

S-210831
Vancouver Registry

In the Supreme Court of British Columbia
(BEFORE THE HONOURABLE MR. JUSTICE CRERAR)

Vancouver, B.C.
October 28, 2021

BETWEEN:

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

PLAINTIFF

AND:

**DR. BONNIE HENRY IN HER CAPACITY AS PROVINCIAL HEALTH
OFFICER FOR THE PROVINCE OF BRITISH COLUMBIA
AND HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF
BRITISH COLUMBIA**

DEFENDANTS

PROCEEDINGS IN CHAMBERS

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**Counsel for the Plaintiff appearing
by teleconference:**

P.H. Furtula

**Counsel for the Defendants
appearing by videoconference:**

**E.C. Lapper
S.A. Davis**

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Proceedings

Vancouver, B.C.
October 28, 2021

(VIDEOCONFERENCES/TELECONFERENCES COMMENCE)
(JUSTICE CRERAR IN REMOTE LOCATION)
(COUNSEL IN REMOTE LOCATIONS)

THE CLERK: In the Supreme Court of British Columbia at Vancouver, this 28th day of October, 2021. In the matter of Canadian Society for the Advancement of Science in Public Policy versus Her Majesty the Queen in right of the Province of British Columbia and others, My Lord.

THE COURT: Thank you, Madam Registrar. Let's have counsel introductions starting with counsel for the applicant, the defendants.

CNSL E. LAPPER: My Lord, Emily Lapper, L-a-p-p-e-r, first initial E., and pronouns are "she/her". And with me is Steven Davis, D-a-v-i-s, first initial S., pronouns "he/him", appearing for the defendants, the applicants on this matter.

THE COURT: Thank you, Ms. Lapper. Now, at least on my screen, I'm not seeing counsel for the plaintiff.

CNSL P. FURTULA: My Lord --

THE COURT: Are you -- are you just virtual right now?

CNSL P. FURTULA: -- My Lord, I'm having some last minute technical issues. For some reason neither my camera nor my microphone will turn on, on Microsoft Teams. So I've joined by phone, and I apologize. I'm not sure what the issue is. It was working yesterday, so I guess I'll just -- I'll do this.

THE COURT: Apology is accepted. This is not the sort of application that one is compromised by not appearing with one's face. It'll be a relatively shortened procedural application, so -- so no fear about your appearance as a dot rather than a face.

CNSL P. FURTULA: Thank you, My Lord.

THE COURT: Before we proceed, Ms. Furtula, as per our earlier hearings, do you have a quick and ready way to get feedback from your clients? I want to do the same test that we had done with respect to the phone-in lines that members of the public who are trying to listen in are successfully hearing and we don't discover that half-way through.

CNSL P. FURTULA: Well, My Lord, we've had some significant issues with being able to connect

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1 today. They -- they were originally instructed
2 that they should connect via dial-in through
3 Microsoft Teams.

4 THE COURT: Mm-hmm.

5 CNSL P. FURTULA: But this morning those instructions
6 changed, which is one of the reasons there was a
7 delay. But I understand, with the phone-in line,
8 only 100 people can access the hearing. And so
9 because of that, my client has instructed me to
10 seek an adjournment. We also have an issue with
11 one of our affidavits, but the main reason is due
12 to the fact that the number of people that wanted
13 to hear today's proceedings are not able to
14 connect.

15 THE COURT: Okay. Are there 100 people on the line
16 right now, Madam Registrar?

17 THE CLERK: I'm not able to see the number of
18 attendees. However, I've been told by others
19 trying to connect by the phone line that it is at
20 maximum capacity; this was some time ago.

21 THE COURT: Okay, we've detected -- what I'm going to
22 do, Ms. Furtula -- my question was a lot more
23 discrete and succinct than the answer I received.
24 Could you quickly check with your client
25 representative or someone else, just to make sure
26 that the audio is coming through on the telephone
27 phone-in line?

28 CNSL P. FURTULA: Oh, yes, My Lord, I will do that.
29 Yes, My Lord, it is working but only for those
30 that were able to connect, which is 100 people.

31 THE COURT: All right. So, I don't need to hear from
32 the Province with respect to the request for
33 adjournment. I will note that it's -- it's highly
34 unusual and generous for the court to allow a
35 phone-in line for a hearing. And we -- having 100
36 people here for a hearing is actually enormously
37 unusual and generous as well. Ordinarily, people
38 would attend in the courtroom and, depending on
39 the size of the courtroom, they range between 12
40 and 100 seats. So, we're already hearing --
41 having more members of the public hearing this
42 process than we would ordinarily.

43 We've delayed the matter and we're -- as you
44 know, we are on a tight schedule with respect to
45 pleadings. And so I won't put you to the question
46 because I don't want to put you in a horrible
47 position, Ms. Furtula, but if we were to grant an

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1 adjournment, we would have to revisit all of the
2 deadlines including the certification, and that
3 may well push back the certification hearing by a
4 month or multiple months. So, I'm not going to
5 ask you to make that horrible decision. I'm just
6 going to make the call right now that we are going
7 to proceed. There are many members of the public
8 listening in, who wish to listen in. And those
9 who are unable to call in can no doubt get
10 briefed. I am aware that your client's
11 organization does give very full briefings to its
12 members and other interested parties about what
13 occurs in these hearings.

14 So, let's proceed right now. We've delayed
15 enough with this matter, and we do have pleadings
16 deadlines coming up. So, I'll turn now to -- I
17 take it, Ms. Lapper, you -- or, sorry, Ms. Lapper,
18 but I take it you're going to give the submission
19 for your...

20 Actually, pardon me, before we do that, I'll
21 issue my usual warning to those members of the
22 public who are listening in. There are court
23 policies, very strict court policies with respect
24 to audio-taping proceedings. They are strictly
25 forbidden unless you are an accredited member of
26 the media who has been accredited by the court.
27 As I've said in past hearings, if there's any
28 doubt in your mind about whether you qualify, you
29 almost certainly are not a member of the
30 accredited media.

31 The consequences for a breach of this policy
32 are -- are very serious and they can proceed to be
33 quasi-criminal proceedings under contempt of
34 court. If the person is associated with one of
35 the parties, then one of the remedies available is
36 the striking of a claim or defence. So I can't
37 emphasize strongly enough that there's to be no
38 recording of these proceedings.

39 Any -- any other technical matters from
40 either side before we proceed to the application
41 of substance?

42 CNSL P. FURTULA: My Lord, perhaps at the end of the
43 hearing, I would just ask leave that we determine
44 the proper protocols to avoid this kind of
45 situation in the future but, you know, I can
46 address that at the end with your permission.

47 THE COURT: Yes. I mean the protocol going forward, if

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1 I understand correctly, there was a request from
2 you, Ms. Furtula, that members of the public could
3 jump in on Teams. I issued a direction, and maybe
4 through the registry that -- that message was
5 confused. But apart from -- well, various issues
6 make it a problem to have hundreds of people
7 jumping in on a Teams meeting. Technical issues,
8 bandwidth et cetera; it's not feasible. So, I
9 issued that direction yesterday. If -- I
10 apologize if that direction was not properly
11 communicated, but the Teams meeting should never
12 have been open to members of the public and, going
13 forward, we -- presumptively, I am inclined
14 generally to make the same order that I have in
15 the past with an adherence that we take the
16 unusual and generous step of having a phone-in
17 line.

18 And, if there are technical limitations and,
19 you know, appreciating my job, and the system is
20 not IT, thank goodness for everyone involved, but
21 judging -- if there are technical limitations that
22 max that out at 100, then unfortunately that's a
23 reality, but there we are.

24 Ms. Lapper, over to you.

25 CNSL E. LAPPER: Thank you, My Lord.

26

27 **SUBMISSIONS FOR DEFENDANTS BY CNSL E. LAPPER:**

28

29 CNSL E. LAPPER: This is the defendants' application
30 for further and better particulars of the amended
31 claim which was filed by the plaintiff on
32 September 15th of this year. And perhaps I'll
33 just begin by asking if Your Lordship has had an
34 opportunity to review the materials for this
35 morning?

36 THE COURT: I have, yes. And if that assists, I've --
37 I've spent very little time on the notice of
38 application and the application response. And
39 I've looked at, I believe, all of the cases that
40 have been cited to me, so perhaps one can be more
41 brief than anticipated if that assists.

42 CNSL E. LAPPER: That does, My Lord, thank you.

43

44 Perhaps at the outset then, I will just
45 clarify that the defendants are no longer seeking
46 one of the terms of relief, and that's the relief
47 sought in paragraph 1.b of the notice of
application. That's at Tab 1 of your application

Submissions for Defendants by Cnsl E. Lapper

1 record, is the notice of application.
2 THE COURT: Yes.
3 CNSL E. LAPPER: Now over onto page 2.
4 THE COURT: This is which orders?
5 CNSL E. LAPPER: This is the order with respect to part
6 1, paragraph 53.k.
7 THE COURT: Yes. So, of the 200 orders that have been
8 issued, you wanted the plaintiff to specify which
9 of those orders were delayed in the
10 reconsideration.
11 CNSL E. LAPPER: And so the plaintiff has advised in
12 their response, their application response, that
13 the reference to the orders in paragraph 53.k in
14 the claim should in fact read, "The Provincial
15 Health Officer orders only." And the defendants
16 are satisfied with that response and expect that
17 the plaintiff will take steps to amend their claim
18 in the usual course to reflect that correction.
19 THE COURT: All right. Well, that's a responsible step
20 to take, thank you.
21 CNSL E. LAPPER: And then I'll just note that the
22 relief sought in paragraph 2 -- and that's the
23 order pursuant to Rule 22-4(2), abridging the
24 timelines for bringing this application to permit
25 it to come on for hearing today.
26 THE COURT: Yes.
27 CNSL E. LAPPER: The order is by consent and so I won't
28 be speaking to it this morning.
29 THE COURT: Thank you very much to both sides for
30 that.
31 CNSL E. LAPPER: So, the -- the substance of the
32 application today is just confined to two demands
33 for particulars as sought by the defendants.
34 Those are the demand for particulars set out in
35 paragraph 1.a of the notice of application, the
36 relief sought with respect to paragraph 44.
37 THE COURT: All right.
38 CNSL E. LAPPER: And paragraph 1.c which is the relief
39 sought in respect of paragraph 58.c of the amended
40 claim.
41 THE COURT: Yes.
42 CNSL E. LAPPER: And so before turning to those
43 specific demands or particulars, My Lord, I would
44 propose just to contextualize those demands within
45 the nature and scope of the plaintiff's proposed
46 claim.
47 THE COURT: Yes.

Submissions for Defendants by Cnsl E. Lapper

1 CNSL E. LAPPER: So, the plaintiff filed its original
2 claim on January 26th of this year. And after
3 being pressed to provide a response within the
4 timelines provided under the Rules, the defendants
5 filed a response to civil claim on March 31st.
6 That response is at Tab 6 of your application
7 record, though I don't propose to take you through
8 it in any way.

9 The point is simply this. The response to
10 civil claim expressly pleaded that there were
11 deficiencies in the notice of civil claim,
12 including but not limited to the failure to
13 provide sufficient material facts to support the
14 cause of action. The defendants further pleaded
15 that the deficiencies in the notice of civil claim
16 had impaired their ability to respond. And so,
17 for reference, My Lord, those are at paragraphs 1
18 to 4 of part 3 of the response to civil claim.

19 And the defendants made a demand for
20 particulars in respect to the original claim in
21 August of this year, and that demand was responded
22 to in August as well. Those demands are in the
23 record but they're not material to the issues
24 before you this morning.

25 So following that initial demand for
26 particulars, the plaintiff filed the amended claim
27 on September 15th which is at issue today. And
28 that amended claim is ambitious in scope, My Lord.
29 It seeks to challenge every order made by the --
30 by the Provincial Health Officer under the *Public*
31 *Health Act*, and numerous Ministerial orders made
32 by the Province in response to the COVID-19
33 pandemic. It does go on [indiscernible] and
34 constitutional grounds including sections 2, 6, 7,
35 8, 9 and 15 of the *Charter*. The claim also pleads
36 and relies upon the doctrine of unconscionability,
37 which Your Lordship knows is contract law
38 doctrine.

39 And to assist Your Lordship in understanding
40 the scope of this claim, the defendants have
41 prepared an appendix A to the notice of
42 application, a list of all the orders which, on
43 our current understanding, are being challenged by
44 the amended claim. And so currently the
45 defendants expect that this is approximately 173
46 different orders, and those orders deal with
47 everything from restaurants to mink farming, to

Submissions for Defendants by Cnsl E. Lapper

1 electronic attendance at local government meetings
2 in British Columbia.

3 And so, if you turn to the amended claim
4 itself, My Lord, that can be found at Tab 5 of the
5 application record.

6 THE COURT: I'm there.

7 CNSL E. LAPPER: Great. At paragraph 3 of the claim,
8 which is just on page 2, the defendants provide a
9 sort of overview of the claim, and -- and the
10 overview is this:

11
12 In response to the COVID-19 virus, the
13 government of British Columbia has invoked
14 extraordinary executive powers predicated on
15 unsubstantiated scientific and legal grounds
16 with catastrophic consequences for British
17 Columbians.

18
19 So, this is really -- it's a sort of global
20 challenge to the government's pandemic response.

21 And at paragraphs 4 and 5 they set out the
22 proposed representative plaintiff; that's the
23 society, the Canadian Society for the Advancement
24 of Science in Public Policy, whose mandate is to
25 advocate for a greater role for science
26 information in public policy.

27 Paragraphs 8 and 9 set out the proposed class
28 and subclasses for the class proceeding, and at
29 paragraph 8 the plaintiff pleads that [as read
30 in]:

31
32 This action is brought on behalf of members
33 of the class consisting of all persons
34 residing or doing business in British
35 Columbia who, since on or after March 17th,
36 2020, have suffered personal injury or other
37 damage as a result of the actions of the
38 defendants in declaring a state of emergency
39 under the *Emergency Program Act* and the
40 *Public Health Act*.

41
42 And then it identifies three different subclasses
43 within the class. And it says at paragraph 9 that
44 [as read in]:

45
46 It is estimated that the class consists of
47 hundreds of thousands of residents and

Submissions for Defendants by Cnsl E. Lapper

1 business owners in British Columbia.

2

3 THE COURT: It actually said, "businesses owners", but
4 there we are.

5 CNSL E. LAPPER: So then part 2 of the claim sets out
6 the relief sought, and that starts at page 14 of
7 the claim.

8

9 And so you'll see that the defendants are
10 seeking declaration declaring all of the orders of
11 the -- the Ministerial orders and the orders of
12 the Provincial Health Officer to be of no force
13 and effect, to be *ultra vires* their statutory
14 authority under the various acts into which they
15 were made. And then they seek damages including
16 *Charter* damages, special damages, and general
17 damages on behalf of the proposed class.

18 And then part 3 of the claim, My Lord, pleads
19 three legal bases for the relief sought. The
20 first is a virus argument that alleges the
21 defendants did not have the statutory authority to
22 issue the declarations of emergency under the --
23 under the *Public Health Act* and the *Emergency*
24 *Program Act*, and to exercise their emergency
25 powers under those statutes. And so that's at
26 paragraphs 1 through 26 of the legal basis of the
27 claim.

28 At paragraph 27 of the legal basis they plead
29 the doctrine of unconscionability and say this is
30 applicable to waiver notices provided by the BC
31 Centre for Disease Control.

32 In the paragraphs that follow, paragraphs 28
33 through 32 of the claim, the plaintiffs advance a
34 *Charter* argument alleging that the orders made
35 under the *Emergency Program Act* and the *Public*
36 *Health Act* are inconsistent with sections 2, 6, 7,
37 8, 9 and 15 of the *Charter*.

38 And so, in this case the defendants' position
39 is that further particulars are required to
40 clarify the material facts pled in support of
41 these causes of action, and the relief sought by
42 the plaintiff. The defendants require the
43 particulars sought to ensure proper notice of the
44 case against them, and to enable them to prepare
45 an amended response to civil claim in advance of
46 certification.

47 An order for further and better particulars
will also assist the court in determining the

Submissions for Defendants by Cnsl E. Lapper

1 suitability of this proceeding as a class action
2 under s. 4 of the *Class Proceedings Act* and in
3 particular will assist the court in determining
4 whether this pleading discloses a cause of action
5 under s. 4(1)(a) of the *Class Proceedings Act*.

6 My Lord, it is the defendants' position that
7 the time for the plaintiff to address the
8 deficiencies in its claim is now, in advance of
9 certification when the court will be called upon
10 to determine whether this pleading discloses a
11 cause of action.

12 So, My Lord, I'll turn back to the notice of
13 application. And given your note that you have
14 reviewed the cases and the notice of application
15 in some detail, I don't intend to take you through
16 the particulars in any great detail. I'll note
17 that starting at page 4 of our notice of
18 application, we've set out there the legal bases
19 and the law, the particulars generally. And
20 there's basic agreement between the parties on
21 some of these principles, so I don't intend to
22 take Your Lordship through it. But, essentially,
23 we agreed that the governing rule is Rule 3-7(22).
24 There's general agreement on the functions of the
25 particulars.

26 My Lord, you've disappeared from me.

27 THE COURT: Have I reappeared?

28 CNSSL E. LAPPER: You -- you have.

29 THE COURT: Okay, good. Thank you.

30 CNSSL E. LAPPER: So, there's also general agreement on
31 the functions of the particulars which are set out
32 in paragraph 3 of our notice of application; those
33 are the *Cansulex* factors. To inform the other
34 side of the nature of the case, we have to meet to
35 prevent the other side from being taken by
36 surprise at trial; to enable the other side to
37 know what evidence they ought to be prepared with
38 and prepare for trial; to limit the generality of
39 the pleadings, which we say is of particular
40 importance here, and to limit and decide the
41 issues to be tried and as to which discovery is
42 required, and to tie the hands of the parties so
43 they cannot without leave go into any matters not
44 included.

45 And there is also agreement with my friend
46 about the fact that an order for particulars is
47 discretionary, and that discretion can be

Submissions for Defendants by Cnsl E. Lapper

1 exercised, with regard to whether the particulars
2 are necessary.

3 My Lord, where the parties disagree is -- is
4 with respect to two matters on the -- on the law.
5 And that's first, the relevance of the demand
6 being made in the context of a class proceeding
7 and being made in advance of certification. The
8 second point of disagreement with my friend is
9 whether particulars should be ordered prior to
10 discovery where the information is alleged to be
11 within the defendants' knowledge. So, I'll
12 address both those points briefly now.

13 With respect to the first point, the class
14 action context, the defendants say that the
15 requirement to provide particulars is especially
16 significant in the context of their proposed class
17 proceeding and are of particular significance
18 prior to certification.

19 And, My Lord, so I'll ask you to turn to the
20 *Hoy v. Medtronic* case, and that's at Tab 10 of
21 your book of authorities.

22 THE COURT: Yes, Madam Justice Kirkpatrick.

23 CNSL E. LAPPER: That's right, Madam Justice

24 Kirkpatrick as she then was, sitting in chambers.

25 THE COURT: Yes.

26 CNSL E. LAPPER: So, at paragraphs 5 and 6 - are the
27 paragraphs I'm going to take you to, they're just
28 on page 3 of that decision - she writes:

29
30 Counsel for the defendants argues that the
31 general function of the pleadings, which is
32 to bring the parties to an issue, is doubly
33 important in the context of a class action
34 because of central importance in a class
35 action is the notion that it is possible to
36 define a common issue or issues. The only
37 means by which the parties can define such
38 issues is through pleadings.

39
40 There is no question that, in an application
41 to certify a class action, the particulars of
42 the claim are significant because the court
43 is required to assess the suitability of the
44 action as a class action.

45
46 She then goes on to cite herself in a case, *L.R.*
47 *v. Her Majesty the Queen*, and she says:

Submissions for Defendants by Cnsl E. Lapper

1
2 That exercise requires information
3 traditionally supplied through
4 particulars - the nature of the case and
5 issues to be tried - as well as whether, in
6 the words of s. 4(2) (a) of the Act,
7 "questions of fact or law common to the
8 members of the class predominate over any
9 questions affecting only individual members."
10 That assessment cannot be made in an
11 information vacuum.

12
13 And, so, in their application response, the
14 plaintiff is at great pains to show that the
15 certification of the class proceeding is not
16 concerned with the merits of an action. And for
17 that proposition, they rely extensively on the
18 *Kwicksutaineuk/Ah-Kwa-Mish* case.

19 Respectfully, the particulars sought by the
20 defendants in this case do not go to the merit of
21 the claim pleaded. They go to the sufficiency of
22 the pleading itself and whether that pleading
23 discloses a cause of action.

24 So the *Kwicksutaineuk* case is not applicable
25 in the present case. In that case the particulars
26 sought aimed at identifying the individual members
27 of the class and identifying whether there was a
28 basis to assume that they had common issues. In
29 particular, whether their individual -- the basis
30 for their individual assertions of aboriginal
31 title; or aboriginal rights, pardon me.

32 And so here the defendant alleged the
33 particulars are necessary to properly delineate
34 the issues between the parties and for the court
35 to determine whether those issues are suitable for
36 certification. This is an issue that I would turn
37 to when I review each of the specific demands.

38 THE COURT: All right.

39 CNSL E. LAPPER: So, the second point of disagreement
40 or departure between me and the plaintiff,
41 My Lord, is whether particulars should be ordered
42 prior to discovery where information is alleged to
43 be within the defendants' knowledge.

44 And so, on this point I will turn to the
45 *Sidhu* case which is at Tab 19 of the book of
46 authorities.

47 THE COURT: Yes.

CNSL E. LAPPER: So, this is a recent decision of Madam
Justice Forth. And if you turn to -- you'll see

Submissions for Defendants by Cnsl E. Lapper

1 that she goes through, starting at paragraph 11 --
2 oh no, sorry, paragraph 36, pardon me. So, she
3 starts by noting that:

4
5 Material facts are distinct from particulars.
6 A material fact is one that is essential in
7 order to formulate a complete cause of
8 action. Particulars are information which
9 allow a party to understand the case he or
10 she must meet.

11
12 And then she goes on to go through some of
13 the principles we've already discussed this
14 morning when particulars are required, the
15 discretion of the judge to order particulars,
16 and the factors under which that discretion
17 is exercised.

18
19 And then turning to paragraph 45, My Lord.

20 THE COURT: Yes.

21 CNSL E. LAPPER: She turns to the allegation that the
22 particulars sought or within the knowledge of the
23 defendants are only determinable through further
24 discovery; or through discovery, pardon me. And
25 so at paragraph 45 she writes:

26
27 A requirement to provide particulars is not
28 excused because the plaintiff does not have
29 the information within his knowledge. The
30 plaintiff must plead his claim with precision
31 and set out the facts within his knowledge. A
32 plaintiff is not entitled to plead generally
33 and then embark on a fishing expedition to
34 determine whether there are facts supportive
35 of his position.

36
37 The jumping down to paragraph 47, My Lord, she
38 writes:

39
40 Where a plaintiff seeks to assert that he is
41 unable to provide particulars because they
42 are not within his knowledge, and seeks to
43 delay the provision of particulars until
44 after discovery, the plaintiff must provide
45 an affidavit stating: (i) he is unable to
46 provide the specific particulars requested;
47 and (ii) his belief that there is a basis for

Submissions for Defendants by Cnsl E. Lapper

1 the allegation and the grounds for that
2 belief:

3
4 Turning over to paragraph 48 which is just over
5 the page, she writes:

6
7 Discovery is not a substitute for
8 particulars. A demand for particulars should
9 not be refused on the basis that what is
10 sought is best known to the party demanding
11 it. As held in *G.W.L.* at 4-5:

12
13 Discovery is not a substitute for
14 particulars. The contention that what
15 is demanded can be obtained, or that it
16 has been obtained, on discovery is no
17 reason to refuse particulars properly
18 sought. ... A party is entitled to know
19 what case is made against it when
20 (whether before or after the discovery)
21 the other side is in a position to give
22 particulars of the facts it will prove
23 at trial.

24
25 And so, this brings me directly to the
26 plaintiff's response to the first demand for
27 particulars that is the subject of this morning's
28 application, My Lord.

29 THE COURT: All right.

30 CNSL E. LAPPER: So, if we turn back to the amended
31 claim at Tab 5 of the application record.

32 THE COURT: I'm there.

33 CNSL E. LAPPER: And turn to paragraph 44. This is the
34 paragraph -- this is the subject of -- of the
35 defendants' demand.

36 THE COURT: Yes.

37 CNSL E. LAPPER: So, the paragraph reads:

38
39 In addition, the defendants have obstructed
40 or discouraged licensed physicians and other
41 treatment providers licensed under the *Health*
42 *Professions Act* from advocating modalities or
43 therapies with respect to the clinical
44 approach in treating COVID-19 and related
45 diseases, despite the physician having
46 independently undertaken reasonable review of
47 the scientific literature, that may improve a

Submissions for Defendants by Cnsl E. Lapper

1 patient's immune system, reduce the potential
2 negative outcome of the viral infection, and
3 potentially accelerate the time required for
4 recovery.
5

6 So that is the pleading, My Lord. And so, if
7 we turn now to -- I'll take you to the defendants'
8 demand dated October 12th. And that's at Exhibit
9 "C" to the affidavit of Vanessa Lever, so Tab 3 of
10 the application record, My Lord.

11 THE COURT: All right, I'm there.

12 CNSL E. LAPPER: Okay. And so, this is at paragraph 1
13 of that demand. You'll see that we -- the
14 defendants sought with respect to part 1,
15 paragraph 40, particulars of which of the
16 defendants are alleged to have... And then we've
17 set out the -- the conduct, "Obstructed the
18 licensed physicians," et cetera. Paragraph (b)
19 [as read in]:
20

21 If the answer to 1(a) includes the
22 Province ...
23

24 Keeping in mind that the defendants are the
25 Province and Dr. Henry.
26

27 ... to provide particulars of which
28 employees, representatives and/or agents of
29 the Province are alleged to have engaged in
30 the conduct described in paragraph 44.
31

32 At (c), the defendants sought to
33 [indiscernible] the acts, statements or other
34 conduct by which the defendants or either of them
35 are alleged to have engaged in -- in the described
36 conduct, including without limitation, the date
37 the act or conduct occurred, or the statement was
38 made. And (ii), if the alleged obstruction was
39 made by way of a statement, whether that statement
40 was made orally or in writing. And finally,
41 they -- we sought particulars of the modalities or
42 therapies referred to.

43 So, if you turn now to the defendants' -- or
44 pardon me, the plaintiff's response to that demand
45 for particulars, that's Exhibit "D" of the Lever
46 affidavit.
47

THE COURT: Yes.

Submissions for Defendants by Cnsl E. Lapper

1 CNSL E. LAPPER: So, you'll see that the -- the
2 plaintiff provided in response to paragraph 1(a),
3 both defendants are included in that pleading. So
4 then if we come to paragraph 2 in response to
5 paragraph 1(b), the request is denied. So, the
6 defendants are seeking evidence in support of the
7 material fact that has been pled, and therefore
8 the demand is not a proper request for
9 particulars.

10 In response to paragraph 1(c), that's the
11 further details of the conduct, whether the
12 conduct -- when it was done, whether it was made
13 orally or in writing. That was also refused on
14 the basis that we are seeking evidence and that
15 the information is best known by the defendant.

16 And then a response was provided in respect
17 of which modalities or therapies are being
18 referred to, and you can see that list is set out
19 in paragraph 4 and includes the -- the treatments
20 or therapies listed there.

21 THE COURT: Yes.

22 CNSL E. LAPPER: And so, My Lord, the application
23 before you is with respect to the answers provided
24 in paragraphs 2 and 3 of that response to
25 particulars. So it's to understand which
26 employees, representatives or agents of the
27 Province are alleged to have engaged in the
28 conduct of obstructed or discouraged licensed
29 physicians and other treatment providers from
30 advocating modalities or therapies with respect to
31 the clinical approach in treating COVID-19, and
32 the acts, statements or other conduct by which the
33 Province and Dr. Henry, or either of them, are
34 alleged to have engaged in the conduct, including
35 the date the act or conduct occurred and, if the
36 alleged obstruction was made by way of a
37 statement, whether that statement was in -- was
38 made orally or in writing.

39 And so, My Lord, the allegation that's
40 currently set out in the amended claim in
41 paragraph 44 is very broadly stated. The
42 defendants assert that particulars are necessary
43 to limit the generality of this pleading, to
44 delineate the issues between the parties, and to
45 enable the defendant to respond to the specific
46 acts or conducts being complained of.

47

Submissions for Defendants by Cnsl E. Lapper

1 And, My Lord, I'll just make three
2 observations in that regard, in terms of the
3 defendants' ability to respond and understand
4 the claim.

5 The first is that generally speaking the
6 approval for healthcare treatments, the modalities
7 or therapies, is regulated by Health Canada, and
8 Health Canada is not a party to this proceeding.

9 The second observation I'll make is that
10 again, and generally speaking, the regulation of
11 individual licensed positions in British Columbia
12 is the responsibility of the College of Physicians
13 and Surgeons of British Columbia which is a
14 separate legal entity from the Province who again,
15 is not a party to this proceeding.

16 The third observation that I'll make is that
17 the Province is a very large entity with a vast
18 number of employees, agents and representatives.
19 It is difficult to understand, on the basis of the
20 current pleading, what conduct of the Province may
21 be said to be at issue, and whose conduct is said
22 to be at issue.

23 So, the defendants are seeking material facts
24 so that the plaintiff must prove what conduct is
25 at issue, whose conduct is at issue, and when that
26 conduct took place. These are material facts,
27 My Lord, not evidence. They must be known to the
28 plaintiff, failing which the pleading is nothing
29 more than a fishing expedition. Indeed - and I'll
30 come to this in a moment - the plaintiff's
31 affidavit evidence suggests they are capable of
32 pleading the necessary material facts in support
33 of this claim and have chosen not to.

34 So, the -- further, the issue of when the
35 relevant conduct took place is of particular
36 significance in the context of this claim, and
37 that's because the scientific data and
38 recommendations with respect to COVID-19 have
39 evolved over the course of the pandemic. The
40 basis and rationale for the defendants' alleged
41 conduct may well be different depending on the
42 point in time the conduct took place. And so the
43 defendants cannot adequately plead in response
44 without knowing when the alleged conduct is said
45 to have taken place.

46 The defendants, to be clear, do not seek the
47 evidence by which those facts will be proven. The

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1 testimony to be given by the licensed physicians
2 or other healthcare providers who allege they were
3 obstructed, or prevented from providing treatment,
4 is not what is being sought by the defendants
5 today.

6 The defendants simply seek further and better
7 details of the allegation, to enable to respond,
8 and to assist this court in determining whether
9 the issue is appropriate for certification as a
10 class proceeding. That is, if there's an issue
11 common to the class that can effectively be
12 determined in a class action.

13 My Lord, in it's application response, the
14 plaintiff has provided an affidavit of Kip Warner
15 who's one of the directors of the plaintiff's
16 society, and I propose to turn to that affidavit
17 now.

18 THE COURT: Thank you.

19 CNSL E. LAPPER: It's at Tab 4 of your application
20 record.

21 THE COURT: I'm there.

22 CNSL E. LAPPER: Okay. So, at paragraph 3 of the
23 affidavit of Kip Warner, he writes:

24
25 With respect to the Defendants' demand for
26 particulars set out in Part 1, paragraph 1(a)
27 of the Notice of Application ...

28
29 That's the demand we're speaking of with respect
30 to paragraph 44 of the amended claim.

31
32 ... this information is within the
33 Defendants' knowledge and this information is
34 not known at this time by the Plaintiff or
35 its directors. However, I suspect, the
36 Plaintiff will be in a better position to
37 provide further details after document
38 discovery and examinations for discovery of
39 the Defendants.

40
41 Then over the page, My Lord, at paragraph 4, Kip
42 Warner gives evidence that:

43
44 The grounds for the Plaintiff's allegations
45 that the Defendants have engaged in the
46 alleged conduct is based on the fact that the
47 Plaintiff has been conducted by a number of

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1 licensed physicians who have stated that
2 their ability to prescribe various
3 treatments, both prophylactically or
4 otherwise with respect to Covid-19 has been
5 discouraged both by their governing body and
6 by the Defendants. This includes the ability
7 of physicians to provide an opinion regarding
8 whether vaccination is advisable, or if the
9 patient's health may be adversely affected by
10 the Defendants' mandated vaccines in light of
11 the specific health conditions of each
12 patient, and despite credible scientific
13 evidence to the contrary. These people have
14 not provided the Plaintiff with consent to
15 use their names as they are afraid the
16 Defendants and each informants' governing
17 bodies may cause adverse consequences to
18 their ability to practice their profession.

19
20 So, My Lord, the defendants submit that the
21 evidence provided by Kip Warner is contradictory.
22 While he himself, and the other directors to the
23 plaintiff's society, may not possess the relevant
24 knowledge as he asserts in paragraph 3, paragraph
25 4 of the affidavit makes it clear that someone
26 within the plaintiff's society has the requisite
27 means and knowledge to respond to this demand.

28 The fact the physicians who allege that they
29 were discouraged wish to remain anonymous is not
30 material to this application. The defendants are
31 seeking particulars of the conduct alleged, not
32 the identity of the specific physician. And,
33 My Lord, I'll note here that of course claims
34 cannot be advanced anonymously, so at some point
35 these physicians are going to have to either meet
36 the standard to obtain a sealing order, to -- to
37 keep their identities secret, or disclose their
38 identities so the defendants can make full answer
39 to the claim. But that's not a matter for you
40 to --

41 THE COURT: A sealing order won't help them, if they're
42 certified and this goes to trial. These
43 individuals will have to come forward and testify
44 in an open court. So, it's really just pushing --
45 kicking the ball down the street in effect.

46 CNSL E. LAPPER: It is, My Lord, and -- and so that
47 being said, what -- what our demand for

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1 particulars is aimed at is not the identity of
2 those physicians; the demand doesn't go that far.
3 Though, of course, their identity may well have to
4 be revealed in the course of time in this
5 proceeding. Buy rather, it's just aimed at
6 providing further and better material facts
7 relevant to the conduct that's being alleged here.

8 My Lord, I'll go on to say that the -- the
9 evidence of Kip Warner really raises more --
10 THE COURT: Just so we're completely clarifying, you
11 are -- you envision particulars which would say,
12 "This communication on this date by this member of
13 the government," or "agent of the government," or,
14 "associated professional body," for example, "was
15 issued on this date in this form." You're not
16 asking for the identity of individual doctors for
17 example, who received these directions?

18 CNSL E. LAPPER: That's exactly correct, My Lord.

19 THE COURT: All right. And I [indiscernible] dynamic
20 hearings. I'm going to turn to your friend right
21 now.

22 Ms. Furtula, I'll give you a chance to
23 obviously make your full submission, but it
24 strikes me from your client's -- from your
25 client's affidavit that that would be the greatest
26 concern, the revelation of the identities of
27 specific doctors whose professional status could
28 be in peril if their names are disclosed right
29 now.

30 That confirmation from Ms. Lapper that
31 they're not seeking the government and the -- that
32 the defendants are not seeking the identity of the
33 recipients of these communications, does that
34 change your position at all?

35 CNSL P. FURTULA: No, My Lord. It's the fact that they
36 want the name of the government employee, the
37 government representative or agent, that our
38 client does not have the knowledge of, at this
39 point in time.

40 THE COURT: Your client has communicated you -- doctors
41 who, as your client's affidavit indicates, have
42 been told by government officials that they can --
43 they must say and cannot say certain things.
44 That's -- that's been put down in the evidence.

45 Two observations, and I'll hear your point on
46 this, but... The first is that you -- in order
47 for Mr. Warner to swear that, or solemnly affirm

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1 that in his affidavit - no, he's swearing it -
2 swear that fact in his affidavit, he must have
3 that information in hand, and I'd imagine that
4 they're fairly broad pronouncements for the most
5 part, from the -- from the governing body and from
6 the government, that doctors are to say certain
7 things. They're not specific indications with a
8 specific doctor.

9 With respect to communications, with specific
10 doctors, in order to make that statement in the
11 affidavit, it strikes me that Mr. Warner must have
12 that information in hand.

13 CNSL P. FURTULA: Well, My Lord, again, we're getting
14 into the particulars of the evidence to prove a
15 material fact --

16 THE COURT: Mm-hmm.

17 CNSL P. FURTULA: -- which is not appropriate at this
18 stage. And I find in our client's affidavit which
19 I will take you through, there are some
20 attachments from directives received by the
21 governing body and also the Province. But there's
22 a problem with the affidavit. We filed it with a
23 few pages missing, so perhaps over the break, I
24 can email it to Madam Registrar so she can provide
25 you with the complete copy.

26 THE COURT: Yes, all right. Okay, well I'll leave it
27 at that then. Back to Ms. Lapper.

28 CNSL E. LAPPER: My Lord, I would propose now to -- to
29 address the documents that my friend was just
30 referring to, and those are set out in paragraph 5
31 of the Warner affidavit.

32 THE COURT: Yes.

33 CNSL E. LAPPER: So, Kip Warner says:

34
35 Now produced and shown to me and marked as
36 Exhibit "B" to this my affidavit are true
37 copies of the following:

38
39 And then it lists five documents there. But in
40 the filed copy of the affidavit, My Lord, there
41 are only three documents attached, and my friend
42 just alerted you to that fact. So, it appears
43 that the affidavit as filed is defective and, in
44 the circumstances, I'm not sure what weight can be
45 given to it. But regardless, there is no context
46 provided for these documents in the affidavit, the
47 reasons for attaching them, or where they were

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1 obtained by -- by the plaintiff. So -- but I will
2 just take you through the three documents that
3 were attached to the filed version of the
4 affidavit.

5 THE COURT: Yes.

6 CNSL E. LAPPER: Beginning at Exhibit "B", it's page 2
7 of the exhibit. So, this is a June 2020 document
8 prepared by the Clinical Reference Group.

9 THE COURT: Yes.

10 CNSL E. LAPPER: Healthcare professionals that provide
11 advice to the Provincial Health Officer and the
12 Ministry of Health, and it provides
13 recommendations with respect to unproven therapies
14 for COVID-19. And so, I'll wait to hear further
15 from my friend on this, but if this document is
16 the alleged discouragement that is pleaded in
17 paragraph 44, then the plaintiff should provide
18 particulars of this document.

19 THE COURT: Yeah, it's in hand.

20 CNSL E. LAPPER: It's in hand, exactly. And amend
21 their pleading to -- to indicate that those are
22 the relevant facts. So, at page --

23 THE COURT: Ms. Lapper, are we insisting that your
24 friend actually amend the pleading? As we know,
25 particulars are often a separate document and that
26 has advantages in many ways to make a pleading
27 less cumbersome. Are you taking the position that
28 there actually has to be an amendment or would you
29 be content if your friend simply provides them --
30 as she pleaded earlier, particulars, in a formal
31 but separate document?

32 CNSL E. LAPPER: Your Lordship is quite correct that if
33 the response is provided as a response to
34 particulars in a formal document, that response to
35 particulars forms part of the pleading under the
36 current law. So, I am -- I'm not requesting an
37 amendment to the claim, but I would request that a
38 response be provided in a -- in a formal response
39 to particulars, not in the form of this affidavit.

40 THE COURT: That makes sense. Thank you.

41 CNSL E. LAPPER: So, turning to the second attachment;
42 that's at page 6 of the exhibit.

43 THE COURT: Mm-hmm.

44 CNSL E. LAPPER: This is a May 2021 Joint Statement on
45 Misleading COVID-19 Information. It's provided by
46 the College of Physicians and Surgeons and the
47 First Nations Health Authority. My Lord, this

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1 document has nothing to do with any of the
2 defendants. Both the College of Physicians and
3 Surgeons and the First Nations Health Authority
4 are separate legal entities from the Province and
5 the Provincial Health Officer, and neither have
6 been named as defendants in this action.

7 THE COURT: Yes.

8 CNSL E. LAPPER: There's no ability for the Province or
9 the PHO to respond to this document. This is not
10 a document issued by those bodies. If the
11 plaintiff wishes to challenge, actually, the
12 college or the health authorities, they need to
13 commence a different proceeding or add defendants
14 to the current one.

15 The third document, My Lord, is page 7 of the
16 exhibit, and this is a document issued by the
17 Provincial Health Officer that sets out valid
18 contraindications to the COVID-19 vaccine.
19 My Lord, it's the defendants' submission that this
20 document is completely irrelevant to the pleading
21 in paragraph 44. This deals with criteria for
22 medical exemptions for vaccination.

23 So given the defects in the way this evidence
24 was provided, and that two of the three documents
25 provided at least don't appear to even address the
26 particulars sought, I'll wait to hear further from
27 my friend on -- on the significance of these
28 documents. But we say to the extent that the
29 plaintiff appeared to have in hand the information
30 that the defendants seek, that that should
31 provided in their response to particulars.

32 And so that -- that concludes my submissions
33 on the first request for relief, My Lord. I'll
34 turn now to the -- to the second demand for
35 particulars that's at issue this morning unless
36 Your Lordship has any further questions with
37 respect to the first.

38 THE COURT: No, that's fine, thank you. We can proceed
39 to paragraph 58.c.

40 CNSL E. LAPPER: Fifty-eight, yeah. So, we'll turn to
41 the amended claim at Tab 5, and it's at page 13 of
42 that claim, My Lord.

43 THE COURT: All right, go ahead.

44 CNSL E. LAPPER: So, this is under the heading
45 "Hippocratic Oath", and I'll just read you all
46 three paragraphs under that heading.

47 THE COURT: No need to; I can read.

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1 CNSL E. LAPPER: Okay. So, 58.c is the one at issue,
2 My Lord, and it's that the Provincial Health
3 Officer is in violation of her oath.

4 THE COURT: Yes.

5 CNSL E. LAPPER: And so, these paragraphs in the
6 original notice of civil claim were part of the
7 legal basis of the claim, and you can -- you can
8 see that at page 19 where they've been struck out
9 from the legal basis of the claim, and they were
10 moved verbatim into the factual basis for the
11 claim.

12 And so, the defendants' demand for
13 particulars in this regard is again the Exhibit
14 "C" to the Lever affidavit. And this is with
15 respect to Part 1, paragraph 58.c, provide
16 particulars of the Provincial Health Officer's
17 alleged violation of her Hippocratic Oath,
18 including what conduct is said to be in violation
19 of the oath, the dates the conduct occurred, the
20 harm alleged to have been caused by the PHO's
21 alleged breach of her Hippocratic Oath, and then
22 the individuals who are alleged to have suffered
23 harm caused by the alleged breach of the
24 Hippocratic Oath.

25 THE COURT: Now this is challenging, particularly in
26 the context of a proposed class proceeding. The
27 point of a class proceeding is you have presumably
28 a mass of people out there; you don't know their
29 names. And I confess, I've never seen particulars
30 of individuals provided or ordered in a class
31 proceeding. And where the defendants simply say,
32 "Oh, look at paragraph 8 and 8.a," that's the best
33 we could do. Maybe we could plead Mr. Warner and
34 various members connected with the organization,
35 but what good does that do, really?

36 CNSL E. LAPPER: Well, My Lord, here's what I would --
37 I have two submissions, and so I'll answer your
38 question first, and then proceed to my
39 [indiscernible] position. But essentially the --
40 to the extent that the plaintiff alleged that
41 there is some cause of action to which these --
42 this breach of the Hippocratic Oath is somehow
43 material to a cause of action that they've alleged
44 in the claim --

45 THE COURT: But they've resiled from that. They're
46 now -- they're now saying -- and this raises all
47 sorts of other problems for the plaintiff.

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1 CNSL E. LAPPER: Yes.

2 THE COURT: But we're saying, "Oh, we threw the
3 Hippocratic Oath in; it's not a material fact."
4 So -- and you know, I'll raise this now. It's
5 more kind to raise it with you in front of me
6 because you didn't draft this. But if it's not a
7 material fact, why is it there at all?

8 CNSL E. LAPPER: Yes. So, My Lord, that's -- that is
9 our primary position, and I have advised my friend
10 of that in advance of today's hearing. But, in
11 fact, what this -- what the -- what the plaintiff
12 had said in its application response at paragraph
13 46 is that whether the PHO breached her
14 Hippocratic Oath is not a material fact. So,
15 provided that remains her position in this hearing
16 this morning - and I'll wait to hear from my
17 brother on that - the defendants are content to
18 rely on the plaintiff's position that this is not
19 a material fact and won't speak to that relief any
20 further. We'll deal with the repercussions of
21 that position at the certification hearing.

22 THE COURT: And I suppose that was going to be my
23 second observation -- I was debating whether or
24 not to make it. It's very much in -- in your
25 clients' interest to leave that in, it strikes,
26 and not ask for particulars and don't give them
27 the opportunity to fix that in effect.

28 Ms. Furtula, what's your position on this now
29 that you've heard Ms. Lapper on this? Is it a
30 material fact or is it not, and if it's not a
31 material fact, why is it in there?

32 CNSL P. FURTULA: Well, My Lord, it is the fact of
33 whether Ms. -- or sorry, Dr. Henry breached the
34 Hippocratic Oath is -- is not necessarily material
35 from a legal perspective, but [indiscernible] say
36 she's breached her oath. And we've provided
37 particulars in that respect, and I can take you to
38 the -- the Lever affidavit at Tab 3. And at page
39 15 of the affidavit, at paragraph --

40 THE COURT: [Indiscernible]. I see it there, yes.

41 CNSL P. FURTULA: Yes. So, we've particularized why we
42 say she has breached the Hippocratic Oath, and
43 it's those things that are material. She has
44 failed to use the least intrusive means necessary
45 to respond to a public health threat. She's
46 failed to consider the effect of the orders on --
47 on various groups, et cetera. So, these are all

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1 particularized, and that conduct is material.
2 Whether she's breached the oath or not, whether
3 that [indiscernible] a breach, that's an ethical
4 question and it's more of a background fact to
5 provide context of [indiscernible/overlapping
6 speakers].

7 THE COURT: Ms. Furtula, I don't know if you've read
8 the recent decision of the Court of Appeal in
9 *Mercantile Office Systems*, but it's a very clear
10 indication that the Court of Appeal is taking a
11 much more strict approach to pleading non-material
12 facts as background colour, or narrative, or "part
13 of the story". So, it's not something I have to
14 decide today, but I strongly urge you and your
15 clients to consider that decision which I believe
16 came out last month.

17 And you know, I can't give you legal advice,
18 but insofar as the claim is larded with colour,
19 and non-material assertions, and background
20 information, it's putting the claim at grave risk
21 when it comes to say for example a potential
22 strike application, or indeed its certification
23 where these matters are considered as well.

24 So, I'll leave it at that. I'm not giving
25 you legal advice but read that case and go through
26 your pleading very carefully and ask yourself, do
27 you really need to have these non-material facts
28 in there.

29 As I read the Court of Appeal's decision,
30 non-material facts should only be included if they
31 provide some context without which no one would
32 understand the pleading properly but I'll let you
33 consider that. Obviously, this court has to
34 follow our Court of Appeal and there's been an
35 expansive statement on non-material facts in that
36 decision, and it would be prudent for you and your
37 clients to spend some great quality time with that
38 decision, with your amended claim at your elbow.

39 I'll leave it that. I don't have to decide
40 that today. Back to you, Ms. Lapper. We didn't
41 get a clarification though, I think, from
42 Ms. Furtula.

43 So, with Ms. Lapper's -- I guess you're
44 sticking with your guns with that pleading, and so
45 Ms. Lapper must continue with her application to
46 seek particulars of it. Is that -- is that a
47 correct distillation of your answer?

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1 CNSL P. FURTULA: Well, I'm not sure that it is. What
2 our position is, is that the material facts with
3 relation to whether she's breached the oath or not
4 have been provided. Or sorry, particulars of how
5 she's breached the oath have been provided. And
6 those particulars are material to the action as a
7 whole and I've taken you through those.

8 THE COURT: Okay. So, I take it, Ms. Lapper, you're --
9 you will continue with your application with
10 respect to that?

11 CNSL E. LAPPER: Yes, My Lord. I -- I understood
12 Ms. Furtula to be resiling from the position
13 advanced in paragraph 46 of the application in
14 response, that this is not a material fact. So, I
15 will -- I will move forward and seek the relief
16 sought in -- in respect of this paragraph.

17 THE COURT: Yes.

18 CNSL E. LAPPER: To go back, My Lord, to your earlier
19 question about -- about particulars not being in
20 respect of the specific individual. The claim of
21 the defendants here is not -- is not that
22 granular. It's simply -- it's simply this; that
23 if the plaintiff is asserting that the breach of
24 the Hippocratic Oath is somehow material to the
25 legal causes of action pled in the claim, the
26 defendants need to understand who is alleged to
27 have suffered the harm, and the plaintiff bears
28 the onus to prove that harm or injury was in fact
29 suffered by someone. And the pleading is
30 currently deficient in this regard.

31 THE COURT: I'm just going to ask the question I posed
32 to you right at the outset of this chapter. How
33 is this proposed class action different from other
34 class actions where you don't even know the names
35 of people who have suffered harm as a matter of
36 being the injured parties, let alone being
37 particularized? I am scratching my head.

38 CNSL E. LAPPER: No, I -- I hear. The particulars
39 we're seeking is simply whether the harms were
40 suffered; is the allegation on behalf of the class
41 as a whole, a particular subclass, or by the
42 representative plaintiff. And that's what's
43 missing. I'm not looking for names; that's not
44 what the defendants are seeking. It's just simply
45 there is no pleading about, is this a claim
46 brought on behalf of the class; is this a claim
47 brought on... Like, you know, in a -- in a class

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1 action proceeding, normally you have a
2 representative plaintiff who is an individual who
3 has suffered the harms alleged and can provide a
4 sort of -- you know, a set of facts that grounds
5 the -- the injury in sort of the factual context
6 the court would need to adjudicate the claim.

7 Here, that's not what we have, the proposed
8 plaintiff; we have a society. It's not clear
9 whether the society has suffered harm as a result
10 of these alleged breaches of the Hippocratic Oath
11 as the representative plaintiff, and whether that
12 claim is brought on behalf of the class, which is
13 all British Columbians. And those particulars are
14 necessary to enable the defendants to plead and,
15 frankly, to assist the court in determining
16 whether these are issues appropriate for
17 certification at the certification hearing. And
18 so we're trying mainly to assist the court by
19 narrowing this pleading and understanding it
20 better in advance of certification so that we can
21 use our time most effectively in that hearing.

22 So those are my submissions. It's simply a
23 request to have a proper pleading that we say that
24 to the extent the plaintiff wants to allege this
25 is material to the legal causes of action, that
26 there should be a clear indication that this is
27 brought on behalf of the class or the
28 representative plaintiff; that there should be
29 some indication of who has suffered harm here.

30 And so, my last -- my last point, My Lord, is
31 just a submission with respect to the timing of
32 any order Your Lordship might -- might make today.
33 I note -- and you'll be well aware of this -- that
34 the defendants are required to provide an amended
35 response to civil claim by November 25th per your
36 Order of October 1st. And so, if further and
37 better particulars are to be ordered, the
38 defendants will require time to review and
39 consider those particulars, to consider their
40 response, and to seek instruction prior to filing
41 a response. And so, the order we seek today is an
42 order that any particulars be delivered on or
43 before November 5th. That's next Friday, so just
44 over a week.

45 THE COURT: All right.

46 CNSL E. LAPPER: Subject to any further questions,
47 My Lord, those are my submissions.

Proceedings

1 THE COURT: Thank you very much, Ms. Lapper.
2 We started late, so I pushed back the morning
3 break late. Then again, we're also up against the
4 lunch hour. So, what I propose doing, we will
5 have a 15-minute -- well, we'll come back at 12:15
6 let's say, and that will allow Ms. Furtula to get
7 her foot in the door before the lunch hour, and
8 then we'll reconvene at 2 o'clock. Thank you
9 everyone.

10
11 (VIDEOCONFERENCES/TELECONFERENCE PAUSED)

12
13 (PROCEEDINGS ADJOURNED FOR MORNING RECESS)
14 (PROCEEDINGS RECONVENED)

15
16 (VIDEOCONFERENCES/TELECONFERENCE RESUMED)

17
18 THE COURT: All right. Over to you, Ms. Furtula.
19 CNSL P. FURTULA: Thank you, My Lord.

20
21 **SUBMISSIONS FOR PLAINTIFF BY CNSL P. FURTULA:**

22
23 CNSL P. FURTULA: At the October 1st, 2021 judicial
24 management conference, Your Lordship encouraged
25 the parties to be reasonable with respect to
26 particulars, including urging the plaintiff to
27 provide more details than perhaps normally would
28 be provided with respect to the claim. But you
29 also cautioned the defendants that because of the
30 nature of the proceeding and the stage where we're
31 at, some information would be known to the
32 plaintiff, and the defendants should be mindful of
33 that when considering whether to bring an
34 application for further particulars.

35 The plaintiff took your direction to heart,
36 and we have provided very lengthy and detailed
37 particulars as evidenced in our response to demand
38 to particulars dated October 12th, and this is
39 found at Tab 3 of the application record.

40 THE COURT: Yes.

41 CNSL P. FURTULA: It's the Lever affidavit starting at
42 page 12.

43 THE COURT: Yes.

44 CNSL P. FURTULA: And I will just quickly take you
45 through it. So, as we see at page 13, we've
46 provided a list of various complimentary
47 therapies, various orders. At the next page we've

Submissions for Plaintiff by Cnsl P. Furtula

1 provided even the URL where we've obtained certain
2 information, and which is evidence in the ordinary
3 course and generally is not provided in a response
4 to demand for particulars.

5 If you flip over to the page, you'll see
6 more -- more details provided. At page 16 we've
7 again provided the -- we've pinpointed the URL
8 where certain directives that were issued by the
9 government. So, the point of this is that we've
10 really tried to provide as much information as the
11 plaintiff could at this stage. And, of course,
12 the situation is constantly changing and new
13 information is becoming available, so we can't
14 provide information that we don't know at a
15 particular time. And furthermore, the information
16 that the defendants have requested is outside of
17 the plaintiff's knowledge.

18 If the court rules that particulars be
19 provided at this time, we seek an additional order
20 that the plaintiff be given leave to conduct
21 limited discovery on the particular allegation
22 that my friend [indiscernible].

23 THE COURT: All right. Our alternative would be, as
24 put forward in one of the cases you rely upon, is
25 that the plaintiff be ordered to provide the
26 particulars that are presently known, with leave
27 to provide more particulars after discovery.

28 CNSL P. FURTULA: Yes, that is another option for the
29 court.

30 THE COURT: I mean that would be a typical -- let's say
31 this is an unusual claim. But for example, in a
32 fraud context, a plaintiff may have limited
33 knowledge of how someone defrauded them, but
34 they're expected to step up to the plate and
35 provide as much detail as they have in hand right
36 now and continue providing that detail as it's
37 learned in discovery and other -- through other
38 avenues. That's an altogether normal order in a
39 demand for particulars. But go on.

40 CNSL P. FURTULA: Yes, My Lord, and I was actually
41 going to mention that, as well, later on in my
42 submissions, but...

43 So, for now, I'd like to just take you back
44 to what this action is about.

45 THE COURT: Yes.

46 CNSL P. FURTULA: So, the action challenges the premise
47 that the actual threat of COVID-19 justified the

Submissions for Plaintiff by Cnsl P. Furtula

1 government's initial and continued use of
2 emergency powers. So, when people say that
3 COVID-19 caused the lockdown for example, we say
4 it was the government that chose to impose a
5 lockdown, and not because it was necessary in the
6 circumstances. And this is because there were --
7 as pled in the amended notice of civil claim,
8 there were issues with the way the statistics were
9 collected, the method of testing for the virus,
10 the impact on persons with pre-existing health
11 conditions, and other factors that challenged the
12 way the government responded to this.

13 In essence, the plaintiff argues that the
14 lockdowns, limitations on associations,
15 [indiscernible] protests, et cetera, were
16 disproportionate to the actual threat posed by the
17 virus to British Columbians. And this is set
18 out -- precisely set out in Part 3 of the amended
19 notice of civil claim. I have reproduced the
20 response -- the application response at paragraph
21 4, if that assists.

22 THE COURT: All right.

23 CNSL P. FURTULA: So that is essentially what this
24 action is about, and that is why so many of the
25 government's orders are being challenged, because
26 we're questioning the initial premise for calling
27 a state of emergency.

28 THE COURT: Yes.

29 CNSL P. FURTULA: I will take you now to the legal
30 basis quickly, starting at paragraph 15 of the
31 application response at Tab 2. And my friend
32 already touched on this. Rule 3-7(18) requires
33 that if a party relies on certain types of
34 allegations, then full particulars with dates and
35 items must be stated in the pleadings, or if
36 particulars may be necessary. Sub (20) clarifies
37 that particulars need only be pleaded to the
38 extent that they are known at the date of
39 pleading, but further particulars may be served
40 after they become known.

41 In terms of whether particulars may be
42 necessary, this has now been interpreted to mean
43 helpful or of assistance. And this is pursuant to
44 a decision in *Hoy v. Medtronic*. It's the 2004
45 decision my friend is referring -- it's the 2000
46 decision for the same action.

47 And particulars are provided to -- to

Submissions for Plaintiff by Cnsl P. Furtula

1 disclose what one party intends to prove against
2 the other, but not how the party intends to prove
3 that, because the how is a matter of evidence.
4 And we have Rules of Court dealing with how
5 evidence is to be discovered and exchanged. And
6 we're not anywhere near that at this stage of this
7 proceeding.

8 The function of particulars is outlined in
9 *Cansulex v. Perry*. I'm not going to go through
10 each of them. But one of the main factors is to
11 prevent the other side from being taken by
12 surprise at trial and also what evidence they
13 ought to be prepared with for trial. So -- and
14 there's no hierarchy in terms of which of these
15 factors is more important, and the circumstances
16 of each case are an important factor in
17 determining whether and how the court exercises
18 its discretion. And so, in my submission, the
19 class action context is highly relevant in
20 determining which particulars should be ordered.

21 My friend at paragraph 23 relied on the
22 *Ah-Kwa-Mish First Nation v. British Columbia*.
23 This is found at Tab 14 of the joint book of
24 records, but the paragraphs I'll be relying on are
25 set out in the application response. And the
26 court concisely summarizes how demands for
27 particulars are to be treated in the class action
28 context. So, at paragraph 44 of the decision, the
29 court confirms that due regard must be taken with
30 respect:

31
32 ... to the nature of an intended class
33 proceeding, keeping in mind that a
34 certification application is not a trial of
35 the action or its merits.

36
37 And that material facts may be necessary, in order
38 to prepare for trial, but in a class proceeding:

39
40 ... the question is whether the certification
41 materials, which include the Statement of
42 Claim ...

43
44 Or the notice of civil claim in this case.

45
46 ... provide the defendants "... with
47 sufficient information so that it

Submissions for Plaintiff by Cnsl P. Furtula

1 understands, at least in broad strokes, what
2 the plaintiff's case is about".

3

4 And the court references a decision at paragraph
5 46 where:

6

7 ... Hanssen J. dismissed the defendants'
8 pre-certification application for
9 particulars, noting that anyone who read the
10 pleading would understand what the case is
11 about, and that the risks an inadequate
12 pleading or evidentiary basis may present at
13 a certification hearing are borne by the
14 plaintiff.

15

16

17 Now, at the certification hearing, we're
18 going to be providing affidavit evidence of --
19 well, we anticipate persons who might have been
20 affected by these orders, how they have been
21 affected. Also, expert opinions. And so, there's
22 going to be a great deal of evidence that's going
23 to be provided to the plaintiffs and -- I'm sorry,
24 to the defendants. And we're due to provide this
25 evidence on January 10th next year, and they have
26 until March to provide their affidavits in
27 response.

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 Another important factor is found at
paragraph 30 of the *Ah-Mish First Nations*
decision. And in this paragraph the court talks
about the change in -- in the law in terms of
what's required at a certification hearing. And
I'll start -- I'll just read this paragraph
starting at the middle:

 Therefore, the earlier ruling as to
particulars in class action cases in B.C. are
less helpful today because of this new
evidentiary requirement.

And what the court is referring to there is two
Supreme Court of Canada decisions that were issued
in 2001. One is *Hollick v. Toronto (City)*, and
the other, *Rumley v. British Columbia*. And, in
those cases, the court found that there is a
requirement for some evidentiary foundation for
certification. So that means that the plaintiff
cannot just rely on the notice of civil claim in

Submissions for Plaintiff by Cnsl P. Furtula

1 order to satisfy the test for certification.
2 THE COURT: And you would distinguish your friend's
3 case, the Madam Justice Kirkpatrick decision that
4 was quoted before, as predating those Supreme
5 Court of Canada authorities?

6 CNSL P. FURTULA: That's correct, My Lord. That's the
7 *Hoy v. Medtronic*, the 2000 decision.

8 THE COURT: Yes.

9 CNSL P. FURTULA: And at paragraph 49:

10
11 The question becomes this: does the pleading,
12 the Amended Statement of Claim, make
13 sufficient averments of material fact to
14 establish, on the application of the law, a
15 cause of action?
16

17 So that's all that is required of the pleadings,
18 of the amended notice of civil claim. It's
19 whether we've pled sufficient material facts or
20 evidence to support the claim, and that is one of
21 the factors that the court has to take into
22 consideration when determining whether this is an
23 appropriate action to proceed under the *Class*
24 *Proceedings Act*.

25 THE COURT: Ms. Furtula ...

26 CNSL P. FURTULA: Yes.

27 THE COURT: We'll take the lunch break, and you'll have
28 time to conclude at 2 o'clock. Thank you
29 everyone.
30

31 (VIDEOCONFERENCES/TELECONFERENCE PAUSED)

32
33 (PROCEEDINGS ADJOURNED FOR NOON RECESS)
34 (PROCEEDINGS RECONVENED)

35
36 (VIDEOCONFERENCES/TELECONFERENCE RESUMED)
37

38 THE COURT: All right. Back to you, Ms. Furtula.

39 CNSL P. FURTULA: Thank you, My Lord.
40

41 **SUBMISSIONS FOR PLAINTIFF BY CNSL P. FURTULA,**
42 **CONTINUING:**
43

44 CNSL P. FURTULA: Just before the break, I was going to
45 go into the test for certification. I'm certainly
46 not going to dwell on this -- it's set out in our
47 materials -- except to simply point out that the

Submissions for Plaintiff by Cnsl P. Furtula

1 certification does not concern the merits of the
2 action but merely its form. And that under the
3 proof required of the plaintiff to meet the
4 certification requirements [indiscernible] with
5 the balance of probabilities.

6 What I will address in more detail is the
7 timing of the particulars that should be ordered.
8 And I will take you to paragraph 32 of the
9 application response which is at Tab 2.

10 THE COURT: I'm there.

11 CNSL P. FURTULA: Okay. So, if the order for delivery
12 of -- for the particulars is discretionary, the
13 court should review each demand and decide whether
14 particulars should be delivered now, following
15 discovery, or whether sufficient particulars have
16 already been provided. And this is from the
17 *Cominco v. Westinghouse* decision.

18 THE COURT: Yes.

19 CNSL P. FURTULA: Furthermore:

20
21 Where the facts are almost exclusively within
22 the knowledge of the demanding party ...

23
24 The defendants in this case.

25
26 ... the court has discretion to postpone the
27 order for particulars until after
28 examinations for discovery.

29
30 And if the ability to plead is the focus of the
31 need for particulars, and not if they're being
32 used as a way to discover evidence before the
33 examinations for discovery.

34 Now, turning to the demand for particulars,
35 and this is reproduced at paragraph 36.

36 THE COURT: Yes.

37 CNSL P. FURTULA: I'm going to first take you to the
38 notice of civil claim which is at Tab 5.

39 THE COURT: I'm there.

40 CNSL P. FURTULA: At page 8 paragraph 44. So this is
41 where it's incorrect, and in my position this is
42 the material fact that needs to [indiscernible]
43 nothing more at this stage. So, it starts:

44
45 In addition, the defendants have obstructed
46 or discouraged licensed physicians and other
47 treatment providers licensed under the *Health*

Submissions for Plaintiff by Cnsl P. Furtula

1 *Professions Act* from advocating modalities or
2 therapies with respect to the clinical
3 approach in treating COVID-19 and related
4 diseases ...

5
6 Et cetera. So, in my submission, that's the
7 material fact that the plaintiff at trial needs to
8 prove, and in order to formulate a cause of
9 action. It is the ultimate fact to which we will
10 have to prove by providing evidence in terms of
11 which particular employee, representative, or
12 agent made which particular statement and to whom.
13 And all of that, in my submission, is a matter of
14 evidence. And we've already pled the material
15 facts, obviously.

16 Now, the plaintiff has provided an affidavit
17 deposing that this information is not known at
18 this time, and we have provided information
19 relating to the basis of the allegation, so all
20 the exhibits to the affidavit, which is found at
21 Tab 4 --

22 THE COURT: Yes.

23 CNLSL P. FURTULA: -- or sorry, Exhibit "B" starting at
24 page 2. So, these are directives that provide the
25 reasonable basis for which this claim is made.
26 And they're not perfect, but for example if we
27 take -- if we look at the first attachment at page
28 2, which is the Clinical Reference Group
29 recommendations, it's been issued by the Ministry
30 of Health. We don't know which particular
31 employee, or employees offered this; we don't know
32 to whom it was directly given. This was found
33 online.

34 THE COURT: So, in that case, if you were ordered to
35 provide particulars, you could only provide
36 particulars insofar as you know them, and you
37 would -- at least that particular document, you
38 have a date or [indiscernible], and parameter
39 documents and communications that you're aware of,
40 and that's where you're [indiscernible].

41 CNLSL P. FURTULA: Can you hear me?

42 THE COURT: I can hear you all right, yes.

43 CNLSL P. FURTULA: All right, sorry. It cut off so I
44 didn't hear exactly what you said, but I think
45 your question was, this is a piece of evidence
46 that we -- we could answer the particulars using
47 this piece of evidence, for example; is that

Submissions for Plaintiff by Cnsl P. Furtula

1 correct? Do I understand...
2 THE COURT: That's an example of the specific
3 communication particularized in paragraph 44.
4 [Indiscernible/overlapping speakers].
5 CNSL P. FURTULA: [Indiscernible].
6 THE COURT: [Indiscernible] the plaintiff in fact would
7 want to list these matters because -- for various
8 reasons. First of all, you could perhaps avoid
9 the cost of this application, but it certainly
10 puts you in a better stead at discoveries when
11 you're asking questions to have something pleaded,
12 and that I could [indiscernible], technically
13 speaking, it's not a material fact.
14 CNSL P. FURTULA: I'm sorry, there's a problem with the
15 connection. I can -- I can barely hear you.
16 THE COURT: Ms. Lapper, can you hear me all right?
17 CNSL E. LAPPER: My Lord, I can hear you but there is a
18 bit of feedback or fuzziness coming through.
19 THE COURT: In contradistinction from -- and actually
20 Madam Registrar is [indiscernible] right now.
21 What I would try is switching to a different -- a
22 different outlet. I can perhaps turn on a headset
23 instead.
24 THE CLERK: My Lord, can you hear us?
25 THE COURT: I can hear you. Can you hear me all right?
26 THE CLERK: Very well, thank you.
27 THE COURT: And I apologize, the technical problems are
28 not ending. For some reason I'm getting a tune in
29 my earpiece which, although background music's
30 always nice, doesn't lend itself well to the
31 hearing. This is surreal. All right. How is
32 that; still -- still a problem?
33 CNSL E. LAPPER: Not for me, My Lord.
34 THE COURT: Are you hearing all right, Ms. Lapper?
35 CNSL E. LAPPER: Yes, My Lord.
36 THE COURT: Madam Registrar, you're hearing all right?
37 THE CLERK: Yes, My Lord.
38 THE COURT: Ms. Furtula?
39 CNSL P. FURTULA: Yes, My Lord, much better.
40 THE COURT: Okay. I think this is actually the same
41 audio input as before, so I suspect that the --
42 the simple connection at the start of this round
43 is the problem.
44 So, to go back, Ms. Furtula, to what I was
45 saying, and it's I suppose less of a question than
46 a rumination for your consideration. But, you are
47 asked for this particular. You take a technical

Submissions for Plaintiff by Cnsl P. Furtula

1 position that you've pleaded sufficient material
2 facts in what we see in paragraph 44, but you do
3 have in hand some specific communication that you
4 say are obstructing or discouraging medical
5 professionals from prescribing and exploring other
6 treatment modalities.

7 The case law indicates you only have to
8 provide what you know; that's the first
9 observation. And the second observation is, I
10 would imagine as a matter of strategy, even if you
11 have a technical objection to providing these
12 particulars based upon laws of pleadings or
13 whatnot, or civil procedure, that you can provide
14 the information you have in hand -- it's no skin
15 off your nose -- and that puts you in a better
16 position at the certification stage because you're
17 showing the court that you've got everything
18 mustered, and it puts you in a better position at
19 discovery because you've got some pleaded basis
20 for your questions opposed to the defendants.

21 I don't know if you want to address that. I
22 advertised that it was more of an observation than
23 a question, I suppose.

24 CNSL P. FURTULA: Well, yes, My Lord. Of course, for
25 the certification hearing we will -- we anticipate
26 to have more evidence to substantiate this
27 allegation that the government has obstructed
28 physicians in some way or form. But what the
29 defendants are asking for is to provide
30 particulars, and I quote, "...of which employees,
31 representatives or agents of the Province have
32 allegedly obstructed or discouraged licensed
33 physicians," et cetera.

34 So, we don't know the names of these
35 employees, representatives or agents at this
36 point; that is a matter of evidence. And we're
37 not trying to obfuscate here, but the information
38 available to the plaintiff at this point is
39 incomplete, and it wouldn't be appropriate for the
40 plaintiff to try to guess just to provide some
41 particulars because that could affect, you know,
42 their ability to -- to argue that there's other
43 forms of directives, or other ways that the
44 government has obstructed or discouraged
45 physicians from providing certain treatments, et
46 cetera.

47 THE COURT: I think I'll pause here. I'll pause here

Submissions for Plaintiff by Cnsl P. Furtula

1 and I'll go back to Ms. Lapper.

2 Ms. Lapper, if the plaintiff provided
3 particulars as are known presently, you would not
4 take the position that it is -- that they are
5 limited to those particulars provided on discovery
6 for example, or in proving their claim?

7 CNSL E. LAPPER: No, My Lord, and as further and better
8 particulars become known, the -- the plaintiff
9 would be at leave to provide further particulars
10 at that time. There's -- the case law is clear on
11 that point.

12 THE COURT: Mm-hmm.

13 CNSL E. LAPPER: Only that the information that is
14 currently known, that forms the basis of the
15 September 15th claim, be provided today.

16 THE COURT: And it's only from the side of the
17 government communications. Again, it's not the --
18 it's not exposing the doctors who are receiving
19 those instructions.

20 CNSL E. LAPPER: No, My Lord. I intended to make that
21 as clear as I could in my submissions. We are not
22 seeking the identity, of the physicians, at this
23 time. We're just seeking the specifics of the
24 communications made by Dr. Henry, and/or the
25 Province, or the statements, or whether they would
26 be orally or in writing, that kind of information.

27 THE COURT: So, Ms. -- Ms. Furtula, I appreciate
28 your -- your concern that in an application for
29 particulars, sometimes the order is the party is
30 to provide particulars, and nothing beyond those
31 particulars can be explored in discovery; they're
32 basically a handcuffed order. But I take it from
33 Ms. Lapper that all the defendants are asking for
34 now is, provide the information you have in hand
35 and as you get more information you have to
36 provide more information. But, it's -- it's not
37 going to hobble your attempt to ask questions in
38 examinations for discovery or demand documents in
39 documentary discovery. Is that -- does that
40 assist your position?

41 CNSL P. FURTULA: Well, it -- it doesn't, My Lord.
42 Firstly, because I don't see the point of
43 providing -- making the plaintiff provide
44 information, basically asking them to guess at
45 this point as to -- I apologize if this seems
46 overly technical -- but this is what they've asked
47 us. Which employees, representatives or agents

Submissions for Plaintiff by Cnsl P. Furtula

1 allegedly obstructed licensed physicians, et
2 cetera. So, we don't know how to provide that
3 information except to say that it was the
4 government and Dr. Henry who did so. I don't
5 recall --

6 THE COURT: That may be -- well be the case, and you
7 provide that information later on after discovery.

8 CNSL P. FURTULA: Yes, absolutely. And, you know, once
9 we know, we would certainly put the defendants on
10 notice. Like I said, we're not trying to
11 obfuscate. We just simply don't know, and -- and
12 there's no utility in -- in providing very general
13 statements, which is probably the best that could
14 be done at this point, and I don't see how that
15 would help the defendants in -- in crafting their
16 response to the notice of civil claim.

17 THE COURT: All right.

18 CNSL P. FURTULA: And with respect to -- that's all I
19 have. Those are all my positions regarding the
20 request for particulars in 1.a of the orders
21 sought.

22 THE COURT: And 58.c.

23 CNSL P. FURTULA: Yes. So, at the last page of the
24 application record -- sorry, not record --
25 application response, Tab 2.

26 THE COURT: Yes.

27 CNSL P. FURTULA: I've reproduced the demand for
28 particulars; it's at the top of the page. So,
29 what they're seeking in terms of the Hippocratic
30 Oath is the individuals who are alleged to have
31 suffered harm caused by the PHO's alleged breach
32 of the oath. So -- and this was already touched
33 upon earlier. It seems like the defendants are --
34 they want to know the names of -- of an individual
35 or individuals, at least the way this is drafted,
36 which is inappropriate in a class proceeding,
37 especially at this point in the proceeding.
38 Obviously, the individuals who are affected are
39 the class members. I'm not sure whether that
40 needs to be stated; I think it's implied.

41 And, in terms of which -- which individual
42 persons are affected, well if this matter gets
43 certified, you know, that's something for the
44 court to consider much later on in the process.

45 I just want to conclude by saying that the
46 defendants' curiosity about this case, if we
47 haven't made it clear enough already -- and like I

Submissions for Plaintiff by Cnsl P. Furtula

1 said, we have provided very detailed particulars
2 of all the other matters that they've asked us to.
3 We're not trying to obfuscate, we're trying to be
4 helpful, but we just simply can't answer those
5 demands. And the plaintiff's position will be
6 further clarified during the certification motion
7 and the exchange of materials between the parties.

8 So those are my submissions, My Lord.

9 THE COURT: Thank you, Ms. Furtula. Ms. Lapper, is
10 there any response?

11 CNSL E. LAPPER: My Lord, I have four brief points in
12 reply.

13 THE COURT: All right.

14

15 **REPLY FOR DEFENDANTS BY CNSL E. LAPPER:**

16

17 CNSL E. LAPPER: The first is that I heard my friend
18 say at the outset of her submission that she would
19 seek an order that the defendants be available for
20 discovery prior to any order for particulars being
21 made. And I would just say this, that first of
22 all, there's no application before you for
23 discovery of the defendants, and such an
24 application -- examination, pardon me, is
25 unnecessary. On the plaintiff's own evidence,
26 they do have the means to obtain. They have, at
27 least, some evidence of the conducts described in
28 paragraph 44, so there's -- there is no need for
29 the court to make that order in this case.

30 The second point is that there is no law that
31 says a class action should be treated any
32 differently from a regular action at this stage of
33 the proceeding. And the Court of Appeal, in a
34 case that we've cited in our notice of
35 application, *British Columbia v. The Jean Coutu*
36 *Group (PJC) Inc.*, recently recognized this
37 principle. This is a 2021 decision of the BC
38 Court of Appeal; it's at Tab 4 of the book of
39 authorities.

40 They're dealing in this case with the sort of
41 order of proceedings prior -- prior to
42 certification, and -- and orders made in that
43 respect. It's a different context, My Lord; it's
44 not the particulars of the notes. But, at
45 paragraph 40 the court notes that, as Justice
46 Grauer, the trial judge noted, you couldn't even
47 conceive of the proceeding as being a class

Reply for Defendants by Cnsl E. Lapper

1 proceeding because it had not yet been certified.

2 THE COURT: Mm-hmm.

3 CNSL E. LAPPER: And the court finds here that what --
4 until a proceeding is certified, it's governed by
5 the Supreme Court Civil Rules. And so those are
6 the rules on which we rely today in our
7 application before you.

8 THE COURT: Yes.

9 CNSL E. LAPPER: The third point is with respect to the
10 *Kwicksutaineuk* case, and I -- my submission in the
11 main, I -- I distinguish that case. I don't
12 intend to repeat those submissions here. The
13 point is simply this, that at paragraph 49 of that
14 case, which my friend took you to, it -- sorry,
15 it's produced at her application response on
16 page -- at paragraph 23 of her application
17 response.

18 THE COURT: Yes.

19 CNSL E. LAPPER: He concluded by saying:

20

21 The question becomes this: does the pleading,
22 the Amended Statement of Claim, make
23 sufficient averments of material fact to
24 establish, on the application of the law, a
25 cause of action?

26

27 And so, we say here, even if this does apply to --
28 to the matter before you today, it's clear, and
29 it's the defendants' position that there are not
30 sufficient averments of material fact here, and so
31 that would be our response on that point.

32 The -- the final point I'd make is with
33 respect to the 58.c of the amended claim. I've
34 heard my friend say that, you know, it's implied
35 that the submissions -- or sorry, that the harm is
36 suffered on behalf of the class, even though
37 that's not pled. And so, I would say simply, then
38 there's no -- if it's meant to be implied, there's
39 no harm in my friend providing that response to
40 particulars and -- and making it clear on the face
41 of the pleading that that claim is brought on
42 behalf of the class.

43 And that's -- that's all the -- that's all
44 that the defendants are seeking today; not, as my
45 friend suggested, the identity of the individuals
46 who have been harmed.

47 THE COURT: All right, thank you. And this question is

Proceedings

1 to both sides. I take it that -- I'm just looking
2 at the response right now. I take it that neither
3 side is seeking costs, correct?

4 CNSL E. LAPPER: That's correct, My Lord.

5 THE COURT: Ms. Furtula, I'm not seeing a costs request
6 here?

7 CNSL P. FURTULA: That's correct, My Lord.

8 THE COURT: Okay, all right. Thank you very much both
9 sides for your submissions.

10 I'm going to take a brief break just to
11 triple check a few matters before I pronounce
12 judgment. You all know the tight deadlines that
13 we're facing, so I am going to provide
14 abbreviated, less detailed reasons than I
15 ordinarily would. What I propose we do is that we
16 reconvene at 3 o'clock, and I will provide those
17 reasons orally and spontaneously so that we can
18 move this matter forward, and everyone can meet
19 the deadlines for providing responses and whatnot.
20 So, we'll adjourn until 3 o'clock.

21
22 (VIDEOCONFERENCES/TELECONFERENCE PAUSED)

23
24 (PROCEEDINGS ADJOURNED)
25 (PROCEEDINGS RECONVENED)

26
27 (VIDEOCONFERENCES/TELECONFERENCE RESUMED)

28
29 [REASONS FOR JUDGMENT]

30
31 (VIDEOCONFERENCES/TELECONFERENCE CONCLUDED)

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33 (PROCEEDINGS CONCLUDED)

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36 Transcriber: F. Smith

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I hereby certify the foregoing to be a true and accurate transcript of the evidence recorded on a sound recording apparatus, transcribed to the best of my skill and ability.



F. Smith
Court Transcriber