

COURT OF APPEAL OF ALBERTA

Distributed to Panel

COURT OF APPEAL FILE NUMBER 2401-0321AC

COURT FILE NUMBER 2301-12271

REGISTRY OFFICE CALGARY

PLAINTIFFS/RESPONDENTS REBECCA MARIE INGRAM,
CHRISTOPHER SCOTT, carrying on
business as THE WHISTLE STOP
CAFÉ, and 1786822 ALBERTA LTD.

STATUS ON APPEAL RESPONDENTS

DEFENDANT/APPELLANT HIS MAJESTY THE KING IN RIGHT OF ALBERTA

STATUS ON APPEAL APPELLANT

DOCUMENT RESPONDENTS' SUPPLEMENTAL WRITTEN
SUBMISSION



Appeal from the Decision of
The Honourable Justice C.C.J. Feasby
Dated the 30th day of October, 2024

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1. The Appellant’s supplemental submissions regarding *Hartman v Canada (Attorney General)* (“**Hartman**”),¹ do not alter the certification analysis. *Hartman* is materially distinguishable from the present matter in several critical respects:

- a) *Hartman* concerned vaccine approval, regulation, and promotion by the federal government. This case concerns unlawful executive action and *ultra vires* exercises of provincial authority.
- b) *Hartman* did not involve prior judicial findings that the impugned government actions were *ultra vires* the governing statute. Here, Justice Romaine already determined that the CMOH Orders were *ultra vires* the *Public Health Act* because Cabinet, not the CMOH, was the true decision-maker (“**Ingram 2023**”).²
- c) *Hartman* did not involve allegations grounded in the *Alberta Bill of Rights* or the deprivation of property without due process of law.
- d) *Hartman* arose from allegations relating to personal injury and death allegedly connected to vaccination decisions. This case concerns direct economic harm caused to a defined class of Alberta businesses subjected to coercive and unlawful restrictions.
- e) *Hartman* did not involve allegations that Cabinet used public health officials as a political or legal shield to avoid accountability, transparency, or compensation obligations.
- f) *Hartman* did not arise in the certification context, where the applicable threshold is only whether the pleadings disclose a cause of action and there is “some basis in fact” for certification.

2. For those reasons, *Hartman* is neither determinative nor particularly persuasive in the context of this certification appeal. The factual matrix, legal foundation, and procedural posture are fundamentally different.

3. The Appellant’s supplemental submissions improperly invite this Court to conduct a merits assessment at the certification stage. That approach is contrary to the well-established principles

¹ *Hartman v Canada (Attorney General)*, 2026, ONCA 270, (“**Hartman**”).

² *Ingram v Alberta (Chief Medical Officer of Health)*, 2023 ABKB 453 (CanLII).

governing certification under the *Class Proceedings Act* (“CPA”).³

4. Certification is not a determination of liability, nor is it a forum to resolve contested facts, weigh evidence, or determine whether the plaintiffs will ultimately succeed at trial.⁴

5. The Supreme Court of Canada (“SCC”) held that certification is a procedural screening mechanism intended to determine whether the statutory requirements under the CPA are met⁵ and confirmed that courts must take a “generous” approach to certification legislation in light of the objectives of access to justice, judicial economy, and behaviour modification.⁶ The SCC expressly confirmed that “some basis in fact” is a low evidentiary threshold.⁷

6. The Appellant’s submissions largely ignore these principles and focus instead on ultimate liability.

7. Justice Feasby already considered and rejected the Province’s submission that these claims were doomed to fail at the certification stage.⁸ He expressly found that the pleadings disclosed viable causes of action in negligence, misfeasance in public office, and declaratory relief grounded in the *Alberta Bill of Rights*.

8. This action proceeds against the backdrop of CMOH Orders having already been found *ultra vires* the *Public Health Act*. Justice Romaine determined that Cabinet, not the Chief Medical Officer of Health, was the true decision-maker behind the Orders. **The Province did not appeal that decision.** The unappealed finding fundamentally changes the legal landscape and materially distinguishes this action from *Hartman*.

9. The Appellant improperly reframes this action as a challenge to public health policy rather than unlawful exercises of executive authority. That characterization improperly minimizes the actual claims certified by the Chambers Justice and ignores the unlawful exercise of exclusive

³ *Class Proceedings Act*, SA 2003, c C-16.5.

⁴ *Spring v Goodyear Canada Inc*, 2021 ABCA 182 (CanLII), at para 18.

⁵ *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 (CanLII), [2013] 3 SCR 477, at para 103.

⁶ *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 (CanLII), [2013] 3 SCR 477, at para 103.

⁷ *Hollick v. Toronto (City)*, 2001 SCC 68 (CanLII), [2001] 3 SCR 158, at para 25; and *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 (CanLII), [2013] 3 SCR 477, at para 99.

⁸ *Ingram v Alberta*, 2024 ABKB 631 (CanLII), at para 24.

authority at the core of this proceeding.

10. As the Respondents' Factum explains:

This case is not about the pandemic itself, but about whether public officials who acted unlawfully in the exercise of sweeping powers can be held accountable for the harm they caused.⁹

11. **The rule of law does not disappear during emergencies, nor does the requirement that government act within the lawful limits of their statutory authority.** The claims certified in this matter arise from allegations that:

- a) Cabinet exercised powers it did not lawfully possess;
- b) The Province used the CMOH as a political and legal shield;
- c) Coercive restrictions were imposed through unlawful executive action;
- d) Businesses were targeted and burdened with enforcement obligations; and
- e) The unlawful actions caused foreseeable harm to a defined class businesses.

12. In *Roncarelli v. Duplessis*, the SCC affirmed that no public official is above the law and that discretionary authority must remain bounded by lawful limits.¹⁰ Likewise, this Court in *Alberta (Minister of Infrastructure) v. Nilsson* confirmed that government actors may be held liable where they exceed lawful authority and cause harm, including where public officials act with “blind eye” recklessness or camouflage unlawful purposes behind public objectives.¹¹

13. Justice Feasby carefully considered the causes of actions stating:

In the present case, the value is arguably determinate because the “quality of injury” – business losses – was a foreseeable result of the CMOH Orders ...

The Proposed Representative Plaintiffs plead essentially that Cabinet hid behind the CMOH thereby avoiding democratic accountability. That, in my view, is a collateral purpose that is plausibly bad faith.¹²

⁹ Respondents Factum, at para 20.

¹⁰ *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] SCR 121, at PDF pages 141-142.

¹¹ *Alberta (Minister of Infrastructure) v. Nilsson*, 2002 ABCA 283 (CanLII), at para 118.

¹² *Ingram v Alberta*, 2024 ABKB 631 (CanLII), at para 35 and para 47.

And ultimately concluded:

The question of immunity is relevant to whether a *prima facie* duty of care is negated as discussed above in paras 36-42. This is a proper common issue.¹³

14. By contrast, *Hartman* involved findings that no sufficient factual foundation existed that support the pleaded allegations of bad faith, unlawfulness, or proximity.¹⁴

15. *Hartman* is also distinguishable on the misfeasance claim. There, the Court found the pleadings contained bald allegations unsupported by material facts.¹⁵ The opposite is true here. Justice Feasby specifically found that the pleadings sufficiently alleged recklessness, unlawfulness, foreseeability of harm, and misuse of authority:

The Proposed Representative Plaintiffs have pleaded that Alberta was reckless, that it knew or ought to have known the CMOH Orders were *ultra vires*, and that it knew that the CMOH Orders would harm the proposed class members because the CMOH Orders directed businesses to shut down or curtail operations and because Alberta put in place “insufficient” business support programs.¹⁶

16. The Chambers Justice was entitled to rely on the unappealed findings in *Ingram* 2023 when assessing whether the pleadings disclosed viable causes of action. The Province now effectively asks this Court to disregard those finding and indirectly re-litigate the legality of the CMOH Orders through a certification appeal. That is improper.

17. The Province now effectively asks this Court to disregard those binding findings and indirectly re-litigate the legality of the CMOH Orders through a certification appeal. That is improper.

18. Moreover, the record before the Chambers Justice included and extends well beyond the low threshold required:

- a) Judicial findings that the CMOH Orders were *ultra vires*;
- b) Evidence regarding Cabinet involvement in decision-making;

¹³ *Ingram v Alberta*, 2024 ABKB 631 (CanLII), at para 95.

¹⁴ *Hartman v. Canada (Attorney General)*, 2026 ONCA 270 (CanLII), at para 53.

¹⁵ *Hartman v. Canada (Attorney General)*, 2026 ONCA 270 (CanLII), at para 55.

¹⁶ *Ingram v Alberta*, 2024 ABKB 631 (CanLII), at para 58.

- c) Evidence of direct and foreseeable economic harm; and
- d) Allegations of concealment, bad faith, and misuse of authority.

19. At certification, the Respondents are not required to prove those allegations. A claim should only be struck where it is “plain and obvious” that it cannot succeed. Justice Feasby correctly applied that standard.¹⁷

20. Even if *Hartman* may ultimately prove relevant at trial on certain issues, it does not establish that the Respondents’ claims are doomed to fail at certification, particularly given:

- a) Fundamentally different factual matrix;
- b) The *Alberta Bill of Rights* issues raised;
- c) The unappealed findings that the CMOH Orders were *ultra vires*; and
- d) The low threshold applicable at certification.

21. Governments are entitled to make difficult policy decisions. They are not entitled to act outside the limits imposed by statute and the rule of law without judicial scrutiny. Importantly, **the Province seeks to collapse the distinction between lawful public health decision-making and unlawful exercises of executive authority**. That distinction lies at the heart of this action.

22. This action also satisfies the core objectives of a class proceeding. It promotes access to justice for affected Alberta businesses that could not reasonably pursue individual litigation against the Province, advances judicial economy by resolving common issues in a single proceeding, and supports behaviour modification by ensuring governmental accountability when exercising sweeping powers outside lawful authority.

23. Ultimately, the Appellant identifies no palpable and overriding error, and no misapplication of the certification test. Rather, the Appellant simply disagrees with the fact the Respondents’ claims were found sufficiently grounded to proceed. That is not a basis to overturn certification.

¹⁷ *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 SCR 959 at PDF page 979.

TABLE OF AUTHORITIES

STATUTES

1. *Class Proceedings Act*, SA 2003, c C-16.5.

CASE LAW

2. *1285486 Alberta Ltd v Ape Parkour Inc*, 2024 ABKB 406 (CanLII), at [para 35](#).
3. *Alberta (Minister of Infrastructure) v. Nilsson*, 2002 ABCA 283 (CanLII), at [para 118](#).
4. *Hartman v Canada (Attorney General)*, 2026, ONCA 270, at [para 53](#) and [para 55](#).
5. *Hollick v. Toronto (City)*, 2001 SCC 68 (CanLII), [2001] 3 SCR 158, at [para 25](#).
6. *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 SCR 959, at PDF page 979.
7. *Ingram v Alberta (Chief Medical Officer of Health)*, 2023 ABKB 453 (CanLII).
8. *Ingram v Alberta*, 2024 ABKB 631 (CanLII), at [para 24](#), [para 35](#), [para 47](#), [para 58](#) and [para 95](#).
9. *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 (CanLII), [2013] 3 SCR 477, at [para 99](#) and [para 103](#).
10. *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] SCR 121, at PDF pages 141-142.
11. *Spring v Goodyear Canada Inc*, 2021 ABCA 182 (CanLII), at [para 18](#).