COURT FILE NUMBER	2301-12271
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFFS	REBECCA MARIE INGRAM and CHRISTOPHER SCOTT, carrying on business as THE WHISTLE STOP CAFÉ
DEFENDANT	HIS MAJESTY THE KING IN RIGHT OF ALBERTA
	***Brought under the Class Proceedings Act,* SA 2003, c C-16.5**
DOCUMENT	**BRIEF OF HIS MAJESTY THE KING IN RIGHT OF ALBERTA**

Clerk's Stamp

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I. INTRODUCTION

1. This is an Application for certification as a class action pursuant to the *Class Proceedings Act* (the "*Class Proceedings Act*")[1] brought forward by the Proposed Class Representative Plaintiffs, Rebecca Marie Ingram ("Ms. Ingram") and Christopher Scott, carrying on business as The Whistle Stop Café, ("Mr. Scott") (collectively, the "Proposed Representative Plaintiffs").

2. The claim seeks damages from Alberta for various Chief Medical Officer of Health Orders issued under the *Public Health Act* during the Covid-19 pandemic that were later determined to be *ultra vires*. The Proposed Representative Plaintiffs seek to represent a class of other owners and operators of business in Alberta who suffered losses and damages as a result of public health restrictions placed on the businesses.

3. The certification application is governed by section 5 of the *Class Proceedings Act* which requires the Proposed Representative Plaintiffs to meet all five parts of the enumerated test. The Proposed Representative Plaintiffs fail to meet each and every part of the certification test

    a. The pleadings disclose no cause of action;

    b. The class is not identifiable and the class definition is fundamentally flawed;

    c. There are no common issues that could be determined across the class and would significantly advance the claims;

    d. A class proceeding is not the preferable procedure for the fair and efficient resolution of the issues given the overwhelming preponderance of individual issues; and

    e. Neither Ms. Ingram nor Mr. Scott are appropriate class representatives.

4. As none of the certification requirements are met in this case, and on the evidence before the Court, the certification application by the Proposed Representative Plaintiffs must fail.

II. FACTS IN PLEADINGS

5. The Proposed Representative Plaintiffs, Ms. Ingram and Mr. Scott, have filed a Statement of Claim (the "Claim") which states that since March 16, 2020, Alberta's Chief Medical Officer of Health

[1] *Class Proceedings Act*, SA 2003, c C-16.5 [Alberta Authorities, TAB 1]

pronounced approximately 113 public health orders (the "CMOH Orders"), many of which were found to be *ultra vires* the *Public Health Act* on July 31, 2023 in *Ingram v Alberta (Chief Medical Officer of Health)* (the "*Ingram Decision*").[2]

6. Throughout the Claim, the Proposed Representative Plaintiffs refer to the CMOH Orders exclusively as "the unlawful CMOH Orders", presumably due to the finding in the *Ingram Decision*.

7. The Proposed Representative Plaintiffs have brought this Action against Alberta in their own right and on behalf of:

> Natural persons who:
>
> a. Owned or operated, either wholly or partially, a business or businesses in the Province of Alberta, and whose business operations were fully or partially restricted as a result of the measures contained in the CMOH Orders resulting in economic losses;
>
> b. Between March 17, 2020 and the date of certification of this Action as a Class proceeding, or such other date determined to be appropriate by the Court; and
>
> c. Suffered Damage and losses as a result
>
> (the "Proposed Class Members").[3]

8. With respect to Ms. Ingram, the Claim states she was the sole shareholder and Director of a gym and personal fitness studio (the "Gym") in Calgary, Alberta.[4] It states she closed the Gym twice between spring of 2020 and January of 2021, totalling 4.5 months, pursuant to CMOH Orders.[5]

9. The Claim goes on to allege that "as a result of the CMOH Orders requiring the curtailment of operations or closure for gyms and fitness centres, the Gym received daily membership cancellations and membership holds, resulting in a considerable reduction in monthly sales." [6]

10. The Claim provides Ms. Ingram applied for and received federal government relief, which

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[2] The Claim at paras 1, 2, 15 & 19 [Alberta Compendium, TAB 1]; *Ingram v Alberta (Chief Medical Officer of Health)*, 2023 ABKB 453 [Alberta Authorities, TAB 5]
[3] The Claim at para 11 [Alberta Compendium, TAB 1]
[4] The Claim at para 22 [Alberta Compendium, TAB 1]
[5] The Claim at paras 27-29 & 33 [Alberta Compendium, TAB 1]
[6] The Claim at para 31 [Alberta Compendium, TAB 1]

consisted of a $40,000 loan, $5,000 utility relief, 50% rent relief, and a grant for $15,000. However, "as a result of the measures imposed upon Ms. Ingram and the Gym by the unlawful CMOH Orders, and the corresponding financial hardship, Ms. Ingram was forced [to] put the Gym up for sale." [7] The Claim states the Gym was sold below value, without providing reasons why that was the case.[8]

11. With respect to Mr. Scott, the Claim states he owned and operated the Whistle Stop Café ("Whistle Stop"), which comprises a restaurant, convenience store, gas station, drive-in movie screen, campground, and RV park, located near the hamlet of Mirror, Alberta.[9]

12. The Claim alleges Mr. Scott was forced to close or interrupt business operations of Whistle Stop beginning March 17, 2020 as a result of the CMOH Orders.[10] The Claim does not disclose during which time periods, if any, Mr. Scott actually closed Whistle Stop, or limited its operations pursuant to CMOH Orders.

13. In fact, the Claim goes on to state that Mr. Scott permitted customers to dine in and hold public gatherings at Whistle Stop around January to April, 2021, which resulted in an injunction order requiring compliance with CMOH Orders, made against Mr. Scott and Whistle Stop, by Alberta Health Services.[11] The Claim states that around May 5, 2021, RCMP officers and Alberta Health Services officials prevented access to the building and changed the locks of Whistle Stop, which resulted in the business being closed for approximately 8 weeks, and that around May 8, 2021, Mr. Scott was arrested and charged with breaching the *Public Health Act*. [12]

14. The Claim states that following the 8 week closure and his arrest, Mr. Scott experienced societal impacts, receiving death threats against him and his family.[13] Allegedly, he lost approximately $350,000 comprising property damage, loss of revenue and extra expenses incurred by him.[14] The Claim further alleges Mr. Scott lost his regular customer base.[15]

15. The Claim provides Mr. Scott applied for and received federal government relief, which consisted

[7] The Claim at para 24 [Alberta Compendium, TAB 1]
[8] The Claim at para 38 [Alberta Compendium, TAB 1]
[9] The Claim at para 9 & 43 [Alberta Compendium, TAB 1]
[10] The Claim at para 44 [Alberta Compendium, TAB 1]
[11] The Claim at pars 46-47 [Alberta Compendium, TAB 1]
[12] The Claim at paras 48-51 [Alberta Compendium, TAB 1]
[13] The Claim at para 52 [Alberta Compendium, TAB 1]
[14] The Claim at para 57 [Alberta Compendium, TAB 1]
[15] The Claim at para 53 [Alberta Compendium, TAB 1]

of a $60,000 loan, Canada Emergency Responsible Benefit for approximately $12,000, and a wage subsidy of up to 75% of eligible remuneration paid by Mr. Scott to every eligible employee.

16. With respect to allegations against Alberta, the Claim makes general claims that Alberta breached the *Alberta Bill of Rights*, was negligent, converted the Proposed Representative Plaintiffs' property, breached their fiduciary duties, and expropriated property without compensation.

17. However, there are very few, if any, facts alleged against Alberta to support the listed causes of action. It is clear from both the Claim and the Proposed Representative Plaintiffs' written submissions, that the primary fact on which the Proposed Representative Plaintiffs base their causes of action, is that the CMOH Orders were found *ultra vires* in the *Ingram Decision*

18. The Claim contains bald allegations, legal conclusions and a single reference to bad faith. However, it provides no factual foundation to support any of its allegations.

III. FACTS IN EVIDENCE

19. Covid-19 is the abbreviation commonly used for the novel coronavirus disease first identified in Wuhan China in late 2019. Covid-19 is an infectious respiratory disease caused by the "SARS-CoV-2" virus.[16]

20. The first case of Covid-19 in Alberta was confirmed on March 5, 2020.[17]

21. On March 11, 2020, the World Health Organization declared Covid-19 to be a global pandemic.[18]

22. In Alberta, a Public Health State of Emergency, pursuant to the *Public Health Act* (the "*Public Health Act*"), was first declared on March 17, 2020 in response to the Covid-19 pandemic.[19]

23. As of May 18, 2024, the number of deaths attributable in Alberta to Covid-19 was 6,401. The number of deaths attributable to influenza during the same timeframe was 348. Covid was found to be nearly 20 times more deadly than influenza over the same time period.[20]

24. Between March 17, 2020 and June 30, 2022, there were 27,546 persons who were hospitalized, an

[16] Affidavit of Andy Ridge sworn June 7, 2024 at para 27 (the "Ridge Affidavit") [Alberta Compendium, TAB 7]
[17] Ridge Affidavit at para 28 [Alberta Compendium, TAB 7]
[18] Ridge Affidavit at para 29 [Alberta Compendium, TAB 7]
[19] Ridge Affidavit at para 29 [Alberta Compendium, TAB 7]; *Public Health Act*, RSA 2000, c. P-37 [Alberta Authorities, TAB 67]
[20] Ridge Affidavit at para 64 [Alberta Compendium, TAB 7]

additional 4,105 persons who were admitted to the Intensive Care Unit, and a further 4,625 persons who died as a result of Covid-19. The healthcare system was put under immense stress as a result of the Covid-19 pandemic.[21]

25. Between March 17, 2020 and June 30, 2022, Covid-19 patients made up a significant portion of the total hospital and Intensive Care Unit capacity. If Covid-19 patients had caused the healthcare system to exceed capacity, some patients requiring access to hospital or the Intensive Care Unit may not have been able to access it and nurses and doctors may have had to begin triaging patients to determine who may and who may not receive care.[22]

26. Between March 17, 2020 and June 14, 2022, Alberta's Chief Medical Examiner endorsed the CMOH Orders in response to the Covid-19 pandemic and its serious effects on the healthcare system within Alberta.

27. All of the Covid-19 CMOH Orders were rescinded on June 14, 2022 and came to an end no later than June 30, 2022.[23]

28. The aim of the CMOH Orders was to reduce the spread of Covid-19 and in turn reduce the number of hospitalizations, Intensive Care Unit admissions, deaths and the general adverse health effects on Albertans from a Covid-19 infection. The CMOH Orders were based on the available science known at the time and were additionally intended to be as targeted as possible to minimally limit the freedoms of Albertans and the impacts on society needed to achieve the public health goals.[24]

29. Numerous local authorities also declared a State of Local Emergency in response to the Covid-19 pandemic.[25]

30. Multiple municipalities additionally chose to pass municipal bylaws in response to the Covid-19 pandemic.[26]

31. The CMOH Orders were monitored and enforced by Alberta Health Services.[27]

32. Ms. Ingram was a shareholder and Director for the Gym for many years before March 17, 2020

[21] Ridge Affidavit at paras 65, 66, 69, and 72 [Alberta Compendium, TAB 7]
[22] Ridge Affidavit at paras 78 and 79 [Alberta Compendium, TAB 7]
[23] CMOH Order 10-2022
[24] Ridge Affidavit at para 80 [Alberta Compendium, TAB 7]
[25] Ridge Affidavit at para 161 [Alberta Compendium, TAB 7]
[26] Ridge Affidavit at para 164 [Alberta Compendium, TAB 7]
[27] Ridge Affidavit at para 138 [Alberta Compendium, TAB 7]

until or about January 18, 2023. While Ms. Ingram was a shareholder and Director for the Gym, the Gym operated as a gym and personal fitness studio within the City of Calgary.[28]

33. Mr. Scott operated Whistle Stop as an unincorporated, sole proprietor since or about July 9, 2019. Mr. Scott leased Whistle Stop between July 9, 2019 and May, 2021, at which time he completed his purchase of Whistle Stop, which included several parcels of land and the buildings located thereon. Whistle Stop features a café/restaurant, gas station, convenience store, drive-in movie screen, and a full-service, year-round campground and RV park complete with hookups. Whistle Stop is located in the Hamlet of Mirror.[29]

34. In support of the Proposed Representative Plaintiffs' certification application, Both Ms. Ingram and Mr. Scott swore and filed Affidavits. Each details their involvement with the relevant businesses leading up to the Covid-19 pandemic as well as their experiences while the CMOH Orders were in force and effect. Both Affidavits allege that the CMOH Orders devastated the relevant businesses and, in Ms. Ingram's case, the value of her shares in the business.

35. Neither Ms. Ingram nor Mr. Scott set out material facts which illustrate *how* Alberta acted in bad faith, or abused its power, or acted in a high-handed, oppressive, and reprehensible way, or acted negligently, or breached fiduciary duties, or permanently and improperly interfered with their real and/or personal property.

36. *The only proposed fact Ms. Ingram and Mr. Scott both appear to rely upon is that the CMOH Orders came into effect at the hands of Alberta and that act alone should lead the Court to the legal conclusions that they then offer.*

37. Ms. Ingram and Mr. Scott both confirm that they made choices throughout the Covid-19 pandemic which had far-reaching effects on their businesses:

    a. Ms. Ingram and Mr. Scott both took out loans made available by the Government of Canada[30];

    b. The Gym clientele were permitted to pause or cancel their membership fees during

[28] Affidavit of Rebecca Ingram, sworn April 11, 2024 at paras 2, 3, and 19 ("Ingram Affidavit") [Alberta Compendium, TAB 3]
[29] Affidavit of Christopher Scott, sworn April 11, 2024 at paras 2 and 3 ("Scott Affidavit") [Alberta Compendium, TAB 4]
[30] Ingram Affidavit at para 14 [Alberta Compendium, TAB 3], Scott Affidavit at para 18 [Alberta Compendium, TAB 4]

various points of the Covid-19 pandemic – knowing that this was contrary to the business decisions made by the companies that continued to bill the Gym[31];

c. Ms. Ingram sold her home in August, 2022 to invest "proceeds into keeping the Gym operational"[32];

d. Ms. Ingram sold her shares in the Gym in January, 2023, agreeing to the price and terms of said share sale[33];

e. Included in the sale of her shares, Ms. Ingram agreed to delay receipt of $25,000.00 from the total share sale for 5 years[34];

f. Mr. Scott publicly failed to comply with the CMOH Orders between January, 2021 and April, 2021[35]; and

g. Ms. Ingram and Mr. Scott were both publicly outspoken against the CMOH Orders[36].

38. Ms. Ingram's Affidavit fails to speak to the negative feedback she and the Gym received from the public due to her public disagreement with the CMOH Orders.[37]

39. Ms. Ingram's Affidavit additionally fails to speak to the municipal bylaws put in place in Calgary throughout the Covid-19 pandemic which had similar requirements to many of the CMOH Orders.[38]

40. Mr. Scott's Affidavit fails to speak to requests for donations and the influx of funds he received as a result. On April 14, 2021, Mr. Scott requested $300,000.00 from Whistle Stop Facebook followers. By May 4, 2021, Mr. Scott raised at least $119,746.42 in e-transfers, which did not include cash or in-house debit transactions. Any monies raised by Mr. Scott were deposited into

[31] Ingram Affidavit at para 13 [Alberta Compendium, TAB 3], Cross-Examination of Rebecca Ingram, April 26, 2024, filed August 2, 2024, pg. 27, line 3 – 21 ("Ingram Cross-Examination") [Alberta Compendium, TAB 11]
[32] Ingram Affidavit at paras 17 and 18 [Alberta Compendium, TAB 3]
[33] Ingram Affidavit at paras 19 and 20 [Alberta Compendium, TAB 3]
[34] Ingram Affidavit at para 22 [Alberta Compendium, TAB 3]
[35] Scott Affidavit at para 7 [Alberta Compendium, TAB 4]
[36] Ingram Cross-Examination, Exhibits for Identification A, B and C [Alberta Compendium, TAB 11], Cross-Examination of Christopher Scott, April 25, 2024, filed August 2, 2024, Exhibits for Identification A, G, and L ("Scott Cross-Examination") [Alberta Compendium, TAB 10]
[37] Ingram Cross-Examination, Exhibits for Identification A and B [Alberta Compendium, TAB 11]
[38] Ridge Affidavit at para 164 and Exhibit GG [Alberta Compendium, TAB 7]

his personal bank account.[39]

41. Mr. Scott's Affidavit additionally fails to speak to the fact that he completed his purchase of Whistle Stop in May of 2021, earlier than anticipated in the lease to purchase agreement.[40]

42. Mr. Scott's Affidavit further fails to speak to the increase of visits to Whistle Stop from persons who supported the actions he was taking to disobey the CMOH Orders, resulting in a change to his customer base.[41]

43. Mr. Scott's Affidavit also fails to speak to the increase in business to Whistle Stop in 2021 – for which he needed to hire additional staff because they were so busy.[42]

44. Mr. Scott's Affidavit additionally fails to speak to the multiple communications he received from Leduc County starting in 2022 setting out development permit requirements pursuant to the Land Use Bylaw which ultimately resulted in a Stop Order pursuant to section 645 of the *Municipal Government Act* for unauthorized campground lots in connection with Whistle Stop.[43]

45. In response to the Certification Application, Alberta filed 5 Affidavits which:

    a. Exhibited evidence put before Ms. Ingram and Mr. Scott which their counsel insisted be marked for identification;

    b. Set out the variety of programs instituted by Alberta throughout the Covid-19 pandemic on a good faith basis;

    c. Spoke to the Covid-19 global pandemic and the Alberta Health response;

    d. Had an expert address the accounting issues which will arise should this proceeding be certified; and

    e. Had an expert address the economic impact of the CMOH Orders as well as other factors present throughout the Covid-19 pandemic.

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[39] Scott Cross-Examination, pg. 24, line 11 – 17, Exhibits for Identification A, B, and C [Alberta Compendium, TAB 10]
[40] Christopher Scott Answers to Undertakings, May 10, 2024, filed July 26, 2024, Answer #2 [Alberta Compendium, TAB 12]
[41] Scott Cross-Examination, Exhibit for Identification H [Alberta Compendium, TAB 10]
[42] Scott Cross-Examination, Exhibit for Identification I [Alberta Compendium, TAB 10]
[43] Scott Cross-Examination, Exhibit for Identification F [Alberta Compendium, TAB 10]

46. The Affidavit of Dana Hogemann ("Ms. Hogemann") speaks directly to Alberta's good faith efforts to address the impacts of the Covid-19 pandemic and the CMOH Orders on the economy and businesses in Alberta.

47. Specifically, Ms. Hogemann's Affidavit confirms Alberta had $5.1 billion in expenses as a result of the Covid-19 pandemic and Covid-19 programs and supports in the 2020-2021 fiscal year.[44] Alberta additionally had $3.8 billion in expenses as a result of the Covid-19 pandemic and Covid-19 programs and supports in the 2021 – 2022 fiscal year[45] and a further $2.1 billion in the 2022 – 2023 fiscal year.[46]

48. The Affidavit of Randy Popik ("Mr. Popik") addresses accounting issues that are likely to arise should this matter be certified as a class proceeding. It does not seek to opine on liability.

49. Mr. Popik's Affidavit confirms from an accounting standpoint what will be set out below: the circumstances of each individual Proposed Class Member must be reviewed in order for a proper assessment to be done. A micro approach is necessary.[47]

50. Mr. Popik's Affidavit confirms the factual accounting characteristics that will need to be evidenced for each class member include, but are not limited to the following:

    a. The business structure for the involved business and how said structure impacts damage assessment;

    b. The compensation structure for the involved business and how said structure impacts damage assessment;

    c. How profits/losses and assets/liabilities are impacted by the various business, compensation and accounting structures; and

    d. How the business structure impacts the economic effects experienced by individual class members.[48]

51. In the event that each characteristic is not thoroughly investigated on a case-by-case and

[44] Affidavit of Dana Hogemann, sworn June 7, 2024 at paras 9 – 12 ("Hogemann Affidavit") [Alberta Compendium, TAB 6]
[45] Hogemann Affidavit at paras 13 – 16 [Alberta Compendium, TAB 6]
[46] Hogemann Affidavit at paras 17 – 20 [Alberta Compendium, TAB 6]
[47] Affidavit of Randy Popik, sworn June 7, 2024 at s. 2.03 ("Popik Affidavit") [Alberta Compendium, TAB 8]
[48] Popik Affidavit at s. 5.01 [Alberta Compendium, TAB 8]

individualized basis, Mr. Popik's Affidavit makes it clear that the Court will run the risk of improperly assessing a claim or determining if a claim exists at all.[49]

52. Mr. Popik's Affidavit reviewed the extensive breadth that is entailed in each of the following components of the proposed class definition:

    a. Owner;

    b. Operator;

    c. Business. This necessitated a review of the following:

        i. Business Structure;

        ii. Compensation structure;

        iii. Profits/Losses and Assets/Liabilities under each possible business structure;

        iv. Accounting methods; and

        v. Industry type.[50]

53. Not only would a microscopic look be required, according to Mr. Popik, for determination as to whether a person is even a proper Proposed Class Member, but those same Proposed Class Members would then have to go through a detailed individual assessment to determine whether they have a claim and to what extent that claim exists: a CEO, for example, would likely have a very different claim than a front-line employee; a sole proprietor a very different claim than a shareholder in a corporation, and even a shareholder in one corporation versus a shareholder in another (or, frankly, the same corporation but with different types or amounts of shares).[51]

54. The written submissions of the Proposed Representative Plaintiffs misunderstands the evidence of Mr. Popik. The evidence he provided was that the Proposed Representative Plaintiffs would not be concerned with overstating damages but, should liability be assessed, they would be concerned with understating the same. To avoid this, his evidence is that assessment on a micro or individual basis is necessary.

[49] Popik Affidavit at s. 5.01, conclusion [Alberta Compendium, TAB 8]
[50] Popik Affidavit at ss. 6.0, 7.0, 8.0, 9.0, 10.0, and 11.0 [Alberta Compendium, TAB 8]
[51] Popik Affidavit at s.6.17 [Alberta Compendium, TAB 8]

55. Mr. Popik did not hold himself out to be an expert on or to have any knowledge about the legal elements of a class proceeding or a certification application, nor did his opinion rely upon it.

56. The Affidavit of Professor Christopher Cotton ("Professor Cotton") addresses economic issues surrounding the Covid-19 pandemic and whether it is possible to determine if businesses suffered losses due to the CMOH Orders. Professor Cotton's Affidavit additionally addresses whether it is possible to estimate the value of an individual business's losses on a class-wide basis.[52]

57. Professor Cotton's Affidavit confirms that "the CMOH Orders were just one of the many changing and interconnected factors affecting the business environment, customer behavior, and [individual business] profits when the CMOH Orders were implemented. *No empirical method can credibly disentangle the losses associated with the CMOH Orders from other factors with high accuracy."* Professor Cotton goes on to confirm he is <u>not</u> convinced "the impact caused by individual factors, such as the CMOH Orders, [can be identified] with any degree of confidence or accuracy on a class-wide basis".[53]

58. Professor Cotton's Affidavit further confirms that "*experiences during Covid-19 were highly individualized.* This means that even if one could reasonably estimate average losses within an industry or subsector due to CMOH Orders, these estimates will remain inaccurate predictors of the losses faced by individual businesses. In most subsectors, individual [businesses] have experienced losses (or gains) that have been widely different than the average, even when controlling for other observable characteristics like [business] size."[54]

59. According to Professor Cotton's evidence, "*[a]nalysis of individual [businesses]* can help to ensure that the assessment of whether they faced losses due to the CMOH Orders and the estimated value of any losses is more accurate than is otherwise possible. Such estimates *will never be perfect, but they would be more accurate than relying on industry-level assessments with limited data on the individual experiences of different [businesses]".*[55]

60. Professor Cotton's Affidavit confirms a list of 15 factors that lead to differential effects across individual businesses. In addition to these factors, Professor Cotton suggests "it is important to consider the strategic decisions and actions taken by the [business] in response to the pandemic.

[52] Affidavit of Christopher Cotton, sworn June 6, 2024 at s.9 ("Cotton Affidavit") [Alberta Compendium, TAB 9]
[53] Cotton Affidavit at paras 11 and 212 [Alberta Compendium, TAB 9]
[54] Cotton Affidavit at para13 [Alberta Compendium, TAB 9]
[55] Cotton Affidavit at para17 [Alberta Compendium, TAB 9]

These decisions might include cost-cutting, supply chain management changes, or shifts to remote work and digital platforms."[56]

61. *"Using an algorithm or set of algorithms applied systematically across the class to estimate individual business losses will not be accurate."*[57]

62. It is Professor Cotton's evidence that even within an industry, "…trends mask substantial differences between the experiences of individual businesses within the sectors….Firms within the same subsector or size category can have vastly different outcomes based on their unique circumstances, competitive strategies, and operational efficiencies."[58]

63. Professor Cotton's evidence makes it clear that *"[t]here may be few efficiency savings [in a class-wide analysis] compared to conducting a detailed analysis of individual [businesses], and the approach will be less accurate than one that allows for customizing the assessment at the [individual business] level"*.[59]

64. Professor Cotton's evidence clearly illustrates the difference between effects on businesses of Covid-19 generally versus the CMOH Orders. He further notes that "Covid-19 resulted in substantial losses to businesses during the first half of 2020. After 2020, however, the evidence strongly suggests that businesses have earned greater profits than expected had Covid-19 not occurred. For many sectors, these later gains outweigh the initial losses. As such, it is not clear that the typical business in Canada 'suffered losses' due to Covid-19 when the study period extends to include more than just 2020."[60]

65. "To the extent that the CMOH Orders contributed to the transformations to the economy and business environments, they likely also contributed to the higher profits since 2021."[61]

66. Professor Cotton's evidence did not confirm that predictive data he received from epidemiologists and public health officials turned out to be false.

67. Professor Cotton's evidence did not concede that initial models predicting high death rates and

[56] Cotton Affidavit at paras 127 and 241 [Alberta Compendium, TAB 9]
[57] Cotton Affidavit at paras 20 and 271 [Alberta Compendium, TAB 9]
[58] Cotton Affidavit at paras 205 and 238 [Alberta Compendium, TAB 9]
[59] Cotton Affidavit at para 27 [Alberta Compendium, TAB 9]
[60] Cotton Affidavit at para 29 [Alberta Compendium, TAB 9]
[61] Cotton Affidavit at para102 [Alberta Compendium, TAB 9]

overwhelmed healthcare systems have been discredited.

68. Professor Cotton's evidence did not concede that any measures taken by Alberta were panic-induced.

69. Contrary to all of these alleged 'concessions' improperly attributed to Professor Cotton's evidence by the Proposed Representative Plaintiffs, it was in fact Professor Cotton's evidence that:

> [l]ockdown[s], capacity restrictions, and other CMOH Orders likely contributed to reducing the spread of Covid-19, preventing healthcare systems from being overwhelmed, and showing that the disease could be controlled. These factors may have contributed to consumer confidence and willingness to engage in commerce when restrictions were relaxed. They may have also helped prevent catastrophic outcomes that would have been significantly worse for businesses…Without a provincial government response, there was a higher probability that Alberta would have seen substantially worse outcomes in terms of massive death rates and overwhelmed healthcare system. Such severe outcomes would likely have led to substantial economic uncertainty, decreased consumer confidence, and decreased willingness to leave the house that may have lasted longer than the lockdowns that were in place.[62]

70. Professor Cotton did not hold himself out to be an expert on or to have any knowledge about the statements or intention behind the statements of Alberta or any person acting under the umbrella of Alberta, nor did his opinion rely upon it.

71. The inflammatory conclusions included in the Proposed Representative Plaintiffs' written submissions about Professor Cotton's testimony and the 'concessions' he made are either incorrect, misleading or stem from a significant misunderstanding of Professor Cotton's evidence.

IV. CERTIFICATION

72. Section 5(1) of the *Class Proceedings Act* sets out the five criteria required for an action to be certified as a class proceeding, namely:

    a. The pleadings disclose a cause of action;

[62] Cotton Affidavit at paras 280 and 309 [Alberta Compendium, TAB 9]

b. There is an identifiable class of 2 or more persons;

c. The claims of the prospective class members raise a common issue;

d. A class proceeding would be the preferable procedure for the fair and efficient resolution of any common issues; and

e. There is a person eligible to be appointed as a representative Plaintiff

(the "Certification Test")[63]

73. The burden is on the Proposed Representative Plaintiffs to meet each of the five components of the Certification Test. Other than the cause of action, the remaining portions of the Certification Test each require the Proposed Representative Plaintiffs to show "some basis in fact" for that criteria.[64]

74. The Courts have resisted attempting to define "some basis in fact" in the abstract. Instead, each case must be decided on its own facts.[65]

75. The Certification Test largely considers the procedure in which the action will be prosecuted, however a Court can consider substantive aspects of the claim (on the appropriate standard) at the preferable procedure portion of the Certification Test.[66]

76. The Courts have consistently held that certification acts as an important screening device. The standard for assessing evidence at certification specifically does not require a determination of the merits of the claim, "nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny."[67]

77. As the Court of Appeal stated in *Spring v Goodyear Canada Inc.*:

> While certification remains a low hurdle, it is nonetheless a hurdle. There needs to be "some basis in fact" to support the claim. Claims should not be certified, however if there is a complete absence of evidence to support the claim.[68]

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[63] *Class Proceedings Act*, SA 2003, c C-16.5 at s. 5(1) [Alberta Authorities, TAB 1]
[64] *Hollick v Metropolitan Toronto (Municipality)*, 2001 SCC 68 at para 25 [Alberta Authorities, TAB 47]
[65] *Pro-Sys Consultants Ltd. v Microsoft Corp*., 2013 SCC 57 at para 104 [Alberta Authorities, TAB 53]
[66] *AIC Limited v. Fischer*, 2013 SCC 69 at para 4 [Alberta Authorities, TAB 79]
[67] *Pro-Sys Consultants Ltd. v Microsoft Corp*., 2013 SCC 57 at para 103 [Alberta Authorities, TAB 53]
[68] *Spring v Goodyear Canada Inc*., 2021 ABCA 182 at para 40 [Alberta Authorities, TAB 54]

78. It is not the proper role of the Courts to "enter the ring" and attempt to remedy any aspect of the certification application not met by the Proposed Representative Plaintiffs.[69]

79. The Proposed Representative Plaintiffs have failed to meet their burden on all portions of the Certification Test and their application for certification must necessarily fail.

A. CAUSE OF ACTION

80. The pleadings do not disclose a cause of action as against Alberta, as required by section 5(1)(a) of the *Class Proceedings Act*. Therefore certification of this Action against Alberta must fail.

81. The test for determining if the pleadings disclose a cause of action under section 5(1)(a) of the *Class Proceedings Act* is the same that applies to an application to strike the claim. The cause of action will be struck out where it is "plain and obvious" that the plaintiff's claim cannot succeed.

82. In order to meet this certification criteria, a plaintiff must demonstrate, having regard to the pleadings, viewed against the background of the (assumed) alleged facts that the claims pled are not bound to fail.

83. While the threshold to strike is high and pleadings should be interpreted liberally, needless litigation should be avoided and the court has a duty to apply the rule as it is intended[70]. If the alleged facts do not disclose a cause of action in light of existing law, those portions of the pleadings should be struck out.[71]

84. The Supreme Court of Canada outlined the general principles that should inform the application of rules on striking pleadings in *R v Imperial Tobacco Canada*. At paragraph 22, the Court held:

> A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the Supreme Court Rules (now r. 9-5(2) of the Supreme Court Civil Rules). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. *A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in*

[69] *Andriuk v Merrill Lynch Canada*, 2014 ABCA 177 at para 12 [Alberta Authorities, TAB 75]
[70] *Setoguchi v Uber BV*, 2023 ABCA 45, at paras 44 - 46 [Alberta Authorities, TAB 2]
[71] *Tottrup v. Alberta (Minister of Environment)*, 2000 ABCA 121 at para 9 [Alberta Authorities, TAB 3]

> *a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must*. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted…
>
> Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. *Rather, it operates on the assumption that the claim will proceed through the court system in the usual way — in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in the context of the law and the litigation process, the claim has no reasonable chance of succeeding* [emphasis added].[72]

85. More recently, the Alberta Court of Appeal in *Setoguchi v Uber BV* confirmed the approach to be taken when conducing an analysis of the cause of action under section 5(1)(a) of the *Class Proceedings Act*. The Court held:

> Although the section 5(1)(a) test is a low bar, it should not be treated as a perfunctory exercise. "Courts have no jurisdiction to ignore the plain text of an enactment and make this criterion completely disappear": *Bruno* at para 68. There are compelling reasons for a court to carefully consider whether the pleadings pass the plain and obvious test, by carefully scrutinizing whether the facts as pleaded establish the requisite elements of each cause of action.[73]

86. In this case, the Proposed Representative Plaintiffs' Claim pleads a number of causes of action against Alberta:

    a. A breach of the Alberta Bill of Rights;

    b. Negligence;

[72] *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 22 & 25 [Alberta Authorities, TAB 4]
[73] *Setoguchi v Uber BV*, 2023 ABCA 45 at para 44 [Alberta Authorities, TAB 2]

c. Conversion;

d. Breach of Fiduciary Duty; and

e. Expropriation without Compensation.

87. Reviewing the facts as pled against the established law with respect to the nature of the claim and the causes of action, it is plain and obvious each of the Proposed Representative Plaintiffs' claims are bound to fail. Accordingly, certification of this Action against Alberta cannot succeed pursuant to section 5(1)(a) of the *Class Proceedings Act*.

i. No Factual Foundation for Bad Faith or Improper Purpose

88. The entire basis of the Proposed Representative Plaintiffs' claim is the finding by Justice Romaine in the *Ingram Decision* that the CMOH Orders were *ultra vires* the *Public Health Act*.[74]

89. Before turning to a consideration of the causes of action pled, it is important to understand the law and jurisprudence relating to causes of actions based on laws that are subsequently found to be invalid.

90. Even the Proposed Representative Plaintiffs acknowledge, and plead[75], that the CMOH Orders were presumed valid and only were determined to be *ultra vires* on July 31, 2023 with the release of the *Ingram Decision*.

91. There is a long line of authority, confirmed by the Supreme Court of Canada in *Mackin v New Brunswick (Minister of Justice)* ("*Mackin*"), that "absent conduct that is clearly wrong, in bad faith or an abuse of power" no damages will be awarded for harms suffered as a result of the enactment or application of a law subsequently declared invalid.[76]

92. In *Mackin*, the plaintiffs sought damages arising from a law that was found to be unconstitutional. The Supreme Court of Canada declined to award damages to the plaintiffs based only on the

[74] *Ingram v Alberta (Chief Medical Officer of Health)*, 2023 ABKB 453 at paras 2 and 3 [Alberta Authorities, TAB 5]
[75] The Claim at para 18 [Alberta Compendium, TAB 1]
[76] *Mackin v New Brunswick (Minister of Justice)*, 2002 SCC 13 at paras 78 and 79 [Alberta Authorities, TAB 6]

finding of unconstitutionality and found there was no evidence of the required bad faith to ground a claim.[77]

93. The state's enjoyment of the limited immunity set out in *Mackin* was recently confirmed and clarified by the Supreme Court of Canada in *Canada (Attorney General) v Power*. In *Power*, the issue addressed by the Supreme Court of Canada was whether the plaintiff's pleadings should be struck where the basis of the claim was *Charter* damages arising from a law after it was found to be unconstitutional.[78]

94. While the Supreme Court of Canada rejected Canada's claim of absolute immunity for damages arising from an unconstitutional law, it confirmed that the principles in *Mackin* still apply and set a high threshold that damages would only be available where the law was "clearly unconstitutional" at the time of its enactment or where there are sufficient pleadings of bad faith or abuse of power.[79]

95. The Supreme Court of Canada confirmed that determining the 'clearly unconstitutional standard' or the existence of bad faith is not a means of evaluating the wisdom or policy of the enactment process or the enactment itself.[80]

96. The CMOH Orders were not found to be unconstitutional, but were held to be *ultra vires* the *Public Health Act*. In this Action, given it relates to pure economic loss[81], the Proposed Representative Plaintiffs do not claim the CMOH Orders breached the *Charter*. However, the principles outlined in *Mackin* and in *Power* are clearly applicable.

97. The applicability of *Mackin* and *Power* principles apply at the pleading stage. As the Supreme Court of Canada held:

> The exacting nature of the threshold means that an applicant's failure to provide detailed particulars will be fatal to their claim at the pleadings stage. Bald or vague assertions will necessarily fall short.[82]

[77] *Mackin v New Brunswick (Minister of Justice)*, 2002 SCC 13 at paras 76, 77, 82 and 83 [Alberta Authorities, TAB 6]
[78] *Canada (Attorney General) v Power*, 2024 SCC 26 at para 2 [Alberta Authorities, TAB 7]
[79] *Canada (Attorney General) v Power*, 2024 SCC 26 at paras 4 and 99 - 112 [Alberta Authorities, TAB 7]
[80] *Canada (Attorney General) v Power*, 2024 SCC 26 at paras 108 and 112 [Alberta Authorities, TAB 7]
[81] The Claim at para 97 [Alberta Compendium, TAB 1]
[82] *Canada (Attorney General) v Power*, 2024 SCC 26 at para 112 [Alberta Authorities, TAB 7]

98. This requirement to plead sufficient facts of bad faith at the pleadings stage was earlier described by the Supreme Court of Canada in *Henry v British Columbia (Attorney General)*, which considered, at the pleading stage, the requirement to show bad faith in *Charte*r claims against Crown Prosecutors. The Supreme Court of Canada stated:

> When a heightened *per se* liability threshold has been imposed, this will have consequences at the pleadings stage.
>
> [where the alleged] violation occurs in a context where courts have imposed a heightened *per se* liability threshold, the claimant must particularize facts that, if proven, would be sufficient to establish that the state conduct met the required threshold of gravity. Failure to do so will be fatal to the claim.[83]

99. Pursuant to *Mackin* and *Power*, to survive the pleadings stage, the Proposed Representative Plaintiffs must plead sufficient fact to establish that:

i. the CMOH Orders were, on an objective basis, clearly *ultra vires* the *Public Health Act* at the time they were enacted such that the CMOH Orders were enacted in the face of a known risk or deliberately failing to enquire about the risk when there was a good reason to inquire;[84] and

ii. the CMOH Orders were issued in bad faith where they were enacted for an improper purpose or were dishonest.[85]

100. Pleading such facts alone does not end the inquiry, because even if the Proposed Representative Plaintiffs meet that high threshold, they must still plead sufficient facts to disclosure a reasonable cause of action.[86]

101. The requirement to plead sufficient facts, if proven, to establish bad faith is also a requirement for any civil action pursuant to section 66.1 of the *Public Health Act*. Section 66.1 holds:

> (1) No action for damages may be commenced against:

[83] *Henry v British Columbia (Attorney General)*, 2015 SCC 24 at para 43 [Alberta Authorities, TAB 8]
[84] *Canada (Attorney General) v Power*, 2024 SCC 24 at paras 102, 103, 105 and 112 [Alberta Authorities, TAB 7]
[85] *Canada (Attorney General) v Power*, 2024 SCC 24 at paras 106, 108 and 112 [Alberta Authorities, TAB 7]
[86] *Henry v British Columbia (Attorney General)*, 2015 SCC 24 at para 43 [Alberta Authorities, TAB 8]

(a) the Crown or a Minister of the Crown;

(c) an employee under the administration of the Minister;

(d) the Chief Medical Officer of Health, the Deputy Chief Medical Officer, an executive officer or a medical officer of health

For anything done or not done by that person in good faith while carrying out duties or exercising powers under this or any other enactment.[87]

102. Section 66.1 of the *Public Health Act* serves to act as a full defence and provides full immunity to Alberta unless the Proposed Representative Plaintiffs plead sufficient facts of bad faith.

103. The Court of Appeal considered the scope and nature of the immunity clause in section 66.1 of the *Public Health Act* in *Frank v Alberta Health Services*. In *Frank*, the issue was whether a nurse employed by Alberta Health Services was entitled to rely on the immunity relating to the administration of the influenza vaccine.

104. The Court of Appeal confirmed the legislative intent of section 66.1 was to provide immunity for those addressing a public health concern in good faith and the immunity clause must be interpreted according to its plain words, in the context of the entire statute.[88]

105. The Proposed Representative Plaintiffs must meet the heightened threshold requirement of pleading facts of clearly *ultra vires* and bad faith, as required by *Mackin*, *Power*, and section 66.1 of the *Public Health Act.*

106. The Proposed Representative Plaintiffs must plead sufficient facts to show a lack of good faith by Alberta. Good faith has been defined by Courts previously as:

> an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual's personal good faith is [a] concept of his own mind and inner spirit, and therefore, may not conclusively be determined by his protestations alone. Doyle v. Gordon 158 N.Y.W. (2nd) 248, 259, 260. Honesty of intention, and freedom of knowledge of circumstances which ought to put the

[87] *Public Health Act*, RSA 2000, c P-37, at s 66.1 [Alberta Authorities, TAB 9]
[88] *Frank v Alberta Health Services*, 2019 ABCA 332 at paras 6 - 7 [Alberta Authorities, TAB 10]

holder upon inquiry. An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious. (emphasis added)[89]

107. There are no facts pled that Alberta knew or reasonably ought to have known that the CMOH Orders were clearly *ultra vires* at the time they were issued. There are insufficient facts pled to establish Alberta acted in bad faith in issuing the CMOH Orders. As noted above, the pleadings confirm the CMOH Orders were presumed valid and presumed validly enacted.[90]

108. The Proposed Representative Plaintiffs plead various facts alleging mere negligence and a single bald allegation of bad faith.[91] It is not enough to assert baldly, conclusory phrases such as "deliberately or negligently", or "callous disregard" to establish sufficient facts of bad faith.[92]

109. The scope of the pleadings can be summarized by review of paragraph 5 of the Claim, where the allegations state the CMOH Orders were: i) negligently issued and unreasonable because they were made without lawful authority; and ii) made as a result of an unreasonable and unlawful interpretation of the *Public Health Act*.

110. These allegations of negligence and a technical misinterpretation of the final authority to issue the CMOH Orders relating to a novel, global pandemic, are not pleadings of bad faith at all, let alone sufficient to meet the heightenes threshold standard required.

111. Insofar as the pleading appear to challenge the public health basis of responding to the Covid-19 pandemic through the CMOH Orders, the pleading should be rejected on their face. The Proposed Representative Plaintiffs in their written submissions use language such as "*perceived* public health emergency" and "*purportedly* for the public good."[93]

112. Alleging there was no a public health emergency brought on by the Covid-19 pandemic in Alberta, Canada and across the world is incapable of being proven, should be stuck on its face, and does not provide any basis to conclude Alberta acted in bad faith. This is confirmed given the voluminous

[89] *O'Fearghail Holdings Ltd. v. Bignold,* 2001 ABQB 514 at 21 citing Blacks' law dictionary, 5*th* ed [Alberta Authorities, TAB 11]
[90] The Claim at para 18 [Alberta Compendium, TAB 1]
[91] The Claim at para 82 [Alberta Compendium, TAB 1]
[92] *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 34 [Alberta Authorities, TAB 12]
[93] Brief of the Plaintiffs (Revised) at para 2

case law where Court have taken judicial notice of the Covid-19 pandemic and accepted the existence of a public health emergency.[94]

113. As the Claim does not plead sufficient facts to pass the high threshold required to ground a claim in an invalid law or to meet the statutory requirements of the immunity provision of the *Public Health Act*, it is bound to fail and discloses no reasonable cause of action. The Claim against Alberta should be dismissed and certification refused for failing to meet the minimum threshold requirement of section 5(1)(a) of the *Class Proceedings Act*.

ii. *Alberta Bill of Rights* Claims

114. The Proposed Representative Plaintiffs' claim for a breach of the *Alberta Bill of Rights* does not disclose an independent cause of action and is bound to fail. A breach of a statute does not establish a stand-alone cause of action. And in any event, the relevant issues have already been litigated and determined in the *Ingram Decision*.[95].

115. The Claim contains the Proposed Representative Plaintiffs' allegations with respect to the *Alberta Bill of Rights*.[96] Specifically, the Proposed Representative Plaintiffs allege the CMOH Orders "do not constitute "due process of law" and violate, without justification, the rights of Ms. Ingram, Mr. Scott, and the [Proposed] Class Members to enjoyment of property."[97]

116. The Claim also states "…the rights and freedoms contained in the Alberta Bill of Rights are absolute, and the only mechanism to abrogate Section 1(a) is for the Alberta Legislature to invoke the notwithstanding provisions, which it chose not to do."[98]

117. It has long been recognized that no independent civil cause of action exists for the breach of a statute.[99] There is no statutory provision allowing for damages for the breach of the *Alberta Bill of Rights*.

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[94] *Ingram v Alberta (Chief Medical Officer of Health)*, 2023 ABKB 453 at paras 448 – 451 [Alberta Authorities, TAB 5]; *TRB v KWPB*, 2021 ABQB 997 at para 12 [Alberta Authorities, TAB 13]
[95] *Ingram v Alberta (Chief Medical Officer of Health)*, 2023 ABKB 453 [Alberta Authorities, TAB 5]
[96] The Claim at paras 59-66 [Alberta Compendium, TAB 1]
[97] The Claim at para 62 [Alberta Compendium, TAB 1]
[98] The Claim at para 66 [Alberta Compendium, TAB 1]
[99] *The Queen (Can.) v Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at paras 37 and 38 [Alberta Authorities, TAB 14]; and *Rieger v Plains Midstream Canada ULC*, 2022 ABCA 28 at para 61 [Alberta Authorities, TAB 15]

118. On a plain reading of the *Alberta Bill of Rights*, there is no section similar to section 24(2) of the *Charte*r that permits a remedy, including civil damages, for its breach. Instead, the remedy for a breach of the *Alberta Bill of Rights* is limited to a declaration of invalidity.

119. In any event, it has already been determined in the *Ingram Decision* that the CMOH Orders did not violate the *Alberta Bill of Rights*. Given the weight the Proposed Representative Plaintiffs place on the *Ingram Decision* to ground their claim, they cannot pick and choose which portions of the decision to accept. Instead, the decision in the *Ingram Decision* with respect to the *Alberta Bill of Rights* is binding and the Proposed Representative Plaintiffs' continued challenge is an abuse of process and should be struck.

***Ingram v Alberta* decision on the Alberta Bill of Rights**

120. In the *Ingram Decision*, Justice Romaine referred to an earlier case management Order of Justice Kirker in that action, which directed that the type or nature of the application to be heard at the oral hearing of the matter was an Originating Application for specific relief, including:

    i. a declaration that all provisions of Alberta's CMOH's orders as described in Schedule "A" of the Originating Application are of no force and effect as they offend sections 1(a), 1 (c), 1 (e) and 1 (g) of the *Alberta Bill of Rights* and are accordingly *ultra vires* the CMOH and the Alberta Legislature pursuant to section 2 of the *Alberta Bill of Rights*;

    ii. a declaration that the CMOH orders as described in Schedule "A" are unlawful and are of no force and effect absent the Alberta Legislature passing that the *Public Health Act* is notwithstanding the *Alberta Bill of Rights*.[100]

121. Justice Romaine went on to note at paragraph 10, that as the hearing of the matter progressed, the nature of the issues were clarified. In regards to the Alberta Bill of Rights, the main issue was; "do the impugned Orders offend the [*Alberta Bill of Rights*]. If so, does the [*Alberta Bill of Rights*] include an implicit internal limit similar to the limit under section 1 of the *Charter*?"[101]

122. In the end, Justice Romaine found the impugned CMOH Orders to be *ultra vires* the *Public Health Act* because the final decision maker was elected officials. Nonetheless, Justice Romaine went on for the majority of her Decision (paragraphs 58-510) to consider the *Charter* and *Alberta Bill of*

[100] *Ingram v Alberta (Chief Medical Officer of Health),* 2023 ABKB 453 at para 6(a)(i)-(ii) [Alberta Authorities, TAB 5]
[101] *Ingram v Alberta (Chief Medical Officer of Health),* 2023 ABKB 453 at para 10 [Alberta Authorities, TAB 5]

Rights issues, given "most of the hearing including nearly all the witness testimony, was directed to the *Alberta Bill of Rights* and *Charter* issues, and it is important to consider these issues in the event that I am incorrect about the *Public Health Act* issue".[102]

123. In considering the *Alberta Bill of Rights* issues, Justice Romaine indicated "with respect to section 1(a) of the *Alberta Bill of Rights,* Ms. Ingram submits that the impugned Orders offend her right to enjoyment of property and that they amount to the expropriation of her property without compensation and a deprivation of her property rights without due process of law."[103]

124. The Court went on to reiterate:

> [a]n individual's right to liberty, security of the person and enjoyment of property is expressly limited by the Legislature's ability to legislate to the contrary. The rights recognized in the Bill of Rights are not absolute. There are limits to freedom and the enjoyment of property. As with the Charter, rights are subject to justifiable limitations having regard to the rights and interests of others and the public in general.[104]

125. Following a detailed assessment of the Applicants' expert evidence[105] and the Respondents' evidence from various experts and fact witnesses,[106] Justice Romaine concluded:

> [486] In summary, the rights in the *Alberta Bill of Rights* can be limited if the law was enacted pursuant to a valid legislative objective. This analysis occurs concurrently with the analysis of whether the right was infringed, rather than in two-step *Charte*r- like process, although in this case, the limit has been considered separately for reasons of clarity. The right will not be deemed infringed if the legislature had a valid purpose in enacting the law. A valid objective is not arbitrary or capricious.

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[102] *Ingram v Alberta (Chief Medical Officer of Health),* 2023 ABKB 453 at para 58 [Alberta Authorities, TAB 5]
[103] *Ingram v Alberta (Chief Medical Officer of Health),* 2023 ABKB 453 at para 453 [Alberta Authorities, TAB 5]
[104] *Ingram v Alberta (Chief Medical Officer of Health),* 2023 ABKB 453 at paras 492-493 [Alberta Authorities, TAB 5]
[105] Dr. Bhattacharyam (A professor in the School of Medicine at Stanford University); David Redman (the Executive Director of the Alberta Emergency Management Agency from January 2002 until December 2005).
[106] Dr. Hinshaw; Dr. Kimberly Simmonds (epidemiologist); Deborah Gordon (VP and Chief Officer Clinical Operations of Alberta Health Services); Dr. Kindrachuk (an infectious disease specialist and assistant professor at the University of Manitoba); Dr. Nathan Zelyas (a medical microbiologist); Dr. Balachandra (the Chief Medical Examiner in Alberta); Scott Long (the Executive Director for Operations of the Alberta Emergency Management Agency in the spring of 2020; Dr. Dean (PhD and MA in Biostatistics from Harvard University); Patricia Wood (Senior Mortality Classification Specialist with Statistics Canada); Chris Shandro (Assistant Deputy Minister); Darren Hedley (Dr. Assistant Deputy Minister)

> [487] The restrictions on rights set out in the *Alberta Bill of Rights* that Ms. Ingram submits were infringed were clearly enacted for a valid legislative purpose, to control the spread of the Covid-19 virus and to protect the healthcare system and vulnerable persons.
>
> [488] As I have found with respect to section 1 (a) of the *Charter*, in this case the impugned Orders, to the extent they are in breach of the *Alberta Bill of Rights*, were not arbitrary or capricious, but had a legitimate basis in public protection.
>
> …
>
> [510] I find that a limit to the rights provided by the *Alberta Bill of Rights* must be implied, and that, as with the *Charter*, the breach of any *Alberta Bill of Rights* right is subject to a limitation based on a valid legislative objective. In this case, the impugned Orders, to the extent they are in breach of the *Alberta Bill of Rights*, are not arbitrary or capricious. Alberta has demonstrated through the evidence presented at the hearing that, at all times when the impugned Orders were in force, there existed a pressing and substantial legislative objective. If, as Grasser J suggests, the rights are subject to the same balancing act that would be conducted pursuant to the *Oakes* test, the restrictions would be found to be justifiable.[107]

Res Judicata and Abuse of Process

126. The doctrine of *res judicata* has two distinct forms: issue estoppel and cause of action estoppel.[108] In their most basic definitions:

> Issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceeding, and cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding.
>
> A cause of action is a "set of facts which are said to entitle the claimant to relief from a court". It is the facts that form the "cause" of the "action": *Sherwood Steel Ltd v Odyssey Construction Inc*, 2014 ABCA 320 at paras 23-24 and *Madill v Alexander Consulting Group Ltd*, 1999 ABCA 321 at para 27, 237 AR 307 (*Booth* at para 36)

[107] *Ingram v Alberta (Chief Medical Officer of Health)*, 2023 ABKB 453 at paras 486-510 [Alberta Authorities, TAB 5]
[108] *Booth v Christensen*, 2019 ABQB 878 at para 36 (*Booth*) [Alberta Authorities, TAB 17]

127. In *Cliffs Over Maple Bay Investments Ltd. (Re*) ("*Cliffs Over Maple Bay*"), the Court noted the requirements of issue estoppel as set out by the Supreme Court of Canada in *Angle v. Minister of National Revenue:*[109]

> 1. that the same question has been decided;
>
> 2. that the judicial decision which is said to create the estoppel was final; and,
>
> 3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies...[110]

128. With respect to cause of action estoppel, the Court in *Cliffs Over Maple Bay* summarized the following requirements set out in *Angle:*

> 1. There must be a final decision of a court of competent jurisdiction in the prior action;
>
> 2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action;
>
> 3. The cause of action in the prior action must not be separate and distinct; and
>
> 4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.[111]

129. The Supreme Court of Canada has held that where the technical requirements of *res judicata* are not met (for instance, there is no mutuality of parties), the more flexible abuse of process doctrine, which shares many of the same underlying principles, may still operate to preclude re-litigation of an issue decided in a prior proceeding.

130. This principle, and the application of the doctrine of abuse of process, was addressed by the Supreme Court of Canada in *City of Toronto v. CUPE, Local 79.*[112] *CUPE* involved a recreation instructor who was convicted of sexually assaulting a boy under his supervision and was fired after his conviction. He grieved the dismissal. The arbitrator decided that the conviction was admissible

[109] *Angle v M.N.R.*, 1974 CanLII 168 [Alberta Authorities, TAB 18]
[110] *Cliffs Over Maple Bay*, 2011 BCCA 180 at para 31 [Alberta Authorities, TAB 19]
[111] *Cliffs Over Maple Bay*, 2011 BCCA 180 at para 28 [Alberta Authorities, TAB 19]
[112] *City of Toronto v CUPE, Local 79*, 2003 SCC 63 [Alberta Authorities, TAB 20]

evidence but not binding on him. As a result, he concluded that the instructor had been dismissed without cause.

131. Justice Arbour found that the arbitrator was wrong not to give full effect to the criminal conviction even though neither *res judicata* nor the rule against collateral attack strictly applied. Because the effect of the arbitrator's decision was to re-litigate the conviction for sexual assault, the proceeding amounted to a "blatant abuse of process".[113]

132. Justice Arbour concluded that the doctrine of abuse of process can be triggered where allowing the litigation to proceed would violate principles such as "judicial economy, consistency, finality and the integrity of the administration of justice".[114] She stressed the goals of avoiding inconsistency and wasting judicial and private resources:

> [Even] if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.[115]

133. In *Penner v Niagara*, the Supreme Court of Canada commented on the Court's discretion to refuse the relitigation of an issue:

> [39] Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.
>
> [40] If the prior proceedings were unfair to a party, it will likely compound the unfairness to hold that party to its results for the purposes of a subsequent

[113] *City of Toronto v CUPE, Local 79*, 2003 SCC 63 at para 56 [Alberta Authorities, TAB 20]
[114] *City of Toronto v CUPE, Local 79*, 2003 SCC 63 at para 37 [Alberta Authorities, TAB 20]
[115] *City of Toronto v CUPE, Local 79*, 2003 SCC 63 at para 51 [Alberta Authorities, TAB 20]

proceeding. For example, in *Danyluk*, the prior administrative decision resulted from a process in which Ms. Danyluk had not received notice of the other party's allegations or been given a chance to respond to them.[116]

134. Courts have used the concept of abuse of process to prevent parties from relitigating issues in subsequent litigation involving different parties.

135. For example, in *Solomon v. Smith,* Solomon had been found liable in an earlier Alberta action to the vendor for damages for breach of a real estate contract. Solomon had been the purchaser under the contract, and in the Alberta action he had successfully raised the defence of misrepresentation concerning the sale. Subsequently, Solomon commenced an action in Manitoba to recover the damages (awarded against him in the earlier action) from the vendor's agents who had negotiated the contract, alleging that they had made misrepresentations respecting the property. The Manitoba Court of Appeal held that the plaintiff's action should be struck out as an abuse of process. The court stated that ... the Supreme Court of Canada (in *Angle v. M.N.R.*, 1974 CanLII 168 (SCC), [1975] 2 S.C.R. 248) had expressly affirmed the requirement of mutuality of parties for issue estoppel, and so issue estoppel could not be relied on. However, the Court held that the applicable principle was that of abuse of process: the defendants should not be forced to present a complete defence on the merits to a claim which had been fully and unsuccessfully litigated by the present plaintiff in a prior action, and to permit the present action to proceed would be an abuse of process.[117]

136. Similarly, in *Bjarnarson v. Manitoba,* the trial court held that a defendant, who had been found liable in a previous action on the same facts brought by a different plaintiff, should not be allowed to relitigate the issue where it had had a full opportunity to deal with the issue, and the defendant was held to be bound by issue estoppel as to liability. On appeal, the Manitoba Court of Appeal held that the "same parties" is still a requirement for the application of issue estoppel. However, the court affirmed the trial judgment on the ground that "it would be an abuse of process to permit the defendant to dispute its negligence again in this action".[118]

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[116] *Penner v Niagara*, 2013 SCC 19, at paras 39 and 40 [Alberta Authorities, TAB 21]
[117] *Solomon v. Smith and Montreal Trust Co.*, 1987 CanLii 6962 (MBCA) at paras 15-16 [Alberta Authorities, TAB 22]
[118] *Bjarnarson v. Manitoba,* 1987 CanLII 5396 (MBCA) at para 6 [Alberta Authorities, TAB 23]

Application of the Doctrine of *Res Judicata* and Abuse of Process

137. The Proposed Representative Plaintiffs in this proposed class action claim the CMOH Orders violated their property rights pursuant to s. 1(a) of the *Alberta Bill of Rights.* This issue was specifically claimed and addressed by Justice Romaine at length in the *Ingram Decision*. The relevant facts, cause of action alleged and the issues considered regarding the *Alberta Bill of Rights* in both Actions are the same.

138. Additionally, Ms. Ingram is the claimant in both the Application before Justice Romaine and in this current proposed class action. Accordingly, Ms. Ingram is precluded from bringing this class action based on the doctrine of *res judicata.*

139. With respect to Mr. Scott and the other Proposed Class Members who were not parties in the *Ingram* Action, they too are precluded from bringing this proposed class action. While the doctrine of *res judicata* may not strictly apply due to lack of mutuality of parties, the residual doctrine of abuse of process is applicable.

140. The circumstances of this case warrant the application of the principles of *res judicata* and *abuse of process*. The *Ingram* Action was case managed and involved counsel on both sides. The issues, particularly with respect to the *Charter* and the Alberta Bill of Rights was discussed and argued at length, with consideration of over a dozen fact and expert witnesses presented by both sides. As noted, the Court in the *Ingram Decision* spent over 452 paragraphs providing reasons for their findings regarding the *Charter* and Alberta Bill of Rights issues. There is no reason to believe those issues were not fairly and fully considered.

141. Alberta should not be made to present a complete defence to a claim and on issues which were fully litigated against them by Ms. Ingram already in a prior action. Relitigation would be a waste of judicial resources and require the same witnesses to testify again on the same issues.

142. Further, a new hearing on the same issues risks a finding inconsistent to that of Justice Romaine, which would undermine the credibility of the entire judicial process, thereby diminishing its authority, credibility and aim of finality.

143. The Proposed Representative Plaintiffs' *Alberta Bill of Rights* claims are bound to fail and cannot survive the cause of action test pursuant to s. 5(1)(a) of the *Class Proceedings Act* as it is in the interest of judicial economy, consistency, finality and the integrity of the administration of justice

that the claims and issues regarding the *Alberta Bill of Rights* not be relitigated pursuant to the principles of *res judicata* and abuse of process.

144. In any event, in the *Ingram Decision*, Justice Romaine found the *Alberta Bill of Rights* "can be limited if the law was enacted pursuant to a valid legislative objective."[119] As such, even if this Court finds the doctrines of *res judicata* and abuse of process do not apply, the Proposed Representative Plaintiffs have failed to plead facts to show the CMOH Orders were not enacted for valid legislative purpose. Consequently, their claim with respect to the *Alberta Bill of Rights* must fail.

iii. Negligence Claims

Invalidity of CMOH Orders

145. The Proposed Representative Plaintiffs' Claim makes numerous references to the CMOH Orders being "*ultra vires*" or "illegal".

146. However, as noted above, the bare fact that the CMOH Orders have been found *ultra* vires the *Public Health Act* in the *Ingram Decision* does not imply tort liability on the part of Alberta.

147. In *Holland v Saskatchewan,* the Supreme Court of Canada held:

> …the law to date has not recognized an action for negligent breach of statutory duty. It is well established that mere breach of a statutory duty does not constitute negligence…. The proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity…. No parallel action lies in tort."[120]

148. In *Welbridge Holdings Ltd. v. Greater Winnipeg* [121] the Supreme Court of Canada considered the issue of whether a duty of care was owed by the defendant municipality when engaged in a legislative activity – in this case the enactment of a bylaw. The municipality passed a bylaw rezoning certain property to allow for high-rise development. The developer, Welbridge Holdings Ltd., relied on the bylaw and took an assignment of a 99 year lease of the land and spent substantial sums of money on preliminary construction and development of the site for a multi-storey apartment complex. The bylaw was challenged by neighboring property owners and was eventually

[119] *Ingram v Alberta (Chief Medical Officer of Health),* 2023 ABKB 453 at para 486 [Alberta Authorities, TAB 5]
[120] *Holland v Saskatchewan*, 2008 SCC 42, at para 9 [Alberta Authorities, TAB 24]
[121] *Welbridge Holdings Ltd. v. Greater Winnipeg*, 1970 CanLII 1 (SCC) [Alberta Authorities, TAB 25]

declared invalid. As a result, Welbridge suffered financial loss and sued the municipality for negligence in the enactment of the bylaw. Welbridge took the position that the municipality owed it a duty of care to ensure that proper procedures were followed when enacting the bylaw. The Supreme Court of Canada held there was no responsibility in negligence when the statutory body was exercising a legislative power and commented as follows:

> A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or quasi-judicial level where it is exercising discretionary statutory authority. In exercising such authority, a municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of a Court, albeit it acted on the advice of counsel. It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability in damages for its breach.[122]

149. The Supreme Court of Canada in *Wellbridge* went on to find:

> … the risk of loss from the exercise of legislative or adjudicative authority is a general public risk and not one for which compensation can be supported on the basis of a private duty of care.[123]

150. The Court concluded that while a municipality might go beyond its jurisdiction in enacting a bylaw, "invalidity is not the test of fault and it should not be the test of liability."[124]

151. *Welbridge* has been considered in subsequent cases. For example, in *Campbell et al. v. 2535727 Ontario Inc. o/a Shouldice Trucking et al*. the Ontario Superior Court stated:

> Since the Supreme Court's decision in *Wellbridge Holdings Ltd. v. Greater Winnipeg (Municipality),* 1970 CanLII 1 (SCC), [1971] S.C.R. 957, the law is well settled that public authorities, such as municipalities, charged with making decisions in the general public interest, including land use planning decisions, ought to be free to make those decisions without being subjected to a private law duty of care.[125]

152. In *Mancuso v. Canada (National Health and Welfare),* the Federal Court stated:

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[122] *Welbridge Holdings Ltd. v. Greater Winnipeg,* 1970 CanLII 1 (SCC) at pg. 958 [Alberta Authorities, TAB 25]
[123] *Welbridge Holdings Ltd. v. Greater Winnipeg,* 1970 CanLII 1 (SCC) at pg. 970 [Alberta Authorities, TAB 25]
[124] *Welbridge Holdings Ltd. v. Greater Winnipeg,* 1970 CanLII 1 (SCC) at pg.969 [Alberta Authorities, TAB 25]
[125] *Campbell et al. v. 2535727 Ontario Inc. o/a Shouldice Trucking et al.,* 2024 ONSC 157 at para 11 [Alberta Authorities, TAB 26]

> …simply enforcing a statute and regulations that were valid at the time will not give rise to a cause of action … and there is no cause of action for legislating or failing to legislate in a manner that is adverse to a party's interest or may cause them to incur losses…[126]

153. Recently, in the case of *1285486 Alberta Ltd v Ape Parkour Inc.*[127] an owner of a gym in Grande Prairie initiated a claim against Alberta and Alberta Health Services, with respect to a closure order to his gym in 2020 pursuant to a CMOH Order during the Covid-19 pandemic. Both Alberta and Alberta Health Services brought applications to strike the plaintiff's action. In the decision, the Court struck the plaintiff's claims against Alberta and Alberta Health Services on the basis that the pleadings were vague with unsupported assertions and there were no clear causes of action against the Defendants.

154. At the hearing, the plaintiff raised the *Ingram Decision*. In response, the Court held:

> [31] Had the Plaintiff been charged with a violation of the impugned Order or had AHS sought to enforce the Order after it was determined to be *ultra vires* the Ingram Decision would be much more relevant to this analysis, neither of those circumstances exist here. At the time of the enforcement action, which importantly consisted of little more than two attendances at the Proposed Representative Plaintiffs' place of business, the CMOH Order was still valid and enforceable. *The subsequent striking down of the legislation does not create liability in either of the Defendants, particularly where there is a complete absence of bad faith* [emphasis added].
>
> …
>
> [36] The efforts by the CMOH, the various levels of government in Canada and indeed citizens to minimize the impact of Covid-19 on people and businesses had varying levels of success that may only be properly understood in the fullness of time, if ever. Even if subsequent study of the pandemic response shows a complete failure of the CMOH Orders to have made any positive impact, *the cause of action for negligence, malfeasance or defamation as pled by the Proposed Representative Plaintiffs in this action can not succeed*

[126] *Mancuso v. Canada (National Health and Welfare),* 2014 FC 708 at para 131 [Alberta Authorities, TAB 27]
[127] *1285486 Alberta Ltd v Ape Parkour Inc.*, 2024 ABKB 406 [Alberta Authorities, TAB 28]

> *in the absence of bad faith or deliberate intention to harm a person or class of persons, neither of which was shown to be the case here* (emphasis added).[128]

155. In this case, the Proposed Representative Plaintiffs claim Alberta was negligent because the CMOH Orders were found to be *ultra vires* in the *Ingram Decision.* However, as outlined above, the finding of invalidity of the Orders cannot form the basis of a negligence claim. The CMOH Orders in this case were an exercise of executive authority made pursuant to valid provisions of the *Public Health Act* and in the general public's interest. That the exercise of such authority was subsequently found to be *ultra vires* cannot give rise to liability in damages.

No Duty of Care

156. As stated, there is no claim in negligence for breach of a statutory duty.

157. To the extent the Proposed Representative Plaintiffs allege Alberta was negligent for acts or omissions beyond the passing of CMOH Orders that were later found to be *ultra vires* the *Public Health Act,* the facts as alleged do not support a private law duty of care between Alberta and the proposed class..

158. In *Nelson (City) v Marchi*, the Supreme Court of Canada stated:

> In Canada, the Anns/Cooper test provides a unifying framework to determine when a duty of care arises under the wide rubric of negligence law, including for allegations of negligence against government officials. But as *Cooper* and subsequent cases make clear, the framework applies differently depending on whether the plaintiff's claim falls within or is analogous to an established duty of care or whether the claim is novel because proximity has not been recognized before.[129]

159. In novel duty of care cases, the full two-stage *Anns/Cooper* framework applies.[130]

<u>No Proximity between Alberta and the Proposed Class</u>

160. Under the first stage,

[128] *1285486 Alberta Ltd v Ape Parkour Inc.*, 2024 ABKB 406 at paras 31 and 36 [Alberta Authorities, TAB 28]
[129] *Nelson (City) v Marchi*, 2021 SCC 41 at para 16 [Alberta Authorities, TAB 29]
[130] *Nelson (City) v Marchi*, 2021 SCC 41 at para 17 [Alberta Authorities, TAB 29]

> …the court first asks whether a prima facie duty of care exists between the parties. The question at this stage is whether the harm was a reasonably foreseeable consequence of the defendant's conduct, and whether there is "a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff" … Proximity arises in those relationships where the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law upon the defendant"….[131]

161. In this case, there is no proximity between Alberta and the proposed class to give rise to a duty of care.

162. The fact that amidst a global pandemic, government decision makers made public health decisions that had impacts on all Albertans, including individual business owners, does not form the basis for a close and direct relationship between Alberta and those individuals who owned and operated a business.

163. In determining whether government actors owe any duty to individual persons, the legislative scheme is a key consideration of the proximity analysis. As stated by the Ontario Court of Appeal in *Taylor v. Canada (Attorney General)*:

> The legislative scheme looms large in the proximity inquiry for two reasons. First, the question of whether a regulator should owe a private law duty of care to those individuals affected by its actions is largely a policy decision that falls squarely within the legislative bailiwick. The legislature announces that policy decision through the terms of its legislation. Second, even where the legislation is not determinative and the court must look to the interaction between the regulator and the plaintiff, the terms of the legislation describing the powers and duties of the regulator may to some extent shape the relationship between the regulator and the regulated. That relationship will be relevant in deciding whether the specific interactions between the regulator and the plaintiff are sufficient to create the degree of proximity required to establish a prima facie duty of care.[132]

164. In this case, the legislative scheme is the *Public Health Act*. There are no provisions in the *Public Health Act* that establish a private law duty of care between public health decision makers empowered under the *Public Health Act*, and individual persons affected by those decisions. On the

[131] *Nelson (City) v Marchi*, 2021 SCC 41 at para 17 [Alberta Authorities, TAB 29]
[132] *Taylor v Canada (Attorney General)*, 2012 ONCA 479 at para 76 [Alberta Authorities, TAB 30]

contrary, as noted above, section 66.1(1) of the *Public Health Act* specifically provides statutory immunity to actions for damages against those decision makers, including the Crown and the Chief Medical Officer of Health. This immunity clause reveals the legislature's specific intention that public health decision makers in Alberta do not owe a private law duty of care to individuals.[133]

165. In *Syl Apps Secure Treatment Centre v. B.D.*, the Supreme Court of Canada found:

> Where an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity (*Cooper*, at para. 44; *Edwards*, at para. 6). Such a conflict exists where the imposition of the proposed duty of care would prevent the defendant from effectively discharging its statutory duties. In *Cooper*, for example, a duty to individual investors on the part of the Registrar of Mortgage Brokers was rejected because it was found to "potentially conflict with the Registrar's overarching duty to the public" (para. 44). Similarly, in *Edwards* a private law duty of care on the part of the Law Society to the victim of a dishonest lawyer was rejected at the proximity stage since "[d]ecisions made by the Law Society require the exercise of legislatively delegated discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties" (para. 14). In both cases, the serious negative policy consequences of these conflicting duties were found to justify denying a finding of proximity.[134]

166. In this case, imposing a private law duty of care on decision makers to safeguard the economic interests of individual owners and operators of businesses would conflict with the *Public Health Act*'s statutory purpose to protect the health of Albertans and the duties accordingly imposed therein.

167. The *Public Health Act* is aimed at the general public and the protection of public health. If the authority under subsection 29(2.1) of the *Public Health Act* were to attract a private law duty of care whereby decision makers owed a duty to specific individuals' economic interests when taking steps to limit the transmission of COVID-19 during a public health emergency, it would be impossible for them fulfill their responsibilities under the *Public Health Act* to protect the health of the population at large.

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[133] *Frank v Alberta Health Services*, 2019 ABCA 332 at para 6 [Alberta Authorities, TAB 10]
[134] *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38 at para 28 [Alberta Authorities, TAB 31]

168. Further, aside from the legislative scheme, there are no facts pled in the Claim that reveal a close or direct relationship between Alberta and the proposed class. It is apparent from the Claim that the individual Proposed Representative Plaintiffs did not have any interaction or material relationship with the government decision makers in this case. They, like every other Albertan, were simply subject to the CMOH Orders. That fact alone is insufficient to give rise to a finding of proximity.

169. In *Attis v Canada (Minister of Health),* the Ontario Court of Appeal considered the question of government liability in relation to the regulation of silicone breast implants in Canada. The action alleged that Health Canada breached its duty to properly regulate silicone breast implants under the *Food and Drugs Act*. The Court of Appeal found the legislative scheme signalled an intention that the government's duty was owed to the public as a whole, not to the individual consumer.[135]

170. The Court of Appeal concluded that the motion judge correctly concluded that it was plain and obvious that the plaintiffs failed to frame a cause of action capable of establishing proximity.

171. The same assessment and finding can be made in this case.

Residual Policy Considerations Deny a Duty of Care

172. The second stage of the *Anns/Cooper* analysis involves identifying any residual policy reasons to negate a finding of a duty of care.[136]

173. For instance, the Court in *Attis* found that the imposition of a duty of care was negated in any event under the second stage of the *Anns* test by residual policy considerations reflecting the broad societal and legal implications of imposing a duty of care. The relevant policy considerations included the spectre of indeterminate liability, the chilling effect of the imposition of a duty of care in the public health context and the distinction between policy and operational conduct.[137]

174. In this case, the same residual policy considerations are applicable and negate any duty of care that may otherwise be found.

Indeterminate Liability

175. With respect to indeterminate liability, as found by the Ontario Court of Appeal in *Attis:*

[135] *Attis v Canada (Minister of Health),* 2008 ONCA 660 at para 59 [Alberta Authorities, TAB 32]
[136] *Nelson (City) v Marchi*, 2021 SCC 41 at para 18 [Alberta Authorities, TAB 29]
[137] *Attis v Canada (Minister of Health),* 2008 ONCA 660 at paras 73-78 [Alberta Authorities, TAB 32]

> Indeterminate liability, in my view, is the most relevant policy consideration because the imposition of a duty of care in this case may result in the government becoming the virtual insurer of…medical devices. The appellants argue that indeterminate liability is not a concern because the number of affected consumers in this proceeding is relatively contained. However, Health Canada's responsibilities extend far beyond the regulation of the specific devices at issue in this case to the regulation of thousands of other devices. In addition, potential liability could extend from medical devices to other products regulated under the FDA, such as food, drugs and cosmetics, as well as to many other regulatory regimes. It follows that the imposition of liability on the public purse would place an indeterminate strain on available resources. Accordingly, in my view, the prospect of indeterminate liability weighs against the imposition of liability in this case.[138]

176. Similarly, to find a duty of care in this case would result in Alberta becoming the economic insurer of all health related policies, orders and decisions made under the *Public Health Act*, even if they are made in the midst of a novel and evolving global pandemic.

177. It is important to note unlike in *Attis*, this claim is not for physical injury, but for pure economic loss. Accordingly the concern for indeterminate liability is further enhanced, since unlike physical damage, economic loss "can spread well beyond any confined physical area or group of victims and seep into an ever expanding circle of plaintiffs. This would lead to uncertainty in the marketplace." [139]

178. As found by the Supreme Court of Canada in *Design Services Ltd. v. Canada*, "in cases of pure economic loss… care must be taken to find that a duty is recognized only in cases where the class of plaintiffs, the time and the amounts are determinate."[140]

179. Here, the time and amounts are not determinate. If a duty of care is to be recognized between Alberta and the Proposed Class Members in this case, then there is no reason such a duty would not expand to all businesses and persons experiencing any level of economic loss resulting from any public health orders made pursuant to the *Public Health Act*. This could include orders made in respect of food and housing regulations.

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[138] *Attis v Canada (Minister of Health)*, 2008 ONCA 660 at para 74 [Alberta Authorities, TAB 32]
[139] *Design Services Ltd. v. Canada*, 2008 SCC 22 at para 62 [Alberta Authorities, TAB 33]
[140] *Design Services Ltd. v. Canada*, 2008 SCC 22 at para 62 [Alberta Authorities, TAB 33]

180. The imposition of liability in this case on the public purse would place an indeterminate strain on available resources. This policy concern alone weighs heavily in favor of denying a duty of care.

Operational v Policy Conduct

181. With respect to the distinction between operational and policy conduct, the CMOH Orders in this case constituted core government policy decisions. The Supreme Court of Canada has confirmed that a core government policy decision does not give rise to a duty of care.[141]

182. Whether the Proposed Representative Plaintiffs have pleaded sufficient facts to show the CMOH Orders were operational in nature as opposed to core policy decisions in light of the *Public Health Act* can be determined at this stage of the proceedings, either within the residual policy analysis or as a threshold issue.

183. The Supreme Court of Canada in *R v Imperial Tobacco* ("*Imperial Tobacco"*) defined "core policy" decisions as "decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith."[142] In *Imperial Tobacco*, the Court found that the federal government's decisions to promote low-tar cigarettes and develop new strains of tobacco were based on public considerations such as economic, social, and political factors and were therefore core policy decisions. As such, conducting a pleadings analysis, the Supreme Court of Canada held:

> Applying this approach to motions to strike, we may conclude that where it is "plain and obvious" that an impugned government decision is a policy decision, the claim may be properly struck on the ground that it cannot ground an action in tort. [143]

184. In *Nelson (City) v Marchi*, the Supreme Court of Canada reaffirmed the *Imperial Tobacco* definition of a core policy decision noting that the primary rationale for shielding core policy decisions from liability in negligence is to maintain separation of powers. Subjecting those decisions to private law duties of care would entangle the courts in evaluating decisions best left to the legislature or the executive.[144]

185. Four factors are considered when determining if the challenged decision is a core policy decision:

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[141] *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 116 [Alberta Authorities, TAB 4]
[142] *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 90 [Alberta Authorities, TAB 4]
[143] *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 91 [Alberta Authorities, TAB 4]
[144] *Nelson (City) v Marchi*, 2021 SCC 41 at para 42 [Alberta Authorities, TAB 29]

a. The level and responsibilities of the decision-maker. The higher the level of the decision-maker, the closer the decision-maker is to an elected official and where the job responsibilities of the decision-maker include the assessment and balancing of public policy considerations, the more likely this factor will lean towards core policy immunity;[145]

b. The process by which the decision was made. If the decision making process was deliberative, required debate, involved input and was intended to have broad application and be prospective in nature, it will point to a core policy decision;[146]

c. The nature and extent of budgetary considerations. Budgetary allotments of departments agencies will be classified as a core policy decision;[147]

d. The extent to which the decision was based on objective criteria. The more a government decision weighs competing interests and requires making value judgments, the more likely it will be to engage the separation of powers and be a core policy decision.[148]

186. Conducting the required pleadings analysis in this case, it is plain and obvious that the Respondent is challenging immune core government policy decisions.

187. The decisions challenged by the Proposed Representative Plaintiffs are the CMOH Orders, which allegedly had economic impacts on the proposed class. The decision makers involved in the CMOH Orders included the Chief Medical Officer of Health, and as alleged by the Proposed Representative Plaintiffs and found in the *Ingram Decision,* government officials. Further, the Proposed Representative Plaintiffs' Claim states decision makers held political objectives.[149] These alleged facts, if taken as true, demonstrate the CMOH Orders involved decisions made by high level government members, including elected officials, balancing various policy considerations.

188. Additionally, the Proposed Representative Plaintiffs' Claim appears to take issue with Alberta's process in issuing the CMOH Orders, including that Alberta: should not have followed directions from agencies including the Public Health Agency of Canada and the World Health Organization;[150] that Alberta failed to "follow the science" that vaccines did not stop the spread of

[145] *Nelson (City) v Marchi*, 2021 SCC 41 at paras 56 and 62 [Alberta Authorities, TAB 29]
[146] *Nelson (City) v Marchi*, 2021 SCC 41 at para 56 and 63 [Alberta Authorities, TAB 29]
[147] *Nelson (City) v Marchi*, 2021 SCC 41 at paras 56 and 64 [Alberta Authorities, TAB 29]
[148] *Nelson (City) v Marchi*, 2021 SCC 41 at paras 56 and 65 [Alberta Authorities, TAB 29]
[149] The Claim at paras 66 and 85 [Alberta Compendium, TAB 1]
[150] The Claim at para 85 [Alberta Compendium, TAB 1]

COVID-19;[151] and that Alberta based their decisions on the "unverified, unscientific, and negligent opinions and recommendations of Dr. Hinshaw…".[152] However, even if assumed to be true, these claims only show that decision makers weighed different interests and made value judgments, reinforcing that the CMOH Orders were core policy decisions. The fact that the Proposed Representative Plaintiffs might disagree with the judgements made and interests considered does not change this assessment.

189. The CMOH Orders challenged by the proposed representative Plaintiffs were policies created by the members of the highest level of government in the Province, while balancing various interests, amidst and to address a global pandemic. These are the types of decisions made by the sorts of decision makers that are clearly policy based instead of operational in nature, and they should not give rise to liability. The legislative and executive branches have "core institutional roles and competencies that must be protected from interference by the judiciary's private law oversight."[153]

190. The *Public Health Act* makes it clear that the operational implementation/enforcement of the CMOH Orders falls to Alberta Health Services, which is a distinct legal entity.[154]

Conclusion on Negligence

191. In this case, the Proposed Representative Plaintiffs' negligence claim appears to be based entirely on Justice Romaine's findings in the *Ingram Decision.* However, the case law is clear that breach of statute is not an independent basis for tort liability.

192. Otherwise, Alberta did not have a proximate relationship with the proposed class or the individual representative plaintiffs so as to owe a private law duty of care. The interactions relating to CMOH Orders were not between decision makers and specific individuals but rather the public at large. The Proposed Representative Plaintiffs have not pled otherwise.

193. In any event, there are residual policy concerns that mitigate against finding a duty of care. A duty of care in this case would raise real concerns for indeterminate liability for decision makers issuing public health orders pursuant to the *Public Health Act*, particularly given this Claim is for pure economic loss.

[151] The Claim at para 86 [Alberta Compendium, TAB 1]
[152] The Claim at para 74 [Alberta Compendium, TAB 1]
[153] *Nelson (City) v. Marchi*, 2021 SCC 41 at para 67 [Alberta Authorities, TAB 29]
[154] *Public Health Act*, RSA 2000, c P-37, s.9 [Alberta Authorities, TAB 9]

194. Further, the CMOH Orders were decisions based on public policy considerations, such as economic, social and political factors. They were core government policy decisions, shielded from liability in negligence.

195. For these reasons, the Proposed Representative Plaintiffs' negligence claims against Alberta are bound to fail.

iv. Conversion Claim

196. The Proposed Representative Plaintiffs plead that the public declaration, administration, and enforcement of the CMOH Orders improperly converted their personal property and businesses.

197. While pleaded in their Claim and broadly stated in their Certification Application, a claim of conversion is not made out or even mentioned in the written submissions filed by the Proposed Representative Plaintiffs.

198. The Proposed Representative Plaintiffs have failed to plead any material facts or law which shows that they have a cause of action for conversion against Alberta.

Law

199. The Supreme Court of Canada's decision in *Boma Manufacturing Ltd. v. CIBC,*, describes conversion in the following manner:

> The tort of conversion involves the wrongful interference with the goods of another such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession.[155]

200. Uniquely, a universal definition of conversion has been avoided by the Courts. The Court of Appeal stated:

> …Conversion of goods can occur in so many different circumstances that framing a precise definition of universal application is well nigh impossible. In general, the basic features of the tort are threefold. First, the defendant's conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate, not accidental.

[155] *Boma Manufacturing Ltd. v CIBC*, [1996] 3 SCR 727 at para 31 [Alberta Authorities, TAB 34]

> Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods….[156]

201. While it is well established that there is no detailed universal test for the tort of conversion, the following simple elements have been presented in summary:

    a. A wrongful act;

    b. Involving a chattel;

    c. Consisting of handling, disposing, or destruction of the chattel;

    d. With the intention or effect of denying or negating the title of another person to such chattel.[157]

202. What is clear, is that conversion relates exclusively to goods – personal property – as opposed to real property. It is commonly used when describing a theft of chattels.

203. It is also clear that conversion is an intentional tort. The alleged wrongdoer must intend to deny or take or destroy.

204. While conversion is a strict liability tort, it still requires evidence of each of the simple elements of conversion in order for a claimant to be successful.

205. Conversion is "…some dealing with goods which is repugnant to someone else's right to posses them. Using those goods for your own benefit or purporting to sell, give, or lend them to another would be conversion. These acts involve an intention to exercise dominion over the goods. *Temporarily handling or detaining goods without that intention would not suffice*" (emphasis added).[158]

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[156] *Driving Force Inc. v I Spy-Eagle Eyes Safety Inc*., 2022 ABCA 25 at para 30 citing *Kuwait Airways Corporation v Iraqi Airways and others*, [2002] UKHL 19 at para 39 [Alberta Authorities, TAB 35]
[157] *Driving Force Inc. v I Spy-Eagle Eyes Safety Inc*., 2022 ABCA 25 at para 31 [Alberta Authorities, TAB 35]
[158] Robert Chambers, *An Introduction to Law of Property in Australia*, First edition, Sydney, Thomson Legal and Regulatory Group Asia Pacific Limited, 2001 at pg 56 [Alberta Authorities, TAB 36]

Public Declaration and Administration

206. The acts of public declaration and administration are separate and apart from enforcement and should be analyzed accordingly.

207. The mere act of promulgating and administering the CMOH Orders were not unlawful acts. While the CMOH Orders were found to be *ultra vires* the *Public Health Act*, without more, this does not equate to a wrongful act. It merely makes the CMOH Orders invalid.

208. There was no blameworthy conduct found by Justice Romaine in the *Ingram Decision* or as pled by the Proposed Representative Plaintiffs which would equate to a wrongful act.

209. There was no handling, disposing, or destruction of any chattels owned by the Proposed Representative Plaintiffs by the mere declaration and administration of the CMOH Orders. No specific property – such as fitness equipment, shares in a corporation, or meat in a fridge – were taken, used or destroyed by the public declaration and administration of the CMOH Orders.

210. At no time did the CMOH Orders intend to, or in fact, permanently limit any Proposed Class Member's possession of personal property. The pleadings do not even establish that the Proposed Class Members were the owners of the personal property. The class is not the incorporated businesses themselves, but the owners and operators. To the extent the incorporated business owned the personal property, a shareholder (or other type of owner based on the unique business structure) would not be the owner.

211. There are no pleadings that the CMOH Orders limited or affected businesses share structures and a plain reading of the CMOH Orders confirms that did not occur.

212. The Proposed Representative Plaintiffs' bare assertion that the promulgation and administration of the CMOH Orders improperly converted their personal property does not meet any of the simple requirements for the tort of conversion. A bare or bald assertion is not enough to establish a cause of action. Accordingly, this cause of action must fail.

Enforcement

213. As outlined above, at no material or relevant time did Alberta take enforcement measures in relation to the CMOH Orders.

214. The *Public Health Act* establishes that executive officers, employed by Alberta Health Services are responsible for administering and enforcing CMOH Orders.

215. The Proposed Representative Plaintiffs have appropriately confirmed in their pleadings that the issuance of closure orders, enforcement of business closures, and the seizure of goods were in fact all done by Alberta Health Services or the RCMP.

216. Additionally, all enforcement steps alleged in the pleadings were taken while the CMOH Orders were presumed valid and prior to the declaration in the *Ingram Decision* that the CMOH Orders were *ultra vires* the *Public Health Act*. The subsequent striking down of legislation (or here, the CMOH Orders), does not create liability.[159]

217. If the Proposed Representative Plaintiffs have a cause of action for conversion because of the monitoring and/or enforcement of the CMOH Orders, which is not borne out on the pleadings, such cause of action is not against Alberta. Accordingly, this cause of action against Alberta must also fail.

Conclusion

218. The Proposed Representative Plaintiffs have failed to plead any material facts to support a cause of action for conversion but have pled that it was in fact other parties who enforced the CMOH Orders.

219. Accordingly, there is no reasonable cause of action pled for conversion and this cause of action should not be certified pursuant to section 5(1)(a) of the *Class Proceedings Act*.

v. Breach of Fiduciary Duty Claim

220. In order for the Proposed Representative Plaintiffs' fiduciary duty claim to survive the cause of action test the necessary facts must be pled to establish that Alberta owed the class a fiduciary duty.

221. The leading case on when a fiduciary duty is owed in the government context is the Supreme Court of Canada decision in *Alberta v. Elder Advocates of Alberta Society*.[160]

[159] *1285486 Alberta Ltd v Ape Parkour Inc*., 2024 ABKB 406 at para 31 [Alberta Authorities, TAB 28]
[160] *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 [Alberta Authorities, TAB 37]

222. In *Elder Advocates*, the Court set out the general requirements for a fiduciary duty as established in *Frame v Smith* – but went on to note that "vulnerability alone is insufficient to support a fiduciary claim."[161]

223. In the general context of fiduciary duty, the claimant must plead vulnerability arising from the relationship, as well as:

    a. an undertaking by the alleged fiduciary to act in the best interest of the alleged beneficiary;

    b. a defined person or class of persons vulnerable to the fiduciaries control; and

    c. a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.[162]

224. While these general principles apply in the government context, the Court confirmed that the "special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances."[163]

225. The governmental responsibilities and functions means that an undertaking to act in an alleged beneficiary's best interest will be rare. The duty is one of utmost loyalty to the beneficiary, not to mediate between competing interests.[164]

226. In *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, the Supreme Court of Canada reaffirmed the principles articulated in *Elder Advocates*:

> It is now definitely a requirement of an ad hoc fiduciary relationship that the alleged fiduciary undertake, either expressly or impliedly, to act in accordance with a duty of loyalty. It is critical that the purported beneficiary be able to identify a forsaking of the interests of all others on the part of the fiduciary, in favour of the beneficiary, in relation to the specific interest at issue.[165]

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[161] *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at paras 27-28 [Alberta Authorities, TAB 37]
[162] *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24 at para 36 [Alberta Authorities, TAB 37]
[163] *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 37 [Alberta Authorities, TAB 37]
[164] *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 43 [Alberta Authorities, TAB 37]
[165] *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71 at para 124 [Alberta Authorities, TAB 38]

227. In a governmental context, where it is alleged that the "undertaking" flows from legislation, the statutory language must clearly support it.[166] "The mere grant to a public authority of discretionary power to affect a person's interests is not enough to create an undertaking."[167]

228. As articulated in the negligence section of this brief, to find a duty of care between Alberta and the Proposed Class Members would be a conflict, given Alberta's public duty under the *Public Health Act* is to the public at large, and not to protect any individual's or class of individuals' economic interests.

229. There is nothing in the *Public Health Act* to establish a private law duty of care or a fiduciary duty, between Alberta and individual owners and operators of business. Again, the fact that there is an immunity clause in the *Public Health Act* demonstrates the legislature's intention that no such duties are to be found.

230. The Proposed Representative Plaintiffs have not provided a factual foundation in their pleadings that Alberta at any time undertook to act in accordance with a duty of loyalty to the Proposed Class Members, and that Alberta took steps to forsake the interests of all others in favour of the Proposed Class Members to protect them from economic harm resulting from CMOH Orders.[168] Certainly, given the purpose and scheme of the *Public Health Act*, Alberta could not have given such an undertaking.

231. The Proposed Representative Plaintiff's claim that Alberta owed the Proposed Class Members a fiduciary duty is clearly bound to fail and should not be certified as a cause of action pursuant to section 5(1)(a) of the *Class Proceedings Act*

vi. Expropriation without Compensation Claim

232. The Proposed Representative Plaintiffs plead that the CMOH Orders included closures and restrictions which impacted the operation of businesses and that this amounted to expropriation without compensation by Alberta.

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[166] *K.L.B. v. British Columbia*, 2003 SCC 51 at para 40 [Alberta Authorities, TAB 39]
[167] *Johnson v British Columbia (Attorney General)*, 2022 BCCA 82 at para 140 citing *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24 at para 45 [[Alberta Authorities, TAB 40]
[168] *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71 at para 124 [Alberta Authorities, TAB 38]

233. It is additionally claimed that the CMOH Orders deprived the Proposed Class Members value in their business without proper authority or compensation, "potentially amounting to an abuse of power and disguised as expropriation".[169]

234. The Proposed Representative Plaintiffs point to the Bill of Rights as well as sections 52.6 and 52.7 of the *Public Health Act* as authority for their claims.

235. The Proposed Representative Plaintiffs have failed to plead any material facts to establish a cause of action for expropriation without compensation and the sections of the *Public Health Act* relied upon are irrelevant and of no application.

Expropriation Definition

236. The term expropriation is well-defined.

237. The Proposed Representative Plaintiffs' claim attempts to redefine the term expropriation for their purposes, which is improper in law.

238. The Supreme Court of Canada has stated that "expropriation, by definition, is the forced taking of land without the consent of the owner" (emphasis in original)[170].

239. At no time did the CMOH Orders take land or any property. They merely regulated the use of property, similar to numerous other regulations and permits.

240. The definition of expropriation implies permanency. The CMOH Orders were not permanent and the pleadings confirm they have been rescinded.

241. In the Claim, the Proposed Representative Plaintiffs have inappropriately conflated the notion of "expropriation" with the limited requirement for compensation for the acquisition or use of real or personal property during a public health emergency specifically under section 52.1 of the *Public Health Act.* The two are legally separate and distinct and the assertion that an 'expropriation' occurred here is incorrect at law and not supported by the pleadings.

[169] Brief of the Plaintiffs (Revised) at para 76
[170] *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 at para 142 [Alberta Authorities, TAB 41]

Sections 52.6 and 52.7 of the *Public Health Act*

242. The Proposed Representative Plaintiffs assert that the CMOH Orders interfered with the property and businesses of the Proposed Class Members by putting them to "use" pursuant to section 52.6 of the *Public Health Act* and that, accordingly, the class is entitled to compensation pursuant to section 52.7.

243. Section 52.6(1)(a) allows for the "acquisition or use" of property after a public health emergency is declared pursuant to section 52.1.

244. Compensation for the "acquisition or use" of property under section 52.6(1) requires a determination by arbitration under the *Arbitration Act* – and not by a civil action. This alone negates any cause of action for the claimed expropriation as this Court has no jurisdiction to determine such claims.

245. However, and in any event, any acquisition or use of property under section 52.6 is distinct from the CMOH Orders, which were issued pursuant to section 29(2) of the *Public Health Act*. On the plain reading of the CMOH Orders, they did not "acquire or use" any property.

246. The clear legislative intention of section 52.6 and 52.7 is to address circumstances where real or personal property are actually made use of by the government, such as use as an operation centre or to quarantine contagious individuals.

247. There are no facts pled to set out how the closures and/or restrictions in the CMOH Orders would put real or personal property to practical or effective use by Alberta. A bald assertion is not enough to establish a cause of action and flies in the face of any reasonable or common sense understanding of the word "use".

Conclusion

248. The CMOH Orders, do not, by definition, expropriate Proposed Class Members' property and no factual pleadings support such a claim.

249. The assertion that Alberta has put the businesses of the Proposed Representative Plaintiffs to 'use' pursuant to the CMOH Orders is patently false, and not supported by any pleadings or of a simple review of the CMOH Orders. And the legislative provisions relied upon by the Proposed Representative Plaintiffs are inapplicable and in any event remove the jurisdiction of this Court to determine what, if any compensation might be owed.

250. The four paragraphs included in the Claim by the Proposed Representative Plaintiffs claiming expropriation without compensation do not meet the burden for proving a cause of action pursuant to s. 5(1)(a) of the *Class Proceeding Act*. Accordingly, the cause of action alleging expropriation without compensation fails and should not be certified.

B. IDENTIFIABLE CLASS

251. Section 5(1)(b) of the *Class Proceedings Act* requires that there be an "identifiable class of 2 or more persons."[171]

252. The Supreme Court of Canada in *Sun-Rype Products Ltd. v Archer Daniels Midlands Co.* confirmed that the purpose of the class definition is threefold:

    a. To identify those persons who have a potential claim for relief against the defendants;

    b. To define the parameters of the lawsuit so as to identify those persons who are bound by the result; and

    c. Describe who is entitled to notice of the action.[172]

253. Given the critical importance of the class definition, the definition must state the objective criteria by which members of the class can be identified, must bear a rational relationship to the common issues asserted by the class members and should not depend on the outcome of the litigation.[173]

254. Flowing from the requirement that the class definition be objective and that it not depend on the outcome of the litigation is that the class definition must not be merits based. As Justice Slatter held in *Warner v Smith & Nephew Inc.*:

> Merits based classes are objectionable because of their circularity. The worst examples are definitions of the class as "all those who have a claim" or "all those who are entitled to damages." Under that sort of definition, it is impossible to even know who is in the class until the result is known, after trial.[174]

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[171] *Class Proceedings Act*, SA 2003, c C-16.5 at s. 5(1)(b) [Alberta Authorities, TAB 1]
[172] *Sun-Rype Products Ltd. v Archer Daniels Midlands Co*., 2013 SCC 58 at para 57 [Alberta Authorities, TAB 42]
[173] *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 at para 38 [Alberta Authorities, TAB 43]
[174] *Warner v Smith & Nephew Inc*., 2016 ABCA 223 at para 98 [Alberta Authorities, TAB 44]. See also *Chadha v Bayer Inc*., 2003 Canlii 35843, 63 OR (3d) 22 at para 69 (ONCA) [Alberta Authorities, TAB 45]

255. A class definition that is subjective or merits based is not acceptable as it:

i) frustrates efforts to identify the class;

ii) contravenes the policy against considering the merits of a claim at certification; and

iii) creates potential problems of manageability.

256. The class definition should also not be unnecessarily broad so as to include persons who have no claim against a defendant while at the same time, should not be unnecessarily narrow so as to arbitrarily exclude persons with similar claims to those asserted by the class.[175]

257. It is the plaintiff's onus to establish there is a proper class definition. While the Courts have held that this requirement is not overly onerous, the plaintiff must establish some basis in fact to meet the class definition requirements.[176]

258. Here, the Proposed Representative Plaintiffs' propose the following class definition:

> All individuals who owned or operated, either wholly or partially, a business or businesses in the Province of Alberta, and whose business operations were fully or partially restricted as a result of the measures contained in Alberta's Chief Medical Officer of Health public health orders ("CMOH Orders") between March 17, 2020 and the date of certification of this action as a class proceeding and who suffered damages and losses as a result.[177]

259. The proposed class definition includes:

a. Those who wholly or partially owned or operated a business in Alberta;

b. The business operations was fully or partially restricted by a CMOH Order between March 17, 2020 and the future date of the Court's decision on this application;

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[175] *Windsor v Canadian Pacific Railway Limited*, 2007 ABCA 294 at para 19 [Alberta Authorities, TAB 46]; and *Rieger v Plains Midstream Canada ULC*, 2022 ABCA 28 at para 67 [[Alberta Authorities, TAB 15]
[176] *Hollick v Toronto (City),* 2001 SCC 68 at para 21 [Alberta Authorities, TAB 47]
[177] Certification Application, filed April 25, 2024 at para 2 ("Certification Application") [Alberta Compendium, TAB 2]

c. The individuals suffered damages and losses as a result of the CMOH Orders which fully or partially restricted the businesses they owned or operated.

260. The proposed class is not the businesses themselves as independent legal entities. Instead, the proposed class consists of the individuals who "owned or operated" the businesses.

261. The Proposed Representative Plaintiffs' proposed class does not satisfy the class definition requirement of section 5(1)(b) of the *Class Proceedings Act* as there are two fundamental flaws with the class definition. First, the proposed class is overly broad as definition extends the class to individuals with no claim against Alberta relating to the CMOH Orders. Second, the proposed class definition is not objective as it is merits based and depends on the outcome of the litigation. It includes the requirement that the class member must have suffered "damages and losses" as a result of the CMOH Order.

262. The Proposed Representative Plaintiffs' evidence in support of certification is limited to two affidavits, one from each of the Proposed Representative Plaintiffs. Mr. Scott operated his business not as an incorporated legal entity but as a sole proprietorship. Ms. Ingram incorporated her business but was the sole Director and shareholder.

263. The Affidavit of Mr. Popik goes to the heart of the over-breadth of the class definition. As an expert accountant, Mr. Popik provides evidence with respect to which individuals would be included within the class definition of "owned or operated a business."

264. Businesses in Alberta can, and do, have many different structures which affect how, and to what extent, an individual may "own" the business. Owners can include those who:

a. Operate a business as a sole proprietorships where the business is unincorporated and the individual owner assumes all the risks of the business;

b. Own shares in an legally independent corporation, including in a closely held corporation with one shareholder, or a public corporation where shares are purchased and traded on a public stock exchange;

c. Join in a partnership, either as an individual, as a shareholder in a corporation or part of a trust. This can also include joining a Limited Partnership and a Limited Liability Partnership;

d. Own, control and run, along with others, a co-operative; or

e. Own a franchise as either a franchisee or a franchisor.[178]

265. Operators of a business, as defined in the class definition, would encompass over inclusive categories of individuals, including employees or contractors of the business.

266. Mr. Popik confirms that "operators" of a business can include individuals such as:

a. A Chief Executive Officer that oversees the business organization;

b. Individuals engaged with management responsibilities for the business; and

c. Employees working for wages or salary for the business.[179]

267. The individuals such as a CEO, those within management or employees of a business may fall within the class definition of "operating" the business. It would not be possible to objectively identify all the various individuals within the different types of business who may fall within the definition of "operating" a business.

268. Additionally, those individuals would be in a form of employment relationship with the business. Any potential losses by those individuals operating the business would be subject to employment agreements and labour and employment law principles, taking them outside the realm of a potential claim against Alberta for the CMOH orders.

269. Given the variety of individuals who may be captured by the proposed class definition, it is clear the definition is overly broad and does not meet the test requiring an objective, identifiable class definition.

270. In addition to being overly broad the class definition also suffers from the fundamental, and irredeemable, flaw of being merits based. The class definition includes the requirement that the individuals owning or operating a business "suffered damages and losses" as a result of the CMOH Orders.

271. The requirement to have suffered damages and losses is clearly merits based and is not objective. It turns on the outcome of this litigation in that it can not be known if the class, or any individual

[178] Popik Affidavit at ss. 6.04, 6.05 and 7.03 [Alberta Compendium, TAB 8]
[179] Popik Affidavit at ss. 6.06 – 6.17 [Alberta Compendium, TAB 8]

business suffered damages and losses as a result of the CMOH Order until liability and damages are established.

272. Further, the requirement of damages and losses requires individuals to make a subjective determination of whether they: i) suffered any damages or losses during class period; and ii) whether those damages and losses were the result of the CMOH Orders.

273. In *Chadha v Bayer Inc.* ("*Chadha*"), the Ontario Court of Appeal considered the propriety of the class definition in a price-fixing class action. Similar to the class definition in this action, in *Chadha* the class definition included "all persons in Canada who have *suffered loss or damage* as a result of the defendants' agreement to wrongfully increase or maintain the price of iron oxide and black pigment… (emphasis added)"[180]

274. The Ontario Court of Appeal held the class definition in *Chadha* was not acceptable and did not meet the certification requirements as it was "not objective, but turns on the outcome of the litigation."[181]

275. Some actions have attempted to circumvent the merits based class definition by defining the class as individuals who "claim" to have suffered losses. While the Proposed Representative Plaintiffs have not defined their class in such a way and have not sought to amend their class definition, amending the class here to include those who "claim to have suffered damages and losses" is equally problematic.

276. As in this case, where a claims based class definition is dependant on proof of causation, the class definition will be unacceptable.[182]

277. No matter how the class is attempted to be defined, the fundamental nature of the class requires impermissible proof of causation of damages or losses caused by the CMOH Orders.

278. The class membership is also subjective as the Proposed Class Members would be required to each individual to determine if the business suffered losses, which in turned flowed to them as owners or operators, were the result of the CMOH Orders. As set out in the evidence of Professor Cotton, some businesses may have suffered short-term losses but made greater than expected long term

[180] *Chadha v Bayer Inc*. [2003] O.J. No. 27, 2003 CanLii 35843 (ONCA) at para 6 [Alberta Authorities, TAB 45]
[181] *Chadha v Bayer Inc*. [2003] O.J. No. 27, 2003 CanLii 35843 (ONCA) at para 69 [Alberta Authorities, TAB 45]
[182] *Ragoonanan Estate v Imperial Tobacco Canada Ltd*., [2005] OJ No 4697, 2005 CanLii 5861 at paras 29 - 47 [Alberta Authorities, TAB 48]

profits during the class period. It is not objectively clear whether any Proposed Class Members suffered losses during some discrete period of time or throughout the class period as a whole.

279. Additionally, the Proposed Representative Plaintiffs' class definition requires a subjective assessment of whether any losses an individual believes they suffered were the result of the CMOH Orders or any number of other factors that may have caused businesses losses during the Covid-19 pandemic. These factors are discussed in the Affidavit of Professor Cotton and include factors such as:

    a. Were any business losses caused by decisions made by customers in response to the Covid-19 pandemic generally, as opposed to the CMOH Orders;

    b. Were any businesses losses cause by individual decisions of the business as it adapted to the Covid-19 pandemic and changing business environment;

    c. Were any business losses caused by staffing and employment issues or shortages; and

    d. Were any business losses caused by issue arising outside of Alberta, such as global economic shock, reduced out of province supply and/or demand, and supply chain issues.[183]

280. The Proposed Representative Plaintiffs' class definition in this action does not meet the requirements of section 5(1)(b) of the *Class Proceedings Act*. It is overboard, circular and wholly merits based, and requires a subjective assessment to determine if any individual is a member of the class.

281. As such, certification of this action should be denied on the basis of a failure to have a proper class definition.

C. COMMON ISSUES

282. Section 5(1)(c) of the *Class Proceedings Act* requires the plaintiff to demonstrate the claims of the Proposed Class Members raise common issues.

[183] Cotton Affidavit, at paras 86 - 95 [Alberta Compendium, TAB 9]

283. The resolution of the proposed common issues is the heart of a class proceeding.[184] As the Supreme Court of Canada held in *Western Canadian Shopping Centres v Dutton* with respect to the common issues test:

> The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication or fact-finding and legal analysis. Thus the issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> Success for one class member must mean success for all.[185]

284. A proposed common issue will only be common in the requisite sense where:

a. The resolution of the issue will avoid duplication of fact-finding or legal analysis;

b. The common issue is "a substantial ingredient" of each class member's claims; and

c. Success for one member on a common issue will mean success for all;[186]

285. The common issues should not be framed in overly broad or general terms. Courts should ensure that an issue is truly common and not made to appear common by the manner in which it is posed. As the Supreme Court of Canada held in *Rumley v British Columbia*:

> It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceedings less fair and less efficient.[187]

286. The plaintiff bears the evidentiary burden of showing, based on admissible evidence, "some basis in fact" for each of the proposed common issues. While the evidentiary onus needed to meet the requirement for each common issues is a lower standard than the balance of probabilities typically

[184] *Thorburn v British Columbia*, 2013 BCCA 480 at para 35 [Alberta Authorities, TAB 49]
[185] *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 at paras 39 and 40 [Alberta Authorities, TAB 43]
[186] *Fisher v Richardson GMP Limited*, 2022 ABCA 123 at para 37 [Alberta Authorities, TAB 50]; and *Thorburn v British Columbia*, 2013 BCCA 480 at para 37 [Alberta Authorities, TAB 49]
[187] *Rumley v British Columbia*, 2001 SCC 69 at para 29 [Alberta Authorities, TAB 51]. See also *Scherle v Treadz Auto Group Inc*. 2019 ABQB 987 at para 328 [Alberta Authorities, TAB 52]

used to "prove" a fact in civil matters, this standard operates as an important screening device requiring "more than symbolic scrutiny."[188]

287. Specifically, the onus is on the plaintiff to adduce some basis in fact that (a) the common issue actually exists; and (b) the proposed issue can be answered in common across the class.[189]

288. The Proposed Representative Plaintiffs incorrectly submit that the Court should not "require evidence to decide whether the proposed common issue exists."[190] A careful reading of the paragraphs relied upon by the Proposed Representative Plaintiffs, taken from the Supreme Court of Canada decision in *Pro-Sys Consultants Ltd. v. Microsoft Corp.* ("*Pro-Sys*")[191] and the Ontario Court of Appeal in *Fehr v Sun Life Assurance Company of Canada,* [192] confirms this is not the accepted or proper approach to analysing the common issues.

289. A number of decisions endorse the "two-step approach" which requires the Proposed Representative Plaintiffs to first provide some basis in fact that the common issue actually exists in fact. A thorough analysis and review of the law on the commonality requirement was recently conducted by the Federal Court of Appeal in *Jensen v Samsung Electronics Co. Ltd.* ("*Jensen*")[193]

290. In *Jensen*, the Federal Court of Appeal rejected the argument that *Pro-Sys* stood for the proposition that the plaintiff was not required to show a basis in fact for the existence of a common issue. Justice Rothstein's comment at paragraph 110, relied upon by the Proposed Representative Plaintiffs, was made in response to an argument that the plaintiff was required to establish the some basis in fact standard on a balance of probabilities. Justice Rothstein was merely confirming the some basis in fact standard does not require a determination at that higher standard of proof, which is in line with previous and subsequent Supreme Court of Canada authorities.[194]

291. As the Federal Court of Appeal held:

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[188] *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 at para 103 [Alberta Authorities, TAB 53]; *Spring v Goodyear Canada Inc.*, 2021 ABCA 182 at para 34 [Alberta Authorities, TAB 54]
[189] *Lilleyman v Bumble Bee Foods LLC,* 2024 ONCA 606 at paras 67 – 70 [Alberta Authorities, TAB 56]; *Jensen v Samsung Electronics Co. Ltd*., 2023 FCA 89 at paras 81, 90, and 91 [Alberta Authorities, TAB 57]; *King & Dawson v Government of P.E.I.,* 2020 PECA 13 at para 70 [Alberta Authorities, TAB 59]
[190] Brief of the Plaintiffs (Revised) at paras 89 and 90
[191] *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 at para 110 as cited by the Brief of the Plaintiffs (Revised) at para 89
[192] *Fehr v Sun Life Assurance Company of Canada*, 2018 ONCA 718 at para 86 as cited in the Brief of the Plaintiffs (Revised) at para 90 [Alberta Authorities, TAB 60]
[193] *Jensen v Samsung Electronics Co.* Ltd. 2023 FCA 89 at paras 71 – 91 [Alberta Authorities, TAB 57]
[194] *Jensen v Samsung Electronics Co.* Ltd. 2023 FCA 89 at para 82 – 89 [Alberta Authorities, TAB 57]

> I fail to see how it can seriously be argued that a judge could determine whether the claims of the class members raise common questions of law or fact without first deciding whether there is some basis in fact for the very existence of each common issue.[195]

292. This approach and interpretation of *Pro-Sys* was specifically adopted by the Ontario Court of Appeal in the 2024 decision of *Lilleyman v Bumble Bee Foods LLC*.[196] In *Lilleyman*, the Ontario Court of Appeal held that the requirement for the plaintiff to satisfy the minimal evidentiary standard of some basis in fact that the common issue relating to a cause of action actually exists goes directly to the underlying purpose of class proceedings:

> Certification of a claim that is unable to satisfy such a minimal evidentiary standard would undermine judicial economy, and in the process indirectly impair access to justice for other arguably meritorious claims.[197]

293. The decision in *Fehr* similarly only stands for the proposition that certification does not require an examination of the merits whereby the common issue is proven.[198]

294. The Alberta Court of Appeal implicitly adopted the "two-step approach" in *Spring v Goodyear Canada Inc.* In discussing the evidentiary requirement of the some basis in fact standard, the Court of Appeal confirmed that the common issues should not be certified where there is a "complete absence of evidence."[199]

295. Relevant to the allegations and the common issues in this action, the Court of Appeal in *Spring* went on to hold that the requirement to show some basis in fact for the existence of a common issue is particularly important where the allegations relate to intentional misconduct and dishonesty.[200]

296. This reasoning, which requires a minimum evidentiary basis to show the common issues actually exist, was again endorsed by the Alberta Court of Appeal in *Flesch v Apache Corporation*.[201]

297. In the filed Notice of Application to certify this matter as a class proceeding, the Proposed Representative Plaintiffs set out four proposed common issues:

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[195] *Jensen v Samsung Electronics Co.* Ltd. 2023 FCA 89 at para 77 [Alberta Authorities, TAB 57]
[196] *Lilleyman v Bumble Bee Foods LLC,* 2024 ONCA 606 at paras 67 – 77 [Alberta Authorities, TAB 56]
[197] *Lilleyman v Bumble Bee Foods LLC,* 2024 ONCA 606 at para 74 [Alberta Authorities, TAB 56]
[198] *Fehr v Sun Life Assurance Company of Canada*, 2018 ONCA 718 at para 86 [Alberta Authorities, TAB 60]
[199] *Spring v Goodyear Canada Inc*., 2021 ABCA 182 at para 40 [Alberta Authorities, TAB 54]
[200] *Spring v Goodyear Canada Inc*., 2021 ABCA 182 at para 40 [Alberta Authorities, TAB 54]
[201] *Flesch v Apache Corporation,* 2022 ABCA 374 at para 28 [Alberta Authorities, TAB 61]

a. Did the CMOH Orders violate specific property rights under the *Alberta Bill of Rights*?

b. Did the Defendant act negligently and unlawfully by enforcing the CMOH Orders on businesses?

c. If the answer to common issues (a) or (b) is "yes", should the Proposed Class Members be entitled to damages for losses as a result of the Defendant's actions?

d. If the answer to common issue (c) is "yes", should the Defendant be liable to pay damages in the aggregate, and if so, what is the appropriate amount of such aggregate damages?[202]

298. Without amending the certification application, the Proposed Representative Plaintiffs appear to seek to amend the proposed common issues in their written submissions. At paragraph 96 of the Proposed Representative Plaintiffs' written submissions, the common issues are identified as:

a. Whether the CMOH Orders violated specific property rights under the *Alberta Bill of Rights Act*?

b. Whether the implementation and enforcement by the Defendant of the CMOH Orders were negligent or amount to an abuse of power? and

c. Whether the Defendant's actions create a liability for damages?

299. Again in their written submissions, the Proposed Representative Plaintiffs seek to additionally amend the common issues relating to damages. At paragraph 118 of the Proposed Representative Plaintiffs' written submissions, the new proposed common issues relating to damages are:

a. If the answer to any of the common issues are "yes", what remedies are the Proposed Class Members entitled to?

b. If the answer to any of the common issues is "yes", is the defendant potentially liable on a class-wide basis?

c. If the answer to (b) is "yes", can damages be assessed on an aggregate basis?

[202] Certification Application at para 4 [Alberta Compendium, TAB 2]

d. If "yes":

i. Can aggregate damages be assessed in whole or in part on the basis of statistical evidence, including statistical evidence based on random sampling?

ii. What is the quantum of aggregate damages owed to the class?

iii. What is the appropriate method of procedure for distributing the aggregate damages award to the Class?

e. Is the Class entitled to an award of aggravated or punitive damages based upon the Defendant's conduct? If yes?

i. Can the award of aggravated or punitive damages be determined on an aggregate basis?

ii. What is the appropriate method of procedure for distributing any aggravated or punitive damages to the Proposed Class Members?

300. The Proposed Representative Plaintiffs have not satisfied the test to establish common issues under section 5(1)(c) of the *Class Proceedings Act*. The proposed common issues lack any basis in fact, are framed in the abstract in an attempt to appear common, and do not significantly advance the Proposed Class Members' claims.

Common Issue #1 – Alberta Bill of Rights

301. Proposed common issue one asks whether the CMOH Orders breached the *Alberta Bill of Rights*. This common issue fails as it does not significantly advance the Proposed Class Members' claims. In fact, answering this common issue does not advance Proposed Class Members' claims at all.

302. The property rights provision of section 1(a) of the *Alberta Bill of Rights* holds that an individual has the right to the enjoyment of property, and the right not to be deprived thereof except by due process of law.[203]

[203] *Alberta Bill of Rights*, RSA 2000, c A-14 at s 1(a) [Alberta Authorities, TAB 62]

303. The *Alberta Bill of Rights* operates to make a legislative provision or action inoperative to the extent that it violates a provision of the *Alberta Bill of Rights*.[204] As noted above, there is no provision within the *Alberta Bill of Rights* that authorizes or allows damages to be awarded for a breach. This is in contrast to section 24(2) of the *Charter* which does allow the Court to grant a meaningful remedy for a *Charter* breach.

304. A positive answer to this common issue can only result in a declaration that the CMOH Orders are inoperative. However, the CMOH Orders have already been found by Justice Romaine in the *Ingram Decision* to be inoperative as they determined to be *ultra vires* the *Public Health Act*.[205]

305. Justice Romaine's decision finding the CMOH Orders were *ultra vires* the *Public Health Act* was not appealed and the decision now stands as settled law.

306. A legal common issue that seeks to determine settled law can not and does not advance the Proposed Class Members' action, as the class already has an answer to the common issue.

307. Recently Justice Perell of the Ontario Superior Court of Justice in *Stolove v Waypoint Centre for Mental Health Care*, denied a common issue (and refused certification generally), where the proposed common issue sought to determine an issue of settled law. It was held that the "answers at a common issues trial while having superficial commonality will not do much to advance the class members claims."[206]

308. Given the Proposed Class Members already have an answer to whether the CMOH Orders are *intra vires* or *ultra vires* the *Public Health Act*, this proposed common issue does nothing to advance their claims.

309. Further, the *Ingram Decision* also does not assist the Proposed Representative Plaintiffs in establishing some basis in fact for this common issue. Justice Romaine considered and rejected the argument, advanced by the representative plaintiff, Ms. Ingram, that the CMOH Orders breached section 1(a) of the *Alberta Bill of Rights*.[207]

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[204] *Lavallee v Alberta (Securities Commission)*, 2009 ABQB 17, at para 207 [Alberta Authorities, TAB 63]; and *Yin v Lewin*, 2006 ABQB 402 at para 2 [Alberta Authorities, TAB 64]
[205] *Ingram v Alberta (Chief Medical Officer of Health)*, 2023 ABKB 453 at paras 2 and 520 [Alberta Authorities, TAB 5]
[206] *Stolove v Waypoint Centre for Mental Health Care*, 2024 ONSC 3639,at para 374 [Alberta Authorities, TAB 65]
[207] *Ingram v Alberta (Chief Medical Officer of Health)*, 2023 ABKB 453 at paras 452 - 510 [Alberta Authorities, TAB 5]

310. Justice Romaine specifically found that the rights set out in the *Alberta Bill of Rights* are subject to an implicit internal limit. Any breach of property rights occasioned by the CMOH Orders were justifiable, not arbitrary or capricious.[208]

311. Certification is not an examination of the merits, and at this stage, the Proposed Representative Plaintiffs' are not required to "prove" a breach of the *Alberta Bill of Rights* actually occurred. However, the Proposed Representative Plaintiffs have failed to establish even a minimum evidentiary basis or any basis in fact that could be considered contrary to the finding made in the *Ingram Decision* in relation to the CMOH Orders infringement of the *Alberta Bill of Rights*.

312. Finally, as indicated above, answering the common issue of whether the CMOH Orders breached the *Public Health Act* will only result in a finding the CMOH Orders are inoperative. In addition to already being *ultra vires* the *Public Health Act*, such a finding alone does not advance the Proposed Class Members' civil claim as: i) all the CMOH Orders were varied or rescinded throughout the class period and no CMOH Order has been in force since June 2022 (prior to Justice Romaine's decision); and ii) a breach of a statute does not create a stand alone cause of action.

313. It has long been recognized that no independent civil cause of action exists for the breach of a statute.[209] The Proposed Class Members will still have to establish at least one causes of action alleged in the Claim and any finding of a breach of the *Alberta Bill of Rights* will not assist in that analysis.

Common Issue #2 – Enforcement of CMOH Orders

314. The Proposed Representative Plaintiffs propose a common issue whether Alberta's implementation and enforcement of the CMOH Orders was negligent or an abuse of power.

315. This common issue must fail for two reasons. First, there is no basis in fact that Alberta implemented or enforced the CMOH Orders and therefore, there is no basis in fact that this common issue actually exists. The relevant legislation and all the evidence confirms the implementation and enforcement of the various CMOH Orders in place during the class period was the responsibility of Alberta Health Services. Alberta Health Services is a separate and distinct legal entity from Alberta for which Alberta is not responsible at law.

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[208] *Ingram v Alberta (Chief Medical Officer of Health)*, 2023 ABKB 453 at para 510 [Alberta Authorities, TAB 5]
[209] *The Queen (Can.) v Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at paras 37 and 38 [Alberta Authorities, TAB 14]; and *Rieger v Plains Midstream Canada ULC*, 2022 ABCA 28 at para 61 [Alberta Authorities, TAB 15]

316. Second, the implementation and enforcement of the various CMOH Orders is an individual issue that cannot be answered in common across the class. The Proposed Representative Plaintiffs have failed to show some basis in fact that this question can be answered in common on a class wide basis.

317. This common issue does not exist as against Alberta. The *Public Health Act* specifically authorizes Executive Officers to enforce the provisions of the *Act*, including the CMOH Orders.

318. Section 9 of the *Public Health Act* states that:

> 9(1) a regional health authority shall appoint one or more persons as medical officers of health and one or more persons as executive officers for the regional health authority for the purpose of carrying out this Act and the regulations.[210]

319. "Regional health authority" is defined in the *Public Health Act* as the regional health authority established under *Regional Health Authorities Act*.[211]

320. The *Regional Health Authorities Act* created Alberta Health Services as an independent corporation.[212]

321. Through the legislation, the enforcement of the *Public Health Act* clearly falls to employees of Alberta Health Services and not to Alberta.

322. Executive Officers are authorized under the *Public Health Act* to:

a. Inspect any public place for the purpose of determining whether the Act and regulations are being complied with;[213]

b. Issue written orders to comply where an place, owner of a place or any other person is in contravention of the Act or the regulations;[214]

[210] *Public Health Act*, RSA 2000, c P-37 at s 9(1) [Alberta Authorities, TAB 9]
[211] *Public Health Act*, RSA 2000, c P-37 at s 1(1)(kk) [Alberta Authorities, TAB 9]. This section of the *Public Health Act* was amended on May 30, 2024 by the *Health Statutes Amendment Act*, 2024, SA 2024, c 10 at s 34(2) [Alberta Authorities, TAB 66]
[212] *Regional Health Authorities Act*, RSA 2000, c R-10 at ss 2 and 3 [Alberta Authorities, TAB 67]
[213] *Public Health Act*, RSA 2000, c P-37 at s 59(1) [Alberta Authorities, TAB 9]
[214] *Public Health Act*, RSA 2000, c P-37 at s 62 [Alberta Authorities, TAB 9]

c. Carry out the written order if the person fails to comply;[215]

d. Apply to the Court of King's Bench for any order considered necessary to enforce the Act.[216]

323. In *Pervez v Alberta Health Service*, Justice Hillier considered the role of executive officers in enforcing the *Public Health Act*. Justice Hillier confirmed:

a. Executive officers are appointed by Alberta Health Services;[217]

b. Executive officers are charged with a public function of carrying out responsibilities pursuant to the *Public Health Act*;[218] and

c. The Legislature has conferred significant responsibilities on executive officers for regional health authorities pursuant to section 9(1).[219]

324. There are a number of Court decisions confirming that the enforcement of the CMOH Orders issued during the Covid-19 pandemic was the responsibility of Alberta Health Services.

a. In *1285486 Ltd. v Ape Parkour Inc*, Justice Millsap considered an application to strike and summarily dismiss claims against Alberta Health Services and Alberta relating to a CMOH Order. Justice Millsap confirmed that Alberta Health Services was the party that took efforts to "ensure compliance with the [CMOH] Orders";[220]

b. In *2248870 Alberta Ltd (Stacy's Happy Place) v Alberta Health Services*, Justice Malik considered a judicial review of orders and suspensions issued by an Alberta Health Services executive officer in an attempt enforce the CMOH Orders issued to address the Covid-19 pandemic. Justice Malik confirmed it was Alberta Health Services that received complaints, conducted inspections and issued ordered with respect to compliance with CMOH Orders;[221]

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[215] *Public Health Act*, RSA 2000, c P-37 at s 62.1 [Alberta Authorities, TAB 9]
[216] *Public Health Act*, RSA 2000, c P-37 at s 66.2 [Alberta Authorities, TAB 9]
[217] *Pervez v Alberta Health Services*, 2017 ABQB 446 at para 1 [Alberta Authorities, TAB 68]
[218] *Pervez v Alberta Health Services*, 2017 ABQB 446 at para 44 [Alberta Authorities, TAB 68]
[219] *Pervez v Alberta Health Services*, 2017 ABQB 446 at para 46 [Alberta Authorities, TAB 68]
[220] *1285486 Alberta Ltd. v Ape Parkour Inc.*, 2024 ABKB 406 at paras 2 - 6 [Alberta Authorities, TAB 28]
[221] *2248870 Alberta Ltd (Stacey's Happy Place) v Alberta Health Service*, 2023 ABKB 368 at paras 1 – 3, 7 – 8, 14 – 15, and 28 – 29 [Alberta Authorities, TAB 69]

c. With respect to Mr. Scott, the Proposed Representative Plaintiff in this action, in *Alberta Health Services v Pawlowski*, the Court of Appeal considered an appeal of the sanction arising from a finding of contempt of court against Mr. Scott. The Court of Appeal noted Alberta Health Services obtained the initial Court injunction and brought the contempt application after Mr. Scott failed to comply with CMOH Orders.[222]

325. As confirmed by the legislation and the case law, Alberta Health Services is the legal entity responsible for the enforcement of CMOH Orders issued under the *Public Health Act*, including the CMOH Orders at issue in this Action. Alberta is not the responsible party and the Proposed Representative Plaintiffs have provided no basis in fact that such a common issue actually exists.

326. This proposed common issue also fails for lack of commonality. The evidence establishes that the enforcement of any of the CMOH Orders in force at any time during the class period requires is an individual assessment of each individual instance. It cannot be answered across the class. Similarly, whether any such enforcement was conducted negligently or as an abuse of power requires an individual assessment that can not be applied across the class.

327. The Affidavit of Mr. Ridge confirms that some businesses did not comply with at least some of the CMOH Orders. The extent of compliance both with the CMOH Orders generally and with the specific requirements within each CMOH Order would vary by each business.[223]

328. Whether CMOH Orders were enforced with respect to any one business requires determining if that business complied with the CMOH Orders, and if not, whether Alberta Health Services took enforcement steps at all with respect to the non-compliance.

329. The evidence of Mr. Ridge is that there were 110,411 complaints made by the public to Alberta Health Services in relation compliance with the CMOH Orders by a business in Alberta. Arising from the complaints, there were 96,981 inspections conducted by Alberta Health Services related to Covid-19 complaints.[224]

330. If Alberta Health Services conducted an inspection on a business and non-compliance with a CMOH Order was observed, the Alberta Health Services executive officer conducting the

[222] *Alberta Health Service v Pawlowski*, 2022 ABCA 254 at paras 1, 2, 5 – 9 [Alberta Authorities, TAB 70]. Mr. Scott did not appeal the finding of contempt, only the sanction imposed. See para 2.
[223] Ridge Affidavit at para 140 and Exhibit T [Alberta Compendium, TAB 7]
[224] Ridge Affidavit at paras 146 and 147 [Alberta Compendium, TAB 7]

investigation, had discretion and flexibility, in accordance with their professional judgment, to determine what enforcement measures to take.[225]

331. The various enforcement techniques that may be undertaken by Alberta Health Services for any individual business includes:

    a. Seek voluntary compliance by providing education to the owner and allowing time to correct the issue of non-compliance;[226]

    b. Issuing a written warning to correct the issue of non-compliance;[227]

    c. Issuing a correction order;[228]

    d. Issuing a closure order;[229]

332. Where a closure order has been issued by an Alberta Health Services executive officer and the business continues to operate in non-compliance, Alberta Health Services may pursue litigation (as seen above), including a Court injunction to enforce the order.[230]

333. The Affidavits of both Proposed Representative Plaintiffs confirm the individualized nature of compliance with the CMOH Orders during the class period and with Alberta Health Services' role in the enforcement of the CMOH Orders.

334. Mr. Scott's evidence is that he and his business complied with some CMOH Orders but not others.[231] Mr. Scott confirmed in his Affidavit that Alberta Health Services:

    a. Issued closure orders for Whistle Stop;

    b. Obtained an injunction to force compliance;

    c. Forcibly closed Whistle Stop.[232]

[225] Ridge Affidavit at paras 148 and 149 [Alberta Compendium, TAB 7]
[226] Ridge Affidavit at para 149 [Alberta Compendium, TAB 7]
[227] Ridge Affidavit at para 152 and Exhibit X [Alberta Compendium, TAB 7]
[228] Ridge Affidavit at para 153 [Alberta Compendium, TAB 7]
[229] Ridge Affidavit at para 154 [Alberta Compendium, TAB 7]
[230] Ridge Affidavit at para 155 [Alberta Compendium, TAB 7]
[231] Scott Cross-Examination, pg 51, line 9 – pg 52, line 6 [Alberta Compendium, TAB 10]
[232] Scott Affidavit at paras 7 and 8 [Alberta Compendium, TAB 4]

335. Mr. Scott also confirmed that Alberta Health Services did not immediately issue a closure order or seek a court injunction upon noting his non-compliance. Instead, Alberta Health Services provided information and education about how to comply with the CMOH Orders.[233]

336. Ms. Ingram's evidence was that Alberta Health Services employees at various times attended her business to inspect for compliance with the CMOH Orders. Ms. Ingram confirmed that her business complied with the CMOH Orders, although Ms. Ingram was fined on one occasion for failing to allow Alberta Health Services employees access. Alberta Health Services also provided education and suggestions regarding compliance.[234]

337. The individual nature of this proposed common issue is further highlighted by the Proposed Representative Plaintiffs framing of the common issue in relation to negligence and abuse of power, both of which require individual assessment and are not amenable to class wide, common determinations.

338. Seeking an answer to a common issue relating to negligence or an abuse of power only has the appearance of commonality but would break down into individual issues. To determine negligence necessarily requires an assessment of what was reasonableness in each individual circumstance.[235]

339. Similarly, determining whether any enforcement actions constituted an abuse of power requires a consideration of whether the actions were carried out for an improper purpose, contrary to the law.[236]

340. This necessarily requires an examination of each enforcement action taken to determine not only if it was reasonable in the circumstance, but whether it was taken for an improper purpose, and not in relation to the enforcement of the *Public Health Act* or the CMOH Orders.

341. Given the nature of the proposed common issue, which requires an assessment of each individual enforcement action, and the clear evidence that enforcement of the CMOH Orders is an individual issue, this proposed common issue also fails for lack of commonality. It will necessarily break down into individual assessments.

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[233] Scott Cross-Examination, pg 96, line 7 – pg 97, line 10 [Alberta Compendium, TAB 10]
[234] Ingram Cross-Examination, pg. 62, line 24 – pg. 70, line 16 [Alberta Compendium, TAB 11]
[235] *Thorburn v British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480 at para 41 - 43 [Alberta Authorities, TAB 49]
[236] *Starline Entertainment Centres Inc. v Ciccarelli*, [1995] O.J. No 2494, 1995 CanLii 7132 (ONSC) at paras 50 - 59 [Alberta Authorities, TAB 71]

Common Issue #3 – Liability of Alberta

342. The Proposed Representative Plaintiffs propose a common issue of whether Alberta's actions created a liability for damages to the class.

343. This common issue is framed at the highest level of abstraction in order to attempt to appear common. The Proposed Representative Plaintiffs have not proposed any common issues relating to any of the causes of action pled in the Claim. To determine "liability" will require an examination of whether, on a class wide basis, any of the causes of action are established and whether Alberta can rely on possible defences.

344. As set out above, the Proposed Representative Plaintiffs are required at this stage of the certification proceedings to provide some basis in fact for this common issue. They have failed to do so.

345. Further, an examination of the proposed causes of actions that would have to be examined confirms they are not amenable to being answered on a class wide basis.

346. The Proposed Representative Plaintiffs cannot simply rely on the finding by Justice Romaine that the CMOH Orders were *ultra vires* the *Public Health Act* to establish some basis in fact for liability to the class.

347. Before turning to a consideration of the causes of action pled in the context of this common issue, it is important to reiterate that in order to establish liability relating to the now *ultra vires* CMOH Orders, the Proposed Representative Plaintiffs must meet the threshold requirement of showing the "clearly *ultra vires*" standard and of bad faith or improper purpose.

348. Both Supreme Court of Canada decisions in *Mackin* and in *Power* set a heightened threshold to establish liability where the basis of the claim involves a law declared to be inoperative. Similarly, section 66.1 of the *Public Health Act* provides immunity for all actions done in good faith.

349. To satisfy this common issue of whether Alberta may be liable to the Proposed Class members, the Proposed Representative Plaintiffs must establish some basis in fact of bad faith, improper purpose and that the CMOH Orders were clearly *ultra vires* at the time they were issues.

350. This is not to say the Proposed Representative Plaintiffs need to "prove" such facts at the certification stage. They clearly do not. But the Proposed Representative Plaintiffs are required to

show some basis in fact for the common issue so that the Court can meaningfully fulfill its screening function at certification.

351. The Proposed Representative Plaintiffs have failed to show any basis in fact that the CMOH Orders were clearly *ultra vires* the *Public Health Act* at the time of their enactment or they were enacted in bad faith or an improper purpose. The evidence clearly shows there was no such basis and that Alberta acted in good faith by attempting to address and mitigate the health, economic and overall societal effects of a novel, global Covid-19 pandemic.

352. The CMOH Orders were not clearly *ultra vires* the *Public Health Act* at the time they were enacted, as even the applicants before Justice Romaine did not initially raise that argument when challenging the CMOH Orders. Only after the decision in *C.M. v Alberta* (issued after all the CMOH Orders had been rescinded) did the applicants raise this new argument, near the end of that hearing.[237]

353. The Affidavit of Mr. Ridge establishes that the CMOH Orders were at all times meant to address the novel global pandemic caused by Covid-19 and to reduce the number of hospitalizations, ICU admissions, deaths and adverse health effects of Covid-19.[238] These adverse effects include 6,401 deaths in Alberta attributable to Covid-19 as of May 18, 2024;[239] hospital and ICU capacity being severely strained such that there was a real risk that individuals would have to be triaged and not receive care;[240] and long term health affects from contracting Covid-19.[241]

354. To this end, the CMOH Orders:

    a. relied upon the evolving and developing evidence of Covid-19 available at the time;[242]

    b. were in-line with the accepted principles of public health and preventative medicine by being as targeted as possible so to minimally limit the freedoms of Albertans and the impacts on society;[243]

[237] *Ingram v Alberta (Chief Medical Officer of Health),* 2023 ABKB 453 at para 13 and 14 [Alberta Authorities, TAB 5]
[238] Ridge Affidavit at para 80 [Alberta Compendium, TAB 7]
[239] Ridge Affidavit at para 64 [Alberta Compendium, TAB 7]
[240] Ridge Affidavit at paras 66 – 70 and 72 – 79 [Alberta Compendium, TAB 7]
[241] Ridge Affidavit at para 44 [Alberta Compendium, TAB 7]
[242] Ridge Affidavit at para 47 [Alberta Compendium, TAB 7]
[243] Ridge Affidavit at paras 48 - 55 and 80 [Alberta Compendium, TAB 7]

c. were, when possible, geographically targeted based on Covid-19 infections;[244]

d. were targeted to locations and activities with the highest shown risk of Covid-19 transmission;[245]

e. were implemented after recommended voluntary health measures were insufficient;[246]

f. were rescinded based upon the available evidence of reduced transmission and effects of Covid-19;[247] and

g. were made with due consideration of the implications on the economy, people and businesses.[248]

355. Ms. Hogemann's Affidavit speaks directly to Alberta's good faith efforts to address the impacts of the Covid-19 pandemic and the CMOH Orders on the economy and businesses in Alberta. Alberta had $5.1 billion in expenses as a result of the Covid-19 pandemic and Covid-19 programs and supports in the 2020-2021 fiscal year.[249] Alberta had $3.8 billion in expenses as a result of the Covid-19 pandemic and Covid-19 programs and supports in the 2021 – 2022 fiscal year[250] and $2.1 billion in the 2022 – 2023 fiscal year.[251]

356. The evidence at this certification application is clear that the CMOH Orders, while having been subsequently found to be *ultra vires* the *Public Health Act*, were not clearly understood to be so at the time and were not issued in bad faith or an improper purpose.

357. As noted above, but worth re-iterating here, the Court of Appeal in *Spring v Goodyear Canada Inc.* has held that the some basis in fact standard, even through it is a low standard, will not be met where there is a complete lack of evidence with respect to a claim of intentional misconduct or dishonesty.[252]

[244] Ridge Affidavit at paras 88, 93, 96, 98, 112, 113 [Alberta Compendium, TAB 7]
[245] Ridge Affidavit at para 88 [Alberta Compendium, TAB 7]
[246] Ridge Affidavit at paras 93 and 94 [Alberta Compendium, TAB 7]
[247] Ridge Affidavit at paras 87, 88, 117 – 120, 133 – 137 [Alberta Compendium, TAB 7]
[248] Cross-Examination on Affidavit of Andy Ridge, June 21, 2024, pg 8, line 22 – pg 9, line 8
[249] Hogemann Affidavit at paras 9 – 12 [Alberta Compendium, TAB 6]
[250] Hogemann Affidavit at paras 13 – 16 [Alberta Compendium, TAB 6]
[251] Hogemann Affidavit at paras 17 – 20 [Alberta Compendium, TAB 6]
[252] *Spring v Goodyear Canada Inc.*, 2021 ABCA 182 at para 40 [Alberta Authorities, TAB 54]

358. The Proposed Representative Plaintiffs have provided no basis in fact, and there is none on the record before the Court, to meet even the low threshold required for certification that Alberta may be liable to the class for the CMOH Orders. This proposed common issue must fail on that basis.

359. Additionally, this common issue is framed at the highest level of finding "liability" generally, without specifying the cause of action that might give rise to the liability or seeking to address the required components of the causes of action. The Claim raises five causes of action, including breach of the *Alberta Bill of Rights*, negligence, conversion, breach of fiduciary duty, and expropriation without compensation.

360. In addition to having provided no basis in fact to show the CMOH Orders were clearly *ultra vires*, or issued in bad faith or for as an abuse of power, which is required as a threshold to establishing liability generally,[253] the Proposed Representative Plaintiffs have provided no basis in fact to satisfy the required elements of any pled causes of action.

361. As discussed above in common issue one, the breach of a statute, including the *Alberta Bill of Rights*, does not establish liability.[254] Any liability of Alberta for the CMOH Orders would necessarily have to flow from the other pled causes of action.

362. The Proposed Representative Plaintiffs first allege negligence as a cause of action and a basis for finding liability. The Proposed Representative Plaintiffs have provided no basis in fact (and as set out above, no pleadings) to show there may be a sufficient relationship between Alberta and the class to establish proximity.

363. Without providing any basis in fact to support a proximate relationship, there can be no basis in fact to support a common issue of whether Alberta is liable in negligence to the class.

364. The second cause of action alleged in the claim is conversion. Conversion requires the Proposed Representative Plaintiffs to establish Alberta, through the CMOH Orders, improperly and intentionally took, used or destroyed personal property of the Proposed Class Members.

365. There is clearly no basis in fact to support a common issue regarding the liability of Alberta to the Proposed Class Members for conversion. There is no evidence at all that Alberta took, used or

[253] *Henry v British Columbia (Attorney General),* 2015 SCC 24 at para 43 [Alberta Authorities, TAB 8]; and *Canada (Attorney General) v Power,* 2024 SCC 26 at para 97 [Alberta Authorities, TAB 7]
[254] *The Queen (Can.) v Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at paras 37 and 38 [Alberta Authorities, TAB 14]; and *Rieger v Plains Midstream Canada ULC*, 2022 ABCA 28 at para 61 [Alberta Authorities, TAB 15]

destroyed personal property of the owners and operators of businesses. To the extent one Proposed Representative Plaintiff, Mr. Scott, claims his personal property was seized or destroyed, he makes it clear in his Affidavit it was a result of the closure of his business by the RCMP and Alberta Health Services, not by Alberta. Additionally, the closure of Mr. Scott's business was not a result of any CMOH Order, which continued to permit restaurants to operate in a limited capacity. Instead, it was the result of Mr. Scott's failure to abide by an Alberta Health Services executive order.[255] This evidence does not establish any basis in fact that Alberta may be liable for conversion, especially insofar as any claim relates to personal property owned by incorporated businesses, which themselves are not members of the class.

366. The third cause of action alleged in the claim is a breach of fiduciary duty. For this cause of action, the Proposed Representative Plaintiffs are required to show some basis in fact that Alberta undertook to forsake all other interests to act in the class's best interest.

367. The Proposed Representative Plaintiffs has not provided any facts to suggest such an undertaking was given. Alberta's response to the Covid-19 pandemic, including the CMOH Orders, considered society and the public as whole. Alberta did not and could not have undertaken to exclusively act in the best interest of a specific sub-group of the population, particularly where those interests are economic in nature. As such, there is no basis for the common issue of whether Alberta is liable to the class for breach of a fiduciary duty.

368. The final cause of action pled by the Proposed Representative Plaintiffs is that Alberta, through the CMOH Orders, expropriated the Proposed Class Members' property for governmental "use" without compensation.

369. There is no basis in fact that a common issue with respect to Alberta's expropriation or use of the Proposed Class Members' property actually exists, let alone that there may be liability for such expropriation or us.

370. While the CMOH Orders placed varying restrictions and requirements on businesses, no CMOH Order took, acquired or used any property. The Proposed Representative Plaintiffs rely on a provision at section 52.6(1)(a)of the *Public Health Act* that allows the Minister to acquire or use property during the declared state of emergency. However, the CMOH Orders were all issued pursuant to section 29(2) of the *Public Health Act*.

[255] Scott Affidavit at paras 9 and 11 [Alberta Compendium, TAB 4]

371. The Proposed Representative Plaintiffs have provided no evidence or basis in fact that Alberta acquired any property from the Proposed Class Members or that the CMOH Orders "used" any Proposed Class Member's property in accordance with section 52.6 of the *Public Health Act* or the *Emergency Powers Regulation*.[256]

372. Further, there is no basis in fact that a finding of liability would be common across the class. Any disputed claims for damages relating to the acquisition or use of property under section 52.6 of the *Public Health Act* must be determined by arbitration under the *Arbitration Act*.[257]

373. In addition to failing to provide any basis in fact to establish any bad faith or improper purpose, the Proposed Representative Plaintiffs have also failed to provide any basis in fact that Alberta may be liable to the class under any of the pled causes of action.

Common Issue #4 - Damages

374. Common issues relating to damages are a subsidiary issue and cannot support certification on their own if no liability issues are certified.[258]

375. The Proposed Representative Plaintiffs now seek to certify common issues with respect to whether damages can be awarded on an aggregate basis and whether the class is entitled to aggravated and punitive damages.

376. Section 30 of the *Class Proceedings Act* allows the Court to certify a common issue relating to aggregate damages where resolving the other certified common issues could be determinative of liability and where quantum of damages could reasonably be calculated without proof by individual Proposed Class Members.[259]

377. To certify an aggregate damages common issue, the Proposed Representative Plaintiffs are required to show "a credible or plausible methodology which offers a realistic prospect of establishing loss on a class wide basis."[260]

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[256] *Emergency Powers Regulation*, Alta Reg 187/2009 [Alberta Authorities, TAB 72]
[257] *Public Health Act*, RSA 2000, c P-37 at s 52.7(2) [Alberta Authorities, TAB 9]
[258] *Wuttunee v Merck Frosst Canada Ltd.*, 2009 SKCA 43 at para 159 [Alberta Authorities, TAB 73]
[259] *Class Proceedings Act*, RSA 2003, c C-16.5 at s. 30 [Alberta Authorities, TAB 1]; and *Scherle v Treadz Auto Group Inc*., 2019 ABQB 987 at para 344 [Alberta Authorities, TAB 52]
[260] *Pro-Sys Consultants Ltd. v Microsoft Corp*, 2013 SCC 57 at para 118 [Alberta Authorities, TAB 53]; and *Virani v Uber Portier Canada Inc*, 2023 ABKB 240 at para 62 [Alberta Authorities, TAB 74]

378. An aggregate damages common issue will not be certified where the plaintiff fails to provide a methodology to show that the defendant's liability to some or all of the class can be determined on a global basis and such liability could reasonably be calculated without proof of individual loss. Plaintiffs do not need to establish an actual methodology at this stage to show the alleged loses were caused by the defendant, but they are required to show there is a methodology reasonably capable do doing so.[261]

379. In this case, the Proposed Representative Plaintiffs have provided no evidence at all that there is a workable methodology to determine any losses on a class wide basis. The Proposed Representative Plaintiffs claim that the CMOH Orders caused the Proposed Class Members' losses. However, the Affidavit of Professor Cotton confirms that there are a host of factors which caused or contributed to any class wide losses of business.

380. Based on Professor Cotton's evidence, it is not clear that the Proposed Class Members have suffered damages on a class wide basis, or at all. On a class wide basis, Professor Cotton states that:

> Covid-19 resulted in substantial losses to businesses during the first half of 2020. After 2020, however, the evidence strongly suggests that businesses have earned greater profits than expected had Covid-19 not occurred.[262]

381. However, attempting to isolate any losses attributable to the CMOH Orders, as opposed to the impacts of the Covid-19 pandemic generally, individual business decisions, or any other factor that may impact the profits or losses of a business raises two fundamental challenges that are not suitable for determination on a class wide basis. As explained by Professor Cotton, these include:

a. First, the CMOH Orders were just one of the many changing and interconnected factors affecting the business environment, customer behaviour, and firm profits when the CMOH Orders were implemented. No empirical method can credibly disentangle the losses associated with the CMOH Orders from other factors with high accuracy.[263]

b. Second, firm experiences during Covid-19 were highly individualized. This means that even if one could reasonably estimate average losses within an industry or subsector due to CMOH Orders, these estimates will remain inaccurate predictors of the losses faced by

[261] *Andriuk v Merrill Lynch Canada Inc*. 2014 ABCA 177 at para 10 [Alberta Authorities, TAB 75]
[262] Cotton Affidavit at para 29 [Alberta Compendium, TAB 9]
[263] Cotton Affidavit at para 11 [Alberta Compendium, TAB 9]

> individual businesses. In most subsectors, individual firms have experienced losses (or gains) that have been widely different than the average, even when controlling for observable characteristics like firm size.[264]

382. Additionally, the Affidavit of Mr. Popik confirms that to establish any losses an individual owner or operator of a business may have suffered during the class period, an individual assessment of the business, its structure, and its accounting methodology would be required.

383. The Proposed Representative Plaintiffs have put forward no evidence to suggest there is any workable method to fairly and accurately determine and assess class wide losses attributable to the CMOH Orders.

384. The Proposed Representative Plaintiffs propose a common issue of whether aggregate damages could be determined using "statistical evidence based on random sampling." There is absolutely no evidence or any basis in fact to suggest a method based on random sampling of businesses in Alberta can be used to fairly determine aggregate damages across the class.

385. An assessment of any individual business cannot be extrapolated to other businesses, even similar businesses in the same sector, given the highly individualized nature of profits and losses during the Covid-19 pandemic. In any event, aggregate damages will be unavailable as a common issue where quantum of damages cannot be reasonably calculated without proof by individual Proposed Class Members.[265]

386. The widely varying individual circumstances of the two Proposed Representative Plaintiffs show it is not possible to attempt to assess any damages that might flow from any liability on a class wide basis.

387. Given the complete lack of any workable method or any basis in fact to determine if the CMOH Orders caused the losses to owners and operators of businesses or how it would be possible to reasonably determine such losses on a class wide basis, the common issue of whether aggregate damages are appropriate in this case should not be certified.

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[264] Cotton Affidavit at para 13 [Alberta Compendium, TAB 9]
[265] *Fisher v Richardson GMP Limited*, 2019 ABQB 450 at para 82 [Alberta Authorities, TAB 76]. Upheld by *Fisher v Richardson GMP Limited*, 2022 ABCA 123 [Alberta Authorities, TAB 50]

388. The Proposed Representative Plaintiffs now seek to certify a common issue of whether the class is entitled to aggravated damages. By their very nature, aggravated damages are not suitable for determination on a class wide basis.

389. As the Supreme Court of Canada stated in *Whiten v Pilot Insurance Co*, aggravated damages are based on harms caused to a plaintiff's emotions by reprehensible or outrageous conduct by a defendant.[266]

390. Aggravated damages therefore are based on an individual assessment of each class member and are not determinable on a class wide basis.[267]

391. Finally, the Proposed Representative Plaintiffs seek to certify a common issue of whether the proposed class is entitled to punitive damages.

392. Punitive damages can be awarded to sanction conduct that is harsh, vindictive, reprehensible and malicious. As is required with all common issues, the Proposed Representative Plaintiffs are required to show some basis in fact for this common issue. Where there is no factual basis to suggest the conduct of a defendant merits punitive damages, the common issue will not be certified.[268]

393. It is not disputed that it is possible to certify punitive damages as a common issue on an appropriate record, given they consider the conduct of the defendant, unrelated to the effects on the plaintiff. The Supreme Court of Canada in *Rumley v British Columbia*, certified the common issue of whether punitive damages were appropriate in an action for systemic abuse of students at a residential school for blind and deaf operated by the Province.[269]

394. Noting that "the appropriateness and amount of punitive damages will not always be amendable to determination as a common issue", the Supreme Court of Canada in *Rumley*, tied the issue of punitive damages directly to allegations and the certified common issue relating to system negligence in how the defendant operated the residential school.[270]

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[266] *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 116 [Alberta Authorities, TAB 77]
[267] *Spring v Goodyear Canada Inc.*, 2020 ABQB 252 at para 164 [Alberta Authorities, TAB 55]. Overturned on other grounds in which ultimately denied certification, see *Spring v Goodyear Canada Inc*., 2021 ABCA 182 [Alberta Authorities, TAB 54]
[268] *Virani v Uber Portier Canada Inc*., 2023 ABKB 240 at para 63 [Alberta Authorities, TAB 74]
[269] *Rumley, v British Columbia*, 2001 SCC 69 at paras 1 and 34 [Alberta Authorities, TAB 51]
[270] *Rumley, v British Columbia*, 2001 SCC 69 at para 34 [Alberta Authorities, TAB 51]

395. As is the case here, where the pleadings and the evidence at certification do not establish an air of reality to the claim for punitive damages, it should not be certified as a common issue.[271] And given the lack of any certifiable common issue with respect to liability, a common issue only relating to punitive damages cannot go forward.[272]

Conclusion on Common Issues

396. None of the common issues proposed by the Proposed Representative Plaintiffs – either in their filed Notice of Application, or the proposed amended common issues in their written submissions – meet the requirements of section 5(1)(c) of the *Class Proceedings Act*. None are proper common issues that are common across the class and will advance the Proposed Class Members' claims.

397. Importantly, the Proposed Representative Plaintiffs have provided no basis in fact for their common issues, specifically with respect to the proposed common issues of liability of Alberta for the CMOH Orders or of a basis to determine any aggregate damages on a class wide basis.

D. PREFERABLE PROCEDURE

398. The next burden placed upon the Proposed Representative Plaintiffs by the *Class Proceedings Act*, pursuant to section 5(1)(d), is to show that "a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues".[273]

399. However, before the Court begins a detailed preferability analysis, it is important to note that "where the common issues requirement is not satisfied, the preferable procedure requirement…is likewise not satisfied."[274]

400. Here, the Proposed Representative Plaintiffs have failed to produce evidence of a basis in fact for any of the proposed common issues as against Alberta. Accordingly, there is equally no basis in fact that a class proceeding is the preferable procedure to advance the alleged claims as against Alberta. No analysis beyond this is necessary.

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[271] *Warner v Smith & Nephew Inc*., 2016 ABCA 223 [Alberta Authorities, TAB 44]
[272] *Wuttunee v Merck Frosst Canada Ltd.,* 2009 SKCA 43 at para 159 [Alberta Authorities, TAB 73]
[273] *Class Proceedings Act,* SA 2003, c C-16.5 at s. 5(1)(d) [Alberta Authorities, TAB 1]
[274] *Cirillo v. Ontario*, 2019 ONSC 3066 at 70 [Alberta Authorities, TAB 78]; *Jensen v Samsung Electronics Co. Ltd.,* 2021 FC 1185 at para 303 [Alberta Authorities, TAB 58]

i. **Law**

401. In the event the Court finds that the common issues requirement has been satisfied, and thus needs to analyze preferability further, the Court still maintains a great deal of discretion.

402. The Court may consider any matter that the Court considers relevant in making a preferability determination, but must consider the following questions:

a) Whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;

b) Whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;

c) Whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

d) Whether other means of resolving the claims are less practical or less efficient; and

e) Whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.[275]

403. To satisfy the preferability requirement, the Proposed Representative Plaintiffs are required to show: (1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim; and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims."[276]

404. In a further breakdown of the test, it is "…common ground that to assess whether the class action would be preferable to any other alternative method of resolving the class members' claims, the court compares the competing possibilities through the lens of the goals of *behaviour modification, judicial economy and access to justice,* bearing in mind, of course, that the ultimate question is

[275] *Class Proceedings Act*, SA 2003, c C-16.5 at s. 5(2) [Alberta Authorities, TAB 1]
[276] *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949 at 48 [Alberta Authorities, TAB 79]

whether the statutory requirement of preferability has been established" (emphasis added).[277]

405. The Proposed Representative Plaintiffs have failed to show that:

    a. A class proceeding would be a fair, efficient, and manageable method of advancing the claim; and

    b. That it would be preferable to any other reasonably available means of resolving the Proposed Representative Plaintiffs' claims.

406. Accordingly, the Proposed Representative Plaintiffs have failed to show that the preferability analysis favours a class proceeding and thus cannot succeed.

ii. Statutory Considerations

407. The first required question that is posed when analyzing whether a class proceeding is preferable is "[w]hether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members".

408. There are significant differences between the Proposed Class Members in these proceedings. The Proposed Representative Plaintiffs, for instance, each were involved in businesses with structures that are entirely different, each business is in an entirely different industry, and each business was in a different geographic location. Application of the CMOH Orders to the Gym versus Whistle Stop similarly would show major differences.

409. Even if there are common issues that can appropriately be addressed or may advance the Proposed Class Members' actions, the resolution of those common issues will devolve into individual trials. They will not prevent repetitive factual inquiries in individual claims and raise significant issues of fairness for both Alberta and potential Proposed Class Members. For instance,

    a. If the issues do *not* take individual factual inquiries into account, the process will be unfair.

    b. If the issues *do* take individual factual inquiries into account, the process will be inefficient and unmanageable.

[277] *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949 at 16 [Alberta Authorities, TAB 79]

410. Each class member will still need to show the following, which are individual to their circumstances:

a. The business structure of the involved business;

b. How the involved business distributed value: shares, dividends, salary/wages;

c. The industry category(ies) the involved business falls into;

d. The geographic location of the involved business;

e. Which of the CMOH Orders impacted the involved business;

f. How and how long the relevant CMOH Orders impacted the involved business;

g. What their profits/losses/salary/value of shares were leading up to the Covid-19 pandemic;

h. What their profits/losses/salary/value of shares were during the Covid-19 pandemic when not impacted by a CMOH Order;

i. What their profits/losses/salary/value of shares were after the Covid-19 pandemic, including any unexpected revenue earned after June 30, 2022 as a result of other economic factors stemming from the Covid-19 pandemic;

j. The involved business's ability and attempts to mitigate any damages suffered, through such means as pivoting business models, seeking new client bases, or seeking other streams of income; and

k. The involved business's application for, approval of and repayment of any provincial or federal supports; and

l. Whether the business complied with and the extent of compliance with any CMOH Order that may have applied to it.

411. The issue of each business's compliance with the various CMOH Orders that were in force at various times is especially important and is clearly an individual issue that will have to be determined for each business and owner and operator.

412. A class member cannot claim they suffered damages flowing from a CMOH Order that they did not comply with or follow. An examination of each business's compliance with each CMOH Order that applied to it would be needed.

413. For example, Mr. Scott's evidence is that he complied with some CMOH Orders at the start of the pandemic but did not comply with (and openly flouted) later CMOH Orders. One such CMOH Order was the restriction on dine-in services. While that CMOH Order was in effect, Mr. Scott allowed and encouraged dine-in services at his restaurant. If nothing else, Mr. Scott cannot claim his business suffered any damages as a result of this CMOH Order that he and his business did not comply with.[278]

414. Another individual issue that would have to be determined for each individual class member would be whether a State of Local Emergency was passed for the businesses area pursuant to the *Emergency Management Act* or if a municipal bylaw, passed pursuant to the *Municipal Government Act*, was in force that placed similar or identical restrictions upon the business to the CMOH Orders, at any point during the class period.

415. These local orders and bylaws included similar or identical restrictions as the CMOH Order, which could include mask mandates and the requirement to participate in the Restriction Exemption Program (i.e., the vaccine passport program).[279]

416. While the CMOH Orders were ultimately declared *ultra vires*, there has been no challenge to any Covid-19 pandemic related restrictions passed by a local authority or municipal government. Those laws would still be valid and businesses in those specific areas would still be required to abide by the local restrictions.

417. By necessity of the asserted claims, individual Proposed Class Members will need to present their own circumstances to assess any liability of Alberta.

418. Any benefit achieved by resolving a common issue is quickly washed away where the substance and complexity of the individual issues overwhelm the common issues, as is the case here.[280]

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[278] Scott Affidavit at para 7 [Alberta Compendium, TAB 4] and Scott Cross-Examination, at pg. 50, line 27 – pg. 52, line 11 [Alberta Compendium, TAB 10]
[279] Ridge Affidavit at paras 161 – 164 and exhibits CC to GG [Alberta Compendium, TAB 7]
[280] *Martin v. Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744 at para 357 [Alberta Authorities, TAB 80] (aff'd 2013 ONSC 1169 [Alberta Authorities, TAB 81])

419. In *Thorburn v British Columbia*, the British Columbia Court of Appeal found that where individual issues predominate over common issues, a class proceeding risks "becoming monsters of complexity and cost." Where there are significant individual issues that can only be fairly determined on a case by case basis, the class proceeding "would simply render the litigation inefficient, unmanageable and costly."[281]

420. The Proposed Representative Plaintiffs have not proposed how they intend to prove class wide liability and damages given the vast differences in the Proposed Class Members. They have provided no basis to suggest that a determination of any liability owing by Alberta to Mr. Scott and Ms. Ingram would be applicable or helpful to, for example: i) a member of a limited partnership: ii) a franchisee; iii) an incorporated business with many shareholders and classes of shares (both voting and non-voting); or a iv) a publicly traded company.

421. Proving class wide liability but attempting to prove individual examples is a type of similar fact analysis that Justice Slatter in *L.T. v Alberta (Director of Child Welfare)* specifically warned against. Such an effort would be inefficient, inappropriate, and would be unlikely to be the preferable procedure.[282]

422. Given the preponderance and overwhelming nature of the individual issues in this action, any proposed class action would become a monster of complexity and cost. It would clearly not serve the goals of the *Class Proceedings Act* – being judicial economy, access to justice, and behaviour modification.

423. The second and third required questions posed when analyzing whether a class proceeding is preferable are "[w]hether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions" and "[w]hether the class proceeding would involve claims that are or have been the subject of any other proceedings".

424. There are several parties who would otherwise be members of the class who have already begun proceedings, illustrating a valid interest by individuals in controlling the prosecution of their own actions. This includes Chad Dallas McDonald, who issued a claim against Alberta relating to the CMOH Orders. A decision reported as *1285486 Alberta Ltd v Ape Parkour Inc.*[283] has already been rendered which struck Mr. McDonald's claim against Alberta and Alberta Health Services

[281] *Thorburn v British Columbia*, 2013 BCCA 480 at paras 50 – 53 [Alberta Authorities, TAB 49]
[282] *L.T. v Alberta (Director of Child Welfare)*, 2006 ABQB 104 at para 105 [Alberta Authorities, TAB 82]
[283] *1285486 Alberta Ltd v Ape Parkour Inc.*, 2024 ABKB 406 [Alberta Authorities, TAB 28]

(currently under appeal).

425. In addition to this already decided case, Alberta is aware of the following Actions asserting business loss claims against Alberta in connection with the CMOH Orders:

    a. The Bank of Nova Scotia v Eva Chipiuk; Action No: P2290302648

        i. The Defendant third partied the Government of Alberta and the Government of Canada;

        ii. Withdrawals were filed by Nova Scotia and Eva Chipiuk, resolving the Action, on April 12, 2024.

    b. Westport Equity Ltd. v Puur Athletics (Cold Lake) Ltd. and Jennifer Grey; Action No: P2303400018

        i. The Defendants third partied the Municipality of Jasper and Alberta.

    c. Jesse Clay Johnson, Angelo Contrada and Bravo Ltd. v. HMK, Chief Medical Officer of Health and the City of Edmonton; Action No: 2401 04998.

426. The individual damages claimed by the Proposed Representative Plaintiffs' are substantial, with Ms. Ingram claiming she suffered losses of $10,000,000[284] and Mr. Scott claiming losses of at least $350,000.[285]

427. It is likely that, on the Proposed Representative Plaintiffs' theory of the case, every other Proposed Class Member would also have a substantial claim and would therefore clearly have an interest in managing their own action.

428. As the Supreme Court of Canada held in *Western Canadian Shopping Centres Inc. v Dutton*, class proceedings are typically used as an aggregating tool which allows individuals with relatively small claims to reduce litigation costs by dividing them over a large number of plaintiffs. In this manner, class proceedings serve the interest of access to justice, judicial economy and behaviour modification.[286]

[284] Ingram Affidavit para 20 [Alberta Compendium, TAB 3]
[285] Scott Affidavit at para 11 [Alberta Compendium, TAB 4]
[286] *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 at para 27 - 29 [Alberta Authorities, TAB 43]

429. The large quantum of losses of each potential class member negates the need for a class proceeding as each claim, if each claimant wished to bring it, would be economical to do so. As the Supreme Court of Canada held in *Hollick v Toronto (City)*: "if individual class members have substantial claims against the respondent, we should expect that they will be willing to prosecute those claims individually."[287]

430. The fourth required question posed when analyzing whether a class proceeding is preferable is "[w]hether other means of resolving the claims are less practical or less efficient".

431. Individual actions are clearly preferable to a class action given the host of individual issues that would need resolution in this proposed class proceeding.

432. Individual claimants in individual actions would be able to tailor their own claims and streamline their own process based on their own circumstances and claims. At worst, the Court would be left with the same level of efficiency and practicality of proceeding with a class proceeding

433. Individual actions also comprise many benefits for the individual Proposed Class Members:

    a. Forum and judicial centre of choice:

        i. Decreasing costs to rural class members who would no longer have to travel to larger centres;

        ii. Increasing access to local records and witnesses;

        iii. Increasing familiarity of surroundings, potentially easing concern about the process; and

        iv. Often decreasing wait times before the matter is heard – particularly if it can be streamlined or if it proceeds in the Alberta Court of Justice.

    b. Put their best foot forward:

        i. Instead of worrying about the claims and circumstances of other class members, they could focus on their own.

[287] *Hollick v. Toronto (City)*, 2001 SCC 68 at para 34 [Alberta Authorities, TAB 47]

c. Greater control over the process:

i. No other person would be in control of the proceedings. They would be the captain of their own ship and could determine on an individual basis how to proceed with and how to resolve their own action.

434. The fifth required question posed when analyzing whether a class proceeding is preferable is "[w]hether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means".[288]

435. The Proposed Class Members face no more additional vulnerability in an individual action than they would in a class proceeding. This is in essence a pure economic loss claim and would involve Proposed Class Members that are economically sophisticated, having owned and operated businesses.

436. Although the required questions necessary for the preferability analysis are listed by the Proposed Representative Plaintiffs, there is no legal analysis pointing to any basis in fact to answer the preferability questions in favour of a class proceeding.

437. The Proposed Representative Plaintiffs have failed to show a basis in fact that a class proceeding would be a fair, efficient, and manageable method of advancing their claims. They have accordingly failed to meet their burden set out in section 5(1)(d) of the *Class Proceedings Act* and the certification application must fail.

438. Behaviour modification is not a necessary consideration in this Action, despite the submissions of the Proposed Representative Plaintiffs.

439. The CMOH Orders were issued in response to a novel, global pandemic. The CMOH Orders have also all been rescinded since June 2022.

440. Further, the overarching concern of the Proposed Representative Plaintiffs in this Action appears to be that the CMOH Orders were not properly issued in accordance with section 29(2).

441. The Proposed Representative Plaintiffs have failed to meet the requirements of section 5(1)(d) of the *Class Proceedings Act*. A class proceeding is not favoured when so many subjective and

[288] *Class Proceedings Act,* SA 2003 c C-16.5 at s. 5(2) [Alberta Authorities, TAB 1]

individualized circumstances and issues exist. Accordingly, certification should be denied.

E. REPRESENTATIVE PLAINTIFFS

442. In order for an action to be certified, section 5(1)(e) of the *Class Proceedings Act* requires that a person appointed as the representative plaintiff must, in the opinion of the Court:

i) Fairly and adequately represent the interests of the class;

ii) Have produced a plan for the proceedings that sets out a workable method of advancing the proceedings on behalf of the class and of notifying the class members of the proceeding; and

iii) Does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.[289]

443. As held by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v Dutton*, a representative plaintiff should "vigorously and capably" represent the interests of the class.[290] Further, a representative plaintiff must have a cause of action.[291]

444. In *Sullivan v Golden Intercapital (GIC) Investments Corp*, Justice Thomas refused to certify a proposed class action based on inadequate representative plaintiffs. The Court notes that the function of a representative plaintiff is to direct the lawyer who conducts a class action and that the representative plaintiff is neither a "passive figurehead, nor a hollow puppet operated by the lawyer."[292]

445. In this Action, Mr. Scott and Ms. Ingram cannot adequately represent the interests of the Proposed Class Members.

446. Mr. Scott and Ms. Ingram seek to represent all natural persons who owned or operated, either wholly or partially, a business or businesses in Alberta, and whose business operations were fully

[289] *Class Proceedings Act*, SA 2003, c C-16.5 at s. 5(1)(e) [Alberta Authorities, TAB 1]
[290] *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 at para 41 [Alberta Authorities, TAB 43]
[291] *Cavanaugh v. Grenville Christian College*, 2012 ONSC 2995 at para 175 [Alberta Authorities, TAB 83]
[292] *Sullivan v Golden Intercapital (GIC) Investments Corp*, 2014 ABQB 212 at para 54 [Alberta Authorities, TAB 84]

or partially restricted as a result of the measures contained in the CMOH Orders resulting in economic losses...[293]

447. However, Mr. Scott was the sole proprietor of Whistle Stop and Ms. Ingram was the sole shareholder and Director of the Gym. They have admitted to not knowing about the corporate structures of other businesses in the province.[294] They can provide no evidence of the factual circumstances of large multi-shareholder businesses, corporations, professional partnerships, or other business structures in the province, and the various ways those businesses and their owners/shareholders might have been affected by the CMOH Orders during the COVID-19 pandemic. Accordingly, Mr. Scott and Ms. Ingram are not equipped to properly instruct counsel on behalf of the interests of all of the Proposed Class Members.

448. Additionally, Ms. Ingram and Mr. Scott have taken particular issue with larger businesses and their perception that these businesses were 'winners' while the small to medium sized businesses were 'losers' throughout the Covid-19 pandemic, while simultaneously having no knowledge about these businesses or their profits/losses or assets/liabilities. [295] The proposed class definition does not exclude businesses based on their size or structure. Yet the bias held against such large businesses by Mr. Scott and Ms. Ingram is clear. Mr. Scott and Ms. Ingram would not fairly, adequately, or capably represent the interests of Proposed Class Members who happen to also be classified as a large business.

449. Further, neither Mr. Scott nor Ms. Ingram have a cause of action against Alberta in this Action.

450. With respect to Mr. Scott, it is unlikely he actually experienced losses as a result of the CMOH Orders, given he admitted he did not comply with the CMOH Orders after January, 2021, to the point of being arrested and charged by the RCMP with breaching the *Public Health Act* and being found in contempt of Court in an action brought by Alberta Health Services.[296]

451. Additionally, Mr. Scott gained notoriety for his refusal to follow CMOH Orders, leading to his business experiencing more customers than he had prior to any CMOH Orders being in place.[297] Based on the Facebook posts of Whistle Stop, Mr. Scott began a fundraising campaign in or around

[293] The Claim at para 11 [Alberta Compendium, TAB 1]
[294] Scott Cross-Examination, pg.12, line 22 - pg.13, line 5 [Alberta Compendium, TAB 10]; Ingram Cross-Examination, pg.88, lines 11 – 22 [Alberta Compendium, TAB 11]
[295] Scott Cross-Examination, pg. 10, line 17 – pg.11, line 3 [Alberta Compendium, TAB 10]
[296] The Claim at paras 48-51 [Alberta Compendium, TAB 1]
[297] Scott Cross-Examination, p.73, line 26 – p.74, line 8 [Alberta Compendium, TAB 10]

April, 2021 to keep Whistle Stop open despite the CMOH Orders,[298] and as a result, he received at least $119,746.42 (and likely much more) in donations by May 4, 2021.[299] It appears that instead of suffering losses, Mr. Scott may have actually experienced gains during the COVID-19 pandemic, due substantially to his defiance of the CMOH Orders.

452. These facts place Mr. Scott outside of the class definition, as his business may have been neither a business that was restricted as a result of the CMOH Orders, nor a business that suffered economic losses during the Class period. Certainly, without being a proper member of the class pursuant to the Proposed Representative Plaintiffs' own class definition, Mr. Scott arguably does not have a cause of action against Alberta, and therefore, cannot fairly, adequately and capably represent the class in this Action.

453. Regarding Ms. Ingram, she acknowledged being a plaintiff in the *Ingram* Action, where she was represented by counsel and submitted her own affidavit, along with expert and other affiant evidence. [300] As explained earlier in the Cause of Action section of this brief, the *Ingram* Action addressed the same *Alberta Bill of Rights* issues as this current proposed class action. Now, as Ms. Ingram seeks to act as a representative plaintiff in this case, it is clear that she is attempting to relitigate issues that were already decided in an action in which she was an active party. The principle of *res judicata* alone renders Ms. Ingram unsuitable to fairly and adequately represent the Proposed Class Members' interests and her involvement is an abuse of process.

454. Additionally, neither Ms. Ingram nor Mr. Scott have produced a plan for the proceedings that sets out a workable method of advancing the proceedings and notifying the massive list of Proposed Class Members of the proceeding as required by section 5(1)(e)(ii) of the *Class Proceedings Act.* They have no plan in place (have not even spoken about) resolving any issues of dispute that may arise between them in the course of prosecuting and providing instructions in this action.[301]

455. Mr. Scott and Ms. Ingram have not individually, or together, satisfied the requirements with some basis in fact that they are suitable representative for the class. The Proposed Representative Plaintiffs have not satisfied the test for certification required under section 5(1)(e).

[298] Scott Cross-Examination, Exhibit A marked for identification
[299] Scott Cross-Examination, Exhibits B and C marked for identification
[300] Ingram Cross-Examination at pg. 7, line 17 – pg. 9, line 13 [Alberta Compendium, TAB 11]
[301] Ingram Cross-Examination at pg. 125, line 16 – pg. 126, line 4 [Alberta Compendium, TAB 11]

V. CONCLUSION

456. The Proposed Representative Plaintiffs have failed to satisfy their burden under the Certification Test at each and every stage of consideration.

457. The Court is accordingly prohibited from certifying the proceeding as a class proceeding because none of the matters referred to in section 5(1) of the *Class Proceedings Act* have been met.[302]

VI. RELIEF REQUESTED

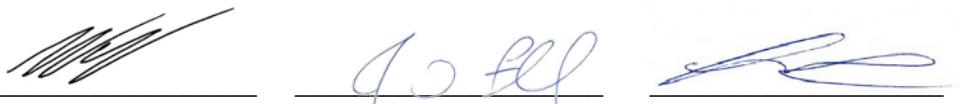
458. Alberta respectfully requests that this Court:

a. Dismiss the Certification Application by the Proposed Representative Plaintiffs against Alberta; and

b. Grant an Order for costs in favour of Alberta.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13 DAY OF SEPTEMBER 2024.

ALBERTA JUSTICE

Per: 

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[302] *Class Proceedings Act*, SA 2003, c C-16.5 at s. 5(4) [Alberta Authorities, TAB 1]

LIST OF AUTHORITIES

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