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COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

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 **PRE-TRIAL FACTUM OF THE APPLICANTS HEIGHTS BAPTIST CHURCH, NORTHSIDE BAPTIST CHURCH, ERIN BLACKLAWS, and TORRY TANNER**

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**I. INTRODUCTION**

The biggest casualty of the lockdown will not be the closed pubs, restaurants and shops and the crippled airlines. It will not be our once-thriving musical, theatrical and sporting culture. It will not even be the wreckage of our economy. These are terrible things to behold. But the biggest casualty of all will be liberal democracy.

...

Liberal democracy breaks down when frightened majorities demand mass coercion of their fellow citizens, and call for our personal spaces to be invaded. These demands are invariably based on what people conceive to be the public good. They all assert that despotism is in the public interest.

...

A society in which oppressive control of every detail of our lives is unthinkable except when it is thought to be a good idea, is not free. It is not free while the controls are in place. And it is not free after they are lifted, because the new attitude will allow the same thing to happen again whenever there is enough public support.

...

Any society that will give up a little liberty to gain a little security will deserve neither and lose both.

1. **Statement of Facts**

1. Rebecca Marie Ingram ("**Ms. Ingram**"), Heights Baptist Church ("**Heights Baptist**"), Northside Baptist Church ("**Northside Baptist**"), Erin Blacklaws ("**Mr. Blacklaws**"), and Torry Tanner ("**Ms. Tanner**"), which are collectively referred to as the "**Applicants**", filed an Originating Application against Her Majesty the Queen in Right of the Province of Alberta ("**Alberta**") and Alberta's Chief Medical Officer of Health ("**CMOH**") , which are collectively referred to as the "**Respondents**".
2. Since March 16, 2020, Dr. Deena Hinshaw, in her role as Alberta's CMOH, pronounced over 40 CMOH Orders (the "**CMOH Orders**") in response to the communicable viral infection SARS-CoV-2 ("**COVID-19**").<sup>1</sup> These CMOH Orders are all endorsed by her and made by her under her authority as a medical officer of health and pursuant to section 29 of the *Public Health Act*. These CMOH Orders placed prohibitions on the ability of Alberta residents to invite friends and family inside their own homes, move about freely, conduct business, peacefully gather in outdoor locations and indoor public and private locations, obtain necessities of life, manifest their religious beliefs, gather to commemorate major life events, to attend school or work, and access personal care and health care services.
3. The specific CMOH restrictions being challenged are as follows (and for greater clarity, any subsequent manifestations of the restrictions in any future CMOH orders not specified below):
  - a. **Private Residence Restrictions:** prohibition that one is not allowed to have a non-resident enter one's own home (CMOH Order 02-2021, part 2, section 3: [A] person who resides in a private residence must not permit a person who does not normally reside in that residence to enter or remain in the residence);

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<sup>1</sup> RECORD OF DECISION – CMOH Order 01-2020, RECORD OF DECISION – CMOH Order 42-2020



**b. Indoor Gathering Restrictions:** the requirements and prohibitions on “indoor gatherings”, where only 10 people are allowed in an indoor public or private place (CMOH Order 02-2021, Part 3, section 16), along with the following restrictions:

i. only a maximum of 10 people are allowed at a wedding (CMOH Order 02-2021, Part 3, section 14);

ii. only a maximum of 20 people are allowed at a funeral service (CMOH Order 02-2021, Part 3, section 15);

iii. wedding and funeral receptions are banned (CMOH Order 02-2021, Part 3, section 16);

iv. requirement that “faith leaders” limit attendance at worship services to 15% of the total operational occupant load capacity restrictions at a place of worship (CMOH Order 02-2021, Part 4, section 18);

v. requirement that individuals maintain two meters physical distance from each other, including when attending worship services, wedding or funeral (CMOH Order 26-2020, sections 1 and 2); and

vi. requirement that individuals cover their face, including when attending worship services, wedding or funeral (CMOH Order 02-2021, Part 5, section 2)

**c. Outdoor Gathering Restrictions:** the prohibitions on “outdoor gatherings” where only a maximum of 10 people are allowed at an outdoor private place or public place (CMOH Order 02-2021, Part 3, Section 13), along with the following restrictions:

i. prohibition on outdoor group physical activities, including hockey, where two meters physical distance from each other at all times is not possible (CMOH Order 02-2021, Part 3, section 57);

ii. prohibition on outdoor group performance activity with more than 10 people (CMOH Order 02-2021, Part 3, section 69); and

iii. requirement that individuals maintain two meters physical distance from each other (CMOH Order 26-2020, sections 1 and 2).

d. **Isolation, Quarantine and Visiting Restrictions:** the mandatory isolation and quarantining measures that prohibit contact with other people, which rely on PCR testing to determine if a person is a confirmed case for when these isolation and quarantine measures are imposed, and the requirement that health care providers must ensure compliance with the Order and guidelines, including:

i. mandatory isolation of at least 10 days for:

- a "confirmed case" of COVID-19 (not defined in the Order, but guidelines indicate that a confirmed case of COVID-19 includes a positive PCR-Test result with no clinical diagnosis) that requires a person to remain at home two metres apart from others, not attend work, school, social events or any other public gatherings, and not take public transit (CMOH Order 05-2020, section 1 and 2); and
- a person exhibiting the following symptoms not related to a pre-existing illness or health condition: cough, fever, shortness of breath, runny nose, or sore throat (CMOH Order 05-2020, section 7);

ii. mandatory quarantining for 14 days of a person who is a close contact of a person with a confirmed case of COVID-19;

iii. requirement that individuals maintain two meters physical distance from each other (CMOH Order 26-2020, sections 1 and 2; CMOH Order 32-2020, section 6);

iv. requirement that individuals cover their face while attending an indoor public place (CMOH Order 02-2021, Part 5, section 23);

v. the banning of visitors except for a single essential visitor (unless resident is at the end of life) (CMOH Order 09-2020, section 1, 5, 7, and 8); and

vi. the imposition on health care facilities to limit visitors and carry out the requirements of an Order via visitation standards in guidelines (CMOH Order 09-2020, section 3; CMOH Order 14-2020, section 1; CMOH Order 29-2020, section 1; CMOH Order 32-2020, section 1, 9).

e. **Business Closures:** the broad interference, prohibition, restrictions, or mandatory closures of businesses or whole sectors of the economy, specifically the forced restrictions or closures of gyms and associated services.

f. **Primary or Secondary School Restrictions:** the blanket prohibition, restrictions or mandatory closures of primary or secondary schools based on grade level or age of students.

(Collectively the “**Impugned Provisions**”)

4. The Impugned Provisions are not “guidelines”, they are mandatory restrictions imposed on all Albertans that come with the threat of a fine for contravening any of the orders.<sup>2</sup> All of the CMOH Orders are endorsed exclusively by the CMOH and made under her purported authority as a medical officer of health under section 29 of the *Public Health Act*. Further, all of the CMOH Orders (unless they have an embedded expiration date) state that they remain in effect until rescinded by the CMOH.<sup>3</sup>
5. Canadians have fundamental rights and freedoms which are constitutionally guaranteed absent demonstrable justification according to law in a free and democratic society. The Applicants, like all Albertans, have been subjected to wide-ranging and long-term restrictions and prohibitions on their movements and activities in an unprecedented manner. Personal rights and freedoms have vanished almost overnight. The Respondents imposed draconian measures upon the Applicants which turned their lives upside down. The Respondents closed churches completely, asserting they were “non-essential” services, which caused the Applicants tremendous mental and spiritual hardship. The Respondents also forbade public outdoor gatherings of more than five people, effectively prohibiting peaceful protests, and indoor visits with anyone other than one’s own household. The stress and loneliness that these measures caused the Applicants, (and all Albertans) is profound and devastating. How “flatten the curve” turned into more than a year of crushing public health measures restricting everything that makes Albertans happy and human is unfathomable.
6. The Applicants claim that the CMOH Orders in Alberta created in response to COVID-19 unjustifiably violate the *Canadian Charter of Rights and Freedoms*. They further submit that

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<sup>2</sup> *Public Health Act*, RSA 2000, c P-37, section 73(3) A person who contravenes this Act, the regulations or an order of a medical officer of health under Part 3 is, if no penalty in respect of that offence is prescribed elsewhere in this Act, liable to a fine of not more than \$100 000 in the case of a first offence and \$500 000 in the case of a subsequent offence.

<sup>3</sup> See e.g. RECORD OF DECISION – CMOH Order 38-2020 [“CMOH Order 38”], Part 5, section 29; RECORD OF DECISION – CMOH Order 42-2020, Part 10, section 48.

these infringements cannot be reasonably justified in a free and democratic society under s.1 of the Charter.

## 2. The Science

7. This Application is a *Charter* challenge to public health orders which the Applicants argue are not justified under section 1 of the *Charter*. While the Applicants will argue below that there are multiple factors which ought to lead this court to the conclusion that the Respondents have not met their section 1 onus, one of the key factors is the scientific evidence which is inextricably connected to Dr. Hinshaw's decisions to issue the impugned CMOH Orders. Therefore, it is necessary to outline the scientific evidence before the court, and which the Applicants expect will be confirmed on cross-examinations.

### a Mortality Danger of Covid-19

8. Dr. Jay Bhattacharya, a world-renowned epidemiologist, medical doctor, PhD in economics, and Full Professor at Stanford University, identified in his 21 January 2021 Affidavit that for most people, including the vast majority of children and young adults, Covid-19 poses less of a mortality risk than seasonal influenza. According to a meta-analysis by Dr. John Ioannidis, (one of the most cited scientists in the world), the median infection survival rate from Covid-19 is 99.77%. For Covid-19 patients under 70, the meta-analysis finds an infection survival rate of 99.95%.<sup>4</sup>
9. Dr. Bhattacharya cites a study of Covid-19 in Geneva published in the prestigious journal *The Lancet* provided a detailed breakdown of the infection survival rate: 99.9984% for patients 5 to 9 years old; 99.99968% for patients 10 to 19 years old; 99.991% for patients 20 to 49 years old; 99.86% for patients 50 to 64 years old; and 94.6% for patients above 65 years old.<sup>5</sup>
10. The Respondent's expert evidence, set out in multiple affidavits, confirms that Covid-19 poses the greatest risk of death to older people, with multiple co-morbidities.

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<sup>4</sup> Affidavit of Jay Bhattacharya, sworn January 21, 2021, Schedule "C" Tab A, p. 2 ("Bhattacharya Affidavit1")

<sup>5</sup> Bhattacharya Affidavit1, Schedule "C" Tab A, p. 3

b Asymptomatic Transmission of Covid-19

11. In his 21 January 2021 Affidavit, Dr. Bhattacharya identified two recent, significant peer-reviewed studies finding that asymptomatic spread of Covid-19 is significantly lower than symptomatic spread. Specifically, one of the studies, a meta-analysis of 54 studies in the *Journal of American Medical Association Network Open*, confirmed that within households, where none of the safeguards that restaurants are required to apply are typically applied, *symptomatic* patients passed on the disease to household members in 18% of instances, while *asymptomatic* patients passed on the disease to household members in 0.7% of instances.<sup>6</sup>
12. Dr. Bhattacharya also cited another study of 10 million residents of Wuhan, China who were tested for the presence of the virus. Only 300 cases of Covid-19 were found, and all were symptomatic. Contact tracing identified 1,174 close contacts of these patients, and none of them tested positive for the virus.
13. Dr. Bhattacharya concluded, based on his review of the medical literature, that asymptomatic individuals are an order of magnitude less likely to infect others than symptomatic individuals, even in intimate settings such as households where people don't typically wear masks or socially distance. He concluded that spread of Covid-19 in less intimate settings by asymptomatic individuals, such as in places of worship, is likely to be less likely than in households.
14. Dr. Jason Kindrachuk, an Infectious Disease specialist and Assistant Professor at the University of Manitoba, also discussed asymptomatic transmission in his evidence. He concluded that while SARS-CoV-2 transmission is likely lower from individuals with asymptomatic infections as compared to symptomatic cases, those in the "pre-symptomatic" phase of disease appear to be able to transmit the virus similarly to symptomatic individuals.<sup>7</sup>

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<sup>6</sup> Bhattacharya Affidavit1, Schedule "C" Tab A, p. 10

<sup>7</sup> Affidavit of Jason Kindrachuk, affirmed July 8, 2021, Schedule A, pp. 12 ("Kindrachuk Affidavit")

15. Dr. Bhattacharya had not previously addressed “pre-symptomatic transmission” of the disease in his 21 January 2021 Affidavit. In his 30 July 2021 responding Affidavit, Dr. Bhattacharya references a previously cited *JAMA Network Open* meta-analysis study, in which the authors concluded that household transmission of the disease from asymptomatic and “pre-symptomatic” patients occurred 0.7% of the time. He also revealed that many of Dr. Kindrachuk’s studies were taken into consideration in the larger meta-analysis from *JAMA Network Open*, which ultimately found a vanishingly low rate of asymptomatic and pre-symptomatic transmission.<sup>8</sup>

c *RT-PCR Testing, Infectiousness, and Cycle Thresholds*

16. Dr. Bhattacharya explains in his 21 January 2021 Affidavit that the RT-PCR test for the SARS-CoV-2 virus is at the heart of the testing system adopted by Canada. He explains that the test amplifies the virus, if present, by a process of repeatedly doubling the concentration of viral genetic material. If the viral load is small, many doublings are required before it is possible to detect the virus. He explains that labs decide in advance how many doublings of the genetic material they will require before deciding that a sample is negative for the presence of the virus. This threshold, or “cycle time” determines the rate at which a positive test result will be returned when the original sample does not include viral concentrations in sufficient amount to be infectious.<sup>9</sup>

17. He states that a higher cycle threshold increases the false positive rate of the PCR test because even if a non-infectious viral load is present in the sample obtained from the patient, a large number of permitted doublings could amplify whatever minute or fragmentary viral segment is present such that the test result is positive. A positive test result obtained in this fashion does not mean that such an individual is infectious or contagious. On the contrary, an individual who tests “positive” using a high cycle threshold is exceedingly unlikely, or even impossible, to be a transmission risk at all.

18. Dr. Bhattacharya asserts that the PCR test is not the gold standard for determining whether a patient is infectious. He says that from an epidemiological point of view, infectivity

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<sup>8</sup> Bhattacharya Affidavit2, Schedule “A” at page 6

<sup>9</sup> Bhattacharya Affidavit 1, Schedule “C”, Tab M, p.37

measurement is more important than a measurement of whether the virus is present, since it is possible for a patient to have non-viable viral fragments present, a positive PCR test, and yet not be infectious. He cites a study published in the *European Journal of Clinical Microbiology & Infectious Diseases* which determined that culture positivity of the virus decreased progressively by Ct values to reach 12% at a Ct of 33. That means only 12% of the samples spun at a Ct of 33 had a positive culture. *Further, no culture was able to be obtained from samples with a Ct of greater than 34.* Dr. Bhattacharya also cited a study published in top epidemiological journal *Eurosurveillance* which found that if 27 cycles are needed for a positive test, the false positive rate is 34%; if 32 cycles are needed for a positive test, the false positive rate is 92%; if more than 40 cycles are needed for a positive test, the false positive rate is nearly 100%.<sup>10</sup>

19. Dr. Bhattacharya also revealed that the WHO published an Information Notice on December 8, 2020 warning users of PCR tests that it had received user feedback on an elevated risk for false SARS-CoV-2 results when testing specimens using PCR test.<sup>11</sup>

d Herd Immunity

20. Dr. Bhattacharya opines that recovery from SARS-CoV-2 infection will provide lasting protection against reinfection, either complete immunity or protection that makes a severe reinfection extremely unlikely. He further opines that herd immunity, a scientifically proven phenomenon, occurs when enough people have immunity so that most infected people cannot find new uninfected people to infect, leading to the end of the pandemic.<sup>12</sup> He urges a strategy of Focused Protection to better protect the elderly while allowing the rest of society to live their lives.<sup>13</sup>
21. Dr. Kindrachuk disagrees with Dr. Bhattacharya's stated approach and cites the example of Manaus, Brazil, which he claims was devastated by the first wave of the pandemic with 4.5-fold excess mortality. He cited a seroprevalence study which found that 76% of the Manaus population was infected with SARS-CoV-2 and had antibodies by October 2020, but that

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<sup>10</sup> Bhattacharya Affidavit1, Schedule "C", Tab N p. 39

<sup>11</sup> Bhattacharya Affidavit1, Schedule "C", Tab N p. 40

<sup>12</sup> Bhattacharya Affidavit1, Schedule "C", Tab L p. 34

<sup>13</sup> Bhattacharya Affidavit1, Schedule "C", Tab K p. 31-33



virus transmission continued to spike in SARS-CoV-2 infections by mid-January 2021. He concluded that the Brazil data provides evidence that a herd immunity approach through natural infections could have devastating impacts upon public health.<sup>14</sup>

22. In reply, Dr. Bhattacharya points out that the Brazil example is based upon a single flawed seroprevalence study conducted in Manaus in mid-2020. He notes that the 76% estimate was not based upon a random survey, rather than blood donors, who are a very select group of people in the developing world. He elucidates that the seroprevalence among the blood donors was 52%, which was adjusted upwards based upon questionable mathematical modelling of waning anti-bodies. He also opines that it is impossible to conclude that lockdowns in a single location are a good strategy to control the epidemic.<sup>15</sup>

*e*      *Spread of Covid-19 Outdoors*

23. The Respondents have not produced any scientific evidence that Covid-19 transmits easily outdoors or that being outdoors amongst other people is a risk to the Alberta population. In fact, it is now a matter of public record that the infamous May 2021 Bowden Lockdown Protest Rodeo which caused the Alberta Government to prohibit public lockdown protests, resulted in no recorded cases of Covid-19 infection among the thousands of Albertans who attended the event.

*f*      *Covid-19 Spread in Religious Settings*

24. Dr. Bhattacharya asserts that places of worship can safely hold indoor worship services, with minimal effect upon the spread of Covid-19 disease, by following guidelines recommended by the CDC. Such guidelines include recommendations to protect staff who are at higher risk for severe illness, engaging in hand-washing, mask wearing when social distancing is difficult, social distancing, disinfecting the worship space before and after each service, minimizing food sharing, encouraging symptomatic congregants to stay home, and posted signs about Covid-19 disease.<sup>16</sup>

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<sup>14</sup> Kindrachuk Affidavit, Schedule "A", p. 16-17

<sup>15</sup> Bhattacharya Affidavit2 Schedule "A", p. 19

<sup>16</sup> Bhattacharya Affidavit1, Schedule "C" Tab H, at p. 26-27



25. He referred to medical studies showing that church attendance provides psychological benefits for attendees, especially for adolescents. He also cites medical studies documenting the psychological benefits of communal singing during worship, which fosters a sense of belonging and connectedness that is crucially important, with measurable ameliorative effects upon mental health.<sup>17</sup>
26. Dr. Hinshaw's stated reason for closing places of worship was that such activities involve prolonged contact between persons in crowded indoor locations with inadequate ventilation, performing activities such as singing that may increase the risk by generation of respiratory droplets and aerosols suspended in the air that people may inhale at distances beyond two meters.<sup>18</sup>
27. The disproportional effects of CMOH Orders restricting religious gatherings reached its peak on 7 April 2021, when Grace Life Church in Stony Plain was not only closed, but triple barricaded. The Pastor of that Church, James Coates, had already been gaoled for 35 days for refusing to be bound by bail terms that would have prohibited him from preaching to his congregation. He was also publicly scolded and fined \$1,500.00 by a Provincial Court Judge after pleading guilty to a minor offense under the *Provincial Offences Procedure Act*. Grace Life Church remained closed for two months, during which time its congregants met secretly at undisclosed locations each Sunday for regular, in person worship services. There remain no documented cases of Covid-19 infections stemming from several months of full in person worship services at Grace Life Church.
28. In May of 2021, This Honourable Court also imposed an unprecedented Injunction which applied universally to a every single Albertan, prohibiting even the organization of public gatherings, including those involving religious worship and peaceful protest of CMOH restrictions. Pastor Timothy Stephens of Fairview Baptist Church was twice arrested and twice imprisoned for breaches of that Injunction, and his Church was also closed pursuant to a CMOH Order. Pastor Coates, Pastor Stephens, Grace Life Church, and Fairview Baptist Church all continue to face ongoing prosecutions related to violations of CMOH

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<sup>17</sup> Bhattacharya Affidavit1, Schedule "C", Tab H p. 27

<sup>18</sup> Affidavit of Dr. Deena Hinshaw, Affirmed July 12, 2021, at paras. 44-45 ("Hinshaw Affidavit")

Orders restricting religious freedoms and public gatherings. Their Constitutional challenges to such restrictions are pending the Courts decision in the case at bar.

*g*      *Variants of Concern*

29. Dr. Kindrachuk and Dr. Hinshaw<sup>19</sup> raised the issue of “Variants of Concern” (VOC) in their affidavits. Dr. Kindrachuk states in his affidavit that variant B.1.1.7 has increased transmissibility ranging from 30-70% over circulating non-VOCs and has been associated with increased risk of severe and fatal disease in hospitalized patients. He recommends decreased community transmission to reduce the potential for additional emergence of VOCs.<sup>20</sup>
30. In response, Dr. Bhattacharya explained that VOCs do not escape immunity provided by previous infections or by the Covid-19 vaccines. He states that the presence of VOCs pose little additional risk of hospital overcrowding or excess mortality, and that such predictions are based upon faulty modelling. He cites Florida as a jurisdiction where UK variant B.1.1.7 is wide-spread but in which cases have still dropped sharply. He further explains that vaccines have decoupled the growth in Covid-19 cases from Covid-19 mortality. While cases in Canada went up in March 2021, deaths have continued to fall.<sup>21</sup> Consequently if restrictive public health measures did not work to protect Canadians from the less infectious Covid-19, there is little reason to expect that they would work to suppress VOCs.

## II.      **LEGAL BASIS – CHARTER ANALYSIS**

### **A.      Charter Section 2(a) – Freedom of Conscience and Religion**

31. In *Law Society of British Columbia v Trinity Western University*, the Supreme Court of Canada stated the following regarding freedom of religion as protected by section 2(a) of the *Charter*:

Although this Court's interpretation of freedom of religion reflects the notion of personal choice and individual autonomy and freedom, religion is about both religious beliefs and religious relationships (*Amselem*, at para. 40; *Loyola*, at para. 59, quoting Justice LeBel in *Hutterian Brethren*, at para.

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<sup>19</sup> Affidavit of Dr. Deena Hinshaw, Affirmed July 12, 2021, at paras. 159, 222-223

<sup>20</sup> Kindrachuk Affidavit, TAB B, at p. 16

<sup>21</sup> Bhattacharya Affidavit2, Schedule “A” at p.13

182). The protection of individual religious rights under s. 2(a) 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).<sup>22</sup>

32. An infringement of section 2(a) of the *Charter* occurs if a 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 the claimant's ability to act in accordance with that belief or practice in a manner that is more than trivial or insubstantial.<sup>23</sup>

33. The Supreme Court of Canada also stated:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, **the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.**<sup>24</sup>

34. The Applicants Heights Baptist Church and Northside Baptist Church, like all Albertans, have had their freedom of religion sacrificed upon the altar of public health. These Applicants sincerely believe that expression of their religious freedoms must be done physically, in-person and without their congregations being artificially and arbitrary divided and separated by government. These 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. They believe that the CMOH Orders generally, but especially the Indoor Gathering Restrictions, hurt congregants far more than COVID-19 ever could, and are compelled by conscience to continue worship services that are not restricted to a small number that divides, separates, or interferes with congregants' religious practices.

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<sup>22</sup> *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 SCR 293 at para 64

<sup>23</sup> *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 SCR 386 at para 122

<sup>24</sup> *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 94.

## **B. Section 2(b) – Freedom of Thought, Belief, Opinion and Expression**

35. Freedom of expression “has been recognized as a fundamental ingredient to the proper functioning of democracy for hundreds of years.”<sup>25</sup> As the Supreme Court of Canada has found, “[i]t is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression.”<sup>26</sup> Indeed, “[f]reedom in thought and speech... are the essence of our life.”<sup>27</sup>
36. The Supreme Court has stated: “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.”<sup>28</sup> To summarize the jurisprudence, “[t]he vital importance of freedom of expression cannot be overemphasized.”<sup>29</sup>
37. At the core of the protection for 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.”<sup>30</sup>
38. 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 result of either the location or the method of expression?

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<sup>25</sup> *Christian Heritage Party v. City of Hamilton*, 2018 ONSC 3690 at para 39

<sup>26</sup> *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326, 1989CanLII 20 (SCC) at para 3

<sup>27</sup> *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*]

<sup>28</sup> *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2 at para 2

<sup>29</sup> *Committee for the Commonwealth* at para 95, quoting *R v Kopyto* (1987), 24 OAC 81 at pp 90-91, 62 OR (2d) 449

<sup>30</sup> *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

(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?

**C. Section 2(c) – Freedom of Peaceful Assembly**

39. Although comparatively undeveloped, an identified purpose of freedom of peaceful assembly is to protect the physical gathering together of people.<sup>31</sup> Further, the right of peaceful assembly is, by definition, a collectively held right: it cannot be exercised by an individual and requires a coming together of people.<sup>32</sup>
40. 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.<sup>33</sup> Although freedom of assembly cases have typically been determined on other *Charter* grounds, most notably freedom of expression,<sup>34</sup> freedom of peaceful assembly is an independent constitutionally-protected right.
41. 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 goes to the core of what 2(c) protects.

**D. Section 2(d) – Freedom of Association**

42. 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".<sup>35</sup> Freedom of association allows the achievement of individual potential through interpersonal relationships and collective action.<sup>36</sup>

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<sup>31</sup> *Roach v Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FC 406, 1994 CanLII 3453 (FCA) at para 69

<sup>32</sup> *Mounted Police Assn. of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 64 [MPAO]

<sup>33</sup> See e.g. *Garbeau c Montreal (Ville de)*, 2015 QCCS 5246 at paras 120-156

<sup>34</sup> Basil S. Alexander, "Exploring a More Independent Freedom of Peaceful Assembly in Canada" (2018) 8: 1, *UWO J Leg Stud* 4 online: <https://ojs.lib.uwo.ca/index.php/uwojls/article/view/5715/4809>

<sup>35</sup> 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*]

<sup>36</sup> *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 17

43. The purpose of 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".<sup>37</sup>
44. The purpose and effect 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).

#### **E. Section 7 - the Right to Life, Liberty and Security of the Person**

##### Liberty

45. Section 7 protects the rights to life, liberty and security of the person. The liberty interest protects the right of individuals to be free from state restrictions upon the freedom of movement.<sup>38</sup> It also protects bodily autonomy, core lifestyle choices, and fundamental relationships.<sup>39</sup>
46. The Supreme Court of Canada 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".<sup>40</sup> 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.<sup>41</sup>
47. According to Dr. Bhattacharya, the risk of severe illness or death from the virus for persons under 70 years of age is less than influenza. In a free society, the CMOH's oppressive overturning of fundamental rights and freedoms in such circumstances, in light of such

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<sup>37</sup> *MPAQ*, at para 54, citing from *Re Public Service*, at 366

<sup>38</sup> *R v Heywood*, [1994] 3 SCR 761, 1994 CanLII 34 (SCC) at 789 [*Heywood*]

<sup>39</sup> *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

<sup>40</sup> *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

<sup>41</sup> *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, at para. 54 [*"Blencoe"*]

scientific evidence, cannot be justified. Covid-19 is simply not a sufficient threat to most of the populace to prevent free people from the exercise of their fundamental right to gather and worship if they choose.

### Security of Person

48. 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”.<sup>42</sup> 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.<sup>43</sup>
49. That the CMOH Orders have caused “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. The existence of such suffering is acknowledged in the Respondents' own evidence, which references various programs developed by the Alberta Government to address higher suicide rates, depression, opiate abuse, and other mental health concerns related to Covid-19.

### **F. Section 7's Inherent Limits – The Principles of Fundamental Justice**

50. Limitations upon protected section 7 interests are only lawful so long as the infringements caused by government action or a law are in accordance with the principles of fundamental justice.<sup>44</sup> According to the Supreme Court of Canada, the principles of fundamental justice “are about the basic values underpinning our constitutional order.”<sup>45</sup> The Court has recognized a number of principles of fundamental justice, but three have “emerged as central... laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their object.”<sup>46</sup>

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<sup>42</sup> *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, at pp. 587-88 (para 136) per Sopinka J.

<sup>43</sup> *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

<sup>44</sup> *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 at paras 74-78 [*Bedford*]

<sup>45</sup> *Bedford* at para 96

<sup>46</sup> *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 at para 72 [*Carter*]



51. National security concerns—and by analogy, pandemics—cannot be used to excuse procedures that do not conform to fundamental justice at the section 7 stage of the analysis.<sup>47</sup>

Gross Disproportionality

52. 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.<sup>48</sup> 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.<sup>49</sup>

53. 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, that 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”.<sup>50</sup>

54. In *Canada v. PHS Community Services Society*<sup>51</sup>, 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 had 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.<sup>52</sup>

55. Similarly, in *Canada v. 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

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<sup>47</sup> *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, at paras 23, 27

<sup>48</sup> *Carter*, at para 89

<sup>49</sup> *Carter*, at para 89

<sup>50</sup> *Bedford*, *supra*, at para. 120

<sup>51</sup> *Canada v. PHS Community Services Society*, [2011] 3 S.C.R. 134 [“PHS”]

<sup>52</sup> *Ibid.*, at para. 136



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 was to prevent neighborhood disorder, criminalized prostitution indoors, and risked having the prostitutes dangerously engage with their customers on the streets.<sup>53</sup>

56. In the present case, the stated objective of the CMOH Orders are to reduce the spread of Covid-19, preserve hospital capacity, and reduce morbidity. However, the physical and 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, and it would be foolish to think Alberta has not followed the same trend.<sup>54</sup> Further, there has been an explosion in overdoses in Canada and 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.<sup>55</sup>

57. Perhaps most troubling is that the very act of keeping families confined to their homes actually *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.<sup>56</sup>

### Arbitrariness

58. A law is arbitrary if it lacks a real connection on the facts to the purpose the law is said to serve.<sup>57</sup> Arbitrariness involves:

...whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. 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. A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests.<sup>58</sup>

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<sup>53</sup> *Bedford*, *supra*, at paras. 133-136, 147, 158-159

<sup>54</sup> Bhattacharya Affidavit1, Exhibit “C”, at p. 23

<sup>55</sup> Bhattacharya Affidavit1, Exhibit “C”, at p. 15

<sup>56</sup> Bhattacharya Affidavit1, Exhibit “C”, p. 24

<sup>57</sup> *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

<sup>58</sup> *Bedford* at para 111

59. The Supreme Court articulated the arbitrariness doctrine in *Chaoulli v. Quebec*.<sup>59</sup> 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.

60. Although the court was unanimous in its finding of the *prima facie* Charter breaches, it was evenly divided on the issue of fundamental justice. The Applicants submit that in the absence of some justification in 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. No strong evidence has been provided to connect the ban/restrictions on worship, outdoor and indoor gatherings to the purpose of preventing the overwhelming of hospitals, reducing Covid-19 spread and reducing mortality. There is no precedent in Canadian history for the state's prevention of corporate worship, even during an outbreak of illnesses with a far higher mortality rate than Covid-19. In 1969, there was a world-wide outbreak of the Hong Kong Flu Virus, which resulted in much greater mortality rates than Covid-19, and yet no such restrictions were imposed in Canada.

61. The Applicants submit that 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. Therefore, the CMOH Orders are arbitrary.

### Overbreadth

62. "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. In 1994, the Supreme Court of Canada established the doctrine of overbreadth in *R. v. Heywood*. It applies to a law that is broader than necessary to accomplish its purpose.

63. In *Heywood*, the accused challenged a provision of the *Code* that made it an offence of "vagrancy" for a person found guilty of the offence of sexual assault to be "found loitering in

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<sup>59</sup> *Chaoulli, supra*,

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 the purpose of the law was to protect the safety of children, and that a restriction on liberty to protect childrens' safety would not be a breach of fundamental justice; but also that a law which restricted liberty more than was necessary to accomplish its purpose would be a breach of fundamental justice by reason of "overbreadth".

64. Writing for the majority, Justice Cory stated:

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? **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 because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.**

...However, before it can be found that an enactment is so broad that it infringes s. 7 of the *Charter*, it must be clear that the legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective.

... In determining whether s. 179(1)(b) is overly broad and not in accordance with the principles of fundamental justice, it must be determined whether the means chosen to accomplish this objective are reasonably tailored to effect this purpose. **In those situations where legislation limits the liberty of an individual in order to protect the public, that limitation should not go beyond what is necessary to accomplish that goal...**<sup>60</sup>

65. 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 applied for life without any possibility of review; and (3) the class of persons to whom it applied was too wide, because some of the offenders to whom it applied would not be a continuing danger to children. The overbroad law offended the principles of fundamental justice. It could not be upheld 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).

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<sup>60</sup> *Heywood* at pp. 792-794 (emphasis added)

66. 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 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.

67. According to Dr. Bhattacharya, the CMOH Orders needed to target immunocompromised populations and elderly people at greatest risk of infection and death. The science 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 CMOH Orders are therefore overbroad.

**G. Section 1 – Justification (and the lack thereof)**

68. The *Charter* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. This case will be determined on the basis of whether the Respondents prove that the CMOH Orders are “demonstrably justified in a free and democratic society.”

69. Section 1 of the *Charter* not only contains the constitutional “guarantee of rights and freedoms set forth in the *Charter*” and the narrow “power to restrict them within certain limitations”, it also “includes a description of the character of our society.”<sup>61</sup> Section 1 mandates that Canada be, and must always remain absent constitutional amendment, a “free and democratic society.”

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<sup>61</sup> *Alliance des Professeurs de Montreal v. A.-G. Quebec*, 1985 CanLII 3058 (QC CA), para. 37, (Applicant’s BOA, TAB 27)

70. This mandate is not mere aspiration. “The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence.”<sup>62</sup>
71. The principle of a free and democratic society did not originate with section 1 of the *Charter*. The constitutional analysis is shaped by the terms “demonstrably justified”, “free” and “democratic society”. This requires “cogent and persuasive” evidence which “makes clear to the Court the consequence of imposing or not imposing the limit.”<sup>63</sup> The core issue in this matter is the necessity of restrictions imposed to prevent transmission of the SAR-CoV-2 virus, which must necessarily be determined by the evidence and the science provided to this Court, with regard to the Respondents’ burden of proof.
72. As noted in an earlier hearing on the constitutionality of the broad delegation of authority, section 91 and 92 of the *Constitution Act, 1867* delegates law making power to the democratically elected Parliament and provincial legislatures. The Supreme Court noted that the *Constitution Act, 1867*,

...contemplates a Parliament working under the influence of public opinion and public discussion. There can be no controversy that **such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament**, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.<sup>64</sup>

73. The concept of “freedom” was most eloquently described by Chief Justice Dickson in the seminal *R. v. Big M Drug Mart* decision<sup>65</sup>:

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion

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<sup>62</sup> *Re Manitoba Language Rights*, [1985] 1 SCR 721, at para. 64 [Applicants’ BOA, Delegation Hearing, TAB 13]

<sup>63</sup> *R. v. Oakes*, at para. 68 (Applicants’ BOA, TAB 28); *R. v. Spratt*, 2008 BCCA 340, at para. 30 (Applicants’ BOA, TAB 29)

<sup>64</sup> *Re Alberta Legislation*, [1938] S.C.R. 100 at p. 133, cited in “*Alliance*”, at para. 43

<sup>65</sup> *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 SCR 295, at para. 94 (Applicants’ BOA, TAB 31)

includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. 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.

74. The Court further defined the concept of a “democratic society” in the *Secession Reference*<sup>66</sup>:

Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, “resting ultimately on public opinion reached by discussion and the interplay of ideas” (*Saumur v. City of Quebec, supra*, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live .

75. The foregoing analysis holds that democratic governance is required by the Constitution.

Section 1 stipulates that laws which override otherwise guaranteed fundamental rights and freedoms and which do not emanate from this democratic process are unconstitutional.

76. The CMOH’s Orders have not been brought before the Legislature for study, proposed amendments or democratic approval. There are no sunset clauses in the *Public Health Act* that restrain these orders or make them go for review before the Legislative Assembly after a certain timeframe. There is no record of debate, no consideration of competing interests like financial, educational, religious, or even the infringement of *Charter*-protections. There is no requirement legislatively for the Chief Public Health Officer to provide the legislature with an explanation or justification of the science supposedly underpinning these Orders. Without scientific explanation, the legislature is incapable of commencing its democratic obligation to act in an informed fashion on behalf of the citizenry. Because the CMOH

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<sup>66</sup> *Reference re Secession of Quebec* [1998] 2 SCR 217, at para. 68 (Applicants’ BOA for Delegation Hearing, TAB 16)



Orders, which have overridden fundamental rights and freedoms, were not debated and are in force with no meaningful public input or legislative review or even legislative comprehension as to their basis, the paradigm within which the infringements take place is neither free or democratic. According to section 1 of the *Charter*, infringements of fundamental rights and freedoms cannot be justified if they are undemocratic. As a result, the infringements cannot be justified. They fail the test in section 1 of the *Charter*.

## **b. The Oakes Test**

### *i. The Onus of Proof Lies on the Respondents*

77. Per section 1, the rights and freedoms set out in the *Charter* can only be “demonstrably justified in a free and democratic society.”<sup>67</sup> This “clearly indicates that the onus of justification is on the party” who has limited the *Charter* rights engaged. Consequently, the onus in this case is upon the Respondents to prove, on a balance of probabilities, that the *Charter* infringements resulting from the CMOH Orders are justified in accordance with the *Oakes* test.

78. “[D]emonstrably justified” connotes a strong evidentiary foundation: the Respondents must demonstrate through cogent and persuasive evidence the “consequences of imposing or not imposing” the restrictions on gatherings that are the subject of this proceeding. Whether the impugned restrictions are necessary to achieve their objective must be determined by evidence.<sup>68</sup>

### *ii. The Two Branches of the Test*

79. The *Oakes* test requires the Respondents to show that:

1. The objective of the CMOH Orders are pressing and substantial.

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<sup>67</sup> *Oakes* at pp 136-37 (para 66) (Applicant’s BOA, TAB 28)

<sup>68</sup> *Oakes* at page 138 (para 68) (Applicant’s BOA, TAB 28); *R v Spratt*, 2008 BCCA 340 at para 30 (Applicant’s BOA, TAB 29)

2. The CMOH Orders are reasonable and demonstrably justified.

i. The CMOH Orders must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. They must be rationally connected to the objective.

ii. The CMOH Orders must impair the Applicants' *Charter* rights as little as possible.

iii. There must be a proportionality between the effects of the CMOH Orders on individuals and groups in society, and their objective. The more severe the deleterious effects, the more important the objective must be.

### **1. First Branch – Pressing and Substantial**

80. The Respondent cannot satisfy the first branch of the test. The Respondent alleges in its evidence that the objectives of the CMOH Orders were to reduce the spread of Covid-19, reduce morbidity, and preserve hospital capacity. However, the Respondent has adduced no evidence that Covid-19 ever threatened hospital capacity. Nor is there any evidence that the restrictions imposed under these orders reduced either the spread of Covid-19 or morbidity rates. Consequently, it cannot be said that there was ever a pressing and substantial need to impose such broad and severe restrictions upon the civil liberties of all Albertans.

### **2. Second Branch – Not Reasonable or Demonstrably Justified**

81. The Applicants submit, however, that the CMOH Orders are not reasonable or demonstrably justified, and that they fail all three parts of the second arm of the *Oakes* test.

82. A recent Scottish case from the Outer House, Court of Session (Scotland's Supreme Civil Court),<sup>69</sup> analyzed a petition challenging the enforced closure of places of worship in

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<sup>69</sup> *Reverend Dr. William J. U. Philip and Others*, [2021] CSOH 32, Outer House, Court of Session (Applicants' BOA, TAB 32)(*"Reverend Dr. William"*)



Scotland in January 2021. The case raised two issues: (1) the extent, if any, to which the respondents had the constitutional power, at common law, to restrict the right to worship in Scotland; and (2) whether the closure was an unjustified infringement of the human rights of the petitioners and others to manifest their religious beliefs, and to assemble with others in order to do so, in terms of articles 9(2) and 11 of the European Convention on Human Rights (ECHR). Lord Braid found that the respondents had the legal authority to restrict worship in Scotland, but found that the closures failed the proportionality test.

83. The legal test on judicial review for assessing the legality of the closures involved a test strikingly similar to the *Oakes* test.<sup>70</sup> Lord Braid found that the regulations were prescribed by law and had the legitimate aim of protection of public health and preservation of life.<sup>71</sup> He also found that the regulations had a rational connection to their goal of preserving life (although he did not have access to the scientific evidence that is before this Honourable Court). He found that the regulations failed the “less intrusive means” test (i.e. Minimal impairment test). On this issue, he wrote:

they have not demonstrated why there was an unacceptable degree of risk by continuing to allow places of worship which employed effective mitigation measures and had good ventilation to admit a limited number of people for communal worship. They have not demonstrated why they could not proceed on the basis that those responsible for places of worship would continue to act responsibly in the manner in which services were conducted, and not open if it was not safe to do so; in other words, why the opening of churches could not have been left to guidance.<sup>72</sup>

84. When balancing the severity of the regulations against their benefits, Lord Braid accounted for the seriousness of Covid-19 and the variants. He still found that the regulations were disproportionate as their effect on religious people banned from attending worship was impossible to measure, a breach of the regulations could result in a hefty fine, and there was no indication that the respondents appreciated the importance of the right to worship in comparison to other activities.<sup>73</sup> The regulations were thus found to be unlawful.

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<sup>70</sup> *Reverend Dr. William*, at para. 100 (Applicant’s BOA, TAB 32)

<sup>71</sup> *Reverend Dr. William*, *supra*, at paras. 98-99 (Applicant’s BOA, TAB 32)

<sup>72</sup> *Reverend Dr. William*, *supra*, at para. 115 (Applicant’s BOA, TAB 32)

<sup>73</sup> *Reverend Dr. William*, *supra*, at para. 121, 122, 126

**a. There is No Rational Connection Between the CMOH Order's Objectives and the CMOH orders**

85. As confirmed by McLachlin CJ in *Hutterian Brethren*, section 1 requires the Respondents to “to show a rational connection between the infringement and the benefit sought on the basis of reason or logic.”<sup>74</sup>

86. According to Dr. Hinshaw, the objective of Alberta’s public health guidance and measures has been to protect the community and prevent widespread transmission.<sup>75</sup> The Applicants submit that there is no rational connection between this stated goal and the CMOH Orders for multiple reasons.

i. **Positive PCR Test Results – Unreliable to determine infectiousness / contagiousness**

87. The Applicants submit that “cases of Covid-19” are unreliably diagnosed as a result of a PCR test or close contact with someone who has had a positive PCR test. As noted above by Dr. Bhattacharya and the WHO: PCR tests are highly unreliable. After 25 cycles, a person’s level of infectiousness decreases to the point where, as the cycles approach 40, the chances that that person will be contagious are close to zero.

88. The filed Affidavit of the Applicant, Erin Blacklaws, attests to how the CMOH restrictions upon Indoor Gatherings and flawed PCR testing conspire to violate the s.7 right to liberty. Her father was admitted to hospital due to a head injury but was misdiagnosed with the virus and placed in a Covid isolation ward, where he ultimately died alone. Erin was denied the opportunity to see her father while in hospital, causing her to suffer considerable emotional anguish and concern about whether neglect of her father’s head injury and being placed in the Covid isolation ward contributed to his death. The Blacklaws Affidavit thus highlights both the human costs of unreliable PCR testing and also of depriving one of their liberty, including the ability to see a dying relative in the hospital.

89. The Respondents assert that it is good public health practice to ignore the errors of the PCR test because it is in the interest of Canadian public health to identify every single person virally infected and quarantine them, whether or not they pose any risk whatsoever in

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<sup>74</sup> *Hutterian Brethren*, at para. 48

<sup>75</sup> Hinshaw Affidavit, at paragraph 97

spreading the virus. Dr. Bhattacharya's response to that is that it is poor public health practice to quarantine asymptomatic people whose positive tests were as a result of high Ct values, and violate their *Charter* rights with no discernable public health benefit whatsoever.

90. The Portuguese Court of Appeal agrees with Dr. Bhattacharya's opinions on the reliability of PCR tests to determine infectiousness. In a November 2020 decision<sup>76</sup> it dismissed the appeal of a lower court's finding that the forced quarantine of the plaintiffs upon return from a trip to Germany based on positive PCR tests was illegal. The Appellant Court cited a study in *The Lancet* which found that "Any diagnostic test must be interpreted in the context of the actual possibility of the disease, existing prior to its performance. For Covid-19, this decision to perform the test depends on the prior evaluation of the existence of symptoms, previous medical history of Covid-19 or presence of antibodies, any potential exposure to this disease, and no verisimilitude of another possible diagnosis."

91. The Portuguese Court of Appeal further held that

"... false positive Covid-19 tests are becoming increasingly likely in the current epidemiological climate in the UK, with substantial personal, health system and societal consequences. Thus, as there are so many scientific doubts expressed by experts in the field, which are the ones that matter here, as to the reliability of such tests, ignoring the parameters of their performance and there being no diagnosis made by a doctor, in the sense of the existence of infection and risk, it would never be possible for this court to determine that C was a carrier of the SARS-CoV-2 virus..."<sup>77</sup>

92. So many factors that go into Dr. Hinshaw's decisions in making the CMOH Orders relate to positive PCR tests, without any requirement for a clinical diagnosis.

93. Further, the number of categorized "probable cases" which were determined as a result of being a close contact of one of these false positive results is unknown. The Respondents ought also to have considered that a high number of death certificates of people with a

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<sup>76</sup> *Tribunal da Relação de Lisboa, Proc. 1783/20.7T8PDL.L1* (see original and English translated versions)

<sup>77</sup> *Ibid.* at para. 16-18;

positive test result would be classified as Covid-19 deaths when those results were from high Ct values.

94. Using unreliable PCR tests as the basis to impose restrictive and *Charter*-infringing CMOH Orders is irrational. It is also profoundly unfair and arbitrary to quarantine people and remove their freedoms to live as they choose based on case counts of high numbers of people that pose no risk to anyone.

ii. Negligible Risk of Asymptomatic Transmission

95. Another factor which is highly problematic for the Respondents is asymptomatic transmission. As discussed above, household transmission of Covid-19 in asymptomatic people where social distancing and mask protocols are not enforced is only 0.7%. There is no rational connection between the objective of reducing the spread of Covid-19 and the CMOH Orders when one of the main factors behind the CMOH Orders is that Albertans may be infectious without symptoms and could unknowingly transmit Covid-19 to other people. Basing CMOH restrictions on the risk of asymptomatic transmission when such risk is negligible is an irrational consideration. It is also extremely arbitrary and manifestly unfair.

iii. Unreliable Models With Poor Performance are Tied to Unreliable Case Counts

96. It is clear from the Respondent Affidavits that the November 2020 modelling played a major role in imposing the CMOH Orders at that time. Dr. Bhattacharya's conclusion on the performance of theoretical models, which is in part due to the results of an evaluation of such models by Dr. Ioannidis (who determined their performance is very poor) is that "extreme caution should be exercised by public health decision makers in using compartment models to forecast the future direction of the pandemic and in predicting the effects of policy interventions such as lockdowns on Covid-19 outcomes such as mortality and hospitalization."<sup>78</sup>

iv. No Scientific Evidence to Justify Restrictions on Outdoor Gatherings

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<sup>78</sup> Bhattacharya Affidavit1, Schedule "C", at p. 11

97. Dr. Kindrachuk states that more research needs to be done to determine the risk of outdoor transmission of Covid-19. He does not provide any study to support the CMOH Orders which restrict outdoor gatherings. The Respondents also do not provide any evidence of outbreaks resulting from outdoor events, or cases of Covid-19 being linked to people specifically gathering outdoors.
98. Prohibiting outdoor assembly on the premise that it may pose some hypothetical risk of transmission of Covid-19, whether for social reasons or protests, with no scientific evidence or data to justify such a restriction is irrational. Ticketing Torry Tanner in such circumstances for his peaceful protest of the CMOH Orders which have deprived him of his civil liberties is tyrannical, egregiously arbitrary and massively unfair. The right to peacefully protest government measures is one of the cornerstones of democracy. Preventing citizen protest of Dr. Hinshaw's unilaterally issued orders is not only cruel and undemocratic, it leaves aggrieved citizens with no means to express their suffering. The stifling of democratic protest is unconstitutional and breeds distrust and resentment of the government, and sows the seeds of civil unrest and instability.
99. *Beaudoin v British Columbia*<sup>79</sup> involved a constitutional challenge to public health orders of Provincial Health Officer Dr. Bonnie Henry, to the extent that those orders prohibited or unduly restricted outdoor public protests and in-person religious gatherings. Based upon a concession from the Attorney General of British Columbia, Chief Justice Christopher Hinkson issued a declaration that the prohibition by Dr. Henry of outdoor public protests unjustifiably infringed the petitioner Alain Beaudoin's rights under sections 2(c) and (d) of the *Charter* and is consequently of no force or effect.

v. Poor Evidence to Show that Places of Worship Needed to be Closed/Restricted

100. A potential acquisition does not rise to the level required to justify closing churches, especially when establishments higher on that list, such as retail establishments (includes big-box, grocery, liquor/cannabis stores), universities, financial/white collar, were permitted to stay open. These associations and links between religious services and "cases" are

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<sup>79</sup> *Beaudoin v British Columbia*, 2021 BCSC 512, at paras. 68, 147, 151 (Applicants' BOA, TAB 35)

weak, and closing places of worship based on this “evidence” (or lack thereof) is irrational, arbitrary and unfair.

101. In *Beaudoin*, although the Chief Justice held that Dr. Henry’s prohibition of in-person religious services limited the rights of the religious petitioners under sections 2(a), (b), (c) and (d) of the *Charter*, he deferred to Dr. Henry’s decision-making in concluding that this prohibition was reasonable and therefore justified under the *Doré/Loyola* analysis. The decision is under appeal.<sup>80</sup>

vi. Failure to Conduct A Cost / Benefit Analysis

102. The Respondents claim that they have sought to impose the least restrictive measures necessary. Yet, they have not provided a transparent strategy and response plan. There has been no evidence of a cost / benefit analysis which would have been useful to determine whether or not alternative, less restrictive measures were considered, and why they were rejected taking into account the costs and the benefits of the current strategy versus an alternate one. Without this information, the Respondents have not demonstrated how they have met the relevant public health standards.

vii. Smoking Causes 3000 deaths in Alberta per year, but is not Prohibited

103. According to The Canadian Lung Association, smoking is the leading cause of *preventable* death in Alberta.<sup>81</sup> The activity causes 3000 deaths a year<sup>82</sup>, which is *triple* the number of Covid-19 deaths in 2020. And a whopping 50% of smokers will die from a tobacco related illness, whereas the median infection survival rate from Covid-19 is 99.77%.<sup>83</sup> While deaths from Covid-19 began in 2020 and ought to end when the pandemic is over, deaths from smoking accumulate every year as they have for decades. And yet, the Respondents have chosen not to ban cigarettes. Surely this would prevent most of the 2000 deaths per year, and would protect innocent children from the harms of second-hand smoke in a home.<sup>84</sup> But

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<sup>80</sup> *Beaudoin*, *supra*, at paras. 124, 126, 168, 172, 174, 177, 218, 247-248 (Applicant’s BOA, TAB 35)

<sup>81</sup> “Smoking and Tobacco Statistics”-Canadian Lung Association <https://www.lung.ca/lung-health/lung-info/lung-statistics/smoking-and-tobacco-statistics>

<sup>82</sup> “Tobacco and Smoke Free Environments Policy”- Alberta health Services <https://www.albertahealthservices.ca/about/page4160.aspx>

<sup>83</sup> Bhattacharya Affidavit1, Schedule “C”, p. 2

<sup>84</sup> “Secondhand Smoke” <https://myhealth.alberta.ca/Health/pages/conditions.aspx?hwid=sts14447&lang=en-ca>

this easily preventable cause of death is a perfectly legal activity, even where adults put their own children's health and lives at risk when they smoke in the family home. Research has shown that, in 2002, exposure to second-hand smoke alone caused 831 deaths in Canada, including 579 deaths from heart disease and 252 lung cancer deaths.<sup>85</sup>

104. The Applicants submit that it is stunning how the Respondents have shut down society and trampled upon their Charter freedoms to protect Albertans from Covid-19 in one year, but have refused to ban smoking which causes 3000 Albertans to die annually and sicken their own children with second hand smoke.

105. Due to these considerations, it cannot be said that the CMOH Orders bear any rational connection to their objective, even on the basis of reason or logic. These restrictions are therefore unjustifiably arbitrary.

**b. The Impugned Restrictions Do Not Minimally Impair the Charter Rights they Infringe**

106. Under section 1 of the *Charter*, minimal impairment means that the impugned measure is unjustified if it does not "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.<sup>86</sup>

107. The Supreme Court elucidated the minimal impairment stage of the section 1 test in *Hutterian Brethren*:

**In considering whether the government's objective could be achieved by other less drastic means, the court need not be satisfied that the alternative would satisfy the objective to exactly the same extent or degree as the impugned measure.** In other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunize the law from scrutiny at the minimal impairment stage. The requirement for an "equally effective" alternative measure in the passage from *RJR-MacDonald*, quoted above, should not be taken to an impractical extreme. It includes alternative measures that give sufficient protection, in all the

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<sup>85</sup> Government of Canada, "Second Hand Smoke", <https://www.canada.ca/en/health-canada/services/health-concerns/tobacco/legislation/tobacco-product-labelling/second-hand-smoke.html>

<sup>86</sup> *Oakes*, at p. 139 (para. 70) ; *Hutterian Brethren*, at para. 54



circumstances, to the government's goal: *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 [2007] 1 S.C.R. 350. While the government is entitled to deference in formulating its objective, that deference is not blind or absolute. The test at the minimum impairment stage is whether there is alternative, less drastic means of achieving the objective in a real and substantial manner.<sup>87</sup>

ii. Religious settings

108. The Respondents have tendered no evidence to indicate that the risks which Dr. Hinshaw associates with religious activities cannot be mitigated by measures less extreme and drastic closing and barricading Churches or even restricting in-person worship by 85%. If there is concern about compliance with safety measures in the context of in-person worship, public health inspectors or other enforcers could randomly inspect these settings and events, presumably as they are doing for other settings.

109. It is a crucial point that pre-symptomatic and asymptomatic transmission in households, where there is likely to be no social distancing or mask wearing, is 0.7%. As Dr. Bhattacharya opines:

Spread of the disease in less intimate settings by asymptomatic individuals, including religious services, are likely to be even less likely than in the household. The clear implication of this scientific fact is that many intrusive lockdown policies (including church and business capacity limitations and closures) could be replaced with less intrusive symptom checking requirements, with little or no detriment to infection control outcomes.<sup>88</sup>

110. The Respondents could require temperature and symptom checking at the doors of places of worship, and require that signs be erected which remind people to stay at home if they are sick. There is no good reason to close or barricade churches. The Religious Applicants' *Charter* rights have been infringed in the most extreme manner possible. The complete ban on and prohibition of corporate worship is at the extreme end of the spectrum in terms of the violation of their right to worship and assemble. Short of incarceration for engaging in corporate worship (such as was experienced by Pastor James Coates of Grace Life Church and Pastor Timothy Stephens of Fairview Baptist Church) nothing violates the Religious

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<sup>87</sup> *Hutterian Brethren*, at para. 55 (emphasis added)

<sup>88</sup> Bhattacharya Affidavit1, Schedule "C", at p. 11



Applicants' *Charter* protected rights to worship more than closing and barricading churches. Closure orders go far beyond a minimal impairment in the instant circumstances. There is no evidence that the Respondents considered any such alternative measures before resorting to outright prohibition of in-person worship services, therefore, the justification for the CMOH Orders affecting the Religious Applicants ought to fail this stage of the *Oakes* test.

iii. *Private In-Home Gatherings*

111. The Respondents do not provide specific evidence that in-home gatherings have resulted in outbreaks of Covid-19. Since the best data on pre-symptomatic and asymptomatic spread reveals that it occurs within households only 0.7% of the time<sup>89</sup>, it would make sense to ask homeowners to do symptom and temperature checks of all guests and ask their guests not to visit if they are symptomatic.<sup>90</sup> To completely prohibit or severely restrict Albertans from visiting friends or having family and friends over to visit is an egregious infringement of the right to assemble.

iii. *Outdoor Gatherings*

112. The Respondent has provided no evidence that restricting outdoor gatherings and protests advances the objective of preventing transmission of Covid-19. The Respondents have also failed to consider measures short of restricting outdoor gatherings. Torry Tanner submits that it is apparent that his right to assemble has not been minimally impaired - he was ticketed for breaching a CMOH Order which is devoid of a foundation in science.<sup>91</sup>

113. The Applicants argue that the Respondents' attempt to mitigate the severe mental health damage caused by the CMOH Orders by online counselling sessions, a help telephone line, and online recreational activities has done little to assist Albertans in one of the biggest mental health crises this province has faced.

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<sup>89</sup> Bhattacharya Affidavit1, Schedule "C", at p. 8

<sup>90</sup> Bhattacharya Affidavit2, Schedule "A", at p. 11

<sup>91</sup> Tanner Affidavit, sworn 20 January 2021

iv. Focused Protection

114. Dr. Bhattacharya is the co-author of The Great Barrington Declaration, which relies upon the premise of 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 approach is called "Focused Protection." He outlines his strategy, which has been endorsed by more than 50,000 scientists, physicians and other medical professionals worldwide, which 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 lives.<sup>92</sup>

115. Dr. Bhattacharya referenced the success of the Focused Protection strategy in Florida and compared its approach with California's. 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 mandated by law. Florida also followed the Focused Protection approach which included increased testing and protection of its nursing home residents.<sup>93</sup>

116. Dr. Bhattacharya compared the trend in Covid-19 deaths in California and Florida through 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.<sup>94</sup>

117. Even when considering the issue of Variants of Concern, Dr. Bhattacharya states:

The second wave of cases (after the first wave in March 2020) started in September 2020, peaked in January 2021, and subsided by February 2021. The third wave of cases began in March 2021, peaked in late April/May 2021, and subsided by July 2021. During the second wave, in a largely unvaccinated population, deaths rose proportionally with cases with a lag of

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<sup>92</sup> Bhattacharya Affidavit1, Schedule "C", Tab K p. 32

<sup>93</sup> Bhattacharya Affidavit2, Schedule "A," p. 10

<sup>94</sup> Bhattacharya Affidavit2, Schedule "A", at p. 9

two- to three- weeks, just as they had during the first wave of cases in March 2020. However, during the third wave, cases and deaths decoupled. Though cases rose sharply during the third wave, deaths did not rise as sharply as cases..... Because of the success of the vaccination campaign in Alberta, COVID poses no real or imminent serious threat to the population's health and the situation is clearly no longer an emergency, even for previously vulnerable older adults. <sup>95</sup>

118. Thus the Focused Protection approach could have, and should have been employed to protect those in society most at risk of Covid-19, while permitting the vast majority of Albertans who are healthy to live normal lives. This would have increased herd immunity naturally before the vaccine was available and eliminated most of the harms discussed in the next section including excess deaths likely caused by mental health issues due to the CMOH Orders. As stated above, this approach does not have to 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*-infringing approach that avoids the devastating harms of the CMOH Orders.

119. 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 disproportionate and unjustified on this basis as well.

**c. The Severely Deleterious Effect of the Impugned Restrictions Outweigh any Salutory Effect Resulting from Them**

120. The CMOH Orders have egregiously severe and unprecedented deleterious effects on the *Charter* rights they infringe, without yielding any discernable benefit established by the evidence.

121. To be justified, the salutary effect of a measure which infringes *Charter* rights must outweigh their deleterious effect on the rights at issue. In other words, the Court must

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<sup>95</sup> Bhattacharya Affidavit2, Schedule "A", at p. 14-15

weigh the impact “on protected rights against the beneficial effect of the [measure] in terms of the public good.”<sup>96</sup>

*i. Deleterious Effects*

122. The CMOH Orders at issue here have had the effect of prohibiting any person in the province from the exercise of certain rights which are both fundamental to the democratic nature of our society and involve what are for many, sacred practices which are compelled by their most deeply-held convictions.

123. It is difficult to fathom more drastic limitation on the free exercise of religion than to prevent its exercise in a communal and a collective fashion as commanded by conscience and divine decree. It is also hard to fathom a restriction which strikes deeper into the beating heart of a free and democratic society than to prohibit the gathering of people for political protest, particularly at a time when the Respondents are encroaching on citizen’s most fundamental of rights and freedoms on a scale unprecedented in Canadian history.

124. A District Court Judge in Weimar, Germany, recently struck down gathering limits in a scathing landmark decision. In this case a citizen of Weimar had been prosecuted and was to be fined €200 for celebrating his birthday together with seven other people in the courtyard of a house at the end of April 2020, thus violating the contact requirements in force at the time. This only allowed members of two households to be together. The Court found the prohibition on social contact to be unconstitutional. It held:

**A general ban on contact is a serious encroachment on civil rights. It is one of the fundamental freedoms of people in a free society to be able to determine for themselves with which people (assuming they are willing) and under what circumstances they enter into contact. The free encounter of people with each other for the most diverse purposes is at the same time the elementary basis of society. The state has to refrain from any purposeful regulating and restricting intervention. The question of how many people a citizen invites to his home or with how many people a citizen meets in public space to go for a walk, to**

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<sup>96</sup> *Oakes*, at p. 140, para. 71; *Carter*, at para. 122

**do sports, to go shopping or to sit on a park bench is of no fundamental interest to the state<sup>97</sup>.**

...

In addition, and as an aspect to be considered separately, it should be noted that by imposing a general ban on contact for the purpose of protecting against infection, the state treats every citizen as a potential risk to the health of others. If every citizen is regarded as a danger from which others must be protected, he or she is at the same time deprived of the opportunity to decide what risks he or she will expose himself or herself to, which is a fundamental freedom<sup>98</sup>.

125. The Judge went through a comprehensive analysis of the lockdown harms experienced by German citizens, and the ineffectiveness of the lockdowns by citing some of the same studies cited by Dr. Bhattacharya. He concluded:

**According to what has been said, there can be no doubt that the number of deaths alone that can be attributed to the measures of the lockdown policy exceeds the number of deaths prevented by the lockdown many times over.** For this reason alone, the standards to be assessed here do not satisfy the proportionality requirement. Added to this are the direct and indirect restrictions on freedom, the gigantic financial damage, the immense damage to health and the non-material damage. **The word “disproportionate” is too colourless to even hint at the dimensions of what is happening. The lockdown policy pursued by the state government in the spring (and now again) of which the general ban on contact was (and is) an essential component, is a disastrous political mistake with dramatic consequences for almost all areas of peoples’ lives, for society, for the state, and for the countries of the Global South<sup>99</sup>.**

126. The comments of Weimar Court are equally applicable to Alberta. The deleterious effects of the CMOH Orders are staggering. Mental health problems have risen dramatically, which can be seen in national studies. The CMOH Orders which restrict gatherings in homes, outdoors or in churches caused immense stress, depression, anxiety, despair, and a crisis of conscience to the Applicants and many other Albertans. The social isolation which results from these kinds of CMOH Orders causes more serious problems and behaviours. Dr. Bhattacharya outlines the immense psychological harm from social isolation, which has caused sharp rises in drug overdoses in Canada. Social isolation of the elderly has

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<sup>97</sup> *Amtsgericht Weimar*, Urteil vom 11.01.2021, Az. 6 OWi - 523 Js 202518/20 / *Weimar District Court*, judgment of January 11th, 2021, Az. 6 OWi - 523 Js 202518/20, at para. 40 (See original and English translated versions) (“*Weimar*”)

<sup>98</sup> *Weimar*, *supra*, at para. 43

<sup>99</sup> *Weimar*, *supra*, at para. 104 (emphasis added)

contributed to a sharp rise in dementia-related deaths.<sup>100</sup> A Canadian Mental Health Association survey found that nearly 1 in 5 young adults had suicidal thoughts.

127. A recent Mental Health Commission of Canada Summary Report made the following findings from their survey of people suffering with mental health issues during the pandemic:

a. The mental health and substance use impacts of the pandemic have been greater for people living with, or at risk of, mental health and substance use disorders.

- Only 2 in 5 respondents report strong (very good/excellent) mental health.

- 14% of respondents report moderately severe/severe current symptoms of depression, 24% report moderate/severe symptoms

of anxiety, and 5–6% have seriously contemplated suicide since March 2020.

- 1 in 3 respondents who use alcohol report increased use and 1 in 5 report problematic use; 2 out of 5 who use cannabis report increased use AND problematic use.

b. The pandemic is amplifying the close relationship between mental health and substance use.

- Respondents with past and current substance use concerns report more mental health symptoms. Nearly 1 out of 2 respondents with past substance use disorders report moderately severe to severe depression symptoms since March 2020.

- Respondents with past and current mental health concerns report greater increases in substance use. Almost 1 out of 2 respondents with current mental health symptoms who consume cannabis report increased consumption.

c. Access to services is not keeping up with increasing need.

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<sup>100</sup> Bhattacharya Affidavit1, Schedule "C" Tab E, p. 17

- d. Only 22% of respondents with current mental health symptoms and 24% with current problematic substance use report access to treatment since March 2020; about 1 in 5 of respondents who have received care report finding access difficult.<sup>101</sup>

128. Children's First Canada declared #codePINK (a term used for pediatric emergencies), called for an urgent meeting of Canada's First Ministers to take immediate action to address the crisis facing 8 million Canadian children. It included "safely reopening schools, camps, parks and other recreational facilities as quickly as possible." The organization revealed:

- a. Suicide attempt admissions have increased by 100% on average among children and youth during the pandemic (Children's Healthcare Canada). McMaster Children's Hospital reported a 200% increase.
- b. Admissions for substance-use disorders have increased by 200% compared to last year, and the use of potentially deadly opioids has also increased (Children's Healthcare Canada).
- c. Child abuse rates have risen sharply, with a 100% increase in cases of infants presenting with fractures and head trauma since September 2020. There have also been spikes in reported cases of nutritional neglect and starvation.
- d. 70% of kids say the pandemic has harmed their mental health.
- e. SickKids reports a 25% increase in ER visits for mental health conditions during the pandemic.<sup>102</sup>

129. The Canadian Centre for Child Protection also released a recent report revealing that reports to Cybertip.ca (Canada's tipline for reporting online child sexual predation and "sextortion") increased by 88%, due to more youth spending more time online.<sup>103</sup> Whether this is through school closures or the prohibition and restriction on visiting friends in homes, it is only natural that youth would turn to online activities to quell their boredom and loneliness.

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<sup>101</sup> "Mental Health and Substance Use During Covid-19" Canadian Centre for Substance Abuse and Addiction, Mental Health Commission of Canada, Summary Report, October 13-November 2, 2020 & November 19-December 2, 2020

<sup>102</sup> Children's First Canada, #codePINK, May 19, 2021, <https://childrenfirstcanada.org/code-pink/kids-are-in-crisis-canadas-top-advocates-and-experts-unite-to-declare-codepink/>

<sup>103</sup> "National Tipline Sees Rise in Reports of Sextortion" Canadian Centre for Child Protection, February 9, 2021 <https://protectchildren.ca/en/press-and-media/news-releases/2021/tipline-sees-rise-in-reports-of-sextortion>



130. Another harm which can reasonably be said to be linked to CMOH Orders which force social isolation upon a population is excess deaths, which means that there are more deaths than expected for a certain period of time. Statistics Canada released an analysis of excess deaths in Canada in 2020. It found:

During the fall of 2020, younger people became more heavily affected by excess deaths, as 35% of these deaths involved individuals under the age of 65, up from 14% in the spring. The number of deaths was 24% higher than expected. By comparison, there were 6% more deaths than expected among those aged 85 and older during the fall period. As these shifts imply an increase in deaths not directly caused by Covid-19, it is important to note that **some deaths may be due to the indirect consequences of the pandemic, which could include increases in mortality due to overdoses.**<sup>104</sup>

131. A more recent Statistics Canada report reveals the continued damage caused by the lockdowns:

While we sometimes observe excess mortality that is consistent with the number of deaths attributed to COVID-19, data reveal that indirect consequences of the pandemic are also having a significant impact on the number of excess deaths in Canada, particularly among younger Canadians. Based on the newly updated provisional dataset released today from the Canadian Vital Statistics Death Database, **from the end of March 2020 to the beginning of April 2021, an estimated 62,203 deaths were reported among Canadians aged 0 to 64. This represents 5,535 more deaths than expected were there no pandemic**, after accounting for changes in the population such as aging. **Over the same period, 1,380 COVID-19 deaths have been attributed to the same age group (those younger than 65), suggesting that the excess mortality is, in large part, related to other factors such as increases in the number deaths attributed to causes associated with substance use and misuse, including unintentional (accidental) poisonings and diseases and conditions related to alcohol consumption.**<sup>105</sup>

ii. *No Salutory Effects – The Lockdowns Don't Work*

132. Dr. Bhattacharya explains that lockdowns push cases into the future, they do not prevent them altogether. He states that seasonality should be accounted for in any analysis of case spread. The best studies, according to him, are the ones which account for environmental, epidemiological, and economic factors alongside policy

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<sup>104</sup>Provisional Death Counts and Excess Mortality, January to December 2020, Statistics Canada (emphasis added) <https://www150.statcan.gc.ca/n1/daily-quotidien/210712/dq210712b-eng.htm>

<sup>105</sup> Provisional Death Counts and Excess Mortality, January 2020 to April 2021, Statistics Canada (emphasis added) <https://www150.statcan.gc.ca/n1/daily-quotidien/210712/dq210712b-eng.htm>

interventions. Those studies conclude that the mortality from Covid-19 infection is not primarily driven by lockdowns, but by other factors specific to each region. Countries that had a population predisposed to poor Covid-19 infection had worse outcomes irrespective of whatever lockdown policies they implemented.<sup>106</sup>

133. His comparison of California and Florida provides a helpful example of how lockdowns don't work. As noted above, California had one of the harshest lockdowns in the US. Florida lifted all of its lockdown measures by September 2020. The two states' death rates were comparable, and once adjusted for age, Florida's mortality rate was more favourable than California's.<sup>107</sup>

134. 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.<sup>108</sup> 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.<sup>109</sup>

135. 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 on gatherings are not "demonstrably justified in a free and democratic society", and are consequently unconstitutional.

### III. RELIEF SOUGHT

136. The Applicants request that this Honourable Court find that the Respondents' CMOH Orders, which prohibit and/or restrict religious, private in-home and public outdoor gatherings violate their ss. 2(a)(b)(c), 7 and 15 *Charter* rights, and that those violations cannot be saved under section 1 of the *Charter*. In the alternative, the Applicants request that this Honourable Court find that the CMOH Orders are *ultra vires* section 3 of the *Public Health Act*. In the further

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<sup>106</sup> Bhattacharya Affidavit1, Schedule "C" Tab D, p. 14

<sup>107</sup> Bhattacharya Affidavit2, Schedule "A", p.9

<sup>108</sup> Bhattacharya Affidavit2, Schedule "A", p.9

<sup>109</sup> Bhattacharya Affidavit2, Schedule "A", p.8

alternative, the Applicants request that this Honourable Court find that the CMOH Orders which prohibit and restrict religious gatherings are inoperative because they conflict with section 176 of the *Criminal Code of Canada*.

137. The Applicants seek the following relief from this Honourable Court:

- a. A Declaration pursuant to section 24(1) of the *Charter* and Rule 3.15(1) of the *Alberta Rules of Court* that the Impugned Provisions are unreasonable because they disproportionately limit sections 2(a), 2(b), 2(c), 2(d) and 7 of the *Charter*, and
- b. A Declaration pursuant to section 52(1) of the *Constitution Act, 1982* that the Impugned Provisions are of no force or effect because they unjustifiably infringe sections 2(a), 2(b), 2(c), 2(d) and 7 of the *Charter*.
- c. Costs of this Application; and
- d. Such further and other relief as counsel may advise and this Honourable Court deems just and equitable.

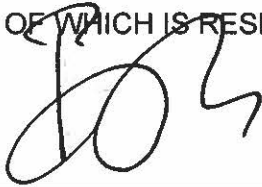
#### IV. CONCLUSION

138. Over the last 18 months, Albertans experienced the greatest collective violation of civil liberties this Province has ever known. Yet there is no war, no calamitous natural disaster, no catastrophic loss of critical infrastructure, and no dramatic, overwhelming, or sweeping loss of life.

139. Select individual rights and freedoms have been constitutionalized in this country for a reason. Not merely because living in a free society is convenient, because of the recognition that the activities, experiences and endeavours those rights protect are what make life truly worth living. History has borne out that maximum individual freedom is directly linked to maximum human flourishing and suffocating government control is directly linked to less human flourishing, and, sometimes, none at all.

140. 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.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1st day of September 2021:



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Leighton B.U. Grey, Q.C.

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

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