

Amended pursuant to Rule 6-1(1)(a)
Original filed May 6, 2024



No. 233275
Victoria Registry

In the Supreme Court of British Columbia

Between

JEDEDIAH JEREMIAH MERLIN FERGUSON and TERRI LYN PEREPOLKIN

Plaintiffs

and

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA and DR. BONNIE HENRY IN HER CAPACITY AS PROVINCIAL HEALTH OFFICER FOR THE PROVINCE OF BRITISH COLUMBIA

Defendants

Brought under the Class Proceedings Act, R.S.B.C. 11996, c. 50

AMENDED RESPONSE TO CIVIL CLAIM

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

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendants’ Response to Facts

1. The facts alleged in paragraph 13 of Part 1 of the amended notice of civil claim are admitted.
2. The facts alleged in paragraphs 1-12, 14, and 27-35 and of Part 1 of the amended notice of civil claim are denied.
3. The facts alleged in paragraphs 15-26 and of Part 1 of the amended notice of civil claim are outside the knowledge of the Defendants.

Division 2 – Defendants’ Version of Facts

The Parties

4. In response to paragraph 3 of Part 1 of the Amended Notice of Civil Claim (the “**Claim**”), proceedings against the Province must name the government as “His Majesty the King in right of the Province of British Columbia”.
5. In response to paragraph 4 of Part 1 of the Claim, the Provincial Health Officer (the “**PHO**”) is the senior public health official for the Province, appointed pursuant to the *Public Health Act*, SBC 2008, c. 28 (the “**Public Health Act**”). The PHO leads the public health response under the *Public Health Act* to public health emergencies in British Columbia, including the transmission of the novel coronavirus SARS-CoV-2 that causes the illness known as COVID-19.

The PHO Orders

6. In response to paragraphs 4-5 and 13-14 of Part 1 of the Claim, on October 14, 2021, October 21, 2021, November 9, 2021, November 18, 2021, September 12, 2022, April 6, 2023, and October 5, 2023 the PHO made orders under the *Public Health Act* titled “Hospital and Community (Health Care and Other Services) COVID-19 Vaccination Status Information and Preventive Measures” (collectively, the “**Orders**”).
7. In response to paragraph 14 of Part 1 and the whole of the Claim, the Orders required that, in order to work (as defined in the Orders), certain healthcare workers either receive a specified course of vaccines against SARS-CoV-2 and provide proof of vaccination to their employer; or receive an exemption, provide proof of the exemption to their employer, and comply with the conditions of the exemption.
8. In further response to paragraph 5 of Part 1 and the whole of the Claim, the Orders applied to certain healthcare workers and their employers, as well as other individuals, including:
 - a. healthcare workers employed by a regional health authority (Fraser Health Authority, Interior Health Authority, Northern Health Authority, Vancouver Coastal Health Authority, or Vancouver Island Health Authority), the Provincial Health Services Authority, British Columbia Emergency Health Services, the Providence Health Care Society, and as of November 18, 2021, Community Living BC, as well as individuals under contract with those organizations to perform services in a care location;

- b. healthcare workers employed by or under contract with healthcare system contractors and subcontractors as specified in the Orders, to perform service in a care location as defined under the Orders, and self-employed individuals who perform work in care locations;
 - c. healthcare workers employed by provincial mental health facilities within the meaning of the *Mental Health Act*, RSBC 1996, c. 288, including the Youth Forensic Psychiatric Services Inpatient Assessment Unit and the Maples Adolescent Treatment Centre;
 - d. postsecondary students, faculty, researchers, and staff who work in a care location; and
 - e. postgraduate medical education residents, trainees, and fellows who work in a care location.
9. The Orders did not apply to Indigenous health service organizations, peer workers, or home share providers. As of November 9, 2021, individuals who performed construction work under a contract were excluded. Further, as of November 9, 2021, the Orders applied to the Choices in Supports for Independent Living program, but this program was excluded as of October 5, 2023.
10. In response to paragraphs 27-35 of Part 1 and the whole of the Claim, the purpose of the Orders was to protect patients and clients of healthcare services, residents of long-term care and assisted living facilities, and healthcare workers from COVID-19, as well as to maintain the ability of the health care system to meet the needs of the population for COVID-19 related care and other healthcare, including critical care and surgical services, based on the best available and generally accepted scientific evidence and epidemiological data at the time the particular order was issued.
11. In further response to paragraphs 27-35 of Part 1 and the whole of the Claim, the PHO's overriding concern was to ensure that public health orders, including the Orders, and other public health guidance, protected the most vulnerable members of society, including patients, clients and residents who were undergoing care in healthcare facilities, while minimizing social disruption and preserving the ability of the healthcare system to meet the needs of the population for COVID-19 related care and other healthcare, including critical care and surgical services.
12. In response to paragraphs 1 and 2 of Part 1 and the whole of the Claim, the Defendants deny the plaintiffs and/or any putative class members were terminated pursuant to the Orders.

The COVID-19 Pandemic

13. In further response to paragraphs 27-35 of Part 1 and the whole of the Claim:
 - a. SARS-CoV-2 is a highly transmissible virus that can be spread by symptomatic and asymptomatic people through the air;
 - b. A person infected with SARS-CoV-2 can infect other people with whom the infected person comes into contact; and
 - c. Ongoing transmission in populations leads to the emergence of new variants of SARS-CoV-2, some of which are more transmissible and cause more severe illness than earlier strains of SARS-CoV-2.
14. In further response to paragraphs 27-35 of Part 1 and the whole of the Claim, the PHO has been actively trying to protect patients, clients, residents and workers in the healthcare system from COVID-19, reduce the risk of transmission of SARS-CoV-2, and maintain the ability of the healthcare system to meet the needs of the population for COVID-19 related care and other healthcare, including critical care and surgical services, through a series of comprehensive public health measures, including health promotion, prevention, testing, case identification, isolation of cases and contact tracing, and vaccination, all based on the best available and generally accepted scientific evidence, including epidemiological data for COVID-19 in British Columbia, nationally and internationally, evidence regarding SARS-CoV-2 transmission and disease, as well as factors leading to elevated transmission risk in certain settings.
15. In further response to paragraphs 27-35 of Part 1 and the whole of the Claim, without adequate public health measures, SARS-CoV-2 would spread exponentially.
16. In further response to paragraphs 27-35 of Part 1 and the whole of the Claim, protecting patients, clients, residents, and workers in the healthcare system and reducing the risk of transmission of communicable diseases is essential to maintaining the provincial health system's ability to deliver quality care and continue the safe delivery of essential health services, for both COVID-19 related care and other healthcare, including critical care and surgical services.
17. In further response to paragraphs 27-35 of Part 1 and the whole of the Claim, the presently available vaccines for SARS-CoV-2 are safe, highly effective and an important preventative measure that provide protection for individuals and other persons with whom they come into contact from infection, severe illness, and possible death from COVID-19. In particular, and without limitation, at the time the impugned Orders were in effect:

- a. a full course of vaccine was more reliable in providing effective and enduring protection from infection and severe illness than post-infection immunity from prior COVID-19 infection alone, or post-infection immunity in combination with a single-dose of vaccine;
- b. unvaccinated and partially vaccinated people were at a higher risk than vaccinated people of becoming infected with SARS-CoV-2 and those who were infected experienced significantly higher rates of hospitalization, ICU-level care and invasive mechanical ventilation, complications and death when compared with fully vaccinated people;
- c. unvaccinated and partially vaccinated people presented a higher risk of transmission of SARS-CoV-2 to other people. Vulnerable groups such as people over 70 years of age, and people with chronic health conditions or compromised immune systems were more vulnerable to severe illness and death from COVID-19 even if they were vaccinated;
- d. vaccinated people who became infected with SARS-CoV-2 were generally contagious for a shorter prior of time, were less symptomatic, and were less likely to transmit SARS-CoV-2 than unvaccinated people;
- e. unvaccinated people who contracted SARS-CoV-2 comprised the majority of hospitalizations and ICU admissions;
- f. communities with low vaccination rates had experienced rapid spread of SARS-CoV-2 causing serious illness and increases in hospitalizations and intensive care admissions, primarily in unvaccinated people;
- g. unvaccinated and partially vaccinated people in close contact with other people could promote the transmission of SARS-CoV-2; and
- h. programs that require proof of vaccination limited the presence of unvaccinated and partially vaccinated people in settings conducive to transmission and increased vaccination uptake in populations thereby reducing the public health risk of SARS-CoV-2 and COVID-19.

Healthcare Workers in British Columbia

18. In response to paragraphs 5 and 6 of Part 1 of the Claim, as of 2022, there were approximately 222,000 healthcare workers in British Columbia, some of whom were not subject to the Orders.

The Collective Agreements

19. In response to paragraphs 17-26 and the whole of the Claim, the Health Employers Association of BC (“**HEABC**”) is the accredited bargaining agent for most publicly funded health employers in the province, negotiating six major provincial agreements for unionized health care employees. These contracts include:

- a. the collective agreement between HEABC and the Ambulance Paramedics and Ambulance Dispatchers Bargaining Association;
- b. the collective agreement between HEABC and the Health Services and Support – Community Subsector Association of Bargaining Agents;
- c. the collective agreement between HEABC and the Facilities Bargaining Association;
- d. the collective agreement between HEABC and the Health Science Professionals Bargaining Association;
- e. the collective agreement between HEABC and the Nurses’ Bargaining Association; and
- f. the collective agreement between HEABC and the Resident Doctors of British Columbia

(collectively, the “**HEABC Collective Agreements**”).

20. As required under s. 84(2) of the British Columbia *Labour Relations Code*, RSBC 1996, c. 244 (“**Labour Relations Code**”), each of the HEABC Collective Agreements provides for resolution of all disputes in accordance with a grievance and arbitration procedure.

Improper Pleadings

21. Paragraphs 7-12 of Part 1 of the Claim constitute argument and are not proper pleadings.

Division 3 – Additional Facts

Additional Healthcare Worker Contracts

22. Healthcare workers in British Columbia are employed by both public sector and private sector employers. Workplaces can be unionized, with the employer being a HEABC member; unionized, with the employer not being a HEABC member; and non-unionized.
23. Unionized employees of employers who are not HEABC members are covered by collective agreements that are separate from the HEABC Collective Agreements (the “**Other Collective Agreements**”). These include, but are not limited to, individual collective agreements negotiated directly between individual employers and unions which may be site-specific to individual facilities or worksites.
24. As required under s. 84(2) of the British Columbia *Labour Relations Code*, each of the Other Collective Agreements provides for resolution of all disputes in accordance with a grievance and arbitration procedure.
25. Healthcare workers in British Columbia may also be employed or contracted directly by a healthcare employer and not covered by a collective agreement. This includes workers employed at sites that are not unionized, as well as workers at unionized sites that fall outside of the scope of a union bargaining unit, such as managers or other staff not included in a bargaining unit (collectively, the “**Healthcare Worker Contracts**”).

Additional PHO Orders

26. Between August 21, 2021 and October 5, 2023, the PHO also made the following orders under the *Public Health Act* respecting vaccinations for COVID-19 for employees of long-term care facilities, private hospitals, stand-alone extended care hospitals and assisted living residences for seniors:
- a. COVID-19 Vaccination Status Information and Preventive Measures Order dated August 20, 2021;
 - b. COVID-19 Vaccination Status Information and Preventive Measures Order dated August 31, 2021;

- c. Residential Care Staff COVID-19 Preventive Measures Order dated September 2, 2021;
- d. COVID-19 Vaccination Status Information and Preventive Measures Order dated September 9, 2021;
- e. COVID-19 Vaccination Status Information and Preventive Measures Order dated September 27, 2021;
- f. Residential Care COVID-19 Vaccination Status Information Order dated October 6, 2021;
- g. Residential Care Staff COVID-19 Preventive Measures Order dated October 8, 2021;
- h. Residential Care Staff COVID-19 Preventive Measures Order dated October 21, 2021;
- i. Residential Care COVID-19 Vaccination Status Information Order dated February 28, 2022;
- j. Residential Care Staff COVID-19 Preventive Measures Order dated September 12, 2022;
- k. Residential Care Staff COVID-19 Preventive Measures Order dated April 6, 2023; and
- l. Residential Care COVID-19 Vaccination Status Information and Preventive Measures dated October 5, 2023 (collectively, the “Residential Care Orders”).

Part 2: RESPONSE TO RELIEF SOUGHT

26-27. The Defendants oppose the granting of the relief sought in **ALL** of the paragraphs of Part 2 of the Claim.

Part 3: LEGAL BASIS

Inducing Breach of Contract

27-28. The plaintiffs and many of the putative class members are not parties to the HEABC Collective Agreements, the Other Collective Agreements, and/or the Healthcare Worker Contracts. The plaintiffs and the non-party putative class members do not have standing to advance a claim for inducing breach of contract.

28-29. The Defendants did not intend to cause a breach of contract, as alleged or at all. The Defendants intended to protect patients, clients, residents, and workers in the healthcare system from COVID-19, including from serious illness and death, reduce the risk of transmission of SARS-CoV-2, and to maintain the ability of the health care system to meet the needs of the population for COVID-19 related care and other healthcare.

~~29.30.~~ The Defendants deny that the Orders were issued in bad faith. At all material times, the Defendants acted in good faith.

~~30.31.~~ Under the HEABC Collective Agreements and the Other Collective Agreements, only a labour arbitration board appointed under the terms of the agreement and pursuant to the *Labour Relations Code*, has jurisdiction to determine whether the relevant employer breached the contract.

~~31.32.~~ Further and in the alternative, the employers of the plaintiffs and putative class members did not breach the HEABC Collective Agreements, the Other Collective Agreements, the Healthcare Worker Contracts, or any other applicable contract or collective agreement, as alleged or at all.

~~32.33.~~ In addition, and in any event, pursuant to s. 42 of the *Public Health Act*, the plaintiffs, putative class members, and employers were required to comply with the Orders. If the terms and conditions of any contract were inconsistent with any terms of the Orders, which is denied, the Orders prevail, and the contract are unenforceable to the extent of the inconsistency.

~~34.~~ In addition, and in any event, if the plaintiffs and putative class members did not provide their respective employers with proof of vaccination or an exemption as required by the Orders, then the plaintiffs and putative class members were in breach of contract and/or rendered themselves ineligible to work at a care location, and their employer had just and reasonable cause to terminate the plaintiffs' and putative class members' employment.

~~33.35.~~ In the alternative, the Orders constituted a supervening event that (i) radically altered the plaintiffs and putative class members' contractual obligations; (ii) was not foreseeable and which none of the contracts contemplated; and (iii) was not caused by the parties to the contract. As a result, the plaintiffs and putative class members' contracts were discharged pursuant to the doctrine of frustration of contract.

~~34.36.~~ In the further alternative, if the employers breached a contract, which is denied, the Defendants' conduct did not induce the breach, as alleged or at all.

~~35.37.~~ In addition or in the alternative, the Defendants' conduct was justified by the overriding concern to ensure that public health orders, including the Orders, and other public health guidance protected the most vulnerable members of society, including patients, clients and residents who were undergoing care, while minimizing social disruption and preserving the ability of the healthcare system to meet the needs of the population for COVID-19 related care and other healthcare.

36:38. The Defendants deny that the plaintiffs or putative class members suffered any damage, as alleged or at all. In addition, or in the alternative, if the plaintiffs or putative class members have suffered or continue to suffer any damage, as alleged or at all, which is denied, then they have failed to take all reasonable steps to mitigate such losses.

Misfeasance in Public Office

37:39. The Claim lacks sufficient material facts or a legal basis to support a cause of action for the tort of misfeasance in public office.

38:40. In addition, and in any event, the Defendants deny that the PHO engaged in any deliberate and unlawful conduct in her capacity as a public officer, as alleged or at all. At all material times, the PHO was acting in the lawful exercise of her duties and in good faith.

39:41. The Defendants deny that any of their acts or omissions caused or contributed to any harm suffered by the plaintiffs or putative class members, as alleged or at all.

40:42. The Defendants deny that the plaintiffs or putative class members suffered any damage, as alleged or at all. In addition, or in the alternative, if the plaintiffs or putative class members have suffered or continue to suffer any damage, as alleged or at all, which is denied, then they have failed to take all reasonable steps to mitigate such losses.

Section 2(d) of the *Charter*

41:43. The Claim lacks sufficient material facts or a legal basis to support a cause of action for the alleged breach of the plaintiffs' or putative class members' rights under s. 2(d) of the *Charter*.

42:44. The Defendants deny that the plaintiffs or putative class members have been deprived of their rights under s. 2(d) of the *Charter*, as alleged or at all.

43:45. In the alternative, if the plaintiffs or putative class members were deprived of their rights under s. 2(d) of the *Charter*, which is denied, the Defendants deny that any of their acts or omissions caused or contributed to the breach, as alleged or at all.

44:46. In the further alternative, the Orders reflected a proportionate balance between the objectives of the *Public Health Act* and the plaintiffs' and putative class members' *Charter*-protected freedom of association and are justified under s. 1 of the *Charter*.

45-47. In the further alternative, the Defendants deny that damages pursuant to s. 24(1) of the *Charter* are just or appropriate.

Privacy Rights

46-48. The Claim lacks sufficient material facts or a legal basis to support a cause of action relating to the privacy rights of the plaintiffs or putative class members.

47-49. In addition, and in any event, during a public health emergency, the *Public Health Act* governs the collection, use or disclosure of personal information despite any other provision or enactment.

Aggravated and Punitive Damages

48-50. The Claim lacks sufficient material facts to support a claim for punitive or aggravated damages.

49-51. In addition, and in any event, the Defendants deny that either of them engaged in any conduct that would support an award of aggravated or punitive damages, as alleged or at all. The Defendants' conduct was intended to protect patients, clients, residents, and workers in the healthcare system from COVID-19, including from serious illness and death, reduce the risk of transmission of SARS-CoV-2, and to maintain the ability of the health care system to meet the needs of the population for COVID-19 related care and other healthcare.

Statutory Immunity

50-52. In addition, or in the alternative, the plaintiffs' and putative class members' claim is statutorily barred in whole or in part by operation of s. 92 of the *Public Health Act*.

51-53. The Claim lacks sufficient material facts or a legal basis to support a constitutional challenge to s. 92 of the *Public Health Act*. The Claim pleads no material facts or legal basis to support the declaratory relief sought in respect of s. 92 of the *Public Health Act*.


52-54. The Defendants plead and rely on the following:

- a. *Public Health Act*;
- b. *Labour Relations Code*; and
- c. *Crown Proceeding Act*, R.S.B.C. 1996, c. 89.

Defendants' address for service: Ministry of Attorney General
Legal Services Branch
1301 – 865 Hornby Street
Vancouver, BC V6Z 2G3
Attention: Emily Lapper, Chantelle Rajotte, Trevor Bant, and Rory Shaw

E-mail for service: emily.lapper@gov.bc.ca
chantelle.rajotte@gov.bc.ca
trevor.bant@gov.bc.ca
rory.shaw@gov.bc.ca

Date: ~~May 6, 2024~~ October 23, 2024



Signature of lawyers for the Defendants
Emily Lapper, Chantelle Rajotte, Trevor Bant,
and Rory Shaw

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

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.