MEMORANDUM

To: Mariko Langdale

From: Mariko Langdale

Date: April 2, 2022

Re: Constitutionality of BC's Vaccine Passport Scheme

This memo identifies a few of the constitutional vulnerabilities of BC's Vaccine Passport Scheme. It is unconscionable that our leaders have chosen to normalize the routine screening of people on the basis of biology, turning BC into a technocratic biosecurity surveillance state.

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1 UPDATE: RESTRICTIONS LIFTED, BUT NOT REPEALED

On April 8, 2022, various provincial public health orders were lifted but not repealed, including the requirement to show a BC Vaccine Card to access "non-essential" events, services, and businesses.[1] Because this memo was written before the emergency orders were lifted, it assumes all mandatory measures remain in effect.

2 THE PERMANENT EDIFICE OF TEMPORARY MEASURES

On March 17, 2020,[2] Public Health Officer Bonnie Henry (the "PHO") declared a "Public Health Emergency" under s. 52(2) of the *Public Health Act*,[3] affording her a range of sweeping powers for dealing with the pandemic. On March 18, 2020,[4] Minister of Public Safety and Solicitor General Mike Farnworth (the "Minister") declared a province-wide "State of Emergency" under s. 9(1) of the *Emergency Program Act*[5] "...to support our provincial health officer and Minister of Health in swift and powerful response to the COVID-19 pandemic."[6] Though the original declaration expired on April 1, 2020, s. 9(4) of the *Emergency Program Act* authorized further 14-day extensions:

> 9(4) A declaration under subsection (1) expires 14 days from the date it is made, but the Lieutenant Governor in Council may extend the duration of the declaration for further periods of not more than 14 days each.

For each 2-week renewal of the original declaration, ongoing rule by fiat was justified "due to the threat the COVID-19 pandemic poses to the health, safety or welfare of people."[7] Armed with their extraordinary new powers, the PHO and the Minister went into overdrive, enacting a convoluted mess of orders and regulations, supplemented by a weighty compendium of notices, statements, guidance, letters, news releases, and reports.[8] British Columbians inadvertently found themselves in a coercive doctor-patient relationship with Dr. Henry, whose opinions on Covid and the novel vaccines have been

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1 Ministry of Health, *B.C. takes next step in balanced plan to lift COVID-19 restrictions*, news release, 10 March 2022 <https://news.gov.bc.ca/releases/2022HLTH0081-000324>.

2 Provincial Health Officer, *Notice Declaring COVID-19 Public Health Emergency*, 17 March 2020 <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/reports-publications/pho-regional-event-notice.pdf>.

3 *Public Health Act*, SBC 2008, c.28.

4 Ministerial Order M073/2020, 18 March 2020 <https://www.bclaws.gov.bc.ca/civix/document/id/mo/mo/m0073_2020>.

5 *Emergency Program Act*, RSBC 1996, c.111.

6 Minister of Public Safety and Solicitor General, *Province declares state of emergency to support COVID-19 response*, 18 March 2020 <https://news.gov.bc.ca/releases/2020PSSG0017-000511>.

7 See e.g.: Order in Council No 366/2021, 22 June 2021 <https://www.bclaws.gov.bc.ca/civix/document/id/oic/oic_cur/0366_2021>.

8 Orders, notices, guidance, letters & statements issued under the *Provincial Health Act*: Ministry of Health, *COVID-19 (Novel Coronavirus)*, updated 9 February 2022 <https://www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/current-health-topics/covid-19-novel-coronavirus>. Orders & regulations issued under the *Emergency Programs Act*: Minister of Public Safety and Solicitor General, *Gradual ending for COVID-19 orders and regulations*, updated 14 October 2021 <https://www2.gov.bc.ca/gov/content/covid-19/info/state-of-emergency-ends>. Regulations, orders in council, and ministerial orders issued under the *CRMA*, the *Emergency Program Act*, and other statutes: BC Laws, *COVID-19 related regulations, orders in council and ministerial orders*, accessed 31 January 2022 <https://www.bclaws.gov.bc.ca/covid-19.html>. Laws, regulations & emergency orders impacting the judicial system: British Columbia, *Response to COVID-19*, updated 13 October 2021 <https://www2.gov.bc.ca/gov/content/justice/covid-19>. Reports issued by the Minister of Public Safety under the *COVID-19 Related Measures Act*: Minister of Public Safety and Solicitor General, *Reports under the COVID-19 Related Measures Act*, accessed 27 January 2022 <https://www2.gov.bc.ca/gov/content/safety/emergency-management/emergency-management/legislation-and-regulations#crma>. Reports issued by the Attorney General under the *COVID-19 Related Measures Act*: Ministry of Attorney General, *Attorney General reports to the speaker under the CRMA*, accessed 27 January 2022 <https://www2.gov.bc.ca/gov/content/justice/covid-19#reports>.

codified into law—as the Minister warned early in the pandemic, "Dr. Henry's orders aren't suggestions. ***They are the law***."[9]

In recent months, Omicron's rapid spread has triggered a global shift from pandemic to endemic mode, and it has become painfully obvious that the Experimental Vaccines are completely ineffective against Omicron.[10] And the vaccines *are* experimental—they're still in the trial phase, they carry serious short-term risks (including death), and we have no long-term safety data:

> The Covid shots are new, and clinical trials will not be complete until 2023. As such, the Covid shots are experimental. Each of the shots also contain warnings from Health Canada, including warnings about pericarditis, myocarditis, and thrombosis.... We are unaware of any previous circumstance where a pharmaceutical company has rushed a product to market and has no liability for deaths or injuries, where no long-term studies have been conducted, where governments have induced, coerced and threatened people to get it, and where Canadians may lose their jobs and civil liberties for refusing to take it. This is unprecedented.[11]

There is simply no ethical, scientific, or legal justification for the continuation of the PHO's draconian measures, particularly her ongoing campaign to coerce British Columbians to participate in a risky medical experiment regardless of their particular circumstances or individual risk factors. Because the PHO's laws are backed by the state's monopoly on force, rejecting her unsolicited advice can result in harsh consequences, including banishment from social gatherings and public venues. BC has effectively become a medical dictatorship under the rule of an autocratic doctor; informed consent and second opinions are irrelevant.

The province-wide "State of Emergency" officially ended last summer. Before the final 14-day extension order expired (OIC 366/2021),[12] the Minister issued an order cancelling the emergency effective 30 June 2021 (M275/2021).[13] Though the emergency is over, the tyranny continues: BC's draconian health measures will remain in effect until the PHO "provides notice that the emergency has passed" under s. 59(b) of the *Public Health Act*, and the Minister's orders will remain in effect until the *COVID-19 Related Measures Act*, S.B.C. 2020, c. 8 (the "CRMA") is repealed.[14] The PHO recently committed to lifting all restrictions, but warned British Columbians to "be prepared" for restrictions to be reinstated this fall, stating vaccine passports and masks are "not tools that we abandon". And she encouraged businesses to continue using the BC Vaccine Card:

> [W]e need to be prepared for immunity to wane again and for us to have new approaches and adapt depending on what we see come the fall.... I absolutely will support businesses continuing to protect their workers, making sure that depending on what the business is and the risks, that

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9 Alyse Kotyk, *Here are the changes B.C. just announced to the province's state of emergency*, 26 March 2020 <https://bc.ctvnews.ca/here-are-the-changes-b-c-just-announced-to-the-province-s-state-of-emergency-1.4869187>.

10 The vaccines authorized for use in Canada are: Moderna (mRNA-1273/SpikeVax), Pfizer-BioNTech (BNT162b2/Comirnaty), AstraZeneca/Verity (ChAdOx1-S/Vaxzevria/Covishield), Janssen/Johnson & Johnson (Ad26.COV2.S), Novavax Nuvaxovid COVID-19 vaccine, and Medicago Covifenz COVID-19 vaccine: Government of Canada, Approved COVID-19 Vaccines, accessed 8 April 2022 <https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-treatments/vaccines.html> ("**Experimental Vaccines**").

11 Justice Centre for Constitutional Freedoms, *Mandatory Covid Vaccine FAQs*, 1 September 2021 <https://www.jccf.ca/mandatory-covid-vaccine-faqs/>.

12 Order in Council No 366/2021, 22 June 2021 <https://www.bclaws.gov.bc.ca/civix/document/id/oic/oic_cur/0366_2021>.

13 Ministerial Order M275/2021, 29 June 2021 <https://www.bclaws.gov.bc.ca/civix/document/id/mo/mo/m0275_2021>.

14 Order in Council No 726/2021, 20 December 2021 <https://www.bclaws.gov.bc.ca/civix/document/id/oic/oic_cur/0726_2021>.

> they can continue to use the BC Vaccine Card, it is an important tool that helps people in different situations. That masking will still be supported in many of those indoor environments where we know it is riskier, and it will be different in different communities. And I will also say that these are not tools that we abandon, they are things that helped us, that worked.[15]

Because the emergency measures will be lifted but not repealed, unvaccinated, partially-vaccinated, and naturally immune but vaccine-free individuals (the "Vaccine-Free") will continue to face ongoing arbitrary discrimination from businesses that choose to require proof of vaccination.[16] And it is disheartening to know the PHO may fully reinstate her discriminatory measures this fall.

3 THE ADMINISTRATIVE SUPERSTRUCTURE

3.1 The Vaccine Passport Scheme

BC's egregiously discriminatory proof of vaccination scheme, which obligates private businesses to medically segregate on the basis of vaccination status, has four key components: public health orders issued by the PHO, enforcement orders issued by the Minister, records of personal health data obtained by citizens, and a medical surveillance app used by "non-essential" businesses:

1) Public health orders issued by the PHO under ss. 30, 31 & 32 of the *Public Health Act*[17] restrict the ability of British Columbians to participate in communal activities; these orders include:

   - the *Gatherings and Events Order* ("**Gatherings Mandate**");[18] and
   - the *Food and Liquor Serving Premises Order* ("**Venues Mandate**").[19]

   (collectively the "**PHO Mandates**")

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15 Province of BC, *COVID-19 Update for March 1, 2022* at 12:38 <https://youtu.be/HW3fr_bv-zU?t=758> and at 36:26 <https://youtu.be/HW3fr_bv-zU?t=2186>.

16 "Individual businesses and organizations can choose to continue to require the BC Vaccine Card proof on their premises." Ministry of Health, *B.C. takes next step in balanced plan to lift COVID-19 restrictions*, news release, 10 March 2022 <https://news.gov.bc.ca/releases/2022HLTH0081-000324>.

17 In Privacy Impact Assessments pertaining to the BC Vaccine Card and the BC Vaccine Card Verifier App, the Ministry of Health claims the Vaccine Passport Scheme has been implemented under the authority of ss. 30, 31, and 32 of the *Public Health Act*: Ministry of Health, *Privacy Impact Assessment: "Health Gateway" Initiative* (HLTH21100) at p.4-5, accessed 11 March 2022 <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/services-policies-for-government/information-management-technology/information-privacy/privacy-impact-assessments/corporate/hlth21100_hg_update_-_vaccine_card.pdf>; Ministry of Health, *Privacy Impact Assessment: "BC Vaccine Card Verifier App" Initiative* (HLTH21101) at p.6-7, accessed 11 March 2022 <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/services-policies-for-government/information-management-technology/information-privacy/privacy-impact-assessments/corporate/hlth21101_-_2021-76_bc_vaccine_card_verifier_app_-_all_signed.pdf>.

18 Provincial Health Officer, *Gatherings and Events – March 10, 2022* <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/covid-19-pho-order-gatherings-events.pdf>. The PHO has issued 38 versions of the Gatherings Mandate (not including supplemental orders, variances, or regional orders) since 16 March 2020 – **archived orders**: Ministry of Health, *COVID-19 (Novel Coronavirus)*, updated 31 March 2022 <https://www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/current-health-topics/covid-19-novel-coronavirus>.

19 Provincial Health Officer, *Food and Liquor Serving Premises – March 10, 2022* <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/covid-19-pho-order-nightclubs-food-drink.pdf>. The PHO has issued 24 versions of the Venues Mandate (not including regional orders) since 20 March 2020 – **archived orders**: Ministry of Health, *COVID-19 (Novel Coronavirus)*, updated 31 March 2022 <https://www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/current-health-topics/covid-19-novel-coronavirus>.

2) Emergency orders issued by the Minister under s.10 of the *Emergency Program Act* and s.3 of the *CRMA* create an enforcement scheme to support the PHO Mandates; these orders include:

   - M082/2020: "*Bylaw Enforcement Officer (COVID-19) Order*", enacted as Item 1 of Schedule 2 of the *CRMA* by Bill 19 (the "**Bylaw Order**");[20]
   - M093/2020: "*Provincial Compliance Officer (COVID-19) Order*", enacted as Item 5 of Schedule 2 of the *CRMA* by Bill 19 (the "**PCO Order**");[21] and
   - M273/2021: "*Protective Measures (COVID-19) Order No. 2*", enacted as Item 23.8 of Schedule 2 of the *CRMA* by Order in Council No. 372/2021, and amended by Order in Council No. 726/2021 (the "**PMC2 Order**").[22]

   (collectively the "**Enforcement Orders**")

3) The **BC Vaccine Card**[23] is a record of personal information (i.e.: legal name, date of birth, Personal Health Number, date of vaccination, vaccine type, lot number of vaccine, and clinic where the vaccine was received) in Quick Response (QR) or PDF format that must be downloaded or printed by Covid vaccinees and presented to "non-essential" businesses.

4) Non-essential businesses are required to use the **BC Vaccine Card Verifier App**[24] to verify the vaccination status of their customers, and they must deny access to the Vaccine-Free.

(collectively the "**Vaccine Passport Scheme**")

The Vaccine-Free have been barred from public venues such as movie theatres, restaurants, pubs, casinos, and fitness centres, they've been prohibited from attending social functions such as weddings, conferences, workshops and sporting events, and they've even been banned from private residences—a few days before Christmas, for instance, the PHO declared the Vaccine-Free *persona non grata* at the homes of their friends and families.[25] How did we get here?

In its 1996 National Report on Immunization, Health Canada confirmed that vaccination is not and *cannot* be made mandatory in Canada:

> Unlike some countries, immunization is not mandatory in Canada; it cannot be made mandatory because of the Canadian Constitution.... It must be emphasized that, in [Ontario, New

20 Ministerial Order M082/2020, 26 March 2020 <https://www.bclaws.gov.bc.ca/civix/document/id/mo/mo/m0082_2020>, enacted as Item 1 of Schedule 2 of the *CRMA* when that Act came into force on 10 July 2020.

21 Ministerial Order M093/2020, 31 March 2020 <https://www.bclaws.gov.bc.ca/civix/document/id/mo/hmo/m0093_2020>, enacted as Item 5 of Schedule 2 of the *CRMA* when that Act came into force on 10 July 2020.

22 Ministerial Order M273/2021, 28 June 2021 <https://www.bclaws.gov.bc.ca/civix/document/id/mo/mo/m0273_2021>, enacted as Item 23.8 of Schedule 2 of the *CRMA* by Order in Council No. 372/2021, 29 June 2021 <https://www.bclaws.gov.bc.ca/civix/document/id/oic/oic_cur/0372_2021>.

23 Ministry of Health, *Privacy Impact Assessment: "Health Gateway" Initiative* (HLTH21100), accessed 11 March 2022 <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/services-policies-for-government/information-management-technology/information-privacy/privacy-impact-assessments/corporate/hlth21100_hg_update_-_vaccine_card.pdf>.

24 Ministry of Health, *Privacy Impact Assessment: "BC Vaccine Card Verifier App" Initiative* (HLTH21101), accessed 11 March 2022 <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/services-policies-for-government/information-management-technology/information-privacy/privacy-impact-assessments/corporate/hlth21101_-_2021-76_bc_vaccine_card_verifier_app_-_all_signed.pdf>.

25 Ian Holliday, *No gatherings for households with unvaccinated people in them under new B.C. restrictions*, 17 December 2021 <https://bc.ctvnews.ca/no-gatherings-for-households-with-unvaccinated-people-in-them-under-new-b-c-restrictions-1.5712071>.

> Brunswick, and Manitoba], exceptions are permitted for medical or religious grounds and reasons of conscience; legislation and regulations must not be interpreted to imply compulsory immunization.[26]

Even though vaccination *cannot* be made mandatory in Canada, s. 56(1) of the *Public Health Act* purportedly authorizes the PHO to mandate vaccination, i.e.: in an emergency, the PHO may order a person to take "preventive measures":

> **Preventive measures**
> 16(1) Preventive measures include the following:
> (a) being treated or vaccinated;
>
> **Emergency preventive measures**
> 56(1) The provincial health officer or a medical health officer may, in an emergency, order a person to take preventive measures within the meaning of section 16 [*preventive measures*], including ordering a person to take preventive measures that the person could otherwise avoid by making an objection under that section.

Despite having statutory authority to mandate vaccination in an emergency, the PHO infamously promised "there is no way" she would implement a Vaccine Passport Scheme in BC:

> [T]his virus has shown us that there are inequities in our society that have been exacerbated by this pandemic, and ***there is no way*** that we will recommend inequities be increased by use of things like vaccine passports for services, for public access here in British Columbia. And that's my advice, and I've got support from, the Premier and I have talked about this, Minister Dix, and others.[27]

At the time, the Minister was optimistic the provincial emergency was nearly behind us:

> We all look forward to the day things go back to normal. To do that, we need to keep following the orders and public health guidance. If we all work together and do the right things, it is my hope that by Canada Day we will be in a position to enter Step 3 of the restart plan, further relax restrictions and finally put this provincial emergency behind us.[28]

So mandatory vaccination is unconstitutional, the Minister was confident the emergency was nearly behind us, and despite having statutory authority to mandate vaccination in an emergency, the PHO was unwilling to "increase inequities" by imposing a scheme to punish the Vaccine-Free. What changed? Early last year, Prime Minister Justin Trudeau negotiated procurement agreements with seven different vaccine makers, securing options to purchase over 400 million doses of the Experimental Vaccines—***more than 10 doses per Canadian***.[29] And during his recent election campaign, Trudeau bribed the

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26 Health Canada, *Canadian National Report on Immunization, 1996*, CCDR 1997;23S4:1-50 at p.3.

27 Vancouver Sun, *COVID-19: Vaccine passports, required or not?* 25 May 2021 <https://youtu.be/y7C-59XFUFU?t=49>.

28 Minister of Public Safety and Solicitor General, *State of emergency extended to continue B.C.'s COVID-19 response*, news release, 22 June 2021 <https://news.gov.bc.ca/releases/2021PSSG0043-001208>.

29 Trudeau has negotiated 3-year deals with Pfizer and Moderna, procuring up to 65 million doses of Pfizer-BioNTech + 35 million doses of Moderna in 2022, up to 60 million Pfizer doses + 35 million Moderna doses in 2023, and up to 60 million Pfizer doses + 35 million Moderna doses in 2024. Mia Rabson, *Canada has contracts for up to 100 million Pfizer, Moderna doses in 2022*, 11 January 2022 <https://www.theglobeandmail.com/canada/article-canada-has-contracts-for-up-to-100-million-pfizer-moderna-covid-19/>. See

provinces to mandate vaccination, offering them $1 billion to implement vaccine passports.[30] Coincidentally, the week Trudeau announced his bribe, the BC government announced its plan to implement an egregiously discriminatory provincial proof of vaccination scheme that would ultimately transition to a "federally compliant" proof of vaccination scheme:

> "Getting vaccinated keeps everyone in B.C. safe and stops the spread of COVID-19," said Adrian Dix, Minister of Health. "And getting 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."[31]

Rather than mandating vaccination for the general public, the PHO did an end-run around the constitution by imposing an *indirect* scheme of mandatory vaccination, inflicting "consequences" on those who choose not to receive an Experimental Vaccine. After the scheme was announced, the wording of the recitals in the PHO Mandates changed, brazenly shifting blame for Covid outbreaks to the Vaccine-Free, stigmatizing them as a "health hazard".

Long a fierce advocate of vaccination, the PHO has a history of finding creative ways to punish the Vaccine-Free. She was instrumental in introducing BC's 'Vaccinate or Mask' ("VOM") policy, a punitive measure designed to increase flu shot uptake in healthcare settings.[32] When she testified at a VOM arbitration in Ontario, the PHO admitted she was "not a huge fan of the masking piece", she agreed there was "scant evidence about the value of masks in preventing the transmission of influenza,"[33] and she conceded forced masking was imposed on unvaccinated healthcare workers to penalize them for refusing flu shots:

> Dr. Henry commented in her direct examination that U.S. studies show that voluntary efforts to increase vaccination rates are of limited value. The only studies that show increased [healthcare workers] immunization rates over a long time have included "consequences if people don't get immunized", vaccinate or wear a mask during influenza season.... In this regard, I note Dr. Henry's recognition that the wearing of a mask could be reasonably regarded as a "consequence" for failure to consent to vaccination.[34]

Much as the "consequence" of masking (which the PHO admitted was ineffective) was imposed to penalize non-compliant healthcare workers who'd refused flu shots, the "consequence" of banishment from social and societal life (which the PHO swore she would never do) was imposed to penalize non-compliant British Columbians who'd refused experimental Covid shots. As indicated by the PHO's post-bribe messaging, the Vaccine Passport Scheme is clearly intended to drive up vaccination rates:

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also: John Paul Tasker, *Canada has ordered more than 400 million COVID-19 vaccine shots: Here's the progress report*, 21 May 2021 <https://www.cbc.ca/news/politics/canada-vaccine-deliveries-progress-report-1.6034624>.

30 "Liberal Leader Justin Trudeau today announced a billion-dollar fund to help provinces create their own vaccine passports.... If a province requires that everyone at a local restaurant, gym or other non-essential business location be fully vaccinated and show proof of vaccination, Trudeau said, Ottawa would pay for the development and the rollout of that program." John Paul Tasker, *Trudeau promises $1B to help provinces pay for vaccine passports*, 27 August 2021 <https://www.cbc.ca/news/politics/trudeau-promises-1b-vaccine-passports-1.6155618>.

31 Ministry of Health, *B.C. launches proof of vaccination to stop spread of COVID-19*, news release, 23 August 2021 <https://news.gov.bc.ca/releases/2021HLTH0053-001659>.

32 *Sault Area Hospital v. Ontario Nurses' Association*, 2015 CanLII 55643 (ON LA) at para 249.

33 *Sault Area Hospital v. Ontario Nurses' Association*, 2015 CanLII 55643 (ON LA) at para 300.

34 *Sault Area Hospital v. Ontario Nurses' Association*, 2015 CanLII 55643 (ON LA) at footnote 420.

- Programs that require proof of vaccination have been shown to ***increase vaccination uptake*** in populations, thereby reducing the public health risk of SARS-CoV-2 and the burden of COVID-19 illness on the public health system, health care system and society as a whole.[35]
- The BC Vaccine Card... will help ***increase vaccinations***, while protecting people in these settings, keeping businesses open and allowing events to take place.[36]
- The BC Vaccine Card requirement is applied in certain discretionary settings, including most restaurants and indoor events, through provincial health officer orders. This requirement helps ensure that businesses can stay open and people can feel safe in these settings, while continuing to ***increase vaccinations*** throughout the province.[37]

The Vaccine Passport Scheme rewards Covid vaccinees for their compliance by granting them permission to participate in social and societal life on the *false presumption* they are virus-free, and it penalizes the Vaccine-Free for their non-compliance by prohibiting them from participating in social and societal life on the *false presumption* they are high-risk, virus-carrying spreaders of disease. But the Experimental Vaccines were never tested for spread reduction, so using vaccine passports for this purpose is irrational and unjustified:

> Although vaccine passports are now being used to ostensibly prevent or reduce transmission of COVID-19, this outcome was never studied in the trial and it is inappropriate to assign that capability to these inoculations. There is no evidence at all that they reduce the spread of disease and transmission was never one of the study's endpoints.[38]

In an ostensibly "free and democratic" country, it defies belief that a novel experimental mRNA therapy would be mandated as a precondition for participating in social and societal life, particularly on the pretext of stopping a virus with an experimental treatment that ***does not stop the virus***.

3.2 The PHO Mandates

Over the course of the pandemic, the PHO has issued a litany of public health orders purporting to regulate everything from workplaces and residential care homes to schools and overnight camps for children.[39] As noted above, the province-wide orders that remain in effect,[40] justifying ongoing discrimination against the Vaccine-Free, include the latest versions of the Gatherings and Venues Mandates. In each of her orders, the PHO warns:

> You are required under section 42 of the *Public Health Act* to comply with this Order. Failure to comply with this Order is an offence under section 99(1)(k) of the *Public Health Act*. If you fail to comply with this Order, I have the authority to take enforcement action against you under Part 4, Division 6 of the *Public Health Act*.

35 Gatherings & Venues Mandates at para S.
36 Ministry of Health, *Vaccine card enhances confidence, increases safety at B.C. events*, news release, 7 September 2021 <https://news.gov.bc.ca/releases/2021PREM0054-001746>.
37 Ministry of Health, *Reminder: People need the BC Vaccine Card to access certain settings*, news release, 25 September 2021 <https://news.gov.bc.ca/releases/2021HLTH0171-001851>.
38 Canadian Covid Care Alliance, *The Pfizer Inoculations Do More Harm Than Good*, 16 December 2021 <https://rumble.com/vqx3kb-the-pfizer-inoculations-do-more-harm-than-good.html>.
39 Ministry of Health, *COVID-19 (Novel Coronavirus)*, updated 9 February 2022 <https://www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/current-health-topics/covid-19-novel-coronavirus>
40 Government of BC, *Province-wide restrictions*, updated 1 February 2022 <https://www2.gov.bc.ca/gov/content/covid-19/info/restrictions>.

Subsection 42(1) of the *Public Health Act* stipulates that "A person named or described in an order made under this Part [*Part 4 – Inspections and Orders*] must comply with the order." Section 99 creates various offences including, *inter alia*:

- failing to comply with an order of a health officer: s. 99(1);
- failing to prevent or respond to health hazards: s. 99(2);
- causing a health hazard: s. 99(3); and
- knowingly providing false or misleading information: s. 99(4).

Pursuant to s. 108(1), these offences are punishable by fines of up to $3 million, three years' imprisonment, or both. The enforcement mechanisms set out in Part 4, Division 6 authorize the PHO to issue warrants (s. 47), seek injunctions (s. 48), and apply for court orders against those who allegedly pose a danger to themselves or to public health (ss. 49-50).

The mildness and ubiquity of Omicron offered the PHO an opportunity not only to lift the mandates, but to provide notice that the alleged public health emergency "has passed" under s. 59(b) of the *Public Health Act*. Instead, she warned British Columbians to "be prepared" for the discriminatory restrictions to be fully reinstated this fall.

3.3 The Enforcement Orders

After declaring a State of Emergency, the Minister began issuing orders purporting to regulate everything from the reporting of greenhouse gas emissions to the suspension of mandatory limitation periods.[41] BC's Ombudsperson took the Minister to task for issuing orders that had the effect of suspending, amending, and overriding valid BC laws:

> From a rule of law perspective, the minister acting under s. 10(1) of the *Emergency Program Act* has no special legal status relative to anyone else in the province exercising delegated authority. All exercise of delegated authority must conform to the enabling statute.
> ...
> The *Emergency Program Act* does not expressly authorize the minister to suspend, amend or override otherwise valid statutes or regulations when acting under s. 10(1). Do the opening words of s. 10(1) implicitly authorize that? In my opinion, the words "acts" and "procedures," read on their own and in the context of the *Emergency Program Act* as a whole, do not have the dramatic effect of transferring the legislature's law-making power to the minister, let alone allowing the minister to then transfer those powers to others.[42]

In anticipation of the Ombudsperson's report, Bill 19, the *COVID-19 Related Measures Act*,[43] was drafted to retroactively authorize the impugned ministerial orders, providing a veneer of legitimacy to this devious circumvention of our typical legislative checks and balances:

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41 A non-exhaustive list of ministerial orders can be found at BC Laws, *COVID-19 related regulations, orders in council and ministerial orders*, accessed 13 February 2022 <https://www.bclaws.gov.bc.ca/covid-19.html>.

42 Jay Chalke, *Extraordinary Times, Extraordinary Measuers: Two ministerial orders made under the Emergency Program Act in response to the COVID-19 pandemic*, Ombudsperson's Special Report No. 44 at p.17 & 22, 22 June 2020 <https://bcombudsperson.ca/investigative_report/extraordinary-times-extraordinary-measures/>.

43 Bill 19, *COVID-19 Related Measures Act*, 5th Sess, 41st Parl, 2020 (assented to 8 July 2020), SBC 2020, c.8 <https://www.bclaws.gov.bc.ca/civix/document/id/bills/billsprevious/5th41st:gov19-3>.

> [O]n the same day as the Ombudsperson's report (June 22, 2020), the BC government introduced Bill 19 – *COVID-19 Related Measures Act*, which proposed to enact into law the Ministerial Orders made under the *Emergency Program Act*, and to expressly transfer the legislature's law-making power to the Lieutenant Governor in Council (i.e. the executive branch – the Premier and Ministers) during declared states of emergency.[44]

Attorney General David Eby believes the Minister has the lawful authority to amend, suspend and override valid BC laws:

> I will note that the CRMA change — one of them was to elevate a power that we believe lawfully existed with a single cabinet minister, the Minister of Public Safety, to cabinet as a whole, which was not a change in terms of the authority but was a change in terms of, in our opinion, additional oversight — that it was the executive council, the LGIC, rather than a single cabinet minister, exercising authority.
> ....
> [R]ather than a single individual having authority, a single minister, that it has been elevated to cabinet, the authorities under the EPA, and that, by function, means that you would need to have an entire rogue cabinet as opposed to a single rogue minister, which is a safeguard.[45]

If the Ombudsperson was correct, and the Minister did not have the lawful authority to suspend, amend, or override valid BC laws, it's difficult to see how transferring powers the Minister didn't lawfully possess "to cabinet as a whole" in any way fixed the problem. In an Information Bulletin circulated by the Law Society of BC, the Attorney General assured the legal community this devious power grab was a temporary measure:

> Orders or regulations enacted under the CRMA may be further extended by regulation, <u>for a maximum period of up to one year from the date that the CRMA came into force</u>. The CRMA and any regulations made under it will be automatically repealed on that date.[46]

The alleged impermanence of the "temporary" measures derived from the language of ss. 3(7) and 7 of Bill 19:

> 3 (1) Each of the EPA instruments is enacted as a provision of this Act.
> ....
> (6) The Lieutenant Governor in Council may, before a COVID-19 provision is repealed under subsection (5), specify by regulation a later date on which the COVID-19 provision is repealed, and if a later date is so specified, the COVID-19 provision is repealed on that later date.
> (7) The Lieutenant Governor in Council <u>may not specify a date</u> for the purposes of subsection (6) <u>that is later than the date that is one year after the date this Act comes into force</u>.

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44 Michal Jaworski, *Provincial Emergency Measures Enacted into Law*, 13 July 2020 <https://www.cwilson.com/provincial-emergency-measures-enacted-into-law-updated-with-list-of-measures-and-effective-dates/>.

45 British Columbia, Legislative Assembly, *Debates* (1 June 2021) at 2325 & 2327 (D. Eby) <https://www.leg.bc.ca/content/hansard/42nd2nd/20210601pm-Hansard-n81.pdf>.

46 Ministry of Attorney General, *Information Bulletin: COVID-19 Related Measures Act* <https://www.lawsociety.bc.ca/Website/media/Shared/docs/about/covid/CRMA.pdf>.

....

7 Sections 1 to 5 of this Act are repealed on the date that is one year after the date this Act comes into force.

If, by virtue of the sunset clause in s. 7, each Ministerial Order enacted as a provision of the *CRMA* by virtue of s. 3(1) was automatically repealed on 10 July 2021 (the date that was one year after the *CRMA* came into force),[47] and extensions beyond 10 July 2021 were expressly prohibited by s. 3(7), why are the emergency measures still in effect? The executive branch simply amended the inconvenient limitations—not once, but *twice!* Bill 11, the *Miscellaneous Statutes Amendment Act, 2021*,[48] extended the measures to 31 December 2021 and expressly prohibited further extensions:

1 Section 3 (6) and (7) of the *COVID-19 Related Measures Act*, S.B.C. 2020, c. 8, is repealed and the following substituted:

(6) The Lieutenant Governor in Council may, before a COVID-19 provision is repealed under this section, specify by regulation a different date on which the COVID-19 provision is to be repealed, and if a different date is so specified, the COVID-19 provision is repealed on that specified date.

(7) The Lieutenant Governor in Council may not specify a date

(a) for the purposes of subsection (5)(c) that is later than December 31, 2021, and

(b) for the purposes of subsection (6) that would have retroactive effect or that is later than December 31, 2021.

....

3 Section 7 is repealed and the following substituted:

Repeal

7 Sections 1 to 5 and this section are repealed on December 31, 2021.

Though further extensions were prohibited, Bill 30, the *Attorney General Statutes Amendment Act, 2021*,[49] amended the repeal date to 31 December 2022, effecting a further one-year extension:

1 Section 3 (7) of the *COVID-19 Related Measures Act*, S.B.C. 2020, c. 8, is amended by striking out "December 31, 2021" in both places and substituting "December 31, 2022".

2 Section 7 is repealed and the following substituted:

Repeal

7(1) Subject to subsection (2), the Act is repealed on December 31, 2022.

(2) The Lieutenant Governor in Council may by regulation repeal the Act on a date earlier than December 31, 2022.

47 Order In Council No 391/2020, 10 July 2020 <https://www.bclaws.gov.bc.ca/civix/document/id/oic/oic_cur/0391_2020>.

48 Bill 11, *Miscellaneous Statutes Amendment Act, 2021*, 2nd Sess, 42nd Parl, 2021 (assented to 17 June 2021), SBC 2021, c.17 <https://www.bclaws.gov.bc.ca/civix/document/id/bills/billsprevious/2nd42nd:gov11-3>.

49 Bill 30, *Attorney General Statutes Amendment Act, 2021*, 2nd Sess, 42nd Parl, 2021 (assented to 25 November 2021), SBC 2021, c.34 <https://www.bclaws.gov.bc.ca/civix/document/id/bills/billsprevious/2nd42nd:gov30-3>.

On Christmas Eve, the Attorney General delivered notice to the Speaker that the repeal date for the *CRMA* had been extended to 31 December 2022,[50] and that various Covid-related orders would remain in effect until the *CRMA* is repealed.[51] Given the government's repeated failure to give effect to sunset clauses, there is clearly nothing to stop our tyrannical rulers from repeatedly amending the *CRMA*, sabotaging the legislative process by artificially prolonging the unofficial "emergency".

Among the ministerial decrees that will continue in force for another year are the Enforcement Orders, i.e.: the PMC2 Order, the Bylaw Order, and the PCO Order. The PMC2 Order prohibits "belligerent behaviour", requires patrons and staff of "food serving premises" to abide by the Venues Mandate, and punishes those who would dare to socialize with their "unsafe" Vaccine-Free friends in violation of the Gatherings Mandate. The Enforcement Orders collectively authorize a wide range of individuals—police officers, conservation officers, liquor and cannabis inspectors, gaming investigators, and bylaw enforcement officers—to monitor facilities, issue warnings, and snitch on offenders. As designated "Enforcement Officers" under Schedule 1 of the V*iolation Ticket Administration and Fines Regulation*, BC Reg 89/97 (the "VTAF Regulation"), these individuals can issue violation tickets under the *CRMA* and the *Emergency Program Act* (but not under the *Public Health Act*).

Over and above these enforcement mechanisms, s. 27 of the *Emergency Program Act* stipulates that anyone who contravenes the Act, or who interferes with or obstructs a person exercising a power or performing a duty under the Act, is liable to one year's imprisonment, a $10,000 fine, or both.

3.4 The BC Vaccine Card

BC citizens unwilling to be deprived of the right to access "non-essential" events, services, and businesses were required to be partially vaccinated by September 13, 2021, and fully vaccinated by October 24, 2021.[52] Covid vaccinees prove their vaccination status by presenting a digital or paper copy of their BC Vaccine Card to non-essential organizations,[53] and non-essential organizations are required to use the BC Vaccine Card Verifier App[54] to discern which of their potential customers must be shunned because they are, by order of the BC government, authorized targets of discrimination. According to Premier John Horgan, this measure ensures Covid vaccinees will not "come into contact with" Covid-infected individuals:

> I have to say, and it's critically important at this point, in our consultations with the business community, those who provide services to people, restaurateurs, the hospitality sector, tourism industries that have indoor activities, sporting events, cultural events, arts events, all of them want to make sure that they can continue to provide quality entertainment, quality services for

50 Attorney General's Report, *Amendments to Schedule 1 and 2 items in COVID-19 Related Measures Act*, 24 December 2021 <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/covid-19-assets/oic_726__december_20_2021__amendments_to_schedule_1_and_2_items_in_covid-19_related_measures_act.pdf>.

51 Order in Council No 726/2021, 20 December 2021 <https://www.bclaws.gov.bc.ca/civix/document/id/oic/oic_cur/0726_2021>.

52 Ministry of Health, *Privacy Impact Assessment: "BC Vaccine Card Verifier App" Initiative* (HLTH21101) at p.10, accessed 11 March 2022 <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/services-policies-for-government/information-management-technology/information-privacy/privacy-impact-assessments/corporate/hlth21101_-_2021-76_bc_vaccine_card_verifier_app_-_all_signed.pdf>.

53 Ministry of Health, *Privacy Impact Assessment: "Health Gateway" Initiative* (HLTH21100), accessed 11 March 2022 <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/services-policies-for-government/information-management-technology/information-privacy/privacy-impact-assessments/corporate/hlth21100_hg_update_-_vaccine_card.pdf>.

54 Ministry of Health, *Privacy Impact Assessment: "BC Vaccine Card Verifier App" Initiative* (HLTH21101), accessed 11 March 2022 <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/services-policies-for-government/information-management-technology/information-privacy/privacy-impact-assessments/corporate/hlth21101_-_2021-76_bc_vaccine_card_verifier_app_-_all_signed.pdf>.

> British Columbians, and they want to do it in a way that gives their patrons confidence that they're taking every step possible to make sure that they can attend an event, they can go to a spin class, they can go out for dinner, and not be fearful that they may contract... ***come into contact with someone who might be able to transmit Covid-19***.[55]

Our relatively recent transformation to a "papers please" society is morally offensive, ethically disturbing, and a dystopian erosion of our privacy rights. And it happened despite express limitations on the collection, use and disclosure of personal information in BC's privacy laws. Pursuant to ss. 2 and 4(1) of the *Personal Information Protection Act*,[56] information about identifiable individuals may only be collected, used or disclosed by private sector organizations for "reasonable purposes", i.e.: purposes "a reasonable person would consider appropriate in the circumstances." Because no reasonable person would consider medical surveillance an appropriate response to a viral illness that is clinically indistinguishable from the common cold, the requirement to notify complete strangers of our medical status before we may participate in social and societal activities is objectively unreasonable.

> [A]llowing private entities to collect and use personal health information about us is invasive. Tying the ability to participate in public life with a ubiquitous or persistent form of surveillance ("show us proof you have made a socially acceptable choice about your health") is a diminishment of the level of freedom we expect in a democracy that must be carefully examined for proportionality in the pandemic context. If the passport is digital or has a digital version, additional issues of technical privacy, security, and access arise.[57]

Before they may demand proof of vaccination, organizations must have "clear legal authority":

> Public and private sector entities that require or request individuals to present a vaccine passport in order to receive services or enter premises must ensure that they have the legal authority to make such a demand or request. Clear legal authority for vaccine passports may come from a new statute, an existing statute, an amendment to a statute, or a public health order that clearly specifies the legal authority to request or require a vaccine passport, to whom that authority is being given, and the specific circumstances in which that can occur.[58]

According to Michael McEvoy, BC's Information and Privacy Commissioner, because the PHO Mandates "...are made under the *Public Health Act* and they have the force of law," the government has clear legal authority to compel individuals to disclose their personal information to non-essential businesses, and clear legal authority to compel non-essential businesses to collect and use personal information to verify their customers' vaccination status.[59] But even if the government has clear legal authority to implement an egregiously discriminatory proof of vaccination scheme, it does not follow that it is justified in doing so. When our governments first floated the idea of segregating society via an

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55 BC Government, *COVID-19 vaccinations in BC update* at 4:39, 23 August 2021 <https://youtu.be/AKJXVAIv4Vk?t=279>.

56 *Personal Information Protection Act*, SBC 2003, c.63. Pursuant to ss. 26, 32 and 33 of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c.165, personal information may only be *collected* by public bodies in prescribed circumstances (e.g.: if authorized by law), it may only be *used* for the purposes for which it was obtained, and it may only be *disclosed* in prescribed circumstances (e.g.: if the individual concerned consents to the disclosure).

57 Breda McPhail, *FAQ: Vaccine Passports*, Canadian Civil Liberties Association, 17 August 2021 <https://ccla.org/privacy/surveillance-technology/faq-vaccine-passports/>.

58 Privacy Commissioners of Canada, *Privacy and COVID-19 Vaccine Passports: Joint Statement by Federal, Provincial and Territorial Privacy Commissioners*, 19 May 2021 <https://www.priv.gc.ca/en/opc-news/speeches/2021/s-d_20210519/>.

59 Office of the Information & Privacy Commissioner, *Privacy and the BC vaccine card: FAQs*, 13 September 2021 <https://www.oipc.bc.ca/guidance-documents/3577>

invasive regime of medical surveillance, the federal, provincial and territorial Privacy Commissioners issued a Joint Statement warning of the risks inherent in allowing public and private sector entities to collect, use and disclose our personal health information, and they posited an *Oakes*-style test to gauge whether vaccine passports could be seen as a justifiable response to Covid:

> [I]n light of the significant privacy risks involved, the necessity, effectiveness and proportionality of vaccine passports must be established for each specific context in which they will be used.
>
> - **Necessity**: vaccine passports must be necessary to achieve each intended public health purpose. Their necessity must be evidence-based and there must be no other less privacy-intrusive measures available and equally effective in achieving the specified purposes.
> - **Effectiveness**: vaccine passports must be likely to be effective at achieving each of their defined purposes at the outset and must continue to be effective throughout their life cycle.
> - **Proportionality**: the privacy risks associated with vaccine passports must be proportionate to each of the public health purposes they are intended to address. Data minimization should be applied so that the least amount of personal health information is collected, used or disclosed.
>
> The necessity, effectiveness and proportionality of vaccine passports must be continually monitored to ensure that they continue to be justified. Vaccine passports must be decommissioned if, at any time, it is determined that they are not a necessary, effective or proportionate response to address their public health purposes.[60]

Because the non-sterilizing Experimental Vaccines do not prevent Covid vaccinees from transmitting Covid, banishing the Vaccine-Free from society cannot achieve the public health purpose of ensuring Covid vaccinees will not "come into contact with" infected individuals. Since medical apartheid is neither necessary nor effective to achieve this purpose, *any* privacy risk associated with biosecurity surveillance is disproportionate, and BC Vaccine Cards must be decommissioned.

4 THE FOUNDATION OF LIES

4.1 Covid is Not Deadly Enough to Justify Risky Experimental Treatments for All

The PHO Mandates implicitly assume the risk of severe illness and death is the same for everyone regardless of age and health, but this is simply not true. The risk of serious illness and death from Covid is entirely dependent upon one's age, sex, and health status. By any rational assessment, SARS-CoV-2 poses minimal risk to most, typically producing only mild symptoms, and the Omicron strain is even milder, clinically indistinguishable from the common cold.[61] Vast segments of society are at extremely low risk, with healthy young and middle-aged people at a statistical zero risk of death:

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60 Privacy Commissioners of Canada, *Privacy and COVID-19 Vaccine Passports: Joint Statement by Federal, Provincial and Territorial Privacy Commissioners*, 19 May 2021 <https://www.priv.gc.ca/en/opc-news/speeches/2021/s-d_20210519/>.

61 Brief of America's Frontline Doctors as *Amicus Curiae* Supporting Applicants, *Job Creators Network, et al., v. Department of Labor, Occupational Safety and Health Administration, et al.*, NSD 21A243-21A267/2021, 17-22 December 2021, [15]. https://americasfrontlinedoctors.org/2/files/aflds-amicus-brief-in-support-of-emergency-applications-for-osha-ets-cases/

Age	Infection Fatality Rate	Infection Survival Rate
0-19	0.0013%	**99**.9987%
20-29	0.0088%	**99**.9912%
30-39	0.021%	**99**.979%
40-49	0.042%	**99**.958%
50-59	0.14%	**99**.86%
60-69	0.65%	**99**.35%
70+	2.9% (non-inst.)	97.1% (non-inst.)
70+	4.9% (all)	95.1% (all)

The above data relate to the Delta variant;[62] preliminary data suggest the Omicron variant is even less severe. Those at greatest risk are the elderly, the obese, and people with co-morbidities:

- 99.1% of Covid deaths occur in those with at least one co-morbidity;
- obesity yields a 30% increased risk of death [aRR = 1.30]; and
- diabetes yields a 26% increased risk of death [aRR = 1.26].[63]

There is simply no need to vaccinate the vast majority of healthy young and middle-aged people who are at no risk of becoming seriously ill. A virus that kills far less than 1% of its victims below the age of 70—and essentially zero victims below the age of 30—is clearly *not* a disease to be feared, but merely one to be managed, with focused protection offered to (but <u>never</u> forced upon) the vulnerable:

> The aim of focused protection is to minimize overall mortality from both COVID-19 and other diseases by balancing the need to protect high-risk individuals from COVID-19 while reducing the harm that lockdowns have had on other aspects of medical care and public health. It recognizes that public health is concerned with the health and well-being of populations in a broader way than just infection control.
> ....
> For older people, COVID-19 is a deadly disease that should be met with overwhelming resources aimed at protecting them wherever they are, whether in nursing homes, at their own home, in the workplace, or in multi-generational homes. For the non-vulnerable, who face far greater harm from the lockdowns than they do from COVID-19 infection risk, the lockdowns should be lifted and – for those who so decide – normal life resumed.[64]

A “one size fits all” approach to mitigation which includes a drive to push experimental medical treatments on everyone, including those at a statistical zero risk of death from Covid, is nonsensical.

4.2 Case, Hospitalization, and Death Rates are Unreliable

The PHO frequently suggests our hospitals are overflowing with the Vaccine-Free – in previous versions of the Gatherings and Venues Mandates, the PHO claimed unvaccinated people comprise “the majority” of hospitalizations and ICU admissions:

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62 Cathrine Axfors & John Ioannidis. *Infection fatality rate of COVID-19 in community-dwelling populations with emphasis on the elderly: An overview*. medRxiv. (December 23, 2021) https://www.medrxiv.org/content/10.1101/2021.07.08.21260210v2

63 Lyudmyla Kompaniyets *et al*., “Underlying Medical Conditions and Severe Illness Among 540,667 Adults Hospitalized With COVID-19, March 2020–March 2021” (2021) 18:E66 Prev Chronic Dis <https://www.cdc.gov/pcd/issues/2021/pdf/21_0123.pdf>.

64 Jay Bhattacharya *et al., Focused Protection*, 25 November 2020 <https://gbdeclaration.org/focused-protection/>.

> Both the public health and the health care systems are using disproportionate amounts of their resources in their efforts to prevent and respond to the transmission of SARS-CoV2, and to provide care for those who become ill with COVID-19, primarily unvaccinated people who comprise ***the majority*** of hospitalizations and ICU admissions.[65]

The PHO tones down her hyperbole in the current version of the Gatherings and Venues Mandates, claiming unvaccinated people comprise "a substantial proportion" rather than "the majority" of hospitalizations and ICU admissions.[66] Either way, this is dissimulation at its finest; the flaws in the PHO's hyperbolic claims are myriad.

4.2.1 Covid Illness Versus Incidental Covid

Over-cycled PCR tests have been used uncritically throughout the pandemic, despite massively over-reporting illness:

> [H]how many of the millions and billions of positive tests were actually positive, since this insanity began? We know that cycle count thresholds (Ct) above 24 denotes viral dust and fragments and not infectious, viable virus. Yet CDC and elsewhere over cycled the test to 40 and above. Above 35 had a 97% false positive rate.[67]

Equally scandalous is the failure of health authorities to differentiate between actual Covid illness (death or hospitalization "from" Covid) and incidental Covid (death or hospitalization "with" Covid). In BC, this statistical sleight of hand resulted in massive over-reporting of Covid hospitalizations:

> [A] study conducted in partnership with the BCCDC showed that a large proportion of hospitalizations in COVID-infected patients were not FOR COVID-19 but rather WITH COVID-19, i.e., the infections were incidentally diagnosed and were not the cause for about 60% of the hospitalizations.[68]

Kieran Moore, Ontario's chief medical officer, revealed that half of Ontario's Covid hospitalizations are not *from* Covid, and admitted their numbers do not distinguish between deaths from Covid and deaths with Covid.[69] A Louisiana whistleblower suggests the practice is rampant.[70] In Grand County, Colorado, for instance, a murder-suicide was included in the state's running tally of Covid deaths.[71] In a

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65 Gatherings Mandate (previous version) at para M: Provincial Health Officer, *Gatherings and Events – January 17, 2022* <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-gatherings-events-jan17.pdf>; Venues Mandate (previous version) at para L: Provincial Health Officer, *Food and Liquor Serving Premises – January 17, 2022* <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-nightclubs-food-drink-jan17.pdf>.

66 Gatherings & Venues Mandates at para M.

67 Paul Alexander, *97% of positive tests the last 2 years were false*, 4 January 2022 <https://palexander.substack.com/p/cdcs-dr-rochelle-walensky-told-us?s=r>.

68 BC Covid Therapeutics Committee, *Clinical Practice Guide for the Use of Therapeutics in Mild-Moderate COVID-19*, 23 March 2022 at p.4 <http://www.bccdc.ca/Health-Professionals-Site/Documents/COVID-treatment/ClinicalPracticeGuide_Therapeutics_MildModerateCOVID.pdf>.

69 Arjun Walia, *Ontario (Canada) Admits 50% of "COVID" Hospitalizations Not From COVID, Death Count May Also Be Misleading*, 5 January 2022 <https://thepulse.one/2022/01/05/ontario-canada-admits-50-of-covid-hospitalizations-not-from-covid-deaths-count-may-also-be-misleading/>.

70 Project Veritas, *DOH Whistleblower Says Covid Inflated for Profit 'He went for gunshot wounds and was coded as COVID'*, 2 February 2022 <https://youtu.be/hx2FFPhbNIY>.

71 Sharyl Attkisson, *Counting Covid*, Full Measure, 20 September 2021 <https://youtu.be/DKwQlkKJ6Uo>.

particularly egregious example, Deena Hinshaw, Alberta's Chief Medical Officer of Health, falsely claimed a 14-year-old child had died from Covid when his cause of death was actually brain cancer.[72]

Defining "Covid death" not as "death from Covid as a proximate cause", but as "death from ***any*** cause if you had a positive PCR test for Covid in the previous 28-30 days" is egregiously misleading.[73] There is no valid reason for counting as a Covid death a person who dies of a burst aneurysm but happens to have tested positive for Covid within the previous 28-30 days, nor is there any valid reason for counting as a Covid hospitalization an otherwise healthy person with a broken arm who happens to test positive for Covid. In some jurisdictions, hospital administrators had perverse incentives to exaggerate Covid hospitalizations and deaths:[74]

> Hospitals in the USA are fraudulently bilking the US Government for literally billions of dollars, by claiming excess disease and death. So much so, that it has become impossible to figure out the true rates of disease and death of Covid-19 and for all causes in the USA. It is shocking.[75]

Health authorities used over-cycled PCR test results and artificially-inflated counts of cases, hospitalizations, and deaths to manipulate the public into fearing Covid and to justify the imposition of liberty-violating "public health" measures. Their Covid-counting duplicity is scandalous.

4.2.2 Infections & Deaths Within 3 Weeks of Vaccination

The BC Centre for Disease Control (the "BCCDC") has committed further statistical sleight-of-hand by employing a categorization error to inflate cases, hospitalizations, and deaths ("Covid Events") in the unvaccinated, and to deflate Covid Events in the vaccinated. This is epidemiological fraud:

> Any systemic errors or biases can lead to conclusions that are inversions of reality. For example, simply reporting deaths one week late when a vaccine programme is rolled out will (with statistical certainty) lead to any vaccine, even a placebo, to seemingly reduce mortality. The same statistical illusion will happen if any death of a person occurring in the same week as the person is vaccinated is treated as an unvaccinated, rather than vaccinated, death.[76]

Though many jurisdictions count Covid Events that occur ***within 14 days*** of dose 1 as "Unvaccinated", BC goes one better and counts Covid Events that occur ***within 21 days*** of dose 1 as "Unvaccinated" (not "Vaccinated, 1 dose").[77] Covid Events that occur within 14 days of dose 2 are counted as "Vaccinated, 1 dose" (not "Vaccinated, 2 doses"), and Covid Events that occur within 14 days of dose 3

72 Tyler Dawson, *Dr. Deena Hinshaw apologizes and says Alberta teen didn't actually die from COVID*, 14 October 2021 <https://nationalpost.com/news/dr-deena-hinshaw-says-alberta-teen-didnt-actually-die-from-covid>.

73 el gato malo, *CDC reports of historical covid deaths drop by 70k to correct "coding error"*, 18 March 2022 <https://boriquagato.substack.com/p/cdc-reports-of-historical-covid-deaths?s=r>.

74 Elizabeth Vliet & Ali Shultz, *Biden's Bounty on Your Life: Hospitals' Incentive Payments for COVID-19*, 17 November 2021 <https://aapsonline.org/bidens-bounty-on-your-life-hospitals-incentive-payments-for-covid-19/>.

75 Robert Malone, *The US Public Health Response has been a Colossal Failure*, 3 February 2022 <https://rwmalonemd.substack.com/p/the-us-public-health-response-has>.

76 Martin Neil *et al*., *Official mortality data for England suggest systematic miscategorisation of vaccine status and uncertain effectiveness of Covid-19 vaccination* at p.1-2, January 2022 <https://doi.org/10.13140/RG.2.2.28055.09124>. See also: Norman Fenton & Martin Neil, *The impact of misclassifying deaths in evaluating vaccine safety: the same statistical illusion*, 1 December 2021 <https://probabilityandlaw.blogspot.com/2021/12/the-impact-of-misclassifying-deaths-in.html>.

77 **Unvaccinated** is defined as "Unvaccinated or vaccinated population with one dose of any vaccine but not considered protected (surveillance episode date is <21 days since dose 1)." BC Centre for Disease Control, *COVID-19 Regional Surveillance Dashboard: Data Notes*, accessed 30 January 2022 <http://www.bccdc.ca/health-professionals/data-reports/covid-19-surveillance-dashboard>.

are counted as "Vaccinated, 2 doses" (not "Vaccinated, 3 doses").[78] This blatant manipulation is horribly misleading, a lie designed to make the Experimental Vaccines *seem* more effective. When an astute researcher noticed the Government of Alberta engaging in this deceptive practice, he pointed out the consequences of the flawed methodology:

> Fortunately, they inadvertently let us in on the magnitude of this duplicity by also publishing the time from dose to infection for each of the events, thereby allowing us to recalculate just how many events in the first 14 days were shifted from the vaccinated to the unvaccinated cohort.
>
> Almost half of all COVID hospitalizations of the newly vaccinated occurred within 14 days which means they were treated as unvaccinated in the stats. Not only that but almost 80% occurred within 45 days....
>
> In terms of deaths, the duplicity is even more severe with almost 56% of deaths of the newly vaccinated occurring within 14 days and almost 90% within 45 days.[79]

BC doesn't publish statistics reflecting time from dose to infection, so it's impossible to say how many Covid Events in the vaccinated have been deceptively attributed to the Vaccine-Free. But if our numbers are anything like Alberta's, we can assume:

- half of all hospitalizations and 56% of all deaths occur within 14 days of vaccination; and
- 80% of all hospitalizations and 90% of all deaths occur within 45 days of vaccination.

Because we know from Alberta's data that a huge number of Covid Events occur in the first 14 days after vaccination, indicating the half-dosed experience particularly high rates of illness and death, categorizing these events improperly is either a grossly manipulative lie or fraud. To any rational person, it is egregious that a person who has received one dose is counted as "Unvaccinated", a person who has received a 2nd dose is counted as "Vaccinated, 1 dose", and a person who has received a 3rd dose is counted as "Vaccinated, 2 doses".

4.2.3 Data Not Disaggregated by Health Status

Because we know that those at greatest risk of severe illness and death from Covid are the elderly, the obese, and those with co-morbidities,[80] data disaggregated by age ***and*** health status (i.e.: by number and severity of co-morbidities) is crucial, but the BCCDC does not provide this data. The agency publishes age-specific data about Covid Events (the median age of death from or with Covid in BC is 82 years[81]),

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78 **Vaccinated, 1 dose** is defined as "surveillance episode date is >=21 days after administration of 1st dose and surveillance episode date is <14 days since dose 2." **Vaccinated, 2 doses** is defined as "surveillance episode date is >=14 days after administration of 2nd dose and surveillance episode date is <14 days after dose 3." **Vaccinated, 3 doses** is defined as "surveillance episode date is >=14 days after administration of 3rd dose." BC Centre for Disease Control, *COVID-19 Regional Surveillance Dashboard: Data Notes*, accessed 30 January 2022 <http://www.bccdc.ca/health-professionals/data-reports/covid-19-surveillance-dashboard>.

79 Joel Smalley, *Alberta just inadvertently confessed to fiddling the COVID vaccination stats*, 13 January 2022 <https://metatron.substack.com/p/alberta-just-inadvertently-confessed>.

80 See e.g.: Lyudmyla Kompaniyets *et al*., "Underlying Medical Conditions and Severe Illness Among 540,667 Adults Hospitalized With COVID-19, March 2020–March 2021" (2021) 18:E66 Prev Chronic Dis <https://www.cdc.gov/pcd/issues/2021/pdf/21_0123.pdf>.

81 BC Centre for Disease Control, *COVID-19 Situation Report, Week 13: March 27-April 2, 2022* at p.8 <http://www.bccdc.ca/Health-Info-Site/Documents/COVID_sitrep/Week_13_2022_BC_COVID-19_Situation_Report.pdf>.

but none of the data is disaggregated by health status, and incidence by vaccination status is published separately.[82]

The BCCDC clearly does not want us to have access to data confirming that vast segments of society are at practically negligible risk of severe illness and death from Covid. The authorities need us to fear Covid so we'll take the Experimental Vaccines, not dismiss Covid as a threat. As noted above, the PHO candidly admits her draconian measures are intended to drive up vaccination rates.

When researchers at Johns Hopkins School of Medicine analyzed health insurance data on approximately 48,000 children who'd been diagnosed with Covid, they found a "mortality rate of zero among children without a preexisting medical condition such as leukemia."[83] It defies belief that Experimental Vaccines have been administered to healthy children and youth for whom vaccination provides no health benefit, only risk. This is clearly NOT a pandemic of healthy young and middle-aged unvaccinated people; rather, it is a pandemic of the elderly (particularly frail and otherwise unhealthy elderly people), the obese, and those with co-morbidities. Trusting the "experts" has never been more dangerous.

4.2.4 Reported Rates & the "Healthy Recipient" Bias

With regard to the seasonal flu, people at ***low*** risk of serious illness and death are, ironically, much more likely to get flu shots than those at ***high*** risk:

> [T]he popular belief that sick people are more likely to be vaccinated than healthy people is entirely wrong.
>
> People who receive vaccines are healthier overall than those who do not. They care more about avoiding sickness, and they have the time and energy and money to find their way to a vaccination site. <u>They are not healthier because they get vaccines; they get vaccines because they are healthier</u>.
>
> Older people who receive flu vaccines die—of both the flu and all causes—at much lower rates than unvaccinated people after they receive flu shots. But <u>they also die at much lower rates BEFORE they receive the vaccines</u>....
>
> This paradox helps explain why a huge study of flu vaccines in the United Kingdom showed that increasing vaccination levels in older people did not reduce to the number of hospitalizations or deaths from the flu. The same pattern is visible in the United States, where a massive increase in the number of flu vaccines in the last generation has made no apparent difference in the number of flu deaths.[84]

A study published in 2006 powerfully exposed the "healthy recipient" phenomenon:

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82 BC Centre for Disease Control, *COVID-19 Regional Surveillance Dashboard*, accessed 30 January 2022 <http://www.bccdc.ca/health-professionals/data-reports/covid-19-surveillance-dashboard>.

83 Marty Makary, *The Flimsy Evidence Behind the CDC's Push to Vaccinate Children*, 19 July 2021 <https://www.wsj.com/articles/cdc-covid-19-coronavirus-vaccine-side-effects-hospitalization-kids-11626706868>.

84 Alex Berenson, *The English data on vaccines and mortality, revisited*, 28 November 2021 <https://alexberenson.substack.com/p/the-english-data-on-vaccines-and/comments>.

> The reductions in risk before influenza season indicate preferential receipt of vaccine by relatively healthy seniors. Adjustment for diagnosis code variables did not control for this bias. In this study, the magnitude of the bias demonstrated by the associations before the influenza season was sufficient to account entirely for the associations observed during influenza season.[85]

Not only have flu vaccines failed to reduce flu deaths in seniors, they appear to have *increased* deaths:

> Influenza vaccination coverage among elderly persons (≥65 years) in the United States increased from between 15% and 20% before 1980 to 65% in 2001. Unexpectedly, estimates of influenza-related mortality in this age group also increased during this period....
>
> We could not correlate increasing vaccination coverage after 1980 with declining mortality rates in any age group. Because fewer than 10% of all winter deaths were attributable to influenza in any season, we conclude that observational studies substantially overestimate vaccination benefit.[86]

If people at low risk of serious illness and death from the seasonal flu are much more likely to be vaccinated than those at high risk, we can infer the same is true of Covid. Reported rates of severe illness and death that do not correct for the "healthy recipient" bias can be considered misleading.

4.2.5 Unvaccinated Elderly & Palliative Patients Skew the Data

Many elderly people are too frail to tolerate the Experimental Vaccines:

> Many people over 80 who have not been vaccinated are simply too frail to tolerate even a single Covid vaccine. Some of the people who have not been boosted are not receiving a third dose because they had severe side effects after the second.[87]

And some patients in palliative care decline vaccines because they do not want to extend their lives:

> [H]ospice providers acknowledge that some end-of-life patients may simply not want to be vaccinated, as they may no longer may be trying to extend their lives as long as possible.
>
> Thus the vaccinated and unvaccinated elderly populations cannot be easily compared. Randomized clinical trials are supposed to account for these differences. But Pfizer and Moderna enrolled almost no one over 80 in their trials, even though people in that age range account for most Covid deaths in most Western countries.[88]

Norwegian researchers acknowledged this reality in a recent study that considered how vaccinated patients fared in hospitals against unvaccinated patients:

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85 Lisa Jackson *et al*., "Evidence of bias in estimates of influenza vaccine effectiveness in seniors" (2006) 35:2 Int J Epidemiol 337 <https://doi.org/10.1093/ije/dyi274>.

86 Lone Simonsen *et al*., "Impact of influenza vaccination on seasonal mortality in the US elderly population" (2005) 165:3 Arch Intern Med 265 <https://doi.org/10.1001/archinte.165.3.265>.

87 Alex Berenson, *Why the "risk ratios" that supposedly prove vaccines offer 90 percent protection against deaths from Covid are a lie*, 21 January 2022 <https://alexberenson.substack.com/p/why-the-risk-ratios-that-supposedly/comments>.

88 Alex Berenson, *Why the "risk ratios" that supposedly prove vaccines offer 90 percent protection against deaths from Covid are a lie*, 21 January 2022 <https://alexberenson.substack.com/p/why-the-risk-ratios-that-supposedly/comments>.

> Vaccination did not reduce the odds of in-hospital death. The exception was patients ≥80 years in a sensitivity analysis including all SARS-CoV-2 positive patients, regardless of main cause of hospitalisation. For unvaccinated patients with another main cause of hospitalisation, COVID-19 may have been a more significant contributing factor for admission, while frail elderly patients with multiple comorbidities may be more likely to be unvaccinated.
>
> Our results suggest that once hospitalised the risk of death among vaccinated and unvaccinated patients in Norway is similar.[89]

A revised version of the study removed the claim that elderly patients with multiple comorbidities may be more likely to be unvaccinated, but found the experimental jabs failed to reduce the risk of death:

> Our results suggest that once hospitalised the risk of death among fully vaccinated and unvaccinated patients in Norway is similar....
>
> For all outcomes, we observed no difference between vaccinated and unvaccinated patients ≥80 years. Vaccine effectiveness against hospitalisation has been reported to be lower among older age groups in Norway. This age group is also generally less frequently admitted to ICU, and it could be that treatment limitations confound vaccine effects in the elderly. However, the small number of unvaccinated patients ≥80 years should be considered. Our results also highlight that factors other than vaccination also continue to influence patient outcomes. A longer LoS and/or increased risk of ICU admission or death were associated with advanced age, male sex and certain risk factors such as immunosuppression, kidney disease, obesity and diabetes, as reported by others.[90]

If the majority of people hospitalized *from* Covid (and not *with* Covid) are (a) elderly and too frail to be vaccinated, or (b) in palliative care and unwilling to be vaccinated, then the PHO's bald assertions that our hospitals are overflowing with unvaccinated people are clearly misleading.

4.3 The Experimental Vaccines are Not "Safe"

The PHO would have us believe the Experimental Vaccines are safe:

> Vaccination is ***safe***, highly effective, and the single most important preventive measure a person can take to protect themselves, their families, and other persons with whom they come into contact from infection, severe illness and possible death from COVID-19.[91]

A "Post-authorization Adverse Event Report" from Pfizer documents adverse events to BNT162b2 reported from 1 December 2020 through 28 February 2021.[92] According to Dr. John Campbell, anyone with access to Pfizer's post-marketing report could not in good conscience have claimed the vaccine is

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89 Robert Whittaker *et al*., "Patient trajectories among hospitalised COVID-19 patients vaccinated with an mRNA vaccine in Norway: a register-based cohort study" (2021) medRxiv 2021.11.05.21265958 <https://www.medrxiv.org/content/10.1101/2021.11.05.21265958v1.full>.

90 Robert Whittaker *et al*., "Length of hospital stay and risk of intensive care admission and in-hospital death among COVID-19 patients in Norway: a register-based cohort study comparing patients fully vaccinated with an mRNA vaccine to unvaccinated patients" (2021) medRxiv 2021.11.05.21265958 <https://www.medrxiv.org/content/10.1101/2021.11.05.21265958v2.full>.

91 Gatherings & Venues Mandates at para C.

92 Pfizer, *Cumulative Analysis of Post-authorization Adverse Event Reports*, accessed 12 March 2022 <https://phmpt.org/wp-content/uploads/2021/11/5.3.6-postmarketing-experience.pdf>.

"safe" in any conventional sense of the word.[93] In the brief 3-month period covered by Pfizer's report, there were 158,893 adverse events and 1,223 deaths. Appendix 1, which consumes the last 9 pages of the report, contains a laundry list of "Adverse Events of Special Interest". If the PHO had access to Pfizer's report before she implemented the Vaccine Passport Scheme, she can be taken to have known Pfizer's vaccine was not "safe", and her assertions to the contrary are either false or grossly negligent.

No legitimate claim can be made about the safety of experimental products for which there is a concerning lack of safety studies and no long-term safety data:

> Due to the unprecedented 'rush to market' via Emergency Authorisation Usage in the USA, doctors should be aware of the deficiency of many of the established standards for vaccine development which have been bypassed. Of particular concern being the absence of completed Developmental and Reproductive Toxicity (DART) studies. Neither were genotoxicity nor carcinogenicity studies performed. There is also an absence of long-term safety data.[94]

Before the Experimental Vaccines were put into widespread use, key toxicological studies ought to have been performed:

> Here is a list of preclinical toxicology studies that in my view should have been performed before regulatory authorities gave their approval to the licensing of these novel therapies under the Government emergency powers:
>
> 1. Acute toxicity assessment in rodents and possibly pigs to assess the local and intramuscular irritancy. The pig is a very good model for assessing human muscle irritancy.
> 2. A 14 day repeat-dose study in two animal species at three different dose levels of the active moiety i.e., the spike protein. The objective of these studies would be to achieve a no effect dose level and to identify those organs in the body that would be adversely affected at high doses. In other words, establish the potential target organs of toxicity in the clinical setting.
> 3. Pharmacology studies in appropriate animal species to establish any possible adverse effects on the normal functioning of the body vital organs. Emphasis being paid on the cardiovascular and blood systems as these had been clearly established as targets of the SARS-CoV-2 virus through the spike protein and its known attachment to angiotensin converting enzyme 2 (ACE2) receptors in exerting its pathological effects.
> 4. Pharmacokinetic studies to establish the distribution of the gene sequence to other parts of the body following intramuscular injection of the gene sequence and the concentrations of spike protein in the blood after intramuscular injection.[95]

The risk signals emerging from various sources, viewed in totality, are alarming:

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93 Dr. John Campbell, *The Pfizer documents*, 9 March 2022 <https://www.youtube.com/watch?v=7YOD9drZasM>.

94 Covid Medical Network, *Open Letter to All Doctors and All Australians*, 11 August 2021 <https://www.covidmedicalnetwork.com/open-letters/Covid-Medical-Network-Letter-to-Doctors-and-All-Australians-09082021.pdf>.

95 John Flack, *Why Weren't These Vaccines Put Through the Proper Safety Trials For Gene Technology, Asks a Former Pharmaceutical Research Scientist*, 7 February 2022 <https://dailysceptic.org/why-werent-these-vaccines-put-through-the-proper-safety-trials-for-gene-technology-asks-a-former-pharmaceutical-research-scientist/>.

- The latest data from VAERS, the CDC's Vaccine Adverse Event Reporting System, lists 1,255,355 reports for all age groups, including 226,703 reports of serious injuries, 27,758 deaths, and 41,948 reports of adverse events among 5-17 year olds.[96]
- Stanford researchers have found that vaccine spike antigen and mRNA persist in lymph node germinal centres, and aren't "self-destructing" as intended.[97]
- Because mRNA vaccines were not designed to invade the nuclei of human cells, the CDC claims it's a FACT that "COVID-19 vaccines do not change or interact with your DNA in any way."[98] But a new study out of Sweden suggests otherwise: "Our study shows that BNT162b2 can be reverse transcribed to DNA in liver cell line Huh7, and this may give rise to the concern if BNT162b2-derived DNA may be integrated into the host genome and affect the integrity of genomic DNA, which may potentially mediate genotoxic side effects."[99]
- An Oxford-conducted study of men under age 40 found the risk of myocarditis after one dose of mRNA exceeded the risk of myocarditis from Covid infection.[100] A group of US researchers quantified this increased risk, finding the risk of myocarditis following mRNA vaccination was 133 times greater than the background risk in the population.[101]
- In a letter to the American Board of Obstetrics and Gynecology, Dr. James Thorp provides links to 1,019 studies which show "[t]he dangers of the COVID-19 experimental gene therapy are irrefutable" and "the COVID-19 experimental gene therapy injections are highly morbid and mortal in women of reproductive ages, pregnant women, their offspring and children."[102]
- Pfizer missed its all-cause mortality endpoint, i.e.: there were more deaths in the vaccinated group than in the placebo group: "From Dose 1 through the March 13, 2021 data cut off date, there were a total of 38 deaths, 21 in the COMIRNATY group and 17 in the placebo group."[103] A drug that fails this endpoint would not ordinarily be approved, because there is no benefit to a reduction in cases if it comes at a cost of increased illness and death.[104]
- A researcher from the University of Alberta claims the global vaccination campaign has worsened the pandemic, causing a 31% increase in deaths per million.[105]
- Scott Davison, CEO of OneAmerica, notes that all-cause mortality has surged, with death rates up 40% among working-age people: "We are seeing, right now, the highest death rates we have seen in the history of this business – not just at OneAmerica. The data is consistent across every

96 Megan Redshaw, *More Than 8,000 New COVID Vaccine Injuries Reported to VAERS, CDC Data Show*, 6 May 2022 <https://childrenshealthdefense.org/defender/covid-vaccine-injuries-vaers-cdc-data/>.

97 Katharina Röltgen *et al*., "Immune imprinting, breadth of variant recognition, and germinal center response in human SARS-CoV-2 infection and vaccination" (2022) 185:6 Cell 1025 <https://doi.org/10.1016/j.cell.2022.01.018>.

98 US Centers for Disease Control, *Myths and Facts about COVID-19 Vaccines*, updated 15 December 2021 <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/facts.html>.

99 Markus Aldén *et al*., "Intracellular Reverse Transcription of Pfizer BioNTech COVID-19 mRNA Vaccine BNT162b2 In Vitro in Human Liver Cell Line" (2022) 44:3 Curr Issues Mol Biol 1115 <https://www.mdpi.com/1467-3045/44/3/73/htm>.

100 M. Patone *et al*., "Risks of myocarditis, pericarditis, and cardiac arrhythmias associated with COVID-19 vaccination or SARS-CoV-2 infection" (2021) 28 Nat Med 410 <https://doi.org/10.1038/s41591-021-01630-0>.

101 Matthew Oster *et al*., "Myocarditis Cases Reported After mRNA-Based COVID-19 Vaccination in the US From December 2020 to August 2021" (2022) 327:4 JAMA 331 <https://doi.org/10.1001/jama.2021.24110>.

102 James Thorp, *Letter to the American Board of Obstetrics and Gynecology*, 12 January 2022 <https://www.rodefshalom613.org/wp-content/uploads/2022/01/Thorp-ABOG-Letter-.01.12.2021.pdf>.

103 FDA, *Summary Basis for Regulatory Action for COMIRNATY*, 8 November 2021 at p.23 <https://www.fda.gov/media/151733/download>.

104 Canadian Covid Care Alliance, *The Pfizer Inoculations Do More Harm Than Good*, 16 December 2021 <https://rumble.com/vqx3kb-the-pfizer-inoculations-do-more-harm-than-good.html>.

105 "The results of this study taken together demonstrate a product that directly causes more COVID-19 associated cases and deaths than otherwise would have existed with zero vaccines": Kyle Beattie, *Worldwide Bayesian Causal Impact Analysis of Vaccine Administration on Deaths and Cases Associated with COVID-19: A BigData Analysis of 145 Countries*, 16 November 2021 <https://www.researchgate.net/publication/356248984_Worldwide_Bayesian_Causal_Impact_Analysis_of_Vaccine_Administration_on_Deaths_and_Cases_Associated_with_COVID-19_A_BigData_Analysis_of_145_Countries>.

> player in that business.... [A] three-sigma or a one-in-200-year catastrophe would be 10% increase over pre-pandemic. So 40% is just unheard of.[106]"

Not only are these risk signals worrisome, the editors of the prestigious British Medical Journal are appalled by the shocking lack of transparency from the pharmaceutical giants that manufacture the Experimental Vaccines:

> Today, despite the global rollout of covid-19 vaccines and treatments, the anonymised participant level data underlying the trials for these new products remain inaccessible to doctors, researchers, and the public—and are likely to remain that way for years to come. This is morally indefensible for all trials, but especially for those involving major public health interventions.
> ...
> As the global vaccine rollout continues, it cannot be justifiable or in the best interests of patients and the public that we are left to just trust "in the system," with the distant hope that the underlying data may become available for independent scrutiny at some point in the future.
> ...
> Data must be available when trial results are announced, published, or used to justify regulatory decisions. There is no place for wholesale exemptions from good practice during a pandemic. The public has paid for covid-19 vaccines through vast public funding of research, and it is the public that takes on the balance of benefits and harms that accompany vaccination. The public, therefore, has a right and entitlement to those data, as well as to the interrogation of those data by experts.
> ...
> We need complete data transparency for all studies, we need it in the public interest, and we need it now.[107]

The FDA has been similarly opaque, battling to withhold documents related to the licensing of the Pfizer-BioNTech vaccine for up to 75 years.[108] This lack of transparency is particularly egregious in light of revelations from Brook Jackson, former regional director at Ventavia Research Group, about serious data integrity issues in Pfizer's clinical trials.[109] While under contract with Pfizer to conduct trials at various sites in Texas, Ventavia enrolled 1,500 participants and allegedly falsified data, unblinded patients, and was plagued by quality control issues. A few hours after Jackson filed her anonymous complaint with the FDA, she was fired by Ventavia. She is suing Pfizer, Ventavia, and a company called ICON under the *False Claims Act*, claiming the Defendants "deliberately withheld crucial information from the United States that calls the safety and efficacy of their vaccine into question" and "concealed violations of both their clinical trial protocol and federal regulations, including falsification of clinical trial documents".[110] Though Ventavia's compromised data ought to

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106 Margaret Menge, *Indiana life insurance CEO says deaths are up 40% among people ages 18-64*, 1 January 2022 <https://www.thecentersquare.com/indiana/indiana-life-insurance-ceo-says-deaths-are-up-40-among-people-ages-18-64/article_71473b12-6b1e-11ec-8641-5b2c06725e2c.html>.

107 Peter Doshi *et al*., "Covid-19 vaccines and treatments: we must have raw data, now" (2022) 376 BMJ o102 <https://doi.org/10.1136/bmj.o102>.

108 Aaron Siri, *Why a Judge Ordered FDA to Release Covid-19 Vaccine Data Pronto*, 18 January 2022 <https://news.bloomberglaw.com/health-law-and-business/why-a-judge-ordered-fda-to-release-covid-19-vaccine-data-pronto>.

109 Paul Thacker, "Covid-19: Researcher blows the whistle on data integrity issues in Pfizer's vaccine trial" (2021) 375 BMJ n2635 <https://doi.org/10.1136/bmj.n2635>.

110 *Jackson v. Ventavia Research Group et al.* (Complaint of Relator) at p.1 <https://www.documentcloud.org/documents/21206071-brook-jackson-lawsuit>.

have been discarded, Pfizer simply rolled Ventavia's data into its overall results, potentially skewing the reported efficacy of BNT162b2.

Even if Pfizer's overall results weren't skewed by the inclusion of Ventavia's compromised data, Pfizer's reported efficacy is misleading because it is based on Relative Risk Reduction. There were 8 cases of Covid out of 18,198 patients in the BNT162b2 group (0.04% risk of contracting Covid) and 162 cases out of 18,325 patients in the placebo group (0.88% risk of contracting Covid), yielding a 95% relative risk reduction. But the Absolute Risk Reduction is a measly 0.84% (0.88 – 0.04):

> Vaccine efficacy is generally reported as a relative risk reduction (RRR). It uses the relative risk (RR)—ie, the ratio of attack rates with and without a vaccine—which is expressed as 1–RR. Ranking by reported efficacy gives relative risk reductions of 95% for the Pfizer–BioNTech, 94% for the Moderna–NIH, 91% for the Gamaleya, 67% for the J&J, and 67% for the AstraZeneca–Oxford vaccines. However, RRR should be seen against the background risk of being infected and becoming ill with COVID-19, which varies between populations and over time. Although the RRR considers only participants who could benefit from the vaccine, the absolute risk reduction (ARR), which is the difference between attack rates with and without a vaccine, considers the whole population. ARRs tend to be ignored because they give a much less impressive effect size than RRRs: 1.3% for the AstraZeneca–Oxford, 1.2% for the Moderna–NIH, 1.2% for the J&J, 0.93% for the Gamaleya, and 0.84% for the Pfizer–BioNTech vaccines.[111]

How many people would have refused the Experimental Vaccines had they known they offered ***less than 1% benefit***? And how many would have decided to take the Experimental Vaccines had they known they were only tested for their ability to reduce symptoms, not their ability to reduce the risk of transmission and death?

> Pivotal randomized control trials (RCTs) underpinning approval of Covid-19 vaccines did not set out to, and did not, test if the vaccines prevent transmission of the SARS-CoV-2 virus. Nor did the trials test if the vaccines reduce mortality risk. A review of seven phase III trials, including those for Moderna, Pfizer/BioNTech and AstraZeneca vaccines, found the criterion the vaccines were trialled against was just reduced risk of Covid-19 symptoms.[112]

Furthermore, it seems criminal that Pfizer could unblind its trial before Phase III completes in 2023.[113] Because the majority of placebo participants "crossed over" to the inoculated group, it will ***never*** be possible to assess safety and efficacy by comparing the outcomes of an inoculated group against a placebo group. And it defies belief that the novel mRNA vaccines were authorized for emergency use in humans after being monitored for safety concerns for a mere ***two months***.[114] As Pfizer knows from

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111 Pierre Olliaro *et al*., "COVID-19 vaccine efficacy and effectiveness—the elephant (not) in the room" (2021) 2:7 Lancet Microbe e279 <https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247(21)00069-0/fulltext?s=09>.

112 John Gibson, *How Vaccine Messaging Confused the Public*, 23 March 2022 <https://brownstone.org/articles/how-vaccine-messaging-confused-the-public/>.

113 Canadian Covid Care Alliance, T*he Pfizer Inoculations Do More Harm Than Good* at 3:55, 16 December 2021 <https://rumble.com/vqx3kb-the-pfizer-inoculations-do-more-harm-than-good.html>.

114 Dr. Peter Marks, the US Food and Drug Administration's top vaccine regulator, suggests two months is "a reasonable standard" for assessing severe outcomes: Alex Berenson, *Remember how health authorities said serious vaccine side effects always will be seen fast? Turns out that's not true*, 17 January 2022 <https://alexberenson.substack.com/p/remember-how-health-authorities-said>. The CDC concurs: "Serious side effects that could cause a long-term health problem are extremely unlikely following any vaccination, including COVID-19 vaccination. Vaccine monitoring has historically shown that side effects generally happen within six weeks of

the PregSure BVD fiasco, severe outcomes can take *several years* to manifest. PregSure BVD, a defective veterinary vaccine developed by Pfizer to prevent bovine viral diarrhea, was administered to cows and ultimately linked to a fatal disorder in their calves called Bovine Neonatal Pancytopenia. Unsurprisingly, it took much longer than two months for scientists to connect the vaccine given to cows with the resulting bleeding disease in their calves. For affected calves, the destruction of bone marrow and blood cells resulted in a particularly gruesome death:

> Between 10 days and three weeks after their birth, the calves would begin bleeding uncontrollably from their eyes, ears, and even their skin. Farmers called the illness "bleeding calf syndrome" or even "blood sweating."[115]

The link between Pfizer's PregSure BVD vaccine and Bovine Neonatal Pancytopenia was clearly neither discovered ***nor discoverable*** within two months. And given that Pfizer CEO (and veterinarian) Albert Bourla was "Area President of Animal Health" for Pfizer's veterinary division when the PregSure BVD disaster unfolded, he ***knows*** severe outcomes can take much longer than two months to manifest.[116] If additional severe outcomes[117] from the Experimental Vaccines are discovered several years from now, the officials who authorized the vaccines for use in humans after a brief two-month safety evaluation should be held criminally liable for their negligence, recklessness and/or intentional wrongdoing. I honestly cannot fathom the end goal of a campaign to inject every person on the planet —including children and those at a statistical zero risk of death—with an experimental product that does not block infectious transmission. But where there is risk, there must be choice.

4.4 The Experimental Vaccines are Not "Effective"

When the Experimental Vaccines were first rolled out, health bureaucrats and corporate media assured us the jabs were effective.[118] Mona Nemer, Canada's Chief Science Advisor, was no exception:

> Fully vaccinated individuals have a ***significantly decreased risk*** of SARS-CoV-2 infection and likely have a decreased risk of spreading the infection to others.... The use of COVID-19 vaccination certificates to access crowded venues is predicated on the ***effectiveness*** of the different vaccines to mitigate the risk of importing or spreading SARS-CoV-2 and its emerging variants.[119]

In the recitals to her mandates, the PHO frequently repeats the myth of Experimental Vaccine efficacy:

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receiving a vaccine dose. For this reason, the U.S. Food and Drug Administration (FDA) collected data on each of the authorized COVID-19 vaccines for a minimum of two months (eight weeks) after the final dose." Centers for Disease Control and Prevention, *Possible Side Effects After Getting a COVID-19 Vaccine*, 11 January 2022 <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/expect/after.html>.

115 Alex Berenson, *Remember how health authorities said serious vaccine side effects always will be seen fast? Turns out that's not true*, 17 January 2022 <https://alexberenson.substack.com/p/remember-how-health-authorities-said>.

116 Alex Berenson, *If you missed last night's story: Pfizer made a veterinary vaccine that killed thousands of calves. As the German gov't investigated, Pfizer denied responsibility and kept selling the vaccine*, 18 January 2022 <https://alexberenson.substack.com/p/if-you-missed-last-nights-story-pfizer>.

117 Pfizer's post-authorization adverse event report for BNT162b2 includes 1,223 deaths and 9 pages of "Adverse Events of Special Interest": Pfizer, *Cumulative Analysis of Post-authorization Adverse Event Reports*, accessed 12 March 2022 <https://phmpt.org/wp-content/uploads/2021/11/5.3.6-postmarketing-experience.pdf>.

118 el gato malo, *yes, the vaccines were supposed to stop covid spread. yes, the "experts" told us so*, 30 December 2021 <https://boriquagato.substack.com/p/yes-the-vaccines-were-supposed-to>.

119 Chief Science Advisor of Canada, *Scientific Considerations for Using COVID-19 Vaccination Certificates* at p.2, 31 March 2021 <https://science.gc.ca/eic/site/063.nsf/eng/h_98229.html>.

- Vaccination is safe, ***highly effective***, and the single most important preventive measure a person can take to protect themselves, their families, and other persons with whom they come into contact from infection, severe illness and possible death from COVID-19.[120]
- There are difficulties and risks in accommodating a person who is unvaccinated, since there is ***no other measure*** that is ***as effective*** as vaccination in reducing the risk of contracting or transmitting SARS-Co-2, and the likelihood of experiencing severe illness, hospitalization, ICU admission and death if infected.[121]
- Unvaccinated people are at a ***significantly greater risk*** than vaccinated people ***of being infected*** with SARS-CoV-2... Unvaccinated people are also at ***higher risk of transmitting*** SARS-CoV-2 to other people, including vaccinated people.[122]

These claims are false; the Experimental Vaccines stop neither infection nor transmission:

> It is the consensus of the medical community that the currently available Covid-19 vaccine injections do not prevent the spread of SARS-CoV-2. Relevant federal agencies have repeatedly acknowledged this consensus. Therefore, there is no scientific or legal justification for OSHA to segregate injected and un-injected people. Indeed, since the Covid-19 injections do not confer immunity upon the recipients, but are claimed to merely reduce the symptoms of the disease, they do not fall within the long-established definition of a vaccine at all. They are instead treatments and must be analyzed as such under the law.[123]

As noted above, the Experimental Vaccines were only tested for their ability to reduce symptoms; "efficacy" (their ability to reduce the risk of transmission and death) was not a primary endpoint of the studies conducted by the vaccine manufacturers. Because the Experimental Vaccines are not—and were never claimed to be—effective at reducing transmission, vaccination status is an egregiously misleading proxy for (sterilizing) immunity:

> Dr. Henry's new Public Health Order (PHO) states that an unvaccinated healthcare provider is a health hazard and therefore must disclose their vaccination status. The mandate allows patients to know the vaccination status of their provider and "have confidence that when they receive care... they are not putting their health at risk." It is pitched as an extra layer of protection against COVID-19 transmission and attempts to substantiate a simple message: a vaccinated provider is safer to see than an unvaccinated provider. However, vaccination status is not a binary method of quantifying risk and believing the contrary is the true health hazard. But Dr. Henry doesn't want you to know that.
> ...
> The evidence proves the least protected immune healthcare provider is one with a primary series yet Dr. Henry portrays this immunity status as some grandiose shield of public protection.... The science and evidence of protection depends on one's timing since their vaccinations and/or

120 Gatherings & Venues Mandates at para C.
121 Gatherings & Venues Mandates at para T.
122 Gatherings Mandate (previous version) at para F: Provincial Health Officer, *Gatherings and Events – January 17, 2022* <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-gatherings-events-jan17.pdf>; Venues Mandate (previous version) at para F: Provincial Health Officer, *Food and Liquor Serving Premises – January 17, 2022* <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-nightclubs-food-drink-jan17.pdf>.
123 Brief of America's Frontline Doctors as *Amicus Curiae* Supporting Applicants, *Job Creators Network et al. v. Department of Labor, Occupational Safety and Health Administration et al.*, NSD 21A243-21A267/2021, 17-22 December 2021, [ii] <https://americasfrontlinedoctors.org/2/files/aflds-amicus-brief-in-support-of-emergency-applications-for-osha-ets-cases/>.

> previous COVID-19 infection. These nuances determine one's protection, not the illusion of a misleading and divisive "vaccinated" versus "unvaccinated" label.[124]

Not only are the Experimental Vaccines ineffective at blocking infectious transmission, evidence from highly-vaccinated Israel indicates they are also ineffective at reducing severe illness:

> Are Israeli hospitals really overloaded with unvaccinated COVID patients? According to Prof. Yaakov Jerris, director of Ichilov Hospital's coronavirus ward, the situation is completely opposite.
>
> "Right now, most of our severe cases are vaccinated," Jerris told Channel 13 News. "They had at least three injections. Between seventy and eighty percent of the serious cases are vaccinated. So, the vaccine has no significance regarding severe illness, which is why just twenty to twenty-five percent of our patients are unvaccinated."[125]

The failure of the Experimental Vaccines to prevent transmission and severe illness is fatal to the PHO's repeated claims that the vaccines are "highly effective". Even if the vaccines could prevent severe illness, however, no good faith argument can be made that those at ***no*** risk of severe illness and death from Covid should be compelled to take an experimental treatment that carries the risk of severe injury and death. Since the decision to get the jab poses the exact same level of risk to others as the decision to decline it, such that one decision is no more dangerous than the other, the individual must be free to accept or decline the risk of taking the Experimental Vaccines.

4.5 The Settings & Venues Affected by the PHO Mandates are Not High Risk

Social and recreational settings are frequently portrayed as high risk:

- The BC Vaccine Card will allow vaccinated people to conveniently and securely show their proof of vaccination at ***higher-risk*** social and recreational events and settings.[126]
- [Dr. Henry] said the information reported to her was that poorer ventilation and often loud music is where there was ***higher risk***.[127]
- ***[S]ocial mingling***, particularly when coupled with the consumption of alcohol which ***increases risky behavior***, is associated with increases in the transmission of SARS-CoV-2.[128]
- Per the PHO's Orders regarding ***high-risk*** public activities, citizens wanting to participate are required to provide proof of COVID-19 vaccination via a digital QR code or physical card.[129]

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124 Y. Hsiang & R. Behrens, *Dr. Henry's vaccination status order 'egregiously fails as a credible evidence-based policy'*, 17 March 2022 <https://www.victorianow.com/watercooler/news/news/Your_Voice/Your_Voice_Dr_Henry_s_vaccination_status_order_egregiously_fails_as_a_credible_evidence_based_policy>.

125 Israel National News, *'80% of serious COVID cases are fully vaccinated' says Ichilov hospital director*, 3 February 2022 <https://www.israelnationalnews.com/news/321674>.

126 Ministry of Health, *Vaccine card enhances confidence, increases safety at B.C. events*, news release, 7 September 2021 <https://news.gov.bc.ca/releases/2021PREM0054-001746>.

127 *Beaudoin v. British Columbia*, 2021 BCSC 512 at para 41.

128 Gatherings Mandate (previous version) at para S: Provincial Health Officer, *Gatherings and Events – January 17, 2022* <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-gatherings-events-jan17.pdf>; Venues Mandate (previous version) at para R: Provincial Health Officer, *Food and Liquor Serving Premises – January 17, 2022* <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-nightclubs-food-drink-jan17.pdf>.

129 Ministry of Health, *Privacy Impact Assessment: "Health Gateway" Initiative* (HLTH21100) at p.8, accessed 11 March 2022 <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/services-policies-for-government/information-management-technology/information-privacy/privacy-impact-assessments/corporate/hlth21100_hg_update_-_vaccine_card.pdf>.

- The [Public Health] Orders require individuals seeking to enter certain ***higher-risk*** social and recreational events to show their proof of vaccination against COVID-19.[130]
- [The Privacy, Compliance and Training Branch] has reviewed the ministry's [Privacy Impact Assessment] outlining the BC Vaccine Card Verifier App which indicates the associated activities to carry out the PHO's Orders mandating citizens to provide proof of COVID-19 vaccination status in order to engage in ***high-risk*** public activities.[131]

These claims are false. The highest-risk settings in this province (i.e.: the places that have experienced the lion's share of BC's Covid death toll) are government-run facilities such as long-term care homes, hospitals, and prisons:

> As you would expect, outbreaks in long-term care facilities and hospitals are much more dangerous (more deaths per outbreak) than outbreaks in the rest of community. Outbreaks in schools, gyms, restaurants, local processing plants, personal care, etc, are essentially irrelevant to your statistical risk of dying because they cause so few deaths. A PCR-confirmed case does not automatically unleash the Hellhounds to snap at your heels. The level of risk in different settings are orders of magnitude apart.
> ....
> [A] full 97% of outbreak-related deaths are in long-term care & hospitals/healthcare! Add prison populations and that number rises to a full 98.6%.... [T]his is a crisis that affects people with extremely serious pre-existing health conditions and compromised immune systems. ***And almost no-one else***.
> ....
> [D]espite all the shaming about our desire to have a BBQ in our backyards with our friends, 98.6% of outbreak-linked deaths are from infections caught and spread inside the walls of tightly controlled institutional environments, not out in the community.[132]

Patty Daly, Chief Medical Health Officer for Vancouver Coastal Health, recently admitted social and recreational settings are ***not*** high risk, the government just wants to "improve vaccination coverage":

> The vaccine passport requires people to be vaccinated to do certain discretionary activities such as go to restaurants, movies, gyms. Not because these places are high risk, we're not actually seeing focused transmission in these settings. It's really to create an incentive to improve our vaccination coverage.[133]

Beneath the PHO's professed concern for the safety of her people is a concerning lack of honesty about the locations and settings that pose the greatest risk of outbreak-related deaths.

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130 Office of the Information & Privacy Commissioner, *Privacy and the BC vaccine card: FAQs*, 13 September 2021 <https://www.oipc.bc.ca/guidance-documents/3577>

131 Ministry of Health, *Privacy Impact Assessment: "BC Vaccine Card Verifier App" Initiative* (HLTH21101) at p.14, accessed 11 March 2022 <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/services-policies-for-government/information-management-technology/information-privacy/privacy-impact-assessments/corporate/hlth21101_-_2021-76_bc_vaccine_card_verifier_app_-_all_signed.pdf>.

132 Julius Ruechel, *The Lies Exposed by the Numbers: Fear, Misdirection, & Institutional Deaths (An Investigative Report)*, 28 May 2021 <https://www.juliusruechel.com/2021/05/the-lies-exposed-by-numbers-fear.html>.

133 Pat Brand, *Patty Daly [Chief Medical Health Officer for Vancouver Coastal Health]*, 31 October 2021 at 0:23 <https://youtu.be/aHjnMdCXDv8?t=23>.

4.6 The Vaccine-Free Do Not Constitute a "Health Hazard"

What do West Nile Virus and unvaccinated people have in common? According to the BC government, both are "health hazards". In each of her mandates, the PHO states:

> I have reason to believe and do believe that
> (a) the continued presence of unvaccinated people in the population... poses a risk to the health of the population, threatens the capacity of the public health and health care systems to address the health care needs of the population, and constitutes a health hazard;[134]

She frequently characterizes the Vaccine-Free as a menace to society:

- I... continually engage in a process of reconsideration of these measures... with a view to balancing the interests of the public, including constitutionally protected interests, against the ***risk of harm to public health created by the presence of unvaccinated persons*** [at gatherings and events | in food and liquor serving premises].[135]
- ***Unvaccinated people*** in close contact with other people ***promotes the transmission of SARS-CoV-2*** to a greater extent than vaccinated people in the same situations, which in turn increases the number of people who develop COVID-19 and become seriously ill.[136]
- I recognize privacy interests and the interests protected by the *Human Rights Code*, and have taken these into consideration when exercising my powers to protect the health interests of members of the public from the ***risk created by being in contact with unvaccinated persons*** [in gatherings and events | in food or liquor serving premises].[137]
- ***Unvaccinated people are also at higher risk of transmitting SARS-CoV-2*** to other people, including vaccinated people.[138]
- [I]n order to protect the health of the public... it is necessary for me to keep in place preventive measures to reduce the risk of the transmission of SARS-CoV-2 [at gatherings and events | in food and liquor serving premises], which could lead to widespread infection and serious illness, ***especially among unvaccinated people***.[139]
- Our public health and health care systems are currently experiencing severe stress, and are stretched beyond capacity in their efforts to prevent and respond to illness resulting from the transmission of COVID-19 in the population, ***primarily among unvaccinated people***.[140]

The *Public Health Act* defines "health hazard" as follows:

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134 Gatherings Mandate at p.7; Venues Mandates at p.6.
135 Gatherings & Venues Mandates at para AA.
136 Gatherings & Venues Mandates at para R.
137 Gatherings Mandate (previous version) at para EE: Provincial Health Officer, *Gatherings and Events – January 17, 2022* <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-gatherings-events-jan17.pdf>; Venues Mandate (previous version) at para AA: Provincial Health Officer, *Food and Liquor Serving Premises – January 17, 2022* <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-nightclubs-food-drink-jan17.pdf>.
138 Gatherings & Venues Mandates at para F.
139 Gatherings Mandate at p.7; Venues Manadate at p.6.
140 Gatherings Mandate (previous version) at para L: Provincial Health Officer, *Gatherings and Events – January 17, 2022* <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-gatherings-events-jan17.pdf>; Venues Mandate (previous version) at para K: Provincial Health Officer, *Food and Liquor Serving Premises – January 17, 2022* <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-nightclubs-food-drink-jan17.pdf>.

Definitions

1 In this Act:

"**health hazard**" means

(a) a condition, a thing or an activity that

(i) endangers, or is likely to endanger, public health, or

(ii) interferes, or is likely to interfere, with the suppression of infectious agents or hazardous agents, or

(b) a prescribed condition, thing or activity, including a prescribed condition, thing or activity that

(i) is associated with injury or illness, or

(ii) fails to meet a prescribed standard in relation to health, injury or illness;

....

"**thing**" includes

(a) tangible things, and

(b) organisms, other than humans;

Though SARS-CoV-2 is evidently not dangerous enough for the government to bother regulating it as a prescribed health hazard, West Nile Virus is a prescribed health hazard under s. 4(2) of the *Health Hazards Regulation*.[141] As such, West Nile Virus is a prescribed "thing" within the meaning of subsection (b) of the "health hazard" definition. Because "thing" does not include humans, and because unvaccinated people are neither a "condition" nor a prescribed health hazard, the PHO presumably contemplates the "presence" of the Vaccine-Free constituting an "activity" within the meaning of subsection (a).

For the Vaccine-Free, the consequences of their "continued presence... in the population" (which allegedly constitutes a health hazard) can be quite severe:

Must not cause health hazard

15 A person must not willingly cause a health hazard, or act in a manner that the person knows, or ought to know, will cause a health hazard.

Offences

99(3) A person who contravenes either of the following commits an offence:

(a) section 15 [*causes a health hazard*];

Fines and incarceration

108(1) In addition to a penalty imposed under section 107 [*alternative penalties*], a person who commits an offence listed in

....

(c) section 99(3) is liable on conviction to a fine not exceeding $3 000 000 or to imprisonment for a term not exceeding 36 months, or to both.

It is outrageous that an unelected bureaucrat who wields inordinate power over British Columbians has the audacity to reiterate the provably false claim that the presence of the Vaccine-Free in society

141 *Health Hazards Regulation*, BC Reg 216/2011 <https://www.bclaws.gov.bc.ca/civix/document/id/crbc/crbc/216_2011>.

constitutes a "health hazard". Her claims are even more contemptible in light of the fact that Covid vaccinees have been shown to carry *as much* virus as unvaccinated individuals when infected,[142] and there is no appreciable difference in transmission rates between vaccinated and unvaccinated people:

> [T]here is growing evidence that peak viral titres in the upper airways of the lungs and culturable virus are similar in vaccinated and unvaccinated individuals. A recent investigation by the US Centers for Disease Control and Prevention of an outbreak of COVID-19 in a prison in Texas showed the equal presence of infectious virus in the nasopharynx of vaccinated and unvaccinated individuals. Similarly, researchers in California observed no major differences between vaccinated and unvaccinated individuals in terms of SARS-CoV-2 viral loads in the nasopharynx, even in those with proven asymptomatic infection.[143]

Breakthrough infections in fully vaccinated individuals have been associated with extremely high viral loads. A study of healthcare workers in Vietnam showed that Delta variant infections in fully vaccinated individuals were associated with viral loads ***251 times higher*** than the loads associated with earlier strains of the virus.[144] And in recent months, it has become increasingly clear that the Vaccine-Free may be *less* susceptible to Omicron infection than vaccinated people:

> One preprint study found that after 30 days the Moderna and Pfizer vaccines no longer had any statistically significant positive effect against Omicron infection, and after 90 days, their effect went negative—i.e., vaccinated people were more susceptible to Omicron infection. Confirming this negative efficacy finding, data from Denmark and the Canadian province of Ontario indicate that vaccinated people have higher rates of Omicron infection than unvaccinated people.[145]

Before highly-vaccinated Scotland began censoring unfavourable data,[146] their statistics confirmed this negative efficacy trend, with 2-dose Covid vaccinees being *more than twice as likely* as the Vaccine-Free to become infected:

- the age standardised case rate per 100,000 ***unvaccinated*** people was 1092.80;
- the age standardised case rate per 100,000 ***vaccinated*** people (2 doses) was 2,499.52; and
- the age standardised case rate per 100,000 ***boosted*** people (3 doses) was 1,466.76.[147]

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142 Shaun Griffin, "Covid-19: Fully vaccinated people can carry as much delta virus as unvaccinated people, data indicate" (2021) 374 BMJ n2074 <https://www.bmj.com/content/374/bmj.n2074>.

143 Carlos Franco-Paredes, "Transmissibility of SARS-CoV-2 among fully vaccinated individuals" (2022) 22:1 Lancet 16 <https://doi.org/10.1016/S1473-3099(21)00768-4>.

144 Nguyen Chau *et al.*, "An observational study of breakthrough SARS-CoV-2 Delta variant infections among vaccinated healthcare workers in Vietnam" (2021) 41 J eClinMed 1 <https://doi.org/10.1016/j.eclinm.2021.101143>.

145 Luc Montagnier & Jed Rubenfeld, *Omicron Makes Biden's Vaccine Mandates Obsolete*, 9 January 2022 <https://www.wsj.com/articles/omicron-makes-bidens-vaccine-mandates-obsolete-covid-healthcare-osha-evidence-supreme-court-11641760009>. See also: Alex Berenson, *Vaccine failure in two charts and two graphs from four countries*, 26 January 2022 <https://alexberenson.substack.com/p/vaccine-failure-in-two-charts-and/comments>. **Danish study**: Christian Hansen *et al.*, "Vaccine effectiveness against SARS-CoV-2 infection with the Omicron or Delta variants following a two-dose or booster BNT162b2 or mRNA-1273 vaccination series: A Danish cohort study" (2021) medRxiv 2021.12.20.21267966 <https://doi.org/10.1101/2021.12.20.21267966>.

146 Lauren Brownlie, *Covid data will not be published over concerns it's misrepresented by anti-vaxxers*, 17 February 2022 <https://www.glasgowtimes.co.uk/news/19931641.covid-data-will-not-published-concerns-misrepresented-anti-vaxxers/>.

147 Public Health Scotland, *COVID-19 & Winter Statistical Report* at p.30, 12 January 2022 <https://publichealthscotland.scot/media/11089/22-01-12-covid19-winter_publication_report.pdf>.

The trend toward negative efficacy has been evident for some time:

> At the country-level, there appears to be no discernable [*sic*] relationship between percentage of population fully vaccinated and new COVID-19 cases in the last 7 days (Fig. 1). In fact, the trend line suggests a marginally positive association such that countries with higher percentage of population fully vaccinated have higher COVID-19 cases per 1 million people. Notably, Israel with over 60% of their population fully vaccinated had the highest COVID-19 cases per 1 million people in the last 7 days. The lack of a meaningful association between percentage population fully vaccinated and new COVID-19 cases is further exemplified, for instance, by comparison of Iceland and Portugal. Both countries have over 75% of their population fully vaccinated and have more COVID-19 cases per 1 million people than countries such as Vietnam and South Africa that have around 10% of their population fully vaccinated.[148]

The fact that Covid vaccinees may be more susceptible to Omicron infection, and can carry extremely high viral loads when infected, is fatal to the PHO's claims that the Vaccine-Free are uniquely high-risk, virus-spreading carriers of disease whose "continued presence... in the population" constitutes a "health hazard". As such, there is no valid ethical, scientific, or legal justification for allowing the PHO to exclude the Vaccine-Free from society, or to override their constitutional rights.

4.7 Natural Immunity is Superior to Vaccine-induced Immunity

The PHO repeatedly claims vaccine-induced immunity is *superior to* natural immunity:

- [A] full course of vaccine provides ***more effective and durable protection*** against infection and severe illness than natural immunity from prior COVID-19 infection alone, or natural immunity in combination with a single-dose of vaccine.[149]
- While people who have contracted SARS-CoV-2 may develop some natural immunity for a period of time following infection, the strength and duration of that immunity varies depending on a multitude of factors, including which variant they were infected with and severity of infection. The risk of reinfection and hospitalization is ***significantly higher*** in people who remained unvaccinated after contracting SARS-CoV-2 than in those who were vaccinated post-infection.[150]

The science simply does not support the PHO's claims that natural immunity is inferior—even the BCCDC admits previous infection is equivalent to 2 vaccine doses.[151] Natural immunity is robust, complete and durable:

> [G]etting Covid and recovering from it is better protection from future reinfection and severe Covid disease than any of the available vaccines. This is clear from an excellent Israeli study. That study, conducted at the Maccabi Healthcare Services, in Tel Aviv, makes clear that it is

148 S Subramanian & A Kumar, "Increases in COVID-19 are unrelated to levels of vaccination across 68 countries and 2947 counties in the United States" (2021) 36:12 Eur J Epidemiol 1237 <https://doi.org/10.1007/s10654-021-00808-7>.

149 Gatherings & Venues Mandates at para C(c).

150 Gatherings & Venues Mandates at para N.

151 BC Covid Therapeutics Committee, *Clinical Practice Guide for the Use of Therapeutics in Mild-Moderate COVID-19*, 23 March 2022 <http://www.bccdc.ca/Health-Professionals-Site/Documents/COVID-treatment/ClinicalPracticeGuide_Therapeutics_MildModerateCOVID.pdf>.

> probably safer to be in a room filled with unvaccinated people who have recovered from Covid than it is to be in a room filled with vaccinated people who have never had Covid.[152]

Israeli researchers found that people who recovered from Covid during one of the earlier waves of the pandemic had a lower risk of contracting the Delta variant than those who got two doses of the Pfizer vaccine.[153] The CDC recently released data demonstrating that natural immunity was 2.8 times as effective as vaccination at preventing hospitalization, and 3.3 to 4.7 times as effective at preventing Covid infection.[154] And a new report in the Journal of the American Medical Association notes that anti-spike protein antibodies following Covid infection persist indefinitely in unvaccinated people.[155]

Not only does natural immunity confer longer-lasting and stronger protection against infection and hospitalization than vaccine-induced immunity, vaccinated individuals have 27 times higher risk of symptomatic COVID infection than those with natural immunity from prior COVID disease:[156]

> More than 15 studies have demonstrated the power of immunity acquired by previously having the virus. A 700,000-person study from Israel two weeks ago found that those who had experienced prior infections were 27 times less likely to get a second symptomatic covid infection than those who were vaccinated. This affirmed a June Cleveland Clinic study of health-care workers (who are often exposed to the virus), in which none who had previously tested positive for the coronavirus got reinfected. The study authors concluded that "individuals who have had SARS-CoV-2 infection are unlikely to benefit from covid-19 vaccination." And in May, a Washington University study found that even a mild covid infection resulted in long-lasting immunity.[157]

Several studies have demonstrated the equivalence or superiority of naturally-acquired immunity over the vaccine-induced variety:[158]

> [N]atural immunity in COVID-recovered individuals is, at least, equivalent to the protection afforded by full vaccination of COVID-naive populations. There is a modest and incremental relative benefit to vaccination in COVID-recovered individuals; however, the net benefit is marginal on an absolute basis. COVID-recovered individuals represent a distinctly different

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152 Jay Bhattacharya & Jonathan Ketcham, *Vaccine Mandates: The End of Covid? Or the Beginning of Tyranny?* 22 September 2021 <https://bariweiss.substack.com/p/vaccine-mandates-the-end-of-covid>.

153 Michelle Cortez, *Previous Covid Prevents Delta Infection Better Than Pfizer Shot*, Bloomberg, 26 August 2021 <https://www.bloomberg.com/news/articles/2021-08-27/previous-covid-prevents-delta-infection-better-than-pfizer-shot>.

154 Marty Makary, *The High Cost of Disparaging Natural Immunity to Covid*, 26 January 2022 <https://www.wsj.com/articles/the-high-cost-of-disparaging-natural-immunity-to-covid-vaccine-mandates-protests-fire-rehire-employment-11643214336>.

155 Jennifer Alejo *et al*., *Prevalence and Durability of SARS-CoV-2 Antibodies Among Unvaccinated US Adults by History of COVID-19*, (2022) 327:11 JAMA 1085 <https://doi.org/10.1001/jama.2022.1393>.

156 Sivan Gazit *et al.*, "Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections" (2021) medRxiv 2021.08.24.21262415 <https://doi.org/10.1101/2021.08.24.21262415>.

157 Marty Makary, *Natural immunity to covid is powerful. Policymakers seem afraid to say so*, Washington Post, 15 September 2021 <https://www.washingtonpost.com/outlook/2021/09/15/natural-immunity-vaccine-mandate/>. See also: Jon Miltimore, *Harvard Epidemiologist Says the Case for COVID Vaccine Passports Was Just Demolished*, 30 August 30 2021 <https://fee.org/articles/harvard-epidemiologist-says-the-case-for-covid-vaccine-passports-was-just-demolished> & Kristen Cohen *et al.*, "Longitudinal analysis shows durable and broad immune memory after SARS-CoV-2 infection with persisting antibody responses and memory B and T cells" (2021) 2:7 Cell Rep Med <https://doi.org/10.1016/j.xcrm.2021.100354>.

158 Rachael Raw *et al.*, "Previous COVID-19 infection, but not Long-COVID, is associated with increased adverse events following BNT162b2/Pfizer vaccination" (2021) 83:3 J Inf 381 <https://doi.org/10.1016/j.jinf.2021.05.035>. This study found the previously infected went from 99.74% immunity before vaccination to 99.86% after, a negligible difference with no clinical significance.

> benefit-risk calculus. Therefore, vaccination of COVID-recovered individuals should be subject to clinical equipoise and individual preference.[159]

University of Washington researchers discovered that infection with SARS ***two decades ago*** conferred robust immunity against SARS-CoV-2.[160] When studying why people who recovered from SARS have cross-reactive immunity to SARS-CoV-2,[161] researchers found that individuals exposed to pathogens as mundane as the coronaviruses that cause the common cold also have cross-immunity to SARS-CoV-2:

> The team tested subjects who recovered from COVID-19 and found the presence of SARS-CoV-2-specific T cells in all of them, which suggests that T cells play an important role in this infection. Importantly, the team showed that patients who recovered from SARS 17 years ago after the 2003 outbreak, still possess virus-specific memory T cells and displayed cross-immunity to SARS-CoV-2. "Our team also tested uninfected healthy individuals and found SARS-CoV-2-specific T cells in more than 50 percent of them. This could be due to cross-reactive immunity obtained from exposure to other coronaviruses, such as those causing the common cold, or presently unknown animal coronaviruses. It is important to understand if this could explain why some individuals are able to better control the infection," said Professor Antonio Bertoletti, from Duke-NUS' Emerging Infectious Diseases (EID) program, who is the corresponding author of this study.[162]

Because natural immunity is robust, complete and durable, a key prong in any sensible mitigation strategy ought to have included widespread testing for cross-reactive cellular immunity to SARS-CoV-2 from previous exposure to other coronaviruses, and widespread screening for persistent antibodies from previous Covid infection. Instead, the PHO has displayed appalling ignorance of basic immunology and is evidently unaware that vaccines can, at best, mimic the effect of natural immunity. Her claim that it is "important" for those with natural immunity to get vaccinated is utterly nonsensical:

> Vaccination, even after infection, remains an important measure to protect against reinfection. It does so by providing a stronger immune response that is known to be effective for a longer period of time and against a wider variety of strains of SARS-CoV-2 that are currently circulation in British Columbia, including the Delta variant.[163]

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159 Mahesh Shenai *et al.*, "Equivalency of Protection from Natural Immunity in COVID-19 Recovered Versus Fully Vaccinated Persons: A Systematic Review and Pooled Analysis" (2021) medRxiv 2021.09.12.21263461 <https://www.medrxiv.org/content/10.1101/2021.09.12.21263461v1>.

160 Peter Doshi, "Covid-19: Do many people have pre-existing immunity?" (2020) 370 BMJ m3563 <https://www.bmj.com/content/370/bmj.m3563>.

161 Nina Le Bert *et al.*, "SARS-CoV-2-specific T cell immunity in cases of COVID-19 and SARS, and uninfected controls" (2020) 584 Nature 457 <https://www.nature.com/articles/s41586-020-2550-z>.

162 Duke-NUS Medical School, *Scientists Uncover Evidence That a Level of Pre-Existing COVID-19 / SARS-CoV-2 Immunity Is Present in the General Population*, SciTech Daily, 25 July 2020 <https://scitechdaily.com/scientists-uncover-evidence-that-a-level-of-pre-existing-covid-19-sars-cov-2-immunity-is-present-in-the-general-population/>. See also Swapnil Mahajan *et al.*, "Immunodominant T-cell epitopes from the SARS-CoV-2 spike antigen reveal robust pre-existing T-cell immunity in unexposed individuals" (2021) 11 Scientific Rep 1 <https://www.nature.com/articles/s41598-021-92521-4>: "[O]ur findings suggest that SARS-CoV-2 reactive T-cells are likely to be present in many individuals because of prior exposure to flu and CMV viruses.... Healthy humans not exposed to COVID-19 show pre-existing CD4 and CD8 T-cell immunity to SARS-CoV-2."

163 Gatherings Mandate (previous version) at para N: Provincial Health Officer, *Gatherings and Events – January 17, 2022* <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-gatherings-events-jan17.pdf>; Venues Mandate (previous version) at para M: Provincial Health Officer, *Food and Liquor Serving Premises – January 17, 2022* <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-nightclubs-food-drink-jan17.pdf>.

Not only may vaccination following infection and acquisition of natural immunity *reduce* immune protection,[164] it may put those with natural immunity at increased risk of thrombosis (clotting):

> [V]iscosity increases in all groups after vaccination. Given the hyperviscosity occurs at a viscosity higher than 5.0 cp,5 it seems that there will be no problem in any vaccine recipient without previous COVID-19. However, hyperviscosity is likely to occur in any recipient who has previous COVID-19. Based on this preliminary study, it is suggested that screening for possible previous COVID-19 before COVID-19 vaccination might be necessary for prevention of unwanted blood thrombohemostasis adverse effect.[165]

Given the elevated risk of clotting in those with natural immunity, the PHO's reckless orders may in fact be endangering lives.

4.8 The Government's Negligence Has Strained Our Healthcare System

The PHO claims the Vaccine-Free have placed an unprecedented strain on our healthcare system:

- ***Our public health and health care systems are currently experiencing severe stress***, and are stretched beyond capacity in their efforts to prevent and respond to illness resulting from the transmission of COVID-19 in the population, ***primarily among unvaccinated people***.[166]
- Absent vaccination, British Columbia would be in a far more challenging situation than the fragile balance our current immunization rates have provided, but the transmissibility of the Delta and Omicron variants means that higher vaccination rates than previously expected are now required to maintain this balance, mitigate transmission, reduce case numbers and serious outcomes, and most importantly, given the high case rates experienced with Omicron, ***reduce the burden on the healthcare system***....[167]
- [I]n order to protect the health of the public, and the public health and health care systems, it is necessary for me to keep in place preventive measures to reduce the risk of the transmission of SARS-CoV-2 [at gatherings and events | in food and liquor serving premises], which could lead to widespread infection and serious illness, ***especially among unvaccinated people***, and ***overwhelm the public health and the health care systems, which are already operating beyond capacity***.[168]

If our hospitals are overwhelmed, it's not because the Vaccine-Free have placed an unprecedented strain on our healthcare system; rather, it's because:

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164 Alessio Mazzoni *et al.*, "First-dose mRNA vaccination is sufficient to reactivate immunological memory to SARS-CoV-2 in subjects who have recovered from COVID-19" (2021) 131:12 J Clin Invest e149150 <https://www.jci.org/articles/view/149150>.

165 Beuy Joob *et al.*, "Expected Viscosity After COVID-19 Vaccination, Hyperviscosity and Previous COVID-19, (2021) 27 Clin & Applied Thrombosis/Hemostasis 1 <https://doi.org/10.1177/10760296211020833>.

166 Gatherings Mandate (previous version) at para L: Provincial Health Officer, *Gatherings and Events – January 17, 2022* <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-gatherings-events-jan17.pdf>; Venues Mandate (previous version) at para K: Provincial Health Officer, *Food and Liquor Serving Premises – January 17, 2022* <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-nightclubs-food-drink-jan17.pdf>.

167 Gatherings & Venues Mandates at para I.

168 Gatherings Mandate at p.7; Venues Manadate at p.6.

- The Ministry of Health has chronically mismanaged our healthcare system—bed shortages, overcrowding, and "hallway medicine" plagued BC's hospitals long before SARS-CoV-2 arrived in British Columbia.[169]
- Any "crisis" in staffing levels was precipitated by the asinine decision of hospital administrators to fire unvaccinated staff. Because many of those terminated "heroes" have recovered from Covid and benefit from robust natural immunity, they pose minimal risk to vulnerable patients:

> Public-health officials ruined many lives by insisting that workers with natural immunity to Covid-19 be fired if they weren't fully vaccinated. But after two years of accruing data, the superiority of natural immunity over vaccinated immunity is clear. By firing staff with natural immunity, employers got rid of those *least* likely to infect others. It's time to reinstate those employees with an apology.... Soldiers who have been dishonorably discharged should be restored their rank. Teachers, first responders, and others who have been denied their livelihood should be reinstated. Everyone is essential.[170]

- Hospitals are invariably overwhelmed during flu season—as reported by CTV News back in 2013, "As both the flu and the stomach infection norovirus sweep across Canada, ***hospitals all over the country say they are being pushed to the limit***."[171]
- Vaccinated and boosted staff have been getting sick in droves with... Covid.[172]

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169 See e.g.: Corey Ogilvie, *The Tragedy of Dr. Bonnie Henry* at 2:42, 5 February 2022 <https://youtu.be/L-xwB0RGuFQ?t=162>; Postmedia News, *B.C. hospital Tim Hortons turned into extended ER*, 1 March 2011 <https://nationalpost.com/news/canada/b-c-hospital-tim-hortons-turned-into-extended-er>; Brent Shearer, *Beds spill into halls, lobby of overcrowded B.C. hospital*, 4 January 2012 <https://bc.ctvnews.ca/beds-spill-into-halls-lobby-of-overcrowded-b-c-hospital-1.749000>; Brady Strachan, *Princeton, B.C., seeks health care crisis solutions*, 31 January 2013 <https://www.cbc.ca/news/canada/british-columbia/princeton-b-c-seeks-health-care-crisis-solutions-1.1331880>; Kelly Sinoski, *Overcrowding plagues Royal Columbian Hospital emergency department*, 19 March 2014 <https://vancouversun.com/news/metro/overcrowding-plagues-royal-columbian-hospital-emergency-department>; Stacy Penner, *Elderly Man Spends Weeks in Shower Room at Abbotsford Hospital*, 13 February 2015 <https://www.kamloopsbcnow.com/watercooler/health/news/Health/15/02/13/Elderly_Man_Spends_Weeks_in_Shower_Room_at_Abbotsford_Hospital>; Lisa Johnson, *B.C. Children's Hospital postpones surgeries due to nursing shortage*, 9 May 2016 <https://www.cbc.ca/news/canada/british-columbia/bc-childrens-hospital-nursing-shortage-1.3574132>; Bill Tieleman, *Lack of Beds Leaves Patients Stacked in Hospital Hallways*, 18 April 2017 <https://thetyee.ca/Opinion/2017/04/18/Lack-of-Beds-in-BC-Hospitals/>; Clare Hennig, *New Comox Valley hospital over capacity 6 months in concerns union*, 29 March 2018 <https://www.cbc.ca/news/canada/british-columbia/new-comox-valley-hospital-overcapacity-six-months-in-1.4599668>; Kendall Hanson, *Nurses worried about overcrowding at Nanaimo hospital*, 25 April 2019 <https://www.cheknews.ca/nurses-worried-about-overcrowding-at-nanaimo-hospital-555350/>.

170 Marty Makary, *The High Cost of Disparaging Natural Immunity to Covid*, 26 January 2022 <https://www.wsj.com/articles/the-high-cost-of-disparaging-natural-immunity-to-covid-vaccine-mandates-protests-fire-rehire-employment-11643214336>.

171 Pauline Chan, *Hospitals overwhelmed by flu and norovirus patients*, 10 January 2013 <https://www.ctvnews.ca/health/health-headlines/hospitals-overwhelmed-by-flu-and-norovirus-patients-1.1108376>. A multitude of stories were reported around the world during the peak of the 2017-18 flu season describing overwhelmed hospitals—see e.g.: Kelly Grant, *Hospital overcrowding has become the norm in Ontario, figures show*, 21 May 2017 <https://www.theglobeandmail.com/news/national/hospital-overcrowding-has-become-the-norm-in-ontario-figures-show/article35076965/>; Amanda Ferguson, *Surgeries postponed due to severe flu cases overwhelming Toronto ICU*, 13 February 2018 <https://toronto.citynews.ca/2018/02/13/toronto-hospital-flu/>; Amanda MacMillan, *Hospitals Overwhelmed by Flu Patients Are Treating Them in Tents*, 18 January 2018 <https://time.com/5107984/hospitals-handling-burden-flu-patients/>; Ceylan Yeginsu, *N.H.S. Overwhelmed in Britain, Leaving Patients to Wait*, 3 January 2018 <https://www.nytimes.com/2018/01/03/world/europe/uk-national-health-service.html>; The Local, *Italy is in the grip of its worst flu season in 14 years*, 19 January 2018 <https://www.thelocal.it/20180119/italy-worst-flu-season-in-14-years/>; Chisato Tanaka, *Japanese hospitals sick of requests for flu-recovery certificates*, 22 February 2018 <https://www.japantimes.co.jp/news/2018/02/22/national/science-health/japanese-hospitals-sick-requests-flu-recovery-certificates/>. See also: Caroline Alphonso, *Hospitals Overwhelmed by surge of flu cases*, 12 January 2011 <https://www.theglobeandmail.com/life/health-and-fitness/hospitals-overwhelmed-by-surge-of-flu-cases/article562037/>.

172 "...the hospital crush happening right now is mostly vaccinated patients showing up sick and vaccinated staff calling in sick." Brian Lilley, *Mandatory vaccinations an affront to Charter and Canadian ideals*, 8 January 2022 <https://torontosun.com/opinion/columnists/lilley-mandatory-vaccinations-an-affront-to-charter-and-canadian-ideals>.

The results of a Freedom of Information request seeking "Records showing hospitalizations and ICU admissions in BC during the Covid-19 pandemic (Date Range for Record Search: From 1/1/2015 To 8/27/2021)"[173] indicate hospitalizations have actually ***decreased*** from what they were in the 5 years preceding the pandemic.[174] This information directly contradicts the PHO's claims that our hospitals have been "stretched beyond capacity" accommodating (primarily unvaccinated) Covid patients.

5 JUDICIAL REVIEW OF THE VACCINE PASSPORT SCHEME

5.1 Constitutional Remedies

The opening words of the *Charter* proclaim Canada to be "founded upon principles that recognize the supremacy of God and the ***rule of law***." Applications for judicial review, which are based upon the rule of law, provide Canadians with a shield against arbitrary state action:

> At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.[175]

It is trite law that all within government—including elected ministers and unelected administrative decision-makers—have a duty to exercise their discretion in accordance with the *Charter*. In *Slaight Communications Inc. v. Davidson*, Justice Lamer confirmed that legislatures may not unjustifiably confer on administrative decision-makers power to infringe the *Charter*:

> As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so.[176]

If legislatures and government officials pass laws or make decisions that violate the *Charter*, reviewing courts have broad authority to nullify their actions. If an unjustifiable limit on a *Charter* right is caused by a ***law*** (i.e.: legislation or a "binding rule of general application"), the appropriate remedy is a declaration the invalid law is of no force or effect under s. 52(1) of the *Constitution Act, 1982*. If an

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173 Letter from Fiorella Moccia, FOI Analyst (7 October 2021) <http://docs.openinfo.gov.bc.ca/Response_Letter_HTH-2021-13906.pdf>.

174 Information Access Operations, FOI Request HTH-2021-13906, 15 September 2021 <http://docs.openinfo.gov.bc.ca/Response_Package_HTH-2021-13906.pdf>.

175 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at 257, 161 DLR (4th) 385.

176 *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038 at 1078, 59 DLR (4th) 416.

individual's *Charter* rights have been infringed by ***government action*** taken pursuant to otherwise valid legislation, an individual remedy may be available under s. 24(1) of the *Charter*:

> There is no question, of course, that the *Charter* applies to provincial legislation; see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573. There are two ways, however, in which it can do so. First, legislation may be found to be unconstitutional on its face because it violates a *Charter* right and is not saved by s. 1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. Secondly, the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the *Charter*.[177]

On an application for judicial review, the constitutionality of the Vaccine Passport Scheme could be challenged in three distinct ways:

1. ***Invalid Laws***: insofar as the constituent parts of the Vaccine Passport Scheme (particularly the PHO Mandates) are "binding rules of general application" that unjustifiably limit the *Charter* rights of the Vaccine-Free, these unconstitutional laws could be declared of no force and effect under s. 52(1) of the *Constitution Act, 1982*.
2. ***Invalid Government Actions***: if the constituent parts of the Vaccine Passport Scheme are (incorrectly) characterized as "government acts", insofar as the conduct of government actors (i.e.: the PHO's *implementation* of the *Public Health Act* and the Minister's *implementation* of the *Emergency Program Act* and the *CRMA*) unjustifiably infringes the *Charter* rights of the Vaccine-Free, a personal remedy could be sought under s. 24(1) of the *Charter*.
3. ***Invalid Legislative Provisions***: insofar as the constituent parts of the Vaccine Passport Scheme have been implemented under the authority of unconstitutional statutory provisions, these provisions could be declared of no force and effect under s. 52(1) of the *Constitution Act, 1982*.

Though I have only considered the first two grounds of challenge in this memo, a few statutory provisions may be particularly vulnerable to constitutional challenge, including s. 10.1 of the *Emergency Program Act*, s. 56(1) of the *Public Health Act*, and the *CRMA*.

5.2 Can an Unconscionable Choice Engage the *Charter*? Part I

Health Canada long ago confirmed that vaccination ***cannot*** be made mandatory in Canada. If the Vaccine Passport Scheme ***mandated*** vaccination, it would clearly violate several *Charter* rights including, *inter alia*, freedom of conscience, the right to liberty and security of the person, the right not to be subjected to cruel and unusual treatment, and the right to equal protection of the law without discrimination. But the Vaccine Passport Scheme does not *directly* mandate vaccination; it does so *indirectly* by offering a choice: receive the Experimental Vaccine and continue to enjoy the benefits of modern life, or decline the vaccine and not only face social and societal ostracism, but risk incurring penalties for attempting to access certain public venues or participate in certain communal activities. This is in addition to sanctions the Vaccine-Free already face in other areas of life, including employer vaccine mandates that result in termination of employment, and federal vaccine mandates that prohibit the Vaccine-Free from flying across Canada. In other words, a person who exercises their right to decline a non-consensual medical treatment and their right to refuse to participate in a medical or

177 *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at 643-44, 151 DLR (4th) 577 per LaForest J.

scientific experiment will be deprived of all vestiges of liberty—no income, no dining at restaurants, no visiting relatives in hospital, no watching films at movie theatres, no flying across Canada. Can indirect ***but grossly punitive*** mandates be said to infringe our *Charter* rights?

In several injunction cases, the courts have said that an employee who can decide to decline a vaccine isn't being ***forced*** to get vaccinated ***even if*** the consequence of that decision is termination of their employment. In *Wojdan v. Canada (Attorney General)*, 2021 FC 1341, for instance, the Applicants sought an interlocutory injunction staying the operation of their employer's vaccine mandate. In the Applicants' view, the harm they faced was "preserving [their] right to refuse medical treatment, without the threat of financial reprisal, stigma, and social isolation." The court rejected this characterization:

> [T]he Applicants have mischaracterized the harm at issue. The harm the Applicants may suffer is being placed on unpaid leave, or being terminated from employment, if they remain unvaccinated. They are not being ***forced*** to get vaccinated; they are being ***forced*** to choose between getting vaccinated and continuing to have an income on the one hand, or remaining unvaccinated and losing their income on the other.... Put simply, a vaccine mandate does not cause irreparable harm because it does not force vaccination.
> ....
> [T]he loss of employment, while a ***significant and important consequence***, is something that can be compensated in monetary damages.

This logic is perverse; it is unconscionable that anyone would be ***forced*** to choose between their job and an unwanted and ineffective experimental medical treatment. The same repugnant logic informs the reasoning of those in legacy media who claim vaccine mandates are constitutionally sound:

> Various vaccine mandates have been in place across Canada for months, requiring proof of COVID-19 vaccination to access non-essential businesses, attend certain events or board planes and trains, for example.... [C]ontrary to claims otherwise, vaccine mandates do not constitute forced vaccination..... It's just limiting the ability to participate in certain activities if they don't have a vaccine.... Mandates offer a choice: receive or decline the vaccine. Those who decline are instead presented with a different set of options.... These may be ***inconvenient and unwanted options***, but they are options.... [W]hile nothing is certain in the law – there are always perils of litigation – all of the good jurisprudence points to the conclusion that a Section 7 claim would not be actionable. To make up ***spurious*** legal claims as an excuse [not to get vaccinated] I find very questionable.[178]

In this view, unless you've been held down and forcibly injected, it would be "spurious" to claim your *Charter* rights had been infringed; the Vaccine-Free simply face "inconvenient and unwanted options" or "significant and important consequences" for declining the ***only choice deemed acceptable*** by their government or employer. In a recent paper, administrative law expert Paul Daly considered whether vaccine mandates constitute ***imperium*** (force of law: the state's use of coercive power), ***dominium*** (force of money: the state's distribution of public funds), or ***suasion*** (force of information: the state's use of information to persuade the citizenry). In Daly's view, employer mandates are an exercise of dominium, general mandates are an exercise of suasion, and neither constitutes imperium:

178 Nicole Bogart, *Do vaccine mandates violate Canadians' charter rights?* updated 2 February 2022 <https://www.ctvnews.ca/health/coronavirus/do-vaccine-mandates-violate-canadians-charter-rights-1.5569971>.

> Most recently, governments both federally and provincially have introduced general so-called vaccine mandates, which restrict unvaccinated individuals' ability to engage in communal activities. Despite their name, these mandates do not compel individuals to become vaccinated and, as such, qualify as suasion rather than imperium.
>
> It is helpful to distinguish two different types of mandates: employer mandates and general mandates. Employer mandates required government employees in certain sectors to become vaccinated or lose their employment. There is, obviously, a sense in which these mandates are coercive, but they are better viewed as an exercise of dominium: as a condition of the distribution of governmental largesse, in the form of a salary, one must be vaccinated; there are no legal consequences to non-compliance other than the loss of one's status as a governmental employee. General mandates imposed obligations on businesses to verify the vaccination status of customers and to refuse access to non-essential services to the unvaccinated. Again, there is a coercive aspect to such mandates, as businesses which fail to comply might be punished.[179]

This reasoning is flawed. Not only are ***threats*** of employment termination and social banishment coercive, the targets of employer and general mandates are ***forced*** to make a choice—***forcing*** someone to make an unconscionable choice is not a "coercive aspect", it is ***coercion***. I'll take a brief detour into the law of informed consent before concluding this topic.

5.2.1 Consent to Medical Treatment

A central tenet of medical ethics, rooted in individual autonomy and the sanctity of the person, is the requirement of valid consent, meaning consent that is fully informed and freely given:

> Having control over who touches one's body, and how, lies at the core of human dignity and autonomy.... The common law has recognized for centuries that the individual's right to physical integrity is a fundamental principle, "every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner": see Blackstone's *Commentaries on the Laws of England* (4th ed. 1770), Book III, at p. 120. It follows that any intentional but unwanted touching is criminal.[180]

In *Hopp v. Lepp*, Chief Justice Laskin confirmed that it is the prerogative of the patient to decide whether to engage in medical risk-taking:

> The term "informed consent", frequently used in American cases, reflects the fact that although there is, generally, prior consent by a patient to proposed surgery or therapy, this does not immunize a surgeon or physician from liability for battery or for negligence if he has failed in a duty to disclose risks of the surgery or treatment, known or which should be known to him, and which are unknown to the patient. The underlying principle is the right of a patient to decide what, if anything, should be done with his body.[181]

In *Parmley v. Parmley*, Estey J cited Pollock on Torts as authority for the proposition that any medical treatment done without the consent of the patient constitutes an ***assault and battery***:

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179 Paul Daly, *COVID-19 in Canada: The Legal Framework* at p.2, 24 January 2022 <http://dx.doi.org/10.2139/ssrn.4016632>.
180 *R. v. Ewanchuk*, [1999] 1 SCR 330 at para 28, 169 DLR (4th) 193.
181 *Hopp v. Lepp*, [1980] 2 SCR 192 at 196, 112 DLR (3d) 67.

> Force to the person is rendered lawful by consent in such matters as surgical operations. The fact is common enough; indeed authorities are silent or nearly so, because it is common and obvious. Taking out a man's tooth without his consent would be an ***aggravated assault and battery***. With consent it is lawfully done every day.[182]

In *Reibl v. Hughes*, Laskin CJ said non-consensual medical treatment constitutes ***battery***:

> The well-known statement of Cardozo J. in *Schloendorff v. Society of New York Hospital*, at pp. 129-30 and at p. 93 respectively, that "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages" cannot be taken beyond the compass of its words to support an action of battery where there has been consent to the very surgical procedure carried out upon a patient but there has been a breach of the duty of disclosure of attendant risks. In my opinion, actions of ***battery*** in respect of surgical or other medical treatment should be confined to cases where surgery or treatment has been performed or given to which there has been no consent at all or where, emergency situations aside, surgery or treatment has been performed or given beyond that to which there was consent.[183]

In *R. v. Morgentaler*, Dickson CJ said non-consensual medical treatment constitutes an ***assault***:

> The law has long recognized that the human body ought to be protected from interference by others. At common law, for example, any medical procedure carried out on a person without that person's consent is an ***assault***.[184]

Regardless of whether the action is framed in assault or battery, the common law prohibits non-consensual medical treatment. The right to bodily integrity is paramount—where there is risk, there must be choice. The corollary of informed consent is the right to refuse an unwanted medical procedure. In *Rodriguez v. British Columbia (Attorney General)*, Sopinka J affirmed the right that exists at common law to refuse medical treatment, including treatment deemed beneficial:

> That there is a right to choose how one's body will be dealt with, even in the context of beneficial medical treatment, has long been recognized by the common law. To impose medical treatment on one who refuses it constitutes battery, and our common law has recognized the right to demand that medical treatment which would extend life be withheld or withdrawn.[185]

In *Malette v. Shulman*, the plaintiff carried in her wallet a signed Jehovah's Witness card refusing blood transfusions.[186] After a car accident, the plaintiff was rushed unconscious to a hospital where the defendant doctor administered a life-saving blood transfusion. Robbins J.A. upheld the lower court's finding that the card constituted a valid advance directive prohibiting the doctor from administering the transfusion. Because the doctor had no right to disregard the plaintiff's choice to refuse to consent to medical treatment on religious grounds, the doctor was held liable in battery.

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182 *Parmley v. Parmley*, [1945] SCR 635 at 645, [1945] 4 DLR 81.
183 *Reibl v. Hughes*, [1980] 2 SCR 880 at 890-91, 114 DLR (3d) 1.
184 *R. v. Morgentaler*, [1988] 1 SCR 30 at 53, 44 DLR (4th) 385.
185 *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519 at 588, 107 DLR (4th) 342.
186 *Malette v. Shulman* (1990), 67 DLR (4th) 321, 72 OR (2d) 417 (CA).

Consent obtained by reason of fear, duress, or the exercise of authority is invalid. In *R. v. Ewanchuk*, for instance, the accused was unable to rely on a defence of consent to a charge of sexual assault because the complainant's consent was vitiated by fear:

> To be legally effective, consent must be freely given. Therefore, even if the complainant consented, or her conduct raises a reasonable doubt about her non-consent, circumstances may arise which call into question what factors prompted her apparent consent. The *Code* defines a series of conditions under which the law will deem an absence of consent in cases of assault, notwithstanding the complainant's ostensible consent or participation. As enumerated in s. 265(3), these include submission by reason of force, fear, threats, fraud or the exercise of authority, and codify the longstanding common law rule that consent given under fear or duress is ineffective.[187]

Article 6(1) of the *Universal Declaration on Bioethics and Human Rights* provides that "Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned... and may be withdrawn by the person concerned at any time and for any reason ***without disadvantage or prejudice***."[188] Though this instrument has the status of a "nonbinding" declaration under public international law, the principle it states is not controversial, i.e.: if the state or an employer inflicts "disadvantage or prejudice" upon a person who revokes their consent to preventive medical treatment, that exercise of authority vitiates consent.

Pursuant to s. 4 of the *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c.181 British Columbians have the right to give, refuse or revoke consent on ***any*** grounds, even if the refusal will result in death, and we have the right to have our decisions respected. Section 5(1) prohibits health care providers from administering non-consensual care, and s. 6 stipulates that consent must be voluntary and cannot be obtained by fraud or misrepresentation. In its Consent Handbook, the Canadian Medical Protective Association warns Canadian physicians that duress, coercion, and compulsion invalidate consent:

> **Voluntary consent**
> Patients must always be free to consent to or refuse treatment, and be free of any suggestion of duress or coercion. Consent obtained under any suggestion of compulsion either by the actions or words of the physician or others may be no consent at all and therefore may be successfully repudiated. In this context physicians must keep clearly in mind there may be circumstances when the initiative to consult a physician was not the patient's, but was rather that of a third party, a friend, an employer, or even a police officer. Under such circumstances the physician may be well aware that the patient is only very reluctantly following the course of action suggested or insisted upon by a third person. Then, physicians should be more than usually careful to assure themselves patients are in full agreement with what has been suggested, that there has been no coercion and that the will of other persons has not been imposed on the patient.[189]

187 *R. v. Ewanchuk*, [1999] 1 SCR 330 at para 36, 169 DLR (4th) 193.
188 UNESCO, *International Bioethics Committee*, accessed 15 March 2022 <https://en.unesco.org/themes/ethics-science-and-technology/ibc>.
189 CMPA, *Consent: A guide for Canadian physicians*, 4th ed, updated April 2021 <https://www.cmpa-acpm.ca/en/advice-publications/handbooks/consent-a-guide-for-canadian-physicians>.

Insofar as the Vaccine Passport Scheme operates to compel or coerce British Columbians to engage in medical risk-taking on pain of being prohibited from participating in social activities or banned from public venues, the scheme overrides the requirement for ***voluntary*** consent, rendering any vaccination so administered an assault and/or battery.

5.2.2 Consent to Medical or Scientific Experimentation

Because Phase III of the clinical trials will not complete until 2023, the Covid shots are undeniably experimental. International law extends the right of informed consent to medical and scientific experiments, guaranteeing our right to refuse to participate in medical or scientific experimentation. In the aftermath of World War II, with full awareness of the atrocities committed by the Nazis, the presiding judge at the Nuremberg Medical Trial formulated a set of ethical principles to guide future medical and scientific experiments. The central principle articulated in the Nuremberg Code, which has subsequently become a norm of international law,[190] was the requirement of free and informed consent:

> The voluntary consent of the human subject is absolutely essential.
>
> This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision.[191]

Summary versions of the Nuremberg Code were incorporated into the *Geneva Conventions* of 1949, which apply only during wartime, and the *International Covenant on Civil and Political Rights*, which applies during wartime and peacetime (the "*ICCPR*").[192] Ancillary to the right of every person not to be subjected to "inhuman or degrading treatment or punishment", Article 7 of the *ICCPR* codifies our right not to be subjected to non-consensual medical or scientific experimentation:

> Article 7 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.[193]

Article 4(1) of the *ICCPR* permits States Parties to depart from their treaty obligations during an emergency, but Article 4(2) stipulates that certain fundamental rights may ***not*** be abridged or limited ***even during an emergency***, including the rights articulated in Article 7.

Many other statements of ethical principles have been devised to guide the conduct of human research. In 1964, the World Medical Association adopted the *Declaration of Helsinki*, a set of ethical principles

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190 George Annas, "Beyond Nazi War Crimes Experiments: The Voluntary Consent Requirement of the Nuremberg Code at 70" (2018) 108:1 Am J Public Health 42 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5719679/>.

191 Evelyne Shuster, "Fifty Years Later: The Significance of the Nuremberg Code" (1997) 337 N Engl J Med 1436 <https://doi.org/10.1056/NEJM199711133372006>.

192 George Annas, "Beyond Nazi War Crimes Experiments: The Voluntary Consent Requirement of the Nuremberg Code at 70" (2018) 108:1 Am J Public Health 42 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5719679/>.

193 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) (entered into force 23 March 1976, accession by Canada 19 May 1976). <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

similar to the *Nuremberg Code*, but written by physicians instead of judges.[194] Though the Declaration has undergone multiple revisions, the core principles have not changed, i.e.: the consent of research subjects must be fully informed and freely given (i.e.: not obtained under ***duress***), and subjects must be informed of their right to refuse to participate ***without reprisal***:

> 25. Participation by individuals capable of giving informed consent as subjects in medical research must be voluntary.
>
> 26. In medical research involving human subjects capable of giving informed consent, each potential subject must be adequately informed of the aims, methods, sources of funding, any possible conflicts of interest, institutional affiliations of the researcher, the anticipated benefits and potential risks of the study and the discomfort it may entail, post-study provisions and any other relevant aspects of the study. The potential subject must be informed of the right to refuse to participate in the study or to withdraw consent to participate at any time ***without reprisal***.
>
> 27. When seeking informed consent for participation in a research study the physician must be particularly cautious if the potential subject is in a dependent relationship with the physician or may consent under ***duress***....[195]

In 1976, the US National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research published the *Belmont Report*, a set of ethical principles to guide the conduct of research involving human subjects. In part C of the Report, the Commission notes the conditions under which the consent of potential research subjects will be vitiated by involuntariness:

> **Voluntariness**. An agreement to participate in research constitutes a valid consent only if voluntarily given. This element of informed consent requires conditions free of coercion and undue influence. ***Coercion*** occurs when an overt threat of harm is intentionally presented by one person to another in order to obtain compliance. ***Undue influence***, by contrast, occurs through an offer of an excessive, unwarranted, inappropriate or improper reward or other overture in order to obtain compliance. Also, inducements that would ordinarily be acceptable may become undue influences if the subject is especially vulnerable.
>
> Unjustifiable pressures usually occur when persons in positions of authority or commanding influence—especially where possible sanctions are involved—urge a course of action for a subject. A continuum of such influencing factors exists, however, and it is impossible to state precisely where justifiable persuasion ends and undue influence begins. But undue influence would include actions such as manipulating a person's choice through the controlling influence of a close relative and threatening to withdraw health services to which an individual would otherwise be entitled.[196]

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194 George Annas, "Beyond Nazi War Crimes Experiments: The Voluntary Consent Requirement of the Nuremberg Code at 70" (2018) 108:1 Am J Public Health 42 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5719679/>.

195 World Medical Association, *Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects* (Helsinki, Finland: adopted in 1964) <https://www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/>.

196 US Department of Health and Human Services, *The Belmont Report*, 18 April 1979 <https://www.hhs.gov/ohrp/regulations-and-policy/belmont-report/index.html>.

Pursuant to the *International Ethical Guidelines for Biomedical Research Involving Human Subjects*, which were adopted by the Council for International Organizations of Medical Sciences in 1982, researchers must obtain "free and informed consent" from potential research subjects to participate—***or to decline to participate***—in medical experiments ***even during disasters or disease outbreaks***:

> **Guideline 9**: Individuals Capable of Giving Informed Consent
>
> Researchers have a duty to provide potential research participants with the information and the opportunity to give their free and informed consent to participate in research, or to decline to do so... Informed consent should be understood as a process, and participants have a right to withdraw at any point in the study ***without retribution***.
>
> [Commentary: *Informed consent is a process. The start of this process requires providing relevant information to a potential participant, ensuring that the person has adequately understood the material facts and has decided or refused to participate without having been subjected to* ***coercion***, ***undue influence***, *or* ***deception****.... Informed consent is voluntary if an individual's decision to participate is free from undue influence.*]
>
> **Guideline 20**: Research in Disasters and Disease Outbreaks
>
> Researchers, sponsors, international organizations, research ethics committees and other relevant stakeholders should ensure that... the individual informed consent of participants is obtained even in a situation of ***duress***
>
> [Commentary: *Even though most disaster victims are under duress, it is important to obtain their informed consent for study participation*....][197]

Because Canada's international obligations aid in the interpretation of our constitutional rights, judicial review may properly be informed by the values reflected in international law:

> It is well-accepted that international instruments cannot stand alone as the basis for a constitutional challenge. However, our own constitution should not sharply diverge from the values we espouse on the international stage. For this reason, the Supreme Court has held that Canada's international obligations may inform the interpretation of the content of the rights guaranteed by the Canadian constitution, as well as the interpretation of what can constitute pressing and substantial objectives that may justify restrictions upon those rights. The extent to which international instruments protect certain human rights shows the high degree of importance attached to those rights. Judicial review, therefore, may properly be informed by the values reflected in international human rights law.[198]

Canada's treaty obligations and the norms of international law provide a clear indication that British Columbians have the right to refuse to participate in medical and scientific experiments. We cannot

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197 Council for International Organizations of Medical Sciences, *International Ethical Guidelines for Biomedical Research Involving Human Subjects* (Geneva, Switzerland: adopted in 1982, amended in 1993 and 2002) <https://cioms.ch/wp-content/uploads/2017/01/WEB-CIOMS-EthicalGuidelines.pdf>.

198 Roy Millen, *The Independence of the Bar: An Unwritten Constitutional Principle*, (2005) 84 Can. Bar Rev. 107 at 123.

lawfully be coerced, deceived, or unduly influenced to participate in an experiment, and our decision to refuse to participate cannot be met with overt threats of harm, sanctions, reprisal or retribution.

5.3 Can an Unconscionable Choice Engage the *Charter*? Part II

As noted above, the targets of employer and general vaccine mandates are ***forced*** to make an unconscionable choice between: (a) an unwanted and ineffective experimental treatment and (b) social banishment and/or termination of employment. This is not a "coercive aspect", it is ***coercion***. Even if such threats aren't coercion, they're most certainly an exercise of authority and/or ***undue influence***. Every statement of ethical principles devised to guide the conduct of human research stipulates that consent may be vitiated by coercion or undue influence, and the Belmont Report is no exception:

> **Voluntariness**. An agreement to participate in research constitutes a valid consent only if voluntarily given. This element of informed consent requires conditions free of coercion and undue influence. ***Coercion*** occurs when an overt threat of harm is intentionally presented by one person to another in order to obtain compliance. ***Undue influence***, by contrast, occurs through an offer of an excessive, unwarranted, inappropriate or improper reward or other overture in order to obtain compliance. Also, inducements that would ordinarily be acceptable may become undue influences if the subject is especially vulnerable.[199]

Article 6(1) of the *Universal Declaration on Bioethics and Human Rights* stipulates that "Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned... and may be withdrawn by the person concerned at any time and for any reason ***without disadvantage or prejudice***."[200]

The Vaccine Passport Scheme forces British Columbians to make an unconscionable choice: receive an unwanted Experimental Vaccine and be inappropriately rewarded, or decline it and face consequences. Either way, compliance is elicited in a manner that vitiates consent, either by offering inappropriate or improper rewards (undue influence), or by presenting overt threats of harm and sanctions (coercion):

- Receive the vaccine (undue influence): vaccine mandates operate by revoking civil rights and repackaging them as privileges to be meted out as rewards for compliance, or by severing one's employment and offering it as a reward for compliance. But basic civil rights and ongoing employment are "***inappropriate or improper*** ***rewards*** for compliance; these egregious exercises of authority constitute undue influence, vitiating consent.
- Decline the vaccine (coercion): threatening one's employment, one's ability to participate in communal activities, and one's ability to access public venues are ***overt threats of social, economic, and psychological harm*** that inflict "***disadvantage or prejudice***" and constitute coercion, vitiating consent. Furthermore, in addition to the fines that can be meted out for "unsafe COVID-19 behaviour", incarceration is within the range of possible sanctions: "If violation tickets do not act as a deterrent, or in cases of particularly egregious contraventions or for repeat offenders, police can recommend charges in relation to the offence. On conviction, judicial penalties of up to $10,000 and/or one year in prison may be imposed."[201] Sanctions such

199 US Dept of Health & Human Services, *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research*, 18 April 1979 <https://www.hhs.gov/ohrp/regulations-and-policy/belmont-report/index.html>.

200 UNESCO, *International Bioethics Committee*, accessed 15 March 2022 <https://en.unesco.org/themes/ethics-science-and-technology/ibc>.

> as fines and incarceration are ***overt threats of economic and physical harm*** that inflict "***disadvantage or prejudice***" and constitute coercion, vitiating consent.

By depriving British Columbians of the right to decline an unwanted non-consensual experimental medical treatment without suffering disadvantage, prejudice, or punitive consequences, the Vaccine Passport Scheme is both unduly influential and coercive. The choice between (a) sacrificing one's bodily autonomy and (b) being deprived of all vestiges of liberty—no income, no dining at restaurants, no visiting relatives in hospital, no flying across Canada—cannot in any rational sense be considered a ***meaningful*** choice. For those who capitulate to the government's unreasonable demands out of fear, duress, fraud, or the exercise of authority, the involuntariness of their submission vitiates their consent, any treatment so received constitutes an assault and/or battery, and the experimental nature of the treatment aggravates the severity of the state's interference with the individual's autonomy. In other words, because the Vaccine Passport Scheme offers no ***meaningful*** choice to decline an experimental treatment without suffering ***grossly punitive*** and ***harmful*** consequences, the government's indirect vaccine mandate clearly engages our *Charter* rights.

5.4 Justification Under s. 1 of the *Charter*

5.4.1 The Standard of Review: Administrative (*Doré*) or Constitutional (*Oakes*)?

No issue has proved more vexing to our courts than the standard of review to apply to administrative decisions, particularly decisions that engage *Charter* rights. Before *Dunsmuir v. New Brunswick*, there were three standards of review for administrative decisions: correctness, reasonableness *simpliciter*, and patent unreasonableness; in *Dunsmuir*, the Supreme Court collapsed the two deferential standards into one, leaving only correctness and reasonableness.[202] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, the Court decided reasonableness should be the default standard:

> [A] reconsideration of this Court's approach is necessary in order to bring greater coherence and predictability to this area of law. We have therefore adopted a revised framework for determining the standard of review where a court reviews the merits of an administrative decision. The analysis begins with a presumption that reasonableness is the applicable standard in all cases. Reviewing courts should derogate from this presumption only where required by a clear indication of legislative intent or by the rule of law.[203]

Chief Justice Wagner rejected the distinction previously drawn between errors committed *within* and *outside* jurisdiction, whereby errors committed within jurisdiction would attract a reasonableness review, and errors committed outside jurisdiction would attract a correctness review:

> After hearing submissions on this issue and having an adequate opportunity for reflection on this point, we are now in a position to conclude that it is not necessary to maintain this category of correctness review. The arguments that support maintaining this category — in particular the concern that a delegated decision maker should not be free to determine the scope of its own authority — can be addressed adequately by applying the framework for conducting

201 Government of BC, *Violation tickets for unsafe COVID-19 behaviour*, updated 17 February 2022 <https://www2.gov.bc.ca/gov/content/covid-19/info/violation-tickets>.

202 *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. The statutory standard of "patent unreasonableness" survived the purge, but applies only to BC tribunals governed by the *Administrative Tribunals Act*, SBC 2004, c.45.

203 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 10, 441 DLR (4th) 1.

> reasonableness review that we describe below. Reasonableness review is both robust and responsive to context. A proper application of the reasonableness standard will enable courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment regarding whether a particular interpretation raises a "truly" or "narrowly" jurisdictional issue and without having to apply the correctness standard.[204]

The presumption of reasonableness review can be rebutted by legislative intent or if "correctness review is required by the rule of law":

> In these reasons, we have identified five situations in which a derogation from the presumption of reasonableness review is warranted either on the basis of legislative intent (i.e., legislated standards of review and statutory appeal mechanisms) or because correctness review is required by the rule of law (i.e., constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between administrative bodies). This framework is the product of careful consideration undertaken following extensive submissions and based on a thorough review of the relevant jurisprudence. We are of the view, at this time, that these reasons address all of the situations in which a reviewing court should derogate from the presumption of reasonableness review. As previously indicated, courts should no longer engage in a contextual inquiry to determine the standard of review or to rebut the presumption of reasonableness review.[205]

Chief Justice Wagner's assertion that "correctness review is required by the rule of law" for constitutional questions is consistent with the Court's earlier jurisprudence. Though expert tribunals with the authority to interpret the law were deemed to have the authority to interpret the supreme law of Canada, they could expect "no curial deference" in doing so:

> It is clear to me that a *Charter* issue must constitute a question of law; indeed, the *Charter* is part of the supreme law of Canada. This comports with the view expressed in *Douglas College* that the statutory authority of the arbitrator in that case to interpret any "Act" must include the authority to interpret the *Charter*.
> ....
> That having been said, the jurisdiction of the Board is limited in at least one crucial respect: it can expect no curial deference with respect to constitutional decisions.[206]

In *Nova Scotia (Workers' Compensation Board) v. Martin*, Justice Gonthier confirmed that an expert tribunal's interpretation of the *Charter* can always be "reviewed fully" on a correctness standard:

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204 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 67, 441 DLR (4th) 1.

205 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 69, 441 DLR (4th) 1.

206 *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 SCR 5 at 15 & 17, 81 DLR (4th) 121. See also: *Douglas/Kwantlen Faculty Assn. v. Douglas College* [1990] 3 SCR 570 at 605, 77 DLR (4th) 94: "I should add that constitutional determinations by arbitrators or other administrative tribunals or agencies should, of course, receive no curial deference" and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22 at 33, 81 DLR (4th) 358: "Although curial deference will not be extended to an administrative tribunal's holding on a *Charter* issue, such deference is generally applied to the interpretation of a statute within the tribunal's area of expertise, when the tribunal has been given the power to interpret law."

> [A]dministrative tribunal decisions based on the *Charter* are subject to judicial review on a correctness standard: see *Cuddy Chicks, supra*, at p.17. An error of law by an administrative tribunal interpreting the Constitution can always be reviewed fully by a superior court.[207]

In its more recent jurisprudence, however, the Supreme Court has made a bewildering choice to take a deferential approach to individualized administrative decisions that limit *Charter* rights. In their minority reasons in *Multani v. Commission scolaire Marguerite-Bourgeoys*, Justices Deschamps and Abella advocated a bifurcated approach to *Charter* issues, favouring a robust ***constitutional review*** of unconstitutional laws, and a more deferential ***administrative review*** of unconstitutional individualized decisions.[208] The majority rejected this bifurcated approach, rightly concerned a purely administrative analysis of individualized decisions would be insufficiently protective of *Charter* rights. As noted by Justice Charron, rigorous review for compliance with the *Oakes* test is ***always*** required, as doing otherwise "…could well reduce the fundamental rights and freedoms guaranteed by the *Canadian Charter* to mere administrative law principles."[209] It assuredly makes no difference to the individual whose rights have been infringed whether the source of the infringement is the legislative text or its discretionary application to his or her case:

> My colleagues [Deschamps and Abella JJ] believe that the Court should address the issue of justification under s. 1 only where a complainant is attempting to overturn a normative rule as opposed to a decision applying that rule. With respect, it is of little importance to Gurbaj Singh — who wants to exercise his freedom of religion — whether the absolute prohibition against wearing a kirpan in his school derives from the actual wording of a normative rule or merely from the application of such a rule. In either case, any limit on his freedom of religion must meet the same requirements if it is to be found to be constitutional.[210]

Though the bifurcated approach favoured by Deschamps and Abella JJ was properly rejected by the majority in *Multani*, it was subsequently adopted by the Court in *Doré v. Barreau du Québec*:

> [T]he approach used when reviewing the constitutionality of a law should be distinguished from the approach used for reviewing an administrative decision that is said to violate the rights of a particular individual (see also Bernatchez). When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference (para. 53; see also *Suresh v. Canada (Minister of Citizenship and Immigration*), 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 39). When a particular "law" is being assessed for *Charter* compliance, on the other hand, we are dealing with principles of general application.[211]

Doré's watered-down proportionality test departs from the *Oakes* test in several key respects: the objective need not be pressing, the measures need not be demonstrably justified, the measures and the objective need not be rationally connected, there is no threshold consideration of whether the measures are "arbitrary, unfair or based on irrational considerations,"[212] and the measures need not be shown to

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207 *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 at para 31, [2003] 2 SCR 504.
208 *R. v. Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.
209 *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 16, [2006] 1 SCR 256.
210 *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 21, [2006] 1 SCR 256.
211 *Doré v. Barreau du Québec*, 2012 SCC 12 at para 36, [2012] 1 SCR 395.
212 *R. v. Oakes*, [1986] 1 SCR 103 at para 70, 26 DLR (4th) 200.

minimally impair the right or freedom. *Doré*'s deferential approach has attracted considerable criticism for applying a proportionality test that is insufficiently protective of *Charter* rights:

> A main concern expressed about the *Doré* proportionality test is that it is under-protective of *Charter* rights in the administrative law context. We have seen that it departs from the limitation/justification structure of *Oakes*, whereby an applicant's burden is only to demonstrate a limit on a *Charter* right and the burden then shifts to the governmental respondent to justify the limit under section 1. It instead puts the burden entirely on the applicant to show that an administrative decision is unreasonable in virtue of unjustifiably limiting *Charter* values. It is said that *Doré* proportionality thus improperly abandons the standard assumption that unremitting protection of *Charter* rights is the norm such that limits on them demand justification by the state. And it purportedly dilutes *Charter* rights by treating their scope and breadth as determinable by administrative decision-makers whose determinations are owed judicial deference.[213]

These concerns animated the dissent of Justices Côté and Brown in *Law Society of British Columbia v. Trinity Western University* who criticized the *Doré* approach for "subvert[ing] the promise of our Constitution" by shifting the burden of proof, by resorting to abstract *Charter* "values", and by failing to subject individualized decisions to the same level of scrutiny as general laws:

> We acknowledge the majority's insistence (at para 80) that "[t]he framework set out in *Doré* and affirmed in *Loyola* is not a weak or watered-down version of proportionality". Rather, it maintains, it is "robust". But saying so does not make it so. Indeed, the Chief Justice's attempt to clarify that framework, combined with the majority's continued defence of the "robustness" of proportionality as set out in the *Doré/Loyola* framework, simply reinforce our view that the orthodox test — the *Oakes* test — must apply to justify state infringements of *Charter* rights, regardless of the context in which they occur. Holding otherwise subverts the promise of our Constitution that the rights and freedoms guaranteed by the *Charter* will be subject only to "such reasonable limits prescribed by law as can be demonstrably justified" (s. 1).
> ....
> We are in agreement with the Chief Justice and our colleague Rowe J. that *Charter* values do not receive independent protection under the *Charter*. In our view, and for several reasons, resorting to *Charter* values as a counterweight to constitutionalized and judicially defined *Charter* rights is a highly questionable practice.
> ....
> As to how we would resolve the question of onus under *Doré/Loyola*, it is this simple: either the majority's statements about the *Doré/Loyola* framework's equivalency to *Oakes* and about the "same justificatory muscles" being flexed (Majority Reasons, at para 82) are empty and meaningless words, or they are statements to be taken seriously. And if they are statements to be taken seriously, they must in our view mean that the burden to justify a rights limitation rests with the state actor under *Doré/Loyola*, just as it does when *Oakes* flexes its "justificatory muscles".[214]

213 Anthony Sanguiliano, *The Dawn of Vavilov, the Twilight of Doré: Remedial Paths in Judicial Review of Rights-Affecting Administrative Decisions and the Unification of Canadian Public Law* (2022) 59:3 Alberta L Rev 1 at 17 <https://ssrn.com/abstract=3900044>.

214 *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at paras 304-314, [2018] 2 SCR 293.

If *Doré* remains good law, the correct test to apply (i.e.: the administrative test from *Doré* or the constitutional test from *Oakes*) will depend on whether the impugned administrative decision is characterized as a general norm (***law***) or an individualized decision (***government act***).

5.4.2 'Prescribed by Law': General Norm or Individualized Decision?

In *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, Justice Deschamps' expansive interpretation of the word "law" in s. 1 captured legislation and "binding rules of general application", subjecting both to robust constitutional scrutiny:

> In its decisions on the "prescribed by law" requirement in s. 1, the Court has distinguished between challenges to government acts and challenges to "laws" (*Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038; *Eldridge*, at para. 20). This case raises the latter type of claim: the policies are being challenged, not the decision made by the transit authorities pursuant to the policies. In assessing whether the impugned policies satisfy the "prescribed by law" requirement, it must first be determined whether the policies come within the meaning of the word "law" in s. 1 of the *Charter*. To do this, it must be asked whether the government entity was authorized to enact the impugned policies and whether the policies are binding rules of general application.
> ....
> The Court has also implicitly recognized other forms of limits that were not originally identified in *Therens* as being prescribed by law, including limits contained in municipal by-laws (*Ramsden* and *City of Montréal*), provisions of a collective agreement involving a government entity (*Lavigne*) and rules of a regulatory body (*Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591). Such limits satisfy the "prescribed by law" requirement because, much like those resulting from regulations and other delegated legislation, their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply.
> ....
> The key question is thus whether the policies are focussed [*sic*] on "indoor" management. In such a case, they are meant for internal use and are often informal in nature; express statutory authority is not required to make them. Such rules or policies act as interpretive aids in the application of a statute or regulation. They cannot in and of themselves be viewed as "law" that prescribes a limit on a *Charter* right. An interpretive guideline or policy is not intended to establish individuals' rights and obligations or to create entitlements. Moreover, such documents are usually accessible only within the government entity and are therefore unhelpful to members of the public who are entitled to know what limits there are on their *Charter* rights.
> ....
> Thus, where a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law".
> ....
> [T]he appropriate remedy for an invalid rule of general application is one under s. 52(1) of the *Constitution Act, 1982*, not s. 24(1) of the *Charter*.[215]

215 *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at paras 50, 53, 63, 65 & 89, [2009] 2 SCR 295.

The distinction drawn by Justice Deschamps between "binding rules of general application" (***laws***) and decisions (***government acts***) is key—if the PHO Mandates are characterized as "decisions", it could lead to the erroneous conclusion that her mandates are government acts rather than laws. On the facts, however, the PHO Mandates are clearly "binding rules of general application":

- **Their adoption is authorized by statute**: in the Gatherings and Venues Mandates, the PHO invokes ss. 30, 31, 32, 39, 43, 54, 56, 67(2) and 69 of the *Public Health Act* as authority for the adoption of her orders.
- **They set out a general standard that is meant to be binding**: the PHO's website warns, "You ***must*** follow PHO orders."[216] And early in the pandemic, the Minister warned, "Dr. Henry's orders aren't suggestions. ***They are the law***."[217] The PHO Mandates clearly set a general standard that applies to, and is meant to be binding upon, everyone in BC—no Vaccine-Free person in BC is permitted to enter a "non-essential" business, and no "non-essential" business is permitted to grant entry to a Vaccine-Free person.
- **They are accessible and precise**: the PHO Mandates are available in PDF format on a public website that is neither intended for internal use nor "focused on 'indoor' management".[218]

The Gatherings and Venues Mandates each contain "Variance, Reconsideration and Review" provisions regulating individual requests for exemption from mandatory vaccination.[219] In *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, Justice Deschamps noted "...the policies are being challenged, not the decision made by the transit authorities pursuant to the policies." By analogy, the PHO Mandates are laws/policies/binding rules of general application, and each discretionary individualized decision rendered by the PHO pursuant to the "Variance, Reconsideration and Review" provisions of these laws would be a "government act".

5.4.3 Legal Expertise of the Decision-Maker: Apposite or Irrelevant?

In *Doré*, the majority framed the issue as follows:

> Normally, if a discretionary administrative decision is made by an adjudicator within his or her mandate, that decision is judicially reviewed for its reasonableness. The question is whether the presence of a *Charter* issue calls for the replacement of this administrative law framework with the *Oakes* test, the test traditionally used to determine whether the state has justified a law's violation of the *Charter* as a "reasonable limit" under s. 1.[220]

With respect, this misses the mark. The question is not whether the presence of a *Charter* issue ought to displace the reasonableness standard; the question is whether the nature of the decision ought to displace the correctness standard such that bureaucratic *fonctionnaires* making discretionary decisions that violate the *Charter* rights of specific individuals will be afforded more deference than ***expert tribunals*** deciding ***any other type*** of constitutional question. If, as noted by Chief Justice Wagner in

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216 Ministry of Health, *COVID-19 (Novel Coronavirus)*, updated 24 March 2022 <https://www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/current-health-topics/covid-19-novel-coronavirus>.

217 Alyse Kotyk, *Here are the changes B.C. just announced to the province's state of emergency*, 26 March 2020 <https://bc.ctvnews.ca/here-are-the-changes-b-c-just-announced-to-the-province-s-state-of-emergency-1.4869187>.

218 Ministry of Health, *COVID-19 (Novel Coronavirus)*, updated 31 March 2022 <https://www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/current-health-topics/covid-19-novel-coronavirus>.

219 Gatherings Mandate at p.14; Venues Mandate at p.11.

220 *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 at para 3 ("Doré").

Vavilov, "a correctness review is required by the rule of law" for constitutional questions,[221] such that an administrative decision-maker's interpretation of the supreme law of Canada must be judged solely for its correctness,[222] it is absurd to suggest that courts should defer to bureaucrats lacking legal and interpretive expertise, but ***only if*** their decisions violate the *Charter* rights of specific individuals. If a distinction is to be drawn between administrative decisions with a constitutional aspect, such that some are to be judged for their correctness and others for their reasonableness, the ***only*** rational basis upon which to support such a distinction would be the ***expertise*** of the decision-maker, not the ***variety*** of decision. It would be perverse if, by default, statutory delegates without legal expertise got to "ride on the deference bicycle" built for expert labour tribunals:

> Save for matters falling within the correctness categories, the categorical approach forces us to accept that that all administrative decision-makers possess a relative expertise on all matters. Better still, the law fails to account for the political reality that not all not all tribunals are created equal. The importance of these assertions should not be readily discounted. The post-*Dunsmuir* jurisprudence has extended the deference obligation beyond the adjudicative tribunal, to the interpretative decisions of statutory delegates such as government ministers and their delegates, office holders and even the Governor in Council. In short, it looks as though every statutory delegate gets to ride on the deference bicycle originally built for labour tribunals.[223]

Whilst discussing Bill 56, the proposed law ultimately enacted as the *Administrative Tribunals Act*, SBC 2004, c.45 (the "ATA"), former Attorney General Geoff Plant noted that only two tribunals—the Labour Relations Board and the Securities Commission—have the expertise to consider ***all*** constitutional questions (including *Charter* issues), only three tribunals—the Employment Standards Tribunal, the Farm Industry Review Board, and the Human Rights Tribunal—have the expertise to consider ***some*** constitutional questions (i.e.: division of powers issues, but not *Charter* issues), and no other administrative tribunal has the specialized expertise necessary to decide "inevitably complex" constitutional questions with "far-reaching implications":

> The kinds of questions that we're talking about, the kinds of questions I referred to a minute ago — questions about the division of powers, questions about aboriginal rights and title, questions about *Charter* rights — are inevitably complex questions. They involve a wide-ranging consideration of a great number of legal issues, and they have far-reaching implications. The expertise required to decide these issues often goes well beyond the specialized expertise of most tribunals. There is no doubt that most tribunal members have quite a bit of expertise in the areas they are asked to make decisions about. That is why they are appointed to become tribunal members, but that expertise may be in areas that are quite a long way away from the core questions that arise in constitutional disputes.
>
> Expertise in science, medicine, finance, social policy, forestry or engineering may not necessarily be expertise in these questions of constitutional law. In fact, in many of these tribunals, our hope as government is to appoint tribunal members who have that subject matter expertise but don't necessarily have to be people with legal training at all. It's that subject

221 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 69, 441 DLR (4th) 1.

222 "The Constitution of Canada includes the *Constitution Act, 1867*, and the *Constitution Act, 1982*. It is the supreme law of Canada." Government of Canada, *The Canadian Constitution*, accessed 27 February 2022 <https://www.justice.gc.ca/eng/csj-sjc/just/05.html>.

223 Joseph T. Robertson, Q.C., *Dunsmuir's Demise & The Rise of Disguised Correctness Review*, 15 February 2018 <https://www.administrativelawmatters.com/blog/2018/02/15/dunsmuirs-demise-the-rise-of-disguised-correctness-review-the-hon-joseph-t-robertson/>.

> matter expertise that tribunals need in order to come to good decisions within their statutory mandates.
> ....
> The courts have stated clearly that when an inferior administrative tribunal—and that's not intended as a value statement, just as a hierarchical statement—makes a decision on constitutional questions, that decision is always subject to review by the courts on a standard of correctness. In other words, the tribunal has to get it right.
> ....
> I want to say this editorially. We have recognized that the courts have afforded this deference to the Labour Relations Board and the Securities Commission. I do so with a certain measure of reluctance because even in those tribunals, I think we find that the people who staff those tribunals are there because they have expertise in labour relations. They're there because they have expertise in securities regulation. They're not there because they are constitutional law scholars.
> ....
> There are some other exceptions. Three other tribunals—the Employment Standards Tribunal, the Farm Industry Review Board and the Human Rights Tribunal—are each given limited constitutional jurisdiction to consider questions about the division of powers between federal and provincial governments. These questions can arise in the course of tribunal proceedings, and the tribunals' expertise in resolving them has been acknowledged by the courts.[224]

The ATA framework incorporates a hierarchy of constitutional competence that permits very few tribunals to decide constitutional questions. Under s. 43, *Charter* questions are implicitly deemed the *most* complex, the *least* likely to be properly decided, and may be decided by the fewest tribunals. Under s. 45, division of powers questions are deemed less complex and may be decided by a slightly wider range of tribunals. Under s. 44, all other tribunals are implicitly deemed unqualified to decide constitutional questions and are required to refer such questions to the court by way of stated case. For administrative decision-makers *not* covered by the ATA, there is no principled basis upon which to insist that a reasonable yet incorrect decision that infringes the "life, liberty and security" of a particular person ***must*** be tolerated, but a reasonable yet incorrect decision that impinges upon the federal government's exclusive jurisdiction over "weights and measures" ***must not*** be tolerated.

In *Doré,* Abella J said reviewing courts should be "guided by a policy of deference" for tribunals with specialized expertise and "the power to decide questions of law":

> In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Court held that judicial review should be guided by a policy of deference, justified on the basis of legislative intent, respect for the specialized expertise of administrative decision-makers, and recognition that courts do not have a monopoly on adjudication in the administrative state (para. 49). And in *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at paras. 78-82, building on the development of the jurisprudence, the Court found that administrative tribunals with the power to decide questions of law have the authority to apply the *Charter* and grant *Charter* remedies that are linked to matters properly before them.[225]

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224 British Columbia, Legislative Assembly, *Debates* (18 May 2004) at 11194-11195 (Geoff Plant) <https://www.leg.bc.ca/content/Hansard/37th5th/h0518am-15.pdf>.

225 *Doré v. Barreau du Québec*, 2012 SCC 12 at paras 30, [2012] 1 SCR 395.

In *Vavilov*, Chief Justice Wagner rejected expertise as a threshold consideration:

> We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. However, we are not doing away with the role of expertise in administrative decision making. This consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review.[226]

If, in keeping with *Vavilov*, "a correctness review is required by the rule of law" for constitutional questions,[227] then the default standard of review for ***all*** constitutional questions—***especially*** *Charter* questions—should be robust and exacting, not deferential. It seems absurd to endorse a bifurcated approach that departs from the correctness standard, but only if the decision under review is an "individualized decision" that limits *Charter* rights. The courts may wish to carve out an exception for tribunals with specialized legal expertise and "the power to decide questions of law," but given Chief Justice Wagner's rejection of expertise as a threshold consideration in *Vavilov*, a better approach, consistent with the reasoning of Justice Gonthier in *Nova Scotia (Workers' Compensation Board) v. Martin*, would recognize the authority of superior courts to always "fully review" administrative decisions that infringe *Charter* rights on a correctness standard.[228]

On a reasonableness review, the decision-maker's reasoning is relevant:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[229]

On a correctness review, the decision-maker's reasoning is irrelevant:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.[230]

If *Doré* remains good law despite *Vavilov*'s claim that "a correctness review is required by the rule of law" for constitutional questions, and despite *Doré*'s proportionality test being insufficiently protective of *Charter* rights, the success or failure of a *Charter* challenge may hinge on whether the impugned decision is categorized as a binding rule of general application or a discretionary individualized

226 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 31, 441 DLR (4th) 1.
227 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 69, 441 DLR (4th) 1.
228 *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 at para 31, [2003] 2 SCR 504.
229 *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190.
230 *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 50, [2008] 1 SCR 190.

decision. In *Beaudoin v. British Columbia,* Hinkson CJ characterized the PHO's orders as "an administrative decision" and applied the *Doré* framework:

> In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov], the Court confirmed the applicability of the Doré framework when reviewing an administrative decision that is said to limit a *Charter* right.
> ....
> Under the *Doré* analysis, the issue is not whether the exercise of administrative discretion that limits a *Charter* right is correct (i.e., whether the court would come to the same result), but whether it is reasonable (i.e., whether it is within the range of acceptable alternatives once appropriate curial deference is given). An administrative decision will be reasonable if it reflects a proportionate balancing of the *Charter* right with the objective of the measures that limit the right.
> ....
> In this case, I have determined that the G&E Orders are more akin to an administrative decision than a law of general application, and that the *Doré* test is the appropriate test to apply. Although the G&E Orders are not a classical administrative adjudicative decision, they were made through a delegation of discretionary decision-making authority under the *PHA*.[231]

With respect, this aspect of the case was wrongly decided. The Court in *Vavilov* did not "confirm the applicability of the *Dore* framework"; rather, Chief Justice Wagner refused to reconsider the *Doré* approach because it was not "germane" to the issues on appeal:

> Although the *amici* questioned the approach to the standard of review set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395, a reconsideration of that approach is not germane to the issues in this appeal. However, it is important to draw a distinction between cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms* (as was the case in *Doré*) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the *Charter* (see, e.g., *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 SCR 504, at para 65). Our jurisprudence holds that *an* administrative decision maker's interpretation of the latter issue should be reviewed for correctness, and that jurisprudence is not displaced by these reasons.[232]

By incorrectly characterizing the G&E Orders as "an administrative decision" rather than "binding rules of general application", Hinkson CJ applied the wrong test; he ought to have reviewed the G&E Orders on a correctness standard with a *de novo* judicial application of the *Oakes* test.

In summary, if a court is asked to review an unconstitutional administrative decision, "a correctness review is required by the rule of law" per *Vavilov.*[233] Failing to conduct a rigorous review for compliance with the *Oakes* test could reduce our fundamental rights and freedoms to "mere administrative law principles,"[234] and "subvert the promise of our Constitution."[235] If, as noted by

231 *Beaudoin v. British Columbia*, 2021 BCSC 512 at paras 215-18.
232 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 57, 441 DLR (4th) 1.
233 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 69, 441 DLR (4th) 1.
234 *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 16, [2006] 1 SCR 256.
235 *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para 304, [2018] 2 SCR 293.

Justice Gonthier, an ***expert tribunal's*** interpretation of the *Charter* can always be "reviewed fully" on a correctness standard,[236] then ***any*** discretionary decision that infringes *Charter* rights should be fully reviewable on a correctness standard with a *de novo* judicial application of the *Oakes* test. The distinction favoured by Justices Deschamps and Abella in *Multani* (and adopted in *Doré*) between general norms and individualized decisions ought to be rejected; if the bifurcated *Doré* approach is retained, it should be confined to judicial review of decisions:

- that are individualized (not decisions that create "binding rules of general application");
- that "engage *Charter* values" (not decisions that limit *Charter* rights); and
- that are rendered by expert tribunals "with the power to decide questions of law."[237]

Because the PHO Mandates are "binding rules of general application" that apply to everyone in BC (***not*** an "individual administrative decision"), because the PHO is a doctor (***not*** an expert tribunal "with the power to decide questions of law"), and because the PHO Mandates limit *Charter* rights (***not*** merely "engage *Charter* values"), the appropriate test for determining whether the limits imposed by the PHO on the Vaccine-Free are justified is the robust *Oakes* test, not the watered-down proportionality test devised by Justice Abella in *Doré*.

5.4.4 A Sufficiently Important Objective

When the SARS-CoV-2 virus first arrived in Canada there were many unknowns, including a dearth of epidemiological data, and draconian public health measures (such as lockdowns and mask mandates) *seemed* necessary. As our understanding of Covid's epidemiology and relative risks grew, draconian measures that once *seemed* necessary have since proved neither reasonable nor necessary. The rapid spread of the mild Omicron variant, which is clinically indistinguishable from the common cold, simply does not justify the ongoing suspension of our *Charter* rights and freedoms. As noted by Justice Gorsuch in *Roman Catholic Diocese of Brooklyn v. Cuomo*: "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical."[238]

The PHO acknowledges her orders "may engage" the *Charter*, but relies upon s. 1 to justify the erasure of our civil liberties:

> I... recognize that constitutionally protected interests include the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*, including specifically freedom of religion and conscience, freedom of thought, belief, opinion and expression, and the right not to be deprived of life, liberty or security of the person, other than in accordance with the principles of fundamental justice. I understand that making decisions about whether to get vaccinated may engage these rights and freedoms. However, these rights and freedoms are not absolute and are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, which include proportionate, precautionary and evidence-based

236 *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 at para 31, [2003] 2 SCR 504.

237 *Doré v. Barreau du Québec*, 2012 SCC 12 at para 30, [2012] 1 SCR 395. In *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 SCR 293 and its companion case, *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33, [2018] 2 SCR 453, the Supreme Court applied the *Doré* test to decisions rendered by these two law societies, applying a deferential approach given their "particular expertise". It is unclear whether these cases would be decided the same way after *Vavilov* given Chief Justice Wagner's rejection of expertise as a threshold consideration.

238 *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 US __ (2020) at p.3 <https://www.supremecourt.gov/opinions/20pdf/20a87_4g15.pdf>.

> measures, including vaccination, to prevent loss of life, serious illness and disruption of our health system and society.[239]

According to former Newfoundland and Labrador Premier Brian Peckford, s. 1 was intended to justify *Charter* infringements only in extreme circumstances.[240] Having played a key role in drafting the *Charter*, and being its only surviving signatory, Peckford is uniquely positioned to speak to the intentions of its framers. He posits that s. 1 was meant to apply in times of peril, war, insurrection, or when the state's very existence is in jeopardy. Because a virus with a 99% recovery rate does not imperil our country, the pandemic does not constitute a crisis sufficiently dire to "demonstrably justify" measures that deprive us of our fundamental rights and freedoms. As noted by Saskatchewan physician Dr. Francis Christian, for the vast majority of Canadians (especially children) ***there is no emergency***:

> [I]n order to qualify for "emergency use authorization" there must be an emergency. For the elderly population, for the vulnerable, for health care workers, there is of course an emergency – several thousand people in Canada have died of covid-19. But the mean age of those who have died is 83.8. There is therefore a strong case for vaccinating the elderly, the vulnerable and health care workers. Covid-19 does not pose a threat to our kids. The risk of them dying of covid is less than 0.003% – this is even less than the risk of them dying of the flu. There is no emergency in children.[241]

5.5 Freedom of Conscience—s. 2(a)

For the Vaccine-Free, the objection to mandatory vaccination may be grounded in conscience, it may be grounded in religion, or it may be grounded in both. Though conscience is necessarily a broader concept than religion, the s. 2(a) jurisprudence has been dominated by challenges to limits on freedom of religion, with relatively little consideration given to freedom of conscience. By overemphasizing certain rights and freedoms and under-defining others, we risk diminishing the *Charter*:

> [A] danger of adjudicating one type of freedom through recourse to a related but distinct type of freedom comes into focus when government takes action that interferes unambiguously with the freedom that has been ignored. Recent litigation in Ontario over conscientious objection by physicians to providing referrals for procedures they deem immoral or unethical was almost exclusively treated by the courts as a matter of religious freedom, even though the activity in question – as the term *conscientious objection* suggests – may be better captured by freedom of conscience. A recent decision on this issue by Ontario's highest court declined to even consider arguments about freedom of conscience, focusing instead on religious freedom.[242]

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239 Gatherings Mandate (previous version) at para DD: Provincial Health Officer, *Gatherings and Events – January 17, 2022* <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-gatherings-events-jan17.pdf>; Venues Mandate (previous version) at para Z: Provincial Health Officer, *Food and Liquor Serving Premises – January 17, 2022* <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/archived-docs/covid-19-pho-order-nightclubs-food-drink-jan17.pdf>.

240 The Jordan B. Peterson Podcast, *S4:E78—Canadian Constitutional Crisis | Brian Peckford*, 26 January 2022 <https://www.jordanbpeterson.com/podcast/s4e78/>.

241 Francis Christian, *Safety Concerns About Covid Shots for Children*, 17 June 2021 <https://www.jccf.ca/wp-content/uploads/2021/06/17-June-press-conference-statement-Dr.-Christian.pdf>.

242 B. Bird, D. Newman & D. Ross, *The Charter's forgotten fundamental freedoms*, 16 June 2020 <https://policyoptions.irpp.org/magazines/june-2020/the-charters-forgotten-fundamental-freedoms/>.

Freedom of conscience includes, at a minimum, the right to express and manifest religious non-belief, and the right ***not*** to have a religious basis for one's conduct.[243] In her concurring reasons in *R. v. Morgentaler*, Wilson J. opined:

> [I]n a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning.[244]

To ensure linked words—thought and expression, conscience and religion, liberty and security of the person—are not deprived of independent content, the Supreme Court has consistently favoured an approach to *Charter* interpretation that construes our rights in a non-derivative way. In discussing freedom of association, for instance, McLachlin CJ and LeBel J. opined:

> Freedom of association is not derivative of these other rights. It stands as an independent right with independent content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests.[245]

And regarding the four basic equality rights, Wilson J. opined:

> In defining the scope of the four basic equality rights it is important to ensure that each right be given its full independent content divorced from any justificatory factors applicable under s. 1 of the *Charter*.[246]

It defies belief that citizens of an ostensibly free and democratic society have been vilified and shunned for the "crime" of attempting to preserve their personal autonomy and bodily integrity. Against a backdrop of rising authoritarianism, heavy-handed censorship, and ongoing oppression of the Vaccine-Free, our courts should be invited to recognize the protective power of this neglected freedom, applying it as a bulwark against the coercive state with its monopoly on force and its obsession with compliance.

5.5.1 The Cornerstone of a Functioning Democracy

In his thesis on freedom of conscience, Michael Manley-Casimir describes the claim of conscience as a non-negotiable assertion of moral autonomy rooted in individual dignity:

> To assert the claim of conscience is to assert the fundamental integrity and dignity of the self; it is to assert that the individual takes what is at issue as unconditionally serious, non-negotiable, binding; it is an ontological claim approximating what Tillich refers to as an "ultimate concern." The individual here affirms his/her capacity to see more clearly, to read more deeply, discern more sharply than others the quintessential moral chasm ahead and to choose to affirm self, integrity, personhood – in short moral autonomy – in the face of the authority of the state.
>
> As Wolff concludes in his examination of these issues:

243 *R. v. Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at para 99, 35 DLR (4th) 1.
244 *R. v. Morgentaler*, [1988] 1 SCR 30 at 179, 44 DLR (4th) 385.
245 *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para 49, [2015] 1 SCR 3.
246 *R. v. Turpin*, [1989] 1 SCR 1296 at 1325, 48 CCC (3d) 8.

> It is out of the question to give up the commitment to moral autonomy. Men [*sic*] are no better than children if they not only accept the rule of others from force of necessity, but embrace it willingly and forfeit their duty unceasingly to weigh the merits of the actions which they perform. When I place myself in the hands of another, and permit him to determine the principles by which I shall guide my behaviour, I repudiate the freedom and reason that give me dignity.[247]

Unlike faith, which expresses "a commitment to that which cannot be established by reason," conscience has been described as a "rational property", an ethically-based moral imperative derived from education and experience:

> [Timothy Macklem] goes on to examine the nature of faith which he contrasts with reason
>
> > When we say that we believe in something as a matter of faith, or to put it the other way around, when we say that we have faith in certain beliefs, we express a commitment to that which cannot be established by reason, or to that which can be established by reason but is not believed for reason's sake.
>
> This in turn leads to his distinction between faith and conscience where faith as a non-rational property is integral to religious belief in contrast to conscience which Macklem argues is a rationally derived understanding.
>
> > In short, religious belief is sustained by faith, conscientious belief by reason. It is true that the claims of religion and the claims of conscience frequently coincide, as in conscientious objector cases, for religion commonly asks us to believe what there is reason to believe as a matter of conscience. Yet only the claims of religion are consequently referred to as faith, for only the claims of religion are endorsed as a matter of faith. The claims of conscience, by contrast, are the product of reason.[248]

The foundation of this "rational property" may be either agnostic/atheistic or religious. In his dissenting opinion in *Chamberlain v. Surrey School District No. 36*, Justice Gonthier chafed at the notion that atheistically-based moral positions should trump religiously-based positions; in his view, to denigrate the religiously-informed conscience demonstrates a "feeble notion of pluralism":

> In my view, Saunders J. below erred in her assumption that "secular" effectively meant "non-religious". This is incorrect since nothing in the *Charter*, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy. I note that the preamble to the *Charter* itself establishes that "...Canada is founded upon principles that recognize the supremacy of God and the rule of law". According to the reasoning espoused by Saunders J., if one's moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that

247 Michael Manley-Casimir, *The Meaning of 'Freedom of Conscience' in the Canadian Charter of Rights and Freedoms: A Polyvocal Cultural Analysis* (LL.M. Thesis, University of British Columbia, 2004) at p.26-27 <https://open.library.ubc.ca/soa/cIRcle/collections/ubctheses/831/items/1.0077582>.

248 Michael Manley-Casimir, *The Meaning of 'Freedom of Conscience' in the Canadian Charter of Rights and Freedoms: A Polyvocal Cultural Analysis* (LL.M. Thesis, University of British Columbia, 2004) at p.83 <https://open.library.ubc.ca/soa/cIRcle/collections/ubctheses/831/items/1.0077582>.

> everyone has "belief" or "faith" in something, be it atheistic, agnostic or religious. To construe the "secular" as the realm of the "unbelief" is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism.[249]

In *R. v. Big M Drug Mart Ltd.*, Justice Dickson (as he then was) discussed at length the purpose of s. 2(a), suggesting the individual's ability to make "free and informed decisions" was "the absolute prerequisite" for the legitimacy of our democratic tradition:

> What unites enunciated freedoms in the American First Amendment, s. 2(a) of the *Charter* and in the provisions of other human rights documents in which they are associated is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation. In *Hunter v. Southam Inc.*, *supra*, the purpose of the *Charter* was identified, at p. 155, as "the unremitting protection of individual rights and liberties". It is easy to see the relationship between respect for individual conscience and the valuation of human dignity that motivates such unremitting protection.
>
> It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.
>
> Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice.[250]

Whilst describing the relationship between freedom and coercion, Justice Dickson noted that a person forced to act against their conscience is not "truly free":

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would

249 *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 at para 137, [2002] 4 SCR 710.
250 *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at paras 121-23, 18 DLR (4th) 321.

> not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes ***indirect forms of control*** which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.[251]

Crucially, Justice Dickson clearly contemplates the *Charter* protecting not only against measures that impair rights and freedoms directly, but also against measures that exert ***indirect forms of control*** over the individual. People who are coerced, compelled, or otherwise forced—directly or indirectly—to act in ways contrary to their conscience or beliefs are not, in any meaningful sense, "free".

In *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, Justice Linden noted that conscience is "the location of profound moral and ethical beliefs," and freedom of conscience protects "views based on strongly held moral ideas of right and wrong":

> It seems, therefore, that freedom of conscience is broader than freedom of religion. The latter relates more to religious views derived from established religious institutions, whereas the former is aimed at protecting views based on strongly held moral ideas of right and wrong, not necessarily founded on any organized religious principles. These are serious matters of conscience. Consequently the appellant is not limited to challenging the oath or affirmation on the basis of a belief grounded in religion in order to rely on freedom of conscience under paragraph 2(a) of the *Charter*. For example, a secular conscientious objection to service in the military might well fall within the ambit of freedom of conscience, though not religion. However, as Madam Justice Wilson indicated, "conscience" and "religion" have related meanings in that they both describe the location of profound moral and ethical beliefs, as distinguished from political or other beliefs which are protected by paragraph 2(b).[252]

In *R. v. Morgentaler*, Justice Wilson opined that in matters of bodily autonomy, the conscience of the individual must be paramount to the will of the state:

> In my view, the deprivation of the s. 7 right with which we are concerned in this case offends s. 2(a) of the *Charter*. I say this because I believe that the decision whether or not to terminate a pregnancy is essentially a moral decision, a matter of conscience. I do not think there is or can be any dispute about that. The question is: whose conscience? Is the conscience of the woman to be paramount or the conscience of the state? I believe, for the reasons I gave in discussing the right to liberty, that in a free and democratic society it must be the conscience of the individual. Indeed, s. 2(a) makes it clear that this freedom belongs to "everyone", i.e., to each of us individually.[253]

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251 *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at para 95, 18 DLR (4th) 321.
252 *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FC 406, 113 DLR (4th) 67 (FCA).
253 *R. v. Morgentaler*, [1988] 1 SCR 30 at 175-76, 44 DLR (4th) 385.

In conclusion, the claim of conscience is both a non-negotiable assertion of moral autonomy rooted in individual dignity, and a rational, ethically-based moral imperative derived from education and experience. Section 2(a) protects strongly-held moral ideas of right and wrong, it safeguards the ability of each citizen to make free and informed decisions, and it proscribes legislative or administrative measures that would impose coercive burdens on the individual's conscience, undermining their personal autonomy and bodily integrity.

5.5.2 Proposed Test for Violations of Conscience

In *R. v. Edwards Books and Art Ltd.*, Chief Justice Dickson articulated a two-part test for establishing a violation of freedom of religion, i.e.: the claimant must show (1) their religious beliefs or conduct "might reasonably be threatened" by the impugned measure, and (2) the "coercive burden" on their religious beliefs or practices must be neither trivial nor insubstantial:

> The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably be threatened. For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial.[254]

The Supreme Court has not articulated a standalone test for establishing a violation of freedom of conscience. In *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, Justice Linden adapted the *Edwards Books* test to suit claims grounded in freedom of conscience that lack a nexus with religion, i.e.: the claimant must show (1) their conscientiously-held moral views "might reasonably be threatened" by the impugned measure, and (2) the "coercive burden" on their conscience must be neither trivial nor insubstantial:

> A similar analysis [to *Edwards Books*] should be employed in assessing any interference with freedom of conscience. This would require a claimant to show that his or her conscientiously held moral views might reasonably be threatened by the legislation in question, and that the coercive burden on his or her conscience would not be trivial or insubstantial.[255]

In *Syndicat Northcrest v. Amselem*, Justice Iacobucci modified the first prong of the *Edwards Books* test, but only for claims grounded in freedom of religion:

> [T]he first step in successfully advancing a claim that an individual's freedom of religion has been infringed is for a claimant to demonstrate that he or she sincerely believes in a practice or belief that has a nexus with religion. The second step is to then demonstrate that the impugned conduct of a third party interferes with the individual's ability to act in accordance with that practice or belief in a manner that is non-trivial.[256]

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254 *R. v. Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at 759, 35 DLR (4th) 1.
255 *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FC 406, 113 DLR (4th) 67 (FCA).
256 *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para 65, [2004] 2 SCR 551.

Michael Manley-Casimir proposes a three-part test to be met by individuals who object for reasons of conscience to coercive burdens imposed by the state:

> The essential elements of the proposed test are threefold. ***First***, that the claim advanced in the case reflects an individual refusing to comply with state action on the basis of a deeply held personal position. ***Second***, there must be a preponderance of evidence that the claimant's position is authentic and coherent – that it represents a moral or political commitment justified by reason rather than faith. And ***third***, there must also be a preponderance of evidence that the claimant has either demonstrably held this position over time as a consistent principle of individual integrity, or, as a result of significant personal reflection and introspection, has recognized the existential force of a personal categorical imperative. 'Existential force' implies the recognition of the unconditional ontological gravity of the matter at hand for the individual.[257]

Given that the Supreme Court has not yet devised a standalone test for establishing a violation of freedom of conscience, it seems sensible to favour the two-part test devised by Justice Linden in *Roach*—a test substantively similar to the test articulated by Chief Justice Dickson in *Edwards Books*—over the more demanding test proposed by Michael Manley-Casimir.

5.5.3 Section 1 Considerations Relevant to s. 2(a)

In the context of considering the proportionality of measures limiting freedom of religion, Chief Justice McLachlin opined that if laws have the "incidental effect" of depriving individuals of a "meaningful choice" about their religious practice, their impact will necessarily be "very serious":

> The incidental effects of a law passed for the general good on a particular religious practice may be so great that they effectively deprive the adherent of a meaningful choice: see *Edwards Books*. Or the government program to which the limit is attached may be compulsory, with the result that the adherent is left with a stark choice between violating his or her religious belief and disobeying the law: *Multani*. The absence of a meaningful choice in such cases renders the impact of the limit very serious.
>
> However, in many cases, the incidental effects of a law passed for the general good on a particular religious practice may be less serious. The limit may impose costs on the religious practitioner in terms of money, tradition or inconvenience. However, these costs may still leave the adherent with a meaningful choice concerning the religious practice at issue.... A limit on the right that exacts a cost but nevertheless leaves the adherent with a meaningful choice about the religious practice at issue will be less serious than a limit that effectively deprives the adherent of such choice.[258]

Similar considerations should presumably apply if limits are imposed on freedom of conscience, i.e.: if a law passed for the general good has the "incidental effect" of depriving individuals of a meaningful choice about their moral autonomy and bodily integrity, the impact of such limits will necessarily be "very serious". The Vaccine Passport Scheme imposes an ***unconscionable*** choice, forcing people to

257 Michael Manley-Casimir, *The Meaning of 'Freedom of Conscience' in the Canadian Charter of Rights and Freedoms: A Polyvocal Cultural Analysis* (LL.M. Thesis, University of British Columbia, 2004) at p.102 <https://open.library.ubc.ca/soa/cIRcle/collections/ubctheses/831/items/1.0077582>.

258 *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 92-95, [2009] 2 SCR 567.

choose between (a) violating their conscience (and their bodily integrity) or (b) being deprived of all vestiges of liberty. The absence of a ***meaningful*** choice renders the impact of the limit "very serious".

In *Ross v. New Brunswick School District No. 15*, Justice La Forest noted that courts should not formulate "internal limits" to the scope of freedom of religion (and, by implication, freedom of conscience) based on "public safety, order, health or morals"; rather, any competing interests ought to be reconciled under s. 1:

> [T]his Court has affirmed that freedom of religion ensures that every individual must be free to hold and to manifest without State interference those beliefs and opinions dictated by one's conscience. This freedom is not unlimited, however, and is restricted by the right of others to hold and to manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of religion of others. Freedom of religion is subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others.
>
> This said, a broad interpretation of the right has been preferred, leaving competing rights to be reconciled under the s. 1 analysis elaborated in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, decided after *Big M*. This approach was adopted by the majority in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 S.C.R. 315, which refused to formulate internal limits to the scope of freedom of religion.[259]

5.6 Right to Liberty & Security of the Person—s. 7

5.6.1 Liberty & Security of the Person

Insofar as s. 7 is protective of both physical and psychological integrity, the liberty interest will be engaged not only by the threat or imposition of physical restraint (e.g.: arrest or imprisonment), but also by state interference with personal autonomy:

> [L]iberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.[260]

The protected sphere of personal autonomy includes "inherently private choices" that go to the "core of what it means to enjoy individual dignity and independence":

> [T]he right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. As I have already explained, I took the view in *B. (R.)* that parental

259 *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825 at para 72, 133 DLR (4th) 1.
260 *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 368, 122 DLR (4th) 1.

> decisions respecting the medical care provided to their children fall within this narrow class of inherently personal matters. In my view, choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.[261]

Security of the person is similarly protective of both physical and psychological integrity. As such, the interest will be engaged not only by the imposition of physical punishment, but by the threat of physical punishment (e.g.: if a deportee faces a substantial risk of torture in his home country, the threat of physical punishment engages security of the person)[262] and by state measures that interfere with personal autonomy and psychological integrity:

> In the criminal context, this Court has held that state interference with bodily integrity and serious state-imposed psychological stress constitute a breach of an individual's security of the person. In this context, security of the person has been held to protect both the physical and psychological integrity of the individual (*Morgentaler, supra*, at p. 56, per Dickson C.J., and at p. 173, per Wilson J.; *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 SCR 519, at p. 587, per Sopinka J.; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, 1990 CanLII 105 (SCC), [1990] 1 SCR 1123, at p. 1177, per Lamer J.). These decisions relate to situations where the state has taken steps to interfere, through criminal legislation, with personal autonomy and a person's ability to control his or her own physical or psychological integrity such as prohibiting assisted suicide and regulating abortion.[263]

A key aspect of bodily integrity is the right to be free from non-consensual medical treatment:

> It should not be forgotten that every patient has a right to bodily integrity. This encompasses the right to determine what medical procedures will be accepted and the extent to which they will be accepted. Everyone has the right to decide what is to be done to one's own body. This includes the right to be free from medical treatment to which the individual does not consent[264]

State-imposed medical treatment implicates both liberty and security of the person:

> An order imposing medical treatment under s. 25 implicates a child's liberty and security of the person. Wilson J., in *Morgentaler*, stated that "[liberty], properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance" (p. 166; see also *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307, at para 49: "...'liberty' is engaged where state compulsions or prohibitions affect important and fundamental life choices"; *Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 SCR 844, at para 66: "[T]he right to liberty... protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference"). And in *Rodriguez*, Sopinka J. for the majority confirmed that the concept of security of the person encompasses "a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress" (pp. 587-88).[265]

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261 *Godbout v. Longueuil (City)*, [1997] 3 SCR 844 at para 66, 152 DLR (4th) 577.
262 *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 44, [2002] 1 SCR 3.
263 *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 55, [2000] 2 SCR 307.
264 *Ciarlariello v. Schacter*, [1993] 2 SCR 119 at 135, 100 DLR (4th) 609.
265 *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para 100, [2009] 2 SCR 181.

In a free and democratic society, s. 7 protects "fundamental life choices" from state interference, including "state compulsions and prohibitions":

> The liberty interest protected by s. 7 of the *Charter* is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. This applies for example where persons are compelled to appear at a particular time and place for fingerprinting (*Beare, supra*); to produce documents or testify (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission*), 1990 CanLII 135 (SCC), [1990] 1 SCR 425); and not to loiter in particular areas (*R. v. Heywood*, 1994 CanLII 34 (SCC), [1994] 3 SCR 761). In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference.[266]

Though s. 7 protects interests that go beyond "mere freedom from physical restraint", when a law includes incarceration in the range of possible sanctions, the liberty interest is clearly engaged, particularly if the law "forecloses reasonable medical choices":

> First, the prohibition on possession of cannabis derivatives infringes Mr. Smith's liberty interest, by exposing him to the threat of imprisonment on conviction under s. 4(1) or s. 5(2) of the *CDSA*. Any offence that includes incarceration in the range of possible sanctions engages liberty: *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 SCR 486, at p. 515. The prohibition also engages the liberty interest of medical marihuana users, as they could face criminal sanctions if they produce or possess cannabis products other than dried marihuana....
>
> Second, the prohibition on possession of active cannabis compounds for medical purposes limits liberty by foreclosing ***reasonable medical choices*** through the threat of criminal prosecution: *Parker*, at para. 92. In this case, the state prevents people who have already established a legitimate need for marihuana — a need the legislative scheme purports to accommodate — from choosing the method of administration of the drug.... [B]y forcing a person to choose between a legal but inadequate treatment and an illegal but more effective choice, the law also infringes security of the person.[267]

If "state compulsions and prohibitions" mandate proof of non-consensual medical risk-taking as a precondition to participating in society, this clearly engages both liberty and security of the person. And because incarceration is within the range of possible sanctions when the Vaccine-Free engage in "unsafe COVID-19 behaviour" (which includes dining at a restaurant and using the facilities at a community centre),[268] the violation of s. 7 is glaringly obvious. Nobody who has a constitutionally-protected right to liberty and security of the person should ever be ***forced*** to choose between (a) engaging in medical risk-taking and (b) attending their child's wedding, keeping their job, or flying across the country to visit relatives. Either we have the right to make inherently private choices free from state interference or we do not. If we may no longer exercise our right to bodily autonomy

266 *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 49, [2000] 2 SCR 307.
267 *R. v. Smith*, 2015 SCC 34 at paras 17-18, [2015] 2 SCR 602.
268 "If violation tickets do not act as a deterrent, or in cases of particularly egregious contraventions or for repeat offenders, police can recommend charges in relation to the offence. On conviction, judicial penalties of up to $10,000 and/or one year in prison may be imposed." Government of BC, *Violation tickets for unsafe COVID-19 behaviour*, updated 17 February 2022 <https://www2.gov.bc.ca/gov/content/covid-19/info/violation-tickets>.

without suffering disadvantage or prejudice—and banishment from social and societal life, losing one's job, and being denied the right to board an airplane certainly constitute "disadvantage or prejudice"—then the *Charter*'s guarantee of "liberty and security of the person" is worthless.

5.6.2 Principles of Fundamental Justice

The claimant who establishes a breach of s. 7 must also show the deprivation of life, liberty or security of the person is not in accordance with the principles of fundamental justice. As a preliminary matter, it is necessary to inquire into the purpose of the impugned law or measure. In *R. v. Moriarty*, Justice Cromwell said this objective must be stated at an appropriate level of generality in "precise and succinct terms", focusing on legislative ends rather than means:

> The objective of the challenged provision may be more difficult to identify and articulate. The objective is identified by an analysis of the provision in its full context.... In general, the articulation of the objective should focus on the ends of the legislation rather than on its means, be at an appropriate level of generality and capture the main thrust of the law in precise and succinct terms.
> ....
> The appropriate level of generality for the articulation of the law's purpose... resides between the statement of an "animating social value" — which is too general — and a narrow articulation, which can include a virtual repetition of the challenged provision, divorced from its context — which risks being too specific: *Carter*, at para. 76. An unduly broad statement of purpose will almost always lead to a finding that the provision is not overbroad, while an unduly narrow statement of purpose will almost always lead to a finding of overbreadth.[269]

In *R. v. Appulonappa* Chief Justice McLachlin said the inquiry into legislative purpose requires a consideration of "legislative context", and may also be informed by international law:

> As with statutory interpretation, determining legislative purpose requires us to consider statements of legislative purpose together with the words of the provision, the legislative context, and other relevant factors: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 268-87; *R. v. Chartrand*, [1994] 2 S.C.R. 864, at pp. 879-82. Where legislation is enacted in the context of international commitments, international law may also be of assistance.[270]

The principles of fundamental justice are, in essence, an added layer of protection against arbitrary, overbroad, and grossly disproportionate laws:

> Section 7 does not catalogue the principles of fundamental justice to which it refers. Over the course of 32 years of *Charter* adjudication, this Court has worked to define the minimum constitutional requirements that a law that trenches on life, liberty or security of the person must meet (*Bedford*, at para. 94). While the Court has recognized a number of principles of fundamental justice, three have emerged as central in the recent s. 7 jurisprudence: laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their object.[271]

269 *R. v. Moriarity*, 2015 SCC 55 at paras 26 & 28, [2015] 3 SCR 485.
270 *R. v. Appulonappa*, 2015 SCC 59 at para 33 [2015] 3 SCR 754.
271 *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para 72, [2015] 1 SCR 331.

In *Canada (Attorney General) v. Bedford*, Chief Justice McLachlin expounded at length upon the scope and significance of the rules precluding arbitrariness, overbreadth, and gross disproportionality:

> Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person.
> ...
> Overbreadth deals with a law that is so broad in scope that it includes some conduct that bears no relation to its purpose. In this sense, the law is arbitrary in part. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and some, but not all, of its impacts.
> ...
> Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose.
> ....
> Gross disproportionality... targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure.
> ....
> [G]ross disproportionality is not concerned with the number of people who experience grossly disproportionate effects; a grossly disproportionate effect on one person is sufficient to violate the norm.[272]

In *R. v. Malmo-Levine*, Justices Gonthier and Binnie included the rule against irrationality in the principles of fundamental justice:

> [W]e do not believe that the content of the "harm" principle as described by Mill and advocated by the appellants provides a manageable standard under which to review criminal or other laws under s. 7 of the *Charter*. Parliament, we think, is entitled to act under the criminal law power in the protection of legitimate state interests other than the avoidance of harm to others, subject to *Charter* limits such as the rules against arbitrariness, irrationality and gross disproportionality, discussed below.[273]

Objective of the Vaccine Passport Scheme: pronouncements from on high shed light on the objectives of the Vaccine Passport Scheme:

272 *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras 111-22, [2013] 3 SCR 1101.
273 *R. v. Malmo-Levine*, 2003 SCC 74 at para 129, [2003] 3 SCR 571.

- Programs that require proof of vaccination have been shown to ***increase vaccination uptake*** in populations, thereby ***reducing*** the public health risk of SARS-CoV-2 and ***the burden*** of COVID-19 illness ***on the public health system***, health care system and society as a whole.[274]
- What I would say to people is, unfortunately, this wave has been a ***pandemic of the unvaccinated***. I have nothing but compassion for people, and they are getting the best health care in the world, but ***we need people to get vaccinated***, and we need them to get vaccinated now. With the level of transmission we're seeing amongst the number of people who are unvaccinated, we need to continue to raise those levels.[275]
- The vaccine passport requires people to be vaccinated to do certain discretionary activities such as go to restaurants, movies, gyms. Not because these places are high risk, we're not actually seeing focused transmission in these settings. It's really to create ***an incentive to improve our vaccination coverage***.[276]
- [T]he continued presence of unvaccinated people in the population... poses a risk to the health of the population, ***threatens the capacity of the public health and health care systems*** to address the health care needs of the population, and constitutes a health hazard.[277]
- [P]roof of vaccination... will continue to ***increase the vaccination rate*** across the province and ***provide confidence*** to fully vaccinated people that those around them are also fully vaccinated.[278]
- The BC Vaccine Card requirement... helps ensure that businesses can stay open and people can ***feel safe*** in these settings, while continuing to ***increase vaccinations*** throughout the province.[279]
- 3.7 million British Columbians have downloaded the B.C. immunization card so they can interact in their community, they can go to public events and they can know ***with comfort*** that the people around them have made the same choices to protect themselves, their families and their communities.[280]
- Anything that ***encourages people to get vaccinated*** is important, it remains important.[281]
- [The BC Vaccine Card] will help ***increase vaccinations***, while protecting people in these settings, keeping businesses open and allowing events to take place.[282]

Extrapolating from these statements, the Vaccine Passport Scheme has four primary objectives:

1. increase vaccine uptake ("Objective 1");
2. shield Covid vaccinees from exposure to Covid ("Objective 2");
3. protect the capacity of the public healthcare system ("Objective 3"); and
4. make Covid vaccinees "feel" safe ("Objective 4").

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274 Gatherings & Venues Mandates at para S.
275 British Columbia, Legislative Assembly, *Debates* (21 October 2021) at 3600 (Adrian Dix) <https://www.leg.bc.ca/content/hansard/42nd2nd/20211021am-Hansard-n111.pdf >.
276 Pat Brand, *Patty Daly [Chief Medical Health Officer for Vancouver Coastal Health]*, 31 October 2021 at 0:23 <https://youtu.be/aHjnMdCXDv8?t=23>.
277 Gatherings Mandate at p.7; Venues Mandate at p.6.
278 Ministry of Health, *B.C. launches proof of vaccination to stop spread of COVID-19*, news release, 23 August 2021 <https://news.gov.bc.ca/releases/2021HLTH0053-001659>.
279 Ministry of Health, *Reminder: People need the BC Vaccine Card to access certain settings*, news release, 25 September 2021 <https://news.gov.bc.ca/releases/2021HLTH0171-001851>.
280 British Columbia, Legislative Assembly, *Debates* (21 October 2021) at 3600 (John Horgan) <https://www.leg.bc.ca/content/hansard/42nd2nd/20211021am-Hansard-n111.pdf >.
281 Amy Judd, *B.C. health officials say they would fully support vaccine passports*, 11 August 2021 <https://globalnews.ca/news/8105225/vaccine-passport-bc/>.
282 Ministry of Health, *Vaccine card enhances confidence, increases safety at B.C. events*, news release, 7 September 2021 <https://news.gov.bc.ca/releases/2021PREM0054-001746>.

Objective 1 is more properly a statement of legislative means than ends, i.e.: the Vaccine Passport Scheme punishes the Vaccine-Free for their disfavoured medical choices by making life inconvenient for them, which explains ***how*** vaccination rates will be driven up, but not ***why*** vaccination rates must be driven up. Objectives 3 and 4 are more properly characterized as "benefits" of the scheme than statements of overriding purpose. Objective 2 is closest to the mark and likely corresponds to what the government would claim, i.e.: the scheme's purpose is ***limiting the spread of Covid***. By not attempting to constrain the activities of those ***actually*** infected with Covid (e.g.: by imposing a universal testing requirement), the scheme was clearly not designed to limit the spread of Covid in any meaningful sense —the scheme discriminates ***only*** against the Vaccine-Free, who are ***presumed*** to pose a grave risk of infection and transmission, and does not discriminate against those ***actually*** infected with Covid, including infected Covid vaccinees and infected unvaccinated staff:

> The Order also does not apply to workers at a workplace when engaged in work activities, including staff meetings. In other words, the Order does not impose any requirement for employee vaccination or proof of vaccination even where a member of the public has to be vaccinated in order to receive a service.[283]

Again, however, the scheme's use of inappropriate means (arbitrary and irrational restrictions are imposed on those *presumed* to be infected, not on those *actually* infected with Covid) to achieve its ostensible ends is irrelevant. Accordingly, a viable statement of objective for the Vaccine Passport Scheme is ***limiting the spread of Covid***.

The Vaccine Passport Scheme is Arbitrary & Irrational: banning the Vaccine-Free from certain venues (e.g.: indoor skating rinks) but not others (e.g.: hair salons) is arbitrary. Targeting the Vaccine-Free for discriminatory treatment even if they are not infected, and not targeting infected Covid vaccinees and infected unvaccinated staff, is irrational. Because there is no direct connection between the purpose of the scheme (limiting the spread of Covid) and the effect on the Vaccine-Free (who are singled out for discriminatory treatment on the basis of a presumption, rather than proof, of infection), the Vaccine Passport Scheme is arbitrary and irrational.

The Vaccine Passport Scheme is Overbroad: insofar as the scheme presumes the Vaccine-Free to pose a grave risk of infection and transmission, it necessarily captures uninfected and/or naturally-immune unvaccinated people who are not contributing to the spread of Covid. In doing so, the Vaccine Passport Scheme "overreaches in its effect" and is overbroad.

The Vaccine Passport Scheme is Grossly Disproportionate: in *Bedford*, Chief Justice McLachlin said the rule against gross disproportionality only applies in "extreme cases" where the seriousness of the deprivation of liberty and security of the person is "totally out of sync with the objective of the measure." The predicament of the Vaccine-Free—individuals who for myriad personal and/or health reasons refuse to engage in medical risk-taking—clearly constitutes an "extreme case" and the "seriousness of the deprivation" cannot be divorced from the wider context, including the cumulative impact of multiple vaccine mandates imposed by employers and governments. The Vaccine-Free have lost their jobs, they've been prohibited from watching their children play sports at indoor arenas, they've been denied access to hospitals to comfort ailing relatives, they've been prevented from

283 Carolyn MacEachern & Pam Costanzo, *New Events and Gatherings Order Includes Vaccine Card Requirements*, 15 September 2021 <https://www.younganderson.ca/publications/bulletins/new-events-and-gatherings-order-includes-vaccine-card-requirements>.

discussing business with clients and colleagues over lunch at restaurants, and they've been denied the right to fly across Canada. Viewed within the context of the cumulative impact of myriad egregious deprivations of liberty and security of the person, the negative impact of the Vaccine Passport Scheme is so grossly disproportionate to its objective of limiting the spread of Covid that the scheme's detrimental effects cannot be rationally supported.

5.6.3 Section 1 Considerations Relevant to s. 7

As with breaches of other *Charter* rights, justification on the basis of competing social interests and overarching public goals plays no part in the s. 7 analysis:

> In determining whether the deprivation of life, liberty and security of the person is in accordance with the principles of fundamental justice under s. 7, courts are not concerned with competing social interests or public benefits conferred by the impugned law. These competing moral claims and broad societal benefits are more appropriately considered at the stage of justification under s. 1 of the *Charter* (*Bedford*, at paras. 123 and 125).[284]

Because the rights protected by s. 7 "are basic to our conception of a free and democratic society, and hence are not easily overridden by competing social interests,"[285] violations of s. 7 "are not easily saved by s. 1"[286] and will only be justified "in the most exceptional of circumstances, ***if at all***".[287] In the opinion of Justice Wilson, no impairment of s. 7 rights that violates the principles of fundamental justice could ***ever*** be justified under s. 1:

> There must first be found an impairment of the right to life, liberty or security of the person. It must then be determined whether that impairment has been effected in accordance with the principles of fundamental justice. If it has, it passes the threshold test in s. 7 itself but the Court must go on to consider whether it can be sustained under s. 1 as a limit prescribed by law on the s. 7 right which is both reasonable and justified in a free and democratic society. <u>If, however, the limit on the s. 7 right has been effected through a violation of the principles of fundamental justice, the enquiry, in my view, ends there and the limit cannot be sustained under s. 1</u>. I say this because <u>I do not believe that a limit on the s. 7 right which has been imposed in violation of the principles of fundamental justice can be either "reasonable" or "demonstrably justified in a free and democratic society"</u>.[288]

In the *Motor Vehicle Reference*, Justice Lamer alluded to the possibility that deprivations of liberty and security of the person could, in exceptional circumstances such as epidemics, be justified:

> Administrative expediency, absolute liability's main supportive argument, will undoubtedly under s. 1 be invoked and occasionally succeed. Indeed, administrative expediency certainly has its place in administrative law. But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of

284 *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para 79, [2015] 1 SCR 331.
285 *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 66, [2007] 1 SCR 350 per McLachlin CJ.
286 *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46 at 92, 177 DLR (4th) 124 per Lamer CJ.
287 *Godbout v. Longueuil (City)*, [1997] 3 SCR 844 at 909, 152 DLR (4th) 577; *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para 129, [2013] 3 SCR 1101; *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at 518, 24 DLR (4th) 536.
288 *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at 523, 24 DLR (4th) 536.

> the person guaranteed under s. 7 should be sacrificed to administrative expediency. Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.[289]

Justice Lamer is not suggesting that violations of s. 7 will ***always*** be justifiable during an epidemic; rather, he is saying that ***if*** the state wished to attempt to justify an infringement of s. 7 on the basis of exigent circumstances, the appropriate place to do so would be under s. 1 where competing state and individual interests are weighed.

5.7 Right Not to be Subjected to Cruel & Unusual Treatment—s. 12

There are two hurdles for the individual alleging a breach of s. 12, i.e.: the measures imposed must be "treatment or punishment" and they must be "cruel and unusual".

5.7.1 Treatment or Punishment

The Supreme Court has been relatively silent on the meaning of "treatment", noting the inclusion of the word "treatment" necessarily extends the ambit of s. 12 beyond punishments:

> [T]he protection afforded by s. 11 must be contrasted with s. 12 of the *Charter* that protects against cruel and unusual "treatment" or punishment. For example, DNA sampling, ordered as a consequence of conviction, would undoubtedly constitute a "treatment" and, if the physical method for obtaining a DNA sample were cruel and unusual, redress could be obtained under s. 12.[290]

Justice McDermid of the Ontario Divisional Court opined that medical care imposed on mentally ill patients without their consent would necessarily constitute "treatment" for purposes of s. 12:

> With respect for the views of Virtue J., I disagree with his opinion that s. 12 of the *Charter* does not extend to medical treatment. When medical treatment is administered by an agent of the government without the consent and against the will of the patient and is grossly intrusive, it may very well be "cruel and unusual" especially if it is administered not for the benefit of the patient but for the benefit of the government agency.[291]

Some courts view unduly harsh measures as "state action" constituting "treatment" for purposes of provisions substantively similar to s. 12. In *R. v. Secretary of State for the Home Department, ex parte Adam*, for instance, the House of Lords considered whether the consequences imposed on asylum-seekers constituted "treatment" for purposes of Article 3 of the European Convention on Human Rights which provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". The impugned statutory regime required asylum-seekers to file claims for support "as soon as reasonably practicable" after arrival in the UK; the respondents were denied support, having failed to file their claims in a timely manner. In the opinion of Lord Hope, the denial of support was positive state action that constituted "treatment" for purposes of Article 3:

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289 *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at 518, 24 DLR (4th) 536.

290 *R. v. Rodgers*, 2006 SCC 15 at para 63, [2006] 1 SCR 554. As noted by Wilson J in *R. v. Morgentaler*, each *Charter* right must be given independent meaning: "...as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning": *R. v. Morgentaler*, [1988] 1 SCR 30 at 179, 44 DLR (4th) 385.

291 *Howlett v. Karunaratne* (1988), 64 OR (2d) 418, 9 ACWS (3d) 218 (Div Ct).

> [T]he imposition by the legislature of a regime which prohibits asylum-seekers from working and further prohibits the grant to them, when they are destitute, of support amounts to positive action directed against asylum-seekers and not to mere inaction. This constitutes "treatment" within the meaning of the article.[292]

US courts consider measures that target intermediaries, ***indirectly impacting*** the rights and liberties of individuals, to be "state action". In response to the US government's demand that social media companies censor those with views that diverge from the "official" Covid narrative, one litigator notes:

> When the government ***commandeers, coerces, or utilizes*** private companies to accomplish what it can't do directly, courts recognize that is state action.
>
> In a version of this case during the mid-20th century, *Bantam Books v. Sullivan*, the Supreme Court held that a state commission consigned with reprimanding sellers of pornography and advising them of their legal rights (a veiled threat) "deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." The high court looked "through forms to the substance" and concluded that the state program violated the First Amendment.
>
> That is similar to what is happening here. The Biden administration knows that it can't get away with issuing orders directly prohibiting people from articulating views about COVID-19-related matters that differ from the government's, or with obtaining social media users' private information, so it is coercing companies into doing this on the government's behalf.[293]

In *Rodriguez v. British Columbia (Attorney General)*, Justice Sopinka accepted that "treatment" could include measures imposed by the state in non-penal or quasi-penal contexts, but felt this would require a "more active state process" involving "an exercise of state control":

> For the purposes of the present analysis, I am prepared to assume that "treatment" within the meaning of s. 12 may include that imposed by the state in contexts other than that of a penal or quasi-penal nature. However, it is my view that ***a mere prohibition*** by the state on certain action, ***without more***, cannot constitute "treatment" under s. 12. By this I should not be taken as deciding that only positive state actions can be considered to be treatment under s. 12; there may well be situations in which a prohibition on certain types of actions may be "treatment" as was suggested by Dickson J. of the New Brunswick Court of Queen's Bench in *Carlston v. New Brunswick (Solicitor General)* (1989), 43 C.R.R. 105, who was prepared to consider whether a complete ban on smoking in prisons would be "treatment" under s. 12. The distinction between that case and all of those referred to above, and the situation in the present appeal, however, is that in the cited cases the individual is in some way within the ***special administrative control*** of the state. In the present case, the appellant is simply subject to the edicts of the *Criminal Code*, as are all other individuals in society. The fact that, because of the personal situation in which

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292 *R. v. Secretary of State for the Home Department, ex parte Adam*, [2005] UKHL 66 at para 56, (2006) 1 AC 396. Lord Scott concurred at para 69: "It could not, in my opinion, sensibly be argued that a statutory bar preventing asylum seekers, or a particular class of asylum seekers, from obtaining NHS treatment would not be treatment of them for article 3 purposes."

293 Jenin Younes, *Under Biden, Government Forces Social Media Companies to Censor Americans*, 27 April 2022 <https://www.dailysignal.com/2022/04/27/under-biden-government-forces-social-media-companies-to-censor-americans/>.

> she finds herself, a particular prohibition impacts upon her in a manner which causes her suffering does not subject her to "treatment" at the hands of the state. The starving person who is prohibited by threat of criminal sanction from "stealing a mouthful of bread" is likewise not subjected to "treatment" within the meaning of s. 12 by reason of the theft provisions of the *Code*, nor is the heroin addict who is prohibited from possessing heroin by the provisions of the *Narcotic Control Act*, R.S.C., 1985, c. N-1. There must be some ***more active state process*** in operation, involving ***an exercise of state control*** over the individual, in order for the state action in question, whether it be positive action, inaction or prohibition, to constitute "treatment" under s. 12. In my view, to hold that the criminal prohibition in s. 241(b), without the appellant being in any way subject to the state administrative or justice system, falls within the bounds of s. 12 stretches the ordinary meaning of being "subjected to... treatment" by the state.[294]

In *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, Justice Mactavish felt the denial or reduction of healthcare funding to asylum seekers could constitute "treatment" for purposes of s. 12 because such individuals were "effectively under the administrative control of the state":

> I agree with the applicants that the situation of those seeking the protection of Canada may be readily distinguished from that of Ms. Rodriguez.
>
> In this case, those seeking the protection of Canada are under immigration jurisdiction, and as such are effectively under the administrative control of the state. Some claimants may be detained, and obligations such as reporting requirements may be imposed upon others. In addition, their ***rights and opportunities*** (such as their right to work or their ability to receive social assistance benefits) ***may be limited*** in a number of different ways by the state. Indeed, their entitlement to a range of benefits is wholly dependent upon decisions made by various branches of the Government of Canada as to their right to seek protection, and the ultimate success of their claims for protection.
>
> Furthermore, Ms. Rodriguez was subject to a law of general application, albeit one that had an adverse differential impact on her because of her compromised physical condition.[295]

Though the PHO Mandates are laws of general application, the Vaccine Passport Scheme is a ubiquitous "exercise of state control" that "limits the rights and opportunities" of British Columbians. Private organizations—restaurants, community centres, and purveyors of other regulated services—are "commandeered, coerced, or utilized" to ban the Vaccine-Free from their premises, enabling the government to accomplish indirectly (i.e.: coerce British Columbians to take the Experimental Vaccines) what can't be done directly (i.e.: impose an unconstitutional vaccine mandate). And insofar as British Columbians are required to jump through medical and administrative hoops before they may participate in run-of-the-mill activities, the scheme clearly constitutes a "more active state process". To watch their children play sports at indoor arenas, for instance, BC parents must:

> (a) submit to an unwanted, experimental, non-consensual medical treatment administered not for their benefit, after considering their unique circumstances and personal risk factors, but for the benefit of a government which prioritizes administrative expediency over bodily autonomy and has dispensed with the requirement of informed consent;

294 *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519 at 611-12, 107 DLR (4th) 342.
295 *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651 at paras 584-86, [2015] 2 FCR 267.

(b) download a record of their private medical decisions in QR Code or PDF format; and
(c) disclose their private medical decisions to strangers.

By commandeering private businesses to ban the Vaccine-Free from their premises, and by imposing medical and administrative burdens on British Columbians that limit their rights and opportunities, the Vaccine Passport Scheme is precisely the kind of "more active state process" contemplated by Justice Sopinka in *Rodriguez* that brings British Columbians within the "special administrative control of the state", the consequences of which constitute "treatment" for purposes of s. 12 of the *Charter*. Very few activities are exempted from the PHO's dystopian "papers please" requirement.

5.7.2 Cruel & Unusual

The test for determining whether a ***punishment*** is cruel and unusual is "gross disproportionality":

> The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the *Charter* is, to use the words of Laskin C.J. in *Miller and Cockriell*, *supra*, at p. 688, "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.
>
> In imposing a sentence of imprisonment, the judge will assess the circumstances of the case in order to arrive at an appropriate sentence. The test for review under s. 12 of the *Charter* is one of gross disproportionality, because it is aimed at punishments that are more than merely excessive.[296]

In *Quebec (Attorney General) v. 9147-0732 Québec inc.*, Justices Brown and Rowe noted that because s. 12 is "anchored in human dignity", even a monetary fine could constitute cruel and unusual punishment if it were "so excessive as to outrage standards of decency":

> [E]xcessive fines (which a corporation can sustain), without more, are not unconstitutional. For a fine to be unconstitutional, it must be "so excessive as to outrage standards of decency" and "abhorrent or intolerable" to society: *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at paras. 45 and 94. This threshold is, in accordance with the purpose of s. 12, inextricably anchored in human dignity. It is a constitutional standard that cannot apply to treatments or punishments imposed on corporations.[297]

If measures are overly broad, they are more likely to be "grossly disproportionate":

> This Court has established a high bar for finding that a sentence represents a cruel and unusual punishment. To be "grossly disproportionate" a sentence must be more than merely excessive. It must be "so excessive as to outrage standards of decency" and "abhorrent or intolerable" to society: *Smith*, at p. 1072, citing *Miller v. The Queen*, [1977] 2 S.C.R. 680, at p. 688; *Morrisey*, at para. 26; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 14. The wider the range of conduct and circumstances captured by the mandatory minimum, the more likely it is that the

296 *R. v. Smith (Edward Dewey)*, [1987] 1 SCR 1045 at 1072, 40 DLR (4th) 435.
297 *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 at para 17.

> mandatory minimum will apply to offenders for whom the sentence would be grossly disproportionate.[298]

In *United States v. Burns*, the Supreme Court regarded as "incontestable" the fact that irreversible and psychologically harmful measures "engage the underlying values" that animate s. 12:

> We are not called upon in this appeal to determine whether capital punishment would, if authorized by the Canadian Parliament, violate s. 12 of the *Charter* ("cruel and unusual treatment or punishment"), and if so in what circumstances. It is, however, incontestable that capital punishment, whether or not it violates s. 12 of the *Charter*, and whether or not it could be upheld under s. 1, engages the underlying values of the prohibition against cruel and unusual punishment. It is final. It is irreversible. Its imposition has been described as arbitrary. Its deterrent value has been doubted. Its implementation necessarily causes psychological and physical suffering. It has been rejected by the Canadian Parliament for offences committed within Canada. Its potential imposition in this case is thus a factor that weighs against extradition without assurances.[299]

The Supreme Court has not devised a test for determining whether ***treatment*** is cruel and unusual. In *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, Justice Mactavish identified factors that may indicate a treatment is "cruel and unusual" for purposes of s. 12:

> In determining whether treatment or punishment is "cruel and unusual", Canadian courts have looked at a number of factors as part of a kind of 'cost/benefit' analysis. These factors include whether the treatment goes beyond what is necessary to achieve a legitimate aim, whether there are adequate alternatives, whether the treatment is arbitrary and whether it has a value or social purpose. Other considerations include whether the treatment in question is unacceptable to a large segment of the population, whether it accords with public standards of decency or propriety, whether it shocks the general conscience, and whether it is unusually severe and hence degrading to human dignity and worth: *R. v. Smith*, above at para. 44.

With respect, whether treatment has "a value or social purpose" is a consideration for s. 1, not s. 12.

There is clearly a high bar for finding a punishment to be cruel and unusual, i.e.: it must be "grossly disproportionate", "abhorrent or intolerable to society", or "so excessive as to outrage standards of decency". Because the ***punished*** individual is guilty of wrongdoing that attracts moral opprobrium, the bar for finding punishment to be cruel and unusual should be higher; for the ***treated*** individual who is guilty of no wrongdoing, the bar for finding treatment to be cruel and unusual should be lower. Insofar as the Vaccine Passport Scheme makes no attempt to constrain the activities of those ***actually*** infected with Covid, and discriminates against healthy individuals who are ***presumed*** to pose a risk of infection and transmission, it is "unusually severe and hence degrading to human dignity and worth". And because the scheme necessarily captures uninfected and naturally-immune Vaccine-Free people who are not in any way contributing to the spread of Covid, it overreaches in its effect and "goes beyond what is necessary to achieve a legitimate aim". Furthermore, it is "incontestable" that directly or indirectly compelling individuals to submit to an unwanted and ***irreversible*** treatment which carries the risk of death "engages the underlying values" that animate s. 12.

298 *R. v. Lloyd*, 2016 SCC 13 at para 24, [2016] 1 SCR 130 per McLachlin CJ.
299 *United States v. Burns*, 2001 SCC 7 at para 78, [2001] 1 SCR 283.

5.7.3 Medical or Scientific Experimentation

As noted above, ancillary to the right of every person not to be subjected to "cruel, inhuman or degrading treatment" under Article 7 of the *ICCPR* is the right not to be subjected to non-consensual medical or scientific experimentation:

> Article 7 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.[300]

The language in s. 12 of the *Charter* clearly echoes the language in Article 7 of the *ICCPR*:

> 12 Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Article 4(1) permits States Parties to depart from their *ICCPR* obligations during a public emergency, but Article 4(2) stipulates that certain fundamental rights may ***not*** be abridged or limited ***even during an emergency***, including the rights enshrined in Article 7. Insofar as the right to refuse to participate in non-consensual medical experiments is ancillary to the right not to be subjected to "cruel, inhuman or degrading treatment or punishment" in Article 7, it should also be seen as ancillary to the right not to be subjected to "cruel and unusual" treatment for purposes of s. 12.

In the alternative, s. 26 of the *Charter* stipulates that the guarantee of specific rights does not negate the existence of ***any other rights that exist in Canada***:

> 26 The guarantee in this *Charter* of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Having acceded to the *ICCPR* on 19 May 1976, the Canadian government is bound by its obligations, and the right of every Canadian not to be subjected to non-consensual medical or scientific experimentation must be seen as a right "that exist[s] in Canada" within the meaning of s. 26.

5.7.4 Section 1 Considerations Relevant to s. 12

As noted by Chief Justice McLachlin in *R. v. Nur*, it will be difficult for the state to justify a "grossly disproportionate" ***punishment***:

> It will be difficult to show that a mandatory minimum sentence that has been found to be grossly disproportionate under s. 12 is proportionate as between the deleterious and salutary effects of the law under s. 1.[301]

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300 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) (entered into force 23 March 1976, accession by Canada 19 May 1976). <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

301 *R. v. Nur*, 2015 SCC 15 at para 111, [2015] 1 SCR 773. In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835 at 839, 120 DLR (4th) 12, the Supreme Court modified the proportionality aspect of the *Oakes* test, deciding: "...there must be a proportionality not only between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, but also between the deleterious and the salutary effects of the measures."

If the same standard applies to "cruel and unusual ***treatment***", and if the claimant meets its burden, it should be difficult for the state to justify "grossly disproportionate" treatment.

5.8 Right to Equal Protection of the Law Without Discrimination—s. 15(1)

Section 15 protects Canadians against discriminatory laws and the discriminatory *implementation* of otherwise valid laws.[302] In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice),*[303] for instance, customs officials who'd been granted a large measure of discretion to prevent the importation of obscene material systemically targeted homosexual erotica imported by the appellant bookstore. Though the impugned legislation was not discriminatory on its face, the *implementation* of the legislation by government officials discriminated against the appellants on the basis of sexual orientation, an analogous ground under s. 15(1), and could not be justified.

In *Law v. Canada (Minister of Employment and Immigration)*,[304] Justice Iacobucci created a "flexible and nuanced" 3-step approach to analyzing claims of discrimination under s. 15(1) requiring proof of:

1. differential treatment under the law,
2. on the basis of an enumerated or analogous ground,
3. which constitutes discrimination.

As the s. 15(1) jurisprudence evolved, Justice Iacobucci's "flexible and nuanced" test became rigid and complex, with the claimant having to prove each element on a balance of probabilities. In *R. v. Kapp*,[305] the Supreme Court refined *Law*'s three-step analysis into two:

1. Does the law create a distinction based on an enumerated or analogous ground?
2. Is the distinction discriminatory?

A distinction will be discriminatory if it imposes a burden or denies a benefit in a manner that:

1. creates a disadvantage by perpetuating prejudice or stereotyping,[306] or
2. reinforces, perpetuates or exacerbates disadvantage, including historical disadvantage.[307]

The failure to designate an appropriate mirror comparator group—i.e.: a group "like the claimants in all ways save for the characteristics relating to the alleged ground of discrimination"[308]—was often fatal to s. 15(1) claims:

> As is evident, a misidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis. In fact, the seemingly straightforward selection of a comparator group has proven to be the Achilles' heel in a variety of recent cases, including

302 *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120.
303 *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120.
304 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at 508, 170 DLR (4th) 1.
305 *R. v. Kapp*, 2008 SCC 41 at para 17, [2008] 2 SCR 483.
306 *R. v. Kapp*, 2008 SCC 41 at para 17, [2008] 2 SCR 483; *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para 30, [2011] 1 SCR 396; *Quebec (Attorney General) v. A*, 2013 SCC 5 at paras 324 & 418, [2013] 1 SCR 61.
307 *Quebec (Attorney General) v. A*, 2013 SCC 5 at para 332, [2013] 1 SCR 61; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para 20, [2015] 2 SCR 548; *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18 at para 22, [2018] 1 SCR 522; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 25, [2018] 1 SCR 464; *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para 27, 450 DLR (4th) 1.
308 *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 at para 55, [2004] 3 SCR 657.

> *Granovsky, supra*, *Lovelace*, *supra*, and *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54. In other cases, the selection has sparked a good deal of judicial debate, as in *M. v. H.*, 1999 CanLII 686 (SCC), [1999] 2 S.C.R. 3, and *Gosselin*.[309]

In *Withler v. Canada (Attorney General)*, the Supreme Court rejected the mirror comparator approach:

> It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.[310]

Though claimants need not identify a comparator group that precisely corresponds to themselves, they must establish distinctive treatment on the basis of a prohibited ground.

5.8.1 Enumerated & Analogous Grounds

In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, Justices McLachlin and Bastarache noted that s. 15(1) protects against discrimination on the basis of both ***actually*** and ***constructively*** immutable characteristics:

> What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 — race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion.[311]

On its face and in its impact, the Vaccine Passport Scheme creates a distinction between the Vaccine-Free and those who have chosen to accept vaccination as a condition of participating in communal life. Though "medical status" is not an enumerated ground of discrimination, it is both actually and constructively immutable. For the Vaccine-Free who are ***unable*** to be vaccinated for reasons of health, their medical status as unvaccinated persons is a personal characteristic that is ***actually*** immutable because their health would be harmed if they were to be vaccinated. For the Vaccine-Free who are ***unwilling*** to be vaccinated for reasons of conscience or religion, their medical status as unvaccinated persons is a personal characteristic that is ***constructively*** immutable, i.e.: "changeable only at unacceptable cost to personal identity." Whether their medical status as unvaccinated persons is actually or constructively immutable, this is a characteristic "the government has no legitimate interest

309 *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65 at para 18, [2004] 3 SCR 357.
310 *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para 63, [2011] 1 SCR 396.
311 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1.

in expecting [the Vaccine-Free] to change to receive equal treatment under the law," particularly since the Experimental Vaccines offer little-to-no protection against infection and transmission.

5.8.2 Discriminatory Distinctions

In *Andrews v. Law Society of British Columbia*, Justice McIntyre defined discrimination as follows:

> [D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.[312]

In *Law v. Canada (Minister of Employment and Immigration)*, Justice Iacobucci emphasized that a claimant's burden may be met by proving discriminatory ***intent*** or discriminatory ***effect***:

> As this Court has previously stated, the s. 15(1) claimant is not required to establish that the intent of the legislature in enacting the impugned legislation was discriminatory, in the sense that, for example, the legislation was consciously premised upon a prejudicial stereotype, or the legislature purposely failed to take into account the social disadvantage of an individual or group in enacting the legislation: see, e.g., *Miron, supra*, at para. 129, per McLachlin J. While it is well established that it is open to a s. 15(1) claimant to establish discrimination by demonstrating a discriminatory legislative purpose, proof of legislative intent is not required in order to found a s. 15(1) claim: *Andrews, supra*, at p. 174. What is required is that the claimant establish that either the purpose or the effect of the legislation infringes s. 15(1), such that the onus may be satisfied by showing only a discriminatory effect.[313]

In *Fraser v. Canada (Attorney General)*, Justice Abella noted that economic and social exclusion are harms that merit s. 15 protection:

> This brings us to the second step of the s. 15 test: whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*Alliance*, at para. 25). This inquiry will usually proceed similarly in cases of disparate impact and explicit discrimination. There is no "rigid template" of factors relevant to this inquiry (*Quebec v. A*, at para. 331, quoting *Withler*, at para. 66). The goal is to examine the impact of the harm caused to the affected group. The harm may include "[e]conomic exclusion or disadvantage, [s]ocial exclusion... [p]sychological harms... [p]hysical harms... [or] [p]olitical exclusion", and must be viewed in light of any systemic or historical disadvantages faced by the claimant group.[314]

Though Justice Abella believes harms should be viewed in light of "historical disadvantages", in *Ontario (Attorney General) v. G*, Justice Karakatsanis confirmed that historical discrimination need not be demonstrated for an impugned law to infringe s. 15(1):

312 *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at 174-75, 56 DLR (4th) 1.
313 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at 543-44, 170 DLR (4th) 1.
314 *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para 76, 450 DLR (4th) 1.

> As Abella J. noted in *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, the "root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed" (para. 332) — though, of course, historical discrimination need not be demonstrated for a court to find that a law infringes s. 15(1). The equality guarantee... expresses a commitment to recognizing the essential, inalienable equal worth of all persons through the law.[315]

In *Trociuk v. British Columbia (Attorney General)*, Justice Deschamps said the absence of historical discrimination will not necessarily be a "compelling factor":

> Although the Court in *Law* held that historical disadvantage is "probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory" (para. 63), it does not follow that the absence of historical disadvantage is a compelling factor against a finding of discrimination.... [N]o single factor can determine, in all circumstances, whether a reasonable claimant would perceive that an impugned distinction infringes his or her dignity.[316]

The Vaccine Passport Scheme clearly discriminates against an identifiable group—the Vaccine-Free—on the basis of a personal characteristic—their medical status as unvaccinated persons—which is either actually immutable (it cannot be changed without jeopardizing the individual's health) or constructively immutable (it is "changeable only at unacceptable cost to personal identity") and which the government has "no legitimate interest in expecting us to change to receive equal treatment under the law". The scheme "imposes burdens, obligations, or disadvantages" not imposed on others, i.e.: the Vaccine-Free are presumed infectious ***even if healthy***, whereas Covid vaccinees and unvaccinated staff are presumed healthy ***even if infectious***. The scheme also "withholds or limits access to opportunities, benefits, and advantages" available to others, i.e.: even though the Vaccine-Free pose no appreciably greater risk of contagion than Covid vaccinees and unvaccinated staff, the Vaccine-Free are banned from communal life, whereas Covid vaccinees and unvaccinated staff are permitted to participate in communal life.

5.8.3 Prejudice & Stereotyping

In *Quebec (Attorney General) v. A*, Justice Abella noted that s. 15 claimants need only prove discriminatory impact, not the perpetuation of prejudicial or stereotypical attitudes towards them:

> We must be careful not to treat *Kapp* and *Withler* as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory attitude exists, not a discriminatory impact, contrary to *Andrews*, *Kapp* and *Withler*.[317]

Nevertheless, in recent months, there has been a dramatic increase in prejudice and stereotyping against the Vaccine-Free. During an unhinged rant that aired on the French-language program *La semaine des 4 Julie*, Prime Minister Trudeau directed a barrage of insults at the Vaccine-Free:

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315 *Ontario (Attorney General) v. G*, 2020 SCC 38 at para 39, 451 DLR (4th) 541.
316 *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34 at para 20, [2003] 1 SCR 835.
317 *Quebec (Attorney General) v. A*, 2013 SCC 5 at para 327, [2013] 1 SCR 61. LeBel J wrote for the majority in the result, Abella J wrote for the majority on s. 15(1).

> [The unvaccinated] do not believe in science or progress and are very often misogynists, also often racists. It is a very small group of people that muscles in and takes up space. This leads us, as a leader and as a country, to make a choice: Do we tolerate these people?[318]

In the midst of his recent (unnecessary) election campaign, Trudeau even denounced Erin O'Toole for failing to condemn "those people":

> The folks out there tonight shouting, the anti-vaxxers, they're wrong! They're wrong about how we get through this pandemic. They are putting at risk their own kids, and they're putting at risk our kids as well.... Shame on you, Erin O'Toole. You need to condemn those people, you need to correct them, you need to use your voice and actually add it to those of us who understand that vaccinations are the way through this pandemic.[319]

At a news conference in Mississauga, Ontario, Trudeau reiterated his specious claim that the Vaccine-Free are misogynists:

> Do we sit back and say 'oh, let's leave them space for their antivax beliefs, for their misogynistic beliefs' 'cuz we don't wanna ruffle the boat, rock the boat, or ruffle feathers. Or do we stand up, do we say 'no, not in Canada, not in our Canada'.[320]

Trudeau's vilification of Vaccine-Free Canadians provides a stark contrast to his earnest defence of Omar Khadr, the young Toronto-born militant captured in Afghanistan in 2002, accused of killing one U.S. soldier and injuring another:[321]

> The measure of a society, of a just society, is not whether we stand up for people's rights when it's easy or popular to do so. It's whether we recognize rights when it's difficult, when it's unpopular. We are a society that stands up for people's rights and when governments fail to respect people's rights, we all end up paying. And that is the lesson that hopefully future governments will draw from this settlement.[322]

Trudeau is not the only leader to engage in a hateful campaign of demonization and scapegoating. Akin to Trudeau's repugnant suggestion that the Vaccine-Free "take up space",[323] Dr. John Gerrard, Queensland's Chief Health Officer, recently accused the Vaccine-Free of "taking up a disproportionate amount of oxygen."[324] Earlier this year, Quebec Premier François Legault attempted to make vaccination mandatory for adults under threat of financial penalties.[325] And during a high profile

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318 Cosmin Dzsurdzsa, *Clip resurfaces of Trudeau calling unvaccinated "extremists, misogynists, racists"*, 4 January 2022 <https://tnc.news/2022/01/04/clip-resurfaces-of-trudeau-calling-unvaccinated-extremists-misogynists-racists/>.

319 David Akin, *Trudeau condemns anti-vax protesters, accuses them of endangering others*, 31 August 2021 <https://globalnews.ca/news/8156568/trudeau-condemns-anti-vax-protesters-accuses-them-of-endangering-others/>.

320 CPAC, *Justin Trudeau reaffirms campaign promises, pressed on Jody Wilson-Raybould book*, 11 September 2021 at 46:30 <https://youtu.be/ZcqHg-XZYUg?t=2790>.

321 CBS News, *Murder Charges For Canadian Gitmo Inmate*, 24 April 2007 <https://web.archive.org/web/20080418044227/http://www.cbsnews.com/stories/2007/04/24/terror/main2723020.shtml>.

322 Jeremy Patzer [@JeremyPatzerMP], 14 January 2022 <https://twitter.com/JeremyPatzerMP/status/1482054807498199055>.

323 Cosmin Dzsurdzsa, *Clip resurfaces of Trudeau calling unvaccinated "extremists, misogynists, racists"*, 4 January 2022 <https://tnc.news/2022/01/04/clip-resurfaces-of-trudeau-calling-unvaccinated-extremists-misogynists-racists/>.

324 Australians vs. The Agenda [@ausvstheagenda], 6 April 2022 <https://twitter.com/ausvstheagenda/status/1511610931662692355>.

325 Harley Sims, *Quebec makes vaccination mandatory under threat of "significant" fees*, 11 January 2022 <https://tnc.news/2022/01/11/quebec-makes-vaccination-mandatory-under-threat-of-significant-fees/>.

interview, French President Emmanuel Macron announced his desire to "fu** up" ("*emmerder*") the lives of French citizens who decline the Experimental Vaccines:

> While [Macron] would stop short of putting [the unvaccinated] in prison or putting the needle in forcibly, he wants to go "all the way" ("*jusqu'au bout*") in "limiting their access to social life." Basically, he wants to marginalise the hell out of them. Why not, given that in his eyes, they are "irresponsible" individuals, and "irresponsible" people "have forfeited their citizenship" ("*un irresponsable n'est plus an citoyen*").
>
> When this sort of incendiary, exclusionary language is echoed by the President of the United States and the Prime Minister of Canada, who have both suggested or strongly implied that parents should not let their children mix with unvaccinated families, you know that this is not just one Western leader going off the deep end, but a worrying international trend toward an ugly and brutish form of medical segregation, no different, morally speaking, from Nazi anti-semitism or racial apartheid.[326]

Stigmatizing the unvaccinated as high-risk virus-spreading carriers of disease is classic scapegoating with disturbing historical parallels—when Adolf Hitler created the Warsaw Ghetto, he did so "with a view to preventing the spread of disease," segregating Jews for "Public Health" and "Public Safety".[327] This dangerous rhetoric emboldens the fearful masses on one side of a growing divide who are eager to censor, track, fine, banish, and jail the Vaccine-Free:

> Data has revealed that a stunning 59 percent of Democrats want to see their fellow American citizens forced into isolation and confinement if they are unwilling to take Big Pharma's COVID-19 vaccines, with 45 percent endorsing the idea of quarantine camps for the unvaxxed.... Nearly half, roughly 48 percent, of Democratic voters reported that federal and state governments should be able to fine or imprison people who publicly exercise their first amendment rights by questioning the efficacy of existing COVID-19 vaccines on social media, television, radio, or in online or digital publications.[328]

A Canadian poll yielded equally alarming results:

> Thirty-three per cent of the survey respondents said it would be acceptable to not allow [the Vaccine-Free] to renew their drivers' licence. Another 37 per cent said it would be ok to refuse to "allow them access to any publicly funded hospital/medical services." More than a quarter, 27 per cent, said it would be acceptable to make them serve up to five days "as part of a jail sentence for endangering others/overwhelming (the) healthcare system."... Sixty-one per cent of the respondents said it would be ok to make the unvaccinated pay "a monetary healthcare surcharge on their taxes of up to $150 per month." That's the same percentage that said it would be ok to make such individuals "pay out of pocket for the full medical cost" if they are admitted to hospital or the ICU with COVID-19.[329]

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326 David Thunder, *Macron Wants to 'Fu** Up' the Life of Unvaccinated Citizens*, 6 January 2022 <https://davidthunder.substack.com/p/macron-wants-to-fu-up-the-life-of>.

327 DW Documentary, *The Warsaw Ghetto*, 27 January 2021 at 9:15 <https://youtu.be/V8QmqHfy-EI?t=555> and at 17:13 <https://youtu.be/V8QmqHfy-EI?t=1033>.

328 Kay Smythe & Raheem Kassam, *DATA: Nearly 50% of Democrat Voters Want 'Camps' for the Unvaccinated*, 17 January 2022 <https://thenationalpulse.com/2022/01/17/data-nearly-50-of-democrat-voters-want-camps-for-the-unvaccinated/>.

Disturbing footage from a television show in Quebec demonstrates that children in *la belle province* have been taught it is appropriate to arrest and "cut everything from" the unvaccinated:

> Q: Are you in favour of mandatory vaccination?
> A1: Yes.
> Q: What should we do with the people who don't want the vaccine?
> A1: We should call the police.
> A2: If they don't have the vaccine, it can make a lot of people in danger, so like what the government does right now. We should cut everything from them, little by little, until they submit and get vaccinated.[330]

If the Prime Minister of an ostensibly free country feels at liberty to publicly question whether we should "tolerate" those who refuse to participate in a global medical experiment, is it any wonder that some citizens feel emboldened to say the Vaccine-Free should ***not*** be tolerated? How long before demagogues like Trudeau and Macron decide to round up and incarcerate the Vaccine-Free—***or worse***?

5.8.4 Section 1 Considerations Relevant to s. 15(1)

In *Nova Scotia (Attorney General) v. Walsh*,[331] broad policy goals were considered under s. 15(1). Because these goals ought to have been considered under s. 1, where the government bears the burden of justifying its discriminatory treatment, this approach was specifically disavowed by the majority in *Quebec (Attorney General) v. A*:

> The majority in *Walsh* accepted that marital status is an analogous ground, but justified distinctions within this ground by pointing to an individual's "choice" to marry. This contradicts the approach to substantive equality under s. 15(1), where any argument concerning the reasonableness of the legislation is considered under s. 1. Contrary to this approach, the majority of the Court in *Walsh* collapsed the justification into the s. 15 analysis, leaving the claimants to justify what should analytically have been part of the government's burden.
> ....
> Examining choice at the s. 1 stage instead of integrating it into the discrimination analysis as the majority did in Walsh properly places the onus on the government to justify the exclusion based on freedom of choice, rather than compromising the s. 15(1) analysis. It is not the claimant's burden to disprove the legislative purpose for the exclusion, but the government's to demonstrate it under s. 1.[332]

In *Fraser v. Canada (Attorney General)*, Justice Abella confirmed that state objectives and broad policy goals may be relevant to s. 1, but they're irrelevant to s. 15(1):

> The perpetuation of disadvantage, moreover, does not become less serious under s. 15(1) simply because it was relevant to a legitimate state objective.... [A]dding relevance to the s. 15(1) test — even as one contextual factor among others — risks reducing the inquiry to a search for a "rational basis" for the impugned law.... The test for a *prima facie* breach of s. 15(1) is

329 Anja Karadeglija, *More than one in four Canadians support jail time for the unvaccinated, poll finds*, 19 January 2021 <https://nationalpost.com/news/canada/more-than-one-in-four-canadians-support-jail-time-for-unvaccinated-poll>.
330 Daniel Lemire [@dlemire], 19 January 2022 <https://gettr.com/post/ppbjz4da87>.
331 *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 SCR 325.
332 *Quebec (Attorney General) v. A*, 2013 SCC 5 at paras 340 & 343, [2013] 1 SCR 61.

> concerned with the discriminatory impact of legislation on disadvantaged groups, not with whether the distinction is justified, an inquiry properly left to s. 1.[333]

Sections 39(3) and 54(2) of the *Public Health Act* permit the PHO to make orders "in respect of a class of persons":

> **Contents of orders**
> 39(3) An order may be made in respect of a class of persons.
>
> **General emergency powers**
> 54(2) An order that may be made under this Part may be made in respect of a class of persons or things, and may make different requirements for different persons or things or classes of persons or things or for different geographic areas.

Though ss. 39(3) and 54(2) permit the PHO to discriminate, she may not do so ***arbitrarily***. Singling out a class of persons (the Vaccine-Free) for discriminatory treatment, and not targeting infected Covid vaccinees and infected unvaccinated staff, is arbitrary; banning the Vaccine-Free from certain venues (e.g.: indoor skating rinks) but not others (e.g.: hair salons) is arbitrary. Even though the measures are clearly arbitrary, the burden is on the government—not the claimant—to prove discriminatory distinctions are ***not*** arbitrary under s. 1:

> [T]here is no burden on a claimant to prove that the distinction is arbitrary to prove a *prima facie* breach of s. 15(1). It is for the government to demonstrate that the law is *not* arbitrary in its justificatory submissions under s. 1.[334]

5.9 Abuses of Discretion

5.9.1 Fettering of Discretion

Section 54(1)(h) of the *Public Health Act* permits the PHO to ***not*** reconsider an order:

> **General emergency powers**
> 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*]

While s. 54(1)(h) permits the PHO to not reconsider an order, it does not allow her to adopt an inflexible rule dictating the result of reconsideration requests without regard to the merits of each case, yet that is precisely what she has done. The PHO has adopted an inflexible rule stipulating that she will only accept reconsideration requests from individuals on the basis of a "medical deferral", and only if "the health of the person would be seriously jeopardized" by vaccination. She will not entertain requests for exemption from vaccination on conscientious or religious grounds:

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333 *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para 79, 450 DLR (4th) 1.
334 *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para 80, 450 DLR (4th) 1.

Variance, Reconsideration and Review[335]

1. After weighing the interests of [participants and staff at gatherings and events | patrons and staff in food and liquor serving premises] against the interests of persons who are not vaccinated for reasons other than a medical deferral to vaccination, and taking into account... the risk inherent in accommodating persons who are not vaccinated... [I] will not be accepting requests for a reconsideration of this Order, except from an individual on the basis of a medical deferral to a vaccination.

2. I will not be accepting requests for reconsideration with respect to the provisions of Part B, sections 12 and 13 of this Order on any basis, including on the basis of a medical deferral to a vaccination....

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

....

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

By preemptively rejecting requests for exemption on the basis of constitutionally-protected conscientious and religious grounds, the PHO has unlawfully fettered her discretion:

> Because Administrative Law generally requires a statutory power to be exercised by the very person upon whom it has been conferred, there must necessarily be some limit on the extent to which the exercise of a discretionary power can be fettered by the adoption of an inflexible policy.... After all, the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be looked at individually, on its own merits.[336]

In *British Oxygen Co Ltd v Minister of Technology*, Lord Reid said, "The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application'... What the authority must not do is to refuse to listen at all."[337] In *Halfway River First Nation v. British Columbia (Ministry of Forests)*, Justice Finch said it "offends to rules of procedural fairness" for decision-makers to pre-judge the merits of a claim, to fail to provide an opportunity to be heard, or to fetter their discretion by blindly following policies and refusing to consider other legally relevant factors:

> The learned chambers judge held that the process followed by the District Manager offended the rules of procedural fairness in four respects: he fettered his discretion by applying government policy; he pre-judged the merits of issuance of the cutting permit before hearing from the petitioners; he failed to give the petitioners adequate notice of his intention to decide whether to issue C.P.212; and he failed to provide an opportunity to be heard. These are all matters of

335 Gatherings Mandate at p.14-15; similar language is found in the Venues Mandate at p.11-12.
336 D.P. Jones & A.S. de Villars, *Principles of Administrative Law*, 3rd ed (Ontario: Carswell, 1999) at p.177.
337 *British Oxygen Co Ltd v Minister of Technology*, [1971] AC 610 at 625.

> procedural fairness, and do not go to the substance or merits of the District Manager's decision. There is, therefore, no element of curial deference owed to that decision by either the chambers judge or by this Court.
> ....
> The general rule concerning fettering is set out in *Maple Lodge Farms Ltd. v. Canada*, 1982 CanLII 24 (SCC), [1982] 2 S.C.R. 2, which holds that decision makers cannot limit the exercise of the discretion imposed upon them by adopting a policy, and then refusing to consider other factors that are legally relevant. Other cases to the same effect are *Davidson v. Maple Ridge (District)* (1991), 60 B.C.L.R. (2d) 24 (C.A.) and *T(C) v. Langley School District No. 35* (1985), 1985 CanLII 557 (BC CA), 65 B.C.L.R. 197 (C.A.). Government agencies and administrative bodies must, of necessity, adopt policies to guide their operations. And valid guidelines and policies can be considered in the exercise of a discretion, provided that the decision maker puts his or her mind to the specific circumstances of the case rather than blindly following the policy: see *Maple Lodge Farm, supra* at pages 6-8 and *Clare v. Thompson* (1983), 1993 CanLII 523 (BC CA), 83 B.C.L.R. (2d) 263 (C.A.).[338]

By predetermining the outcome of reconsideration requests, regardless of the specific circumstances of individual cases and other legally-relevant factors, the PHO has unlawfully fettered her discretion. The violation of procedural fairness is particularly egregious because her "refusal to listen at all" deprives the Vaccine-Free of their *Charter* rights.

5.9.2 Improper Purposes

Discretion may not be used to achieve a purpose not contemplated by the decision-maker's governing statute;[339] if the decision-maker has acted for an improper purpose, a reviewing court may quash the decision.[340] The PHO has arguably abused her discretion by acting for improper purposes, i.e.: to secure federal funding and to increase vaccine uptake.

5.9.2.1 Secure Federal Funding

As noted above, shortly before the PHO implemented the egregiously discriminatory Vaccine Passport Scheme in BC, she infamously promised "there is no way" she would "increase inequities" by implementing an egregiously discriminatory Vaccine Passport Scheme in BC:

> [T]his virus has shown us that there are inequities in our society that have been exacerbated by this pandemic, and ***there is no way*** that we will recommend ***inequities*** be ***increased*** by use of things like vaccine passports for services, for public access here in British Columbia. And that's my advice, and I've got support from, the Premier and I have talked about this, Minister Dix, and others.[341]

At the time, the Minister was optimistic the emergency was nearly behind us: "...it is my hope that by Canada Day we will be in a position to enter Step 3 of the restart plan, further relax restrictions and finally put this provincial emergency behind us."[342] But when Trudeau announced his $1 billion

338 *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 at paras 58 & 62, 64 BCLR (3d) 206.
339 *Re Multi-Malls Inc. et al. and Minister of Transportation and Communications et al.*, 14 OR (2d) 49, 73 DLR (3d) 18 (CA).
340 *Métis Nation B Saskatchewan Secretariat Inc v Royal Bank of Canada*, 2013 SKQB 257 at para 28, 425 Sask R 77.
341 Vancouver Sun, *COVID-19: Vaccine passports, required or not?* 25 May 2021 <https://youtu.be/y7C-59XFUFU?t=49>.
342 Minister of Public Safety and Solicitor General, *State of emergency extended to continue B.C.'s COVID-19 response*, news release, 22 June 2021 <https://news.gov.bc.ca/releases/2021PSSG0043-001208>.

election bribe to incentivize the provinces to implement discriminatory vaccine passports, things that "increase inequities" were clearly back on the table. Coincidentally, the week Trudeau announced his $1 billion election bribe, the BC government announced its decision to launch an "interim" ***provincial*** proof of vaccination scheme that would ultimately transition to a ***federal*** proof of vaccination scheme.[343] The PHO's stunning about-face on vaccine passports indicates she is clearly quite happy to "increase inequities" if the price is right, but her ulterior motive for doing so—securing federal funding—is, arguably, an improper purpose.

5.9.2.2 Increase Vaccine Uptake

The PHO has repeatedly acknowledged that masks are ineffective at preventing the spread of respiratory viruses,[344] yet she discriminated against unvaccinated healthcare workers by forcing them to wear ineffective masks as a "consequence" of their decision to decline flu shots. As noted above, when she testified at a VOM arbitration in Ontario, the PHO admitted she was "not a huge fan of the masking piece", she agreed there was "scant evidence about the value of masks in preventing the transmission of influenza,"[345] and she conceded that forced masking was imposed on unvaccinated healthcare workers to penalize them for refusing flu shots:

> Dr. Henry commented in her direct examination that U.S. studies show that voluntary efforts to increase vaccination rates are of limited value. The only studies that show increased [healthcare workers] immunization rates over a long time have included "consequences if people don't get immunized", vaccinate or wear a mask during influenza season.... In this regard, I note Dr. Henry's recognition that the wearing of a mask could be reasonably regarded as a "consequence" for failure to consent to vaccination.[346]

The PHO has employed the same strategy with the Vaccine Passport Scheme, i.e.: she has discriminated against the Vaccine-Free by excluding them from social and societal life as a "consequence" of their decision to decline experimental Covid shots. The PHO's ulterior motive for coercing British Columbians to submit to an ineffective experimental medical treatment—increasing vaccine uptake—is, arguably, an improper purpose.

5.9.3 Failure to Consider Relevant Grounds

The failure of an administrative decision maker to consider a highly relevant factor is just as erroneous as the improper consideration of an extraneous factor.[347] If a decision-maker fails to consider all relevant factors prior to making a decision, a reviewing court may quash the decision.[348] In *C.U.P.E. v. Ontario (Minister of Labour)*, the Minister had statutory discretion to appoint labour arbitrators who, in his opinion, were "qualified to act". In choosing to appoint retired judges, the Minister considered one marginally relevant factor (judicial experience) and failed to consider a highly relevant factor (labour relations expertise) that "went straight to the heart of the legislative scheme." The Minister's failure to consider this highly relevant factor was deemed patently unreasonable.[349]

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343 Ministry of Health, *B.C. launches proof of vaccination to stop spread of COVID-19*, news release, 23 August 2021 <https://news.gov.bc.ca/releases/2021HLTH0053-001659>.
344 See e.g.: Jay Zimma, *Bonnie vs Bonnie*, 22 March 2021 <https://youtu.be/-CefaYs_pFs>.
345 *Sault Area Hospital v. Ontario Nurses' Association*, 2015 CanLII 55643 (ON LA) at para 300.
346 *Sault Area Hospital v. Ontario Nurses' Association*, 2015 CanLII 55643 (ON LA) at footnote 420.
347 *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] 2 All E.R. 433, [1959] A.C. 663 at 693 (H.L.); *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality)*, [1985] 2 SCR 164, 20 DLR (4th) 641.
348 *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para 27, [2013] 2 SCR 125.
349 *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539.

To justify banning the Vaccine-Free from social and societal life, the PHO has failed to consider a number of highly relevant factors including, *inter alia*:

- Covid is highly stratified by age, weight & health. There is no need to vaccinate those at a statistical zero risk of severe illness & death, including healthy young and middle-aged people.
- The Experimental Vaccines carry severe risks, up to and including the risk of death. Where there is risk, there must be choice.
- The highest-risk settings in our province—the places that have experienced the lion's share of BC's Covid death toll—are government-run facilities such as long-term care homes, hospitals, and prisons. Outbreaks in schools, gyms, restaurants, local processing plants, personal care facilities, etc, are irrelevant to your statistical risk of dying because they cause so few deaths.

Because the PHO failed to consider—or consciously chose to ignore—highly relevant factors, her orders should be quashed.

6 CONCLUDING THOUGHTS

It is unconscionable that British Columbians have been forced to choose between (a) an unwanted experimental medical treatment that carries the risk of death, and (b) their careers, their ability to visit ailing relatives in hospital, and their freedom to fly across Canada. Our fundamental *Charter* rights and freedoms must be restored, our elected representatives must be held accountable for their failings, and unelected bureaucrats must never again be given *carte blanche* to impose draconian public health mandates under the guise of real (or fabricated) emergencies:

> The postmortem of the last two years is sure to begin now in earnest. We will thereby be confronted by failure on an epic scale, orchestrated by our expert class. Nationally and internationally, too many extreme decisions were made in too short a period by too few people with far too little reflection on the broader impact upon society. In pushing for their preferred remedies of lockdowns, mask mandates, social distancing—as well as flirting with vaccine passports and mandates—our experts intervened like never before in the proper functioning of a free society. They have made themselves the inevitable target of future investigations and potential retribution.[350]

Throughout the pandemic, the PHO has wielded—and continues to wield—far too much power. There is no rational justification for the ongoing "public health emergency" that grants the PHO sweeping powers to suspend the rule of law and crush our civil liberties. With her myopic focus on Covid *to the exclusion of all other economic and social issues*, the PHO's draconian mandates have inflicted massive collateral damage on individuals, businesses, and communities:

> During the COVID-19 Pandemic in Canada, it is apparent that the emergency management system has been sidelined. The Medical Officers of Health (MOHs) have been placed in charge both federally and in the provinces/territories (P/T). This has resulted in a deadly and massively damaging response. It has caused unnecessary death in our seniors and massive collateral damage to mental health, societal health, education/development of our children, to our citizens

350 Alex Story, *A Public Health Reckoning Is Coming*, 29 January 2022 <https://amgreatness.com/2022/01/29/a-public-health-reckoning-is-coming/>.

> with other severe illnesses, to our national economy, our civil rights, and to our trust in our democracy.
> ....
> The MOHs focus on COVID-19, to the exclusion of all other health matters, resulted in massive collateral damage both to health outcomes and societal outcomes. The MOHs broke their two overarching oaths, "To do no/minimum harm" and "To ensure informed consent by providing complete and accurate information on treatment and risks, before action".[351]

When confronted with the threat of an allegedly vaccine-preventable illness, each of us has the right to weigh our personal risk of contacting the illness against the known (and as-yet unknown) risks of any proposed treatment. Our right to refuse to consent to medical treatment must be respected, as must our right to refuse to participate in a medical or scientific experiment. The government cannot be allowed to coerce or unduly influence us to engage in medical risk-taking, and no unelected medical bureaucrat should ever again be permitted to enforce a one-size-fits-nobody approach to the practice of medicine that overrides our personal autonomy and bodily integrity. If we lose the right to individual inviolability and self-determination in matters of medical risk-taking, we lose everything:

> This then is the awful dilemma that the unvaccinated face: to trade their liberty and the integrity of their own bodies for the security of a job that allows them to support their families.... [O]nce individuals permit the state to dictate what is done to their bodies, that is the end of personal autonomy. No Charter of Rights or Nuremberg Code can ever bring it back. Informed consent is a watershed, and this is precisely the point.[352]

Insofar as the Experimental Vaccines do not meaningfully reduce my risk of catching Covid and transmitting it to you, the Vaccine Passport Scheme treats ***my*** body as a tool for reducing (but not eliminating) ***your*** perceived risk, which is ethically indefensible:

> As an argument for coerced vaccination, "you don't have the right to put me at risk" is the ultimate form of objectification: by overriding consent, it treats someone else's body as a mere tool for reducing one's own perceived risk. It is a selfish theft of personhood & dignity.[353]

In the words of Benjamin Franklin, "They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety." If we relinquish our rights and freedoms to be safe from a virus with an Infection Fatality Rate of 0.0013—0.65%, we deserve neither liberty nor safety.

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351 David Redman, *Position Paper: Canada's Deadly Response to COVID-19* at p.2-3, 1 July 2021 <https://tbof.ca/wp-content/uploads/2021/12/Position_Paper_Canadas_Deadly_Response_to_COVID_19_July01_2021.pdf>.

352 Leighton Grey, Q.C. *Vaccine Mandates Reveal Our True Enemy: The State*. (January 1, 2022). https://fcpp.org/2022/01/13/vaccine-mandates-reveal-that-the-state-is-our-enemy/

353 Ian Garrick Mason [@iangarrickmason], 18 September 2021 <https://twitter.com/iangarrickmason/status/1439365832564432899>.

7 APPENDIX

7.1 Constitutional Provisions

7.1.1 Canadian Charter of Rights and Freedoms

The relevant provisions of the *Charter* are as follows:[354]

> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:
>
> **Guarantee of Rights and Freedoms**
> 1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **Fundamental Freedoms**
> 2 Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion;
>
> **Legal Rights**
> 7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
> ....
> 12 Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.
>
> **Equality Rights**
> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> **Enforcement**
> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> **General**
> 26 The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

354 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11 (the "Charter").

7.1.2 The Constitution Act, 1982

Section 52(1) is the relevant provision of the *Constitution Act, 1982*:[355]

> **Primacy of Constitution of Canada**
> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

7.2 Statutory Provisions

7.2.1 *Public Health Act*, SBC 2008, c.28

The opening words of the PHO Mandates indicate they were issued pursuant to ss. **30**, **31**, **32**, **39(3)**, **43**, **54**, **56**, **67(2)** and **69** of the *Public Health Act*. In each mandate the PHO warns, "You are required under **section 42** of the *Public Health Act* to comply with this Order. Failure to comply with this Order is an offence under **section 99(1)(k)** of the *Public Health Act*. If you fail to comply with this Order, I have the authority to take enforcement action against you under Part 4, Division 6 [**ss. 47-50**] of the *Public Health Act*." The relevant portions of these and other key provisions are set out below:

> **Definitions**
> 1 In this Act:
>
> "**health hazard**" means
> (a) a condition, a thing or an activity that
> (i) endangers, or is likely to endanger, public health, or
> (ii) interferes, or is likely to interfere, with the suppression of infectious agents or hazardous agents, or
> (b) a prescribed condition, thing or activity, including a prescribed condition, thing or activity that
> (i) is associated with injury or illness, or
> (ii) fails to meet a prescribed standard in relation to health, injury or illness;
>
> "**preventive measures**" means measures taken for the purpose of
> (a) preventing illness,
> (b) promoting health,
> (c) preventing transmission of an infectious agent, or
> (d) preventing contamination by a hazardous agent
> and includes the measures set out in section 16(1);
>
> "**thing**" includes
> (a) tangible things, and
> (b) organisms, other than humans;

355 *Constitution Act, 1982*, s.35, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11 (the "Constitution Act, 1982").

Must not cause health hazard

15 A person must not willingly cause a health hazard, or act in a manner that the person knows, or ought to know, will cause a health hazard.

Preventive measures

16(1) Preventive measures include the following:

(a) being treated or vaccinated;

....

(2) A person subject to a regulation requiring preventive measures must not be in a place or do a thing that is prohibited by the regulation until the person has

(a) taken preventive measures as set out in the regulation, or

(b) if permitted by the regulation, made an objection under subsection (4).

....

(4) A person subject to a regulation requiring preventive measures may, if permitted by the regulation, make an objection to a medical health officer, either in person or in the prescribed manner, stating that the person

(a) believes that the preventive measures would be harmful to his or her health, or

(b) objects to the preventive measures for reasons of conscience.

....

(6) A person who has made an objection must not

(a) be required to take the preventive measures, and

(b) if applicable, be in a place or do a thing that is prohibited by the regulations.

When orders respecting health hazards and contraventions may be made

30(1) A health officer may issue an order under this Division only if the health officer reasonably believes that

(a) a health hazard exists,

(b) a condition, a thing or an activity presents a significant risk of causing a health hazard,

....

General powers respecting health hazards and contraventions

31(1) If the circumstances described in section 30 [*when orders respecting health hazards and contraventions may be made*] apply, a health officer may order a person to do anything that the health officer reasonably believes is necessary for any of the following purposes:

(a) to determine whether a health hazard exists;

(b) to prevent or stop a health hazard, or mitigate the harm or prevent further harm from a health hazard;

(c) to bring the person into compliance with the Act or a regulation made under it;

Specific powers respecting health hazards and contraventions

32(1) An order may be made under this section only

(a) if the circumstances described in section 30 [*when orders respecting health hazards and contraventions may be made*] apply, and

(b) for the purposes set out in section 31(1) [*general powers respecting health hazards and contraventions*].

(2) Without limiting section 31, a health officer may order a person to do one or more of the following:

....

(b) in respect of a place,

(i) leave the place,

(ii) not enter the place,

....

(j) provide evidence of complying with the order, including

(i) getting a certificate of compliance from a medical practitioner, nurse practitioner or specified person, and

(ii) providing to a health officer any relevant record;

(k) take a prescribed action.

Contents of orders

39(3) An order may be made in respect of a class of persons.

Duty to comply with orders

42(1) A person named or described in an order made under this Part must comply with the order.

Reconsideration of orders

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,

Warrants

47(1) Without notice to any person, a health officer may apply, in the manner set out in the regulations, to a justice of the peace for an order under this section.

Injunctions

48(1) Without notice to any person, a health officer may apply, in the manner set out in the regulations, to a judge of the Supreme Court for an order under this section.

Application to court if danger to public health

49(1) To obtain an order under this section, a medical health officer may apply, in the manner set out in the regulations and with the approval of the provincial health officer, to a judge of the Provincial Court.

Application to court if danger to personal health

50(1) To obtain an order under this section, a medical health officer may apply, in the manner set out in the regulations and with the approval of the provincial health officer, to a judge of the Supreme Court.

Definitions for this Part

51 In this Part:

"**emergency**" means a localized event or regional event that meets the conditions set out in section 52(1) or (2) [*conditions to be met before this Part applies*], respectively;
"**localized event**" means an immediate and significant risk to public health in a localized area;
"**regional event**" means an immediate and significant risk to public health throughout a region or the province.

Conditions to be met before this Part applies

52(2) Subject to subsection (3), a person must not exercise powers under this Part in respect of a regional event unless the provincial health officer provides notice that the provincial health officer reasonably believes that at least 2 of the following criteria exist:

(a) the regional event could have a serious impact on public health;
(b) the regional event is unusual or unexpected;
(c) there is a significant risk of the spread of an infectious agent or a hazardous agent;
(d) there is a significant risk of travel or trade restrictions as a result of the regional event.

Part applies despite other enactments

53 During an emergency, this Part applies despite any provision of this or any other enactment, including

(a) in respect of the collection, use or disclosure of personal information, the *Freedom of Information and Protection of Privacy Act* and the *Personal Information Protection Act*, and
(b) a provision that would impose a specific duty, limit or procedural requirement in respect of a specific person or thing,

to the extent there is any inconsistency or conflict with the provision or other enactment.

General emergency powers

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*];

(2) An order that may be made under this Part may be made in respect of a class of persons or things, and may make different requirements for different persons or things or classes of persons or things or for different geographic areas.

Emergency preventive measures

56(1) The provincial health officer or a medical health officer may, in an emergency, order a person to take preventive measures within the meaning of section 16 [*preventive measures*], including ordering a person to take preventive measures that the person could otherwise avoid by making an objection under that section.

(2) If the provincial health officer or a medical health officer makes an order under this section, a person to whom the order applies must comply with the order...

When authority to act under this Part ends

59 Unless otherwise expressed, the authority to act under this Part ends,

....

(b) in the case of a regional event, when the provincial health officer provides notice that the emergency has passed.

Provincial health officer may act as health officer

67(2) During an emergency under Part 5 [*Emergency Powers*], the provincial health officer may exercise a power or perform a duty of a health officer under this or any other enactment, and, for this purpose, subsection (1) does not apply.

Delegation by provincial health officer

69 The provincial health officer may in writing delegate to a person or class of persons any of the provincial health officer's powers or duties under this Act, except the following:

(a) a power to further delegate the power or duty;

(b) a duty to make a report under this Act.

Offences

99(1) A person who contravenes any of the following provisions commits an offence:

....

(f) section 16 [*failure to take or provide preventive measures, or being in a place or doing a thing without having taken preventive measures*];

(g) section 17(2) [*failure to take steps to avoid transmission, seek advice or comply with instructions*];

....

(k) section 42 [*failure to comply with an order of a health officer*], except in respect of an order made under section 29(2)(e) to (g) [*orders respecting examinations, diagnostic examinations or preventive measures*];

(l) section 56(2) or (3) [*failure to take emergency preventive measures or comply with instructions*], except in respect of an order to do a thing described in section 29(2)(e) to (g);

(2) A person who contravenes any of the following commits an offence:

(a) section 18 [*failure to prevent or respond to health hazards, train or equip employees, or comply with a requirement or duty*];

(b) section 22 [*failure to comply with the regulations or train or equip employees*];

(c) section 91 [*unauthorized disclosure of personal information*].

(3) A person who contravenes either of the following commits an offence:

(a) section 15 [*causes a health hazard*];

(b) section 26 [*failure to provide a designated quarantine facility*].

(4) A person who does either of the following commits an offence:

(a) knowingly provides false or misleading information to a person who is exercising a power or performing a duty under this Act, or a person acting under the order or direction of that person;

(b) wilfully interferes with, or obstructs, a person who is exercising a power or performing a duty under this Act, or a person acting under the order or direction of that person.

Fines and incarceration

108(1) In addition to a penalty imposed under section 107 [*alternative penalties*], a person who commits an offence listed in

(a) section 99(1) [*offences*] is liable on conviction to a fine not exceeding $25 000 or to imprisonment for a term not exceeding 6 months, or to both,

(b) section 99(2) or (4) is liable on conviction to a fine not exceeding $200 000 or to imprisonment for a term not exceeding 6 months, or to both, or

(c) section 99(3) is liable on conviction to a fine not exceeding $3 000 000 or to imprisonment for a term not exceeding 36 months, or to both.

7.2.2 *COVID-19 Related Measures Act,* SBC 2020, c.8

The relevant provisions of the *CRMA* are as follows:

Definitions

1 In this Act:

"**COVID-19 pandemic**" means the pandemic that was the subject of the declaration of a state of emergency made under the *Emergency Program Act* on March 18, 2020;

"**COVID-19 provision**" means a provision enacted by section 3(1);

"**declaration of a state of emergency**" has the same meaning as in the *Emergency Program Act*;

"**EPA instrument**" means an order or regulation, listed in Schedule 1 or 2, that was made under section 10 or 10.1 of the *Emergency Program Act*.

Conflict

2 If there is a conflict between

(a) this Act, including a COVID-19 provision, or a regulation under this Act, and

(b) any other Act or regulation,

the enactment referred to in paragraph (a) prevails.

Re-enactment and continuation of EPA instruments

3(1) Each of the EPA instruments is enacted as a provision of this Act.

(2) An EPA instrument is repealed on its enactment as a COVID-19 provision by subsection (1).

(3) Subject to subsection (8) (b), the enactment of a COVID-19 provision by subsection (1) is effective,

(a) respecting EPA instruments in Schedule 1, on the date of the relevant declaration of a state of emergency, and

(b) respecting EPA instruments in Schedule 2, on the date the instrument was made under section 10 or 10.1 of the *Emergency Program Act*.

(4) For certainty, a COVID-19 provision remains in effect in accordance with this section despite
(a) the *Emergency Program Act*, and
(b) anything in the COVID-19 provisions to the contrary.
....
(6) The Lieutenant Governor in Council may, before a COVID-19 provision is repealed under this section, specify by regulation a different date on which the COVID-19 provision is to be repealed, and if a different date is so specified, the COVID-19 provision is repealed on that specified date.
....
(8) The Lieutenant Governor in Council may, by regulation,
(a) repeal a COVID-19 provision or a portion of a COVID-19 provision, and
(b) add to Schedule 1 or 2 an order made under section 10 of the *Emergency Program Act* or a regulation made under section 10.1 of that Act respecting the COVID-19 pandemic.
....
(10) A regulation under subsection (8) may be made retroactive to a specified date and, if made retroactive, is deemed to have come into force on the specified date.

(11) This section is retroactive to the extent necessary to give full force and effect to its provisions and must not be construed as lacking retroactive effect in relation to any matter because it makes no specific reference to that matter.

No actions or proceedings
5(1) Subject to subsection (2) and the regulations, no legal proceeding for prescribed damages related to the COVID-19 pandemic lies or may be commenced or maintained against a prescribed person or a person in a prescribed class of persons because of
(a) any prescribed act or omission of the person, or
(b) any act or omission of the person in a prescribed class of acts or omissions.

(2) Subsection (1) does not apply in relation to damages caused by gross negligence.

Protection continues
6 For certainty, despite the repeal of section 5, the repeal does not affect any protection acquired under that section.

7.2.3 *Emergency Program Act*, RSBC 1996, c.111

The relevant provisions of the *Emergency Program Act* are as follows:

Definitions
1(1) In this Act:
"declaration of a state of emergency" means a declaration of the minister or the Lieutenant Governor in Council under section 9(1);
"**emergency**" means a present or imminent event or circumstance that
(a) is caused by accident, fire, explosion, technical failure or the forces of nature, and

(b) requires prompt coordination of action or special regulation of persons or property to protect the health, safety or welfare of a person or to limit damage to property;

Declaration of state of emergency

9(1) If satisfied that an emergency exists or is imminent, the minister or the Lieutenant Governor in Council may, by order, declare a state of emergency relating to all or any part of British Columbia.

....

(4) A declaration under subsection (1) expires 14 days from the date it is made, but the Lieutenant Governor in Council may extend the duration of the declaration for further periods of not more than 14 days each.

Powers of minister in declared state of emergency

10(1) After a declaration of a state of emergency is made under section 9 (1) and for the duration of the state of emergency, the minister may do all acts and implement all procedures that the minister considers necessary to prevent, respond to or alleviate the effects of an emergency or a disaster, including, without limitation, any or all of the following....

Powers of Lieutenant Governor in Council in declared state of emergency

10.1(1) After a declaration of a state of emergency is made under section 9 (1), and for the duration of the state of emergency, the Lieutenant Governor in Council may, subject to this section, make regulations as follows to prevent, respond to or alleviate the effects of an emergency or a disaster:

(a) making an exception to an enactment;

(b) establishing limits on the application of an enactment;

(c) establishing powers, duties, functions or obligations that apply in place of or in addition to an enactment;

(d) establishing conditions in relation to anything done or established under paragraphs (a) to (c).

....

(8) A regulation under subsection (1) or (2) may be made retroactive to a specified date that is not earlier than the date of the relevant declaration of a state of emergency and, if made retroactive, is deemed to have come into force on the specified date.

Enforcement

10.2 The Lieutenant Governor in Council may, by regulation, specify that a failure to comply with a provision of a regulation made under section 10.1 (1) or (2) is to be treated as though it were a failure to comply with the Act to which that provision relates.

Cancellation of declaration of state of emergency

11(1) When, in the opinion of the minister or the Lieutenant Governor in Council, an emergency no longer exists in an area in relation to which a declaration of a state of emergency was made under section 9 (1), the minister or the Lieutenant Governor in Council must make an order cancelling the declaration of a state of emergency in respect of that area.

Offence

27(1) A person commits an offence who

(a) contravenes this Act or the regulations, or

(b) interferes with or obstructs any person in the exercise of any power or the performance of any duty conferred or imposed under this Act.

(2) A person who commits an offence under subsection (1) is liable to imprisonment for a term of not more than one year or to a fine of not more than $10 000 or to both imprisonment and fine.

Power to make regulations

28(1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:

....

(b) delegating to any person or committee appointed under this Act or to any one or more members of the Executive Council any of the powers vested by this Act in the minister or the Lieutenant Governor in Council, except the power to make an order for a declaration of a state of emergency or to make regulations

7.2.4 *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c.181

The relevant provisions of the *Health Care (Consent) and Care Facility (Admission) Act* are as follows:

Presumption of capability

3(1) Until the contrary is demonstrated, every adult is presumed to be capable of

(a) giving, refusing or revoking consent to health care

Consent rights

4 Every adult who is capable of giving or refusing consent to health care has

(a) the right to give consent or to refuse consent on any grounds, including moral or religious grounds, even if the refusal will result in death,

(b) the right to select a particular form of available health care on any grounds, including moral or religious grounds,

(c) the right to revoke consent,

(d) the right to expect that a decision to give, refuse or revoke consent will be respected, and

(e) the right to be involved to the greatest degree possible in all case planning and decision making.

General rule — consent needed

5(1) A health care provider must not provide any health care to an adult without the adult's consent except under sections 11 to 15.

Elements of consent

6 An adult consents to health care if

(a) the consent relates to the proposed health care,

(b) the consent is given voluntarily,

(c) the consent is not obtained by fraud or misrepresentation,

(d) the adult is capable of making a decision about whether to give or refuse consent to the proposed health care,

(e) the health care provider gives the adult the information a reasonable person would require to understand the proposed health care and to make a decision, including information about

(i) the condition for which the health care is proposed,

(ii) the nature of the proposed health care,

(iii) the risks and benefits of the proposed health care that a reasonable person would expect to be told about, and

(iv) alternative courses of health care, and

(f) the adult has an opportunity to ask questions and receive answers about the proposed health care.

7.2.5 *Administrative Tribunals Act*, SBC 2004, c.45

The relevant provisions of the *Administrative Tribunals Act* are as follows:

Discretion to refer questions of law to court

43(1) The tribunal has jurisdiction to determine all questions of fact, law or discretion that arise in any matter before it, including constitutional questions.

Tribunal without jurisdiction over constitutional questions

44(1) The tribunal does not have jurisdiction over constitutional questions.

....

Tribunal without jurisdiction over *Canadian Charter of Rights and Freedoms* issues

45(1) The tribunal does not have jurisdiction over constitutional questions relating to the *Canadian Charter of Rights and Freedoms*.

7.3 International & Comparative Law Instruments

7.3.1 International Covenant on Civil and Political Rights

On May 19, 1976 Canada acceded to the *International Covenant on Civil and Political Rights*; the relevant provisions of this binding treaty are as follows:[356]

Recognizing that these rights derive from the inherent dignity of the human person,

....

Art. 2(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language,

356 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) (entered into force 23 March 1976, accession by Canada 19 May 1976). <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

religion, political or other opinion, national or social origin, property, birth or other status.

Art. 4(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

(2) No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

Art. 7 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Art. 9(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Art. 18(1) Everyone shall have the right to freedom of thought, conscience and religion....

(2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

Art. 26 All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

7.3.2 Universal Declaration of Human Rights

In international law, treaties create binding legal obligations, and declarations set out aspirations or understandings. Though the *Universal Declaration of Human Rights* does not create binding obligations for Canada, it has been influential in our human rights jurisprudence.[357] The relevant provisions of the *Declaration* are as follows:[358]

> *Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law....*

357 "The Supreme Court of Canada referred to the *Declaration* for the first time in 1976, in a case which dealt with an attempt to challenge the now repealed death penalty provisions of the *Criminal Code*. Since then it has cited the *Declaration* in no fewer than sixteen judgments." William Schabas, "Canada and the Adoption of Universal Declaration of Human Rights" (1998) 43 McGill L.J. 403 <https://lawjournal.mcgill.ca/wp-content/uploads/pdf/5890478-43.Schabas.pdf>.

358 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 <https://www.un.org/sites/un2.un.org/files/udhr.pdf>.

Art. 3 Everyone has the right to life, liberty and security of person.

Art. 5 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Art. 7 All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Art. 18 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

7.3.3 Universal Declaration on Bioethics and Human Rights

The International Bioethics Committee of UNESCO was created in 1993 as a "global forum for reflection in bioethics", and is influential in shaping research ethics and health policy.[359] The *Universal Declaration on Bioethics and Human Rights*, which has the status of a nonbinding declaration under public international law, "expresses in its title and substance a controversial linkage of two normative systems: international human rights law and bioethics."[360] The relevant provisions of the *Universal Declaration on Bioethics and Human Rights* are as follows:[361]

Article 3 – Human dignity and human rights

1. Human dignity, human rights and fundamental freedoms are to be fully respected.

2. The interests and welfare of the individual should have priority over the sole interest of science or society.

Article 6 – Consent

1. Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice.

Article 11 – Non-discrimination and non-stigmatization

No individual or group should be discriminated against or stigmatized on any grounds, in violation of human dignity, human rights and fundamental freedoms.

359 UNESCO, *International Bioethics Committee*, accessed 15 March 2022 <https://en.unesco.org/themes/ethics-science-and-technology/ibc>.

360 Thomas Faunce & Hitoshi Nasu, "Normative Foundations of Technology Transfer and Transnational Benefit Principles in the UNESCO Universal Declaration on Bioethics and Human Rights" (2009) 34:3 J of Med & Phil 296 <https://doi.org/10.1093/jmp/jhp021>.

361 *Universal Declaration on Bioethics and Human Rights*, Resolution 15 adopted by the General Conference of UNESCO, 21 October 2005, 33 C/Res 15 <https://unesdoc.unesco.org/ark:/48223/pf0000142825.page=80>.

7.3.4 Nuremberg Code

The relevant provisions of the *Nuremberg Code* are as follows:[362]

1 The voluntary consent of the human subject is absolutely essential.

This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.

The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.

....

9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seems to him to be impossible.

7.3.5 Declaration of Helsinki

In 1964, the World Medical Association adopted the *Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects*, the "the stone tablet of medical research ethics."[363] The relevant provisions of the *Declaration* are as follows:[364]

General Principles

8. While the primary purpose of medical research is to generate new knowledge, this goal can never take precedence over the rights and interests of individual research subjects.

Informed Consent

25. Participation by individuals capable of giving informed consent as subjects in medical research must be voluntary. Although it may be appropriate to consult family members or community leaders, no individual capable of giving informed consent may be enrolled in a research study unless he or she freely agrees.

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362 Evelyne Shuster, "Fifty Years Later: The Significance of the Nuremberg Code" (1997) 337 N Engl J Med 1436 <https://doi.org/10.1056/NEJM199711133372006>.

363 Editorial, "Dismantling the Helsinki Declaration" (2003) 169:10 CMAJ 997 <https://www.cmaj.ca/content/cmaj/169/10/997.full.pdf>.

364 World Medical Association, *Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects* (Helsinki, Finland: adopted in 1964) <https://www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/>.

26. In medical research involving human subjects capable of giving informed consent, each potential subject must be adequately informed of the aims, methods, sources of funding, any possible conflicts of interest, institutional affiliations of the researcher, the anticipated benefits and potential risks of the study and the discomfort it may entail, post-study provisions and any other relevant aspects of the study. The potential subject must be informed of the right to refuse to participate in the study or to withdraw consent to participate at any time without reprisal. Special attention should be given to the specific information needs of individual potential subjects as well as to the methods used to deliver the information....

27. When seeking informed consent for participation in a research study the physician must be particularly cautious if the potential subject is in a dependent relationship with the physician or may consent under duress. In such situations the informed consent must be sought by an appropriately qualified individual who is completely independent of this relationship.

7.3.6 Belmont Report

In 1976, the US National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research published the *Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research*.[365] The relevant provisions are as follows:

Part C: Applications

1. **Informed Consent**. Respect for persons requires that subjects, to the degree that they are capable, be given the opportunity to choose what shall or shall not happen to them. This opportunity is provided when adequate standards for informed consent are satisfied.

   While the importance of informed consent is unquestioned, controversy prevails over the nature and possibility of an informed consent. Nonetheless, there is widespread agreement that the consent process can be analyzed as containing three elements: information, comprehension and voluntariness.

   ....

   Voluntariness. An agreement to participate in research constitutes a valid consent only if voluntarily given. This element of informed consent requires conditions free of coercion and undue influence. Coercion occurs when an overt threat of harm is intentionally presented by one person to another in order to obtain compliance. Undue influence, by contrast, occurs through an offer of an excessive, unwarranted, inappropriate or improper reward or other overture in order to obtain compliance. Also, inducements that would ordinarily be acceptable may become undue influences if the subject is especially vulnerable.

   Unjustifiable pressures usually occur when persons in positions of authority or commanding influence—especially where possible sanctions are involved—urge a course of action for a subject. A continuum of such influencing factors exists, however, and it is impossible to state precisely where justifiable persuasion ends and undue

365 US Dept of Health & Human Services, *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research*, 18 April 1979 <https://www.hhs.gov/ohrp/regulations-and-policy/belmont-report/index.html>.

influence begins. But undue influence would include actions such as manipulating a person's choice through the controlling influence of a close relative and threatening to withdraw health services to which an individual would otherwise be entitled.

7.3.7 International Ethical Guidelines for Biomedical Research Involving Human Subjects

The Council for International Organizations of Medical Sciences is an international NGO established jointly by WHO and UNESCO in 1949 to advance public health by providing guidance on health research and policy.[366] The *International Ethical Guidelines for Biomedical Research Involving Human Subjects* was adopted by the Council in 1982, and the relevant provisions are as follows:[367]

Guideline 9: Individuals Capable of Giving Informed Consent

Researchers have a duty to provide potential research participants with the information and the opportunity to give their free and informed consent to participate in research, or to decline to do so, unless a research ethics committee has approved a waiver or modification of informed consent. Informed consent should be understood as a process, and participants have a right to withdraw at any point in the study without retribution.

Researchers have a duty to:

- seek and obtain consent, but only after providing relevant information about the research and ascertaining that the potential participant has adequate understanding of the material facts;
- refrain from unjustified deception or withholding of relevant information, undue influence, or coercion;
- ensure that the potential participant has been given sufficient opportunity and time to consider whether to participate...

Commentary on Guideline 9

General considerations*. Informed consent is a process. The start of this process requires providing relevant information to a potential participant, ensuring that the person has adequately understood the material facts and has decided or refused to participate without having been subjected to coercion, undue influence, or deception.*

Informed consent is based on the principle that individuals capable of giving informed consent have a right to choose freely whether to participate in research. Informed consent protects the individual's freedom of choice and respects the individual's autonomy.

....

Voluntariness and undue influence*. Informed consent is voluntary if an individual's decision to participate is free from undue influence. A variety of factors may affect the voluntariness with which consent is provided. Some of these factors can be internal to participants, such as mental illness, whereas other influences can be external, such as a dependent relationship between*

366 Council for International Organizations of Medical Sciences, *About*, accessed 15 March 2022 <https://cioms.ch/>.

367 Council for International Organizations of Medical Sciences, *International Ethical Guidelines for Biomedical Research Involving Human Subjects* (Geneva, Switzerland: adopted in 1982, amended in 1993 and 2002) <https://cioms.ch/wp-content/uploads/2017/01/WEB-CIOMS-EthicalGuidelines.pdf>.

participants and clinician-researchers. Circumstances such as severe illness or poverty may threaten voluntariness, but do not necessarily imply that participants cannot give voluntary informed consent in these situations. Research ethics committees must determine for each individual protocol if influences on voluntary consent cross the threshold of being undue, and if so, which safeguards are appropriate.

Guideline 20: Research in Disasters and Disease Outbreaks

....

In the conduct of research in disasters and disease outbreaks, it is essential to uphold the ethical principles embodied in these Guidelines. Conducting research in these situations raises important challenges such as the need to generate knowledge quickly, maintain public trust, and overcome practical obstacles to implementing research. These challenges need to be carefully balanced with the need to ensure the scientific validity of the research and uphold ethical principles in its conduct.

Researchers, sponsors, international organizations, research ethics committees and other relevant stakeholders should ensure that:

....

- the individual informed consent of participants is obtained even in a situation of duress, unless the conditions for a waiver of informed consent are met....

Commentary on Guideline 20

Potential individual benefits and risks of investigational interventions and emergency use outside clinical trials*. Especially when disasters are caused by infectious diseases that are highly contagious or serious (for example influenza, Ebola), there is great pressure to develop effective treatments and vaccines. When facing a serious, life-threatening infection, many people are willing to assume high risks and use unproven agents within or outside of clinical trials. However, it is essential that researchers and sponsors realistically assess the potential individual benefits and risks of experimental interventions and communicate these clearly to potential participants and individuals at risk. Even in ordinary circumstances, many promising experimental agents may not be safe and effective, and experimental interventions must be systematically evaluated in clinical trials. Moreover, emergency use can compromise recruitment of research participants and therefore undermine the conclusion of trials. Widespread emergency use with inadequate data collection about patient outcomes must therefore be avoided.*

Informed consent*. Even though most disaster victims are under duress, it is important to obtain their informed consent for study participation and especially to emphasize the difference between research and humanitarian aid. To explain the difference is especially important in the context of clinical trials that test experimental interventions in the early phases of development. The fact that potential participants are under duress does not prevent them from making a voluntary decision. The informed consent process must be designed in a way that is comprehensible and sensitive to persons who are under duress.*