SCS APPROVED

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. 1996, c. 50

NOTICE OF APPLICATION

Names of applicants: 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 (the "**PHO**") (collectively, the "**Defendants**")

To: the plaintiffs

TAKE NOTICE that an application will be made by the Defendants to Justice Edelmann at the courthouse at 850 Burdett St., Victoria, B.C. on April 28, 2025 at 10:00 a.m., as arranged with Scheduling, for the orders set out in Part 1 below.

The Defendants estimate that the application will take 5 days, together with the other applications scheduled to be heard at the same time.

This matter is not within the jurisdiction of an associate judge.

Part 1: ORDERS SOUGHT

1. An order pursuant to Rule 9-5(1)(d) striking the amended notice of civil claim in its entirety, without leave to amend, and dismissing the action.

2. Alternatively, orders pursuant to Rule 9-5(1)(a):

a. striking paragraphs 66 and 67 of the amended notice of civil claim, without leave to amend, and dismissing the breach of privacy claim; and,

b. dismissing the action as against the PHO.

3. In the further alternative, an order pursuant to Rule 9-6 dismissing the misfeasance in public office claim.

4. Costs.

Part 2: FACTUAL BASIS

Background

5. On March 17, 2020, the PHO issued a notice of regional event under s. 52(2) of the *Public Health Act*,[1] designating the transmission of SARS-CoV-2 as a regional event as defined in s. 51 of the *Public Health Act*.[2]

Impugned PHO orders

6. 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*" (each an "**Order**" and collectively the "**Orders**"). The latter Order remained in force until the PHO rescinded the notice of regional event effective July 26, 2024.[3]

7. In essence, the Orders provided that, to be eligible to work at designated health care facilities, certain health care workers had to 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.

Plaintiffs' labour grievances and their resolution

8. The plaintiff, Jedediah Ferguson, was employed by the Vancouver Island Health Authority as a laundry worker at Cumberland Regional Hospital.

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[1] S.B.C. 2008, c. 28.

[2] Affidavit #1 of Dr. Brian Emerson, made October 7, 2024 ("**Emerson #1**"), at para. 17, Ex. C.

[3] Affidavit #1 of Dr. Elizabeth Brodkin, made October 21, 2024 ("**Brodkin #1**"), at para. 6, Ex. B.

Mr. Ferguson was a unionized employee and a member of the Hospital Employees' Union.[4] The Hospital Employees' Union is one of the constituent unions in the Facilities Subsector Bargaining Association.[5] Mr. Ferguson was therefore subject to the collective agreement between the Facilities Subsector Bargaining Association and the Health Employers Association of British Columbia ("**HEABC**").[6]

9. The plaintiff, Terri Perepolkin, was employed by the Interior Health Authority as a laboratory technologist at Vernon Jubilee Hospital. Ms. Perepolkin was a unionized employee and a member of the Health Sciences Association.[7] The Health Sciences Association is one of the constituent unions in the Health Science Professionals Bargaining Association.[8] Ms. Perepolkin was therefore subject to the collective agreement between the Health Science Professionals Bargaining Association and HEABC.[9]

10. Mr. Ferguson and Ms. Perepolkin both declined to be vaccinated against COVID-19 (and did not receive exemptions). Under the Orders, they were ineligible to continue working for their then-employers.

11. The Vancouver Island Health Authority put Mr. Ferguson on leave without pay in October 2021 and terminated his employment in November 2021.[10]

12. The Interior Health Authority put Ms. Perepolkin on leave without pay in October 2021 and terminated her employment in November 2021.[11]

13. Both plaintiffs availed themselves of the grievance procedures under their respective collective agreements:

a. Mr. Ferguson filed a labour grievance when he was put on leave without pay and another when his employment was terminated.[12] Mr. Ferguson's union, the Hospital Employees' Union, referred his termination grievance to arbitration before an industry troubleshooter (a form of arbitration), who concluded that the termination was

[4] Amended notice of civil claim ("**ANOCC**"), Part 1 at para. 1.
[5] Affidavit #1 of Erin Cutler, made October 14, 2024 ("**Cutler #1**"), at para. 14.
[6] Affidavit #1 of Ryan Murray, made October 16, 2024 ("**Murray #1**), at para. 33, Ex. X.
[7] ANOCC, Part 1 at para. 2.
[8] Cutler #1, at para. 21.
[9] Murray #1, at para. 31, Ex. T.
[10] ANOCC, Part 1 at para. 1.
[11] ANOCC, Part 1 at para. 2.
[12] Cutler #1, at paras. 12, 13, Exs. A, B.

justified.[13] Following the troubleshooter's decision, the Hospital Employees' Union withdrew Mr. Ferguson's grievance.[14] The Hospital Employees' Union and HEABC subsequently entered into a "process agreement", resolving all outstanding grievances regarding terminations of unvaccinated employees (including Mr. Ferguson's grievances).[15]

b. Ms. Perepolkin also filed a labour grievance when she was put on leave without pay and another when her employment was terminated.[16] Her union, the Health Sciences Association, referred her termination grievance to arbitration.[17] The Health Sciences Association and HEABC subsequently entered into a process agreement, resolving all outstanding grievances regarding terminations of unvaccinated employees (including Ms. Perepolkin's grievances).[18]

Pleadings

14. The plaintiffs advance three tort claims (inducing breach of contract, breach of privacy, and misfeasance in public office) and claim under s. 2(d) of the *Charter*.

Hoogerbrug

15. The October 5, 2023 iteration of the Order was the subject of three petitions for judicial review heard and decided together in *Hoogerbrug v. British Columbia*.[19] With one exception that is not material to this action, Justice Coval dismissed the petitions and held that the Order was reasonable.[20]

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[13] Affidavit #2 of Jedediah Ferguson, made August 21, 2024 ("**Ferguson #2**"), at para. 8, Ex. C.

[14] Ferguson #2 at para. 11, Ex. D.

[15] Cutler #1 at para. 15, Ex. C.

[16] Cutler #1, at paras. 17, 18, Exs. E, F.

[17] Affidavit #2 of Terri Lyn Perepolkin, made August 21, 2024 ("**Perepolkin #2**"), at paras. 8-9; Cutler #1 at paras. 19-20, Exs. G, H.

[18] Perepolkin #2 at paras. 8-9; Cutler #1 at para. 22.

[19] 2024 BCSC 794. The order of Justice Coval is now under appeal. See Affidavit #1 of Vanessa Lever, made October 16, 2024 (**"Lever #1**"), at paras. 4-11, Ex. C, D, E, F, G, H, I, J.

[20] The exception was with respect to a portion of the term of the Order in which the PHO exercised her power under s. 43 of the *Public Health Act* to suspend reconsideration requests. Justice Coval found that the PHO had not adequately explained why she suspended reconsideration requests for health care workers able to perform their roles remotely, or in-person but without contact with patients, residents, clients or the frontline workers who care for them. Justice Coval quashed that portion of the Order and remitted to the PHO to reconsider whether she should suspend reconsideration requests from that subset of workers. The PHO issued a reconsideration decision in August 2024: Brodkin #1 at para. 8, Ex. D.

Part 3: LEGAL BASIS

Overview

16. The Defendants respectfully submit that:

a. the action is an abuse of process that should be dismissed under Rule 9-5(1)(d);

b. alternatively, the breach of privacy claim and all the claims against the PHO are bound to fail and should be struck under Rule 9-5(1)(a); and,

c. in the further alternative, the misfeasance in public office claim raises no genuine issue for trial and should be dismissed under Rule 9-6.

This action is an abuse of process that should be struck and dismissed under Rule 9-5(1)(d)

(a) Overview

17. This action is an abuse of process for two reasons.

18. First, the plaintiffs are attempting to usurp the roles of their unions. Unionized employees give up certain individual rights in exchange for certain collective powers exercisable through unions.[21] The issues raised in this action could have been, and in some instances were, raised by unions through the mandatory grievance and arbitration processes set out in the relevant collective agreements. Many of those grievances have now been settled. To the extent that unions have settled grievances filed by the plaintiffs or putative class members, the issues raised by those grievances are *res judicata* and it is abusive for the plaintiffs to attempt to re-litigate them in this action. If the plaintiffs (or any putative class members) are dissatisfied with how their unions have handled or settled their grievances, their remedy is a fair representation complaint under s. 12 of the *Labour Relations Code*.[22]

19. The misfeasance in public office and breach of privacy claims are also an abuse of process because they seek to re-litigate the central conclusions of this Court in *Hoogerbrug*.

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[21] *Driol v. Canadian National Railway Company*, 2011 BCCA 74 at para. 18.
[22] R.S.B.C. 1996, c. 244.

(b) General principles

20. Abuse of process is a broad, flexible, and discretionary doctrine. Its primary purpose is to protect the integrity of the adjudicative functions of the Court and does not turn on the motives of the parties.[23] Relevant to the present action, the doctrine of abuse of process protects against collateral attacks (*i.e.*, submitting a dispute for resolution in one forum and attacking the result in another) [24] and inconsistent results (*i.e.*, wasting judicial resources re-litigating questions already resolved in another proceeding).[25]

(c) Plaintiffs are abusively attempting to usurp role of their unions

21. The first reason this action is an abuse of process is that the plaintiffs are attempting to usurp the roles of their unions. In other words, the plaintiffs are attempting to circumvent the mandatory grievance and arbitration processes set out in the relevant collective agreements, which are controlled by their unions, and instead pursue workplace complaints through this action. Unions have “ownership” over grievance proceedings and the exclusive power to determine whether and how to proceed—and when to settle.[26] It is an abuse of process for the plaintiffs to seek to wrest control from their unions through this action. If the plaintiffs (or any putative class members) are dissatisfied with how their unions have handled or settled their grievances, their remedy is a fair representation complaint under s. 12 of the *Labour Relations Code*. [27]

22. Moreover, to the extent that unions have settled grievances filed by the plaintiffs or putative class members, the issues raised by those grievances are *res judicata* and it is abusive to attempt to re-litigate them in this action.[28] Union members do not have a “veto over whether or not the grievance should be settled” and are ultimately bound by the settlement agreement’s terms.[29]

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[23] *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 51.

[24] *Pereira v. Dexterra Group Inc.*, 2021 BCSC 1484 [***Pereira BCSC***] at paras. 60-64; *Speckling v. C.E.P., Local 76*, 2006 BCCA 203 at paras. 43-47.

[25] *Bajwa v. Veterinary Medical Assn. (British Columbia)*, 2011 BCCA 265 at para. 36. See also: *Quinn v. British Columbia*, 2018 BCCA 320 at para. 81.

[26] *Pereira v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2024 BCCA 158 [***Pereira BCCA***] at para. 83.

[27] See *e.g.*, *Pereira BCSC* at paras. 60-64; *Speckling v. C.E.P.I, Local 76*, 2006 BCCA 203 at paras. 43-47.

[28] See *e.g.*, *McGregor v. Holyrod Manor*, 2014 BCSC 679 at para. 152, aff’d 2015 BCCA 157.

[29] *Pereira BCCA* at para. 83, citing *Judd v. Communications Energy and Paperworkers Union of Canada, Local 2000*, 2003 CanLII 62912 (B.C. L.R.B.) at paras. 94-95.

23. As developed in the following paragraphs, all of the issues raised by this action could have been, and in some instances were, raised by unions through the mandatory grievance and arbitration processes set out in the relevant collective agreements.

24. Dealing first with the inducing breach of contract claim, one element of this tort is, of course, a breach of contract.[30] To succeed in his inducing breach of contract claim against the PHO and Province, Mr. Ferguson would have to show (among other things) that his employer, the Vancouver Island Health Authority, breached the collective agreement between the Facilities Subsector Bargaining Association and HEABC by suspending him without pay and terminating his employment. Ms. Perepolkin would have to show that her employer, the Interior Health Authority, breached the collective agreement between the Health Sciences Association and HEABC.

25. The question of whether there has been a breach of a collective agreement is within the exclusive jurisdiction of a labour arbitrator [31] and, as set out above, Mr. Ferguson and Ms. Perepolkin each grieved their terminations. Their respective unions referred those grievances to arbitration and ultimately settled them with HEABC. It is an abuse of process for Mr. Ferguson and Ms. Perepolkin to now attempt to pursue that same issue—whether their employers breached the relevant collective agreements—through an artfully pleaded tort claim against the PHO and Province for inducing breach of contract. The abuse is exacerbated by the absence of the plaintiffs' employers and unions as parties. The plaintiffs are seeking to litigate the issue of whether their employers breached their collective agreements, without the participation of the employers or unions as parties and despite the settlement reached between them.

26. The breach of privacy claim also raises issues that turn on the collective agreements and could have been raised through the mandatory grievance and arbitration processes. The plaintiffs' complaint appears to be that the requirement in the Orders to disclose their vaccination status to their employers was a tortious breach of privacy. One of the issues raised by this claim is whether the plaintiffs' employers had the contractual right to collect this information under the relevant collective agreements. To take Mr. Ferguson as an example, he is subject to the collective agreement between the Facilities Subsector Bargaining Association and HEABC. Section 6.02 of that collective agreement provides that "[a]ny employee refusing, without sufficient medical grounds, to take medical or x-ray examination

[30] *Correia v. Canac Kitchens*, 2008 ONCA 506 at para. 99.
[31] *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.

at the request of the Employer, or to undergo vaccination, inoculation and other immunization when required, may be dismissed”.[32] Does this provision of the collective agreement include a contractual right for the Vancouver Island Health Authority to collect information about Mr. Ferguson’s vaccination status? That question is properly answered by a labour arbitrator, in a grievance referred to arbitration by Mr. Ferguson’s union.

27. The misfeasance in public office claim engages, among other issues, questions about the safety and efficacy of the vaccines. Putative class members’ unions could have challenged the safety and efficacy of the vaccines through grievance and arbitration processes,[33] for example by arguing that it was unreasonable for an employer to terminate an employee (as opposed to placing them on leave) because they declined to take a vaccine that is allegedly unsafe or ineffective.

28. Lastly, the *Charter* issues also turn on the proper interpretation of the collective agreements and could have been raised through the mandatory grievance and arbitration processes. The plaintiffs’ essential complaint is that the Orders imposed a new term and condition of employment outside of the collective bargaining process. However, even if this assertion were correct (which it is not), it would not establish that the Orders violate s. 2(d) of the *Charter*. Under that provision, the ultimate question is whether the impugned law “substantially interferes” with the right to collectively bargain, such that the employees’ efforts are rendered pointless or futile.[34] This is a contextual and fact-driven analysis—which in this case necessarily involves interpretation of each of the various collective agreements applicable to putative class members.[35]

29. To again take Mr. Ferguson as an example, his collective agreement provides that in the event that “present or future legislation… renders null and void or materially alters any provision of this Collective Agreement”, all other provisions remain in effect and the parties will negotiate necessary amendments.[36] This provision clearly permits some level of legislative and quasi-legislative interference with the terms and conditions of employment. The question is what level of

[32] Murray #1, Ex. X at p. 3298.

[33] Unions could not bring a tort claim against the PHO through grievance and arbitration processes. The point here is that the issues in the misfeasance claim could have been pursued through arbitration as parts of different possible claims and legal theories.

[34] *Fraser v. Ontario (Attorney General)*, 2011 SCC 20 at para. 46.

[35] *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para. 92; *Amalgamated Transit Union, Local 113 v. Ontario*, 2024 ONCA 407 at para. 39.

[36] Murray #1, Ex. X at p. 3287.

interference is permitted by Mr. Ferguson's collective agreement and when would such interference go outside the agreement and "substantially interfere" with Mr. Ferguson's collective bargaining rights? Given that labour arbitrators have jurisdiction to grant *Charter* remedies, including damages, that question is properly answered by a labour arbitrator, in a grievance referred to arbitration by Mr. Ferguson's union.[37]

30. Justice Punnett's reasoning in *Pereira BCSC* is apposite. There, the plaintiff was a unionized employee who was disciplined and suspended by her employer. Her union grieved both the discipline and suspension. Ultimately, the union settled both grievances. Following settlement of the initial grievances, the plaintiff was terminated for conduct the employer alleged violated workplace policy. The union also grieved her termination. The termination grievance was referred to arbitration and ultimately settled by the union. In response to the union's decision to settle the discipline, suspension, and termination grievances, the plaintiff filed a fair representation complaint under s. 12 of the *Code*. When the initial application was dismissed, she sought reconsideration, which was also dismissed.

31. After the plaintiff had exhausted the processes available to her under the *Code* and her collective agreement, she commenced an action against her employer for wrongful dismissal. The employer sought to have the claim struck on jurisdictional grounds and as an abuse of process. On abuse of process, Justice Punnett accepted the employer's submissions and struck the claim under Rule 9-5(1)(d). He held that by pursuing the grievance procedures and filing her s. 12 complaint, "the plaintiff implicitly accepted that [the labour arbitration] forum was the appropriate one to address her claims."[38] Following the Court of Appeal's decision in *Speckling*, the Court held as follows:

> [63] The plaintiff has, as a member of the Union, utilized the internal grievance procedure under the Collective Agreement and has brought two s. 12 applications to the Board. Her action in this Court is an attempt to re-litigate the matter. Such is a collateral attack, "offend(s) the legislative scheme" and is an abuse of process.

32. This reasoning is directly applicable here. Having quite properly followed the mandatory grievance and arbitration processes under their collective agreements, the plaintiffs are not permitted to now circumvent those processes because they are unhappy with the outcome. While the plaintiffs attempt to avoid this fact by artful pleading—advancing tort and *Charter* claims against the PHO and Province, rather than bringing more conventional claims against their

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[37] *Weber* at paras. 59-66.

[38] *Pereira BCSC* at para. 60.

employers—the substance of this action raises issues that were or could have been raised by the plaintiffs' unions in the grievance and arbitration processes.

33. For these reasons, the action is an abuse of process and should be struck under Rule 9-5(1)(d).

(d) Misfeasance and breach of privacy claims seek to re-litigate *Hoogerbrug*

34. The misfeasance in public office and breach of privacy claims are also an abuse of process because they seek to re-litigate the central conclusions of this Court in *Hoogerbrug*. This attempted re-litigation not only invites inconsistent results which undermine the finality of the judicial process, but also risks needlessly expending scarce judicial resources. Either outcome is an abuse of process.

35. Misfeasance in public office is an intentional tort with two distinguishing elements: (a) deliberate unlawful conduct in the exercise of public functions; and (b) awareness that the conduct is unlawful and likely to injure the plaintiff.[39] There are two types of misfeasance claims: "Category A" involves conduct that is specifically intended to injure a person or class of persons, whereas "Category B" involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff.[40]

36. The plaintiffs do not identify whether they are alleging Category A or Category B misfeasance, but it appears that they are alleging Category B. Reading the pleading charitably, the claim appears to be that the PHO committed Category B misfeasance by making the Orders while being reckless or willfully blind to whether the Orders were authorized by the *Public Health Act*. Specifically, the claim is that the PHO was reckless or willfully blind about alleged inefficacy and risks of vaccines.[41]

37. But this Court in *Hoogerbrug* held that the October 5, 2023 Order was reasonable (subject only to the limited exception noted above), i.e., that the October 5, 2023 Order was authorized by the *Public Health Act*. If the final Order was reasonable, surely the earlier Orders, made at more acute stages of the pandemic, were also reasonable. Since the Orders were lawful, the PHO cannot have acted unlawfully by making the Orders.

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[39] *Odhavji Estate v. Woodhouse,* 2003 SCC 69 at para. 32.
[40] *Odhavji Estate* at para. 22.
[41] ANOCC, Part 3 at para. 47.

38. On the efficacy of vaccines, this Court held in *Hoogerbrug* that there was "ample evidence" supporting the PHO's opinion that vaccination was "an important preventative measure against transmission of the virus, by the healthcare workforce, to both vulnerable patients and other workers".[42] This conclusion is irreconcilable with the plaintiffs' allegations in support of their misfeasance claim.

39. The same problem afflicts the breach of privacy claim: it seeks to re-litigate the conclusion that the Orders were authorized by the *Public Health Act*. Subparagraph 2(2)(c) of the *Privacy Act* provides that conduct is not a violation of privacy if the conduct was authorized or required by law. The plaintiffs cannot defeat this defence without re-litigating *Hoogerbrug* and attempting to show the Orders were not authorized by the *Public Health Act*.

40. In seeking to re-litigate the central conclusions of *Hoogerbrug*, the plaintiffs' misfeasance and breach of privacy claims are an abuse of process and should be struck under Rule 9-5(1)(d).

In the alternative, breach of privacy claim and claims against PHO are bound to fail and should be struck under Rule 9-5(1)(a)

(a) Overview

41. In the alternative, the breach of privacy claim and all claims against the PHO are bound to fail and should be struck under Rule 9-5(1)(a).

(b) Legal principles

42. The test under Rule 9-5(1)(a) is whether, assuming the pleaded facts are true, it is plain and obvious the claim will not succeed. Allegedly "novel" claims do not benefit from a lower threshold.[43] Evidence is not admissible to challenge the veracity of the pleaded facts, but it is admissible: (a) to explain and contextualize the legislative scheme;[44] and (b) where parties have referred to documents or agreements in their pleadings.[45] In this case, the plaintiffs' collective agreements fall into the latter category.[46]

[42] *Hoogerbrug* at paras. 13, 145. See generally: *Hoogerbrug* at paras. 142-150.
[43] *Atlantic Lottery Corp. v. Babstock*, 2020 SCC 19 at para. 19.
[44] *Hartt v. British Columbia (Attorney General)*, 2013 BCSC 264 at para. 26.
[45] *Bagri v. Quesnel (City)*, 2022 BCSC 2003 at para. 15; *Ahamed v The Great Canadian Landscaping Company Ltd.*, 2021 BCSC 197 at para 33.
[46] ANOCC, Part 1 at paras. 1-2.

(c) Breach of privacy claims should be struck

43. As noted above, s. 2(2)(c) of the *Privacy Act* provides that conduct is not a violation of privacy if the conduct was authorized or required by law. The Orders were authorized by the *Public Health Act* and therefore cannot constitute a tortious breach of privacy.

44. Moreover, during a public health emergency, s. 54(1)(k) of the *Public Health Act* specifically authorizes the PHO to "collect, use or disclose information, including personal information", even if that information could not otherwise be collected, used or disclosed. Pursuant to s. 53 of the *Public Health Act,* the emergency powers in that *Act* apply despite any other enactment.

45. Accordingly, the breach of privacy claim is bound to fail. Paragraphs 66 and 67 of the amended notice of civil claim plead the breach of privacy claim and should be struck without leave to amend under R. 9-5(1)(a).

(d) All claims against the PHO should be struck

46. All of the claims against the PHO are bound to fail because it is plain and obvious that s. 92 of the *Public Health Act* immunizes her from any claim for damages, including damages under s. 24(1) of the *Charter*.[47]

47. Although the plaintiffs seek declaratory relief reading down s. 92 of the *Public Health Act* to avoid its application to *Charter* damages, no factual or legal basis is pleaded to support a challenge to the constitutionality of s. 92 of the *Public Health Act*. The plaintiffs' notice of application is silent on this point, which amounts to abandonment of the challenge to the constitutionality of s. 92.

48. Accordingly, all claims against the PHO should be struck and the action should be dismissed as against her pursuant to R. 9-5(1)(a).

In further alternative, misfeasance claim should be dismissed under Rule 9-6 because there is no genuine issue for trial that vaccines are effective and safe

(a) Overview

49. Alternatively, the misfeasance in public office claim should be dismissed under Rule 9-6. As demonstrated by the expert report of Dr. Kindrachuk, Canada Research Chair in Molecular Pathogenesis of Emerging Viruses, there is no

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[47] *Ernst v. Alberta Energy Regulatory*, 2017 SCC 1; *Weisenburger v. College of Naturopathic Physicians of British Columbia*, 2024 BCSC 1047 at paras. 106-123.

genuine issue for trial that COVID-19 vaccines are effective and safe. Given that COVID-19 vaccines are effective and safe, the PHO cannot have committed misfeasance in public office by making the Orders while reckless or willfully blind about alleged inefficacy and risks of vaccines.

(b) General principles

50. An application under Rule 9-6 "is a challenge on a limited review of evidence".[48] Defendants will succeed "by showing the case pleaded by the plaintiff is unsound or by adducing sworn evidence that gives a complete answer to the plaintiff's case".[49] The court is not permitted to weigh evidence on a Rule 9-6 application beyond determining whether it is "incontrovertible".[50] If the defendant meets their burden, the claim must be dismissed.

51. While the court cannot weigh evidence on a Rule 9-6 application, it must be satisfied that evidence parties rely on to establish a genuine issue for trial is admissible.[51] Likewise, to the extent a plaintiff argues their evidence controverts that of the defendant, the court is entitled to consider whether there is a genuine contradiction in the evidence.[52]

52. Proposed class action proceedings enjoy no special status and, until certified, are treated as any other individual action.[53] As a result, "[i]t is appropriate, and in the interests of justice, for a summary disposition to be heard in conjunction with a class action certification application."[54] Resolving some or all proposed common issues via summary procedure advances the purposes of the *CPA* and is consistent with the court's gatekeeping function, as it narrows the scope of the claim and promotes efficiency and judicial economy.[55]

(c) No genuine issue for trial that vaccines are effective and safe

53. The plaintiffs allege that, in enacting the Orders, the PHO acted with reckless indifference or willful blindness to alleged inefficacy and risks of vaccination against COVID-19.[56] However, as demonstrated by Dr. Kindrachuk's

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[48] *Beach Estate v. Beach*, 2019 BCCA 277 at para. 48.
[49] *Beach Estate* at para. 48.
[50] *Beach Estate* at para. 48.
[51] See *e.g.*, *Vanguard Mortgage Investment Corporation v. Dietterle*, 2022 BCSC 1512 at paras. 40-52; *Williams v. Audible Inc.*, 2022 BCSC 834 at paras. 78-88.
[52] See *e.g.*, *Latifi v. The TDL Group Corp.*, 2024 BCSC 832 at paras. 88-94.
[53] *Dussiaume v. Sandoz Canada Inc.*, 2023 BCSC 795 at para. 21.
[54] *Dussiaume* at para. 21.
[55] *Dussiaume* at paras. 21-23.
[56] ANOCC, Part 3 at para. 47.

expert report, there is no genuine issue for trial that COVID-19 vaccines are effective and safe.

54. Dr. Kindrachuk is an Associate Professor at the University of Manitoba and Canada Research Chair in Molecular Pathogenesis of Emerging Viruses. His field of expertise is the investigation of emerging viruses, the infections they cause, and their impact on global health. He has been actively involved in emerging virus research since 2009 with a focus on those viruses that are considered global health threats, including ebolaviruses, influenza viruses, and coronaviruses. Dr. Kindrachuk has served as an elected member of the Executive Committee of the Canadian Society for Virology for multiple terms. He has also been a member of World Health Organization committees, including the WHO Technical Advisory Group on Virus Evolution. He has a PhD in biochemistry.[57]

55. To understand the expert report of Dr. Kindrachuk, it is necessary to distinguish between SARS-CoV-2 and COVID-19. SARS-CoV-2 is the virus which causes the infection and disease known as COVID-19.[58]

56. Vaccination reduces the likelihood that a person will become infected with SARS-CoV-2. If an individual does become infected, vaccination reduces the likelihood that they will develop severe disease.[59] By definition, a person who is not infected cannot transmit the virus.[60] Therefore, by preventing infection, the vaccine prevents transmission.[61] There is also evidence that infected individuals who have been vaccinated are less likely to transmit the virus to others than infected individuals who have not been vaccinated.[62]

57. With respect to safety, only 0.0011% of the more than 100 million vaccine doses that have been administered in Canada have led to a serious adverse event. The vaccines are safe.[63]

(d) Cassels affidavit inadmissible

58. The plaintiffs have purported to adduce expert evidence from Mr. Alan Cassels. However, his report (and affidavit) is inadmissible.

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[57] Kindrachuk Report, pp. 1-2.
[58] Kindrachuk Report, p. 4.
[59] Kindrachuk Report, pp. 8-16.
[60] Kindrachuk Report, pp. 8-16.
[61] Kindrachuk Report p. 9.
[62] Kindrachuk Report, pp. 6-8.
[63] Kindrachuk Report, pp. 16-22.

59. Mr. Cassels is unqualified to provide expert testimony on the efficacy or safety of vaccination. Mr. Cassels has no scientific or medical training. Indeed, by his own admission, Mr. Cassels' professional experience relates to "studying pharmaceutical policies and reporting on medical evidence", and his roles have been limited to "research" and "journalism". He does not possess any relevant expertise which allows him to authoritatively opine on the meaning of scientific data or the efficacy, effect, or safety of vaccination.[64] Mr. Cassels' affidavit is inadmissible.

Part 4: MATERIAL TO BE RELIED ON

i. The pleadings and other material filed in this action;

ii. Affidavit #1 of Dr. Emerson made October 7, 2024;

iii. Affidavit #1 of K. McLean made October 10, 2024;

iv. Affidavit #1 of E. Cutler made October 14, 2024;

v. Affidavit #1 of R. Murray made October 16, 2024;

vi. Affidavit #1 of V. Lever made October 16, 2024;

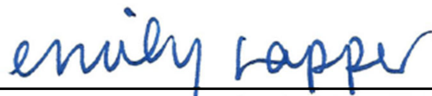
vii. Affidavit #1 of Dr. Brodkin made October 21, 2024;

viii. Affidavit #1 of T. Ma made October 24, 2024;

ix. Expert report of Dr. Kindrachuk dated October 14, 2024; and

x. Such further and other materials as counsel may advise and this Honourable Court permit.

Date: October 28, 2024



Signature of lawyer for the Defendants
Emily Lapper
Chantelle Rajotte
Trevor Bant
Rory Shaw

[64] *S.E.T. v. J.W.T,* 2023 ONSC 5416 at para. 9. See also, *R. v. Mohan,* [1994] 2 S.C.R. 9 at 25; *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the 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 the person,

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

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 [ ] Associate Judge

This **NOTICE OF APPLICATION** is prepared by Emily Lapper, Barrister & Solicitor, of the Ministry of Attorney General, whose place of business and address for service is 1301 - 865 Hornby Street, Vancouver, British Columbia, V6Z 2G3; Telephone: (604) 660-6795; Email Address: emily.lapper@gov.bc.ca.

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
[X] summary judgment
[] summary trial
[ ] service
[ ] mediation
[ ] adjournments
[ ] proceedings at trial
[ ] case plan orders: amend
[ ] case plan orders: other
[ ] experts
[ ] none of the above