

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, as represented by the ATTORNEY GENERAL OF BRITISH COLUMBIA and  
DR. BONNIE HENRY IN HER CAPACITY AS PROVINCIAL HEALTH OFFICER FOR  
THE PROVINCE OF BRITISH COLUMBIA

Respondents

**PRELIMINARY OBJECTION BRIEF**

**PETITIONERS MUST AMEND TO CHALLENGE RECONSIDERATION**

**A. OVERVIEW**

1. This is an application for relief under section 2 of the *Judicial Review Procedure Act*.<sup>1</sup> It is a basic principle of judicial review that an applicant must first exhaust all adequate statutory remedies and that review must be of a *final* decision. The Court of Appeal has drawn a corollary to this principle: *where a party has taken advantage of a reconsideration process, only the reconsideration decision may be judicially reviewed*.<sup>2</sup>

2. There are many reasons for this rule. It promotes judicial economy. It respects the institutional design choices of the legislature. Where initial orders must be made to manage a fluid situation, reconsideration allows for an opportunity to make individualized representations, a defined set of issues, a discrete record and reasons that are responsive to those representations, issues and record. This is crucial when the judicial task is to ensure internal coherence and respect

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<sup>1</sup> *Judicial Review Procedure Act*, RSBC 1996, c 241. Petition, filed 7 Jan 2021, Part I

<sup>2</sup> *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 [*Yellow Cab*] at para. 40.

for the factual and legal constraints of the reasoning process and its outcomes.

3. Although the Petition raises other issues, it is common ground that, at its core, is the issue of whether the restrictions on the freedom of religion and assembly of the petitioners other than Alain Beaudoin (the “Religious Petitioners”), created by the Gatherings and Events Orders<sup>3</sup> of Dr. Bonnie Henry in her capacity as the Provincial Health Officer, are proportionate limits on those freedoms.

4. Even before the Petition was brought, Dr. Henry encouraged the Petitioners to use the reconsideration process under section 43 of the *Public Health Act*<sup>4</sup> to seek if they sought a variance of the Gatherings and Events Orders. Section 43 also permits parties to draw to the attention of a health officer any information they say was not available at the time of an order, and requires reasons be issued.

5. After bringing the Petition, the Religious Petitioners invoked section 43 and submitted over 1000 pages of evidence. On February 25, 2021, Dr. Henry issued a decision, allowing a partial variance, permitting the Religious Petitioners to gather in-person outdoors with conditions. In addition to Dr. Henry’s reasons, the decision appends two reviews by Dr. Naomi Dove of the Office of the Provincial Health Officer and published articles relating both to transmission in religious settings and to modelling of epidemic dynamics on plausible assumptions about the transmission dynamics of new variants of the SARS-CoV-2 virus.

6. The rule set out by the Court of Appeal in *Yellow Cab* – that where a reconsideration decision addresses the merits of the party’s complaints, the reconsideration is the *only* decision that may be judicially reviewed– applies here. A party that does not seek interlocutory relief must await a final decision in the administrative process before proceeding to court. A party may not proceed with a judicial review of an original decision if it has invoked reconsideration.

7. The Respondents have been clear throughout this proceeding that this is their position and have worked as quickly as possible in the circumstances of an ongoing pandemic to provide a final decision on the Petitioners’ reconsideration request. That decision having now been made, the Petitioners must either amend their petition to seek judicial review of the reconsideration—which

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<sup>3</sup> Gatherings and Events Orders, dated [2 December 2020](#), [4 December 2020](#), [9 December 2020](#), [15 December 2020](#), [24 December 2020](#), [8 January 2021](#), [5 February 2021](#), [10 February 2021](#).

<sup>4</sup> *Public Health Act*, [SBC 2008, c. 28](#).

will put the proper record and decision are before the court on the merits—or the Petition must be dismissed in respect of the Religious Petitioners.

## **B. THE RECONSIDERATION PROCESS UNDER THE *PUBLIC HEALTH ACT***

8. [Section 43](#) of the *Public Health Act* states in relevant part:

### **Reconsideration of orders**

**43** (1) A person affected by an order, or the variance of an order, may request the health officer who issued the order or made the variance to reconsider the order or variance if the person

(a) has additional relevant information that was not reasonably available to the health officer when the order was issued or varied,

(b) has a proposal that was not presented to the health officer when the order was issued or varied but, if implemented, would

(i) meet the objective of the order, and

(ii) be suitable as the basis of a written agreement under section 38 [*may make written agreements*], or [...]

(2) A request for reconsideration must be made in the form required by the health officer.

(3) After considering a request for reconsideration, a health officer may do one or more of the following:

(a) reject the request on the basis that the information submitted in support of the request

(i) is not relevant, or

(ii) was reasonably available at the time the order was issued;

(b) delay the date the order is to take effect or suspend the order, if satisfied that doing so would not be detrimental to public health;

(c) confirm, rescind or vary the order.

(4) A health officer must provide written reasons for a decision to reject the request under subsection (3) (a) or to confirm or vary the order under subsection (3) (c).

(5) Following a decision made under subsection (3) (a) or (c), no further request for reconsideration may be made.

(6) An order is not suspended during the period of reconsideration unless the health officer agrees, in writing, to suspend it

9. The Gatherings and Events Orders are made under the authority of Dr. Henry, as a “health

officer” to issue “orders” under Part 4, Division 4 of the *Act*. There is no question that section 43 applies to them. (The subsequent “review” process under section 44 allows for review by the provincial health officer of orders of medical health officers and of environmental health officers by medical health officers, but does not apply to orders of the provincial health officer.

10. Reconsideration under s. 43(1)(a) requires identification of “additional relevant information that was not reasonably available to the health officer” at the time of the order. Reasons are required if reconsideration under s. 43(1)(a) is denied. Reconsideration under s. 43(1)(b) requires a “proposal” that could be in the form of an agreement under s. 38. Section 38 states as follows:

**May make written agreements**

**38** (1) If the health officer reasonably believes that it would be sufficient for the protection of public health and, if applicable, would bring a person into compliance with this Act or the regulations made under it, or a term or condition of a licence or permit held by the person under this Act, a health officer may do one or both of the following:

(a) instead of making an order under Division 1, 3 or 4, enter into a written agreement with a person, under which the person agrees to do one or more things;

(b) order a person to do one or more things that a person has agreed under paragraph (a) to do, regardless of whether those things could otherwise have been the subject of an order under Division 1, 3 or 4.

(2) If, under the terms of an agreement under subsection (1), a health officer conducts one or more inspections, the health officer may use information resulting from the inspection as the basis of an order under this Act, but must not use the information as the basis on which to

(a) levy an administrative penalty under this Act, or

(b) charge a person with an offence under this Act.

11. Although s. 54(1)(h) allows a provincial health officer not to reconsider an order under section 43 in an emergency,<sup>5</sup> Dr. Henry has not applied this section to the Gatherings and Events Orders. All of them contain the following language:

Under section 43 of the *Public Health Act*, you may request me to reconsider this Order if you:

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<sup>5</sup> *Public Health Act*, [s. 54\(1\)\(h\)](#). See Gatherings and Events Orders.

1. Have additional relevant information that was not reasonably available to me when this Order was issued,
2. Have a proposal that was not presented to me when this Order was issued but, if implemented would
  - (a) meet the objection of the order, and
  - (b) be suitable as the basis of a written agreement under section 38 [may make written agreements]
3. Require more time to comply with the order.

Under section 43(6) an Order is not suspended during the period of reconsideration unless the health officer agrees, in writing, to suspend it.

12. Public guidance is provided for the reconsideration process.<sup>6</sup>

### **C. FACTUAL BACKGROUND**

13. On December 18, 2020, on becoming aware of their decision not to abide by the Gatherings and Events Orders, Dr. Henry wrote to the Petitioners Brent Smith and Riverside Calvary Chapel and to the Petitioners John Koopman and Chilliwack Free Reformed Church. The letters stated in relevant part:

You will see that the Order includes an excerpt of section 43 of the *Public Health Act*, S.B.C. 2008, c. 28, which permits a person affected by an order under the Act to request that I reconsider the order. I have considered and approved case-specific requests in the past and am open to a request from your church. If you believe that your church can conduct its activities in a manner that meets the objectives of the Orders you may submit a written proposal to me in accordance with section 43(1) of the Act. Upon receipt of your request, I will evaluate your proposal and consider whether, in my view, your proposal satisfactorily minimizes the risk of transmission of COVID-19.

Again, I would like to encourage your church and faith-based organizations to accept the importance of compliance with this Order and the need to respect the difficult decisions of public health officials.<sup>7</sup>

14. Pastor John Koopman of the Free Reformed Church of Chilliwack responded on December 22, 2020, stating in relevant part:

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<sup>6</sup> Reconsideration Process for Provincial Health Officers Orders, 12 August 2020, Emerson #1, Ex. 12, pp. 161-2.

<sup>7</sup> Emerson #1, Ex. 44, p. 608 (to Riverside Calvary Chapel); Ex. 45, p. 634 (to Chilliwack Free Reformed Church).

With respect, your Order is a direct and substantial interference with the religious beliefs and practices of our Church. We are in legal jeopardy for practicing our faith because of your order.

Our Church has taken every reasonable precaution to minimize any risk of COVID-19 at our services, and our members have carefully observed these measures. There has been no transmission of COVID-19 at any of our numerous worship services this year.

[...]

Your offer to consider a request from our church to reconsider your Order sadly rings hollow. Any such decision by you would be discretionary and [revocable] at any time. Further, this offer fundamentally fails to address the central issue, which is the discriminatory and overbroad nature of your Order which directly prohibits an essential practice of our faith.

As many others have done, we urge you to allow in-person worship services.<sup>8</sup>

15. On January 29, 2021, after filing this Petition, counsel for the Petitioners provided a letter to counsel for the Respondents in the form of a request for reconsideration under section 43(1) of the *Public Health Act*. The letter noted counsel for the Respondents' understanding that the Koopman letter of December 22, 2020 was not a reconsideration request under section 43, and stated in relevant part:

[K]indly accept this letter as a formal request under section 43 of [the] *Public Health Act*, SBC 2008, c. 28 to your client, Dr. Henry, that she reconsider and suspend her order as against these churches upon reviewing the material we provided to her. We submit that the evidence clearly establishes a suitable basis for her exercise of discretion in this regard.<sup>9</sup>

16. The same day, counsel for the Respondents provided a letter stating it would be accepted as such and asking for clarification on certain points:

1. In the material provided, what, if anything is a proposal that if implemented would meet the objectives of the January 8 [Gatherings and Events] order and is suitable to a written agreement under section 38 of the *Public Health Act*? Please respond for each of Mr. Beaudoin and the three churches. If you wish to provide draft agreements under s. 38, that would be of assistance.

2. For each of these proposals, if the request is for a class of persons, please identify the class under s. 43(7) of the *Act*.

3. What material should the Provincial Health Officer look to as, in your clients' view, additional relevant information that was not reasonably available to her on January 8, 2021?

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<sup>8</sup> Emerson #1, Ex. 51, p. 660.

<sup>9</sup> Affidavit #1 of Vanessa Lever, made 2 February 2021 ("Lever #1"), Ex. D.

4. Can you confirm that you are not asking for more time to comply with the order under section 43(1)(c)?

5. I draw your attention to s. 43(6) of the *Public Health Act*, which provides that an order is not suspended unless the health officer agrees, in writing, to suspend it. If you are asking for suspension, please do that and provide your justification in writing.

6. If you are not asking for a suspension, please confirm that your clients will abide by the order until the reconsideration process is complete. If you are asking for a suspension, please confirm that your client will comply with the order while the suspension request is considered.<sup>10</sup>

17. On February 3, 2021, counsel for the Petitioners answered the first questions as follows:

1. The three specific churches propose that, for their in-person worship gatherings they continue to

maintain physical distancing of at least 2 metres between members of different households;

maintain contact tracing;

maintain the use of hand sanitizer and at all times of ingress and egress from the buildings; and

maintain the use of masks as Dr. Henry directed.

In addition, these churches also propose to continue to maintain their present practice of not having before and after worship coffee and other social events until such time as PHO orders permit and/or this litigation is decided on the merits.<sup>11</sup>

18. The February 3 letter stated that the additional relevant information that the Religious Petitioners sought to be considered under section 43 consisted in the affidavits filed as of that time in this Petition. The Religious Petitioners did not ask for more time to comply with the applicable Gatherings and Events Order or for a suspension pending determination of the section 43 application.

19. On February 14, 2021, counsel for the Respondents asked whether the Religious Petitioners were relying on the affidavits of Dr. Kettner and Dr. Warren, provided after the February 3 letter, as part of the record on reconsideration. Counsel for the Petitioners confirmed that if Dr. Henry was required to consider those opinions in order to grant the section 43 exemptions, the Religious Petitioners would expect her to consider them.<sup>12</sup> The affidavits and their exhibits, between them,

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<sup>10</sup> Lever #1, Ex. E.

<sup>11</sup> Affidavit #3 of Vanessa Lever (“Lever #3”) made 26 February 2021, Ex. A, p. 1.

<sup>12</sup> Lever #3, Ex. B, p. 3.

include over 1000 pages.

20. On February 25, 2021, Dr. Henry provided a response to the section 43 application. She was not prepared to give the variance requested by the Petitioners. She was prepared to give a conditional variance of the Gatherings and Events Order to the Religious Petitioners allowing outdoor weekly worship services, subject to adherence to a number of conditions. The variance does not have an expiry date, but may be withdrawn at any time if conditions exist that warrant doing so in the interests of protection public health.<sup>13</sup> Three and a half pages of reasons are added in justification of the conditional variance.<sup>14</sup> In addition, there is an enclosed update on COVID-19 Epidemiology and Modelling document prepared February 19, 2021 by the Public Health Agency of Canada, a scholarly article, and two reviews by Dr. Naomi Dove, MD MPH FRCPC, one of which specifically reviews the affidavits submitted by the Religious Petitioners.<sup>15</sup>

#### **D. LEGAL ARGUMENT**

##### **1) Where a Party Has Invoked a Reconsideration Process, the Result of That Process Is What Must Be Judicially Reviewed**

21. In a number of administrative contexts, the legislature provides for internal reconsideration processes. The Court of Appeal authoritatively considered the relationship between reconsideration processes and judicial review in the 2014 *Yellow Cab* decision.

There is a general principle that a party must exhaust statutory administrative review procedures before bringing a judicial review application: *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561. For that reason, where an alleged error comes within a tribunal's statutory power of reconsideration, a court may refuse to entertain judicial review if the party has not made an attempt to take advantage of the reconsideration provision. Of course, where the power of reconsideration is not wide enough to encompass the alleged error, reconsideration cannot be considered an adequate alternative remedy to judicial review, and the existence of the limited power of reconsideration will not be an impediment to judicial review.

Where a party has taken advantage of a tribunal's reconsideration power, and the tribunal has undertaken the reconsideration, it is the reconsideration decision that represents the final decision of the tribunal. In such a situation, it is only the

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<sup>13</sup> Affidavit #2 of Valerie Christopherson ("Christopherson #2") made 25 February 2021, Ex. B, pp. 11-12.

<sup>14</sup> Christopherson #2, Ex. B, pp. 13-16.

<sup>15</sup> Christopherson #2, Ex. B, pp. 18-67.



reconsideration decision that may be judicially reviewed, since it is the final decision of the tribunal.<sup>16</sup>

22. In the statutory scheme at issue in *Yellow Cab*, reconsideration required leave of the chair of the tribunal, which in that case was denied.<sup>17</sup> The Court of Appeal had to decide whether, in these circumstances, judicial review could be of the original decision or if it could only be of the failure to grant leave.<sup>18</sup> The specific holding of *Yellow Cab* is that whether an original decision can be judicially reviewed when leave to reconsider is denied depends on whether, in the context of the statutory scheme, a denial of leave constitutes a determination that the request for reconsideration lacks merit.<sup>19</sup>

23. However, the broader holding in *Yellow Cab* is that the principles that adequate administrative remedies must be exhausted and that judicial review must be of *final* administrative decisions have, as a necessary corollary, that where a party takes advantage of reconsideration, only the reconsideration decision may be judicially reviewed:

24. Since the decision in *Yellow Cab*, the British Columbia Supreme Court has consistently refused to consider judicial review of an original decision where there is a reconsideration decision.<sup>20</sup>

25. The reasons for this principle are on full display here. Reconsideration focuses the issues, the record and, in the case of reconsideration under section 43(1)(a) of the *Public Health Act*, it requires reasons. This is essential where the role of the court is to ensure internal coherence and

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<sup>16</sup> *Yellow Cab* at [paras. 39-40](#). Emphasis added. See *British Columbia Old Age Pensioners' Organization v. British Columbia Utilities Commission*, [2017 BCCA 400](#) at [para. 28-29](#).

<sup>17</sup> *Yellow Cab* at [para. 34](#).

<sup>18</sup> As found, in relation to the scheme of the *Labour Relations Code* in *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung*, [2011 BCCA 527](#).

<sup>19</sup> *Yellow Cab* at [para. 44](#).

<sup>20</sup> *Zara v. Rudling*, [2017 BCSC 161](#); *British Columbia Nurses' Union v. Health Sciences Association of British Columbia*, [2017 BCSC 343](#); *Singh v. British Columbia (Jobs, Tourism and Skills Training)*, [2017 BCSC 1408](#); *Howie v British Columbia (Labour Relations Board)*, [2017 BCSC 1331](#); *Jiang v You*, [2018 BCSC 791](#); *Albion Truck Repairs Ltd. v. British Columbia (Infrastructure and Transportation)*, [2018 BCSC 1010](#) at [para. 7](#); *Vernon (City) v Vernon Professional Firefighters' Association, I.A.F.F. Local 1517*, [2021 BCSC 277](#).

respect for factual and legal constraints of the reasoning process and its outcomes.<sup>21</sup>

26. The principle that judicial review is of the reconsideration decision applies with equal force when the basis for review is an alleged failure of an administrative decision maker to proportionately balance their statutory mandate with *Charter* rights, including freedom of religion.<sup>22</sup> The issue under *Doré* is whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play.<sup>23</sup> The relevant “decision” is the reconsideration decision, for precisely the same reasons as in non-*Charter* judicial review.

## 2) Petition Does Not Address Relevant Decision, Record or Reasons

27. The Petition has not been amended since it was filed – before the Religious Petitioners sought reconsideration under section 43. Insofar as the Religious Petitioners seek to challenge the Gatherings and Events Orders, the Petition does not address the relevant decision, record or reasons, let alone show that the decision is not a proportionate response to the Religious Petitioners’ *Charter* rights.

28. The Petitioners also impugn 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 on November 13, 2020 under section 10 of the *Emergency Program Act*<sup>24</sup> (the “Ministerial Order”).<sup>25</sup> The Ministerial Order in relevant part, contains enforcement provisions in respect of the Gatherings and Event Order. The Ministerial Order is therefore incidental to the Gatherings and Events Orders. With the exception of the issues raised by Mr. Beaudoin, the Petition cannot be heard on the merits until it has been amended and the Respondents are provided with a reasonable opportunity to amend their petition response and put the proper record before the court.

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<sup>21</sup> *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#) [Vavilov] at [para. 101](#).

<sup>22</sup> *Crook v British Columbia (Director of Child, Family and Community Service)*, 2019 BCSC 1954 at [para. 81](#), decision reversed on other grounds *Crook v. British Columbia (Director of Child, Family and Community Service)*, [2020 BCCA 192](#).

<sup>23</sup> *Doré v. Barreau du Québec*, [2012 SCC 12](#) at [para 57](#).

<sup>24</sup> RSBC 1996, c. 111.

<sup>25</sup> Food and Liquor Premises, Gatherings and Events (Covid-19) Order No. 2, [M416/2020](#).

29. The rule in *Yellow Cab* is not a discretionary one and cannot be avoided on the grounds that the Petitioners have an interest in early resolution. In any event, the Petitioners could have made submissions to the Provincial Health Officer asking for a suspension and chose not to. They have also chosen not to bring an interlocutory injunction application to this court, despite asking for it in the Petition. The Respondents have at all times acted to try to have the reconsideration decision brought and decided in as timely a way as possible. The Religious Petitioners' attempt to proceed with a judicial review of the Gatherings and Events Order in these circumstances, is prejudicial to both to the Respondents and to the administration of justice.

#### **E. PROPOSED RESOLUTION**

30. In the event that the court agrees that *Yellow Cab* precludes the Religious Petitioners from proceeding with their complaints until the Petition is amended to properly seek judicial review of the reconsideration decision, the Respondents propose that the hearing should, at minimum, be stood down for sufficient time for the Petitioners to amend the Petition and for the Respondents to seek instructions and amend in response. At that point, the parties will be in a position to address the most efficient way of moving forward with this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of March, 2021.



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J. Gareth Morley  
Jacqueline D. Hughes, Q.C.  
Emily Lapper

Counsel for the Respondents