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VIA E-MAIL

October 26, 2022

Ministry of Attorney General
Legal Services Branch
PO BOX 9280 STN PROV GOVT
Victoria, BC V8W 9J7

Attention: Julie K. Gibson

Dear Julie:

**Re: Hsiang et al v. Provincial Health Officer of British Columbia SCBC Vancouver
Registry No. S224731**

**Hoogerbrug v. Provincial Health Officer of British Columbia SCBC Vancouver
Registry No. S224652**

I write in response to your letters dated October 14 and 18, 2022 letter regarding the completion of the record before the Provincial Health Officer (“**PHO**”) in this case when she made the September 12, 2022 Order.

As stated in our previous letter of October 14, 2022, the categories that we provided to the Respondent on October 3, 2022 are all relevant to the determination of the main issues raised in the Petitions – that is, whether the present conditions, scientific evidence, and circumstances support or justify the ongoing use of the emergency powers in the *Public Health Act*, and whether the PHO’s decision to maintain the vaccination mandate is reasonable in light of the evidence before her in making this decision.

Further, as explained in more detail in our draft notice of application, it is not legally open to the Respondent to unilaterally determine which documents in the record are “necessary to allow for the petitions to be fully and fairly determined”, as it does in its October 14 and 18 letters.

Simply put, the categories of documents in question are, by definition, part of the record, as they pertain to materials that are relevant to the issues raised in the Petitions and that were directly or indirectly before the PHO in making the decisions and orders challenged in the Petitions.



Thus, we maintain our position that the Petitioners are legally entitled to, at least, the documents coming within the listed categories. However, as mentioned at the conclusion of this letter, we will endeavor to further narrow the categories of documents we request at this stage in an attempt to ensure that the merits of the Petitions can be heard as soon as possible.

With that by way of brief introduction, we provide our specific responses to your two letters below.

Respondent's Letter dated October 14, 2022

Contrary to what is stated in your letter, Dr. Emerson's affidavit includes very few documents with respect to the main issues in this case, and perhaps more concerning, only includes a sample of the documentation from the record that was selected to support the conclusions that the Respondent has drawn from the evidence.

For example, Dr. Emerson's affidavit does not include much, if any, documentation, with respect to the current situation with the Omicron variants, which have been the dominant strain of the virus in the province, and around the world, since in or around January 2022.

Nor does it include much, if any, documents that, for instance, discuss or compare the effectiveness of two-doses of vaccination with infection-based immunity as it relates to contracting or transmitting COVID-19, and severe outcomes such as hospitalization, since the Omicron variants became the dominant strain of the virus.

Further, in response to request #1, you state that the documents responsive to this request are the PHO's reasons in the recitals of the September 12, 2022 Order and the media briefings attached to Dr. Emerson and Ms. Dragland's affidavits. However, the PHO's statements in the September 12, 2022 Order and in previous or subsequent media briefings are not *evidence* in the record – at best, they contain the conclusions that the PHO has drawn from evidence in the record, many of which conclusions are disputed.

The Petitioners are entitled to the actual evidence – including any summaries of the evidence – that were directly or indirectly before the PHO, not merely the conclusions that the PHO has reached.

In response to requests #3, you state that the decisions of the PHO with respect to other regulations and restrictions issued under the *Public Health Act* are not under review in this case, and thus are not relevant or useful to the Court.

Again, it is not legally open to the Respondent to narrow the record of evidence in this case based on its view of what documents it believes would be “useful” to the Court.



As explained in our draft notice of application, these documents are highly relevant to the case, as they relate to the information that led the PHO to conclude that other measures with respect to the COVID-19 virus, including measures tied to vaccination, are no longer necessary.

Indeed, presumably the Respondent believes that facts and information pertaining to these other measures are at least relevant to the Petition, as it has included paragraphs in Dr. Emerson's affidavit discussing these very measures (see e.g. paragraphs 34-37, and 94).

It is simply not plausible to assert that this material is relevant and helpful to the Court only to the extent that the Respondent wants to reveal this information as part of the Respondent's narrative, but otherwise irrelevant and unhelpful to the extent it might be used by the Petitioners in support of their position.

In response to request #12, you state that the two letters to the UBC President from the Vancouver Coastal Health Chief Medical Officer and the UBC faculty professors are not relevant to the issues under review, as they involve a different context (i.e. primarily younger people at university residences).

The informed views set out in those letters clearly pertain to the efficacy of two doses of vaccination generally and the necessity of imposing measures tied to vaccination on members of the population, both of which are matters at the heart of the issues to be decided in these Petitions. To the extent that the Respondent believes that the views of these experts were properly given little or no weight by the PHO in the context at issue in this proceeding, and if there is any evidence in the record that would support this assertion, the Respondent can make that argument during the hearing. It does not in any way affect whether the materials are relevant and properly included in the record.

Again, the Respondent cannot narrow the record based solely on its views of the case. These letters and the studies cited within them pertain to a number of matters raised in the Petitions and were provided to the PHO by the Petitioners, are clearly relevant to the issues raised in the Petitions, and therefore any other documents in the possession of the PHO relating to consideration given to these letters and studies are part of the record.

The fact that the Court in *Beaudoin* found that "there is no indication of the bases for" the views set out in these letters, based on the record before the Court in that case, highlights the importance of having a full and complete record of proceedings in this case, which was evidently not present in the *Beaudoin* proceeding. The views of these experts is fully consistent with the evidence that has been tendered by the Petitioners, and likely consistent with and supported by other evidence in the PHO's possession as well. That is exactly why it is essential to have a full and complete record before the Court in this proceeding.

With respect to requests #13-16, you state in your letter that there is no religious exemption process under the vaccination orders, and that none of the *Hsiang* and *Hoogerbrug* Petitioners applied for



a medical exemption. With respect, that is beside the point. The documents relating to the PHO's decision to grant medical exemptions, but not to similarly grant religious exemptions to the orders, clearly relate to a fundamental issue raised in the Hoogerbrug Petition. The Petitioners and the Court are entitled to any evidence in the record pertaining to the decision to refuse to permit religious exemptions in the same way that medical exemptions were permitted.

For instance, the PHO clearly came to the conclusion that it would be possible for unvaccinated persons with a medical exemption to continue to work without posing a threat to the health and wellbeing of the public or otherwise undermining the objectives of the mandatory vaccination orders. The Petitioners are entitled to any evidence relevant to that conclusion (and not merely any evidence in support of that conclusion).

Similarly, the PHO presumably came to the conclusion that allowing individuals with valid religious exemptions to continue to work would in some way pose an "unacceptable" threat, in a way that permitting individuals with medical exemptions would not. The Petitioners are entitled to any evidence before the PHO relevant to that conclusion (and not merely the evidence in support of that conclusion).

If the PHO had no evidence in support of either of these conclusions, the Respondent should confirm that in writing, which can then be placed before the Court.

In response to request #24, you state that visitor policies at hospitals and community health care facilities after the emergence of the COVID-19 virus "are not under review in these Petitions". With respect, that does not demonstrate that the evidence is irrelevant. The measures under review in these Petitions prevent unvaccinated registered health professionals from working in designated health care settings, based on the assertion that this is necessary to protect the health of persons living and working in those locations. Therefore, the other protective measures that are, or are not, being undertaken in relation to these locations are clearly relevant to the issues raised in this case.

Further, the Respondent also seems to believe that visitor policies at these facilities are relevant to the Petitions, as they are discussed in Dr. Emerson's affidavit at paragraphs 72 and 73. Therefore, the Respondent cannot now reasonably claim that this information is not at least relevant to the Petitions.

While we do not agree with the Respondent's assertion that requests #31-32 are not relevant to the issues raised in the Petitions, we agree not to pursue these requests further for the time being.

Finally, while Dr. Emerson's affidavit alludes to the fact that documents provided to the PHO by the Petitioners are included in the record, we ask for the PHO's confirmation in writing that the record of evidence includes all of the correspondence and documents provided by the Petitioners' counsel to the PHO's counsel, as well as the documents filed by the Petitioners' in these proceedings, up until the date of the September 12, 2022 Order.



Respondent's Letter dated October 18, 2022

In response to the three additional categories of documents identified in your letter, we have the following response:

1. *Modelling presentations and media briefings (and transcripts of those briefings) from January 2022 to September 12, 2022, to the extent those are not already in Dr. Emerson's Affidavit #1*

As noted in our draft notice of application, we object to the paragraphs of Dr. Emerson's affidavit where he attaches the transcripts of the media briefings of the PHO, to the extent the Respondent intends to use those previous statements as "evidence" in the record upon which the PHO could rely.

While PHO's previous statements may or may not have been supported by evidence in the record, the statements are clearly not themselves evidence in the record, and cannot be relied on by the PHO to support the imposition of the vaccination mandate.

Put another way, the Respondent cannot file statements of the PHO having previously reached certain conclusions as *evidence* that those conclusions are reasonable. The question as it pertains to the record is what evidence (if any) was before the PHO that led to these factual conclusions, and what evidence (if any) was before the PHO that undermined, questioned, or contradicted those conclusions.

And, as also set out in our draft application, our position is that media briefings or other statements of this nature cannot be used to supply additional or supplementary reasons in support of the impugned measures beyond the reasons set out in the Order itself.

Therefore, in our view, these types of materials are either inadmissible in their entirety, or they are entitled to no weight in relation to the reasonableness and legality of the impugned measures. They cannot properly be considered evidence in the record or the reasons upon which the impugned measures are based.

That being said, given that we anticipate that the Respondent will take the position that these briefings are admissible for some purpose, we would appreciate the production of these additional media briefings and modelling presentations from January 2022 to September 12, 2022 for the sake of completeness, as Dr. Emerson has attached media briefings and modelling presentations to his affidavit that, in the most part, pre-date the Omicron variants.

However, for the reasons stated above, this should not be taken as a concession that the media briefings (or any other previous statements by the PHO made in support of the



measures in question) are properly treated as “evidence” in the record or are admissible as supplementing the PHO’s reasons in support of the impugned measures.

2. *Documents from the Public Health Agency of Canada that were available to the PHO*

Please provide us with any updates that have been prepared by the Public Health Agency of Canada to its Omicron Monitoring Report 5 dated January 11, 2022.

3. *Documents from the National Advisory Committee on Immunization*

We do not require production of documents from the National Advisory Committee on Immunization. The documents from the Public Health Agency of Canada are sufficient, in our view.

Proposal for Completing the Record

As can be seen, we do not agree with the reasons set out in your letters for not disclosing the documents identified in our October 3 letter. In our view, all of the categories of documents are relevant and are properly considered part of the record.

However, in the interest of moving this case forward as expeditiously as possible, we will endeavor to provide you with an updated list of document categories before the end of the week, in which we hope to limit our requests to those that we believe are absolutely essential to a determination of the issues raised in the Petitions, and, therefore, to a meaningful judicial review.

Yours very truly,

GALL LEGGE GRANT ZWACK LLP

A handwritten signature in black ink that reads "Peter A. Gall".

Peter A. Gall, K.C.*

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