

CANADA / JUDGMENT

Kassian v. British Columbia

2025 BCCA 20

COURT

British Columbia Court of Appeal

DECIDED

29 January 2025

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2025 BCCA 20 Kassian v. British Columbia

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Kassian v. British Columbia,

2025 BCCA 20

Date: 20250129

Docket: CA48586

Between:

Sharon Kassian, Veronica Shier, Erica Rooke, a minor by her litigation

guardian Stephanie Rooke and Canadian Constitution Federation

Appellants

(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

(Respondents)

Corrected Judgment: The text of the judgment was corrected at paragraph 66 on January 30, 2025.

Before:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Abrioux

The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated
September 12, 2022 (Kassian v. British Columbia, 2022 BCSC 1603,
Vancouver Docket S2111137).

Counsel for the Appellants:

G. Trotter

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Place and Date of Hearing:

Vancouver, British Columbia

October 4-6, 2023

Place and Date of Judgment:

Vancouver, British Columbia

January 29, 2025

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Mr. Justice Abrioux

The Honourable Justice Skolrood

Summary:

The individual petitioners had health challenges they say ought to have exempted them from the vaccination passport regime imposed during the COVID-19 pandemic. They contend that the regime violated their rights under the Charter by creating a closed list of medical conditions justifying exemptions, and by requiring separate applications for an exemption for each activity or series of activities. None of the applicants applied for exemptions. Ms. K.'s doctors declined to sign the form, while Ms. S. did not seek a physician's signature. Ms. R. would have qualified for an exemption, but did not apply for one because she understood it could only be granted for a single event.

At first instance, the judge held that the list of medical conditions justifying an exemption was not a closed one. He dismissed the petition as premature because the petitioners had not exhausted their remedies under the administrative process. On appeal, held: Appeal dismissed. While the judge erred in embarking on his own interpretation of the regime, there was no reversible error because his interpretation matched that of the Provincial Health Officer ("PHO"), and that interpretation was reasonable. Ms. K. and Ms. S. failed to give the PHO the opportunity to decide whether to exempt them from the regime.

The regime, initially, did not allow for blanket exemptions, though the PHO did grant such exemptions. The failure of the PHO to follow the rules of the regime does not insulate it from constitutional challenge. It is arguable that the regime, as initially set out, infringed Ms. R.'s s. 15 rights. The initial rule was in place for a relatively short time, and the circumstances are unlikely to be repeated. The only remedy that is sought is declaratory, and it would have no practical effect. Given the factual complexity of the constitutional issue, and the absence of any practical effect, the Court declines to address the issue of whether the failure of the initial regime to provide for blanket exemptions was a violation of s. 15.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

- [1] During the COVID-19 pandemic, the Provincial Health Officer made orders designed to limit the spread of the disease and its severity. Among the measures taken was the implementation of a "vaccine passport" regime. Under the regime, those who had received two doses of an approved COVID-19 vaccine were allowed to attend certain places and events. Persons who were unvaccinated, or had received only one dose of the vaccine, were barred from those places and events unless they received an exemption. Exemptions were only given in limited circumstances.
- [2] The three individual petitioners elected not to be fully vaccinated, believing that health concerns rendered vaccination risky. They say that they ought to have been exempted from the vaccine passport requirement, and that because of their individual circumstances, they were particularly adversely affected by the Provincial Health Officer's orders. They challenge aspects of the orders that implemented the vaccine passport requirements. On this appeal, they seek orders declaring that the impugned provisions violated their rights under both ss. 7 and 15 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982. The Canadian Constitution Federation, a group that has been granted public interest standing, joins in the litigation as a petitioner.
- [3] The orders in question have long-since ceased to apply, and this appeal was moot before it came on for hearing. We decided, however, that it was appropriate to hear and decide this case notwithstanding the fact that it was moot: *Kassian v. British Columbia*, 2023 BCCA 383.

Background

- [4] On January 27, 2020, the first case of COVID-19 was identified in British Columbia. As elsewhere in the world, there was great concern over the spread of the new disease, which was contagious and caused widespread illness. The disease was frequently debilitating and sometimes fatal, especially for older persons and others who had health vulnerabilities.
- [5] On March 11, 2020, the World Health Organization declared COVID-19 to be a pandemic. In British Columbia, the Provincial Health Officer issued a Notice of Regional Event under s. 52(2) of the Public Health Act, S.B.C. 2008, c. 28 on March 17, 2020. This had the effect of declaring the spread of the disease a public health emergency. In such a state of emergency, the Provincial Health Officer was authorized to take extraordinary actions under the statute. On May 18, 2020, the Province's Minister of Public Safety and Solicitor General declared a more general Provincial state of emergency under the Emergency Program Act, R.S.B.C. 1996, c. 111.
- [6] The Provincial and Federal governments established several programs and restrictions to deal with the pandemic. The Provincial Health Officer of British Columbia, in coordination with regional and local health officials and the BC Centre for Disease Control, took an active role in attempting to limit the spread of the disease, both with advice to the public and with orders imposing restrictions on activities. Two of those orders are the subject of this litigation:
- the Food and Liquor Serving Premises Order (first made on March 20, 2020), which applied to restaurants and establishments serving alcoholic beverages; and
 - The Gatherings and Events Order (first made on July 27, 2020)[1], which applied to gatherings of people.
- [7] The scope of activities and places covered by these orders changed over time, as did the nature of the restrictions that applied to them. This appeal focuses on the eventual inclusion of a vaccination requirement in the orders.

The Vaccination Requirements

- [8] COVID-19 vaccines were developed very quickly, and by late December 2020, British Columbia had established a vaccination program. As the supply of vaccines was initially limited, the program prioritized persons considered most at risk.
- [9] Supplies of the vaccines were secured relatively quickly, however, and by August 2021, 75% of British Columbians had received two doses of a COVID-19 vaccine and were considered fully vaccinated. By this time, the vaccine supply was sufficient to allow anyone over 12 years of age to be vaccinated. The vaccines were not, at that time, approved for younger people, though a vaccine was subsequently approved for all persons over the age of five and a vaccine is now available for persons as young as six months. The vaccines were found to be effective in limiting the spread and severity of the disease.

- [10] On August 23, 2021, the Province announced that the Provincial Health Officer would be issuing orders requiring individuals to show proof that they had received a COVID-19 vaccination before attending certain social and recreational settings and events. The orders were to take effect on September 13, 2021.
- [11] On September 10, 2021, the Provincial Health Officer formally made the announced orders. New versions of the Food and Liquor Serving Premises Order and the Gatherings and Events Order were issued.
- [12] In order to attend in a place covered by the orders on or after September 13, 2021, a person was required to provide proof that they had received at least one dose of an approved COVID-19 vaccination. After October 24, 2021, only a government-issued vaccine card was accepted as proof of vaccination, and a person was required to have had two COVID-19 vaccinations, the second of which had to have been administered at least seven days before the attendance. People under the age of 12 were exempted from the requirement.
- [13] The September 2021 Food and Liquor Serving Premises Order applied to restaurants with table service, cafes, and premises serving alcoholic beverages. While there were minor changes to the definitions over the course of replacement orders (made October 25, 2021; December 12, 2021; December 22, 2021; January 17, 2022; February 7, 2022; February 16, 2022; and March 10, 2022), the premises covered by the order remained essentially the same until the expiry of the final order on April 8, 2022. There were several substantive changes to the order over the course of time, but none affect this litigation.
- [14] The premises and events covered by the Gatherings and Events Order of the September 2021 order included the following definition, which set out the types of activities requiring proof of vaccination:

"event" means

- a. a gathering of more than 50 participants in an inside place for social, entertainment, dancing, choral, musical, recreational, gambling, arts or crafts, or business and includes a ticketed sports activity, concert, theatrical production, dance or symphony performance, festival, conference, convention, trade fair, home show, workshop, wedding reception, funeral reception not at a funeral home, and a sponsored, ticketed party;
- b. a gathering of participants in an inside place for the purpose of an adult sports activity, or an exercise, fitness or dance activity or class;
- c. but does not include a program for children or youth, or a meeting of a council, board, or trust committee of a local authority as defined under the Community Charter, the Local Government Act or the Islands Trust Act, or a school board, at which members of the public attend in person .

[15] The September 2021 Gatherings and Events Order was repealed and replaced several times (on October 25, 2021; November 16, 2021; December 3, 2021; December 22, 2021; January 17, 2022; January 27, 2022; February 16, 2022; and March 10, 2022). The last order expired on April 8, 2022. There were several substantive changes in the orders over time, and some variation in the types of events and places where proof of vaccination was required. For the purposes of this litigation, however, it is not necessary to detail the changes. The orders remained in effect throughout the period from September 13, 2021 to April 8, 2022, restrictive in terms of recreational, social and cultural events that could be attended by persons who could not provide proof of vaccination.

The Exemption Process

[16] There were very limited exemptions from the vaccine requirements in the orders themselves. Apart from those under the age of 12, most people were required to present proof of vaccination before attending most indoor gatherings, restaurants with table service, or establishments serving alcoholic beverages.

[17] The Public Health Act includes a provision allowing persons affected by such orders to apply to have the order "reconsidered":

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 .

(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).

[18] The Provincial Health Officer interpreted the section as being broad enough to allow people to apply for individualized orders exempting them from the vaccination requirements. Initially, the ability to request an exemption was unrestricted -- the Provincial Health Officer was prepared to receive all requests for exemptions, without regard to the basis upon which an exemption was sought.

[19] Both the Food and Liquor Serving Premises Order and the Gatherings and Events Order made September 10, 2021, referred to the reconsideration provision and set out the following process to be followed by persons seeking to apply for individual exemptions from the vaccination requirement:

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

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

[20] The Provincial Health Officer's office received over 400 requests for reconsideration of the Gathering and Events Order and the Food and Liquor Servicing Premises Order. In an affidavit filed in this proceeding, the Deputy Provincial Health Officer summarized the nature of the requests:

Some of these requests are made on the basis of a medical deferral or contraindication to vaccination, some are sought based on an individual or group's rights under the Charter, and many others seek reconsideration on other grounds or simply because they do not agree with the [Provincial Health Officer]'s orders. In many cases, requests for reconsideration suggested alternative measures to those adopted by the [Provincial Health Officer], such as rapid testing or reliance on natural immunity. Considering and determining each of these reconsideration requests occupies a significant amount of time and effort from multiple individuals within the [Office of the Provincial Health Officer] and requires a decision from the [Provincial Health Officer].

[21] The reconsideration process quickly proved to be onerous for the Office of the Provincial Health Officer, which was already under enormous pressure as a result of the pandemic itself. The Deputy Provincial Health Officer, in his affidavit, described the situation as follows:

Given the amount of the [Office of the Provincial Health Officer] and [Provincial Health Officer]'s time and resources being occupied by this process, resources that are more efficiently and effectively expended dealing with other facets of managing the ongoing pandemic, the [Provincial Health Officer] determined that it was necessary, in the interests of protecting public health, for her not to consider requests for reconsideration of those aspects of the Orders, other than on the basis of medical deferral to vaccination, until the level of transmission, incidence of serious disease, and strain on the public health and health care systems are significantly reduced.

[22] Section 54(1)(h) of the Public Health Act allows the Provincial Health Officer, where a health emergency is ongoing, to "not reconsider an order." On November 12, 2021, the Provincial Health Officer issued a "Variance Order" under the authority of that provision suspending the reconsideration process in respect of the proof of vaccination requirements, except for applications for reconsideration that were made "on the basis that the health of the individual would be seriously jeopardized if the individual were to comply with the Orders ." Any such request was required to comply with guidelines posted on the Provincial Health Officer's website.

[23] The guidelines included the following:

These guidelines provide some general principles for requests for reconsideration of these Orders. If you would like the [Provincial Health Officer] 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".

To be considered for an exemption, you will likely have had a dose of vaccine and experienced a serious adverse event or have a pre-existing medical condition that warrants being exempted for a period of time .

Conditions that could warrant an exemption include [based on expert advice from the BC Centre for Disease Control, BC public health officials, and allergy specialists]:

1. Anaphylaxis to components of both mRNA and adenovirus vector vaccine (i.e., polyethylene glycol and polysorbate 80) that has been confirmed by a qualified allergist who offers testing and graded dose administration procedures.
2. Receipt of anti SARS-CoV-2 monoclonal antibodies or convalescent plasma for treatment or prevention of COVID-19 (except tocilizumab or sarilumab).
3. Diagnosis of Multisystem Inflammatory Syndrome.
4. Medical practitioner-diagnosed myocarditis or pericarditis following the first dose of COVID-19 vaccine with no other cause identified.

5. Serious adverse event following first dose of COVID-19 vaccine awaiting recommendation for further vaccination by the medical health officer. Serious adverse events are those that required urgent medical care, resulted in hospitalization, or permanent disability.
6. Serious adverse event following first dose of vaccine not yet reported to the medical health officer.
7. Serious adverse event following a dose of vaccine and recommendation by the medical health officer to not receive further doses.

To submit a medical exemption request, follow these directions:

For people who experienced a serious adverse reaction to COVID-19 vaccination

1. If you experienced a serious adverse reaction to a dose of vaccine that could warrant an exemption, you should have reported the reaction to the health care provider or representative of the health care organization that gave you the vaccination, and you should have received a recommendation from a medical health officer.

If you did not report the reaction, then the first step is to report that event to your health care provider or representative of the health care organization that gave you the vaccination, who needs to report the reaction to the medical health officer. You should also confirm that your health care provider reported your reaction to the medical health officer and wait for a recommendation from a medical health officer. Your health care provider should complete and submit a COVID-19 vaccine adverse event report .

2. If you have received a recommendation from a medical health officer about your reaction, or once you receive a recommendation after the reaction has been reported to a medical health officer, then send that information to the Office of the Provincial Health Officer .

For people who have a medical condition that warrants consideration of an exemption

1. You need to have a medical practitioner (a registrant of the College of Physicians and Surgeons of British Columbia) or nurse practitioner (a registrant of the British Columbia College of Nurse and Midwives) fill out the medical deferral form and give it back to you so that you can submit it to the Office of the Provincial Health Officer, as described below.
2. Your request must be accompanied by the medical deferral form supporting the request.

[Underlining in original document.]

[24] The medical deferral form specified that it could only be completed by a physician. The form included checkboxes allowing the physician to specify whether a particular condition was present (these conditions corresponded with those listed as 1-6 in the guidelines; persons with the condition listed as 7 did not have to submit a form). The form did not have any checkbox to specify other conditions, but also contained no indication that a physician could not write in another condition.

[25] On the back of the form, eight conditions were listed under the heading "The following are NOT contraindications to COVID-19 vaccination":

- Anaphylaxis to a previous dose of mRNA or adenovirus vector vaccine that has been confirmed by a qualified allergist. Such individuals may receive their 2nd dose using vaccine of the different type or undergo graded dose administration of the original vaccine type under allergist supervision.
- Anaphylaxis to any component of one type of vaccine that has been confirmed by a qualified allergist. Such individuals may receive vaccine of the different type or undergo graded dose administration of the original vaccine type under allergist supervision.
- History of non-anaphylactic reaction or suspected hypersensitivity to a component of the vaccine. Such individuals may receive vaccine of the different type that does not contain the same component, or may be immunized in a clinic prepared to deal with potential hypersensitivity reactions including anaphylaxis. Such patients should be observed for an extended 30 minute monitoring period post vaccination.
- History of thrombosis with thrombocytopenia following a previous dose of an adenovirus vector COVID-19 vaccine. Such individuals may receive mRNA vaccine pending advice of the involved hematologist.
- History of capillary leak syndrome. Such individuals may receive mRNA vaccine.
- History of cerebral venous sinus thrombosis (CVST) with thrombocytopenia, unrelated to adenovirus vector COVID-19 vaccination, or heparin induced thrombocytopenia (HIT). Such individuals may receive mRNA vaccine.
- Immunocompromised and those with autoimmune disorders: such individuals may respond less well to vaccines if immunocompromised but COVID-19 vaccines are not live vaccines and are safe for such individuals.
- Pregnancy: pregnant women benefit from COVID-19 vaccination. The vaccine is not contraindicated for use at any stage of pregnancy or when breastfeeding.

[26] In addition to the medical deferral form, a person requesting an exemption was required (at least during the period from November 12, 2021 until December 23, 2021) to complete a form stating: the activities or events for which they were seeking exemption, the negative effects on them of being unable to attend in person, and why alternatives to attending in person were not sufficient. The original form included a note stating that "exemptions

[would] generally only be considered for one type of activity or event, or recurring activities or events, per request."

- [27] It is not entirely clear, on the evidence, when the idea that an exemption request would only be considered for one type of activity or event was abandoned. The guidelines were modified on December 23, 2021, to eliminate mention of the requirement to state the activity or event for which a request was being made, and it appears that the November 12, 2021 form was also abandoned in favour of a simple letter. The Gatherings and Events Order itself, however, continued to state that exemptions would be considered "with respect to an event or type of event" until February 16, 2022. The issue is further complicated by evidence establishing that the Provincial Health Officer always granted blanket exemptions, and never followed the language of the guidelines or order, which suggested that exemptions would only be granted for individual events or series of events.

The Petitioners

- [28] The individual petitioners all indicated general support for the orders' requirement that members of the public who wished to participate in certain activities or attend events and gatherings be vaccinated. They do not challenge the core aspects of the regime. Instead, their challenges are limited to what they saw as its failure to provide an effective, comprehensive and accessible system for individuals to obtain medical exemptions from the vaccination requirements, particularly for conditions that did not fall within the guidelines.

Ms. Kassian

- [29] Sharon Kassian is a school secretary and mother. Ms. Kassian had a first vaccine dose on April 19, 2021. On May 8, she awoke with severe right shoulder pain and discomfort. She attended at a hospital emergency department and was referred to an orthopedic specialist, who she saw on May 18. In the meantime, on May 14, she attended at her family doctor, who prescribed pain medication and referred her to a neurologist.
- [30] At the May 18 appointment with the orthopedic specialist, the doctor confirmed that her shoulder did not show any signs of structural damage. He gave a clinical diagnosis of "brachial neuritis", a neurological condition. He stated that a definitive diagnosis would have to await the completion of nerve conduction studies, which would be conducted by the neurologist. In the meantime, he prescribed medication to ease the pain. Ms. Kassian says that the orthopedic specialist stated that the condition "was likely a rare reaction to her [COVID-19] vaccine", but she has not produced any documentation of such a diagnosis, and the specialist's consultation note does not mention the vaccination or suggest any link to her condition.

- [31] On June 2, 2021, Ms. Kassian saw a neurologist who performed a test known as an Electromyography ("EMG"). Although the test was not conclusive, the neurologist agreed with the diagnosis of brachial neuritis with scapular winging. She said that while she would normally have ordered a Magnetic Resonance Imaging ("MRI") to completely rule out the existence of structural damage in the shoulder, she refrained from doing so because Ms. Kassian had recently become pregnant.
- [32] The neurologist's report notes that Ms. Kassian had received a COVID-19 vaccination, but does not include any hypothesis suggesting that the brachial neuritis was caused by it.
- [33] Ms. Kassian made a claim to the federal Vaccine Injury Support Program, and had her neurologist complete a medical assessment form that was submitted with the claim. The form sets out the details of Ms. Kassian's vaccination. In a box headed "Disease associated to vaccine" the doctor wrote "Brachial neuritis" but there is no elaboration on the nature of the association.
- [34] In her affidavit, Ms. Kassian states that "in May and early June, both [my family doctor] and [my neurologist] advised me against getting a second dose of [COVID-19] vaccine, because of the risk that doing so will cause further nerve damage", but there is no indication of such advice in the medical records from that time, and no evidence from the doctors.
- [35] On June 28, 2021, in response to a report of an adverse event following immunization, a Registered Nurse with the Regional Immunization Team prepared a recommendation for Ms. Kassian in respect of getting a second immunization. It stated:

Although temporally associated, the neurologist was not of the opinion that this was vaccine-related. In most instances, the cause of brachial neuritis is not determined, although it has also been associated most commonly with infection or trauma. Although disconcerting, brachial neuritis in temporal association of prior vaccination is not a contraindication to safely receiving a second dose of a COVID-19 vaccine, which is highly recommended, particularly in pregnancy, to provide optimal, sustained protection against COVID-19 infection. Ms. Kassian may wish to discuss this further with her family doctor and with her neurologist at her next appointment.

- [36] Although the report refers to the "neurologist's opinion", there is no indication of the source of the information, and it is not clear that the nurse had any direct contact with the neurologist.
- [37] The report states that it was sent to Ms. Kassian's family doctor on July 2, 2021.
- [38] On August 25, 2021, Ms. Kassian's family doctor wrote a letter addressed "To Whom it may concern" stating simply that "[Ms. Kassian] has an exemption from 2nd vaccination due to rare severe complication [she had following her first vaccination]." The letter pre-dates the Provincial Health Officer's orders that imposed vaccination requirements and was apparently given to Ms. Kassian in case her employer adopted a vaccination policy. The "exemption" referred to by the doctor had no official status.

[39] Ms. Kassian did not apply for an exemption from the vaccination requirements in the orders, as her doctors were not prepared to complete a medical deferral form. In her affidavit, Ms. Kassian states that she requested that her family doctor provide the required document, and her doctor "told me words to the effect that 'because public health is involved and deems you OK to receive a second dose, I can't write you a second letter.'" She says that she also asked her neurologist for assistance, but that the neurologist stated that "because [Ms. Kassian's condition] was not on the list of vaccine-exempted conditions put out by the [Provincial Health Officer] she would not be able to write a medical exemption letter at least until after a further consultation with a physiatrist." The neurologist referred Ms. Kassian to a physiatrist, whose consultation report included the following observations:

This did occur shortly after receiving COVID 19 Pfizer vaccine as well as a root canal, which could have been the inciting events .

She is quite concerned about her 2nd dose of the COVID vaccine, There are case reports in the literature of link to COVID vaccine with brachial neuritis. This is a course complicated by the fact she is presently pregnant. I will discuss further with her neurologist regarding further vaccination.

[40] The physiatrist did not provide documentation to support an exemption and referred Ms. Kassian back to her neurologist. Ms. Kassian deposed that her neurologist was "open to considering writing an exemption letter", but despite follow ups by Ms. Kassian and an in-person appointment in January 2022, the neurologist ultimately declined to provide documentation to support an exemption application.

[41] Ms. Kassian deposed that she was, as a result of not having an exemption and not wishing to risk a second vaccination, unable to go out to restaurants with her partner, extended family, work colleagues and friends. She also referred to missing out on other social occasions.

Ms. Shier

[42] Veronica Shier is a certified life coach, who was born with spina bifida and hydrocephalus. She has had over 15 surgeries in her lifetime, and some have had poor outcomes. She deposed that she has chronic health problems and has had difficult experiences with medical treatments, including severe reactions to some medications and to anaesthesia. As a result of those difficult experiences, she reached the conclusion that it would be unsafe for her to receive a COVID-19 vaccination.

[43] Ms. Shier does not suggest that she received any medical opinion to the effect that vaccination against COVID-19 was contraindicated, nor does she provide any evidence of any request to a doctor for documentation to support an exemption request. Rather, she simply relates her impression that doctors are "unwilling to seriously consider giving [her] an exemption letter."

- [44] Ms. Shier undertook swim therapy at public swimming pools as a method of ameliorating her chronic pain and other symptoms. Prior to the pandemic, she swam three hours each day. In March 2020, public pools were closed as a result of the pandemic. The pools in Ms. Shier's area partially reopened in September 2020, and Ms. Shier resumed her swimming therapy. This continued until December 22, 2021, when the Gatherings and Events Order was modified to include swimming activities within the definition of "inside event".
- [45] After December 22, 2021, Ms. Shier was not able to engage in swim therapy because she was unvaccinated, and did not have an exemption. The inability to attend public swimming pools subsisted until the Gatherings and Events Order expired on April 8, 2022.
- [46] Ms. Shier deposes that the inability to engage in swim therapy had a serious detrimental effect on her. She also states that her disabilities mean that she has limited opportunities to engage in social activities, and her inability to attend gatherings in restaurants led to increased social exclusion.

Erica Rooke

- [47] Erica Rooke is a competitive swimmer and was a part-time swim coach. She received a first vaccination in May 2021. Four days after the vaccination, she experienced sharp stabbing pain in her chest and was diagnosed with pericarditis. Her family physician provided an opinion that the pericarditis was likely a reaction to her first dose of the vaccine. After consultation with a disease expert, the doctor received a "strong and clear" recommendation that Ms. Rooke should not receive a second dose. Her condition qualified her for an exemption under the guidelines, but the initial version of the form stated that, generally, a person had to apply for a separate exemption for each type of activity or event they wished to participate in. The form suggested that blanket exemptions would not be granted.
- [48] Ms. Rooke had a doctor complete a medical deferral form in October 2021. She understood, however, that she would have to send a new request to the Provincial Health Officer every time she wanted to do things with friends or family. She considered that to be unworkable because many social engagements that she wished to attend were not planned far in advance.
- [49] Ms. Rooke also lost her employment as a part-time swim coach, because her swim club required coaches to have received two vaccinations. It is important, however, to recognize that this was not a result of the Provincial Health Officer's orders, which would not have required a swim coach to be vaccinated.
- [50] Ms. Rooke describes various social and educational events that she was unable to attend as a result of not having an exemption from the vaccination passport regime.

The Canadian Constitution Foundation ("CCF")

- [51] The CCF is a national organization that is a registered charity. It describes itself as being dedicated to "defending the fundamental rights and freedoms of Canadians through public education, communication, and litigation." It provided support to enable the petitioners to bring their challenges to the Provincial Health Officer's orders, and was afforded standing as a petitioner.
- [52] The CCF accepts that COVID-19 is a serious illness and that the existence of the pandemic warranted public health measures. It also accepts that the approved COVID-19 vaccinations were effective and safe for the vast majority of recipients. It was opposed to vaccine mandates, however, taking the position that individuals should not be subject to government pressure to obtain vaccinations, but should be left to make vaccination decisions without the spectre of regulatory consequences.
- [53] When the Provincial Health Officer announced the vaccine passport program, the CCF immediately indicated that it planned to challenge it on the basis that it did not provide adequate accommodations to persons with medical concerns. It sought out individuals to act as petitioners in this matter and agreed to fund the litigation on their behalf. The CCF made itself a co-petitioner.

The Petition

- [54] The petition in these proceedings (as amended) alleges that the medical conditions that the Provincial Health Officer was prepared to accept as justification for an exemption from the vaccination requirements was a "closed list" consisting only of the checkbox items on the medical deferral form. They say that as Ms. Kassian and Ms. Shier did not have conditions that were included in the checkbox list, they could not receive exemptions.
- [55] Ms. Rooke, on the other hand, would have qualified for a checkbox exemption had she made an application. Her complaint was that the exemption procedure was unwieldy and unworkable, because she would have had to make a separate application each time she wished to attend an event or place that was subject to the vaccine passport regime. As I have indicated, the guidelines appear to have contained such a restriction between November 12, 2021 and December 23, 2021. The Gatherings and Events Order itself contained a recital indicating that such a restriction existed as late as February 16, 2022. The evidence, however, is clear that the Provincial Health Officer was not applying such a restriction at any time.
- [56] The petitioners alleged that the orders violated their rights under ss. 7 and 15 of the Canadian Charter of Rights and Freedoms and sought that the orders be quashed. As the orders expired before this appeal was brought, the petitioners now seek only declaratory relief to the effect that the impugned orders violated their rights and the rights of others for whom vaccination was contraindicated.

The Judgment Below

- [57] The chambers judge reviewed the legislative regime, the Provincial Health Officer's Orders and the factual circumstances of the petitioners. He then turned to the question of whether the petition was premature. He noted the "basic principle" that an applicant must exhaust all adequate remedies under the administrative regime before embarking on a judicial review application, citing *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Chu v. British Columbia (Police Complaint Commissioner)*, 2021 BCCA 174 at para. 65; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; and *Strickland v. Canada (Attorney General)*, 2015 SCC 37.
- [58] The judge noted that the Provincial Health Officer continued, throughout the period the vaccination passport regime was in effect, to consider requests for exemptions from its requirements. He rejected the petitioners' contention that exemption requests could only be made by persons whose conditions were listed on the medical deferral form beside checkboxes:
- [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 [Provincial Health Officer], 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.
- [59] The judge also rejected the suggestion that the Provincial Health Officer had required the College of Physicians and Surgeons and the College of Nurses and Midwives to adopt restrictive practices in respect of letters to support exemption applications:
- [138] I find that the [Provincial Health Officer] did not mandate that the Colleges adopt the Guidelines in completing the supporting documentation, but rather provided general principles for reconsideration of the [Gatherings and Events and Food and Liquor Serving Premises] 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 [Provincial Health Officer] is without merit.
- [140] Moreover, the respondents are clearly not responsible for the actions of the College or any other professional regulatory body.
- [142] I am not prepared to accept the view 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."
- [60] Finally, the judge rejected the proposition that blanket exemptions from the vaccine passport regime were unavailable. In his judgment, he noted that the Provincial Health Officer had, despite the language of the Gatherings and Events Order up until February 2022, always issued blanket exemptions, and had not restricted herself to making exemptions only for a single event or activity or series of activities. Given this evidence, he considered that it was incumbent on Ms. Rooke to apply for an exemption:
- [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 [Provincial Health Officer'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.
- [61] The judge found that the individual petitioners had not pursued adequate alternative remedies. As the CCF relied only on the evidence presented in respect of the individual petitioners, its application, too, was premature. The judge accordingly dismissed the petition.

Argument on Appeal

- [62] The appellants contend that the judge made an error of law in interpreting the orders and forms, and that, properly interpreted, they created a closed list of bases for seeking exemptions, which list did not include the medical conditions that affected Ms. Kassian and Ms. Shier.
- [63] They further argue that while the evidence suggests that the exemptions granted by the Provincial Health Officer were typically blanket exemptions, such exemptions were either not permitted by the legislative regime, or were being granted only "secretly". In those circumstances, they say that the petition of Ms. Rooke should not have been dismissed as premature.
- [64] The petitioners contend that if this Court finds that the judge erred in holding that the petitions were premature as a result of the petitioners' failure to pursue adequate alternative remedies, then this Court should proceed to decide the constitutional issues in their favour.

Were the Orders and Forms "Law" for Charter Purposes?

- [65] The legislative scheme at issue in this case is a complex one. The statutory provisions gave the Provincial Health Officer broad emergency powers that were exercised by orders. The orders themselves refer to guidelines and forms, and the guidelines also incorporate forms. In large part, the question of what medical conditions could be considered by the Provincial Health Officer in granting exemptions depends on an interpretation not of the order itself, or even the guidelines, but of a form that physicians were required to complete in order to provide support for an exemption application.
- [66] I am satisfied that the orders and forms constitute "law" for the purposes of the Canadian Charter of Rights and Freedoms, particularly given the broad interpretation of that concept set out in *Greater Vancouver Transportation Authority v. Canadian Federation of Students -- British Columbia Component*, 2009 SCC 31. If the form's requirements prevented Ms. Kassian and Ms. Shier from being eligible for exemptions from the vaccine passport regime, then they have a right to challenge the constitutionality of the scheme.

Does the Court Owe Deference on the Interpretation of the Form?

- [67] The chambers judge interpreted the forms and guidelines and held that they did not constitute a closed list of conditions that could justify an exemption. The appellants say that the matter is an issue of law, and allege that the judge's interpretation was flawed.
- [68] The focus on the judge's interpretation, in my view, is not appropriate. The issue of whether the guidelines and form contemplated a closed list of conditions that could justify an exemption was an issue of law, but it was an issue arising within a complex administrative regime. The Provincial Health Officer was the person with initial jurisdiction to interpret that regime. She would be entitled to deference on any such interpretation. Under the framework set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC

65, a standard of review of reasonableness would apply to any interpretation by the Provincial Health Officer.

- [69] Of course, the petitioners did not apply for exemptions, so the Provincial Health Officer did not have an opportunity, in their cases, to interpret the administrative regime. It seems to me that the failure to afford the Provincial Health Officer an opportunity to weigh in on the interpretation is a serious omission, and strengthens the assertion that the judicial review was brought prematurely. The courts should not usurp the authority given to the Provincial Health Officer.
- [70] In this case, however, the failure of the petitioners to place the matter before the Provincial Health Officer does not actually prevent us from knowing how she interpreted the administrative regime. The evidence clearly established that the Provincial Health Officer "never considered the Guidelines to be a closed list of medical considerations that may warrant an exemption or deferral." Further, the evidence indicates that some exemptions were granted in respect of medical conditions that were not specifically listed on the form with the checkboxes: hemolytic anemia, corneal grafts, Guillain Barré syndrome, platelet disorder, neurological condition, and mental health issues.
- [71] The question, then, is whether the Provincial Health Officer's interpretation of the regime was a reasonable one. I see no basis for doubting that it was.
- [72] The purpose of the medical exemption regime was to protect the health of the small minority of people for whom vaccination was medically contraindicated. There was clearly no governmental or public interest in vaccinating such people. Nothing in the guidelines or the forms indicated that the conditions listed with checkboxes served to exclude others, and nothing in the form suggested that physicians were precluded from providing additional medical information. Indeed, the fact that the form specifically listed conditions for which vaccination was not contraindicated strongly suggests that the checkbox list was not intended to be exclusive.
- [73] The Provincial Health Officer's interpretation of the regime was eminently reasonable, both from the standpoint of the language of the guidelines and the forms and from the standpoint of public policy. It must be upheld as reasonable.

Did the Provincial Health Officer Require the Colleges of Physicians and Surgeons and of Nurses and Midwives to Adopt Restrictive Practices?

- [74] The question of whether the Provincial Health Officer required the College of Physicians and Surgeons and College of Nurses and Midwives to adopt restrictive practices in recommending exemptions is a question of fact. It arose for the first time on the hearing of the judicial review petition. Because the issue led to an original finding of fact by the chambers judge, he is entitled to deference on this issue: *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476 at para. 77; *Crook v. British Columbia (Director of Child, Family and Community Service)*, 2020 BCCA 192 at para. 36.

[75] The chambers judge's findings at paras. 138-142 (quoted at para. 59 above) were based on the evidence before him and were open to him. It is not, in my opinion, open to this Court to interfere with his findings on the issue.

The Finding that Blanket Exemptions were Available

[76] Just as the question of whether the list of medical conditions justifying an exemption was closed was for the Provincial Health Officer to decide, so was the question of whether blanket exemptions were available under the orders and guidelines.

[77] It is clear that the Provincial Health Officer granted blanket exemptions throughout the period of the vaccination passport regime. Her interpretation of the scheme as allowing for such exemptions must be upheld unless it was unreasonable.

[78] In my view, the Provincial Health Officer's interpretation of the regime was unreasonable in respect of blanket exemptions, at least for the period from November 12, 2021 until December 23, 2021. During that period, the guidelines, forms and orders all indicated that exemptions could only be granted for individual events or series of events. Even after the guidelines and forms were changed in December 2021, the Gatherings and Events Order continued to include language suggesting the blanket exemptions were not available until February 16, 2022.

[79] The rationale for denying blanket exemptions was never apparent, though we might speculate on it. It is clear, however, that the Provincial Health Officer treated applications for medical exemptions as blanket exemption applications, despite the language of her order and the guidelines. That fact would seem to support the view that the orders and forms were more restrictive than was necessary.

[80] The Provincial Health Officer's practice of granting blanket exemptions cannot, of course, save the orders and forms from constitutional scrutiny. On the face of it, there would appear to be some force in the argument that a regime that unnecessarily restricted exemptions to individual activities or series of activities served to further disadvantage persons suffering from medical conditions contraindicating vaccination.

Should the Court Consider the Application for a Declaration in Respect of the Blanket Exemption Issue?

[81] Unlike the general questions that are raised on this appeal, which may be of some interest if a vaccine passport regime is revived in the future, it is not at all apparent what would be gained by analysing the "blanket exemption" issue. To the extent that those restrictions existed, they were never enforced, and they lasted for -- at most -- a period of three months and arguably for a much shorter period.

[82] I am particularly loath to address the constitutional issue in this case because, in addition to being an issue of no practical importance, it is one of considerable complexity.

- [83] The appellants, rightly in my view, contend that the issue of constitutionality in this case turns on an analysis under the principles set out in *Doré v. Barreau du Québec*, 2012 SCC 12. The recitals in the orders demonstrate that the Provincial Health Officer was alive to the Charter issues, and made genuine attempts to make her orders as unintrusive as possible in the face of what was, undoubtedly, a true emergency situation.
- [84] Given the orders were frequently modified and that it is unlikely that the precise scenario under consideration will ever be repeated, I would exercise discretion against entertaining the request for a declaration.

Conclusion

- [85] In the result, I would dismiss the appeal.
- [86] With respect to the question of whether the scheme had a closed list of bases for an exemption, the chambers judge erred in embarking on his own interpretation of the administrative scheme rather than assessing the reasonableness of the Provincial Health Officer's interpretation of it. In the end, however, the error was a harmless one, as the judge's interpretation did not differ appreciably from that of the Provincial Health Officer.
- [87] The chambers judge made no error in dismissing the judicial review applications of Ms. Kassian and Ms. Shier as premature on the basis that they did not exhaust adequate alternative administrative remedies before embarking on judicial review.
- [88] With respect to Ms. Rooke, it is arguable that, at least for a short period of time, no adequate alternative remedy was available. Given that the only remedy sought is declaratory, and that there would be no practical consequences to such a declaration, I would not embark on an analysis of the complex constitutional issues in Ms. Rooke's case. I would dismiss her appeal, and the appeal of the CCF as well.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Justice Skolrood"

- [1] The Gatherings and Events Order repealed and replaced the Mass Gathering Events Order that had been first made on March 16, 2020.

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