



April 30, 2021

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**Attention: Thomas Hesse, Richelle Stewart and Pablo Godoy**

This letter is in response to the April 22, 2021 letter posted on your website at <https://gounion.ca/news/letter-sent-to-major-retailers-on-mandatory-masking/> that was sent by your organization to all major retailers in Alberta on the issue of mandatory masking. As lawyers, we are very concerned about the misrepresentations that you have made as a union, which we understand is supposed to be there to protect your employees. We therefore write to request that you **immediately** withdraw your letter and publicly correct the misinformation, in stating “the law is clear. Masks must be worn.” Our reasons, and the actual relevant laws, are as follows.

Before launching into our review of the applicable laws, we note that the wide acceptance of masking, does not mean it is the law, or even lawful. Further, your baseless assertion that the “science is clear”, that a failure to mask creates a serious risk. Appended to this letter is a report from an Alberta Respiriologist that briefly explains the absurdity of believing that masks are effective at preventing the transmission of respiratory viruses such as the virus that causes COVID-19. If you regarded truth and evidence with as much interest as power and control, you would realize that masks reduce health and safety, not improve it.

What we witness in our society today has been coerced by way of misrepresentations in government and media headlines, signage and messaging – absent information, without debate and without informed consent.

We were born with certain inalienable rights. The right to breathe freely. The right to express oneself freely. The right to associate and communicate. Freedom of conscience, thought and religion. It goes without saying, but is noteworthy at the outset, that a face covering inhibits most, if not all, of these rights and freedoms which safeguard our human dignity and inalienable freedoms. It follows then, that no man or woman can force or coerce another man or woman to wear any type of face covering.

In March of 2020 – now over a year ago -- a 'pandemic' was declared and, many months later, ordinances and bylaws related to masking were issued. Our 'natural' rights referred to above, however, are protected by Part I of *The Constitution Act, 1982* referred to as the *Canadian Charter of Rights and Freedoms* (the “*Charter*”). Federal, provincial and municipal governments may only infringe our rights and freedoms to meet serious threats in the least restrictive manner possible, for

the shortest amount of time possible<sup>1</sup>.

**Further, any and all restrictions must be based on science and evidence, not merely speculation and conjecture.** The *Charter* is the supreme law of Canada and exists to protect us when the government exceeds its powers and violates our rights and freedoms.

The relevant parts of *The Charter*, are as follows:

In the preamble:

“Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law;”

Section 24(1), provides as follows:

### **Enforcement of guaranteed rights and freedoms**

“24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”

Section 52(1), provides as follows:

### **Primacy of Constitution of Canada**

“52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

As such, all acts, regulations or rules that infringe upon our basic freedoms and human dignity are invalid.

### **Businesses' Legal Obligations to NOT Discriminate**

We have become aware, that in the midst of this 'covid' situation, inspectors and officers of Alberta Health Services (AHS) routinely attend and monitor businesses -- imposing various health standards. Many businesses have revealed that they are threatened with large fines for non-compliance with 'covid' standards, most (if not all) of which are irrational, onerous and arbitrary. It seems that in response to these threats, some businesses have implemented their own policies without giving due consideration to their legal obligations to not discriminate.

A business' legal obligations to not discriminate are clearly set out in both the *Alberta Human Rights Act*, the CMOH Order 12-2021 (Alberta) and various municipal by-laws related to masking within Alberta.

#### **a) *Alberta Human Rights Act, RSA 2000, Ch. A-25.5***

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<sup>1</sup> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Human rights are not optional. There are a number of reasons not everyone wears a mask, including by reason of physical disability, mental disability (which is often subjective and based on an individual's experience) or religion – each of which are protected grounds under Section 4 of the *Alberta Human Rights Act*, RSA 2000, Ch. A-25.5:

#### **Discrimination re goods, services, accommodation, facilities**

4. No person shall:

- (a) **Deny to any person or class of persons any goods, services, accommodation or facilities that are customarily available to the public, or**
- (b) **Discriminate against any person or class of persons with respect to any goods, services, accommodation or facilities that are customarily available to the public,**

because of the race, **religious beliefs**, colour, gender, gender identity, gender expression, **physical disability, mental disability**, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons or of any other person or class of persons.

(emphasis added)

The failure on the part of governments to mention or highlight a business' duty to comply with laws that apply to them, including human rights legislation, in no way minimizes or obliterates the requirement of businesses to comply with their obligations to not discriminate – be it in relation to their customers or their employees.

**To be clear, businesses who outright deny goods, services or facilities to persons on the basis that they do not wear a mask are in direct violation of section 4 of the *Alberta Human Rights Act* and are thus exposed to liability for such discriminatory actions.**

#### *b) Alberta Masking CMOH Order 12-2021*

CMOH Order 12-2021, being an Order made under the *Public Health Act* (Alberta) effective April 19, 2021, provides for a list of broad exceptions in section 2 (as have all previous CMOH Orders), to the general requirement to wear a face covering in indoor locations. These exemptions are material because they serve to protect the grounds enumerated in section 4 of the *Alberta Human Rights Act*.

"Part 2, Section 2.7: Section 2.6 [that a person must wear a face mask] does not apply to a person attending an indoor public place if the person:

- (a) is a child under two years of age;
- (b) is unable to place, use, or remove a face mask without assistance;
- (c) **is unable to wear a face mask due to a mental or physical limitation;**
- (d) is consuming food or drink;
- (e) is engaging in high intensity physical exercise;

- (f) is providing or receiving care or assistance where a face mask would hinder that caregiving or assistance;
- (g) is alone at a workstation and separated by at least two metres distance from all other persons; ..."

(emphasis added)

In addition to physical limitations, which may or may not be visible (including inhibited breathing), the CMOH Order exempts anyone unable to wear a face mask due to a mental limitation. A person may have a mental limitation for one or more of a number of reasons, including because wearing a face mask may offend their religion.

The CMOH Order assigns no authority for whom is to be the decision maker to make said determination about whether an individual is exempt from wearing a mask, nor does it direct that claimed exemptions to the requirement to wear a mask need be verified or what the criteria of such verification is. This is hardly surprising, as anything to the contrary would conflict with human rights legislation and various sections of the *Canadian Charter of Rights and Freedoms*. As such, it is also hardly surprising that a significant number of individuals do not and cannot wear a face covering.

**The onus is therefore on the individual to determine whether he or she is exempt.** No authority is assigned (nor would such be appropriate) to judge whether another person is 'exempt' from masking. It is not, for example, up to any doctor, nor any person in a business – to decide whether another person is exempt. If asked, a declaration by the person that he or she is exempt, ends the matter and businesses have no right to deny goods, services or facilities to such person by reason of not wearing a face covering.

**The rule of law—not to mention common decency—demands that declared exceptions to wearing a face covering be respected by businesses.** Further, a person's reasons for an exemption are confidential and protected by privacy laws. Therefore, it is our view that no “proof” of the exemption is required.

*c) City of Calgary Bylaw 26M2020*

The City of Calgary’s Temporary Face Coverings Bylaw came into effect on August 1, 2020. While it states that “all persons must wear a face covering in indoor public premises and in public vehicles”, it has specific provisions for “people who are exempt from wearing face coverings” including:

- “Children under two years old.
- People with underlying medical conditions or disabilities inhibiting their ability to wear a face covering.
- People who are unable to place, use or remove a face covering safely without assistance...

**Please note:** Customers **do not need proof** that they are included in one of the exemptions listed above. **Businesses are also not expected to deny services as not everyone is required to wear a face covering.**” (emphasis added)

The City of Edmonton goes one step further to expressly recognize a person as exempt if they “are unable to wear a face covering because of mental or physical concerns or protected reasons under

the Alberta Human Rights Act. The City of Lethbridge “ask[s] that everyone be respectful of their fellow residents and understand that there will be situations where masks are not required.” These exemptions can be found across all municipal bylaws across the province.

As briefly described above, not all disabilities are visible, and no person should be able to coerce or impose on another person that they must do something that they are exempt from having to do. This is why both the province, and municipalities, have acknowledged that there are exemptions to the Orders and Bylaws, which recognize the basic human rights outlined in the *Charter* and the *Human Rights Act*.

It goes without saying: **The law is clear**, people who are exempt from wearing face coverings are exempt from the municipal Bylaw, and businesses are not expected to deny services to these individuals.

### **Businesses Claiming Trespass**

In the context of masking, businesses cannot rely on the laws of trespass. A customer has a defence under section 2(3) of the Petty Trespass Act, RSA. 2000, ch. P-11 and s. 8 of the Trespass to Premises Act, RSA 2000, c T-7 to a charge of trespass if it is established that they had a right or authority conferred by law to be on the property. That right to be on the property of a business open to the public without a face mask in reliance on an exemption in the masking order or bylaw, is conferred by s. 4 of the *Alberta Human Rights Act*, as the requirement to wear a mask in all cases and the denial of goods/services or entry, based on this only, is discriminatory. Further, while it may be the purview of the business to create a policy restricting entry or the provision of services/goods, any policy must be congruent with human rights legislation. Imagine if businesses denied entry to a person on the basis of his or her skin colour or religious belief. In our view, denying entry or providing goods/services to those who have a mask exemption, is the same and against the law.

### **Masking Requires Informed Consent**

The perceived need for the use of ‘masks’ is to purportedly limit the spread of a deadly virus. Any requirement imposed on a person to wear a face covering is a medical intervention for which informed consent by the individual is required.

We believe that businesses and their staff are not qualified to inform a person of the risks of mask usage and informed consent cannot be obtained in this setting. Anyone being asked to wear a mask should first be assessed and the individual risks posed to them, and then, only if they consent, could they be required to wear a mask. Again, an individual has sole authority to determine whether a mask is appropriate for that individual, if a person believes they are exempt from wearing a mask, they are. It is not the business of an individual, a company, or a union to tell a person that they are not exempt.

### **Summary**

In short, we know that businesses are encouraged by various levels of government (including AHS) to impose on customers and their employees perceived 'mask mandates'. The misperception that masks are required is fueled by the misuse of the word 'mandatory' in mask signage and other materials (including media misinformation), along with the presence of and intimidation by AHS

inspectors.

We see a number of businesses operating under an ill-conceived notion that the dictates of the AHS supersede a business' duty to respect the dignity of their customers and employees. Many customers have been induced and emboldened by government and media fearmongering to harass their fellow person who does not wear a mask – often complaining to the management of a business.

Many businesses have fallen prey to these tactics and do not have the wherewithal to challenge the authority of AHS inspectors and government over-reach. They attempt to settle the unrest and make their lives easier by implementing draconian policies that are, simply put, discriminatory, unlawful and harmful. In so doing, these businesses expose themselves to potential liability as they leave it open to customers and employees to bring claims for the various harms that discrimination and forced mask wearing can cause.

The liability business owners and their personnel will face as a result of discriminating against their customers by reason of not wearing a face covering will be theirs to bear. Governments have misled the public and businesses – and when the harm is finally realized – whether it is discrimination claims by customers or employees harmed physically or psychologically because they are forced to wear a face covering – **it will be the business that bears that cost, not any government or politician.**

The supreme law is the *Constitution* and the *Charter*, which codify our inalienable ‘natural’ rights, not any government official or politician.

By encouraging businesses to “enforce” a mask mandate that you do not understand, you are opening yourselves up to potential liability. Further, by making the claims that you have made in the April 22, 2021 letter, you are misinforming businesses and the public who are already unaware of what the law truly states and harming the individuals whom these unlawful masking impositions affect. We have attached a copy of the City of Calgary Bylaw, as well as the most recent 12-2021 CMOH Order for your ease of reference. If, in the future, you decide to distribute a legal opinion, it ought to reflect what the law actually is.

In addition, your statement that “no employee is required to interact with or share space with any unmasked customer in any way” is in and of itself discriminatory under the *Charter* and is not in line with the exemptions that are provided by both the Province and the City of Calgary.

It is our understanding that the missions of UFCW Local 401 include the following:

“Provide and promote an inclusive environment, reflecting the diversity of the membership, based on the respect and dignity of all members”, and

Continue our fight for the fair and equal treatment of women...disabled and disadvantaged, racialized people, and other human rights issues.”

Can you please advise how your letter, and your general outlook, which requests major retailers not require their employees to interact with or share space with any unmasked customer in any way, does not discriminate against people who have disabilities? Essentially you are telling retailers to deny people service, even if they have a valid exemption under the law. Despite your

claims of your knowledge surrounding the law, **this is not what the law is.**

Finally, even if you were to suggest that a retailer has a grocery pick up option for individuals you are suggesting businesses discriminate against, can you please advise how you envision, for example, an elderly person getting their daily necessities? These people, and others, have an exemption under the law, and they may not even own or know how to use a computer. How are they supposed to get their groceries if they are, as you suggest, to be “restricted from entering stores”?

We urgently seek your immediate withdrawal and correction of the letter that was sent to the public, in the same way and to those who would have received your initial letter. We further require your response within one week of receiving this letter.

Yours truly,

**Lawyers 4 Truth**



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