

CANADA / JUDGMENT

Eliason v. British Columbia (Attorney General)

2022 BCSC 1604

COURT

Supreme Court of British Columbia

DECIDED

12 September 2022

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2022 BCSC 1604 Eliason v. British Columbia (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Eliason v. British Columbia (Attorney General),

2022 BCSC 1604

Date: 20220912

Docket: 220833

Registry: Victoria

Between:

Leigh Anne Eliason, William Robertson Prendiville, and Dawn Slykhuis

Petitioners

And

The Attorney General of British Columbia and the Provincial Health Officer of British Columbia

Respondents

Corrected Judgment: The text of the judgment was corrected at para. 44 on September 22, 2022

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Petitioners:

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W.M. Katz

Counsel for the Respondents:

J.K. Gibson

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Place and Date of hearing:

Victoria, B.C.

May 10 and 11, 2022

Place and Date of Judgment:

Victoria, B.C.

September 12, 2022

Introduction

- [1] The petitioners challenge the constitutionality of certain public health orders announced by the Public Health Officer (the "PHO"), and seek judicial review thereof. The impugned orders were announced on August 23, 2021, and are entitled "the Food and Liquor Serving Premises Order" and "the Gatherings and Events Order" (collectively referred to as the "Orders"). The Orders were published on September 10, 2021, and became effective on September 13, 2021. The Orders were updated between their issuance and ultimate expiry in April 2021, but remained substantively the same.

The Parties

- [2] The petitioner, Leigh Anne Eliason, is a mother and resident of Maple Ridge, British Columbia.
- [3] The petitioner, William Robertson Prendiville, works in building operations in New Westminster and is a hiking guide and resident of Burnaby, British Columbia.
- [4] The petitioner, Dawn Slykhuis, holds Bachelor and Masters degrees in Social Work from the University of Calgary, and works as a youth crisis clinician at Fraser Health in Port Moody, British Columbia.
- [5] The respondent, the Attorney General of British Columbia, is the legal adviser to the government of British Columbia, pursuant to the Attorney General Act, R.S.B.C. 1996, c. 22, s. 2(a).
- [6] The PHO is the senior public health official for British Columbia, appointed pursuant to the Public Health Act, S.B.C. 2008, c. 28 [PHA].

Background

- [7] "Public health" is one component of British Columbia's health system seeking to reduce the incidence of premature death and minimize the effects of disease, disability and injury.
- [8] The PHO leads the public health response to public health emergencies in the province, including addressing the COVID-19 pandemic. The PHO oversees and provides guidance and direction to the provincial Medical Health Officers ("MHOs").
- [9] The British Columbia Centre for Disease Control (the "BCCDC")--which is part of the Provincial Health Services Authority--is the scientific and operational arm of the PHO. In this role, the BCCDC provides communicable disease prevention and control programs for the Ministry of Health and is the provincial reporting centre for reportable cases of communicable diseases.
- [10] The BCCDC manages provincial programs and clinics that contribute to public health and help prevent and control the spread of disease in BC. It operates the provincial microbiology laboratory, conducts surveillance, analyses and investigations, and prepares reports on the prevalence and incidence of communicable diseases on behalf of the PHO. In this way, the BCCDC provides specialist, clinical, analytical, and policy support to the PHO, government, and health authorities, and diagnostic and treatment services to reduce disease.
- [11] The BCCDC maintains the "COVID-19 Dashboard", which is an online tool that provides information on COVID-19 cases, recoveries, deaths, hospitalizations, testing, and vaccinations in BC. The COVID-19 Dashboard is updated weekly.
- [12] On January 27, 2020, the first case of COVID-19 was diagnosed in BC.
- [13] On March 11, 2020, the World Health Organization declared the COVID-19 outbreak a pandemic.
- [14] In response to the pandemic, the Province and the PHO undertook a variety of measures that included health promotion, prevention, testing, case identification, isolation of cases, contact tracing, and vaccination.
- [15] On March 17, 2020, the PHO issued a Notice of Regional Event under s. 52(2) of the PHA that the transmission of the infectious agent SARS-CoV-2--which causes COVID-19--had caused cases, clusters, and outbreaks of COVID-19, and thus constituted a "regional event" as defined in s. 51 of the PHA. This declaration allowed the PHO to exercise powers under Part 5 of the PHA, including making oral and written public health orders in response to the pandemic.
- [16] On March 18, 2020, the Minister of Public Safety and Solicitor General declared a state of emergency throughout the province pursuant to the Emergency Program Act, R.S.B.C. 1996, c. 111, as a result of the pandemic. That declaration was extended multiple times and eventually expired at 11:59 p.m. on June 30, 2021.

The Orders

[17] On August 23, 2021, Premier John Horgan, Minister of Health Adrian Dix, and the PHO announced the upcoming issuance of the Orders. The terms of the Orders included as follows:

- a) as of September 13, 2021, people in British Columbia would be required to be partially vaccinated with at least one dose of a COVID-19 vaccine for access to certain businesses and events;
- b) as of October 24, 2021, people in British Columbia would be required to be fully immunized, with at least seven days having passed since receiving a second dose of an approved COVID-19 vaccine, to access the list of businesses and events;
- c) in the interim, where a community transmission had increased significantly, or where there are outbreaks, the requirements to be fully vaccinated to access the events and activities might be required at the direction of the local MHO; and
- d) proof of vaccination would also be required for people visiting from outside British Columbia.

[18] In announcing the Orders, the Province also stated, in part, that:

[G]etting vaccinated is the best choice to protect yourself, the people you love and to ensure you can continue to participate in these public and private events and settings. Our B.C. vaccine card is an essential interim action until we transition to a federally compliant proof of vaccine.

[19] Pursuant to the Orders, events and business for which proof of vaccination was required included:

- a) indoor ticketed sporting events;
- b) indoor concerts;
- c) indoor theatre/dance/symphony events;
- d) restaurants, cafes, and other establishments serving food and liquor;
- e) night clubs;
- f) casinos;
- g) movie theatres;
- h) fitness centres/gyms (excluding youth recreational sport);
- i) businesses offering indoor high-intensity group exercise activities;
- j) organized indoor events (e.g., weddings, parties, conferences, meetings, workshops); and
- k) discretionary organized indoor group recreational classes and activities.

- [20] Individuals without proof of vaccination could not access those spaces and/or participate in those activities. However, the proof of vaccination requirements did not apply to many locations, such as retail stores and libraries, among others.
- [21] The Orders included preambles explaining the PHO's considerations in their implementation, including the protection of more vulnerable populations--such as people over 70, those too young to be immunized, and those who had underlying conditions that caused them to develop lower levels of immunity to vaccines than most people.
- [22] The objectives of the Orders were said to include:
- a) reducing the risk of infection, severe illness, and death for all vaccination-eligible age groups and those 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 COVID-19 transmission;
 - c) increasing vaccination uptake in populations, thereby reducing the public health risk of COVID-19;
 - 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; 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 COVID-19 (e.g., cancer care and cardiac care).
- [23] The Orders also included a statement that the current scientific evidence indicated that testing was generally not an adequate substitute for vaccination, but might form part of additional layers of protection needed to protect higher risk populations--such as during the roll out of vaccinations. They also included the PHO's assertion that the Orders were made after the consideration of the rights and freedoms guaranteed under the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter]. The Orders stated they were issued in a context where proportionate, precautionary, and evidence-based measures--including vaccination--were necessary to prevent loss of life, serious illness and disruption of the health care system and society.

Exemptions under the Orders

- [24] The Orders also advised those affected that they could request a reconsideration under s. 43 of the PHA:

147. Based on public health, medical and scientific data, the PHO determined that a medical deferral-based exemption process including medical evidence and public health oversight was a reasonable and effective way to provide deferrals for people whose health would be seriously jeopardized by vaccination, while maintaining access to vaccines for those without medical contraindications who may choose vaccination to reduce their risk of serious illness, hospitalization and death due to COVID-19.

[25] Section 43 of the PHA provides that persons can seek a reconsideration of a public health order. Specifically, it states:

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

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

- (i) meet the objective of the order, and

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

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

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

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

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

- (i) is not relevant, or

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

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

- (c) confirm, rescind or vary the order.

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

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

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

- (7) For the purposes of this section,
- (a) if an order is made that affects a class of persons, a request for reconsideration may be made by one person on behalf of the class, and
 - (b) if multiple orders are made that affect a class of persons, or address related matters or issues, a health officer may reconsider the orders separately or together.
- (8) If a health officer is unable or unavailable to reconsider an order he or she made, a similarly designated health officer may act under this section in respect of the order as if the similarly designated health officer were reconsidering an order that he or she made.

[26] Subparagraph 54(1)(h) of the PHA provides that:

54(1) A health officer may, in an emergency, do one or more of the following:

[]

- (h) not reconsider an order under section 43 [reconsideration of orders], not review an order under section 44 [review of orders] or not reassess an order under section 45 [mandatory reassessment of orders] []

[27] The process for a medical deferral-based exemption in the Orders was to contact the PHO with a "signed and dated statement from a medical practitioner, based upon a current assessment, that the health of the person would be seriously jeopardized if the person was to receive the first or second dose of vaccine, and a signed and dated copy of each portion of the person's health record relevant to this statement."

[28] The process under s. 43 of the PHA required that a decision to vary an order be made by the PHO or their delegate, and did not permit a process where individual physicians who were not PHO delegates to decide and register medical exemptions.

[29] On October 8, 2021, the PHO and the Ministry of Health published "Guidelines for the Request for Reconsideration (Exemption) Process for Health Care Workers affected by the Provincial Health Officer Orders" (together with the updated guidelines issued November 12 and December 23, 2021, the "Guidelines").

[30] On October 28, 2021, the PHO issued two forms to permit individuals to request an exemption under s. 43 of the PHA:

- a) The "Medical Reporting Form", which can only be completed by a physician requesting a temporary or indefinite deferral of COVID-19 vaccination and must include the physician's recommendation to the patient with supporting rationale or consultation notes; and
- b) The "COVID-19 Vaccine Medical Deferral Form", which can only be completed by a physician requesting a temporary deferral for a patient from receiving the COVID-19 vaccination on the basis of the following conditions:

- i. anaphylaxis to components of both mRNA and adenovirus vector vaccine (i.e., polyethylene glycol and polysorbate 80);
- ii. receipt of anti-SARS-CoV-2 monoclonal antibodies or convalescent plasma for treatment or prevention of COVID-19 (except tocilizumab or sarilumab);
- iii. diagnosis of multisystem inflammatory syndrome;
- iv. physician-diagnosed myocarditis or pericarditis following the first dose of the COVID-19 vaccine, with no other cause identified;
- v. serious adverse event following the first dose of the COVID-19 vaccine reported to an MHO, and awaiting recommendation for further vaccination by an MHO; and
- vi. Serious adverse event following the first dose of the COVID-19 vaccine not yet reported to the MHO.

[31] Dr. Emerson deposed that the Office of the PHO (the "OPHO") received hundreds of such requests during the pandemic, including 404 requests relating to the Orders. He said that due to the amount of the OPHO and PHO's time and resources occupied by this process, the PHO determined that, in the interests of public health, it was necessary to decline to consider requests other than on the basis of medical deferral to vaccination until the levels of transmission, incidence of serious disease, and strain on the public health and health care systems had significantly reduced.

[32] The Guidelines for the deferral process provided general principles for such requests, but did not present a limited list of conditions for which medical deferral would be considered.

[33] On November 12, 2021, pursuant to ss. 39(6) and 54(1)(h) of the PHA, the PHO suspended the s. 43 reconsideration process, including for requests already received by the PHO but not yet considered (the "Variance Order").

[34] Both the November 12 and December 23, 2021 Guidelines include italicized language on the first page that reads:

These guidelines provide some general principles for request 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".

[35] The Variance Order did not apply to requests for reconsideration for 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 Orders. However, this was not challenged in the petition herein.

[36] The Variance Order required that the request comply with the guideline documents posted on the PHO's website. Guidance documents for medical deferral included:

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

The Petitioners

[37] The petitioners have all participated in public vaccinations. They do not challenge the Orders in general--their challenge is only to the alleged unconstitutional failure to provide an effective, comprehensive, and accessible regime for medical exemptions in the Orders provisions.

Ms. Eliason

[38] Ms. Eliason has a complicated medical history which includes a neuro-vestibular disorder, atrial fibrillation, and Wenckebach Syndrome. She has received all of the vaccinations required by the Canadian Immunization Guide.

[39] In her letter of February 22, 2017, Michele Aldrich, a certified ventricular therapist described Ms. Eliason's medical history as including "kidney disease, hypothyroidism, cardiac ablation and ongoing bradycardia" and stated that her medications are Synthroid, Wellbutrin and Oxycodone.

[40] Ms. Eliason's evidence is that in May 2021, she was advised by her physician, Dr. Sclater, that due to her underlying medical conditions, she should decline to receive a COVID-19 vaccination.

[41] In her affidavit sworn March 2, 2022, Ms. Eliason deposed that:

10. At or around November 2021, my family physician expressly noted that while he still believed that, due to my underlying medical conditions, the risk of receiving the COVID-19 Vaccine was significant, the Deferral Form did not have a space to accommodate these concerns. He therefore advised me, at that time, that he could not submit the Deferral Form in its current state as my conditions were not listed as one of the "Medical reason(s) for temporary deferral" as outlined and defined in the Deferral Form.

[42] Ms. Eliason says she cannot get a medical exemption, but also says that her physician "prepared and submitted a revised deferral form outlining the medical reasons that [she] is not recommended to take" the COVID-19 vaccine.

[43] As of the date of the hearing of the petition, Ms. Eliason has not been approved for an exemption and has not been able attend any businesses or agencies subject to the Orders.

Dr. Sclater

[44] Dr. Kevin Sclater has been Ms. Eliason's family doctor for some 30 years. In his affidavit sworn April 22, 2022, he deposed that:

4. I obtained a Doctor of Medicine (MD) from the University of Calgary in 1990.
5. I have worked as a family physician in BC since 1991 for over 30 years and currently treat patients at the Burke Mountain Medical Centre []
6. I have been [Ms.] Eliason's family physician since 2000.

Medical Exemption Requests from the Vaccine Card Orders.

7. In August 2021, I saw [Ms.] Eliason as a patient and expressly advised her that, due to her underlying medical conditions, the risk of receiving the COVID-19 Vaccine, and potential side-effects, were significant. I therefore provided her with a Doctor's Note to this effect [...]
8. It was and remains my medical recommendation that [Ms. Eliason] should not receive any COVID-19 vaccinations due to her increased risk of adverse medical events related to several conditions within her complex medical history.

[45] In a supplementary doctor's note prepared in support of Ms. Eliason's deferral application dated September 13, 2021, Dr. Sclater wrote:

[] I support [Ms. Eliason]'s informed decision to NOT receive any of the COVID-19 vaccines due to her chronic underlying medical conditions.

[]

To put this risk-benefit analysis into perspective, the risk of severe COVID-related illness or death for non-obese individuals under age 70 is very low (>99.7% recovery). We now know that COVID vaccine-related side effects involving the neurological and cardiovascular systems - areas where [Ms. Eliason] is vulnerable - are common. A quick database search done today reveals that "vertigo" after COVID vaccine administration is also common. According to the Vaccine Adverse Events Reporting System (VAERS), there were 5918 reported events which specifically included the word "vertigo" following COVID-19 vaccine injections in the United States. The true incidence of "vertigo" following vaccination may even be 10x greater due to the voluntary construct[ion] of the reporting system. For [Ms. Eliason], the risk of vertigo being aggravated is too great to risk. []

[46] Dr. Sclater's affidavit also included his evidence that:

14. Initially, when the [] Orders were first published, the medical deferral request form available from the BC Ministry of Health was so restrictive in its criterion for deferral that very few patients would qualify. Specifically, there was no mechanism for selecting a checkbox for a pre-existing medical condition that might be associated with an increased risk of vaccine-related adverse events. In practical terms, the very limited criterion for medical deferral included only previous severe COVID-19 vaccine-related adverse events

[]

20. Initially, when the [] Orders were first published, there was no mechanism available to provide Leigh with a medical deferral request. There was no "checkbox" that would allow for consideration of pre-existing medical conditions.
21. In or around February 2022, given the lack of information regarding an exemption to the [] Orders in [Ms. Eliason]'s circumstances, I indicated a willingness to [Ms. Eliason] to modify the Deferral Form to add [Ms. Eliason]'s concerns to the Deferral Form in the hopes of receiving an exemption on her behalf [] accompanied with a cover letter explaining that revision []

[]

24. Personally, I have had a fear of consequences from the College [of Physicians and Surgeons of British Columbia] for completing Deferral Forms. I am aware of a family physician colleague who has recently had his medical license suspended by the College for completing medical exemption letters. This fear of such consequences is one of the reasons that I delayed in completing the initial Deferral Form for Leigh when her "Medical reason(s) for temporary deferral" were not included within the narrow scope of the pre-printed Deferral Form.

- [47] On February 17, 2022, Dr. Sclater prepared a revised COVID-19 Vaccine Medical Deferral Form he says was submitted to the OPHO outlining the medical reasons that Ms. Eliason was not recommended to take doses of any recommended COVID-19 vaccine, stating:

x VESTIBULAR DYSFUNCTION - VERTIGO

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

Signature: "K. Sclater" Date: Feb. 17, 2022

- [48] As discussed below, there is no evidence that the Deferral Form was received by the PHO in February 2022. While Dr. Sclater deposes to his belief he sent it at that time, the only evidence of delivery is from his subsequent attempt to send the Deferral Form in April 2022.

Mr. Prendiville

- [49] Mr. Prendiville had a career in the tourism industry operating as a guide through various hikes and mountain ranges across the globe. He works in building operations in New Westminster and has received each of his standard vaccinations, as required and prescribed under the Canadian Immunization Guide.
- [50] On May 18, 2021, Mr. Prendiville received his first COVID-19 vaccination (a Pfizer vaccine). In the following days, he began to experience pain in his chest that radiated throughout his upper body, and by May 28, 2021, the pain increased, and he was unable to breathe without assistance. He was taken to hospital and was advised that he was fighting for his life.
- [51] Dr. Vandegriend, a cardiologist, determined that Mr. Prendiville had experienced an adverse reaction to the COVID-19 vaccination he had received, and as a result had developed pericarditis. He was told to avoid further COVID-19 vaccinations.
- [52] On November 3, 2021, Dr. Vandegriend submitted a COVID-19 Vaccine Medical Deferral Form request for a medical exemption under the Orders to the OPHO on Mr. Prendiville's behalf.
- [53] On December 15, 2021, the PHO authorized Ms. Prendiville's medical exemption on a temporary basis, and provided him with an exemption certificate. The temporary exemption was subject to the following mandatory conditions:
- a) the exempted party had to wear a mask when attending a "gathering", "event", or "premises" as prescribed in the Orders, except when consuming food or beverage or for personal hygiene;
 - b) the exempted party was permitted to make one physical/paper copy of the exemption certificate to present as official proof of his medical exemption from the proof of vaccination requirements in the Orders; and
 - c) the exempted party was not to otherwise copy, scan, or reproduce the exemption certificate in any way, nor was he permitted to share, transmit, disseminate, broadcast or publish it in any way, including without limitation by posting it on a website or social media, whether publicly or at all.
- [54] The exemption certificate provided that failure to comply with these conditions may result in the revocation of the exemption.
- [55] The exemption was subject to cancellation or amendment by the PHO if there was reason to believe that, due to changing circumstances involving the transmission of COVID-19 in British Columbia, it was in the public interest to amend the Orders, such that persons with medical deferrals who are not vaccinated should be required to undertake additional preventative measures or not be exempted from proof of vaccination requirements.

- [56] Enclosed with the exemption certificate was a letter stating that the PHO was "working with officials at the Ministry of Health to ensure that the electronic BC Vaccine Card and Accompanying QR code reflect any medical exemptions which have been granted."
- [57] It was Mr. Prendiville's evidence that since he received his exemption certificate in December 2021, his attempts to utilize the certificate for its intended purpose have largely been unsuccessful. He deposed that he has been turned away from the majority of businesses he attempted to access utilizing the exemption certificate, and that store owners and facility managers to whom he has presented the exemption certificate have repeatedly accused him of forging the document, stated they had never heard of anyone receiving such an exemption, told him to leave the premises, and refused him entry based on his vaccination status.
- [58] Mr. Prendiville deposed that even businesses that granted him access with his exemption certificate did so inconsistently. He said that staff members would occasionally ask him numerous questions about his personal medical conditions before granting him access or would simply decide that they could not let him in because they were unfamiliar with the document.

Ms. Slykhuis

- [59] Ms. Slykhuis is 39 years-of-age. She has received all of her Canadian Immunization Guideline vaccinations.
- [60] Ms. Slykhuis holds Bachelor and Masters degrees from the University of Calgary in Social Work. She worked for the first 18 months of the pandemic as a youth crisis clinician. She also worked as a private therapist and yoga instructor at her studio, RVN Wellness, in Port Moody. She is presently on leave without pay and gave evidence that her employment is now in jeopardy because of her inability to get exemption from the proof of vaccination programs.
- [61] On October 29, 2020, Ms. Slykhuis tested positive for COVID-19. She had mild symptoms and quarantined appropriately.
- [62] On April 28, 2021, Ms. Slykhuis received the Pfizer vaccine, and on May 18, 2021, started to experience sharp, shooting pain on the left side of her head. The pain continued intermittently for one week and she sought medical attention with no result.
- [63] Ms. Slykhuis swore an affidavit dated March 10, 2022, that included her evidence that:
14. On Wednesday May 18, 2021, around 12:30 pm, I began experiencing sharp, shooting pain in the left side of my head. The pain was so severe and I was unable to reduce it through pain killers, pressure, or massage. This pain continued intermittently for approximately one week. I saw my family doctor on May 18 and May 19, 2021 and he was unable to diagnose or treat this pain.

15. After approximately one week, the pain settled into chronic headaches, approximately five to six days a week. My family doctor ordered a Magnetic Resonance Imaging ("MRI") of my head and ear.
- [64] On August 21, 2021, Ms. Slykhuis underwent an MRI arranged by her family doctor.
- [65] Her March 10, 2022, affidavit goes on to state:
19. In or around September and October of 2021, I began to notice additional concerns including, numbness and loss of control in my hands. []
20. Additionally, in September 2021, I began noticing that my menstrual cycle had been disrupted. []
21. In October 2021, I began experiencing severe gastrointestinal symptoms, not related to food. []
22. On October 8, 2021, the left side of my body became numb and tingly. I was unable to see my GP due to his schedule so I phoned a walk-in-clinic. The physician I saw via telephone advised me to attend the hospital based on my description of symptoms. I went to Eagle Ridge Hospital in Port Moody [] where I waited several hours and completed blood work. The feeling returned to my limbs, and I left the Eagle Ridge Hospital without being seen by a physician.
23. On October 13, 2021, the left side of my body became numb and tingly again. I was increasingly falling and dropping things without cause or notice. I went back to Eagle Ridge Hospital and was seen by the Emergency Physician who was unable to detect any acute issues causing these symptoms. I received a head Computed Tomography [] while at Eagle Ridge Hospital which the Emergency Physician advised showed no sign of stroke or any other lesions. The Emergency Physician advised that I see an outpatient neurologist. []
- [66] Ms. Slykhuis also gave evidence that on or around October 14, 2021, she took steps to follow the Guidelines, which stated:

A request for reconsideration from a person seeking an exemption from the requirement to be vaccinated or to provide proof of vaccination must be made on the basis that the health of the person would be seriously jeopardized if the person were to comply with Order and must follow the guidelines posted on the Provincial Health Officer's website.

- [67] On October 25, 2021, Ms. Slykhuis emailed the OPHO requesting an exemption on "religious or conscience" grounds, saying she was a vegan/animal rights advocate. In that correspondence, she asserted that the Medicago COVID-19 vaccine would be a viable option for her to receive once it was approved. Medicago has now been approved by Health Canada.
- [68] Furthermore, Ms. Slykhuis also deposed as follows in her March 10, 2022, affidavit:

24. On November 8, 2021, I was finally able to see saw Dr. Li, at the Burnaby Clinic, by video conference. During this consultation she described my symptoms as "common side effects to the COVID-19 Vaccine" and stated an additional dose "would not likely be without consequence." During this consultation, Dr. Li referred to the mandates as the "social consequences" I would have to weigh as a consideration and advised that another dose of the COVID-19 Vaccine would likely cause further harm []
25. At no time during the Dr. Li Phone Consultation did Dr. Li recommend a second dose of the COVID-19 Vaccine.
26. On November 8, 2021, Dr. Li prepared a written report of her findings [] Upon review of the [written prognosis], I was shocked to see that her written recommendation was in direct contrast to the advice she had provided in [her phone consultation]. []
- []
29. On December 29, 2021, I saw Dr. Li again for a brief phone call. During the phone call she stated that she could not sign exemptions for the second dose of the COVID-19 Vaccine as the Board of Neurologists (the "Board") recommends full vaccinations. She stated that she has previously inquired as she has several patients with the same conditions and symptoms as me but that she has been unable to sign exemptions for them due to the recommendations of the Board.
- []
37. On January 20, 2022, I received notification that my exemption request was denied [] [The denial] states that the [OPHO] will not accept further information, documentation or requests for reconsideration respecting this matter and that the decision is final. [...]
- [69] Ms. Slykhuis gave evidence that, to date, her family physician has refused to sign any form permitting an exemption. When he provided her with a copy of the COVID-19 Vaccine Medical Deferral Form, she concluded that it did not take into consideration any of those individuals who may be suffering from a reaction to the COVID-19 vaccine--as she alleges she was.
- [70] Her March 10, 2022, affidavit continues:
45. My GP has advised me that his reluctance to complete the B.C. Deferral Form is due to concern about the College of Physicians and Surgeons advising physicians not complete these exemptions

46. My inability to work or access services in my community has resulted in severe physical and mental health symptoms. As a mental health clinician and health care worker, I do as much as I am able to in order to maintain my health but living in chronic pain without an income or access to services has had a severe impact on my functioning and health. Because of the order banning gatherings in the homes of the unvaccinated, I spent Christmas 2021 alone and at home in isolation.
47. My [e]xemption [d]enial states there are no reconsiderations allowed and on February 9, 2022 it was announced that the mandates would be extended to all licensed health professionals with regulatory bodies in B.C. requiring vaccinations by March 24, 2022. I live in daily fear of losing my license to practice Social Work and my career of 18 years, due to my medical inability to receive another COVID-19 Vaccine.
- [71] Ms. Slykhuis has another referral to a different neurologist, but understands that the wait-time to see this neurologist is 8-12 months.
- [72] As I discuss below, although she says she has been "denied an exemption", Ms. Slykhuis has not submitted a COVID-19 Vaccine Medical Deferral Form to the OPHO in support of her requested deferral, despite advising the OPHO of her intention to do so.
- [73] To date, Ms. Slykhuis has not been granted an exemption from the vaccine requirements in the Orders.

Relief Sought

- [74] None of the petitioners are challenging the general importance of receiving vaccinations, and in particular, COVID-19 vaccines.
- [75] Their petition challenges the constitutional validity of the Orders under the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 [JRPA], as allegedly limiting their ability to exercise their rights in a free and democratic society, as they assert that they have medical restrictions and limitations that prevent their ability to receive a full course of the vaccines contemplated by the Orders.
- [76] The petitioners seek following relief:
- a) A declaration that the Orders announced by the PHO on August 21, 2021, and published on September 10, 2021, made under the PHA unconstitutional and of no force or effect, as being contrary to s. 52(1) of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
 - b) Alternatively, a declaration that the Orders are unconstitutional and of no force or effect, as being contrary to s. 24(1) of the Charter.
 - c) Alternatively, an order setting aside the Orders as an unreasonable, unjustified, or invalid use of legislative authority pursuant to s. 7 of the JRPA.

- d) An order that the petitioners be entitled to costs, as assessed by this Court.

Issues

[77] The issues on this petition are as follows:

- a) Do the petitioners have standing to bring the petition?
- b) Is the petition moot?
- c) Have the petitioners exhausted all alternate remedies?
- d) Did the Orders infringe on the petitioners' rights under ss. 2(c), 6(2)(b), 7, or 15 of the Charter?
- e) If the Orders infringed on the petitioners' Charter rights, were such limits justified under s. 1?

Analysis

Do the Petitioners have Standing to Bring the Petition?

[78] Private interest standing exists where the petitioner has a personal and direct interest in an issue being litigated by virtue of its effect on them. Such an interest arises where the petitioner has a private right infringed by the respondent, or where a decision will cause or threaten to cause special damage to the petitioner, beyond that suffered by the general public: *Emerman v. Association of Professional Engineers*, 2008 BCSC 1186 at para. 19.

[79] The petitioners say they have personally suffered an unconstitutional impact from the Orders.

[80] There is some evidence of the impact of the Orders on the petitioners arising from their lack of proof of vaccination--or in the case of Mr. Prendiville, the exemption document that he received.

[81] The respondents deny that the petitioners have suffered any unconstitutional impact, because two of them have not properly pursued the available pathway to seek a medical deferral-based exemption from the PHO, and the third already has an exemption.

[82] While this issue may be dispositive of the petition, I am not persuaded that this submission has relevance to the issue of standing. I find that the petitioners have established the direct, personal interest in the Orders required to advance their arguments on the basis of private interest standing.

[83] While it may be that the petitioners cannot succeed to the extent that they challenge the suspension of reconsiderations under the Variance Order generally, I am again not persuaded that this submission has relevance to the issue of standing.

[84] I find that the petitioners have direct interest standing to bring their petition.

Is the Petition Moot?

- [85] On March 10, 2022, the PHO and the Minister of Health conducted a regular COVID-19 briefing. The PHO noted that lab-confirmed cases had come down dramatically in the preceding few weeks and that hospitalizations and the number of people in care had also decreased. The PHO also noted that wastewater surveillance indicated a decrease in virus levels.
- [86] After reviewing some further updates, the PHO stated that risks to public health were lower and that as of 12:01 am on March 11, 2022, the Province's face covering order would be repealed and restrictions on overnight child and youth camps would be lifted. Moreover, the PHO announced that on March 18, 2022, long-term care visitation would be restored.
- [87] The PHO stated that on April 8, 2022, assuming conditions continued to improve:
- a) proof of vaccination would no longer be required in indoor settings and higher risk settings and events;
 - b) post-secondary students living in residence would no longer be required to be vaccinated against COVID-19; and
 - c) businesses would transition from the workplace safety orders (requiring COVID-19 safety plans) to the communicable disease plans in place by the summer of 2021.
- [88] The vaccination requirements under the Orders were discontinued by the respondents on April 8, 2022.
- [89] The respondents assert that I should decline to hear the petition because it raises no live controversy, and is instead merely a hypothetical or abstract question. Moreover, they submit that even if the Orders remained extant, there are no adjudicative facts concerning these petitioners before me.
- [90] The difficulty with the respondents' submission is that they could offer no assurance that the Orders 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).
- [91] Based on the possibility of the Orders--or restrictions similar in nature--being re-introduced, I decline to dismiss the petition as moot.

Have the Petitioners Exhausted all Alternate Remedies?

- [92] On an application for relief under s. 2 of the JRPA, the basic principles are that an applicant must first exhaust all adequate statutory remedies and that review must be of a final decision: *Diaz-Rodriguez v. British Columbia (Police Complaints Commissioner)*, 2020 BCCA 221 at para. 29. Where a party has taken advantage of a reconsideration process, only the reconsideration decision may be judicially reviewed: *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 at para. 40; *Beaudoin v. British Columbia*, 2021 BCSC 512 [Beaudoin] at para. 73.

- [93] The respondents assert that the petition should be dismissed on the basis that two of the three petitioners did not exhaust their remedy of a reconsideration pursuant to s. 43 of the PHA, and that the one petitioner who did so received an exemption, and thus has no grounds on which to seek relief from the Court.
- [94] The respondents properly point out that parties must pursue all effective remedies within an administrative process. It is only when the administrative process has finished, or when it affords no effective remedy, that a party may proceed to court: *Chu v. British Columbia (Police Complaints Commissioner)*, 2021 BCCA 174 at para. 65; *Strickland v. Canada (Attorney General)*, 2015 SCC 37 at para. 42. If a petitioner does not exhaust their alternate remedies, the Court may decline to exercise its discretion to undertake judicial review until they exhaust their internal remedies: *Beaudoin* at paras. 75, 78; *Klassen v. British Columbia (Attorney General)*, 2021 BCSC 2254 at paras. 37-42.
- [95] However, 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: *O.K. Industries Ltd. v. District of Highlands*, 2021 BCSC 81 at paras. 111-122, rev'd in part on other grounds 2022 BCCA 12.
- [96] The respondents assert that while the Orders require that individuals obtain a proof of vaccination to access certain venues and events, they expressly offer an exemption process on medical grounds.
- [97] The petitioners contend that the medical exemption and reconsideration path was not an adequate alternate remedy for any of them at the time of filing this petition, or later before the rescission of the Orders.
- [98] Dr. Brian Emerson is the Deputy PHO. In his April 14, 2022, affidavit, he deposed that neither Ms. Slykhuis nor Ms. Eliason had properly sought a deferral from the vaccination requirements under the Orders from the OPHO. With respect to Ms. Slykhuis, he stated as follows:
6. The OPHO has received correspondence from [Ms.] Slykhuis indicating that she would provide medical information to be considered regarding an exemption. However, the OPHO has not received a completed COVID-19 Vaccine Medical Deferral Request Form from [Ms.] Slykhuis nor any documentation from Ms. Slykhuis' physicians or other health care providers. []
 7. On October 25, 2021 Ms. Slykhuis emailed the OPHO requesting an exemption from the Residential Care COVID-19 Preventive Measures Order or the Hospital Community (Health Care and Other Services) COVID-19 Vaccination Status Information and Preventive Measures Order on "religious or conscience" grounds, saying she has been a vegan/animal rights advocate. In the October 25, 2021, correspondence, Ms. Slykhuis wrote that Medicago would be a viable option for her to receive as a vaccine once it was approved. []

[]

9. On January 20, 2022, Ms. Slykhuis' request for a medical exemption from the Residential Care COVID-19 Preventive Measures Order (Residential Care Order) or the Hospital Community (Health Care and Other Services) COVID-19 Vaccination Status Information and Preventive Measures Order (Health Care Order) was rejected because it was not supported by a COVID-19 Vaccine Medical Deferral Request Form with an attestation from a physician that proceeding with her COVID-19 immunization would seriously jeopardize her health. []

[]

11. The Residential Care and Health Care orders are different from the Orders under review in this petition [...]

[99] The respondents argue that Ms. Slykhuis did not properly seek a medical deferral-based exemption, because she did not provide documentation from a health care provider to support her request. Accordingly, they say that she has failed to pursue the available statutory remedies and therefore is not entitled to any relief on this petition.

[100] Similarly, Dr. Emerson deposed in his April 14, 2021, affidavit that the OPHO has no record of receiving any medical exemption application or other correspondence from Ms. Eliason.

[101] Ms. Eliason's affidavit says she applied for a deferral but had not yet been approved for an exemption by the time the petition was filed, but offered no confirmation of such an application by copies of emails or letters. Likewise, Ms. Eliason's physician, Dr. Sclater, deposed that he sent a COVID-19 Vaccine Medical Deferral Form to the OPHO in February 2022. However, he was unable to provide any confirmation of the same. Indeed, Dr. Sclater's only evidence suggesting he sent Ms. Eliason's COVID-19 Vaccine Medical Deferral Form to the OPHO is purportedly related to his subsequent re-submission of the Deferral Form in April 2022. This evidence is somewhat problematic, however, as it only consists of an automated response acknowledging Dr. Sclater sent a message via email to the OPHO. There is no evidence indicating whether the Deferral Form was attached to the subject email. Furthermore, the question of whether Ms. Eliason submitted a Deferral Form in February or April 2022 is largely irrelevant, as the present petition was filed in November 2021. Accordingly, there is no evidence suggesting Ms. Eliason ever sought a deferral prior to filing the present proceeding in any event.

[102] Given Dr. Emerson's evidence that the OPHO has not received correspondence from Ms. Eliason seeking the available statutory remedy, I do not accept that such a request was in fact sent to the OPHO. Moreover, even if Ms. Eliason had requested a deferral in February or April 2022 as asserted, she still did not exhaust all her available statutory remedies before filing the present petition in November 2021.

- [103] Ms. Slykhuis indicated difficulty in obtaining an exemption certificate, but on her own evidence, that difficulty stemmed from her physician's initial hesitance to submit a modified request form--not as a result of the Orders.
- [104] Only Mr. Prendiville applied for an exemption. The respondents contend that as Mr. Prendiville already has an exemption, there is no basis upon which he can succeed on the petition.
- [105] For their part, the petitioners advance various reasons why the COVID-19 vaccine medical deferral scheme was unclear or otherwise unfair, and thus the Court should exercise its discretion to hear the petition despite their failure to pursue all available statutory remedies.
- [106] First, the petitioners assert they were unable to submit COVID-19 Vaccine Medical Deferral Forms in a timely manner because their physicians either received unclear direction from the College of Physicians and Surgeons of British Columbia or feared repercussions from the College if they filed Deferral Forms on behalf of their patients.
- [107] As set out above, Dr. Sclater said he feared repercussions from the College of Physicians and Surgeons of British Columbia if he altered the deferral requisition form in any way. Moreover, Ms. Slykhuis deposed that in December 2021, her physician informed her she would not support a vaccine deferral application, as her governing board allegedly only supported "full vaccination".
- [108] Additionally, the petitioners contend that branches of the medical profession--including the College of Physicians and Surgeons of British Columbia, BC Family Doctors, and American Academy of Neurology--advised medical practitioners against aiding patients seeking a medical exemption from the COVID-19 vaccine, including advising doctors that there were "no medical exemptions for the requirement to have proof of vaccinations" and that "people who are unable to be vaccinated against COVID-19 for medical reasons are not exempt from the proof of vaccination requirement".
- [109] In my view, the petitioners' assertions that their physicians feared reprisals from their respective regulatory authorities did not diminish their responsibility to pursue the statutory remedies available to them. Moreover, the PHO did not mandate that the Colleges adopt its guidelines in completing the supporting documentation, but rather provided general principles for reconsideration of the Orders. It is therefore difficult to put any purported pressure felt by the petitioners' physicians at the feet of the respondents.
- [110] Second, the petitioners say that the COVID-19 Vaccine Medical Deferral Form only allowed physicians to recommend deferral of vaccination on six grounds. These six grounds included four conditions that the then-current data indicated required a presumptive deferral due to a risk of putting a person's health in serious jeopardy if they proceeded with vaccination. The PHO considered these to be the only conditions with strong evidence for presumptive deferral at the time of preparing the Deferral Form. The fifth and sixth

checkboxes were intended for any other serious adverse events following the first dose of vaccine. The petitioners say that their respective medical conditions were not recognized as legitimate causes for deferral, and thus they were unable to file COVID-19 Vaccine Medical Deferral Forms.

[111] In his affidavit affirmed April 28, 2022, Dr. Emerson gave evidence that:

3. The Deferral Form was developed as part of the medical deferral for the COVID-19 vaccination process to make obtaining a medical opinion regarding exemption from the PHO proof of vaccination checking orders requirements efficient. The Deferral Form check boxes were included based on a synthesis of evolving medical evidence in support of deferral of vaccination for those known issues, while the process also included an opportunity to communicate to the PHO about other issues. The second page of the Deferral Form [] provided information about some conditions that did not warrant medical deferral of vaccination, based on the evidence.
4. On the Deferral Form, under "Medical reason(s) for temporary deferral", there are six check boxes.

[]

15. As I explained in my first affidavit the medical deferral-based exemption process included an option to contact the PHO for any other request that might depart from the principles in the Deferral Form, for individualized consideration.

[112] In my view, the fact that the checklist of conditions on the Deferral Form did not include the petitioners' respective conditions does not absolve them of their responsibility to follow-through with the available statutory remedies. Indeed, as Dr. Emerson deposed, the Deferral Form had an option to seek individualized consideration for conditions not listed. In any event, it would have been incumbent on the petitioners to first seek deferral through the appropriate channels prior to bringing the petition. At present, Ms. Eliason and Ms. Slykhuis have not engaged with the reconsideration process and thus there is no final decision for this Court to review.

[113] I find that neither Ms. Eliason nor Ms. Slykhuis have exhausted all of their statutory remedies, and thus should not be permitted to pursue the relief sought in this petition until they have done so. In respect of their claim for judicial review, the petition is premature.

[114] Moreover, I find that Mr. Prendiville successfully pursued the statutory remedies available to him. While he has encountered less than full acceptance of his temporary deferral by businesses he has attempted to patronize, I am unable to find that this is the fault of the respondents. Indeed, the Province cannot be held responsible for the implementation of the Orders by private businesses, nor can private businesses violate an individual's Charter rights. Accordingly, I am unable to find that Mr. Prendiville Charter rights have been infringed, and thus the relief he has sought in this petition is unjustified.

[115] With respect to Ms. Eliason and Ms. Slykhuis, I find that the present petition is premature and should be dismissed. Likewise, Mr. Prendiville has successfully pursued the statutory remedies available to him, and thus he has no grounds on which to claim the Orders violated his Charter rights. I find that any harm he has suffered was not a result of anything done or not done by the respondents, and the present petition should be dismissed.

Conclusion

[116] Based on my above-findings, I decline to consider the petitioners' arguments in respect of the alleged Charter violations and the application of s. 1.

[117] The petition is dismissed.

"The Honourable Chief Justice Hinkson"

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Prepared on 29 October 2026 · Esheria