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

APPLICATION RESPONSE

Application response of: 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**")

THIS IS A RESPONSE TO the notice of application of the plaintiffs, filed October 22, 2024.

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

Part 1: ORDERS CONSENTED TO

The Defendants consent to the granting of the orders set out in the following paragraphs of Part of the notice of application: **NONE**.

Part 2: ORDERS OPPOSED

The Defendants oppose the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: **ALL**.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Defendants take no position on the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: **NONE**.

Part 4: FACTUAL BASIS

Overview

1. 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]

2. 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 The latter Order remained in force until the PHO rescinded the notice of regional event effective July 26, 2024.[3]

3. The terms and scope of the Orders changed over time. However, in essence, each of the Orders provided that, to be eligible to work for certain health care employers or at certain health care facilities, certain health care workers had to receive a specified course of vaccines 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.

4. Before the Orders came into effect, 119,818 (95.5%) of the 125,528 active employees of the main publicly funded health care employers had already been vaccinated. Similarly, 11,884 (95.0%) of the 12,505 accredited medical staff of the main publicly funded health care facilities had already been vaccinated.[4]

5. Notwithstanding that the vast majority of health care workers were already vaccinated against COVID-19 prior to the Orders coming into effect, the plaintiffs seek to bring a class proceeding on behalf of <u>all</u> health care workers who were subject to the Orders. The proposed class is not limited to those health care

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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.

[4] Affidavit #1 of Ryan Murray, made October 16, 2024 ("**Murray #1**"), at para. 42.

workers who chose to remain unvaccinated and, under the Orders, became ineligible to work for the employers and facilities set out in the Orders.

6. The plaintiffs have failed to satisfy any of the criteria for certification:

   a. It is plain and obvious the claim will not succeed. The breach of privacy claim and all the claims against the PHO are bound to fail. Moreover, this action is an abuse of process, as the plaintiffs are attempting to usurp the roles of their unions and re-litigate the central conclusions of this Court in *Hoogerbrug*. The issues raised in this action could have been—and in some instances were—raised by the plaintiffs' unions and other putative class members' unions through the mandatory grievance and arbitration processes set out in their collective agreements. The Supreme Court of Canada has consistently held that labour relations legislation properly places control over unionized workers' ability to advance workplace-related claims in the hands of labour unions.[5] It is abusive for the plaintiff and unionized putative class members to attempt to usurp this role with this artfully pleaded action. The Defendants have filed an application to strike the claim under R. 9-5(1)(a) and (d) of the *Supreme Court Civil Rules,* scheduled to be heard together with the certification application.

   b. The proposed class definition is vague, subjective, and overinclusive. It includes persons (including both of the plaintiffs) who filed grievances that have been adjudicated or settled by their unions. These persons are precluded from re-litigation by the doctrines of *res judicata*, collateral attack, and/or abuse of process.

   c. There are no common issues. The proposed common issues have no basis in fact, require individualized investigation, or both. The proposed issues are not capable of benefitting all members of the class, even if successfully prosecuted. Certifying this proceeding would not avoid duplication of fact-finding or legal analysis, and would not serve the ends of fairness or efficiency.

   d. A class proceeding is not the preferable procedure. As noted, the preferable and appropriate procedure for unionized class member is labour arbitration. It would also undermine the goals of the *Class*

[5] *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 [***Horrocks***] at para. 18.

Proceedings Act [6] to certify a class action in which the overwhelming majority of class members chose to be vaccinated for their own reasons and presumably have no issue with the Orders.

e. Finally, the proposed representative plaintiffs are not suitable. They have no evidenced ability to adequately represent the class. They are precluded from relitigating their terminations by the doctrines of *res judicata*, collateral attack, and/or abuse of process. The two-lawyer firm they have chosen to retain as proposed class counsel has no evidenced experience acting as class counsel. This submission should not be misinterpreted as a criticism of those two lawyers. Rather, the point is that prosecuting a complex class proceeding in an efficient manner and representing the interests of more than 185,000 class members is a massive, resource-intensive undertaking that cannot realistically be done by two lawyers—especially while simultaneously prosecuting *Baldwin*,[7] another complex class proceeding with more than 40,000 class members. The plaintiffs' litigation plan does not present a workable plan for resolving an action of this scale and complexity.

7. The plaintiffs' certification application should be dismissed.

COVID-19 pandemic in British Columbia

8. The first case in British Columbia of what became known as COVID-19 was diagnosed on January 27, 2020.[8] On March 17, 2020, the PHO issued a Notice of Regional Event under s. 52(2) of the *Public Health Act*, designating the transmission of SARS-CoV-2 [9] a regional event, as defined in s. 51 of the *Public Health Act*.[10]

9. The Notice of Regional event was the first time the emergency powers under the *Public Health Act* had been triggered in respect of a communicable disease in British Columbia.[11] The designation of a regional event allows the PHO to exercise powers under Part 5 and 6 of the *Public Health Act*.

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[6] R.S.B.C. 1996, c. 50 [***CPA***].

[7] *Baldwin v. British Columbia and Dr. Henry*, S.C.B.C. Victoria Registry No. S-233427.

[8] Emerson #1 at para. 14.

[9] SARS-CoV-2 is the virus that can lead to the illness of COVID-19.

[10] Emerson #1 at para. 17, Ex. C.

[11] Emerson #1 at para. 18.

10. The Notice of Regional Event issued in respect of SARS-CoV-2 remained in effect until July 26, 2024.[12]

PHO and public health

11. As the PHO, Dr. Henry is the senior public health official for British Columbia. In that role, she is responsible for monitoring the health of the population and providing independent advice to ministers and public officials on public health issues. [13] This included leading British Columbia's public health response to the COVID-19 pandemic.

12. The PHO issued the first Order on October 14, 2021.[14] The provisions of the October 14, 2021 Order required that, to be eligible to "work" (as defined in the Orders), "staff members" (as defined in the Orders) needed to either receive a specified course of vaccines 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.[15]

13. As noted above, the PHO repealed and replaced the Orders from time to time in response to the changing circumstances of the COVID-19 pandemic in British Columbia.[16] Although the general vaccination and proof of vaccination requirements of the Orders remained consistent in each iteration of the Orders, the terms and scope of the Orders' application changed. For example, as of November 9, 2021, the Orders applied to the Choices in Supports for Independent Living program, but this program was excluded from the Orders in the October 5, 2023 Order.[17]

14. The October 5, 2023 Order was rescinded effective July 26, 2024, when the PHO rescinded the notice of regional event.[18]

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

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[12] Brodkin #1 at para. 6, Ex. B.
[13] *Public Health Act*, ss. 64, 66; Emerson #1 at para. 10.
[14] Emerson #1 at para. 66, Ex. V.
[15] Emerson #1 at Ex. V.
[16] Emerson #1 at paras. 32-33.
[17] Emerson #1 at Ex. Y, EE.
[18] Brodkin #1 at para. 6, Ex. "B".
[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.

petitions and held that the October 5, 2023 Order was reasonable.[20] He also specifically upheld as reasonable the PHO's determinations that:

a. unvaccinated health care workers posed a risk to patients, residents, clients, and other healthcare workers, as well as to the functioning of the healthcare system;[21] and,

b. it was essential to maintain the high level of workforce vaccination already in place in these setting, as the best means to mitigate these risks and safeguard the public health system.[22]

16. Importantly, Justice Coval also accepted that there was evidence supporting the PHO's opinion that, as of October 5, 2023, vaccination "continued to be an important preventative measure against transmission of the virus, by the healthcare workforce, to both vulnerable patients and other workers."[23]

Health care in British Columbia

17. British Columbia's health care system is a complex network of programs and services that are overseen, managed, and delivered by health care workers, health care facilities, hospitals, non-profit organizations, for-profit organizations, the five regional health authorities, the Provincial Health Services Authority (the "**PHSA**"), Providence Health care, the Medical Services Commission, the Ministry of Mental Health and Addictions, and the Ministry of Health (the "**Ministry**"), among others.[24]

18. The regional health authorities are primarily responsible for planning, managing, and delivering health care services in British Columbia. Practically speaking, the regional health authorities deliver most medical services and employ most health care workers in British Columbia. However, there are thousands of health care workers employed across British Columbia outside of the regional health authorities. These workers are scattered across public institutions (*e.g.*, the

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[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 from 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.

[21] *Hoogerbrug* at para. 13(b).

[22] *Hoogerbrug* at para. 13(c).

[23] *Hoogerbrug* at para. 145.

[24] Murray #1 at para. 4.

PHSA—which includes BC Children's Hospital, BC Cancer and BC Women's Hospital—and the Ministry) and private settings (*e.g.*, private clinics and some long-term care facilities).[25]

Unionized health care workers in British Columbia

19. Unionized health care workers in the public sector are organized into six bargaining associations.[26]

20. The Health Employers' Association of British Columbia ("**HEABC**") is the accredited agent for most health employers in the public sector.[27] HEABC has negotiated and entered into collective agreements with each of the six bargaining associations.[28]

21. The proposed representative plaintiffs, Mr. Ferguson and Ms. Perepolkin, were members of the Facilities Bargaining Association and Health Science Professionals Bargaining Association, respectively.

Non-unionized health care workers in British Columbia

22. While the majority of health care workers in British Columbia are unionized, there are discrete groups of non-unionized workers dispersed throughout the health care system.[29]

23. The largest subgroup of non-unionized health care workers are self-employed professionals. Almost all physicians, dentists, midwives, optometrists, and osteopaths are self-employed. The same is true for many physiotherapists and massage therapists. To a lesser degree, some nurse practitioners are self-employed.[30]

24. The Province has entered into master agreements with five professional associations (*i.e.*, physicians, dentists, midwives, optometrists, and osteopaths). The agreements cover compensation and benefits for services provided in the public health care system.[31]

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[25] Murray #1 at paras. 8-9.
[26] Murray #1 at paras. 26-34.
[27] *Public Sector Employers Act*, R.S.B.C. 1996, c. 384, s. 6.
[28] Murray #1 at para. 27.
[29] Murray #1 at para.35-36.
[30] Murray #1 at para. 18.
[31] Murray #1 at paras. 20-24.

25. There are also employees working in the public health care sector who are non-unionized. These consist of physicians employed by a health authority or the BC Cancer Agency; and nurse practitioners, pharmacists, physiotherapists, and other health care workers employed by a health authority, the PHSA, or other non-profit organizations receiving public funding. These types of employees have individual employment contracts with their employers. These contracts are not in the possession of the Defendants.[32]

26. Finally, there are many health care workers in the private sector. This would include self-employed health professionals or clinics owned by health professionals who employ medical office assistants and other administrative professionals. Likewise, there are many for-profit companies that employ nurses, midwives, physiotherapists, pharmacists, care aides, and other health care workers. The Defendants have virtually no information about the employment relationships of these health care workers.[33]

Plaintiffs' grievances

27. Approximately 2,500 health care workers employed by health authorities were terminated by their employers when, due to their choice to remain unvaccinated (and failure to obtain a medical exemption), they became ineligible to work for the employers and at the facilities set out in the Orders or the PHO's related "*Residential Care COVID-19 Preventive Measures Order*".[34] The Defendants do not know what employment or work-related consequences were experienced by other health care workers (i.e., self-employed professionals and employees of other health sector employers) who chose to remain unvaccinated.

28. Each of the proposed representative plaintiffs is in the small subset of putative class members who were terminated by their employers. Following their terminations, the proposed representative plaintiffs each filed grievances through their unions. Both proposed plaintiffs' grievances were ultimately resolved by their respective unions through a "process agreement", a type of settlement agreement that is common in the labour context.[35]

29. After the Orders were rescinded in July 2024, each of the proposed representative plaintiffs' unions entered into Letters of Understanding with HEABC.

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[32] Murray #1 at paras. 35-36.

[33] Murray #1 at para. 37.

[34] Affidavit #1 of Erin Cutler, made October 14, 2024 ("**Cutler #1**"), at paras. 7-8. The data available to the Defendants does not differentiate between the Orders and the related *Residential Care COVID-19 Preventive Measures Orders*.

[35] Cutler #1 at paras. 12-15, 18-22, Ex. A, C, F, I.

These Letters include terms respecting the re-hiring process for individuals terminated from their employment from the application of the Orders.[36]

Best Information on Class Size

30. The Defendants' best estimate is that the proposed class includes at least 185,000 persons. This is the number of health care employees and medical staff at publicly funded health care employers or facilities that were subject to the Orders.[37] Some health care workers employed in private settings were also subject to the Orders, but the Defendants have virtually no information about the number of such putative class members.

Part 5: LEGAL BASIS

Evidentiary objections

31. Evidence on a certification application must meet the usual criteria for admissibility.[38]

32. While expert evidence at certification is scrutinized at a lower standard than it will be at a trial, there remains a standard that must be met. The court must be satisfied that the expert's evidence on the issue is sufficiently reliable that it provides some basis in fact for the existence of the common issue.[39]

33. The Defendants object to the admissibility of the following evidence on the following grounds:

a. Affidavit #1 of A. Cassels in its entirety. The Defendants adopt the objections to the Affidavit #1 of A. Cassels set out in paras. 58 to 59 of their notice of application filed October 28, 2024;

b. Affidavit #1 of T. Perepolkin at paras. 14 and 15 (argument, legal opinion); and

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[36] Cutler #1 at paras. 16, 23, Ex. D., J.

[37] Murray #1 at para. 43.

[38] *Ernewein v. General Motors of Canada Ltd.,* 2005 BCCA 540 at para. 31; *Chow v. Facebook Inc.,* 2022 BCSC 137 at paras. 36, 38.

[39] *Bosco v. Mentor Worldwide LLC*, 2024 BCSC 1931 at para. 113, citing *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396 at para. 127, aff'd *WN Pharmaceuticals Ltd. v. Krishnan*, 2023 BCCA 72.

c. Affidavit #1 of J. Ferguson at paras. 4 and 5 [40] (argument, legal opinion) and 20 (argument, opinion).

Plaintiffs have not satisfied any of the certification criteria

34. The Court has an important gate-keeping role, requiring it to carefully screen proposed claims to determine if they are suitable for a class action.[41]

35. The plaintiffs bear the onus of satisfying each of the five certification requirements set out in s. 4 of the *CPA*. The requirement for a reasonable cause of action is decided on the pleadings alone. For the other criteria, the plaintiffs need to show "some basis in fact" that the certification requirement is met. There must be sufficient evidence to satisfy the Court that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis.[42]

36. The plaintiffs have failed to satisfy any of the certification criteria and this application ought to be dismissed.

(a) Plain and obvious the claim will not succeed (s. 4(1)(a))

37. The test under s. 4(1)(a) of the *CPA* is the same as under Rule 9-5(1)(a) of the *Supreme Court Civil Rules*: assuming the facts pleaded are true, is it plain and obvious the claim will not succeed.[43] In other words, is there "some radical defect which would amount to an abuse of process of the court such that the claim should be struck?"[44]

38. It is plain and obvious the claim will not succeed. The Defendants adopt paras. 16 to 48 of their notice of application filed October 28, 2024.

(b) No identifiable class (s. 4(1)(b))

39. A class definition must provide an objective basis by which members of the class can reasonably be identified in an objective manner. Class members should be able to self-identify using the class definition.[45] Further, the plaintiffs must

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[40] Note that this is para. 5 at p. 6 (the paragraph numbers in the affidavit restart on p. 5).

[41] *Kett v. Mitsubishi Materials Corporation*, 2020 BCSC 1879 at para. 54.

[42] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [***Pro-Sys***] at paras. 99-104.

[43] *Atlantic Lottery Corp. v. Babstock*, 2020 SCC 19 at para. 19

[44] *Hunt v. Carey*, [1990] 2 S.C.R. 959 at 980.

[45] *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at paras. 81-82; *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 20-21.

provide some basis in fact for an overarching central commonality among class members.

40. The proposed class definition is: “All healthcare workers in British Columbia who have been subject to [one or more of the Orders]”.[46] This definition fails to meet the identifiable class criterion for at least five reasons.

(i) Class definition requires legal judgment/opinion

41. First, the class definition requires legal judgment or opinion as to the scope of the Orders (*i.e.*, the persons to whom they apply). The scope of the Orders also varied over time, creating ambiguity as to whether a person is included in the class if they were subject to some but not all of the Orders.

(ii) Class definition vague and subjective

42. The vagueness and subjectivity in the proposed class definition also make objective self-identification impossible. Key terms are left undefined.

43. For example, the proposed class definition uses the term “healthcare worker” without providing any definition of the term. Does it denote only those persons who directly provide health care to patients, or does it denote all persons who fell within the scope of (one or more of) the Orders? Mr. Ferguson was a laundry worker, so presumably the latter meaning is intended, but a person looking at the class definition, trying to determine whether they are included, has no way of knowing that.

44. Similarly, it is unclear whether the phrase “subject to” in the proposed class definition is intended to denote all persons to whom the Orders applied, even if the Orders did not actually affect them in practice because they had chosen to be vaccinated before the Orders even came into effect.

45. Finally, the proposed class definition arbitrarily does not include similar orders issued by the PHO during this time period that applied to employees of long-term care facilities, private hospitals, stand-alone extended care hospitals and assisted living residences for seniors. The class is both too large and unwieldy, and too small for arbitrarily excluding similarly situated persons.

[46] The definition omits reference to the October 21, 2021, iteration of the Order but the Defendants presume this was unintentional and that Order is intended to be included.

(iii) Class definition overinclusive

46. Third, the class definition is overinclusive. The class includes persons (such as both of the plaintiffs) who have already filed grievances that have been resolved or settled by their unions. Such persons are precluded from re-litigation by the doctrines of *res judicata*, collateral attack, and/or abuse of process. The Defendants adopt paras. 20 to 33 of their notice of application filed October 28, 2024.

47. Further, the proposed class definition includes both unionized and non-unionized employees, despite purporting to advance "common" issues for the claim under s. 2(d) of the *Charter.*

(iv) Overlap in *Ferguson, Baldwin,* and *CSASPP* class definitions

48. Fourth, the class definition overlaps with the class definition in *Baldwin* as well as another extant proposed class proceeding in Supreme Court of British Columbia, Vancouver Registry No. S-210831, *Canadian Society for the Advancement of Science in Public Policy et al v. His Majesty the King in Right of the Province of British Columbia et al*. (**"CSASPP"**), such that there are some persons who are members of multiple classes.

49. With respect to *Baldwin,* approximately 213 persons subject to the PHO's Order were unionized BC Public Service employees who were also subject to "Human Resources Policy 25, COVID-19 Vaccination Policy" and the *Public Service COVID-19 Vaccination Regulation*.[47]

50. With respect to *CSASPP,* the proposed class definition in that proceeding includes "all natural persons 18 years or older, residing in British Columbia who, since on or after March 17, 2020, have been subject to orders…of the [PHO] made in response to the SARS-CoV-2 ("COVID-19") virus and/or pursuant to… Part 5 of the *Public Health Act*".[48] All, or almost all, putative class members in this proceeding are also putative class members in *CSASPP*.[49] There is a carriage issue as between *CSASPP* and this proceeding that the respective plaintiffs have not resolved.

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[47] B.C. Reg. 284/2021.

[48] Lever #1 at Ex. K.

[49] It is unclear if there is a difference in the residency requirement in the class definitions.

(v) No meaningful commonality among class members

51. Finally, as detailed below, there is no meaningful commonality among the members of the class.

(c) No common issues (s. 4(1)(c))

52. Of central importance to the use of the class proceeding is the ability to make class wide determinations of issues.[50] The plaintiff must lead evidence to provide a basis in fact that the proposed common issue: (i) actually exists; and (ii) can be answered in common across the class.[51]

53. A common issue is a question that can be answered for all class members "without individualized investigation".[52] Underpinning the commonality question, as well as the overarching class action framework, is an inquiry into "whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis".[53]

54. Common issues do not have to be determinative of liability. However, the issues do need to advance the litigation in a material way for the benefit of class members. The essence of a common issue is that it be a substantial ingredient of each class member's claim.[54]

55. The plaintiffs have failed to satisfy the third criterion for certification. There are no common issues.

(i) No basis in fact that misfeasance issues (#1-3) actually exist

56. The misfeasance in public office claim alleges that, in enacting the Orders, the PHO acted with reckless indifference or willful blindness to alleged inefficacy and risks of vaccination against COVID-19.[55]

57. There is no basis in fact for the existence of the misfeasance in public office proposed common issues.

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[50] *Campbell v. Flexwatt*, 1997 CanLII 4111 at para. 52 (B.C.C.A.).

[51] *Bhangu v. Honda Canada Inc.*, 2021 BCSC 794 at paras. 97–99; *Krishnan* at para. 127.

[52] *Ewert v. Canada (Attorney General)*, 2022 BCCA 131 at para. 25; *Thorburn v. British Columbia*, 2013 BCCA 480 at para. 35; *Western Canadian Shopping v. Dutton*, 2001 SCC 46 [***Dutton***] at para. 40.

[53] *Pro-Sys* at para. 108, citing *Dutton* at para. 39.

[54] *Kett* at para. 121; *Dutton* at para. 39; *Hollick* at para. 21.

[55] Amended notice of civil claim, Part 3 at paras. 47-49.

58. As set out above, the plaintiffs have purported to adduce expert evidence from Mr. Alan Cassels. However, as set out above, his report (and affidavit) is inadmissible.

59. Further, as demonstrated by the expert report of Dr. Kindrachuk, COVID-19 vaccines are effective and safe. The Defendants adopt paras. 53 to 57 of their notice of application filed October 28, 2024.

60. Accordingly, there is no basis in fact for the plaintiffs' misfeasance claim. The only admissible expert evidence before the Court unequivocally demonstrates vaccines are safe and effective.

(ii) Misfeasance issues (#1-3), inducing breach of contract issues (#5-8), and *Charter* issues (#9-12) incapable of benefiting all class members

61. The misfeasance in public office, inducing breach of contract, and *Charter* issues should also not be certified because they are incapable of benefiting all members of the class if successfully prosecuted. The misfeasance, inducing breach of contract, and *Charter* claims do not raise common questions that are a common ingredient of success for all class members.

62. All class members must share an interest in the resolution of all common issues. It is not necessary that all class members have the same interest in the resolution of the common issues, but all class members must have an interest in the resolution of all the common issues.[56]

63. In the present case, the overwhelming majority of class members were not actually affected by the Orders because they had already chosen, for their own reasons, to be vaccinated. Although the Orders applied to them, the Orders had no practical impact on them. These class members have no legal interest in the resolution of the misfeasance in public office, inducing breach of contract, and *Charter* issues.

64. Similarly, class members who received exemptions from vaccination requirements under the Orders and therefore remained eligible to work, with conditions (such as wearing a mask), did not experience the same practical impacts as those who chose not to be vaccinated but were not eligible to work under the Orders. These class members similarly have no legal interest in the resolution of the misfeasance in public office, inducing breach of contract, and *Charter* issues.

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[56] *Hollick* at para. 21; *Kett* at para. 134.

65. Further, putative class members who were members of a union but were hired after the Orders took effect plainly and obviously have no s. 2(d) claim. For this reason as well, the *Charter* issues should not be certified because they are incapable of benefiting all members of the class if successfully prosecuted.

(iii) Breach of privacy (#4), inducing breach of contract (#5-8), and *Charter* issues (#9-12) require individualized investigation

66. In addition, the breach of privacy, inducing breach of contract, and *Charter* issues cannot be resolved across the class and require individualized investigation.

67. These claims inevitably require an assessment of the effects of the Orders on each class member. Given the heterogeneity of the class, these effects will be different. The class includes unionized employees, non-unionized employees, and self-employed professionals. Among the unionized class members, there are at least 12 different collective agreements. Among the non-unionized class members, there are a variety of individual employment contracts (which are not in the possession of the Defendants). Among self-employed professional class members, there are at least 10 master or main agreements, plus a variety of individual agreements between medical staff and health care facilities (which, again, are not in the possession of the Defendants).

68. Take as an example the inducing breach of contract claim. This claim requires an assessment of whether, for each class member whose employment was terminated, the applicable collective agreement or their individual employment contract authorized their employer to terminate their employment in the particular circumstances of that employee. Different contracts have different provisions. Mr. Ferguson was subject to the collective agreement between the Facilities Subsector Bargaining Association and HEABC, which includes a provision that "[a]ny employee refusing, without sufficient medical grounds, to take medical or x-ray examination at the request of the Employer, or to undergo vaccination, inoculation and other immunization when required, may be dismissed".[57] Ms. Perepolkin was subject to the collective agreement between the Health Science Professionals Bargaining Association and HEABC, which includes a different provision: "[a]n employee may be required by the Employer, at the request of and at the expense of the Employer […] To take skin tests, x-ray examination, vaccination, inoculation and other immunization (with the exception of a rubella vaccination when the employee is of the opinion that a pregnancy is possible), unless the employee's physician has advised in writing that such a procedure may

[57] Murray #1, Ex. X.

have an adverse effect on the employee's health".[58] Other collective agreements are silent on vaccination. The Defendants have no knowledge of the terms of the various individual employment contracts that non-unionized class members had with their employers. And self-employed professional class members have no employment contracts at all. Given this heterogeneity, individualized investigation is inevitably required to determine whether any given employer breached any given collective agreement or employment contract.

(vi) Damages issues (#13 – 23) require individualized investigation

69. The damages issues are individual issues because they require consideration of the effects of the Orders and those effects are individual.

70. Employees who were eligible to work under the Orders throughout the class period (either because they chose to be vaccinated or received an exemption) are not similarly situated to employees who were terminated by their respective employers or placed on leave without pay. Further, some categories of employees were ineligible to work only under certain iterations of the Orders.

71. Aggravated damages are generally unsuitable for determination as a common issue because "they require an individual inquiry into the additional harm caused to the plaintiff's feelings or emotional stress".[59]

(d) Class proceeding not preferable procedure (s. 4(1)(d))

72. The preferability criterion has two distinct components. The plaintiff must show that a class proceeding would be: (i) a fair, efficient, and manageable method of advancing class members' claims; and (ii) preferable to any other reasonably available means of resolving class members' claims.[60]

73. In assessing whether a class proceeding would be the preferable procedure, the Court must consider all relevant factors.[61] As part of the analysis, the Court must specifically consider and discuss each of the factors set out in s. 4(2) of the *CPA*.[62] The Court may also consider the extent to which the proceeding

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[58] Murray #1, Ex. T.

[59] *Gomel v. Live Nation Entertainment, Inc.*, 2021 BCSC 699 at paras. 168-169, rev'd in part on other grounds 2023 BCCA 274; see also W.K. Branch, *Class Actions in Canada*, 2nd ed. (Toronto: Thomson Reuters, 2024), § 4:8.

[60] *AIC Limited v. Fischer*, 2013 SCC 69 at para. 48; *Hollick* at para. 28.

[61] *CPA*, s. 4(2).

[62] *Lewis v. WestJet Airlines Ltd.*, 2022 BCCA 145 at paras. 38-51.

is likely to enhance the three purposes of class actions: access to justice, judicial economy, and behaviour modification.[63]

74. A class proceeding is not the preferable procedure. A class proceeding would not be a fair, efficient, or manageable method of advancing class members' claims, nor would it be preferable to other reasonably available means of resolving class members' claims. Certifying this proceeding would not fulfil the purposes of class actions.

75. Rather, the preferable and appropriate procedure for the plaintiffs' claim is already set out in their collective agreements. Their unions have the exclusive authority to advance claims relating to their agreements and may do so on behalf of all union members under a policy grievance or similar mechanism. In fact, each of the plaintiffs' unions did avail themselves of this process and settled their grievances with HEABC.[64]

(i) Not fair, efficient, or manageable method of advancing class members' claims

76. This proceeding would not be an efficient or manageable method of advancing class members' claims. As noted above, there is considerable heterogeneity within the class and a wide variety of employment contracts, many of which are not in the parties' possession. The individualized investigation that would be required (after extensive third-party production applications) for a class of more than 185,000 persons make this proceeding inefficient and unmanageable.

(ii) Significant number of class members have interest in controlling separate proceedings

77. A significant number of class members have a valid interest in controlling separate proceedings, if they wish to bring proceedings at all. The overwhelming majority of putative class members chose to be vaccinated before the PHO made the original Order. It would undermine the goals of the *CPA* to certify a class action in which the overwhelming majority of class members have no issue with the Orders.

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[63] *Hollick* at paras. 13, 27.

[64] Cutler #1, Ex. C, I.

(iii) Significant number of other proceedings already commenced, with most having being decided or resolved

78. A significant number of other proceedings have already commenced by putative class members or their unions, with most of those other proceedings now having being decided or resolved. This includes:

a. Three petitions for judicial review of one or more of the Orders, which were dismissed by Justice Coval.[65]

b. A proposed class proceeding, with certification (and an application by the Defendants under Rule 9-5) currently under reserve with Justice Crerar.[66]

c. Labour grievances filed by each of the plaintiffs, all of which were settled by their plaintiffs' unions and employers.[67]

d. Various labour grievances filed by many putative class members, some of which were referred to arbitration and decided by arbitrators,[68] others of which have been settled.[69]

79. The petitioners in the three dismissed judicial reviews, who are included in the class definition, are barred by issue estoppel from challenging the Orders. The plaintiffs and other putative class members who filed labour grievances that have been resolved are barred by cause of action estoppel.

(iv) Not preferable to other reasonably available means of resolving class members' claims

80. Most importantly, the preferable and appropriate procedure for unionized class members is labour arbitration and this action is an abuse of process. The Defendants adopt paras. 20 to 33 of their notice of application filed October 28, 2024.

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[65] *Hoogerbrug.* Lever #1 at paras. 4-11, Ex. C, D, E, F, G, H, I, J.

[66] Lever #1 at para. 12, Ex. K.

[67] Cutler #1 at paras. 12-23.

[68] See *e.g.*, *Fraser Health Authority v. British Columbia General Employees' Union (Capozzi Grievance)*, [2022] B.C.C.A.A.A. No. 31; *Fraser Health Authority v. Hospital Employees' Union (London Grievance)*, [2022] B.C.C.A.A.A. No. 80; *Vancouver Island Health Authority (Cowichan Home Support)*, 2024 BCLRB 81.

[69] Cutler #1 at paras. 24-27.

(e) Proposed representative plaintiffs not suitable (s. 4(1)(e))

81. Mr. Ferguson and Ms. Perepolkin would not be suitable representative plaintiffs for at least five reasons.

82. First, they have no evidenced ability to adequately represent the proposed class.

83. Second, as detailed above, they already filed grievances relating to being placed on leave without pay and terminated. Their unions settled those grievances. They are precluded from re-litigation by the doctrines of *res judicata*, collateral attack, and/or abuse of process.

84. Third, in assessing the adequacy of a proposed representative plaintiff, the Court may consider their choice of counsel.[70] The two-lawyer firm they have chosen to retain as proposed class counsel has no evidenced experience acting as class counsel. This submission should not be misinterpreted as a criticism of those two lawyers. Rather, the point is that prosecuting a complex class proceeding in an efficient manner and representing the interests of more than 185,000 class members is a massive, resource-intensive undertaking that cannot realistically be done by two lawyers—especially while simultaneously prosecuting *Baldwin*, another complex class proceeding with more than 40,000 class members.

85. Fourth, the proposed representative plaintiffs' litigation plan does not present a workable plan for resolving an action of this scale and complexity. The purposes of a litigation plan are to provide a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel understand and have a plan to address the complexities involved in the case.[71] While a "standard form" litigation plan may be suitable for a case with a clear common core, larger and more complex proceedings require a litigation plan that "reflect[s] a clear acknowledgement of the massive undertaking involved".[72] The generic plan proposed by the proposed representative plaintiffs does not achieve these purposes.

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[70] *Dutton* at para. 41.

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

[72] *Kett* at paras. 205-207.

86. Lastly, Mr. Ferguson appears to subscribe to certain views that make him an unsuitable representative of the more than 185,000 persons in the proposed class. He is quoted in a media article as calling for public health officials to be prosecuted and jailed through what he has described as "Nuremberg 2.0".[73]

87. The final criterion for certification is not met.

Conclusion

88. The certification application should be dismissed.

Part 6: 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 may permit.

The application respondents have filed in this proceeding a document that contains the application respondents' address for service.

Date: October 28, 2024

emily lapper

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

[73] Lever #1 at Ex. L. There is no evidence that Ms. Perepolkin subscribes to such views.

This **APPLICATION RESPONSE** 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.