COURT OF APPEAL FILE NO. 47688
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COURT OF APPEAL

ON APPEAL FROM the order of Madam Justice Morellato of the Supreme Court of British Columbia pronounced on the 19th day of July 2021 at New Westminster, British Columbia.

BETWEEN:

THE REDEEMED CHRISTIAN CHURCH OF GOD

RESPONDENT
(Petitioner)

AND:

CITY OF NEW WESTMINSTER

APPELLANT
(Respondent)

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

Pursuant to the *Constitutional Question Act*

FACTUM OF THE ATTORNEY GENERAL OF BRITISH COLUMBIA

City of New Westminster, Appellant	The Redeemed Christian Church of God, Respondent	Attorney General of British Columbia
Alison M. Latimer Barrister & Solicitor 1200-1111 Melville Street Vancouver, BC V6E 3V6 Tel: [redacted] Email: [redacted]	Brandon Langhjelm & Marty Moore Justice Centre for Constitutional Freedoms c/o Carey Linde Personal Law Corporation 605-1080 Howe Street Vancouver, BC V6Z 2T1 Tel: [redacted] Email: [redacted] and [redacted]	Jonathan Penner & Robert Danay Ministry of Attorney General 1001 Douglas Street Victoria, BC V8W 9J7 Tel: [redacted] Email: [redacted] and [redacted]

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OPENING STATEMENT

The appellant City of New Westminster (the "City") appeals from the chambers judge's decision that the City had breached the rights of the respondent The Redeemed Church of God ("Grace Chapel") under s. 2(b) of the *Canadian Charter of Rights and Freedoms*.[1] The Attorney General of British Columbia (the "AGBC") intervenes to make submissions with respect to two discrete issues arising from the chambers judge's decision.

First, the AGBC says that s. 24(1) of the *Charter* does not authorize a court to grant declaratory relief in petition proceedings when neither Rule 2-1(2) nor the *Judicial Review Procedure Act*[2] applies. The chambers judge erred by concluding otherwise. Her ruling was inconsistent with Rule 2-1(2) as well as the principle that constitutional adjudication should only be undertaken on the basis of a sufficient factual record.

Second, *if* this court finds that the chambers judge properly considered the merits of Grace Chapel's claim under s. 2(b), it may be necessary to consider whether any such breach was justified pursuant to s. 1 of the *Charter*. Because the breach in issue was the result of the exercise of contractual discretion, rather than the result of a statute or an exercise of a *statutory* discretion, neither the traditional *Oakes* test nor the *Doré/Loyola* test provides an adequate or appropriate framework for analysis. The chambers judge recognized this problem and devised a novel test in their stead. The AGBC says that the chambers judge's test is incomplete, and offers as an alternative a test based on the private law of contract.

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ([the "*Charter*"].
[2] R.S.B.C. 1996, c. 241 [the "*JRPA*"].

PART 1 - STATEMENT OF FACTS

1. The AGBC appears in this proceeding in response to the Notice of Constitutional Question served on him by the appellant, the City.

2. The AGBC accepts the facts as set out by the City in its factum.

PART 2 - ISSUES ON APPEAL

3. The AGBC will address only the following issues arising from the Order under appeal:

    a. It is not open to a party to seek declaratory relief under s. 24(1) of the *Canadian Charter of Rights and Freedoms*[3] by way of a petition when neither Rule 2-1(2) nor the *Judicial Review Procedure Act*[4] applies; and

    b. When the exercise of the government's power to contract as a "natural person" causes a *prima facie* breach of the *Charter*, a workable and doctrinally sound justification analysis under s. 1 of the *Charter* should be anchored in the private law of contract. The jurisprudence of the Supreme Court of Canada on the common law duty to exercise contractual discretion in good faith provides an appropriate framework that can be utilized in this context.

4. The AGBC takes no position on the remaining issues raised by the City.

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[3] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ([the "*Charter*"].
[4] R.S.B.C. 1996, c. 241 [the "*JRPA*"].

PART 3 - ARGUMENT

A. Section 24(1) Does Not Authorize Declaratory Relief in Petition Proceedings

5. The chambers judge erred by issuing a declaration that the respondent Grace Chapel's right to freedom of expression under s. 2(b) of the *Charter* had been unjustifiably infringed, because Grace Chapel sought that relief by way of petition in the absence of a statutory provision permitting it to proceed that way.

a) The Rules Did Not Permit a Petition Proceeding

6. Rule 2-1(1) of the *Supreme Court Civil Rules* (the "*Rules*") provides as follows:

> Unless an enactment or these Supreme Court Civil Rules otherwise provide, every proceeding must be started by the filing of a notice of civil claim under Part 3.

7. The *Rules* provide that proceedings may be started by filing a petition in certain narrowly circumscribed circumstances, none of which apply to these proceedings.[5] The proceedings that Rule 2-1(2) permits to be brought by way of petition all have in common that they will not ordinarily require the kind of adversarial fact finding permitted by actions.

8. The *JRPA* provides for proceedings to be started by way of petition.[6] But it does so precisely because judicial review applications are supervisory proceedings on the record, so that an evidentiary basis has normally already been established by the tribunal whose decision is under review.

9. The chambers judge correctly held that the *JRPA* did not apply to the proceeding brought by Grace Chapel:

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[5] *Rules*, Rule 2-1(2)
[6] *JRPA*, s. 2(1).

> For the reasons set out below, I find that this petition is, at its core, a contractual dispute over the rental of property that does not fall within the ambit of the *JRPA*. Declaratory relief under s. 2(2)(b) of the *JRPA* is not available because the Decision did not involve the exercise of a statutory power. In addition, the City's decision to terminate the Agreement does not have a sufficiently public character to engage s. 2(2)(a) of the *JRPA*. While the Decision was informed by the City's policies, it was ultimately the exercise of a contractual right contained within the Agreement. The Booking Policy did not afford the City the capacity to terminate the Agreement; the contract did. The proper remedy, in the context of this case, is not by way of judicial review.[7]

10. The chambers judge nevertheless went on to hold that "the petitioner's request for declaratory relief under s. 24(1) of the *Charter* was brought properly by way of petition".[8]

11. The chambers judge erred in so holding, and in proceeding to grant Grace Chapel relief pursuant to s. 24(1).

b) Constitutional Issues Must Be Addressed on a Full Factual Record

12. Both the Supreme Court of Canada and this Court have emphasized repeatedly the importance of ensuring that constitutional issues are addressed on a full factual record.

> Counsel for the Attorney General draws the court's attention to the numerous instances in which the Supreme Court of Canada has cautioned against deciding constitutional cases without an adequate evidentiary record: citing, in particular, *Christie v. British Columbia (Attorney General)*, 2007 SCC 21 (S.C.C.) at para. 28; *R. v. Videoflicks Ltd*., [1986] 2 S.C.R. 713 (S.C.C.), at 762; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 (S.C.C.), at 361; and *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 (S.C.C.), at 1099.
>
> In *Mackay*, Cory J. for the Court, held:
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> > A factual foundation is of fundamental importance on this appeal. It is not the purpose of the legislation which is said to infringe the *Charter* but its effects. If the deleterious effects are not established there can be no *Charter* violation and no case has been made out. Thus the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants' position.

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[7] Reasons for Decision, para. 5.
[8] Reasons for Decision, para. 6.

[Emphasis added.]

> In *Danson*, Sopinka J., citing Morgan, "Proof of Facts in Charter Litigation," in Robert J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) at p. 162, adopted the view that: "... the process of constitutional litigation remains firmly grounded in the discipline of the common law methodology."[9]

13. This Court has also made abundantly clear that, where possible, constitutional issues are properly dealt with in the first instance by expert administrative tribunals, whose decisions are subsequently subject to judicial review:

> … It is, in my view, indisputable that the grant of jurisdiction by the Legislature to the Review Division to decide constitutional issues evidences a legislative intent to have such issues decided in the first instance by the specialized tribunal charged with administering the scheme and expert in its purposes, application and the context in which it operates. Courts should be reluctant to ignore this intent, especially where the legislative and administrative scheme provide reasonable access to individuals to have their claims adjudicated.
>
> This approach coheres with the preferred approach to a court's review of constitutional claims calling for a complete factual context and a developed record. The point here is both that such claims should be considered in the context of a developed record, and that the views of the administrative tribunal on those matters in respect of which it is expert are invaluable to a reviewing court.[10]

14. As a result, in the normal course petitions that are brought pursuant to the *JRPA* will have the necessary evidentiary foundation for any constitutional issues to be dealt with appropriately. If not, it will be up to the applicant to show some defect in the process that rendered it unfair or some basis for saying the finding of fact should be overturned on the appropriate standard of review. Either way, there is an *existing* body of factual findings that forms the basis for the constitutional analysis.

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[9] *Allart v. Alec's Automotive Machine Shop (2003) Ltd.*, 2014 BCCA 242 at paras. 17-19 (Chambers). See also *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCCA 385 at paras. 33-55.

[10] *Denton v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2017 BCCA 403 at paras. 48-49.

15. The same thing can *not* be said, however, for petitions that are not brought pursuant to the *JRPA*. Proceeding by way of petition "presupposes that there will be no dispute about the material facts; although the inferences to be drawn from those material facts may very well be in dispute".[11] It would be an unusual constitutional challenge in which there is no dispute about material facts: certainly it is unlikely that a constitutional challenger could be assured *prior* to initiating their claim that there would be no dispute about material facts.[12]

16. Furthermore, the parties to a petition proceeding are limited in their ability to ensure that the court has a sufficiently complete factual record to decide important constitutional issues. The absence of a discovery process, the abbreviated timelines, and the absence of *viva voce* evidence all inhibit this ability, and therefore the ability of the court to decide the constitutional issues on the basis of an appropriate factual record. Some of the relevant differences between petition proceedings and civil claims were recently highlighted by this court in *Beedie*.[13]

17. The manner in which this particular proceeding was initiated created exactly the problem described above. Because Grace Chapel framed its application as an application for judicial review pursuant to the *JRPA*, the City's ability to assemble and put before the court an appropriate factual context was severely constrained: judicial review, of course, must proceed on the basis of the record, and extra-record materials are only permitted in very narrow circumstances.[14]

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[11] *Strata Plan 1086 v. Coulter*, 2005 BCSC 146 at para. 26. See also *Jones v. McLeod*, 2017 BCSC 1478 at para. 34.
[12] The problem is highlighted by cases such as *Schooff v. British Columbia (Medical Services Commission)*, 2009 BCSC 1596 (varied on other grounds 2010 BCCA 396), where the challengers sought to have the constitutional issues dealt with by way of petition, but after the challenge proceeded by way of civil action the resulting judgment (*Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2020 BCSC 1310) included over 1200 paragraphs of factual findings.
[13] *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2021 BCCA 160 at para. 79 ["*Beedie*"], citing *Rocky Point Metalcraft Ltd. v. Cowichan Valley (Regional District)*, 2011 BCSC 441.
[14] *Beedie* at paras. 76-78.

c) Authorities Cited Did Not Support the Chambers Judge's Decision

18. At para. 88 of her Reasons, the chambers judge cites three authorities, apparently indicating that they support her finding that Grace Chapel's request for declaratory relief was properly before her by way of petition.

19. In fact, none of those authorities support that conclusion.

20. *McKenzie v. Canadian Human Rights Commission*[15] is a 1985 decision of the Federal Court in which McNair J. addresses the question of whether a litigant is entitled to seek declaratory relief under s. 24(1) of the *Charter* in that court by way of an originating application (similar to a petition under the *Rules*). McNair J. emphatically dismissed the suggestion, relying in part on the earlier Federal Court decision in *Banks*, the second of the authorities cited by the chambers judge:

> 16 …. In my opinion, ss. 24(1) of the *Charter*, creates a general, substantive right to relief for the infringement or denial of guaranteed rights under the *Charter* but it does not mandate the particular mode of proceeding by which the claim for relief must be enforced in the procedural sense.
>
> 17 Put another way, section 24 of the *Charter* does not authorize a complainant to casually ignore the prescribed rules of procedure of the Court when making a claim. If it were otherwise, havoc would result in the plethora of litigation arising under the *Charter* in the sense that the Court would be called upon to adjudicate on claims in the abstract without any regard to rules of procedure for the pursuit or enforcement of those claims.
>
> 18 The point came before Mr. Justice Collier in *Banks et al v. The Queen*, and he disposed of the argument that ss. 24(1) of the *Charter* empowered the Court to make a declaration on simple application or motion by stating at p. 6:
>
> > I do not agree. The *Charter* subsection does not, in my opinion, alter the procedure set out in the rules or statutes governing this, or any other, court of competent jurisdiction. It permits someone alleging infringement to apply to a competent court for relief. It does not, to my mind, lay down the method of getting into, and invoking the process of, the particular court.
> >
> > In any event, I am of the view the constitutional point should, in the best interests of everyone, go to trial in the usual way.

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[15] [1985] F.C.J. No. 529, 1985 CarswellNat 926 ["*McKenzie*"].

> 19 I am of the same mind and therefore conclude that the application for declaratory relief pursuant to section 18 of the *Federal Court Act* must be dismissed on these grounds without prejudice to the applicant's right to proceed by way of action if he deems it advisable. [emphasis added]

21. Thus both *Banks* and *McKenzie* are squarely against the chambers judge's finding: in both cases the court held that s. 24(1) does *not* provide a standalone basis for bringing a constitutional challenge by way of a petition proceeding.

22. The third authority cited by the chambers judge is this court's decision in *Saputo*.[16] In that case, however, a statute authorized the petitioner to bring their claim by way of petition, which brought the proceedings squarely within Rule 2-1(2)(b). The decision thus has no relevance to whether Grace Chapel was entitled to seek declaratory relief under s. 24(1) by way of petition in the absence of statutory authority to do so.

23. The chambers judge also relied at para. 84 on the 2011 decision of Willcock J. (as he then was) in *Conseil*.[17] As expressly noted by the chambers judge, however, the "*ratio* from *Conseil* is found in Willcock J.'s holding that it 'is permissible to seek both declaratory relief under s. 24 of the *Charter* and a remedy under the *JRPA* in the same petition'." *That* proposition is not at issue in this appeal. Where s. 24(1) relief is claimed in a judicial review proceeding, the court has the same authority to decide a constitutional issue as that presumptively held by a tribunal with the authority to decide questions of law. It will have before it the evidentiary record that was before the challenged decision maker, which will at least presumptively satisfy the requirement for a full factual record. No such evidentiary record exists, however, when, as here, there is no statutory decision maker, but merely the exercise of a contractual power.

24. *Conseil* does not support the chambers judge's decision.

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[16] *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P. / Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247 ["*Saputo*"].
[17] *Assoc. des parents de l'école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique*, 2011 BCSC 89 ["*Conseil*"].

25. Finally, the chambers judge rests her finding on two decisions of Bouck J. from the early 1980s. The first, *S.B.*,[18] was decided a mere six months after the *Charter* came into force, and in the absence of any appellate court guidance on the interpretation of the *Charter*. The second, *Noyes*,[19] was decided some three years later, but it was not a case in which any *Charter* remedy was granted: indeed, the petitioner's *Charter* claims were summarily dismissed.

26. Subsequent to both *S.B.* and *Noyes*, the Supreme Court of Canada held in *R. v. Mills*[20] that s. 24(1) of the *Charter* is not a procedural provision, and that the granting of *Charter* remedies must "be fitted into the existing scheme of Canadian legal procedure". As McLachlin CJC stated in *974649 Ontario Inc.*:

> 23 As McIntyre J. cautioned in *Mills*, *supra*, at p. 953, the *Charter* was not intended to "turn the Canadian legal system upside down". The task facing the court is to interpret s. 24(1) in a manner that provides direct access to *Charter* remedies while respecting, so far as possible, "the existing jurisdictional scheme of the courts": *Mills*, *supra*, at p. 953 (per McIntyre J.); see also the comments of La Forest J. (at p. 971) and Lamer J. (at p. 882) in the same case; and *Weber*, *supra*, at para. 63. ….[21]

27. Thus, *Noyes* and *S.B.* can no longer be considered good law to the extent that they contemplate that s. 24(1) *in and of itself* permits seeking declaratory relief by way of petition: that is, other than in a proceeding in which that relief would *already* be available. As *Mills* and subsequent authorities make clear, the *Charter* does not supplement, add to, or alter existing procedural provisions.

28. Thus, none of the authorities relied on by the chambers judge support her conclusion that Grace Chapel's request for a declaration was properly before the court.

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[18] *R. v. B. (S.)*, [1983] 1 W.W.R. 512 (B.C.S.C.) ["*S.B.*"].
[19] *Noyes v. South Cariboo School District No. 30* (1985), 64 B.C.L.R. 287 ["*Noyes*"]
[20] *R. v. Mills*, [1986] 1 S.C.R. 863 ["*Mills*"].
[21] *Ontario v. 974649 Ontario Inc.*, 2001 SCC 81 ["*974649 Ontario Inc.*"].

d) The Petition Should Have Been Dismissed or Converted to an Action

29. In practice, significant mischief is created by the use of petitions to resolve constitutional issues where there are disputed questions of legislative and adjudicative fact but no evidentiary record compiled by a statutory decision maker. The timelines and summary process of petition proceedings are not well adapted to complex factual disputes that have never before been adjudicated. Both the administrative decision-making process and the civil action process have ways of distinguishing truth from falsity and winnowing out bad expert evidence. A petition without a prior decision-making process has neither.

30. For all of the foregoing reasons, absent an application for judicial review pursuant to the *JRPA*, or some other statutory provision permitting a party to proceed by way of petition, Grace Chapel was required to proceed by way of a civil claim in order to seek declaratory relief under the *Charter*.

31. The chambers judge ought not to have decided Grace Chapel's claim of a breach of s. 2(b). Instead, in the face of the City's assertion that it was prejudiced by the abrogation of its procedural rights,[22] the chambers judge had two options open to her: converting the entire proceeding to an action pursuant to Rule 22-1(7)(d); or dismissing the petition on its merits.

32. Even in cases where a proceeding has been *properly* commenced by way of petition, the court will order conversion of the proceeding into an action "when there are disputes of fact or law, unless the party requesting the trial is bound to lose".[23]

33. Where, as here, the proceeding has *not* been properly commenced by way of petition, the only alternative to converting the petition proceeding into an action is dismissing the petition on its merits.[24]

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[22] Written Submissions of the City of New Westminster, paras. 39-48; Appeal Book pp. 173-175.
[23] *Saputo* at para 43, cited in *Beedie* at para. 54.
[24] As occurred, for example, in *Transpacific Tours Ltd. (Canadian Pacific Air Holidays) v. Canada (Director of Investigation & Research)* (1985), 68 B.C.L.R. 32 (S.C.) and

B. The Chambers Judge's Section 1 Justification Test was Incomplete

a) Overview

34. If this court nevertheless determines that it was appropriate for the chambers judge to consider the merits of Grace Chapel's *Charter* argument, it may be necessary to consider the novel question of how to analyze when government's exercise of a contractual right constitutes a "reasonable limit prescribed by law" under s. 1 of the *Charter*.

35. As the chambers judge correctly noted (at para. 102), insofar as s. 1 justification is concerned, "this case falls within relatively novel territory." Where the government exercises its "natural person" powers and thereby limits a claimant's rights under the *Charter*, existing justification tests are not applicable. In the absence of a statutory referent, the court needs a different yardstick by which to measure whether the *prima facie Charter* breach at issue is justified under s. 1.

36. In such a situation, the justification test initially articulated by the Supreme Court in *Oakes*[25] does not apply, because the *prima facie* breach was not caused by a legislative enactment. As the Supreme Court held in *Doré*,[26] a formulaic application of the *Oakes* approach does not work for an individual discretionary decision. The justification test from *Doré* and *Loyola*[27] is likewise not appropriate, however, because it relies on concepts of administrative law that are foreign to the exercise of discretion in a contractual setting.

37. While it seems clear that a new or different test for justification ought to apply in these circumstances, the chambers judge's proposed new test of "applying the criteria of minimal impairment and the proportionate balancing of *Charter* protections, viewed through the lens of reasonableness"[28] is insufficiently precise.

Sellors v. British Columbia (Superintendent of Motor Vehicles), 2007 BCSC 313, as well as *Noyes*.

[25] *R. v. Oakes*, [1986] 1 S.C.R. 103 ["*Oakes*"].

[26] *Doré v. Barreau du Quebec*, 2012 SCC 12 ["*Doré*"].

[27] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 ["*Loyola*"].

[28] Reasons for Decision, para. 110.

That test lacks an objective legal referent from which to measure the proportionality/reasonableness of a *prima facie Charter* breach, thereby injecting undue uncertainty and subjectivity into constitutional adjudication.

38. Just as a workable and doctrinally sound s. 1 proportionality analysis in the context of judicial review should draw upon concepts of reasonableness from administrative law, the analysis in a private law context should be grounded in the private law. In the case of contractual powers, the concepts of justification, reasonableness, democracy, and freedom can be given shape by the existing law of contract, both common law and civilian.

39. In other private law contexts (*e.g*., a decision *not* to enter into a contract, proprietary rights, monopoly, trust-like situations, etc.), other private law concepts would appropriately give meaning to reasonable limits under s. 1. While the law in this regard should develop incrementally in response to appropriate cases as they arise, there is no doubt that there are concepts of reasonableness from areas such as regulatory law, fiduciary law, and negligence law that may be adapted to suit the s. 1 justification analysis.

40. On the facts of *this* case, which involved an exercise of discretion pursuant to a contract between the City and Grace Chapel, Supreme Court of Canada jurisprudence on the common law duty to exercise contractual discretion in good faith provides the appropriate framework within which to measure justification under s. 1 of the *Charter*.

41. Under this framework, government's exercise of contractual discretion should be considered unreasonable, and thus not justified under s. 1 of the *Charter*, *if it is not sufficiently connected to the objectives that underlie the grant of discretion by the parties to the contract*. In order to be considered sufficiently connected, the impugned exercise of contractual discretion should limit *Charter* rights *as little as reasonably possible in light of those objectives.*

42. Like the *Doré* analysis in the administrative law context, this test achieves "analytical harmony" with the *Oakes* test, as proportionality is judged based on pre-existing legal concepts: in *Oakes*, the analysis of general laws based on means/end proportionality; in *Doré*, the review of statutory decisions based on the concepts of justification, fairness, and reasonableness in administrative law; and in the private law, the review of the exercise of contractual rights based on private law concepts. In each case, proportionality requires that interests protected by the *Charter* be affected as little as reasonably possible in light of the relevant underlying objectives.

b) Oakes and Doré/Loyola apply to the review of statutes and statutory decisions

43. We should start with the text of s. 1 itself. Section 1 of the *Charter* constrains the ability of legislatures to enact laws that limit rights and freedoms guaranteed in the *Charter*. It provides that "[t]he 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" [emphasis added]. The relevant concepts in s. 1 itself are "reasonableness," prescription by law, demonstrable justification, freedom, and democracy. *Oakes* and *Doré/Loyola* are doctrinal ways to interpret these concepts in the legislative and adjudicative contexts, respectively.

44. As the Supreme Court recently noted in *Vavilov*,[29] when applying s. 1 "it is important to draw a distinction between cases in which it is alleged that the effect of the *administrative decision* being reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms*…and those in which the issue on review is whether *a provision of the decision maker's enabling statute* violates the *Charter*" [emphasis added]. In either case, however, the central animating concepts seek to ensure that (a) the *Charter* infringement was "prescribed by law" in the sense that it arose as a result of a "sufficiently defined power, guided by legal norms;"[30] and

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[29] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 S.C.C. 65 ["*Vavilov*"] at para. 65.
[30] *Bracken v. Fort Erie (Town)*, 2017 ONCA 668, ["*Bracken*"] at para. 65.

(b) there was proportionality between the purposes underlying the statute and the *Charter* breach at issue.

45. If a claimant establishes that a statute has limited their *Charter* rights, the question of whether that limit is justifiable under s. 1 must be determined by applying the *Oakes* test. The threshold requirement that a limit be "prescribed by law" was not contentious in *Oakes* itself as the limit in that case was caused by a legislative enactment. At the time that *Oakes* was decided, the prevailing view was that this requirement could *only* be satisfied if the *Charter* infringement was "provided for by statute or regulation," either explicitly or implicitly.[31]

46. With regard to the balance of the s. 1 analysis, the *Oakes* test requires that two central criteria must be met to justify a *Charter* limit. First, the objective of the measure must be sufficiently "pressing and substantial" that it could justify limiting a *Charter* right. Second, the means by which the objective is furthered must be proportionate. The proportionality inquiry has three components: (i) rational connection to the objective, (ii) minimal impairment of the right, and (iii) proportionality between the effects of the measure and the stated legislative objective.[32]

47. If the *prima facie* breach of a claimant's *Charter* rights was caused by administrative action taken by a statutory decision-maker, rather than the statute itself, the test set out in *Doré* and *Loyola* applies. The Supreme Court noted in those cases that some of the aspects of the *Oakes* test are poorly suited to the review of discretionary decisions.[33]

48. To begin with, the Supreme Court in *Doré* noted that it had already adopted a "flexible approach" to the requirement under s. 1 that a limit be "prescribed by law" in its earlier jurisprudence. This requirement, the court confirmed, extends beyond formal legislation to any binding rules of general application that are sufficiently

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[31] *R. v. Therens*, [1985] 1 S.C.R. 613 at 645.
[32] *Frank v. Canada (Attorney General)*, 2019 SCC 1 at para. 38.
[33] *Doré*, at para. 37.

accessible and precise to those to whom they apply.[34] This requirement had been satisfied by limits contained in municipal by-laws, provisions of a collective agreement involving a government entity, rules of a regulatory body, and the common law.[35]

49. More significantly, the court in *Doré* and *Loyola* held that when discretionary administrative action taken pursuant to a statutory provision limits a *Charter* right, the *Oakes* test should be replaced with "a robust proportionality analysis consistent with administrative law principles."[36] In that context, the issue is whether the exercise of administrative discretion that limits a *Charter* right is *reasonable* (*i.e*., whether it is within the range of acceptable alternatives once appropriate curial deference is given). An administrative decision will be reasonable in this sense if it reflects a proportionate balancing of the *Charter* right with the objective of the statutory measure that permits the right to be limited.[37]

50. In *Loyola*, Abella J. explained (at para. 40) the "analytical harmony" between the proportionality analyses required by the *Oakes* and *Doré/Loyola* frameworks:

> A *Doré* proportionality analysis finds analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a Charter right under s. 1: minimal impairment and balancing. Both [*Oakes*] and *Doré* require that *Charter* protections are affected as little as reasonably possible in light of the state's particular objectives. As such, *Doré*'s proportionality analysis is a robust one and "works the same justificatory muscles" as the *Oakes* test [citations omitted].

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[34] *Doré*, para. 37.
[35] *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 S.C.C. 31 at paras. 52-53.
[36] *Loyola*, para. 3.
[37] *Beaudoin v British Columbia*, 2021 B.C.S.C. 512 at para. 216; *Law Society of British Columbia v. Trinity Western University*, 2018 S.C.C. 32 at para. 79.

(a) Neither Oakes *nor* Doré/Loyola *is workable when the government contracts as a "natural person"*

51. As the chambers judge correctly noted, the *Oakes* and *Doré/Loyola* s. 1 tests leave a lacuna in the law.[38] Neither test addresses the situation where a *prima facie Charter* breach cannot be tied to a statute because the governmental actor at issue was exercising one of the government's powers as natural person.

52. As was noted by Justice Groberman in *Strauss*[39] at para. 22:

> … while it remains true that 'almost all powers exercised by public authorities today have a statutory basis', it is important to recognize that public authorities can also function based on powers that do not owe their existence to enactments. The Crown has the powers of a natural person, and can conduct some of its affairs without relying on statutory powers.

53. The fact that the Crown has the same legal powers as a natural person means that it may hold and sell property, enter into contracts, and spend money even in the absence of a statutory provision that specifically empowers it to do so.[40] And, as in all other jurisdictions in Canada, the Legislature in British Columbia has granted municipalities (amongst other statutorily created entities)[41] the powers of a natural person.[42] These proprietary and contractual powers are critical to the exercise of democratic mandates. The legal framework governing the relationships between the executive and others when such powers are exercised is the ordinary private law.[43]

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[38] Reasons for Decision, para. 102.
[39] *Strauss v. North Fraser Pretrial Centre (Deputy Warden of Operations)*, 2019 BCCA 207 ["*Strauss*"].
[40] *Steam Whistle Brewing Inc v Alberta Gaming and Liquor Commission*, 2019 ABCA 468 ["*Steam Whistle*"] at para. 66; P. Hogg, P. Monahan and W. Wright, *Liability of the Crown*, 4th ed., (Toronto: Thomson Reuters Canada, 2011) at para. 1.4(a).
[41] See, for example, *Financial Services Authority Act*, S.B.C. 2019, c 14, s. 5(1); *Destination BC Corp. Act*, S.B.C. 2013, c 6, s. 5(1); *Safety Authority Act*, S.B.C. 2003, c. 38, s. 3(2); *Public Sector Pension Plans Act*, S.B.C. 1999, c. 44, s. 5(2); *School Act*, R.S.B.C. 1996, c. 412, ss. 85(1), 166.12(3).
[42] *Community Charter*, S.B.C. 2003, c. 26, s. 8(1).
[43] See, *e.g.*, *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 ["*Wastech*"]; *Ontario (Attorney General) v. Fatehi*, [1984] 2 S.C.R.

54. Logically, where the exercise of the government's "natural person" power limits a claimant's rights under the *Charter*, neither *Oakes* nor *Doré/Loyola* is applicable. Under both of those tests, proportionality is measured by weighing the *Charter* limit at issue against the objectives being pursued by the legislature in the applicable statutory enactment. In the absence of a statute, the court needs a different yardstick by which to measure whether the *prima facie Charter* breach at issue is "proportional" (and thus "reasonable" within the meaning of s. 1).

c) The justification test devised by the chambers judge is incomplete

55. While the chambers judge correctly identified the need for a new justification test to be crafted, the one that she devised was incomplete.

56. The chambers judge indicated (at para. 110) that:

> … in the instant case, which is neither a challenge to a law of general application nor a judicial review of an administrative decision, I am of the view that 'analytical harmony' can be found by upholding the *Charter* values at play, through applying the criteria of minimal impairment and the proportionate balancing of *Charter* protections, viewed through the lens of reasonableness [emphasis added].

57. The concepts of proportionality, minimal impairment, and reasonableness do infuse both the *Oakes* and *Doré/Loyola* tests. But they must be supplemented with an objective legal standard against which to weigh the *prima facie* breach of the *Charter* at issue.

58. In the absence of such a measure, a reviewing judge is left to search for an *ad hoc* standard against which to weigh the *prima facie* breach at issue, or to simply apply their own subjective sense as to whether the government "went too far". Such an

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536; *R. v. Murray*, [1967] S.C.R. 262; *Bank of Montreal v. Quebec (Attorney General)*, [1979] 1 S.C.R. 565.

approach injects undue uncertainty into constitutional adjudication, which is inimical to the fundamental tenet of the rule of law.[44]

59. In both the *Oakes* and *Doré/Loyola* tests the proportionality of the *Charter* limit is assessed by weighing it against the objectives being pursued by the legislature through the underlying statute. Fortunately, there is an existing legal framework in the private law context that incorporates principles of reasonableness and proportionality, which can be adapted for this purpose.

d) The duty to exercise contractual discretion in good faith should be utlized to assess proportionality in this context

60. When government exercises its "natural person" power under a contract and, in so doing, limits a *Charter* right, the law of contract satisfies the requirement in s. 1 that the limit be "prescribed by law." In addition, the law of contract, particularly the common law duty to exercise contractual discretion in good faith, provides an objective framework within which proportionality and reasonableness may be assessed. This doctrine provides that contractual discretion is exercised unreasonably if that exercise is unconnected to the purpose underlying that grant of discretion by the contracting parties.[45] Like reasonableness in administrative law, this private law concept may be adapted for use as part of a s. 1 *Charter* justification test.

61. As noted above, it is now well-established that the requirement that a reasonable limit under s. 1 of the *Charter* be "prescribed by law" may be satisfied by the common law.[46] As the Ontario Court of Appeal held in *Bracken* at para. 65:

> Section 1 establishes that limits to *Charter* rights must be reasonable and must be "prescribed by law". In the context of government action, such as expelling a person from government owned property and issuing a trespass notice, this means that the action must be grounded in law. That is, the action must have

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[44] *Vavilov* para. 72; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para. 273.
[45] *Wastech*.
[46] See, *e.g*. *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at para. 52; *Bracken*, para. 65.

> been an exercise of a sufficiently defined legal power, guided by legal norms. A "law" need not be a statute to satisfy the "prescribed by law" requirement. "Law" in this context includes regulations and the common law, and it is sufficient that "the limit simply result by necessary implication from either the terms or the operating requirements of the law" [emphasis added].

62. In the case at bar, the City exercised its discretion under a contract into which it had entered into pursuant to its powers as a natural person. The common law duty to exercise contractual discretion in good faith, which applied under the circumstances, represents a "sufficiently defined legal power" that is "guided by legal norms." It is in this way that the "prescribed by law" requirement in s. 1 of the *Charter* is satisfied in this case. The applicable law of contract must also be employed in order to assess reasonableness and proportionality in this context.

63. In *Doré* the Supreme Court adapted the existing framework of judicial review in administrative law so that a s. 1 proportionality analysis could be undertaken when administrative action limited a *Charter* right. In so doing, the court held that while "a formulaic application of the *Oakes* test may not be workable" in the context of an administrative decision, there is "nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection — meaning its guarantees and values — we expect from an *Oakes* analysis."[47]

64. Similarly, while a formulaic application of the *Oakes* test or the *Doré/Loyola* framework may not be workable when government exercises its "natural person" power to contract, there is nothing in the applicable law of contract that is inherently inconsistent with the strong *Charter* protection that we expect from an *Oakes* (or *Doré/Loyola*) analysis.

65. This is evident from the recent decision of the Supreme Court of Canada in *Wastech*. In that case, the court clarified that the common law duty to exercise

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[47] *Doré*, at para. 5.

contractual discretion in good faith is a general doctrine of contract law that operates in every contract irrespective of the intentions of the parties.[48]

66. The court in *Wastech* held that the duty to exercise contractual discretion in good faith is breached "where the discretion is exercised *unreasonably*, which here means in a manner *unconnected to the purposes underlying the discretion*" [emphasis added].[49] As Justice Kasirer explained:[50]

> The touchstone for measuring whether a party has exercised a discretionary power in good faith is the purpose for which the discretion was created. Where discretion is exercised in a manner consonant with the purpose, that exercise may be characterized as reasonable according to the bargain the parties had chosen to put in place. Perforce, the exercise of power consonant with purpose may be thought of as undertaken fairly and in good faith on the parties' own terms [emphasis added].

67. Where the exercise of contractual discretion stands outside the "compass" set by the underlying contractual purpose, it will be found to be unreasonable. Justice Kasirer emphasized on behalf of the majority in *Wastech* (at para. 71) that the measure of reasonableness in this context "is not what a court sees as fair according to its view of what is the proper exercise of the discretion."

68. Instead, drawing on the purpose set by the parties, the measure of fairness is what is reasonable according to the parties' own bargain. Where the exercise of the discretionary power falls outside of the range of choices connected to the purpose for which the agreement provides discretion, it will be found to be contrary to the requirements of good faith (and thus unreasonable).

69. The court in *Wastech* held (at para. 76) that what will be considered unreasonable is highly context-specific, and ultimately depends upon the intention of the parties as disclosed by their contract. The court went on, however, to state:[51]

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[48] *Wastech*, para. 4.
[49] *Wastech*, para. 91; *Bhasin v. Hrynew*, 2014 SCC 71 at para. 74.
[50] *Wastech*, para. 70.
[51] *Wastech*, para. 77.

> … For contracts that grant discretionary power in which the matter to be decided is readily susceptible of objective measurement — *e.g*., matters relating to "operative fitness, structural completion, mechanical utility or marketability" — the range of reasonable outcomes will be relatively smaller…. For contracts that grant discretionary power "in which the matter to be decided or approved is not readily susceptible [to] objective measurement — [including] matters involving taste, sensibility, personal compatibility or judgment of the party" exercising the discretionary power — the range of reasonable outcomes will be relatively larger….

70. The operation of these principles is well illustrated by the Supreme Court's application of this analytical framework to the contractual dispute in *Wastech*. At issue was whether Metro, a statutory corporation responsible for the administration of waste disposal for the Metro Vancouver Regional District, had violated the duty to exercise contractual discretion in good faith in relation to its contract with Wastech, a waste transportation and disposal company.

71. The parties in *Wastech* had a long-standing contractual relationship which contemplated the removal and transportation of waste by Wastech to three disposal facilities. Wastech was to be paid at a differing rate depending on which disposal facility the waste was directed to and how far away the facility was located. The contract did not guarantee that Wastech would achieve a certain profit in any given year and it gave Metro absolute discretion to allocate waste as it so chose.

72. A dispute arose between the parties after Metro reallocated waste from a disposal facility located farther away to one that was closer, resulting in Wastech recording an operating profit well shy of its target for that year. Wastech alleged that Metro breached its duty of good faith by allocating waste among the facilities in a manner that deprived Wastech of the possibility of achieving its target profit.

73. A majority of the Supreme Court disagreed. It found that Metro's exercise of discretion was not unreasonable *with regard to the purposes for which the discretion was granted*. Reading the contract as a whole, the purpose of the contractual discretion was to allow Metro the flexibility necessary to maximize efficiency and

minimize costs of the operation.[52] The contract gave Metro the absolute discretion to determine how the waste was to be allocated, with no guaranteed minimum volume of waste allocated in a given year.

74. The fact that the contractual discretion in *Wastech* existed alongside a detailed framework to adjust payments towards the goal of a negotiated level of profitability belied the suggestion that the parties had intended Metro's discretion to be exercised so as to provide Wastech with a certain level of profit.[53] As such, the court found that Metro had acted reasonably under the circumstances.

e) Justification is qualitatively different when Charter claimants voluntarily contract with government

75. All of the foregoing is consistent with the reality that when government exercises its power as a "natural person" to enter into a contract, it is not deploying any of the state's extensive powers of coercion. It is well-established that different constitutional considerations may apply to such actions.

76. Most notably, the Crown's exercise of its power to enter into contracts is not restricted by the division of powers provisions in the Constitution.[54] The significant implications of this were recently noted by the Alberta Court of Appeal in *Steam Whistle* as follows:

> [68] The inapplicability of the Constitution to the Crown's exercise of its natural-person powers means that sometimes the Crown can do things by contract that would be unconstitutional if it used other means. Hogg, Monahan and Wright give the example of the provincial Crown owning minerals on Crown land and granting a lease authorizing the extraction of minerals with a royalty set out in the lease that would be invalid if it were enacted by the legislature as an indirect tax….[emphasis added][55]

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[52] *Wastech*, para. 99.
[53] *Wastech*, para. 99.
[54] *Attorney General of British Columbia v The Deeks Sand & Gravel Company Limited*, [1956] S.C.R. 336 at 341-343; *Attorney General of Quebec v Labrecque*, [1980] 2 S.C.R. 1057 at 1082; *Boniferro Mill Works ULC v Ontario*, 2009 ONCA 75 at para 31; *Steam Whistle* para. 67.
[55] *Steam Whistle*

77. The court in *Steam Whistle* went on to explain (at para. 69) that exercises of the natural-person power to contract are unregulated by the division of powers provisions in the Constitution because, unlike traditional governmental activities, they do not involve the unilateral imposition of obligations on others. In other words:

> The paradigm[atic] case of the Crown's natural-person power – contracting with another person – creates obligations only if the other party agrees. By contrast, statutes normally impose, or can impose, obligations unilaterally. Contract terms which would be invalid if enacted in legislation are not restricted by the Constitution because the terms are voluntarily accepted by the counterparty, rather than imposed by statute [emphasis added].

78. Although the exercise of the Crown's natural person power to contract is not restricted by the constitutional division of powers, all governmental activities, including those that are "private, commercial, contractual or non-public (in) nature", are nevertheless subject to the *Charter*.[56]

79. While the *Charter* applies, the fact that the legal obligations of non-governmental contracting parties only arise because they have freely[57] agreed to accept them distinguishes such cases from cases involving the exercise of legislative authority. People undoubtedly have the ability to agree to limits to their *Charter* interests when those limits are the product of a freely-negotiated bargain. There are limits, for example, to the free speech of government employees that do not apply to the general public,[58] and people using government property may legitimately be subject to limitations that would go beyond what could be required by a law of general application.[59] This fundamental distinction should be reflected in the s. 1 justification

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[56] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 40.
[57] The AGBC acknowledges a conceptual distinction between government exercising its power to contract as a natural person in a free and competitive market and government exercising monopoly or monopsony power. The City in this case was operating in a free/competitive market, so this question does not arise. Nevertheless, there are concepts from regulatory law that are available to be adapted if/when the question is put squarely before the courts: see, *e.g.* *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44.
[58] See, *e.g.* *Fraser v. P.S.S.R.B.*, [1985] 2 S.C.R. 455 at 457-58, 471.
[59] See, *e.g.* *Langenfeld v. Toronto Police Services Board*, 2019 ONCA 716.

test employed when an exercise of the Crown's natural person power to contract causes a *prima facie* breach of the *Charter*.

f) How the principles from the common law duty of good faith should be applied

80. The framework governing the duty to exercise contractual discretion in good faith is contextual. When adapted to a test to be utilized by courts in applying s. 1 to *Charter* breaches caused by the government's exercise of its "natural person" power to contract, it requires some modification and elaboration.

81. A court conducting a s. 1 justification analysis in such circumstances should begin by identifying the purposes underlying the grant of contractual discretion at issue. As with any other question of contract interpretation, the overriding concern should be to determine "the intent of the parties and the scope of their understanding".[60] To do so, the contract as a whole must be examined, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.[61]

82. Once the underlying contractual objectives have been identified, the court should assess whether the impugned exercise of contractual discretion was reasonable in the sense that it was sufficiently connected to those contractual objectives. In order to be considered sufficiently connected to the underlying objectives, the impugned exercise of contractual discretion should not limit *Charter* rights in a way unconnected to those objectives, nor in a way that is disproportionate to those objectives. As in the administrative law context, a measure of deference to (or a "margin of appreciation" for) the government's conduct should be afforded by the courts when making this determination.[62] This should be the margin of appreciation appropriate to the commercial or other contractual context.

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[60] See, *e.g.* *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, at para. 27; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, at paras. 64-65.
[61] See, *e.g.* *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47.
[62] See *Doré* at para. 54.

83. When the *Charter* right at issue is freedom of expression, a proportionality analysis must consider the extent to which the restricted expression furthers the core values that underlie s. 2(b) of the *Charter* (namely, the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process).[63] The further that the speech at issue lies from these core values, the less connection to the objectives the government would be compelled to demonstrate to show it acted reasonably in its exercise of contractual discretion.[64]

g) Some considerations on the application of the justification test in this case

84. The AGBC takes no position on whether the City's exercise of contractual discretion proportionately balanced Grace Chapel's rights under s. 2(b) of the *Charter* and the purposes for which that discretion was granted under the applicable contract. Nevertheless, based on the foregoing submissions, the methodology that the court ought to have applied in making that determination is as follows.

85. Once the chambers judge determined that the City's exercise of contractual discretion to revoke Grace Chapel's licence violated Grace Chapel's right to free expression under s. 2(b) of the *Charter*, the question became whether the breach was justified under s. 1. This question ought to have been assessed by considering whether the City's exercise of discretion was reasonable (*i.e.*, whether it fell within the range of acceptable alternatives) in that it was sufficiently connected to the purpose for which that exercise of discretion was granted to the City under the applicable contract. Determining what that purpose was required the court to interpret the applicable contract using the usual rules of contractual interpretation.

86. Having identified the purpose underlying the grant of contractual discretion, the court's task would have been to determine whether the City's exercise of discretion was sufficiently connected to that purpose. This ought to have been a highly

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[63] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 72-73.
[64] *Groia v. Law Society of Upper Canada*, 2018 SCC 27 at para. 117.

context-specific determination that depended on consideration of all of the relevant circumstances.

87. Those relevant circumstances included: (a) the extent to which the restricted expression furthered the core values that underlie s. 2(b) of the *Charter*; and (b) whether, after granting the City a "margin of appreciation", Grace Chapel's free expression rights were affected as little as reasonably possible in light of the underlying contractual objectives.

C. Conclusion

88. For the foregoing reasons, the AGBC respectfully submits that the chambers judge erred in: (a) concluding that the petitioner could seek declaratory relief under s. 24(1) of the *Charter* by way of petition when the *JRPA* did not apply; and (b) employing a justification test under s. 1 of the *Charter* that did not adequately reflect the fact that the impugned conduct involved the exercise of non-statutory contractual discretion pursuant to the City's "natural person" powers.

PART 4 - NATURE OF ORDER SOUGHT

89. The AGBC takes no position on the appropriate Order that this court ought to issue following the hearing of this appeal.

90. The AGBC does not seek costs, and says that he ought not to have costs awarded against him.[65]

All of which is respectfully submitted.

Dated at the City of Victoria, Province of British Columbia, this November 18th of 2021.

Jonathan Penner
Counsel for the Attorney General
of British Columbia

Robert Danay
Counsel for the Attorney General
of British Columbia

[65] *Gichuru v. British Columbia (Attorney General)*, 2020 BCCA 374.

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