

Action No.: 2001-14300  
E-File Name: CVQ22INGRAMR  
Appeal No.: \_\_\_\_\_

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

BETWEEN:

REBECCA MARIE INGRAM, HEIGHTS BAPTIST CHURCH,  
NORTHSIDE BAPTIST CHURCH,  
ERIN BLACKLAWS and TORRY TANNER

Applicants

and

HER MAJESTY THE QUEEN  
IN RIGHT OF THE PROVINCE OF ALBERTA  
and THE CHIEF MEDICAL OFFICER OF HEALTH

Respondents

---

H E A R I N G  
(Excerpt)

---

Calgary, Alberta  
February 17, 2022

Transcript Management Services  
Suite 1901-N, 601-5th Street SW  
Calgary, Alberta T2P 5P7  
Phone: (403) 297-7392  
Email: TMS.Calgary@csadm.just.gov.ab.ca

This transcript may be subject to a publication ban or other restriction on use, prohibiting the publication or disclosure of the transcript or certain information in the transcript such as the identity of a party, witness, or victim. Persons who order or use transcripts are responsible to know and comply with all publication bans and restrictions. Misuse of the contents of a transcript may result in civil or criminal liability.

## TABLE OF CONTENTS

Description		Page
February 17, 2022	Morning Session	1
Submissions by Mr. Rath		2
Submissions by Mr. Trofimuk		7
Submissions by Mr. Rath (Reply)		8
Submissions by Mr. Trofimuk (Reply)		9
Decision		11
Certificate of Record		17
Certificate of Transcript		18

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

---

2  
3  
4 February 17, 2022

Morning Session

5  
6 The Honourable Justice Romaine  
7 (remote appearance)

Court of Queen's Bench of Alberta

8  
9 J. R. Rath (remote appearance)

For R. Ingram

10 L. B. Grey, QC (remote appearance)

For Heights Baptist Church, Northside Baptist  
Church, E. Blacklaws and T. Tanner

11 N. Parker (remote appearance)

For Her Majesty the Queen in Right of the  
Province of Alberta and The Chief Medical  
Officer

12 N. Trofimuk (remote appearance)

For Her Majesty the Queen in Right of the  
Province of Alberta and The Chief Medical  
Officer

13  
14  
15 B. LeClair (remote appearance)

For Her Majesty the Queen in Right of the  
Province of Alberta and The Chief Medical  
Officer

16  
17  
18 M. Palmer

Court Clerk

---

19  
20  
21  
22  
23  
24 THE COURT:

Good morning. Okay. Good morning, everyone.

25 I'm ready to hear oral submissions on the application to amend the pleadings and, Mr. Rath,  
26 are we starting with you?

27  
28 MR. RATH:

Thank you, My Lady. I'd ask the clerk if my  
29 sound levels were all right this morning. Can you hear me?

30  
31 THE COURT:

Yes, I can. That's great. And I do want to say  
32 that I have received the briefs of both, I understand, you, Mr. Rath, on behalf of all of the  
33 applicants and the respondents' brief and I have read both of them. Thank you.

34  
35 MR. RATH:

Thank you, My Lady --

36  
37 MR. PARKER:

(INDISCERNIBLE) Romaine. Both -- with  
38 your leave, Mr. Trofimuk will be responding for the respondents on this this morning.

39  
40 THE COURT:

I'm sorry, what was your question?

41

1 MR. PARKER: Sorry. I'm just -- sorry, I'm just asking that Mr.  
2 Trofimuk will be responding for the respondents on this application, with your leave, after  
3 Mr. Rath is done.

4  
5 THE COURT: Of course. Thank you.

6  
7 MR. RATH: Yeah. I don't know -- I don't know if it was a  
8 question so much, My Lady, as Mr. Parker not being able to resist interrupting other  
9 counsel, but there we are.

10  
11 THE COURT: Oh, that's uncalled for, Mr. Rath. Okay. Go  
12 ahead, Mr. Rath.

13  
14 **Submissions by Mr. Rath**

15  
16 MR. RATH: All right. My Lady, good morning. The first  
17 thing that I'd like to address is why we are where we are on the temporal continuum with  
18 regard the hearing of this matter. I would like to note for the record that previous to where  
19 we are today and this application being before the court, there have been two lengthy  
20 adjournments that were necessitated by -- necessitated and requested by the Crown.

21  
22 The first lengthy adjournment requested by the Crown was to marshal evidence that the  
23 decisionmaker, Deena Hinshaw, should have had in front of her in advance of making  
24 decisions to infringe the constitutionally-protected rights of the citizens of this province in  
25 accordance with the test in *R. v. Oakes* which requires that the government justify  
26 infringements of treaty and aboriginal rights and have evidence to prove that they  
27 considered lesser measures of infringement, et cetera, prior to making decisions that have  
28 the impact of infringing constitutionally-protected rights. So we've had a lengthy  
29 adjournment already in order for the Crown to marshal evidence that the Crown should  
30 have had at its fingertips prior to the orders having -- the impugned orders having been  
31 issued.

32  
33 Then the second adjournment, and there's no other way to place -- there's no other way to  
34 state this, was necessitated by my friend's clients either lying or misrepresenting to the  
35 court the degree to which any crisis existed that would have prevented them attending in  
36 court in September to hear this matter. It's clear from the record in correspondence from  
37 my friends that, upon the adjournment being granted in September, Dr. Hinshaw promptly  
38 went on vacation. And the reason we raise that, My Lady, is that my friends are now, in  
39 their written materials, opposing any adjournment claiming that matters have gone too long  
40 and that there's prejudice to others that can't be cured by an adjournment in this province,  
41 and I would note for the record that the reason we are where we are on the temporal

1 continuum and with time moving on is because of the Crown obtaining an adjournment in  
2 September that on the record and on the Crown's own admission was entirely unnecessary  
3 given that Dr. Hinshaw was, in fact, available in September contrary to representations  
4 made to this court that necessitated the September adjournment.  
5

6 Now, the reason that that's relevant, My Lady, is that all of the matters that are now  
7 necessitating this amendment could have been brought to a head in September when this  
8 trial was supposed to commence within literally a week of my serving on my friends our  
9 reply which clearly replied to his reply where he had the orders in -- in his pleadings with  
10 regard to the schedule A orders and our reply which clearly included the impugned CMOH  
11 orders 42-21 and 43-21. This matter would have been brought to a head in September, any  
12 of the issues relating thereto would have been resolved in September and we wouldn't find  
13 ourselves where we are, again with the passage of time, were it not for the completely  
14 unnecessary adjournment that my friends sought and obtained back in September. Now  
15 we find ourselves where we are and my friends are using their clients' misrepresentations  
16 to this Court and the passage of time --  
17

18 THE COURT: Mr. Rath, I have to stop you there.

19  
20 MR. RATH: Yeah.

21  
22 THE COURT: I find that you should be very careful in your  
23 submissions about what happened in September. You have accused the Crown of lying,  
24 you have accused the Crown's client of misrepresentation. Those are issues that have not  
25 been determined at all in this hearing. Please watch your references and it's not necessary  
26 for you to do so.  
27

28 MR. RATH: (INDISCERNIBLE) certainly the position of our  
29 clients and it's certainly borne out by the record, My Lady. So we -- we are where we are  
30 as a result of two lengthy adjournments having been obtained by the Crown and for what -  
31 - for whatever reason. So now here we are, here we are and the Crown is saying that on  
32 the basis of the two lengthy adjournments that they obtained, too much time has gone on  
33 and no further adjournments, you know, should be required in order to sort out a matter  
34 that should have been sorted out back in September and which we submit would have been  
35 far less prejudicial to the position of the applicants had this matter come to a head in the  
36 hearing or trial in September when it should have been, but for the adjournment sought and  
37 obtained by the Crown.  
38

39 The next issue that we would like to address, My Lady, is my friend's submissions with  
40 regard to evidentiary submissions. They've stated repeatedly that with regard to -- with  
41 regard to the inclusion -- and I'm not saying the amendment of the pleadings because our

1 initial position, regardless and with the greatest of respect to your ruling, My Lady, to be  
2 clear, our initial position was and remains that the order that we're seeking that all CMOH  
3 orders, including 42 and 43-2021, be declared ultra vires the CMOH on the basis that they  
4 go far beyond the scope of her legal authority on the *Public Health Act*, do not require an  
5 evidentiary basis to determine. They are pure questions of law that go to the interpretation  
6 of the statute, specifically the *Public Health Act* -- specifically the *Public Health Act*, and  
7 what we submit is what amounts to the Chief Medical Officer of Health misreading section  
8 29 of the *Public Health Act* to claim that she has the authority to quarantine healthy people  
9 or isolate healthy people or deny rights to healthy people, and in the case of -- in a case of  
10 the public health orders that were brought in in September, the impugned public health  
11 orders in September, included preventing unvaccinated people from attending businesses,  
12 restricting the operation of businesses and so on.

13  
14 And as far as those orders go, from the standpoint of our client, we don't even need  
15 evidence from our client with regard the manner in which those orders impact her because  
16 the clear facial terms of the orders themselves make it clear that they violate rights under  
17 the *Charter* and they make it clear that -- they clearly provided the foundation for this Court  
18 to determine the extent to which those orders extend beyond what we would refer to as the  
19 typhoid Mary provisions in section 29(a), which were only ever intended to apply to people  
20 that could be identified as having a communicable illness that were wilfully spreading that  
21 illness through the community and not healthy people.

22  
23 The other issue that we would raise in that regard - and again we state that it's -- you know,  
24 it's in the pleadings, but to the extent the pleadings be -- need to be amended, we're happy  
25 to do it - is the issue of the extent to which, and especially when you think about -- think  
26 about this in the context of the so-called, you know, Exemptions Program, where  
27 businesses themselves are being interfered with in their operation, businesses themselves  
28 are being turned into agents of the government to check people's vaccination status as they  
29 come and go, et cetera. With regard to these restrictions, the legal question for the Court  
30 is that these restrictions fall under the purview of the Chief Medical Officer of Health under  
31 section 29 of the *Public Health Act*, given the limitations on the Chief Medical Officer of  
32 Health's authority under section 30 of the *Public Health Act* to interfere with the ongoing  
33 operations of a business, that that's limited to a 24 hour period and that to extend beyond  
34 that requires the authority of a judge.

35  
36 So those are all live issues before this Court that, as such, do not (INDISCERNIBLE) again,  
37 to the extent that my friends say that they would marshal additional evidence and they need  
38 additional time to marshal additional evidence, so be it. Again, we would remind this  
39 (INDISCERNIBLE) that the evidence in question from the standpoint that they seek to  
40 justify these infringements under section 20 -- I'm sorry, under -- under CMOH order 43-  
41 2021 and 42-2021, they should have had all of that information at their fingertips prior to

1 those orders being promulgated. There should have been a full cost benefit analysis done  
2 prior to those orders being promulgated and the evidence (INDISCERNIBLE) within the  
3 Government of Alberta and should be readily and easily obtainable, but as we see to date  
4 in this hearing from the evidence that we've seen so far, that evidence isn't obtainable  
5 because (INDISCERNIBLE) appears, at least according to Mr. Long (phonetic), the cost  
6 benefit analyses were being done on an ongoing basis prior to orders being promulgated.  
7 So that would be my response to those issues.

8  
9 As to my friends' submissions with regard to other matters, you know, (INDISCERNIBLE)  
10 that have been held somewhat in abeyance, you know, as a result, you know, of these -- of  
11 these proceedings, that wasn't something the applicants asked for --

12  
13 THE COURT: I'm sorry, I'm --

14  
15 MR. RATH: -- that was a decision made --

16  
17 THE COURT: I'm sorry, Mr. Rath, you are breaking up now.

18  
19 MR. RATH: Okay. Thank you.

20  
21 THE COURT: After you said with respect to other matters,  
22 maybe take it from there. Okay?

23  
24 MR. RATH: Sure. So with regard to the other matters that my  
25 friend speaks of, and that's specifically we're all generally aware, and I'm not aware of the  
26 specifics, of other cases that are being held in queue either in the Provincial Court or the  
27 Court of Queen's Bench by the Associate Chief Justice from a case management  
28 perspective, with regard to those cases, and again this is with the greatest of respect to the  
29 court and its administrative processes, the administrative process (INDISCERNIBLE)  
30 administration of -- administrative decisions made by the court to manage other litigation  
31 should not in any way impact on the rights of the applicant in this case to have a full and  
32 proper hearing of the issues -- of the issues that pertain to them.

33  
34 The other concern, and this is -- we've set this out in our brief, My Lady, is that the issues  
35 in the CMOH orders, that's CMOH 42 and -- 42-2021 and 43-2021, require resolution for  
36 our client. So, if our client then has to leave the court today without having these issues  
37 being added by way of amendment which can be cured by an adjournment, and we would  
38 say a brief adjournment given how well crystallized these issues are at this point, our client  
39 would be left with no option other than to file a new originating notice specifically dealing  
40 with those two matters -- or those two orders and then either seeking to have those matters  
41 joined to these proceedings for the sake of judicial economy or, alternatively, have them



1 run again as a standalone hearing which, from my perspective, doesn't appear to be a  
2 particularly good use of court time given that we're in a place now where the issues are  
3 crystallized between the parties and, as I've said before, if my friend -- Deena Hinshaw has  
4 yet to testify. We would take no objection to my friends leading evidence on direct from  
5 her as to her justification for CMOH order 42-2021 or 43-2021. We -- you know, we  
6 intend, obviously, cross-examine her on those orders with regard to her justification.  
7 Regardless of your ruling in this regard, we may yet anyway because it will be illustrative  
8 of the process that the Chief -- or that the Chief Medical Officer of Health goes through to  
9 determine how it is that she's going to infringe the -- or the constitutionally-protected rights  
10 of the citizens of this province. So this issue does not go away by simply ignoring this  
11 application and not allowing the amendments.

12  
13 This is an issue that needs to be resolved, it needs to be resolved on behalf of all of the  
14 applicants and it needs to be resolved on behalf of the citizens of Alberta. And having the  
15 Court follow along with my friends' suggestion and that this matter simply be kicked down  
16 the road, have the can kicked down the road to another day I don't think is particularly  
17 helpful or particularly appropriate and in light of the manner in which they obtained the  
18 September adjournment, which would have put it a -- a completely different light on this  
19 application at this time or even the -- the ruling that you made yesterday, in light of the fact  
20 that we literally would have been within weeks of those orders as opposed, now, you know,  
21 months, in my view, the Crown is attempting to take procedural advantage of an  
22 adjournment that they obtained from this court and this court should vigorously reject that  
23 -- that suggestion.

24  
25 So with that, My Lady, and subject to any questions, those are our submissions and thank  
26 you for your attention.

27  
28 THE COURT: Thank you. Thank you, Mr. Rath. Mr.  
29 Trofimuk.

30  
31 MR. TROFIMUK: Can you (INDISCERNIBLE) Justice Romaine?

32  
33 UNIDENTIFIED SPEAKER: (INDISCERNIBLE) My Lady, or  
34 (INDISCERNIBLE) our behalf --

35  
36 THE COURT: Oh, I'm sorry, I thought Mr. Rath was giving the  
37 submissions. Mr. Grey, I apologize. Have you submissions to make as well?

38  
39 MR. GREY: No, My Lady. I had -- I had actually written to  
40 Ms. Wright (phonetic) this morning, indicated for the sake of economy as obviously time  
41 is of the essence, I'd indicated that Mr. Rath would make the submissions on our joint

1 behalf.

2  
3 THE COURT: Okay. Thank you.

4  
5 MR. GREY: I do not have anything to add.

6  
7 THE COURT: Oh, thank you. And I'm sorry I didn't receive that  
8 email, but.

9  
10 MR. GREY: Okay.

11  
12 THE COURT: Okay. Mr. Trofimuk.

13  
14 MR. GREY: That's fine.

15  
16 MR. PARKER: Thank you, My Lady, and I only interjected  
17 because I wasn't sure either. So thank you for that.

18  
19 THE COURT: Yeah. Okay. Okay.

20  
21 MR. PARKER: My apologies.

22  
23 THE COURT: Mr. Trofimuk.

24  
25 **Submissions by Mr. Trofimuk**

26  
27 MR. TROFIMUK: Thank you, Justice Romaine. Can you hear me  
28 okay?

29  
30 THE COURT: Yes, I can. For some reason, I don't have your  
31 --

32  
33 MR. TROFIMUK: Perfect.

34  
35 THE COURT: -- picture up, though, but. Madam clerk, can you  
36 help me with that?

37  
38 THE COURT CLERK: (INDISCERNIBLE) I'll do my best.

39  
40 THE COURT: Okay. But go ahead. I can certainly hear you.

41

1 MR. TROFIMUK: Perfect. So one thing I just wanted to start with,  
2 since it was mentioned a few times, was the September adjournment. We wanted to go  
3 ahead in September. It was -- we -- we advised our friends that Dr. Hinshaw and Deborah  
4 Gordon were unavailable, the fourth wave just started. We suggested going ahead,  
5 adjourning their testimony and it was the applicants who requested we adjourn the whole  
6 trial, so that was done by consent. I just wanted to clarify that for the record.  
7

8 THE COURT: Okay. Thank you.  
9

10 MR. TROFIMUK: On the -- on the issue at hand, which is the  
11 amendment of the pleading, my friends set out in their brief the relevant test that they  
12 should generally be allowed unless there's prejudice, we've put in a couple cases in very  
13 similar situations, the Soro (phonetic) case on the final day of a 5 day trial they asked --  
14 they realized their pleadings were deficient, asked to amend, the Court said that was  
15 prejudice. And *Eon Energy* case, it was a few days before a trial. They had an application  
16 heard on the first day to amend and the Court again denied that as there was prejudice.  
17

18 I just wanted to also point out paragraph 11 of the Soro case. It refers to a 1998 Queen's  
19 Bench case which reviewed a number of cases where amendments were sought pretrial and  
20 found to be unfair to the other party. So we've presented several cases to the court that  
21 exactly this sort of situation meets the test for prejudice and my friends in their brief and  
22 submissions today have not submitted any authorities to support their position that there's  
23 no prejudice here.  
24

25 You know what, I think that's sufficient. Thank you, Justice Romaine. Those are all my  
26 submissions.  
27

28 THE COURT: Okay. Thank you. Mr. Rath?  
29

30 **Submissions by Mr. Rath (Reply)**  
31

32 MR. RATH: And (INDISCERNIBLE) just quickly in reply,  
33 My Lady. Our -- our submission is that we did speak to the issue of prejudice and the  
34 submission and the case law we rely on in our brief is that prejudice can be cured in this  
35 case by an adjournment and my friend has not suggested any reason why any prejudice  
36 could not be cured by an adjournment, nor has he taken you to any prejudice that cannot  
37 be cured by an adjournment. And then we would point out that we're not on -- on the last  
38 day of trial, my friends have -- have the opportunity to tender direct evidence through their  
39 witnesses or, alternatively, seek an adjournment, both of which would cure any -- any  
40 issues raised by the amendments to clarify the pleadings which we have been of the view  
41 from the outset included a judicial determination as to whether all of the CMOH orders

1 prior (INDISCERNIBLE) the CMOH 42-2021 and 43-2021, were ultra vires the *Public*  
2 *Health Act*, which is a purely legal determination. So thank you, those are our -- that's our  
3 reply.

4  
5 THE COURT: Okay. Okay. You know, I'd like to go back to  
6 Mr. Trofimuk and ask him, it's clear from your brief, sir, that you believe that if I was to  
7 allow these amendments there would be a requirement for an adjournment and additional  
8 evidence, including expert evidence and probably argument. Can you expand on that for  
9 me since --

10  
11 MR. TROFIMUK: Sure.

12  
13 THE COURT: -- Mr. Rath has raised that.

14  
15 MR. TROFIMUK: Absolutely.

16  
17 THE COURT: Yes. Okay. Go ahead.

18  
19 **Submissions by Mr. Trofimuk (Reply)**

20  
21 MR. TROFIMUK: Yes. And I think Mr. Rath has mentioned in his  
22 brief the -- that an adjournment would be necessary. Just to clarify why. So, if -- if we're  
23 bringing in additional orders from an additional time period, that being the fourth wave,  
24 and an additional issue, which is the vaccine Restriction Exemption Program, first of all  
25 there would have to be some evidence founding a *Charter* claim to start with, so Mr. Rath  
26 would have to explain and give particulars, which was the whole issue that started this in  
27 the first place, give particulars of what provisions of the CMOH orders specifically  
28 breached his *Charter* rights and how, and that's required by section 24(3) of the *Judicature*  
29 *Act*. So he would need to particularize that, then he would need to bring some evidence  
30 supporting that, or Mr. Grey as well if he wanted to make those submissions. Once there  
31 was that factual foundation, then Alberta would have to provide their own evidence, first,  
32 of the context of the fourth wave because these *Charter* -- *Charter* issues have to be  
33 determined in context, there has to be a factual foundation. And the fourth wave is quite  
34 different from the second and third. This is -- now we're dealing with a situation where  
35 vaccines are readily available. That was not the case in the first, second and third wave.  
36 And this -- this whole issue of -- of the Restriction Exemption Program, we would have to  
37 have expert evidence on vaccines and -- and a number of issues in that respect. And -- and  
38 we've cited some cases in our brief about how courts can't make *Charter* determinations  
39 without these sorts of factual foundations, so those would be my submissions in that regard.  
40 Thank you, Justice Romaine.

41

1 THE COURT: Okay. And can you tell me how long of an  
2 adjournment you think might be required?

3  
4 MR. TROFIMUK: It's difficult to say. I don't know that I could  
5 estimate it right now off the top of my head. Sorry.

6  
7 THE COURT: Okay. Okay. I know. Mr. --

8  
9 MR. TROFIMUK: It would depend --

10  
11 THE COURT: I understand. I don't want to put you on the spot,  
12 but Mr. Rath has suggested it would only have to be a brief adjournment. Do you agree  
13 with that?

14  
15 MR. TROFIMUK: No, I don't agree with that. It would be -- I think  
16 the -- the pretrial process in this case so far has taken almost a year, maybe over a year, and  
17 so it would certainly be -- it wouldn't be a brief adjournment to go and talk to experts, find  
18 this out, get our factual foundation, it would be fairly significant. The other point I just  
19 wanted to make, Mr. Rath brought up the issue of prejudice and how it could be remedied.  
20 The cases I referred to all found that that was prejudice that could not be remedied by costs  
21 and so the same facts would apply here today. I just wanted to clarify that point as well.  
22 Thank you.

23  
24 THE COURT: Okay. Okay. Thank you. Mr. Rath, I'll give you  
25 an opportunity to respond to that.

26  
27 MR. RATH: Certainly. Again, our view, My Lady, is that my  
28 friends are grossly overstating the amount of time that would be required for them to  
29 marshal the evidence. They've already identified, you know, a number of experts with --  
30 within these proceedings that should be able to provide them the additional evidence they  
31 need. There's been no (INDISCERNIBLE) ongoing litigation in this province with regard  
32 to these matters and there's a wealth of information that's available to the Crown that, again,  
33 our submission is should have been before the decision maker in any event before these  
34 orders were issued. And that's, again, what I find is, you know, so disconcerting (sic) and  
35 concerning about the submissions that my friend makes is that the Crown is repeatedly  
36 saying, Oh, anytime one of these orders that on its face restricts the -- restricts the  
37 constitutionally-protected rights of citizens of Alberta, we need a year to marshal evidence  
38 after the fact to justify these infringements when that evidence should have been marshaled  
39 in advance, and that's something that this Court should take judicial notice of. And those  
40 would be our submissions.

41

1 THE COURT: Okay. Thank you, Mr. Rath. I have had the  
2 opportunity, as I said, to read your written briefs this morning and now I've heard from  
3 you. Given that the time is of the essence with respect to this hearing, I am going to just  
4 adjourn for one hour and then I'll give you my decision on this. Okay. Thank you.  
5

6 MR. TROFIMUK: Thank you.  
7

8 (ADJOURNMENT)  
9

10 **Decision**  
11

12 THE COURT: Okay. Thank you, everyone. I made the decision  
13 on Friday, 16th, that was yesterday, that CMOH orders 42-2021 and 43-2021 do not fall  
14 within the scope of this hearing after reading written submissions and hearing oral  
15 submissions from the parties on that issue. I am in the course of providing written reasons  
16 for that decision.  
17

18 The applicant then brought this application at noon yesterday for leave to amend their  
19 amended originating application to include these orders. They raise many of the same  
20 submissions that they raised in the previous application, but provide no new information  
21 that would justify a variance of my previous decision. As I will note in my written reasons,  
22 the first time the respondents could have become aware of the applicants' intention to  
23 include the September 16th, 2021 orders in the scope of this hearing is after they had filed  
24 their pretrial brief when counsel for Ms. Ingram made reference in his pretrial brief to the  
25 orders. Counsel for Ms. Ingram then, very properly, applied in a letter that seems to have  
26 been ultimately referred to the case management justice for leave to file a new expert report  
27 in direct rebuttal to these new orders and leave to file a further supplemental affidavit  
28 copying this request for leave to the respondents. However, it appears that this application  
29 was abandoned by the applicants. It was not unreasonable for the respondents to assume  
30 that the applicants' intention to reopen the process to add these orders, which as the letter  
31 indicates would require new evidence and probably new briefing on both sides had been  
32 abandoned. It is noteworthy that the amended originating application that was ultimately  
33 filed a few days before this hearing commenced did not include direct reference to these  
34 orders, even in the schedule A that was attached to it.  
35

36 My written reasons will give a full analysis of the reasons for my decision on the  
37 application that was heard yesterday. I am not going to adjourn to give complete reasons  
38 for my decision on the current application today given that the hearing is already behind  
39 schedule with respect to the admission of evidence, but I am going to give a summary of  
40 it.  
41

1 I find that there would be significant prejudice to the respondents in allowing the  
2 amendments at this stage that cannot adequately be cured by a costs award. I accept that  
3 such amendment would require significant delay, would involve a split in the expert  
4 testimony and would significantly inconvenience witnesses on both sides of this hearing.  
5 It would necessitate a further expenditure of public, private and court resources in a matter  
6 that has already consumed many of those resources to get to this stage.

7  
8 I also note, with respect to prejudice to the applicants, that a decision on the many  
9 impugned CMOH directions and orders that are presently before the court may provide  
10 guidance on the constitutionality of the September orders and may help to resolve the issue  
11 without further litigation.

12  
13 I will have further comments to make on the applicants' characterization of the previous  
14 adjournments and the allegation that the respondents are attempting to take procedural  
15 advantage in this matter. This is not just a procedural issue, it is an issue of hearing fairness.  
16 I will attempt to provide written reasons on both of these issues to the parties by next  
17 Tuesday. These are serious issues that justify measured reasons.

18  
19 Okay. Counsel, then having said that, I hope that we can now continue the hearing and get  
20 back to the evidence.

21  
22 MR. PARKER: I can speak to that, Justice Romaine. We were -  
23 - Dr. Bhattacharya was under redirect and my friends did not want to complete that until  
24 this issue was resolved. We were told that -- by my friends that Dr. Bhattacharya is not  
25 available today, nor tomorrow and so I wanted to address that issue first in terms of do you  
26 wish the redirect of Dr. Bhattacharya to be concluded before Alberta puts -- the respondents  
27 put up any of their witness -- further witnesses, in particular the witnesses dealing with the  
28 scientific issues?

29  
30 THE COURT: What's your position on that, Mr. Parker?

31  
32 MR. PARKER: Well, my position is it just seems a little strange  
33 to me that we would have the -- the applicants' main witness dealing with the scientific  
34 issues still under redirect while -- while witnesses for the respondents on some of these  
35 issues are being cross-examined. But my position is ultimately that I'm in your hands if  
36 you think that that's a fair approach in the circumstances, recognizing that we are behind.  
37 So that was the first issue and then I've got some comments on availability of witnesses if  
38 -- how -- depending how we're moving forward.

39  
40 THE COURT: Okay. Mr. Grey, Mr. Rath, your comments?

41

1 MR. GREY: My Lady, it's Leighton Grey here.

2

3 THE COURT: M-hm.

4

5 MR. GREY: I certainly understand Mr. Parker's position. I  
6 think he's right, it's a bit unusual and it certainly is not consistent with the way that we  
7 thought things would unfold. The intention was always that we would complete the  
8 applicants' case and then the respondents would carry on, and there are good procedural  
9 evidentiary reasons for -- for doing what he says. I regret very much that Mr. -- Dr.  
10 Bhattacharya is unavailable today. We had him standing by the last couple of days before  
11 we sort of -- sort of drifted into these procedural issues, but -- that had to be sorted out.  
12 Unfortunately, Dr. Bhattacharya is a person that -- very much in demand and he had some  
13 prior commitments that -- that really prevented his -- his participation either today or  
14 tomorrow. He's indicated to me that he's actually available on Monday. I told him that  
15 Monday is a holiday here, but he's available throughout next week so we can start with him  
16 on -- on Tuesday.

17

18 I'm in your hands here. I understand why Mr. Parker's taken the position that he has. I  
19 realize that we're behind. However, having said that, there might be some sense in not  
20 proceeding further with the evidence at this time because, obviously, a lot has happened  
21 over the past week and I expect that, if we did not hear any further evidence let's say today  
22 or tomorrow, that still would give all counsel a lot of time to do work. We could do work  
23 other than -- and perhaps streamline some of the evidence. Certainly, I have already shown  
24 a willingness to streamline the evidence and it would give all counsel an opportunity to  
25 sort of take stock. So those are my comments. I'm prepared to proceed with the cross-  
26 examination today, however, I am respectful of the position that Mr. Parker has stated on  
27 behalf of Alberta.

28

29 THE COURT: Okay. Thank you. Thank you, Mr. Grey.

30

31 MR. GREY: Thank you.

32

33 THE COURT: Mr. Rath?

34

35 MR. RATH: We adopt my friend's submissions, but one of the  
36 points that I would add is that with regard to the continued cross-examination of my friend  
37 Mr. Parker's witnesses, you know, we're somewhat at a disadvantage because we have yet  
38 to hear my friend's opening remarks with regard to matters that he wishes the Court to focus  
39 on and I think there's a certain degree of prejudice to the applicants not having had the  
40 benefit of my friend's learned submissions in that regard prior (INDISCERNIBLE) any  
41 further cross-examination of their witnesses, so I would echo my friend Mr. Grey's



1 submissions. Thank you.

2

3 THE COURT: Okay. Thank you. It appears there is a  
4 consensus that it would be best then to adjourn this hearing until next Tuesday and start at  
5 that point with Dr. Bhattacharya and his redirect. And I'll ask Mr. Parker for your  
6 comments on this, but it does seem to make sense to me that that would be then an  
7 opportunity for you to make your opening address. Mr. Parker?

8

9 MR. PARKER: Sure. I'm -- again, we're in your hands. I wanted  
10 to raise this as a potential procedural fairness issue. I'm ready to make the opening  
11 statement whenever it would be convenient for the Court. The -- and I appreciate my  
12 friends' submissions and their candor on this and where you're going. We -- we have  
13 Tuesday, Wednesday, Thursday next week, so 3 trial days, and then we've used up the 10  
14 days that were scheduled so we're not, you know, likely to get done within those 3 days is  
15 my thinking.

16

17 THE COURT: Right.

18

19 MR. PARKER: And then that's the downside of not getting  
20 anybody in today or tomorrow. We do have -- and, again, I'm not arguing against myself,  
21 I'm just making you aware of the situation right now. We have Dr. Zelyas PCR who is  
22 available today and is standing by. And tomorrow is a little difficult. Dr. Kindrachuk was  
23 only available today, 10 to 12:30, and so that window is closing. He's told me that  
24 tomorrow is -- sorry, do you want to hear me on this, Justice Romaine?

25

26 THE COURT: No, no, I don't think I have to. I don't think --

27

28 MR. PARKER: Okay.

29

30 THE COURT: -- I have to hear you on that because it's clear that  
31 all counsel agree that it would be beneficial to take the time today and tomorrow and start  
32 again on Tuesday, so I don't have to hear about the availability of witnesses.

33

34 I can tell you it is obviously very clear that we're going to at least have to go over to April  
35 for argument and so I can tell counsel, so you can start to think about it, that I have the  
36 week of April 4th available, I may have the week of April 11th available if the schedulers  
37 can get me free from that and then the week of April 25th. So perhaps before we adjourn  
38 next week, you can let me know when would be the best time to resume in April.

39

40 MR. GREY: My Lady, it's Leighton Grey here.

41

1 THE COURT: Yes.

2

3 MR. GREY: I certainly would -- will make myself available  
4 for any of those sittings. The other thing that I'll offer, and I don't know whether this is  
5 possible for my friends, if -- if the Court would like to start earlier next week, for example  
6 a half an hour earlier each day --

7

8 THE COURT: (INDISCERNIBLE)

9

10 MR. GREY: -- and sit later, I'm quite prepared to do that. So  
11 -- so I'll abide by your direction in that regard if you want to -- to add -- I mean every little  
12 bit helps at this point is my -- is what I would say.

13

14 THE COURT: Yes.

15

16 MR. GREY: Thank you.

17

18 THE COURT: I understand that and, before I hear from Mr.  
19 Rath and Mr. Parker, I can say, depending on the availability of a clerk, I'm happy to start  
20 at 9:00. I'm a little reluctant to go past 5, only because our experience this week has been  
21 that every day after 5 there is something for people to do and prepare for for the next  
22 morning. So let's start with starting at 9 and, again, depending on the availability of the  
23 clerks, going to 5:30. Okay. Okay.

24

25 Mr. Parker -- I'm sorry, Mr. Rath or Mr. Parker, of course, this concerns you as well, is this  
26 satisfactory to you?

27

28 MR. GREY: Please go ahead, Mr. Rath.

29

30 MR. RATH: We're -- we have full availability the week of  
31 April 4th and I believe the week of April 11 as well. I have one or two matters that I can  
32 likely move --

33

34 THE COURT: Okay.

35

36 MR. RATH: -- as counsel (INDISCERNIBLE) the Court, so I  
37 would offer that. And then with regard to the proposed schedule next week, we would  
38 certainly make ourselves available and would thank the Court for extending the hours to  
39 accommodate the evidence in this case. That being said, again for the benefit of my friend,  
40 I think we've already indicated that we don't intend to cross-examine Dr. Bhattacharya.  
41 My understanding is that cross-examination of Dr. Zelyas is going to be extremely brief,

1 it'll be carried out by my friend Mr. Grey and I don't intend to cross-examine Dr. Zelyas.  
2 And then with regard to Dr. Kindrachuk, both my friend and I have indicated that our cross-  
3 examination of Dr. Kindrachuk is not anticipated to be very long. I would think, by both  
4 of us, could be easily accommodated within less than half a day, so --  
5

6 THE COURT: Okay.

7  
8 MR. RATH: -- if that's of assistance.

9  
10 THE COURT: Well, that's good news, but of course we still also  
11 have Dr. Hinshaw. Okay. Mr. Parker? I'm sorry, did I hear from you --  
12

13 MR. PARKER: Yeah, you can --

14  
15 THE COURT: Yes. Nine to 5:30?

16  
17 MR. PARKER: Just not on the hours.

18  
19 THE COURT: Yes.

20  
21 MR. PARKER: The hours -- the extended hours would be fine.  
22 Thank you, Justice Romaine.  
23

24 THE COURT: Okay. Okay. Thank you. And thank you all for  
25 your extensive briefing on these two issues this week. It's unfortunate that we can't use  
26 tomorrow, but I'll see you next Tuesday morning at 9:00. Okay. Thank you.  
27

28 MR. PARKER: Thank you.  
29  
30

---

31  
32 PROCEEDINGS ADJOURNED UNTIL 9:00 AM, FEBRUARY 22, 2022  
33  
34  
35  
36  
37  
38  
39  
40  
41

---

1 **Certificate of Record**

2  
3 I, Michelle Palmer, certify that this recording is the record made of the evidence in the  
4 proceedings, in the Court of Queen's Bench, held in courtroom 1702, at Calgary, Alberta, on  
5 the 17th day of February, 2022, and that I was the court official in charge of the sound-  
6 recording machine during the proceedings.  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41

1 **Certificate of Transcript**

2  
3 I, Lori Nelson, certify that

4  
5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the best of  
6 my skill and ability and the foregoing pages are a complete and accurate transcript of the  
7 contents of the record, and

8  
9 (b) the Certificate of Record for these proceedings was included orally on the record and is  
10 transcribed in this transcript.

11  
12  
13  
14  
15 Lori Nelson, (Operating as Pro-to-type Word Processing)  
16 Order: TDS-1001118  
17 Dated: February 18, 2022

18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41