

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kassian v. British Columbia*,  
2022 BCSC 1603

Date: 20220912  
Docket: S2111137  
Registry: Vancouver

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

Before: The Honourable Chief Justice Hinkson

## Reasons for Judgment

Counsel for the Petitioners:

G. Trotter

Counsel for the Respondents:

J.K. Gibson  
A.C. Bjornson

Place and Date of Hearing:

Vancouver, B.C.  
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Place and Date of Judgment:

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## **Introduction**

[1] The petitioners challenge certain aspects of what I refer to in these reasons as the “Vaccine Passport Regime” contained in orders made by the Provincial Health Officer (“PHO”) in an effort to respond to the COVID-19 pandemic.

[2] The petitioners challenge the constitutionality of the vaccine passport provisions. Specifically, they say the medical exemption regime discriminates against persons with disabilities, contrary to s. 15 of the *Charter*, and is unjustifiably coercive, contrary to s. 7 of the *Charter*. They seek an order quashing and setting aside the orders that created the vaccine passport provisions.

[3] Alternatively, the petitioners assert that the orders must be struck down as unreasonable on judicial review.

## **The Parties**

[4] The petitioner, Sharon Kassian, is a mother and a school secretary.

[5] The petitioner, Veronica Shier, is a certified life coach.

[6] The petitioner, Erica Rooke, is a competitive swimmer and recent swim coach.

[7] I will refer to Ms. Kassian, Ms. Shier, and Ms. Rooke as the “Personal Petitioners”.

[8] The Canadian Constitution Foundation (“CCF”) is a nationally registered charity dedicated to defending the fundamental rights and freedoms of Canadians through public education, communication, and litigation.

[9] The respondent, Dr. Bonnie Henry, is the PHO, appointed pursuant to the *Public Health Act*, S.B.C. 2008, c. 28 [*PHA*].

[10] The Attorney General was named as a respondent in respect of the declaratory relief sought by the petitioners.

### Legislative Provisions

[11] The PHO's responsibilities are outlined in the *PHA* and include, among other things:

- (a) providing independent advice to the ministers and public officials on public health issues;
- (b) monitoring the health of British Columbians and advising, in an independent manner, the ministers and public officials on the need for public health related legislation, policies and practices;
- (c) working with the British Columbia Centre for Disease Control ("BCCDC"), and British Columbia's medical health officers to fulfill their legislated mandates on prevention, disease control and health protection; and
- (d) overseeing the work of medical health officers ("MHOs").

[12] One of the powers of a health officer that the PHO can exercise in an emergency is the power to issue orders respecting health hazards under Part 4 of the *PHA*.

[13] The term "health hazard" is defined in s. 1 of the *PHA* to mean:

- (a) a condition, a thing or an activity that
  - (i) endangers, or is likely to endanger, public health, or
  - (ii) interferes, or is likely to interfere, with the suppression of infectious agents or hazardous agents, or
- (b) a prescribed condition, thing or activity, including a prescribed condition, thing or activity that
  - (i) is associated with injury or illness, or
  - (ii) fails to meet a prescribed standard in relation to health, injury or illness.

[14] Section 30 of the *PHA* provides that a health officer (or the PHO in an emergency) can issue an order if they reasonably believe that, *inter alia*, "a health

hazard exists”, or “a condition, a thing or an activity presents a significant risk of causing a health hazard”.

[15] Section 31 of the *PHA* provides that a health officer (or the PHO in an emergency) “may order a person to do anything that the health officer reasonably believes is necessary for any of the following purposes [...] (b) to prevent or stop a health hazard, or mitigate the harm or prevent further harm from a health hazard”.

[16] Section 32 of the *PHA* permits a health officer (or the PHO in an emergency) to make orders in respect of, *inter alia*, “a place”, including that a person not enter a place, and s. 39(3) of the *PHA* permits an order to be made in respect of classes of persons.

[17] Part 5 of the *PHA* provides for “emergency powers” that be exercised in an emergency. An “emergency” is defined as “a localized event or regional event that meets the conditions set out in section 51(1) or (2), respectively”. “Regional event” is in turn defined to mean “an immediate and significant risk to public health throughout a region or the province”.

[18] Section 52 of the *PHA* provides conditions that are to be met before the Part 5 emergency powers may be exercised.

[19] Section 67(2) of the *PHA* permits the PHO to exercise a power or perform a duty of a “health officer” during an emergency.

## **Background**

[20] The regional health authorities (Fraser Health Authority, Interior Health Authority, Island Health Authority, Northern Health Authority, and Vancouver Coastal Health Authority) are regional health boards designated under the *Health Authorities Act*, R.S.B.C. 1996, c. 180. The health authorities are responsible for implementing the *PHA* and its regulations within their jurisdiction.

[21] The first diagnosed case of COVID-19 in British Columbia was discovered on January 27, 2020. By early March of that year, public health officials understood that

the SARS-CoV-2 Virus (the “Virus”) was the infectious agent causing outbreaks of COVID-19 and that gatherings of people in close contact could cause transmission.

[22] On March 17, 2020, the PHO issued a Notice of Regional Event under s. 52(2) of the *PHA*, designating the transmission of the Virus, which has caused cases and outbreaks of a serious communicable disease known as COVID-19 among the population of British Columbia, a regional event as defined under s. 51 of the *PHA*. That provision allows the PHO to exercise powers under Part 5 of the *PHA* such as making oral and written public health orders.

[23] On March 18, 2020, the Minister of Public Safety issued a declaration of a state of emergency in British Columbia and made Ministerial Order M073, [MO73] issued under the *Emergency Program Act*, R.S.B.C. 1996, c. 111. The recitals to this order stated:

WHEREAS the COVID-19 pandemic poses a significant threat to the health, safety and welfare of the residents of British Columbia, and threatens to disproportionately impact the most vulnerable segments of society;

AND WHEREAS prompt coordination of action and special regulation of persons or property is required to protect the health, safety and welfare of the residents of British Columbia, and to mitigate the social and economic impacts of the COVID-19 pandemic on residents, businesses, communities, organizations and institutions throughout the Province of British Columbia.

NOW THEREFORE I declare that a state of emergency exists throughout the whole of the Province of British Columbia.

[24] The declaration of the state of emergency was extended a number of times, but eventually expired as of 11:59 p.m. on June 30, 2021.

[25] At the time the petition was made, all individuals living in or visiting British Columbia who were five years of age and older were eligible to receive a Health Canada-approved vaccine.

[26] As set out in the affidavits of Dr. Brian Emerson, the Deputy PHO, public health is one component of British Columbia’s health system and shares the same overall goals of other parts of the system: reducing premature death and minimizing the effects of disease, disability, and injury. This component focuses on the health of

populations as a whole, rather than providing health care to individuals with health conditions.

[27] One of the goals of public health, according to Dr. Emerson, is to prevent and manage outbreaks of disease within the population as a part of the responsibility for developing and delivering province-wide vaccination programs, including the oversight of and administration and insurance of the various vaccinations available to treat COVID-19.

[28] On August 23, 2021, the PHO announced a British Columbia domestic Vaccine Passport Regime, a system for officially proving an individual's immunization against COVID-19 and requiring such proof in certain circumstances. 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.

### **The Impugned Orders**

[29] On September 10, 2021, the PHO issued two *PHA* orders which the petitioners challenge:

- (a) the Gathering and Events Order ("G & E Order") - September 10, 2021 (replaced by PHA Orders issued on October 25, November 16, December 3, December 22, 2021; and January 17, January 27, and February 16, 2022), and
- (b) the Food and Liquor Serving Premises Order ("FLSP Order") - September 10, 2021 (replaced by PHA Orders issued on October 25, December 12, December 22, 2021; January 17, February 7, February 16, 2022).

(collectively, the "impugned Orders").

[30] The stated objectives of the impugned Orders included:

- (a) reducing the risk of infection, severe illness, and death for all vaccination-eligible age groups and those who are not eligible for vaccination;
- (b) reducing the likelihood of transmission in the higher risk setting of social mingling coupled with alcohol consumption, which is associated with increased transmission of the Virus;
- (c) increasing vaccination uptake in populations, thereby reducing the public health risk of the Virus;
- (d) implementing full vaccination for those without medical exemptions, because doing so provides more effective and durable protection against infection and severe illness than natural immunity from prior COVID-19 infection alone, or natural immunity plus a single-dose of vaccine; and
- (e) preserving the ability and resources of public health and the health care system to protect and care for the health needs of the public, including providing care for health needs other than the Virus (such as cancer care and cardiac care).

[31] The impugned Orders referenced the consideration given by the PHO to current scientific evidence regarding of the utility of testing for COVID-19 infection and indicated that testing is generally not an adequate substitute for vaccination, but may form one the of additional layers of protection needed to protect higher risk populations, such as during the roll-out of vaccinations.

[32] The preambles to the impugned Orders each included an assertion that the PHO had considered the rights and freedoms guaranteed under the *Charter* and that those rights were considered in a context where proportionate, precautionary, and evidence-based measures, including vaccination, are necessary to prevent loss of life, serious illness, and disruption of the health system and society.



[33] In the PHO's FLSP Order dated September 10, 2021, proof of vaccination or exemption was made a requirement for adult patrons of certain food and liquor serving premises as of October 24, 2021.

### **Initial Exemptions from the Vaccination Passport Regime**

[34] The requirements of the impugned Orders included that attendees at certain establishments and events provide proof of vaccination or exemption, but provided that those affected could request an exemption or reconsideration under s. 43 of the *PHA*.

[35] On September 15, 2021, the PHO published a one-page document titled "Valid contraindications and deferrals to COVID-19 vaccination".

[36] On the same day, the British Columbia College of Physicians and Surgeons (the "College") published a document titled "Guidance re: valid contraindications and deferrals to COVID-19 vaccination", and provided a link to the PHO publication with the following statement: "[t]he 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". The College referenced and linked its practice standard on "Medical Certificates and Other Third-party Reports" to this document, which warned registrants that "[t]he College may consider the provision of untruthful information [...] in [...] medical certificates or reports as professional misconduct."

[37] On October 15, 2021, the College issued a publication titled "How to verify a legitimate COVID-19 vaccine exemption or deferral", which stated that "[a]ccording to the Provincial Health Officer, the reasons outlined in the deferrals to COVID-19 vaccination table are the only valid reasons for a COVID-19 exemption or deferral. Legitimate exemption or deferral letters must state one of these valid reasons." The underlined text linked to a version of the PHO's "COVID-19 Vaccine Medical Deferral" form which contained a list of medical reason(s) for temporary deferral.

[38] The requirement for proof of vaccination through the British Columbia Vaccine Passport Regime was continued in the PHO's FLSP Order applying dated October 25, 2021.

[39] After the Vaccine Passport Regime was announced, some individuals applied for exemptions.

### **The Variance Order and Amended Exemption Process**

[40] On November 12, 2021, the PHO exercised her power pursuant to ss. 39(6) and 54(1)(h) of the *PHA* to issue Variance of Gatherings and Events and Food and Liquor Serving Premises Orders to Suspect Reconsideration re: Proof of Vaccination (the "Variance Order"). The Variance Orders provided that the PHO would no longer consider reconsideration requests under s. 43 in respect of certain public health orders other than on the basis of a medical deferral to a vaccination. In other words, she would not consider requests to reconsider or vary the G & E or the FLSP Orders generally. However, she would still consider requests for reconsideration of a medical deferral to vaccination made on the basis that the health of the individual would be seriously jeopardized if the individual were to comply with the impugned Orders. The Variance Order had retroactive effect.

[41] The Variance Order required that an exemption request comply with the guideline documents posted on the PHO's website, which included:

- (a) the Form for Reconsideration (Exemption) Process for the Public Affected by the Provincial Health Officer Proof of Vaccination Orders (the "Exemption Form");
- (b) a COVID-19 Vaccine Medical Deferral Form (the "Deferral Form"); and
- (c) Public Guidelines for Request for Reconsideration (Exemption) Process affected by the Provincial Health Officer Proof of Vaccination Orders (the "Guidelines").

[42] The Guidelines, which were also issued on November 12, 2021, provided general principles for the exemption process and offered a route for questions about the process to be addressed by the PHO or her office. The Guidelines explained that proof of vaccination was required to access certain inside activities or events to mitigate public health risks associated with transmission and outbreaks of COVID-19 by preventing and reducing the risk of infection in community settings. The Guidelines also stated that the intention of vaccine requirements was to reduce COVID-19 case rates, outbreaks, hospitalizations, critical care admissions, and deaths, protect people who cannot be vaccinated and those whose level of protection may be lowered due to age or immunocompromise, and to protect our healthcare system.

[43] The Guidelines outlined the process for consideration of a variation of the impugned Orders or a patient-specific medical exemption from the application of the Vaccine Passport Regime, on the basis either of a serious adverse event after the first dose of vaccine or a pre-existing medical condition that warrants exemption for a period of time. For people with a pre-existing medical condition, the Guidelines required that they have their medical practitioner complete the medical deferral form explaining the reasons for the exemption.

[44] The Guidelines included the following explanatory note on their first page:

These guidelines provide some general principles for requests for reconsideration of these Orders. If you would like the PHO to depart from these general principles in considering your request, please explain why. If you have questions about this process please contact the Office of the Provincial Health Officer at the contact information below, with the subject line "Requests for Reconsideration Question".

[45] The initial iteration of the Guidelines stated that exemptions would generally be considered for one type of activity or event, or recurring activities or events, per request.

[46] The Exemption Form accompanying the Guidelines 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, and why alternatives were insufficient, by

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 by submitting “a completed COVID-19 Vaccine Medical Deferral form that has been filled out by a medical practitioner.”

[47] In the case of a patient-specific medical exemption, the applicant’s physician or nurse practitioner had to submit a Deferral Form on which they checked off a medical reason for requesting a temporary deferral of vaccination. Among the reasons to choose from were anaphylaxis, receipt of anti-SARS-CoV-2 monoclonal antibodies or convalescent plasma for treatment or prevention of COVID-19 (except tocilizumab or sarilumab), diagnosis of multisystem inflammatory syndrome, physician-diagnosed myocarditis or pericarditis following the first dose, or a serious adverse event following the first dose of vaccine.

[48] There were also directions for physicians on the Deferral Form concerning referral for assessment in the case of anaphylaxis and recommended deferral periods.

[49] The Deferral Form provided no options for a person who had not already had an adverse reaction to a first dose or who had an adverse reaction to a first dose but who had not obtained a public health recommendation that they should avoid a second dose.

[50] It required a doctor to complete a statement reading:

I, \_\_\_\_\_, attest that proceeding with COVID-19 immunization for this individual would seriously jeopardize their health.

[51] The back of the form listed both reasons for temporary deferral and matters that did not qualify as contraindications to COVID-19 vaccination.

### **The Personal Petitioners**

[52] The personal petitioners are supporters of public vaccinations, both generally and with respect to the Virus. They do not challenge the Vaccine Passport Regime

in general; their challenge is only to the Vaccine Passport Regime's alleged unconstitutional failure to provide an effective, comprehensive, and accessible regime for medical exemptions for persons such as themselves, whose medical issues do not fall within those set out in the Guidelines or on the Deferral Form.

**Ms. Kassian**

[53] Following her first dose of Pfizer COVID-19 vaccine on April 19, 2021, Ms. Kassian was diagnosed with brachial neuritis with scapular winging, a neurological condition causing extreme pain and partial paralysis of primarily her right, dominant arm. She contends that her brachial neuritis with scapular winging was caused by the injection she received. Ms. Kassian was pregnant at the time of the injection.

[54] On May 18, 2021, Ms. Kassian saw Dr. Irfan Abdulla, an orthopedic specialist. She deposed that he confirmed that her shoulder was structurally fine with no injuries, but that he suspected that the winged scapula was caused by brachial neuritis. She deposed that he told her that this was likely a rare reaction to her COVID-19 vaccine, but his consultation note to Dr. Paola Carnorlinga dated May 19, 2021 gave no such diagnosis.

[55] Ms. Kassian's family practitioner, Dr. Fan, received a letter from the Fraser Public Health Authority based on assessment by the Communicable Disease Nurse Coordinator, Adverse Events Following Immunization, Fraser Health Public Health. Her review in consultation with Dr. Mark Bigham, Medical Health Officer, Fraser Health Public Health, recommended no change to Ms. Kassian's immunization schedule following her brachial neuritis, noting that her condition was not a contraindication to receiving a second shot, and that she should consider proceeding for her own health, particularly in pregnancy, to provide optimal and sustained protection against COVID-19 infection.

[56] Ms. Kassian deposed that in May and early June of 2021, Dr. Fan and her neurologist, Dr. Stables, advised her against getting a second dose of COVID-19 vaccine, because the risk of doing so would cause further nerve damage.

[57] On June 3, 2021, Ms. Kassian saw Dr. Stables, a neurologist, who did an EMG and diagnosed her with brachial neuritis. Ms. Kassian alleges Dr. Stables told her that the conditions could be a rare side effect of the COVID-19 vaccine, but her consultation report dated June 4, 2021 contains no such diagnosis.

[58] On June 24, 2021, Dr. Stables signed a form in support of Ms. Kassian's application to the federal Vaccine Injury Support Program. On the form in a box entitled "Disease associated to Vaccine" Dr. Stables entered "[b]rachial neuritis".

[59] Ms. Kassian deposed that Dr. Stables was open to considering writing an exemption letter but that she has been unable to follow-up with her.

[60] On August 25, 2021, Ms. Kassian obtained a brief statement from her family doctor, that "[t]he patient above has an exemption from 2<sup>nd</sup> vaccination due to rare severe complication. Patient has had her first COVID vaccination."

[61] Ms. Kassian deposed that the physicians and a midwife she spoke to would not write her a letter in favour of an exemption for the following reasons:

- (a) public health "is involved" and deems Ms. Kassian "OK to receive a second dose";
- (b) doctors "can't write exemption letters for anything other than anaphylactic shock"; and
- (c) medical professionals are "not allowed" to write letters for Ms. Kassian's condition.

[62] Ms. Kassian deposed that since October 2021, when a second dose became required under the PHO's vaccine passport orders, she has been unable to engage in social activities that she otherwise would have.

[63] Ms. Kassian deposed that she has suffered chronic pain, which affects her work and daily activities with her now infant daughter. Given that her brachial neuritis is still unresolved, a half year later, and may be permanent, she does not want to

receive a second dose and risk even worse or longer-term or permanent nerve damage.

[64] Ms. Kassian deposed that even if only the Pfizer or Moderna mRNA vaccines posed a risk of re-triggering brachial neuritis, she does not want to take an adenovirus vector vaccine (e.g., Johnson & Johnson or AstraZeneca) because she “would prefer to take the risk of getting COVID [...] rather than run the risk of death from a vaccine-induced blood clot.”

[65] Ms. Kassian did seek the review of her request for exemption from the Fraser Health Medical Officer, supplying additional medical information in support of her request. Her request was denied, and the respondent conceded in oral argument that this exhausted her alternate remedies. But this, of course was short of a s. 43 *PHA* exemption request to the PHO.

[66] Despite being in possession of Dr. Fan’s letter of August 25, 2021, Ms. Kassian did not apply for a reconsideration under s. 43 of the *PHA*.

[67] Ms. Kassian argues that Dr. Fan’s letter of August 25, 2021 was obtained for employment purposes, and could not have been used for a medical exemption application under s. 43 of the *PHA* as it was not compliant with the requirements of the subsequently-issued impugned Orders and the Guidelines in that it did not give the required opinion that receiving a vaccine would “seriously jeopardize” Ms. Kassian’s health, and did not attach the underlying supporting medical records.

### **Ms. Shier**

[68] Ms. Shier was born with spina bifida and hydrocephalus. She has undergone over 15 surgeries, some of them with very poor recoveries. She is suspected of suffering from a scarring disorder.

[69] Ms. Shier deposed that she has chronic health problems and difficult experiences with medical treatments, including severe reactions to prescribed medications and anaesthesia, as a result of her underlying health conditions.

[70] Ms. Shier has relied for years on swim therapy at public swimming pools as a natural, cost-effective solution to ameliorate her chronic pain and other symptoms. Her limited financial resources meant that she could not afford increased chiropractic, physiotherapy and massage therapy which might have helped.

[71] Ms. Shier deposed that prior to March 2020, she spent about three hours each day in a swimming pool for swim therapy, and that with that regularity of swim therapy, her strength, flexibility, and endurance were maintained, she needed to receive trigger-point injections once per month, and needed to take pain medication and a muscle relaxant occasionally, usually around two to three days every couple of months, when her pain was unmanageable.

[72] She deposed when she was unable to perform her swim therapy, she experienced increased pain and medication side effects, less flexibility, strength, and endurance, and much more pain. She also she gained at least 15 pounds between March and September 2020 when swimming pools were closed, putting more strain on her joints and muscles, and making her more susceptible to injury, creating a vicious cycle.

[73] She was allowed to use her local pool for the first three and a half months of the Vaccine Passport Regime, attending three times per week. Although she still needed to receive the same three medications on the same increased frequency as when the pool was completely closed, she was able to halt her weight gain, and start reversing the degeneration of her muscles and joints, and reducing her pain. Ms. Shier deposed that over the course of the last 14 months she had approached, but not reached, the physical condition that she enjoyed prior to the swimming pool shutdown.

[74] The PHO order restrictions announced on December 22, 2021 resulted in her exclusion from all public swimming pools. She deposed that since then she has needed to increase the frequency of her trigger point injections to every ten days, and to take a course of her pain medication and muscle relaxants weekly rather than



every two months, but that even with that amount of medication, her chronic pain was worse than when she was in the pool daily prior to COVID-19.

[75] Ms. Shier also deposed that she believed her health would decline because of the Vaccine Passport Regime requirements since she would not have access to public pools.

[76] The respondents contend that, although the primary impact that Ms. Shier cites is her inability to swim at public pools, she has not provided any medical evidence supporting swimming as a therapeutic method. I accept that Ms. Shier has the ability to describe the benefits that she has enjoyed from her swimming regime, and I accept her evidence in that regard.

[77] Because of her complex and overlapping disabilities and past reactions to medications, and the fact that the approved COVID-19 vaccines have not been tested on persons with disabilities like her own, Ms. Shier concluded that receiving the COVID-19 vaccine would be too risky for her. She contends that no doctor would even consider writing her a letter as her disabilities are not on the approved PHO list.

[78] Ms. Shier has also deposed that her inability to apply for a medical exemption from the vaccine passport orders has meant that she has been unable to attend social events and see family, exacerbating the social exclusion that she already experiences due to her medical challenges.

[79] Ms. Shier gave evidence that she was unable to obtain a letter from a physician but described no efforts to obtain one. She has not applied for a reconsideration under s. 43 of the *PHA*.

### **Ms. Rooke**

[80] Ms. Rooke received a first dose of Pfizer COVID-19 vaccine in May 2021. Following her first dose, she initially experienced no ill effects, however, four days later woke up with a sharp, stabbing pain in her chest. She was taken to the hospital,

tested, and diagnosed with pericarditis, which required hospitalization and a lengthy period off work.

[81] Ms. Rooke deposed that her doctors told her that her pericarditis was likely a reaction to the COVID-19 vaccine. They prescribed her various medications which she started taking. On June 12, 2021, she returned to hospital due to a flare-up of chest pain.

[82] Her family doctor, Dr. Drake, provided an opinion that Ms. Rooke's pericarditis was likely secondary to her first dose of COVID-19 vaccine and reported that after consultation with a disease expert, Dr. Reynolds, he received a strong and clear recommendation that Ms. Rooke "should not receive a second dose of her COVID-19 vaccine".

[83] Ms. Rooke's condition was on the PHO's list, and she obtained a doctor's letter supporting her exemption from the vaccination requirements, but asserted that by the time she obtained it, the exemption regime was only available on an "activity-by-activity" basis, as blanket exemptions were precluded. Ms. Rooke deposed that she could no longer obtain a general exemption and instead had to submit a form to the PHO every time she wanted to do anything that requires a Vaccine Passport.

[84] Despite having Dr. Drake's letter, Ms. Rooke did not apply for a reconsideration under s. 43 of the *PHA*.

[85] Ms. Rooke deposed that, because of restrictions specific to the Northern Health Region, many of her social activities are curtailed.

[86] She also deposed that she has lost her job as a swim coach because of her non-compliance with the Vaccine Passport Regime.

### **The CCF**

[87] The CCF was established in 2002. It asserts that it envisions a Canada in which every Canadian is equal before the law and treated equally by governments, that individuals control their own destinies as free and responsible members of

society, and that governments are held accountable to our Constitution in making and applying laws, regulations, and policies. It relies on voluntary donations from donors across Canada.

[88] The CCF has a history of involvement in matters of public policy and law, especially matters involving the *Charter*, including litigation concerning the right to equality before and under the law, the right to life, liberty, and security of the person, and the principles of fundamental justice.

[89] Although the CCF is opposed to domestic vaccine passports generally, it brings particular constitutional challenge not against the Vaccine Passport Regime generally, but only with respect to its failure to provide required medical exemptions to all who are constitutionally entitled to them. The CCF alleges that the impugned Orders deny those who are unable, due to disability, to comply with the Vaccine Passport Regime access to aspects of daily living and thereby violate their rights under s. 15 of the *Charter*.

### **Relief Sought**

[90] The personal petitioners and the CCF seek a declaration, pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996 c. 241 [JRPA] and s. 24 (or alternatively, s. 52) of the *Charter* that the impugned Orders are of no force and effect, as they unjustifiably infringe the s. 7 and s. 15 rights of the petitioners and others requiring medical exemptions, and that exemptions from the impugned Orders are not provided in a way that accommodates the petitioners and their *Charter*-guaranteed rights.

[91] They also seek an order of mandamus compelling the PHO to request that the British Columbia College of Physicians and Surgeons and the British Columbia College of Nurses and Midwives announce to their members that they may write an opinion letter in support of a patient's medical exemption from the Vaccine Passport Regime in respect of any medical conditions, disabilities, or past vaccine reactions they deem appropriate.

[92] Finally, they seek an order of *certiorari* pursuant to the *JRPA* quashing and setting aside the Vaccine Passport Regime, including the Vaccine Exemption Protocol Documents, as it exceeds the statutory authority of their enabling statute and is unreasonable.

### Discussion

[93] The petition is brought pursuant to the *JRPA*, which includes the following definitions:

"statutory power" means a power or right conferred by an enactment:

- (a) to make a regulation, rule, bylaw or order,
- (b) to exercise a statutory power of decision,
- (c) to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,
- (d) to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, or
- (e) to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability...

"tribunal" means one or more persons, whether or not incorporated and however described, on whom a statutory power of decision is conferred.

[94] Section 2 of the *JRPA* applies to this judicial review. That section provides:

2(1) An application for judicial review must be brought by way of a petition proceeding.

(2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:

- (a) relief in the nature of mandamus, prohibition or certiorari;
- (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

[95] On an application for relief under s. 2 of the *JRPA*, the basic principle is that an applicant must first exhaust all adequate statutory remedies and that review must be of a final decision. Where a party has taken advantage of a reconsideration process, only the reconsideration decision may be judicially reviewed: *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3. It is only when the

administrative process has finished, or when it affords no effective remedy, that a party may proceed to court. See, for example, *Chu v. British Columbia (Police Complaints Commissioner)*, 2021 BCCA 174 at para 65; *Harelkin v. University of Regina*, [1979] 2 SCR 561; and *Strickland v. Canada (Attorney General)*, 2015 SCC 37. If the petitioners do not exhaust their alternate remedies, the court may decline to exercise its discretion to undertake judicial review until they do: *Beaudoin v. British Columbia*, 2021 BCSC 512 at paras. 75, 78, and *Klassen v. British Columbia (Attorney General)*, 2021 BCSC 2254 at paras. 37-42.

[96] The petitioners challenge certain aspects of the Vaccine Passport Regime contained in orders made by the PHO and contend that the November 12, 2021 Variance Order and subsequent orders exercising the PHO's power not to accept requests for reconsideration under s. 54(1)(h) of the *PHA* and the emergency powers set out in Part 5 are unreasonable and *ultra vires* of the PHO's powers under the *PHA*.

[97] As the relief they seek is unavailable through statutory mechanisms, the petitioners maintain that there is no adequate statutory remedy available to them, and they are therefore required to proceed directly to judicial review.

[98] The respondents argue that if the petitioners succeed on their application for judicial review, the appropriate remedy is to set the decision aside and remit the matter to the PHO for reconsideration.

## **Standing**

### ***The Personal Petitioners***

[99] The respondents challenge the personal petitioners' standing to bring their petition.

[100] Private interest standing exists where a party or parties have a personal and direct interest in an issue being litigated by virtue of its effect on them. The respondents concede that such an interest arises where the party has a private right infringed by a respondent, or where a decision will cause, or threaten to cause,

special damage to the party, beyond that suffered by the general public; *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45 [DTES] at para. 1.

[101] The personal petitioners contend that they have all suffered the unconstitutional impacts of the impugned Orders and have standing as of right.

[102] The respondents argue that to the extent the personal petitioners challenge the suspension of reconsiderations under the Variance Order generally, they do not have standing, as the medical deferral reconsideration option remained open to the petitioners, and the suspension of reconsideration for other reasons did not impact them.

[103] The respondents argue that the personal petitioners have not established they have the direct, personal interest in the impugned Orders required to advance their arguments on the basis of private interest standing. The respondents contend the personal petitioners cannot say that they were impacted by the impugned Orders because they have refused to seek exemptions that would permit them to access the facilities that require exemption: *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at para. 21, and *Klassen v. British Columbia (Attorney General)*, 2021 BCSC 2254 at para. 19.

[104] I am not persuaded that it is appropriate to deny standing when a petitioner or petitioners establish they have a personal and direct interest in an issue being litigated because of its effect on them. I find that the availability of alternate procedures is a matter to be addressed as an issue if the personal petitioners have standing, and that the personal petitioners have established that they do have a private interest standing.

### **CCF**

[105] The respondents also say that CCF should not be granted public interest standing in this petition.

[106] In restating the test for public interest standing in *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241, [CCD], the Court of Appeal commented that public interest standing is intended “to ensure that legislation and state action are lawful, that courts are accessible and that judicial resources are deployed economically and appropriately”. The Supreme Court of Canada has recently reaffirmed the three steps of the test in *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27:

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

[107] On the first step, CCF argues, and I agree, that if the individual petitioners have standing, then there is clearly a serious and justiciable issue raised.

[108] CCF contends, and I also agree, that the second and third steps of CCD should 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, and 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.

[109] The respondents argue that while the CCF cites access to justice issues and contends that it is unreasonable for disabled British Columbians to pursue a systematic constitutional challenge, none of the individual petitioners has applied for an exemption, so there is no basis for a constitutional challenge. The respondents concede that they do not oppose CCF being granted public interest standing if the individual petitioners have standing.

[110] Having determined that the personal petitioners enjoy private interest standing, and given the respondents' concession that they would not oppose public interest standing for the CCF if such standing was found for the personal petitioners, together with my findings with respect to the CCF, I find that the CCF has public interest standing in these proceedings.

### **Mootness**

[111] On March 10, 2022, the PHO announced that vaccine card requirements would be lifted by April 8, 2022 and that vaccination requirements for post-secondary students living in residence would be lifted at the same time. Relying on *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342, at p. 353, the respondents submit that the petition should be dismissed, as there is no longer any concrete legal dispute between the parties.

[112] A court may exercise its discretion to hear a matter in spite of mootness after weighing certain factors:

- (a) whether an adversarial contest continues to exist despite the disappearance of the concrete dispute;
- (b) whether the circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it; and
- (c) whether, in hearing the moot matter, the court would be straying outside of its proper role as an adjudicative body.

[113] The difficulty with the respondents' submission is that they could offer no assurance that the impugned aspects of the order would not be reintroduced if the communication and incidence of COVID-19 increased due to the anticipated fall cold and flu season or for any other reason.

[114] In the result I decline to dismiss the petition as moot.



### Prematurity

[115] The respondent argues that the petition is premature, as the petitioners have not exhausted their statutory remedies, and therefore the Court should not exercise its discretion to undertake a judicial review.

[116] The petitioners argue that they were precluded from availing themselves of other remedial options, and that there are three key questions of fact to be resolved for the disposition of their petition:

- (1) Did the impugned Orders, together with the Guidelines, create a closed-list system where those with unlisted disabilities were not eligible to apply for an exemption?
- (2) Even if the impugned Orders and Guidelines did not create a closed-list system, was the exemption regime illusory to the petitioners because the respondents' public statements, together with the statements of the College of Physicians and Surgeons, reasonably caused doctors to believe that they would suffer consequences if they provided an exemption letter for an unlisted condition, such that it was practically impossible for the petitioners to obtain a doctor's letter to even apply for an exemption?
- (3) Even if the petitioners could apply for an exemption, did the impugned Orders limit the exemption which could be granted to the petitioners to an activity-by-activity exemption, such that it was not possible for them to obtain a general exemption from the impugned provisions?

[117] The petitioners argue that I must not dismiss the proceeding as premature, when their inability to avail themselves of the statutory reconsideration springs from the respondents' very conduct which grounds part of their *Charter* claim. They say that only after I engage with the factual and legal issues raised by the petitioners can I determine whether they even had the ability to seek reconsideration. They contend

that the substantive analysis must be performed before the prematurity argument can be addressed.

[118] There is no evidence that the petitioners pursued the necessary medical opinions to support exemption requests prior to the issuance of the Variance Order, but in any case, the second clause of that Order provided that “[t]his suspension does not apply to a request for reconsideration brought by an individual on the basis of a medical deferral to vaccination made on the basis that the health of the individual would be seriously jeopardized if [they were to comply with the Orders....]”. In the result, notwithstanding the Variance Order, the petitioners would have been able to apply for exemptions if they could demonstrate that they had acceptable medical reasons for not being vaccinated.

### ***Closed-list System?***

[119] Ms. Kassian contends that there can be no prematurity in respect of her or Ms. Shier. They argue that even if the impugned Orders were reinstated today, they would be unable to avail themselves of the reconsideration process because their conditions do not fall within the PHO’s own reconsideration documentation, which contains a closed-list of eligible conditions and requires a doctor’s letter.

[120] Ms. Kassian contends that her 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, but she led no evidence from them to support her assertion.

[121] The respondents contend that there is no direct evidence from the specialists visited by Ms. Kassian that the Pfizer vaccine is the likely cause or even a possible cause of her brachial neuritis. Ms. Kassian’s evidence that such opinions were relayed to her verbally by various physicians is inadmissible hearsay.

[122] The initial November 12, 2021 iteration of the exemption process stated that exemptions "will generally be considered for one type of activity or event, or recurring activities or events, per request." However, the petitioners assert that ultimately the PHO never issued single or recurring event or activity exemption. They

maintain that instead, the Office of the Provincial Health Officer treated all exemption requests as blanket exemptions and only blanket exemptions were issued.

[123] The petitioners argue that the PHO's list does not include all of the severe COVID-19 reactions which are acknowledged by the 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, transverse myelitis, and Guillain-Barre Syndrome); and
- (b) the Health Canada product monographs and the Public Health Agency of Canada National Advisory Committee on Immunization documents similarly rare neurological side effects including Bell's Palsy, Guillain-Barre Syndrome, hypoesthesia, and chronic inflammatory demyelinating polyradiculoneuropathy.

[124] Dr. Emerson deposed that the PHO has never considered the Guidelines to be a closed-list of medical considerations that may warrant an exemption or deferral. Requests for reconsideration that seek to have the PHO depart from the general principles set out in the Guidelines can be, and have been, submitted.

[125] Dr. Emerson also deposed that, to date, the PHO issued approximately 113 exemptions broken down as 32 health care worker exemptions and 81 additional exemptions pertaining to the G & E Order. Seven of those exemptions issued were for reasons other than those expressly stated on the COVID-19 Vaccine Medical Deferral Form and included exemptions for medical conditions of history of hemolytic anemia, corneal grafts, Guillain-Barre Syndrome, platelet disorder, neurological condition, or mental health. Two of these seven exemptions were issued to health care workers and five were issued under the G & E Order. Of the seven exemptions granted that were outside of the list on the Medical Deferral Form, six were supported by a letter from the applicants' treating physician.

[126] The respondents argue that the PHO considered those exemption requests and, in appropriate circumstances, approved medical deferrals to vaccination for conditions that are not specifically listed in the Guidelines or the Medical Deferral Form.

[127] I reject the petitioners' assertions that the impugned Orders affect their rights and those of disabled persons whose conditions are not specifically included in Deferral Form. Those for whom it was dangerous to receive a vaccination had a remedy and were not prevented from obtaining and relying upon a doctor's evidence of their medical contradiction before the PHO, including after the Variance Order was made.

[128] The Deferral Form included two tick box options for "serious adverse event following first dose" the list of valid grounds for deferral on the front of the form included:

- (a) a serious adverse event following first dose of vaccine reported to the medical health office (MHO) and awaiting recommendation for further vaccination by a MHO; and
- (b) a serious adverse event following first dose of vaccine not yet reported to the MHO.

[129] Even if Ms. Kassian's doctor could not have ticked the box for the first category, she could have ticked the box for the second or written in a view that taking a vaccination would seriously jeopardize Ms. Kassian's health.

[130] I am not persuaded that the Guidelines created a closed-list system where those with unlisted disabilities were not eligible to apply for an exemption.

[131] Additionally, none of the petitioners applied for an exemption, something dealt with in further detail below.

***The Effect of the Respondents' Public Statements on British Columbia College of Physicians and Surgeons***

[132] The petitioners assert that their security of the person and life interests, and therefore their rights under s. 7 of the *Charter*, as well as their s. 15 rights to equality

under the law as persons with physical disabilities, were engaged by what they argue is the PHO's fettering of the clinical judgment of doctors. They allege that by coordinating communications about the Guidelines with doctors' regulator, the College, the PHO induced the College to threaten doctors to support the Guidelines or face professional discipline. This, they say, made it impossible for patients with conditions left off the approved PHO list to obtain a doctor's letter in support of an exemption application.

[133] The petitioners argue that the PHO's conduct resulted in the fettering of the clinical judgment of doctors, both by the allegedly 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.

[134] The petitioners argue that the impugned Orders 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 illusory to the petitioners.

[135] The petitioners argue that as a result of this chilling effect Ms. Shier and Ms. Kassian cannot even obtain a doctor's letter in support of an exemption, because their disabilities are not on the PHO's list of conditions approved for medical exemption. As a result, they assert that they have been denied the opportunity to even apply to the PHO for a medical exemption.

[136] The petitioners seek an order mandating the PHO to request the College and the British Columbia College of Nurses and Midwives (the "Colleges") to announce that physicians and nurse practitioner registrants are "permitted to write an opinion letter in support of a patient's medical exemption" from the impugned Orders in respect of "any medical conditions, disabilities or past vaccine reactions which the registrant in their clinical judgement believes in good faith means that proceeding with COVID-19 immunization would put the patient's health in serious jeopardy [...]."

[137] The respondents say this form of relief is improper and a veiled attempt to obtain an order impacting the Colleges without joining them as respondents. They contend that, consistent with her role under the *PHA* as the senior provincial physician providing advice on public health issues, the PHO will occasionally provide clarification of best public health practices to the public and to the medical profession.

[138] I find that the PHO did not mandate that the Colleges adopt the Guidelines in completing the supporting documentation, but rather provided general principles for reconsideration of the G & E and FLSP Orders.

[139] The petitioners' assertion that the respondents prohibited physicians in British Columbia from providing exemption letters is unfounded and incorrect. The admonition to its members by the College was that the College "may consider the provision of untruthful information [...] in [...] medical certificates or reports as professional misconduct". The suggestion that this obvious advice discouraged doctors from submitting truthful information to the PHO is without merit.

[140] Moreover, the respondents are clearly not responsible for the actions of the College or any other professional regulatory body.

[141] In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 73, Justice LaForest refused to accept what he described as a thin and impoverished vision of s. 15 of the *Charter* – that is, one that allowed governments to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of them.

[142] To borrow from that phraseology, I am not prepared to accept the thin and impoverished view of members of the medical profession advocated for by the petitioners. Their duties are to advocate for and promote the health and wellbeing of their patients. They were not prohibited, as the petitioners assert "from writing exemption letters for documented but unlisted medical contraindications, that endangered the health of the petitioners and public health generally".

[143] I dismiss the petitioners' application for an order of *mandamus* making any request of the College or the British Columbia College of Nurses and Midwives.

***Activity-by-Activity Exemption Only?***

[144] The petitioners contend that a government decision-maker cannot evade constitutional review in legal proceedings by making slight variations to regularly updated orders so as to make a previously unavailable exemption regime potentially available, and then fault a petitioner for not having pursued it.

[145] They say that the November 12, 2021 order, and all subsequent versions of it, purported to quash all outstanding reconsideration applications as to the structure of the orders, leaving only reconsideration for individualized medical exemptions compliant with a closed-list of potentially qualifying conditions, and only on an "activity-by-activity" basis.

[146] The basis for the petitioners' contention is denied by Dr. Emerson.

[147] Given my finding that the Deferral Form was not a closed-list and Dr. Emerson's evidence, I do not accept that the reconsideration applications were limited to individualized medical exemptions.

[148] Before the petition was filed, Ms. Rooke had obtained a supportive doctor's letter, but she contends that the exemption regime in force at the time only permitted her to apply for an exemption on an "activity-by-activity" basis. She contends that blanket exemptions were precluded, and reconsiderations of the Order itself were not permitted by the PHO's decision to stop reconsiderations apart from those made on medical grounds.

[149] While Ms. Rooke contends that if a blanket exemption had been available between November 2021 and January 2022, she would have pursued it, and maintains that such an exemption was not available during that period of time, that contention is belied by the evidence of Dr. Emerson. I am unable to determine what kind of exemption might have been granted to Ms. Rooke had she applied during

this time frame, but as I have determined above, her failure to make the application represents a failure to exhaust her alternate remedies before invoking the assistance of the Court.

[150] I thus find that Ms. Rooke was not precluded from seeking a blanket exemption. As she did not seek any exemption, her part of the petition is premature.

[151] Ms. Kassian and Ms. Shier assert that at the time that their petition was filed, there was no reconsideration process available to either of them, and no way for them to obtain a doctor's opinion letter to even submit to the PHO under s. 43, or to put before the Court.

[152] I have already rejected that submission.

***Did the Petitioners have an Alternate Remedy?***

[153] The respondents assert that the petition should be dismissed on the basis that the petitioners did not exhaust their remedy of a reconsideration pursuant to s. 43 of the *PHA*.

[154] The principle of internal exhaustion may 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; see *O.K. Industries Ltd. v District of Highlands*, 2021 BCSC 8, at paras. 111-122.

[155] The petitioners contend that the medical exemption/reconsideration path was not an adequate alternative remedy for any of the personal petitioners, at the time of filing their proceeding or later, before the rescission of the impugned Orders.

[156] The respondents assert that while the impugned Orders require that individuals show proof of vaccination to access certain venues and events, they expressly offer an exemption process on medical grounds. According to Dr. Emerson, none of the three petitioners applied to the PHO for reconsideration or exemption from the vaccine requirements under the impugned Orders as of March



11, 2022. The impugned Orders therefore did not prevent the personal petitioners from accessing venues and events; rather, their choice not to proceed to apply for exemption did.

[157] The petitioners assert that under the Guidelines and Deferral Form introduced pursuant to the Variance Order, the PHO would no longer consider granting the petitioners and others like them a general medical exemption from the Vaccine Passport Regime.

[158] They note that the Guidelines specified no time period for a decision on an exemption request, even though some exemption requests (such as to attend a funeral reception) may be time-sensitive and of extreme personal importance.

[159] Only Ms. Kassian indicated difficulty in obtaining an exemption letter, but on her own evidence, that difficulty stems from her physicians' alleged misunderstanding of the Guidelines, and is not a result of the impugned Orders. Notwithstanding the respondents' explanation to Ms. Kassian by letter dated February 4, 2022, it appears that Ms. Kassian has taken no steps to bring this alleged misunderstanding to her physicians' attention.

[160] Ms. Kassian's evidence of what she was told by doctors and a midwife is hearsay, and there is no evidence from the specialists visited by her that her brachial neuritis is likely caused by the Pfizer vaccine.

[161] In her second affidavit, dated March 31, 2022, Ms. Kassian deposed that Dr. Stables refused to complete a medical exemption form for her, but it is unclear on what basis Dr. Stables declined, or precisely how Ms. Kassian made her request.

[162] The respondents argue that Ms. Shier said that, through her own research, she has concluded that it would not be safe to take a COVID-19 vaccine, and that while she has deposed that she is unable to obtain a letter from a physician but describes no efforts to obtain one.

[163] There is an absence of evidence with respect to Ms. Rooke's efforts, if any, to obtain a supportive medical letter from any physician.

[164] I find that the personal petitioners have not exhausted the remedies available to them under the legislative scheme, and that had they pursued those remedies, the alternative procedures would not have been duplicative or ineffective.

[165] Given my findings with respect to prematurity, it is unnecessary for me to resolve the petitioners' other arguments with respect to alleged *Charter* breaches or the potential justification of any breaches through the application of s. 1 of the *Charter*.

**Costs**

[166] The petitioners submitted that submissions on costs should be deferred until after this Court's judgment on the merits.

[167] The respondents did not oppose such a result, and I will therefore await submissions from the parties either in writing or in person upon a schedule to be determined by their agreement within 30 days from the date of these reasons for judgment.

"The Honourable Chief Justice Hinkson"