

COURT OF APPEAL FILE NO. CA49934
Tatlock et al. vs. Attorney General for the Province of British Columbia et al.
Appellant's Factum

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' FACTUM

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

Allison Pejovic and Marty Moore

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

Julie K. Gibson, Alexander C. Bjornson,
and Christine Bant

[REDACTED]

[REDACTED]

TABLE OF CONTENTS

CHRONOLOGY	5
OPENING STATEMENT	10
PART 1 - STATEMENT OF FACTS	11
A. Background to the Orders	11
B. The Appellants	13
C. Exemptions from vaccine mandate not a viable option for most healthcare workers.....	15
D. Supreme Court remits the issue of denying reconsideration under s. 43 of the PHA to administrative and remote healthcare workers to Dr. Henry.....	15
PART 2 - ERRORS IN JUDGMENT	17
PART 3 - ARGUMENT	17
A. Standard of Review	17
B. The Petitioners' Section 7 Liberty Rights Were Limited in a Manner Not in Accordance with the Principles of Fundamental Justice	19
i. A Limit on Liberty Does Not Depend Upon Succumbing to State Pressure....	19
ii. Engaging a Liberty Interest as a Condition of Employment Is a Deprivation of that Right Under Section 7	23
iii. The Orders Are Overbroad.....	25
iv. The Orders Are Arbitrary	26
C. Remote Working and/or Administrative Religious Appellants' Section 2(a) Rights, and all Appellants' Section 7 Rights Were Unreasonably Infringed	26
i. The <i>Charter</i> Section 1 Analysis and the Legal Framework	26
ii. Religious Freedom	27
a) The Chambers Judge failed to Analyze Reasonableness of Limits on Section 2(a) Rights on Remote and Administrative Workers.....	27
b) The Chambers Judge Found a Lack of Justification for Refusal to Include a Reconsideration Process for Remote and Administrative Workers	28
c) Limits on s. 2(a) Freedoms of Remote or Administrative Workers Unreasonable.....	29
d) Limits on All Appellants' Liberty Interests are Disproportionate and Unreasonable.....	29
D. The Science Revealed that the Orders Are Fundamentally Flawed	30

i. Legal Framework for Determination of Orders' Reasonableness	30
ii. Facts Are Essential for Consideration of <i>Charter</i> issues	31
a) Dr. Henry Said she Reviews the Latest Science Before she Creates Orders	31
b) No Science Supporting the Safety and Efficacy of The X.BB.1.5 Vaccine	31
c) The Expert Opinions on Natural Immunity, Hybrid Immunity and Effectiveness of Two-Dose Vaccine Regimen	32
d) Chambers Judge Erred in His Assessment of his Role on Judicial Review 35	
e) Dr. Henry Failed to Account for Important Evidence Before Her	36
iii. Factors That Show the Orders Are Fundamentally Flawed and Unreasonable	37
PART 4 - NATURE OF ORDER SOUGHT	40
APPENDICES: LIST OF AUTHORITIES	41
APPENDICES: ENACTMENTS	43

CHRONOLOGY

Date	Event	Reference
October 8, 2021	Guidelines for Request for Reconsideration (Exemption) Process for Health Care Workers affected by the Provincial Health Officer Orders	Affidavit #1 of Anneke Pingo, Exhibit "O"
October 21, 2021	Order of the Provincial Health Officer (RESIDENTIAL CARE COVID-19 PREVENTIVE MEASURES – OCTOBER 21, 2021) – first Order that caused a group of BC healthcare workers, including one of the Petitioners (Scott MacDonald) to provide proof of vaccination for Covid-19 by October 26, 2021, or be prevented from working.	Affidavit #1 of Anneke Pingo, Exhibit "I"
November 2, 2021	Interior Health public letter entitled "to Contractors" seeking remote-working contract workers – who were not subject to Covid-19 vaccine requirement.	Affidavit #2 of Ashley Sexton, Exhibit "C"
November 8, 2021	Northern Health public letter entitled "Notice to Contractors" seeking remote-working contract workers – who were not subject to Covid-19 vaccine requirement.	Affidavit #1 of Jennifer Koh (witness), Exhibit "H"
November 18, 2021	Order of the Provincial Health Officer (HOSPITAL AND COMMUNITY (HEALTH CARE AND OTHER SERVICES) COVID-19 VACCINATION STATUS INFORMATION AND PREVENTIVE MEASURES-NOVEMBER 18, 2021) –Order requiring BC healthcare workers, including the remaining Petitioners,	Affidavit #1 of Anneke Pingo, Exhibit "M"

	to provide proof of vaccination for Covid-19 by November 16, 2021, or be prevented from working.	
February 16, 2022	Letter from the Chief Medical Health Officer and Deputy Chief Medical Health Officer of Vancouver Coastal Health to UBC President Ono advising against deregistering students who are not vaccinated for Covid-19, based on scientific evidence that the vaccines do not prevent infection or transmission	– Affidavit #2 of Ashley Sexton, Exhibit “E”
February 20, 2022	Letter to UBC President Ono from David Patrick, MD , FRCPC, MHSc Director of Research and Medical Epidemiology Lead for Antimicrobial Resistance, BCCDC, Professor, UBC School of Population and Public Health, Sarah (Sally) Otto , FRSC, University Killam Professor, Department of Zoology, Member of the BC COVID-19 Modelling Group: co-lead Pillar 6 CoVaRR-Net and Daniel Coombs , Professor, Department of Mathematics, Member of the Canadian Chief Scientific adviser’s expert panel on COVID-19 and of the BC COVID-19 Modelling group – advised that “there is no longer a strong scientific reason to differentially treat those who were fully vaccinated months ago and those who are unvaccinated, in terms of the risks that they pose for transmitting COVID to others.”	– Affidavit #2 of Ashley Sexton, Exhibit “F”
March 16, 2022	Petition filed	Amended Appeal Record, page 4

August 23, 2022	Amended Petition filed	Amended Appeal Record, page 32
September 12, 2022	Order of the Provincial Health Officer (RESIDENTIAL CARE COVID-19 VACCINATION STATUS INFORMATION AND PREVENTIVE MEASURES –SEPTEMBER 12, 2022) – applied the Covid -19 vaccination requirement to “providers, construction workers, vendors, suppliers and technical specialists” and included students applying to health programs in post-secondary institutions	Affidavit #2 of Anneke Pingo, Exhibit “A”
September 12, 2022	Order of the Provincial Health Officer (HOSPITAL AND COMMUNITY (HEALTH CARE AND OTHER SERVICES) COVID-19 VACCINATION STATUS INFORMATION AND PREVENTIVE MEASURES – SEPTEMBER 12, 2022 – applied the Covid -19 vaccination requirement to “providers, construction workers, vendors, suppliers and technical specialists”, and included students applying to health programs in post-secondary institutions	Affidavit #2 of Ashley Sexton, Exhibit “G”
September 15, 2022	Response to Petition filed	Amended Appeal Record, page 155
October 24, 2022	Further Amended Petition filed	Amended Appeal Record, page 61
April 6, 2023	Order of the Provincial Health Officer (RESIDENTIAL CARE COVID-19 VACCINATION STATUS INFORMATION AND PREVENTIVE MEASURES – APRIL 6, 2023) – removed providers, contract construction workers, vendors, suppliers and technical specialists from the Covid -19 vaccination requirement.	Affidavit #3 of Dr. Brian Emerson, Exhibit “A”
April 6, 2023	Order of the Provincial Health Officer (HOSPITAL AND COMMUNITY (HEALTH CARE AND OTHER SERVICES) COVID-19 VACCINATION STATUS INFORMATION AND PREVENTIVE MEASURES – APRIL 6, 2023) - removed providers, contract construction	Affidavit #3 of Dr. Brian Emerson, Exhibit “B”

	workers, vendors, suppliers and technical specialists from the Covid -19 vaccination requirement.	
April 24, 2023	2 nd Further Amended Petition filed	Amended Appeal Record, page 90
October 5, 2023	Order of the Provincial Health Officer (RESIDENTIAL CARE COVID-19 VACCINATION STATUS INFORMATION AND PREVENTIVE MEASURES - OCTOBER 5, 2023) – added requirement for prospective hires not previously vaccinated against Covid-19 to take the recommended dose or doses of the new XBB.1.5 Covid-19 vaccine	Affidavit #1 of Haley Miller, Exhibit “A”
October 5, 2023	Order of the Provincial Health Officer HOSPITAL AND COMMUNITY (HEALTH CARE AND OTHER SERVICES) COVID-19 VACCINATION STATUS INFORMATION AND PREVENTIVE MEASURES - OCTOBER 5, 2023) - added requirement for prospective hires not previously vaccinated against Covid-19 to take the recommended dose or doses of the new XBB.1.5 Covid-19 vaccine	Affidavit #1 of Haley Miller, Exhibit “B”
October 5, 2023	Explanations of Changes to Residential Care and Hospital and Community Orders	Affidavit #1 of Haley Miller, Exhibit “C”
November 1, 2023	3 rd Further Amended Petition filed	Amended Appeal Record, page 121
November 3, 2023	Amended Response to Petition filed	Amended Appeal Record, page 181
November 20-24, 28, and December 1, 2023	Hearing dates	
January 15, 2024	Deadline for AG’s written submissions on s.2(a) conscience objections	
January 22, 2024	Deadline for Tatlock Petitioners’ reply submissions on s.2(a) conscience objections	

May 10, 2024	Reasons for Judgment released – finding a lack of justification for not including a reconsideration process for remote and purely administrative workers and remitting to the PHO for reconsideration whether to consider requests for reconsideration of the Covid-19 vaccination requirement from healthcare workers able to perform their roles remotely, or in-person but without contact with patients or the frontline workers who care for them; dismissing the remainder of the Petition.	
August 30, 2024	RECONSIDERATION DECISION – Availability of Section 43 Requests - Dr. Bonnie Henry, Provincial Health Officer – Dr. Henry confirms her decision in the Orders not to consider applications for reconsideration under section 43 of the Public Health Act from healthcare workers able to perform their roles remotely, or in-person without contact with patients, residents, clients or the frontline workers who care for them.	Reconsideration Decision

OPENING STATEMENT

This appeal involves an examination of Public Health Orders that mandated Covid-19 vaccination long after perceived justifications for mandating Covid-19 vaccination had been dissipated by science and experience. The mandate of Covid-19 vaccines for healthcare workers as late as October 5, 2023 was not warranted, since (1) the Respondents' own data showed that unvaccinated people in BC had immune markers from previous infection, and (2) the Respondents' own public health expert admitted that (a) a previous Covid-19 infection can reduce the likelihood of reinfection by 80-90% for 6-9 months, (b) two-dose vaccine protection against SARS-CoV-2 infection declined during Omicron to 10-15% against serious illness, and (c) vaccinated and unvaccinated people have comparable viral loads and duration of viral shedding during Omicron. Dr. Henry's Recitals to her Orders are inconsistent with this evidence. The Appellants ask this Court to step in and reverse the Chamber's Judge's erroneous conclusion that the Orders were reasonable, and find that the Orders were unreasonable, disproportionate and fundamentally flawed, both under the Charter and in an administrative context.

The Chambers Judge was wrong to dismiss the Appellant's Charter claims. He adopted an erroneous approach to the s. 7 liberty interest in the context of a vaccine mandate. This Court should correct the jurisprudence, and hold that to engage s. 7, the Appellants do not need to show that they succumbed to state interference with their fundamental medical decision whether to be injected with the Covid-19 vaccines. Their liberty was violated when Dr. Henry used coercion to interfere with that decision making process. The liberty interest protected is not a 'right to work,' but the right to make personal medical decisions free from state interference. The Orders are overbroad and arbitrary.

The Chambers Judge also made an inconsistent finding about remote and administrative workers. On one hand, he agreed that there was a lack of justification for Dr. Henry's failure to consider requests for reconsideration of the remote and administrative workers due to the fact that they did not have contact with vulnerable patients. On the other hand, he found that while the religious Appellants' section 2(a) rights were limited, the limits were reasonable under section 1 of the Charter. Yet some religious Appellants were remote and administrative workers. This Court ought to hold that the religious freedoms of the remote and administrative religious Appellants were unreasonably infringed.

PART 1 - STATEMENT OF FACTS

A. Background to the Orders

1. In August, September, and October 2021, the BC Public Health Officer, Dr. Bonnie Henry (“Dr. Henry”), issued a series of Orders entitled “COVID-19 VACCINATION STATUS INFORMATION AND PREVENTIVE MEASURES” that required BC healthcare personnel working for, or contracted to, BC Health Authorities, care facilities or other designated facilities across the province, and to show their vaccination status to their employers.
2. On October 8, 2021, the BC Centre for Disease Control, together with the BC Ministry of Health, issued Guidelines for Request for Reconsideration (Exemption) Process for Health Care Workers affected by the Orders.¹ These guidelines (the “Guidelines”) allowed a worker to apply for an exemption from the vaccine requirement for medical reasons if he or she met specific medical criteria. Very few workers qualified (approximately 35 – 40 in the entire Province of BC²), as most could not meet the criteria.
3. Over the next two years Orders entitled the “HOSPITAL AND COMMUNITY (HEALTH CARE AND OTHER SERVICES) COVID-19 VACCINATION STATUS INFORMATION AND PREVENTIVE MEASURES” (the “Hospital and Community Order”) and the RESIDENTIAL CARE COVID-19 VACCINATION STATUS INFORMATION AND PREVENTIVE MEASURES” (the “Residential Care Order”) were issued, modified and expanded. As a result of these Orders, healthcare workers who did not show proof of having received two doses of an approved Covid vaccine would not be permitted to work.³
4. Orders issued between August 2021 and February 2022 allowed employers, operators, and contractors to obtain personal information, including Covid-19 vaccination status, from healthcare practitioners and staff. Employers and contractors were compelled to report that information to the BC Government.⁴

¹ Guidelines for Request for Reconsideration Affidavit #1 of Anneke Pingo, sworn August 25, 2022, Exhibit “O” (“Affidavit #1 of Anneke Pingo”)

² Reasons for Judgment, at para. 57

³ Hospital and Community Order and Residential Care Order

⁴ Amended Appeal Record, at page 9

5. The April 2023 Orders expanded the scope of previous Orders by requiring staff member construction workers to be vaccinated for Covid-19 in order to work at hospitals and other medical facilities. Under previous Orders, construction workers, whether staff members or working under contract, as well as other outside service providers working on projects within the BC healthcare system, did not need to show proof of vaccination to work inside facilities if they followed protocols set out in the Orders. The April 2023 Orders were silent about outside service providers, and specifically exempted construction services working under contract, meaning these groups of workers were not subject to the Covid-19 vaccination requirement and further no longer needed to follow personal protective equipment protocols within the Orders.⁵

6. Each subsequent Order issued by Dr. Henry repealed and replaced its preceding Order, such that the only Orders remaining at the time of the hearing were the Hospital and Community Order and the Residential Care Order, both dated October 5, 2023. These were the Orders challenged at the hearing of this matter.⁶ The Orders resulted in approximately 1,800 BC healthcare workers being terminated from their jobs, as advised by counsel for the Respondents.⁷

7. On February 16, 2022, the Chief Medical Health Officer and Deputy Chief Medical Health Officer for Vancouver Coastal Health sent a letter to UBC President Ono advising against deregistering students who were not vaccinated for Covid-19, based on scientific evidence that the vaccines do not prevent infection or transmission.⁸ On February 20, 2022, another letter was sent to him by David Patrick, MD, FRCPC, MHSc Director of Research and Medical Epidemiology Lead for Antimicrobial Resistance, BCCDC, Professor, UBC School of Population and Public Health, and others, advising him that “there is no longer a strong scientific reason to differentially treat those who were fully vaccinated months ago and those who are unvaccinated, in terms of the risks that they pose for transmitting COVID to others.”⁹

⁵ Reasons for Judgment, at para. 313

⁶ Reasons for Judgment, at para. 2

⁷ Reasons for Judgment, at para. 57

⁸ Affidavit #2 of Ashley Sexton, sworn September 21, 2022, Exhibit “E” (“Affidavit #2 of Ashley Sexton”)

⁹ Affidavit #2 of Ashley Sexton, Exhibit “F”

B. The Appellants

8. On March 16, 2022, 11 BC healthcare workers filed a constitutional challenge to the Orders' Covid-19 vaccination requirement for specified groups of healthcare workers ("the Appellants").¹⁰ All Appellants worked in different roles and had their own reasons for rejecting the Covid-19 vaccines:

- Phyllis Janet Tatlock had held many senior healthcare positions in Alberta and BC for twenty years and had served as Director of Operations for BC Cancer in Prince George since 2021. The Provincial Health Services Authority terminated her because she refused to be vaccinated for Covid-19 for religious reasons.¹¹
- Laura Koop had served her community since 2014 as a Primary Care Nurse Practitioner, focusing on high-risk populations, such as those with mental health and substance abuse problems. She refused to be vaccinated for Covid-19 for reasons of conscience and was terminated.¹²
- Monika Bielecki had worked in Kelowna as an Employee Health and Wellness Advisor since 2015. She had worked remotely since 2016 but was terminated because she refused to be vaccinated for Covid-19 for reasons of conscience.¹³
- Lori Nelson had served as a Provider Engagement Lead, Clinical Informatics for the British Columbia Provincial Health Services Authority ("PHSA"). She was an administrative worker and had a work-from-home agreement with her employer. An employee of PHSA for 25 years, Ms. Nelson was nonetheless terminated because she refused to be vaccinated for Covid-19 for religious and medical reasons. She has severe allergies and has experienced multiple systemic and anaphylactic reactions to injections in the past.¹⁴
- Ingeborg Keyser had served Interior Health as a Communications Advisor in Kelowna since 2017. She was not a healthcare worker and had no contact with patients. She worked entirely from home but was terminated because she refused to be vaccinated for Covid-19 for reasons of conscience. She was pregnant at the time.¹⁵
- Scott Macdonald was a Registered Art Therapist at the Dr. Peter Centre in Vancouver. He was employed in this position for 11 years. He was fired from his position for refusing to take the Covid-19 vaccines for reasons of conscience.¹⁶

¹⁰ Amended Appeal Record, page 4; Reasons for Judgment, para 21

¹¹ Amended Appeal Record, pages 11 – 12; Reasons for Judgment, para 221

¹² Amended Appeal Record, pages 9 – 10; Reasons for Judgment, para 254

¹³ Amended Appeal Record, pages 13 – 14; Reasons for Judgment, paras 221 and 254

¹⁴ Amended Appeal Record, page 15; Reasons for Judgment, para 221

¹⁵ Amended Appeal Record, page 17; Reasons for Judgment, para 221

¹⁶ Amended Appeal Record, page 14; Reasons for Judgment, para 254

- Ana Lucia Mateus was employed by Vancouver Coastal Health (“VCH”). She worked as an Administrative Assistant for the Health Authority Medical Advisory Committee and was not a healthcare worker. She was fired for not taking the Covid-19 vaccines for reasons of conscience.¹⁷
- Darold Sturgeon served as the Executive Director of Medical Affairs for Interior Health in an administrative role, not in a healthcare setting, and worked remotely during the pandemic. Darold had proof that he acquired COVID-19 in August of 2021. He was fired for not taking the Covid-19 vaccines for religious reasons.¹⁸
- Linda June Hamley had been employed by the Kootenay Society of Community Living (“KCLS”) as a residential support worker. KCLS provides care to young men and women with developmental disabilities living in a group home setting. Ms. Hamley is also a certified Classroom and Community Support Worker. She had supported children with disabilities and challenging behaviours in the school system for 13 years. She lost her job for refusing to take the Covid-19 vaccines for religious reasons.¹⁹
- Appellant Melinda Joy Parenteau is a midwife and was a private contractor. She lost her hospital privileges on October 26, 2021, because she failed to prove she was vaccinated for Covid-19. She objected to the Orders for conscience reasons.²⁰
- Appellant Dr. Nordine is a family physician and was also a clinic physician at the Bridge Detox Centre in Kelowna from 2017 until October 2021. Bridge Detox Centre is an addiction recovery and services clinic operated by Interior Health. On November 16, 2021, Interior Health terminated Dr. Nordine’s employment with the Bridge Detox Centre, and revoked his hospital privileges because he refused to be vaccinated for Covid-19.²¹

9. Although the remote-working Appellants lost their jobs for failure to provide proof of vaccination for Covid-19, at least two BC health authorities hired remote-working healthcare workers on contract in the autumn of 2021, and these contract workers did not have to show proof of vaccination for Covid-19.²²

¹⁷ Amended Appeal Record, page 14 –15; Reasons for Judgment, at paras. 221, 254

¹⁸ Amended Appeal Record, pages 15 – 16; Reasons for Judgment, at paras. 221, 249
Affidavit #1 of Darold Sturgeon, sworn April 22, 2022, para 6 (“Affidavit #1 of Darold Sturgeon”)

¹⁹ Amended Appeal Record, pages 17 – 18; Reasons for Judgment, page 251

²⁰ Amended Appeal Record, page 18; Reasons for Judgment, para 254

²¹ Amended Appeal Record, page 19; Reasons for Judgment, para 252

²² Affidavit #1 of Jennifer Koh, sworn May 17, 2022, para 20 and Exhibit “H” (“Affidavit #1 of Jennifer Koh”)

C. Exemptions from vaccine mandate not a viable option for most healthcare workers

10. Exemptions to the vaccine mandate were available for only limited medical reasons as determined by government authorities, not by patients' physicians. Healthcare workers were required to (a) take one dose of an approved Covid-19 vaccine and experience a serious adverse reaction; or, (b) have been diagnosed with myocarditis or pericarditis, in order to be considered for an exemption. Exemptions were not granted for reasons of conscience or religion, or for those with natural immunity.²³ Nor did the Orders exempt healthcare workers who worked remotely or in an administrative capacity with no contact with patients. The Orders prevented healthcare workers from seeking reconsideration for non-medical reasons under the *Public Health Act*, [SBC 2008] c. 28 (the "PHA"), which is a remedy contained in that legislation.²⁴

D. Supreme Court remits the issue of denying reconsideration under s. 43 of the PHA to administrative and remote healthcare workers to Dr. Henry

11. In a 13-day hearing at the Supreme Court of British Columbia that commenced November 20, 2023, the Appellants argued that the October 5, 2023, Orders continued to violate their freedoms of conscience and religion, rights to life, liberty and security of the person, protected under sections 2(a), and 7 of the *Charter*. They also argued that the Orders were unreasonable given that accommodation had been made for construction workers, vendors and technical specialists to work in facilities during the height of the pandemic, yet remote and administrative workers were fired for not showing proof of vaccination. The Appellants further argued that the Orders were irrational, given that some remote healthcare workers were hired on contract and those workers were not subject to the vaccine requirement. Another aspect of irrationality was that Dr. Henry did not mandate the booster shot in the face of overwhelming evidence that Covid-19 vaccine efficacy dropped off quickly after the primary series, and the fact that Dr. Henry vigorously promoted the booster shot to the general public.

12. The Appellants also argued that it was unreasonable for Dr. Henry to disallow requests for reconsideration under s. 43 of the *Public Health Act*. Regarding the new

²³ Reasons for Judgment, para 214

²⁴ Reasons for Judgment, paras 38 and 214

XBB.1.5 vaccine requirement, the Appellants argued that it had not undergone sufficient safety testing (only 20 days), that the XBB.1.5 variant was no longer the dominant variant, and that there was no data to show its efficacy against severe disease. The Appellants also argued that it was unreasonable for Dr. Henry not to require vaccinated healthcare workers (ones who had taken the primary series and even a booster) to take the new XBB.1.5 vaccine, given the evidence that the primary series vaccines were no longer effective against the new variants. In Recital O, Dr. Henry said:

Although it is highly recommended that people who were vaccinated with a primary series of vaccine previously recommended by Health Canada be vaccinated with one of the updated vaccines, seroprevalence data from British Columbia indicates that nearly all people in British Columbia have antibodies to SARS CoV-2 virus from combinations of infection and vaccination. This means that people who have been vaccinated with a previously recommended primary series are most likely to have had their immune systems stimulated by subsequent vaccination or infection and therefore continue to have an immunity to infection. Therefore, I am satisfied that it is not necessary to require that a person who was vaccinated with a primary series previously recommended by Health Canada, and who is already working, or is already a student, or is already a volunteer in the health-care sector, be vaccinated with one of the updated vaccines.²⁵

13. In doing so, Dr. Henry acted contrary to the National Advisory Council on Immunization (“NACI”) who recommended that “[p]eople who provide essential community services” should take the new XBB.1.5 vaccine.²⁶ The Appellants also argued that if “nearly all people in British Columbia have antibodies to SARS CoV-2 from combinations of infection and vaccination”, and if Dr. Henry believes vaccinated healthcare workers do not need the new XBB.1.5 vaccine, then no one should be required to take it at all. Finally, the Appellants argued that firing healthcare workers imposed a further strain on the BC healthcare system, a system that was already overburdened and short-staffed.

14. On May 10, 2024, the Chambers Judge released his decision. He dismissed the Petition, with the exception that, he found there was “a lack of justification in the record or Orders to support as reasonable the decision not to consider requests, under section

²⁵ Affidavit #1 of Haley Miller, sworn November 1, 2023, Exhibits “A” and “B”, Recital O, (“Affidavit #1 of Haley Miller”)

²⁶ *Ibid.* at Exhibits “K” and “L”

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 healthcare workers who care for them.”²⁷ The Chambers Judge remitted this matter back to Dr. Henry for reconsideration.²⁸

15. On June 10, 2024, the Appellants filed their Notice of Appeal to this Honourable Court. Further, on August 30, 2024, Dr. Henry published her decision to not consider requests for reconsideration from remote and administrative workers.²⁹

PART 2 - ERRORS IN JUDGMENT

16. The Chambers Judge erred by:

- a. Failing to find that the Appellants’ *Charter* s.7 liberty interests were infringed in a manner not in accordance with the principles of fundamental justice.
- b. Failing to find that the *Charter* s.2(a) rights of the Religious Appellants who were remote or administrative workers were unreasonably infringed.
- c. Failing to find that the Orders were fundamentally flawed, disproportionate and unreasonable, due to the science in the record before Dr. Henry.

17. These errors resulted in Orders that were incorrect for the reasons described below.

PART 3 - ARGUMENT

A. Standard of Review

18. As per *Beaudoin v British Columbia*:

This Court’s task on an appeal from an application for judicial review is to “step into the shoes” of the chambers judge and determine whether they identified the correct standard of review and applied that standard correctly...it is not necessary for the appellate court to identify a specific error on the part of the judge who conducted the judicial review...although the chambers judge’s reasoning may be instructive, his decision is not entitled to deference...³⁰

²⁷ Reasons for Judgment, at para. 15

²⁸ Reasons for Judgment, at para. 315

²⁹ Reconsideration Decision

³⁰ *Beaudoin v British Columbia (Attorney General)*, 2022 BCCA 427, at para. 139

19. In a review of administrative decisions, *Canada (Minister of Citizenship and Immigration) v Vavilov*³¹ determined that there is a presumption that the standard of review is reasonableness. The Supreme Court of Canada clarified when the presumption of reasonableness review is rebutted concerning constitutional questions: the correctness standard applies to the question of whether a *Charter* right arises, the scope of its protection and the appropriate framework of analysis.³² The Court explained:

The determination of constitutionality calls on the court to exercise its unique role as the interpreter and guardian of the Constitution. Courts must provide the last word on the issue because the delimitation of the scope of constitutional guarantees that Canadians enjoy cannot vary “depending on how the state has chosen to delegate and wield its power”[.]³³

As a result, whether *Charter* rights are infringed is a question of law reviewed for correctness.

20. Reasonableness review does apply to whether a decision proportionately balanced the *Charter* protections engaged with the applicable statutory objectives. This further requires proof that the decisions at issue affected *Charter* protections as little as reasonably possible in light of the applicable statutory objectives.³⁴ The Court in *Law Society of British Columbia v Trinity Western University* held:

...if there was an option or avenue reasonably open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives, the decision would not fall within a range of reasonable outcomes.³⁵

21. Unlike the ordinary burden of proof on the party challenging a decision to show it is unreasonable,³⁶ “[t]he *Charter* enumerates a series of guarantees that can only be

³¹ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (“*Vavilov*”) at para. 23

³² *York Region District School Board v Elementary Teachers’ Federation of Ontario*, 2024 SCC 22 (“*York*”) at para. 62-63

³³ *York, supra*, at para. 64

³⁴ *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (“*LSBC v TWU*”) at para. 81

³⁵ *Ibid.*

³⁶ *Vavilov, supra*, at para. 100

limited if the government can justify those limitations as proportionate.”³⁷ Consequently, a state actor’s decision infringing the *Charter* must show it meaningfully considered those *Charter* rights and reflects the significant impact that decision may have.³⁸

B. The Petitioners’ Section 7 Liberty Rights Were Limited in a Manner Not in Accordance with the Principles of Fundamental Justice

22. Section 7 of the *Charter* provides 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. Those principles guard against “inherently bad laws” that take away life, liberty, and security of the person in ways that run afoul of our basic values against overbreadth, arbitrariness, and gross disproportionality.³⁹ Section 7 *Charter* rights to life, liberty and security of the person encompass the right of medical self-determination.⁴⁰ The Respondents’ Orders compelling the Appellants to take Covid-19 vaccine on pain of losing their ability to practice their profession in BC seriously interfered with and infringed their rights to medical self-determination.

i. A Limit on Liberty Does Not Depend Upon Succumbing to State Pressure

23. The right to liberty under section 7 is “rooted in fundamental notions of human dignity, personal autonomy, privacy and choice”, and protects an individual’s right to make “fundamental personal decisions.”⁴¹ The right to liberty includes the right to refuse medical treatment,⁴² and the right to make “reasonable medical choices” without threat of criminal

³⁷ *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 (“*Loyola*”) at para. 38; *LSBC v TWU* at paras. 80, 162, 175, 188, 195-197, 206, 313-314; *Loyola* at para. 146 (reasons of McLachlan CJ and Moldaver J (Rothstein joining)); *Doré v Barreau du Québec*, 2012 SCC 12 (“*Doré*”) at para 66;

³⁸ *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 (“*CSFTNO*”), at paras. 68-69

³⁹ *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 96 (“*Bedford*”)

⁴⁰ *Carter v Canada (Attorney General)*, 2015 SCC 5 (“*Carter*”); *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 (“*AC v Manitoba*”); *B(R) v Children’s Aid Society of Metropolitan Toronto*, 1995 CarswellOnt 105 (“*Children’s Aid Society*”)

⁴¹ *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, at para 50;

⁴² *AC v Manitoba*, at para. 100-102, 136

prosecution.⁴³ In *Carter*, the Supreme Court found that state interference with one's ability to make decisions concerning her bodily integrity and medical care trenching on liberty.⁴⁴

24. The Appellants in contextualizing "liberty" rely – like La Forest did in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*⁴⁵ – on Chief Justice Dickson's characterization of "freedom" in *R. v Big M Drug Mart*:

Freedom can primarily be characterized by **the absence of coercion or constraint**. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. **Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction**, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices.⁴⁶

25. Justice La Forest in *Children's Aid Society* wrote, "Although the English version of the *Charter* employs two different words, 'freedom' and 'liberty,' both emanate from the same concept. In French, the term 'liberté' is used in s. 2 as well as in s. 7."⁴⁷

26. The way in which Dr. Henry's Orders engage the liberty interest protected by s. 7 that they use the tactic of coercion in order to achieve their objective. As Chief Justice Dickson rightly pointed out, coercion includes "direct commands to act on pain of sanction." In this case, the Appellants were directly commanded to receive novel injected medications, failing which they would be sanctioned through loss of their ability to work. In this way, the state interfered with the Appellants' ability to make decisions concerning their bodily integrity and medical care.

27. Recent case law has largely determined that the liberty interest is not engaged for individuals who are still able to reject the Covid-19 vaccine despite the consequences:

⁴³ *R. v Smith*, 2015 SCC 34, at para. 18

⁴⁴ *Carter*, *supra*, at para. 66

⁴⁵ *Children's Aid Society*, at paras. 79-80 (L'Heureux-Dubé, Gonthier and McLachlin JJ.)

⁴⁶ *R. v Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 SCR 295 ("*Big M*"), per Chief Justice Dickson, at para. 95 [emphasis added]

⁴⁷ *Children's Aid Society*, *supra*, at para. 79 [emphasis added]

- “...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.”⁴⁸
- “Ms. Lewis has freely made, and will continue to be free to make, fundamental personal choices without state interference; the respondents have not trespassed upon, impaired, or eroded her individual autonomy or dignity.”⁴⁹
- “Section 7 of the *Charter* protects an individual’s right to decide: whether or not to be vaccinated. The Policy does not require mandatory vaccination. The Policy does not violate anyone’s life, liberty or security of the person...Employees are not prevented in any way from making a fundamental life choice ...”⁵⁰

The takeaway from these decisions is that liberty is not engaged unless a person succumbs to the pressure and agrees to take the Covid-19 vaccine. The Appellants respectfully submit that these decisions do not reflect the purpose of the liberty interest.

28. In *Big M.*, Dickson CJ. discussed the purposive interpretation of *Charter* rights:

...the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. **The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection.** At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore...be placed in its proper linguistic, philosophic and historical contexts.⁵¹ [emphasis added]

⁴⁸ Reasons for Judgment, at para. 276

⁴⁹ *Lewis v Alberta Health Services*, 2022 ABCA 359, at para. 56

⁵⁰ *Costa, Love, Badowich and Mandekic v Seneca College of Applied Arts and Technology*, 2022 ONSC 5111, at para. 243

⁵¹ *Big M*, *supra*, at paras. 116-117

Therefore, the Appellants submit that the liberty interest ought to be interpreted broadly, remembering that the purpose of the guarantee is to safeguard human dignity, personal autonomy, privacy and choice in decisions going to the individual's fundamental being.⁵²

29. The Appellants argue that they did not need to submit to the pressure and take the Covid-19 vaccines for the liberty interest to be engaged. It was engaged as soon as Dr. Henry used coercion and threats (loss of ability to work) to try to convince the Appellants to agree to be injected with the novel medication. The *Charter* protects against coercive state action and is not dependent upon whether a person submits to state coercion.

30. Deciding whether to agree to have a novel medication with unknown long-term side effects injected into one's body is a highly personal medical decision.⁵³ Once the state interfered with that personal medical decision, and imposed a sanction upon that personal decision-making process, that process was no longer free. The Appellants had the threat of significant sanction hanging over their heads during their decision-making process. That is an evil that section 7 of the *Charter* was meant to protect against.

31. Conversely, and as noted by the Chambers Judge, the Superior Court of Quebec in the *United Steelworkers, Local 2008 v Attorney General of Canada*, did find that section 7 rights to liberty and security of the person were engaged by the orders of the federal Minister of Transport, requiring Covid-19 vaccination in the federally regulated transportation sector.⁵⁴ In that case, Justice Phillips wrote:

The right to consent or not to any treatment falls within the sphere of very personal decisions, just like the attitude that a person can adopt, more generally as a lifestyle choice, with regard to pharmacologically based treatments. However, this choice has been seriously compromised by the direct or indirect effect of ministerial decrees.

...

⁵² *Children's Aid Society, supra*, at para. 80; See also: *R. v Morgentaler*, [1988] 1 S.C.R. 30, at para. 237, per Wilson J, concurring

⁵³ Affidavit #1 of Laura Koop, sworn May 2, 2022, at para. 10; Affidavit #1 of Scott MacDonald, sworn April 19, 2022, at para. 6; Affidavit #1 of Ana Lucea Mateus, sworn May 10, 2022, at para 16; Affidavit #1 of Darold Sturgeon, para 20; Affidavit #3 of Darold Sturgeon, sworn October 27, 2023, at para 2(a)(ii); and Affidavit #1 of Melinda Joy Parenteau, sworn May 19, 2022, at para 5 ("Affidavit #1 of Melinda Joy Parenteau")

⁵⁴ Reasons for Judgment, at para. 272, citing *United Steelworkers, Local 2008 v Attorney General of Canada*, 2022 QCCS 2455 ("*United Steelworkers*"), at paras. 171-176 (unofficial English translation)

Of course, the treatment is not imposed on them and they theoretically retain the choice of accepting it or not. But the consequences of a refusal are such that this choice is not really one.

...their position...is based on a significant constraint on an important life choice.

What is problematic here is the combined effect of the (non-absolute) obligation to be vaccinated and the related consequence for the individual in the event of a refusal, i.e. the loss of one's job. **There is a certain coercion that weighs on the decision to consent or not to medical treatment.** However, it has already been recognized that even where the vaccination obligation remains subject to the individual's consent, there is nevertheless an infringement of the rights provided for in Article 7 if the refusal to be vaccinated entails significant consequences.

...

...it would be wrong to minimize or trivialize the pressure thus caused.⁵⁵

32. The Appellants submit that this Honourable Court ought to follow Justice Phillips' reasoning, and that he correctly applied the meaning and intent of section 7's protections of liberty in the context of a vaccine mandate that imposes a sanction for non-compliance.

ii. Engaging a Liberty Interest as a Condition of Employment Is a Deprivation of that Right Under Section 7

33. The Respondents below took the position that section 7 has not traditionally protected one's right of employment. Respectfully, that argument is a red herring. The section 7 protection here is not on one's employment but the right to make a personal medical decision free from the pressure and pain of government sanction.

34. There is Supreme Court of Canada authority for the proposition that engaging a liberty or security of the person interest as a condition of employment constitutes a deprivation of that right for the purposes of the section 7 analysis. In *Godbout v Longueuil (City)*⁵⁶, the Supreme Court of Canada unanimously struck down a municipal resolution requiring all new permanent employees to reside within the city boundaries. The Court held that the resolution infringed the 'right to respect for one's private life' under section 5 of the Quebec *Charter of Human Rights and Freedoms*, CQLR, c C-12. In a concurring

⁵⁵ *United Steelworkers, supra*, at paras. 172, 174-5, 178, [emphasis added]

⁵⁶ *Godbout v Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 SCR 844, ("Godbout")

judgment, three⁵⁷ of the nine judges concluded that the resolution violated Ms. Godbout's rights under section 7 of the *Charter* to choose where to establish one's home. The three justices found that even though Ms. Godbout could choose not to be employed by the city, or could choose to live in the city, her liberty interests were engaged by the city's requirement that she live in the city if she wanted to remain employed by the city.

35. Writing for the three judges, Justice La Forest found:

In modern times, the ability of individuals to make decisions free from unwelcome external interference is increasingly under pressure. Whether that pressure finds its roots in changing patterns of social organization, in technological advancements, in governmental action, or in some other source, its net effect has largely been to whittle down the scope of personal freedom. While the exigencies of community life clearly preclude the possibility that individuals could ever be guaranteed an untrammelled right to do as they please, **the basic ability to make fundamentally private choices unfettered by undesired restrictions demands protection under law**, such that it can only be overridden where other pressing concerns so dictate.⁵⁸

36. In that case, the municipality argued that the right actually asserted by Ms. Godbout was not a right to choose where to establish her home but rather an economic right in the nature of a "right to employment" and that such a right was not protected by section 7. Justice La Forest found that the municipality's position was "flawed"⁵⁹:

In seeking to impugn the residence restriction imposed upon her, the respondent [Ms. Godbout] is not, as the appellant [municipality] alleges, surreptitiously trying to assert a constitutionally protected "right to employment" with the City of Longueuil. She is, instead, claiming that her ability to take an unfettered decision as to where she wishes to live -- an ability which, she argues, enjoys the status of a constitutionally protected right -- ought not to be denied her simply because she has chosen to earn her living by working for the appellant municipality. This is clear, I think, inasmuch as the respondent does not challenge the very fact of her termination as being contrary to her s. 7 liberty interest; rather, she seeks to impugn the basis upon which that termination was purportedly justified; viz., the residence restriction itself. Put another way, the respondent's [Ms. Godbout] real complaint is not simply that she was dismissed from the appellant's [municipality] employ, but rather that she was dismissed because she exercised (what she claims is) a constitutionally protected right to choose her place of residence as she sees

⁵⁷ La Forest, McLachlin, and L'Heureux-Dube

⁵⁸ *Godbout, supra*, at para. 15, [Emphasis added]

⁵⁹ *Ibid.*, at para. 61

fit. In light of these considerations, I am satisfied that the respondent's Charter claim does not implicate any notion of a constitutional "right to employment" or any other "economic right", and I would reject the appellant's submission to the contrary.⁶⁰

37. The finding that a place of residence is protected by section 7 remains unsettled in law,⁶¹ as it was determined by three justices out of nine in *Godbout*. The other six justices declined to opine on that issue. However, the three justices' determination that – engaging a liberty interest as a condition of employment may constitute a deprivation of that right for the purposes of the section 7 analysis – remains persuasive authority.⁶²

38. The Chambers Judge's conclusion that the Appellants' loss of employment did not engage their section 7 right to liberty "because of the well-established principle that section 7 does not protect the right to work in any specific employment or particular profession"⁶³ is flawed similarly to the City of Longueuil's argument. While he found that, "This is not a constitutionally protected fundamental life choice," the Appellants submit that the Chambers Judge made an error in terms of his understanding of what right the Appellants were seeking to be protected by section 7. The Appellants' right to make a personal health decision free from state interference is a constitutionally protected fundamental life choice. Just because the exercise of that right was threatened with punishment by loss of employment, that does not turn the '*right to make a free personal medical decision*' into a '*right to employment*'.⁶⁴

iii. The Orders Are Overbroad

39. If an impugned law or government measure which limits section 7 rights "goes too far and interferes with some conduct that bears no connection to its objective," it will be

⁶⁰ *Ibid.*

⁶¹ *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, at para. 93

⁶² See: *Lavergne-Poitras v Canada (Attorney General)*, 2021 FC 1232, at paras. 59-61

⁶³ Reasons for Judgment, at para. 277

⁶⁴ See also: Nina Frid, Findings and Recommendations in respect of a grievance submitted by an unknown Master Corporal, Military Grievances External Review Committee, File No.:2022-109, May 30, 2023; Annex I – Constitutionality of the CAF Covid-19 Vaccination Policy, Military Grievances External Review Committee, May 30, 2023, at p. 14 ("Annex I")

overbroad.⁶⁵ In assessing whether an impugned law violates the principles of fundamental justice, the object of the law must be given a precise and narrow definition.⁶⁶ The Appellants understand that the constitutional object of the Orders and the Guidelines is to “protect[ing] vulnerable patients, residents and clients from serious illness and death, and safeguard[ing] the functioning of the province’s healthcare system.”⁶⁷

40. The Orders are overbroad because they apply to workers who worked remotely, i.e. Monika Bielecki, Ana Lucia Mateus, Lori Jane Nelson, Darold Sturgeon and Ingeborg Keyser. Out of those remote workers, Ms. Mateus, Ms. Nelson, Mr. Sturgeon and Ms. Keyser were also administrative workers, not healthcare workers. The Orders also applied to administrative workers who did not work remotely. Phyllis Janet Tatlock was an administrative worker who did not work with patients or in healthcare facilities. Even if the Covid-19 vaccines prevented transmission (which the Appellants deny), remote and administrative workers posed no threat to vulnerable persons or to the healthcare system.

iv. The Orders Are Arbitrary

41. The Appellants argue that the remote and administrative workers posed the same level of risk as the contract workers doing comparable work. Yet the employees lost their jobs for not showing proof of vaccination, and the government actively sought contract workers, and specifically stated they were not required to show proof of vaccination.⁶⁸ Such state conduct is arbitrary. The irony is that the contract workers likely took over for remote workers who were fired.

C. Remote Working and/or Administrative Religious Appellants’ Section 2(a) Rights, and all Appellants’ Section 7 Rights Were Unreasonably Infringed

i. The Charter Section 1 Analysis and the Legal Framework

42. As per *Dore*, the onus is on the Respondents to demonstrate that the limits that the Orders placed upon the Appellants’ *Charter* rights were reasonable through proportionate balancing of those *Charter* rights with their objectives. The *Doré* framework “works the same justificatory muscles” as the *Oakes* test. The Orders can be upheld only

⁶⁵ *Bedford, supra*, at para. 101, See also, *R. v Heywood*, [1994] 3 SCR 761

⁶⁶ *Carter, supra*

⁶⁷ Reasons for Judgment, at para. 16

⁶⁸ Affidavit #1 of Jennifer Koh, Exhibit “H” and Affidavit #2 of Ashley Sexton, Exhibit “C”

if the evidence establishes that they are *minimally impairing* of the Appellants' section 2(a) and 7 rights.⁶⁹

ii. Religious Freedom

43. The Religious Appellants⁷⁰ agree with the Chambers Judge's findings that the Orders limited their section 2(a) *Charter* rights, as these Appellants satisfied the two-branch section 2(a) test from the Supreme Court of Canada decision in *Syndicat Northcrest v Amselem*⁷¹. He wrote, "...the Orders limited the s. 2(a) rights of the religious petitioners, all of whom demonstrated that the Orders presented an objectively significant interference with following their religious beliefs."⁷²

a) The Chambers Judge failed to Analyze Reasonableness of Limits on Section 2(a) Rights on Remote and Administrative Workers

44. The Religious Appellants argue that the Chambers Judge erred, however, when he found that the limit on remote and/or administrative workers' section 2(a) rights was reasonable. Three out of five of the Religious Appellants (Phyllis Janet Tatlock, Darold Sturgeon, and Lori Jane Nelson) were remote or administrative workers.

45. In his determination of whether the limits imposed upon the section 2(a) rights were reasonable, he found that, "...the Orders reasonably balanced the risks posed by unvaccinated healthcare workers and the s. 2(a) rights of those who eschewed the vaccine for religious reasons."⁷³ He relied on the following factors to support his conclusion:

- the Orders were not overbroad in preventing unvaccinated religious petitioners from working in the designated healthcare settings;
- it is essential to maintain a high level of vaccination currently in place in the hospital and community care workforce; and,

⁶⁹ *LSBC v TWU, supra*

⁷⁰ Ms. Tatlock, Mr. Sturgeon, Ms. Nelson, Ms. Hamley and Dr. Nordine

⁷¹ *Syndicat Northcrest v Amselem*, 2004 SCC 47, at para. 65

⁷² Reasons for Judgment, at para. 263

⁷³ *Ibid.*, at para. 310

- healthcare workers are in a special situation given the crucial role they play in the system and their near-constant, close contact with the most vulnerable patients, who have no choice but to be treated by them.⁷⁴

46. Yet these factors do not apply to the special circumstances of remote and administrative workers, who do not have contact with patients. The Chambers Judge failed to separate the Religious Appellants who were remote or administrative workers from those who were not in his analysis of the reasonableness of the Orders' limits on their section 2(a) *Charter* rights.

b) The Chambers Judge Found a Lack of Justification for Refusal to Include a Reconsideration Process for Remote and Administrative Workers

47. Despite his failure to separate the Religious Appellants who were remote and administrative workers from those who were frontline healthcare workers, the Chambers Judge analyzed the risks that remote and administrative healthcare workers posed to vulnerable patients and frontline healthcare workers in his determination of whether it was reasonable to include remote and administrative workers without a s. 43 reconsideration process.⁷⁵ He found that there is a "lack of justification" for not including a reconsideration process for remote and purely administrative workers. He cited these factors:

- Recital SS expresses concerns about workers who have "little or no direct contact with patients, residents, clients or other workers on a regular basis", yet many of the remote and administrative workers' roles involved "no such contact at all";
- there is a lack of connection between vaccination of these types of workers and the central rationale for the Orders, which is to protect vulnerable patients and the healthcare workers who care for them;
- there is an absence of evidence about vaccination status and transmission of the virus within settings regarding remote and administrative workers;
- Ms. Tatlock, Mr. Sturgeon, and Ms. Nelson were able to perform their jobs without contact with vulnerable patients or frontline healthcare workers; and,
- a single example of absenteeism and slippage in the system and worries about surgical scheduling did not justify the total elimination of a reconsideration process for remote and administrative workers.⁷⁶

⁷⁴ Reasons for Judgment, at paras. 311, 313

⁷⁵ Reasons for Judgment, at paras. 210-227

⁷⁶ *Ibid.*, at paras. 217-222, 225

c) Limits on s. 2(a) Freedoms of Remote or Administrative Workers Unreasonable

48. The Chambers Judge's analysis and conclusions on the reconsideration issue for remote and administrative workers are inconsistent with his findings on the reasonableness of the Orders' limits on the religious freedoms of such workers. The reasons that the Chambers Judge cited for why there was a lack of justification for Dr. Henry to deny a reconsideration process for remote and administrative workers ought to have been applied to his analysis of the reasonableness of the limits on the section 2(a) *Charter* rights of those remote and administrative workers (see para. 47 above). The Appellants argue that: They (1) have no contact with vulnerable patients or frontline healthcare workers; (2) vaccinating remote and administrative workers does not protect vulnerable patients as they have no contact with them; and, (3) there is no evidence showing that vaccinating remote or administrative workers reduces transmission of Covid-19. Further, the failure to consider other reasonable alternatives for health-care workers rather than forcing them to vaccinate against their religious objections is not reasonable.⁷⁷

49. The Religious Appellants ask this Court to find that the Orders' limits on their section 2(a) *Charter* rights were disproportionate and unreasonable.

d) Limits on All Appellants' Liberty Interests are Disproportionate and Unreasonable

50. Should a section 1 analysis be necessary to determine whether the infringement of the Appellants' liberty interest was reasonable, the Appellants submit that the objectives of the Orders could be met with measures that do not disproportionately limit the Appellants' section 7 *Charter* rights:

- For Appellants who do attend facilities where vulnerable persons are present (Laura Koop, Scott MacDonald, Lynda June Hamley, Melinda Joy Parenteau and Dr. Joshua Nordine), there is no consideration of whether the use of additional personal protective equipment and rapid testing prior to attending the workplace would meet the objectives of the Orders;
- There is no provision for alternate employment for those Appellants who chose not to be vaccinated for other medical reasons- Lori Jane Nelson and Darold Sturgeon had reactions to vaccines in the past; and,

⁷⁷ *Electrical Safety Authority v Power Workers Union*, 2022 CanLII 343 (ON LA)

- The Orders do not consider natural immunity on infections with, and transmissibility of, Covid-19. Workers with proof of prior infection could be permitted to work.

51. When analyzing these facts through the lens of the *Doré* framework, it is apparent that the Orders are not “minimally impairing” of the Appellants’ section 7 rights. The harm that they inflicted upon the Appellants – i.e. interference with their religious rights and/or right to make personal health decisions free from state interference, with the sanction of removal of their ability to work if they didn’t comply – is disproportionate to the Orders’ public benefit, especially at this stage of the Covid-19 pandemic, which was the case when Dr. Henry issued her Orders on October 5, 2023. For further arguments about the Orders’ unreasonableness in respect of the *Charter* analysis, see section D below.

D. The Science Revealed that the Orders Are Fundamentally Flawed

i. Legal Framework for Determination of Orders’ Reasonableness

52. As noted by the Chambers Judge, *Vavilov* identified two types of “fundamental flaws” indicating the unreasonableness of an administrative decision:

...a failure of rationality internal to the reasoning process; and, a failure of justification given the legal and factual constraints bearing on the decision. A reviewing court does not need to categorize “unreasonableness” as falling into one category or another.⁷⁸

In each case, “the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker.”⁷⁹

53. A failure of rationality arises if the decision “fails to reveal a rational chain of analysis” or “reveals that the decision was based on an irrational chain of analysis.” A reviewing court “must be able to trace the decision maker’s reasoning without encountering any fatal flaws” in the decision maker’s “overarching logic.”⁸⁰ A failure of justification arises where the decision “is not justified in light of the facts” or when “the decision maker has fundamentally misapprehended or failed to account for the evidence before it.”⁸¹

⁷⁸ Reasons for Judgment, at para. 76, citing *Vavilov, supra*, at para. 101, and *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 (“*Mason*”) at para. 64

⁷⁹ *Ibid.*

⁸⁰ *Mason, supra*, at para. 65, citing *Vavilov, supra*, at paras. 102-104

⁸¹ *Ibid.* at para. 73

54. The remainder of this section will provide caselaw and facts to support the Appellants' position that the Orders unreasonably violated all of the Appellants' *Charter* and that the Orders were an unreasonable administrative decision.

ii. Facts Are Essential for Consideration of *Charter* issues

55. Constitutional cases must be decided with careful consideration of the facts. As Justice Cory wrote for a unanimous Supreme Court of Canada in *Mackay v. Manitoba*:

***Charter* decisions should not and must not be made in a factual vacuum.** To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues...⁸²

a) Dr. Henry Said she Reviews the Latest Science Before she Creates Orders

56. Dr. Henry stated that she examined the science before she made the Orders:

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 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."⁸³

b) No Science Supporting the Safety and Efficacy of The X.BB.1.5 Vaccine

57. Because Dr. Henry's Orders infringed *Charter* protections, she has the onus to show that her decision to mandate a brand-new vaccine for unvaccinated healthcare workers who wanted to work was reasonable given the science that was before her. The

⁸² *Mackay v Manitoba*, [1989] 2 SCR 357, at p. 361 c-j [Emphasis added]

⁸³ Affidavit #1 of Haley Miller, Exhibits "A" and "B", Recital WW, Residential Care Preventive Measures Order, *supra*. [Emphasis added]

problem for the Respondents is that the science that was before Dr. Henry on October 5, 2023 included only 20 days of data on the safety or efficacy of this new XBB.1.5 vaccine. Testing for the new XBB.1.5 vaccine was too short to properly assess its safety. An article published by the Government of Canada on September 12, 2023, entitled “Regulatory Decision Summary for Spikevax XBB.1.5” stated that, “[r]egarding safety, the median follow-up time in the interim analysis was 20 days”, and that “[r]esults related to safety and effectiveness from ongoing and planned studies will be submitted as they become available.”⁸⁴ None of the expert opinions in this case addressed the safety or efficacy of the XBB.1.5 vaccine.

58. To uphold as reasonable—and constitutionally justified—not just a recommendation, but the requirement for healthcare workers to take the XBB 1.5 vaccine without evidence showing it is safe and effective would be to 1) ignore the SCC’s direction against determining *Charter* issues in a factual vacuum, and 2) ignore the section 1 obligation on government to demonstrably justify its *Charter*-infringing actions.

c) The Expert Opinions on Natural Immunity, Hybrid Immunity and Effectiveness of Two-Dose Vaccine Regimen

59. Even if it the evidence that was before Dr. Henry about the effectiveness of prior Covid-19 vaccines could be considered in justifying Orders’ requirement of the XBB.1.5 vaccine, the rationale and justification for the Orders fall apart. The Appellants highlight evidence about vaccine effectiveness, safety, and natural immunity from two ‘competing’ expert witnesses, who agreed about some important scientific facts.

60. The Appellants proffered expert evidence from Microbiologist and Infectious Disease Specialist Dr. Thomas Warren. Dr. Warren’s evidence was that:

- “...the effects of vaccination are transient. Several months after vaccination, the **risks related to COVID-19 are similar between those vaccinated and unvaccinated...**”⁸⁵

⁸⁴ Affidavit #3 of Phyllis Janet Tatlock, sworn May 26, 2022, Exhibit “A”, pages 4 and 6 <https://covid-vaccine.canada.ca/info/RDS1694116967823-spikevax-xbb-1-5-en.html>

⁸⁵ Affidavit #2 of Ashley Sexton, Exhibit “A”, at page 10

- “The Omicron variant has resulted in much less severe disease compared to previously dominant variants.”⁸⁶
- **Vaccine effectiveness** against symptomatic Omicron disease after two Pfizer doses was 65.5% four weeks after receiving the second dose but **dropped to 8.8% 25 weeks after the receiving the second dose.**⁸⁷
- “The odds of symptomatic Omicron infection are not significantly different three to six months after receiving the second dose of vaccine compared to unvaccinated persons...there were no differences in infectious virus recovery between boosted, fully vaccinated, and unvaccinated groups infected with Omicron.”⁸⁸
- Natural immunity provides robust protection against re-infection (95% lower risk) and hospitalization (87% lower risk) for at least 20 months compared to non-immune individuals. In that study, vaccination further lowered re-infection and hospitalization risk in naturally immune persons; but, to prevent one reinfection in those with natural immunity, 767 people needed to be vaccinated with two doses.⁸⁹
- Immunity from natural SARS-CoV-2 infection provides protection against hospitalization and death comparable to vaccination.⁹⁰
- 12 weeks after the second dose of the Covid-19 vaccines, transmission rates between vaccinated and unvaccinated are similar.⁹¹
- A February 2023 Lancet study showed that “immunity from COVID-19 infection confers substantial protection against infection” and “is at least equivalent if not greater than that provided by two-dose mRNA vaccines.”⁹²
- The beneficial effects of vaccination on hospitalization and death decreases over time and the effects are greatly reduced by 6 months after last vaccination.⁹³
- September 2022 study showed a “16% higher risk of serious adverse events in mRNA vaccine recipients” which calls for “formal harm-benefit analyses, **particularly those that are stratified according to risk of serious COVID-**

⁸⁶ *Ibid.* at page 6

⁸⁷ *Ibid.* at p. 5

⁸⁸ *Ibid.* at p. 11

⁸⁹ *Ibid.* at p. 7

⁹⁰ *Ibid.* at p. 8

⁹¹ Affidavit #2 of Ashley Sexton, Exhibit “A”, pp. 10-11

⁹² Affidavit #5 of Ashley Sexton, sworn April 24, 2023, Exhibit “H”, at page 2 (“Affidavit #5 of Ashley Sexton”)

⁹³ *Ibid.* at p. 8

19 outcomes.⁹⁴ I.e., **in persons low risk** for serious COVID-19 outcomes (e.g. <50 and healthy), **the risk of vaccination may outweigh the benefits.**⁹⁵

61. Further, Dr. Naomi Dove, the Respondents' expert in public health, gave the following opinions, which largely agreed with Dr. Warren's opinions:

- Emerging studies of Omicron infection suggest comparable viral loads and duration of viral shedding between vaccinated and unvaccinated individuals.⁹⁶
- Study participants with symptomatic, non-severe Covid-19 disease through the Omicron wave did not find a large difference in the median duration of viral shedding among participants by vaccination status.⁹⁷
- Vaccine effectiveness sank to a low in the Omicron wave, particularly against infection...while some observational studies suggest that **having a prior Covid-19 virus can decrease** the likelihood of reinfection **by 80-90% for 6-9 months.**⁹⁸
- **Two dose protection** against SARS-CoV-2 infection declined during Omicron. **It declined to 10-15% against serious illness.**⁹⁹

62. The key difference between the two opinions was on the issue of whether vaccination was necessary when someone was naturally immune. Dr. Dove cited some studies that she said suggested that protection from infection from Covid-19 was strongest in people who were both naturally immune and vaccinated, i.e. "hybrid immunity".¹⁰⁰ (Dr. Warren referenced a study that confirmed that to technically be the case, but pointed out the miniscule additional benefit of Covid-19 vaccination in relation to natural immunity: to prevent one Covid-19 recovered person from reinfection, 767 Covid-19 recovered people had to receive two-doses of the Covid-19 vaccine¹⁰¹.) Dr. Henry expressed this opinion in Recital Z as one of the key factors for why the Orders were necessary as late as October 2023, and one of the reasons why having recovered

⁹⁴ Affidavit #5 of Ashley Sexton, Exhibit "H", at page 2

⁹⁵ *Ibid.*

⁹⁶ Affidavit #1 of Dr. Emerson, sworn September 13, 2022, Exhibit "65", at page 2466 ("Affidavit #1 of Dr. Emerson")

⁹⁷ *Ibid.* at p. 2469

⁹⁸ *Ibid.*

⁹⁹ *Ibid.* at page 2471

¹⁰⁰ Affidavit #1 of Dr. Emerson, Exhibit "65", pp. 2474-2475

¹⁰¹ Affidavit #2 of Ashley Sexton, Exhibit "A", at page 7

from Covid-19 was insufficient to be excused from the vaccine mandate.¹⁰² Recital Z states:

The risk of reinfection and hospitalization is significantly higher in people who remain unvaccinated after contracting SARS-CoV-2 than in those who are vaccinated post-infection. Vaccination, even after infection, remains an important measure in protecting against reinfection by providing a more consistent and reliable immune response than immunity arising from infection alone.¹⁰³

d) Chambers Judge Erred in His Assessment of his Role on Judicial Review

63. The Chambers Judge agreed that Dr. Henry's Orders were reasonable in part due to her citing this scientific opinion about hybrid immunity. He stated, "The Dove Report also stated that 'similar vaccine immune profiles' have been found among healthcare workers, and that the combination of vaccination and prior infection appears to provide the most robust protection against infection, particularly during the Omicron wave."¹⁰⁴ He also determined that his role was not to assess the competing scientific evidence in the record and decide which to prefer, as that determination was for Dr. Henry and her team to make. He wrote, "My role is to assess whether her Orders were reasonable in the context of the record before her. As the Hsiang petitioners put it in their Outline/Overview of Argument, the court must not 'purport to resolve areas of scientific controversy – but rather .. look at the evidence of whether there is any credible evidence in support of what the PHO is saying.'"¹⁰⁵

64. The Appellants submit that the Chambers Judge erred in his assessment of his role on judicial review, the effect of which error is magnified where *Charter* protections are engaged. As stated above, the court's role, as per *Vavilov*, is to ascertain whether the decision-maker failed to account for the evidence before her and whether her decision is irrational based on the evidence before her. While the Chambers Judge went into great detail about the findings in Dr. Dove's report, he said very little about Dr. Warren's findings

¹⁰² October 5, 2023, Hospital and Community Order, and Residential Care Order, Recital Z (See Residential Care Preventive Measures Order and Hospital and Community Preventive Measures Order, *supra*), Affidavit #1 of Haley Miller, Exhibits "A" and "B"

¹⁰³ *Ibid.*

¹⁰⁴ Reasons for Judgment, at para. 128

¹⁰⁵ *Ibid.* at para. 120

on the same issues. He appeared to prefer Dr. Dove's evidence without discussing why it was rational for Dr. Henry to ignore some of Dr. Warren's most important conclusions.

e) Dr. Henry Failed to Account for Important Evidence Before Her

65. While courts on judicial review must not reweigh and reassess the evidence, they must determine whether decision makers' conclusions are in fact based on the evidence before them.¹⁰⁶ The courts' role is enhanced in *Charter* cases which cannot be determined in factual vacuums and where demonstrable justification is required: the "burden of justification [which] varies with the circumstances" is thus necessarily increased in these circumstances.¹⁰⁷

66. The Appellants contend that conclusions about hybrid immunity and the strength of natural immunity's protection central to Dr. Henry's reasoning for the Orders, were not "justified in light of the facts".¹⁰⁸ Dr. Henry's conclusions, adopted from Dr. Dove, purported to be based on facts from scientific studies. Those facts from one of Dr. Dove's key studies, however, do not support, and in some instances, contradict, those conclusions. The fundamental misapprehension, or failure to account for, these facts result in the fundamental flaw of the Orders not being justified in light of the facts.

67. In a review of the studies Dr. Dove cited for her opinion that "studies suggest that the combination of vaccination and infection-induced immunity may provide the strongest protection against future infection," the following points were observed:

Dr. Dove's report dated September 8, 2022: "A national matched, test-negative case control study in Qatar (the "Qatar Study") observed similar effectiveness between prior infection and a 2-dose vaccine series in protecting against SARS-CoV-2 infection during the Delta and Omicron waves, with the combination of vaccination and prior infection yielding the strongest results."¹⁰⁹

The Qatar Study Dr. Dove referenced at footnote 64 of her September 8, 2022 report: "Previous infection with a variant other than omicron was associated with an approximately 50% reduced risk of infection...Two-dose vaccination

¹⁰⁶ See *Vavilov, supra*, at para 126.

¹⁰⁷ See *Mason, supra*, at para, 66

¹⁰⁸ See *Mason, supra*, at para 73; *Vavilov, supra*, at para. 126

¹⁰⁹ Affidavit #1 of Dr. Emerson, Exhibit 65, at page 2475, citing Altarawneh, H. et al., "Effects of Previous Infection and Vaccination on Symptomatic Omicron Infections," *N Engl J Med* 2022 ["Qatar Study"]

and no previous infection had negligible effectiveness against BA.1 and BA.2...The protection conferred by hybrid immunity of previous infection and two-dose vaccination was similar to that of previous infection alone, at approximately 50%, which suggests that this protection originated from the previous infection and not from vaccination. However, the highest effectiveness was seen with hybrid immunity from previous infection and recent booster vaccination (approximately 80%). Any form of previous immunity, whether induced by previous infection or vaccination, is associated with strong and durable protection against Covid-19 related hospitalization and death."¹¹⁰

68. Contrary to Dr. Dove's conclusions about "similar" protective effectiveness between prior infection and the 2-dose vaccine series, the authors actually found that prior infection was 50% effective, and the 2-dose vaccine series' effectiveness was "negligible". This is hardly "similar" protection, and such a conclusion is highly misleading. Further, when Dr. Dove said that the strongest protective effect resulted from vaccination and prior infection, she omitted that the study actually said that the strongest protective effect was from **booster** vaccination (not the two-dose series) and prior infection. The Orders do not require boosters of any healthcare workers, therefore, her conclusions from this study are misleading and irrelevant. Most importantly, Dr. Henry's Recital Z (reproduced above at para. 62) is inconsistent with the Qatar study cited by her own expert. Ultimately, Dr. Henry incorporated Dr. Dove's errant conclusions. This is a fundamental flaw which led her to continue mandating Covid-19 vaccination with the Orders.

iii. Factors That Show the Orders Are Fundamentally Flawed and Unreasonable

69. Dr. Henry's decision to implement the October 5, 2023 Order is unreasonable for the following reasons:

- It failed to account for Dr. Warren's concerns about the risks of Covid-19 vaccines for Appellants who were under 50 years of age and healthy – i.e. they have a 16% higher chance of having a serious adverse event after taking an mRNA vaccine.
- It failed to account for Dr. Henry's own finding that "adults who had a previous moderate or severe SARS-CoV-2 infection were more likely to experience side effects from the first vaccine dose."¹¹¹ And it failed to account for the fact that

¹¹⁰ Qatar Study, *supra*, "Discussion" section

¹¹¹ Affidavit #3 of Dr. Emerson, sworn September 27, 2023, Exhibit "QQ," page 1915 ["Affidavit #3 of Dr. Emerson"]

testing for the new XBB.1.5 vaccine was too short to properly assess its safety or effectiveness. (See para. 57 above)

- It failed to account for healthcare workers who were naturally immune to Covid-19. (Dr. Henry states in Recitals N of the October 5, 2023 Orders that "people who have not been vaccinated have a high probability of having some immune markers from infection."¹¹² Dr. Dove's studies showed that natural immunity provided 80-90% decrease in likelihood of reinfection with Omicron for 6-9 months.¹¹³)
- It ignored the critical finding in Dr. Dove's Qatar Study about the strength of natural immunity: "Any form of previous immunity, whether induced by previous infection or vaccination, is associated with strong and durable protection against Covid-19 related hospitalization and death." This conclusion allows another pathway to reach the Orders' objective of reducing Covid-19 serious illness, hospitalization and death, i.e. natural immunity.
- It ignored Dr. Dove's Qatar study's finding that the protection conferred by two dose vaccination was similar to previous infection alone, at 50%, which suggests that the protection originated from the previous infection and not from vaccination.
- It failed to account for the February 2023 Lancet study which showed that "natural immunity confers substantial protection against infection" and **"is at least equivalent if not greater than that provided by two-dose mRNA vaccines."**

70. Further, Recital T is inconsistent with Dr. Dove's evidence that the viral loads and virus shedding was comparable between the vaccinated and unvaccinated.¹¹⁴ It ignored Dr. Warren's evidence that there is no difference in infectious virus recovery between boosted, fully vaccinated or unvaccinated.¹¹⁵ It also ignored Dr. Warren's evidence that 12 weeks after the second dose of the Covid-19 vaccines, transmission rates between vaccinated and unvaccinated are similar.¹¹⁶ Recital T states:

People who are unvaccinated are a greater risk to other people than vaccinated people. The reasons for this are that unvaccinated people are more prone to carry SARS-CoV-2 compared with vaccinated people, can be infectious for a longer period of time, clear the infection more slowly, and are more likely to have symptoms which spread the virus than a vaccinated person. The result is that an unvaccinated person is more likely to become infected than a vaccinated person and is more likely to transmit SARS-CoV-2 than a vaccinated person.¹¹⁷

¹¹² Hospital and Community Order and Residential Care Order, Recitals N

¹¹³ Affidavit #1 of Dr. Emerson, Exhibit 65, at page 2469

¹¹⁴ *Ibid.*, at page 2466

¹¹⁵ Affidavit #2 of Ashley Sexton, Exhibit "A", at page 11

¹¹⁶ *Ibid.* at pp. 10-11

¹¹⁷ Recital T to the Residential Preventative Measures Order, *supra*

71. Using coercion against the Appellants who contracted Covid-19 (Monika Bielecki,¹¹⁸ Darold Sturgeon,¹¹⁹ Lori Jane Nelson,¹²⁰ Melinda Joy Parenteau,¹²¹ and Dr. Joshua Nordine¹²²) violated their *Charter* rights and left them unemployed for a minimal potential benefit. They already had a 80-90% decreased chance of reinfection with Omicron,¹²³ and according to Dr. Henry's own evidence all of the Appellants would have had some antibodies to SARS CoV-2.¹²⁴ Further, Dr. Henry's decision to mandate the vaccine with her knowledge of the evidence about virus shedding and transmission being comparable between vaccinated and unvaccinated three months after the second dose is also irrational and not justified. All healthcare workers who received two doses of the vaccine did so two years prior to the October 2023 Order.¹²⁵ Those vaccinated healthcare workers were permitted to work, regardless of whether they had been previously infected with Covid-19. There may have been many of them who never had Covid-19 whose level of protection against symptomatic disease was down to 8.8% per Dr. Warren's evidence,¹²⁶ and protection against serious illness was as low as 10-15% as per Dr. Dove's evidence.¹²⁷ They may not even possess the hybrid immunity relied on by Dr. Henry, and the Chambers Judge, to justify the Orders, and they did not have to receive the new XBB.1.5 vaccine, while the Appellants were required to.¹²⁸ This glaring inconsistency is irrational. It renders the Orders unreasonable.

72. Dr. Henry was required to balance the interests of protecting vulnerable patients and healthcare workers, and protecting the *Charter* protected rights of the Appellants. Her decision does not strike a reasonable or proportionate balance. It takes a black and white approach to try to satisfy her objectives, failing to account for natural immunity, ignoring more minimally impairing accommodations reasonably available, and also failing entirely

¹¹⁸ Affidavit #1 of Monika Bielecki, sworn May 31, 2022, para 12, Exhibit "H"

¹¹⁹ Affidavit #1 of Darold Sturgeon, at para. 16, Exhibit "F"

¹²⁰ Affidavit #1 of Lori Jane Nelson, sworn May 10, 2022, at para. 15, Exhibit "J"

¹²¹ Affidavit #1 of Melinda Joy Parenteau, at para. 10, Exhibit "D"

¹²² Affidavit #1 of Dr. Joshua Nordine, at para. 20, Exhibits "H" and "I"

¹²³ Affidavit #1 of Dr. Emerson, Exhibit 65, at p. 2469

¹²⁴ Hospital and Community Order and Residential Care Order, Recitals N

¹²⁵ See Reasons for Judgment at para. 57

¹²⁶ Affidavit #2 of Ashley Sexton, Exhibit "A", at page 5

¹²⁷ Affidavit #1 of Dr. Emerson, Exhibit 65, at p. 2471

¹²⁸ Recital O to the Residential Preventative Measures Order, *supra*

to account for the risks of the Covid-19 vaccines to healthy healthcare workers. Her Orders are wholly unfounded for the Appellants who were remote or administrative workers who cannot infect any vulnerable patients or healthcare workers.

73. The Appellants submit that this Honourable Court ought to find that the Orders are unreasonable and fundamentally flawed – they are disproportionate to their objective, reflect internal irrationality in the decision-making process, and show a failure to account for contrary facts (from Dr. Warren and her own expert Dr. Dove) which support a more balanced approach to the protection of vulnerable patients and the Appellants' *Charter* rights. The Orders therefore unreasonably violate the Appellants ss. 2(a) and 7 *Charter* rights and are unreasonable exercises of decision-making authority.

PART 4 - NATURE OF ORDER SOUGHT

74. The Appellants seek an Order:

- a. Declaring that the decision to mandate the Covid-19 vaccine for healthcare workers contained in Provincial Health Orders issued by Dr. Bonnie Henry on October 5, 2023, unreasonably limits sections 2(a) and 7 of the *Charter*, and is therefore of no force or effect pursuant to section 52(1) of the *Constitution Act, 1982*.
- b. Declaring that the decision to mandate the Covid-19 vaccine for healthcare workers contained in Provincial Health Orders issued by Dr. Bonnie Henry on October 5, 2023, is fundamentally flawed, and therefore, unreasonable.
- c. That no costs be awarded to any party to this appeal.

75. All of which is respectfully submitted.

Dated at the City of Calgary, Province of Alberta, this 16th day of September of 2024.

Allison Pejovic and Marty Moore
Counsel for the Appellants

APPENDICES: LIST OF AUTHORITIES

Authorities	Page # in factum	Para # in factum
<i>AC v Manitoba (Director of Child and Family Services)</i> , 2009 SCC 30	19	22, 23
<i>Alberta (Aboriginal Affairs and Northern Development) v Cunningham</i> , 2011 SCC 37	25	37
<i>B(R) v Children's Aid Society of Metropolitan Toronto</i> , 1995 CarswellOnt 105	19, 20, 22	22, 24, 25, 28
<i>Beaudoin v British Columbia (Attorney General)</i> , 2022 BCCA 427	17	18
<i>Blencoe v British Columbia (Human Rights Commission)</i> , 2000 SCC 44	19	23
<i>Canada (Attorney General) v. Bedford</i> , 2013 SCC 72, [2013] 3 S.C.R. 1101	19, 25, 26	22, 39
<i>Canada (Minister of Citizenship and Immigration v Vavilov)</i> , 2019 SCC 65	18, 30, 35, 36	19, 21, 52, 53, 64, 65, 66
<i>Carter v Canada (Attorney General)</i> , 2015 SCC 5	19, 20, 21, 26	22, 23, 27, 39
<i>Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)</i> , 2023 SCC 31	19	21
<i>Costa, Love, Badowich and Mandekic v Seneca College of Applied Arts and Technology</i> , 2022 ONSC 5111	21	27
<i>Doré v Barreau du Québec</i> , 2012 SCC 12	19, 26, 30	21, 42, 51
<i>Electrical Safety Authority v. Power Workers Union</i> , 2022 CanLII 343 (ON LA)	29	48
<i>Godbout v Longueuil (City)</i> , 1997 CanLII 335 (SCC), [1997] 3 SCR 844	23, 24, 25	34, 35, 36, 37

<i>Lavergne-Poitras v Canada (Attorney General)</i> , 2021 FC 1232	25	37
<i>Law Society of British Columbia v Trinity Western University</i> , 2018 SCC 32	18, 19, 27	20, 21, 42
<i>Lewis v Alberta Health Services</i> , 2022 ABCA 359	21	27
<i>Loyola High School v Quebec (Attorney General)</i> , 2015 SCC 12	19	21
<i>Mackay v. Manitoba</i> , [1989] 2 SCR 357	31	55
<i>Mason v. Canada (Citizenship and Immigration)</i> , 2023 SCC 21	30, 36	52, 53, 65, 66
<i>R. v Big M Drug Mart Ltd.</i> , 1985 CanLII 69 (SCC), [1985] 1 SCR 295	20	24
<i>R. v Heywood</i> , [1994] 3 SCR 761	26	39
<i>R. v Morgentaler</i> , [1988] 1 S.C.R. 30	22	28
<i>R. v Smith</i> , 2015 SCC 34	20	23
<i>Syndicat Northcrest v Amselem</i> , 2004 SCC 47	27	43
<i>United Steelworkers, Local 2008 v Attorney General of Canada</i> , 2022 QCCS 2455	22, 23	31
<i>York Region District School Board v Elementary Teachers' Federation of Ontario</i> , 2024 SCC 22	18	19
SECONDARY SOURCES		
Annex I – Constitutionality of the CAF Covid-19 Vaccination Policy, Military Grievances External Review Committee, May 30, 2023	25	38
Altarawneh, H. et al., “Effects of Previous Infection and Vaccination on Symptomatic Omicron Infections,” N Engl J Med 2022	36	67
Findings and Recommendations in respect of a grievance submitted by an unknown Master Corporal, Military Grievances External Review Committee, File No.:2022-109, May 30, 2023	25	38
Reconsideration Decision – Availability of Section 43 Requests	17	15

APPENDICES: ENACTMENTS***Canadian Charter of Rights and Freedoms*****Rights and freedoms in Canada**

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

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

- a) freedom of conscience and religion;
- b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- c) freedom of peaceful assembly; and
- d) freedom of association.

Life, liberty and security of person

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

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

Primacy of Constitution of Canada

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

Public Health Act, S.B.C. 2008, c. 28

Part 4 – Inspections and Orders

Division 5- Making and Reviewing Orders

Reconsideration of orders

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

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

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

(i) meet the objective of the order, and

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

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

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

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

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

(i) is not relevant, or

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

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

(c) confirm, rescind or vary the order.

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

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

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

(7) For the purposes of this section,

- (a) if an order is made that affects a class of persons, a request for reconsideration may be made by one person on behalf of the class, and
- (b) if multiple orders are made that affect a class of persons, or address related matters or issues, a health officer may reconsider the orders separately or together.

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

ORDER OF THE PROVINCIAL HEALTH OFFICER

(Pursuant to Sections 30, 31, 32, 39 (6), 54, 56, 57, 67 (2) and 69 *Public Health Act*, S.B.C. 2008)

HOSPITAL AND COMMUNITY (HEALTH CARE AND OTHER SERVICES) COVID-19 VACCINATION STATUS INFORMATION AND PREVENTIVE MEASURES – OCTOBER 5, 2023

Recitals:

N. As the variants of the virus have evolved in the past year and vaccines have been updated to cover the variants now circulating the best protection for unvaccinated people is derived from receipt of one of the updated vaccines tailored to the XBB.1.5 variant of the Omicron strain. Due to the high effectiveness of vaccination, and that seroprevalence data indicates that people who have not been vaccinated have a high probability of having some immune markers from infection, Health Canada has authorized that vaccination with the mRNA based updated vaccines, rather than the vaccines previously recommended, is adequate to provide protection. In addition, the National Advisory Committee on Immunization has advised to no longer provide the bivalent or original strain vaccines once the updated vaccines are available. Therefore, I am satisfied that receiving the recommended dose or doses of one of the updated vaccines will provide an unvaccinated person seeking to work, be a student or volunteer in the health-care sector with immunity from infection.

O. Although it is highly recommended that people who were vaccinated with a primary series of vaccine previously recommended by Health Canada be vaccinated with one of the updated vaccines, seroprevalence data from British Columbia indicates that nearly all people in British Columbia have antibodies to SARS CoV-2 virus from combinations of infection and vaccination. This means that people who have been vaccinated with a previously recommended primary series are most likely to have had their immune systems stimulated by subsequent vaccination or infection and therefore continue to have an immunity to infection. Therefore, I am satisfied that it is not necessary to require that a person who was vaccinated with a primary series previously recommended by Health Canada, and who is already working, or is already a student, or is already a volunteer in the health-care sector, be vaccinated with one of the updated vaccines.

T. People who are unvaccinated are a greater risk to other people than vaccinated people. The reasons for this are that unvaccinated people are more prone to carry SARS-CoV-2 compared with vaccinated people, can be infectious for a longer period of time, clear the infection more slowly, and are more likely to have symptoms which spread the virus than a vaccinated person. The result is that an unvaccinated person is

more likely to become infected than a vaccinated person and is more likely to transmit SARS-CoV-2 than a vaccinated person.

Z. The risk of reinfection and hospitalization is significantly higher in people who remain unvaccinated after contracting SARS-CoV-2 than in those who are vaccinated post-infection. Vaccination, even after infection, remains an important measure in protecting against reinfection by providing a more consistent and reliable immune response than immunity arising from infection alone.

SS. To avoid the risk of undermining the ability of the hospital and community care sectors to function safely, and to properly care for patients, residents and clients, it is necessary to keep the number of unvaccinated people in the health-care workforce as low as possible, including among the members of the workforce who may have little or no direct contact with patients, residents, clients or other workers on a regular basis.

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.

I. VACCINATION REQUIREMENTS AND OTHER PREVENTIVE MEASURES

1. A staff member must not work unless the staff member
 - (a) is vaccinated and provides proof of vaccination to the staff member's employer, or
 - (b) has an exemption, provides proof of the exemption to the employer, and complies with the conditions of the exemption when working.

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:

N. As the variants of the virus have evolved in the past year and vaccines have been updated to cover the variants now circulating the best protection for unvaccinated people is derived from receipt of one of the updated vaccines tailored to the XBB.1.5 variant of the Omicron strain. Due to the high effectiveness of vaccination, and that seroprevalence data indicates that people who have not been vaccinated have a high probability of having some immune markers from infection, Health Canada has authorized that vaccination with the mRNA based updated vaccines, rather than the vaccines previously recommended, is adequate to provide protection. In addition, the National Advisory Committee on Immunization has advised to no longer provide the bivalent or original strain vaccines once the updated vaccines are available. Therefore, I am satisfied that receiving the recommended dose or doses of one of the updated vaccines will provide an unvaccinated person seeking to work, be a student or volunteer in the health-care sector with immunity from infection.

O. Although it is highly recommended that people who were vaccinated with a primary series of vaccine previously recommended by Health Canada be vaccinated with one of the updated vaccines, seroprevalence data from British Columbia indicates that nearly all people in British Columbia have antibodies to SARS CoV-2 virus from combinations of infection and vaccination. This means that people who have been vaccinated with a previously recommended primary series are most likely to have had their immune systems stimulated by subsequent vaccination or infection and therefore continue to have an immunity to infection. Therefore, I am satisfied that it is not necessary to require that a person who was vaccinated with a primary series previously recommended by Health Canada, and who is already working, or is already a student, or is already a volunteer in the health-care sector, be vaccinated with one of the updated vaccines.

T. People who are unvaccinated are a greater risk to other people than vaccinated people. The reasons for this are that unvaccinated people are more prone to carry SARS-CoV-2 compared with vaccinated people, can be infectious for a longer period of time, clear the infection more slowly, and are more likely to have symptoms which spread the virus than a vaccinated person. The result is that an unvaccinated person is more likely to become infected than a vaccinated person and is more likely to transmit SARS-CoV-2 than a vaccinated person.

Z. The risk of reinfection and hospitalization is significantly higher in people who remain unvaccinated after contracting SARS-CoV-2 than in those who are vaccinated post-infection. Vaccination, even after infection, remains an important measure in protecting against reinfection by providing a more consistent and reliable immune response than immunity arising from infection alone.

SS. To avoid the risk of undermining the ability of the hospital and community care sectors to function safely, and to properly care for patients, residents and clients, it is necessary to keep the number of unvaccinated people in the health-care workforce as low as possible, including among the members of the workforce who may have little or no direct contact with patients, residents, clients or other workers on a regular basis.

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.

B. VACCINATION REQUIREMENTS AND OTHER PREVENTIVE MEASURES

1. A staff member must not work unless the staff member
 - (a) is vaccinated and provides proof of vaccination to the staff member's employer,
 - (b) has an exemption, provides proof of the exemption to the employer, and complies with the conditions of the exemption when working.