of COVID-19. Based on his review and

[31] Kindrachuk Report, p 8.
[32] Cassels Affidavit pp 1-5, Exhibit A.

expertise, Alan Cassels has proffered his opinion, *inter alia*, that COVID-19 vaccines do not show an impact on reducing the likelihood of viral transmission to others and that vaccinated populations have been found to be an important and relevant source of transmission of the virus to others.[33]

51. Further Alan Cassels has reviewed numerous studies in relation to COVID-19 vaccination safety and found, *inter alia*:[34]

> Pfizer and Moderna mRNA COVID-19 vaccines were associated with an excess risk of serious adverse events of special interest of 10.1 and 15.1 per 10,000 vaccinated over placebo baselines of 17.6 and 42.2 (95 % CI −0.4 to 20.6 and −3.6 to 33.8), respectively. Combined, the mRNA vaccines were associated with an excess risk of serious adverse events of special interest of 12.5 per 10,000 vaccinated (95 % CI 2.1 to 22.9); risk ratio 1.43 (95 % CI 1.07 to 1.92). The Pfizer trial exhibited a 36 % higher risk of serious adverse events in the vaccine group; risk difference 18.0 per 10,000 vaccinated (95 % CI 1.2 to 34.9); risk ratio 1.36 (95 % CI 1.02 to 1.83). The Moderna trial exhibited a 6 % higher risk of serious adverse events in the vaccine group: risk difference 7.1 per 10,000 (95 % CI –23.2 to 37.4); risk ratio 1.06 (95 % CI 0.84 to 1.33). Combined, there was a 16 % higher risk of serious adverse events in mRNA vaccine recipients: risk difference 13.2 (95 % CI −3.2 to 29.6); risk ratio 1.16 (95 % CI 0.97 to 1.39).

52. The expert evidence offered by the Defendants is not incontrovertible and requires the weighing of evidence by the court. It is not manifestly clear that there is no genuine issue for trial, nor is it plain and obvious that the Plaintiffs' claim will fail and, as such, the Defendants' Rule 9-6 motion should be dismissed.

**Costs**

53. The Plaintiffs submit that there should be no award of costs against them unless the Defendants are successful on dismissing the whole Claim without leave to amend. If the Plaintiffs are granted leave to amend on any claim, success would be split between the parties and no costs award would be merited.[35]

**Part 6: MATERIAL TO BE RELIED ON**

[33] Cassels Affidavit pp 5-13.
[34] Cassels Affidavit pp 12-14
[35] *See, eg, Al Omani* at para 128

54. The pleadings and other material filed in this action;

55. Affidavit #1 of Alan Cassels made June 2, 2024;

56. Affidavit #1 of Jason Baldwin, made June 10, 2024;

57. Affidavit #2 of Jason Baldwin, made July 2, 2024;

58. Affidavit #3 of Jason Baldwin, made August 21, 2024.

The Application Respondent has filed in this proceeding a document that contains the Application Respondent's address for service.

Date: November 18, 2024

Umar A. Sheikh

Signature of ☐ Application Respondent
☒ Lawyer for Application Respondents

Umar A. Sheikh