No. VIC-S-S-233275
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

JEDEDIAH JEREMIAH MERLIN FERGUSON and TERRI LYN PEREPOLKIN

PLAINTIFF

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. 1996, c. 50

NOTICE OF APPLICATION

Name of applicants: The Plaintiffs, Jedediah Jeremiah Merlin Ferguson and Terri Lyn Perepolkin.

TO: The Defendants

TAKE NOTICE that an application will be made by the Applicant to the Honourable Justice Edelmann at the Courthouse at 850 Burdett Avenue Victoria, BC on April 28, 2025 for 5 days at 10:00 a.m. for the order(s) set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

1. This action be certified as a class proceeding;

2. The Class be defined as:

   All healthcare workers in British Columbia who have been subject to the *COVID-19 Vaccination Status information and Preventative Measures order(s)* issued by the Provincial Health Officer on October 14, 2021, November 9, 2021, November 18, 2021, September 12, 2022, April 6, 2023, and October 5, 2023, pursuant to

Sections 30, 31, 32, 39 (3), 54, 56, 57, 67 (2) and 69 *Public Health Act*, S.B.C. 2008 ("the Class").

3. The Plaintiffs be appointed as the representative Plaintiffs for the Class.

4. The manner in which and the time within which Class Members may opt out of the proceeding;

5. Certifying the common issues as set out at Schedule A;

6. Approving the Litigation Plan at Schedule B; and

7. Such further and other relief as counsel may advise and this Honourable Court may deem just.

Part 2: FACTUAL BASIS

1. This case arises from the issuance by the British Columbia Provincial Health Officer of the *COVID-19 Vaccination Status information and Preventative Measures Orders* (the "Orders") on October 14, 2021, and revised on: November 9, 2021; November 18, 2021; September 12, 2022; April 6, 2023; and October 5, 2023. The Orders mandated all healthcare workers to be vaccinated against COVID-19, to disclose their vacation status and, absent such, rendered them unable to work. The Orders provided for limited exceptions and did not differentiate healthcare workers who had patient contact from those with administrative functions and no patient contact. The Orders imposed a new term and condition of employment on existing healthcare workers absent consultation, consideration, or agreement.

2. The Provincial Health Officer issued the Orders pursuant to Sections 30, 31, 32, 39 (3), 54, 56, 57, 67 (2) and 69 of the *Public Health Act*, S.B.C. 2008.

3. The Orders stated, *inter alia*, that:

   a. Vaccination is safe, very effective and the single most important preventative health measure;

b. an unvaccinated staff member of an organization which provides health care or services puts staff who provide health care or services, and patients, residents or clients, at risk of infection with SARS-CoV-2, and constitutes a health hazard under the *Public Health Act;*

c. There are difficulties and risks in accommodating persons who are unvaccinated, since no other measures are nearly as effective as vaccination in reducing the risk of contracting or transmitting SARS-CoV-2, and the likelihood of severe illness and death;

d. The public needs to have confidence that when they receive health care from a health professional they are not putting their health at risk;

e. a lack of information on the part of employers about the vaccination status of staff interferes with the suppression of SARS-CoV-2 in hospital and community settings, and constitutes a health hazard under the *Public Health Act*;

f. An employer must request and collect proof of vaccination, or an exemption, from each staff member, and must keep a record of the information; and,

g. An employer must not permit an unvaccinated staff member to whom this Part applies to work after October 25, 2021, unless the staff member is in compliance with either section 2 (a) or (b), or has an exemption and is in compliance with the terms of the exemption.

Affidavit # 1 of Jedediah Jeremiah Merlin Ferguson at paragraphs 6-8,
Affidavit Exhibits "A", "B", "C", "D", "E", "F", "G".

4. The Plaintiffs and putative Class Members have been subject to the Orders. Some have refused to share their vaccination status or are otherwise unvaccinated and thus did not conform to the Orders and were placed on leave without pay, effectively a suspension; some were subsequently terminated from employment; and some were forced to comply with the Orders.

5. The Plaintiffs and putative Class Members allege that provincially regulated healthcare facilities ("the Employers") subject to the Orders were induced by the

Defendants to breach their contractual employment agreements through the following actions:

a. Mandatory disclosure of private medical information;

b. Mandatory COVID-19 vaccinations;

c. Placement on mandatory leave without pay; and

d. Termination of employment.

6. The Plaintiff Jedediah Jeremiah Merlin Ferguson ("Ferguson") was an employee of Island Health at Cumberland Regional Hospital Laundry and had worked as a Laundry Worker (LW1). Ferguson had been an employee of Island Health since June 2015 and maintained an exemplary and unblemished record until, as a result of the Orders, he was placed on leave without pay on October 26, 2021, and subsequently terminated effective November 18, 2021. Ferguson is a member of the Hospital Employees' Union ("HEU") and at all material times his employment was governed by the HEU collective agreement ("the HEU Contract").

Affidavit # 1 of Jedediah Jeremiah Merlin Ferguson at paragraphs 6-7, Affidavit Exhibits "J" and "K".

7. The HEU Contract is the product of a good faith collective bargaining process. The process includes a procedure through which terms and conditions of employment were settled by negotiations between the employer and their employees on the basis of a comparative equality of bargaining strength.

8. The HEU Contract was negotiated between the HEU and the Health Employers Bargaining Association ("HEABC") which is comprised of members who work in the health care profession of which Mr. Ferguson is a member.

9. The negotiation process included, *inter alia*:

a. member consultation;

b. development of bargaining proposals;

c. an exchange of proposals;

d. deliberation on proposals;

e. an exchange of consideration;

f. an ability to negotiate, amend, reject proposals;

g. the right to job action if the parties are unable to reach agreement; and,

h. A vote in the affirmative on the proposed contract by both the Employer and HEU members.

10. The HEU Agreement does not contain a term or condition of employment which allows employees to unilaterally be placed on an unpaid leave of absence.

11. The HEU Agreement does not contain a term or condition of employment which mandates Covid-19 vaccinations.

Affidavit # 1 of Jedediah Jeremiah Merlin Ferguson at paragraphs 1-5, Affidavit Exhibit "I".

12. The Plaintiff Terri Lyn Perepolkin ("Perepolkin") was an employee of Interior Health at Vernon Jubilee Hospital and had worked as a Laboratory Technologist since 2004. Perepolkin maintained an exemplary and unblemished employment record until she was placed on leave without pay on October 26, 2021, and subsequently terminated from her position on November 18, 2021, pursuant to the Orders. Perepolkin is a member of the Health Sciences Association ("HSA") and at all material times her employment was governed by the Health Science Professionals Bargaining Association ("HSPBA") collective agreement ("the HSPBA Contract").

Affidavit # 1 of Terri Lyn Perepolkin at paragraphs 16-19, Affidavit Exhibits "J", "K", "L", "M", and "N".

13. The HSPBA Contract is the product of a good faith collective bargaining process. The process includes a procedure through which terms and conditions of employment were settled by negotiations between the Employer and their employees on the basis of a comparative equality of bargaining strength.

14. The HSPBA Contract was negotiated between the Health Employers Bargaining Association ("HEABC") and The Health Science Professionals Bargaining Association which is comprised of members who work in the health science profession of which Ms. Perepolkin is a member.

15. The negotiation process included, *inter alia*:

    a. member consultation;

    b. development of bargaining proposals;

    c. an exchange of proposals;

    d. deliberation on proposals;

    e. an exchange of consideration;

    f. an ability to negotiate, amend, reject proposals;

    g. the right to job action if the parties are unable to reach agreement; and,

    h. A vote in the affirmative on the proposed contract by both the Employer and HSPBA members.

16. The HSPBA Agreement does not contain a term or condition of employment which allows employees to unilaterally be placed on an unpaid leave of absence.

17. The HSPBA Agreement does not contain a term or condition of employment which mandates COVID-19 vaccinations.

Affidavit # 1 of Terri Lyn Perepolkin at paragraphs 10-15, Affidavit Exhibit "I".

16. The Plaintiffs and putative Class Members do not challenge or dispute the interpretation, application, or administration of the negotiated terms of the collective agreements.

17. The Orders were inconsistent, contradictory, and contrary to reasonably established medical and scientific principles and research, known to the Public Health Officer of British Columbia at the time of the issuance of the Orders.

18. The Plaintiffs and putative Class Members allege that the Provincial Health Officer's actions were motivated by political pressure and/or political self-interest in that the government needed and wanted to appear responsive to COVID-19, regardless of the effectiveness of their response. The stated objective of the Orders was to reduce the severity, infection rates, and transmission of COVID-19. In formulating that objective, the Provincial Health Officer knew or ought to have known that:

    a. these goals were not materially furthered by the Orders and were not necessary to meet these goals;

    b. the Orders were not supported by scientific evidence; and

    c. the Orders were not proportionate to the infringement of the Plaintiffs' and putative Class Members' rights and interests.

19. The Provincial Health Officer knew or ought to have known that enacting the Orders:

    a. was unconstitutional as it unilaterally altered terms fundamental to the Plaintiffs' and Class Members' employment that were previously negotiated

    b. that the Orders would induce the breach of existing employment agreements; and

    c. likely would result in compensable economic and emotional harm to the Plaintiffs and putative Class Members.

20. At the time the Orders were issued, all Health Canada approved COVID-19 vaccinations had filed product monographs which are available to inform the public of the effects of the vaccination. There were six (6) COVID-19 vaccines (the "Vaccines") available to the public in Canada. Listed below is the manufacturer with the name of each vaccine in brackets.

    a. Pfizer/BioNTech ("Comirnaty")
    b. Moderna ("Spikevax")
    c. Janssen and Johnson & Johnson ("Jcovden")
    d. AstraZeneca ("Vaxzevria")
    e. Medicago ("Covifenz")

f. Novavax ("Nuvaxovid")

Affidavit # 1 of Alan Cassels at paragraph 27.

21. The Plaintiffs and putative Class Members plead that the Vaccines did not prevent viral transmission of COVID-19 to other people.

Affidavit # 1 of Alan Cassels at paragraphs 32-51, 56.

22. The Plaintiffs and putative Class Members plead that clinical reports, product monographs, studies, and observational data existed at the time of the Order and Policy which demonstrated that the Vaccines did not prevent viral transmission of COVID-19 to other people.

Affidavit # 1 of Alan Cassels at paragraphs 38-45.

23. The Plaintiffs and putative Class Members plead that the Provincial Health Officer acted in bad faith when issuing the Orders as she knew or could have reasonably discovered that the Vaccines were not effective at preventing viral transmission of COVID-19 to other people.

24. The Orders have failed to provide reasonable accommodation to the Plaintiffs and putative Class Members such as exempting persons who have recovered from COVID-19 and produced a negative COVID-19 test, or those who could have worked remotely.

25. The Plaintiffs and putative Class Members plead that the Vaccines posed significant risks for potential adverse side effects on their personal health.

Affidavit # 1 of Alan Cassels at paragraphs 53-55.

26. The Plaintiffs and putative Class Members plead that safety studies, clinical data, manufacturer studies, and identified quality control issues existed at the time of the

Policy and Order which demonstrated significant risks of the Vaccines to their personal health.

Affidavit # 1 of Alan Cassels at paragraph 52.

27. The Plaintiffs and putative Class Members plead that the Provincial Health Officer acted in bad faith when issuing the Orders as she knew of could have reasonably discovered that the Vaccines were not safe and posed significant risks for potential side effects.

Effect of the Orders on the Plaintiffs and putative Class Members

28. The effects of the Orders on the Plaintiffs and putative Class Members have caused personal injury and dame disproportionate to any threat posed by COVID-19, including but not limited to the following:

a. Imposition of a term and condition of employment absent collective bargaining, consultation, agreement, or compensation;

b. Suspension from employment;

c. Termination from employment;

d. Loss of income;

e. Loss of medical benefits;

f. Loss of pension contributions, service, and expected retirement age;

g. Loss of employment insurance benefits;

h. Loss of primary residences; and,

i. Increased depression and mental illness;

Affidavit # 1 of Jedediah Jeremiah Merlin Ferguson at paragraphs 9-20.

Affidavit # 1 of Terri Lyn Perepolkin at paragraphs 21-25.

Part 3: LEGAL BASIS

29. The requirements set out in s. 4 of the *Class Proceedings Act*, RSBC 1996, c 50 (the "CPA") are as follows:

> 4(1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

30. Certification is not meant to be a test of the merits or strength of the action. Instead, certification focuses on the form of the action.

Section 5(7) of the *Class Proceedings Act*.

31. The fact that a defendant attempts to lead evidence at certification that goes to the merits does not change this.

Tiboni v. Merck Frosst Canada Ltd., 2008 CanLII 37911 (ONSC), at para. 53.

32. The evidentiary burden on the plaintiff on a certification motion is low. The plaintiff need only show "some basis in fact" for each of the certification requirements. The standard of proof is below the "balance of probabilities".

Hollick v. Toronto (City of), 2001 SCC 68

33. This case is well suited to, and should be certified as, a class proceeding.

Section 4(1)(a) of the Class Proceedings Act

34. The first requirement, pursuant to s. 4(1)(a) of the CPA, is whether the pleadings disclose any cause(s) of action against the Defendants. A plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed. This is decided on the pleadings alone. The Court must read the pleadings generously and the plaintiff need only satisfy the Court that the action is not bound to fail.

Supreme Court Civil Rules, Rule 9-5(1).

Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57.

R v. Imperial Tobacco Canada Ltd., 2011 SCC 42.

35. The test under s. 4(1)(a) of the CPA is the same as the test for striking pleadings under R.9-5(1)(a) of the *Supreme Court Civil Rules*.

Pearce v 4 Pillars Consulting Group Inc., 2021 BCCA 198, at para. 55.

36. An important consideration on any application under Rule 9-5(1)(a) is whether a pleading can be preserved by amendment.

International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited, 2011 BCCA 149, at para. 28.

37. If an amendment could cure the defect, the plaintiff should not be driven from the "judgment seat" even with the potential for the defendant to present a strong defence.

James v Johnson & Johnson Inc., 2021 BCSC 488, at para. 63.

38. A party who seeks to amend deficiencies in the pleadings should do so in the trial court, before an order is made striking the pleadings.

Jones v. Bank of Nova Scotia, 2018 BCCA 381, at para. 36.

39. Novel claims should be given the opportunity to go to trial.

Freeman-Maloy v. York University, 2006 CanLII 9693 (ON CA), at paras. 18, 26-28, leave to appeal refused [2006] S.C.C.A. No. 201.

Misfeasance in Public Office

40. To prove misfeasance in public office, the plaintiff must show "(i) deliberate, unlawful conduct in the exercise of public functions; (ii) awareness that the conduct is unlawful and likely to injure the plaintiff; (iii) harm; (iv) a legal causal link between the tortious conduct and the harm suffered; and (v) an injury that is compensable in tort law."

Anglehart v Canada, 2018 FCA 115, at para 52.

41. Misfeasance may be found when the Public Health Officer "could have discharged his or her public obligations" — here, basing the Orders upon a proper scientific and medical foundation and/or with sufficient exceptions as to protect *Charter* rights — "yet willfully chose to do otherwise."

Odhavji Estate v Woodhouse, 2003 SCC 69, at para 26.

42. In Part 3, paragraphs 47-49 of the Amended Notice of Civil Claim, the Plaintiffs plead that the Provincial Health Officer engaged in deliberate, unlawful conduct in the exercise of public functions as she were aware, based on the available scientific evidence, that the Orders would not advance the objectives of preventing transmission of COVID-19.

43. The Plaintiffs and putative Class Members plead that as a result of the Defendants' unlawful actions they have suffered injury which is compensable at law.

44. The Provincial Health Officer acting under authority of the *Public Health Act*, SBC 2008, C 28 issued Orders mandating that employees of healthcare facilities be fully

vaccinated against COVID-19. The Plaintiffs and putative Class Members plead that the Provincial Health Officer acted in bad faith with reckless indifference or willful blindness in issuing and enforcing the Orders. Such actions included:

a. The Provincial Health Officer had no basis in fact that COVID-19 vaccination was as an effective measure to prevent transmission of COVID-19. As such the Plaintiffs' and putative Class Members plead that the Provincial Health Officer acted in bad faith by either recklessly or willfully ignoring the reality of the vaccine in exercising her authority under the *Public Health Act, SBC 2008, C 28*, with foreseeable losses to the Plaintiff and putative Class Members.

b. Known potential risk of adverse events associated with the COVID-19 vaccination were either recklessly or willfully ignored and omitted by the Provincial Health Officer with foreseeable losses to the Plaintiffs' and putative Class Members.

c. The Provincial Health Officer acted in furtherance of an objective which supplanted the stated objectives of the Orders as those objectives were known or should have been known to be unachievable by virtue of the information and data available to the Provincial Health Officer.

45. The Plaintiffs and putative Class Members plead that as a result of the Provincial Health Officer's actions they suffered significant economic deprivation and emotional trauma and that such harm was foreseeable by the Defendants.

46. The Plaintiffs and putative Class Members plead that the Provincial Health Officer, in exercising her statutory authority under the *Public Health Act* with reckless indifference or willful blindness, acted in bad faith and committed the tort of Misfeasance in Public Office.

Privacy Rights

47. The British Columbia *Privacy Act* , R.S.B.C. 1996, c. 373, s 1, provides:

(1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

(2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

(3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

48. The focus is on providing an individual with some measure of control over his or her personal information: The ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of a democracy. As the Supreme Court of Canada has previously recognized, legislation which aims to protect control over personal information should be characterized as "quasi-constitutional" because of the fundamental role privacy plays in the preservation of a free and democratic society.

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, at para. 24.

Dagg v. Canada (Minister of Finance) [1997] 2 S.C.R. 403, at paras. 65-66.

H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General), [2006] 1 S.C.R. 441, at para. 28.

49. The determination of liability for breach of privacy under the *Privacy Act* depends on the particular facts of each case. The Court must decide whether the plaintiff was entitled to privacy in the circumstances and, if so, whether the defendant breached the plaintiff's privacy. The trial judge has "a high degree of discretion" to determine what is a reasonable expectation of privacy in the circumstances.

Milner v. Manufacturers Life Insurance Company, 2005 BCSC 1661 [*Milner*], at paras. 74 and 7.

50. The *Privacy Act* expressly does not require the plaintiff to show that the privacy breach caused damage in the sense of actual harm.

Davis v. McArthur, 17 D.L.R. (3d) 760, 1970 CanLII 813 (B.C.C.A.), at pp. 764-765.

51. The Plaintiffs and putative Class Members plead that in requiring them to disclose private medical information to their Employers, the Orders intentionally, recklessly, or willfully, and without claim of right, intruded upon the Plaintiffs' and putative Class Members' private affairs; a reasonable person would regard this intrusion as highly offensive and causative of distress, humiliation, or anguish.

a. Collection of personal medical information relating to their COVID-19 vaccination status or medical history represents an unreasonable infringement of their privacy rights.

b. Dissemination of personal medical information relating to their COVID-19 vaccination status or medical history represents an unreasonable infringement of and intrusion on their privacy rights.

52. The Plaintiffs and putative Class Members plead that the Policy and Order's requirement for disclosure of private medical information violates common law and statutory privacy rights.

Inducement to Breach Contract

53. The essential elements of the tort of inducement to breach of contract are: the plaintiffs must establish (1) knowledge of the contract; (2) an intention to bring about a breach of contract; (3) conduct which results in the breach; (4) damage to the plaintiff; and (5) the lack of anything that might justify what the defendant did.

Canada Steamship Lines Inc v Elliot, 2006 FC 609 at para 23.

54. The Provincial Health Officer was aware of the existence of the contractual employment agreements when she decided to issue the Orders.

Amended Notice of Civil Claim Part 3, Paragraph 57.

55. The Plaintiffs and putative Class Members allege that the Provincial Health Officer intended to and caused, and/or induced, their healthcare Employers to breach contractual employment agreements by their actions in relation to: mandating vaccinations for COVID-19, the disclosure of private medical information; imposition of mandatory leave without pay; and/or unlawful termination by ordering the Employers to enforce the Orders absent justification.

Amended Notice of Civil Claim Part 3, Paragraph 58.

56. The Plaintiffs and putative Class Members allege that the conduct of the Provincial Health Officer in inducing the breach of Contract was unjustified and thus unlawful.

Amended Notice of Civil Claim Part 3, Paragraph 59.

57. The Plaintiffs and putative Class Members allege that as a result of the Provincial Health Officer's interference with the Plaintiffs' and Class Members' contractual relationship with the Employers, the Defendants have caused the Plaintiffs and Class Members to suffer damages.

Amended Notice of Civil Claim Part 3, Paragraph 60.

Section 2 (d) of the *Charter*

58. The Plaintiffs and putative Class Members plead that the Orders listed in Part 1, paragraphs 13 and 14 of the Amended Notice of Civil Claim violate s. (d) of the *Charter*, which guarantees the right to freedom of association.

59. What s. 2 (d) of the *Charter* protects is the "right of employees to associate in a process of collective action to achieve workplace goals."

Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27, at para 19.

60. Laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially

interfere with the activity of collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements.

Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27, at para 96.

61. Consultation assumes particular contextual significance in s. 2(d) cases because the protected right is one to a process of "associational collective activity in furtherance of workplace goals."

Fraser v. Ontario (Attorney General), 2011 SCC 20, at para 37.

62. Government actions suffer from overbreadth where "the law goes too far and interferes with some conduct that bears no connection to its objective".

Canada (Attorney General) v. Bedford, 2013 SCC 72 (CanLII), [2013] 3 SCR 1101, at para. 101.

63. The Plaintiffs and putative Class Members plead that the deprivation of associative rights by unilaterally imposing terms and condition of employment, absent consultation, consideration, or bargaining, contravenes the principles of fundamental justice because the Orders are overbroad, arbitrary, and not proportional.

Amended Notice of Civil Claim Part 3, Paragraph 63.

64. The Plaintiffs and Class Members plead that the Orders were issued in bad faith through reckless disregard or willful blindness to their disproportional, unsubstantiated impact and as a result violated their rights under s. 2(d) of the *Charter.*

Amended Notice of Civil Claim Part 3, Paragraph 61.

65. The Plaintiffs and Class Members plead that the Orders constitute an improper and unjustified imposition by the Provincial Health Officer of a new term and condition of employment absent collective bargaining, memoranda of agreement, consideration,

or consent to their existing and freely negotiated employment agreements and as such violate their protected right under s. 2(d) of the *Charter*.

Amended Notice of Civil Claim Part 3, Paragraph 62.

Orders Are Not Justified Under s. 1 of the *Charter*

66. The Plaintiffs and Class Members plead the Orders violate s. 2(d) by infringing on this right in a manner that does not accord with the principles of fundamental justice. The infringements cannot be justified pursuant to the criteria of s. 1 of the *Charter*. The infringements cannot be demonstrably justified because they were not minimally impairing and there was no proportionality between the deleterious and salutary effects of the Orders.

Amended Notice of Civil Claim Part 3, Paragraph 63.

67. The objectives underlying the Orders cannot be demonstrably justified as pressing and substantial. The Defendants have not discharged their evidentiary burden under *R. v. Oakes*, where the Court said that governments must adduce "cogent and persuasive" evidence.

68. The *Oakes* test sets up a process of "reasoned demonstration", as opposed to simply accepting the say-so of governments.

RJR-MacDonald Inc v Canada (Attorney General), [1995] 3 SCR 199, at paras. 129 and 133.

69. The s. 1 inquiry is by its very nature a fact-specific inquiry.

RJR-MacDonald Inc v Canada (Attorney General), [1995] 3 SCR 199, at para. 133.

70. Second, the orders are not minimally impairing, because:

a. the Orders do not provide for reasonable exemptions, such as natural immunity, a negative PCR or antigen test, a single vaccination after contracting COVID-19, or to allow individuals to wear protective masks and

follow appropriate hygiene as they have been prior to the promulgation of these Orders.

b. the Orders create a term and condition of employment which, unjustifiably, absent consultation, consideration, or agreement, supplants preexisting employment agreements; and

c. the Orders do not adopt less intrusive measures, such as universal rapid testing for COVID-19, amongst others.

71. In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the Court must examine the actual objective of the law. In determining proportionality, it must determine the actual connection between the objective and what the law will in fact achieve; the actual degree to which it impairs the right; and whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right. In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions.

72. Whether a limitation of *Charter* protections by a law of general application is justified under s. 1 is determined by an *Oakes* analysis. Alternatively, the analysis in *Doré v. Barreau du Québec* , 2012 SCC 12 applies in administrative settings.

73. In any event, the *Doré* framework does not deviate fundamentally from the principles set out in *Oakes* for assessing the reasonableness of a limit on a *Charter* right under s. 1.

Law Society of British Columbia v. Trinity Western University, 2018 SCC 32.

Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario, 2019 ONCA 393, at para. 60.

Requirements for Class Certification Have Been Met

74. The Amended Notice of Civil Claim raises genuine legal and factual questions that must be determined at trial. Accordingly, the requirement in section 4(1)(a) of the CPA has been met.

75. With respect to the remaining requirements for certification set out in sections 4(1)(b) through 4(1)(e) of the *Act*, the Plaintiff need only show "some basis in fact". This is a low evidentiary threshold that falls below the balance of probabilities test.

Hollick v. Toronto (City of), 2001 SCC 68.

Section 4(1)(b) of the CPA

76. Section 4(1)(b) of the *Act* requires that there be an identifiable class of two or more persons. This requirement has been satisfied given the proposed class definition, which has objective criteria and is sufficiently clear. Any particular person's claim to membership in the class is determined by stated, objective criteria.

77. There is a rational connection between the common issues and the proposed class definition.

78. Sheikh Law has been retained to represent the Plaintiffs.

Section 4(1)(c) of the CPA

79. Section 4(1)(c) of the CPA requires that the claims of Class Members raise a common issue. The commonality threshold is low and a triable factual or legal issue, which advances the litigation when determined will be sufficient.

80. The Plaintiff need not show that everyone in the Class shares the same interest in the resolution of the common issue or that the issue will be answered in the same way for each Class Member. Furthermore, the possibility that there may be differences between Class Members doesnot represent a barrier to finding that common issues exist.

Hollick v. Toronto (City), 2001 SCC 68, at para. 21.

Rumley v. British Columbia, 2001 SCC 69, at para. 33.

See also *Endean v. Canadian Red Cross Society*, 1997 CanLII 2079, (BCSC) rev'd on other grounds (1998) 48 B.C.L.R. (3d) 90 (C.A.).

81. To be considered common, issues need not be dispositive of the litigation.

McDougall v. Collinson, 2000 BCSC 398 (CanLII), at para. 86

82. For a class action to satisfy the commonality portion of the test, it does not have to resolve all issues that may exist in terms of establishing liability. The proposed classes share a central commonality, joining multiple classes in the same class proceeding would facilitate recognized goals of class proceedings.

Good v. Toronto (Police Services Board), 2016 ONCA 250, leave to appeal dismissed 2016 CanLII 76801 (SCC).

Ewert v. Canada (Attorney General), 2016 BCSC 962.

83. The requirement of commonality may be met even if the common issues make up a very limited aspect of the liability question and even though many individual issues remain after resolving them.

Cloud v. Canada (Attorney General), 2004 CanLII 45444 (ON CA), at para. 53.

84. Though the Plaintiffs propose common issues, it is for the court to determine and frame the issues. At the certification stage, the common issues should be framed in general terms. As the action proceeds, the court may determine that the common issues need to be more particularized.

Cloud v. Canada (Attorney General), 2004 CanLII 45444 (ON CA).

85. The Plaintiffs propose common issues of fact and law, as set out at Schedule A.

86. The Affidavits relied on by the Plaintiffs speak to the commonality of the factual events in issue, raising common issues of law. There is "some basis in fact" on the record before the Court that the resolution of the proposed common issues is necessary to the resolution of each Class Member's claim. The resolution of these

issues will avoid duplication of fact-finding and legal analysis. Accordingly, the requirements of s. s.4(1)(c) of the CPA have been met.

Section 4(1)(d) of the CPA

87. To satisfy section 4(1)(d) of the CPA, a class proceeding must be the preferable procedure for the fair and efficient resolution of the common issues.

88. Section 4(2) of the CPA, lists the following matters that the court must consider in deciding whether a class proceeding is preferrable:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

89. Section 4(2) of the CPA provides a non-exhaustive list of considerations that inform the analysis to determine whether a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. In this case, each consideration militates in favour of certification.

90. In determining whether a class action is the preferable procedure, the Court must review the factors in s. 4(2) collectively. No single factor is determinative. The inquiry

into preferable procedure "should be conducted through the lens of the three principle procedural advantages of class actions: judicial economy, access to justice, and behavioural modification".

AIC Limited v. Fischer, 2013 SCC 69, at para. 16.

See also *Hollick v. Toronto (City of)*, 2001 SCC 68, at paras. 27-31.

91. The preferability requirement has two concepts at its core: first, whether the class action would be a fair, efficient and manageable method of advancing the claim; second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members.

Toronto Community Housing Corporation v. Thyssenkrupp Elevator (Canada) Limited, 2011 ONSC 4914.

92. Class proceedings are the only practical and efficient means of resolution for those whose claims have modest damage potential and for whom separate proceedings would not be feasible. Greater difficulties would be experienced in administering separate proceedings for modest claims unless those claims were simply not pursued at all, which would defeat the whole purpose of class proceedings.

Harrington v. Dow Corning Corp., 1996 CanLII 3118 (BC SC).

93. The common issues in Schedule A predominate over any questions affecting only individual class members.

94. Aggregating these claims under the CPA benefits Class Members and the judicial system. Requiring Class Members to prosecute separate actions would be expensive, impractical and inefficient. In reality, these claims would not be brought as individual actions since the damages owed to each Class Member will be relatively small. Class Members would have no redress for the spectrum of damages they have suffered as a consequence of the Defendants' conduct. A class

proceeding will avoid inconsistent findings and will promote the goals of class action litigation.

95. As such, there is "some basis in fact", on the record before the Court, that a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues.

Section 4(1)(e) of the CPA

96. Section 4(1)(e) of the CPA requires that there be a representative Plaintiff who:

a. would fairly and adequately represent the interests of the class,

b. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying Class Members of the proceeding, and

c. does not have, on the common issues, an interest that is in conflict with the interests of other Class Members.

97. The proposed representative Plaintiffs meet these stated criteria. In their respective affidavits, the Plaintiffs depose that they will do their best to fairly and adequately represent the interests of Class Members. The Plaintiffs do not have on the common issues an interest that conflicts with the interests of other Class Members.

Affidavit # 1 of Jedediah Jeremiah Merlin Ferguson at paragraphs 21-26.
Affidavit # 1 of Terri Lyn Perepolkin at paragraphs 26-31.

98. The proposed litigation plan attached as Schedule B addresses the progression of the action and proposes a workable plan for pursuing the matter through to the trial of the common issues and, ultimately, for distributing damages to Class Members. The plan is flexible and provides for ongoing review by the parties and the Court as the litigation proceeds.

99. In any event, the Court does not scrutinize the plan at the certification hearing. The court may anticipate that the plan will require amendments as the case proceeds and the nature of any individual issues are demonstrated.

Fakhri et al v. Alfalfa's Canada Inc. cba Capers, 2003 BCSC 1717, at para. 77, aff'd at 2004 BCCA 549.

100. The requirement of s. 4(1)(e) of the CPA has been met.

Conclusion

101. Certification of this action as a class proceeding meets the three goals of class proceedings as described by the Supreme Court of Canada in the trilogy of *Rumley v. British Columbia*, 2001 SCC 69, *Hollick v. Toronto (City)*, 2001 SCC 68, and *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, and affirmed in *AIC Limited v. Fischer*, 2013 SCC 69, namely:

    a. access to justice;

    b. judicial economy; and

    c. behaviour modification.

Part 4: MATERIAL TO BE RELIED ON

102. Pleadings;

103. Affidavit #1 of Terri Perepolkin, made June 11, 2024

104. Affidavit #1 of Jedediah Ferguson, made June 10, 2024;

105. Affidavit #1 of Alan Cassels, made June 2, 2024;

106. Affidavit #1 of Angela Wood, made July 2, 2024;

107. Such further materials as may be advised.

The Applicant estimates that the application will take five days.

This matter is not within the jurisdiction of a Master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to

respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

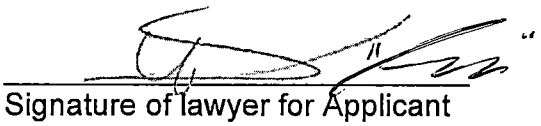
(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: October 18, 2024



Signature of lawyer for Applicant
UMAR A SHEIKH
"AGENT FOR"

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs ..... of Part 1 of this notice of application

[ ] with the following variations and additional terms:

.....

.....

.....

Date: .....[*dd/mmm/yyyy*].....

.....

Signature of [ ] Judge [ ] Master

Appendix

[*The following information is provided for data collection purposes only and is of no legal effect.*]

THIS APPLICATION INVOLVES THE FOLLOWING:

[*Check the box(es) below for the application type(s) included in this application.*]

[ ] discovery: comply with demand for documents

[ ] discovery: production of additional documents

[ ] other matters concerning document discovery

[ ] extend oral discovery

[ ] other matter concerning oral discovery

[ ] amend pleadings

[ ] add/change parties

[ ] summary judgment

[ ] summary trial

[ ] service

[ ] mediation

[ ] adjournments

[ ] proceedings at trial

[ ] case plan orders: amend

[ ] case plan orders: other

[ ] experts

[X] other - certification

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SCHEDULE "A" - PROPOSED COMMON ISSUES

Misfeasance in Public Office

1. Was the Provincial Health Officer aware, or should she reasonably have been aware, that COVID-19 vaccinations did not prevent transmission of COVID-19 and had serious risks of adverse side effects?

2. Did the Provincial Health Officer reasonably and lawfully believe mandating vaccinations for COVID-19 was a reasonable and proportional approach to prevent transmission of COVID-19 within the British Columbia Health Sector?

3. Was the Provincial Health Officer aware that her conduct in ordering mandatory vaccinations for COVID-19 was likely to injure the Plaintiff and putative Class Members?

The British Columbia Privacy Act

4. Did the Public Health Order(s) breach the Plaintiff and putative Class Members' privacy pursuant to the *Privacy Act* when they required disclosure of COVID-19 vaccination status?

Inducement to Breach Contract

5. Was the Provincial Health Officer aware of the preexisting employment contracts of the Plaintiffs' and putative Class members?

6. Were the Provincial Health Officers Orders a new term and condition of employment for health care workers?

7. Did the Provincial Health Officers Orders induce healthcare employers to breach the preexisting employment contracts of the Plaintiffs' and putative Class members?

8. Were the Orders issued by the Provincial Health Officer justified?

Charter

9. Do the *Orders* and create and impose a new term and condition of employment for unionized employees of the British Columbia Public Service ?

10. If yes, did the Provincial Health Officer engage in consultation with the impacted healthcare employees, prior to the issuance of the Orders?

11. Do the *Orders* infringe on s. 2(d) *Charter* right of freedom of association?

12. If the Orders violated s.2(d) the *Charter,* can such violations be saved by section 1 of the *Charter*?

Damages

13. Are damages pursuant to s. 24 of the *Charter* an appropriate and just remedy for the breaches of Charter rights?

14. Are the Plaintiff and putative Class Members entitled to general damages based on the breach of the Privacy Act?

15. Are the Plaintiff and putative Class Members entitled to general damages based on the tort of Misfeasance of Public Office?

16. Are the Plaintiff and putative Class Members entitled to general damages based on the tort of inducement to breach contract?

17. If the Defendants are liable to the Plaintiff and putative Class Members for damages, what is the appropriate quantum of damages?

18. Should the court make an aggregate damages award for all or part of the damages? If so, in what amount?

19. If awarding aggregate damages is not appropriate in the circumstances, what is the appropriate method of assessing damages?

20. Should the Defendants pay the cost of administering and distributing the Plaintiff and Class Member's recovery? If so, in what amount?

21. Would damages fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches?

22. Have the Defendants demonstrated countervailing factors that defeat the functional considerations that support a damage award and render damages inappropriate or unjust?

23. What is the appropriate quantum of damages?

SCHEDULE "B" - PROPOSED LITIGATION PLAN

CLASS COUNSEL AND THE RESOURCES AVAILABLE TO PROSECUTE THE ACTION

1. The Plaintiffs counsel ("Class Counsel") possesses the requisite knowledge, skill, experience, personnel, and financial resources to prosecute this class action.

2. Class Counsel anticipates that prosecuting this action will require:

    a. reading, organizing, profiling, scanning, managing and analyzing thousands of documents;

    b. the analysis of complex legal issues; and

    c. expert evidence.

THE COMPOSITION OF THE CLASSES

3. At present, the Class is defined as:

> All healthcare workers in British Columbia who have been subject to the Covid-19 Vaccination Status information and Preventative Measures order(s) issued by the Provincial Health Officer on October 14, 2021, November 9, 2021, November 18, 2021, September 12, 2022, April 6, 2023, and October 5, 2023, pursuant to Sections 30, 31, 32, 39 (3), 54, 56, 57, 67 (2) and 69 Public Health Act, S.B.C. 2008 ("the Class").

REPORTING TO AND COMMUNICATING WITH CLASS MEMBERS

5. Based on information provided by the Office of the Attorney General of British Columbia, Class Counsel estimates that two hundred and twenty thousand British Columbia healthcare workers have been affected by the Defendants' actions.

6. The Plaintiffs are in the process of developing a website for this proposed class proceeding (the "Plaintiffs' Website"). Class Counsel is also developing a website dedicated to its class action work ("Counsel Website") Current information on the

status of the action will be posted on the Plaintiffs' Website and the Counsel Website (collectively, the "Websites") and will be updated regularly. Copies of some of the Court decisions and other information relating to the action will be accessible on the Websites.

7. The Counsel Website will contain the contact information of Class Counsel and allows Class Members to submit enquiries to Class Counsel. Enquiries are sent directly to Class Counsel who will promptly respond.

8. Class Counsel is also maintaining a database of potential Class Members who have identified themselves as interested in participating in the action.

PLEADINGS

9. The Plaintiffs will ask the Court to order the Defendants to deliver any further amendments to the Response to Civil Claim in accordance with the Supreme Court Civil Rules or the general practice of the Court in respect of class proceedings.

LITIGATION SCHEDULE

10. The parties have agreed to a litigation schedule, which is subject to change as follows:

Date	Event
July 2, 2024	Delivery of Plaintiff's certification application and affidavits, including expert evidence
TBD	Delivery Defendants' certification response and affidavits as well as rule 9-5/9-6 application materials, including expert evidence
September 3, 2024	Delivery of Plaintiff's reply materials on certification, and application response
September 16,2024	Delivery of Plaintiff's certification argument
October 28, 2024	Delivery of Defendants' certification argument
November 12, 2024	Delivery of Plaintiff's reply certification argument

November/December, 2024	Certification hearing (to be heard contemporaneously with Defendants' Rule 9-5 /9-6 Application)

11. A further case conference will be scheduled after the certification application, to finalize the schedule for the following:

    a. delivery of any further amended Response to Civil Claim;

    b. document production;

    c. examinations for discovery;

    d. delivery of expert reports; and

    e. trial of the common issues.

12. The Plaintiffs may also ask that the litigation schedule be amended from time to time as required.

DOCUMENT EXCHANGE AND MANAGEMENT

13. The Defendants possess most of the documents relating to scientific and other information they rely on. These documents will be produced to Class Counsel through the normal production, cross-examination and examination for discovery processes after certification of the proceeding.

14. Class Counsel anticipates and is able to handle the intake and organization of the large number of documents that will likely be produced by the Defendants after certification. Class Counsel will use data management systems to organize, code, and manage the documents.

15. If required, the documents may be maintained on a secure, password-protected internet website for access by Class Counsel.

16. The same data management systems will be used to organize and manage all relevant documents in the possession of the Plaintiffs although the Plaintiffs have relatively few documents relating to the common issues.

17. The parties will execute a version of the standard protocol under the Electronic Evidence Practice Direction - July 1, 2006.

NOTICE OF CERTIFICATION AND OPT-OUT PROCEDURE

18. If the action is certified as a class proceeding, the Court will be asked to:

    a. settle the form and content Notice of Certification and the opt-out period, within 30 days of the issuance of the certification order (the "Certification Order");

    b. set an opt-out date of 90 days after the date of the Certification Order; and

    c. settle the means by which the Notice of Certification and the opt-out period will be given (the "Notice Process"). The Plaintiffs propose that the Notice of Certification be disseminated in accordance with the following Notice Process:

        i. published once in a full-page advertisement in the Vancouver Sun and The Province (Vancouver);

        ii. posted on Class Counsel's Website;

        iii. delivered by Class Counsel to any Class Member who requests it.

19. The Plaintiffs will request that the costs of the Notice Process be paid for by the Defendants.

20. The Plaintiffs propose the following opt-out procedure:

    a. 90 days after the Certification Order, a person may opt-out of the class proceeding by sending a written election to opt-out to a person designated by the Court;

    b. a guardian may opt-out a minor or a person who is mentally incapable without leave of the Court; and

    c. no Class Member may opt-out of the class proceeding after the expiration of the opt-out period without leave of the Court.

DISCOVERY

21. Within 30 days of the date of the Certification Order, the Plaintiffs shall deliver their initial list of documents and provide copies of those documents to the Defendants in electronic form.

22. Within 30 days of the Certification Order, the Defendants shall deliver their initial list of documents and provide copies of those documents to the Plaintiffs in electronic form.

23. Any additional production shall be made by the parties on an ongoing basis thereafter. For greater certainty and to achieve efficiency, parties must respond to any demands for additional documents pursuant to Supreme Court Civil Rule 7-1(10) and (11) within 14 days of receipt of the demand.

24. Within 60 days of the Certification Order, a schedule for Examinations for Discoveries shall be set at a Case Management Conference. For greater certainty, Examinations for Discoveries shall not have to await the completion of the document discovery process. In advance of the Case Management Conference, the Defendants shall provide a list of at least three proposed representatives for examinations and their relevant areas of knowledge. This is without prejudice to the Plaintiffs' right to select an alternative representative or to seek additional discovery from a witness or witnesses.

25. Examinations for Discoveries shall be completed not less than three months before the common issues trial.

26. The parties have leave at any time after the delivery of the Defendants' List of Documents to serve interrogatories in accordance with Supreme Court Civil Rule 7-

27. The Plaintiffs may ask the Court for an order allowing examination of multiple representatives of each of the Defendants, if necessary.

INTERLOCUTORY APPLICATIONS

28. Pursuant to s. 14(1) of the CPA, the Case Management Judge shall hear all interlocutory applications either at regular Case Management Conferences or on a date for hearing secured at a Case Management Conference or through Trial Division as directed by the Case Management Judge. For greater certainty and to achieve efficiency, the parties may request and the Case Management Judge may direct on his own motion, that applications be heard in regular Chambers.

29. All materials in support of an interlocutory application shall be delivered and filed in accordance with the Supreme Court Civil Rules unless otherwise directed by the Case Management Judge. If an application is being made in regular Chambers, a copy of the application and any order must be delivered to Trial Scheduling for the attention of the Case Management Judge.

30. No applications may be brought prior to trial under Rules 9-3, 9-4, 9-5, 9-6, 9-7, 18-2, 22-7, except with leave of the Court.

EXPERTS

31. Any expert reports that the parties intend to rely upon at trial shall be delivered in accordance with the Supreme Court Civil Rules.

CLARIFICATION OF COMMON ISSUES

32. Following certification, Examinations for Discoveries, and the exchange of expert opinions, if any, and before the trial of the common issues, the Plaintiffs may ask the Court for an order to clarify and/or redefine the common issues, if required.

DISPUTE RESOLUTION

33. The Plaintiffs are willing to participate in mediation if the Defendants are prepared to do so.

TRIAL OF THE COMMON ISSUES

34. The Plaintiffs will ask that the common issues trial will proceed within six months after the completion of Examinations for Discoveries on a date to be determined.

35. The parties will exchange Witness Lists and Trial Briefs in accordance with the Supreme Court Civil Rules. A Trial Management Conference will be held in accordance with the Supreme Court Civil Rules.

36. In advance of the Trial Management Conference, the parties will meet and confer on a documents agreement.

37. Assuming that the common issues are resolved by judgment in favour of the Plaintiffs, the Plaintiffs will ask the court to award damages to the Class Members in the following manner or such manner as the Court may direct:

    a. An aggregate amount representing the damages for breaches of the *Charter* pursuant to s.29 of the CPA;

    b. An aggregate amount representing the damages for misfeasance in public office and other damages pursuant to s.29 of the CPA;

    c. Any applicable pre-judgment and/or post-judgment interest for the above amounts.

38. Alternatively, or to the extent that any damages issues cannot be determined on an aggregate basis, the Plaintiffs will seek orders to allow the Class Members to proceed with the balance of the action in the manner set out below.

NOTICE OF DETERMINATION OF COMMON ISSUES

39. The Plaintiffs will ask the Court to:

    a. settle the form and content of a notice of determination of the common issues (the "Notice of Determination");

    b. order that the Notice of Determination be distributed substantially in accordance with the Notice Process set out in paragraph 19, except that the

Notice of Determination shall not be sent to any Class Member who opted out in accordance with the procedure set out therein; and

c. order that the costs of the distribution of the Notice of Determination be paid by the Defendants.

INDIVIDUAL ISSUES DETERMINATIONS

40. To the extent there are any individual issues that remain to be decided, the Plaintiffs propose that the parties convene pursuant to ss. 27 and 28 of the CPA to determine the appropriate course for any remaining issues.

41. The determination of what is the most appropriate and expeditious method for resolving these issues will depend on what portion of damages remain to be resolved and the evidence provided during the discovery process.

DISTRIBUTION PROTOCOL IF AGGREGATE AWARD IS MADE

42. The Plaintiffs will propose a claims process to be supervised by a Court appointed claims administrator (the "Administrator"), who will report to the Court, and whose fees will be paid for by the Defendants.

43. Without limiting the generality of the foregoing, the Court will be asked to:

a. approve methods of distribution for any damages payable to Class Members;

b. settle the claim form (the "Claim Form"), both in web format and paper-based format, for any Class Members that are required to submit a claim;

c. set a claims deadline by which the date the claimants will be required to file their claims ("Claims Deadline");

d. direct the Administrator to hold any monies recovered at the common issues trial and to implement the distribution plan by, among other things, receiving and evaluating Claim Forms in accordance with protocols approved by the Court, supervising the distribution of funds to Class Members.

44. Each claimant must deliver a completed Claim Form to the Administrator before the Claims Deadline.

45. In and with the Claim Form, the claimant will assert the basis of his or her eligibility as a Class Member.

46. The Administrator shall decide (the "Eligibility Decision"), based on information submitted in the Claim Form:

    a. whether or not a claimant is a Class Member who is entitled to a share of the aggregate award of damages;

    b. the share of aggregate damages to which each eligible Class Member is entitled.

47. Upon determining a Class Member's eligibility for a share of the aggregate damages, the Administrator shall issue an Eligibility Decision to the Class Member setting out the amount of the Class Member's entitlement, if any, and the reasons for that decision. The Administrator will send each Eligibility Decision by email or regular mail to the Class Member and file the Eligibility Decision with the Court.

48. If a Class Member disagrees with the Eligibility Decision, the Class Member may file an Appeal form.

49. Appeals by Class Members of the Eligibility Decision will be handled by the Court.

50. The Court's decision will be issued in a report, which will be confirmed on the expiration of 15 days after a copy is mailed or emailed to the Appellant Class Member.

51. As soon as practicable after the Claims Deadline, on notice to Class Counsel and the Defendants, the Administrator will report to the Court the proposed distribution for each Class Member including any pre-judgment interest award that has been paid to the Administrator.

52. If there is no overall settlement with the Defendants and each claim must be proven and assessed, then the Defendants should be required to pay to the Administrator the amount of each judgment immediately after each report becomes final. The Administrator shall hold the money in trust and invest it as the Court directs.

53. If a lump sum is recovered from the Defendants at the common issues trial, no distribution to eligible Class Members shall be made until authorized by the Court. The Administrator may make an interim distribution if authorized by the Court.

54. Each eligible Class Member shall electronically or physically sign such documents as the Administrator may require in accordance with any protocol approved by the Court as a condition precedent to receiving any distribution.

INSUFFICIENT RECOVERED MONIES

55. In the event the Defendants do not pay the judgments in full, the Court will be asked to give further directions to ensure that there are no priorities among eligible Class Members.

CY-PRES DISTRIBUTION

56. If there is a residue from the recovered monies, (and any interest that has accrued thereon) after payment of all legal fees and expenses and administrative costs, the Court will be asked to authorize that this residue be distributed cy-pres in accordance with s.36.2 of the *Act*, part of which to be designated for designated for pro-bono legal advice initiatives. This distribution would indirectly benefit Class Members who cannot be located or did not submit a claim. The cy-pres distribution shall be paid in such manner to such recipients and in such proportions as the Court may decide.

CLASS COUNSEL FEES AND ADMINISTRATION EXPENSES

57. The Court will be asked to fix the amount of Class Counsel fees, disbursements and applicable taxes ("Class Counsel Fees"). Class Counsel will ask the Court to direct

the Administrator and Defendants to pay the Class Counsel Fees out of the monies recovered or owing as a first charge.

58. The Court will be asked to fix the costs of the persons appointed to implement and oversee the distribution plan such as the Administrator and to order payment of these costs as a second charge any monies paid by the Defendants.

FINAL REPORT

59. After the Administrator makes the final distribution to Class Members and to any cy-pres recipients, the Administrator shall make its final report to the Court in such manner as the Court directs and the Court will be asked to then discharge the Administrator.

REVIEW OF THE LITIGATION PLAN

60. This plan will be reconsidered and may be revised under the continuing case management authority of the Court, if required, both before and after the determination of the common issues.