COURT OF APPEAL

ON APPEAL FROM the order of the Honourable Mr. Justice Coval of the Supreme Court of British Columbia pronounced on May 10, 2024

BETWEEN:

Phyllis Janet Tatlock, Laura Koop, Monika Bielecki, Scott Macdonald, Ana Lucia Mateus, Darold Sturgeon, Lori Jane Nelson, Ingeborg Keyser, Lynda June Hamley, Melinda Joy Parenteau and Dr. Joshua Nordine

APPELLANTS
Petitioners

AND:

Attorney General for the Province of British Columbia and Dr. Bonnie Henry in her capacity as Provincial Health Officer for the Province of British Columbia

RESPONDENTS
Respondents

RESPONDENTS' FACTUM

Attorney General of British Columbia and Dr. Bonnie Henry in her capacity as Provincial Health Officer for the Province of British Columbia

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Phyllis Janet Tatlock, Laura Koop, Monika Bielecki, Scott Macdonald, Ana Lucia Mateus, Darold Sturgeon, Lori Jane Nelson, Ingeborg Keyser, Lynda June Hamley, Melinda Joy Parenteau and Dr. Joshua Nordine

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Pejovic Law
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Attorney General of British Columbia and Dr. Bonnie Henry in her capacity as Provincial Health Officer for the Province of British Columbia

Julie K. Gibson, Alexander C. Bjornson and Christine Bant
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Counsel for respondents

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CHRONOLOGY

Date	Event
January 27, 2020	First case of SARS-CoV-2, the virus that causes COVID-19, diagnosed in British Columbia.
January 30, 2020	World Health Organization ("**WHO**") declares a public health emergency of international concern.
March 11, 2020	WHO declares a pandemic. COVID-19 case counts rise. There is no vaccine or cure.
March 17, 2020	Dr. Bonnie Henry, the Provincial Health Officer ("**PHO**"), provides notice that the transmission of SARS-CoV-2 constitutes a "regional event" under s. 51 of the *Public Health Act* ("***PHA***"), enabling her to exercise emergency powers.
Late-March 2020	PHO begins issuing COVID-19 public health orders. Orders are regularly updated based on surveillance data, epidemiological information and evolving public health and scientific evidence.
August 2021	Delta variant-driven "fourth wave" - increasing cases and hospitalizations in BC, particularly among unvaccinated individuals.
October 2021	PHO issues *Hospital and Community (Health Care and Other Services) COVID-19 Vaccination Status Information and Preventive Measures Order* and *Residential Care COVID-19 Preventive Measures Order* requiring staff in certain long-term care and assisted living facilities, and certain hospital and community healthcare to be vaccinated against COVID-19 to work in these settings.
November 9, 2021	PHO issues a variance to the public health orders limiting exemption applications to medical grounds only.
March 16, 2022	Appellants file petition for judicial review.
September 2022, April 2023	PHO repeals and replaces the public health orders.
October 5, 2023	PHO repeals and replaces the orders. The October orders require applicants to have an XBB.1.5 vaccine. Existing healthcare workers already vaccinated (primary series) are not required to have an XBB.1.5 vaccine.
May 10, 2024	Mr. Justice Coval dismisses the petition except for remitting to the PHO for reconsideration whether to consider reconsideration requests under s. 43 of the *PHA* from healthcare workers "able to perform their roles remotely, or in-person but without contact with patients, residents, clients or the frontline healthcare workers who

	care for them.”
July 26, 2024	PHO rescinds the October 5, 2023 orders, ending the regional event and the COVID-19 vaccination requirement to be eligible to work in certain healthcare settings.
August 28, 2024	PHO issues her reconsideration decision.

OPENING STATEMENT

Beginning in March 2020, the PHO exercised her statutory authority in response to the COVID-19 public health emergency, to protect British Columbians by limiting serious illness, hospitalizations, and preventable death.

In autumn 2021, the PHO issued orders providing that staff of certain long-term care and assisted living facilities, and hospital and community healthcare settings, needed to be vaccinated to be eligible to work. Vaccination reduced risks of serious illness and death and preserved capacity for all healthcare needs. The PHO replaced the orders several times. As of November 2021, the PHO did not allow applications for reconsideration (exemptions) from the vaccination requirement except on limited medical grounds.

The appellants challenged the October 5, 2023 iteration of the orders (the "**Orders**") and confined their relief sought to directions to the PHO to provide a reconsideration process for remote and administrative healthcare workers and those with ss. 2(a) and 7 *Charter* claims. The chambers judge dismissed the petition except for remitting to the PHO for reconsideration whether she ought to consider requests for exemptions from the vaccination requirement from remote workers or those without patient, resident, client, or frontline worker contact. Having granted that relief, the chambers judge appropriately exercised his discretion not to decide those appellants' s. 2(a) claims.

On July 26, 2024, the PHO rescinded the Orders and ended the COVID-19 public health emergency. The appellants now seek declaratory relief about the Orders *generally*, and in the face of the chambers judge's conclusions that the record on judicial review contained "ample evidence to support" the Orders as reasonable as they applied to healthcare workers with clinical contact.

The appeal should be dismissed. The appeal is moot, which will be addressed in application materials. The Orders did not engage ss. 2(a) or 7 *Charter* rights. In the alternative, the Orders were a proportionate and reasonable balancing of rights with the PHO's objectives of protecting vulnerable individuals, stopping preventable illness and death, and protecting the functioning of the healthcare system as a whole during an unprecedented public health emergency.

PART 1 - STATEMENT OF FACTS

I. The Provincial Health Officer

1. Dr. Henry is the Provincial Health Officer ("**PHO**"), the senior public health official for British Columbia.[1] Throughout the COVID-19 pandemic, Dr. Henry had the "formidable responsibility" of making public health decisions required to manage and prevent illness and death from COVID-19.[2]

2. Dr. Henry is a physician with a master's degree in public health (epidemiology).[3] Dr. Henry has extensive experience in public health and preventative medicine, including as a leader in public health emergencies related to COVID-19, Ebola, SARS, pandemic influenza and the opioid crisis. She has held numerous leadership roles, including as the Associate Medical Officer of Health for the City of Toronto and the Provincial Executive Medical Director for the BC Centre for Disease Control ("**BCCDC**").

3. As the PHO, Dr. Henry is responsible for monitoring the health of the population and providing independent advice to the minister and public officials on public health issues, and the need for legislation, policies, and practices respecting public health issues.[4] She is also responsible for leading the public health response to public health emergencies in BC.[5]

II. Public health

4. "Public health" is one component of the province's health system and shares the same overall goals of other parts of the system: reducing premature death and minimizing

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[1] Affidavit #1 of Dr. Brian Emerson ("**Emerson #1**") at para. 7; *Hoogerbrug v. British Columbia*, 2024 BCSC 794 ("**Decision**") at para.34.
[2] Decision at para.33.
[3] Emerson #1, Ex. 2; Decision at paras. 33-34.
[4] *Public Health Act*, S.B.C. 2006, c. 28 ("***PHA***"), s. 66; Decision at para. 34.
[5] Emerson #1 at para. 9.

the effects of disease, disability, and injury.[6] The goals of public health include preventing and managing outbreaks of disease within the population.[7]

5. Public health programs in Canada share a common set of principles and ethics which public health officials, including the PHO, are expected to follow when making public health decisions.[8] One of the core principles of public health is that the scientific method is the basis for action and informs interventions for policies and programs to protect public health.[9] A second core principle is the precautionary principle: in the face of scientific uncertainty, public health interventions may be warranted when there is a risk of harm to the population even before all scientific data are obtained to confirm the risk.[10]

III. The PHO's authority under the *Public Health Act*

6. The *PHA* grants the PHO broad statutory authority in a public health emergency. An "emergency" is defined in s. 51 as including a "regional event" that meets the conditions set out in s. 52(2). A "regional event" means an immediate and significant risk to public health throughout a region or the province.

7. Section 52(2) provides for the exercise of emergency powers if the PHO provides notice that she reasonably believes that at least two of four listed 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; and (d) there is a significant risk of travel or trade restrictions as a result of the regional event.

8. Section 56(1) allows the PHO to order a person to take "preventive measures" during an emergency. If the PHO makes such an order, a person to whom the order applies must comply with the order unless the person delivers written notice from a medical practitioner stating that the health of the person would be "seriously jeopardized"

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[6] Emerson #1 at para. 3; Decision at para. 35.
[7] Emerson #1 at para. 5; Decision at para. 36.
[8] Emerson #1 at para. 6.
[9] Emerson #1 at para. 6.
[10] Emerson #1 at para. 6; Decision at para. 186.

if the person did comply, and a copy of each portion of that person's health record relevant to the statement.[11]

9. Section 43 provides that a person affected by an order may request that the PHO reconsider the order if the person (a) has additional relevant information that was not reasonably available to the PHO when the order was issued; (b) has a proposal that was not presented to the PHO when the order was issued but, if implemented, would meet the objective of the order and be suitable as the basis of a written agreement under s. 38; or (c) requires more time to comply.

10. In an emergency, s. 54(1)(h) authorizes the PHO to not reconsider an order under s. 43. The PHO cannot, however, suspend the process under s. 56(2) for seeking an exemption from an order on the basis that compliance would seriously jeopardise their health.

11. The *PHA* also provides for non-emergency powers that can be exercised on their own or by the PHO in response to a "regional event". Under s. 30, the PHO[12] may issue an order if she reasonably believes that a "health hazard" exists.[13] Section 31(1)(b) allows the PHO to, among other things, order a person to do anything that the PHO reasonably believes is necessary to prevent or stop a health hazard, or mitigate the harm or prevent further harm from a health hazard. Section 32(2) lists a broad range of orders, without limiting s. 31, that the PHO may make.

IV. COVID-19 pandemic in British Columbia

12. The first case of COVID-19 was diagnosed in British Columbia on January 27, 2020.[14] On March 17, 2020, six days after the WHO declared COVID-19 a pandemic, Dr. Henry gave notice that the spread of SARS-CoV-2, the infectious agent that causes the

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[11] *PHA*, s. 56(2).
[12] Section 67(2) of the *PHA* authorizes the PHO to exercise the powers of a "health officer" in an emergency. This includes the authority to issue orders under s. 30.
[13] A "health hazard" is defined in s. 1 to include a condition, thing or activity that endangers or is likely to endanger public health, or a prescribed condition or thing that is associated with injury or illness.
[14] Emerson #1 at paras. 17, 19; Decision at para. 42.

disease COVID-19, was a "regional event" under s. 51 of the *PHA*.[15] The notice triggered the PHO's authority to exercise her emergency powers.

13. The PHO was responsible for leading BC's public health response to the COVID-19 pandemic. The PHO regularly received and reviewed the latest scientific evidence, as well as global, national, and provincial epidemiological data regarding SARS-CoV-2 and COVID-19.[16] The PHO encouraged the adoption of public health measures known to limit the spread of coronaviruses, and issued responsive public health orders pursuant to the *PHA*.[17] She amended orders to respond to the evolving COVID-19 situation in BC.[18]

14. Early in the pandemic it was recognized that vaccination would be necessary to bring the pandemic under control.[19] This was particularly acute during the Delta-driven fourth wave of the pandemic, where cases, hospitalizations, and deaths were significantly higher amongst unvaccinated people.[20]

15. Vaccine and infection-induced immunity became more prevalent during the emergence of the Omicron variant. Immunity from vaccination, however, did not become less important. Vaccine-induced immunity continued to be the primary factor in reducing the seriousness of COVID-19 consequences, especially hospitalization and death.[21]

V. Orders relating to certain health and care workers

16. Vaccination was particularly important in hospital and community care settings, where many patients and residents have co-morbidities which render them particularly susceptible to COVID-19, with exponentially higher risk of severe illness and death.[22] Further, vaccination amongst the healthcare workforce was important to ensure the

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[15] Emerson #1 at paras. 19-20; Decision at para. 44.
[16] Emerson #1 at para. 25.
[17] Emerson #1 at para. 34-36.
[18] Emerson #1 at para. 36; Decision at para. 45.
[19] Emerson #1 at para. 38.
[20] See for example Emerson #1 at Ex. 7, p. 645. References to page numbers are to the cumulative page number of the exhibits.
[21] Emerson #1 at para. 55; See also Decision at paras. 122-124.
[22] Affidavit #1 of Haley Miller ("**Miller #1**") at Ex. A, p. 24; Ex. B, p. 24; Ex. I, p. 100., Ex. J, p. 113.

healthcare system functioned by reducing the rates of infection generally and reducing preventable absenteeism caused by illness in the workforce.

17. In response to these concerns, in the fall of 2021, the PHO issued orders titled "Hospital and Community (Health Care and Other Services) COVID-19 Vaccination Status Information and Preventive Measures Order" and "Residential Care COVID-19 Vaccination Status Information and Preventive Measures Order". The orders provided that workers in hospital and community care settings and long-term care and assisted living facilities needed to receive at least the original two-dose, primary series of the vaccine in order to be eligible to work in those settings.

18. The orders were repealed and replaced in November 2021, September 2022, and April 2023. The orders that were ultimately at issue before the chambers judge were made on October 5, 2023, and required unvaccinated workers seeking employment in these settings to be vaccinated with an updated vaccine tailored to the XBB.1.5 variant of the Omicron strain to be eligible to work in these settings.[23]

19. The Orders include detailed recitals describing the PHO's reasoning in light of the epidemiology of COVID-19, the importance and effectiveness of vaccination, impacts on the respective settings, and the balancing of the competing interests of the unvaccinated.[24] After the recitals, the Orders set out the PHO's key conclusions about the importance of vaccination in medical and care settings.

20. Pursuant to s. 54(1)(h) of the *PHA*, the PHO exercised her authority to suspend requests for reconsideration of the Orders under s. 43 of the *PHA*.[25] Under s. 56 of the *PHA*, it remained open for individuals to seek a deferral from compliance with the orders where vaccination would seriously jeopardize their health.

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[23] Miller #1 at Ex. A, Ex. B.
[24] Decision at paras. 61-62. Miller #1 at Ex. A., Ex. B.
[25] Miller #1 at Ex. A, p. 15; Ex. B, pp. 43-44.

VI. Petition for Judicial Review

21. The chambers judge heard three petitions challenging the Orders together, *Hsiang*,[26] *Hoogerbrug*,[27] and *Tatlock*, and issued one set of reasons.[28] All three matters concerned the Orders, but the petitioners largely advanced different cases and sought different relief. The *Hoogerbrug* and *Hsiang* petitioners argued that the statutory preconditions for the PHO's use of her emergency powers no longer existed or that the record did not support the PHO's conclusions, and therefore the Orders should be quashed.[29] They alternatively challenged the reasonableness of the Orders in their entirety and sought an order under s. 5(1) of the *Judicial Review Procedure Act*,[30] that the PHO reconsider and determine whether to maintain the Orders in light of the findings they urged on the Court. Ms. Hoogerbrug also advanced a s. 2(a) *Charter* challenge.[31]

22. The *Tatlock* petitioners (the appellants) argued that the inclusion of remote and administrative workers was unreasonable, and advanced ss. 2(a) and 7 *Charter* challenges to the Orders.[32] Before the chambers judge, the appellants significantly narrowed the scope of their relief sought. They ultimately did not seek to quash the Orders or seek broad declaratory relief. At paragraph 91 of the Decision, the chambers judge noted the scope of relief sought as follows:

> Turning to the Tatlock petitioners, during the hearing they expressly confined their relief to seeking, under *JRPA* s. 5(1), directions to the PHO to provide a meaningful s. 43 reconsideration process for remote and administrative workers and for those whose ss. 2(a) and 7 rights had been infringed.

23. Implicit in the appellants' position in chambers was a concession that the alleged unreasonableness and *Charter* breaches would be cured by having access to the then-

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[26] *Hsiang et al v. Provincial Health Officer of British Columbia*, Vancouver Reg., S224731.
[27] *Hoogerbrug v. Provincial Health Officer of British Columbia*, Vancouver Reg., S224652.
[28] The matters were not consolidated and therefore remained separate proceedings: *Repa v. Geil*, 2022 BCSC 1366 at para. 14.
[29] Decision at paras. 88-89.
[30] *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 ("***JRPA***").
[31] Decision at paras. 88-90.
[32] Decision at paras. 6-7, 225 and 228.

suspended s. 43 *PHA* process for remote and administrative workers, and those workers whose ss. 2(a) and 7 rights had been infringed.[33]

24. On May 10, 2024, the chambers judge dismissed the three petitions with one exception. The chambers judge granted relief with respect to remote and administrative workers, and remitted to the PHO for reconsideration whether she ought to consider "requests under s. 43 of the *PHA*, for reconsideration of the vaccination requirement from healthcare workers able to perform their roles remotely, or in-person but without contact with patients, residents, clients or the frontline workers who care for them."[34]

PART 2 - ISSUES ON APPEAL

25. The issues on appeal are as follows:

1. Should the Court exercise its discretion to hear this moot appeal?

2. If the Court decides to hear the appeal, what is the proper scope of the appeal?

3. Is the appellants' interpretation of the chambers judge's *Charter* analysis accurate with respect to remote and administrative workers?

4. With the appeal properly framed, for the appellants with clinical or frontline-worker contact, did the chambers judge err in finding:

    a. to the extent the Orders engaged s. 2(a) *Charter* rights, the Orders were a reasonable and proportionate balancing of those rights with the public health objectives underlying the Orders; and

    b. the Orders did not engage s. 7 *Charter* rights?

26. The appeal should be dismissed. The appeal is moot and it would not further judicial economy to hear this moot appeal. If this Court decides to exercise its discretion to hear the appeal, the chambers judge did not err in declining to consider the *Charter*

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[33] See also Decision at para. 92.
[34] Decision at para. 315.

rights of the remote and administrative appellants. Moreover, the PHO's Orders did not limit s. 2(a) *Charter* rights nor even engage s. 7 rights. In the alternative, any limitation on those rights was proportionate and therefore reasonable under the *Doré* framework.

PART 3 - ARGUMENT

I. The Court should not hear this moot appeal

27. The appeal is moot and should not be heard on its merits. The Orders were rescinded on July 26, 2024 and the notice of regional event, which enables the PHO to exercise her emergency powers, is no longer in place. The Court should not exercise its discretion to hear this moot appeal. The appeal lacks practical value, would not advance judicial economy, and the adjudicative function of this Court weighs against hearing the appellants' claim for declaratory relief. The respondents will provide their detailed argument on mootness in separate application materials.

II. Standard of review

28. On an appeal from a judicial review decision, the Court's role is to determine whether the judge identified the correct standard of review and applied it correctly. In addressing these questions, the Court "step[s] into the shoes" of the reviewing judge.[35] Here, the chambers judge correctly identified and applied the reasonableness standard of review to both the administrative law and *Charter* issues.

29. The question of whether the chambers judge ought to have decided the *Charter* claims of the appellants in remote and administrative roles, in addition to granting them relief on administrative law grounds, is a matter of discretion. An appellate court should only interfere where, in exercising the discretion, the chambers judge erred in principle, gave no or insufficient weight to relevant considerations, made a palpable and overriding factual error, or made a decision that is so clearly wrong as to amount to an injustice.[36]

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[35] *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47.
[36] *Plaza 500 Hotels Ltd. v. SRC Engineering Consultants Ltd*., 2024 BCCA 288 at para. 37.

III. The proper scope of the appeal

30. Before this Court, and without seeking leave, the appellants expand the scope of the relief sought, raise new arguments, take positions that are inconsistent with those they advanced before the chambers judge, and rely on new and extra-record evidence. In keeping with this Court's role as a court of review, the appeal ought to be appropriately confined to the issues advanced by the appellants before the chambers judge.

a. Appellants seek to advance a revised case on appeal

31. The appellants did not ask the chambers judge to declare that a "vaccine mandate" generally was unreasonable or contrary to the *Charter*. Instead, the appellants focused their challenge on (1) the reasonableness of including remote and administrative workers in the Orders; and (2) whether the Orders infringed their ss. 2(a) and 7 rights. The narrow relief they sought was a direction that the PHO provide a reconsideration process under s. 43 of the *PHA.*[37]

32. The appellants' position before the chambers judge includes two important concessions. First, the position necessarily acknowledges that the Orders *generally* withstand scrutiny, because there would be no need for a s. 43 process if the Orders (and vaccination requirement therein) were struck down by the chambers judge. Second, a "meaningful" s. 43 process was sufficient to remedy the alleged unreasonableness or *Charter* breaches.

33. On appeal, and without seeking leave, the appellants advance a broader challenge and seek expanded relief. The appellants ask this Court to conduct "an examination" into the Orders on the basis that a "vaccine mandate" *generally* was not justified.[38] They argue the chambers judge erred because he did not find the Orders were "fundamentally flawed" on the evidence.[39] The appellants also now seek broad declaratory relief impugning the

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[37] Decision at paras. 91-92. As noted by the chambers judge at para. 93, the appellants also sought "an expanded basis" for medical exemptions, but did not provide a factual foundation for such relief or specifics of what they were seeking.
[38] Appellants' Factum, Opening Statement, p. 10.
[39] Appellants' Factum at para. 16(c). Paragraphs 52-73 of the appellants' factum focus on the appellants' new argument that a "vaccine mandate" generally was unsupported.

Orders in their entirety and applying to *all* healthcare workers, rather than just remote/administrative or those with ss. 2(a) or 7 claims.[40]

34. The Court should not permit the appellants to advance a broader, and inconsistent, case before this Court. Subject to certain exceptions, a party is not permitted to raise new issues on appeal.[41] Moreover, a party that has chosen a particular position in the trial court is generally not permitted to abandon that position on appeal.[42] The appellants have provided no basis upon which the Court ought to allow them to revise their challenge to the Orders on appeal and seek broader relief.

35. Further, allowing the appellants to advance new arguments and broaden the scope of the relief sought would undermine the goals of finality in litigation and the preservation of this Court's function as a court of review.[43] As Madam Justice Southin stated in *Protection Mutual Insurance Company v. Beaumont*,[44] "a litigant who deliberately adopts a position in the court below, for whatever reason, must live with it in this Court".

36. The appellants' revised challenge is also an improper end-run around the PHO's August 28, 2024 decision.[45] In that decision, the PHO reconsidered, in light of the chambers judge's reasons, whether the Orders ought to have permitted s. 43 requests from remote/administrative workers. Having sought narrow relief on administrative law grounds in the court below, and succeeded in obtaining relief, the remote/administrative appellants should not be allowed to circumvent the PHO's decision by reframing their appeal and seeking further and broader relief. Should the remote/administrative appellants disagree with the PHO's reconsideration decision, they must file a petition for judicial review of that decision.

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[40] Appellants' Factum at para. 74.
[41] *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at para. 44.
[42] *Argo Ventures Inc. v. Choi*, 2020 BCCA 17 at para. 31.
[43] *1193652 B.C. Ltd. v. New Westminster (City)*, 2021 BCCA 176 at para. 87.
[44] *Protection Mutual Insurance Company v. Beaumont*, 1991 CanLII 5728 (BCCA) at para. 26 citing *Teller v. Sunshine Coast (Regional District)*, 1990 CanLII 2131 (BCCA).
[45] See, for example, *Byelkova v. Fraser Health Authority*, 2022 BCCA 205.

37. Considering the above, the proper scope of the appeal is relatively narrow. The proper question before the Court is whether the Orders unjustifiably infringed the ss. 2(a) and 7 rights of the appellants with clinical or frontline worker contact (i.e. those who are not remote or administrative workers), such that a s. 43 *PHA* reconsideration process would be warranted.

b. Appellants misconstrue the Court's role on judicial review and urge an inappropriate use of extra-record evidence

38. The appellants also misconstrue the Court's role on judicial review. The appellants argue that the chambers judge erred in failing to weigh scientific, public health and other evidence, including purported expert opinion, as if the chambers hearing was a civil trial.

39. The appropriate role of the court on judicial review is supervisory. A judicial review is not a re-weighing of evidence or an opportunity to substitute different findings of fact.[46] The chambers judge's role was not to second-guess conclusions drawn from the public health evidence by the PHO. As stated by the Court in *Ontario (Attorney General) v. Trinity Bible Chapel*,[47] and cited by this Court in *Beaudoin v. British Columbia (Attorney General)*,[48] the Court is not to sit as an "armchair epidemiologist".[49]

40. The parties agreed that evidence on the judicial review was confined to materials before the PHO up until the time she made the October 5, 2023 Orders, apart from general background information.[50] Now, the appellants seek to rely on evidence that was not before the PHO in making the Orders, or to inappropriately rely upon evidence to urge this Court to make findings of fact, contrary to the Court's role on judicial review.[51]

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[46] *Alfier v. Sunnyside Villas Society*, 2021 BCSC 212 at paras. 29-30.
[47] *Ontario (Attorney General) v. Trinity Bible Chapel*, 2022 ONSC 1344 ("***Trinity Bible Chapel ONSC***") aff'd 2023 ONCA 134 ("***Trinity Bible Chapel ONCA***"), leave to appeal ref'd 2023 CanLII 72135 (SCC).
[48] *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427, leave to appeal ref'd 2023 CanLII 72130 (SCC).
[49] *Beaudoin* at para. 156 citing *Trinity Bible Chapel ONSC* at para. 6.
[50] Decision at para. 78
[51] See Appellants' Factum at paras. 67-69 and fns. 109-110.

41. For example, the appellants refer extensively to the "expert evidence" of Dr. Warren,[52] which was admitted as part of the record but not as an expert opinion,[53] urging a comparison to other evidence in the record about the degree to which vaccination protects against symptomatic disease and serious illness, among other medical/scientific issues. They also rely on a single study (referred to as the "Qatar Study")[54] that was cited in an evidence review before the PHO, but was not itself in the record or before the chambers judge.

42. The appellants wrongly seek to have this Court re-hear the petition in a manner inconsistent with its role on appeal from a judicial review, relying upon inadmissible, extra-record evidence or evidence that was not admitted as expert opinion. The chambers judge's proper role was not to make findings of facts on the underlying scientific, medical or public health evidence, but to assess the reasonableness of the Orders and their medical-only exemption process on the record before the PHO.

IV. The *Charter* arguments

a. Introduction

43. The respondents submit that the chambers judge did not err in concluding that any engagement of the appellants' s. 2(a) rights reflected a proportionate balancing of *Charter* interests with the PHO's objectives. The PHO also defends the chambers judge's order on the basis that the Orders did not engage the appellants' s. 2(a) rights in any event. There is also no error in the chambers judge's finding that the Orders did not engage the appellants' s. 7 *Charter* rights.

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[52] Appellants' Factum at para. 60.
[53] *Canadian Society for the Advancement of Science in Public Policy v. British Columbia*, 2023 BCSC 284 at para. 29.
[54] Decision at para. 67.

V. Section 2(a)

a. Chambers judge was not required to decide s. 2(a) *Charter* issues for remote and administrative workers

44. The appellants focus their s. 2(a) argument on the false premise that the chambers judge reached a conclusion about remote and administrative workers' s. (2)(a) rights. However, the chambers judge did not decide whether remote and administrative workers' s. 2(a) rights were infringed because those petitioners were already successful in obtaining administrative law relief that rendered the constitutional issues academic. The Decision at paragraphs 210-227 deals with those workers and their relief, before turning to s. 2(a) for the remaining workers at paragraphs 233-263 and 301-314. That approach was correct, and it was a pragmatic exercise of judicial restraint.

45. This analysis is consistent with the courts' general approach. As a general rule, courts should refrain from deciding constitutional issues where it is unnecessary to do so to properly dispose of a case.[55] This policy of restraint is based on the principle that unnecessary constitutional pronouncements may prejudice future cases with unforeseen implications.[56] As an exercise of judicial discretion, the chambers judge's decision on this point is entitled to a high degree of appellate deference.[57]

46. The chambers judge began his analysis of the appellants' claims by addressing the administrative law issues. The chambers judge found there was a lack of justification in the record and the Orders to support the PHO's decision not to consider s. 43 requests for exemptions from remote and administrative workers (i.e. those without *any* contact with patients or frontline workers).[58] He remitted the matter to the PHO for reconsideration.[59]

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[55] *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at para. 6.
[56] *Gauthier v. Air Canada*, 2024 BCSC 231 at para. 104.
[57] *R. v. Alexander*, 2019 BCCA 100 at paras. 50, 56; *Plaza 500 Hotels Ltd.* at para. 37.
[58] Decision at para. 225.
[59] Decision at para. 226.

47. Having reached the conclusion urged on him with respect to the remote and administrative workers, the chambers judge turned to the remaining *Charter* issues. It is evident from the Decision that the chambers judge's s. 2(a) analysis concerns clinical contact/frontline workers, and not remote/administrative workers.

48. In his *Doré* analysis, the chambers judge framed his analysis expressly about clinical and frontline worker contact appellants: "unvaccinated religious petitioners…working in the designated healthcare settings".[60] The chambers judge considered the appellants' arguments for masking or rapid testing—both of which are not applicable to fully remote/administrative workers.[61] He assessed the argument that unvaccinated persons are permitted in "these settings", but rejected that point because of the workers' "near-constant, close contact with the most vulnerable patients".[62] The chambers judge referred to the "religious petitioners", notably distinct from the "remote and administrative workers".

49. The s. 2(a) analysis must be read in the context of the entire Decision. The remote and administrative petitioners' relief had been considered and granted. The chambers judge's conclusions about s. 2(a) necessarily only applied to clinical contact/frontline religious petitioners.

50. The chambers judge's decision not to decide the s. 2(a) issue for remote and administrative workers in his analysis, albeit not expressly stated as such, was consistent with the principle of judicial restraint. Having already granted those individuals relief on administrative law grounds, it was unnecessary and would have been duplicative to also decide their constitutional claims.

51. The respondents' submissions that follow address the s. 2(a) rights of the appellants who did not already obtain relief, i.e., the clinical contact and frontline religious petitioners.

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[60] Decision at para. 311.
[61] Decision at para. 312.
[62] Decision at para. 313.

b. The Orders did not engage section 2(a)

52. The Orders do not limit the s. 2(a) rights of clinical contact and frontline religious appellants. While the chambers judge did not accept this position, it remains an independent basis upon which the judge's order dismissing the appellants' s. 2(a) *Charter* claims ought to be upheld.

53. An infringement of s. 2(a) will be established where a claimant: (1) sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with their religious beliefs in a manner that is "more than trivial or insubstantial".[63]

54. For a state-imposed cost or burden to be proscribed by s. 2(a), it must be capable of interfering with a religious belief or practice. Administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden does not threaten actual religious beliefs or conduct.[64] While the *Charter* guarantees freedom of religion, it "does not indemnify practitioners against all costs incident to the practice of religion".[65]

55. In *Alberta v. Hutterian Brethren of Wilson Colony*, the claimants challenged a regulation requiring photographs to be taken for driver's licenses in Alberta. The regulation posed an obstacle for the claimants whose religious beliefs prohibited them from willingly allowing a photograph to be taken of them. The claimants led evidence that the inability to obtain a driver's license threatened the viability of their communal lifestyle.[66] While the Court conducted its analysis under s. 1 of the *Charter*,[67] the majority's comments "readily transfer" to the s. 2(a) framework articulated in that case.[68]

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[63] *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at paras. 56-59.
[64] *R. v. Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at 759.
[65] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 95.
[66] *Hutterian* at para. 8.
[67] *Hutterian* at paras. 33-34. The majority noted that the government had conceded the first element of the s. 2(a) test; however, the record did not disclose a concession on the second element of the test. As the courts below seemed to have proceeded on the assumption that the requirement was met, the majority only considered the s. 1 analysis.
[68] *Trinity Bible Chapel ONSC* at para. 94.

56. The majority found that the impugned regulation did not deprive the claimants of a meaningful choice to follow or not follow the edicts of their religion.[69] Importantly, the law did not compel the taking of the photo, but instead required a person who wished to obtain a driver's license to permit a photo to be taken. The regulation imposed non-trivial costs on the claimants (ineligibility to drive), but those costs did not rise to the level of seriously affecting the claimants' right to pursue their religion.[70]

57. The PHO does not dispute that the Orders made the appellants ineligible to work in certain public healthcare settings while the Orders remained in place during the public health emergency. As their own evidence demonstrates, however, the appellants' choice not to receive the vaccine was preserved. Any cost imposed by the Orders did not interfere with the appellants' ability to adhere to their religious beliefs in a manner that was "more than trivial or insubstantial".

58. Contrary to the chambers judge's conclusion, the Orders did not engage religious rights in the same manner as other COVID-19 related decisions cited by the chambers judge.[71] *Beaudoin*, *Trinity Bible Chapel ONCA*, and *Gateway Bible Baptist Church et al v. Manitoba et al*[72] all concerned restrictions that limited the ability to hold religious gatherings. The impugned limits in those cases directly interfered with the ability of religious institutions to engage in religious practice. In contrast, the Orders do not interfere with the appellants' religious freedom to engage in "the very activity that animates and defines its religious character."[73]

59. The cost imposed by the Orders is also not comparable to the circumstances in *Multani v. Commission scolaire Marguerite-Bourgeoys*.[74] In that case, the majority found that requiring a Sikh student to choose between wearing a kirpan and attending public

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[69] *Hutterian* at para. 98.
[70] *Hutterian* at para. 99.
[71] Decision at paras. 258-259.
[72] *Gateway Bible Baptist Church et al v. Manitoba et al*, 2023 MBCA 56, leave to appeal ref'd 2024 CanLII 20245.
[73] *Trinity Bible ONSC* at para. 107 citing *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12.
[74] *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6.

schooling amounted to an infringement of the student's s. 2(a) rights. The Court held that the interference with the student's religion was neither trivial nor insignificant as it deprived him of his right to attend a public school.[75] The cost of the Orders on the appellants cannot be equated to the burden imposed in *Multani*. There is a significant difference in the magnitude of the burden between the right of a child to attend public school, and the eligibility of the appellants to work in certain public health and residential care settings while the Orders remained in place during a public health emergency.

VI. Section 7

a. The Orders did not engage section 7 of the *Charter*

60. The chambers judge did not err in finding that the Orders did not engage the appellants' s. 7 *Charter* rights.[76] The Orders do not compel vaccination or otherwise interfere with medical self-determination. Section 7 does not protect the right to work in any specific employment free from regulation.

61. Section 7 states that 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. To establish a limitation on s. 7 rights, a claimant must show that a law or state action has: (i) interfered with, or deprived them of, their life, liberty or security of the person; and (ii) done so in a manner inconsistent with the principles of fundamental justice. Such inconsistency may be proven by showing the law or government measure is arbitrary, overbroad, or grossly disproportionate.[77]

62. The appellants focus on the "liberty" interest in s. 7. The liberty interest does not cover all decisions, but instead only fundamental choices going to the core of individual dignity and independence.[78] While s. 7 protects personal autonomy, it is not synonymous with unconstrained freedom.[79]

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[75] *Multani* at para. 40.
[76] Decision at para. 18.
[77] *Carter v. Canada (Attorney General)*, 2015 SCC 5 at paras. 55 and 72.
[78] *R. v. Clay*, 2003 SCC 75 at para. 31.
[79] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 54.

63. The scope of the liberty interest in the medical context extends to the right to withhold consent from medical intervention, but not to pure economic interests.[80] It also does not bestow upon individuals an unconstrained right to transact business whenever or however one wishes.[81] Nor does the *Charter* confer a "constitutional right to practise a profession unfettered by the applicable rules and standards which regulate that profession".[82] State action that limits or puts conditions on a person's ability to practise a profession engages only "an economic interest of the sort that is not protected by the *Charter*".[83]

64. The courts have not found s. 7 engagement where a medical examination is required to be a teacher nor where persons who seek to become or remain licensed as pilots are required to undergo medical testing.[84] In the specific context of the COVID-19 pandemic, the courts have repeatedly confirmed that a requirement to be vaccinated in order to practise one's profession (1) does not amount to "forced vaccination"; (2) does not violate informed consent or bodily autonomy; and (3) does not violate *Charter* rights.[85]

b. The Orders did not limit bodily autonomy

65. The appellants attempt to engage s. 7 by framing their argument as being about bodily integrity.[86] This argument is at odds with the foundational case law on s. 7. In *Carter*

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[80] *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2022 BCCA 245 at paras. 234-235, leave to appeal ref'd [2022] S.C.C.A. No. 354.
[81] *Edwards Books* at 785-786.
[82] *Mussani v. College of Physicians and Surgeons of Ontario*, 2004 CanLII 48653 (ONCA); *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482, leave to appeal ref'd [2021] S.C.C.A. No. 350; *Ouellette v. Law Society of Alberta*, 2019 ABQB 492, leave to appeal ref'd 2021 ABCA 99; *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3; *Banas v. HMTQ*, 2022 ONSC 999.
[83] *Mussani* at paras. 41 and 43; see also *Cambie Surgeries Corporation* at paras. 233-235; *B.C. Teachers' Federation v. School District No. 39 (Vancouver)*, 2003 BCCA 100, leave to appeal ref'd [2003] S.C.C.A. No. 156.
[84] *B.C. Teachers' Federation* at paras. 201-210; *Siemens* at para. 46.
[85] *Maddock v. British Columbia*, 2022 BCSC 1605 at paras. 78-80, 83, appeal dismissed as moot, *Kassian v. British Columbia*, 2023 BCCA 383; *Parmar v. Tribe Management Inc.*, 2022 BCSC 1675 at paras. 132-33, 153-56; *Amalgamated Transit Union, Local 113 et al v. Toronto Transit Commission and National Organized Workers Union v. Sinai Health System*, 2021 ONSC 7658 at paras. 50-52, aff'd 2022 ONCA 802.
[86] See Appellants' Factum at para. 26.

v. Canada (Attorney General), the Supreme Court of Canada described the underlying concepts:

> Underlying both of these rights is a concern for the protection of individual autonomy and dignity. Liberty protects "the right to make fundamental personal choices free from state interference". Security of the person encompasses "a notion of personal autonomy involving . . . control over one's bodily integrity free from state interference" and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering.[87]

66. To the extent that choosing whether to be vaccinated against COVID-19 goes to the core of human dignity, that choice is preserved under the Orders. An individual's choice about vaccination may have impacted their eligibility to work in certain public healthcare settings (though not all healthcare settings)[88] while the Orders were in place during the public health emergency. The choice to become vaccinated or not may have been difficult; however, it did not infringe upon self-determination nor does a difficult choice constitute "coercion" or "threats" as the appellants characterize it.

67. The appellants' position can be contrasted with Supreme Court of Canada cases that concerned direct impacts on bodily integrity, such as laws preventing access to abortion (*R. v. Morgentaler*[89]*),* laws preventing physician-assisted dying (*Carter* and *Rodriguez v. British Columbia (Attorney General)*[90]), or persons providing medical treatment against the patient's wishes (*A.C. v. Manitoba (Director of Child and Family Services*[91]).

68. Here, the appellants retained and exercised their right to withhold consent to vaccination. That was their personal choice associated with bodily integrity and medical self-determination. While this choice limited their eligibility to work in certain healthcare

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[87] *Carter* at para. 64. Citations omitted.
[88] For example, the appellant Dr. Nordine deposed that he continued his family practice in a private clinic in Kelowna: Affidavit #1 of Dr. Joshua Nordine at para. 2.
[89] *R. v. Morgentaler*, [1988] 1 S.C.R. 30.
[90] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.
[91] *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30.

settings for a period of time (during a public health emergency), their s. 7 rights were unimpeded as summarized by the chambers judge:

> [276] On the evidence, the Orders compelled none of the Tatlock petitioners to accept unwanted medical treatment. Thus, unlike *Carter*, their s. 7 rights associated with bodily integrity and medical self-determination were not engaged.
>
> [277] Instead, they lost their jobs because they chose not to accept vaccination against a highly contagious virus which posed the risk of serious illness and death to vulnerable patients and other healthcare workers. In my view, this loss did not engage their s. 7 right to liberty because of the well-established principle that s. 7 does not protect the right to work in any specific employment or particular profession, particularly when the job-loss arises from non-compliance with its governing rules and regulations. This is not a constitutionally-protected fundamental life choice.

c. Section 7 does not encompass a right to practise a profession

69. The appellants argue that this Court should deviate from the established s. 7 jurisprudence to find that a workplace eligibility requirement is an infringement on liberty. Were it to do so, this Court would be departing from what a five-member division of the Ontario Court of Appeal described as "an unbroken line of authority from the Supreme Court of Canada confirming that s. 7 of the *Charter* does not protect the right to practise a profession or occupation".[92] Employment consequences of personal choices have consistently been found to be outside the ambit of s. 7.

70. The Court's decision in *Mussani* dealt with a constitutional challenge to the mandatory revocation of a registration certificate. The physician engaged in a consensual sexual relationship with his patient and was found guilty of sexual abuse pursuant to legislation. The consequence was revocation of his license to practise medicine.

71. The Court considered whether mandatory revocation violated s. 7. In its analysis, the Court noted that the essence of what the physician sought to protect was not the right to choose a consensual sexual partner from among his patients, but rather the right to engage in the economic activity of his choice.[93] The Court held that a bar to the ability to

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[92] *Tanase* at para. 40.
[93] *Mussani* at para. 39.

practise a chosen profession, like being licensed to drive, does not violate s. 7 because it does not interfere with a fundamental right.[94]. The Court held that this alone was sufficient to dispose of the case.[95] The same reasoning applies here.

72. The physicians and other healthcare workers in the present case are not being prevented from choosing whether or not to be vaccinated; instead, their choice not to become vaccinated may have made them ineligible to work in specific healthcare settings or engage in their chosen professions for the duration of the Orders. This situation does not engage the appellants' s. 7 interests.

73. It is insufficient that the appellants faced a difficult decision. In *Lewis v. Alberta Health Services*,[96] the Alberta Court of Appeal dismissed the idea that a COVID-19 vaccination requirement to remain on a life-saving transplant list engaged s. 7 rights.[97] The Court of Appeal concluded that it remained Ms. Lewis' choice whether she would comply with the vaccination requirement. The COVID-19 vaccine requirement did not prohibit her access to medical treatment but was part of her treatment as a necessary component of proper medical care for those seeking an organ transplant. By analogy, the appellants faced a difficult choice, but their right to refuse vaccination was preserved.

74. Finally, the appellants rely on Justice La Forest's minority reasons on behalf of three judges in *Godbout v. Longeuil (City)*.[98] The decision does not assist them. In *Godbout,* six judges expressly refused to consider s. 7, while three concluded s. 7 applies to a choice of place a residence. The courts have not subsequently adopted this view, and as the appellants concede at paragraph 37 of their factum, the conclusion that a place of residence is protected by s. 7 remains unsettled.[99] Regardless, the unsettled issue

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[94] *Mussani* at para. 40.
[95] *Mussani* at para. 43.
[96] *Lewis v. AHS*, 2022 ABCA 359, leave to appeal ref'd 2023 CanLII 49297 (SCC).
[97] The Court found that the *Charter* did not apply to the vaccination policy at issue; however, the Court went on to provide an opinion on the *Charter* claims, assuming for the sake of argument, that the *Charter* applied: see para. 36.
[98] *Godbout v. Longeuil (City)*, [1997] 3 S.C.R. 844.
[99] Notably, the appellants cite the reasons of Chief Justice McLachlin (as she then was) in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham,* 2011 SCC 37

concerns a place of residence, not a person's ability to work in certain healthcare settings or to practise a health profession. The latter issue is settled law: the choice to practise a particular profession or be employed in a particular role is not a s. 7 right.

d. The Orders complied with the principles of fundamental justice

75. If this Court considers the principles of fundamental justice, the appellants' arguments, specifically that the Orders are overbroad and arbitrary, must be dismissed.

76. The deprivation of a right will be overbroad if it goes too far and interferes with some conduct that bears no connection to its objective.[100] The deprivation of a right will be arbitrary and thus violate s. 7 only if it bears no real connection to the law's purpose.[101]

77. The appellants' argument is a catch-22. They say the Orders are overbroad because they cover too many people (specifically remote and administrative workers, though those appellants are not the subject of this analysis, as discussed above), but arbitrary because they do not cover enough people (contract workers).[102] The appellants' position only reinforces that the PHO found a reasonable balance in accordance with the principles of fundamental justice.

78. The appellants rely on *United Steelworkers, Local 2008 v. Attorney General of Canada,*[103] an outlier for its conclusion that s. 7 is engaged in the context of a workplace requirement. However, even having found that engagement, Justice Phillips concluded

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for this proposition. In that decision, McLachlin C.J. writing for the Court states at para. 93: "It is not clear that place of residence is a protected liberty interest under s. 7 of the *Charter*. In *Godbout* …, La Forest J., writing for himself and two other members of the Supreme Court, suggested that it was, but the issue remains unsettled." McLachlin C.J. was one of those "two other members" and so her subsequent opinion on the point being unsettled is far from an endorsement of the conclusion.

[100] *Canada (Attorney General) v. Bedford,* 2013 SCC 72 at paras. 93-123; see also *Tanase* at paras. 47-48: "As the Court explained in *Carter*, the test is not whether the legislature has chosen the least restrictive means; it is "whether the chosen means infringe life, liberty or security of the person in a way that has *no connection with the mischief contemplated by the legislature*". This is a difficult test to meet…".

[101] *Bedford* at paras. 93-123.

[102] Appellants' Factum at paras. 40-41.

[103] *United Steelworkers, Local 2008 v. Attorney General of Canada*, 2022 QCCS 2455.

that vaccination requirements complied with the principles of fundamental justice. Having accepted that the objective of the vaccine requirement was to protect workers from severe illness, reduce absenteeism, and foster key supply chains, Phillips J. found the orders: (1) not arbitrary, as there was evidence to suggest that unvaccinated people were at higher risk to develop more severe forms of the disease, with consequences on the rate of absenteeism;[104] (2) not overbroad, as the petitioners had not shown that the measure caused effects unrelated to its objective;[105] and (3) proportionate to the goal of avoiding the potentially dramatic consequences of absenteeism and disruptions in the Canadian transport system.[106] Similar concerns apply here.

79. On overbreadth, the appellants rely on the impact of the Orders on remote and administrative workers[107] who are not the subject of the Court's analysis because, as set out above, the chambers judge granted them relief on administrative law grounds.

80. With respect to arbitrariness, the appellants argue that contract employees were not covered and therefore the Orders were arbitrary.[108] The exclusion of contract workers does not show the Orders bore no real connection to their purpose. The exclusion shows the PHO balanced the effect of the Orders, and there is a clear connection between vaccination of clinical-contact healthcare workers, and the protection of vulnerable patients and the healthcare system.

VII. The Orders proportionately balanced public health objectives with the appellants' *Charter* rights in accordance with section 1

81. Even if the appellants establish an appealable error regarding any *Charter* engagement or limitations, the Orders reflect a reasonable and proportionate limit on those *Charter* rights under s. 1. In *Beaudoin*, this Court held that the *Doré* analysis is applicable on judicial review of PHO decisions.[109] The s. 1 question is whether the impact

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[104] *United Steelworkers* at paras. 195-198.
[105] *United Steelworkers* at paras. 199-202.
[106] *United Steelworkers* at paras. 203-211.
[107] Appellants' Factum at para. 40.
[108] Appellants' Factum at para. 41.
[109] *Beaudoin* at para. 257.

of the Orders on the appellants' rights reflects a proportionate balance between the *Charter* protections at play and the relevant statutory objectives of the decision maker, also known as the *Doré/Loyola* framework.[110]

82. In *Law Society of British Columbia v. Trinity Western University*,[111] the Court applied the *Doré/Loyola* framework to uphold a decision to not approve a law school that imposed a mandatory religious covenant, when that covenant would have excluded and degraded LGBTQ students. The limit on freedom of religion was justified to uphold and protect the public interest in the administration of justice.

83. The proportionality analysis requires considering not only the individual appellants' rights, but broader objectives, and understanding that sometimes conflicts between the two are inevitable.[112] Under the *Doré* analysis, the issue is not whether the exercise of administrative discretion that limits a *Charter* right is correct (i.e., whether the court would come to the same result), but whether it is reasonable (i.e., whether it is within the range of acceptable alternatives once appropriate curial deference is given).[113] An administrative decision will be reasonable if it reflects a proportionate balancing of the *Charter* right with the objective of the measures that limit the right. Rights and freedoms under the *Charter* are not absolute.

84. The Orders' preambles include the objectives of protecting public health, preventing severe illness, hospitalization and death, and preserving the healthcare system's ability and capacity to provide care for all care needs. The chambers judge observed that it was "difficult to imagine more important and pressing public health concerns and objectives than reducing illness and loss of life, and safeguarding the functioning of the healthcare system."[114]

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[110] *Doré*; *Loyola High School v. Québec (Attorney General)*, 2015 SCC 12. See also *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31.
[111] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32.
[112] *Trinity Western* at para. 100.
[113] See *Doré* at paras. 56-57.
[114] Decision at para. 307.

85. Courts have consistently acknowledged the specialized public health expertise of public health officials and the need to judicially review their decisions made in emergent circumstances with "a degree of judicial humility".[115] The PHO is BC's chief public health official and a public health physician with extensive training and unique experience that equips her to make informed decisions to combat the impacts of COVID-19. The PHO made decisions in real time, to protect patients, vulnerable populations and the healthcare system, in a climate of evolving knowledge. As the Court of Appeal affirmed in *Beaudoin*, limitations on individual rights can be proportionate where there is a "…need to take precautions to stop preventable deaths from occurring and the need to protect the capacity of the health-care system".[116]

86. The Orders explain the PHO's reasoning and provide specific justification for the Orders anchored in the epidemiological data and generally accepted scientific knowledge regarding SARS-CoV-2 and COVID-19 that was in the record before her, with available exemptions limited to medical grounds establishing serious risk to the person's health only. The PHO proportionately balanced the pressing public health objectives of the Orders against their impact on individual liberties.

87. As noted by the chambers judge, the Orders' preambles expressly acknowledge the PHO's consideration of the *Charter* rights and freedoms of those who may be subject to them and note that any limitations are aligned with public health principles, proportionate, precautionary and evidence-based, and intended to prevent loss of life, serious illness, and disruption of the health system and society.[117]

88. A proportionality analysis asks whether the deleterious effects of the Orders, in their impact on the appellants' rights, outweigh the salutary benefits to be gained from them. The chambers judge found an "ample" evidentiary foundation for the PHO's conclusions about the risks posed by an unvaccinated healthcare workforce and recognized that deference is owed to the PHO regarding those complex medical and

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[115] *Beaudoin* at para. 150.
[116] *Beaudoin* at para. 267.
[117] Decision at para. 305.

scientific issues.[118] The Orders were in place to ensure that the healthcare system could provide care for all care needs, and to protect vulnerable populations. These significant salutary public health and healthcare system effects and outcomes outweigh the situation of comparatively few appellants who were able to exercise choice about vaccination.

VIII. Response to specific arguments

a. The Orders (broadly) were reasonable

89. Given the relief sought in chambers, this appeal does not extend to a broad consideration of the reasonableness of the Orders generally. However, to the extent those arguments are permitted, the chambers judge properly held that the record demonstrated medical and scientific evidence available to the PHO as of October 5, 2023 contained "ample evidence" to support her conclusions that:

> a) Transmission of the virus continued to pose an immediate and significant risk to public health throughout the province, justifying the ongoing use of the emergency powers in the *PHA (*paragraphs 179-198);
>
> b) An unvaccinated healthcare workforce continued to pose a risk to patients, residents, clients and healthcare workers in hospitals and other care settings, and to the functioning of the healthcare system, and to constitute a "health hazard" as defined in the *PHA* (paragraphs 199-209); and
>
> c) It was essential to maintain the high level of workforce vaccination already in place in these settings, as the best means to mitigate these risks and safeguard the public health system in the province (paragraphs 199-209).[119]

90. The chambers judge based those findings on a wealth of medical, scientific and epidemiological evidence in the record, including Public Health Agency of Canada (PHAC) Monitoring Reports and National Advisory Committee on Immunization (NACI) guidance, COVID-19 surveillance reports from the BCCDC, Dr. Dove's evidence review and studies including a study by the Federal Government's COVID-19 Immunity Task Force.[120] The chambers judge's conclusion that the Orders were reasonable was

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[118] Decision at para. 310.
[119] Decision at para. 13.
[120] Decision at paras. 112-177.

grounded in concrete evidence in the record that established, as summarized at paragraph 188:

> …(i) the three-year COVID-19 experience of an unprecedented and unpredictable virus, with the ability to create new variants, and to attack in waves causing widespread serious illness, death, and harm to the functioning of the healthcare system which stressed it beyond capacity to protect and care for the health needs of the population; (ii) the extreme contagiousness of Omicron and its variants, including within healthcare settings; (iii) the particular vulnerability of patients within the healthcare and long-term care settings; and (iv) the key negative indicators, leading up to October 2023, of rising COVID-19 severe outcomes and deaths, back to levels seen in the fall of 2021, as the annual onset of flu and other respiratory illnesses was about to arrive.

91. The chambers judge's finding of reasonableness of the Orders does not contain any error and is properly grounded in the record that was before the PHO.

b. The Orders and the chambers judge addressed relative efficacy of Personal Protective Equipment and Rapid Testing

92. Turning to the appellants' specific arguments about reasonableness and proportionality of the Orders, at paragraph 50 of the appellants' factum, they contend that there was "no consideration" of whether the use of additional personal protective equipment and rapid testing would meet the Orders' objectives. This is once again outside the proper scope of the appeal in light of the relief sought by the appellants in the court below. However, if this Court nonetheless considers these arguments, the assertion is inaccurate and misconstrues both the Orders (which expressly addressed rapid testing and masking within their recitals[121]), and the reasons below. The chambers judge found that the PHO's medical conclusions that alternatives such as masking and rapid testing are "not as effective" as vaccination to be substantiated on the record, reasonable, and appropriately subject to deference.[122]

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[121] Decision at para. 312; Miller #1 at Ex. A, p. 5; Ex. B, pp. 26-27.
[122] Decision at paras. 204-205 and 312.

c. No requirement for the Orders or the PHO to furnish alternative employment for the appellants

93. Also at paragraph 50 of their factum, the appellants argue that because the Orders failed to provide "alternative employment" for appellants who chose not to be vaccinated for "other medical reasons", they were either unreasonable or not proportionate.

94. There was no legal requirement or authority for the PHO to provide alternative employment for those whom the Orders rendered ineligible to continue working for their current employers. They remained able to seek alternative employment. By analogy, in *Hutterian Brethren*, the regulation was found reasonable under s. 1 even though those who opted not have their photographs taken could not obtain driver's licenses, meaning they were required to arrange alternative means of transportation at their cost. The Court did not impose an obligation upon the legislature to provide alternative transportation for those appellants to travel on highways, nor would such a requirement be practical.

95. The Orders did not dictate the appellants' employment outcomes. The appellants' choice to remain unvaccinated rendered them ineligible to work under the Orders, which did not prescribe what employment consequences, if any, would flow from that ineligibility.

d. Requirement for XBB.1.5 vaccination supported on the record

96. The appellants also argue that the vaccine requirement in the October 5, 2023 Orders was not supported by "science".[123] This submission again casts this appeal as a rehearing and misconstrues the role of the court on judicial review.

97. The chambers judge referred to evidence in the record that the updated mRNA vaccine for the newly dominant XBB.1.5 strain, a sublineage of the Omicron variant, was strongly recommended by the National Advisory Committee on Immunization (NACI) and the Public Health Agency of Canada (PHAC).[124] The appellants may disagree with that medical and scientific evidence, but the Orders were reasonable and proportionate in

[123] Appellants' Factum at para. 57.
[124] Decision at para. 141.

incorporating a vaccination requirement based upon that evidence. The chambers judge's conclusion on the point is correct.

e. The Court's role on judicial review is not weighing "expert opinions"

98. Judicial review is concerned with reasonableness and *Charter* compliance of the Orders. It is a not a civil trial where competing expert opinion may be admitted if it meets particular criteria, experts are subject to cross-examination and the court may be charged with preferring one expert opinion over another.

99. Dr. Warren's report was accepted as part of the record before the PHO because it was provided to her by the appellants. It was not admitted into evidence as an expert opinion as that term applies in civil trials. The record also contained over 6,000 pages of material including BCCDC data and analysis, NACI reports, PHAC Monitoring Reports and scans of evidence, and Dr. Dove's evidence summary which concluded that hybrid immunity offers the best protection.[125]

100. The appellants' arguments about natural immunity, hybrid immunity and effectiveness of the two-dose primary series[126] are all efforts to improperly encourage this Court to make findings of fact on complex scientific issues, and outside the proper scope of judicial review. They inaccurately frame their argument as a contest between experts, failing to acknowledge that Dr. Dove and Dr. Warren's reports were only part of the substantial public health and scientific record before the PHO. The appellants may prefer Dr. Warren's opinions, but that does not make the PHO's consideration of the record, analyzed through the lens of her experience and public health expertise, and the public health precautionary principle, unreasonable.

IX. Conclusion

101. The appeal ought to be dismissed. The Orders did not engage, or in the alternative, unreasonably limit the clinical contact and frontline worker appellants' *Charter* rights.

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[125] Decision at para. 80-85.
[126] Appellants' Factum at para. 59-72.

102. Should the Court hear the appellants' broader arguments, despite them narrowing their relief in the court below, the Orders were reasonable. The chambers judge found that there was ample record evidence to support as reasonable the PHO's conclusion that it was "essential to maintain the high level of workforce vaccination already in place in these settings, as the best means to mitigate these risks and safeguard the public health system."[127] That is, vaccination was the best way to protect vulnerable patients and the healthcare system broadly.

103. The Orders were carefully considered and put in place in healthcare and residential care, to protect our most vulnerable, reduce severe illness, hospitalization and death, and to preserve the system's ability to provide care for everyone during a public health emergency.

PART 4 - NATURE OF ORDER SOUGHT

104. The respondents seek an order dismissing the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Victoria, Province of British Columbia, this 31st day of October 2024.

Counsel for the respondents
Julie K. Gibson, Alexander C. Bjornson, and Christine Bant

[127] Decision at para. 13.

APPENDICES: LIST OF AUTHORITIES

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APPENDICES: ENACTMENTS

PUBLIC HEALTH ACT

[SBC 2008] CHAPTER 28

Part 3 – Preventing Disease and Other Health Hazards

Division 1 – Preventing Disease and Other Health Hazards

Preventive Measures

16 (1) Preventive measures include the following:

a) Being treated or vaccinated;
b) Taking preventive mediation;
c) Washing with, applying or ingesting a substance, or having a substance injected or inserted;
d) Undergoing disinfection and decontamination measures;
e) Wearing a type of clothing or other personal protective equipment, or changing, removing or altering clothing or personal protective equipment;
f) Using a type of equipment or implementing a process, or removing or altering equipment or processes.

Part 4 – Inspections and Orders

Division 4 – Orders Respecting Health Hazards and Contraventions

30 (1) A health officer may issue an order under this Division only if the health officer reasonably believes that

a) a health hazard exists,
b) a condition, a thing or an activity presents a significant risk of causing a health hazard,
c) a person has contravened a provision of the Act or a regulation made under it, or
d) a person has contravened a term or condition of a licence or permit held by the person under this Act.

(2) For greater certainty, subsection (1) (a) to (c) applies even if the person subject to the order is complying with all terms and conditions of a licence, a permit, an approval or another authorization issued under this or any other enactment.

General powers respecting health hazards and contraventions

31 (1) If the circumstances described in section 30 [*when orders respecting health hazards and contraventions may be made]* apply, a health officer may order a person to do anything that the health officer reasonably believes is necessary for any of the following purposes:

b) to prevent or stop a health hazard, or mitigate the harm or prevent further harm from a health hazard;

Specific powers respecting health hazards and contraventions

32 (2) Without limiting section 31, a health officer may order a person to do one or more of the following:

a) have a thing examined, disinfected, decontaminated, altered or destroyed, including
   i. by a specified person, or under the supervision or instructions of a specified person,
   ii. moving the thing to a specified place, and
   iii. taking samples of the thing, or permitting samples of the thing to be taken;
b) in respect of a place,
   i. leave the place,
   ii. not enter the place,
   iii. do specific work, including removing or altering things found in the place, and altering or locking the place to restrict or prevent entry to the place,
   iv. neither deal with a thing in or on the place nor dispose of a thing from the place, or deal with or dispose of the thing only in accordance with a specified procedure, and
   v. if the person has control of the place, assist in evacuating the place or examining persons found in the place, or taking preventive measures in respect of the place or persons found in the place;
c) stop operating, or not operate, a thing;
d) keep a thing in a specified place or in accordance with a specified procedure;
e) prevent persons from accessing a thing;
f) not dispose of, alter or destroy a thing, or dispose of, alter or destroy a thing only in accordance with a specified procedure;
g) provide to the health officer or a specified person information, records, samples or other matters relevant to a thing's possible infection with an infectious agent or contamination with a hazardous agent, including

information respecting persons who may have been exposed to an infectious agent or hazardous agent by the thing;

h) wear a type of clothing or personal protective equipment, or change, remove or alter clothing or personal protective equipment, to protect the health and safety of persons;

i) use a type of equipment or implement a process, or remove equipment or alter equipment or processes, to protect the health and safety of persons;

j) provide evidence of complying with the order, including

i. getting a certificate of compliance from a medical practitioner, nurse practitioner or specified person, and

ii. providing to a health officer any relevant record;

k) take a prescribed action.

May make written agreements

38 (1)If the health officer reasonably believes that it would be sufficient for the protection of public health and, if applicable, would bring a person into compliance with this Act or the regulations made under it, or a term or condition of a licence or permit held by the person under this Act, a health officer may do one or both of the following:

a) instead of making an order under Division 1, 3 or 4, enter into a written agreement with a person, under which the person agrees to do one or more things;

b) order a person to do one or more things that a person has agreed under paragraph (a) to do, regardless of whether those things could otherwise have been the subject of an order under Division 1, 3 or 4.

(2) If, under the terms of an agreement under subsection (1), a health officer conducts one or more inspections, the health officer may use information resulting from the inspection as the basis of an order under this Act, but must not use the information as the basis on which to

a) levy an administrative penalty under this Act, or

b) charge a person with an offence under this Act.

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 the health officer 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 the similarly designated health officer made.

Review of orders

44 (1) A person affected by an order may request a review of the order under this section only after a reconsideration has been made under section 43 *[reconsideration of orders]*.

(2)A request for a review may be made,

a) in the case of an order made by a medical health officer, to the provincial health officer, or
b) in the case of an order made by an environmental health officer, to a medical health officer having authority in the geographic area for which the environmental health officer is designated.

(3) If a review is requested, the review is to be based on the record.

(4) If a review is requested, the reviewer may do one or more of the following:

a) 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;
b) confirm, vary or rescind the order;
c) refer the matter back to the person who made the order, with or without directions.

(5) A reviewer must provide written reasons for an action taken under subsection (4) (b) or (c), and a person may not request further review of an order.

Mandatory reassessment of orders

45 (1) Subject to the regulations, a person affected by an order may request the health officer who issued the order to re-assess the circumstances relevant to the order to determine whether the order should be terminated or varied.

(2) On receiving a request under subsection (1), the health officer must re-assess the order in accordance with the regulations.

(3) If, following a reassessment, a health officer reasonably believes that the order is, or conditions within the order are, no longer necessary to protect public health, the health officer must immediately terminate the order, or vary or remove the conditions, as applicable.

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 (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.

Division 2 – Emergency Powers

General emergency powers

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

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*];

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.

56 (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.

Part 6 – Health Officials

Division 2 – Provincial Health Officer

Duty to advise on provincial public health issues

66 (1) The provincial health officer must monitor the health of the population of British Columbia and advise, in an independent manner, the minister and public officials

a) on public health issues, including health promotion and health protection,
b) on the need for legislation, policies and practices respecting those issues, and
c) on any matter arising from the exercise of the provincial health officer's powers or performance of the provincial health officer's duties under this or any other enactment.

(2) If the provincial health officer believes it would be in the public interest to make a report to the public on a matter described in subsection (1), the provincial health officer must make the report to the extent and in the manner that the provincial health officer believes will best serve the public interest.

(3) The provincial health officer must report to the minister at least once each year on

a) the health of the population of British Columbia, and
b) the extent to which population health targets established by the government, if any, have been achieved,

and may include recommendations relevant to health promotion and health protection.

(4) The minister must lay each report received under subsection (3) before the Legislative Assembly as soon as it is reasonably practical.

Provincial health officer may act as health officer

67 (2) During an emergency under Part 5 *[Emergency Powers]*, the provincial health officer may exercise a power or perform a duty of a health officer under this or any other enactment, and, for this purpose, subsection (1) does not apply.