No. S-210209
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

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

Petitioners

and

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

Respondents

RESPONSE TO PETITION

Filed by: Her Majesty the Queen in right of the Province of British Columbia (the "Province") and Dr. Bonnie Henry in her capacity as Provincial Health Officer for the Province of British Columbia ("Dr. Henry") (collectively, the "Respondents")

THIS IS A RESPONSE TO the petition filed 7/JAN/2021.

Part 1: ORDERS CONSENTED TO

The Respondents consent to the granting of the orders set out in **NONE** of the paragraphs of Part 1 of the petition.

Part 2: ORDERS OPPOSED

The Respondents oppose the granting of the orders set out in paragraphs **1-7** of Part 1 of the petition.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Respondents take no position on the granting of the orders set out in **NONE** of the paragraphs of Part 1 of the petition.

Part 4: FACTUAL BASIS

Overview of Facts

1. Since March 16, 2020, Dr. Bonnie Henry, in her role as the Provincial Health Officer, has used her powers under the *Public Health Act*, SBC 2008, c. 28 to restrict public gatherings and events in order to limit the risk of transmission of the SARS-CoV-2, the virus that causes COVID-19. At all times, the objective was to avoid exponential growth in the incidence of COVID-19, which would overwhelm the medical system's ability to trace the spread of the virus and treat the disease in order to protect the most vulnerable members of society and minimize serious illness and overall deaths while, on the other hand, minimizing social disruption.

2. In the fall of 2020, it became clear that the existing measures were insufficient to avoid an exponential increase in the prevalence of the virus. British Columbia faced exponential growth in transmission. A number of the clusters were linked to religious events, notwithstanding the measures in place.

3. On November 19, 2020, as a result of evidence of exponential growth in prevalence of the virus – a trend which, if continued, would overwhelm British Columbia's ability to contain and treat COVID-19 – Dr. Henry announced a temporary province-wide ban on all in-person gatherings, including religious gatherings. The temporary ban continues. It does not apply to online services, drive-through services, individual meetings with religious leaders or to private prayer or contemplation. Exemptions for special circumstances are available under s. 43 of the *Public Health Act* and have been granted to orthodox Jewish congregations conducing services on the Sabbath outdoors when they are prohibited by their religious convictions from meeting electronically.

4. In coming to this decision, Dr. Henry considered and gave weight to the importance of religious freedom and exercise, as well as the mental health benefits of participation in an in-person religious community, but determined that, in her view, the restrictions were a necessary and proportionate response.

5. The Petitioners Brent Smith, John Koopman, John Van Muyen, Riverside Calvary Chapel, Immanuel Covenant Reformed Church and Free Reformed Church of

Chilliwack, B.C (collectively, the "Religious Petitioners") have decided not to abide by the orders of Dr. Henry or the impugned orders of the Solicitor General and Minister of Public Safety or the provisions of the *Covid 19 Related Measures Act,* SBC 2020, c. 8 on the basis of their own assessment of public health risks. When Dr. Henry became aware of this position, she explained the rationale for her action and invited them to make applications under s. 43 of the *Public Health Act* for reconsideration if they disagreed. They refused to do so and continued to hold in-person services contrary to the order despite repeated attempts by police officers to get them to comply.

Identity of the Record

6. With limited exceptions, in an application for judicial review, the evidence is confined to the record before the decision maker.[1] The "record of proceeding" is defined in s. 1 of the *Judicial Review Procedure Act*.[2] It includes a "document produced in evidence before the tribunal" and "the decision of the tribunal and any reasons given for it." In *Dane Developments Ltd.*, in a passage referred to by Justice Newbury in *Sobeys West Inc.*, Mr. Justice Bracken identified the three categories of exceptions to the rule that all evidence on judicial review must have been in the record before the decision maker as follows:

a. general background information which will assist the reviewing court in understanding the issues;

b. evidence of procedural defects that could not be found in the record of the proceeding; or

c. evidence reconstructing what was before the decision maker.[3]

7. Dr. Brian Emerson is the Acting Deputy Provincial Health Officer. He has regularly participated in the meetings of senior Ministry of Health and other Ministry

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[1] *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 paras. 35-36; *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41 at para. 52, and cases cited there.

[2] *Judicial Review Procedure Act*, RSBC 1996, c 241, s. 1 "**record of proceeding**".

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*.[4]

8. Dr. Emerson's affidavit provides general background information and evidence reconstructing what was before Dr. Henry at the time she made the impugned orders under the *Public Health Act*. With respect to their impact on political and religious assembly at issue in this proceeding, the other impugned orders follow on from Dr. Henry's decisions.

Background Information About COVID-19 and Transmission in Gatherings

9. Dr. Henry is the senior public health official for the province. Her responsibilities are outlined in the *Public Health Act*. She is informed by the public health component of British Columbia's health system, which includes the B.C. Centre for Disease Control and regional medical health officers.[5]

10. The first diagnosed case of COVID-19 in British Columbia was on January 27, 2020. By early March, public health officials understood that the SARS-CoV-2 virus (the "Virus") was the infectious agent causing outbreaks of COVID-19 and that gatherings of people in close contact could cause transmission. On March 16, Dr. Henry issued the first gatherings order, prohibiting gatherings in excess of 50 people. On March 17, Dr. Henry declared COVID-19 to be a regional event under the *Public Health Act* and the Solicitor General and Minister of Public Safety declared there to be a state of provincial emergency.[6]

11. SARS-CoV-2 can be spread by people who do not have symptoms. Without public health interventions, it has a high infectivity, with each infected individual likely to transmit the Virus to another 2 to 3 people. As long as that number is greater than 1, the Virus will spread exponentially, ultimately overwhelming the health system. Public health

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[3] *Dane Developments Ltd. v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCSC 1663 at para. 46.
[4] Affidavit #1 of Dr. Brian Emerson, made February 2, 2021 ("Emerson #1"), para. 2.
[5] Emerson #1, paras. 7-28.

monitoring looks for clusters (two or more cases associated with the same location, group or event), since these can evolve into outbreaks wherein transmission becomes sustained.[7]

12. From the outset of the pandemic through the first wave (March through August 2020), Dr. Henry decided to limit gatherings and events to a maximum of 50 people. Guidance was also provided to persons sponsoring events. Dr. Henry and other public health officials monitored surveillance data respecting the emergence and progression of the Virus in British Columbia. Situation reports summarizing the data are made available to the public on the BCCDC's website and are included in the record.[8]

Reconstruction of Evidence Before Decision Maker

13. Dr. Henry relied on information showing transmission of the Virus seems highest in settings of sustained interpersonal interaction (15 minutes or more) indoors or in enclosed spaces. Behavioural factors can also increase the risk or transmission, including loud talking, chanting, singing and being in close proximity to other people. Since transmission can be asymptomatic, the Virus may spread even though no one in the gathering appears to be sick. There are protective measures that can be taken, but their effectiveness will vary based on how well people comply.[9]

14. The epidemiological situation in British Columbia changed in Fall 2020. The number of new cases, hospitalizations and the reproduction rate all climbed. There was evidence of cases and clusters associated with social gatherings in homes, bars and restaurants and religious gatherings. There is no data showing significant or routine transmission arising from outdoor protests or demonstrations.[10]

15. The Premier, Minister of Health and Dr. Henry have engaged with faith leaders throughout the pandemic to discuss preventative measures and their impact on faith communities and religious practices. A Jewish Orthodox synagogue submitted a request for reconsideration under s. 43 of the *Public Health Act,* noting that their understanding

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[6] Emerson #1, paras. 29-37.
[7] Emerson #1, paras. 38-46.
[8] Emerson #1, para. 47-55, 72, 78, 83 and 90; Exs.18-22, 26-27, 32-33 and 38.
[9] Emerson #1, paras. 60-62.

of Jewish law prohibits the use of electronic devices on the Sabbath. They were granted an exemption on an agreement that the service would take place in an open tent, the synagogue building would be locked, no more than 25 persons would attend, every participant would wear a face mask, non-family members would not stand within six feet of each other and the service would not last more than one hour. This was subsequently extended to other orthodox synagogues. [11]

Decisions and Reasons

16. 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.[12]

17. The November 7 oral order was followed by written orders dated November 10 and 11, 2020. These included written recitals setting out the reasons for the order.[13]

18. On November 19, 2020, Dr. Henry made a province-wide oral order prohibiting visitors at private residences and all in-person events. She gave reasons in the form of a media briefing announcing the order.[14]

19. On December 2, 2020, Dr. Henry issued a written Gatherings and Events order that confirmed the oral order. The recitals provided brief reasons for the order.[15]

Correspondence with Petitioners Regarding Alternate Remedy

20. On December 18, 2020, on becoming aware of their decision not to abide by the Gatherings and Events Order, Dr. Henry wrote to the Petitioners Brent Smith and Riverside Calvary Chapel and to the Petitioners John Koopman and Chilliwack Free Reformed Church.[16]

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[10] Emerson #1, paras. 63-109, Exs. 14-41.
[11] Emerson #1, paras. 113-119.
[12] Emerson #1, Ex. 23.
[13] Emerson #1, Exs. 24-25.
[14] Emerson #1, Ex. 28.
[15] Emerson #1, Ex. 29.
[16] Emerson #1, Exs. 49-50.

21. On December 22, 2020, John Koopman responded to Dr. Henry's letter, advising, among other things, that her "offer to consider a request from our church to reconsider your Order sadly rings hollow."[17]

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 s. 43(1) of the *Public Health Act*. The same day, counsel for the Respondents provided a letter stating it would be accepted as such and asking for clarification on certain points.[18]

Ministerial Order No. M416 and "Food and Liquor Premises, Gatherings and Events" Order

23. On November 13, 2020, the Solicitor General and Minister of Public Safety (the "Minister") issued Ministerial Order No. M416, pursuant to the *Emergency Program Act*. Ministerial Order No. M416 provides compliance and enforcement measures in respect of Dr. Henry's Gathering and Events orders.[19]

24. The Petitioners also challenge the "Food and Liquor Premises, Gatherings and Events" order, item 23.5 in Schedule 2 of the *COVID-19 Related Measures Act*, SBC 2020, c 8. This Item was repealed on January 8, 2021 by BC Reg. 1/2021.

25. There are no reasons or record of decision associated with these decisions, which do not substantively limit the type of gathering or event that can take place.

Part 5: LEGAL BASIS

Overview

26. This is a judicial review application seeking relief in relation to a number of statutory decisions, most substantively the Gatherings and Events Orders of Dr. Henry from November 9 to the present. The legal issue is not whether Dr. Henry's orders were "correct" in the sense of being the best possible balance between the values underlying religious and political assembly and the needs of public health in the opinion of the court.

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[17] Emerson #1, Ex. 51.
[18] Affidavit #1 of Vanessa Lever, made February 2, 2021 ("Lever #1") Exs. D, E.
[19] Lever #1, Ex. C.

The issue is whether they were "reasonable" as that term is understood in Canadian administrative law, elucidated most recently and authoritatively in the Supreme Court's decision in *Vavilov*.[20]

27. There is no question that restrictions on gatherings to avoid transmission of SARS-CoV-2 limit rights and freedoms guaranteed by the *Charter of Rights and Freedoms*, as well as personal liberty in a more generic sense. It is not possible to limit how people may come together without affecting fundamental freedoms, including freedom of religion and conscience, of expression, of peaceful assembly and of association. 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.

28. The framework for analyzing whether the limits on *Charter* rights and freedoms are justified under section 1 of the *Charter* depends on whether what is challenged is a provision of a statute that authorizes administrative or executive action or if what is challenged is the effect of a statutory decision as unjustifiably limiting *Charter* rights.[21] In the latter case, the decision maker should ask how the values underlying the right or freedom should best be protected in view of the statutory objectives.[22] On review by a court, the issue becomes whether, in assessing the impact of the relevant *Charter* protections 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.[23] This assessment is made on a reasonableness standard of review based on the record before the decision maker.[24]

29. In this case, the record shows Dr. Henry turned her mind to the impact on religious practice of her orders. She was governed by the principle of proportionality. She consulted widely with faith leaders and individually asked for the input of the leaders

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[20] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ["*Vavilov*"].
[21] *Vavilov* at para. 57.
[22] *Doré v. Barreau du Québec*, 2012 SCC 12 ["*Doré*"] at para. 56.
[23] *Doré* at para. 57.
[24] *Vavilov* at para. 57.

of two of the churches making up the Religious Petitioners, while affirming the need for respect for the rule of law and public health.

30. The Petition cannot succeed and should be dismissed for the following reasons:

a. The Petitioners initially failed to pursue an adequate alternative remedy by seeking reconsideration under section 43 of the *Public Health Act*. Having now done so, their Petition cannot succeed until that reconsideration is complete and any judicial review should be of the reasons for reconsideration.

b. The correct framework for determining whether the limits on *Charter* freedoms are justified under section 1 is the one set out in *Doré*. The record shows that Dr. Henry understood that her role was to try to find a proportionate balance between the statutory objectives of the *Public Health Act* and the impact of her decisions on freedoms that require gathering together to enjoy, specifically including religious freedom.

c. The Petitioners have failed to demonstrate that the impugned decisions demonstrated either a "failure of rationality internal to the reasoning process" or are untenable in light of the relevant factual and legal constraints.

Parties Are Misidentified

31. The Crown is not subject to the prerogative writs, nor is it the proper respondent in a proceeding for a declaration of invalidity – that is the Attorney General. So "Her Majesty" should not have been named as a respondent and the Attorney General should have been. Further, since relief is sought against the Minister of Public Safety and Solicitor General, he should also have been added as a respondent. It is conceded that there is no prejudice in making these substitutions.

Reconsideration is an Adequate Alternative Remedy

32. In this case, the Petitioners sought a reconsideration under s. 43 of the *Public Health Act* on January 29, 2021, a few business days before the time ordered to file this Petition Response. This process should be completed before a judicial review application is entertained.

33. Where an adequate alternative remedy or forum exists, the court may exercise its discretion to refuse to undertake judicial review.[25]

34. Where an alleged error comes within a statutory decision maker's power of reconsideration, a court will typically refuse to entertain judicial review if the party has not made an attempt to take advantage of the reconsideration provision. If the power of reconsideration is not wide enough to encompass the alleged error, reconsideration will not be considered an impediment to judicial review. Where a party has taken advantage of a statutory decision maker's reconsideration power, it is the reconsideration decision that represents the final decision of the tribunal and only the reconsideration decision may be judicially reviewed.[26]

35. Section 43 of the *Public Health Act* provides that an individual affected by a public health order may request a variance or reconsideration of the order by the health officer who made the order (in this case, Dr. Henry) 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, or
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> (c) requires more time to comply with the order.

36. In exercising her discretion under s. 43 of the *Public Health Act*, Dr. Henry is required to weigh an applicant's *Charter* rights with her statutory mandate to preserve public health, and to do so in a reasonable and procedurally fair way.[27]

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[25] *Strickland v. Canada (Attorney General)*, 2015 SCC 37; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561.
[26] *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 at paras. 39-40; *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499 at paras. 117-121.
[27] *Doré*; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 1 ["*Loyola*"].

37. Section 43(1) provides a relatively convenient and cheap remedy. All the person seeking reconsideration need do is submit the alleged additional relevant information or a proposal that would meet the objective of the order. The evidence can be scientific or medical in nature or it can be about the *Charter* interests at stake. If additional relevant information not reasonably available is submitted, then reasons must be given under s. 43(4). A health officer may suspend an order pending reconsideration, although this is not presumed.

38. To the extent the Petitioners argue that the Provincial Health Officer may not restrict the in-person exercise of section 2 rights at all, and regardless of the scientific evidence, then section 43 would not be an adequate remedy, since it does depend on either the existence of new evidence not available to the health officer or a proposal that will meet the objectives of the order and is suitable to be made the subject of an agreement. But since such a broad proposition is not tenable in any event, the section 43 process is an adequate remedy if the petitioners feel Dr. Henry failed to proportionately balance their own circumstances with the public health objective of mitigating risk of transmission of SARS-CoV-2. This process should be completed before judicial review is considered – if the Petitioners are not content with the result of the reconsideration, then *it* can be judicially reviewed on the record thereby created.

Framework for Constitutional Analysis

39. If the judicial review goes forward on the merits, then the issue is whether Dr. Henry's orders are unreasonable as balances between *Charter* freedoms and the public health objectives for which she is responsible, based on the information before her.

40. The Respondents concede the Orders engage the Petitioners' rights under ss. 2(a), 2(b), 2(c) and 2(d) of the *Charter*. There is no evidence that the Religious Petitioners have demonstrated a *religious* conviction that in-person meetings are a religious duty – two of the three churches discontinued in-person services when they were under no legal obligation to do so, and it appears they became convinced that the public health measures against the spread of SARS-CoV-2 were unnecessary for secular reasons. There is no doubt, however, that in-person gatherings are a practice connected with religion and that the November 19 order in particular interferes in a

manner that is more than trivial or insubstantial with religious practice.[28] There is also no doubt that restrictions on political protest interfere with section 2(b) and 2(c) of the *Charter*. Restrictions on gatherings also presumably engage freedom of association under s. 2(d) of the *Charter*, which, at minimum, would protect the ability of individuals to meet to pursue collective goals.

41. The real issue is whether the impugned orders are "reasonable limits" on these freedoms under section 1 of the *Charter*. It is therefore unnecessary to consider the Petitioners' other alleged *Charter* breaches. With respect to section 7, the Petitioners have not established that their "life", "liberty" or "security of the person" interests have been infringed or that this was done contrary to the principles of fundamental justice: indeed the right to a written hearing for exemptions has been specifically preserved.[29] The Respondents do not dispute that there are mental health benefits of in-person religious and other gatherings. However, the kind of serious state-caused psychological harm required to establish a breach of "security of the person" has not been established.[30] Moreover, they have not established any arbitrariness, overbreadth or gross disproportion.

42. Nor have they shown that any of the Orders make a distinction based on an enumerated or analogous ground or that such a distinction creates a disadvantage.[31] People are not treated differently based on their religious identity. Gatherings are defined neutrally, and exempted activities such as support groups or counselling are exempted whether delivered in a secular or religious way. There is no evidence that any particular group is disadvantaged because of its religious identity.

43. In any event, even if other *Charter* rights are engaged, the Court must engage in the same process to determine whether the limits imposed by the Orders are "reasonable". Since this is a matter of the alleged effects of executive discretion, rather than the validity of a law, the analysis is that set out in *Doré*.

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[28] *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 65.
[29] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44.
[30] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (delay of adjudication of a human rights complaint not sufficiently serious to invoke security of the person).
[31] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30.

44. In that case the Supreme Court of Canada unified the legal test where administrative discretion is alleged to have been exercised in a way contrary to *Charter* rights or values. *Doré* involved a decision by a law society as to whether to discipline a lawyer for an uncivil 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.[32]

45. If the underlying statute is not challenged, but it is alleged that discretion under it was employed in a way inconsistent with *Charter* rights or values, the *Doré* analysis applies.[33]

46. On judicial review, the task of the reviewing court applying the Doré framework is to assess whether the decision is reasonable because it reflects a proportionate balance between the *Charter* protections at stake and the relevant statutory mandate: *Doré*, at para. 57.

Reasonableness Review

47. Under *Vavilov*, there are two bases for holding a decision maker's decisions to be unreasonable. One is a failure of rationality internal to the reasoning process. The second is where the decision is untenable in light of a factual or legal constraint.[34]

48. Dr. Henry's reasons, both in the preambles to the orders and in the media events, do not exhibit a failure of internal rationality. 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.

49. In making the Orders, Dr. Henry assessed the available scientific evidence to determine COVID-19 risk for gatherings in British Columbia including epidemiological

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[32] *Doré* at paras. 3-5.
[33] *Loyola*; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 [*"TWU"*].

data regarding COVID-19 transmission associated with religious activities globally, nationally and in British Columbia, evidence regarding SARS-CoV-2 transmission and disease, factors leading to elevated transmission risk in religious settings, and COVID epidemiology in British Columbia.

50. Dr. Henry also carefully considered the significant impacts of the Orders on freedom of religion. In this regard, she consulted with the inter-faith community 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*.

51. In making the Orders Dr. Henry was guided by the principles applicable to public health decision making, and in particular, 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.

52. 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.

Non-Constitutional Review

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

54. 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

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[34] *Vavilov* at para. 101.

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 .

55. Where the criteria in ss. 30 and 31 of the *PHA* are established, s. 32 of the *PHA* 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)).

56. 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.

57. 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*.

58. Section 10(1) of the *Emergency Program Act*, RSBC 1996, c 111 gives the minister responsible 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.

59. 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.

60. 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.

Other Relief

61. The petitioners' request that this Court dismiss violation tickets issued to them, as set out in paragraph 5 of Part 1 of the petition, constitutes a collateral attack on the violation tickets, which must be challenged in the Provincial Court.

62. The petitioners cannot satisfy the test for injunctive relief.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Dr. Brian Emerson, made February 2, 2021;
2. Affidavit #2 of Vanessa Lever, made February 2, 2021;
3. The materials and proceedings herein; and
4. Such further and other material as counsel may advise and this Court permit.

The petition respondents estimate that the application will take 3 days.

Date: February 2, 2021

emily Lapper

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Emily Lapper
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