Court File No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

MOMS STOP THE HARM SOCIETY and LETHBRIDGE OVERDOSE PREVENTION SOCIETY

APPLICANTS
(Appellants)

-and-

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

RESPONDENT
(Respondent)

APPLICATION FOR LEAVE TO APPEAL
(MOMS STOP THE HARM SOCIETY and LETHBRIDGE OVERDOSE PREVENTION SOCIETY, APPLICANTS)
(Pursuant to s. 40(1) of the *Supreme Court Act*, RSC, 1985, c S-26
and Rule 25 of the *Rules of the Supreme Court of Canada*)

NANDA & COMPANY
10007 – 80 Avenue NW
Edmonton, AB T6E 1T4

Avnish Nanda
Tel: 780-916-9860
Fax: 587-318-1391
Email: avnish@nandalaw.ca

Counsel for the Applicants

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855 ext 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Applicants

ALBERTA JUSTICE
10th Floor, 102A Tower
10025 – 102A Avenue
Edmonton, Alberta T5J 2Z2

Lilian Riczu
Nathaniel Gartke

GOWLING WLG (Canada) LLP
2600 - 160 Elgin St
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel.: (613) 786-8695
Fax: (613) 563-9869

Phone: 780-427-4418 / 780-415-2993
Fax: 780-643-0852
Email: lilian.riczu@gov.ab.ca
nathaniel.gartke@gov.ab.ca

Counsel for the Respondent

Email: lynne.watt@gowlingwlg.com

Agent for Counsel for the Respondent

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PART I – STATEMENT OF FACTS

1. The Defendant Her Majesty the Queen in Right of Alberta ("**HMQA**") will soon require supervised consumption service providers in Alberta to demand the personal identification of those accessing their services, and for this information to be stored and disclosed to others without additional consent. The measure will take effect on April 1, 2022.

2. The Alberta Court of Appeal accepted that the measure may be unconstitutional, and would deter people from accessing supervised consumption services and result in their deaths. However, it determined that preventing the death of marginalized, vulnerable people who use illegal substances in Alberta provides a lesser public benefit than postponing the implementation of the measure until its legality can be decided.

3. The Court of Appeal declined to grant the Applicants Moms Stop the Harm Society ("**MSTH**") and Lethbridge Overdose Prevention Society ("**LOPS**") an injunction on the grounds that although people would die from the regulation, it was unable to determine how many people would die, and that HMQA had a mandate to impose the measure even if it would kill people.

4. The decision on appeal represents the first time that a Canadian court has held that preventing the death of human beings is insufficient to enjoin state action that may be unlawful and the source of these deaths.

5. It also reflects a persistent attempt to reconstruct the framework for interlocutory injunctive relief in the constitutional law setting to impose a presumption of constitutionality at the balance of convenience stage of the analysis that an applicant must rebut to enjoin state action. A presumption of constitutionality has been consistently dismissed by this Court and every other jurisdiction in Canada since the enactment of the *Charter of Rights and Freedom*. In 2021, a specially constituted five-member panel of the Alberta Court of Appeal rejected the presumption of constitutionality, ruling that it was not part of the framework for public law injunctions. Despite a majority of the panel rejecting the presumption, it has been resurrected in the underlying appeal, creating significant uncertainty in both the jurisprudence of public law injunctions and administration of justice in Alberta.

6. The intervention of this Court is necessary to prevent a large number of vulnerable Albertans from being put at immediate risk of death and to clarify the correct framework for injunctions based on unconstitutional state action.

A. Overview

7. Alberta is in the midst of an unprecedented overdose crisis that claims the lives of approximately five people each day. These deaths are preventable. They are the result of a toxic supply of illegal substances that contain highly potent opioids such as fentanyl and carfentanil.

8. Foundational to any strategy to prevent overdose deaths is access to low barrier supervised consumption services. These services allow individuals to consume illegal substances safely and receive the interventions needed to reverse an overdose. There has never been a fatal overdose at a supervised consumption site in Canada.

9. The federal government has long regulated supervised consumption services. The primary aim of its regulatory framework found at section 56.1 of the *Controlled Drug and Substances Act* is to expand the availability of supervised consumption services in Canada and ensure low-barrier access to safe spaces for people to consume illegal substances.

10. HMQA enacted a regulatory framework that restricts the delivery of supervised consumption services and erects major barriers to accessing them. The Applicants challenged the constitutionality of the regulatory framework, alleging that it breaches the rights of substance users under the *Charter*; frustrates the purpose behind the federal government's framework for regulating supervised consumption services; and is *ultra vires* to the provincial powers enumerated at section 92 of the *Constitution Act, 1867*. The Applicants then moved to enjoin the implementation of a narrow portion of the framework that would cause the most significant and immediate harm to substance users in Alberta.

11. On April 1, 2022, HMQA will require all supervised consumption service providers in Alberta to request the personal health number ("**PHN**") and other identifying details of those accessing these services, and for this information to be stored and shared with others without any additional consent. Access to supervised consumption services will no longer be anonymous and confidential. Visits to supervised consumption sites will be stored in the province's electronic medical systems and shared with health care providers and police agencies.

12. The Applicants sought to enjoin this requirement as it will cause large numbers of substance users to disengage from supervised consumption services. This will leave them at increased risk of overdose death and other serious harms associated with unsupervised substance use. The measure will only fuel the overdose death crisis in Alberta.

B. The Overdose Crisis in Alberta

13. Between 2016 and 2020, 21,174 Canadians died of an accidental overdose from the consumption of street-sourced, illegal substances.[1] The mortality rate from overdose deaths is so severe that it has reversed a four-decade trend of increasing life expectancy in Canada.[2]

14. Alberta is one of the provinces most grievously impacted by the overdose crisis as measured by the rate and total numbers of deaths.[3] Overdose death rates in Alberta are nearly double the national average and are increasing exponentially year over year.[4]

15. Canadian public health research establishes that low-barrier access to supervised consumption services is critical to stemming the tide of overdose deaths.[5] Supervised consumption services are a harm reduction strategy that provides a safe and clean environment to consume pre-obtained illegal substances under the supervision of staff with first aid or other medical training.[6] They also include the delivery of sterile substance use equipment, safe disposal facilities, education on safer substance use, and access or referrals to health care providers, substance use treatment, and other services.[7]

16. Public health studies, including in the Alberta context, show that people will not consume substances at supervised consumption sites if there is a risk that it may lead to their identification as substance users. Possession of illegal substances is criminalized in Canada and substance users fear

[1] Affidavit of Elaine Hyshka, sworn August 31, 2021 ("**Hyshka Affidavit**") at ¶13.
[2] Hyshka Affidavit at ¶13.
[3] Hyshka Affidavit at ¶17 and Figure 1.
[4] Hyshka Affidavit at ¶17 and ¶18.
[5] Hyshka Affidavit at ¶¶30-39.
[6] Hyshka Affidavit at ¶¶30-39.
[7] Hyshka Affidavit at ¶¶30-39.

legal repercussions and discrimination in other health care settings if their identities are collected and recorded while accessing supervised consumption services.[8]

17. To encourage uptake, supervised consumption services are delivered in an anonymous and confidential manner, akin to testing for sexually transmitted infections.[9] Preserving the anonymity and confidentiality of those requiring supervised consumption services improves the accessibility of these services, and thus achieves two key public health objectives: preventing overdose deaths and decreasing the spread of communicable diseases.

C. The Federal Regime Governing Supervised Consumption Services

18. For decades, the federal government has regulated supervised consumption services through the *Controlled Drug and Substances Act*.[10] Section 56.1 of the *Controlled Drug and Substances Act* grants an exemption to the criminal drug laws for people who consume illegal substances at supervised consumption sites. It recognizes that the alternative is for individuals to consume substances in manners that increase their risk of overdose death and contracting diseases. The section 56.1 exemption framework addresses this public health crisis by providing safe spaces for individuals to consume illegal substances.

19. In 2017, after overdose deaths in Alberta and British Columbia surged to record numbers, the federal government overhauled the section 56.1 exemption framework. The existing regulatory framework made it difficult to open, deliver, and access supervised consumption services despite the clear need to increase access to them to save lives. At the time, only two supervised consumption sites were operating in Canada (both in Vancouver), and the existing regulatory framework made approval contingent on extensive community consultations, background checks, and other onerous conditions.

20. Parliament streamlined the regulatory framework, reducing the number of requirements that applicants would have to meet to obtain a section 56.1 exemption from 26 to only five. The federal government's objective was to increase the availability of supervised consumption services and

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[8] Affidavit of Bernadette Pauly, sworn August 31, 2021 ("**Pauly Affidavit**") at ¶¶12-16; Affidavit of Bonnie Larson, sworn August 31, 2021 ("**Larson Affidavit**") at ¶¶18-19; and Affidavit of Sahil Gupta, sworn August 31, 2021 ("**Gupta Affidavit**") at ¶¶8-16.
[9] Gupta Affidavit at ¶15.
[10] SC 1996, c 19.

ensure low-barrier access to these sites, especially in Alberta and the other regions of the country hardest hit by the overdose crisis.[11]

D. Alberta's Regulatory Framework for Supervised Consumption Services

21. In June 2021, HMQA enacted a new licensing regime for supervised consumption services in Alberta. Operators now require both provincial approval and a section 56.1 exemption to provide supervised consumption services. HMQA took the position that the measures were complementary to the federal requirements set out under the *Controlled Drug and Substances Act*, and operators are required to fulfill both regulatory frameworks to provide supervised consumption services.[12]

22. The provincial framework is set out in the *Mental Health Services Protection Regulation*[13] and Recovery Oriented Overdose Prevention Services Guide[14] (collectively referred to as the "**Regulations**"). The Regulations have a different purpose than the federal government's framework. Instead of increasing the availability of supervised consumption services and facilitating low-barrier access to these services, the aim of the Regulations is to make supervised consumption sites a pathway to direct individuals to recovery centres for their illegal substance use.[15]

23. To achieve this aim, the Regulations have imposed measures on supervised consumption sites that frustrate the aims behind the federal regulatory regime. HMQA has moved away from a delivery model that provides substance users anonymity and confidentiality in accessing supervised consumption services. Service providers must request the PHN and other identifying information from those seeking to access supervised consumption services, and for this information to be stored and shared with others on electronic medical records systems.

24. The measure is a major deterrent to accessing supervised consumption services in Alberta. HMQA says its necessary to make more informed policy decisions in the addictions realm and track the health outcomes of substance users. The Applicants argue that the requirements will deter access to these sites, placing the people who require these services at high risk of overdose death and other harms associated with unsupervised substance use.

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[11] Affidavit of Devyn Ens, sworn August 26, 2021 ("**Ens Affidavit**") at Exhibit "2".
[12] *Mental Health Services Protections Regulation*, Alta Reg 114/2021, s 3.
[13] Alta Reg 114/2021.
[14] Ens Affidavit at Exhibit "4".
[15] *Moms Stop the Harm Society v Alberta*, 2022 ABCA 35 at ¶34.

25. The PHN and personal identification requirements under the Regulation were to take effect in September 2021. Implementation was delayed to January 3, 2022, and then again to February 1, 2022. However, now HMQA has postponed the implementation of the requirement to April 1, 2022.

E. The PHN Requirement Will Lead Many to Die or Suffer Other Serious Harms

26. The Applicants tendered a significant, unchallenged record from both direct and expert witnesses outlining that the personal identification requirement imposed under the Regulations would cause many people to die or suffer other serious harms because it deters substance users from accessing supervised consumption sites.[16] They would rather preserve their anonymity and consume substances in an unsupervised manner, increasing their risk of overdose death or contracting bloodborne and bacterial infections and other injuries that commonly occur with unsupervised substance use.[17]

27. Importantly, the record also establishes that these harms would occur even if personal information was requested and logged into electronic medical records on a voluntary basis. Awareness that this practice was occurring would prevent many substance users from attending supervised consumption services and erode the relationship of trust between substance users and service providers

28. The Applicants also tendered evidence that HMQA's objectives can be achieved without collecting and storing identifying information on people accessing supervised consumption services in Alberta and recording their visits to the facilities in their medical record profiles.[18] Supervised consumption service providers in Alberta routinely connect substance users to other services in the health system and track outcomes while preserving an anonymous space for individuals to consume illegal substances safely.

F. Procedural History

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[16] Affidavit of T.F., sworn August 24, 2021 ("**T.F. Affidavit**") at ¶¶25-27; Affidavit of Timothy Slaney, sworn August 30, 2021 ("**Slaney Affidavit**") at ¶¶75-77; Hyshka Affidavit at ¶169-203; Larson Affidavit at ¶¶28-42; Affidavit of Claire O'Gorman, sworn August 31, 2021 ("**O'Gorman Affidavit**") at ¶¶48-51; Pauly Affidavit at ¶¶23-32; and Gupta Affidavit at ¶¶16-43.

[17] T.F. Affidavit at ¶¶25-27; Slaney Affidavit at ¶¶75-77; Hyshka Affidavit at ¶169-203; Larson Affidavit at ¶¶28-42; O'Gorman Affidavit at ¶¶48-51; Pauly Affidavit at ¶¶23-32; and Gupta Affidavit at ¶¶16-43.

[18] Hyshka Affidavit at ¶196.

i. Court of Queen's Bench of Alberta

29. The Chambers Justice declined to qualify any experts. He was concerned that by accepting portions of the Applicants' extensive evidentiary record, he would be usurping the role of the trial judge, binding them to the findings made in the injunction hearing.[19] But, the Chambers Justice was "prepared to accept that some admissible evidence will be presented at trial supporting the position" of the Applicants that the Regulations create barriers to users accessing supervised consumption services in Alberta.[20] This included the evidence of the proposed experts.[21] No framework or explanation was provided on what was admissible and on what basis but this can be inferred on the findings the Chambers Justice made.

30. The Chambers Justice accepted that the Applicants' claim met the serious issue to be tried prong of the test for injunctive relief.[22] HMQA also conceded that all of the causes of action advanced against the Regulations had merit and the measures were arguably unconstitutional.[23]

31. The Chambers Justice also found that the nature of the harm that substance users would experience if the personal identity requirements of the Regulations were implemented consisted of "serious adverse medical consequences, some of which may result in death."[24] The Chambers Justice was "satisfied that the applicants have met the burden of establishing that irreparable harm will occur to some illicit drug users if the Interlocutory Injunction is not granted."[25]

32. However, the Chambers Justice noted that "quantifying irreparable harm in this case is extremely challenging," and that "the number of illicit drug users who may be impacted by the challenged Regulation is impossible to determine with any degree of precision."[26] This level of precision was infeasible because the injunction application was made before the measures were implemented. The Applicants' objective in acting proactively was to prevent any death or grievous injury resulting from the measures.

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[19] *Moms Stop the Harm Society v Alberta*, 2022 ABQB 24 at ¶8, ¶¶40-44, and ¶53.
[20] *Moms Stop the Harm Society v Alberta*, 2022 ABQB 24 at ¶44.
[21] *Moms Stop the Harm Society v Alberta*, 2022 ABQB 24 at ¶8, ¶¶40-44, and ¶53.
[22] *Moms Stop the Harm Society v Alberta*, 2022 ABQB 24 at ¶¶47-49.
[23] *Moms Stop the Harm Society v Alberta*, 2022 ABQB 24 at ¶49.
[24] *Moms Stop the Harm Society v Alberta*, 2022 ABQB 24 at ¶51.
[25] *Moms Stop the Harm Society v Alberta*, 2022 ABQB 24 at ¶54.
[26] *Moms Stop the Harm Society v Alberta*, 2022 ABQB 24 at ¶52.

33. At the balance of convenience stage of the analysis, the Chambers Justice did not consider the harm to those accessing supervised consumption services in Alberta if the personal identification requirements were implemented and the injunction did not issue.[27] According to the Court, the balance of convenience stage is focused exclusively on assessing the underlying claims prospect of success at trial. However, the Chambers Justice misapprehended or misunderstood the paramountcy argument advanced by the Applicants. Additionally, for reasons that are not clear, the Chambers Justice did not consider the merits of the Applicants various *Charter* claims, including their section 7 *Charter* claim that the measures would deprive substance users of their right to life, liberty, and security of the person interests in manner that fails to accord with the principles of fundamental justice.

34. On this basis, the Chambers Justice dismissed the Applicants' injunction application.

ii. The Court of Appeal of Alberta

35. The Court of Appeal granted an expedited hearing, and although determined that the Chambers Justice made no error warranting its intervention, reached different conclusions at various prongs of the test for injunctive relief.

36. The Chambers Justice found that all the claims advanced by the Applicants were arguable, satisfying the serious issue to be tried stage of the test. However, the Court of Appeal found that only the Applicants' section 7 *Charter* argument provided a serious issue to be tried, rejecting the remaining arguments.[28] This determination was made without the benefits of the arguments for each cause of action being before the Court of Appeal. Unlike the Chambers Justice, who had submissions on each claim advanced, this did not form part of the record before the Court of Appeal given the expedited nature and narrow focus of the appeal. The written submissions tendered for the Chambers Justice that set out the Applicants' position were not returned filed by the court registry until *after* the Court of Appeal hearing due to a black log in civil court filings. The arguments were not before the Court of Appeal before it passed judgment on the viability of the remaining claims, explaining its departure from the Chambers Justice's finding that none of the causes of action advanced should be struck for being frivolous or vexatious.

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[27] *Moms Stop the Harm Society v Alberta*, 2022 ABQB 24 at ¶¶60-70.
[28] *Moms Stop the Harm Society v Alberta*, 2022 ABCA 35 at ¶¶25-27.

37. The Court of Appeal held that the Chambers Justice's finding that substance users will suffer irreparable harm in the form of death and other "serious adverse medical consequences" is entitled to deference and was a reasonable finding based on the record.[29] However, it also reinforced that "it is 'extremely challenging' at this stage of the proceedings to estimate what proportion of potential users might possibly be deterred" by the impugned portions of the Regulations.[30]

38. The Court of Appeal and Chambers Justice maintained that a separate merits-based assessment occurred at the balance of convenience stage of the framework. The Applicants disputed this characterization of the test. The Applicants argued that the merits-based assessment under the test was satisfied if the claims advanced were neither frivolous nor vexatious, demonstrating that there was a serious issue to be tried in the action. That was the extent of a merits assessment under the framework. Requiring two separate merits assessments and at different standards under the same legal test have never been part of the framework, and is both redundant and inconsistent with the evolutionary nature of *Charter* rights.

39. At the Court of Appeal hearing, the Applicants submitted that if a separate merits assessment occurred at the balance of convenience stage of the analysis, the Court should clarify the threshold that applicants must meet to satisfy it because there is no jurisprudential guidance on the matter. In its decision, the Court of Appeal provided the clarity requested in its formulation of the merits assessment that courts are to conduct at this stage of the framework:[31]

> interlocutory judicial intervention is not warranted unless the decisions made by the government are so obviously unreasonable that the *Charter* is engaged, and the challenged policy cannot be justified.

40. The Court of Appeal has adopted a threshold that is so high, few applicants will ever be able to satisfy it. The high threshold articulated by the Court of Appeal also establishes a presumption that the impugned state action is constitutional. It requires courts to engage in an assessment of whether the impugned state action is "so obviously unreasonable" that it violates the *Charter* and cannot be justified under a section 1 analysis.

41. After an applicant rebuts the presumption of constitutionality, a court is to then balance the competing harms in relation to the injunction. In the decision, preventing substance users from dying

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[29] *Moms Stop the Harm Society v Alberta*, 2022 ABCA 35 at ¶32.
[30] *Moms Stop the Harm Society v Alberta*, 2022 ABCA 35 at ¶29.
[31] *Moms Stop the Harm Society v Alberta*, 2022 ABCA 35 at ¶36.

and experiencing other serious health harms was balanced against the public benefit that HMQA's stated objectives behind the impugned state action was intended to achieve. Although the Court of Appeal recognized the harms to be serious and had accepted they would occur, it had no certainty about how many substance users would die of an overdose, acquire a range of bloodborne and bacterial infections, or experience the array of other substantial and irreparable harms that it accepted the impugned state action would cause.

42. Because of this lack of certainty over the number of impacted individuals, and the acceptance that the personal identification requirements under the Regulations pursued a legitimate health care objective that HMQA "has the mandate to make," the balance of convenience favoured maintaining the impugned state action.[32] Allowing HMQA to formulate addictions policy in an unrestricted manner outweighed any public benefit that could be derived from preventing death and serious injuries to substance users in Alberta.

PART II – QUESTIONS IN ISSUE

43. MSTH and LOPS seek leave to appeal on the following issues of public importance:

- whether the balance of convenience stage of the test for injunctive relief in the constitutional setting involves a merits assessment of the underlying claim;
- whether there is a presumption of constitutionality that attaches to the impugned state action that an applicant must rebut to satisfy the threshold for the merits assessment at the balance of convenience stage of the analysis; and
- whether the courts below gave adequate weight at the balance of convenience analysis to death as a harm caused by the impugned state action.

[32] *Moms Stop the Harm Society v Alberta*, 2022 ABCA 35 at ¶34.

PART III – ARGUMENT

A. The Balance of Convenience Framework in Constitutional Injunctions Requires Clarity

i. Canada Currently Has Two Approaches to Assessing the Balance of Convenience

44. Two divergent approaches have emerged in Canadian jurisprudence on the correct framework to assess the balance of convenience in injunctions sought against state action that is alleged to be unconstitutional.

45. In recent years, Alberta courts have reinterpreted the "clear case" threshold in *Harper v Canada* to require two separate merits assessments. The first is at the serious issue to be tried stage of the framework, which requires an applicant to disclose an arguable basis to challenge the impugned state action on constitutional grounds. This is a low-threshold determination that is met if the claims advanced are neither frivolous nor vexatious.

46. At the balance of convenience stage of the analysis, Alberta courts have held that the merits of a claim must be assessed once again. According to the Alberta Court of Appeal in *AC and JF*,[33] a leading 2021 decision rendered by a specially constituted five-member panel to clarify the framework for injunctive relief in the constitutional law context, "the relative strength of the plaintiff's claim is a relevant consideration in the overall assessment of whether to grant the requested relief" and specifically factors in at the balance of convenience stage of the analysis.[34] The prospect of a claim's success at trial will determine if the balance of convenience favours the granting of an injunction.

47. The decision on appeal sets out, for the first time, the threshold that applicants must meet to satisfy the merits assessment at the balance of convenience prong of the test. The impugned state action must be "so obviously unreasonable" that it infringes the *Charter* on its face and cannot be justified pursuant to section 1. Applicants must rebut the presumption that the impugned state action is constitutional to enjoin it under the framework. This is a higher standard than what applicants are required to demonstrate at the serious issue to be tried stage of the test. An applicant must now demonstrate the merits of an action at both a low and high threshold to obtain an injunction against state action that is alleged to be unconstitutional.

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[33] 2021 ABCA 24.
[34] *AC and JF v Alberta*, 2021 ABCA 24 at ¶27.

48. This approach is at odds with the jurisprudence of this Court that has consistently held that the only merits assessment that occurs under the framework is to determine if there is a serious issue to be tried.[35] The "clear cases" threshold at the balance of convenience stage of the test refers to the public interest. An injunction will issue only if the public interest favours one. This determination does not involve a further investigation or assessment of the underlying merits of an action. It involves a balancing of the irreparable harm to the applicant against the impact an injunction will have on the public interest presumption attaches to the impugned state action. There may be additional factors to consider depending on the circumstances, but the balancing of harms is the central consideration and there is no reassessment of the merits of the action as part of this analysis.

49. Injunctive relief is granted in constitutional actions on the grounds that these claims are difficult to resolve in a short period of time and significant harm can be caused while an action proceeds to a full hearing on its merits.[36] They require significant time to decide, and it would be unjust to have individuals suffer serious harms resulting from state action that is arguably unconstitutional while its legality is being decided. It is for this reason that a low threshold assessment of the merits of a claim was adopted for injunctions in the constitutional setting:[37]

> The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim.

50. When it comes to the section 1 analysis in *Charter* claims, this Court expressly rejected the proposition that it should be conducted in an interlocutory injunction. A full record and significant amount of time is required to properly address section 1 justifications, and is not possible in an injunction application brought on an urgent basis at the outset of an action.[38]

51. This Court rejected a robust merits assessment at the first prong of the test for injunctive relief on the same grounds, including that *Charter* rights are evolutionary in nature. This Court held

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[35] *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at pages 337-342.
[36] *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at pages 340-342.
[37] *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at pages 337.
[38] *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at pages 340.

in *Manitoba (AG) v Metropolitan Stores Ltd* that the evolutionary nature of *Charter* rights means that a court may not necessarily have a reliable understanding of the relevant strength of a *Charter* claim at the outset of an action. [39] Courts should not prejudge the outcome of an action on a limited record and without full submissions. This can lead to instances where individuals suffer serious harms and violations of their *Charter* rights while awaiting a full trial on the merits of their claims.

52. The same rationale should result in the rejection of a separate merits assessment at a higher threshold at the balance of convenience stage of the analysis. Assessing the relative strength of constitutional claims premised on *Charter* breaches at the outset of an action and without a complete record will lead to findings at the balance of convenience stage of the analysis that may not actually reflect the merits of the underlying claim. It also permits serious and unnecessary violations of *Charter* rights while a matter is being litigated.

53. The balance of convenience analysis is focused on the harms to the parties in an injunction application and where the public interest lies after assessing the harms. Adding a high threshold merits assessment changes the focus from the public's interest to the underlying claim's likelihood of success at trial. By shifting the focus in this way, this new framework weakens a court's ability to mitigate the harms resulting from arguably unconstitutional conduct pending a final determination on the merits.

54. Courts across Canada have rejected that proposition that the balance of convenience prong of the test for injunctive relief against state action involves a further merits assessment. Most recently, the British Columbia Court of Appeal rejected this formulation of the framework. The "clear case" requirement does not impose "a higher standard in the sense of a strong or highly meritorious argument" but rather "informs the court's task in assessing the second factor of the analysis, irreparable harm," and if the applicant has met its burden of proving "a more compelling public interest" to rebut the public interest presumption that attaches to the impugned state action.[40]

55. This is the correct statement of the law. There are no additional or more rigorous merits assessments at the balance of convenience stage of the test for injunctive relief against state action. The "clear cases" threshold refers to which party has established the more compelling public interest in relation to granting or denying an injunction. An applicant does not have to rebut the presumption

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[39] *Manitoba (A.G.) v. Metropolitan Stores Ltd*., [1987] 1 S.C.R. 110 at pages 123-124.
[40] *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29 at ¶49.

of constitutionality to demonstrate that there is sufficient merit to tip the balance of scales in its favour. It is only required to demonstrate a more compelling public interest in the circumstances.

ii. This Court Must Clarify Whether There is a Presumption of Constitutionality in Injunctions Against State Action

56. The decision on appeal provides the first jurisprudential pronouncement of the threshold that applies to the merits assessment of *Charter* claims at the balance of convenience stage of the injunction framework. It is a high standard. A party must demonstrate that the impugned state action is "so obviously unreasonable" that it infringes the *Charter* on its face and that it cannot be justified pursuant to section 1 of the *Charter*.

57. By requiring Applicants to prove the strength of their case against such a rigorous standard, the Court of Appeal is insulating the impugned state action from being enjoined on an interlocutory injunction application. This requirement operates like a presumption of constitutional validity. An applicant cannot succeed unless they establish a strong case that the law is not constitutional, which means the court is starting with the presumption that the converse is true and the law is constitutional

58. A presumption of constitutionality has been expressly rejected by this Court and every jurisdiction in Canada. In *Metropolitan Stores*, this Court examined whether a presumption exists. It does not: a presumption of constitutionality was found to be antithetical to purpose and context around injunctive relief in the *Charter* setting.[41]

59. Despite the clear pronouncement by this Court that there is no constitutional presumption at the balance of convenience stage of the test for injunctive relief against state action, a dispute has emerged among the Alberta Court of Appeal over its inclusion in the framework. Over the past three years, competing articulations of the framework have been advanced, with certain members of the Court of Appeal asserting that a presumption exists under the test while others reject it.

60. The presumption first emerged in *Alberta Union of Provincial Employees v Alberta*, where in a split decision of the Court of Appeal, the majority found that "there is a strong presumption that legislation is constitutional."[42] The authority for this proposition was the "clear case" threshold identified by this Court in *Harper*.[43] In addition to a presumption of constitutionality, the impugned

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[41] *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 at pages 122-124.
[42] 2019 ABCA 320 at ¶7.
[43] *Alberta Union of Provincial Employees v Alberta*, 2019 ABCA 320 at ¶7.

state action is also deemed to serve a valid public interest. An applicant must rebut both presumptions to satisfy the balance of convenience threshold to obtain injunctive relief under this version of the framework.

61. The dissenting opinion in *AUPE* rejected that *Harper* imposed a presumption of constitutionality at the balance of convenience stage of the framework.[44] Canadian jurisprudence, including the jurisprudence of this Court, establishes that the only presumption that exists under the framework is that state action serves a valid public interest. The presumption of public interest is the only presumption that an applicant must rebut to enjoin state action.

62. In the chambers decision in *AC and JF v Alberta*, the Chambers Justice applied the framework for injunctive relief that included a presumption of constitutionality at the balance of convenience prong of the test.[45] An injunction was issued. The applicants had rebutted the presumption of constitutionality and demonstrated that the public interest was best served through issuing an injunction.

63. HMQA appealed *AC and JF*. The respondents on appeal (the applicants before the Chambers Justice) then moved to reconsider *AUPE* on the grounds that the decision was wrongfully decided. Specifically, that the adoption of a presumption of constitutionality at the balance of convenience stage of the framework was an incorrect statement of the law. The respondent argued that "*AUPE* incorrectly modified and created a more stringent test, applicable when an interim injunction is sought to prevent the implementation of legislation, and that this more stringent test is inconsistent with the test prescribed by other decisions of this Court and of the Supreme Court of Canada."[46]

64. The reconsideration application was heard and granted by a three-member panel of the Court of Appeal who agreed with the respondent's position.[47] This resulted in a five member panel being struck to hear the appeal on its merits with the specific task of clarifying whether the test for injunctive relief in the *Charter* setting included a presumption of constitutionality that an applicant was required to rebut to satisfy this portion of the test. The panel in *AUPE* formed part of the five member panel in *AC and JF*.

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[44] *Alberta Union of Provincial Employees v Alberta*, 2019 ABCA 320 at ¶55.
[45] *AC and JF v Alberta*, 2021 ABCA 24 at ¶13.
[46] *AC and JF v Alberta*, 2020 ABCA 251 at ¶4.
[47] *AC and JF v Alberta*, 2020 ABCA 251 at ¶12.

65. The Court of Appeal in *AC and JF* split on the question of whether a presumption of constitutionality exist at the balance of convenience stage of the test for injunctive relief. However, this time, the framework set out in the *AUPE* dissent was adopted as the correct statement of the law: there is no presumption of constitutionality under the framework. The majority held:[48]

> A presumption of constitutionality is not supported by Supreme Court jurisprudence. There is no presumption of constitutionality anywhere in the test for interim relief, whether at the first or third stage, and any argument to the contrary was laid to rest by the Supreme Court in *Metropolitan Stores*.

66. The dissent in *AC and JF*, who penned the majority decision in *AUPE*, refused to accede to the majority's formulation of the test. They maintained that this Court made an implicit finding that there was a presumption of constitutionality at the balance of convenience stage of the framework in *Harper* and that it must be applied in injunction hearings of this nature.[49] An applicant must rebut the presumption to demonstrate that the balance of convenience favoured the granting of an injunction.

67. Now, in the underlying decision, a panel of the Court of Appeal has resurrected the presumption of constitutionality. An applicant must rebut the presumption by demonstrating that the impugned state action is "so obviously unreasonable" that it breaches the *Charter* and cannot be justified at section 1. Despite the majority in *AC and JF* finding that this is not a correct statement of the law and there is no presumption of constitutionality, the court below found that it did and imposed it as the merits-based threshold applicants must meet to satisfy this element of the test.

68. There is no consensus among members of the Alberta Court of Appeal if the balance of convenience stage of the test for injunctive relief includes a presumption of constitutionality that must be rebutted to enjoin state action. The specially constituted panel convened by the Court of Appeal in *AC and JF* to resolve this issue has not clarified the law nor resulted in a consistent finding at this portion of the test. The version of the balance of convenience stage of the test for injunctive relief that applicants must meet appears to depend on which members of the Court of Appeal are assigned to their panel.

69. The lack of clarity on the correct approach to the balance of convenience stage of the test for injunctive relief against state action is not a trivial matter. The procedure enjoins state conduct

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[48] *AC and JF v Alberta*, 2021 ABCA 24 at ¶35.
[49] *AC and JF v Alberta*, 2021 ABCA 24 at ¶¶114-122.

that is the source of *Charter* and other constitutional infringements. This involves serious harms, including death. The finding that a presumption of constitutionality continues to exist after *AC and JF* creates significant uncertainty in relation to the law of injunctive relief against state action and to the administration of justice in Alberta. It also means that different frameworks and thresholds apply to enjoin state action on *Charter* grounds between jurisdictions in Canada.

70. This Court must resolve the uncertainty created by this conflicting jurisprudence. As *AC and JF* demonstrates, the impasse at the Court of Appeal will remain unless this Court's intervenes to clarify the law. Absent this Court's intervention, competing versions of the framework will continue to be formulated and applied, with each relying on the same jurisprudence of this Court to assert that a presumption of constitutionality does and does not exist.

B. Weighing of Death at the Balance of Convenience Stage of the Analysis Requires Clarification

71. The Court of Appeal accepted that people who use illegal substances in Alberta would die if an injunction did not issue but held that the lack of details on the number of people who would be impacted created uncertainty and was a factor that weighed against enjoining the PHN requirement.

72. Death is permanent. There is no form of harm that is as irreparable as the loss of life. The evidence admitted by the courts below was that large numbers of substance users in Alberta would disengage from supervised consumption services and suffer overdose deaths. The record established that the measure would lead to the deaths of many people. The injunction was intended to prevent mass death among the most vulnerable and marginalized Albertans.

73. The Applicants cannot establish the number of deaths with exactitude because the injunction was brought proactively to prevent mass deaths among the most vulnerable and marginalized Albertans. Waiting until the measure was implemented to provide a specific number of deaths that could have been avoided if an injunction was issued earlier is neither a practical nor moral option. The proposition that was put to the courts below, and which is put to this Court now, is that even a single preventable death is too many. Courts should not wait to see exactly how many people die before considering enjoining a narrow aspect of HMQA's broader regulatory regime for supervised consumption services.

74. The courts below rejected the Applicants' position, finding that without knowledge of the specific number of deaths, they would err on the side of maintaining the impugned state action

because HMQA "has the mandate to make these decisions and must bear the ultimate responsibility for the decisions it makes."[50] Instead of preventing the deaths of countless Albertans through a regulation that infringe the *Charter*, the courts below were primarily concerned with deference to governmental decisions around the content of addictions policy.

75. The prevention of death must weigh heavily in a balance of convenience assessment. There is no more serious form of harm than death. Critically, the courts below accepted not only that there was an increased risk of death, but that death would actually occur. Under a properly formulated version of this stage of the test, it would be one of the dominant considerations, as the focus is on harms rather than the merits of the underlying claim and questions of justiciability.

76. *Providence Health Care Society v Canada (Attorney General)*[51] is the only other instance where a court has dealt with a request for an injunction where changes to state regulated services individuals depend upon to consume illegal substances safely would increase their likelihood of death. In *Providence Health Care*, the federal government ended a program for people consuming street-sourced, illegal opioids where they would be prescribed pure versions of the substances and provided a safe space to consume them.

77. The Supreme Court of British Columbia's analysis at the balance of convenience prong of the test emphasizes that the potential for death to result from the impugned state action must "weigh heavily" in its assessment.[52] The Court's focus at this stage of the framework is on the harms that would occur to the parties, and where the public interest lay in the circumstances. The injunction was also sought in anticipation of the state suspending a program providing substance users supports that substantially decreased their use of street-sourced opioids in unsupervised settings. The harms, including deaths, had not yet occurred. However, the prospect of death, and preventing it, became an overriding consideration when weighed against the state objective of "a uniform stance on the possession of narcotics" and the expert evidence it tendered to establish that alternative measures existed to prevent the harms alleged.[53]

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[50] *Moms Stop the Harm Society v Alberta*, 2022 ABCA 35 at ¶35.
[51] 2014 BCSC 936.
[52] *Providence Health Care Society v Canada (Attorney General)*, 2014 BCSC 936 at ¶80.
[53] *Providence Health Care Society v Canada (Attorney General)*, 2014 BCSC 936 at ¶71.

78. In *Providence Health Care,* it was uncertain how many people would die, but the Court recognized that the impugned state conduct would cause death. This approach gives sufficient weight to the grievous nature of the harm. Conversely the decisions below diminish the seriousness of death because the magnitude of the harm was "impossible" to ascertain before the measures were implemented.

79. Additionally, the Court in *Providence Health Care* considered, in-depth, the public interest in the federal government maintaining its drug laws and even its elected mandate to restrict programs of this nature and pursue a different approach to addictions policy than its predecessor. But, in the face of people dying on the basis of state action that the federal government admitted and the Court accepted was arguably unconstitutional, the Court held that the "seriousness of the potential harms facing the applicants" meant the balance of convenience favoured an injunction.[54]

80. The seriousness of the harms was the prevailing consideration to the Court because it consisted of death. The balance of convenience analysis turned on this point. An injunction was necessary in the circumstances because it prevented people from dying.

81. Every other jurisdiction that has heard an injunction request against a government actor that involved death if injunctive relief was not granted has placed significant weight on death being a consequence of the impugned state action. This includes injunction motions heard in the Federal Court context involving the deportation of foreign nationals to countries where they are likely to die.[55] Federal Court jurisprudence is that even though death cannot be predicted with certainty, the risk is serious and sufficient enough that the balance of convenience favours an applicant. The approach is: "where the Court is satisfied that a serious issue and irreparable harm have been established, the balance of convenience will flow with the Applicant."[56] There will only be a deviation from this approach in exceptional circumstances that are rarely, if ever, made out.

82. When the federal government opposes injunction motions in the deportation context, it does so with the objective of maintaining the integrity of Canada's immigration laws. This objective has a significant public interest attached to it, but the Federal Court has consistently found that,

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[54] *Providence Health Care Society v. Canada (Attorney General)*, 2014 BCSC 936 at ¶81.
[55] *Medina Cerrato v. Canada*, 2018 FC 1231; *Babolim v. Canada*, 2007 FC 909; *Abdulrahman v. Canada*, 2018 FC 842, *Surmanidze v Canada*, 2019 FC 1615.
[56] *Mauricette v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 420 at ¶48.

notwithstanding the objective's importance, the prevention of death prevails. The balance of convenience always favours preventing death, even in the face of state action that serves a legitimate public interest, unless exceptional circumstances are present.

83. Here, the courts below conceptualized and situated death differently as part of its balance of convenience analysis. They minimized its weight as part of their assessment because the exact numbers of deaths were uncertain and of HMQA's mandate to pursue a particular addictions policy even if it resulted in death. The different emphasis placed on anticipated death from state action as part of the balance of convenience framework led to different findings on where the balance of convenience lay in the circumstances and whether the injunction would issue.

84. Clarifying the weight that death and similar serious harms have in balance of convenience assessments is a question of national and public importance. The right to life is a foundational *Charter* protection. Death is the most severe form of irreparable harm. These differing approaches between courts in Alberta, British Columbia, and under the Federal Court system sow confusion on how it is to be considered and assessed under the balance of convenience stage of the analysis, and at its worst formulation, encourage parties to wait until after certain death will or has occurred before filing for injunctive relief. An injunction at that point has little utility, as the applicant or the people the applicant is intending to protect have already died.

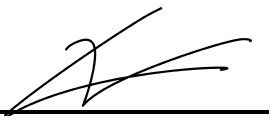
PART IV – SUBMISSIONS ON COSTS

85. The Applicants seek costs.

PART V – RELIEF SOUGHT

86. The Applicants request that leave to appeal of the underlying decision be granted on an urgent and expedited basis, and that an accelerated procedural schedule to ensure that an appeal on its merits can be held by April 1, 2022 to prevent the death of countless Albertans.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16th DAY OF FEBRUARY 2022



Avnish Nanda
Counsel for the Applicants

PART VI – TABLE OF AUTHORITIES

APPLICANTS' AUTHORITIES	CITED AT PARAGRAPH NO.
CASES	
AC and JF v Alberta, 2021 ABCA 24	46, 62, 65-70
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LEGISLATION	**SECTION(S)**
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