

[Rule 3.8 and 3.15]

COURT FILE NUMBER: 2101-09446

COURT: COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE: CALGARY

APPLICANT: CHRISTOPHER SCOTT

RESPONDENTS: HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA
THE CHIEF MEDICAL OFFICER OF HEALTH
ALBERTA HEALTH SERVICES

DOCUMENT: **ORIGINATING APPLICATION**

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FILE NO.: 119-00812C-CW

**NOTICE TO RESPONDENTS:**

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date: ~~August 20, 2021~~ August 26, 2021

Time: 10:00 am

Where: Calgary Courts Centre, Law Courts
Virtually via WebEx Video Conferencing

Before Whom: Presiding Justice in Chambers

Remedy claimed or sought:

1. An Order abridging the time for service of this Originating Application and supporting materials, if necessary;
2. An Order that this action and Court of Queen's Bench Action 2101-05742 (the "**Injunction Proceedings**") should be immediately consolidated;
3. An Order granting leave to the Applicant to cross-examine the affiants in the Injunction Proceedings, David Brown and Dr. Deena Hinshaw, as such cross-examinations relate directly to matters in this action and to the Injunction Proceedings, both in respect of the merits and constitutional elements of the Injunction Proceedings and of this action;
4. A Declaration or an Order granting the Applicant Public Interest Standing;
5. A Declaration pursuant to section 24(1) of the *Charter of Rights and Freedoms* or section 52(1) of the *Constitution Act, 1982*, or both, and/or Rules 3.15(1) of the *Alberta Rules of Court*, that orders issued by the Respondent, the Chief Medical Officer of Health (the "**CMOH**") under the *Public Health Act*, since March 2020 or alternatively any CMOH Orders issued within a period of six months prior to either the commencement of the Injunction Proceedings or this action, (individually a "**CMOH Order**" and collectively or any collection of "**CMOH Orders**") are unreasonable because they disproportionately limit or violate the Applicant's constitutionally protected rights and freedoms with respect to public protests and/or gathering for political purposes pursuant to sections 2(b), 2(c), and 2(d) of the *Charter of Right and Freedoms*;
6. A Declaration pursuant to section 24(1) of the *Charter of Rights and Freedoms* or section 52(1) of the *Constitution Act, 1982*, or both, and/or Rules 3.15(1) of the *Alberta Rules of Court*, that the Applicant's sections 2(b), 2(c), and 2(d) rights were infringed and the infringements are not saved by section 1 of the *Charter of Rights and Freedoms*.
7. A Declaration that all provisions of the CMOH Orders, both those in force or rescinded,

pertaining in any form or manner to public or private gatherings of people, especially to public protests and/or gathering for political purposes, violate sections 1(d) and 1(e) of the *Alberta Bill of Rights* and accordingly are *ultra vires* the CMOH and the Alberta Legislature pursuant to section 2 of the *Alberta Bill of Rights* and/or are of no force and effect as against Albertans, or alternatively as against the Applicant.

8. A Declaration that the CMOH Orders, both those in force or rescinded, are unlawful and are of no force and effect as against Albertans, or alternatively as against the Applicant, absent the Alberta Legislature passing legislation that the *Public Health Act* is notwithstanding the *Alberta Bill of Rights*.
9. A Declaration that the CMOH Orders, both those in force or rescinded, restricting public or private gatherings of people, especially public protests and/or gathering for political purposes, are *ultra vires* section 29 of the *Public Health Act* and are of no force or effect as against Albertans, or alternatively as against the Applicant.
10. Costs of this Application; and
11. Such further and other relief as Counsel may advise and this Honourable Court deems meet, just, and equitable given the circumstances.

Grounds for making this Application:

Background

12. In addition to the CMOH, Her Majesty the Queen in Right of the Province of Alberta and Alberta Health Services are the other Respondents to this Application.
13. Since March of 2020, in response to the SARS-CoV-2 virus (“**COVID-19**”), the Respondent, Alberta’s CMOH has pronounced over 80 CMOH Orders.
14. The CMOH Orders have implemented purportedly lawful prohibitions and penalizations that have restricted the rights and freedoms of the Applicant and Albertans, generally:
 - a) To be with friends and family;

- b) To engage in freedom of expression, especially political expression;
 - c) To engage in peaceful assembly, especially for the purpose of political protest;
 - d) To freely associate, especially to join with others in pursuit of constitutional and other rights;
 - e) To join with others to meet on more equal terms the power and strength of other groups or entities; and
 - f) Such other and further rights and liberties as will be proved at adjudication of this action.
15. The Applicant resides, has business interests, and operates a truck stop, fuelling station, campground, meeting place, and café restaurant in Mirror, Alberta. The Applicant and his business interests have been subjected to restrictions under the CMOH Orders and the *Public Health Act* by the Respondents.
16. At all material times during the period in which the CMOH Orders have been in effect, the Applicant has stood in vocal political and civil opposition to the actions taken by the CMOH, Alberta Health Services, and the Government of Alberta in relation to the lockdown and the Respondents' actions related to COVID-19.
17. Provisions of the CMOH Orders which, either collectively or separately, infringed on the rights of the Applicant were those which:
- a) Limited capacity, restricted access, and forced the closure his restaurant, business, and meeting place;
 - b) Prohibited gatherings at private residences;
 - c) Prohibited gatherings at his place of business;
 - d) Prohibited social gatherings;
 - e) Prohibited protests;
 - f) Prohibited gatherings for political purposes; and

g) Arbitrary and discriminatory application of the law, which includes but is not limited to CMOH Orders and restrictions under the *Public Health Act*, against small business owners, including the Applicant.

18. At all material times, the Respondents have increased the intensity of lockdown enforcement against the Applicant to the point where such enforcement was punitive in nature — punishing an individual for the expression of political views and political will and preventing him from organizing protests, assembling with others to pursue constitutional rights and political aspirations, and creating a chilling effect on political organization, assembly, and protest. The aforementioned amounts to repression of political dissent, censorship, and is often characteristic of authoritarian governments — it offends the fundamental and cardinal principles of a free and democratic society.
19. In response to public opinion that the Respondents were losing control of the COVID-19 response measures, and with public defiance to Respondents' oppressive and disproportionate enforcement on the rise, the Respondents specifically targeted and chose to make an example of the Applicant by unfairly pursuing sustained, multiplicitous, and duplicative legal actions against him.
20. On or about May 2021, as far as is known to the Applicant, the Government of Alberta directed officials to target and aggressively enforce CMOH Orders against high profile dissidents of COVID-19 lockdown rules, including the Applicant. The Government of Alberta by giving such directions, directly involved itself and interfered with the administration of justice.
21. Since March 2020, the Applicant has been charged with at least eight (8) regulatory infractions under the *Public Health Act* and other enactments. Prosecution of these regulatory charges are ongoing.
22. Enforcement of the CMOH Orders has arbitrarily been more aggressive against political

dissidents and those who stand in political opposition than against those not expressing dissent or public opposition to public policy set by the Government of Alberta and investigated and enforced by Alberta Health Services and other agencies.

23. On January 29, 2021, Alberta Health Services filed an originating application against the Applicant seeking an order compelling the Applicant to close dine-in service in compliance with a CMOH Order and restricting the public from meeting in his business, whether for political purposes or otherwise.
24. On February 5, 2021, an injunctive order was filed requiring the Applicant to comply with the CMOH Order in effect at the time.
25. On February 5, 2021, a procedural order was filed setting a litigation schedule for the full hearing of the Alberta Health Services originating application.
26. On March 1, 2021, a consent order was filed allowing Alberta Health Services to discontinue its action against the Applicant.
27. The Applicant, alongside other concerned Albertans, planned, organized and advertised a peaceful assembly for the purpose of political protest, known as the Save Alberta Campout Protest (the “**Peaceful Protest**”). The Peaceful Protest was a gathering fundamentally protected by sections 2(b), 2(c), and 2(d) of the *Charter of Rights and Freedoms* and by 1(d) and 1(e) of the *Alberta Bill of Rights*. It was scheduled for May 8 and 9, 2021, to engage in freedom of expression to protest the CHOH Orders, Alberta Health Services, the Government of Alberta, and corresponding breaches of the rights and freedoms guaranteed by the *Charter of Rights and Freedoms*, among other constitutional protections.
28. On or about May 6, 2021, in the Injunction Proceeds, Alberta Health Services applied *ex parte* seeking an order prohibiting, among other things, the Peaceful Protest and deeming the same to be an “Illegal Public Gathering”. The order was granted on or about May 6, 2021 (the “**Order**”). The Order was amended on May 18, 2021.

29. On May 8, 2021, the Applicant was arrested by the Royal Canadian Mounted Police for contempt of the Order at the Peaceful Protest.
30. On May 11, 2021, a release order (“**Release Order**”) was pronounced, and the Applicant was released from custody on the condition that he not breach any CMOH Orders.
31. Since May 11, 2021, the Applicant has, under protest, been in strict compliance with the CMOH Orders and orders of the Court requiring such compliance.
32. On June 1, 2021, Alberta Health Services filed an application in the Injunction Proceedings seeking a declaration of civil contempt against the Applicant.
33. On June 28, 2021, the Court held the Applicant to be in contempt of Court. The hearing of the sanctions portion of the contempt proceedings have yet to occur.
34. The Applicant is still subject to existing CMOH Orders, the Order, and the Release Order, and may be subject to further CMOH Orders and other restrictions.
35. This Application and the Injunction Proceedings are of public interest and have ongoing relevance to the liberty and freedoms of the Applicant, and Albertans.

Legal basis

36. The Supreme Court has referred collectively to the section 2 freedoms as protecting rights fundamental to Canada’s liberal democratic society.

Section 2(b) – Freedom of expression

37. The meaning of "expression" within section 2(b) has been read broadly as including any activity that conveys, or attempts to convey, meaning. Commercial expression is recognized as an activity protected under section 2(b). This includes advertising and any other similar means of expression used to sell goods and services.¹
38. A law will be found to violate the freedom of expression where the law either has the purpose or effect of violating the right.

¹ *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3 at paragraph 48

39. The Supreme Court of Canada set out a three-part test to determine whether in a specific case, freedom of expression under section 2(b) of the Charter applies. Adapted to the present context, the test is as follows:
- a) Did the actions of the Applicant have expressive content, thereby bringing it within section 2(b) protection?
 - b) If so, does the method or location of this expression remove that protection?
 - c) If the expression is protected by section 2(b), does CMOH Order 42-2020 and other CMOH Orders restricting expression and/or the *Public Health Act* infringe that protection, either in purpose or effect?²

Section 2(c) – Freedom of peaceful assembly

40. Freedom of peaceful assembly is geared towards protecting the physical gathering together of people.³
41. In cases where there is a failure with respect to the minimal impairment requirement, regulatory measures that have infringed freedom of peaceful assembly have failed section 1 *Charter* analysis.⁴ Further, measures regulating public gatherings that were enforceable through a strict liability offence punishable by fine were similarly not justifiable under section 1.⁵

Section 2(d) – Freedom of association

42. Freedom of association is intended to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of their ends.⁶ It protects the collective action of individuals in pursuit of their common goals.⁷ It functions to protect individuals against more powerful entities, thus empowering vulnerable

2 *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 at para 56

3 *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FCR 406

4 *Gammie v. South Bruce Peninsula (Town)* 2014 ONSC 6209; *Villeneuve v. Montréal*, 2016 QCCA 2888

5 *Bérubé c. Ville de Québec*, 2019 QCCA 1764

6 *(Mounted Police Association of Ontario v. Canada)*, 2015 SCC 1 (“MPAO”) at paragraph 54).

7 *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 at 253

groups and helping them work to right imbalances in society.⁸ It allows the achievement of individual potential through interpersonal relationships and collective action.

Infringements of the Alberta Bill of Rights

43. The orders of the CMOH made under section 29 of the *Public Health Act* contravene section 2 of the *Alberta Bill of Rights*. The paramountcy clause of the Public Health Act, section 75, expressly reiterates the supremacy of the *Alberta Bill of Rights*. To the degree the CMOH Orders violate the rights protected by sections 1(d) and 1(e) of the *Alberta Bill of Rights*, the CMOH orders are unlawful and of no force or effect. Pursuant to section 2 of the *Alberta Bill of Rights*, section 29 of the *Public Health Act* must be construed and applied so as not to authorize the abrogation or infringement of the rights protected by section 1 of the *Alberta Bill of Rights*. All infringements of enumerated rights protected under section 1 are prohibited unless the government has passed legislation declaring that the infringement may occur “notwithstanding” the *Alberta Bill of Rights*. The CMOH Orders, as applied restricting public or private gatherings of people, especially public protests and/or gathering for political purposes, are *ultra vires* s 29 of the Public Health Act.

Application

44. The CMOH Orders unjustifiably limited or infringed upon the Applicant’s *Charter* rights and freedoms as guaranteed by sections 2(b), 2(c), and 2(d) of the *Charter of Rights and Freedoms* and sections 1(d) and 1(e) of the *Alberta Bill of Rights*.

45. The impugned CMOH Order provisions can be categorized broadly as:

- a) Indoor Gathering Restrictions: the broad requirements and prohibitions on “indoor gatherings” that restricted the amount of people that were allowed in an indoor public or private place subject to certain exemptions, including but not limited to gatherings for political purposes;

⁸ *MPAO, supra*, at paragraph 58

- b) Outdoor Gathering Restrictions: the prohibitions on “outdoor gatherings” that restricted the amount of people that were allowed an outdoor private place or public place including at one time or another the strict prohibition of all outdoor gatherings, including but not limited to gatherings for political purposes;
 - c) Business Restrictions: the broad interference, discrimination, prohibition, restrictions, or mandatory closures of businesses of whole sectors of the economy, specifically the forced restrictions or closure of restaurants, cafés, and meeting places, which include businesses where people meet and gather for political purposes or otherwise;
46. Indoor, Outdoor, and Business Gathering Restrictions interfere with the Applicant's freedom of expression, freedom of peaceful assembly, freedom of association, and the liberty and security interest *Charter* rights, and other rights, as they prohibit gathering in groups to protest government action, to meet for political purposes, an activity in which the Applicant strongly believes. 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.
47. Provisions of the CMOH Orders that prohibit or limit to small number gatherings or gatherings at public or private facilities disproportionately limit freedom of peaceful assembly as protected by section 2(c) of the *Charter* and freedom of expression as protected by section 2(b) of the *Charter*.
48. Meeting, assembling, gathering, and acting in the expression of political will is a precept and cornerstone of democracy in Alberta and in Canada. These rights are fundamental to all citizens and residents of Alberta and Canada. As such, and for other reasons, the Applicant has a public interest standing.

49. The claims in both this action and in the Injunction Proceedings arise from the same set of facts, the same dealings, the same set of circumstances, and share common elements.
50. There are common claims, disputes, and relationships between the parties.
51. Consolidation will save time and resources in pre-trial procedures.
52. No party will be seriously prejudiced by the consolidation of these actions.
53. Both actions are at an early stage and neither action is at a more advanced stage than the other. In fact, the Injunction Proceedings have specifically been managed and refer to this action, which was contemplated by the parties and anticipated by the Court.
54. Time at trial will be reduced as a result of consolidation.
55. Consolidation will not cause undue delay.
56. In actuality, keeping the actions separate will delay, confuse and hinder both actions and will cause litigation by instalments. As both actions arise from the same set of facts, same dealings, the same set of circumstances, and share common elements, both actions are inextricably bound to one another and should be heard and tried together. Bifurcating these actions will cause delay, litigation by instalments, double costs, and efforts and maintain duplicitious proceedings where the same is not necessary.
57. Consolidation of both actions prevents the waste of resources, will save expenses, and will avoid multiplicity of legal proceedings in both matters, both for this Honourable Court and for the litigants involved.
58. Consolidation of both actions will avoid inconsistent verdicts or outcomes.
59. If the actions are tried separately, their individual pre-trial steps will require the duplicate disclosure of roughly the same documents and duplicate or similar cross-examinations or questioning of the same parties.
60. The Applicant is still subject to existing CMOH Orders, the Order, and the Release Order, and may be subject to further CMOH Orders and other restrictions. The COVID-19

pandemic is not over.

61. As previously stated herein, this Application and the Injunction Proceedings are of great public interest and have ongoing relevance to the liberty and freedoms of the Applicant, and Albertans.
62. Having regard to all circumstances, on balance, it is in the interests of justice that the actions be consolidated.
63. The Applicant pleads and relies on the facts, pleadings, allegations, claims, remedies, and other particulars described in the Injunction Proceedings as though each and every fact, allegation, claim, remedy, and other particular had been expressly plead herein.

Material or evidence to be relied upon:

64. The Applicant relies on the following evidence:
 - a) The Originating Application of AHS, filed on May 6, 2021 in the Injunction Proceedings;
 - b) The Affidavit of David Brown, filed on May 6, 2021 in the Injunction Proceedings;
 - c) The Affidavit of Deena Hinshaw, files on May 6, 2021 in the Injunction Proceedings;
 - d) The Order of Associate Chief Justice Rooke, filed on May 6, 2021 in the Injunction Proceedings;
 - e) The Order of Justice Germain, filed on May 11, 2021 in the Injunction Proceedings;
 - f) The Affidavit of Mia Neudorf, filed on May 12, 2021 in the Injunction Proceedings;
 - g) The Affidavit of Sean Mihalcheon, filed on May 12, 2021 in the Injunction Proceedings;
 - h) The Application of Christopher Scott, filed on May 12, 2021 in the Injunction Proceedings;

- i) The Affidavit of Bruce Holliday, filed on May 20, 2021 in the Injunction Proceedings;
- j) The Affidavit of John Spaan, filed on May 20, 2021 in the Injunction Proceedings;
- k) The Order of Justice Germain, filed on May 21, 2021 in the Injunction Proceedings;
- l) The Contempt Application of AHS, filed on May 1, 2021 in the Injunction Proceedings;
- m) The Reasons for Decision of Justice Germain, filed on June 29, 2021 in the Injunction Proceedings;
- n) The Affidavit of Christopher Scott, filed on July 20, 2021 in the Injunction Proceedings;
- o) The Affidavit of Sean Mihaelcheon, to be filed which incorporates items 64(a)-(m);
- p) Transcripts of proceedings in the Injunction Proceedings;
- q) Such further Affidavit(s) of Christopher Scott and third parties, which may be filed subsequently in this action;
- r) The anticipated transcripts of cross-examinations of the affidants, David Brown and Dr. Deena Hinshaw;
- s) Additional materials and/or evidence yet to be filed by the parties to this action; and
- t) Such other and further material and evidence as Counsel may adduce and this Honourable Court permit.

Applicable rules:

65. Rules 1.2, 1.3, 3.15, 3.72, 9.14, and such other and further Rules as may be advised by Counsel and permitted by this Honourable Court

Applicable acts and regulations:

66. CMOH Orders made by the CMOH;

67. *Alberta Rules of Court*, Alta Reg 124/2010, its regulations and amendments;
68. *Alberta Bill of Rights*, RSA 2000, c A-14, as amended;
69. *Constitution Acts, 1867 to 1982*, 30 & 31 Vict, c 3, as amended and as otherwise colloquially known;
70. *Canada Act 1982 (UK)*, 1982, c 11, including the Canadian Charter of Rights and Freedoms section 2;
71. *Public Health Act*, RSA 2000, c P-37, its regulations and amendments;
72. *Bill 10: Public Health (Emergency Powers) Amendment Act, 2020*, its regulations, amendments, and upon its proclamation;
73. *Bill 66: Public Health Amendment Act, 2021*, its regulations, amendments, and upon its proclamation; and
74. Such other enactments and legislation as the Applicants may advise and this Honourable Court may consider given the circumstances.

Any irregularity complained of or objection relied on:

75. As above and as Counsel may further advise and this Honourable Court take into consideration given the circumstances.

How the application is proposed to be heard or considered:

76. Orally in Chambers or by video conferencing via WebEx; and/or
77. In any other manner this Honourable Court deems appropriate given the circumstances.

WARNING

You are named as a respondent because you have made or are expected to make an adverse claim in respect of this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant(s) and against all persons claiming under the applicant(s). You will be bound by any order the Court makes, or another order might be given or other proceedings taken which the applicant(s) is/are entitled to make without any further notice to you. If you want to take part in the application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.