Court of King's Bench of Alberta

Citation: Ingram v Alberta, 2024 ABKB 631

Date: 20241030
Docket: 2301 12271
Registry: Calgary

Between:

Rebecca Marie Ingram and Christopher Scott, carrying on business as The Whistle Stop Café

Plaintiffs/Applicants

- and -

His Majesty the King in Right of Alberta

Defendant/Respondent

Reasons for Decision of the Honourable Justice Colin C.J. Feasby

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I. Introduction

[1] Rebecca Ingram and Christopher Scott (the "Proposed Representative Plaintiffs") ask the Court to certify this action as a class proceeding pursuant to the *Class Proceedings Act*, SA 2003, c C-16.5 ("*CPA*"). The Proposed Representative Plaintiffs, on behalf of a proposed class including individual business owners in Alberta, seek recovery of losses caused by business restrictions and closures required by orders issued in the name of the Chief Medical Officer of Health to mitigate the impact of the COVID-19 pandemic (the "CMOH Orders").

[2] The CMOH Orders were found to have been *ultra vires* the *Public Health Act*, RSA 2000, c P-37 (the "*PHA*") in ***Ingram v Alberta (Chief Medical Officer of Health)***, 2023 ABKB 453 ("***Ingram 2023***") because the decisions to issue the CMOH Orders were taken by Cabinet or a Cabinet committee (together, "Cabinet"), not the CMOH. The Proposed Representative Plaintiffs assert that because the CMOH Orders were *ultra vires*, Alberta is liable for proposed class members' losses caused by the business restrictions and closures required pursuant to the

CMOH Orders. The Proposed Representative Plaintiffs assert several causes of action, including negligence, misfeasance in public office, conversion, breach of fiduciary obligation, and constructive expropriation. The Proposed Representative Plaintiffs assert that a class proceeding is the most fair and efficient way to determine the claims of proposed class members against Alberta.

[3] Alberta asserts that the Proposed Representative Plaintiffs' causes of action are fatally flawed in various respects and assert that Alberta enjoys immunity for various reasons including that the CMOH Orders were policy decisions. Alberta further submits that a class proceeding is inappropriate because the Proposed Representative Plaintiffs are not representative of class members and class members can reasonably be expected to pursue independent actions as some have already done.

[4] At the certification stage, what is at issue is a procedural question. This Court is not to decide the merits of the case, but instead to determine if the preconditions to certification found in s 5 of the *CPA* are met: ***Spring v Goodyear Canada Inc***, 2021 ABCA 182 at paras 17-18.

II. Background – *Ingram 2023*

[5] The proposed class proceeding cannot be understood apart from its predecessor action, ***Ingram 2023***. The proposed class proceeding relies on Justice Romaine's finding in ***Ingram 2023*** that the CMOH Orders were made by Cabinet, not the CMOH. Cabinet, according to Justice Romaine, acted without legal authority in making the CMOH Orders. The unauthorized CMOH Orders are the common thread that links the causes of action pleaded by the Proposed Representative Plaintiffs.

[6] A clear understanding of what was decided and what was not decided in ***Ingram 2023*** is critical to the analysis that follows in these Reasons. Indeed, both sides invoked ***Ingram 2023*** to support different arguments that certain points in issue in this application have already been decided.

[7] ***Ingram 2023*** was commenced by an Originating Application and sought, amongst other things, declarations that the CMOH Orders were: (a) *ultra vires PHA* s 29; (b) contravened *Alberta Bill of Rights*, RSA 2000, c A-14, s 2; and (c) were inconsistent with various *Charter* rights.

[8] Justice Romaine tackled the question of whether the CMOH Orders were *ultra vires PHA* s 29 first. She found that *PHA* s 29 gave the CMOH the power to make the CMOH Orders. Then she found, as a matter of fact, that the CMOH Orders were made by Cabinet not the CMOH. The CMOH Orders were, therefore, invalid. Romaine J explained as follows at para 3:

> The *Public Health Act* requires that decisions with respect to public health orders must be made by the CMOH, or her statutorily authorized delegate. The final decisions implemented by the impugned Orders in this case were made by the cabinet of the government of Alberta or by committees of cabinet. While the CMOH made recommendations and implemented the decisions of the cabinet and committees through the impugned Orders, she deferred the final decision making to cabinet.

[9] ***Ingram 2023*** was not appealed. Even if the strict requirements of issue estoppel outlined in ***Danyluk v Ainsworth Technologies Inc***, 2001 SCC 44 at para 25 are not satisfied, the

conclusion that the CMOH Orders were *ultra vires PHA* s 29 is binding as a practical matter. Indeed, Alberta's submissions evince no intention to challenge Romaine J's conclusion in ***Ingram 2023***.

[10] After concluding that the CMOH Orders were *ultra vires PHA* s 29, Romaine J considered alternative scenarios. Specifically, she analyzed whether the CMOH Orders would have been constitutional "had the impugned Orders been validly enacted by the CMOH": ***Ingram 2023*** at para 5. Her *Alberta Bill of Rights* analysis was also conducted in the alternative and proceeded on the assumption that the CMOH Orders were *intra vires PHA* s 29.

[11] Justice Romaine's conclusion that the CMOH Orders were consistent with the *Alberta Bill of Rights*, based on the assumption they were *intra vires PHA* s 29, does not dictate the outcome of the *Alberta Bill of Rights* claim in the present case. The Proposed Representative Plaintiffs argue that by causing the CMOH Orders to be issued without legal authority Cabinet denied affected individuals "enjoyment of property" without "due process of law" contrary to *Alberta Bill of Rights* s 1(a). This is a different argument than that decided in ***Ingram 2023***. The principle of *res judicata* does not apply to the *Alberta Bill of Rights* arguments advanced by the Proposed Representative Plaintiffs.

III. The Test for Certification of a Class Proceeding

[12] The test for certification is set out in the *CPA* s 5. Section 5(1) provides as follows:

> 5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
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> (a) the pleadings disclose a cause of action;
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> (b) there is an identifiable class of 2 or more persons;
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> (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
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> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
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> (e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,
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> (i) will fairly and adequately represent the interests of the class,
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> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
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> (iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

[13] The Proposed Representative Plaintiffs bear the burden of establishing each element of the test for certification. Apart from the cause of action criterion, which is determined based on the pleadings, the Proposed Representative Plaintiffs must demonstrate "some basis in fact" to satisfy the certification criteria: ***Hollick v Metropolitan Toronto (Municipality)***, 2001 SCC 68 at para 25; ***Spring*** at para 40.

IV. Causes of Action

A. *Alberta Bill of Rights*

[14] The Proposed Representative Plaintiffs pleaded that the CMOH Orders violate the due process guarantee in s 1(a) of the *Alberta Bill of Rights* because they were promulgated without legal authority and deprived affected persons of the enjoyment of their property. Section 1(a) of the *Alberta Bill of Rights* reads as follows:

> 1 It is hereby recognized and declared that in Alberta there exist without discrimination by reason of race, national origin, colour, religion, sexual orientation, sex, gender identity or gender expression, the following human rights and fundamental freedoms, namely:
>
> (a) the right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; ... [emphasis added].

[15] Justice Major in ***Authorson v Canada (Attorney General)***, 2003 SCC 39 at para 37 considered the meaning of due process in the context of the *Canadian Bill of Rights*. The plaintiffs in ***Authorson*** contended that they were entitled to notice and a hearing to contest proposed legislation that would affect their rights. Major J concluded that due process in the context of federal legislation means nothing more than following the steps required by law for enacting statutes. By analogy, the Proposed Representative Plaintiffs argue that due process with respect to orders issued pursuant to the *PHA* requires, at a minimum, that the orders be made by a decision-maker with legal authority to make such orders. The argument advanced by the Proposed Representative Plaintiffs posits a plausible reading of *Alberta Bill of Rights* s 1(a) that, on the facts pleaded, could result in a finding that individual property rights protected by the *Alberta Bill of Rights* have been infringed.

[16] Alberta submits that no independent civil cause of action exists for the breach of a statute: ***R v Saskatchewan Wheat Pool***, [1983] 1 SCR 205 at 225. Alberta further submits that the *Alberta Bill of Rights* does not have a provision like s 24(1) of the *Charter* which empowers a court to grant "such remedy as the court considers appropriate and just in the circumstances." *Charter* s 24(1) has been interpreted as giving individuals the right to claim damages: ***Vancouver (City) v Ward***, 2010 SCC 27 at paras 16-22. According to Alberta, the absence of a specific provision in the *Alberta Bill of Rights* comparable to *Charter* s 24(1) or granting the power to award damages for the infringement of rights means that damages cannot be recovered.

[17] Alberta's argument is sound insofar as it goes, but it does not address what the Proposed Representative Plaintiffs pleaded. The Proposed Representative Plaintiffs seek a declaration that the rights of the proposed class under the *Alberta Bill of Rights* have been infringed, not damages. A cause of action is "a set of facts entitling a plaintiff to a remedy": ***Grant Thornton LLP v New Brunswick***, 2021 SCC 31 at para 38. Damages is only one of many remedies

available in law and equity, so the absence of a right to damages does not mean that a claim is not a cause of action. Indeed, a declaration like that sought by the Proposed Representative Plaintiffs is a kind of remedy. Justice O'Bonsawin explained in ***Shot Both Sides v Canada***, 2024 SCC 12 at para 66:

> Declarations set out the parameters of a legal state of affairs or the legal relationship between the parties. They primarily confirm or deny the legal rights of the parties. Importantly, declarations can also confirm or deny the breach of a right or declare the existence of a new legal state of affairs. [emphasis added and citations omitted].

[18] Breach of the *Alberta Bill of Rights*, like any other breach of statutory duty, is not a tort: ***Saskatchewan Wheat Pool*** at 225. But an action for breach of the *Alberta Bill of Rights* seeking declaratory relief is a cause of action in the sense contemplated by ***Grant Thornton*** and ***Shot Both Sides***. This, in my view, meets the *CPA* requirement that the pleadings disclose a cause of action. Even if I am wrong and the pleading that *Alberta Bill of Rights* s 1(a) has been breached is not a cause of action, it may be relevant to the pleading of negligence which will be considered next.

B. Negligence

i. Is *Ape Parkour* Binding?

[19] Alberta submits that the principle of horizontal *stare decisis* outlined in ***R v Sullivan***, 2022 SCC 19 at para 75 requires the Court to follow ***1285486 Alberta Ltd v Ape Parkour Inc***, 2024 ABKB 406 and dismiss the Proposed Representative Plaintiffs' negligence claim. ***Ape Parkour*** concerned an attempt by a business affected by the CMOH Orders to advance third party claims against Alberta Health Services and Alberta in a proceeding brought by a landlord to collect rent. Justice Millsap struck the claim against Alberta Health Services on the grounds that it failed to disclose a cause of action and denied permission to amend the pleadings to add Alberta on the grounds that the claim would be hopeless. Though ***Ape Parkour*** raised some of the same issues before the Court in the present case, the case was advanced by a self-represented litigant who framed the negligence claim differently than the Proposed Representative Plaintiffs. Specifically, ***Ape Parkour*** does not consider the *Alberta Bill of Rights* argument advanced by the Proposed Representative Plaintiffs. As such, ***Ape Parkour*** is distinguishable.

ii. Can the *Alberta Bill of Rights* Ground a Duty of Care?

[20] The question that the Court must ask at the certification stage is whether the pleadings disclose a cause of action. The standard is whether it is "plain and obvious, assuming the facts pleaded to be true, that each of the plaintiffs' pleaded claims disclose no reasonable cause of action": ***Atlantic Lottery Corp Inc v Babstock***, 2020 SCC 19 at para 14.

[21] The Proposed Representative Plaintiffs posit a novel duty of care. They assert that the *Alberta Bill of Rights* imposes a duty of care on Alberta not to deprive individuals of enjoyment of property without due process of law. The Proposed Representative Plaintiffs invoke the words of Dickson J, as he then was, in ***Saskatchewan Wheat Pool*** at 227: "Proof of statutory breach, causative of damages, may be evidence of negligence." Justice Conrad, referring to ***Saskatchewan Wheat Pool***, explained in ***Tottrup v Lund***, 2000 ABCA 121 at para 23 that "a duty of care on a public authority arises only at common law, though it may derive from powers and duties conferred on a public authority by statute."

[22] Justice Stone in ***Brewer Bros v Canada (Attorney General)***, [1992] 1 FC 25 (CA) considered whether the Canadian Grain Commission, which was subject to a statutory duty to assess the financial security of grain handlers, owed a duty of care to grain producers to ensure that grain handlers had sufficient security. Stone JA concluded at 54 that, pursuant to ***Saskatchewan Wheat Pool***, it was "permissible to have regard to ... the Act in considering whether one of the major elements of negligence – duty of care – exists." The Alberta Court of Appeal followed this approach in ***Elder Advocates of Alberta Society v Alberta***, 2009 ABCA 403 at para 47.

[23] The Supreme Court of Canada reversed the Court of Appeal in part in ***Alberta v Elder Advocates of Alberta Society***, 2011 SCC 24. The Court distinguished ***Brewer Bros*** at para 70 on the grounds that the statute in issue in ***Elder Advocates (SCC)*** granted "only permissive monitoring powers" whereas "the statute in question [in ***Brewer Bros***] imposed on the public authority a *positive duty to act*." Justices Butler and Abrioux, citing ***Fullowka v Pinkerton's of Canada Ltd***, 2010 SCC 5, observed in ***Waterway Houseboats Ltd v British Columbia***, 2020 BCCA 378 at para 230 "a private law duty of care will be found more readily where legislation imposes a statutory duty to act." The line drawn in ***Elder Advocates (SCC)*** between permissive statutory powers and positive statutory duties is fuzzy and may require further refinement by appellate courts.

[24] The *Alberta Bill of Rights* s 1(a) imposes a duty on Alberta not to deprive individuals of their right to enjoyment of property without due process of law. This is arguably a positive duty to act which is significant for the purpose of determining the existence of a private law duty of care according to ***Elder Advocates (SCC)***. The alleged duty of care is novel, but it is not plain and obvious that it will fail by reason of the principle in ***Saskatchewan Wheat Pool***. The asserted duty of care is sufficiently plausible that it may be considered by the trial judge.

iii. The *Anns/Cooper* Framework

[25] The Supreme Court of Canada in ***Kamloops v Nielsen***, [1984] 2 SCR 2 adopted the two-stage framework for establishing a public authority's common law duty of care from ***Anns v Merton London Borough Council,*** [1978] AC 728. The approach was restated in ***Cooper v Hobart***, 2001 SCC 79 and recently affirmed in ***Nelson v Marchi***, 2021 SCC 41. The ***Anns/Cooper*** framework, as it is often called, "applies to claims grounded in statutory duties": ***Elder Advocates (SCC)*** at para 68.

[26] The ***Anns/Cooper*** framework is comprised of two stages. At the first stage of the analysis, the Court must ask "whether a *prima facie* duty of care between the parties exists": ***Nelson*** at para 17. A *prima facie* duty of care exists where "the harm was a reasonably foreseeable consequence of the defendant's conduct" and "there is 'a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff": ***Nelson*** at para 17 quoting ***Rankin (Rankin's Garage & Sales) v JJ***, 2018 SCC 19 at para 18.

[27] At the second stage of the ***Anns/Cooper*** framework, the Court must consider "whether there are residual policy concerns outside the parties' relationship that should negate the *prima facie* duty of care": ***Nelson*** at para 18. ***Just v British Columbia***, [1989] 2 SCR 1228 at 1240-44 identified two bases on which a *prima facie* duty of care may be negated: (1) statutory exemptions from liability; and (2) immunity for true policy decisions.

iv. Proximity

[28] Justices Karakatsanis and Martin held that "[p]roximity arises in those relationships where the parties are in such a 'close and direct' relationship that it would be 'just and fair having regard to that relationship to impose a duty of care in law upon the defendant": ***Nelson*** at para 17 quoting ***Cooper*** at paras 32 and 34.

[29] The Proposed Representative Plaintiffs assert that the *Alberta Bill of Rights* is the foundation for a close and direct relationship between Alberta and the proposed class members. The Proposed Representative Plaintiffs submit that the *Alberta Bill of Rights* is an undertaking by Alberta to be bound by a standard of conduct when depriving individuals of their property rights which would not otherwise apply to government action.

[30] Alberta submits that the relevant legislative scheme determines whether a government actor owes a duty of care to individual persons: ***Taylor v Canada (Attorney General)***, 2012 ONCA 479 at para 76. Alberta argues in its written submission "the legislative scheme is the *Public Health Act*. There are no provisions in the *Public Health Act* that establish a private law duty of care between public health decision makers empowered under the *Public Health Act*, and individual persons affected by those decisions." The problem with this submission is that Romaine J found in ***Ingram 2023*** that the impugned decision was not made by public health decision makers empowered under the *PHA*.

[31] Alberta contends that there can be no duty of care where the alleged duty conflicts with a statutory or public duty: ***Syl Apps Secure Treatment Centre v BD***, 2007 SCC 38 at para 28. Alberta submits that "imposing a duty of care on decision makers to safeguard the economic interests of individual owners and operators of businesses would conflict with the *Public Health Act*'s statutory purpose to protect the health of Albertans...." Again, this might be a good argument if the CMOH Orders were made by the CMOH under the *PHA*.

[32] The Proposed Representative Plaintiffs allege that Alberta has a duty of care when depriving individuals of enjoyment of their property to follow due process which they say means, at a minimum, that the decision must be made by the correct decision-maker. A duty to honour due process in depriving individuals of their property rights does not conflict with Alberta's other responsibilities, including protecting Albertans' health pursuant to the *PHA*.

[33] Alberta relies on ***Attis v Canada (Minister of Health)***, 2008 ONCA 660 at para 74 where the Court refused to recognize a duty of care in the regulation of medical devices because it would effectively make the government the insurer of all medical devices. Alberta submits that "find[ing] a duty of care in this case would result in Alberta becoming the economic insurer of all health related policies, orders and decisions made under the *Public Health Act*, even if they are made in the midst of a novel and evolving global pandemic." Again, this submission overlooks Romaine J's finding in ***Ingram 2023*** that the CMOH Orders were not made by the CMOH and, accordingly, were not "made under the *Public Health Act*." Nevertheless, Alberta may be understood to be arguing that the duty of care alleged by the Proposed Representative Plaintiffs should not be recognized because the potential liability is indeterminate.

[34] The question of indeterminate liability may be relevant to both proximity analysis and residual policy concerns though Justices Gascon and Brown suggest in ***Deloitte & Touche v Livent Inc (Receiver of)***, 2017 SCC 63 at para 44 that it is best dealt with as a question of proximity. Gascon and Brown JJ explained in ***Livent*** at para 43 that there are three kinds of

indeterminacy relevant to a duty of care analysis: (1) value indeterminacy; (2) temporal indeterminacy; and (3) claimant indeterminacy. The question of indeterminacy arises mainly in claims for economic loss as in the present case. Rothstein J held in ***Design Services Ltd v Canada***, 2008 SCC 22 at para 62 that "in cases of pure economic loss ... care must be taken to find that a duty is recognized only in cases where the class of plaintiffs, the time and the amounts are determinate." Gascon and Brown JJ in ***Livent*** at para 43 explain that to be indeterminate the scope of liability must be impossible to ascertain. They emphasize that value indeterminacy is different than the liability being significant and yet unquantified.

[35] In the present case, the value is arguably determinate because the "quality of injury" – business losses – was a foreseeable result of the CMOH Orders: ***Livent*** at para 44. There is arguably temporal determinacy because the claim seeks compensation for losses caused by the CMOH Orders which were in force for a known period. The class of claimants in this case will be considered later in these Reasons but for present purposes it may be said that the class of claimants is determinate because it is limited to individuals and corporations that owned businesses subject to the CMOH Orders.

v. Residual Policy Concerns

[36] Alberta asserts three bases on which it is immune from liability under the second branch of the ***Anns/Cooper*** analysis. First, Alberta submits that it is shielded from liability by *PHA* s 66.1. Second, Alberta contends that a government cannot be held liable if a statute, regulation, or order enacted in good faith is subsequently ruled invalid. Third, Alberta argues that the CMOH Orders were policy decisions that should be immune from review to maintain the separation of powers.

[37] *PHA* s 66.1 provides that "no action for damages may be commenced against ... the Crown ... [f]or 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 problem with Alberta's invocation of *PHA* s 66.1 is that the decision-maker, Cabinet, was not carrying out duties or exercising powers under the *PHA* or any other enactment. Cabinet was found to have been acting *ultra vires* the *PHA* and Alberta has not suggested any other valid basis for Cabinet's actions. *PHA* s 66.1 does not shield Alberta from liability.

[38] Alberta submits that no duty of care can be owed by Alberta to the proposed class members because the government is not liable for acts later found to be *ultra vires*. Alberta relies on ***Holland v Saskatchewan***, 2008 SCC 42 which concerned a group of game farmers who suffered financial losses because of their refusal to register in a government program to prevent chronic wasting disease ("CWD"). The game farmers refused to register in the program because a condition of registration was execution of a release and indemnity in favour of the federal and provincial governments. The game farmers commenced judicial review proceedings. Chief Justice Gerein held that "the Minister had no legislative authority to make acceptance of these clauses ... a condition to participate in the CWD program": ***Holland (SCC)*** at para 3 citing ***Holland v Saskatchewan (Agriculture, Food and Rural Revitalization)***, 2004 SKQB 478 at para 38. Saskatchewan did not appeal ***Holland (QB)***, and the game farmers commenced an action for tort damages.

[39] Chief Justice McLachlin characterized the claim in ***Holland (SCC)*** as one of breach of statutory duty. She said, "the alleged fault may be described as failing to act in accordance with the authorizing acts and regulations": ***Holland (SCC)*** at para 7. McLachlin CJC endorsed the

conclusion of Richards JA, as he then was, that no proximity existed under the first branch of the ***Anns/Cooper*** analysis and any duty would be negated under the second branch for policy reasons: ***Saskatchewan (Agriculture, Food and Rural Revitalization) v Holland***, 2007 SKCA 18. At para 10, McLachlin CJC adopted Richards JA's conclusion at para 43:

> ...the respondent's theory of liability would fundamentally shift the way in which the public and private spheres historically have carried the consequences or burden of governmental action which is shown to be *ultra vires*. I see no policy reason which would warrant such a dramatic revision in the shape of the law and, as indicated above, see much which cuts tellingly against shaping the law in the manner sought by the respondent.

[40] Alberta also relies on ***Welbridge Holdings Ltd v Greater Winnipeg***, [1971] SCR 957 where a developer who relied on a municipal by-law that was subsequently found to be invalid commenced an action against the municipality for negligence. Laskin J, as he then was, observed at 969 that "invalidity is not the test of fault and it should not be the test of liability." He went on at 970 to opine:

> the risk of loss from the exercise of legislative or adjudicative authority is a general public risk and not one for which compensation can be supported on the basis of a private duty of care. The situation is different where a claim for damages for negligence is based on acts done in pursuance or in implementation of legislation or of adjudicative decrees.

[41] The immunity posited in ***Welbridge*** and ***Holland (SCC)*** is not absolute. Chief Justice Wagner and Justice Karakatsanis in ***Canada (Attorney General) v Power***, 2024 SCC 26 at para 41 observed that "[a]n award of damages against the state for exceeding its legal powers has long been recognized as an important requirement of the rule of law" [citations omitted]. They explained that there is no immunity where "it is established that the law was clearly unconstitutional, or that its enactment was in bad faith or an abuse of power": ***Power*** at para 4 [emphasis added]. Though ***Power*** concerned a law subsequently found to be unconstitutional, the principle identified by Wagner CJC and Karakatsanis J in the underlined portion of the preceding quotation applies when state action is later found to be *ultra vires* for reasons other than being unconstitutional.

[42] Alberta submits that the CMOH Orders were policy decisions and, as such, it is immune from civil liability: ***R v Imperial Tobacco Canada Ltd***, 2011 SCC 42 at 91. Karakatsanis and Martin JJ explained in ***Nelson*** at para 42 that "[t]he primary rationale for shielding core policy decisions from liability in negligence is to maintain the separation of powers." The legislature and the executive are better suited to "weighing competing economic, social, and political factors and conducting contextualized analyses of information": ***Nelson*** at para 44. They also make decisions that "require value judgments" on matters where "reasonable people can and do legitimately disagree": ***Nelson*** at para 44. The immunity for core policy decisions, like the immunity when enacting legislation, does not apply when there is bad faith: ***Imperial Tobacco*** at para 90.

vi. Bad Faith

[43] Alberta submits that the Proposed Representative Plaintiffs must establish that Alberta acted in bad faith: ***Mackin v New Brunswick (Minister of Finance)***, 2002 SCC 13 at paras 78-

79; ***Power*** at para 61. The Proposed Representative Plaintiffs' claim must fail at the certification stage, according to Alberta, because they have not pleaded particulars of Alberta's bad faith: ***Power*** at para 112 and ***Henry v British Columbia (Attorney General)***, 2015 SCC 24 at para 43.

[44] The Proposed Representative Plaintiffs plead that Alberta "acted ... in bad faith and/or in abuse of its power, in pronouncing CMOH Orders which it knew, or ought to have known, were *ultra vires* the *PHA*...." The Proposed Representative Plaintiffs elaborated on this pleading in their written submissions. They submit that "the CMOH Orders ... served as a form of camouflage." They went on to argue that Cabinet "chose to camouflage their actions as public health orders under the *PHA* so they could blame the CMOH rather than accept political responsibility."

[45] Alberta submits that the Proposed Representative Plaintiffs must plead sufficient facts to establish that:

> (a) The CMOH Orders were, on an objective basis, clearly *ultra vires* the *PHA* at the time they were enacted such that the CMOH Orders were enacted in the face of a known risk or deliberately failing to enquire about the risk when there was a good reason to inquire; and
>
> (b) The CMOH Orders were issued in bad faith where they were enacted for an improper purpose or were dishonest.

[46] To address Alberta's first objection to the sufficiency of the pleading of bad faith, the Proposed Representative Plaintiffs rely on ***Ingram 2023*** which held that the CMOH Orders were *ultra vires* the *PHA* because they were made by Cabinet. The Proposed Representative Plaintiffs' pleading is sufficient because ***Ingram 2023*** is based on a plain reading of the *PHA*. In my view, for the Proposed Representative Plaintiffs to say that Cabinet knew or ought to have known what the *PHA* plainly said is enough.

[47] Alberta's second concern, that the pleading of bad faith in the Statement of Claim lacks the required particulars, is addressed by the elaboration of the Proposed Representative Plaintiffs' theory in their written submissions. 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. I grant the Proposed Representative Plaintiffs leave to amend their Statement of Claim pursuant to Rule 3.62 to include the particulars of the allegation of bad faith made in their written submission.

vii. Causation

[48] Causation is an essential element of negligence: Lewis Klar & Cameron Jefferies, *Tort Law*, 7th ed, (Thomson Reuters: Toronto, 2023) at 545. Causation is also an element of the tort of misfeasance in public office which is discussed in the next section: ***Odhavji Estate v Woodhouse***, 2003 SCC 69 at paras 41 and 74. The issue of causation was raised by Alberta at points in oral argument but was not addressed in its written submissions except indirectly in the context of the problem of assessing damages on a class-wide basis.

[49] The question of causation in most cases requires a court to ask whether "but for" the defendant's wrongful conduct would the plaintiff's injury have occurred. Alberta's alleged wrongful conduct in the present case was promulgating the CMOH Orders without authority. But what is the correct counterfactual scenario? Is it a situation where the CMOH Orders were

never made? Is it a situation where different CMOH Orders were made *intra vires*? Or is it something else altogether?

[50] The evidence accepted by Romaine J in ***Ingram 2023*** at para 52 was that the CMOH presented a range of alternatives to Cabinet which "were acceptable to her as a matter of public health...." Further, "[t]he only evidence is that elected officials did not direct her to impose more severe restrictions in the CMOH orders than she had recommended to them." The Proposed Representative Plaintiffs in oral argument imagined a scenario where Cabinet approved restrictions at the more restrictive end of the range presented by the CMOH. This implies that the Proposed Representative Plaintiffs' position is that the appropriate counterfactual scenario is not the absence of CMOH Orders but different and less restrictive CMOH Orders. Whether the evidence will bear that out is unclear at this stage of the litigation. Regardless, causation is properly pleaded and is an appropriate matter for trial.

C. Misfeasance in Public Office/Abuse of Power

[51] The Proposed Representative Plaintiffs do not identify misfeasance in public office or abuse of power by name as causes of action in either their pleading or in their written submissions. The other causes of action considered were all identified in the Proposed Representative Plaintiffs' pleading by separate headings. However, as noted above in para 17, a cause of action is a set of facts entitling a plaintiff to a remedy. I must consider whether Proposed Representative Plaintiffs' pleading discloses a cause of action, not whether they have labelled it as such.

[52] The tort of misfeasance in public office is sometimes called abuse of public office or abuse statutory authority: ***Uni-Jet Industrial Pipe Ltd v Canada (Attorney General)***, 2001 MBCA 40 at para 18. The Proposed Representative Plaintiffs use the term "abuse of power." The Proposed Representative Plaintiffs plead at para 82 of their Statement of Claim that Cabinet acted "recklessly" and "in abuse of its power" when it made the decisions that resulted in the CMOH Orders because it "knew or ought to have known" the CMOH Orders were *ultra vires* the *PHA*.

[53] The Proposed Representative Plaintiffs' written submissions dedicate nearly three pages to the issue of abuse of power. Those submissions cite ***Roncarelli v Duplessis***, [1959] SCR 121 which is often considered to be the paradigm example of abuse of power in Canada and ***Alberta (Minister of Infrastructure) v Nilsson***, 2002 ABCA 283, the leading Alberta case on misfeasance in public office.

[54] The Court of Appeal in ***Nilsson (CA)*** at paras 95 and 101 adopted the statement of the test for what it called "abuse of public office" stated by Justice Marceau in ***Alberta (Public Works, Supply and Services) v Nilsson***, 1999 ABQB 440 at para 108:

> 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.

[55] Following Marceau J's decision in ***Nilsson (QB)*** the House of Lords released its decision in ***Three Rivers District Council v Bank of England (No. 3)***, [2000] 3 All ER 1 (HL) which is the leading UK decision on misfeasance in public office: Erika Chamberlain, "What is the Role of Misfeasance in Public Office in Modern Canadian Tort Law?" (2010) 88 Canadian Bar Review 575 at 575 and 578-82. Lord Steyn explained that there are two forms of the tort of misfeasance in public office. The first form of the tort involves "targeted malice by a public officer." The second form of the tort "is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff": ***Three Rivers*** at 8. Lord Steyn explained at 8 that the second form of the tort "involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful." He went on to observe at 9 that it is "settled law that an act performed in reckless indifference as to the outcome is sufficient to ground the tort in its second form."

[56] Justice Iacobucci, writing for the Court, in ***Odhavji Estate*** adopted the approach in ***Three Rivers***. He stated the test for misfeasance in public office at para 23 as follows: "First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff."

[57] Though ***Odhavji Estate*** does not recite the finer points of the test from ***Nilsson (QB)***, Iacobucci J's reasons indicate his agreement with the reckless indifference standard: ***Odhavji Estate*** at paras 25, 29, and 38. More recently, Justice Abella in ***Ontario (Attorney General) v Clark***, 2021 SCC 18 at para 23 called the mental requirement of the test "subjective recklessness" or "conscious disregard." In my view, ***Odhavji Estate*** and ***Clark*** do not change the approach that must be taken to analyzing the tort of misfeasance in public office. The test stated in ***Nilsson (QB)*** and endorsed in ***Nilsson (CA)*** remains the correct test.

[58] 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. I am satisfied that the Proposed Representative Plaintiffs have sufficiently pleaded misfeasance in public office.

[59] During oral argument, I asked counsel for the Proposed Representative Plaintiffs whether it is proper to bring a misfeasance in public office claim against Alberta when it was the members of Cabinet who were alleged to be acting contrary to their duties as public officers. I questioned whether Alberta should be the defendant when it is arguably the individual members of Cabinet, not Alberta, who are the alleged tortfeasors. There was, to my mind, a legitimate

question whether Alberta should be vicariously liable for the actions of public officials who act without authority.

[60] Counsel for the Proposed Representative Plaintiffs provided me with ***British Columbia v Greengen Holdings Ltd***, 2023 BCCA 24 where Hunter JA, writing for a five-member panel, held at para 72:

> [W]hen the claim is made against public authorities, it is not necessary to add individual officials as defendants, as long as they are identified in such a way as to allow the defendants to understand the case to be met and to inform the individuals so that they know that their conduct is at issue.

[61] ***Greengen*** is consistent with the practice in Alberta. For example, the lone defendant in ***Nilsson (CA)*** was Alberta. More recently, the Court of Appeal commented favourably on ***Greengen*** in ***Gay v Alberta (Workers' Compensation Board),*** 2023 ABCA 251 at para 17. Despite my misgivings expressed at oral argument, I am satisfied that the Proposed Representative Plaintiffs have proceeded correctly in naming only Alberta. Further, given that Cabinet is a small group of people, and the relevant time is defined by the CMOH Orders, I am satisfied that Alberta can identify the individuals whose conduct is in issue without any difficulty. Indeed, Alberta did not suggest that the failure to name individual public officers affected its ability to understand the case to be met.

D. Other Alleged Causes of Action

[62] The Proposed Representative Plaintiffs allege three other causes of action, conversion, breach of fiduciary obligation, and expropriation without compensation. These causes of action were notably absent from their written submissions. Counsel for the Proposed Representative Plaintiffs indicated in oral argument that his clients stand by their pleading though he conceded that the breach of fiduciary obligation pleading could not be sustained. Accordingly, I will deal briefly with each alleged cause of action.

a. Conversion

[63] Conversion is an intentional tort. The elements of conversion were set out in ***Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce***, [1996] 3 SCR 727 at para 31 and ***Driving Force Inc v I Spy-Eagle Eyes Safety Inc***, 2022 ABCA 25 at paras 30-31 as follows:

> (a) a wrongful act;
>
> (b) involving a chattel;
>
> (c) consisting of handling, disposing, or destruction of the chattel;
>
> (d) with the intention or effect of denying or negating the title of another person to such chattel.

[64] The Proposed Representative Plaintiffs pleaded that the "CMOH Orders interfered with and exercised control over the businesses and personal property of ... the Class Members in a manner inconsistent with their rights of title, possession, and usage."

[65] The CMOH Orders are arguably wrongful because they were made *ultra vires*. But the CMOH Orders did not involve chattels; rather, they pertained to the use of real property. The effect of the CMOH Orders on chattels was indirect as, for example, in the form of spoilage of restaurant food inventory. Though the CMOH Orders were intentionally made, there are no facts

pleaded to support a conclusion that they made with the intention of "denying or negating the title of another person to such chattel." Nor are there facts pleaded that would support that CMOH Orders had such an effect.

b. Breach of Fiduciary Obligation

[66] Outside the established categories of fiduciaries such as lawyer-client, fact-based or *ad hoc* fiduciary relationships are identified using general characteristics: ***Frame v Smith***, [1987] 2 SCR 99 *per* Wilson J dissenting at 102. Chief Justice McLachlin in ***Elder Advocates (SCC)*** at para 36 restated the general characteristics of *ad hoc* fiduciary relationships holding that a fiduciary relationship may exist where there is:

> (a) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;
>
> (b) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and
>
> (c) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[67] The Proposed Representative Plaintiffs' pleading fails with respect to the undertaking requirement. An "undertaking may be found in the relationship between the parties, in an imposition of responsibility by statute, or under an express agreement to act as trustee of the beneficiary's interest": ***Elder Advocates (SCC)*** at para 32.

[68] There is nothing pleaded about the relationship between the proposed class members and Alberta that supports a finding of the existence of a fiduciary obligation nor is an agreement pleaded. The only remaining possibility is that the fiduciary obligation flows from the *Alberta Bill of Rights* guarantee of due process.

[69] McLachlin CJC observed that imposing a fiduciary obligation on the Crown to act in the best interests of a specific group "is inherently at odds with its duty to act in the best interests of society as a whole....": ***Elder Advocates (SCC)*** at para 44. As such, "if the undertaking is alleged to flow from a statute, the language in the legislation must clearly support it": ***Elder Advocates (SCC)*** at para 45. The *Alberta Bill of Rights* requires Alberta to follow due process; it does not require Alberta to act in the best interests of the proposed class members. The pleading of breach of fiduciary obligation is doomed to fail.

c. Constructive Taking

[70] The Proposed Representative Plaintiffs allege in their written reply submissions that the CMOH Orders affected proposed class members' property "in a manner akin to expropriation." They posit that, as a general proposition of law, when the government expropriates private property compensation is due and that this idea is incorporated into both the *PHA* and *Emergency Management Act*, RSA 2000, c E-6.8 ("*EMA*"). *PHA* s 52.7 provides for compensation where "the Minister ... acquires or uses real or personal property" during a health emergency and *EMA* s 19(3) provides that "[i]f the Minister acquires or utilizes real or personal property ... the Minister shall cause compensation to be paid for it."

[71] Put in its best light, the Proposed Representative Plaintiffs' claim is for what is called a "constructive taking" or "'*de facto*' or 'regulatory taking'": ***Annapolis Group Inc v Halifax***

Regional Municipality, 2022 SCC 36 at para 17. Justices Côté and Brown, writing for the majority in ***Annapolis***, set out the test for constructive taking at para 44. A court must determine:

> (1) whether the public authority has acquired a beneficial interest in the property or flowing from it (i.e. an advantage); and
>
> (2) whether the state action has removed all reasonable uses of the property. [emphasis in original]

[72] Côté and Brown JJ explained that "beneficial interest" is to be construed broadly to mean "a benefit or advantage accruing to the state" as opposed to being understood "in the strict equitable sense of that term": ***Annapolis*** at para 40.

[73] The facts pleaded by the Proposed Representative Plaintiffs, if proved, arguably satisfy the first element of the test. Alberta acquired an advantage – creating conditions to mitigate the spread of COVID-19 – by promulgating and enforcing the CMOH Orders. This is enough to show at the certification stage.

[74] The facts pleaded by the Proposed Representative Plaintiffs do not meet the second part of the test for constructive takings for two reasons. First, the leading constructive takings cases all relate to permanent impairments of rights: ***Annapolis***; ***Canadian Pacific Railway Co. v. Vancouver (City)***, 2006 SCC 5; ***The Queen in Right of the Province of British Columbia v Tener***, [1985] 1 SCR 533; ***Manitoba Fisheries Ltd v The Queen***, [1979] 1 SCR 101. The present case is different because it involves a temporary restriction of the use of property with the alleged loss being mainly a loss of business income rather than a loss of value of the property. In my view, the requirement that "state action has removed all reasonable uses of the property" should not be understood to include temporary suspensions of rights such as those effected by the CMOH Orders. The Proposed Representative Plaintiffs have not provided any cases to the contrary.

[75] Second, the question "whether the state action has removed all reasonable uses of the property" is highly individualized. While the Proposed Representative Plaintiffs have pleaded facts relating to the limits on the use of their property, to make out a claim for constructive taking each proposed class member must show that the CMOH Orders removed all reasonable uses of the individual class member's property. Further, it is common ground that some of the CMOH Orders for some periods permitted limited use of property – for example, reduced occupancy of restaurants and retail outlets, take out and delivery service, etc. – which is inconsistent with the requirement of constructive taking that all reasonable uses of the property be removed. I find that the Proposed Representative Plaintiffs' constructive taking claim is doomed to fail.

V. Identifiable Class

[76] The Supreme Court of Canada in ***Sun-Rype Products Ltd v Archer Daniels Midland Company***, 2013 SCC 58 at para 57 held that "the purpose of class definition is to: (i) identify those persons who have a potential claim for relief against the defendants; (ii) define the parameters of the lawsuit so as to identify those persons who are bound by its result; (iii) describe who is entitled to notice of the action" [citations omitted]. Accordingly, "[t]he

definition should state objective criteria by which members of the class can be identified": ***Western Canadian Shopping Centres Inc v Dutton***, 2001 SCC 46 at para 38.

[77] The Proposed Representative Plaintiffs proposed the following class definition in the Statement of Claim:

> Natural persons who:
>
> (a) owned or operated, either wholly or partially, a business or businesses in the Province of Alberta, and whose business operations were fully or partially restricted as a result of the measures contained in the CMOH Orders resulting in economic losses;
>
> (b) between March 17, 2020, and the date of certification of this action as a Class proceeding or such other date determined to be appropriate by the Court; and
>
> (c) suffered damage and losses as a result.

[78] Alberta submits, correctly in my view, that the inclusion of those who "operated" a business is overinclusive because it captures employees who manage a business. The Proposed Representative Plaintiffs offered a revised class definition in their Reply Brief to address this criticism as follows:

> All individuals who owned, either wholly or partially, a business or businesses in the Province of Alberta, and whose business operations were fully or partially restricted as a result of the measures contained in Alberta's Chief Medical Officer of Health public health orders between March 17, 2020, and the date of certification of this action as a class proceeding and who suffered damages or losses as a result.
>
> "Owned" includes individuals who:
>
> a. Operate a business as a sole proprietorship where the business is unincorporated and the individual owner assumes all the risks of the business;
>
> b. Join in a partnership, either as an individual, as a shareholder in a corporation or part of a trust. This can also include joining a Limited Partnership and a Limited Liability Partnership;
>
> c. Own, control and run, along with others, a co-operative; or
>
> d. Own a franchise as either a franchisee or a franchisor.

[79] Alberta objects to the revised proposed class definition on the grounds that the proposed class includes individuals whose businesses are operated through a corporation. This is problematic according to Alberta because the return to a shareholder in a corporation depends on myriad factors other than corporate revenue. Further, by expanding the definition of business ownership to shareholders, it potentially includes shareholders in widely held public companies that have some operations in Alberta. The challenge in identifying and notifying all shareholders of corporations that do business in Alberta may be insurmountable.

[80] After the completion of the hearing, I raised with the parties what I considered to be a more significant problem with the inclusion of shareholders in the proposed class. The problem that I identified with the inclusion of shareholders of corporations doing business in Alberta in the proposed class is that shareholders may not have a cause of action against Alberta. A fundamental principle of corporate law is that corporations and their shareholders have separate legal identities: *Alberta Business Corporations Act*, RSA 2000, c B-9, s 16(1) and ***Saloman v A Saloman & Co Ltd,*** [1897] AC 22 (HL). The same problem applies to the inclusion of members of cooperatives in the proposed class. A cooperative, like a corporation, has a separate legal personality: *Cooperatives Act*, SA 2001, c -28.1, s 22(1)(a). The separate legal identities of a shareholder and a corporation means that a shareholder cannot, subject to some exceptions, sue for wrongs done to the corporation: ***Foss v Harbottle***, (1843), 67 ER 189 (HL); ***Hercules Managements Ltd v Ernst & Young***, [1997] 2 SCR 165 at para 59; ***Meditrust Healthcare Inc v Shoppers Drug Mart***, 2002 CanLII 41710 (ONCA) at paras 13-14. I gave the parties an opportunity to make short written submissions on this issue.

[81] The Proposed Representative Plaintiffs responded stating that "[t]his class action seeks to hold the Province liable for its unlawful actions on behalf of both individuals and corporations affected by those actions." The Proposed Representative Plaintiffs' use of the terms "individual" as distinct from "corporation" in their submission is consistent with common usage which is to use the term "individual" to mean "natural person." This is consistent with their first proposed framing of the class as a class of "natural persons" and subsequent definitions of the class as a class of "individuals." Moreover, there is no corporation proposed as representative plaintiff. If the Proposed Representative Plaintiffs want to redefine the class or create a sub-class of corporations, then they must follow the correct process. It is not appropriate to make such a wholesale change in written submissions.

[82] The Proposed Representative Plaintiffs further argue that individual shareholders are proper members of the class because their enjoyment of property – including shares in corporations – are protected by the *Alberta Bill of Rights*. They submit, "[a] shareholder's 'enjoyment' of their property – specifically, their shares – is 'deprived' when business closures, such as those caused by the CMOH Orders, interrupt dividends or reduce the value of shares...." The Proposed Representative Plaintiffs' position is that shareholders should be permitted to recover indirect losses caused by the effect of the CMOH Orders on corporations.

[83] Alberta submitted that the problem that I identified was fatal to the inclusion of shareholders in the proposed class. Alberta, quoting ***Hercules Managements Ltd*** at para 59, submitted "[t]he rule in ***Foss v Harbottle*** provides that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action." The rule in ***Foss v Harbottle*** prevents shareholders from suing for "harm to the corporation [that] indirectly harms the shareholders": ***Meditrust Healthcare*** at para 13. Alberta courts have applied this principle to strike actions by shareholders for indirect injuries that caused diminution of the value of shares: see, for example, ***New Century Properties Ltd v Bank of Montreal***, 2020 ABQB 39 at para 14 and ***North v Davison***, 2024 ABKB 242 at para 23. Accordingly, shareholders cannot be included in the class.

[84] Alberta submits that the proposed class definition cannot be approved because it provides that class members have "suffered damage and losses as a result" of the impugned conduct. Making membership contingent on having suffered damage or loss contravenes the principle that

a class definition must not be merits-based or circular. Feldman JA held in ***Chadha v Bayer Inc***, 2003 CanLII 35843 (ONCA) at para 70 that defining a class as those who suffered damage is inappropriate.

[85] The Proposed Representative Plaintiffs provided yet another formulation of their proposed class definition in their Reply Brief to address Alberta's criticisms as follows:

> All individuals who owned, in whole or in part, a business or businesses in Alberta that was subject to full or partial closure, or operational restrictions, mandated by the CMOH Orders between March 17, 2020, and the date of certification.

[86] Justice Martin in ***Andriuk v Merrill Lynch Canada Inc***, 2013 ABQB 422 opined at para 107 that on a certification application a judge should not "enter the ring" to remedy deficiencies in a pleading. She cited with approval ***Caputo v Imperial Tobacco Ltd***, 2004 CanLII 24753 (ONSC) where Winkler J held that it was inappropriate for a judge on a certification application to make "wholesale changes" to a class definition. The Court of Appeal affirmed Martin J's decision: ***Andriuk v Merrill Lynch Canada Inc***, 2014 ABCA 177.

[87] The latest proposed class definition reproduced above in para 85 is not perfect but with a minor clarification it is good enough. For the purposes of the class definition, the word "owned" does not include ownership via shares in a corporation or via membership in a cooperative. This change to the class definition is not the kind of "wholesale change" that Winkler J objected to in ***Caputo***.

VI. Common Issues

[88] The Proposed Representative Plaintiffs identify four common issues: (1) *Alberta Bill of Rights*; (2) negligent implementation and enforcement of CMOH Orders; (3) liability of Alberta; and (4) damages.

[89] An "issue will be 'common' only where its resolution is necessary to the resolution of each class member's claim": ***Dutton*** at para 39. Subsequent caselaw has clarified that an issue will only be common where:

(a) the resolution of the issue will avoid duplication of fact-finding or legal analysis;

(b) the common issue is a substantial ingredient of each class member's claim; and

(c) success for one member on a common issue will mean success for all.

(d) ***Thorburn v British Columbia (Public Safety and Solicitor General)***, 2013 BCCA 480 at para 37; see also, ***Fisher v Richardson GMP Limited***, 2022 ABCA 123 at para 37.

[90] The Proposed Representative Plaintiffs must show that there is some basis in fact that (a) the common issue exists; and (b) the proposed issue can be answered in common across the class: ***Lilleyman v Bumble Bee Foods LLC***, 2024 ONCA 606 at paras 67-70; ***Jensen v Samsung Electronics Co Ltd***, 2023 FCA 89 at paras 71-91. This is a low evidentiary standard: ***Lilleyman*** at para 71; ***Flesch v Apache Corporation***, 2022 ABCA 374 at para 28.

a. *Alberta Bill of Rights*

[91] Though an action for a declaration that the class members' rights under the *Alberta Bill of Rights* were infringed could be pursued by individual plaintiffs outside the context of the *CPA*, the Proposed Representative Plaintiffs' use of the *Alberta Bill of Rights* to assert a claim in negligence means that judicial economy favours allowing this question of infringement of the *Alberta Bill of Rights* to go forward as a common issue. The question of whether the CMOH Orders infringed the proposed class members' right not to be deprived of their right to enjoyment of property without due process is common to all class members and is relevant to the question of Alberta's potential liability in negligence.

b. Negligent Implementation and Enforcement of CMOH Orders

[92] The Proposed Representative Plaintiffs' initial statement of this proposed common issue and Alberta's response are both confused. The Proposed Representative Plaintiffs' Reply Brief restated this common issue as three sub-issues as follows:

> Did the Defendant's actions in implementing or enforcing *ultra vires* CMOH Orders constitute an abuse of power?
>
> Is the Defendant precluded from asserting immunity from liability for actions taken in violation of the law while implementing or enforcing *ultra vires* CMOH Orders?
>
> Did the Defendant act in bad faith by implementing or enforcing *ultra vires* CMOH Orders for improper purposes, contrary to the intended scope and purpose of the *Public Health Act*?

[93] Throughout the Proposed Representative Plaintiffs' pleading there is a distinction made between the CMOH Orders being made *ultra vires* and the alleged wrongful enforcement of the CMOH Orders. 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.

[94] The Proposed Representative Plaintiffs' first sub-issue asks whether making the CMOH Orders *ultra vires* was an abuse of power. This is best understood to be asking whether the tort of misfeasance in public office is made out. In turn, the common issues that should be stated are the elements of the tort set out in ***Nilsson (QB)*** and reproduced above in para 54.

[95] The Proposed Representative Plaintiffs' second sub-issue asks whether Alberta enjoys immunity from liability. 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.

[96] The Proposed Representative Plaintiffs' third sub-issue asks whether Alberta acted in bad faith. The question of bad faith is relevant to whether a negligence action may succeed against a government entity as set out above in paras 43-47. This is a proper common issue.

c. Liability of Alberta

[97] The Proposed Representative Plaintiffs' third common issue is stated in their First Brief at para 96 to be a question of whether the "Defendant's actions create a liability for damages." This common issue is stated at such a high level of generality as to be meaningless. The Proposed Representative Plaintiffs' Reply Brief does not provide any detail to assist in discerning the meaning of the proposed common issue.

[98] My best guess is that in using the words "liability for damages" the Proposed Representative Plaintiffs are trying to invoke the concept of causation. As discussed above at paras 48-50, there are aspects of causation that are common to all class members. There are also individual causation issues specific to each class member. For example, whether a decline in revenue for a class member's business during the relevant period is attributable to the CMOH Orders is a question of fact peculiar to each business.

[99] Given the high level of generality and lack of clarity as to the meaning of the proposed "liability for damages" common issue, I find that it is not an appropriate common issue as currently stated. However, I encourage the parties to agree on a common issue of causation as that would be in the interests of judicial economy.

d. Damages

[100] The Proposed Representative Plaintiffs state two damages questions. First, can aggregate damages be assessed on a class-wide basis? Second, is the class entitled to an award of aggravated or punitive damages?

[101] The Proposed Representative Plaintiffs assert that damages may be assessed on an aggregate class-wide basis using "statistical evidence based on random sampling." There is no basis in fact for this assertion. The Proposed Representative Plaintiffs adduced no evidence to support their claim that damages can be assessed on an aggregate basis. Alberta has provided expert evidence that an assessment of damages requires an examination of each individual business, its structure, and its accounting methodology

[102] The damages sought by the Proposed Representative Plaintiffs are mainly to compensate for what may be characterized as business losses. The proposed class is comprised of owners of businesses that participated in different industries and the businesses operated at different locations within Alberta during the relevant period. The CMOH Orders affected different industries and different businesses within industries differently. Different industries, different businesses, and different locations were subject to different market conditions, trends, and forces. Moreover, different businesses adopted different mitigation strategies. The task of assessing aggregate damages on a class-wide basis in this case is a fool's errand. The present case is one that cries out for individual assessment of damages.

[103] The question of whether aggravated or punitive damages could be claimed on a class-wide basis was considered in ***Ross v Canada (Attorney General)***, 2018 SKCA 12 at paras 90-91. Chief Justice Richards found that assessing aggregate general damages on a class-wide basis was not appropriate because the harm to each individual class member must be assessed. He found that this was also true with respect to aggravated damages. But he found that sometimes punitive damages could be assessed on a class-wide basis. He went on to explain,

> *[P]unitive* damages are a different story. They are not compensatory in nature and thus may be amenable to class-wide determination in a way that general damages

> typically are not. A number of class actions have been certified with punitive damages as a common issue. For example, in ***Rumley***, at paragraph 34, the Supreme Court found both the appropriateness and the amount of punitive damages to be amenable to resolution as common issues. ***Cloud*** is to the same effect. There, the Court of Appeal for Ontario certified questions as to whether punitive damages were warranted and, if so, the amount of such damages. [emphasis in original and citations omitted].

[104] Richards CJS held at para 92 that even if punitive damages was certified as a common issue "the common issues trial judge could ultimately conclude the quantification of punitive damages ... must await the determination of the individual damage awards, or is otherwise not appropriate...." In my view, Richards CJS's conclusion is sound and should be followed in the present case. I am satisfied that entitlement to punitive damages is an appropriate common issue though I emphasize that the trial judge has the discretion described by Richards CJS in ***Ross***.

VII. Preferable Procedure

[105] *CPA* s 5(2) requires the Court to consider whether the proposed class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. The Proposed Representative Plaintiffs must show: "(1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims": ***AIC Limited v Fischer***, 2013 SCC 69 at para 48; ***Reilly v Alberta***, 2024 ABCA 270 at para 23. Justices Ho and de Wit in ***Reilly*** at para 24 explained that the question of preferability should be "viewed through the lens of judicial economy."

[106] When determining whether the proposed class proceeding is the preferable procedure, the Court must assess whether there are "barriers to access to justice" and the potential of the proposed class proceeding to address those barriers: ***AIC*** at paras 27-28. The baseline for comparison in the preferable procedure analysis is "other court procedures" that might be used by class members to resolve their claims: ***AIC*** at para 35. The Court is to "consider the costs as well as the benefits of the proposed class proceeding in relation to those of the proposed alternative procedure": ***AIC*** at para 38.

[107] Earlier in these Reasons I found that there are several common issues. These common issues, in my view, may be fairly, efficiently, and manageably determined in a class proceeding. The remaining question is whether the proposed class proceeding is preferable to other means of resolving the class members' claims.

[108] The proposed class is comprised of individual business owners, not corporations. For the most part, it may be assumed that the proposed class members are owners of small businesses that may not have the resources or experience to competently advance complex litigation against Alberta. I am satisfied that a class proceeding in the present circumstances addresses a legitimate need for access to justice.

[109] Alberta argues that individual proceedings are a viable and preferable alternative for class members. Alberta points to ***Ape Parkour*** and three other cases that have been commenced as evidence that class members can advance individual claims and do not require a class proceeding. But these cases can just as easily be seen to be evidence that individual actions are not viable. Of a proposed class that may include thousands of people, Alberta can point to only

four independent actions, three of which are third party claims. The fact that the actions against Alberta have predominantly been third party claims suggests that absent the main claims against the defendants, the claims against Alberta would not have been commenced.

[110] Chief Justice McLachlin observed in ***Hollick*** at para 34 that "[i]f individual class members have substantial claims against the respondent, we should expect that they will be willing to prosecute those claims individually...." The proposed class in the present case likely includes individuals with claims that range in size. When considering whether proposed class members should be willing to prosecute their claims individually it is important to have an appreciation for what it might cost to litigate an individual action against Alberta to its conclusion. Assuming that the case would be firmly resisted by Alberta, an individual action involving the issues identified in the present case would involve significant documentary and oral discovery, potentially significant pre-trial applications on concerning disclosure issues, and a trial of a reasonable duration. Depending on the choice of counsel, the cost of litigating such an action to completion could range from hundreds of thousands of dollars to possibly over a million dollars. Moreover, unless the potential damages were very large, an individual plaintiff would be unlikely to convince any counsel to take the claim on a contingency. In my view, such an action would be impractical or impossible for most of the proposed class members to prosecute.

[111] An equally significant problem with independent actions to recover damages alleged to have been caused by the *ultra vires* CMOH Orders is illustrated by ***Ape Parkour***. ***Ape Parkour*** was advanced by a self-represented litigant as a third party claim to resist enforcement proceedings brought by a landlord. The claim against Alberta in ***Ape Parkour*** was ill-conceived and poorly executed. The proliferation of similar actions is the antithesis of judicial economy. Moreover, it would be unfair to class members to be bound by a case like ***Ape Parkour*** according to the principle of horizontal *stare decisis*.

VIII. Representative Plaintiffs

a. Law

[112] *CPA* s 5(1)(e) requires that the Court be satisfied that a person appointed as representative plaintiff:

i. will fairly and adequately represent the interests of the class,

ii. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

iii. does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

[113] A person may serve as a representative plaintiff where the person has a cause of action against one defendant but not other defendants so long as there are issues common to the representative plaintiffs' cause of action and the causes of action of class members against other defendants: ***Red Seal Vacations Inc v Alves***, 2011 SKCA 117 at paras 41-43. But a representative plaintiff must have a cause of action: ***Smith v Lafarge Canada Inc***, 2022 ABQB 289 at para 40. The requirement that a representative plaintiff have a cause of action may be dispensed with pursuant to *CPA* s 2(4) which permits the Court to appoint a representative

plaintiff who is not a member of the class to avoid substantial injustice. The issue of substantial injustice was not argued by the parties and, in my view, does not arise on this application.

[114] Chief Justice McLachlin outlined the approach a court should take in assessing whether a class representative adequately represents the proposed class in ***Dutton*** at para 41:

> In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class. [citations omitted].

[115] The *CPA* requires that the representative plaintiff be adequate, not perfect.

b. Rebecca Ingram

[116] The Statement of Claim explains at para 22 that "Ms. Ingram was the sole shareholder and director of The Gym Fitness Club Ltd., a gym and personal fitness studio located in the City of Calgary." The Statement of Claim goes on a para 26 to plead, "[t]he restrictions and unlawful CMOH Orders devastated Ms. Ingram's business and the value of the shares she owned in The Gym."

[117] Ms. Ingram does not have a cause of action against Alberta. She was a shareholder in The Gym Fitness Club Ltd ("TGFCL") which operated the fitness studio business. Her alleged losses are business losses to TGFCL and the decreased value at which she sold her shares in TGFCL. The fact that she invested her personal funds into TGFCL in an attempt to save the business does not change the fact that the harm was to TGFCL. As discussed above at paras 80-83, the rule in ***Foss v Harbottle*** means that only corporations have the right to sue for wrongs to the corporation, not shareholders. Perhaps TGFCL could assert a cause of action against Alberta, but Ms. Ingram cannot. TGFCL might be an appropriate representative plaintiff if there was a proposed class of corporations, but no such class is proposed.

c. Christopher Scott

[118] The Statement of Claim at para 9 explains that Mr. Scott "is an individual and the sole proprietor of The Whistle Stop Café located off Highway 21, at Highway 50, in the Hamlet of Mirror, in the Province of Alberta." As a sole proprietor, he has causes of action against Alberta.

[119] Mr. Scott is atypical of the proposed class because for much of the time in question he refused to abide by the CMOH Orders. Mr. Scott's refusal to abide by the CMOH Orders resulted in enforcement action by Alberta Health Services, contempt of court proceedings, criminal charges, and a brief stay in the Red Deer Remand Centre. The criminal charges against Mr. Scott were dropped after ***Ingram 2023***.

[120] At times during the period of restrictions imposed by the CMOH Orders the Whistle Stop Café was so busy that Mr. Scott tried to recruit additional staff. He testified on cross-examination as follows:

> Mr. Dube: Were you, in fact, busier in January 2021 than you have been in – prior to the CMOH orders coming into effect:

> Mr. Scott: Yes. I suppose that's what happens when you're the only restaurant in the province that's open.

[121] Later he testified as follows:

> Mr. Dube: Would you agree with me that sort of given the notoriety ... with relation to the Whistle Stop Café in terms of its opposition to the CMOH orders, that you would have also gained many new clients?
>
> Mr. Scott: It's fair to say that for a period of time when I was one of the few restaurants open that more people would have attended my restaurant than usual.... But I will point out that I've lost some of my regular customer base because they died suddenly after their Covid vaccination.

[122] Mr. Scott also collected approximately $120,000 in donations to fund his resistance to the CMOH Orders and he admitted on cross-examination that his notoriety for resisting the CMOH Orders led to more business for The Whistlestop Café.

[123] Alberta's submission that Mr. Scott has not suffered losses by reason of the CMOH Orders and is, therefore, not an appropriate representative plaintiff runs contrary to its insistence that the class not be defined as including individuals who have suffered losses. It is incongruous to argue that the class be defined without reference to losses and then argue that a proposed representative plaintiff is not a class member because he has not suffered loss. The evidence before the Court at the certification stage shows that Mr. Scott is atypical of the class and may have mitigated his losses in unusual ways, but whether he suffered a loss remains an open question. The issue of Mr. Scott's loss or lack thereof is a matter for individual damage assessment.

[124] The mere fact that Mr. Scott is atypical of the class does not disqualify him as a representative plaintiff. The question is whether he can "fairly and adequately" represent the interests of the class. A related issue is whether he has an interest in conflict with the class.

[125] The proposed class members' most significant common interest is in the efficient litigation of their case. The common issues identified in these Reasons do not require the Court to consider questions that appear to preoccupy Mr. Scott such as whether the COVID-19 pandemic was a genuine public health crisis, whether COVID-19 vaccines are effective, and whether COVID-19 vaccines cause sudden death. There is a risk that Mr. Scott may use this litigation to re-litigate his personal conflicts with Alberta during the COVID-19 pandemic and to vindicate his ideological views on COVID-19 and vaccines. There are signs in the Proposed Representative Plaintiffs' Brief that this is what is intended. For example, the Proposed Representative Plaintiffs refer to the COVID-19 pandemic as a "*perceived* public health emergency." [emphasis added].

[126] Despite my concerns about how this litigation can be misused, I find that Mr. Scott is an appropriate representative plaintiff. Even though he disobeyed the CMOH Orders and profited from his disobedience, his business was forcibly closed for a period and, as such, he was subject to the CMOH Orders like other class members. My concern that Mr. Scott may be inclined to use the litigation to pursue irrelevant ideological objectives, advance theories that COVID-19 was not a public heath emergency, and re-litigate his personal battles with Alberta and Alberta Health Services can be managed by the clear and narrow statement of the common issues in

these Reasons and ongoing case management. This approach is consistent with the direction of Justice Groberman in ***Harrison v Afexa Life Sciences Inc***, 2018 BCCA 165 at para 60. He held that "if a class action is otherwise appropriate ... a court should do what it can to ensure that it can proceed, either by giving directions to ensure the representative plaintiff proceeds efficiently with the litigation, or by allowing substitution of a more representative plaintiff...."

[127] The Proposed Representative Plaintiffs attached a proposed litigation plan to their Amended Notice of Application. Alberta expressed no concerns about the plan. The plan appears workable to me. I direct the parties to confer with respect to the plan to determine if any modifications are required considering the various directions made in these Reasons.

IX. Conclusion

[128] The application for certification of this action as a class proceeding is allowed on the following terms. Mr. Scott shall be the representative plaintiff. The class is defined as follows:

> All individuals who owned, in whole or in part, a business or businesses in Alberta that was subject to full or partial closure, or operational restrictions, mandated by the CMOH Orders between March 17, 2020, and the date of certification. For clarity, "owned" does not include ownership as a shareholder in a corporation or as a member of a cooperative.

[129] The common issues are as follows:

(1) Did Alberta breach *Alberta Bill of Rights* s 1(a) in making the CMOH Orders *ultra vires* the *PHA*?

(2) Did Alberta owe a *prima facie* duty of care to not deprive class members of their right to enjoyment of property without due process of law?

(3) Did Alberta act in bad faith in making the CMOH Orders *ultra vires* the *PHA*?

(4) If Alberta owes class members a *prima facie* duty of care to not deprive class members of their right to enjoyment of property without due process of law, is that negated by any statutory or common law immunity or any other legal or policy ground?

(5) If Alberta owes class members a duty of care to not deprive class members of their right to enjoyment of property without due process of law, was that breached by the *ultra vires* CMOH Orders?

(6) Was the making of the CMOH Orders deliberate misconduct on the part of a public official(s)?

   a) Was the making of the CMOH Orders an intentional use of statutory authority for an improper purpose?

   b) Was there actual knowledge that Cabinet had no legal authority to make the CMOH Orders?

   c) Was there reckless indifference or wilful blindness to Cabinet's lack of legal authority to make the CMOH Orders?

d) Was there an actual intention to harm class members by making the CMOH Orders?

e) Was there actual knowledge that harm to class members would result from making the CMOH Orders?

f) Was there reckless indifference or wilful blindness to the harm that could have been foreseen to result to class members?

(7) Should the class members be granted declaratory relief?

(8) Should class members be awarded punitive damages? If yes, in what amount?

[130] The parties shall discuss whether, with the benefit of these Reasons, a common issue of causation can be stated. Failing agreement between the parties, the parties may apply to the Court for direction.

[131] If the parties are unable to agree on costs, they may make written submissions of 5 pages or less supported by a bill of costs.

Heard on the 2nd day of October, 2024 to the 3rd day of October, 2024.
Dated at the City of Calgary, Alberta this 30th day of October, 2024.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

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for the Plaintiffs/Applicants

John-Marc Dube, Jessica Flanders, and Frances Chiu
for the Defendant/Respondent