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July 14, 2021

VIA EMAIL

Darryl B. Ruether
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Court of Queen's Bench of Alberta
Calgary Courts Centre
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RE: Continuation of the Alberta Courts' Mask Mandate

I write as legal counsel for Katherine Kowalchuk. Ms. Kowalchuk is a Calgary lawyer with a family law practice who is required to be in regular attendance at the Calgary courthouse, as well as other courthouses in Alberta.

Ms. Kowalchuk is also a founder of Lawyers 4 Truth, a group of lawyers and other professionals who are deeply concerned about the current civil liberties crisis in Alberta. For nearly 6 months, volunteer lawyers with Lawyers 4 Truth have been providing *pro bono* legal services to Albertans who have suffered under and experienced rights violations as a result of government overreach and discrimination in the private sector. As such, Ms. Kowalchuk also represents the interests of Lawyers 4 Truth, as well as members of the public for whom Lawyers 4 Truth advocates.

On behalf of herself and all members of the public who assert their right to breath freely while accessing justice, Ms. Kowalchuk respectfully requests that all levels of the Alberta Courts forthwith rescind their requirement that individuals required to physically access Alberta courthouses cover their faces.

Background

On July 6, 2020, the Provincial Court, Court of Queen's Bench and Court of Appeal (the "Courts") imposed a blanket requirement that all persons entering Alberta courthouses cover their faces with a mask (the "Court Mask Mandate"). This was circulated in a "Notice to the Profession and Public" and endorsed by the Chief Justice of Alberta, Catherine A. Fraser of the Court of Appeal, Chief Justice Mary T. Moreau of the Court of Queen's Bench and Provincial Court Chief Judge Terrence J. Matchett. The Notice was silent regarding any requirement to produce personal medical information in support of a mask exemption.

On December 10, 2020, Ms. Kowalchuk attended at the Calgary courthouse to conduct a Provincial Court trial on behalf of a client. The trial required *viva voce* evidence for which the Court required in-person attendance. Appearing remotely was not an option. Upon attempting to enter the courthouse, a Sheriff

demanded Ms. Kowalchuk cover her face with a mask. Ms. Kowalchuk explained she was unable to cover her face, was exempt from any requirement to do so, and had a trial she was required to conduct in-person. Three other Sheriffs quickly gathered around Ms. Kowalchuk. The Sheriffs asked her for details regarding why she was exempt. Ms. Kowalchuk advised the Sheriffs she was not prepared to provide her personal medical information and the Sheriff threatened to charge her with a \$1,200 fine if she entered the courthouse with her face exposed. To the detriment of her health and in order to fulfill her duties as an officer of the court, Ms. Kowalchuk was compelled to unwillingly cover her face to gain access to the courthouse and conduct her client's trial. This public interaction was humiliating and caused Ms. Kowalchuk emotional and psychological distress.

Upon entering the courtroom, Ms. Kowalchuk's face was uncovered. The presiding Judge Cornfield, who was also unmasked, promptly advised Ms. Kowalchuk that masks were required. Upon informing the Court she was exempt and that her personal medical information was confidential, Judge Cornfield asked what the nature of her exemption was. Ms. Kowalchuk reiterated that she was not publicly disclosing her personal information and again confirmed she had a medical exemption. Judge Cornfield stated that face coverings were required in the courthouse, including the public gallery, and that his "jurisdiction" was within the courtroom where the public gallery ended. Judge Cornfield advised Ms. Kowalchuk that upon stepping into his "jurisdiction", she was not required to wear a mask. This interaction was anxiety-provoking and occurred in the presence of Ms. Kowalchuk's client and the opposing party.

Between December 2020 and March 2021, a series of letters were exchanged between Ms. Kowalchuk, the Provincial Court and the Court of Queen's Bench. Both Courts communicated that they required Ms. Kowalchuk to disclose her personal medical information, to the satisfaction of the Courts, to gain access to courthouses.

Ms. Kowalchuk ought not be compelled by the Courts, or Sheriffs at the direction of the Courts, to violate her conscience and put her health at risk by covering her face in order to avoid being fined and to conduct her duties as an officer of the court. To avoid a repeat of the humiliating events of December 10, 2020, Ms. Kowalchuk has been unable to earn income by providing court-based services for her clients when physical attendance at the courthouse is required. This serious limitation was communicated to the Courts in an exchange of letters between the parties, yet no accommodation or alternatives were offered that did not require Ms. Kowalchuk to disclose personal information.

On June 25, 2021, notwithstanding the July 1, 2021 Province-wide rescission of government-imposed mask mandates, all levels of the Alberta Courts announced that individuals seeking in-person access to Alberta courthouses would remain compelled to cover their faces.

Charter Protections of Fundamental Rights and Freedoms

The inalienable freedom to show one's face, to openly communicate one with another, to maintain bodily autonomy, to not be compelled to act contrary to one's conscience or religious beliefs, and to refuse unhealthy interventions are all permanent and fundamental features of a society that aspires to be or remain free and democratic.

For over a year, Alberta lawyers, courthouse employees and members of the public have suffered under the yoke¹ of the Court Mask Mandate while attempting to address matters requiring in-person attendance at a courthouse. This mandate is not a mere inconvenience. It causes physical and psychological harm and violates several fundamental rights and freedoms that are guaranteed by our *Canadian Charter of Rights and Freedoms* (the “*Charter*”).

As the third branch of government, the actions and decisions of the courts must accord with the fundamental rights and freedoms guaranteed by the *Charter*. The courts, as well as government, may only limit the *Charter* rights of Albertans if doing so is **demonstrably justified** in a **free** and democratic society.

The Court Mask Mandate infringes freedom of conscience as guaranteed by section 2(a) of the *Charter*, freedom of expression as guaranteed by section 2(b), liberty and security of the person as guaranteed by section 7, and privacy as guaranteed by section 8 of the *Charter*.

Freedom of Conscience

It has long been a known scientific fact that face coverings, be they medical or non-medical, are utterly ineffective at preventing the transmission of airborne viral infections. This was indeed one of the reasons mask requirements were not immediately imposed by authorities upon citizens in Canada as COVID emerged in the spring of 2020. Unfortunately, like so many things related to COVID, masks became highly politicized in the summer of 2020 and both the wearing of masks and compelling others to wear masks became a matter of political theatre and virtue signalling.

As both an officer of the court and a private citizen, Ms. Kowalchuk is dedicated to seeking the truth, acting in accordance with truth, and to live not by lies. For Ms. Kowalchuk, to wear a face covering for the purposes of complying with a COVID-related mandate is to be complicit in the deception that masks are “safe and effective”. As a matter of conscience, Ms. Kowalchuk refuses to participate in the lie propagated by governments and, most unfortunately, the Alberta Courts, that masks are effective at preventing the transmission of COVID.

Demanding that Ms. Kowalchuk cover her face with a mask to fulfill her duties as an officer of the court while at a courthouse is a violation of her section 2(a) *Charter* rights.

Freedom of Expression

The Court Mask Mandate also infringes Ms. Kowalchuk’s freedom of expression. Face coverings 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 courthouses and in courtrooms, is severely hindered by the concealment of facial expressions.

Freedom of expression also protects against compelled speech. Ms. Kowalchuk has the right to not express support for or rebroadcast a message she disagrees with, both verbally and non-verbally. Masks hold symbolic value and visually communicate meaning. For Ms. Kowalchuk, wearing a mask on her face at a public venue such as the courthouse communicates her support for the compelled covering of people’s faces and rebroadcasts the false messages that wearing a mask is effective and virtuous. It also communicates

¹ See the June 11, 2021 decision of Justice Tanenbaum of the Florida First District Court of Appeal in *Justin Green vs Alachua County*, No. ID20-1661.

that the most visually important part of her bodily identity—her face—is not owned and controlled by her, but by some other entity purporting to exercise authority over her body and identity.

The Courts' requirement that Ms. Kowalchuk cover her face to obtain in-person access to courthouses within Alberta violates her right to Freedom of Expression, as protected by section 2(b) of the *Charter*.

Liberty and Security of the Person

Life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice, are rights guaranteed by section 7 of the *Charter*. The principals of fundamental justice safeguard against government and court action that is overly broad, arbitrary, or grossly disproportionate.

Liberty under section 7 protects Ms. Kowalchuk's right to bodily autonomy, free bodily movement, core lifestyle choices, and fundamental relationships. The distinctiveness of one's face and what is or is not worn on it are core to everyone's identity, individuality, autonomy, dignity, and capacity for creativity and expression. The face is one of the most deeply private and unique aspects of anyone's body, yet is also the most public. Ownership and autonomy over one's face is every bit as important as control over other deeply personal parts of one's body. Choosing whether to cover one's face, and when, how, why, or with what, is a critical aspect of individual liberty. Governments and courts do not own or control people's faces and must never be permitted to act as if they do by compelling people to cover their faces without their consent. The Court Mask Mandate prohibits and penalizes Ms. Kowalchuk for choosing to show her full face at courthouses and in courtrooms.

Security of the person protects the right of individuals to be free from state action that threatens physical harm to their bodies or has a "serious and profound effect on a person's psychological integrity".² Face coverings are harmful to physical health. They restrict breathing, deprive the wearer of oxygen and increase the amount of carbon dioxide inhaled. They expose the wearer to pathogens that grow on the face covering and frequently cause skin irritations and infections. They cause people to breath too much through their mouth, causing serious dental problems.

Face coverings also cause psychological harm. They incite claustrophobia and panic attacks in some, and anxiety in many. This is in fact the effect the wearing of a face mask has on Ms. Kowalchuk. Face coverings also trigger PTSD in some, especially for woman who were attacked or sexually assaulted by men wearing masks.

Social anxiety is experienced by people in the spaces subject to a mask mandate because they live in fear of others informing on them if they are not wearing their masks, or wearing them properly, or, if they have to take off their mask, that someone will get angry at them or deny them a service. This rises far above ordinary stress and anxiety.

This has been Ms. Kowalchuk's experience these last 16 months. She has been denied entry and service at various public venues in and outside the City of Calgary. This has significantly and adversely curtailed her lifestyle by limiting interactions with friends, family and the public due to the anxiety associated with interactions at public establishments. It has also impaired Ms. Kowalchuk's ability to earn income in her

² *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para 60.

chosen profession and subjected her to humiliating and intimidating criticisms at courthouses, which is one of her workplaces.

Overbreadth, Arbitrariness, and Gross Disproportionality

According to the Supreme Court of Canada, the principles of fundamental justice “are about the basic values underpinning our constitutional order”. Requirements that “impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their object.”³

There is no evidenced or real connection between face coverings generally, the supposed objective of the Court Mask Mandate in preventing the spread of the SARS-Cov-2 virus, and any actual desirable benefit of face coverings. The mandated covering of faces is an arbitrary measure that does nothing more than create the illusion of safety while enabling people to control the behaviour of and impair the rights and freedoms of others in a harmful manner.

The Court Mask Mandate is also overbroad because it applies everywhere in courthouses and to everybody. Quite apart from the question of whether masks work, the reality is that the vast majority of the general population is at a greater risk of being harmed from an auto accident than COVID.

The Supreme Court recently ruled that “if the impact of the restriction on the individual's life, liberty or security of the person is grossly disproportionate to the object of the measure”,⁴ the restriction will not be held to accord with the principles of fundamental justice. As exemplified above, there is significant harm associated with mandating people required to attend at a courthouse cover their faces. The detrimental effects of the Court Mask Mandate are grossly disproportionate to the objective and purported benefit of preventing the transmission of COVID given COVID is not a credible threat to over 95% of the population and considering masks do not achieve the objective in any measurable way.

The Court Mask Mandate interferes with Ms. Kowalchuk’s section 7 rights to liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice.

Privacy

“The human condition flourishes as the fear of state intrusion fades.”⁵ The human condition in Alberta these last 16 months has not flourished—but much more due to government intrusion in the private affairs of citizens than any respiratory infection.

Individuals have a legitimate and reasonable expectation of privacy in their personal medical information. The requirement that Ms. Kowalchuk disclose personal medical information to a Sheriff as a pre-condition to fulfilling her duties as an officer of the court constitutes a search that infringes upon Ms. Kowalchuk’s dignity and autonomy. Pursuant to the direction of the courts, Ms. Kowalchuk’s confidential medical information would be scrutinized in the presence of her peers and client(s), while she anxiously awaited the subjective opinion of a Sheriff regarding whether the information is sufficient to permit her access to the courthouse. This public interaction notifies the public present that the person, who’s information is being scrutinized by a Sheriff, has a possible condition which impairs the person’s ability to wear a mask, thus “outing” the person’s medical status. Further, even in the event this information is not disseminated, of

³ *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para 72.

⁴ *Carter* at para 89.

⁵ *R. v. Ahmad*, 2020 SCC 11 at para 38.

which there is no assurance, Sheriffs, who are strangers to Ms. Kowalchuk, will have knowledge of her private medical information they are not otherwise ever entitled to.

The demand pursuant to the Court Mask Mandate that Ms. Kowalchuk provide the Courts with personal medical information in order to claim an exemption and enter courthouses without covering her face limits her section 8 *Charter* rights.

The Court Mask Mandate is Not Justified

The Courts are constitutionally obligated to demonstrate the *Charter* rights limitations caused by the Court Mask Mandate are justified in a free and democratic society. This is done through cogent and persuasive evidence. Such evidence does not exist. On the contrary, a large and growing body of scientific evidence, building on the evidence existent prior to COVID, irrefutably demonstrates that mandatory mask policies are not remotely justified in a truly free and democratic society. Appended to this letter for the benefit of the Courts is an expert report from Canadian scientist, Dr. Byram Bridle that elucidates how scientifically uninformed the Court Mask Mandate is.

The Court Mask Mandate is not rationally connected to any pressing and substantial objective, it is not minimally impairing of *Charter* rights, and it is the furthest thing from proportionate. Lest the Courts distract from its inability to meet its burden under section 1 by claiming there are competing rights, there are no competing *constitutional* rights engaged in this context. Individuals have a *Charter*-protected right to show their face and not be compelled to cover it in order to participate in society, which includes physically accessing courthouses. Individuals do not have a *Charter*-protected right to demand government or courts use the force of the state to cover the faces of everyone around them. With rare exceptions, *Charter* rights are *negative* rights. That is, they are rights to be free from undue government interference; they are rights that constrain government, including courts. *Charter* rights are not *positive* rights, that is, they are not rights that obligate others to do something against their will in order to make someone feel safer. There is no competing constitutional right to live in a society where others altruistically sacrifice their own rights in order to effect the illusion of an unattainable level of control or safety.

Conclusion

The repute of the Alberta Courts is currently at an all-time low. The people of Alberta have looked on these last 8 months while the Provincial Court and Queen's Bench have repeatedly declined to fulfil their sacrosanct duty to uphold the Constitution by essentially rubber-stamping government oppression of Albertans under the excuse of "public health". Adding insult to injury, the Alberta Courts continue to infringe the constitutional rights of justice system participants even while governments have finally largely ceased to.

The Courts lack the lawful authority to compel the unwilling covering of people's faces while attending in-person to courthouses. Every day the Court Mask Mandate remains in place the administration of justice in Alberta is brought into further disrepute. The Courts must never become politicized. Yet, refusal on the part of the Courts to rescind their Mask Mandate can only be viewed by a reasonable person to be primarily a political decision for the sake of appearances, as it cannot be based on scientific evidence and masks are now more to do with political theatre and control than objective health and safety.

Ms. Kowalchuk, with all due respect to the Chief Justices and Judge, demands the immediate rescission of the Court Mask Mandate by all three Courts.

In the event the Courts do not honour this request, Ms. Kowalchuk will proceed to bring a *Charter* challenge to the Court Mask Mandate along the lines described above.

However, the Court of Queen’s Bench cannot possibly adjudicate such a proceeding in an unbiased manner, as doing so would offend the principle of natural justice that no entity can be a judge in its own case. Although not directly involved in the within dispute, the Court of Appeal has also endorsed the Court Mask Mandate and therefore its suitability to adjudicate a challenge to the Mandate is also in question.

If the Courts refuse to rescind their Mask Mandate, Ms. Kowalchuk expects and invites the Courts to provide direction on what they believe to be an appropriate jurisdiction in which to proceed with such a challenge.

Ms. Kowalchuk sincerely hopes the Courts will see reason, follow the evidence, act in accordance with truth, and prioritize justice and access thereto above considerations of the illusion of “health and safety”.

Ms. Kowalchuk requests a substantive response to her request above within 14 days of the date of this letter.

Regards,

A handwritten signature in black ink, appearing to be 'J.S.M. Kitchen', written in a cursive style.

James S. M. Kitchen
Barrister & Solicitor
Counsel for Katherine Kowalchuk

Encl.