

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canadian Society for the Advancement of
Science in Public Policy v. British
Columbia*,
2023 BCSC 284

Date: 20230228
Docket: S2110229
Registry: Vancouver

In the Matter Concerning the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241;
and the *Public Health Act*, S.B.C. 2008, c. 28

Between:

**Canadian Society for the Advancement of Science in Public Policy
and Kipling Warner**

Petitioners

And

**Dr. Bonnie Henry in her capacity as Provincial Health Officer
for the Province of British Columbia**

Respondent

- and -

Docket: S224652
Registry: Vancouver

Between:

Peternella Hoogerbrug

Petitioner

And

Provincial Health Officer of British Columbia

Respondent

- and -

Docket: S224731
Registry: Vancouver

Between:

York Hsiang, David William Morgan and Hilary Vandergugten

Petitioners

And

Provincial Health Officer of British Columbia

Respondent

- and -

Docket: S222427
Registry: Vancouver

Between:

**Phyllis Janet Tatlock, Laura Koop, Monika Bielecki, Scott Macdonald,
Ana Lucia Mateus, Darold Sturgeon, Lori Jane Nelson, Ingeborg Keyser,
Lynda June Hamley, Melinda Joy Parenteau and Dr. Joshua Nordine**

Petitioners

And

**Attorney General for the Province of British Columbia and
Dr. Bonnie Henry in her capacity as Provincial Health Officer
for the Province of British Columbia**

Respondents

Corrected Judgment: The text of this judgment at paragraphs 27, 92, 96 and 98
were corrected on March 30, 2023.

Before: The Honourable Mr. Justice Coval

Reasons for Judgment

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Place and Dates of Hearing:

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Introduction

[1] In these interlocutory applications, the petitioners seek orders requiring the respondent, the Provincial Health Officer of British Columbia (“PHO”), to significantly augment the documentary record it has filed in evidence in these four judicial review petitions, scheduled to be heard together in May 2023.

[2] The PHO cross-applies to strike two affidavits filed by certain of the petitioners.

[3] All four petitions challenge the PHO’s September 12, 2022 order (“Order”), extending the requirement that health-care workers in hospitals and designated community settings be vaccinated for SARS-CoV-2 in order to provide health services to patients in those settings.

[4] The petitioners argue that, while this vaccine mandate may have been justified at the height of the SARS-CoV-2 virus, it can no longer be reasonably supported given the reduced severity of the virus and changing government responses to it. Many of the petitioners are unvaccinated health-care workers claiming to have lost their employment due to the Order.

[5] The PHO submits that ensuring safe hospital and community care for patients, and protecting the health care system’s capacity, are critical public health goals served by requiring a vaccinated healthcare workforce.

[6] For the reasons that follow, the petitioners’ application to augment the current record is dismissed, and the PHO’s application to strike two affidavits is granted.

The Parties

[7] The petitioners in the Hsiang proceedings are doctors and nurses in British Columbia who allege that the Order prevented them from working in hospitals and community settings due to their unvaccinated status. They refused vaccinations due to their assessment of the risks and benefits in their particular medical and personal circumstances.

[8] The petitioner Ms. Hoogerbrug is a member of the Dutch Reformed Church. She is unvaccinated because of the tenets of her religion. She alleges being terminated from her role as a family nurse practitioner due to her unvaccinated status.

[9] The petitioners in the Tatlock proceedings are health care workers, mainly in management and administrative roles. Their evidence is they refused vaccination for reasons of conscience or assessment of the risks and benefits in their personal circumstances. They claim to have lost their employment due to their unvaccinated status despite lack of contact with vulnerable populations in the hospitals or care facilities where they were employed.

[10] The petitioner Canadian Society for the Advancement of Science in Public (“CSASPP”) is a not-for-profit society incorporated under the *Societies Act*, S.B.C. 2015, c. 18. With a head office in Vancouver, it describes itself as a non-partisan, secular organization, advocating for the development and advancement of science in the formation of public policy in British Columbia. It was granted public interest standing to bring its petition in my decision at 2022 BCSC 724.

[11] As PHO, Dr. Henry is the Province’s senior public health official, responsible for providing independent advice on public health issues to government ministers and public officials. A medical doctor with a master’s degree in public health, Dr. Henry is the former Executive Medical Director for the BC Centre for Disease Control (“BCCDC”), the scientific and operational arm of the Public Health Officer. She has held positions in the Faculties of Medicine at the University of British Columbia and University of Toronto. As Associate Medical Officer of Health for the City of Toronto, she was the operational lead for the SARS outbreak in 2003.

The Order

[12] The Order was made, September 12, 2022, pursuant to ss. 30-32, 39(6), 56-57, 67(2) and 69 of the *Public Health Act*, S.B.C. 2008, c. 28 [*PHA*]. It was an extension of a series of similar orders that have been in place since October 14, 2021.

[13] The Order is entitled “Hospital and Community (Health Care and Other Services) COVID-19 Vaccination Status Information and Preventive Measures – September 12, 2022”.

[14] Its Recitals include:

- C. People over 70 years of age, and people with chronic health conditions or compromised immune systems, are particularly vulnerable to severe illness, hospitalization, ICU admission, and death from COVID-19, even if they are vaccinated;
- ...
- F. Unvaccinated people in close contact with other people promotes the transmission of SARS-CoV-2 to a greater extent than vaccinated people in the same situations, which in turn increases the number of people who develop COVID-19 and become seriously ill;
- ...
- I. The emergence of the Omicron variants has introduced further uncertainty into the course of the pandemic. The suddenness of the arrival of the first Omicron variant and its swift and significant impact on the level of infection, hospitalization and ICU admission rates in British Columbia, and the greater level of transmissibility of subsequent Omicron variants, reflect the unpredictability of SARS-CoV-2, and this uncertainty, coupled with uncertainty about the impact which the seasonal rise in respiratory viruses in the autumn and winter may have on the course of the virus, has led me to conclude that I must exercise caution when determining what measures continue to be necessary to mitigate the extent of the virus’s transmission, and to reduce the severity of disease which it causes;
- J. Chief among these measures is vaccination, and I am of the opinion that any slippage in the level of vaccination in the health-care workforce would undermine the capacity of the health-care system to respond to a significant resurgence of disease;
- K. Based on the latest modelling information available to me, there is a continuing risk of a significant resurgence of disease in the province;

[15] Paragraph UU describes the information and evidence available to the PHO in reaching her decision to extend the Order despite its effect on unvaccinated hospital and community care workers:

- UU. I recognize the effect which the measures I am putting in place to protect the health of patients, residents, clients and workers in hospital and community care settings may have on people who are unvaccinated and, with this in mind, continually engage in the reconsideration of these measures, based upon the information and

evidence available to me, including case rates, sources of transmission, the presence of clusters and outbreaks, the number of people in hospital and in intensive care, deaths, the emergence of and risks posed by virus variants of concern, vaccine availability, immunization rates, the vulnerability of particular populations and reports from the rest of Canada and other jurisdictions, scientific journal articles reflecting divergent opinions, and opinions expressing contrary views to my own submitted in support of challenges to my orders, with a view to balancing the interests of the people working or providing services in the hospital and community care sectors, including constitutionally protected interests, against the risk of harm posed by unvaccinated people working or providing services in the hospital or community care sectors.

[Emphasis added.]

What the Petitions Seek

[16] The petitioners challenge the Order under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*]. Some of the petitioners also challenge it as an unjustified infringement of their *Charter* rights and freedoms.

[17] Under ss. 2(2) and 7 of the *JRPA*, the petitioners seek (among other things):

- (a) quashing and setting aside of the Order, to the extent that it requires individuals to have received the SARS-CoV-2 vaccination in order to work in hospital and designated community settings; and
- (b) a declaration that continuing the Order is unreasonable, as there is no reasonable basis for the exercise of emergency powers under the *PHA*, and the vaccination mandate is not a reasonable or effective way to address the spread of SARS-CoV-2.

[18] The petitioners submit that, based on the best available evidence, SARS-CoV-2 no longer poses either an immediate or significant threat to public health. They point to the Province and other governments across Canada easing or eliminating vaccination mandates and other restrictions, due to reduction of transmission and severity of the SARS-CoV-2 virus across the country.

[19] They argue the Order was an unreasonable and ineffective measure because:

- i. unvaccinated health professionals do not pose any greater risk of spreading the SARS-CoV-2 virus to their patients than vaccinated health professionals;
- ii. natural immunity from previous infection of the SARS-CoV-2 virus affords equal, or better, protection from infection, serious illness, hospitalization and death from the virus than vaccination; and
- iii. the risk of either vaccinated or unvaccinated health professionals transmitting the SARS-CoV-2 virus to patients is very low, as a result of the preventative measures already being followed by health professionals.

Standard of Review

[20] The parties agree that the Order is to be judicially reviewed on the reasonableness standard.

[21] In *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427, the Court of Appeal dismissed an appeal by various churches and their spiritual leaders of PHO orders prohibiting or restricting different types of in-person gatherings for religious worship during the second wave of the pandemic.

[22] Justice Fitch summarized the legislative authority for the PHO to make orders responding to this public health crisis (paras. 29-39), and explained the rationale for the standard of review of such orders being whether the PHO exercised her authority in a reasonable way (paras. 142-153).

[23] He described the reviewing court's task this way:

[144] A reviewing court must strive to understand the decision maker's reasoning process and ask whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Vavilov* at para. 99.

[24] The reasonableness standard of review respects the specialized knowledge and experience of public health officials, and deference to the complexity of the problems and solutions that they face, which in this case of course was an unprecedented pandemic and associated public health emergency (*Beaudoin*, paras. 151-152).

[25] At the same time, when their decisions significantly impact people's lives, administrative decision-makers have a "heightened responsibility to ensure that their reasons demonstrate consideration of the consequences of their decision and satisfaction that those consequences are justified in light of the facts and law" (*Beaudoin*, para. 148).

Relief Sought in These Applications

[26] Much of the relief sought in these applications fell away during the hearing, as positions were abandoned or the parties resolved issues in dispute.

[27] What remained were applications by the Hsiang, Hoogerbrug and CSASPP petitioners for the PHO to add broad categories of documents to the current record, and the PHO's application to strike from the record two affidavits submitted by the Tatlock and CSASPP petitioners.

[28] The petitioners abandoned their applications to: strike the PHO's affidavits containing the current record; require the PHO to file a new record identifying and attaching all information directly or indirectly before the PHO in making the Order; cross-examine Dr. Emerson on the contents of the record; and, permit them to file further affidavit evidence in response to the factual assertions in the Order.

[29] The PHO agreed to certain redactions from Dr. Brian Emerson's affidavits and to provide pinpoint cites from the record for certain statements therein. The PHO also confirmed the prior agreement that the record should include the expert medical evidence submitted by the petitioners to the PHO before the Order was made. The parties agreed the expert opinions expressed therein were not admitted for the truth of their contents. The petitioners agreed to the admission of the PHO's expert opinion affidavit from Dr. Dove on the same basis.

[30] The Tatlock petitioners consented to the dismissal of their broad applications to augment the record, in exchange for the PHO agreeing to add a narrow group of specified documents.

[31] The Hsiang, Hoogerbrug and CSASPP petitioners withdrew some of their own sweeping demands to augment the record, and focussed on the specific categories of documents addressed below.

[32] The PHO withdrew her application to strike the three affidavits of the petitioner Kipling Warner, the two affidavits of Ada Skowronska, and the affidavit of Lilly Leppky. All were all sworn, and provided to counsel for the PHO, before the Order and therefore, in that sense, were part of the record. The PHO reserved the position, however, that these affiants were not persons affected by the Order and so their evidence should be of no weight.

[33] During the hearing, the Hsiang petitioners agreed that the affidavit of Dr. Richard Schabas was struck because it was evidence and information created after the Order.

The Current Record

[34] The “record of proceeding” is defined in s. 1 of the *JRPA* to include documents produced in evidence before the tribunal and the tribunal's decision and reasons given by it.

[35] The current record is included in two affidavits from Dr. Emerson, the Acting Deputy Provincial Health Officer (“Deputy PHO”), plus two additional affidavits appending press conference information.

[36] Throughout the COVID-19 pandemic, Dr. Emerson has been the Deputy PHO with the Ministry of Health. Working closely with the PHO on many aspects of the COVID-19 response, he was the lead public health official involved in drafting and amending PHO orders under the *PHA*, including the orders under consideration in these proceedings.

[37] His affidavits provide background information about the COVID-19 pandemic and describe the response of the PHO. They attach more than 4,000 pages of the material documents said to have been before the PHO when she made the Order.

[38] The general background provided by Dr. Emerson is admissible in judicial review cases such as this, involving procedural and factual complexity and where the record is voluminous and constantly evolving. Its purpose is to review “in a neutral and uncontroversial way”, the steps taken and evidence considered by the administrative decision-maker (*Beaudoin*, para. 51).

[39] The parties agreed that, as a matter of law in British Columbia, apart from such general background, the evidence on an application for judicial review is generally confined to the record before the decision-maker. This is because of the limitations on the court’s supervisory role described above.

[40] They also agreed that, in a non-adjudicative situation such as this, the record has to be constructed. They agreed that, with the vast amount of information available to the PHO by the time of the Order, it would be impractical, and likely impossible, to identify every relevant document available to the PHO at the material time.

[41] The petitioners emphasized that the record must nevertheless allow for a robust, meaningful form of review, to ensure that courts intervene when necessary to safeguard the legality, rationality, and fairness of the administrative process and to ensure that the exercise of public power can be justified to the citizenry (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, paras. 13-14; *Canada Mink Breeders Association v. British Columbia*, 2022 BCSC 1731, paras. 34-35).

[42] They also referred to *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128, paras. 67-71, for the principle that the evidentiary record lies at the heart of meaningful judicial review. It is indispensable to the reviewing court’s fulfilment of its responsibility to engage in meaningful review, as unreasonableness is assessed by comparing the reasons with the result reached in light of the legislative scheme and the evidentiary record before the administrative decision-maker.

[43] The petitioners also relied on s. 17 of the *JRPA*, which the PHO argued did not apply. In my view, whether s. 17 applies is immaterial to the petitioners' application to augment the record, and I believe this was also counsel's ultimate perspective in the hearing. This is because s. 17 does not require an exhaustive record to be filed in circumstances such as this, but rather gives the court the discretion to direct that the record, or any part of it, be filed. I will therefore not decide the issue of whether s. 17 applies in these circumstances.

Should the Record Be Augmented?

Documents sought by the petitioners

[44] During the hearing, the Hsiang and Hoogerbrug petitioners limited the scope of their demands to the time period of January 1 to September 12, 2022, because their arguments focus on the PHO's response to the Omicron variant rather than to the prior variants. The documents they sought to be added to the record are as follows:

Termination of other COVID orders

[45] The petitioners seek:

Any and all documents explaining the basis of, justification and/or rationale for the discontinuation or removal of other COVID regulations and restrictions, including those tied to vaccination, as well as the discontinuation or removal of any emergency designation tied to COVID, in BC and other jurisdictions.

COVID incidence

[46] The petitioners seek:

Any and all documents relating to the incidence of COVID infections, transmission and serious illness, as well as hospitalization and death attributable to COVID, broken down by vaccination status and number of doses and age, since the emergence of the Omicron variants.

Other respiratory illnesses

[47] The petitioners seek:

Any and all documents that support the comments made by the PHO in a media conference on January 21, 2022, during which the PHO stated that the provincial government's approach to the COVID virus has shifted to be "much like how we manage other respiratory illnesses – influenza, or RSV (respiratory syncytial virus), or enteroviruses that cause the common cold", including documents from January 2022 to September 12, 2022 that support this statement.

Previous measures 2009-2019

[48] The petitioners seek:

Any and all documents relating to the measures put in place to prevent infection and transmission of influenza and other respiratory illnesses, other than COVID, at hospitals and community health care facilities from 2009-2019.

Vaccine effectiveness

[49] The petitioners seek:

Any and all documents relating to the relative effectiveness of the primary course of vaccination:

In preventing people from contracting and transmitting COVID, since emergence of the Omicron variants; and

Compared to infection acquired immunity without vaccination with respect to preventing infection, transmission and serious illness, BC and other jurisdictions about vaccine mandates.

Prevalence of infection

[50] The petitioners seek:

Any and all documents relating to the prevalence or estimated prevalence of infection and/or infection-acquired immunity in the provincial population.

UBC correspondence

[51] The petitioners seek:

All documents related to the consideration given to the two publicly available letters to UBC President & Vice-President Chancellor, Dr. Santa Ono, from the Vancouver Coastal Health Chief Medical Officer, Dr. Patricia Daly et al, dated February 16, 2022, and the and the UBC Faculty professors Dr. David

Patrick, Dr. Sarah (Sally) Otto, and Dr. Daniel Coombs, dated February 20, 2022

Medical exemptions but not religious exemptions

[52] The petitioners seek:

All documents relating to the decision to permit unvaccinated individuals with a medical exemption to continue working at hospitals and community health care facilities, but not extending the same opportunity to unvaccinated persons with valid religious reasons for not being vaccinated.

Medical exemption measures

[53] The petitioners seek:

All documents relating to the measures put in place for those working at hospitals and community health care facilities with a medical exemption.

Effectiveness of other measures

[54] The petitioners seek:

Any and all documents relating to the effectiveness of measures other than vaccination in preventing the transmission of COVID at hospitals and community health care facilities, including, but not limited to, measures such as the use of personal protective equipment, hygiene policies, and daily or less frequent testing.

Transmission by registered health professionals

[55] The petitioners seek:

All documents relating to the transmission of COVID by registered health professionals at hospitals and community health care facilities to patients and vice versa, including by vaccination status.

Transmission by others

[56] The petitioners seek:

All documents relating to the transmission of COVID at hospitals and community health care facilities by persons who are not subject to the vaccination mandate.

[57] CSASPP sought its own categories of documents to be added to the record, from January 1, 2022 to September 12, 2022, as follows:

- a. the medical and scientific studies and/or papers considered, or reviewed by the PHO prior to September 12, 2022 that do not support or contradict Dr. Henry's statements in the Hospital and Community (Health Care and other Services) COVID-19 Vaccination Status Information and Preventative Measures September 12, 2022 (the "Hospital Order");
- b. the medical and scientific studies and/or papers considered, reviewed or relied on by the PHO that relate to her conclusions in any of the orders being challenged that:
 - i. Unvaccinated people in close contact with other people promote the transmission of SARSCoV-2 ("Covid-19") to a greater extent than vaccinated people in the same situations, which in turn increases the number of people who develop COVID-19 and become seriously ill;
 - ii. Immunity acquired from previous Covid-19 infections is less strong than immunity acquired from vaccinations against Covid-19;
 - iii. It is unnecessary for the definition of "vaccinated" in the Orders, especially the September 12, 2022 Hospital Order, to include the requirement of booster vaccinations against Covid-19;
 - iv. Infection and/or symptomatic disease with two Covid-19 vaccine doses is similar to infection and/or symptomatic disease with mRNA booster dose;
 - v. The immunity of a healthcare workers who meet the definition of "vaccinated" in the September 12, 2022 Order, and who were last vaccinated in 2021 is the same or similar to healthcare workers vaccinated more recently in 2022 or those who have obtained booster shots against Covid-19 in 2022;
 - vi. Expanding the grounds upon which a worker may request an exemption to the requirement to be vaccinated beyond those based upon a risk to the health of the worker would undermine the high level of vaccination which is currently in place among the hospital and community care workforce, introduce an unacceptable level of risk to the health of patients, residents, clients and workers, weaken the preparedness and resiliency of the health-care system, and undermine the confidence of the health-care workforce in the safety of their working environment and the confidence of the public in the safety of the health-care system.

Positions of the parties

[58] As indicated by their requests above, the Hsiang, Hoogerbrug and CSASPP petitioners, while recognizing the impossibility of a “complete record” in these circumstances, seek exhaustive production of all documents before the PHO relating to many aspects of the arguments they wish to raise.

[59] They argue that the complete record is required on these issues to determine whether the factual conclusions reached are reasonable in light of all of the evidence. They submit that reviewing only a fraction of the evidence, as selected by the PHO in seeking to have her decision upheld, precludes a reviewing court’s independent assessment of whether the conclusions reached are reasonable. They say this leads, not to meaningful review, but something closer to “rubber stamping”.

[60] The PHO submits that the current, extensive record contains the most relevant documents available to the PHO in the categories sought by the petitioners. They say it is a balanced record, permitting of fair, meaningful judicial review, because it includes the key records and information available to the PHO on the issues that matter to the petitioners, plus all of the reports and evidence submitted by the petitioners themselves to the PHO before the Order was made.

[61] The PHO says that compiling the exhaustive material sought by the petitioners is not only unnecessary for this judicial review, but prohibitively time-consuming, expensive, and likely even impossible. Even if such a record could be compiled, it would present the court with an unworkable volume of material that would be contrary to the summary nature of judicial review.

Analysis

[62] Based on the case law described above, in my view the guiding principle for determination of the record in this case, where a vast amount of information has been generated throughout this lengthy pandemic, is to ensure that the record contains a balanced representation of the important information available to the PHO

on the issues in dispute, so that a meaningful and fair judicial review can be conducted.

[63] On the evidence and argument heard in this application, I am satisfied that the PHO has produced such a record. That is not to say that, as the case proceeds, additional documents, or categories of documents, might not be identified for inclusion in the record. In this application, however, the petitioners have not persuaded me that such documents are missing, for the following reasons.

[64] First, the current record contains extensive documentation from what appears to be the key sources, being not just the PHO herself, but also BCCDC, the Public Health Agency of Canada (“PHAC”), the National Advisory Committee on Immunization (“NACI”)¹, and the World Health Organization (“WHO”).

[65] The documents in the record provide regular updates, data and reports, from across Canada and other jurisdictions, about case rates, outbreaks, transmissibility, hospitalizations, deaths, variants of concern, vaccine status and effectiveness, masking, and vulnerability of particular populations. They also summarize, or reference, an enormous number of additional reports and information from other sources on these topics.

[66] By way of example of what is in the record:

- a) PHO news releases, media briefing transcripts and modelling presentations April 2020 – September 17, 2022.

These include the epidemiological data for BC and internationally. For BC, they include information such as: COVID-19 hospitalizations, critical care, and deaths, including by age and vaccine status; key epidemiological and trajectory findings; new cases; wastewater viral loads; critical care demand and supply; case rates and vaccinations rates by location; vaccination progress; hospitalizations by age and vaccination status; antibody screening studies; recent trends and modelling of potential cases or transmission scenarios including by vaccination status; mask and vaccine card mandate terminations; and current and next steps.

¹ NACI is a national advisory committee of experts in multiple fields that provides guidance on the use of vaccines to the Government of Canada.

- b) BCCDC COVID Situation Reports, weekly up to September 24, 2022.

These include in-depth information about COVID-19, underscoring data and key trends in the province, including case counts, epidemic curves, test rates, positivity percentages, hospitalization rates, care facility outbreaks, deaths and likely sources of infection.

- c) BCCDC Weekly COVID-19 Reports, up to September 29, 2022.

The modelling work in these documents shows the epidemiologic circumstances in British Columbia, along with potential consequences of not taking action to limit transmission. It also identifies hospitalizations, critical care admissions and deaths.

- d) BCCDC Adverse Events reports, up to September 24, 2022.

These summarize vaccine adverse events following immunization including number of reports of serious incidents.

- e) September 8, 2022 evidence review “Impacts of COVID-19 Vaccination on Health Care Workers, SARS-CoV-2 Transmission”.

- f) NACI publications, up to October 7, 2022.

These include: updated guidance on vaccine boosters; recommendations on the use of bivalent Omicron vaccines; recommendations on the vaccine booster campaign and the use of Omicron containing vaccines; risks that increase the risk of poor outcomes from COVID-19, including many conditions that would require hospitalization.

- g) A large volume of PHAC documents from the federal government's health portfolio, including:

- i. Omicron Monitoring Report 5 – January 11, 2022

These include data regarding Omicron hospitalizations and key literature reviews regarding vaccine effectiveness against Omicron infection and symptoms, including after one, two or three boosters, risk of hospitalizations/severe disease, asymptomatic infection, household transmission, incubation period, risk in children, testing sensitivity and period of communicability.

They also include: summaries of key epidemiology information, including for Canada and British Columbia; summaries of recent key articles on Omicron breakthrough/vaccine effectiveness and epidemiologic characteristics; articles on Omicron transmission, hospitalization and vaccine and booster effectiveness.

ii. Weekly COVID Evidence Reviews

These include evidence, reviews and findings on: COVID and indoor air; masking; transmissibility among vaccinated individual; strategies to mitigate risk of outbreaks and mortality in long-term care facilities; and prioritization of residents in long-term care homes;

- h) September 2022 draft study of the production of antibodies from vaccines and infections, co-authored by Dr. Bonnie Henry.

[67] Second, the petitioners' evidence and submissions made little, if any, effort to take into account what was already included in the record. They did not identify specific gaps in the record so much as make sweeping demands for "any and all documents" on broad issues. These demands did not address the organization of Dr. Emerson's affidavits or the documentary record attached thereto.

[68] By contrast, counsel for the PHO referred to documents and information in the current record addressing all categories sought by the petitioners. The petitioners provided little if any response to the PHO's submissions regarding the key types of documents and information already included, or why they were insufficient for fair, meaningful review of the issues they wished to raise.

[69] In sum, the petitioners have not shown why the current record – with the enormous amount of medical and scientific information it contains, summarizes or refers to – is insufficient for fair, meaningful judicial review of the arguments they wish to make regarding the Order.

[70] Third, the petitioners' requests are vast and vague. They seek exhaustive production of "any and all documents" in extremely broadly defined categories. In my view, it is impractical and unreasonable to order the PHO to try to identify all such information and documents before her, all in the context of a lengthy global pandemic that produced untold information and documents. Such an approach is also at odds with the summary nature of a petition proceeding and threatens an unworkably large evidentiary record.

[71] Fourth, when the petitioners specified particular documents they wished added to the record, the Crown generally complied. This occurred throughout the hearing, and was the basis for the Tatlock petitioners withdrawing their document application altogether. Counsel for the PHO also provided extensive pinpoint cites connecting statements in Dr. Emerson's affidavit to the specific supporting materials in the record.

[72] Fifth, although some of the petitioners suggested the PHO may have "cherry-picked" the record for materials helpful to her position, they provided no evidence or argument to demonstrate this might be so. The documents themselves do not suggest it, as they appear to be regular updates of the key publications from the most relevant sources.

[73] Sixth, the record includes eight expert medical reports and affidavits obtained by the petitioners in support of their position, each containing numerous studies. All of these were submitted to the PHO before September 1, 2022. Just listing the numerous studies in these materials consumes some 19 pages. In my view, the petitioners did not demonstrate why their own extensive materials combined with the rest of the PHO's record was insufficient for meaningful review of their challenges.

[74] As the matter proceeds, if the petitioners identify specific documents as important to meaningful judicial review, they can seek their inclusion in the record, either by agreement or application. The petitioners are well-placed to do so given the experts assisting them in their case.

Should the Two Petitioner Affidavits Be Struck?

[75] The respondent applied to strike the affidavits of Dr. Joshua Nordine and Dr. Steven Pelech, primarily on the grounds that they contained evidence and information created after the Order and were therefore not part of the record.

[76] Dr. Nordine is a petitioner in the Tatlock petition. He swore an affidavit on November 17, 2022 (with a follow-up on January 18, 2023 correcting a defective exhibit in the first affidavit).

[77] The PHO does not oppose admissibility of the personal information in his affidavit, being the first eight paragraphs and the first sentence of the ninth paragraph. In those paragraphs, Dr. Nordine explains that, as an Evangelical Protestant Christian, he opposed the vaccine because it was developed through the use of historical fetal tissue cell lines and that, as a result of the Order, he lost his job at The Bridge Detox Centre in Kelowna, where he worked with drug-addicted clients.

[78] The balance of his affidavit is a criticism of the Order. He says that “because of Dr. Henry's orders, the Province of British Columbia has lost my valuable and much-needed professional medical services to its citizens... [However] becoming infected with COVID-19 is not considered very serious; it is treated like a ‘common cold’”.

[79] The affidavit focusses on:

- a) the damage to the healthcare system from removing him from working with drug-addicted clients, in circumstances where deaths resulting from toxic drug overdoses in British Columbia have exceeded COVID-19 deaths since March 2020; and
- b) the fact that, with two shots of an approved COVID-19 vaccine, hospital staff may still become sick with COVID-19, but then are merely required to stay home for five days after symptom onsets, pursuant to the directives of the Chief Medical Health Officer for Vancouver Coastal Health, September 29, 2022.

[80] Counsel for the Tatlock petitioners says she relies on the Nordine affidavit, not as expert opinion, but for the factual evidence explaining the effect of the Order on Dr. Nordine himself and his patients. Alternatively, she says it is admissible as a “Brandeis Brief” or as social context evidence.

[81] The PHO argues the impugned parts of the affidavit, and all of its exhibits, are inadmissible because they: were created after the Order, and so not part of the record before the PHO; are argument better addressed through counsel’s submissions; and, are unnecessary because there is already evidence in the record regarding these issues.

Analysis

[82] I agree with counsel for the PHO that the impugned parts of the affidavit are neither a description of the effect of the Order on Dr. Nordine and his patients, nor social context evidence or Brandeis Brief. They are medical evidence and argument in support of Dr. Nordine’s opinion that the Order is unreasonable, all created after the Order.

[83] In *Beaudoin* (paras. 154-157), the Court of Appeal upheld Chief Justice Hinkson’s decision below that affidavits created after the orders in question, and therefore not available to the PHO when she made them, were not part of the record. To include them would be inconsistent with the supervisory jurisdiction of the court and place it in the “untenable position of assessing matters afresh on an expanded record.”

[84] This approach applies to the impugned parts of Dr. Nordine’s affidavit and the exhibits he attaches. The affidavit and its exhibits were all created after the Order and were therefore not part of the record before the PHO when the Order was made.² The petitioners provided no authority for admissibility in judicial review in such circumstances.

[85] Regarding the affidavit being social context evidence, such evidence can assist to create a frame of reference, or background context, for deciding factual issues where *Charter* issues are raised. Dr. Nordine is not, however, an expert who has been qualified to give such evidence, and his affidavit does not provide such evidence but rather provides argument on the ultimate issue of the reasonableness of the Order.

²The exhibits are: a) BC Coroners Service posting, September 28, 2022, regarding illicit drug toxicity deaths in British Columbia, January 1, 2012 to August 31, 2022; b) BCCDC Covid-19 situation report, October 27, 2022; c) BCCDC table of top 15 causes of death in British Columbia, March 2020 to February 2022, undated and with no explanation of how it was generated; d) Vancouver Coastal Health Covid-19 update, September 29, 2022; e) British Columbia Select Standing Committee on Health, November 2022 report “Closing Gaps, Reducing Barriers: Expanding the Response to the Toxic Drug and Overdose Crisis”.

[86] Even if part of Dr. Nordine’s affidavit could be characterized as social context evidence regarding the seriousness of the toxic drug crisis, such evidence is already in the record. Counsel for the PHO referred to the media briefing, March 11, 2021, from the PHO stating that, in addition to the COVID-19 pandemic, the Province is facing the overdose crisis wherein deaths from illicit drug toxicity is the fifth highest cause of death, with overdose deaths particularly affecting younger people in our communities.

[87] Brandeis Briefs may be admitted in constitutional litigation to establish the purpose and background of legislation, including its social, economic and cultural context (*Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCSC 860, paras. 23-28). In my view, Dr. Nordine’s affidavit is not a Brandeis Brief but, as I have said, advocacy and expert opinion arguing against the reasonableness of the Order.

[88] Turning to Dr. Pelech’s affidavit, he is a professor in the Department of Medicine at the University of British Columbia. His affidavit, sworn November 16, 2022, says that he was asked to provide his expert opinion on the “validity of the arguments put forth in the public health orders issued on June 10, 2022 and September 12, 2022”.

[89] He says the issues he was asked to address were:

- a. The benefits and/or risks of getting the first, second and third doses of COVID-19 vaccines.
- b. The effectiveness of the COVID-19 vaccines approved for use in Canada, including the most recently approved bivalent vaccine, particularly in respect of their effectiveness against the Omicron variants, in terms of:
 - i. Infection, including an explanation of absolute versus relative risk reduction, and a comparison between the vaccinated and the unvaccinated;
 - ii. Transmission, including the duration that a person is contagious, and a comparison between the vaccinated and the unvaccinated persons;
 - iii. Reduction of recovery time, severe illness, hospitalization and death, including what outcomes the

vaccines were tested for, and a comparison between the vaccinated and the unvaccinated; and

iv. The rate at which the effect of the vaccines wane, especially for those with two shots and three shots.

c. The differences and/or similarities between natural immunity versus vaccine immunity.

d. The methodology by which reduction in infection and transmission has been or might be measured in any given long-term care, assisted care and/or hospital setting.

e. The risks and side effects of the vaccines, including the more serious side effects, specific risks for working age people, and the concept of cost-benefit for different age groups.

f. The rationale, assertions of fact, and evidence stated in the Orders of the BC Public Health Officer, particularly the Orders of June 10, and September 12, 2022).

g. The rationale, assertions of fact, and evidence stated in the affidavits of Dr. Emerson in the present litigation.

[90] The PHO acknowledges that two of his exhibits are admissible as part of the record available to her when making the Order. These are Schedules 4 and 5 to his affidavit, being his “point-by-point critique” of the PHO's June 10, 2022 order, that he co-authored in August 2022, and his email of August 9, 2022 transmitting this to the PHO.

[91] The PHO submits that the balance of his affidavit is inadmissible, post-record expert opinion and should be struck.

[92] Counsel for the CSASPP petitioners argues that Dr. Pelech’s affidavit permissibly supplemented the record because it was evidence necessary to:

- (i) provide general background (as opposed to addressing the merits) in circumstances where that information might assist in understanding the issues for review;
- (ii) bring to the attention of the court procedural defects that cannot be found on the evidentiary record;
- (iii) highlight the complete absence of evidence before the tribunal when making a particular finding; or

(iv) elucidate the record upon which the administrative body's reasons were based.

Saskatchewan (Workers' Compensation Board) v Gjerde, 2016 SKCA 30 at para. 44.

[93] During submissions, counsel for the petitioners did not demonstrate how Dr. Pelech's affidavit fell within any of these categories.

[94] The point of the affidavit is to identify what Dr. Pelech refers to as "the key flaws in the BC Public Health Office arguments" – which he describes in detail in paragraphs 24-25 – and to support his opinion that, if the Order continues, "this will lead to further reductions in this critical workforce and endanger the long-term health of those that choose to remain, and in doing so also the general public".

[95] The affidavit is therefore advocacy and expert opinion. It was created after the Order and so is not part of the record and should not be admitted on judicial review.

[96] The impugned portions of these affidavits are therefore struck for containing advocacy, expert opinion and information created after the Order under review.

Conclusion

[97] The petitioners' applications to augment the current record are dismissed, though they have leave to seek to add further specific documents or information to the record as the case proceeds.

[98] The impugned portions of the affidavits of Drs. Nordine and Pelech are struck.

[99] During the hearing the parties advised of their agreement that no costs should be awarded for the applications.

"Coval J."