



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: Jedediah Jeremiah Merlin Ferguson and Terri Lyn Perepolkin, (the "Application Respondents")

THIS IS A RESPONSE TO the Notice of Application of 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 filed 28 Oct 2024.

The Plaintiffs 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 CONSENTED TO

The Application Respondents consent to the granting of the Orders set out in the following paragraphs of Part 1 of the Notice of Application on the following terms: NONE

Part 2: ORDERS OPPOSED

The Application Respondents oppose the granting of the Orders set out in paragraphs 1, 2,3, 4 of Part 1 of the Notice of Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondents take no position on the granting of the Orders set out in paragraphs NONE of Part 1 of the Notice of Application.

Part 4: FACTUAL BASIS

1. The Plaintiffs rely upon the facts as stated in the Amended Notice of Civil Claim dated April 2, 2024, (“the Claim”). However, given the Defendants’ position that these facts are insufficient and/or do not support any cause of action, the Plaintiffs seek to clarify their position by restating the facts found in the Claim (albeit in a more summary form) below.

The Impugned Orders and resultant policies

2. The Plaintiffs were subject to the *Covid-19 Vaccination Status information and Preventative Measures order(s)* issued by the Provincial Health Officer (“PHO”) 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 Impugned Orders”).
3. The Impugned Orders required that British Columbia health care employers not permit an unvaccinated staff member, to whom the Impugned Orders applied, to work after October 25, 2021, unless the staff member had an exemption and was in compliance with the terms of the exemption. Further, under the Impugned Order, health employers were required to collect and disclose information pertaining to their employees’ vaccination status.
4. The Impugned Orders directed healthcare employers in British Columbia to prohibit any unvaccinated employees, to whom the Orders applied, from continuing to work after October 25, 2021, unless the employee held a valid exemption and was in full compliance with the terms of that exemption. Furthermore, the Orders obligated healthcare employers to collect and disclose information concerning their employees' vaccination status.
5. On October 15, 2021, Island Health and Interior Health announced their mandatory COVID-19 Vaccination Policy. Under this policy, employees would be required to disclose their vaccination status and be vaccinated for COVID-19. Employees who did not comply, unless they fit into one of the two limited exceptions, would not be able to work and would face consequences including being placed on an unpaid leave of absence or termination of employment.
6. Both Island Health and Interior Health relied upon the Impugned Orders in enacting these policies and were in fact induced by the Impugned Orders to create these policies.

The consequences to the plaintiffs

7. The Plaintiffs are former employees of Island Health and Interior Health. They were subject to—and seek to represent a class of individuals that were also subject to—discipline, including suspension and termination, for failure to disclose their vaccination status and/or failure to become vaccinated as required by the Impugned Orders (the proposed class members, unless otherwise indicated, are referred to herein as the “Plaintiffs”).
8. The Plaintiffs’ employment with Island Health and Interior Health and other relevant health employers (the “Employers”) were comprehensively and exhaustively covered by collective agreements. These collective agreements contained terms that had been previously negotiated by and between the Employers and the Plaintiffs’ bargaining units/unions.
9. None of the collective agreements between the Plaintiffs and the Employers contain terms stating, expressly or impliedly, that:
 - (a) Vaccination status be disclosed prior to the Plaintiffs being able to perform their job duties;
 - (b) COVID-19 vaccination or other medical procedures be undertaken prior to the Plaintiffs being able to perform their job duties; or
 - (c) The Employers could discipline the Plaintiffs for failure to disclose vaccination status or failure to become vaccinated for COVID-19.
10. The Employers breached the collective agreements by requiring compliance with, and disciplining the Plaintiffs based on, terms of employment not found within these agreements.

The PHO’s knowledge and motivations

11. The PHO was, or ought to have been, aware of the existence of these terms within the collective agreements.
12. The PHO was therefore aware of and in fact intended that enactment of the Impugned Orders would lead the Employers to breach the relevant collective agreements.
13. The PHO was further aware that the collective agreements had been subject to extensive negotiations between the Employers and the Plaintiffs’ respective bargaining units.
14. Nevertheless, the PHO imposed the terms of the Impugned Order into the employment relationship between the Plaintiffs and their Employers without the

rights and protections afforded by collective bargaining and without the Plaintiffs' consideration or consent.

15. The PHO was also aware that:
 - (a) the scientific information underlying each of the approved COVID-19 vaccines did not reference or support the proposition that the vaccines prevented transmission of COVID-19;
 - (b) there was evidence of a significant potential risk of adverse side effects arising from the majority of the approved vaccines; and
 - (c) there was no information regarding long-term safety data of the approved vaccines, which was relevant information required prior to mandating vaccination.
16. The PHO's stated objective in enacting the Impugned Order was to reduce the transmission of COVID-19, even though the PHO knew that mandatory vaccination would not further this objective.
17. In enacting the Impugned Orders, the PHO was responding to political pressures as opposed to acting within her statutory grant of authority—enacting measures to deal with safety—under the *Public Health Act*.
18. The PHO enacted the Impugned Orders even though she was aware that the terms of the Impugned Order would pose a direct risk of substantial harm to the Plaintiffs.
19. The Plaintiffs were in fact harmed by the loss of pay and benefits pursuant to their valid collective agreements and the emotional harm arising from the loss of their ability to work and the coercive tactics employed by the PHO.

Part 5: LEGAL BASIS

Overview

20. The Defendants seek to dismiss the action as an abuse of process under Rule 9-5(1)(d), alternatively to strike the breach of privacy claim and all claims against the PHO under Rule 9-5(1)(a), and in further alternative to dismiss the misfeasance in public office claims under Rule 9-6. The defendants also rely heavily on the reasoning of the British Columbia Supreme Court in *Hoogerbrug v. British Columbia, 2024 BCSC 794*.

This action is not an abuse of process

21. Abuse of process is a broad and flexible doctrine that permits the court to prevent unfairness and oppressive treatment in the context of civil actions. The Proceedings must be so unfair as to bring the administration of justice into disrepute. A party invoking the doctrine of abuse of process bears a heavy onus and must show that the abuse is plain and obvious. *Rossner v. Nystrom* 2019 BCSC 583, at para 43-47. Courts should only strike pleadings as an abuse of process in the clearest of cases and that only “egregious conduct will engage the doctrine”. *A.M. v. Dr. F.*, 2021 BCSC 32, at para 63.
22. The Defendants submit that this action is an abuse of process predicated on two arguments. First, they submit that the action falls within the exclusive jurisdiction of the *British Columbia Labour Relations Code* RSC 1996, c. 244 (“the Code”), and in so arguing invoke the doctrine of collateral attack. Second, the Defendants submit that the misfeasance in public office and privacy claims seek to relitigate the central conclusions in *Hoogerburg*. Both arguments fail to establish abuse of process as 1) this present action does not fall within the exclusive jurisdiction of the Code; 2) the claims advanced in this action have not been adjudicated in any forum; and 3) the decision in *Hoogerburg* is not decisive on the present claims. The Defendants have failed to meet the heavy onus that the present action constitutes an abuse of process.
23. The Defendants argue that, because the Plaintiffs are or were members of certified trade unions, they are obliged under their collective agreements and the Code to proceed with any dispute within the employment grievance process. In so arguing, the Defendants fundamentally mischaracterize the nature of the Claim.
24. The Supreme Court of Canada has repeatedly warned not to overextend the jurisdiction of labour arbitration: the exclusivity of labour arbitration “does not close the door to all legal actions involving the employer and the unionized employee... This is so because the exclusive jurisdiction of a labor arbitrator applies only to ‘disputes which arise expressly or implicitly from the collective agreement.’”¹
25. Here the claims of inducement to breach contract, misfeasance in public office, breach of privacy, and infringement of s.2(d) of the *Charter of Rights and Freedoms* do not concern “the interpretation, application, administration, or alleged contravention of a collective agreement” such that it must be exhausted through the grievance process.² Rather, this dispute arises out of the PHO’s implementation of the Impugned Orders. The Plaintiffs allege that the Impugned Orders imposed terms on the Plaintiffs’ employment that were contrary to (and indeed un contemplated by) the relevant collective agreements. Here, as in *Québec (Commission des Droits de*

¹ *Northern Regional Health Authority v Horrocks*, [2021 SCC 42](#) at para 22

² *Id* at para 25

la Personne et des Droits de la Jeunesse) v Québec (Attorney General), 2004 SCC 39 (“*Morin*”):

[24] ... All parties agree on how the agreement, if valid, must be interpreted and applied. The only question that arises is whether the process leading to the adoption of the clause held to be discriminatory and the insertion of it in the collective agreement contravenes the *Quebec Charter*, thereby rendering the clause inapplicable.

26. Dealing with the inducement to breach contract claim, although this cause of action in the present case does require the Plaintiffs to prove their contract was breached, this claim does not arise out of a dispute as defined by the Code. The jurisdiction of the court is not ousted by the Code because here the question is not to be determined under the Code. As stated by the Court in *Pitura v. Lincoln Manor Ltd* “the said defendants are being sued for conduct allegedly amounting to the tort of inducing a breach of contract, and in those circumstances the Labour Code did not remove jurisdiction from the courts”.³
27. The Court in *Pitura* found there was no issue of exclusive jurisdiction as the action was not a “labour dispute.” If it had been a labour dispute, then it would have been within the exclusive jurisdiction of the Labour Relations Board to determine if the Code had been breached.
28. Additionally with respect to misfeasance, breach of privacy and an infringement of s.2d of the *Charter*, 1) the Defendants are not parties to the relevant collective agreements that govern(ed) the Plaintiffs’ employment, and 2) the proposed class also includes individuals who are not unionized. These facts further militate against the exclusive jurisdiction of arbitration. A “grievance arbitrator cannot claim to have authority over persons considered to be third parties in relation to the collective agreement and cannot render decisions against them,” absent their consent⁴
29. As reiterated by the Supreme Court of Canada: “[b]ecause the nature of the dispute and the ambit of the collective agreement will vary from case to case, it is impossible to categorize the classes of case that will fall within the exclusive jurisdiction of the arbitrator.”⁵ Here, the lawfulness of the actions taken by the PHO—a non-party to the collective agreements—is not grounded in the collective agreements.⁶ As such, it

³ 1978 *Carswell BC 219*, 94 D.L.R. (3d) 421, 9 B.C.L.R. 77

⁴ *Bisaillon v Concordia University*, [2006 SCC 19](#) at para 40; see also *Bruce v Cohon*, [2017 BCCA 186](#) at para 84.

⁵ *Morin* at para 11

⁶ See also *British Columbia Teachers’ Federation v British Columbia*, [2015 BCCA 184](#) at para 32 (affirmed and adopted [2016 SCC 49](#)) [*BCTF*] (“the issue here is whether legislation which interfered with terms of a collective agreement and temporarily prohibited collective bargaining on certain topics substantially interfered with workers’ freedom of association”); *AUPE v Alberta*, [2014 ABCA 43](#) at para 37 (“true character” of dispute “is about

cannot be within the exclusive purview of a labour arbitrator and is not an abuse of process.

***Hoogerbrug* is Not Decisive on the Issues Before this Court**

30. The Defendants cite *Hoogerbrug v. British Columbia*, 2024 BCSC 794 as authority for the propositions that the claims of misfeasance in public office and breach of privacy are an abuse of process because they seek to relitigate the central conclusions in *Hoogerbrug*. However, this case is not decisive of the issues before this Court.
31. In *Brake v Canada (Attorney General)*, 2019 FCA 274, the Federal Court of Appeal explicitly cautioned against viewing another decision—even if legally and factually similar—as determinative of whether a Plaintiff’s claims disclosed a reasonable cause of action.⁷ Specifically, the court noted that:
 - (a) the Plaintiff before them “did not consent to his claims being decided [elsewhere] as a ‘lead case’” and “did not have an opportunity to make submissions or present evidence” in that proceeding;⁸
 - (b) each case is “based on the particular evidentiary record filed and the specific claims pleaded;”⁹ and
 - (c) this Plaintiff sought to “place a different evidentiary record before the Court to support different claims.”¹⁰
32. In *Hoogerbrug*, the Petitioners requested a declaration of invalidity of two PHO orders of October 5, 2023 (“Orders”), which continued the vaccination requirement for the healthcare workforce in British Columbia which had been in place since October 2021. The Petitioners sought the declarations on the basis of reasonableness of the Orders and for violation their s. 2a and s. 7 *Charter* rights. The Petitioners in *Hoogerbrug* did not advance a claim in tort for misfeasance in public office or breach of privacy. As in *Brake*, none of the Plaintiffs here consented to have their claims decided, presented evidence, or otherwise participated in the *Hoogerbrug* proceedings. Similarly, the Plaintiffs here are pursuing different causes of action and are requesting different remedies from those requested in *Hoogerbrug*. Furthermore,

exclusion from the bargaining unit due to an allegedly unconstitutional statutory provision” and therefore does not arise under the collective agreement);

⁷ *Brake v Canada (Attorney General)*, 2019 FCA 274 at paras 56-59

⁸ *Id* at para 57

⁹ *Id* at para 58

¹⁰ *Id* at para 58

the Plaintiffs here have the benefit of more fulsome evidence and information than that present when *Hoogerbrug* was decided.

33. As noted by at least one academic, the evidence relating to the need for and effectiveness of various measures aimed at combatting COVID-19 was “somewhat thin in the early days of the pandemic given the novelty of the virus.”¹¹ However, the accumulation of scientific knowledge, over time, has the “potential for changing judicial assessment that have largely given the benefit of the doubt to legislatures and governments.”¹²
34. To illustrate, in *Yardley v Minister for Workplace-Relations and Safety*, 2022 NZHC 291, the New Zealand High Court found that a governmental order mandating vaccination for police and military staff imposed a limitation on the applicants’ rights that was not demonstrably justified. The court found that the objective of the mandate—ensuring continuity of public services—was not “materially advanced by the Order;” that there was “no evidence” that the number of affected staff “is any different from the number that would have remained unvaccinated and employed” under existing policies; and that the threat of COVID-19 infection “exists for both vaccinated and unvaccinated staff,” particularly because the Omicron variant “is so transmissible.”¹³
35. Given the “expert evidence before the Court on the effects of vaccination on COVID-19 including the Delta and Omicron variants,” the court in *Yardley* was “not satisfied that the Order ma[de] a material difference.”¹⁴ Canadian grievance arbitrators have made similar comments on COVID-19 variants when assessing other challenges to mandatory vaccination policies.¹⁵
36. Furthermore, there have been “significant discrepancies” in the imposition and relaxation of various governmental vaccine requirements between different organizations and individuals. While the courts have not previously appeared willing to critique these distinctions, “this does not mean they will not in the future.”¹⁶ Indeed, grievance arbitrators have already found certain employer vaccination policies to be unreasonable due to such differential treatment.¹⁷
37. Further, the Court's role and the rules of evidence in a proceeding subject to the *Judicial Review Procedure Act* are entirely different than in an action. As

¹¹ John M Keyes, “Judicial Review of COVID-19 Legislation – How Have the Courts Performed?” (2022), Canadian Legal Information Institute, [2022 CanLII Docs 4339](#) at s 6 [Keyes].

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See, eg, *Rehibi v Deputy Head (Department of Employment and Social Development)*, [2024 FPSLR 47](#) at paras [224-25](#) (citing cases) [*Rehibi*].

¹⁶ Keyes at s 6.

¹⁷ See e.g., *Parmar v Tribe Management Inc*, [2022 BCSC 1675](#) at para [123](#) (citing cases).

examinations for discovery and production of relevant documents have not occurred, the Court cannot transpose *Hoogerbrug* or other administrative law decisions to the allegations in this action.

38. In sum, each case must be “decided on its own particular facts and the state of knowledge at the time the policy was implemented.”¹⁸ Contrary to the Defendants’ submissions, *Hoogerbrug* does not constitute “a complete answer to the questions before” this Court.¹⁹

The Breach of Privacy and Claims Against the PHO are Not “Bound to Fail”

39. A pleading will be struck under Rule 9-5(1)(a) if it is “plain and obvious” that the claim has no reasonable prospect of success. The facts as pleaded are assumed to be true unless they are manifestly incapable of being proven²⁰. Otherwise framed, even if the facts are accepted as true, the Claim must be:

...“so clearly improper as to be bereft of any possibility of success”: *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1994 CanLII 3529 \(FCA\)](#), [1995] 1 F.C. 588 at page 600 (C.A.). There must be a “show stopper” or a “knockout punch” – an obvious, fatal flaw striking at the root of this Court’s power to entertain the application: *Rahman v. Public Service Labour Relations Board*, [2013 FCA 117](#) at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, [2012 FCA 286](#) at paragraph 6; cf. *Hunt v. Carey Canada Inc.*, [1990 CanLII 90 \(SCC\)](#), [1990] 2 S.C.R. 959.²¹

40. The Defendants have an “onerous” burden in seeking to strike the Claim, particularly without leave to amend.²² As stated by the Supreme Court of Canada, “the motion to strike is a tool that must be used with care.”²³ Courts “must” take a “generous approach” and “err on the side of permitted a novel but arguable claim to proceed to trial.”²⁴
41. A claim should not be struck where, if amended, it could disclose a reasonable cause of action²⁵. The Defendants have a “heavy” burden in requesting that the court deny the Plaintiffs leave to amend, as this should only be disallowed “in the clearest of cases” where “it is clear that the claim cannot be amended to show a proper cause of action” or “it is clear that the Plaintiff cannot allege further material facts that [they

¹⁸ *Id.*, at para [124](#).

¹⁹ *Rehibi* at para [225](#).

²⁰ *Nevsum Resources Ltd. v. Araya* 2020 SCC 5, at para 64.

²¹ *Id.*

²² *Doan v Canada*, [2023 FC 968](#) at para [40](#) [*Doan*].

²³ *R v Imperial Tobacco Canada Ltd*, [2011 SCC 42](#) at para [21](#).

²⁴ *Id.*

²⁵ *Olumide v. British Columbia (Human Rights Tribunal)*, 2019 BCCA 386 at para 10.

know] to be true to support the allegations.”²⁶ The general rule is that leave to amend should be granted “unless there is no scintilla of a cause of action.”²⁷ Indeed, “however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without prejudice to the other side.”²⁸

42. Conversely, at this preliminary stage in the proceedings, the threshold in establishing a reasonable cause of action “is quite low, as the right of action must be protected.”²⁹ The Claim must merely “contain a concise statement of the material facts on which the parties relies,” must not “include evidence by which those facts are to be proved,” and “may raise any point of law.”

43. As stated in *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 19, the “material facts” that must be pled must be determined “in light of the cause of action and the damages sought to be recovered”:

[18] There is no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence. They are points on a continuum, and it is the responsibility of a motions judge, looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.

44. It should also be remembered that, for pleadings, “perfection is not the standard.”³⁰ In essence, a statement of claim should “tell the defendant who, when, where, how and what gave rise to its liability.”³¹ This should be done “in a reasonably practical fashion;” “the court should only interfere with a party’s organization of its pleading in the clearest of cases where the allegations are incapable of being understood.”³²

45. In particular, on a motion to strike, “[t]he court should not engage in a paragraph by paragraph examination of a pleading or insist on precise compliance with the rules of pleading.”³³ Rather, the court “must read [the pleading] to get at its ‘real essence’ and ‘essential character’ by reading it ‘holistically and practically without fastening

²⁶ *Al Omani* at para 34; *Yan v Daniel*, 2023 ONCA 863 at para 19.

²⁷ *Al Omani* at para 34.

²⁸ *Café Cimo Inc v Abruzzo Italian Imports Inc*, 2014 FC 810 at para 8 (internal emphasis omitted) (citing test to grant leave to amend, which—per *McCain Foods Limited v JR Simplot Company*, 2021 FCA 4 at para 20, mirrors the test applicable on a motion to strike).

²⁹ *Doan* at para 43 (considering motion to certify a class action which—as described at para 41—is the same test as on a motion to strike).

³⁰ *Ponnampalam v Thiravianathan*, 2019 ONSC 5008 (Ont SCJ) at para 14.

³¹ *Mancuso* at para 19.

³² *Ponnampalam v Thiravianathan*, 2019 ONSC 5008 (Ont SCJ) at para 14.

³³ *Id* at para 19.

onto matters of form.”³⁴ As stated by the Supreme Court of Canada, in considering such a motion, the court is “obliged to read the statement of claim as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies.”³⁵

Breach of Privacy

46. In arguing that the breach of privacy claim should be struck, the Defendants proffer a legal conclusion that the Impugned Orders were validly enacted under the Public Health Act and thus no tortious breach of privacy has occurred. The Defendants further state, *inter alia*, that the *Public Health Act* authorizes the PHO to collect or disclose personal information. In so arguing the Defendants mischaracterize the nature of the claim.
47. The legal conclusion proffered by the Defendants that the Impugned Orders were validly enacted does not vitiate the Plaintiffs’ pleading that their privacy rights were violated due to the Impugned Orders requiring disclosure of private medical information. In fact, the conclusion offered by the Defendants is, as drafted, a bald assertion which illustrates the need for evidence on this point to be adduced in the trial process.
48. The Plaintiffs have pled that the Impugned Orders violated their privacy rights by requiring disclosure of private medical information to their ‘employers’ and thus was a tortious breach of privacy.³⁶ The argument that the *Public Health Act* authorizes the PHO to collect or disclose personal information is immaterial to the Plaintiffs’ allegations of tortious breach of privacy.
49. As such, the breach of privacy claim should not be struck under Rule 9-5(1)(a) and in the alternative leave to amend should be granted.

Claims Against the PHO

50. In arguing that the claims against the PHO should be struck, the Defendants state that the claim is bound to fail because it is plain and obvious that s.92 of the *Public Health Act* immunizes the PHO from any claim for damages including damages under s.24(1) of the *Charter*. The Defendants further state that no factual or legal basis is pled to support a challenge to the constitutionality of s.92 of the *Public Health Act* and that the Plaintiffs notice of application is silent on this point, which amounts to an abandonment of challenge of constitutionality of s. 92. In so arguing, the defendants mischaracterize the nature of the claim.

³⁴ *Canadian Frontline Nurses* at para [123](#).

³⁵ *Operation Dismantle v The Queen* (1985), [1985 CanLII 74 \(SCC\)](#) at para [14](#).

³⁶ Amended notice of civil claim at para 66.

51. The immunity conferred by s.92 (1) of the *Public Health Act* does not apply to a person in that subsection in relation to anything done or omitted in bad faith.³⁷
52. In the Amended Notice of Civil Claim at paragraph 32, the Plaintiffs plead that the *Public Health Officer* acted in bad faith when issuing the Impugned 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.
53. In the Amended Notice of Civil Claim at paragraph 35, the Plaintiffs plead that the Public Health Officer acted in bad faith when issuing the Impugned Orders as she knew or could have reasonably discovered that the vaccines were not safe and posed significant risks for potential side effects.
54. In the Amended Notice of Civil Claim at paragraph 37, the Plaintiffs seek a declaration that s.92 of the *Public Health Act* be read so that its effects do not limit rights established under the *Charter*, with respect to *Charter* damages.
55. The facts pled by the Plaintiffs regarding bad faith, taken as true, establish a reasonable cause of action to proceed against the PHO as it is not plain and obvious that the claims against the PHO are doomed to fail. In the alternative, the Plaintiffs should be allowed to further amend the pleadings.

The Misfeasance Claim Should Not be Dismissed Under Rule 9-6

56. Rule 9-6 is a challenge based upon a limited review of the evidence in which a defendant can succeed by showing that the plaintiff's case is unsound or by adducing sown evidence that gives a complete answer to the plaintiff's case. If the court is satisfied that the plaintiff is bound to lose or the claim has no chance of success, the defendant must succeed. Conversely, if the plaintiff submits evidence that contradicts the defendant's evidence in some material respect or if the defendant's evidence fails to meet all of the causes of action raised by the plaintiff, the application must be dismissed. A judge cannot weigh evidence beyond determining whether it is incontrovertible. If it is oath against oath, it is unlikely that the application could succeed. A judge must conclude this beyond a reasonable doubt. It must be manifestly clear that there was no genuine issue for trial. This is a high bar. If the evidence needs to be weighed and assessed, then the test of plain and obvious or beyond a doubt has not been satisfied and the application is bound to fail.³⁸
57. To satisfy the application under Rule 9-6 the Defendants have proffered an expert report purporting to be the final authority on COVID-19 vaccine safety and efficacy.

³⁷ *Public Health Act*, [SBC 2008] s. 92(2).

³⁸ *Beach Estate v. Beach*, 2019 BCCA 277, at paras. 48-49, 62-68

Notably, Dr. Kindrachuk, relies upon and reports aggregate studies and clinical research done by third parties in formulating his opinion.³⁹

58. One such external source used by Dr. Kindrachuk is the United States Food and Drug Administration's Emergency Use Authorization Guidelines which state, *inter alia*⁴⁰:
- (a) Based on the totality of scientific evidence available, including data from adequate and well controlled trials, if available, it is reasonable to believe that the product may be effective to prevent, diagnose, or treat such serious or life-threatening disease or condition that can be caused by SARS-CoV-2 and;
 - (b) *Ed. Note:* this clearly identifies that prevention and/or treatment is referring to disease caused by SARS-CoV-2 infection and not the prevention of SARS-CoV-2 infection
59. Dr. Kindrachuk further reports that factors such as age, comorbidities, strain of the virus, and intervals between doses play a role in vaccine efficacy.⁴¹ Dr. Kindrachuk also reports that, reviewing Delta variant breakthrough infections, there is a reduced likelihood of vial transmission per vaccination.
60. Similarly, on the issue of vaccine safety, Dr. Kindrachuk reports, based largely on the Government of Canada's vaccine safety report, that serious side effects including thrombosis, myocarditis/pericarditis, and death have occurred as a result of the COVID-19 vaccination.⁴²
61. Dr. Kindrachuk's expert report largely focuses on point in time studies conducted post-introduction of the COVID-19 vaccinations. However, Dr. Kindrachuk reports on studies conducted by the vaccine manufacturers during clinical trials (pre-introduction), which note⁴³:
- The authors clearly noted that a limitation within this study was the protective effect of this vaccine against either asymptomatic infection and onwards transmission of virus. Similar study designs and reporting were provided for the ChAdOx1 vaccine (AstraZeneca) and for the mRNA-1273 vaccine (Moderna) [47, 48].
62. Conversely, the Plaintiffs have produced an expert report of Alan Cassels dated June 2, 2024. Alan Cassels has 30 years of experience in reviewing and studying Canadian Pharmaceutical policy, reviewing and reporting on empirical studies on drug effects, including the safety and effectiveness of vaccines clinical trials, and the reporting of

³⁹ Kindrachuk Report, pp. 8-16.

⁴⁰ Kindrachuk Report, p. 9.

⁴¹ Kindrachuk Report, p.10.

⁴² Kindrachuk Report, pp. 16- 20.

⁴³ Kindrachuk Report, p 8.

medical evidence. He has authored four books in the areas of evidence-based health, drug information and actuarial science. He has also lectured at universities and to professional regarding the same subject areas. Alan Cassels' work history included, *inter alia*, evaluating the impacts of evidence based drug information to consumers in a clinical setting; advising medical associations, research, international study of Coverage with Evidence Development (CED), a method of conducting real-world safety and effectiveness studies on behalf of public drug insurance agencies; and investigating inappropriate polypharmacy, and Director of Communications at the Therapeutics Initiative for the Department of Anaesthesiology, Pharmacology and Therapeutics, Faculty of Medicine, at the University of British Columbia⁴⁴.

63. Two Supreme Court of Canada decisions govern the admissibility of expert evidence: *R v Mohan*, 1994 CanLII 80 (SCC), [1994] 2 SCR 9 [*Mohan*] and *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 SCR 182 [*White Burgess*]. The general test from *Mohan* is that expert evidence must satisfy the following criteria: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any exclusionary rule; and (4) a properly qualified expert (defined as a person shown to have acquired special or peculiar knowledge through study or experience in respect of the matters which he or she undertakes to testify).
64. Alan Cassels' expert evidence is relevant, necessary, not subject to exclusion, and he is a properly qualified expert to provide testimony on clinical data, pharmaceutical research, and the safety and efficacy of vaccinations.
65. As part of his expert evidence, Alan Cassels has reviewed submissions to Health Canada by the vaccine manufacturers as well numerous studies on the effect of the COVID-19 vaccination on transmission of COVID-19. Based on his review and expertise, Alan Cassels has proffered his opinion, *inter alia*, that COVID-19 vaccines do not show an impact on reducing the likelihood of viral transmission to others and that vaccinated populations have been found to be an important and relevant source of transmission of the virus to others.⁴⁵
66. Further, Alan Cassels has reviewed numerous studies in relation to COVID-19 vaccination safety and found *inter alia*:⁴⁶

Pfizer and Moderna mRNA COVID-19 vaccines were associated with an excess risk of serious adverse events of special interest of 10.1 and 15.1 per 10,000 vaccinated over placebo baselines of 17.6 and 42.2 (95 % CI -0.4 to 20.6 and -3.6 to 33.8), respectively. Combined, the mRNA vaccines were

⁴⁴ Cassels Affidavit pp 1-5, Exhibit A.

⁴⁵ Cassels Affidavit pp 5-13.

⁴⁶ Cassels Affidavit pp 12-14.

associated with an excess risk of serious adverse events of special interest of 12.5 per 10,000 vaccinated (95 % CI 2.1 to 22.9); risk ratio 1.43 (95 % CI 1.07 to 1.92). The Pfizer trial exhibited a 36 % higher risk of serious adverse events in the vaccine group; risk difference 18.0 per 10,000 vaccinated (95 % CI 1.2 to 34.9); risk ratio 1.36 (95 % CI 1.02 to 1.83). The Moderna trial exhibited a 6 % higher risk of serious adverse events in the vaccine group: risk difference 7.1 per 10,000 (95 % CI -23.2 to 37.4); risk ratio 1.06 (95 % CI 0.84 to 1.33). Combined, there was a 16 % higher risk of serious adverse events in mRNA vaccine recipients: risk difference 13.2 (95 % CI -3.2 to 29.6); risk ratio 1.16 (95 % CI 0.97 to 1.39).

67. The expert evidence offered by the Defendants is not incontrovertible and requires the weighing of evidence by the court. It is not manifestly clear that there is no genuine issue for trial, nor is it plain and obvious that the Plaintiffs' claim will fail and, as such, the Defendants Rule 9-6 motion should be dismissed.

Costs

68. The Plaintiffs submit that there should be no award of costs against them unless the Defendants are successful on dismissing the whole Claim without leave to amend. If the Plaintiffs are granted leave to amend on any claim, success would be split between the parties and no costs award would be merited.⁴⁷

Part 6: MATERIAL TO BE RELIED ON

69. The pleadings and other material filed in this action;
70. Affidavit #1 of Alan Cassels made June 2, 2024;
71. Affidavit #1 of Terri Perepolkin, made June 11, 2024
72. Affidavit #1 of Jedediah Ferguson, made June 10, 2024
73. Affidavit #2 of Terri Perepolkin, made August 21, 2024
74. Affidavit #2 of Jedediah Ferguson, made August 21, 2024

The Application Respondent has filed in this proceeding a document that contains the Application Respondent's address for service.

⁴⁷ See, eg, *Al Omani* at para [128](#).

PO Box 24062 Broadmead RPO
Victoria BC V8X 0B2

Date: November 18, 2024

Umar A. Sheikh

Signature of Application Respondent

Lawyer for Application Respondents

Umar A. Sheikh