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[Rules 6.3 and 10.52(1)]

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COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	CARRIE SAKAMOTO
DEFENDANTS	ATTORNEY GENERAL OF CANADA and HIS MAJESTY THE KING IN RIGHT OF ALBERTA
	***Brought under the Class Proceedings Act,* SA 2003, c C-16.5**
DOCUMENT	**BRIEF OF THE PLAINTIFF**

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I. INTRODUCTION

1. The central issue on this sequencing discussion is whether the Defendants' applications to strike the pleadings should be heard before the certification hearing or concurrently with it. His Majesty The King in Right of Alberta ("**Alberta**") seeks to have its application heard in advance of certification, while the Attorney General of Canada ("**Canada**") takes no position on the sequencing but intends to argue its application alongside Alberta's application. Both applications focus solely on striking the pleadings, without evidence, on the basis that the pleadings fail to disclose a cause of action. Alberta also raises the additional issue of whether the Government of Alberta is the appropriate Defendant. However, the Plaintiff's position is that this analysis is already required at the certification stage, and fragmenting the processes is redundant and inefficient.

2. The Defendants acknowledge that their proposed approach involves conducting the pleadings analysis twice, even though they concede it should occur only once. Despite this, Alberta insists on having its striking application heard in advance, effectively bifurcating the process rather than addressing all issues in a single certification hearing. Furthermore, the *Class Proceedings Act*, and prevailing case law supports the position that the pleadings issues raised by the Defendants should occur exclusively at the certification stage.

3. Moreover, the Court must assume that the allegations of fact in the Statement of Claim are true. The Defendants have failed to establish a clear legal basis demonstrating that their applications present a "plain and obvious" defense capable of resolving the lawsuit without evidence. By proposing a pre-certification striking motion, the Defendants impose a higher threshold on themselves to demonstrate that the claims are "plain and obvious" to fail, while simultaneously depriving the Court of the evidence and full record available at certification.[1] This approach is both procedurally inefficient and premature.

4. Alberta's application does not address the claim of negligence, ensuring that this cause of action will survive. Canada, through its Vaccine Injury Support Program,[2] has already acknowledged causation—a challenging element to prove in negligence—further weakening its position. Consequently, the core issues of misrepresentation, negligence, and misfeasance in public office remain intact.

5. Alberta's argument that Alberta Health Services ("**AHS**") should be the Defendant, not Alberta, does not justify fragmenting the process. Even if valid, it would not resolve the lawsuit or eliminate the need for certification. This approach misrepresents the facts, as there are direct allegations against Alberta, not AHS, and misinterprets the law, as Alberta cannot avoid liability for the actions of a government entity like AHS in any event. Alberta has not demonstrated that this argument requires pre-certification adjudication or would meaningfully streamline the proceedings.

6. The *Class Proceedings Act* is designed to promote judicial efficiency and access to justice by consolidating common issues in a single, comprehensive process. A striking application before certification undermines these objectives and risks delaying the resolution of the

[1] *Stewart v. Enterprise Universal Inc.*, 2010 ABQA 259, at para. 45.
[2] Statement of Claim, at para. 76; and Carrie Sakamoto Affidavit, at paras. 24-25.

matter while increasing costs and burdening the Court with duplicative processes. Both case law and legislative intent support the position that a single, unified certification hearing is the appropriate forum for addressing all preliminary challenges to the pleadings.

The Law on Sequencing Applications

7. The Plaintiff asserts that this motion for sequencing is inconsistent with statute and case law, as the issues raised can and should be addressed during the certification hearing. Alberta and Canada's applications involve an alleged lack of cause of action, with Alberta also arguing that AHS, not Alberta, is the proper Defendant. However, neither argument is appropriate for consideration before the certification hearing. In most of the cases relied on by the Defendants, pre-certification motions were denied, and where granted, the circumstances were highly distinguishable.

8. Alberta relies on Section 13(1) of the *Class Proceedings Act* which grants Courts the authority to make orders that ensure a fair and expeditious resolution of class proceedings:

> The Court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure the fair and expeditious determination of the proceeding and, for that purpose, may impose on one or more of the parties any terms or conditions that the Court considers appropriate.[3]

9. However, in Alberta, class proceedings are defined as those that have been certified. Therefore, the provision under Section 13(1) does not grant authority to hear pre-certification applications. This principle was affirmed in *British Columbia v. Apotex Inc*. ("***Apotex 2020***"), where Section 12 in British Columbia which is analogous to Section 13 in Alberta was discussed:

> But in this, respectfully, the judge and the parties misconceived the process they were following. Section 12 of the CPA concerns making orders "respecting the conduct of a class proceeding". The CPA defines a "class proceeding" as "a proceeding, including a multi-jurisdictional class proceeding, that is certified as a class proceeding". **This matter has yet to be certified as a class proceeding, and consequently is not subject to section 12 of the CPA; it follows that the court's discretion to hear pre-certification applications does not flow from that section**.[4] [emphasis added]

10. Court's refuse to hear pre-certification applications when the Court would benefit from the evidentiary record available at the certification hearing,[5] or when the application raises issues overlapping with the certification analysis. In such cases, the motion should be heard

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[3] *Class Proceedings Act, RSBC 1996, c 50* Section 13(1).
[4] *British Columbia v. Apotex Inc*., 2020 BCCA 186 (CanLII), at para. 11.
[5] *Attis v. Canada (Minister of Health)*, 2005 CanLII 10884 (ON SC); *Baxter v. Canada (Attorney General)*, 2005 CanLII 18717 (ON SC); *Douez v. Facebook, Inc*., 2012 BCSC 2097 (CanLII), at para. 44; and *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands)*, 2009 BCSC 1593.

at the same time as, or after, the certification application.[6]

11. In most of the cases cited by the Defendants the Courts have considered the issue and consistently held that challenges to a cause of action should be addressed during the certification hearing, where the Plaintiff must establish a reasonable cause of action as part of the certification process. Justice Michalyshyn, in a decision we submit is binding on this Court stated:

> … unlike a pre-certification application, say for summary judgment, an application to strike a claim for disclosing no cause of action is part of the certification process itself, and attracts the usual 'plain and obvious' test in the leading cases: *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 23, [2011] 2 SCR 261; *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57, [2013] 3 SCR 477.)...
>
> Nothing contrary to *Stewart* is stated in the balance of the authorities put before me by the parties, including: *P.(W.) v Alberta*, 2014 ABCA 404, [2014] CarswellAlta 2152, leave to appeal to SCC denied April 30, 2015; *Nette v Stiles*, 2009 ABQB 153; *Kowch v Gibralter Mortgage Ltd*, 2013 ABQB 317, 2013 CarswellAlta 868; *Stewart v General Motors of Canada*, 2007 OJ No 2319; *Moyes v Fortune Financial Corp*, 2001 OJ No 4455; and *Cannon v Funds for Canada Foundation*, 2010 ONSC 146 (CanLII), 2010 OJ No 314.

…The cases of *Nette* and *Cannon* involved applications to have motions to strike heard pre-certification. The applications were dismissed in both cases.[7]

12. This approach aligns with the Supreme Court of Canada guidance to avoid "litigation by instalments."[8]

13. The Defendants' request to bifurcate the proceedings is unjustified, as the issues they seek to address in a striking motion are already encapsulated in the certification motion. Justice Hollins' reasoning warns against fragmenting the process, finding that revisiting similar issues at the certification hearing could lead to unnecessary confusion and delays.

14. In the *Perez-Nana v. Cargill Limited* ("*Perez-Nana"),* Justice Hollins of the Alberta King's Bench made it clear that addressing such issues ahead of the certification hearing is both unnecessary and premature, stating:

> Cargill wishes to bring a preliminary motion to strike the claim or portions thereof on the basis that there is no duty of care owed by Cargill to these plaintiffs. It wants to bring that striking motion now, prior to the

[6] *Hryniak v. Mauldin*, [2014] S.C.J. No. 7, at para. 2; *Perez-Nana v. Cargill Limited*, 2022 ABQB 283; and *Cannon v. Funds for Canada Foundation*, 2010 ONSC 146.
[7] *Carlson v Transalta Corporation*, 2018 ABQB 343 (CanLII), at para. 7, para. 8 and para. 11.
[8] *Garland v. Consumers' Gas Co*. [2004] S.C.J. No. 21, at para. 90.

> yet-unscheduled motion for certification. The Plaintiff objects, saying the striking motion should be heard contemporaneously with the motion for certification. This is what is known as a sequencing motion.
>
> For the reasons that follow, I am dismissing the Defendant's application and directing that the application to strike be heard with the certification motion…
>
> Without a better sense that the Defendant's striking motion would be completely successful or unsuccessful, **I believe the potential efficiencies are limited and therefore outweighed by the risk of repeating the process again at the certification hearing, possibly impacted by decisions made on the striking motion when no evidence was yet available to the Court**.[9] [emphasis added]

15. The Defendants' positions are undermined by their own acknowledgements.

Alberta concedes:

> … that it would be bound by the Court's determination of the causes of action arising from the striking application and (subject to any of the parties' right of appeal) would not seek to reargue the viability of a cause of action under the section 5(1)(a) test at certification, should the Action proceed to certification.[10]

And Canada concurs:

> No countervailing principles suggest that there are [*sic*] any advantage to this Court considering the same questions twice.[11]

16. These admissions demonstrate the redundancy of the proposed bifurcation. While the Defendants agree that the cause of action should only be adjudicated once, the proposal to hear these applications first undermines procedural safeguards by seeking an evidence-free determination, contrary to certification's rigor. It also allows Alberta and Canada the potential future procedural delay of any appeal of their striking motions separate from certification by occasioning even further unnecessary steps in these proceedings.

17. The Supreme Court of Canada held that parties cannot rely on mere allegations to demonstrate the absence of genuine issue for trial; such assertions must be proven.[12] The Defendants fail to explain how their evidence-free approach satisfies the substantive and procedural requirements for a motion to strike. Their applications introduce unnecessary complexity, delays, and inefficiencies while lacking justification.

18. Certification is traditionally the first step in class proceedings. It serves as the framework

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[9] *Perez-Nana v. Cargill Limited*, 2022 ABQB 283, at para. 2, para. 3 and para. 16.
[10] Alberta's Brief, at para. 62.
[11] Canada's Brief, at para. 16.
[12] *Canada (Attorney General) v. Lameman*, 2008 SCC 14, at para. 11.

for determining whether a proposed class action should proceed collectively, assessing whether the Plaintiff's claims raise common issues suitable for class-wide resolution. Alberta's emphasis on sequencing before certification undermines this framework and risks prematurely dismissing claims without considering their class-wide context. In support of their position, Alberta cites *Kowch v. Gibraltar Mortgage Ltd.* ("*Kowch*") which states:

> The learned author of Class Actions in Canada, Mr. Ward Branch, (Canada Law Book *at paras. 4.1397 et seq*) acknowledges that this is a topic of "some judicial debate". Mr. Branch concludes that in **the normal course a certification application ought to be the first order of business**. However there is nothing in the *Class Proceedings Act* that prevents final applications from being heard first. It appears really to be a question of balancing the ills of litigation by instalment (*Garland v. Consumers Gas Co.,* 2004 SCC 25 (CanLII), 2004 S.C.C. 25) with the desirability of dealing with dispositive motions first: *Stewart v. Enterprise Universal Inc*., 2010 ABQB 259 per S. L. Martin, J. which granted summary dismissal.[13] [emphasis added]

19. Further, in the *Kowch* case, the Court allowed a pre-certification application on a limitations issue that was a fatal defect in the claim. No such fatal defect exists in the present case.

20. Similarly, *Stewart v. Enterprise Universal Inc.*[14] involved unique circumstances where the plaintiffs had not advanced the case for two years and the Court found that delaying the defendants' summary judgment application would have been unfair given the significant delay in advancing the action. Unlike in *Stewart*, the Plaintiff here has acted diligently, seeking timely certification.

21. In *Li v. British Columbia*[15] ("***Li***") and *Consumers' Association et al. v. Coca-Cola Bottling Company et al.*,[16] ("***Consumers' Association***") pre-certification motions were allowed to address pivotal legal issues—constitutional questions in *Li* and key legal questions regarding the validity of central claims in *Consumers' Association*—which were deemed efficient to resolve before certification due to their complexity and public interest. In contrast, the Defendants' pre-certification motion in this case does not address such foundational issues.

22. In *Halliday v. Shaw Communications Inc.*,[17] the pre-certification application required substantive adjudication on the merits, involving evidentiary consideration. This differs from the motions here, which seeks to strike pleadings, without the benefit of evidence, and is more appropriately addressed at the certification stage.

23. Alberta relies on the following cases in support of their pre-certification application;

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[13] *Kowch v. Gibraltar Mortgage Ltd.*, 2013 ABQB 317 (CanLII), at para. 12.
[14] *Stewart v. Enterprise Universal Inc*., 2010 ABQB 259.
[15] *Li v British Columbia*, 2017 BCSC 1616.
[16] *Consumers' Association et al. v. Coca- Cola Bottling Company et al*., 2005 BCSC 1042.
[17] *Halliday v Shaw Communications Inc*., 2019 BCSC 2251.

however, most cases cited by Alberta **did not** grant such motions:

a) *Martindale v. Mercon Benefit Service*;[18]

b) *Nette v.* Stiles;[19]

c) *Carlson v. Transalta Corporation*;[20]

d) *Perez-Nana v. Cargill Limited;*[21]

e) *Cannon v. Funds for Canada Foundation;*[22] and

f) *Forster v Monsanto Company.*[23]

These cases underscore the general principle that certification should proceed first and that pre-certification striking motions in the face of overwhelming case law to the contrary are highly inappropriate.

24. Canada relies on *WP v. Alberta*,[24] where an application on a limitations issue was made under Rule 7.3 of the *Alberta Rules of Court* which would have disposed of the lawsuit entirely. Here the issue raised by the Defendants do not present fatal challenge to the claim and the applications are brought under Rule 3.68 of the *Alberta Rules of Court*.

25. Courts have wide discretion to modify proposed class actions to ensure efficient and effective proceedings. This flexibility allows for suggesting amendments to the class, common issues, litigation plan, or representative plaintiff to ensure the proceedings work efficiently. Class action statutes allow for flexibility in adjusting the certification order as the matter proceeds to adapt to evolving circumstances.[25]

26. The broad powers of Courts in the certification process are both administrative and supervisory in nature. This is supported by class action legislation, which provides the Courts with "generous discretion to make orders and impose terms as necessary to ensure a fair and expeditious resolution of class actions."[26] This discretion, however, is guided by the goals of certification, aiming for efficiency and cost-effectiveness rather than perfection in justice.[27]

27. The Defendants argue that hearing a motion to strike before certification would clarify the scope of the action, but certification itself serves this purpose more effectively by refining

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[18] *Kowch v. Gibraltar Mortgage Ltd.*, 2013 ABQB 317.
[19] *Nette v. Stiles*, 2009 ABQB 153.
[20] *Carlson v Transalta Corporation*, 2018 ABQB 343.
[21] *Perez-Nana v. Cargill Limited*, 2022 ABQB 283.
[22] *Cannon v. Funds for Canada Foundation*, 2010 ONSC 146.
[23] *Forster v Monsanto Company*, 2020 BCSC 1376.
[24] *WP v Alberta*, 2014 ABCA 404.
[25] *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, at paras. 45–47.
[26] *Canada (Attorney General) v. Fontaine*, 2017 SCC 47 (CanLII), [2017] 2 SCR 205, at para. 31.
[27] *Newfoundland and Labrador v Chiasson*, 2020 NLCA 28 (CanLII), at para. 14; *Endean v. Canadian Red Cross Society* (1997), 1997 CanLII 2079 (BC SC), at para. 58.

pleadings and identifying common issues. Addressing a motion to strike at this stage risks procedural inefficiencies, ultimately delaying resolution and perhaps causing *res judicata* issues which would fetter the discretion of the Court to perform its function on certification.

28. Questions of causation and liability, central to the Plaintiff's claims, are best addressed at certification. This ensures a class-wide analysis and avoids bifurcation of legal proceedings. Certification enables the Court to evaluate whether these questions are suitable for collective resolution, supported by a comprehensive evidentiary record.

29. The *Cannon v. Funds for Canada Foundation*[28] ("***Cannon***") decision, relied on by Alberta, supports hearing motions concurrently with certification to promote efficiency, avoid delays, and prevent redundant appeals:

> In this case, it is my view that the motion should be brought at the same time as the certification motion, for the following reasons.
>
> First, the test on the motion under Rule 21.01(1)(b) is the same as, and can most conveniently be dealt with, under the "reasonable cause of action" test in section 5(1)(a) of the *C.P.A*. **Dealing with the matter at one time, for all parties, at the certification hearing will promote efficiency and judicial economy**.
>
> Second, **the proposed motion will not finally dispose of the proceeding. If successful, it will only affect some of the defendants**. To the extent that the motion asserts lack of particulars, its outcome may not even result in the dismissal of the action against the Directors.
>
> Third, I am concerned that the motion will result in delays, inefficiencies and additional costs. If the motion is brought before certification, the unsuccessful party may well appeal. This could result in delays that could delay the certification motion which is scheduled to be heard almost 18 months after the commencement of the action. It seems to me that it is preferable that the certification motion and the Rule 21 motion should be heard at the same time so that, if there are appeals, they can be heard together.
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> Fourth, there is no particular prejudice to the Directors in having the motion heard at the same time as the certification motion. They are represented by the same counsel who represents Cannon, which will have to incur the costs of the certification motion in any event. If the motion succeeds, and the action is not certified against the Directors, they can be compensated in costs, if appropriate.
>
> I therefore order that the Directors may bring their proposed motion at the same time as the hearing of the Certification motion.[29] [emphasis added]

[28] *Cannon v. Funds for Canada Foundation*, 2010 ONSC 146.
[29] *Ibid.*, at para. 16-21.

30. While the Defendants argue that their approach promotes efficiency, it is more likely to create more confusion and procedural inefficiencies. Case management serves a procedural purpose, as do the provisions under the *Class Proceedings Act*. These provisions do not grant a case management judge the authority to ignore or override the statutory framework governing class proceedings, they do however empower:

> … the case management judge to make appropriate orders to ensure the fair and expeditious determination of the proceeding and to impose appropriate terms on the parties. This provision is procedural (see *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445, 293 O.A.C. 274, at para. 142) and does not permit a judge to ignore or override provisions of the *CPA*. However, together with Rule 1.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, it does permit the judge to impose procedural terms that will promote access to justice and judicial economy as well as ensure the "just, most expeditious and least expensive determination" of the proceeding on its merits.[30]

31. Canada's own Brief inadvertently supports the Plaintiff's position acknowledging: "Canada takes no position about whether its motion to strike should be heard well in advance of the certification motion, or immediately preceding it. Either timing is agreeable to Canada," supporting the Plaintiff's position that sequencing before certification is unnecessary.

32. The Supreme Court of Canada underscores the importance of responsibly managing court resources, stating:

> Access to justice depends on the efficient and responsible use of court resources. Frivolous lawsuits, endless procedural delays, and unnecessary appeals increase the time and expense of litigation and waste these resources. To preserve meaningful access, courts must ensure that their resources remain available to the litigants who need them most-namely, those who advance meritorious and justiciable claims that warrant judicial attention.[31]

33. The Plaintiff and Class Members are individuals who have been harmed by the Covid Vaccines. They deserve a fair and efficient process to determine the Defendants' liability and assess whether damages are owed. As government entities with significant resources, the Defendants have a heightened obligation to act as model litigants,[32] prioritizing judicial efficiency and the broader public interest.

34. Alberta repeatedly emphasizes potential cost savings in their Brief as a justification for hearing their motion first. It is striking—and disconcerting—to see the Government of Canada and the Province of Alberta, with massive litigation budgets, focusing so heavily on costs in comparison to the vulnerable Plaintiff and Class Members, many of whom face

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[30] *Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City)*, 2015 ONCA 572 (CanLII), at para. 68.
[31] *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27 (CanLII), at para. 1.
[32] *Facchini v. The Attorney General of Canada*, 2019 ONSC 6559 (CanLII), at para. 20.

considerable barriers in accessing justice. To uphold public respect for our institutions and maintain the integrity of the judicial process, Alberta should avoid framing their arguments so prominently around cost concerns. A more balanced approach that reflects their duty to litigate fairly and responsibly would better serve the interests of the public and the Court.

35. Furthermore, given the gravity and public importance of these claims, which raise significant issues affecting Albertans, the Defendants should not seek costs from the Plaintiff. These claims are neither vexatious nor frivolous; they present serious legal questions that require judicial consideration and are in the public interest. Imposing unnecessary costs on the Plaintiff would undermine access to justice and deter others from pursuing claims of public interest.

II. ALBERTA'S APPLICATION TO STRIKE WILL FAIL

36. Alberta argues that its motion to strike the class action is "*prima facie* strong," claiming that it is not liable for several reasons, including that it was neither the manufacturer nor the regulator of Covid Vaccines. However, this broad denial of liability misrepresents the Plaintiff's claim and overlooks Alberta's pivotal role in public health communications and its authority in shaping pandemic response measures, which Albertans were compelled to follow with an associated loss of their civil liberties.

37. The Defendants' representations and campaigns on Covid Vaccine safety, efficacy, and interchangeability are central to the public's decision-making process, especially when such communications come from positions of authority. If the Defendants' statements or actions regarding Covid Vaccine information was misleading, this undermines the Plaintiff and the Class Members' ability to make informed decisions. The extent to which the Defendants promoted the Covid Vaccines—through unprecedented campaigns and measures-requires thorough investigation by the Court. Furthermore, Alberta sought to enforce or coerce Covid Vaccine compliance though public health orders which "plausibly" constituted misfeasance of public office as found by Justice Feasby in a recent certification case where Alberta made numerous, similarly unmeritorious arguments on invalid causes of action.[33]

38. Alberta also contends that it is not responsible for administering vaccines or securing informed consent. However, informed consent depends not only on the process of administration but also on access to accurate information. The Plaintiff alleges that Alberta's representations and campaigns were misleading and deprived individuals of critical information required for informed consent to be given, thereby breaching a fundamental legal duty of care. This claim raises significant legal issues that cannot be dismissed summarily and merit full consideration by the Court.

39. Alberta seeks to shift blame onto other entities, including the federal government, AHS, and health care practitioners while avoiding responsibility for its own actions and behavior. By disseminating misleading or incomplete information, Alberta misrepresented the facts not only to the public at large, but also to the health care practitioners who rely on their guidance to inform and advise their patients. Misrepresentations undermine the entire

[33] *Ingram v Alberta*, 2024 ABKB 631 (CanLII), at para. 93.

framework of trust and decision-making necessary for the administration of public health, further emphasizing the seriousness of the allegations in this case.

40. Alberta's attempt to deflect responsibility onto other entities raises serious questions about the integrity of its decision-making processes. By disseminating misleading or incomplete information, Alberta not only jeopardized public trust but also misled the very health care professionals tasked with providing health care advise to Albertans. These actions strike at the core of the duty to provide reliable information in times of crisis, a point echoed by Justice Feasby in *Ingram 2024*:

> The causes of action that I have found to be properly pleaded – negligence and misfeasance in public office – concern the making of the CMOH Orders not the enforcement of the CMOH Orders. **More to the point, the making of the CMOH Orders presumes enforcement. No separate analysis is required to ascertain whether enforcement was wrongful. Any wrongfulness of enforcement flows from the alleged wrongful making of the CMOH Orders**. There is no basis in fact to conclude that those enforcing the CMOH Orders were privy to the fact that they were *ultra vires* the *PHA* and, as such, there is no plausible independent wrong in the enforcement of the CMOH Orders.[34] [emphasis added]

41. It appears Alberta's position is that it has no duty to provide accurate and reliable public health information and is immune from suit where false, questionable or misleading information is promulgated by public health authorities in their employ making negligent statements. Whether positions of authority, such as the Premier and the Chief Medical Officer of Health, have a duty to ensure the public receives accurate and reliable medical information and guidance is a matter for the Court to determine. Until this issue is resolved, it remains central to the case and cannot be dismissed or deflected summarily.

42. Alberta also emphasizes the novelty of the claim as a basis for its application to strike. However, while the facts are novel, the legal principles underlying the claim are not. Nor does novelty preclude a case from being valid. Class actions frequently address claims that challenge or expand legal principles, particularly in areas involving government accountability, and courts have previously allowed such claims to proceed when they raise substantial issues of public concern or involve the protection of fundamental rights.[35]

43. The Plaintiff's claim raises serious and systemic issues, including the Defendants' authoritative misrepresentations, efforts to promote mass vaccinations, limited access to essential public health information, and coercive orders that restricted civil liberties, ultimately causing harm to the Plaintiff and Class Members. These are matters of significant public concern and warrant thorough examination by the Court rather than being heard on a premature dismissal without evidence or evidentiary record.

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[34] *Ingram v Alberta*, 2024 ABKB 631 (CanLII), at para. 93.

[35] *Attis v. Canada (Minister of Health)*, 2005 CanLII 10884 (ON SC), at para. 9; *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands)*, 2009 BCSC 1593 (CanLII), at paras. 53-55; and *Ingram v Alberta*, 2024 ABKB 631 (CanLII), at para. 108.

A. Alberta Health Services Legal Status

44. Alberta's argument to strike the Plaintiff's class action for Covid Vaccine-related harms rests, in part, on the questionable assertion that AHS is a standalone company. This position is untenable and ignores the statutory framework that defines and constrains AHS's operations, statute and case law.

45. AHS is not an arm's-length standalone private corporation. At a minimum it is a Crown corporation acting as a government agent subject to significant oversight by the Minister of Health and Cabinet, which retains and possesses the authority to dismiss AHS's board of directors and direct its operations at ministerial whim. By contrast, Alberta does not have the power to dismiss the board of a private corporation like Enbridge, illustrating the unique and subordinate relationship between AHS and Alberta.

46. Alberta's claim that it lacks legal responsibility for AHS's actions disregards the structure under which AHS operates. Alberta relies on Section 3(3) of the *Regional Health Authorities Act* which states "A regional health authority is a corporation consisting of its members" and Section 1.93(1) of the *Provincial Health Agencies Act*, which states, "A provincial health agency is a corporation consisting of its members," to support its position.[36] The very nature of such Crown corporations, including AHS, is defined by their subordination to ministerial and cabinet direction. Alberta cannot use the statutory language that nominally identifies AHS as a corporation to shield itself from liability while retaining comprehensive control over its policies, funding, and governance.

47. Alberta's assertion that it "has an extremely strong *prima facie* case that Alberta Health Services is a separate and distinct legal entity from Alberta" is incorrect and disregards the Plaintiffs' claims and the evidence against Alberta itself, including statements by former Premier Jason Kenney and Dr. Deena Hinshaw, that demonstrate Alberta's direct involvement in public health policy and communication. Furthermore, it was Alberta, not AHS, that enacted the coercive and ultimately illegal public health orders, which restricted the civil liberties of the Plaintiff and Class Members unless they received the Covid Vaccines.

48. Dr. Deena Hinshaw, in her role as Chief Medical Officer of Health ("CMOH"), was not acting independently of Alberta. Alberta maintained direct oversight and authority over her role and her fulfillment of public health duties. This was explicitly addressed in *Ingram v. Alberta (Chief Medical Officer of Health)* ("*Ingram 2023*"),[37] where the Justice Romaine found that public health orders ("CMOH Orders") enacted by Dr. Hinshaw were *ultra vires* because Cabinet, not the CMOH, made the decisions. Dr. Hinshaw issued CMOH Orders under her name when such orders were actually directives of Cabinet. Dr. Hinshaw was an employee of Alberta, not AHS, and her unlawful CMOH Orders were issued at the direction of Cabinet without statutory authority.

49. The very representations made by Premier Kenney and other public servants about public health and Covid Vaccine policies were *ultra vires* because they lacked the statutory

[36] Alberta's Brief, at para. 27.
[37] *Ingram v Alberta (Chief Medical Officer of Health)*, 2023 ABKB 453.

authority to make such decisions unilaterally. The *Ingram 2023* decision explicitly found that public health orders were *ultra vires* because they were made by the Premier and Cabinet, not by the CMOH, as required under the *Public Health Act*. *Ingram 2023* illustrates that significant public health decisions, including representations made to the public, must be made within the confines of legal authority.

50. It is a question for the Court whether the Premier and Cabinet can unilaterally make binding representations or decisions outside of the statutory framework of the *Public Health Act*, *Regional Health Authorities Act*, or other enabling legislation. Additionally, the Court must determine whether public statements made by the Premier and CMOH regarding public health measures can override statutory processes or shield Alberta from liability for harm caused by those measures taken by the Premier and the Cabinet.

51. The Supreme Court of Canada has been decisive on this matter that a Crown agent cannot escape liability stating:

> I am not prepared to accept the proposition enunciated in *Wheeler v. Public Works Commissioners*, *supra,* that a corporation constituted for the sole purpose of doing acts for the Crown is not capable of doing a wrongful act in its corporate capacity, unless that statement is to be limited in its meaning to say that such a wrongful act is not authorized by its corporate powers. Otherwise, the statement subscribes to the theory that a corporation cannot be made liable in tort because its corporate powers do not authorize it to commit a wrong. In my opinion, if a corporation, in the purported carrying out of its corporate purposes, commits a wrongful act, it is liable therefor and it cannot escape liability by alleging that it is not responsible for anything done outside its corporate powers. This is true whether it is purporting to act as a Crown agent, or not.[38]

52. This principle was more recently confirmed at the Alberta Court of Appeal as follows: "In any event, s. 23(1) of the *Crown Liability and Proceedings Act,* R.S.C., 1985, c. C-50 makes it plain that the Attorney General, not the Department, should have been named as a party. Moreover, in *Le Conseil des Ports Nationaux v. Langelier*, 1968 CanLII 51 (SCC), [1969] S.C.R. 60 at 72, Martland J. noted that a government department is not a legal entity and cannot be sued."[39]

53. Furthermore, according to the *Class Proceedings Act*, and confirmed by *Apotex 2020*, pre-certification motions cannot be heard until the action has been certified. In the alternative, the Alberta's argument regarding AHS should fail because:

a) It does not meet the threshold of disposing of the entire lawsuit. Resolving the argument of whether AHS operates independently from Alberta is unnecessary because this argument does not eliminate the claims against all Defendants.

b) Even if AHS were found to be independent, which the Plaintiff does not concede,

[38] *Conseil des Ports Nationaux v. Langelier et al*., 1968 CanLII 51 (SCC), [1969] SCR 60, at page 72.
[39] *V.W.W. (Guardian and Trustee) v. Al-Hassan*, 2004 ABCA 275 (CanLII) at para. 5.

the lawsuit would still proceed against Canada, as its involvement is not contingent on AHS's status.

c) Determining AHS's independence requires exploration of key evidence. For example, in *Ingram 2023*, the evidence demonstrated that decision-making authority rested with the Cabinet rather than the CMOH. Similarly, evidence in this case may show that Cabinet, not AHS, made the decisions at issue. If so, Alberta cannot escape liability by shifting responsibility onto AHS.

d) Representations by Premier Kenney were not made by AHS but directly by the Premier. Similarly Dr. Hinshaw, as CMOH, was employed by Alberta, not AHS. As such, any liability arising from her representations cannot be attributed to AHS.

54. Alberta's reliance on Justice Feasby's decision in the *Alberta Health Services v. Johnston* ("*Johnston*")[40] case to refute liability is also misplaced. The *Johnston* decision examined whether AHS could be considered a "government actor" for the limited purpose of pursuing a defamation claim, not whether Alberta could evade liability for AHS's actions under the *Proceedings Against the Crown Act* or other relevant statutes. There is no precedent supporting Alberta's assertion that it is absolved of liability for actions taken by AHS under provincial direction and funding.

60. Regarding the claim that AHS is a separate legal entity, the Province advanced a similar argument before Justice Feasby in *Ingram 2024*. Justice Feasby expressed incredulity at this assertion saying:

> I cannot remember whether I said this in oral argument or in the written decision, the Government of Alberta has twice fired the entire board of AHS and replaced it with a single administrator responsible to the cabinet. **And I do not think the lawyers for the Government of Alberta should be standing in front of our Courts and saying with a straight face that AHS is anything but a creature of the government**.[41] [emphasis added]

B. Causes of Action

i. Negligent Misrepresentation

55. The Defendants argue that there is no duty of care or insufficient facts in the claim to establish such a duty of care based on a special relationship between the Defendants and the Class. However, the Plaintiff's claim is grounded in the unique role the Defendants assumed during the Covid pandemic as a primary source of authoritative information, guidance, and mandates directly influencing the health decisions of Albertans.

56. The Defendants' role extended beyond general public statements. They exercised significant authority and influence through public health directives and targeted information campaigns designed to persuade individuals to receive Covid Vaccines. The

[40] *Alberta Health Services v. Johnston*, 2023, ABKB 209.
[41] *Ingram 2024* Transcript, at page 110 lines 14-19. [Attached hereto at **TAB 1**]

"special relationship" alleged in the claim arises from the Defendants' dual role as elected officials and government authorities influencing personal healthcare decisions during an unprecedented public health crisis. This degree of influence reasonably establishes a duty of care toward those who relied on the Defendants' guidance and assurances.

57. Alberta cites *Knight v. Imperial Tobacco* incorrectly referring to *R v. Imperial Tobacco*[42] ("*Imperial Tobacco*"), which Canada also relies on, to assert that public statements do not establish a special relationship or duty of care. However, the context in *Imperial Tobacco* is fundamentally different. In that case, the government made statements regarding consumer goods, low-tar cigarettes, in a commercial setting, where individuals had alternatives and access to independent information. In contrast, the Defendants' public health messaging occurred within the framework of government-mandated public health orders, closures, and restrictions. The Defendants' representations severely limited individuals' access to alternative information sources and compelled reliance on government-issued guidance and measures restricted civil liberties. Further the Cabinet issued CMOH Orders that were coercive in nature and designed to encourage or force citizens to get vaccinated whether they were fully informed or not. This context amplifies the reliance factor, i.e. the "special relationship," as individuals had little choice but to trust, and rely on, the Defendants messaging during the pandemic as they were intended to by Alberta.

58. In *Imperial Tobacco* the Court held that policy decisions made by governments are typically immune from liability in tort, particularly when they involve discretionary decisions or are based on public policy considerations such as social, economic, or political factors.[43] Operational decisions, which implement established policies, can attract liability. The Court clarified that even where policy immunity is claimed, the facts pleaded must be taken as true, and it is inappropriate to strike claims at an early stage if there is a reasonable chance that the conduct does not fall within the ambit of policy immunity:

> The second problem with the argument is that, as discussed above, a motion to strike is, by its very nature, not dependent on evidence. The facts pleaded must be assumed to be true. Unless it is plain and obvious that on those facts the action has no reasonable chance of success, the motion to strike must be refused. To put it another way, if there is a reasonable chance that the matter as pleaded may in fact turn out not to be a matter of policy, then the application to strike must be dismissed. Doubts as to what may be proved in the evidence should be resolved in favour of proceeding to trial. The question for us is therefore whether, assuming the facts pleaded to be true, it is plain and obvious that any duty of care in negligent misrepresentation would be defeated on the ground that the conduct grounding the alleged misrepresentation is a matter of government policy and hence not capable of giving rise to liability in tort.[44]

59. The Defendants' representations about Covid Vaccines being "safe, effective, and

[42] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (CanLII), [2011] 3 SCR 45.
[43] *Ibid.*, at para. 88.
[44] *Ibid.*, at para. 70.

interchangeable," while suppressing known risks, are distinguishable from the *Imperial Tobacco* decision for the following reasons.

a) First, unlike the policy-based development of low-tar tobacco discussed in *Imperial Tobacco*, the Covid Vaccine messaging constituted direct, explicit, misleading and false public health representations. These statements went beyond broad policy decisions and entered the operational realm by actively promoting specific vaccines to the public.

b) Second, the Covid Vaccine representations were made with the intention of influencing individual health decisions and encouraging mass vaccination using coercive mandates, creating a direct and proximate relationship between the government and the public. This distinguishes them from the generalized policy context in *Imperial Tobacco*.

c) Third, the suppression of known risks related to Covid Vaccines constitutes an operational failure to communicate accurate and complete information, which could ground a claim in negligent misrepresentation.

d) Finally, even policy decisions are not immune if they are irrational or taken in bad faith, as noted in *Imperial Tobacco*. If it is demonstrated that the government knowingly suppressed risks, this could move the conduct outside the protective sphere of policy found in *Imperial Tobacco*.

60. The decision in *Imperial Tobacco* reinforces the notion that operational actions—such as misrepresenting or omitting critical health information—can attract liability in tort. This distinction reinforces the Plaintiff's claim that the Defendants' conduct regarding Covid Vaccine representations is actionable, and not shielded by policy immunity and government action can lead to government liability. At the very least, this is an issue the Court should decide, as it involves harm caused by the Defendants' actions, which go beyond policy decisions into areas of misleading the public and impacting public health.

61. Alberta argues that "there is no legislative scheme that Alberta is alleged to be subject to that may establish a proximate relationship." Ironically, this argument reinforces the Plaintiff's claim, as it implies Alberta was acting outside any legislative framework, rendering its public health representations and actions *ultra vires*.

62. The *Ingram 2023* decision makes clear that public health decisions must follow statutory authority. The CMOH Orders, which significantly impacted personal health decisions, were issued by the Premier and Cabinet rather than the CMOH, as required under the *Public Health Act*. Despite this Alberta misrepresented the CMOH Orders as lawful and urged public compliance, relying in large part on its own misrepresentations as justification. These misrepresentations included, but are not limited to:

a) The Covid Vaccine being effective at preventing infection of Covid;

b) Mixing Covid Vaccines was safe and recommended; and

c) The Covid Vaccines prevented transmission of Covid.

All of these statements were proven to be untrue.

63. Alberta's failure to adhere to its statutory obligations under the *Public Health Act* led to misleading information that significantly affected public trust and decision-making during the pandemic. By acting outside its legal authority and presenting its actions as lawful, Alberta misled the public into relying on its representations as if they were binding and legitimate. This overreach not only undermines the statutory framework but also exacerbates the harm by positioning Alberta as the primary and authoritative source of guidance on pandemic-related healthcare decisions. The Court must determine whether Alberta's actions, based on false representations, amounted to negligent misrepresentation.

64. By presenting *ultra vires* orders as legitimate, Alberta's role as the central authority on pandemic-related healthcare decisions, amplifying public reliance on its guidance. Despite this Alberta presented the CMOH Orders as lawful and urged public compliance relying in large part on its own misrepresentations as justification for the orders.

65. Alberta's arguments also fail to account for the unprecedented reliance placed on its guidance during the pandemic and the direct influence it wielded over personal health decisions. The misrepresentations alleged in the claim pertain not just to general information but to specific, compelling public health directives, including the legal authority underpinning public health orders. This reliance was heightened by Alberta's central role in dictating pandemic policy, creating a relationship of trust that extended well beyond typical public statements or advisory roles. Dr. Hinshaw routinely publicly describe all Albertans as her "patients" while calling Cabinet orders that she passed off as medical decisions.

66. Alberta's claim that the Plaintiff's allegations lack factual support is unsubstantiated. Alberta asserts that the Plaintiff has made "bald assertions without corresponding facts pleaded."[45] Meanwhile, Alberta also relies on *Knight* and *Queen v. Cognos Inc*., a case about an employer's negligent misrepresentation about a job opportunity, which is entirely distinguishable on the facts and does not apply to the circumstances of this case. Despite its reliance on a single highly distinguishable precedent, Alberta claims, "Given the Supreme Court of Canada authorities, Alberta has a strong case that the facts plead in the Claim do not, at law, satisfy the requirements for a negligent misrepresentation claim."[46]

67. In contrast, the Plaintiff's claim provides specific details of the Defendants' misrepresentations, the unlawful nature of their public health orders, and the reliance and harm suffered by individuals who trusted the Defendants' guidance. The Plaintiff presented evidence of statements made by the CMOH, including:

On February 21, 2021:

> Vaccines are safe, effective & save lives. I encourage all Albertans who wish to be,

[45] Alberta's Brief, at para. 44.
[46] Alberta's Brief, at para. 42.

> to get immunized as soon as they are eligible. This will help to further protect ourselves, our loved ones & those around us against COVID-19.

On June 21, 2021:

> Our AB data shows that both Pfizer and Moderna have 90+% effectiveness with 2 doses. Pfizer is about 90% effective and Moderna 93% after 2 doses. Bottom line: both are safe and both work very well.
>
> These vaccines are safe & they will protect you & those around you… Both Pfizer and Moderna are mRNA vaccines. They're not identical but extremely similar and **it's perfectly ok to get one dose of each. In fact, there's some evidence that suggests this may actually boost your immune response**.[47] [emphasis added]

68. Canada similarly made assurances, such as on February 24, 2021:

> Health Canada is expediting the review of all vaccines for COVID-19, but timelines can vary according to the completeness and complexity of the data that is provided to us. Ultimately, **Health Canada will not authorize a vaccine until it has been shown to be safe and effective**. [emphasis added]

And on March 31, 2021, Canada further stated:

> How do I know COVID-19 vaccines are safe? Only vaccines that are safe, effective and of the highest quality are authorized by Health Canada. Canada is recognized around the world for its high standards and rigorous vaccine review process.[48]

69. The Defendants repeatedly altered their representations regarding the efficacy of the Covid Vaccines, shifting the narrative as earlier claims about effectiveness were proven inaccurate. Rather than acknowledging previous inaccuracies, the Defendants made further misrepresentations, offering revised assurances. This continual shifting of the goalposts raises concerns of systemic negligent misrepresentation, as the Defendants failed to provide consistent and accurate public health information, essential for providing informed consent. It would be like a surgeon saying that a surgery had 95% success rate when the actual survival rate of the surgery was closer to 5%.

70. Despite these assurances, Canada altered its approval process for Covid Vaccines under an Interim Order. Instead of relying on the traditional "safe and effective" standard, approvals were granted based on the conclusion that the benefits of the vaccines outweighed the risks, making this new standard a subjective test. As outlined in the Statement of Claim:

> Under the Interim Order, the requirements for approval of the Covid Vaccines were altered such that the approvals were given based on the conclusion that the benefits associated with the Covid Vaccines outweigh the risks making the new Covid Vaccines approval a subjective test. There

[47] Affidavit of Tracey Bradley, at pages 24, 26 and 27.
[48] Affidavit of Tracey Bradley, at page 11.

> must be strict objective evidence of both safety and efficacy. It must also be objectively clear that the benefits outweigh the risks before a new drug is approved. It can only be objectively clear that the benefits of a drug outweigh the risks when the benefits and risks are objectively known.[49]

71. Furthermore, the Covid Vaccine contracts explicitly stated limitations on guarantees of safety, efficacy and interchangeability:

> [Canada] further acknowledges that **the long-term effects and efficacy of the Vaccine are not currently known and that there may be adverse effects** of the Vaccine that are not currently known.
>
> **There are currently no data available from Pfizer and BioNTech clinical trials on the interchangeability** of COMIRNATY with other COVID-19 vaccines to complete the primary vaccination series or for a booster dose. [50] [emphasis added]

72. The Statement of Claim further alleges:

> The Defendants held themselves out to the public as public health experts, reporting on behalf of health experts establishing a relationship of trust between themselves and the public during the Covid pandemic at a time when the public was vulnerable. The Defendants knew or ought to have known that the public, including the Plaintiff and Class Members, would be relying on their information for their health, safety and protection. Further, these governmental agents and agencies encouraged, and even implored, the public to trust the Defendants for their health, safety, and protection during the Covid pandemic and specifically with respect to the Covid Vaccines.[51]

73. The existence of the Vaccine Injury Support Program further demonstrates the Defendants' misrepresentation of the Covid Vaccines as safe. Despite the Defendants' public assurances that the vaccines were safe, effective and interchangeable, the program recognizes that the Covid Vaccines caused harm to some Albertans, directly contradicting the Defendants' repeated claims that the Covid Vaccines were safe and without significant risk.

74. In support of its position, Canada references *Imperial Tobacco*. In that case, the Supreme Court of Canada emphasized that Canada owed a *prima facie* duty of care to consumers, stating:

> I conclude that on the facts pleaded, Canada owed a *prima facie* duty of care to the consumers of light and mild cigarettes in the *Knight* case. On the facts pleaded, it is at least arguable that Canada was acting in a commercial capacity when it designed its strains of tobacco. As Tysoe J.A. held in the court below, "a person who designs a product intended for sale to the public

[49] Statement of Claim, at para. 116.
[50] Affidavit of Tracey Bradley, at page 53 and page 103.
[51] Statement of Claim, at para. 77.

owes a *prima facie* duty of care to the purchasers of the product" (para. 48).[52]

75. In *Imperial Tobacco*, the Supreme Court of Canada rejected the argument that no duty of care existed due to a lack of proximity. Instead, it concluded that sufficient proximity existed because the government's actions in designing the tobacco strains were reasonably foreseeable to affect both the manufacturers and the consumers. The Supreme Court of Canada went on to say that in situations where a product is designed for public use, a designer of that product, such as the government in that case, must reasonably contemplate the impact on consumers and the potential for harm if the product does not perform as intended.[53]

76. The Defendants' promotion of the Covid Vaccines as "safe, effective and interchangeable," without fully disclosing the risks and dangers, that it knew or ought to have known, raises similar questions of proximity and duty of care. Like the government's actions in *Imperial Tobacco*, which foreseeably connected the design of tobacco strains to consumer harm, the Defendants' representations regarding the Covid Vaccines as "safe, effective and interchangeable" could foreseeably impact public health. By actively promoting and distributing the vaccines, the Defendants assumed a duty of care to ensure the public was fully informed. Suppressing or downplaying critical information, including that the Covid Vaccines were not warranted for safety, efficacy or interchangeability, breached this duty, particularly given the direct impact of these actions on individual health. This foreseeable harm underscores the importance of the Court's role in assessing whether the Defendants' conduct constitutes a breach of their duty of care.

77. Canada also relied on *Attis v. Canada (Health)*[54] ("***Attis***") where the issue centered around whether the government, in performing its regulatory duties, could be held liable for the safety of these devices on a case-by-case basis. However, the Plaintiff's claim is distinguishable. In *Attis*, the government was acting within its role as regulator, whereas in the present case, the Defendants making affirmative public health statements and implemented coercive measure aimed at influencing individual choices. The key distinction lies in the nature of the government's actions: in *Attis*, the government's role was administrative and regulatory, whereas in the present case, the Defendants actively shaped public perception and decisions through direct communication and measures that not only impacted individuals' understanding of risks and benefits but also encroached on civil liberties.

78. In *Tylor v. Canada*,[55] ("***Tylor***") is another case relied on by Canada. The *Tylor* case focused, in part, on the government's failure to recall a product that posed a serious risk. In the case of the Covid Vaccines, the Defendants response goes beyond mere negligence. Not only did the Defendants fail to take action to recall or pause the vaccines, but they also misrepresented their safety and effectiveness to the public. In addition to suppressing or downplaying known risks, the Defendants continue to promote the Covid Vaccines as

[52] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (CanLII), [2011] 3 SCR 45, at para. 115.
[53] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (CanLII), [2011] 3 SCR 45, at para. 57.
[54] *Attis v. Canada (Health)*, 2008 ONCA 660 (CanLII).
[55] *Taylor v. Canada (Attorney General)*, 2020 ONSC 1192 (CanLII).

"safe, effective and interchangeable," despite knowing that the manufacturers had explicitly stated that the vaccines were not warranted as such.

79. In the case *Los Angeles Salad Company Inc. v. Canadian Food Inspector Agency*,[56] the key issue revolved around whether a duty of care exists in relation to a negligent inspection or investigation conducted by a government entity, specifically the Canadian Food Inspection Agency. The Court found that the inspection's purpose was not to protect the food supplier's interests but to safeguard public health. Therefore, a supplier's financial harm was merely a consequence of the broader public interest, and no duty of care was owed to the supplier. This case can be distinguished from the Plaintiff's claim, where the Plaintiff's claim involves direct communications by the Defendants that affected the rights and health outcomes of the Plaintiff and Class Members.

80. In *Copper v. Hobart* ("***Copper***"), the Court found government actor's duties were part of a broader regulatory framework and did not create a direct or proximate relationship with the plaintiffs. In contrast, a more direct relationship exists with the Defendants' misinformation about the Covid Vaccines. Unlike the general policy actions in *Copper*, the Defendants made direct, repeated and coordinated statements about the Covid Vaccines being "safe, effective and interchangeable" while supressing the risks and dangers and while imposing significant hardship on the "unvaccinated". These hardships include denying access to public spaces, denial of ability to travel, forced hotel incarceration to name a few. These actions directly impacted individuals' decisions, well-being, and civil liberties through the implementation of restrictive measures tied to vaccine compliance. This closer connection establishes a basis for a claim of negligent misrepresentation, as the Defendants' actions directly influenced public perception, restricted civil liberties, and caused harm to individuals, thereby creating a duty of care.

81. The Plaintiff's case is distinguishable from the case law provided by the Defendants. Negligent misrepresentation is a valid cause of action. Unlike other cases, where the government's actions were seen as broader policy decisions, the Defendants' public health messaging about the Covid Vaccines was explicit, repeated, and coordinated, designed with the coercive public health orders issues by cabined to directly influence individuals' decisions and health outcomes.

82. The present case requires the Court to determine whether the Defendants' conduct, including their promotion of the Covid Vaccines as "safe, effective, and interchangeable," and their suppression of risks and alternative viewpoints, establishes a "special relationship" of trust between the Defendants and the Plaintiff and Class Members, thereby giving rise to a duty of care. The Plaintiff contends that the Defendants, through targeted and authoritative public health messaging, went beyond general policy decisions and directly impacted the Plaintiff and Class Members. The Plaintiff further argues that the Defendants' failure to fully disclose risks, combined with their active promotion and use of coercive measures to coercively push mass injections, breached this duty of care, distinguishing this case from the precedents cited by the Defendants.

[56] *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, 2013 BCCA 34 (CanLII).

ii. Misfeasance in Public Office

83. The Plaintiff claims that the Defendants exceeded their legal authority through their public health actions, issuing statements and policies that they knew or should have known could harm individuals. Their role in promoting the Covid Vaccines and public health mandates constitutes misfeasance in public office. These were not neutral statements; they were government-backed directives enforced by unlawful CMOH Orders that directly affected individuals' medical decisions and civil liberties.

84. The Defendants' reliance on *Odhavji Estate v. Woodhouse*[57] ("***Odhavji Estate***") as a defense is misplaced. *Odhavji Estate* focused on individual misconduct, but here, the Defendants' actions were systemic and caused foreseeable harm on a much larger scale. The Defendants' ongoing push for mass vaccination including coercive unlawful CMOH Orders, while minimizing concerns about adverse effects, shows a level of recklessness not present in *Odhavji Estate*.

85. Justice Feasby, in his analysis of the Nilsson case in *Ingram v. Alberta*[58] ("***Ingram 2024***"), provided a definition of deliberate misconduct stating:

> Has there been deliberate misconduct on the part of a public official? Deliberate misconduct is established by proving:
>
> 1. an intentional illegal act, which is either:
>
> i. an intentional use of statutory authority for an improper purpose; or
> ii. actual knowledge that the act (or omission) is beyond statutory authority; or
> iii. reckless indifference, or willful blindness to the lack of statutory authority for the act;
>
> 2. intent to harm an individual or a class of individuals, which is satisfied by either:
>
> i. an actual intention to harm; or
> ii. actual knowledge that harm will result; or
> iii. reckless indifference or willful blindness to the harm that can be foreseen to result.

86. This commonsense definition of misconduct highlights not only intentional acts but also recklessness or willful blindness. The Defendants' actions—continuing to promote the Covid Vaccine despite known risks—fit this broader definition of misconduct.

87. The Defendants' reliance on *Odhavji Estate* overlooks the fact that their actions went beyond ignorance or bad judgment; they reflected a deliberate disregard for public safety.

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[57] *Odhavji Estate v. Woodhouse*, 2003 SCC 69 (CanLII), [2003] 3 SCR 263.
[58] *Ingram v Alberta*, 2024 ABKB 631 (CanLII).

Despite numerous warnings about the risks of the Covid Vaccines including from the Covid Vaccine manufacturers, the Defendants continued to promote them as "safe, effective, and interchangeable" for everyone, ignoring potential harms. This reckless indifference to foreseeable harm is a textbook example of misfeasance in public office.

88. Furthermore, the Defendants acted in bad faith by promoting the Covid Vaccines despite being aware, or having reason to be aware, of adverse effects and lack of efficacy. They continue to push the Covid Vaccines under false assurances of safety and efficiency.

89. Alberta argues that no facts have been pled to show its public statements were unlawful or intended to harm. However, as outlined in paragraph 60 of the Statement of Claim:

> Further, the Defendants provided the Covid Vaccines to the public at no cost and the Provincial Defendant offered monetary incentives to entice and coerce the public to take the Covid Vaccines under false assurances. In addition, Alberta's CMOH issued numerous public health orders *ultra vires* the *Public Health Act* which were unlawful in an effort to coerce and restrict the civil rights of persons who failed or refused to take the Covid Vaccines against their will

90. Alberta's claim that it did not misuse its statutory powers is false. During the pandemic, Alberta misused its statutory authority, including powers under the *Public Health Act*, to enact illegal health orders, compel compliance, and incentivize actions that directly influenced individuals' healthcare decisions.[59]

91. Alberta admits that its public statements were meant to "influence public confidence in COVID-19 vaccines." The overreach of this intent is exactly the issue in this claim. The Defendants' assurances were not merely informational, they were mis-informational; they were coupled with mandates that restricted civil liberties and widespread representations that influenced individuals' personal health decisions without adequate disclosure of known risks or alternative viewpoints on vaccine safety including data from Pfizer indicating that the Pfizer Vaccines would potentially kill more children than Covid itself.[60]

92. Even if the Defendants did not intend to harm individuals, they knew or should have known that no medical intervention is 100% "safe and effective," and that some individuals would experience severe, and potentially fatal, adverse effects. Yet, they failed to acknowledge or mitigate these risks and took many steps to limit personal choice including the issuance by Alberta of unlawful government orders. This conduct demonstrates recklessness or willful blindness and is precisely the type of misconduct actionable under misfeasance in public office.

93. Notwithstanding the representations made by the Defendants, Canada established a Vaccine Injury Support Program to compensate individuals injured by the Covid Vaccine. This program directly acknowledges the potential for harm caused by the vaccine and the need for careful consideration of risks. The Defendants knew or should have known about

[59] *Ingram v Alberta (Chief Medical Officer of Health)*, 2023 ABKB 453 (CanLII).
[60] Affidavit of Tracey Bradley, at page 299.

the existence of this program, which highlights their awareness of the potential for harm, further underscoring their failure to adequately warn the public. This program establishes that the government recognized the risks yet continued to mislead the public about the safety of the vaccine, demonstrating misfeasance in public office.

94. The Plaintiff's claim of misfeasance in public office is well-founded. Alberta has already been found to have acted illegally in misusing its authority under the *Public Health Act*, and it is anticipated that Canada similarly failed to act in protecting the public by not recalling the Covid Vaccines or safeguarding individuals from harm. In any event, both Alberta and Canada enacted coercive mandates and recklessly promoted the Covid Vaccines. These actions constitute deliberate misconduct that led to foreseeable harm. The Defendants' conduct raises serious concerns that warrant judicial examination and supports the Plaintiff's claim for misfeasance in public office.

iii. Breach of Fiduciary Duty

95. The Defendants, as public health authorities, have a responsibility to protect the health, safety, and well-being of residents, particularly when issuing vaccine guidance, policies, and mandates. This responsibility is implied through obligations under the *Food and Drugs, Public Health Act* and related health legislation, where public health decisions directly impact the public's health and safety. By controlling the messaging about the Covid Vaccines and mandating compliance with public health policies, the Defendants assumed an obligation to act in the public's best interests.

96. The Defendants argue that the Plaintiff and Class do not meet the requirement of vulnerability to their control. However, the Class consists of individuals who relied on the Defendants' Covid Vaccine public health statements and policies and who were subjected to unlawful government orders restricting their civil liberties to enforce compliance. These individuals were subject to the Defendants' influence and direction in making health decisions, creating a dependency on the accuracy, transparency, and completeness of the information and recommendations provided. Given the Defendants' authority in shaping pandemic response measures, the Plaintiff and Class were in a uniquely vulnerable position, relying on the Defendants' guidance to make critical health choices. This dependency underscores the fiduciary-like nature of the relationship between the Defendants and the Class.

97. The Defendants rely on the case of *Alberta v. Elder Advocates of Alberta Society*,[61] ("***Elder Advocates***") where residents of Alberta's long-term care facilities alleged that the government improperly inflated accommodation charges to subsidize medical expenses, constituting a breach of fiduciary duty, negligence, and unjust enrichment. The claim failed to establish a fiduciary duty because the government did not undertake to act in the best interests of the plaintiffs, nor did it control their personal interests in a manner similar to traditional fiduciary relationships. The Court emphasized that a general public duty does not create the special obligations needed for a fiduciary relationship, especially when the interests at stake do not amount to a distinct, pre-existing legal entitlement.

[61] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 (CanLII), [2011] 2 SCR 261.

98. However, unlike in *Elder Advocates*, the Defendants' actions in the present case involve a direct relationship with a vulnerable group, individuals harmed by the Covid Vaccine, that relied on their guidance in making crucial health decisions. While *Elder Advocates* involved a general public duty, the relationship between the Defendants and the Plaintiff and Class in the present case is far more specific and direct, with the Defendants exerting significant control over individuals' health decisions through coercive mandates and misrepresentation. This creates a fiduciary-like responsibility, as the public depended on the Defendants' transparency and integrity in making informed medical choices.

99. The Defendants' assertion that they did not undertake a duty to the Plaintiff and Class overlooks the fiduciary-like obligations that arise when government actions significantly influence individuals' health, bodily autonomy, and the fundamental right to make informed decisions about their own well-being. This raises a critical issue for the Court: whether the Defendants' actions, including their control over public health decisions and the public's reliance on those decisions, created a fiduciary duty owed to the Plaintiff and Class, and if so, whether the Defendants breached this duty through their suppression of risks, misrepresentation, and coercive public health measures.

iv. The Tort of Conspiracy

100. Alberta argues that the claim fails to establish that its actions were intended to cause injury to the Plaintiff class. However, a predominant purpose to cause harm is not a mandatory requirement for establishing the tort of conspiracy. The Plaintiff's claim for conspiracy is based on the allegation that the Defendants, in a coordinated manner, acted with reckless disregard for the potential consequences of its conduct, which it knew or should have known could result in harm to the Plaintiff and Class. Specifically, the Plaintiff claims that the Defendants' public statements and policies surrounding the Covid Vaccine ignored known risks, thereby creating a foreseeable injury. This knowledge element is significant under the second prong of the tort of conspiracy, as it establishes that the Defendants were aware, or should have been aware, that its actions could lead to harm.

101. Even if the Defendants' primary aim was to influence public confidence, this does not negate the Plaintiff's allegations that the Defendants acted with deliberate indifference to the potential for harm, satisfying the knowledge requirement for conspiracy.

102. Alberta argues that the Plaintiff has failed to name individual doctors, nurses, and pharmacies who actually administered the Covid Vaccines without informed consent thereby allegedly committing the tort of assault and battery. However, Alberta overlooks the fact that these other "legal entities" were subject to the same public health directives and coercive messaging as the Plaintiff and Class Members. Moreover, individuals and entities that expressed alternative views were suppressed by the Defendants. As outlined in paragraph 92 of the Statement of Claim:

> The Defendants acted negligently and recklessly by suppressing information related to adverse events from the Covid Vaccines and suppressing opinions of medical and scientific experts, from Canada and around the world, who raised concerns about the Covid Vaccines and

disagreed with the Representations made by the Defendants.

103. Additionally, the Plaintiff's claim asserts that the Defendants engaged in unlawful conduct by misleading the public about the risks of the Covid Vaccines, specifically under Section 9 of the *Food and Drugs Act*, which prohibits the dissemination of false or misleading information about drugs. While Alberta contends that this provision only applies to manufacturers, the statute broadly addresses misleading information related to drug promotion. If the Court finds that the Defendants' statements about Covid Vaccine efficacy, safety and interchangeability constituted promotion or endorsement of the vaccines, these statements could fall within the scope of the *Food and Drugs Act*.

104. Alberta relies on *Harrison v. Afexa Life Sciences Inc.*[62] ("***Harrison***"), a case centered on consumer protection and fraud in a private context, to argue against responsibility under Section 9 of the *Food and Drugs Act*. Meanwhile, Canada asserts that actions under Section 9 of the *Food and Drugs Act* are discretionary. However, the Defendants in this case are government entities, and the issues extend beyond consumer fraud to matters of public trust, governmental responsibility, and potential harm to the public. These concerns carry broader legal implications and distinct evidentiary challenges compared to a private-sector case like *Harrison*.

105. While both cases may involve claims of misrepresentation, the context and legal framework are fundamentally different. In this case, the Court must hear the arguments in full to properly determine whether the governments' discretion to misrepresent was justified in light of their duty to safeguard public health and maintain public trust. The Court's determination should weigh whether public interest or legal immunity can absolve the Defendants of liability for potential harm caused by their representations.

106. Alberta's Brief concludes with a bold statement, unsupported by legal authority, claiming that "general public statements made by government officials about the overall efficacy of a class of drugs are not the type of 'advertisement' contemplated by and regulated by the *Food and Drugs Act*." This unsubstantiated assertion weakens Alberta's argument and undermines their entire position.

107. Alberta's purported understanding of the Plaintiff's conspiracy claim is based on a narrow interpretation of the allegations and fails to recognize the legal standards for establishing conspiracy, particularly in cases where the Defendants' conduct may foreseeably harm a defined group. Additionally, Alberta overlooks the widespread impact of its misrepresentations, which not only affected those receiving the Covid Vaccines but also those administering them, all of whom acted under the representations and directives controlled by the Defendants. This broader impact strengthens the conspiracy claim and highlights the immense power and responsibility the Defendants held in their roles. Such power should not be abused, particularly during an emergency, as its effects extend well beyond the Defendants themselves, influencing those under their authority. This also further justifies the identification of both Canada and Alberta as the named Defendants in this case, given their leadership role in the promulgation of false and misleading public

[62] *Harrison v. Afexa Life Sciences Inc.*, 2015 BCSC 638 (CanLII).

health information and the significant power they exercised through their positions.

v. Negligence

108. Alberta has overlooked a crucial aspect of the Plaintiff's claim: the tort of negligence, specifically the negligence of public officials in failing to provide a balanced and accurate account of the Covid Vaccines' benefits and risks. The Defendants' role in disseminating information about vaccine safety, downplaying risks, and using civil liberties restrictions to encourage or coerce vaccination raises significant concerns that should not be dismissed at this stage. Whether intentional or unintentional, this oversight sidesteps a critical legal question regarding the duty of care Alberta owed to its citizens during the pandemic.

109. Notwithstanding the representations made by the Defendants, Canada established a Vaccine Injury Support Program to compensate individuals injured by the Covid Vaccines like the Plaintiff. The creation of the Vaccine Injury Support Program directly acknowledges the potential for harm caused by the Covid Vaccines, establishing a clear link between vaccination and adverse effects. This program is critical in demonstrating causation, as it shows that the Defendants knew, or ought to have known, that injuries could result from vaccination. The Defendants' failure to adequately warn the public or communicate the risks associated with the Covid Vaccines directly contributed to the harm suffered by the Plaintiff and Class Members, who relied on their assurances.

110. The Plaintiff's allegations are rooted in the concept of negligence by public officials, arguing that the Defendants promoted a one-sided message about the Covid Vaccines—emphasizing their safety and efficacy while allegedly suppressing or failing to disclose known or potential risks. This issue is compounded by the Defendants' use of CMOH Orders aimed at the unvaccinated and incentives to drive mass vaccination, creating a coercive environment where individuals felt pressured to submit to vaccination, sometimes against their will. The Plaintiff contends that through these actions, the Defendants violated their duty of care to provide accurate, comprehensive, and non-coercive public health guidance.

111. To establish negligence, the Plaintiff must demonstrate that the Defendants owed a duty of care, breached that duty, and caused damage that resulted in harm. Each of these elements is met here:

a) **Duty of Care**: Public officials have a duty to act in a manner that does not endanger or harm the public, especially in disseminating health-related information. As a government entity responsible for public health, the Defendants owed a duty to their citizens to provide truthful, complete, and balanced information about the Covid Vaccines. Given the Defendants' authority and expertise, the public reasonably relied on their representations regarding vaccine safety and necessity, strengthening the Defendants' duty to provide accurate and non-misleading information.

b) **Breach of Duty**: The Plaintiff claims that the Defendants breached their duty by promoting a simplified and misleading message about vaccine safety, downplaying

risks, and, in some cases, ignoring adverse effects. Allegations that the Defendants suppressed discussions about vaccine risks and discouraged alternative perspectives further support this claim. The Defendants' alleged use of coercion—restricting civil liberties, offering incentives, and creating penalties for the unvaccinated—exacerbates the breach. These coercive measures interfere with informed consent, especially when paired with one-sided information, potentially making the public feel obligated to get vaccinated despite grave personal reservations.

c) **Causation**: The Plaintiff argues that the Defendants' actions directly contributed to vaccine-related injuries suffered by Class Members. If the Defendants' representations led individuals to consent to vaccination under misleading premises or pressure, a direct causal link can be established between the Defendants' actions and the injuries sustained as demonstrated by the Vaccine Injury Support Program.

d) **Damages**: The Plaintiff and Class Members claim they suffered both physical and emotional harm as a result of vaccine-related injuries. This harm stems not only from the physical effects of the vaccines but also from the psychological impact of perceived coercion. Damages, therefore, are an inherent part of the claim.

112. The Plaintiff's claim raises a reasonable argument that Defendants' actions constitute negligence by failing to provide balanced information and by unduly pressuring citizens to accept medical treatment without being provided sufficient information to give their informed consent. The Defendants' motion to strike ignores these essential tort law elements, which should be fully considered in a hearing, rather than being dismissed summarily.

113. How many people would have consented to be vaccinated, or have their children vaccinated, if they knew that the Covid Vaccine manufacturers expressly did not warrant the Covid Vaccines for safety, efficiency or interchangeability or that evidence provided by the Covid Vaccine manufacturers indicated that more children would die from the Covid Vaccines that would die from the Covid virus itself?[63]

III. MOST EFFICIENT AND FAIR METHOD TO DETERMINE THE ISSUES

114. Alberta argues for fragmenting the process while relying on Justice Belzil's ruling in *Nette v. Stiles* in their Brief stating:

> Justice Belzil in *Nette v Stiles* considered an application by the plaintiff to bifurcate the determination of whether a cause of action against one defendant existed. Finding that even if the pleadings were struck as against one defendant, that the claim against the other defendants would still have to proceed to certification, the Court held that the facts of that case did not warrant granting a pre-certification application.
>
> However, Justice Belzil did find that "if it could be argued that an

[63] Affidavit of Tracey Bradley, at page 299.

> application to determine if the pleadings disclose a cause of action could be dispositive of the entire action, likely bifurcation would be ordered."[64]

115. This test is not met in this case. The Plaintiff agrees with the law, as outlined by Alberta, this is not a case where the cause of action is "dispositive of the entire action." Far from it. In fact, we believe that the case Alberta relies on actually supports the Plaintiff's argument on both points. First, *Nette v. Stiles* recognizes that even if a cause of action is struck as to one defendant, the claim against other defendants can still proceed, which aligns with our position that the claims against the Defendants, including Alberta, should be allowed to proceed to certification. Second, the case emphasizes that claims should not be struck pre-certification unless they can be shown to fail entirely. In this case, the Plaintiff's claims do not fail in such a manner; they involve complex factual and legal issues that require a full examination through the certification process to determine whether they can proceed as a class. Therefore, *Nette v. Stiles* actually supports the Plaintiff's right to proceed with certification and test their claims in Court.

116. The Defendants' application to strike seeks to dismiss all claims before certification but fragmenting the process at this stage risks undermining the integrity of class action procedure. Striking complex claims without the benefit of the focused examination that comes with certification can prematurely limit or disregard issues that may warrant class-wide adjudication. Certification ensures that any narrowing of issues is deliberate and structured, avoiding a piecemeal approach that could address only select claims without considering the class as a whole.

117. The Plaintiff's claims involve complex factual and legal issues related to public health measures, government communications, and the Covid Vaccines rollout and measures. These issues require a structured discovery and evidentiary context provided by the certification process. Striking the claim at this stage would bypass the procedural safeguards of certification, such as clarifying common issues and developing a solid evidentiary foundation.

118. Alberta's position also appears inconsistent when compared to its conduct in the recently certified *Ingram 2024* case. In that case, the same legal counsel for Alberta presented nearly identical arguments at the certification hearing without resorting to unnecessary procedural delays. Alberta has provided no justification for why the Court should deviate from the process it followed in *Ingram 2024*. This inconsistency suggests an attempt to unnecessarily complicate and delay the current litigation.

119. While Alberta argues that a successful striking application would avoid the costs of certification, the opposite is more likely if the striking application is only partially successful or is appealed when Alberta and Canada are unsuccessful. Given the complexity of the issues at hand, a series of appeals could delay resolution for all parties involved. Certification provides a focused approach, allowing the Court to determine whether the claims should proceed collectively, minimizing fragmented proceedings and avoiding the inefficiency of piecemeal appeals on threshold issues.

[64] Alberta's Brief, at paras. 64-65.

120. Alberta further contends that the allegations against Alberta are "significant and stigmatizing." The Claim contains not only the polarizing subject of Covid-19 vaccines but the alleged impropriety by Alberta in responding to the public health emergency brought on by the Covid-19 pandemic."[65] This argument is perhaps the most troubling of all. If anyone has made the issue of Covid Vaccines stigmatizing and polarizing, it is the Defendants themselves. The Defendants positioned themselves as trusted and respected authorities and, from that position, misinformed, coerced and incentivized the public to submit to a medical intervention without full informed consent for example:

> On or about June 29, 2021, Dr. Hinshaw publicly stated: "It has been a tremendous privilege to support Albertans over the last 16 months and to help keep you informed. This pandemic has tested us and at time it has polarized us. It has challenged all of us in ways we never could have expected. But it has also made clear one indisputable fact, we are stronger and safer together."
>
> On or about July 27, 2021, the office of the Prime Minister published the following public statement: "The best way to end this pandemic is for everyone to get their shots as soon as they can."[66]

On June 16, 2021, Alberta made the following public statement:

> Got vaccinated? Get rewarded! Albertans 18+ with at least 1 dose can entre to win one of 3 draws for $1 million.[67]

121. As a result of these representations and actions, the Plaintiff and Class Members have been harmed. To now use the very issues—the stigmatization and polarization—that the Defendants created in an attempt to avoid accountability and dismiss this lawsuit is not only unjust but undermines the Plaintiff's and Class Members' right to have these actions tested in Court.

122. This case is not about individual grievances; it concerns a systemic issue of governmental action that affects a large, vulnerable group, making it an ideal candidate for a class action. Government actions, particularly those that affect public health and individual freedoms, carry significant implications for the public trust and the rule of law. When such actions are challenged, it is crucial that they be tested in open Court to ensure accountability, transparency, and fairness. If the Defendants acted appropriately, they should be able to demonstrate the fairness and reasonableness of their actions in open Court. If not, the Plaintiffs and Class Members should be given the opportunity to hold the Defendants accountable for their conduct in Court.

IV. CONCLUSION

123. Bifurcating the issues raised in the Defendants' applications undermines the principles of

[65] Alberta's Brief, at para. 78.
[66] Statement of Claim, at paras. 56(e) and (f).
[67] Affidavit of Tracey Bradley, at page 29.

fairness, judicial efficiency, access to justice, and behavior modification—principles foundational to class action litigation. The Defendants—Alberta and Canada—are government entities expected to uphold the principles of accountability and transparency. Their attempt to avoid scrutiny before evidence is examined is troubling, particularly in light of the public's right to have these allegations tested in Court. Class actions serve to address systemic issues, deter misconduct, and ensure good governance.

124. The Defendants also appear to fundamentally misunderstand the Plaintiff's claim, which focuses on their public assurances, misrepresentations, misstatements, false information, misinformation and systemic failure to disclose critical safety and efficacy concerns, despite explicit warnings and limitations from vaccine manufacturers. These alleged misrepresentations, compounded by coercive mandates and restrictions, undermined informed consent, endangered public safety, and caused harm to the Plaintiff and Class Members.

125. The Plaintiff's claims are detailed, precise, and grounded in evidence, including:

a) Vaccine contracts and product monographs that explicitly did not warrant for safety, efficacy, or interchangeability;

b) Contradictory public assurances from the Defendants misrepresenting manufacturers' warnings;

c) Coercive mandates and restrictions infringing civil liberties and undermined informed consent; and

d) Harm suffered by the Plaintiff as a result of the Defendants' misrepresentations.

126. While the application to strike aims to eliminate claims with no chance of success, it must not be misapplied to prematurely dismiss serious allegations. The Plaintiff's claims, which include failures to provide accurate public health information, suppression of critical risks, and coercion through civil liberty restrictions, are far from frivolous and warrant judicial consideration.

127. The Supreme Court of Canada in *Imperial Tobacco,* relied on by both Defendants, emphasized the importance of approaching motions to strike with caution, particularly in contexts where novel legal claims are involved.

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, 1932 CanLII 536 (FOREP), [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd*., [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The

> history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in Donoghue v. Stevenson. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. **The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.**[68]

128. Addressing the application to strike before certification will cause unnecessary delay and procural fragmentation. Certification is specifically designed to assess whether claims meet the requirements for collective adjudication, including whether a valid cause of action exists. Hearing the application separately duplicates efforts and risks inconsistent findings.

129. The issues raised in the application to strike are best evaluated during the certification hearing, where the claims' legal and factual context can be properly assessed. Certification aligns with the goals of class action litigation: access to justice, judicial economy, and behavior modification.

130. The Plaintiff respectfully submits that the application to strike should not be heard prior to certification. Proceeding with the certification hearing first ensures fairness, judicial efficiency, and a comprehensive examination of the legal and factual issues, consistent with both statutory provisions and case law. In the alternative, should the Court accept the Defendants' approach, the Plaintiff submits that success in overcoming the application to strike—given its higher threshold—should result in automatic certification, as the certification standard is significantly lower.

131. For these reasons, the Plaintiff requests that the Court deny the Defendants' application to sequence the hearing of the application to strike before certification.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of November 2024.

RATH & COMPANY BARRISTERS AND SOLICITORS

JEFFREY R.W. RATH

Counsel for the Plaintiff
CARRIE SAKAMOTO

[68] *R v Imperial Tobacco Canada Ltd, 2011* SCC 42 at para. 21.

Action No.: 230112271
E-File Name: CVK24INGRAMR
Appeal No._____

IN THE COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

REBECCA MARIE INGRAM and CHRISTOPHER SCOTT,
carrying on business as THE WHISTLESTOP CAFÉ

Plaintiffs

and

HIS MAJESTY THE KING IN RIGHT OF ALBERTA

Defendant

P R O C E E D I N G S
(Excerpt)

Calgary, Alberta
October 2, 2024

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Proceedings taken in the Court of King's Bench of Alberta, Courthouse, Calgary, Alberta

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October 2, 2024 Morning Session

The Honourable Justice Feasby Court of King's Bench of Alberta

J.R. Rath	For R. Ingram and C. Scott
E. Chipiuk	For R. Ingram and C. Scott
M. Freeman	For R. Ingram and C. Scott
J. Dube	For His Majesty the King in Right of Alberta
F. Chiu	For His Majesty the King in Right of Alberta
J. Flanders	For His Majesty the King in Right of Alberta
D. Marion	Court Clerk

Discussion

THE COURT: Good morning, everyone. Please be seated.

MS. CHIPIUK: Good morning.

THE COURT: For those of you that do not know me, my name is Justice Feasby. I am just going to take a moment to organize myself. I see there is a compendium --

MR. RATH: I thought you might use some extra paper, so...

THE COURT: Yeah. Well, on that subject, I brought down the compendium of evidence that had been brought -- sent to me earlier. All of your briefs and legal authorities I have on my tablet here, which is not the greatest way to look at things. I guess we -- I do have screen as well. So, I will navigate that way. And I just ask you guys be patient with me on that. I guess one of the things I would like to cover first is how long do we think we are going to need? Are we going to need the full 2 days? And what is sort of the order of operations?

MR. DUBE: I think from Alberta's perspective, Justice, we would not need the full 2 days, I mean, clearly depending on how long submissions would be for my friends. I would imagine we would be, on Alberta in total, probably about half a day --

THE COURT: Okay.

MR. DUBE: -- I'd estimate.

THE COURT: All right.

MR. RATH: And I would estimate, likely, half a day to slightly less than half a day, with some time in -- half an hour to an hour in reply.

THE COURT: Okay. And sort of the way I am going to proceed is, you know, we have 2 days. If we need it we can take it. I would like to take a break a mid-morning just to sort of gather my thoughts and I am sure that counsel would appreciate that. So, just if I have not signalled for it and you want the break just me know and we can do that. Is there anything else we should cover as a preliminary matter before we get going?

MR. RATH: No. Other than to note that the compendium that we've handed up of our materials --

THE COURT: Yeah.

MR. RATH: -- we've page numbered sequentially starting on page 3 with the Statement of Claim and through, so I'm going to be referring to that throughout my argument --

THE COURT: Okay.

MR. RATH: -- by tab and then by page number at the top of the page.

THE COURT: Sure.

MR. RATH: So, if that's -- you know, for ease of the Court's reference, if that --

THE COURT: No, that is great.

MR. RATH: -- would be of assistance to you.

THE COURT: Yeah.

MR. DUBE: And, Sir, perhaps the one thing on our end in

reply to my friends' materials, we do have some additional cases we might refer to in our submissions and we'll hand them forward.

THE COURT: Of course.

MR. DUBE: We're not sure if it's helpful, we thought we would print out all of the CMOH Orders that were at dispute. We have a copy for you here if you'd like a hard copy. I'm not sure if they're found, sort of, in one place anywhere else though. So, I can --

THE COURT: Well, I am --

MR. DUBE: -- hand it forward, but…

THE COURT: -- I am happy to receive it, I guess. Yeah.

MR. DUBE: Okay.

THE COURT: I mean, we are really dealing -- unless someone tells me otherwise, I think dealing with the CMOH Orders as a concept as opposed to --

MR. DUBE: Correct.

THE COURT: -- like, I mean, if there is something important between them, I trust people would point it out, but --

MR. RATH: But I wanted to thank my friend for doing that. I don't think that anybody's gone to the trouble of actually pulling them altogether in one place before. So, we're grateful to have it if for no other reason than the historical records, so…

THE COURT: Okay. Good. All right.

MR. DUBE: And I -- and I did hand forward -- my -- my friend Ms. Flanders had provided just hard copies of the briefs in case you would need those as well.

THE COURT: That is appreciated. Thank you. Okay. Shall we begin?

MR. RATH: Certainly.

Submissions by Mr. Rath

MR. RATH: Again, good morning, Mr. Justice Feasby. For the record, my name is Jeffrey Ralph Wallace Rath. I'm here for the plaintiffs, the applicants. I'm joined by my colleagues, Ms. Eva Chipiuk, and our senior counsel, Mr. Mark Freeman.

The first thing that I would like to do is situate the Court's thinking into how it is that we conceive of this case, and how it is that we conceive of the class action and the need for this class action to proceed. And specifically, our thinking on this all -- all the way through -- and this is certainly, you know, contrary to some of the evidence that my friends have filed and the approach that they seem to be taking, which is that we need to relitigate the pandemic and the need for orders during the pandemic and so on -- our position is that even if you accept as a thought exercise that every order that was issued through the pandemic was for a bona fide purpose and for a bona fide reason, where those orders specifically were aimed at causing harm to a specific group of society, specifically business operating in Alberta that were shut down in effect for the public good and the public benefit -- again, accepting that all the orders were for a bona fide reason and a bona fide purpose --

THE COURT: Right. I do not think that they were purposed to cause harm.

MR. RATH: No. No. But -- just --

THE COURT: Right.

MR. RATH: -- but they weren't purposed to cause harm. No. And I said I'm prefacing my argument by saying that we accept that they're -- you know, just accept for a moment that they're for a bona fide purpose --

THE COURT: Right.

MR. RATH: -- but they certainly did cause harm to a segment of society --

THE COURT: Yeah.

MR. RATH: -- which suffered economic losses as a result of the orders being directed at them, shutting down their businesses, and interrupting their business operations.

So, we start from the premise that where a segment of society, and a small segment of society, is harmed for the benefit of the public at large, right, for the public good, the public at large, in keeping with the concept of the public good, has an obligation to compensate those people and make them whole regardless of whether the orders were issued for a bona fide purpose or not. And, you know, we have some issues that we'll get into when we get into responding to some of my friends' arguments about trying to raise the *Public Health Act* as a shield to liability in this case when the orders themselves were ultra vires the *Public Health Act*, and we'll be discussing that later. But there is a real issue in this case that flows from the *Ingram* decision that we -- you know, that this Court needs to keep in the back of his mind, and that is specifically that the Court found in *Ingram* that the legal way, the only legal way, for cabinet to have issued executive orders shutting down businesses in this province were under the *Emergency Management Act,* not the *Public Health Act*. And you know, that's something that, you know, unfortunately, I think colours this case from a number of perspectives, including my friends raising section 66.1 of the *Public Health Act* as a shield, because section 66.1 starts with orders that were issued in good faith under the form of the *Act* -- and at some point -- and this is not at issue for you, but this will be at issue for a trial judge, and this is why we say this case needs to be certified -- there is an issue that's going to need to be determined as to whether or not the decision by the government to proceed under the *Public Health Act* rather than to proceed under the *Emergency Management Act,* which was the only legal way to proceed, was done for the purposes of avoiding liability by being able to raise section 66.1 of the *Public Health Act*, as my friends have done in their reply. And, again, that begs the question -- we've responded to that argument -- but, again, you know, we say that they --

THE COURT: Sorry. I do not quite understand. Would there have been liability under the *Emergencies Act*?

MR. RATH: Yes. The *Emergencies Act* -- and it's in our reply brief, and I'll take you to it later -- specifically requires compensation to be paid to people whose -- who were affected by *Emergency Management Act* orders. And we've provided some case law in our reply brief, you know, where that issue was actually litigated in this court.

THE COURT: Okay.

MR. RATH: So -- and, again, with regard to my friends raising section 66.1 of the *Public Health Act* as a shield, again, it raises that issue of, you know, whether or not the decision to proceed with executive orders under the *Public Health Act,* you know, was done in good faith, or was it done with the view to where they're saying, Hey, let's go under the *Public Health Act* because then we can raise 66.1 as a shield to any

actions that are brought. But, again, that's leaving aside the issue that the Court on two separate occasions, one in the *CM* decision, Mr. Justice Dunlop, and the second in the *Ingram* decision, by Madam Justice Romaine, found that the orders themselves were ultra vires the *Public Health Act*, which, from our perspective, means that they were void ab initio, so they're not under the *Public Health Act* and section 66.1 wouldn't apply in any event.

THE COURT: Right.

MR. RATH: So, you know, by -- by way of introduction.

So, the other thing that I want to then launch into is the fact that my friends raise -- attempt to raise as a bar to these proceedings what we think is a somewhat interesting assertion that no causes of action are pled within the Statement of Claim. But, of course, that comes from section 5(1) of the -- of the *Class* action *Proceedings Act*, which sets out the requirements for certification. And I think, you know, it'd be useful at the start of this to, you know, just to go to that section.

THE COURT: Sure.

MR. RATH: It's at page 60 of our compendium, and it's page 6 of our original brief. And, yeah, if you can just have that open, My Lord, I'll be flipping back and forth through it as we go. So, page 60, bottom of the page, under the heading, "Law and Argument Test for Certification."

THE COURT: Yes.

MR. RATH: And, of course, our submission is that, you know, the first requirement, "Do the pleadings disclose a cause of action?" We're going to go through that in depth. Second, "Is there an identifiable class of two or more persons?" Clearly, from our perspective, in this case there is.

THE COURT: M-hm.

MR. RATH: The third requirement, "The claims of the prospective class members raise a common issue, even if the common issue does not predominate over individual issues." Clearly it does in this case. The four -- the fourth requirement:

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

And, again, my friends have pointed to numerous other cases that have been pending through the courts and the fact that we potentially could have thousands and thousands and thousands of individual claims. So, clearly, this is -- would be a preferable procedure to that, having unrepresented plaintiffs like the -- the *Ape Parkour* case that they're referring to, trying to muddle their way through, as opposed to having class counsel dealing with the issues.

And then whether there is a person eligible to be appointed as representative plaintiff. And in this case, we strongly submit that both Ms. Ingram and Mr. Scott are suitable representative plaintiffs and they're both here today in keeping with their interests in these proceedings.

So, now, what I'd like to do, is I'd like to go through all of those five items in depth --

THE COURT: Okay.

MR. RATH: -- grounded in the *Statute* and the tests.

So, the first thing I'd like to deal with in terms of causes of action is if you could turn to page 3 of the -- of the compendium. We might just as well start with the actual initiating document of this proceeding being the Statement of Claim.

THE COURT: Yes. Just give me a second here.

MR. RATH: Okay. And that's at tab -- it's the very first document, tab 'A', and it's paginated as page 3 as the --

THE COURT: Right.

MR. RATH: -- first page. I'm not sure why, but that's the way it is.

THE COURT: That's fine.

MS. CHIPIUK: It's this.

MR. RATH: Oh. Apparently our index and the cover page were pages 1 and 2.

THE COURT: It will all make sense.

MR. RATH: All right. It does.

So, the first thing that I'd like to refer to generally with regard to my friends' arguments with regard to the fact that the pleadings don't disclose a cause of action is that I think my friends to a great degree are confusing or conflating defences to causes of action with the existence of causes of action. So, much of what they raise in their -- you know, in their pleadings, including section 66.1 of the *Public Health Act*, that -- that doesn't mean there isn't a cause of action, it means that's a potential defence to the cause of the action; right? And on that issue alone, again, when we break it down and you look at the actual wording of section 66.1 of the *Public Health Act*, there are two requirements for that to be raised as a defence to a claim; (1) that the person issuing the orders was acting in good faith; and (2) that it was pursuant to the *Statute*, which in this case we know it wasn't.

So, those -- that -- those might be defences for the trial judge to consider. They might not be much of a defence, but they're still defences for the trial judge to consider and either accept or reject following certification. But that in and of itself does not mean that there's not a cause of action because you can raise a defence, as weak as it may be, with regard to the action. And what we see throughout is, you know, in my friends' materials and my friends' submissions, is over and over again they are conflating things into meaning that there is no cause of action when in fact what -- the things that they're raising as a defence. And I can take -- I'll take you through some of those specifically, but, you know, one of the ones that, you know, I was -- that, you know, that I noted was, you know, when they're talking about, you know, whether or not a duty of care arises. Well, whether or not there's a duty of care that arises, again, that might be a defence, but it doesn't go to whether or not there's a cause of action. The cause of action is a negligence which is pled throughout the Statement of Claim and, we would submit, in a proper manner. So, referring to page 6 of the Statement of Claim at paragraph 19, it's pled:

> On July 31st, 2023, in *Ingram v. Alberta (Chief Medical Officer of Health), 2023 ABKB* 453, the Alberta Court of King's Bench found the CMOH Orders listed in Appendix 'B' to the Statement of Claim were invalid being *ultra vires* the *PHA* because the final decision makers were the cabinet and committees of cabinet, rather than the CMOH or one of her statutorily authorized delegates as required by the *PHA.* As a result, all CMOH Orders pronounced by Dr. Hinshaw, including those listed in Appendix 'A', were *ultra vires* the *PHA*, and unlawful.

So, again, you know, my friends say that that doesn't disclose a cause of action as against Alberta. My question for the Court is, who else could that apply to, other than Alberta, who

was promulgating the orders and was seeking to enforce the orders.

The other thing I'd like to refer you to is on page 12 of the Statement of Claim.

THE COURT: M-hm.

MR. RATH: And we're at paragraphs 64 and 65 where we're talking -- where we're dealing with the *Alberta Bill of Rights*, and this is an important -- the *Alberta Bill of Rights* is an important cause of action in this case. One of the issues that has been raised in this case previously is the *Authorson* decision. And the *Authorson* decision -- well, in the *Ingram* case, not in this case, this is our first kick at it, obviously -- but this Court is obviously well aware of the *Authorson* decision, that being a specific *Act* of Parliament brought specifically to curtail a judgment for damages in favour of veterans whose pensions had been mismanaged by the Government of Canada. So, a very specific *Act* of Parliament aimed specifically at curtailing damages won in court on behalf of veterans, you know, was, in effect, declared by Parliament to be a nullity and that no damages would be paid to the veterans pursuant to that judgment.

THE COURT: M-hm.

MR. RATH: Well, the Supreme Court in that case found that that decision by Parliament could override the *Bill of Rights* because it was validly enacted legislation, right, that specifically sought to curtail damages. Well, we have no such thing in this case. We do not have a specific *Act* of the legislature saying that no damages should be paid under the *Emergency Management Act* or any other form of *Statute*. And, further, the reason the Supreme Court found in *Authorson* that Parliament's decision was to be upheld was because they followed the due process of parliamentary procedure. It went through three readings in Parliament, validly enacted by law, passed by the Senate, et cetera. Again, we have no such thing here. So, any pronouncements of the lower court with regard to -- or the lower court of this court -- with regard to the *Bill of Rights* and *Bill of Rights* arguments -- even at the Court of Appeal -- were based on the supposition that the *Public Health Act* -- or the misunderstanding that we were arguing that the *Public Health Act* was somehow ultra vires or that the *Public Health Act* was somehow unconstitutional or illegal, our argument has always been -- and that's what the Court found at the end of the day -- was that the orders themselves were illegal executive orders that were not issued under the *Public Health Act*. So, as a result of these orders being unlawful ultra vires orders, no due process protection pursuant to *Authorson* would apply.

And, of course, it's the same issue that we see -- and I'll kind of, you know, jump ahead a little bit -- where my friends refer to the *Welbridge* decision from 1970 of the Supreme Court, where, you know, there's this finding by the Supreme Court where you don't have a

cause of action that arises from challenging a validly enacted municipal bylaw that was passed by, you know, a municipal council in the proper form that's later found to be unconstitutional. That's not the case here. We don't have validly passed legislation. We do not have anything that followed the normal legislative process. What we have is a finding of fact by Madam Justice Feasby --

THE COURT: No. No. Romaine.

MR. RATH: Or not Madam Justice Feasby. Madam Justice Romaine. My apologies.

THE COURT: It is okay.

MR. RATH: It's Madam Justice Romaine and Justice Dunlop and, to a certain extent, Justice Millsap in Grande Prairie in the *Ape Parkour* case, what we find is that we're dealing with orders that were not validly passed and were not lawful because they were illegal executive orders that should have been promulgated under the *Emergencies Act*, which is not the case here. So -- and, again, on that basis, and this is pled in the Statement of Claim, and this is why it's important that I take you to it, at paragraph 65 we say:

> The Impugned Orders were unlawful *ab initio*, and therefore could not have been enacted pursuant to a valid legislative objective. As such, the Impugned Orders can be distinguished from legislation or regulations made *intra vires* the enabling legislation, but subsequently found by the Courts to offend the provisions of the *Alberta Bill of Rights*.

So, all of that is specifically pled. So, you know, my friend may have defences to that and may want to argue contrary to that at trial, but that should only come with the fulsomeness of discovery and evidence. Sir?

THE COURT: No, I -- look, let me just tell you my perspective on this and where I think your challenge is on this argument.

MR. RATH: Certainly.

THE COURT: And your friend may want to take notes on this because I think -- I am going to convey some views on the weakness of his position as well. So, Madam Justice Romaine in the *Ingram* decision dealt with the *Bill of Rights* in the alternative. So, she -- the way her decision works is she says the *Public Health Act* -- or

the cabinet's actions were ultra vires the *Public Health Act* -- or the CMOH Orders are not valid because they were made by cabinet, not by the CMOH -- and then her decision entirely rests on the *Public Health Act*. And then she goes on and does a *Charter* analysis and an *Alberta Bill of Rights* analysis in the alternative. And she says, Well -- essentially, she is saying -- if I am wrong, then I am going to ask whether the orders violate the *Charter* and violate the *Alberta Bill of Rights*. But as I understand your argument today, is you are not arguing what she considered. What you are saying is because they are ultra vires under the *Public Health Act* they cannot serve a valid objective. And I have some sympathy for that point of view. And by definition, the due process has not been followed because -- now, normally when we think of due process we think of a court process and an ability to challenge something, but I think due process is an officially expansive concept to say they must be acting intra vires --

MR. RATH: Well, I think what we're talking about is due process in the context of *Authorson* in the Supreme Court's --

THE COURT: Right.

MR. RATH: -- you know, of the regularity of parliamentary process or legislative process.

THE COURT: Right. And -- so, I am -- I can -- I am with you that far.

MR. RATH: Okay.

THE COURT: Where I have trouble with your position on the *Alberta Bill of Rights* is -- and I think this is a significant problem -- is that you are essentially saying you can sue on a breach of the *Alberta Bill of Rights* for damages, and that the *Alberta Bill of Rights* conveys upon your clients a right of action, a cause of action. And when we look at the *Charter*, the reason why people can sue for *Charter* damages is because *Charter* 24(2) creates that right of action. And if you look at the *Alberta Bill of Rights* jurisprudence or the *Canadian Bill of Rights* jurisprudence -- because it is modelled on the *Canadian Bill of Rights* -- you do not see damages actions. You do not see people making damages claims. And if you look at the structure of the *Alberta Bill of Rights*, it -- that is not the way that it protects rights. Now, you might say, Well, it is not good at protecting rights, it has a shortcoming, it could have been written differently. Well, sure, it could have been written differently, but it was not written differently. It was written -- you know, you look at section 2, it talks about how the Court is to construe or apply the law, and that is the way that the *Bill of Rights* implements rights protection. It does not implement rights protection through a private cause of action.

MR. RATH: And that -- that's your concern that you'd like us to address?

THE COURT: Yes.

MR. RATH: Okay. And we'll address that more fulsomely later in the argument for sure.

THE COURT: Okay.

MR. RATH: So -- but that -- that having been said, you know, our position on that is that where there's a wrong, there has to be a -- there should always be a remedy.

THE COURT: Yeah.

MR. RATH: And, again, simply because these issues have never been litigated before doesn't mean that this is not something that should be -- should be considered not at this stage as certification -- I don't consider that to be -- I don't consider that to be something that should stop us at this stage of the proceedings for a lack of cause of action. I think that's an issue that should be litigated fulsomely on a full record in front of the trial judge.

THE COURT: But the problem is, is the *Class Proceedings Act* says there has to be cause of action; right? And so, I cannot let this go to trial and say, Well, there is going to be a big trial, and the judge is going to hear a whole lot of evidence, and then create a cause of action. It says there has to be a cause of action. So, you have to tell me what is that cause of action.

MR. RATH: Well -- and, again, you know, we can respond to that more fulsomely. Just off the top of my head, I'd look at the *Saskatchewan Wheat Pool* case --

THE COURT: Yeah.

MR. RATH: -- as an example, which deals with, you know, subsuming the tort of a breach of statutory duty into the law of negligence in Canada. And I would certainly point to the fact that the law of negligence is pled throughout the claim insofar as that the executive orders were issued negligently under the improper *Statute* and, we would argue, in violation of the *Alberta Bill of Rights*. I think all of that serves as a

foundation to the claims that we have brought in negligence and with the *Bill of Rights* setting -- you know, setting the flavour for what the expectation of the Legislature is with regard to the protection of those rights.

So, you know -- and, again, I'll -- you know, I want to consider, you know, throughout the day, you know, more fulsomely, your suggestion and your concerns with the *Bill of Rights*, but, again, our submission is, you know, that that -- you know, that, I don't think, in and of itself should prevent this action from being certified, and we've certainly pled any number of other causes of action which get us to where we need to go by way of common issues. Even if you -- you know, even if you were to take that narrow approach to the *Bill of Rights* and say that simply because the bill of -- you know, the *Bill of Rights* doesn't specifically allow for damages, that the fact that property rights are violated doesn't give rise to a claim. So, you know, that's something that, you know, that we'll consider and discuss further.

But, again, I'd like to move on now to -- and we will come back to that --

THE COURT: Okay.

MR. RATH: -- but deal with the pleadings with regard to negligence. And, again, throughout the Statement of Claim, starting on page 13, the claim for negligence is reasonably and properly made out. They -- and the case law that my friends have, you know, presented with regard to saying that negligence claims can't be met are not absolute. They suggest -- you know, they actually suggest the opposite and suggest that claims can be brought under certain circumstances. And obviously our submission is that this is certainly one of those circumstances because we have -- you know, we have a situation where, you know, even from a public policy perspective, and from the perspective of the appearance of justice being done for, you know, thousands of people in this province whose businesses were shut down under illegal orders, you know, it's going to be pretty hard for citizens of this province to understand or accept that this Court could say at the end of the day, Oh, well, it doesn't matter that you were harmed through all of these unlawful and illegals orders, but there is no -- there is no remedy for you, and you can't have a class action to determine these issues, you know -- you know, at the end of the day. I mean, it's -- it becomes very problematic. So, you know, in our view, the pleadings on negligence, you know, cover that -- more than cover that off.

Then we also have the pleadings on expropriation, which, in our view, you know, these could be seen as a constructive expropriation, and that's properly pled and made out. And then at paragraph 90 of the Statement of Claim, page 16, we specifically plead that:

> The Defendant failed to follow its own procedures, legislation, and guidelines to deal with emergencies such as the public health

> emergency created by COVID-19, including Alberta's Pandemic Influenza Plan.

So, obviously, the legislation we're referring to there is the Alberta *Emergencies Act,* which is the *Statute* that they should have proceeded under but didn't. And, again, you know, our submission is that it's open to this Court to find that the reason that they didn't proceed under the Alberta *Emergencies Act* was the -- the hope that they could be shielded by section 66.1 of the *Public Health Act* and avoid having to pay damages, which is effectively --

THE COURT: So --

MR. RATH: -- what we see here --

THE COURT: Well --

MR. RATH: -- in our friends' pleadings and the materials they filed with the Court.

THE COURT: Let us look at the *Emergencies Act*. Where is the damages piece there?

MR. RATH: I'll find the section. I've noted it. It's in our reply brief.

THE COURT: No. I am sure it is. I am -- I know I am putting you on the spot. I just --

MR. RATH: I'll just -- I'll find the -- I'll --

THE COURT: It is interesting to me now, so I am just --

MR. RATH: No.

THE COURT: -- give me a…

MR. RATH: I'll find the reference in our reply brief. And our reply brief is at tab 'E'.

MR. DUBE: It might be section 19 of the *Act*, Sir, if that helps.

THE COURT: Okay. Thank you.

MR. DUBE: 19(3). And, certainly, my friend can correct me if I'm wrong.

Discussion

MS. CHIPIUK: Can I jump in with a technical issue? We don't have the live stream going at all for party participants that want to view. I've just been informed that nobody can access the live stream of --

THE COURT: Oh.

MS. CHIPIUK: -- this -- these proceedings. That --

THE COURT CLERK: Do they have the right link?

MR. FREEMAN: Yeah.

THE COURT CLERK: It's virtual courtroom 16?

MS. CHIPIUK: We were provided with one yesterday and I'm just --

THE COURT: Yeah.

MS. CHIPIUK: -- being told it's not available.

THE COURT: I was on that email, so…

MS. CHIPIUK: It's not working.

MR. FREEMAN: No. Nobody can get into the -- there's a number of people that are trying to get onto the link, but they can't -- can't seem to call in.

THE COURT: Well, mister clerk, do we need to take a few minutes to work on this?

THE COURT CLERK: Which link did you give the -- was that virtual courtroom 16?

MS. CHIPIUK: It was the link we were provided yesterday, and there was a call in number. They've tried both.

THE COURT CLERK: Do you have the -- do you have the email? Like, can you tell me --

THE COURT: I --

THE COURT CLERK: -- which link you have?

THE COURT: I have it mister clerk.

MS. CHIPIUK: Sure.

THE COURT: Just give me a moment here.

MS. CHIPIUK: It is --

THE COURT: So, it was --

MS. CHIPIUK: It's webinar number 2-7-7-2-5-4-2-6-9-6-9.

THE COURT: Yes.

THE COURT CLERK: No.

THE COURT: It was not a virtual courtroom number. It was -- the link is https://albertacourts.webex.com/albertacourt/ and then a bunch of numbers and stuff.

THE COURT CLERK: That's not the right link. Who --

THE COURT: Well --

THE COURT CLERK: -- who sent that?

THE COURT: So, this was sent by remote hearings K-B-J to its counsel, so…

THE COURT CLERK: So…

THE COURT: So -- and I think this was supposed to be a -- not the normal link because the idea was that attendees were not going to be able to view.

MS. CHIPIUK: Right. Just view --

THE COURT: Or, sorry, they would be able to view. We would not be able to seem them or hear them.

MS. CHIPIUK: Right.

THE COURT CLERK: And --

THE COURT: Right? So, the idea was it was just for the public.

THE COURT CLERK: Yeah. So, it's virtual courtroom 16. If you give me your email address…

MS. CHIPIUK: Sure. It's E-C-H-I-P-I-U-K at Rath and Company dot com.

THE COURT CLERK: Okay. I will send you that.

MS. CHIPIUK: Thanks.

MR. RATH: Shall we continue?

MS. CHIPIUK: Just --

MR. RATH: Or just --

MS. CHIPIUK: We need people to see our arguments.

MR. RATH: I don't care.

THE COURT CLERK: Just give me a second.

MS. CHIPIUK: Okay. They have it.

THE COURT: Sorry. Are we waiting for me?

MR. RATH: No. No. I'm just waiting to --

THE COURT: All right.

MR. RATH: -- to be told that it's all right to continue to proceed with my argument.

THE COURT: All right.

MR. RATH: It's not often that I get to be quiet for this long.

Submissions by Mr. Rath

MR. RATH: In any event, My Lord, we're at tab 'E', page 171 of our compendium.

THE COURT: Tab -- tab 'E'.

MR. RATH: Page 171 where we've reproduced section 19 of the *Emergency Management Act* --

THE COURT: Yeah.

MR. RATH: -- and we're referring to section 19(1) and sub(3):

> On the making of the declaration and for the duration of the state of emergency, the Minister may do all acts and take all necessary proceedings including the following:
>
> (3) If the Minister acquires or utilizes real or personal property under subsection (1) or if any real or personal property is damaged or destroyed due to an action of the Minister in preventing, combating or alleviating the effects of an emergency or disaster, the Minister shall cause compensation to be paid for it.

THE COURT: Right.

MR. RATH: And, of course, it's our --

THE COURT: And so, you are --

MR. RATH: Go ahead.

THE COURT: -- you are saying that -- I mean, what happened here is they said essentially you have to close your business for the duration of some of these orders or you have to operate on a reduced capacity. So how is that damaging or destroying real and personal property?

MR. RATH: Well, first of all…

THE COURT: Or acquiring or utilizing.

MR. RATH: Well, it's acquiring or --

THE COURT: -- real and personal property?

MR. RATH: -- utilizing it in the sense that they're being utilized as -- in essence, as a buffer to stop the spread, which was the slogan that they continually utilized. So, they were shutting down these businesses to, in effect, slow the spread of the virus throughout society. So, they were being utilized, the businesses were being utilized for a public health purpose.

And, certainly, from the standpoint of personal property being damaged or destroyed -- and it's pled specifically with regard to Christopher Scott, but every single restauranteur in the province could speak to that -- they were continually having produce and food destroyed and spoiled by the openings and closings and openings and closings on no rational basis that anybody could discern, such that, you know, they would stock their restaurants and then all of -- with fresh produce, and then all of a sudden they're shut down again, and all of that produce that they've stocked is, in effect, destroyed. So, that was all a direct result of those orders. And those are certainly on behalf of the restaurant's damages that are going to accrue as, you know, through the class action and which was pled specifically with regard to Christopher Scott.

THE COURT: So, what you are saying to me is I should read this as if the Minister utilizes real or personal property, and telling people to keep their business shut or telling them they can only have, you know, one person in the store at a time or what have you, the word "utilizes" encompasses that and I should give it -- and I guess what we are talking about here is we are saying, Okay, what is the purpose here? The purpose of the -- of this provision -- well, the purpose of the *Act* is to facilitate the combating of emergencies. The purpose of this provision is to compensate people who are hurt by the actions that are taken in the interests of the public good, the greater good. And "utilize" here should be given a broad meaning that would encompass saying, Shut your restaurant, shut your store, shut your gym?

MR. RATH: Yeah. A broad purpose of interpretation --

THE COURT: Yeah.

MR. RATH: -- because, again, you know, keep in mind what they're doing is they're actually interfering with people's leasehold -- you know, in many cases, either interfering with real property that's owned by the business or interfering in somebody's leasehold interest where they have a lease and they have an obligation to continue to pay their landlords and --

THE COURT: Well, a lease is real property.

MR. RATH: What's that?

THE COURT: A lease is real property.

MR. RATH: Well, no, exactly. So, they -- but they continue to have obligations to pay their landlords, as an example, pursuant to the lease, but they have no ability to generate revenue from that property because of the illegal executive orders.

THE COURT: M-mm.

MR. RATH: So, that's -- you know, that's the harm that we say was done. And, again, whether -- whatever weight you put on section 19, again, for our purposes of certification and for the purposes of winning this lawsuit at the end of the day, which isn't the test on certification, it's not whether we'll win but whether there's at least a plausible argument --

THE COURT: Is there not a similar provision in the *Public Health Act*?

MR. RATH: But under the *Public Health Act*, again, you've got that section 66.1 that they raise -- you know, that they would raise as a shield if the orders had been legally promulgated under the *Public Health Act* --

THE COURT: M-hm.

MR. RATH: -- and in good faith and pursuant to the *Statute*. We actually say in our materials those provisions are somewhat contradictory and, you know, create a bit of a, you know, sort of an anomalous situation where on one hand there's

an ability to seek damages under the *Public Health Act* but on the other my friends raise section 66.1 as a bar to -- to claims pursuant to orders issued under the *Public Health Act*.

THE COURT: M-hm.

MR. RATH: But, again, those, you know, from our perspective, are issues for the trial judge. Because, again, the other issue that's outstanding with regard to this, and this is -- it was never determined in the *Ingram* case -- was that what was found in *Ingram* was that what was going on was that Dr. Hinshaw would go into cabinet with a range of options from least -- you know, least impactful to most impactful, and our understanding is that generally the cabinet was picking the option in the middle. So, you know, it becomes a question of some nicety as to whether the trial judge is going to order those orders to be produced in the context of this case so that we can see whether or not some of the options that were being ignored by the ultra vires executive orders didn't involve business closures at all, which, you know, from Dr. Hinshaw presenting them as a range of options acceptable to her would have been acceptable public health options that would also meet, you know, the requirement of the government to impact citizens as little as possible with regard to the management of the emergency.

THE COURT: Yeah.

MR. RATH: So -- and again those are -- from our perspective, those are all issues for the trial judge and --

THE COURT: Yeah.

MR. RATH: -- those are all issues --

THE COURT: And I am sure there will be a big fight over cabinet privilege and whatnot --

MR. RATH: Oh, of course.

THE COURT: -- but that is not my problem.

MR. RATH: No. That's not your problem. But we're --

THE COURT: Yeah.

MR. RATH: -- pointing to you that, again, these are all issues that should come up post-certification, and should be dealt with, you know, in that context.

And that's why, you know, also, you know, in our briefing materials we refer to decisions from the Supreme of Court of Canada which say that where punitive damages are pled, as an example, that those are issues that can be certified for, you know, for trial, and, again, should only be properly considered by the trial judge, you know, following evidence. Because, again, if it turned out on --

THE COURT: I mean --

MR. RATH: -- evidence -- sorry --

THE COURT: -- punitive damages is not a cause of action though. It is -- if you have a cause of action you can ask for punitive damages and --

MR. RATH: No. But in the context of class action cases and class action certification, it's a common issue, right --

THE COURT: Yeah.

MR. RATH: -- that can be determined by way of a class action.

THE COURT: Sure.

MR. RATH: So -- so that's why we refer to that -- those Supreme Court decisions. And, again, those are, you know, those are issues of some nicety if, you know, evidence is uncovered through the discovery process that, you know, as an example, cabinet specifically chose to go under the *Public Health Act* knowing it was -- that was unlawful, because they wanted to avoid any possibility of having to pay damages under the *Emergencies Act.* I mean, that would certainly be something that would go both to, you know, whether or not these orders were issued in good faith and certainly, you know, would be an issue to be considered in the context of punitive damages.

So, you know, again, this is why we're saying in the context of these submissions and these arguments that these -- you know, these issues all speak to the need for certification and the fact that there are valid causes of action pled throughout the Statement -- throughout the Statement of Claim.

THE COURT: Okay. Can you get punitive damages against the Crown?

MS. CHIPIUK: Of course. Yes.

MR. RATH: We --

MR. DUBE: You can. Yeah.

MR. RATH: Yeah.

THE COURT: Yeah. Okay.

MR. RATH: Yeah. I think against the Federal Crown the -- the Federal *Crown Proceedings Act* may prohibit it but not against the Provincial --

THE COURT: Okay.

MR. RATH: -- Crown. And, again, that's -- you know, that may well be a stretch, but that's -- it's certainly an issue -- that's certainly a common issue to be considered in the context of -- of these proceedings.

Now, the other -- the next issue that I would like to move on to is a lot of the evidence that our friends have submitted. Obviously you've read both our brief -- brief and our reply. From our perspective, a lot of the evidence that was provided should be given --

THE COURT: Are you done with causes of action?

MR. RATH: I am -- yeah, I am.

THE COURT: Okay. I am not done with causes of action.

MR. RATH: Okay. That's fair.

THE COURT: Okay. So, when I read your -- which brief was it? I think it was your --

MR. RATH: Reply?

THE COURT: -- reply brief.

MR. RATH: Yes.

THE COURT: Let me just find it.

MR. RATH: That's at tab 'E' again?

THE COURT: Yeah. So, let me just find where it was. So, you have the *Alberta Bill of Rights.* I think you have covered that well. Then there is the abuse of process. And it was not clear to me whether you are pleading a separate cause of action of abuse of process or not.

MR. RATH: Oh, no. That was -- that paragraph in our reply, that's referring to my friend raising arguments claiming that the -- you know, as a result of the *Ingram* decision, all of the matters before this Court are res judicata.

THE COURT: So, not an abuse of process? I am muddling my words. Abuse of power --

MR. RATH: Oh, okay. I was referring to page 173 --

THE COURT: Yeah.

MR. RATH: -- res judicata. And abuse of --

THE COURT: Yeah.

MR. RATH: -- process was the paragraph I think --

THE COURT: I am going back to your first argument, or first brief, I think it is there. Yeah. So, paragraph 66 of your first -- it is page 65 of your compendium.

MR. RATH: Oh. Oh. Okay. Of our argument.

THE COURT: Yeah. You say abuse of power, and then you go and you argue about *Roncarelli* and things like that.

MR. RATH: Yes.

THE COURT: Okay. Are you saying that abuse of power is one of the causes of action?

MR. RATH: Yes.

THE COURT: Okay. Because when I look at the cases I do not

see a cause of action that is, strictly speaking, abuse of power. When you look for abuse of power you normally come up with misfeasance in public office as the tort.

MR. RATH: Well, the Supreme Court --

THE COURT: Are you saying there is a --

MR. RATH: -- of Canada itself describes it at -- and this our reference at page 67:

> Moreover, like bad faith and abuse of power, the clearly unconstitutional standard implicates Parliament's conduct in enacting legislation. As we explained, a finding of clear unconstitutionality amounts to a conclusion that in "enacting" the legislation, lawmakers knew the law was unconstitutional, or were reckless or wilfully blind as to its unconstitutionality.

And, of course, that's what we're talking about here with regard to Justice Romaine's clear finding that the orders were ultra vires the *Public Health Act* --

THE COURT: But the problem with *Power* -- *Power* is a *Charter* case, and the --

MR. RATH: No. No. This is -- sorry -- oh, sorry, go ahead.

THE COURT: You are talking about --

MR. RATH: I'm reading that from *Power*, yeah.

THE COURT: Yeah. The recent Supreme Court case called *Power* -- and that is confusing because we are talking about abuse of power and --

MR. RATH: In *Power,* yeah.

THE COURT: -- and the case is named *Power.*

MR. RATH: Right.

THE COURT: But in *Power*, it is a *Charter* case, and the reason they can make a claim for damages is they have section 24(2). It does not seem to me that -- it seems to me that it is a constitutional cause of action. It is provided by the *Constitution*.

It is not a tort per se. And then when I look at the tort, I mean, *Roncarelli* is not super helpful because it is a Quebec case and they have their own civil law. There is the case where Jim Prentice was counsel -- was that the *Nilsson* case? It might be. And they talk about the tort of misfeasance in public office. And I just wanted to clarify, is that what you are arguing here or -- and what are the elements of the tort of abuse of power?

MR. RATH: Well, I mean, if we have to call it misfeasance in public office as opposed to an abuse of power --

THE COURT: Well, you may want to or you may not want to. If you -- you may look at the elements of that tort and go, Well, I am not sure I want those. Because my question, where I was ultimately going to get to, is if we are alleging a tort, and misfeasance in public office is an intentional tort, the respondent would not be Alberta, it would be the individuals who have misused their public office. And --

MR. RATH: Well --

THE COURT: -- and, I mean, I do not think that is what you are trying to do.

MR. RATH: No. And -- and, again, because I don't think it's appropriate to name any individuals as defendants in a case of this magnitude. There's no -- you know, ultimately there's no point to it because any judgment would be illusory as against an individual defendant in its personal capacity; right? And, again -- and I'm just going to go back to the Statement of Claim, and -- and I think this is why we pled it, and I'd referred to that -- that paragraph earlier where we plead that:

> The Defendant failed to follow its own procedures, legislation, and guidelines…

You know, so whether that's negligence or whether that's, you know, misfeasance in public office, or whatever you want to call it, from our perspective that's a cause of action. They had legislation that they were bound to follow if they wanted to issue these types of orders, specifically the *Emergencies Act*. And this Court, Justice Romaine, found specifically that they did not follow the *Statute* that they should have been proceeding under, and instead chose to proceed in the manner they did, promulgating illegal executive orders under the *Public Health Act*. So, you know, what do we call that? Do we call that misfeasance in public office? Do we call that, you know, negligence? You know, what's -- you know, what -- what -- what should we call it? But it's definitely a wrong for which --

THE COURT: Because --

MR. RATH: -- there needs to be a remedy.

THE COURT: Some of the commentary teases out that there is a difference between negligence and misfeasance in public office. Because in negligence the problem that you will have, whether you have a problem with me or you have a problem with the trial judge, is that in the duty -- for there to be a duty of care under the *Anns v. Merton Borough Council* case, you know, the two step, you have to establish proximity. And I think it is going to be difficult to say cabinet has proximity to a class of business owners in Alberta and -- whereas misfeasance in public office you do not have a proximity issue.

MR. RATH: Right. But, again, we've responded in our reply to the proximity issues my friends raised in their -- you know, in their materials; right?

THE COURT: M-hm.

MR. RATH: Our reply to that is how could there not be proximity when cabinet itself is directing the orders at specific businesses? So, I mean, how does it get any less proximal than that? Where, you know -- it wasn't -- it's not like we're going to issue some general order that applies to the province at large. And they -- they specifically targeted specific types of businesses. It wasn't all businesses. It was, effectively, small retail -- small retail businesses. And they specifically exempted certain businesses; cannabis stores, liquor stores. Initially they exempted casinos; right? And so, you know, we pointed that out in our injunction application as to how strange it was that they were shutting down the high schools but leaving the casinos and strip clubs open for 18-year-old high school students to go to --

THE COURT: Yeah.

MR. RATH: -- and the very next day an order issued shutting down the strip clubs and the casinos. So --

THE COURT: Right. Well --

MR. RATH: -- you know, it can't get much -- much more proximal that that when they are specifically targeting orders at specific businesses while exempting other businesses. So, I honestly don't -- you know, didn't understand my friends' proximity argument. And I think that, you know, clearly, where orders are directed not at the public at large and not to the, you know, not to the world at large to apply equally to everyone, but are targeted against certain businesses the proximity is made out.

THE COURT: Yeah. So, I am just looking at the tort of abuse of public offence. It is in the *Nilsson* case that you cite, 2002 ABCA 283. And the test derives from a House of Lords case from 2000, *Three Rivers v. Bank of England*, and let me find where the test is stated. So, this is quoting -- anyways, it says -- this is at paragraph 95:

> Based on the foregoing, the appropriate test for abuse of public office in Canada can be stated as follows:
>
> Has there been deliberate misconduct on the part of a public official?
>
> Deliberate misconduct is established by proving:
>
> 1. an intentional illegal act, which is either:
>
> (i) an intentional use of statutory authority for an improper purpose; or
>
> (ii) actual knowledge that the act (or omission) is beyond statutory authority; or
>
> (iii) reckless indifference, or willful blindness to the lack of statutory authority for the act;

You could probably argue the third one:

> 2. intent to harm an individual or a class of individuals, which is satisfied by either:
>
> (i) an actual intention to harm; or
>
> (ii) actual knowledge that harm will result; or
>
> (iii) reckless indifference or willful blindness to the harm that can be foreseen to result.

So…

MR. RATH: Certainly, from our perspective, we've made out -- the test is made out on the facts as pled. I would also refer you to page 15 of our brief.

THE COURT: And that is where I was getting -- that --

MR. RATH: Okay.

THE COURT: -- is where I was getting it from, from 15.

MR. RATH: Okay. So --

THE COURT: So, I followed from page 15 to *Nilsson* and --

MR. RATH: Right. Well, I -- I'm going to refer you to *Alberta (Minister of Public Works, Supply and Services)* -- oh, yeah, this is *Nilsso*n.

MS. CHIPIUK: Yeah.

THE COURT: That is the case.

MR. RATH: So, yeah. So, in *Nilsson* it says, the Alberta Court of Appeal found:

> …that the way in which the Crown sought to camouflage the real purpose of the [government's action] is relevant to the tort of abuse of public office…

So, again, I think it's -- you know, it's either explicit or implicit in the *Ingram* decision that these decisions were made under the *Public Health Act* when the only lawful way to do this was under the -- to issue these orders -- were under the *Emergency Management Act*. And I think -- you know, my friends have not provided any evidence on this point, and I think it's clear that the Court can draw an inference, at least at this stage for the purposes of certification, that -- that by proceeding under the *Public Health Act* as opposed to the *Emergencies Act* that these were -- that what they were trying to do was to disguise political decisions -- and Justice Romaine refers to that, the fact that these are political decisions made by politicians not by medical officers of health -- that they were trying to disguise political decisions as public health decisions. So, they're -- you know, in effect they're making decisions as to what's -- you know, what segments of society should be allow to operate and continue to -- continue to profit by providing services to the public and which segments of society, you know, should be shut down, and, in effect, put in a financial hole for the benefit of society as a whole. These were -- these were political decisions. And what we say is had they been forced to go under the *Emergencies Act*, as they should have done, then these decisions might not have been made because they would have been politically accountable for them. But, instead, they chose to hide behind public health orders and hide

behind Dr. Hinshaw, in effect saying, Don't blame us, these are doctors' orders, which, you know, as it turns out, they weren't. So --

THE COURT: Right.

MR. RATH: -- you know, so I think that -- you know, what the Court of Appeal has to say there about camouflaging the real purpose of the government action being relevant to the tort of abuse of public office is -- you know, is -- is relevant to this case.

THE COURT: Right. So, what I would ask you, Mr. Rath, and ask of your friends as well, *Nilsson* is 2002, I do not know whether that is the last word on the tort of abuse of office or abuse of power in Canada. You know, given that we are a couple decades on, it would not surprise me if there is newer case law. So, I would ask over the next 24 hours or so if --

MR. RATH: We would note that up?

THE COURT: -- counsel could take a look --

MR. RATH: M-hm.

THE COURT: -- you know, in a lunch or overnight and let me know if there is more case law.

MR. RATH: Okay.

THE COURT: Okay.

MR. RATH: Now, I see we're at 11:00. Is this a good point to take the morning break?

THE COURT: It is a good time.

And, mister clerk, I wonder if you could send me the link that you sent to counsel over the break?

THE COURT CLERK: Okay.

THE COURT: All right. Thank you very much. How much time would people like?

MR. RATH: 15 minutes?

THE COURT: Okay. I will be back at quarter after, give or take.

MR. RATH: Thank you.

THE COURT: Thank you.

(ADJOURNMENT)

THE COURT: All right. Please be seated.

Mr. Rath, you may continue.

MR. RATH: Thank you. I'd like to -- just because we were discussing it over the break, I'd like to skip back to your -- the point -- or the question that you were raising with regard to proximity.

THE COURT: Yes.

MR. RATH: And, specifically, what I'd like to do -- and here we do get to use my friends' compendium all of the COVID orders --

THE COURT: Okay.

MR. RATH: -- that were issued.

THE COURT: Great.

MR. RATH: And I'd like to refer you to the COVID order at tab 2, 2nd page --

THE COURT: M-hm.

MR. RATH: -- where the order delineates places of business:

> The following types of non-essential places of business are no longer permitted to offer or provide services to the public at a location that is accessible to the public…

And then it lists them all out. I'm not going to read through the entire section but it goes on -- it goes on through paragraph 10 up to point 'K'. And, again, you know, these are very specific orders and these are very specific businesses that are being targeted, you know, by the -- by these orders. So, you know, we would say that that in and of itself is sufficient to -- you know, to meet the proximity test because they were knowing specifically what businesses that these orders were applying to or which were being targeted by these orders. This wasn't a broad, general, you know, law of general application. These were very targeted orders.

And then, I also wanted -- with regard to the *Bill of Rights* discussion we were having earlier --

THE COURT: Yeah.

MR. RATH: I also -- to the extent that it assists -- would refer you to paragraph 84 of our reply, which again is at tab 'E' of our materials -- in our compendium, sorry.

THE COURT: 84 of the reply.

MR. RATH: And I'll -- I'll give you a page reference. It is page 175.

THE COURT: Okay.

MR. RATH: It says:

> Furthermore, the *Alberta Bill of Rights* is paramount over the *Public Health Act* and its orders. The Province had the option to invoke the notwithstanding clause to shield the CMOH Orders from scrutiny under the *Alberta Bill of Rights* but chose not to do so. This decision is telling. By not using the notwithstanding clause the Province implicitly acknowledged that its actions could be subject to review under the *Alberta Bill of Rights*. As a result, violations of the *Alberta Bill of Rights* must lead to compensation for those whose rights were infringed, as no legal mechanism was used to limit their applicability during the pandemic response.

So, to the extent that that assists with the question you had asked earlier --

THE COURT: I --

MR. RATH: -- I'm just --

THE COURT: I am not sure it does, but…

MR. RATH: Sorry.

THE COURT: Okay. I know you were anxious to move on from causes of action. But I think it --

MR. RATH: I'm not anxious to move on at all --

THE COURT: Okay.

MR. RATH: -- I'm happy to stay here as long as you need to satisfy yourself --

THE COURT: All right.

MR. RATH: -- the causes of action exist.

THE COURT: So, let us -- let me go back to the causes of action because I want to go through this systematically. So, we have covered the *Alberta Bill of Rights*.

MR. RATH: And then when we were discussing negligence you brought up the proximity point.

THE COURT: Yes. So, I think we have covered negligence, we have covered abuse of power. And that is all you deal with in your first brief. Your pleadings have more. And this is what I wanted to get at, is there some other causes of action, and the ones that jump immediately to mind, and there may be more, were breach of fiduciary obligation --

MR. RATH: Yes.

THE COURT: -- and conversion.

MR. RATH: Yes.

THE COURT: And your friend has responded to those, and

perhaps others, but that was not, sort of -- you did not play those cards. I mean --

MR. RATH: Well, they --

THE COURT: -- they are --

MR. RATH: -- but to the extent that they're in the Statement of Claim they're certainly in play. And those -- my friend is correct --

THE COURT: Yeah.

MR. RATH: -- that those are causes of action that are pled and that --

THE COURT: Yeah. But -- but --

MR. RATH: -- and -- and give rise to common issues. We're certainly not abandoning those issues.

THE COURT: No. But they --

MR. RATH: No.

THE COURT: -- they were not sufficiently high on your list to make your brief.

MR. RATH: Well -- and perhaps the reason for that is we thought they were self explanatory and the fact that they were --

THE COURT: Okay.

MR. RATH: -- valid causes of action spoke for themselves.

THE COURT: Okay. Well, let us start with --

MR. RATH: But -- but, I mean -- but that having been said, we did respond to my friends' argument and we addressed them specifically in our reply.

THE COURT: Right.

MR. RATH: Right.

THE COURT: So, I struggle with breach of fiduciary obligation.

MR. RATH: Well, let me give you a scenario that might help you with that.

THE COURT: Okay.

MR. RATH: Let's look at the circumstance of Mr. Scott --

THE COURT: M-hm.

MR. RATH: -- who was taken away in handcuffs and then, much like Mr. Roncarelli's business, his business was padlocked.

THE COURT: M-hm.

MR. RATH: So, his business had a chain thrown on it, the doors were padlocked, and at that point the government had physical control and physical possession of Mr. Scott's property. And while that business was physically under the control of the Government of Alberta it was broken into, property was damaged, cigarettes were stolen, et cetera, et cetera. So --

THE COURT: But -- but he -- and this, you know, may come up in the context of appropriate class representatives -- he in that respect is different than everybody else who you are representing because not everybody was arrested, not everybody had their business padlocked, not everybody had something stolen. I mean, when we look at the big picture here, what is going on is the government is telling businesses they have to be closed or they have to work at reduced capacity. Mr. Scott went to war with the government and ended up in, you know, in gaol, and his business --

MR. RATH: He ended up --

THE COURT: -- was padlocked.

MR. RATH: -- being right, by the way, but…

THE COURT: We do not need to get into that. But the point is, is he is different and what happened to him was different than everybody else.

MR. RATH: Well, other than --

THE COURT: And the --

MR. RATH: Go ahead.

THE COURT: And that matters in this proceeding because it is a class proceeding, and we are worried about, you know, the things that happened to the class.

MR. RATH: No. But there's still other members of the class, and I'm think of, you know, I'm thinking of some of the churches that had fences built around, and some of the -- you know, I think what's really clear from the record, and certainly this would be something that we would be arguing at trial, the government set out to make examples of certain people. So, you know, as part of, you know, Okay, well, you know, we don't have to enforce against everybody. If we take a few people away in handcuffs that should scare everybody else sufficiently to follow our unlawful orders. So, I think that there's an element of that that needs to be considered.

And, you know, to the extent that you look at the businesses that weren't padlocked or that weren't -- or people weren't being hauled away in handcuffs, certainly, the examples that the government was intentionally setting in hauling people away in handcuffs and throwing people in gaol for violating illegal orders were such that people that were afraid to have that happen to themselves, you know, toed the line and simply sat there and continued to lose money through having to pay rent, lost revenue, et cetera, you know, rather than taking the steps that were taken by Mr. Scott.

So, you know, and, again, the government knew which businesses these were, targeted these businesses, and specifically under what was a clear threat to the public at large of what would happen to them if they didn't toe the line of being hauled away in handcuffs and thrown in gaol, et cetera, effectively took possession of all of those businesses and business establishments, again, for the -- ostensibly -- for the public good, which we say give rise to a fiduciary obligation.

THE COURT: All right. So, we have to say, what is the test for a fiduciary; right? And there is lots of law on this.

MR. RATH: Right.

THE COURT: And a fiduciary obligation is a duty of utmost loyalty; right? And it is problematic to look at government as being a fiduciary except in some limited circumstances; right? I mean, obviously, we have a Crown fiduciary

obligation to Indigenous people; right? Now, we can have an argument about whether or not that is really properly called a fiduciary obligation, but that is typically what we -- the word we use.

MR. RATH: Sui generis obligation, I think, is what the Supreme Court said in *Guerin,* so…

THE COURT: Right.

MR. RATH: Yeah.

THE COURT: But in private law we have a whole body of law that says, you know, how you identify a fiduciary. So, there is certain categories; right? You know, there is lawyer/client, there is principal/agent, and so forth. Then there is the situational fiduciaries that we use, the test that comes out of *Frame v. Smith* and later cases for it; right? And the problem is, is when I look at cabinet -- and is it cabinet that you are saying is the fiduciary or are you saying the Government of Alberta is the fiduciary?

MR. RATH: Well, we say --

THE COURT: Who --

MR. RATH: -- we say that the government --

THE COURT: -- who is the --

MR. RATH: -- we say that the government writ large as, you know, if -- if it was cabinet that were making the decisions, the government is vicariously liable for the decisions --

THE COURT: Okay.

MR. RATH: -- of cabinet or the decisions of Deena Hinshaw or the decisions of whoever it was that, you know, that caused the harm or effectively took that property for a public use.

THE COURT: Right.

MR. RATH: Because, as far as we're concerned, there was a taking of property, it was clear.

THE COURT: Oh, I understand that. But the problem I have is when we think of a fiduciary obligation as a duty of loyalty, right, the government has a duty to all citizens; right? They are to govern in the interests of all Albertans. And they are not to be loyal to any specific subset of Albertans. And, again, I am going to leave out exceptions like children who are in -- under the care of CFS, or something like that, vulnerable populations, but, generally speaking, the government is not a fiduciary to any specific subset of the population because they have a duty to everyone.

MR. RATH: I understand that point. But, again, I would again refer you to that CMOH Order that I showed you. In this case, what the government did was it created a class of vulnerable persons, specifically business owners that fell within those categories. They created the vulnerability by saying, Yeah, and if you continue to operate that business you're going to be hauled away in handcuffs like Mr. Scott and we're going to throw a padlock on your building. So, you know, that in and of itself created the vulnerability. And, again, this is -- you know, we're talking about the power of the state versus the power of a small, independent businessperson. It doesn't get more vulnerable than that. And this isn't a situation where -- and I'm -- you may or may not know I've spent most of my career arguing the Indigenous cases, so --

THE COURT: I am aware of that.

MR. RATH: -- so, I'm very familiar with the body of law that you're referring to. And there's -- within that body of law, I mean, there's cases that the Federal Government throws up all the time about how, you know, fiduciary duties do not exist at large for the government, et cetera, et cetera, but this is not a duty that exists at large. The government has specifically -- and if the word targeted is too strong, has specifically identified a group of businesses or businesspeople within the province that are going to be harmed, and they knew they were going to be harmed because you can see that from the various programs that they were trying to bring in with regard to, you know, that we referred to, small business grants, et cetera, they knew harm was going to occur; right? And the flip side of that was to make sure that the harm was as little as possible.

THE COURT: So --

MR. RATH: So -- and, again, you know, that's the duty. So, I don't think that in this case, you know, when we want to refer to, you know, governments, you know, and fiduciary duties not existing at large, that's not what we're talking about here. We're talking about the government itself creating a class of vulnerable people by singling out various businesses through these orders.

THE COURT: But vulnerability, it comes into fiduciary

analysis sometimes, but what the defining element of fiduciary is the undertaking -- when the fiduciary undertakes the *Act* in the best interests of the beneficiary.

MR. RATH: Sure.

THE COURT: And I do not see an undertaking of that sort.

MR. RATH: Well, and, again, it's a question of some nicety because had the government proceeded by way of an injunction against all of these businesses it would have had to give an undertaking for damages. And then --

THE COURT: Sure. But the government does not have to do that because they have plenary power; right? They --

MR. RATH: Well, but, again -- but, again, isn't that the problem here; right? The very thing that we're trying to wrestle with is that the government is exercising that power in an inappropriate and unlawful mechanism where they're targeting a certain class or group of society for the benefit of society as a whole. So, the very fact that they're singling out this one segment of society for the benefit of the rest of society is what creates that obligation. And the obligation, it's not, you know, necessarily to make every decision they make for the benefit of that group, but it's certainly to meet the lowest levels of that obligation, which is to ensure that the harm that they're inflicting on that group is as little as possible, ensuring that fair compensation is available to them for the harm that they've suffered for the benefit of society as whole, et cetera. So, that's why, you know -- and, again, whether we want to call it a sui generis fiduciary obligation or what -- you know, whatever we want to call it -- this is a very unique case with very unique circumstances, and I don't think I'll ever be before a Court in Canada ever again.

THE COURT: Maybe not. So, I understand the overarching moral point that you are making, and you made it at the start of your submissions, and you have said, essentially, the class of people you represent made a sacrifice, not voluntarily, but they made a --

MR. RATH: Right.,

THE COURT: -- sacrifice that was imposed upon them by the government for the public good, and they should be fairly compensated for the sacrifice that they made in the interests of all Albertans. I understand that point. That does not magically create a fiduciary obligation. And what I am very concerned about here is I do not want to be hammering square pegs into round holes. And I am not persuaded that the government is a fiduciary here to your clients because I think of other situations where

people can say, you know, any other kind of regulation that is imposed upon people and they say, Well, you know, geez, now we have been put in this box by the government. It might be a different box. It might be, you know, you can only have one cannabis store per block or one liquor store per block, you know, whatever kind of regulation they put, they say, Well, that burdens me somehow, and I am an identifiable class, and you, by identifying me and imposing rules upon me, you have made me -- you are now a fiduciary to me. But --

MR. RATH: But, again, that --

THE COURT: -- but that --

MR. RATH: -- oh, sorry. Go ahead.

THE COURT: -- that is what you are essentially saying to me here.

MR. RATH: No. I mean, what we're saying is a little bit different. I think the scenario that you're talking about is more kind of the Freddie Laker *Laker Airways* case that went to the British House of Lords back in the 70s where, from an administrative law perspective, the House of Lords was dealing with, you know, different levels of obligation that were owed to different parties, you know, throughout a licencing process. So, you know, using your cannabis store, you know, example; right? So, if you're applying for a licence, right, the duties that are owed by the government, you know, would be at the lowest end of the scale, to, you know, consider the application, you know, reasonably, in good faith, without basis, you know, general -- you know, general principles of natural --

THE COURT: It is not a fiduciary obligation.

MR. RATH: -- justice, et cetera. But where somebody has an existing licence and for -- you know, they've been generating, you know, huge amounts of revenue from that licence for decades, you know, to all of a sudden come along and remove that licence in the same manner as if you're denying an initial licence application --

THE COURT: But that is what administrative law is for.

MR. RATH: No. But, again, my -- but my point --

THE COURT: It is not a private cause of action.

MR. RATH: No. But my point there is that what you have is you have that higher duty at the highest end of the spectrum, which I say in this case amounts to a fiduciary duty.

THE COURT: Okay.

MR. RATH: And that -- sorry.

THE COURT: Sorry. Go ahead.

MR. RATH: And I think what we say at our brief -- and, again, we're -- I'm not sure if we're in the brief or the reply now. In the reply, at paragraph 195. So, again, that's tab 'E', 195.

THE COURT: Sorry. Tab 'E', 195?

MR. RATH: Yeah.

THE COURT: Yeah.

MR. RATH: You got it?

THE COURT: This is the expropriation or compensation?

MR. RATH: Right.

THE COURT: Yeah.

MR. RATH: So, what we say at -- or, sorry, paragraph 196:

> The Province overlooks that the Plaintiffs' claim is not based on compensation under the *Public Health Act*'s provisions or the traditional "use" of properties for operation centers or for quarantining contagious individuals. Rather, the claim seeks to establish liability for the significant damages resulting from the restrictions imposed by the unlawful CMOH Orders on their operations and access -- damages that may be as great, if not greater, than those incurred if the properties had been used as operation centers or for quarantining individuals.

So, and --

MS. CHIPIUK: (INDISCERNIBLE)

MR. RATH: Well -- and, again, I think the point that my friend wanted to have me draw your attention is that, again, this creates vulnerability, which gets us -- you know, gets us over that first hurdle. And then again, with regard to the duty itself, you know, the duty may not be to put the interests of those people, you know, ahead of the interests of everybody else, but certainly the duty could extend to, you know, ensuring that the impact was going to be as little as possible and ensuring that fair compensation was available, you know, which I think -- which I think are -- you know, reasonable conclusions to draw in this case and would fit within -- you know, would fit within the framework of the law of fiduciary duty as discussed in *Frame v. Smith*.

Now, do you have any further questions on that or do you want to address expropriation or conversion yet?

THE COURT: Well, I think sooner or later you need to get to both of those.

MR. RATH: Yeah. And I think both of those we've dealt with in our reply --

THE COURT: Yeah.

MR. RATH: -- in greater detail in response to my friends' submissions. So, we're in tab 'E' again. And, again, subject to any questions the Court has, I think that our reply adequately addresses the issues, you know, with regard to both of those things.

THE COURT: Well, so, you say at paragraph 181 on page 195:

> While expropriation is traditionally understood as the forced taking of land, the essence of expropriation -- interference with property rights to such an extent that it deprives owners of their use or enjoyment -- can arguably apply indirectly to the unlawful CMOH Orders.

Now, it is an interesting argument, I am intrigued, but where is the support for this in the case law? Is there any case law you can point to me where, you know, if it is not a true taking it, it is a, shall we say, temporary sterilization of the property that -- that has been…

MR. RATH: And I think what we do -- you know, what we do do is we refer to the *Osoyoos Band* case, you know, for authority on that proposition. And

again, the fact that this a First Nations case I think is irrelevant here because of the facts of that case make it general enough that it could apply to any specific situation. And what the Court said in *Osoyoos Band* -- I'm just looking for the reference to constructive expropriation -- it says, "In its traditional sense" -- oh, hang on:

> As the Crown's fiduciary duty is to protect the use and enjoyment of the Indian interest in expropriated lands to the greatest extent practicable, the duty includes the general obligation, wherever appropriate, to protect a … Indian interest …

And then I'm skipping ahead to the next paragraph:

> In its traditional sense, a "right of way" is a type of easement, and at common law the acquisition of a right of way does not give the holder a fee simple interest or the right to exclusive possession…However, as noted by Newbury J.A. in the Court of Appeal, in modern usage the term right of way does not always correspond to the common law concept and in some circumstances may refer to a right to the exclusive use and occupation of a corridor of land. I acknowledge that the term "rights-of-way" can have two meanings and that the degree of occupation will be governed by the document conceding the grant. However, it is not clear from the context in which it appears in the Order in Council whether the term "rights-of-way" necessarily refers to an easement as it is traditionally known, or some greater interest in a corridor of land.

And then it goes on to say:

> I conclude that the Order in Council is ambiguous as to the nature of the interest transferred. It does not evince a clear and plain intent to extinguish the Band's interest in the reserve land. An interpretation of the instrument as granting only an easement over or right to use the canal lands is both plausible and consistent with the policies of the Indian Act… I find that the Order in Council effected a grant of an easement…and did not take away the whole of the Band's interest… Therefore, the canal land is still "in the reserve"…

So, what we say looking at that is that, you know, effectively, the Court still found liability for breach of fiduciary duty in that case. So, it wasn't a clear expropriation per se, but it amounted to what we would call a constructive expropriation. So --

THE COURT: I believe there is a body of case law out there on constructive expropriation. And, I mean, I am in passing aware of other cases before this court, not before me, regarding, among other things, changes to coal policies where constructive expropriation has been ordered. And, you know, I struggle with the submission you have made here because I am broadly aware of this other body of law. I cannot tell you I have any detailed understanding of it. But, you know, *Osoyoos* is not the case. And so, I mean, if you want to look at that, I would --

MR. RATH: And we -- and we can come back to that in --

THE COURT: -- I will give you an opportunity to do that.

MR. RATH: Come back to that --

THE COURT: Yeah.

MR. RATH: -- in reply. But in any event, our -- you know, our point on expropriation -- and, again, maybe, you know, your comment earlier about wanting round pegs to fit in round holes, you know, what we have is on the unique circumstances of this case, you know, effectively we have an oblong -- we have an oblong peg and we're trying to find --

THE COURT: Yeah.

MR. RATH: -- the hole that it fits the most neatly into for the purposes of this class action proceedings.

THE COURT: And my job here on a certification motion is a couple things. One, if a case -- I should not let any case go ahead if it is not a proper case. And that is really what the cause of action test is getting at. Like, I am not supposed to let something that is a mess get in front of a trial judge. It has got to be a proper case. And then the other thing is, is if I am going to let it go forward, I am to let it go forward on things that are -- I do not know if reasonable is the right word -- at least plausible. And so, in that sense my job is to tidy things up and make sure that the more frivolous causes of action are pruned away. And so --

MR. RATH: Rather than frivolous, shall we just say creative? Because I don't -- I don't consider any of these arguments to be frivolous, to be frank, My Lord -- Mister Justice.

THE COURT: That is fair. I will take that as a friendly

amendment. Creative arguments, yes. So, anyways, I do not know that the expropriation one, whether it is something that has legs or not, because I just do not feel that you have put the right stuff in front of me for me to know that.

MS. CHIPIUK: That's in the first brief.

MR. RATH: And my friend took me to a reference in our first brief.

THE COURT: Okay. So, that is -- where was that? Is that tab 'D'?

MS. CHIPIUK: Yeah.

MR. RATH: Tab 'D'.

THE COURT: Yeah.

MR. RATH: And it's paragraph 72 and -- yeah, paragraph 72.

THE COURT: M-hm.

MR. RATH: That says:

> Accountability of government officials is particularly crucial when considering the concept of disguised expropriation, where regulatory actions effectively expropriate property rights under the guise of other measures. Such actions have been recognized as an abuse of power.

And that's citing the *Lorraine (Ville)* case from Quebec in 2018 and that's at the Supreme Court of Canada.

THE COURT: Okay.

MR. RATH: So, you know, again, this -- you know, we have Supreme Court of Canada authority. And, again, you know, I'd like to go back to *Roncarelli* for a minute. I don't think that any of the concepts being discussed in *Roncarelli* arise from the fact that Quebec is a civil law jurisdiction. You know, this is a Supreme Court of Canada decision that talks about, effectively, abuses of power by government officials, right, that, in effect, interfere with property rights and interfere with economic rights for improper -- for improper motives, that the Supreme Court said as early at the 1950s gives

rise to damages for economic loss. So, I don't think that, you know, *Roncarelli* is one of these cases that we should just dismiss out of hand as having no application, you know, in this case on the basis that it's a decision from Quebec. I think it's -- I think, obviously, we submit that it's good law --

THE COURT: Oh, it is a --

MR. RATH: -- especially --

THE COURT: -- it is a foundational case in lots of senses. What I meant when I said that it is in the civil code -- it is, I mean, when we are dealing with a question of causes of action we are looking at common law causes of action; right? And so, *Roncarelli* is a seminal case, it tells us a lot about administrative law, a lot about the accountability of public officials and so forth, but, you know, if I am looking somewhere for the elements of a tort or elements of a cause of action, that is not where I am looking; right? So, you know, some people talk about *Roncarelli* as a touchstone for abuse of power or a misfeasance in public office, but -- and it is in a sense, but when I look at, you know, what does the Alberta Court of Appeal say the elements of that tort are, and they say -- they go to the *Three Rivers v. Bank of England* case. So, that is all I would say.

MR. RATH: Right. No, fair enough. But our point with regard to that, you know, and obviously I think, you know, I've made it previously, is that, you know, all of that can, you know, be subsumed under the law of negligence in any event. And, I mean, from, you know -- and from the standpoint of the class and the class action, you know, quite frankly, we appreciate your role in terms of, you know, pruning -- you know, pruning the case down, you know, to have it proceed in the most direct way forward as possible, and we're grateful for that, but at the end of the day, we need to have a cause of action under which we can proceed. And whether it's, you know, whether it's negligence or, you know, the tort of misfeasance in public office, or whatever it is, you know, there needs to be a way forward for the people that have suffered economic losses as a result of these orders that have been deemed by this court to be illegal.

And then getting back to your earlier question about, you know, shouldn't you be naming, you know, people individually? The problem that we have is because of, you know, cabinet confidentiality, we don't know who made what decision and when. So, you know, that may come, you know, that may come out later through discovery or otherwise, I'm sure following numerous motions fighting over, you know, what is and isn't available. But at the end of the day, it's the Government of Alberta that's responsible for the implementation of its own laws and ensuring that those laws are, you know, are, you know, are legal. And in this case, clearly, you know, we have case where, you know, there was a clear *Statute* -- like even the Alberta Pandemic Preparedness Plan, which wasn't applied in this case and

which my friends' witnesses acknowledged, you know, wasn't applied in this case, that entire plan was presupposed on the basis that it was going to operate under the Alberta *Emergencies Act* so that you'd have a whole of government response, you know, to, you know, to the emergency.

THE COURT: And just -- you have mentioned this a few times. Where would I find that, so I just --

MR. RATH: The pandemic plan or…?

THE COURT: Yeah.

MR. RATH: We can provide pinpoint references. It's certainly in the materials.

MS. CHIPIUK: It's going to be here. I think it's attached as an exhibit to Ridge, tab 'I' it should be.

THE COURT: Sorry. Who?

MS. CHIPIUK: Andy Ridge.

THE COURT: Okay. So, I have got the compendium. Okay. Ridge is tab 7 of the compendium.

MS. CHIPIUK: Oh, it was --

MR. RATH: In ours it's tab 'F', Ridge response --

MS. CHIPIUK: 'I'. 'I'.

MR. RATH: Oh, no. 'I'. Sorry. Ridge --

THE COURT: Okay.

MR. RATH: -- transcript.

THE COURT: So, what page -- because I do not the exhibits tabs so -- but I do have them page numbered.

MR. RATH: It starts at page --

MS. CHIPIUK: I don't have the page numbers.

MR. RATH: Oh. You don't have -- oh, so that's tab 'I' I need to go to?

MS. CHIPIUK: It'll be halfway through about.

MR. RATH: Oh, yeah.

MS. CHIPIUK: It's exhibit --

THE COURT: Sorry.

MR. RATH: No. I got it.

MS. CHIPIUK: I'll find it here.

MR. RATH: It starts at page 308, "Alberta's Pandemic Influenza Plan."

THE COURT: Sorry. Of -- it is in your binders.? Because I am --

MR. RATH: It is --

THE COURT: -- I am --

MR. RATH: -- it is, and it's page --

THE COURT Okay. Sorry. I was in the -- okay.

MR. RATH: -- it's -- it's -- in the binder that I -- that we provided, it's --

THE COURT: Yeah.

MR. RATH: -- tab 'I', and it starts at page 308.

THE COURT: 308. Okay.

MR. RATH: It's attached to the -- the Ridge Affidavit.

THE COURT: Okay. And why do you say it is premised on the *Emergency Act*? So, what page would I go to, to see that?

MS. CHIPIUK: First page.

THE COURT: So, I see, for example, page 9, it identifies the *Public Health Act*, the *Emergency Management Act*, and the *Regional Health Authorities Act*.

MR. RATH: Right.

THE COURT: So, that does not necessarily tell me that it was supposed to be -- it was a plan under the *Emergency Act*.

MR. RATH: Sorry. One moment. What page is that at? Page 9. "Pandemic Planning in Alberta." It's at page 316 of the binder:

> Pandemic planning at the provincial and regional levels has been in place since the 1980s (sic). In 2009, Alberta Health and Alberta Emergency Management Agency consolidated their plans … and the newly formed AHS developed a provincial pandemic plan to reflect activities required for the … virus --

And --

MS. CHIPIUK: Go to page 317.

MR. RATH: And then at the top of page 317, it says

> The *Emergency Management Act* ... provides the Minister of Municipal Affairs with the power to respond to disasters and outlines the roles of the GoA and local authorities. The Alberta Emergency Plan outlines the responsibility of each government department.
>
> It is not necessary for a municipality to declare a State of … Emergency … in order to request additional support and resources from the GoA. However, if deemed necessary, a SOLE --

Order or State of Local Emergency Order:

> -- can be declared to gain access to the same powers as the Minister of Municipal Affairs within the municipal boundaries under … the *Emergency Management Act*.

So -- and, again, I might be going back and have to dig into the evidence in *Ingram*, but it was clear from the testimony that was provided in that case that the pandemic plan itself was to be operated as a whole of government response under -- under the Alberta *Emergency Management Act*.

And of course, the reason for that is that -- and it's found in that one -- in that one paragraph where that under the *Emergency Management Act* you can actually deal with things on a municipality or local, you know, area -- by local area basis. So, in effect, you wouldn't necessarily be having to shut down the entire province as an example. You could be focusing on areas where the outbreaks were the worst or whatever it was. And that was all considered within, you know, within the -- within this pandemic plan.

THE COURT: Okay. Well, you know, maybe we will not belabour the point right now and you can check whether it is the *Ingram* decision or the *Ingram* evidence or whatever it is. Tell me, because looking at what you showed me there, they identify the *Emergency Management Act*, they identify the *Public Health Act*, it does not seem to suggest to me that, as you had said earlier, this was going -- you know, if this was done properly, the plan was to do it under the *Emergency Management Act*. That is not what it says.

MS. CHIPIUK: Yeah. It says there at 315.

MR. RATH: Oh, hang on.

MS. CHIPIUK: The top paragraph.

MR. RATH: The top of 315?

MS. CHIPIUK: Introduction.

MR. RATH: We'll come -- we'll come back to that, in any event --

THE COURT: Yeah. That is fine.

MR. RATH: -- after the break.

THE COURT: Okay.

MR. RATH: Now, do you have any other questions relating to causes of action?

THE COURT: Conversion.

MR. RATH: Okay.

THE COURT: It does not fit what we would normally think of as conversion. I mean, I normally think of conversion as -- I mean, to call it civil theft is probably a little bit glib, but it is a misappropriation, and it seems a little bit of a stretch to me.

MR. RATH: Well, other than, you know, what we're talking about here is, again, the government, through orders, executive orders, taking control of property for, you know, for their own purposes, specifically public health purposes. They wanted certain properties shut down and vacated and emptied for the purposes of ameliorating the *Public Health Act* -- or, sorry, for the purposes of -- the ostensible purposes of mitigating the effects of the virus. So, we say at paragraph 149 on page 189 of our reply:

> Alberta's Brief relies on a quote used by the Alberta Court of Appeal as authority for conversion:
>
> > … 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).

We have that here. So, the action of ordering these businesses and these premises shut down were inconsistent with the rights of possession; right? Second point:

> the conduct was deliberate, not accidental.

Well, certainly these orders, they may have been issued incompetently and under the wrong *Statute* according to this court but they were in fact deliberate and not accidental. And then

the third point was:

> the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods…

Well, clearly, that's what we have here under those orders. And, in fact, it was so exclusive that when somebody like Mr. Scott wished to open their premises in the face of these illegal orders they're hauled away in handcuffs. So, you know, I know that it's not a traditional means of dealing with the tort of conversion, I hear exactly what you're saying, but when you read that test, it fits.

THE COURT: But under the *Public Health Act,* let us set COVID aside, let us say that the health inspectors show up and there is problems in the kitchen.

MR. RATH: Sure.

THE COURT: Maybe there is rats, maybe there is goodness knows what other kind of disgusting things, and they say, Well, you have to shut your restaurant down. It is not conversion; is it?

MR. RATH: Well, under the *Public Health Act* there is a process. So, all a health inspector can do is shut it down for 24 hours. Any longer than that, right, and that was another problem with these orders, was any longer than that and you'd have to go under section 30, and you'd have to go to a judge for any lengthier, you know, period of, you know, period of closure. So, I would submit that if a health inspector came in and issued an unlawful order of shutting a business down for good without going to judge, that it could amount to a conversion.

THE COURT: Well --

MR. RATH: On -- you know, on the test of --

THE COURT: -- I -- I would agree that it is wrong. I am not sure that I would agree that it was conversion. It is my square pegs in round hole problem again.

MR. RATH: But, again, you know, we -- you know, when you read the test for conversion as set out by the Alberta Court of Appeal in *Koeneman*, right, it fits. You know, I mean, it doesn't fit in necessarily our traditional concept of conversion, but it certainly fits with the tests, you know, is the point that we would make. And, again,

for the purposes --

THE COURT: And conversion usually applies not to real property but to chattels; is that right?

MR. RATH: Well, but in this case, you know, there were, you know, when you're talking about goods, you know, that are -- that are constrained within those -- within those properties, and certainly in the cases of restaurants where their produce spoiled and whatever it was because they were illegally shut down, you know, that certainly, you know, would fit within the concept of, you know, of chattels. But I haven't seen -- and, you know, we could look for it, but I'm not aware of any case that specifically says that conversion cannot apply to real property.

THE COURT: Okay.

MR. RATH: So -- and, again, you know, as far it goes on causes of action -- and, again, I -- you know, I respect the Court's views on this and I certainly respect the role that the Court has in paring this, you know, the -- you know, the action down to the causes of action that have the best chance, you know, of success moving forward, but as far as -- as far as we're concerned, you know, this action has to move forward in some circumstance whether it's under the -- you know, the law of negligence or otherwise, so, you know, we're -- you know, on the basis, you know, of the arguments that we've already made.

So, other than if you have any other questions on causes of action we're prepared to move on.

THE COURT: I guess my only other question is are there any causes of action that you say are in your Statement of Claim that we have not discussed today? Because what I do not want to do is miss a cause of action and, you know, if this ends up with the Court of Appeal, someone says, Well, Feasby did not deal with this cause of action. So, I want to sort of understand the full catalogue of causes of action you say that I need to think about.

MR. RATH: Well, I think our submission in that regard is that the Statement of Claim, you know, speaks for itself and all the causes of action that are pled are within the Statement of Claim.

THE COURT: Okay. So, does the Statement of Claim identify all the causes of action or am I going to have to read between the lines to figure out?

MR. RATH: I think as far as it goes the Statement of Claim identifies the causes of actions.

THE COURT: Okay.

MR. RATH: You know, in -- you know, including, you know, failures by the defendant to follow their own legislation. You know, so whether we want to characterize that as a, you know, misfeasance in public office or we want to characterize that as, you know, being subsumed under the law of negligence under *Saskatchewan Wheat Pool*, or however we get there, you know, as far -- as far as we're concerned the Statement of Claim contains causes of actions that are actionable and should be allowed to proceed.

THE COURT: Okay.

MR. RATH: Okay. We're at noon. How late do we want to go into lunch?

THE COURT: I was going to say maybe finish at quarter after because I perhaps foolishly booked another case in at 1:00. So, there will be -- and everybody here should know that -- and the people online, we are going to close the Webex over the noon hour because no one needs to watch that other case. And, counsel, you need to know that another set of counsel will be here at 1:00, and, you know, obviously can come in the court --

MR. RATH: And then we'll restart at 2?

THE COURT: We will start at 2. I will make sure we are ready to start at 2. But, you know, if you want to come in the courtroom and see what is -- where we are at, and whether we are keeping on time, that is fine, but I just did not want anyone to be surprised by that.

MR. RATH: Okay. All right. Now, I guess the next point we'll move on to from causes of action is whether or not the class action itself is a preferable procedure in this case. And, you know, clearly, my friend has, you know, my friends in their brief have identified a number of other cases that have been going forward. Certainly, you know, from the standpoint -- and, again, you know, we actually refer to Justice Milsap's decision in the *Ape Parkour* case as being a good example of the fact that many of -- many other of these cases are out there percolating, some of them being brought by unrepresented litigants, and, you know, what we say is that from the standpoint of access to justice, that a class action is the preferable procedure in these -- in this case. From the standpoint of judicial economy -- and this is all starting at page 78 in our brief -- from the standpoint of

access to justice, you know, we reference at -- paragraph 127 of brief:

> The Supreme Court of Canada described the class action process as "an ordinary remedy whose purpose is to further (sic) social justice."

And that's at paragraph 80 of tab 'D'.

You know, and in this case -- I mean, look at, you know, you know, from a social justice perspective, you know, Ms. Ingram, a single mother trying to take care of her children, you know, with a business that's just arbitrarily shut down by the government without any evidence whatsoever that that business was any risk whatsoever to the public from a public health perspective.

THE COURT: Did you say paragraph 80?

MR. RATH: No. I said paragraph -- we're in tab 'D'.

THE COURT: Yes.

MR. RATH: Page 80, paragraph 127.

THE COURT: Oh, page -- page 80. I am sorry.

MR. RATH: Sorry. Where:

> The Supreme Court of Canada described the class action process as "an ordinary remedy whose purpose is to foster social justice."

THE COURT: Yeah.

MR. RATH: Then we go on to say:

> This means that class actions do not create new forms of relief for members, but allow individuals to band together to seek remedies they could pursue individually, with minimal personal cost or effort.

And, again, you know, some -- some businesses that were impacted, like small, you know, personal services businesses, you know, et cetera, I mean, their lawsuit may be, you know, 30, 40, 50, $60,000, you know, for the period that they were -- that they were shut down. Other -- you know, other businesses they could be in the hundreds of thousands of dollars.

THE COURT: Oh.

MR. RATH: But certainly, for the -- you know, for the, you know, for the 10, 30, 40, 50, $60,000 damage people, you know, they're not going to be able to afford legal counsel to take cases forward of that nature because they're not economic. You know, we don't -- certainly don't want the courts clogged with cases of that nature, you know, seeking -- you know, seeking relief on the basis of, you know, of the *Ingram* decision at various levels of court including the small claims court. So, from the standpoint of judicial economy, it simply makes sense that this case would be certified and allowed to proceed as a class action. You know, the issues are common. The class is readily identifiable in terms of, you know, in terms of the parties that were affected. I mean, the government itself did a fairly good job of describing the class in the various orders that were issued because they certainly -- the government could identify the class well enough to know who to haul away in handcuffs and what businesses were -- you know, what businesses were to be shut down. So, certainly from the government's perspective identification of the class was something that they did throughout the pandemic. So, I really -- you know, couldn't understand my friends' argument, you know, saying that the class isn't identifiable when the government was certainly able to identify it very clearly, you know, at the time it was enforcing the unlawful orders.

And then, finally, I think that -- that brings us to, you know, the issue of appropriate representatives. I mean, certainly -- and I think we dealt with, you know, we dealt with that in chief and then we've dealt with it in reply -- I don't think my friends' arguments as to why either Ms. Ingram or Mr. Scott are unsuitable representatives, you know, really holds much water. They're both businesspeople that had businesses that were shut down during the pandemic. They identified specifically that they were shut down pursuant to orders that were later, you know, termed unlawful. They both identified that they suffered losses as a result of, you know, of these orders. So, beyond that, I'm not sure what else is required for them to be the appropriate representative. They attempted to make -- or they attempted to get Ms. Imgram on cross-examination on her affidavit to somehow suggest that she had an axe to grind against larger businesses. You know, like, you know, there certainly are potential claimants that are represented by this action that, you know -- you know, where you have a chain of restaurants or a chain of businesses that were shut down as a result of these orders, you know, that are larger and their losses may be in the millions of dollars, but to suggest that because, you know, Ms. Ingram was a small businessperson as opposed to a medium or larger sized businessperson, you know, that she's an inappropriate representative for the class as a whole, you know, to me doesn't hold a lot of weight. And quite frankly, when you read the transcript of her examination on that point that's contained in our reply, you know, she ably answered the question and, obviously, you know, stated properly that she had, you know, that -- you know, that she was a fair representative for the entire class and anybody that lost revenue as a result of these orders regardless of whether

they were a small business or big business.

So -- so, yeah, and then, you know, a workable litigation plan. I mean, we've attached a litigation plan to the -- you know, as required. Certainly, Ms. Scott (sic) and Mr. Ingram (sic) have no conflicts of interest, you know, with regard to, you know, this action moving forward. You know, so as far as -- as far as it goes, our strong submission is that we've met all the requirements of the test for certification. There's at least one cause of action that should proceed to certification, if not more. And, in any event, even if it's -- you know, even if it's only one or two causes of action that are certified to proceed on a streamlined basis, that's really to the benefit of the class in any event and, you know, we welcome the Court's views on that, so…

And I think with that, subject to any other questions, those would be our submissions.

THE COURT: Okay. Thank you, Mr. Rath. I do not have any other questions at the moment.

What I would propose, rather than having Alberta start their submissions, that we would take our lunch break now.

MR. RATH: I was 4 minutes off.

THE COURT: It was pretty good. So, Mr. Rath, when we come back in the afternoon, hopefully at 2:00, if I can keep the other matter on time, I will give you an opportunity, if you have found any of those loose ends that we have identified over the lunch hour, I will let you address that then. So, as much as that can be done before Alberta starts, and then Alberta can take that into account and respond. Obviously, there is a bunch of things that I do not expect you to have all that sorted when you come back, but if you have got a couple of those points banged off, I would like to deal with those before we switch to the other side.

MR. RATH: Sure.

THE COURT: Okay. I will see everybody here at 2:00.

Mister clerk, you will close the Webex and then reopen it shortly before 2?

THE COURT CLERK: Yes.

THE COURT: All right. Thank you very much.

MR. RATH: Thank you, Mr. Justice.

PROCEEDINGS ADJOURNED UNTIL 2:00 PM

Certificate of Record

I, David Marion, certify that this recording is the record made of the evidence in the proceedings in the Court of King's Bench, held in courtroom 1203, at Calgary, Alberta, on October 2nd of 2024, and that I was the court official in charge of the sound recording machine during proceedings.

Certificate of Transcript

I, Stephanie Johnson, certify that

(a) I transcribed the record, which was recorded by a sound recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Stephanie Johnson, Transcriber
Order Number: TDS-1070070
Dated: November 14, 2024

Proceedings taken in the Court of King's Bench of Alberta, Courthouse, Calgary, Alberta

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October 2, 2024	Afternoon Session
The Honourable Justice Feasby	Court of King's Bench of Alberta
J.R. Rath	For R. Ingram and C. Scott
E. Chipiuk	For R. Ingram and C. Scott
M. Freeman	For R. Ingram and C. Scott
J. Dube	For His Majesty the King in Right of Alberta
F. Chiu	For His Majesty the King in Right of Alberta
J. Flanders	For His Majesty the King in Right of Alberta
D. Marion	Court Clerk

THE COURT: Good afternoon, everyone. Please be seated.

All right. Mr. Rath?

Submissions by Mr. Rath

MR. RATH: Mr. Justice. Well, over the lunch break we tried to answer some of your questions.

THE COURT: Okay.

MR. RATH: The first one I'd like to take you to is in our compendium tab 'I'.

THE COURT: Yeah.

MR. RATH: And it's page 355. And this is the question about whether the Pandemic Response Plan was to operate under the *Emergencies Act*.

THE COURT: Yes.

MR. RATH: That paragraph under 4, "Broader Provincial Response":

> The *Emergency Management Act* and Government Emergency

> Management Regulations designate the AEMA as the co-ordinating agency for the GoA during an emergency.
>
> Because the effects are not exclusive to the health system, it is critical for the GoA and emergency management partners to use a common approach during pandemic influenza. AEMA will use enhanced emergency response mechanism to co-ordinate the broader provincial response in alignment with the health care system response.

So, again, it begs the question of some nicety as to why it is that a committee of cabinet thought they should be promulgating orders under the *Public Health Act* when the Pandemic Emergency Plan itself made it clear that it should be under the *Emergency Management Act* so that we would have a whole of government response.

THE COURT: M-hm.

MR. RATH: So, that's the reference there that I wanted to give you. And then the other point that I wanted to go back to was the point with regard to the *Alberta Bill of Rights* that we were discussing earlier. And the reference, it's -- it's page -- in tab 'E' of our reply, page 174, paragraph 76, where we're discussing the *Byron Hills* case.

THE COURT: Sorry. Just slow down a sec. 174. Okay.

MR. RATH: And I think this raises some interesting issues. So, paragraph 76 says:

> In *Byron Hills*, the Court also emphasized the fundamental principle that denying compensation without explicit statutory language violates rights under the *Alberta Bill of Rights*. This reasoning underscores the necessity of due process in protecting individuals from deprivation of property, highlighting the importance of legal clarity in compensation matters. The Court stated:
>
> > With respect to the Plaintiffs Kovachs, I find that to deny them compensation in the absence of express language in the *Disaster Services Act* would offend the *Alberta Bill of Rights*. That is, the Kovachs' right to enjoy property and not be deprived thereof except by due process of law would be violated. The Supreme Court of Canada affirmed *in Curr v. The Queen*… that ‘due process', as used in the *Canadian Bill of Rights*, amounts to "the legal processes recognised by

> Parliament and the Courts in Canada" at the time the *Canadian Bill of Rights* was enacted. The Alberta Court of Appeal extended this understanding to the *Alberta Bill of Rights* in *R. v. Pennington*.

And then they go on to say:

> When the *Alberta Bill of Rights* was enacted in 1972, express statutory wording denying compensation in cases of expropriation was a recognized rule of statutory interpretation.

So here, there's no statutory language in any of those orders denying compensation to anybody effected. Then the Court went on to say:

> There is no such language in the *Disaster Services Act*, thus denying the Kovachs' compensation is tantamount to infringing their s. 1(a) right under the *Alberta Bill of Rights*.

So, it seems to me from that case, the Alberta Court of Queen's Bench, as it then was, was making it clear that in fact our right to damages arises from a process violation under the *Alberta Bill of Rights* and awarded compensation in that case on that basis.

So, the other thing that -- that I would like to draw your attention to in conjunction with that point is our reference at page 186 to the *Emergency Powers Regulation* -- or sorry, it's at paragraph 132.

THE COURT: Okay.

MR. RATH: And it says:

> Further, the *Emergency Powers Regulation*, passed pursuant to the *Public Health Act*, requires that all emergency powers exercised under the *Public Health Act* must state whether compensation is available.

So, of course, this was never argued or raised in front of Madam Justice Romaine in the *Ingram* case because I don't think, strictly speaking, it was relevant to that decision. But not one of the orders that we're dealing with follows the rule of statutory interpretation that says that if compensation is not to be provided, you know, it has to be stated expressly in the orders. None of the orders contain any language whatsoever with regard to compensation one way or another as required by the Emergency Management -- *Emergency Powers Regulation*, which I think underlines the fact that this remedy could be

provided under the *Bill of Rights* per the *Byron Hill* decision.

So, I think that hopefully tidies up the issues that were remaining from this morning. Subject to any other questions that you have.

THE COURT: So, let me just understand what you are saying. You are saying that the words or the concept of due process in section 1(a) of the *Alberta Bill of Rights*, that concept entails compensation, a right to compensation --

MR. RATH: It could.

THE COURT: -- unless the statutory language specifically says there is no right to compensation.

MR. RATH: Well, I -- what I'm saying is that I think what the court cases are saying, or what the cases seem to be saying going all the way back to *Roncarelli*, is if a government takes action that on its face is illegal, right, or that -- you know, or, you know, ends up being illegal, and somebody suffers harm from it, unless there's expressed statutory language that says that they're not to be compensated, the presumption of law is that they should be compensated. And that's in line with the -- you know, with the *Manitoba Fisheries Act* that if you want, you know, somebody isn't to be compensated for damage done to them by the government, there has to be expressed language in the *Statute* saying so.

So, our point is that with regard to the *Bill of Rights*, simply because the *Bill of Rights* is silent on whether or not compensation is available if you violate the due process provision in section 1, doesn't mean the opposite, which is that that means that compensation is prohibited under the *Bill of Rights*. And, in fact, when you look at the *Byron Hill* decision, the *Byron Hill* decision indicates that this court has previously awarded compensation where it has found a process violation under the *Alberta Bill of Rights*.

And keep in mind in this case we are in a very, very unique circumstance, where really this court has said the government should have proceeded under the *Emergency Management Act*, which would mean that compensation arguably was available. Instead, it proceeded unlawfully or in an ultra vires fashion under the *Public Health Act*, which, again, arguably under the *Public Health Act* there are some provisions that indicate that some level of compensation would be available, but then we have the contradictory provision in section 66.1. But, in effect, what's going on here is because we have the government acting under no *Statute* whatsoever and acting completely outside of the statutory framework in a manner that's ultra vires, my friends from the Province are arguing that there's no cause of action and there's no compensation that's available. And what we would suggest on the

basis of *Byron Hill* and on the basis of those references that we've taken you to that that simply could not be a correct interpretation of the law.

And that would be the answer to those questions, from our perspective.

THE COURT: Okay.

MR. RATH: Thank you.

THE COURT: Thank you. All right.

MR. DUBE: Good afternoon, Justice Feasby.

THE COURT: It's Mr. Dube?

MR. DUBE: It is. Again, for the record, my name is John-Marc Dube, I am with Alberta Justice. Along with my co-counsel, Ms. Chiu and Ms. Flanders, we represent the defendant and respondent in this application, His Majesty the King in Right of Alberta.

Now, Sir, as a brief roadmap of our submissions, I intend to provide an introduction and then brief comments on the *Ingram* decision of Justice Romaine, given the importance that it plays in this action. I then will turn the floor over to Ms. Chiu who will provide Alberta submissions with respect to the cause of action criteria. I'll come back on my feet to make submissions regarding the class definition and common issues portions of the test. Finally, Ms. Flanders will make Alberta submissions with respect to the preferable procedure and representative plaintiff portions of the certification test.

THE COURT: Okay.

Submissions by Mr. Dube

MR. DUBE: Now, Sir, as you are aware from our filed material, Alberta opposes certification of this action as a class proceeding. This action concerns whether civil liability flows from -- flows to the proposed class of owners of businesses as a result of the Chief Medical Officer of Health Orders, that were issued between March 2020 and finally rescinded by June of 2022, that were an attempt to address the global COVID-19 pandemic.

It's important to recall at this stage that this is a certification application governed by the test as set out in section 5(1) of the *Class Proceedings Act.* Neither this application nor this

action generally are a public inquiry into Alberta's handling of the COVID-19 pandemic. Issues around good governance and public accountability may be relevant if it was a public inquiry but are not a basis to grant certification of this class action. Instead, the issues on this application are whether the plaintiffs --

THE COURT: Well, let --

MR. DUBE: -- have met --

THE COURT: -- let me stop you there. The fact that the government has acted in a certain way, you know, certainly could be examined through a public inquiry, but can it not also be examined through the litigation process?

MR. DUBE: Well --

THE COURT: It --

MR. DUBE: -- I mean, it certainly can, I would just submit references of the lack of say the Court making findings on whether, you know, the public had a right to government accountability, those are issues that should be properly determined through the ballet box.

THE COURT: Well --

MR. DUBE: And, again --

THE COURT: -- but in order -- --

MR. DUBE: -- the Court can certainly --

THE COURT: -- in order --

MR. DUBE: -- look --

THE COURT: -- in order to exercise the right to vote it is pretty important for citizens to have information and one of the ways that citizens get information is through public processes in our open courts.

MR. DUBE: Yes, Sir.

THE COURT: And it is -- you cannot just say, Well, Court, you

should -- you should look away, this is a ballet box issue.

MR. DUBE: Certainly not, Sir.

THE COURT: I think there is a connection between what happens in our open courts and how people exercise their democratic rights.

MR. DUBE: And certainly -- and I certainly agree with that, and I wasn't suggesting that the Court should simply turn away from examining what the issues are on this action or this certification application and say it needs to be left for the public to determine. Again, we have a filed Statement of Claim, we have a certification application, and whether the government has acted in a way will certainly be -- or in a way that arises or allows for a class proceeding and in a way that ultimately allows for the Court to determine whether there's any liability for civil damages on behalf of the government is certainly before you and is certainly something we will argue. I just simply note that there are, you know, broad issues that have been raised in this action relating to public accountability and as far as those fall outside the scope of the Court and this action there are also issues to be considered for the public at large whether, you know, their happiness with the government in how they acted can be addressed at the ballet box, and certainly has been addressed at the ballet box.

THE COURT: So, I would say what you are saying to me, essentially, is if they do not meet the test they do not get to have a trial just because it is public interest.

MR. DUBE: Correct. That is a much more elegant way of stating my position --

THE COURT: Okay.

MR. DUBE: -- than I was trying to do, Sir. Again, my hope was to bring it back to the test that is set out in the legislation, the five part certification test, and whether that has met in this case.

THE COURT: Right.

MR. DUBE: Now, again, we're dealing with the certification criteria that take into account the pleadings, the evidence that is before you, and the relevant case law and legislation that would govern whether any of the five elements of the certification test have been met. And while the CMOH Orders have been declared ultra vires in the *Public Health Act*, in July of 2023, again, after they had all been rescinded, that

does not mean, in our submission, Sir, to frame our action generally and our position, that they were illegal at the time that they were enforced. As will be discussed in more detail in our submissions, while the CMOH Orders were in effect they were considered valid executive legislation, they had not been found to be ultra vires, and they were issues pursuant to valid legislation that attempted to address a novel global pandemic.

It is our submission that the Court must keep this in mind -- keep in mind that the underlying -- underlying this claim and the certification application as the plaintiffs have framed it, is the well established law around when civil liability can be imposed for government actions and government laws that are subsequently found to be invalid by a court, whether that's being found ultra vires or unconstitutional as in the *Power* decision that we had discussed earlier today.

Now, it's not disputed that the certification application is largely a procedural application. However, the Court must consider each part of the certification test to determine whether it has been met. That means considering the sufficiency of the pleadings in the section 5(1)(a) portion of the analysis and considering whether there is some basis in fact for the remaining four portions of the test.

And you'll likely hear me say this a couple times in my submissions, Sir, but the plaintiffs clearly do not have to proof anything at this stage as is understood at a civil trial. They do not need to establish any of the portions of the certification test that require evidence on a balance of probabilities. But they do need to show some basis in fact that the four parts of the certification test were met. It is Alberta's position that the plaintiffs have failed to provide -- or failed to meet any of the five certification criteria set out in section 5(a) -- or, 5(1) of the *Class Proceedings Act*.

With that, Sir, I will -- I will move on to some comments regarding the Justice -- regarding the *Ingram* decision of Justice Romaine. In July 31st, 2023, Justice Romaine issued her decision in *Ingram v. Alberta*. In that action, Ms. Ingram was one of a proposed number of -- proposed plaintiffs and applicants who sought declarations that the CMOH Orders issued during the COVID-19 pandemic were unconstitutional, breached the property provisions of the *Alberta Bill of Rights*, and were ultra vires the *Public Health Act*. And, again, Justice Romaine considered extensive evidence during this application including lay evidence and multiple expert evidence from both the applicants and Alberta.

Now, specifically with respect to the business closure orders that are at issue in this lawsuit, Ms. Ingram has alleged specifically for her application that they were ultra vires both the purpose of the *Public Health Act* as well as ultra vires section 29 of the *Public Health Act*. She also alleged that they were inconsistent with her property rights as found in section 1(a) of the *Alberta Bill of Rights* and that they interfered with various *Charter* rights as

well.

Now, with respect to the arguments that the CMOH Orders were ultra vires the purpose of the *Public Health Act*, Justice Romaine found that argument unpersuasive. The CMOH Orders were meant to manage the spread and impact of communicable diseases. And the purpose of the *Public Health Act* was the regulation of public health emergencies, including the spread of communicable diseases. Now, Justice Romaine did find that the CMOH Orders were ultra vires section 29 of the *Public Health Act*, as those orders were final decisions made by cabinet or committees of cabinet and not by the Chief Medical Officer of Health.

And it's important to note in our submissions, Sir, that this was a new argument that was raised near the end of the hearing as noted by Justice Romaine, and that became --

THE COURT: It is --

MR. DUBE: -- more focused --

THE COURT: It is what it is.

MR. DUBE: It is what it is. And just -- and certainly we'll likely have some submissions around whether it was clearly ultra vires at the time, given the timing of the decisions that were raised in *CM* and in *Ingram*.

Again, *CM* seems to be a basis for the finding in *Ingram* that the orders with ultra vires. Again, in *CM* the applicant -- or the issue was a challenge to the removal of a restriction by -- through a CMOH Order. As here, it is the imposition of restrictions that are at issue. Justice Dunlop in *CM*, again, issued a declaration that it was not reasonable for that CMOH Order, given that the final decision-making authority rested with elected officials. This argument was then raised by Ms. Ingram, and Justice Romaine found that reasoning persuasive, ultimately finding that the CMOH Orders at issue in this lawsuit and were before her in that application were ultra vires the *Public Health Act*.

I'll simply note here, Sir, *CM* was appealed. The Court of Appeal dismissed that appeal for mootness. The *Ingram* decision was not appealed and it stands.

Turning to the -- some comments that the -- or Justice Ingram (sic) found that the *Emergency Management Act* should have been the process used, I'll simply reference section (sic) 54 of her decision.

THE COURT: Sorry. This is the Romaine decision?

MR. DUBE: This is the Romaine decision, Sir.

THE COURT: Let me just pull it up here so I can --

MR. DUBE: Thank you, Sir.

THE COURT: -- follow along with you. That is *Ingram* 2023, and what paragraph do you want me to go to?

MR. DUBE: That is paragraph 54. Again, this is in response to Alberta submission in -- before Justice Romaine that it was reasonable given the -- given the entirety of the pandemic and the effects on Alberta that elected officials would be involved in the decision making. Justice Romaine found that given the wording of the *Public Health Act* that that was not the case. It simply notes that had -- or, "However, the only legislation" -- and I'll just simply quote it:

> …the only legislation that provides cabinet… officials with such authority is the *Emergency Management Act*… which was not used by Alberta [during] the pandemic.

It's our submission, Sir, that Justice Romaine did not find that that should have used, simply that had cabinet -- that the *Emergency Management Act* does allow cabinet to make those decisions under that *Act* for that *Act*'s purpose.

THE COURT: Yeah.

MR. DUBE: Now, again, my friend -- or my colleague, Ms. Chiu will likely address the *Alberta Bill of Rights* issues as found by Ms. -- or found by Justice Romaine. But we'll simply note that in her findings Justice Romaine did find that given the broad term "enjoyment of property" found in the *Bill of Rights* that the CMOH Orders would have restricted or infringed Ms. Ingram's rights. However, the internal limiting mechanism that is inherent in the *Bill of Rights* similar to section 1 of the *Charter* ultimately found that no *Bill of Rights* breach was made out in this case.

THE COURT: So, my problem -- and I do not have a problem with Justice Romaine's analysis, but my problem with the use of Justice Romaine's decision in the present case -- I explained a little bit of that --

MR. DUBE: Yes, Sir.

THE COURT: -- when I was talking to Mr. Rath -- it seems to me that she was considering things in the alternative.

MR. DUBE: Absolutely. Yes.

THE COURT: All right. So, it is not before me now that this -- the hypothetical situation she considered where we have valid Public Health Orders and do valid Public Health Orders violate the *Alberta Bill of Rights*, what we have now is invalid or ultra vires orders that are alleged to violate the *Alberta Bill of Rights*.

MR. DUBE: That -- that's true. And, again, we certainly acknowledge -- I think it's very clear that Justice Romaine considers both the *Charter* and the *Alberta Bill of Rights* in the alternative.

THE COURT: Yeah. And because of that, I mean, the whole notion of internal limits, which I have some difficulty with, or at least the way it was expressed in that decision -- I do not think I need to get into that.

MR. DUBE: And I think Alberta, in our submission, we agree with that, Sir. I think, you know, Justice Romaine clearly considered the evidence that was before her and made the findings that she found.

THE COURT: Right.

MR. DUBE: Here, again, your -- the Court's role is to consider the certification tests, which includes whether there are valid causes of action, and certainly, we've had -- you had that discussion with my friend this morning. Ms. Chiu will provide Alberta's submissions on that and whether even a breach of the *Bill of Rights* grounds a civil cause of action. That is certainly submissions that we will be making, have made in our brief, and Ms. Chiu will make before you today, Sir.

Again, we certainly appreciate the sort of legal landscape changed after *Ingram*, in that the findings were ultra vires and had been found ultra vires, and Alberta does not dispute that finding. That clearly stands as a decision of Justice Romaine.

With that, Sir, I will hand over the floor to Ms. Chiu.

THE COURT: Sure. Thank you --

MR. DUBE: Thank you, Sir.

THE COURT: -- Mr. Dube.

MS. CHIU: Good afternoon, Justice Feasby.

THE COURT: Good afternoon, Ms. Chiu.

Submissions by Ms. Chiu

MS. CHIU: I am Frances Chiu with Alberta Justice. And as my colleague Mr. Dube advised, I'll be making submissions on Alberta's position with respect to section 5(1)(a) of the *Class Proceedings Act*. In so doing, I'll first introduce section 5(1)(a), and then briefly review the plaintiffs' Statement of Claim, then discuss the cases *Mackin v. New Brunswick*, and *Canada v. Power*, as well as section 66.1 of the *Public Health Act*, all of which we submit directly address the plaintiffs' claims. And then following that, I will go through each of the causes of action that have been listed in the plaintiffs' Statement of Claim, and make our submissions on why they are bound to fail as against Alberta.

Now, we've provided written materials to Your Honour in advance of today's proceedings and, certainly, there's already been some discussion this morning on these topics. I'll endeavor to limit repetition and focus our -- on our key points and responding to my friends' submissions.

So, I'll start with section 5(1)(a). Section 5(1)(a) of the *Class Proceedings Act* provides that:

> In order for a proceeding to be certified as a class proceeding… the Court must be satisfied… the pleadings disclose a cause of action.

I'll therefore refer to the section 5(1)(a) criterion today as the cause of action criterion or the cause of action test. The cause of action criterion in a certification application is the same that applies in an application to strike. The cause of action will be struck where it is plain and obvious that the plaintiffs' claim cannot succeed. The focus in the analysis is on the facts in the pleadings and whether they disclose a cause of action in light of existing law. Now, my friend has suggested that defences are not relevant in the cause of action test at this stage. However, the test again is whether it is plain and obvious that the plaintiffs' claims cannot succeed. So, in order to assess whether it is plain and obvious we need to look at existing law including available defences to determine if the claim is bound to fail. If there is an applicable immunity clause, for example, and the plaintiffs' pleadings do not plead facts disclose why the immunity clause would not be applicable, then the claim is bound to fail and cannot pass the cause of action test. And it's Alberta's position that the

facts as pled by the plaintiffs against the established law with respect to the nature of the claim and the causes of action, it is plain and obvious that the 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*.

With that said, I'll -- and I'll briefly discuss the plaintiffs' pleadings and their allegations against Alberta. The Statement of Claim alleges that following the declaration of a public health emergency in Alberta in March of 2020, the Chief Medical Officer of Health issued 113 CMOH Orders. Some of these orders imposed restrictions or closures on businesses owned by the proposed class members. The claim goes on to state that on July 31st, 2023, in the *Ingram v. Alberta* decision, which my colleague Mr. Dube addressed a little bit in his submissions and has been discussed this morning, the Court of King's Bench found that the final decision makers behind the CMOH Orders were cabinet and its committees not the Chief Medical Officer of Health. And as a result, the CMOH Orders were deemed ultra vires the *Public Health Act*. The plaintiffs thus refer to the CMOH Orders in their pleadings and in their submissions as the "unlawful CMOH Orders".

The Statement of Claim describes the plaintiffs' businesses and the impacts that they experienced from the CMOH Orders. And the causes of actions that are brought against Alberta are under the headings of the *Alberta Bill of Rights*, negligence, conversion, breach of fiduciary duty, and expropriation without compensation. And they're clearly bolded and listed in the Statement of Claim. Now, the claim makes various allegations under these headings stating that Alberta was negligent, owed a duty, infringed rights, interfered with property, and so on, but the claim fails to plead facts to support the requisite elements of each cause of action. The one fact that is consistently repeated throughout the pleadings and relied on heavily by the plaintiffs to support their claim against Alberta is that CMOH Orders were found ultra vires the *Public Health Act* in the *Ingram* decision. And this is evident not only in the pleadings but also in the plaintiffs' submissions. However, Alberta submits that the CMOH Orders being found ultra vires the *Public Health Act* is not alone grounds for a claim for damages against Alberta. And on that basis, the plaintiffs have not met the cause of action test pursuant to section 5(1)(a) of the *Class Proceedings Act*.

So, to further articulate Alberta's position on that point, we'll invite the Court to review the case of *Mackin v. New Brunswick* and the case of *Canada v. Power*. These cases represent a long-standing principle that absent conduct that is clearly wrong, in bad faith, or an abuse of power, no damages will be awarded for harms suffered us a result of the enactment or application of a law subsequently declared invalid. Now, in *Mackin* which is found in tab 6 of Alberta's Book of Authorities, the plaintiffs sought damages resulting from a law that was later found unconstitutional and the Supreme Court of Canada declined to award damages for that finding alone noting that there was no evidence of the required bad faith to ground a claim. And this limited immunity established in *Mackin* was confirmed by the

Supreme Court of Canada in *Canada v. Power*, which is found in tab 7 of Alberta's Book of Authorities. In *Power,* the issue was whether the plaintiff's pleadings should be struck when the basis of the claim was *Charter* damages stemming from a law that was, again, later declared unconstitutional.

THE COURT: So, the distinction between the present case and *Power* -- well, first of all, *Power* is a *Charter* case, this is not. Second, *Power* involved the passage of legislation; did it not? It was liability for clearly unconstitutional legislation; am I right?

MS. CHIU: I believe so, yes.

THE COURT: Okay. And what we are talking about in the present case is an administrative action. So, this is not, you know, the Legislature of Alberta sitting down and passing an act that later turns out to be unconstitutional. You know, this an unimaginable hypothetical in 2024, but, nevertheless, what we are talking about is the Alberta cabinet usurping the statutory responsibility of the CMOH. And that seems to me to be a fundamentally different scenario than is being considering in *Power*.

MS. CHIU: Fair enough. So, I can speak to first the fact that *Power* dealt with the *Charter* challenge or *Charter* claim.

THE COURT: Yeah.

MS. CHIU: So, in *Power*, the threshold -- in *Power*, and I think it's at paragraph 104 -- the Court states that:

> …the threshold will be met where the legislation was "clearly unconstitutional" in the sense that, at the time of its enactment, it would clearly violate *Charter* rights.

So, we agree that that one -- that case deals specifically with a *Charter* count -- or a claim for damages from a *Charter* count -- breach of the *Charter*.

THE COURT: So, let me find *Power*.

MS. CHIU: Sure thing.

THE COURT: Just so I can --

MS. CHIU: It's on --

THE COURT: -- follow along with you.

MS. CHIU: -- I believe it's tab 7, I had said, of Alberta's --

THE COURT: So --

MS. CHIU: -- Book of Authorities.

THE COURT: Okay. Sorry. It is not attached to your brief there. So, I am going to have to find it on my computer then.

MR. DUBE: We can hand up hard copies if --

THE COURT: Oh.

MR. DUBE: -- you'd like.

THE COURT: Sure. That would be helpful.

MR. DUBE: It's a good thing (INDISCERNIBLE) in two volumes.

THE COURT: Yeah. We have got quite an accumulation of paper going on there.

Okay. Ms. Chiu, sorry, which tab is *Power* at?

MS. CHIU: Seven.

THE COURT: Seven. All right. And you wanted me to look at paragraph?

MS. CHIU: Well, I think maybe before we look at any paragraphs, I -- I more generally would submit that in both *Power* and in this case the remedy that was sought was damages for a law that was then later found invalid.

THE COURT: Yes.

MS. CHIU: And it, in our submission, is not relevant to the Court's assessment what the cause of action was claimed or framed under. The policy

reasons that negate a finding of liability in *Power* we submit are applicable in this case.

THE COURT: So, we -- I talked to Mr. Rath about the tort of whether you want to call it abuse of power or misfeasance in public office. I do not see anything in that kind of case law that imports the requirement from *Power*.

MS. CHIU: Sorry?

THE COURT: So, you are saying there is this consideration in *Power* that operates irrespective of the cause of action?

MS. CHIU: That's our submission.

THE COURT: Right. But I am saying I look at the case law on abuse of power and I don't see that that consideration from the *Power* case.

MS. CHIU: I see. We will speak to the abuse of power piece. I think that, you know, the principle that was -- that based the decision in *Power* was that, you know, where there is invalid -- there was law that's later found to be invalid, you know, there are policy reasons that negate the finding of liability on that basis alone. And, you know, I think it's our submission that that's applicable there.

THE COURT: But, you know, there is a big difference between the Legislature passing a statute that is later found to be unconstitutional, and, you know, it is important that our elected representatives be able to make laws with a measure of confidence that they will not be exposing the public purse to damages claims. It is somewhat different when you have administrative actors acting outside their statutory -- outside their authority. And so, I look at this situation and say, Okay, so cabinet is making -- I am -- this is from Justice Romaine's decision -- I have not found this, this is what she found -- cabinet made decisions that should have been made by the CMOH. The Government of Alberta is -- it is their law, it is their ranks, they have got a lot of lawyers, surely we can count on them to make the right choices under the laws that they passed. This is not sort of saying, We are passing a statute and sometime in the future some Court might say it is unconstitutional. This is asking them to follow their own law that they passed, which seems to me to be a very different circumstance.

MS. CHIU: I take your point. I think, you know, to the nature of what the CMOH Orders were, that is addressed in the case of *CM*.

THE COURT: M-hm.

MS. CHIU: And I believe it is in paragraph 48, and, unfortunately, it's not in our materials, but the Court in that case talked about what the nature of a CMOH Order is because that one dealt with a specific CMOH Order, which I think -- believe dealt with masking requirements for students in schools.

THE COURT: Yeah.

MS. CHIU: And in paragraph 48 the Court says:

> I agree that the Order is executive legislation, similar to a regulation, because it is an instrument of binding, general application that sets a norm or code of conduct.

THE COURT: M-hm.

MS. CHIU: And, certainly, you know, that makes sense. These are orders that were issued that were required to be followed. On the basis of these orders, as has been submitted by my friend, people were arrested, there were certainly steps that were taken to follow the orders, and they were treated, at the very least, like regulation. And I note the case of *Welbridge*, which we talk a little bit about under the negligence heading. But that case dealt with a municipal bylaw. And I believe it was a regulation but I can have a look at that case here. Yeah. That case -- the Supreme Court of Canada considered whether a duty of care was owed by a municipality when enacting a bylaw. And in that case, the municipality rezoned property for a high-rise development -- or for high-rise development leading, the plaintiff in that case, Welbridge Holdings, to lease the land, invest in preliminary construction, and -- but then the bylaw was later invalidated due to a challenge by neighbouring property owners, and that caused Welbridge financial losses. And then Welbridge sued the municipality for negligence arguing it had a duty to follow proper procedures. And in that case, the Court commented at page 958 -- and *Welbridge* is on tab 25 of our Book of Authorities -- commented at page 958 that:

> 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.

So, you know, in our submission, this case is very similar to what we're seeing in *Welbridge*. You know, we're dealing with what is, essentially, at the very least, a regulation that ultimately, and subsequently, was found to have been invalid. And in the meantime, before that happened, there were people who alleged to have suffered losses. And in that

case, the Court said that no liability can be found on that basis alone.

Does that somewhat answer your question?

THE COURT: It is an interesting case. I am not sure it is exactly on all fours with this one. I mean, it is one thing for a municipality -- *Welbridge* seems to have echoes of the *Power* case in the sense that they pass a bylaw and then later it is declared invalid. Here the *Public Health Act* and the ability of the CMOH to make these orders has never been challenged. I mean, it seems to me that there is no question that it is valid. The reason that things are invalid here is because cabinet took over as being the decision maker. And, you know, I can understand different perspectives on that. Some people might say, Well, so what, they are the political masters, and, you know, they could have made that decision other ways if they had wanted to, whether it was through the *Emergencies Act* or just amending the *Public Health Act*, they are the elected representatives, they can make the decisions, so, you know, no harm, no foul. And I can also have some time for the perspective that legal process and formalities matter for a reason and, you know, if you are going to do things you should do them out in the open so people know who is actually accountable for the decision making. And so, when I look at *Welbridge* I do not see, you know, cabinet coming in and elbowing the municipal council to the curb and taking over. What I see is the council seemingly acting in good faith and then later having their action to be declared invalid.

MS. CHIU: Certainly. And we'll get to, you know, whether this is good faith or bad faith and what qualifies in that.

THE COURT: Yeah.

MS. CHIU: But -- and we would agree that legal processes matter and accountability for decision making is important, and that is why that finding in the *Ingram* decision was made. Ultimately, that was an application for a declaration that the CMOH Orders were invalid, and that was found, and that's the accountability aspect. Here we have a civil claim for damages. So, this case law, in our submission, speaks to whether or not there is a right to make that claim in light of, you know, a finding of invalidity. And, again, our submission is that there is not based on the case law. Okay. All right.

So, as I've mentioned, you know, to the extent that the plaintiffs rely on the *Ingram* decision to support their claims against Alberta, then our submission is that Supreme Court of -- the Supreme Court's decision in *Mackin* and *Power* negate that ability. And a finding that the CMOH Orders were ultra vires the *Public Health Act* is insufficient to ground a claim for damages unless the orders were clearly unconstitutional at the time they were issued or

there are sufficient pleadings of bad faith or abuse of power. And we submit those exceptions are absent here.

Now, the requirement to plead sufficient facts of bad faith is not only necessary to pass the high threshold required to ground a claim in an invalid law, but it is also necessary to meet the statutory requirements to negate the immunity provision of the *Public Health Act*. Specifically, section 66.1 of the *Public Health Act*, which we've talked about, provides that:

> No action for damages may be commenced against
>
> (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.

THE COURT: And that bit is where I have a problem.

MS. CHIU: Okay.

THE COURT: So:

> No action for damages may be commenced against the Crown… [et cetera, et cetera] … for carrying out duties or exercising powers under this or any other enactment.

So, first of all, let us look at this enactment; right? They were not acting under the *Public Health Act*. What they -- the orders were ultra vires, which means they are not under the *Public Health Act*; right? I do not know how you shelter from a liability provision if you are not acting pursuant to the *Act*. I mean to me ultra vires means you are acting outside the authority given by the *Act*. So, how can you shield under the liability provision of the *Act*?

MS. CHIU: So -- and I'll first just quote Justice Milsap in the *Ape Parkour* decision --

THE COURT: M-hm.

MS. CHIU: -- that my friend has raised. And that is found in tab 28 of our --

THE COURT: Oh, tab 28.

MS. CHIU: -- Book of Authorities.

THE COURT: Sorry. Yeah, 28, *Ape Parkour*.

MS. CHIU: Yes. Now, for a little bit of context on that case, that is a case that -- in that case there is an owner of a gym in Grande Prairie, Alberta --

THE COURT: M-hm.

MS. CHIU: -- and they initiated a claim against Alberta and Alberta Health Services. They took issue with a closure order that was issued against the individual's gym during the COVID-19 pandemic --

THE COURT: M-hm.

THE COURT: -- pursuant to a CMOH Order.

THE COURT: Yes.

MS. CHIU: And then the plaintiff in their submissions argued the improper enactment of the CMOH Order pursuant to the *Ingram* decision.

THE COURT: M-hm.

MS. CHIU: And they ordered that -- they argued that:

> …the improper enactment of the [CMOH] Order should allow the Court to make a finding of bad faith…

So, in response, Justice Milsap found at paragraphs 30 and 31 -- and I appreciate this isn't specific to section 66.1 and I'll get to that -- but they've -- the Court says, "The finding of ultra vires does not impact this action."

THE COURT: Sorry. Which paragraph?

MS. CHIU: My apologies. It's paragraphs -- the very end of paragraph 30.

THE COURT: 30, okay.

MS. CHIU: And then the beginning of 31.

THE COURT: I see.

MS. CHIU: Or the entirety of 31.

THE COURT: Yeah.

MS. CHIU: So, at the end of paragraph 30 the Court says, "The finding of *ultra vires* does not impact this action". And then in 31 the Court says:

> 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 … 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.

And I raise this quote because, as stated by the Court, at the time the orders were pronounced they were valid and enforceable. And reviewing the CMOH Orders themselves we see that the orders were made pursuant to section 29(2.1) of the *Public Health Act* with the view of lessening the impact of the public health emergency at the time. And the Court in the *Ingram* decision confirmed this valid legislative purpose.

So, you know, we would argue that section 66.1 is intended to apply to circumstances just like these where the Crown and the Chief Medical Officer of Health made public -- well, in this case, the Crown -- made public health decisions, perhaps imperfectly, but with the view of fulfilling their duties and promoting the objectives of the *Public Health Act*, and so absent bad faith -- and we do need to talk about bad faith, of course -- but absent bad faith there is no reason -- reason section 66.1 would not be applicable. And that's our submission on that piece.

THE COURT: If something is declared ultra vires because the wrong decision makers made the decision, are not -- are they void ab initio?

MS. CHIU: Sorry. I didn't hear…

THE COURT: Are they not void ab initio?

MS. CHIU: Well, our -- our submission is that -- I mean, it depends on the wording of the immunity, but in this case --

THE COURT: But are not the CMOH Orders void ab initio?

MS. CHIU: At the time that they were in place, they were valid and enforceable, so --

THE COURT: But --

MS. CHIU: And we're talking about damages that were incurred at the time that they were in place, so --

THE COURT: But how are they valid if they are made by the wrong decision maker? I do not understand. Like, does the invalidity date from the time Justice Romaine issued her decision, or Justice Dunlop, or does it date from the time the decision was made by the wrong decision maker -- or the order is made by the wrong decision maker? I mean, I think -- I think that is a fairly critical point.

MS. CHIU: That's a fair question. And maybe I'll take that with me as I carry on with the submissions --

THE COURT: Okay.

MS. CHIU: -- and speak --

THE COURT: And --

MS. CHIU: -- to it when I have a little --

THE COURT: -- and --

MS. CHIU: -- more thought on it.

THE COURT: -- you know, I have a lot of respect for Justice Milsap, but the *Ape Parkour* case, it is self-representative, the Crown is not a part of this. So, we have a self-represented defendant and self-represented plaintiff, and it does not appear to me, based on the fairly brief reasons, that that case was argued with any degree close to the diligence that has been put forward in the present case and so I am reluctant to find myself bound by stare decisis on this one.

MS. CHIU: I completely understand and agree. I mean, I cite that decision because I think some of what Justice -- Justice Milsap's comments about the CMOH Orders we, you know, think are useful and persuasive, in our submission, and, of course, it's --

THE COURT: You like it, I get it.

MS. CHIU: We like it.

THE COURT: I get it.

MS. CHIU: But no, we're not suggesting that, you know, it must be followed or that it is binding. But, in our view, at the very least, some of the comments with respect to the CMOH Orders we believe are persuasive.

THE COURT: M-hm.

MS. CHIU: So, I'll move on and talk about, you know, the notion of bad faith and whether that's been sufficiently pled. I note that in paragraph 66 to 77 of the plaintiffs' written submissions -- their original ones, not the reply ones -- they discuss this notion of abuse of power, and specifically in paragraph 75 they argue that:

> The CMOH Orders, ruled *ultra vires,* served as a form of camouflage disguising political decisions as essential public health measures.

THE COURT: M-hm.

MS. CHIU: Now, perhaps they were speaking of abuse of power as a different head of -- or a different cause of action. But to the extent that it is an argument that Alberta acted in bad faith, we would submit that the Statement of Claim includes no factual support for the argument.

THE COURT: So, as I understand it in the *Ingram* case there were -- there was an invocation of cabinet privilege; was there not?

MS. CHIU: I believe with respect to some of the (INDISCERNIBLE), but I'm -- I'm not certain of that.

UNIDENTIFIED SPEAKER: Yes.

THE COURT: Because I struggle a little bit with the Crown arguing that there is no evidence of bad faith when the Crown is invoking privilege presumably to prevent scrutiny of its good or bad faith as the case may be.

MS. CHIU: At least for the cause of action piece here what I'm suggesting here is that there aren't facts pled --

THE COURT: Okay. There may not be facts --

MS. CHIU: -- that support --

THE COURT: -- could not a Court take an adverse inference based on the known facts?

MS. CHIU: Well, the known facts is that the ultimate -- the final decision maker was not the CMOH.

THE COURT: Right. So --

MS. CHIU: Now, what led -- what happened in between, you know, that and then the orders being made, I -- in our submission --

THE COURT: So, an objective observer --

MS. CHIU: Okay.

THE COURT: -- of the circumstances might look at it and say, Cabinet made the decisions when the CMOH was statutorily required to make the decisions and then cabinet trotted the CMOH out in front of the cameras to announce the decisions. One might infer from those facts that cabinet was not wanting to be accountable for those decisions. And in the absence of any other facts one might infer that that is a bad faith maneuver, for lack of a better word.

MS. CHIU: Fair enough. There could be any reasons that --

THE COURT: There could be lots of reasons, yes, but that is one possible reason; right?

MS. CHIU: Absolutely. And I -- we don't suggest that -- you know, we're not putting out an alternative reason because we don't know. What we do know is that there was ultimately a legal interpretation from a court on the -- what we'd suggest the technical matter of who had the final decision making authority. And, you know, our submission is that that is distinct from the assessment of whether the orders were made in bad faith. There is case law that discusses what is required for bad faith. And I think, you know, our submission is that, you know, the inference that Your Honour has suggested, that it's not sufficient. And based on the -- what -- the high threshold that's required for a pleadings of bad faith, we don't see any facts pled. And, again, facts pled don't require --

THE COURT: Where would they get these facts?

MS. CHIU: Well, certainly, I mean, facts are pled, and then there is discovery, and there are other processes that --

THE COURT: Well, they made a bunch of allegations; right? You know, you guys say, Well, you know, it is not true or whatever. But the only way they are going to test the allegations -- and you can call the allegations facts if you want in their pleading -- but the only way they are going to test it is by getting discovery and examining people which, presumably, you will not let them do.

MR. RATH: (UNREPORTABLE SOUND) Sorry.

MS. CHIU: Okay. Well, this -- a striking application or the cause of action test requires fulsome pleadings. And --

THE COURT: I mean --

MS. CHIU: -- pleading allegations --

THE COURT: -- it is a -- it is a -- thorough pleading --

MS. CHIU: -- Your --

THE COURT: I mean --

MS. CHIU: -- allegations, Your Honour, is not the same as pleadings of fact.

THE COURT: Well, everything is an allegation until it is proved; right? So, I mean…

MS. CHIU: And, in any event, bad faith was not an allegation that was made --

THE COURT: So --

MS. CHIU: -- in the --

THE COURT: -- so --

MS. CHIU: -- Statement of Claim.

THE COURT: -- I mean, let us -- let us just -- paragraph 75:

> The CMOH Orders, were not a *bona fide* exercise of the Defendant's discretion under the PHA because they were made without authority…

Well, they already have a court case that says they were made without authority. You know, I do not know what you need more to plead bad faith. I mean, they did it without authority, they have raised the question about there being improper motives, and, you know, the only way that we can get to the bottom of that is not in a pleading motion, it is seems to be at a trial. You know, The defendant acted recklessly, in bad faith -- this is at paragraph 82 -- in a way that it knew, or ought to have known, the things were ultra vires the PHA. The defendant followed -- failed to follow its own procedures, legislation, and guidelines, paragraph 90.

I mean, all of these things would seem to -- like, you know, if they are correct and if they are to be believed, would seem to support a bad faith conclusion in my view. So, I am not saying that it is bad faith, I am just saying I have trouble seeing that he has not cleared the bar on a pleadings motion for that.

MS. CHIU: In our submission, the pleadings should at the very least explain what actions done by Alberta were in bad faith and what the bad faith motives were because bad faith speaks to intention and motives. And in the plaintiffs' pleadings --

THE COURT: I mean the acts are the CMOH Orders; right?

MS. CHIU: The acts are the CMOH Orders, but what were the motives and intention to, for instance, have a cabinet minister make the final decision and how did those acts and motives actually influence the CMOH Orders themselves? Our friend has submitted that -- and has acknowledged that what likely happened was that a range of options were provided to cabinet by the CMOH and that the -- and cabinet ended up choosing something somewhere in the middle. That does not suggest bad faith in our opinion. Certainly, they underwent process that led to the CMOH Orders, and that process was ultimately declared to be invalid based on the -- an interpretation of the *Public Health Act*, but the process leading up to that, there needs to be an inquiry into whether or not the steps that were taken were in bad faith. And to an extent, in the *Ingram* decision, our submission is that that Court underwent that exercise --

THE COURT: M-hm.

MS. CHIU: -- and had numerous witnesses testify to both the process and the outcomes of the CMOH Orders. And ultimately the Court found that the orders were for valid legislative purpose. While they were -- I appreciate that that was found in the alternative of the ultra vires finding with regard to the *Public Health Act*, but the process that led to that decision that the -- that there was valid legislative purpose is the same process that we would have to engage in this trial ultimately to determine whether or not there was bad faith.

THE COURT: I struggle with the idea that there is a distinction between a valid purpose and whether they are ultra vires. I mean, to me it is a legal question. Did the right decision maker make the decision or the did the wrong decision maker make the decision? And that decides whether it is intra vires or ultra vires. Now, the decision maker may have been making the decision for the best possible reasons. They have said, This is the right decision for Albertans; right? They might have had a noble purpose, but they were not acting lawfully. And so, this whole -- and I did not quite understand that part of the decision where, you know, there is a valid legislative purpose. But they were not acting under the legislation; right? Because they were acting ultra vires. If the decision had made -- been made by the CMOH, yes, valid legislative purpose intra vires, no problem.

MS. CHIU: And our submission is that the reason why there's a distinction because a valid legislative purpose speaks to the purpose. The purpose of the CMOH Orders --

THE COURT: The purpose of the legislation. Not the purpose of the order. Like the *PHA* has a valid purpose, sure, but the CMOH Order was made by cabinet not by the CMOH, so it is not made under the *Public Health Act.*

MS. CHIU: The Court's assessment in *Ingram*, in the *Ingram* decision, was whether, in our submission, the CMOH Orders were made with valid legislative purpose. And in so doing, the Court assessed whether or not, as a result, it breached the *Alberta Bill of Rights* and whether it --

THE COURT: I mean --

MS. CHIU: -- was justified.

THE COURT: -- maybe -- maybe I am dense. I do not understand that. I do not understand how an order that is made ultra vires can have a valid legislative purpose.

MS. CHIU: Because -- because looking --

THE COURT: I understand ---

MS. CHIU: -- the --

THE COURT: -- in the abstract they may be acting in the public good, and you may say, Forget about the legalities, this was the right thing to do. That might be right, but I do not understand how in a legal sense there was a valid purpose. Because if it is the wrong decision maker, that means they were not acting under the *Public Health Act*. There is no -- they were not acting under any legislation at all. That is what ultra vires means. They were not acting under legislation.

MS. CHIU: So, our submission is that, as you -- as you, Your Honour, had indicated, this is invalid -- legislation that was declared invalid. And the reason for that --

THE COURT: Well, the legislation --

MS. CHIU: -- is that the wrong --

THE COURT: -- was not declared invalid.

MS. CHIU: Or not legislation, the CMOH Orders.

THE COURT: The orders were.

MS. CHIU: My apologies. They were declared invalid. And as you said because the -- it was the decision maker -- wrong final decision maker.

THE COURT: Yeah. They were issued without authority.

MS. CHIU: Absolutely. Separate from that, our submission is that according to the Court in *Ingram* there's the question of whether or not the orders themselves were for a valid legislative purpose. And the Court underwent a process in making that finding, looking at whether or not the orders were made -- I believe the terms were -- in --

THE COURT: Well, let us -- let us look at *Ingram*.

MS. CHIU: Okay.

THE COURT: Let us a look at the case. Well, part of it is --

MS. CHIU: So, I mean, I would take the Court to paragraphs 487 --

THE COURT: 487?

MS. CHIU: Yeah. And 488. So, there Justice Romaine held after considering extensive evidence from both Alberta and the applicants -- and I note that some of this evidence included, you know, political members of the government, and what they found, and I quote:

> The restrictions on rights set out in the *ABR* 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.

THE COURT: So, this is the section of her decision where she talks about the *Alberta Bill of Rights*.

MS. CHIU: That's correct.

THE COURT: Right. And the structure of her decision is she goes *Public Health Act*, *Charter*, *Alberta Bill of Rights*. She finds that the CMOH Orders are ultra vires under the *Public Health Act*, and then says, But if I am wrong and those orders are valid, I am going to consider things under the *Charter* and the *Alberta Bill of*

Rights. And so, I struggle because the way that the decision is structured I am not sure that what she is saying is the invalid orders had a valid purpose.

MS. CHIU: M-hm.

THE COURT: I think what she is saying is, Based on my sort of alternative scenario of maybe I am wrong on the *Public Health Act*, I am going to consider the allegations under the *Alberta Bill of Rights*. You know, if these things were properly issued were they then a violation of the *Alberta Bill of Rights?* And she says no. And her valid legislative objective comes out of her reading of the *Canadian Bill of Rights* law and the *Alberta Bill of Rights* law that says, If a statute is enacted for a valid purpose, then those rights can be limited or infringed. And so, I think what she is really saying -- and if there is somewhere that shows that I wrong please take me to it because I am wrong lots -- she is saying the *Public Health Act* is enacted in furtherance of a valid legislative objective and therefore the *Public Health Act* can limit the rights in the *Alberta Bill of Rights*. That is all I think she is saying. I do not think she is saying that the invalid orders were somehow in furtherance of some abstract valid purpose.

MS. CHIU: Well, our submission is that in her analysis of -- which led to the conclusion that the CMOH Orders were for valid legislative purpose, that analysis is the same analysis that would be conducted if we were to proceed with a trial in this case where we know that the orders ultimately were invalid. And that the fact that the CMOH Orders have been found ultra vires the *Public Health Act* does not alter that analysis.

And I'm not aware of case law that suggests that simply because, you know, orders or acts or legislation were ruled ultra vires that automatically, you know, they were enacted with capricious or arbitrary objections, which is what we look at when we're looking at whether or not there is valid legislative purpose, at least that's what was done in the *Ingram* decision. And so, we appreciate that, yes, they were invalid -- ultimately found to be invalid, but the process by which Justice Romaine came to her decision, our submission is -- can be applicable here for a -- to determine whether or not, you know, there was a breach of -- or whether or not the breach of *Alberta Bill of Rights* was justified or -- for a valid legislative purpose regardless of this finding of ultra vires.

So, I can continue on if -- subject to the Court's further questions.

THE COURT: Please, go ahead.

MS. CHIU: Yeah. So, as, you know, on the piece about bad faith and the, you know, submissions that my friends have made about abuse of power and

the like, our submission is -- and I appreciate Your Honour has brought me to some allegations that have been made by my friend -- but our submission is that there are no facts that support a claim of bad faith and that is necessary. There is no facts explaining what specifically Alberta's political motives or intentions were in issuing the CMOH Orders, how those motives and intentions influenced the orders and affected the plaintiffs. Again, the assumption seems to be that simply because the final decision maker behind the CMOH Orders were subsequently found to be -- have been cabinet members, Alberta must have acted in bad faith. And that leap, in our submission, is not supported by the case law.

And, you know, it's frankly, in our submission, difficult to conceive what Alberta's, you know, bad faith motives could have been in restricting or closing businesses during the COVID-19 pandemic, which ultimately is the nature --

THE COURT: Well --

MS. CHIU: -- of this claim.

THE COURT: -- I do not accept that there was any bad faith in closing the businesses.

MS. CHIU: Certainly.

THE COURT: What I -- the point that I was talking about that -- where I find the argument interesting is the argument that cabinet did not want to be accountable for the decisions that it was making and so it pretended that the CMOH was making the decisions. That to me is the nugget of bad faith. I do not think there is any bad faith in them closing businesses.

MS. CHIU: And, of course, we don't agree that, you know, necessarily that that was what was behind that decision, but even accepting that -- let's say that that was, you know, the motive behind -- that they were -- they were -- let's accept that they knew that the CMOH Orders were ultra vires. Let's accept that the reason for that was that they didn't want to be accountable for decisions. None of that is pled and none of that, in our submissions, is obvious on its face.

THE COURT: Well --

MS. CHIU: Let's say -- well, accepting that --

THE COURT: -- but -- let --

MS. CHIU: Okay.

THE COURT: -- let us say it was pled --

MS. CHIU: Okay.

THE COURT: -- you know, I could give Mr. Rath leave to amend his pleadings in that regard.

MS. CHIU: Fair enough.

THE COURT: It would seem to me to be a fairly minor thing to do.

MS. CHIU: Okay. Appreciating that. Even if that was the case, there needs to be a connection between that motive and the claim. This claim is about business losses, businesses that had to close their businesses during -- the COVID-19 pandemic or had their businesses restricted. So, that's the ultimate damage that's being sought, and that's the reason for this claim. And so, the bad faith motive has to be the cause of that result. And it's not evident on its face why, other than for public health reasons, the government would've wanted to prevent businesses from operating at full capacity. Like, if there were -- if the -- if cabinet didn't want to be accountable for their decisions, those decisions that specifically were made need to have been in relation to restrictions and closures, and had to have caused those restrictions and closures.

And I note that instead of the restrictions and closures, there's -- it's our submission that it's not clear on its face why the government would have preferred instead that business owners rely on government funded grants. And, you know, on its face, it's just not evident. And that's why it needs to be pled what the motives would've been, and the plaintiffs have not provided an explanation for that in their pleadings.

THE COURT: I mean, motives are not facts though.

MS. CHIU: Fair enough. But I think that what's important, again, is that link between the restrictions and closures to businesses and the actions of the -- of Alberta in this case. And I just don't think that there is that link. And that link can be explained by way of facts.

So, Alberta submits that the plaintiffs' claim does not plead sufficient facts of bad faith to pass the high threshold required to ground a claim in invalid law or meet the statutory requirements to negate the immunity provision of section 66.1 And so, in our submission,

the plaintiffs' application for certification must be dismissed. But in the alternative, we submit that each of the causes of action that have been listed by the plaintiff are, in any event, bound to fail, given the lack of factual foundation and the existing law.

So, in that vein, I'll go through the causes of action listed in the Statement of Claim, if it pleases the Court.

MR. RATH: If I may, Mr. Justice, is it an appropriate time for the afternoon break?

THE COURT: Ms. Chiu?

MS. CHIU: I'm happy. Yeah. That's fine with me.

THE COURT: It that fine by you? Okay. I will come back a little after half past.

MR. RATH: Thank you.

THE COURT: Okay. Thank you.

(ADJOURNMENT)

THE COURT: Good afternoon. Please be seated. All right.

Ms. Chiu?

MS. CHIU: Thank you, Sir. Before I proceed with the cause of action -- causes of action -- I had the benefit of taking a few minutes and speaking with my colleagues and --

THE COURT: Sure.

MS. CHIU: -- just to answer one of the questions that, you know, Your Honour had raised, which was whether or not the CMOH Orders were valid before they were found ultra vires, given they've been found ultra vires. And my friend -- or my colleague, Mr. Dube, will get into this case a little bit more. We've provided a copy to our friend earlier today. But it's *Katz v. Ontario* --

THE COURT: Sorry.

MS. CHIU: -- and I'll -- I'll hand it up to the --

THE COURT: Oh. Okay.

MS. CHIU: -- to the Court. But it's *Katz Group Canada v. Minister of Health*. It is a Supreme Court of Canada decision. And I'll just hand a copy to Your Honour here.

Thank you, mister clerk.

THE COURT: Thank you.

MS. CHIU: And I just note paragraph 25 of the decision.

THE COURT: Give me a second. Paragraph 25.

MS. CHIU: Where it starts with stating that, "Regulations benefit from a presumption of validity."

THE COURT: M-hm.

MS. CHIU: And, again, my colleague will get into the case, but I wanted to hand it to the Court at this time and note that it is our submission that the CMOH Orders were valid at the time that they were enforced and remained valid because they benefit from the presumption of validity until they're found not to be. And --

THE COURT: Except I think the presumption of validity is an interpretative principle. I do not think it answers the question of whether a declaration that they are ultra vires means that they were void ab initio or not.

MS. CHIU: And, you know, our submission on that -- and I've already spoken to it, certainly -- but is that, you know, good governments allows people to make mistakes in -- within the government. And in this case, certainly it was found that there was a misinterpretation of the -- of section 29(2.1) of the *Public Health Act*. That was found in *Ingram*. But our submission is that you can't look back and just assign or assume bad faith because of that finding. And I'll leave it at that, but I --

THE COURT: Okay.

MS. CHIU: -- wanted to bring the Court to --

THE COURT: Okay.

MS. CHIU: -- that case. And I will also, just before moving on, speak to certain improper purpose and bad faith as alleged -- or in our submission -- it hasn't been alleged, but to the extent that, you know, Your Honour had pointed to some provisions that may suggest bad faith, we just note that what our friend has submitted is that Alberta was acting for an improper purpose because they should have issued orders under the *Emergency Management Act*, and they didn't do that because there was the improper purpose of wanting to rely on immunity provisions in section 66.1 of the *Public Health Act*. And I'll get to it a little bit more, the *Emergency Management Act*, but I want to just flag for the Court that there are immunity provisions in the *Emergency Management Act*, and certainly if -- and section 19, which my friend cites, of the *Emergency Management Act* actually allows the Minister to take actions. So, certainly, if orders had been issued under the *Emergency Management Act,* they would not have been deemed ultra vires --

THE COURT: But --

MS. CHIU: -- they would have been made by the right decision maker.

THE COURT: That is right. I am just looking for the *Emergency Management Act* again.

MS. CHIU: And I can -- you know, if -- I can take --

THE COURT: I just want to know the immunity provisions in that.

MS. CHIU: Yeah. I can -- I can take the Court to that. Just give me a moment.

THE COURT: Okay. So, I have got the *Emergency Management Act*.

MS. CHIU: So, it's section 27 of the *Act*, and that's under part 3, which is titled, "Liability Protection for Emergency Service Providers". And under that heading under section 27 of the *Act* and that states that:

> No action lies against the Minister or a person acting under the Minister's direction or authorization for anything done or omitted to

> be done in good faith while carrying out a power or duty under this *Act* or the regulations, including a power or duty under section 19(1)(d), (e), (f), (g), (j) or (k) or (1.1) or 19.1, and any of those powers or duties exercised as a result of an order made under section 24(1.011).

THE COURT: And, sorry, where was the compensation -- or the --

MS. CHIU: Yeah. That's under section 19.

THE COURT: Yeah. So, I have got 19 here.

MS. CHIU: Yeah.

THE COURT: Nineteen is a big section. So, let me just find it. Right. So, 19(3):

> If the Minister acquires or utilizes real or personal property [blah, blah, blah]… the Minister shall cause compensation to be paid for it.

So, that is 19(3). And you are saying 27 negates that; does it?

MS. CHIU: Well, we're saying -- I mean, there's a number of reasons why we don't believe that section 19 applies, including that, as you mentioned, that --

THE COURT: Sure --

MS. CHIU: -- that --

THE COURT: -- but the -- the provision you just took me to -- so, 19(3) is where Mr. Rath says the compensation is owed. It itemizes a bunch of sections and subsections under 19, but conspicuously not 19(3).

MS. CHIU: Well, absolutely, because 19(3) deals with a very specific type of compensation for a very specific type of action. And that action is in respect of -- and I'll go to that section --

THE COURT: Utilizing property.

MS. CHIU: -- acquiring or using property if orders were made under that *Act*. And, of course, it's our submission that CMOH Orders did not involve the acquisition or use of any real property.

THE COURT: Okay.

MS. CHIU: But I -- I do raise this --

THE COURT: I mean, Mr. Rath has made -- and I will say creative in a good sense here -- he says utilize or use could just as easily -- like, what the government -- when the government says, You shall not open your restaurant or you shall only have this many guests, or you cannot open your store, they are in effect using or utilizing your property for the purpose of protecting the public good.

MS. CHIU: And I can speak to that submission, certainly. So, I have another case --

THE COURT: Okay.

MS. CHIU: -- for Your Honour.

THE COURT: Sure.

MS. CHIU: It was also provided to my friend earlier today. It is *Altius Royalty Corporation v. Alberta*. It is a 2024 decision. And I will just hand it up to Your Honour. Thank you.

Now, this case deals with constructive appropriation -- expropriation -- my apologies -- but I wanted to bring the Court's attention to paragraph 20 first of the decision --

THE COURT: M-hm.

MS. CHIU: -- which I believe we've highlighted. So, I'm just going to read that paragraph out loud since --

THE COURT: Yeah.

MS. CHIU: -- this is not in our authorities:

> The concept of "acquisition" in the *CPR/Annapolis* test must be understood as pertaining to property. In the words of *Annapolis*, a

> constructive expropriation may arise where a "beneficial interest -- understood as an advantage -- in respect of private property accrues to the state, which may arise where the use of such property is regulated in a manner that permits its enjoyment as a public resource".

And then I'll continue on and take the Court to paragraph -- I believe it's 32. The Court states here that:

> Canada's prediction of the health and environmental benefits resulting from the reduction of greenhouse gas emissions describes benefits to the public, not, as expressed by the majority in *Annapolis*, "an 'advantage' flowing to the state": … From cases decided before *Annapolis*, in reliance on precedents which *Annapolis* did not change, courts have concluded that a generalized public benefit cannot constitute an acquisition flowing to the Crown. For example --

And then the Court cites a few other cases, but I'll just go to the actual examples:

> …"[i]t is too far fetched to suggest that the public gets a benefit from [anti-smoking regulations] such that there has been a ‘taking' by the province".

And then in another case:

> …the court held achievement of the public purpose behind a regulation was "not an asset the government acquired".

And I raise these to respond to the submission that, you know, there was -- that this sort of --

THE COURT: This is what I was looking for --

MS. CHIU: Okay.

THE COURT: -- in my question before. So, thank you.

MS. CHIU: Certainly. And I'll get a little bit more to -- into this case when we get to the expropriation section.

THE COURT: Yeah.

MS. CHIU: But I wanted to raise that at this -- in answer to your earlier question. Okay.

So, generally speaking -- and we kind of ended up here because we started talking about the *Emergency Management Act*, and that really that is the *Act* that my friends have suggested that these orders, these CMOH Orders, should've been made under, and that, you know, in failing to do so there was sort of an improper purpose behind that. And for that reason, I brought us to the immunity clause.

So, I'll -- from that I'll move on to now talking about the *Alberta Bill of Rights*. Though I appreciate in some of the back and forth we've already covered a lot of that, but I'll generally kind of summarize our submission. So, you know, the plaintiffs allege that the CMOH Orders violated without justification the rights of the plaintiffs and the proposed class members to enjoyment of property. And our response to that is two-fold. The first, and Your Honour has raised this earlier in questions to my friend, but it has long been recognized since the Supreme Court of Canada's decision in *Queen v. Saskatchewan Wheat Pool,* that no independent civil cause of action exists for the breach of *Statute*. And our submission is that this applies to a breach of the *Alberta Bill of Rights* legislation where, unlike the *Charter*, there is no statutory provision allowing for a claim in damages. And the only remedy for a breach of the *Alberta Bill of Rights* is a declaration of invalidity, which was applied for and denied in *Ingram*, in respect of -- in respect of the *Alberta Bill of Rights*.

THE COURT: So, I think your point there is very strong. What Mr. Rath come back and caused me some pause was the *Byron Hills* case where he suggested Justice Phillips has essentially said the right to due process under the *Alberta Bill of Rights* implies a right to compensation unless there is expressed statutory language to the contrary. Now, that was new to me because when I look at the *Alberta Bill of Rights* I look at it in the constitutional sense, you know, the *Canadian Bill of Rights*, the *Charter*, and the reason you can sue under the *Charter* for damages is section 24. The *Alberta Bill of Rights* does not have that. So, how do you respond to his citing *Byron Hills*?

MS. CHIU: I -- if it's okay with Your Honour, I would -- I may take a moment to fully review the case --

THE COURT: Sure.

MS. CHIU: -- because I think in the --

THE COURT: Because --

MS. CHIU: -- brief moment that I did, our --

THE COURT: I am with you on the argument --

MS. CHIU: Certainly.

THE COURT: -- until he raised that.

MS. CHIU: Yeah, no. I --

THE COURT: That is my -- his point there is my concern.

MS. CHIU: And our thoughts were that -- that it was a misinterpretation of the case based on my friends' submissions. But I don't want to speak to that without having had a chance to --

THE COURT: Well --

MS. CHIU: -- more fully --

THE COURT: -- I suspect that you guys will still be going in the morning, so you can address it then.

MS. CHIU: Certainly. And I will do that.

And then, our second response, as Your Honour is aware, is that it's our position that it has already been determined in the *Ingram* decision that the CMOH Orders did not violate the *Alberta Bill of Rights* without valid justification.

THE COURT: That point I do not find convincing.

MS. CHIU: I hear you.

You know, I've gone over some of our submissions with respect to that point and I'll simply add that, you know, we've outlined the tests for -- and the relevant cases with respect to the principles of res judicata and abuse of process in our written submissions. And I'll just simply summarize them by submitting that to avoid collateral attack, inconsistency in findings, wasting judicial resources, and unfairness to the parties, the principles of res judicata and abusive process, in our submission, precludes re-litigation of an issue that's already decided in a prior proceeding. And it's our submission that the circumstances of this case warrant the application of those principles. The *Ingram* action was case managed,

it involved counsel on both sides. As mentioned, one of the plaintiffs, Ms. Ingram, was an applicant in the other action. And, in our submission, the issues concerning the *Charter* and *Alberta Bill of Rights* were discussed and argued extensively in that decision with consideration of both fact and expert witnesses. You know, it's our submission that the same analysis would need to be conducted again if this matter were to proceed with respect to those issues and the same witnesses called. You know, in the *Ingram* decision, Justice Romaine dedicated over --

THE COURT: Have I read *Ingram* wrong?

MS. CHIU: Excuse me, Sir?

THE COURT: Have I read *Ingram* wrong? I read *Ingram* -- the discussion of the *Alberta Bill of Rights* to be in the alternative where she says, If I am wrong and the orders are intra vires, she then says, Are these intra vires orders contrary to the *Alberta Bill of Rights*? And then she says no. Whereas our present case is we have to take the orders as ultra vires because that is, in fact, what she found. And she did not do that analysis to my eye. Am I wrong?

MS. CHIU: You're not wrong.

THE COURT: Okay.

MS. CHIU: However, our --

THE COURT: So, then I am -- there is no res judicata then --

MS. CHIU: So, our submission --

THE COURT: -- because she did not --

MS. CHIU: -- is --

THE COURT: -- she did not consider that question.

MS. CHIU: So, our submission is that what she did consider was whether the CMOH Orders were capricious and arbitrarily made, and in so doing -- in making that determination found that the CMOH Orders were made for valid legislative purpose and the same process would need to be conducted here in order to make a determination --

THE COURT: Yeah.

MS. CHIU: -- with respect to the *Alberta Bill of Rights*. So, it's --

THE COURT: I think it would be entirely different. I mean --

MS. CHIU: -- really the same issue and --

THE COURT: -- I think it is an entirely different analysis when you are dealing with something that is ultra vires.

MS. CHIU: And that's fair. If -- you know, you have our submissions, of course.

THE COURT: I have your --

MS. CHIU: Yeah.

THE COURT: -- submissions. I understand them. I just wanted to make sure that we were not in disagreement how the *Ingram* decision works.

MS. CHIU: I don't think so.

THE COURT: Okay.

MS. CHIU: Okay. And yes, so Alberta, you know, submits that the plaintiffs' *Alberta Bill of Rights* claims, in our submission, based on our two responses are bound to fail and cannot meet the cause of action test under 5(1)(a) of the *Class Proceedings Act,* and that it would be in the interest of judicial economy, consistency, finality, and the integrity of the administration justice that these issues not be relitigated in -- in accordance with the principles of res judicata and abuse of process.

So, the next cause of action listed in the plaintiffs' Statement of Claim is negligence. And here we reiterate what we submitted earlier the -- that the bare fact that the CMOH Orders have been found ultra vires the *Public Health Act* in the *Ingram* decision does imply tort liability including negligence on the part of Alberta. Now, I'm not suggesting that we don't need to conduct the analysis with respect to potential other claims of negligence, but just the bare fact that there was a finding of ultra vires, our submission is that that does not imply negligence. And I've already talked about *Welbridge*, so I won't repeat what was found in that case, but, you know, our submission is that that case is applicable to

supporting that submission. And as is outlined in our written materials, subsequent cases have followed the findings in *Welbridge* and confirmed the principle that passing or enforcing legislation or regulations that were valid at the time will not give rise to a cause of action and that the subsequent striking down of legislation does not itself create a claim in negligence.

Now, I note in the plaintiffs' reply brief they argue at paragraph 91 that *Welbridge* is not applicable because -- and, you know, Your Honour had also raised this, but the Court's ruling was limited to the specific context of municipal bylaws and a negligence claim in the exercise of legislative powers not executive orders. And, again, I reference the Court in *CM*'s characterization of the CMOH Orders as:

> …executive legislation, similar to a regulation, because it is an instrument of binding, general application that sets a norm or code of conduct.

So, it is our submission that the cases of *Welbridge* do apply.

And so, in this case, again, the CMOH Orders were an exercise of executive authority made pursuant to the provisions of the *Public Health Act* in the general public's interest, and based on established case law that the exercise of such authority was subsequently found to be ultra vires cannot give rise to a claim of negligence. But to the extent that the plaintiffs allege Alberta was negligent for acts or omissions beyond the passing of CMOH Orders that were later found to be ultra vires, we submit that even applying the two-stage duty of care analysis the facts as alleged still do not support a private law duty of care between Alberta and the proposed class members.

So, at -- so, I'll briefly go through that two-stage analysis, though I'm sure Your Honour is very familiar with it. But at the first stage we look at proximity between the parties. And as our -- you know, in determining whether government actors owe a duty to individual persons the legislative scheme, in our submission, is a key consideration of that proximity analysis, and we've cited some cases to that effect, including Taylor v. Alberta (sic), which is found in tab 30 of our Book of Authorities. So, in this case, the relevant legislative framework is the *Public Health Act*. And in our submission, there is no provisions within the *Act* that establish a private law duty of care between public health decision makers and individuals affected by their decisions. On the contrary, as we previously submitted, section 66.1 of the *Public Health Act* explicitly provides a statutory immunity from actions for damages against those decision makers, including the Crown and the Chief Medical Officer of Health. This immunity clause clearly demonstrates the legislator's intention that public health decision makers in Alberta do not owe a private law duty of care to individuals.

Now, in the case *Syl Apps Secure Treatment v. B.D.*, which is found in tab 31 of our Book of Authorities, the Supreme Court of Canada held that when an alleged duty of care conflicts with an overarching statutory or public duty, this provides compelling reasons to refuse finding proximity. And the Court provided examples where imposing a proposed duty of care would prevent a defendant from effectively discharging its statutory duties. So, in -- for example, in *Cooper v. Hobart* a duty to individual investors by the Registrar of mortgage brokers was rejected because it would, and I quote -- I quote from the *Syl* case -- but they quote the decision itself that it would "potentially conflict with the Registrar's overarching duty to the public." And similarly in *Edwards v. Law Society of Upper Canada*, a private law duty of care by the Law Society to the victim of a dishonest lawyer was rejected at the proximity stage as -- and then I also quote -- a decision:

> … 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.

And the Court in *Syl Apps* noted that:

> In both cases, the serious negative policy consequences of these conflicting duties … [justified] denying … proximity.

So, in this case we submit that imposing a private law duty of care on decision makers to safeguard the economic interests of individual business owners and operators would conflict with the statutory purpose of the *Public Health Act*, which is to protect the health of all Albertans and impose corresponding duties to that effect. The *Public Health Act* is directed towards the general public and the protection of public health. And if the authority under section 29(2.1) of the *Act* were to attract a private law duty of care to protect specific individual's economic interests while taking steps to limit the transmission of a global pandemic during a public health emergency, it would be impossible for decision makers to fulfill their responsibilities under the *Act* to protect the health of the population at large.

And moreover, aside from the legislative scheme, our submission is that there is no facts pled in the claim that establish a close or direct relationship between Alberta and the proposed class. And it's evident from the claim that the plaintiffs had no specific interactions or material relationship with the government or its agents. Like every Albertan, their relationship is that they were simply subject to the CMOH Orders and that fact alone is not sufficient to establish proximity.

THE COURT: So, on proximity we have a bunch of road cases, for lack of a better description, and I had a case a couple of years ago now *Pyke v. Calgary (City)* where I found the City of Calgary had a duty of care towards drivers using -- it was

Glenmore Trail, and there was some unsafe barriers on Glenmore Trail. How -- how are small business owners any different than drivers on the road?

MS. CHIU: So, first, I would submit that small business owners, in this case is one group, one subset, and --

THE COURT: I know there is some bigger businesses in there. I get that.

MS. CHIU: No. The class members --

THE COURT: Yeah.

MS. CHIU: -- we'll say is a group of people among all of Albertans --

THE COURT: Yeah.

MS. CHIU: -- that -- whose interests the Ministers in this case, or those acting under the *Public Health Act*, are tasked to protect. And secondly, the interest is public health. That is distinct from the economic interests of the class members in this case. Now, with respect to road cases, presumably the interests that the -- Alberta in your case or the, you know, the government ministry that is a defendant, is responsible for the -- likely the health -- or the safety of road users. And, you know, our submission is that there's less of a conflict in the cases that you've described where the Minister would have some responsibility to individuals using the road versus what we're talking about here is a -- is the economic interests of a group of people among the population at large. And to protect those individuals' interests would be in direct conflict of protecting the public health interests of the population at large.

And I'll just briefly respond to a submission that -- that was made by my friend earlier that sort of creating categories or groups of people who would be impacted the CMOH Orders differently might create some sort of proximity. And our submission is that perhaps there may be -- that may create some sort of foreseeability, although that's not necessarily the case on its face, but there is a distinction between proximity and foreseeability for a reason. And proximity is about the relationship between Alberta and the class members in this case, and whether that amounted to a close and direct relationship. And creating categories of people that would be differently impacted does not do that. So --

THE COURT: I mean, it was pretty obvious when the closure orders went out that businesses were going to suffer. I think that was well known. It is

reflected in various government policies, CERB and various other things as well. So, clearly, there was a level of understanding that business owners were going to be harmed by these choices; right? I mean -- so, I guess you are saying that is foreseeability, that is not proximity?

MS. CHIU: That's correct. Because proximity speaks to the relationship, and the relationship is found based on -- especially when -- with respect to a government of -- on the *Act*, on the *Statute*, and the *Public Health Act* does not have any provisions that speak to a direct and close relationship between --

THE COURT: I mean --

MS. CHIU: -- Alberta and the --

THE COURT: -- negligence is a common law tort though. I mean, you know, going back to my example about roads users, I mean, yes, you can have a duty arising out of *Highway Traffic Act* and things like that, but, you know, when you look at cases about municipal or other authorities having duties to road users, it is a common law thing. It comes out of -- it does not have its roots in a statute. It is just the -- the province or the municipality provides roads, invites, you know, drivers to use the roads, and the act of providing the road creates the relationship.

MS. CHIU: The importance of the *Statute* here though is that whatever proximity can be found should not conflict with the duties of the, you know, the Ministry in this case that are under the *Statute*. So, it's our submission that there is a conflict if the -- certainly, economic interests were going to be affected, and we're -- we're not -- we're not arguing against that. But what we're saying is that if there is a duty by the Ministry to protect those interests in issuing CMOH Orders under the *Public Health Act* then that conflicts with their duties under the *Public Health Act*. And those duties are to the public at large. And so, that's why the *Statute* is especially important to consider in this case.

And certainly, you know, it is -- there can be circumstances where a government, ministry or minister, or individual, can have a direct and close relationship. That's not been pled. We're not aware of any actual interaction. If there were, then we could look at that and determine whether that amounts to a close and direct relationship. Without that, we're left to assume that the relationship that's being talked about is that the class members are subject to the CMOH Orders, and whether or not the -- Alberta in this case had a duty to protect those class members' economic interests in the face of their duties under the *Public Health Act*.

So, I'll move on to the residual policy considerations --

THE COURT: Yeah.

MS. CHIU: -- under the second stage of the *Anns-Cooper* analysis. And here the analysis involves identifying any residual policy reasons to negate a finding of a duty of care. Now, at this stage, our submission is that the *Attis v. Canada* case, which is found in tab 32 of our Book of Authorities, and we've referenced it at length in our written submissions, but it provides some guidance. In that case, the Ontario Court of Appeal addressed a government liability regarding the regulation of silicone breast implants. And the claim alleged that Health Canada failed to properly regulate under the *Food and Drugs Act*. The Court found that the government's duty was owed to the public as a whole and not to individual consumers. And at the second stage of the test, the *Anns* test, the Court found that a duty of care was also negated by residual policy considerations. And the relevant considerations considered were the risk of indeterminate liability, the chilling effect of imposing a duty of care in public health, and the distinction between policy and operational conduct. And with respect to indeterminate liability the Ontario Court of Appeal found at paragraph 74, and I'm going to quote it because I think it's relevant:

> 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.

And similarly to finding -- to find a duty of care in the plaintiffs' case here 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. And it's important to note that, unlike in *Attis*, this claim in not for physical injury. It's for pure economic loss. And as found by the Supreme Court of Canada in *Design Services v. Canada*, which is found in tab 33 of authorities:

> …in cases of pure economic loss… care must be taken to find that a duty is recognized only in cases with a class of plaintiffs, the time and the amount are determinate.

Otherwise, 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.

And here our submission is that 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's no reason that 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 even include orders made in respect of food and housing regulations. And Your Honour brought up some examples earlier of regulations on how many liquor stores or cannabis stores can be on a block. Of course, that would not be a tenable outcome, and it's our submission this policy concern alone weighs heavily in favour of denying a duty of care.

Now, in respect of the distinction between operational and policy conduct, the CMOH Orders in this case constituted, in our submission, core policy decisions. The Supreme Court of Canada in *R. v. Imperial Tobacco* confirmed that a core policy decision does not give rise to a duty of care. We've fleshed this out a little bit in our written submissions, but I'll just summarize by saying that, you know, it's our submission that the CMOH Orders challenged by the plaintiffs were policies developed by the highest level of government in the province aimed at balancing various interests during a global pandemic. These decisions are executive legislation and, therefore, clearly policy based rather than operational in nature. They should not give rise to liability. And as the Supreme Court of Canada held in *Nelson (City) v. Marchi*:

> …the legislative and executive branches have core institutional roles and competencies that must be protected from interference by the judiciary's private law oversight.

So, in summary, on negligence -- because that was a long one -- based on -- it's our submission that based on Justice Romaine's findings in the *Ingram* decision, the plaintiffs' negligence claim -- let me rephrase that -- the plaintiffs' negligence claim based on Justice Romaine's finding in *Ingram* fails because case law confirms that a breach of a statute does not alone create tort liability. And then, further, Alberta did not have a proximate

relationship with the proposed class to a private law duty of care, as the CMOH Orders applied to the public at large not specific individuals, and policy concerns such as indeterminate liability and the fact that the CMOH Orders were core government policy decisions also weigh against the duty of care. Therefore, the plaintiffs' negligence claims against Alberta are bound to fail.

Now, the next cause of action in the Statement of Claim that I will address is conversion. As set out in Alberta's brief starting at paragraph 42 there are four basic elements required to establish conversion. (1) a wrongful act; (2) involving chattels; (3) were taken -- where the chattel is taken, used, or destroyed; and (4) with the intention or effect of permanently denying or negating the title of another person to such chattel. A simple example of conversion. Person 'A' takes the licence plate off of person's 'B' vehicle without permission and puts it on their own car. The act of taking the licence plate without permission is the wrongful act and the intent is to permanently deprive person 'B' of their property by using it for themselves. There are no material facts like this licence plate example pled by the plaintiffs here.

In our written materials we've gone through each of the elements of conversion and identified what's missing, but here I'll highlight some key issues. With respect to the wrongful act, the only fact pled by the plaintiffs -- that the plaintiffs appear to rely on is, again, that the CMOH Orders which came into effect at the hands of Alberta were declared ultra vires in the *Ingram* decision. It's our submission that the finding of ultra vires did not render the promulgation, administration, or enforcement of CMOH Orders a wrongful act, there was no blameworthy conduct assessed by the Court in that decision. But more importantly, there are no facts pled showing that the promulgation or administration of the CMOH Orders involved permanently taking, using, or destroying chattels. Restricting access to a premises does not take, use, or destroy personal property. Spacing or distancing requirements do not use, take, or destroy personal property, nor do masking requirements, vaccine exemption programs, or cleaning measures. I think it's important to note that at no point did any of the CMOH Orders, that I'm aware of, prevent people from entering their own premises. Owners of properties continued to have the right to possess and access their properties, and they were just restricted on how they could use it in the face of a global pandemic.

Ultimately, with respect to the claim of conversion, it's our submission there is nothing in the pleadings other than bald allegations with no factual foundation. And as a final note here, I will just mention that Alberta did not take any steps to monitor or enforce the CMOH Orders. As confirmed in the plaintiffs' pleadings, the monitoring and enforcement of the CMOH Orders were carried out by Alberta Health Services and police officers such as RCMP members who would have been permitted under the *Public Health Act* to assist Alberta Health Services' employees in carrying out an order. And both Alberta Health

Services and policing entities in Alberta are unique legal entities that are separate and apart from Alberta.

THE COURT: Sorry. Help me understand what is the significance of AHS being distinct from Alberta?

MS. CHIU: I only mention this because there were some suggestion -- at least in our interpretation -- from my friends that enforcement of the CMOH Orders was also something that Alberta show be liable for.

THE COURT: Okay. I am not sure that I necessarily follow that. But I had a decision a year and a bit ago, *Alberta Health Services v. Johnston,* and I went on at some length in that decision about whether or not AHS was independent from the Government of Alberta. And the short version is it is not. And one of the points -- I cannot remember whether I said this in oral argument or in the written decision, the Government of Alberta has twice fired the entire board of AHS and replaced it with a single administrator responsible to the cabinet. And I do not think the lawyers for the Government of Alberta should be standing in front of our Courts and saying with a straight face that AHS is anything but a creature of the government.

MS. CHIU: Fair enough. And I'm not familiar enough with that case to speak to it. But what I will say is that to the extent that there are any claims or allegations that specific enforcement measures were inappropriate or contrary to the CMOH Orders -- for example, I know Mr. Scott had encountered AHS and policing entities in his experience with the CMOH Orders -- and to the extent that there's an allegation that, you know, specific individuals within AHS or those policing entities had acted in a wrongful manner or there was misconduct there, Alberta is not their employer, Alberta Health Services and the policing entities would have been. So, I'll leave it at. But, I -- you know, and this is just sort of an aside. I mean, our --

THE COURT: Yeah.

MS. CHIU: -- primary point with respect to conversion is that there was no taking of property --

THE COURT: Yes.

MS. CHIU: -- or chattels. And so, generally, our, you know, submission is that the plaintiffs have not provided sufficient or any facts upon which to establish the elements of conversion, and so Alberta submits that this cause of action must fail.

THE COURT: Okay.

MS. CHIU: And then I'll move on to the breach of fiduciary duty. I don't expect to be too much longer, so if -- I -- I note it's 4:20, but if it --

THE COURT: That is fine.

MS. CHIU: -- pleases the Court --

THE COURT: We will go to 4:30 and --

MS. CHIU: -- I'm happy to continue.

THE COURT: -- and, as I say, I do not know how much you really need to say on the breach of fiduciary obligations.

MS. CHIU: Okay.

MR. RATH: For the sake of brevity, we concede that one.

THE COURT: Thank you. That makes things easy.

MS. CHIU: Okay. Well, in that case, I will just say that there are no facts pled that support a finding of a breach of fiduciary duty that Alberta any time undertook to forsake the interests of all others in order to protect the proposed class members' economic interests. And, again, given the purpose and scheme of the *Public Health Act*, Alberta could not have given such an undertaking. So, we say it's plain and obvious there's no fiduciary duty between Alberta and the proposed class members in respect of the CMOH Orders, and I'll leave it at that.

So, the last cause of action, expropriation without compensation. And, again, our submission here is that there are no facts pled to support the requisite elements of this cause of action. The Supreme Court of Canada has defined expropriation as the forced taking of land without the consent of the owner. And our submission is that there is no factual pleading that Alberta took land without the consent of the owner. Importantly, a reading of the CMOH Orders themselves confirms that this did not happen. Closures and restrictions is not taking of land. No titles were put into Alberta's name as a result of the CMOH Orders. And, in fact, the orders themselves did not prevent individuals from accessing or using their own properties.

Now, similar to conversion an element that has to be pled in order to establish expropriation is permanency. And here the plaintiffs themselves plead that the final CMOH Order was in June of 2022. So, there can be no permanency if the CMOH Orders were not permanent or if the alleged taking did not result in a permanent or formal acquisition by Alberta, and so in our submission there can be no expropriation, and that this cause of action must fail.

And in the plaintiffs' Statement of Claim under the heading of, "Expropriation without Compensation," the plaintiffs make reference to section 52.6 and 52.7 of the *Public Health Act*. So, I think it would make sense to review those sections because they've been mentioned. So, section 52.6 is actually quite similar to some of the wording that we've seen in the -- in section 19 of the *Emergency Management Act*. But section 52.6 says that:

> (1) On the making of an order under section 52.1 and for up to 60 days following the lapsing of that order the Minister or a regional health authority may do any or all of the following for the purpose of preventing, combating or alleviating the effects of the public health emergency and protecting the public health:
>
> (a) acquire or use any real or personal property;
>
> (b) authorize or require any qualified person to render aid of a type the person is qualified to provide…
>
> (d) authorize the entry into any building or on any land, without warrant, by any person;
>
> (e) provide for the distribution of essential health and medical supplies and provide, maintain and co-ordinate the delivery of health services.

And section 52.6(1.01) says:

> On the making of an order under section 52.2 and during the state of public health emergency the Minister or the regional health authority may exercise any or all of the powers set out in subsection (1)(a), (b), (d) or (e) for the purpose of preventing, combating or alleviating the effects of the public health emergency and protecting the public health.

And then with respect to compensation, section 52.7 speaks to it. It says:

> (1) Where the Minister or a regional health authority acquires or uses real or personal property under section 52.6 or where real or personal property is damaged or destroyed due to the exercise of any powers under that section, the Minister or regional health authority shall pay reasonable compensation in respect of the acquisition, use, damage or destruction.

And then:

> (2) If any dispute arises concerning the amount of compensation payable… the matter is to be determined by arbitration…

So, our submission -- and I just wanted to read it all because I think it's relevant to actually look at the words of the section -- but our submission is that sections 52.6 and 52.7 first do not speak to the legally defined term of expropriation even though it's been pled under that umbrella. The sections speak to both real and personal property for one, not just land. The term "acquire or use" is also vastly different from the required taking without consent of expropriation. And, in any event, section 52.6 and 52.7 are simply not applicable in these circumstances. 52.6 applies to empower a Minister to take certain actions following the declaration of a state of public health emergency. Under section 52.1 -- and when we look at the CMOH Orders themselves, they were issued under section 29(2.1) of the *Public Health Act*, not section 52.6. And the fact that the CMOH Orders were declared ultra vires the *Public Health Act* in the *Ingram* decision is actually evidence of that distinction. If the CMOH Orders were issued under 52.6 then it would not be ultra vires the *Public Health Act* for the final decision makers to have been members of cabinet.

And even if the CMOH Orders had been issued under section 52.6, which we submit is clear on its face it was not, there's no factual pleading as to how the CMOH Orders allowed Alberta to acquire or use the real personal property of the proposed class members. This makes sense looking at the CMOH Orders, they did not do that. Alberta made no practical or effective utility of closed or restricted premises pursuant to the CMOH Orders for its own purpose. They were not turned into makeshift triage units, for example, or a meeting place to discuss pandemic responses. The plaintiffs have appropriately not pled that Alberta used the property of the proposed class members in these ways. And, additionally, according to section 52.7, compensation disputes must be dealt with by the *Arbitration Act*, and not in the midst of a sizable, proposed class action.

Now, we already talked a little bit about the *Emergency Management Act*. And that's been cited by my friend on a number of occasions, specifically section 19(3). And our submission is that that section, the wording is similar to what we read in section 52.6, both of which has a mechanism for compensation. And our response is that, again, is very similar

to our response with respect to section 52.6 and 52.7, that section 19(3) of the *Emergency Management Act* is simply not applicable. The CMOH Orders were not issued under that *Act*. The orders did not acquire or utilize, damage or destroy real personal property. And in any event, the *Emergency Management Act* is utilized for disaster scenarios; forest fires, floods, and so on. And it's our submission it would not have been applicable or appropriate to have issued orders under that *Act* for the COVID-19 pandemic, particularly since the *Public Health Act* specifically deals with communicable diseases, which the COVID-19 virus was.

And it's also not pled that the reason Alberta issued the orders under the *Public Health Act* was so that Alberta could rely on section 66.1, as my friend has suggested. You know, the orders -- and I think, you know, the irony, of course, is that -- the Alberta -- had Alberta issued under the *Emergency Management Act* or section 52.6 they would not have been found ultra vires, as I've talked about. And so, my point is if, you know, the orders were issued under the *Emergency Management Act*, which my friend says that Alberta specifically evaded, they'd be no issue of the orders being ultra vires or invalid, and so no need to rely on any immunity clause to protect Alberta. Now, I've also mentioned that section 27 of the *Emergency Management Act* actually provides immunity as well to the Minister, so I won't belabour that point.

A final note on the plaintiffs' expropriation claim. In the plaintiffs' reply brief and in their submissions today they have talked about constructive expropriation. And while constructive expropriation is not specifically pled, we'll briefly speak to this cause of action. The test for constructive expropriation, as set out by the Supreme Court of Canada in the 2022 case of *Annapolis Group Inc. v. Halifax Regional Municipality*, and recently cited in the case that I've provided to Your Honour, the 2024 Court of Appeal's decision of *Altius Royalty v. Alberta*, the test is that, one, there needs to be:

> (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property…

Alberta neither acquired a beneficial interest in any property for which the proposed class members held an interest, nor were all reasonable uses of the property -- of properties removed. Now, I took the Court through paragraph 20 and 32 of the case, which I think provides some good examples of -- or some -- some good reasoning for why, you know, a general advantage to public health is -- would not be, you know -- a generalized benefit is not -- does not, kind of, qualify the -- or meet the test for acquiring or taking. The public health benefit of reducing the COVID-19 -- or a COVID-19 transmission, in our submission, does not constitute a taking or acquisition of a benefit. Alberta did not acquire beneficial interest in the property of class members as required for constructive expropriation.

And I think this -- you know, as mentioned in response to my friends' submission that restrictions and closures amounted to acquiring property in *Altius*, you know, our submission is that that's not the case. And, lastly, again, the CMOH Orders were not permanent, so it's our submission there could not have been expropriation of any kind. And the reality is that businesses can be ordered to modify or temporarily halt all operations due to public health concerns pursuant to the *Public Health Act* for a variety of reasons. It happens fairly regularly with respect to violations of food safety regulations, for example, and the notion that each time that happens the province is liable for expropriation without compensation is neither a reasonable nor tenable conclusion.

So, we would submit that the CMOH Orders did not by definition expropriate the class members' properties, and so the plaintiffs claim of expropriation for compensation must fail.

I note its 4:30. I had a few points to make with respect to what was raised earlier, misfeasance in public office --

THE COURT: And --

MS. CHIU: -- I can speak to that tomorrow if we want to stop there.

THE COURT: I would like to hear about that but I think tomorrow morning is the time.

MS. CHIU: Certainly.

THE COURT: Okay. All right. Before we finish here, Ms. Chui, or Mr. Dube, or whoever wants to speak, how long do you think Alberta will be in the morning?

MR. DUBE: Are you --

MS. CHIU: I'm almost done.

MR. DUBE: Ms. Chiu is almost done. I imagine myself and Ms. Flanders will be 2 hours total max. We're happy to start earlier if that's of some assistance to allow some reply. We do have, again, the four additional parts of the certification test to go over, subject, obviously --

THE COURT: Okay.

MR. DUBE: -- to comments --

THE COURT: We have all day tomorrow, so I do not see any need to bend the court day.

MR. DUBE: Okay.

THE COURT: I know sometimes it can seem leisurely but paying attention the whole time can be a challenge if we stretch the day too much, especially -- I have another motion tomorrow at lunch as well, so -- all right. So, it sounds like you will take the better part of the morning collectively.

Mr. Rath, you will obviously have a right of reply, whether it is late in the morning or early in the afternoon, I guess we will figure that out tomorrow.

All right. Mister clerk, thank you for you help today. I appreciate it.

And thank you, counsel, and we will see everyone back here tomorrow.

PROCEEDINGS ADJOURNED UNTIL OCTOBER 3, 2024

Certificate of Record

I, David Marion, certify that this recording is the record made of the evidence in the proceedings in the Court of King's Bench, held in courtroom 1203, at Calgary, Alberta, on October 2nd of 2024, and that I was the court official in charge of the sound recording machine during proceedings.

Certificate of Transcript

I, Stephanie Johnson, certify that

(a) I transcribed the record, which was recorded by a sound recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Stephanie Johnson, Transcriber
Order Number: TDS-1070070
Dated: November 14, 2024