No. 210209
Vancouver Registry

In the Supreme Court of British Columbia

Between

ALAIN BEAUDOIN, BRENT SMITH, JOHN KOOPMAN, JOHN VAN MUYEN, RIVERSIDE CALVARY CHAPEL, IMMANUEL COVENANT REFORMED CHURCH, and FREE REFORMED CHURCH OF CHILLIWACK, B.C.

Petitioners

and

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, and DR. BONNIE HENRY IN HER CAPACITY AS PROVINCIAL HEALTH OFFICER FOR THE PROVINCE OF BRITISH COLUMBIA

Respondents

Written Submissions of the Petitioners
on Hearing of Petition, March 1, 2021

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Contents

I. INTRODUCTION

1. The Constitution remains the supreme law of Canada even during pandemics.

2. At the outset of the public health emergency in March, 2020, the Respondents recognized certain important principles. They committed to ensure their actions would reflect, *inter alia*:

- "Respect: To whatever extent possible, individual autonomy, individual liberties, and cultural safety must be respected";
- "Least Coercive and Restrictive Means: Any infringements on personal rights and freedoms must be carefully considered, and the least restrictive or coercive means must be sought";
- "Proportionality: Measures implemented, especially restrictive ones, should be proportionate to and commensurate with the level of threat and risk";
- "Decision makers should take into account all relevant views expressed";
- "Take into account any disproportionate impact of the decision on particular groups of people"; and
- "Practical - have a reasonable chance of being feasible to implement and to achieve their stated goals".

Application Record ("AR") Tab 7, "Covid-19 Ethical Decision Making" (Aff of R. O'Neil, Ex A)

3. The Respondents ignored these commitments of last March in regard to the impact of the Orders (as defined in the Petition) on the Petitioners herein. Among other things, the Orders disregard the need for minimal impairment and reflect over-breadth, arbitrariness and disproportionality.

Petition, filed January 7, 2021, Part I, para 1.c
See *Carter v Canada (AG),* 2015 SCC 5 [*Carter*], paras 83-90

4. An over-broad curtailment of constitutional freedoms for reasons of administrative ease and convenience is unacceptable in Canada. An exercise of government powers in this manner will, if unchallenged, undermine the rule of law. Given that many gatherings for secular purposes are not banned under the Orders, the Respondents must rely on the untenable proposition that the public health risk of gatherings is affected by the subject of discussion.

5. The *prima facie* infringements of rights under section 2 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") herein are admitted by Respondents at paragraph 40 of their Response.

6. While this case may be decided without express rulings on the asserted infringements of rights under sections 7 and 15 of the *Charter*, the principles and perspectives engaged in these areas further underscore the egregious nature of the section 2 infringements. They also inform as to the onerous burden faced by the Respondents under section 1 of the *Charter* herein.

II. PRELIMINARY MATTERS

7. At this early point in the document, the Petitioners briefly address two areas which have been raised by the Respondents.

A. The "Record of Proceeding"?

8. At paragraph 6 of their Response, the Respondents seek to have this Court consider only the evidence which they say was the "record" before Dr. Henry when she made the Orders. In other words, they seek to have this Court address the impact of the Orders in a factual vacuum.

9. However, the Orders at issue herein are clearly distinct from tribunal decisions made in an adjudicative process. They are in the nature of subordinate legislation, issued at the discretion of a statutory decision maker without any kind of hearing and upon being issued, become the law of the land. The Orders do not determine issues between parties participating before tribunals in any sort of adjudicative process.

10. Furthermore, there is simply nothing in the nature of any fixed and identifiable "record of the proceeding" in the present case, as that term in applies to the case law asserted by the Respondents.

11. Dr. Emerson has described the moving epidemiological landscape which Dr. Henry has considered over the past year. From the outset the pandemic, Dr. Henry has considered a wide-ranging and ongoing flow of data from a myriad of sources in that open ended and continuing process. This process continues as Dr. Emerson states:

> I am advised by the PHO that she reads the published scientific literature on an ongoing basis.
>
> AR Tab 12, Aff #1, B. Emerson, para 39

12. Accordingly, the concept of a "record of the proceeding" as addressed by the case law relied upon by the Respondents to exclude the evidence of the Petitioners simply does not apply to the present matter.

13. Constitutional challenges of this nature cannot be addressed effectively if the evidence is confined to only that which a particular statutory decision maker happened to consider. The law does not undermine challenges in this way nor does it impose such an impossible task on courts.

14. In *Crowder v. British Columbia (Attorney General)*, 2019 BCSC 1824, this Court, while recognizing the significance of the record as applying to many judicial reviews, said this:

> [37] I also accept that constitutional questions are ideally resolved on the basis of as extensive a factual record as is reasonable: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 59. A proper factual foundation is of fundamental importance: *MacKay v. Manitoba,* 1989 CanLII 26 (SCC), [1989] 2 S.C.R. 357; *Danson v. Ontario (Attorney General)*, 1990 CanLII 93 (SCC), [1990] 2 S.C.R. 1086; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21*; Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCCA 385.

15. After referring to passages from earlier cases directly on point, this Court concluded:

> [42] I find that as in *Twenty Ten Timber* and *462284 B.C. Ltd*., the process that led to the creation of the impugned Rule was not an adjudicative hearing process and I will therefore adopt the approach taken by Adair J. and rely on the non-hearsay evidence proffered by the petitioners.

16. Furthermore, even if there was such a thing as a "record of the proceeding" in making the Orders, the Respondents have tendered evidence which exceeds anything that was before Dr. Henry when she first made the Orders. Most notable in this regard is the evidence of Dr. Emerson regarding which, Dr. Warren and Dr. Kettner have provided reply evidence.

17. The matter at hand is not static, as was indicated in the Petitioners' challenge to "such further orders as may be pronounced which prohibit or unduly restrict gatherings for public protests and for worship…." The most recent "Gatherings and Events" order was issued by Dr. Bonnie Henry on February 10, 2021, well after much of material filed with the Court was provided to counsel for Dr. Henry.

Petition, filed January 7, 2021, Part I, para 1.c

B. The Standard of Review

18. This matter was required to be commenced via petition as it involves judicial review of the Orders.

Judicial Review Procedure Act, RSBC 1996, c 241, s 2(1)
Supreme Court Civil Rules, BC Reg 168/2009, Rule 2-1(2)(b)

19. However, this proceeding is primarily centred on what is in substance a *Charter* challenge to orders—to the extent of their inconsistency with the Constitution—that constitute laws of general application rather than merely a judicial review of an administrative decision. Consequently, the Court does not owe deference to Dr. Henry in determining the question of the constitutionality of her orders or provisions thereof, to which a standard of correctness applies.

Canada (Minister of Citizenship and Immigration v Vavilov, 2019 SCC 65 [*Vavilov*] at para 53
Dunsmuir v New Brunswick, 2008 SCC 9 at para 58
The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario, 2018 ONSC 579 [*CPSO ONSC*] at paras 63-69

20. This Court has made clear that *Charter* remedies can be issued in a proceeding commenced by petition.

L'Association des parents de l'école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique, 2011 BCSC 89 at para 28
Noyes v. Board of School Trustees, School District 30 (South Cariboo), 1985 CanLII 508 at para 7

21. As is set out in detail section V.G.2 of this document, as the Orders amount to laws of general application rather than administrative decisions pertaining specifically to

the interests of a particular individual, whether the *Charter* infringements which result from these Orders are justified is to be determined under the *Oakes* test rather than the *Doré/Loyola* framework.

R v Oakes, [1986] 1 SCR 103 [*Oakes*] at pp 137-140 (paras 66-71)
Doré v Barreau du Québec, 2012 SCC 12 [*Doré*] at paras 3-7, 36-39
CPSO ONSC at paras 56-62

22. Nonetheless, in the event that this Court regards the constitutional question at hand as judicial review of an administrative decision which limits *Charter* rights, the Petitioners submit that the *Charter* infringements resulting from the Orders in any event do not constitute a proportionate balance between the rights engaged and a legitimate statutory objective in accordance with the *Doré/Loyola* framework. As such, these infringements are unreasonable, unjustified and irrevocably unconstitutional regardless of whether the *Oakes* test or the *Doré/Loyola* is the applicable analysis in the case at hand.

Loyola High School v Quebec (Attorney General), 2015 SCC 12 [*Loyola*] at paras 37-39
Law Society of British Columbia v. Trinity Western University, 2018 SCC 32 [*LSBC v TWU*] at paras 79-82

III. RELIEF SOUGHT

23. The following relief is sought as stated in the Petition:

> 1. A Declaration pursuant to sections 24(1) and 52(1) of the Constitution Act, 1982, that:
>
> a. Ministerial Order No. M416 entitled “Food and Liquor Premises, Gatherings and Events (COVID-19) Order No. 2” issued by the Minister of Public Safety and Solicitor General of BC, dated November 13, 2020, under the authority of sections 10 of the *Emergency Program Act*, RSBC 1996, c 111;
>
> b. an order made under section 3 of the *Covid 19 Related Measures Act*, SBC 2020, c 8, entitled “Food and Liquor Premises, Gatherings and Events”, referred to as item 23.5 in Schedule 2 of that Act;

c. orders made by the Public Health Officer entitled “Gatherings and Events” and made pursuant to Sections 30, 31, 32 and 39 (3) Public Health Act, SBC 2008, c 28, including orders of November 19, 2020, December 2nd, 9th, 15th and 24th, 2020 and such further orders as may be pronounced which prohibit or unduly restrict gatherings for public protests and for worship and/or other religious gatherings including services, festivals, ceremonies, receptions, weddings, funerals, baptisms, celebrations of life and related activities associated with houses of worship and faith communities;

(collectively referred to herein as the “Orders”) are of no force and effect as they unjustifiably infringe the rights and freedoms of the Petitioners guaranteed by the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the “*Charter*”), specifically:

a) *Charter* section 2(a) (freedom of conscience and religion);
b) *Charter* section 2(b) (freedom of thought, belief, opinion and expression);
c) *Charter* section 2(c) (freedom of peaceful assembly);
d) *Charter* section 2(d) (freedom of association);
e) *Charter* section 7 (life, liberty and security of the person); and
f) *Charter* section 15(1) (equality rights).

24. Items 2, 3, 4 and 5 under “Orders Sought” in the Petition are subsumed by the above relief and not argued separately.

25. To be clear, the Petitioners do not seek to set aside the Orders in their entirety but, as *per* the wording of section 52 of the *Constitution Act, 1982*:

> 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. [Emphasis added].

IV. FACTUAL CONTEXT

A. Legislative Background

26. The Respondent Dr. Bonnie Henry is British Columbia's Provincial Health Officer ("PHO") appointed under Part 6 of the *Public Health Act,* SBC 2008, c 28 (the "*PHA*").

27. On March 17, 2020, Dr. Henry declared a "public health emergency" under Part 5 of the *PHA* by which she unlocked a range of emergency powers. Among other things, this empowered her to issue verbal and written orders that have immediate effect. A person who contravenes the orders of the Dr. Henry may, among other things, be fined or imprisoned (*PHA*, s. 108).

28. On March 18, 2020, British Columbia declared a "state of emergency" under the *Emergency Program Act*, RSBC 1996, c 111 (the "*EPA*"). This enabled sweeping statutory powers which, among other things, seek to establish and enforce the restrictions and prohibitions which are at issue herein.

29. On March 28, 2020, BC's "Provincial Covid-19 Task Force" published guidelines called "Covid-19 Ethical Decision Making" as above described.

AR Tab 7, Aff. of R. O'Neil, Ex A

30. Ministerial Order No. M416 was issued on November 13, 2020, pursuant to section10 of the *EPA*. Section 4 of the order reads as follows: "A person must not promote a gathering or event referred to in section 3 [of the order] or encourage another person to attend such a gathering or event." Reference to "gathering and event" in this enactment is broadly defined and includes the activities at issue herein. A person who contravenes the *EPA* or a regulation may be fined or imprisoned (section 27).

31. Under section 3 of the *COVID-19 Related Measures Act*, SBC 2020, c 8 (the "*CRMA*"), *EPA* instruments are incorporated including item 23.5 in Schedule 2 of the *CRMA*, called "Food and Liquor Premises, Gatherings and Events" and which is at issue herein.

32. On November 19, 2020, Dr. Henry issued an oral order prohibiting activities which include those at issue herein. It was affirmed by subsequent written orders pertaining to "Gatherings and Events," including those dated December 2, 9, 15, and 24, 2020.

Affidavit of Michelle Gusdal, made Dec 18, 2020, Ex C, E and F

33. Subject to certain exemptions, the Orders prohibit certain “events”, referring to “in-person gathering of people in any place whether private or public, inside or outside, organized or not”, including, among other things, a “demonstration” and “a worship or other religious service, ceremony or celebration”.

See PHO Order, Gatherings and Events – February 10, 2021, Part C (pages 10-13)

B. Alain Beaudoin and Outdoor Protests

34. The Petitioner Alain Beaudoin relies on the facts set out in paragraphs 9 to 26 of the Petition.

35. Mr. Beaudoin’s evidence (AR Tab 3) demonstrates the that the protests he participated in:

i) occurred outdoors;

AR Tab 3, Aff. #1, A. Beaudoin, paras 19-20, 27-28, 31, 33, 44

ii) were political events;

AR Tab 3, Aff. #1, A. Beaudoin, paras 8, 12, 25, 46-47

iii) were peaceful;

AR Tab 3, Aff. #1, A. Beaudoin, paras 15, 17-18

iv) prioritized the safety of attendees, including their physical distancing; and

AR Tab 3, Aff. #1, A. Beaudoin, paras 20, 23-24, 27, 32, 44

v) involved cooperation with police.

AR Tab 3, Aff. #1, A. Beaudoin, paras 14-16, 22, 26

36. The broad definition of “event” under the Orders in effect in December, 2020 made it unlawful to organize and/or attend outdoor protests and exposed Mr. Beaudoin to the risk of penal sanctions. The RCMP informed Mr. Beaudoin that the protest could not exceed 50 people, and further demanded that he document the personal information of protestors, since that is a required element of a “COVID-19 Safety Plan” required under the Orders.

AR Tab 3, Aff. #1, A. Beaudoin, paras 9, 26, 39-40

37. Mr. Beaudoin believes that trying to comply with safety plan requirements of the Orders was impossible, as he is unable to control the number of people who attend an outdoor public protest or gather contact information from each of them.

AR Tab 3, Aff. #1, A. Beaudoin, paras 9, 26, 39-40

38. Mr. Beaudoin further deposes that he objected to documenting all of the protesters' information because he was concerned that such a list could be required to be turned over to the government and used to target protestors.

AR Tab 3, Aff. #1, A. Beaudoin, paras 10, 40

39. Mr. Beaudoin was fined for failing to comply with the "Gatherings and Events" order: the violation ticket issued to Mr. Beaudoin on December 12, 2020, with a penalty of $2,300, was issued pursuant to the "COVID 19 Related Measures Act" and under "Description of Offence" it states "Item 23.4 Schedule 2 Contravention of Gatherings and Events".

AR Tab 3, Aff. #1, A. Beaudoin, paras 42-43, Ex A

40. For participating in public protests, Mr. Beaudoin has been proactively contacted by police, visited in-person by police and warned about violating the Gathering and Events order, followed by unmarked and plainclothes police after a protest, issued a $2300 ticket, and threatened with further $2300 fines and $230 fines to other protestors if the protests continued.

AR Tab 3, Aff. #1, A. Beaudoin, paras 14, 26, 30, 36-37, 45

41. As the Respondents concede, the Orders infringe Mr. Beaudoin's constitutionally guaranteed freedoms of expression and peaceful assembly.

Response to Petition, para 40

42. It is also clear that there was no evidence that the infringement of Mr. Beaudoin's constitutional rights could be justified on the basis of a public health risk. As the Respondent's own Dr. Emerson confirms:

> Similarly, to date, the data before the PHO does not demonstrate that BC is experiencing significant or routine transmission of COVID-19 arising from outdoor protests or demonstrations, such as the Black Lives Matter and Anti-Mask demonstrations held in British Columbia in 2020.

AR Tab 12, Aff. #1, B. Emerson, para 109

43. It is only recently that the Orders have been amended to acknowledge what appears to be obvious. Dr. Bonnie Henry, in issuing her latest "Gathering and Events" Order on February 10, 2021, added the following statement in its "Whereas" clauses:

> When exercising my powers to protect the health of the public from the risks posed by COVID-19, I am aware of my obligation to choose measures that limit the Charter rights and freedoms of British Columbians less intrusively, where this is consistent with public health principles. In consequence, I am not prohibiting outdoor assemblies for the purpose of communicating a position on a matter of public interest or controversy, subject to my expectation that persons organizing or attending such an assembly will take the steps and put in place the measures recommended in the guidelines posted on my website in order to limit the risk of transmission of COVID-19.

PHO Order, Gatherings and Events – February 10, 2021, Clause J (page 3) [emphasis added]
Compare PHO Order, Gatherings and Events – February 5, 2021, "Whereas" Clauses 1-13 (page 1-3) (AR Tab 15, Aff. #1, M. Patterson, Ex A)

C. The Religious Petitioners

44. Petitioners Brent Smith, Riverside Calvary Chapel, John Van Muyen, Immanuel Covenant Reformed Church, John Koopman and Free Reformed Church of Chilliwack, B.C (collectively referred to as the "Religious Petitioners") rely on the facts set out in paragraphs 27 to 78 inclusive in the petition.

45. Key points from their evidence include:

1. Deeply held fundamental religious beliefs and imperatives

46. The Religious Petitioners have given evidence showing that the practice of in-person worship is fundamental to their religious beliefs, including the evidence of two ordained religious ministers, Rev. Brent Smith and Rev. John Koopman. They make ample references to the specific scriptures as a source for this deeply held tenet of their faith and that such gatherings are vital to the practice of their religion.

AR Tab 9 Aff. #1, J. Koopman at paras 1-2, 8-11
AR Tab 10, Aff. #1, B. Smith, paras 1-2, 14-16, Ex B, D
AR Tab 8, Aff. #1, J. Van Muyen, para 30, Ex A

See also AR Tab 6 Aff. #1, T. Champ at paras 5, 6

47. For example, one scripture referenced by each of the Religious Petitioners grounding their belief that they must meet in person is Hebrews 10:23-25, which states:

> Let us hold fast the confession of our hope without wavering, for He who promised is faithful. And let us consider one another in order to stir up love and good works, not forsaking the assembling of ourselves together, as is the manner of some, but exhorting one another, and so much the more as you see the Day approaching.

AR Tab 9 Aff. #1, J. Koopman at para 8
AR Tab 10, Aff. #1, B. Smith, paras 14
AR Tab 8, Aff. #1, J. Van Muyen, para 30, Ex A

48. Rev. Smith explains the religious beliefs of Riverside Calvary Chapel:

> Our Church believes, as do I personally, that Christians are called to assemble, in-person, for regular corporate worship services. Christians not only gather together for worship out of love toward God, but also because it is essential to our spiritual health and because we are commanded to do so (Psalm 95:1, 2; Psalm 111:1; Psalm 122:1; Acts 2:46; Ephesians 5:19; 1 Timothy 4:13; Hebrews 10:23-25).

AR Tab 10, Aff. #1, B. Smith, para 14

49. Rev. Koopman similarly explains that gathering in-person is essential to the religious practices at the Free Reformed Church:

> Coming together as a congregation is an essential component of the exercise of our faith. In fact, we speak of our members as the 'congregation' because congregating together before our God is of the essence of our faith. We call our assemblies a 'worship service' because we gather there to give our worship and praise to God together as a congregation. In fact, unless we come together as a congregation it is not a worship service.
>
> To forbid 'in-person worship services' is to undermine the very essence of our service to our God.

AR Tab 9 Aff. #1, J. Koopman at paras 10-11

50. The Council of Immanuel Covenant Reformed Church explained how assembling in-person is essential to their religious practices in a November 28, 2020 letter to Premier Horgan, Minister Dix and Dr. Henry, stating in part:

> First, all Christians are called to assemble, in-person, for regular corporate worship services. Christians not only gather together for worship out of love toward God, but also because it is *essential* to our spiritual health and because we are commanded to do so (Psalm 65:4; Psalm 84:1,2; Psalm 95:1, 2; Psalm 111:1; Acts 2:46; Ephesians 5:19; Colossians 3:16; 1 Timothy 4:13; Hebrews 10:23-25). We are called to worship God in the way that He has commanded in Scripture including, though limited to, hearing preaching of the Word, partaking of the sacraments of baptism and communion, singing His praises, praying together, confessing His name, exercising church discipline, and fellowshipping with other Christians. Although some of these aspects of worship can be performed online, many of them cannot. [Bolding and italics in original]
>
> AR Tab 8, Aff. #1, J. Van Muyen, para 30, Ex A

51. As explained below, the Religious Petitioners have continued to meet in-person even in the face of threats from police and thousands of dollars in fines.

2. Important non-religious benefits of in-person worship gatherings

52. The Petitioners have given evidence that gathering in-person for worship provides benefits in addition to the fulfillment of the religious beliefs described above. These benefits include:

i) accommodating members who do not have the means to use technology;
AR Tab 10, Aff. #1, B. Smith, para 11, Ex D
AR Tab 8, Aff. #1, J. Van Muyen,, Ex A

ii) identifying specific needs of vulnerable persons in the church community;
AR Tab 9 Aff. #1, J. Koopman at paras 27, 29
AR Tab 10, Aff. #1, B. Smith, Ex D
AR Tab 8, Aff. #1, J. Van Muyen, Ex A

iii) Providing physical, mental and emotional care; and
AR Tab 9 Aff. #1, J. Koopman at paras 28-29

AR Tab 10, Aff. #1, B. Smith, para 17-19, 21-22, 26, Ex D
AR 8, Aff. #1, J. Van Muyen, Ex A

iv) Providing comfort and encouragement and reducing loneliness, depression, anxiety, and fear.

AR Tab 9 Aff. #1, J. Koopman at paras 26, 30
AR Tab 10, Aff. #1, B. Smith, para 11, 18, 21-22

53. The Religious Petitioners are aware of the mental health crisis BC residents are facing which has been exacerbated, and they believe that closing their in-person gatherings could cause serious mental harm to people.

AR Tab 9 Aff. #1, J. Koopman at paras 28-30, Ex B, C

3. Safety Measures Implemented by the Petitioners

54. The Petitioners have adopted extensive safety protocols to minimize any risk of transmission of the SARS-CoV-2 at their religious services, including:

i) ensuring physical distancing at all times between members of different households;

AR Tab 8, Aff. #1, J. Van Muyen, paras 15-16, 21-22, 41
AR Tab 9, Aff. #1, J. Koopman, paras 15-16, 19
AR Tab 19, Aff. #2, J. Koopman, Ex D, E
AR Tab 10, Aff. #1, B. Smith, paras 13, 30

ii) providing hand sanitizer for use throughout their facilities;

AR Tab 8, Aff. #1, J. Van Muyen, paras 21, 41
AR Tab 9, Aff. #1, J. Koopman, para 21
AR Tab 19, Aff. #2, J. Koopman, Ex D, E
AR Tab 10, Aff. #1, B. Smith, paras 13, 30

iii) requiring the use of masks;

AR Tab 8, Aff. #1, J. Van Muyen, paras 32b, 41
AR Tab 9, Aff. #1, J. Koopman, para 21
AR Tab 10, Aff. #1, B. Smith, paras 13, 30

iv) maintaining detailed contact tracing systems;

AR Tab 8, Aff. #1, J. Van Muyen, paras 15, 21, 41
AR Tab 9, Aff. #1, J. Koopman, para 16

AR Tab 19, Aff. #2, J. Koopman, Ex E
AR Tab 10, Aff. #1, B. Smith, para, 30

v) ensuring cleaning and sanitization of the facilities;

AR Tab 9, Aff. #1, J. Koopman, para 17
AR Tab 19, Aff. #2, J. Koopman, Ex D, E
AR 10, Aff. #1, B. Smith, paras 13, 30

vi) restricting gathering sizes to 50 or fewer persons in a room;

AR Tab 8, Aff. #1, J. Van Muyen, paras 14, 19-20, 23
AR Tab 10, Aff. #1, B. Smith, paras 13, 30

vii) changing communion and tithe collection practices prevent possible surface transmission;

AR Tab 9, Aff. #1, J. Koopman, para 18
AR Tab 10, Aff. #1, B. Smith, para 19 (at fn 1)

viii) cancelling coffee and fellowship times;

AR Tab 8, Aff. #1, J. Van Muyen, para 16
AR Tab 9, Aff. #1, J. Koopman, para 19

ix) requiring those experiencing COVID symptoms to remain home;

AR Tab 8, Aff. #1, J. Van Muyen, para 15
AR Tab 9, Aff. #1, J. Koopman, para 22
AR Tab 19, Aff. #2, J. Koopman, Ex D, E
AR Tab 10, Aff. #1, B. Smith, para 27

x) encouraging those with existing vulnerabilities to a severe COVID infection to not attend in-person services;

AR Tab 19, Aff. #2, J. Koopman, Ex D

xi) advising and reminding members of safety protocols; and

AR Tab 8, Aff. #1, J. Van Muyen, para 15
AR Tab 9, Aff. #1, J. Koopman, para 23
AR Tab 19, Aff. #2, J. Koopman, Ex D, E

xii) taking further action up to and including the cancellation of services to prevent the possibility of transmission from persons who have tested positive for COVID.

AR Tab 19, Aff. #2, J. Koopman, paras 8-11, Ex D-F

55. The guidelines adopted by the Petitioners are largely mirror in those required in the “Gathering and Events” Orders of Dr. Bonnie Henry at permitted support group meetings, critical service meetings, programs for children or youth or occupational training. These requirements are, in summary:

- physical distancing of two metres between persons who do not reside together;
- hand sanitation supplies to be readily available;
- contact tracing information gathered
- cleaning and sanitization of the place;
- no more than fifty persons;
- measures put in place to avoid congregating of persons; and
- separation from persons attending a different event in the place.

See PHO Order, Gatherings and Events – February 10, 2021, Part C (pages 10-13)

56. In her public statement of October 26, 2020, the Respondent Dr. Henry herself confirmed:

> And we know that when these COVID safety plans are followed in settings like restaurants, event spaces, churches, temples, hotels, that we don't see transmission.

AR Tab 19, Aff. #2, J. Koopman, para 5

4. State interference with efforts to conduct worship services.

57. In working to enforce the Orders against those conducting in-person religious services, law enforcement officers have

i) regularly attended at houses of worship during services seeking to enforce the Orders;

AR Tab 10, Aff. #1, B. Smith, paras 31-33, 37
AR Tab 11, Aff. #1, R. Dyck, para 2
AR Tab 9, Aff. #1, J. Koopman, para 35
AR Tab 8 Aff. #1, J. Van Muyen, paras 34, 52, 60

ii) threatened to jail and fine clergy and elders;

AR Tab 10, Aff. #1, B. Smith, para 37
AR Tab 8, Aff. #1, J. Van Muyen, para 54
AR Tab 6, Aff. #1, T. Champ, para 31-32
AR Tab 5, Aff. #1, C. Pollard paras 6, 12-13

iii) threatened to issue fines to persons attending the worship services;

AR Tab 10, Aff. #1, B. Smith, para 32
AR Tab 11, Aff. #1, R. Dyck, para 3
AR Tab 8, Aff. #1, J. Van Muyen, para 45
AR Tab 5, Aff. #1, C. Pollard, para 18

iv) disrupted religious services with loud knocking during the services;

AR Tab 8, Aff. #1, J. Van Muyen, paras 53
AR Tab 6, Aff. #1, T. Champ, para 31
AR Tab 5, Aff. #1, C. Pollard para 3

v) disrupted a service causing women and children to cry and youth to distrust police;

AR Tab 6, Aff. #1, T. Champ, para 31
AR Tab 5, Aff. #1, C. Pollard para 14-16, 19, 21, 23

vi) demanded that the meeting immediately stop;

AR Tab 8 Aff. #1, J. Van Muyen, para 37
AR Tab 5, Aff. #1, C. Pollard para 12
AR Tab 4, Aff. #1, B. Versteeg, paras 2-12

vii) attempted to infiltrate religious services in plainclothes;

AR Tab 9, Aff. #1, J. Koopman, para 38
AR Tab 5, Aff. #1, C. Pollard paras 27-28

viii) conducted surveillance of houses of worship;

AR Tab 10, Aff. #1, B. Smith, para 36
AR Tab 11, Aff. #1, R. Dyck, para 6
AR Tab 9, Aff. #1, J. Koopman, para 38
AR Tab 8, Aff. #1, J. Van Muyen, para 47, 55
AR Tab 5, Aff. #1, C. Pollard paras 29-31

ix) issued tens of thousands of dollars in fines to churches, pastors and elders; and

AR Tab 10, Aff. #1, B. Smith, paras 32
AR Tab 9, Aff. #1, J. Koopman, para 41
AR Tab 19, Aff #2, J. Koopman, para 12
AR Tab 8, Aff. #1, J. Van Muyen, paras 44, 56
AR Tab 6, Aff. #1, T. Champ, para 32

x) recommended charges against churches.

AR Tab 9, Aff. #1, J. Koopman, para 39, Exhibit E

5. Efforts to change the Orders and/or be exempted

58. On November 28, 2020, the Council of the Immanuel Covenant Reformed Church submitted a letter to Premier Horgan, Minister Dix and Dr. Henry explaining their religious beliefs requiring that they gather in-person for worship, and specifically requesting that the restriction on worship services be immediately rescinded. The letter specifically stated that the church would continue to take the following safety precautions to limit the risk of COVID-19 transmission,

> We will strongly encourage those who are feeling unwell not to attend, maintain social distancing, provide hand sanitizer at the entrance of the building, require masks to be worn at all times except while seated, and require all attendees to leave immediately after the service. We will also practice the Lord's Supper and the offering so that there is no communal touching of plates, cups, or bags.

AR Tab 8 Aff. #1, J. Van Muyen, Ex A

59. On November 30, 2020, Rev. Brent Smith sent a similar letter to Premier Horgan, Minister Dix and Dr. Henry requesting that the restriction on worship services be rescinded. In the letter, Rev. Smith agreed to continue to adhere to safety guidelines, including "specific protocols around the maximum number of worshippers at a service, the use of masks, the use of hand sanitizer, social distancing, contact tracing, the distribution of food and drink, and the use of shared items."

AR Tab 10, Aff. #1, B. Smith, para, Ex D

60. There is no evidence of any response to these letters from anyone in the BC government.

AR Tab 12, Aff #1, B. Emerson, paras 121

61. Others attempted more formal requests to have the prohibition on in-person worship services reconsidered or accommodations made, specifically referencing sections 38 and 43 of the *Public Health Act*. On December 7, 2020, Rev. Garry Vanderveen submitted a letter and a proposed agreement to Dr. Bonnie Henry and other political, public health and law enforcement officials, seeking permission to gather

in-person for worship subject to safety conditions. As of February 8, 2021, Rev. Vanderveen had received no response to his request and proposal.

AR Tab 20, Aff #1, G. Vanderveen, paras 3-4, Ex. A-B

62. Similarly, 11 churches, represented by legal counsel, submitted formal requests for reconsideration and accommodation pursuant to section 38 and 43 of the *Public Health Act* to the Provincial Health Officer on both January 8, 14 and 25, 2021.

63. Likewise, as of February 8, 2021, no response had been received in response to these requests.

AR Tab14, Aff # 1, J. Sikkema, paras 3-9 and Ex. A-B

64. On December 18, 2020, Dr. Bonnie Henry sent letters to Rev. Brent Smith and Rev. John Koopman, referencing section 43 of the *Public Health Act* and encouraging them and their churches to "accept the importance of compliance with this Order and the need to respect the difficult decisions of public health officials."

AR Tab 12, Aff #1, B. Emerson, paras 122-125 Ex 49-50

65. On December 22, 2020, Rev. Koopman responded to Dr. Henry, informing her that he was aware that many requests had been made for her to reconsider her order without success. Rev. Koopman urged Dr. Henry to allow in-person worship services.

AR Tab 9, Aff. #1, J. Koopman, para 42-45, Ex I-L

66. Since the commencement of these proceedings, counsel for the Religious Petitioners have sought exemptions under section 43 of the PHA.

AR Tab 14, Aff # 1 of V. Lever, Ex. D and E

D. The Medical Evidence

1. Dr. Joel Kettner

67. In addition to the above evidence, expert evidence has been tendered to address the specific worship services at issue and to reply to the evidence of Dr. Emerson.

68. The affidavit of Dr. Joel Kettner is found at AR Tab 22. His qualifications (set out in paras 5-8) include expertise as an epidemiologist and scientific director of Public Health Agency of Canada's National Collaborating Centre for Infectious Disease. he also spent 12 years as Manitoba's Chief Medical officer of Health, during which he lead

that province's public health responses to several outbreaks, including the SARS Coronavirus-1 and the H1N1 influenza pandemic.

69. Upon reviewing the evidence of Dr. Emerson in this matter, Dr. Kettner points out a lack of identifiable options, goals and objectives for COVID restrictions (paras 15-16). He also observes what he says is a lack of transparency which violates principles requiring "clearly stated goals and […] proven effectiveness" (para 44).

70. Dr. Kettner also points out that the evidence of Dr. Emerson reflects an absence of some important relevant considerations, factors and facts that would be expected to be used for these decisions (para 23).

71. Dr. Kettner states at para 68: "…based on information provided in Dr. Emerson's first affidavit,7/1,333 = .005 of all reported cases have been associated with places of worship. This equates to one in 190 cases." Note: the above number is from all places of worship, as opposed to from those taking precautions.

72. Dr. Kettner then goes on to note at para 69 the absence of other relevant data resulting in "a significant gap of epidemiological evidence for the assertions of Dr. Henry that there is a 'high risk of transmission' in these settings."

73. Upon reviewing the affidavit of John Koopman regarding the Free Reformed Church, Dr. Kettner notes at para 74 that the precautions are

> as strict and complete as any that I have seen for settings attended by the public. In my opinion, if these rules are applied as described, the likelihood of transmission of a COVID-19 infection would be equal to or lower than other publicly attended settings.

74. Dr. Kettner concludes at para 76:

> In my opinion, permitting places of worship to open and apply similar restrictions expected of other settings would enable their members to gain the potential benefits of worship and support – many of which are not otherwise available at this time – in an environment at least as safe as other public settings.

2. Dr. Thomas Warren

75. The affidavit of Dr. Thomas Warren is found at AR Tab 21.

76. As indicated at paragraphs 2 and 3 of his affidavit (his full CV is appended), Dr. Warren has practiced in the areas of infectious diseases and microbiology for 10 years and his role as Assistant Clinical Professor (Adjunct) at McMaster University in Hamilton, Ontario includes supervising Infectious Diseases Clinical Rotations for physician assistant students, medical students, and Infectious Diseases fellows.

77. Dr. Warren notes (at para 36) that, as of January 23, 2021 there were 18,974 COVID-19 deaths in Canada, and 11,991 (63.2%) of those deaths were related to outbreaks.

78. He states at para 38 that in Canada, 99.8% (11,966/11,991) of outbreak-related deaths are in settings that might be considered non-modifiable - long term care (11,114 deaths), healthcare (612 deaths), corrections/shelters (184 deaths), communities such as Indigenous communities (56 deaths).

79. As to cases of COVID-19, he noted that in the national study he cites as the source for this data, religious gatherings appear to be grouped in the “Other” category which includes “social gatherings, office workplaces, recreational facilities, etc.” in the Canadian epidemiologic summary (para 39). The number of cases related to outbreaks in the “Other” category is 4,445. That is less than 1% (4,445/743,058) of all cases of which, the number of cases related to religious gatherings outbreaks is actually only a fraction of <1% (para 40).

80. As to COVID-19 related deaths, he says (para 42) these “are the most important statistic for analysis and comparison.” The total number of COVID-19 deaths related to outbreaks in the “Other” category is four. Only 0.02% (4/18,974) of COVID-19 deaths in Canada could be linked to outbreaks in the “Other” category which includes religious gatherings (para 42).

81. Based on his consideration of the national data on both COVID-19 related cases and deaths, Dr. Warren concludes at para 43:

> Based on the primary drivers of transmission as set out in the medical literature and discussed above - seasonality and population density - both of which are nonmodifiable, the risk of infection related to these church

services is low and is not greater than the risk of transmission within the general community. Based on the source of outbreaks and deaths as identified in the publicly reported national data, the risk of COVID-related death as a direct result of attending these church services is negligible.

V. LEGAL ARGUMENT

82. Dr. Emerson's evidence is generalized and makes no reference to the activities at issue. Rather, he deposes in a general way about certain risks "related to religious activities".

83. The Orders unfairly infringe upon the rights of all religious groups on the basis that there is evidence that only some of them may be problematic. This approach appears to be based on administrative convenience and an example of being over broad, disproportionate, arbitrary, irrational and unreasonable.

84. The Respondents have produced no evidence that the worship gatherings at issue constitute a public health risk. In fact, as the Respondent Dr. Henry herself confirmed on October 26, 2020: "…we know that when these COVID safety plans are followed in settings like restaurants, event spaces, churches, temples, hotels, that we don't see transmission."

AR Tab 19, Aff #2, J. Koopman, para 5

85. There is considerable interplay and overlap between the freedoms under section 2 of the Charter both in regard to political protests and in regard to worship services. Section 2 rights collectively are described as protecting rights fundamental to Canada's liberal democratic society.

Mounted Police Association of Ontario v Canada (Attorney General), 2015 SCC 1 [*Mounted Police*] at para 48

A. Section 2(a) of the Charter – Freedom of Conscience and Religion

86. The Dr. Henry's prohibition on in-person worship services across British Columbia is a severe and egregious interference with the freedom of conscience and religion as protected by section 2(a) of the *Charter*, striking at the very heart of the most fundamental of rights in a free and democratic society.

87. In light of its arbitrariness—as reflected in the complete absence of evidence tendered in this proceeding that in-person worship services, when conducted in accordance with safety guidelines recommended by the Dr. Henry herself (and as followed by the Petitioner Churches) pose any disproportionate risk of COVID-19 transmission relative to other forms of in-person gathering which the Dr. Henry continues to permit—this prohibition cannot withstand constitutional scrutiny and must be invalidated.

88. The Supreme Court of Canada has identified the "essence" of freedom of religion as protected by the *Charter* as encompassing the rights "to entertain such religious beliefs as a person chooses", "to declare religious belief openly without fear of hindrance or reprisal", and "to manifest religious by worship or practice or by teaching and dissemination."

R v Big M Drug Mart Ltd, [1985] 1 SCR 295 [*Big M Drug Mart*], p 336 (paras 94-95)

89. Although this freedom is founded in "founded in respect for the inviolable rights of the human person" and reflects an "emphasis on individual conscience and individual judgment which lies at the heart of our democratic political tradition", it is also "'profoundly communitarian". It "must therefore account for the socially embedded nature of religious belief", as well as the 'deep linkages between this belief and its manifestation through communal institutions and traditions'."

Big M Drug Mart, pp 336, 346 (paras 94, 122)
LSBC v TWU at para 64, citing *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*] at para 89
Loyola High School v Quebec (Attorney General), 2012 SCC 12 [*Loyola*] at para 60

90. An infringement of section 2(a) is made out when the claimant shows: "(1) that he or she sincerely believes in a belief or practice that has a nexus with religion"; and "(2) that the impugned conduct interferes with the claimant's ability to act in accordance with that belief or practice in a manner that is more than trivial or insubstantial".

Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations), 2016 SCC 54 at para 122

91. The prohibition on in-person worship is to outright forbid all British Columbians from the free exercise of the fundamental right to engage in sacred religious practices in a communal and collective setting.

92. Pastors Smith, Koopman and Champ as well as Mr. Van Muyen depose to the beliefs held by their churches and by each of them personally regarding the profound religious significance of in-person worship to them as Christian believers. All of them cite Biblical passages as the source of these beliefs. Pastor Smith and Mr. Van Muyen refer to in-person worship as a matter of divine and Biblical command, and both Pastors Koopman and Champ describes the forbidding of such worship as undermining "the very essence of our service to our God."

AR Tab 6, Aff. #1, T. Champ, paras 5-8
AR Tab 8, Aff. #1, J. Van Muyen, para 30 and Ex A
A, Tab 9Aff. #1, J. Koopman, paras 8-11
AR Tab 10, Aff. #1, B. Smith, paras 14-16 and Ex B

93. Pastor Smith and Mr. Van Muyen also note that worship from the Christian perspective includes practices—such as communion—which cannot be performed online. Further, not all Christians are able to access worship services online.

AR Tab 8, Aff. #1, J. Van Muyen, para 30 and Ex A
AR Tab 10, Aff. #1, B. Smith, paras 11, 16, 19

94. Interference with such beliefs and practices is more than trivial. The effect is not merely to impose added costs for religious adherents in the exercise of a privilege— like the freedom to drive cars or to practice medicine—but to outright obliterate their right to engage in sacred practices as protected by the *Charter*.

SL v Commission scolaire de Chenes, 2012 SCC 7 at para 23.
Hutterian Brethren at paras 89, 95, 98.
Syndicat Northcrest v Amselem at para 74

95. Given the significance of in-person services to the Petitioners and others, there could not be a more substantial interference with religious freedom than to prohibit individuals from gathering to worship.

96. As confirmed in *LSBC v TWU* at para 64:

> The ability of religious adherents to come together and create cohesive communities of belief and practice is an important aspect of religious freedom under s. 2 (a).

97. In addition to religious freedom, the banning of gatherings for worship herein also constitutes a clear infringement of freedom of peaceful assembly under section 2(c) of the Charter,

98. The right of peaceful assembly is, by definition, a collectively held right — it cannot be exercised by an individual and requires a coming together of people.

B. Section 2(b) of the *Charter* – Freedom of Expression

99. Freedom of expression as protected by section 2(b) of the *Charter*: a fundamental right which sustains "the very lifeblood of democracy", the "vital importance" of which "cannot be overemphasized."

Committee for the Commonwealth of Canada v Canada, [1991] 1 SCR 139 at page 182 (para 94), quoting *R v Kopyto*, 1987 CanLII 176 (ONCA)

100. Section 2(b) extends *prima facie* constitutional protection to all human activity intended to convey a meaning. Such expressive activity may only be excluded from section 2(b) protection if its method or location clearly "undermines the values that underlie the guarantee", namely, "democratic discourse", "truth-finding" and "self-fulfilment".

Irwin Toy Ltd v Quebec (Attorney General), [1989] SCR 927 [*Irwin Toy*] at pages 968-969 (paras 52-55)
Montréal (City) v 2952-1366 Québec Inc, 2005 SCC 62 [*Montreal (City)*] at para 72, 74

101. Section 2(b) also protects the right to receive expression, and "'protects listeners as well as speakers'."

Little Sisters Book and Art Emporium v Canada (Minister of Justice), 2000 SCC 69 at para 41, quoting *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at page 767

107. The Supreme Court of Canada has established a three-part test to determine whether an activity is protected by section 2(b):

a. Does the activity have expressive content?
b. Does the method or location of the activity remove it from section 2(b) protection?
c. Does the impugned law or government action infringe that protection in purpose or effect?

Montreal (City) at para 56

108. Public protests, by definition, are intended to convey meaning, and peaceful protests in the public square without threats of violence are clearly protected by section 2(b). As noted by the Supreme Court of Canada in *Montreal (City)*, "the public square and the speakers' corner have by tradition become places of protected expression."

Montreal (City) at paras 61, 66

109. Prohibiting in-person worship services also clearly infringes freedom of expression, which extends even to physical acts—such as the sacrament of communion—intended to convey a religious meaning of profound significance.

AR Tab 6, Aff. #1, T. Champ, para 6
AR Tab 8, Aff. #1, Dr. B. Emerson, para 30, Ex A
AR Tab 9, Aff. #1, J. Koopman, para 9
AR Tab 10, Aff. #1, B. Smith, para 16

C. Section 2(c) of the *Charter* – Freedom of Peaceful Assembly

110. Peaceful assembly as protected by section 2(c) of the Charter is "geared toward the physical gathering together of people" and is by definition a collective right protecting activities which are "incapable of individual performance."

Roach v Canada (Minister of State for Multiculturalism and Citizenship), [1994] 2 FC 406, at para 69
Mounted Police Association of Ontario v Canada (Attorney General), 2015 SCC 1 at para 64

111. This right has been described as "speech in action", and is "concerned with the public expression of opinion by spoken work and by demonstration."

Ontario (Attorney General) v. Dieleman, 1994 CanLII 10546, [1994] OJ No 1864 (QL), at para 227, quoting Tarnopolsky and Beaudoin, eds., *The Canadian Charter of Rights and Freedoms* (1982), at pages 138, 142-143

112. The activities organized by Mr. Beaudoin epitomize such speech in action and are of vital importance to our society, particularly at a time in which governments may be using the pandemic as a pretext for actions which might otherwise may be unacceptable.

113. As Mr. Beaudoin deposes, it is virtually impossible to organize outdoor public protests open to the public at large—with individuals free to come and go as they choose—in such a way as to document all who are ultimately in attendance.

AR Tab 3, Aff. #1, A. Beaudoin, para 40

114. Further, as deposed to by Mr. Beaudoin, he has a genuine fear for the wellbeing of those attending those protests if he is to put their names on a list, adding that he "will not knowingly aide government in targeting protesters for exercising their constitutional rights."

AR Tab 3, Aff. #1, A. Beaudoin, para 40

115. As regards the churches herein, the distinction between which gatherings are permitted and which are not is the absence or presence of a religious purpose determines the permissibility of a gatherings. For example, the Orders permit "support group" meetings so long as certain safety conditions are met, but prohibit virtually the same type of activity if for group prayer.

116. As such, the prohibition of the activities at issue in this proceeding clearly infringe the constitutional protection afforded to such activities by section 2(c) of the *Charter*.

D. Section 2(d) of the *Charter* – Freedom of Association

117. The purpose of this right is to "'to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends'", with roots "in the protection of religious minority groups". It protects "the right to join with others and form associations", "the right to join with others to join with others in the pursuit of other constitutional rights", and "the right to join with others to meet on more equal terms the power and strength of other groups and entities."

Mounted Police at paras 35, 56, 66

118. Infringement of section 2(d) occurs when the impugned government action constitutes "a substantial interference with freedom of association" in either its purpose or effect."

Mounted Police at para 121

119. The Orders substantially interfere with the freedom of individuals to join together in-person in exercising their constitutional rights to protest and/or participate in religious worship.

E. Section 7 of the Charter

120. Section 7 of the *Charter of Rights and Freedoms* states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

121. A link between the impugned government action and the limit on life, liberty or security of the person is satisfied on the standard of reasonable inference.

Bedford v Canada (AG), 2013 SCC 72 [*Bedford*] at para 76

122. On the present facts, there is considerable overlap between the interests of life, liberty and security of the person and the present facts.

1. Right to Life

123. As the SCC noted in *Carter*, the phrase “right to life” might be presented itself as a depreciation in the value of the lived experience. Where state action imposes an increased risk of—for instance—anxiety, loneliness, domestic violence, stress, depression, substance abuse and other factors which could—directly or indirectly—lead to death, the right to life is engaged.

Carter at paras 60-62

124. The Petitioners raise grave concerns about the psychological condition of their congregants in the wake of COVID-19 should their churches be shuttered. Concerns about loneliness, depression, anxiety, and fear have been expressed.

125. There is evidence of this nature from the Petitioners and others regarding how personal interaction can help the most vulnerable in the congregation who are at risk of mental and physical harm from the closure of the churches.

2. Right to liberty

126. State prohibitions affecting one's ability to move freely are properly treated as liberty and security interests.

R v Heywood, [1994] 3 SCR 761 at 789 (para 45)
Carter at para 62

127. The section 7 right to liberty also protects a sphere of personal autonomy involving “inherently private choices” that go to the “core of what it means to enjoy individual dignity and independence”.

Association of Justice Counsel v. Canada (Attorney General), 2017 SCC 55 at para 49.

128. In relation to both the protests and in-person worship, the Orders restrict the right of participants to make personal choices free from state interference.

Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44 [*Blencoe*] at para 54

129. With regard to protests, the imposition of constraints on the right to engage in political protest clearly engages this constitutionally guaranteed freedom. Similarly, the risk of imprisonment for continuing this activity and/or refusal to pay the fines obviously engages this area.

3. Right to security of the person

130. Security of the person is generally given a broad interpretation and has both a physical and psychological aspect.

131. It encompasses “a notion of personal autonomy involving...control over one's bodily integrity free from state interference”.

Rodriguez v British Columbia (Attorney General), [1993] 3 SCR 519 [*Rodriguez*], at 587-88 (para 136) per Sopinka J.

132. “Security of the person” is engaged by state interference with an individual’s physical or psychological integrity, including any state action that causes physical or serious psychological suffering.

New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46, at para 58
Blencoe at paras 55-57
Chaoulli v. Quebec (Attorney General), 2005 SCC 35 [*Chaoulli*], at paras. 43, 191 and 200
Carter at para 65

4. Fundamental justice

133. National security concerns—and by analogy, pandemics—cannot be used to excuse procedures that do not conform to fundamental justice at the section 7 stage of the analysis.

Charkaoui v Canada (Citizenship and Immigration), 2007 SCC 9, at paras 23, 27

134. The principles of fundamental justice include the principles against arbitrariness, overbreadth and gross disproportionality. There is considerable overlap between them as indicated below.

i. Arbitrariness

135. A deprivation of a right will be arbitrary and thus unjustifiably limit section 7 if it "bears no connection to" the law's purpose.

Bedford at para 111
Rodriguez at 594-95 (para 147);
Chaoulli at paras 129-30 and 232

136. In the absence of some justification in the medical evidence, the closure of gatherings for worship as opposed to a variety of secular activities is, amomg other things, clearly arbitrary.

137. According to what the Respondent must prove to refute the assertion of arbitrariness, there is something inherently unsafe about worshiping that, unlike so many secular activities, presents such an unacceptable public health risk that such worshiping must be banned.

ii. Overbreadth

138. Overbreadth deals with laws that are rational *in part* but that overreach and capture *some* conduct that bears no relation to the legislative objective. As stated in Bedford at paras 112-113:

> Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. For instance,...

> Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose. For example…

iii. Gross Disproportionality

139. Gross disproportionality targets laws that may be rationally connected to the objective but whose *effects* are so disproportionate that they cannot be supported. Gross disproportionality applies only in extreme cases where "the seriousness of the deprivation is totally out of sync with the objective of the measure".

Bedford at para 120

140. A prohibition on an activity for the purpose of stopping a harm that does not exist is rightly described as out of sync with the objective of the measure.

141. A clear example of this are restrictions confronting Alain Beaudoin in this matter. Even if a virus was so bold as to brave the icy chills of Dawson Creek in December, banning his outdoor protests is a good example of this constitutionally impermissible defect.

142. Equally clear of gross disproportionality is the impact on religious gatherings which Dr. Henry confirms, given the way they are conducted: "Dr. Henry herself confirmed: *"…we know that when these COVID safety plans are followed in settings like restaurants, event spaces, churches, temples, hotels, that we don't see transmission."*

Tab19 Aff #2, J. Koopman, para. 5

F. Section 15(1) of the *Charter*

> **15 (1)** Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, **religion**, sex, age or mental or physical disability.
> [Emphasis added]

143. McLachlin CJ and Abella J, writing in *R v Kapp*, quoted *Andrews*: "The promotion of equality entails the promotion of a society in which all are secure in the knowledge

that they are recognized at law as human beings equally deserving of concern, respect and consideration".

R v Kapp, 2008 SCC 41, at para15

144. Discrimination perpetuates or promotes "the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration".

Quebec (AG) v A, 2013 SCC 5, at para 417

145. The manner in which the Orders prohibit religious gatherings yet permit many secular gatherings has a discriminatory effect. For instance, they prevent gatherings for worship but exempt "a support group meeting" from such prohibition.

PHO Order, Gatherings and Events – February 10, 2021, "event" definition (page 5), Clause B (pages 9-10) and Clause C.1 (page 10)

146. Proof of legislative intent to discriminate is not required and the claimant need establish only that either the purpose or the effect of the law or action is discriminatory.

Law v Canada [1999] 1 S.C.R. 497 at paras. 76-83

147. Discrimination will be more easily established where government action fails to take into account the claimant's actual situation.

Law at para 69-71

148. A member of any group, disadvantaged or not, may successfully bring a section 15(1) claim if he or she establishes a distinction on an enumerated or analogous ground that amounts to substantive discrimination. It is not necessary to show historical disadvantage.

See Trociuk v British Columbia (Attorney General), 2003 SCC 34 at para 20

149. Government actions that take into account the claimant's actual needs, merits, capacities or circumstances in a way that respects his or her value as a human being are less likely to limit section 15(1), whereas those that reflect stereotypical assumptions and decision-making will be suspect.

Lavoie v Canada, 2002 SCC 23 at para. 44

Winko v British Columbia (Forensic Psychiatric Institute), [1999] 2 SCR 625 at para 88

G. Section 1 of the Charter

1. Justification, Freedom and Democracy

150. 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.

151. Regardless of whether this Court applies an *Oakes* or *Doré* section 1 analysis, this case will be determined on the basis of whether the Respondent proves that the Orders are "demonstrably justified in a free and democratic society."

152. The constitutional analysis is shaped by the terms "demonstrably justified", "free" and "democratic society".

153. This requires "cogent and persuasive" evidence which "makes clear to the Court the consequence of imposing or not imposing the limit."

Oakes para 68
R v Spratt, 2008 BCCA 340, para 30

154. The core issue in this matter is the necessity of restrictions imposed to prevent transmission of the SAR-CoV-2 virus, which must necessarily be determined by the evidence and the science provided to this Court, with regard to the Respondents' burden of proof.

155. The concept of "freedom" was perhaps most eloquently described by Chief Justice Dickson in *Big M Drug Mart*:

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to

> such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> *Big M Drug Mart* at para 94.

156. In regard to a “democratic society”, the Court concluded its discussion of Canada’s democratic principle the *Secession Reference* as follows:

> Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (*Saumur v. City of Quebec*, *supra*, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.
>
> *Reference re Secession of Quebec*,
> [1998] 2 SCR 217, para 68

157. The Orders at issue are not laws passed after legislative debate among the people’s elected representatives. As *per* the evidence, the platform for dissenting voices is limited to letter writing, which may be ignored for months without response by officials within the civil service.

AR Tab 18, Aff. #1, J. Sikkema, at paras 2-9, Ex A-C
Aff. #1, G. Vanderveen AR Tab 20 at paras 3-5, Ex A-C

158. This is not a case where “the contextual factors favour a deferential approach to Parliament” in determining whether the infringements on fundamental rights and freedoms “are demonstrably justified in a free and democratic society.” The risks and harms at issue are identifiable in the evidence, including expert evidence, before this Court. The Orders are of general application across the Province. They are subordinate legislation and their enactment was not subject to debate or public scrutiny.

Harper v Canada (Attorney General), 2004 SCC 33
at para 88

2. The *Oakes* Test Applies

159. The Orders are in substance laws of general application. Accordingly, the Petitioners submit that whether the *Charter* infringements resulting from these Orders are justified is to be determined on the basis of the *Oakes* test rather than the *Doré*/*Loyola* framework.

Oakes at pp 137-140 (paras 66-71)
Doré at paras 3-7, 36-39, 55-58
Loyola at paras 3-4, 35-42

i. The Oakes Test Applies In Relation to Rules of General Application

160. The Supreme Court of Canada has indicated that the *Oakes* test remains the applicable test in determining whether laws which violate *Charter* rights are justified under section 1 of the *Charter*. In *Doré*, the Court *per* Abella J referred to *Hutterian Brethren* to draw a distinction between the approach to be applied in "reviewing the constitutionality of a law" and that which should be applied in "reviewing an administrative decision that is said to violate the rights of a particular individual". In doing so, the Court effectively affirmed the statement of McLachlin CJ in *Hutterian Brethren* that "[w]here the validity of a law is at stake, the appropriate approach is a [section 1] *Oakes* analysis."

Doré at para 37 [Emphasis added]
Hutterian Brethren at para 66

161. A "law" in this context is broadly defined to include "binding rules of general application" which are "sufficiently precise to those whom they apply", and to which "the difficulty of applying" the *Oakes* test as outlined in *Doré* does not apply.

Doré at paras 36-39

162. This is reflected in *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*. 2018 ONSC 579, in which the Ontario Divisional Court held that the *Oakes* test applied to the question of whether policies created by the Ontario College of Physicians and Surgeons which engaged the *Charter* rights of Ontario doctors were justified under section 1.

CPSO ONSC at paras 56-68

163. Although the Ontario Court of Appeal chose not resolve the question of whether *Oakes* or *Doré*/*Loyola* is the applicable framework in that context, it nonetheless reviewed the lower court decision on the basis of the *Oakes* test.

Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of *Ontario*, 2019 ONCA 393 at paras 58-60

164. Further, the *Oakes* test was recently applied by the Supreme Court of Newfoundland and Labrador in the context of a *Charter* challenge to orders of general application issued by that province's Chief Medical Officer of Health—authorized by that jurisdiction's equivalent to the *PHA*—restricting entry into the province to prevent transmission of COVID-19.

Taylor v. Newfoundland and Labrador, 2020 NLSC 125 at paras 1-4, 399

ii. The Orders are Laws for the Purposes of the Charter

165. The Orders are rules of binding and general application, and are consequently "laws" for the purposes of *Charter* review.

166. The general application of these Orders is illustrated in clause B4 of their most recent iteration—issued on February 10, 2021—which states that "[n]o person may be present at an event except as provided for in this Order", with "event" being defined to refer "an in-person gathering of people in any place whether public or private, inside or outside, organized or not, on a time, regular or irregular basis", explicitly including "a worship or other religious service, ceremony or celebration" and a myriad of other activities which involve gathering amongst people in British Columbia.

PHO Gathering and Events Order – February 10, 2021, clause B4

167. As such, these Orders do not merely concern the rights or interests of an individual in a limited factual context. Instead, they apply to every single person present in British Columbia at a given time.

168. As just one example, none of the over 4 million residents of British Columbia can attend a service in any house of worship within the province's borders as prohibited by the PHO—unless they seek and are granted an exemption by the PHO—regardless of what their beliefs and their consciences otherwise demand of them.

169. Further, anyone in British Columbia who contravenes these Orders is subject to the risk of being fined or even imprisoned.

PHA, section 108(1)(a)

iv. The Oakes Test Applies to Review of the PHO's Charter Infringements

170. Given that the Orders are laws for the purposes of *Charter* review, the Respondents must therefore justify the *Charter* infringements which result from these Orders on the basis of the *Oakes* test.

3. Application of the *Oakes* Test

171. In light of the lack of evidence presented by the Respondents to demonstrate a disproportionate risk of COVID-19 resulting from the *Charter*-protected gathering activities at issue in this proceeding, the Respondents cannot meet the requirements of section 1 justification in accordance with the *Oakes* test.

i. The Onus of Proof Lies on the Respondents

172. Per section 1, the rights and freedoms set out in the *Charter* can only be "demonstrably justified in a free and democratic society." This "clearly indicates that the onus of justification is on the party" who has limited the *Charter* rights engaged. Consequently, the onus in this case is on the Respondents to prove, on a balance of probabilities, that the *Charter* infringements resulting from the Orders are justified in accordance with the *Oakes* test.

Oakes at pp 136-37 (para 66)

173. "[D]emonstrably justified" connotes a strong evidentiary foundation: the Respondents must demonstrate through cogent and persuasive evidence the "consequences of imposing or not imposing" the restrictions on gathering that are the subject of this proceeding. Whether the impugned restrictions are necessary to achieve their objective must be determined by evidence.

Oakes at page 138 (para 68)
R v Spratt, 2008 BCCA 340 at para 30

ii. The Objective of the Must be Pressing and Substantial, and there Must be Proportionality between that Objective and the Means Chosen to Achieve it

174. To meet this threshold, the Respondents must specifically prove that the objective of the impugned restrictions on gathering is "pressing and substantial", and that there is proportionality between this objective and means used to achieve it. Proving of the required proportionality requires a "rational connection" between the impugned restrictions and its objective, that those restrictions "minimally impair" the *Charter* rights

at stake, and that the salutary effects of the impugned restrictions outweigh their deleterious effect on the rights engaged.

Oakes at pages 138-140 (paras 68-71)
Canada (Attorney General) v Hislop, 2007 SCC 10 at para 44

iii. There is No Rational Connection Between the PHO's Objective and The Charter Infringements at Issue

175. According to the narrative set out by Deputy PHO Dr. Brian Emerson, the impugned restrictions on gathering imposed by the PHO came into effect because of an increase in COVID-19 cases and hospitalizations, beginning with an oral order specific to the Vancouver Coastal and Fraser health regions issued on November 7, 2020, and later extending province-wide with the Oral Order issued on November 19, 2020.

AR Tab 12, Aff. #1, Dr. B. Emerson, at paras 72-79

176. The Petitioners do not dispute the importance of the stated public health objective, the Respondents have established no rational connection between that objective and the specific restrictions at issue.

177. As confirmed by McLachlin CJ in *Hutterian Brethren*, section 1 requires the Respondents to "to show a rational connection between the infringement and the benefit sought on the basis of reason or logic." As also explained by Dickson CJ in *Oakes*, rational connection means that "the measures adopted must be carefully defined to achieve the objective in question" and "must not be arbitrary, unfair or based on irrational considerations."

Hutterian Brethren at para 48
Oakes at page 139 (para 70)

178. In *Bedford*, in the context of articulating the principles of fundamental justice under section 7 of the *Charter*, the Supreme Court of Canada explained that the question of arbitrariness turns on "whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose", adding that "[a] law which imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges" on the section 7 interest engaged." In other words, "there must be a rational connection between the object of the measure" and "the limit it imposes on section 7 interests". The same conception of arbitrariness is applicable here.

Bedford at para 111

179. As illustrated at Clause C of the October 30, 2020 iteration of the PHO's Gathering and Events Orders, at the time in which the impugned restrictions in question were imposed, "events" such as in-person worship services and outdoor public protests—though permitted—were generally restricted to fifty "patrons" at a time, subject to restrictions that were generally being followed by the Petitioner Churches. The PHO was not faced with a choice between leaving worship services and outdoor public protests unrestricted or prohibiting them entirely, as those activities were already being restricted by order of the PHO.

PHO Order, Gathering and Events Order – October 30, 2020, Clause C (pages 5-8)

180. Although Dr. Emerson deposes to there being "instances of COVID-19 exposures and transmission in religious settings" in British Columbia and elsewhere, he provided no evidence at all about what safety measures—if any—were being followed within those religious settings. Dr. Emerson also acknowledges "that it is possible that some of the cases that Health Authorities consider to have been associated with religious settings could have been acquired elsewhere in the community."

AR Tab 12, Aff. #1, Dr. B. Emerson, at paras 101-107

181. Dr. Joel Kettner--himself a former provincial Chief Medical Officer of Health and Chief Public Health Officer in Manitoba—states that there is a "significant gap of epidemiological evidence for the assertions of [the PHO] that there is a 'high risk of transmission in [religious] settings'." In fact, having reviewed and analyzed the data provided by Dr. Emerson concerning COVID-19 in such settings, Dr. Kettner projects that an extremely small proportion of reported COVID-19 cases in British Columbia in a defined period "have been associated with places of worship": namely, 7 out of 1,333 or [approximately 0.5%] of all reported cases, or one in 190 cases. This is even without factoring in the question of whether the PHO's required safety measures were being followed in these particular settings.

AR Tab 22, Aff. #1, Dr. J. Kettner, at paras 4, 61-65, 69

182. Dr. Thomas A. Warren—an infections disease specialist and Adjunct Assistant Clinical Professor at McMaster University—also notes that as of January 23, 2021, the number of COVID-19 cases in Canada "related to religious [gathering] outbreaks is […] only a fraction of <1%." Dr. Warren also notes that the number of COVID-related deaths in Canada linked to outbreaks in the sub-category of settings within which religious gatherings is included is 4 out of 18,974, or 0.02%.

AR Tab 21, Aff. #1, Dr. T. Warren, at paras 2-3, 36, 40, 42

183. The lack of a rational connection between the restrictions at issue and the subject activities is further pointed out by Dr. Emerson's evidence concerning publicly reported locations of COVID-19 exposures in the Fraser Health Authority, Vancouver Coastal Health Authority, and Island Health Authority. Of the identified exposure settings, only two of them are places of worship, with an exponentially higher number of them being bars, restaurants, or other places where the PHO continues to permit in-person gathering.

AR Tab 12, Aff. #1, Dr. B. Emerson, at paras 66-68 and Exhibits 14-16

184. There is no evidence to indicate COVID-19 transmission could be expected from worship services adhering to the safety steps prescribed in the October 30, 2020 Gathering and Events Order relative to other forms of in-person gathering permitted from November 2020 forward.

PHO Order, Gathering and Events Order – October 30, 2020, Clause C (pages 5-8)

185. Further, while Dr. Emerson states that "the data before the PHO does not demonstrate BC experiencing significant or routine transmission of COVID-19 from encounters at grocery and retail stores", this fails to account for the reality of patrons of such establishments being generally free to enter and leave at will, without any form of contact tracing: as Dr. Kettner notes, "[w]ithout complete and accurate data collection as could be obtained by contract tracing or enhanced surveillance, conclusions about comparative rates of transmission […] are often based on subjective 'experience' or other unscientific methods." Neither does Dr. Emerson's observation in this regard establish that "significant or routine transmission of COVID-19" has occurred in religious settings which have followed the safety measures adhered to by the Petitioner Churches and as were previously required in such settings by Dr. Henry herself.

AR Tab 12, Aff #1, Dr. B. Emerson, at para 108
AR Tab 22, Aff. #1, Dr. J. Kettner, at para 67

186. In fact, Dr. Henry publicly stated on October 26, 2020 that "when […] COVID-19 safety plans are followed in settings like restaurants, event spaces, churches, temples, hotels, that we don't see transmission."

AR Tab 19, Aff #2, J. Koopman, at para 5 [Emphasis added]

187. In relation to outdoor public protests, Dr. Emerson confirms that the PHO had no evidentiary basis to prohibit such activities: "the data before the PHO does not

demonstrate that BC is experiencing significant or routine transmission from outdoor protests or demonstrations."

AR Tab 12, Aff #1, Dr. B. Emerson, at para 19

188. In light of these considerations, it cannot be said that the impugned restrictions on in-person gatherings bear any rational connection to their objective, even on the basis of reason or logic. These restrictions are therefore unjustifiably arbitrary.

iv. The Impugned Restrictions Do Not Minimally Impair the Charter Rights they Infringe

189. The impugned restrictions on in-person gatherings do not minimally impair the *Charter* rights they infringe.

190. Under section 1 of the *Charter*, minimal impairment means that the impugned measure is unjustified if it does not "impair the protected right as little as reasonably possible", meaning that the measure "must be carefully tailored so that rights are impaired no more than necessary." The measures therefore must fall "within a range of reasonable alternatives". A failure to "explain why a significantly less intrusive and equally effective measure was not chosen" may be fatal to the impugned measure.

Oakes at page 139 (para 70)
Hutterian Brethren at para 54

191. Although Dr. Emerson deposes—without referring to any actual underlying evidence—that "the scientific community and public health officials"—have learned that "the likelihood of [COVID-19] transmission is greater" in relation to some activities which can be associated with in-person worship, the Respondents have tendered no evidence to indicate that the risks which Dr. Emerson associates with such activities cannot be mitigated by measures less extreme and drastic than outright prohibiting in-person worship entirely.

AR Tab 13, Aff #2, Dr. B. Emerson, at para 4

192. For example, Dr. Kettner states that "[i]f there is concern about compliance" with safety measures in the context of in-person worship, "public health inspectors or other enforcers could randomly inspect these settings and events, presumably as they are doing for other settings."

AR Tab 22, Aff. #1, Dr. J. Kettner at para 74

193. There is no evidence that the PHO considered any such alternative measures before resorting to outright prohibition of in-person worship services.

194. On the question of prohibiting outdoor public protests—there is simply no evidence that this would advance the objective of preventing transmission of COVID-19, and furthermore, no evidence that the PHO considered other measures short of prohibiting them entirely.

AR Tab 12, Aff #1, Dr. B. Emerson at para 109

195. The gathering restrictions at issue thus cannot be deemed to fall within a range of reasonable alternatives to achieve the objective of preventing transmission of COVID-19, and are consequently disproportionate and unjustified on this basis as well.

vi. The Severely Deleterious Effect of the Impugned Restrictions Outweigh any Salutary Effect Resulting from Them

196. The Orders have an egregiously severe and unprecedented deleterious effect on the *Charter* rights they infringe, without yield any discernable benefit established by evidence.

197. To be justified, the salutary effect of a measure which infringes *Charter* rights must outweigh their deleterious effect on the rights at issue. In other words, the Court must weigh the impact "on protected rights against the beneficial effect of the [measure] in terms of the public good."

Oakes at page 140 (para 71)
Carter at para 122

198. The PHO's impugned restrictions at issue here have had the effect of prohibiting any person in the province from the exercise of certain rights which are both fundamental to the democratic nature of our society and involve what are for many sacred practices which are compelled by their most deeply-held convictions.

199. It is hard to fathom a more drastic limitation on the free exercise of religion than to outright prevent its exercise in a communal and a collective fashion as commanded by conscience and divine decree, particularly when those engaged in such exercise have acted diligently and conscientiously to protect themselves and others from COVID-19 transmission.

200. It is also hard to fathom a restriction which strikes deeper into the beating heart of a free and democratic society than to prohibit the gathering of people for political protest, particularly at a time when public officials—the PHO included—are encroaching on the people's most fundamental of rights and freedoms on a scale unprecedented in our country's history.

201. These restrictions have even resulted in the traumatic spectacle of an officer of the law aggressively disrupting a worship service and demanding that a pastor cease preaching to his flock—a sight previously foreign to a free society such as Canada. They have also had the effect of disrupting the care given and received in houses of worship for the most vulnerable in our society in these most difficult of trying times.

202. In its effort to justify these measures, the Respondents provide no evidence to indicate that they have any measurable effect in protecting the public from the transmission of COVID-19 and the association harms which are expected to flow from that transmission.

203. Given their severe deleterious effect on the rights they infringe and the associated benefits to the public good resulting from the exercise of those rights, the Respondents must do far more than simply expect this Court to infer in an evidentiary vacuum that these measures have the salutary effect on public health which these measures were intended to achieve.

204. As such, the PHO's restrictions on in-person gathering at issue in this proceeding are not "demonstrably justified in a free and democratic society", and are consequently unconstitutional.

205. Even if the impugned Orders are reviewed as adjudicative administrative decisions under the standard of reasonableness, they cannot be found to be reasonable and justified limitations of the *Charter* rights and freedoms they limit.

4. The Orders are Unreasonable and Unjustified *per Doré/Loyola*

206. Should this Court conclude that *Doré/Loyola* is the applicable framework to review of the Orders on in-person gathering, the Petitioners submit that those restrictions—for the same reasons as stated in relation to the *Oakes* test—do not represent a proportionate balance between the *Charter* rights infringed any applicable statutory objective.

i. The Onus Remains on the Respondents to Justify the Charter Infringements at Issue

207. In light of both the language of section 1 itself and the decision of the Alberta Court of Appeal Decision in *UAlberta Pro-Life v the Governors of the University of Alberta*, 2020 ABCA 1, the burden to justify the *Charter* infringements at issue in this proceeding remains on the Respondents even under the *Doré/Loyola* framework. As written by Watson JA in that decision:

> To be consistent with the *Charter*, the limitation must, in my view, be demonstrably justified in a free and democratic society. Although that expression about demonstrable justification does not figure prominently in the cases from *Dore* onward, it is not erased from the *Charter* as linguistic frill. As pointed out in *Loyola*, at para 40, "*Doré*'s proportionality analysis is a robust one and "works the same justificatory muscles" as the *Oakes* test"[.]
>
> Furthermore, and of key importance, the onus on proving the 'section 1 limit' […] should be on the state agent as it is the exercise of power by an emanate of the state.

UAlberta Pro-Life v the Governors of the University of Alberta, 2020 ABCA 1 at paras 161-162

ii. Doré/Loyola Works the Same Justificatory Muscles as Oakes

208. As noted in *UAlberta* and indicated by Abella J in *Doré*, *Loyola* and *TWU*, the *Doré/Loyola* framework "'works the same justificatory muscles'" as the *Oakes* test, and finds "analytical harmony with the final stages of the *Oakes* [test] used to assess the reasonableness of a limit on a *Charter* right under [section 1]: minimal impairment and balancing."

Doré at para 5
Loyola at para 40
TWU at paras 80, 82

209. Both analyses therefore require that *Charter* rights are infringed "as little as reasonable in light of the state's particular objectives." In that sense, "[w]hen an [administrative] decision engages the *Charter*, reasonableness and proportionality become synonymous." As such, "a decision that has a disproportionate impact on *Charter* rights is not reasonable."

Loyola at paras 39-40
TWU at para 80

210. This robust conception of reasonableness remains intact even after the Supreme Court of Canada's decision in *Vavilov*. That case did not alter the requirements of the *Doré/Loyola* framework in relation to review of administrative decisions which engage *Charter* rights, as the Court held that "a reconsideration of that approach is not germane to the issues in this appeal."

Vavilov at para 57

211. In *LSBC v TWU*, the Court also explained that a reviewing court

> must consider whether there were other reasonable possibilities that would give effect to the *Charter* protections more fully in light of the objectives [….] If there was an option or avenue *reasonably* open to the decision maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant objectives, the decision would not fall within a range of reasonable outcomes [….] the question is whether the administrative decision-maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right.
>
> *LSBC v TWU*, para 36

212. The Orders do not "give effect, as fully as possible" to the *Charter* rights engaged by them. There is no evidence that the PHO considered measures that would have limited those rights in a less drastic and severe fashion.

213. Nor is there any evidence that the infringements at issue impugned restrictions further the objective which they were intended to serve. There is simply nothing to illustrate a causal link between these restrictions and a corresponding reduction in COVID-19 transmission.

214. In light of the severity of the deleterious impact of these restrictions on the fundamental rights engaged by the Orders, without corresponding benefit to the public interest, these restrictions are clearly disproportionate and unreasonable. Even when reviewed under the *Doré/Loyola* framework, they are irrevocably unconstitutional.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of February, 2021.

Paul Jaffe

Counsel for the Petitioners

Appendix A: Cases Cited

1. *Carter v Canada (AG),* 2015 SCC 5, paras 60-62, 65, 83-90, 122
2. *Crowder v. British Columbia (Attorney General)*, 2019 BCSC 1824, paras 37, 42
3. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, paras 53, 57
4. *Dunsmuir v New Brunswick*, 2008 SCC 9, para 58
5. *The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2018 ONSC 579, paras 56-69
6. *L'Association des parents de l'école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique*, 2011 BCSC 89, para 28
7. *Noyes v. Board of School Trustees, School District 30 (South Cariboo)*, 1985 CanLII 508 (BC SC), para 7
8. *R v Oakes*, [1986] 1 SCR 103, paras 66-71
9. *Doré v Barreau du Québec*, 2012 SCC 12, paras 3-7, 36-39, 55-58
10. *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, paras 3-4, 35-42, 60
11. *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32,paras 36, 64, 79-82
12. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, paras 48, 54, 66, 89, 95, 98
13. *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2016 SCC 54, para 122
14. *SL v Commission scolaire de Chenes*, 2012 SCC 7, para 23.
15. *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] SCR 927, para 52-55
16. *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62, paras 56, 61, 66, 72, 74
17. *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139, para 94
18. *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, para 41
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20. *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, paras 35, 56, 48, 64, 66, 121

21. *Ontario (Attorney General) v. Dieleman*, 1994 CanLII 10546, [1994] OJ No 1864 (QL), para 227

22. *R v Heywood*, [1994] 3 SCR 761, para 45

23. *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55, para 49

24. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, paras 54-57

25. *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, paras 136, 147

26. *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, para 58

27. *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, paras 43, 129-30,191, 200, 232

28. *Charkaoui v* Canada (Citizenship and Immigration), 2007 SCC 9, paras 23, 27

29. *R v Kapp*, 2008 SCC 41, para 15

30. *Quebec (AG) v A*, 2013 SCC 5, para 417

31. *Law v Canada* [1999] 1 SCR 497, paras 69-71, 76-83

32. *Trociuk v British Columbia (Attorney General)*, 2003 SCC 34, para 20

33. *Lavoie v Canada*, 2002 SCC 23, para 44

34. *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625, para 88

35. *R v Spratt*, 2008 BCCA 340, para 30

36. *Reference re Secession of Quebec*, [1998] 2 SCR 217, para 68

37. *Harper v Canada (Attorney General)*, 2004 SCC 33, para 88

38. Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of *Ontario*, 2019 ONCA 393, paras 58-60

39. *Canada (Attorney General) v Hislop*, 2007 SCC 10, para 44

40. *UAlberta Pro-Life v the Governors of the University of Alberta*, 2020 ABCA 1 at paras 161-162