



Form 66 (Rule 16-1 (2))

No. 22 0833  
Victoria Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**BETWEEN:**

LEIGH ANNE ELIASON, WILLIAM ROBERTSON PRENDIVILLE, and DAWN SLYKHUIS  
PETITIONERS

**AND:**

THE ATTORNEY GENERAL OF BRITISH COLUMBIA and THE PROVINCIAL HEALTH  
OFFICER OF BRITISH COLUMBIA

**RESPONDENTS**

**PETITION TO THE COURT**

**ON NOTICE TO:**

Her Majesty the Queen in right of the Province of British Columbia as represented by the Attorney General and the Provincial Health Officer.

**This proceeding is brought for the relief set out in Part 1 below, by**

[X] The persons named as petitioners in the style of proceedings above

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
  - (i) 2 copies of the filed response to petition, and
  - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

**Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.**

**Time for response to petition**

A response to petition must be filed and served on the petitioners,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	<p>The address of the registry is:</p> <p>The Law Courts Victoria Registry 850 Burdett Avenue Victoria, BC V8W 9J2</p>
(2)	<p>The ADDRESS FOR SERVICE of the petitioners is:</p> <p>Jensen Shawa Solomon Duguid Hawkes LLP Robert Hawkes, QC, William M. Katz, and Sarah Miller 800, 304 8 Ave SW, Calgary, Alberta, T2P 1C2 (403) 571-1544, (403) 571-1541 or (403) 571-1051 E-mail address: hawkesr@jssbarristers.ca and katzw@jssbarristers.ca</p> <p>Hutchison Oss-Cech Marlatt Lorenzo G. Oss-Cech 1-505 Fisgard Street, Victoria, British Columbia V8W 1R3 (250) 360-2500 Email address: lgo@hom-law.com</p>
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### Claim of the Petitioner(s)

#### Part 1: ORDER(S) SOUGHT

1. A declaration that the Public Health Orders announced by the Provincial Health Officer on August 21, 2021, and published on September 10, 2021 (the Food and Liquor Serving Premises Order and Gatherings and Events Order) or any subsequent or substantially similar orders which may arise (collectively, the “**Vaccine Card Orders**”) made under the *Public Health Act*, SBC 2008, c 28 (the “**Public Health Act**”) are unconstitutional and of no force or effect, as being contrary to s. 52(1) of the *Constitution Act*, 1982.
2. Alternatively, a declaration that Vaccine Card Orders are unconstitutional and of no force or effect, as being contrary to s. 24(1) of the *Constitution Act*, 1982.
3. Alternatively, an order setting aside the Vaccine Card Orders as an unreasonable, unjustified, or invalid use of legislative authority pursuant to s. 7 of the *Judicial Review Procedure Act*, RSBC 1996, c. 241.
4. An order that the petitioners be entitled to costs, as assessed by this Court.

#### Part 2: FACTUAL BASIS

##### Introduction

1. This petition is a judicial review and challenge to the constitutional validity of the Public Health Orders defined above as the Vaccine Card Orders under the *Public Health Act*. The Vaccine Card Orders limit the ability of the petitioners to exercise their rights in a free and democratic society despite having medical restrictions that prevent their ability to receive vaccines contemplated in the Vaccine Card Orders.
2. One petitioner has received a medical exemption under s. 43 of the *Public Health Act*. However, the exemption is temporary, not accepted by organizations subject to the Vaccine Card Orders, and places further restrictions on the petitioner despite his physical disabilities.

3. Another petitioner is unable to receive a medical exemption, despite being medically advised to not get the contemplated vaccines, because the form required for the medical exemption is arbitrary, restrictive, and does not consider the significant constitutional interests at stake.
4. The final petitioner has suffered significant side-effects from her first dose of the vaccination but has not to date been able to fulfill the medical exemptions required by the respondents.

### **The Parties**

5. The petitioner, William Robertson Prendiville ("**William**"), is an individual resident of the City of Burnaby in the Province of British Columbia.
6. The petitioner, Leigh Anne Eliason ("**Leigh**"), is an individual resident of the Town of Maple Ridge in the Province of British Columbia.
7. The petitioner, Dawn Slykhuis ("**Dawn**"), is an individual resident of Port Moody in the Province of British Columbia.
8. The Respondent, the Attorney General of British Columbia, is her Majesty's Attorney General for British Columbia, and has the management and direction of the Ministry of Attorney General, pursuant to the *Attorney General Act*, RSBC 1996, c 22. The Attorney General is the proper respondent to a judicial review of an order made pursuant to the *Public Health Act*.
9. The Respondent, the Provincial Health Officer of British Columbia, is the public official who made the Vaccine Card Orders under the *Public Health Act*.

### **William Robertson Prendiville**

10. William is 28 years old.
11. William has a healthy and active lifestyle and has no known underlying health conditions. William has received each of his standard vaccinations, as required and prescribed under the Canadian Immunization Guide ("**CIG**").
12. As part of this lifestyle, William worked extensively as a hiking guide in remote parts of the world including high altitude mountain ranges leading numerous groups to altitudes up to and exceeding 17,500 ft above sea level.
13. In or around the end of April of 2021, William became eligible to receive his COVID-19 vaccination (the "**COVID-19 Vaccine**"). On or around this date, William took steps to book his vaccination in accordance with the prescribed guidelines in British Columbia at that time.

14. On Tuesday, May 18, 2021, William received his first COVID-19 Vaccine shot and was given the vaccine produced by Pfizer Inc., colloquially known as the Pfizer vaccine.
15. In the days that followed his vaccination, William began to experience pain in his chest that radiated throughout his upper body.
16. On or about Friday, May 28, 2021, the pain became more pronounced and progressively increased in severity to the extent that William could no longer breathe without assistance or pain and was only able to utilize 20% of his lung capacity.
17. William was rushed to the Royal Columbian Hospital (the “**Emergency Hospital**”). While at the Emergency Hospital, William was advised by the attending physician that he was experiencing an acute and critical condition and that he was “fighting for his life.”
18. Thereafter, William was referred to a cardiologist who determined that William’s body was experiencing an adverse reaction to the COVID-19 Vaccine and that he had developed a condition known as perimyocarditis likely resulting from his body’s response to the COVID-19 Vaccine.
19. Given William’s adverse reaction to the COVID-19 Vaccine, William’s cardiologist strongly discouraged him from any further doses of the COVID-19 Vaccine.
20. On November 3, 2021, William provided a request for a medical exemption under the Vaccine Card Orders to the Provincial Health Officer.
21. On December 15, 2021, the Provincial Health Officer authorized the medical exemption on a temporary basis. This temporary exemption is subject to the following mandatory conditions and a failure to comply with these conditions may result in the revocation of the exemption:
  - (a) Must wear a mask when attending a gathering or event as prescribed in the *Gatherings and Events Order*, or “premises” as defined in the *Food and Liquor Serving Premises Order* except when consuming food or beverage or for personal hygiene;
  - (b) May make one physical / paper copy of the enclosed variance certificate to present as official proof of his medical exemption from the proof of vaccination requirements in the *Food and Liquor Service Premises Order* and the *Gatherings and Events Order*; and,
  - (c) Must not otherwise copy, scan, or reproduce the enclosed variance certificate in any way, nor is he permitted to share, transmit, disseminate, broadcast or publish it in any way, including without limitation by posting it on a website or social media, whether publicly or at all.

22. In addition, the medical exemption may be canceled or amended by the Provincial Health Officer if they have reason to believe that due to changing circumstances involving the transmission of SARS-CoV-2 in British Columbia, it is in the public interest to amend the Orders such that persons with medical deferral who are not vaccinated should be required to undertake additional preventative measures or not be exempted from proof of vaccination requirements.
23. On December 15, 2021, the medical exemption states that the Provincial Health Officer is working with officials at the Ministry of Health to ensure that the electronic BC Vaccine Card and accompanying QR code reflect any medical exemptions which have been granted.
24. Despite QR code Vaccine Cards having been readily available to the public with vaccinations since September 8, 2021, William has not received a QR code to date and his exemption certificate has been regularly refused at premises subject to the Vaccine Card Orders.

#### **Leigh Eliason**

25. Leigh, is 41 years old, married, with two children. Leigh has a complicated and difficult medical history including, among other things, a neuro-vestibular disorder, atrial fibrillation, and Wenckebach Syndrome.
26. Leigh has received each of her standard vaccinations, as required and prescribed under the CIG.
27. In or around the end of April of 2021, Leigh became eligible to receive her first dose of the COVID-19 Vaccine. On or around that date, she took steps to meet with her family physicians to determine whether, given her medical history, the COVID-19 Vaccine was safe for her.
28. In May of 2021, she attended the medical office of her physician who advised her that, given her medical conditions, the risk of receiving the COVID-19 Vaccine, and the potential for side-effects were significant. Leigh was expressly advised by her physician not to receive the COVID-19 Vaccine, no matter the brand or manufacturer.
29. On September 13, 2021, Leigh's family physician provided her with a note advising that she should avoid any doses of the COVID-19 Vaccine due to her underlying medical conditions.
30. Leigh's physician has reviewed the COVID-19 Vaccine Medical Deferral form and has advised that none of the categories listed apply to Leigh and the Provincial Health Officer has not provided any options for individuals with complex medical history.

31. On October 8, 2021, the respondents issued guidelines for seeking an exemption for healthcare workers but did not produce any guidelines for non-health care workers.
32. Leigh's physician provided her a copy of the medical deferral form but advised that the form did not have space to accommodate the basis for his recommendations. As such, the physician could not complete and submit any request for an exemption.
33. As months passed and no further guidelines were produced, Leigh's physician prepared and submitted a revised deferral form outlining the medical reasons that Leigh is not recommended to take doses of any recommended COVID-19 Vaccine.
34. To date Leigh has not been approved for an exemption and has not been able attend any businesses or agencies subject to the Vaccine Card Orders.

### **Dawn Slykhuis**

35. Dawn is 39 years old and maintains a healthy and active lifestyle with no underlying health conditions.
36. On October 29, 2020, Dawn tested positive for COVID-19 due to members of her household testing positive. Dawn had mild symptoms and quarantined appropriately.
37. On April 28, 2021, Dawn received the Pfizer vaccine.
38. On May 18, 2021, Dawn started to experience sharp, shooting pain in the left her head. The pain continued intermittently for one week and Dawn sought medical attention with no result.
39. On August 21, 2021, Dawn underwent a MRI arranged by her family doctor.
40. In September and October 2021, Dawn noticed additional concerns including lost feeling in her hands, cognitive impairments, and disruption of her menstrual cycle.
41. On October 8, 2021, Dawn experienced numbness and tingling through the left side of her body. She spoke to a physician by telephone who sent her to a hospital. While waiting at the hospital the numbness and tingling dissipated so Dawn left without seeing a physician.
42. On November 8, 2021, Dawn saw a neurologist who described the above symptoms as a common side effect to the COVID-19 Vaccines and advised that a further dose of the vaccination would "not be without consequence".
43. Dawn has continued to experience the numbness and tingling through the left side of her body as well as muscle weakness.

44. On November 18, 2021, Dawn was advised by her physician that, contrary to the neurologist's verbal statement to Dawn that she should not get another COVID-19 Vaccine dose, the neurologist's consult report recommended a further dose.
45. On December 29, 2021, Dawn had another appointment with the neurologist who said that she could not sign the exemption form as the Board of Neurologists recommends full vaccination. Despite having several patients with similar symptoms to Dawn, the neurologist advised Dawn that she would not sign the exemption form.
46. Dawn has another referral to a different neurologist but the wait-time to see this neurologist is 8 to 12 months. To date Dawn's family physician has refused to sign any form permitting an exemption.
47. Dawn has worked for the first 18 months of the pandemic as a health care provider as a youth crisis clinician. She is presently on leave without pay and her employment is now in jeopardy because of her inability to get exemption from the proof of vaccination programs.
48. To date Dawn has been denied an exemption from the program despite receiving medical advice to not receive a second dose of any COVID-19 Vaccine.

### **Summary**

49. As a result of the advice received from their respective physicians, William, Leigh, and Dawn have physical disabilities, which ought to give them a medical exemption from receiving further vaccine injections.
50. As a result of the advice received from their respective physicians, William, Leigh, and Dawn have each sought a medical exemption from receiving further vaccine injections.
51. Each respective physician expressly raised concerns that neither the government nor any of the provincial medical associations have provided appropriate guidelines or information as to how to properly write an exemption letter in these circumstances, what information should be included in such a letter, or how this process will evolve moving forward.

### **The BC Vaccination Requirement**

52. On March 17, 2020, the Public Health Officer provided notice under section 52(2) of the *Public Health Act* that the transmission of the infectious agent SARS-CoV-2, which has caused cases, clusters and outbreaks of a serious communicable disease known as "COVID-19" among the population of the Province of British Columbia, constituted a regional event, as defined in section 51 of the *Public Health Act*.
53. The Vaccine Card Order is the most recent of several orders issued under the *Public Health Act* by Dr. Bonnie Henry, the Provincial Health Officer as defined under the *Public Health Act*.



*Health Act*, (the “**Provincial Health Officer**”) in response to COVID-19 in British Columbia.

54. On Monday, August 23, 2021, British Columbia’s Premier, John Horgan (“**Premier Horgan**”), the Provincial Health Officer, and Adrian Dix, British Columbia’s Minister of Health (“**MoH**”) announced that, starting September 13, 2021, proof of Vaccination will be required in British Columbia for all people attending certain business, social, and recreational settings, and events (the “**Vaccine Card Announcement**”).

55. The Vaccine Card Announcement states, among other things, that:

- (a) As of September 13, people in British Columbia will be required to be partially vaccinated with at least one dose of a COVID-19 Vaccine to access certain businesses and events;
- (b) As of October 24, people in British Columbia will be required to be fully immunized, which requires that at least seven days have passed after receiving the second dose of an approved COVID-19 Vaccine, to access the same list of businesses and events;
- (c) In the interim, in areas where community transmission has increased significantly or where there are outbreaks, the requirements to be fully vaccinated to access these events and activities may be required at the direction of the local medical health officer; and
- (d) Proof of vaccination will also be required for people visiting from outside of British Columbia.

(collectively, the “**Vaccination Requirements**”)

56. In addition, the Vaccine Card Announcement provides a list of settings where proof of vaccination will be required which includes, without limitation:

- (a) indoor ticketed sporting events;
- (b) indoor concerts;
- (c) indoor theatre/dance/symphony events;
- (d) restaurants (indoor and patio dining);
- (e) night clubs;
- (f) casinos;
- (g) movie theatres;

- (h) fitness centres/gyms (excluding youth recreational sport);
  - (i) businesses offering indoor high-intensity group exercise activities;
  - (j) organized indoor events (e.g., weddings, parties, conferences, meetings, workshops); and
  - (k) discretionary organized indoor group recreational classes and activities
- (collectively, the “**Vaccination Restrictions**”).

57. Importantly, while the Vaccine Card Orders have been announced, press released and the subject of a press conference by Premier Horgan and the MoH, aspects of the Vaccine Card Orders enumerated in the Vaccine Card Announcement have not been published. This is particularly concerning in consideration of the fact that businesses and the public were required to comply with the unpublished portions of the Vaccine Card Announcement starting on September 13, 2021.
58. In the Vaccine Card Announcement Premier Horgan stated, among other things that:
- “There is no reason why those who are anxious to participate in the social and economic life of our community can’t take that next step and get that safe effective vaccine.”
59. In the Vaccine Card Announcement, the MoH claimed, among other things that:
- “[G]etting vaccinated is the best choice to protect yourself, the people you love and to ensure you can continue to participate in these public and private events and settings. Our B.C. vaccine card is an essential interim action until we transition to a federally compliant proof of vaccine.”
60. The Vaccine Card Announcement does not provide any notice to the public of medical exemptions or that individuals may apply for medical exemptions.
61. On September 10, 2021, the MoH published the Vaccine Card Orders, which encompass only portions of the Vaccination Restrictions enumerated in the Vaccine Card Announcement suggesting that additional and future Vaccine Card Orders will be forthcoming.
62. On October 8, 2021, the Provincial Health Officer and the MoH published Guidelines for Request for Reconsideration (Exemption) Process for Health Care Workers affected by the Provincial Health Officer Orders.
63. On October 28, 2021, the Provincial Health Officer issued two forms to permit individuals to request an exemption under s. 43 of the *Public Health Act*:

- (a) The Medical Reporting form can only be completed by a physician requesting a temporary or indefinite deferral of COVID-19 vaccination recommendation for a patient with supporting rationale or consult notes; and,
  - (b) The COVID-19 Medical Deferral form can only be completed by a physician requesting a temporary deferral for a patient from receiving the COVID-19 vaccination on the basis of the following conditions:
    - (i) Anaphylaxis to components of both mRNA and adenovirus vector vaccine (i.e., polyethylene glycol and polysorbate 80);
    - (ii) Receipt of anti SARS-CoV-2 monoclonal antibodies or convalescent plasma for treatment or prevention of COVID-19 (except tocilizumab or sarilumab);
    - (iii) Diagnosis of multisystem inflammatory syndrome;
    - (iv) Physician-diagnosed myocarditis or pericarditis following the first dose with no other cause identified;
    - (v) Serious adverse event following first dose of vaccine reported to the medical health officer (MHO) and awaiting recommendation for further vaccination by a MHO;
    - (vi) Serious adverse event following first dose of vaccine not yet reported to the MHO.
64. The Vaccine Card Orders are being frequently modified and updated by the Provincial Health Officer but in effect are substantially the same form and have the same impact upon the petitioners.
65. The most recent version of the Vaccine Card Orders are dated February 16, 2022. The most recent version of the Vaccine Card Orders describe a similar process for applying for a medical exemption, the particulars of which are:
- (a) Food and Liquor Serving Premises – February 16, 2022, Order:
    - (i) Term C:
 

“Under the authority vested in me [the Provincial Health Officer] by section 69 of the *Public Health Act*, I delegate my authority under section 42 of the *Public Health Act* to the medical health officer for the geographic region of the province in which a person resides to receive, consider, and make a decision with respect to a request for reconsideration made by the person on the basis of a medical deferral to a vaccination, and to add conditions to or change conditions on an

exemption, or to suspend or cancel an exemption.”

- (ii) Term D 1. “This Order comes into force at 12:01 A.M. on February 17, 2022.”
- (iii) Term D 2. “This Order expires at 11:59 P.M. on June 30, 2022.”
- (iv) Term F:

“After weighing the interests of patrons and staff in food and liquor serving premises, against the interests of persons who are not vaccinated for reasons other than a medical deferral to vaccination, and taking into account the importance of protecting the health of patrons and staff, the stress under which the public health and health care systems are currently operating, and the impact this is having on the provision of health care to the population, the burden which responding to more clusters and outbreaks of COVID-19 would put on the public health system, the burden which responding to more patients with serious illness would place upon an already overburdened health care system, and the risk inherent in accommodating persons who are not vaccinated, and for the reasons set out in my Variance of November 12, 2021, posted on my website, I have decided pursuant to section 54 (1) (h) of the *Public Health Act*, and in accordance with the emergency powers set out in Part 5 of the Act, to confirm the application of the Variance to this Order, and, in accordance with the Variance, will not be accepting requests for a reconsideration of this Order, except from an individual on the basis of a medical deferral to a vaccination.

A request for an exemption from providing proof of vaccination must be made on the basis that the health of the person would be seriously jeopardized if the person were to be vaccinated, and must follow the guidelines posted on the Provincial Health Officer’s website (<https://www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/current-health-topics/covid-19-novel-coronavirus>).

A request under section 43 may be submitted to the Provincial Health Officer at [PHOExemptions@gov.bc.ca](mailto:PHOExemptions@gov.bc.ca) with the subject line “Request for Reconsideration about Proof of Vaccination”.

Pursuant to section 54 (1) (h) of the *Public Health Act*, and in accordance with the emergency powers set out in Part 5 of the Act, I will not be accepting requests for a review of this Order.”

(b) Gatherings and Events – February 16, 2022, Order

(i) Term D, which is the same as paragraph 65 (a) (i) above;

(ii) Term G:

1. After weighing the interests of participants and staff at gatherings and events against the interests of persons who are not vaccinated for reasons other than a medical deferral to vaccination, and taking into account the importance of protecting the health of participants and staff, the stress under which the public health and health care systems are currently operating, and the impact this is having on the provision of health care to the population, the burden which responding to more clusters and outbreaks of COVID-19 would put on the public health system, the burden which responding to more patients with serious illness would place upon an already overburdened health care system, the increased risk to the population arising from the presence of the Omicron variant in the Province, and the risk inherent in accommodating persons who are not vaccinated, and for the reasons set out in my Variance of November 12, 2021 posted on my website, I have decided, pursuant to section 54 (1) (h) of the *Public Health Act*, and in accordance with the emergency powers set out in Part 5 of the Act, to confirm the application of the Variance to this Order, except as varied below with respect to worship services, and, in accordance with the Variance, will not be accepting requests for a reconsideration of this Order, except from an individual on the basis of a medical deferral to a vaccination.

2. For the purposes of this Order, I am varying the Variance to the extent that I will not be accepting requests for reconsideration with respect to the provisions of Part C (Worship Services) of this Order on any basis, including on the basis of a medical deferral to a vaccination. The reason for this is the heightened risk of transmission of SARS-CoV-2 in worship spaces which are densely packed with participants, particularly during a period of increased religious observance on the part of a faith community. Instead, I have made provision for faith communities to hold worship services with fewer participants in order to permit faith communities to accommodate community members who are not vaccinated by providing them with a less risky space in which to engage in communal religious observance.

3. In addition, I am also varying the Variance to provide that I will not be accepting requests for reconsideration with respect to the provisions of Part B, sections 8 and 9, of this Order on any basis, including on the basis of a medical deferral to a vaccination. The reason for this is that these

sections apply to a volunteer position rather than to a position essential to providing a program for children and youth, and, in my opinion, the inconvenience of losing an unvaccinated volunteer is outweighed by the risk to children or youth created by the involvement of a unvaccinated volunteer.

4. A request for an exemption from being vaccinated or providing proof of vaccination on the basis of a medical deferral to a vaccination must be made on the basis that the health of the person would be seriously jeopardized if the person were to be vaccinated, and must follow the guidelines posted on my website.

<https://www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/current-health-opics/covid-19-novel-coronavirus>).

5. A request under section 43 may be submitted to me at [PHOExemptions@gov.bc.ca](mailto:PHOExemptions@gov.bc.ca) with the subject line "Request for Reconsideration about Proof of Vaccination".

6. Pursuant to section 54 (1) (h) of the Public Health Act, and in accordance with the emergency powers set out in Part 5 of the Act, I will not be accepting requests for a review of this Order.

66. As a result of the Vaccine Card Orders, the petitioners are subject to the Vaccine Restrictions despite having physical disabilities that prevent them from complying with the COVID-19 vaccination recommendation.

#### **Vancouver Coastal Health Medical Forum**

67. On September 20, 2021 the Vancouver Coastal Health held virtual meeting entitled "COVID-19 Virtual Medical Staff Forum: Vaccine Updates & Build Back Better" (the "**Medical Forum**"). The Medical Forum was recorded, archived, and made available to the public.
68. During the Medical Forum, Dr. Patty Daly, Chief Medical Health Officer of Vancouver Coastal Health implied that the Vaccine Card Orders are not in response to risks of transmission in restricted settings. From this Medical Forum, it is apparent that the petitioners cause little to no threat to the public health situation and there is no need to prohibit the petitioners from participating in daily life in British Columbia.

#### **Part 3: LEGAL BASIS**

69. The petitioners assert that any enforcement of the Vaccine Card Orders is improper and unconstitutional as the MoH and Public Health Officer do not or cannot believe, on reasonable grounds that the restrictions set out in Vaccine Card Announcement are not

overly restrictive or necessary to eliminate the risk to health presented by COVID-19 in British Columbia.

### Orders under Review

70. The rule of law animates judicial reviews of administrative action. The rule of law ensures that all administrative decision-makers act within their grant of authority (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 28).
71. Members of the executive branch of government are subject to limits on their discretion and ability to govern by the legislation enacted by the legislative branch of government. There is no absolute and untrammelled discretion available to members of the executive branch (*Roncarelli v Duplessis*, [1959] SCR 121). Executive decision makers must act in accordance with the legislation available (*Smith & Rhuland Ltd v R.*, [1953] 2 SCR 95).
72. The limit on executive discretion is a part of the rule of law that animates the constitutional structure of the Canadian constitutional system. The rule of law requires that legislation be applied to all individuals (including state officials), that legislation must exist for government action, and that state officials' actions be legally founded (*British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, at para 57-59).
73. Any legislation or government action must conform not only to the constitution but also to the requirements that flow by necessary implication from the express terms of the constitution (*Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, at para 37).
74. In making the Vaccine Card Announcement, the Respondents and the state actors making that announcement acted in breach of the constitutional principles arising from the rule of law by purporting to set out Vaccine Card Restrictions without legal basis and without any legislative foundation.
75. The Vaccine Card Announcement occurred on August 23, 2021, setting an enforcement date of September 13, 2021. The Vaccine Card Announcement sets the program's parameters and its scope. In particular, the state officials represented that the program would have no exceptions and no legal basis was established.
76. The purpose of announcing the program was to ensure that businesses and agencies subject to the Vaccine Card Announcement would know the details of the proof of vaccination program that these businesses and agencies were required to enforce. This matter is not one of a political question or decision on a policy, but it is instead whether the Vaccine Card Announcement is unconstitutional. This announcement is a valid object for the Court to review in addition to the subsequent Vaccine Card Orders (*Operation Dismantle v The Queen*, [1985] 1 SCR 441, at para. 63).

77. Only three days before the program became enforceable according to the Vaccine Card Announcement were the Vaccine Card Orders published with limited details on exemptions including medical exemptions.
78. The failure to explain that exemptions were possible to the larger public has resulted in no method for the petitioners to be accommodated by businesses or organizations subject to the Vaccine Card Orders. The executive branch sought to govern by announcement as opposed to law.
79. As items of governance and state official conduct, the petitioners seek to review the entire program from the Vaccine Card Announcement to the Vaccine Card Orders (in both their past and present iterations) for Constitutional compliance.

### **Standard of Review**

80. The petitioners submit that the Vaccine Card Announcement and the Vaccine Card Orders are orders of general application and should be reviewed under s. 1 of the *Charter of Rights and Freedoms* and the test set out in *R v Oakes*, [1986] 1 SCR 103.
81. The scope of the Vaccine Card Orders and their general application suggest that the proper framework for review is the *Oakes* test as they are akin to legislative instruments of general application rather than administrative decisions that apply to only affected particular individuals (*Gateway Bible Baptist Church et al v Manitoba et al*, 2021 MBQB 219, at para 37).
82. The decision on the creation and implementation of the proof of vaccination program is similarly of general application that applies to all British Columbians and businesses subject to the Vaccine Card Orders. A business failing to comply will receive punishment and an individual without acceptable proof of vaccination will be legally refused access to businesses and agencies that they would have been permitted but for the Vaccine Card Orders.
83. In essence, the petitioners submit that the Vaccine Card Orders fail to address their physical disabilities in the proof of vaccination program in such a manner as to render the program unconstitutional and of no force and effect, particulars of which are set out later in this petition.
84. With respect to the decision of whether the petitioners satisfy any exemption requirements, to the extent that those requirements are constitutionally valid, represents a decision that is subject to the standard of reasonableness set under *Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65, and *Doré v Barreau du Québec*, 2012 SCC 12. That is a decision on an individual matter and warrants a review on the standard of reasonableness.



## Record

85. The “record of proceeding” includes a document produced in evidence before the decision-maker and the decision of the decision-maker and any reasons given by it (s. 1 of the *Judicial Review Procedure Act*). The record can also include:
- (a) Evidence with general background information to help the court understand the issues on judicial review;
  - (b) Evidence that brings the court’s attention to the procedural defects that cannot be found in the evidentiary record of the decision maker; or,
  - (c) Evidence that identifies or reconstructs the record that was before the administrative decision-maker.

*(Dane Developments Ltd v British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCSC 1663, at para 46).

86. In determining whether an affidavit is admissible on judicial review, the key question is whether the admission of the evidence is consistent with the limited supervisory jurisdiction of the court. Evidence that was before the decision-maker is admissible. Evidence that casts light on the way the decision-maker made its decision will also be admissible within tight limits. Evidence setting out procedures followed by the decision-maker or providing evidence showing that the decision-maker was not impartial will also be admissible. (See *Air Canada v British Columbia (Workers’ Compensation Appeal Tribunal)*, 2018 BCCA 387, at para 32-44).
87. Each petitioner has provided evidence of valid medical justification for abstaining from a COVID-19 Vaccine. This evidence should be considered both in evaluating the constitutional validity of the orders generally, the constitutional validity of the medical exemption program, and in evaluating the reasonableness of any decision to grant an exemption or not.
88. The petitioners have also included evidence pertaining to the Vaccine Card Announcement and other prominent health officials to prove that the purpose of the proof of vaccination program was not public health or safety but to coerce individuals to become vaccinated. In doing so, the petitioners are providing evidence of background information that pertains to the justification of the program under s. 1 of the *Charter* and the purpose of the program for evaluating the alleged breaches of protected rights and freedoms.

## Impact of the Vaccine Card Orders

89. The petitioners have, to date, followed each of the recommended physical distancing, hand washing, and mask wearing procedures outlined by the Provincial Health Officer and MoH.
90. All the petitioners have attempted to be responsible in reducing the spread of COVID-19.
91. There is no evidence to suggest that the Attorney General of British Columbia or the Provincial Health Officer have considered individuals like the petitioners in making the Vaccine Card Announcement or in crafting the Vaccine Card Orders.
92. The Vaccine Card Orders are a substantial change in restrictions imposed on the petitioners, residents of British Columbia and citizens of Canada. The Vaccine Card Orders, as described in the Vaccine Card Announcement, require the petitioners to choose between their own physical health and well being and their civil liberties. Either choice has negative consequences on them and their families.
93. The Vaccine Card Orders actively deprive the petitioners of their *Charter* protected rights and freedoms. Any enforcement of the Vaccine Card Orders unjustly impairs the petitioners' and other members of the public's rights and freedoms to gather and engage in public life, to join together for common goals, to pursue a livelihood in the Province of British Columbia, and to generally participate in the social and economic life of British Columbia and their communities.
94. Enforcement of the Vaccine Card Orders or any subsequent orders will unjustly preclude the petitioners from engaging in employment and participating in the social and economic life of British Columbia with their families and their communities.

## Constitutional Infringement

95. The Vaccine Card Orders unjustifiably infringe upon fundamental freedoms and rights protected by the *Charter* and to that extent should be of no force and effect. Specifically, the Vaccine Card Orders:
  - (a) Unjustifiably and unreasonably impair the fundamental freedom and right to gather and engage in public life, contrary to section 2(c) of the *Charter* for the freedom of assembly;
  - (b) Unjustifiably and unreasonably impair the mobility rights of each Canadian citizen or permanent resident of Canada to pursue a livelihood in the Province of British Columbia contrary to section 6(2)(b) of the *Charter*;
  - (c) Unjustifiably and unreasonably infringe on the legal right of life, liberty, and security of the person contrary to section 7 of the *Charter* and is contrary to the principles of fundamental justice; and

- (d) Unjustifiably and unreasonably discriminate on the basis of physical disabilities and infringes section 15(1) of the *Charter* guaranteeing that each individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, including to be free of discrimination by physical disability.

### **Section 2(c): Freedom of Assembly**

96. The right of peaceful assembly is by definition a group activity incapable of individual performance (*Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, at para 64).
97. The prohibition of the petitioners from entry into the businesses and agencies subject to the Vaccine Card Orders and finding those businesses and agencies that do not obey the Vaccine Card Orders to be guilty of an offence directly impairs the petitioners' constitutional right to gather peacefully in locations of their choosing. The object of the protection is geared towards protecting the physical gathering of people together (*Roach v Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FCR 406 (CA)).
98. The petitioners without valid or operative medical exemptions from the Vaccine Card Orders have been refused entry into businesses and agencies subject to these orders. The petitioners have been denied the ability to freely gather with other individuals by government action in breach of s. 2(c) of the *Charter*.

### **Section 6(2)(b): Right to Pursue a Livelihood**

99. Individuals have the right to be able to participate in the economy in the pursuit of their livelihoods without being subject to the legislation that discriminates primarily on the attributes related to mobility. The right to pursue the livelihood of choice to the extent and subject to the same conditions as residents of that same province (*Black v Law Society of Alberta*, [1989] 1 SCR 591).
100. This section establishes the right of citizens and permanent residents to earn a living in any province subject to the laws and practices of general application in that province which do not discriminate primarily on the basis of provincial residency (*Re Mia and Medical Services Commission of British Columbia* (1985), 17 DLR (4<sup>th</sup>) 385 (BCSC)).
101. The petitioners are members of the public in British Columbia and as such they pursue their livelihood in businesses and agencies that are either subject to the Vaccine Card Orders or are associated with these orders.

### **Section 7: Life, Liberty, and Security of Person**

102. The purpose of s. 7 of the *Charter* is to require that laws or state actions that interfere with life, liberty and security of the person conform to the principles of fundamental

justice, which are the basic principles that underlie our notions of justice and fair process (*Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350, at para 19).

103. The analysis requires determining the following:
- (a) Whether there is an infringement of life, liberty, or security of the person?
  - (b) Whether the deprivation is in accordance with the principles of fundamental justice?
- (*R v Malmo-Levine*, [2003] 3 SCR 571, at para 83).
104. An infringement by government action or law need not be the sole or only cause but it must be real as opposed to a speculative link (*Canada (Attorney General) v Bedford*, 2013 SCC 72, at para 75).
105. The right to liberty protects a sphere of personal autonomy involving inherently private choices that go to the core of what it means to enjoy individual dignity and independence and where state compulsions or prohibitions affect such choices then this provision of the *Charter* is engaged.
106. The inability of an individual to determine their own medical treatment constitutes a deprivation of liberty and security of the person, which must be constitutional be in accordance with the principles of fundamental justice (*A.C. v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, at para 100-102; *R v Smith*, [2015] 2 SCR 602, at para 18).
107. The petitioners are significantly restricted in their ability to attend any business or agency subject to the Vaccine Card Orders and their ability to engage in society at all in British Columbia is significant reduced. The ability to determine the environment in which to live one's private life and thereby make choices in respect of other highly individual matters (such as family life, education, or care of loved ones) is inextricably bound upon with the notion of personal autonomy protected by s. 7 of the *Charter* (*Godbout v Longueil (City)*, [1997] 3 SCR 844, at para 68).
108. The businesses and agencies covered by the Vaccine Restrictions comprise of a significant portion of modern social interaction and the prevention of participation in or attendance at these businesses and agencies by the respondents is a significant deprivation of liberty justifying constitutional protection. The petitioners suffer restrictions in their liberty due to their inability to receive the Covid-19 Vaccines approved under the Vaccine Card Orders.
109. The principles of fundamental justice include principles against arbitrariness, overbreadth, and gross disproportionality. Overbreadth deals with laws that are rational

in part but overreach and capture some conduct that bears no relation to the legislative objective (*Canada (Attorney General) v Bedford*, 2013 SCC 72, at para 112-113).

110. The legislative objective of the Vaccine Card Orders was to persuade all British Columbians to receive the recommended doses of acceptable COVID-19 Vaccines and to limit the ability of individuals who have not from accessing businesses and agencies subject to the Vaccination Restrictions. The purpose was coercive.
111. The overbreadth of the Vaccine Card Orders is that individuals such as the petitioners are unable to safely receive an acceptable COVID-19 Vaccine and yet are still subject to the deprivation of their liberty. An arbitrary, overbroad, or grossly disproportionate impact on one person suffices to establish a breach (*Canada (Attorney General) v Bedford*, 2013 SCC 72, at para 123).
112. The legislative objective of the Vaccine Card orders is overbroad and impermissibly restrains the liberty of the petitioners and individuals like them.
113. Vagueness also offends the principles of fundamental justice where the law, considered in its full interpretive context, is so lacking in precision that it does not provide sufficient guidance for legal debate as to the scope of prohibited conduct or of an area of risk. In particular, the doctrine of vagueness is directed at ensuring fair notice to citizens and limiting the enforcement discretion of officials (*R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, at 626-627).
114. The ability for individuals to apply for medical exemption from the Vaccine Card Orders is impermissibly vague as they provide no adequate notice as to what constitutes a valid exemption for both those applying for an exemption from the PHO as well as businesses and agencies subject to the Vaccine Card Orders.
115. Within the Vaccine Card Announcement, Premier Horgan, the Provincial Health Officer, and MoH announced that the Vaccine Card Orders would be enforceable against all members of the public in British Columbia without exception.
116. The Vaccine Card Orders published on the afternoon of Friday September 10, 2021 (and enforceable as of Monday September 13, 2021), contain a provision allowing for reconsideration of the Vaccine Card Orders pursuant to section 43 of the *Public Health Act* (the “**Reconsideration Provisions**”), which state:

Pursuant to s. 43 of the *Public Health Act*, you may request a medical health officer to reconsider this Order if you:

- (a) Have additional relevant information that was not reasonably available to the me or another health office when the order was issued or varied,

(b) Have a proposal that was not presented to me or another 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, or

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

A request for reconsideration of this Order on the basis of a medical contraindication made by a person to whom the Order applies must include a signed and dated statement from a medical practitioner, based upon a current assessment, that the health of the person would be seriously jeopardized if the person were to receive a first or second dose of vaccine, and a signed and dated copy of each portion of the person's health record relevant to this statement.

A request under section 43 may be submitted to the Provincial Health Officer at [ProvHlthOffice@gov.bc.ca](mailto:ProvHlthOffice@gov.bc.ca) with the subject line "Request for Reconsideration about Proof of Vaccination".

117. The Reconsideration Provisions, on their face, are vague, ambiguous, and lack the necessary clarity to be sufficiently complied with in any meaningful or material manner and certainly not within the prescribed timelines enumerated in the Vaccine Card Orders.
118. Procedurally, there is no reference within the Vaccine Card Orders to the appropriate infrastructure to provide guidelines or information as to how to properly write or submit a "request for reconsideration", what information should be included within such a request, or how comprehensive the requirement for "each portion of the person's health record relevant to [a request]" would be.
119. Currently, as will be evidenced by Leigh's and Dawn's experience in attempting to obtain an exemption, even with a signed and dated statement from a medical practitioner outlining that the health of the person "would be seriously jeopardized if the person were to receive a first or second dose of the vaccine", there is no effective procedural process for reconsideration.
120. Notably, there is no reference or guideline within the Reconsideration Provisions as to who may qualify for reconsideration, or under what circumstances an individual may qualify for reconsideration, leaving the petitioners without any clarity as to whether any request for reconsideration will even be entertained or reviewed.
121. Most notably, there is no reference to any prescribed timelines as to when a request for reconsideration would be reviewed, determined, or ultimately responded to, leaving the petitioners without any clarity as to how or when they may be able to continue to participate in the social and economic life of British Columbia with their families and communities. In the interim, the petitioners are subject to the adverse effects caused by

the Vaccine Card Orders and Vaccine Card Announcements while they attempt to obtain a reconsideration.

122. Lastly, when an individual is provided with an exemption such as Will has received, the Vaccine Card Orders fail to provide that individual with an adequate substitute QR code accepted by businesses and agencies subject to the Vaccine Card Orders. Instead, Will is provided with a letter that is temporary, only permitted one copy, confidential, and not in a form acceptable the most businesses and agencies.

### **Section 15: Equality**

123. Section 15(1) of the *Charter* reflects a commitment to promote equality and prevent discrimination of disadvantaged groups. To prove a prima facie violation of s. 15(1) the petitioners must demonstrate that the impugned law or state action:
- (a) On its face or in its impact, creates a distinction based on enumerated or analogous grounds; and,
  - (b) Imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.
124. As outlined in *Law v. Canada*, [1999] 1 SCR 497, the Court synthesized its approach into a framework, which requires that this Court determine, if the Vaccine Card Orders, on [their] face or in [their] impact, create a distinction based on an enumerated or analogous ground.
125. In essence, the Vaccine Card Orders strip the petitioners of their fundamental freedoms and rights protected by the *Charter* and then require that the petitioners proceed through a vague, ambiguous, arbitrary, onerous, and indeterminate process to retrieve them.
126. As articulated by the Supreme Court in *R v Kapp*, [2008] 2 SCR 483 “[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration” ...and discrimination perpetuates or promotes “the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.”
127. The Vaccine Card Orders, on their face and certainly in their impact, unjustifiably and unreasonably separate the petitioners from participating in the social and economic life of British Columbia and are discriminatory, among other reasons, on the basis of the physical disabilities and the limitations each petitioner suffers from.
128. There are several reasonable alternatives, which are just as, if not more, effective than the Vaccine Card Orders in minimizing the spread of COVID-19, which would not violate the petitioners’ *Charter* rights, the particulars of which are as follows:

- (a) A proof of vaccination program that clearly set out reasonable exemptions for individuals not medically capable of being vaccinated and provided a QR code for those individuals subject to a justified medical exemption; and,
  - (b) Such further and other particulars as counsel for the petitioners may advise this Court.
129. The Vaccine Card Orders are not rationally connected to its legislative purpose, do not minimally impair fundamental freedoms and rights protected by the *Charter* and are not a proportionate response to the public health situation in British Columbia. Therefore, the Vaccine Card Orders are not reasonable or justifiable and cannot be saved by section 1 of the *Charter*.
130. Moreover, there is currently no data proving that measures akin to the Vaccine Card Orders have any impact on minimizing the spread of COVID-19. Any actual impact on vaccination rates, which the vaccine passports or the Vaccine Card Orders have, has not been studied by the Public Health Agency of Canada to reasonably justify the impairment of fundamental freedoms and rights protected by the *Charter*.

### **Section 1: Limit on Charter Rights**

131. Section 1 allows the state to justify a limit on a right as demonstrably justified in a free and democratic society.
132. First, to establish a limit on the rights, the objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom, namely an objective related to concerns which are pressing and substantial in a free and democratic society.
133. It is acknowledged that the COVID-19 pandemic and orders made to protect the people of British Columbia is an objective of sufficient importance that is both pressing and substantial. It is also accepted that vaccination is one of the most important tools in addressing this pressing and substantial concern. An order that limits the liberty of those individuals who are either unable to become vaccinated or who choose not to become vaccinated must be carefully and thoughtfully made, which is addressed under the second part of the s. 1 test.
134. Second, if a sufficiently significant objective is recognized then the state must show that the means chosen are reasonable and demonstrably justified through the proportionality test, namely that: constitutional rights and freedoms are the foundation of the remedial analysis because the breadth of the remedy should reflect the breadth of the breach. The Court is permitted to tailor remedies to suit both the larger constitutional breach as well as provide individual remedies to those whose interests are directly impacted in the litigation (*Ontario (Attorney General) v G*, 2020 SCC 38).



135. The petitioners seek a declaration that the Vaccine Card Orders are unconstitutional, void, and of no effect immediately.
136. Alternatively, if such a declaration is delayed for a period so the government may revise the Vaccine Card Orders to bring them into constitutional compliance, then there should be a declaration under s. 24(1) that the petitioners are exempt from any further amendment of these Vaccine Card Orders and an appropriate QR code should be issued to the petitioners showing this medical exemption.
137. In further alternative, the petitioners seek orders under the *Judicial Review Procedure Act* declaring that the petitioners are exempt the Vaccine Card Orders and any further amendment of those orders and an appropriate QR code should be issued to the petitioners showing this medical exemption.

**Part 4: MATERIAL TO BE RELIED ON**

1. The Affidavit of William Robertson Prendiville to be filed and sworn March 4, 2022;
2. The Affidavit of Leigh ANNE Eliason sworn March 2, 2022;
3. The Affidavit of Dawn Slykhuis to be filed and sworn; and,
4. Such further and other materials as counsel may advise and this Honourable Court may permit.

The Petitioners estimate that the hearing of the Petition will take 2 days.

Date: 04/03/2022

  
\_\_\_\_\_  
Signature of  Petitioner  
 Lawyer for Petitioners

Lorenzo G. Oss-Cech

To be completed by the Court only:

Order made

in the terms requested in paragraphs \_\_\_\_\_ of Part 1 of this Notice of Application

with the following variations and additional terms:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Date: \_\_\_\_\_

Signature of  Judge  Master