In the Court of Appeal of Alberta

Citation: Ingram v Alberta, 2026 ABCA 366

Date: 20261113
Docket: 2401-0321AC
Registry: Calgary

Between:

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

Respondents
(Plaintiffs)

- and -

His Majesty the King in right of the Province of Alberta

Appellant
(Defendant)

The Court:

The Honourable Justice Jo'Anne Strekaf
The Honourable Justice Kevin Feehan
The Honourable Justice Joshua B. Hawkes

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice C.C.J. Feasby
Dated the 30th day of October, 2024
Filed on the 25th day of February, 2025
(2024 ABKB 631, Docket: 2301 12271)

Memorandum of Judgment

The Court:

Overview

[1] In response to the Covid-19 pandemic, Alberta's Chief Medical Officer of Health issued various public health orders that placed restrictions on the public, some of which mandated the closure of or otherwise placed restrictions on certain types of businesses (CMOH Orders). The respondents (also referred to as the proposed representative plaintiffs) applied to certify a class action on behalf of a proposed class of business owners, seeking recovery of losses caused by those business restrictions and closures. The certification judge certified causes of action in declaratory relief, negligence, and misfeasance in public office: *Ingram v Alberta*, 2024 ABKB 631 (Certification Decision). The Province of Alberta appeals the certification of the class action.

[2] The certification of the claims in the class action hinges on a finding in an earlier King's Bench decision that certain public health orders, including the CMOH Orders, were *ultra vires* the *Public Health Act*, RSA 2000, c P-37: *Ingram v Alberta (Chief Medical Officer of Health)*, 2023 ABKB 453 (*Ingram 2023*). In an originating application challenging the public health orders, the Court in *Ingram 2023* found that the Chief Medical Officer provided advice and recommendations with respect to the CMOH Orders but the final decisions to issue them were taken by Cabinet or a Cabinet committee (collectively the Cabinet). This process was found to be *ultra vires* the statutory requirements of the *Public Health Act*, which requires that decisions with respect to public health orders be made by the Chief Medical Officer or her statutorily authorized delegate. The CMOH Orders were otherwise found constitutional in *Ingram 2023*, as they were enacted for a valid legislative purpose and were amply and demonstrably justified as reasonable limits pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*.

[3] The class action, as certified, is premised on the failure to follow the correct process in enacting the CMOH Orders, which in turn is alleged to have breached the due process requirement in the *Alberta Bill of Rights*, RSA 2000, c A-14. The alleged negligent conduct therefore does not relate to the substance of the CMOH Orders, but to the process used to enact them. For the reasons that follow, we conclude that the class action pleadings fail to disclose causation - that the alleged procedural defect caused injury to the class members - an essential element of actions in negligence and misfeasance in public office. As a result of this fundamental flaw in the proposed claim, it is plain and obvious that it is bound to fail.

[4] The appeal is allowed and the order certifying the class action is set aside.

The decision in *Ingram 2023*

[5] The decision in *Ingram 2023* considered challenges to public health orders issued by the Chief Medical Officer during the Covid-19 pandemic, including the business closure restrictions imposed by the CMOH Orders at issue on this appeal. The originating application, which was brought by several applicants including Rebecca Ingram, one of the respondents on this appeal, claimed that the impugned orders were unconstitutional as well as *ultra vires* the *Public Health Act*. Affidavit and oral evidence were considered by the Court, including affidavit evidence and oral testimony from the Chief Medical Officer.

[6] In considering whether the impugned orders were *ultra vires* section 29 of the *Public Health Act* because they were made by Cabinet and not the Chief Medical Officer, the Court referred to the decision in *CM v Alberta*, 2022 ABKB 716[1]. *CM* considered an order of the Chief Medical Officer that rescinded a previous order requiring masking in schools. The applicants in *CM* submitted that the Chief Medical Officer acted unreasonably by lifting the masking mandate, a position that the Court in *Ingram 2023* noted was "antithetical" to the position taken by the applicants in that case. Similar to the situation in *Ingram 2023*, the evidence in *CM* was that the Chief Medical Officer made recommendations to elected officials, those officials took the final decisions on policy, and the policy decisions were implemented through the instrument of CMOH orders. The Court in *CM* found that to be an unreasonable interpretation of the *Public Health Act* and an improper sub-delegation of decision-making authority from the Chief Medical Officer.

[7] As in *CM*, the Court in *Ingram 2023* concluded that section 29 of the *Public Health Act* requires such decisions be made by the Chief Medical Officer or her statutorily authorized delegate, and does not permit the Chief Medical Officer to make orders at the direction of Cabinet or any other person not specifically authorized as a delegate under the *Public Health Act*. While the Chief Medical Officer made recommendations with respect to the CMOH Orders, the final decisions were made by Cabinet and implemented by the Chief Medical Officer. As a result, the Court concluded that the CMOH Orders were *ultra vires* the *Public Health Act*. That decision was not appealed.

[8] The Court in *Ingram 2023* went on to consider and reject arguments that the CMOH Orders were unconstitutional and enacted contrary to the *Alberta Bill of Rights*. The Court concluded that, had the CMOH Orders been validly enacted by final decision of the Chief Medical Officer rather than by Cabinet, they would not have been unconstitutional. The CMOH Orders were enacted pursuant to a valid legislative purpose and the limitations were "amply and demonstrably justified as reasonable limits in a free and democratic society": *Ingram 2023* at para 5. The Chief Medical Officer's evidence, which was accepted, was that she "stood by her recommendations, ... she did not sign Orders implementing cabinet decisions that were more restrictive than she judged

[1] On appeal, the issues were found to be moot and this Court declined to exercise its discretion to hear the appeal: *CM v Alberta*, 2024 ABCA 136.

necessary", and that "elected officials did not direct her to impose more severe restrictions in the CMOH orders than she had recommended to them": *Ingram 2023* at para 52.

[9] The certified class action at issue on this appeal is based on the finding in *Ingram 2023* that the CMOH Orders issued by the Chief Medical Officer in response to the Covid-19 pandemic were *ultra vires* the *Public Health Act*. The parties to the certification application, as well as the certification judge and the parties on appeal, all relied upon the evidence accepted and findings made in *Ingram 2023*.

The Certification Decision

[10] The proposed representative plaintiffs applied to have an action certified as a class proceeding pursuant to the *Class Proceedings Act*, SA 2003, c C-16.5 on behalf of a proposed class of individual and corporate business owners in Alberta seeking recovery of losses caused by business closure or restrictions imposed by the CMOH Orders. The basis of the claim is that the CMOH Orders were found to be *ultra vires* the *Public Health Act* because the final decisions to issue the CMOH Orders were made by the wrong entity. The claim asserts several causes of action against Alberta and claims that a class proceeding is the most fair and efficient way to determine the claims of the proposed class members.

[11] The certification judge concluded that the preconditions to certification in section 5 of the *Class Proceedings Act* were met for three of the proposed causes of action:

(a) negligence;

(b) misfeasance in public office; and

(c) declaratory relief that the CMOH Orders violated the due process guarantee in section 1(a) of the *Alberta Bill of Rights* because they were promulgated without legal authority and deprived affected persons of the enjoyment of their property.

[12] The certification judge determined that Christopher Scott would be the representative plaintiff and defined the class to be:

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

[13] The common issues were defined as follows:

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

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

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

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

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

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

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

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

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

[14] The certification judge also granted permission for amendments to be made to the statement of claim to include particulars of alleged bad faith on the part of Alberta.

Grounds of Appeal

[15] Alberta submits the Certification Decision should be reversed on the grounds that:

a. It is plain and obvious that all the causes of action are bound to fail and do not pass the test in section 5(1)(a) of the *Class Proceedings Act*;

b. There is no basis in fact for the common issues and they therefore do not satisfy section 5(1)(c) of the *Class Proceedings Act*;

c. There is no basis in fact that a class action is the preferable procedure and satisfies section 5(1)(d) of the *Class Proceedings Act*.

Standard of Review

[16] The standard of review on an appeal of a certification decision depends on the nature of the question. Whether the pleadings disclose a cause of action is a question of law reviewed for correctness: *Pioneer Corp v Godfrey*, 2019 SCC 42 at para 57; *Spring v Goodyear Canada Inc*, 2021 ABCA 182 at para 16. Other aspects of the certification test involve discretion and are reviewed for reasonableness: *Spring* at para 16; *L'Oratoire Saint Joseph de Mont Royal v JJ*, 2019 SCC 35 at paras 10-12.

Analysis

The test for certification of a class proceeding

[17] Section 5(1) of the *Class Proceedings Act* sets out the requirements for certification of a class proceeding. The court must be satisfied that:

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

[18] On a certification application the proposed representative plaintiffs bear the burden to establish that the pleadings disclose a cause of action as required by section 5(1)(a) and to

demonstrate "some basis in fact" for the remaining criteria: *Hollick v Toronto (City)*, 2001 SCC 68 at para 25.

[19] A cause of action is "a set of facts entitling a plaintiff to a remedy": *Grant Thornton LLP v New Brunswick*, 2021 SCC 31 at para 38. In assessing whether the pleadings disclose a cause of action under section 5(1)(a), the court considers the same test as that applied on a motion to strike a claim: whether it is plain and obvious, assuming the facts pleaded to be true, that the claim has no reasonable prospect of success: *Hollick* at para 25; *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 14; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17.

[20] In assessing a proposed cause of action, the court will assume all facts pleaded to be true unless they are manifestly incapable of being proven, and determine on that basis whether the required elements of a cause of action are made out: *Imperial Tobacco* at para 22. The court should also consider whether a deficiency in the pleadings could be remedied through an amendment: *Setoguchi v Uber BV*, 2023 ABCA 45 at para 35.

[21] For the reasons that follow, we conclude that none of the causes of action pleaded in the statement of claim have a reasonable prospect of success as required by section 5(1)(a).

The claim in negligence

[22] The Ontario Court of Appeal recently upheld a decision striking an action alleging negligence and misfeasance in public office against Canada relating to its response to the Covid-19 pandemic: *Hartman v Canada (Attorney General)*, 2026 ONCA 270. While the circumstances are quite different, the analysis of the legal principles governing public authorities' liability in negligence is helpful.

[23] To succeed in a claim in negligence, the plaintiff must establish that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached that duty; (3) the plaintiff suffered damage; and (4) the damage was "caused, in fact and in law, by the defendant's breach": *Hemmings v Padmore*, 2026 SCC 34 at para 42. Pleadings alleging negligence "must be supported by facts capable of sustaining a determination that a duty was owed, that an act or omission occurred breaching that duty, and that damages resulted": *Tottrup v Lund*, 2000 ABCA 121 at para 11, see also *Reilly v Alberta*, 2024 ABCA 270 at para 14.

[24] When negligence is claimed against a public authority, the pleadings must allege that the public authority owes a private law duty of care to the plaintiff. The court will use the "*Anns/Cooper*" test for this inquiry: *Cooper v Hobart*, 2001 SCC 79; *Nelson (City) v Marchi*, 2021 SCC 41 at para 16. If the claim does not fall within or is not analogous to an established duty of care, the court will consider: (1) if the relationship between the parties discloses sufficient foreseeability and proximity to establish a *prima facie* duty of care, and (2) if the answer to the first question is yes, are there residual policy considerations that negate or otherwise preclude the existence of such a duty: *Hartman* at para 31; *Cooper* at paras 30-39; *Nelson* at paras 15-19. The

plaintiff bears the burden of establishing a *prima facie* duty of care. If it is established, the burden shifts to the defendant to demonstrate countervailing policy considerations sufficient to negate the duty: *Childs v Desormeaux*, 2006 SCC 18 at para 13.

[25] Regulatory actions taken by government and its delegates generally do not lend themselves to the requisite foreseeability and proximity to create a private law duty of care, as the duties owed are to the public in general rather than individuals. As the Ontario Court of Appeal noted in *Hartman* at para 33:

> While some statutes may impose duties on public authorities with respect to particular individuals, more often statutes are aimed at public goods and broad policy goals. In such cases it is often difficult to infer that the legislature intended to create private law tort duties towards the plaintiffs. This will be especially true if the recognition of a private law duty would conflict with the public authority's duty to the public.

Where proximity is said to have arisen from specific interactions, if a finding of proximity would conflict with the public authority's statutory duty the court may hold that no proximity arises: *Hartman* at para 34; *Imperial Tobacco* at para 45.

[26] If the plaintiff is able to establish a *prima facie* duty of care, the onus shifts to the defendant to establish residual policy considerations that might negate or limit the existence of a duty of care. The policy concerns implicated in establishing a private relationship involving a public body are complex: *Ernst v Alberta (Energy Resources Conservation Board)*, 2014 ABCA 285 at paras 16-17. Such considerations may include: that the government body was exercising a policy rather than an operational decision (*Imperial Tobacco* at para 86); the possibility of unlimited liability to an unlimited class (*Cooper* at para 37) may result in the government being responsible for paying private damages in an indeterminate amount and have a chilling effect on its willingness to act under its regulatory powers (*Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 74); and whether the law already provides a remedy (*Cooper* at para 37), such as actions for breach of statutory duty where the proper remedy is judicial review for invalidity (*Holland v Saskatchewan*, 2008 SCC 42 at para 9).

[27] In *Holland*, the Supreme Court noted that "mere breach of a statutory duty does not constitute negligence" (citing *The Queen in right of Canada v Saskatchewan Wheat Pool*, 1983 CanLII 21 (SCC), [1983] 1 SCR 205), and stated, at para 9:

> The proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity. The appellant pursued this remedy before Gerein C.J.Q.B. and obtained a declaration that the government's action of reducing the herd certification status was unlawful and invalid. No parallel action lies in tort.

[28] Similar principles apply here. The proper remedy for a breach of duty by public officials in acting without statutory authority is judicial review for invalidity; the respondent Ingram has sought and obtained that remedy. Moreover, the *Public Health Act* contains a clear immunity clause in section 66.1(1) for anything done in good faith under it or any other enactment, and imposes clear duties on public health officials that would conflict with a private law duty of care to an individual: *Taylor v Canada (Attorney General)*, 2012 ONCA 479 at para 78. Policy considerations would negate recognition of a duty of care under the *Public Health Act*. This was also the conclusion of the Ontario Court of Appeal in *Hartman*, which noted that the federal statutory scheme governing public health "establishes duties owed to the general public rather than to particular individuals or groups", consistent with "a growing body of jurisprudence which has declined to impose private law duties of care in the context of government policy decisions which are made in response to health emergencies impacting the general population": *Hartman* at para 39.

[29] The certification judge dismissed similar arguments based on the finding in *Ingram 2023* that the impugned decisions in the CMOH Orders were *ultra vires* and therefore "not made by public health decision makers empowered under the [*Public Health Act*]": at paras 30-33, 37. The certification judge also noted that immunity from liability for breach of statutory authority may not apply where "it is established that the law was clearly unconstitutional, or that its enactment was in bad faith or an abuse of power [emphasis in original]": at para 41, citing *Canada (Attorney General) v Power*, 2024 SCC 26 at para 4.

[30] The certification judge's approach to duty of care was grounded in the proposed representative plaintiffs' arguments under the *Alberta Bill of Rights*. He found that the proposed representative plaintiffs were positing a novel duty of care in asserting that the *Alberta Bill of Rights* imposes a duty on Alberta not to deprive individuals of enjoyment of property without due process of law. He concluded it was not plain and obvious that the claim, cast in this manner, would fail (para 24):

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

[31] We do not find it necessary to address further the certification judge's conclusion that the *Alberta Bill of Rights* may impose a positive duty on government to act such that a private duty of care would be owed to the proposed representative plaintiffs in this situation. This is because, as explained below, we conclude that the proposed cause of action suffers from a fatal flaw at the causation stage of the negligence analysis.

[32] Causation of damage is a required element of the tort of negligence and it must be pleaded. "[T]he conduct of a defendant in negligence is wrongful only to the extent that it *causes* damage": *Atlantic Lottery Corp* at paras 37-38. Causation entails two inquiries. First, the defendant's breach must be the factual cause of the plaintiff's loss. Factual causation is generally assessed using the "but for" test. The plaintiff must show on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act: *Hemmings* at paras 42 and 45; *Nelson* at para 96. Second, the court must determine whether the plaintiff's injuries are too remote from the defendant's conduct to assign liability (remoteness of damage, sometimes referred to as legal causation): *Hemmings* at para 42; *Nelson* at para 97.

[33] The wrongful conduct alleged in the pleadings is the promulgation of the CMOH Orders without authority, based on the finding that the final decisions regarding the CMOH Orders were made by Cabinet and implemented by the Chief Medical Officer. In addressing factual causation, the certification judge considered whether the correct counterfactual scenario was "where the CMOH Orders were never made" or "where different CMOH Orders were made *intra vires*" or "something else altogether". He stated:

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

[34] We are satisfied that the certification judge erred in his approach to causation[2]. The problem identified in *Ingram 2023* with the CMOH Orders was procedural; not that the Orders were unconstitutional or otherwise problematic in substance, but that the final decision on their scope was made by Cabinet rather than the Chief Medical Officer. This is the basis on which the proposed representative plaintiffs found their class action. If the identical CMOH Orders had been issued by the Chief Medical Officer or her statutorily authorized delegate, as required by the *Public Health Act*, there would be no negligent act and no claim.

---

[2] On September 4, 2026, the panel invited the parties to make additional submissions on the issue of causation. Additional submissions were received from the appellant on September 18, 2026; no additional submissions were received from the respondents.

[35] There is no pleading to the effect that the Chief Medical Officer did not believe the CMOH Orders, as implemented, were necessary. To the contrary, the evidence of the Chief Medical Officer, accepted in *Ingram 2023*, was that she "stood by her recommendations, and that she did not sign Orders implementing cabinet decision that were more restrictive than she judged necessary ...". It was also clear from her evidence that the Chief Medical Officer believed she was operating under the *Public Health Act* and that the CMOH Orders were promulgated in accordance with the requirements of the *Public Health Act*. In other words, the Chief Medical Officer's opinion was that the CMOH Orders needed to be at least as restrictive as they were.

[36] A plaintiff must establish that its injury would not have occurred "but for" the defendant's negligent act. The defendant's negligent conduct must have been *necessary* to bring about the damage; where the damage would have happened even without the alleged negligent act, causation is not made out: *Clements v Clements,* 2012 SCC 32 at paras 8, 10-11. "A finding of factual causation necessarily entails the exclusion of the counterfactual where the plaintiff's injuries occur regardless of the defendant's breach ... If after considering the counterfactual, the court concludes that 'the damage would have happened just the same, fault or no fault, then the fault is not (the factual) cause of the damage'": *Hemmings* at paras 48-51.

[37] In this context, there is no basis on which a reasonable counterfactual could be found that different, less restrictive public health orders, or no public health orders at all, might have been implemented had the process to promulgate the CMOH Orders been different, with the final decision being made by the Chief Medical Officer rather than by Cabinet. If anything, the proposed representative plaintiffs may have benefitted from CMOH Orders made by Cabinet that were *less* restrictive than if the final decision had been made by the Chief Medical Officer.

[38] The pleadings and the findings from *Ingram 2023*, which all parties have relied upon, do not establish that having Cabinet make the final decision on the CMOH Orders, based on recommendations of the Chief Medical Officer and implemented by her, caused the proposed class of plaintiffs any damage. There is no reasonable prospect that the claim in negligence will succeed. This aspect of the Certification Decision is therefore set aside.

Misfeasance in Public Office/Abuse of Power

[39] Misfeasance in public office is an intentional tort, the underlying purpose of which is "to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions": *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 30.

[40] To establish a claim for misfeasance in public office the plaintiff must demonstrate that a public officer:

1. engaged in deliberate and unlawful conduct in their official capacity; and

2. was aware both that their conduct was unlawful and that it was likely to harm the plaintiff: *Odhavji* at para 23.

[41] At paragraph 22 of *Odhavji*, the Supreme Court endorsed the approach adopted in *Three Rivers District Council v Bank of England (No. 3)*, [2000] 2 WLR 1220, which identified two ways in which the tort can arise:

1. by "conduct that is specifically intended to injure a person or class of persons"; or

2. by "a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff".

[42] There is no suggestion that this case involved the first formulation, that the impugned conduct was specifically intended to injure a class of persons. Nothing in the pleadings or the argument of the respondents suggests that the CMOH Orders were issued for any purpose other than to respond to the pandemic. The conclusion in *Ingram 2023* was to the same effect. In rejecting the argument that the enactment of the CMOH Orders breached the *Canadian Charter of Rights and Freedoms* and the *Alberta Bill of Rights*, the Court found that the impugned orders were enacted pursuant to a "pressing and substantial legislative objective" and were "reasonable limits, demonstrably justified in a free democratic society": *Ingram 2023* at paras 510 and 451.

[43] Rather, the respondents say the tort arises in this case under the second formulation: that the public officials, namely Cabinet, acted with knowledge that their conduct was unlawful in that Cabinet did not have the authority to directly issue the CMOH Orders under the *Public Health Act* as that authority lay with the Chief Medical Officer, and with awareness that this unlawful conduct would likely harm the proposed class.

[44] The Supreme Court in *Odhavji* described the requirement for knowledge or awareness as follows at para 28:

> *The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in a public office requires an element of "bad faith" or "dishonesty".* In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. *Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.* [emphasis added]

[45] In addition to establishing deliberate unlawful conduct and the requisite knowledge, the plaintiff must also establish the requirements common to all torts, including "that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law": *Odhavji* at para 32.

[46] The requirement to establish "bad faith" or "dishonesty" on the part of the public officials is a serious impediment to the claim of the proposed representative plaintiffs. Any "bad faith" alleged here does not relate to the substance of the CMOH Orders. The complaint is with the process, and the "bad faith" acts alleged include that Cabinet sought to obscure its own role in directing or influencing the CMOH Orders, and framed the orders under the *Public Health Act* to deflect public criticism onto public health officials and avoid the political consequences of issuing orders that would be unpopular in some quarters, rather than issuing those same or similar orders under the *Emergency Management Act*, RSA 2000, c E-6.8. It is difficult to see why, if Cabinet's main concern was to "use the CMOH as a shield", as stated in the amended statement of claim, and if Cabinet knew it was acting without proper authority under the *Public Health Act*, it would not simply permit the Chief Medical Officer to issue the CMOH Orders directly in accordance with the requirements of the legislation. As noted above, in *Ingram 2023* the Chief Medical Officer was found to be a credible witness who believed she was operating under the *Public Health Act* in making recommendations to Cabinet and then implementing Cabinet's decisions by way of CMOH Orders. If Cabinet's understanding of its authority differed from that of the Chief Medical Officer, those same CMOH Orders could, and based on the findings in *Ingram 2023*, would, have been issued directly by the Chief Medical Officer without the need for the alleged obfuscation.

[47] It is unnecessary to definitively address the hurdles that would be faced by the proposed representative plaintiffs to establish bad faith in these circumstances. As with the claim in negligence, the misfeasance in public office claim is fundamentally flawed from the perspective of causation. The claim is based on the finding that the CMOH Orders were *ultra vires* because the final decision was made by Cabinet and implemented by the Chief Medical Officer. As described above, having regard to the findings made and evidence of the Chief Medical Officer accepted in *Ingram 2023*, there is no reasonable counterfactual that, if decisions about the CMOH Orders had been made by the Chief Medical Officer rather than Cabinet, less restrictive orders, or no orders at all, would have been imposed. Any harms suffered by the proposed class did not flow from the process used to promulgate the CMOH Orders.

[48] There is no reasonable prospect that this claim will succeed. This aspect of the Certification Decision is set aside.

Declaratory Relief

[49] The proposed representative plaintiffs sought a declaration that Alberta violated the due process rights of the individual class members under section 1(a) of the *Alberta Bill of Rights* in relation to the promulgation, administration, and enforcement of the CMOH Orders because they

were promulgated without legal authority and deprived affected persons of the enjoyment of their property.

[50] Section 1(1)(a.1) of the *Alberta Bill of Rights* states:

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

[51] The certification judge noted that due process in the context of federal legislation and the *Canadian Bill of Rights* "means nothing more than following the steps required by law for enacting statutes": at para 15, citing *Authorson v Canada (Attorney General)*, 2003 SCC 39 at para 37. The certification judge found the submission that due process with respect to the *Public Health Act* required "that the orders be made by a decision-maker with legal authority to make such orders" was "a plausible reading of *Alberta Bill of Rights* s 1(a) that, on the facts pleaded, could result in a finding that individual property rights protected by the *Alberta Bill of Rights* have been infringed": at para 15. He acknowledged Alberta's argument that no independent civil cause of action exists for breach of a statute, based on *Saskatchewan Wheat Pool*, but pointed out that the remedy sought was a declaration, not damages, and reasoned that an action for breach of the *Alberta Bill of Rights* seeking declaratory relief can be a cause of action in the sense contemplated by *Grant Thornton LLP* at para 38 and *Shot Both Sides v Canada*, 2024 SCC 12 at para 66.

[52] The certification judge concluded the claim for a declaration that the CMOH Orders violated the due process guarantee in section 1(a) of the *Alberta Bill of Rights* because they were promulgated without legal authority and deprived affected persons of the enjoyment of their property, disclosed a cause of action as contemplated in section 5(1)(a) of the *Class Proceedings Act.* In the alternative, he found if the pleading that the *Alberta Bill of Rights* section 1(a) has been breached is not a cause of action, it may be relevant to the pleading of negligence.

[53] A declaration is a pronouncement on a legal state of affairs and does not grant any consequential or coercive relief: *Shot Both Sides* at para 65. A declaration can be available without a cause of action and can be made whether or not there is other relief available: *Ewert v Canada*, 2018 SCC 30 at para 81.

[54] A court has the discretion to grant a declaration where:

1. It has jurisdiction to hear the issue;

2. There is a real and not theoretical dispute before the court;

3. The party seeking the declaration has a genuine interest in resolving the dispute; and

4. The respondent has an interest in opposing the declaration sought.

   Ewert at para 81.

[55] A declaration may confirm or deny whether a right has been breached: *Shot Both Sides* at para 66. However, a declaration should generally not be issued if there is no practical utility in doing so, such as when the dispute between the parties is over or has yet to arise. In *Shot Both Sides* at para 68, the Supreme Court noted the importance of practical utility:

> Declarations should not be issued where there is no practical effect. ... The importance of practical utility is well established, including through the following excerpts from academic commentary:
>
> > A declaration must serve some utility to the parties; otherwise, the court speaks for no reason befitting its jurisdiction. Therefore a court should avoid issuing a declaration devoid of tangible or concrete use to the litigants.
> >
> > (Sarna, at p. 46)[3]
> >
> > The courts will not generally grant a declaration that is merely advisory, of no practical utility, or deals with a hypothetical dispute. . . . (A declaration) may also serve a corrective function in that it may authoritatively demonstrate to the defendant that he or she is infringing the claimant's rights.
> >
> > (Zakrzewski, at p. 159)[4]
> >
> > It is essential that the declaration be directed to the determination of legal controversies and produces some real consequences for the parties.
> >
> > (D. Wright, *Remedies* (2nd ed. 2014), at p. 284)[5]

---

[3] Sarna, Lazar. *The Law of Declaratory Judgments*, 4th ed Toronto: Thomson Reuters, 2016.

[4] Zakrzewski, Rafal. *Remedies Reclassified*. New York: Oxford University Press, 2005.

[5] Wright, David. *Remedies*, 2nd ed Sydney, NSW: Federation Press, 2014.

[56] The certification judge stated that if the pleading that the *Alberta Bill of Rights* has been breached is not a cause of action, it may be relevant to the pleading of negligence. That alternate justification for allowing the claim for declaratory relief is no longer relevant as the causes of action for negligence and misfeasance in public office should not have been certified. In the circumstances, it is our view that it would not be appropriate for the class action to proceed where relief would be limited to seeking a declaration that the CMOH Orders violated rights under the *Alberta Bill of Rights*. The proposed representative plaintiffs have already received a declaration that the CMOH Orders were invalid: *Ingram 2023* at para 520. A further declaration, without providing additional remedies, is of little practical utility and does not justify the use of limited court resources.

Conclusion

[57] The appeal is allowed and the certification order is set aside.

Appeal heard on March 10, 2026

Further written submissions received May 28, June 11 and September 18, 2026.

Memorandum filed at Calgary, Alberta
this 13th day of November, 2026

Strekaf J.A.

Authorized to sign for: Feehan J.A.

Hawkes J.A.

Appearances:

J.R.W. Rath
E. Chipiuk
for the Respondents

J.M. Dube
J. Flanders (no appearance)
F. Chiu (no appearance)
J.B. Kingdon (no appearance)
for the Appellant