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APPLICANTS	REBECCA MARIE INGRAM, HEIGHTS 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
DOCUMENT	**WRITTEN FINAL ARGUMENTS OF THE APPLICANTS HEIGHTS BAPTIST CHURCH, NORTHSIDE BAPTIST CHURCH, ERIN BLACKLAWS, and TORRY TANNER**

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I. INTRODUCTION

1. These written closing submissions are provided on behalf of the Applicants, Heights Baptist Church, Northside Baptist Church, Erin Blacklaws and Torry Tanner, following the closing of evidence in the hearing of this matter before the Honourable Madam Justice Romaine. In addition to these closing submissions, Heights Baptist Church, Northside Baptist Church, Erin Blacklaws and Torry Tanner repeat and adopt their submissions set out in the Pre-Trial Factum of the Applicants Heights Baptist Church, Northside Baptist Church, Erin Blacklaws and Torry Tanner, dated September 1, 2021 ("Pre-Trial Factum"), and the Responding Brief of the Applicant Heights Baptist Church, Northside Baptist Church, Erin Blacklaws and Torry Tanner, dated and filed September 21, 2021 ("Pre-Trial Reply Brief"). Heights Baptist Church, Northside Baptist Church, Erin Blacklaws and Torry Tanner also repeat and adopt the submissions of the Applicant, Rebecca Marie Ingram (together with Heights Baptist Church, Northside Baptist Church, Erin Blacklaws and Torry Tanner (the "Applicants"), in so far as they apply to their claims and with respect to any relevant evidence filed in this matter.

2. Throughout this case, the Applicants have produced evidence showing the profound negative impacts and real harms they have endured as a result of Dr. Deena Hinshaw, in her capacity as Alberta's Chief Medical Officer of Health ("**CMOH**"), pronouncing over 40 orders ("**CMOH Orders**") in response to SARS-CoV-2 ("**COVID-19**").[1] These CMOH Orders restricted, and at times outright prohibited, some of the most fundamental aspects of a free society, such as:

    a. Gathering with friends and family in the safety and privacy of their own homes;

    b. Moving about freely;

    c. Conducting business to sustain livelihoods;

    d. Peacefully gathering with likeminded individuals for self-fulfillment;

    e. Manifesting religious beliefs;

    f. Gathering to commemorate major life events;

    g. Attending school or work; and

    h. Accessing personal care and health care services.

[1] RECORD OF DECISION – CMOH Order 01-2020; RECORD OF DECISION – CMOH Order 42-2020.

3. Each and every one of these restrictions were endorsed by the CMOH and made under her purported authority as a medical officer of health under section 29 of the *Public Health Act*.

4. The Applicants have submitted affidavits evidencing how these CMOH Orders, both on their face and in their effect, infringed their constitutionally protected rights as guaranteed in the *Charter of Rights and Freedoms* ("***Charter***"). The *only way* the CMOH Orders can lawfully infringe the Applicants' rights is if the Respondents can satisfy its onus that the infringements were "prescribed by law" and can be "demonstrably justified in a free and democratic society."[2]

5. Despite the Respondents' many expert and lay witnesses, the record remains void of any concrete evidence that the CMOH Orders, and their resulting limitations on the Applicants' rights and freedoms, were demonstrably justifiable.

II. *CHARTER* RIGHTS INFRINGED

6. The *Charter* was written specifically to limit government action regardless of the situation. Constitutional rights are not suspended during a pandemic. In fact, history shows that individual rights and freedoms are most vulnerable during times of unrest. This is why it is more important than ever to ensure that *Charter* rights and freedoms are being protected while the Respondents reacted to COVID-19.

7. Counsel for the Respondents have sought to muddy the waters in this regard. Dr. Deena Hinshaw, in her capacity as CMOH, provided unequivocal clarity on the Respondent's position. During questions regarding whether the CMOH Orders would restrict the liberties of Albertans, the CMOH agreed, "it was clear that – that these interventions would restrict liberties".[3]

8. The law is clear, if a single right or freedom of even one individual Applicant is unjustifiably infringed, the CMOH Orders are unconstitutional.

a) Section 2(a) – Freedom of Conscience and Religion

9. An infringement of section 2(a) of the *Charter* occurs if the claimant shows:

> (1) that he or she sincerely believes in a belief or practice that has a nexus with religion, and (2) that the impugned conduct interferes with

[2] *Charter* s. 1.
[3] April 4, 2022 Hearing Transcript, p 32, l 12.

> the claimant's ability to act in accordance with that belief or practice in a manner that is more than trivial or insubstantial.[4]

10. The Supreme Court of Canada has also stated that an individual's religious rights, as protected by the *Charter*:

> …must therefore account for the socially embedded nature of religious belief, as well as the "deep linkages between this belief and its manifestation through communal institutions and traditions" *(Loyola,* at para. 60). In other words, religious freedom is individual, but also "profoundly communitarian" *(Hutterian Brethren,* at para. 89). The ability of religious adherents to come together and create cohesive communities is an important aspect of religious freedom under s. 2 (a).[5] [Emphasis added]

11. The Applicants each have religious beliefs that are fundamental to them as individuals, but their beliefs are broader than any one person. The Applicants sincerely hold that their religious ceremonies and worship must be done physically, in-person and without their congregations being artificially and arbitrary divided and separated by government. The Applicants further believe that to limit the worship gatherings of their congregants is an act of disobedience to Christ, the Head of the Christian Church. They are called to care for the whole health of their congregants: physical, spiritual, mental, emotional, and relational.

12. The Applicants' communitarian and socially embedded nature of their religious beliefs is precisely what the Supreme Court of Canada confirmed was protected in *TWU*.

13. In their pre-trial brief, the Respondents allege that "no jurisdiction exists expressly recognizing the rights of corporations (or non-natural persons) to hold s. 2(a) *Charter* rights…"[6] This implies that they are doing the Applicants a favour by conceding that the Applicant Churches may assert s. 2(a) *Charter* infringements.

14. This statement by the Respondents is patently false. In the *Loyola High School*, the Supreme Court of Canada (SCC) confirmed this very issue by stating that the claimant corporation had a section 2(a) clarified *Charter* right:

> In our view, Loyola may rely on the guarantee of freedom of religion found in s. 2(*a*) of the *Canadian Charter*. The communal character of religion means that protecting the religious freedom of individuals requires protecting the religious freedom of religious organizations,

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[4] *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 SCR 386 at para 122.
[5] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 SCR 293 at para 64 [***TWU***].
[6] Pre-Trial Brief of Law of the Respondents, para 14 [**Respondents' Brief**].

including religious educational bodies such as Loyola. Canadian and international jurisprudence supports this conclusion.

This Court has affirmed that freedom of religion under s. 2(*a*) of the *Canadian Charter* has both an individual and a collective dimension.[7]

15. Despite its persistent pre-trial position, the Respondents now readily concede that certain of the Applicants' section 2(a) *Charter* rights have been infringed.[8]

b) Section 2(b) – Freedom of Thought, Opinion and Expression

16. Freedom of expression "has been recognized as a fundamental ingredient to the proper functioning of democracy for hundreds of years."[9] The Supreme Court has repeatedly found that, "[i]t is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression."[10] Indeed, "[f]reedom in thought and speech… are the essence of our life."[11]

17. The Supreme Court has clearly stated that: "The right to freedom of expression is just as fundamental in our society as the open court principle. It fosters democratic discourse, truth finding and self-fulfilment."[12] To summarize the jurisprudence, "[t]he vital importance of freedom of expression cannot be overemphasized."[13]

18. Essential to protecting freedom of expression – and at the heart of democracy – is the right to peacefully, publicly, and collectively protest government action. Due to its importance as a fundamental value in our society, any government interference with freedom of expression "must be subjected to the most careful scrutiny" and "calls for vigilance."[14]

19. Expression is protected by the *Charter* if it meets the following test: (1) Does the activity in question have expressive content, thereby bringing it, *prima facie*, within the scope of s. 2(b) protection?; (2) Is the activity excluded from that protection as a

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[7] *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 91-92.
[8] Respondent's Brief at para 24.
[9] *Christian Heritage Party v. City of Hamilton*, 2018 ONSC 3690 at para 39.
[10] *Edmonton Journal v. Alberta (Attorney General),* [1989] 2 SCR 1326, 1989CanLII 20 (SCC) at para 3.
[11] *Committee for the Commonwealth of Canada v. Canada,* [1991] 1 SCR 139, 1991 CanLII 119 (SCC), 1991] 1 RCS 139 at para 78, quoting *Boucher v The King*, [1951] SCR 265 at page 288 [***Committee for the Commonwealth of Canada***].
[12] *Canadian Broadcasting Corp. v. Canada (Attorney General),* 2011 SCC 2 at para 2.
[13] *Committee for the Commonwealth* at para 95, quoting *R v Kopyto* (1987), 24 OAC 81 at pp 90-91, 62 OR (2d) 449.
[14] *R v Sharpe,* [2001] 1 SCR 45, 2001 SCC 2 (CanLII) at para 22 ; *Little Sisters Book & Art Emporium v Canada (Minister of Justice),* 2000 SCC 69 (CanLII), [2000] 2 SCR 1120 at para 36.

result of either the location or the method of expression?; and (3) If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action?

20. In the case at bar, CMOH Orders prohibited public outdoor gatherings of more than five people, resulting in the outright prohibition of meaningful peaceful protests. In CMOH Order 29-2021, Alberta responded to overbroad and unjustifiable restrictions on the Applicants' 2(b) rights. On 27 May 2021, CMOH Order 29-2021 "established specific rules applicable to protest gatherings which had previously been covered by measures applicable to 'private social gatherings'."[15]

21. These new rules prohibited protestors from going indoors "except where necessary to use the washroom", wear a face mask at all times, maintain two meters from any other person in attendance, and not offer any food or beverage to any other person.[16]

22. The CMOH admits that these stringent new rules "expanded the ability of Albertans to protest" compared to the draconian measures that were in place prior to the revision.[17] CMOH Order 29-2021 is proof that the prior CMOH Orders were not minimally intrusive, since the more lenient measures were put in place "while the health care system was still at a critical point due to a spike in cases…"[18]

23. The CMOH Orders placed severe restrictions upon the Applicants' ability to participate in social and political decision making by publicly expressing their concerns as they searched for truth regarding the risks of COVID-19 and the Government of Alberta's response to the virus.

24. Furthermore, the Respondents' conduct and the CMOH Orders stifled the Applicants' freedom to express themselves, as the evidence in this case clearly shows; certain of the Applicants felt restricted from attending peaceful protests and expressing their political beliefs due to the threat of fines and even arrest.[19]

c) Section 2(c) – Freedom of Peaceful Assembly

25. Although comparatively undeveloped, an identified purpose of freedom of peaceful assembly is to protect the physical gathering together of people.[20] Further, the right

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[15] Affidavit of Dr. Deena Hinshaw, Affirmed on 12 July 2021, at para 223.
[16] CMOH Order 29-2021, s. 4.11.
[17] April 5, 2022 Hearing Transcript, p 58, l 39-40.
[18] Affidavit of Dr. Deena Hinshaw, Affirmed on 12 July 2021, at para 223.
[19] Supplemental Affidavit of Torry Tanner, Sworn 20 January 2021 at para 2.
[20] *Roach v Canada (Minister of State for Multiculturalism and Citizenship),* [1994] 2 FC 406, 1994 CanLII 3453 (FCA) at para 69.

of peaceful assembly is by definition a collectively held right; it cannot be exercised by an individual and requires a coming together of people.[21]

26. The right to peacefully assemble is separate and distinct from the other section 2 *Charter* rights, and it requires the state to refrain from interfering in such assembly. It may also require the state to facilitate such assembly.[22] Although freedom of assembly cases have typically been determined on other *Charter* grounds, most notably freedom of expression,[23] freedom of peaceful assembly is an independent constitutionally-protected right.

27. Both the purpose and the effect of the CMOH Orders are to severely restrict the Applicants' right to peacefully assemble. Although the scope of what collective activities section 2(c) of the *Charter* guarantees is not yet fully defined, there can be no doubt that assembling for political and religious purposes is at the core of what 2(c) protects.

28. Prior to the enactment of CMOH 29-2021, the Applicants were unable to effectively assemble. Even after the CMOH implemented a specific set of rules for assembling at protests, the right to peacefully assemble was still tainted by these arbitrary restrictions, along with the constant fear of police intervention. This caused many Albertans, including certain of the Applicants, to refrain from exercising their constitutionally-protected rights.

29. The Respondents have now conceded that certain of the Applicants' section 2(c) *Charter* rights have been infringed.[24]

d) Section 2(d) – Freedom of Association

30. A purposive approach to freedom of association defines the content of this right by reference to its purpose: "to recognize the profoundly social nature of human endeavors and to protect the individual from state-enforced isolation in the pursuit of his or her ends".[25] Freedom of association allows the achievement of individual potential through interpersonal relationships and collective action.[26]

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[21] *Mounted Police Assn. of Ontario v Canada (*Attorney *General),* 2015 SCC 1 at para 64 [***MPAO***].
[22] See e.g. *Garbeau c Montreal (Ville de),* 2015 QCCS 5246 at paras 120-156.
[23] Basil S. Alexander, "Exploring a More Independent Freedom of Peaceful Assembly in Canada" (2018) 8: I, UWO J Leg Stud 4 online: https://ojs.lib.uwo.ca/index.php/uwojls/article/view/5715/4809.
[24] Respondent's Brief at paras 55, 59, 60, 62, 64.
[25] MPAO at para 54, citing from Reference re Public Service Employee Relations Act (Alta.), [1987) 1 SCR 313, 1987 CanLII 88 (SCC) at 365 [***Re Public Service***].
[26] *Dunmore v Ontario (Attorney General), 2001 SCC 94* at para 17.

31. The right to freedom of association encompasses the protection of (1) individuals joining with others to form associations (the constitutive approach); (2) collective activity in support of other constitutional rights (the derivative approach); and (3) collective activity that enables "those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict".[27]

32. The purposes and effects of the CMOH Orders are to severely limit the exercise of the collective rights of the Applicants, as private religious associations and individual Albertans, to peacefully assemble together for the purposes of manifesting their religious beliefs and/or political views therefore engaging section 2(d).

33. The Respondents have conceded that certain of the Applicants' section 2(d) *Charter* rights have been infringed.[28]

e) Section 7 – Life, Liberty and Security of the Person

Security of Person

34. Section 7 protects the rights to life, liberty and security of the person. Security of the person is generally given a broad interpretation and has both a physical and psychological aspect. The Supreme Court of Canada held that it encompasses "a notion of personal autonomy involving...control over one's bodily integrity free from state interference".[29] It further held that security of the person is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering.[30]

35. The CMOH Orders have clearly caused irrevocable "serious psychological suffering" to the Applicants, and also for many in Alberta's society who have turned to substance abuse or suicide to cope with all of the restrictions imposed by the Province.[31] The existence of such suffering is acknowledged in the Respondents' own evidence,[32] which references various programs developed by the Alberta Government to address

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[27] MPAO, at para 54, citing from *Re Public Service,* at 366.
[28] Respondent's Brief at paras 55, 59, 60, 62, 64.
[29] *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, at pp. 587-88 (para 136) per Sopinka J.
[30] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para; *Blencoe*, *supra*, at paras 55-57; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, at paras. 43, 191 and 200 ["***Chaoulli***"]; *Carter*, *supra*, at para 65.
[31] February 14, 2022 AM Hearing Transcript, p8, l30-36, p14, l7- 8, p21, l38-40, p23, l15-17, p25, l10-11, p25, l15-16, p29, l25-36, p45, l33-35.
[32] April 4, 2022 Hearing Transcript, p11, l19, 21, p20, l26-30, p23, l39, p79, l20, p80, l4, p82, l10, 21, p84, l11; April 5, 2022 Hearing Transcript, p84, l6; April 6, 2022 Hearing Transcript p61, l12.

higher suicide rates, depression, opiate abuse, and other mental health concerns related to COVID-19.[33]

Liberty

36. The liberty interest protects the right of individuals to be free from state restrictions upon the freedom of movement.[34] It also protects bodily autonomy, core lifestyle choices, and fundamental relationships.[35]

37. The Supreme Court has also held that the section 7 right to liberty protects a sphere of personal autonomy involving "the right to make fundamental personal choices free from state interference" and "inherently private choices" that go to the "core of what it means to enjoy individual dignity and independence".[36] The prohibitions on gathering at private homes, to protest, or for in-person worship restrict the right of participants to make personal choices free from state interference.[37]

38. The Respondents concede that certain of the Applicants' section 7 *Charter* rights to liberty have been restricted, but baldly claim that the restrictions are "clearly in accordance with the principles of fundamental justice."[38]

f) Section 7's Inherent Limits – The Principles of Fundamental Justice

39. A limitation upon a section 7 interest may be lawful so long as the infringement is in accordance with the principles of fundamental justice.[39] According to the Supreme Court of Canada, the principles of fundamental justice "are about the basic values underpinning our constitutional order."[40] Although the Supreme Court of Canada has recognized a number of principles of fundamental justice, three have emerged as seminal: arbitrariness, overbreadth, and grossly disproportionality.[41]

40. National security concerns—and by analogy, pandemics—cannot excuse procedures that do not conform to fundamental justice at the section 7 stage of the analysis.[42]

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[33] April 4, 2022 Hearing Transcript, p15, l15-19, 21-22, p21, l18-24, p28, l16-19, 33-34, p65, l26-31, p66, l7-9, p78, l32-34, p79, l832-36, p80, l3-4; April 5, 2022 Hearing Transcript p84, l17-19.
[34] *R v Heywood*, [1994] 3 SCR 761, 1994 CanLII 34 (SCC) at 789 [**Heywood**].
[35] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 SCR 315 at paras 83-85; *Godbout v Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 SCR 844 at para 66.
[36] *Carter v. Canada (Attorney General)*, 2015 SCC 5, at paras. 62, 64 [***Carter***]; *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55 at para 49.
[37] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, at para. 54 [***Blencoe***].
[38] Respondent's Brief at paras 73.
[39] *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 at paras 74-78 [***Bedford***].
[40] *Bedford* at para 96.
[41] *Carter v Canada (Attorney General),* 2015 SCC 5, [2015] 1 SCR 331 at para 72 [***Carter***].
[42] *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, at paras 23, 27.

Gross Disproportionality

41. Regarding gross disproportionality, the Supreme Court has stated, “if the impact of the restriction on the individual's life, liberty or security of the person is grossly disproportionate to the object of the measure”, the restriction will not be found to accord with the principles of fundamental justice.[43] The Court further found:

> The inquiry into gross disproportionality compares the law's purpose, "taken at face value", with its negative effects on the rights of the claimant and asks if this impact is completely out of sync with the object of the law.[44]

42. Where a law has some connection to its objective but impairs section 7 of the *Charter* so severely that it is out of proportion to its objective, such impairment is “grossly disproportionate.” Gross disproportionality applies only in extreme cases where “the seriousness of the deprivation is totally out of sync with the objective of the measure”.[45]

43. In *Canada v. PHS Community Services Society*[46], the Supreme Court found that the Minister of Health’s refusal to extend an exemption to the criminal prohibition of possession of proscribed drugs to Insite, a safe-injection clinic in Vancouver, was a denial of the principles of fundamental justice. It disregarded the evidence that Insite saved lives and prevented injury and disease without any adverse effects on public safety. The Court found that the closure of Insite was “grossly disproportionate” to any government interest in maintaining an absolute prohibition on drug possession at Insite.[47]

44. Similarly, in *Bedford*, the Supreme Court found that laws criminalizing prostitution-related provisions in the *Code* actually increased the risks faced by prostitutes to an extent that was grossly disproportionate to the stated objectives. The offence of communicating with any person in a public place for the purpose of prostitution, the object of which was to prevent street nuisance, criminalized attempts to screen customers publicly, which heightened the safety risk to prostitutes. The offence of keeping or being found in a “bawdy house”, the object of which was to prevent neighborhood disorder, merely criminalized prostitution indoors and risked having the prostitutes dangerously engage with their customers on the streets.[48]

45. The stated objective of the CMOH Orders is to reduce the spread of COVID-19, preserve hospital capacity, and reduce morbidity. However, the physical and

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[43] *Carter*, at para 89.
[44] *Carter*, at para 89.
[45] *Bedford*, *supra*, at para. 120.
[46] *Canada v. PHS Community Services Society*, [2011] 3 S.C.R. 134 [“***PHS***”].
[47] *Ibid*., at para. 136.
[48] *Bedford*, *supra*, at paras. 133-136, 147, 158-159.

psychological damage done to Albertans is grossly disproportionate to the potential benefits of the CMOH Orders. A UBC study highlighted the self-reported increase in suicidal thoughts and increased substance abuse among residents of Manitoba and Saskatchewan in 2020, it would be illogical to think Alberta has not suffered the same trend.[49] There has also been an explosion in drug overdoses in Canada and in overall damage to mental health. A Swiss study showed that for vulnerable populations in Canada, they would experience 7.79 years of life lost, and the mental trauma of forced isolation from friends and family would be irreversible.[50]

46. Perhaps most troubling is that the very act of keeping families confined to their homes increases the risk of death to elderly family members who have to spend more time with adolescents and younger adults who may bring Covid-19 into the home.[51]

Arbitrariness

47. A law is arbitrary if it lacks a real connection on the facts to the purpose the law pretends to serve.[52] Arbitrariness involves:

> …whether there is a direct connection between the purpose of the law and the impugned effect on the individual…There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person.[53]

48. The Supreme Court articulated its arbitrariness doctrine in *Chaoulli v. Quebec*.[54] There, the appellant brought a constitutional challenge to Quebec's prohibition on the purchase of private health care insurance. The prohibition's purpose was to make the Province's universal public health care plan exclusive. The evidence was that delays in the public health care system increased the risk of death and prolonged pain and stress, breaching the s.7 right to life and security of the person. Although the court was unanimous finding *prima facie Charter* breaches, it was evenly divided on the issue of fundamental justice.

49. The Applicants submit that given the paucity of solid justification from the medical evidence, the closure of gatherings for worship, restrictions on outdoor and private indoor gatherings, when gathering indoors at big box stores, grocery stores, liquor stores and cannabis stores is permitted, is clearly arbitrary.

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[49] Bhattacharya Affidavit1, Exhibit "C", at p. 23.
[50] Bhattacharya Affidavit1, Exhibit "C", at p. 15.
[51] Bhattacharya Affidavit1, Exhibit "C", p. 24.
[52] *Canada v. Bedford* [2013] 3 SCR 1101, at para. 111["*Bedford*"] ; *Rodriguez*, *supra*, at para. 147 (pp. 594-95); *Chaoulli*, *supra*, at paras. 129-30, 232.
[53] *Bedford* at para 111.
[54] *Chaoulli*, *supra*.

50. Nor was persuasive evidence adduced to connect the ban/restrictions on worship, outdoor and indoor gatherings to the purpose protecting hospital capacity, reducing Covid-19 spread, or reducing mortality. The Respondents have boldly claimed otherwise, but the record fails to show actual proof.[55]

51. The Applicants submit that this is because the Respondents are unable to prove that there is anything inherently unsafe about gathering which presents an unacceptable public health risk such that gathering must be banned. The CMOH Orders are therefore arbitrary.

Overbreadth

52. "Overbreadth" is a breach of the principles of fundamental justice, and therefore a basis for a finding of unconstitutionality in a law that affects life, liberty or security of the person. The Supreme Court of Canada established the doctrine of overbreadth to apply to any law that is broader than necessary to accomplish its purpose.[56] This is not a high burden.

53. In *Heywood*, the accused challenged a provision of the *Criminal Code* that described "vagrancy" as a person found guilty of the offence of sexual assault to being "found loitering in or near a schoolground, playground, public park or bathing area". He had previously been found guilty of sexual assault. The Supreme Court of Canada found that the law restricted the liberty of convicted sex offenders to whom the prohibition applied. It held that a law which restricted liberty more than was necessary to accomplish its valid purpose breaches principles of fundamental justice by reason of "overbreadth".

54. Writing for the majority, Justice Cory stated:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose…**If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated…**
>
> …[I]t must be determined whether the means chosen to accomplish this objective are reasonably tailored to effect this purpose. [57]

55. The Supreme Court found that the law was overbroad in three ways: (1) its geographic scope was too wide, because parks and bathing areas included places where children were not likely to be found; (2) its duration was too long, because it

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[55] The Applicants repeatedly asked to see what studies were relied on. Each time, the Respondent's had nothing to provide. *See* April 4, 2022 Hearing Transcript, p26, l22-23, p38, l21-25, p40, l23-40, p77, l19-25, p78, l23-28.

[56] *R v Heywood*, [1994] 3 SCR 761 [***Heywood***], https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1198/index.do?site_preference=normal&pedisable=true&alternatelocale=en

[57] *Heywood* at pp. 792-794 (emphasis added).

applied for life without any possibility of review; and (3) the class of persons it impacted was too wide, because some of the offenders to whom it applied would not be a continuing danger to children. The overbroad law thus offended the principles of fundamental justice. It was not saved under s. 1, because its overbreadth would cause it to fail the minimum impairment branch of the s. 1 analysis. The law was therefore struck down under s. 52(1) of the *Constitution Act, 1982*.

56. There are obvious parallels between *Heywood* and the present case. In *Heywood*, the purpose of the law was to protect children from predators. The stated purpose of the CMOH Orders is to preserve hospital capacity, prevent morbidity and prevent community spread. The expansive scope of the Impugned Provisions is far too wide. There is no compelling scientific evidence about the spread of COVID-19 outdoors, or evidence that COVID-19 is more transmissible at a place of worship as opposed to a grocery, big box, liquor or cannabis store. The class of persons to whom these CMOH Orders apply is thus far too wide. They apply to every Albertan - yet the science is clear that people under the age of 65 have a vanishingly low morbidity rate.

57. According to Dr. Bhattacharya, the CMOH Orders needed to target the most vulnerable: immunocompromised populations and elderly people at greatest risk of infection and death. The scientific data does not show that COVID-19 is transmissible through asymptomatic people. There is thus no valid medical or scientific basis to prevent healthy, asymptomatic people from gathering at churches, outdoors or in their homes. These non-infectious people do not present a risk of spreading COVID-19 to anyone, anywhere. The impugned CMOH Orders are therefore overbroad.

III. RESPONDENTS' EVIDENCE

a) Lack of Hard Evidence

58. The Respondents have repeatedly claimed support for their position based on bald assertions, rather than evidence, as is required.

59. In her 12 July 2021 Affidavit, Dr. Deena Hinshaw relies on information provided by the Government of Canada to support her CMOH Orders. However, this information is not evidence but merely speculation. The article speculates:

    a. certain outbreaks "*suggest*" people inhaled the virus beyond 2 meters;

    b. transmission "*can*" be facilitated by certain conditions; and

    c. certain activities "*may*" increase risk.[58] [emphasis added]

[58] Affidavit of Dr. Deena Hinshaw, Affirmed on 12 July 2021, at Exhibit "F".

60. These statements are nothing more than conjecture and do not meet the evidentiary burden on the Crown to justify *Charter* infringements, as will be discussed in detail herein.

61. The Respondents also rely heavily upon "modelling" as a basis for the CMOH Orders. However, by their very definition, these models are speculative and were shown to be unreliable repeatedly throughout the pandemic.

62. The Respondents' witness, Scott Long, who was the Acting Managing Director of the Alberta Emergency Management Agency from October 2020 until May 2021, admitted that the non-pharmaceutical interventions ("**NPI's**") at the time "*probably* saved lives in the earliest parts."[59] This is hardly reassuring and shows how the Respondents have failed to base their decisions on a foundation of evidence and therefore unable to prove their assertions.

b) <u>Bias of Expert Witnesses</u>

63. > One of the most formidable hurdles in generating and conveying knowledge is curbing one's own biases; <u>we often see what we want to see</u>.
>
> …
>
> There are many reasons to be concerned with the biases of expert witnesses: bias can <u>reduce the accuracy</u> of the expert's opinion, diminish the public's faith in the justice system, and <u>create unjust, potentially life-ruining, outcomes</u>.[60] [Emphasis added]

64. Admittedly, seeing what we want to see is a challenge which we all face. However, an expert witness, along with this Honourable Court, is held to a higher standard of impartiality.

65. It is respectfully submitted that Mr. Scott Long, while qualified as an expert by this Honourable Court, is biased towards the Respondents, and therefore any evidence tendered by him must be given minimal weight.[61]

66. The Supreme Court has indicated that employment by a party is not automatically a cause for disqualification, but in the case at bar, Mr. Long's employment created a reasonable apprehension of bias, since the outcome of the case will either bolster or trivialize his opinion and conduct during his time as the Acting Managing Director of the Alberta Emergency Management Agency.

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[59] February 15, 2022 PM Hearing Transcript, p44, l30-32 [Emphasis added].
[60] Jason M Chin, Michael Lutsky and Itiel E Dror, The Biases of Experts: An Empirical Analysis of Expert Witness Challenges, 2019 42-4 *Manitoba Law Journal* 21, 2019 CanLIIDocs 2802, <https://canlii.ca/t/sms3>, retrieved on 2022-06-03.
[61] *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23 at para 45.

67. A similar issue arose in *Prairie Well Servicing Ltd v Tundra Oil and Gas Ltd*, in which the Court found that the employee expert witness was not an independent expert witness because he was a senior executive of the company in question, and he was thus "too connected to one side of this litigation for his opinions to have much value in this context."[62]

68. Mr. Long was also a Managing Director of a vital government agency. Mr. Long continues to serve as an employee of the Government of Alberta. His evidence must therefore be given minimal weight, for two reasons. First, Mr. Long's testimony creates a situation in which he was able to retro-actively bolster his own decisions, but also the decisions of his Employer, the Respondent. Mr. Long's opinion is self-congratulatory, and while he admits the process was not flawless, that is hardly sufficient to counteract the otherwise affirming nature of his own decision as well as those of his employer.

69. The Respondent's reaction to COVID-19 and the resulting decisions made are also highly controversial and divisive. For his own self-preservation as an employee, notwithstanding any future potential promotion, Mr. Long is biased towards condoning, or at the very least, not opposing the responses made by the Respondent to COVID-19, which have all been partisan.

70. While Mr. Long undoubtedly has a unique perspective and provided this Honourable Court with evidence, it should be treated with caution and given dubious weight.

IV. THIS CASE DIFFERES GREATLY FROM *GATEWAY*

71. While the Court in *Gateway Bible Baptist Church et al. v. Manitoba et al* found that the Applicants section 2 rights had been infringed, that is where the similarities between these cases ends.[63] With the Respondents conceding that the Applicants' *Charter* rights have been infringed, the crucial issue is whether these infringements were justified as required in section 1 of the *Charter*.

72. The following s.1 justification analysis requires a careful critique of the impugned government action to ensure that it has been carefully tailored to the specific objective at hand. The *Gateway* decision is thus of minimal assistance to this Honourable Court, and it should be noted that the *Gateway* decision is currently under appeal.

73. In *Gateway*, the Court dealt with the Government of Manitoba's response to COVID-19 to that Province. 9.5% of Manitobans tested positive for COVID-19, with a 0.15%

[62] *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, at para 24.
[63] *Gateway Bible Baptist Church et al. v. Manitoba et al*., 2021 MBQB 219 [***Gateway***].

death rate.[64] Only 7.5% of Albertans tested positive with a 0.1% death rate.[65] While these numbers may seem comparable, when dealing with millions of residents in each Province, even a small fraction of one percent is significant. Moreover, as will be shown under the section 1 analysis, the Respondents' own expert on COVID-19 testing within Alberta, Dr. Zelyas, admitted that the tests were prone to false-positives, and that the number could be significantly lower.

74. The evidentiary record for these two cases is also different. This Honourable Court has been presented with evidence relevant to Alberta and the CMOH Orders pronounced for this Province. It would be improper to rely on evidence that was used for a decision in a different jurisdiction that is not part of this case's official record.

V. SECTION 1 ANALYSIS – INGRINGEMENT NOT JUSTIFIED

75. In order to justify the Respondent's *Charter* violations under section 1, the Respondents must establish on a balance of probabilities that the CMOH Orders are '"reasonable limits prescribed by law' that can be 'demonstrably justified in a free and democratic society.'"[66]

a) Prescribed By Law

76. Before turning to the *Oakes* analysis under section 1, the Respondents must first establish that the CMOH Orders satisfy the "prescribed by law" requirement. The Supreme Court has stated that "it must be asked whether the government entity was authorized to enact the impugned policies…"[67]

77. The CMOH Orders are effectively rules of general and universal application which, if not adhered to by all members of the public, can result in non-compliant members of the public being harshly penalized and even imprisoned. In both its purpose and effect, the CMOH Orders are legislation. While the CMOH asserts that such Orders were "implemented at the direction of elected officials"[68], the fact remains that the these were not Orders of an elected official, but rather Orders of the Chief Medical Officer of Health, an unelected official,[69] and therefore *ultra vires*, making them unable to be "prescribed by law".

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[64] Provincial COVID-19 and Seasonal Influenza Surveillance | Health | Province of Manitoba (gov.mb.ca)
[65] COVID-19 Alberta statistics | alberta.ca
[66] *Canadian Federation of Students v Greater Vancouver Transportation Authority,* 2009 SCC 31 at para 48 [***Greater Vancouver***].
[67] *Greater Vancouver* at para 50.
[68] April 4, 2022 Hearing Transcript, p8, l15-17.
[69] April 4, 2022 Hearing Transcript, p8, l19-22.

b) Pressing and Substantial Objective

78. The Respondents claim that "the pressing and substantial objective is clear; to preserve life by stopping the spread of COVID-19."[70] However, this is not the first time that the Crown has sought to "short-circuit" the section 1 analysis by claiming an overbroad objective. In fact, the Supreme Court has "warned against stating the objective of a law 'too broadly' in the s. 1 analysis, lest the resulting objective immunize the law from challenge under the *Charter*".[71] An objective must be established carefully and with precision.[72]

79. In *Carter*, the Crown claimed the objective was "the preservation of life".[73] However, the Supreme Court rejected this objective because it would result in the outcome being "foreordained"[74] and found that the actual objective was "the narrow goal of preventing vulnerable persons from being induced to commit suicide at a time of weakness."[75]

80. In the present case, the Respondents employed the same tactic rejected in *Carter*, claiming that the objective is "the preservation of life by stopping the spread of COVID-19."[76]

81. It should be noted, however, that the Respondents' do not necessarily agree with this portrayal. During cross-examination, the CMOH stated "the intent of non-pharmaceutical interventions [which is what the CMOH Orders implemented] is to spread out the course of the pandemic".[77] The CMOH also admitted that the only control the Respondents had over COVID-19 was "over how high that peak is, how steep the rise is and what the subsequent impact on acute care and severe outcomes is."[78]

82. A more accurate objective would be to ensure that acute care is continued by providing medical assistance to those in need of medical attention. The Applicants agree that this is both a pressing and substantial objective, but disagree that the facts of this case ever gave rise to such dire consideration.

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[70] Respondents' Brief at para 257.
[71] *Carter* at para 76.
[72] *R v K.R.J.*, 2016 SCC 31 at para 63.
[73] *Carter* at para 77.
[74] *Carter* at para 77.
[75] *Carter* at paras 78, 86.
[76] Respondents' Brief at para 257.
[77] April 5, 2022 Hearing Transcript, p 66, l21-23.
[78] April 5, 2022 Hearing Transcript, p 35, l1-6.

c) Rational Connection

83. Section 1 of the *Charter* requires the CMOH Orders to "be carefully designed to achieve the objective in questions."[79] This means that the CMOH Orders "must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective."[80]

84. Throughout the pandemic, the CMOH based her Orders upon the number of positive test cases within Alberta. As the number of positive cases increased, more severe restrictions were imposed on Albertans. Indeed on 17 June 2020, the CMOH stated during a press conference that people should "[p]romote the fact that everyone should get tested –even with no symptoms."[81] On cross-examination she stated that this was important to identify cases so that they could "manage the spread of COVID-19 in a targeted way by identifying those who were infectious…"[82]

85. While this seems *prima facie* valid, basing the CMOH Orders on positive test cases is still arbitrary, unfair, and utterly irrational based upon the testimony of Dr. Bhattacharya, and even that of the Respondents' own expert witnesses.

86. The Respondents called Dr. Nathan Zelyas as an expert witness. This Honourable Court found Dr. Zelyas:

> qualified as an expert to give opinion evidence as a medical microbiologist regarding an analysis of polymerase chain reaction diagnostic tests for COVID-19, including their accuracy and inaccuracy, their use to determine cases of COVID-19 and whether people who test positive from a PCR test are infected/contagious with COVID-19.[83]

87. In explaining how the PCR test works, Dr. Zelyas confirmed that what the PCR test:

> detects is the virus' genetic material, its RNA. And so RNA can be present…when the virus is no longer actively infectious…[T]he RT-PCR is unable to distinguish between live infective virus or just the genetic material that is present there due to the virus having infected that individual at an early time point.[84]

88. Dr. Zelyas did however also confirm that people can test positive, "certainly up to 100 days after they are infected with COVID-19."[85] This is because PCR tests merely

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[79] *R v Oakes*, [1986] 1 SCR 103, 1985 Canlii 36 (SCC) at para 70 [***Oakes***].
[80] *Oakes* at para 70.
[81] April 6, 2022 Hearing Transcript, p44, l11-12.
[82] April 6, 2022 Hearing Transcript, p44, l17-19.
[83] February 22, 2022 PM Hearing Transcript, p16, 119-23.
[84] February 22, 2022 PM Hearing Transcript, p18, 11-6.
[85] February 22, 2022 PM Hearing Transcript, p26, 12-4.

"confirm the presence of fragments of viral RNA of the target SARS-CoV-2 Virus in someone's nose."[86]

89. The Respondents' own expert has confirmed this point by saying that PCR tests "can't distinguish between live and dead or non-viable virus" and went on to say this was "important to keep in mind"[87] as it means PCR tests "don't verify infectiousness of COVID-19."[88]

90. The Applicants' eminent expert witness, Dr. Jay Bhattacharya, opined that PCR testing could potentially indicate infectivity if two tests were taken 24 hours apart. Dr. Zelyas, clarified that even the accuracy of this process would depend on a variety of factors.[89]

91. It is therefore respectfully submitted that the CMOH Order cannot be rationally connected to the Respondents' objective, since such Orders were entirely premised on the number of positive cases- as determined by PCR testing- which the Respondents' own expert admitted is entirely unreliable for determining infectious individuals.

92. It was irrational to impose sweeping restrictions on the Applicants' constitutionally protected rights and freedoms based upon the assumption that someone is infectious because they tested positive, when in fact they may have stopped being infectious 100 days prior to the test date.

93. Another example of a lack of rational connection arose when the CMOH stated that "choirs performing indoors are a particular concern for the spread of the virus."[90] While this concern resulted in CMOH Orders prohibiting choirs and similar activities, when challenged about what science this concern was based upon, the CMOH was unable to rationally connect the concern without creating an extremely specific situation. The CMOH simply stated that if a person was infectious with COVID-19 and attended a choir, the chance of spreading the virus was increased. However, in explaining this concern, she qualified that this was an increased chance only, "…if they're in an enclosed space, especially if it's a smaller space, that they're there for a long period of time, if there's poor ventilation."[91]

94. Despite these concerns, CMOH Orders were applied universally. Restrictions on choirs did not depend on space, timing or ventilation requirements. Rather, the CMOH prohibited all singing in choirs. Despite such a broad CMOH Order, the Respondents

[86] February 22, 2022 PM Hearing Transcript, p25, 128-30.
[87] February 22, 2022 PM Hearing Transcript, p24, 120-21, 35-36.
[88] February 22, 2022 PM Hearing Transcript, 25, 114-15.
[89] February 22, 2022 PM Hearing Transcript, p32, l29-36.
[90] Affidavit of Dr. Deena Hinshaw, Affirmed 12 July 2021 at para 44.
[91] April 4, 2020 Hearing Transcript, p45, l 25-28.

failed to establish a rational connection between the CMOH Orders and their objective.

d) Minimal Impairment

95. Under section 1 of the *Charter*, minimal impairment means that the CMOH Orders are justified only if they "impair the protected right as little as reasonably possible", meaning that the measure "must be carefully tailored so that rights are impaired no more than necessary." A failure to "explain why a significantly less intrusive and equally effective measure was not chosen" may be fatal to the impugned measure.[92]

96. At the outset, it is worth noting that the Respondents have not provided any evidence as to why less intrusive, yet effective measures were not implemented.

97. In order to understand whether a measure may or may not have been minimally intrusive, it is important to understand the threat COVID-19 posed. The Applicants have repeatedly asserted that COVID-19 is only dangerous for a small percentage of those already vulnerable but it was not until the hearing that the Respondents conceded this fact.

98. Under cross-examination, the CMOH stated that the CMOH Orders and their resulting mandates were only put in place "when the threat that COVID posed to the population as a whole was so significant".[93] [Emphasis added]

99. However, the CMOH previously conceded that of the small number actually infected, "most people" did not require hospital care at all, estimating that about "4 percent required treatment in hospital."[94] This is because, as the CMOH agreed, "the majority of people who get COVID-19 will experience minor symptoms, if any."[95]

100. Obviously, "age was a definite risk factor" for needing hospitalization or ICU admission.[96] The CMOH went on to say that, "COVID-19 infection is not a significant risk to…people under the age of 19…children have a very low risk of health outcomes."[97] A less intrusive method of handling COVID-19 would therefore have been layered or focussed protection, as recommended by Dr. Bhattacharya.

101. The idea of focussed protection is not merely a theoretical idea as the CMOH suggests. Dr. Bhattacharya is the co-author of The Great Barrington Declaration ("GBD"), which advocates building herd immunity in a population by allowing people at low risk of death to live their lives normally, while better protecting those who are at highest risk. This strategy, which has been endorsed by more than 50,000 eminent

[92] *Oakes*, at p. 139 (para. 70) ; *Hutterian Brethren*, at para 54.
[93] April 5, 2022 Hearing Transcript, p11, l37-40.
[94] April 4, 2022 Hearing Transcript, p53, l1-4, 36-41.
[95] April 6, 2022 Hearing Transcript, p30, l18-22.
[96] February 24, 2022 PM Hearing Transcript, p17, l2-4.
[97] April 4, 2022 Hearing Transcript, p64, l36-39.

scientists, physicians and other medical professionals worldwide, includes: frequently testing staff and visitors at long-term care homes, minimizing staff rotation, promoting grocery delivery to elderly people at home and having them meet family members outside, and for those not vulnerable, promoting hand washing and staying home while sick, and otherwise living their formal lives. Dr. Hinshaw repeatedly stated that this approach would not work, but never told this Honourable Court why.

102. Dr. Bhattacharya referenced the success of the Focused Protection strategy in Florida and compared its approach with California. In Florida, Governor DeSantis partially lifted the lockdown measures in May 2020, and further relaxed restrictions in September 2020. Normal activities like university, school, sports, church, visits to the park, and going to Disneyworld, are common place again, and have been for many months. Masks are not legally mandated. Florida also followed the Focused Protection approach which included increased testing and protection of its nursing home residents.

103. Dr. Bhattacharya also compared the trend in COVID -19 deaths in California and Florida throughout the entire pandemic. Despite California having one of the most draconian lockdowns in the US – closed schools, businesses, churches, curfews, stay-at-home orders, and mask mandates, California has had higher COVID -19 mortality.

104. The Focused Protection approach could have been rationally employed to protect those in society most at risk of COVID-19 harms, while permitting the vast majority of healthy Albertans to live normally, as opposed to the “new normal”..

105. Curiously, the CMOH agreed that “the layers of protection that we have for those who are at the highest risk, those who are most vulnerable, should be the most robust.”[98] However, with few exceptions, the CMOH Orders applied universally to people of all ages and risk factors. Why the CMOH would agree that focussed, or layered protection is important and yet impose CMOH Orders defying this very logic is inexplicable.

106. The GBD approach could have increased herd immunity naturally before the vaccine was available and eliminated most of the harms discussed in the next section, including those excess deaths caused by mental health issues due to the CMOH Orders. This approach need not achieve the objective in the same way or to the same extent, but it has to do so in a real and substantial manner. The Applicants submit that this approach has been proven to work in Florida and is the most logical, scientifically backed, and least *Charter*-violative approach that avoids the devastating

[98] April 4, 2022 Hearing Transcript, p73, l20-22.

harms of the CMOH Orders. Alberta was also well aware of the Florida and Sweden approaches.

107. The CMOH Orders thus cannot be said to impair the Applicants' *Charter* rights as minimally as possible to achieve the objective of preventing transmission of COVID-19. Consequently, they are both disproportionate and unjustified.

108. Despite the fact that the CMOH was the one implementing these Orders, no economist reported to her about tailoring the economic impact of the restrictions.[99] Even when creating the Scientific Advisory Group, the Respondents failed to include a single psychiatrist or psychologist to do a cost-benefit analysis and ensure that the CMOH Orders impacted those involved as little as possible.[100]

109. The CMOH Orders acted were a sledgehammer use to swat a fly, and by the time the Respondents sought to implement mitigatory programs, the carnage to the Applicants' rights and freedoms, as well as the economy and health of all Albertans, had already been irreparably inflicted.

e) Proportionality

110. The final proportionality stage of the *Oakes* test requires:

> …proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".[101] [Emphasis in original]

111. This stage requires the Respondents to prove that the benefits of the CMOH Orders outweigh their deleterious effects. It is respectfully submitted that the Respondents have failed to even begin to establish this, nor is there proof that they engaged in any cost-benefit analysis.

112. The CMOH Orders were imposed by the order of a single, non-democratically selected, publicly unaccountable civil servant: a medical officer. Absolutely no democratic process was engaged by the CMOH in making her pronouncements, nor was any widespread feedback from the public received, let alone considered. She rules as a dictator.

113. As a direct result of these CMOH Orders, the Applicants, along with all Albertans, suffered the destruction of their liberty, livelihood, mental, physical, emotional and spiritual health and relationships. After two and a half years, the Respondent's sought to defend their CMOH orders in court. Mr. Scott Long, the Acting Managing Director of the Alberta Emergency Management Agency from October 2020 until May 2021,

[99] April 4, 2022 Hearing Transcript, p78, l22.
[100] February 22, 2022 PM Hearing Transcript, p39, l12-13.
[101] *Oakes* at para 70.

admitted that the CMOH Orders, and their resulting NPI's only "*probably* saved lives in the earliest parts."[102]

114. Even if we assume that the CMOH Orders did in fact save lives (which assumption is here quite improper), there is no proportionality between the deleterious effects, which are profound and numerous, and the benefit of reducing the spread of a virus that is of no concern, by the CMOH's own estimate, to over 99% of Albertans.

115. Despite their constitutional duty to do so, the Respondents have failed to provide any evidence that they conducted even a simple cost-benefit analysis of the NPI's. What we do know from Ms. Deborah Gordon, Vice President and Chief Operating Officer of AHS' Clinical Operations, is that the Respondents did not know what to expect, and to took a very cautious approach to manage people's health and safety,[103] while no approach was taken to manage people's rights and freedoms.

116. Examples of such disproportionality can be clearly seen throughout the CMOH Orders and the CMOH's press conferences. One such example is when the CMOH announced "aggressive new public health measures to limit the spread of the virus" despite the fact that there "were only 19 diagnosed cases in the province at the time".[104] Similarly, the CMOH prohibited all organized gatherings of more than 50 people and prohibited Albertans:

> from attending public recreational facilities and private entertainment facilities including casinos, racing entertainment centres and bingo halls. They should also not attend all recreational facilities, gyms, arenas, science centres, museums, art galleries, community centres, fitness centres, swimming pools.

All during a time when the Province was experiencing less than 100 active cases.[105]

117. The Respondents have repeatedly claimed that NPI's were effective, but they have failed to provide any proof that this is true. They instead rely on speculation and conjecture. One example of this was during cross examination, when the CMOH stated that it was "very clear" that the NPI's reduced infection and/or death.[106] However, no factual basis was provided for this claim. The CMOH simply relied upon her personal interpretation of comparing jurisdictions, without mentioning which jurisdictions those might be.[107] This is particularly noteworthy as it was the

[102] February 15, 2022 PM Hearing Transcript, p44, l30-32m [Emphasis added].
[103] February 24, 2022 PM Hearing Transcript, p20, l38 – p21, l1.
[104] April 6, 2022 Hearing Transcript, p19, l7-28.
[105] April 6, 2022 Hearing Transcript, p27, l8-22.
[106] April 5, 2022 Hearing Transcript, p16, l17-22, 37-40.
[107] April 5, 2022 Hearing Transcript, p16, l17-22, 37-40.

Respondents' own witness who insisted that various jurisdictions could not simply be compared without further analysis.[108]

118. Dr. Bhattacharya's own peer-reviewed study, published after his first expert report was drafted, found that there were no significant benefits on case growth of more restrictive non-pharmaceutical interventions.[109] He explains that the best peer-reviewed study evaluating the efficacy of lockdowns was published in March 2021 in Scientific Reports. It considered the effects of lockdown type non-pharmaceutical interventions on COVID -19 mortality in 87 regions globally. The primary finding was that in the vast majority of cases there is no detectable effect of lockdowns on COVID-19 mortality.[110]

119. This finding is consistent with a subsequent report which examined over 80 COVID-19 studies.[111] The Allen Report revealed that:

> [M]any relied on assumptions that were false, and which tended to over-estimate the benefits and underestimate the costs of lockdown. As a result, most of the early cost/benefit studies arrived at conclusions that were refuted later by data, and which rendered their cost/benefit findings incorrect. Research done over the past six months has shown that lockdowns have had, at best, a marginal effect on the number of Covid-19 deaths.
>
> …
>
> The limited effectiveness of lockdowns explains why, after one year, the unconditional cumulative deaths per million, and the pattern of daily deaths per million, is not negatively correlated with the stringency of lockdown across countries.[112] [Emphasis added]

120. Overall, the deleterious effects of the CMOH Orders far outweigh their salutary effects, which have not prevented COVID -19 deaths or reduced stress on the hospital system. As such, the Respondents' restrictions are not "demonstrably justified in a free and democratic society" and are consequently unconstitutional.

VI. CONCLUSION

121. Over the last 18 months, Albertans experienced the greatest collective violation of civil liberties this Province has ever known. Select individual rights and freedoms have

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[108] February 24 AM Hearing Transcript, p24, l7-22.
[109] Bhattacharya Affidavit2, Schedule "A", p 9.
[110] Bhattacharya Affidavit2, Schedule "A" at p8.
[111] Allen, D. "Covid Lockdown Cost/Benefits: A Critical Assessment of the Literature", Simon Fraser University, Department of Economics April 2021. LockdownReport.pdf (sfu.ca). Marked Exhibit "O" for identification, [**Allen Report**].
[112] Allen Report's Abstract.

been constitutionalized in this country for a reason. There can be nothing more antithetical to the public interest than the systemic dismantling of the freedoms of the Alberta people, even if that dismantling is an unintended consequence of government efforts to respond to a perceived crisis.

122. The Applicants request a declaration from this Honourable Court that the CMOH Orders, which prohibit and/or restrict religious, private in-home and public outdoor gatherings violate their section 2(a)(b)(c)(d), 7 and 15 *Charter* rights, and that those violations cannot be saved under section 1 of the *Charter*.

123. In the alternative, the Applicants seek a declaration from this Honourable Court that the CMOH Orders are *ultra vires* section 3 of the *Public Health Act*. In the further alternative, the Applicants seek a declaration that the CMOH Orders which prohibit and restrict religious gatherings are inoperative because they conflict with section 176 of the *Criminal Code of Canada*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10th day of June 2022:

Leighton B.U. Grey, Q.C.

Counsel for the Applicants, Heights Baptist Church, Northside Baptist Church, Erin Blacklaws and Torry Tanner.

VII. PART VII: LIST OF AUTHORITES

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