

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

Plaintiffs

and

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

Defendants

PROCEEDINGS

Calgary, Alberta
June 1, 2021

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

2

3

4 June 1, 2021

Morning Session

5

6 The Honourable Justice Kirker

Court of Queen's Bench of Alberta

7

8 M.M. Rejman (remote appearance)

For R. Ingram

9 L.B.U. Grey, QC (remote appearance)

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

10

11 J. Gerke (remote appearance)

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

12

13 N. Parker (remote appearance)

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

14

15
16 B.M. LeClair (remote appearance)

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

17

18

19 N. Arevalo

Court Clerk

20

21

22 THE COURT:

Good morning. Let me just make sure that
everyone can see and hear okay. So Ms. LeClair, you are at my top left, can you see and
hear me okay?

23

24

25

26 MS. LECLAIR:

I can, yes. Thank you.

27

28 THE COURT:

All right. Terrific. Now, I think I have got Mr.

29

30

31 MS. LECLAIR:

Mr. Kamal is from our office; he is just

32

33

34 THE COURT:

I just want to make sure he can hear okay. I just
saw him turn off his mute so I am going to take from that that he can hear. Okay. Ms.
Gerke, I can see you next, you can see and hear okay?

35

36

37

38 MS. GERKE:

Yes, I can, thank you.

39

40 THE COURT:

Terrific. Mr. Gray?

41

- 1 MR. GRAY: Yes, My Lady, good morning.
2
- 3 THE COURT: Good morning. Mr. Rejman, you can see and
4 hear okay?
5
- 6 MR. REJMAN: Good morning, My Lady, yes.
7
- 8 THE COURT: Good morning. Good. And Mr. Parker?
9
- 10 MR. PARKER: I can. Good morning Justice Kirker. Thank you.
11
- 12 THE COURT: Terrific and madam clerk, are you able to hear
13 okay?
14
- 15 THE COURT CLERK: I am My Lady. Thank you very much.
16
- 17 THE COURT: Counsel, thank you very much for the work that
18 you have done to narrow the issues in relation to the affidavit evidence and the standing
19 question. I appreciated the clarification. I have read through the briefs with reference to the
20 issues that remain in dispute and as I understand it, those issues focus on some of the
21 evidence that Ms. Ingram seeks to rely upon.
22
- 23 Perhaps I will turn the floor over to Ms. LeClair or Mr. Parker, just to make whatever oral
24 submissions you wish to make in relation to that evidence and then I will hear from Mr.
25 Rejman, Mr. Gray, I will turn to you and give you an opportunity to add anything. But as
26 I understand it, the issues with your clients' evidence have all been resolved by consent. So
27 I assuming that you are here for the most part of observe, is that fair?
28
- 29 MR. GRAY: Yes, My Lady, that's correct.
30
- 31 THE COURT: Okay.
32
- 33 MS. LECLAIR: So it is me, Justice Kirker, who is going to be
34 making the submissions addressing the evidence. They are quite brief today.
35
- 36 **Submissions by Ms. LeClair**
37
- 38 MS. LECLAIR: As our materials set out, the Court is empowered
39 to strike these affidavits or portions of the affidavit that are frivolous, irrelevant or
40 improper. That is 3.68(4). So I am going to walk the Court through all of the affidavits that
41 remain at this point because we have resolved much of the issues.

1
2 So, the first affidavit I think we should start with is the affidavit of Shawn McCaffery. I
3 don't have to take you to any of these affidavits with the exception of Ms. Ingram's later,
4 I'd like to take you there, but there's no need to make you flip around with all the affidavits
5 right now.

6
7 THE COURT: And I read them all, so I am familiar with the
8 content.

9
10 MS. LECLAIR: Wonderful. So, as you're aware, Justice Kirker,
11 Ms. McCaffrey is not an applicant, neither is her bowling alley business that Ms.
12 McCaffrey feels she did not receive adequate business support does not make Ms. Ingram's
13 claims more or less likely to succeed and in my submission, this affidavit doesn't contain
14 evidence that passes that basic threshold logical relevance test.

15
16 Ms. McCaffrey is unrelated to the parties and she provides to evidence about the parties
17 that are before this Court to have their claims adjudicated. My friends have suggested that
18 this affidavit provides evidence for the proportionality analysis of the *Oakes* text. In my
19 submission, it appears that the relevance of this evidence is then conceded that it's
20 contingent on something else occurring, namely that this Court -- or this Court has to find
21 that Ms. Ingram's *Charter* rights were infringed in such a way as to make the harms to Ms.
22 McCaffrey's business relevant.

23
24 Ms. Ingram is claiming a variety of *Charter* infringements including section 7, but the
25 Supreme Court has been clear that section 7 does not cover property and economic rights.
26 So, I submit there is really no relevance to this with this evidence if we get to a section 1
27 analysis, that a business is someone entirely unrelated to the applicants has struggled with
28 the available supports for her business, isn't relevant to whether the harms to the applicant
29 is outweighed by the benefits to society.

30
31 So I would submit this evidence is really not relevant even if we get to section 1 and this
32 evidence, I would submit, also has no relevance to the remaining claims for Ms. Ingram's
33 Bill of Rights claims. Nothing in this affidavit makes it more or less likely that Ms. Ingram's
34 rights as guaranteed by the Bill of Rights have been infringed, so it is our submission that
35 this affidavit needs to be struck in its entirety as irrelevant.

36
37 Our alternative submission is that paragraph 19 must be struck as improper. As our brief
38 sets out, this paragraph is in my submission very clear hearsay. Hearsay is admissible on
39 interlocutory motions but not for final relief according to the Rules unless the hearsay can
40 satisfy the principled exception namely that it is necessary and reliable. The onus is on the
41 party calling the hearsay to demonstrate its necessity and reliability. As our materials set

1 out, this hearsay is not necessary.

2
3 My friend appears to acknowledge that this hearsay is not necessary by suggesting that
4 Alberta could simply call the declarant to test the veracity of the statement. That does not
5 demonstrate necessity. It's also not Alberta's responsibility to call witnesses to verify
6 hearsay and I would submit that none of the traditional indicia of reliability are present in
7 this case, so the applicant cannot make out neither the necessity or reliability to have this
8 evidence admitted.

9
10 The next group of affidavits are the affidavits of Kyle Pawelko and Abdullah Al-Sharah.
11 Again, it's my submission that these affidavit are irrelevant. The affiants have almost no
12 relationship to the applicant. The only relationship is that they are -- they attend the gym
13 of Ms. Ingram. Ms. Ingram is an applicant; her gym is not. My friends have suggested this
14 evidence is also relevant to the proportionality of analysis in *Oakes*, but again this only
15 arises if the Court finds that Ms. Ingram's rights have been infringed in such a way as to
16 make this evidence in such a way as to make this evidence potentially relevant.

17
18 THE COURT:

Ms. LeClair, can I just stop you there and ask a
19 question because this is one of the things that I was thinking about when I was reviewing
20 the material. I take your point -- and I think Mr. Rejman and I will hear from him, will
21 concede that the evidence and I think the brief does concede this but I will let him tell me
22 if I am wrong on it, when it comes to his turn to speak -- Ms. McCaffrey's evidence and
23 the evidence of Mr. Pawelko and Al-Sharah (phonetic); I do not think that Ms. Ingram says
24 that their evidence is relevant to the determination of whether or not Ms. Ingram's rights
25 have been infringed.

26
27 Where they say that it becomes relevant, as I read their argument, is actually at the final
28 stage of the section 1 analysis, in the event of a breach. And that is, where the Court, after
29 looking at the parts of the test that focus on the purpose of the impugned order of provision
30 or restriction, looks at the practical effects and whether its salutary effects outweigh its
31 deleterious effects.

32
33 So, I think it is right at that final part of the analysis where Mr. Rejman and Ms. Ingram
34 would say, well the evidence may have some relevance there. So my question is this; I take
35 you point that it is contingent -- this evidence may never come into play or be anything a
36 Court needs to look at if you do not get to a section 1 analysis. But for practical purposes,
37 given that we set up these preliminary applications to try to narrow the issues and make
38 sure what is tee'd up, if you will, for the Justice who ultimately hears this is well organized
39 and concise, does it make some practical sense to you and do you agree that I have the
40 jurisdiction to say, okay, I am not going to strike these affidavits, but I am going to say that
41 they are not relevant and shall not be relied on for the first part of the hearing where a

1 determination will be made about whether or not the various infringements are made out?

2

3 And then in the event a Court finds that there is an infringement of one or more of Ms.
4 Ingram's *Charter* rights or her rights under the Bill of Rights, then the trial Justice, the
5 Hearing Justice, may in his or her discretion decide what, if any, weight to give to that
6 evidence for the purposes of the section 1 analysis.

7

8 It seems -- it is sort of your alternate argument, right?

9

10 MS. LECLAIR: Yes.

11

12 THE COURT: And it occurred to me that the objective of the
13 exercise in relation to the affidavits, in particular, is to try to be practical. So I do not think
14 it makes sense, for example, if I strike them, then what happens if there is a finding in the
15 hearing that there is an infringement? Does the whole thing have to be adjourned so people
16 can go away and gather their evidence? I do not want that to happen.

17

18 MS. LECLAIR: And I think -- I was thinking about that too as I
19 went through this exercise that that practically that direction you could issue today, this
20 isn't to be considered unless and until an infringement is found; I think that's a good
21 solution. But where I'm still and where our submissions will go is that when we make it to
22 the section 1 analysis, in particular, I still don't believe this evidence has relevance because
23 when we get to section 1 analysis we're no longer looking at harms to individuals. By the
24 time we get to section 1, we've already found that there has been a harm to individuals in
25 that they're people, persons, holding *Charter* rights who have had their rights infringed.

26

27 So, this evidence is just more evidence of infringement but they're not properly applicants
28 before the Court. So I still -- I would submit that this evidence is still not relevant when we
29 get to section 1 because we aren't looking at harms to individuals. What we're supposed to
30 be looking at in section 1 is balancing the harms to the individuals that we've identified by
31 finding a *Charter* breach with the benefits to the society as a whole. The societal harms
32 and I think with the evidence of Mr. Pawelko and Mr. Al-Sharah, in particular, it's
33 dangerous to make generalizations to say that based on two individuals that we can
34 conclude that there is this sweeping harm to society.

35

36 So, my submission is that by the time we get to section 1 we're focussed on the societal
37 harms and this evidence is not relevant to societal harms because you cannot make those
38 generalizations. If that answers your question, Justice Kirker?

39

40 THE COURT: Okay. I understand.

41

1 MS. LECLAIR: So that really -- that concludes all I had to say
2 about Mr. Pawelko and Mr. Al-Sharah and moves onto the affidavit of Mr. Barry Lee,
3 which is another one, I would submit, is just not relevant. This one is another individual
4 that isn't related and provides no evidence. It appears that the applicant's goal with this
5 evidence is to substantiate claims that there are treatments for COVID-19 and that Alberta
6 has intentionally not advised people of these possible treatments so the Government could
7 allegedly engage in these wholesale *Charter* right infringements.

8

9 Mr. Lee is not an expert capable of providing the evidence about treatments for COVID-
10 19 and I would suggest that this assertion borders dangerously close to a conspiracy theory
11 that should be outright rejected.

12

13 And then this brings us to the affidavits of Rebecca Ingram. So --

14

15 THE COURT: Let me just grab my binder with those affidavits
16 in it, you said you wanted me to refer.

17

18 MS. LECLAIR: Just because with Ms. Ingram's we are not
19 seeking to strike the entire thing and so I think it is helpful to have the specific paragraphs
20 before you, at least with respect to her first affidavit.

21

22 THE COURT: I have got it here.

23

24 MS. LECLAIR: Okay. So the first paragraph we're submitting
25 needs to be struck is paragraph 7. Here you'll see that Ms. Ingram is engaging in a selective
26 recitation of facts that she has no personal knowledge of and in my submission this is
27 another case of hearsay. It is not Alberta's responsibility to call evidence to test the veracity
28 of the facts. I believe my friend's have suggested we could cross-examine Ms. Ingram to
29 test this evidence, but in my submission that doesn't solve the problem.

30

31 Ms. Ingram didn't collect the data she relies on here. She didn't prepare the statistics. If we
32 were to cross-examine Ms. Ingram on this and I appreciate this is a hypothetical exercise
33 here, the types of responses we would get from Ms. Ingram in response to this data is
34 speculative and I would say that's probably inappropriate for her to answer on cross-
35 examination or they would be, I don't know, because Ms. Ingram didn't collect and prepare
36 this data. So, in my submission, this doesn't meet the standards for adducing this type of
37 hearsay. It's Ms. Ingram's burden to demonstrate that hearsay is necessary and reliable and
38 in this case the applicant has not done so.

39

40 The other portion of this paragraph that Alberta is objecting to is the speculations by Ms.
41 Ingram about the psychological harms here. As far as we're aware Ms. Ingram has no

1 qualifications that would enable her to speculate about psychological harm and in my
2 submission this is not an observation a lay person is capable of making. There is no obvious
3 metric for psychological harms, it's not like you can hook someone up to a machine like a
4 blood pressure machine and get a reading. They're not established on any sort of obvious
5 metric. So in my submission, this is not an objective measurement, it's a subjective
6 determination that Ms. Ingram doesn't have the qualifications to make and so this paragraph
7 should be struck.

8
9 The next paragraph is paragraph 8 and the first sentence, I agree with my friends, that this
10 is Ms. Ingram's understanding of the law and we have no issues with that, but it is the final
11 sentence in this paragraph where Ms. Ingram is opining on the ultimate issue of this case
12 when she says, her civil rights have been violated. That's for this Court to determine, not
13 for Ms. Ingram.

14
15 We have that same problem at paragraph 21 of Ms. Ingram's affidavit where she states or
16 where I quote, sorry, "that her rights have been fundamentally upended and infringed upon"
17 which again this is improper for Ms. Ingram to opine on as she is stepping on the toes of
18 the Court.

19
20 The next -- paragraph 22 has been resolved by consent and that one has come out or will
21 come out,, but paragraph 23 is still for this Court to consider and in my submission, this is
22 another clear case of hearsay. The applicant hasn't provided any justification for why this
23 evidence is necessary and reliable. I would submit that this is effectively gossip in the form
24 of an affidavit and the wording of this paragraph also makes it clear that Ms. Ingram is
25 providing this fact on the basis of information and belief, which is not permitted by the
26 Rules for final decision.

27
28 Next, is paragraphs 33 through 36 of Ms. Ingram's affidavit.

29
30 THE COURT: Okay, so you have got paragraph 21 and 23 --

31
32 MS. LECLAIR: Yes.

33
34 THE COURT: -- that you say need to come out?

35
36 MS. LECLAIR: Yes.

37
38 THE COURT: Sorry, I am just tracking that to my notes here,
39 let me just make sure I ask the questions I need to ask. All right. Thank you.

40
41 MS. LECLAIR: So, the next batch is paragraphs 33 to 36. I have

1 to apologize our application identified paragraph 37; I have no problems with paragraph
2 37 staying in. So it's just paragraphs 33 to 36.

3
4 And so my submission is that this evidence is entirely irrelevant. There are no facts pled
5 anywhere in the originating application that Ms. Ingram is suing for the loss of an
6 opportunity, so in my submission, this evidence is just irrelevant on the face of it. Secondly,
7 even if there were facts, Ms. Ingram's own evidence is that she lost an opportunity because
8 as part of the interview she took a polygraph and she did not disclose to the Fire Department
9 the corporate debt of the gym. There can be no reasonable suggestion that even if the
10 CMOH orders are responsible for the incurrence of that debt they did not require Ms.
11 Ingram to lie in a job interview.

12
13 And then thirdly, this whole bath of evidence is premised on the hearsay of the interviewer
14 and this comes back to the same issue we've had throughout that is this hearsay necessary
15 and reliable? And I would submit, in this case here, just as in the others, the applicants have
16 not shown that it is and so this evidence must be struck.

17
18 The very last paragraph that we're seeking to have struck today is paragraph 24 of Ms.
19 Ingram's supplemental affidavit. You don't have to go there; this one is the NHL exemption
20 paragraph. Ms. Ingram, as we stated, has no personal knowledge of the NHL exemption or
21 the CMOH order.

22
23 I appreciate my friends want to argue that the NHL exemption is relevant to how this whole
24 process has been conducted and I would say that's open to them, it is just not appropriate
25 to go in through the form of an affidavit. The CMOH order is effectively a law in Alberta.
26 Affidavits should be confined to statements of fact not assessments of the law especially
27 when we're dealing with domestic laws, this isn't a foreign law that --

28
29 THE COURT: So the exhibit of the order, well -- does not
30 necessarily have to be exhibited.

31
32 MS. LECLAIR: Yes.

33
34 THE COURT: But you do not take objection with the exhibit, it
35 is her description of it?

36
37 MS. LECLAIR: Yes, yes and that is really all I have for you
38 today, Justice Kirker, so subject to any questions, those are our submissions.

39
40 THE COURT: You answered my questions. Thank you. Mr.
41 Rejman?

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Submissions by Mr. Rejman

MR. REJMAN: Good morning Justice Kirker. The first preliminary issue I wanted to address is, we were having a hard time submitting to your office the consent order. Have you received that one?

THE COURT: Sorry, the one I signed?

MR. REJMAN: No, the one that addresses two paragraph of ...

THE COURT: I did receive that order and I have -- I have a list of housekeeping matters to deal with but I did receive a copy of the consent order in relation to those final couple of paragraphs or affidavits that you sorted out.

MR. REJMAN: Yes, it's paragraph 12 and 22 of Ms. Ingram's December affidavit.

THE COURT: Yes.

MR. REJMAN: And we were just getting a run around it and it just bounced back from a number of the admin staff and that is why I'm asking.

THE COURT: Okay. It came through. Got it.

MR. REJMAN: Wonderful. So, you have in front of you, Justice Kirker, our submissions and we do rely on them on the entirety, as well. A couple of rebuttal or reply comments to be made this morning.

As you suggested and we do agree with your assessment of the affidavits that they are for the second part of the test if the *Charter* rights have been infringed. So we would absolutely rely on that kind of process because they were submitted in anticipation of the section 1 analysis and they do not go to any evidence of the infringements of Ms. Ingram's rights and freedoms.

The one affidavit that maybe outside the *Charter* arguments is the affidavit of Shawn McCaffrey. There is also the live issue of does the CMOH orders have the -- are they *vires* and do they have the power to shutdown all the businesses and you did state in your last hearing that that is still a live issue and we would submit that that's where we would also rely on that affidavit. We anticipate the Government of Alberta submitting evidence that there are numerous programs for struggling businesses and that would be a rebuttal

1 affidavit to that assertion.

2

3 The Lee affidavit, Mr. Lee's affidavit that one is attempting to reply -- sorry is attempting
4 to rely, Ms. Ingram relies on that one as evidence of the -- that Mr. Lee is evidencing the
5 availability of COVID-19 treatments is kind of outside or a wrong conclusions has been
6 drawn by our friend.

7

8 THE COURT: So, Mr. Rejman, I am going to be transparent
9 with you. I have a real problem with Mr. Lee's affidavit, in particular, and I think -- it is
10 certainly not probative. It does not inform one way or another Ms. Ingram's proposition
11 that her rights have been infringed. So that affidavit evidence does not make it any more
12 or less likely that that proposition that she makes would be accepted.

13

14 So, then you move on, assume that the Court finds there is an infringement and you are
15 into the section 1 analysis.

16

17 MR. REJMAN: Right.

18

19 THE COURT: I do not see how Dr. Lee's evidence informs that
20 at all and to the extent that Ms. Ingram seeks to argue that COVID-19 can be effectively
21 treated, his affidavit -- there is no evidence that he is qualified to give that evidence. His
22 affidavit does not provide any basis for such qualification and his anecdotal personal
23 experience with COVID-19, I do not see how that helps at all. So I am really struggling to
24 understand how it is you propose to use that affidavit. So, you tell me where I am wrong,
25 I want to be quite transparent with you, so that you can answer my concerns if you can.

26

27 MR. REJMAN: And I appreciate that. Mr. Lee is not a doctor and
28 we haven't -- and we don't tender him as an expert. Like you said it is his personal
29 experience of the process when he was infected with COVID-19 and the subsequent
30 dealings with Alberta Health Services and what instructions he was given or not given.

31

32 THE COURT: But why does that matter at all? There is no claim
33 here that the restrictions requiring people diagnosed with COVID-19 to isolate infringe
34 anybody's rights. That claim is not here. So, the evidence of someone who is diagnosed as
35 positive and whatever experience he said he had, so what? There is no claim in relation to
36 the -- and I went back through the originating application, there is nothing about restrictions
37 on people actually diagnosed infringing any rights.

38

39 And when we get to whether the impugned restrictions are infringing rights and then if they
40 are, whether they have a pressing and substantial purpose, whether they are aimed at that
41 purpose, whether they are restrictions within the range of reasonable alternatives and

1 ultimately whether there are salutary versus deleterious effects, where that balancing takes
2 you, I just do not see how Dr. Lee's evidence comes in at all.

3
4 And to the extent Ms. Ingram wants to say, well, if you take vitamins and Tylenol, you
5 know, for Dr. Lee that worked, so what? He is not an expert.

6
7 MR. REJMAN: No he's not and we don't make him out as an
8 expert, but I would submit that it goes to the minimally impairment portion of the *Oakes*
9 test that no other alternatives have been provided, other than going straight to *Charter*
10 infringements and there doesn't seem to be any indication that anything else was
11 considered.

12
13 Now, if our friends do submit evidence that other procedures or processes or protocols
14 were considered as alternatives to the rights infringement then Mr. Lee's affidavit would
15 become rather irrelevant. But as it stands right now, we believe it is relevant until we see
16 the full evidentiary record of Alberta.

17
18 THE COURT: All right.

19
20 MR. REJMAN: Now, with respect to the claims of intrinsic
21 evidence, with respect to the NHL exhibit and document, we submit that it falls under the
22 class of intrinsic evidence as contemplated in the two reference cases and is therefore
23 admissible in a supplemental Ingram affidavit. In the alternative, as my friends, some have
24 alluded to, it is -- it would be essentially law and an extension of the CMOH orders.

25
26 And if Madam Kirker, you feel that it is inappropriate to be in the affidavit then we in the
27 alternative would say that we should still be allowed to submit it and rely upon it on our
28 written submissions and our oral submissions at a later time, in any manner that the CMOH
29 orders or piece of Regulation or a piece of legislation would be also relied upon.

30
31 With regards to the statistics, Ms. Ingram was not a collector of the evidence, of those
32 statistics or those numbers or those cases, but she relies on them as they are public
33 documents and have been available to the public -- to all the public in Alberta.

34
35 THE COURT: And I do not -- I am not sure that your friends
36 take issue with her exhibiting information that may be publicly available or even frankly
37 the simple exhibiting of a CMOH order to affidavit, it is her interpretation or insofar as she
38 attempts to draw conclusions from that data. Is she not stepping into the purview of the
39 Court there? Is it not for the Court to decide what, if anything, the data that she points to
40 says in the context of the evidence as a whole once it is all in? What makes Ms. Ingram a
41 person who should be telling the Court what to make?

1
2 MR. REJMAN: And I thinks that --

3
4 THE COURT: And I think that is the issue, it is the conclusions
5 that she draws, the opinions that she proffers. And you will recall that when I gave my
6 decision in December on the injunction application, I made the point that I was ignoring
7 paragraphs in affidavits where those who had sworn them offered opinions or conclusions.
8 I dealt with in a broader brush way, but I did make note of it at the time and I -- so what
9 are your -- do you agree that it is improper for Ms. Ingram to be offering her analysis or
10 drawing conclusions from whatever information she is looking at and suggesting that that
11 is appropriate evidence for me to consider?

12
13 MR. REJMAN: Well, we know what the law is and the law
14 prohibits opinions and conclusions to be drawn and if you -- if you feel that's what's
15 happening here and decide to strike portions of that paragraph that are conclusions and
16 opinions, we'll just simply make those similar arguments in our submissions.

17
18 So, if it a conclusion or an opinion or an opinion or an argument it will not be lost in our
19 mind, it will just be made in our written submissions.

20
21 THE COURT: I mean you are entitled to ask the Court in a
22 hearing on the merits to draw whatever inferences or conclusions can be drawn from the
23 evidentiary record or the facts as they are found.

24
25 MR. REJMAN: Absolutely. Thank you. Now, I believe there's a
26 couple of other paragraphs that remain. Ms. LeClair took us to paragraph -- well 7 being
27 one of them -- and any mention -- that was a statistic -- but any mention of the psychological
28 harms to her children we would submit that -- and it was in our written brief, that Ms.
29 Ingram is the best person to opine on how the measures are affecting her children and we've
30 submitted some case law that allows for the opinions specifically on matters such as this.

31
32 Did you want me to take you to that paragraph or ...?

33
34 THE COURT: I have got it here.

35
36 MR. REJMAN: Paragraph 21, again that's part of Ms. Ingram's
37 right to provide evidence on how her -- how her life has been impacted by the measures,
38 whether directly or indirectly. And again, if the Court finds that there is some argument
39 and decides to strike that, like you said, we are within our right to plead that in our
40 arguments at a later date.

41

1 Paragraph 23 is a observation of Ms. Ingram and I do agree that there is no statistical
2 information, but we would admit that judicial notice would be relevant in that case. There
3 has been numerous news reports and statistics that have been coming out with how many
4 businesses are failing and the indirect -- direct or indirect collateral damage that has been
5 impacting Alberta as a result of these measures.
6

7 With respect to paragraphs 33 to 36, again we rely on our written submissions and Ms.
8 Ingram is not claiming that -- or claiming to sue for damages because of a lost opportunity,
9 she's just again stating how these measures have impacted her, whether it's directly or
10 indirectly.
11

12 THE COURT: Okay. Anything else?
13

14 MR. REJMAN: Yes. The McCaffrey affidavit that there's hearsay
15 evidence, we have never conceded that this evidence is not necessary. Our arguments that
16 we've put forward in our written arguments, in our written brief are a rebuttal to the
17 assertion that there's no way to test the veracity of the statement and we just propose that
18 there are numerous methods to test the statement that there has been no documented
19 COVID-19 infections or transmissions at her bowling alley.
20

21 Ms. McCaffrey spoke to her conversation with her MLA, she told him that there was never
22 a transmission at her bowling alley, her place of business and for that reason she did not
23 understand why she had to be, but other businesses had to be shutdown. Mr. Rutherford
24 confirmed her suspicions or what she knew and that's all that evidence is being tendered.
25 Again it would be going to either the section 1 analysis or any of our arguments based on
26 the powers to shutdown the Alberta businesses as a wholesale action by these measures.
27

28 So barring any questions, those would be all my submissions, Justice Kirker.
29

30 THE COURT: Thank you Mr. Rejman. Anything briefly -- well
31 maybe I will ask whether Mr. Gray has anything to add?
32

33 MR. GRAY: I do not, My Lady. Thank you.
34

35 THE COURT: Thank you. Anything briefly in reply, Ms.
36 LeClair?
37

38 MS. LECLAIR: No, Ma'am.
39

40 THE COURT: Okay. Thank you very much again counsel for
41 your very helpful written arguments, for your efforts to narrow the issues that we had to

1 deal with today and for answering my questions this morning.

2
3 I am in a position to give you my decision.

4
5 **Decision**

6
7 THE COURT: Alberta applied to strike parts of the affidavit
8 evidence upon which the applicants rely. Alberta also applied to dismiss the claims by
9 Heights Baptist and Northside Baptist churches that the CMOH orders violate section 7
10 *Charter* rights. Many of the issues, as I have said, have been resolved by consent: two
11 consent orders have been prepared confirming that the section 7 claims of the two churches
12 shall be struck by consent. And a number of the affidavits filed in December 2020 and in
13 January 2021 shall also be struck by consent and again, I commend all of you for the work
14 you have done to narrow the issues requiring adjudication.

15
16 What remains to be decided by me today is whether or not the following affidavits or parts
17 of affidavits upon which Ms. Ingram relies ought to be struck as containing improper or
18 irrelevant information. The affidavit of Barry Lee, sworn December 11th, 2020. The
19 affidavit of Shawn McCaffrey, sworn January 21, 2021. The affidavit of Kyle Pawelko
20 sworn January 28th, 2021. The affidavit of Abdullah Al-Sharah, sworn January 19th, 2021
21 and several paragraphs of the affidavit and supplemental affidavit of Ms. Ingram.

22
23 In *Delisle v. Canada (Deputy Attorney General)* [1999] 2SCR 989, at paragraph 76,
24 Supreme Court of Canada Justices Cory and Iacobucci confirmed that the ordinary rules of
25 evidence applicable in civil trials apply in *Charter* cases.

26
27 First, and fundamentally, I must consider whether the evidence in issue is relevant to an
28 issue in dispute in this case. Relevant evidence, and the parties do not disagree about this,
29 is evidence that has some tendency as a matter of logic and human experience to make the
30 proposition for which it is advance more likely than the proposition would appear to be in
31 the absence of that evidence.

32
33 The issues in dispute in this action are whether:

- 34
35 1) The business restrictions imposed by the CMOH orders
36 breach Ms. Ingram's rights as guaranteed by section 1(a) of
37 the *Alberta Bill of Rights* and are therefore *ultra vires*
38 pursuant to section 2 of the *Bill of Rights*. The issue here
39 was whether the restrictions imposed by the CMOH orders
40 fall within the delegated order making authority conferred
41 on Medical Officers of Health by section 29 of the *Public*

1 *Health Act.*

- 2
- 3 2) The second issue the Court is going to have to address when
- 4 the merits come on for hearing is whether the CMOH orders
- 5 offend Ms. Ingram's rights under sections 1(c), 1(e) and
- 6 1(g) of the *Alberta Bill of Rights* and whether they are
- 7 therefore *ultra vires* pursuant to section 2. I will not quote
- 8 what sections 1(c), 1(e) and 1(g) of the *Alberta Bill of*
- 9 *Rights* say, but those are the sections that are in issue that
- 10 the Court is going to have to look at.
- 11
- 12 3) There are also questions about whether the CMOH orders
- 13 violate Ms. Ingram's section 2, section 7 and section 15
- 14 *Charter* rights and, if so, whether the respondent can show
- 15 that the infringements are demonstrably justifiable in a free
- 16 and democratic society as required by section 1 of the
- 17 *Charter*.
- 18

19 I wish to be very clear about the scope of Ms. Ingram's *Charter* challenge. Section 2 of the

20 *Charter* guarantees people freedom of conscience and religion, freedom of thought, belief,

21 opinion, expression including freedom of press and other media communications. Freedom

22 of peaceful assembly and freedom of association.

23

24 Section 7 provides everyone with the right to life, liberty and security of the person, the

25 right not be deprived thereof except in accordance with the principles of fundamental

26 justice.

27

28 Section 15 of the *Charter* the alleged violation in Ms. Ingram's case, is limited to whether

29 the CMOH orders insofar as they restrict attendance at school and make distinctions on the

30 basis of age, violates section 15 of the *Charter*. I struck the claim that the business

31 restrictions violate section 15 following the earlier preliminary application.

32

33 Finally, if the infringements alleged are made out, the Court will be required to determine

34 whether the infringements are demonstrably justified. More specifically, the Court will be

35 asked to determine whether the impugned restrictions have a goal that is pressing and

36 substantial and whether the restrictions imposed are rationally connected to the law's

37 purpose. The Court will have to consider whether the impugned restrictions are restrictions

38 within a range of reasonable, supportable alternatives.

39

40 And finally, section 1 of the *Charter* also requires the Court to consider whether the impact

41 of the impugned restrictions on the *Charter* rights is too high a price to pay for the

1 advantage the restrictions provide in advancing a purpose.

2
3 These are the issues in dispute that inform my analysis of relevance and materiality.

4
5 So, I turn first to the affidavit of Barry Lee. The affidavit of Mr. Lee does not make Ms.
6 Ingram's proposition that her rights have been violated any more or less likely nor does it
7 inform whether impugned CMOH order restrictions alleged to infringe rights under the *Bill*
8 *of Rights* or the *Charter* may or may not be justified under section 1. There is no claim that
9 restrictions requiring people diagnosed with COVID-19 to isolate infringes any *Charter*
10 rights.

11
12 Ms. Ingram argues that Mr. Lee's evidence and I am quoting from Mr. Rejman's brief: (as
13 read)

14
15 Mr. Lee's evidence supports Ms. Ingram's position that Alberta has
16 ignored other alternatives such as treatment of patients that could
17 potentially decrease the number of people who progress to hospital or
18 ICU, which has been the ongoing excuse for the lockdown measures.

19
20 That is part of the argument Ms. Ingram makes about why Mr. Lee's evidence is relevant.
21 So here departing from the issue of relevance for a moment, stepping back, to the extent
22 Ms. Ingram seeks to rely on Mr. Lee's evidence to say that COVID-19 can be effectively
23 treated with zinc, vitamins and Tylenol; there is no evidence that Mr. Lee is qualified to
24 give that evidence. His affidavit does not provide any basis for such qualification. His
25 anecdotal, personal experience with COVID-19 is not helpful. It does not, in my view,
26 inform any of the issues in dispute and as a consequence, I find that affidavit is
27 appropriately struck out.

28
29 Turning now to the affidavits of Shawn McCaffrey, Kyle Pawelko and Abdullah Al-
30 Sharah; these affidavits suffer from some of the same relevance and materiality problems.
31 They are evidence about their experiences and does not make Ms. Ingram's proposition that
32 her rights have been violated more or less likely to be true. Nor in my view, can this
33 anecdotal evidence from three individuals help to inform in any material way a
34 determination about whether any restrictions that impugn Ms. Ingram's rights have an
35 objective that is pressing and substantial, or about whether they are rationally connected to
36 the law's purpose and impair rights within a range of supportable alternatives to achieve
37 the legislative objection.

38
39 Where Ms. Ingram seeks to rely most heavily on this evidence is at the stage of the analysis
40 that asks whether the salutary effects of the restrictions outweigh their deleterious effects
41 and Mr. Rejman confirmed that during his submissions today. While in the first stages of

1 the *Oakes* analysis, the section 1 analysis are anchored in an assessment of the purpose of
2 the CMOH orders, Ms. Ingram argues that the affidavit evidence of Ms. McCaffrey and
3 Mr. Pawelko and Mr. Al-Sharah will assist the Court in its analysis at the last branch of
4 the review where the Court must take into account the practical affect of the restrictions.
5

6 Here, I am mindful of Alberta's point that, whether or not the Court reaches the stage of
7 the analysis remains to be seen because it is only if an alleged infringement of Ms. Ingram's
8 *Charter* rights is found that the Court will move onto to consider section 1. At the same
9 time, and Ms. LeClair candidly, in my view, acknowledged the practical challenge, if we
10 look at this from a practical perspective, I hear Ms. LeClair saying to me that Alberta
11 accepts that the evidence may become relevant, subject to the argument she made about
12 why relevance is not made out. But that if it had any relevance, it would be at that last stage
13 of the section 1 analysis. And the fact that that analysis may not take place is not a reason
14 to take it out when we look at this from a practical perspective, because our objective here
15 today is to try to figure out what body of evidence will go froward to the merits hearing
16 and what will have absolutely no relevance.
17

18 So, the evidence may become relevant and while Ms. LeClair makes compelling arguments
19 that the evidence of these three individuals cannot inform the final stage of the section 1
20 analysis because it does not help the Court decide whether the proposition that the harm to
21 society is greater than the salutary effects more or less likely, I am not prepared to strike
22 these three affidavits at this time.
23

24 They may, in the discretion and view of the Judge who hears the merits, have some bearing
25 on that final question. So I am not going to strike the affidavits, but I am going to exercise
26 the Court's jurisdiction in controlling its process and give the direction that those three
27 affidavits, the McCaffrey affidavit, the Al-Sharah affidavit and the Pawelko affidavit shall
28 not be tendered for the purposes of establishing the alleged *Charter* violations. In my view
29 they are not relevant to that inquiry.
30

31 If an alleged infringement of any *Charter* right is found, the affidavits may then be relied
32 upon by Ms. Ingram, subject to the discretion of the Justice hearing the matter, to determine
33 whether and to what extent they may be weighed in the section 1 analysis. So, I am not
34 going to strike those affidavits but am giving the direction that those affidavits will not be
35 relied upon to make out the infringement, which Mr. Rejman said they are not looking to
36 do I am not in anyway tying the hands of the hearing Justice to determine that those
37 affidavits may be disregarded. I am just not prepared based on what is in front of me now
38 to strike them and to find that there is no basis upon which they can be relevant.
39

40 With respect to paragraph 19 of the McCaffrey affidavit, I agree with counsel for the
41 respondents that that is hearsay evidence, it is improper and it needs to be struck. It is a

1 statement made outside of this Court proceeding that Ms. Ingram asks the Court to accept
2 as true. It is hearsay and I cannot, on a principled basis, allow its admission because there
3 is no basis upon which to find that it is necessary for the evidence to come from Ms. Ingram
4 or that it is reliable evidence. So paragraph 19 of the McCaffrey affidavit is struck as
5 inadmissible hearsay.

6
7 I turn now to Ms. Ingram's affidavits. So those paragraphs in the affidavit that the
8 respondents take issue with, Alberta asks that the following paragraphs be struck;
9 paragraphs 7, 8, 21, 23, 33 through 36 of her first affidavit and paragraph 24 of the
10 supplemental affidavit. I agree with Ms. LeClair, on behalf of the respondents, that
11 paragraph 23 of Ms. Ingram's affidavit contains inadmissible hearsay. What Ms. Ingram
12 has heard or been made aware of by others is neither necessary nor reliable enough to be
13 admitted for its truth which is what Ms. Ingram seeks to do with that paragraph. No basis
14 for necessity is made out and Ms. Ingram does not even explain when, where or from whom
15 she learned the asserted fact.

16
17 I also agree that it is improper for affidavits to contain argument or conclusions that the
18 Court is required to draw. As I indicated during oral argument I noted that in my decision
19 on the injunction application in December and I indicated I was ignoring the parts of the
20 affidavits that contained arguments and conclusions. Ms. Ingram has agreed to paragraph
21 12 coming out of her affidavit, being struck by consent. In my view, paragraph 8 must also
22 be struck on this ground. She is making a conclusory statement there that is for the Court
23 to draw.

24
25 I also find that Ms. Ingram's affidavit contains opinion evidence at paragraph 7. She
26 purports to provide her opinion that there is no reason to prevent anyone under 60 from
27 attending or working at a school based on the statistics she cites. The basis of her
28 qualifications to be making that statement is certainly not made out. The conclusions she
29 draws in that paragraph are conclusions that she may ask the Court to draw but it is not for
30 her to decide. Ms. Ingram's statement that she is concerned about the psychological harm
31 being done to her children can stay in, that is a concern she has. Everything else she says
32 about the statistics and the reasons for restrictions needs to come out. Exhibit A to her
33 affidavit, which are published statistics can stay in. So to the extent she asks the Court to
34 look at some information that was on the website, she is entitled to leave those statistics
35 exhibited to her affidavit, but except for the first part of the first sentence of that affidavit,
36 the rest purports to be information that Ms. Ingram is not qualified to give and she has
37 drawn conclusion that are the Court's purview. So, I am hoping that is clear.

38
39 The first part of paragraph 7 up to the point, this part of the first sentence: (as read)

40
41 I am extremely concerned about the psychological harm being done

1 to my children by the CMOH forcing them out of school and forcing
2 them to wear masks and not being able to engage in normal
3 socialization.
4

5 Is fine. In other words, her children, I do not need Ms. Ingram providing evidence about
6 what is happening with peers and her citing statistics and drawing conclusions for those,
7 that needs to come out, the exhibit can stay.
8

9 Paragraphs 21 and 23, I dealt with 23, it is hearsay and needs to come out. 21 is a paragraph
10 that contains conclusory statements and argument and in my view, is appropriately struck.
11

12 I agree with Alberta that paragraphs 33 and 36 of Ms. Ingram's affidavit, in those
13 paragraphs Ms. Ingram asks the Court to accept as true something she was told by someone
14 outside of this Court proceeding. There is no basis again upon which I can find that the
15 evidence is necessary to come from Ms. Ingram or that it is reliable and moreover and
16 given Mr. Rejman's candid acknowledgement that there is no claim for damages for the
17 loss of opportunity that Ms. Ingram is describing. I cannot see how paragraphs 33 to 36
18 have any relevance, leaving aside the argument that cause a causal link problem in the way
19 in which Ms. Ingram's described. So most fundamentally, I am concerned that 33 and 36
20 are predicated on inadmissible hearsay and then more fundamentally that they are
21 irrelevant to the issues that the Court actually has to grapple with. So 33 to 36 of Ms.
22 Ingram's affidavit are properly struck.
23

24 Paragraph 24 of the supplemental affidavit, much of that information is irrelevant to the
25 question of whether Ms. Ingram's rights have been infringed and much of what she says
26 there is argument or conclusions, opinions. But the exhibit, I see no difficulty with allowing
27 her to exhibit the CMOH order relating to the NHL exemption, technically it does not have
28 to be exhibited, but I am not going to strike the exhibit and that order exhibited to her
29 affidavit, may in the discretion of the hearing Justice be relevant as part off a section 1
30 analysis if the Court gets there.
31

32 So, I am directing that paragraph 24 of Ms. Ingram's supplemental affidavit come out save
33 and except for the exhibits. So she is welcome to exhibit that order, but her argument in
34 the first part of that paragraph is just that, it is argument and conclusion and is improper
35 and should be struck.
36

37 So does that give everyone the guidance they need? Any questions from that? It was a little
38 bit choppy at times, so I want to make sure that I have been clear about what comes out
39 and what stays in. Any clarification required?
40

41 MR. REJMAN:

Nothing arising.

- 1
2 MR. PARKER: I am sorry, Justice Kirker and my apologies I
3 may have missed it. Paragraphs 34 and 35 of Ms. Ingram's affidavit, what was the result
4 on that?
5
- 6 THE COURT: Paragraphs 33 to 36 all come out.
7
- 8 MR. PARKER: They all come out. My apologies. Thank you.
9
- 10 THE COURT: So that whole set of -- where I really tripped was
11 over the hearsay because it is all predicated on that, and then I just cannot see it is relevant.
12 So 33 to 36 I think appropriately come out and need not be part of the evidentiary picture
13 presented to the hearing Justice.
14
- 15 MR. PARKER: Got it. Thank you.
16
- 17 THE COURT: Okay. So I am going to lean on -- who is going
18 to put a pen to this order?
19
- 20 MS. LECLAIR: I can do that, Justice Kirker.
21
- 22 THE COURT: So, Ms. LeClair, I will ask you to draft the order,
23 circulate it to your friends and once you have a form of order that meets with everyone's
24 approval, send it to me, I will sign it.
25
- 26 **Discussion**
27
- 28 THE COURT: I will also sign the second consent order that I
29 did receive and get it back to you today.
30
- 31 As a housekeeping matter, I wanted to follow up about the status of the order exhibiting
32 the blackline originating application, so the status of the order following my last decision
33 that I issued in writing, where is that at?
34
- 35 MS. LECLAIR: So, Justice Kirker, we have been going back and
36 forth on that. There are still two matters that I do not believe we have agreed on your
37 decision in relation to them yet.
38
- 39 THE COURT: Okay. So you may need some help --
40
- 41 MS. LECLAIR: I can --

1
2 THE COURT: -- so let me just park that for a second so that you
3 may need some help settling the terms of the order is what you are saying? Is that right?
4

5 MS. LECLAIR: Yes.
6

7 THE COURT: Okay and I also just wanted to confirm, Ms.
8 LeClair, I saw in the respondent's brief the reference -- because part of your argument,
9 particularly around the Lee affidavit, was that the applicant's had provided proper expert
10 reports and you will respond to them in due course. So there is no issue which was flagged
11 in the procedural order that leave of the Court required for any of those expert reports,
12 correct? Alberta does not take -- you are satisfied that the applicants have provided their
13 expert reports, you will respond to them?
14

15 MR. PARKER: That's right and July 12th is the date we're relying
16 on to respond, yes.
17

18 THE COURT: Right. Okay. I just wanted to confirm that there
19 were no issues with applicants' expert reports. I appreciate that you will have responding
20 reports and you will ask the hearing Justice to consider the substance and draw whatever
21 conclusions. I was just thinking whether there was any procedural issue and what I
22 understood from your brief is there was not.
23

24 MR. PARKER: Not at this point, we do notice that the procedural
25 order does indicate that -- well we're not dealing with it, we haven't raised anything and so
26 --
27

28 THE COURT: Right.
29

30 MR. PARKER: -- (INDISCERNIBLE) yes, thank you.
31

32 THE COURT: Okay. Okay. And then the final issue was this;
33 was the stage in our litigation plan where we were going to nail down some dates. Now,
34 we have narrowed the issues and the body of evidence that you and the Court are going to
35 have to grapple with. We were thinking that two weeks of hearing time might be required.
36 I am wondering if perhaps fewer days might be manageable.
37

38 What I am going to propose is this, I do not need an answer right now, but here is my
39 thought. We have the day booked today. We have now dealt with the preliminary
40 application; does it make sense that we take a short adjournment and that we come back to
41 speak to settling the terms of the order and perhaps to talk about whether you are in a

1 position to say how many days you might need?

2

3 Because I have already reached out to our coordinators to say, okay, this is what we were
4 aiming for, can you give me some dates. Might it be helpful to spend some of the time we
5 have today to start hammering out what that oral hearing order might look like or do you
6 think that is premature?

7

8 MR. PARKER: One matter that has come up just yesterday is our
9 friends have filed a notice of appeal from your decision on the preliminary applications
10 and I understand from that notice of appeal, they would like that appeal expedited.

11

12 THE COURT: Okay.

13

14 MR. PARKER: I had some other matters for housekeeping to
15 discuss, but I think the first part from the respondent's perspective, is this notice of appeal
16 and what the applicant's see this doing with the hearing schedule. I think we need to hear
17 from them.

18

19 MR. GRAY: That's one issue. The other issue, My Lady, is
20 that obviously the Attorney General is well aware of the extent of the evidence or at least
21 in large part he's going to call. We don't know anything that any of the respondents are
22 (INDISCERNIBLE). So, it is difficult for us to determine, you know, the length of time
23 that we would need to hear the matter.

24

25 We do have some guidance from -- for example, the Manitoba action if that evidence is
26 going to be similar, but we would need to hear from my friends about how long they expect
27 the expert evidence to be and I don't know if they're in a position to tell us that given that
28 they've got till July to produce that.

29

30 THE COURT: Okay.

31

32 MR. PARKER: I can speak to that, to some degree, if it would be
33 helpful Justice Kirker.

34

35 THE COURT: Sure. I am just trying to figure out when we
36 might next meet because we will want to put in place, what I contemplated was an oral
37 hearing order that kind of sets out what is going to happen when and who is doing what.
38 So I am just trying to gauge, when is the best time to be doing that.

39

40 MR. PARKER: Sure and then so to address to the extent I am
41 able to, my friend's question on the expert evidence of the respondents, it is due July 12th.

1 We have followed the Manitoba hearing that took place over 8 days last month and you
2 know, candidly, we are facing some of the same evidence. The applicant's in Manitoba
3 filed a very similar report to that Dr. J. Bhattacharya that is filed in Alberta. So we would
4 expect the evidence in terms of the witnesses called in Manitoba to be similar in Alberta.
5 There will be a number of witnesses covering areas within their expertise, likely beyond
6 Dr. Hinshaw.

7
8 In terms of another matter I wanted to speak to today and this is a good opportunity to do
9 so, is the temporal aspect of what the respondent's are justifying. In Manitoba, the
10 justification was for what I will refer to as the second wave. Our intent to file evidence
11 justifying any breaches in both the second and third wave up to yesterday, May 31st, is the
12 date we are using for a cut-off just because we have got to look ahead and now file July
13 12th.

14
15 And so that is our intent from a temporal perspective and I wanted to just advise the Court
16 of that and just for the purpose of to see if there is any further direction. I had brought that
17 to my friend's attention. I don't know if they need to agree with it, or not, they may agree,
18 but that is our intent.

19
20 And so, I don't know if that helps on number of days. You know, I would think other than
21 this notice of appeal which gets to the timing of the hearing and potentially the timing of
22 the expert evidence, I would think that we're into, I think we should keep the two weeks
23 right now, given that we had eight days in Manitoba and we probably may have some more
24 evidence here.

25
26 THE COURT: Okay and so that was part of it, was there any
27 reason to think we would use less days if Manitoba was eight, it seems to me ten is not far
28 off the mark. It gives you a little bit of wiggle room.

29
30 And you, Mr. Gray and Mr. Rejman, you're asking for an expedited hearing at the Court of
31 Appeal, I guess they will deal with as they deem fit. Perhaps what I will do, is I have already
32 made the request to find out, to try to nail down some dates in that target range we were
33 looking at, but perhaps you should -- I do not know how long it typically takes the Court
34 of Appeal to let you know whether they will hear it on an expedited basis, or not, do you
35 have any sense of that?

36
37 MR. GRAY: I do not, perhaps Mr. Parker might but I couldn't
38 advise the Court in an authoritative way at this point, My Lady.

39
40 THE COURT: Okay.

41

1 MR. PARKER: I think Ms. LeClair might have the best expertise
2 on that in our recent matter with the JCCF, I think it was in a matter of couple of weeks
3 that they made that decision, Ms. LeClair.
4

5 MS. LECLAIR: I actually think it was sooner. So, I don't
6 anticipate it will take very long for the Court to make a determination as to whether an
7 expedited hearing will be granted, but I note that in our previous or other appellate matter
8 with the Justice Centre we are doing an expedited appeal and we still actually have not
9 received dates for the appeal. So I am not sure when those dates will be granted and I guess
10 how soon we will be put on the hearing schedule. So ...
11

12 MR. GRAY: If I could just chime in, My Lady, everyone
13 especially you works so hard to put together the procedural order, I would really, really
14 hate to do anything to upset the timeline that's in that order.
15

16 THE COURT: Well, so here is what I am going to do. I will get
17 -- I will hear back probably today, if not likely tomorrow in terms of what dates we might
18 be able to secure even to put a tentative hold on, pending a decision on the appeal that
19 might delay us. And what we could perhaps do is once you know the date of the appeal
20 being heard you could let me know and we could arrange another case management
21 meeting, I guess, or case conference really to decide where we are at in terms of putting
22 the final pieces in place to tee-up the hearing.
23

24 But we cannot really lock in the dates until we know whether those dates will work, I guess,
25 is the point with the moving parts. So, why do we not do this? Do you want to take a short
26 adjournment and perhaps -- do you have -- is there someone who can send me a draft of
27 the order that you are working on and maybe we could settle the terms of the order and get
28 that done while we are together today?
29

30 And then maybe that is all we can accomplish to day. I will find out what dates look like
31 that will be available in our targeted timeslot. I will do my best to try to protect those dates
32 but pending some more information around what impact the appeal may have on the
33 timeline or whether even if you get an expedited hearing that may not impact it at all.
34

35 So, what we can do is just arrange another case conference a little bit down the road to just
36 see where we are at to decide when we lock in and start putting into shape an oral hearing
37 order.
38

39 So why do we not take -- it is 11:18, may I suggest that we take a 20 minute or if that is
40 enough time or half hour break, do you want to say half hour to 11:45 and then if you can
41 just email me the form of order or orders that you are debating, let's see if we can settle the

1 terms of that order.

2

3 MS. LECLAIR: Justice Kirker --

4

5 MR. PARKER: Somebody go ahead who was going to speak
6 there, please.

7

8 MS. LECLAIR: It was me Mr. Parker. I was going to say, Justice
9 Kirker, I think we're not reading debating over the form -- we're fighting over the blackline
10 in terms of what is actually being struck out.

11

12 THE COURT: Oh --

13

14 MS. LECLAIR: So I don't know if -- I think Ms. Gerke was going
15 to draft the form of order, but if I'm speaking out of turn let me know. But I think what we
16 are really going back and forth on, is that blackline. So if counsel is amenable and you're
17 amenable, Justice Kirker, it might be more helpful for us to send you the specific portions
18 of the paragraphs that we're not in agreement on.

19

20 THE COURT: Okay. Why do we not do that? Because then
21 maybe I can help you settle that, you can get your order finalized which you are going to
22 need for the appeal in any event. So, should we say -- let's take a half hour break, if you
23 can send me whatever you are working with and then we will just work through the issues
24 you are having and if I am able to provide you with the guidance you need today, or if I
25 need to take it away and read some more, then I will do that. But hopefully we can come
26 to some resolution.

27

28 MS. GERKE: My Lady, if I may interrupt and speak.

29

30 THE COURT: Certainly.

31

32 MS. GERKE: As Ms. LeClair was saying, we're very close, it
33 is simply one claim of relief we're debating over if it's struck or not, we're saying that it
34 wasn't part of the amendments and it wasn't challenged to be struck and they're saying it's
35 your decision that it be struck.

36

37 So and then it's one sentence in another paragraph that follows from that relief. So, I agree
38 with Ms. LeClair's proposal, we are very close. So it should be quick.

39

40 THE COURT: So just send -- you have got my email, so just
41 send through what you have got, let's reconvene let's say at 10 to 12, it will give you time

1 to get organized, take a break and then let's just work through what you are doing. All right.

2

3 (ADJOURNMENT)

4

5 THE COURT: Okay. I will just wait for Mr. Parker and Ms.
6 Gerke to sign on. Your email came through so I have got your email in front of me and I
7 have printed a copy of the amended originating application.

8

9 MS. LECLAIR: I believe Ms. Gerke sent another a few minutes
10 ago, did you get hers well?

11

12 THE COURT: Just a minute, let me see if that came through. It
13 did. Sorry, I was just -- let me just pull this up on my screen where I can see it. There we
14 go. Okay. I understand. So the -- where you are at odds, is 1(k) and 15?

15

16 MS. GERKE: That is correct.

17

18 MR. REJMAN: Madam, or Justice Kirker, I believe 1(l)(v) and
19 1(m)(v), as your comments today that they're restricted to education and age of the school
20 children.

21

22 THE COURT: Right, while insofar as what I struck was that
23 there was any claim based on discriminatory grounds or analogous grounds around the
24 business restrictions, what I said is the age issue (INDISCERNIBLE) -- so any changes
25 and I think I am understanding Ms. LeClair's email to say that you have figured out some
26 language, for example paragraph 9 and 1(h) to address that, just so it is clear. Is that fair?
27 So if you need to tweak the language in 1(l)(v) and 1(m)(v) to make that clear, then you
28 can go ahead and do that. I do not know that it is strictly necessary because you are making
29 that clarification elsewhere.

30

31 MS. GERKE: If I could just speak to that and Mr. Rejman may
32 also want to.

33

34 THE COURT: Yes.

35

36 MS. GERKE: I think we made a bit of an inadvertent error,
37 where in the 1(m)(v) and 1(l)(v), we struck section 15 out completely, but in paragraph 86
38 of your decision from April 30th, it talked about how you did not strike -- that there is no
39 reasonable claim in relation to attendance at school violates section 15.

40

41 THE COURT: Right.

1
2 MS. GERKE: So I think that potentially those should be just
3 adjusted to say section 15 only as it relates to school attendance and age or -- I don't know
4 the exact language.

5
6 THE COURT: I am not even sure that you need to add the
7 clarification in those -- in that paragraph 1, sub-paragraphs because what you are proposing
8 to do, well I guess with 1(h) you are going to highlight the issue with business restrictions
9 is ultra vires and paragraph 9 --

10
11 MS. GERKE: One of the *Charter* --

12
13 THE COURT: You know what, just a minute.

14
15 MS. GERKE: The business restrictions, I believe, is applied as
16 whether they are ultra vires section 29.

17
18 THE COURT: I have got it.

19
20 MS. GERKE: Section 15 is everything should be struck except
21 for as it relates to school age and I think we struck it entirely.

22
23 THE COURT: Sorry, got it, got it. Okay. So yes, there is still a
24 section 15 claim in relation to school restrictions. So you can make that change to make
25 that clear. I did not strike that part of the claim and the other clarifications in 1(h) in
26 paragraph 9 make sense to me. Sorry, I was speaking at cross purposes.

27
28 Now, with respect to the debate you are having around what happens to 1(a) and the last
29 sentence of paragraph 15, so I did in paragraphs 51 through 61 of my decision deal with
30 that amendment to add what I understood was effectively a new claim based on this notion
31 that the Medical Officer of Health was restricted to giving orders against persons, as
32 opposed to more generally, for the reasons I articulated.

33
34 I saw that, and from the submissions made, understood that the addition of that, or what
35 proposed amendment at what was paragraph 10 was to provide, was actually to add some
36 new -- a new basis, if you will, to support the allegations at 1(a) and that last sentence of
37 15. But I also understood that 1(k) and 15 related to the question of delegation, subordinate
38 versus primary.

39
40 And I also, so I must confess, I was not reading 1(k) and 15 as necessarily tied to the ground
41 of person versus more than one person, a single person versus more than one person, but

1 also the challenge to the delegation of authority. And on both fronts, both the proposed
2 amendment to add the claim that the power was limited to a person and the argument that
3 there had been wrongful delegation, I am not sure what is left for 1(k) and the last sentence
4 at 15.

5
6 So, I guess I did not tie those particular parts of the pleading to just the amendment that
7 was proposed that I denied, but also to the delegation question, which I dealt with. So, I
8 am wondering, can I just hear from you on that? Because I guess what I am left thinking
9 about is, on what basis coming out of my decision is there a basis for a declaration that the
10 CMOH orders are effectively rules of general application and therefore *ultra vires*.

11
12 So I tied the concept of rules of general application to two things, I guess is what I am
13 saying. The amendment you proposed to add about orders of general application to multiple
14 people, but also your characterization of the delegation of laws of universal and general
15 application without oversight, time limits or any contextual specificity.

16
17 So, you have used the words, general application in more than one way. There was the
18 delegation issue and the amendment issue. So, I am just wondering is there somewhere else
19 in the pleading where the idea that there of general application leaves a claim to survive?
20

21 MS. GERKE: So, My Lady --

22
23 THE COURT: In the concept -- in the delegation or the limits on
24 the orders? That is what I am struggling with a bit, I do not quite -- I can see where your
25 friends are saying, well what is left of that statement?
26

27 MS. GERKE: Just to clarify, are you referring to paragraph 15,
28 that sentence or the claim under paragraph 1(k)?
29

30 THE COURT: So, 1(k) says: (as read)

31
32 A declaration that all provisions that are effectively rules of general
33 application are *ultra vires* and of no force and effect.
34

35 So, that set out one of the things you are seeking. And then when you get to the legal basis
36 for that declaration, there was the allegation that you wanted to add and that was that they
37 did not -- that section 29 did not grant the Chief Medical Officer of Health the authority to
38 grant orders of general application to multiple people. I did not allow that amendment.
39

40 But you also, as I understand your pleading, argue that the orders are effectively rules, and
41 now I am looking at 15, of general and universal application which if not adhered to by

1 members of the public can result in non-compliance and that they are in both purpose and
2 effect -- the orders -- are legislation and therefore ultra vires. I understood that to be tied to
3 the notion of an unlawful delegation of primary legislating power.

4
5 MS. GERKE: Thank you. I understand --

6
7 THE COURT: That is what I am getting at, so 1(k) you say I
8 would like this declaration and then you set out the legal basis upon which you would ask
9 the Court -- the background, the legal basis -- upon which you would ask the Court to do
10 that. And I understood there were two bases: you said the rules of general application would
11 be found ultra vires and that was because (a), they did not have the power to give orders
12 against more than one person and (b) unlawful delegation of legislative authority.

13
14 Is there another legal basis in your pleading apart from those two, which I both think deal
15 -- I understood you relied on for the declaration, that you say that declaration could be
16 limited? I guess what I am saying is I do not think it is limited to my decision on the
17 amendment.

18
19 MS. GERKE: I think I am understanding. Thank you. No, there
20 is not another legal basis that was our -- and I'm mostly going to let my friend Mr. Rejman
21 speak to this (INDISCERNIBLE) -- so he wants to. But the basis for our position was
22 essentially that the -- it wasn't a proposed amendment, so that didn't count and then the
23 paragraph -- sorry I am flipping through the decision here -- yes so the paragraph 51 to 61
24 of your decision was specifically related to the proposed amendment, which this wasn't.

25
26 And then that the no reasonable claim striking specifically my reading was about section
27 29(2)(b)(i) and 2.1(b), whereas this is more general in terms of the provisions of the order.
28 But, I mean, we are here seeking your direction because there are a lot of moving pieces
29 here so that was the basis for our (INDISCERNIBLE).

30
31 THE COURT: Okay. I see what you are saying Ms. Gerke, I did
32 not specifically in my decision talk about 1(k) or that last sentence of paragraph 15. But
33 this was a bit of a challenge because of the way the pleadings set up to know what fell away
34 from those substantive issues I wrestled with.

35
36 And I guess what I am -- I think what your friends are saying is on what basis is there
37 anything -- what is the legal basis upon which the Court would now give that declaration?
38 I do not want the hearing Justice to get this and say, okay, so the issue about whether the
39 order making power went beyond individual people is not in front of me and the delegation
40 of authority -- subject to what the Court of Appeal may say, of course -- but the delegation
41 of rule making authority is not in front of me. So when I am looking at this pleading, on

1 what basis am I making a declaration that all provisions of the order currently in force are
2 effectively rules of general application and therefore ultra vires. That is what I am asking
3 you.
4

5 What else is there, what is the legal basis that is left flowing from my decision that would
6 be the underpinning of that declaration? Because I can tell you that the first thing one of
7 my colleagues is going to do is sit down and -- that is why I asked for the blackline, they
8 are going to read through and they are going to say, okay, so what are they asking for? And
9 then they are going to make notes about the basis for each of these things.
10

11 And I think what effectively your friends are saying is that the basis for that declaration
12 has fallen away in my decision, so my intention in directing the black line was to make
13 clear what issues were and were not on the table as a consequence in my decision. I am not
14 sure that there is any basis left for the declaration at 1(a) or the finding that you asked for
15 at the end of 15, that because they are rules of general and universal application, they are
16 ultra vires.
17

18 And there were two ways I understand you were coming at that and I am just wondering,
19 is there another way you come at that that I am not seeing? My instinct is, based on my
20 decision is that there is no basis flowing from what I struck or did not allow for that
21 particular remedy.
22

23 MS. GERKE: And I -- I understand if you are considering this
24 under the delegation of authority. I think that that argument was more based on striking the
25 specific provisions in the -- or the specific take whatever steps are necessary phrase in
26 section 29 of the *Public Health Act* to say this is authority that is not without -- or does not
27 have limits attached to it and the Chief Medical Officer of Health, shouldn't have this
28 authority and I realize that is off the table now.
29

30 THE COURT: Okay.
31

32 MS. GERKE: It's more of saying, you know, one provision was
33 essentially from the legislation. This is a relief that looks specifically more at the orders
34 and things in these orders have it. But I mean I'm also going to invite Mr. Rejman if he has
35 -- if he has thoughts. Like I said, we're here seeking direction about this.
36

37 MR. REJMAN: If I may chime in Justice Kirker, it's Martin.
38

39 THE COURT: Go ahead.
40

41 MR. REJMAN: And I do apologize, we are having a bandwidth

1 issue, so I've turned off the video.

2

3 THE COURT: That is fine.

4

5 MR. REJMAN: But with respect to these two paragraphs, the
6 legal basis, the way I look at it, is that there is a difference between an order that affects
7 every single person in Alberta versus every single person identifiable that is infected. That's
8 the difference, the way I read things. Is that we would take the position that the CMOH
9 orders don't have the authority to restrict every healthy person in Alberta, but that they are
10 only restricted and section 29 -- the impugned sections of the *Public Health Act* are
11 restricted to only those identifiable grounds that are infected.

12

13 So, there is a difference in our opinion that the general population versus those that are
14 specifically infected and need to quarantine to stop the spread.

15

16 THE COURT: And so what you say that those parts of the
17 pleadings should stay where they are because they are tied question about whether the
18 exercise of the authority delegated under section 29 is inconsistent with the purpose of the
19 *Public Health Act* or the means designated to achieve its purpose.

20

21 MR. REJMAN: That's correct.

22

23 THE COURT: At paragraph 51 of my decision, I made the point
24 that:

25

26 The Respondents acknowledge that an exercise of the authority
27 delegated in section 29 that is inconsistent with the purpose of the
28 *Public Health Act*, or the means designated to achieve its purpose,
29 would be beyond the CMOH's delegated power and subject to judicial
30 review.

31

32 So are you saying Mr. Rejman --

33

34 MR. REJMAN: That's correct.

35

36 THE COURT: -- those 1(k) and the last paragraph of 15, are tied
37 to that narrow question and that the grounds -- the amendment that I disallowed, that is the
38 addition to the pleading about single person versus multiple persons and the delegation of
39 authority they are off the table, but would not be the basis upon which that declaration
40 would be sought?

41

1 MR. REJMAN: Yes, My Lady.

2

3 THE COURT: So, Ms. LeClair, does that make sense? I think
4 the issue is on what basis would that declaration flow and the only basis I guess would be
5 that if the authority was inconsistent for the purpose of the Act or the means designated to
6 achieve the Act, although it is a little clunky as currently drafted.

7

8 MS. LECLAIR: So, we understood it I think the same way you
9 did, Justice Kirker, that this paragraph 1(k) and the final sentence of paragraph 15, was
10 expressly tied to this declaration about the primary and subordinate legislation which is
11 why we set it should be struck.

12

13 So --

14

15 THE COURT: But I guess what Mr. Rejman and Ms. Gerke are
16 pointing is that there is an issue that survived my decision and that is whether you exercised
17 authority inconsistent with the *Public Health Act*.

18

19 MS. LECLAIR: Right.

20

21 THE COURT: Beyond the delegated power. So --

22

23 MS. LECLAIR: But is that not captured by the amendment at
24 section 8 --

25

26 THE COURT: So let's have -- I was going to say is there
27 somewhere else in the pleading where that -- I do not want to --

28

29 MS. LECLAIR: 1(h), sorry.

30

31 THE COURT: 1(h)?

32

33 MS. LECLAIR: Yes, that they would be ultra vires section 29, if
34 I understood your decision was they could be ultra vires section 29 if the purpose was a
35 bad faith purpose essentially. So, I still am confused with paragraph 1(k) and 15.

36

37 THE COURT: Okay, I see what you are -- so the amendment at
38 1(h) was permitted, so that is the question of whether effectively the exercise of the
39 authority was ultra vires section 29 and the issue raised at paragraph 51 of my decision.

40

41 What your friends are saying is 1(k) and the end of 15 kind of back it up a step and either

1 speak about (1) the delegation of the authority, which is off the table, subject to what the
2 Court of Appeal has to say or whether that argument that you sought to add that the
3 authority is limited to an order against one person and that when you get to the delegation
4 authority or let's say the scope of it in terms of person versus people there 1(k) falls and the
5 argument Mr. Rejman's saying, well no, there is still an issue about whether the exercise
6 of that authority is ultra vires Medical Officer of Health. Ms. LeClair is pointing out that
7 1(h) captures that.

8
9 So we are back to the kind of confusing question and that is what is the Judge who picks
10 this up for the first time at the end of September and says okay they are wanting me to
11 make this decision on what basis? If there is no basis that survives the striking/amendments
12 preliminary applications then that declaration should probably come out for the sake of
13 clarity.

14
15 And I think the argument you are describing, Mr. Rejman, is the exercise of the delegated
16 authority, that is still in and that amendment was allowed. So, Ms. Gerke, is there -- does
17 that address your concern?

18
19 MS. GERKE: I'd just like to back it up a little bit in regard to
20 the 1(h) amendment. If you are looking at the PDF, that is not the amendment that is going
21 to go in, instead Ms. LeClair provided in her email the wording of that amendment that we
22 have agreed on.

23
24 THE COURT: Yes.

25
26 MS. LECLAIR: You are right, I am sorry, Ms. Gerke.

27
28 THE COURT: Okay. So what you are doing is you are limiting
29 1(h) to business restrictions.

30
31 MS. GERKE: That is correct, because as we understood the
32 decision that amendment was denied, except for as it applies to business restrictions so my
33 friends and I we agreed on that proposed wording.

34
35 THE COURT: So, I guess the question is, how do you capture
36 the part of the applicant's claim, that the exercise of authority delegated in section 29 has
37 to be consistent with the purpose of the *Public Health Act* and the means designated to
38 achieve its purpose? That question survived, so where does that reside in the pleading?
39 That is the question because that fairly resides in the pleading, the intention was not to take
40 that right off the table.

41

1 So, I am just looking for the -- let me just go back -- maybe that -- I am just looking for the
2 amendments here. pandemic So can you point to where in the pleading what I said at
3 paragraph 51 is captured?
4

5 MS. GERKE: I have a proposal to make.
6

7 THE COURT: Okay.
8

9 MS. GERKE: And subject to what my friends think. We could
10 amend paragraph 1(k) so that it explicitly has that wording in it about the exercise of
11 authority. Sorry I lost my wording here. But what you were talking about that wording in
12 paragraph 51, we could add in a phrase in 1(k).
13

14 About the inconsistency, yes. I think that works for us and I think it would clarify this issue
15 because I think that we have sort of come to this conclusion that 1(k) as it is currently
16 drafted pulls us back to this delegated legislative authority part. I think we can agree to that
17 amendment and fix 1(k) to capture this exercise of authority. That would be inconsistent
18 with the purpose of the *Public Health Act*, some wording to that extent if that -- I think that
19 would resolve our concerns there.
20

21 THE COURT: Right and then do you want (h) as you have
22 agreed to and that is the question of whether the orders pertaining to business restrictions
23 are ultra vires, section 29 as kind of a separate question that otherwise survived?
24

25 MS. GERKE: That makes sense to me.
26

27 MS. LECLAIR: That makes sense to me too.
28

29 THE COURT: Okay. I think that is a fair way to resolve it. So, I
30 agree with Ms. LeClair, that to the extent 1(k) or that last sentence of 15 were tied to either
31 delegated authority or the notion of person versus people, those claims are gone, but there
32 is the question about -- as I indicated at paragraph 51 and the respondent has conceded that
33 the exercise of the authority is -- I am just looking for my exact words here -- inconsistent
34 with the purpose or the means designated and that would be open for judicial review.
35

36 So why do you not tweak 1(k) to make that clear and then whoever is reading it understands
37 that it is that narrow question? If that is acceptable to everybody.
38

39 MS. LECLAIR: Thank you My Lady, that sounds good.
40

41 THE COURT: All right. Okay. So I am going to leave it in your

1 capable hands to finalize what needs to be done to that blackline to complete the order and
2 send it along to me. I will let you know as soon as I hear about possible dates and I will
3 simply ask that you let me know what is happening in terms of the timing of the appeal and
4 we can gauge our next case conference around that timing, so that we are not taking steps
5 that will have to be undone for some reason, once we have some sense of what the path
6 looks like, we can work around the timing.

7

8 MS. LECLAIR: My Lady, I can speak a little bit to the timing.

9

10 THE COURT: Okay.

11

12 MS. LECLAIR: Okay. So this is just based on another appeal we
13 have had where for a fast track appeal you write a letter to the case management officer
14 and ask for it and they ask for our position and then opposing -- for our friend's position on
15 it too . And last time the case management officer got back to us within a week and gave
16 us then a month to file an appeal record and then it is about two weeks after that to file a
17 factum. So that is all within about -- if it is a fast track appeal, that is all handled on our
18 side within two months, but we could also make efforts to get done our factum earlier to
19 speed up that process and then I believe my friends would have -- it is either one month to
20 file their factum or it is 10 days before a hearing and a hearing has to be more than 20 days
21 but potentially that would be a month out.

22

23 What I am summarising here is within a week we should know whether it is a fast track
24 and it could happen within three months depending on Court availability and other things,
25 but that would be routine.

26

27 THE COURT: So possibly by the end of August or early
28 September you have it heard.

29

30 MS. LECLAIR: That is without me knowing about Court
31 availability --

32

33 THE COURT: Right.

34

35 MS. LECLAIR: -- et cetera but that is a general deadline.

36

37 THE COURT: And then I suppose there is the issue of the Court
38 having the time to make a decision before a hearing commences. We just do not -- anyway
39 let's do this. I am going to canvass -- I have already sent a note to canvass dates. You let
40 me know what is happening with the request for an expedited appeal and then we will just
41 gauge when our next case conference makes sense, so that we can start to put some bones

1 to that oral hearing order because we could even figure out what an oral hearing order looks
2 like pending an outcome of an appeal for timing.

3
4 And all I am worried about -- we do not have our fall sitting schedule yet, I was hoping
5 that I could -- I might be able to hold onto some dates for you, but the concern is, I cannot
6 necessarily lock anything in if there is a chance that will get upended. So it is okay, we will
7 do with it, but I will do my best to let you know what our options are and then we can -- if
8 we know that it is an expedited appeal we might with some confidence ask that they be
9 held onto.

10
11 Mr. Parker?

12
13 MR. PARKER: Thank you Justice Kirker. I had three other
14 matters for housekeeping that I wanted to just put on your radar either for today or the next
15 case conference.

16
17 The first was other matters that are being filed in QB challenging the same orders or similar
18 orders of the Chief Medical Officer of Health and raising the same or similar *Charter*
19 grounds. We are aware of comments made by ACJ Rooke in a matter involving I believe
20 it is Whistlestop Café suggesting -- I am paraphrasing -- in the interest of judicial economy
21 the section 1 evidence where this may ultimately go, shouldn't be called ten times and his
22 comments were aware of the *Ingram* matter and these matters should potentially be
23 concurrently heard with Ingram or if not heard with Ingram, heard at the same as Ingram,
24 so we are only calling the evidence once.

25
26 I know some -- or at least one of those matters is making its way to us for service and our
27 intent is based on these comments from ACJ Rooke that these matters should come to you
28 to be managed, if you feel this is appropriate, in the same way you've been managing the
29 Ingram matter. So I wanted to put that on the table, that was the first point.

30
31 THE COURT: Well, you can -- I appreciate knowing about ACJ
32 Rooke's indication that it may be that more than one of these actions should be heard at the
33 same time so that you are not having to call the evidence twice. He is aware of the
34 procedural order we have in place here because I had to lean on him, if you recall, when
35 we were working so hard to try to set this out to get the dates for the preliminary
36 application, they had to carve out time for me to get those on and heard.

37
38 And I also put him on notice that we were aiming for those September 20 to October 1st
39 timeslot if at all possible, so that I put the word out in order to be able to secure those dates.
40 So, I certainly have no difficulty in writing to Justice Rooke just to let him know what is
41 happening in this matter. He may or may not ask me to look after it. He might be happy to

1 shepherd those matters that you are sending to him. But what I can do is just when I hear
2 back from our trial coordinator about dates, I will just flag the fact that there may be a
3 couple of other claims that might be heard together. And I will circle with ACJ Rooke
4 about maybe what we should be doing is trying to grab some extra time if they are gong to
5 be heard at the same time.

6
7 I think that would be -- and then the question is whether those matters will be teed-up and
8 ready to go.

9
10 MR. PARKER: Yes.

11
12 THE COURT: So there may be some -- because you know what
13 we do not want is to do all the work we have done on this matter to have it so beautifully
14 prepared and everybody knows exactly what they are doing. And the Justice is getting --
15 there is not a lot of what I have called, white noise, on it because otherwise the Judge
16 hearing it has to make all these preliminary rulings. We have taken that out of the way, so
17 that you can get right to the merits based on the evidence that is there.

18
19 We just probably want to make sure that those other matters have been properly prepared,
20 as well, so that they are not dragging and slowing you down.

21
22 MR. PARKER: Absolutely and it may be that these other matters
23 are better to stand down while a decision is made in Ingram if it goes ahead if it is covering
24 the same issues. I think these are case conference matters when we are served and we will
25 write to ACJ Rooke with these is what we will do then Justice Kirker.

26
27 THE COURT: Can I just ask -- may I just ask this? Is the Justice
28 Centre involved in those other matters?

29
30 MR. GRAY: That's one of the issues, My Lady, I certainly
31 understand from the Attorney General's point of view why they would want to have these
32 heard concurrently around the same time and I think that Mr. Parker has pretty fairly stated
33 what I read Associate Chief Justice Rooke's comments in that injunction decision.

34
35 THE COURT: Okay.

36
37 MR. GRAY: But I think you've also put -- put your finger on
38 our position, that is we really don't want anything to interrupt the progress of his case. We
39 -- our position is that this case is very much on track and as you quite rightly put, everybody
40 has worked very hard.

41

1 To answer you question, we are not counsel for Whistlestop in that case, that is one of the
2 problems procedurally. It's a different type of case and as you know there is an injunction
3 that has penal sanctions attached to it. There may be some -- some consistency in terms of
4 the legal issues, certainly in terms of the *Charter* but there are different parties, different
5 evidence in that application, of course, it is Alberta Health Services is the applicant.

6

7 But the main issue would be -- one of the main issues will be we are not counsel in that
8 case so we are not steering the ship.

9

10 THE COURT: Right.

11

12 MR. GRAY: We would certainly work very hard to cooperate
13 with counsel in that situation if, you know, if things were moved around, we would
14 certainly do our best to cooperate, but Your Ladyship put it very succinctly, we don't want
15 anything to derail the progress of this case. This is the one that we're responsible for and
16 we want this to get heard and along the -- along the lines that are set out in the procedural
17 order.

18

19 That's not to say we disagree with what Mr. Parker has put forward, but if there's a way to
20 do it that doesn't delay the progress of this case, I think we would be very amenable.

21

22 THE COURT: Yes.

23

24 MR. GRAY: But we just -- we don't want to sort of
25 compromise, as you put it, the work that we have done.

26

27 THE COURT: Okay. Okay. I think I understand what the issue
28 is. I will just -- just as Mr. Parker said, just keep it on my radar and I will just make sure
29 that I will let ACJ Rooke know what I am doing in terms of trying to hold onto dates and
30 the issues that arise, both in terms of the efficient use of court resources but perhaps it being
31 more difficult to try to do these things together in all of the circumstances.

32

33 And as Mr. Parker points out, you know, maybe depending on where that matter is, it might
34 benefit from a determination being made in this matter, so that there is no -- that it in fact
35 makes some sense that it stand down. I do not know, I am not making a decision on any of
36 that, but it is helpful to know. So ...

37

38 MR. REJMAN: If I may just briefly provide some comments. I
39 echo Mr. Gray's concerns, as well. We just have a case right now in Federal Court that is
40 very similar in how a number of other matters got attached to it. So -- but those -- all those
41 cases were filed within a two week, three week time window of each other and we were

1 the leading one and the other parties adjusted to the expedited schedule we provided or we
2 had.

3
4 The concern with this one that Justice Rooke is involved with and Mr. Parker has alluded
5 to is that we don't even know where in the proceedings it is currently and with the amount
6 of effort that has already been put to narrow the issues, I imagine that a similar exercise
7 would be taking place in that matter and would definitely delay this matter and prejudice
8 our clients.

9
10 THE COURT: Understood. I think I understand what the issue
11 is. All right. Mr. Parker, do you have anything else, so you said there was a few things by
12 way of housekeeping. There were the other matters being filed?

13
14 MR. PARKER: Yes, two other things, thank you Justice Kirker.
15 Related to the notice of appeal and I just -- we're aiming -- sorry -- the July 12th date is
16 when our rebuttal evidence is due for the order. I'm just -- I'm going to just raise this
17 concern with the notice of appeal and I know my friend is aware that even the Government
18 has limits on its resources. We've now got a lot of evidence due on the 12th and if we've
19 got to also deal with the expedited appeal, we may run into some resource issues.

20
21 And so, we'll have to see when that expedited appeal comes down relative to the July 12th
22 because we've got only so many people we can put on this and we are aiming for the July
23 12th date for our evidence and we're on track for that per the order.

24
25 Sorry, I just wanted to raise that because it is a concern and we'll see when the -- how the
26 fast track appeal comes down and whether that concerns us still. The last point related to
27 the reasonable particulars that my friends have provided, they provided these back in
28 March, I believe. We've taken issue that they are not sufficient in terms of how the
29 applicant's *Charter* rights were allegedly violated and that the particulars should also
30 contain the legal principles relied on at this point.

31
32 We've written to them back in April and again in May. My suggestion on this is we try to
33 resolve this for the balance of the week and if we're not able to resolve this that we could
34 resolve it by written application to you the week after. My friends have sent a document
35 back in March that they say is the reasonable particulars. I don't think it's come to you.

36
37 So my suggestion is, if we can't resolve it by consent, that we would write -- apply for
38 particulars, I don't think more than three pages of written submissions is necessary beyond
39 the attachment the particulars provided and have you resolve it, if it's suitable by way of
40 written submissions.

41

1 And those were the matters I wanted to deal with Justice Kirker.

2

3 MR. GRAY: Madam Justice, I thank my friend for mentioned
4 that actually, it's very timely that he did so. The Jocelyn and I have been working on this
5 and we do have an updated, revised draft that we wanted to get through today to clarify
6 some of the things that will be in those particulars, but we expect we will be able to provide
7 my friends with something before the end of the week and then they can, they can gauge
8 their position decide, whether or not, they will bring a further application to compel
9 additional particulars. But we do have a draft, a working draft that we will finalise for them
10 before then end of the week.

11

12 THE COURT: Why do we not do this? Does it make -- so
13 continue your efforts to try to resolve this and provide -- it is helpful if you can provide
14 particulars that help kind of crystalize what exactly is it that the issues are. So I will leave
15 that in your capable hands to try to sort out.

16

17 If there is still disagreement about whether the particulars provided are adequate, can you
18 keep your briefs to under five pages on that and Mr. Gray, Mr. Rejman, Ms. Gerke; do you
19 agree to having me deal with that issue strictly in writing? I mean if you are not, I have
20 limited time between now and July, but if I am not going to get hit with binders of materials,
21 I can probably find the time to deal with it and issue a written endorsement or arrange to
22 have -- you know -- we can arrange a meeting and I can give you my decision orally.

23

24 But if it is not going to be too cumbersome, I will make the time, if you agree that it can be
25 resolved by way of written argument. And I think we just -- hang on, I have got some
26 bandwidth issues with Mr. Gray, let's just wait till he is back.

27

28 So Mr. Gray, if you are able to still hear us, what I might ask you to do is log off and then
29 log back in, sometimes that fixes the problem.

30

31 MS. GERKE: My Lady, if maybe we can just take a brief 2
32 minute break, I will call him and give him your instructions cause he may not -- he may
33 not hear you.

34

35 THE COURT: Okay. So let's -- you know what let's just turn off
36 our mics and our video just very quickly and Ms. Gerke just pop back on once you have
37 talked to Mr. Gray and we can just warp things up.

38

39 MS. GERKE: Okay.

40

41 THE COURT: So let's just take a real quick break and you can

1 try and get a hold of him.

2

3 MS. GERKE: Thanks.

4

5 (ADJOURNMENT)

6

7 THE COURT: Okay. Ms. Gerke you were able to speak -- oh I
8 will just wait until everybody else is back, sorry.

9

10 MS. GERKE: Okay.

11

12 THE COURT: All right. I see everybody here. So I think the
13 question was whether you think with very brief written submissions I can deal with the
14 question of particulars in writing, I you cannot agree?

15

16 MS. GERKE: Yeah, so I discussed with Leighton and we -- we
17 believe that the revised particulars we are going to provide should satisfy our friends. But
18 also suggested that instead -- like if they still have issues with it, that could be discussed at
19 that next case management call that we are going to touch base with about oral hearing
20 dates and the appeal.

21

22 But we would also be willing to provide written submissions if required, but we think we'll
23 be able to resolve it.

24

25 THE COURT: Okay. So why do we not do this, in terms of the
26 plan? I will let you know what dates I learn about. I am going to ask you to let me know
27 once you know what the status of the appeal is and whether it is being expedited or not. I
28 will also ask that you let me know whether or not you are able to resolve the particulars
29 question.

30

31 And if you are not, you can, (a) arrange a meeting with me through my assistance and I
32 will make myself available on short notice and we can just convene a quick case conference
33 and talk about what to do next. So let's do that first and it may be that that is a real quick
34 conversation around setting some deadlines for some written materials or if it is a really
35 narrow issue, maybe I can just resolve it.

36

37 So let's do that. So if you do not have an agreement on particulars, reach out through my
38 assistant and let's just meet first because I will want to set some deadlines for materials
39 based on my own workload, in any event, before I receive anything from you.

40

41 And I have made a note of some of those other things that are on the radar that we need to

1 try to keep track of here being the other matters filed, deadlines for evidence given demands
2 of appeal and whether those might need to be tweaked which is what I think Mr. Parker is
3 signalling is a possibility and then the question of particulars.
4

5 So just reach out through my assistant as and when you need and I will make myself
6 available and we will try to deal with these moving parts, okay?
7

8 MR. PARKER: Thank you very much, Justice Kirker.
9

10 THE COURT: Okay. Thank you.
11

12 MS. LECLAIR: Thank you.
13

14 MS. GERKE: Thank you.
15

16 THE COURT: Thank you. Have a good afternoon everyone.
17 Thanks very much.
18

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20 PROCEEDINGS CONCLUDED
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1 Certificate of Record

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3 I, Nancy Arevalo, 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 1203, at Calgary, Alberta,
5 on the 1st day of June, 2021 and that I was the court official in charge of the sound-
6 recording machine during the proceedings.

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1 **Certificate of Transcript**

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3 I, Su Zaherie, certify that

4

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

8

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

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17 TEZZ TRANSCRIPTION, Transcriber

18 Order Number: TDS-1014322

19 Dated: August 28, 2022

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