RECONSIDERATION DECISION – Availability of Section 43 Requests related to the following Orders:

HOSPITAL AND COMMUNITY (HEALTH CARE AND OTHER SERVICES) COVID-19 VACCINATION STATUS INFORMATION AND PREVENTIVE MEASURES – OCTOBER 5, 2023

RESIDENTIAL CARE COVID-19 VACCINATION STATUS INFORMATION AND PREVENTIVE MEASURES – OCTOBER 5, 2023

The *Public Health Act* is at:
http://www.bclaws.ca/civix/content/complete/statreg/08028/?xsl=/templates/browse.xsl
(excerpts enclosed)

WHEREAS:

A. In reasons for judgment indexed as *Hoogerbrug v. British Columbia*, 2024 BCSC 794 (the "Reasons for Judgment"), the Honourable Justice Coval remitted to me for reconsideration, in light of the Reasons for Judgment, "whether to consider requests under section 43 of the *Public Health Act* for reconsideration of the vaccination requirement from healthcare workers able to perform their roles remotely, or in-person but without contact with patients, residents, clients or the frontline workers who care for them" in my October 5, 2023 Orders.[1]

B. I have considered the Reasons for Judgment and reviewed my orders titled *Hospital and Community (Health Care and Other Services) COVID-19 Vaccination Status Information and Preventive Measures* and *Residential Care COVID-19 Vaccination Status Information and Preventive Measures* made October 5, 2023 (the "Orders").

C. For the reasons given below, I am confirming my decision in the Orders not to consider applications for reconsideration under section 43 of the *Public Health Act* from healthcare workers able to perform their roles remotely, or in-person without contact with patients, residents, clients or the frontline workers who care for them.

[1] Reasons for Judgment at paragraph 315.

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Overview

D. The Orders should not permit requests for reconsideration of the COVID-19 vaccination requirement from healthcare workers who are able to perform their roles remotely, or without contact with patients, residents, clients, or the frontline workers who care for them for three primary reasons.

E. First, the presence of unvaccinated remote or administrative workers in the healthcare system during the COVID-19 public health emergency could create significant barriers to timely redeployment. The public healthcare system and healthcare workers must regularly meet unique, unexpected and unpredictable demands to provide safe patient care and healthcare services. Those demands are exacerbated in a public health emergency with the additional requirement of urgency. This means that even those workers who perform remote or administrative work may be required to be physically present in healthcare facilities from time to time, including through formal redeployment.

F. Second, COVID-19 vaccination was and remains an effective intervention and preventive measure to protect against severe illness and complications, and sometimes death, and therefore to protect the healthcare system from the impacts of preventable outbreaks and absences.

G. Third, in addition to potentially hampering redeployment efforts, and preventable absenteeism, allowing broad applications for reconsideration of the COVID-19 vaccination requirement from remote and administrative workers would have been impractical and not an effective allocation of limited public health resources during the public health emergency.

Redeployment Capability - Supporting Timely, Flexible Response to Healthcare Needs

H. Responding to emergency demands requires that the public healthcare system maintain the ability to engage in redeployment of human resources including on short notice. Redeployment requires staff to move into roles or care locations they would not normally work in, including moving remote and administrative workers to settings with contact with patients, clients, residents or their care providers, to support the continued functioning of the healthcare system and protect public health.

I. Throughout the COVID-19 public health emergency, healthcare workers were redeployed to support public health and to respond to increased strain on the healthcare system, including in ways that could not be anticipated. For example, healthcare workers were redeployed:

a) to support contact tracing, testing, and mass immunization activities;

b) to staff separate alternative assessment centres established next to some hospitals to accommodate a dramatic increase in people presenting with respiratory illness, particularly children, in a short period of time;

c) to assist in patient care areas where transmission risk was high and patients were at high risk of severe illness or death from COVID-19, during outbreaks, including in the northern and interior regions of the Province; and

d) to support evacuation of healthcare facilities during wildfires that occurred during the COVID-19 public health emergency.

J. The potential need for redeployment persisted throughout the COVID-19 public health emergency. The anticipated fall 2023 viral respiratory season, and in particular the reports from the Southern Hemisphere of significant overlap between influenza, RSV and COVID-19 outbreaks, led to planning and preparation being taken for system-wide health human resource redeployment – including remote and administrative workers – to support the continued operation of frontline and other critical clinical-contact functions. The potential need for redeployment was heightened by overlapping emergencies, such as flooding, extreme heat, and wildfires.

K. Having certain healthcare workers unavailable for redeployment when they are most needed during a public health emergency risks adding additional strain to the public healthcare system and posing avoidable risks to individual and public health. Vaccination against SARS-CoV-2 across the healthcare workforce, including amongst remote and administrative workers, allowed for the potential quick and efficient redeployment of workers, eliminating the potential need for extensive efforts to be made to urgently identify and exclude unvaccinated individuals from roles involving contact with patients or frontline workers.

Importance of Vaccination & Impacts of Preventable Absenteeism

L. Preventable healthcare worker absenteeism during a public health emergency – including among remote and administrative workers who often fill important roles that keep the system functioning – poses a risk to the healthcare system as a whole and to individuals. COVID-19 vaccination was and remains an effective intervention and preventive measure to protect against severe illness and complications, and sometimes death, in turn protecting the system from more severe or wide-ranging clinical impacts, potentially lengthy and unpredictable absenteeism and operational disruptions.

M. Even a small number of unvaccinated remote or administrative workers becoming ill during the viral respiratory illness season could significantly increase the workload of staff, including frontline staff who, during the public health emergency, have often been stretched beyond a reasonable capacity. This is particularly true in remote communities where additional human resources are not as readily available to cover these absences.

Challenges In Reliable Identification of Remote/No Clinical Contact Workers

N. Even leaving aside important considerations regarding emergency redeployment, preventable absenteeism and negative clinical impacts, allowing broad applications for reconsideration of the COVID-19 vaccination requirement from remote and administrative workers would have been impractical and not an effective allocation of limited public health resources during the COVID-19 public health emergency.

O. The potential fluidity in healthcare worker location and role makes it difficult to categorize workers definitively as "remote" or know with both certainty and immediacy their physical work location at any given time. Even absent formal redeployment, administrative-focused workers and worksites operated by health authorities are often not truly separated from other healthcare workers or from patients or residents. Office locations housing administrative healthcare workers often interact with

non-administrative healthcare workers, and include shared elevators, breakrooms and office floors. They also frequently share those spaces with workers who provide clinical care.

P. Many healthcare workers with flexible work arrangements are subject to employment agreements that permit employers to require their presence in physical health care locations from time to time or as operational needs require it. Even temporary redeployment, which is frequent in our public healthcare system, makes it impossible to definitively categorize a worker as remote or administrative at a specific location. These challenges are exacerbated during a public health emergency where volatility and urgency are heightened.

Preventive Measures and Public Health Resource Allocation

Q. Further, my office, the Office of the Provincial Health Officer ("OPHO"), has limited resources to attend to the public health needs of people in British Columbia and must manage these resources with care to ensure that public health priorities are met. The public health and healthcare systems have experienced burnout, turnover, and workforce shortages throughout the COVID-19 pandemic, and the OPHO has experienced the same impacts.

R. In addition to the COVID-19 public health emergency, the OPHO has simultaneously been responding to the overdose public health emergency, which has been in place since April 2016 and has led to many lives being tragically lost. The gravity of the overdose public health emergency has led to significant public health resources being allocated to that issue on an ongoing basis.

S. The OPHO has also increasingly had to dedicate resources to the annual wildfire season in British Columbia, which has expanded in duration and severity. The demands on public health resources were amplified by the 2023 wildfire season in British Columbia, which saw the evacuation and displacement of nearly 50,000 people, including healthcare workers and healthcare facilities. These layered crises and competing public health demands required significant health human resources.

T. Outside these two overlapping public health emergencies, and the wildfire responses, the OPHO is also responsible for many public health programs including childhood immunizations, drinking water safety, food and waterborne illness prevention, addressing anti-Indigenous racism in the health system, extreme weather preparedness (e.g. extreme heat and cold), and addressing antimicrobial resistance, amongst other critical public health issues. These public health initiatives require time and expertise from my office and are central to the ongoing health of people in British Columbia.

U. The important and extensive sets of public health responsibilities that the OPHO must address on an ongoing basis to help keep the people in British Columbia safe and healthy and the resources dedicated to them, as well as OPHO resource demands associated with the medical exemption process as required by section 56(2) of the *Public Health Act*, supported my decision that remaining OPHO resources had to be preserved for other public health functions, particularly given the other considerations supporting the vaccination mandate generally.

V. Public health in the Province has limited and finite resources that must be balanced and appropriately allocated to meet the population's public health needs, with that balance and

allocation being part of my statutory mandate under the *Public Health Act* and my related public health obligations as PHO.

Therefore, I have reason to believe and do believe that

(a) The COVID-19 pandemic has been an unprecedented, protracted emergency event that strained all aspects of the health system including the public health system and my office.

(b) It is part of my responsibility to balance *Charter* interests with ongoing uncertainty, through the lens of the precautionary principle, to ensure that the public health and healthcare systems remain able, by preserving and carefully allocating overall health resources and ensuring flexible redeployment capability, to provide safe care, education and interventions to serve the interests of all British Columbians.

(c) Public health and healthcare system needs, including those for vulnerable patient populations, require a healthcare workforce that can be redeployed to different locations or roles on short notice, particularly in public health emergencies and in accordance with the precautionary principle.

(d) Given the potential need in a public health emergency for urgent redeployment, and the need for and availability of changing work locations and job responsibilities, a vaccination requirement across all healthcare workers allowed for the possibility of flexible, safe, timely and efficient redeployment.

(e) Preventable absenteeism, particularly in communities with more limited health resources, also creates unnecessary risks to the healthcare system and its vulnerable patients and residents, during a public health emergency. A vaccination requirement reduces potentially lengthy and unpredictable absenteeism, reducing risk to the health system and individuals who rely on it.

(f) In addition, the OPHO must prioritize, balance and appropriately allocate limited public health resources between multiple public health emergencies and ongoing, non-emergency public health responsibilities to ensure that British Columbia's public health and healthcare systems continue to respond to the population's needs.

(g) For these reasons, I confirm my decision to suspend requests for reconsideration under section 43 of the *Public Health Act* in the Orders.

You may contact me at:

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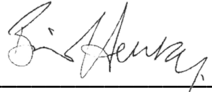
DATED THIS: 28 day of August 2024

SIGNED: 

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DELIVERY BY: Posting to the BC Government website.

Enclosure: Excerpts of the *Public Health Act*.

ENCLOSURE

Excerpts of the *Public Health Act* [SBC 2008] c. 28

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,

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

(i) meet the objective of the order, and

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

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

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

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

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

(i) is not relevant, or

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

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

(c) confirm, rescind or vary the order.

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

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

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

(7) For the purposes of this section,

(a) if an order is made that affects a class of persons, a request for reconsideration may be made by one person on behalf of the class, and

(b) if multiple orders are made that affect a class of persons, or address related matters or issues, a health officer may reconsider the orders separately or together.

(8) If a health officer is unable or unavailable to reconsider an order he or she made, a similarly designated health officer may act under this section in respect of the order as if the similarly designated health officer were reconsidering an order that he or she made.

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];

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 unless the person delivers to a person specified by the provincial health officer or medical health officer, in person or by registered mail,

(a) a written notice from a medical practitioner stating that the health of the person who must comply would be seriously jeopardized if the person did comply, and

(b) a copy of each portion of that person's health record relevant to the statement in paragraph (a), signed and dated by the medical practitioner.

(3) If a person delivers a notice under subsection (2), the person must comply with an instruction of the provincial health officer or a medical health officer, or a person designated by either of them, for the purposes of preventing infection with, or transmission of, an infectious agent or a hazardous agent.