

COURT FILE  
NUMBER

QBG No. 395 of 2021

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE **SASKATOON**

APPLICANT(S) **JASMIN GRANDEL AND DARRELL MILLS**

RESPONDENT(S)

**THE GOVERNMENT OF SASKATCHEWAN AND  
DR. SAQIB SHAHAB in his capacity as CHIEF  
MEDICAL HEALTH OFFICER FOR THE  
PROVINCE OF SASKATCHEWAN**

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**BRIEF OF LAW OF JASMIN GRANDEL AND DARRELL MILLS**

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## **BRIEF OF LAW OF JASMIN GRANDEL AND DARRELL MILLS**

### **I. OVERVIEW**

1. The Applicants seek remedies pursuant to the *Canadian Charter of Rights and Freedoms* (“*Charter*”) with regard to the Respondents’ restrictions on outdoor protests contained in Provincial Orders issued by Dr. Shahab which limited public outdoor gatherings to 10 or 30 persons at various material times (the “Outdoor Gathering Restrictions”).
2. This case does not require the Court to settle scientific or medical debates. Rather, the material fact that the transmission of SARS-CoV-2 is less likely to occur outdoors is not in dispute. In light of this, the Respondents’ restriction of public outdoor gatherings to 10 persons while simultaneously permitting public indoor gatherings of 30 persons is unreasonable and unjustifiable. This necessitates the Court to exercise its role as a “guardian[] of the constitution and of individuals’ rights under it”.<sup>1</sup>
3. The Applicants seek a declaration that the Outdoor Gathering Restrictions unjustifiably infringe the Applicants’ *Charter* rights of freedom of expression, peaceful assembly and association, and that the Respondents have not satisfied the burden of establishing that the Outdoor Gathering Restrictions are reasonable and demonstrably justified in a free and democratic society.

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<sup>1</sup> *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169 (Dickson J. as he then was, writing for a unanimous Court).

## II. FACTS

### **Summary of the Relevant Facts**

4. The Respondents' initial response to Covid in 2020 included imposing limitations on outdoor protests, including restricting outdoor protests to 10 and then 30 people. In the summer of 2020, several large Black Lives Matters protests took place in Saskatchewan in violation of the Respondents' 10 and 30 person limits on protests. There is however no evidence that any transmission of SARS-CoV-2 occurred at these protests.
5. The lack of transmission of a respiratory virus at outdoor protests was not unexpected from a scientific and medical perspective given the known minimal risk of outdoor transmission of other respiratory viruses. The weight of scientific data accumulated in throughout 2020 confirmed that the risk of transmission of the SARS-CoV-2 virus at an outdoor protest was minimal.
6. Despite this fact, the Respondents continued their 30-person limit on outdoor protests, and in December 2020, reduced that limit to 10 persons. This 10-person limit was imposed although many other indoor in-person gatherings known to have a greater transmission risk, were permitted 30 persons.
7. The Applicants Ms. Grandel and Mr. Mills were charged for attending outdoor protests against the governments' restrictions that exceeded the Respondents' strict numerical gathering limits. These same numerical gathering limits had not been enforced against the earlier Black Lives Matter protests, which had rather been supported by the Respondents and the police.

### **A. The Respondents' initial response to Covid-19 and large outdoor protests**

8. The first case of Covid-19 was reported in Saskatchewan on March 12, 2020.<sup>2</sup> In response, Saskatchewan declared a State of Emergency on March 18, 2020.<sup>3</sup> The Saskatchewan government did not impose restrictions on gatherings under

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<sup>2</sup> Affidavit of Dr. Julie Kryzanowski, MD CCFP FRCPC MSc, affirmed November 24, 2021, [Kryzanowski Affidavit] at para. 29 and Exhibit "K".

<sup>3</sup> Kryzanowski Affidavit at para. 36 and Exhibit "L".

*The Emergency Planning Act*.<sup>4</sup> Rather, Dr. Saqib Shahab, Chief Medical Health Officer of Saskatchewan, issued Provincial Orders, citing section 45 of *The Public Health Act, 1994* and section 25.2 of *The Disease Control Regulations*, which confer powers on the Minister of Health.<sup>5</sup>

9. On March 17, 2020, Dr. Shahab prohibited outdoor gatherings over 50 people if any attendees had travelled internationally in the prior 14 days.<sup>6</sup>
10. On March 26, 2020, Dr. Shahab issued another order prohibiting outdoor gatherings with more than 10 people.<sup>7</sup>
11. In early summer 2020, large protests occurred around the world and in Saskatchewan in support of Black Lives Matter. Protests in Saskatoon and Regina saw hundreds, even thousands, of people gathering to protest against racism.<sup>8</sup> On June 2, 2020, during a Covid-19 news conference,<sup>9</sup> Premier Scott Moe noted that there had been “hundreds at the peaceful demonstrations in front of the Legislature today.”<sup>10</sup> The Premier spoke out against racism and in support of those peacefully protesting:

Racism remains a problem in our society and in our communities and we should take every opportunity to speak out against it. We should do so peacefully and we should do so lawfully. Unlike the individual who chose to vandalize the War Memorial at the Legislature. I’m heartened by the fact that that disgraceful act was done quite likely by one individual. Meanwhile, we had hundreds at the peaceful demonstration in front of the

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<sup>4</sup> Kyzanowski Affidavit at para. 37.

<sup>5</sup> The Applicants do not concede that the orders were properly issued pursuant to *The Public Health Act, 1994* or *The Disease Control Regulations*, but do not challenge the orders on that basis.

<sup>6</sup> Kyzanowski Affidavit at para. 38; <https://publications.saskatchewan.ca/#/products/112172>.

<sup>7</sup> Kyzanowski Affidavit at para. 38; <https://publications.saskatchewan.ca/#/products/104652>.

<sup>8</sup> Affidavit of Jasmin Grandel (“Grandel Affidavit”) at paras. 22-30, 33-34 and Exhibits “P” and “Q”.

<sup>9</sup> See Grandel Affidavit at para. 24, hyperlinking to Premier Scott Moe’s Facebook post of the June 2, 2022 news conference (<https://www.facebook.com/PremierScottMoe/posts/3226562117388162>) and also linking to the Government of Saskatchewan post of the June 2, 2022 news conference on its YouTube channel at [https://www.youtube.com/watch?v=KkOz696RkAc&ab\\_channel=GovernmentofSaskatchewan](https://www.youtube.com/watch?v=KkOz696RkAc&ab_channel=GovernmentofSaskatchewan) (the “COVID-19 June 2 Video”).

<sup>10</sup> Grandel Affidavit at para. 26, hyperlink to specific location in the COVID-19 June 2 Video [here](https://youtu.be/KkOz696RkAc?t=4m27s): <https://youtu.be/KkOz696RkAc?t=4m27s>.

Legislature today. So I commend those in the US and Canada, as well as here in Saskatchewan who are making their voice heard and are doing so peacefully and safely.<sup>11</sup>

12. The Premier indicated a willingness to consider attending the protests, noting that he had respect for those at the rally:

And we see these voices that are being heard. And I just have all the respect in the world for them as individuals for communicating the message that racism is not alright, and black lives do matter. And so there was a rally out here today. I'm sure I'll have some additional questions on the size of that rally. But it was a peaceful rally, and it is one that I think has brought people together to raise the discussion, yet again, of a societal challenge that we all face.<sup>12</sup>

13. A reporter then asked the Premier: "what do you make of the size of the rally, you know, more than five hundred people there, not everyone wearing masks, certainly not everyone physical distancing, and do you have any recommendations, Dr. Shahab, for what they should do now?"<sup>13</sup>

14. The Premier's response was that "the recommendation is 10",<sup>14</sup> when in fact, Dr. Shahab's order in force at that time stated:

Indoor and outdoor public gatherings and private **gatherings of over 10 people** (excluding family members living in the same household) **are prohibited** except in the following circumstances where 2 meter distancing between people can be maintained:

- (i) Settings where people are distributed into multiple rooms or buildings, and workplaces; and
- (ii) Are a critical public service or an allowable business service.

In the event that a critical public service or allowable business service is unable to maintain 2 meter distancing, other measures such as self-monitoring of personal health or supervision by Infection Prevention and

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<sup>11</sup> Grandel Affidavit at para. 24, hyperlink to specific location in the COVID-19 June 2 Video [here](https://youtu.be/KkOz696RkAc&t=4m04s): <https://youtu.be/KkOz696RkAc&t=4m04s>.

<sup>12</sup> Grandel Affidavit at para. 25, hyperlink to specific location in the COVID-19 June 2 Video [here](https://www.youtube.com/watch?v=KkOz696RkAc&t=503s): <https://www.youtube.com/watch?v=KkOz696RkAc&t=503s>.

<sup>13</sup> Grandel Affidavit at para. 25, hyperlink to specific location in the COVID-19 June 2 Video [here](https://youtu.be/KkOz696RkAc&t=10m27s): <https://youtu.be/KkOz696RkAc&t=10m27s>.

<sup>14</sup> *Ibid.*

Control Officers or Occupational Health and Safety in the workplace shall be applied.<sup>15</sup>

15. Section 61(a) of *The Public Health Act, 1994* states:

**Offence and penalty**

61 **Every person who contravenes any provision of this Act or a regulation, bylaw or order made pursuant to this Act** is guilty of an offence and liable on summary conviction:

(a) in the case of an individual:

(i) for a first offence:

(A) to a fine of not more than \$75,000; and

(B) to a further fine of not more than \$100 for each day during which the offence continues; and

(ii) for a second or subsequent offence:

(A) to a fine of not more than \$100,000; and

(B) to a further fine of not more than \$200 for each day during which the offence continues[.]

16. Premier Moe expressly stated his support for the decision of law enforcement not to enforce the order prohibiting outdoor gatherings over 10 persons:

So with respect to the enforcement, or the size of the rally, my assumption is that the law enforcement officials have used their judgement with respect to this particular rally on the broader societal challenge that we have, and I can do nothing but support the law enforcement officials with that judgment.<sup>16</sup>

17. Dr. Shahab's response to the reporters' question on June 2 recommendations for protestors indicated that the rally was a "special event" and emphasized the importance of keeping physical distance:

I think we all need to be conscious of our responsibility to each other, in terms of, you know, we have learned that, you know, even in your outdoors, we see around Wascana Lake, people are walking, hundreds of people are walking safely, keeping the physical distance. And I think just practicing those measures of physical distancing is kind of helps all of us to stay safe. And also I would remind people who were at the rally and

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<sup>15</sup> May 3, 2020, Public Health Order, section 1(b), Exhibit Q to the Grandel Affidavit, page 259 [emphasis added].

<sup>16</sup> Grandel Affidavit at para. 26, hyperlink to specific location in the COVID-19 June 2 Video [here](https://youtu.be/KkOz696RkAc&t=10m27s): <https://youtu.be/KkOz696RkAc&t=10m27s>.

were maybe closer than two meters and weren't wearing a mask, just keep an eye on their symptoms and do seek testing if they are concerned.<sup>17</sup>

18. At another news conference on June 8, 2020, Dr. Shahab noted that “outdoor gatherings while observing physical distancing are better than indoor gatherings.”<sup>18</sup> June 8<sup>th</sup> was also the date Dr. Shahab’s order increasing the outdoor gathering limit to 30 people came into force.<sup>19</sup>
19. Premier Moe made it very clear that he was listening carefully to the concerns of individuals who attended the protests in Saskatoon and Regina.<sup>20</sup>
20. A week after Premier Moe stated publicly that he could do nothing but support the law enforcement officials judgement not to charge protestors, the Regina Police Chief spoke at a large outdoor protest, in which he noted that “many of our police officers brought their families today because we need to come together as a community.”<sup>21</sup>

#### **B. The lower risk of outdoor transmission**

21. The Respondents have provided no evidence of any transmission of the SARS-CoV-2 occurring at these Black Lives Matter protests, despite the failure of those protests to comply the Respondents’ restrictions on outdoor protests.<sup>22</sup>

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<sup>17</sup> Grandel Affidavit at para. 26, hyperlink to specific location in the COVID-19 June 2 Video [here](https://youtu.be/KkOz696RkAc&t=12m00s): <https://youtu.be/KkOz696RkAc&t=12m00s>.

<sup>18</sup> Grandel Affidavit at para. 29, linking to the June 8, 2020 Covid-19 press conference on the Government of Saskatchewan YouTube channel posted at [https://www.youtube.com/watch?v=bTe38zHbC8Q&ab\\_channel=GovernmentofSaskatchewan](https://www.youtube.com/watch?v=bTe38zHbC8Q&ab_channel=GovernmentofSaskatchewan) (“COVID-19 June 8 Video”), hyperlink to specific location in COVID-19 June 8 Video [here](#).

<sup>19</sup> Grandel Affidavit at para. 28 and Exhibit “S”.

<sup>20</sup> Grandel Affidavit at paras. 27 (hyperlink to specific location in the COVID-19 June 2 Video [here](https://youtu.be/KkOz696RkAc&t=17m38s): <https://youtu.be/KkOz696RkAc&t=17m38s>) and at para. 30 (hyperlink to specific location in COVID-19 June 8 Video [here](https://youtu.be/KkOz696RkAc&t=17m38s): <https://youtu.be/KkOz696RkAc&t=17m38s>).

<sup>21</sup> Grandel Affidavit at para. 33, incorporating the hyperlink to *The Leader-Post*’s video of the June 5, 2020 protest, where the Police Chief is speaking posted on [YouTube](#): <https://www.youtube.com/watch?v=DrXGQceXXz4>.

<sup>22</sup> Transcript of Oral Cross-Examination of Moliehi Khaketla, February 25, 2022 (“Khaketla Transcript”) 42:8-43:12; Responses to Undertakings of Dr. Moliehi Khaketla, April 14, 2022, Undertaking No. 2.



22. Dr. Thomas Warren, an infectious disease specialist, has deposed that scientific evidence existing prior to Covid-19 concerning the risk of outdoor transmission of other important respiratory tract infections, specifically tuberculosis and influenza, showed little to no outbreaks associated with single day gatherings.<sup>23</sup> This fact supported an assumption that the risk of outdoor transmission of SARS-CoV-2 at outdoor protests would be negligible.<sup>24</sup>
23. This assumption was borne out as data specific to SARS-CoV-2 emerged in 2020. A July 13, 2020 study of the transmission of SARS-CoV-2 in China only found one outdoor outbreak involving two Covid-19 cases out of 7324 identified cases.<sup>25</sup>
24. A systemic review published in November 2020 confirmed that the risk of SARS-CoV-2 transmission in outdoor locations is lower than in indoor spaces.<sup>26</sup> Dr. Khaketla, called by the Respondents to give her opinion, deposed that “definitely within 2020” transmission was known to occur mostly in indoor and crowded settings.<sup>27</sup>
25. The fact that outdoor gatherings had a lower risk of transmission of SARS-CoV-2 than indoor gatherings, was expressly stated by Dr. Shahab himself on June 8, 2020: “outdoor gatherings while observing physical distancing are better than indoor gatherings.”<sup>28</sup>

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<sup>23</sup> Affidavit of Thomas Warren (“Warren Affidavit”), at paras. 5-9.

<sup>24</sup> Warren Affidavit at para. 4.

<sup>25</sup> See Warren Affidavit at Exhibit L.

<sup>26</sup> See Warren Affidavit at Exhibit G.

<sup>27</sup> Khaketla Transcript, 47:14-48:9; see also Affidavit of Dr. Moliehi Khaketla (“Khaketla Affidavit”), at Exhibit “B”, R-1371: “Most of transmission is known to occur in indoor and crowded settings, and the research regarding outdoor transmission is limited.”

<sup>28</sup> Grandel Affidavit at para. 29, hyperlink to specific location in COVID-19 June 8 Video [here](https://youtu.be/bTe38zHbC8Q&t=15m10s): <https://youtu.be/bTe38zHbC8Q&t=15m10s>.

26. On December 9, 2020, Dr. Shahab reiterated that it's "good to be outdoors and it's safe to be outdoors and maybe meet and greet people from a distance"<sup>29</sup> and that "being outdoors is safer."<sup>30</sup>
27. Despite this knowledge, the Respondents maintained a 30-person limit on outdoor protests through the summer, fall and early winter of 2020. The first evidence of this restriction being enforced is a ticket issued to Mr. Mark Friesen, who allegedly spoke at a protest on December 12, 2020.<sup>31</sup>

### **C. Imposition of 10 person outdoor gathering limit in winter of 2020**

28. On December 14, 2020, the Respondents again imposed a 10-person outdoor gathering limit.<sup>32</sup> No distinction was made between a private outdoor social gathering and a public outdoor protest. The Respondents have never differentiated between outdoor social gatherings such as backyard parties where there is often potential for indoor interactions<sup>33</sup> with a greater transmission risk, and protests where public visibility would be hindered by an indoor component.
29. In contrast to provinces such as Manitoba and Ontario,<sup>34</sup> Saskatchewan permitted numerous indoor activities at greater capacity limits than its Outdoor

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<sup>29</sup> Transcript of December 9, 2020 Covid-19 news conference, attached as Exhibit "M" to the Kryzanowski Affidavit, RR Vol I, R-0351-0352.

<sup>30</sup> *Ibid.* at R-0354:20-21. On January 12, 2021, Dr. Shahab again, speaking at a news conference, highlighted the benefits of meeting outside: "The weather was mild. People were meeting outdoors. The weather continues to be mild, so, again, you know, it's a great opportunity to keep taking advantage of the outdoors." Transcript January 12, 2021 Covid-19 news conference, RR I, Ex. M, Tab 4 ("Jan 12 2021 Transcript"), page 11:19-23, R-0518; see also 14:18-21, R-0521.

<sup>31</sup> Grandel Affidavit, para. 20, Exhibit "O", page 238, Ticket No. 85447890, stating the charge as follows: "did fail to comply with a Public Health Order dated November 26, 2020, by participating in an outdoor public/private gathering of more than 30 people".

<sup>32</sup> *Kryzanowski Affidavit* at para. 38; <https://publications.saskatchewan.ca/#/products/110743>.

<sup>33</sup> See e.g. *Kryzanowski Affidavit*, Exhibit "I", "Maple Creek Party Outbreak" (R-0309): "Gathering held outdoors and indoors at private residence on April 3, 2021." The Respondents cannot identify any particular transmission that occurred outdoors, rather than indoors: Transcript of Oral Questioning of Julie Kryzanowski, February 25, 2022 ("Kryzanowski Transcript"): 29:24-30:12.

<sup>34</sup> See Jan 12 2021 Transcript 19:19-20:3, R-0526-0527; *Ontario v. Trinity Bible Chapel*, [2022 ONSC 1344](#) [*Trinity Bible Chapel*] at para. 27, 35, 48-49, 56, 74; *Gateway Bible Baptist Church et al. v. Manitoba et al.*, [2021 MBQB 219](#) [*Gateway*] at para. 56, 69, 257.

Gathering Restrictions. For example, the following indoor gatherings were in place during December 2020 and January 2021 while the 10-person Outdoor Gathering Restriction was also imposed:

- a. Personal services (hairdressers, barbers, massage therapy, acupuncture, tattooing and others) at 50 percent of fire-code capacity<sup>35</sup>;
  - b. 30 people for event venues such as arenas, museums, theatres and places of worship<sup>36</sup>;
  - c. 50 percent capacity for retail services, 25 percent capacity for large retailers<sup>37</sup> (restrictions that did not come into effect until December 25, 2020<sup>38</sup>);
  - d. Attendance at a restaurant (four people allowed per table)<sup>39</sup>; and
  - e. Use of a gym<sup>40</sup>.
30. When increasing government restrictions, Dr. Shahab noted that they were seeing significant transmission in the household settings and in the “in-between places” such as sitting together over lunch break, meeting up after work, not practicing physical distancing, maybe sharing a meeting or a meal, and not in a structured environment.<sup>41</sup> Dr. Shahab never mentioned outdoor protests in Saskatchewan as a transmission setting.

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<sup>35</sup> Transcript December 14, 2020 Covid-19 news conference RR I, Ex. M, Tab 3 (“Dec 14 2020 Transcript”), page 5:23-6:2, R-0403-0404; see also Transcript January 12, 2021 Covid-19 news conference, RR I, Ex. M, Tab 4 (“Jan 12 2020 Transcript”), page 2:14-3:11, R-0509-0510.

<sup>36</sup> Dec 14 2020 Transcript 6:3-6; R-0404. Dr. Shahab noted on January 19, 2021 that some funerals and wakes, where 30 people could gather, “lead to significant transmission.” Transcript January 19, 2021 Covid-19 news conference, RR I, Ex. M, Tab 6 (“Jan 19 2021 Transcript”), page 9:9-16, R-0640. On that date, Dr. Shahab made an estimate that one in three funerals of 30 persons will see transmission. Jan 19 2021 Transcript page 12:22-13:8, R-0643-0644.

<sup>37</sup> Dec 14 2020 Transcript 6:7-15; R-0404.

<sup>38</sup> Dec 14 2020 Transcript 54:6-25, R-0452.

<sup>39</sup> Dec 14 2020 Transcript 7:15-18; R-0407; 48:3-50:4, R-0446-0448; restaurants and bars were often noted by Dr. Shahab as a transmission setting (Transcript January 14, 2021 Covid-19 news conference, RR I, Ex. M, Tab 5 (“Jan 14 2020 Transcript”), page 46:12-25, R-0608); see page 51:11-24, R-0613 for Dr. Shahab’s estimate of 30 cases a day in bars and restaurants.

<sup>40</sup> Dec 14 2020 Transcript 7:20-21, R-0407.

<sup>41</sup> *Ibid.* 10:1-8, R-0408.

31. Reviewing settings where the SARS-CoV-2 virus was being transmitted, Dr. Shahab noted that, “the investigation suggests that they’re more likely indoors, you know, social contacts.”<sup>42</sup> Again, on December 14, 2020, Dr. Shahab noted that “[w]e can meet others outdoors” and that “it’s safe to be outside, greet people outdoors while maintaining the physical distance”.<sup>43</sup>

**D. Enforcement of Outdoor Gathering Restrictions against those protesting government restrictions**

32. In response to the increased restrictions imposed by the Respondents on nearly every aspect of Saskatchewanians’ lives, there were large public outdoor protests against these restrictions, including at the legislature in Regina, much as there had been for Black Lives Matter six months before.
33. Unlike the Black Lives Matter protests where the Premier praised the protestors and assured them that they had been heard, the Premier spoke out against those protesting his government’s restrictions, including at his news conferences<sup>44</sup> and on social media.<sup>45</sup>
34. The Regina police, who had themselves contravened the public health order by participating at the Black Lives Matter protests, now began to enforce those same restrictions against peaceful outdoor protestors for a different cause.<sup>46</sup>

**1. Jasmin Grandel’s involvement in outdoor protests**

35. The Applicant Jasmin Grandel is a resident of Regina, who recently graduated with a degree in Kinesiology with a major in Health Promotion from the University

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<sup>42</sup> *Ibid.* 11:21-22, R-0409.

<sup>43</sup> *Ibid.* 15:6-11, R-0413.

<sup>44</sup> Dec 14 2020 Transcript, 26:16-25.

<sup>45</sup> Tweet of Scott Moe, December 12, 2020, Exhibit S to Grandel Affidavit, page 272: “I understand a large anti-mask rally is being planned today in Regina. I hope those attending would consider how insignificant the inconveniences they are being asked to follow are compared to the pain of losing a loved one.”

<sup>46</sup> Offence Notice Ticket No. 85447890 to Mark Friesen, December 12, 2020 (Grandel Affidavit, Ex. N, page 238), stating charge as: “did fail to comply with a Public Health Order, dated November 26, 2020, by participating in an outdoor public/private gathering of more than 30 people”.

of Regina.<sup>47</sup> She has a son who was six years old and in Kindergarten at the time of the swearing of her Affidavit. She became concerned when the government ordered all children, including her son, to wear masks in school without sharing the information on which the decision was based.<sup>48</sup>

36. Ms. Grandel was concerned with the lack of transparency and consistency from the Government of Saskatchewan and Saskatchewan Health Authority regarding the information on which they base their decisions.<sup>49</sup>
37. Ms. Grandel was also concerned about the detrimental psychological, economic and sociological effects caused by the Respondents' Orders, including the closing of small businesses, resulting in unemployment and loss of income to many Saskatchewan families.<sup>50</sup>
38. These concerns motivated Ms. Grandel to participate in peaceful outdoor protests to express her dissatisfaction with the restrictions imposed on Saskatchewanians by the Respondents' Orders.<sup>51</sup>
39. These protests have all occurred outdoors in large public spaces, where participants could naturally physically distance.<sup>52</sup>
40. On December 19, 2020, Ms. Grandel spoke at a peaceful protest in front of the Vimy Memorial in Saskatoon, addressing the negative impacts of the Respondents' Orders and the attacks on people who express their concerns about the restrictions imposed by the government.<sup>53</sup>
41. The protest was attended by a large group of people, who were naturally physically distanced and dressed for winter weather, with many wearing toques,

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<sup>47</sup> Grandel Affidavit at para. 2; Transcript of Oral Cross-Examination of Jasmin Grandel, February 24, 2022 ("Grandel Transcript") 6:6-17.

<sup>48</sup> Grandel Affidavit at para. 3.

<sup>49</sup> Grandel Affidavit at para. 4.

<sup>50</sup> Grandel Affidavit at paras. 5-6.

<sup>51</sup> Grandel Affidavit at para. 7.

<sup>52</sup> Grandel Affidavit at para. 17.

<sup>53</sup> Grandel Affidavit at paras. 8-9.

scarfs and mitts. The temperature was -6°C, -12°C with the wind-chill.<sup>54</sup>

42. Ms. Grandel attests that there was an “intimidating police presence” at the protest, which was perceived as a threat to those who gathered peacefully to protest the government restrictions.<sup>55</sup> This was not an empty threat as Ms. Grandel was issued a summons for failure to comply with clause 1(c) of the December 14 Order for attending the outdoor protest on December 19, 2020.
43. Ms. Grandel however, continued to engage in peaceful public outdoor protests, including at the Saskatchewan Legislature in Regina on January 30, 2021, the Cenotaph in Victoria Park in Regina on February 20, 2021 and March 27, 2021, and a large green space near Main Street in Moose Jaw on January 16, 2021.<sup>56</sup> Police charged Ms. Grandel for her alleged participation in each of these protests.<sup>57</sup> Ms. Grandel continued to be charged for participating in outdoor protests after she swore her affidavit.<sup>58</sup>
44. Given Ms. Grandel’s awareness of the fact that those protesting other issues were not charged for violating the Outdoor Gathering Restrictions, and the Premier’s public praise of those protestors and condemnation of protesters against government restrictions, Ms. Grandel believes that the Outdoor Gathering Restrictions were being used to target her and her fellow protestors on the basis of their views, contrary to the fundamental principle of the Rule of Law.<sup>59</sup>

## **2. Darrell Mills involvement in outdoor protests**

45. The Applicant Darrell Mills is a resident of Saskatoon with 30 years of experience in mechanical construction.<sup>60</sup> He is certified in Mask Fit Testing and trained in

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<sup>54</sup> Grandel Affidavit at para. 10.

<sup>55</sup> Grandel Affidavit at para. 11.

<sup>56</sup> Grandel Affidavit at paras. 13-16.

<sup>57</sup> *Ibid.*

<sup>58</sup> Response to Undertaking of Jasmin Grandel.

<sup>59</sup> Grandel Affidavit at para. 21-34.

<sup>60</sup> Mills Affidavit at para. 2.

supplied air breathing systems.<sup>61</sup>

46. Mr. Mills is worried that the negative effects of improper mask wearing are not known to the public.<sup>62</sup> He is concerned that the limited exemptions to mask requirements available under the applicable Respondents' Orders, put a tremendous strain on people who cannot wear a mask due to psychological or physical health issues.<sup>63</sup>
47. These concerns motivated Mr. Mills to participate in peaceful outdoor protests against the restrictions imposed by the Respondents' Orders, including the mandatory wearing of masks.<sup>64</sup>
48. Mr. Mills also spoke at the December 19, 2020 peaceful outdoor protest at Vimy Memorial Park in Kiwanis Park in Saskatoon. He spoke about his concerns of harm from improper mask wearing and the lack of respect for people with emotional, psychological and physical health conditions that prevent them from wearing masks.<sup>65</sup> Mr. Mills was charged for his participation at this protest.<sup>66</sup>
49. Mr. Mills and Ms. Grandel are two of a number of other Saskatchewanians who have been issued summonses for exceeding the Outdoor Gathering Restrictions while gathering to protest government restrictions on individual rights and freedoms.<sup>67</sup>

**E. Restrictions on outdoor protests in context of other gathering restrictions**

50. At the time the Applicants finalized and swore their affidavits in late March and early April, 2021, the restriction of public outdoor protests was the harshest gathering restriction imposed by the Respondents, aside from a select few gathering settings which remained prohibited. This is despite the fact that,

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<sup>61</sup> Mills Affidavit at para. 3.

<sup>62</sup> Mills Affidavit at paras. 3-5.

<sup>63</sup> Mills Affidavit at para. 5.

<sup>64</sup> Mills Affidavit at paras. 6-7.

<sup>65</sup> Mills Affidavit at para. 8.

<sup>66</sup> Mills Affidavit at para. 9.

<sup>67</sup> See summonses attached to Grandel Affidavit as Exhibit O.

according to the Respondents' expert witness, some of the specific activities subject to much more lenient gathering restrictions "have been associated with an increased risk for acquiring or transmission of disease: ...indoor dining at a public establishment; ... attending a place of worship, attending bars...."<sup>68</sup> The following chart lists the restrictions set out in the March 30, 2021 Provincial Order<sup>69</sup> and the *Saskatchewan Re-Open Plan*, updated March 23, 2021,<sup>70</sup> referred to in the Provincial Order (page references on the chart are to the relevant pages in the *Saskatchewan Re-Open Plan*):

<b>Re-Open Saskatchewan Plan, Updated March 23, 2021</b>			
<b>Gathering Restrictions</b>	<b>Unspecified or Both Indoor and Outdoor</b>		
	<b>Indoor</b>	<b>Outdoor</b>	
10 persons	- Private gatherings (p 5)	- Private and public gatherings (p 5)	
15 persons per defined area	- Child and youth day camps (p 113)		
25 persons per defined area	- Child care facilities (p 29)		
30 persons	- Worship services in Regina, Belle Plaine, Pense, Grand Coulee, Lumsden Beach, Regina Beach, Craven, Lumsden, Edenwold, Pilot Butte, White City, Balgonie, Kronau, Davin, Gray, Riceton, RM of Lajord, RM of Edenwold, RM of Sherwood, RM of Pense, RM of Lumsden (p 37)		
	- Spectating (pp 86, 94, 102)		
	- Libraries, museums, art galleries and animal exhibits (p 188)		
	- Performing arts groups, choirs, orchestras, dance troupes (not including crew, directors, conductors, teachers) (p 139)		
	- Rodeos, races and livestock sales (not including facility staff, event organizing staff/volunteers and event contestants) (p 154)		
	- Car and trade shows (not including staff, volunteers, participants and contestants) (p 164)		
		- Movie/live theatres (p 194)	
	- Temporary food vendors (p 151)		
		- Banquets and conferences facilities (p 158)	
			- Graduations (graduates not including spectators)

<sup>68</sup> Khaketla Affidavit, Exhibit B, R-1365.

<sup>69</sup> Grandel Affidavit, Exhibit M.

<sup>70</sup> Grandel Affidavit Exhibit N.



		(p 50)	
25% of capacity	- Large retailers (pp 64, 70)		
100 persons	- Aquatic facilities except spray parks (p 100)		
Lesser of 30% or 150 persons	- Worship services (except in the communities and rural municipalities specified above) (pp 5, 37)		
50% of capacity	- Other retailers (pp 64, 70)		
	- Personal services (p 73)		
	- Ski Chalet (p 92)		
No specified limit (minimum space of two metres)	- Bars, pubs and restaurants (p 54)		
	- Farmer's markets (p 68)		
	- Beaches and shower/change facilities (119)		
	- Gyms and fitness facilities (pp 79-80)		
	- Public transportation (p 27)		
		- Golf courses (p 84)	
		- Parks and playgrounds (p 107)	
	- Drive-in theatres (p 51)		
No specified limit (physical distancing if possible)	- Primary and secondary educational institutions (p 42)		

### III. ISSUES

51. This straightforward *Charter* challenge raises two issues:

- A. Does the restricting the number of attendees at outdoor protests to 10 or 30 persons limit the fundamental freedoms of thought, belief, opinion and expression, peaceful assembly and association protected by sections 2(b), 2(c) and 2(d) of the *Charter*?
- B. Has the government of Saskatchewan provided sufficient evidence to demonstrably justify its restrictions of outdoor protests as reasonable in a free and democratic society?

## IV. ARGUMENT

### A. Violation of Fundamental Charter Freedoms

52. “[T]he *Charter* charges the courts with the responsibility of safeguarding fundamental rights.”<sup>71</sup>
53. The first step in the legal analysis of this case is to review the Applicants’ assertions that the Respondents’ imposition of the Outdoor Gathering Restrictions limiting outdoor protests to 10 or 30 people violated their *Charter* freedoms of expression, peaceful assembly and association. Although this is not an issue open to much reasonable debate,<sup>72</sup> it is important to consider the nature of the violation of each of these *Charter* freedoms.
54. The Supreme Court of Canada has held concerning the *Charter* that “[e]ach right is distinct and must be given effect.”<sup>73</sup> In particular regard to the fundamental freedoms under section 2 of the *Charter*, the Court held *Mounted Police* that these rights are not “derivative” of each other:

Freedom of association, like the other s. 2 freedoms — freedom of expression, conscience and religion, and peaceful assembly — protects rights fundamental to Canada’s liberal democratic society.

Freedom of association is not derivative of these other rights. It stands as an independent right with independent content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests.<sup>74</sup>

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<sup>71</sup>*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, [1994 CanLII 117 \(SCC\)](#), at pp. 333-34 (Sopinka and Cory JJ).

<sup>72</sup> See *Beaudoin v. British Columbia*, [2021 BCSC 512 \[Beaudoin\]](#) at para. 225, where the Court noted that the British Columbia and the Provincial Health Officer “concede that there is no question that restrictions on gatherings to avoid transmission of the Virus limit rights and freedoms guaranteed by the *Charter*”; see also *Gateway Bible Baptist Church et al. v. Manitoba et al.*, [2021 MBQB 219 \[Gateway\]](#) at para. 8, where the Government of Manitoba conceded that “the restrictions on gathering had the effect of limiting the freedoms of religion, expression and peaceful assembly under s. 2 of the *Charter*.” In that case, the applicants did not raise a claim under section 2(d) freedom of association (*Gateway* at para. 6).

<sup>73</sup> *Thomson Newspapers Co. v. Canada (Attorney General)*, [\[1998\] 1 S.C.R. 877 \[Thompson Newspapers\]](#), at para. 80.

<sup>74</sup> *Mounted Police Assn of Ontario v. Canada (Attorney General)*, [2015 SCC 1](#) at paras. 48-49.

55. The violation of multiple distinct *Charter* protections necessarily affects the *Charter* analysis, as explained by the court in *British Columbia Civil Liberties Assn v Canada (Attorney General)*, [2018 BCSC 62](#) at para 262: “A law that has deleterious effects on multiple protected interests will weigh differently in the balance than a law that impacts only one.”

**1. The Outdoor Gathering Restrictions limit the freedom of expression**

56. Expression of a political nature is at the very heart of the values sought to be protected by the freedom of expression guaranteed by s. 2(b) of the Canadian *Charter*.<sup>75</sup> Other values supporting the freedom of expression are truth-seeking and self-fulfilment. The closer the expression in question lies to these three core values, the harder it will be for the state actor to justify an infringement of the freedom to engage in that expression.<sup>76</sup>

57. Expression of thoughts, beliefs and opinions in relation to matters of public concern lies at the very heart of these core values. The free exchange of ideas and opinions is critical to a functional democracy. The fundamental importance of freedom of expression to Canada’s democracy was eloquently described by Chief Justice Dickson in *Keegstra*:

“Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.”<sup>77</sup>

58. The freedom of thought, belief, opinion and expression as entrenched within the

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<sup>75</sup> *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, [1997 CanLII 326](#) [*Libman*], at para. 29 (citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1355-56; *R. v. Zundel*, [1992] 2 SCR 731, [1992 CanLII 75 \(SCC\)](#), at pp. 752-53).

<sup>76</sup> *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Ford v. Quebec*, [1988] 2 S.C.R. 712.

<sup>77</sup> *Libman* at para. 28, citing *R. v. Keegstra*, [1990] 3 SCR 697, [1990 CanLII 24 \(SCC\)](#), at pp. 763-64.

*Charter* extends constitutional protection to all human activity intended to convey a meaning so long as the method (e.g. violence) or location of the activity does not exclude it from that protection.<sup>78</sup> Section 2(b) also shields the right to receive expression, protecting listeners as well as speakers.<sup>79</sup>

59. The test for identifying section 2(b) involves three considerations<sup>80</sup>:
- 1) Does the activity in question have expressive content?
  - 2) Does the method or location of this expression remove that protection?
  - 3) If the expression is protected by section 2(b), does the government action in question infringe that protection, either in purpose or effect?
60. The gathering of people in public places to protest a government policy clearly has expressive content. The presence and number of people who attend a protest has expressive content apart from the verbal expression of the attendees themselves. By their very nature and intent, large outdoor protests garner the attention of media and politicians. In the case of Mr. Mills, his participation led to the further opportunity to share his concerns in a media interview.<sup>81</sup>
61. Ms. Grandel and Mr. Mills sought to engage in peaceful outdoor protests, in prominent public locations such as the Legislature, Victoria Park in Regina and Vimy Memorial Park in Saskatoon. There is no basis to remove section 2(b) protection of their expression.
62. The effect of the Outdoor Gathering Restrictions strikes at the very heart of constitutional protection for free expression—restricting the number of Saskatchewanians who can freely and directly participate in the inherently expressive and political activity of collective public protest in public outdoor settings. The Respondents’ severe restriction of participation in protests violates both the rights of those who would speak and those who would simply attend and listen in solidarity.

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<sup>78</sup> *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [\[2005\] 3 S.C.R. 141](#) at para. 72.

<sup>79</sup> *Edmonton Journal v. Alberta (Attorney General)*, [\[1989\] 2 S.C.R. 1326](#).

<sup>80</sup> See *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011 SCC 2](#) at para. 38; *Montréal (City) v. 2952-1366 Québec Inc.*, [\[2005\] 3 S.C.R. 141](#) at para. 56.

<sup>81</sup> Mills Transcript, 31:22–32:18.

63. The actions of the Government together with the differential treatment of anti-lockdown protestors and Black Lives Matter protestors in Saskatchewan during the pandemic indicate that the Outdoor Gathering Restrictions have been used to target public expression against the Government's infringement of fundamental rights and freedoms. Other, larger, protests were permitted, even praised by the Respondents, without any attempt to enforce the restrictions on outdoor protest.
64. By limiting the number of people permitted at outdoor protests and encouraging the enforcement of this prohibition against only some protestors like Ms. Grandel and Mr. Mills, the Respondents seriously infringed the freedom of expression.

## **2. The Outdoor Gathering Restrictions limit the freedom of peaceful assembly**

65. The *Charter* freedom most directly restricted by the Outdoor Gathering Restrictions is the freedom of peaceful assembly protected by section 2(c). "Assembly" necessarily involves the "physical gathering together of people",<sup>82</sup> which is exactly what the Respondents' sought to prevent by limiting gatherings to 10 or 30 persons at various times.
66. Beginning with the United States in 1791, free societies prized "the right of the people peaceably to assemble".<sup>83</sup> The rationale for this freedom was explained by Mr. Chief Justice Hughes of U.S. Supreme Court in a landmark case of *De Jonge v Oregon*, where a conviction for attending a Communist Party meeting was overturned. The Court's reasoning runs directly contrary to totalitarian impulses and rather appeals to responsive and constitutional government:

These rights [freedom of speech, the press and peaceful assembly] may be abused by using speech or press or assembly in order to incite to violence and crime. The people, through their legislatures may protect themselves against that abuse. But the legislative intervention, can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to

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<sup>82</sup> *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FC 406, [1994 CanLII 3453 \(FCA\)](#), at para. 50 (Linden J.A. (dissenting in part)).

<sup>83</sup> U.S. Constitution, 1<sup>st</sup> Amendment.

preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.<sup>84</sup>

67. Following World War II, the United Nations of the world created the *Universal Declaration of Human Rights* [UDHR], which expressly states that “[e]veryone has the right to freedom of peaceful assembly”.<sup>85</sup> The *International Covenant on Civil and Political Rights* [ICCPR] likewise requires protection of the “right of peaceful assembly”, providing further as follows:

No restrictions may be placed on the exercise of this right other than those ... which are **necessary** in a democratic society in the interests of national security, or public safety, public order (order public), the protection of public health or morals or the protections of the rights and freedoms of others.”<sup>86</sup>

68. Canada has signed the *UDHR* and acceded to the *ICCPR*,<sup>87</sup> and “it must be presumed that the *Charter* affords at least as much protection as the international human rights instruments ratified by Canada.”<sup>88</sup> The Court’s interpretation of the freedom of peaceful assembly under the *Charter* must at least meet Canada’s obligations under the *UDHR* and *ICCPR*.
69. Given the significant dearth of Canadian jurisprudence addressing the freedom of peaceful assembly, reference to international principles is useful, as Justice Cournoyer found it to be in *Garbeau c Montréal (Ville de)*, 2015 QCCS 5246. There, Justice Cournoyer relied on the *Guidelines on Freedom of Peaceful*

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<sup>84</sup> *De Jonge v. Oregon*, 299 US 353, 364-65, available at <https://supreme.justia.com/cases/federal/us/299/353/>.

<sup>85</sup> *UDHR*, ga Res. 217A(III), UNGAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, art. 20(1), available at [https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf).

<sup>86</sup> *ICCPR*, (December 19, 1966), 999 UNTS 171, art 21 (entered into force March 23, 1976, accession by Canada May 19, 1976) [emphasis added].

<sup>87</sup> *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013 SCC 47 \(CanLII\)](#), [2013] 3 S.C.R. 157 [*Divito*], at paras. 24-25.

<sup>88</sup> See *Saskatchewan Federation of Labour v. Saskatchewan*, [2015 SCC 4](#), at para. 64, quoting *Divito*, at para. [23](#).

*Assembly*, published by the European Commission for Democracy through Law and the OSCE Office for Democratic Institutions and Human Rights, in considering whether the freedom of peaceful assembly protected protests in public streets.<sup>89</sup> The current version of the *Guidelines on Freedom of Peaceful Assembly*<sup>90</sup> likewise provide insight in considering restrictions on protests.

70. To date in Canada, Courts has largely not developed on the protection for peaceful assembly particularly, opting rather to subsume its analysis within that for section 2(b)'s freedom of expression.<sup>91</sup> This approach has been subject to academic critique.<sup>92</sup>

71. An insightful and applicable comment is made by Professor Dwight Newman:

What could appear to be a trivial infringement of one freedom might actually be more appropriately recognized as a more substantial infringement in the context of an intersectionality of different freedoms [...] The possibility of such intersectional freedom infringement is a further reason to carry out independent development of each of the freedoms recognized within the section 2 fundamental freedoms clause -- only in doing so can we fully identify the full depth of impacts on human freedom arising from certain state actions.<sup>93</sup>

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<sup>89</sup> *Garbeau c. Montréal (Ville de)*, [2015 QCCS 5246](#) [Garbeau] at paras. 75, 145-153, 472.

<sup>90</sup> *Guidelines on Freedom of Peaceful Assembly*, 3<sup>rd</sup> Edition, July 8, 2019, available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)017-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017-e).

<sup>91</sup> *Figueiras v. Toronto Police Services Board*, [2015 ONCA 208](#), at paras. 77-78 (Rouleau J.A.)  
*R v. Behrens*, 2001 CarswellOnt 5785, [2001] O.J. No. 245 at paras. 26, 91 and 104; *British Columbia Teachers' Federation v. British Columbia Public School Employees' Assn.*, [2009 BCCA 39](#), at para. 39.

<sup>92</sup> See Basil S Alexander, Exploring a More Independent Freedom of Peaceful Assembly in Canada, 2018 8-1 *Western Journal of Legal Studies*, 2018 CanLII Docs 66, <<https://canlii.ca/t/29mn>>, retrieved on 2022-05-08 [Alexander]; Kristopher EG Kinsinger, Restricting Freedom of Peaceful Assembly During Public Health Emergencies, 2021 30-1 *Constitutional Forum* 19, 2021 CanLII Docs 815, <<https://canlii.ca/t/t30m>>, retrieved on 2022-05-08 [Kinsinger, "Restricting Freedom of Peaceful Assembly"]; Kristopher E G Kinsinger "Positive Freedoms and Peaceful Assemblies: Reenvisioning Section 2(c) of the Charter" (2020) 98 SCLR (2d) 377 [Kinsinger, "Positive Freedoms and Peaceful Assemblies"]; Nnaemeka Ezeani, "Understanding Freedom of Peaceful Assembly in the Canadian Charter of Rights and Freedoms" (2020) 98 SCLR (2d) 351 [Ezeani, "Understanding Freedom of Peaceful Assembly"].

<sup>93</sup> Dwight Newman, "Interpreting Freedom of Thought in the Canadian Charter of Rights and Freedoms", (2019), 91 SCLR (2d) 107 – 122, at page 12; See also Jamie Cameron, "Big M's Forgotten Legacy of Freedom", (2020) 98 SCLR (2d) 15 – 45, at page 36: "Minimizing the severity of the violation [by addressing only one freedom] demonstrated a lack of insight into the

72. In the present case where the heart of the *Charter* infringing action is against the assembling of people together, subsuming constitutional consideration of the freedom of peaceful assembly into that of expression would violate the presumption against tautology, as described by the Supreme Court in *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, [2006 SCC 20](#), at para 45 as follows:

Under the presumption against tautology, "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose": see R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 159. To the extent that it is possible to do so, courts should avoid adopting interpretations that render any portion of a statute meaningless or redundant.

73. Rather than subsuming freedom of association into the section 2(b) test, a straightforward test has been proposed for considering a section 2(c) infringement:

first, the claimant must have sought to participate in a gathering of two or more people for a common purpose; second, this gathering must have been peaceful (i.e., non-violent) in nature; and third, interference with this gathering must have been neither trivial nor insubstantial.<sup>94</sup>

74. These factors are clearly present in this case. Ms. Grandel and Mr. Mills each participated in outdoor gatherings for a common purpose, to protest government restrictions imposed on individual lives during the COVID-19 pandemic. The protests were entirely peaceful in nature.

75. Finally, the Outdoor Gathering Restrictions limiting protest to 10 or 30 people are neither trivial nor insubstantial interference with the freedom of peaceful assembly. This fact can be illustrated by reference to the points quoted by Justice Adams of the Ontario Superior Court in the *Dieleman* case:

If we do indeed have a right to speak, and to be heard, the right to assemble may be the only way of ensuring the advocacy of the right to

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scope and severity of the breach and how it engaged section 2's guarantees as an integral whole...[This] can diminish the significance and severity of compound violations."

<sup>94</sup> Kisinger, "Restricting Freedom of Peaceful Assembly" at p. 22.



speak. Mr. Justice Berger notes that:

Assemblies, parades and gatherings are often the only means that those without access to the media may have to bring their grievance to the attention of the public.

Groups without the money to advertise often find it necessary to demonstrate. If their right to demonstrate is denied, the group must languish in a communicative vacuum. Demonstrations guarantee media exposure and in Western society, access to the media is essential to the communication of a point of view, and to the fulfillment of group interests.

In addition to this group fulfillment rationale for freedom of assembly, there are social instrumentalist justifications:

Whenever the demonstrators are complaining of a *bona fide* wrong, society's interests will be advanced if their grievance is brought to public attention and relief is granted.

Moreover, by allowing free assemblies, governmental authorities are able to measure both the identity of feeling with regard to an issue and the "extent" of grass-root support for a specific point of view.<sup>95</sup>

76. An outdoor gathering of 30 or less people is quite unlikely to garner much if any public or media attention. Perhaps more fundamentally, by prohibiting larger gatherings, government is permitted the illusion that their controversial policies are not significantly opposed.
77. In *Beaudoin v British Columbia*, Chief Justice Hinkson specifically ruled on the restriction of outdoor protests in response to Covid-19. He found that public health orders in BC which had the effect of prohibiting outdoor protests violated the *Charter* section 2(c) freedom of peaceful assembly and section 2(d) freedom of association.<sup>96</sup>

### **3. The Outdoor Gathering Restrictions limit the freedom of association**

78. The purpose of the guarantee of freedom of association entrenched within the *Charter* is "to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her

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<sup>95</sup> *Ontario (Attorney-General) v. Dieleman*, [1994 CanLII 7509](#) (ON SC) at para 700, quoting Mopolsky and Beaudoin eds., *Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982), at 142-148.

<sup>96</sup> *Beaudoin* at paras. 249, 251.

ends.”<sup>97</sup> This purpose protects joining with others in “collective activity in support of other constitutional rights.”<sup>98</sup>

The purposive approach thus recognizes that freedom of association is empowering, and that we value the guarantee enshrined in s. 2(d) because it empowers groups whose members’ individual voices may be all too easily drowned out. This conclusion is rooted in “the historical origins of the concepts enshrined” in s. 2(d) (*Big M Drug Mart*, at p. 344).

79. Infringement of section 2(d) occurs when the impugned government action constitutes “a substantial interference with freedom of association” in either its purpose or effect.”<sup>99</sup>
80. Ms. Grandel and Mr. Mills could not hold hope to exert effective oppositional pressure on Respondent’s restrictions by individually protesting against those measures, as their voices could all too easily be ignored. Any effective protest requires joining with others. The larger the protest, the more effective it will likely be in expressing its message and encouraging government to respond.
81. The Outdoor Gathering Restrictions suffocated the freedom of association protections under the *Charter*, which Ms. Grandel and Mr. Mills relied on to protest government restrictions.

**B. The Respondents have failed to show that the ban on outdoor protests is a reasonable limit demonstrably justified in a free and democratic society**

82. The Respondents have seriously limited the fundamental freedoms of Ms. Grandel and Mr. Mills as protected by the *Charter*. Consequently, the burden<sup>100</sup>

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<sup>97</sup> *Mounted Police Association* at para. 54, quoting Dickson CJ in the *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 365.

<sup>98</sup> *Mounted Police Association* at para 54; see also para. 62: “Section 2(d), we have seen, protects associational activity for the purpose of securing the individual against state-enforced isolation and empowering individuals to achieve collectively what they could not achieve individually.”

<sup>99</sup> *Ibid.* at para. 121.

<sup>100</sup> See *R. v. Oakes*, [1986] 1 S.C.R. 103 at para. 66; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*] at para. 38: “The *Charter* enumerates a series of guarantees that can only be limited *if the government can justify* those limitations as proportionate”; see also *Guidelines on Freedom of Peaceful Assembly*, para. 134: “**The burden of proof for**

falls on the Respondents to justify their limitation of *Charter* rights under section 1 of the *Charter*.

83. Section 1 of the *Charter* states:

Guarantee of Rights and Freedoms

**Rights and freedoms in Canada**

**1** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

84. Section 1 of the *Charter* is the “Guarantee of Rights and Freedoms”<sup>101</sup> and only permits limitation of protected rights and freedoms if the specific requirements are met, including that any limitation be “reasonable” and be “demonstrably justified in a free and democratic society.”

85. Before turning to a detailed legal analysis, a brief consideration of the factual context shows that the Respondents cannot possibly prove that the Outdoor Gathering Restrictions were “reasonable limits” “demonstrably justified in a free and democratic society”, when they imposed stricter public gathering limits outside – where they admit transmission risk is less<sup>102</sup> – than they simultaneously imposed on public gathering limits indoors. Only ten people were permitted to attend a public protest in front of the legislature, but 30 people could

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**restrictions.** Mere suspicions, fears or presumptions are not sufficient to warrant the imposition of prior restrictions on assemblies”.

<sup>101</sup> Understanding section 1 of the *Charter* properly as the “Guarantee” of rights and freedoms is critical to properly interpret and apply it: “The Charter, from its first introduction in the constitutional process, included many headings including the heading now in question ... It is clear that these headings were systematically and deliberately included as an integral part of the *Charter* for whatever purpose. At the very minimum, the Court must take them into consideration when engaged in the process of discerning the meaning and application of the provisions of the Charter.” *North Ridge Development Corporation v. Saskatoon (City)*, [2015 SKQB 351](#), at para. 65, quoting *Law society of Upper Canada v. Skapinker*, [1984] 1 SCR 357, [1984 CanLII 3](#) (SCC) [*Skapinker*], at para. 22; see also *Skapinker* at para. 23: “At a minimum the heading must be examined and some attempt made to discern the intent of the makers of the document from the language of the heading.”

<sup>102</sup> Kryzanowski Transcript 27:23-28:9; 31:16-19 (“recognizing that the risk of transmission in indoor gatherings is greater than the risk of transmission at outdoor gatherings”); Khaketla Transcript 45:18-46:7 (“The outdoor space would be much more less of a risk...”).

attend a number of indoor events and activities.

86. To date, only one superior Court decision has specifically ruled on the constitutionality of restrictions on outdoor protests. From November 19, 2020 to February 10, 2021, the Province of British Columbia prohibited outdoor protests under its public health orders. On February 10, 2021, the Provincial Health Officer amended her orders to specifically exempt outdoor protests from the public health orders.
87. At the hearing of a *Charter* challenge to the prior prohibition on outdoor protests, Chief Justice Hinkson held:
- Mr. Beaudoin has persuaded me that his s. 2(c) and (d) *Charter* rights were infringed by the G&E Orders that predated February 10, 2021, and that the infringement of those rights by those orders cannot be demonstrably justified in a free and democratic society.<sup>103</sup>
88. Chief Justice Hinkson issued a declaration that “orders made by Dr. Henry entitled ‘Gatherings and Events’ pursuant to ss. 30, 31, 32 and 39(3) of the *PHA*, including the orders of November 19, 2020, December 2, 9, 15 and 24, 2020 are of no force and effect as against Mr. Beaudoin as they unjustifiably infringe his rights and freedoms with respect to public protests pursuant to ss. 2(c) and (d) of the *Charter*.”<sup>104</sup> The Chief Justice was aided in this regard by the concession of counsel for British Columbia that “Dr. Henry’s orders made between November 19, 2020 and February 10, 2021, prohibiting outdoor gatherings for public protests were of no force and effect during that time.”<sup>105</sup>
89. In Manitoba, Chief Justice Joyal had opportunity to review that province’s restriction on outdoor protests,<sup>106</sup> in the context of a broad challenge to the “circuit break” lockdown measures. Unfortunately, the decision provided no specific analysis from the Court addressing whether the restriction of outdoor protests was justified. The submissions of the Applicants and Manitoba on the

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<sup>103</sup> *Beaudoin* at para. 249.

<sup>104</sup> *Beaudoin* at para. 251.

<sup>105</sup> *Beaudoin* at para. 147.

<sup>106</sup> *Gateway* at para. 79.

issue of outdoor protests were noted,<sup>107</sup> but the legal analysis found the lockdown measures justified in a global sense, without specific attention to outdoor protests.<sup>108</sup> The referenced arguments of Manitoba regarding outdoor protests asserted the following justifications:

h) Despite the size limit on outdoor gatherings, this did not preclude many other means of expression to protest the PHOs or other important issues. This included petitions, emails, social media and letters to the media or politicians. In fact, the impugned PHOs did not preclude a protest involving many small groups as long as each group of five persons was discrete, sufficiently spread out and did not interact with other groups.

...

j) The Circuit Break was temporary. It was limited to a 13 week period when the pandemic was at its most dangerous point to date, cases were surging and our health care system was under enormous strain. Once the measures achieved the desired goal of flattening the curve, restrictions were gradually eased.<sup>[77]</sup> Currently [April 12, 2021], gatherings are limited to 5 people at indoor public places, 10 persons at an outdoor gathering on private property and 25 persons at outdoor public places. Religious services can hold up to 100 people or 25% of capacity. Weddings and funerals have increased to 25persons. Private residences may allow up to 2 visitors or can create a “bubble” with another residence.

90. Because of the lack of judicial analysis of the particular issue of restrictions on outdoor protests and the risk of outdoor transmission, *Gateway* is of limited precedential value to the present case. In any event, it is readily distinguishable.
91. Manitoba did not treat indoor public gatherings more favourably than outdoor protests. While protests were subject to a severe restriction of 5 persons, indoor public gathering locations, such as restaurants, worship services, theatres, concert halls, or indoor sporting events were closed.<sup>109</sup> Thus, Manitoba’s approach did not suffer from the unreasonable and irreconcilable inconsistency of restricting outdoor protests more severely than indoor public events, despite

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<sup>107</sup> *Gateway* at paras. 7, 87, 111, 209, 213, 233, 235, 240-242, 285-287, 303.

<sup>108</sup> *Gateway* at paras. 277-335.

<sup>109</sup> *Gateway* at paras. 81-82, 114, 260, 274 and 303(g).

the acknowledged fact that transmission is more likely to occur in indoor spaces.<sup>110</sup>

92. The recent decision of *Ontario v. Trinity Bible Chapel* from the Ontario Superior Court is also readily distinguishable on this basis. There, Justice Pomerance upheld Ontario restrictions on religious gathering sizes both indoors and outdoors. Justice Pomerance noted: “During brief periods, religious gathering restrictions were the same for indoor and outdoor services, despite the recognition that the risk of transmission is far lower in outdoor settings.”<sup>111</sup> In contrast, the Respondents’ restrictions on outdoor protests were three times as strict as those for indoor public events. Further, whereas in Ontario the “ten-person limit was geographically limited and time limited”, Saskatchewan’s restriction on outdoor protests was Province wide and was in place from December 17, 2020 to May 30, 2021.

**The Outdoor Gathering Restrictions are laws of general application**

93. The Outdoor Gathering Restrictions are legally binding rules of general and universal application, restricting the freedom of all Saskatchewanians to freely gather in outdoor settings, including for the exercise of the fundamental right of collective public protests on matters of public concern.
94. As such, the Outdoor Gathering Restrictions are properly viewed as laws for the purpose of constitutional review. Whether a limitation of *Charter* protections by a law of general application is justified under s. 1 is determined by an *Oakes* analysis.<sup>112</sup>
95. In reviewing public health restrictions, courts in Manitoba, Ontario and

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<sup>110</sup> It was also noted in *Gateway* that by May 22, 2020 there was a “growing understanding that the risk of transmission was greater in indoor settings.” *Gateway* at para. 69.

<sup>111</sup> *Trinity Bible Chapel*, at para. 147.

<sup>112</sup> See *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, [2018 ONSC 579](#), paras. 51-69, which applied the *Oakes* test rather than the *Doré reasonableness analysis* where the issue was constitutionality of particular provisions in administrative policies of general application to all physicians. The Court of Appeal applied the same approach without deciding the issue: see *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, [2019 ONCA 393](#) at paras. 58-60.

Newfoundland have applied the *Oakes* analysis in their consideration of section 1 of the *Charter*.<sup>113</sup> The BC Supreme Court in *Beaudoin* applied the *Doré/TWU/Loyola* framework, finding the public health orders at issues “more akin to an administrative decision than a law of general application”.<sup>114</sup> In contrast, Chief Justice Joyal stated that “the impugned PHOs [Public Health Orders] relating to gatherings and places of worship are, in essence, akin to legislative instruments of general application rather than an administrative decision that affects only particular individuals”.<sup>115</sup>

96. The Provincial Orders issued by Dr. Shahab containing the Outdoor Gathering Restrictions are more analogous to the health orders in Manitoba than those in British Columbia. Dr. Shahab was not exercising his own authority as Chief Medical Health Officer in issuing the Provincial Orders, but rather was exercising delegated authority from the Minister of Health under section 45 of *The Public Health Act, 1994* and under subsection 25.2 of *The Disease Control Regulations*.<sup>116</sup> This is similar to the Orders in Manitoba, where “Manitoba’s CPHO exercises delegated authority to issue PHOs with the approval of the minister.”<sup>117</sup> The Orders of the Provincial Health Officer in British Columbia were not subject to ministerial oversight or delegation, since she exercised direct authority to issue public health orders pursuant to BC’s *Public Health Act*.<sup>118</sup>
97. The *Doré/TWU/Loyola* framework was designed to facilitate constitutional review of administrative decisions affecting specific persons before the decision maker.<sup>119</sup> In contrast, the Provincial Orders affected everyone in Saskatchewan.

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<sup>113</sup> *Gateway Bible Baptist Church et al. v. Manitoba et al.*, [2021 MBQB 21](#) [*Gateway*]; *Ontario v. Trinity Bible Chapel*, [2022 ONSC 1344](#) [*Trinity*]; *Taylor v. Newfoundland and Labrador*, [2020 NLSC 125](#).

<sup>114</sup> *Beaudoin* at para. 218.

<sup>115</sup> *Gateway* at para. 36, citing *Springs of Living Water Centre Inc. v. The Government of Manitoba*, [2020 MBQB 185](#), at paras. 50-51.

<sup>116</sup> See Grandel Affidavit, Exhibit “M”, March 30, 2021 Provincial Order, section A.

<sup>117</sup> *Gateway* at para. 35.

<sup>118</sup> See *Public Health Act, SBC 2008*, sections 30, 31, 32 and 39(3).

<sup>119</sup> See *Doré v. Barreau du Québec*, [2012 SCC 12](#) at para. 36.

98. *Oakes* requires that the Respondents provide “cogent and persuasive” evidence which “makes clear to the Court the consequence of imposing or not imposing the limit.”<sup>120</sup>

99. More specifically, the *Oakes* test requires the Respondents to prove that the Outdoor Gathering Restrictions were made pursuant to a pressing and substantial objective, that they are rationally connected to that objective, that they minimally impair the *Charter* rights they infringe, and that their salutary effects outweigh their deleterious effect on the *Charter* rights they infringe.

**1. Is there a pressing and substantial objective to ban outdoor protests over 10 or 30 persons?**

100. The Supreme Court of Canada holds that “people should not be left guessing about why their *Charter* rights have been infringed.”<sup>121</sup>

101. There is no evidence that the Respondents specifically considered outdoor protests when issuing the Outdoor Gathering Restrictions, which had the effect of restricting outdoor protests to 10 or 30 persons.<sup>122</sup> Consequently, there is no specific “pressing and substantial” objective identified for the Respondents’ restrictions on outdoor protests, other than the general objective stated in the Public Health Orders issued by Dr. Shahab, namely, to reduced and control the transmission of SARS-CoV-2.<sup>123</sup>

**2. Is the ban on outdoor protests over 10 or 30 persons rationally connected to the objective?**

102. What has become known as the “rational connection test” was first set out by the Court in *Oakes*, as follows:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on

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<sup>120</sup> *R. v. Oakes* at para. 68; *R. v. Spratt*, [2008 BCCA 340](#) at para. 30.

<sup>121</sup> *Sauvé v. Canada (Chief Electoral Officer)*, [2002 SCC 68](#) at para. 23.

<sup>122</sup> See Kryzanowski Transcript, 36:12-14: “My understanding is that outdoor gatherings and specifically outdoor protests are not addressed in Re-Open Saskatchewan guidelines.”

<sup>123</sup> Public Health Order, Provincial Order, March 30, 2021, section O, Exhibit M to the Grandel Affidavit, page 47.



irrational considerations. In short, they must be rationally connected to the objective.<sup>124</sup>

This inquiry can also be described as “a consideration of the rationality of the provision”.<sup>125</sup>

103. Given the fact that the Respondents have failed to identify a single transmission of SARS-CoV-2 that occurred at an outdoor protest, the rationality of restricting the number of people at outdoor protests in order to reduce the transmission of SARS-CoV-2 is not made out.
104. Moreover, restricting outdoor protests to 10 persons or less makes no sense at all, since the Respondents simultaneously permitted larger in-person gatherings in indoor settings with a higher transmission risk.<sup>126</sup>
105. As a result, if the general objective of reducing transmission of SARS-CoV-2 stated in Dr. Shahab’s Orders applies to the consequential ban on outdoor protests, there is no rational connection between the objective and the consequential ban on protests, given the irrationality of simultaneously permitting larger indoor public gatherings than outdoor public gatherings.

### **3. Does the ban on outdoor protests over 10 or 30 persons minimally impair the *Charter* freedoms its infringes?**

106. The Respondents are obligated to show on a balance of probabilities<sup>127</sup> that the means chosen to reduce SARS-CoV-2 transmission impaired the *Charter* protections “as little as possible.”<sup>128</sup> The Court is called upon to make this determination on the basis of the evidence tendered.<sup>129</sup>
107. Despite their own acknowledgement that gatherings outdoors are *safer*, the Respondents imposed *stricter* numerical limits on those attending outdoor

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<sup>124</sup> *Oakes* at para. 74.

<sup>125</sup> *Oakes* at para. 81.

<sup>126</sup> See chart at para 50 above listing *Re-Opening Saskatchewan Plan* restriction dated March 23, 2021, Grandel affidavit, Ex. N, pp. 61-236.

<sup>127</sup> *Oakes* at para. 67.

<sup>128</sup> *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CarswellQue 115, [1989] 1 S.C.R. 927 at para. 79.

<sup>129</sup> *Ibid.* at para. 82.

protests than a large number of indoor events and activities. Where activities with a greater potential SARS-CoV-2 transmission risk are permitted with three times the number of attendees, it is impossible to posit that the Respondents' 10-person limit restricts one of democracy's most sacred rights "as little as possible."

108. The *Guidelines on Freedom of Peaceful Assembly*,<sup>130</sup> developed in 2019, have prescient guidance, which the Respondents' entirely ignored:

Public health may at times be invoked to limit assemblies **only where there is no alternative less restrictive means of safeguarding it**. In the rare instances in which general public health concerns (including, e.g., smog or air pollution or a contagious disease) may be an appropriate basis for restricting one or more public assemblies, **those restrictions should not be imposed unless other similar aggregations of individuals are also restricted, such as crowds in a shopping area, at a concert, or a sports event.**<sup>131</sup>

109. The Respondents' own expert witness acknowledged that the kinds of measures implemented at other permitted in-person gatherings could be implemented at outdoor protests to permit a protest larger than ten people to be of minimal risk.<sup>132</sup> Yet, the Respondents imposed a strict 10 or 30 person limit for outdoor protests, regardless of the safety measures implemented at those protests.<sup>133</sup>

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<sup>130</sup> 3<sup>rd</sup> Edition, July 8, 2019, available at

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)017-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017-e).

<sup>131</sup> *Guidelines on Freedom of Peaceful Assembly*, para. 141 [emphasis added]; see also para. 138: "extra precautionary measures should generally be preferred over more extensive restrictions on the assembly itself."

<sup>132</sup> Khaketla Transcript 55:3-14: "A. Yes, it would be possible for specific layers of protection to be incorporated in outdoor gatherings to minimize the risk of disease transmission within those settings, to further minimize it, yeah"; see Khaketla Transcript 55:3-58:25 for full response: "would it have been possible to implement some of these measures during that time period [December 2020 to May 2021] to allow for outdoor protests to have up to 30 people as well? A. It is possible? It could have been. . . . So it is possible that the - - the measures could have been put in place, and if they were, they could have minimized the - - the potential for disease transmission in outdoor - - in outdoor settings."

<sup>133</sup> Kryzanowski Transcript 30:13-31:5.

**4. Do the restrictions on outdoor protests proportionally balance its deleterious and salutary?**

110. The *Guidelines on Freedom of Peaceful Assembly* once again provide a useful counterpoint for considering whether the Outdoor Gathering Restrictions on protests were proportional:

Restrictions should be necessary and proportionate to achieving a legitimate aim. Restrictions to the right to freedom of peaceful assembly, whether set out in law or applied in practice, must be both necessary to achieve a legitimate aim, and proportionate to such aim. Necessity denotes a 'pressing social need' for the restriction in question; this means that a restriction must be considered imperative, rather than merely 'reasonable' or 'expedient'. The means used should be proportional to the aim pursued, which also means that where a wide range of interventions may be suitable, preference should always be given to the least restrictive or invasive means. The relevant state authorities should review and debate a range of restrictions, rather than viewing the choice as simply between non-intervention or prohibition. The reasons provided by the authorities for any restriction(s) should be relevant and sufficient, convincing and compelling, and based on a comprehensive assessment of the relevant facts. Moreover, the interference should go no further than is justified by a legitimate aim. The principle of proportionality requires that there be an objective and detailed evaluation of the circumstances affecting the holding of an assembly. Thus, the State must demonstrate that any restrictions promote a substantial interest that would not be achieved, or would be achieved less effectively, without the restriction. The principle of proportionality also requires that authorities should generally not impose restrictions which would fundamentally alter the character of an event (such as relocating assemblies to less central areas of a city).<sup>134</sup>

111. The Respondents have failed to demonstrate that restricting outdoor protests was necessary for reducing transmission. The fact that the Respondents are not able to point to a single transmission of SARS-CoV-2 at any outdoor protest that occurred in Saskatchewan<sup>135</sup> conclusively shows that they have failed to

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<sup>134</sup> *Guidelines on Freedom of Peaceful Assembly*, para. 131 [internal citations omitted].

<sup>135</sup> Kryzanowski Transcript, 46:1-16; Khaketla Transcript 42:8-12; 54:5-19 ("I wouldn't at this point be able to say I have information about a specific protest that then resulted in an outbreak or transmission of disease"). This is despite the fact that "we have consistently and historically done very detailed case investigations . . . and, through those processes . . . were able to ascertain as much as possible periods of exposure, the risks of exposure, where in specific

demonstrate the restrictions on protests promoted a substantial interest that would not have been achieved as effectively without the restriction. There is further a lack of evidence that from December 14, 2020 to May 28, 2021 the Respondents reviewed and debated whether the 10 person restriction was necessary. Finally, restricting a protest to 10 persons or less, fundamentally changes the character of a protest, to such an extent that a gathering of 10 persons or less can hardly be called a “protest.”

112. The deleterious effect of the Outdoor Gathering Restrictions is not outweighed by any salutary effect. These restrictions strike at the very heart of activities central to the functioning of a free and democratic society with no discernible corresponding benefit to the public health of Saskatchewanians.
113. The Respondents have not provided any – let alone “cogent and persuasive” – evidence showing that their uniquely severe restrictions on outdoor protests were justified.
114. It appears that the Respondents felt justified by “jurisdictional scans” which compared Saskatchewan’s gathering limits with those in places in other provinces.<sup>136</sup> These “jurisdictional scans” were particularly inaccurate or incomplete in representing other provinces’ approach to outdoor protests. For example, the “jurisdictional scans” failed to note that BC had expressly exempted outdoor protests from its public health restrictions beginning on February 10, 2022,<sup>137</sup> or the fact that in March 2021, BC had consented to a Court order striking down its earlier prohibition on outdoor protests as of no force and effect.<sup>138</sup> The “jurisdictional scans” noted Alberta’s prohibition on “outdoor social gatherings”<sup>139</sup> but did not consider that that restriction did not prohibit outdoor public protests.

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settings the transmission would have occurred, who would have been at high risk, and then that informs the measures that are put in place....” (Khaketla Transcript 77:12-21).

<sup>136</sup> Kryzanowski Affidavit, para. 48 and Exhibit P.

<sup>137</sup> Exhibit C, Kryzanowski Transcript, February 10, 2021 Gatherings and Events Order,

<sup>138</sup> *Beaudoin* at para. 147.

<sup>139</sup> See Kryzanowski Affidavit, Exhibit P, R-1268.

115. Of course, it is no constitutional justification for a government to assert that other governments also violated *Charter* rights and freedoms.
116. The Respondents' affiant Dr. Kryzanowski attests that "the limits on gatherings were a public health measure expected to prevent the spread of Covid-19 in Saskatchewan", but she cannot make this statement from personal knowledge<sup>140</sup> on behalf of the Respondents, in part, because she only joined the Ministry of Health as deputy chief medical health officer in April 2021, after the last order restricting outdoor protests to 10 persons was issued.<sup>141</sup> Further, the reasons for limits on gatherings provided by Dr. Kryzanowski do not relate specifically to outdoor protests, but to gatherings generally. Dr. Kryzanowski entirely fails to outline any evidence or reasoning explaining the harsher treatment of outdoor protests than many permitted indoor gatherings, a point she may have in fact been under a misimpression about.<sup>142</sup>

**C. The Outdoor Gathering Restrictions are unreasonable when considered as administrative decisions under the *Doré/TWU/ Loyola* framework**

117. Should the Court choose to apply the *Doré/TWU/ Loyola* framework under an administrative law analysis of the Provincial Orders, the Outdoor Gathering Restrictions are unreasonable and therefore unjustified under section 1's guarantee of *Charter* rights and freedoms.
118. Under the *Doré/TWU/ Loyola* framework, the Court considers whether the decisions at issue affected *Charter* protections as little as reasonably possible in light of the applicable statutory objectives.<sup>143</sup> The Court in *LSBC v TWU* held:
- if there was an option or avenue *reasonably* open to the decision-maker that would reduce the impact on the protected right while still permitting

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<sup>140</sup> Kryzanowski Transcript, 12:21–16:8.

<sup>141</sup> See Kryzanowski Affidavit at para. 38.

<sup>142</sup> Kryzanowski Transcript, 31:13-19: "within each of the orders, **the restrictions on indoor gatherings was greater, so the size of indoor gatherings permitted under the order was less at each point in time**, recognizing that the risk of transmission in indoor gatherings is greater than the risk of transmission at outdoor gatherings". As shown above at paras. 28 and 49, the Respondents in fact permitted **more** people to gather at indoor events than outdoor protests.

<sup>143</sup> *Law Society of British Columbia v. Trinity Western University*, [2018 SCC 32](#) [*LSBC v. TWU*] at para. 80.

him or her to sufficiently further the relevant statutory objectives, the decision would not fall within a range of reasonable outcomes.<sup>144</sup>

119. In the administrative context, the burden of justification on the Respondents<sup>145</sup> requires that the government must first acknowledge the *Charter* right at issue and explain how the limitation of that right is a proportionate balance with the government's objectives.<sup>146</sup> "[A]t a minimum, the original decision must demonstrate that the decision-maker engaged in the *Doré/Loyola* balancing exercise."<sup>147</sup>
120. Finally, the consideration of reasonableness in this context is also informed by the Supreme Court of Canada's *Vavilov* decision which holds that:
- a. Judicial review of a decision by a subordinate decision-maker is a review of "the decision maker actually made, including the justification offered for it."<sup>148</sup> It is not a determination of whether a decision is correct, all things considered, and thus excludes reasons that might be adduced in support of a decision after the fact.
  - b. In reviewing a decision for reasonableness, a Court must ask whether the decision has the qualities that define reasonableness: justification, transparency and intelligibility.<sup>149</sup> A reasonable decision *must* be based on an internally coherent and rational chain of analysis.<sup>150</sup>
121. The Provincial Orders imposing the Outdoor Gathering Restrictions are unreasonable and unjustifiable for the following reasons:

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<sup>144</sup> *Ibid.* at para. 81 [emphasis in original].

<sup>145</sup> *UAlberta Pro-Life v Governors of the University of Alberta*, [2020 ABCA 1](#), at paras. 159, 169, 215.

<sup>146</sup> *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*, [2018 BCCA 344](#) [*South Coast*], at para. 54: "In denying the CCRB's advertisement request, Mr. Beaudoin did not acknowledge the CCRB's right to freedom of expression, let alone explain how the denial represents a proportionate balance with TransLink's objectives."

<sup>147</sup> *Guelph and Area Right to Life v. City of Guelph*, [2022 ONSC 43](#) [*Guelph*] at para. 66 (citing [South Coast](#)).

<sup>148</sup> *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#) [*Vavilov*] at para. 15.

<sup>149</sup> *Vavilov* at para. [99](#).

<sup>150</sup> *Vavilov* at para. [85](#).

- a. These Provincial Orders up to the March 23, 2021 Order<sup>151</sup> all fail to indicate that the Respondents considered the *Charter and* engaged in the required *Doré/Loyola* balancing exercise;
- b. The Court cannot find the Provincial Orders to be reasonable by relying on attempted justifications put forward by the Respondents after-the-fact;
- c. None of the Provincial Orders provide an explanation for why stricter numerical limits needed to be imposed on outdoor public protests than on indoor public gatherings, and thus each Provincial Order suffers from a “fundamental gap” in reasoning<sup>152</sup>; and
- d. Given the fact that the Respondents permitted public gatherings of 30 (or more) indoors, restricting public gatherings to 10 people outdoors, where the transmission risk is less, clearly does not affect the *Charter* protections as little as reasonably possible in light of the Respondents’ objectives to reduce transmission of SARS-CoV-2.

#### **D. The Role of Deference**

122. The administrative law principle of deference generally prevents a reviewing court from interfering with the factual findings of a decision maker, absent exceptional circumstances.<sup>153</sup>
123. The material factual finding reiterated repeatedly by Dr. Shahab is that outdoor gatherings are safer outdoors.
124. To go beyond this and find the Outdoor Gathering Restrictions reasonable and justified on the basis of “deference” to the Respondents would not in fact be an application of the principle of deference, but rather an abdication of judicial responsibility to ensure that the Outdoor Gathering Restrictions are justified and

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<sup>151</sup> Saskatchewan Public Health Orders are archived and available at <https://publications.saskatchewan.ca/#/categories/5478>.

<sup>152</sup> *Vavilov* at paras. 96-98; see Kryzanowski Transcript 60:10-13: “To my knowledge, there’s nothing explicit about - - related to outdoor gatherings for protests within any of the public health orders that are part of my affidavit or evidence.”

<sup>153</sup> *Vavilov* at para. 125.

reasonable in light of the evidentiary record and the factual matrix.<sup>154</sup> This judicial role has constitutional importance under section 96 of the *Constitutional Act, 1867* as well as under section 1 of the *Charter*, where limits on *Charter* rights and freedoms are guaranteed subject *only* to reasonable limits that are demonstrably justified.

125. The Court's review of the reasonableness and justification for *Charter* violations likewise cannot be thwarted by reliance on the "precautionary principle" which holds that "when an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically."<sup>155</sup>
126. It is neither reasonable nor justifiable to selectively apply the precautionary principle. The Respondents' restricted outdoor protests to 10 people, after six months of experience yielded no evidence of transmission at a protest in Saskatchewan and accumulated scientific knowledge showed that risk of transmission was much less outdoors. In contrast and simultaneously, the Respondents permitted at least three times as many people to gathering in settings with a known "increased risk for acquiring or transmission of disease."<sup>156</sup>

## V. RELIEF REQUESTED

127. Ms. Grandel and Mr. Mills request that the Court grant the following relief:
- a. A Declaration pursuant to section 52(1) of the *Constitution Act, 1982* that the Outdoor Gathering Restrictions, in restricting the gathering of persons outdoors for peaceful, collective demonstrations or protests, unjustifiably infringe the freedoms of thought, opinion, belief, expression, peaceful assembly and association as protected by sections 2(b), 2(c) and 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") respectively, and are therefore of no force or effect;

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<sup>154</sup> *Vavilov* at para. 126.

<sup>155</sup> Khaketla Affidavit, Exhibit "B", R-1372.

<sup>156</sup> Khaketla Affidavit, Exhibit "B", R-1365: "indoor dining at a public establishment"; "attending a place of worship"; "attending bars...or funerals".



- b. Further, or in the alternative, a Declaration pursuant to section 24(1) of the *Charter* that the Outdoor Gathering Restrictions and their enforcement constitute unreasonable and unjustified infringements of the Applicants' freedoms of thought, belief, opinion and expression, peaceful assembly and association, as protected by sections 2(b), 2(c) and 2(d) of the *Charter* respectively; and
- c. Costs.

128. All of which is respectfully submitted.

Dated at the City of Saskatoon, in the Province of Saskatchewan, this 13<sup>th</sup> day of May of 2022.

*Andre Memauri*

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Andre Memauri and Marty Moore  
Counsel for the Appellants

## LIST OF AUTHORITIES

Authorities	Legal Principle	Paragraph Cited
<u>Cases</u>		
<i>Beaudoin v. British Columbia</i> , <a href="#">2021 BCSC 512</a>	Charter ss. 1, 2(c), 2(c)	147, 218, 249, 251
<i>British Columbia Teachers' Federation v. British Columbia Public School Employees' Assn.</i> , <a href="#">2009 BCCA 39</a>	Charter s. 2(c)	39
<i>Canada (Minister of Citizenship and Immigration) v. Vavilov</i> , <a href="#">2019 SCC 65</a>	Charter s. 1	15, 85, 96-99, 125-126
<i>Canadian Broadcasting Corp. v. Canada (Attorney General)</i> , <a href="#">2011 SCC 2</a>	Charter s. 2(b)	38
<i>Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority</i> , <a href="#">2018 BCCA 344</a>	Charter s. 1	34
<i>Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario</i> , <a href="#">2018 ONSC 579</a>	Charter s. 1	51-69
<i>Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario</i> , <a href="#">2019 ONCA 393</a>	Charter s. 1	58-60
<i>Divito v. Canada (Public Safety and Emergency Preparedness)</i> , <a href="#">2013 SCC 47 (CanLII)</a> , [2013] 3 S.C.R. 157	Charter s. 2(c)	23-25
<i>Doré v. Barreau du Québec</i> , <a href="#">2012 SCC 12</a>	Charter s. 1	36
<i>Edmonton Journal v. Alberta (Attorney General)</i> , [1989] 2 S.C.R. 1326	Charter s. 2(b)	Pages 1355-56
<i>Ford v. Quebec</i> , <a href="#">[1988] 2 S.C.R. 712</a>	Charter s. 2(b)	
<i>Figueiras v. Toronto Police Services Board</i> , <a href="#">2015 ONCA 208</a>	Charter s. 2(c)	77-78
<i>Garbeau c. Montréal (Ville de)</i> , <a href="#">2015 QCCS 5246</a>	Charter s. 2(c)	75, 145-153, 472
<i>Gateway Bible Baptist Church et al. v. Manitoba et al.</i> , <a href="#">2021 MBQB 219</a>	Charter s. 1	6, 7, 35-36, 69, 79, 81-82, 87, 111, 114, 209, 213, 233, 235, 240-242, 260, 274 277-335, 285-287, 303
<i>Guelph and Area Right to Life v. City of Guelph</i> , <a href="#">2022 ONSC 43</a>	Charter s. 1	66
<i>Hunter v. Southam Inc.</i> , [1984] 2 S.C.R. 145	Charter s. 1	Page 169
<i>Irwin Toy Ltd. v. Quebec (Attorney General)</i> , [1989] 1 S.C.R. 927	Charter s. 2(b)	79, 82

<i>Law Society of British Columbia v. Trinity Western University</i> , <a href="#">2018 SCC 32</a>	Charter s. 1	80
<i>Law Society of Upper Canada v. Skapinker</i> , [1984] 1 SCR 357, <a href="#">1984 CanLII 3</a> (SCC)	Charter s. 2(c)	22-23
<i>Libman v. Quebec (Attorney General)</i> , [1997] 3 S.C.R. 569, <a href="#">1997 CanLII 326</a>	Charter s. 2(b)	28-29
<i>Loyola High School v. Quebec (Attorney General)</i> , <a href="#">2015 SCC 12</a>	Charter s. 1	28
<i>Montréal (City) v. 2952-1366 Québec Inc.</i> , 2005 SCC 62, <a href="#">[2005] 3 S.C.R. 141</a>	Charter s. 2(b)	56, 72
<i>Mounted Police Assn of Ontario v. Canada (Attorney General)</i> , <a href="#">2015 SCC 1</a>	Charter ss. 2(c) 2(d)	48-49, 54, 62
<i>North Ridge Development Corporation v. Saskatoon (City)</i> , <a href="#">2015 SKQB 351</a>	Charter s. 1	65
<i>Ontario v. Trinity Bible Chapel</i> , <a href="#">2022 ONSC 1344</a>	Charter s. 1	27, 35, 48-49, 56, 74, 147
<i>Ontario (Attorney-General) v. Dieleman</i> , <a href="#">1994 CanLII 7509</a> (ON SC)	Charter s. 2(c)	700
<i>Placer Dome Canada Ltd v Ontario (Minister of Finance)</i> , <a href="#">2006 SCC 20</a>	Charter s. 2(c)	45
<i>Reference re Public Service Employee Relations Act (Alta.)</i> , <a href="#">[1987] 1 S.C.R. 313</a>	Charter s. 2(d)	Page 365
<i>RJR-MacDonald Inc. v. Canada (Attorney General)</i> , [1994] 1 SCR 311, <a href="#">1994 CanLII 117</a> (SCC)	Charter s. 1	Pages 333-334
<i>Roach v. Canada (Minister of State for Multiculturalism and Citizenship)</i> , [1994] 2 FC 406, <a href="#">1994 CanLII 3453</a> (FCA)	Charter s. 2(c)	50
<i>R v. Behrens</i> , 2001 CarswellOnt 5785, [2001] O.J. No. 245 [Appendix A hereto]	Charter s. 2(c)	39
<i>R. v. Keegstra</i> , [1990] 3 SCR 697, <a href="#">1990 CanLII 24</a> (SCC)	Charter s. 2(b)	Pages 363-364
<i>R. v. Oakes</i> , <a href="#">[1986] 1 S.C.R. 103</a>	Charter s. 1	66, 67, 68, 74, 81
<i>R. v. Zundel</i> , [1992] 2 SCR 731, <a href="#">1992 CanLII 75</a> (SCC)	Charter s. 2(b)	Pages 752-53
<i>Saskatchewan Federation of Labour v. Saskatchewan</i> , <a href="#">2015 SCC 4</a>	Charter s. 2(c)	64
<i>Springs of Living Water Centre Inc. v. The Government of Manitoba</i> , <a href="#">2020 MBQB 185</a>	Charter s. 1	50-51
<i>Taylor v. Newfoundland and Labrador</i> , <a href="#">2020 NLSC 125</a>	Charter s. 1	
<i>Thomson Newspapers Co. v. Canada (Attorney General)</i> , <a href="#">[1998] 1 S.C.R. 877</a>	Charter s. 1	80
<i>UAlberta Pro-Life v Governors of the University of Alberta</i> , <a href="#">2020 ABCA 1</a>	Charter s. 1	159, 169, 215

<u>Legislation</u>		
<a href="#">Canadian Charter of Rights and Freedoms , Constitution Act, 1982, schedule B to the Canada Act 1982 (UK), 1982, c 11</a>	<i>Charter</i> ss. 1, 2(b), 2(c), 2(c)	<i>Charter</i> s. 1, 2(b), 2(c), 2(c)
<i>The Public Health Act, 1994, SS 1994, c P-37.1</i>	<i>Charter</i> s. 1	Section 45, 61(a)
<i>The Disease Control Regulations</i> [excerpt Appendix B hereto]	<i>Charter</i> s. 1	Section 25.2
<a href="#">Public Health Act, SBC 2008</a>	<i>Charter</i> s. 1	Sections 30, 31, 32 and 39(3).
<u>Academic Articles</u>		
Basil S Alexander, Exploring a More Independent Freedom of Peaceful Assembly in Canada, 2018 8-1 <i>Western Journal of Legal Studies</i> , 2018 CanLIIDocs 66 [Appendix C hereto]	<i>Charter</i> s. 2(c)	
Kristopher EG Kinsinger, Restricting Freedom of Peaceful Assembly During Public Health Emergencies, 2021 30-1 <i>Constitutional Forum</i> 19, 2021 CanLIIDocs 815 [Appendix D hereto]	<i>Charter</i> s. 2(c)	Page 22
Kristopher E G Kinsinger “Positive Freedoms and Peaceful Assemblies: Reenvisioning Section 2(c) of the Charter” (2020) 98 SCLR (2d) 377 [Appendix E hereto]	<i>Charter</i> s. 2(c)	
Nnaemeka Ezeani, “Understanding Freedom of Peaceful Assembly in the Canadian Charter of Rights and Freedoms” (2020) 98 SCLR (2d) 351 [Appendix F hereto]	<i>Charter</i> s. 2(c)	
Dwight Newman, “Interpreting Freedom of Thought in the Canadian Charter of Rights and Freedoms”, (2019), 91 SCLR (2d) 107 [Appendix G hereto]	<i>Charter</i> s. 2(c)	Page 12
Jamie Cameron, “Big M’s Forgotten Legacy of Freedom”, (2020) 98 SCLR (2d) 15 – 45 [Appendix H hereto]	<i>Charter</i> s. 2(c)	Page 36
<u>International Authorities</u>		
U.S. Constitution	<i>Charter</i> s. 2(c)	1 <sup>st</sup> Amendment
<i>De Jonge v. Oregon</i> , 299 US 353	<i>Charter</i> s. 2(c)	364-65
<i>Universal Declaration of Human Rights</i> , ga Res. 217A(III), UNGAOR, 3d Sess., Supp.	<i>Charter</i> s. 2(c)	Art. 20(1)

No. 13, UN Doc. A/810 (1948) 71		
<i>International Covenant on Civil and Political Rights</i> , (December 19, 1966), 999 UNTS 171	<i>Charter</i> s. 2(c)	Art. 21
<i>Guidelines on Freedom of Peaceful Assembly</i> , 3 <sup>rd</sup> Edition, July 8, 2019	<i>Charter</i> ss. 1, 2(c)	Paras 131, 134, 138, 141