COURT OF APPEAL

ON APPEAL FROM the order of Chief Justice Hinkson of the Supreme Court of British Columbia pronounced on the 12th day of September 2022.

BETWEEN:

Canadian Society for the Advancement of Science in Public Policy and Kipling Warner

Appellants
(Petitioners)

AND:

Dr. Bonnie Henry in Her Capacity as Provincial Health Officer for the Province of British Columbia

Respondent
(Respondent)

APPELLANTS' FACTUM

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CHRONOLOGY

Date	Event
September 10, 2021	The PHO issues *Gatherings and Events* and *Food and Liquor Service* orders requiring that persons have received two doses of a vaccine against Covid-19 in order to attend various gatherings and certain venues. Failure to comply may result in imprisonment of up to 6 months.
September 30, 2021	Mr. Curtis emailed a request for reconsideration to the Office of the PHO (the "**OPHO**"), along with supporting materials, including links to various studies, such as from the World Health Organization ("**WHO**") concluding that natural immunity provides strong protection against Covid-19 published on May 10, 2021.
October 20, 2021	Reconsideration Request sent to PHO by Appellants attaching various studies and expert report from Dr. Kettner, MD, MSC, FRCSC, FRCPC, who is also the former Chief Medical Officer of Health and Chief Public Health Officer for the Province of Manitoba.
November 4, 2021	Petition filed.
November 12, 2021	PHO issues an order (the "**Variance Order**") pursuant to section 54(1) of the *Public Health Act* declaring that she would not consider reconsideration requests other than those seeking medical deferral.
November 16, 2021	*Gatherings and Events* Order was repealed and replaced.
December 3, 2021	*Gatherings and Events* Order was repealed and replaced.
December 12, 2021	*Food and Liquor Service* Order was repealed and replaced.
December 22, 2021	*Gatherings and Events* Order was repealed and replaced. *Food and Liquor Service* Order was repealed and replaced.
January 17, 2022	*Gatherings and Events* Order was repealed and replaced. *Food and Liquor Service* Order was repealed and replaced.

	Deputy PHO, Dr. Brian Emerson, responds to the Reconsideration Request, stating that such requests were precluded by the Variance Order.
January 27, 2022	*Gatherings and Events* Order was repealed and replaced.
February 7, 2022	*Food and Liquor Service* Order was repealed and replaced.
February 16, 2022	*Gatherings and Events* Order was repealed and replaced. *Food and Liquor Service* Order was repealed and replaced.
March 10, 2022	*Gatherings and Events* Order was repealed and replaced. *Food and Liquor Service* Order was repealed and replaced.
April 8, 2022	Proof of vaccination to attend venues no longer required by PHO.
May 18 and 19, 2022	Hearing held before the Honourable Chief Justice Hinkson.
September 12, 2022	Reasons issued dismissing petition.

OPENING STATEMENT

1. This is an appeal from an Order made by the Honourable Chief Justice Hinkson in chambers, dismissing a Petition seeking relief pursuant to the *Canadian Charter of Rights and Freedoms* ("***Charter***") and the *Judicial Review Procedure Act* ("***JRPA***"). The Petition sought relief against a series of Orders made by the respondent Provincial Health Officer ("**PHO**") from September 10, 2021 to March 10, 2022, that, *inter alia*, required all "participants" at "events" or those attending establishments such as restaurants to be vaccinated against COVID-19, to provide proof of vaccination to third-parties, and that exercised her discretion not to entertain any requests for variance or relief from her Orders, save and except for certain limited medical reasons.
2. Contravention of the PHO's Orders constituted an offence pursuant to subsection 99(1)(k) of the *Public Health Act*, punishable by "a fine not exceeding $25,000 or to imprisonment for a term not exceeding 6 months, or to both". Due to the express threat of imprisonment, the liberty interests protected by section 7 of the *Charter* were necessarily engaged, and the learned Chambers Judge erred in law by holding otherwise.
3. The Chambers Judge did not address the question of the principals of fundamental justice or the *Doré* analysis. However, the Orders are overbroad, as the legislative objective of limiting transmission of SARS-CoV-2 was not furthered by restricting individuals with immunity from prior infection, a recent negative COVID-19 test, or other reasonable accommodations.
4. Further, the learned Chambers Judge erred in holding that documents provided to the PHO with the Appellants' request for reconsideration were not relevant to the PHO's decisions, because they were provided to her after September 10, 2021 (the date of the first vaccine mandate). In fact, such documents were before the PHO at relevant and material times as the PHO repeatedly re-enacted the Orders, and the Petition expressly sought relief against the updated Orders as updated from time to time.
5. The Orders also exceed the authority of the PHO as they require persons to disclose personal information to third parties, which requirement may only be imposed by the Lieutenant Governor-in-Council pursuant to section 121 of the *Public Health Act*.

PART 1 - STATEMENT OF FACTS

A. The Background Leading up to the Proof of Vaccination Requirements

1. On March 17, 2020, the respondent PHO declared that the transmission of SARS-CoV-2 constituted a "regional event" effecting the Province of British Columbia, which notice enabled the exercise of emergency powers pursuant to Part 5 of the *Public Health Act*, S.B.C. 2008 c. 28.
2. On December 9, 2020, Health Canada approved the Pfizer-BioNTech, COVID-19 Vaccine pursuant to an Interim Order Authorization, the first COVID-19 vaccine to be authorized for use in Canada. In 2020 and 2021 several other COVID-19 vaccines would be approved in this way by Health Canada, such as Moderna, Janssen and AstraZeneca.
3. By June 2021, over 4 million vaccine doses had been administered to individuals in British Columbia, and the BC Vaccine Card was already available.

B. Proof of Vaccination Requirements are Introduced Without Including Any Exceptions to Ensure Minimal Impairment of Constitutional Rights

4. On September 10, 2021, Food and Liquor Service Order and the Gathering and Events Order were repealed and replaced with requirements, *inter alia*, all participants in events and patrons of food and liquor services to provide proof of vaccination against COVID-19, commencing September 13, 2021:

> d. A participant who has not provided an organizer with proof in the form of a vaccine card of having received at least one dose of vaccine must not enter or remain in a place for the purpose of an event.[1]

5. These orders in their various iterations each contained the following notice, or words to their effect:

[1] Affidavit #1 of Dr. Brian Emerson, Exh. 30, AB Vol.2 p.1421

> If you fail to comply with this Order, I have the authority to take enforcement action against you under Part 4, Division 6 of the *Public Health Act*.[2]

6. The September 10, 2021, versions of the Impugned Orders suggest the following legislative objectives in their recitals: (1) limiting transmission of SARS-CoV-2; and (2) increasing immunity to COVID-19 in British Columbia:

> F. Evidence is emerging that even people who are vaccinated can be infected with SARSCoV-2 and can transmit SARS-CoV-2, although this is much less likely than in the case of unvaccinated people
> …
> H. Programs that require that proof of vaccination be provided have been shown to increase vaccination uptake in populations, thereby reducing the public health risk of COVID-19.[3]

7. The first objective rests on the unsupported (and indeed refuted by the BC CDC) statement that vaccinated people are less likely to transmit the disease than unvaccinated people and an Israeli study published August 25, 2021.[4]
8. None of these legislative objectives are meaningfully furthered by prohibiting individuals with prior immunity, or other reasonable accommodations from participating in events or attending certain venues such as restaurants. Persons requiring accommodation based on *Charter* rights are a small group of B.C. residents.
9. Indeed, exemptions were possible and were made. As of March 15, 2022, the Respondent had issued approximately 113 exemptions.[5]
10. The September 10, 2021, and further versions of the Gathering and Events Order and Food and Liquor Service Order continued to explicitly threaten the prospect of imprisonment for non-compliance, and did not provide for any exceptions to the proof of vaccination requirements for those who had already recovered from COVID-19, or those able to provide a recent, negative COVID-19 test.

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[2] Affidavit #1 of Dr. Brian Emerson, Exh. 30, AB Vol.2 p.1423

[3] Affidavit #1 of Dr. Brian Emerson, Exh. 30, AB Vol.2 p.1414

[4] Affidavit #2 of Kipling Warner, Exhibit B, p.6, AB Vol. 1 p.300; Affidavit #3 of Kipling Warner Warner, para. 23, Exh. I, AB Vol. 1 p.392

[5] Affidavit #1 of Dr. Brian Emerson, para. 108, AB Vol. 1 p.448

11. Further, the requirement to furnish proof of vaccination applied even to gatherings and events hosted on public property, save and except for "outdoor public assemblies for the purpose of communicating a position on a matter of public interest or controversy".

C. The Request for Reconsideration of Mr. Curtis

12. Stefan Curtis is an individual resident in British Columbia.
13. On or about August 20, 2021, Mr. Curtis tested positive for COVID-19 while travelling in the European Union.
14. Mr. Curtis received an EU Digital Covid Certificate confirming his recovery from COVID-19, valid from September 2, 2021 to February 15, 2022.
15. On September 30, 2021 Mr. Curtis emailed a request for reconsideration to the Office of the PHO (the "OPHO"), along with supporting materials. Mr. Curtis included a link to a bulletin published by the World Health Organization, published on May 10, 2021, that stated that natural immunity to COVID-19 was as good as immunity following vaccination.
16. Mr. Curtis did not receive a response to his reconsideration request.[6]

D. The Respondents Issue a Request for Reconsideration, based on Expert Evidence, and Practice in other Similar Jurisdictions That Make Exceptions For Those Having Natural Immunity or Recent Negative COVID-19 Tests

17. On October 20, 2021, the appellants submitted a request for reconsideration (the "**Reconsideration Request**") for the following classes of persons pursuant to section 43(7) of the *Public Health Act*:
    a. "persons who attend events"; and
    b. "patrons of restaurants…"[7]
18. These classes of persons included both Mr. Curtis and the appellant Mr. Warner.

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[6] Affidavit #1 of Stefan Curtis, para. 7, Exhibit C, AB Vol. 1 pp.282 -287

[7] Affidavit #1 of Kipling Warner, Exh. B, AB Vol. 1 p.14

19. The Reconsideration Request included relevant information, including a report from Dr. J. Kettner, MD, MSC, FRCSC, FRCPC, the former Chief Medical Officer of Health and Chief Public Health Officer for the Province of Manitoba.[8]

20. The Reconsideration Request sought a replacement of the September 10, 2021 Gathering and Events Order and Food and Liquor Service Order and subsequent updates that would recognize that the following persons, among others, were as safe as those with two doses of vaccines according to the then emerging expert consensus (the "**Requested Exemptions**"):

    a. Those with natural immunity through a positive RT-PCR or rapid antigen test result demonstrating recovery from COVID-19 issued no less than 11 days and no more than six months after the date on which a person first tested positive;

    b. those with a negative PCR or antigen test less than 48 hours prior to attendance at an event; and

    c. those with a single vaccination after contracting COVID-19 after an interval of at least 21 days following the illness.[9]

21. On 4 November 2021, the Petitioners issued a Petition pursuant to the *JRPA* and the *PHA*, SBC 2008, c. 28, in relation to the Orders.[10]

22. On November 12, 2021, prior to addressing the Reconsideration Request, the PHO issued an order (the "**Variance Order**") pursuant to section 54(1) of the *Public Health Act* declaring that she would not consider reconsideration requests other than those seeking medical deferral.[11]

23. The Variance Order would apply to reconsideration requests already received, but not yet considered.

24. On January 17, 2022, the Deputy PHO, Dr. Brian Emerson, responded to the Reconsideration Request, stating that such requests were precluded by the Variance Order.

25. On 29 April 2022, the PHO issued a Response to Petition. This Response relied on

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[8] Affidavit #1 of Kipling Warner, Exh. B, AB Vol. 1 p.14-24

[9] Affidavit #1 of Kipling Warner, Exh. A p.6-13, AB Vol. 1 p.19

[10] Reasons for Judgment, AR p.26

[11] Affidavit #1 of Dr. Brian Emerson, Exh. 20, AB Vol. 2 p.1283

the affidavit of Dr. Brian Emerson, the Deputy Provincial Health Officer ("DPHO"), in support of the Orders issued by the PHO, as the sole evidence for the basis upon which the Orders were made. The affidavit makes no reference to the Reconsideration Request, or the Kettner Report.[12]

E. The Impugned Orders are Repealed and Replaced While Dr. Kettner's Report Is Before the PHO

26. Following receipt of the Reconsideration Request, and the information contained in the report of Dr. Kettner, the PHO refused to reconsider or vary the Impugned Orders and re-enacted them with updated terms.
27. The Gatherings and Events Order was repealed and replaced on October 25, November 12, December 3 and 22, 2021, and on January 17 and 27, February 16, and March 10, 2022 and the Food and Liquor Service Order was repealed and replaced on October 25, December 12 and 22, 2021 and on January 17, February 7 and 16, and March 10, 2022 (collectively, the **"Impugned Orders"**).[13]
28. Each of these later versions of the Impugned Orders constituted the enactment of delegated legislation on their stated dates. Accordingly, the information contained in the Reconsideration Request and provided by Mr. Curtis, including the information contained in Dr. Kettner's report, was before PHO at the time of the relevant statutory decisions.
29. However, the later versions of the Impugned Orders did not include the Requested Exemptions. In fact, the Gatherings and Events Order of March 10, 2022, became more coercive, and included for the first time an unambiguous and express "vaccine mandate" with the following language in respect of participants at events: "A participant must be vaccinated".[14]
30. Like each of the preceding orders, the March 10, 2022, version expressly threatened legal process and imprisonment for non-compliance.[15]

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[12] Response to Petition, AR p. 24
[13] Affidavit #1 of Dr. Brian Emerson, paras. 80 – 83, 90 – 98, 102, AB Vol. 1 pp. 443, 445, 446
[14] Affidavit #1 of Dr. Brian Emerson, Exh. 40, AB Vol. 2, p.1649
[15] Affidavit #1 of Dr. Brian Emerson, Exh. 40, AB Vol. 2, p.1653

F. The Chambers Proceedings – the Appellants File their Petition, which is dismissed

31. The Appellants filed a Petition seeking that the Impugned Orders, as amended from time to time, be set aside as constitutionally invalid, that they be quashed as unreasonable, and that the Canadian Society for the Advancement of Science in Public Policy be granted public interest standing to bring the petition.[16]
32. On May 18 and 19, 2022, Chief Justice Hinkson heard the Petition in chambers.
33. On September 12, 2022, the learned Chambers Judge delivered his Reasons for Judgment and granted an Order to dismiss the Petition, holding, *inter alia*, that the Society did not qualify for public interest standing (granting Mr. Warner private interest standing instead), that the liberty interest under section 7 of the *Charter* was not engaged by the Impugned Orders, and that the information contained in Dr. Kettner's report was not before the PHO at a relevant time, and could not form part of the record under the *JRPA*.

PART 2 - ERRORS IN JUDGMENT

34. The learned Chambers Judge erred by:
    a. Failing to grant public interest standing to the Society;
    b. Failing to determine that section 7 of the *Charter* was engaged by the Impugned Orders;
    c. Failing to determine whether the Impugned Orders infringed section 7 of the *Charter* in a manner contrary to the principals of fundamental justice, and, if so, whether they may be saved under the *Oakes* or *Doré* analysis;
    d. Failing to admit the Dr. Kettner Report as relevant evidence that was before the PHO when she re-enacted the Impugned Orders following her receipt of it; and
    e. Failing to find that the Impugned Orders were unreasonable.

[16] Amended Petition, AR p. 5

PART 3 – ARGUMENT

A. The Standard of Review Is Correctness Regarding the Charter, Evidentiary Questions, and Jurisdiction Between the PHO and the Lieutenant Governor-in-Council

35. This appeal raises issues reviewable on both the correctness and reasonableness standards.

36. The applicable standard of review to PHO orders was recently discussed by this Honourable Court:

> [139] This Court's task on an appeal from an application for judicial review is to "step into the shoes" of the chambers judge and determine whether they identified the correct standard of review and applied that standard correctly: ... On an appeal of a judicial review decision, it is not necessary for the appellate court to identify a specific error on the part of the judge who conducted the judicial review... Further, although the chambers judge's reasoning may be instructive, his decision is not entitled to deference.[17]
>
> [citations omitted]

37. The standard of correctness also applies to the question of whether the information contained in the Reconsideration Request is relevant evidence. As was recently stated by Justice Moldaver, writing for the majority of the Supreme Court of Canada, "*the standard of review for evidentiary errors is correctness*".[18]

38. Finally, as the Appellants claim that the PHO did not have the jurisdiction to enact the proof of vaccination requirements, which authority was exclusively granted to the Lieutenant Governor-in-Council, there is a question of jurisdiction between two administrative bodies, and the presumption of reasonableness is rebutted and the standard of correctness applies.[19]

("*Vavilov*")

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[17] *Beaudoin v. British Columbia (Attorney General),* 2022 BCCA 427 at para. 139

[18] *R. v. Samaniego*, 2022 SCC 9 at para. 25

[19] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 17

B. The Society Satisfies the *Borowski* Factors for Public Interest Standing

39. The Chambers Judge erred in finding the Society did not have public interest standing.

40. The Chambers Judge concluded that s. 43(7)(a) of the PHA specifically allows reconsideration requests to be made on behalf of a class of persons and that a challenge to the constitutionality of legislation is justiciable, but given that Mr. Warner had private interest standing, the inclusion of the Society as a public interest litigant was not reasonable or effective and thus failed the third *Borowski* factor. [20]

41. This approach was specifically rejected by the Supreme Court of Canada:

> [94] Second, the chambers judge's fourth concern attaches undue weight to the importance of an individual plaintiff. But as I explained above, Downtown Eastside sets out no requirement for such a plaintiff. Instead, it directs courts to consider whether the plaintiff's claim is a reasonable and effective means of bringing the case to court, regardless of whether other reasonable and effective means exist (para. 44).[21]

42. The Society was granted public interest standing in a similar challenge to the Respondent's orders that required vaccination of healthcare workers in order to work in healthcare settings.[22]

43. With respect to the third *Borowski* factor, Justice Coval's reasons were as follows:

> [58] The PHO argues the petition is not a reasonable and effective way to bring the issue before the courts. It says that directly impacted healthcare workers are better suited to challenge the Impugned Orders. As stated by Dickson J.A. in *CCD*, "all other relevant considerations being equal, a plaintiff with private interest standing will usually be preferred over a public interest litigant seeking to advance a duplicative claim in a separate action" (para. 83).
>
> [59] As discussed in the hearing, numerous individual healthcare workers, allegedly having lost their jobs due to being unvaccinated, are challenging the Impugned Orders in another proceeding that is also in its

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[20] Reasons for Judgement, paras. 47, 48, 60, 65 and 66, AR pp. 37, 39, 41

[21] *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27 at para. 94

[22] *Canadian Society for the Advancement of Science in Public Policy v. British Columbia (Provincial Health Officer),* 2022 BCSC 724 at para. 63

> early stages: *Tatlock v. Attorney General for the Province of British Columbia*, Vancouver Registry Court File No. S-222427.
>
> [60] Given the *Tatlock* proceedings, CSASPP's standing appears unnecessary for access to justice for impacted healthcare workers. Nevertheless, guided by Crowell J.'s flexible, purposive approach in *Downtown Eastside*, CSASPP's petition appears to be a reasonable and effective means of bringing forward the evidence and claims regarding the Reconsideration Request and Response. It appears that no similar issue is being pursued in *Tatlock*.
>
> [61] In my view, subject to the comments above about the shortcomings in its pleadings, the Petition represents a reasonable and effective means to bring forward the important and complex healthcare issues in the Reconsideration Request that transcend the interests of those directly involved.
>
> [62] Overall, the reasonable and effective means factor supports standing.[23]

44. The Society's members, such as healthcare workers, and others include a cross section of British Columbians, all of which are persons who attend gatherings and events and restaurants.[24]
45. The Respondents initially appealed Justice Coval's decision regarding standing but have abandoned the appeal.
46. By placing disproportionate weight on the existence of an individual plaintiff, the Chambers Judge erred in holding that the Society lacked standing in this proceeding.

C. The Impugned Orders Necessarily Engage Section 7 as Contravention of them Raised the Prospect of Imprisonment

47. A constitutional claim pursuant to section 7 of the *Charter* engages a two-stage analysis. First, the impugned government act must be shown to impose limits on a "life", "liberty" or "security of the person" interest. Second, this deprivation must be shown to be contrary to the "principles of fundamental justice", which include the principles against arbitrariness, overbreadth, and gross disproportionality.[25]

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[23] *Canadian Society for the Advancement of Science in Public Policy v. British Columbia (Provincial Health Officer),* 2022 BCSC 724 at paras. 58-62

[24] Affidavit #3 of Kipling Warner, paras. 9-12, Exh. C, AR pp. 306, 307, 331, 332

[25] Canada (Attorney General) *v. Bedford*, [2013] 3 S.C.R. 1101 at paras. 45 and 57

48. The interests protected by section 7 are broad, and the liberty interests protected by section 7 of the *Charter* are engaged whenever the state, by resorting to the justice system, raises the threat of punishment or imprisonment in any circumstances:

> Put shortly, I am of the view that s. 7 is implicated when the state, by resorting to the justice system, restricts an individual's physical liberty in any circumstances. Section 7 is also implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity. Finally, s. 7 is implicated when the state, either directly or through its agents, restricts certain privileges or liberties by using the threat of punishment in cases of non-compliance.[26]

49. In *R v Heywood*, the Supreme Court of Canada held that provisions of the Criminal Code that allowed the imposition of lifetime bans on access to public property, such as parks, for those convicted of various sex offences, violated the appellant's section 7 liberty interest as they restricted access to places where the rest of the public is "free to roam".[27]

50. In this case the Chambers Judge erred in holding that section 7 was not engaged, and in distinguishing *Heywood* on the basis that public property and imprisonment were not in issue. The Gatherings and Events Orders applied to public and private property alike, with narrow exceptions for protests held outdoors.

51. Each of the Impugned Orders expressly threatened offence proceedings under the *Public Health Act*, which were punishable by up to 6 months of imprisonment:

> ***Offences***
>
> ***99*** *(1) A person who contravenes any of the following provisions commits an offence:*
>
> *[…]*
>
> *(k) section 42 [failure to comply with an order of a health officer], except in respect of an order made under section 29 (2) (e) to (g) [orders respecting examinations, diagnostic examinations or preventive measures];*

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[26] Reference re ss. 193 and 195.1(1)(c) of the *Criminal Code (Man.),* 1990 CanLII 105 (SCC), [1990] 1 S.C.R. 1123 at 1177

[27] *R v Heywood*, 1994 CanLII 34 (SCC), [1994] 3 SCR 761

> ***Fines and incarceration***
> ***108*** *(1) In addition to a penalty imposed under section 107 [alternative penalties], a person who commits an offence listed in*
>
> *(a) section 99 (1) [offences] is liable on conviction to a fine not exceeding $25 000 or to imprisonment for a term not exceeding 6 months, or to both,*

52. The Chambers Judge further erred in holding that s. 7 rights do not extend to publicly-accessible private establishments in this context. [28]

53. Where a law extends to publicly accessible private establishments, the *Charter* applies to the interpretation of the law or government action. For example, s.213 of the *Criminal Code* provides:

> ***213 (1)*** *Everyone is guilty of an offence punishable on summary conviction who, in a public place or in any place open to public view, for the purpose of offering, providing or obtaining sexual services for consideration,*
>
> ***(a)*** *[...]*
>
> ***(b)*** *impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place.*
>
> ***Communicating to provide sexual services for consideration***
> ***(1.1)*** *Everyone is guilty of an offence punishable on summary conviction who communicates with any person — for the purpose of offering or providing sexual services for consideration — in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre.*
>
> ***Definition of public place***
> ***(2)*** *In this section,* ***public place*** *includes <u>any place to which the public have access</u> as of right <u>or by invitation, express or implied</u>, and any motor vehicle located in a public place or in any place open to public view.*[29]
>
> [emphasis added]

54. Clearly, section 213 of the *Criminal Code* is subject to the *Charter,* even though it captures activities at private establishments like restaurants or places where people gather. While this section relates to the provision of sexual services, it illustrates that

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[28] Reasons for Judgment, para. 147 and 148, AR, pp. 55, 56

[29] Section 213 of the Criminal Code, R.S.C., 1985, c. C-46

where legislative powers extend to private establishments where the public have access by invitation, express or implied, the *Charter* applies.

55. The Chambers Judge further erred in concluding that the liberty interests in s.7 are not engaged as the vaccine requirement was not "mandatory" and only affected "discretionary" activities, such as going to cultural events or public gatherings.[30]

56. The activities affected by Impugned Orders effectively prevent members of our society to fully participate in the social and cultural life of British Columbia. Restaurants and concerts, as well as sporting venues are important cultural gathering places and where the exchange of ideas, both political and social take place.

57. Section 7 rights are broad and are substantially equivalent to the statutory objectives of the *Human Rights Code*, found at s.3(a) as follows:

> ***Purposes***
> ***3*** *The purposes of this Code are as follows:*
> *(a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;*[31]

58. Participation in the social and cultural life of our society are clearly interests protected by the *Charter*, subject to s.1.

59. *Charter* rights should be interpreted in a broad and purposive manner having regard to the appropriate historical and social context. From this general principle, three particular considerations are relevant to the interpretation of the section 7 right:

> (1) the *Charter* is part of the living tree that is the Canadian constitution and that as such, "the past plays a critical but non-exclusive role" in determining the scope of *Charter* rights;
>
> (2) practical considerations should be borne in mind when undertaking constitutional interpretation; and
>
> (3) that the Court must be guided by the ideal of a "free and democratic society" as enunciated by Dickson C.J. in *R. v. Oakes*.[32]

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[30] Reasons for Judgment, para. 143, AR p. 55

[31] *Human Rights Code*, RSBC 1996, c. 210

[32] *Reference Re Prov. Electoral Boundaries (Sask.),* 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158 p.179 and 180

60. While there is no section 7 jurisprudence with respect to a widespread ban on participation in our culture and society, this is because the factual circumstances are unprecedented in our modern society.

D. The Impugned Orders Were Overbroad, as they Restricted Conduct Unrelated to the Objective of Preventing the Spread of COVID-19

61. As section 7 of the *Charter* is necessarily engaged in these circumstances, the Chambers Judge was required to address the question of the principles of fundamental justice.
62. The rule against overbreadth is one of the principles of fundamental justice, which rule requires the Impugned Orders to avoid overreach, and to avoid restricting conduct that bears no relation to the legislative objective.[33]
63. In *R. v. Heywood*, the Court held that an overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason.[34]
64. The Impugned Orders' objective of reducing transmission of SARS-CoV-2 is not furthered by restricting the conduct of those with proven, prior immunity to COVID-19 and recent negative COVID-19 tests, the Impugned Orders were overbroad.
65. The evidence shows that vaccination requirements were meant to create an incentive for higher vaccination rates, and without reasonable exemptions, were overbroad.
66. Dr. Patty Daly, Chief Medical Health Officer for Vancouver Coastal Health, has publicly stated that transmission in restaurant settings are not high risk as follows:

> *The vaccine passport requires people to be vaccinated to do certain discretionary activities such as go to restaurants, movies, gyms, not because these places are high risk.* ***We are not actually seeing Covid***

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[33] *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at paras 112-113
[34] *R v Heywood*, 1994 CanLII 34 (SCC), [1994] 3 SCR 761, at p. 792-93

> ***transmission in these settings****. It really is to create an incentive to improve our vaccination coverage…The vaccine passport is for non-essential opportunities, and its really to create an incentive to get higher vaccination rates.*[35]

67. While, the appellants will discuss this portion of the Chambers Judge's reasoning at paragraphs 120-130 below, the fact that public health officials at Vancouver Coastal Health, who according to Dr. Emerson, work with the PHO to implement immunization plans, concluded that there was no elevated risk in these settings provides evidence and support that the Impugned Orders were overly broad.[36]
68. The Impugned Orders' objective of reducing transmission of SARS-CoV-2 is also not furthered by restricting the freedoms of unvaccinated persons while allowing vaccinated to enjoy the freedom of participation in society.
69. The reliance on the belief that the vaccinated do not spread the virus was not based on scientific evidence, and in fact, the PHO was aware that the opposite was true.
70. The evidence before the PHO by early 2022 clearly established that double vaccinated persons spread the virus in a manner similar to unvaccinated individuals. In its February 16, 2022 letter from Coastal Health to UBC's president and vice-chancellor, Dr. Ono, signed by the Chief Medical Health Officer, Dr. P. Daly, Deputy Chief Medical Health Officer, Dr. M. Lysyshyn, and two other Medical Health Officers, Dr. M. Dewar, and Dr. M Schwandt, stated in part as follows:

> *Current scientific evidence, including BC data, indicates that COVID-19 vaccination (2-doses), while effective at preventing severe illness, is not effective at preventing infection or transmission of the Omicron variant of the virus, which now accounts for almost 100% of cases in the province. Therefore there is now no material difference in likelihood that a UBC student or staff member who is vaccinated or unvaccinated may be infected and potentially infectious to others. We also know that Omicron causes less serious illness than other variants of COVID-19, which is particularly true for young people.*[37]

71. This evidence is simply ignored and not addressed by the PHO. The evidence relied on by the PHO as to why she (or Dr. Emerson) concluded that vaccinated individuals do not spread the virus is also unknown.

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[35] Affidavit #3 of Kipling Warner, para. 22, AB Vol. 1 p.308
[36] Affidavit #1 of Dr. Brian Emerson, paras. 46 and 47, AB Vol. 1 p. 435
[37] Affidavit #3 of Kipling Warner, Exh. F, AB Vol. 1 pp. 343-344

72. Indeed, exemptions were possible and were made. As of March 15, 2022, the Respondent had issued approximately 113 exemptions.[38]

73. On November 12, 2021, the Respondent suspended the s. 43 reconsideration process with retroactive effect, including requests already received but not yet considered.

74. There is no explanation provided as to why reasonable *Charter* based exemptions could not be considered or included in the Impugned Orders, except that she was essentially "too busy" to deal with the *Charter* exemptions in settings where Covid transmission was not observed by the PHO.

75. At para. 110 of his affidavit, Dr. Emerson states:

> *110. Given the amount of the OPHO and PHO's time and resources being occupied by this process, resources that are more efficiently and effectively expended dealing with other facets of managing the ongoing pandemic, the PHO determined that it was necessary, in the interests of protecting public health, for her not to consider requests for reconsideration of those aspects of the Orders, other than on the basis of medical deferral to vaccination, until the level of transmission, incidence of serious disease, and strain on the public health and health care systems are significantly reduced.*[39]

76. However, no explanation is provided as to exactly what time and resources were occupied in the process or why it was not possible to make accommodations. The Court must make assumptions as to how much resources were required. Maybe a lot, but maybe not. There is no way to evaluate whether the above conclusion is reasonable, in the circumstances.

77. Finally, the following statement at para. 139 of Dr. Emerson's affidavit is telling that the Respondent failed to consider reasonable alternatives:

> *139. If any of the currently active orders being challenged on this judicial review were to be quashed, then the PHO would need to consider what other measures and further orders would need to be implemented to best protect individuals, the health of the population and our public health and healthcare systems, given the current state of the pandemic in British Columbia and the recent Omicron-driven fifth wave.*[40]

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[38] Affidavit #1 of Dr. Brian Emerson, para. 108, AB Vol. 1, p.448

[39] Affidavit #1 of Dr. Brian Emerson, para. 110, AB Vol. 1 p.448

[40] Affidavit #1 of Dr. Brian Emerson, para. 139, AB Vol. 1, p. 453

78. Is it simply enough for a public health official to state they are too busy to deal with the *Charter?*
79. This is not a situation where the government invoked the notwithstanding clause in section 33 of the *Charter,* so the answer is surely no. And the jurisprudence makes it clear that the *Charter* cannot simply be ignored.[41]

E. Dr. Kettner's Report Was Before the PHO as She Repeatedly Re-enacted the Impugned Orders – It Is Therefore Relevant and Admissible under the *JRPA*

80. At paragraph 103 the Chambers Judge found that the Reconsideration Request was not before the PHO when the Impugned Orders were issued, and that there was no basis to argue that the materials contained inside were a part of the "record of the proceeding". [42]
81. The Chambers Judge made this finding on the basis that the Impugned Orders were made on September 10, 2021, and the Reconsideration Request was not made until October 20, 2021.
82. However, on the face of the Petition, relief was sought against the Impugned Orders "and subsequent updates". Each subsequent update to the Impugned Orders constituted a new decision of a statutory decision maker, with a new "record of the proceeding" under the *JRPA* (this result is obviously necessary, otherwise it would be impossible for the PHO to justify new restrictions and requirements set out with the updated orders).[43]
83. Indeed, by the date the Petition was filed on November 4, 2021, the September 10 versions of the Impugned Orders had already been repealed and replaced. The Gatherings and Events Order and the Food and Liquor Services Order were repealed and replaced on October 25, 2021.
84. Both of these versions of the Impugned Orders were issued after the PHO had received the Reconsideration Request on October 20, 2021.

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[41] *Constitution Act*, 1982, Canadian Charter of Rights and Freedoms, s. 33
[42] Reasons for Judgment, para. 103, AR p.48
[43] Amended Petition, Part 1, para. 1, p. 3, AR p.5

85. In this case, the Reconsideration Requests of both Mr. Warner and Mr. Curtis were sent to the PHO prior to her decisions to re-enact the Impugned Orders, and their Affidavits are circumscribed simply to set out the materials they placed before the PHO.

86. The Chambers Judge did correctly find that the Reconsideration Requests of both Mr. Warner and Mr. Curtis were before the PHO with respect to orders made subsequently.[44]

87. For these reasons, the Chambers Judge erred in holding that the Reconsideration Request and Mr. Curtis's materials were not relevant to the Impugned Orders.

F. The Impugned Orders Were Unreasonable

i. The Impugned Orders Exceeded the Statutory Authority of the PHO by Requiring Participants To Disclose Their Medical Information to Third Parties, Which Is the Exclusive Jurisdiction of the Lieutenant Governor-In-Council

88. It cannot be denied that the PHO is granted broad powers pursuant to the *Public Health Act*, and that these powers are enhanced following the invocation of her emergency powers.

89. However, the rule of law requires that all delegated legislation be enacted consistently with the relevant statutory purposes, and pursuant to valid statutory authority, even in an emergency situation:

> […] substantive review is premised on the fundamental assumption derived from the rule of law that a legislature does not intend the power it delegates to be exercised unreasonably, or in some cases, incorrectly.[45]

90. In the present case, the *Public Health Act* is a part of the legislative scheme of British Columbia's health and privacy law statutes, which are generally protective of personal private information, such as vaccination status, and which the legislature has taken great care to craft extensive legislation.

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[44] Reasons for Judgment, para. 106, AR p.49

[45] *Catalyst Paper Corp. v. North Cowichan (District),* 2012 SCC 2, at 12

91. Indeed, broad powers in respect of the making of delegated legislation impacting personal information is expressly granted only to the Lieutenant Governor-in-Council under section 121 of the *Public Health Act*:

> **121** The Lieutenant Governor in Council may make regulations respecting personal information as follows:
>
> (a) if necessary for the effective operation of a provision of this Act or a regulation made under it, authorizing the collection, use and disclosure of personal information for a purpose set out in section 9 *[purposes for collection, use and disclosure of personal information]*;
>
> (b) if the collection, use or disclosure of personal information is authorized under this Act,
>
> (i) clarifying or limiting the purposes for which collection, use or disclosure is authorized, and
>
> (ii) limiting or putting conditions, in addition to any limits or conditions already provided for in this Act, on that collection, use or disclosure;
>
> (c) requiring the keeping of records or the making of reports respecting the collection, use or disclosure of personal information under this Act.[46]

92. Personal information under this section has the same meaning as under the *Personal Information Protection Act*, which is broad and encompasses personal vaccination status. Indeed, “personal information" means information about an identifiable individual.[47]

93. An example of properly made law respecting the disclosure of vaccination status by persons to third parties is the *Vaccination Status Reporting Regulation*, B.C. Reg. 146/2019, which sets out the requirement for parental guardians to make disclosure of their child’s vaccination status in respect of childhood scheduled vaccines and was passed by Order-in-Council.[48]

94. The emergency powers of the PHO do not enabled her to utilize the Lieutenant Governor-in-Council’s powers under section 121 (notwithstanding that the *Public Health Act* at various points expressly empowers her to utilize a Minister’s powers

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[46] *Public Health Act,* S.B.C. 2008, c. 28, s 121

[47] *Public Health Act,* S.B.C. 2008, c. 28, s 121, “personal Information” s.1; Personal Information Protection Act, S.B.C. 2003, c. 63, “personal Information” s.1

[48] *Public Health Act, Vaccination Status Reporting Regulation*, s. 5

from certain other sections), and her emergency power to infringe on the confidentiality of personal private information is relatively circumscribed, merely allowing her to "collect, use, or disclose information, including personal information", but the Public Health Act expressly does not allow her to compel disclosure or reports containing personal information to third-parties.

95. Accordingly, the Impugned Orders fell outside of the PHO's emergency legal authority to make delegated legislation, which limits were clearly expressed at sections 54 and 56 of the *Public Health Act*.

96. The *Public Health Act* cannot be interpreted, on the applicable standard of correctness, to grant the PHO authority to require each and every British Columbian to disclose their personal information to third parties, as that law making power was exclusively granted to the Lieutenant Governor-in-Council.

ii. Impugned Orders were Unreasonable on the Face of the Record Produced

97. The Chambers Judge erred in concluding that the Impugned Orders were reasonable on the face of the record produced by the PHO.

98. In *Law Society of British Columbia v. Trinity Western University*, the Court confirmed that in relation to *Charter* challenges to administrative decisions, reasonableness means the following:

> *[81] The reviewing court must consider whether there were other reasonable possibilities that would give effect to Charter protections more fully in light of the objectives. This does not mean that the administrative decision-maker must choose the option that limits the Charter protection least. The question for the reviewing court is always whether the decision falls within a range of reasonable outcomes (Doré, at para. 57; Loyola, at para. 41, citing RJR-MacDonald Inc. v. Canada (Attorney General), 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para. 160).* ***However, if there was an option or avenue reasonably open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives, the decision would not fall within a range of reasonable outcomes.*** *This is a highly contextual inquiry.*[49]

[49] *Law Society of British Columbia v.Trinity Western University*, 2018 SCC 32, ("*Trinity Western"),* para 81

[emphasis added]

("*Trinity Western")*

99. In reviewing a decision for reasonableness, a Court must ask whether the decision has the qualities that define reasonableness: justification, transparency and intelligibility. A reasonable decision must be based on an internally coherent and rational chain of analysis.[50]

100. It is a fundamental principle of Canadian administrative law that the reasonableness of an administrative decision can only be determined by reading the formal decisions in light of the record before the decision-maker (i.e., the record of proceeding), which as the Supreme Court of Canada recently explained, "generally consists of the evidence that was before the decision-maker". [51]

101. As the Supreme Court explained in *Vavilov* the record is central to determining whether the decision-maker has taken (at para. 126) "the evidentiary record and the general factual matrix that bears on its decision into account", and whether (at para. 127) "an administrative decision-maker's reasons meaningfully account for the central issues and concerns raised by the parties".[52]

102. As the BC Court of Appeal has recently stated:

> [49] Thus, while it may be more difficult to identify precisely which documents were before a decision maker such as the Minister or their delegate as in this case, as opposed to a tribunal, it is clear that the only documents to be produced as part of the record are those that were actually before the decision maker. [53]

103. This legal requirement to include all documents before the decision-maker in the record before the Court was recently applied by this Court in the Canada Mink Breeders case:

> [35] In summary, I have concluded that the respondents should be directed to produce, to the extent they have not already done so, the documents in their possession or control reflecting the information and

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[50] *Vavilov* at paras. 99 and 85

[51] *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 at para. 52

[52] *Vavilov* at paras. 126, 127

[53] *British Columbia (Minister of Health) v. Eastside Pharmacy Ltd*., 2022 BCCA 259, para 49

> submissions that were directly or indirectly considered by cabinet in making the impugned decision, unless continuing to withhold those documents is found to be justified under the PII test, to which I turn next.[54]

104. This is especially important in light of the heightened duty of justification on decision-makers arising from the severe consequences for individuals who are not double vaccinated. [55]
105. The paucity of the record that was before Dr. Henry was an issue at the hearing. Essentially, the respondent's affidavit amounted to "trust us, we got it right.", which was accepted by the Chambers Judge, respectfully in error.[56]
106. Reasonableness in a *Charter* context further requires proof that the decisions at issue affected *Charter* protections as little as reasonably possible in light of the applicable statutory objectives.
107. The Court in *LSBC v TWU* held:

> if there was an option or avenue reasonably open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives, the decision would not fall within a range of reasonable outcomes.[57]

108. However, in this proceeding, the Respondent has neither produced the portion of the record relied on, nor limited itself to evidence and documents contained in the record that was produced.
109. The Respondent relied on an affidavit provided by Dr. Emerson, who was the Deputy Provincial Health Officer ("Deputy PHO") with the Ministry of Health at the material times. Dr. Henry did not provide any affidavit in support of her position.
110. Numerous issues were highlighted with the general statements made in Dr. Emerson's affidavit at the Hearing, but despite this, the Chambers Judge made the following conclusions:

> [146] Mr. Curtis is a British Columbia resident who received an EU Certificate covering a limited time period from September 2, 2021 to

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[54] *Canada Mink Breeders Association v British Columbia*, 2022 BCSC 1731 at para. 35
[55] *Vavilov* at para.133
[56] *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227 at para. 137
[57] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 81

February 15, 2022, and who made a request for reconsideration on the basis of natural immunity. There is also no evidence on the record to prove that reliance on natural immunity was effective in the EU. The PHO considered both the relative effectiveness of vaccination as a protective measure and natural immunity.

…

[160] The impugned Orders require individuals to be vaccinated to attend at non-essential settings or events where there is a high risk of transmission of SARS-CoV-2, or in settings where there is potential for contact with and transmission to vulnerable populations. That determination was made with careful consideration of the difficulties and risks in accommodating unvaccinated persons, and the associated threats to the health of the broader public.

…

[163] Dr. Emerson deposed that the PHO necessarily relies on the generally accepted scientific and epidemiological evidence available to her at the relevant time, as well as the precautionary principle i.e., reasonable measures to avoid threats that are serious and plausible, when making public health orders under the *PHA*.

[164] Dr. Emerson deposed that the PHO regularly receives and reviews the latest scientific evidence, as well as available global, national, and provincial level epidemiological data regarding SARS-CoV-2 and COVID-19, and information with respect to modelling and outbreaks, to determine what measures are necessary to respond to and mitigate the effects of the pandemic at any given point in time. He said that in a public health emergency, the need to act to protect the public in the face of changing circumstances does not permit all decisions to be made with scientific certainty.

[165] Dr. Emerson deposed that the OPHO received hundreds of requests for exemption from vaccination during the pandemic, including 404 requests relating to the Vaccine Passport Regime. He said that due to the amount of the OPHO and PHO's time and resources occupied by this process, the PHO determined in the interests of public health that it was necessary to decline to consider requests other than on the basis of medical deferral to vaccination, until the levels of transmission, incidence of serious disease, and strain on the public health and health care systems were significantly reduced.

[166] The PHO's factual findings and rationale for issuing the impugned Orders and the Variance Order were supported by the information available to her at the time, including, without limitation: the currently available scientific evidence regarding SARS-CoV-2; the then-current epidemiology in British Columbia; scientific literature; her background in epidemiology; risks associated with social settings and particular behaviours; the risks associated with vulnerable populations contracting COVID-19; and the impact on the public health and health

> care systems due to the burden of preventing COVID-19 and treating COVID-19 patients.
>
> [167] In making the impugned Orders and the Variance Order, I am satisfied that the PHO assessed available scientific evidence to determine COVID-19 risk for gatherings in British Columbia, including epidemiological data regarding transmission of SARS-CoV-2 globally, nationally, and in British Columbia, factors leading to elevated transmission risk in religious settings, and COVID-19 epidemiology in British Columbia.
> …
> [175] Similarly, I find that Dr. Emerson's statement that a "not insignificant" proportion of eligible population remained unvaccinated, without data to support that view, his failure to explain how hospitalizations were recorded, the lack of an explanation as to how the respondent adjusted for age differences, required no further elaboration.[58]
>
> [emphasis added]

111. However, there is no evidence as to what the "difficulties and risks in accommodating unvaccinated persons" were, what the accepted "scientific and epidemiological evidence" was, and what the other general statements mean or what they were based on.

112. Dr. Emerson's affidavit is full of sweeping generalizations without reference to the scientific basis his conclusions rely on, and which if simply accepted by the Court, make it impossible to analyse whether the Impugned Orders were reasonable, thus immunizing them from meaningful judicial review. For example:

    a. Para. 45 does not explain what the "*current scientific evidence*" is:

        > *The current available scientific literature has established*…

    b. Para. 57 also does not explain what "scientific literature" is being referred to:

        > *For both Delta and Omicron, the emerging consensus in the scientific literature is that vaccinated people who contract Covid-19 can still transmit the virus to others …*[59]

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[58] Reasons for Judgment, AR pp. 55, 57 – 59, 61

[59] Affidavit #1 of Dr. Brian Emerson, para. 45 and 57, AB Vol. 1, p. 435 and 437

c. Para. 58 and 60 does not explain why unvaccinated and previously infected people are at a higher risk than vaccinated people with two doses. If three doses are necessary, why not mandate three doses?

d. Para. 60 does not provide any evidence of "overtax" of the public health care system. Did this occur? Were other factors involved like systemic underfunding of the healthcare system?

e. Para. 61 stated a "not insignificant" proportion of eligible population remains unvaccinated. No data as to what this subjective statement means or how it would affect the public health system.

f. Para. 63 does not explain how "hospitalizations" were recorded. Does this include people who were hospitalized for other reasons, but happened to test positive to Covid-19?[60]

g. Para. 66 provides no explanation of what "after adjusting for age differences" means or how this "adjustment" was made. Also, was any adjustment made to account for people who had serious underlying conditions that may have caused the death?

h. Para. 75 - why is it an objective for those too young to be immunized – are children at a greater risk?

i. Para. 76 does not explain what the "current scientific evidence" is or why testing is not an adequate substitute.

j. Para. 77 talks about the preambles, but again, no scientific evidence is referenced.

k. Para. 103 does not address the information provided in the Reconsideration Request, which is also from then currently available scientific data from credible sources. Nor does he explain what "generally accepted scientific data" is.

l. Para. 106 does not explain why, for example, natural immunity exemptions would take a "significant amount of time and effort" to respond to or what efforts were made by the PHO to comply with her obligation under s.43 of the PHA.

m. Para. 110 does not explain how much "time and resources" were being occupied in the process.

[60] Affidavit #3 of Kipling Warner, Exh. G, AB Vol. 1 p.379-380

n. Para. 131 – what are "currently available scientific evidence, modelling and other data" that he bases his opinion on? Did he review the materials in the Reconsideration Request? Is that not credible? Why not?

o. Para. 131 - where he deposes that:

> *currently-available vaccines in Canada have reduced effectiveness against infection from Omicron, but third doses provide increased protection and two doses continue to provide protection against severe disease, hospitalization, acute care admission, and death*;

There is no explanation as to why is a third dose of the vaccine not required by the Impugned Orders?

p. Para. 138 – Dr. Emerson apparently is "continuing analyzing" "experiences from other jurisdictions", yet there is no explanation why the approach in other jurisdictions, as contained in the Reconsideration Request is simply being ignored.

q. Para. 139 – Why was this not considered at the time of the Reconsideration Request or subsequently? This is essentially what the Reconsideration Request required of Dr. Henry.[61]

113. The Chambers Judge did not engage in an analysis of what the "informed views" of Dr. Henry were, but simply accepted the opinion statements of Dr. Emerson. Dr. Emerson's affidavit is not the complete or even relevant "record" before Dr. Henry, as these are Dr. Emerson's opinions and not Dr. Henry's.

114. The Chambers Judge further erred in interpreting the reasonableness analysis to effectively mean that if the decision maker considered a factor or some (unknown) information, then her decision was reasonable.

115. For example:

> [146] Mr. Curtis is a British Columbia resident who received an EU Certificate covering a limited time period from September 2, 2021 to February 15, 2022, and who made a request for reconsideration on the basis of natural immunity. There is also no evidence on the record to prove that reliance on natural immunity was effective in the EU. <u>The PHO considered both the relative effectiveness of vaccination as a protective measure and natural immunity.</u>

[61] Affidavit #1 of Dr. Brian Emerson, AB pp. 435, 3437 – 439, 441, 442, 447, 448, 451 - 453

> …
> [173] Dr. Emerson also deposed that unvaccinated and previously infected are at a higher risk than vaccinated people with two doses, without providing a complete explanation for this view. I do not find that it was necessary for Dr. Emerson to fully explain his view.
>
> [174] I reject as unreasonable, the petitioners' assertion that Dr. Emerson's affidavit is deficient because he did not provide any evidence that the public health care system was overtaxed. I find that his statement to that effect is sufficient.[62]
>
> [emphasis added]

116. There is nothing in Dr. Emerson's affidavit apart from that hearsay statement that addresses how or what Dr. Henry considered. There is no evidence whether Dr. Henry considered the EU experience with vaccination passport exemptions. A search for "EU" or "European" keywords results in no such references in Dr. Emerson's affidavit.
117. As such there is no record of what Dr. Henry considered, except the bald statement that she did so.
118. The Chambers Judge further erred in dealing with the important discrepancies in the record by simply accepting the Respondent's version.
119. At paragraphs 56, 78 and 85 to 89 of Dr. Emerson's affidavit, Dr. Emerson discusses the justification for vaccination requirements in restaurants and places where people gather as being places of "higher risk".[63]
120. The Chambers Judge addressed the discrepancy between Dr. Emerson's statement above and Dr. Daly's statement by simply accepting Dr. Emerson's statement, which directly contradicts Dr. Daly's statement. Presumably they both based their statements on some type of evidence, which was not disclosed by the Respondent.

> [176] The petitioners place considerable reliance on the comments of Dr. Patty Daly, Chief Medical Health Officer for Vancouver Coastal Health, who stated publicly that transmission in restaurant settings is not a high risk:
>
> > The vaccine passport requires people to be vaccinated to do certain discretionary activities such as go to restaurants, movies, gyms, not

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[62] Reasons for Judgment, AR pp. 55, 60, 61

[63] Affidavit #1 of Dr. Brian Emerson, AB Vol. 1, pp. 437, 442, 444-445

> because these places are high risk. We are not actually seeing Covid transmission in these settings. It really is to create an incentive to improve our vaccination coverage […] The vaccine passport is for non-essential opportunities, and its really to create an incentive to get higher vaccination rates.
>
> [emphasis added]

> [177] Accepting that this was Dr. Daly's view, there is no indication of the basis upon which she may have reached that view, nor a bases for preferring that view to what I have accepted to be the informed views of the respondent.[64]

121. There is also no indication on the basis on which Dr. Emerson reached his views I paras. 78 and 85 to 89 of his affidavit either (See para. 119 above).
122. At para. 137, Dr. Emerson states that "*people with two or three doses of vaccine are less likely to be infected and transmit virus than unvaccinated people*." This seems to contradict other "*current scientific evidence*" that apparently shows there is "*no material difference*" in vaccinated and unvaccinated persons spreading the virus.
123. February 16, 2022 letter from Coastal Health to UBC's president and vice-chancellor, Dr. Ono, stating in part as follows:

> *Current scientific evidence, including BC data, indicates that COVID-19 vaccination (2-doses), while effective at preventing severe illness, is not effective at preventing infection or transmission of the Omicron variant of the virus, which now accounts for almost 100% of cases in the province. Therefore there is now no material difference in likelihood that a UBC student or staff member who is vaccinated or unvaccinated may be infected and potentially infectious to others. We also know that Omicron causes less serious illness than other variants of COVID-19, which is particularly true for young people.*[65]

124. The Chambers Judge simply accepted the Respondent's version without engaging in the necessary analysis as required by Vavilov.

> [176] The petitioners place considerable reliance on the comments of Dr. Patty Daly, Chief Medical Health Officer for Vancouver Coastal Health, who stated publicly that transmission in restaurant settings is not a high risk:

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[64] Reasons for Judgment, paras. 176, AR p.61

[65] Affidavit #3 of Kipling Warner, Exh. F, AB Vol. 1 p.343

> The vaccine passport requires people to be vaccinated to do certain discretionary activities such as go to restaurants, movies, gyms, not because these places are high risk. We are not actually seeing Covid transmission in these settings. It really is to create an incentive to improve our vaccination coverage […] The vaccine passport is for non-essential opportunities, and its really to create an incentive to get higher vaccination rates.

[177] Accepting that this was Dr. Daly's view, there is no indication of the basis upon which she may have reached that view, nor a bases for preferring that view to what I have accepted to be the informed views of the respondent.

[178] On February 16, 2022 Coastal Health sent a letter to UBC's president and vice-chancellor, Dr. Ono, stating in part as follows:

> Current scientific evidence, including BC data, indicates that COVID-19 vaccination (2-doses), while effective at preventing severe illness, is not effective at preventing infection or transmission of the Omicron variant of SARS-CoV-2, which now accounts for almost 100% of cases in the province. Therefore, there is now no material difference in likelihood that a UBC student or staff member who is vaccinated or unvaccinated may be infected and potentially infectious to others. We also know that Omicron causes less serious illness than other variants of COVID-19, which is particularly true for young people.

[179] Like the view attributed to Dr. Daly, there is no indication of the bases for this view, nor a basis for preferring that view to what I have accepted to be the informed views of the respondent.

[180] I find that the PHO's decision to issue the impugned Orders and the Variance Order was internally consistent and was based on her expert evaluation of the facts available at the time. In result, I find that the PHO's decision was not unreasonable and it fell within a range of reasonable options.[66]

125. The Chambers Judge did not address why the "current scientific evidence" relied on by Vancouver Coastal Health is not relevant to the decisions by the Respondent, or why the Respondent also has not provided any basis for her views.

126. The only contemporaneous materials that the Dr. Emerson's affidavit cites -- transcripts of press conferences given by the PHO, at which the Orders were announced – should not have been considered part of the record. The reason is that

[66] Reasons for Judgment, AR p. 61, 62

neither the affidavit of the DPHO, nor the Response to the Petition, quote or rely on these materials to attempt to shed any light on the basis for the Impugned Orders. Because the Respondent herself does not rely on these materials, this Honourable Court should not regard them as part of the record.

127. By contrast, the Reconsideration Request refers to specific information and studies.
128. By referring to specific information, it is possible to evaluate the reasonableness of an opinion or decision.
129. When referring to general undefined and subjective terms, it is impossible for the Court to evaluate whether Dr. Henry's decisions were reasonable.
130. This effectively immunizes makes public health Orders from judicial review, which is contrary to s.96 of the *Constitution Act, 1867*.
131. The inherent power of superior courts to review administrative action stems from the judicature provisions in s. 96 of the *Constitution Act, 1867*.[67]
132. Judicial review is directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by government decision makers. It is designed to enforce the rule of law and adherence to the Constitution. [68]
133. The deprivation of a meaningful access to superior court review engaged by s. 96, is the uniting thread in the jurisprudence under s.96.
134. It cannot be that the continuingly evolving nature of the Orders and continuing exercise of powers to not review those orders, coupled with failure to respond to requests for reconsideration, has the practical effect of shutting down judicial review.[69]
135. Courts are starting to caution against the untested acceptance of government official statements about the pandemic by the Courts.[70]

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[67] *Constitution Act, 1867, s. 96; Crevier v. A.G. (Québec) et al*., 1981 CanLII 30 (SCC) at 236-237; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (CanLII), [2014] 3 SCR 31 at paras. 29 – 30

[68] *Constitution Act*, 1867, s. 96; *Canada (Attorney General) v. TeleZone Inc*., 2010 SCC 62 (CanLII) at para. 24; *Crevier v. A.G. (Québec) et al*., 1981 CanLII 30 (SCC) at 236-237; *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), at para. 83; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para. 13; Trial Lawyers, 2014 at paras. 29 – 30

[69] *Yellow Cab Company Ltd. v. Passenger Transportation Board,* 2014 BCCA 329 at para. 44

[70] *M.M. v. W.A.K*., 2022 ONSC 4580 at paras. 31 – 34, 37 – 40

136. The Chambers Judge erred in accepting the general opinion statements of Dr. Emerson, which as presented are incapable of evaluation. Doing so amounts to the proposition that we have rule by public health official, rather than rule by law.

PART 4 – NATURE OF ORDER SOUGHT

137. The Appellants seek an Order:

a. That the appeal be allowed and the Order granted by Chief Justice Hinkson in the Supreme Court of British Columbia at Vancouver, on September 12, 2022, be set aside.

b. Declaring that the requirements for participants at events to be vaccinated, and for patrons of events and food and liquor establishments to provide Proof of Vaccination, contained in the Provincial Health Orders issued by the PHO unjustifiably infringe section 7 of the *Charter* and are of no force or effect pursuant to section 52(1) of the *Constitution Act 1982*.

c. Declaring that the PHO Orders are unreasonable and exceeded her statutory powers.

d. In the alternative, that the Petition be remitted to the Supreme Court of British Columbia for rehearing.

e. That the appellants be granted costs of the appeal and the petition.

All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, this 16th day of January, 2023.

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Polina Furtula

Counsel for the Appellant

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APPENDICES: ENACTMENTS

CONSTITUTION ACT, 1867

96 The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

CONSTITUTION ACT, 1982
Canadian Charter of Rights and Freedoms

Rights and freedoms in Canada

1 The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Life, liberty and security of person

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Exception where express declaration

33 (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Primacy of Constitution of Canada

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect

CRIMINAL CODE, R.S.C., 1985, c. C-46

Stopping or impeding traffic

213 (1) Everyone is guilty of an offence punishable on summary conviction who, in a public place or in any place open to public view, for the purpose of offering, providing or obtaining sexual services for consideration,

(a) stops or attempts to stop any motor vehicle; or

(b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place.

(c) [Repealed, 2014, c. 25, s. 15]

Communicating to provide sexual services for consideration
(1.1) Everyone is guilty of an offence punishable on summary conviction who communicates with any person — for the purpose of offering or providing sexual services for consideration — in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre.

Definition of *public place*
(2) In this section, ***public place*** includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.

HUMAN RIGHTS CODE
[RSBC 1996] CHAPTER 210

Purposes
3 The purposes of this Code are as follows:
(a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;

PERSONAL INFORMATION PROTECTION ACT
[SBC 2003] CHAPTER 63

Definitions
1 In this Act:
"personal information" means information about an identifiable individual and includes employee personal information but does not include
(a) contact information, or
(b) product information;

PUBLIC HEALTH ACT
[SBC 2008] CHAPTER 28

Definitions
1 In this Act:
"personal information" includes
(a) personal information within the meaning of the *Freedom of Information and Protection of Privacy Act* and the *Personal Information Protection Act*, and
(b) contact information;

Reconsideration of orders

43 (1) A person affected by an order, or the variance of an order, may request the health officer who issued the order or made the variance to reconsider the order or variance if the person

(a) has additional relevant information that was not reasonably available to the health officer when the order was issued or varied,

(b) has a proposal that was not presented to the health officer when the order was issued or varied but, if implemented, would

(i) meet the objective of the order, and

(ii) be suitable as the basis of a written agreement under section 38 *[may make written agreements]*, or

(c) requires more time to comply with the order.

(2) A request for reconsideration must be made in the form required by the health officer.

(3) After considering a request for reconsideration, a health officer may do one or more of the following:

(a) reject the request on the basis that the information submitted in support of the request

(i) is not relevant, or

(ii) (was reasonably available at the time the order was issued;

(b) delay the date the order is to take effect or suspend the order, if satisfied that doing so would not be detrimental to public health;

(c) confirm, rescind or vary the order.

(4) A health officer must provide written reasons for a decision to reject the request under subsection (3) (a) or to confirm or vary the order under subsection (3) (c).

(5) Following a decision made under subsection (3) (a) or (c), no further request for reconsideration may be made.

(6) An order is not suspended during the period of reconsideration unless the health officer agrees, in writing, to suspend it.

(7) For the purposes of this section,

(a) if an order is made that affects a class of persons, a request for reconsideration may be made by one person on behalf of the class, and

(b) if multiple orders are made that affect a class of persons, or address related matters or issues, a health officer may reconsider the orders separately or together.

(8) If a health officer is unable or unavailable to reconsider an order he or she made, a similarly designated health officer may act under this section in respect of the order as if the similarly designated health officer were reconsidering an order that he or she made.

Part 4 — Inspections and Orders
Division 6 — Enforcement of Orders

Warrants

47 (1) Without notice to any person, a health officer may apply, in the manner set out in the regulations, to a justice of the peace for an order under this section.

(2) A justice of the peace may issue a warrant in the prescribed form authorizing a health officer, or a person acting on behalf of a health officer, to enter and search

a place, including a private dwelling, and take any necessary action if satisfied by evidence on oath or affirmation that it is necessary for the purposes of

(a) taking an action authorized under this Act, or

(b) determining whether an action authorized under this Act should be taken.

Injunctions

48 (1) Without notice to any person, a health officer may apply, in the manner set out in the regulations, to a judge of the Supreme Court for an order under this section.

(2) A judge of the Supreme Court may grant an injunction restraining a person from contravening, or requiring a person to comply, with

(a) a provision of this Act or a regulation made under it, or

(b) a term or condition of the person's licence or permit issued under this Act, or an order made under this Act,

if satisfied by evidence on oath or affirmation that there has been or will be a contravention of this Act, the regulations, the licence, the permit or the order.

(3) A judge of the Supreme Court may order a person to do or refrain from doing those things the judge considers necessary if satisfied by evidence on oath or affirmation that the person is interfering with or obstructing, or will likely interfere with or obstruct, a person who is exercising powers or performing duties under this Act.

(4) A judge of the Supreme Court may grant an interim injunction or order until the outcome of an application commenced under this section.

Application to court if danger to public health

49 (1) To obtain an order under this section, a medical health officer may apply, in the manner set out in the regulations and with the approval of the provincial health officer, to a judge of the Provincial Court.

(2) Subject to the regulations, a judge of the Provincial Court, on receiving an application, may make an order under subsection (3) if satisfied by evidence on oath or affirmation that

(a) a person is an infected person,

(b) either

(i) the person has contravened an order of the medical health officer to remain in a place or not enter a place, or

(ii) (an order to remain in a place or not enter a place is not practical in the circumstances, and

(c) the person, if not detained, may be a danger to public health.

(3) On being satisfied of the matters set out in subsection (2), a judge of the Provincial Court may do one or both of the following:

(a) order the detention of the person, including setting the location oftention, the terms of detention and expiry of the order, and

(b) order the person to submit to an examination, preventive measures, or any other thing necessary to ensure that the person will not be a danger to public health.

(4) For the purposes of enforcing an order made under this section, a judge of the Provincial Court may issue a warrant in the prescribed form authorizing apprehension of the person, and transportation of the person to a place.

(5) If a judge of the Provincial Court is not available to hear an application for the purposes of this section, a medical health officer may detain a person by signing a certificate in the prescribed form stating the reasons why the medical health officer believes the person to be a person described in subsection (2).

(6) A certificate completed under subsection (5) is authority for anyone to apprehend and detain the person, and for the transportation of that person to the place of detention stated in the certificate.

(7) If a person is detained under subsections (5) and (6), an application to continue the detention must be made to a judge of the Provincial Court under subsection (1) as soon as reasonably possible, but no later than 7 days from the start of the detention.

Application to court if danger to personal health

50 (1) To obtain an order under this section, a medical health officer may apply, in the manner set out in the regulations and with the approval of the provincial health officer, to a judge of the Supreme Court.

(2) Subject to the regulations, a judge of the Supreme Court, on receiving an application, may make an order under subsection (3) if satisfied by evidence on oath or affirmation that

(a) a person is living under conditions that are a health hazard, and

(b) continuing to reside in the place may be a danger to the person's health.

(3) On being satisfied of the matters set out in subsection (2), a judge of the Supreme Court may do one or more of the following:

(a) order the person to leave a place in which he or she is residing, including putting conditions on the person's return to the place;

(b) order the detention of the person in a facility that will provide care and maintenance to the person;

(c) suspend an order made under paragraph (b) as long as the person subject to it is residing with, and receiving care and maintenance from, another person;

(d) require the medical health officer to provide a copy of an order made under paragraph (b) to an agency designated under section 61 (a.1) of the *Adult Guardianship Act* for the purposes of Part 3 of that Act.

(4) Section 49 (4) *[application to court if danger to public health]* applies for the purposes of an application under this section.

Part 5 — Emergency Powers
Division 1 — Application of this Part

Definitions for this Part

51 In this Part:

"emergency" means a localized event or regional event that meets the conditions set out in section 52 (1) or (2) *[conditions to be met before this Part applies]*, respectively;

"localized event" means an immediate and significant risk to public health in a localized area;

"regional event" means an immediate and significant risk to public health throughout a region or the province.

Conditions to be met before this Part applies

52 (1) A person must not exercise powers under this Part in respect of a localized event unless the person reasonably believes that

(a) the action is immediately necessary to protect public health from significant harm, and

(b) compliance with this Act, other than this Part, or a regulation made under this Act would hinder that person from acting in a manner that would avoid or mitigate an immediate and significant risk to public health.

(2) Subject to subsection (3), a person must not exercise powers under this Part in respect of a regional event unless the provincial health officer provides notice that the provincial health officer reasonably believes that at least 2 of the following criteria exist:

(a) the regional event could have a serious impact on public health;

(b) the regional event is unusual or unexpected;

(c) there is a significant risk of the spread of an infectious agent or a hazardous agent;

(d) there is a significant risk of travel or trade restrictions as a result of the regional event.

(3) If the provincial health officer is not immediately available to give notice under subsection (2), a person may exercise powers under this Part until the provincial health officer becomes available.

Part applies despite other enactments

53 During an emergency, this Part applies despite any provision of this or any other enactment, including

(a) in respect of the collection, use or disclosure of personal information, the *Freedom of Information and Protection of Privacy Act* and the *Personal Information Protection Act*, and

(b) a provision that would impose a specific duty, limit or procedural requirement in respect of a specific person or thing,

to the extent there is any inconsistency or conflict with the provision or other enactment.

Division 2 — Emergency Powers

General emergency powers

54 (1) A health officer may, in an emergency, do one or more of the following:

(a) act in a shorter or longer time period than is otherwise required;

(b) not provide a notice that is otherwise required;

(c) do orally what must otherwise be done in writing;

(d) in respect of a licence or permit over which the health officer has authority under section 55 *[acting outside designated terms during emergencies]* or the regulations, suspend or vary the licence or permit without providing an opportunity to dispute the action;

(e) specify in an order a facility, place, person or procedure other than as required under section 63 *[power to establish directives and standards]*,

unless an order under that section specifies that the order applies in an emergency;

(f) omit from an order things that are otherwise required;

(g) serve an order in any manner;

(h) not reconsider an order under section 43 *[reconsideration of orders]*, not review an order under section 44 *[review of orders]* or not reassess an order under section 45 *[mandatory reassessment of orders]*;

(i) exempt an examiner from providing examination results to an examined person;

(j) conduct an inspection at any time, with or without a warrant, including of a private dwelling;

(k) collect, use or disclose information, including personal information,

(i) that could not otherwise be collected, used or disclosed, or

(ii) in a form or manner other than the form or manner required.

(2) An order that may be made under this Part may be made in respect of a class of persons or things, and may make different requirements for different persons or things or classes of persons or things or for different geographic areas.

Acting outside designated terms during emergencies

55 (1) The provincial health officer may, in an emergency, make an order authorizing

(a) a health officer to exercise a power or perform a duty in a geographic area for which the health officer has not been designated, and

(b) an environmental health officer to exercise a power or perform a duty of environmental health officers that is not permitted by his or her designation.

(2) A health officer must act in accordance with an order of the provincial health officer until the provincial health officer notifies the health officer that the emergency that gave rise to the order has passed.

Emergency preventive measures

56 (1) The provincial health officer or a medical health officer may, in an emergency, order a person to take preventive measures within the meaning of section 16 *[preventive measures]*, including ordering a person to take preventive measures that the person could otherwise avoid by making an objection under that section.

(2) If the provincial health officer or a medical health officer makes an order under this section, a person to whom the order applies must comply with the order unless the person delivers to a person specified by the provincial health officer or medical health officer, in person or by registered mail,

(a) a written notice from a medical practitioner stating that the health of the person who must comply would be seriously jeopardized if the person did comply, and

(b) a copy of each portion of that person's health record relevant to the statement in paragraph (a), signed and dated by the medical practitioner.

(3) If a person delivers a notice under subsection (2), the person must comply with an instruction of the provincial health officer or a medical health officer, or a person designated by either of them, for the purposes of preventing infection with, or transmission of, an infectious agent or a hazardous agent.

(4) The provincial health officer, or a medical health officer with the approval of the provincial health officer, may apply to a judge of the Provincial Court for an order to detain a person who

(a) does not comply with an order under this section or an instruction under subsection (3), or

(b) delivers a notice under subsection (2) but in respect of whom an instruction under subsection (3) would not be reasonably practical in the circumstances.

(5) For the purposes of subsection (4) of this section,

(a) the application must be made in the manner set out in the regulations,

(b) a judge of the Provincial Court, on receiving the application, may make an order described in section 49 (3) *[application to court if danger to public health]* if satisfied by evidence on oath or affirmation that the circumstances described in subsection (4) of this section exist, and

(c) section 49 (4) to (7) applies.

Emergency powers respecting reporting

57 (1) The provincial health officer may, in an emergency, order that a specified infectious agent, hazardous agent, health hazard or other matter be reported under this section.

(2) If an order is made under this section, a person required by the order to make a report must promptly report, to the extent of his or her knowledge, to a medical health officer the information required by the order.

(3) If a person is required to make a report under this Act, the provincial health officer may in an emergency order the person exempt from the requirement, or vary the requirement.

Emergency powers to make regulations

58 (1) The minister may, in an emergency, prescribe an infectious agent or a hazardous agent for the purposes of a section that refers to an infected person or an infected thing, and, for this purpose, section 111 (2) *[regulations respecting terms]* applies.

(2) The minister may, in an emergency, make regulations as follows:

(a) exempting a person, place or thing from a provision of this Act or the regulations made under it;

(b) modifying a requirement of this Act or the regulations made under it;

(c) authorizing the provincial health officer to make an exemption or modify a requirement as described in paragraphs (a) and (b);

(d) authorizing persons to exercise powers and perform duties as health officers, with or without conditions;

(e) applying or modifying a regulation made under section 118 (b) to (e) *[regulations respecting inspections and enforcement]* for the purposes of applications to the court under section 56 *[emergency preventive measures]*.

(3) A person authorized to exercise powers and perform duties as a health officer under subsection (2) (d) is deemed to be a health officer designated under this Act, subject to any conditions set out in the regulations made under that subsection.

Division 3 — When Authority to Act under this Part Ends

When authority to act under this Part ends

59 Unless otherwise expressed, the authority to act under this Part ends,

(a) in the case of a localized event, as soon as reasonably practical after the emergency has passed, or

(b) in the case of a regional event, when the provincial health officer provides notice that the emergency has passed.

Duties when authority to act ends

60 (1) If a person exercises a power under this Part, the person must, as soon as reasonably practical after the person's authority ends under section 59 *[when authority to act under this Part ends]*, take any reasonable action to do the following:

(a) unless it would serve no reasonable purpose, do a thing that the person would otherwise have been required to do under this Act if this Part did not apply;

(b) in the case of a power exercised under section 54 *[general emergency powers]* in respect of a localized event, provide to affected persons written reasons for exercising the power;

(c) rescind an order that was made under this Part and give notice of the rescission to persons affected by the order, or, if necessary to protect public health,

(i) reissue the order in accordance with sections 39 [contents of orders] and 41 [service of orders], and

(ii) (provide to persons affected by the order the rights to reconsideration, review or reassessment available under Parts 3 and 4;

(d) repeal a regulation made under section 58 *[emergency powers to make regulations]*.

(2) If a person was detained under section 56 *[emergency preventive measures]*, as soon as reasonably practical after the emergency has passed, the provincial health officer or medical health officer must

(a) provide notice to the detained person that the person's detention has ended,

(b) order the detained person to remain in a place under section 29 (2) *[specific powers respecting infectious agents and hazardous agents]*, or

(c) apply to court for detention of the person under section 49 *[application to court if danger to public health]*.

(3) The provincial health officer may at any time issue instructions to health officers for the purposes of fulfilling their duties under this section, and health officers must comply with those instructions.

Offences

99 (1) A person who contravenes any of the following provisions commits an offence:

(k) section 42 *[failure to comply with an order of a health officer]*, except in respect of an order made under section 29 (2) (e) to (g) *[orders*

respecting examinations, diagnostic examinations or preventive measures];

Fines and incarceration

108 (1) In addition to a penalty imposed under section 107 *[alternative penalties]*, a person who commits an offence listed in

(a) section 99 (1) *[offences]* is liable on conviction to a fine not exceeding $25 000 or to imprisonment for a term not exceeding 6 months, or to both,

Regulations respecting personal information

121 The Lieutenant Governor in Council may make regulations respecting personal information as follows:

(a) if necessary for the effective operation of a provision of this Act or a regulation made under it, authorizing the collection, use and disclosure of personal information for a purpose set out in section 9 *[purposes for collection, use and disclosure of personal information]*;

(b) if the collection, use or disclosure of personal information is authorized under this Act,

(i) clarifying or limiting the purposes for which collection, use or disclosure is authorized, and

(ii) limiting or putting conditions, in addition to any limits or conditions already provided for in this Act, on that collection, use or disclosure;

(c) requiring the keeping of records or the making of reports respecting the collection, use or disclosure of personal information under this Act.

PUBLIC HEALTH ACT
VACCINATION STATUS REPORTING REGULATION

[Last amended September 1, 2020 by B.C. Reg. 146/2019]

Guardian's duty to report

5 (1) A medical health officer may require a student's guardian to provide one or both of the following to the medical health officer or a person specified in writing by the medical health officer:

(a) a vaccination status report with respect to the student;

(b) proof of the student's vaccination with a scheduled vaccine.

(2) A student's guardian must comply with a requirement under subsection (1) in the form and manner and by the date required by the medical health officer.