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COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	CALGARY
APPLICANTS:	REBECCA MARIE INGRAM, HEIGHT BAPTIST CHURCH, NORTHSIDE BAPTIST CHURCH, ERIN BLACKLAWS and TORRY TANNER
RESPONDENTS:	HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA and THE CHIEF MEDICAL OFFICER OF HEALTH

BRIEF OF LAW OF THE RESPONDENTS, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA and THE CHIEF MEDICAL OFFICER OF HEALTH

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PART I – OVERVIEW

1. The Applicants seek to enjoin the operation of CMOH Order 42-2020 (the "Order") that has been implemented to respond to the growing public health crisis caused by the uncontrolled spread of the SARS-CoV-2 virus in Alberta. The virus has claimed the lives of 790 Albertans, hospitalized thousands, and threatens to leave even more Albertans with lingering adverse health effects.[1] This virus has created an unprecedented crisis in Alberta, which requires an extraordinary response. How does a government respond effectively to a devastating virus that thrives and survives on social gatherings? How can a government protect human beings from not only the virus, but the knock on effects to the public health care system, the economy, and the collective well-being of the community? The balance of convenience favours potential limitations on any rights that may be impacted in order to protect the public at large from a virus that has not yet been contained.

2. Alberta is in an extraordinary situation. The impugned public health order is an urgent and necessary response to the serious threat to our collective well-being and our health care system. The Applicants have a significant onus on this Application to demonstrate that suspending the legislation would provide a greater benefit than its continued operation. Not only have the Applicants failed to meet that burden, but the stakes are simply too high to stop this duly enacted legislation in its tracks.

PART II - FACTS

3. SARS-CoV-2 is a novel coronavirus that first appeared in the city of Wuhan, China in late 2019. The virus is highly contagious and causes the illness COVID-19. Within a few months of the appearance of SARS-CoV-2 and COVID-19, the World Heath Organization declared a global pandemic.[2] The first case appeared in Alberta on March 5, 2020,[3] and the cases have been steadily and exponentially rising ever since. November was the deadliest month for Alberta.[4]

4. SARS-CoV-2 is transmitted through close to person-to-person contact. The virus may be transmitted by respiratory droplets or droplet nuclei produced when an infected person breathes,

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[1] Hinshaw Affidavit at paras. 18-19, 30, and Exhibit A.
[2] Hinshaw Affidavit at para. 5.
[3] Hinshaw Affidavit at para. 28.
[4] Hinshaw Affidavit at para. 18.

coughs, sneezes, talks, or sings. The virus may also be transmitted by touching a surface or object contaminated with the virus and then touching the eyes, nose, or mouth.[5]

5. Not every infected person will display symptoms of COVID-19.[6] This invisibility helps the virus spread through community, particularly when strong public health measures are not in effect or not being followed.

6. COVID-19 primarily, but not exclusively, affects the respiratory tract.[7] It disproportionately affects those over 60 years of age and those with comorbidities.[8] This is not to say that people under 60 years of age or without comorbidities are unaffected by the virus. The long term effects of COVID-19 are not yet understood, and there are no known treatments.[9] Vaccines have only recently become available and are currently only available to select, high priority groups. It could be another year before the vaccine is available to the wider community and uptake is sufficient that public health measures can be eased.[10]

7. Public health measures, such as physical distancing, handwashing, limitations on gatherings, isolation, and quarantine are the best and only measures available to the majority of the population.[11] Alberta was successful in controlling the spread of the virus with relatively minimal public health measures until the fall of 2020.[12]

8. Despite some public heath measure in place, the number of active cases of COVID-19 grew rapidly in Alberta.[13] As a result of this unchecked spread, an increasingly large number of cases of COVID-19 have no known source.[14] Reducing the number of contacts an individual has with other people will reduce the spread of SARS-CoV-2.[15]

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[5] Hinshaw Affidavit at para. 10.
[6] Hinshaw Affidavit at paras. 13-14.
[7] Hinshaw Affidavit at para. 5
[8] Hinshaw Affidavit at para. 6.
[9] Hinshaw Affidavit at paras. 7 and 9.
[10] Hinshaw Affidavit at para. 8.
[11] Hinshaw Affidavit at para. 9.
[12] Hinshaw Affidavit at paras. 18, 19, 26 and Exhibit A.
[13] Hinshaw Affidavit at para. 18.
[14] Hinshaw Affidavit at paras. 20-22.
[15] Hinshaw Affidavit at para. 22.

9. The rising numbers of active cases threatens to overwhelm the health care system. As more and more people are hospitalized with COVID-19, this takes away resources from the rest of the health care system and affects access to health care for other Albertans.[16]

10. In response to the increasing number of COVID-19 cases in the province, Alberta declared a state of public health emergency.[17] On December 11, 2020, the Chief Medical Officer of Health of Alberta ("CMOH") issued CMOH Order 42-2020 (the "Order") that is the subject of these proceedings. The Order makes mandatory a number of public health measures across Alberta.

11. The Order mandates public health measures that are known to be effective at reducing the transmission of SARS-CoV-2. Masks, worn properly, are effective at reducing transmission between people.[18] Masking alone is not enough to drive down transmission and must be used in conjunction with other measures.[19] The Order has imposed limitations on gatherings. There is significant risk of transmission among groups of people gathered indoors, or performing high risk activities.[20]

12. Notwithstanding some of the suggestions by the affiants, the Order does not prohibit the observation of religious practices across Alberta. While the Order prohibits gatherings in private residences[21] and reduces capacity of some "public venues," churches and other places of religious worship are entitled to remain open but are required to operate at only 15% of the fire code capacity.[22] These capacity restrictions also apply to retail.

PART III – EVIDENTIARY CONCERNS

13. Alberta has several concerns with the affidavits filed and is seeking their exclusion from these Applications.

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[16] Hinshaw Affidavit at paras. 23-26.
[17] Hinshaw Affidavit at para. 19.
[18] Hinshaw Affidavit at para. 33.
[19] Hinshaw Affidavit at para. 35.
[20] Hinshaw Affidavit at para. 34.
[21] Order, Part 3.
[22] Order, s. 29(a).

A. The Affidavits Contain Improper Content

14. Several of the Affidavits contain inadmissible hearsay evidence, specifically:

- Patrick Schoenberger – paras. 14-18
- Dr. Stephen Tilley – paras. 7-14
- Kirstin Aikins – Exhibits A, B, and C

15. Hearsay is presumptively inadmissible in an affidavit. Hearsay is only admissible if it is tendered for the truth of its contents and meets an exception to the hearsay inadmissibility rules. The *Alberta Rules of Court* allow for hearsay to be admitted during an application for interim relief if is accompanied by a statement providing the source of the evidence and the deponent's belief in its truth.[23] The Court is not required to admit such evidence.[24] The Court must still assess the adequacy of the evidence and is not compelled to rely on any information before it. As Justice Renke stated, "[a] claim in an affidavit does not necessarily have any or any significant probative value, just because it is found in an affidavit."[25]

16. If hearsay is being tendered for the truth of its contents, the affiant must establish that the hearsay is admissible under the traditional exception; that the hearsay is necessary and reliable.[26]

17. Necessity is based on the unavailability of the testimony, but not necessarily the unavailability of the witness or affiant.[27]

18. Reliability turns on the assessment of the circumstances under which the hearsay statement was made. An applicant can make out threshold reliability when hearsay "is sufficiently reliable to overcome the dangers arising from the difficulty of testing it."[28] There are two ways to establish threshold reliability and the standard to establish both is high:

- procedural reliability - there are adequate substitutes for testing truth and accuracy, or
- substantive reliability - there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy.[29]

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[23] AR 124/2010, r. 13.18(1)(b) and r. 13.18(2) [*Rules of Court*] **[TAB 1]**.
[24] *ANC Timber Ltd v Alberta (Minister of Agriculture and Forestry)*, 2019 ABQB 653 at para. 21 **[TAB 2]**.
[25] *Condominium Corporation No. 042 5177 v Kuzio*, 2019 ABQB 814 at para. 109. [*Kuzio*] **[TAB 3]**.
[26] *Sahaluk v. Alberta (Transportation and Safety Board)*, 2013 ABQB 683 at paras. 18-24 [*Sahaluk*] **[TAB 4]**; *Kuzio* at para. 106 **[TAB 3]**.
[27] *R. v. Khelawon*, 2006 SCC 57 at para. 78 [*Khelawon*] **[TAB 5]**.
[28] *Khelawon* at para. 49 **[TAB 5]**; *R. v. Bradshaw*, 2017 SCC 35 at para. 26 [*Bradshaw*] **[TAB 6]**.
[29] *Bradshaw* at para. 27 **[TAB 6]**.

19. Procedural reliability can only be established when the applicant satisfies the court that the substitutes for testing truth and accuracy provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement.[30] Substantive reliability can only be established when the applicant establishes that the evidence is "so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process."[31]

20. Mr. Schoenberger and Dr. Tilley attested to (what they consider to be) the dire circumstances faced by their parishioners and patients, respectively.[32] Neither provide any context for these bare assertions or any information beyond sweeping generalizations. This evidence does not meet either the necessity or reliability requirements for the admission of hearsay evidence. Further, neither affiant provides an explanation as to why the testimony of the parishioners or patients was unavailable except through their generalized impressions. This evidence also fails to meet the test for threshold reliability. Neither affiant provided any information about the sources of this evidence or the conditions under which it was created. The Court has no ability to test the accuracy or trustworthiness of this evidence. The Court must exclude this evidence.

21. Ms. Aikins' evidence must also be excluded in its entirety. Ms. Aikins affirms that she has personal knowledge of the facts and matters herein deposed to. Ms. Aikins has included a transcript of a press conference.[33] Although she does not explain, it appears this transcript was included to give context to a newspaper article[34] she also included as evidence. It is unclear how or why Ms. Aikins has personal knowledge of the facts contained within the newspaper article. Even if this evidence is being tendered for the truth of its contents, it has very little probative value because the CMOH deferred answering the question. The relevance of this evidence to the Applications is highly questionable.

22. Assuming that the article is being proffered for the truth of its contents, it fails to meet the test for the principled exception to the hearsay rule. Ms. Aikins has provided no explanation for

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[30] *Bradshaw* at para. 28 **[TAB 6]**.
[31] *Khelawon* at para. 49 **[TAB 5]**; *Bradshaw* at para. 31 **[TAB 6]**.
[32] Schoenberger Affidavit at paras. 14-19; Tilley Affidavit at paras. 6-14.
[33] Aikins Affidavit, Exhibit A.
[34] Aikins Affidavit, Exhibit B.

why the information contained within her affidavit is unavailable but for this article. Rather, she has attested that she has personal knowledge of the facts contained within. There is no reason to rely on a newspaper article when the affiant can provide the same information but fails to do so.

23. Ms. Aikins has also provided a journal article[35] that she did not write, nor has she provided any indication she has any expertise in the subject matter. Without more, this exhibit is irrelevant and inadmissible hearsay.

B. The Affidavits Contain Legal Argument

24. Several affidavits contain legal argument:

- Torry Tanner – para. 2
- Maria Keibel – para. 2
- Diane Hachey – para. 7.

25. It is well established that affidavits cannot include argument. Arguments must be made by counsel, not witnesses.[36]

26. Ms. Tanner and Ms. Keibel have offered their interpretations of the Order. This is legal argument and inappropriate to include in an affidavit.[37]

27. Ms. Hachey attested that she is "dismayed that government is able to violate [her] rights to such an extreme degree."[38] This is a legal issue that is within the sole purview of the Court to decide.[39] It is improper for an affiant to include a legal conclusion as part of her evidence.

C. The Affidavits Contain Unqualified Expert Opinions

28. Expert evidence is only admissible if it meets the all of the following criteria:

- relevance;
- necessity in assisting the trier of fact;
- the absence of any exclusionary rule; and
- a properly qualified expert.[40]

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[35] Aikins Affidavit, Exhibit C.
[36] *Sahaluk* at paras. 35-36 **[TAB 4]**.
[37] Tanner Affidavit at para. 2; Keibel Affidavit at para. 2.
[38] Hachey Affidavit at para. 7.
[39] *Sahaluk* at para. 35 **[TAB 4]**.
[40] *R. v. Mohan*, [1994] 2 SCR 9 at 20 **[TAB 7]**.

29. Several affidavits introduce expert opinions without proper qualification of the affiants as experts. These are the affidavits of:

- Denise Buchner;
- Dr. Bao Dang;
- Dr. Stephen Tilley;
- Dr. Dennis Modry;
- David Redman.

30. The Rules also require expert evidence to be submitted in a Form 25.[41] No such form has been included for any of these affiants.

31. Ms. Buchner appears to have been proffered as an expert in "global health research" with no explanation as to what her expertise entails.[42] She has provided a number of articles without explanation on how they tie into her area of expertise. Her evidence is not admissible as expert evidence. Without proper qualification, this evidence is also irrelevant.

32. The purpose of Dr. Dang's affidavit is also unclear. He is a practicing respirologist but has not provided any evidence related to this area of expertise. He has offered his observations and opinions about hospital capacity; how these relate to his role as a respirologist is unexplained.[43] He has attached the "Great Barrington Declaration" without any explanation as to how his experience in respirology applies to the conclusions drawn about herd immunity. His evidence is not admissible as expert evidence. His evidence is also irrelevant.

33. Dr. Tilley provided evidence about hospital capacity in his community and his opinions on how this year has compared to previous influenza seasons.[44] He has not provided any qualifications or expertise on these matters. This evidence is not admissible as expert evidence and is irrelevant.

34. Dr. Dennis Modry is a retired cardiovascular and thoracic surgeon. He has provided his curriculum vitae, which is expected of an affiant being put forward as an expert; however, it is unclear what expertise he has in pandemic response. This comprises the majority of his proffered

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[41] *Rules of Court*, r 5.34 **[TAB 1]**.
[42] Buchner Affidavit at para. 1.
[43] Dang Affidavit at paras. 3-7.
[44] Tilley Affidavit at paras. 3-5.

evidence through the exhibits attached to his affidavit. His evidence is not admissible as expert evidence and is irrelevant.

35. David Redman appears to have been proffered as an expert in pandemic planning. He has not provided his curriculum vitae; all that is provided is a single paragraph about his previous, dated experience leading the team that developed the 2014 Alberta Pandemic Response Plan.[45] He acknowledges that the 2014 plan has been updated. He has not included the 2014 plan or the updated plan as exhibits to his affidavit. There is insufficient information for this Court to accept his expertise or his conclusions. The Court must exclude this evidence as unqualified expert opinion and irrelevant.

D. The Affidavits Contain Prior Consistent Statements

36. It is trite law that a party cannot tender evidence for the sole purpose of bolstering the credibility of their own witness, a practice known as oath-helping.[46] This rule precludes a party from tendering prior consistent statements.[47] This type of evidence is not only a form of hearsay, it is also irrelevant.[48]

37. Dr. Modry has tendered a letter he sent to Premier Kenney.[49] This letter is an irrelevant, prior consistent statement and must be excluded.

38. Mr. Redman has also provided a copy of an open letter he wrote.[50] This must also be excluded as it offends the rule against prior consistent statements, serves no purpose, and is irrelevant.

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[45] Redman Affidavit at para. 1.
[46] *R. v. Beland*, [1987] 2 SCR 398 at para. 7 [*Beland*] **[TAB 8]**.
[47] *Beland* at para. 10 **[TAB 8]**.
[48] *Beland* at para. 12 **[TAB 8]**.
[49] Modry Affidavit, Exhibit B.
[50] Redman Affidavit, Exhibit A.

E. The Affiants Have No Standing

39. Of the five named applicants who bring this extraordinary application for injunctive relief, only two of them have standing to do so: Rebecca Ingram and Torry Tanner. These individuals have standing in this Application because they are individual applicants.

40. Northside Baptist Church and Heights Baptist Church are not individuals. They cannot claim protection under s. 2(a) of the *Charter* because they cannot possess conscience or religious beliefs. Neither organization has been charged with an offence so they have no claim to standing to bring a constitutional challenge on behalf of the rights of others in order to defend charges against them.[51]

41. Patrick Schoenberger swore his affidavit on behalf of Heights Baptist Church. He is not a named applicant. His evidence is irrelevant because the party his affidavit supports has no standing.

42. It is unclear for what purpose the affidavits of R.K.,[52] Barry Lee, Maria Keibel, and Diane Hachey have been provided. They have all provided evidence about their experiences in the last year and their opinions about the Order. Their evidence is largely inadmissible, as previously discussed. They have not joined any Applicants in bringing these Applications. Their evidence has no relevance to these Applications.

43. While the Applicants have filed evidence from individuals not parties to this action, they have not provided evidence from or about Erin Blacklaws. The Court should not consider this party in any remedy it may award. There is no information before this Court to establish that Erin Blacklaws has standing or any interest in the Applications.

PART IV – ARGUMENT

44. The Applicants have correctly set out the tripartite test for interlocutory injunctions. The Applicants bear the onus to meet each stage of the test.

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[51] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para. 47 [*Big M*] **[TAB 9]**.
[52] The admissibility of the Affidavit is also pending the outcome of the Application under R. 6.28(c) of the *Rules of Court*.

45. Alberta disputes that the Applicants have met any element of the test and, as such, these applications must be dismissed.

A. <u>There are No Serious Issues to be Tried</u>

46. Generally, the Court should only engage in a preliminary assessment of the merits of the case in order to determine that the application is not frivolous or vexatious at this stage of the analysis. However, when the remedy amounts to final relief, the Court should engage in a more extensive review of the merits of the application.[53]

47. The relief the Applicants seek amounts to final relief. Enjoining the Order will nullify its purpose and operation. The effect will be the same as a finding of unconstitutionality after a full hearing on the merits. Because the Applicants are essentially seeking final relief, this Court *should* engage in an extensive review of the merits of the Applications.

48. Notwithstanding this review, adjudication of the constitutional issues must occur at trial, not during these Applications. As Justice Cory stated:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.[54]

49. An extensive review of the merits discloses no serious issue to be tried for any of the Applicants. For this purpose, Alberta is only considering the evidence of Torry Tanner, and Rebecca Ingram as they are the only parties with standing on these Applications. The balance of the evidence from the remaining affiants are irrelevant and otherwise inadmissible.

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[53] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at 314 [*RJR-MacDonald*] **[Tanner Book of Authorities, TAB 41]**.
[54] *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at para. 9 **[TAB 10]**.

50. The thrust of the Applicants' complaints is that the Order has inconvenienced them and caused them unhappiness. While this may invoke sympathy for the Applicants, the *Charter*[55] does not protect against trivial or passing inconveniences, nor does it impose a positive obligation on government to ensure everyone enjoys life, liberty, and security of person.[56] The government cannot possibly have a positive obligation to ensure its citizens are free from lesser interferences with their convenience.

(1) There is No Serious Issue in the Claims under the Bill of Rights

51. Ms. Ingram argues that the Order breaches various rights under the *Bill of Rights* and the *Charter*. She deposed that she owns and operates a fitness centre that has had to close and consequently, she has lost a source of income. She blamed the Order for preventing her from securing other sources of income.[57] She complained that Order has affected her attendance at her church.[58]

52. The *Bill of Rights* is not a constitutional instrument. Alleged breaches of this statute should not be given the same weight as actual constitutional breaches.[59] As acknowledged by the Supreme Court in *Authorson*, the *Bill of Rights* "allows deprivation of the enjoyment of property only through due process of law."[60] Due process occurs during the passage of legislation.[61] There is insufficient evidence that the Order is responsible for any loss of property and even if it were, the Order's operation is evidence of due process.

53. Moreover, Ms. Ingram's claims that the Order violated her right to freedom of religion under the *Bill of Rights* is unsubstantiated by her own evidence. Ms. Ingram has not led any

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[55] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] **[TAB 11]**.
[56] *Gosselin v Quebec (Attorney General)* 2002 SCC 84 at paras. 80-81 [*Gosselin*] **[TAB 12]**.
[57] There is an insufficient causal connection on the evidence between the Order and Ms. Ingram's inability to secure other employment.
[58] Ingram Affidavit at para. 14
[59] *T.(P.) v. B.(R.)*, 2001 ABQB 739 at para. 55 [*T.(P.)*] **[TAB 13]**; see also *R. v. Oakes*, [1986] 1 SCR 103 [*Oakes*] **[TAB 14]** at para. 38:

> As this Court held in *R. v. Big M Drug Mart Ltd.*, *supra*, the *Charter*, as a constitutional document, is fundamentally different from the statutory *Canadian Bill of Rights*, which was interpreted as simply recognizing and declaring existing rights.

See also *Bigsby v. Alberta*, 2002 ABQB 574 **[TAB 15]**.
[60] *Authorson v. Canada (Attorney General)*, 2003 SCC 39 [*Authorson*] **[TAB 16]**.
[61] *Authorson* at para. 37 **[TAB 16]**.

evidence suggesting that her freedom of religion has been infringed. She indicated that the Order has affected the number of people that may attend at her church, but she failed to provide evidence that she has been unable to attend.[62] The Order has not prohibited attendance at her church. Even if Ms. Ingram's freedom of religion has been infringed, that right is protected by more robust *Charter* protections. As such, this *Bill of Rights* claim is without merit.

54. Accordingly, neither Ms. Ingram's property deprivation claim nor her claims of religious infringement can demonstrate that there is a serious issue that warrants an injunction in these circumstances.

(2) There is No Evidence the Order Infringes Freedom of Conscience or Religion

55. The Supreme Court of Canada has broadly defined protected religious practice. Religious practices need not be part of an established or shared belief system. All that is required is that the claimant sincerely believe their practices hold religious significance.[63]

56. Neither Applicant provided any evidence of how the Order infringes upon the religious practice. Ms. Ingram has not provided any evidence as to how the Order has infringed on her s. 2(a) rights. The Order has lowered attendance at churches to 15% fire code capacity. Ms. Ingram has not led any evidence that her religious beliefs require her to attend services with a certain quantum of worshippers. Her evidence is clear that worshippers are still allowed to attend church, just not in the numbers before the pandemic started. Ms. Ingram has also failed to provide evidence as to how the Order's restrictions on attendance on weddings and funerals have affected her ability to practice her religious beliefs or how those restrictions have affected her at all.

57. Torry Tanner has not provided adequate evidence to support her claim of a breach of her s. 2(a) rights. The operation of the Order prevents her from celebrating Christmas in the manner

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[62] Ms. Ingram gives evidence at para. 14 of her affidavit that she has had to cease attending her church due to the Order; however, the Order does not prohibit Ms. Ingram (or any Albertan) from attending religious services. Ms. Ingram also indicates at para. 16 she was prevented from celebrating Easter in her preferred fashion, but gives no particulars on this. Moreover, Ms. Ingram goes on to speculate that the Order may prohibit her from attending religious services on Christmas. This claim is purely speculative. It is as likely, based on the evidence before the Court, that a number of congregants would be unwilling to attend in person services, choosing a remote option instead, as a result of the COVID-19 pandemic.

[63] *Syndicat Northcrest v. Anselem*, 2004 SCC 47 at para. 47 **[TAB 17]**.

she is accustomed. She has not provided any evidence as to why those activities are tied to her religious beliefs. She lamented the loss of "four days together filled with laughter and joy, away from the usual daily chaos."[64] There is no evidence tying these experiences to her religious beliefs or practice.

58. Ms. Tanner also attested that the she will be "stripped of Christmas together with family."[65] This is hyperbolic and unsupported by the evidence. She resides with a family member. The Order does not preclude her from celebrating or visiting with her family in virtual or other ways that do not require close physical proximity.

(3) The Order Does Not Infringe Freedom of Expression

59. The Order compels people to wear masks indoors. However, the Order also provides a number of exceptions and circumstances in which people are not required to wear a mask. One of these exceptions directly applies to Ms. Ingram, who claimed she is unable to wear a mask under any circumstances because of her health.[66] Ms. Ingram cannot claim her rights have been violated when the Order does not apply to her.

(4) There is No Breach of Freedom of Assembly

60. The Order does not infringe on the right to gather peacefully, which is also an expressive activity, in the manner the Applicants suggest. The Order restricts the quantum of people gathering. It provides exemptions for weddings and funerals,[67] places of worship,[68] businesses and other listed entities,[69] and education.[70]

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[64] Tanner Affidavit at para. 4.
[65] Tanner Affidavit at para. 5.
[66] Order, s. 24(c).
[67] Order, s. 13
[68] Order, ss. 15-17, 40-45.
[69] Order, ss. 25-32.
[70] Order, s. 37.

(5) There is No Breach of Freedom of Association

61. Freedom of association is usually related to labour and collective bargaining. Freedom of association is meant to protect the right to do collectively what one may do as an individual.[71] This right recognizes the profoundly social nature of human endeavours and protects the individual from state-enforced isolation in the pursuit of their ends.[72] Freedom of association is comprised of three types of rights:

- constitutive right to join with others and form associations;
- derivative right to join with others in the pursuit of other constitutional rights; and
- purposive right to join with others to meet on more equal terms the power and strength of other groups or entities.[73]

62. The constitutive right precludes the state from interfering with individuals meeting or forming associations. It does not preclude the state from interfering with the activities of such an association. The derivative right protects the activities of an association that relate specifically to other *Charter* freedoms. The purposive right protects activities, such as bargaining or striking. These are activities that enable individuals to meet on more equal terms with more powerful entities, such as employers.[74]

63. There is no evidence that the Order has interfered with anyone person's s. 2(d) rights. The Order precludes people from meeting in person. It does not prevent them from associating in other ways and it certainly does not interfere with any activities protected by s. 2(d).

(6) There is No Evidence Supporting the Section 6 Claims

64. There is no evidence supporting the claims made under s. 6 of the *Charter*, which protects the right to enter and travel within Canada. Accordingly, the Applicants have not demonstrated that there is a serious issue with respect to these claims.

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[71] *Mounted Police Association of Ontario v. Canada*, 2015 SCC 1 at para. 54 [*MPAO*] **[Tanner Book of Authorities, TAB 33]**.
[72] *MPAO* at para. 54 **[Tanner Book of Authorities, TAB 33]**.
[73] *MPAO* at para 51**[Tanner Book of Authorities, TAB 33]**.
[74] *MPAO* at paras. 52-54 **[Tanner Book of Authorities, TAB 33]**.

(7) The Charter *Does Not Protect Economic Rights*

65. Ms. Ingram deposed that she owns and operates a fitness centre that has had to close and consequently, she has lost a source of income. She blamed the Order for this loss as well as for preventing her from securing other sources of income.

66. It is trite law that the *Charter* does not protect economic rights.[75] Ms. Ingram's allegations of s. 6 and 7 breaches are based entirely on economic hardships, which are not protected by the *Charter*.

(8) There is No Breach of Life, Liberty, or Security of the Person

67. Anyone alleging a breach of section 7 must prove "first, that there has been or could be a deprivation of the right to life, liberty and security of the person, and second, that the deprivation was not or would not be in accordance with the principles of fundamental justice."[76] Section 7 is engaged when state action results in physical detention, imprisonment, and deportation to a substantial risk of torture.

68. The Order's requirement that people wear masks in most indoor settings falls far short of infringing life, liberty, and security of the person. The Order provides a number of exceptions to the "mask mandate," one of which directly applies to Ms. Ingram. The mask mandate does not apply to anyone who is unable to wear a mask due to a mental or physical concern or limitation.[77]

B. <u>The Order Has Not Caused Irreparable Harm</u>

69. Irreparable harm refers to the nature of the harm, not the magnitude of harm.[78] Irreparable harm includes harm that cannot be quantified with damages. The evidence of

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[75] *Gosselin* at paras. 81-82 **[TAB 12]**.
[76] *Charkaoui v. Canada*, 2007 SCC 9 at para. 12 **[TAB 18]**.
[77] Order, s. 24(b).
[78] *RJR-MacDonald* at 315 **[Tanner Book of Authorities, TAB 41]**.

irreparable harm must be clear and not speculative. The Court cannot simply presume irreparable harm; the Applicant must provide sufficient evidence.[79]

70. None of the Applicants have provided clear evidence of irreparable harm. They ask this Court to speculate and presume harm by the mere fact that the Order remains in operation.

(1) The Applicants Have Not Provided Objective Evidence

71. Ms. Ingram and Ms. Tanner made references to harms to mental health, should the Order continue over the Christmas season. In *Wasylynuk,* [80] the Federal Court considered an affidavit similar in content to those before the Court in these Applications. There, the applicant, indicated in his affidavit that his irreparable harm would be (in part) the profound mental distress he experienced.[81] The Court noted that this was not objective evidence. The affidavit used similar "strong language"[82] to describe the expected harms to the applicant's mental health that he would experience if the Court did not grant the injunction. In considering this harm, the Court noted:

> His evidence also does not directly address the difference between the usual anxiety and upset that must surely accompany any investigation or allegation against a member of the Force related to failing to obey an order, and any greater or enhanced effect due to his mental or physical health at the moment. Like the reputational harm above, I am unable to conclude that the impact on the applicant's integrity, pride and self-identity as a Mountie is different from what all RCMP members who find themselves in the same position would also suffer.[83]

72. Here, the evidence of the affiants with respect to the emotional and psychological harms that they might suffer are no different than the harms that any member of society will suffer. The Order has application throughout the province and affects all Albertans.

73. In *Wasylynuk*, notwithstanding that the effects were not unique to the applicant, the Court observed the kind of evidence that was *not* before it. Just as in these Applications, the applicant

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[79] *Springs of Living Water Centre Inc. v. The Government of Manitoba*, 2020 MBQB 185 at para. 23 [*Springs of Living Water*] **[TAB 19]**.
[80] *Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 [*Wasylyuk*] **[TAB 20]**.
[81] *Wasylynuk* at para. 169 **[TAB 20]**.
[82] *Wasylynuk* at para. 184 **[TAB 20]**.
[83] *Wasylynuk* at para. 184 **[TAB 20]**.

in *Wasylynuk* had no "expert" evidence that would speak to the harm that may arise. While the Court noted that such evidence was not mandatory,[84] the Court concluded:

> In the absence of any such evidence to assist in understanding the nature and extent of potential harm that might occur to his mental or physical health in the future, I am unable to find that the evidence related to the harm [the applicant] apprehends to his future health, including his mental health and his integrity, pride and self-identity, meets the strict test for irreparable harm.[85]

74. Here, just as in *Wasylynuk*, there is no evidence before this Court from mental health professionals that have assessed and considered the harm that the Applicants may experience. While Alberta acknowledges the short time frame in which these Applications were brought, the Applicants were able to file fourteen affidavits, none of which speak to the harm experienced by any of the Applicants from an objective, medical perspective. This absence of evidence should be considered by the Court, just as it was considered in *Wasylynuk*.

(2) Economic Harm is Quantifiable

75. Ms. Ingram deposed to the economic harm she suffered over the last nine months. Even assuming that the Order is responsible for these harms, which Alberta expressly denies, such harms are entirely quantifiable. Moreover, both the federal and the provincial governments have offered financial relief to individuals and business owners throughout the pandemic.[86]

76. In extraordinary circumstances such as these, where a dangerous virus threatens the collective health and safety of all Albertans, irreparable harm would actually arise from suspending or lessening the Order. The Order requires the Applicants to find different ways to visit with their family and to amend their holiday traditions for a temporary period of time. The Order is in effect for four weeks. It cannot be said that against the backdrop of a global pandemic, irreparable harm arises from these temporary lifestyle changes.[87]

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[84] *Wasylynuk* at para. 185 **[TAB 20]**.
[85] *Wasylynuk* at para. 186 [emphasis added] **[TAB 20]**.
[86] Evans Affidavit at paras. 2-4 and Exhibit A.
[87] *Springs of Living Water* at para. 25 **[TAB 19]**.

C. The Balance of Convenience Favours Alberta

77. Courts must not lightly set aside laws that the Legislature has duly enacted for the public good.[88] This Court must assume that the law will produce a public good. It then falls to the applicant to demonstrate that suspending the duly enacted law would provide a public benefit.[89] The balance of convenience imposes a very high burden on an applicant seeking to enjoin legislation.[90] The court need not assess the actual benefits arising from the specific terms of the legislation; the Applicants must demonstrate there is a more compelling public interest in suspending the legislation.[91]

78. This high burden means that, in constitutional cases, it is only in the clearest of cases that the court should grant an interlocutory injunction.[92] There are only five examples from the Supreme Court granting this kind of extraordinary interlocutory relief since the *Charter* came into force.[93]

79. An interlocutory application is not the appropriate venue to adjudicate *Charter* claims. This can only be done at a hearing on the merits where all parties can present evidence and arguments. The urgent nature of injunction applications makes this kind of thorough examination almost impossible.

80. The Applicants have failed to demonstrate that enjoining the Order would serve the greater good or produce a public benefit.

(1) The Order was Duly Enacted

81. The CMOH's authority to make public health orders comes from s. 14 of the *Public Health Act*.[94] Section 29(1) of the *PHA* authorizes the CMOH to initiate an investigation to determine what action is necessary to protect public health. Once the CMOH has confirmed the

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[88] *Harper v. Canada*, 2000 SCC 57 at para. 9. **[Tanner Book of Authorities, TAB 22]** *Springs of Living Water* at para. 27 **[TAB 19]**.
[89] *RJR-MacDonald* at 348-349 **[Tanner Book of Authorities, TAB 41]**.
[90] *PT v. Alberta*, 2019 ABCA 158 at para. 75 **[Tanner Book of Authorities, TAB 37]**.
[91] *RJR-MacDonald* at 316 **[Tanner Book of Authorities, TAB 41]**.
[92] *Harper v. Canada*, 2000 SCC 57 at para. 9. **[Tanner Book of Authorities, TAB 22]** *Springs of Living Water* at para. 27 **[TAB 19]**.
[93] *Springs of Living Water* at para. 28 **[TAB 19]**.
[94] RSA 2000, c P-37 [*PHA*] **[TAB 21]**.

presence of a communicable disease, the CMOH may take whatever steps are necessary to suppress and prevent the disease and to protect the public.[95]

82. The Applicants argue that the Order is unlawful for various reasons. Ms. Tanner and the Churches argue that the Order is not legislation and was not enacted by elected representatives. This argument has no merit. It is well-settled law that a provincial government has authority to delegate matters that fall within its jurisdiction.[96]

83. All of the Applicants argue that the Order is invalid because it lacks democratic accountability. This argument has no merit. The *PHA* empowers the Lieutenant Governor in Council (LGIC) to declare that a public health emergency exists, on the advice of the CMOH.[97] LGIC refers to the Lieutenant Governor acting on the advice of the Premier or Cabinet. The LGIC declared a public health emergency existed on November 24, 2020.[98] The LGIC could only have done so on the advice of elected representatives, who in turn acted on the advice of the CMOH. There is no merit to the argument that the Order was enacted in a democratic void.

(2) Suspending the Order Would Cause Public Harm

84. There is insufficient evidence to establish that suspending the Order would provide a greater public good than the continued operation of the Order. There is strong and compelling evidence that Alberta is affected by the global pandemic and that significant public health measures are necessary to protect the health and safety of the public. Removing or lessening these protections has great potential to damage and undermine public health.

85. Alberta has been experiencing exponential growth in COVID-19 actives cases, hospitalizations, and deaths. The harm posed by SARS-CoV-2 is real and life-threatening. The harm affects not just those people who have suffered illness or worse, but their close contacts and loved ones. The virus has displaced people who had non-urgent surgeries scheduled because

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[95] *PHA*, s. 29(2) **[TAB 21]**.
[96] *Hodge v The Queen* (1883), 9 App Cas 117 at 132 **[TAB 22]**.
[97] *PHA*, s. 52.1(1) **[TAB 21]**.
[98] Hinshaw Affidavit at para. 19.

health care resources had to be diverted to attend to the public health crisis. The effects of SARS-CoV-2 on Alberta have been staggering.[99]

86. The Applicants have argued at length that the Order is an unjustified erosion of fundamental freedoms. Notwithstanding the dearth of evidence to support this argument, freedom has never been absolute. Individual freedoms have always been justifiably curtailed by the public good. As then Chief Justice Dickson wrote:

> Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.[100]

87. The *Charter* itself contemplates the need for governments to curtail rights and freedoms; this is the entire purpose of s. 1. The Supreme Court has recognized that "[it] may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance."[101] Surely suspending or minimizing public health orders in the face of a deadly and dangerous pandemic is inimical to the realization of collective goals of fundamental importance. The Courts have recognized the suspension of proven *Charter* protected rights in less dire circumstances.

88. Canadian courts have considered the balance of COVID-19 related public health measure against individual rights and freedoms. The Newfoundland and Labrador Supreme Court heard a constitutional challenge to provincial travel restrictions earlier this year.[102] In that matter, a woman was denied entry into Newfoundland to attend her mother's funeral and attend to her estate. The applicant alleged that her s. 6 and 7 *Charter* rights were violated. The Court accepted unhesitatingly the existence of a public health emergency and the serious threat posed by SARS-CoV-2. The Court also agreed with the Applicant that her right to travel within Canada as guaranteed by s. 6(1) of the *Charter* had been breached. However, the Court concluded that this breach was justified under s. 1 of the *Charter*.[103] The Court held that:

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[99] Hinshaw Affidavit at para. 26.
[100] *Big M* at para. 95 [emphasis added] **[TAB 9]**.
[101] *Oakes* at para. 65 **[TAB 14]**.
[102] *Taylor v. Newfoundland and Labrador*, 2020 NLSC 125 [*Taylor*] **[TAB 23]**.
[103] *Taylor* at para. 402 **[TAB 23]**.

> In the context of such a public health emergency, with emergent and rapidly evolving developments, the time for seeking out and analyzing evidence shrinks. Where the goal is to avert serious injury or death, the margin for error may be narrow. In such a circumstance, the response does not admit of surgical precision. Rather, in public health decision making the "precautionary principle" supports the case for action before confirmatory evidence is available.[104]

89. At the time the applicant was denied entry to Newfoundland, the case numbers in the province were relatively low. Infection from outside sources posed a significant threat to Newfoundland's efforts to control the spread of the virus.[105] The Court was satisfied that the measures Newfoundland imposed were rationally connected and minimally impairing for that reason. With respect to proportionality, the Court held that:

> While restrictions on personal travel may cause mental anguish to some, and certainly did so in the case of Ms. Taylor, the collective benefit to the population as a whole must prevail. COVID-19 is a virulent and potentially fatal disease. In the circumstances of this case Ms. Taylor's *Charter* right to mobility must give way to the common good.[106]

90. The Manitoba Court of Queen's Bench recently heard and dismissed an application to enjoin its COVID-19 related public health orders. In *Springs of Living Water*, the Court heard an application from a church that wanted an exemption from a public health order ban on gatherings. The church argued that its worshippers should be permitted to attend sermons in their vehicles or "church in our cars."[107]

91. Manitoba conceded, and the Court agreed, that the applicant church could make out a serious issue to be tried but noted that the constitutionality had to be properly decided at a later date.[108] The Court dismissed the claims of irreparable harm due to an absence of evidence.[109] With respect to the balance of convenience, the Court acknowledged the public good the church provided. However, the Court also noted:

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[104] *Taylor* at para. 411 **[TAB 23]**.
[105] *Taylor* at paras 434.435 **[TAB 23]**.
[106] *Taylor* at para. 492 **[TAB 23]**.
[107] *Springs of Living Water* at para. 4 **[TAB 19]**.
[108] *Springs of Living Water* at para. 22 **[TAB 19]**.
[109] *Springs of Living Water* at paras. 23-25 **[TAB 19]**.

> I take seriously the applicant's argument that it provides a public service by offering religious services and fostering a sense of community. Like the respondent Manitoba, I do not dispute that this is in the public interest, however, I am of the view that at best in a pandemic, it is on an equal footing with the public interest served by the PHOs, which as Manitoba has emphasized is designed to mitigate the risk of contact in order to prevent death, illness and the overwhelming of the Manitoba health care system. I am persuaded by the Government's position that even if the public interest in fostering community and the public interest in keeping people safe can be said to be equivalent, that is not sufficient for the applicant to succeed on this application for a stay. In that regard, the applicant's onus requires it to show that the public interest in granting the stay outweighs the public interest in denying it. In that respect, the applicant has failed to so demonstrate.[110]

92. The Court further held that there was a strong public interest in maintaining the public health orders during a public health emergency. The circumstances of the pandemic militated in favour of the Court being cautious and not suspending the operation of public health orders before a full hearing on the merits could occur.[111]

93. Over the last nine months, more people have died from COVID-19 than from influenza over the last decade.[112] During a public health emergency such as this, the courts have recognized the risks of enjoining legislation specifically directed at the public good. The courts have confirmed the significant onus that the Applicants bear in showing that the public interest favours staying the legislation. Here, as in the other Canadian examples, the Applicants have failed to meet their considerable burden. Alberta's pandemic response requires nothing less and must remain in operation to address the incredible danger posed by SARS-CoV-2 to our collective wellbeing.

D. The *Bill of Rights* Does Not Change the Balance of Convenience

94. The *Bill of Rights* is an ordinary statute. It does not carry the constitutional weight of the *Charter*, nor does it allow for the judicial remedies available under the *Charter*.[113]

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[110] *Springs of Living Water* at para. 37 **[TAB 19]**.
[111] *Springs of Living Water* at para. 38 **[TAB 19]**.
[112] Hinshaw Affidavit at para. 28.
[113] *T.(P.)*at para. 55 **[TAB 13]**.

95. The rights protected in the *Bill of Rights* are not absolute. Even the constitutionally protected rights protected by the *Charter* are subject to reasonable limitations with regard to the public interest. The *Bill of Rights* is no different in that respect. As with the *Charter*, rights under the *Bill of Rights* are subject to justifiable limitations having regard to the rights and interests of others and the public in general.[114]

96. The *PHA* gives the CMOH the tools to respond to a public health emergency. The CMOH enacted the Order under this authority. The Order suspends some of the activities people used to enjoy prior to the pandemic. There is no compelling evidence that the Order has breached the rights protected by the *Bill of Rights*. It is difficult to conceive of what evidence could tip the balance in favour of undermining the public health measures designed to prevent the spread of the dangerous and deadly SARS-CoV-2 virus. The public health measures set out in the Order are a reasonable limit on the rights protected by the *Bill of Rights*.

PART V - CONCLUSION

97. This Court must dismiss these Applications. The Applicants have failed to establish each and every branch of the tripartite test. There is insufficient evidence to support a finding that there is a serious issue or that there is irreparable harm in this case. Most significantly, there is insufficient evidence before this Court that suspending the Order would serve the public good more so than the continued operation of the validly enacted Order. It is Alberta's position that there can be no dispute as to the existence of the pandemic and the public health emergency it has created. Suspending the Order as the Applicants request would undermine the rational and proportionate measures imposed by the Order. Lesser measures would fail to contain the spread of the virus and endanger the collective good.

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[114] *Peter v Public Health Appeal Board of Alberta*, 2019 ABQB 989 at para. 86 **[TAB 24]**.

PART VI - RELIEF

98. Alberta respectfully asks that both Applications be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of December, 2020.

for: **Aleisha Bartier**
Counsel for Her Majesty the Queen in Right of Alberta and the Chief Medical Officer of Health

PART V – LIST OF AUTHORITIES

TAB

1. *Alberta Rules of Court*, Alta Reg 124/2010
2. *ANC Timber Ltd v Alberta (Minister of Agriculture and Forestry)*, 2019 ABQB 653
3. *Condominium Corporation No. 042 5177 v Kuzio*, 2019 ABQB 814
4. *Sahaluk v Alberta (Transportation and Safety Board)*, 2013 ABQB 683
5. *R v Khelawon*, 2006 SCC 57
6. *R v Bradshaw*, 2017 SCC 35
7. *R v Mohan*, [1994] 2 SCR 9
8. *R v Beland*, [1987] 2 SCR 398
9. *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295
10. *MacKay v Manitoba*, [1989] 2 SCR 357
11. *Canadian Charter of Rights and Freedoms*, s. 7, Part 1 of *The Constitution Act, 1982* being Schedule B to the *Canada Act (1982)* UK, 1982 c 11
12. *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84
13. *T.(P). v B.(R.)*, 2001 ABQB 739
14. *R v Oakes*, [1986] 1 SCR 103
15. *Bigsby v Alberta*, 2002 ABQB 574
16. *Authorson v Canada (Attorney General)*, 2003 SCC 39
17. *Syndicat Northcrest v Anselem*, 2004 SCC 47
18. *Charkaoui v Canada*, 2007 SCC 9
19. *Springs of Living Water Centre Inc. v The Government of Manitoba*, 2020 MBQB 185
20. *Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962
21. *Public Health Act*, RSA 2000, c P-37
22. *Hodge v The Queen* (1883), 9 App Cas 117

23. *Taylor v Newfoundland and Labrador*, 2020 NLSC 125

24. *Peter v Public Health Appeal Board of Alberta*, 2019 ABQB 989