No. VLC-S-S-2111137
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Sharon Kassian; Veronica Shier; Erica Rooke, a minor, by her litigation guardian Stephanie Rooke; and the Canadian Constitution Foundation

PETITIONERS

AND:

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

RESPONDENTS

WRITTEN ARGUMENT IN CHIEF OF THE PETITIONERS

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DATE, TIME, PLACE OF HEARING OF PETITION

April 19-20, 2022, 10:00 a.m.
at 800 Smithe Street, Vancouver BC
In person
Before Chief Justice Hinkson (seized)

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I. **Overview**

1. The petitioners are supporters of public vaccinations, both generally and with respect to Covid-19. They do not challenge the Vaccine Passport Provisions[1] in general – their constitutional challenge is only to the Vaccine Passport Provisions' unconstitutional failure to provide an effective, comprehensive, and accessible regime for medical exemptions. The lack of such accommodation discriminates, contrary to s. 15 of the *Charter*, against disabled persons like the petitioners whose medical conditions prevent them from safely receiving a Covid-19 vaccine, by denying them access to important locations. The regime also infringes their s. 7 interests by coercing their medical decisions and bodily autonomy, and putting their health (and for some, their life) at risk; the coercive effect is contrary to the principles of fundamental justice for those who cannot safely "choose" to be vaccinated.
2. Prior to filing this proceeding, the petitioners Ms. Kassian and Ms. Shier attempted for months to obtain doctors' letters in support of medical exemption application to the office of the Provincial Health Officer ("PHO" – a term used in this argument as inclusive of the Provincial Health Officer and her staff). However, the medical exemption process – technically a s. 43 reconsideration under the *Public Health Act* – as circumscribed by the PHO's mandatory forms, was available only to applicants whose conditions were on the PHO's "closed list." Doctors were unwilling to provide a medical support letter – a requirement for an exemption application – for any unlisted condition based on statements made on the same day by the PHO (that the list was closed) and the College of Physicians and Surgeons (that providing letters for any condition not included on the PHO's list could be professional misconduct).
3. The petitioner Ms. Rooke had a condition which was on the PHO's closed list, and obtained a doctor's letter, but by the time she obtained it, the exemption regime which became available under the November 12, 2021 Variance was only available on an "activity by activity" basis – blanket exemptions were precluded.

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[1] As defined in Part 1 of the Amended Petition.

4. Accordingly, the medical exemption/reconsideration path was not an adequate alternative remedy for any of the petitioners at the time of filing this proceeding, at the time of the service of the Notice of Hearing, or even at the time that Respondents' counsel wrote petitioners' counsel inviting reconsideration applications two months ago.
5. There is very little evidentiary dispute in this case, and the vast majority of the Respondents' record affidavit is not even relevant, as the petitioners do not challenge the regime *in toto*, but only the inadequacy of the medical exemption regime. The substantive balancing exercise under *Doré* will be whether respecting the petitioners' *Charter* rights through an approach to medical exemptions which would not have excluded them at the outset through a pre-judged list, and could have provided them general (rather than activity-by-activity) exemptions, would have unduly prejudiced the PHO's objectives in making the vaccine passport orders. On that issue the Respondents have adduced no evidence whatsoever; the limit on the petitioners' *Charter* rights therefore cannot be demonstrably justified. Indeed, on the record, the Respondents simply failed to consider the s. 7 and s. 15 rights of the few British Columbians in the petitioners' position.
6. Although the Respondents assert that the impugned orders will be repealed ten days prior to the hearing of the petition, it is crucial that the court decide this matter on the merits. The PHO has been clear that restrictions could return depending on the trajectory of the pandemic – particularly in the next fall respiratory season. As this proceeding demonstrates, it takes many months to get a matter like this before the court and on for hearing. The public and the PHO require this court's guidance on the constitutional contours of the unprecedented vaccine passport orders at issue and their impact on vulnerable, disabled British Columbians, to guide future government conduct.

II. **Key Facts**

A. Background

7. On May 25, 2021, the PHO was asked whether BC would be introducing vaccine passports for domestic purposes, akin to vaccine passports in development for international travel. She responded:

> This virus has shown us that there are inequities in our society that have been exacerbated by this pandemic, and **there is no way that we will recommend that inequities be increased by use of things like vaccine passports for services for public access here in British Columbia, and that's my advice**, and I got support from the Premier and I have talked about this, Minister Dix, and others. I do think it will be something that will be necessary to support international travel and that is something we're working with our colleagues in the Public Health Agency and at the federal level to make sure that Canadians have access to travel in the same way that other countries do as well. **But it would not be my advice that we have any sort of vaccine passport within British Columbia for services in BC.**[2]

8. Nevertheless, a BC domestic vaccine passport regime was announced on August 23, 2021.[3] The early announcements stated that a goal of the system was to incentivize vaccination, and that there would be no religious or medical exemptions available.[4]
9. One week later, on August 30th, the petitioner Canadian Constitution Foundation ("CCF") wrote to the Respondents warning them of the unconstitutionality of a no-exemption regime.[5] The following week, on September 9th, the province's public statements began acknowledging that there would be a process for medical exemptions, and the original vaccine passport order, dated September 10th, did include a mechanism for exemption requests.
10. The impugned orders do not grant treating physicians the power to write letters which have the effect of exempting their patient from the vaccine passport requirements. Instead, the PHO has reserved to itself and delegates throughout the province the sole right to "approve" an exemption "request" or "application" submitted as reconsideration requests under s. 43 of the *Public Health Act*. Thus, the PHO has given itself veto power over the clinical judgments of doctors in respect of their own patients, and insert the PHO into that otherwise private relationship. As the Emmerson Record Affidavit utilizes the language of "exemptions," that is the language used throughout this argument.
11. Under the September 10, 2021 and October 25, 2021 versions of the Vaccine Passport Provisions, it was possible for members of the public such as the petitioners to request reconsideration from the PHO either as to the structure of the Vaccine Passport

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[2] Baron #2 para. 2, Ex A.
[3] Baron #1 Ex HH p. 696-700, cross reference to Emmerson #1 Ex 17 p. 791-792.
[4] Emmerson #1 para. 74, Ex 17 p. 791; Baron #1para. 17, Ex C pp. 30-34 Ex D pp. 36-37; Baron #2 para. 3, Ex B.
[5] Baron #1 Ex B p. 20-25.

Provisions, or for a patient-specific medical exemption.[6] However, under the November 12, 2021 variance and all subsequent versions of the orders, the PHO purported to quash all outstanding reconsideration applications as to the structure of the orders.[7] Thereafter, only reconsideration for individualized medical exemptions compliant with a closed list[8] of potentially qualifying conditions, and only on an "activity by activity" basis, could be made.[9]

12. The documentation regarding the exemption "reconsideration" process specified no time period within which a decision on an exemption request would be made, even though some exemption requests (such as to attend a funeral reception) may be time-sensitive and of extreme personal importance. The application form[10] required the applicant to describe the proposed activity or event, its date and city, its number of participants, the impact of exclusion on the applicant, why alternatives (such as virtual attendance and ordering take-out, according to the accompanying guidance document) were not sufficient, and either attaching a letter from a medical health officer confirming that "I have been informed by a medical health officer that I should not receive additional doses of a COVID-19 vaccine at this time due to an adverse event following immunization" or submitting "a completed COVID-19 Vaccine Medical Deferral form that has been filled out by a medical practitioner." This was the same Covid-19 Vaccine Medical Deferral form[11] which the BC College of Physicians and Surgeons informed registrants they may sign only if the applicant's condition is on the approved PHO list, failing which they may be disciplined for professional misconduct, as addressed in further detail below.

B. The Petitioners' disabilities

13. The individual petitioners suffer from disabilities (some caused by a first dose of Covid-19 vaccine) by which their health would be seriously jeopardized for them to receive a (first or second) dose of Covid-19 vaccine.

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[6] Emmerson #1, Ex 18 pp. 796, 805, 806; Emmerson #1, Ex 19, pp. 815-16, 820, 821.
[7] Emmerson #1, Ex 20 pp. 829-830.
[8] See paras. 21-24 of this argument and footnoted evidence.
[9] Emmerson #1 paras. 111-112, Ex 24.
[10] Baron #1 Ex H pp. 170-172, cross reference to Emmerson #1 Exs 45-46 p. 1246-1253
[11] Baron #1 Ex I pp. 174-175, cross reference to Emmerson #1 Ex 42 p. 1239-1240.

14. Ms. Kassian and Ms. Rooke eagerly received a first dose of Covid-19 vaccine in the second quarter of 2021, but suffered serious adverse reactions which required hospitalization and ongoing medical treatment: brachial neuritis for Ms. Kassian, and recurrent pericarditis for Ms. Rooke.

15. Following her first dose of Pfizer Covid-19 vaccine, the petitioner Ms. Kassian was ultimately diagnosed with brachial neuritis with scapular winging, a neurological condition comprising extreme pain and partial paralysis of the affected area (in her case, primarily her right – dominant – arm).[12] Even today, Ms. Kassian still experiences chronic pain, significantly reduced strength which significantly interferes with the activities of daily living, sleep, and employment.[13] Ms. Kassian's compromised arm function is of particular concern as she was pregnant for the first five months of the vaccine passport regime,[14] and since two months ago is now the mother of a newborn. Both her GP and her neurologist advised her against getting a second dose,[15] and her neurologist and her psysiatry specialist are of the view that Ms. Kassian's Covid-19 vaccine was the most likely cause of her brachial neuritis.[16] Despite all this, Public Health nonetheless advised her to proceed with a second dose, even though her doctors were unable to assure her that a second dose will not result in a repeat, or worsening, of her brachial neuritis, which could cause her further or permanent nerve damage, and (while pregnant) could have potentially impacted her baby.[17]

16. Following her first dose of Covid-19 vaccine, the petitioner Ms. Rooke, a lifelong competitive swimmer and recent swim coach, developed physician-diagnosed pericarditis, which required hospitalization and a lengthy period off work.[18] It recurred a few months later, requiring further hospitalization.[19] Her specialist confirmed that the Covid-19 vaccine was the most likely cause of her pericarditis.[20] Although pericarditis is on the PHO's closed list, the impugned orders in force until <u>after</u> the Notice of Hearing in

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[12] Kassian #1 paras. 5-14, Ex D.
[13] Kassian #1 paras. 15; Kassian #2 para. 3.
[14] Kassian #1 para. 20.
[15] Kassian #1 para. 16.
[16] Kassian #1 paras. 18, 21, 26, 28, Exs E, I.
[17] Kassian #1 para. 18, Ex G; admitted by the Respondents at Petition Response, para. 68.
[18] Rooke #1 paras. 4-6.
[19] Rooke #1 para. 15(b).
[20] Rooke #1 para. 15(a).

this proceeding was filed indicated that the PHO would not even consider granting a general vaccine passport exemption, but only activity-by-activity exemptions. This made the exemption regime largely illusory to her.[21] For many months, Ms. Rooke's inability to obtain a general exemption made it illegal for her to even visit a friend at the friend's home (as she was under particularly restrictive orders in the Northern Health region).

17. The petitioner Ms. Shier was born with spina bifida and hydrocephalus, has undergone over 15 surgeries, some of them with very poor recoveries.[22] She is also suspected of suffering from a scarring disorder. She has reacted badly to various past medications, sometimes requiring hospitalization.[23] Because of her complex and overlapping disabilities and past reactions to medications, the fact that the approved Covid-19 vaccines have not been tested on persons with disabilities like her own, and the emergence of serious adverse reactions to the vaccine once societal-scale administration was underway, she concluded that receiving the vaccine was too risky for her.[24] No doctor would even consider writing her a letter as her disabilities were not on the approved PHO list, and contrary to Petition Response para. 79, Ms. Shier did describe efforts to obtain a doctor's letter. [25]

18. Contrary to Petition Response para. 71, there is sufficient evidence that Ms. Kassian's Covid-19 vaccine caused her disability,[26] but that is not a controlling fact in any event – it is the likely risk to the patient of receiving the <u>next</u> dose which justifies an exemption, regardless of whether that risk is apparent from a serious reaction to a first dose, or to a pre-existing condition not caused by Covid-19 vaccination as is the situation for Ms. Shier (the PHO's exemption list includes pre-existing anaphylactic allergies to vaccine ingredients, for example).

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[21] Rooke #1 paras. 9.
[22] Shier #1 para. 4, 7-12.
[23] Shier #1 para. 13-16.
[24] Shier #1 para. 3, 25-27.
[25] Shier #1 paras. 3, 30(c)
[26] Kassian #1 para. 12.

C. The impacts of the impugned provisions on the petitioners

19. Because of their inability to safely become fully vaccinated, the petitioners were – and, as of the filing of this argument, remain – excluded from many crucial aspects of social and community life. They have, on the affidavit evidence,[27] been excluded by the impugned orders from birthday, anniversary, and extended family events in restaurants, work social functions, craft fairs, their exercise regimes in gyms and pools, volunteering opportunities, travel to visit family, and essentially all of Christmas – both outdoor events, and deeply important personal Christmas gatherings in private homes. These are highly impactful social exclusions, which in turn have impacted their mental health. The injustice of the petitioners' social exclusion adds to their suffering, since their inability to receive the Covid-19 vaccine is due to their disabilities, which are beyond their control.
20. Ms. Shier has lost four months of essential swim therapy for her spina bifida since public pools became off-limits to unvaccinated persons in December 2021[28]. Her evidence describes how decreases in swim therapy have resulted in weight gain, decreased mobility, and increased medication intake with all its attendant side effects.[29]
21. Ms. Rooke was fired from her job for being unvaccinated.[30]
22. Ms. Kassian is now raising her daughter without the supports available to vaccinated persons at her local library, pool, and community centre,[31] and she is unable to join her other young mom friends in restaurants.[32]
23. The mental health of all of the petitioners has been negatively impacted.[33]

D. The PHO's statements have caused doctors not to provide exemption letters for conditions which are not on the PHO's approved list

24. Ms. Kassian[34] and Ms. Shier[35] were unable to obtain the medical opinions required to even apply under the impugned orders' reconsideration process because doctors are

[27] Kassian #1 paras. 2, 29-32; Kassian #2 para. 4. Rooke #1 para. 11; Shier #1 para. 30(b).
[28] Shier #1 para. 5.
[29] Shier #1 paras. 17-24, 30(a).
[30] Rooke #1, para. 10.
[31] Kassian #2 para. 5.
[32] Kassian #1 para. 30
[33] Kassian #1 para. 32; Rooke #1 para. 13.
[34] Kassian #1 paras. 23-28; Kassian #2 para. 2
[35] Shier #1 para. 3, 30(c).

unwilling to provide letters in support of a medical exemption application due to apparently coordinated public statements and warnings made by the PHO and the BC College of Physicians and Surgeons, as follows:

a. On September 15, 2021, two days after the Vaccine Passport Provisions went into effect, the PHO published a 1-page document titled "Valid contraindications and deferrals to COVID-19 vaccination"[36];

b. On the same day, the BC College of Physicians and Surgeons published a document titled "Guidance re: valid contraindications and deferrals to COVID-19 vaccination."[37] In this document:

    i. the College provided a link to the PHO publication referenced in the previous subparagraph, which the College described as "the Provincial Health Officer has recently published guidance on valid contraindications and deferrals to vaccination. There are very few acceptable medical contraindications to the Covid-19 vaccination. It may be helpful to share this guidance with your patients so that they understand what constitutes a legitimate medical condition that warrants a medical certificate"; and

    ii. the College referenced and linked to its Practice Standard on "Medical Certificates and Other Third-party Reports"[38] which warns registrants that "The College may consider the provision of untruthful information … in … medical certificates or reports as professional misconduct."

c. The BC College of Nurses & Midwives (who regulate Nurse Practitioners, who were also permitted to write exemption letters) made the substantially same announcement to its members on September 15-16 as well.[39]

d. Subsequently, on October 15, 2021, the BC College issued a publication titled "How to verify a legitimate COVID-19 vaccine exemption or deferral"[40] which stated that "According to the provincial health officer, the reasons outlined in the deferrals to COVID-19 vaccination table are the only valid reasons for a COVID-

[36] Baron #1 Ex U p. 576-577.
[37] Baron #1 Ex V p. 579-580; emphasis added.
[38] Baron #1 Ex X pp. 584-586; emphasis added.
[39] Baron #1 Ex U pp. 576-576.
[40] Baron #1 Ex W p. 582; emphasis added.

19 exemption or deferral. Legitimate exemption or deferral letters must state one of these valid reasons." The College's publication linked to a version of the PHO's "Covid-19 Vaccine Medical Deferral"[41] which had no tick box for someone off the PHO's closed list who had not already had an adverse reaction to a first dose, and no available tick box for an application for a person who had an adverse reaction to a first dose but who Public Health had not already agreed should avoid a second dose.

e. The foregoing were received by registrants subsequent to a "Joint Statement on Misleading COVID-19 Information" issued by the BC College and the First Nations Health Authority issued on May 6, 2021,[42] which expressed "concern … about reports that some BC physicians are spreading information that contradicts public health orders and guidance" and stating that "Public statements from physicians that contradict public health orders and guidance are confusing and potentially harmful to patients … Those who put the public at risk with misinformation may face an investigation by the College, and if warranted, regulatory action." Although the joint statement, literally interpreted, allows for the possibility that *some* contradiction of PHO guidance by doctors *might* not constitute a disciplinary offence, the thrust of the joint statement is to equate the two, and was made in the context of notoriety of disciplinary action taken by the College against doctors who made public statements contradicting the PHO regarding Covid-19 vaccine matters.[43]

f. Subsequently, the PHO stated on November 1, 2021 that she was:

> … working very closely with the College of Physicians, and we put out guidance for physicians on, you know, what constitutes a valid medical exemption and what constitutes fraud, to be frank… the College has the responsibility as the regulatory authority to reach out and take action. And we have been working together.[44]

[41] Baron #1 para. 36, Ex W p. 582, Ex I p. 174-175, cross-reference to Emmerson #1 Ex pp. 1239-1240.
[42] Baron #1 Ex T, p. 574; emphasis added.
[43] Baron #1 Ex T p. 574.
[44] Baron #1 Ex C p. 33; emphasis added.

25. The foregoing created a significant chilling effect. Due to the apparently coordinated statements of the PHO and the Colleges five days after the vaccine card orders were introduced, and the PHO's equating of writing letters for any basis not on the "guidance for physicians" document which the "[PHO] put out", the direct evidence of Ms. Kassian and Ms. Shier is that their doctors would not provide exemption letters because they understood that providing a letter for a condition not contained on the PHO's "closed list" would be professional misconduct. This evidence is not rebutted. As a result, both Ms. Kassian and Ms. Shier have been denied the opportunity to even <u>apply</u> to the PHO for a medical exemption.
26. The PHO's closed list of conditions from September 15th was rolled forward in the subsequent "Public Guidelines for Request for Reconsideration (Exemption) Process" issued November 12.[45] Even though the related "COVID-19 Vaccine Medical Deferral" form included two tick box options for "serious adverse event following first dose"[46] the closed list of valid grounds for deferral was still listed on the back of the form,[47] and Ms. Kassian's doctor could not have ticked either box because she was neither in the category "Serious adverse event following first dose of vaccine reported to the medical health office (MHO) and awaiting recommendation for further vaccination by a MHO" (because the MHO had already rejected her doctor's inquiry)[48], nor could they tick "Serious adverse event following first dose of vaccine not yet reported to the MHO" (as it had in fact been reported). And the form still rendered it impossible for Ms. Shier to apply because there was no tick box option for an open category of applying on "any other reason by which taking a dose of Covid-19 vaccine would seriously jeopardize the patient's health" for those who had not had a first dose.[49]

27. The PHO's response in its pleading[50] is that doctors' refusal to provide exemption letters to the petitioners results from their "misunderstanding" of the PHO's documentation. The petitioners disagree, but even if it were so, it would be a simple thing for the PHO to

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[45] Baron #1 Ex. H p. 166, cross reference to Emmerson #1 Exs 45-46 p. 1247.
[46] Baron #1 Ex I p. 174, cross reference to Emmerson #1 Ex 42 p. 1239.
[47] Baron #1 Ex I p. 175, cross reference to Emmerson #1 Ex 42 p. 1240.
[48] Kassian #1 para.18, Ex.G.
[49] Baron #1 Ex I p. 174, cross reference to Emmerson #1 Ex 42 p. 1239.
[50] Petition Response, para. 124.

correct that misunderstanding by issuing a "clarification" of the September 15th document. Instead, the PHO continues to deny that anything it has done has made medical exemption letters unavailable to the petitioners, and has made no public statement to correct it.

28. Even if a court might interpret the Guidelines relied upon by the PHO in the way argued for by the Respondents, the evidence is that both public health and patients' doctors have interpreted it conservatively with respect to their own interests – that is, as the exemption provisions being narrow – in order to protect themselves from professional misconduct allegations. It is the actual impact of the PHO's wording on the petitioners which matters for constitutional purposes. On Ms. Kassian's evidence, the regime was in fact treated by both public health[51] (which stated that her condition was "not a contraindication to receiving a second shot"), and her doctor,[52] as being closed. Any exemption regime which might be available in the mind of a lawyer or Judge, but not available in the mind of the petitioners' doctors charged with providing exemption letters, is illusory and ineffective to vindicate her constitutional rights.
29. Five weeks before hearing, the Respondents' pled[53] and filed evidence[54] that they have in fact issued exemptions for conditions off the closed PHO lists. This is an admission that they have failed to uphold their own policies expressed in their publicly posted forms which the impugned orders set as the mandatory conditions for an exemption application.[55] This admission does not cure the fact that the petitioners have been denied doctors' letters because of what is actually stated in the orders and its related documentation, which has not been amended to accord with what the PHO now asserts is its actual practice.

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[51] Kassian #1 paras. 18-19, 23-25, 28 and Ex G; see respondents' admission at Petition Response para. 73.
[52] Kassian #1 para. 18, 24, 25, 27, 28; Kassian #2 para. 2.
[53] Petition Response, para. 65.
[54] Emmerson #1 paras. 108-109, 120-125.
[55] Emmerson #1 Ex 42 p. 1239-1240 Covid-19 Vaccine Medical Deferral form; Ex 46 p. 1251-1253 Form for Reconsideration (Exemption); These were the forms which the G&E and F&L orders themselves required to be utilized for any exemption application, by the statement "A request for an exemption… must be made … follow[ing] the guidelines posted on my website…"

30. The PHO's closed list does not include all of the severe Covid-19 reactions which are acknowledged by the BC Centre for Disease Control ("BCCDC") and Health Canada as sometimes (albeit rarely) resulting from a Covid-19 vaccine:
    a. The BCCDC documentation recognizes other conditions such as seizures and various conditions representing long term or permanent nervous system damage up to and including paralysis (including Bell's Palsy[56], transverse myelitis, and Guillain-Barré syndrome).[57]
    b. The Health Canada product monographs and the Public health Agency of Canada National Advisory Committee on Immunization documents similarly reference rare neurological side effects including Bell's Palsy, Guillain-Barre Syndrome, hypoaesthesia, and chronic inflammatory demyelinating polyradiculoneuropathy.[58]
31. There is no explanation in the Respondents' evidence of why the PHO's closed list does not include all of the known adverse reactions, thus excluding such persons from applying for exemption.

III. **Standing and Prematurity**

32. These issues must be addressed together, as the Respondents position is that the individual petitioners lack direct standing <u>only because</u> the Respondent says this entire proceeding is premature due to the petitioners not making personalized medical exemption requests through the s. 43 process.
33. The principle of internal exhaustion does not apply where "there are doubts that the alternative procedure would be duplicative or effective" and will not prevent judicial review where no effective internal remedies were in fact available to the petitioner.[59]
34. The Respondents' prematurity position fails for two fundamental reasons.
35. At the time that this petition was filed, Ms. Rooke had recently obtained a supportive doctor's letter, but the exemption regime in force at the time only permitted her to apply

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[56] Which causes partial paralysis of the face that can last for months.
[57] Baron #1 Ex P, p. 546.
[58] Baron #1 Exs N (pp. 300, 303, 330, 352-354, 361, 383-384), O. See also the Health Canada authorized vaccine documents appended to the Emmerson Affidavit at Ex 5 pp. 28, 35, 42, 43, 48, 49.
[59] *O.K. Industries Ltd. v District of Highlands*, 2021 BCSC 8, at paras. 111-122.

for an exemption on an "activity by activity" basis – blanket exemptions were precluded, and structural reconsiderations of the order were not permitted by the PHO's (lawful) election in the order not to consider them.[60] The *Charter* relief which Ms. Rooke sought – a blanket exemption to be treated equally to other members of the community who were able to be vaccinated – was therefore not available through s. 43, such that s. 43 could not be an adequate statutory remedy. Ms. Rooke's only recourse to vindicate her asserted *Charter* rights was therefore by way of judicial review.

36. The Respondents nonetheless contend that Ms. Rooke's petition should be dismissed because the orders were amended on February 16, 2022 to permit blanket exemption applications to be made[61]. The PHO made this change not only after this petition was filed and served, but also after hearing dates were obtained,[62] and even after Respondents' counsel wrote petitioners' counsel inviting reconsideration applications in early February.[63] Based on the wording of the order in effect at that time, petitioners' counsel declined.[64] It was only after this time that the Respondents changed the orders – without advising petitioners' counsel of having done so until filing their Petition Response on March 15. Despite the implied admission that the orders in place until six weeks ago were unconstitutional, the Respondents have refused to admit as much in their Petition Response. Time will tell whether they will consent to a declaration at the hearing as they did in *Beaudoin*,[65] but Ms. Rooke obviously cannot be faulted for not having sought a reconsideration which was not even available at the time she commenced these proceeding, or even at the time when the Respondents' lawyer suggested that she should be seeking reconsideration.

37. The court must not permit a government decision-maker to evade constitutional review in advanced legal proceedings by making slight variations to regularly updated orders so as to make a previously unavailable exemption regime potentially available, and then to retroactively fault the petitioner for not having pursued it. If a blanket exemption had

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[60] Emmerson #1 Ex 20 pp. 829-830.
[61] Emmerson #1 paras. 121-122. Petition Response, para. 63.; Emmerson #1 Ex 37 pp. 1141-1142.
[62] Notice of Hearing filed February 8, 2022; service accepted February 11, 2022 (Dines #1 Ex D p. 11)
[63] Respondents' counsel invited reconsiderations on February 4, 2022 (Dines #1 Exhibit C p. 8). At this time the G&E order in effect was the G&E order of January 27, 2022 which still limited reconsideration applications to "an event or type of event": Emmerson #1 Ex 36 p. 1118.
[64] Dines #1 Ex D p. 12.
[65] *Beaudoin v British Columbia*, 2021 BCSC 512, at paras. 144-146, 249, 251.

been available to Ms. Rooke between November 2021 and January 2022, she would have pursued that approach. But having foreclosed that option during that period, and having put the petitioners to the great expense, stress, and work of bringing these proceedings, the Respondents must not now be permitted to switch course in a way which frustrates this court's ability to pronounce on Ms. Rooke's constitutional rights, and to provide binding guidance to the Respondents going forward.

38. Regardless of what the court concludes about Ms. Rooke's situation, there can be no prematurity in respect of Ms. Kassian and Ms. Shier. Still today, they are not eligible to avail themselves of the reconsideration process because their conditions do not fall within the PHO's own reconsideration documentation, which continues to contain a closed list of eligible conditions, and to require a doctor's letter. Ms. Kassian's doctors have told her that they do not believe they are permitted to provide a letter for her condition which is off the PHO's list. Ms. Shier, and anyone else seeking an exemption before a first dose, are in an even more difficult position. There is no reconsideration process available to either of them, and no way for them to get a doctor's opinion letter to even submit to the PHO under s. 43, or to put before the court. The court must not dismiss the proceeding as premature when these petitioners' inability to avail themselves of the statutory reconsideration springs from the Respondents' very conduct which grounds part of the *Charter* claim. Only after it engages with the factual and legal issues raised by the petitioners can the court determine whether the petitioners even had the ability to seek reconsideration. The substantive analysis must be performed before the prematurity argument can be addressed.

39. The Respondents should not be able to defeat the petitioners' standing to even have this claim adjudicated by stating, for the first time ever upon the filing of their petition response and supporting evidence on March 15, 2022, that they have disregarded their own mandatory policies for processing reconsideration requests, and that the petitioners ought to have done the same. The public, including the petitioners, are entitled to take the orders and the exemption policies incorporated by reference into them at face value. The Respondents may admit to a declaration of unconstitutionality and amend their exemption policies to comply with their actual practices, but may not defend against a finding of unconstitutionality by relying on their own breaches of their own policies.

40. The Respondents impliedly admit that if their prematurity argument fails, then the individual petitioners have standing as of right, having personally suffered the alleged *Charter* infringements.[66]

41. If the individual petitioners have standing, then the Respondents do not oppose CCF being granted public interest standing[67] (and the petitioners do not seek public interest standing for CCF if all petitioners are found to lack standing due to prematurity). Such public interest standing is appropriate on the facts here. The Court of Appeal most recently restated the test for public interest standing in *Council of Canadians with Disabilities v British Columbia (Attorney General)* ("CCD")[68]:

    a. there is a serious and justiciable issue raised by the claim(s);

    b. they are directly affected by the proposed action or, if not, have a genuine interest in the outcome of the claim; and

    c. the action is a reasonable and effective means of bringing the claim(s) to court.

42. These factors are intended "to ensure that legislation and state action are lawful, that courts are accessible and that judicial resources are deployed economically and appropriately".[69] The Court of Appeal drew from the Supreme Court of Canada's ruling in *Downtown Eastside* that these factors are "not to be viewed as items on a checklist or as technical requirements" but rather "as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes."[70]

43. Since the *Downtown Eastside* ruling, courts have applied the test for public interest standing "flexibly, purposively and pragmatically" with a view to "[upholding] the legality principle" and "[providing] meaningful access to justice for vulnerable and marginalized citizens affected by legislation of questionable constitutional validity". [71]

44. All of the CCD factors are met. On the first step, if the individual petitioners have standing, then there is clearly a serious and justiciable issue raised by this constitutional

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[66] Petition Response, para. 103.
[67] Response to Petition, para. 66.
[68] *Council of Canadians with Disabilities v British Columbia (Attorney General)*, 2020 BCCA 241 [*Council of Canadians*] at paras. 3-4, adopting the framework re-articulated in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*].
[69] *Council of Canadians with Disabilities v British Columbia (Attorney General)*, 2020 BCCA 241, at para 4.
[70] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at para 36.
[71] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at para. 86.

challenge to unprecedented public health orders that deny access to facets of daily living to those who are unable, due to disability, to receive a particular medical intervention due to no fault of their own.

45. The second and third steps must be treated together in a case like this where public interest standing is sought by an organization not as the sole petitioner, but as a co-petitioner. The individual petitioners represent vulnerable and marginalized citizens who have been demonstrably affected by the impugned orders and otherwise lack the knowledge, sophistication, and finances to bring forward independent *Charter* challenges of these provisions[72]. The CCF, as a national civil liberties organization with established knowledge and expertise in the issues raised by this constitutional challenge,[73] has been actively monitoring public health measures implemented in response to the Covid-19 pandemic and has consistently advocated for *Charter*-compliant policies that minimize the impact of these extraordinary measures on vulnerable individuals. It was involved in the early stages in warning the Respondents of the unconstitutionality of their initial proposal,[74] which the Respondents took into account in part (but not sufficiently) in drafting the impugned orders. The CCF then played the role of "convener" in advertising for and screening for the individual petitioners, and is paying for this litigation.[75] The CCF thus has a unique and vested interest in the outcome of this litigation and in ensuring that the claims brought by the individual petitioners are effectively resolved, and its involvement is a reasonable and effective means for bringing this matter before this court.

46. The Supreme Court of Newfoundland and Labrador's ruling in *Taylor v Newfoundland and Labrador* is entirely on point.[76] The court granted public interest standing to the Canadian Civil Liberties Association (the "CCLA") which sought public interest standing alongside an individual litigant who was challenging public health orders that restricted entry into Newfoundland and Labrador. The court noted that CCLA had an established interest in the *Charter* and public health orders pursued in response to Covid-19,[77] and that the purpose of public interest standing is to "screen out the 'mere busybody' and

[72] Kassian #1 paras. 29-33; Rooke #1 para. 14; Shier #1 para 31; Baron #1 para. 10.
[73] Baron #1 paras. 2-11, Ex A.
[74] Baron #1 paras. 12-13.
[75] Baron #1 paras. 14-15.
[76] *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 [*Taylor*; leave to appeal filed].
[77] *Taylor v Newfoundland and Labrador*, 2020 NLSC 125, at para. 140.

determine whether 'the plaintiff has a real state in the proceedings or is engaged with the issues they raise'".[78]

47. Granting the CCF public interest standing will facilitate meaningful access to justice for the individual petitioners and further help to effectively bring about a clear resolution to the issues raised by their claims. It is unreasonable to expect disabled British Columbians – in the face of a global pandemic and public health restrictions that impose stark personal and social disadvantages on their material, physical, and emotional resources – to marshal the knowledge and expertise necessary to bring forward a complex constitutional challenge which manifestly raises a serious justiciable issue.
48. The CCF possesses the expertise and knowledge necessary to supplement the individual petitioners' positions and thereby assist this Honourable Court in adjudicating the constitutionality of the challenged public health orders.[79]
49. As in *Manitoba Métis Federation,* "The presence of other claimants does not necessarily preclude public interest standing" and the case at bar "is not a series of claims for individual relief. It is rather a collective claim for declaratory relief."[80]
50. The petitioners also rely upon this court's decisions in:
    a. *B.C./Yukon Association of Drug War Survivors v. Abbotsford (City)*, 2014 BCSC 1817, at paras. 24-62, where this court granted public interest standing in a *Charter* challenge brought by an advocacy group on behalf of homeless individuals displaced by bylaws prohibiting encampment;
    b. *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2021 BCSC 348, at paras. 41-60, where public interest standing was granted to TLABC, affirming that the test is to be applied "purposively and flexibly" (para. 46), and that public interest standing can be granted where individual litigants are unlikely to have the time or financial resources to litigate the issue (paras. 54, 59));
    c. *BC Civil Liberties Association v. University of Victoria*, 2015 BCSC 39, at paras. 93-106: public interest standing granted to the BCCLA to assist an individual

[78] *Taylor v Newfoundland and Labrador*, 2020 NLSC 125, at para. 128 [emphasis added by Court], citing *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at para 43.
[79] *Taylor v Newfoundland and Labrador*, 2020 NLSC 125, at paras. 136-141.
[80] *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, at paras. 43-44 (emphasis added).

plaintiff in raising *Charter* arguments concerning a student group's entitlement to campus space, and university sanction of an individual student.

IV. **Mootness**

51. The Respondents have expressed an intention to argue that this matter will be moot by the time of the hearing, on the basis that the vaccine passport provisions will be repealed on April 8th, the same day that the Respondents are scheduled to file their written argument in this matter.

52. As the Respondents bear the onus on their mootness argument, and as the argument is currently hypothetical as the vaccine passport provisions have not yet been repealed, the petitioners will await the Respondents' April 8th argument, and will address any mootness argument raised by the Respondents by way of the petitioners' reply argument to be filed prior to the hearing on April 14th.

V. **The impugned provisions discriminate against the petitioners on the basis of disability contrary to s. 15 of the *Charter***

53. The Respondents' position that "The petitioners have not adduced a sufficient, or indeed any, evidentiary foundation upon which the court could determine the alleged *Charter* breaches [which is] fatal to judicial review on *Charter* grounds" is a remarkably bold denial in light of the restated s. 15 test in *Fraser*. The petitioners accept that *Charter* litigation cannot be decided in factual vacuum. However, on the law, the petitioners have clearly established all of the elements of a s. 15 breach here.
54. Under *Fraser*[81], the claimant must first demonstrate that the effect of an impugned law or policy creates a distinction based on an enumerated or analogous ground, in the sense that the law or policy disproportionately impacts members of a protected group.[82] The Court in *Fraser* held that even policies that are seemingly neutral in their application may have "built-in headwinds" for members of protected groups.[83] On this point, the Court

[81] *Fraser v Canada (Attorney General)*, 2020 SCC 28 [*Fraser*]. See the British Columbia Court of Appeal's recent application of the restated section 15 test from *Fraser* in *Li v British Columbia*, 2021 BCCA 256 [*Li*], at para. 127. See also *K.S. v British Columbia (Ministry of Children and Family Development)*, 2021 BCSC 1818, at para 104.
[82] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at para. 52.
[83] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at para. 53.

emphasized that the principle of substantive equality is the "animating norm" of s. 15, which contextually recognizes that "identical or facially neutral treatment may 'frequently produce serious inequality'".[84] The Province's Covid-19 Ethical Decision-Making Framework also identifies substantive equality as its animating norm.[85] This court addressed the substantive equality nature of s. 15 in *Single Mothers' Alliance of BC Society v British Columbia*.[86]

55. At the second stage of the s. 15 test, the claimant must establish that the challenged law or policy has the effect of reinforcing, perpetuating, or exacerbating their disadvantage.[87] Although the presence of systemic or historical disadvantages (including social prejudices or stereotyping) may be relevant in making this determination, these are not necessary factors; the focus of the s. 15 inquiry is on discriminatory impacts and effects, not discriminatory attitudes or intentions.[88] On this point, the Court in *Fraser* crucially removed the requirement that such disadvantage be arbitrary, holding that it is ultimately the government's onus under s. 1 to demonstrate that policies which limit s. 15 are not arbitrary.[89]
56. Both branches of the s. 15 test are made out in this case.
57. All of the individual petitioners have physical disabilities – either pre-existing or caused by a first dose of Covid-19 vaccine. It is those disabilities which render them unable to be safely vaccinated, but also ineligible to even apply for a general medical exemption, and thus excluded by operation of the orders from numerous important locations where other British Columbians who can be safely vaccinated have free access. The effect of the impugned orders is thus to create a *prima facie* distinction on the basis of physical disability, an enumerated ground listed in s. 15.
58. The current exemption regime, which cures the discriminatory impact for those on the PHO's closed list, fails to have that effect for Ms. Kassian and Ms. Shier who are off the

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[84] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at paras. 42, 47.
[85] Baron #1 Ex K, p. 254, item B3(a).
[86] *Single Mothers' Alliance of BC Society v British Columbia*, 2019 BCSC 1427; see especially paras. 128-132, 137-138: motion to strike novel Charter challenge against legal aid regime; motion to strike dismissed; held that it could not be said that sections 7 and 15 claims had no reasonable prospect of success; discussion of substantive equality.
[87] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at para. 76.
[88] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at para. 78, citing *Quebec (Attorney General) v. A*, 2013 SCC 5, at para. 329.
[89] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at paras. 79-80. See also *Li v British Columbia*, 2021 BCCA 256, at para. 144.

list and ineligible to apply and/or unable to apply (due to being unable to obtain a doctor's letter).

59. Even for those such as the petitioner Ms. Rooke whose condition is on the PHO's list, the impugned provisions still create a distinction on the basis of her disability because she is not granted a general exemption and treated the same as a fully vaccinated person, but is presumptively excluded from all vaccine-passport-required venues and events unless she obtains specific permission from the PHO to attend a particular venue or event. She is not treated as a free citizen entitled to direct her own life within the limits of the general law, but is rather treated as a ward of the state who must ask the PHO or her delegate for permission for each place she wants to go, or person she wants to see.

60. *Fraser* directs that, "There is no "rigid template" of factors relevant to [the second step] inquiry", and that, "The goal is to examine the impact of the harm caused to the affected group" and that this harm "may include "[e]conomic exclusion or disadvantage, [s]ocial exclusion . . . [p]sychological harms . . . [p]hysical harms . . . [or] [p]olitical exclusion.".[90] The impact of the impugned orders on all three petitioners includes social exclusion and psychological harms; for Ms. Shier it includes physical harms as well (e.g. weight gain, decreased mobility, increased medication intake with resultant side effects, etc.). The basis of this exclusion is the petitioners' disabilities, and it does not matter that others with *different* disabilities are not excluded from vaccine passport locations. Where the law has "a disproportionate impact on members of a protected group ... the first stage of the s. 15 test will be met,"[91] and "disproportionate impact can be established if members of protected groups are denied benefits … more frequently than others."[92] "Heterogeneity" within the claimant group "does not defeat a claim of discrimination."[93] That is, it is not a defence for the Respondents that the discriminatory effect is experienced by only *some* disabled persons rather than by *all* disabled persons.

[90] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at para. 76.
[91] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at para. 52.
[92] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at para. 55.
[93] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at para. 75. The Court reiterated at para. 48 that all that is required is a "*disproportionately negative impact* on a group or individual *that can be identified by factors relating to enumerated or analogous grounds*" (quoting *Withler*); see also paras. 51, 72-73.

61. The petitioners have neither a burden to prove a governmental intention to discriminate,[94] nor to "independently prove that the protected characteristic "caused" the disproportionate impact."[95] Nor is a discriminatory impact excused under s. 15 "simply because it was relevant to a legitimate state objective … Similarly, there is no burden on a claimant to prove that the distinction is arbitrary to prove a *prima facie* breach of s. 15(1)."[96] The focus at s. 15 is upon distinction and differential impact only. All of the Respondents' justificatory arguments about the purpose for the impugned provisions must be left to be addressed at s. 1.
62. Moreover, any suggestion that the petitioners could have avoided the discrimination by "choosing" not to attend a vaccine passport-requiring location, or by "choosing" to be vaccinated despite their elevated risk, is no defence.[97] Rather, "[t]he very act of forcing some people to make such a choice violates human dignity, and is therefore inherently discriminatory."[98]
63. The impugned orders fail to respond to the actual capacities and needs of persons whose disabilities prevent them from receiving a full course of Covid-19 vaccine. The orders instead impose burdens on them in a manner that has the effect of reinforcing, perpetuating, or exacerbating their disadvantage. Disabled persons already face societal discrimination and exclusion. The under-inclusive and ineffective medical exemption provisions in the Vaccine Passport Provisions adds further societal exclusion to the exclusion and hardship which the individual petitioners already suffer as a result of their underlying disabilities, particularly during a period of a global pandemic.
64. Imposing these burdens on the petitioners on the basis of their disability is also contrary to the Province's Covid-19 Ethical Decision-making Framework which prohibits "placing unfair burdens on particular individuals and/or segments of the population."[99]

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[94] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at para. 69; *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, at para. 35.
[95] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at para. 70.
[96] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at paras. 79, 80.
[97] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at paras. 86-92 (particularly para. 86).
[98] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at para. 87, quoting *Lavoie v. Canada*, [2002] 1 S.C.R. 769.
[99] Baron #1 Ex K p.255 item B3(b).

VI. **The impugned provisions imperil the liberty, security of the person, and even lives of the petitioners contrary to the principles of fundamental justice under s. 7 of the *Charter***

A. Orders' coercive effect engages all s. 7 interest

65. The purpose, or one of the purposes, of the Vaccine Passport Provisions is to pressure or coerce vaccination – or at the very least to incentivize it. This purpose, and in any event the Vaccine Passport Provisions' effect, engages all three of the interests protected by s. 7[100] as the impugned orders have the following impacts on persons with a medical reason why they cannot be safely vaccinated:

    a. The orders impact "the right to make fundamental personal choices free from state interference" protected by the liberty interest, of which medical decisions are the paradigmatic example; liberty is engaged by impacts on decisions of fundamental personal importance, such as choice of medication, regardless of the threat of incarceration[101]. The Province's Covid-19 Ethical Decision-Making Framework also speaks to respecting individuals' "autonomy, choice and perspectives"[102] and requiring "Any infringements on individual autonomy and choice must be carefully considered, and the least restrictive or coercive but effective means must be sought."[103]

    b. The orders impact "control over one's bodily integrity free from state interference… that causes physical or serious psychological suffering " protected by the security of the person interest. The risk of serious adverse reactions requiring hospitalization, such as Ms. Rooke's pericarditis and Ms. Kassian's brachial neuritis, clearly rises to the requisite level. It is also well-established that security of the person safeguards "bodily integrity free from state interference", including unwanted medical interventions.[104]

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[100] *Abbotsford (City) v. Shantz*, 2015 BCSC 1909, at paras. 182-185.
[101] *R. v. Smith*, 2015 SCC 34, at para. 18.
[102] Baron #1 Ex K p. 255 item B4
[103] Baron #1 Ex K p. 255 item B6.
[104] *A.C. v Manitoba (Director of Child and Family Services*, at para. 220, citing *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, at para. 122

c. The orders create, for those for whom vaccination is medically contraindicated, a coercive effect towards "increased risk of death… either directly or indirectly" (e.g., blood clots and other fatal side-effects recognized by the governments of BC and Canada). Indeed, the Respondents impliedly admit that if the exemption provisions are too unconstitutionally narrow, then the life interest is engaged.[105]

66. Furthermore, prohibiting doctors from writing exemption letters for documented – but not yet PHO-acknowledged – medical contraindications, endangers the health (and thus security of the person and potentially the life) of the petitioners and public health generally. When initially approved by Health Canada, it was unknown that the mRNA (Pfizer and Moderna) vaccines had a low, but statistically significant, risk of causing myocarditis and pericarditis; it was similarly initially unknown that the Astra Zeneca and Johnson & Johnson vaccines carried low, but statistically significant, risks of fatal blood clots; these side-effects became acknowledged only after some weeks or months of mass administration.[106] Such risks became recognized by Health Canada and the PHO only after reports – especially by doctors – of adverse reactions.[107] There is no constitutional justification for the PHO to close its eyes to evidence that there could be previously unknown contraindications.

67. Paras. 115-116 of the Petition Response, and the case cited therein, miss the point of the petitions' s. 7 claim. The case cited simply stands for the proposition that s. 7 of the *Charter* does not also guarantee economic liberty, a point which the petitioners do not assert. It is the medical coercion, not the resulting social exclusion, which engages s. 7. The resulting social exclusion is addressed by s. 15. The petitioners are not claiming that the inability to participate in social gatherings is what engages the s. 7 interests. Rather, it is the coercive nature of the policy, by denying important aspects of daily living to those with disabilities, that pressures persons in the petitioners' position towards a medical treatment that is ill-advised for them; it is the adoption of this risk, not the deprivation of being able to participate in the restricted activities, that engages the petitioners' s. 7 interests.

[105] Petition Response, para. 117
[106] Baron #1 Ex N pp. 352-353, 383-384.
[107] Baron #1 Ex N pp. 293-294, 303, 314, 323-324, 334, 349, 351-355, 380, 382-385, 390.

B. Where a constitutionally required exemption regime is illusory or unreasonable, it will not be in accordance with the principles of fundamental justice

68. It is impliedly conceded by the Respondents that a total lack of medical exemption regime would engage the petitioners' liberty, security of the person, and/or life interests, in a way not in accordance with fundamental justice. Their position is that the exemption regime is what makes the orders constitutionally compliant.[108]

69. The question, then, is whether the medical exemption regime is effective, comprehensive, and accessible, in a way which actually respects the petitioners' rights, or whether it is in fact illusory[109] or otherwise unreasonable.[110] The petitioners contend that it is illusory or unreasonable, such that for the petitioners and those like them, there is in effect no exemption regime available at all.

Illusory because unlisted conditions excluded and doctors' judgment fettered

70. The PHO's conduct has resulted in the fettering of the clinical judgment of doctors, both by the apparently coordinated statements of the PHO and the College, and by the PHO's statement that only conditions on the PHO's closed list will be considered. The Respondents' plea of "no [direct] evidence"[111] and its technical arguments[112] are insufficient to displace the obvious inference from the petitioners' evidence as to the timing, content, and co-ordination between the PHO and both the Physicians' and Nurses' Colleges. That the PHO did not have the statutory authority to compel the Colleges to act as they did is beside the point. It is the effect of the PHO's conduct on the petitioners, both directly through the PHO's own statements, and indirectly through the

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[108] The Human Rights Commissioner's guidance similarly spoke of the requirement to accommodate those who cannot be vaccinated on the basis of a ground protected under the Human Rights Code, including disability.: Baron #1 Ex L, p. 280.
[109] See *Parker* and *Morgentaler*, cited below.
[110] In *Vancouver (City) v Karuna Health Foundation*, 2018 BCSC 2221, this court upheld municipal bylaws regulating cannabis dispensaries which "limit[ted] the number and location of cannabis dispensaries" on the basis that "Section 7 demands that individuals be given *reasonable* access to medical cannabis not *unrestricted* access. Individuals may be inconvenienced, but such inconvenience does not engage s. 7": para. 148. The petitioners contend that the impugned orders do not give the petitioners *reasonable* access to medical exemptions because doctors are prevented from providing letters in support.
[111] Petition Response, para. 118.
[112] Petition Response, paras. 119, 125.

requests which the PHO made of the Colleges (with which they complied), which is in issue.

71. Whether the PHO and College coordinated or not, the result on the evidence is that the PHO's actions made it impossible for patients with conditions left off the PHO's closed list to even obtain a doctor's letter in support of an exemption application. It also places patients like the petitioners in a catch-22 where they cannot even put a doctor's evidence of their medical contradiction before the court on this petition.

72. This is borne out by the Respondents' own evidence. Dr. Emmerson's evidence is that since the implementation of the vaccine card program, the PHO received 404 reconsideration requests pursuant to the Gathering and Events order; of these, only 81 requests were granted, and only five were issued for contraindications other than those explicitly listed in the COVID-19 Vaccine Medical Deferral Form. In other words, only 20% of exemption requests were successful, and of these only 6.1% were for non-listed contraindications.[113] Where the vast majority of reconsideration requests are unsuccessful (particularly so for those off the PHO's list), the exemption regime is illusory.

73. The Ontario Court of Appeals' apposite ruling in *R v. Parker* (approved by the SCC in *R. v. Smith*, which affirmed our Court of Appeal's decision which gave extensive treatment to *Parker* and found it highly "germane")[114] concerned a *Charter* challenge to the regulatory prohibition of marijuana under the federal *Controlled Drugs and Substances Act*. While the impugned regulations "theoretically contemplate that a physician could prescribe marijuana", the Court held this framework to be illusory at insofar as there was "no legal source for marijuana, [and therefore] no pharmacist [who] could fill the prescription and that the government would not look favourably upon a physician who purported to write such a prescription".[115]

74. In the case at bar, by fettering doctor's clinical judgment, the impugned provisions likewise prohibit doctors from writing exemption letters for emerging medical contraindications to the Covid-19 vaccine, thereby endangering the health of the petitioners and public health generally; the medical exemption regime is therefore

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[113] Emmerson #1 paras. 105, 108.
[114] *R. v. Smith*, 2015 SCC 34, aff'g 2014 BCCA 322; see especially paras. 90-96.
[115] *R v. Parker*, [2000] OJ No 2787 (ONCA) [*Parker*], at paras. 154-156, citing *R v. Morgentaler*, [1988] 1 SCR 30, at pp. 72-73.

illusory to the petitioners.[116] If the impugned provisions had been enacted in the first half of 2021, it may have well delayed the public recognition of emerging risks with Covid-19 vaccines, and would certainly have resulted in some patients receiving these vaccines who could have been warned of contraindications to them by their treating physician. Respecting the clinical judgment of treating physicians is essential to safeguarding the security of the person and lives of all patients.[117]

75. Furthermore, where a regime purports to grant a substantive right to apply for relief, but another part of the regime denies the potential applicant the ability to obtain the evidence required to base the application, the courts will give *Charter* remedies to enable the applicant to vindicate the substantive right.[118]

76. The result of the foregoing is that, for the petitioners, there is no functioning exemption regime available. In respect of the petitioners then, the impugned orders' compliance with the principles of fundamental justice must be assessed on the basis that the impugned orders contain no functional medical exemption regime – which is exactly what was initially announced by the Respondents in August 2021.

C. Not in accordance with the principles of fundamental justice

77. If the court agrees that the exemption regime is illusory to the petitioners, or otherwise unreasonable, then the impugned orders are not in accordance with the principles of fundamental justice as set out by the Supreme Court of Canada in *PHS*[119], *Bedford*[120], and re-summarized in *Carter*[121], and applied by this court last year in *Beaudoin*.[122]

Arbitrariness

78. In *PHS*, the refusal to provide a medical exemption to the application of drug laws for a safe injection site was found to be arbitrary because refusal of the exemption undermined

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[116] *R v. Parker*, [2000] OJ No 2787 (ONCA) [*Parker*], at paras. 154-156, citing *R v. Morgentaler*, [1988] 1 SCR 30, at pp. 72-73.
[117] See *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at pp. 69-70.
[118] *Roberts v. British Columbia (Attorney General)*, 2021 BCCA 346.
[119] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, at paras. 129-133.
[120] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at paras. 98, 101-103, 105.
[121] *Carter v. Canada*, 2015 SCC 5, at paras. 83-88.
[122] *Beaudoin v British Columbia*, 2021 BCSC 512, at para. 179.

the very objective of the statutory scheme (i.e. to protect people from the harms of drugs). This court held last year that the goal of the legislation under which the exemption discretion was exercised in this case is the protection of public health.[123] In the case at bar, the impugned orders' failure to contain an accessible, comprehensive, and effective regime for medical exemption has the effect of pressuring citizens to take a vaccine which is medically unsafe for them. Like in *PHS*, this effect is directly contrary to the purposes of the scheme: the protection of public health. In addition, for Ms. Shier, the refusal to even entertain an exemption application has caused her to lose access to swim therapy which is worsening her physical condition – that is, the effect of the impugned orders' failure to provide a workable exemption regime is not only failing to *improve* Ms. Shier's health through vaccination (i.e. the intended effect of the vaccine passport regime generally) but is actually threatening to make it *worse*. Similarly, the impugned orders exclusionary effects are *worsening* the mental health of *all* of the petitioners.

79. The comments from *Bedford* are apposite: "The <u>evidence</u> may, as in *Morgentaler*, show that the <u>effect</u> actually undermines the objective and is therefore "inconsistent" with the objective."[124]

<u>Overbreadth</u>

80. Even if the impugned orders are not arbitrary, they are clearly overbroad. In the words of *Bedford* (with original emphasis):

> [112] Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. For instance, the law at issue in *Demers* required unfit accused to attend repeated review board hearings. The law was only disconnected from its purpose insofar as it applied to permanently unfit accused; for temporarily unfit accused, the effects were related to the purpose.
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> [113] Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose. For example, where a law is drawn broadly

[123] *Beaudoin v British Columbia*, 2021 BCSC 512, at para. 179.
[124] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at para. 119.

> and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the *specific individual*. Enforcement practicality may be a justification for an overbroad law, to be analyzed under s. 1 of the Charter.

81. Punishing those who cannot be safely vaccinated with social exclusion does nothing to improve public health. The impugned orders' impacts – deprivation of liberty, security of the person, and (risk to) life – are overbroad with respect to those in the position of the petitioners who cannot be safely vaccinated, and who are excluded from being eligible to apply for an exemption.

Gross Disproportionality

82. To paraphrase para. 133 of *PHS*: The effect of denying medical exemptions to the petitioners is grossly disproportionate to any benefit that the province might derive from insisting on a rigid "closed list" approach. The effect of compelling the petitioners (and the small number of other individuals in similar positions) to receive a vaccination which is unsafe for them would result in "no discernable negative impact" (*PHS*) on the objects of the vaccine card program, while conversely imposing risks on the petitioners (particularly with regard to their own health and safety) that are extremely significant.
83. For the purpose of this analysis:

> As with overbreadth, the focus is not on the impact of the measure on society or the public, which are matters for s. 1, but on its impact on the rights of the claimant. The inquiry into gross disproportionality compares the law's purpose, "taken at face value", with its negative effects on the rights of the claimant, and asks if this impact is completely out of sync with the object of the law… [125]

VII. The impugned provisions are not reasonably justified under s. 1 of the *Charter*

A. Analytical Framework

84. In light of the holding in *Beaudoin*,[126] this argument will proceed on the basis that the *Doré* framework applies to the government's burden to justify the impugned provisions

[125] *Carter v. Canada*, 2015 SCC 5, at para. 89
[126] *Beaudoin v British Columbia*, 2021 BCSC 512, at para. 218.

under s. 1 of the *Charter*. If, however, the *Oakes* test applies, then it becomes only more difficult for the government to justify the infringement.

85. Where, as here, an infringement of the petitioners' *Charter* rights has been shown, government bears the onus of proof under the *Doré* framework[127] to demonstrably justify the PHO's decision to impose the orders in their current form on the basis that they proportionately balance the petitioners' *Charter* rights with the PHO's statutory objectives.
86. As acknowledged last year in *Beaudoin*,[128] the Supreme Court of Canada has been clear that the *Doré* framework "works the same justificatory muscles" as the *Oakes* test. Under *Doré*, as under *Oakes*, the orders can be upheld only if the government establishes, with evidence, that they are minimally impairing of the petitioners' s. 15 and s. 7 rights, and that the harm which they inflict on the petitioners' constitutional rights is proportionate to the orders' public benefit which the PHO is charged to pursue under the *Public Health Act*.
87. The petitioners generally rely upon this court's robust minimal impairment and proportionality analysis, including its consideration of workable policies in other jurisdictions, in *Abbotsford (City) v. Shantz*.[129]

B. <u>No Consideration of *Charter* rights in issue</u>

88. Failure to actually consider the *Charter* rights of a petitioner is fatal to the Government's *Doré* argument.[130] There must be evidence of such consideration in the record from the time the decision was actually made.[131]
89. There is no evidence in the record that the Respondents gave any consideration to the *Charter* rights of persons such as the petitioners:
    a. Disabled persons such as Ms. Kassian and Ms. Shier who were unable to receive the vaccine for medical reasons (or who assert such) who were left off the PHO's closed exemption-approved conditions list, and are unable to even obtain a doctor's letter to apply for an exemption;

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[127] *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1, at paras. 161-162.
[128] *Beaudoin v British Columbia*, 2021 BCSC 512, at para. 217.
[129] *Abbotsford (City) v. Shantz*, 2015 BCSC 1909, at paras. 237-247
[130] *Lethbridge and District Pro-Life Association v Lethbridge (City*), 2020 ABQB 654, at paras. 108- 112.
[131] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paras. 83-87.

b. Even for persons like Ms. Rooke who are on the PHO's closed list, there is no evidence of a consideration of how requiring advance permission for numerous private activities would render the exemption regime illusory or at best only partially effective, and that permitting applicants to obtain a general exemption would more fully respect their *Charter* rights without frustrating the underlying objective(s) of the orders.

C. Identifying the relevant objective

90. The applicable s. 1 analysis requires that the impugned provisions pursue a pressing and substantial objective before they can be held to reasonably limit the *Charter*. The objective to be considered is that of the impugned measure itself, not the broader objective of the legislation in which the measure is found.[132]

91. In this regard, an impugned law's objective must be articulated specifically and with precision. As the Supreme Court of Canada recently held in *Frank v. Canada (Attorney General)*, "[i]f a legislative purpose is stated too broadly, the result may be to exaggerate the importance of the objective and compromise the analysis".[133]

92. To paraphrase *Fraser*:

> The [PHO] bears the burden of showing that [the impugned orders terms] and excluding [the petitioners] from accessing [a medical exemption] achieves a compelling state objective… it is the *limitation* that must be justified, not the legislative scheme as a whole… the "objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified.[134]

93. An impugned law's objective must be assessed at the time that it was adopted; the government cannot subsequently attach a new, more palatable objective to a law that previously pursued an impermissible objective. As the Supreme Court held in *R v. Big M*

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[132] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, at para. 144. See also *Withler v. Canada (Attorney General)*, 2008 BCCA 539, at para. 112.
[133] *Frank v. Canada (Attorney General)*, 2019 SCC 1, at para. 46. See also *R v. Sullivan*, 2020 ONCA 333, at paras. 102-103.
[134] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at para. 125.

Drug Mart Ltd., "[p]urpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable".[135]

94. The petitioners' position on the correct objective is set out below, but the key conceptual point is that as stated repeatedly by the PHO and other government officials, and as stated in the orders' preambles, the objective of the impugned provisions relates to incenting (or, to be put it more bluntly, to coerce) vaccine update.[136] Depending on how narrowly the objective is defined (addressed in the next section below), this may not constitute a pressing and substantial objective with respect to persons who are unable to be safely vaccinated but who are left off the PHOs closed exemption list.
95. The conclusory "evidence" as to Dr. Emmerson's subjective intention as to the orders' objective,[137] as the drafter of the impugned orders[138], is not controlling. For *Charter* purposes, the objectives of the order are for the court to determine based on their objective wording at the time that they were implemented.[139]
96. It is submitted that the extremely broad objectives claimed by Dr. Emmerson at paras. 73-74 are of the type warned against in *Fraser* paras. 102-103: they are "stated too broadly" in a way which "compromise[s] the analysis."
97. The court should thus find that true objective of the impugned provisions is <u>not</u> the reduction of transmission generally by eliminating unvaccinated persons from controlled spaces. This is clear from the following:

    a. Proof of vaccination requirements in the orders is imposed not on the basis of the level of transmission risk, but rather on the basis of whether or not the PHO considers the activity to be discretionary vs. essential.[140] For example, proof of vaccination is not required for vaccine-aged children attending school (the PHO

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[135] *R. v. Big M Drug Mart Ltd*, [1985] 1 S.C.R. 195, at para. 91. See also *R. v. Zundel*, [1992] 2 S.C.R. 731, at pp. 761-762.
[136] See evidence cited at footnote 4. Preamble R to November 12th variance [Emmerson #1 Ex 20 pp. 828] and the November 16th G&E order [Emmerson Ex 32 p. 1001] stated that "Programs that require that proof of vaccination be provided have been shown to increase vaccination uptake in populations." Both the March 10 G&E [Emmerson #1 Ex 40 pp. 1189-1190] and F&L orders [Emmerson #1 Ex 39 p. 1171-1172] include the following preambles: (S) "increase vaccination uptake"; (Z) "incentivize vaccination."
[137] Emmerson #1 paras. 72-74; Petition Response, para. 51.
[138] Emmerson #1 para. 1.
[139] See *R. v. Big M Drug Mart Ltd*, [1985] 1 S.C.R. 195, at para. 91.
[140] Baron #1 Ex C pp. 30, 33.

specifically stated at her October 5 press conference that this was because schools pose a "low risk" of transmission)[141], but is required for eating on an outside restaurant patio where the transmission risk is even lower;[142]

b. That the PHO permits unvaccinated *employees* to be present in a space (such as a restaurant), despite requiring *patrons* to provide proof of vaccination to attend in that same location;[143] and

c. Comments attributed to government guidance confirm that the Vaccine Passport Provisions are focused on incentivizing vaccination, rather than reducing transmission directly by removing potentially infectious persons from specified locations or events.[144]

98. Even if the broad objective claimed by Dr. Emmerson are correct with respect to the aims of the vaccine card provisions generally, they are not correct with respect to the *exemption provisions*, which is the limitation under challenge.

99. Alternatively, if the court finds that the impugned provisions have multiple objectives,[145] the allegedly valid objectives (to directly decrease transmission of Covid-19 by eliminating unvaccinated persons from controlled spaces) are coloured by the objective of compelling vaccination, resulting in the former objective weighing less heavily in a proportionality analysis.

100. Although the concept of colourability is typically employed in cases that concern questions of federalism, the petitioners contend that it may also prove useful where the objective of a law is being assessed pursuant to s. 1 of the *Charter*. As the Supreme Court of Canada held in *Reference re Upper Churchill Water Rights Reversion Act*: "in constitutional cases, particularly where there are allegations of colourability, extrinsic

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[141] Baron #1 Ex C p. 30.
[142] Emmerson #1 Ex 24 pp. 898-902.
[143] Emmerson #1 Ex 24 pp. 896, 898-902.
[144] Baron #1 Ex C pp. 31-33.
[145] In *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, the Court held that the impugned law in question had multiple objectives, and considered each of these objectives in turn under section 1.

evidence may be considered to ascertain not only the operation and effect of the impugned legislation but its true object and purpose as well."[146]

101. This same approach ought to apply in cases where a seemingly permissible objective under s. 1 is coloured by the presence of a secondary, impermissible objective. In this regard, it is noteworthy that that the purpose of the federal *Lord's Day Act* was assessed under both *Charter* <u>and</u> federalism grounds in *R v Big M Drug Mart*.[147] Indeed, where an impugned law is held to pursue an impermissible objective under s. 1, it may be said that the law is *ultra vires* the *Charter*, and as such neither federal nor provincial governments may legislatively pursue this objective.

102. An impugned law's true objective cannot be hidden behind a more palatable one. Governments cannot rely on a colourable objective under section 1 to justify indirectly what they could not justify directly. The petitioners contend that the orders' purposes have been so coloured, and therefore either do not constitute a pressing and substantial objective or weigh less heavily at the minimal impairment and proportionate effects stages of the s. 1 analysis, addressed below.

D. <u>No Pressing and Substantial Objective when properly defined</u>

103. Recalling that the warning in *Frank* against defining the legislative purpose too broadly, and the direction in *Fraser* that "it is the limitation that must be justified, not the legislative scheme as a whole", the petitioners assert that the relevant objective is the objective of the <u>exemption regime</u>, which is to incentivize and/or coerce British Columbians to be vaccinated who are off the PHO's exemption list. This is not a pressing and substantial objective with respect to persons such as the petitioners who cannot be safely vaccinate. To restrict access to "discretionary" activities purely to "incent" (or coerce) vaccination is clearly not a constitutionally valid purpose with respect to persons whose health would be imperiled by complying, such as the petitioners.[148]

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[146] *Reference re. Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, at p. 318. See also *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 148.

[147] *R. v. Big M Drug Mart Ltd*, [1985] 1 S.C.R. 195, at para. 141.

[148] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 141: "Parliament cannot rely upon an ultra vires purpose under s. 1 of the Charter. This use of s. 1 would invite colourability, allowing Parliament to do indirectly

104. If the court is of the view that this states the objective to narrowly, such that the objective should be stated more broadly as to incent/coerce vaccine uptake in all British Columbians generally, then, although this may constitute a pressing and substantial objective, the application of this objective to those who cannot be safely vaccinated fails at minimal impairment.

E. No Rational Connection

105. Where a provision is arbitrary under s. 7, it generally fails at the rational connection stage under s. 1.

106. The PHO's general statutory mandate is to protect public health; incentivizing vaccination for those who ought not to be vaccinated due to their rare medical risks and disabilities undermines, rather than furthers, that statutory objective.

107. There is no rational connection between unduly restricting access to medical exemptions, and incentivizing vaccination. Those with medical contraindications will not receive the vaccine because, if they are forced to choose between their health and their ability to participate in the same activities as their family, friends, and other associates, they will (or ought) to choose their health. That is the evidence before the court from the petitioners. The only effect of the Vaccine Passport Provisions on such persons is to impose a burden on them due to their disability. This does not advance the government's objective of incenting vaccination, or even of public health generally. In fact, it undermines it because if a person succumbs to the pressure created by the Vaccine Passport Provisions and is vaccinated despite their medical contraindication, it seriously jeopardizes, rather than improves, their own health, and places avoidable further demand on the already strained public health system.[149] It directly undermines the Respondents' "overriding goal of the public health response … to protect the most vulnerable members of society…".

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what it could not do directly." See also *Canada Without Poverty v. AG Canada*, 2018 ONSC 4147, at paras. 62 and 63.

[149] See *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, at paras. 108, 131.

F. No Minimal Impairment

108. The impugned provisions are not minimally impairing of the petitioners' *Charter* rights for the same core reason as they are discriminatory in the first place: they fail to grant full exemptions to those who are not on the PHO's approved list, even though persons like the petitioners are prevented from receiving a Covid-19 vaccine for the same reason as those on the PHO's approved list: a medical contraindication.

109. This failure of minimal impairment is underlined by the fact that the impugned orders' approach also contravenes the Province's Covid-19 Ethical Decision-Making Framework's requirement that "Any infringements on individual autonomy and choice must be carefully considered, and the least restrictive or coercive but effective means must be sought."[150]

110. The Respondents have adduced no evidence to satisfy their burden under minimal impairment.[151]

111. The impugned provisions suffer from further minimal impairment deficits:

a. The existing exemption procedure itself is far too burdensome. There are less-impairing options available.[152] The impugned provisions arrogate to the PHO veto power to approve every single exemption request. By this approach, the PHO departs from public health considerations of populations, and intrudes deeply upon the sacrosanct physician-patient relationship of the individual petitioners and those like them. Both the original Ontario[153] and Quebec[154] vaccine passport

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[150] Baron #1 Ex K p. 255 item B6.

[151] *Reference re Election Act (BC)*, 2012 BCCA 394, at paras. 38-40, 42-43 (Hinkson J.A. concurring): section 2(b) infringements of legislation restricting pre-writ political advertising not minimally impairing; AG had not adduced sufficient evidence to demonstrate minimal impairment, and reliance on "logic and common sense" ill-founded.

[152] See *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at pp. 33-34.

[153] Baron #1 Exs. Z-AA, see particularly Ex Z p. 592. The relevant section is 2.1(6)(c) of O. Reg. 364/20, and that "The requirement is only that an individual provide documentation, in accordance with Ministry guidelines, that they have a medical reason for not being vaccinated, and which specifies the time period of this exemption."] The petitioners acknowledge that the Ontario regime was subsequently changed in January 2022, when enhanced QR codes became mandatory, to require health professionals to submit a form to public health before an exemption QR code was issued.

[154] Baron #1 Exs. BB-CC; see particularly Ex BB p. 622: per Order-in-Council 1173-2021, a person is deemed to be "adequately protected against COVID-19" if they "[have] a contraindication to vaccination against the illness certified by a health professional qualified to make such a diagnosis and entered into the vaccination registry maintained by the Minister of Health and Social Services".

regimes, and the federal 'planes and trains' vaccine requirement[155] initially respected physicians' authority to 'unilaterally' issue of medical exemption letters to their patients in cases of *bona fide* medical contraindication, with no requirement for government approval and no opportunity for a government veto. Such letters were legally effective to grant access to an otherwise vaccine-passport-controlled venue or event, without a requirement of prior PHO approval. Minimal impairment requires BC to do the same as others have been able to do (see *Abbotzford (City) v. Shantz*). Alternatively, BC must to do so for at least the conditions on its current approved list (e.g., anaphylaxis, pericarditis, myocarditis, and other listed conditions) with a right to apply to the PHO for a medical exemption in respect of any *unlisted* condition which the treating physician considers would seriously jeopardize the patient's health to receive a Covid-19 vaccine but which are not already on the PHO's list. The record discloses no consideration of this issue by the PHO or evidence as to why following such approaches would not achieve the PHO's valid objectives.

b. It cannot be minimally impairing for the PHO to fetter the clinical judgment of doctors, whether through its closed list or its implied threats against doctors writing a letter for any condition off its list.[156] This places patients such as Ms. Shier and Ms. Kassian in an unconstitutional catch-22 which makes the exemption protocol entirely illusory for those British Columbians who have an unlisted condition.[157] The straitjacket created by the Vaccine Passport Provisions and the government's conduct is entirely unnecessary. This is no reason why the Vaccine Exemption Protocol Documents cannot include a general category for "any other medical condition or disability which, in the medical practitioner's *bona fide* clinical opinion, creates the risk that receiving a Covid-19 vaccine would seriously jeopardize the applicant's health." This is particularly so if the PHO maintains its veto power to reject unmeritorious applications.

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[155] Baron #1 Ex FF p. 678; Baron #2 para. 4, Ex C.
[156] See *R. v. Parker*, [2000] 49 OR (3d) 481, at paras. 154-156, 187-189.
[157] See *R v Parker*, [2000] 49 OR (3d) 481 paras. 154-163. See also *R v. Morgentaler*, [1988] 1 S.C.R. 30, at 33-34, 72-73.

c. The impugned provisions fail to recognize exemptions granted pursuant to vaccine passport orders in other provinces. There is no reason to compel persons who are ordinarily resident in other provinces and have gone through the onerous process of obtaining an exemption in accordance with their home province's vaccine passport order, to lose that constitutional protection when they cross a provincial border in order to work or visit family in British Columbia. It is impractical to expect persons who must travel for their business or employment to perform duplicate exemption applications in every province they must cross into. It is inhumane to exclude someone resident from another province from attending, for example, a parent's funeral reception in BC, which will often be on short notice which prevents the possibility of obtaining a BC PHO exemption in time. The record discloses no consideration of this issue by the PHO.

G. Disproportionality of effects

112. The harm inflicted on the petitioners' constitutionally protected rights is disproportionate to the Respondents' valid objectives, for at least the following reasons:

a. The Respondents have the burden of proof to demonstrate on the evidence the salutary effects of the vaccine passport regime by quantifying the estimated increase in vaccination rates said to result. The petitioners will address this point in reply once the Respondents have done so. For now, the petitioners note that public reports are that any early uptick in vaccination rates were short lived.[158]

b. The province has publicly recognized that the incidence of disabilities which will require medical exemptions, will be "rare" (preamble V to the Nov 16 G&E order states that "very few people fall into this category")[159]. The petitioners agree. That being the case, amending the orders to provide an effective, comprehensive, and accessible exemption regime to the very few people who need it will not materially impair the achievement of the government's valid purposes. The petitioners, if granted general vaccine passport exemptions, will still be subject to

[158] Baron #1 Ex R pp. 567-571.
[159] Emmerson #1, Ex 32 p. 1002.

the same public health requirements, such as masking and social distancing, which apply to all other persons. Crucially, the Respondents have adduced absolutely no evidence whatsoever as to the estimated marginal impact of permitting the exemptions sought in this proceeding on vaccination rates (or even transmission rates, if reducing them was in fact an of the order's objectives). The PHO cannot, by citing the precautionary principle, displace the demonstrable justification standard under s. 1 of the *Charter*. To do so would be to tolerate over-reactive public health measures which infringe *Charter* rights where those infringements are not necessary.

c. Even if a person has a condition on the approved PHO list, such as Ms. Rooke, the requirement from November 12, 2021 to February 15, 2022 to obtain separate permission for each event and location was unduly burdensome. The practical effect was that most persons suffered the exclusion of the orders rather than deal with the requirement to convince a bureaucrat to approve every single outing. This is not how a free and democratic society is supposed to function.[160] The record discloses no consideration of this issue by the PHO, apart from admissions in her order preambles and the reconsideration provisions that she was finding reconsideration requests so burdensome that she had to refuse to accept any more structural reconsideration requests under the November 12, 2021 Variance.[161]

d. The nature of the discriminatory harm to the petitioners is of great weight. For Shier and Ms. Kassian, they are entirely excluded from restaurants, indoor recreation facilities, cultural venues, and many other locations as patrons. Ms. Kassian has given heart-wrenching detail of how the orders cancelled her Christmas with those she loves.[162] They are permitted to attend controlled venues only to cook, serve, and clean as employees. The impugned orders segregates and marginalizes the already disadvantaged on the basis of disability – an appalling result in a society that claims to be increasingly aware of social injustice. Ms.

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[160] See *R v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at paras. 94-95. See also *R v. Oakes*, [1986] 1 S.C.R 103, at paras. 64, 66.

[161] Emmerson #1, paras. 105-106, 110-111.

[162] Kassian #1, paras. 30-31.

Kassian is now precluded from attending crucial social supports at her local community centre, library, and pool.

e. The government's failure to provide accessible and complete medical exemptions is having a ripple effect for the petitioners within the private sector, which is compounding the disproportionate harm. Ms. Rooke, for example, was dismissed from her employment on the basis of not having received a complete course of Covid-19 vaccine.[163] Having already lost the opportunity to meet with friends and extended family due to her vaccination status, she then lost her only other opportunity to see people outside her household in person in otherwise controlled venues.[164]

f. Incidents of medical exemptions on the basis of physical disability as sought in this petition, will be evenly distributed throughout the population. Respecting the constitutional rights of the petitioners and those like them will make an enormous difference in the life of the petitioners, but will not pose the public health risk identified in preamble CC(a) to the November 16 G&E order regarding "some age groups and some communities where vaccination rates continue to be low… continues to pose a risk to the health of the population, and constitutes a health hazard."[165] That is, making the medical exemption regime comprehensive, effective, and accessible will not result in no "clumping" of unvaccinated persons, and therefore no pockets of exponential growth.[166]

g. For those with heighted risks of an adverse reaction, and especially for medically complex people such as Ms. Shier, the choice to get vaccinated involves making deeply personal trade-offs about their own health. Informed consent is the touchstone of the law in this area,[167] recognizing that it is for the individual, not their doctor or the government,[168] to decide how much of a treatment or

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[163] Rooke #1, para. 10.
[164] Emmerson #1 Ex 34 pp. 1054-1059.
[165] Emmerson #1 Ex 40 p. 1191.
[166] See Emmerson #1 para. 37.
[167] See *Hopp v. Lepp*, [1980] 2 S.C.R 192, at pp. 209-210. See also *Ciarlariello v. Schater*, [1993] 2 S.C.R 119, at pp. 133-134.
[168] *Carter v. Canada (Attorney General)*, 2015 SCC 5, at para. 68, citing *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, at para. 49. See also *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, at para. 39.

prophylactic risk to run in pursuit of reducing other risk (here, contracting or transmitting Covid-19).

h. Alternatively, if certain British Columbians will elect, despite being medically contraindicated for the Covid-19 vaccine, to nonetheless be vaccinated in order to regain their freedoms from the impugned orders, it would not be on the basis of meaningful consent, but on the basis of the coercive effect of under-inclusiveness of the medical exemption regime, and the harm which the person would suffer from exclusion from public spaces, which is itself an unconstitutional effect (both by constituting substantive discrimination contrary to s. 15, and to jeopardizing their security of the person and life contrary to s. 7). It is one thing for government to coerce the 'consent' of members of the general population who are at low risk of adverse reactions to the Covid-19 vaccine; it is quite another thing for government to coerce those who are at heighted risk of an adverse reaction.

i. As noted above, there is no evidence of an appreciable improvement in the province obtaining its public health objectives to take an under-inclusive approach to medical exemptions. The s. 1 standard is a rigorous one.[169] Even if there was evidence that not recognizing the petitioners' exemption requests may prevent some Covid-19 transmission, that should not suffice to justify a blanket ban on the social participation of the petitioners. Some degree of Covid-19 transmission risk from unvaccinated persons is already present in vaccine passport venues and events both through attendee fraud (fraudulent QR codes are publicly available online)[170] and through the presence of unvaccinated persons who are expressly permitted by the orders (e.g. employees)[171]. Even vaccinated persons pose some transmission risk, albeit at lower rates, as is acknowledged throughout the Respondents' evidence. The complete exemption ban for Ms. Kassian and Ms. Shier cannot be justified simply on the basis of some small and unspecified reduction in Covid-19 transmission risk. The proportionality prong of the s. 1

[169] See *F.H. v. McDougall*, 2008 SCC 54, at para. 29, citing *R v. Oakes*, [1986] 1 S.C.R. 103, at paras. 68-68. See also *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 986-987. See also *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at para. 139.

[170] Baron #1 Ex C p. 33, Ex GG pp. 681-693.

[171] Emmerson #1 Ex 24 pp. 898-902.

analysis demands more than rational connection or minimal impairment – it requires the government to demonstrably justify, with evidence,[172] that the beneficial impacts of the impugned orders outweigh their constitutional harms to the petitioners. The court here is not simply asking whether there is <u>any</u> evidence in support of the orders as it might under typical administrative law review for reasonableness; the court is conducting a constitutional review which, at a minimum under *Doré*, "'works the same justificatory muscles' as the Oakes test."

j. But even further: this is not a case of public health vs. the petitioners s. 7 and 15 rights. The cost borne <u>by the petitioners</u> includes health costs as well. Thus, the petitioners' health weighs on both sides of the scales. The discriminatory impact of the impugned orders harms the petitioners' health in the name of protecting it,[173] either because:

   i. For those persons like the petitions who hold firm against the pressure of the Vaccine Passport Provisions, and are thereby denied in-person interactions and relationships in a host of scenarios, their physical (particularly for Ms. Shier), mental, emotional, relational, and spiritual health suffers – harms which the PHO has confirmed is one of the key harms of the pandemic itself.[174] While the Vaccine Passport Provisions permit most British Columbians to choose to be vaccinated in order to achieve re-admittance to those venues and relationships, it denies those benefits to the petitioners through no fault of their own, due only to their physical disabilities which prevent them from safely being vaccinated; or

   ii. For those persons whose disabilities place them at heightened risk of an adverse reaction, who succumb to the pressure of the Vaccine Passport Provisions and seek vaccination in order to gain equal access to regulated spaces, their health is seriously jeopardized through a vaccination which is dangerous for them.

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[172] *R. v. Sharpe*, [2001] 1 S.C.R. 45, at paras. 97, 110.
[173] *See Canada (Attorney General) v. PHS Community Services Society,* 2011 SCC 44, at paras. 108, 131, 133.
[174] Baron #1, Exhibit C pp. 30, 34.

k. The exclusion of the petitioners from an effective medical exemption regime results in additional harms being inflicted upon them in the midst of the underlying harms of intersection of the pandemic with their disabilities. This is contrary to the province's Ethical Decision-Making Framework's requirement that "Individuals or populations who face increased risk and/or disproportionate burdens during a pandemic should be supported, and the harms, risks as well as burdens should be minimized as far as possible."[175]

113. Courts should give due weight and attention to each of multiple infringements, as well as to the cumulative and intersectional impact upon all of them collectively. Professor Dwight Newman opines:

> What could appear to be a trivial infringement of one freedom might actually be more appropriately recognized as a more substantial infringement in the context of an intersectionality of different freedoms […] The possibility of such intersectional freedom infringement is a further reason to carry out independent development of each of the freedoms recognized within the section 2 fundamental freedoms clause - only in doing so can we fully identify the full depth of impacts on human freedom arising from certain state actions."[176]

114. Jurisprudence,[177] consistent with scholarly opinion,[178] already directs criminal courts to weigh the cumulative effect of infringements of multiple Charter breaches of legal rights (in particular, ss. 8, 9, and 10). This court should likewise weigh the cumulative and intersectional effect of the multiple ss. 7 and 15 *Charter* infringements in the s. 1 analysis. The impugned provisions simultaneously breached security of the

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[175] Baron #1 Exhibit K p. 255 item B7.

[176] Dwight Newman, "Interpreting Freedom of Thought in the Canadian Charter of Rights and Freedoms", (2019), 91 SCLR (2d) pp. 107 – 122, paras. 34-35; See also Jamie Cameron, "Big M's Forgotten Legacy of Freedom", (2020) 98 SCLR (2d), paras. 41-44: "Minimizing the severity of the violation [by addressing only one freedom] demonstrated a lack of insight into the scope and severity of the breach and how it engaged section 2's guarantees as an integral whole…[This] can diminish the significance and severity of compound violations."

[177] *R. v. Lauriente*, 2010 BCCA 72, para. 30: "…these breaches did not occur in a vacuum…the trial judge was entitled to have regard to all of these breaches, both in placing the seriousness of the individual breaches in context, and … in determining whether this pattern of disregard of the *Charter* by the authorities could bring the administration of justice into disrepute;" *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, paras. 26-29.

[178] James Fontana and David Keeshan, *The Law of Search and Seizure in Canada*, 11th ed. (2019), Ch 24, §5: "…courts are not to consider breaches of *Charter* rights in a vacuum… they should take into account the cumulative effect of multiple *Charter* breaches."

person and equality rights. It is the total constitutional harm which must be weighed in the proportionality analysis under s. 1.

VIII. <u>The impugned provisions are in any event unreasonable</u>

115. If the court finds that the petitioners have proven neither a breach of their s. 7 or s. 15 rights, the petitioners nonetheless assert that the orders must be struck down as unreasonable under *Vavilov*. The arguments above regarding arbitrariness, lack of rational connection, and minimal impairment, apply equally to a reasonableness review under *Vavilov*. There is no rational chain of analysis with respect to the impugned provisions' impact on British Columbians such as the petitioners.[179]

IX. <u>Costs</u>

116. The petitioners propose that submissions on costs be deferred until after this court's judgment on the merits.

X. <u>Orders Sought</u>

117. The petitioners seek the declaration and order set out in Part 1, paras. 1-3 of the Amended Petition. A cross-reference of where the documents referenced in paragraph 1 of the Petition can be found in the evidentiary record is set out in the appendix to this argument.

118. The declaration of unconstitutionality (if the orders are still in force, it can be a suspended declaration, together with an order quashing the impugned orders, or the vaccine card provisions of them) will give the Respondents the opportunity to draft constitutionally compliant medical exemption provisions in any replacement order, whether now or in the upcoming fall respiratory season when the PHO has stated vaccine cards may need to be resorted to again.[180] A *Charter* declaration in respect of since-repealed orders was granted in *Beaudoin*.[181]

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[179] See *Beaudoin v British Columbia*, 2021 BCSC 512, at para. 236, citing *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 102.

[180] Emmerson Affidavit #1, Exhibit 38, p. 1161 and 1165-166; Dr. Emmerson's affidavit confirms the general seasonal pattern of Covid-19 transmission: Emmerson #1 para. 35.

[181] *Beaudoin v British Columbia*, 2021 BCSC 512, at para. 251.

119. The orders requiring the PHO to publicly state that doctors' letters in support of exemption applications are not restricted to the PHO's closed list of conditions, and asking the Colleges to communicate this to their members, will enable Ms. Kassian, Ms. Shier, and others in their position to seek the required letters in order to be able to make an exemption application to the PHO.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: April 1, 2022

Signature of Geoffrey Trotter
Lawyer for petitioners

XI. **Appendix – location in the evidentiary record at which the documents referenced in paragraph 1 of Part 1 of the Amended Petition may be found.**

Category	**Date**	**Location in Emmerson #1 (Ex and p.)**	**Location in Baron #1 (Ex and p.)**
Gatherings & Events ("G&E" order)	September 10, 2021	Ex 30 pp. 960-978	Ex F pp. 135-153
G&E order	October 25, 2021	Ex 31 pp. 979-998	Ex F pp. 115-134
G&E order	November 16, 2021	Ex 32 pp. 999-1019	Ex F pp. 94-114
G&E order	December 3, 2021	Ex 33 pp. 1020-1042	Ex F pp. 71-93
G&E order	December 22, 2021	Ex 34 pp. 1043-1070	N/A
G&E order	January 17, 2022	Ex 35 pp. 1071-1098	N/A
G&E order	February 16, 2022	Ex 36 pp. 1099-1127	N/A
G&E order	March 10, 2022	Ex 40 pp. 1186-1207	N/A
Variance	November 9, 2021	Ex 41 pp. 1208-1238	N/A
Variance	November 12, 2021	Ex 20 pp. 826-835	Ex F pp. 154-163
Public Guidelines for Request for Reconsideration (Exemption) Process affected by the Provincial Health Office Proof of Vaccination Orders	November 12, 2021	Ex 45 pp. 1246-1250	Ex H pp. 165-169
Public Guidelines for Request for Reconsideration (Exemption) Process affected by the Provincial Health Office Proof of Vaccination Orders	December 23, 2021	Ex 43 pp. 1241-1244	N/A
Form for Reconsideration (Exemption) Process for the Public affected by the Provincial Health Officer Proof of Vaccination Orders	November 12, 2021	Ex 46 pp. 1251-1253	Ex H pp. 170-172
Covid-19 Vaccine Medical Deferral form	October 28, 2021	Ex 42 pp. 1239-1240.	Ex I pp. 174-175
Food & Liquor ("F&L") Order	September 10, 2021	Ex 18 pp. 795-810	Ex E pp. 54-69
Food & Liquor ("F&L") Order	October 25, 2021	Ex 19 pp. 811-825	Ex E pp. 39-53

F&L Order	December 12, 2021	Ex 21 pp. 836-851	N/A
F&L Order	December 22, 2021	Ex 22 pp. 852-870	N/A
F&L Order	January 17, 2022	Ex 23 pp. 871-898	N/A
F&L Order	February 7, 2022	Ex 24 pp. 890-910	N/A
F&L Order	March 10, 2022	Ex 39 pp. 1168-1185	N/A