

MAY 03 2022

## FORM 3

NOTICE OF MOTION SEEKING A  
DECLARATION OF  
UNCONSTITUTIONALITYCourt File Numbers: 09677102,  
09678002, 09722802 and 09677002PROVINCIAL COURT OF NEW  
BRUNSWICK

(Provincial Court Office of Saint John)

## BETWEEN

HER MAJESTY THE QUEEN,  
Respondent

and

PHILIP JAMES HUTCHINGS and  
KEITH CODY BUTLER

Applicants/

Defendants

*(New Brunswick Rules of Provincial Court  
Practice)*

TAKE NOTICE that a motion will be brought at  
a.m./p.m on the day  
of , 2022, in Courtroom ,  
at 10 Peel Plaza, Saint John, NB E2L 3G6, for an  
order to declare as unconstitutional and of no  
force or effect, in whole or in part, the following  
enactment, principle or rule of law:

1. Sections 3 and 15 of the Revised  
Mandatory Order, dated October 10,  
2021 (the "Revised Mandatory Order");

(state concisely the enactment, principle or rule  
of law in question)

THE GROUNDS FOR THE APPLICATION  
ARE:

See Below

THE CONSTITUTIONAL ISSUES TO BE  
RAISED ARE:

See Below

THE CONSTITUTIONAL PRINCIPLES TO BE  
ARGUED ARE:

See Below

STATUTORY PROVISIONS OR RULES UPON  
WHICH THE APPLICANT PLACES  
RELIANCE ARE:

See Below

## FORMULE 3

PROVINCIAL COURT/COUR PROVINCIAL  
SAINT JOHN NBAVIS DE MOTION VISANT UNE  
DÉCLARATION  
D'INCONSTITUTIONNALITÉ

Numéro de dénonciation :

COUR PROVINCIAL DU NOUVEAU-  
BRUNSWICK

(Bureau de )

## ENTRE :

SA MAJESTÉ LA REINE  
(Intimée)

Et

(Requérant)

(Règle de fonctionnement de la  
Cour provinciale du Nouveau-Brunswick)

SACHEZ qu'une requête sera présentée le jour  
de , 2022 à heures à la salle de cour  
numéro au , NB en vue  
d'obtenir une ordonnance déclarant  
inconstitutionnelle et inopérant en totalité ou en  
partie, le texte, la règle ou le principe de droit  
suivant :

(préciser le texte, règle ou principe)

## LES MOTIFS DE CETTE DEMANDE SONT :

LES QUESTIONS CONSTITUTIONNELLES  
SOULEVÉES SERONT :LES PRINCIPES CONSTITUTIONNELS QUI  
SERONT SOULEVÉS SONTLE DEMANDEUR S'APPUIE SUR LES  
DISPOSITIONS STATUTAIRES OU RÈGLES  
SUIVANTES :LE DEMANDEUR S'APPUIE SUR LES  
DOCUMENTS SUIVANTS :L'ORDONNANCE SOLLICITÉE EST LA  
SUIVANTE :LE DÉFENDEUR PEUT SIGNIFIER LES  
DOCUMENTS PERTINENTS AU  
DEMANDEUR

1. La signification doit être faite  
conformément aux dispositions de la règle 4 au  
demandeur :

THE GROUNDS OF THE APPLICATION ARE:

1. Section 3 of the Revised Mandatory Order represents an unjustified infringement of the section 2(a) Freedom of Religion rights of the Applicants and their congregation, guaranteed by the Canadian Charter of Rights and Freedoms, *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11* (the "Charter");
2. Section 3 of the Revised Mandatory Order represents an unjustified infringement of the section 2(b) Freedom of Expression rights of the Applicants and their congregation, guaranteed by the *Charter*;
3. Section 3 of the Revised Mandatory Order represents an unjustified infringement of the section 2(c) Freedom of Assembly rights of the Applicants and their congregation, guaranteed by the *Charter*;
4. Section 3 of the Revised Mandatory Order represents an unjustified infringement of the section 2(d) Freedom of Association rights of the Applicants and their congregation, guaranteed by the *Charter*;
5. Sections 3 and 15 of the Revised Mandatory Order represent an unjustified infringement of the section 8 rights of the Applicants and their congregation against arbitrary search and seizure, guaranteed by the *Charter*;

CONSTITUTIONAL ISSUES TO BE RAISED:

6. Does section 3 of the Revised Mandatory Order infringe the Charter-protected freedom of religion of the Applicants in a way that is not demonstrably justified in a free and democratic society?
7. Does section 3 of the Revised Mandatory Order infringe the Charter-protected freedom of expression of the Applicants in a way that is not demonstrably justified in a free and democratic society?
8. Does section 3 of the Revised Mandatory Order infringe the Charter-protected freedom of assembly of the Applicants in a way that is not demonstrably justified in a free and democratic society?
9. Does section 3 of the Revised Mandatory Order infringe the Charter-protected freedom of association of the Applicants in a way that is not demonstrably justified in a free and democratic society?
10. Do sections 3 and 15 of Revised Mandatory Order infringe the Charter-protected rights against unreasonable search and seizure of the Applicants in a way that is not demonstrably justified in a free and democratic society?
11. With regard to section 1 of the *Charter*, how long does deference from the courts towards the government on scientific questions, as found in recent Queen's Bench decisions dealing with the early (pre-vaccine) stages of the pandemic, continue to apply and at what point does "demonstrable justification" require governments to provide not just an arguable scientific basis for their actions, but a demonstrable scientific basis (defined by Oxford Dictionary as "clearly apparent or capable of being logically proved.") to justify extended Charter infringements implemented to meet a long-term public health issue that is known to only be a real problem for a small percent of the population and for which we have a government-claimed safe and effective vaccine?



## CONSTITUTIONAL PRINCIPLES TO BE ARGUED:

### *Background*

12. In March of 2020, the Government of New Brunswick (the "Government") started implementing various measures to stop the spread of the SARS-CoV-2 virus, which causes the Covid-19 illness.
13. From the onset of the pandemic in March 2020, the Applicants and the His Tabernacle church showed cooperation and willingness to suspend their normal religious programming for the sake of complying with public safety guidelines in the face of a new and unknown threat. They held online services, followed by drive-in services and worked closely with public health.
14. In late 2020, the first vaccines against Covid-19 were approved by Health Canada. Voluntary vaccine distribution took place throughout Canada and New Brunswick throughout the spring and summer of 2021 and by the time New Brunswick vaccine passes started being announced in July, 2021, 65.4% of New Brunswickers were fully vaccinated and 81.7% had received their first dose.
15. During the summer of 2021, there were four vaccines approved by Health Canada for immunization against Covid-19 for adults and children over the age of 12: the Moderna Spikevax Covid-19 vaccine ("Moderna"), the Pfizer-Biontech Comirnaty Covid-19 vaccine ("Pfizer"), the AstraZeneca Vaxevria Covid-19 vaccine ("AstraZeneca") and the Janssen (Johnson & Johnson) Covid-19 vaccine ("Janssen") Two others were subsequently approved in February, 2022. (collectively, the "vaccines").
16. In the summer of 2021, the Province loosened many Covid-19 related restrictions and churches were able to resume full-capacity services with few restrictions. No proof of vaccination was required at that time.
17. Around September 20, 2021, despite very low hospitalization and case rates in the Province, and a fully operational, widely implemented vaccination program in place, a State of Emergency was declared throughout the Province and a Mandatory Order was enacted by the Minister of Justice and Public Safety.
18. Section 3 of the Revised Mandatory Order reads:

In every church and other faith venue, paragraph 2 does not apply, but the owners, occupiers and managers are required to take every reasonable step to ensure at every indoor faith gathering that every person in the venue is fully vaccinated against COVID-19. For gatherings other than weddings, funerals and social gatherings, the owners, occupiers and managers may alternatively choose to ensure that (a) all persons in the venues are masked at all times, (b) the venue does not at any time exceed 50% of its fire-rated capacity under the National Building Code, (c) persons attending are distanced 2 or more metres from persons with whom they do not reside, (d) there is no congregational singing, (e) a record is kept of every person in attendance by date and time, with the name, contact information and row/pew number of each person, and the record is made available to Public Health upon demand, and (f) no persons are admitted if they have symptoms of COVID-19 or if they are under a self-isolation order.
19. Section 15 of the Revised Mandatory Order reads:

Every peace officer in the execution of their lawful duties, every occupational health and safety officer appointed under the *Occupational Health and Safety Act*, and every inspector appointed under the *Public Health Act* is authorized to enter and inspect any premises to ensure compliance with this Order, and authorized to serve on any person not found in compliance with this Order an Order to comply with this Order and/or, in the case of occupational health and safety officers, an order issued under section 9 of the *Occupational Health and Safety Act*.
20. Section 1 of the Public Health Act, SNB 1998, c P-22.4 defines "occupier" as:



(a) a person who is in physical possession of premises,

(b) a person who has responsibility for and control over the condition of the premises or the activities there carried on, or control over persons allowed to enter the premises, or

(c) a person for the time being receiving the rent of premises, whether as principal or as agent or trustee for another person, or who would receive the rent if the premises were let, or who is responsible for the payment of local government taxes,

although there is more than one occupier of the same premises;

### ***The Applicants***

21. The Applicants are pastors of the His Tabernacle Family Church Inc., ("His Tabernacle") a non-denominational church of the Pentecostal Christian tradition located in Saint John, New Brunswick. The infractions at issue are related to the church services of the His Tabernacle Church congregation which took place on October 3 and October 10, 2021.
22. The Applicants, along with others within the His Tabernacle congregation, have chosen not to be vaccinated against Covid-19. The Applicants do not monitor who within their church is or is not vaccinated.
23. In view of this unjustified overreach of government emergency powers based on very low hospitalization rates in the Province, and with no end in sight and no clear beginning or endpoints set by the Government in the fall of 2021, the Applicants became concerned about how they were going to be able to faithfully serve their congregations spiritual needs in the long-term going forward. They were faced with the choice of either permanently denying their religious calling and convictions in serving their congregation, or finding themselves in violation of the Revised Mandatory Order.
24. After the Province applied for an injunction against the His Tabernacle Church in the Court of Queen's Bench, the Applicants moved their services outdoors through the fall and winter of 2021 in order to be able to continue to faithfully follow their religious convictions. The Province, however, continued to actively seek to hinder them in doing this.

### ***Section 2(a) Freedom of Religion***

25. Freedom of conscience and religion as guaranteed by section 2(a) of the *Charter*, which protects the manifestation of sincerely held religious belief from interference that is more than trivial or substantial. Freedom of religion is both a collective and individually held right and is held by both individuals and religious institutions such as churches and their pastors.
26. An infringement of section 2(a) of the *Charter* will be made out where a claimant has a sincerely-held religious belief that has a nexus with religion and where the impugned government action interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial.
27. According to the Supreme Court of Canada:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

28. The practical freedom to manifest religious beliefs and peacefully assemble in-person, among many other things, are permanent and fundamental features of a society that aspires to be or remain free and democratic. Preventing congregants from entering their own church to gather for worship unless they unwillingly injected their bodies and/or unwillingly disclose personal medical information is an unjustifiable assault on freedom, despite any real or imagined public health threat.
29. The Applicants are Christian ministers who sincerely believe that the impugned provisions violate their sincerely held religious beliefs for the following reasons.
- a. According to the Applicants, the Bible, which is their authoritative guide to doctrine and religious truth, contains numerous prescriptive passages about churches being the family of God, the need for demonstration of love and affection within the church, the need for close fellowship among believers, not being afraid before God, the vital importance of fellowship meals and breaking of bread together, partaking in the communion service in accordance with their scriptural and faith tradition, the important spiritual connection, and the command that God be praised through singing and the laying on of hands.
  - b. The expression of joy in worship and other emotions is also an essential part of the worship services of His Tabernacle Family Church Inc. and other churches of the same tradition. This expression is not only for God, but also for the sake of expressing to others and testifying to the goodness of God with our facial expressions. These emotions can only be seen and expressed with uncovered faces.
  - c. The Applicants believe that corporate in-person gatherings are a scriptural necessity and because of the moving of the Holy Spirit must consist of both structured and unstructured elements that require active participation, close personal contact, and the mutual religious edification and encouragement of each other.
  - d. The Applicants sincerely believe that they have a religious duty to treat every congregant and attendee as equals and to not discriminate against them based on personal medical decisions. They sincerely believe that they have a duty to invite all to come to church and not exclude any sincere seeker for truth and church fellowship.
  - e. The Applicants, along with many within his congregation, believe that the Covid-19 vaccines represent technology that violates their religious convictions by, among other things:
    - i. Being tested on the cell lines of aborted fetuses or otherwise making use of foetal cells or tissues in their testing, development or manufacturing;
    - ii. Introducing synthetic genetic instructions into their cells so as to elicit an immune response; instructions which may enter cell dna;
    - iii. Being promoted by deception and dissimulation of the facts with regard to their safety and efficacy;
    - iv. Being imposed by compulsion.

***Section 2(b) Freedom of Expression***

30. Freedom of thought, belief, opinion, and expression as entrenched by section 2(b) of the Charter protects all human activity intended to convey a meaning, so long as the method (e.g. violence) or



location of the activity does not exclude it from that protection. Freedom of expression also guarantees the right to receive expression, protecting listeners as well as speakers. Three core values have been identified as underlying the constitutional protection for free expression: truth seeking, self-fulfillment and democratic discourse.

31. The restrictions at paragraph 3 of the Revised Mandatory Order include a prohibition against congregational singing in churches that do not require proof of vaccination. Singing is fundamentally an expressive activity of devotion and praise to God. Such expression lies near the very core of the type of expressive activity that section 2(b) is in place to protect.
32. Conducting a worship service necessarily includes expressive content, such as preaching, Scripture reading, the singing of praise and worship songs, and prayer. This content is not excluded from constitutional protection by means of the method or location of the expression.
33. The state requirement to wear a mask has heavy expressive content. The face is the center of human communication. A mask covers the mouth, the vehicle of communication. Much communication is non-verbal, based on facial expressions and cues which cannot be easily detected with masks. For this reason, the requirement to cover one's face is a prima facie infringement of our freedom of expression.
34. Masks make speaking and hearing in courtrooms more difficult because voices are muffled and diminished. Open communication between individuals, as symbolically and practically important as it is at churches, is severely hindered by the concealment of facial expressions and the muffling of voices.

#### ***Section 2(c) Freedom of Peaceful Assembly***

35. The freedom of peaceful assembly as guaranteed by section 2(c) of the Charter protects the right of people to physically gather together for peaceful purposes. It is by necessity both a collective and individual right.
36. Arbitrary capacity limits having nothing to do with the actual capacity of a building in a place of Charter-protected assembly represent a prima facie infringement of the right to peaceful assembly since the inevitable result is that those wishing to assemble in a certain place that would normally be suitable to accommodate them are unable to.
37. Although largely undeveloped, an identified purpose of freedom of peaceful assembly is to protect the physical gathering together of people. Further, the right of peaceful assembly is, by definition, a collectively held right: it cannot be exercised by an individual and requires a literal coming together of people.
38. The right to peacefully assemble is separate and distinct from the other section 2 Charter rights, and it requires the state to refrain from interfering in such assembly. It may even require the state to facilitate such assembly. Although freedom of assembly cases have typically been determined on other Charter grounds, most notably freedom of expression, freedom of peaceful assembly is an independent constitutionally-protected right that is directly engaged by the Charge.
39. Although the scope of what collective activities section 2(c) of the Charter guarantees is not yet fully defined, there can be no doubt that assembling for religious purposes goes to the core of what 2(c) protects, on the same level of importance as assembling for political purposes.

### ***Section 2(d) Freedom of Association***

40. The freedom of association as guaranteed by section 2(d) of the Charter protects the rights of individuals to join together to, among other things, collectively exercise their other section 2 fundamental freedoms. The purpose of freedom of association is to "recognize the profoundly social nature of human endeavors and to protect the individual from state-enforced isolation". It is also, by necessity, both a collective and individual right.
41. A purposive approach to freedom of association defines the content of this right by reference to its purpose: "to recognize the profoundly social nature of human endeavors and to protect the individual from state-enforced isolation in the pursuit of his or her ends". Freedom of association allows the achievement of individual potential through interpersonal relationships and collective action.
42. The purpose of the right to freedom of association encompasses the protection of (1) individuals joining with others to form associations (the constitutive approach); (2) collective activity in support of other constitutional rights (the derivative approach); and (3) collective activity that enables "those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict".
43. Freedom of Association includes the protection of religious congregations to organize their internal structures and authority model in accordance with their own religious convictions and choose how and when to include and exclude members based on their own freely chosen rules.
44. By designating certain individuals as responsible for controlling the actions and behaviours of congregants within churches, the restrictions violate the freedom of the Applicants to freely associate together in the way that they please. The Government unilaterally decreed that going all religious congregations must follow a specific model of church authority that recognizes the authority of "owner, occupier and manager" to exclude individuals, while ignoring the authority of community consensus or the vested authority structure of the association. This violates the freedom of association of the Applicants.

### ***Section 8 Privacy and Unreasonable Search***

45. Every individual has a reasonable expectation of privacy with regard to their personal healthcare information. The decision to be or not to be vaccinated is a personal healthcare choice that also benefits from this expectation.
46. The church proof of vaccination requirements at section 3 of the Revised Mandatory Order represent significant breaches of privacy and unreasonable search and seizure to the extent they require individuals to divulge their personal healthcare information as a condition of entry to their churches.
47. Paragraph 15 of the Revised Mandatory Orders creates a wide-ranging power of public health officers to enter a church without a warrant to ensure compliance with all aspects of the Revised Mandatory Order. Unauthorized entry without a warrant into churches having a reasonable expectation of privacy, is unreasonable.



### *Lack of Justification Under Section 1*

48. The Province of New Brunswick bears the entire burden of justification of Charter infringements and the Applicants do not need to prove that the infringements are unjustified. Nevertheless, in this case it is manifestly clear that there is no justification for the Charter infringements at issue.
49. Demonstrable justification under the Charter in the context of an alleged public health emergency is not something the courts have had to wrestle with until the Covid-19 pandemic and the tendency of early decisions has been to yield to government on issues of uncertain science. However, as the pandemic turned into a manageable public health issue, starting in the summer of 2021, the government's onus must increase in order to safeguard freedom and democracy in the long-term. Should every public health issue provide a carte-blanc to governments to do anything they can muster some science in support of to save some indeterminate number of lives, Canada would quickly cease to be a free and democratic society and would instead be ruled by the dictates of public health bureaucrats.
50. Section 1 is a narrow exception to limit Charter-protected rights only if the state can reasonably demonstrate, with real world evidence, that such limitation is justified in a free and democratic society; not a utilitarian society or scientific autocracy.
51. Furthermore, when a government relies on scientific justifications with regard to public health interventions to justify infringing the Charter, a court, though not in a position to decide fine issues of scientific debate, is in a position to require that governments provide persuasive and credible evidence throughout the lifespan of the public health measure (not just in court after the fact) to demonstrate during the entire time of the infringement that the following questions have been satisfactorily considered and answered with adequate evidence:
  - a. How serious is the harm at issue compared to background risks to the population in general, as well as specific risks that Canadians co-exist with and accept because of the value of freedom in our society and in the Charter? (this goes to the issue of Pressing and Substantial Objective)
  - b. Are the public health measures merely delaying harm or actually preventing harm? (Rational Connection and Minimal Impairment)
    - i. How many average quality of life years are being saved by the interventions not just in the short-term, but in the long term?
  - c. Would less intrusive measures that rely on persuasion rather than coercion work equally well, taking into account the loss of trust caused by government coercion? (Minimal Impairment)
  - d. Are the public health measures causing harm and has a meaningful harm/benefit analysis been carried out throughout the time the public health measures were in place? (Proportionate Effect)
    - i. What is the loss of average quality-of-life years caused by the unintended harms?
52. That the lengthy use of extraordinary powers that are fundamentally undemocratic and unfree must be extraordinarily justified in a free and democratic society should not be a controversial statement. At every stage of the analysis, courts must require a heightened level of justification that increases the longer the extraordinary powers are being invoked.



### ***Pressing and Substantial Objective***

53. After what the Province understood to be safe and effective vaccines became available in the spring and summer of 2021, the Province could no longer allege a pressing and substantial objective to stop the spread of Covid-19 because Covid-19 would, by their science, have ceased being a significant threat to most of the general population and the reduction of quality-of-life-years from the virus became similar to other communicable diseases. It was also well-known by the summer of 2021 that initial estimates and fears about the lethality and seriousness of Covid-19 had been overstated generally, both for the vaccinated and unvaccinated.
54. The Government, throughout the time of the pandemic, never provided a complete picture of all of the factors causing the hospitals problems with management of Covid-19 and pinned on Covid-19 what is in fact a chronic problem of inadequate healthcare delivery that has been a problem for decades.
55. The Government has throughout the pandemic failed to articulate clearly defined public health objectives and the infringements came and went without anyone knowing why.
56. The Government knew at least by the summer of 2021 that the data was no longer there to support evoking emergency measures or for continuing to infringe the Charter rights of New Brunswickers, but chose to do so anyway in reckless disregard for the Charter.
57. The Government has actively participated in deceiving the public with regard to the true severity of Covid-19 by falsely inflating Covid-19 death numbers to include all individuals who died with Covid-19, and doing the same with hospitalization and ICU admission numbers.
58. The Government of New Brunswick for nearly two years gave New Brunswickers cherry-picked statistics to distort public opinion in favour of its ongoing violations of Charter rights. Statistics on Covid-19 were offered in isolation, with no context or comparison with other risks New Brunswickers live with and no context or comparison with regard to other burdens on our healthcare system over the past several years, including during recent pandemic flu seasons.
59. The Government of New Brunswick has failed to demonstrate a pressing and substantial objective by failing to provide data relating to:
  - a. Hospital protocols for categorizing a hospitalization, ICU admission, or death, as a Covid-19 hospitalization, ICU admission, or death?
  - b. The percentage of those classified as a Covid-19 case on the basis of a positive PCR test only, but who never developed symptoms.
  - c. Hospital data regarding the age, chronic conditions, primary reason for admission, and symptom profile that those hospitalized with Covid-19 have presented with.
  - d. Hospital data of the age, chronic conditions, primary reason for admission, and symptom profile that those admitted to an ICU with Covid-19 have presented with.
  - e. The primary cause of death and other comorbidities as provided on the autopsy report of all Covid-19 related deaths.
  - f. Data to allow New Brunswickers to understand the true impact of Covid-19 on the hospital system in terms of its ordinary occupancy and capacity, and all other causes of hospitalization in the Province.

### ***Rational Connection, Minimal Impairment, Proportionate Effect***

60. Even if the Province had a pressing and substantial objective, there was no rational connection between the religious freedom infringements and any pressing and substantial objective whatsoever since the Province had no realistic prospect of eradicating the virus and knew at least by the summer



of 2021 that any measures to curb the spread would not actually prevent but rather only delay people from getting infected. Efforts to merely delay Covid-19 infection are not rationally connected to objectives relating to preventing people from catching Covid-19 altogether.

61. Proof of vaccination for churches is also not rationally connected to any pressing and substantial objective since a vaccine is supposed to primarily protect the vaccinated person and unless the vaccine is of the kind that provides full neutralizing immunity, its effect on protecting others is speculative and uncertain at best. In this case, the vaccines have been shown to not be effective at preventing transmission of Covid-19, which indicates that the Province understood that allowing vaccinated churches to meet normally at full capacity, sing, and otherwise carry out their normal activities, despite the likelihood that they would transmit the virus to each other, shows that these restrictions on churches that did not require proof of vaccination were not about preventing transmission of Covid-19 but rather about punishing the unvaccinated.
62. The Covid-19 vaccines have been deemed safe to even the most fragile and vulnerable, so (assuming for the sake of argument that this is true) there is no group of people who do not have the opportunity to protect themselves through vaccination and masking, so as to justify infringing the rights of church congregations and of unvaccinated religious persons like the Applicants.
63. Even if there was a rational connection, the restrictions at issue would not be minimally impairing since the majority of churches take precautionary measures without needing compulsion and the small minority of churches that see government restrictions as contrary to their sincerely held religious beliefs are not going to meaningfully prevent the Government from substantially achieving any sort of clearly defined public health objectives.
64. Church vaccination requirements are also not minimally impairing since voluntary vaccination combined with immunity from natural infection in New Brunswick has provided a sufficiently high level of population-level immunity to protect the most vulnerable and the theoretical safety gains from coerced vaccine passes are too marginal to make any definitive real-world difference.
65. The law of diminishing returns has been observed since the summer of 2021, with most government restrictions beyond the summer of 2021 having very little provable effect and public health measures based on voluntary compliance and public trust in the Government would likely have worked just as well as what has been done and the Government appears to now agree with that, having ended these measures despite the continued presence of Covid-19.
66. The deceptive way the Government of New Brunswick went about implementing the proof of vaccination requirements also shows absence of rational connection or minimal impairment since honest communication and allowing people to make informed decisions was never seriously tried. Instead, the Government actions eroded the trust necessary to achieve long-term public health goals.
67. The Government failed to communicate honestly about the very new and experimental nature of the vaccines and the limited nature of the clinical trials that had taken place to approve it, or the unavailability of most of the safety data to independent scientists and researchers. No effort was made to communicate absolute risk reduction from the vaccine and only relative risk reduction was given any publicity. Significant censorship of any information about the vaccine that contradicted the mainstream narrative took place, and the Government of did nothing to counter that by providing forthright and complete information, encouraging public discussion, and hosting public



discussions among scientists. When discussing vaccine safety, it showed no interest in all-cause-mortality, but instead has only focused on reported post-vaccine incident data, which is known for underrepresenting true risk. Even post-vaccine incident data has been suppressed and not been made easily accessible by the Government. Very few realize that there have been over 8600 Canadians seriously injured by these vaccines, and rising, according to the Government of Canada's post-vaccination incident report statistics.

68. The Government also made no effort to test for or discover the extent of natural immunity in the population or recognize natural immunity as an alternative to vaccination. This decision also tended to erode public trust by suggesting a bias towards vaccination that is hard to scientifically justify.
69. With regard to mask-wearing requirements, restrictions on singing, capacity limits, social distancing requirements and record-keeping requirements for unvaccinated religious services, these are not minimally impairing since most churches in New Brunswick are small and the proportion of unvaccinated individuals attending those churches is also small and there is no basis for the belief that a measurable long-term effect on Covid-19 transmission would be seen if churches were simply left alone because of their Charter protected status. The lack of such restrictions on churches that did require proof of vaccination shows that the Province understood this.
70. The deleterious effects of these indefinite breaches of Charter rights for only speculative and marginal gains in actual safety, both in the short and long-term, fails the proportionate effects part of the Oakes test. Sooner or later, everyone is going to get Covid-19 and there is no reason to suppose that there is some future event that will make the risk of serious illness or death from Covid-19 less than what it is now. These infringements represent a fundamental and pervasive change to the delicate balance between private autonomy, religious autonomy, and government control that our free and democratic society has operated under for centuries.
71. The harms from the proof of vaccination requirements for churches has outweighed the benefits. Prior to their widespread abandonment, vaccine passes in general were fueling increasing hate of the unvaccinated and social breakdown for no real public health gain. It has all become political theatre since we have known since mid-2021 that the virus would eventually spread to and infect everyone and with population immunity since mid-2021 at a much higher level than in the early stages of the pandemic, there was a need for new and more compelling justifications to continue these measures after the rollout and widespread availability of voluntary vaccination.
72. Forced vaccination, compelled through the loss of fundamental rights for the unvaccinated, also harms long-term trust in government vaccine programs. The normalization of this level of government control over our lives over a manageable communicable disease, that most experience as being similar to the flu, represents the potential end of Canada as a free and democratic society since there will always be a public health problem that can be used to justify these draconian measures.
73. Section 15 of the Revised Mandatory Order cannot be said to be minimally impairing or proportionate given that enforcement using normal police warrant-based search powers would be adequate to achieve a satisfactory level of compliance. It is also not proportionate to grant such powers for protection of residents from a virus that kills very few except the morbidly ill when such powers are not available to enforce drug laws for harmful drugs that kill thousands of healthy people every year and involve genuine criminality.

74. Alternatively, that section 3 of the Revised Mandatory Order can only be meaningfully enforced through search and seizure powers of peace officers that are themselves Charter-infringing constitutes a further harm on Canadian society caused by these measures. The widespread and prolonged use of such measures to address communicable airborne viruses that will be with us indefinitely accustoms Canadians to living without privacy rights and thus completely breaks down one of the key pillars of a free and democratic society, which is freedom from government intrusion into the private lives of Canadians.

THE FOLLOWING DOCUMENTS WILL BE RELIED UPON:

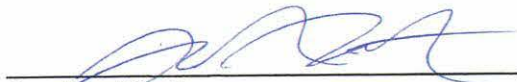
- 75. Affidavit of Philip James Hutchings;
- 76. Affidavit of Keith Cody Butler;
- 77. Affidavit and Report of Dr. Euzebiusz Jamrozik;
- 78. Affidavit and Report of Dr. Norman Fenton;
- 79. Affidavit and Report of Dr. Clare Craig;
- 80. Affidavit and Report of Dr. Stephen Pelech;
- 81. Such further and other materials as counsel may advise and the court may allow;

THE RELIEF SOUGHT IS:

- 82. A declaration pursuant to section 52 of the *Constitution Act*, 1982, that sections 3 and 15 of the Revised Mandatory Order are unconstitutional and of no force and effect as against the Applicants.

THE APPLICANT MAY BE SERVED WITH DOCUMENTS PERTINENT TO THIS APPLICATION

Dated at Saint John, New Brunswick, this 11 day of April, 2022

  
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