No. S210209
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, 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

WRITTEN BRIEF OF THE RESPONDENTS

A. INTRODUCTION

1. We are in the midst of a terrible pandemic.[1] SARS-CoV-2, the virus that causes COVID-19, is new to humans: almost a year after its spread was designated as an emergency in this province under the *Public Health Act*[2] and *Emergency Program Act*[3], the overwhelming majority of British Columbians still do not have immunity to it. Without public health interventions, it would grow exponentially through the population, overwhelm the health system and cause many more deaths and serious illnesses than we have experienced so far. It has therefore been a fundamental objective of the Provincial Health Officer, Dr. Bonnie Henry, as the leading public health official in the province, to "flatten the curve" by avoiding sustained exponential growth of the virus.

2. Because the virus is spread through contact, one of the effective interventions is to

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[1] *Beaudoin v. British Columbia*, 2021 BCSC 248 at para. 1.
[2] *Public Health Act*, SBC 2008, c. 28.
[3] *Emergency Program Act*, RSBC 1996, c. 111.

restrict people from gathering together. Restrictions on people gathering together necessarily limit rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*, including freedom of religion, freedom of expression and freedom of peaceful assembly. Through the pandemic, Dr. Henry has consistently expressed her awareness of these impacts, of her mandate to protect public health, and of her duty to do so in a way that is proportionate to those impacts.

3. During the first wave of the pandemic in British Columbia, Dr. Henry decided to limit the number of people who could attend gatherings and events, including in religious settings, and to require those sponsoring such gatherings or events to abide by safety plans. Guidance was provided that allowed activities such as in-person services or ceremonies if certain precautions were taken. This generally worked in the summer of 2020. But because the virus is seasonal, British Columbia was hit with a second wave in the fall of 2020. Based on the information before her, Dr. Henry found that our healthcare system and ability to monitor the virus was "strained" so that if nothing changed, we were facing a crisis. As the fall wore on, case counts and outbreaks increased, and modelling showed that the situation could dramatically worsen if personal contact was not substantially reduced.

4. In November 2020, Dr. Henry took more drastic measures. First in the Vancouver Coastal and Fraser Health Regions (November 7) and then province-wide (November 19), she issued new orders that prohibited anyone from attending, organizing, hosting or permitting the use of a place for an "event", i.e. an in-person gathering of people. There were some exceptions. Religious instruction of children, baptisms, weddings and funerals were among the exceptions. But periodic in-person collective services were not.

5. The Petitioners concede that public health is a sufficiently important objective that it can justify limits on *Charter* rights.[4] But they ask this Court to say that the measures Dr. Henry has taken are arbitrary, irrational and disproportionate, and therefore not reasonable limits demonstrably justified in a free and democratic society.

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[4] Petitioners' Submissions, para. 176.

6. The Respondents disagree. They say the question before this Court is not whether Dr. Henry reached the correct balance, but whether, on the information available to her, she acted within the reasonable range of alternatives. But on any test, the limits she imposed were proportionate to the peril.

7. The Respondents' submission is organized as follows:

a. First, it sets out a fundamental problem with the Petition, namely that it seeks to judicially review an original decision that the Petitioners themselves asked Dr. Henry to reconsider under s. 43 of the *Public Health Act.* As the Court of Appeal has explained, a party that invokes reconsideration must seek judicial review of the result of the reconsideration, not the decision reconsidered. Alain Beaudoin's claim for judicial review should be dismissed for a different reason, namely that it is moot.

b. Next, the submission will set out the orders in question, the reasons for them and how they evolved.

c. It will then set out the case law about what evidence can be considered as part of the "record of proceeding" on judicial review. Judicial review is a supervisory jurisdiction, and only evidence that was before the decision maker can be used to impugn the decision made. This applies equally to constitutional cases as to non-constitutional ones. And with a suitably contemporary understanding of the "record", it applies to decision makers like Dr. Henry as much as it does where the decision-making processes look more like that of a court.

d. Based on these principles, the submission next identifies the relevant record for the purposes of the application for judicial review of the impugned orders. Some evidence can be considered for the limited purposes of establishing standing and considering whether the Petitioners have exhausted their statutory remedies. Dr. Kettner and Dr. Warren's affidavits are not part of the record of proceeding on any account.

e. The next part of the submission develops the framework for legal analysis. Because this is a challenge to discretionary decisions by statutory decision makers, the court must ask, using a reasonableness standard of review, whether those decision makers proportionately balanced their statutory objectives in light of the impact on constitutionally-protected interests. While freedom of religion, expression and peaceful assembly are clearly at stake, there is no evidentiary basis for section 7 or section 15 *Charter* claims.

f. Finally, we will argue that applying the framework for analysis to this record, Dr. Henry and the Minister of Public Safety and Solicitor General acted reasonably and proportionately. The Petition should therefore be dismissed.

B. PRELIMINARY OBJECTION: ONCE RECONSIDERATION IS INVOKED, ONLY RECONSIDERATION DECISION CAN BE JUDICIALLY REVIEWED

8. This is an application for relief under section 2 of the *Judicial Review Procedure Act*.[5] 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 bright line rule as a corollary to this principle: ***where a party has taken advantage of a reconsideration process, only the reconsideration decision may be judicially reviewed.***[6]

9. 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 and create a defined set of issues, discrete record and reasons that are responsive to those representations, issues and record. This assists the judiciary fulfil its task is of ensuring the fairness and rationality of the administrative process as a whole.

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[5] *Judicial Review Procedure Act*, RSBC 1996, c 241. Petition, filed 7 Jan 2021, Part 1
[6] *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 [*Yellow Cab*] at para. 40.

10. The core of the Petition 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[7] of Dr. Bonnie Henry in her capacity as the Provincial Health Officer, are proportionate limits on those freedoms in light of their public health objectives.

11. Even before the Petition was brought, Dr. Henry encouraged the Petitioners to use the reconsideration process under section 43 of the *Public Health Act*[8] 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.

12. 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.

13. 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.

14. The Respondents have been clear throughout this proceeding that this is their

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[7] 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.
[8] *Public Health Act*, SBC 2008, c. 28.

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 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.

1) The Reconsideration Process Under the *Public Health Act*

15. 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

16. 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.)

17. 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
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> (a) levy an administrative penalty under this Act, or
>
> (b) charge a person with an offence under this Act.

18. Although s. 54(1)(h) allows a provincial health officer not to reconsider an order under section 43 in an emergency, [9] 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:
>
> 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.

19. Public guidance is provided for the reconsideration process.[10]

2) Chronology of Reconsideration Application

20. 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

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[9] *Public Health Act*, s. 54(1)(h). See Gatherings and Events Orders.
[10] Reconsideration Process for Provincial Health Officers Orders, 12 August 2020, Emerson #1, Ex. 12, pp. 161-2.

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 form 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.[11]

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

> 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.[12]

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[11] Emerson #1, Ex. 44, p. 608 (to Riverside Calvary Chapel); Ex. 45, p. 634 (to Chilliwack Free Reformed Church).
[12] Emerson #1, Ex. 51, p. 660.

22. 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.[13]

23. 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?
>
> 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.
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> 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

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[13] Affidavit #1 of Vanessa Lever, made 2 February 2021 ("Lever #1"), Ex. D.

> you are asking for a suspension, please confirm that your client will comply with the order while the suspension request is considered.[14]

24. 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
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> maintain physical distancing of at least 2 metres between members of different households;
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> 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.[15]

25. 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.

26. 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.[16] The affidavits and their exhibits, between them, include over 1000 pages.

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[14] Lever #1, Ex. E.
[15] Affidavit #3 of Vanessa Lever ("Lever #3") made 26 February 2021, Ex. A, p. 1.
[16] Lever #3, Ex. B, p. 3.

27. 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.[17] Three and a half pages of reasons are added in justification of the conditional variance.[18] 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.[19]

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

28. 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.
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> Where a party has taken advantage of a tribunal's reconsideration power, and the tribunal has undertaken the reconsideration, it is the

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[17] Affidavit #2 of Valerie Christopherson ("Christopherson #2") made 25 February 2021, Ex. B, pp. 11-12.
[18] Christopherson #2, Ex. B, pp. 13-16.
[19] Christopherson #2, Ex. B, pp. 18-67.

> reconsideration decision that represents the final decision of the tribunal. In such a situation, it is only the reconsideration decision that may be judicially reviewed, since it is the final decision of the tribunal.[20]

29. In the statutory scheme at issue in *Yellow Cab*, reconsideration required leave of the chair of the tribunal, which in that case was denied.[21] 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.[22] 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.[23]

30. 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.

31. 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.[24]

32. 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

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[20] *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.
[21] *Yellow Cab* at para. 34.
[22] 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.
[23] *Yellow Cab* at para. 44.
[24] *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.

internal coherence and respect for factual and legal constraints of the reasoning process and its outcomes.[25]

33. The Petitioners' note that the record does not include specific reference to the activities they themselves conduct, as opposed to religious activities broadly.[26] This is an inevitable feature of "class" orders, as authorized by section 39(3) of the *Public Health Act.* The *Public Health Act* responds to this problem with section 43(1)(b), which permits members of a class subject to an order to identify their own circumstances and make a proposal that would meet the objectives of the order.

34. In their oral argument, the Petitioners also complain it would be unfair for a person affected by an order not to be able to put in their own evidence if it has not been considered by the health officer. The *Public Health Act* addresses this issue with section 43(1)(a), which provides precisely this opportunity and requires reasons if the information is not accepted.

35. 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.[27] 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.[28] The relevant "decision" is the reconsideration decision, for precisely the same reasons as in non-*Charter* judicial review.

36. This makes sense, so long as the decision maker can address the *Charter* issue on

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[25] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at para. 101.
[26] Petitioners' Submission, para. 82.
[27] *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.
[28] *Doré v. Barreau du Québec*, 2012 SCC 12 at para 57.

reconsideration.

4) Petition Does Not Address the Relevant Decision, Record or Reasons

37. 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.

38. 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*[29] (the "Ministerial Order").[30] 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.

39. 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.

5) Alain Beaudoin's Complaint is Moot

40. As is acknowledged by the Petitioners, Mr. Beaudoin is no longer prohibited from engaging in protests against the federal or provincial government's approach to COVID-

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[29] RSBC 1996, c. 111.
[30] Food and Liquor Premises, Gatherings and Events (Covid-19) Order No. 2, M416/2020.

19. There is no relief this court can give him. Whether the constitutionality of a prohibition on outdoor protests has an impact on his violation tickets is properly before the judicial justice or provincial court judge who eventually hears that proceeding. The merits or legality of alleged actions of police officers cannot be adjudicated in a proceeding to which those police officers are not parties. There is no reason for the court to exercise its discretion to consider a moot issue in this case.

C. THE ORDER UNDER REVIEW

1) The Gatherings and Events Orders Are the Critical Decisions Under Review

41. The Petition impugns the following enactments, which it collectively defines as the "Orders"[31]:

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 on November 13, 2020 ("the Ministerial Order"),[32] enacted under s. 10 of the *Emergency Program Act.* The Ministerial Order was incorporated into the *Covid-19 Related Measures Act*[33] by being added to Schedule 2 of that *Act*.[34] The Ministerial Order was renumbered as Item 23.5 of Schedule 2 of the *Covid-19 Related Measures Act* on January 8, 2021.[35]

b. Orders made by the Provincial Health Officer, entitled "Gatherings and Events" orders, under sections 30, 31, 32 and 39(3) of the *Public Health Act.*[36] The Petition states that the earliest impugned order is an oral order of Dr. Henry on November 19, 2020[37] and then identifies additional written orders with

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[31] Petition, Part 1, para. 1
[32] Food and Liquor Premises, Gatherings and Events (Covid-19) Order No. 2, M416/2020.
[33] *Covid-19 Related Measures Act*, SBC 2020, c. 8, Sched. 2.
[34] B.C. Reg. 269/2020, deposited 17 November 2020.
[35] OIC 4/2021, ordered and recorded 8 January 2021.
[36] *Public Health Act*, Part 4, Divisions 4 (Orders Respecting Health Hazards and Contraventions) and 5 (Making and Reviewing Orders).
[37] The transcript of the oral order of 19 November 2020 is found at Affidavit of Dr. Brian Emerson #1, made 2 February 2021 ("Emerson #1"), Exhibit 28, p. 306 ("I am extending the regional orders that currently apply to the Fraser and Vancouver health regions across the entire

specific dates, in relation to which there have been subsequent repeals and replacements.[38]

c. Violation Tickets AJ19780619, AJ06525763, AJ13323225, AJ13323259, AJ16458508, AH96863545, AJ17179822 and AJ16958269 (the "Violation Tickets").

42. The primary source of the restrictions on conduct complained about by the Petitioners, however, are the Gatherings and Events Orders. It is the Gatherings and Events Orders that are the product of a balance between individual freedoms and public health, based on the application of statutory and *Charter* principles to a factual situation by an expert decision maker. They will be the subject of the bulk of the submissions.

43. The Respondents have no specific information about the Violation Tickets beyond that supplied by the Petitioners. The Respondents will briefly make submissions that seeking judicial review of the Violation Tickets when they have yet to be adjudicated is a collateral attack and that their validity does not depend on the constitutionality of the other Orders (as defined by the Petitioners), but will not be submitting any factual record in relation to any of the Violation Tickets.

44. The Ministerial Order was a regulatory instrument between 13 November 2020 and 17 November 2020, when it was incorporated into the *Covid-19 Related Measures Act*. It is now therefore part of a statute. Section 4 of the Ministerial Order has the effect of prohibiting a person from promoting a gathering or event prohibited by the Gatherings and Event Order in force at the time. Section 5 of the Ministerial Order requires a person who attends or promotes a gathering or event so defined to comply with a direction of an

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province and am putting new province-wide orders in place"), p. 307 ("All indoor and outdoor events as defined in my gatherings and events orders are not allowed to take place until further notice.") ("While places of worship are to have non in-person group services for this period of time […] the exceptions will be those important events – funerals and weddings and ceremonies such as baptisms – which may proceed in a limited way with a maximum of ten people including the officiant."). Throughout this submission, page references will be to exhibit pages of affidavits.

[38] 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.

enforcement officer, including a direction to disperse. The Ministerial Order does not specify what gatherings or events are prohibited, which is determined by the Gatherings and Events Order, as amended.

45. The recitals for the Ministerial Order state as follows:

> WHEREAS a declaration of a state of emergency throughout the whole of the Province of British Columbia was declared on March 18, 2020 because of the COVID-19 pandemic;
>
> AND WHEREAS additional enforcement measures for the operation of food service and liquor service premises, as well as gatherings and events, are necessary to protect public safety and alleviate the effects of the COVID-19 pandemic;
>
> AND WHEREAS section 10 (1) of the *Emergency Program Act* provides that I may do all acts and implement all procedures that I consider necessary to prevent, respond to or alleviate the effects of any emergency or disaster…

46. This submission will briefly address both the administrative-law reasonableness and *Charter* implications of the Ministerial Order. To the extent it applies to the conduct of the Petitioners, the justification comes largely from the reasons for the Gatherings and Events Orders. The record and reasons for the Gatherings and Events Orders are therefore the critical building blocks for the determination of the petition as a whole.

2) <u>Dr. Henry's Reasons for the Orders</u>

47. In the November 7, 2020 verbal order, Dr. Henry gave the following reasons why, given the facts as she found them, she was making the orders in the Vancouver Coastal and Fraser health regions:

a. From the outset of the pandemic, the goal of the COVID-19 response had been "to maintain capacity within our health care system" to protect those suffering from COVID-19 and other illnesses. A breakdown would especially affect the most vulnerable, including seniors. Urgent action was necessary to avoid the serious consequences of a breakdown of the health system and to avoid closing

schools and workplaces.[39]

b. It was "very important" to reduce social interactions in the two most affected regions.[40]

c. Exponential growth, particularly in Fraser Health and Vancouver Coastal Health regions, was the reason to take additional actions because not acting would lead to a rapid increase in people being affected in those regions. [41]

d. Without action, the ability to contact trace effectively could be lost and thereby the ability to control the pandemic effectively and knowledgeably. [42]

48. In extending the measures province-wide on November 19, 2020, Dr. Henry gave the following reasons why the facts, as she had laid them out, supported the action being taken:

a. The virus can have tragic effects on the people we are closest to and to the people we love.[43]

b. Increased activity in terms of community transmission, outbreaks and effects on the health care system in every health authority in the province mean we "now need to do more".[44]

c. We need to keep our essential services, our essential activities open and operating safely.[45]

d. We need to keep schools and workplaces open safely.[46]

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[39] Emerson #1, Ex. 23, pp. 247-8.
[40] Emerson #1, Ex. 23, p. 248.
[41] Emerson #1, Ex. 23, p. 252
[42] Emerson #1, Ex. 23, p. 252
[43] Emerson #1, Ex. 28, p. 306.
[44] Emerson #1, Ex. 28, p. 306.
[45] Emerson #1, Ex. 28, p. 306.
[46] Emerson #1, Ex. 28, p. 306.

e. We need to relieve stress on the health care system. If this does not occur, people with COVID-19 and with other urgent health issues will suffer.[47]

f. Measures would be reviewed every two weeks, which is the incubation period for a clear and notable difference and slowing of transmission, for "balance and control".[48]

g. Transactional gatherings were not prohibited, but masks were required. A group was tasked with looking at physical exercise indoors, and some activities were prohibited. The information was that poorer ventilation and often loud music is where there was higher risk.[49]

h. Generally, the prohibited activities were narrowed down to those that were felt to be too high-risk, with all others required to adhere to new guidelines.[50] Dr. Henry emphasized the importance of managing the pandemic by "flattening the curve" and keeping the economy functioning and schools open.[51]

49. In announcing her oral order of November 19, 2020, Dr. Henry stated the following:

> While places of worship are to have no in-person group services for this period of time – I've had the privilege of meeting with a number of faith leaders from around the province – and this is important and they understand we need our faith services more than ever right now but we need them to do them in a way that's safe. With the community transmission that we're seeing and the fact that we have seen transmission in some of our faith-based settings.
>
> We need to suspend those and support each other and find those ways to care for each other remotely.

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[47] Emerson #1, Ex. 28, p. 306.
[48] Emerson #1, Ex. 28, p. 306.
[49] Emerson #1, Ex. 28, pp. 308-9.
[50] Emerson #1, Ex. 28, p. 310.
[51] Emerson #1, Ex. 28, p. 311

> The exceptions will be those important events – funerals and weddings and ceremonies such as baptisms – which may proceed in a limited way with a maximum of ten people including the officiant.[52]

50. The last recital linked these facts to Dr. Henry's legal authority and to the decision made:

> I have reason to believe and do believe that
>
> (i) the risk of an outbreak of COVID-19 among the public constitutes a health hazard under the *Public Health Act*;
> (ii) there is an immediate and urgent need for focused action to reduce the rate of the transmission of COVID-19 which extends beyond the authority of one or more medical health officers;
> (iii) coordinated action is needed to protect the public from the transmission of COVID-19;
> (iv) and that it is in the public interest for me to exercise the powers in sections 30, 31, 32 and 39(3) of the *Public Health Act.*[53]

51. On December 7, 2020, Dr. Henry publicly stated the following specifically in relation to religious organizations objecting to the Gatherings and Events Order:

> It is a challenge. I know. There are many faith groups. There are a few faith groups that are continuing to meet and that concerns me. It concerns me because it is a misunderstanding of why we are trying to put restrictions in place. These restrictions are about recognizing there are situations where this virus is spreading rapidly, and we have seen when we come together and congregate indoors, in particular, those are settings where the virus is transmitted, despite our best efforts, despite the measures that we have had in place for several months that were working for many months. We are now seeing that those are not enough right now.[54]

52. Dr. Henry provided additional reasons to the Religious Petitioners in her letters of December 18, 2020. She told them as follows:

> It is necessary for me to make these orders since the gather[ing] of people in person is resulting in significant community transmission of COVID-19 in BC.

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[52] Emerson #1, Ex. 28, p. 307.
[53] Emerson #1, Ex. 29, p. 324
[54] Emerson #1, Ex. 34, p. 406.

> In recent weeks the number of COVID-19 cases in the province has escalated precipitously. The epidemiological data in BC demonstrates that a number of cases of transmission of the virus have occurred from religious gatherings including temples, churches and other religious settings.
>
> In making the most recent orders, I have weighed the needs of persons to attend in-person religious services with the need to protect the health of the public. The limitations on in-person attendance at worship services in the Orders is precautionary and is based on current and projected epidemiological evidence. It is my opinion that prohibiting in-person gatherings and worship services is necessary to protect people from transmission of the virus in these settings.
>
> You will see from the written order that religious services can continue by using remote or virtual attendance options (such as Zoom or Skype), outside drive-in services and that individuals may still visit a place of worship for individual contemplation or personal prayer.
>
> I am aware that some people do not agree with my decision to prohibit in-person religious services, since other types of activities such as people visiting restaurants or other commercial establishments are permitted with restrictions. In my view, unlike attending a restaurant or other commercial or retail operation (all of which are subject to WorkSafe COVID-19 Safety Plans) experience has shown it is particularly difficult to achieve compliance with infection-control measures when members of a close community come together indoors at places of worship.
>
> Unlike dining with one's household members in a restaurant, or visiting an establishment for short-term commercial purposes, it is extremely difficult to ensure that attendees keep appropriate physical distance from each other in the intimate setting of gatherings for religious purposes attended by persons outside of each attendee's own household. Additionally, singing, chanting and speaking loudly are proven to increase the risk of infection when indoors.

53. On February 12, 2021, Dr. Henry provided the following reasons, specifically for why safety protocols accepted in other circumstances were not sufficient for regular in-person religious services:

> Reporter: Dr. Henry, I would like to ask you if churches were able to put in the same safety protocols as bars, restaurants and health clubs, what is it about churches or other religious gathering points that still makes them more of a public health threat for the spread of the virus?

Henry: I think we need to look back on what we were seeing. And this is something that is not unique to this pandemic. We have seen it with other outbreaks as well – that the nature of the interaction, the social interaction that you have with a faith group is fundamentally different than some of the transactional relationships we have if we're going to a store or even an individual working out in a gym, an individual going to a restaurant with your small group of people.

Having said that, we engaged very early with faith leaders across the province. And they recognize the important role that they play. I just want to reiterate, we know how important – essential – faith services are for people and for communities across BC. And that is why we have been working with faith community leaders since March of last year.

And we stopped all of those types of interactions when we were learning about this virus, and what was happening with this virus, and how it was transmitted, and in what situations it was being transmitted last March. And then when we reopened gatherings, and particularly faith gatherings, we did talk with the community about what were the things that made it safer.

And those measures were in place. We limited numbers, we had spacing, we introduced masks when that was needed. We talked about different things that happen in different – whether it's church, or a gudwara, or a temple, or a synagogue – and we tried to make rational approaches that would support people.

We also know that there is a demographic that goes to many faith services that is older and more at risk in some cases. So we needed to take that into account. And we were able to allow and to have active in-person services through most of the summer and into the fall.

As with many other things, as we got into the respiratory [season], we saw the transmissibility of the virus increasing. And what we were seeing was that there was transmission in a number of faith settings despite having those measures in place. So that spoke to us about there was something about those interactions that meant that the measures that we thought were working were no longer good enough to prevent transmission in its highly transmissible state during the winter respiratory season.

So it was because of that we put in additional measures to stop the in-person services starting at the end of November. It really was because we were seeing, despite people taking their best precautions, we were still seeing transmission. We were seeing people ending up in hospital, and sadly, we had some deaths in particularly older people who were exposed in their faith settings.

> I want to get back – and I have been talking with the faith leaders – as soon as we can. Once we're out of that danger zone; once we understand what's happening with these variants; once we get our community levels low enough that it's not that risky any more, then absolutely. We will be going back to those safety precautions that we know work.[55]

3) <u>Decision to Exempt Outdoor Protests</u>

54. As already mentioned, the February 10, 2021 Gatherings and Events Order included the following:

> I further recognize that constitutionally-protected interests include the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*, including specifically freedom of religion and conscience, freedom of thought, belief, opinion and expression, freedom of peaceful assembly and freedom of association. These freedoms, and the other rights protected by the *Charter*, are not, however, absolute and are subject to reasonable limits, prescribed by law as can be demonstrably justified in a free and democratic society. These limits include proportionate, precautionary and evidence-based restrictions to prevent loss of life, serious illness and disruption of our health system and society. 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.[56]

55. As a consequence, outdoor assemblies for the purpose of communicating a position on a matter of public interest or controversy is an exception to the prohibition on "events" in the Gatherings and Events Order. It continues to be an expectation that persons follow recommended guidelines.

D. THE ONLY RELEVANT EVIDENCE IS WHAT WAS BEFORE THE PHO

56. With limited exceptions, in an application for judicial review, the evidence is

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[55] Christopherson #2, pp. 7-8.
[56] Christopherson #1, Ex. A (February 10, 2021 Gatherings and Events Order)

confined to the record before the decision maker.[57] The "record of proceeding" is defined in s. 1 of the *Judicial Review Procedure Act*.[58] It includes a "document produced in evidence before the tribunal" and "the decision of the tribunal and any reasons given for it."

57. A "tribunal" is broadly defined in s. 1 of the *JRPA* as "one or more persons, whether or not incorporated and however described, on whom a statutory power of decision is conferred." A health officer exercising authority under Part 4, Division 4 of the *Public Health Act* is therefore clearly a "tribunal" in the relevant sense.

58. The restriction of the evidence properly admissible on judicial review is not discretionary. The principle, and the basis for any exceptions, was set out authoritatively by the Court of Appeal in *Air Canada* [59]as follows:

> The function of a court on judicial review is supervisory. The court must ensure that a tribunal has operated within legal norms. Courts are, in a very strict sense, reviewing what went on before the tribunal. They are not undertaking a fresh examination of the substantive issues. For that reason, judicial review normally concerns itself only with evidence that was before the tribunal [citations omitted].[60]

59. The ancient principle that judicial review is on the record is sound, but must be understood in a contemporary way, inclusive of all the material looked at by the statutory decision maker, regardless of whether that would traditionally have been understood to be part of the "record."[61]

60. In *Air Canada*, the Court of Appeal explained that viewed in this more contemporary light, what had sometimes been considered "exceptions" to this principle

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[57] *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353; *Albu v. The University of British Columbia*, 2015 BCCA 41 at para. 35-36. *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41 at para. 52, and cases cited there.
[58] *Judicial Review Procedure Act*, RSBC 1996, c 241, s. 1 "**record of proceeding"** [*JRPA*].
[59] *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 [*Air Canada*].
[60] *Air Canada* at para. 34.
[61] *Air Canada* at para. 35.

could in fact be reconceptualized as applications of it.

> A court must also recognize that, particularly in the case of tribunals operating in specialized domains and tribunals that are not adjudicative in nature, the tribunal's own expertise and experience will inform its decisions. Courts are generally required to defer to a tribunal's expertise, not ignore it. For that reason, there must be mechanisms available that allow a court to gain an understanding of the foundation from which a tribunal approaches problems in front of it. Appropriately circumscribed affidavits explaining that foundation can be proper on judicial review.[62]

61. The "key question" is whether the evidence sought to be admitted is consistent with the supervisory role of the court.[63] Where, as here, the issue is the substantive reasonableness of the statutory decision maker's decision, then it would be inconsistent with the supervisory role of the court to include any information that was not before the statutory decision maker or could be presumed by it as the "common understanding of those operating in a particular field."[64]

62. The principle that the evidence on a judicial review application is limited to the record before the decision maker (in the contemporary sense elucidated in *Air Canada*) applies with equal force when the decision is challenged on constitutional grounds.[65] It does not matter whether the issue that is the basis of review is one on which correctness or reasonableness is the standard – either way, correctness or reasonableness is determined on the record.[66] Constitutional evidence of issues that are not contested or that should have been put before the decision maker are not admissible if they were not.[67]

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[62] *Air Canada* at para. 36.
[63] *Air Canada* at para. 39.
[64] *Air Canada* at para. 40.
[65] *The Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority*, 2017 BCSC 1388 at para. 12-15. A cross-appeal on this point was dismissed for want of jurisdiction: *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*, 2018 BCCA 344 at para. 61-70.
[66] *Accton Transport Ltd. v. British Columbia (Employment Standards)*,2010 BCCA 272 (underlying issue concerned division of powers and standard of review was correctness; record before court sill confined to record before decision maker).
[67] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568 at paras. 113-134 (question involved impact on religious freedom on decisions under

63. This is not at all in tension with the principle that constitutional issues should not be determined in a factual vacuum. The appropriate factual matrix can be submitted to the decision maker, who is then expected to use their expertise to come to reasonable factual inferences. A failure to provide an affected party with a reasonable opportunity to do this will normally be a breach of procedural fairness, and reviewable on that ground.

64. This principle is also a *constraint* on administrative decision makers. It means they cannot supplement a decision that is not reasonable on the evidence originally before them with evidence put into the record by counsel after the fact.

65. The fundamental principle that judicial review is "on the record" is not restricted to "tribunal decisions made in an adjudicative process."[68] On the contrary, the leading case in this province for many years involved a judicial review of a mines inspector.[69] Since a major purpose of the rule is to ensure that courts do not "second guess" specialized decision makers based on information they did not have a chance to review, it is of *particular* importance when the decision maker's process is unlike that of a court.

66. Section 43(1)(a) of the *Public Health Act* provides for a process whereby a person affected by an order under that *Act* can put information to a health officer and the health officer must respond with reasons if they reject the information or if they confirm, vary or rescind the order based on that information. It is thus wrong to suggest that the record is limited to what Dr. Henry "happened to consider"[70] – if a person affected by an order thinks there is information that a health officer did not consider and should have, section 43 not only provides a vehicle for them to put that evidence in, but requires reasons if the information is rejected.

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forest legislation and duty to consult; record before the court confined to what was before the statutory decision maker).

[68] As stated in the Petitioners' Submissions, para. 9. See *Air Canada* at para. 36.

[69] *Morlacci v. British Columbia (Minister of Energy, Mines and Petroleum Resources)* (1997) 44 BCLR (3d) 41 (CA) at para. 29-33.

[70] Petitioners' Submissions, para. 13.

67. Neither *Twenty Ten Timber*[71] nor *Crowder*[72] support the Petitioners' position. In *Twenty Ten Timber*, the issue was whether the "record of proceeding" in a decision by the Minister of Finance to certify that a corporate entity was liable for a stumpage debt was confined to the letter sent to that entity or could include internal audit documents that led to that decision.[73] All of this was either "general background information" or was to "reconstitute what was before the decision maker." The Ministry was *not* entitled to file documents that went beyond what was before the decision maker: the non-adjudicative nature of the process was important to determine the *scope* of the record, not to dispense with the principle that judicial review is based on it.

68. *Crowder* dealt with the *Rules of Court*, which is subordinate legislation enacted by the Lieutenant Governor in Council on recommendation of the Attorney General. This Court emphasized the basic rule that "absent exceptional circumstances, the evidence that may be adduced in support of an application for judicial review of an administrative hearing process is limited to the record that was before the decision maker."[74] As in *Twenty Ten Timber* (and, for that matter, in *SELI*), that principle was upheld, but it was *applied in light of the process involved.* So this Court allowed News Releases from the Attorney General's office explaining the rule change[75] and verifiable information about a legal proceeding before the British Columbia Supreme Court.[76] The Court rejected emails from ICBC representatives, newspaper reports of statements by the Attorney General and "sampling" evidence of cases in which expert evidence was relied on.[77]

69. No case licences what the Petitioners propose to do here – bypassing the statutory decision maker altogether and putting purportedly expert evidence to the court, without either the deference to findings of fact on the face of the record that characterizes judicial

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[71] *Twenty Ten Timber Products Ltd. v British Columbia (Finance)*, 2018 BCSC 751 [*Twenty Ten Timber*].
[72] *Crowder v British Columbia (Attorney General)*, 2019 BCSC 1824 [*Crowder*].
[73] *Twenty Ten Timber* at para. 25-27.
[74] *Crowder* at para. 36.
[75] *Crowder* at para. 50.
[76] *Crowder* at para. 51-59.
[77] *Crowder* at para. 43-49, 60.

review or the safeguards around the use of expert evidence that characterizes a civil action.[78] They are asking for the court to engage in the dangerous task of deciding whether on the one hand, British Columbia's current provincial health officer, or on the other hand a retired one from another province, are right about a matter of epidemic management, and to so do based on nothing but affidavits.

70. In the case of a non-adjudicative tribunal, the record must be reconstructed, and it is not necessarily "static", but it still consists either of general, uncontroversial background information that will assist the reviewing court in understanding the issues or information that was before the decision maker. Controversial expert evidence that was not put to the decision maker must be rejected, as must lay evidence that was not put to the decision maker.[79]

E. WHAT CONSTITUTES THE RECORD ON THIS JUDICIAL REVIEW?

71. The primary record affidavit, as it was as of 2 February 2021, has been provided through Dr. Brian Emerson.[80] Dr. Emerson is the Acting Deputy Provincial Health Officer. He has regularly participated in the meetings of senior Ministry of Health and other Ministry officials and senior public health practitioners during the COVID-19 pandemic. He has been the lead public health official providing drafting instructions for written orders of Dr. Henry. He has also been the primary recipient of requests for reconsideration under s. 43 of the *Public Health Act.*[81]

72. In addition to Dr. Emerson's Affidavit #1, the record for judicial review of the Gatherings and Events Order also includes the subsequent reasons and orders given by Dr. Henry for changes to that order.[82]

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[78] *Accton Transport* at paras. 21-23
[79] *Accton Transport* at para. 23 ("The reviewing court usurps the role of the tribunal when it embarks upon a *de novo* hearing. The procedure adopted here was wrong and should not be repeated.").
[80] Emerson #1.
[81] Emerson #1 para. 2.
[82] Affidavit #1 of Megan Patterson (Patterson #1) made 8 February 2021, Exs. A, B, and C (February 5, 2021 Gatherings and Events Order, COVID-19 Monthly Update, Media Availability

73. The evidence contained in Dr. Emerson's Affidavit #1 setting out the background context and what was known to Dr. Henry when she made the various Gatherings and Events Orders is not "hearsay" even if it necessarily involves relating matters she informed him about. Hearsay, by definition, is evidence on information and belief tendered for the truth of its contents.[83] Dr. Emerson's evidence is not about the *truth* of the information received by Dr. Henry, but about what that information was. His role is to reconstruct the record, not prove its accuracy. This is consistent with the well-settled proposition that absent exceptional circumstances—none of which exist here—there is no role for the court on judicial review to investigate the facts.[84]

74. It is typical for a person other than the decision maker to reconstruct what was before him or her. Mr. Jaffe's comment in oral argument that it was "troublesome" for the respondents to have tendered a record affidavit from Dr. Emerson instead of Dr. Henry herself is without merit. The usual practice on judicial review is *not* to have the decision-maker provide the record affidavit; both the presumption of regularity and principle of deliberative secrecy militate against this. The decision-maker's reasoning is reflected by their decision, and cannot be supplemented by additional evidence. In the vast majority of cases they will therefore have no material evidence to give.[85] Notably, in *Eastside Pharmacy*, the Court of Appeal expressed "difficulty" understanding why the Minister had filed an affidavit from the decision-maker, even in response to an allegation that the decision maker had not in fact made the decision in issue.[86] If a person other than the decision maker is ever to make a record affidavit, then they will necessarily have to report what the statutory decision maker says they consulted. There is nothing troubling about this.

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of A. Dix/B. Henry February 5, 2021); Affidavit #1 of Valerie Christopherson (Christopherson #1), made 11 February 2021, Ex. A (February 10, 2021 Gatherings and Events Order); Affidavit #2 of Valerie Christopherson (Christopherson #2), made 25 February 2021, Ex. A (Media Availability of A. Dix/B. Henry, February 12, 2021).

[83] *R. v. Baldree*, 2013 SCC 35 at para. 1.

[84] *Eastside Pharmacy Ltd. v. British Columbia (Minister of Health)*, 2019 BCCA 60, at para. 59.

[85] *Eastside Pharmacy*, para. 54; *Keiros-Meyer v. Canada (Attorney General)*, 2019 BCSC 2457, para. 42.

[86] *Eastside Pharmacy*, paras. 54, 57, 60.

75. Although the Petitioners say that Dr. Emerson's affidavit goes beyond what was before Dr. Henry or uncontroversial explanations of matters that public health practitioners would generally understand to be true, they do not particularize this with any examples.[87]

76. Dr. Emerson's record affidavit is supplemented by the subsequent reasons and orders given by Dr. Henry for changes to the Gatherings and Events Order.[88]

77. The of what was before Dr. Henry when she made the Gatherings and Events Order is not to be conflated with the record before this Court in this petition proceeding, the latter of which also includes the following information, which can be relied on for determining standing or whether the Petitioner has exhausted administrative remedies, but not for whether the Orders are reasonable or compliant with the *Charter*:

a. The additional Petitioners' affidavits[89] for the purpose of establishing standing and demonstrating alleged *prima facie* infringements of the *Charter*. These establish standing, but were not before the decision maker and so cannot be the basis for concluding her decision was unreasonable.

b. Affidavit #2 of Valerie Christopherson made February 25, 2021, Ex. B – which attaches Dr. Henry's variance decision on the Religious Petitioners' section 43 application, to show the fact of the decision having been made and for no other purpose, as that fact is relevant to the Respondents' preliminary objection. It is

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[87] Petitioners' Submissions, para. 16.

[88] Affidavit #1 of Megan Patterson (Patterson #1) made 8 February 2021, Exs. A, B, and C (February 5, 2021 Gatherings and Events Order, COVID-19 Monthly Update, Media Availability of A. Dix/B. Henry February 5, 2021); Affidavit #1 of Valerie Christopherson (Christopherson #1), made 11 February 2021, Ex. A (February 10, 2021 Gatherings and Events Order); Affidavit #2 of Valerie Christopherson (Christopherson #2), made 25 February 2021, Ex. A (Media Availability of A. Dix/B. Henry, February 12, 2021).

[89] Affidavit #1 of Alain Beaudoin, made December 21, 2020; Affidavit #1 of Brian Versteeg, made December 21, 2020; Affidavit #1 of Cameron Pollard, made December 21, 2020; Affidavit #1 of Timothy Champ, made December 21, 2020; Affidavit #1 of Russ O'Neill, made December 21, 2020; Affidavit #1 of John Van Muyen, made December 22, 2020; Affidavit #1 of John Koopman, made December 23, 2020; Affidavit #1 of Brent Smith made January 5, 2021; Affidavit #1 of Randy Dyck, made January 5, 2021; Affidavit #1 of Jack Shoeman, made February 8, 2021; Affidavit #1 of John Sikkema, made February 8, 2021; Affidavit #2 of John Koopman, made February 8, 2021; Affidavit #1 of Gary Vanderveen, made February 8, 2021.

not, however, relevant to the reasonableness of the original decision.

c. Affidavit #1 of Vanessa Lever, made February 2, 2021 – Exs. A, B, D and E – which attaches correspondence between counsel for the Petitioners, Mr. Jaffe, and counsel for the Respondents, Mr. Morley, regarding the Petitioners' section 43 application, as that correspondence is relevant to the Respondents' preliminary objection; and

d. Affidavit #3 of Vanessa Lever, made February 26, 2021 – which attaches further correspondence between Mr. Jaffe and Mr. Morley related to the Petitioners' section 43 application and is therefore relevant to the Respondents' preliminary objection.

78. This evidence was not before the decision-maker, Dr. Henry, when she made her Orders and therefore cannot form part of the "record of proceeding" in a judicial review of her Gatherings and Events Orders, but it has other purposes for the Petition.

79. Dr. Emerson's second affidavit was put forward for the purpose of the injunction application, and is not admissible in support of the decision itself (i.e. as part of the "record of proceeding").

80. Had the Petitioners' amended their Petition to seek judicial review of Dr. Henry's decision to grant them a variance to her Gatherings and Events Orders, then the "record of proceeding" would include all of the "record of proceeding" on the judicial review presently before this Court set out above, as well as the following material, all of which was properly before Dr. Henry when she made her decision on the variance (but not before her when she issued the Gatherings and Events Order):

a. Affidavit #1 of Dr. Joel Kettner, made February 9, 2021;

b. Affidavit #1 of Dr. Thomas Warren, made February 9, 2021;

c. Affidavit #2 of Valerie Christopherson made February 25, 2021, Ex. B – for the purpose of showing the decision of Dr. Henry in respect of the Petitioners'

> section 43 variance and the supporting documentation appended to her decision, including an analysis conducted by Dr. Naomi Dove, an epidemiologist working in the Office of the Provincial Health Officer, who comments in detail on the information provided by Dr. Kettner and Dr. Warren.

81. However, because the judicial review is not of the reconsideration, then assuming it can go ahead at all, this material must all be excluded from consideration. In the Respondents' submission, the court should not consider Dr. Kettner and Dr.Warren's affidavits, but, if they do, we argue they do not assist the Petitioners.

82. With respect to Dr. Kettner, his opinion must by necessity be limited to the safety protocols in place at the Free Reformed Church as he only appears to have reviewed Mr. Koopman's affidavit.[90] Regardless, his opinions cannot be given much—if any—weight by the court as they lack the necessary factual foundation or are founded on incorrect assumptions of fact. Dr. Kettner's affidavit is replete with instances of unidentified or incorrect factual assumption.[91] By way of notable example, Dr. Kettner opines that "the precautions for services at the Free Reformed Church described in the affidavit by John Koopman are as strict and complete as any that I have seen for settings attended by the public",[92] but does not provide any comparator against which the Court can weight or judge this statement. Dr. Kettner also appears to have misconstrued the safety protocols in place at the Free Reformed Church in at least one material instance: Dr. Kettner states that "one of the rules of the Free Reformed Church is to exclude people over the age of 65 from attendance",[93] yet Mr. Koopman's affidavit does not contain any statement that such a rule is in place at the Free Reformed Church.

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[90] Kettner #1, paras. 12, 76.
[91] See e.g. para. 22 (fails to identify the basis for the facts he relies on regarding the applicable order and in any event incorrectly states that "only individual worshipping or other spiritual practice is permitted" when in fact drive-in services, online services are also permitted), para. 62 (fails to provide the source for his assumption of "about 11,000 cases reported in VCHA" or for Vancouver Coastal's population being 1.25 million), paras. 64-65 (fails to provide the basis for the data used in his calculations).
[92] Kettner #1, para. 74.
[93] Kettner #1, para. 72.

83. Dr. Kettner's opinions about lack of "transparency" or "clearly stated objectives and goals" fail the requirements for expert opinion set out in *Mohan.*[94] The court can determine whether the reasoning of a government official is sufficiently transparent and whether objectives are stated consistently with the governing statute.

84. With respect to Dr. Warren, and leaving aside his lack of expertise as someone who is only beginning his training as an epidemiologist, Dr. Warren's opinions as to seasonality and density support the Respondents' position the Gatherings and Events Order represents a reasonable balancing of *Charter* rights and the protection of public health. More specifically, Dr. Warren opines that the peak transmission for SARS-CoV-2 is in the coldest months of the year and that colder temperatures and less humidity are associated with increased transmission.[95] This opinion supports the need for ongoing restrictions on gatherings, including religious gatherings, through the balance of the winter season. As to density, Dr. Warren opines that transmission is strongly associated with population density.[96] The petitioner churches are located in Fraser Health, the most populous health authority which has consistently had the highest incidence of SARS-CoV-2 in the province.

85. Finally, Dr. Warren's "Concluding Observations" are devoid of any basis in fact. Dr. Warren does not identify which of the "various measures and protocols" the churches have adopted upon which he bases his opinion that "the risk of infection related to these church services is low and is not greater than the risk of transmission in the general community". There is simply no foundation for that opinion in his report. Importantly, in giving this opinion Dr. Warren ignores the three factors that he says are most important:

a. seasonality: we are currently in winter, which he recognizes as peak transmission season;

b. density: he does not address from either the perspective of density within the churches in terms of their proposed physical distancing measures, or from a

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[94] *R. v. Mohan*, [1994] 2 SCR 9.
[95] Warren #1, paras. 21-22.
[96] Warren #1, paras. 23-25.

broader community perspective; and

c. age: despite identifying age as the most important risk factor for COVID-19-mortality,[97] he does not appear to consider in any way whether the age demographic of the congregations in issue might impact on the risk profile for any of the petitioner churches.

86. His concluding opinion that "the risk of COVID-related death as a direct result of attending these church services is negligible" again misses the issue entirely. The key point from a public health perspective and epidemiologic perspective is not whether individual participants will die if they contract COVID-19 from attending a religious gathering; the issue is protection of the broader community from increased levels of community spread and the increased risk of serious illness and death that such transmission brings to the community as a whole. The risk to public health has to be at the forefront of this analysis, not individual participants' risk of death should they contract COVID-19 from a religious gathering.

87. Thus even if either of Dr. Kettner or Dr. Warren's affidavits properly formed part of the "record of proceeding" before Dr. Henry when she made the Gatherings and Events Order—which they clearly do not—the opinions contained therein do not assist the Petitioners. Regardless and in any event, Dr. Henry reviewed the affidavits of Dr. Kettner and Dr. Warren in the process of considering the Religious Petitioners' s. 43 variance request and found that they did not provide new information that was not available to her in making her findings and decisions.[98] Importantly, the key difference was that Drs. Kettner and Warren considered the risk of *death* alone and did so in a static way, ignoring the potential for tipping British Columbia into further exponential growth, while Dr. Henry considered the risk primarily in light of the objective of avoiding *growth* in the number of cases.[99]

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[97] Warren #1, para. 26.
[98] Christopherson #2, Ex. B.

88. Dr. Warren's evidence confirms that the probability of transmission increases exponentially with the number of in-person social contacts and that interventions to reduce these social contacts reduce the rate of transmission.[100]

89. The affidavits of Dr. Kettner and Dr. Warren do not deny that there is risk of transmission at religious gatherings, like the ones conducted by the Religious Petitioners.[101] Dr. Kettner calculates the case rate from attending religious gatherings in British Columbia as seven per 250,000, which of course is based on the actual restrictions in place in British Columbia during the relevant time period.[102] Dr. Kettner says this is "equal to or lower than other publicly attended settings", but does not say whether these are ones that are permitted under the Gatherings and Events Order.

90. Neither Dr. Kettner nor Dr. Warren quantify what they mean by "low" risk, but make comparisons to risk of death from motor vehicle collisions and excluded those over

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[100] Warren #1, Ex. 15 (Afshordi et al.), p. 2 ("In mid-March 2020, every region of the country [US] saw a period of uniform exponential growth in daily confirmed cases – signifying robust community transmission – followed by a plateau in late March, *likely due to social mobility reduction.*", concluding that social mobility is greater factor than seasonality and advocating targeted closures of businesses and community gathering places), Ex.16 (Riley et al.) (finding density of people that a person is exposed to on average (PWD) is major factor in transmission), Ex.18 (Tzampoglou & Loukidis) (median age of population, temperature, and delays in taking governmental measures or issuing stay-at-home orders most highly correlated with COVID deaths globally), Ex.19 (Chatziprodrmidou et al.) (early containment crucial to stop SARS-CoV-2 spread), Ex 22 (Diao et al.) (population density not associated with transmission in China because of strict lockdown), Ex. 24 (Chen & Li) (control and prevention measures for SARS-CoV-2 more effective in regions of US with higher population density), Ex. 25 (Ives & Bozzuto) (high variation in reproduction number shows need for tailored interventions), Ex. 27 (Rubin et al.) (concluding social distancing measures had most substantial association with reduction of SARS-CoV-2 transmission across US counties, above population density and weather), Ex. 29 (Garland et al.) (cross-cultural comparison suggests higher rates of transmission in more "individualistic" cultures, dwarfing effect of population density; more collectivist cultures able to more quickly and strongly put in place effective control measures), Ex. 31 (Malani et al.) (higher transmission rates in slums in India partially attributable to more social contacts), Ex. 42 (Fong et al.) (experience of past pandemics and biological/epidemiological theory supports social distancing measures; randomized control trials infeasible); Ex. 43 (Hatchett et al,) (earlier use of non-pharmaceutical interventions in 1918 pandemic resulted in less steep epidemic curve); Ex. 44 (Markel et. al) (earlier non-pharmaceutical interventions in 1918-1919 led to fewer deaths), Ex. 48 (Adam et al.) (Hong Kong experience shows religious gatherings potential superspreader events).

[101] Kettner #1

[102] Kettner #1, para. 71.

60. Canada's death rate is not independent of the measures taken to contain the spread of the virus: other countries have experienced death rates of up to 4 times higher.

91. There is no explanation for Dr. Warren's claim that the non-modifiability of seasonality and population density is relevant to the risk of infection in church. Dr. Henry took both seasonality and the higher levels of infection in Vancouver Coastal and Fraser Health Regions into account in deciding when and how far to act. Dr. Warren's opinion that the risk of transmission is not greater than the risk "within the general community" is vague and consistent with the risk being unacceptably high when transmission is growing or when it has plateaued despite existing measures. Further, the "general community" is, with limited exceptions, subject to the same or greater restrictions as religious communities on social interactions. Whether a risk of death comparable to motor vehicle collisions is "negligible" is arguable, but in any event that is not the primary metric. [103]

92. Finally, in the event that the court finds that the affidavits of Drs. Kettner and Warren are properly form part of the record on judicial review of the Gatherings and Events Order, then so too must the literature review and risk assessment prepared by Dr. Naomi Dove, an epidemiologist working in the Office of the Provincial Health Officer.[104] Dr. Dove responds to the information provided by Dr. Kettner and Dr. Warren and provides the counterpoint to their evidence.

F. CONCLUSIONS FROM THE RECORD

1) Findings of Fact of the PHO

93. The first factual findings of Dr. Henry are in her original order in response to the COVID-19 pandemic, issued March 16, 2020.[105] It stated the following:

a. A communicable disease known as COVID-19 has emerged in British Columbia. The illness is serious.

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[103] Warren #1, para. 43.

[105] Emerson #1, Ex. 9, Exhibit pages 106-107.

b. The virus SARS-CoV-2 is the infectious agent.

c. The gatherings of large numbers of people in close contact with each other can promote the transmission of the virus and increase the number of people who develop COVID-19.

d. Gatherings therefore constitute a health hazard under the *Public Health Act*.[106]

94. These findings do not appear to be contested.

95. On November 7, 2020, Dr. Henry verbally imposed further restrictions on gatherings in the Vancouver Coastal and Fraser regions. She provided reasons in the form of a media briefing when announcing the oral order.[107] She made the following findings of fact:

a. In the previous two weeks, there had been a "dangerously high and rapid increase" of COVID-19 cases and outbreaks. These primarily affected the health care system, but there had been outbreaks in many other places, particularly in the Fraser Health and Vancouver Coastal Health regions.[108]

b. Transmission was not occurring in places like restaurants if COVID safety plans were being followed.[109]

c. While the province had previously been seeing linear growth in cases, which was concerning but controllable, in the last two weeks, there had been exponential growth, particularly in the two most affected regions. [110]

d. The modelling available indicated exponential growth of COVID incidence if

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[106] *Public Health Act*, s. 1 "**health hazard".**
[107] Emerson Affidavit #1, Ex. 23, pp. 247-260.
[108] Emerson #1, Ex. 23, p. 247.
[109] Emerson #1, Ex. 23, p. 249. Note that this was a change from what Dr. Henry had found on October 26, 2020, where she included "churches" and "temples" as places where transmission was not occurring when safety plans were being followed: Affidavit #2 of John Koopman, made 8 February 2021, para. 5.
[110] Emerson #1, Ex. 23, p. 252.

social contacts were not reduced from the existing baseline.[111]

e. There was a risk that without more restrictive measures, the ability to continue contact tracing would be compromised.[112]

96. On November 19, 2020, Dr. Henry extended the measures in the Fraser Health and Vancouver Coastal regions province wide. At that time, she made the following findings of fact:

a. The Province was now facing 538 new cases of COVID-19 in a single day, compared with about 175 cases per day four weeks earlier. The Province was clearly in a "second wave".[113]

b. Provincial hospitals and ICU capacity were "stretched."[114]

c. With higher prevalence, the probability of a young person having severe illness or dying increased, illustrated by the fact that one person in his 30s had died recently from COVID-19.[115]

d. Transmission at social events in communities had spilled over into long term care and hospitals, with British Columbia facing 50 active outbreaks in the health system.[116]

e. Transmission of SARS-CoV-2 was increasing in every health authority.[117]

f. While the health care system was still functioning, without intervention it would be overwhelmed and people with COVID-19 and with other urgent health issues

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[111] Emerson #1, Ex. 23, p. 252 ("[T]he modelling that we've been using has shown this to be the case here").
[112] Emerson #1, Ex. 23, p. 252.
[113] Emerson #1, Ex. 28, p. 305.
[114] Emerson #1, Ex. 28, p. 306.
[115] Emersion #1, Ex. 28, p. 306.
[116] Emerson #1, Ex. 28, p. 306.
[117] Emerson #1, Ex. 28, p. 306.

would suffer.[118]

g. There had been transmission in faith-based settings under the existing rules.[119]

h. There had been notable levels of transmission and there are some activities that are higher risk.[120]

i. Hair salons, spas and restaurants were not seeing transmission, except where it was clear rules were not being followed.[121]

j. Transmission in schools had been low, but there had been more exposure events. There was greater concern about the Lower Mainland.[122]

k. The measures in the Lower Mainland since November 7, 2020 had resulted in a decrease in the number of people infected as a result of attending social gatherings, a category including religious-based events.[123]

l. Rolling averages of daily cases is a particularly important indicator of whether the pandemic was under control, in conjunction with other indicators. [124] Other important metrics were the percentage of cases that could not be linked to a known case or cluster.[125]

m. Despite best efforts to comply with the existing rules and despite limits of 50 people, transmission was happening at religious gatherings. Dr. Henry stated, "[T]hose services that were explicitly under the [Gatherings and Event] order, where people came together at specific times and it was up to 50 people in a space, depending on how large the space was, that we need those to be suspended for

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[118] Emerson #1, Ex. 28, p. 306.
[119] Emerson #1, Ex. 28, p. 307 ("[W]e have seen some transmission in some of our faith-based settings").
[120] Emerson #1, Ex. 28, p. 308.
[121] Emerson #1, Ex. 28, p. 310.
[122] Emerson #1, Ex. 28, p. 311.
[123] Emerson #1, Ex. 28, p. 315.
[124] Emerson #1, Ex, 28, p. 314.
[125] Emerson #1, Ex. 28, p. 315.

this short period of time, because we have seen that despite our best efforts we have transmission happening in those events."[126]

97. On December 2, 2020, Dr. Henry issued a written Gatherings and Events order that confirmed the oral order made on November 19. The recitals provided brief reasons for the order. These included the following findings of fact:

a. A person infected with SARS-CoV-2 can infect other people with whom the infected person is in direct contact through droplets in the air.[127]

b. Social interactions are associated with significant increases in the transmission of SARS-CoV-2. These result from the gathering of people and events, which therefore increase the risk of serious illness from COVID-19.[128]

c. The opening of the schools and seasonal changes increased the risk of transmission of SARS-CoV-2 in the population and the incidence of serious illness from COVID-19.[129]

d. Seasonal and other celebrations had resulted in transmission of SARS-CoV-2.[130]

e. There had been a rapid and accelerating increase in COVID-19 cases in the province.[131]

f. There was an immediate and urgent need for more drastic ("focused") action to reduce the rate of transmission of COVID-19.[132]

98. On December 7, 2020, when extending the Gatherings and Events order on similar terms to January 7, 2021, Dr. Henry made the following findings:

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[126] Emerson #1, Ex. 28, p. 319.
[127] Emerson #1, Ex. 29, p. 322 (Recital 3).
[128] Emerson #1, Ex. 29, p. 323 (Recitals 4-5).
[129] Emerson #1, Ex. 29, p. 323 (Recital 6).
[130] Emerson #1, Ex. 29, p. 323 (Recital 7).
[131] Emerson #1, Ex. 29, p. 323 (Recital 8).
[132] Emerson #1, Ex. 29, p. 324 (Recital 11 (ii)).

a. While the new case count remained high, and had been increasing steeply, it was beginning to level off, especially in the Fraser Health and Vancouver Coastal Health regions, which had been the first to have the greater restrictions.[133]

b. Measures implemented a month earlier were "starting to have an effect and starting to work."[134]

c. However, in many other communities in the province, especially in the Interior and the North, showed increasing rates.[135]

d. SARS-CoV-2 transmits especially through in-person interactions, especially indoors and especially in the colder months of the year.[136]

e. There was not a large number of transmission events in schools.[137]

f. The measures that had been in place for many months for religious gatherings and that were working earlier in 2020, "we are now seeing that those are not enough right now."[138]

g. The risk of transmission at outside peaceful demonstrations is less than indoor meetings, even without a mask, but in December, it is more dangerous than it was earlier in the year.[139]

99. The recitals to the Gatherings and Events Orders on December 9, 15 and 24, 2020 and on January 8, 2021 were not materially different from those in the written order of December 2, 2020.[140]

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[133] Emerson #1, Ex. 34, p. 399.
[134] Emerson #1, Ex. 34, p. 399.
[135] Emerson #1, Ex. 34, p. 399.
[136] Emerson #1, Ex. 34, p. 400.
[137] Emerson #1, Ex. 34, p. 403.
[138] Emerson #1, Ex. 34, p. 406.
[139] Emerson #1, Ex. 34, p. 407.
[140] Emerson #1, Exs. 35, 36, 37, pp. 409-486.

100. On February 5, 2021, a new Gatherings and Events order was issued. Recital 8 was changed, so that it no longer referred to an accelerating increase in COVID-19 cases. Instead, there is a finding that "[v]irus variants of concern are now present in Canada and the province, and have heightened the risk to the population if people gather together."[141]

101. On February 12, 2021, Dr. Henry made the following findings:

a. At that point, there had been 46 confirmed cases of variants of concern in BC. 29 of the B117 variant originally discovered in the United Kingdom and 17 of the B1351 variant originally discovered in South Africa.[142]

b. It was not yet clear whether these variants have increased transmissibility or cause more severe illness. [143]

c. All but one of the B117 cases were travel related, but a majority of the B1351 cases were locally transmitted.[144]

d. Both in the COVID pandemic and in other outbreaks, the nature of interactions at faith group gatherings is fundamentally different than in transactional relationships at the store or gym or at a restaurant.[145]

e. The demographic of churchgoers skews older than the population in general and is at more risk.[146]

f. In the "respiratory season", as the transmissibility of the virus increased, there was transmission in a number of faith settings despite having measures in place, so that measures previously thought to be good enough no longer were.[147]

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[141] February 5, 2021 Gatherings and Events Order, p. 2.
[142] Christopherson #2, Ex. A, p. 2.
[143] Christopherson #2, Ex. A, p. 2.
[144] Christopherson #2, p. 7.
[145] Christopherson #2, p. 7
[146] Christopherson #2, p. 8.
[147] Christopherson #2, p. 8.

g. Some deaths from COVID-19 were from people exposed in faith settings.[148]

2) <u>Understanding of the PHO of the Need to Act Proportionately When Affecting Religious Practice</u>

102. The record demonstrates Dr. Henry understood she was required to act in a proportionate way when her orders affected religious practice and she consistently articulated this principle.

103. Dr. Henry participated in the preparation of the BC Centre for Disease Control's ("BC CDC") "Ethics Framework and Decision Making Guide" for public health.[149] This sets out both a set of ethical principles and a process for decision making in public health. The principles include:

a. respect for autonomy,

b. recognition of sociality,

c. proportionality, minimization of "risk" (defined as the probability of harm multiplied by the magnitude of harm),

d. the "precautionary principle" (recognition that public health interventions may be warranted based on theoretical risk before all empirical data are obtained) and

e. proportionality (public health intervention should be proportionate to threat faced and should not exceed those necessary to address the actual risk).[150]

104. The precautionary principle works together with evaluation of decisions once made.[151]

105. On December 24, 2020, the BCCDC published an Ethical Decision-Making

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[148] Christopherson #2, p. 8.
[149] Emerson #1, Ex. 3, pp. 51-62. The role of the BC CDC and its relationship to the Provincial Health Officer is explained at Emerson #1, paras. 23-28.
[150] Emerson #1, Ex. 3, pp. 54-55.
[151] Emerson #1, Ex. 3, p. 61.

Framework specific to COVID-19. It sets out a commitment to respect individual autonomy, cultural perspectives, choice of the least restrictive or coercive but effective means and proportionality. [152]

106. Throughout the pandemic, specific guidance has been provided for "faith-based, spiritual and worship practices."[153]

107. In giving the November 7, 2020 order affecting Fraser Health and Vancouver Coastal region, Dr. Henry stated she had spoken to faith leaders. She said, "I know that it has been hard for many people not to come together and worship together or have their ceremonies together but we cannot do that yet. We will come together again, but it is not time yet. So the mass gathering restriction[s] apply there [i.e. in relation to religious services]."[154] She specifically noted the impacts on religious communities, stated she had consulted with faith leaders and noted exemptions for events they had told her were particularly important, namely weddings, funerals, baptisms and similar ceremonies in other faith traditions – which were permitted with up to ten people.[155]

108. In explanations to questions, she noted that faith organizations can provide meals to those who need them, meetings to address addiction, and provide religious daycare and extra-curricular instruction to children.[156] She also clarified that attendance for religious reasons in religious spaces was permitted, except for when people come together at particular times, so that private or family prayer, contemplation or meditation were permitted, as are individual meetings with faith leaders.[157]

109. On December 7, 2020, Dr. Henry stated it is "more and more important as we go through these important holiday periods to support people to be able to safely practice their

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[152] Emerson #1, Ex. 4, pp. 63-80.
[153] Emerson #1, Ex. 7, pp. 100-102.
[154] Emerson #1, Ex. 23, p. 258. Affidavit #1 of Vanessa Lever, made 2 February 2021, Ex. A, pp. 1-33.
[155] Emerson #1, Ex. 28, p. 307.
[156] Emerson #1, Ex. 23, p. 318.
[157] Emerson #1, Ex. 23, p. 319.

faith".[158] Also on December 7, 2020, Dr. Henry noted that "people have a right to peaceful demonstration as long as it is outside and they are not putting others at risk."

110. The February 5, 2021 Gatherings and Events Orders added the following recitals:

> I recognize the societal effects, including the hardships, which the measures which I have and continue to put in place to protect the health of the population have on many aspects of life, and with this in mind continually engage in a process of reconsideration of these measures, based upon the information and evidence available to me, including infection rates, sources of transmission, the presence of clusters and outbreaks, the number of people in hospital and in intensive care, deaths, the emergence of and risks posed by virus variants of concern, vaccine availability, immunization rates, the vulnerability of particular populations and reports from the rest of Canada and other jurisdictions, with a view to balancing the interests of the public, including constitutionally-protected interests, in gatherings and events, against the risk of harm created by gatherings and events;[159]
>
> I further recognize that constitutionally-protected interests include the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*, including specifically freedom of religion and conscience, freedom of thought, belief, opinion and expression, freedom of peaceful assembly and freedom of association. These freedoms, and the other rights protected by the *Charter*, are not, however, absolute and are subject to reasonable limits, prescribed by law as can be demonstrably justified in a free and democratic society. These limits include proportionate, precautionary and evidence-based restrictions to prevent loss of life, serious illness and disruption of our health system and society. When exercising my powers to protect the health of the public from the risks posed by COVID19, 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.[160]

111. On February 12, 2021, Dr. Henry reiterated that "we know how important – essential – faith services are for people and for communities across BC. And that is why

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[158] Emerson #1, Ex. 34, p. 406.
[159] Patterson #1, Ex. C, Recital 9.
[160] Patterson #1, Ex. C, Recital 10.

we have been working with faith community leaders since March of last year."[161]

112. The office of the Provincial Health Officer and the BCCDC have provided an unprecedented amount of real-time information about the dynamics of the COVID-19 pandemic in British Columbia since March 2020. The COVID-19 Dashboard provides the most recent information on cases, recoveries, deaths, hospitalizations and testing and is updated each business day.[162] Using mathematical modelling, BCCDC routinely generates estimates of transmission and short-term projections of new COVID-19 cases. The key indicator of transmission from these models is R_t or the "time varying reproductive number." In the absence of interventions, SARS-CoV-2 has high infectivity, with an estimated reproductive number of 2.87, meaning that each infected individual is likely to transmit the virus to another 2 to 3 people. The BCCDC estimates, and publishes, its modelled time-varying reproductive number. When the estimated R_t is above 1, that indicates a risk of rapidly growing numbers of new cases, unless the situation is changed.[163]

113. There is seasonal variation in coronaviruses, such that they transmit more rapidly in colder temperatures. [164] This was expected to be true of SARS-CoV-2 as a novel coronavirus, and that the global experience with SARS-CoV-2 confirms this. As a result, Dr. Henry anticipated a second wave might arrive in Fall 2020 as a result of weather and behavioural changes.[165] Indeed, there was a precipitous increase in cases, hospitalization and deaths in November and December 2020 and while declining in January 2021, these remain high.[166] Since February 16, 2021, there has been a reversal in the trend, such that the seven-day moving average of cases in BC has now *increased* from 409 cases/day to 505 cases/day.[167]

114. The BCCDC's surveillance reports in the fall of 2020 showed an alarming increase

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[161] Christopherson #2, p. 7.
[162] Emerson #1 at para. 26.
[163] Emerson #1, paras. 42-45.
[164] Emerson #1, para. 46.
[165] Emerson #1, para. 71.
[166] Christopherson #2, p. 56.
[167] Christopherson #2, p.13.

in the number of cases between the first week of October and the first week of November, going from 18 cases per 100,000 population (in Week 41) to 45 per 100,000, more than 2.5 times higher (in Week 45), despite an expectation (later proved correct) that the later week tallies were incomplete.[168]

115. When the surveillance report for November 15-21 (Week 47) was produced, incidence provincially was reported at 77 per 100,000, with some convergence between the highest incidence health regions that had the earlier restrictions and the other health authorities.[169] Week 48 (November 22-28, 2020) remained high (reported at 83 per 100,000 compared with Week 47 now at 96 per 100,000, but expected to be at 113 per 100,000).[170] Week 49 (November 29-December 5) represented the first decline in weekly reports, with a reported incidence of 77 per 100,000, expected to be 97 per 100,000 once onset data was received.[171] New cases continued to plateau in Week 50,[172] and in the new year it appeared that the peak had been week 48, but cases remained high.[173]

116. Modelling data at the end of 2020 showed that the time varying reproductive number (R_t) was above 1 between late September and late November, implying exponential growth. Since late November, it was "hovering around 1", implying stability, but with a risk of returning to exponential growth with small changes in probability of exposure.[174] Modelling showed the enormous differences in result depending on whether infectious contact rates were 50% of normal compared with 70% of normal: in the former case the pandemic would be contained, while in the latter it would explode.[175]

117. In January 2021, cases began to decline province-wide, but have remained high compared with the period before November 2020.[176] New variants have emerged that may

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[168] Emersion #1, Ex. 22, p. 236.
[169] Emerson #1, Ex. 27, p. 293.
[170] Emerson #1, Ex. 31, p. 362.
[171] Emerson #1, Ex. 32, p. 374.
[172] Emersion #1, Ex. 33, p. 386.
[173] Emerson #1, Ex. 37, p. 457.
[174] Emerson #1, Ex. 40, p. 565.
[175] Emerson #1, Ex. 40, p. 568.
[176] Christopherson #2, p. 56.

be problematic due to a number of factors, including increased transmissibility, evading detection by usual diagnostic tests, changing ability to cause severe disease and increased ability to evade natural or vaccine-induced immunity.[177] There is a great deal of scientific uncertainty, but federal monitoring makes clear that it is a reasonable scenario if these variants become more common in the population that there will be a "third wave" dwarfing the second wave in significance, potentially leading to breakdown of the ability to monitor the spread of the virus and then of the health system's ability to deal with it.[178]

3) Summary of Evidence in the Record Regarding Transmission Risks of In-Person Religious Services

118. In their argument, the Petitioners make the bold claim that there is "no evidence" that 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, such as in schools or retail establishments.[179]

119. The most direct evidence facing Dr. Henry was that *there was in fact transmission in British Columbia from worship services apparently adhering to the safety steps prescribed in the October 30, 2020 order and its predecessors.*

120. In November 2020, Dr. Henry was in receipt of a letter from Dr. Theresa Tam, Canada's Chief Public Health Officer, dated October 15, 2020, setting out what was known, namely that a number of outbreaks across Canada had been linked to gatherings such as weddings, funerals and other religious and community gatherings.[180]

121. In British Columbia, data showed the following:

a. In Vancouver Coastal Health, between September 15, 2020 and January 15, 2021, 25 places of worship were affected with 61 associated cases. 28 cases

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[177] Christopherson #2, p. 58.
[178] Christopherson #2, pp. 18-34.
[179] Petitioners' Submissions at para. 184.
[180] Emerson #1, Ex. 41, pp. 575-577.

and one death were associated with an outbreak at a religious setting in Vancouver in November 2020, and it is likely that 2 index cases from that religious setting sparked a large outbreak at another facility. 5 cases were linked to a religious setting in Richmond in November 2020 and 3 cases were associated with a different religious setting in that same month. Data before September 2020 for Vancouver Coastal is not available.[181]

b. In Fraser Health, between March 15, 2020 and January 15, 2020, 7 places of worship were affected with 59 associated cases.[182]

c. In Interior Health, 11 places of worship were affected with 20 associated cases during this same time period.[183]

d. In Northern Health, 5 religious settings were affected with 40 associated cases.[184] A further 24 cases occurred in residents of Northern Health associated with a religious gathering in Alberta.[185]

122. These cases all occurred while the same restrictions proposed by the Petitioners were in place province-wide.

123. To be sure, the data are imperfect because they may both include cases actually acquired elsewhere and exclude some caused by attendance at religious ceremonies. These numbers do not include persons infected by persons who contracted SARS-CoV-2 at a religious gathering.[186]

124. Dr. Henry has also pointed to specific demographic and behavioural factors of in-person gatherings in religious settings that could reasonably support an inference that transmission risk is higher than in many of the in-person gatherings permitted.

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[181] Emerson #1, para. 102.
[182] Emerson #1, para. 103.
[183] Emerson #1, para. 104.
[184] Emerson #1, para. 105.
[185] Emerson #1, para. 106.
[186] Emerson #1, para. 107.

125. It is important to note that there was no "singling out" of religion at all. Gatherings were simply generally prohibited, and in-person worship services were not exempted from that general prohibition. There was abundant evidence that greater prohibitions on people gathering together were needed to flatten the curve in November 2020, and it was reasonable not to exclude in-person worship services, unless a particular group could make a compelling case under section 43 of the *Public Health Act.*

4) <u>Petitioners' Claims About the Evidentiary Record</u>

126. In their submissions, the Petitioners' maker the following claims about the evidentiary record:

a. Dr. Henry's decisions were motivated by "administrative ease and convenience."[187]

b. There is "no evidence" that Dr. Henry considered measures that would have limited *Charter* rights in a less drastic and severe fashion.[188]

c. There is "simply nothing to illustrate" a causal link between restrictions and a corresponding reduction in COVID-19 transmission.[189]

127. There is abundant evidence that Dr. Henry consulted with faith leaders from the beginning of the pandemic, and explained her reasoning in light of public health imperatives. The measures that the Petitioners are asking for were not only "considered", they were the measures that were in place in British Columbia when many other jurisdictions had gone further.

128. The Petitioners' repeatedly emphasize a comment by Dr. Henry on *October 26, 2020*, that public health officials were not seeing transmission when COVID safety plans

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[187] Petitioners' Written Submssions, para. 4.
[188] Petitioners' Written Submissions, para. 212.
[189] Petitioners' Written Submissions, para. 213.

are followed in churches and temples, among other places.[190] That comment was made in the context of urging people to comply and was made before the data became available that led to the impugned orders. There is evidence in the record that transmission occurs at religious settings in circumstances where there is no documented failure to comply with a safety plan.[191]

G. FRAMEWORK FOR LEGAL ANALYSIS

1) Freedom of Religion, Expression and Peaceful Assembly

129. The Respondents concede the Gathering and Events Orders engage the Petitioners' rights under ss. 2(a) (religion and conscience), 2(b) (expression), and 2(c) (peaceful assembly) of the *Charter*.

130. A law or other government action engages freedom of religion if it interferes with a practice connected with religion in a manner that is more than trivial or insubstantial. It is conceded that restrictions on in-person religious gatherings meets this threshold.[192]

131. Section 2(b) of the *Charter* guarantees freedom of thought, belief, opinion and expression, although it is usually just referred to as "freedom of expression." Freedom of expression is understood very broadly in Canadian law: all non-violent activity intended to communicate a meaning counts as expression and any law or government action that has the purpose or effect of interfering with such an activity is a *prima facie* breach of freedom of expression.[193] While restrictions on gatherings do not have the *purpose* of restricting communication of meaning, there is no doubt that they do have that *effect*.

132. There is relatively little case law on the freedom of peaceful assembly under s. 2(c) of the *Charter*. The Supreme Court of Canada has said, in passing, that peaceful assembly

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[190] Full statement is found in Koopman #2, para. 5. This statement is referred to X times in the Petitioners' Written Submissions at para. 56, 84, 186

[191] Emerson #1, pp. XX to YY. There is nothing to suggest these cases involved non-compliance with the safety plan other than the fact that transmission occurred. One case investigated in Ontario suggested no breach of a safety plan: see Christopherson #2, p. 58.

[192] S*yndicat Northcrest v. Amselem*, 2004 SCC 47 at para. 65.

[193] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 [*Irwin Toy*].

is inherently a group activity.[194] The Ontario Divisional Court has held it guarantees access to public spaces, subject to reasonable regulations governing the use of those spaces.[195] The Respondents would concede that it protects gathering together in a non-violent and otherwise lawful way to protest or otherwise comment on matters of public interest and controversy. Leading constitutional scholar Peter Hogg stated that it is "plausible" that section 2(c) protects peaceful picketing, for example.[196] As the Court of Appeal has noted, however, issues about restrictions on such activity are subsumed under s. 2(b) case law.[197] However, there is no doubt that to the extent the Gatherings and Events Order prohibits indoor gatherings to protest or comment on matters of public interest and controversy, it at least engages s. 2(c) of the *Charter*.

133. The most authoritative recent decision on the scope of freedom of association, as protected by s. 2(d) of the *Charter*, is the 2015 *MPAO* decision. The majority there stated that freedom of association protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.[198] *MPAO* does not specifically support the proposition that these associations must be conducted in-person, as opposed to electronically, and so s. 2(d) does not appear to add to the analysis.

2) Framework For Section 7 and 15

134. Where the factual impacts on the interests of the challengers are clearly protected by particular rights in the *Charter*, the courts generally do not go on to engage in an analysis of other provisions.[199] As a result, it is not necessary to consider section 7 or section 15. Despite the intervener ARPA's submissions, the "compound" nature of a limit on *Charter*

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[194] *Mounted Police Assn. of Ontario v. Canada (Attorney General)*, 2015 SCC 1 [*MPAO*] at para. 64.
[195] *Husain v. Toronto*, 2016 ONSC 3504 at paras. 38, 44.
[196] Peter W. Hogg, *Constitutional Law of Canada*, c. 44.2.
[197] *Health Employers Assn. of British Columbia v. H.E.U.*, 2009 BCCA 39 at para. 39 [*HEABC*].
[198] *MPAO* at para. 66.
[199] See *HEABC* at para. 39; *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 93 (declining to conduct a s. 15 analysis upon finding s. 7 was breached).

infringement (i.e. whether it breaches more than one right) has never been of significance. What matters to proportionality is the extent of impact and importance of the *Charter* interest, as balanced against the significance of the statutory objective and extent to which it is furthered. It does not matter how many *Charter* rights are said to be infringed – as indicated by the common practice of the courts of turning to the section 1 analysis once *any Charter* right has been infringed. If, however, the Court does decide it is necessary to consider these sections, the Respondents deny that they are engaged on the facts.

135. There are two stages to an analysis under section 7. First, the applicant must establish that the impugned governmental act imposes limits on a "life", "liberty" or "security of the person" interest, such that section 7 is "engaged." Having done that, the applicant must then establish that this "deprivation" is contrary to the "principles of fundamental justice."[200]

136. With respect to "life", the Petitioners misread paragraphs 60-62 of the Supreme Court of Canada's *Carter* decision. The Court in fact rejected the proposition that anything other than the risk of death engages the "life" interest. Since there is no evidence from any petitioner of any risk to life from the restrictions, it is not engaged.

137. To establish a breach of "security of the person", there must be specific evidence of the kind of serious state-caused psychological harm that goes beyond even highly stressful events such as being accused of wrongdoing before a tribunal.[201] "Liberty" protects freedom from physical restraint and the "right to make fundamental personal choices."[202] It is *not* enough to show a breach of a fundamental freedom protected by s. 2 to establish a breach of liberty – these are separate rights.[203] *Heywood* does not establish

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[200] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 [*Bedford*] at para. 57.
[201] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*] (delay of adjudication of a human rights complaint not sufficiently serious to invoke security of the person).
[202] *Blencoe* at para. 54.
[203] *Reference re. ss. 193 and 194.1 of Criminal Code*, [1990] 1 SCR 1123 [*Prostitution Reference*] at pp. 1170-1171. This aspect of the *Prostitution Reference* was left unchanged by *Bedford.*

that freedom of movement is an aspect of "liberty."[204]

138. If the Petitioners are able to establish a breach of "liberty" or "security of the person", they must also establish that this deprivation is contrary to the principles of fundamental justice. The Petitioners improperly reverse the onus of proof at paragraph 137 of their submission.

139. The Petitioners do not appear to be alleging any *procedural* principle of fundamental justice: the right to a written hearing for exemptions has been specifically preserved.[205]

140. Therefore, the Petitioners must establish that the impugned orders are contrary to a substantive principle of fundamental justice, as well as breaching a liberty or security of the person interest.

141. A government action that engages liberty or security of the person will be found to be contrary to the substantive principles of fundamental justice if it is arbitrary, overbroad or grossly disproportionate. A government action is *arbitrary* if there is no real connection between it and the object of the law (in this case, public health).[206] It is *overbroad* if it interferes with some conduct in a way that has no connection with its objective, even if it is instrumentally rational over some part of its domain of applicability.[207] Finally, a government action is *grossly disproportionate* if the seriousness of the deprivation is so totally out of sync with the objective that it cannot be rationally supported.[208]

142. Arbitrariness review is not about micromanaging distinctions drawn by decision makers in trying to balance individual and pubic interests.

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[204] *R. v. Heywood*, [1994] 3 SCR 761 (liberty was established because of threat of imprisonment).
[205] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44
[206] *Bedford* at para. 98.
[207] *Bedford* at para. 101.
[208] *Bedford* at para. 120 (giving example of life imprisonment for spitting on the sidewalk).

3) Framework for Section 15

143. The analysis for whether there is a breach of section 15 of the *Charter* involves two questions:

a. First, does the challenged law, on its face or in its impact, draw a distinction based on an enumerated or analogous ground? If a law is facially neutral, it may draw a distinction indirectly where it has an adverse impact upon members of a protected group.

b. Second, if it does draw a distinction, does it impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating . . . disadvantage, including historical disadvantage?[209]

144. Since the Petitioners do not allege, let alone establish, *intentional* distinction or discrimination, it is crucial that the law has an adverse impact upon members of a protected group *qua* group. Section 15 does not allow a government to disadvantage a group of persons based on their religious beliefs, but it is not about neutrality among practices or beliefs, which is addressed by s. 2(a).

4) Dr. Henry Did Not Breach Section 7 or 15

145. While no one can question the psychological health benefits to members of religious communities (and others) of meeting in person, there is no evidence of the kind of serious psychological harm required by *Blencoe*. Further, there is clearly a connection between a restriction on gatherings and decreasing the probability of transmission of a virus spread through the air by personal interaction. If, as the Respondents will argue, the restrictions are reasonable, then *a fortiori*, they are not "grossly disproportionate."

146. The fact that some religious activities are restricted and some secular activities are not is not evidence of "arbitrariness." There needs to be a comparison of like with like and a demonstration by the Petitioners that there is no rational basis for the distinction. In fact,

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[209] *Ontario (Attorney General) v. G*, 2020 SCC 38 at para. 40.

religious activities are allowed when *comparable* secular activities are (schooling, after-school instruction, etc.) and not when they are not (communal gatherings).

147. The Petitioners' claim of gross disproportionality turns on their totally unjustified assertion that the harm the Gatherings and Events Order guards against "does not exist."[210]

148. With respect to section 15, there is no evidence that these restrictions specifically disadvantage a group of people based on their religious beliefs. The same activities are allowed and restricted for secular and religious people, and whether in a secular or religious setting. Religious schools are as open as secular ones. Funerals can be conducted by any religious or secular community. Unless they are covered by a specific exemption, non-religious people have no more ability to gather than religious ones.

149. In any event, even if section 7 or section 15 interests are engaged, the same *Doré* analysis must be engaged in under section 1.

5) Section 1 of the *Charter* Anlayzed Under *Doré*

150. It is not possible to limit how people may come together without affecting fundamental freedoms, including freedom of religion and conscience, of expression, and of peaceful assembly. But rights and freedoms under the *Charter* are not absolute. Protection of the vulnerable from death or severe illness and protection of the healthcare system from being swamped by an out-of-control pandemic is also clearly of constitutional importance.

151. There can be no dispute that containing the spread of SARS-CoV-2 is a legitimate objective that can support limits on *Charter* rights under section 1.[211] It is long established that protection of public health is the kind of objective that can justify "reasonable limits" under section 1 of the *Charter*. [212] An outbreak of a communicable disease is a classic

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[210] Petitioners Submission, para. 140.
[211] This is conceded by the Petitioners at para. 176 of their Submission.
[212] *R. v. Oakes*, [1986] 1 SCR 103 [*Oakes*] at para. 76 (reduction of incidence of substance use disorder is pressing and substantial objective); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199 at para. 65.

example of a crisis in which the state is obliged to take measures that affect the autonomy of individuals and of communities within civil society.[213] The constitutional importance of combating the COVID-19 pandemic has been stated by courts across the country.[214]

152. The framework for analyzing whether the limits on *Charter* rights and freedoms are justified under section 1 of the *Charter* depends on what is challenged. The framework is different if dealing with a provision of a statute that authorizes administrative or executive action, or if what is challenged is the effect of a statutory decision alleged to unjustifiably limit *Charter* rights.[215]

153. The framework for analysis in the latter situation – which is clearly this case – is set out in the Supreme Court of Canada's 2012 decision in *Doré*.[216] *Doré* involved a decision by a law society as to whether to discipline a lawyer for an intemperate letter to a judge. Freedom of expression was clearly engaged and some limits on the freedom were clearly implied by the discretion given. The Court rejected the traditional s. 1 *Oakes* analysis and adopted a proportionality analysis consistent with administrative law principles.[217]

154. In *Doré*, Justice Abella writes in some places of "adjudicated administrative decisions"[218] and elsewhere just of "administrative decisions" or decision makers.[219] It is clear from her examples that she did not intend to confine her analysis to tribunals like

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[213] *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), cited by Chief Justice Roberts in *South Bay United Pentecostal Church et al v. Gavin Newsom, Governor of California, et al.*, No. 19A1044 (USSC) at p. 2

[214] *Trest v. British Columbia (Minister of Health)*, 2020 BCSC 1524 [*Trest*]; *Toronto International Celebration Church v. Ontario (Attorney General)*, 2020 ONSC 8027 [*Toronto International Celebration Church*]; *Springs of Living Water Centre Inc. v. The Government of Manitoba*, 2020 MBQB 185 [*Springs of Living Water*]; *Ingram v. Alberta (Chief Medical Officer of Health)*, 2020 ABQB 806 [*Ingram*] *Taylor v. Newfoundland and Labrador*, 2020 NLSC 125 [*Taylor*].

[215] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at para. 57. This issue does not appear to have been raised in *Taylor*.

[216] *Doré v. Barreau du Québec*, 2012 SCC 12.

[217] *Doré* at para. 3-5.

[218] *Doré* at para. 3, 4

[219] *Doré* at para. 23-28.

disciplinary committees of law societies, but all administrative decision makers who apply a legal mandate to a factual situation – a point made clearer by the subsequent decisions of *Loyola* and *Trinity Western,* which involved decision makers that could not be considered "adjudicative" in the sense used by the Petitioners. [220]

155. Under the *Doré* analysis, the issue is not whether the exercise of administrative discretion that limits a *Charter* right is correct (i.e., whether the court would come to the same result), but whether it is *reasonable* (i.e., whether itis within the range of acceptable alternatives once appropriate curial deference is given):

> There is no doubt that when a tribunal is determining the constitutionality of a law, the standard of review is correctness (*Dunsmuir*, at para. 58). It is not at all clear to me, however, based on this Court's jurisprudence, that correctness should be used to determine whether an administrative decision-maker has taken sufficient account of *Charter* values in making a discretionary decision.[221]
>
> It seems to me that applying the *Dunsmuir* principles results in reasonableness remaining the applicable review standard for disciplinary panels. The issue then is whether this standard should be different when what is assessed is the disciplinary body's application of *Charter* protections in the exercise of its discretion. In my view, the fact that *Charter* interests are implicated does not argue for a different standard.[222]

156. *Doré* sets out what the decision maker is supposed to do when faced with a conflict between constitutionally-guaranteed rights and freedoms and the public interest that their statute requires them to uphold:

> Even where *Charter* values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values on the specific facts of the case. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.

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[220] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*]; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 [*TWU*].
[221] *Doré* at para. 43.
[222] *Doré* at para. 45.

> How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives […]
>
> Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives.[223]

157. On judicial review, the "question becomes 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."[224] The administrative decision maker gets a "margin of appreciation" or curial deference in this determination.[225]

158. The *Doré* analysis has been specifically applied to administrative decisions affecting religious freedom. In *Loyala,* the Court held that the *Doré* analysis is "a highly contextual exercise" and that there may be more than one proportionate outcome.[226] In *TWU,* the majority rejected the idea that a decision maker must always choose the option that limits *Charter* protection least – rather, the issue is whether there are other reasonable options that would give effect more fully to *Charter* protections in light of the statutory objectives.[227]

159. Orders under the *Public Health Act* are not "laws of general application." Under s. 39(3) of the *Public Health Act,* they can be directed at classes. But they can also be directed at individuals or small groups. *Loyola* and *TWU* involved the rights of a group of people, demonstrating that isolated phrases about the rights of an individual in some cases do not constitute a "test". If they did, then health orders applied to named individuals would be subject to *Doré* analysis, while those issued on a class basis would be subject to *Oakes*

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[223] *Doré* at para 55-56.
[224] *Doré* at para 57.
[225] *Doré* at para 57.
[226] *Loyola* at para. 41.
[227] *TWU* at para. 81.

analysis, even if the issues were materially identical.

160. In the 2019 *Vavilov* decision, the Supreme Court of Canada confirmed that *Doré* remains good law. It said the difference between *Oakes* and *Doré* dpends on whether the effect of an administrative decision was said to be to limit *Charter* rights or if the empowering statute was challenged.[228] *Vavilov* makes no distinction based on how many people are affected or whether the tribunal is court-like in its procedures.

161. According to *Vavilov*, there are two bases for holding a decision maker's decisions to be unreasonable: a failure of rationality internal to the reasoning process and untenability in light of a factual or legal constraint.[229] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision.[230]

162. A decision has internal rationality if the reviewing court can trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and there is a line of analysis that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.[231] Review for internal rationality is not a "line-by-line treasure hunt for error."[232] If the reasons, read generously and holistically, fail to reveal a rational chain of analysis or do reveal an irrational chain of analysis, then they will be unreasonable. Examples include where it is impossible to understand the decision maker's reasoning on a crucial point or where the reasoning exhibits logical fallacies.[233]

163. In addition to internal rationality, a reasonable decision is consistent with the

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[228] *Vavilov* at para. 57.
[229] *Vavilov* at para. 101.
[230] *Vavilov* at para. 100.
[231] *Vavilov* at para. 102.
[232] *Vavilov* at para. 102
[233] *Vavilov* at para. 103-104.

constraints imposed by the legal and factual context: the test is "tenability" in light of those constraints.[234]

164. With respect to *factual* context, there is substantial deference to statutory decision makers, especially those with specialized expertise. Absent exceptional circumstances – such as a fundamental misapprehension of, or failure to take into account, evidence before the decision maker – factual findings will not be interfered with. The same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review.[235] This is particularly true when it comes to the factual bases of the management of a pandemic by public health officials. These are essentially scientific and medical matters that, with respect, courts do not have the expertise to second guess.[236]

165. Legal constraints come in various forms. In *Vavilov*, the Court identifies as a legal constraint that the decision maker must grapple with severe consequences on individuals.[237] Clearly, developing a proportionate response to constitutionally-protected interests can be understood either as an aspect of this legal constraint or as its own legal constraint.

166. Under either branch of the *Vavilov* analysis, reasonableness review begins with the *reasons* of the decision maker and "prioritizes the decision maker's justifications for its decisions. What matters is not whether there are *formal* reasons – many decision-making processes do not lend themselves to that. What matters is whether the "reasoning process" underlying the decision is opaque.[238]

6) <u>Framework for Statutory Authority</u>

167. In addition to constitutional grounds, the Petition also alleges that the impugned

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[234] *Vavilov* at para. 105.
[235] *Vavilov* at para. 125-126.
[236] *Taylor* at para. 457-458. *Trest* at para. 91.
[237] *Vavilov* at para. 134.
[238] *Vavilov* at para. 137.

Orders exceed statutory authority. This was not emphasized in argument. In any event, since it is not contested that COVID-19 is a "health hazard", the test for whether Dr. Henry acted *ultra vires* her authority under sections 30, 31 and 32 of the *Public Health Act* is the same reasonableness standard at issue in relation to the constitutional claim.

H. THE PHO'S DECISIONS WITH RESPECT TO THE RELIGIOUS PETITIONERS WERE REASONABLE AND PROPORTIONATE

1) Internal Rationality

168. There is a very simple syllogism at the heart of all of Dr. Henry's reasoning. As of November 2020, British Columbia was facing an exponential growth in SARS-CoV-2 infections. The status quo, although fine for the summer of 2020, implied losing control, both by overwhelming the capacity to contract trace and by overwhelming the capacity of the health system to treat people. This would mean preventable death and serious illness and necessitate more extreme measures.

169. Religious worship services were not singled out – they were simply included in a broader restriction. Dr. Henry reasoned that worship services are not transactional, so there is a greater natural tendency for people to come into close contact. Further, because of the age skew of those British Columbians who regularly attend religious services, she reasoned they disproportionately involved the demographic most vulnerable to serious illness or death if infected and most likely to have contacts with people in that demographic. In the vast majority of cases, it was at least possible for services to continue online and most religious communities did that.

170. The premises and the conclusion are logically coherent and were repeatedly explained. In the event, they were vindicated, at least to the extent that the curve was flattened without the need to shut down schools (including, religious instruction of children, whether in religious schools or on an extra-curricular basis).

171. Gatherings and events are a route of transmission. Whether measures less intrusive than prohibition are effective depends on the prevalence of the Virus in the community and behavioural factors. Dr. Henry responded to evidence of accelerating transmission when

she made the orders, and she has explained her reasoning.

2) Factual Constraints

172. Dr. Henry's findings that British Columbia faces (and continues to face) the prospect of exponential growth of COVID-19 cases if we had remained at (or returned to) the *status quo* in November 2020 is supported by the evidence rehearsed above.

173. Equally, her findings about the relative likelihood of transmission in transactional, as opposed to religious, settings was based both on general observations of human behaviour, her background in epidemiology and the specific evidence of outbreaks in religious settings in British Columbia and elsewhere in Canada. The scientific literature, including a paper put in the record by the Plaintiffs, further supports the potential for these events to give rise to significant transmission events.

3) Legal Constraints

174. Dr. Henry carefully considered the significant impacts of the Orders on freedom of religion, expression and peaceful assembly. In relation to political expression and peaceful assembly, she always indicated the lesser risk that outside assembly posed, and on February 10, 2021, she exempted outside demonstrations to comment on matters of public concern or controversy altogether.

175. In regard to religious freedom, there is no suggestion that she misdirected herself as to the effects her orders would necessarily have. She consulted with faith communities to discuss and understand the impact of restrictions on gatherings and events on their congregations and religious practices. Where appropriate, she made exemptions for religious organizations under s. 43 of the *Public Health Act.*

176. In making the Gatherings and Events Orders, Dr. Henry was guided by the principles applicable to public health decision making. In particular, she adhered to the principle that public health interventions be proportionate to the threat faced and that measures should not exceed those necessary to address the actual risk. The Orders are limited in duration and constantly revised and reassessed to respond to current scientific

evidence and epidemiological conditions in British Columbia.

177. Contrary to the intervener's submissions, there is no absolute rule in Canadian law that "constitutionally-protected" interests must be preferred to those that are just pressing and substantial. In *TWU,* for example, the interest against private discrimination that was found to outweigh the effects on religious freedom is not constitutionally-protected, because it did not involve a state actor. Such a rule would be impossible to operationalize, because it would require a defined set of "constitutionally-protected interests."

178. Such an approach would be particularly difficult in the context of public health. Avoiding death and serious illness is constitutionally protected by section 7, albeit only against state action, rather than inaction. On the other hand, there is no way to determine what activities that might be impacted by public health measures are or are not constitutionally protected. Movies, plays and concerts are surely protected by section 2(b). Advocacy of atheism or pacifism is protected by section 2(a) as well. A public health officer cannot be required to determine whether visiting extended family is protected by section 2(d) in order to decide whether to exempt churches. The only requirement is that any balance be struck reasonably, that sincere religious practice be accommodated where possible and that religious belief and non-belief be treated neutrally. Dr. Henry understood these requirements, and applied them to the best of her ability.

179. Dr. Henry's decision to restrict gatherings and events is a discretionary decision taken pursuant to the *Public Health Act.* Public health decisions are the classic example of decisions that must be made in real time based on specialized expertise. Dr. Henry's decision, as reflected in the Orders, reflects a proportionate balancing of the *Charter* protections at play and her relevant statutory mandate. The other impugned orders are incidental to this decision.

4) <u>No Real Issue of *Vires*</u>

180. The Orders are not *ultra vires* their enabling statute.

181. Sections 30 and 31 of the *Public Health Act* specifically empower a health officer, in circumstances where a "health hazard" exists, to make orders "to prevent or stop a health

hazard or mitigate the harm or prevent further harm from a health hazard", a term defined in section 1. Any condition, thing or activity that endangers or is likely to endanger public health is a health hazard, as is anything that interferes or is likely to interfere with the suppression of infectious agents, such as SARS-CoV-2.

182. Where the criteria in ss. 30 and 31 of the *Public Health Act* are established, s. 32 confers a broad discretion on a health officer to make orders, including orders requiring a person not to enter a place (s. 32(2)(b)(ii)) and to stop operating (s. 32(2)(c)).

183. When the transmission of the infectious agent SARS-CoV-2, which causes cases and outbreaks of the serious communicable disease known as COVID-19, was designated as a "regional event" under s. 51 of the *Public Health Act,* Dr. Henry, as Provincial Health Officer, had authority to exercise her emergency powers under Part 5 of the *Public Health Act.* These powers specifically include the power to make an order "in respect of a class of persons or things" which imposes "different requirements for different persons or things or classes of persons or things or for different geographic areas": *Public Health Act*, s. 54.

184. The Orders are consistent with the PHO's mandate under the *Public Health Act* and the powers conferred on her by ss. 30, 31, 32 and 54 of the *Public Health Act.*

185. Section 10(1) of the *Emergency Program Act* gives the minister responsible for that *Act* (presently the Solicitor General and Minister of Public Safety) authority to "do all acts and implement all procedures that the minister considers necessary to prevent, respond to or alleviate the effects of an emergency." This would include prohibiting the promotion of events likely to spread a deadly infectious disease. Further, in making Ministerial Order M416, the Minister of Public Safety and Solicitor General was implementing a provincial emergency plan, namely the Federal/provincial/territorial plan for ongoing management of COVID-19.

186. If the basis for a claim that the Orders are *ultra vires* is that they are unreasonable, this fails for the same reason addressed in relation to the constitutional review.

187. The provisions of the *COVID-19 Related Measures Act,* including its schedules, are

enacted by the Legislature of British Columbia and therefore cannot be *ultra vires* unless they are unconstitutional.

5) Restrictions on Demonstrations

188. While it is wrong to say that outdoor protests are risk free, there is no evidence on this record of any special risk associated with them. Moreover, the Black Lives Matter and "anti-mask" protest movements had not left evidence of significant clusters. It was therefore reasonable that they not be prohibited in light of their importance to expression and the democratic process and the specific words of section 2(c) of the *Charter*.

189. It is reasonable to restrict this exception to assemblies at the core of the freedom guaranteed by section 2(c) of the *Charter* without allowing assemblies for purposes other than expressing a perspective on matters of public concern or controversy. This is not content-specific: a demonstration for or against abortion rights or for or against the province's handling of the COVID-19 pandemic is treated equivalently.

190. Mr. Beaudoin's rights are not, however, violated by being expected to prepare a COVID safety plan as an organizer of a demonstration. His belief, without evidence, that public health information will be handled wrongly or illegally is not protected by the Constitution. Nor does he face any liability if third parties violate the plan, so long as he exercises due diligence.

191. Whether the tickets he was apparently issued should be enforced is a matter for the judicial justice or provincial court judge who hears that case. There is no general principle of immunity from enforcement of a law that later turns out to be overbroad.

6) Alternative Analysis Under *Oakes*

192. For the reasons discussed above, the Respondents submit that the appropriate frame for analyzing whether the limits on *Charter* freedoms caused by the impugned orders are "reasonable" under section 1 is that set out in *Doré*, not *Oakes.* But in any event, the Gatherings and Events Order would be upheld under *Oakes.*

193. The "pressing and substantial objective" part of the test has been conceded by the

Petitioners. Although they contest that there is a rational connection between avoiding the spread of SARS-CoV-2 and prohibiting religious gatherings, the existence of any risk of transmission of the virus in gatherings (or even a plausible case based on reason or evidence) is sufficient for the rational connection test.

194. The "minimal impairment" test has been stated by the Supreme Court of Canada as follows:

> The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.[239]

195. In considering whether the Gatherings and Events Order "minimally impairs" the rights of the Petitioners (assuming, for the purposes of this alternative argument, that this is the right analysis), it is important to recognize that this is a decision made in the face of irreducible uncertainty for the purposes of protecting the vulnerable. That is the type of situation that the Supreme Court of Canada has repeatedly held calls for the greatest level of deference in the application of the *Oakes* test:

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. [240]

196. Taking this into account, there are a number of ways in which Dr. Henry's Gatherings and Events Orders were "minimally impairing." First, she waited to impose it until there was evidence of exponential increase in cases, first in the Vancouver Coastal and Fraser Health regions and then across the province. Unlike in Manitoba, she allowed drive-in services. She made it clear that individual prayer and other forms of religious activity could continue to take place at places of worship. She permitted group religious

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[239] *R.J.R. Macdonald Inc. v. Canada*, [1995] 3 SCR 199 at para. 160.
[240] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927, at pp. 993-994.

instruction of children. Of course, online religious gatherings were encouraged. After consulting with religious leaders, she allowed for specific rules for funerals, weedings and baptisms – baptisms are *specifically* religious and indeed Christian. Finally, she allowed variances under s. 43.

197. When it comes to the final stage of the *Oakes* test, strict proportionality, it is important to note that very few laws have ever been struck down at this stage. Most importantly, where there is evidence of harm to others, that has always been a basis for limitations on section 2 freedoms, including religious freedom:

> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.[241]

198. There are few injuries to neighbours more palpable than increased risk of death and serious illness. While there can be no question that the state must respect the Petitioners' freedom to hold and to manifest the beliefs of their conscience, it must sometimes step in and protect those who do not share them, but do share the community, the air and vulnerability to novel viruses.

I. CONCLUSION AND ORDERS SOUGHT

199. If the Court agrees that the Petitioners should not judicially review the Gatherings and Events Orders, but must instead challenge the result of the reconsideration process that they invoked, then the Petition should be dismissed. If the Court agrees that Dr. Henry reasonably and proportionately balanced her mandate to protect public health with the *Charter* rights of those who would be affected by it, then the Petition should also be dismissed.

200. If, on considering Dr. Henry's reasons, the Court concludes that there is somewhere a problem of internal rationality or a factual or legal constraint that she failed to adequately

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[241] *R. v. Big "M" Drug Mart*, [1985] 1 SCR 295 at para. 123.

respect, then the Court should remit the matter back to Dr. Henry to address in light of that declaration. As the Supreme Court of Canada explained in *Vavilov,* when a court finds a decision to be unreasonable, it will "most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons." [242]

201. If, contrary to our submissions, the court considers that the Gatherings and Events Orders are laws of general application, it must consider whether a declaration of invalidity should be suspended under the principles recently set out by the Supreme Court of Canada in *Ontario (Attorney General) v. G*, 2020 SCC 38. This would clearly require evidence about impacts that is outside this record. While in the Respondents' submission, this simply shows the inapplicability of that form of analysis, if the court disagrees, the Respondents would ask for a chance to make submissions on the test to be applied and why suspension of any declaration of invalidity is warranted.

202. While the Court in *Vavilov* noted that there are exceptional circumstances in which it is appropriate for a reviewing court to direct a particular decision – in traditional terms, issue an order of *mandamus* – this is clearly not a case in which a particular outcome is inevitable and that remitting the case would serve no useful purpose.[243] If, for example, the court were to decide that some distinction between a permitted activity and those forbidden to the Petitioners were arbitrary, only a public health official could possibly determine whether it is better to resolve this difference by prohibiting both or allowing both. Determining what public health measures are necessary at any given time during an ongoing, novel pandemic is a particularly compelling example of circumstances in which the Court ought not to intervene or substitute its views for those of expert decision makers.

203. Even if the Court concludes that the impugned orders are not justified by the facts as revealed in the record, an order in the nature of *mandamus* would hobble the ability of the Provincial Health Officer or the Minister of Public Safety to address *new* facts (for

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[242] *Vavilov* at para. 141.
[243] *Vavilov* at para. 142.

example, the spread of a more transmissible and vaccine-resistant variant, or new evidence about transmission risks in religious settings). It would therefore be particularly inappropriate for this court to make a decision itself, even if it were to find some deficiency in Dr. Henry's reasoning justifying judicial review.

204. Statutory decision makers and the Attorney General do not receive costs or have them awarded against them on judicial reviews, with inapplicable exceptions.[244] Whether the Petition is allowed or dismissed, therefore, each party should bear its own costs.

205. The Respondents therefore ask for the following orders:

a. The Petition is dismissed.

b. In the alternative, the Petition is allowed and Dr. Bonnie Henry, the Provincial Health Officer, is directed to make a new Gatherings and Events Order consistent with these reasons.

c. Each party is to bear its own costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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March 2, 2021

[244] *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244 at paras. 44-48.