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FILED
Sep 01, 2021
by Email
CLERK OF THE COURT

JST
Sept. 20, 2021

COURT FILE NO.	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 THE PROVINCE OF ALBERTA and THE CHIEF MEDICAL OFFICER OF HEALTH
DOCUMENT	**PRE-TRIAL FACTUM OF THE APPLICANT**
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PRE-TRIAL FACTUM OF THE APPLICANT REBECCA MARIE INGRAM

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PART I OVERVIEW

'Quarantine' is when you restrict the movement of sick people, 'Tyranny' is when you restrict the movement of healthy people. – author unknown

Holding both the executive and the legislature accountable is a guaranteed right that citizens can exercise by judicial review or at the ballot box. Emergencies present a challenge to such accountability and even by emergency standards, COVID-19 has presented serious and complicated governmental accountability challenges. Therefore, the current COVID-19 situation has presented questions of how we ensure that the Alberta Executive and the Legislature are held accountable[1] and what are their limits of power are in a public health emergency such as the one that has unfolded and precipitated over the last year and a half.

While freedom is not an absolute, it should be regarded as precious and there should always be the strongest possible presumption in its favour. If the Government infringes or takes away fundamental liberties from the people whom it represents, the Government must demonstrate beyond question that they are acting in a way that is both proportionate and absolutely necessary.

The Government of Alberta has promulgated in excess of 100 public health orders of various degree and effect on the lives of all Albertans, from some that are minimally intrusive to full out breaches of *Charter* rights and freedoms. Certain public health orders shut-down whole sectors of the economy, other orders purported to place limits on whom we can and cannot socialize with, while others effectively restricted the ability to worship in the manner of ones' belief. The absurdities of the measures have been clearly evident: flying on a plane for five hours with 300 people has been allowed, but playing outdoor pond hockey at one point was "prohibited" and led to children being handcuffed and arrested; shopping at Costco or Walmart has been totally fine, but working out at a gym with a small handful of people was forbidden by the measures; riding the Calgary LRT was allowed, but dining at a half empty restaurant was not.

This action raises some important judicial challenges and questions. For starters, the interpretation of the legislation that the Government of Alberta has been issuing the various public health orders under, has the government interpreted it correctly? Is the Government of Alberta even acting under the appropriate statute? How do we protect our most basic rights and freedoms that are not only taken for granted, but are also so basic that they have never been infringed upon nor have they ever been subject to judicial consideration?

None of the measures and restrictions imposed by the Chief Medical Officer of Health have been subject to any legislative scrutiny or public debate. There has been an absence of the regular accountability expected, such as due process and the rule of law. Notwithstanding the challenges imposed by the virus and the corresponding measures, the courts retain critical accountability checks during times of a public health emergency.

[1] MacDonnell, Vanessa. "Ensuring Executive and Legislative Accountability in a Pandemic" (2020) University of Ottawa Press – *Vulnerable: The Law, Policy and Ethics of COVID-19*, 2020 CanLIIDocs 1866, at 141.

Contrary to what Counsel for Alberta will argue, there were *prima facie* infringement of the *Canadian Charter of Rights and Freedoms*[2] (the "***Charter***") and the *Alberta Bill of Rights*.

It will be argued that the Orders promulgated by the Chief Medical Officer of Health were not within the authority bestowed on the position by the *Public Health Act*[3]. It will be further argued that the Orders have breached various provisions of the *Charter* and the *Alberta Bill of Rights*. Accordingly, the Government of Alberta must be held accountable such that the government knows the proper process it must follow to encroach on lawfully protected rights and freedoms. To do otherwise would be a slippery slope as it would essentially provide the government a *carte blanche* to act how it wants devoid of any accountability any time a "novel" virus or bacteria is isolated that makes the top 20 cases of death list by killing 1000 senior citizens with multiple comorbidities. There were five other causes of death with higher mortality numbers than COVID-19 yet none received the attention or emergency status as did this "novel" virus.

Given the simple fact that the vast majority of COVID-19 deaths occur in those over the age of 70, which represents a very identifiable vulnerable group. And further, given that the bulk of this vulnerable population is likely found in long term care facilities, which can be easily isolated and for which effective public health measures could have been implemented, or at the very least attempted, such measures targeting long term care facilities could have been implemented without interfering with the bulk of the Alberta population which has been at little to no risk from COVID-19 mortality and for many of whom symptoms ranged from non-existent, to mild flu or cold like symptoms, to a "nasty" flu or cold.

Absent from Alberta's evidentiary record, even though it was alleged to have been considered, is any analysis of the deleterious effects and collateral damage resulting from the measures imposed by the Chief Medical Officer of Health's public health orders. There is not even proof that any were considered or contemplated.

Statistics Canada Data or excess mortality begs the question as to whether more people have in fact died as a consequence of the lockdowns measures in drug overdose deaths, alcohol related deaths and suicides than in fact died from COVID-19.

While the measures imposed by the CMOH Orders **may** have stemmed the COVID-19 virus, questions remain as to whether the measures had any measurable effect, whether the measures were proportionate to the risks, whether the measures were absolutely necessary, and whether the measures could be reasonably justified in accordance with constitutional principles.

[2] *The Constitution Act, 1982, Part I: Canadian Charter of Rights and Freedoms*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11
[3] *Public Health Act*, RSA 2000, c P-37 ("***PHA***"), **Tab 3.**

PART II FACTS

1. The Applicant, Rebecca Marie Ingram ("**Ms. Ingram**" or the "**Applicant**"), resides in the City of Calgary, in the Province of Alberta.

2. The Respondents, Her Majesty the Queen in Right of the Province of Alberta (the "**Government of Alberta**") and the Chief Medical Officer of Health (the "**CMOH**") for Alberta are represented by the Attorney General of Alberta. Collectively, the Government of Alberta and the CMOH are referred herein as the "**Respondents**".

3. On March 16, 2020, the CMOH promulgated the first public health order: RECORD OF DECISION-CMOH Order 01-2020[4]. Since then, the CMOH has pronounced over 100 public health orders ("**CMOH Orders**" or "**Orders**") in response to the communicable viral infection SARS-CoV-2 ("**COVID-19**") that have abrogated constitutionally protected rights and freedoms as guaranteed by the *Alberta Bill of Rights*[5].

4. On March 17, 2020, the Lieutenant Governor in Council declared a state of public health emergency in Alberta, which expired after 90 days.

5. On November 24, 2020, on the recommendation of the Minister of Health, the Lieutenant Governor in Council declared a second 90-day provincial state of public health emergency pursuant to sections 52.1(1) and 52.8 of the *Public Health Act*, RSA 2000, c P-37 (the "***PHA***"). Additional prohibitions on and penalization of the ability of Alberta residents to move about, conduct business, be with family and friends, obtain necessities of life, manifest their religious beliefs, and access personal care products and services were implemented through subsequent CMOH Orders.

6. The CMOH Orders have targeted certain businesses in Alberta and ordered them, under the threat of law, to close (the "**Business Restrictions**"). These compulsory and coercive measures have effectively shut-down whole sectors of the province's economy.

7. Ms. Ingram is the sole shareholder and director of a small business located in the Province of Alberta, The Gym Fitness Club Ltd. ("**The Gym**"). As a small business owner, The Gym is Ms. Ingram's primary source of income and way of making of living for her and her five children. As a result of the CMOH Orders, Ms. Ingram was required to close The Gym for three months beginning on March 18, 2020. A subsequent CMOH Order pronounced by the Government of Alberta and the CMOH on December 11, 2020, required the Ms. Ingram close The Gym as of 12:00 a.m. on Sunday, December 13, 2020.

8. The Respondents have not tendered evidence that demonstratively prove that lockdowns, in the form of basic guaranteed rights restrictions, have any clear benefit over other voluntary measures.

9. COVID-19 is a disease that disproportionately affects older members of our population. The Government of Alberta's own statistics show that mortality rate of COVID-19 is 21%

[4] CMOH Order 01-2020, **Tab 38**.
[5] *Alberta Bill of Rights*, RSA 2000, c A-14, **Tab 1**.

for those above the age of 80 with a dramatic decline in mortality rates as the population gets younger. [6] The mortality rate is 0.003% for the age group where case counts are the highest, the 30 – 39 years of age category.

Table 6. Total Hospitalizations, ICU admissions and deaths (ever) among COVID-19 cases in Alberta by age group

Age Group	Cases	Hospitalized			ICU			Deaths		
	Count	Count	Case rate	Pop. rate	Count	Case rate	Pop. rate	Count	Case rate	Pop. rate
Total	247786	10214	4.1	231.0	1925	0.8	43.5	2360	1.0	53.4
Under 1 year	1491	67	4.5	129.5	14	0.9	27.1	0	0.0	0.0
1-4 years	9379	46	0.5	21.2	8	0.1	3.7	0	0.0	0.0
5-9 years	12980	27	0.2	9.7	12	0.1	4.3	0	0.0	0.0
10-19 years	33309	169	0.5	31.7	24	0.1	4.5	0	0.0	0.0
20-29 years	46392	563	1.2	95.1	68	0.1	11.5	10	0.0	1.7
30-39 years	47420	1016	2.1	142.0	152	0.3	21.2	15	0.0	2.1
40-49 years	38427	1258	3.3	206.8	265	0.7	43.6	47	0.1	7.7
50-59 years	28336	1779	6.3	323.0	449	1.6	81.5	119	0.4	21.6
60-69 years	16344	1789	10.9	377.1	513	3.1	108.1	303	1.9	63.9
70-79 years	6989	1614	23.1	619.3	330	4.7	126.6	495	7.1	189.9
80+ years	6543	1883	28.8	1342.4	89	1.4	63.4	1370	20.9	976.7
Unknown	176	3	1.7	NA	1	0.6	NA	1	0.6	NA

10. It is worth noting that in the 30 – 39 year old category, that the combined deaths arising from alcohol, opioid and other drug overdoses, and suicide likely surpass COVID-19 deaths for this group and the question need to be answered as to whether these deaths in 2020 over and above the numbers in 2019 were a direct result of the measured imposed by the CMOH Orders.

11. Comorbidities, or underlying health conditions, have a strong influence on an individual's health outcome as a result of a COVID-19 infection. As the Government of Alberta's graph shows, of all of the individuals that died of COVID-19, 76.4% had three or more underlying health conditions – these are very vulnerable and susceptible individuals. [7]

[6] Government of Alberta, COVID-19 Alberta statistics, https://www.alberta.ca/stats/covid-19-alberta-statistics.htm#characteristics (retrieved August 27, 2021), Tab #

[7] Government of Alberta, COVID-19 Alberta statistics, https://www.alberta.ca/stats/covid-19-alberta-statistics.htm#comorbidities (retrieved August 27, 2021), Tab #.

Table 8. Number and percent of COVID-19 cases with no comorbidities, one comorbidity, two comorbidities, or three or more comorbidities by case severity (non-severe, hospitalized but non-ICU, ICU but not deceased, and deceased), all age groups and both sexes combined, Alberta. Comorbitities included are: Diabetes, Hypertension, COPD, Cancer, Dementia, Stroke, Liver cirrhosis, Cardiovascular diseases (including IHD and Congestive heart failure), Chronic kidney disease, and Immuno-deficiency. Data updated on 2021-08-25.

	Non-Severe		Non-ICU		ICU		Deaths	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
No comorbidity	162179	68.5%	1795	24.6%	287	19.7%	75	3.2%
With 1 condition	48864	20.6%	1396	19.1%	335	23.0%	162	6.9%
With 2 conditions	14968	6.3%	1283	17.6%	329	22.6%	319	13.5%
With 3 or more conditions	10665	4.5%	2821	38.7%	504	34.6%	1804	76.4%

12. The ten comorbidities that the Government of Alberta tracks and publishes statistics for are found below.[8]

Table 7. Number and percent of health conditions among COVID-19 deaths. Data updated on 2021-08-25.

Condition	Count	Percent
Hypertension	1982	84.0%
Cardio-Vascular Diseases	1244	52.7%
Renal Diseases	1213	51.4%
Dementia	1067	45.2%
Diabetes	1064	45.1%
Respiratory Diseases	966	40.9%
Cancer	561	23.8%
Stroke	465	19.7%
Liver Diseases	105	4.4%
Immuno-Deficiency Diseases	71	3.0%

Note:
One individual can have multiple conditions.

Obesity is absent in this list even though the United States of America's Center for Disease Control lists it as one of the comorbidities in COVID-19 deaths it tracks.

13. On December 8th and 11th, 2020, the CMOH proclaimed further restrictions including, but not limited to, a complete prohibition on indoor and outdoor social gatherings (with minor exemptions), further reduction in attendance at places of worship, province wide mandatory masking, reduction or restrictions for in-person dining services at restaurants, further capacity limits on certain retail businesses, and the closing of all business that provide recreational or entertainment, personal services, or wellness services.

14. At the peak, on May 9, 2021, the Government of Alberta recorded 25,129 active COVID-19 cases, representing a "case positive" proportion of 0.57% of Alberta's population.[9]

[8] Government of Alberta, COVID-19 Alberta statistics, https://www.alberta.ca/stats/covid-19-alberta-statistics.htm#comorbidities (retrieved August 27, 2021),
[9] Government of Alberta, COVID-19 Alberta statistics, https://www.alberta.ca/stats/covid-19-alberta-statistics.htm#total-cases (retrieved August 28, 2021)

15. The Government of Alberta has not been pursuing a COVID-19 zero policy, what this means is that the Government of Alberta has decided that they are accepting a certain level of infections and corresponding deaths, but what those "acceptable" rates have never been provided nor does it appear to have been factored into restaurant, gym or other business closures.

PART III ISSUES

16. The Applicant submits that the following issues are unresolved:

    a. Have the Respondents inappropriately interpreted the *Public Health Act*? And as a result:

        i. Are the CMOH Orders *ultra vires* the purpose of the *Public Health Act*?

        ii. Are the Business Restriction *ultra vires* section 29 of the Public Health Act?

    b. Do the CMOH Orders infringe on Ms. Ingram's *Charter* rights and freedoms?

    c. Are the infringements saved by s. 1 of the *Charter*?

    d. Do the CMOH Orders infringe s. 7 of the *Charter* and are the infringements justifiable?

    e. Do the CMOH Orders offend provisions of the *Alberta Bill of Rights*?

PART IV SUBMISSIONS

17. The Applicant pleads that the CMOH Orders are *ultra vires* the purpose of the *PHA*. Furthermore, the Applicant submits that the CMOH Orders that restrict business activity, are *ultra vires* s. 29 of the *PHA*.

18. Further, or in the alternative, Ms. Ingram submits that the measures imposed by the CMOH Orders have infringed upon her rights and freedoms as guaranteed by the *Charter* and the infringements are not saved by s. 1. The Applicant relies on the principles articulated in *R v Oakes*[10] and the test developed therein and frequently referred to as the "**Oakes Test**".

19. In the further alternative, Ms. Ingram submits that the CMOH Orders breach her rights protected by the *Alberta Bill of Rights*.

20. The Respondents have stripped fundamental liberties from the people of Alberta while failing to adequately demonstrate that the restrictions implemented by the CMOH Orders are proportionate and declared with absolute necessity considering the science and their collateral consequences.

[10] *R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC) ("***R v Oakes***"), **Tab 27**.

21. COVID-19 in Canada is a serious illness for elderly people who are grappling with multiple underlying health conditions and live-in congregate care settings. The question is does it justify stripping citizens of their right to earn a livelihood or freely associate with their fellow citizens who are not at serious risk of negative COVID-19 outcomes.

22. There is a substantially and marked difference in risk between the oldest and the youngest people. For those over the age of 70, COVID-19 presents a considerable risk, and for those over 80, the risk is severe as the mortality rate is nearly 21%. In contrast, "for kids 0 to 9, the risk of an ICU admission for seasonal influenza in the year before COVID was roughly equal to their risk of an ICU admission for COVID."[11] Furthermore, "kids aged 5 to 14 had a 140 times greater risk of an emergency department visit for a sports related injury in 2019 than their risk of COVID-related hospital admission since March of 2020."[12]

23. The most at-risk Albertans have been those over the age of 70 in nursing homes, hospitals and palliative care facilities. There have been minimal or negligible measures implemented by the Respondents to protect this highly vulnerable portion of the population.

24. While the CMOH takes the position in her affidavit that "my specialized training equips me to treat the population of Alberta as my patient"[13], it is apparent from the measures implemented by the CMOH Orders and the deleterious effects caused by the measures, that the CMOH has neglected all of its patients that were not infected with COVID-19. The measures may have in fact killed "patients" under the age of 60 through the unintended consequences of drugs, alcohol and suicides associated with the restrictions imposed by the CMOH Orders.

25. COVID-19 was not even the leading cause of death in Alberta in 2020, it was sixth.[14]

Year	Leading_Cause_Death	Ranking	Deaths
2020	Organic dementia	1	2081
2020	All other forms of chronic ischemic heart disease	2	1897
2020	Malignant neoplasms of trachea, bronchus and lung	3	1563
2020	Other ill-defined and unknown causes of mortality	4	1464
2020	Other chronic obstructive pulmonary disease	5	1178
2020	COVID-19, virus identified	6	1084
2020	Acute myocardial infarction	7	1067
2020	**Accidental poisoning by and exposure to drugs and other biological substances**	**8**	**920**
2020	Diabetes mellitus	9	743
2020	Atherosclerotic cardiovascular disease, so described	10	670
2020	**Intentional self-harm (suicide) by hanging, strangulation and suffocation**	**18**	**327**
2020	**Alcoholic liver disease**	**24**	**273**

[11] Government of Alberta, Dr. Deena Hinshaw "Learning to live with COVID-19" (August 4, 2021), **Tab 48**, https://www.alberta.ca/article-learning-to-live-with-covid-19.aspx.
[12] Ibid.
[13] Affidavit of Dr. Deena Hinshaw (Affirmed July 12, 2021), at 17.
[14] Government of Alberta, Leading Causes of Death, updated August 13, 2021: https://open.alberta.ca/opendata/leading-causes-of-death

26. The Respondents have taken the "easy way out" by instituting severe and punishing restrictions and lockdowns instead of developing a proper emergency management plan that considers all the risks, then implementing it in a manner that is the least intrusive to people's lives and well-being. The Respondents have tendered over 3,000 pages of affidavit evidence and expert reports, including from the Acting Managing Director of the Alberta Emergency Management Agency ("**AEMA**"), yet has failed to provide a single pieces of evidence that a plan was formulated let alone any evidence of a plan's execution.

27. Neither have the Respondents provided any assurances, in their evidentiary record, that the emergency measures did not produce more deaths than the COVID-19 virus itself.

28. The Respondents simply chose to implement punishing lock-downs and intrusive restrictions while waiting for a silver bullet to arrive: a vaccine. There is not a single sliver of evidence tendered by the Respondents that alternative solutions were considered, analyzed, properly weighed and that the best solution was selected. But it lucked out, the private sector developed a vaccine in record time and various vaccine products arrived in the province within a year of the discovery of the virus.

29. The CMOH Orders are arbitrary and capricious, require frequent modification or amendments to fix ambiguities or injustices, and set arbitrary boundaries between which Alberta businesses are allowed to operate and which ones are not.

30. The Applicant adopts the arguments of the other Applicants that pertain to and support her position.

31. Further submission will be made in the Applicant's Reply Factum and during the hearing of this matter.

i) Have the Respondents inappropriately interpreted the *Public Health Act*?

Principles of Statutory Interpretation

32. The Applicant submits that the Respondents have incorrectly interpreted the *PHA*.

33. The courts have established clear principles for statutory interpretation that serve to guide us with the issues presented in the case at bar.

34. The judicial function in considering and applying statutes is one of interpretation alone: the court has only to declare what the law is, not what it ought to be.[15]

35. The purpose of a statute and the intention of the legislative body are critical in statutory interpretation. The Supreme Court of Canada (the "**SCC**") has adopted the modern or purposive approach to statutory interpretation:

[15] *Canadian Pacific Railway v James Bay Railway*, [1905] 36 SCR 42, 1905 CarswellNat 33, at 54, **Tab 10**.

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [16]

36. The purpose of the *PHA* and the intentions of the legislature are to be determined on the basis of intrinsic and admissible extrinsic sources regarding the *PHA*'s legislative history and the context of it coming into force.[17]

37. The Respondents appear to be reading s. 29(2.1) of the *PHA* as bestowing the position an almost unlimited range of legal powers to impose duties and restrict liberties, rights and freedoms in order to contain COVID-19. The Respondents have failed to tender any "intrinsic and admissible extrinsic sources" in support of such a broad and pervasive interpretation of the *PHA*.

38. There is no proof that the legislature intended to provide the CMOH or any Medical Officer of Health ("**MOH**") such broad powers. The Respondents have not tendered a single source to substantiate or support their position of such broad powers the CMOH purports to have declared the impugned Orders under.

39. While it is clear from the *Interpretation Act*[18] that an enactment "shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects"[19], the SCC has established that clarity and certainty are necessary when an enactment removes an individual's liberty:

> A related principle is that enactments which take away the liberty of the subject should be clear and any ambiguity resolved in favour of the subject.[20]

40. While this doctrine has been developed in the criminal law context, the Applicant submits that it is appropriate and applicable when legislation contemplates restrictions or breaches of *Charter* rights or other statutorily protected rights and freedoms. Therefore, the impugned provisions must be construed strictly.

41. The Respondents must convince this Honourable Court that the legislature intended to provide any MOH and the CMOH such broad powers. Unfortunately for the Respondents, there is no evidence of such intention as the *PHA* is rather silent on its purpose. Nor is there evidence that the purpose of the *PHA* calls for such broad powers.

42. The *PHA* must be read with granting powers to any of the regional MOH and these powers are restricted within the purpose of those *PHA*. As s. 1(bb) of the *PHA* states, the medical officer of health "includes the Chief Medical Officer and the Deputy Chief Medical

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[16] *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC), 1998 CarswellOnt 1, at 21, **Tab 34**; *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, at 26, **Tab 9**. This quote has been adopted by the SCC in *Rizzo & Rizzo Shoes Ltd., Re*, and *Bell ExpressVu Ltd. Partnership v. Rex and* quoted from Driedger, *Construction of Statutes* (2nd ed. 1983) at p. 87.
[17] *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 (SCC), 1999 CarswellBC 778, at para 25, **Tab 24.**
[18] *Interpretation Act*, RSA 2000, c I-8, s. 10, **Tab 2**.
[19] *Interpretation Act*, RSA 2000, c I-8, s. 10, **Tab 2**.
[20] *R v D.L.W.*, 2016 SCC 22, at para 55, **Tab 22.**

Officer". Therefore, the CMOH does not possess any additional extraordinary powers that a regional MOH does not posses by virtue of the *PHA*.

43. The powers of the MOH and the CMOH are for the purposes of public health and for controlling communicable diseases. These powers do not include the authority to close businesses or impose restrictions on uninfected individuals or groups of individuals. If the Alberta Legislature intended to provide such powers to the MOH or the CMOH, then it would have included such express language in the *PHA* to ensure clarity and conform with the clarity and certainty principles embraced by the SCC in *R v D.L.W.*[21]

44. Counsel for the Respondents has previously submitted that while s. 29(2.1)(b) is rather broad, it has built-in limits within the *PHA*.[22] The Respondent's Counsel argued that the first limit being s. 29(2.1)(a) and the second limit being the introductory clause of subsection (2.1) "Where the investigation confirms the existence of a public health emergency."[23] Counsel for the Respondents has argued that as public health emergency is defined in the *PHA*, this forms part of the second limit.

45. The Applicant agrees with the restrictions argued by the Respondent's Counsel, but submits that there are further limits imposed by the totality of the other subsections within s. 29, specifically s. 29(4) and the class of identifiable individuals listed therein.

Are the CMOH Orders *ultra vires* the purpose of the *Public Health Act*?

46. Section 29(2)(b) of the *PHA* provides:

> (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) by order
>
> (A) prohibit a person from attending a school,
>
> (B) prohibit a person from engaging in the person's occupation, or
>
> (C) prohibit a person from having contact with other persons or any class of persons

[21] Ibid.
[22] Transcript of Proceedings, Court of Queen's Bench of Alberta, April 21, 2021, 6:16 – 7:16.
[23] *PHA*, s. 29(2), **Tab 3**.

> for any period and subject to any conditions that the medical officer of health considers appropriate, **where the medical officer of health determines that the person's engaging in that activity could transmit an infectious agent**;
>
> (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.[24]
>
> **[emphasis added]**

47. There is no expressed provision in the *PHA* that allows for the quarantine or isolation of uninfected individuals. The provisions in s. 29(2)(b)(i) provide a variety of authority that can only be discharged by orders within the confines of subsection (ii). Furthermore, the powers outlined in subsection (ii) are specific to a person's conduct has the potential to "transmit an infectious agent."

48. An uninfected individual is incapable of transmitting an "infectious agent", it is biologically not possible. The powers bestowed pursuant to the *PHA* are constrained and are aimed at occurrences where transmission of an infectious agent is possible. There is no other plausible interpretation that restriction of the infected may be permissible, whereas restrictions on the uninfected are not.

49. Counsel for the Respondents has submitted that certain limits do exist on the delegated authority[25] in s. 29(2.1) of the *PHA*, specifically that s. 29(2) imputes a restriction on this "broad" delegated authority.[26]

50. Counsel for the Respondents will argue vigorously that these broad powers under s. 29(2.1) include measures targeted at uninfected individuals or classes of persons, but this argument must be dismissed for the fact that s. 29 in its entirety focuses on a "person". The term "person" is elaborated on in s. 29(4):

> (4) The jurisdiction of a medical officer of health extends to any person who is known or suspected to be
>
> (a) infected with a communicable disease, illness or health condition,
>
> (b) a carrier,
>
> (c) a contact,
>
> (d) susceptible to and at risk of contact with a communicable disease, illness or health condition, or
>
> (e) exposed to a chemical agent or radioactive material,
>
> whether or not that person resides within the boundaries of the health region.[27]

51. It is not inconceivable to understand how the Orders were applicable to the majority of these categories: the infected; a carrier (infected but not symptomatic)[28]; a person who had associated with an infected person "to a sufficient degree to have had the opportunity to

[24] *PHA*, s. 29, **Tab 3.**
[25] Transcript of Proceedings, April 21, 2021, p. 6: 16 – 7:16.
[26] Transcript of Proceedings, April 21, 2021, p. 6: 20-24.
[27] *PHA*, s. 29(4), **Tab 3**.
[28] *PHA*, s. 1(c), **Tab 3**.

become infected"[29]; and a person exposed to dangerous materials. At issue is the category of "susceptible" persons as it is overly broad and ambiguous.

52. For the Orders to be applicable to persons defined in s. 29(4)(d), they must be identifiable and based on factual information that this person is both susceptible and at a risk "of contact with a communicable disease, illness or health condition". The susceptibility must be genuine, and the risk must not be trivial or arbitrary – this category cannot be a catch all for the healthy, uninfected, and at an average risk of coming into contact with the virus.

53. Section 29(4) does not include uninfected individuals who have not had any contact with a COVID-19 confirmed individual. They pose no risk and therefore are not subject to any restrictions within this section. Any controls found within an order purporting to restrict such individuals is *ultra vires*. Uninfected individuals who pose negligible risk and are at a very low risk of contagion must not be subject to isolation or quarantine. The Respondents have not met the burden of proof to justify such measure. In actuality, the Respondents have not tendered a sliver of evidence proving an heightened risk for this group of individuals to justify such draconian and *Charter* breaching measures.

54. Therefore, the powers in s. 29 are restricted to "persons" who are infected with a communicable disease and it is clear that it is not within the purpose or scope of the *PHA* to impose restrictions on uninfected persons (or a person).

Are the Business Restriction are *ultra vires* section 29 of the *Public Health Act*?

55. Section 29, and specifically s. 29(2.1), of the *PHA* does not provide the CMOH the expressed or implied powers to unilaterally impose restrictions and closures on businesses or close whole sectors of the provincial economy. There is zero mention of businesses or corporations within s. 29.

56. In contrast, s. 30 of the *PHA* provides unquestionable clarity in its intent to provide powers to close a place, including a business, and provides clear constraints on that authority. Section 30 strictly adheres to the principles of clarity and certainty as developed in caselaw including the SCC's decision in R v *D.L.W.* Section 30 states:

> **Entry for examination**
>
> 30(1) Where a medical officer of health knows or has reason to believe that
> (a) a person suffering from a communicable disease referred to in section 20 may be found in any place, or
> (b) that any place may be contaminated with such 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.
>
> (2) Where a medical officer of health is conducting an examination pursuant to subsection (1), the medical officer of health may
> (a) order the detention of any person, and

[29] *PHA*, s. 1(h), **Tab 3.**

(b) order the closure of the place, including any business that is carried on in it, until the medical officer of health has completed the investigation, but not for a period of more than 24 hours.

(3) When the medical officer of health is not able to complete the investigation within 24 hours, the medical officer of health may make an application to a judge of the Provincial Court for an order to extend the period of detention or closure under subsection (2) for an additional period of not more than 7 days, and the judge may make the order accordingly.[30]

57. Sections 29 and 30 cannot be read using different interpretive approaches. Furthermore, their construction would have followed the same rules.

58. It is therefore clear that the law makers intended to provide the specific powers under s. 30, and by deductive reasoning, the same drafters did not intend to provide powers in s. 29 to close businesses. If they did, then those powers would have been as expressively clear and limited in s. 29 as they are in s. 30.

59. Section 29 of the *PHA* does not provide any powers to shut down businesses, has no authority over businesses, instead its only authority is over people, specifically, "identifiable people". The purpose of s. 29 is found in its heading "Isolation and Quarantine". One does not isolate or quarantine a business in the manner prescribed in s. 29.

60. In Ms. Ingram's instance, her business, The Gym, had no recorded case of transmission of the communicable disease COVID-19.[31] The Gym posed minimal risk to the community of COVID-19 transmission. Even if one of the reasons to investigate under s. 30 was satisfied, Ms. Ingram's business would have been closed for 24 hours, or up to seven days pursuant to a court order. In contrast, under the unlawfully asserted authority of the CMOH under the guise of s. 29(2.1), The Gym was closed for ten months pursuant to the CMOH Orders with inadequate compensation being paid and putting the business at risk of bankruptcy.

61. Alternatively, the Legislature could have amended the *PHA* to bestow such broad authority using clear words onto the CMOH or MOHs at the onset of COVID-19.

ii) Do the CMOH Orders infringe on Ms. Ingram's *Charter* rights and freedoms?

62. Ms. Ingram submits that her ss. 2(a), 2(c), 2(d), 7 and 15 *Charter* rights were infringed by the impugned CMOH Orders and that these infringements are not saved by s. 1.

63. The infringement of Ms. Ingram's freedom of association (s. 2(c)), freedom of peaceful assembly (s.2(d)), and liberty and security interests (s. 7) are common to the various areas of her life that CMOH Orders interfere with.

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[30] *PHA*, s. 30, **Tab 3.**

[31] Affidavit of Rebecca Marie Ingram (sworn December 8, 2020), para. 25; Affidavit of Rebecca Marie Ingram (sworn January 22, 2021), at 22.

64. This section will canvass the law as it pertains to these common *Charter* rights and freedoms and will then delve into the particulars of the various infringements.

Freedom of Peaceful Assembly

65. The SCC has referred collectively to the s. 2 freedoms as protecting rights "fundamental to Canada's liberal democratic society."[32]

66. Even though there is limited jurisprudence with respect to s. 2(c) rights, the Federal Court of Appeal has held that "freedom of peaceful assembly was geared toward protecting the physical gathering together of people".[33]

67. Peaceful assembly is a collectively held right, by definition it is "a group activity incapable of individual performance."[34]

Freedom of Association

68. A purposive approach to freedom of association defines the content of this right by reference to its purpose: "to recognize the profoundly social nature of human endeavors and to protect the individual from state-enforced isolation in the pursuit of his or her ends".[35]

69. Freedom of association allows the achievement of individual potential through interpersonal relationships and collective action.[36] It protects the collective action of individuals in pursuit of their common goals.[37]

70. The SCC in *MPAO*, held that from a purposive approach, s. 2(d) protects three classes of activity:

    a. the right to join with others and form associations;

    b. the right to join with others in the pursuit of other constitutional rights; and

    c. the right to join with others to meet on more equal terms the power and strength of other groups or entities. [38]

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[32] *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, 2015 CarswellOnt 210 [***MPAO***], supra, at 48, **Tab 20.**
[33] *Roach v Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FC 406, 1994 CarswellNat 1463 [***Roach***], at 51, **Tab 36.**
[34] *MPAO*, supra, at 64, **Tab 20.**
[35] *MPAO*, supra, at 54, **Tab 20**, citing from *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, 1987 CanLII 88 (SCC) [***Re Public Service***], at 90, **Tab 31.**
[36] *Dunmore v Ontario (Attorney General)*, 2001 SCC 94, at 17, **Tab 13.**
[37] *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, at 20 – 21 & 73 – 74, **Tab 16.**
[38] *MPAO*, supra, at 66, **Tab 20.**

Liberty and Security Interests

71. The s. 7 rights will be considered as a totality in a section below as they possess a different justification matrix and are not subject to the s. 1 analysis.

Indoor Gathering Restrictions Interference with the Applicant's Religion

72. The Indoor Gathering Restrictions interfered with Mr. Ingram's freedom of religion, freedom of peaceful assembly and freedom of association, and the liberty and security interest *Charter* rights, by interfering, restricting and effectively preventing her from attending worship services.

73. The purpose of s. 2(a) is to prevent interference with profoundly held personal beliefs that "govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being."[39]

74. An infringement of s. 2(a) of the *Charter* will be made out where:

a. the claimant sincerely believes in a belief or practice that has a nexus with religion; and

b. 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.[40]

75. The SCC held that at:

> the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered."[41]

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[39] *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713, 1986 CarswellOnt 141 [***Edwards Books***], at 98, **Tab 23.***; R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 1985 CarswellAlta 316 [***R v Big M***], at 122 – 124, **Tab 21**; see *also Syndicat Northcrest v Amselem*, [2004] 2 SCR 551, at 41, **Tab 37** citing *Edwards Books* & R v Big M; see also *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 [***Hutterian Brethren***], at 32, **Tab 4** citing *Edwards Books*.

[40] *Hutterian Brethren*, at 32, **Tab 4**; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, 2018 CarswellBC 1510, (***LSBC v TWU***) at 63, **Tab 17.**

[41] *Syndicat Northcrest v Amselem*, 2004 SCC 47, 2004 CarswellQue 1543, at 56, **Tab 37.**

76. It is the sincerity of the belief at the time of the interference, not its strength or absolute and consistent adherence to the practice over time, that is relevant during this stage of the analysis.[42]

77. Sincerity of belief is a question of fact. Ms. Ingram is a practicing Christian and regularly attends her place of worship to celebrate with her congregation.[43] Ms. Ingram celebrates Christmas and Easter within her church's community, and with family and friends.[44]

78. Therefore, Ms. Ingram submits that the first portion of the test is satisfied.

79. Freedom of religion compromises both individual and collective aspects[45] and the SCC has recognized that religion is about both religious beliefs and "religious relationships".[46]

80. Both the individual and group aspects are engaged in Ms. Ingram's situation.

81. The SCC in *Loyola High School* recognized the linkages between religious belief and its manifestation through "communal institutions and traditions"[47], thus the SCC held that:

> **Ultimately, measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom.[48] [emphasis added]**

82. The measures enforced by the CMOH Orders imposed strict attendance limits on worship services, at one point limiting them to "15% of the total operational occupant load capacity restrictions at a place of worship"[49] and other times to one-third of capacity or 50 people.[50]

83. All coercive burdens, either direct or indirect, on the exercise of religious belief are potentially within the ambit of s. 2(a).[51] The CMOH Orders, with respect to capacity limits on places of worship, essentially rendered a prohibition on attending worship services in person, or in the alternative, a grotesque interference on one's ability to attend worship services that essentially removed the "freedom" portion of the s. 2(a) protection.

84. The capacity limits have been enforced by coercive measures: originally a fine of $100.00 but increased up to $100,000.00 for a first offence and $500,000.00 in the case of subsequent offences.[52] These fines are not a "miniscule state-imposed cost"[53] such as a

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[42] *R v N.S.*, 2012 SCC 72, 2012 CarswellOnt 15763, at 13, **Tab 28.**
[43] Affidavit of Rebecca Marie Ingram (sworn December 8, 2020), at 14.
[44] Supra, at 16.
[45] *Hutterian Brethren*, paras. 31, 130, 182, **Tab 4***; Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613, 2015 CarswellQue 1533, (***Loyola High School***), at 59, **Tab 19.**
[46] *Loyola High School*, at 59, **Tab 19** quoting *Hutterian Brethren*, at 182, **Tab 4**, LeBel J dissenting; *LSBC v TWU*, at 64, **Tab 17.**
[47] *Loyola High School*, at 60, **Tab 19.**
[48] *Loyola High School*, at 67, **Tab 19.**
[49] CMOH Order 42-2020, Part 4, section 16, **Tab 43**; CMOH Order 02-2021, Part 4, section 18, **Tab 44.**
[50] CMOH Order 38-2020, Part 3, section 19, **Tab 40.**
[51] *Edwards Books*, at 96 – 98, **Tab 23.**
[52] *PHA*, s. 73, **Tab 3.**
[53] *Edwards Books*, at 97, **Tab 23.**

sales tax on a bible or rosery. These fines represent direct, intentional, and foreseeable coercive state action restricting the free practice of Ms. Ingram's and her children's religion.

85. As a result of the CMOH Order's imposed restrictions, Ms. Ingram was not able to attend the Christmas and Easter services at her place of worship, nor was she been able to celebrate Sunday service with her church community.[54]

86. The seating capacity at First Alliance Church is in excess of 2,000, thus restricting attendance to 15% of capacity[55] or to 15 people[56] effectively prohibiting anyone from attending.

87. While the Respondents might plead that Ms. Ingram could have "attended" worship services by watching the live-stream on the internet, this should be considered a red-herring or a disingenuous argument as it is not up to the state to direct Ms. Ingram on how she can practice her religion.

88. Furthermore, the CMOH Orders were capricious and arbitrary in nature, and were confusing, hard to adhere to and required modification. For example, CMOH Order 38-2020 restricted attendance at a place of worship to "1/3 of the usual attendance of the place of worship"[57] but four days later was amended by CMOH Order 40-2020 to limit attendance to "1/3 of the total operational occupant load as determined in accordance with the Alberta Fire Code and the fire authority having jurisdiction"[58].

89. Collaterally, the Indoor Gathering Restrictions that interfere with Mr. Ingram's freedom of religion also breach her freedom of peaceful assembly, freedom of association, and the liberty and security interest *Charter* rights.

90. By the operation of the CMOH Orders, Ms. Ingram was effectively prohibited from attending various church services. The worship services are a literal "physical gathering together of people"[59] and there is nothing nefarious, illegal, or meant to disturb the peace within her religious gatherings. This right has limited jurisprudence associated with it as most *Charter* infringements are recognized under a different right. Notwithstanding this tendency, Mr. Ingram submits that her freedom of association had been breached as a result of her being previously restricted to amount to a prohibition from attending her church.

91. As noted earlier, the SCC in *MPOA* held that one of the classes that s. 2(d) protects is "the right to join with others in the pursuit of other constitutional rights."[60]

92. In the SCC case of *Re Public Service*, in disposing the appeal, McIntyre J. had the occasion to review several approaches to freedom of association. After rejecting a number of them,

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[54] Affidavit of Rebecca Marie Ingram (sworn December 8, 2020), at 14 – 16.
[55] CMOH Order 42-2020, Part 4, section 16, **Tab 43**.
[56] CMOH Order 19-2021, Part 7, section 7.2, **Tab 46**.
[57] CMOH Order 38-2020, **Tab 40**.
[58] CMOH Order 40-2020, **Tab 41**.
[59] *Roach*, supra, at 51, **Tab 36.**
[60] MPOA, supra at 66, **Tab 20.**

he went on to assert that "freedom of association should guarantee the collective exercise of constitutional rights."[61] Le Dain J. (Beetz and La Forest JJ. concurring) agreed with McIntyre J.'s disposition of the appeal and emphasized that:

> **Freedom of association is particularly important for the exercise of other fundamental freedoms**, such as freedom of expression and **freedom of conscience and religion**.[62] **[emphasis added]**

93. By infringing Ms. Ingram's freedom of religion rights, the CMOH Orders collaterally infringed upon her freedom of peaceful assembly, freedom of association, and the liberty and security interest *Charter* rights.

The Indoor Gathering Restrictions and Outdoor Gathering Restrictions Interference with Socializing with Family and Friends

94. The *Charter's* purpose is to protect one's freedoms, to reasonable limits, from state interference.

95. The Indoor Gathering restrictions and Outdoor Gathering restrictions breach Ms. Ingram's freedom of peaceful assembly.

96. For the state to interfere in such basic rights as socializing with family and friends have not been previously contemplated or argued under the freedom of peaceful assembly because they have never been infringed upon during the existence of the *Charter*. These form part of the most basic and fundamental rights and freedoms such as: the freedom and liberty to meet and spend time with whomever you wish, such as family and friends, and in a manner or place you desire; the freedom to go out and not be ordered to stay at home or prohibited to stay away from parks, playgrounds, or groups of friends. These rights and freedoms are so basic that the drafters of the *Constitution* and the *Charter* likely did not even contemplate or consider the possibility that the state would infringe upon them, the drafters likely figured they are so basic and fundamental in our everyday lives that they did not require specific mention in the *Charter*.

97. We know that freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. But that is inherent in the 'peaceful' portion of the s. 2(c) right. These rights and freedoms deserve protection and must be afforded protection under s. 2(c), the freedom of peaceful assembly.

98. Ms. Ingram was barred from welcoming into her home her extended family or visiting her family or friends.[63] Her children also were not able to socialize with their friends in-person.[64]

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[61] *Re Public Service*, supra, at 175, **Tab 31.**
[62] *Re Public Service*, supra, at 189, **Tab 31.**
[63] Affidavit of Rebecca Marie Ingram (sworn December 8, 2020), at 8 – 11.
[64] Affidavit of Rebecca Marie Ingram (sworn December 8, 2020), at 7.

99. It is important to note that these measures have been arbitrary and clumsy, as on November 24, 2020, Ms. Ingram, as a single mother, was barred from socializing with anyone other than her children that live with her.[65] But as of December 8th, 2020, with the stroke of a pen, Ms. Ingram was now allowed to nominate two other adults to socialize with provided that they also meet the definition of "single adult".[66] Further, these arbitrary restrictions and definitions meant that married people with children were not allowed to socialize in-person with anyone other than their spouse and their children if they were lucky to have them.

The Primary or Secondary School Restrictions Interference with the Applicant's Children's Education

100. The Primary or Secondary School Restrictions interfere with Ms. Ingram's liberty and security interests and her children's freedom of peaceful assembly, freedom of association, and equality *Charter* rights.

101. The manner in which the CMOH Orders infringe upon Ms. Ingram's s. 7 rights will be considered in a section below.

102. The CMOH orders that prohibited certain schools from offering in-class lessons based on grade level, in actuality age of the student, interfere with Ms. Ingram's children's equality rights.

103. Section 15(1) guarantees that every individual is equal before and under the law and protects the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.[67]

104. The central purpose that underlies s. 15(1) is combatting discrimination.[68]

105. Proof of legislative intent to discriminate is not required; the claimant must establish that either the purpose or the effect of the law or action is discriminatory.[69]

106. The current test for a s. 15(1) infringement, rearticulated in *Kapp*, entails two steps:

    a. Does the law create a distinction based on an enumerated or analogous ground?

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[65] CMOH Order 38-2020, **Tab 40**.
[66] CMOH Order 41-2020, **Tab 42**.
[67] *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [***Kapp***], at 15, **Tab 26** citing *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, at 16, **Tab 5,** per McIntyre J.
[68] Kapp, supra, at 25, **Tab 26.**
[69] *Law v Canada (Minister of Employment & Immigration)*, [1999] 1 SCR 497 [***Law***], at 80, **Tab 18.**

b. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[70]

107. The first inquiry (whether the law creates a distinction based on a ground) can be seen as imposing a threshold requirement in that a claim will fail if the claimant cannot demonstrate that a government law or action withholds a benefit that is provided to others or imposes a burden that is not imposed on others, based on an enumerated or analogous ground.[71]

108. As of November 30, 2020, the Government of Alberta mandated that students in grades seven through twelve continue their learning via on-line instruction. This decision was not promulgated pursuant to a CMOH Order or any other ministerial order. While this decision was announced and implemented, there is a question as to under which legal process it was executed.

109. On April 30, 2021, pursuant to CMOH Order 17-2021, all students in grades seven through twelve were prohibited from attending a school location.[72] Again, students in these corresponding age ranges moved to on-line instruction. All the while younger students, in grades six and below, were allowed to benefit from in-class instructions. Certainly students and teachers under the age of 55 were at little or negligible risk for negative COVID-19 outcomes.

110. It is abundantly clear that a distinction was created based on the age of students, thus meeting the first part of the test for showing discrimination under s. 15(1).[73]

111. This second stage is generally aimed at determining whether the distinction in question amounts to discrimination in the substantive sense. Ms. Ingram submits that it does.

112. The SCC in *Kapp* held that:

> **Under s. 15(1), the focus is on preventing governments from making distinctions based on the enumerated or analogous grounds that**: have the effect of perpetuating group disadvantage and prejudice; **or impose disadvantage on the basis of stereotyping**.[74] **[emphasis added]**

113. The CMOH's claim that "teenagers are a much bigger transmission risk than younger children given the normal behaviours of the age group, which would put them at higher risk for the same reasons that risk of meningococcal bacteria is higher in teens - spread by kissing or the sharing of food, water bottles, cigarettes"[75] is baseless as no evidence has been tendered to support this assertion. It amounts to a stereotype.

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[70] *Kapp*, supra, at 17, **Tab 26.**
[71] *Reference re Same-Sex Marriage*, 2004 SCC 79, at 45, **Tab 33**; *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, at 27, **Tab 6.**
[72] CMOH Order 17-2021 (April 20, 2021), **Tab 19**
[73] *Kapp*, supra, at 17, **Tab 26.**
[74] *Kapp*, supra, at 25, **Tab 26.**
[75] Affidavit of Dr. Deena Hinshaw (Affirmed July 12, 2021), at 149.

114. The students in the age range of grades seven through twelve were stereotyped and disadvantaged by being forced to continue their education on-line. Its effect is that Ms. Ingram's children were unable to obtain education in a manner most beneficial to them: lack of interaction with the teacher in person; inability to obtain help in-person; absence of interaction with their peers and friends to the detriment of their social development.

115. The CMOH Orders have the effect of perpetuating group disadvantage and prejudice.[76]

116. Therefore, the CMOH Orders that prohibited in school learning to students of a certain age (as determined by grade), infringe upon the s. 15 rights of Ms. Ingram's children.

117. Furthermore, while Ms. Ingram's children's freedom of expression was severely stifled by a prohibition of in school classes, it is likely saved by virtual learning instituted where some form of expression was still possible. Nevertheless, the right to join with others in the pursuit of other constitutional rights (a component of the s. 2(d) freedom of association)[77] has been breached as Ms. Ingram's children were barred from attending school to join other in expressive activity such as group work, music, art, dance or other forms.

118. While the Respondents might argue that it was still possible to associate over various virtual classroom settings, again, it is not up to government officials and bureaucrats to dictate how one can manifest their constitutionally protected rights and freedoms.

119. Attendance at school is a literal "physical gathering together of people"[78], and the prohibition to attend was a clear breach of Ms. Ingram's children's freedom of peaceful assembly. Attending school is part of the "profoundly social nature of human endeavors" and must be protected from state-enforced isolation in the pursuit of an individual's ends.[79] The CMOH Orders appear to ignore that the risk of death associated with school age children or parents and teachers under the age of 50 is negligible and comparable to annual flu outbreaks.

120. To summarize, the various school restrictions imposed by the CMOH Orders infringed upon Ms. Ingram's children's freedom of peaceful assembly, freedom of association, and equality *Charter* rights

iii) Are the infringements saved by s. 1 of the *Charter*?

121. Ms. Ingram submits that the breaches of her *Charter* rights are not saved by s. 1.

122. Section 1 of the *Charter* stipulates that:

[76] *Kapp*, supra, at 25, **Tab 26.**
[77] *MPAO*, supra, at 66, **Tab 20.**
[78] *Roach*, supra, at 51, **Tab 36.**
[79] *Roach*, supra, at 51, **Tab 36.**

> 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.[80]

123. In *Oakes*, Dickson C.J., for a unanimous SCC, provided the criteria that must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society.

124. The Oakes Test can be summarized as having four parts that must be satisfied by a law so that it can qualify as a reasonable limit that can be demonstrably justified in a free and democratic society:

i. Sufficiently important objective: the law must pursue an objective that is sufficiently important to justify limiting a *Charter* right;

ii. Rational connection: the law must be rationally connected to the objective;

iii. Least drastic means: the law must impair the right no more than is necessary to accomplish the objective; and

iv. Proportionate effect: the law must not have a disproportionately severe effect on the person to whom it applies.[81]

The second, third and fourth elements form what's referred to as the proportionality test.[82]

125. "The requirements of reasonableness and demonstrable justification are cumulative, not alternative."[83]

126. The burden is on the Respondents to prove that the CMOH Orders meet the criteria set out in s. 1 of the *Charter*:

> The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation.[84]

127. Section 1 has been interpreted as imposing a stringent requirement of justification.[85]

Sufficiently Important Objective

128. The first part of the Oakes Test queries the objective of the challenged law. The SCC in *Oakes* defined this part of the test as:

> …the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a

[80] *Charter*, s. 1.
[81] *R v Oakes*, supra, at 73 – 74, **Tab 27.**
[82] *R v Oakes*, supra, at 74, **Tab 27.**
[83] Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf updated 2016, release 1) ("**Hogg**"), 38-17.
[84] *R v Oakes*, supra, at 70, **Tab 27.**
[85] Hogg, 38-3.

> constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. **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 pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.[86] **[emphasis added]**

129. The reason to ascertain the objective is to determine whether there is a sufficient justification for an infringement of the *Charter*, and therefore, the statement of the objective should be related to the infringement of the *Charter*, rather than to other goals.[87]

130. Professor Hogg provides a succinct analysis[88] of the objective analysis outlined in *RJR-MacDonald v Canada*[89]. In that case, the law banning the advertising of tobacco products was challenged. The infringement of the *Charter* was the breach of the right of freedom of expression. Parliament did not ban the product itself, instead, by banning the advertising, exposed itself to a *Charter* challenge. Therefore, it was futile to the s. 1 justification to characterize the objective as the protection of public health from the use of tobacco, and to establish the importance of the objective by reviewing the evidence that showed the harmful effects of tobacco on health. Professor Hoff goes on to highlight that this way of looking at the objective was too broad because it did not focus on the reason for infringing the *Charter*. McLachlin J., writing for the majority of the SCC, stated that "objective relevant to the s. 1 analysis is *the objective of the infringing measure*"[90]. She went on to conclude that the objective of the advertising ban "must be to prevent people in Canada from being persuaded by advertising and promotion to use tobacco products"[91]. This narrower and "less significant" objective was found to still be an objective of sufficient importance to justify overriding the right of free expression.[92]

131. It is Dr. Hinshaw's evidence that the "objective of Alberta's public health guidance and measures has been to protect the community and prevent widespread transmission"[93] of COVID-19.

132. The preamble in most CMOH Orders state:

> This investigation has confirmed that COVID-19 is present in Alberta and constitutes a public health emergency as a novel or highly infectious agent that poses a significant risk to public health.[94]

133. There has been numerous announcements and press briefings where Dr. Hinshaw or another Alberta Minister, including the Premier, have stated that the measures were designed to "flatten the curve" and to "protect our healthcare system from overloading." While these goals could foreseeably fall within the gambit of 'protecting the community

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[86] *R v Oakes*, supra, at 73, **Tab 27.**
[87] Hogg, 38-20.
[88] Hogg, 38.20.
[89] *RJR-MacDonald Inc. v Canada*, [1995] 3 S.C.R. 199, 1995 CarswellQue 119 ("*RJR-MacDonald*"), **Tab 35.**
[90] *RJR-MacDonald*, supra, at 144, **Tab 35.**
[91] Ibid.
[92] *RJR-MacDonald*, supra, at 146, **Tab 35.**
[93] Affidavit of Dr. Deena Hinshaw (Affirmed July 12, 2021), at 97.
[94] CMOH Order 01-2020, **Tab 38**.

and preventing widespread transmission', the measures pronounced under these goals fall so far outside the other tenets of the Oakes Test, they are unjustifiable.

134. If it is deemed that the objective is sufficiently important to justify limiting the *Charter* rights, which is strictly denied, then the Applicant submits that the measures are not rationally connected to the objective.

Rational Connection

135. The second step of the Oakes Test of justification, and the first element of proportionality, of a law that limits *Charter* rights is to determine whether there is "rational connection" to the objective.

136. "The requirement of rational connection calls for an assessment of how well the legislative garment has been tailored to fit its purpose."[95]

137. The measures "must be carefully designed to achieve the objective in question" and it should not be "arbitrary, unfair or based on irrational considerations."[96]

138. "The essence of rational connection is a causal relationship between the objective of the law and the measures enacted by the law."[97]

139. The Applicant submits that the Respondent cannot make out this step of the Oakes Test.

140. The Respondents must provides proof of a causal link between the CMOH Orders and the objectives and that the measures meet the requirements.

141. There is no evidence tendered that the measures were "carefully designed to achieve the objective in question". Nothing exists in the Respondent's evidence to substantiate that there was analysis, careful planning, risk management and mitigation, and after careful consideration the best plan was implemented.

142. In the very short affidavit tendered by the Acting Managing Director of the AEMA, the only evidence tendered of the provincial response to COVID-19 is the revision of the Emergency Management Act, that the Alberta Health Emergency Operations Centre was activated, the recognition that the COVID-19 response would overlap the "annual hazard season", the establishment of various teams or committees, and the creation of task forces for the delivery and distribution of vaccines and personal protective equipment.[98] No details of planning or implementation were provided.

143. How well was the legislative garment tailored to fit its purpose? The Respondents simply locked down society, closed whole sectors of the provincial economy, and relied on and waited for a vaccination miracle as the only solution – they simply left it to luck and chance. There is an absence of evidence to indicate that various and reasonable solutions were

[95] *Edwards Books*, supra, at 122, **Tab 23.**
[96] *R v Oakes*, supra, at 74, **Tab 27.**
[97] Hogg, 38-35.
[98] Affidavit of Scott Long (Sworn July 16, 2021), at 25 – 32.

considered or explored. The only plausible conclusion, based on the evidentiary record, is that infringements were the only response considered.

144. As luck would have it, the Respondents were presented their 'silver-bullet' as vaccinations were developed in record time, in under a year since the first case was diagnosed in Canada. The Respondents then relied on the botched procurement program of the federal government, something again, out of their control. At no point were the Respondents in control of Alberta's future. Lucky for the Respondents, vaccine procurement improved, and deliveries became regular.

145. The Respondents have tendered evidence of sport and fitness facility COVID-19 outbreaks[99] likely insinuating that such facilities represent a higher risk of viral transmission, and therefore lump Ms. Ingram's business into this risk category. But such a claim is patently false. The tendered affidavit evidence does not differentiate between the various types of sport or fitness facilities and thus ignores any potential variability in the risk of transmission. A bicycle spin studio or boxing-bag rumble studio are designed for close quarters whereas Ms. Ingram's 16,000 square foot facility promotes distancing[100], even allowing patrons to exceed the mandated social distancing requirements. At the busiest of times The Gym experienced occupancy of 11% of capacity, and during the COVID-19 measures occupancy was at 6% of licensed capacity[101], far exceeding any of the imposed or recommended social distancing capacity measures. The evidence tendered by the Respondents does not even attempt to deduce if the listed facilities are capable of implementing any social distancing measures – a spin studio in the winter could not. Therefore, this evidence is of little or no assistance to the Court in determining if the measures are supported by fact. Further, the risks associated with COVID-19 to young healthy adults are negligible.

146. The evidence also ignores or withholds all information as to the degree of various cleanliness and hygiene procedures, or lack thereof, these facilities instituted. Nor does it provide historical data of previous COVID-19 transmission, an important variable in assessing risk as it indicates prior breaches of public health measures.

147. In Ms. Ingram's instance, her business, The Gym, had no recorded or contact traced cases of COVID-19 transmission.[102] Therefore, The Gym posed minimal COVID-19 risk to the community, and the Respondent has tendered no evidence to rebut this assertion. Ms. Ingram submits that a rational connection has not been made out.

[99] Affidavit of Kimberly Simmonds (Affirmed July 11, 2021), Exhibit B, pg. 18.
[100] Affidavit of Rebecca Marie Ingram (sworn December 8, 2020), para. 30.
[101] Affidavit of Rebecca Marie Ingram (sworn December 8, 2020), para. 30.
[102] Affidavit of Rebecca Marie Ingram (sworn December 8, 2020), para. 25; Affidavit of Rebecca Marie Ingram (sworn January 22, 2021), para. 22.

148. A risk matrix[103] could have easily been constructed and used to assess the COVID-19 risk profile for a certain business or class of businesses and appropriately provided for various measures to mitigate the risk, such as appropriate public health measures.

149. The Respondents have also tendered evidence of COVID-19 "outbreaks" at places of worship.[104] Since the first presumed case in Alberta, there have been 246,665 cases of COVID-19 in this province. In comparison, Ms. Simmonds evidence links 533 cases to places of worship[105] through the entirety of the COVID-19 virus presence, hardly an "outbreak" representing a rational connection justifying the severe infringements on the right to freedom of religion and freedom of association.

150. Furthermore, no evidence has been tendered to insinuate that 533 cases were "unacceptable" in light of the Respondents not pursuing a zero COVID-19 policy.

151. The Applicant submits that the measures were not carefully designed to achieve the objective. Furthermore, the measures implemented via the CMOH Orders are at times arbitrary, unfair or based on irrational considerations.

152. While The Gym was prohibited from operating and allowing individuals to obtain health benefitting exercise, liquor and cannabis stores were classified as "essential services"[106] by the Respondents and allowed to remain open with limited restrictions. Without justification on the essential nature of liquor or cannabis stores, this presents an aura of arbitrariness.

153. There existed also very arbitrary capacity limits on various businesses. At various points in time, places of worship were limited to "15% of the total operational occupant load capacity restrictions at a place of worship"[107] and other times to one-third of capacity[108] and the last major restriction limited to 15 individuals[109] notwithstanding their total capacity. Other restrictions limited the capacity at businesses allowed to remain open, at times limited to 25% of capacity and other times to 10% of capacity, while shutting down other businesses fully.[110] No satisfactory explanation was ever provided as to the different restrictions placed on worship services versus wedding or funeral services.

154. None of the evidence tendered by the Respondents can provide the basis for these capacity restrictions. It is therefore plausible that all of these above-mentioned institutions could have operated at 50% capacity, there is no material affirming or denying either, and for this reason the capacity restrictions must be deemed arbitrary.

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[103] A risk matrix is a matrix that is used during risk assessment to define the level of risk by considering the category of probability or likelihood against the category of consequence severity. This is a simple mechanism to increase visibility of risks and assist management decision making.
[104] Affidavit of Kimberly Simmonds (Affirmed July 11, 2021), Exhibit B, pg. 17.
[105] Ibid.
[106] Government of Alberta, Notification of Essential Services (March 30, 2020), at 6, **Tab 565**.
[107] CMOH Order 42-2020, Part 4, section 16; CMOH Order 02-2021, Part 4, section 18.
[108] CMOH Order 38-2020, Part 3, section 19.
[109] CMOH Order 19-2021, Part 7, section 7.2, **Tab 46**.
[110] CMOH Order 07-2020, **Tab 39**; CMOH Order 19-2021, sections 5,1, 5.4 & 6, **Tab 46**.

155. Similarly, no evidence has been presented to show that hair salons, spas, massage therapy clinics, restaurants, bars, casinos, lounges and other businesses have transmitted COVID-19 to a long-term care home resident or other vulnerable Albertan. These businesses have all been shuttered in favour of shopping malls, box stores and others.

156. On January 12, 2021, Dr. Hinshaw granted a narrow exemption to CMOH Order 42-2020 allowing all players and staff of various National Hockey League ("**NHL**") teams, including the Calgary Flames, Edmonton Oilers and all visiting teams to Alberta, to proceed with the hockey season including all team practices and activities, and games between Canadian NHL clubs all while children were prohibited from skating on municipal rinks.[111]

157. The exemption demonstrates the arbitrary and unfair treatment under the *PHA* and the CMOH Orders extended to certain organizations in allowing NHL teams to proceed with group activities and workouts while gyms and other fitness facilities remain closed. It is important to note that the NHL team's personnel travelled across Canada consistently through out the 2021 NHL season.

Least Drastic Means

158. The requirement of the least drastic means is the third step of the Oakes Test, and the second element of the proportionality test. It requires that the law "should impair 'as little as possible' the right or freedom in question"[112].

159. Professor Hogg expanded on this when he stated that the "idea is that the law should impair the right no more than is necessary to accomplish the desired objective, or in other words, that the law should pursue the objective by the least drastic means."[113]

160. In *RJR-MacDonald*, the SCC held that while the law prohibiting the advertising of tobacco products sought a sufficiently important objective and was rationally connected, it was determined that the ban was too drastic a means of curtailing the consumption of tobacco.[114] The prohibition failed the least drastic means test and was deemed an unjustified infringement on the right of free expression.[115]

161. There is no evidence how any of the measures were formulated or designed, or that other options were considered but were appropriately rejected.

162. The limiting measures must be carefully designed to impair as little as possible, and based on the evidentiary record, the only plausible conclusion is that they were not.

163. The Alberta Pandemic Influenza Plan[116] (the "**Influenza Plan**") provides a comprehensive, systematic and "strategic provincial response and recovery plan for pandemic

[111] Request for Exemption – ORDER 42-2020 - NATIONAL HOCKEY LEAGUE (January 12, 2021), **Tab 53**.
[112] *R v Oakes*, para. 74, **Tab 27.**
[113] Hogg, 38-36.
[114] *RJR-MacDonald*, supra, at 144, **Tab 35.**
[115] *RJR-MacDonald*, supra, at 176, **Tab 35.**
[116] Alberta's Pandemic Influenza Plan (Alberta Government, March 2014), **Tab 50.**

influenza."[117] The Influenza Plan has four elements to it. One, control the spread of disease and reduce illness and death by providing access to appropriate prevention measures, care and treatment. Two, mitigate social disruption by ensuring continuity and recovery of critical services. Three, minimize adverse economic impacts. Four, support an efficient and effective recovery. The process in the Influenza Plan has not been followed or adopted to deal with the COVID-19 pandemic. In actuality, no COVID-19 plan appears to exist other than arbitrary and capricious lockdowns. Instead of giving equal weight to all four objectives, as the 2014 Pandemic Plan proposes, by putting a doctor in charge, all the focus was on controlling the disease through rights restrictions. In actuality, the Government appears to have taken every plan they have ever written and cast them away, failed to follow any process, and simply made it up as they went along.

164. Even though the current pandemic plan is designed for pandemic influenza, it could and should have easily formed the basis for a pandemic plan aimed at COVID-19.[118] No evidence has ever been provided as to why this plan was not followed or a COVID-19 pandemic plan was developed based on the Influenza Plan's architecture.

165. Ms. Ingram was not provided any choice when the prohibitions on gyms were enacted. The Respondents did not publish procedures for gyms to remain open under strict health measures, nor was Ms. Ingram provided an opportunity to devise a plan to mitigate and minimize the potential risks of spreading the virus such that her business could remain open. Ms. Ingram's business instituted various voluntary cleaning processes resulting in patrons feeling safe.[119]

166. There is no objectively verifiable evidence that the measures enacted by the CMOH Orders created less harm than other potential measures. Even more concerning is that the is no proof that other options were even considered. Therefore, this portion of the justification test cannot be met.

Proportionate Effect

167. The fourth and last step in the Oakes Test is the requirement of proportionate effect.

168. Dickson C.J. in *R v Oakes* described this step as the third element of proportionality, and this step mandates that "a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom and the objective which has been identified as of 'sufficient importance'."[120]

169. Later, in *R v Edwards Books and Art*, Dickson C.J. rephrased the requirement by stating that "their effects [that is, 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"[121].

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[117] Ibid, page 2.
[118] Expert Report of David Redman, Schedule B, at 4, 6 – 8; Surrebuttal Report of David Redman, Schedule A, at 3 & 12.
[119] Affidavit of Abdullah Al-Shara (Affirmed on January 19, 2021), at 19.
[120] *R v Oakes*, para. 74, **Tab 27.**
[121] *Edwards Books*, supra, at 117, **Tab 23.**

170. Finally, in *Dagenais v CBC*[122], Lamer C.J. provided an additional point to the third element of proportionality by stating that it should take into account the "proportionality between the deleterious and the salutary effects of the measures."

171. On one side of the proportionality scale are the benefits of the public health measures, and on the other side are the costs, the collateral damage[123] the measures have produced.

172. Dr. Bhattacharya's outset observation of his surrebuttal report provides an exceptional summary for the proportionality portion of the Oakes Test: the Respondents simply failed to perform an evaluation of the deleterious and the salutary effects of the measures.

> I note at the outset one overarching issue that the government experts did not address. In particular, nowhere do the government experts provide the government's formal analysis of the marginal benefits and harms of the various lockdown policies – business closures, stay-at-home orders, restrictions on social interactions, etc. – that it has imposed. The government experts provide their views and analyses on the benefits of these policies in terms of reduced COVID-19 disease spread, and they discuss a process of decision making in emergency situations that they say permits to – in effect – not conduct or provide such an analysis. But they do not provide any formal analyses of the harms of these policies, many of which I documented with reference to the scientific literature in my expert report. This insufficient consideration of a policy's harms violates a basic principle of public health, which I outlined in my expert report and which the government experts did not contest.[124]

173. An evaluation of the costs and benefits of the Respondents' COVID-19 response policy would have mirrored this proportionality step.

174. The Governments of Alberta pandemic influenza plan lists as one of its "General Assumptions" that:

> The effects of, and response to, a pandemic influenza are not limited to the health sector. A whole of society approach will be used in mitigating the effects of a pandemic influenza including public and private sectors, communities, families and individuals.[125]

175. What is missing in all of the Respondents' evidence is proof of adherence to this "General Assumption." Absent is any evidence that considerations were made as to the deleterious and salutary effects of any measures on the public and private sectors, communities, families and individuals. While Dr. Hinshaw has stated in her affidavit that "Alberta's response has included the careful weighing of costs and benefits throughout the course of the pandemic"[126], no evidence has been tendered to substantiate this claim.

176. Furthermore, and critical to the issues before this Court, is that Dr. Hinshaw has broadly admitted to collateral damage that the public health measures have caused, but withheld and details of such collateral effects:

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[122] *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835, 1994 CarswellOnt 112, at 99, **Tab 12.**
[123] Affidavit of Dr. Deena Hinshaw (Affirmed July 12, 2021), at 89.
[124] Supplementary Expert Report of Dr. Jay Bhattacharya, Schedule A, at 1.
[125] *Alberta's Pandemic Influenza Plan*, Alberta Government, March 2014, pg. 11, **Tab 19**
[126] Affidavit of Dr. Deena Hinshaw (Affirmed July 12, 2021), at 87.

Alberta recognizes the impacts that COVID-19 and the collateral effects of the public health measures, required to mitigate transmission, have had on Albertans.[127]
[emphasis added]

177. While tragic, there were 75 deaths (cumulative over an approximately 16-month period) recorded in Alberta attributed to COVID-19 of individuals without a single comorbidities.[128] This is inline with the average annual deaths (72) in Alberta attributed to influenza for the periods of 2015/2016 to 2017/2018 flu seasons.[129] If the COVID-19 deaths are annualized, or averaged out for 12 months, then the calculated annual COVID-19 deaths (56) are lower than the average annual influenza deaths (72). It is also important to note that there have been zero attributed deaths to influenza during the COVID-19 timeframe, and it is plausible that people may have been infected with both influenza and COVID-19.

178. COVID-19 discriminately and disproportionately harms older people (79.0% of all COVID-19 attributed deaths were in individuals over the age of 70)[130] and those that are vulnerable (in 96.8% of all COVID-19 deaths, the individuals had at least one comorbidity)[131].

179. All severe outcomes of the virus are heavily skewed towards the older population, as evident in the government's own data.[132]

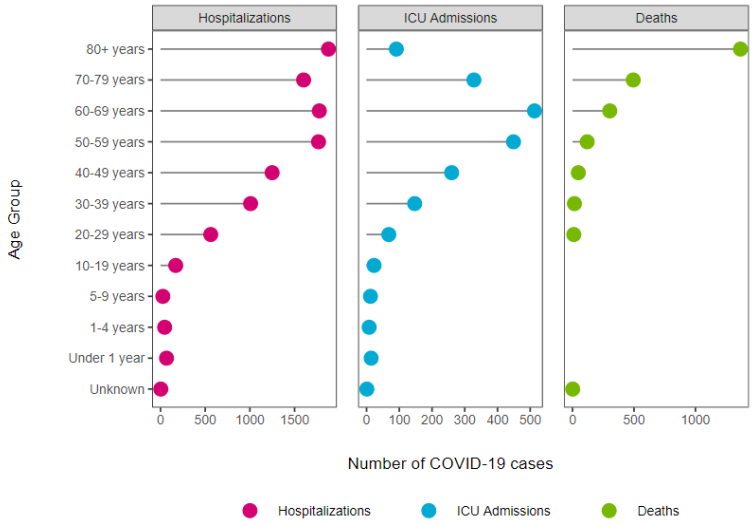

Figure 13: Total hospitalizations, ICU admissions and deaths (ever) among COVID-19 cases in Alberta by age group. Each ICU admission is also included in the total number of hospitalizations.This is based on totals rather than current hospitalizations and ICU admissions.

[127] Affidavit of Dr. Deena Hinshaw (Affirmed July 12, 2021), at 89.
[128] Supra, note 5.
[129] Alberta Health Services, Past Influenza Seasonal Data: https://www.albertahealthservices.ca/influenza/Page14481.aspx, accessed on August 29, 2021.
[130] Supra, note 4.
[131] Supra, note 5.
[132] Government of Alberta, COVID-19 Alberta statistics, https://www.alberta.ca/stats/covid-19-alberta-statistics.htm#severe-outcomes (retrieved August 29, 2021)

180. Dr. Hinshaw's evidence states that "Premier Kenney explained that Alberta's balanced approach to responding to the pandemic required the focus to extend beyond saving lives to also protecting people's livelihoods. Using the least restrictive measures possible to achieve the public health objectives as mandated by the principles of public health practice assisted in trying to achieve this balance."[133]

181. In explaining how the "balanced approach" operates, Dr. Hinshaw went on to state that "the framework for Alberta's balanced approach in response to the COVID-19 public health threat was, where reasonably possible, to allow people to decide for themselves the risks they wanted to take as individuals."[134]

182. While this theoretical principle is extremely worthy and indispensable, in practice, the measures imposed by the CMOH Orders wholly contradicted such intentions. In actuality, the CMOH Orders appear to embrace an implied belief that we should live in a risk-free world and that government restrictions are the best way to pursue this goal.

183. The "balanced approach" does not appear to have been followed. As previously noted, at the height of reported COVID-19 cases, only 0.57% of Albertans were case positive, meaning that 99.43% of Albertans were not infected. The means that the Respondents restricted and locked-down 99.43% of the people in Alberta without cause.

184. This balanced approach was entirely lacking in Ms. Ingram's circumstances.

185. The measures promulgated by the CMOH Orders were too wide sweeping and treated every person in Alberta as if they were infected, even though only 0.57% of the population was case positive during the one-day peak.

186. The measures imposed by the CMOH Orders have annihilated the provincial economy[135], with the Alberta economy being impacted more than any other province in 2020.[136] While the collapse of global oil prices is partially responsible, the public health measures have affected some industries disproportionately and distressingly "with double digit declines in industries most affected by public health measures that limited travel and in-person activities"[137], such as Ms. Ingram's and Ms. McCaffrey's[138] businesses.

187. The Government of Alberta committed funding to small and medium businesses that met the criteria for the Small and Medium Enterprise Relaunch Grant ("**SMERG**") but these programs were "broad based"[139] and not aimed at those businesses that were forcibly closed. However, any evidence of the implementation or success of any of these programs is conveniently absent from the Respondents record. In actuality, when queried on the subject of success, Ms. Shandro, Assistant Deputy Minister (Agency Governance and Program Delivery Division, Ministry of Jobs, Economy and Innovation with the

[133] Affidavit of Dr. Deena Hinshaw (Affirmed July 12, 2021), at 88.
[134] Affidavit of Dr. Deena Hinshaw (Affirmed July 12, 2021), at 97.
[135] Government of Alberta, Economic Spotlight – 2020: A Year in Review (March 2021), **Tab 51**; Government of Alberta, Economic Spotlight – 2020 GDO by Industry (July 2021), **Tab 52**.
[136] Government of Alberta, Economic Spotlight – 2020 GDO by Industry (July 2021), at 1, **Tab 52.**
[137] Ibid.
[138] Affidavit of Shawn Valerie McCaffery (Sworn January 21, 2020), at 2.
[139] Transcript, Questioning for Cross-Examination on Affidavit of Darren Hedley, at 5:11-23.

Government of Alberta) refused to answer the questions, and any further inquiries on the topic were objected to.[140] Ms. Shandro finally testified that her affidavit was tendered only to provide evidence of these program's existence.[141]

188. Ms. Ingram submits that an adverse inference must be drawn as to the execution and success, or failure, of these support programs.

189. Ms. Ingram or her children were not the only ones to experience the deleterious effects of the measures.

190. In his expert report, Dr. Bhattacharya provides a myriad of collateral damage that lockdowns, such as the measures imposed by the CMOH Orders, create: various health repercussions including limited cancer screenings and deteriorating mental health; cancellation or delay of surgeries; psychological harm; suicide; increased substance abuse; learning loss in children; domestic violence; social isolation; and various indirect harms such as massive economic destruction, increases in poverty, and the resurgence of AIDS, malaria, and tuberculosis.[142]

191. The collateral damage from the CMOH Orders will take time to fully understand, but the available data paints a stark picture. Statistics Canada's March 2021 bulletin states that the "direct impacts of COVID-19 cannot fully account for the excess deaths[143] observed in Canada in 2020, particularly in the fall."[144] The bulletin goes on to state in the early days of the COVID-19 virus "excess deaths and deaths caused by COVID-19 were closely aligned and mostly affected older populations, suggesting that COVID-19 itself was driving excess mortality in Canada."[145] However, as the virus progressed and as the population had been subject to months of restrictions, it is concluded that:

> more recently, the number of excess deaths has been higher than the number of deaths due to COVID-19, and these deaths are affecting younger populations, suggesting that other factors, including possible indirect impacts of the pandemic, are now at play.[146]

192. The July 2021 Statistics Canada bulletin on the same topic provides more data on the collateral damage of the measures: "Deaths caused by accidental poisonings increase to a new high during the pandemic"[147]; "Increases in overdose deaths affect younger Canadians"[148]; and "Alcohol-induced mortality increases in 2020 among younger Canadians"[149]. This bulletin states that there were "appreciable increases observed in" Alberta, 920 in 2020 compared with 715 in 2019[150], caused by deaths from unintentional

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[140] Transcript, Questioning for Cross-Examination on Affidavit of Chris Shandro, at 5:2 – 6:9.
[141] Transcript, Questioning for Cross-Examination on Affidavit of Chris Shandro, at 19:19-25.
[142] Expert Report of Dr. Jay Bhattacharya, Schedule C, at 16 – 19.
[143] Excess deaths, or excess mortality, occur when the number of deaths in a time period, such as a year, exceeds a certain range of values what was expected for that same time period.
[144] Statistics Canada, *Provisional deaths counts and excess mortality*, The Daily, March 10, 2021, at 1, **Tab 54.**
[145] Ibid.
[146] Ibid.
[147] Statistics Canada, *Provisional deaths counts and excess mortality*, The Daily, July 12, 2021, at 1, **Tab 55.**
[148] Supra, at 2.
[149] Supra, at 2.
[150] Supra, at 1.

poisoning[151]. There were also significant increases in alcohol-induced mortality, attributed to chronic use of alcohol, especially in young people.[152]

193. As an affiant that is not party to this proceeding, Ms. McCaffery is also a small-business owner in Alberta.[153] The restrictions imposed by the CMOH Orders have decimated her business' revenue[154] which has resulted in Ms. McCaffery having to sell personal belongings to ensure she can continue to service the loan and pay bills.[155] If Ms. McCaffery defaults on her loan, she will lose her home as it is the security for the loan.[156]

194. Two of Ms. Ingram's business patrons, Messrs. Pawelko and Al-Shara, have been using The Gym and its community to improve their lives from a history of struggles, depression and addiction.[157] To them, COVID-19 poses a lower risk than not being able to work out.

195. As a result of being cut-off from workouts and the community at The Gym, Mr. Pawelko attempted suicide.[158]

196. The measures in response to COVID-19 have not considered or provided alternatives for such individuals as Messrs. Pawelko and Al-Shara, and their struggles due to the public health measures are costs not taken into account by the CMOH.

197. The Respondents have not tendered enough evidence to substantiate a justified infringement of *Charter* rights.

Summary of the Oakes Test Analysis

198. Section 1 of the *Charter* requires that the protection of Canadians' fundamental rights and freedoms is subject only to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

199. While a substantial amount of evidence has been tendered by the Respondents, they have failed to satisfy the Oakes Test, and therefore none of the limits or breaches of the Applicant's rights can be demonstrably justified in a free and democratic society.

200. The Respondents must demonstrate that a treatable respiratory infection being potentially spread in the community through citizens living their lives is somehow worse than all of the devastation being caused by the arbitrary, capricious, and poorly developed CMOH Orders.

201. It is submitted that the Respondents have failed to justify the various Charter infringements.

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[151] Deaths from accidental poisoning can include different circumstances such as individuals using substances recreationally along with those who mistakenly ingest too much prescription or over-the-counter medications.
[152] Supra, note 140, at 2.
[153] Affidavit of Shawn Valerie McCaffery (Sworn January 21, 2020), at 2.
[154] Ibid, at 9 & 12.
[155] Ibid, at 6 & 11.
[156] Ibid, at 3 & 6.
[157] Affidavit of Kyle Pawelko (Sworn on January 28, 2021), at 4 – 13; Affidavit of Abdullah Al-Shara (Affirmed on January 19, 2021), at 4 – 16.
[158] Affidavit of Kyle Pawelko (Sworn on January 28, 2021), at 14 – 15.

iv) Do the CMOH Orders Infringe s. 7 of the *Charter* and are the infringements justifiable?

202. The Applicant submits that her s. 7 right, the right to liberty, has been infringed.

203. Section 7 of the *Charter* declares that:

> 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.[159]

204. An analysis of whether s. 7 rights have been infringed consist of three stages: first, whether there exists a real or imminent deprivation of life, liberty and security of the person or a combination of those interests; second, identifying and defining the relevant principle or principles of fundamental justice; and finally, it must be determined whether the deprivation has occurred in accordance with the relevant principle or principles.[160]

205. Section 7 of the *Charter* requires that laws or state actions that interfere with life, liberty and security of the person conform to the principles of fundamental justice – the basic principles that underlie our notions of justice and fair process.[161]

206. The SCC defined fundamental justice as:

> …the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system.[162]

207. A law can be found to be in contravention of fundamental justice for being arbitrary, overbroad, or grossly disproportionate. In *Bedford v Canada*[163], McLachlin C.J. articulated the kind and degree of dysfunctionality that would condemn a law as arbitrary, overbroad, or grossly disproportionate.

208. McLachlin C.J. defined the three as follows: if a law has no connection between the effect and its objective, then the s. 7 deprivation will be arbitrary.[164] If the law goes too far and interferes with some conduct that bears no connection to its objective, then it is arbitrary in those applications, but if it also includes some applications that are connected to its objective, then the s. 7 deprivation is considered as overbroad.[165] Finally, if a law has a connection to its objective, but the s. 7 deprivation is so severe as to be out of all proportion to the objective, then the deprivation is classified as grossly disproportionate.[166]

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[159] Charter, s. 7.
[160] *R v White*, [1999] 2 SCR 417, para 38, **Tab 30.**
[161] *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, at 19, **Tab 11.**
[162] *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486, para 37, **Tab 32.**
[163] *Bedford v Canada (Attorney General)*, 2013 SCC 72 [***Bedford***] , **Tab 8.**
[164] *Bedford*, supra, at 98, **Tab 8.**
[165] *Bedford*, supra, at 101 – 102, **Tab 8.**
[166] *Bedford*, supra, at 103 – 104, **Tab 8.**

209. McLachlin C.J. summarized the three tenets and connected them to the principles of fundamental justice wherein she stated:

> The overarching lesson that emerges from the case law is that laws run afoul of our basic values when the means by which the state seeks to attain its objective is fundamentally flawed, in the sense of being arbitrary, overbroad, or having effects that are grossly disproportionate to the legislative goal. **To deprive citizens of life, liberty, or security of the person by laws that violate these norms is not in accordance with the principles of fundamental justice.**[167] **[emphasis added]**

210. The first step identifies the s. 7 interest and queries whether there exists a real or imminent deprivation.

211. The liberty interest has at least two aspects. The liberty interest protects the right of individuals in a physical manner to be free from state detainment and state restrictions upon the freedom of movement[168] and includes the threat of imprisonment.[169]

212. It also protects a sphere of personal autonomy involving "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.[170]

213. The protection of "inherently private choices" extends into the sphere of parental decision-making for parents to ensure their children's well-being, for example, a right to make decisions concerning a child's education and health.[171] The CMOH Orders respecting school closures denied the ability for Ms. Ingram to make educational core lifestyle choices for her children.[172]

214. Ms. Ingram has been denied the freedom to practice her religion in a manner of her choosing and in accordance with her belief[173], a deprivation of her core lifestyle choices.

215. The measures also interfere with Ms. Ingram's liberty interest of choices on fundamental relationships: she was prohibited and barred to meet with family and friends[174] and to foster community relationships in her volunteer capacity[175]. While a purely legal argument, Ms. Ingram was further deprived of the opportunities to form new relationships such as friends, business relationships and even explore potential romantic relationships.

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[167] *Bedford*, supra, at 105, **Tab 18.**
[168] *R v Heywood*, [1994] 3 SCR 761, 1994 CanLII 34 (SCC) at 789, **Tab 25.**
[169] *R v Vaillancourt*, [1987] 2 SCR 636, at 652, **Tab 29.**
[170] *B. (R.) v Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 SCR 315 [***B.(R). v CASMT***], at 80, **Tab 7**; *Godbout v Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 SCR 844 at para 66, **Tab 15.**
[171] *B.(R). v CASMT*, supra, at 83 – 85 & 87, **Tab 7.**
[172] Affidavit of Rebecca Marie Ingram (sworn December 8, 2020), at 5 – 7.
[173] Affidavit of Rebecca Marie Ingram (sworn December 8, 2020), at 14 & 16.
[174] Affidavit of Rebecca Marie Ingram (sworn December 8, 2020), at 8 -11.
[175] Affidavit of Rebecca Marie Ingram (sworn December 8, 2020), at 13.

216. It is obvious that Ms. Ingram's liberty interests have been deprived. It has been noted above that a law cannot contravene fundamental justice if it is arbitrary, overbroad, or grossly disproportionate. Thus, the analysis can move to the final stage.

217. Ms. Ingram submits that the impugned measures breach the doctrines of fundamental justice as they are overbroad or are grossly disproportionate to the desired outcome, or both.

218. In the SCC case of *R v Heywood*[176], the accused challenged a vagrancy law that prohibited offenders convicted of listed offences from "loitering" in public parks. The majority of the Court found that the law, which aimed to protect children from sexual predators, was overbroad; insofar as the law 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, it was unrelated to its objective.

219. Many of the measures implemented by the CMOH Orders were overbroad. While it is understandable that measures with the objective of public health and stemming the risk of transmission of COVID-19 could not reduce the risk to negligible levels in some businesses, such as a nightclub, but a similar broad prohibition that closed The Gym, which has health benefits and the ability for proper social distancing, is overbroad. Ms. Ingram's business posed no recognizable risk other than a theoretical risk devised by the Respondents.

220. Also, the restrictions ignored the right of citizens to make their own risk assessment and to live their lives without fear on the basis that a COVID-19 infection is an acceptable risk if you are young and healthy. In other words, if you are afraid of COVID-19 because your are high risk or severe symptoms or mortality, you are always free to stay home without the government ordering you to. Healthy citizens shouldn't be forced to stay home to accommodate the immune-compromised. Pre-COVID-19, if you were a parent of an immune-compromised child, or you were an immune-compromised adult, you couldn't petition the government to force everyone else to take protective measures. You were responsible for your own child or your own personal health.

221. Other measures that constituted a broad prohibition on uninfected individuals, who constituted no risk to anyone, from engaging in society in various forms (even socializing outside) were also overbroad. These broad prohibition measures restricted Ms. Ingram's liberty to such a degree that at times she was effectively confined to her home. Furthermore, her fundamental choices were denied.

222. While the CMOH Orders were partially aimed at protecting Albertans from the virus, they indiscriminately attacked the liberty of those that were virus free.

223. The measures were grossly disproportionate because they reached beyond their objective thus creating collateral damage, intruding into economic policy by shutting whole sectors

[176] *R v Heywood*, [1994] 3 SCR 761, **Tab 25.**

of the economy, or imposing such harsh restriction when lesser ones were plausible if properly construed.

224. The CMOH Orders that restricted capacity at places of worship effectively barred the uninfected from exercising their *Charter* protected rights, especially since the Respondents can only attribute 533 cases[177] to places of worship. Likewise, sports and fitness facilities are linked to 501 cases.[178] Considering that the Respondents have never been pursuing a COVID-19 zero policy, this is obviously grossly disproportionate.

225. No attempt was made to balance the freedoms of individuals that are virus free with the need to protect those at risk and those that were infected. The Respondents simply took the position that everyone is vulnerable and at risk and that all of society must be locked down without seeking options to ensure safe functioning of society. Such a policy is grossly disproportionate.

226. The deprivations of Ms. Ingram's liberty interests are overbroad or grossly disproportionate, or both, and thus unjustifiably limit s. 7.

v) Do the CMOH Orders offend provisions of the *Alberta Bill of Rights*?

227. The Applicant submits that the *PHA* is inconsistent or in conflict with s. 1 of the *Alberta Bill of Rights*.

228. Section 1 of the *Alberta Bill of Rights* outlines the recognition and declaration of rights and freedoms in the province of Alberta, expressly stating that:

> 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 expect 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.[179]

229. Section 2 of the *Alberta Bill of Rights* states that:

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[177] Affidavit of Kimberly Simmonds (Affirmed July 11, 2021), Exhibit B, pg. 17.
[178] Affidavit of Kimberly Simmonds (Affirmed July 11, 2021), Exhibit B, pg. 18.
[179] *Alberta Bills of Rights*, supra s. 1, **Tab 1.**

> 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, abridgement or infringement of any of the rights or freedoms herein recognized and declared.[180]

230. The *PHA* does not possess a "notwithstanding" provision.

231. Section 75 of the *PHA* affirms the superiority of *Alberta Bill of Rights* over itself:

> **Paramountcy**
> 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.[181]

232. The term "inconsistent or in conflict with" has been interpreted to refer to situations where two enactments cannot stand together, where compliance with one law involves breach of the other.[182]

233. The *Alberta Bill of Rights* does not incorporate a similar s. 1 justification provision as does the *Charter*, therefore, the protections of the *Alberta Bill of Rights* are absolute unless they are abdicated by a notwithstanding clause.

234. The *PHA* breaches Ms. Ingram's section 1 (c), (e) and (g) rights as guaranteed by the *Alberta Bill of Rights*.

Freedom of Religion

235. Ms. Ingram is a Christian who regularly attends the First Alliance Church in Calgary. As a Christian, Christmas and Easter are important religious holidays which Ms. Ingram celebrates with her family and church community. However, as a result of the CMOH Orders, Ms. Ingram's right to attend church on Sunday and celebrate religious holidays, such as Easter and Christmas, have been severely restricted or infringed by the CMOH Orders.[183]

236. CMOH Order 38-2020 restricted attendance at a place of worship to "1/3 of the usual attendance of the place of worship"[184] but four days later was amended by CMOH Order 40-2020 to limit attendance to "1/3 of the total operational occupant load as determined in accordance with the Alberta Fire Code and the fire authority having jurisdiction"[185].

237. Many churches incorporated some form of registration or reservation system to attend a service. If an individual was not technologically savvy or quick enough, then they were

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[180] *Ibid*, s. 2, **Tab 1.**
[181] *PHA*, s. 75.
[182] *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3, 1992 CarswellNat 1313 at 50, **Tab 14.**
[183] Affidavit of Rebecca Marie Ingram (sworn December 8, 2020), at 14 – 16.
[184] CMOH Order 38-2020, **Tab 40.**
[185] CMOH Order 40-2020, **Tab 41**.

not able to reserve a spot. Larger families, such as Ms. Ingram and her five children[186], experienced difficulty reserving enough spots to attend.

238. As stated previously, the consequential result of these infringements were the effective prohibition of attendance at a place of worship due to all of the challenges one must complete to comply with to attend a service under the restrictions.

239. Therefore, the CMOH Orders restrict and infringe Ms. Ingram's freedom religion as protected by section 1(c) of the *Alberta Bill of Rights*.

Freedom of Assembly and Association

240. While there exists limited jurisprudence on these protections, it is submitted that these provisions are analogous to their *Charter* counterparts.

241. The current form of the *Alberta Bill of Rights* s. 1 rights mirror those found in s. 2 of the *Charter*. Due to this section's analogous nature, it is submitted that *Charter* case law is instructive in matters dealing with *Alberta Bill of Rights* infringements. Therefore, the freedom of assembly portion of s. 1(e) benefits from the guidance that "freedom of peaceful assembly was geared toward protecting the physical gathering together of people".[187]

242. Ms. Ingram's social activities and ability to spend time with family and friends, which is essential to her psychological well-being and social supports as a single mother, have been infringed by the CMOH Orders.[188] Ms. Ingram was initially only allowed to socialize with those in her household but then that was amended to allow two designated "friends" and as such, Ms. Ingram's freedom of assembly and association protected by s. 1(e) of the *Alberta Bill of Rights* have been infringed by the CMOH Orders.

243. Ms. Ingram submits that this section's freedom of association is akin to s. 2(d) of the *Charter* and includes the "right to join with others in the pursuit of other constitutional rights"[189], and by parallel, would include the right to join with others in pursuit of other rights under the *Alberta Bill of Rights*.

244. As such, a restriction or infringement of Ms. Ingram's freedom of religion translates into an accompanying infringement of her s. 1(e) freedom of assembly and association.

Right of Parents to Make Informed Decisions Respecting the Education of Their Children

245. Section 1(g) of the *Alberta Bill of Rights* is abundantly clear, it protects the right of parents to make informed decisions in regard to their children's education.

[186] Affidavit of Rebecca Marie Ingram (sworn December 8, 2020), at 5.
[187] *Roach*, supra, at 51, **Tab 36.**
[188] Ibid, at paras 8 – 13 & 21.
[189] *MPAO*, supra, at 66, **Tab 20.**

246. No relevant case exists on this section and its corresponding protection.[190]

247. As a single mother of three children of school age, the CMOH Orders requiring her children to attend school virtually and shortening their school year by imposing a longer Christmas break, infringe Ms. Ingram's right pursuant to s. 1(g) of the *Alberta Bill of Rights* as a parent to make informed decisions respecting the education of her children.[191]

Summary of Alberta Bill of Rights Breaches

248. There are undeniable and factually supported infringements of Ms. Ingram's ss. 1 (c), (e) and (g) rights as protected by the *Alberta Bill of Rights*, and without a justification provision, these breaches are not saved.

249. Had the Alberta Legislature passed a notwithstanding clause in the *PHA*, these infringements would have been deemed non-justiciable, but instead, the *PHA* possesses an *Alberta Bill of Rights* supremacy clause. From previously noted rules of statutory interpretation, it is abundantly clear that the Alberta Legislature intended that the *PHA* respect the protection of the *Alberta Bill of Rights*.

250. It is for these reasons that the CMOH Orders offend the above noted provisions of the *Alberta Bill of Rights*.

Conclusion

251. It is clear that the CMOH Orders are *ultra vires* the CMOH on the basis of statutory construction, offend the *Alberta Bill of Rights* and the *Charter* infringements are arbitrary and not justified under s. 1, and the principles espoused in R v Oakes. Accordingly, they must be struck.

PART V RELIEF SOUGHT

252. The Applicant seeks:

a. A Declaration that all provisions of Alberta's Chief Medical Officer of Health (the "CMOH") Orders as described in Schedule "A"[192] are of no force and 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 Chief Medical Officer of Health and the Alberta Legislature pursuant to section 2 of the *Alberta Bill of Rights*;

b. A Declaration that the CMOH Orders as described in Schedule "A"[193] 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*;

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[190] Only one reported case exists that refers to s. 1(g) (*PT v Alberta*, 2019 ABCA 158) but nothing turned on this right, therefore this case is not relevant.
[191] Ibid, at paras 5 – 7.
[192] Schedule A to the Oral Hearing Order, pronounced August 6, 2021, by Madam Justice Kirker.
[193] Ibid.

c. A Declaration that all provisions of the CMOH Orders as described in Schedule "A" are *ultra vires* the purpose of the *Public Health Act*;

d. A Declaration pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) and Rule 3.15(1) of the *Alberta Rules of Court* (the *Rules*) that the CMOH Orders as described in Schedule "A"[194] are unreasonable because they disproportionately limit:

   i. section 2 of the *Charter*;

   ii. section 7 of the *Charter*; and

   iii. section 15 of the *Charter*.

e. In the alternative, 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*;

   ii. section 7 of the *Charter*; and

   iii. section 15 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 of no force or effect;

g. Costs of this Application; and

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of September 2021.

DATED this 1st day of September 2021 in the Municipal District of Foothills, in the Province of Alberta.

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

[194] Ibid.

PART VI LIST OF AUTHORITIES

Legislation:

Tab	Case Law
1	*Alberta Bill of Rights*, RSA 2000, c A-14
2	*Interpretation Act*, RSA 2000, c I-8, s. 10
3	*Public Health Act*, RSA 2000, c P-37 (current)
-	*Public Health Act* in force between Dec 5, 2019 and Apr 1, 2020
-	*Public Health Act* in force between Apr 2, 2020 and Jun 25, 2020
-	*Public Health Act* in force between Jun 26, 2020 and Jul 28, 2020
-	*Public Health Act* in force between Jul 29, 2020 and Jan 31, 2021
-	*Public Health Act* in force between Feb 1, 2021 and Jun 16, 2021

Case Law:

Tab	Case Law
4	*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567
5	*Andrews v Law Society of British Columbia*, [1989] 1 SCR 143
6	*Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78
7	*B. (R.) v Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 SCR 315
8	*Bedford v Canada (Attorney General)*, 2013 SCC 72
9	*Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42
10	*Canadian Pacific Railway v James Bay Railway*, [1905] 36 SCR 42, 1905 CarswellNat 33
11	*Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9
12	*Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835, 1994 CarswellOnt 112
13	*Dunmore v Ontario (Attorney General)*, 2001 SCC 94
14	*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3, 1992 CarswellNat 1313
15	*Godbout v Longueuil (City)*, [1997] 3 SCR 844
16	*Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211
17	*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, 2018 CarswellBC 1510
18	*Law v Canada (Minister of Employment & Immigration)*, [1999] 1 SCR 497
19	*Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613, 2015 CarswellQue 1533
20	*Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, 2015 CarswellOnt 210
21	*R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 1985 CarswellAlta 316
22	*R v D.L.W.*, 2016 SCC 22
23	*R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713, 1986 CarswellOnt 141
24	*R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 (SCC), 1999 CarswellBC 778
25	*R v Heywood*, [1994] 3 SCR 761, 1994 CanLII 34 (SCC)

26	*R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483
27	*R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC)
28	*R v N.S.*, 2012 SCC 72, 2012 CarswellOnt 15763
29	*R v Vaillancourt*, [1987] 2 SCR 636
30	*R v White*, [1999] 2 SCR 417
31	*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, 1987 CanLII 88 (SCC)
32	*Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486
33	*Reference re Same-Sex Marriage*, 2004 SCC 79
34	*Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC), 1998 CarswellOnt 1
35	*RJR-MacDonald Inc. v Canada*, [1995] 3 SCR 199, 1995 CarswellQue 119
36	*Roach v Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FC 406, 1994 CarswellNat 1463
37	*Syndicat Northcrest v Amselem*, [2004] 2 SCR 551

CMOH Orders & Orders in Council:

Tab	Order
38	CMOH Order 01-2020
39	CMOH Order 07-2020
40	CMOH Order 38-2020
41	CMOH Order 40-2020
42	CMOH Order 41-2020
43	CMOH Order 42-2020
44	CMOH Order 02-2021
45	CMOH Order 17-2021
46	CMOH Order 19-2021
47	Order in Council 080/2020
48	Order in Council 354/2020

Other:

Tab	Order
49	Government of Alberta, Dr. Deena Hinshaw "Learning to live with COVID-19" (August 4, 2021)
50	Alberta's Pandemic Influenza Plan (Alberta Government, March 2014)
51	Government of Alberta, *Economic Spotlight – 2020: A Year in Review* (March 2021)
52	Government of Alberta, *Economic Spotlight – 2020 GDO by Industry* (July 2021)
53	Request for Exemption – ORDER 42-2020 - NATIONAL HOCKEY LEAGUE (January 12, 2021)
54	Statistics Canada, *Provisional deaths counts and excess mortality*, The Daily, March 10, 2021

55	Statistics Canada, *Provisional deaths counts and excess mortality*, The Daily, July 12, 2021
56	Government of Alberta, Notification of Essential Services (March 30, 2020)

SCHEDULE "A"

COURT FILE NO.	**2001-14300**
COURT	**COURT OF QUEEN'S BENCH OF ALBERTA**
JUDICIAL CENTRE	**CALGARY**
APPLICANTS	**REBECCA MARIE INGRAM, HEIGHTS BAPTISTCHURCH, NORTHSIDE BAPTIST CHURCH, ERIN BLACKLAWS and TORRY TANNER**
RESPONDENTS	**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA and THE CHIEF MEDICAL OFFICER OF HEALTH**

Supplementary Particulars

June 9, 2021

The Applicants believe this to be a complete listing of their *Charter* claims but reserve the right to add, delete or modify any claims prior to the final hearing of this matter in accordance with the Procedural Order and will make every reasonable attempt to inform the Respondents of such amendments.

IMPUGNED CHIEF MEDICAL OFFICER OF HEALTH ORDERS

1. The following CMOH restrictions (and, for greater clarity, any subsequent manifestations of the restrictions in any future CMOH orders not specified below):

   (a) **Private Residence Restrictions**: prohibition that one is not allowed to have a non-resident enter one's own home (CMOH Order 02-2021, part 2, section 3: [A] person who resides in a private residence must not permit a person who does not normally reside in that residence to enter or remain in the residence)

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

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

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

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

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

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

      (vi) requirement that individuals cover their face, including when attending worship services, wedding or funeral (CMOH Order 02-2021, Part 5, section 23).

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

      (i) prohibition on outdoor group physical activities, including hockey, where 2 meters physical distance from each other person at all times is not

possible and more than 10 people (CMOH Order 02-2021, Part 3, section 57);

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

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

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

(i) mandatory isolation of at least 10 days for:

- a “confirmed case” of COVID-19 (not defined in the Order, but guidelines indicate that a confirmed case of COVID-19 includes a positive PCR-Test result with no clinical diagnosis) that requires a person to remain at home two metres apart from others, not attend work, school, social events or any other public gatherings, and not take public transit (CMOH Order 05-2020, section 1 and 2); and

- a person exhibiting the following symptoms not related to a pre-existing illness or health condition: cough, fever, shortness of breath, runny nose, or sore throat (CMOH Order 05-2020, section 7);

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

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

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

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

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

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

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

LEGAL BASIS

SECTION 2(A) – FREEDOM OF RELIGION

2. An infringement of section 2(a) of the Charter will be made out where a claimant has a sincerely-held religious belief that has a nexus with religion and where the impugned government action 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.[1]

SECTION 2(b) – FREEDOM OF EXPRESSION

3. The Supreme Court has established a triparte test for whether freedom of expression protected under section 2(b) of the *Charter* is engaged.[2] Adapted to the present context, the three-part test asks the following three questions:

    (1) Is there protected expressive content captured by the restrictions?
    (2) Did the method or location of the expression remove that protection?
    (3) If the expression is protected by section 2(b), is the effect of the restrictions to infringe that protection?

SECTION 2(c) – FREEDOM OF PEACEFUL ASSEMBLY

4. An identified purpose of freedom of peaceful assembly is to protect the physical gathering together of people.[3] Peaceful assembly is a collectively held right: it requires a literal coming together of people.[4]

SECTION 2(d) – FREEDOM OF ASSOCIATION

5. A purposive approach to freedom of association defines the content of this right by reference to its purpose: "to recognize the profoundly social nature of human endeavors and to protect the individual from state-enforced isolation in the pursuit of

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[1] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 32; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 122
[2] *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at para 56; *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at para 37.
[3] *Roach v Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FC 406, 1994 CanLII 3453 (FCA) at para 69
[4] *Mounted Police Assn. of Ontario v Canada (*Attorney *General)*, 2015 SCC 1 at para 64 [*MPAO*]

his or her ends".[5] Freedom of association allows the achievement of individual potential through interpersonal relationships and collective action.[6]

6. The purpose of the right to freedom of association encompasses the protection of (1) individuals joining with others to form associations (the constitutive approach); (2) collective activity in support of other constitutional rights (the derivative approach); and (3) collective activity that enables "those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict".[7]

SECTION 7 – LIBERTY & SECURITY OF THE PERSON INTERESTS

7. Section 7 protects the triple individual interests of life, liberty, and security of the person. The liberty interest protects the right of individuals to be free from state detainment and state restrictions upon the freedom of movement.[8] It also protects bodily autonomy, core lifestyle choices, and fundamental relationships.[9] The security interest protects the right of individuals to be free from state action that threatens physical harm to their bodies, or a “serious and profound effect on a person’s psychological integrity”.

SECTION 15 – EQUALITY RIGHTS

8. Section 15 guarantees that every individual is equal before and under the law and protects the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.[10]

THE CHARTER INFRINGEMENTS OF THE APPLICANTS

Torry Tanner

9. The Private Residence Restrictions, Indoor Gathering Restrictions, and Outdoor Gathering Restrictions interfere with Torry Tanner’s freedom of religion, freedom of peaceful assembly and freedom of association, and liberty and security interest *Charter* rights. These restrictions prohibited her from having her children and extended family over to her house to celebrate Christmas, a religious celebration for

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[5] MPAO at para 54, citing from Reference re Public Service Employee Relations Act (Alta.), [1987] 1 SCR 313, 1987 CanLII 88 (SCC) at 365 [*Re Public Service*] [Emphasis added].
[6] *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 17
[7] MPAO, at para 54, citing from *Re Public Service,* at 366.
[8] *R v Heywood*, [1994] 3 SCR 761, 1994 CanLII 34 (SCC) at 789
[9] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 SCR 315 at paras 83-85; *Godbout v Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 SCR 844 at para 66
[10] *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at paragraph 15 citing *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, at 171, per McIntyre J)

her. This is a prohibition on the gathering together of her family for religious reasons and has a profound impact on her core lifestyle choices and fundamental relationships. These restrictions are also state action that has an impact on Ms. Tanner's mental state.

10. The Outdoor Gathering Restrictions also interfere with Ms. Tanner's freedom of expression, freedom of peaceful assembly and freedom of association, and liberty and security interest *Charter* rights as they prohibit gathering in large groups to protest government action, an activity that Ms. Tanner strongly believes in. The exposure to censure, restrictions, and prosecution, such as contempt, triggers the violation of these rights. *Charter* rights are not vitiated by compliance with restrictions.

Heights Baptist Church

11. The Private Residence Restrictions and Indoor Gathering Restrictions interfere with Heights Baptist Church's freedom of religion, freedom of expression, freedom of peaceful assembly and freedom of association *Charter* infringements. These restrictions prohibit Heights Baptist Church members from acting in accordance with their religious beliefs in a manner that is more than trivial or insubstantial and therefore infringes their freedom of conscience and religion. These restrictions prohibit them from physically gathering all together in one geographic place according to their religious belief. They also prohibit Heights Baptist Church members from participating in religious practices, such as baptism, serving the Lord's Supper to one another, and laying of hands on people during times of prayer and commissioning. They also prohibit the gathering together in one's homes to show hospitality, which is a religious belief.

12. The Indoor Gathering Restrictions severely limit a funeral service size and ban a funeral reception; at the time of a death, mourning together as a church while simultaneously celebrating that person's life with a service and a reception afterwards is a practice that is now prohibited.

13. The masking requirement of the Indoor Gathering Restrictions is an interfere with Heights Baptist Church members' ability to express themselves without interference at a religious service.

14. The Isolation, Quarantine and Visiting Restrictions that Heights Baptist Church members' freedom of religion, freedom of expression, freedom of peaceful assembly and freedom of association as they require physical distancing, the covering of one's face and the banning of visitors in long term care or health care facilities except for a single essential visitor.

Northside Baptist Church

15. The Indoor Gathering Restrictions interfere with Northside Baptist Church's freedom of religion, freedom of peaceful assembly and freedom of association *Charter* infringements. These restrictions prohibit Northside Baptist Church's members from

acting in accordance with their religious beliefs in a manner that is more than trivial or insubstantial and therefore infringes their freedom of conscience and religion. They cannot physically gather all together in one geographic place as their religious belief mandates, they cannot participate in religious practices, both structured and unstructured, such as fellowship through mutual edification, participation in ordinances, corporate prayer, corporate singing, and other religious practices that requires physical touch among members.

16. The Indoor Gathering Restrictions also interfere with Northside Baptist Church's freedom of expression. The masking requirement is an interference with the members' ability to express themselves without interference at a religious service.

Erin Blacklaws

17. The Indoor Gathering Restrictions interfere with Erin Blacklaws' freedom of peaceful assembly and freedom of association, and the liberty and security interest *Charter* rights. Under these restrictions, which limit funeral size and ban a funeral reception, Mr. Blacklaws is unable to hold a funeral for his father that would accommodate all the friends his father had and allow them and Mr. Blacklaws to have a funeral for his father that properly allows them to collectively grieve, pay their respects and say good-bye.

18. The Isolation, Quarantine and Visiting Restrictions interfere with Mr. Blacklaws' liberty and security interest *Charter* rights. Mr. Blacklaws was not allowed to be with his father or say good-bye to him at the end of his life. This is a profound state interference with freedom of movement, fundamental relationship, and a serious effect on Mr. Blacklaws' psychological integrity.

Rebecca Ingram

19. The Indoor Gathering Restrictions interfere with Mr. Ingram's freedom of religion, freedom of peaceful assembly and freedom of association, and the liberty and security interest *Charter* rights. Ms. Ingram was not able to attend Christmas and Easter services at her place of worship, nor has she been able to celebrate Sunday service with her church community. The Indoor Gathering Restrictions and Private Residence Restrictions have resulted in Ms. Ingram not being able to celebrate Christmas and Easter in her home with extended family and friends. These prohibitions on religious gatherings of her family and friends have profound impacts on her core lifestyle choices and fundamental relationships.

20. The Indoor Gathering Restrictions and Outdoor Gathering Restrictions interfere with Ms. Ingram's and her children's freedom of peaceful assembly and freedom of association, and the liberty and security interest *Charter* rights. Ms. Ingram and her children are forbidden to socialize with their family and friends, including but not limited to the celebration of various life milestones. These prohibitions on indoor and outdoor gatherings with her family and friends have profound impacts on her and her children's core lifestyle choices and fundamental relationships. Alberta does not have the right to tell Ms. Ingram that she can simply socialize over the telephone or

video conference software – there is no legal doctrine that allows the state to instruct its citizens as to how, where, when or with whom they can enjoy their rights and freedoms.

21. The Primary or Secondary School Restrictions interfere with Ms. Ingram's or her children's freedom of expression, freedom of peaceful assembly and freedom of association, the liberty and security interest, and equality *Charter* rights. The CMOH orders that prohibited certain schools from offering in-class lessons based on grade level or age of student interfere with Ms. Ingram's children's equality rights. Ms. Ingram is barred from making core lifestyle choices for her children. Ms. Ingram's children are unable to obtain education in a manner beneficial to them, thus suffocating their freedom of expression, such as the inability to work in groups and express themselves in class, school projects and other educational mechanisms. Her children are unable to see their education friends and peers, and are unable to attend gym class to the betterment of their health.

22. The Business Closures interfere with Ms. Ingram's liberty and security of the person interests. The measures infringe on her ability to make "core lifestyle choices" in which manner she choses to run her business. Ms. Ingram is currently in possession of a "stranded asset" wherein she is prohibited from operating her business which is continually going deeper into debt. Mr. Ingram is unable to provide for herself and her family through her business and is forced to seek alternative methods of earning. Further, the Business Closures interfere with Ms. Ingram's security interests in that they have serious and profound effect on her psychological integrity as she is unable to operate her business, make a living, provide for herself and her family, and is facing immense pressure from the mounting debt of her business.