



No. S-210831  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**CANADIAN SOCIETY FOR THE ADVANCEMENT  
OF SCIENCE IN PUBLIC POLICY**

PLAINTIFF

AND:

**HER MAJESTY THE QUEEN IN THE 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*, RSBC 1996, c. 50

**RESPONSE TO CIVIL CLAIM**

**Filed by:** Her Majesty the Queen in right of the Province of British Columbia (the "Province") and Dr. Bonnie Henry in her capacity as Provincial Health Officer for the Province of British Columbia (collectively, the "Defendants")

**Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS**

**Division 1 – Defendants' Response to Facts**

1. The facts alleged in paragraphs 7 and 21 of Part 1 of the Notice of Civil Claim are admitted.
2. The facts alleged in paragraphs 1 – 3, 5, 6, 8 – 20, 22 – 61 of Part 1 of the Notice of Civil Claim are denied.
3. The facts alleged in paragraph 4 of Part 1 of the Notice of Civil Claim are outside the knowledge of the Defendants.

## Division 2 – Defendants’ Version of Facts

### The COVID-19 Pandemic

1. The Provincial Health Officer (the “PHO”) is the senior public health official for the Province, appointed pursuant to the *Public Health Act*, SBC 2008, c. 28 (the “*Public Health Act*”). The PHO leads the public health response under the *Public Health Act* to public health emergencies in British Columbia, including the transmission of the novel coronavirus SARS-CoV-2 that causes the illness known as COVID-19.
2. The first diagnosis of a case of COVID-19 in British Columbia occurred on January 27, 2020.
3. In response to paragraphs 3, 14 – 20, and 22 – 27 of Part 1 and the whole of the Notice of Civil Claim (the “Claim”), SARS-CoV-2:
  - a. can be spread by people who do not have symptoms;
  - b. has higher transmissibility rate (i.e., a higher basic reproductive number) compared to influenza;
  - c. is highly transmissible prior to symptom onset; and
  - d. has a higher infection fatality rate.
4. In further response to paragraphs 3, 14 – 20, and 22 – 27, 28 – 42 of Part 1 and the whole of the Claim, the Province and the PHO have been actively trying to prevent and contain the transmission of SARS-CoV-2 through a series of comprehensive public health measures, including health promotion, prevention, testing, case identification, isolation of cases and contact tracing, and more recently vaccination, all based on the best available scientific evidence.
5. In further response to paragraphs 3, 14 – 20, and 22 – 27 of Part 1 and the whole of the Claim, without adequate public health measures, SARS-CoV-2 would spread exponentially.
6. In further response to paragraphs 3, 14 – 20, 22 – 27, 43, 46 of Part 1 and the whole of the Claim, preventing and controlling transmission of communicable diseases is essential to maintaining the provincial health system’s ability to deliver quality care and continue the safe delivery of essential health services.
7. In further response to paragraphs 28 – 42 of Part 1 and the whole of the Claim, the Defendants deny that the SARS-CoV-2 testing methodologies used in British Columbia produce a significant number of false-positives as alleged or at all.

8. In response to paragraphs 44 and 45 of Part 1 of the Claim, the Plaintiff failed to provide sufficient particulars for the Defendants to respond to the Claim including but not limited to:
  - a. who allegedly “obstructed or discouraged” licensed physicians or “other treatment providers”;
  - b. what “modalities or therapies” were allegedly obstructed or discouraged;
  - c. how the alleged obstruction or discouragement took place; and
  - d. when the alleged obstruction or discouragement took place.

### **Declarations by the PHO and the Minister of Public Safety and Solicitor General**

9. On March 17, 2020, the PHO declared the transmission of the infectious agent SARS-CoV-2, which has caused cases and outbreaks of a serious illness known as COVID-19 among the province of British Columbia, to be a “regional event” as defined under s. 51 of the *Public Health Act* (the “PHO Declaration”).
10. Pursuant to s. 51 of the *Public Health Act*, a regional event is that which poses “an immediate and significant risk to public health.”
11. In response to paragraphs 51 – 53 of Part 1 and the whole of the Claim, the designation of a regional event allows the PHO to exercise powers under Part 5 of the *Public Health Act*, including the power to make oral and written public health orders in response to the COVID-19 pandemic.
12. On March 18, 2020, the Minister of Public Safety and Solicitor General (“MPSSG”) declared a state of provincial emergency under the *Emergency Program Act*, RSBC 1996 c.111 (the “*Emergency Program Act*”) due to the COVID-19 pandemic. The declaration of emergency has been extended multiple times and remains in effect as of the date of the filing of this Response to Civil Claim (the “MPSSG Declaration”).
13. In response to paragraphs 47 – 50, 53 of Part 1 and the whole of the Claim, the declaration of a state of emergency allows the MPSSG to exercise powers under Part 3 of the *Emergency Program Act*, including section 10(1) which empowers the MPSSG to “do all acts and implement all procedures he considers necessary to prevent, respond to or alleviate the effects of the emergency.”

### **Orders issued by the PHO**

14. From March 2020 to date, the PHO has made orders under the *Public Health Act* in response to the COVID-19 regional event, including new orders and orders revoking or amending prior orders in response to the changing circumstances of the COVID-19 pandemic in British Columbia (the “PHA Orders”).

15. The PHA Orders have been issued in relation to, *inter alia*:

- a. regional preventative measures;
- b. gatherings and events;
- c. food and liquor serving premises;
- d. vending markets;
- e. industrial projects and camps;
- f. travel;
- g. personal service establishments;
- h. long-term care and assisted living facilities; and
- i. workplace safety.

16. In further response to paragraphs 51 – 53 of Part 1 and the whole of the Claim, the aim of the PHA Orders is to prevent and contain of the transmission of SARS-CoV-2 based on the best available scientific evidence and epidemiological data at the time the particular order is issued.

17. In further response to paragraphs 51 – 53 of Part 1 and the whole of the Claim, over the course of the pandemic, the scientific community and public health officials have learned that the likelihood of transmission of SARS-CoV-2 is greater when people are interacting:

- a. in communal settings, other (e.g. gatherings, events, celebrations) than in transactional settings (e.g. at retail outlets);
- b. in close proximity to each other;
- c. in crowded settings;
- d. in indoor settings; and
- e. when speaking, and especially when singing, chanting or engaging in excited expression.

18. In further response to paragraphs 51 – 53 of Part 1 and the whole of the Claim, the PHO can and does amend the PHA Orders to respond to the ever-evolving COVID-19 situation in BC. In making or amending the PHA Orders, the PHO monitors surveillance data of case reports in British Columbia from the BC Centre for Disease Control, national and international surveillance data respecting the emergence and progression of SARS-CoV-2, and local, national and international epidemiological data respecting SARS-CoV-2 and COVID-19.

19. In further response to paragraphs 43, 51 – 53, 61 of Part 1 and the whole of the Claim, the overriding concern is to ensure that PHA Orders and other public health guidance protect the most vulnerable members of the society while minimizing social disruption.

20. In further response to paragraphs 51 – 53 of Part 1 and the whole of the Claim, all of the PHA Orders include a section that advises people who are affected by an order that they can request a variance by making a request for reconsideration to the PHO. Under s. 43 of the *Public Health Act*, a person affected by a public health order can request reconsideration if they:

- a. have relevant information that was not available to the PHO at the time the order was made;
- b. have a proposal that was not presented to the PHO when the order was made and if implemented, would meet the objective of the order (or be suitable for a written agreement under s. 38 of the Act); or
- c. require more time to comply with the order.

21. In response to paragraphs 54 – 61 of Part 1 and the whole of the Claim, the Defendants deny that the PHO Orders have caused the Restriction Effects defined in the Claim and further deny that any effects that the PHO Orders may have had give rise to or support the legal causes of actions advanced, or the remedies sought, in the Claim.

### **Orders issued by the MPSSG**

22. From March 2020 to date, the MPSSG has made orders under the *Emergency Program Act* in response to the declared provincial state of emergency due to COVID-19, including new orders and orders revoking or amending prior orders in response to the changing circumstances of the COVID-19 pandemic in British Columbia (the “MPSSG Orders”).

23. In response to paragraphs 47 – 50, 53 of Part 1 and the whole of the Claim, the MPSSG Orders have been issued in relation to a wide-range of topics which, in the view of the MPSSG, were necessary to address to prevent, respond to or alleviate the effects of the COVID-19 pandemic in British Columbia including, but not limited to:

- a. the adjustment of limitations periods applying to court proceedings;
- b. travel;
- c. electronic witnessing of wills and other documents;
- d. the facilitation of local government meetings and bylaw processes and electronic attendance at statutory meetings;
- e. the ongoing provision of critical services, essential goods and supplies; and

f. the maximum charges to be applied for food delivery services.

24. In further response to paragraph 50 of Part 1 and the whole of the Claim, the *COVID-19 Related Measures Act*, SBC 2020, c. 8 (“*CRMA*”) enacted the MPSSG Orders listed in its Schedules 1 and 2 as legislative provisions. All of the MPSSG Orders identified in paragraph 50 of Part 1 of the Claim have legislative force by virtue of *CRMA* as of March 17, 2020 (for M139/2020) or as of the date that the MPSSG Order was issued under the *Emergency Program Act*.

25. In response to paragraphs 54 – 61 of Part 1 and the whole of the Claim, the Defendants deny that the MPSSG Orders have caused the Restriction Effects defined in the Claim and further deny that any effects that the MPSSG Orders may have had give rise to or support the legal causes of actions advanced, or the remedies sought, in the Claim.

## **Part 2: RESPONSE TO RELIEF SOUGHT**

1. The Defendants consent to the granting of the relief sought in **none** of the paragraphs of Part 2 of the Notice of Civil Claim.
2. The Defendants oppose the granting of the relief sought in **all** of the paragraphs of Part 2 of the Notice of Civil Claim.
3. The Defendants take no position on the granting of the relief sought in **none** of the paragraphs of Part 2 of the Notice of Civil Claim.

## **Part 3: LEGAL BASIS**

1. A notice of civil claim must set out “a concise summary of the legal basis for the relief sought,” meaning the plaintiff must provide some explanation of the relationship between the material facts and the essential legal elements of the causes of action advanced.

SCCR Rules 3-1(2)

2. Pleadings should set out material facts of each cause of action with certainty, precision, and in their natural order. Pleadings should not mix up the facts, leaving the defendant to pick out the facts applicable to each cause.

*311165 BC Ltd. v. Canada (Attorney General)*, 2017 BCCA 196, paras. 40, 56, 60

3. In general, the Claim is missing key elements necessary to support the remedies sought and fails to adequately connect the facts alleged to the causes of actions advanced and/or the remedies sought.

4. The deficiencies in the Claim have impaired the Defendants' ability to respond to the Claim. For clarity, the Defendants deny each and every fact alleged in Part 1 of the Claim, but for those facts set out at paragraphs 7 and 21 of Part 1 of the Claim and oppose all of the relief sought.
5. The Defendants rely on the *Class Proceedings Act*, RSBC 1996, c. 50 and amendments thereto (the "*Class Proceedings Act*").
6. The burden is on the plaintiff to satisfy the certification requirements enumerated in section 4(1) of the *Class Proceedings Act*.
7. The Plaintiff has not raised a claim suitable for proceeding under the *Class Proceedings Act* on behalf of the proposed class. In particular:
  - a. the Claim does not disclose a cause of action;
  - b. the proposed class definition is flawed;
  - c. there is no appropriate representative plaintiff;
  - d. the Plaintiff has failed to identify any common issues that will materially advance the claims of the individual class members;
  - e. a class proceeding procedure is not the preferable procedure for the fair and efficient resolution of the common issues including for the following reasons:
    - i. it will not promote judicial economy or improve access to justice;
    - ii. the questions of fact or law do not predominate over questions affecting individual members;
    - iii. there are other means of resolving the claims that are more practical and/or efficient; and
    - iv. the administration of the class proceeding would create greater difficulty than that likely to be experienced if relief were sought by other means.
8. The Claim lacks sufficient material facts or a legal basis to support a cause of action for any of the alleged breaches of the purported class members' rights as guaranteed by ss. 2, 6(1), 7, 8, 9 and 15 the *Charter of Rights and Freedoms*.
9. In the alternative, if the Plaintiff or the purported class members were deprived of their rights under the *Charter of Rights and Freedoms* as alleged or at all, which is not admitted but expressly denied, any such breach is justified under s. 1 of the *Charter of Rights and Freedoms*.

10. For the purposes of administrative decisions such as the PHA Orders and the MPSSG Orders, the question under s. 1 of the *Charter of Rights and Freedoms* is whether the decisions were reasonable, meaning whether the decisions were within the range of acceptable alternatives once appropriate curial deference is given.

*Doré v. Barreau du Québec*, 2012 SCC 12

11. The PHA Orders and the MPSSG Orders are within the range of acceptable alternatives given the risks of the COVID-19 pandemic and the deference owed to the PHO and the MPSSG.

*Beaudoin v. British Columbia*, 2021 BCSC 512

12. Further, the PHA Orders comply with the legal requirements of the *Public Health Act*, are *intra vires* the PHO, and are reasonable. Beyond complying with the legal requirements of the *Public Health Act*, the PHO is not legally obligated to provide further justification for the PHA Orders as alleged or at all.

13. The PHO Declaration complied with the legal requirements of the *Public Health Act*, was reasonable in March 2020 and was reasonable as of June 1, 2020. Beyond complying with the legal requirements of the *Public Health Act*, the PHO is not legally obligated to provide further justification for the PHA Orders as alleged or at all.

14. The MPSSG Orders comply with the legal requirements of the *Emergency Program Act*, are *intra vires* the MPSSG and are reasonable.

15. The MPSSG Declaration complied with the legal requirements of the *Emergency Program Act*, was reasonable in March 2020 and was reasonable as of June 1, 2020.

16. In response to paragraphs 19 and 22 of Part 3 of the Claim, the MPSSG Orders specifically identified in the Claim are enacted as legislative provisions pursuant to *CRMA* and do not represent an improper sub-delegation as alleged or at all.

17. The Claim lacks sufficient material facts or any legal basis to support a cause of action for general or special damages. Further, and in the alternative, no claim in damages can be brought against the PHO for anything done or omitted in the good faith exercise of her powers or performance of her duties under the *Public Health Act*.

*Public Health Act*, s. 92

18. The Plaintiff does not plead the necessary elements of a cause of action in negligence. Further, and in the alternative, a general public law duty to promote, safeguard and protect health and prevent spread of infectious diseases does not give rise to private law duty of care:

*Williams v. Ontario*, 2009 ONCA 378

*Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)*, 2006 CanLII 37121 (ONCA)



19. The Claim lacks sufficient material facts or any legal basis to support the claimed injunctive relief. The Plaintiff has not raised a serious question to be tried, demonstrated irreparable harm and/or that the balance of convenience favours the injunctive relief sought.

20. The references to the Hippocratic oath in paragraphs 11 – 13 of Part 3 of the Claim and to unconscionability in paragraph 27 of Part 3 of the Claim do not give rise to a cause of action on the face of the Claim.

Defendants' address for service:

Ministry of Justice and Attorney General  
Legal Services Branch  
1301 – 865 Hornby Street  
Vancouver, BC V6Z 2G3

Fax number address for service: (604) 660-3567

Dated: March 31, 2021



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Signature of lawyers for Defendants  
Jacqueline Hughes, Q.C., Gareth Morley, Caily  
DiPuma and Emily Lapper

Rule 7-1(1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to provide or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.