Court of Queen's Bench of Alberta

Citation: Ingram v Alberta (Chief Medical Officer of Health), 2021 ABQB 343

Date: 20210430
Docket: 2001 14300
Registry: Calgary

Between:

Rebecca Marie Ingram, Heights Baptist Church, Northside Baptist Church, Erin Blacklaws and Torry Tanner

Applicants

- and -

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

Respondents

Reasons for Decision
of the
Honourable Justice Anne L. Kirker

Introduction

[1] The Applicants, Rebecca Ingram, Heights Baptist Church, Northside Baptist Church, Erin Blacklaws and Tory Tanner, commenced this action against Her Majesty the Queen in Right of the Province of Alberta and the Chief Medical Officer of Health ("CMOH") by Originating Application on December 7, 2020. On December 21, 2020, I dismissed an injunction application brought by the Applicants to stay restrictions set out in CMOH Order 42-2020. I subsequently issued a procedural order setting out the steps to be taken for the hearing of three preliminary

applications and for the adjudication of the issues raised in the Originating Application in relation to the validity of the CMOH orders issued since March 2020 (the "CMOH Orders") and the challenged sections of the *Public Health Act*, RSA 2000, c P-37 [*Public Health Act*].

[2] This is my decision in relation to two of the preliminary applications.

[3] The Respondents apply pursuant to Rule 3.68 of the *Alberta Rules of Court*, AR 124/2010, to strike parts of the Originating Application as disclosing no reasonable claim.

[4] The Applicants apply pursuant to Rule 3.65 to amend the Originating Application to add claims for additional declaratory relief.

[5] The claims the Respondents ask to have struck and the claims the Applicants seek to add are related, at least in part.

[6] With the proposed amendments, the Applicants seek permission of the Court to advance:

(a) a claim that s. 29(2)(b)(i) of the *Public Health Act* represents an unconstitutional delegation of order-making authority by the Alberta Legislature[1]; and,
(b) a claim that the CMOH Orders issued pursuant to the impugned provisions of s. 29 exceed the authority delegated on the basis that that authority is constrained to "discrete order-making power" directed at "a person".

[7] The Respondents resist these amendments on grounds that the proposed claims are hopeless.

[8] Included in the Respondents' application for an order striking parts of the Originating Application is a request that the Court strike:

(a) The related claims that the delegation of order-making authority in s. 29(2.1) (b) of the *Public Health Act* violate s. 92 of the *Constitution Act, 1867*, and unwritten constitutional principles which take their meaning from the preamble to the *Constitution Act, 1867*; and,
(b) The claim that the CMOH Orders offend s. 1(a) of the *Alberta Bill of Rights*.

[9] The latter claim is not well pleaded in the Originating Application, but is discernably predicated on the assertion that the Applicants have been deprived of property rights without due process of law because the CMOH exceeded the authority delegated by s. 29(2.1) (b) of the *Public Health Act* in ordering the closure of individual businesses and places of work.

[10] The Respondents also ask that the following claims asserted by the Applicants be struck:

(c) The claims that ss. 29(2.1) (b) and 66.1 of the *Public Health Act* offend s. 1(a) of the *Alberta Bill of Rights*, RSA 2000, c A-14 [*Alberta Bill of Rights*];
(d) The claims that s. 29(2.1) (b) of the *Public Health Act*, and the CMOH Orders, offend s. 1(b) of the *Alberta Bill of Rights*;

[1] The Applicants have already made this allegation in relation to s. 29(2.1) (b). They seek to add s. 29(2)(b)(i), and to allege that both sections contravene s. 92 of the *Constitution Act, 1867* (UK) 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*], (the exclusive power of the Provincial Legislature to enact laws), and violate unwritten constitutional principles described as the separation of powers, the democratic principle and the rule of law.

(e) The claims that the ss. 38(1)(c) and 52.6(1)(d) of the *Public Health Act* violate ss. 2, 7, 8 and 9 of the *Canadian Charter of Rights and Freedoms*, being Schedule B to the Canada Act, 1982 (UK), 1982, c 11 [*Charter*]; and,
(f) The claims that the CMOH Orders violate ss. 6(1) and 15 of the *Charter*.

[11] Prior to the hearing, counsel conferred with one another to determine whether any of the issues raised in their respective applications could be resolved by agreement. The foundational Rules demand this of counsel. The Court was advised that the following claims would be struck from the Originating Application by consent:

(a) The claims that ss. 38(1)(c) (mandatory vaccination) and 52.6(1)(d) (entry into a building or onto land without warrant) of the *Public Health Act* violate ss. 2, 7, 8 and 9 of the *Charter*;
(b) The claims that the CMOH Orders unjustifiably infringe the Applicants' rights as Canadian citizens to enter, remain in and leave Canada contrary to s. 6(1) of the *Charter*; and,
(c) The claims that the CMOH Orders limiting attendance at weddings and funerals offend s. 15 of the *Charter*.

[12] Counsel are commended for their work to narrow the issues as much as possible.

The Law

[13] There is no disagreement between the parties in relation to the law that governs their applications.

[14] The foundational purpose of the Rules governing applications to strike pleadings and applications for permission to amend pleadings after they have closed is the same: the objective of the exercise in both cases is to identify the real issues that require adjudication, so that those issues can be determined in a timely way without the unnecessary expenditure of resources, both public and private: ***Grenon v Canada Revenue Agency***, 2017 ABCA 96 at para 7, leave to appeal to the SCC refused, and ***Pace v Economical Mutual Insurance***, 2021 ABCA 1 at para 50.

Applications to Strike Claims

[15] The law in relation to applications to strike informs the determination of whether proposed amendments to pleadings are hopeless. I therefore begin with the test for striking all or part of a pleading.

[16] A claim may be struck under Rule 3.68 if it discloses "no reasonable claim", meaning that it has no reasonable prospect of success: ***HOOPP Realty Inc v The Guarantee Company of North America***, 2015 ABCA 336 at para 13. This is the primary ground upon which the Respondents say parts of the Applicants' pleading should be struck. The Respondents alternatively argue that the impugned parts of the Originating Application are frivolous, irrelevant or improper, although I note that if a pleading discloses a reasonable claim, it cannot fairly be characterized as improper: William A Stevenson & Jean E Côté, *Alberta Civil Procedure Handbook*, 2019 ed by Jean E Côté, F F Slatter & Vivian Stevenson (Edmonton: Juriliber, 2019) vol 1 at 3-123.

[17] There is no dispute between the parties that an application to strike under Rule 3.68 is available for Originating Applications: ***Fort McKay Métis Community Association v Métis Nation of Alberta Association***, 2019 ABQB 892; ***Said v Alberta (Workers' Compensation Board)***, 2018 ABQB 593.

[18] The Alberta Court of Appeal decision in ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2021 ABCA 16 at para 70 provides guidance with respect to the application of the test:

> … an application to strike out a pleading under R. 3.68(2)(b) for failure to disclose a cause of action is dealt with based on the pleadings. The facts as pled are assumed to be true, and no evidence is permitted on the motion. A claim will be read "generously", and will only be struck if it is plain and obvious that the pleading discloses no reasonable cause of action, assuming the facts pled are true: *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 21, [2011] 3 SCR 45. In order to avoid overly restraining the evolution of the common law, a claim will not be struck out merely because it is novel, but a claim will not be allowed to proceed just because it is novel: *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19 at para. 19.

[19] The burden rests upon the Respondents to prove beyond a doubt that the claim will fail: ***Clark v Hunka***, 2017 ABCA 346 at para 20, leave to appeal to the Supreme Court of Canada refused.

Applications to Amend Pleadings

[20] As a general rule, any pleading can be amended, no matter how careless or late the party is in seeking to amend, unless an established exception to the rule applies.

[21] In ***AARC Society v Canadian Broadcasting Corporation***, 2019 ABCA 125 at paras 51 - 66, leave to appeal to the SCC refused, Justice Wakeling explained the purpose amendments serve and the reasons for denying permission to amend in some circumstances:

> The Alberta Rules of Court expressly authorize a court to permit a party to amend a pleading. Surprisingly, no provision states when it is appropriate to grant or deny that permission.
>
> Courts have filled the void.
>
> A court should exercise its discretion and allow a party to amend a pleading after the close of pleadings unless there is a compelling reason not to. The non-moving party bears the burden of demonstrating that there is a compelling reason not to allow the proposed amendment.
>
> There are at least two sound reasons for this presumption in favor of allowing amendments.
>
> First, the goal of pleadings is to identify the issues that the action presents for judicial resolution. Rule 1.2(2)(a) of the Alberta Rules of Court declares that "these rules are intended to be used … to identify the real issues in dispute."
>
> Second, s. 8 of the *Judicature Act* also declares that a court must exercise its jurisdiction "so that as far as possible all matters in controversy between the

> parties can be completely determined and all multiplicity of legal proceedings concerning these matters avoided."
>
> There are two distinct interests that must be considered when a court assesses the merits of an amendment application.
>
> First, the impact the proposed amendment will have on the non-moving party's litigation experience must be ascertained and evaluated.
>
> The second is the public interest. Unresolved disputes are not a social benefit. The public interest is promoted by protocols that resolve litigation as quickly as reasonably possible without the expenditure of more public and private resources than is reasonably necessary. This interest must be recognized and assessed.
>
> Historically, little attention has been accorded the public interest; the focus has largely been on the effect an amendment will have on the non-moving party.
>
> This disparate treatment of these two important interests is inconsistent with the foundational rules of the Alberta Rules of Court, in effect as of November 1, 2010.
>
> Part 1 of the Alberta Rules of Court – the home of the foundational rules – requires a court to be a careful steward of public resources. This objective compels consideration of the impact an action featuring the proposed amendment will have on the timely resolution of the dispute and its ultimate cost in terms of both public and private resources.
>
> It has been generally recognized for some time that there is a compelling reason to disallow a proposed amendment if it falls within one of three narrowly defined exceptions that are relevant when assessing the interests of the non-moving party or parties.
>
> The first exception prohibits an amendment that if granted would cause the non-moving party significant prejudice not compensable in costs. The non-moving party bears the burden of establishing that it would suffer this detriment.
>
> The second proscribes hopeless amendments. Why allow a pleading to be amended if it may be struck on the ground that it discloses no cause of action or is time-barred? Why allow an amendment to a pleading that advances a claim to which there is a rock-solid limitations defence?
>
> The third bans amendments that are the product of bad faith. [citations and footnotes omitted]

[22] Justice Pentelechuk concurred in the result, and expressly agreed with this statement of the law. McDonald JA dissented, however, his dissent did not take issue with the legal test for striking a claim; rather, he concluded the limitation period had expired thereby making the amendment hopeless.

[23] The Respondents in this case argue only that the proposed amendments are hopeless. A proposed amendment may be hopeless if it does not disclose a cause of action or if the moving party fails to satisfy the low evidentiary threshold required to support the amendment: ***Attila***

Dogan Construction and Installation Co Inc v AMEC Americas Limited, 2014 ABCA 74 at paras 26-27.

Issues

[24] On the basis of the law I have just summarized, the questions I must answer are these:

(a) Do the claims, and proposed claims, that the delegation of order-making authority in ss. 29(2)(b)(i) and 29(2.1) (b) of the *Public Health Act* contravene s. 92 of the *Constitution Act, 1867* and unwritten constitutional principles have any reasonable prospect of success?

(b) Is there any basis upon which the Court can reasonably find that the CMOH has exceeded the authority delegated to medical officers of health by ss. 29(2)(b)(i) and 29(2.1) (b) of the *Public Health Act* as alleged in the proposed amendment?

(c) Do the claims that the impugned sections of the *Public Health Act* and the CMOH Orders offend ss. 1(a) and/or 1(b) of the *Alberta Bill of Rights* have any reasonable prospect of success?

(d) Do the claims that the CMOH Orders, in so far as they mandate the closure of businesses and restrict attendance at school, violate s.15 of the *Charter*, which guarantees equality before and under the law and the right to the equal protection and benefit of the law, have any reasonable prospect of success?

Analysis

Do the claims of an unconstitutional delegation of law-making authority in ss. 29(2)(b)(i) and 29(2.1) (b) have any prospect of success?

[25] I find they do not.

[26] I accept the Respondents' argument that the law with respect to the Legislature's power to delegate subordinate law-making authority is settled, and that the law, as settled, applies to the delegation in issue in this case.

[27] To allow the claims challenging the delegation of order-making authority in ss. 29(2)(b)(i) and 29(2.1) (b) would be to ignore binding decisions of the Supreme Court of Canada that are determinative of the issue; something this Court cannot do: ***Canada (Attorney General) v Confédération des syndicats nationaux***, 2014 SCC 49 at paras 26-27, [***CSN***], citing ***R v Imperial Tobacco Canada Ltd.***, 2012 QCCA 2034 at paras 125-127.

[28] In ***Hodge v The Queen*** (1883), 9 App Cas 117 at 132 [***Hodge***], the Judicial Committee of the Privy Council (the "Privy Council") confirmed that provincial legislatures "are in no sense delegates of or acting under any mandate from the Imperial Parliament" (at 132) and are thus able to delegate.

[29] The issue in ***Hodge*** was whether an Ontario statute that delegated power to the License Commissioners of Toronto to issue tavern licenses exceeded the competence of the provincial Legislature under s. 92 of the *Constitution Act, 1867*. The Privy Council held that when the *Constitution Act, 1867* established provincial legislatures with exclusive authority to make laws for matters set out in s. 92:

> … it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, of the Parliament of [Canada] would have had …: at 132.

[30] The Privy Council went on to state that provincial legislatures have the power to "confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect": at p. 132.

[31] In ***Re George Edwin Gray*** (1918), 57 SCR 150 [***Re Gray***], the Supreme Court of Canada considered whether Parliament had authority to delegate "to such an extent as to enable the express provisions of a statute to be amended or repealed": at 156 - 157.

[32] The question in ***Re Gray*** was whether an order-in-council made by the Governor in Council pursuant to s. 6 of the *War Measures Act* was *intra vires*. Section 6 of the *War Measures Act, 1914* authorized the Governor in Council to make any orders or regulations that he deemed advisable "by reason of the existence of real or apprehended war, invasion, or insurrection."

[33] The order in issue removed Mr. Gray's exemption from military service. After the Order in Council was passed, Mr. Gray was ordered to report for duty and refusing to do so, was arrested by military authorities. Mr. Gray sought to be discharged asserting his detention was unlawful.

[34] Mr. Gray argued that the powers conferred by s. 6 of the *War Measures Act, 1914* "were not intended to authorize the Governor in Council to legislate inconsistently with any existing statute, and particularly not so as to take away a right (the right of exemption) acquired under a statute" (at 158).

[35] The majority rejected the argument.

[36] Duff J stated that the words of s. 6 of the *War Measures Act, 1914* were "… comprehensive enough to confer authority, for the duration of the war, to 'make orders and regulations' concerning any subject falling within the legislative jurisdiction of parliament – subject only to the condition that the Governor in Council shall deem such 'orders and regulations' to be by reason of the existence of real or apprehended war, etc. advisable": at 166 - 167.

[37] Duff J rejected the argument that s. 6 delegated to the Governor in Council "the whole legislative authority of parliament": at 170. He noted that the authority was "strictly conditioned in two respects": First, it was exercisable during war only. Second, the measures passed under it must be such that the Governor in Council deemed them advisable by reason of war. Duff J stated at page 170:

> There is no attempt to substitute the executive for parliament in the sense of disturbing the existing balance of constitutional authority by aggrandizing the prerogative at the expense of the legislature. The powers granted could at any time be revoked and anything done under them nullified by parliament, which parliament did not, and for that matter could not, abandon any of its own legislative jurisdiction. The true view of the effect of this type of legislation is that

> the subordinate body in which the law-making authority is vested by it is intended to act as the agent or organ of the legislature and that the acts of the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law…

[38] Anglin J, with whom Davies J concurred, stated that short of abdicating its legislative functions "…any limited delegation would seem to be within the ambit of a legislative jurisdiction …": at 176 citing ***Hodge***.

[39] At page 182 Anglin J said:

> … At all events all we, as a court of justice, are concerned with is to satisfy ourselves what powers Parliament intended to confer and that it possessed the legislative jurisdiction requisite to confer them.

[40] In ***Shannon v Lower Mainland Dairy Products Board***, [1938] 4 DLR 81, the Privy Council again confirmed that provincial legislatures were entitled to delegate legislative powers. In that case, the power delegated to the Lieutenant Governor in Council was to "…set up a central British Columbia Marketing Board to establish or approve schemes for the control and regulation within the Province of the transportation, packing, storage and marketing of any natural products … and to vest in those boards any powers considered necessary or advisable to exercise those functions": at 83-84. In rejecting the argument that it was not within the powers of the Provincial Legislature to delegate such legislative powers to the Lieutenant Governor in Council, the Privy Council said at page 87:

> …This objection appears to [be] subversive of the rights which the Provincial Legislature enjoys while dealing with matters falling within the classes of subjects in relation to which the constitution has granted legislative powers. Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament: and it is unnecessary to try to enumerate the innumerable occasions in which Legislatures both Provincial and Dominion and Imperial have entrusted various persons and bodies with similar powers to those contained in this Act.

[41] The practical point made about the innumerable occasions in which legislatures delegate law-making power is well captured by Peter W. Hogg in his text, *Constitutional Law in Canada*, 5th ed (Toronto: Thomas Reuters, 2007) (loose-leaf updated 2019, release 1), at 14-1:

> It is impossible for … any provincial Legislature to enact all of the laws that are needed in its jurisdiction for the purpose of government in any given year. When a legislative scheme is established, … the Legislature will usually enact the scheme in outline only, and will delegate to a subordinate body the power to make laws on matters of detail.

[42] More recently, in ***Reference re Pan-Canadian Securities Regulation***, 2018 SCC 48, [***2018 Securities Reference***], the Supreme Court of Canada considered whether the implementation of pan-Canadian securities regulation under the authority of a single regulator was constitutional and whether a draft federal *Capital Markets Stability Act* exceeded the authority of Parliament under its trade and commerce power under s. 91(2) of the *Constitution Act, 1867*. At paras 73-74, the Supreme Court of Canada confirmed:

> …Parliamentary sovereignty means that the legislature has the authority to enact laws on its own *and* the authority to delegate to some other person or body certain administrative or regulatory powers, including the power to make binding but subordinate rules and regulations. Accordingly, the power to make such rules and regulations is sometimes referred to as a "subordinate law-making power". This kind of delegation occurs quite frequently in the administrative state, where statutory schemes often merely "set out the legislature's basic objects", such that "most of the heavy lifting [gets] done by regulations, adopted by the executive branch of government under orders-in-council" (B. McLachlin, P.C., *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online), see also Hogg (5th ed.), at pp. 14-1 and 14-2).
>
> It should be noted that a delegated power is rooted in and limited by the governing statute, which of course takes precedence over every exercise of that power. More importantly, the sovereign legislature always ultimately retains the complete authority to revoke any such delegated power (*Hodge*, at p. 132; R. Tuck, "Delegation — A Way Over the Constitutional Hurdle" (1945), 23 Can. Bar Rev. 79, at p. 89).

[43] In the recent decision in ***References re Greenhouse Gas Pollution Pricing Act***, 2021 SCC 11, the concept of delegation was reviewed again. After quoting paragraph 74 from the ***2018 Securities Reference***, Chief Justice Wagner, speaking for the majority of the Supreme Court of Canada, reiterated at para 85:

> This Court has consistently held that delegation such as the one at issue in this case is constitutional. Even broad or important powers may be delegated to the executive, so long as the legislature does not abdicate its legislative role. In *Hodge v. The Queen*, (1883) 9 App. Cas. 117, the starting point of the jurisprudence on delegated authority, the Privy Council found that the Ontario legislature's delegation of power to a board to regulate and license taverns was constitutional. The Privy Council held that delegating the power to make "important regulations" did not amount to an abdication of the legislature's role and that the choice and the extent of any such delegation were matters for the legislature, not the courts. Next, in *Re George Edwin Gray* (1918), 57 S.C.R. 150, this Court affirmed the constitutionality of a very broad grant of law-making power by Parliament to the Governor in Council that included a "Henry VIII clause", that is, a clause by which Parliament delegates to the executive the power to make regulations that amend an enabling statute: see also *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708 (P.C.), in which a broad delegation to the provincial executive by way of a provincial skeletal statute was upheld. This Court affirmed and applied *Re Gray* in *Reference as to the Validity of the Regulations in relation to Chemicals*, [1943] S.C.R. 1. And in *R. v. Furtney*, [1991] 3 S.C.R. 89, Stevenson J., writing for a unanimous Court, commented in obiter that "[t]he power of Parliament to delegate its legislative powers has been unquestioned, at least since the *Reference as to the Validity of the Regulations in relation to Chemicals*. The delegate is, of course, always subordinate in that the delegation can be circumscribed and withdrawn": p. 104 (citations omitted). This governing law has been consistently applied by courts of appeal: see, e.g., *R. v. P.*

(J.) (2003), 67 O.R. (3d) 321, at paras. 20-23 (C.A.); *Canadian Generic Pharmaceutical Association v. Canada (Health)*, 2010 FCA 334, [2012] 2 F.C.R. 618, at para. 63; *House of Sga'nisim v. Canada (Attorney General)*, 2013 BCCA 49, 41 B.C.L.R. (5th) 23, at paras. 89-91.

[44] The Applicants may not agree with the law in relation to delegation as it stands, but this Court is bound by what the Supreme Court of Canada has said, and I am not satisfied (nor do the Applicants strenuously argue) that there is any basis upon which this Court can revisit the precedent binding upon it: see ***Carter v Canada (Attorney General)***, 2015 SCC 5 at para 44.

[45] To avoid the consequence of this conclusion, the Applicants alternatively seek to claim that the order-making power delegated to medical officers of health by ss. 29(2)(b)(i) and 29(2.1)(b) is so broad as to amount to an abdication of primary legislative responsibility; that is, that it is unconstitutional on the basis of the settled law in relation to delegation.

[46] Section 29 of the *Public Health Act* provides as follows:

> **Isolation and quarantine**
>
> 29(1) A medical officer of health who knows of or has reason to suspect the existence of a communicable disease or a public health emergency within the boundaries of the health region in which the medical officer of health has jurisdiction may initiate an investigation to determine whether any action is necessary to protect the public health.
>
> (2) Where the investigation confirms the presence of a communicable disease, the medical officer of health
>
> (a) shall carry out the measures that the medical officer of health is required by this Act and the regulations to carry out, and
>
> (b) may do any or all of the following:
>
> (i) take whatever steps the medical officer of health considers necessary
>
> (A) to suppress the disease in those who may already have been infected with it,
>
> (B) to protect those who have not already been exposed to the disease,
>
> (C) to break the chain of transmission and prevent spread of the disease, and
>
> (D) to remove the source of infection;
>
> (ii) by order
>
> (A) prohibit a person from attending a school,
>
> (B) prohibit a person from engaging in the person's occupation, or

(C) prohibit a person from having contact with other persons or any class of persons

for any period and subject to any conditions that the medical officer of health considers appropriate, where the medical officer of health determines that the person's engaging in that activity could transmit an infectious agent;

(iii) issue written orders for the decontamination or destruction of any bedding, clothing or other articles that have been contaminated or that the medical officer of health reasonably suspects have been contaminated.

(2.1) Where the investigation confirms the existence of a public health emergency, the medical officer of health

(a) has all the same powers and duties in respect of the public health emergency as he or she has under subsection (2) in the case of a communicable disease, and

(b) may take whatever other steps are, in the medical officer of health's opinion, necessary in order to lessen the impact of the public health emergency.

(3) A medical officer of health shall forthwith notify the Chief Medical Officer of any action taken under subsection (2)(b) or of the existence of a public health emergency.

(3.1) On being notified of the existence of a public health emergency under subsection (3) the Chief Medical Officer shall forthwith notify the Minister.

(4) The jurisdiction of a medical officer of health extends to any person who is known or suspected to be

(a) infected with a communicable disease, illness or health condition,

(b) a carrier,

(c) a contact,

(d) susceptible to and at risk of contact with a communicable disease, illness or health condition, or

(e) exposed to a chemical agent or radioactive material,

whether or not that person resides within the boundaries of the health region.

[47] The Applicants take particular issue with:

(a) the authority set out in s. 29(2)(b)(i) which permits a medical officer of health to take "whatever steps" the medical officer of health considers necessary to: supress a disease; protect those who have not been exposed; break the chain of

transmission and prevent the spread of disease; and, remove the source of infection; and with,

(b) the authority in 29(2.1) (b) allowing medical officers of health to take "whatever other steps" are, in the medical officer of health's opinion, necessary to lessen the impact of a public health emergency.

[48] The Applicants' characterization of these provisions as the "delegation of laws of universal and general application without oversight, time limits or any contextual specificity" is not born out by a reading of s. 29 as a whole. The delegated powers are limited to circumstances in which the presence of a communicable disease, or the existence of a public health emergency, have been confirmed by investigation. The delegated authority is limited to taking steps to achieve particularized public health objectives and, by order, to prohibiting activity in three contexts. The Chief Medical Officer of Health is required to forthwith notify the Minister of Health of the existence of a public health emergency and the Legislature retains the authority to revoke the delegated power.

[49] This delegation does not, in my view, represent an abdication of legislative responsibility that takes it outside of the binding precedent that provides a complete, certain and final answer to the questions the existing pleading raises with respect to s. 29(2.1) (b) and that the Applicants seek to raise with respect to s. 29(2)(b)(i): ***CSN*** at para 27.

[50] I find that the Applicants' claim in relation to s. 29(2.1) (b) being an unconstitutional delegation of order-making authority should be struck, and that the amendment they seek to add in relation to s. 29(2)(b)(i) should be denied.

Is there any reasonable basis upon which the Court can find that the CMOH has exceeded the authority delegated to medical officers of health by ss. 29(2)(b)(i) and 29(2.1) (b) of the Public Health Act as alleged in the proposed amendment?

[51] The Respondents acknowledge that an exercise of the authority delegated in s. 29 that is inconsistent with the purpose of the *Public Health Act*, or the means designated to achieve its purpose, would be beyond the CMOH's delegated power and subject to judicial review. I will come back to this point when I address the Respondents' application to strike the claim that the CMOH Orders offend s. 1(a) of the *Alberta Bill of Rights*.

[52] With respect to the proposed amendment, what the Applicants seek to add to their pleading at this stage is a new allegation that the CMOH Orders are *ultra vires* s. 29 of the *Public Health Act* because:

> Section 29 of the *Public Health Act* grants order-making power to medical officers of health for three specific scenarios. These three scenarios are all constrained for discrete order-making power directed at "a person". They do not grant power to the Chief Officer of Health to create orders of general application to multiple people that are legislative in purpose and effect. Therefore, the CMOH Orders made since March 2020 regarding COVID-19 are *ultra vires* section 29 of the *Public Health Act*.

[53] The Applicants contend that the CMOH orders are the main issue in this case, so this amendment to the relief sought helps clarify the disputed issues.

[54] As quoted above, s. 29(2)(b)(ii)(A) through (C) permit a medical officer of health to prohibit a person from attending school, from engaging in the person's occupation, or from having contact with other persons or any class of persons for any period and subject to any conditions that that medical officer of health considers appropriate.

[55] In my view, the claim the Applicants' seek to make – that the delegation of order-making power under s. 29 is limited to orders against individual people – depends upon an interpretation of the language of s. 29 that is sure to be rejected.

[56] The words of a statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the Legislature: ***Rizzo & Rizzo Shoes Ltd, Re*** [1998] 1 SCR 27 at para 21 and ***Bell ExpressVu Ltd v Partnership v Rex***, 2002 SCC 42 at para 26.

[57] The *Interpretation Act*, RSA 2000, c I-8, s 10, also provides that "[a]n enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects."

[58] As suggested by its title, the *Public Health Act* serves the remedial purpose of protecting the health of all Albertans. Section 29(1) itself states that: "[a] medical officer of health who knows of or has reason to suspect the existence of a communicable disease or a public health emergency within the boundaries of the health region in which the medical officer of health has jurisdiction may initiate an investigation to determine whether any action is necessary to protect the public health." [emphasis added]

[59] A fair, large and liberal interpretation of s. 29 that best ensures the attainment of the objects of the *Public Health Act* as a whole, and of the section itself, is that it authorizes the issuance of orders against multiple persons. It would make little remedial sense to read s. 29 of the *Public Health Act* as requiring the CMOH to issue separate orders to all individual citizens affected in circumstances like those presented by the COVID-19 pandemic.

[60] Moreover, and as reasonably conceded by counsel for the Applicants during the oral hearing, s. 26(3) of the *Interpretation Act* provides that: "[i]n an enactment, words in the singular include the plural, and words in the plural include the singular."

[61] The Applicants' request for permission to amend the Originating Application to add this new claim is dismissed.

Do the Applicants' claims that ss. 29(2.1) (b) and 66.1 of the *Public Health Act* and the CMOH Orders offend ss. 1(a) and/or 1(b) of the *Alberta Bill of Rights* have any reasonable prospect of success?

[62] The Applicants seek declarations that s. 29(2.1) (b) of the *Public Health Act* and "all provisions of Alberta's [CMOH] Orders currently in force" offend, among other sections, ss. 1(a) and 1(b) of the *Alberta Bill of Rights*.

[63] They also seek a declaration that s. 66.1 of the *Public Health Act* offends s. 1(a) of the *Alberta Bill of Rights*.

[64] The Applicants claim that ss. 29(2.1) (b), 66.1 and the CMOH Orders are, accordingly and respectively, unlawful and of no force or effect pursuant to s. 2 of the *Alberta Bill of Rights*.

[65] Section 2 of the *Alberta Bill of Rights* states that:

> Every law of Alberta shall, unless it is expressly declared by an Act of the Legislature that it operates notwithstanding the *Alberta Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared.

[66] The *Public Health Act* contains no such declaration.

The Claims in relation to Section 1(a) of the Alberta Bill of Rights

[67] I begin with the claims that rest on s. 1(a) of the *Alberta Bill of Rights*.

[68] Justice Major observed in ***Authorson v Canada (Attorney General)***, 2003 SCC 39 at para 34, (in relation to the *Canadian Bill of Rights*), that many of the protections in the *Bill of Rights* gained constitutional status with the adoption of the *Charter* in 1982. However, the *Canadian Bill of Rights* and its counterpart in Alberta provide certain protections not expressly available in the *Charter*. Section 1(a) of the *Alberta Bill of Rights* protects the enjoyment of property; a right to which Albertans cannot be deprived "... except by due process of law." [emphasis added]

[69] It is for this reason that the Applicants, Ms. Ingram in particular, rely upon s. 1(a) of the *Alberta Bill of Rights* for some of the relief they seek. It is their only hope.

[70] The Applicants assert that the CMOH Orders that shut down certain businesses have caused economic hardship, thereby infringing property rights. Because s. 29(2.1)(b) authorizes the making of the CMOH Orders that have infringed property rights, and because the *Public Health Act* does not expressly state that it operates notwithstanding the *Alberta Bill of Rights* as required by s. 2 of the *Bill of Rights*, the Applicants seek a declaration that s. 29(2.1)(b) must be "construed and applied so as not to authorize the abrogation or infringement of" their property (and other s. 1(a) protected) rights.

[71] Further, and insofar as s. 66.1 of the *Public Health Act* prohibits an action for damages against the Respondents for the alleged infringement of the Applicants' property rights, the Applicants claim that s. 66.1 ought to be declared inoperative.

[72] The Respondents argue that these claims have no reasonable prospect of success and should be struck.

[73] The Respondents' position is that even if the Applicants can establish that they have been deprived of their rights to the enjoyment of property, it is beyond question in this case that the deprivation was by due process of law. There is, therefore, no reasonable basis upon which the Court can find that ss. 29(2.1) (b) and 66.1 of the *Public Health Act* offend s. 1(a) of the *Alberta Bill of Rights*.

[74] In ***Authorson***, the Supreme Court of Canada considered whether the due process protections of the equivalent provision of the *Canadian Bill of Rights* would guard against the expropriation of property by passage of valid legislation. A class of disabled World War II veterans challenged legislation that limited the Crown's liability for past interest on their veteran's pension accounts. It was not disputed that the Crown owed a fiduciary duty to the veterans to pay interest on those accounts. The issue was whether the *Department of Veterans Affairs Act*, RSC 1985, c V-1, s 5.1(4), which barred claims for interest before 1990, was inoperative by virtue of the protections afforded to property rights by the *Canadian Bill of Rights*.

[75] Justice Major, speaking for the Supreme Court of Canada, found that due process encompassed procedural rights in the enactment of legislation, but that "the only procedure due any citizen of Canada is that proposed [federal] legislation receive three readings in the Senate and House of Commons and that it receives Royal Assent": at para 37. Justice Major went on to say that: "[o]nce that process is completed, legislation within Parliament's competence is unassailable": at para 37.

[76] The same principle applies in the context of provincial legislation. Because the *Public Health Act* was duly enacted by the Alberta Legislature – there is no dispute it passed three readings and received Royal Assent – there is no reasonable basis upon which the Court can find that the Applicants were deprived of the due process protection afforded them by s. 1(a) of the *Alberta Bill of Rights* in relation to the impugned legislative provisions. I am, consequently, satisfied that these parts of the Originating Application – the allegations that ss. 29(2.1) (b) and 66.1 of the *Public Health Act* offend s. 1(a) of the *Alberta Bill of Rights* - must be struck.

[77] I am unable to reach the same conclusion in relation to the claims that the CMOH Orders themselves offend s. 1(a) of the *Alberta Bill of Rights*. On a generous reading of the claims asserted in the Originating Application, there is an issue raised in relation to whether business restrictions imposed by the CMOH Orders fall within the delegated order-making authority conferred on medical officers of health by the legislation; that is, whether the impugned business restrictions are consistent with the purpose of the *Public Health Act*, and the means designated to achieve its purpose.

[78] If the challenged business restrictions are found to be within the broad order-making authority delegated to the CMOH by the Alberta Legislature when, by due process of law, it enacted the *Public Health Act*, the Applicants acknowledge that there will be no basis to conclude that the CMOH Orders offend s. 1(a) of the *Alberta Bill of Rights*. But, I am not satisfied, on the basis of the material before me, that I can fairly reach that conclusion now. The question has not been considered before. Guided by the Supreme Court of Canada and the Alberta Court of Appeal to err on the side of generosity and permit novel, but arguable, actions to proceed, I find I must dismiss the Respondents' application to strike the claim that the CMOH Orders offend s. 1(a) of the *Alberta Bill of Rights*.

The Claims in relation to Section 1(b) of the Alberta Bill of Rights

[79] Section 1(b) of the Alberta Bill of Rights states:

> 1 It is hereby recognized and declared that in Alberta there exist without discrimination by reason of race, national origin, colour, religion, sexual orientation, sex, gender identity or gender expression, the following human rights and fundamental freedoms, namely:
>
> ...
>
> (b) the right of the individual to equality before the law and the protection of the law [emphasis added].

[80] The Applicants' claim that s. 29(2.1) (b) of the *Public Health Act* and the CMOH Orders offend s. 1(b) of the *Alberta Bill of Rights*. I find these claims have no reasonable prospect of success because even on a generous reading of the Originating Application, there are *no* facts pleaded to explain or support the allegation that the Applicants' rights to equality before the law and the protection of the law have been denied on any of the enumerated grounds set out in s. 1

and highlighted above. Merely pleading conclusions is not enough to establish a reasonable cause of action: ***Grenon*** at para 47; ***GH v Alcock***, 2013 ABCA 24 at para 58.

[81] These parts of the Applicants' claim are therefore struck.

> **Do the claims that the CMOH Orders, in so far as they mandate the closure of businesses and restrict attendance at school, violate s.15 of the *Charter*, which guarantees equality before and under the law and the right to the equal protection and benefit of the law, have any reasonable prospect of success?**

[82] Equality before and under the law, and the right to the equal protection and equal benefit of the law without discrimination, are also protected by s. 15 of the *Charter*.

[83] Section 15(1) of the *Charter* states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[84] Section 15 casts the protection more broadly than the *Alberta Bill of Rights*. It includes age as one of the enumerated grounds of prohibited discrimination. In addition, the use of the words "in particular" before the enumerated grounds indicates that it was not intended to be an exhaustive list: Hogg, *Constitutional Law in Canada*, 5th ed., at 15-9.

[85] Although the Respondents argue that the Applicants "have not pled any facts discerning how this alleged discriminatory action is based on any of the enumerated immutable characteristics" set out in the *Charter*, the Originating Application includes the factual allegation that provisions of the CMOH Orders have included "unequal province wide mandatory restrictions for schools mandating the shutdown of grades 7-12 as of November 30, 2020, but allowing K-6 to remain open."

[86] These pleaded facts support the claim that the CMOH Orders have made distinctions that deny equal benefit or impose an unequal burden on different age groups. Consequently, I cannot fairly conclude that the pleading discloses no reasonable claim that the CMOH Orders in relation to attendance at school violate s. 15 of the *Charter*. Whether the Applicants, or any one of them, can establish that their s. 15 *Charter* rights have been infringed in this way, and whether the Respondents can, in turn, show that the infringement was demonstrably justified as required under s. 1 of the *Charter*, are issues that will be determined when the merits of the claim are adjudicated.

[87] With respect to the claim that the ordered business restrictions violate s. 15 of the *Charter*, the Applicants plead only that the "... CMOH Orders arbitrarily and capriciously shut down certain businesses while allowing others to remain open ..." and that "... the arbitrary closure of individuals' businesses and places of work thus arbitrarily [chooses] winners and losers in breach of section 15 of the *Charter* that guarantees equality before and under the law." Elsewhere in the pleading, they state that the CMOH Orders have inflicted "devastating economic hardship ... upon small business owners and laid off employees", and, in relation to the allegation that the CMOH Orders violate s. 7 of the *Charter* (the right to life, liberty and security of the person), the Applicants refer to the CMOH Orders restricting the ability of "... small business owners to conduct their businesses and earn a living ...".

[88] Here again, and although not well pleaded, I must read the Originating Application as a whole and err on the side of generosity. Reading the Originating Application as generously as I can, it appears that the distinction the Applicants challenge as having been made unconstitutionally by the CMOH Orders in relation to business closures is a distinction between small business owners and other business owners. For the purposes of the application to strike, I must accept that this alleged distinction has been made in the CMOH Orders. The question is whether this fact is capable of supporting a determination that the business closure provisions of the CMOH Orders make a distinction *on discriminatory grounds*, contrary to s. 15 of the *Charter*.

[89] To successfully challenge a law on the basis of s. 15, the Applicants must establish that the distinction made between them and other comparable persons – in this case, an alleged distinction between one or more of them as small business owners and other business owners – imposes on them (directly or indirectly) a disadvantage in the form of a burden or withheld benefit, and that the disadvantage is based on a discriminatory ground listed in s. 15, or on a ground that is analogous to those listed: Hogg, at 55-19.

[90] What do analogous grounds have to have in common with the enumerated grounds? They must be grounds based on personal characteristics that are "immutable or changeable only at unacceptable cost to personal identity": ***Corbiere v Canada (Minister of Indian and Northern Affairs)***, [1999] 2 SCR 203 at para 13. Enumerated grounds are "... grounds that have an impact on individuals stereotypically or that reinforce existing prejudice and disadvantage"; thus, analogous grounds must also exhibit these same criteria: Robert J. Sharpe and Kent Roach, *The Charter of Rights and Freedoms*, 5th edition (Toronto: Irwin Law Inc, 2013) at 335, citing ***Andrews v Law Society of British Columbia***, [1989] 1 SCR 143; ***R v Kapp***, [2008] 2 SCR 483 at para 17; ***Ontario (Attorney General) v Fraser***, 2011 SCC 20 at para 116.

[91] In addition to recognizing sexual orientation (***Egan v Canada***, [1995] 2 SCR 513; ***Vriend v Alberta***, [1998] 1 SCR 493; ***M v H***, [1999] 2 SCR 3) and off-reserve residence for Aboriginal people (***Corbiere***), the Supreme Court of Canada has recognized citizenship and marital status as analogous grounds (see ***Andrews*** and ***Miron v Trudel,*** [1995] 2 SCR 418). Not all of these characteristics are, as Professor Hogg notes (at 55-23) "... immutable in a strong sense ...", but they have impacted individuals stereotypically and in ways that reinforce prejudice and historic disadvantage.

[92] In contrast, the Supreme Court of Canada has, to date, rejected occupation as an analogous ground.

[93] In ***Delisle v Canada (Deputy Attorney General)***, [1999] 2 SCR 989 the exclusion of members of the RCMP from the federal *Public Service Staff Relations Act* could not be challenged under s. 15 of the Charter because the distinction based on occupation was not "functionally immutable": at para 44.

[94] In ***Health Services and Support-Facilities Subsector Bargaining Assn v British Columbia***, 2007 SCC 27 [***Health Services***], the Supreme Court of Canada explained that the distinction that singled out some groups of workers in that case was not an analogous ground under s. 15 of the Charter because the "differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are." at para 165.

[95] Ms. Ingram argues that "it is not inconceivable that [a] Canadian Court may find new analogous grounds to add to the list" and that "the Applicants should not be prejudiced for claiming discrimination where a ground has currently not been recognized because rights and freedoms have never been curtailed or violated to this extent." In effect, they urge me to reject the Respondents' position that it is plain and obvious this part of the Applicants' claim will fail because the business closure provisions of the CMOH Orders are unprecedented and therefore raise novel issues.

[96] While the circumstances of the COVID-19 pandemic are unprecedented and analogous grounds are not closed, these factors alone do not set up a reasonable claim under s. 15 of the *Charter* in the absence of any pleaded "... personal characteristics required to get a discrimination analysis off the ground ...": ***Health Services*** at para 165.

[97] In ***O'Connor Associates Environmental Inc v Mec OP LLC***, 2014 ABCA 140 at para 16, the Alberta Court of Appeal cautioned that:

> ...In determining whether a novel claim has a "reasonable prospect" of success, many factors must be examined. The clarity of the factual pleadings is important. The existence of case law discussing the same or similar causes of action is relevant. As noted in *Imperial Tobacco*, the courts must be careful not to inhibit the development of the common law by applying too strict a test to novel claims. However, the courts must resist the temptation to send every case to trial, even if some legal analysis is needed to determine if a claim has any reasonable prospect of success: *Kripps v Touche Ross & Co.* (1992), 94 DLR (4th) 284 at p. 309, 69 BCLR (2d) 62 (CA).

[98] A distinction based upon the size of the business owned, which is all that is pleaded, is not a distinction made on any of the enumerated grounds in s. 15 of the *Charter*. Business ownership is not a personal characteristic; it lacks the element of functional immutability that is required for it to be an analogous ground. Further, it is in no way alleged that it is a ground that has impacted individuals stereotypically or that reinforces prejudice or disadvantage. The Applicants do not seek to rely upon any such alleged facts. No request for permission to amend the Originating Application in this respect is made.

[99] Consequently, I am satisfied that this part of the Applicants' claim has no reasonable prospect of success. The claim that the CMOH Order business closure requirements unconstitutionally discriminate against the Applicants contrary to s. 15 of the *Charter* are struck out. This means only that s. 15 of the *Charter* is not a proper tool in this case to challenge the impugned CMOH Ordered business closures. The claims that those business closure requirements offend other sections of the *Charter* remain.

Conclusion

[100] The application brought by the Applicants for permission to amend the Originating Application is dismissed, except insofar as they seek to add the words "section 29 of the *Public Health Act*" to the previously pleaded claim (under the heading "The CMOH Orders Are Issued in Contravention of the *Alberta Bill of Rights*") that the CMOH Orders are *ultra vires*. As addressed above, this claim is limited to whether the business restrictions imposed by the CMOH Orders fall within the delegated order-making authority conferred on medical officers of health by s. 29 of the *Public Health Act*.

[101] The associated plea for relief in the form of a declaration that the CMOH Orders issued since March 2020 are *ultra vires* and of no force and effect shall also be permitted.

[102] The application brought by the Respondents for an order striking parts of the Originating Application is granted, in part, as follows. I am ordering struck:

(a) The claims that the delegation of order-making authority in s. 29(2.1) (b) of the *Public Health Act* violate s. 92 of the *Constitution Act, 1867* and unwritten constitutional principles;
(b) The claims that ss. 29(2.1) (b) and 66.1 of the *Public Health Act* offend s. 1(a) of the *Alberta Bill of Rights*;
(c) The claims that s. 29(2.1) (b) of the *Public Health Act* and the CMOH Orders offend s. 1(b) of the *Alberta Bill of Rights*; and,
(d) The claims that the CMOH Orders, insofar as they mandate the closure of businesses, violate 15 of the *Charter*.

[103] For clarity and ease of reference, I ask that in drafting the form of Order, counsel append a "blackline" copy of the Originating Application showing which parts of the claim have been struck by consent or by my direction, and which parts of the claim remain for adjudication.

[104] The parties may arrange to speak to costs if they are unable to agree.

Heard on the 21st day of April, 2021.
Dated at the City of Calgary, Alberta this 30th day of April, 2021.

Justice Anne L. Kirker
J.C.Q.B.A.

Appearances:

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Rath & Company, Barristers and Solicitors
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Nicholas Parker & Brooklyn LeClair
Alberta Justice, Constitutional and Aboriginal Law
for the Respondents, Her Majesty the Queen in Right of the Province of Alberta and the Chief Medical Officer of Health