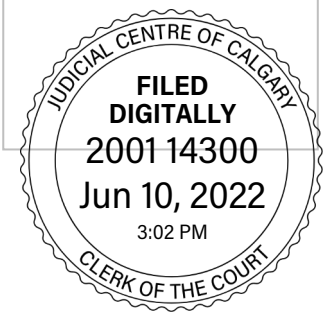
COURT FILE NUMBER	2001-14300
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	REBECCA MARIE INGRAM, HEIGHTS BAPTIST CHURCH, NORTHSIDE BAPTIST CHURCH, ERIN BLACKLAWS and TORRY TANNER
RESPONDENTS	HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA and THE CHIEF MEDICAL OFFICER OF HEALTH

Clerk's Stamp



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WRITTEN FINAL ARGUMENTS OF THE APPLICANT REBECCA MARIE INGRAM

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PART 1: OVERVIEW

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

2. Ms. Ingram is seeking a number of declarations from this Honourable Court with respect to her claims that the public health orders promogulated by the Respondents, Her Majesty the Queen in Right of Alberta ("**Alberta**") and the Chief Medical Officer of Health (the "**CMOH**" and together with Alberta, the "**Respondents**"), pursuant to section 29(2.1) of the *Public Health Act*[1] (the "***PHA***") are *ultra vires* section 29 and the overall purpose of the *PHA*, offend section 1 of the *Alberta Bill of Rights*[2] and are therefore of no force and effect pursuant to section 2 of the *Alberta Bill of Rights*, infringe her rights and freedoms guaranteed by sections 2 and 7 of the *Canadian Charter of Rights of Freedoms*[3] (the "***Charter***"), and that such infringements cannot be justified in accordance with section 1 of the *Charter*.

3. With respect to Ms. Ingram's earlier claims that the impugned public health orders (the "**CMOH Orders**") also infringe section 15 of the *Charter*, Ms. Ingram no longer seeks relief from this Honourable Court with respect to section 15 of the *Charter*.

PART II: FACTS

A. Summary of Facts

4. Ms. Ingram is an individual who resides in the City of Calgary, in the Province of Alberta. She is a single mother, as well as the sole shareholder and director of a small business, The Gym Fitness Club Ltd. ("**The Gym**")[4]. As a small business owner and single mother, The Gym is the primary source of income for Ms. Ingram and her five children.

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[1] *Public Health Act,* RSA 2000, c P-37 [***PHA***].
[2] *Alberta Bill of Rights,* RSA 2000, c A-14.
[3] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (UK), 1982, c 11 [***Charter***].
[4] Affidavit of Rebecca Marie Ingram, sworn December 8, 2020, at paras. 2 and 5 [**Ingram Affidavit**]; Supplemental Affidavit of Rebecca Marie Ingram, sworn January 22, 2021, at para. 3 [**Supplemental Ingram Affidavit**].

5. Since March 16, 2022, Dr. Deena Hinshaw, as the CMOH, has pronounced over 100 public health orders pursuant to her purported authority outlined in section 29(2.1) of the *PHA.*

6. On March 17, 2020, the Lieutenant Governor in Council declared a state of public health emergency pursuant to section 52.1(1) and 52.8 of the *PHA* in response to the communicable viral infection SARS-CoV-2 ("**COVID-19**").

7. It was clear from the outset that COVID-19 – a form of corona virus or cold virus – predominantly affected the elderly and people who were already dying from multiple fatal conditions known as "co-morbidities". It was also clear from the outset that the only so-called "emergency" was a lack of hospital capacity and intensive care unit ("**ICU**") capacity, arguably due to poor management, government underfunding of health care and a failure of the government to provide an outpatient treatment regimen. It was the lack of hospital capacity and ICU capacity, rather than the health and well-being of otherwise healthy individuals whose immune systems easily deal with COVID-19, that was the primary driver of rights infringements, business bankruptcies and the general devastation of public economic health and well-being throughout the Province of Alberta.

8. On November 24, 2020, the Lieutenant Governor in Council once again declared a provincial state of emergency pursuant to sections 52.1(1) and 52.8 of the *PHA*.

9. As a direct result of the public health orders promulgated by the CMOH, the Ms. Ingram has suffered irreparable harm.

PART III: THE EVIDENCE ADDUCED

A. Overview of the Ms. Ingram's Evidence

10. Ms. Ingram tendered the following affidavits as "fact evidence" in this action:

    a. The affidavit of Rebecca Marie Ingram, sworn December 8, 2020 (the "**Ingram Affidavit**");

    b. The supplemental affidavit of Rebecca Marie Ingram, sworn January 22, 2021 (the "**Supplemental Ingram Affidavit**");

    c. The affidavit of Shawn McCaffery, sworn January 21, 2021;

    d. The affidavit of Kyle Pawelko, sworn January 28, 2021; and

    e. The affidavit of Abdullah Al-Sharah, affirmed January 19, 2021.

11. Pursuant to an Order of the Case Management Justice, the affidavits of Shawn McCaffery, Kyle Pawelko, and Abdullah Al-Sharah shall not be considered by this Court unless Ms. Ingram demonstrates a breach of at least one right as guaranteed by the *Charter* and shall not be considered until the final stage of the *Oakes* analysis conducted under section 1 of the *Charter*.[5]

12. The Respondents declined to cross-examine any of Ms. Ingram's affiants prior to the hearing[6], and none of Ms. Ingram's "fact evidence" witnesses were questioned during the hearing before the Honourable Madam Justice Romaine.

13. Ms. Ingram also tendered expert opinion evidence by way of a written report and a surrebuttal report by David Redman, and she relies upon on the expert evidence tendered by the Applicants, Heights Baptist Church, Northside Baptist Church, Erin Blacklaws and Torry Tanner, being the expert evidence of Dr. Jay Bhattacharya and Dr. Martin Koebel.

14. Dr. Bhattacharya and Mr. Redman were both cross-examined by counsel for the Respondents before the Honourable Justice Romaine, whereas Dr. Koebel was never cross-examined. Dr. Bhattacharya was cross-examined by counsel for approximately three and a half days on February 10 to 11, February 14, and February 22, 2022. Mr. Redman was cross-examined by counsel for the Respondents for approximately 30 minutes on February 15, 2022.

B. Overview of the Respondents' Evidence

15. The Respondents tendered the following affidavits in response to the Applicants' evidence:

    a. The affidavit of Chris M. Shandro, affirmed July 8, 2021;

    b. The affidavit of Darren Hedley, affirmed July 12, 2021;

    c. The affidavit of Dr. Deena Hinshaw, affirmed December 18, 2020;

    d. The affidavit of Dr. Kimberly Simmonds, affirmed July 11, 2021;

    e. The affidavit of Deborah Gordon, affirmed July 12, 2021;

    f. The affidavit of Patricia Wood, sworn affirmed July 12, 2021;

[5] See Order of Madam Justice Kirker, dated June 1, 2021 and filed June 15, 2021; see also Order of Madam Justice Kirker, dated August 6, 2021 and filed August 9, 2021 [**Oral Hearing Order**].
[6] See Oral Hearing Order, *supra*.

g. The affidavit of Scott Long, sworn July 16, 2021; and

h. The affidavit of Dr. Deena Hinshaw, sworn July 12, 2021.

16. Pursuant to the Order of the Case Management Justice, dated August 6, 2021, and filed August 9, 2021 (the "**Oral Hearing Order**"), the evidence of Ms. Shandro and Mr. Hedley was tendered by affidavit and transcript only.[7] Ms. Shandro and Mr. Hedley were questioned by counsel for Ms. Ingram on August 12, 2021, and August 18, 2021, respectively.

17. Dr. Hinshaw, Dr. Simmonds, Ms. Gordon and Mr. Long, were all questioned by counsel for the Applicants during the hearing before Madam Justice Romaine. Mr. Long was questioned by counsel for the Applicants as a lay witness and an expert witness for approximately an hour and a half on February 15, 2022. Dr. Simmonds and Ms. Gordon were questioned by counsel for the Applicants on February 24, 2022, and Dr. Hinshaw was questioned by counsel for the Applicants over four days from April 4 to April 7, 2022.

18. The Respondents also tendered expert evidence by way of written rebuttal reports from the following:

a. Scott Long;

b. Dr. Nathan Zelyas;

c. Dr. Jason Kindrachuck; and

d. Dr. Thambirajah Balachandra.

19. Dr. Kindrachuk and Dr. Zelyas were questioned by counsel for the Applicants on February 22 and 23, 2022. Ms. Wood and Dr. Balachandra were not questioned by any of the Applicants either prior to or during the hearing.

PART IV: SUBMISSIONS WITH RESPECT TO THE EVIDENCE ADDUCED

A. Scott Long

20. As noted above, Mr. Long provided evidence in this matter as both a lay witness by providing an affidavit and as an expert by providing a surrebuttal report responding to the written report of Ms. Ingram's expert, David Redman.

[7] *Ibid*.

21. Pursuant to the decisions of the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*[8] and the Court of Queen's Bench of Manitoba in *Prairie Well Servicing Ltd. v Tundra Oil and Gas Ltd.*[9], Ms. Ingram submits that little weight should be given by this Honourable Court to the expert evidence of Scott Long, other than the very frank admission that no cost benefit analysis was done with regard to the imposition of civil rights restrictions on the citizens of the Province of Alberta.[10]

22. As stated by Cromwell J. on behalf of the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.,* "an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted."[11]

23. Mr. Long confirmed that at all relevant times, including when he was cross-examined before the Honourable Madam Justice Romaine, he was a full-time employee of Alberta.[12] While Ms. Ingram recognizes that "employment of the party calling a witness is not a matter for disqualification in and of itself",[13] she submits that Mr. Long's testimony was not independent and amounted to advocacy for the Respondents and the CMOH Orders separate and above whatever his expertise may be in the field of in emergency management.

24. As Mykle J. stated on behalf of the Court of Queen's Bench of Manitoba in *Prairie Well Servicing Ltd. v Tundra Oil and Gas Ltd.,* "[t]o be credible, an expert witness ought to be independent.[14]" In that case, Mykle J. found that Mr. Czyzewski was not an independent expert witness because, as a senior executive of the defendant, his testimony amounted to advocacy for his company and he was too connected to one side of the litigation for his opinion to have much value.[15]

25. Mr. Long made assumptions about the effectiveness of non-pharmaceutical interventions ("**NPIs**") implemented by the Respondents, without any basis and even championed the Respondents implementing NPIs sooner with no evidential basis.[16] Further, throughout his expert report and cross-examination, Mr. Long opined things that he has no authority to

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[8] *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23 (CanLII), [2015] 2 SCR 182.
[9] *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.,* 2000 MBQB 52 (CanLII).
[10] Hearing Transcript, February 15, 2022 PM, p. 34, lines 14 to 23, and 31.
[11] *White Burgess Langille Inman v. Abbott and Haliburton Co., supra* at para. 45.
[12] Hearing Transcript, February 15, 2022 PM, p. 24, lines 26 to 29.
[13] Hearing Transcript, February 15, 2022 PM, p. 27, lines 37 to 38.
[14] *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd., supra* at para. 25.
[15] *Ibid,* at para. 24.
[16] Hearing Transcript, February 15, 2022 PM, p. 45, lines 26 to 28 and lines 34 to 39.

speak on, including facts he had no knowledge of.[17] The only evidence of Mr. Long that should be afforded any weight by this Honourable Court was his frank admission that he had no knowledge of any costs benefit analysis having been conducted regarding the imposition of the civil rights infringements or so called "NPIs".[18]

B. Dr. Jay Bhattacharya

26. Dr. Bhattacharya, as a Professor of Medicine at Standard and an expert in the area of health policy and health economics, including a focus on epidemiology and infectious disease epidemiology,[19] filed an expert report on behalf of the Applicants, Heights Baptist Church, Northside Baptist Church, Erin Blacklaws and Torry Tanner, which Ms. Ingram relies on.

27. Throughout his cross-examination of Dr. Bhattacharya, counsel for the Respondents put the judicial decision of Joyal, C.J.Q.B. of the Court of Queen's Bench of Manitoba in *Gateway Bible Baptist Church, et al. v. Manitoba, et al.*[20] ("***Gateway***") to the witness and asked him to speak to the mind of Joyal, C.J.Q.B, even though Dr. Bhattacharya stated he had not read the decision.[21] Ms. Ingram submits that this line of questioning was inappropriate and should be given little to no weight by this Honourable Court. With respect to Joyal, C.J.Q.B., the *Gateway* decision reads more like a political decision than a legal decision, in effect concluding that upon the mere incantation of the words "public health emergency" the government can do no wrong, and courts should not play any supervisory role.

28. Ms. Ingram submits that the decision of Joyal, C.J.Q.B., particularly with respect to his findings regarding Dr. Bhattacharya's evidence, is not binding upon this Honourable Court. Ms. Ingram respectfully submits that the *Gateway* decision was highly politicized and that this Honourable Court is in a better position to make legal findings with respect to the facts and evidence relevant to these matters in Province of Alberta. Further, as Dr. Bhattacharya was questioned before this Honourable Court for three and a half days, this Court is in strong position to reach its own conclusions with respect to the credibility and weight of Dr. Bhattacharya's evidence.

29. During his cross-examination. Dr. Bhattacharya referred to "we" when referencing a similar case he provided evidence for in the United States, which counsel for the Respondents focussed on.[22] Ms. Ingram submits that it is inappropriate to attack the

[17] Hearing Transcript, February 15, 2022 PM, p. 31, lines 24 to 26, and p. 32, lines 16 to 18.
[18] Hearing Transcript, February 15, 2022 PM, p. 34, lines 14 to 23, and 31.
[19] Expert Report of Dr. Jay Bhattacharya, dated January 20, 2021 and filed January 22, 2021, at paras. 1 and 3.
[20] *Gateway Bible Baptist Church, et al. v. Manitoba, et al.,* 2021 MBQB 219 (CanLII) [***Gateway***].
[21] Hearing Transcript, February 10, 2022, p. 47, lines 23 to 29, p. 61, lines 30 to 41, p. 62, lines 1 to 17, p. 63, lines 1 to 32, p. 90, lines 11 to 41, p. 91, lines 26 to 30, p. 95, lines 10 to 40, and p. 98, lines 30 to 36.
[22] Hearing Transcript, February 10, 2022, p. 58, lines 19 to 26.

credibility of "a world-renowned epidemiologist, medical doctor, PhD in economics, and full professor at Stanford University"[23] on the basis of their identifying with the litigation team in another action by using the word "we". It is a simple indication of which party Dr. Bhattacharya provided evidence for not proof that he lacked objectivity. Certainly, Dr. Bhattacharya's testimony was far more candid than the testimony of Dr. Kindrachuk, who was evasive and unwilling to answer direct questions.

C. Dr. Jason Kindrachuk

30. Dr. Kindrachuk is an Assistant Professor and the Canada Research Chair in emerging viruses in the Department of Medical Microbiology & Infectious Diseases at the University of Manitoba with a bachelor's degree and Ph.D. in Biochemistry, who provided an expert report in response to Dr. Bhattacharya's expert report.[24]

31. Ms. Ingram submits that Dr. Kindrachuk offered expert opinion outside the scope of his expertise. Dr. Kindrachuck confirmed that his expertise is in biochemistry and that he is not a physician, does not have a medical degree, is not licensed, does not have a Master's in Public Health, and is not an expert in epidemiology.[25] While Dr. Kindrachuck testified to having worked as a "virologist"[26], he has no formal training, education, or certification in virology.

32. When questioned by counsel for Ms. Ingram if he thought it was part of his role as an expert to provide the countervailing view given his obligation as an expert to provide the full story to the Court, Dr. Kindrachuck responded that is "the job of your expert witness".[27] Dr. Kindrachuck clearly took an adversarial position in these proceedings, on one hand acknowledging his obligation as an expert to the Court to provide a fulsome picture of the best evidence and not act as an advocate,[28] and on the other deliberately excluding contradictory scientific opinion, not on the basis of his expert opinion that the better prevailing scientific evidence supported his opinion, but on the adversarial basis that that is "the job of your expert".

33. The adversarial nature of Dr. Kindrachuk's approach was further underlined by him referring to questions raised by counsel for Ms. Ingram's as "tropes".[29] When counsel for Ms. Ingram pointed out that he was not making statements of fact and was simply asking

[23] *Gateway, supra* at para. 42.
[24] Expert Report of Dr. Jason Kindrachuk, dated July 8, 2021, at paras. 1 and 2 and Schedule B.
[25] Hearing Transcript, February 22, 2022 AM, p. 53, lines, 17 to 41, and p. 54, lines 1 to 7.
[26] Hearing Transcript, February 22, 2022 AM, p. 53, lines 17 to 25.
[27] Hearing Transcript, February 22, 2022 AM, p. 58, lines 37 to 41.
[28] Hearing Transcript, February 22, 2022 AM, p. 53, lines 12 to 15.
[29] Hearing Transcript, February 22, 2022 AM, p. 75, lines 9 to 16.

questions, Dr. Kindrachuk's response was again argumentative and referred to counsel's questions themselves as "tropes" without in anyway attempting to answer the question.[30]

34. Rather than simply answering questions from counsel in a forthright manner based on the best evidence and his best knowledge in order to provide assistance to this Honourable Court, Dr. Kindrachuck was argumentative, adversarial and clearly demonstrated a lack of independence with respect to the questions being put to him. Therefore, Ms. Ingram submits that his evidence should be given little or no weight by this Honourable Court.

D. Deborah Gordon

35. As noted above, the Respondents filed an affidavit sworn by Deborah Gordon, as the Vice President and Chief Operating Officer for Clinical Operations with Alberta Health Services.[31]

36. The Respondents have an obligation to provide best evidence, particularly to demonstrably justify any infringements and limitations of *Charter* rights and freedoms but have failed to do so. Ms. Gordon claimed that Alberta Health Services developed a specific plan for the COVID-19 pandemic as they prepared for and went through the pandemic, and that this alleged plan was not provided as evidence in these proceedings.[32] This Honourable Court should not countenance attempts by Alberta to claim the existence of evidence that was deliberately not provided.

37. Further, a real issue arises from a credibility perspective with the entirety of Ms. Gordon's testimony. She repeatedly claimed to have no knowledge regarding COVID-19 death statistics when she had in fact attached such information to her sworn affidavit.[33]

E. The Johns Hopkins Meta-Analysis

38. As noted above, during the hearing, the Honourable Madam Justice Romaine made a decision about the admissibility of the Johns Hopkins Meta-Analysis in re-examination and cross-examination following an objection by counsel for the Respondents.[34]

39. Ms. Ingram submits that a determination of the *Charter* issues in favour of the Respondents requires a finding of a mistrial due to the Court's limitation of cross-

[30] Hearing Transcript, February 22, 2022 AM, p. 75, lines 18 to 27.
[31] Affidavit of Deborah Gordon, sworn July 12, 2021, at para. 1.
[32] Hearing Transcript, February 24, 2022 PM, p. 24, lines 18 to 23, and p. 25, lines 28 to 31.
[33] Hearing Transcript, February 24, 2022 PM, p. lines 10 to 11, 25 to 26, p. 15, lines 1 to 40, p. 116, lines 1 to 40, p. 17, lines 1 to 40, p. 18, lines 1 to 6.
[34] Hearing Transcript, February 14, 2022 PM, p. 23, lines 20 to 25; Hearing Transcript, February 15, 2022 AM, p. 30, lines 35 to 41, and p. 31, lines 1 to 7.

examination with respect to the Johns Hopkins Meta-Analysis contrary to the Court of Appeal of Alberta's decision in *R. v. R.N.*[35].

40. As stated on behalf of the Court of Appeal of Alberta in *R. v. R.N.*:

> We are aware of no authority which restricts cross-examination about a fact directly in issue, or requires contradictory statements to permit it. Cross-examining counsel may call the witness' attention to **any** object, fact, or statement, which may refresh the witness' memory or may persuade him to accept counsel's suggestion. That object, fact or statement need not be by the witness.[36] [emphasis added]

41. It is trite law that the Court of Appeal of Alberta's decision in *R. v. R.N.* is binding on this Honourable Court.

42. The objection of the Respondents' counsel to the Johns Hopkins Meta-Analysis being put to witnesses, and the Court's decision to uphold the objection, is fatal to the Court making any finding with respect to the effectiveness of NPIs in this matter. Firstly, only one of the 34 empirical studies reviewed in the Johns Hopkins Meta-Analysis was published outside the relevant period of the impugned CMOH Orders. Secondly, the objection of counsel for the Respondents and the Court's limitation of cross-examination, predisposes the Court from making any finding with respect to the unreasonable nature of the CMOH Orders.

43. Both the objection and the limitation of cross-examination, would be akin to a judicial review taking place of the decision of the Inquisition of the Roman Catholic Church requiring Galileo to recant his theory that the Earth moves around the Sun under threat of torture and sentencing him to house arrest, and at that hearing counsel for Galileo would be prevented from putting documents to the decision maker proving that the Earth revolves around the sun from the standpoint of demonstrating the decision maker's lack of scientific knowledge and the lack of reasonableness in coming to the opposite conclusion.

44. Any finding of the reasonableness of scientific and medical decisions should not be divorced from up to date scientific and medical facts. The Court, in considering these matters, has an obligation to consider, with the full benefit of hindsight, whether NPIs caused more harm than good. If this Honourable Court wishes to avoid this issue, the only *Charter* ruling that it can issue is in favour of the Applicants.

45. Ms. Ingram submits that an objection or decision that advances the exclusion of relevant scientific fact from an analysis of the reasonableness of a medical decision cannot be

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[35] *R. v. R.N.,* 1989 ABCA 177 (CanLII).
[36] *Ibid,* at para. 15.

supported by law. Aside from the fact that Dr. Hinshaw testified the CMOH Orders were Cabinet decisions[37], not medical decisions, from the standpoint of cross-examination, the Applicants should not have been precluded from confronting Dr. Hinshaw with an up-to-date journal article that demonstrates that her decisions were not anchored in any sound empirical or scientific foundation. This all goes to Dr. Hinshaw's credibility, competence and the very reasonableness of her decision making, including whether she was making rational decisions based on the evidence or simply engaging in group think as directed by Cabinet.

PART V: ISSUES

46. Ms. Ingram submits that the following unresolved issues require determination by this Honourable Court:

    a. Are the CMOH Orders *ultra vires* section 29 and the overall purpose of the *Public Health Act*?

    b. Do the CMOH Orders offend sections 1(a), 1(c), 1(e) and 1(g) of the *Alberta Bill of Rights* and are therefore of no force or effect pursuant to section 2 of the *Alberta Bill of Rights*?

    c. Do the CMOH Orders engage and violate section 2 of the *Charter*?

    d. Do the CMOH Orders engage and violate section 7 of the *Charter*, and if so, is the violation contrary to the principles of fundamental justice?

    e. If the CMOH Orders limit sections 2 and 7 of the *Charter*, can those limitations be justified in a free and democratic society in accordance with section 1 of the *Charter*?

    f. Is there institutional bias within the Court of Queen's Bench of Alberta that prevents the Applicants from receiving a fair hearing?

PART VI: SUBMISSIONS RESPECTING THE ISSUES

47. Ms. Ingram submits that in so far as this Honourable Court is able to decide this matter under the first two issues, i.e., that the CMOH Orders are *ultra vires* section 29 and the overall purpose of the *PHA* or that the CMOH Orders infringe section 1 of the *Alberta Bill*

[37] Affidavit of Dr. Deena Hinshaw, sworn July 12, 2021, at para. 29; Hearing Transcript, April 4, 2022, p. 8, lines 11 to 17, and lines 25 to 26, Hearing Transcript, April 5, 2022, p. 95, lines 17 to 24; Hearing Transcript, April 6, 2022, p. 83, lines 29 to 41, p. 84, lines 1 to 5, and p. 117, lines 15 to 24.

of Rights and are therefore of no force or effect, it must do so and should not go any further with respect to the *Charter* issues.

48. As stated by Armstrong J.A. on behalf of the Court of Appeal for Ontario in *R. v. Conway,* "[i]t is trite law that courts and tribunals should not address constitutional issues where non-constitutional remedies are sufficient."[38]

A. Are the CMOH Orders *ultra vires* section 29 and the overall purpose of the *Public Health Act*?

49. Ms. Ingram submits that the CMOH Orders are *ultra vires* section 29 of the *PHA*, in the sense that their contents are not authorized by section 29, and the CMOH Orders are *ultra vires* the overall purpose of the *PHA*. In summary, this issue raises two questions: (1) Are the CMOH Orders consistent with the statutory grant of authority and legislative process set out in the *PHA*, and (2) are the CMOH Orders consistent with the object, purpose, and scheme of the *PHA*?

50. The leading authority on when subordinate legislation, such as a regulation, may be found to be *ultra vires* the enabling statute is the Supreme Court of Canada's decision in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care*)[39] ("***Katz***").

51. While Ms. Ingram recognizes that the CMOH Orders are not regulations *per se,* she submits that they are akin to a regulation made under the *PHA*. Further, Ms. Ingram is not aware of any jurisprudential authority with respect to the test for determining whether public health orders are *ultra vires* their enabling statute, and therefore submits that the test set out in *Katz* should be applied to the CMOH Orders.

52. As the Supreme Court of Canada stated in *Katz*, "[a] successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate"[40]. The test in *Katz* was well summarized by Penny J. for the Ontario Superior Court of Justice in *Toronto District School Board v. Ontario*, who stated:

> It is necessary to ascertain the scope of the mandate conferred by Parliament, having regard to the purpose(s) or objects(s) of the enactment as a whole. The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole.[41]

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[38] *R. v. Conway,* 2008 ONCA 326 (CanLII), at para. 59.
[39] *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 (CanLII), [2013] 3 SCR 810.
[40] *Ibid,* at para. 24.
[41] *Toronto District School Board v. Ontario*, 2021 ONSC 4348 (CanLII) at para. 21.

53. While regulations benefit from a presumption of validity[42], both the challenged regulation and the enabling statute are to be interpreted using a broad and purposive approach that is consistent with statutory interpretation generally[43]. It is important to note that such an inquiry does not involve an assessment of the policy merits of the regulation in order to determine whether they are "necessary, wise or effective in practice"[44]. The motives for promulgating the regulation, the underlying political, economic, social or partisan considerations, and whether the regulations will be successful, are all irrelevant in determining whether a regulation is *ultra vires*.[45] [emphasis added]

54. As such, the merits, effectiveness, and reasonableness of the CMOH Orders are irrelevant with respect to a determination by this Honourable Court of whether they are *ultra vires* the *PHA*. Unlike an analysis under section 1 of the *Charter*, the importance of the objective of either the *PHA* or the CMOH Orders is irrelevant.

55. Pursuant to *Katz*, Ms. Ingram submits that in determining whether the CMOH Orders are *ultra vires* the overall objective or scope of the statutory mandate of the *PHA*, this Honourable Court must consider the *PHA* as a whole, including, but not limited to, sections 29, 30, 52.7(1) and 75.

56. According to Alberta's description of the *PHA*, the overall objective of the *PHA* is very broad as it addresses the duties of medical officers of health, outlines the responsibilities of regional health authorities, deals with the treatment of communicable diseases, addresses epidemics, and deals with public health emergencies.[46] Broadly speaking, the overall objective of the *PHA* is the governance and management of public health, not to grant the CMOH broad and unlimited power over every aspect of life in the Province of Alberta, including an unlimited power to seize property and shutter businesses and homes of the healthy.

57. As noted in the preamble of the CMOH Orders themselves, the CMOH Orders were promulgated pursuant to the CMOH's authority under section 29(2.1) of the *PHA*, which states:

> **(2.1)** Where the investigation confirms the existence of a public health emergency, the medical officer of health

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[42] *Katz, supra* at para. 25.
[43] *Ibid,* at para. 26.
[44] *Ibid,* at para. 27
[45] *Ibid*, at para. 27 and 28.
[46] Alberta Government, Publications, *Public Health Act* (31 December 2021), online: https://open.alberta.ca/publications/p37#:~:text=The%20Act%20addresses%20the%20duties,deals%20with%20public%20health%20emergencies.

(a) has all the same powers and duties in respect of the public health emergency as he or she has under subsection (2) in the case of a communicable disease, and

(b) may take whatever other steps are, in the medical officer of health's opinion, necessary in order to lessen the impact of the public health emergency.[47]

58. Section 29(2.1)(a) of the *PHA* makes reference to subsection (2), which states:

> **(2)** Where the investigation confirms the presence of a communicable disease, the medical officer of health
>
> (a) shall carry out the measures that the medical officer of health is required by this Act and the regulations to carry out, and
>
> (b) may do any or all of the following:
>
> (i) take whatever steps the medical officer of health considers necessary
>
> (A) to suppress the disease in those who may already have been infected with it,
>
> (B) to protect those who have not already been exposed to the disease,
>
> (C) to break the chain of transmission and prevent spread of the disease, and
>
> (D) to remove the source of infection;
>
> (ii) where the medical officer of health determines that a person or class of persons engaging in the following activities could transmit an infectious agent, prohibit the person or class of persons from engaging in the activity by order, for any period and subject to any conditions that the medical officer of health considers appropriate:
>
> (A) attending a school;
>
> (B) engaging in the occupation of the person or the class of persons, subject to subsection (2.01);
>
> (C) having contact with any persons or any class of persons;

[47] *PHA, supra* s. 29(2.1).

(iii) issue written orders for the decontamination or destruction of any bedding, clothing or other articles that have been contaminated or that the medical officer of health reasonably suspects have been contaminated.[48]

59. As noted in subsection (2)(b)(ii)(B), an order prohibiting a person or classes of persons from engaging in their occupation is subject to subsection 2.01, which states:

> **(2.01)** An order made under subsection (2)(b)(ii)(B) does not prevent a person who is subject to the order from engaging in the person's occupation if the person is able to do so without attending any location, having any contact or engaging in any activity that could transmit an infectious agent.[49]

60. Ms. Ingram submits that the CMOH's purported broad authority under section 29(2) and (2.1) of the *PHA* to "take whatever other steps are, in the medical officer of health's opinion, necessary in order to lessen the impact of the public health emergency", cannot be interpreted in a vacuum and are necessarily limited by and must be interpreted by this Honourable Court in light of the *PHA* as a whole. In particular, Ms. Ingram submits that the CMOH's authority is limited to subsection (2)(b)(ii)(B), which should be interpreted in accordance with sections 29(1), 30, 52.7(1) and 75 of the *PHA.*

61. Section 29(1) of the *PHA* enables a medical officer of health to initiate an investigation in order to determine whether any action is necessary to protect public health.[50] In other words, the CMOH must first conduct an investigation before promulgating any orders and that investigation must demonstrate that such orders are "necessary".

62. While the CMOH Orders and Dr. Hinshaw generally refer to her having initiated an investigation into the existence of COVID-19 within the Province of Alberta, no further evidence has been provided by the Respondents with respect to the process or conclusions of the investigation, or that any investigation was conducted into the necessity of the CMOH Orders, alternatives to the CMOH Orders, the impact of the CMOH Orders, a cost benefit analysis of the CMOH Orders, or that any thought was given as to the changing nature of COVD-19 in light of the rapidly mutating nature of the virus.

63. Ms. Ingram submits that section 30 of the *PHA* limits the CMOH's authority to order the closure of a place, including any business, which in turn limits her authority to make orders under section 29(2.1).

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[48] *PHA, supra* s. 29(2).
[49] *PHA, supra* s.29(2.01).
[50] *PHA, supra* s. 29(1).

64. Pursuant to section 30, where a medical officer of health knows or has reason to believe that any place may be contaminated with a communicable disease, the medical officer of health may enter that place without a warrant for the purpose of conducting an examination to determine the existence of the communicable disease.[51] When a medical officer of health is conducting such examination, they may order the closure of the place, including any business that is carried on in it, until they have completed the investigation, but not for a period of more than 24 hours.[52] If the medical officer of health is not able to complete the investigation within 24 hours, they must then make an application to the Provincial Court to extend the period of closure for an additional period of not more than 7 days.[53]

65. The closure of a private place, such as a private business, under the *PHA* is further governed by section 62 whereby an executive officer may order the closure of the place or any part of it, and may prohibit or regulate the selling, supplying, distributing, etc. of any food or thing in, on, to or from the place following an inspection of the private place pursuant to section 60.[54]

66. Ms. Ingram submits that, if the CMOH has the authority under section 29(2.1) to order the closure of a private place, including the closure of a business, for any period of time, such authority would have expressly been provided to her by the legislature as it did under sections 30 and 62 with the requirement of the payment of compensation under section 52.7(1).

67. As further set out below, the *PHA* does not contain a notwithstanding clause pursuant to section 2 of the *Alberta Bill of Rights,* but it does contain a paramountcy clause at section 75, which specifically states that *Alberta Bill of Rights* prevails over the *PHA*. Therefore, Ms. Ingram submits that the *PHA* and the CMOH Orders must be interpreted or read down by the Honourable Court so as to comply with and not abrogate from the *Alberta Bill of Rights* and to <u>not</u> give the CMOH power to cause the wholesale bankruptcy of businesses without a specific individual enquiry or investigation as to the necessity of the CMOH Orders in the context of each individual business.

68. Ms. Ingram submits that sections 30 and 75 of the *PHA* limit the CMOH's authority under subsections (2.1) and (2)(b)(ii)(B) and that the CMOH is only authorized to make orders prohibiting a person or class of persons from attending a school, engaging in an occupation, or having contact with any persons or class of person, and only after a thorough investigation determines that such action is necessary. In short, the CMOH's authority is limited to sick people and places where it is proven that sickness is occurring,

[51] *PHA*, *supra* s. 30(1).
[52] *PHA, supra* s. 30(2).
[53] *PHA, supra* s. 30(3).
[54] *PHA, supra* ss. 62(1) and (4)(c) and (g).

not to impact healthy people or places that are not proven to be transmitting disease. It is not enough to simply say that an "investigation" has determined that a particular disease exists at large.

69. Further, the *PHA* expressly delegates the authority to make public health orders and order the closure of private places due to the presence of a communicable disease to medical officers of health and executive officers as they are best equipped to make medical decisions regarding public health. The *PHA* defines a medical officer of health as "a physician appointed by the Minister or regional health authority under this Act as a medical officer of health and includes the Chief Medical Officer and the Deputy Chief Medical Officer", who is also an executive officer by virtue of their appointment as a medical officer of health.[55]

70. As recognized by the Supreme Court of British Columbia in *Beaudoin v. British Columbia* ("***Beaudoin***") with respect to Dr. Bonnie Henry, the Provincial Health Officer of the Province of British Columbia, which is the equivalent of the CMOH in Alberta, the promulgation of public heath orders in response to COVID-19 "require specialized medical and scientific expertise."[56]

71. Ms. Ingram submits that the CMOH Orders are further *ultra vires* section 29 and the overall purpose of the *PHA* because they were not decisions of the CMOH. Dr. Hinshaw, as the CMOH, confirmed, on multiple occasions that the CMOH Orders, including the restrictions contained therein, were not her decisions but were policy decisions of Cabinet.[57] As such, Ms. Ingram submits that the CMOH Orders are *ultra vires* the statutory grant of authority and legislative process outlined in the *PHA* and are orders that could only legally be enacted by Cabinet itself under the *Emergency Management Act*[58].

72. Regardless of whether Cabinet ever ignored Dr. Hinshaw's "recommendations" or directed her to impose harsher measures, these were Cabinet orders, not CMOH Orders. As such, they were not properly issued under the *PHA*.

73. Further, Dr. Hinshaw may have been disingenuous when she says that Cabinet never ordered her to impose stricter measures. Immediately following the filing of the Applicants' injunction application in this matter, which expressly pointed out the arbitrariness of high schools being closed while bars, strip clubs and casinos were open,

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[55] *PHA, supra* ss. 1(bb) and 16(2).
[56] *Beaudoin v. British Columbia,* 2021 BCSC 512 (CanLII) at para. 244 [***Beaudoin***].
[57] Affidavit of Dr. Deena Hinshaw, sworn July 12, 2021, at para. 29; Hearing Transcript, April 4, 2022, p. 8, lines 11 to 17, and lines 25 to 26, Hearing Transcript, April 5, 2022, p. 95, lines 17 to 24; Hearing Transcript, April 6, 2022, p. 83, lines 29 to 41, p. 84, lines 1 to 5, and p. 117, lines 15 to 24.
[58] *Emergency Management Act,* RSA 2000, c E-6.8.

and prior to the injunction hearing, new CMOH Orders were promulgated closing bars, strip clubs and casinos.[59] This certainly had the appearance of Cabinet telling Dr. Hinshaw what to do for political rather than medical reasons. Unfortunately, the Applicants were not afforded the opportunity to cross-examine on this issue.

74. While the *Emergency Management Act* allows for a Minister, including the Premier, to make certain orders in response to an emergency, and specifically contemplates the appointment of a Cabinet Committee who may advise on matters relating to emergencies and disasters[60], the *PHA* grants no such authority. It is apparent that the strategy of Cabinet in failing to take public responsibility for the CMOH Orders under the *Emergency Management Act* was political in nature. Rather than itself engaging in a proper section 1 analysis and invoking its authority under the *Emergency Management Act*, Cabinet sought to avoid responsibility altogether by having the orders issued by the CMOH as "public health" orders.

75. As noted by Ms. Ingram's Expert, Mr. Redman, the powers under the *Emergency Management Act* place the Premier in charge of emergency powers, superseding the powers of any Minister or civil servant, and would have allowed Cabinet to make decisions while also promulgating supplemental public health orders, where and if necessary.[61]

76. Ms. Ingram submits that Dr. Hinshaw's testimony demonstrates that the Respondents did not follow the proper procedure and authority under the *PHA* because the CMOH Orders, while signed by Dr. Hinshaw, were in reality, pursuant to Dr. Hinshaw's own admission, decisions of Cabinet, which further establishes that CMOH Orders are *ultra vires* the scope of authority of section 29 and the overall purpose of the *PHA*.

B. Do the CMOH Orders offend sections 1(a), 1(c), 1(e) and 1(g) of the *Alberta Bill of Rights* and are therefore of no force or effect pursuant to section 2 of the *Alberta Bill of Rights*?

77. Ms. Ingram submits that the CMOH Orders are inconsistent with and offend sections 1(a), 1 (c), 1(e), 1(g) of the *Alberta Bill of Rights* and are therefore unlawful and of no force or effect pursuant to section 2 of the *Alberta Bill of Rights.*

78. Section 1 of the *Alberta Bill of Rights* expressly outlines the recognition and declaration of rights and freedoms that apply to provincial legislation in the Province of Alberta, stating:

[59] CMOH Order, 42-2020.
[60] *Ibid,* ss. 4 and 19(1).
[61] Surrebuttal Report of David Redman, filed August 6, 2021, at p. 22.

> **1** It is hereby recognized and declared that in Alberta there exist without discrimination by reason of race, national origin, colour, religion, sexual orientation, sex, gender identity or gender expression, the following human rights and fundamental freedoms, namely:
>
> (a) the right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
>
> (b) the right of the individual to equality before the law and the protection of the law;
>
> (c) freedom of religion;
>
> (d) freedom of speech;
>
> (e) freedom of assembly and association;
>
> (f) freedom of the press;
>
> (g) the right of parents to make informed decisions respecting the education of their children.[62] [emphasis added]

i) Section 1(a)

79. Ms. Ingram submits that the CMOH Orders are unlawful and of no force and effect because the Business Closures contained therein are inconsistent with and offend her property rights guaranteed by section 1(a) of the *Alberta Bill of Rights*.

80. While the Case Management Justice struck Ms. Ingram's claims that sections 29(2.1) and 66.1 of the *PHA* offend section 1(a) of the *Alberta Bill of Rights*, a decision which is now subject to a leave application before the Supreme Court of Canada, she was unable to reach the same conclusion in relation to the claims that the CMOH Orders themselves offend section 1(a) of the *Alberta Bill of Rights*.[63]

81. As this Honourable Court stated in *Lavallee v. Alberta (Securities Commission)* ("***Lavallee***") with respect to section 1(a) of the *Alberta Bill of Rights*:

> The expression "enjoyment of property" has been broadly interpreted, and includes enjoyment of land and money: *Trelenberg; R. v. Greckol* (1991), 115 A.R. 124 (Q.B.). Under s. 1(a) of the *Alberta Bill of Rights*, the right to enjoyment of property is only

[62] *Alberta Bill of Rights, supra* s 1.
[63] *Ingram v. Alberta (Chief Medical Officer of Health),* 2021 ABQB 343 at paras. 76 and 77.

protected from infringement in cases where the deprivation is done without due process of law.[64]

82. Ms. Ingram submits that the Business Closures amount to a *prima facie* infringement of her property rights. As a small business owner, Ms. Ingram has the use and enjoyment of everything The Gym owns, including the facility lease agreement, all the equipment, cash registers, and so forth, for the purpose of generating an income for her and her children. Further, as the sole shareholder and director of The Gym, Ms. Ingram's personal property consists of her shares in The Gym, which was effectively shut down for nearly a year pursuant to the CMOH Orders. Not only have the CMOH Orders deprived Ms. Ingram of the right to enjoy her property by forcing her to close The Gym for prolonged periods of time, but they have also devastated the business itself and the value of Ms. Ingram's shares in the business.

83. Ms. Ingram further submits that the Business Closures amount to the expropriation or governmental "use" of her property without compensation. As stated by the Respondents' witness, Darren Hedley, the Alberta business grants, including the Small and Medium Enterprise Relaunch Grant, which the Respondents implemented in order to try and mitigate some of the "unintended consequences" and "harms" of the CMOH Orders, were never intended to fully compensate businesses impacted by the Business Closures.[65]

84. Ms. Ingram also submits that the Private Residence Restrictions amount to a *prima facie* infringement of her property rights as they imposed restrictions with respect to the "use" and enjoyment of her private property contrary to section 1(a) by prohibiting her from having visitors and using her own property in her preferred way, contrary to section 52.7(1) of the *PHA*.

85. As the Supreme Court of Canada stated in *Authorson v. Canada (Attorney General)*, with respect to the *Canadian Bill of Rights*, Parliament can only expropriate property without compensation when it uses clear and unambiguous language that outlines its intent to do so.[66]

86. Neither the *PHA* nor the CMOH Orders contain any clear and unambiguous language outlining the Legislature or the CMOH's intention to expropriate property without compensation. In fact, the *PHA* has a provision which outlines an opposite intention. Section 52.7(1) of the *PHA* states:

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[64] *Lavallee v. Alberta (Securities Commission)*, 2009 ABQB 17 at para. 178.
[65] Transcript of the Questioning on Affidavit of Darren Hedley sworn July 12, 2021, dated August 17, 2021 and filed September 2, 2021, at p. 5, lines 24 to 27, p. 6, lines 1 to 10, p. 11, lines 15 to 22, p. 13, lines 25 to 27, p. 14, line 1, p. 17, lines 26 to 27, and p. 18, lines 1 to 11.
[66] *Authorson v. Canada (Attorney General),* 2003 SCC 39 (CanLII) at paras. 14, 51, 54 and 55, [2003] 2 SCR 40.

> **52.7(1)** Where the Minister or a regional health authority acquires or uses real or personal property under section 52.6 or where real or personal property is damaged or destroyed due to the exercise of any powers under that section, the Minister or regional health authority shall pay reasonable compensation in respect of the acquisition, use, damage or destruction.[67]

To the extent that the CMOH has interfered with Ms. Ingram's property, the CMOH has put that property to a "use" that has caused damage to Ms. Ingram.

87. The question then remains whether Ms. Ingram's right to enjoy her property was infringed by the CMOH Order without due process of law. While Ms. Ingram acknowledged that there will be no basis to conclude that the CMOH Orders offend section 1(a) of the *Alberta Bill of Rights* if the CMOH Orders are *intra vires* the *PHA* and the authority delegated to the CMOH pursuant to section 29(2.1)[68], she submits that is not the case here.

88. In *Lavallee*, the applicants challenged the constitutional validity and quasi-constitutional conformity of sections 29(e) and 29(f) of the *Alberta Securities Act*, RSA 2000, c S-4, alleging that they were inconsistent with section 1(a) of the *Alberta Bill of Rights*.[69] This Honourable Court held that the operation of the relevant sections of the then *Alberta Securities Act* were inconsistent with section 1(a) of the *Alberta Bill of Rights* in so far as the word "shall" under section 29(e) would deprive individuals of the rights to enjoyment of property without due process of law.[70]

89. Citing O'Leary J.'s decision in *Marr v. Marr Estate* (1989), 1989 CanLII 3228 (AB QB), 101 AR 47, Wittmann J., on behalf of this Honourable Court, stated that the Legislature could restrict section 1(a) rights and freedoms without violating the *Alberta Bill of Rights* as long as it acted with due process, which meant "in accordance with 'the process recognized by the Legislature and the Courts as being necessary to the validity of the legislation'".[71]

90. With respect to the CMOH Orders, Ms. Ingram submits that due process requires that the legislature, or its delegated authority, act in accordance with the legislative process, i.e., that the CMOH promulgated the CMOH Orders in accordance with the process set out in the *PHA*. For the reasons set out above with respect to the *ultra vires* CMOH Orders, Ms. Ingram submits that the CMOH Orders were not promulgated in accordance with the

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[67] *PHA, supra* s. 52.7(1).
[68] *Ingram v. Alberta (Chief Medical Officer of Health),* 2021 ABQB 343 at para. 78.
[69] *Lavallee v. Alberta (Securities Commission), supra* at paras. 1 and 5.
[70] *Ibid,* at para. 207.
[71] *Ibid,* at para 181.

legislative process set out in the *PHA* whereby an order closing businesses needs to comply with sections 30, 62 and 52.7(1). Therefore, the CMOH did not act with due process in depriving Ms. Ingram of the right to enjoy her property and the CMOH Orders offend Ms. Ingram's due process property rights under section 1(a) of the *Alberta Bill of Rights*.

91. The degree to which Ms. Ingram's section 1(a) rights are infringed is inherent in sections 29, 30, 60 and 62 of the *PHA*, which set out the legislature due process required in this instance and demonstrate that the CMOH's lack of authority to order the indefinite closure of a business, or a general category of business, under section 29(2.1) of the *PHA*.

92. Under the *PHA*, the due process of law is met by the requirement under section 30 for a Judge to be involved in any business closures over 24 hours in length. The impugned CMOH Orders have no such limitation.

93. As noted above, section 30 of the *PHA* limits the authority of a medical officer of health to order the closure of a place, including any business that is carried on in it, if they have reason to believe that that place may be contaminated with a communicable disease.[72] Pursuant to section 30, a medical officer of health may only order the closure of a business for a period of no more than 24 hours in order to complete an investigation, and if they are not able to complete the investigation within 24 hours, they must make an application to a judge of the Provincial Court for an order to extend the period of closure for an additional period of no more than 7 days.[73]

94. Sections 60 and 62 of the *PHA* authorize an executive officer to conduct an inspection of a private place, with the consent of the owner or subject to a Court order, and order the closure of the place based on an inspection, report or test.[74] As Ms. Ingram stated, an inspection of The Gym was conducted in mid-November 2020 and the resulting report highlighted the extra cleaning measures implemented by Ms. Ingram and concluded that no concerns were noted.[75] Further, the Respondents have failed to provide any direct evidence that anyone contracted COVID-19 at The Gym or that The Gym in some way contributed to the spread of COVID-19 in order to warrant its closure pursuant to the legislative process set out in the *PHA*.

95. As noted above with respect to Ms. Ingram's submissions regarding the CMOH Orders being *ultra vires* section 29 and the overall purpose of the *PHA*, due process was not followed with respect to the promulgation of the CMOH Orders that interfered with and

[72] *PHA, supra* s. 30(1) and (2).
[73] *Ibid,* s. 30(2) and (3).
[74] *Ibid,* ss. 60, 61(1) and 62(4)(c).
[75] Supplemental Ingram Affidavit, *supra* at para. 23.

infringed Ms. Ingram's property rights because they were decisions of Cabinet, not the CMOH as is required by the *PHA*.

ii) Section 1(c)

96. Limited jurisprudence exists with respect to section 1(c), (e) and (d) of the *Alberta Bill of Rights* with the emergence of the *Charter*, that protects nearly identical rights and freedoms. However, the *Charter* and its relevant jurisprudence does not replace the need of the *Alberta Bill of Rights*, which exists as an additional constitutional document in the Province of Alberta that is to be used by the courts when interpreting and implementing provincial legislation.

97. The *Charter* guarantees that everyone has the "freedom of conscience and religion",[76] whereas the *Alberta Bill of Rights* recognizes and declares that in Alberta there exists the "freedom of religion"[77]. Given the analogous language of the section 2(a) of the *Charter* and section 1(c) of the *Alberta Bill of Rights,* Ms. Ingram submits that the case law interpreting "freedom of religion" in section 2(a) of the *Charter* applies equally to the interpretation of "freedom of religion" in the *Alberta Bill of Rights*. Further, Ms. Ingram submits that her freedom of religion, as guaranteed by the *Alberta Bill of Rights,* has been infringed for the same reasons set out below with respect to section 2(a) of the *Charter*.

98. As stated by the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.* ("***Big M Drug Mart Ltd.***"), freedom of religion is defined as "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 beliefs by worship and practice or by teaching and dissemination."[78]

99. The Supreme Court of Canada has also confirmed that the freedom of religion comprises both an individual aspect and a collective aspect and therefore is about religious belief and religious relationships.[79] Therefore, any "measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom."[80]

100. Ms. Ingram submits that the Indoor Gathering Restrictions and the Private Residence Restrictions that restrict attendance at worship services and restrict private religious

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[76] *Charter*, *supra* s. 2(a).
[77] *Alberta Bill of Rights*, *supra* s. 1(c).
[78] *R. v. Big M Drug Mart Ltd.,* 1985 CanLII 69 (SCC) at p. 336, [1985] 1 SCR 295 [***Big M. Drug Mart Ltd.***].
[79] *Alberta v. Hutterian Brethren of Wilson Colony,* 2009 SCC 37 (CanLII) at para. 182, [2009] 2 SCR 567.
[80] *Loyola High School v. Quebec (Attorney General),* 2015 SCC 12 (CanLII) at para. 67; [2015] 1 SCR 613.

gatherings such as Easter and Christmas, are a *prima facie* limitation of her freedom of religion guaranteed by section 1(c) of the *Alberta Bill of Rights.*

101. Ms. Ingram is a Christian who regularly attended the First Alliance church and celebrated important religious holidays, like Christmas and Easter, with extended family and her church community.[81] The CMOH Orders deprived Ms. Ingram of experiencing these aspects of religious belief and practice through Private Resident Restrictions, which prohibited her from having people over to celebrate Christmas and Easter, and the Indoor Gathering Restrictions, which implemented strict capacity limits for worship services and required individual attending worship services to cover their face. As a result of the CMOH Orders, Ms. Ingram was deprived of her right to attend church, and from fully celebrating Easter and Christmas.[82]

iii) Section 1(e)

102. Ms. Ingram submits that the CMOH Orders are unlawful and of no force and effect because the Private Residence Restrictions, Indoor Gathering Restrictions and Outdoor Gathering Restrictions contained therein are inconsistent with and offend her freedom of assembly and association guaranteed by section 1(e) of the *Alberta Bill of Rights*.

103. Similar to section 1(c) of the *Alberta Bill of Rights,* section 1(e) is analogous to subsections 2(c) and (d) of the *Charter*, which guarantee the freedom of peaceful assembly and the freedom of association. As such, Ms. Ingram again submits that case law interpreting the "freedom of peaceful assembly" and the "freedom of association" in subsections 2(c) and (d) of the *Charter* apply to and are of assistance to this Court in interpreting section 1(e) of the *Alberta Bill of Rights*. Further, Ms. Ingram submits that the facts and evidence relevant to sections 2(c) and (d) of the *Charter* are also relevant in determining whether or not the CMOH Orders infringe section 1(e) of the *Albert Bill of Rights*.

104. The Respondents have acknowledged that there was a *prima facie* infringement of Ms. Ingram's freedom of peaceful assembly and freedom of association under the *Charter* in so far as the CMOH Orders prohibited her from hosting Christmas or other holiday events or barred her from celebrating with her mother on her birthday.[83] Ms. Ingram submits that this concession should apply equally to her freedom of assembly and association guaranteed by section 1(e) of the *Alberta Bill of Rights*.

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[81] Ingram Affidavit, *supra* at paras. 14 to 16.
[82] *Ibid.*
[83] Brief of Law of the Respondents, Her Majesty the Queen in Right of Alberta and the Chief Medical Officer of Health, 14 September 2021, at para. 64.

105. In *Roach v. Canada (Minister of State for Multiculturism & Culture*), Linden J.A. of the Federal Court, dissenting in part, noted that there is little case law on the freedom of peaceful assembly and stated that it "is geared towards protecting the physical gathering of people" separate and apart from freedom of association.[84]

106. Whereas in *Mounted Police Association of Ontario v. Canada (Attorney General),* the Supreme Court of Canada per McLachlin C.J. (as she then was) and LeBel J. recognised that the purpose of the freedom of association was "to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends", which encompasses the protection of individuals joining with others to form associations, collective activity in support of other constitutional rights, and collective activity to enable vulnerable people to meet on more equal terms.[85]

107. Based on jurisprudence with respect to subsections 2(c) and (d) of the *Charter*, Ms. Ingram submits that section 1(e) of the *Alberta Bill of Rights* guarantees and protects her right to physically gather with people and her right to meet with people in support of her constitutional rights, such as a freedom of religion.

108. As it further sets out at paragraphs 240 to 244 of Ms. Ingram's Pre-Trial Factum, Ms. Ingram submits that the CMOH Orders infringe her freedom of assembly and association by restricting with whom she is able to socialize, where she is able to socialize and how she is able to socialize. The Private Residence Restrictions, Indoor Gathering Restrictions and Outdoor Gathering Restrictions prohibited Ms. Ingram from socializing with people at her residence, compelled her to socialize with a limited number of individuals, and required that she must maintain two meters physical distance when socializing with others, either indoors or outdoors.

iv) Section 1(g)

109. As it further sets out at paragraphs 245 to 247 of Ms. Ingram's Pre-Trial Factum, Ms. Ingram submits that the CMOH Orders infringe her right as a parent to make informed decisions respecting the education of her children.

110. Unfortunately, no relevant case law exists with respect to section 1(g) and its corresponding protections[86] and no express analogous right in the *Charter* guarantees Ms. Ingram's right as a parent to make informed decisions respecting the education of her

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[84] *Roach v. Canada (Minister of State for Multiculturalism & Culture),* 1994 CarswellNat93 at para. 51, 1994 CanLII 3453 (FCA).
[85] *Mounted Police Association of Ontario v. Canada (Attorney General),* 2015 SCC 1 (CanLII) at para. 54, [2015] 1 SCR 3.
[86] Pre-Trial Factum of the Applicant Rebecca Marie Ingram, dated September 1, 2021, at para. 246.

children. However, she submits it is akin to the protection of important and fundamental life choices guaranteed by section 7 of the *Charter*, as was recognized by the Supreme Court of Canada in *B.(R.) v. Children's Aid Society of Metropolitan Toronto*[87] with respect to the rights of parents to choose medical treatment for their children as further set out below.

111. Ms. Ingram submits that the Primary and Secondary School Restrictions amount to a clear, *prima facie* infringement of her rights under section 1(g) of the *Alberta Bill of Rights* by prohibiting her children from attending school in person and requiring her children to attend school virtually, requiring her children to wear face masks at school, and limiting the school year by imposing longer breaks absent any consultation with parents of school aged children. As a mother of three school-age children, Ms. Ingram was very concerned about the Respondents' interference in her children's education and the lasting impacts the CMOH Orders will have.[88]

v) Section 2

112. Section 2 of the *Alberta Bill of Rights* states:

> **2** Every law of Alberta shall, unless it is expressly declared by an Act of the Legislature that it operates notwithstanding the *Alberta Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared.[89] [emphasis added]

113. Neither the *PHA,* the CMOH Orders nor any other legislation passed by Alberta contain a clause or provisions that says that either the *PHA* or the CMOH Orders operate "notwithstanding" the *Alberta Bill of Rights.* However, the supremacy principle set out in section 2 of the *Alberta Bill of Rights* is recognized by the paramountcy provision at section 75 of the *PHA*, which states:

> **75** Except for the *Alberta Bill of Rights*, this Act prevails over any enactment that it conflicts or is inconsistent with, including the *Health Information Act*, and a regulation under this Act prevails over any other bylaw, rule, order or regulation with which it conflicts.[90]

114. As noted by the Supreme Court of Canada in *Authorson v. Canada (Attorney General)* with respect to the analogous *Canadian Bill of Rights*, the *Canadian Bill of Rights* will

[87] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 SCR 315.
[88] Ingram Affidavit, *supra* at paras. 5 to 7.
[89] *Alberta Bill of Rights, supra* s. 2.
[90] *Public Health Act, supra* s. 75.

render any federal legislation that is inconsistent with it inoperative, unless the conflicting legislation expressly declares that it operates notwithstanding the *Canadian Bill of Rights* as required by section 2.[91]

115. Ms. Ingram submits that the same principle applies to the *Alberta Bill of Rights* and that any legislation that conflicts with the *Alberta Bill of Rights* is to be declared inoperative and is of no force or effect unless it expressly declares that is operates notwithstanding the *Alberta Bill of Rights* as required by section 2. As was confirmed by this Honourable Court in *Lavallee,* generally case law that interprets the *Canadian Bill of Rights* is very instructive with respect to the interpretation of the *Alberta Bill of Rights*.[92]

116. Therefore, pursuant to section 2 of the *Alberta Bill of Rights* and section 29(2.1) of the PHA, the CMOH orders must be construed and applied by the Respondents and this Honourable Court so as not to authorize the abrogation or infringement of the rights and freedoms protected under section 1 of the *Alberta Bill of Rights*.

117. Unlike the rights and freedoms guaranteed by section 1(a) of the *Alberta Bill of Rights,* sections 1(c), (e) and (d) rights and freedoms cannot be deprived by due process and operate unless the legislation expressly declares that it operates notwithstanding the *Alberta Bill of Rights*. As such, even if this Honourable Court finds that the CMOH Orders do not infringe Ms. Ingram's due process property rights under section 1(a) of the *Alberta Bill of Rights* but finds that the CMOH Orders infringe either subsections 1(c), (e) or (d), it is bound by statute and must find that the CMOH Orders are of no force or effect pursuant to section 2 of the *Alberta Bill of Rights*.

118. Further, there is no section 1 justification mechanism or permissible infringement of the rights and freedoms guaranteed under section 1 of the *Alberta Bill of Rights*. The reasonableness or objective of the infringing legislation is irrelevant because it is so easy for the Legislature to abrogate from the *Alberta Bill of Rights.* The rights and freedoms contained in the *Alberta Bill of Right* are absolute and the only mechanism available to the Respondents to abrogate section 1 of the *Alberta Bill of Rights* is for the Legislature to invoke the notwithstanding provisions, which it chose not to do.

119. The Respondents have been aware of Ms. Ingram's position in this regard since December 2020 and have had plenty of opportunities to simply pass legislation or an Order in Council ("**OIC**") stating that the *PHA* and the CMOH Orders operate "notwithstanding" the *Alberta Bill of Rights,* but have taken no steps to remedy this defect, either retrospectively or prospectively.

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[91] *Authorson v. Canada (Attorney General), supra* at paras. 10 and 32.
[92] *Lavallee, supra* at para. 169.

120. In fact, it is far easier for a majority government to satisfy the Court with respect to the *Alberta of Rights* by passing such legislation or OIC than it is to satisfy the Court that its measures are justified pursuant to a section 1 *Charter* analysis. Numerous bills were passed by Alberta in the spring of 2020, including, but not limited to, *Bill 1: Critical Infrastructure Defence Act*[93], *Bill 9: Emergency Management Amendment Act, 2020*[94], *Bill 10: Public Health (Emergency Powers) Amendment Act, 2020*[95], or *Bill 24: COVID-19 Pandemic Respondent Statutes Amendment Act, 2020*[96]. Not one of theses Bills clarifies that the *PHA* or the CMOH Orders apply notwithstanding the *Alberta Bill of Rights*.

121. Instead of taking "political heat" for enacting "notwithstanding" language in a bill, the Respondents are asking this Honourable Court to forgive Alberta for not following its own clear legislative obligations and requirements without the provision of any juristic excuse.

122. The *Alberta Bill of Rights* requires a clear cut, unequivocal question and answer that does not include a subjective section 1 analysis, like the *Charter*. Ms. Ingram submits that the question in regard to this issue is simple: did Alberta pass legislation or an OIC contemporaneous with the CMOH Orders that unequivocally stated they operated "notwithstanding" the *Alberta Bill of Rights*? If the answer is no, the CMOH Orders must fail.

123. With respect to this issue, this matter is easily distinguishable from the decisions in *Gateway* and *Beaudoin*, as none of the applicants or petitioners in those cases sought declarations based on the *Canadian Bill of Rights* or analogous provincial legislation, which makes this case unique in the context of Canadian COVID-19 litigation. In fact, the Province of Alberta is the only province in Canada with a stand-alone *Bill of Rights* that applies to provincial legislation.[97] Ms. Ingram submits that this demonstrates that it was sufficiently important for Albertans to elect a government in 1971 who would enact the *Alberta Bill of Rights* and demonstrates the degree to which Albertans expect their governments and the courts to respect their rights and freedoms.

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[93] Bill 1, *Critical Infrastructure Defence Act,* 2nd Sess, 30th Leg, Alberta, 2020 (assented to 17 June 2020), SA 2020, c C-32.7.
[94] Bill 9, *Emergency Management Amendment Act, 2020*, 2nd Sess, 30th Leg, Alberta, 2020 (assented to 20 March 2020), SA 2020, c 2.
[95] Bill 10, *Public Health (Emergency Powers) Amendment Act, 2020,* 2nd Sess, 30th Leg, Alberta, 2020 (assented to 2 April 2020), SA 2020, c 5.
[96] Bill 24, *COVID-19 Pandemic Response Statutes Amendment Act, 2020,* 2nd Sess, 30th Leg, Alberta, 2020 (assented to 26 June 2020), SA 2020, c 13.
[97] Peter Bowal & Dustin Thul, *Bill of Rights in Canada* (1 January 2013), online: LawNow Magazine https://www.lawnow.org/bills-of-rights-in-canada/#:~:text=Conclusion,Bills%20of%20Rights%20in%20Canada.

C. Do the CMOH Orders engage and violate section 2 of the *Charter?*

124. Ms. Ingram submits that the CMOH Orders amount to a limitation on her freedom of religion, freedom of peaceful assembly and freedom of association guaranteed by subsections 2(a), (c) and (d) of the *Charter*.

125. As was the case in *Beaudoin* and *Gateway,* where the provincial governments conceded that the relevant public health orders interfered with and restricted fundamental freedoms protected by section 2 of the *Charter*, the Respondents have acknowledged that there was a *prima facie* infringement of Ms. Ingram's freedom of peaceful assembly and freedom of association when the CMOH Orders prohibited her from hosting Christmas or other holiday events or barred her from celebrating with her mother on her birthday.[98]

126. However, contrary to the provincial governments' concessions in *Beaudoin* and *Gateway* and the Courts' agreement that the restrictions on in-person religious gatherings are a *prima facie* limit on freedom of religion that must be justified under section 1 of the *Charter*[99], the Respondents do not concede that the CMOH Orders are a *prima facie* limitation on Ms. Ingram's freedom of religion.

127. As such, for this issue, i.e., whether the CMOH Orders engage and violate section 2 of the *Charter*, Ms. Ingram will focus solely on section 2(a) of the *Charter*. Sections 2(c) and (d) will be further addressed below with respect to a section 1 analysis.

128. As stated by Dickson J. on behalf of a majority of the Supreme Court of Canada in *Big M Drug Mart Ltd.* with respect to the freedom of religion guaranteed by section 2(a) of the *Charter*:

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. 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. But the concept means more than that.[100] [emphasis added]

[98] Brief of Law of the Respondents, Her Majesty the Queen in Right of Alberta and the Chief Medical Officer of Health, *supra* at para. 64.
[99] *Beaudoin, supra* at para. 168; *Gateway, supra* at para. 206.
[100] *Big M Drug Mart Ltd., supra* at p. 336.

129. Dickson J. went on to define freedom as "the absence of coercion or constraint" and stated that, "[i]f 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."[101] [emphasis added]

130. As was confirmed by the Supreme Court of Canada in *Law Society of British Columbia v. Trinity Western University,* the freedom of religion is not solely about the individual:

> 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. 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 of belief and practice is an important aspect of religious freedom under s. 2(a).[102] [emphasis added]

131. Citing its decision in *Syndicat Northcrest v. Amselem*, 2004 SCC 47 (CanLII), [2004] 2 SCR 551, the Supreme Court of Canada in *Alberta v. Hutterian Brethren of Wilson County* confirmed that an infringement of section 2(a) of the *Charter* "will be made out where: (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial".[103] The Supreme Court of Canada went on to define "trivial or insubstantial" interference as interference that does not threaten actual religious beliefs or conduct.[104] [emphasis added]

132. Ms. Ingram submits that the CMOH Orders, in particular the Indoor Gathering Restrictions and the Private Residence Restrictions, are a *prima facie* limitation of her freedom of religion guaranteed by section 2(a) of the *Charter*, as was found by the Courts in *Beaudoin* and *Gateway*. It is her sincere belief that matters, not the sincere belief of the Court or the government.

133. In her affidavit, Ms. Ingram gave evidence that, as a Christian, she sincerely believes that attending church, religious services like weddings and funerals, and religious celebrations,

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[101] *Ibid,* at p. 336 to 337.
[102] *Law Society of British Columbia v. Trinity Western University,* 2018 SCC 32 (CanLII) at para 64, [2018] 2 SCR 29.
[103] *Alberta v. Hutterian Brethren of Wilson County, supra* at para. 32.
[104] *Ibid.*

such as Christmas and Easter, are important religious services and important sacramental milestones tied to her practice of Christianity.[105]

134. As noted by the Supreme Court of Canada in *Law Society of British Columbia v. Trinity Western University,* the protection of section 2(a) of the *Charter* has to account for the socially embedded nature of religious beliefs, which includes the manifestation of one's belief through communal institutions and traditions.

135. For Ms. Ingram, attending church, including religious services like funerals and weddings, and participating in religious celebrations with family are the manifestation of her religious beliefs as a Christian, and such communal institutions and traditions were severely limited or restricted altogether by the CMOH Orders. As a direct result of the CMOH Orders, Ms. Ingram was unable to fully celebrate Easter and Christmas because she was prohibited from celebrating in person with family, and she ceased attending First Alliance church because of the CMOH Orders restricting capacity.[106]

136. Contrary to the Respondents' submissions[107], Ms. Ingram is not required to give evidence that she was actually prohibited from attending church services or that she was denied the ability to participate in either of the important sacraments she discussed in her evidence.

137. It is sufficient that Ms. Ingram's "religious beliefs or conduct might reasonably or actually be threatened"[108] by the CMOH Orders, particularly with respect to limitations on the number of persons who may attend religious services in person and prohibitions on gathering for religious holidays during Easter and Christmas. As noted by the Supreme Court of Canada in *R. v. Edwards Books and Art Ltd.,* Ms. Ingram's freedom of religion does not "actually" have to be limited to find an infringement of section 2(a), it is sufficient that the state-imposed burden "<u>be capable</u> of interfering with religious beliefs or practice."[109] [emphasis added]

138. The restrictions enforced by the CMOH Order imposed strict attendance limits on religious services, at one point limiting them to "15% of the total operational occupant load capacity restrictions at a place of worship"[110] and other times to one-third capacity[111]. Ms. Ingram submits that such limitations are sufficient in and of themselves to demonstrate that the

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[105] Ingram Affidavit, *supra* at paras. 14 to 16.
[106] *Ibid*.
[107] Brief of Law of the Respondents, Her Majesty the Queen in Right of the Province of Alberta and The Chief Medical Officer of Health, *supra* at paras 25 to 29.
[108] *R. v. Edwards Books and Art Ltd.,* 1986 CanLII 12 (SCC) at p. 759, [1986] 2 SCR 713.
[109] *Ibid*.
[110] CMOH Order 42-2020, Part 4, section 16; CMOH Order 02-2021, Part 4, section 18.
[111] CMOH Order 38-2020, Part 3, section 19.

CMOH Order might reasonably or actually threaten her religious conduct and that they may be capable of interfering with her religious practice.

139. Ms. Ingram submits that any restriction on in-person religious gatherings, as found in the CMOH Orders, is a *prima facie* limit on freedom of religion that must be justified by section 1 of the *Charter*.

D. Do the CMOH Orders engage and violate section 7 of the *Charter* rights, and if so, is the violation contrary to the principles of fundamental justice?

140. Ms. Ingram submits that the CMOH Orders limit her rights to liberty and security of the person guaranteed by section 7 of the *Charter*, which states that:

> **7** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[112]

141. On numerous occasions, the Supreme Court of Canada has held that when considering the scope of a *Charter* right, that right must be defined generously by considering the interests the *Charter* was intended to protect.[113] In *Big M Drug Mart Ltd.,* Dickson J. summarized the purposive approach as:

> …In *Hunter v. Southam Inc*., 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.[114]

And

> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection…"[115]

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[112] *Charter, supra* at s 7.
[113] *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC) at p. 156, [1984] 2 S.C.R. 145; *Big M Drug Mart Ltd.*, *supra* at p. 344.
[114] *Big M Drug Mart Ltd., supra* at p. 344.
[115] *Ibid*.

142. There is a two-step analysis to determining whether Ms. Ingram's rights under section 7 of the *Charter* have been limited by the CMOH Orders. First, Ms. Ingram must establish that the CMOH Orders impose limits on her liberty or security of the person interests, thus engaging section 7. Second, Ms. Ingram must establish that any such limits are contrary to the principles of fundamental justice.[116]

143. The Supreme Court of Canada confirmed that, at the first stage of the analysis, the question is whether the impugned laws, in this case the CMOH Orders, negatively impact or limit Ms. Ingram's liberty or security of the person, thus bringing them within the ambit of and engaging section 7 of the *Charter*.[117]

144. As noted by the Supreme Court of Canada in *Carter v. Canada (Attorney General)* ("***Carter***"), underlying both the right to liberty and the right to security of the person "is a concern for the protection of individual autonomy and dignity."[118] The right to liberty protects "the right to make fundamental choices free from state interference"[119], and the right to security of the person encompasses personal autonomy involving control of one's bodily integrity free from state interference, which can be engaged by state action that causes physical or serious psychological suffering.[120]

145. Any personal choices as to what constitutes acceptable risks from a respiratory virus should lie with the individual. In a world where "highly transmissible" Omicron variant is now endemic, people make their own choices to attend with unmasked crowds of Flames fans at a full capacity Saddledome. The Respondents never had any business dictating to adult citizens what risks were acceptable or not in the context of religious practice or face coverings. People afraid to catch COVID-19 are free to use whatever personal measures they like, including wearing masks, washing their hands, getting vaccinated or simply staying home. Placing rights restrictions on healthy people because of the fears of unhealthy people or overly anxious or fearful people more susceptible to negative outcomes from COVID-19 is not "reasonable" or "demonstrably justified". Prior to COVID-19, if an anxious parent of an immunocompromised child wrote to the CMOH demanding that people wear masks in shopping malls so their child could attend without fear or that facilities that their child cannot attend be closed, that person would have been politely told that that was outside the scope of governmental authority.

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[116] *Canada (Attorney General) v. Bedford,* 2013 SCC 72 (CanLII) at para. 57 [***Bedford***]; [2013] 3 SCR 1101; *Carter v. Canada (Attorney General),* 2015 SCC 5 (CanLII) at para. 55, [2015] 2 SCR 331 [***Carter***].
[117] *Ibid,* at para. 58.
[118] *Carter, supra* at para. 64.
[119] *Ibid* citing *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII) at para. 55, [2000] 2 SCR 307 [***Blencoe***].
[120] *Carter, supra* at para. 65; *Blencoe, supra* at paras. 55 to 57.

i) Liberty

146. The right to liberty under section 7 of the *Charter* protects the right of an individual in a physical manner to be free from state restrictions on the freedom of movement[121], as well as the right of an individual to make decisions that are of fundamental personal importance.[122]

147. As stated by the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)* ("***Blencoe***"):

> The liberty interest protected by s. 7 of the *Charter* is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. This applies for example where persons are compelled to appear at a particular time and place for fingerprinting (*Beare*, supra); to produce documents or testify (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, 1990 CanLII 135 (SCC), [1990] 1 S.C.R. 425); and not to loiter in particular areas (*R. v. Heywood*, 1994 CanLII 34 (SCC), [1994] 3 S.C.R. 761). In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 S.C.R. 315, at para. 80, La Forest J., with whom L'Heureux-Dubé, Gonthier and McLachlin JJ. agreed, emphasized that the liberty interest protected by s. 7 must be interpreted broadly and in accordance with the principles and values underlying the *Charter* as a whole and that it protects an individual's personal autonomy:
>
> > . . . liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.[123] [emphasis added]

148. The Supreme Court of Canada has reiterated that the right to liberty in section 7 of the *Charter* protects the individual's right to make fundamental choices free from state interference and inherently private choices that go to the core of what it means to enjoy individual dignity and independence, such as bodily autonomy, core lifestyle choices, and fundamental relationships.[124] Over the years, the courts have established examples whereby state compulsions or prohibitions affect important and fundamental life choices, including, but not limited to, choosing where to establish one's home[125], being compelled

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[121] *R. v. Heywood,* 1994 CanLII 34 (SCC), [1994] 3 SCR 761.
[122] *B. (R.) v Children's Aid Society of Metropolitan Toronto*, *supra* at para. 80.
[123] *Blencoe, supra* at para. 49.
[124] *Carter, supra* at para. 64; *Blencoe, supra* at para 51.
[125] *Blencoe, supra* at para 51.

to appear at a particular time and place for fingerprinting[126], being compelled to produce documents or testify[127], not being allowed to loiter in particular areas[128], the rights of parents to choose medical treatment for their children[129], and raising one's children[130].

149. Ms. Ingram submits that all aspects of the CMOH Orders limit and deprive her of her right to liberty under section 7 of the *Charter* in so far as they deprive her of her right to be free from state restrictions on freedom of movement and they limit her right to make decisions that are of fundamental importance.

150. As was the case in *R. v. Heywood* where the Supreme Court of Canada held that state prohibitions affecting an individual's ability to move freely violated liberty and security interests, especially when non-compliance resulted in incarceration[131], the CMOH Orders restrict where Ms. Ingram may go and limit her ability to move freely. For instance, the Indoor Gathering Restrictions interfered with and limited Ms. Ingram's ability to attend indoor gatherings of more than 10 people, including weddings, funerals, and religious services. The Outdoor Gathering Restrictions prohibited Ms. Ingram from going to an outdoor gathering where there are more than 10 people. The Business Closures which directly interfered with certain businesses or sectors, prohibited Ms. Ingram from attending certain places, such as a fitness facility or hair salon.

151. Further, Ms. Ingram submits that the CMOH Orders amount to state compulsions or prohibitions that affect important and fundamental life choices of a personal nature, including the right to socialize and foster fundamental relationships, to celebrate important life milestones in the manner of her choice, the right to make core lifestyle choices for her children, such as the education they receive, and choosing how to run one's own business.

152. While Ms. Ingram recognizes that these have not yet been recognized by the courts as important and fundamental life choices protected by state interference for the purposes of section 7 of the *Charter*, she submits that they are akin or analogous to the examples recognized by the Supreme Court of Canada to date and should therefore be recognized by this Honourable Court.

153. The Business Closures prohibited Ms. Ingram from choosing how to run her own business, The Gym, and in fact prohibited her conducting any business by requiring all fitness

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[126] *R. v. Beare,* 1988 CanLII 126 (SCC), [1988] 2 SCR 387.
[127] *Thomson Newspapers Ltd. v. Canada (Directors of Investigation and Research, Restrictive Trade Practices Commission),* 1990 CanLII 135 (SCC), [1990] 1 S.C.R. 425.
[128] *R. v. Heywood*, *supra*.
[129] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, *supra*.
[130] *New Brunswick (Minster of Health and Community Services) v. G. (J.),* 1999 CanLII 653 (SCC), [1999] 3 SCR 46.
[131] *R. v. Heywood, supra* at p. 789 to 790.

facilities to shut down on more than one occasion, therefore interfering with her ability to operate her business and earn a living, contrary to section 52.7(1) of the *PHA*.[132] There is no more fundamental right in a free and democratic society than the ability to work and earn a living to feed oneself and one's family. Ms. Ingram's preferred means of doing so was to incorporate a company and run a fitness facility in order to generate sufficient revenue to pay rent for her business and to pay for food and shelter for herself and her family through income derived from her business. It is noteworthy that Alberta admitted that the business support programs were deliberately designed not to fully compensate business owners for losses that they were forced to incur against their will in the name of public health and the public good.[133]

154. The Private Residence Restrictions and Indoor Gathering Restrictions limit Ms. Ingram's personal and fundamental life choice of socializing with others, including how, where and who to socialize with. They prohibit Ms. Ingram from socializing with people at her residence[134] or compel her to socialize with a limited number of individuals[135] and require that she must maintain two meters physical distance when socializing with others, either indoors or outdoors[136]. Such restrictions, while ridiculous and arbitrary on their face, have also prohibited Ms. Ingram from celebrating important life milestones in the manner of her choice, such as celebrating with her mother for her mother's birthday.[137]

155. The Primary or Secondary School Restrictions have interfered with Ms. Ingram's right, as a single mother, to make fundamental choices for her children, including the type and quality of education they receive. As a result of the CMOH Orders, Ms. Ingram's school aged children were not allowed to attend school and were forced to do school remotely, contrary to Ms. Ingram's wishes as a parent.[138]

156. Further, Ms. Ingram submits that the Isolation, Quarantine and Visiting Restrictions interfered with Ms. Ingram's liberty rights guaranteed by section 7 of the *Charter* in so far as they prohibited free movement by requiring the mandatory isolation and quarantining measures of healthy individuals who do not have COVID-19 and who therefore could not transmit COVID-19.

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[132] Supplemental Ingram Affidavit, *supra* at paras. 5 and 6.
[133] Transcript of the Questioning on Affidavit of Darren Hedley, *supra* at p. 5, lines 24 to 27, p. 6, lines 1 to 10, p. 11, lines 15 to 22, p. 13, lines 25 to 27, p. 14, line 1, p. 17, lines 26 to 27, and p. 18, lines 1 to 11.
[134] CMOH Order 02-2021, Part 2, section 3; Ingram Affidavit, *supra* at paras. 8, 9 and 11.
[135] CMOH Order 02-2021, Part 3, sections 13 to 16.
[136] CMOH Order 26-2020, section 1.
[137] Ingram Affidavit, *supra* at para. 10.
[138] *Ibid,* at paras. 5 and 7.

ii) Security of the Person

157. In the civil context, Canadian courts have found that security of the person pursuant to section 7 of the *Charter* protects both the physical and psychological integrity of the individual.[139]

158. Ms. Ingram submits that the Isolation, Quarantine and Visiting Restrictions, in so far as they require her to cover her face while attending an indoor public place, infringe her physical integrity and bodily autonomy guaranteed by section 7 of the *Charter*. As Ms. Ingram stated, she suffers from a long history of anxiety and panic attacks, which is accompanied by breathing troubles which inhibit her ability to wear a mask.[140] Further, the College of Physicians & Surgeons of Alberta's *Physician Guidance on Medical Exemption Letters*[141], which threatens that physicians may be at risk of sanction for "unprofessional conduct" for issuing mask exemptions, makes getting a medical mask exemption difficult, if not impossible.

159. Bastarache J., writing for a majority of the Supreme Court of Canada in *Blencoe,* confirmed that the right to security of the person under section 7 of the *Charter* encompasses serious state-imposed psychological stress.[142] As noted by Bastarache J., "serious state-imposed psychological stress" has two requirements that must be met in order for security of the person to triggered: (1) the psychological harm must be state imposed, meaning that the harm must result from the actions of the state, and (2) the psychological prejudice must be serious.[143]

160. With regard to the Business Closures, what could be more psychologically harmful than the threatened and actual destruction of a person's means to feed themselves and their families. In fact, Dr. Hinshaw seemingly acknowledged concerns about mental health, yet she failed to enquire of the Chief Medical Examiner as to his view on the degree to which the CMOH Orders have in fact contributed to or caused suicides in the Province of Alberta and the potential relationship between bankruptcies caused by the CMOH Orders and suicides.[144]

161. Bastarache J. went on to state that, in order for security of the person to be triggered, the impugned state action must have had a serious and profound effect on the individual's

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[139] *Blencoe, supra* at para. 55.
[140] Ingram Affidavit, *supra* at para. 17.
[141] College of Physicians & Surgeons of Alberta, *Physician Guidance on Medical Exemption Letters* (13 May 2021), online: CPSA https://cpsa.ca/wp-content/uploads/2021/05/Medical-Exemption-Letters-Physician-Guidance.pdf.
[142] *Blencoe, supra* at para. 56.
[143] *Ibid,* at para. 57.
[144] Hearing Transcript, April 5, 2022, p. 83, lines 25 to 26, and p. 87, lines 29 to 35.

psychological integrity and that there must be state interference with an individual interest of fundamental importance.[145] As such, violations of security of the person include only serious psychological incursions resulting from state interference with an individual interest of fundamental importance.[146]

162. Easily distinguished from the Supreme Court of Canada's finding in *Blencoe* that the state had not interfered with the respondent and his family's ability to make essential life choices[147], Ms. Ingram submits that the CMOH Orders directly interfere with and limit her and her family's ability to make essential life choices resulting in serious risk of psychological harm.

163. As a result of the Primary and Secondary School Restrictions, Ms. Ingram is "extremely concerned" about the psychological harm being done to her children as a result of the CMOH Orders forcing them out of school and prohibiting them from being able to engage in normal socialization.[148]

164. Ms. Ingram also suffers from a long history of anxiety and panic attacks[149], which have only been exacerbated by the CMOH Orders. Ms. Ingram submits that the masking requirements in the CMOH Orders have created an atmosphere of fear of being accosted by police or irate busybodies demanding to know why she is unmasked or the basis of her mask exemption.[150]

165. Further, the CMOH Orders, particularly the Business Closures which have targeted fitness facilities such as Ms. Ingram's business have resulted in hysteria and a hostile atmosphere that has resulted in The Gym receiving numerous harassing message and complaints.[151] They have also resulted in severe psychological prejudice related to detrimental impacts to Ms. Ingram's personal life and finances as a result of financial hardship and lost revenue caused by the Business Closures.[152]

166. The Medical Exemption Letter requires Ms. Ingram to present herself to a physician who can then decide whether or not to give her a "medical exemption" from a "non-medical" face covering requirement. The Order is ridiculous on its face and brings the practice of public health medicine into disrepute.

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[145] *Blencoe, supra* at para. 81.
[146] *Ibid,* at para. 82.
[147] *Ibid*, at para. 86.
[148] Ingram Affidavit, *supra* at para. 7.
[149] *Ibid,* at para. 17.
[150] *Ibid*, at para. 18.
[151] *Ibid,* at para. 27.
[152] Supplemental Ingram Affidavit, *supra* at paras. 4 and 7.

iii) Principles of Fundamental Justice

167. As noted above, the second part of the two-step analysis in determining whether the CMOH Orders unconstitutionally limit Ms. Ingram's section 7 *Charter* rights, is determining whether the limits to Ms. Ingram's rights to liberty and security of the person are contrary to the principles of fundamental justice.

168. The principles of fundamental justice set out the minimum requirements that a law that negatively impacts on a person's life, liberty or security of the person must meet.[153] Any law, or state-imposed restriction, that impinges on life, liberty, or security of the person "must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their object."[154]

169. The three principles of fundamental justice – arbitrariness, overbreadth, and gross disproportionality – compare the rights infringement caused by the law with the objective of the law. Unlike a section 1 analysis, the Supreme Court of Canada has confirmed that, in determining whether the deprivation of life, liberty and security of the person is in accordance with the principles of fundamental justice pursuant to section 7 of the *Charter*, "courts are not concerned with competing social interests or public benefits conferred by the impugned law."[155] [emphasis added]

170. As the Supreme Court of Canada stated in *Bedford*:

> All three principles — arbitrariness, overbreadth, and gross disproportionality — compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. That is, they do not look to how well the law achieves its object, or to how much of the population the law benefits. They do not consider ancillary benefits to the general population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether anyone's life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.[156] [emphasis added]

171. As noted by the Supreme Court of Canada in *Bedford,* the analysis of whether the law's negative effect on life, liberty and security of the person is in accordance with the principles of fundamental justice under section 7 is different than the analysis under section

[153] *Bedford, supra* at para. 94.
[154] *Carter, supra* at para. 72.
[155] *Carter, supra* at para. 79.
[156] *Bedford, supra* at para. 123.

1 of the *Charter*.[157] With respect to arbitrariness, overbreadth and gross disproportionality under section 7, the question is whether the law's purpose is connected to its effects and whether its negative effects are grossly disproportionate to its purpose.[158] Unlike a section 1 analysis, the overarching public goal of the law is not relevant.[159] Pursuant to section 7, an arbitrary, overbroad or grossly disproportionate impact on one person is sufficient to establish a violation of section 7.[160]

172. The first principle of fundamental justice, arbitrariness, deals with situations where there is no connection between the object of the law and the limit it imposes on life, liberty, or security of the person.[161] In other words, an arbitrary law is one that is not capable of fulfilling its objectives yet imposes a constitutional price in terms of infringing *Charter* rights.[162] Given the lack of empirical evidence provided that any of the CMOH Orders in any way reduced the transmission of COVID-19 in the Province of Alberta, the CMOH Orders are purely arbitrary.

173. In *R. v. Morgentaler*[163]*,* the accused challenged provisions of the *Criminal Code* that required abortions to be approved by a therapeutic abortion committee of an accredited or approved hospital. A majority of the Supreme Court of Canada found that the purpose of the impugned provision was women's health, but that the requirement that all therapeutic abortions take place in accredited hospitals did not contribute to the objective of protecting women's health and even caused delays that were detrimental to women's health.[164] In the end, the Supreme Court of Canada struck down the impugned provision of the *Criminal Code* as having no force or effect under section 52(1) of the *Constitution Act, 1982* because it infringed the rights and freedoms guaranteed by section 7 and was not justified by section 1 of the *Charter*.[165]

174. Ms. Ingram submits that the same principles apply here. The objective of the CMOH Orders is to lessen the impacts of the public health emergency, however, prohibiting access to fitness facilities without fully compensating facility owners in a manner that allows them to earn a living, as previously stated, causes severe psychological harm to business owners as well as putting individuals at higher risk for severe outcomes from COVID-19 from being less healthy. As Dr. Hinshaw stated, obesity is a risk factor for COVID-19 and one

[157] *Ibid,* at paras. 124 to 127.
[158] *Ibid*, at para. 125.
[159] *Ibid*.
[160] *Ibid,* at para. 127.
[161] *Carter, supra* at para. 83; and *Bedford, supra* at paras. 98 and 111.
[162] *Carter, supra* at para 83.
[163] *R. v. Morgentaler,* 1988 CanLII 90 (SCC), [1988] 1 SCR 30.
[164] *Ibid,* at p. 59 to 60, 95, 99, 110, and 120; *Bedford, supra* at para. 98.
[165] *Ibid,* at p. 47 and 184.

of her recommendations to Albertans to help minimize serious harms of COVID-19 was to increase physical activity and exercise.[166]

175. Further, Ms. Ingram submits that the very nature of the masking requirements contained in the relevant CMOH Orders demonstrates the arbitrariness of the CMOH Orders. Pursuant to CMOH Order 02-2021 individuals were required to wear a face mask at all times while attending an indoor public place, unless certain exemptions applied which included the inability to wear a face mask due to a mental or physical limitation.[167] However, a subsequent CMOH Order required a person unable to wear a face mask due to health reasons to get a medical exemption from an authorized health professional.[168] This ignores the fact that given the nature of the broad definition of the "mask", including "non-medical" masks or "face coverings", no medical reason exists for the mask requirement in the first place.

176. None of the masking requirements in the CMOH Orders properly define an acceptable porosity or quality of face mask in order to sufficiently demonstrate a *bona fide* medical purpose for the masking requirements. CMOH Order 02-2021 merely defines a "face mask" as "a medical or non-medical mask or other face covering that covers a person's nose, mouth and chin."[169] [emphasis added] The law as drafted would permit a person to wear a Halloween mask or beekeeper's mesh hood, provided it covered nose, mouth, and chin. This clearly demonstrates the arbitrary nature of the Order. Given the sloppy nature of the manner in which this provision was drafted, it cannot even be said to pass the "rational connection" test under section 1. How can a "non-medical mask or other face covering" be for a *bona fide* medical purpose?

177. The second principle of fundamental justice, overbreadth, looks at whether a law takes away rights in a way that generally supports the object of the law or if it goes too far by denying the rights of some individuals in a way that has no relation to its object.[170] Like the other principles of fundamental justice, the overbreadth principle is not concerned with competing social interests or ancillary benefits for the general population.[171] In essence, the question is whether the law or restriction infringes life, liberty or security of the person in a way that has no connection to the mischief contemplated by the legislature.[172]

[166] Hearing Transcript, April 4, 2022, p. 60, line 33, p. 62, lines 15 to 18 and 29 to 30, and p. 63, lines 18 to 22.
[167] CMOH 02-2021, Part 5, sections 25 and 26(c).
[168] CMOH Order 22-2021, Part 4, section 4.2.
[169] CMOH Order 02-2021, Part 5, section 23.
[170] *Carter, supra* at para. 85; *Bedford, supra* at para. 101 and 112.
[171] *Carter, supra* at para. 85; *Bedford, supra* at para. 112.
[172] *Carter, supra* at para. 85.

178. In *Carter*, the Supreme Court of Canada held that the prohibition on assisted dying was overbroad. It determined that the object of the law was to protect vulnerable persons from being induced to commit suicide at a moment of weakness and recognized that Canada conceded that not every person who wishes to commit suicide is vulnerable, and that there may be people with disabilities who have a considered, rational, and persistent wish to end their lives. As a result, the Supreme Court of Canada held that the blanket prohibition sweeps conduct into its ambit that was unrelated to the law's objective.[173]

179. The Supreme Court of Canada reached a similar conclusion in *Bedford*, finding that the prohibition on living on the avails of prostitution in section 212(1)(j) of the *Criminal Code* was overbroad because the law punished everyone who earned a living through a relationship with a prostitute, without distinguishing between those who would assist and protect them and those who would be at least potentially exploitative of them.[174]

180. This same principle of fundamental justice was applied in the Supreme Court of Canada in *R. v. Heywood*, where the accused challenged a vagrancy law that prohibited certain offenders from loitering in public parks. A majority of the Supreme Court of Canada found that the impugned law, the objective of which was to protect children from sexual predators, was overbroad insofar as it applied to offenders who did not constitute a danger to children and insofar as it applied to parks where children were unlikely to be present.[175]

181. Ms. Ingram submits that the CMOH Orders, particularly the Business Closures and the Isolation, Quarantine and Visiting Restrictions, have the same effect as the prohibition on assisted dying and the prohibition on living on the avails of prostitution and should therefore also be found to be overbroad by this Honourable Court.

182. The object of the CMOH Orders is to lessen the impact of COVID-19 on hospitals and prevent the spread of COVID-19. However, the CMOH Orders impact everyone, including those who are not infected with COVID-19 and do not present a risk of spreading COVID-19. A general swath of businesses was impacted as well, including all fitness facilities, whether or not there had been an outbreak at that business. Ms. Ingram's business, The Gym, was prohibited from opening for certain periods of time or was severely restricted in its operations, even though The Gym has had zero reported cases of COVID-19 and no evidence exists of cases or infections of COVID-19 being contracted at The Gym.[176] None of Alberta's witnesses had any direct evidence as pertained to The Gym.

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[173] *Carter, supra* at para 86.
[174] *Bedford, supra* at para. 142; *Carter, supra* at para. 88.
[175] *R. v. Heywood, supra* at p. 794 to 796 and 798 to 799.
[176] Ingram Affidavit, *supra* at para. 25.

183. Ms. Ingram submits that the purpose of section 30 of the *PHA* is to avoid such overbreadth. Pursuant to section 30 of the *PHA*, where a medical officer of health knows or believes that a place may be contaminated with a communicable disease, they may enter that place without a warrant for the purpose of conducting an examination to determine the existence of the communicable disease.[177] When they are conducting such an investigation, the medical officer of health may order the closure of the place, including any business that is carried on in it, until they have completed the investigation, but not for a period of more than 24 hours.[178] If the medical officer of health is not able to complete the investigation within 24 hours, they may then make an application to the Provincial Court for an order to extend the period of detention or closure for an additional period of not more than 7 days.[179]

184. While the Respondents have provided general sweeping statements of the potential risk fitness facilities pose to the spread of COVID-19, they have failed to provide any direct evidence before this Court that demonstrates fitness facilities have contributed to the strain on hospitals or contributed to the spread of COVID-19 beyond any other potential points of transmission like schools, grocery stores, or shopping malls. In particular, the Respondents have failed to provide any evidence of COVID-19 outbreaks at fitness facilities in the province similar to The Gym and have failed to provide any evidence that The Gym, in particular, contributed to the public health emergency or the spread of COVID-19.

185. Ms. Ingram respectfully submits that the same principles apply to the CMOH Orders and those persons who are not infected with COVID-19 and therefore cannot transmit the virus, those who were previously infected with COVID-19 and recovered thereby having natural immunity which diminishes their likelihood of transmitting the virus or requiring hospitalization, and those persons under the age of 60 with no comorbidities who are at a significantly lower risk of hospitalization, are yet subject to the same restrictions and prohibition as those who are infectious or infected with COVID-19 and who are at high risk of hospitalization.

186. Impugned laws will not be in accordance with the final principle of fundamental justice 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 measures.[180] As with the principle of overbreadth, the focus is not on the impact of the measure on society or the general public, but on its impact on the rights of the individual.[181]

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[177] *PHA, supra* s. 30(1).
[178] *Ibid,* s. 30(2).
[179] *Ibid,* s. 30(3).
[180] *Carter, supra* at para. 89.
[181] *Ibid; Bedford, supra* at para. 121.

187. At this point in the inquiry, the court is asked to compare the objective of the impugned law, "taken at face value", with its negative effect on the rights of the individual and ask whether the impact is out of sync with the law's objective.[182]

188. In *Carter,* the Supreme Court of Canada agreed with the trial judge that the impact of the prohibition on assisted dying was severe as it imposed unnecessary suffering on affected individuals, deprived them of the ability to determine what to do with their bodies and how those bodies would be treated, and may have caused those affected to take their lives sooner than they would were they able to obtain a physician's assistance in dying.[183]

189. Similar to the Supreme Court of Canada's findings in *Carter*, Ms. Ingram submits that the impact of the CMOH Orders on her individual rights has been severe. They have imposed strict limits on her freedom of movement by prohibiting her from going to or attending certain places, and have interfered with important fundamental life choices, including celebrating important milestone, decision about her children's education, and how she runs her business. They have also interfered with her physical and psychological integrity imposing physical and psychological suffering by requiring her to wear a mask even though she suffers from a history of anxiety and panic attacks accompanied by breathing issues as well as devastating her business and livelihood.

E. If the CMOH Orders limit of sections 2 and 7 of the *Charter*, can those limitations be justified in a free and democratic society in accordance with section 1 of the *Charter*?

190. Ms. Ingram submits that the CMOH Orders' violation of sections 2 and 7 of the *Charter* are not saved by section 1 of the *Charter* and that they amount to an unreasonable limitation of her constitutionally protected rights and freedoms that are not demonstrably justified in a free and democratic society.

191. Section 1 of the *Charter* expressly states that:

> **1** The *Canadian Charter of Rights and Freedoms* 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.[184] [emphasis added]

192. As was stated by Evans C.J.H.C. on behalf of the Ontario Supreme Court in *Germany Federal Republic v. Rauca*, "the "limits" to be applied require that the court adopt an objective standard in assessing the restrictions "prescribed by law", and that the demonstrable justification which modifies the reasonable limits be interpreted in a manner

[182] *Carter, supra* at para. 89.
[183] *Ibid,* at para. 90.
[184] *Charter, supra* s. 1.

that leans slightly in favour of the individual when the competing rights of the individual and of society are being balanced by the courts."[185] Evans C.J.H.C. went on to state that:

> In the phrase "as can be demonstrably justified", the key word is the word "justified", which forms the cornerstone of the phrase. It means: to show or maintain the justice or reasonableness of an action; to adduce adequate grounds for; or to defend as right or proper. The legal use of the word is to show or maintain sufficient reason in court for doing that which one is called upon to answer for. The notion of justification is qualified by the word "demonstrably", which means in a way which admits of demonstration, which in turn means capable of being shown or made evident or capable of being proved clearly and conclusively. The standard of persuasion to be applied by the court is a high one if the limitation in issue is to be upheld as valid.[186] [emphasis added]

193. As noted above, the Respondents have conceded that Ms. Ingram's section 2(c) and (d) *Charter* rights have been infringed by the CMOH Orders[187], and Ms. Ingram submits that she has made out, as set out above, that the CMOH Orders also infringe her section 2(a) and 7 *Charter* rights. As such, the onus on proving that the limitations are reasonable and demonstrably justified in a free and democratic society rests upon the Respondents.[188] [emphasis added]

194. Reasonableness in the context of section 1 of the *Charter* is not the same standard of reasonableness as in a pure administrative law context. The Respondents cannot submit that the CMOH's decision must be so unreasonable as to not be capable of being ordered by any other "reasonable" CMOH acting "reasonably". The Respondents must prove that the CMOH Orders were reasonable and demonstrably justifiable. Ms. Ingram submits that there is insufficient evidence before this Honourable Court for the Court to reach that conclusion.

195. As confirmed by the Supreme Court of Canada in *R. v. Oakes* ("***Oakes***"), limits on the rights and freedoms guaranteed by the *Charter* are exceptions and the presumption is that the rights and freedoms are guaranteed unless the Respondents can bring the limitation within the exception criteria required to justify the limitations.[189]

196. Section 1 should never serve as a mechanism to free a government from invoking the notwithstanding provision pursuant to section 33 of the *Charter*. The bar under section 1 is

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[185] *Federal Republic of Germany v. Rauca,* 1982 CanLII 3177 (ON SC) at para. 41 (affirmed in *Re Federal Republic of Germany and Rauca*, 1983 CanLIII 1774 (ON CA)).
[186] *Ibid,* at para. 46.
[187] Brief of Law of the Respondents, Her Majesty the Queen in Right of Alberta and the Chief Medical Officer of Health, *supra* at para. 64.
[188] *R. v. Oakes,* 1986 CanLII 46 (SCC) at p. 136 to 137, [1986] 1 SCR 103 [***Oakes***] (emphasis added).
[189] *Ibid.*

meant to be high, because the framers of the *Charter* intended that any abrogation of certain rights under the *Charter* occur pursuant to section 33. The Respondents are asking for relief with respect to sections of the *Charter* which could have been resolved by the government. Like the "notwithstanding" provision of the *Alberta Bill of Rights* and Cabinet's decision not to invoke the *Emergency Management Act*, Alberta would rather place the responsibility for the violation of rights and freedoms on this Court as opposed to taking responsibility through the implementation of section 33 of the *Charter*. With respect to the landscape of COVID-19 litigation in Canada, no courts have considered the ease to which provincial governments can resolve these issues by simply invoking section 33 of the *Charter*. Instead, governments would rather place the court in the position of having to take the responsibility for vitiating the rights of citizens the courts should otherwise protect.

197. The standard of proof under section 1 is proof by a "preponderance of probability".[190] Within that standard, there are degrees of probability, and the degree depends on the subject-matter. The phrase "demonstrably justified" requires that the preponderance of probability test must be applied rigorously and that the Respondents must demonstrate a very high degree of probability "commensurate with the occasion".[191] As such, evidence provided by the Respondents to justify the limitations of constitutionally protected *Charter* rights, must be cogent and persuasive, and clearly identify the consequences of imposing or not imposing the limitation.[192] This also means that the Court needs to know what alternative measures for implementing the objective were considered by the decision-maker.[193] This evidence is entirely lacking in this case.

198. In *Oakes,* the Supreme Court of Canada outlined a two-step test that must be satisfied whenever a government seeks to establish that a law which limits a *Charter* right is reasonable and demonstrably justified in a free and democratic society pursuant to section 1 of the *Charter* (the "***Oakes* Test**").

199. In order to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied:

    a. the objective, which the measures responsible for limit on a *Charter* right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; and

[190] *Ibid,* at p. 137 to 138.
[191] *Ibid*.
[192] *Ibid,* at p. 138.
[193] *Ibid.*

b. once a sufficiently significant objective is recognized, then the party invoking section 1 must show that the means chosen are reasonable **and demonstrably justified**.[194] [emphasis added]

200. Citing *Big M Drug Mart Ltd.,* the Supreme Court of Canada referred to the second element as "a form of proportionality test"[195], with three important components:

a. the law must be rationally connected to the objective;

b. the law must impair the right or freedom no more than is necessary to accomplish the objective; and

c. the law must not have disproportionately severe effects on the persons to whom it applies.[196]

201. However, before the Court is to undergo an analysis of the *Oakes* Test pursuant to section 1 of the *Charter*, it must first determine whether the impugned law that seeks to limit the *Charter* rights and freedoms is "prescribed by law".[197] As such, Ms. Ingram submits that, should this Honourable Court determine that the CMOH Orders are *ultra vires* section 29 and the purpose of the *PHA* as set out above, or offend the *Bill of Rights*, it is not required to determine whether the CMOH Orders are reasonable and demonstrably justified in a free and democratic society pursuant to section 1 of *Charter* because they would not be "prescribed by law" and would therefore fail at this stage.

202. Further, while Ms. Ingram recognizes that there is a possibility that the Respondents could establish that a violation of her section 7 *Charter* rights is justified under section 1 of *Charter*, she submits that a law that violates section 7, such as the CMOH Orders as established above, are very unlikely to be justified under section 1 of the *Charter*.[198]

i) Sufficiently important objective

203. With respect to the first element of the *Oakes* Test, the Supreme Court of Canada noted that:

> …The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are

[194] *Ibid,* at p. 138 to 139.
[195] *Ibid,* at p. 139.
[196] *Ibid.*
[197] *Alberta v. Hutterian Brethren of Wilson Colony*, supra at para. 39.
[198] *Bedford, supra* at para. 129.

pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.[199]

204. McLachlin J., writing for the majority of the Supreme Court of Canada in *RJR-Macdonald Inc. v. Canada* ("***RJR-MacDonald***") clarified that "[t]he question at this stage is whether the objective of the infringing measure is sufficiently important to be capable in principle of justifying a limitation on the rights and freedoms guaranteed by the constitution".[200] The relevant objective is not the general objective of the law, but the more narrow "objective of the infringing measure" itself.[201]

205. The preamble of the CMOH Orders, as well as section 29(2.1) of the *PHA*, state that objectives of the CMOH Orders are to "lessen the impact of the public health emergency", "to protect Albertans from exposure to COVID-19" and "prevent the spread of COVID-19".

206. In her affidavit evidence filed on behalf of the Respondents and upon cross-examination Dr. Hinshaw, as the CMOH, further elaborated on the objectives of the CMOH Orders, stating the objectives were to:

    a. protect the community and prevent widespread transmission of COVID-19"[202];

    b. protect the overall health of the population[203];

    c. minimize the impact of COVID harms across the whole population[204];

    d. avoid the experience that happened in other jurisdictions[205];

    e. minimize community transmission[206];

    f. protect the healthcare system from being overwhelmed[207]; and

    g. minimize the serious harms of COVID, such as death[208].

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[199] *Ibid,* at para 69.
[200] *RJR-MacDonald Inc. v. Canada (Attorney General),* 1995 CanLII 64 (SCC) at p. 335, [1995] 3 SCR 199 [***RJR-Macdonald***].
[201] *Oakes, supra* at p. 138 to 139.
[202] Affidavit of Dr. Deena Hinshaw, affirmed on July 12, 2021, at para. 97.
[203] Hearing Transcript, April 4, 2022, at p. 24, line 41 and p. 25, line 1.
[204] Hearing Transcript, April 4, 2022, at p. 28, lines 14 to 19.
[205] Hearing Transcript, April 4, 2022, at p. 33, lines 16 to 17.
[206] Hearing Transcript, April 4, 2022, p. 39, lines 32 to 34.
[207] *Ibid.*
[208] *Ibid.*

207. In and of themselves, these are not sufficiently important objectives that are even capable of being empirically evaluated. COVID-19 is a "novel" virus. From the outset it was unknowable and unprovable that the alleged objectives were even achievable. They are akin to praying for world peace; laudable in sentiment but impossible in execution. Orders prohibiting the sale of refined sugar, pop, chips and high fat and sodium snack foods would meet all of the objectives listed above given the linkage between obesity and death from COVID-19. These measures would have similarly been capable of passing the bar set by the Respondents.

208. The same things could be said in the face of every severe cold and flu or pneumonia outbreak devastating the sick and elderly of the Province of Alberta. There is no expressed right in the Canadian constitution to have government protect you from a ubiquitous airborne respiratory virus at the expense, loss, cost, or impact of or on your fellow citizens' rights and freedoms.

ii) Rational Connection

209. With respect to the first element of the proportionality test, "rational connection", the Supreme Court of Canada has clarified that "[t]he requirement of rational connection calls for an assessment of how well the legislative garment has been tailored to suit its purpose"[209], meaning that the impugned law "must be carefully designed to achieve the objective in question"[210] and "must not be arbitrary, unfair or based on irrational considerations"[211]. [emphasis added]

210. In the subsequent decision of the *RJR-MacDonald,* the Supreme Court of Canada clarified that:

> "…[The government] must show a causal connection between the infringement and the benefit sought on the basis of reason or logic. To put it another way, the government must show that the restriction on rights serves the intended purpose. This must be demonstrated on a balance of probabilities."[212]

As mentioned, the masking Orders were far from "carefully designed" and thus seem more about creating broad and visible societal fear and compliance than any *bona fide* medical purpose rationally connected to Dr. Hinshaw's alleged "objectives".

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[209] *R. v. Edwards Books and Arts Ltd., supra* at p. 770 to 771.
[210] *Oakes, supra* at p. 139.
[211] *Ibid.*
[212] *RJR-MacDonald, supra* at p. 339.

211. Ms. Ingram submits that there is no rational connection between the CMOH Orders and their objective, particularly with respect to the Outdoor Gathering Restrictions, the Isolation, Quarantine, and Visiting Restrictions for individuals without COVID-19, the Business Closures related to fitness facilities, and the Primary and Secondary School Restrictions.

212. As Dr. Hinshaw testified to questioning on her evidence:

    a. the risk of outdoor transmission is significantly lower than indoor and really requires proximity[213];

    b. asymptomatic transmission of COVID-19 is rare and pre-symptomatic transmission only has a probabilistic estimate of 62%[214];

    c. most people (over 95%) do not require hospital care[215];

    d. the risk of COVID-19 decreases with every decade and the risk of severe outcomes in children, including hospitalization and death, are very small[216]; and

    e. obesity is a risk factor of poor health outcomes from COVID-19 and the Respondents recommended that people exercise and increase physical activity in order to minimize the risk of negative impacts from COVID-19[217].

213. Ms. Ingram submits that the Respondents' evidence is insufficient to demonstrably justify the limitations of her constitutionally protected *Charter* rights and freedoms. As noted by the Supreme Court of Canada in *Oakes,* the Respondents' evidence must meet the high degree of probability standard due to the bedrock, foundational importance of *Charter* rights and freedoms to Canadian democracy. Ms. Ingram submits that the above-noted evidence does not meet this "high degree" of probability required and that this Honourable Court must therefore find in favour of the individual whose *Charter* rights and freedoms are being limited by the CMOH Orders.

214. Dr. Hinshaw, without any real proof, seems to operate under the view the NPIs are like a brake on a car. Press the brake and the car stops or slows down. No evidence of this clear mechanism exists. Graphs and charts with dates superimposed are not evidence. As the

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[213] Hearing Transcript, April 4, 2022, at p. 38, lines 38 to 39.
[214] Hearing Transcript, April 4, 2022, at p. 49, lines 35 to 41, and p. 50, lines 29 to 30.
[215] Hearing Transcript April 4, 2022, at p. 52, line 40, and p. 53, lines 1 to 4.
[216] Hearing Transcript, April 4, 2022, at p. 56, lines 39 to 41, p. 57, lines 1 to 3, p. 63, lines 37 to 41, and p. 64, lines 1 to 8.
[217] Hearing Transcript, April 4, 2022, at p. 60, line 33, p. 62, lines 15 to 18 and 29 to 30, and p. 63, lines 18 to 22.

Respondents' witness stated, "correlation does not equal causation"[218]. Nor does a mere correlation amount to proof on the "very high degree" of probability required on the preponderance of probability "commensurate with the occasion".

215. All of the CMOH Orders, particularly the Isolation, Quarantine, and Visiting Restrictions, applied equally to persons without COVID-19 or those with natural immunity who were not at risk of spreading COVID-19. At all material times, the CMOH Orders required individuals who tested positive via PCR to isolate even if those individuals had post-infection immunity and even though PCR tests are unable to distinguish between live infective virus and dead or non-viable, non infectious virus, and cannot verify infectiousness.[219] The Respondents' expert further testified that people could test positive on a PCR test for up to 100 days after they are infected with COVID-19.[220] While Dr. Hinshaw did state that the Respondents eventually changed their policy with respect to requiring isolation for someone who tested positive via PCR to not requiring individuals who test positive to isolate if it has been less than 90 days since prior infection, this was not done until later and no evidence was tendered to show that this change in policy coincided with the impugned Orders. The evidence with respect to PCR tests demonstrates the shallowness of the Respondents' analysis and the simplistic view they took in order to justify the CMOH Orders, which Ms. Ingram submits does not meet the high probability and strength of evidence required under the *Oakes* Test.

216. The Respondents have failed to provide any evidence that fitness facilities or The Gym in particular, have contributed to the spread of COVID-19 in a manner that placed stress on acute care capacity in the Province of Alberta. As previously stated, an inspector from Alberta Health Services conducted an inspection of The Gym in mid-November 2020, highlighting the extra cleaning measures that were being instituted to minimize the spread of COVID-19 and concluding his report with "No Concerns Noted".[221]

217. It should further be noted that even if people were infected at a fitness facility, young healthy people are not the ones putting strain on acute care facilities. No evidence was provided by the Respondents that gym goers were more likely to infect someone that ended up in acute care than a box store patron.

218. As was found by the Supreme Court of Canada in *Morgentaler*[222], Ms. Ingram further submits that the closure of fitness facilities is actually counterintuitive to the CMOH Orders' objectives, i.e., to minimize serious harms of COVID-19. As Dr. Hinshaw

[218] Hearing Transcript, February 22, 2022, AM, p. 69, lines 25 to 26.
[219] Hearing Transcript, February 22, 2022, PM, at p. 18, lines 1 to 6, p. 24, lines 18 to 22, p. 25, lines 14 to 15.
[220] Hearing Transcript, February 22, 2022, PM, at p. 26, lines 2 to 4.
[221] Supplemental Ingram Affidavit, *supra* at para. 23.
[222] *Bedford, supra* at para. 98.

testified, increased physical activity and exercise will improve overall health and minimize the risk of serious outcomes from COVID-19, including hospitalization. As such, fitness centres such as The Gym contribute to the objective of minimizing serious harms of COVID-19 and help alleviate stress on acute care capacity by contributing to a reduction in hospitalizations. Further, access to fitness centres such as The Gym may mitigate some of the "unintended consequences" and "harms" of the CMOH Orders, particularly incidents of severe mental health crises.

219. Ms. Ingram submits that the Respondents have failed to provide cogent and persuasive empirical evidence that NPIs such as the ones implemented in the CMOH Orders are effective at minimizing the transmission and serious harms of COVID-19 and protecting the healthcare system. Simply providing graphs and charts with arrows indicating when measures were imposed is not evidence. As the Respondents' expert, Dr. Kindrachuck, repeatedly stated: "correlation does not equal causation."[223]

220. Dr. Bhattacharya also gave evidence that "you can't just simply automatically look at a correlation and decide it's causation" and went even further, stating that the "literature documents the lack of correlation between stay-at-home orders and COVID mortality".[224] When pressed by counsel for the Respondents, Dr. Bhattacharya stated "there is a big debate going on in the academic community" regarding the effectiveness of government interventions against COVID-19.[225] He also gave evidence, as noted above, that lockdown measures, such as those implemented by the CMOH Orders, do not necessarily protect the community from widespread transmission, minimize transmission, or minimize the negative harms of COVID-19 across the population, while directly leading to harms to the health of the population.[226]

221. Ms. Ingram submits that there is a big difference between an "immense variance of opinion" on scientific issues as to whether certain broad ranging rights infringements are "effective at reducing transmission" and being able to "demonstrably justify" a rights infringement in accordance with the high standard set by the Supreme Court of Canada in *Oakes*.

222. The Court also must recognize that section 1 requires a much higher standard of proof than a mere "balance of probabilities". As the Supreme Court of Canada stated in *Oakes*, quoting Lord Denning:

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[223] Hearing Transcript, February 22, 2022, AM, p. 69, lines 25 to 26.
[224] Hearing Transcript, February 11, 2022, p. 17, lines 16 to 18, and p. 19, lines 34 to 35; Hearing Transcript, February 22, 2022, AM, p. 12, lines 2 to 19, p. 16, lines 33 to 41, p. 17, lines 1 to 2 and lines 13 to 23.
[225] Hearing Transcript, February 11, 2022, at p. 43, line 5.
[226] Hearing Transcript, February 14, 2022, AM, at p. 45, lines 29 to 38.

> Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion".[227]

iii) Minimal Impairment

223. With respect to the second part of the proportionality test, or the third part of the *Oakes* Test*,* the Supreme Court of Canada states that the means should impair the right or freedom in question "as little as possible".[228]

224. As stated by McLachlin J. in *RJR-MacDonald,* with respect to minimal impairment:

> …the government must show that the measures at issue impair the right of free expression as little as possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary…"[229] [emphasis added]

225. The Supreme Court of Canada went on to state that "if the government fails to explain why a significantly less intrusive and equally effective measures was not chosen, the law may fail."[230]

226. In *RJR-MacDonald,* a majority of the Supreme Court of Canada determined that, while the *Tobacco Products Control Act* sought a sufficiently important objective, i.e., reducing tobacco consumption, the impugned provisions failed to meet the minimum impairment requirement of the proportionality test.[231] In particular, the Supreme Court of Canada noted the trial judge's concerns that the government presented no evidence showing that a less comprehensive ban on advertising would not have been equally effective, or that an unattributed warning would not have been equally effective as an attributive one, and held that the requirement of a complete ban on advertising and an attributed warning in the impugned legislation were more intrusive than was necessary to accomplish the legislative objectives.[232]

227. Ms. Ingram submits that the Respondents have failed to provide the required evidence to demonstrate that the CMOH Orders are minimally impairing and what alternative measures were considered when the CMOH, or Cabinet, made their decisions. The only evidence provided with respect to alternative measures were the voluntary measures implemented in

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[227] *Oakes, supra* at p. 138
[228] *Ibid.* at p. 139.
[229] *RJR-MacDonald, supra* at p. 343.
[230] *Ibid*.
[231] *RJR-MacDonald, supra* at p. 335, 336, and 343 to 349.
[232] *Ibid,* at p. 343 to 349.

the fall of 2020 which Dr. Hinshaw claimed, without any empirical evidence, were insufficient.[233]

228. Again, the lack of evidence with respect to any alternative measures that were recommended or considered by the CMOH or Cabinet that could have potentially been less impairing is due to the impropriety of the decision makers' decision-making process as set out in the section with respect to *ultra vires*. Such evidence has not been provided in these proceedings because Cabinet made the final decisions with respect to any NPIs, not the CMOH as prescribed by the *PHA*.

229. With respect to the Business Closures for instance, the Respondents failed to provide any evidence whether limitations on fitness facilities instead of full-blown closures, such as attendance by appointment only, limited capacity, better ventilation, or increased cleaning practices, would not have been equally effective at achieving the objectives.

iv) Proportionate Effect

230. In *Oakes,* Dickson C.J., as he then was, stated that the third and final element of the proportionality test requires "a proportionality between the effects of the measures which are reasonable for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance"."[234] [emphasis added]

231. In the subsequent decision of *R. v. Edwards Books and Arts,* Dickson C.J. rephrased this part of the proportionality requirement, stating that the effects of the limiting measures "must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights."[235]

232. Eight years later, Lamer C.J., as he then was, elaborated on this proportionality requirement even further, stating that there must be "a proportionality between the salutary and deleterious effects" of the impugned measure.[236] In this case, the benefits of the CMOH Orders are nothing if not debatable, while the impacts of the CMOH Orders are clearly devastating to those citizens most affected by them.

233. As Dr. Bhattacharya said throughout his cross-examination, the lockdowns and NPIs themselves have imposed health harms on the population[237], including, but not limited to:

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[233] Hearing Transcript, April 4, 2022, p. 33, lines 31 to 33.
[234] *Oakes, supra* at p. 139.
[235] *R. v. Edwards Books and Art Ltd., supra* p. 768 to 769.
[236] *Dagenais v. Canadian Broadcasting Corp.,* 1994 CanLII 39 (SCC) at p. 840, [1994] 3 SCR 835.
[237] Hearing Transcript, February 14, 2022, AM, p. 14, lines 7 to 8, p. 25, lines 10 to 11.

a. harms caused by isolating somebody who is not positive for COVID-19[238];

b. the psychological effect of creating an atmosphere of fear by quarantining healthy populations and closing schools[239];

c. social isolation harms, especially for older people who need memory care[240];

d. harms to the younger population[241];

e. economic harm and increases in depression, substance abuse and deaths of despair arising out of unemployment[242];

f. long-term harm in children from closing schools[243]; and

g. harms caused by the fundamental division and discord created in society as a whole.

234. Such negative effects of the CMOH Orders are further demonstrated by the evidence of Shawn McCaffery, Kyle Pawelko, and Abdullah Al-Shara.

235. As Ms. McCaffery stated in her affidavit evidence, the CMOH Orders prohibited her from operating her business, Leduc Lanes, and rendered her business financially unfeasible.[244] As a result, Ms. McCaffery was potentially going to lose her home and will have zero protection if something happens given that she had to cancel her private home insurance, business insurance and life insurance.[245]

236. Mr. Pawelko has provided evidence in these proceedings that attending The Gym helped him manage his depression and anxiety, and the CMOH Orders exacerbated his struggles with addiction and depression, which lead to a suicide attempt in 2020 and in 2021.[246]

[238] Hearing Transcript, February 14, 2022, AM, p. 8, lines 30 to 36.
[239] Hearing Transcript, February 14, 2022, AM, p. 21, lines 38 to 40.
[240] Hearing Transcript, February 14, 2022, AM, p. 23, lines 15 to 17.
[241] Hearing Transcript, February 14, 2022, AM, p. 25, lines 15 to 16.
[242] Hearing Transcript, February 14, 2022, AM, p. 29, lines 25 to 36.
[243] Hearing Transcript, February 14, 2022, AM, p. 45, lines 33 to 35.
[244] Affidavit of Shawn Valerie McCaffery, sworn January 21, 2021, at para. 17.
[245] *Ibid,* at paras. 3 and 7.
[246] Affidavit of Kyle Pawelko, sworn January 28, 2021, at paras. 4, 7, 11, and 12 to 15.

237. Mr. Al-Shara stated in his affidavit evidence that The Gym has helped his mental health tremendously and that, as a result of the CMOH Orders, he became suicidal and has mentally deteriorated.[247]

238. As a Professor of Medicine at Standard and an expert in the area of health policy and health economics with a focus on epidemiology and infectious disease epidemiology, Dr. Bhattacharya recognized that in order for there to be proportionality between the effects and the objectives of governments' response to COVID-19, they must balance both the harms and the benefits.[248] From a legal perspective, proof that the benefits outweigh the harms must be on a very high degree of preponderance of probability, which does not exist in this record.

239. Based on the Respondents' evidence in this matter, it is clear that they did not adequately balance both the harms and benefits of the CMOH Orders before promulgating them. During cross-examination, Dr. Hinshaw repeatedly stated that the Respondents knew there would be "unintended consequences"[249] and "harms"[250] of NPIs and the CMOH Orders but provided no direct evidence that the Respondents considered any potential effects in particular or that they conducted an analysis to determine that the CMOH Orders were proportionate to their negative effects. Ms. Ingram submits that the mere fact that the Respondents refer to the negative effects of the CMOH Orders as "unintended consequences" shows that the Respondents did not conduct a thorough analysis or take sufficient care or any care in performing the balancing obligation.

240. In fact, Mr. Long gave evidence on cross-examination that no cost benefit analysis was done with regard to the imposition of civil rights restrictions on the citizens of the Province of Alberta.[251]

241. Further, given Dr. Hinshaw's evidence that there was no mental health specialist on the Scientific Advisory Group[252], and her lack of knowledge on the issue of how many people under the age of 30 have committed suicide as a result of the CMOH Orders[253], it is clear that the Respondents did not adequately assess the impacts of the CMOH Orders. It

[247] Affidavit of Abdullah Al-Shara, affirmed on January 19, 2021, at para 9 and 14 to 16.
[248] Hearing Transcript, February 14, 2022, AM, p. 8, lines 38 to 41, p. 14, lines 5 to 13, p. 15, lines 32 to 39, p. 20, lines 36 to 27,
[249] Hearing Transcript, April 4, 2022, p. 11, lines 19 and 21, p. 20, lines 26 to 27, p. 23, line 39, p. 79, line 20, and p. 80, line 4; Hearing Transcript, April 5, 2022, p. 84, line 6.
[250] Hearing Transcript, April 4, 2022, p. 20, line 30, p. 79, line 20, and p. 82, lines 10 and 21; Hearing Transcript, p. 84, line 11; Hearing Transcript, April 6, 2022, p. 61, line 12.
[251] Hearing Transcript, February 15, 2022, PM, p. 34, lines 14 to 18, 20 to 23, and 31.
[252] Hearing Transcript, April 5, 2022, p. 87, line 41.
[253] Hearing Transcript, April 5, 2022, p. 83, lines 25 to 26, and p. 87, lines 29 to 35.

remains an open question as to whether, for certain age cohorts, the CMOH Orders themselves have killed more people than COVID-19.

F. Is there institutional bias within the Court of Queen's Bench of Alberta that prevents the Applicants from receiving a fair hearing?

242. Ms. Ingram respectfully submits that the Court of Queen's Bench of Alberta's response to COVID-19 has created a reasonable apprehension of bias with respect to the matters at issue.

243. Even after the Respondents lifted or rescinded many of the CMOH Orders at issue here, including CMOH Orders requiring masking in public places, the Court of Queen's Bench of Alberta implemented its own NPIs, which included mandatory masking.

244. Ms. Ingram submits that a reasonable apprehension of bias with respect to the issues before this Court, including but not limited to the effectiveness and the legality of NPIs, was created by the Court of Queen's Bench of Alberta implementing its own NPIs above and beyond those promogulated by the Respondents, and even after the Respondents removed such measures. As a result, Ms. Ingram is concerned that she has not and will not be afforded a fair and impartial hearing.

245. Cloth masks of unspecified porosity may be as effective against COVID-19 as a chain-link fence is at preventing dust particles from blowing onto a neighbour's land given the relative size of a COVID-19 molecule in comparison to the porosity of the weave of most cloth masks, yet this NPI is evidently endorsed by the Court.[254] The mask requirements themselves are more about the theatre of public health than actual public health. The mask requirements only require a "covering" without any specifications as to the weave or porosity. The fact that someone could make a mask out of "non-medical" screen mesh material and be compliant tells you all you need to know about the *bona fide* "medical" necessity of the CMOH Orders.

246. The CMOH Orders do not specify any criteria with regard to the porosity of reusable cloth masks, which themselves can be reused for indefinite periods of time notwithstanding being saturated with bacteria or other contaminants.

247. The Court of Queen's Bench requires these masks and the hearing Justice routinely appeared in Court wearing a cloth mask. This raised grave concerns for Ms. Ingram with respect to a reasonable apprehension of bias regarding all issues related to NPIs and the ability of this Honourable Court to impartially listen to any evidence that contradicts those

[254] Hearing Transcript, February 14, 2022, AM, p. 38, lines 35 to 41, and p. 39, lines 1 to 5; and Hearing Transcript, February 22, 2022, AM, p. 56, lines, 31 to 40, p. 57, lines 1 to 41, p. 58, lines 1 to 31.

mandates of the Chief Justices of Alberta and the application of NPIs within the court process. Were these measures merely voluntary within the courts, these concerns would have been of a passing rather than an enduring concern.

248. In order to avoid a mistrial with respect to this issue, Ms. Ingram urges this Honourable Court to rule that the CMOH Orders are *ultra vires* section 29 and the overall purpose of the *PHA*, or in the alternative, that the CMOH Orders were not the subject of legislation "notwithstanding" the *Alberta Bill of Rights*. Any ruling as to the effect that the CMOH Orders were "reasonable" enough to afford them section 1 protection is irredeemably tainted with reasonable apprehension of bias.

PART VII: RELIEF SOUGHT

249. Ms. Ingram seeks the following relief:

a. A Declaration that all provisions of the CMOH Orders are of no force or effect as they offend sections 1(a), 1(c), 1(e) and 1(g) of the *Alberta Bill of Rights* and are accordingly *ultra vires* the CMOH and the Alberta Legislature pursuant to section 2 of the *Alberta Bill of Rights*.

b. A Declaration that the CMOH Orders are unlawful and are of no force and effect absent the Alberta Legislature passing that the *Public Health Act* is notwithstanding the *Alberta Bill of Rights*.

c. A Declaration that all provisions of the CMOH Orders are *ultra vires* the purpose of the *Public Health Act*.

d. A Declaration pursuant to section 24(1) of the *Charter* and Rule 3.15(1) of the *Alberta Rules of Court* that the CMOH Orders currently in force are unreasonable because they disproportionately limit:

    i. section 2 of the *Charter*; and

    ii. section 7 of the *Charter*.

e. Declarations pursuant to section 52(1) of the *Constitution Act, 1982* that the CMOH Orders are of no force or effect because they unjustifiably infringe:

    i. section 2 of the *Charter*; and

ii. section 7 of the *Charter*.

f. A Declaration that the CMOH Orders issued since March 2020 regarding business restrictions imposed due to COVID-19 are *ultra vires* section 29 of the *Public Health Act* and are of no force or effect.

g. Costs of the Originating Application.

h. Such further and other relief as counsel may advise and this Honourable Court deems just and equitable.

ALL OF WHICH IS RESPECTFULLY SUBMITED this 10 day of June 2022.

Jeffrey R. W. Rath
Counsel for the Applicant, Rebecca Marie Ingram

PART VIII: LIST OF AUTHORITIES

TAB	NAME AND CITATION
CASE LAW	
1.	*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII), [2009] 2 SCR 567.
2.	*Authorson v. Canada (Attorney General)*, 2003 SCC 39 (CanLII), [2003] 2 SCR 40.
3.	*B.(R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 SCR 315.
4.	*Beaudoin v. British Columbia*, 2021 BCSC 512 (CanLII).
5.	*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 SCR 307.
6.	*Canada (Attorney General) v. Bedford*, 2013 SCC 72 (CanLII), [2013] 3 SCR 1101.
7.	*Carter v. Canada (Attorney General)*, 2015 SCC 5 (CanLII), [2015] 1 SCR 331.
8.	*Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 SCR 835.
9.	*Federal Republic of Germany v. Rauca*, 1982 CanLII 3177 (ON SC).
10.	*Gateway Bible Baptist Church et al. v. Manitoba et al.*, 2021 MBQB 219 (CanLII).
11.	*Hunter et al. v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 SCR 145.
12.	*Ingram v. Alberta (Chief Medical Officer of Health)*, 2021 ABQB 343 (CanLII).
13.	*Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 (CanLII), [2013] 3 SCR 810.
14,	*Lavallee v. Alberta (Securities Commission)*, 2009 ABQB 17 (CanLII).
15.	*Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (CanLII), [2018] 2 SCR 293.
16.	*Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] SCR 613.
17.	*Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 (CanLII), [2015] 1 SCR 3.

18.	*New Brunswick (Minister of Health and Community Services) v. G.(J.),* 1999 CanLII 653 (SCC), [1999] 3 SCR 46.
19.	*Prairie Well Servicing Ltd. v. Tundra Oil and Gast Ltd.,* 2000 MBQB 52 (CanLII).
20.	*R v. Beare,* 1988 CanLII 126 (SCC), [1988] 2 SCR 387.
21.	*R. v. Big M Drug Mart Ltd.,* 1985 CanLII 69 (SCC), [1985] 1 SCR 295.
22.	*R. v. Conway,* 2008 ONCA 326 (CanLII).
23.	*R. v. Edwards Books and Art Ltd.,* 1986 CanLII 12 (SCC), [1986] 2 SCR 713.
24.	*R v. Heywood,* 1994 CanLII 34 (SCC), [1994] 3 SCR 761.
25.	*R. v. Morgentaler,* 1988 CanLII 90 (SCC), [1988] 1 SCR 30.
26.	*R. v. Oakes,* 1986 CanLII 46 (SCC), [1986] 1 SCR 103.
27.	*R. v. R.N.,* 1989 ABCA 177 (CanLII).
28.	*RJR-MacDonald Inc. v. Canada (Attorney General),* 1995 CanlII 64 (SCC), [1995] 3 SR 199.
29.	*Roach v. Canada (Minister of State for Multiculturalism & Culture),* 1994 CarswellNat93, 1994 CanLII 3453 (FCA).
30.	*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission),* 1990 CanLII 135 (SCC), [1990] 1 SCR 425.
31.	*Toronto District School Board v. Ontario,* 2021 ONSC 4348 (CanLII).
32.	*White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23 (CanLII), [2015] 2 SCR 182.
LEGISLATION & REGULATIONS	
33.	*Alberta Bill of Rights,* RSA 2000, c A-14.
34.	Bill 1, *Critical Infrastructure Defence Act,* 2nd Sess, 30th Leg, Alberta, 2020 (assented to 17 June 2020), SA 2020, c C-32.7.
35.	Bill 9, *Emergency Management Amendment Act, 2020,* 2nd Sess, 30th Leg, Alberta, 2020 (assented to 20 March 2020), SA 2020, c 2.

36.	Bill 10, *Public Health (Emergency Powers) Amendment Act, 2020,* 2nd Sess, 30th Leg, Alberta, 2020 (assented to 2 April 2020), SA 2020, c 5.
37.	Bill 24, *COVID-19 Pandemic Response Statutes Amendment Act, 2020,* 2nd Sess, 30th Leg, Alberta, 2020 (assented to 26 June 2020), SA 2020, c 13.
38.	*Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Constitution Act 1982* (UK), 1982, c 11.
39.	CMOH Order 26-2020.
40.	CMOH Order 38-2020.
41.	CMOH Order 42-2020.
42.	CMOH Order 02-2021.
43.	CMOH Order 22-2021.
44.	*Emergency Management Act,* RSA 2000, c E-6.8.
45.	*Public Health Act,* RSA 2000, c P-37.
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48.	Peter Bowal & Dustin Thul, *Bill of Rights in Canada* (1 January 2013), online: LawNow Magazine https://www.lawnow.org/bills-of-rights-in-canada/#:~:text=Conclusion,Bills%20of%20Rights%20in%20Canada.