

Action No.: 201308467P1
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E-File Name: CCP22CARRIGANC
Appeal No.: _____

IN THE PROVINCIAL COURT OF ALBERTA
JUDICIAL CENTRE OF CALGARY

HER MAJESTY THE QUEEN

V

CLAYTON BRADLEY CARRIGAN

Accused

TRIAL

Calgary, Alberta
May 9, 2022

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

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1 Proceedings taken in the Provincial Court of Alberta, Courthouse, Calgary, Alberta

2
3 May 9, 2022 Morning Session

4
5 The Honourable Judge Dinkel Provincial Court of Alberta

6
7 S.P. MacKenzie For the Crown

8 H. Kheir (remote appearance) For the Accused (remote appearance)

9 C. Berezanski Court Clerk

10
11
12 **Ban on Publication**

13
14 THE COURT: Thank you.

15
16 THE COURT CLERK: This is the matter of Clayton Carrigan.

17
18 MR. MACKENZIE: And --

19
20 THE COURT: Okay. We're up to speed now. Go ahead.

21
22 **Discussion**

23
24 MR. MACKENZIE: Thank you, Sir. Peter MacKenzie. I appear for
25 the Provincial Crown on this matter. Mr. Kheir is here on behalf of the accused, Mr.
26 Carrigan.

27
28 I can advise you this morning, Sir, there are two Informations before you. With respect
29 to Information that ends 8467P1, that has two offences alleged to have occurred on the
30 28th day of November 2022. I would apply to withdraw that Information, Sir.

31
32 THE COURT: 8467 is withdrawn. That leaves us with 452, a
33 four-count Information.

34
35 MR. MACKENZIE: Yes. With respect to Information that ends
36 0452P1, there are four counts on this. It is my intention only to proceed to trial on count
37 1, an allegation on or about the 28th day of December 2020 at or near Calgary, Alberta,
38 did knowingly contravene an order of the Chief Medical Officer of Health, to wit:
39 participate in a gathering of people, contrary to section 73(1) of the *Public Health Act*.
40 The other three counts may be withdrawn.

41

1 THE COURT: Okay. Just to be clear though, count 2 there
2 was an amendment. It looks like April 7th, 2021. Madam clerk, can you confirm that it
3 was amended to the 26th day of December, 2020?
4

5 THE COURT CLERK: That is correct.
6

7 MR. MACKENZIE: And that's fine. I'm still withdrawing that, Sir.
8

9 THE COURT: But I want to make sure that count 1 remains
10 the 20th of December.
11

12 MR. MACKENZIE: It -- it does.
13

14 THE COURT: It does? Counts 2, 3, and 4 are withdrawn.
15 That leaves us with count 1 on 452 from December 20th, 2020. Okay. What now?
16

17 MR. MACKENZIE: So, Sir, this was a matter that Mr. Carrigan has
18 given two constitutional notices on, and they have proposed that this proceed in a
19 truncated matter. So hearing the trial proper today and, depending on the outcome of the
20 trial, deal with the constitutional matter on another day when a member of our
21 constitutional branch would be available.
22

23 So I can tell you this morning, Sir, that my friend and I have negotiated an agreed set of
24 facts, and we would simply run this trial. I would propose to only call by way of Crown
25 evidence the agreed facts that we've agreed upon, and then give you some argument and
26 look for some decision from you about whether or not I have discharged my burden on
27 this count.
28

29 THE COURT: Okay. I don't need to see the constitutional
30 argument that his lawyer had?
31

32 MR. MACKENZIE: Yes.
33

34 THE COURT: Okay.
35

36 MR. MACKENZIE: And -- and then there is a -- there -- there is a
37 group of charges that are being case managed by your sister judge, Judge Pepper, that are
38 similar. And depending on the outcome, if this is going to proceed to a constitutional
39 challenge I would propose to join them up with --
40

41 THE COURT: Right.

1
2 MR. MACKENZIE: -- those cases. Mr. Kheir, is that consistent with
3 your understanding?
4
5 MR. KHEIR: Yes.
6
7 THE COURT: And what's -- what's the burden on this ticket
8 here, or whatever it is, public health order?
9
10 MR. MACKENZIE: So because it's quasi-penal, I would say it's
11 beyond a reasonable doubt, Sir.
12
13 THE COURT: Beyond a reasonable doubt, okay. Okay. Do
14 you have a copy of the ASF?
15
16 MR. MACKENZIE: I do. And, Sir, I actually have two copies for
17 you. When we have a moment, madam clerk, the top copy is to be marked as an exhibit
18 and the bottom copy is a convenience copy for you, Sir. And I dealt with Mr. Kheir over
19 the weekend. We've both signed this, and I have emailed all of this to him.
20
21 THE COURT: Okay, great. Thanks. What do you want to do
22 about the ASF? Do you want to read it into the record, or --
23
24 MR. MACKENZIE: I'm happy --
25
26 THE COURT: It seems pretty brief.
27
28 MR. MACKENZIE: Yes. I'm happy to read it into the record. I -- I
29 would be pleased to do that, Sir, and then I would close my case. We -- we haven't dealt
30 with whether we're going to wait to do this until we have Webex up, and we also haven't
31 dealt with --
32
33 THE COURT: Yeah.
34
35 MR. MACKENZIE: -- whether or not Mr. Carrigan is present. And I
36 -- I would tell you, Sir, with respect to Mr. Carrigan, this matter has, from memory I
37 believe, been set for trial three times. Once in September of 2021; Mr. Kheir was not
38 involved. Mr. Carrigan was unrepresented. He sought an adjournment for personal
39 reasons.
40
41 It was then set for trial the week before Christmas of 2021, and I don't remember which

1 day, Sir, because I had three of these three days in a row and I can't remember which day
2 this one feel on.

3

4 THE COURT: That's fine.

5

6 MR. MACKENZIE: Mr. Kheir came on as counsel in December of
7 2021 but on the pre-condition that that -- that he was not available that day and it would
8 have to be adjourned, and I agreed because counsel assists. It was then set for trial a third
9 time, and on the third time it was adjourned for court closure. Yes.

10

11 THE COURT: And that's in 2022.

12

13 MR. MACKENZIE: Yes. And I don't have the date, Sir. From
14 memory is was in January but --

15

16 THE COURT: Okay.

17

18 MR. MACKENZIE: -- I -- I could be wrong about that.

19

20 THE COURT: Okay. So two defence adjournments
21 effectively, and a court closure.

22

23 MR. MACKENZIE: Yes. And --

24

25 THE COURT: Okay.

26

27 MR. MACKENZIE: -- as you can see, the offence date is from
28 December of 2020.

29

30 THE COURT CLERK: Your Honour, in the lobby there is a Sarah
31 Miller. Is she to be added into this today?

32

33 MR. MACKENZIE: Ms. Miller is counsel on another related mater.
34 I don't have any objection to her watching if she wants to watch, but she has been -- she
35 has been representing -- oh my goodness, I'm just drawing a blank on the name --

36

37 MR. KHEIR: Pastor Pawlowski (INDISCERNIBLE) --

38

39 MR. MACKENZIE: Yes, the Pawlowski, yes.

40

41 THE COURT: I guess the premise is even if it's done on

1 Webex it's an open courtroom, right.

2

3 MR. MACKENZIE: And -- and she is counsel. She -- she's a
4 member of the Law Society of Alberta.

5

6 THE COURT: Sure. She's allowed in. So let's talk about
7 Carrigan.

8

9 **Submissions by Mr. MacKenzie (Remote Appearance)**

10

11 MR. MACKENZIE: Yes. So I will tell you, Sir, previously when the
12 matter was set on the last occasion I had agreed that both counsel and the accused could
13 appear remotely because of the circumstances of the practice note at the time. And about
14 ten days ago I was in touch with my friend and said you -- you better ask permission
15 again because there's a new practice note.

16

17 THE COURT: Yeah.

18

19 MR. MACKENZIE: And generally speaking it's my understanding
20 that the Court now wants accused persons here for substantive matters. So I take no
21 position as to whether Mr. Carrigan should appear or should not appear remotely -- he
22 should certainly appear. I do note that it's a -- in -- it's an abbreviated trial, so I will leave
23 it with you and let Mr. Kheir address you on that.

24

25 THE COURT: Go ahead, Mr. Kheir.

26

27 **Submissions by Mr. Kheir (Remote Appearance)**

28

29 MR. KHEIR: Thank you, Your Honour. So, as my friend had
30 explained, we applied previously in January for permission to appeal -- appear remotely,
31 both myself and Mr. Carrigan. That was granted on consent.

32

33 THE COURT: By whom?

34

35 MR. KHEIR: I don't remember (INDISCERNIBLE) --

36

37 MR. MACKENZIE: I think it might have been Judge Bascom.

38

39 THE COURT: Okay.

40

41 MR. KHEIR: Thank you. So that -- that was granted on

1 consent. And in brief the basis for that request was that I'm based in Ontario, so I -- I can
2 only appear remotely. But then for Mr. Carrigan's part, the request is for him to appear
3 remotely to facilitate easier conversation between me and him if necessary to -- to obtain
4 instructions or -- or explain what's happening. That would be easier if he was also calling
5 in remotely, and -- rather than having to leave the courtroom to find a private place to
6 speak to me.

7
8 With the Court's permission, we could always briefly just mute our -- mute our
9 microphones, turn off our cameras, and -- and speak to each other if need be. So at -- at
10 this point, Mr. Carrigan is at his home ready to -- to dial in. He has a private space. He
11 has a computer with -- with internet connection. He -- he is quite far from Calgary. He's
12 -- he lives near Canmore, so --

13
14 THE COURT: Oh, he's in the province?

15
16 MR. MACKENZIE: Yeah.

17
18 MR. KHEIR: Yes, he is in the province.

19
20 THE COURT: And what's preventing him from coming down
21 to Calgary?

22
23 MR. KHEIR: Well -- so on reliance of the previous -- the
24 previous permission of the Court. That -- there's been nothing we've heard to rescind or
25 overturn that order. I understand there is a new practice direction but my read of it is that
26 the practice direction still permits for applications to be made for remote appearances.

27
28 THE COURT: Yeah, but wasn't that permission given for the
29 last date as opposed to today's date? You didn't reapply for permission for today's date,
30 correct?

31
32 MR. KHEIR: No, Your Honour. My interpretation was that
33 the permission was granted that at the trial we would be permitted to appear remotely,
34 given that our -- our request was not contextually premised on the COVID-19 situation
35 but rather on the -- the logistics of communication between counsel and client, myself
36 and Mr. Carrigan.

37
38 So on today's date this is -- there's no -- going to be no evidence -- no oral evidence heard
39 at the trial. It's all going to be an agreed statement of fact and oral submissions. Mr.
40 Carrigan is ready and waiting to -- to dial in, so I'd request that Your -- Your Honour
41 confirm the previous order and allow us both to appear remotely so that the -- this trial

1 can be conducted in a timely manner today.

2
3 **Ruling (Remote Appearance)**
4

5 THE COURT: Yeah. Well, my -- yeah, look, my sense of it is
6 this: That applications were supposed to be made to the trial judge of the day through the
7 ACJ, and Bascom may have been the judge for the last date but I'm the judge now. And
8 if it's not made, then as I say the ACJ should be making the decision on a trial date by
9 trial date basis because things are very much (INDISCERNIBLE) COVID.

10
11 And my expectation, I will tell you, at this time is that everybody better be here for every
12 trial in front of me. Witnesses, lawyers, I don't care if you're in Hamilton or on the moon,
13 you should be here. What I will say is that because of the agreements that have been in
14 place before and because of the nature of the agreed statement of facts being the entirety
15 of the evidence, I'm fine to deal with it as described by you guys.

16
17 I'll deal with it that way today. But if -- if I had been approached on this on an earlier
18 date I would not have agreed to it, I'll say that much. So you can get Carrigan but --
19 madam clerk, is the Webex ready to go?

20
21 THE COURT CLERK: Yes, Your Honour. We do have Webex.

22
23 THE COURT: Yeah.

24
25 THE COURT CLERK: Mr. Kheir could hang up the phone and join by
26 Webex.

27
28 MR. MACKENZIE: He's (INDISCERNIBLE) --

29
30 THE COURT: Do you want to do that, Mr. Kheir?

31
32 MR. MACKENZIE: He's up.

33
34 MR. KHEIR: So I've -- I contacted the Court ahead of -- oh,
35 actually I believe I have been allowed in. So, yes, I'm actually dialled in. I'm just muted
36 and my camera is turned off. So I will -- I will hang up with Your Honour's permission,
37 and I'll just momentarily give Mr. Carrigan a call, let him know to -- to log in as well, and
38 we will both be available on the Webex --

39
40 THE COURT: Yeah.
41

1 MR. KHEIR: -- Webex momentarily.
2
3 THE COURT: Yeah. We'll take a bit of a break, but
4 everybody's got to be on camera. It can't just be your name sitting up there. You've got
5 to be on camera so I can see who's doing what. Okay.
6
7 MR. KHEIR: Yes, Your Honour. We'll both have our
8 cameras on.
9
10 THE COURT: Thank you.
11
12 MR. KHEIR: Thank you.
13
14 THE COURT: Madam clerk, can I get a bottle of water from
15 you?
16
17 THE COURT CLERK: Yes, you can.
18
19 THE COURT: Thank you. Thank you.
20
21 MR. KHEIR: Okay. I will call back on Webex momentarily.
22 Thank you.
23
24 THE COURT: Thank you.
25
26 THE COURT CLERK: And, Your Honour, to confirm you have
27 marked the agreed admission as Exhibit 1?
28
29 THE COURT: Not yet. Not yet.
30
31 THE COURT CLERK: (INDISCERNIBLE) --
32
33 THE COURT: We'll wait until he gets back on, and then we'll
34 do that. You don't anticipate any other exhibits, do you?
35
36 MR. MACKENZIE: No, Sir, not -- not in the prosecution of this.
37
38 THE COURT: Yeah.
39
40 MR. KHEIR: Just confirming that the Court can hear me.
41

1 THE COURT: Yeah, I can see you.
2

3 MR. KHEIR: Okay, thank you. And Mr. Carrigan will be
4 logging in momentarily. There was some -- a couple cases I intended to rely on in my
5 submissions. Is there an address to which I could send them?
6

7 THE COURT: Yeah. Madam clerk will give you some.
8

9 THE COURT CLERK: One moment, please, Your Honour. Mr. Kheir,
10 it's going to be the same address that you would have signed into our assignment court
11 proxy. That is PCCourtAC.Calgary@just.gov.ab.ca.
12

13 MR. KHEIR: Okay. I will send it right now. Thank you.
14

15 THE COURT: Madam clerk, when you get those cases can you
16 print them for me?
17

18 THE COURT CLERK: I am working on that right away for you.
19

20 THE COURT: Oh, great, thanks. I assumed you were. Have
21 we found Carrigan yet, or --
22

23 MR. MACKENZIE: He doesn't appear to have signed in yet, Sir.
24

25 THE COURT: You've given him the link, have you, Mr.
26 Kheir?
27

28 MR. KHEIR: Yes.
29

30 THE COURT: Yeah, okay.
31

32 MR. KHEIR: Yes, Your Honour.
33

34 THE COURT: Okay.
35

36 THE COURT CLERK: Your Honour, here's some --
37

38 THE COURT: Thank you. That's both?
39

40 THE COURT CLERK: -- and I'm just going to reload the paper. Your
41 Honour, with your permission might I run next door to get a package of paper?

1
2 THE COURT: Only if the government can afford it.
3
4 MR. MACKENZIE: Sir, I note we're still waiting for Mr. Carrigan. I
5 don't know how long we want to wait for him.
6
7 THE COURT CLERK: He has now joined.
8
9 MR. MACKENZIE: Oh, he's joined. Okay.
10
11 THE COURT: I don't see his face. Do you have him, madam
12 clerk? I don't have him on mine.
13
14 THE COURT CLERK: No, Your Honour. I am just seeing him on the
15 screen -- there it is.
16
17 MR. MACKENZIE: There we go.
18
19 THE COURT: It looks like him there. Okay. I've got a video.
20 Mr. Carrigan, can you see us and hear us?
21
22 THE ACCUSED: Yeah. Can you hear me?
23
24 THE COURT: Yeah. Okay. Mr. MacKenzie, take it away.
25
26 MR. MACKENZIE: Thank you very much, Sir. As -- as indicated
27 we do have an agreed admission that the prosecution will rely upon for its case in this
28 matter. I've given you a copy of it, Sir, and there's a copy to be marked. And my friend
29 has a copy, as well. Might that agreed admission dated today's date be marked as Exhibit
30 1 in these proceedings?
31
32 THE COURT: No problem with that, Mr. Kheir?
33
34 THE ACCUSED: Your Honour --
35
36 THE COURT: Yeah. Mr. Carrigan, just to be clear, this agreed
37 statement of facts has not been signed by you.
38
39 MR. MACKENZIE: No. And so, Sir, I'm going to suggest that I
40 read it, and that --
41

1 THE COURT: Yeah.

2
3 MR. MACKENZIE: -- we ask Mr. --

4
5 THE COURT: On the record.

6
7 MR. MACKENZIE: -- Carrigan to confirm it.

8
9 THE COURT: Yeah, you bet. I agree with that. Just to be
10 clear though, Mr. Carrigan, you've had an opportunity to see it, read it?

11
12 THE ACCUSED: Overall I think I discussed it with -- with my
13 lawyer, and I agreed to allow him to submit it and with my agreement based on some
14 changes, so I'm sure the changes were made.

15
16 THE COURT: Okay. Well, we'll hear it as it's read in and then
17 you can let us know if you continue to agree with it. Go ahead, Mr. MacKenzie.

18
19 **Agreed Statement of Facts**

20
21 MR. MACKENZIE: Paragraph 1: (as read)

22
23 Clayton Bradley Carrigan, herein after Carrigan, admits the
24 attached orders of the Chief Medical Officer of Calgary, Alberta,
25 marked "A" and "B". Carrigan admits identity for the purpose of
26 this prosecution. He is the accused named in this Information
27 alleging he has violated the attached order.

28
29 Paragraph 3: (as read)

30
31 Carrigan admits the following observations from Calgary Police
32 Service Officer Giffin, regimental 3554: a) on 2020/12/20 at
33 1510 hours Carrigan approached Calgary Police at the Walk for
34 Freedom rally and stated that he was the event organizer and he
35 opposes mask mandates; b) approximately 250 people, the
36 crowd, had gathered at City Hall, 800 Macleod Trail, Calgary,
37 Alberta, for this Freedom rally; c) police observed Carrigan in
38 the crowd during the rally speaking with the people, he was not
39 masked and at times did not maintain a 6 foot distance from other
40 people; d) the majority of the people in the crowd also did not
41 wear masks; e) the crowd formed at City Hall and carried out a

1 march through the downtown streets of Calgary, Alberta, and
2 returned to City Hall, 800 Macleod Trail, Calgary, Alberta,
3 where they disbursed; 4) Carrigan was charged with violating
4 section 73(1) of the *Public Health Act* this date 2020/12/20 all of
5 which is admitted this 9th day of May 2022.
6

7 Exhibit A is a certified copy of Record of Decision, Chief Medical Officer of Health,
8 Order 38-2020, which rescinds CMOH Order-36-2020 and part 3 of CMOH Order 37-
9 2022, and it is dated the 24th of November of 2020, and you can find that on page 7, Sir.
10

11 THE COURT: The date is on page 7?

12
13 MR. MACKENZIE: Yes.

14
15 THE COURT: Okay.

16
17 MR. MACKENZIE: Exhibit B is a certified copy of Record of
18 Decision, Chief Medical Officer of Health, Order 42-2020, which rescinds Chief Medical
19 Officer of Health Orders 38-2020 and 39-2020, and this is an order dated the 11th day of
20 December of 2020, and you can find that date on page 9 of that order, Sir.
21

22 THE COURT: Are they both relevant now that you're not
23 pursuing on that one Information?
24

25 MR. MACKENZIE: No. Really it's 'B' that I'm going to be talking
26 about, Sir.
27

28 THE COURT: Which is the -- the second public health order --
29

30 MR. MACKENZIE: That's right. The one --
31

32 THE COURT: -- dated December 11th.
33

34 MR. MACKENZIE: -- one from December 11th of 2020.
35

36 THE COURT: Okay. Good. Okay.
37

38 MR. MACKENZIE: If we can --
39

40 THE COURT: Let's ask Mr. Carrigan: You've heard that, Mr.
41 Carrigan, and you discussed it with your counsel. Do you continue to agree to that

1 admission, that everything that was read into the record by the Crown is in fact accurate?
2

3 THE ACCUSED: To a point. I think they -- the first point -- I
4 mean, he went through it fast so I -- and I don't have a copy in front of me
5 (INDISCERNIBLE) --
6

7 THE COURT: Madam clerk, can I have a little volume --
8

9 THE ACCUSED: -- all right what I --
10

11 THE COURT CLERK: I'm sorry --
12

13 THE COURT: Volume.
14

15 THE ACCUSED: Can -- can you hear me all right?
16

17 THE COURT: Yeah, go ahead. Yeah, go ahead.
18

19 THE ACCUSED: Oh, I was going to say the police -- you know,
20 you mentioned -- can you just read the one where with the police, the first one and the
21 second -- I forget what title it was. I was trying to track it down but you went fast. It was
22 number 'A' -- was it 'A' or one at the --
23

24 THE COURT: Before we do that, Mr. Kheir, did you not
25 provide your client with a copy of this?
26

27 MR. KHEIR: Sorry, Your Honour. Me and --
28

29 THE ACCUSED: It was in (INDISCERNIBLE) --
30

31 MR. KHEIR: -- me and Mr. Carrigan can just --
32

33 THE COURT: Yeah, I'm talking to Mr. Kheir.
34

35 THE ACCUSED: -- (INDISCERNIBLE) --
36

37 THE COURT: One person at a time, Mr. Carrigan. That's the
38 only way it works. Mr. Kheir, I'm asking you, did you provide a copy to your client?
39

40 MR. KHEIR: Mr. Carrigan and I discussed it in detail
41 yesterday. I -- I'm providing him the final copy just now.

1
2 THE COURT: Okay. You emailed it to him, right?
3
4 MR. KHEIR: Yes, Your Honour. So, Mr. Carrigan, if you --
5 if you check your email, you'll have a full written copy of it there.
6
7 THE ACCUSED: Yeah, sorry. My computer has been acting up.
8 It's a satellite, and the problem is the -- there's a snow storm here, believe it or not, out in
9 the mountains and it's -- everything is really slow (INDISCERNIBLE) anyway, yes, I've
10 got it. Sorry. I didn't see that because the computers been acting up.
11
12 So number -- it says identify the purpose of prosecution, Carrigan, okay, admits the
13 following observations of the Calgary Police. On -- approached Calgary Police at the
14 Walk of Freedom rally and stated he was the event -- actually the police came up to me.
15 They usually -- they usually would find me at the stage, and come up to me because we
16 did so many of the rallies that they -- they'd usually come up and speak to me, not that
17 that matters but I -- I usually wouldn't walk into the audience. They'd usually come up to
18 me and we'd talk, and we had a cordial relationship overall for -- after many rallies, so --
19
20 MR. MACKENZIE: So, Sir, let -- let's just -- let's --
21
22 THE ACCUSED: -- I don't -- I just don't --
23
24 MR. MACKENZIE: Let's just be clear here. This is what I seek as
25 an admission. I have that agreement. If Mr. Kheir wants to -- sorry -- if Mr. Carrigan
26 wants to give evidence he can give evidence, but I'm not negotiating here.
27
28 THE COURT: Yeah.
29
30 MR. MACKENZIE: I -- I negotiated over the weekend.
31
32 THE COURT: Yeah. Mr. Kheir, did you want to take a
33 moment to talk to your client?
34
35 THE ACCUSED: No, that's fine. He --
36
37 THE COURT: No, Mr. Carrigan --
38
39 UNIDENTIFIED SPEAKER: Yeah (INDISCERNIBLE) --
40
41 THE COURT: -- Mr. Carrigan, I didn't ask you. I'm asking

1 Mr. Kheir. Please, be aware of who I'm talking to.
2
3 UNIDENTIFIED SPEAKER: Yes, Your Honour, with --
4
5 THE COURT: Mr. Kheir, I asked you: Do you want to talk to
6 your client?
7
8 MR. KHEIR: Your Honour, perhaps if we can just have a
9 minute or two we can -- we can just discuss --
10
11 THE COURT: Okay.
12
13 MR. KHEIR: -- I -- I think this should be -- should be really
14 brief.
15
16 THE COURT: Madam clerk, can we just put them on mute and
17 Mr. Kheir can message you when he's ready to go? Is that possible?
18
19 THE COURT CLERK: I'm not too sure, Your Honour.
20
21 MR. MACKENZIE: They should be able to mute on their end
22 (INDISCERNIBLE) --
23
24 MR. KHEIR: Your Honour --
25
26 THE COURT: Yeah.
27
28 MR. MACKENZIE: -- (INDISCERNIBLE) --
29
30 THE COURT CLERK: (INDISCERNIBLE) need to call --
31
32 MR. KHEIR: -- I'll just mute myself and turn off my video,
33 and Mr. Carrigan can do the same, and I'll -- I'll just quickly call him. Thank you.
34
35 THE COURT: Yeah. That sounds fine, but message us when
36 you're ready to go. We'll go off the record.
37
38 MR. KHEIR: Okay. Thank you.
39
40 (ADJOURNMENT)
41

1 THE COURT: Okay. Mr. Kheir, I'm going to ask you again:
2 Is your client prepared to admit everything that's in the agreed statement of facts as is?

3
4 MR. KHEIR: Yes, Your Honour.

5
6 THE COURT: Thank you. That will be filed as Exhibit 1 then
7 as is.

8
9 **EXHIBIT 1 - Agreed Statement of Facts**

10
11 MR. MACKENZIE: Thank you, Sir. And, Sir, with the filing of that
12 document that is the case for the Crown. I call no further evidence with respect to this
13 issue.

14
15 THE COURT: Thank you. What's the plan, Mr. Kheir?

16
17 MR. KHEIR: The defence also has no evidence to call. We
18 will just have submissions.

19
20 **Final Submissions by Mr. MacKenzie**

21
22 MR. MACKENZIE: And, Sir, I'm happy to go first here. I am --

23
24 THE COURT: Okay.

25
26 MR. MACKENZIE: -- I am going to reference the *Public Health Act*
27 a little bit, Sir. I -- I do have excerpts for you. I have the entire Act here if you want it
28 but, you know, I am not sure that you need all of it but it --

29
30 THE COURT: Not yet.

31
32 MR. MACKENZIE: -- it's all here.

33
34 THE COURT: Yeah. If I need it, I'll let you know.

35
36 MR. MACKENZIE: And I also had sent a copy of this to my friend.

37
38 THE COURT: Thank you.

39
40 MR. MACKENZIE: So, Sir, the -- the issue here in my view is a
41 technical one, and it is whether this freedom rally violated the provisions of Exhibit B,

1 which is the December 11th, 2020, order of the Chief Medical Officer of Health in that it
2 was an unlawful -- sorry, just one moment, please, Sir. I looked at the wrong document.
3 I apologize, Sir.

4
5 THE COURT: Take your time.

6
7 MR. MACKENZIE: It violates clause 12 of Exhibit B, which is
8 found on page 3, which says that: (as read)

9
10 All persons are prohibited from attending a private social
11 gathering at an outdoor private place or public place except in
12 accordance with this part of this order.

13
14 And this -- this gathering does not accord with the remainder of this order. So there is no
15 provision in it for there to be a freedom rally of 250 people or more.

16
17 THE COURT: Was there a limit on gatherings at that point of
18 like 15, or somewhere?

19
20 MR. MACKENZIE: There -- there are no public gatherings at this
21 point, Sir.

22
23 THE COURT: Oh, at that stage it was zero.

24
25 MR. MACKENZIE: Yes.

26
27 THE COURT: Okay. And to be clear, that's the November
28 24th order though.

29
30 MR. MACKENZIE: No, that -- that is the --

31
32 THE COURT: Page 3?

33
34 MR. MACKENZIE: Yes -- no, let me -- let me make sure that I'm
35 not doing this incorrectly.

36
37 THE COURT: Yeah. I want to make sure you're on the right
38 order.

39
40 MR. MACKENZIE: Yes, no -- order B, page 3, sub-clause 12.

41

1 THE COURT: Okay. But aren't we dealing with the December
2 charge?
3

4 MR. MACKENZIE: We are dealing with the December charge, Sir.
5

6 THE COURT: And didn't you want to deal with the December
7 order?
8

9 MR. MACKENZIE: Yes. This is -- 'B' is the December order, Sir. If
10 you go to -- if you go to the last page of 'B' which is 9 --
11

12 THE COURT: Bear with me. Hang on. Sorry, I went to the
13 first page 3.
14

15 MR. MACKENZIE: Yes.
16

17 THE COURT: You're telling me it's the second page 3, right?
18

19 MR. MACKENZIE: Yes, it -- it's exhibit B --
20

21 THE COURT: Yeah.
22

23 MR. MACKENZIE: -- page 3.
24

25 THE COURT: Yeah. I missed that part. Sorry. Thank you.
26

27 MR. MACKENZIE: Yes.
28

29 THE COURT: It's the same numbered clause 12 though.
30 Okay.
31

32 MR. MACKENZIE: Okay.
33

34 THE COURT: That's the December -- give me the date -- 11th?
35

36 MR. MACKENZIE: Yes --
37

38 THE COURT: 2020 --
39

40 MR. MACKENZIE: -- 2020 --
41

1 THE COURT: -- order. Got it. Okay. Again, gatherings were
2 zero at that point.
3
4 MR. MACKENZIE: Yes. If we look at the same order, which is
5 exhibit B, the same page 3 --
6
7 THE COURT: Can I get you to take off your mask so I can --
8
9 MR. MACKENZIE: Yes, I'm sorry, Sir. I --
10
11 THE COURT: Yeah.
12
13 MR. MACKENZIE: -- I had put it back on --
14
15 THE COURT: Yeah, Yeah. No, that's fine.
16
17 MR. MACKENZIE: -- to take something to madam clerk and I -- I
18 forgot. So if we look at the same order, if we look at page 3 of exhibit B --
19
20 THE COURT: Yeah.
21
22 MR. MACKENZIE: -- and we look at 8.
23
24 THE COURT: Yeah.
25
26 MR. MACKENZIE: (as read)
27
28 For the purpose of part 3 of this order, a public place has the
29 same meaning given to it in the Public Health Act --
30
31 And I'll talk about that in a minute. And then if we look at the same order in 10: (as read)
32
33 For the purposes of this order, a private social gathering is
34 defined as any type of private social function or gathering --
35
36 So disjunctive: (as read)
37
38 -- at which a group of persons come together and move freely
39 around to associate, mix, or interact with each other for social
40 purposes rather than remain seated or stationery for the duration
41 of the function or gathering, but does not include a gathering in

1 which all persons are members of the same household, any
2 gathering in which a person resides on their own interacts with
3 the two other persons referred to in section 5 of this order.
4

5 So and those two exceptions don't apply here. This is a -- this is a protest that's taking
6 place in front of City Hall. There are 250 people. Its stated purpose is to oppose mask
7 mandates. And Mr. Carrigan has identified himself as an organizer and he's clearly a
8 participant, and he has been observed by police moving in the crowd during the --
9

10 THE COURT: Does it matter whether he's organizing it or just
11 there? I mean --

12
13 MR. MACKENZIE: It doesn't matter whether he's --

14
15 THE COURT: -- the -- the wording is 'participate in a
16 gathering of people', right?

17
18 MR. MACKENZIE: It -- it doesn't matter whether he --

19
20 THE COURT: So I don't really care if he's an organizer or he
21 was just there with the crowd, right.

22
23 MR. MACKENZIE: Okay. And from the facts, Sir, I simply point
24 out that importantly police have -- this is 3(c): (as read)

25
26 Police observed Carrigan in the crowd during the rally speaking
27 with people. He was not masked, and at times did not maintain a
28 6 foot distance from other people.
29

30 So this is really whether this is a private social gathering at an outdoor public place, and I
31 say it is. And I say it is for a number of reasons, Sir. I will give you the definition. I'm
32 looking here at the *Public Health Act*, Sir, and so I've handed that up to you --
33

34 THE COURT: Yeah.

35
36 MR. MACKENZIE: -- in their definition portions. So if I take you to
37 page 8 of the document that I gave you --
38

39 THE COURT: Yeah.

40
41 MR. MACKENZIE: -- and I've highlighted for you (hh.1) and then

1 (ii).

2
3 THE COURT: Yeah.

4
5 MR. MACKENZIE: (as read)

6
7 "Public place" includes any place in which the public has an
8 interest arising out of the need to safeguard the public health and
9 includes, without limitations --

10
11 (i) does not apply, (ii) does not apply, (iii) does not apply, (iv) does not apply, (v) does
12 not apply, (vi) places of assembly. So in my view, when you gather people in front of
13 City Hall to go on a march through the downtown streets of Calgary, that is a place of
14 assembly. (vii) doesn't apply, (viii) doesn't apply, (ix) doesn't apply, (x) doesn't apply,
15 (xi) the residuals, Sir: (as read)

16
17 . . . any other building, structure or place visited by or accessible
18 to the public.

19
20 So again the gather in front of City Hall would fall, in my respectful view, within the
21 meaning of place -- either a place of assembly or the more general place under the
22 residual category.

23
24 So in my respectful view, Sir, if we look at the two definitions and we look at the facts
25 that we have, we have a gathering outside, 250 people of which Mr. Carrigan is one, and
26 we see them -- and again I want to take you to exhibit B, page 3, sub (10) which talks
27 about a private social gathering, "Any type of private social function or gathering" --

28
29 THE COURT: Sorry, I lost you there. Where are you?

30
31 MR. MACKENZIE: I'm on exhibit B, page 3, sub (10) -- or
32 paragraph 10.

33
34 THE COURT: Yeah.

35
36 MR. MACKENZIE: (as read)

37
38 A private social gathering is -- is defined as any type of private
39 social function or gathering -- disjunctive -- at which a group of
40 persons come together and move freely around to associate, mix,
41 or interact with each other for social purposes. A social purpose

1 MR. MACKENZIE: Yes.
2
3 THE COURT: There is?
4
5 MR. MACKENZIE: Yes.
6
7 THE COURT: And that's exhibit 1(b), right?
8
9 MR. MACKENZIE: It's exhibit B to the agreed facts.
10
11 THE COURT: Exhibit B, okay, to the ASF. Thanks. Next, I --
12 I look specifically at the details of that and I see a part 3, private social gatherings, right?
13
14 MR. MACKENZIE: Yes.
15
16 THE COURT: And under that we have the definition in
17 number 10.
18
19 MR. MACKENZIE: Yes.
20
21 THE COURT: Well, 8 and 10, I guess, right?
22
23 MR. MACKENZIE: Yes.
24
25 THE COURT: Public place. So number 8 and number 10. So
26 it's got to be a public place.
27
28 MR. MACKENZIE: Yes.
29
30 THE COURT: And it's got to be -- that was 8. And 10 would
31 be social purpose, right?
32
33 MR. MACKENZIE: It's the private social --
34
35 THE COURT: Private, okay. Okay. And -- and then, I'm
36 wondering if I go to 12 at that point and simply look to the fact that the public health
37 order says that all outdoor private social gatherings are prohibited.
38
39 MR. MACKENZIE: Yes.
40
41 THE COURT: Okay.

- 1
2 MR. MACKENZIE: And -- and just to finish, Sir, the -- the charging
3 provision is 73.1 of the *Public Health Act*.
4
- 5 THE COURT: So that would be -- the public health order is in
6 existence under, what I call, element number 2.
7
- 8 MR. MACKENZIE: Yes.
9
- 10 THE COURT: Pursuant to the 73.1.
11
- 12 MR. MACKENZIE: Yes. And -- and that includes violating an order
13 of the Chief Medical Officer of Health --
14
- 15 THE COURT: Right.
16
- 17 MR. MACKENZIE: -- or of the Medical Officer of Health is actually
18 the language it uses.
19
- 20 And you have that as well in your package.
21
- 22 THE COURT: Okay. Just bear with me. And then, I've got to
23 dig a little further, if I'm not mistaken, and I start to look at the *Public Health Act* in
24 terms of elements of the offence. Because, what I'll call my 3(a), public place, comes out
25 at number 8 on the public health order --
26
- 27 MR. MACKENZIE: Yes.
28
- 29 THE COURT: -- is defined in the *Public Health Act*.
30
- 31 MR. MACKENZIE: Yes. There's Section 1 with all of the little
32 subsections.
33
- 34 THE COURT: Yeah. Is it actually Section 1?
35
- 36 MR. MACKENZIE: Yes. Definitions. And then --
37
- 38 THE COURT: Yeah, it's under definitions.
39
- 40 MR. MACKENZIE: Yes.
41

- 1 THE COURT: Okay.
- 2
- 3 MR. MACKENZIE: And if -- and -- but it has so many. It's --
- 4
- 5 THE COURT: Yeah.
- 6
- 7 MR. MACKENZIE: -- it's (hh.1)(ii), and then I've gone through and
8 I've spoken to (hh.1)(ii), public place; (vi) places of assembly. And I say this is a place
9 of assembly. And in the alternative, if you find that this is not a place of assembly, I then
10 point you to (hh.1)(ii)(xi), which is, "Any other building, structure, or place visited by or
11 accessible to the public."
- 12
- 13 THE COURT: Okay.
- 14
- 15 MR. MACKENZIE: And I say this falls within a place, as an
16 alternative. My first position is place of assembly.
- 17
- 18 THE COURT: Right. So it is not a private place, in other
19 words a dwelling or privately owned land, correct?
- 20
- 21 MR. MACKENZIE: No, it's not.
- 22
- 23 THE COURT: Okay. So that then, according to you, falls to
24 public place.
- 25
- 26 MR. MACKENZIE: Yes.
- 27
- 28 THE COURT: (as read)
- 29
- 30 Which includes any place in which the public has an interest
31 arising out of the need to safeguard the public health and
32 includes, without limitation --
- 33
- 34 A number of things, including a subcategory called 'places of assembly', correct?
- 35
- 36 MR. MACKENZIE: Yes. Or alternatively, just 'place' under
37 residual categories.
- 38
- 39 THE COURT: Which is the (xi).
- 40
- 41 MR. MACKENZIE: Yes.

1
2 THE COURT: Okay. The first one was (vi). Okay.
3
4 Now, do I care that he has no mask or that he's within 6 feet of people?
5
6 MR. MACKENZIE: So --
7
8 THE COURT: Not really, I don't think.
9
10 MR. MACKENZIE: -- for certain -- for certain, you don't, nor can I
11 point to the mask issue. Because they're under -- under the order of the Chief Medical
12 Officer of Health, there was no mask requirement outdoors. It was only an indoor
13 requirement. And similarly, I believe the physical distancing was also --
14
15 THE COURT: So it's -- it's just part of the factual matrix.
16
17 MR. MACKENZIE: Yeah. That's right.
18
19 THE COURT: Okay. So it's not an element of the offence.
20
21 MR. MACKENZIE: No.
22
23 THE COURT: So let me back up and see if I've got it right
24 here, according to you.
25
26 MR. MACKENZIE: Yes.
27
28 THE COURT: ID admitted, that's one. Two, is the public
29 health order, 73.1.
30
31 MR. MACKENZIE: Yes.
32
33 THE COURT: Three is the part 3 private social gathering
34 definition --
35
36 MR. MACKENZIE: Yes.
37
38 THE COURT: -- found at 8, 10, and 12. Eight is the public
39 place; 10 is private social purpose --
40
41 MR. MACKENZIE: Yes.

1
2 THE COURT: -- 12 is the -- 12 is the all-private social
3 gathering are prohibited.

4
5 MR. MACKENZIE: Yes.

6
7 THE COURT: So that's the first three. And then, I get to what
8 I'm calling the fourth element, which I describe as the public place found in (hh)(ii) (sic)
9 under the public health order -- oh, Act, sorry -- *Public Health Act*.

10 And following within that are the two definitions for the place of assembly. And a place.

11
12
13 MR. MACKENZIE: Yes.

14
15 THE COURT: Period. And you're satisfied, from your point
16 of view, that his identification has been admitted, that the order is in existence, and that
17 this happened in a public place. It's a private social gathering that happened in a public
18 place for a -- a private social purpose. All gatherings were prohibited and it happened in
19 a place of assembly or a place --

20
21 MR. MACKENZIE: Yes.

22
23 THE COURT: -- period.

24
25 MR. MACKENZIE: That's exactly right. And I -- what I rely upon
26 is not whether he was wearing a mask or not wearing a mask, whether he was social
27 distancing or not social distancing. It's all about numbers. So it's all about he was within
28 a group of people of 250 or so.

29
30 THE COURT: Well, you make a good point there. Let's back
31 the bus up a little bit and say there has to be -- well, no. No. Because all -- we don't care
32 about the numbers because all private social gatherings were prohibited, right?

33
34 MR. MACKENZIE: That's right, Sir. But it has to be a gathering in
35 the sense that if Mr. Carrigan were standing by himself on the sidewalk in front of City
36 Hall and holding up a sign that said, No masks --

37
38 THE COURT: He's okay to do that.

39
40 MR. MACKENZIE: -- that -- that would probably not attract this.

41

- 1 THE COURT: There's no gathering then.
2
3 MR. MACKENZIE: That's right.
4
5 THE COURT: So it's important to note the gathering of 250.
6
7 MR. MACKENZIE: Yes.
8
9 THE COURT: Because it's more than one.
10
11 MR. MACKENZIE: Yes.
12
13 THE COURT: Okay. Okay. Fair enough.
14
15 MR. MACKENZIE: Okay.
16
17 THE COURT: Okay. So the way I broke it down into elements
18 of the offence, you're okay with that?
19
20 MR. MACKENZIE: I am, Sir.
21
22 THE COURT: Okay. That's just my way of trying to make
23 sense of this. Okay.
24
25 Mr. Kheir, you've heard that. Go ahead.
26
27 **Final Submissions by Mr. Kheir**
28
29 MR. KHEIR: Thank you, Your Honour.
30
31 The matter before this Court today, in my submission, turns on a single issue: Is a public
32 protest a private social gathering for the purposes of (INDISCERNIBLE) of Health. It's
33 my submission that it is not.
34
35 So just in relation back to those elements of the offence that Your Honour listed out. We
36 have no issue that Mr. Carrigan was there or that it was an outdoor public place or that
37 there was a gathering in the sense that people were there. The question is whether or not
38 that gathering was a rally, meets the definition of a private social gathering under the
39 order.
40
41 THE COURT: But can I ask you this?

1
2 MR. KHEIR: (INDISCERNIBLE).
3

4 THE COURT: Can I ask you this? Is there anything in the
5 public health order that specifically excludes protests?
6

7 MR. KHEIR: Your Honour, I would say it's the word
8 'private' used in the private social gathering. And also the fact that it specifies for a
9 social purpose. So I think those are the two things that this will turn on and which I
10 intend to address.
11

12 THE COURT: Okay. But going back to my question, if you
13 could answer that. Am I right to say that there's no exclusion on protest, correct?
14

15 MR. KHEIR: Correct. There's no -- there's exception
16 provision for -- for protest specifically.
17

18 THE COURT: Okay.
19

20 MR. KHEIR: And nor -- nor would one be necessary, in my
21 submission, because they're not captured by the definition to begin with.
22

23 So what's prohibited by the order is attending a private social gathering. So, you know,
24 according to the rules of statutory interpretation, the governing principles, they have to be
25 read in their plain meaning in harmony with the scheme and object of -- in this case, the
26 order of the Chief Medical Officer of Health.
27

28 So first, just looking towards the plain meaning of the words of the order. The order
29 assists in providing a definition under Section 10, which my friend took Your Honour to.
30 But it defines a private social gathering as: (as read)
31

32 A private social function or gathering at which a group of
33 persons come together to freely move around to associate, mix,
34 or interact with each other for social purposes, rather than
35 remaining seated or stationary for the duration.
36

37 And then it has some specific exceptions.
38

39 So the -- as I stated, the -- the key points here that we take issue are -- are whether it was
40 private and whether it was for a social purpose.
41

1 So first, just addressing the issue of it being private. In my submission, this wasn't -- the
2 rally was not private. In fact, I'm not so sure that there's such a thing as a private rally
3 (INDISCERNIBLE) that's oxymoronic. But even if it's not inherently paradoxical, this
4 really certainly was not private.
5

6 So just to give us some sort of a guiding definition here, I included, in the cases I
7 provided to the Court, *R v Harrison*. It's an older case. It has to do with obscenity law.
8 So certainly, the context is different, but the -- the issue there was whether or not the -- it
9 had been exposed to public view.
10

11 And at page 3, in paragraph 14, about halfway through the paragraph, the court refers to
12 (INDISCERNIBLE).
13

14 THE COURT: I don't know what you're talking about.
15

16 MR. KHEIR: So the -- one of the cases I supplied to the Court
17 is labelled as *R v Harrison*.
18

19 THE COURT: I'm not seeing that. I don't see any labelled.
20

21 MR. KHEIR: I'll take a moment to just confirm that I
22 included it and it's not my own error.
23

24 THE COURT CLERK: Your Honour, that one may not have printed. I
25 can print that now.
26

27 THE COURT: Okay. Thanks.
28

29 MR. KHEIR: Your Honour, if it assists, I can share my screen
30 and show the Court.
31

32 THE COURT: No, I'm not going to read it off a screen.
33

34 MR. KHEIR: Okay. We'll just have to wait.
35

36 THE COURT: I've got -- how many did you send?
37

38 MR. KHEIR: Three cases. So there should be *R v Harrison*,
39 which I understand madam clerk is printing currently; and then there is a case called
40 *Builders Holdings Ltd. v Gasland Properties Ltd.*; and then the third case is just titled
41 *Application Under Section 33.28 of the Criminal Code*.

1
2 THE COURT: That's the only one I've got so far is *Application*
3 *Under Section 83.28 of the Criminal Code*. I was just handed something else. It's a 1-
4 page document, Alberta District Court, *R v Harrison*.
5
6 THE COURT CLERK: Your Honour, I can confirm that I can see more
7 pages on that screen. They just have not printed.
8
9 THE COURT: Oh, we're trying to print that. Hang on. So the
10 document that I do have goes from -- on 83.28 -- goes from page 248 to page 331.
11
12 MR. KHEIR: Okay. So that was the -- the relevant section.
13
14 THE COURT: That's all the pages on that one? Yes or no?
15
16 MR. KHEIR: I'm just confirming the last page here. Yes.
17 Yeah, that's all the pages.
18
19 THE COURT: Okay. So that one's good.
20
21 Next, I now have 4 pages of *Harrison*. How many do you have there?
22
23 MR. KHEIR: It's actually a 3-page decision.
24
25 THE COURT: Okay. Maybe I've got a duplicate page here.
26 Hang on. Well, even better, I got the first page four times.
27
28 And then, I've got the cover page to *Builders Holdings*. So bear with us. We're printing.
29
30 MR. KHEIR: Thank you.
31
32 THE COURT CLERK: Your Honour, these (INDISCERNIBLE).
33
34 THE COURT: Okay. Oh, this is a mess. *Harrison*, 3 pages, 16
35 paragraphs?
36
37 MR. KHEIR: Yes.
38
39 THE COURT: Okay.
40
41 MR. KHEIR: That's the total case.

1
2 THE COURT: Okay. So I've got that now. And what is
3 *Builder Holdings -- Builders Holdings*, how long is that?
4

5 MR. KHEIR: So the -- the whole thing is 17 pages, but I --
6 I'm just taking Your Honour to a quote on page 6, if that makes it easier to print off for
7 the court staff.
8

9 THE COURT: Well, I'd better (INDISCERNIBLE) in context,
10 so.
11

12 Madam clerk, do you have 17 pages to print on that one?
13

14 THE COURT CLERK: Yes, I do.
15

16 THE COURT: Okay. I've just got the cover page at this point.
17 Great. Thank you.
18

19 Okay. I was just handed *Builders Holdings Ltd. v Gasland Properties Ltd.*, (2001)
20 ABQB 823. And you're telling me that's 17 pages, right?
21

22 MR. KHEIR: Yes.
23

24 THE COURT: Okay. Looks like I've got all 3 cases now. Go
25 ahead.
26

27 MR. KHEIR: Okay. Thank you.
28

29 So the first case I wanted to discuss was *R v Harrison*. So this is -- you know, looking
30 for what the -- the plain meaning of (INDISCERNIBLE) private social gathering would
31 mean.
32

33 So *R v Harrison*, it's a case on the old obscenity laws, but the issue was whether or not
34 something had been exposed to the public or shown to the public. So it does go into a
35 discussion about the definition of private. I would submit that there is actually an
36 analogy that could be made there, in the sense that all too many cases that talk about
37 privacy are concerned with, you know, what's the definition of a private communication
38 for something. But this is actually discussing what does it mean
39 for something to be in the public or -- or in private.
40

41 So specifically on the third page, it's about halfway down paragraph 14 -- and I

1 highlighted it in the version I sent the Court. But the -- the court in that case takes
2 judicial notice of the definition of the word 'private'. And it refers to as: (as read)

3
4 Kept or removed from public view; not within the cognizance of
5 people generally; not open to the public; intended only for the
6 use of particular and privileged persons.

7
8 So in the context of a gathering, I would submit that that would apply to things like, for
9 example, a party at a house, any sort of function held at a public location where there's
10 some sort of a requirement to attend -- whether it's tickets or there's some degree of
11 exclusion happening. And I think that's what's fundamental to the definition of private
12 here.

13
14 So my home is private. I don't just let anyone in it. Information can be private because
15 not anyone is allowed to see it.

16
17 But when we look at the rally that's at the issue before the Court today, anyone was
18 welcome to come. We don't have any evidence of anyone being excluded. In fact, quite
19 the opposite. This was being held at a -- as the Crown discussed -- a public place. It was
20 held to make a public statement. Anyone would have been welcome to come. No one
21 was being excluded.

22
23 And in reality, no one could have been excluded. This was (INDISCERNIBLE) so for
24 that reason, it should not be found to constitute a private social gathering.

25
26 But this is also true if we look beyond just the plain meaning of the words themselves
27 towards the overall scheme of these orders. Because the order took care to define and use
28 the words 'private' and 'public' precisely.

29
30 So looking at part 3 of the -- the order -- and the order attached as 'B' to the Agreed
31 Statement of Facts. Section 8 and 9 take -- make a point to define public place and
32 private place by referencing the *Public Health Act*. Sections 11, 12, and 13 differentiate,
33 in their application, between public places or a private place or public place.

34
35 So certainly, when the order was drafted, whether or not something was public or private
36 was in the mind of the -- in this case -- the Chief Medical Officer of Health.

37
38 So there is a -- in trying to give meaning to this phrase, 'private social gathering', the
39 Court can turn to a presumption of statutory interpretation that the words ought not to be
40 reduced to mere surplusage. And that's why I included the -- the *Builders Holdings* case.

41

1 So on page 6 of that case, I've side barred paragraph 23.

2
3 THE COURT: Go ahead.

4
5 MR. KHEIR: So the court, quoting another decision, lays out
6 helpfully 4 points governing statutory interpretation, which I would submit are applicable
7 in this case where we're interpreting an order for regulation.

8
9 So the 4 points are that: (as read)

10
11 (1) The legislature is a competent and careful user of language
12 and skillful crafter.

13
14 (2) Legislatures use simple, straightforward and concise
15 language.

16
17 (3) The legislature avoids superfluous or meaningless words and
18 does not repeat itself or speak in vain.

19
20 (4) The legislature uses language carefully and consistently so
21 that the same words have the same meaning and different words
22 have different meanings.

23
24 So when we apply those principles to -- to interpreting section -- what a private social
25 gathering is in the context of these orders, in order to give meaning to the fact that these
26 were -- these only applied to private social gatherings, that word 'private' has to mean
27 something. It has to be differentiated between what would be public gatherings.

28
29 So certainly, it must contemplate that there would be certain gatherings which are public
30 and which would not be captured on (INDISCERNIBLE) and I would submit that a
31 protest must fall under that category. Because if a rally of this sort -- 250 people in
32 attendance, out on public property, before a government building, open -- open to anyone
33 who might want to join in -- if that counts as private, then it seems that nothing would be
34 left to -- to count as public. And that word 'private' would have been reduced to -- to
35 mere surplusage.

36
37 THE COURT: So --

38
39 MR. KHEIR: It becomes superfluous.

40
41 THE COURT: -- am I right to suggest that what you're saying

1 is that this is a poorly drafted public health order, in the sense that it should have said --
2 to capture a protest, it should have said, Private or public social gatherings? It should
3 have included both.

4
5 MR. KHEIR: Your Honour -- perhaps, Your Honour, if that's
6 what the -- the Chief Medical Officer of Health was trying to do. But giving -- giving the
7 Officer some -- perhaps the benefit of the doubt, I would actually argue that it was
8 properly drafted, in the sense that protests should have been excluded. And, in fact, they
9 were.

10
11 So I can actually turn to that point a little sooner than I otherwise would have. But that's
12 why I included the case, *Application Under Section 83.28*. So it's another statutory --
13 presumption of statutory interpretation I want to refer to.

14
15 So the quote I referred to is at the bottom of page 269.

16
17 THE COURT: Go ahead.

18
19 MR. KHEIR: So at paragraph 35, which I've highlighted, the
20 court -- the Supreme Court says: (as read)

21
22 Underlying this approach is the presumption that legislation is
23 enacted to comply with constitutional norms, including the rights
24 and freedoms enshrined in the *Charter*.

25
26 There's a quote taken -- or a citation there. And then it goes on to say: (as read)

27
28 This presumption acknowledges the centrality of constitutional
29 values in the legislative process, and more broadly, in the
30 political and legal culture of Canada. Accordingly, where two
31 readings of a provision are equally plausible, the interpretation
32 which accords with *Charter* values should be adopted.

33
34 So in the context of this public health order and whether or not it was poorly drafted,
35 insofar as the Court might find that the words 'private social gathering' could be
36 ambiguous -- so, for the reasons previously mentioned (INDISCERNIBLE) it's not
37 ambiguous -- but if the Court is still of the view that it is ambiguous, then the Court also
38 (INDISCERNIBLE) interpretation that is consistent with *Charter* values.

39
40 So protests, in particular, are -- are *Charter* protected activity because they engage both
41 Section 2(b), the right to freedom of expression, and Section 2(c), the right to peaceful

1 assembly. So they're -- they're of particular importance in that sense.

2
3 And so, the Court should presume that the -- actually, that the Chief Medical Officer of
4 Health didn't intend to prohibit protests. So while they're -- they're targeting activities
5 such as house parties, where people might come together and spread -- and spread
6 COVID, where perhaps, on the balance of interests, it's just not worth the risk.
7 Something like -- like an outdoor protest, which -- which is public, it's outside, it's on
8 public property, it's -- the balance favours protecting that. And so, the Chief Medical
9 Officer of Health chose not to include it.

10
11 So that's the -- those are my submissions with respect to whether or not this is private.

12
13 The other issue I wanted to raise for the Court was whether or not it was for a social
14 purpose. They both have to be present for the definition to obtain that.

15
16 And this rally didn't have a social purpose. The people in attendance were not gathered
17 to spend time with one another. As is stated in the Agreed Statement of Facts, and my
18 friend agreed, it was to protest -- it was a protest against mask mandates. And so, the
19 purpose there is not social, but, rather, it's a political -- political purpose.

20
21 And I -- I would just note that, you know, where the definition in the order says social
22 purpose -- or sorry, in the definition of a social private -- private social gathering, it says,
23 People freely mixing around. That is in addition to it being for a social purpose. So that
24 in itself cannot be taken as (INDISCERNIBLE) social purpose. Otherwise, they would
25 make those words redundant.

26
27 So if -- if we could say that, you know, the purpose of an event is essentially asking the
28 why - why are these people gathered together, what -- well, the answer to the why in this
29 case is advocating, to protest. Not merely to socialize.

30
31 So overall, I would --

32
33 THE COURT: But isn't protesting a social activity of sorts?

34
35 MR. KHEIR: Your Honour, I would -- I would submit that the
36 purpose of protests isn't socializing. The purpose of protests is to -- is to enact a political
37 change or -- or raise a political awareness.

38
39 And, again, given any ambiguity that might remain, the presumption should be that the
40 Chief Medical Officer of Health wasn't trying to capture that. If -- if the Chief Medical
41 Officer of Health was concerned with large groups across the board, it would have been

1 very easy to simply prohibit gatherings. And, you know, they could have accepted any
2 specific things, as they did in this order. But they -- they chose not to do that. They
3 chose to specify private social gathering.
4

5 And that's -- you know, on the plain meaning, it implies some degree of exclusion, which
6 is inconsistent with a wide open rally, in this case. It makes sense in the context of the
7 whole order, where the -- the order takes -- takes care to define what is a public place and
8 what's a private place or, you know, it defines what a private social gathering is. And
9 reiterates, in the definition, that it's private.
10

11 So in that context, it -- within the scheme of that and given the presumptions that the
12 Chief Medical Officer of Health was -- intended those words to carry meaning and the
13 presumption that the Chief Medical Officer of Health wasn't trying necessarily to
14 infringe *Charter* rights -- it would have been very clear if that was the Officer's intention
15 -- given those presumptions, given the plain meaning in the overall scheme of the Act,
16 it's my submission that protests are not captured by private social gatherings.
17

18 The rally that's described in the Agreed Statement of Facts is not contrary to Section 12
19 of the order. And for that reason, I would ask that Your Honour acquit Mr. Carrigan of
20 the charge. Thank you.
21

22 THE COURT: Go ahead, Mr. MacKenzie.
23

24 **Final Submissions by Mr. MacKenzie (Reply)**
25

26 MR. MACKENZIE: Thanks very much, Sir. Just briefly in return,
27 dealing with this notion of some degree of exclusion and the necessity to have that in
28 order to have something that is a private social gathering.
29

30 Pragmatically, under this order, if you had a group -- a private group of 10 people, who
31 decided to gather in a public park, and hold a barbeque, that would be a private social
32 gathering that is not necessarily exclusive in the fact that someone might wander up and
33 talk to those persons and join that barbeque is -- does not change the nature of that
34 gathering is still a private gathering (INDISCERNIBLE).
35

36 THE COURT: But still -- still, if -- if I'm having my 10-person
37 barbeque --
38

39 MR. MACKENZIE: Yes.
40

41 THE COURT: -- first of all, I'm going to invite people.

1
2 MR. MACKENZIE: Yes.
3
4 THE COURT: And secondly, when Billy Baloney Buckets
5 (phonetic) shows up -- walks up and says, I want a bit of your barbeque, I'm going to
6 politely tell him no.
7
8 MR. MACKENZIE: Well, you might tell him no, or you might say
9 yes. That would be your choice.
10
11 THE COURT: If it's somebody I knew. I -- I agree.
12
13 MR. MACKENZIE: Right.
14
15 THE COURT: I'd say, Come on in. Oh, you know, we tried to
16 call you. You didn't answer. Glad you're here. Come on in.
17
18 MR. MACKENZIE: Right.
19
20 THE COURT: But if it's -- if it's something I don't --
21 somebody I don't know, I'm going to say, Yeah, you know, thanks for coming by but
22 you're not welcome.
23
24 MR. MACKENZIE: Okay.
25
26 THE COURT: And we all know of situations like that, where
27 somebody's trying to crash the party or things go bad and they come back and swing a
28 baseball bat and all kinds of crazy things happen.
29
30 MR. MACKENZIE: Okay. So let's push that analogy a little bit
31 again. Because I do appreciate that this particular rally wanted to attract people. I expect
32 it wanting to attract people and it was not going to -- it was not going to turn people
33 away.
34
35 However, there are some rallies that are done in public spaces that are -- are associated to
36 certain groups where, in fact, they may turn people away. So by analogy, again,
37 regrettable, over time, there have been lots of problems and -- in Israel and the Palestinian
38 authority. And there are frequently protests in Alberta of groups on one side or the other.
39 The Palestinian group that supports certain things; Israeli group that supports other
40 things. It's --
41

1 THE COURT: In a more general sense, we get lots of protests
2 with two sides.
3

4 MR. MACKENZIE: We do. I'm just using --
5

6 THE COURT: Yeah.
7

8 MR. MACKENZIE: -- an example, an analogy here.
9

10 THE COURT: I see what you're saying.
11

12 MR. MACKENZIE: So if you have a Palestinian group that is
13 holding this protest at the same time, people who are not aligned who might want to be
14 involved in a counter protest would, in fact, not be welcome.
15

16 And so, what I'm getting at is the exclusivity is not sine qua non on here. What I'm
17 going to say --
18

19 THE COURT: Is not what?
20

21 MR. MACKENZIE: It's not -- it's not the sine qua non. This is not
22 what we want to focus on in this particular section.
23

24 I would say to you that a private function is a group of like-minded people and their
25 purpose is to do something that was brought forward by this group of private persons.
26 And the fact that someone can -- someone can join in is not a necessary preclusion to it
27 being a private function -- or sorry, private group.
28

29 With respect to --
30

31 THE COURT: But --
32

33 MR. MACKENZIE: Sorry.
34

35 THE COURT: I'm going to keep you there for a second, sorry.
36

37 MR. MACKENZIE: Yeah.
38

39 THE COURT: He wants to boil this down, as we understand --
40

41 MR. MACKENZIE: Yeah.

1
2 THE COURT: -- to say, What is private?
3
4 MR. MACKENZIE: Yes. And that's --
5
6 THE COURT: And he goes through some stuff.
7
8 MR. MACKENZIE: Yeah.
9
10 THE COURT: Quite rightly. And -- and the one thing I took
11 out of all of that was not open to the public.
12
13 MR. MACKENZIE: Yes.
14
15 THE COURT: Well, that's a pretty common sense
16 understanding of what is private.
17
18 MR. MACKENZIE: Right.
19
20 THE COURT: Private club says it's not open to the public.
21 You're -- you're invited to that club by invitation only.
22
23 MR. MACKENZIE: Right.
24
25 THE COURT: You become a member of that club. That -- that
26 kind of similar analogy, if I May.
27
28 MR. MACKENZIE: Right.
29
30 THE COURT: So -- so if I apply that thinking to a protest of
31 this nature and I -- I think, What is private; it's not open to the public. Okay. That means
32 that people would have to be there for not just a like-minded purpose, but they would
33 have to be there by invitation, by agreement. Something has to --
34
35 MR. MACKENZIE: Well, I think they are there by agreement, Sir.
36 And I would -- I --
37
38 THE COURT: This is a good point. Because I think that
39 they're all there because they read on social media or wherever -- in the newspaper -- that
40 there's a protest coming up.
41

1 MR. MACKENZIE:

Right.

2

3 THE COURT:

But does that equate to what amounts to an

4 invitation of sorts?

5

6 MR. MACKENZIE:

I want to stay away from using the invitation.

7 There has to be this common purpose. I agree with you on that. And -- but I think it can
8 come in a very informal way.

9

10 And it's people rallying around a specific idea that they want to articulate. And
11 remember, the drafters included both private places and public places. So you've got to
12 deal with private gatherings and public places, which goes back to my barbeque analogy.
13 That as it might be, Sir.

14

15 But by contrast, you know, for example, if this -- if this public protest had happened on a
16 private space -- so, for example, let's say the owner of a shopping mall decided that they
17 wanted to support an anti-mask movement. If they made available their parking lot for
18 that purpose, that would be a private place. But that's not what the order says.

19

20 The order said -- the order speaks to both private places and public places. So how do
21 you reconcile the two?

22

23 My -- my friend is right. This is -- this is about whether a private social gathering covers
24 a protest or not. And I will say to you it's uncertain. Like, I -- to be frank with you, it's
25 uncertain.

26

27 But it's clearly the intention to stop large gatherings of private people and this is --

28

29 THE COURT:

That -- so that, I agree.

30

31 MR. MACKENZIE:

This is a large gathering of private people.

32

33 THE COURT:

But if -- the moment you use that word

34 'private', that has a whole different connotation. Not open to the public. That just rings
35 in my head.

36

37 And I -- I just -- you know, I -- Mr. Kheir thinks that it's -- it's well drafted and they
38 specifically did it this way for their own reasons. And my sense is why didn't they
39 address what I will -- for the moment -- call a private situation where it's an invitation.
40 You're invited to a wedding. Let's use that analogy. And there's 100 people at the
41 wedding. You get an invitation. You go. And they have it in a public place.

1
2 Why didn't they have that as one thing in mind. And then, on the flip side, specifically
3 think of the protest, which is more of a public gathering of people with a common
4 purpose.

5
6 MR. MACKENZIE: Yeah.

7
8 THE COURT: So that is open to the public, common purpose.
9 Why didn't they go after that?

10
11 MR. MACKENZIE: I -- I don't know, Sir. But I will --

12
13 THE COURT: And I'm not expecting you to answer that. It's
14 rhetorical. But you see what I'm saying.

15
16 MR. MACKENZIE: But -- I do, Sir. But I will tell you that, in the
17 spring of 2021 -- and I can provide a copy of this order to you if you would like -- there
18 was an amendment to the order of the Chief Medical Officer of Health that specifically
19 did allow for protests. But that was in the spring of 2021.

20
21 THE COURT: After all this happened.

22
23 MR. MACKENZIE: After this.

24
25 THE COURT: So it did come to their attention. They did
26 change it. So doesn't that make me think more that --

27
28 MR. MACKENZIE: I -- I'm telling, Sir, the -- so you have it.

29
30 THE COURT: Yeah.

31
32 MR. MACKENZIE: And I can send it to you, if you'd like.

33
34 THE COURT: No, that's fine. No, I -- I accept that that's what
35 you're saying. But that goes more to them having it in their mind and looking back and
36 saying, Well, we didn't put this in when we should have. We should have made this
37 more clear. Let's talk about protests.

38
39 And Mr. Kheir, quite rightly, says -- he points to the case where it says -- where it's too
40 vague or two readings are possible (INDISCERNIBLE) interpretation which in
41 accordance with *Charter* values being adopted. And -- and that's where you might have

1 a problem.

2
3 MR. MACKENZIE:

I -- I understand that, Sir.

4
5 I would go on and just speak to that actual point. So when -- when my friend is talking
6 about application 83.28 on page 269 -- and I just received it, I've not read it recently --
7 but I will say this to you.

8
9 If you look at the order itself, the orders recognize that there is -- there are superordinate
10 rights in the *Charter* and some rights are being restricted. And so, you need to look at all
11 of -- all of Exhibit B together. Because, for example, freedom of religion is also an issue.
12 And this is being litigated otherwise. Not here today. But this order also, in 15 and 16,
13 clearly restricts freedom of religion and purposefully so.

14
15 So this -- the drafting of this order, in answer to what my friend has said about the
16 statutory interpretation presumption, is that these orders clearly anticipated that there
17 were superordinate rights. And some were being subordinated to others.

18
19 And so, I -- I would say to you, Sir, that it's actually not apparent from this drafting that
20 they (INDISCERNIBLE) to be compliant with provisions with respect to freedom of
21 association, for example.

22
23 THE COURT:

Okay.

24
25 MR. MACKENZIE:

Because, clearly, there was a superordinate
26 focus on -- on Section 7, right? Life, liberty, security of the person.

27
28 I don't have anything more, Sir. I think you have the issue, the dilemma.

29
30 THE COURT:

Yeah.

31
32 MR. MACKENZIE:

And --

33
34 THE COURT:

Oh, and I see the dilemma, yeah. And a
35 dilemma it is, yeah.

36
37 MR. MACKENZIE:

And we'd like to know.

38
39 THE COURT:

Okay. Mr. Kheir, you got anything in
40 response?
41

1 **Final Submissions by Mr. Kheir (Reply)**

2

3 MR. KHEIR: Your Honour, the only thing I would say is that
4 (INDISCERNIBLE) as my -- my friend had --

5

6 THE COURT: Sorry, I can't hear you.

7

8 MR. KHEIR: That --

9

10 THE COURT: Say it again.

11

12 MR. KHEIR: Yes, Your Honour, just that if there is an
13 uncertainty, as my friend just acknowledged, then the Court ought to weigh on the side of
14 allowing peaceful assemblies and freedom of expression. That's all I have in surreply.
15 Thank you.

16

17 THE COURT: Sort of like the tie goes to the runner in
18 baseball.

19

20 MR. KHEIR: That's one way to put it.

21

22 **Reasons for Judgment**

23

24 THE COURT: Yeah. Okay. Well, look, interesting issue. I'll
25 give you my decision now.

26

27 I think it was helpful for me to break down the elements of the offence and go through
28 that. And quite frankly, all of the elements, at first blush, appear to have been met. ID is
29 admitted; there's a public health order; there's commentary on the order about private
30 social gatherings; the definitions are set out; we talk about public place; private social
31 purpose; all private social gatherings are prohibited; there was more than one person
32 there, there was 250. And then, we next get into the public place, which includes places
33 of assembly and any place. So yeah, looks good initially. And that's where we start.

34

35 And then, Mr. Kheir, on behalf of Carrigan, quite rightly, muddies the waters for me here.
36 And says, Well, let's just drill down a little bit further and start talking about the concept
37 of what is private and what is a social purpose.

38

39 And what I gathered, my common sense reading and understanding of the things that Mr.
40 Kheir put to me regarding -- that came out of a number of things, including *Harrison*, I
41 believe it was, is that what is private is something that's not open to the public. That's --

1 seems kind of common sense to me.

2
3 He says that there should be some degree of exclusion. You know, I mean
4 (INDISCERNIBLE) invitations, maybe something like a wedding. And he -- he, again,
5 rightly says there's no evidence of anyone being excluded. Anyone was welcome to -- to
6 join. And he says, In fact, no one could be excluded.

7
8 And I don't disagree with that. I -- I take Mr. MacKenzie's analogy of the barbeque with
9 somebody else walking up and potentially joining. But it depends on those
10 circumstances, I think.

11
12 And I -- and I think in this situation -- this protest, freedom march, whatever you want to
13 call it -- was, in my mind, open to the public.

14
15 Then I look at what is its social purpose. Is this for a social purpose? Can a -- can a
16 protest be for a social purpose? Well, the word 'social' has a lot of different meanings
17 and connotations nowadays, so that's complicated. And I think it is possible that a
18 political rally, protest, something seeking political change can possibly be for a social
19 purpose.

20
21 So I'm not so certain that Mr. Kheir is bang on with that. I'm not so sure it's even
22 necessary that I -- I comment on it.

23
24 But I appreciate Mr. MacKenzie's comments about private being like-minded individuals
25 with a common purpose. I get that and I agree with that. And it's clear to me that all of
26 these people were in that situation. They were protesting because they were all of a like
27 mind. They were protesting against something they disliked that the government did. In
28 other words, they had a common purpose. They were opposed to what the government
29 did or was doing at the time. However, it was not private in any way because it was open
30 to the public.

31
32 So if anybody's keeping a score card out there, I'm going to agree with Mr. Kheir on
33 what is private. In other words, it was open to the public. I'm -- I'm not certain what the
34 answer is on what is a social purpose.

35
36 So as a result, if I go back to my elements of the offence, again, the idea is admitted the
37 public health order is in place. We have proof of all of that. And where we fail in this
38 situation is when we get down to part 3, private social gatherings. And my answer there
39 is that that element of the offence has not been made out.

40
41 In find that this was not a private gathering. This was a -- effectively, a public gathering.

1 And I can sort of hang my hat on the fact that the government -- and I'll say quite rightly
2 -- down the road, ended up changing that and amended their wording to properly
3 encompass what it should have. And that is by -- including protests as somewhere you --
4 you couldn't be with people without masks and not 6 feet apart, et cetera, et cetera. In
5 other words, protecting people from COVID.
6

7 So there you go. At the end of the day, I don't think all -- I know, in my mind, all of the
8 elements of the offence have not been made out. As a result, the Crown has not proven
9 their case. The burden, as we talked about earlier, is proof beyond a reasonable doubt.
10 That burden has not been satisfied. Therefore, I find the accused not guilty and he is free
11 to go.
12

13 MR. MACKENZIE: Thank you very much, Sir.

14
15 THE COURT: Thank you. Mr. Kheir, do you have any
16 questions?
17

18 MR. KHEIR: Thank you, Your Honour. No questions.
19

20 THE COURT: Okay. You and your client are good to go then.
21 Thank you, Mr. Kheir.
22

23 MR. KHEIR: Thank you very much (INDISCERNIBLE).
24

25 THE ACCUSED: Thank you very much. Thank you. Great
26 decision.
27

28 MR. KHEIR: Mr. Carrigan, I will call you to discuss.
29

30 THE COURT: Okay.
31

32
33 PROCEEDINGS CONCLUDED
34
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36
37
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41

Certificate of Record

I, Corinna Berezanski, certify that this recording is the record made of the evidence in the proceedings in Provincial Criminal Court, held in courtroom 1107, at Calgary, Alberta on the 9th of May, 2022, and that I was the court official in charge of the sound recording machine during the proceedings.

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1 **Certificate of Transcript**

2
3 I, Sandi Wagner, certify that

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

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

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12 Digi-Tran Inc.
13 Order Number: TDS-1007633
14 Dated: May 19, 2022

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