

COURT FILE NUMBER 2203 04046

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

APPLICANTS C.M, LITIGATION GUARDIAN FOR A.B.,
S.A, LITIGATION GUARDIAN FOR F.S.,
C.H., LITIGATION GUARDIAN OF G.H.,
A.B., LITIGATION GUARDIAN FOR J.K.,
R.L., LITIGATION GUARDIAN FOR L.M.,
and ALBERTA FEDERATION OF LABOUR

RESPONDENTS HER MAJESTY THE QUEEN IN RIGHT OF
ALBERTA

DOCUMENT **ORIGINATING APPLICATION
(For Judicial Review)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT ROBERTS O'KELLY LAW
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File Number: 57-001



JC - RES ent

NOTICE TO THE RESPONDENTS AND TO THE MINISTER OF JUSTICE AND ATTORNEY GENERAL FOR THE PROVINCE OF ALBERTA:

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: March 21, 2022
Time: 10:00 am
Where: Law Courts Building, in the City of Edmonton
Before: Presiding Justice in Special Chambers

Go to the end of this document to see what you can do and when you must do it.

To appear by video:
<https://www.albertacourts.ca/qb/court-operations-schedules/scheduling>
Civil Chambers - Virtual Courtroom 50 (ELC QB)
To appear by telephone:
Dial in Number: 780-851-3573
Access code: 969 378 739

Overview

1. This is an application for judicial review of the “**Decision**” of February 8, 2022 rescinding the previous mask decision as applicable to children (Record of Decision- CMOH Order 55-2021 COVID-19 response (“**CMOH Order 55-2021**”)) by the Chief Medical Officer of Health (“**CMOH**”) in accordance with the power delegated to her under section 29 (2.1) of the *Public Health Act*, RSA 2000, c P-37, as amended from time to time (the “**Public Health Act**”).
2. The CMOH is the sole decision-maker under section 29(2.1) and, as an administrative decision-maker, her decisions are subject to judicial review in this Court and are required to comply with the *Charter of Rights and Freedoms*.
3. The Decision was communicated by Premier Jason Kenney (the “**Premier**”) at a press conference on February 8, 2022. Although it purports to take effect on February 13, 2022 at 11:59 pm, the Decision (Record of Decision- CMOH Order 08-2022), was not published in accordance with *Regulations Act*, RSA 2000 c R-14 until after business hours on Friday, February 11, 2022.
4. The CMOH has declined to answer questions regarding the basis for the Decision. She refused to share her recommendations, claiming cabinet confidence applies to them and their disclosure is outside her discretion.
5. Following the February 8 press conference and in reliance on the Decision, Education Minister Adrianna LaGrange (“**Minister LaGrange**”) issued a *de facto* “**Prohibition**” on school mask mandates, even when initiated by school boards.
6. In this application for judicial review, the Applicants also challenge the Prohibition as a part of the Decision.
7. Both the Prohibition and the Decision infringe on the rights of the Applicants, children with disabilities, to have equal access to education. The effect of removing universal masking in schools is to force the Applicants to choose between their education and their health and, in some cases, their life.

Basis for this Application:

The Applicants

8. The Applicants are parents and litigation guardians of Albertan children with disabilities (the “**Applicants**”) and the Alberta Federation of Labour as a public interest litigant.
9. The Applicants have well-founded concerns, based on the illegal blockade/“freedom” convoy movement, for their children’s safety should they reveal their identities publicly. The Applicants use pseudonyms to protect their identities.

i. C.M. parent of A.B.

10. The Applicant, C.M., is a mother of five (5) children in rural Alberta. She is immunocompromised. At the start of the COVID-19 pandemic, C.M. was forced to leave her career to be home with her children then ranging in ages 7 through 15.
11. A.B.’s school is in a rural school district in southern Alberta (“**District 1**”).
12. A.B. has a neuromuscular disorder. Although A.B.’s cognitive functioning is excellent, A.B. requires a feeding tube and a tracheostomy. A.B. needs mechanical ventilation overnight. As a result, A.B. faces a heightened risk of infection and severe health outcome from COVID-19 infection.
13. During the 2020-2021 school year, C.M. chose to keep A.B, her youngest child – now 10 years old – at home for approximately half the school year. This was to protect A.B’s safety in that A.B. was in grade 3 and the CMOH did not require grade 3 children to mask. As such, A.B. could not attend school without facing significant risk.
14. In September 2021, C.M. was forced to return to the work force for financial reasons. She holds two jobs, currently. A.B. was required to attend in-person schooling.
15. Prior to September 16, 2021, A.B. attended school in-person with a KN95 mask and with a nurse. Due to the lack of a mask mandate for this period and the fact that only 10% of students in A.B.’s class wore masks at that time, A.B. was not included with the classroom. The teacher only wore a mask when approaching A.B. As such, A.B was required to sit 8 feet away from other students. A.B. could only interact 1:1 with those few students willing to wear a mask.
16. Between September 16, 2021 and February 11, 2022, A.B. was able to attend school. Other than the CMOH Order 55-2021 mask mandate, there have been no protections against airborne transmission in A.B.’s school. To C.M.’s knowledge there are no air ventilation measures in place at the school to protect the children if not wearing masks.

Other than reporting absenteeism, since September 2021, there has been no reporting or tracing of positive cases in the school, causing severe anxiety for A.B.

17. Recently, one of C.M.'s children contracted COVID-19. This child is the only one who takes the school bus. One of A.B's other siblings had a panic attack because they are so worried A.B. will also contract COVID-19. The family is continuously masking at home in hopes of protecting A.B.
18. Without warning, in the afternoon of February 8, 2022, C.M. learned of the Decision. She does not understand why school children will be the first to be exempted from indoor mask wearing. She does not know the basis for the Decision.
19. As a result of the Decision, there will be no mask mandate in A.B.'s school and A.B. will be forced to stay home or risk their own health. A.B. has chosen health. Home schooling is not possible, nor is online learning at A.B.'s school. As such, A.B. will forego education for the remainder of the school year unless a mask mandate remains in place.

ii. **A.S. parent of S.F.**

20. A.S. is the parent of child E.F, who is 11 years old.
21. E.F. is a student at school within an urban school district which has had its own mask mandates since September 2021 ("**District 3**"). The district's school board, based on the Prohibition, advised District 3 families that they lack authority to extend their own school mask mandate. A.S. was not consulted about, and had no prior notice of, the Decision or Prohibition and does not understand the reasons for eliminating the mask mandate.
22. E.F. has severe asthma and Type 1 diabetes and is therefore at risk of serious complications if they contract COVID-19. In addition, E.F. has extreme anxiety and had a panic attack over the Decision and Prohibition.
23. As result of the Decision, E.F. is unsure whether they will be able to re-attend in-person learning.

iii. **C.H. parent of G.H.**

24. C.H. is the parent of G.H. G.H is in Grade 3, who, along with their two siblings, attends public school in an urban district ("**District 4**").
25. G.H. is physically disabled and has Arthrogryposis Multiplex Congenita, severe scoliosis and low hypotonia. G.H. requires a 1:1 aide in school and, as a result, is at increased risk of severe illness and complications from COVID-19 infection. G.H. is mask exempt because they cannot remove and put on a mask themself.

26. G.H. still wears a mask where possible. Due to CMOH Order 55-2021, G.H. has benefitted from peers wearing masks, including to protect G.H., and has been able to attend in-person schooling since September 2021.
27. In January, C.H. made the election to have her children, including G.H., attend in person schooling based on the mitigation measures in place, including the mask mandate in CMOH Order 55-2021.
28. In the evening of February 8, 2022, without any warning, C.H. learned of the Decision and its rescission of the universal mask mandate, and that it would take effect in three business days' time. C.H. had no prior notice of the Decision and does not understand the basis for the Decision.
29. On February 9, 2022, C.H. contacted the District 4 superintendent. The school board informed C.H. they could not accommodate G.H. through its own universal masking order based on the Prohibition. Having already made the decision for in-person learning by a prior date, as required by the school district, C.H. was informed that G.H. would either have to attend without the protection of a mask mandate or stay out of school for the remainder of the 2021-2022 school year.
30. Due to G.H.'s disability, C.H. has been forced to remove G.H. and G.H.'s two siblings from school, for the rest of this school year. G.H.'s ability to access education has been directly affected as a result of the rescission of the CMOH Order 55-2021.

iv. A.B. parent of J.K

27. A.B. is the parent of J.K. Both A.B. and J.K. are immunocompromised. J.K. has Kleefstra syndrome and Kallman syndrome, which have caused J.K. to be severely disabled, have heart issues and seizures. A.B. is also a cancer survivor. Both A.B. and J.K. face a heightened risk of severe outcome from COVID-19 infection.
28. J.K. has been unable to attend school since March 12, 2020. J.K.'s sibling has only been able to attend school when adequate protections are in place and COVID-19 case counts are low. They both attend a school in an urban school district ("**District 5**").
29. As a result, J.K. has had no access to in-person education for almost two years. Also, as a result of the inadequate health protections in place during the spread of Omicron, J.K.'s older sibling is currently residing with another family just so that they can attend in-person school without placing both J.K. and their parent, A.B., at risk. The risk, as advised by A.B.'s physician, is significant. Because of the tremendous risk to both A.B. and J.K., these immediate family members can only see each other outdoors.
30. A.B. had no notice of the Decision and Prohibition and does not understand on what basis the mask mandate is being revoked.

v. **R.L. parent of L.M**

31. R.L. is the parent of L.M., who is 8 years old and in Grade 3. Since 2020, L.M. has attended a private school so that they can be accommodated. The private school has the autonomy to offer cohorting, smaller class sizes, UV filters and can support online learning where necessary.
32. L.M. has a Congenital Heart Defect. Their condition has been considered severe and palliative. L.M. also has severe obstructive sleep apnea, ADHD and Autism. They have an older sibling in grade 5.
33. L.M. wears a mask but it is difficult, as they often fidget and chew the mask, likely due to sensory issues. L.M. has therefore benefited from the CMOH-Order 55-2021 and the masking of children around L.M.
34. In January, 2022, L.M. stayed home due to high COVID-19 infection rates being reported, lower vaccination rates among children aged 5 to 11, and greater transmissibility of the Omicron variant (including among vaccinated persons). On February 7, 2022, L.M.'s sibling returned to in-person schooling because it was affecting their mental health.
35. On February 8, 2022, without any notice, R.L. learned of the Decision. She does not understand the basis for the decision.
36. On February 9, 2022, based on the Prohibition, the private school advised R.L. that they did not have the autonomy to accommodate L.M. As a result of the Decision, R.L. is unsure whether L.M. will be able to re-attend in person knowing that, if so, attending will be a risk to L.M.'s health.

vi. **Alberta Federation of Labour**

37. The Alberta Federation of Labour ("**AFL**"), is Albertans' largest worker advocacy group, representing 29 unions in the public and private sectors who, in turn, represent about 170,000 unionized Alberta workers. AFL claims public interest standing in this proceeding.
38. AFL includes the unions of employees of schools throughout Alberta, including Educational Assistants ("**EAs**") and janitorial staff. Many EAs are critical to the accommodation and access to education required by the Applicants. The EAs, the unions and AFL were not consulted prior to the Decision.
39. The Application raises serious justiciable issues in challenging the Decision and its discriminatory effects and impacts on each of the Applicants.

40. AFL has a genuine interest in these justiciable issues. AFL's mandate includes speaking out on public education as a social issue of importance to working people. AFL is dedicated to providing a safe and healthful work environment, to a just and equitable society, and to a peaceful world.

Evidence on the Application

41. The Applicants also intend to call evidence from experts on epidemiology, child psychiatry/psychology, disability workers, and/or clinical medical doctors to provide evidence of the benefit of masking in schools, the heightened risk of contraction/severe outcomes for the Applicants and the scant evidence of harm to children from mask wearing.

42. The Applicants also intend to call evidence from other children, through their parents, and/or public education stakeholders.

43. The Applicants seek the Record of Proceedings in accordance with Rule 3.18, without redaction based on the common law duty of candour.

COVID-19 Airborne

44. The consensus in the scientific and medical communities is that COVID-19 is airborne. The scientific literature reached this consensus by April 2021, at the latest ("**Airborne Consensus**").

45. On or about November 12, 2021, Dr. Theresa Tam, Canada's Chief Public Officer of Health, confirmed that COVID-19 is airborne. At that time, Dr. Tam issued statements on the effectiveness of masks and strongly recommended the use of medical masks and, if possible, respirators, as opposed to cloth masks, as an essential layer of protection (the "**Federal Mask Recommendation**"). This recommendation was amplified for indoor settings with suboptimal ventilation.

46. Despite the Airborne Consensus and the Federal Mask Recommendation, Alberta's Chief Medical Officer of Health continues to rely on policies and directives from November 2020 which were premised on a position that COVID-19 was primarily transmitted through contact with droplets containing the virus causing COVID-19 ("**Droplet Theory**").

47. Even when the Respondent was advancing recommendations grounded in the Droplet Theory, airborne transmission was known and acknowledged by the Respondent, including the CMOH of Alberta.

Omicron variant and Children

48. In or around the last quarter of 2021, Omicron emerged as a variant of concern, first identified in South Africa. In Alberta, the Omicron variant became the dominant variant on or about December 16, 2021.
49. As compared to previous variants, Omicron was believed to cause less pneumonitis and therefore less intensive care unit (“**ICU**”) admissions and immediate deaths per 100,000 cases. Omicron is also much more transmissible than the previous Delta variant. Experts still do not know the possible long-term consequences of Omicron infection, including the risk of Long COVID in children.
50. However, as of February 11, 2022 and since January 1, 2022, there have been 3 pediatric deaths and pediatric hospitalizations have increased exponentially in Alberta.
51. Based on the data so far, the impact of Omicron on pediatric patients has eclipsed previous variants. The risk of contraction and/or severe outcome from Omicron, and all COVID-19 variants, is elevated for children with disabilities, including for the Applicants.
52. Omicron remains a real and present risk to Albertans, including children and children with disabilities.
53. Although the Premier claimed on February 8, 2022 that Omicron had “peaked” and hospitalizations were declining, he did not cite any evidence to confirm that hospitalization numbers were in fact declining and not merely plateaued, or whether the plateau or decline was due to patients having died or been discharged, for example.

Effectiveness of Masks

54. The weight of the scientific research confirms that masks are an effective means of preventing infection from COVID-19. The benefit of masks is pronounced where other measures do not exist, including high rates of full vaccination among (most) children, appropriate air ventilation, and/or contact tracing and isolating.
55. At present, the vaccination rate for children 5 to 11 (kindergarten to Grade 6) remains at 46.4 per cent with one dose and only 19.0 per cent with both doses.
56. The benefits of masks in schools are recognized and reported in the scientific literature.
57. Conversely, there is little if any credible research on the harms of masks on children. In fact, there is clinical evidence of the mental health harms on children in abruptly removing mask mandates in schools, including on the Applicants and their families.

Mask Mandates in Schools

58. With the exception of a two-week period in September, masks have been mandatory in schools for children in grades 4 to 12 for the 2020-2021 and 2021-2022 school years. Masking for kindergarten to Grade 3 was dependent on the decisions of individual school districts.
59. In addition to CMOH Order 55, most, if not, all of the largest school districts have maintained their own mask mandates in accordance with the *Education Act*, SA 2012, c E-0.3 ("***Education Act***"). These have included district wide mask mandates for children in kindergarten to Grade 3.
60. Other than masks and opening the windows, schools have limited means of protecting children from airborne transmission. For the 2021-2022 school year, the Respondent eliminated the ability of schools to require reporting, tracing and isolating COVID-19 cases in their schools. Ventilation and funding for ventilation remains suboptimal and inadequate in the Applicants' schools.
61. Various organizations have come out in favour of masking, including in schools:
 - a. Alberta Medical Association - Execution Section of Pediatrics publicly stated their opposition to removing masking in schools.
 - b. The Canadian Pediatric Association stated their concerns with lifting the mask mandate in Alberta and continues to recommend that all children over two, who can remove a mask without assistance, should wear a well-fitting mask as often as possible.
 - c. The Alberta Teachers Association publicly voiced their concern with the hastiness of removing masking - the one protection that students have in school.
62. The Alberta government and the CMOH were supporting masks in schools in late January 2022. The government procured and offered medical masks to all schools, many of which only arrived after February 10, 2022.

Abrupt End to CMOH Orders

63. Many parents had to elect whether their children would attend in-person or online learning for February 1, 2022. These decisions are irrevocable. This means that those children who elected to attend in person cannot change their decision without forfeiting the school year.
64. On or about January 31, 2022, trucks began illegally blockading the Canada- US Border in Coutts, Alberta. Despite widespread condemnation, the blockade has persisted, causing millions of dollars in damage to the Alberta economy. One of the purported

demands of the blockaders is that the Alberta government drop all mandates, including mask and vaccine mandates.

65. Following the blockade commencing, the Alberta government and/or the CMOH took an abrupt decision to dismantle the CMOH Orders.

The Decision

66. The Decision is an administrative decision by an administrative official. Alternatively, it is delegated legislation. Both are subject to judicial review in this Court in accordance with, *inter alia*, section 96 of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.) and the constitutional rule of law principle

67. Without notice, the Decision to abruptly end the school mask mandate was announced at press conference on February 8, 2022 only starting at approximately 15:45.

68. No prior notice of the Decision was provided to the school boards, the Alberta Teachers Association, AFL, the Applicants and/or other stakeholders.

69. The Applicants, the affected parties and stakeholders received inadequate notice of the Decision. The timeline for the Decision and for parents, schools, school boards and staff to respond was only 3 business days. There was no or inadequate opportunity to mitigate the impacts of the Decision, which will be severe for the Applicants.

70. Only the CMOH or another medical officer of health have the legislative authority to render the Decision under section 29(2.1) of the *Public Health Act*, RSA 2000 c P 37. Following the Premier's press conference on February 8, 2022, a CMOH Order rescinding CMOH Order 55-2021 was necessary to give effect to the Decision.

71. CMOH Order –08-2022 was not executed until February 10, 2022 and was not published. The CMOH Order was not published until after business hours on Friday, February 11, 2022 and now purports to come into effect on February 13, 2022 at 11:59pm. No notice of the CMOH Order-08-2022 was provided.

72. The Reasons for the Decision include:

- a. The Premier explained kids should 'live their lives again', pointed to lowering case numbers, even though COVID-19 testing protocols are severely restricted, and the harm of actual school closures outweighing the harm of COVID-19.
- b. Minister LaGrange cited undocumented mental health concerns from mask wearing as well as the right of a child to choose not to wear a mask and have access to education.

- c. The CMOH states in her Decision that rapid tests are available and that vaccinations are available for 5-11 year olds.
73. The Decision accords with the demands of the unlawful blockaders self-identifying as the “freedom convoy” or words of a substantially similar nature and intent, including those occupying the U.S.-Canada border crossing in Coutts, Alberta.
74. The Decision does not accord with or explain why it ignores the science and the recommendations from various reputable medical professionals and organizations. There are no reasons given as to why the Airborne Consensus, the Federal Mask Recommendation and known effect of Omicron on children are ignored in the Decision. The Decision ignores the low vaccination rate among children. Finally, there is no mention of, and no apparent consideration of, the need to ensure access to education for children such as the Applicants.
75. Before issuing the Decision, the Respondent and/or the CMOH knew or ought to have known about the prevailing evidence and public, authoritative statements, on mask-wearing, airborne transmission, and the emerging evidence of the Omicron variant’s effect on, and its heightened transmissibility, including to and by children.
76. The Decision also does not reinstate alternative mitigation measures to protect children, including medically complex and/or vulnerable children, including quarantine for close contacts of confirmed COVID-19 cases, contact tracing for confirmed cases and/or proper air ventilation. No reason was provided by the CMOH in the Decision or otherwise for not reinstating these other safety measures.

The Prohibition

77. Almost simultaneous to the Decision, the Minister LaGrange issued a *de facto* prohibition against School Boards reinstating or continuing their own mask mandates.
78. Minister LaGrange claims that school boards cannot institute their own mask mandates, even though they previously could do so for children in kindergarten to Grade 3 without explicit authorization in a CMOH Order.
79. There is no statutory authority for the Prohibition. Inherent powers cannot be used in a coercive manner to prevent the school boards from enacting their own mask mandates to compensate for the Decision.

80. The Prohibition infringes on the rights of the Applicants to have equal access to education, including under:

- a. Section 3 of the *Education Act*, SA 2012 c E0.3 (the “**Education Act**”);
- b. Section 4 of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (the “**Human Rights Act**”);
- c. Section 15 of the *Charter of Rights and Freedoms, The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11 (the “**Charter**”), which infringement cannot be justified by section 1; and/or
- d. The *Convention on Rights of Persons with Disabilities* (the “**CRPD**”).

81. The Prohibition purports to interfere with the Districts’ and the school boards’:

- a. duty to accommodate under the *Human Rights Act*;
- b. responsibility to provide a safe school environment under section 33 of the *Education Act*; and/or
- c. duties to maintain policies to implement this responsibility under sections 52 and 53 of the *Education Act*.

Improper Purpose/ Delegation of decision-making

82. The CMOH purportedly made the Decision with her authority as an administrative-decision maker under section 29 (2.1) of the *Public Health Act*.

83. On or about September 14, 2021, the CMOH publicly informed a group of physicians that she had delegated her authority under section 29(2.1) of the *Public Health Act* to her “proxy” decision-makers. She did not explain who these proxy decision-makers are.

84. On February 10, 2022, through her silence and through Minister Copping’s statement, the CMOH confirmed that she did not make the Decision.

85. Alternatively, if the CMOH did make the Decision, she fettered her discretion to that of Cabinet and/or unreasonably exercised her discretion.

The Decision was unreasonable, unfair, made in bad faith and/or without jurisdiction

86. The Decision was unreasonable in that:

- a. The CMOH fettered her discretion by deferring to proxy decision-makers and/or extraneous political considerations regarding an illegal blockade in coming to the Decision;

- b. The CMOH ignored the public statements and prevailing evidence before her that masking in school is a necessary, minimally invasive public health measure with the Omicron variant;
 - c. The CMOH ignored the precautionary principle;
 - d. The CMOH did not provide reasons for her Decision or, alternatively, if she did provide reasons they are inadequate and unintelligible to the Applicants and other individuals subject to the Decision;
 - e. The CMOH failed to consider the relevant factors, including the low vaccination rate and the interplay between the absence of a quarantine requirement and the absence of a mask mandate to the risk of in school transmission of the Omicron variant;
 - f. The Decision failed to consider and is inconsistent with the values embodied in section 7 (security of the person, right to life) and section 15 (age and disability) of the *Charter*;
 - g. Any other ground that may be alleged upon review of the Record of Proceedings.
87. The Decision was not made in accordance with the principles of natural justice. The CMOH did not provide adequate notice of her intention to end the school mask mandate to the Applicants, the stakeholders and others who would be significantly affected by the Decision.
88. The Decision was made in the absence of good faith and/or the CMOH had a reasonable apprehension of bias in that:
- a. The CMOH, through her public statements, demonstrated that the Decision was influenced or controlled by irrelevant and/or improper considerations;
 - b. The CMOH was biased, or had the appearance of bias, in being improperly influenced by political aspects in making a public health Decision contrary to the prevailing scientific and clinical evidence.
89. Further and/or in the alternative, the Decision was made by the Premier, Ministers and/or Cabinet, and therefore without jurisdiction under the *Public Health Act*.
90. Further and/or in the alternative, the Decision is unlawful as it was improperly based on the demands of an illegal blockade to the exclusion of most if not all public health evidence.
91. Further and/or in the alternative, the Decision, if delegated legislation, is unreasonable and *ultra vires*. The Decision is irrelevant to the objectives of the *Public Health Act* and/or based on extraneous factors that fall well outside the statutory mandate.

The Decision was in violation of the *Charter of Rights and Freedoms*

92. The Decision is a state action that constitutes a prima facie violation of section 15(1) of the Charter and has an adverse impact on children and children with disabilities.
93. The Decision, on its face and/or in its impact creates a distinction on an enumerated grounds of age and/or mental or physical disability.
94. The Decision imposes burdens and/or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage of children and/or children with disabilities.
95. Discrimination for the Applicants results from, inter alia, segregation, the failure to make accommodations to existing policies, relegation to suboptimal education, and/or effective infringement on equal access to education.
96. The exemption has a discriminatory impact on the Applicants, on grounds of physical disability and age, as they are forced to choose between the risk of attending in person learning while Omicron is the dominant variant or not having equal access to school.
97. The exemption creates a discriminatory impact for the Applicants, who are not offered the same protection in the Decision as those who are above 18 and attend public places until at least March 1, 2022.
98. Through the exemption, the Applicants were forced and are being forced to take on burdens that adults and able-bodied children do not face. Just to be able to attend school, all three are at risk and suffer the results of this discrimination, including that:
 - a. They have a discriminatory and isolating experience at school; and/or
 - b. They attend a school where airborne COVID-19 presents a real risk to their health.
99. The violation of section 15(1) is not justified by section 1 of the *Charter*.
100. Further and/or in the alternative, the Decision violates the rights of the Applicants rights to life, liberty and security of the person protected under section 7 of the *Charter*.
101. Any other grounds as counsel may submit and this Court may permit.

Remedy sought:

102. By the discreet motion submitted for filing concurrently with this Originating Application, the Applicants seek an Order on an emergency and interim basis:
 - a. Abridging time for service;
 - b. Staying the implementation of the Decision and extending the effectiveness of the mask mandate provisions set out in CMOH 55-2021, which remained publicly in force as at 4:00 pm on Friday, February 11, 2022, such that said provisions shall continue to apply to children in school settings until March 1, 2022, or such later date as the parties may agree or this Court may direct;
 - c. Awarding the Applicants, as public interest litigants, advance costs and/or costs on a substantial indemnity basis, in any event of the cause; and
 - d. Such further and other relief as this Honourable Court deems fit.

103. At the fulsome hearing of the Originating Application for Judicial Review of the Decision, the Applicants seek the following relief:
 - a. A Declaration that the Decision was unreasonable, unfair, biased and/or made in the absence of good faith.
 - b. A Declaration that the Decision was inconsistent with and/or violated sections 15 and section 7 of the *Charter* and such infringement cannot be saved under section 1.
 - c. A Declaration that sections 3.4(b) and 3.4(c) of CMOH Order 08-2022 are of no force and effect pursuant to section 24 of the *Charter* and/or section 52 of the *Constitution Act, 1867* 30 & 31 Victoria, c. 3 (U.K.).
 - d. An Order in the nature of certiorari, quashing and setting aside the Decision.
 - e. An Order directing that this matter be determined, on a *de novo* basis in accordance with the Court's directions, by a new and unbiased CMOH.
 - f. An Order in the nature of *mandamus* directing the CMOH to make a new decision, herself, and in accordance with her obligations under the *Public Health Act* and otherwise not inconsistent with the rights of the Applicants as contemplated within the *Education Act*, the *Human Rights Act*, the *Charter*, the *CPRD* and/or such other enactments as may apply to the rights of children with disabilities in Alberta.
 - g. An Order for Costs on a substantial indemnity basis to the Applicants, as public interest litigants, in any event of the cause.

h. Such further and other relief as this Honourable Court deems just.

Affidavit or other evidence to be used in support of this application:

- 104. The Record of Proceedings before the CMOH.
- 105. The affidavit evidence to be filed on behalf of the Applicants.
- 106. Such further and other materials as may be filed in relation to the within application.

Applicable Acts and regulations:

- 107. *Public Health Act*, RSA 2000, c P-37.
- 108. *Administrative Procedures and Jurisdiction Act*, RSA 2000, c. A-3.
- 109. *Judicature Act*, RSA 2000, c J-2.
- 110. *Alberta Human Rights Act*, RSA 2000, c A-25.5.
- 111. *Education Act*, SA 2012, c E-0.3, as amended.
- 112. *Alberta Rules of Court*, AR 124/2010, as amended.

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 rely on an affidavit or other evidence when the originating application is heard or considered, you must reply by giving reasonable notice of that material to the applicant(s).