COURT OF APPEAL

ON APPEAL FROM the Order of The Honourable Justice Coval of the Supreme Court B.C. 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)

Publication Ban or Anonymity Order (if any): NIL

Sealing Order (if any): NIL

APPELLANTS' REPLY

Filed by the Appellants

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	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
Allison Pejovic and Marty Moore Pejovic Law	Julie K. Gibson, Alexander C. Bjornson, and Christine Bant Ministry of Attorney General Legal Services Branch

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Counsel for the Appellants

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Counsel for the Respondents

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APPELLANTS' REPLY TO RESPONDENTS' FACTUM ON APPEAL

A. The proper scope of the appeal

a. Appellants' appeal seeks the only practical relief available

1. Contrary to the assertions made in the Respondents' factum, the Appellants' written argument before the Chambers Judge asked the court to declare that the "vaccine mandate" in the Orders was unreasonable and infringed their section 2(a) and 7 *Charter* rights.[1] The Respondents addressed these arguments in their own written submissions.

2. In oral argument, counsel for Ms. Hoogerbrug and Drs. Hsiang, Morgan and Ms. Vandergugten (the "**Joined Petitioners**") made broad arguments about the Orders' unreasonableness, and that they violated Hoogerbrug's section 2(a) religious rights. In cases where there are more than one set of plaintiffs/applicants/petitioners, the parties often split their arguments orally to avoid repetition and maximize efficiency. This hearing was already 13 days long. Speaking second, Karen Bastow, counsel for the Appellants, focused on the unreasonableness of the Orders for the Appellants who were remote and administrative workers, and that the Orders infringed the Appellants' section 2(a) and 7 *Charter* rights. Following extensive oral submissions by Appellants' counsel Charlene Le Beau on the unreasonableness of the Orders, Ms. Bastow argued for relief on a direction that the PHO reconsider under section 43 of the *PHA*, for unreasonableness of the Orders and that they infringed section 2(a) and 7 *Charter* rights.

3. It appears that the real dispute now is about what remedy the Appellants may seek. Since the Orders are no longer in force, the remedy of ordering the PHO to provide section 43 reconsideration is no longer practical or available to the Appellants. The Appellants therefore seek the only effective remedy available to them – a declaration that the Orders were unreasonable and violated their section 2(a) and 7 *Charter* rights. These claims were made in the Petition and the arguments were made in the Appellants' written

[1] Factum of the Respondents, ("RF"); The Appellants intend to file a fresh evidence motion in advance of the appeal in order to admit their written argument into evidence before this Honourable Court.

argument before the Chambers Judge. Further, the facts and record required to support those arguments were before him.

4. The Chambers Judge made findings on these arguments, including in respect of the Joined Petitioners. The Joined Petitioners have not appealed the Chambers' Judge's decision, so there is no need to attempt to split the arguments between two sets of Appellants. The Respondents will suffer no prejudice as a result of the Appellants making those arguments in this appeal, as they already responded to them before the lower court. Further, the Chambers Judge made broad findings on the reasonableness of the Orders for all healthcare workers and also specifically for remote and administrative workers, and whether the Orders violated the petitioners' section 2(a) and 7 *Charter* rights.

b. Appellants Do Not Raise New Claims on Appeal

5. Contrary to the Respondents' argument,[2] the Appellants raise no new claims on appeal. All positions advanced on appeal were put before the Chambers Judge in their written submissions, and/or argued by the Joined Petitioners orally. The Chambers Judge addressed these arguments, regardless of which Petitioners advanced them.[3]

c. Appellants Satisfy Legal Test for Admission of New Issues on Appeal

6. In the alternative, the Appellants submit that they have satisfied the Supreme Court of Canada's legal test for the circumstances in which a new issue may be raised on appeal. In *Quan v. Cusson*,[4] McLachlin C.J. writing for the majority wrote:

> Further guidance as to the appropriate test is provided by *Wasauksing First Nation v. Wasausink Lands Inc.* (2004) …
>
> > An appellate court may depart from this ordinary rule and entertain a new issue where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so. [para. 102][5]

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[2] RF, *supra*, at para. 34
[3] Reasons for Decision, at paras. 199-209 (reasonableness of Orders); paras. 233-252 (s. 2(a)); paras. 264-300 (s. 7); paras. 301-314 (reasonableness of Orders under *Dore*)
[4] *Quan v. Cusson*, 2009 SCC 62
[5] *Ibid.*, at para. 37

McLachlin C.J. went on to analyze whether (1) a new issue was raised on appeal, and if so, (2) whether the evidentiary record and (3) the interests of justice supported granting an exception to the general rule.[6]

7. In this case, if this Honourable Court should determine that the Appellants are raising a new issue with their requests for a declaration on appeal, the evidentiary record supports their claims in full. The claims for declaratory relief on the basis of the unreasonableness of the Orders and that the Orders infringed the Appellants' section 2(a) and 7 *Charter* rights were made in the written argument filed in the lower court based on an almost 9000-page Petition Record full of facts and scientific reports which more than support those claims. Further, the Appellants agreed with the submissions of the Joined Petitioners in the court below on the reasonableness issues for all healthcare workers, and the section 2(a) *Charter* argument. Since the Joined Petitioners chose not to appeal the Chambers' Judge's decision, it is in the interests of justice to permit the Appellants to make the full arguments that they made in their written argument before the Chambers Judge. Further, and as stated above, although it is not a factor in the legal test in *Quan*, the Respondents are not prejudiced by the Appellants' "new" arguments as they already responded to them before the lower court.

d. A Court's Role on Judicial Review is to Determine Reasonableness of Dr. Henry's Decision Based on Evidence Before Her

8. The Respondents assert that, "The Chambers Judge's role was not to second-guess conclusions drawn from the public health evidence by the PHO."[7] Respectfully, the Respondents have misstated the court's proper role. The Supreme Court of Canada in *Vavilov* was clear that a reviewing court must examine whether the decision maker's decision was reasonable in light of the facts before it, and that determination can only be made by considering the evidence:

> …a reasonable decision is one that is justified in light of the facts…**The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence**

[6] *Ibid*., at para. 38
[7] RF, *supra*, at para. 39

> **before it.** In *Baker*…the decision maker had relied on irrelevant stereotypes and **failed to consider relevant evidence**, which led to a conclusion that there was a reasonable apprehension of bias…Moreover, **the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him**: *ibid*.[8]

9. A reviewing court cannot properly determine that a decision maker failed to account for evidence before her, failed to consider relevant evidence, or that her conclusions were not based on evidence before her, without reviewing that evidence. The Appellants are not asking this Honourable Court to reweigh the evidence as though it was the decision maker at first instance; rather they request that this Court examine the evidence and determine whether Dr. Henry's conclusions were reasonably based on the evidence before her.

e. The Qatar Study was Before Dr. Henry

10. The Respondent argues that "…the appellants seek to rely on evidence that was not before the PHO in making the Orders…,"[9] referring to the "Qatar Study" cited in Dr. Dove's report which Dr. Henry relied on in making her Orders. While the Qatar Study in full was not included in Dr. Dove's report, the footnote with the full citation for the study was.[10] As Dr. Henry stated she reviews the scientific literature prior to making her Orders,[11] the Appellants' submit that this study was indeed before her. As stated by the Supreme Court of Canada, "*Charter* decisions should not and must not be made in a factual vacuum."[12] This is a constitutional case, and in order for it to be properly adjudicated and reviewed on appeal, the facts must be properly before this Honourable

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[8] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653, at para. 126 [emphasis added], citing *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC)
[9] RF, *supra*, at para. 40
[10] The Appellants will bring a fresh evidence motion which will be filed in advance of the appeal to include the Qatar Study footnoted in Dr. Dove's report.
[11] Affidavit #1 of Haley Miller, Exhibits "A" and "B", Recital WW, Residential Care Preventive Measures Order
[12] *Mackay v. Manitoba* [1989] 2 SCR 357, at p. 361 c-j

Court. The Appellants were not entitled to cross-examine Dr. Henry, therefore, this Honourable Court must be able to examine these facts to preserve the rule of law.

B. Section 7

11. The Respondents have misconstrued the Appellants' position on section 7 of the *Charter*.[13] The Appellants do not argue that section 7 protects one's right to practice her profession. On the contrary, they argue that the Orders, in requiring them to be vaccinated in order to work, violate their right to make fundamental personal medical choices. Section 7 protects one's right to make fundamental personal medical choices.[14] The Respondents further characterize Justice La Forest's reasons in *Godbout v Longeuil (City)* as "minority" reasons.[15] The Appellants reiterate that his reasons as a whole on behalf of three justices were not a dissent, but rather a concurring majority judgment.

12. Further, the Respondents refer to Justice Phillips' finding that the vaccination requirements complied with the principles of fundamental justice in *United Steelworkers, Local 2008 v Attorney General of Canada*,[16] and argue that any limitation of the Appellants' liberty rights in this case would be in accordance with the principles of fundamental justice. The analysis into whether a vaccination requirement is overbroad, arbitrary or grossly disproportionate is highly reliant on the scientific evidence in the record and before the court. The science in this case is different than the science (or lack thereof) in the *United Steelworkers* case, and such a comparison is not persuasive.

All of which is respectfully submitted.

Dated at the City of Calgary, Province of Alberta, this 14th day of November of 2024.

A.K. Pejovic

Allison Pejovic
Appellants

[13] RF, *supra*, at paras. 69-74
[14] *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at para. 237, per Wilson J, concurring
[15] *Godbout v. Longeuil (City)*, [1997] 3 S.C.R. 844
[16] *United Steelworkers, Local 2008 v. Attorney General of Canada*, 2002 QCCS 2455

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APPENDICES: ENACTMENTS

ORDER OF THE PROVINCIAL HEALTH OFFICER

(Pursuant to Sections 30, 31, 32, 39 (3), 54 56, 67 (2) and 69 *Public Health Act*, S.B.C. 2008)

RESIDENTIAL CARE COVID-19 VACCINATION STATUS INFORMATION AND PREVENTIVE MEASURES – OCTOBER 5, 2023

Recitals:

WW. I recognize the effect which the measures I am putting in place to protect the health of patients, residents, clients and workers in hospital and community care settings may have on people who are unvaccinated and, with this in mind, continually engage in the reconsideration of these measures, based upon the information and evidence available to me, including case rates, sources of transmission, the presence of clusters and outbreaks, the number of people in hospital and in intensive care, deaths, the emergence of and risks posed by virus variants of concern, vaccine availability, immunization rates, the vulnerability of particular populations, reports from the rest of Canada and other jurisdictions, scientific journal articles reflecting divergent opinions, and opinions expressing contrary views to my own submitted in support of challenges to my orders, with a view to balancing the interests of the people working or volunteering in the hospital and community care sectors, including constitutionally protected interests, against the risk of harm posed by unvaccinated people working or volunteering in the hospital or community care sectors.