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APPLICANTS	REBECCA MARIE INGRAM, HEIGHTS BAPTIST CHURCH, NORTHSIDE BAPTIST CHURCH, ERIN BLACKLAWS and TORRY TANNER
RESPONDENTS	HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA and THE CHIEF MEDICAL OFFICER OF HEALTH
DOCUMENT	**WRITTEN FINAL ARGUMENTS OF THE APPLICANTS HEIGHTS BAPTIST CHURCH, NORTHSIDE BAPTIST CHURCH, ERIN BLACKLAWS, and TORRY TANNER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

a) Summary

1. In this Reply, the Applicants, Heights Baptist Church, Northside Baptist Church, Erin Blacklaws, and Torry Tanner (collectively the "**Applicants**"), address the claims made in the Final Written Argument of The Respondents, Her Majesty the Queen in Right of the Province of Alberta and the Chief Medical Officer of Health (collectively "**Alberta**") dated 13 July 2022 (the "**Respondents' Final Argument**" or "**Alberta's Final Argument**").

2. This Reply will focus on three main areas of the Respondents' Final Argument, namely the criticism of Dr. Bhattacharya, the role of the *Gateway*[1] decision, and the flaws within the Respondents' *Charter* section 1 analysis.

3. This Reply will also address recent relevant and material evidence of Alberta that was publicly disclosed by order of this Honourable Court on 13 July 2022.

II. ADDRESSING CRITICISM OF DR. BHATTACHARYA

b) Ethical Concerns Regarding Respondents' Submissions

4. At the outset, it is necessary to address an ethical issue arising from the Respondents' Final Argument. Throughout the Respondents' Final Argument, Alberta repeatedly makes *ad hominem* attacks upon Dr. Bhattacharya's character and reputation[2] and claims Dr. Bhattacharya "lack[ed] candour" and "came unprepared."[3]

5. The Respondents flagrantly disregard the truth by falsely stating, "[e]ven Dr. Bhattacharya admitted on cross-examination that he did not know whether his own statement about this in his expert report was true or not."[4] While Alberta provides a footnoted reference for this allegation, once one checks the footnoted reference, it becomes clear that Dr. Bhattacharya was stating whether or not he knew if the

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[1] *Gateway Bible Baptist Church et al v Manitoba et al*, 2021 MBQB 219 [***Gateway***]
[2] Respondents' Final Argument at paras 103-126, 242, 263-264, 269, 271, 273, 313.
[3] *Ibid* at para 125.
[4] *Ibid* at para 313.

expert report of Alberta's witness, Dr. Balachandra, was true or not.[5] Alberta has taken this quotation from the transcript and used it to fabricate an argument with the deliberate purpose of misleading this Honourable Court on a material evidentiary point.

6. The Applicants are concerned that Alberta would seek to mislead this Honourable Court regarding evidence adduced by an eminent expert witness.

7. No explanation could justify such salacious attacks against Dr. Bhattacharya, which go beyond the scope of legal propriety and are unsupported by any evidence.[6]

8. Chapter 2.1-1 of the Law Society of Alberta's *Code of Conduct* (the "**Code**") states:

> A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity. [Emphasis added]

9. Chapter 5.1-1 of the Code states:

> When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.

10. If Alberta believed Dr. Bhattacharya was being untruthful during cross-examination, they are obliged to address this contemporaneously with the witness' testimony. Alberta needed to take steps within the trial process to call attention to this allegation and provide the witness a fair opportunity to respond. Instead, Alberta strategically waited until the witness was no longer able to respond before misleading how the evidence was presented.

11. Given Alberta's mischaracterization and fabrication respecting Dr. Bhattacharya's evidence, it is necessary to read the entirety of Dr. Bhattacharya's testimony, line by line, to establish the proper context.

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[5] Transcript of Proceedings, February 14, 2022, PM, p6/19-21.
[6] Respondents' Final Argument at paras 103-126, 242, 263-264, 269, 271, 273.

c) Alberta's mischaracterization of Dr. Bhattacharya's expertise following his expert qualification

12. In reply to paragraph 109 of the Respondents' Final Argument, Alberta misrepresents Dr. Bhattacharya's evidence in relation to the *Curriculum Vitae* that was adduced and then put to him during cross-examination.[7] Alberta has tagged certain statements from the transcript to bolster their position and attempt to limit Dr. Bhattacharya's expertise.

13. Alberta states that Dr. Bhattacharya *"*acknowledged that he didn't 'remember the last time he updated'" his *Curriculum Vitae*[8]*.* However, when one reads the Transcript of Proceedings, the evidence of Dr. Bhattacharya on this point is clear.

14. At the very outset of questioning under cross-examination, when asked if this *Curriculum Vitae* was updated in 2015, Dr. Bhattacharya testified "I don't remember specifically that date, I can check for you the last time I updated it, but it's something in that order, before the pandemic"[9]. This is contrary to Alberta's allegation that Dr. Bhattacharya asserts that "it was [updated] in 2015 and then concede[s] it was [updated] in 2018"[10]. Dr. Bhattacharya's evidence was unequivocal. No concessions were made.

15. Alberta's Final Argument suggests that this *Curriculum Vitae* is a fulsome and inclusive self-disclosure of Dr. Bhattacharya's expertise and experience. Alberta uses this allegation to suggest that this Court should impose restrictions on Dr. Bhattacharya's expertise and limit it to the sole issue of "health economics".[11]

16. Dr. Bhattacharya testified that this *Curriculum Vitae* was neither exhaustive nor complete. Due to limitations with technology and java script, Dr. Bhattacharya testified that when preparing the *Curriculum Vitae*, he was constrained from including all of his research in this particular online format.[12] Therefore, the list of

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[7] Exhibit 2, Bhattacharya Research, C*urriculum Vitae.*
[8] Respondents' Final Argument, para 109.
[9] Transcript of Proceedings, February 10, 2022 AM, p. 67/28-35.
[10] Respondents' Final Argument, para 109; see also Transcript of Proceedings, February 10, 2022 AM p. 68/20-22; p.68/40-41; p.69/13-14; p.69/26-28.
[11] Respondents' Final Argument, paras 109-110.
[12] Transcript of Proceedings, February 10, 2022 AM, p.68/24-29; p.69/38-41

scientific research within this *Curriculum Vitae* is not comprehensive as Alberta suggests in their Final Argument.[13] The *Curriculum Vitae* itself also cites over 150 peer reviewed articles authored or co-authored by Dr. Bhattacharya on a wide range of topics, including epidemiology, virology, public health, and economics.

17. In reply to paragraphs 112 to 115 of Alberta's Final Argument, the Respondents attempt to use two court decisions from the United States to support their attacks upon Dr. Bhattacharya's expertise and evidence in these proceedings. Those decisions are irrelevant to this proceeding. Legal matters related to COVID-19 issues in the United States are partisan and highly politicized. In relation to the findings of Judge Waverly David Crenshaw[14], it is not surprising that a Democratic judge appointed by a former Democratic President, Barack Obama, made politicized statements against a witness who was objecting to the mask policies supported by the current Democratic President, Joe Biden.

d) <u>Alberta's attempt to mischaracterize Dr. Bhattacharya's evidence, competency, and objectivity</u>

18. The Respondents rely on paragraphs 119 and 121 of their Final Argument to suggest that Dr. Bhattacharya is a careless and unprepared expert witness. These allegations are unfounded, improper, and insulting.

19. In reply to paragraph 119 of the Respondent's Final Argument, it is alleged that Dr. Bhattacharya testified that Alberta's approach to the pandemic was "medical malpractice."[15] A footnoted reference is provided to support this direct quotation. However, this quotation is not in the transcript and is a complete fabrication by Alberta.

20. In addition to falsely stating Dr. Bhattacharya's evidence, paragraph 119 of the Respondents' Final Argument also mischaracterizes Dr. Bhattacharya's evidence

[13] Transcript of Proceedings, February 10, 2022 AM, p.68/24-29
[14] *RK v Lee,* 3:21-cv-00725 (MD Tenn 2021), at Respondents' Final Argument para 114.
[15] Respondents' Final Argument, para 119.

by asserting that “he could provide little detail as to the specifics of Alberta’s pandemic measures or approach”.[16]

21. When one checks the footnoted reference of the Respondents’ Final Argument, the transcript is clear. Counsel for Alberta specifically asks Dr. Bhattacharya about Alberta’s pandemic response in the context of a particular point in time over the entire pandemic: the second wave. Accordingly, Dr. Bhattacharya testified that Alberta’s approach to the pandemic was complicated with a suite of restrictions. He stated that he could not provide detail as to the timing of which restrictions were implemented and when they were implemented without refreshing his memory. When pressed for further details by Alberta’s counsel, Dr. Bhattacharya stated:

> No, I can work through more specifics. I would have to refresh my memory about timing, and as you can see, I'm not very good with particular dates. But Alberta -- and I know Alberta has relaxed its provisions and put more, sort of, re-enacted the provisions over time. It's a complicated story over two full years. I can give you more detail, but I'd have to refresh my memory about the specifics.[17]

22. Alberta has clearly mischaracterized this evidence to support an attack upon Dr. Bhattacharya’s preparedness as an expert witness.

23. In reply to paragraph 121 of the Respondents’ Final Argument, when one looks at the footnoted reference, it clearly contains none of the Respondents’ misrepresentations.

24. In reply to paragraph 113 of the Respondents’ Final Argument and the allegation that Dr. Bhattacharya “clearly identifies closely with the approach taken by the State of Florida”[18], this was put to Dr. Bhattacharya by the Respondents’ counsel on cross-examination and was specifically denied.[19]

25. To further attack the objectivity of Dr. Bhattacharya’s expert opinion, in relation to the State of Florida case, the Respondents state that Dr. Bhattacharya testified “we

[16] Respondents’ Final Argument, para 119.
[17] Transcript of Proceedings, February 10, 2022, p. 98/23-28.
[18] Respondents’ Final Argument, para 113.
[19] Transcript of Proceedings, February 10, 2022, p.58/2-6.

won on appeal" on two occasions.[20] This assertion is a mischaracterization of the evidence.

26. As has been candidly explained by both Dr. Bhattacharya during his cross-examination and within the Applicants' Final Argument, Dr. Bhattacharya once stated: "we won on appeal." Dr. Bhattacharya explained this statement to this Honourable Court: "I was asked to provide government testimony by the government" and "I provided my honest testimony".[21]

27. This statement of Dr. Bhattacharya was made in the context of identifying with the litigation team in another case, not to personally connect himself to that case. Dr. Bhattacharya's statement simply delineated which party he testified for and was not a declaration of his lack of objectivity as an expert witness or his personal interest in a particular outcome.

28. The only other occasion where "we won on appeal" appears in the entirety of the Transcript of Proceedings in this matter is not from Dr. Bhattacharya as Alberta wrongly alleges, but from Alberta's own counsel, who misstated Dr. Bhattacharya's evidence on the record.

29. When asked again by counsel for Alberta about the Florida case, Dr. Bhattacharya states "we -- the case was won on appeal" to which the Respondent's counsel replies: ""[w]e won on appeal," I heard what you said, sir."[22]

30. In reply to paragraph 196 of the Respondents' Final Argument, the Respondents misrepresent Dr. Bhattacharya's evidence several times in this paragraph alone.

31. Dr. Bhattacharya is quoted as not having "any estimate as to the number of people in Alberta who fall into that limited number of people with certain chronic conditions."[23] While attributed to Dr. Bhattacharya, this quotation finds no foundation in the hearing transcript.

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[20] Respondents' Final Argument, para 113.
[21] Transcript of Proceedings, February 10, 2022, p.58/5-6
[22] *Ibid*, p.58/24-26
[23] Respondents' Final Argument, para 196.

32. The Respondents also falsely claim at paragraph 196 that Dr. Bhattacharya was "guessing" while giving evidence about chronic conditions in Alberta.[24] The evidence from the transcript is clear that Dr. Bhattacharya is not "guessing" but is using the phrase "I guess" as a figure of speech:

> I guess the question is a qualitative one rather than a quantitative one. The questions (sic) is what is an acceptable level of risk from disease the population? And the answer can't be zero because . . . people die because that's . . . how life, you know, what life goes. And so . . . a public health emergency over the entire population, or is it a public health emergency for part of the population? . . . in order to answer that, you have to ask whether the interventions imposed themselves impose costs relative to the things you're protecting against.[25]

33. The Respondents also misrepresent Dr. Bhattacharya's evidence at paragraph 196 by stating Dr. Bhattacharya has limited the "number of people with certain chronic conditions" to those who primarily have "diabetes and obesity."[26] When checking these allegations against the transcript, Dr. Bhattacharya's evidence is:

> Well, what I can tell you is that the number of people who have a high infection mortality rate that are not elderly is limited . . . the fraction of portion of the population (sic) is obese is 40 percent. . . if a young person is obese, they have nowhere near a five percent infection mortality rate from the disease. The infection mortality rate is high, primarily for the older population and for, again, for a limited number of people who are younger. Primarily people with diabetes and obesity.[27]

34. In reply to paragraph 207 of the Respondents' Final Argument, it is alleged that Dr. Bhattacharya concluded that symptom checks can replace lockdowns with "no harm to public health."[28] When one checks the referenced footnote the Respondents rely on for this bold assertion, it cites both the transcript and Dr. Bhattacharya's Surrebuttal Report. However, such references are patently false. Under cross-examination, Dr. Bhattacharya was asked questions about symptom checking in general. In his Surrebuttal Report per the noted reference, he

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[24] Respondents' Final Argument at para 196.
[25] Transcript of Proceedings, February 14 AM, 2022 p.11/18-25.
[26] Respondents' Final Argument at para 196.
[27] Transcript of Proceedings, February 14 AM, 2022, p.12/9-15.
[28] Respondents' Final Argument at para 207.

discusses asymptomatic and pre-symptomatic spread. In neither cited reference does Dr. Bhattacharya mention that there would be "no harm to public health".

35. In reply to paragraph 238 of the Respondents' Final Argument, they state that Dr. Bhattacharya provided an opinion on protecting hospitals and ICUs. They allege that Dr. Bhattacharya pointed to the Great Barrington Declaration "though he couldn't remember specifically what he had written or where it was in his report."[29] This is another mischaracterization of the evidence. The Great Barrington Declaration is part of his report. He referenced it directly. Further, he testified that:

> So if I'm going to point to where it is, I'll point to the Great Barrington Declaration. I may have put more in there -- again, it's been a year since I've written this, so I don't remember specifically, and I'd have to go search -- but the idea of controlling hospitalizations and deaths is part of the Great Barrington Declaration.[30]

36. The Respondents' Final Argument is thus replete with egregious examples of mischaracterized and misrepresented evidence in an attempt to convince this Honourable Court that Dr. Bhattacharya is an unreliable, thoughtless, and irresponsible witness.

e) Alberta's legal error and factual misrepresentations of Dr. Bhattacharya's evidence related to the *John Hopkins Study*

37. In reply to paragraph 126 of the Respondents' Final Argument, it is patently absurd for the Respondents to argue that Dr. Bhattacharya "appeared to misunderstand the relevance of certain evidence."[31] This statement has no basis in law and is factually untrue.

38. Alberta also falsely suggests that Dr. Bhattacharya "frequently" attempted to testify regarding the *John Hopkins Study* when Dr. Bhattacharya knew it was irrelevant and inadmissible in these proceedings.[32]

39. Firstly, whether evidence is relevant or not is an issue requiring a legal determination: simply put, evidentiary relevancy is a question of law for this

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[29] Respondents' Final Argument at para 238.
[30] Transcript of Proceedings, February 10, 2022, p.97/35-39.
[31] Respondents' Final Argument at para 126.
[32] *Ibid* at para 126.

Honourable Court to determine. Such legal conclusions are certainly not within the role of an expert witness. Secondly, this statement by Alberta is patently untrue.

40. This Honourable Court's ruling on the relevancy of the *John Hopkins Study* did not even occur until 15 February 2022, following several days of oral evidence by Dr. Bhattacharya.[33]

41. The evidentiary relevancy of the *John Hopkins Study* was not "cut and dried" as the Respondents imply: this Honourable Court's ruling on relevancy came after lengthy oral submissions by counsel in a *voir dire.*[34]

42. For the Respondents to now state that Dr. Bhattacharya "frequently tried to give evidence on the *Johns Hopkins Study* that this Court had already ruled was not relevant to the matters it must decide"[35] is a flagrant misrepresentation.

43. This misrepresentation of the record by Alberta is yet another example of the Respondents misconstruing the facts and evidence to convince this Honourable Court that Dr. Bhattacharya is either incompetent or has ulterior motives.

f) Alberta's *ad hominem* attacks on Dr. Bhattacharya in relation to the *Savaris Study*

44. In reply to the allegations surrounding the *Savaris Study* and Dr. Bhattacharya's "lack of candour"[36], Alberta has once again mischaracterized the evidence of Dr. Bhattacharya.

45. Dr. Bhattacharya was forthcoming about the issues surrounding the *Savaris Study* and its retraction; he was not at all evasive.

46. When counsel for Alberta suggested in cross-examination that Dr. Bhattacharya was purposely misleading the court, Dr. Bhattacharya was forthright and frank:

> Mr. Parker, you asked me about the paper, and I said that, I just described to you both the scientific issue at hand, and also the fact that it was retracted, before you brought it up. So what you just said is an inaccurate characterization of what just happened. I did not have an opportunity to tell

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[33] Transcript of Proceedings, February 15, 2022, p.30/37 - p. 31/7.
[34] *Ibid*, p.24/38-p.30/31.
[35] Respondents' Final Argument, para 126 [Emphasis added].
[36] *Ibid*, paras 122, 123, 125, 263-272.

> the paper (sic) about the fate of every single paper that I cited. As you said, there's thousands of pages of studies in there.[37]

47. Alberta suggests that Dr. Bhattacharya testified that the retraction of the *Savaris Study* was "extraordinary."[38] While this was his evidence in *Gateway*, Dr. Bhattacharya clarified this opinion while testifying before this Honourable Court.

48. During the trial of *Gateway,* Dr. Bhattacharya held the opinion that a retraction of a study would be extraordinary. However, this is no longer the case as "retractions are extraordinary but they're less extraordinary now than they were before the pandemic."[39] Topics surrounding pandemic issues have become controversial and retractions are happening with more frequency now.

49. In particular, Dr Bhattacharya testified that:

> I think that retracting the article is more common now than I've seen it at any other time. While it would have been seen as an absolutely extraordinary thing before (sic) COVID pandemic, I've seen many prominent articles now, during this pandemic, retracted. Which makes it less extraordinary than it wasn't (sic) was.[40]

50. The controversary surrounding the *Savaris Study* stems from a dispute between the authors and the editors. It was not a case of scientific fraud. Dr. Bhattacharya testified that the primary reason for retracting an article is for scientific fraud[41] and not, as in the case of *Savaris,* where editors "look at the debate and . . . now fall down on the one side of the debate versus another when there's still legitimate disagreement among scientists that a retraction is warranted."[42]

51. Alberta suggests that Dr. Bhattacharya "did not feel the need to tell this Court about" the dispute between the authors of the *Savaris Study*.[43] While Alberta provides a footnote reference for this allegation, when one checks the footnoted reference, it is obvious that this was not Dr. Bhattacharya's evidence.

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[37] Transcript of Proceedings, February 10, 2022, p.111/20-24.
[38] Respondents' Final Argument, para 261.
[39] Transcript of Proceedings, February 11, 2022, p.18/6-7; see also p.18/9-20.
[40] Transcript of Proceedings, February 10, 2022, p.116/19-22.
[41] Transcript of Proceedings, February 11, 2022, p.18/29-35.
[42] *Ibid*, p.18/33-35.
[43] Respondents' Final Argument, para 266.

52. While Alberta purports to quote directly from the transcript to support this assertion, here is the entire context of Alberta's referenced footnote:

> Mr. Parker: Right. But don't you think the Court should hear about what you've just described that caused you to change your views on this and change the language?
>
> Dr. Bhattacharya: Just so we're clear, this was a dispute between the authors of the paper that was already peer-reviewed and published -- so therefore, vetted -- and some other scientists that was still ongoing and had not received any clarification in my mind when I wrote the Alberta report. So there was not, I mean, I've reflected my thinking on the paper correctly at the time.[44]

53. Alberta states that Dr. Bhattacharya testified that "he had no opportunity to tell the Court the *Savaris Study* had been retracted."[45] The footnoted reference in the Respondents' Final Argument does not reflect this allegation. Some lines further in the transcript may reveal what the Respondents are alluding to. Notwithstanding repeated interruptions by counsel for Alberta, Dr. Bhattacharya testified:

> I have not had the opportunity to do that, to tell the Court, except for right now when you [Mr. Parker] asked me about this paper. And I did. I just told you. . . before you brought this up. I didn't wait for you to bring it up.[46]

54. Alberta suggests a nefarious motive for Dr. Bhattacharya changing his qualification of the *Savaris Study*[47] from "perhaps the best paper" on 31 March 2021,[48] to "another paper" on 30 July 2021.[49] Under cross-examination Dr. Bhattacharya explained that his opinion of the paper has evolved since *Gateway*.

55. During cross-examination, when asked why his opinion changed on the quality of the *Savaris Study*, Dr. Bhattacharya testified it was due to an after-publication comment questioning the timing of lockdowns, specifically:

> [T]he technical issue is this: When the lockdowns are imposed, how long does it take to see a benefit on the mortality rate in a population? And

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[44] Transcript of Proceedings, February 10, 2022, p.109/32-38.
[45] Respondents' Final Argument, para 270.
[46] Transcript of Proceedings, February 10, 2022, p.110/40-p.111/7.
[47] Respondents' Final Argument, paras 264-266.
[48] Manitoba Surrebuttal Report of Dr. Bhattacharya, March 31, 2021.
[49] Alberta Surrebuttal Report of Dr. Bhattacharya, July 31, 2021.

> some author, some scientist put a question to the authors of this paper asking whether decisions about how the timing between the imposition of a lockdown and the mortality rate, whether the result is sensitive of that. And I learned about that after, I looked into that afterwards, and I thought it was still a good paper, but no longer necessarily the best paper.[50]

56. In reply to paragraph 272 of the Respondents' Final Argument, Dr. Bhattacharya was aware of the retraction of the *Savaris Study* in late December 2021 or early January 2022,[51] several months following the filing of the Applicants' Pre-Trial Factum.

57. Under re-examination, Dr. Bhattacharya testified that even in the aftermath of its retraction, the *Savaris Study* had become the prevailing scientific view.[52]

58. Dr. Bhattacharya confirmed under re-examination that there are several other scientific studies supporting the theory and conclusions of the *Savaris Study*.

59. The following studies were put to Dr. Bhattacharya. They all support the conclusions of the *Savaris Study*:

    a. The *Douglas Allen Study,* referenced in the Applicants' Pre-Trial Responding Brief,[53] is consistent with the conclusions of the *Savaris Study* in terms of the effects "of lockdowns on mortality for COVID-19."[54]

    b. *Evaluating the Effects of Shelter in Place Policies During the COVID-19 Pandemic* which found no correlation between the implementation of lockdown orders and mortality.[55]

    c. *The Impact of the COVID-19 Pandemic and Policy Responses on Excess Mortality* studied a large number of countries and the United States at a state level. This study also found that there was no correlation between the imposition of lockdowns and excess mortality. "In fact, to the extent that there

[50] Transcript of Proceedings, February 10, 2022, p.109/20-26.
[51] Transcript of Proceedings, February 11, 2022, p.17/4-11.
[52] Transcript of Proceedings, February 22, 2022 AM, p.3/13-16.
[53] *Ibid*, p.10/20-41; p.11/1-3.
[54] *Ibid*, p.10/41; p.11/1
[55] *Ibid*, p.12/9-10.

is a correlation . . . the imposition of these orders actually increased mortality."[56]

d. *A Country Level Analysis Measuring the Impact of Government Actions, Country Preparedness and Socioeconomic Factors on COVID-19 Mortality and Related Health Outcomes* which found that "shelter in place orders. . . had no correlation with [COVID-19] outcomes in terms of the mortality . . . whereas demographic factors like age and comorbidities actually did have some correlation with COVID-19 outcomes."[57]

g) *Madewell Study* allegations and asymptomatic and pre-symptomatic transmission

60. In reply to paragraph 124 of the Respondents' Final Argument, Alberta alleges that Dr. Bhattacharya "continued representing the data . . . as being the result of an analysis of 54 studies . . . when, in reality the 0.7% result was from only 4 studies."[58] When one checks the first footnoted reference from the transcript, it cites the cross-examination regarding the *Savaris Study* and the *Johns Hopkins Study.* The reference has absolutely nothing to do with the *Madewell Study.*

61. In order to evaluate Dr. Bhattacharya's evidence regarding the *Madewell Study*, it is necessary to review the entirety of his cross-examination on that subject.[59]

62. The allegation by Alberta's counsel that Dr. Bhattacharya continued to misrepresent the number of studies in relation to asymptomatic and pre-symptomatic transmission is not borne out by his testimony.

63. When counsel for Alberta continued to interrupt Dr. Bhattacharya's evidence and repeatedly suggested to Dr. Bhattacharya that he was misleading the court in his characterization of the *Madewell Study*, Dr. Bhattacharya stated:

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[56] *Ibid*, p.16/39-41, p.17/1-2.
[57] *Ibid*, p.17/20-23.
[58] Respondents' Final Argument at para 124.
[59] Transcript of Proceedings, February 11, 2022, p.91/32 – p.106/10.

> I said there were 54 studies in *Madewell*. There are 54 studies in *Madewell*. I didn't say there were 54 studies of asymptomatic spread in *Madewell*. I said there were 54 studies in *Madewell*, which is true[60]

64. When pressed by counsel for the Respondents on this issue, Dr. Bhattacharya repeatedly clarified that he believed that the portion of the *Madewell Study* dealing with asymptomatic and pre-symptomatic transmission was reliable because it was a matter of quality over quantity:

> Mr. Parker: Because the 0.7 percent, sir, is derived from the four studies of 151 individuals. It's not derived from the 54 studies with over 77,000 individuals. It's misleading. What you wrote is misleading, sir.
>
> Dr. Bhattacharya: I don't agree with that. I quoted directly from the study. The question is how cleanly chosen are the studies and how cleanly chosen is the context. Four . . good studies of the asymptomatic spread with a clean context like household settings is going to provide you better information . . . than 10 million people in a less controlled study.[61]

h) <u>Role of Court and Expert Witnesses</u>

65. The Respondents claim that courts should not resolve disputes over complex areas of science as such matters fall outside the expertise of courts.[62] Alberta relies on two non-binding cases to support this assertion.[63] For the reasons below, such a proposition is patently absurd.

a. <u>This court's ability to resolve scientific disputes</u>

66. Alberta relies on *Beaudoin* to support its contention that "courts are not well suited to resolve…complex areas of science and medicine"[64]. However, Alberta has both misinterpreted and misrepresented the caselaw to support this argument.

67. First, *Beaudoin* was a Judicial Review determined using the *Dore* and *Loyola* framework rather than an *Oakes Charter* analysis. This distinction is significant as the evidentiary record permitted in such cases is substantially different, as is the applicable standard of review. The effects of these different procedures can be

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[60] *Ibid*, p.102/8-10.
[61] *Ibid*, p.101/17-26.
[62] Respondents' Final Argument at paras 93-94, 346.
[63] See *Gateway* at para 292; *Beaudoin v British Columbia*, 2021 BCSC 512 at para 37 [***Beaudoin***].
[64] Respondents' Final Argument at para 93.

clearly seen. For example, in *Beaudoin*, the Petitioners did not present any expert scientific evidence to challenge the reliability of evidence from the Provincial Health Officer, Dr. Bonnie Henry. Thus, the only science to be relied upon was that of Dr. Henry, to whom the court gave great deference.

68. Alberta also argues incorrectly that *Beaudoin* stands for the principle that courts are not well suited to resolve complex areas of science or medicine. Alberta misinterpreted *Beaudoin*, or in the alternative, *Beaudoin* misinterpreted the Supreme Court of Canada ("**SCC**") on this issue in *Lapointe v Hopital Le Gardeur*.[65] Had the Court in *Beaudoin* included the very next sentence from the SCC, it would have been clear what exactly was being discussed.

69. In *Lapointe*, the SCC dealt with a matter involving medical malpractice. In that case, the Court stated:

> Given the number of available methods of treatment from which medical professionals must at times choose, and the distinction between error and fault, a doctor will not be found liable if the diagnosis and treatment given to a patient correspond to those recognized by medical science at the time, even in the face of competing theories.[66]

70. The SCC went on to adopt the following quote, which both the Respondents and the Court in *Beaudoin* misinterpreted:

> [translation] The courts do not have jurisdiction to settle scientific disputes or to choose among divergent opinions of physicians on certain subjects. They may only make a finding of fault where a violation of universally accepted rules of medicine has occurred. The courts should not involve themselves in controversial questions of assessment having to do with diagnosis or the treatment of preference.[67]

71. The case at bar is not a medical malpractice claim involving complex medical questions for which there may be multiple acceptable procedures, such as in *Lapointe* where a physician's conduct was in question after dissecting a five-year-old girl's vein. Rather, this is a constitutional challenge to specific provisions within certain of Alberta's Chief Medical Officer of Health's Orders (the "**CMOH Orders**").

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[65] 1992 CanLII 119 (SCC), [1992] 1 SCR 351 at paras 31-32 [***Lapointe***].
[66] *Ibid* at para 31.
[67] *Ibid* at para 31.

72. Alberta also relies on *Gateway* to support this claim. However, the decision in *Gateway* was regarding "decisions [which] are otherwise supported in the evidence."[68] If the case at bar involved actual evidence supporting the CMOH Orders, the Applicants would not have brought this claim. Indeed, the very fact that the CMOH Orders are not supported by evidence forms the impetus for the present Application.

b. Expert Witnesses

73. If courts put Alberta's claims into practice, expert evidence would be inadmissible and irrelevant in any trial or hearing involving scientific or medical issues. We know this is not the case, as the SCC has dealt with matters of the utmost scientific, social, and medical complexity.[69] The SCC has also stated, "[t]he object of expert evidence is to explain the effect of facts of which otherwise no coherent rendering can be given."[70] If complex claims were not to be challenged within a court, there would be no need for expert witnesses within the judicial system.

74. The SCC subsequently stated:

> An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury."[71]

75. In the present case, information about the efficacy of non-pharmaceutical interventions ("**NPIs**") is outside the experience and knowledge of this Honourable Court. While Alberta wishfully claims this should therefore mean the government be given full discretion, that is contrary to settled law. It is the role of qualified experts, such as Dr. Bhattacharya, to assist this Honourable Court, as the fact finder, with making an informed decision which it would otherwise be unable to do, given the complex and novel science surrounding NPIs and COVID-19.

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[68] *Gateway* at para 292; Respondents' Final Argument at para 94.
[69] See for example, *R v Morgentaler*, [1988] 1 SCR 30, 37 CCC (3d) 449; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11; *R v Sullivan*, 2022 SCC 19
[70] *Kelliher (Village) v Smith*, [1931] SCR 672, [1931] 4 DLR 102 at para 18.
[71] *R v Abbey*, [1982] 2 SCR 24, [1982] SCJ No. 59 at para 44.

i) Dr. Bhattacharya's Expert Qualifications and Testimony

76. Throughout the Respondents' Final Argument, Alberta repeatedly belittles and disparages Dr. Bhattacharya. While the Applicants' ethical concerns regarding Alberta's submissions were discussed above, brief clarification regarding Dr. Bhattacharya's expertise and qualifications is required given Alberta's incongruous allegations.

77. The scientific and legal issues in this proceeding are novel, requiring expert evidence to assist this Honourable Court in arriving at the proper conclusions. "A case by case evaluation of novel science is necessary in light of the changing nature of our scientific knowledge: it was once accepted by the highest authorities of the western world that the earth was flat."[72]

78. In *R v J(J)*, the SCC emphasizes that "the trial judge should take seriously the role of 'gatekeeper'" and the time to scrutinize the admissibility of expert evidence is when it is proffered.[73]

79. When assessing the scope of expertise, "how the witness acquired that 'special' or 'peculiar' knowledge is not the central issue. . . [r]ather the issue is whether the witness does, in fact, have the 'special' or 'peculiar' knowledge."[74]

80. Dr. Bhattacharya's expert qualification in this case is incontrovertible: he was qualified by this Honourable Court to give expert opinion evidence in the areas of public health and health economics, including a focus on epidemiology and infectious disease epidemiology and the public health impact of lockdowns.[75]

81. The Respondents had no objections to Dr. Bhattacharya's expert qualification during trial and Alberta agreed to the admission of Dr. Bhattacharya's expert reports on that basis.[76] Alberta's suggestion that Dr. Bhattacharya's expert evidence now be narrowed to issues limited to "health economics" is unreasonable and not

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[72] *R. v J(J)*, 2000 SCC 51 **[*R v J(J)*]** at para 34.
[73] *Ibid,* at para 28.
[74] *R. v. Thomas,* 2006 CarswellOnt226, [2006] OJ no 153, **[*R. v Thomas*]** at para 7.
[75] Transcript of Proceedings, February 10, 2022, AM, p43/20-32.
[76] *Ibid*, p43/38-41.

supported by the transcript evidence or this Court's expert qualification of Dr. Bhattacharya.

82. To come to this erroneous conclusion, Alberta relies on the findings of *Gateway*: another case, in another jurisdiction, before another court with different facts and evidence.

83. Throughout the Respondents' Final Argument, Alberta repeatedly attempts to use the findings of *Gateway* to influence the record of this proceeding and the findings of this Honourable Court. *Gateway*, it appears, has become a Trojan Horse for Alberta to launch a subversive attack on the evidence and findings of this Honourable Court.

84. An *ex-post facto* limitation on Dr. Bhattacharya's expert evidence is unreasonable and lacks any evidentiary basis. Alberta did not cross-examine Dr. Bhattacharya on his expert qualifications. However, following Dr. Bhattacharya's qualification by this Honourable Court, counsel for Alberta spent considerable time cross-examining Dr. Bhattacharya on the scope of his expertise. Those questions should properly be put to Dr. Bhattacharya prior to this Honourable Court's ruling on his expert qualification, not after.

85. Again, if counsel for Alberta had any issues with the scope of Dr. Bhattacharya's expert qualification, those objections should have been raised at trial at which time they could be appropriately dealt with by counsel for the Applicants and this Honourable Court.

III. LACK OF CANDOUR IN THE EVIDENCE OF THE RESPONDENTS AND DR. DEENA HINSHAW AS CHIEF MEDICAL OFFICER OF HEALTH FOR ALBERTA

86. Dr. Deena Hinshaw, as the Chief Medical Officer of Health for the Province of Alberta, provided affidavit evidence in this proceeding in two affidavits sworn on 18 December 2020, and on 12 July 2021. Dr. Hinshaw also provided oral evidence before this Honourable Court on April 4, 5, 6, and 7, 2022.

87. Specifically, on 5 April 2022, Dr. Deena Hinshaw was cross-examined in relation to the NPI of masking.[77]

88. It has now come to light that Dr. Hinshaw was not candid and forthright with this Honourable Court. Dr. Hinshaw and the Respondents' expert witnesses failed to disclose evidence that was relevant and material to issues at the very center of this proceeding: the demonstrable and known harms of imposing NPIs upon the population.

89. When asked specifically about the harms caused to children as a result of wearing face masks, Dr. Hinshaw testified that "there was no evidence regarding . . . adverse health outcomes from wearing masks."[78]

90. Dr. Hinshaw further testified that though the Scientific Advisory Group has no psychologists, psychiatrists, or other specialists in those fields providing input, they were "well versed in the scientific method in reading evidence and their scope of that particular masking harms review was to look at any published literature that documented harms from wearing masks."[79]

91. On 4 July 2022, the Honourable Justice G. S. Dunlop made a ruling on cabinet privilege in Court of Queen's Bench of Alberta Action No. 2203-04046. In that ruling, the Honourable Justice G. S. Dunlop ordered Dr. Hinshaw to file a further Amended Certified Record of Proceedings attaching a PowerPoint presentation and Cabinet minutes.[80]

92. Pursuant to Justice Dunlop's Order, an Amended Amended Certified Record of Proceedings[81] was filed in that action on 12 July 2022. It was made publicly available on 13 July 2022 (the "**Documents**").

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[77] Transcript of Proceedings, April 5, 2022, p.35/32-p.37/3; and p.88/18-p.89/18.
[78] *Ibid*, p.88/37-38.
[79] *Ibid*, p.89/9-12.
[80] *C.M v. Alberta*, 2022 ABQB 462 (CanLII). **[C.M.]**
[81] Amended Amended Certified Record of Proceedings in QB Action No. 2203-04046, filed July 12, 2022.

93. The Applicants only became aware of the Documents and their contents on 13 July 2022, when they became publicly available.

94. Despite portions of the information contained within the Documents being known to the Respondents as early as the spring of 2020, and the Documents being in the possession, custody, or control of the Respondents at all material times, the Documents were not disclosed to the Applicants in this matter.

95. Particularly, as disclosed in the Documents, on 7 February 2022, the Premier's Office sent a memo to the Honourable Jason Kenney, Premier of the Province of Alberta. A copy of the memo was provided to the Respondent, Dr. Deena Hinshaw as the Chief Medical Officer of Health (the "**Memo**").[82]

96. The Memo states:

    a. that there is insufficient direct evidence of the effectiveness of face masks in reducing COVID-19 transmission in education settings;

    b. that existing research supporting mask use in schools has limitations that make the pool of evidence weak and the benefits of masking children unclear;

    c. that there are harmful effects of mask wearing on children; and

    d. that masks can:

        i. disrupt learning;

        ii. interfere with children's social development;

        iii. interfere with children's emotional development;

        iv. interfere with children's speech development;

        v. impair verbal and non-verbal communication;

        vi. impair emotional signaling; and

        vii. impair facial recognition.

[82] Amended Amended Certified Record of Proceedings in QB Action No. 2203-04046, filed July 12, 2022, Schedule "A" at Tab 6.

97. Despite their duties of utmost candour to this Honourable Court, neither Dr. Deena Hinshaw nor the Respondents' expert witnesses provided the information contained within the Documents to the Court.

98. It was only after Dr. Hinshaw was compelled by a Court Order in recent days that this disclosure was known to the Applicants.

99. This disclosure reveals the lack of transparency in Dr. Hinshaw's evidence in this proceeding. It is incumbent upon her to be honest and truthful. Her denial of any effects of masking on children's psychological health, psychiatric health, and social development before this Honourable Court is inconsistent with the Documents and in particular, the Memo she was provided a copy of.

100. Consequently, the Applicants in this proceeding have been severely prejudiced by the conduct of Dr. Hinshaw and Alberta. The Applicants have not been afforded the opportunity to properly cross-examine Dr. Hinshaw or Alberta's expert witnesses. Further, this Honourable Court has been deprived of the opportunity to weigh relevant and material evidence that goes to fundamental and salient issues of this Application.

IV. CLARIFYING ROLE OF *GATEWAY* DECISION

a) Distinguishing *Gateway*

101. The SCC has stated that "precedent requires judges to examine prior judicial decisions, examine the ratio decidendi in order to determine whether the ratio is binding or distinguishable…."[83]

102. The Alberta case *R v Briscoe*[84] found that "differentiating a case based on the facts does not violate principles of judicial comity and is necessary to avoid outcomes that are inappropriate for the facts of the case."[85]

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[83] *Sullivan* at para 64.
[84] 2012 ABQB 111 [***Briscoe***]
[85] *Ibid*, at para 42.

103. The Respondents have relied extensively on the *Gateway* decision. They are, respectfully, mistaken in noting that "Chief Justice Joyal's reasons are highly instructive on the approach this Court should take…."[86]

104. In fact, *Gateway* is quite distinguishable from the facts of this case.

105. Firstly, *Gateway* was based on the governmental and administrative decisions of a different jurisdiction, with its own unique medical and political challenges. Notably, as has been led in evidence by both parties in this matter, different jurisdictions responded to the pandemic with disparate approaches and varying degrees of harm. The Respondents have laid out an entire section of their Final Argument on how the scientific knowledge on COVID-19 has evolved.[87]

106. *Gateway* stated that:

> …it is to the provincial governments that a particularly heavy day-to-day burden and responsibility falls as they attempt — in sometimes very distinct and divergent ways — to achieve, in exceptional circumstances, the requisite balance between public health protection and the restriction of fundamental freedoms in a manner that is both reasonable and legally justifiable.[88]

107. The Respondents have argued that "setting the time frame is important because 'the COVID-19 pandemic was fluid and evolving.'"[89] However, the specific time frames at play in this Action differ from those that were assessed in *Gateway*. As stated in *Gateway*, "Manitoba's evidence and arguments are focussed on justifying the impugned public health orders (the "**PHO's**") in the relevant period from November 22, 2020 until January 22, 2021."[90]

108. Different time periods were focussed on in this matter, specifically the health measures put in place in Alberta in December 2020. The Respondents' time frame

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[86] Respondents' Final Argument at para 6.
[87] *Ibid* at VI.A.
[88] *Gateway* at para 17.
[89] Respondents' Final Argument at para 86.
[90] *Gateway* at para 22.

discussed in their evidence focused on the CMOH Orders from the start of the second wave in October 2020 until the end of the third wave in June 2021.

109. Given the different jurisdictions, different health records, different provincial governments in place, different time periods, and the evolving science, the decision in *Gateway* is not instructive to this Honourable Court. As stated in *Gateway*, there are "…well-established constitutional tests…"[91] in place, and the specific facts and evidence in this case should be placed against those tests.

110. The second reason why *Gateway* is distinguishable from this Application is the differences in the public health orders and public health legislation extant in Manitoba and Alberta.

111. *The Public Health Act*[92] of Manitoba is properly enacted legislation of that province and has no effect in the Province of Alberta. Alberta's *Public Health Act*[93] and *TPHA* (MB) share similarities in purpose and objective, though importantly, the PHO's that stemmed from *TPHA* (MB) differed substantially. In effect, Manitoba's response to the COVID-19 pandemic through its issuance of PHO's differed substantially from Alberta's response and its own issuance of the CMOH Orders.

112. The Provincial and Federal Governments have concurrent jurisdiction over health care.[94] That said, the handling of the pandemic via the "lockdowns" that were implemented in response to COVID-19 were exclusively handled by the provinces themselves. The Honourable Jean-Yves Duclos stated such on 8 February 2022 in the House of Commons: "…the lockdown measures to which she [the Honourable Melissa Lantsman] refers are provincial decisions made by the provinces and territories. I believe no one in this House is confused between federal and provincial responsibilities…."[95]

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[91] *Ibid* at para 21.
[92] SM 2006 [***TPHA* (MB)**].
[93] RSA 2000, c P-37 [***PHA* (AB)**].
[94] *Carter v Canada (Attorney General)*, 2015 SCC 5, 2015 CarswellBC 227 [***Carter***] at para 53.
[95] "Many COVID-19 mandates are in provincial jurisdiction: Health minister", Global News (February 8, 2022), online: <https://globalnews.ca/video/8604055/many-covid-19-mandates-are-in-provincial-jurisdiction-health-minister/>.

113. Prime Minister Justin Trudeau also alluded to this far earlier in the pandemic in a televised address to Canadians on 10 November 2020 where he stated "we're seeing record spikes [COVID-19 case numbers] today across the country, so I urge the Premiers and the Mayors to please do the right thing. Act now, to protect public health…I'm asking all Canadians to please follow your local public health guidelines."[96]

114. From beginning to end, the public health restrictions and "lockdowns" in Canada were a provincial responsibility.

115. The Canadian Federal Government implemented its own initiatives for travel, including mandating tests when crossing the border, acquiring and distributing vaccines, and assisting businesses and Canadian citizens economically impacted by the pandemic, along with other federal areas of jurisdiction.

116. The provinces implemented restrictions as they saw fit based on the specific healthcare situations in their own provinces, along with differing cost-benefit analyses based on numerous factors: political, scientific, and medical.

117. The respondents in *Gateway* utilized a large number of witnesses. Every scientist or medically trained witness taught, practiced, or worked in Manitoba at the time of the *Gateway* decision. The exception to this was Dr. Kindrachuk who had been seconded to the University of Saskatchewan while remaining an assistant professor at the University of Manitoba.[97]

118. Most importantly, the respondent and expert witness Dr. Brent Roussin in *Gateway* was the individual responsible for implementing the PMO's that ultimately were based on political, scientific, and medical factors in Manitoba. Further, the authority he relied on to make such orders was drawn from Manitoba's *TPHA*.

119. The third reason that *Gateway* can be distinguished from this Application is the fact that Dr. Bhattacharya was qualified only as an expert in health economics in

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[96] "Trudeau calls on premiers and mayors to 'do the right thing' as COVID caseloads rise", CBC News (November 10, 2020), online: <https://www.cbc.ca/news/politics/trdueau-premiers-covid-restrictions-1.5796720>.
[97] *Gateway* at para 43.

Gateway.[98] In the case at bar, he was qualified as "…an expert in the area of public health and health economics, including a focus on epidemiology and infectious disease epidemiology" along with being an expert in "…public health impacts on lockdowns…."[99]

120. The Respondent admitted that their intent was not to object to Dr. Bhattacharya's expertise, but simply "…to argue that it's going to go to weight."[100] The Respondent reiterated that "we've taken no objection with any of the evidence going in in terms of expertise, but that doesn't mean we're not going to argue weight…."[101]

121. Chief Justice Joyal in *Gateway* spoke extensively about Dr. Bhattacharya's apparently limited work in epidemiology, stating "prior to COVID-19, [Dr. Bhattacharya] had done limited work in respect of anything dealing with viruses and much of what he did was connected to economics."[102]

122. Much of Chief Justice Joyal's suspicion of Dr. Bhattacharya's evidence stemmed from the erroneous assertion that he had limited expertise on viruses and epidemiology. Chief Justice Joyal stated that despite Dr. Bhattacharya's obvious credentials and general qualifications "…questions can be and were raised respecting the weight that should attach to some of his opinions and views on the specific topics of immunology and virus spread."[103]

123. Chief Justice Joyal also found that "…in the absence of a more consistent and more specialized long-term academic focus and a more obviously rooted practical and clinical experience…" some of Dr. Bhattacharya's views could be "justifiably challenged."[104] Chief Justice Joyal referred to Dr. Bhattacharya's expert opinions in a disparaging manner as "…contrary and in some cases contrarian."[105]

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[98] *Gateway* at para 166.
[99] Transcript of Proceedings, February 10, 2022, p43/23-41.
[100] *Ibid* at p9/26-27.
[101] *Ibid* at p9/28-31.
[102] *Gateway* at para 166.
[103] *Ibid* at para 181.
[104] *Ibid*.
[105] *Ibid* at para 183.

124. In fact, Dr. Bhattacharya testified that he had been "…writing and publishing in peer-review journals on infectious disease epidemiology and infectious disease policy…" since approximately the year 2000.[106] Dr. Bhattacharya's knowledge of viruses includes publishing research on HIV, H1N1, H5N1, antibiotic resistance, along with six peer-reviewed papers on COVID-19 relating to "…the extent of spread of COVID, the mortality rate of COVID, the fairness of placement of testing centres, of the efficacy of non-pharmaceutical interventions in slowing the spread of COVID disease and other topics related to COVID."[107]

125. When questioned by the Respondent under cross-examination, Dr. Bhattacharya was asked:

> Mr. Parker: You've not done epidemiology, doing surveillance work of diseases for government, sir?
>
> Dr. Bhattacharya: No, actually that's not true. I worked with the US Food and Drug Administration on vaccine safety and on biologic safety.[108]
>
> …
>
> Mr. Parker: I would think that whether you're a fringe epidemiologist was Mr. Collins' opinion and I'm not sure that that could be seen to be necessarily true or false…
>
> Dr. Bhattacharya: …I'm hired by Stanford University to work on and research epidemiology, among many many other things.[109]

126. Vitally important in distinguishing *Gateway* from this case is the fact that Dr. Bhattacharya was qualified in this matter as an expert whose qualifications included "a focus on epidemiology and infectious disease epidemiology."[110]

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[106] Transcript of Proceedings, February 10, 2022, p40/4-6.
[107] *Ibid* at p40/6-11.
[108] *Ibid* at p56/10-13.
[109] *Ibid* at p 91/2-9.
[110] *Ibid* at p43/23-41.

127. The Respondents stated in their Final Argument that "…the scientific evidence in *Gateway* [is] very similar to the evidence and issues before this Court…."[111] This is irrelevant in relation to Dr. Bhattacharya's evidence because of his qualifications being different in *Gateway* and this matter.

128. Therefore, though Chief Justice Joyal provided many of Dr. Bhattacharya's opinions and assertions with limited weight given that he was only qualified as an expert in health economics, his evidence in this Application, though of a similar nature, must be weighed through the expert qualifications he received in this Application.

129. In conclusion, given Alberta's exclusive provincial jurisdiction over the CMOH Orders, the *Gateway* decision is clearly distinguishable from this case. *Gateway* dealt with different legislation that led to different PMO's that relied on a different political, scientific, and medical situation unique to the province of Manitoba.

130. Additionally, given the different jurisdictions, different health records, different provincial governments in place, different time periods, and the evolving science, the decision in *Gateway* is not instructive to this Honourable Court.

131. Finally, the expert qualifications of the Applicants' vital expert witness Dr. Bhattacharya are different from those in *Gateway*. Much of Dr. Bhattacharya's evidence in *Gateway* was provided limited weight, due to his qualification as only an "expert in health economics." In this case, his qualifications include "a focus on epidemiology and infectious disease epidemiology" and therefore his evidence must be accorded significant weight, markedly more than in *Gateway*.

b) Persuasiveness of *Gateway* While it is Under Appeal

132. The judgment in *Gateway* is currently before the Manitoba Court of Appeal. This does not mean that it is not good law in the province of Manitoba. However, this information can assist this Honourable Court in placing less weight on how instructive it is to this case.

[111] Respondents' Final Argument at para 6.

133. In *Re Oldfield Estate (No. 2)*[112], the Court adopted the words of Sir George Jessel in finding that "it is of the utmost importance, as regards our law, that Judges of the first instance should not disregard a series of decisions by other Judges of first instance, none of which have been appealed or have been otherwise interfered with."[113]

134. Few, if any, instances in the history of this country have interfered with Canadians' rights in such a substantial way. At minimum, Alberta's unjustified restrictions on the Appellants' rights, if true as alleged, were highly onerous and to such a degree that it would be reckless to place any significant weight on the trial decision of *Gateway*.

135. This is particularly the case when there exist similar cases yet to be resolved at appellate levels dealing with constitutional issues impacting all Canadians significantly. In the years to come, the law will see countless more cases involving Albertans' (and other Canadians') rights being infringed by the heavy-handed measures taken by governments and businesses during the COVID-19 pandemic.

c) Persuasiveness of *Gateway* on this Court

136. The Respondents rely heavily on the *Gateway* decision, having noted that "Chief Justice Joyal's reasons are highly instructive on the approach this Court should take…."[114]

137. *Gateway* is a superior court judgment of the Manitoba Court of Queen's Bench. It is not binding on this Honourable Court. The persuasiveness of *Gateway* towards the unique issues at this trial should be tempered with the constitutional concept of federalism, and the unique circumstances that Alberta had towards the impugned CMOH Orders.

138. The SCC in *Bedford v Canada (Attorney General)*[115] agreed with the statement that "…the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional."[116] The SCC also

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[112] [1949] 1 W.W.R. 540, [1949] 2 D.L.R. 175
[113] *Ibid* at p. 212, citing *Re Birkett*, (1878) 9 Ch D 576, 47 LJ Ch 846 [Emphasis added].
[114] Respondents' Final Argument at para 6.
[115] 2013 SCC 72 [***Bedford***].
[116] *Ibid* at para 43.

agreed that "…lower courts should not be limited to acting as 'mere scribe[s]', creating a record and findings without conducting a legal analysis."[117]

139. From *Bedford*, it stands that a lower court, like the Honourable Court in this Application, is not bound to blindly follow decisions of other competent courts, particularly those that deal with allegedly unconstitutional laws. As noted, the decision in *Gateway* is under appeal due to the impugned COVID-19 measures taken by the Province of Manitoba.

140. A lower court cannot ignore binding precedent. Importantly, *Bedford* speaks to the horizontal and vertical *stare decisis* doctrines that govern a lower court.

141. The SCC has recently discussed the role of *stare decisis* on questions of law related to constitutional matters. In *Sullivan* the SCC found that "it would be unwise for a single trial judge in a province to bind all other trial judges. It is better to revisit precedent than to allow it to perpetuate an injustice."[118]

142. Though a declaration of unconstitutionality or constitutionality made by a superior court in one province may be persuasive,[119] the SCC made it clear in *Sullivan* that federalism prevents a declaration issued in one province, under s 52(1) of the *Constitution Act, 1982*, from binding other provinces. It logically follows that through federalism it is vital that individual provinces are able to answer constitutional questions relevant to their own specific circumstances.

143. *Sullivan* found that "…to allow a declaration of unconstitutionality issued by a superior court in British Columbia to bind a superior court, much less an appellate court, in Quebec or Alberta would be wholly inconsistent with our constitutional structure."[120]

144. *Federation of Law Societies of Canada v Canada (Attorney General)* found that "…there is a high social value in one court of equal jurisdiction in one province giving

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[117] *Ibid* at para 44.
[118] *Sullivan* at para 66.
[119] *Ibid* at para 63.
[120] *Ibid*.

respect to another court of equal jurisdiction in another province."[121] Justice Watson found in *FLSC* that a court must give "…some respect to other rulings of comparable authority."[122]

145. However, even the court of appeal of a different province is not binding on a superior court.[123]

146. *FLSC* found that "…it would be wrong in law for me to hold that, either on the grounds of comity or *res judicata*, I could declare a judgment made by the Superior Court of jurisdiction in British Columbia to have effect in the Province of Alberta."[124]

147. *Briscoe* found that, though a court applies the law based on the most recent binding caselaw, "…subsequent developments in the law may require this Court to arrive at a different conclusion."[125] Given this, there is no binding authority for this Honourable Court to base their decision, specifically on actions related to the COVID-19 pandemic and the resulting restrictive measures put forth by the Alberta government infringing the *Charter* rights of each and every Albertan. Even when the *Gateway* appeal is rendered, this will still only be a persuasive authority for this Honourable Court.

148. Given the recent SCC ruling in *Sullivan*, matters that invoke the constitutionality of legislation should be decided on by a superior court of a province, with limited persuasion by the same level of court in another province.

V. ADDRESSING FLAWS IN RESPONDENTS' SECTION 1 ANALYSIS

a) The Respondents' Objective

149. The Applicants have already expressed concern regarding the Respondents' stated objective as required for the first part of the *Oakes* test.[126] However, the

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[121] *Federation of Law Societies of Canada v Canada (Attorney General)*, 2001 CarswellAlta 1854, [2001] AJ No 1697 [***FLSC***] at para 34.
[122] *Ibid* at para 38.
[123] *Ibid* at para 29.
[124] *Ibid*.
[125] *Briscoe* at para 15.
[126] Written Final Arguments of the Applicants Heights Baptist Church, Northside Baptist Church, Erin Blacklaws, and Torry Tanner at paras 78-82 [**Applicants' Final Argument**].

Respondents' Final Argument further obscures the specific pressing and substantial objective being addressed. The Supreme Court of Canada has stated that "it is incumbent on the party bearing the burden of proof under s. 1 to establish the pressing and substantial concern."[127]

150. It is therefore imperative that this objective be confirmed as the SCC has repeatedly rejected governments' stated objectives as they seek to short-circuit the section 1 analysis.[128]

151. Within the Respondents' Final Argument alone, Alberta initially claims that the objective is to minimize the number of serious outcomes resulting from COVID-19 infection.[129] The parties agree that COVID-19 is only a serious threat for a minute percentage of Alberta's population[130] and so such an objective would seemingly require only minimal and targeted measures. The SCC has stated:

> little deference should be shown in this case where the contextual factors mentioned above indicate that the government has not established that the harm which it is seeking to prevent is widespread or significant.[131]

152. However, Alberta then states that the objective is "to protect the community and prevent widespread transmission"[132]. This is an extremely overbroad objective and utterly arbitrary as to what it actually means. Minimizing serious outcomes and preventing widespread transmission are two very different objectives and yet Alberta uses them seemingly interchangeably giving the Respondents an incredibly wide net to justify their actions with.

153. Finally, Alberta claims the objective was "protecting public health by reducing the spread of COVID-19."[133] This again is an overbroad objective.

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[127] *Stoffman v. Vancouver General Hospital,* [1990] 3 S.C.R. 483, [1990] S.C.J. No. 125 at para 38.
[128] See *Carter* at paras 76, 77, 78, 86; *R v K.R.J.*, 2016 SCC 31 at para 63.
[129] Respondents' Final Argument at para 127.
[130] February 24, 2022 PM Hearing Transcript, p17/2-4; April 4, 2022 Hearing Transcript, p64/36-39, p73/20-22.
[131] *Thomson Newspapers Co. v. Canada (Attorney General),* [1998] 1 S.C.R. 877, [1998] S.C.J. No. 44 at para 118 [Emphasis in original quote] [***Thomson***].
[132] Respondents' Final Argument at paras 127-130.
[133] *Ibid* at para 316.

154. The Applicants submit that it is improper to allow Alberta to claim so many potential objectives. Alberta bears the burden to show what the precise and carefully established pressing and substantial objective is that it is addressing.[134] Since Alberta has failed to do this, the section 1 analysis fails at this initial stage.

b) Respondents Bear Substantial Burden

155. The case at bar is a constitutional challenge in which this Honourable Court must determine whether the Respondents have shown, on a balance of probabilities, that any infringement to the Applicants' rights arising from the CMOH Orders are "demonstrably justified in a free and democratic society."[135] Demonstrably justified connotes a high evidentiary foundation which the Respondents have failed to meet.

156. The Respondents brazenly submit that "Alberta does not have to provide scientific evidence proving that its restrictions are effective."[136] It is unclear what Alberta proposes a section 1 analysis would look like if governments are not required to demonstrably justify such infringements; which is the very thing that the *Constitution Act, 1982* requires them to do. Even the SCC has stated that evidence is required "to prove the constituent elements of a s. 1 inquiry".[137]

157. Alberta further seeks to circumvent accountability by boldly stating that "the government may be better positioned than courts to choose amongst a wide range of alternatives".[138] The Respondents rely on two cases for the proposition, both of which are trial level courts from other jurisdictions (Newfoundland and Manitoba)[139] carrying little persuasive value to this Honourable Court.

158. While much of the Respondents' Final Argument focusses on seeking to discredit the Applicants' eminent expert witness, the Respondents fail to satisfy their evidentiary burden. While the Applicants submit that the Respondents have not

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[134] *R v K.R.J.*, 2016 SCC 31 at para 63.
[135] *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31 at para 48.
[136] Respondents' Final Argument at para 328.
[137] *R v Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 at para 68 [***Oakes***]
[138] Respondents' Final Argument at para 346.
[139] *Ibid*, footnote 519.

discredited their evidence, even if they had done so, that would be insufficient to satisfy the section 1 onus Alberta bears.

159. In regard to minimal impairment, the Supreme Court of Canada has stated, "if the government fails to explain why a significantly less intrusive and equally less effective measure was not chosen, the law may fail."[140]

160. Throughout the Respondents' Pre-Trial Brief, submissions during trial, and Final Argument, Alberta has repeatedly claimed that the Applicants' proposed responses to COVID-19 would place the public at great risk, undermine the healthcare system, and that alternatives such as focussed protection used in the Great Barrington Declaration were nothing more than "a theoretical construct"[141]. Alberta seemingly proceeds to claim that the blanket restrictions placed on all Albertans, through the CMOH Orders, should be upheld unless the Applicants are able to come up with some better alternative.

161. However, this is precisely the argument rejected by the SCC in *Carter* when it stated:

> This effectively reverses the onus under s. 1, requiring the claimant whose rights are infringed to prove less invasive ways of achieving the prohibition's object. The burden of establishing minimal impairment is on the government.[142]

162. The Applicants do not bear the burden to present alternative measures to prove why they are superior to the methods chosen. It is Alberta which has the onus to satisfy this Honourable Court that it has demonstrably justified the rights-infringing Orders. Although the Applicants' evidence is not required for a section 1 analysis, it provides this Honourable Court with clarity that the government has violated the rights of Albertans in an unjustified manner.

c) Inadequacy of Respondents' Evidence

163. The Supreme Court of Canada has articulated:

> Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms

[140] *Thomson* at para 118.
[141] April 4, 2022 Hearing Transcript, p73/3-4.
[142] *Carter* at para 118.

> the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.[143] [Emphasis added]

164. As discussed in the above section, Alberta bears a high burden to justify infringing the fundamental freedoms of Albertans, protected and guaranteed by Canada's most powerful and influential document; the Constitution. This burden can only be satisfied if this Honourable Court is satisfied that Alberta has provided cogent and persuasive evidence commensurate with the fact that the Applicants have never faced such sweeping infringements on their rights in Alberta's history.

165. Throughout the Respondents' Final Argument, Alberta repeatedly fixates on the *Gateway* decision in an attempt to have this Honourable Court simply mirror what other jurisdictions have found.[144] Alberta states:

> Given this reliance by these Applicants on the identical argument made in Manitoba, it is obviously useful to review what Chief Justice Joyal said about the scientific evidence and the applicants' arguments on these issues.[145]

166. However, none of the *Gateway* record, including any scientific evidence or argument made, was adopted into the present case. If Alberta wanted to rely on evidence from a different case, it had ample time to admit such evidence during the trial. It did not do so, and so any evidence admitted in any other case, regardless of similarity is irrelevant to the case at bar.

167. Nevertheless, Alberta quotes the *Gateway* case as evidence to support its claims that:

    a. the restrictions were a last resort[146];

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[143] *Oakes* at para 68.
[144] See for example Respondents' Final Argument at paras 156, 157, 161-267.
[145] Respondents' Final Argument at para 165.
[146] *Ibid* at para 174.

b. there was a "very real and imminent threat to Alberta's health care system"[147];

c. deaths or serious cases "escalated rapidly and were projected to continue rising"[148];

d. the Alberta "healthcare system was under tremendous strain"[149]; and

e. show that Alberta's witnesses have "credibly and persuasively" explained why the restrictions resulting from the Orders were essential.[150]

168. It is unclear how jurisprudence can act as scientific evidence for a government in a different jurisdiction, dealing with a virus managed entirely by unique and independent provincial governments as they respond to COVID-19 which impacted each and every province uniquely.

169. Despite its burden, Alberta makes statements based on conjecture rather than evidence, stating that "[b]y necessity, the CMOH Orders included measures to prevent exponential growth of the virus from overwhelming Alberta's limited health care resources".[151] However, no cogent or persuasive evidence was admitted proving the truth of this statement. The SCC has confirmed that issues arising out of a particular case can "only be answered on the basis of evidence adduced in the case. They cannot be answered in the abstract."[152]

170. Alberta also states, "given the lack of any persuasive evidence of any obviously faulty science relied on by Alberta, Alberta submits its evidence should convince this Court that 'it is on solid ground in its s. 1 defence' of the CMOH Orders".[153] Alberta also alleges that since their approach was followed across most of Canada, it must clearly be justified.[154]

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[147] *Ibid* at para 174.
[148] *Ibid* at para 174.
[149] *Ibid* at para 174.
[150] *Ibid* at para 175.
[151] *Ibid* at para 171.
[152] *R.W.D.S.U. v Saskatchewan*, [1987] 1 S.C.R. 460, [1987] S.C.J. No. 8 at para 83.
[153] Respondents' Final Argument at para 172.
[154] *Ibid* at para 172.

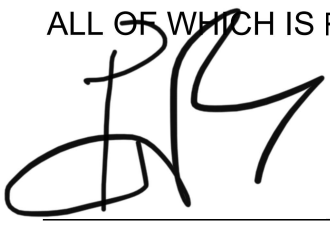
171. “Everyone else did it” is hardly an evidentiary record commensurate of the impact Albertans faced, and the important constitutional questions presented to this Honourable Court.

172. Admittedly, Alberta did provide witnesses and experts to support its claims. However, as discussed throughout the Applicants’ Final Argument, many of these witnesses and experts admitted, either explicitly or implicitly, on cross-examination that Alberta’s response to COVID-19 and the evidence adduced within this trial was not as strong as first portrayed.[155]

173. The Applicants submit that the only evidence to be relied on within this constitutional challenge is the evidence admitted into the record of this case alone. The Respondents cannot attempt to fill in the holes of their evidence after they have rested their case with that of other cases from different jurisdictions.

174. In the case at bar, the Respondents have failed to produce cogent and persuasive evidence sufficient to show why the sweeping restrictions, put in place by the Orders, were demonstrably justified.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27th day of July 2022:



Leighton B.U. Grey, Q.C.

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

[155] See for example Applicants’ Final Argument at para 50, 62, 85-89, 93,98-100, 105, 117.

VI. LIST OF AUTHORITES

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3.	*Lapointe v Hopital Le Gardeur,* 1992 CanLII 119 (SCC), [1992] 1 SCR 351 at paras 31-32
4.	*R v Morgentaler*, [1988] 1 SCR 30, 37 CCC (3d) 449
5.	*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11
6.	*R v Sullivan*, 2022 SCC 19 at paras 63, 66
7.	*Kelliher (Village) v Smith*, [1931] SCR 672, [1931] 4 DLR 102 at para 18
8.	*R v Abbey*, [1982] 2 SCR 24, [1982] SCJ No. 59 at para 44
9.	*R. v J(J),* 2000 SCC 51 at para 28, 34
10.	*R. v. Thomas,* 2006 CarswellOnt226, [2006] OJ no 153
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15.	*Bedford v Canada (Attorney General)*, 2013 SCC 72 at para 43, 44
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17.	*Stoffman v. Vancouver General Hospital,* [1990] 3 S.C.R. 483, [1990] S.C.J. No. 125 at para 38
18.	*R v K.R.J.*, 2016 SCC 31 at para 63
19.	*Thomson Newspapers Co. v. Canada (Attorney General),* [1998] 1 S.C.R. 877, [1998] S.C.J. No. 44 at para 118

20.	*Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31 at para 48
21.	*R v Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 at para 68
22.	*R.W.D.S.U. v Saskatchewan*, [1987] 1 S.C.R. 460, [1987] 3 W.W.R. 673, [1987] S.C.J. No. 8 at para 83
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23.	*Code of Conduct*, Law Society of Alberta, February 20, 2020
SECONDARY SOURCES	
24.	Amended Amended Certified Record of Proceedings in QB Action No. 2203-04046, filed July 12, 2022
25.	"Many COVID-19 mandates are in provincial jurisdiction: Health minister", Global News (February 8, 2022), online: <https://globalnews.ca/video/8604055/many-covid-19-mandates-are-in-provincial-jurisdiction-health-minister/
26.	"Trudeau calls on premiers and mayors to 'do the right thing' as COVID caseloads rise", CBC News (November 10, 2020), online: <https://www.cbc.ca/news/politics/trdueau-premiers-covid-restrictions-1.5796720