No. 22 0637
Victoria Registry

In the Supreme Court of British Columbia

Between

PHILIP DAVIDSON, KARINE BORDUA, ZORAN BOSKOVIC and CLINTON CHEVRIER

Petitioners

and

THE LIEUTENANT GOVERNOR IN COUNCIL, THE ATTORNEY GENERAL OF BRITISH COLUMBIA ON BEHALF OF HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, THE MINISTER OF FINANCE OF BRITISH COLUMBIA and THE GOVERNMENT OF BRITISH COLUMBIA as represented by the BC PUBLIC SERVICE AGENCY

Respondents

APPLICATION RESPONSE

Application response of: The Respondents (the "application respondents")

THIS IS A RESPONSE TO the notice of application of the Petitioners filed 8 March 2022.

Part 1: ORDERS CONSENTED TO

Not applicable.

Part 2: ORDERS OPPOSED

The application respondents oppose the granting of the orders set out in all paragraphs of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

Not applicable.

Part 4: FACTUAL BASIS

Overview

1. The BC Public Service has a policy, "Human Resources Policy 25 — COVID-19 Vaccination" (the "Policy"),[1] requiring employees to show proof of vaccination unless they request and obtain an exemption. The Petitioners are all non-unionized public servants who are either unvaccinated or unwilling to confirm their vaccination status. Some of the Petitioners have pending exemption applications; others do not. Those without pending exemption applications currently have the status of being on leave without pay.

2. An interlocutory injunction can only be granted if the applicant demonstrates (a) a serious question to be tried; (b) the applicant will suffer irreparable harm if the injunction is not granted; and (c) the balance of convenience favours the granting of the injunction.

3. The Petition challenges the *Public Service COVID-19 Vaccination Regulation*, B.C. Reg. 284/2021 (the "Regulation") – which provides that the Policy is a term and condition of employment and deems termination under the Policy to be for just cause – on a number of grounds. Only one of these grounds – that the Regulation infringes section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*")[2] by making it a condition of public employment to undergo medical treatment – raises a serious question to be tried, and the merits of this argument are low since (a) the BC Court of Appeal has held that section 7 does not cover employment-related medical treatment; and (b) the need to take action to prevent the transmission of COVID-19 has been widely acknowledged as a legitimate basis for limiting *Charter* rights.

4. In any event, there is no irreparable harm justifying an interlocutory injunction. Irreparable harm is harm that cannot be compensated by damages,

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[1] Affidavit #1 of A. Jensen, made March 15, 2022 ("Jensen Affidavit"), Ex. C. (the "Policy").
[2] *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.

but if one or more of the Petitioners is dismissed from employment before the hearing, and the Petition is successful on the merits, any harm can – and indeed *can only* – be compensated through damages. Employers can dismiss non-unionized employees at will and their remedy is an action in wrongful dismissal for damages in lieu of notice.

5. Further, there are no currently scheduled dismissals of any of the Petitioners and the Provincial Crown has agreed to provide 14 days' notice before a dismissal takes place. Moreover, contrary to the Petitioners' claims, a dismissal is only relevant to obtaining a new job in the public service if the reasons for the dismissal are relevant to the job criteria. The Petitioners have the ability to obtain a job in the public service if the mandate ends, whether by government decision or court order.

6. Finally, the dominant consideration on the balance of convenience when a law is challenged is the public interest in the ordinary operation of law. In determining where this public interest lies, two principles are established in the case law: first, the government is presumed to act in the public interest; and second, the impact on the public interest cannot be confined to granting interlocutory relief simply in the case before the court, but the prospect of a "cascade of stays" for similarly-situated individuals must be considered. The Petitioners therefore need strong evidence that an injunction is in the public interest to displace this presumption. Moreover, not allowing the Provincial Crown to dismiss employees who are unable to perform their duties creates challenges for government operations because it is not possible to hire a permanent replacement.

The Policy and the Regulation

7. On October 5, 2021, Lori Wanamaker, Deputy Minister to the Premier, Cabinet Secretary, and Head of the BC Public Service announced that the BC Public Service would require its employees to provide proof of vaccination

against COVID-19 as of November 22, 2021.[3]

8. On November 1, 2021, the Minister of Finance issued the Policy under s. 5(4) of the *Public Service Act*, RSBC 1996, c. 385 (the "*PSA*"). It stated that employees who did not provide proof of vaccination to a manager by November 22 would be considered unvaccinated. Employees could request exemptions based on a medical condition or other protected ground under the *Human Rights Code*, RSBC 1996, c. 210, and those who did so might be offered alternative work arrangements if compatible with their job duties. If there were no such application or if it were denied, the employee would immediately be placed on the status of being on leave without pay. After three months, employees who have not become at least partially vaccinated are subject to termination of their employment.[4]

9. On November 19, 2021, Order in Council 627/2021 was adopted by the Lieutenant Governor in Council.[5] It made the Regulation under s. 25(1) of the *PSA.* The Regulation states as follows:

> **Definition**
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> **1** In this regulation, "COVID-19 Vaccination Policy" means the policy entitled "Human Resources Policy 25 — COVID-19 Vaccination" that was issued under section 5 (4) of the *Public Service Act* on November 1, 2021.
>
> **Term and condition of employment**
>
> **2** The COVID-19 Vaccination Policy is a term and condition of employment for employees.
>
> **Termination deemed to be for just cause**
>
> **3** If an employee is terminated under the COVID-19 Vaccination Policy, the employee is deemed to have been dismissed for just cause.

10. As of February 28, 2022, there are 41,097 BC Public Service employees. This includes 32,405 union employees and 8,692 non-union employees. As of

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[3] Jensen Affidavit, Ex. A.
[4] Jensen Affidavit, Ex. B and C.

March 7, 2022, 354 employees have made a request for an exemption from the vaccine requirement: 16 requests have been approved, 47 have been denied, 212 are pending, and 79 have been withdrawn. As of March 14, 2022: 336 employees are on leave without pay under the Policy (318 union, 18 non-union); 288 employees are eligible for termination under the Policy (273 union, 15 non-union); and 15 employees have been terminated under the Policy (all union).[6]

Circumstances of the Petitioners

11. One Petitioner – Philip Davidson – is eligible for termination of his employment under the Policy. Mr. Davidson was placed on leave without pay on November 24, 2021, and became eligible for termination under the Policy on February 24, 2022. The steps to approve termination of Mr. Davidson's employment have not yet taken place.[7]

12. One Petitioner – Zoran Boscovic – is on leave without pay for a period of time that is less than three months and is therefore not currently eligible for termination under the Policy. Mr. Boscovic was placed on leave without pay on January 19, 2022. If he does not provide proof that he has become at least partially vaccinated against COVID-19, he will become eligible for termination under the Policy on April 19, 2022.[8]

13. The other two Petitioners – Clinton Chevrier and Karine Bordua – have made requests for exemption from the vaccination requirement that have not yet been decided. If their exemption requests are granted, the accommodation provisions of the Policy will apply. If their exemption requests are denied, they will be placed on leave without pay in accordance with the Policy. If after three months of being placed on leave without pay they do not provide proof that they have become at least partially vaccinated against COVID-19, they will become

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[5] Jensen Affidavit, Ex. D.
[6] Jensen Affidavit, paras. 9-11.
[7] Jensen Affidavit, para. 12(a).
[8] Jensen Affidavit, para. 12(b).

eligible for termination under the Policy.[9]

14. On March 1, 2022, the Respondents advised the Petitioners that the Respondents will provide the Petitioners with 14 days' notice of the Province's intention to terminate any of the Petitioners. To date, the Respondents have not provided this notice in respect of any of the Petitioners.[10] Since the Petition is scheduled for a two-day hearing during the week of May 16, 2022, it is purely speculative whether any of the Petitioners will be dismissed before the merits can be heard.

15. A hiring manager is only able to fill a position with a permanent appointment when it is vacant. As long as a position is occupied by an employee on leave, the hiring manager can only fill the position on a temporary basis, either with a temporary appointment or an auxiliary appointment. The severity of the impact on the operations of government caused by this situation vary based on a number of factors, including seniority of the employee, the type of work the employee performs, operational demands across the employee's business unit, the amount of notice provided prior to leave and uncertainty about when an employee's leave will end. The Public Service tries to avoid indefinite leaves because it can be difficult to replace an employee.[11] The impact of indefinite leaves for the various Petitioners vary, as explained in the Affidavit of Allison Jensen.[12]

16. While the Petitioners express concerns about being rehired by the Public Service or its affiliated entities with a just cause dismissal, there is no ban on rehiring employees dismissed for cause. Unless the reasons for dismissal are considered relevant in a Past Work Performance check, they will have no effect on rehiring.[13]

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[9] Jensen Affidavit, para. 12(c).
[10] Jensen Affidavit, para. 14, Ex. F.
[11] Jensen Affidavit, paras. 15-19.
[12] Jensen Affidavit, paras. 20-27.
[13] Jensen Affidavit, paras. 28-32.

Part 5: LEGAL BASIS

17. The onus is on the Petitioners, as the applicants for interlocutory relief, to satisfy the three-part test from *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 SCR 311 ("*RJR-MacDonald*"):

i. there is a serious issue to be tried;

ii. the applicant will suffer irreparable harm if the injunction is not granted; and

iii. the balance of convenience favours granting an injunction.

18. The jurisdiction for issuing an interlocutory injunction against the Crown is limited to constitutional cases and is exercised sparingly.[14] Only in clear cases will interlocutory injunctions be granted against the enforcement of legislation on the grounds of alleged unconstitutionality.[15]

Preliminary Issue – Order Sought

19. The Petitioners are clearly seeking relief to prevent the Provincial Crown from terminating their employment prior to the hearing of the Petition on the merits. However, the order sought in the Notice of Application – namely an order prohibiting the enforcement of the Regulation – is neither necessary nor sufficient to do that. Regardless of the Regulation, the Provincial Crown can dismiss non-unionized employees at will, subject to providing notice or damages in lieu of notice if the dismissal is without cause. The Regulation has no legal effect other than to deem the Policy a term and condition of employment and deem dismissal to be for just cause. This is only of legal significance in relation to whether there would be damages for dismissal.

20. The Petitioners require an order in the nature of an injunction against the Provincial Crown requiring it to continue to employ the Petitioners. In a non-

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[14] *Snuneymuxw First Nation et al v R*, 2004 BCSC 205, para 69; *Maxwell's Plumbing and Heating Ltd. v. British Columbia*, 2017 BCCA 285, para. 24.
[15] *Harper v Canada (Attorney General)*, [2000] 2 SCR 764 ("*Harper*"), para 9.

constitutional case, such an injunction is not available.[16]

Preliminary Assessment of the Merits

21. The burden with respect to the first requirement, is there a serious question to be tried, is relatively low. The applicant must satisfy the court that their claim is not frivolous or vexatious. To assess whether there is a serious question to be tried the court must make a "preliminary assessment of the merits of the case" based on the evidence filed on the motion.[17] The court should generally not embark on a prolonged or extensive examination of the merits of the underlying case.[18]

22. The Provincial Crown concedes the Petitioners have met this low burden on the question of whether the Policy breaches their section 7 rights by being state action requiring them to obtain medical treatment to which they would not otherwise consent. However, the merits are low: the BC Court of Appeal has upheld against a section 7 challenge a requirement that a teacher undergo a psychiatric examination as a pre-requisite for practicing their profession.[19]

The Petitioners Have Failed to Demonstrate Irreparable Harm

23. The burden is on the party applying for an interlocutory injunction to adduce clear and non-speculative evidence that irreparable harm, i.e. harm that cannot be compensated through damages, will follow if the application is denied.[20] "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm that either cannot be quantified in monetary terms or that cannot be cured, usually because one party cannot collect damages from the other.[21] Irreparable harm must be grounded in a sound evidentiary foundation; bald assertions and conclusory statements are an inadequate basis to establish

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[16] *Crown Proceeding Act,* RSBC 1996, c. 89, s. 11(2).
[17] *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 SCR 311 ("*RJR-MacDonald*"), p. 337.
[18] *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395, paras. 39-40.
[19] *B. C. Teacher's Federation v. School District No. 39*, 2003 BCCA 100, following *Siemens v Manitoba (Attorney General)*, 2003 SCC 3.
[20] *Ivy Lounge West Georgia Limited Partnership v. TA F&B Limited Partnership*, 2021 BCSC 997, para. 38.

irreparable harm.[22]

24. The remedy for wrongful dismissal *is* damages. Canadian courts have repeatedly confirmed that notwithstanding the emotional and financial stress caused by the loss of employment, loss of employment is something that can be compensated in monetary damages and is therefore not "irreparable harm" in the sense required to obtain an injunction.[23]

25. With respect to the Petitioners' assertions of psychological stress and emotional harm, the jurisprudence recognizes that any employee facing termination can be expected to suffer from stress and emotional harm. If that was sufficient to establish irreparable harm, the courts would routinely be asked to enjoin terminations of employment. Something more is required otherwise irreparable harm as a consequence of loss of employment would always weigh in favour of granting a stay.[24]

26. The Petitioners' claims of stigma are similar to those alleged by employees of the Toronto Transit Commission ("TTC") who sought an interlocutory injunction to restrain their employer from enforcing its COVID-19 mandatory vaccination policy. In finding the applicants had failed to demonstrate irreparable harm, the court observed the evidence about stigma was "speculative at best"[25]. Further, the court stated that "[i]n effect, any stigma that comes from being unvaccinated does not arise as a result of the TTC's policy, but is a

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[21] *RJR-MacDonald,* p. 341.
[22] *Can. American Enterprises Ltd. v. The Office of the British Columbia Container Trucking Commissioner*, 2020 BCSC 2156, paras. 63-65.
[23] *Amalgamated Transit Union, Local 113 et al v. Sinai Health System*, 2021 ONSC 7658 *("Amalgamated Transit")*, paras. 50-55, 71-80; *Lavergne-Poitras v. Canada (Attorney General)*, 2021 FC 1232, paras. 7, 84-89; *Wojdan v. Canada (Attorney General),* 2021 FC 1341, paras. 35-38; *Blake v. University Health Network*, 2021 ONSC 7139, para. 28; see also, *Milkovich v. Field Hockey Canada*, 2013 BCSC 486, para. 45; *Armstrong v. West Vancouver Police Board*, 2007 BCSC 164, para. 38.
[24] *Amalgamated Transit*, paras. 78-79; *Sazant v. College of Physicians & Surgeons (Ontario)*, 2011 CarswellOnt 15914 (ONCA), para. 13; *Kotsopoulos v. North Bay General Hospital*, 2002 CarswellOnt 693, para. 18.
[25] *Amalgamated Transit*, para. 80.

societal consequence of the choice not to be vaccinated."[26]

27. The Petitioners raise concerns about the difficulty of being rehired by the BC Public Service or its affiliated entities with a just cause termination on their record, but this is contrary to the evidence.[27]

The Balance of Convenience Favours Denying the Injunction

28. The balance of convenience test includes public interest considerations that are to be weighed against the interests of an applicant. This includes the interest of the public in the efficacy and enforcement of a regulatory scheme that is designed to benefit the public.[28]

29. Special considerations arise at the balance of convenience stage where a proposed interlocutory injunction would suspend the operation of legislation. An interlocutory injunction may have the effect of depriving the public of the benefit of a statute that has been duly enacted and that may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided.[29] There is no requirement at the balance of convenience stage of the injunction test that government must provide proof that the impugned law will produce a public good. This is not a matter easily susceptible of proof in any event. On an application for an interlocutory injunction, the court will assume that the impugned legislation (and its enforcement) promotes the public interest, and this assumption weighs heavily in the balance.[30]

30. While only a few employees are involved here, in weighing the public interest, the concern must be for whether a "cascade of stays" would result if the same relief were applied to everyone similarly situated. Even in the case of a narrower application for an "exemption", the court is required to weigh the

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[26] *Amalgamated Transit*, para. 80.
[27] Jensen Affidavit, paras. 28-32.
[28] *RJR-MacDonald,* pp. 343-346.
[29] *Harper,* para 5.
[30] *Harper,* para 9; *RJR-MacDonald*, pp. 346-349; *Watch Tower Bible and Tract Society of Canada v. British Columbia (Attorney General)*, 2021 BCSC 1829 ("*Watch Tower*"), paras. 105, 159 and 161.

precedential value and exemplary effects of the proposed "exemption", as those effects may make the relief tantamount to a suspension of the impugned legislation.[31]

31. Given the heavy weight accorded to the public interest at the balance of convenience stage of the injunction test, an injunction suspending legislation is rarely granted, even in the face of proof of irreparable harm to the applicant in the refusal of interlocutory relief.[32]

32. When a private litigant alleges that the public interest is at risk from enforcement of the legislation, rather than that the public interest stands to benefit from it, such harm is not assumed and must be proven. This is because private applicants are normally presumed to be pursuing their own interests rather than those of the public at large.[33]

33. Further, here the Provincial Crown has shown specific interests in not having permanent positions remain unfilled indefinitely.[34]

34. The harm to government and the public interest in the present case outweighs the harm alleged by the Petitioners.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Allison Jensen, made March 15, 2022; and

2. Such further and other material as counsel may advise and this Honourable Court may permit.

The application respondents estimate that the application will take 1 day.

The application respondents have not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR

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[31] *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110, p. 152.
[32] *Harper,* para 9.
[33] *RJR-MacDonald,* pp. 344-345; *Council of Canadians v Canada (Attorney General)*, 2015 ONSC 4601, para 53, leave to appeal refused 2015 ONSC 4940; *Watch Tower*, paras. 109 and 159.
[34] Jensen Affidavit, paras. 15-27.

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