

COURT FILE NUMBER Q.B. No. 395 of 2021

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE SASKATOON

APPLICANTS JASMIN GRANDEL and DARRELL MILLS

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

Clerk's Stamp

BRIEF OF LAW

**ON BEHALF OF THE RESPONDENTS,
THE GOVERNMENT OF SASKATCHEWAN AND DR. SAQIB SHAHAB**

**MINISTRY OF JUSTICE AND ATTORNEY GENERAL
CONSTITUTIONAL LAW BRANCH
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1. INTRODUCTION

- [1] Everyone has lost something to the COVID-19 pandemic. Many have lost everything.
- [2] Across Canada, public health protections enacted in response to the pandemic impacted or infringed on *Charter*-protected rights and interests. Canadian courts have agreed that these protections were reasonable, justified, and proportionate to the threat posed by COVID-19.¹
- [3] In Saskatchewan, these protections included temporary limits on the number of attendees at public and private gatherings, including (but not limited to) outdoor protests.
- [4] The Respondents agree that outdoor gatherings present a decreased risk of transmission of COVID-19 compared to indoor gatherings, *all else being equal*. But all gatherings are not all equal. Disease transmission—or the risk of disease transmission—is affected by many factors, including the ability and willingness of organizers and participants to adhere to public health guidance.
- [5] In the context of an unprecedented global pandemic and the worldwide death of millions, the impugned gathering limits were proportionate. They are saved by section 1 of the *Charter*. The pandemic has required “many sacrifices” of “many individuals and institutions in the interests of public health,”² and the Applicants were no exception.

¹ Chronologically, the key non-injunctive cases on COVID-19 measures have been: [Taylor v Newfoundland and Labrador](#), 2020 NLSC 125 [*Taylor*]; [Beaudoin v British Columbia](#), 2021 BCSC 512, [2021] 10 WWR 501 [*Beaudoin*]; [Spencer v Canada \(Health\)](#), 2021 FC 621, 490 CRR (2d) 32 [*Spencer*]; [Gateway Bible Baptist Church v Manitoba](#), 2021 MBQB 219, [2022] 3 WWR 567 [*Gateway Bible*]; [Ontario v Trinity Bible Chapel](#), 2022 ONSC 1344 [*Ontario Churches*]. Excepting outdoor protests in *Beaudoin*, all other challenges have been unsuccessful.

² *Ontario Churches*, at para 168.

2. SUMMARY OF FACTS

A. COVID-19, IN BRIEF

- [14] The basics of COVID-19 transmission are well-understood.³ COVID-19 is the disease caused by severe acute respiratory syndrome coronavirus 2 (often abbreviated as “SARS-CoV-2”⁴), which first appeared in Wuhan, China in late 2019.⁵ On March 11, 2020, the World Health Organization (“WHO”) characterized the worldwide spread of COVID-19 as a “pandemic.” The first presumptive case in Saskatchewan was reported the next day.⁶
- [15] *COVID-19 is communicable and capable of exponential growth.* This means one person may infect two, who may infect four, and sixteen, *etc.*⁷ Healthcare capacity is limited, and increasing the specific capacity for COVID-19 patients comes at the cost of other components of the healthcare system.
- [16] *COVID-19 spreads primarily through respiratory contact*, which means it can be carried on small droplets or aerosols generated by exhaling, including normal breathing, and stronger expulsions like coughing, sneezing, speaking, or shouting.⁸
- [17] *COVID-19 presents with signs and symptoms that vary from person to person.* These symptoms include fever, cough, difficulty breathing, fatigue, and loss of taste or smell. The long-term consequences of COVID-19 are still being studied but include physical and

³ *Beaudoin*, at para 8ff; *Spencer*, at para 20ff; *Gateway Bible*, at para 53ff; *Ontario Churches*, at 43ff.

⁴ The disease is caused by the virus, though the terms are sometimes used interchangeably. This brief will use “COVID-19” to describe both the disease and virus, except where noted.

⁵ Affidavit of Dr. Julie Kryzanowski, R-0023 (Vol I, Exhibit B) [**Kryzanowski Affidavit**].

⁶ Kryzanowski Affidavit, at para 29 and R-0314 (Vol I, Exhibit K).

⁷ Kryzanowski Affidavit, at para 23. Transcript of cross-examination of Dr. Thomas Warren, at 25 line 14 [**Warren Transcript**].

⁸ Kryzanowski Affidavit, at para 16. Affidavit of Dr. Molihi Khaketla, at R-1364 [**Khaketla Report** will refer to Exhibit B of Vol III of the Respondent’s Materials].

physiological symptoms that persist for months, or perhaps indefinitely, a phenomenon known as “long COVID.”⁹

- [18] ***COVID-19 can spread asymptotically.*** A person can be infected with and contagious with COVID-19 before the onset of symptoms. Some people will not experience symptoms during the course of their infection;¹⁰ nonetheless, they can transmit the disease.
- [19] ***COVID-19 is life-threatening and frequently deadly.***¹¹ As of November 7, 2021, 873 people in Saskatchewan had lost their lives to COVID-19.¹² Significant medical intervention—including time in the hospital and intensive care unit—is often necessary to sustain life.¹³ Cumulatively, 4.5% of all polymerase chain reaction (“PCR”)-confirmed COVID-19 cases in Saskatchewan have required hospitalization, and 1.1% of PCR-confirmed COVID-19 patients have died.¹⁴ Death or other serious health outcomes are more common in persons who are over 60 or have other comorbidities, but can occur at any age.
- [20] ***COVID-19 was a novel virus.*** Until the widespread availability of immunization, all persons were susceptible to catching and spreading COVID-19. The pool of available interventions was limited.¹⁵

⁹ Kryzanowski Affidavit, at para 7; Khaketla Report, at R-1368.

¹⁰ Kryzanowski Affidavit, at para 8; Khaketla Report, at R-1362 and R-1362.

¹¹ Kryzanowski Affidavit, at para 11. Khaketla Report, R-1361.

¹² Kryzanowski Affidavit, at R-0102 (Vol I, Exhibit D1). Khaketla Report, R-1361 provides the total as of October 22.

¹³ Kryzanowski Affidavit, at R-0042 (Vol I, Exhibit D).

¹⁴ Kryzanowski Affidavit, at R-0102 (Vol I, Exhibit D1).

¹⁵ Kryzanowski Affidavit, at paras 20 – 21. Warren Transcript, at 24 lines 5 to 25, and 67 lines 10 to 18.

[21] *COVID-19 evolved rapidly*. By late 2020, Variants of Concern (“VOC”) had arisen worldwide and in Saskatchewan.¹⁶ These VOCs were more transmissible and caused more serious illness than the previously dominant strains.¹⁷

[22] Both parties’ experts described COVID-19 as a “serious public health threat.”¹⁸

B. LEGAL FRAMEWORK

[23] In Saskatchewan, the control of communicable diseases is governed by *The Public Health Act, 1994*¹⁹ (the “*Act*”). In April 2020, COVID-19 was designated a “category I” communicable disease pursuant to *The Disease Control Regulations* (“*Regulations*”),²⁰ rendering it subject to reporting and tracking obligations common to all major communicable diseases.

The Public Health Orders

[20] The *Act* and the *Regulations* authorize the issuance of a variety of orders, collectively referred to as “public health orders” (“PHOs”). Within the *Act* itself, sections 38 and 45 prescribe certain orders that may be made by the medical health officer or Minister to “decrease or eliminate” the threat to public health caused by communicable diseases.²¹

[21] Additionally, in December 2020, new sections were added to the *Regulations* to more explicitly address the Minister’s powers to respond to COVID-19:

¹⁶ Kryzanowski Affidavit, at paras 12 to 13. Khaketla Report, at R-1366 to R-1367.

¹⁷ Khaketla Report, at R-1366.

¹⁸ Warren Transcript, at 25, lines 1 to 10; Khaketla Report, at R-1370.

¹⁹ *The Public Health Act, 1994*, SS 1994, c P-37.1 [*Act*].

²⁰ *The Disease Control Regulations*, RRS c-P37.1, Reg 11 [*Regulations*], as amended by *The Disease Control Amendment Regulations, 2020*, SR 36/2020, s 2(4), which added “COVID-19” to Table 4 of the *Regulations*.

²¹ *The Public Health Act, 1994*, ss 38(1) and 45(2). The power in section 38 is limited to communicable diseases, but the power in section 45 can be exercised in response to a variety of public health threats.

25.2 [...] (2) If, based on the opinion of the chief medical health officer that the increased rate of infection or the expectation of an increased risk of infection from SARS-CoV-2 is likely to cause a serious public health threat, the minister determines that it is in the public interest to do so, the minister may order that any or all of the measures set out in subsection (3) are to be taken for the *purposes of preventing, reducing and controlling the transmission of SARS-CoV-2*.²²

- [22] The measures enumerated in subsection 25.2(3) of the *Regulations* included limits on the size of gatherings.²³ The Minister’s order-making powers under sections 45 of the Act and 25.2(3) of the *Regulations* were delegated to Dr. Saqib Shahab, the chief medical health officer of Saskatchewan, pursuant to *The Legislation Act*.²⁴
- [23] At all times relevant to this application, the PHOs were issued pursuant to the combined authority of section 25.2 of the *Regulations* and section 45 of the *Act*. The two earliest orders addressed by this Application were issued pursuant to both of those provisions, as well as section 38 of the Act. See **Appendix A** for more details.

The Re-Open Saskatchewan Plan

- [24] Additionally, section 25.1 of the *Regulations* authorized the creation and enforcement of the *Re-Open Saskatchewan Plan* (the “**ROSK**”).²⁵ The ROSK supplemented the PHOs with specific guidance for industries, businesses, and organizations.

²² *The Disease Control (COVID-19) Amendment Regulations, 2020*, SR 127/2020, s 6 [emphasis added]. This section would be automatically repealed unless extended by new Regulation. The section expired on May 31, 2022, after the final extension pursuant to *The Disease Control (Vaccination Programs) Amendment Regulations, 2021*, Sask Reg 118/2021, s 4.

²³ *Regulations*, s 25.2(3)(b).

²⁴ *The Legislation Act*, SS 2019, c L-10.2, s 2-34.

²⁵ Also added by *The Disease Control Amendment Regulations, 2020*, *supra* note 21. The eventual repeal date for section 25.1 was September 1, 2021, as finally extended by *The Disease Control (Localized Mitigation of COVID-19) Amendment Regulations, 2021*, Sask Reg 87/2021, s 5(2).

- [25] Pursuant to the terms of each PHO,²⁶ the general indoor or outdoor gathering limits of each PHO were inapplicable to a given facility or gathering where the ROSK prescribed a more specific gathering limit.
- [26] The ROSK also imposed extensive public health measures for each facility or gathering it governed. For such facilities, compliance with the ROSK was mandatory.²⁷
- [27] For example, the March 23, 2021 version of the ROSK permitted indoor worship services (including funerals and weddings) up to 150 people or 30% of seating capacity, whichever was less. This gathering limit was subject to at least *fifteen* additional public health measures, including two-meter separation between households, mandatory masking, a prohibition on ancillary gatherings, plus a prohibition on all physical contact, like handshaking or passing objects between individuals.²⁸
- [28] Protests were not specifically addressed in the ROSK or elsewhere in the PHO. Accordingly, they were governed by the general gathering limits prescribed in the PHOs for all unstructured outdoor gatherings.

C. THE OUTDOOR GATHERING LIMIT AT ISSUE

- [29] The Applicants received tickets for attending outdoor gatherings with more attendees than the PHOs allowed. Ms. Grandel received nine tickets²⁹ and Mr. Mills received two tickets,³⁰ though only a selection are reflected on the record. A list of the PHOs in place from December 2020 to July 2021 is found at **Appendix A**, cross-referenced with tickets issued to the Applicants during the same time period.

²⁶ See e.g. [Public Health Order – Provincial Order](#) (23 March 2021), s 1(d).

²⁷ See e.g. [Public Health Order – Provincial Order](#) (23 March 2021), ss 1(d) and (o). Compliance with the ROSK was also mandatory pursuant to the *Regulations*, s 25.1(3).

²⁸ [Re-Open Saskatchewan Plan](#) (23 March 2021) at 36 to 41. Regina retained a 30-person limit for worship services, given locally high case counts driven by variants of concern.

²⁹ Transcript of cross-examination of Jasmin Grandel, at 10 lines 7 to 12 [*Grandel Transcript*].

³⁰ Transcript of cross-examination of Darrell Mills, at 8, lines 14 to 23 [*Mills Transcript*].

[30] The Respondents *concede* that the Applicants have standing to bring this application with respect to the ten-person limit in place between December 17, 2020 and May 30, 2021 (the “*Outdoor Gathering Limit*”).

[31] However, the Respondents submit the Applicants *do not have standing* to challenge the 30-person outdoor gathering limit in place prior to the December 14, 2020 PHO. There is no evidence the Applicants attended gatherings or protests prior to this date. Ms. Grandel attaches to her affidavit tickets issued to third parties prior to December 14, 2020.³¹ These third parties are not before the Court, and neither the Applicants nor their counsel have sought public interest standing to litigate on their behalf.³²

[32] The Applicants have not challenged the 150-person outdoor gathering limit in place between May 28, 2021 and July 11, 2021,³³ and lack standing to do so in any event.

3. POINTS IN ISSUE

[33] The issues to be decided on this application are as follows:

- a. What is the standard of review of the PHOs? Should the Court apply *Doré* or *Oakes*?
- b. Do the PHOs infringe one or more provisions of the *Charter*?
- c. If the PHOs infringe a *Charter*-protected right, do they represent a proportionate limit thereon, pursuant to s. 1 of the *Charter*?

³¹ Persons with tickets issued prior to December 14, 2020 include “Mark Friesen” and “Tamara Lavoie.” See *e.g.* the Affidavit of Jasmine Grandel, at 238 – 39 and 243 (Exhibit O).

³² Pursuant to [*Canada \(Attorney General\) v Downtown Eastside Sex Workers United Against Violence Society*](#), 2012 SCC 45, [2012] SCR 524. Nor could it feasibly be granted on this record.

³³ The April 7, 2021 Notice of Application asks for a declaration relating to similar limits as “may subsequently” be imposed. However, the Applicants in their Brief of Law refer only to the ten and 30-person limits (see *e.g.* paras 1, 2, 6 and 127). There is no evidence of *any* outdoor gathering tickets issued after May 28, 2021, to the Applicants or otherwise.

4. ARGUMENT

D. THE EVIDENCE

- [34] The evidence should be read as a whole, bearing in mind the specific context in which the subject PHOs were made during the period of December 2020 to May 2021.
- [35] At the time the ten-person Outdoor Gathering Limit was introduced in December 2020, Saskatchewan was into the second “phase” of the pandemic.³⁴ Modeling showed that Saskatchewan was on a rapid growth trajectory, indicating that stronger public health measures were needed in order to prevent severe illness and death,³⁵ and in order to ensure that hospital capacity was not overwhelmed.³⁶
- [36] Saskatchewan had the highest COVID-19 case rate in Canada in January 2021, and the COVID-19 mortality rate in December 2020 and January 2021 was the highest it had been since the start of the pandemic, with 238 deaths occurring in those two months.³⁷ In December 2020 alone, twice as many people died due to COVID-19 than had during the entire pandemic to date.³⁸ Between November 8, 2020 and January 24, 2021, weekly records for deaths due to COVID-19 were broken ten times over in thirteen weeks.³⁹

³⁴ Kryzanowski Affidavit, at para 32.

³⁵ Khaketla Report, at R-1371. Similar modeling can be found in the Kryzanowski Affidavit, at Vol II, Exhibits Q and R.

³⁶ See the modelling at Kryzanowski Affidavit, at R-1325 and R-1339 to 1340 (Vol II, Exhibit R).

³⁷ Khaketla Report, at R-1370 to 71.

³⁸ See the numbers reported at Kryzanowski Affidavit, R-0260 (Vol I, Exhibit H) and R-1295 (Vol II, Exhibit Q). 51 people had died by the beginning of December, and 160 by January 3, 2021.

³⁹ Kryzanowski Affidavit, R-0043 (Vol I, Exhibit D). The weekly number of deaths wouldn't return to June 2020 levels until June of 2021, immediately prior to the final phrase of ROSK.

- [37] With minor exceptions, all monitoring indicators showed concerning trends.⁴⁰ The virus' effective reproduction number (R_t) ranged between 1.5 and 1.9,⁴¹ indicating exponential growth. Test positivity ranged between 6.9% and 11.0%, nearly double the target of less than 5%, indicating a high proportion of undiagnosed positive cases.⁴²
- [38] Vaccination remained largely unavailable.⁴³ Early vaccine distribution was hampered by supply issues, and it would be months before the first vaccination threshold in the *Re-Opening Roadmap* was met. No anti-viral treatments were available.⁴⁴
- [39] All of this was underscored by the Premier on the day the new Outdoor Gathering Limit was announced on December 14, 2020, alongside a number of other reductions in household and other capacity limits. Stricter measures put into place on November 27, 2020 had failed to bring numbers down sufficiently.⁴⁵ More was required in order to protect the capacity of the healthcare system, and to protect communities and families' most vulnerable.⁴⁶
- [40] This was echoed by Dr. Shahab, who noted that the “in-between places” with a lack of “structured environment” were driving transmission, such as households, break rooms, and other places where physical distancing are not observed.⁴⁷

⁴⁰ Kryzanowski Affidavit, R-0113 (Vol I, Exhibit E); R-0162 (Vol I, Exhibit F); R-0211 (Vol I, Exhibit G); R-0260 (Vol I, Exhibit H).

⁴¹ *Ibid.*

⁴² *Ibid.* The less-than-5% target is mentioned by Dr. Shahab at Kryzanowski Affidavit, R-0569 (Vol I, Exhibit M.5).

⁴³ A pilot program for vaccination began December 15, 2020, with emergency workers in Regina. Kryzanowski Affidavit, R-0334 (Vol I, Exhibit M.2). *Nobody* in Saskatchewan was fully vaccinated against COVID-19 until early 2021, given the period between the first and second doses.

⁴⁴ Warren Transcript, at 24 lines 5 to 25.

⁴⁵ Kryzanowski Affidavit, R-0423 (Vol I, Exhibit M.2).

⁴⁶ Kryzanowski Affidavit, R-0400 to 0402 (Vol I, Exhibit M.2).

⁴⁷ Kryzanowski Affidavit, R-0408 (Vol I, Exhibit M.2). See also R-0448 (Vol I, Exhibit M.2) and R-0771 (Exhibit Vol II, M.8).

[41] The 10-person gathering limit remained in force until May 28, 2021, when it was repealed as part of Step 1 of the *Re-Opening Roadmap*, which wound down other public health measures in response to thresholds in population-wide vaccination update.⁴⁸ The PHOs had their intended effect. The infection rate plateaued and fell slowly over the spring, fueled by a surge in variants of concern, particularly in the Regina area.⁴⁹

[42] The Respondents' evidence canvasses the variables that impacted the risk of transmission of COVID-19 at gatherings, including outdoor gatherings. The Applicants' evidence confirms that virtually all of these risks were present at the outdoor gatherings attended by the Applicants:

Factors increasing risk of transmission	Risk factor present at Applicants' protests
Physical distancing not maintained ⁵⁰	Yes ⁵¹
Handing things back and forth ⁵²	Yes ⁵³
Unstructured environment ⁵⁴	Yes ⁵⁵

⁴⁸ Kryzanowski Affidavit, at paras 45 to 46.

⁴⁹ Kryzanowski Affidavit, at para 32(c). See also R-0035 (Vol I, Exhibit D).

⁵⁰ Press conference transcripts: Kryzanowski Affidavit, at R-0413 (Vol I, Exhibit M.1); R-0520 (Vol I, Exhibit M.3); R-0614 (Vol I, Exhibit M.5); R-0641 (Vol I, Exhibit M.6); R-0835 (Vol II, Exhibit M.9); R-0896 (Vol II, Exhibit M.10); R-0965 and R-1002 (Vol II, Exhibit M.11); R-1228 (Vol II, Exhibit M.12); Khaketla Report, at R-1372.

⁵¹ Grandel Transcript, at 16, lines 12 to 21; 17 lines 16 to 20; 18 line 10 to 20 line 5; see also the videos in the Affidavit of Jasmin Grandel, at para 10 [**Grandel Affidavit**].

⁵² Press conference transcripts: Kryzanowski Affidavit, at R-0614 (Vol I, Exhibit M.6); R-0352 (Vol I, Exhibit M.1) and R-0413 (Vol I, Exhibit M.2).

⁵³ Grandel Transcript, at 17 line 23 to 18 line 1; Mills Transcript, at 15 lines 15 to 19.

⁵⁴ Press conference transcripts: Kryzanowski Affidavit, at R-0408 and R-0451 (Vol I, Exhibit M.2); R-0785 (Vol II, Exhibit M.7).

⁵⁵ Grandel Transcript, at 16 lines 12 to 16; 18 line 10 to 20 line 5; Mills Transcript, at 13 line 17 to 14 line 1.

Factors increasing risk of transmission	Risk factor present at Applicants' protests
Shouting or chanting ⁵⁶	Yes ⁵⁷
Prolonged period of contact ⁵⁸	Yes ⁵⁹
Hugging ⁶⁰	Yes ⁶¹
Carpooling ⁶²	Yes ⁶³
Travelling from different communities ⁶⁴	Yes ⁶⁵
Possibility of asymptomatic transmission ⁶⁶	Yes ⁶⁷

⁵⁶ Khaketla Report, at R-1364 and R-1372; Transcript of cross-examination of Dr. Moliichi Khaketla, at 55 line 15 to 57 line 25 [**Khaketla Transcript**].

⁵⁷ Grandel Transcript at 16 lines 17 to 21; Mills Transcript at 14 lines 2 to 10.

⁵⁸ Khaketla Report, at R-1373; Kryzanowski Affidavit, at R-0004, para 17.

⁵⁹ Ms. Grandel gathered with other attendees after the gatherings. Including both the protest itself and the subsequent gathering, she was generally present for between two and four hours: Grandel Transcript, at 15 line 21 to 16 line 11.

⁶⁰ Khaketla Report, at R-2293; Khaketla Transcript, at 55 line 15 to 57 line 25; Press conference transcripts: Kryzanowski Affidavit, at R-0641 (Vol I, Exhibit M.6).

⁶¹ Grandel Transcript, at 17 lines 16 to 20; Mills Transcript, at 15 lines 9 to 14.

⁶² Khaketla Report, at R-1372; Press conference transcripts: Kryzanowski Affidavit, at R-1091 (Vol II, Exhibit M.13).

⁶³ Mills Transcript, at 9, lines 5 to 15.

⁶⁴ Khaketla Report, at R-1372; Press conference transcripts: Kryzanowski Affidavit, at R-1125 (Vol II, Exhibit M.13); R-1170 (Vol II, Exhibit M.14); see also R-0889 (Vol II, Exhibit M.10).

⁶⁵ Grandel Transcript, at 13 line 19 to 14 line 8; Mills Transcript, at 11 line 21 to 12 line 6.

⁶⁶ Press conference transcripts: Kryzanowski Affidavit, at R-0602, R-0604 and R-0618 (Vol I, Exhibit M.5); R-0787 (Vol I, Exhibit M.8); R-1169 (Vol II, Exhibit M.14).

⁶⁷ The Applicants did not take COVID-19 tests prior to attending the protests: Grandel Transcript, at 14 lines 15 to 20; Mills Transcript, at 13 lines 14 to 17. There was no communication to attendees that they should not attend if they were a close contact of a COVID-19 case: Grandel Transcript, at 15 lines 1 to 20; Mills Transcript, at 12 line 7 to 13 line 13.

Factors increasing risk of transmission	Risk factor present at Applicants' protests
Difficulty in contact tracing ⁶⁸	Yes ⁶⁹
Unvaccinated people present ⁷⁰	Yes ⁷¹
Unmasked people present ⁷²	Yes ⁷³
Inability or unwillingness to take public health precautions ⁷⁴	Yes ⁷⁵

[43] On this basis, it is easy to conclude that the Outdoor Gathering Limit was reasonable and proportionate.

Dr. Julie Kryzanowski

[44] Dr. Kryzanowski has been the Deputy Chief Medical Health Officer with the Saskatchewan Ministry of Health since April 2021. Immediately prior to that, she was a Medical Health Officer with the Saskatchewan Health Authority (“SHA”) for ten years.

⁶⁸ Khaketla Transcript, at 77 line 3 to 79 line 13; Khaketla Report, at R-1375; Transcript of the Examination of Dr. Kryzanowski, at 70 line 24 to 72 line 7 [**Kryzanowski Transcript**]; Press conference transcripts: Kryzanowski Affidavit, at R-0618 (Vol I, Exhibit M.5).

⁶⁹ Grandel Transcript, at 12 lines 1 to 5 and 13 lines 7 to 18; Mills Transcript, at 11 lines 10 to 16.

⁷⁰ Khaketla Report, at R-1364; see also Khaketla Transcript at 44 line 16 to 45 line 12; 55 line 15 to 57 line 25; and 75 line 4 to 77 line 2.

⁷¹ Grandel Transcript, at 18 lines 2 to 9; Mills Transcript, at 15 line 20 to 16 line 5.

⁷² Khaketla Report, at R-1364; Kryzanowski Affidavit, at para 17.

⁷³ Grandel Transcript, at 17 lines 2 to 10; Mills Transcript, at 14 lines 11 to 22.

⁷⁴ Khaketla Report, at R-1374 and footnote 62.

⁷⁵ Grandel Transcript, at 20 lines 11 to 16 and 22, lines 9 to 13; Mills Transcript at 18 lines 7 to 13 and 21 line 21 to 22 line 1. See also the Affidavit of Christine Rathwell, which attaches as exhibits numerous social media posts authored and shared by Ms. Grandel throughout the pandemic.

- [45] Dr. Kryzanowski's evidence provides the factual background respecting COVID-19, its evolution in Saskatchewan and Canada, and Saskatchewan's pandemic response, including the objectives of public health measures in Saskatchewan. Critical contextual documents include epidemiological information,⁷⁶ summaries of the measures in force in other provinces,⁷⁷ COVID-19 modelling,⁷⁸ and transcripts of press conferences during which Dr. Shahab and other officials communicated the rationale behind the Orders to the public.⁷⁹
- [46] In addition, Dr. Kryzanowski attests to the expected benefits of imposing gathering limits in both indoor and outdoor settings. She notes that outdoor gathering limits, including for protests, "were an important public health measure that was expected to help limit the spread of COVID-19, minimize the number of people with severe disease, and reduce the risk of overburdening the healthcare system".⁸⁰ This was so for several reasons, including the risk of transmission at the event itself, the broader picture of community rates of COVID-19, and activities associated with the outdoor gathering, such as travel from various communities, potentially via shared transportation.⁸¹
- [47] During cross-examination, Dr. Kryzanowski reiterated that risks to the healthcare system arise out of all gatherings, including outdoor gatherings.⁸²

Dr. Moliehi Khaketla

- [48] Dr. Khaketla is a specialist physician in Public Health and Preventative Medicine. She is a Medical Health Officer with the SHA and the Athabasca Health Authority, based in the Northern Saskatchewan Population Health Unit. She is a Fellow of the Royal College of

⁷⁶ Kryzanowski Affidavit, at R-0029 to R-0310 (Vol I, Exhibits D to I).

⁷⁷ Kryzanowski Affidavit, at R-1267 to R-1286 (Vol II, Exhibit P).

⁷⁸ Kryzanowski Affidavit, at R-1287 to R-1341 (Vol II, Exhibits Q and R).

⁷⁹ Kryzanowski Affidavit, at R-0320 to R-1253 (Vols I and II, Exhibits M.1 to M.15).

⁸⁰ Kryzanowski Affidavit, at para 50.

⁸¹ Kryzanowski Affidavit, at paras 51-59.

⁸² Kryzanowski Transcript, at 44 lines 18 to 25, 45 lines 1 to 14.

Physicians of Canada and is Board-Certified in Public Health and General Preventive Medicine with the American Board of Preventive Medicine. In addition to a medical degree, she also has a master's degree in Public Health and completed an internship with WHO.⁸³

[49] Saskatchewan submits that Dr. Khaketla should be qualified as an expert, and her report is both admissible and relevant in this proceeding, pursuant to the two-step test in *White Burgess Langille Inman v Abbott and Haliburton Co.*⁸⁴

[50] First, these threshold criteria must be met: (1) the evidence must be relevant, (2) the evidence must be necessary in assisting the trier of fact, (3) no other evidentiary rule applies to exclude the expert evidence, and (4) the expert must be properly qualified.⁸⁵

[51] All four elements of the threshold inquiry are met. Dr. Khaketla's evidence is **relevant** to the central issue of the reasonableness, from a scientific perspective, of the Outdoor Gathering Limit. Public health is a matter that requires considerable expertise, and her evidence is therefore **necessary**. There is no applicable **exclusionary rule**, and Dr. Khaketla is **eminently qualified** to provide an opinion on matters of public health.

[52] Second, the discretionary gatekeeping inquiry must be undertaken. The Court must be satisfied that the potential utility of the evidence is not outweighed by the risks often associated with expert evidence.⁸⁶ There are no such risks associated with relying on Dr. Khaketla's opinion. Her evidence will not add either "time, prejudice [or] confusion" nor otherwise harm the trial process.⁸⁷

⁸³ Khaketla Report, at R-1352.

⁸⁴ [*White Burgess Langille Inman v Abbott and Haliburton Co.*](#), 2015 SCC 23, [2015] 2 SCR 182 [*White Burgess*].

⁸⁵ *White Burgess*, at para 23.

⁸⁶ *White Burgess*, at para 54.

⁸⁷ *White Burgess*, at para 24, citing [*R v J-L.J.*](#), 2000 SCC 51 at para 47, [2000] 2 SCR 600.

- [53] In Dr. Khaketla’s expert opinion, temporarily restricting the number of people who could attend outdoor gatherings, including protests, “was warranted and justified.”⁸⁸
- [54] Dr. Khaketla’s opinion is based on a number of factors. While evidence of outdoor transmission is limited, it is clear that COVID-19 can transmit outdoors, and observational studies have shown increased transmission following large anti-racism protests in the United States.⁸⁹
- [55] Waiting for concrete proof that transmission of COVID-19 occurs in particular setting is not an affordable luxury during a rapidly-evolving pandemic caused by a novel virus.⁹⁰ In these circumstances, public health officials must apply the “precautionary principle,” which has been explained as follows: “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.”⁹¹
- [56] Furthermore, “the dynamics and activities related to protest gatherings are typically such that they could pose an increased risk of disease transmission.”⁹² These dynamics include challenges maintaining physical distancing during protests; the fact that protests tend to last longer than 15 minutes; and travel to and from the events from various geographic locations and through shared transportation.⁹³
- [57] The risk of transmission at protests “could have only been partially mitigated but not eliminated, by implementing other measures such as physical distancing and the use of masks.”⁹⁴ No single public health intervention was sufficient to reduce the risk – rather,

⁸⁸ Khaketla Report, at R-1370.

⁸⁹ Khaketla Report, at R-1371.

⁹⁰ Khaketla Transcript, at 49 line 4 to 50 line 10; see also 66 line 21 to 68 line 10.

⁹¹ Khaketla Report, at R-1372.

⁹² Khaketla Report, at R-1372.

⁹³ Khaketla Report, at R-1372.

⁹⁴ Khaketla Report, at R-1373.

“individual and population level measures – including restrictions on the number of people allowed to gather – would need to be implemented.”⁹⁵

[58] Furthermore, various factors could affect the mitigation of risk, including “the prevalence of COVID-19 in the area; the setting in which the event would take place; characteristics of those attending the event and their ability or willingness to follow prevention measures; and the types of activities that would be occurring, and interaction between attendees.”⁹⁶

[59] Dr. Khaketla also explained limitations to determining the sources of transmission of COVID-19 in Saskatchewan. For example, she noted that infected individuals may not be forthcoming about their presence at a particular event, that it might be hard to find people once they have returned home, and that records of attendees might be incomplete or not kept at all.⁹⁷

Christine Rathwell

[60] Christine Rathwell is an employee of the Ministry of Health. Her Affidavit attaches numerous social media posts authored by the Applicant, Jasmin Grandel, as well as media coverage of Ms. Grandel. Generally, Ms. Rathwell’s affidavit shows:

- a) That there are good reasons to suspect Ms. Grandel would not be (and was not) compliant with public health guidance at outdoor gatherings; and
- b) That there were other methods and mediums of expression that Ms. Grandel was able to avail herself of, in lieu of outdoor gatherings.

[61] The Applicants have applied to strike Ms. Rathwell’s Affidavit. The Respondents’ response to their application is addressed in a separate Brief of Law.

⁹⁵ Khaketla Report, at R-1374.

⁹⁶ Khaketla Report, at R-1374.

⁹⁷ Khaketla Transcript, at 77 lines 10 to 25, 78 lines 1 to 25, and 79 lines 1 to 13.

Jasmin Grandel

- [62] Jasmin Grandel attended protests related to COVID-19 public health measures nearly every Saturday from January 2021 through to July 2021.⁹⁸
- [63] The protests ranged in attendance from approximately 20 people to up to 1,500.⁹⁹ Not every single protest had more than ten people, but most did.¹⁰⁰ There were people of all ages present, including many children.¹⁰¹ Some attendees travelled from different communities, including Regina, Saskatoon, Weyburn, and up north.¹⁰²
- [64] The dynamics of the protests are outlined in the table above. Generally speaking, the distancing requirement in the PHOs was not followed; nor were public health recommendations, such as masking, hand-sanitizing, attendance lists, and proper sanitizing of hands and surfaces.
- [65] Ms. Grandel did not take a COVID-19 test prior to attending.¹⁰³ Attendees knew they should stay home if they were feeling sick, but there was no communication that they should stay home if they were close contacts of a COVID-19 case.¹⁰⁴
- [66] Ms. Grandel was neither concerned that she might become infected with COVID-19 at a protest nor concerned that someone else might become infected.¹⁰⁵

⁹⁸ Grandel Transcript, at 9 line 3 to 10 line 1.

⁹⁹ Grandel Transcript, at 7 lines 23 to 25 and 8 lines 11 to 13.

¹⁰⁰ Grandel Transcript, at 10 lines 2 to 6.

¹⁰¹ Grandel Transcript, at 14 lines 9 to 14.

¹⁰² Grandel Transcript, at 13 line 19 to 14 line 8.

¹⁰³ Grandel Transcript, at 14 lines 15 to 20.

¹⁰⁴ Grandel Transcript, at 15 lines 1 to 20.

¹⁰⁵ Grandel Transcript, at 20, lines 11 to 16.

Darrell Mills

- [67] Darrell Mills attended approximately five protests between December 2020 and May 2021.¹⁰⁶
- [68] The protests ranged in attendance from approximately 20 people to a few hundred people.¹⁰⁷ Attendees were present from Saskatoon, Regina, and Moose Jaw. All age groups were present.¹⁰⁸
- [69] The dynamics of the protests were similar to those described by Ms. Grandel and are noted in the table above.
- [70] Mr. Mills was not concerned that he might become infected with COVID-19. He was not concerned that someone else might become infected with COVID-19.¹⁰⁹ He did not believe public health measures might have protected him or others from COVID-19.¹¹⁰

Dr. Thomas Warren

- [71] The Applicants have tendered the Affidavit of Dr. Thomas Warren, an infectious diseases consultant and medical microbiologist, as an expert witness. No specific scope of expertise is proffered in his affidavit.
- [72] The test for admission of expert evidence is set out in *White Burgess* and reproduced above, at para [50]. The Respondents submit that Dr. Warren's evidence fails the fourth stage of the threshold inquiry: he is simply ***not qualified to provide an expert opinion on matters of public health.***

¹⁰⁶ Mills Transcript, at 7 lines 7 to 24.

¹⁰⁷ Mills Transcript, at 10 line 22 to 11 line 3.

¹⁰⁸ Mills Transcript, at 11 line 21 to 12 line 6.

¹⁰⁹ Mills Transcript, at 18 lines 7 to 13.

¹¹⁰ Mills Transcript, at 21 line 21 to 22 line 1.

[73] The crux of this application is whether a specific public health measure, or collection of public health measures, was a proportionate response to the COVID-19 pandemic. This requires expertise in public health. Dr. Warren, by his own admission, has none:

Q. To be clear then, you do not have a residency in public health or preventative medicine?

A. Correct. I do not.

Q. You do not have a fellowship in public health or preventative medicine?

A. No.

Q. In the last ten years, have you practiced in public health or preventative medicine?

A. No.

Q. In your current role as an infectious disease consultant, or in any previous position, has your work involved monitoring and assessing the health needs of a population?

A. No.

Q. In your current role as an infectious disease consultant, or in any previous position you've held, has your work involved public health advice for governments or other public bodies?

A. No.

Q. In your current role as an infectious disease consultant, or any previous position, has your work involved a leadership or management role on matters related to public health?

A. No.

Q. You have not worked in any public health capacity during the outbreak of any previous epidemic or pandemic certainly.

A. No.

Q. In your current role as an infectious disease consultant, or in any previous position, you have not implemented, developed, or evaluated strategies to improve population health or wellbeing.

A. No.

Q. And you have no experience in planning, implementing, or evaluating programs and policies to promote public health.

A. No.¹¹¹

- [74] Dr. Warren is not qualified to provide an opinion regarding public health interventions. His expertise in infectious diseases may permit him to provide some opinion regarding COVID-19 itself, but his lack of training and experience in public health disqualifies him from assessing the merits of a public health response.¹¹²
- [75] He has been put forward as a witness in “eight or nine” cases against COVID-19 measures, by his estimation.¹¹³ Based on a review of published cases, he was qualified as an expert in *Gateway Bible*, apparently without challenge. However, his evidence in that case seems to have related to the reliability of PCR testing¹¹⁴ (a matter likely within his expertise as a medical microbiologist) rather than public health interventions.
- [76] The Respondents ask that this Court refuses to permit Dr. Warren to give opinion evidence in this matter.
- [77] Alternatively, if this Court chooses to qualify Dr. Warren, his evidence should be accorded considerably less weight than that of Dr. Khaketla. **First**, as noted before, he is not a public health specialist.
- [78] **Second**, Dr. Warren either did not consider or deemed the local Saskatchewan context irrelevant in his report.¹¹⁵

¹¹¹ Warren Transcript, at 11 line 25 to 13 line 13. He has also produced no published work on public health: 14, lines 4 to 6.

¹¹² Dr. Kryzanowski contextualized the relevant expertise of infectious disease and public health specialists: Kryzanowski Transcript, at 63 line 1 to 64 line 14.

¹¹³ Warren Transcript, at 14 line 16 to 15 line 17.

¹¹⁴ *Gateway Bible*, at paras 41 and 185 – 190.

¹¹⁵ Warren Transcript, at 21 line 13 to 23 line 25.

[79] *Third*, the core of Dr. Warren’s “argument”¹¹⁶ is that before governments could limit outdoor gatherings, they were required to have “proof” of transmission occurring in that setting:

The burden of proof requires evidence to the contrary, showing that outdoor transmission of SARS-CoV-2 is significant. In the absence of that evidence, the default assumption remains that the outdoor transmission of SARS-CoV-2 is negligible.¹¹⁷

[80] He therefore concluded outdoor gatherings could be considered “safe” until proven otherwise.¹¹⁸ But he acknowledged that even “safe” gatherings carry a level of risk.¹¹⁹

[81] Despite this, Dr. Warren was prepared to admit that “theoretically”, duration, frequency, and density would affect transmission outdoors;¹²⁰ that a variant twice as transmissible indoors would be twice as transmissible outdoors;¹²¹ that in a public health context, different intervention may require different levels of proof;¹²² and that public health policy makers consider factors beyond merely the evidence for the intervention itself.¹²³

[82] The absurdity of Dr. Warren’s position was underscored by Dr. Khaketla. Public health experts were battling a swift-moving and deadly pandemic. The Respondents (and others in their position) did not have the luxury of waiting for certainty or randomized controlled trials before implementing public health measures. Decisions had to be made based on the

¹¹⁶ Warren Transcript, at 103 line 16 to 105 line 4. Throughout his cross-examination, Dr. Warren repeatedly referred to his report as an “argument.”

¹¹⁷ Warren Reply Affidavit at para 4. Dr. Warren clarified on cross-examination that “burden of proof” means “high-quality studies to show that there is outdoor transmission of SARS-CoV-2, that there’s substantial outdoor transmission of SARS-CoV-2.” Warren Transcript, at 108 lines 14 to 17.

¹¹⁸ Warren Transcript, at 96 lines 14 to 25; 97 lines 1 to 18.

¹¹⁹ Warren Transcript, at 99 line 19 to 100 line 7.

¹²⁰ Warren Transcript, at 52 line 23 to 54 line 1.

¹²¹ Warren Transcript, at 175 line 21 to 167 line 13.

¹²² Warren Transcript, at 101 line 25 to 102 line 21.

¹²³ Warren Transcript, at 166 line 10 to 169 line 17.

best evidence available in real time, applying the precautionary principle.¹²⁴ Moreover, the high-quality randomized studies he prefers may be impossible or unethical to obtain rapidly.¹²⁵

E. THE *CHARTER* INFRINGEMENT IS CONCEDED

The section 2(b) violation is conceded

[83] The Respondents concede that the PHOs infringed¹²⁶ the Applicants' rights under section 2(b) of the *Charter*.

[84] The three-part *Irwin Toy*¹²⁷ test, as most recently restated in *Canadian Broadcasting Corp.*,¹²⁸ applies to the within case.

[85] The Applicants' protest activities were performed to convey a meaning, and therefore have expressive content.¹²⁹ There is nothing in the specific place or manner of the protests that removes them from the protection of section 2(b) in the context of this Application.¹³⁰ The first two *Irwin Toy* criteria are met.

[86] The Outdoor Gathering Limit had the *effect* of interfering with the Applicants' right to free expression. Where the effect, rather than purpose, of a government measure is to interfere

¹²⁴ Khaketla Transcript, at 49 line 4 to 50 line 10; see also 66 line 21 to 68 line 10. See below, at para [118].

¹²⁵ Khaketla Transcript, at 79 line 23 to 81 line 9.

¹²⁶ "Infringement" may not be the operative word in cases involving a *Doré* analysis, see e.g. [Loyola High School v Quebec \(Attorney General\)](#), 2015 SCC 12 at 4, 35, and 61, [2015] 1 SCR 613 [*Loyola*] where Abella J. for the majority refers to administrative decisions that "engage" *Charter* rights and values. However, in the interest of simplicity, the Respondents will use "infringement" throughout.

¹²⁷ [Irwin Toy Ltd. v Quebec \(Attorney General\)](#), [1989] 1 SCR 927 [*Irwin Toy*].

¹²⁸ [Canadian Broadcasting Corp. v Canada \(Attorney General\)](#), 2011 SCC 2 at 32 to 36 and 38, [2011] 1 SCR 19 [*CBC*].

¹²⁹ *Irwin Toy*, at 969.

¹³⁰ In other cases involving the use of public property for protests or other demonstrations, the Government's objective of managing competing demands of public property must be balanced, e.g. [Montréal \(City\) v 2952-1366 Québec Inc.](#), 2005 SCC 62, [2005] 3 SCR 141 [*Montréal*].

with free expression, the claimant must also show that the expression “promotes one of the values underlying the freedom of expression.”¹³¹ Protests, in general, foster “participation in social and political decision-making”¹³² which is one of the enumerated values in *Irwin Toy*. The third *Irwin Toy* step, and the test for a 2(b) infringement, is made out.

[87] The Applicants argue, implicitly, that the Outdoor Gathering Limit had the *purpose* of infringing on free speech.¹³³ They rely heavily on earlier police and political reactions to the “Black Lives Matter” protests, which occurred during June of 2020.

[88] Given the concession on 2(b), this alternate route to a *Charter* infringement under the third stage of *Irwin Toy* is redundant. But the Outdoor Gathering Limit did not infringe section 2(b) in purpose.

[89] The decision respecting whether and how to enforce a particular law is a discretionary one.¹³⁴ The multiple police services that issued the Applicants’ tickets (and may have refrained from issuing tickets to unnamed persons over the summer of 2020) are not parties to this proceeding and cannot explain their reasoning. But the different contexts of the two protests show a cogent reason for their respective treatment:

- a) Given that the subject matter of the “Black Lives Matter” protests was *police brutality*, the lack of a sharper police response is understandable.
- b) As discussed above, at paragraphs [34] to [41], the state of the pandemic escalated precipitously between June and December of 2020.¹³⁵

¹³¹ *Montréal*, at para 83; *Irwin Toy*, at 976.

¹³² *Irwin Toy*, at 977.

¹³³ Applicant’s Brief of Law, paragraph 63 most particularly.

¹³⁴ *R v Beare; R v Higgins*, [1988] 2 SCR 387 at para 51. This discretion can be reviewed in narrow circumstances, see *R v Beaudry*, 2007 SCC 5 at paras 35 to 39, [2007] 1 SCR 190.

¹³⁵ At the time “Black Lives Matter” protests were occurring in Saskatchewan, the effective reproductive rate in Saskatchewan was below 1 (0.64). There were less than 20 active cases in Saskatchewan on June 8, 2020: see the video linked in the Grandel Affidavit, para 29: <http://www.youtube.com/watch?v=bTe38zHbC8Q>, at the [7 minute, 25 second mark](#), and [35 second mark](#), respectively

- c) The “Black Lives Matter” protests were a time-limited occurrence. The Applicants violated the PHOs on a regular, weekly basis over the course of several months.¹³⁶ Furthermore, there is evidence that “Black Lives Matter” protestors immediately complied with police directions.¹³⁷ There is also evidence that the attendees of the Applicants’ protests did not.¹³⁸ It is wholly appropriate for consistent, repeat non-compliance to attract escalating police sanctions.

[90] Even if the Applicants were to allege some form of police misconduct in *enforcement*, this would not be relevant to the *purpose* of the Outdoor Gathering Limit. The Outdoor Gathering Limit, like all measures enumerated in the PHOs, was issued for the “purposes of preventing, reducing and controlling the transmission of SARS-CoV-2”.¹³⁹

The section 2(c) and 2(d) analysis are unnecessary

[91] In this case, the applicants *assembled* for the purpose of protesting. They *associated* with each other for the purpose of protesting. The section 2(b) analysis—properly sensitive to the context, particularly the collective nature of protests—covers the waterfront.

[92] Sections 2(c) and 2(d) do not require an independent analysis in this case. This economical approach been recently affirmed by the Supreme Court in *Trinity Western*. So long as the freedom of expression analysis sufficiently accounts for the assemblage and associative rights engaged, there is no need to duplicate the analysis across multiple *Charter* rights.¹⁴⁰ The factual matrix of the three breaches is “largely indistinguishable.”¹⁴¹

¹³⁶ See the list of tickets at **Appendix A**, plus the Grandel Transcript, at 9 line 3 to 18.

¹³⁷ Grandel Affidavit, at Exhibit Q.

¹³⁸ Grandel Transcript, at 21 line 23 to 22 line 13.

¹³⁹ Taken here from section 25.2 of the *Regulations*. See also e.g. [Public Health Order – Provincial Order](#) (23 March 2021), Whereas “N”.

¹⁴⁰ [Law Society of British Columbia v Trinity Western University](#), 2018 SCC 32 at para 77, [2018] 2 SCR 293 [*Trinity Western*].

¹⁴¹ *Ibid.*

[93] Section 2(c) is infrequently litigated. In some cases, courts have declined to decide cases under s. 2(c), and have instead decided them under either s. 2(b)¹⁴² or 2(d).¹⁴³ In other cases, issues related to s. 2(c) have been analyzed with those under s. 2(b), either with courts indicating that the analysis under s. 2(c) is subsumed under s. 2(b), or without any meaningful distinction in the analysis under ss. 2(b) and (c).¹⁴⁴

[94] Treatment of 2(c) and 2(d) of the *Charter* in COVID-19-related litigation has been mixed:

- a) The *Trinity Western* approach was followed in *Ontario Churches*, where Justice Pomerance refused to “repeat or repackage” the freedom of religion claims into parallel arguments respecting freedom of assembly or association.¹⁴⁵
- b) In *Gateway Bible*, Chief Justice Joyal noted that section 2(c) is often “subsumed” into 2(b), and that Manitoba had conceded the “*prima facie*” violation which stood to be justified under section 1, in the specific context of protests.¹⁴⁶ Section 2(d) was not pled.
- c) In *Beaudoin*, Justice Hinkson found that the public health measures infringed the section 2(c) rights of religious petitioners and the 2(d) rights of all petitioners, again in the face of a concession on this point from British Columbia.¹⁴⁷

¹⁴² See e.g. [Saskatchewan v Durocher](#), 2020 SKQB 224 at para 22, 435 DLR (4th) 650; [BCGEU v British Columbia \(Attorney General\)](#), [1988] 2 SCR 214; [British Columbia Teachers' Federation v British Columbia Public School Employers' Assn.](#), 2009 BCCA 39 at para 39, 306 DLR (4th) 144, leave to appeal to SCC refused, 33113 (February 9, 2009); [Figueiras v Toronto \(City\) Police Services Board](#), 2015 ONCA 208 at para 38, 383 DLR (4th) 512.

¹⁴³ [Saskatchewan v Saskatchewan Federation of Labour](#), 2012 SKQB 62 at paras 55 – 56, 390 Sask R 196. This case was appealed to the Supreme Court of Canada, but the 2(c) argument was not revisited by the Court of Appeal or Supreme Court.

¹⁴⁴ [Batty v Toronto \(City\)](#), 2011 ONSC 6862, 342 DLR (4th) 129; [Smiley v Ottawa \(City\)](#), 2012 ONCJ 479, 342 DLR (4th) 129; [Gammie v Town of South Bruce Peninsula](#), 2014 ONSC 6209, 322 CRR (2d) 22; [Attorney General of Ontario v 2192 Dufferin Street](#), 2019 ONSC 615.

¹⁴⁵ *Ontario Churches*, at para 114.

¹⁴⁶ *Gateway Bible*, at paras 212 – 213.

¹⁴⁷ *Beaudoin*, at paras 173 – 177.

d) In *Koehler*, Justice Boone found that 2(c) was not engaged by Newfoundland’s border travel measures.¹⁴⁸

[95] Importantly, there is no established test for section 2(c) of the *Charter*: there are dueling academic theories, and none has received judicial *imprimatur*. Given the concession on section 2(b), it is unnecessary to establish a new section 2(c) test in this case.

[96] The Respondents submit that the 2(c) and 2(d) analysis are subsumed into section 2(b) in this instance.

F. *DORÉ* IS THE PROPER STANDARD OF REVIEW

[97] The Respondents submit that the governing authority is *Doré v Barreau du Québec*:¹⁴⁹

[7] ... In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. ***If, on the other hand, it reflects a proper balance of the mandate with Charter protection, it is a reasonable one.***¹⁵⁰

[98] A law of general application stands to be justified under *Oakes*.¹⁵¹ A discretionary administrative decision stands to be justified under *Doré*. The unresolved question is the framework for justifying a ***discretionary administrative decision of “general application.”*** It is not clear which of the two applies; and, indeed, a hybrid may be required.¹⁵²

[99] The PHOs are not an enabling statute. They are an administrative decision made pursuant to statutory authority. The Applicants argue that ***the effect*** of the PHOs is to unjustifiably limit their *Charter* rights.

¹⁴⁸ *Koehler v Newfoundland and Labrador*, 2021 NLSC 95 at paras 39 – 49.

¹⁴⁹ *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*].

¹⁵⁰ *Ibid.*, at para 7.

¹⁵¹ *R v Oakes*, [1986] 1 SCR 1103 [*Oakes*].

¹⁵² Proposed by Andy Yu, “Delegated Legislation and the Charter” (2020) Can J Adm Law & Practice 49 at 56ff [Yu].

- [100] Each PHO was issued by Dr. Shahab pursuant to (a) powers ordinarily vested in the Minister pursuant to section 45 of the *Act* or 25.2 of the *Regulations* but delegated to him pursuant to *The Legislation Act*; and (b) powers vested in him as the province’s chief medical health officer, under section 38 of the *Act*.
- [101] The three order-making powers implicated here are fundamentally discretionary: “may” is used throughout,¹⁵³ which is “permissive and empowering.”¹⁵⁴ But for the unique context of the COVID-19 pandemic, which required PHOs of a “general application,” the standard of review of such orders would ordinarily be governed by *Vavilov*,¹⁵⁵ informed by *Doré* in cases where the *Charter* is engaged.¹⁵⁶
- [102] The province-wide scope of the PHOs does not, on its own, transform the standard of review from *Doré* to *Oakes*. The Respondents submit that where a decision involves “an exercise of an administrative discretion” that would normally attract the reasonableness standard of review, the *Charter* components are governed by *Doré*.¹⁵⁷
- [103] In the B.C. case, *Beaudoin*, the Court considered a challenge to PHOs that impacted on religious gatherings. The Court found that the appropriate standard was that set out in *Doré*, as the public health orders were “more akin to an administrative decision than a law of general application.” While they were not adjudicative in nature, they “were made through a delegation of discretionary decision-making authority” under the British Columbia *Public Health Act*.¹⁵⁸

¹⁵³ *The Public Health Act, 1994*, s 38(1): “A medical health officer *may*”; s 45(1) “The minister *may*”. The *Regulations* note, s 25.2; “the minister *may*”.

¹⁵⁴ *The Legislation Act*, s 2-30(1)(c).

¹⁵⁵ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, 441 DLR (4th) 1.

¹⁵⁶ There are no reported judicial reviews of orders under the Saskatchewan legislation. But see reviews of similar orders in Alberta: *Boardwalk Equities Inc. v Capital Health Authority*, 2005 ABQB 34 at para 22, 45 Alta LR (4th) 285; *Canadian Union of Public Employees, Local 30 v WMI Waste Management of Canada Inc.*, 1996 ABCA 6 at 3, 34 Admin LR (2d) 172.

¹⁵⁷ *Bonitto v Halifax Regional School Board*, 2015 NSCA 80 at para 38, 388 DLR (4th). See Yu, at 59, where he describes discretion as “arguably *the* key reason” for employing the *Doré* framework [emphasis original].

¹⁵⁸ *Beaudoin*, at para 218, citing the decision-making authority provided by the *Public Health Act*, SBC 2008, c 28.

- [104] This was distinguishable from the structure in *Ontario Churches*, where “Ontario was guided by expert medical opinion, but the orders were issued by the government, not medical experts”, and “given the force of law in statutory and regulatory enactment.”¹⁵⁹ An *Oakes* analysis was therefore applied.
- [105] Finally, in *Gateway Bible*, the Manitoba Court of Queen’s Bench chose to apply the *Oakes* test but recognized that “it remains a reasonable argument that the impugned PHOs could also be properly reviewed as an administrative decision of delegated authority attracting the reasonableness review as set out under *Doré*.”¹⁶⁰
- [106] In the present case, the two Ministerial powers at issue were delegated back to the chief medical health officer. The chief medical health officer must possess the qualifications prescribed in *The Public Health Officers Regulations*,¹⁶¹ namely, pertinent recognition by the Royal College of Physicians and Surgeons of Canada or a master’s degree in public or community health.
- [107] This regime is closest to the British Columbia regime considered in *Beaudoin*, which the Court found to be governed by *Doré*.

G. THE OUTDOOR GATHERING LIMIT WAS PROPORTIONATE

- [108] However, even if this Court chooses instead to apply *Oakes*, this does not significantly change the analysis. Both *Oakes* and *Doré* flex the same “justificatory muscles.”¹⁶² It is *proportionality* that is key.
- [109] The Respondents submit that the Outdoor Gathering Limit was proportionate. The standard of review is therefore unlikely to be determinative.

¹⁵⁹ *Ontario Churches*, at para 124.

¹⁶⁰ *Gateway Bible*, at para 36.

¹⁶¹ [The Public Health Officers Regulations](#), RRS c P-37.1, s 2(c).

¹⁶² *Doré*, at para 5.

[110] In the interest of putting the Applicants’ case at its highest, the following section applies the *Oakes* framework. However, the Respondents’ arguments would apply with even greater force under *Doré*.

[111] It is difficult to overstate the extent and seriousness of the problem posed by COVID-19. The fundamental freedoms of Canadians had to give way, temporarily, for extraordinary measures taken in service of the common good.¹⁶³ The three-part *Oakes* test is met.

The context requires consideration and deference

[112] The *Oakes* test must be applied “flexibly, having regard to the specific factual and social context of each case.”¹⁶⁴ Context is the “indispensable handmaiden”¹⁶⁵ of *Oakes*. Some deference is almost always owed in the *Oakes* analysis, but some cases require more deference than others.¹⁶⁶ A proper understanding of the context will inform the level of deference shown at each stage of the section 1 analysis.¹⁶⁷

[113] The Respondents submit the following are key considerations:

[114] ***The potential for harm was immense, and the future uncertain.***¹⁶⁸ Saskatchewan, like the rest of the world, was contending with the very height of a global pandemic. The PHOs were issued in the face of (a) unprecedented loss of life and a near certainty of escalating future losses; and (b) substantial uncertainty about the virus and the epidemiological impact of individual public health measures. “Surgical” precision was impossible. This militates toward deference, and engages the ***precautionary principle***, discussed below.

¹⁶³ *Taylor*, at para 492.

¹⁶⁴ *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 68 [*RJR-MacDonald*].

¹⁶⁵ *Thomson Newspapers Co. v Canada (Attorney General)*, [1998] 1 SCR 877 at para 87; *Taylor*, at para 403.

¹⁶⁶ *M. v H.*, [1999] 2 SCR 3 at para 78 [*M. v H.*], *Ontario Churches*, at para 122.

¹⁶⁷ Deference is not a threshold determination, though it is useful to explore these contextual factors in advance. Rather, it informs the individual stages of *Oakes* as appropriate. *M. v H.*, at para 78; *Taylor*, at para 416.

¹⁶⁸ *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 77, [2004] 1 SCR 827 [*Harper*]; *Taylor*, at para 410.

- [115] ***COVID-19 disproportionately impacted the most vulnerable.***¹⁶⁹ Older adults and those with pre-existing conditions are more likely to suffer negative impacts of COVID-19 infection. Slowdowns in the healthcare system, due to reallocation of resources to address COVID-19, also disproportionately impacted those groups. This also militates toward deference.
- [116] ***The Respondents had to balance competing values and interests.***¹⁷⁰ The Respondents were forced to weigh competing interests and craft a set of protections that was workable and fair for all Saskatchewanians, distributing the burden of COVID-19 protection measures across society. The Applicants and others in their position were not the only persons impacted by the PHOs, nor the only ones whose *Charter* rights were affected. Moreover, a failure to take measures could precipitate more severe future measures to bring the pandemic back under control.¹⁷¹ The “net” effect of the PHOs on *Charter* rights is profoundly difficult to measure. This strongly signals deference.
- [117] ***Managing the pandemic required specialized expertise and judgment.***¹⁷² The expertise of the CMHO and his team is considerable¹⁷³ and merits deference.
- [118] In the face of a raging global pandemic, public health measures could not wait for scientific certainty. The failure to act could generate catastrophic loss of life. The virus moved faster than the science. Recourse to the ***precautionary principle*** is essential in COVID-19 litigation for this reason.¹⁷⁴ As held in in *Taylor*:

¹⁶⁹ *Harper*, at para 80; *Taylor*, at para 410. See Khaketla Report, at R-1365; Kryzanowski Affidavit, at para 11.

¹⁷⁰ *Irwin Toy*, at 993 – 94; *RJR MacDonald*, at para 68; [Quebec \(Attorney General\) v A](#), 2013 SCC 5, [2013] 1 S.C.R. 61, at para 439.

¹⁷¹ *Ontario Churches*, at para 145. This phenomenon can be seen in Saskatchewan’s modelling, see the Kryzanowski Affidavit, at R-1312 and R-1313 (Vol II, Exhibit Q).

¹⁷² *Ontario Churches*, at paras 123 to 128; *Gateway Bible*, at para 292.

¹⁷³ Adding to both Dr. Shahab and Dr. Kryzanowski and their respective qualifications, the Ministry had teams of people managing the crisis internally, and was assisted by other expert groups, like the SHA, Public Health Agency of Canada, and more: Kryzanowski Affidavit, at paras 24 to 28.

¹⁷⁴ *Ontario Churches*, at para 144; [Spencer v Canada \(Attorney General\)](#), 2021 FC 361 at 113; [Canadian Constitution Foundation v Attorney General of Canada](#), 2021 ONSC 2117 at para 54; *Taylor*, at para 411.

[411] [...] In the context of such a public health emergency, with emergent and rapidly evolving developments, the time for seeking out and analyzing evidence shrinks. Where the goal is to avert serious injury or death, the margin for error may be narrow. In such a circumstance, the response does not admit of surgical precision. Rather, in public health decision making the “precautionary principle” supports the case for action before confirmatory evidence is available.

- [119] The precautionary principle does not “thwart”¹⁷⁵ the Court’s assessment of proportionality. It is critical to it. After all, the evidentiary requirements of section 1 “vary substantially depending upon both the nature of the legislation and the nature of the right infringed.”¹⁷⁶
- [120] Whether *Doré* applies, or *Oakes*, the degree of deference to be shown to the decision-maker is high. As recognized by Justice Pomerance in *Ontario Churches*, this “mix of conflicting interests and perspective, centered on a tangible threat to public health, is a textbook recipe for deferential review.”¹⁷⁷
- [121] It is not the task of the courts to resolve conflicting views about COVID-19. Nor should judges play “Monday morning quarterback”, with the benefit of hindsight, to undermine choices that were reasonable based on the imperfect information available at the time.¹⁷⁸
- [122] Rather, the issue for this Court to decide is “whether the measures chosen by government fall within the range of reasonable alternatives.”¹⁷⁹
- [123] Saskatchewan submits that this burden is easily satisfied by the evidence.

¹⁷⁵ Applicant’s Brief of Law, at para 125.

¹⁷⁶ *RJR-MacDonald*, at para 64; see also *Harper*, at para 407.

¹⁷⁷ *Ontario Churches* at paras 124 – 127. See also *Gateway Bible*, at para 37.

¹⁷⁸ *Ontario Churches*, at para 142.

¹⁷⁹ *Ontario Churches*, at para 138 and 156.

The objective was pressing and substantial

- [124] The PHOs, including the Outdoor Gathering Limit, were enacted for the express purpose of “preventing, reducing and controlling the transmission of SARS-CoV-2”.¹⁸⁰
- [125] The control of a pandemic is a quintessential example of a pressing and substantive objective.¹⁸¹ Each court that has turned to this issue has come to the same conclusion.¹⁸² It is difficult to imagine a more pressing and substantial objective than the protection of every Saskatchewanian from a deadly and novel pathogen. Moreover, this objective must also be understood in light of the dire state of the pandemic in Saskatchewan in December 2020, discussed above at paras [34] to [40].

The limits were rationally connected to the objective

- [126] The burden on the government to establish a rational connection between the infringement and the benefit sought “is not particularly demanding.”¹⁸³ The connection between the measure and the infringement must not be “arbitrary, unfair or based on irrational considerations.”¹⁸⁴ The Respondents must demonstrate “that it is reasonable to suppose that the limit *may* further the goal, not that it *will* do so.”¹⁸⁵
- [127] COVID-19 is transmitted from person to person. Accordingly, “restricting person-to-person contact logically reduces the risk of transmission.”¹⁸⁶ No more is required at this stage.

¹⁸⁰ *Regulations*, s. 25.2(3). Similar language can be seen in sections 38(2) and 45(2) of *The Public Health Act, 1994*.

¹⁸¹ *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at 518.

¹⁸² *Taylor*, at para 436 – 437; *Beaudoin*, at 224; *Spencer*, at para 210; *Gateway Bible*, at para 293; *Ontario Churches*, at paras 130 – 133.

¹⁸³ *Ontario Churches*, at para 135.

¹⁸⁴ *Oakes*, at para 70.

¹⁸⁵ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 para 48, [2009] 2 SCR 567 [emphasis added]; *RJR-MacDonald*, at para 153.

¹⁸⁶ *Ontario Churches*, at para 135.

- [128] The evidence of Dr. Khaketla removes all doubt: COVID-19 can transmit outdoors. The same factors that drive indoor transmission also drive outdoor transmission. Furthermore, this conclusion “is fortified by consideration of the activities”¹⁸⁷ that occur in connection with unstructured outdoor gatherings, including at the protests the Applicants attended: chanting, shouting, embracing, carpooling, *etc.*
- [129] Ironically, it will be difficult to “prove” as a fact that transmission occurred at pandemic-related protests precisely because of the attitude of protestors towards public health more generally: persons who attended illegal gatherings may refuse to disclose that to contact tracers,¹⁸⁸ and they may avoid COVID-19 testing even if symptomatic.¹⁸⁹
- [130] The Outdoor Gathering Limit was rationally connected to the objective of “preventing, reducing and controlling the transmission of SARS-CoV-2.”

The limits were minimally impairing

- [131] Minimal impairment “does not literally translate into the least intrusive choice imaginable.”¹⁹⁰ This is true even if the Court can envision an alternative measure that it believes is better suited to the objective.¹⁹¹
- [132] Rather, the question is “whether the measures chosen by government fall within the ***range of reasonable alternatives.***”¹⁹² The law “must be ***reasonably*** tailored to its objectives,”

¹⁸⁷ *Ontario Churches*, at para 135.

¹⁸⁸ Khaketla Transcript, at 77 line 3 to 79 line 13; Khaketla Report, at R-1375; Kryzanowski Transcript, at 70 line 24 to 72 line 7; Press conference transcripts: Kryzanowski Affidavit, at R-0618 (Vol I, Exhibit M.5).

¹⁸⁹ Ms. Grandel counselled others to not seek testing, for fear that test would reveal more cases and precipitate new public health measures: Affidavit of Christine Rathwell, R-2684 (Tweet dated April 11, 2021).

¹⁹⁰ *Ontario Churches*, at para 138, citing [*Canada \(Attorney General\) v JTI-Macdonald Corp.*](#), 2007 SCC 30 para 41, [2007] 2 SCR 610 [*JTI-Macdonald*].

¹⁹¹ *RJR-MacDonald*, at para 160.

¹⁹² *Ontario Churches*, at paras 138 – 139, citing *JTI-Macdonald* at para 43.

and “must impair the right no more than *reasonably* necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account.”¹⁹³

[133] In “the calm of the courtroom,” it may be possible to envision a solution that impairs the *Charter* right less than the solution actually adopted.¹⁹⁴ However, during a raging public health emergency, governments cannot be expected to choose “the least ambitious means” of protecting the public.¹⁹⁵

[134] Thus, the issue for this Court to decide is *not* whether the Outdoor Gathering Limit should have been 11, or 15, or 20. The question is whether the Outdoor Gathering Limit, viewed in the context of the entire package of public health measures, is proportionate in its *overall* impact.¹⁹⁶

[135] Saskatchewan’s outdoor gathering limits were commensurate with other provinces.¹⁹⁷ As the jurisdictional scans showed, Saskatchewan’s outdoor gathering limits were generally equal to or greater than similar limits in place at the same time.¹⁹⁸

[136] As the Applicants note, some (but not all) provinces chose to regulate outdoor protests differently than other outdoor gatherings, for example by imposing no limits on attendance but placing controls on social distancing, masking, traffic flow, and other options.¹⁹⁹ However, as discussed below, there was a significant risk that the Applicants would not have followed such protocols.

¹⁹³ [R v Sharpe](#), 2001 SCC 2 at 96, [2001] 1 SCR 45 [citations omitted, emphasis original].

¹⁹⁴ *JTI-Macdonald*, at para 43.

¹⁹⁵ *Ontario Churches*, at para 138.

¹⁹⁶ *Oakes*, at para 54.

¹⁹⁷ Interjurisdictional scanning is a consideration in minimal impairment exercises: [Carter v Canada \(Attorney General\)](#), 2015 SCC 5 at paras 104 – 107, [2015] 1 SCR 331.

¹⁹⁸ Affidavit of Julie Kryzanowski, Vol I, Exhibit P.

¹⁹⁹ Certainly, this was the case in British Columbia after February 10, 2021. See *Beaudoin*, at para 145. This also appears to have been the case in Alberta, perhaps as early as May 27, 2021: [Record of Decision of the Chief Medical Officer, which modifies orders 19-2021 and 20-2021 by outlining COVID-19 measures for private social gatherings for a protest or political purpose](#) (27 May 2021).

- [137] The Applicants rely heavily on the fact that certain indoor or outdoor gatherings in the ROSK had attendance limits higher than ten. They submit the Outdoor Gathering Limit of ten people was therefore unreasonable.
- [138] The Respondents disagree. *First*, this differential does not necessarily mean that the Outdoor Gathering Limit should have been higher. It may just as easily be argued that the indoor and outdoor gatherings regulated by the ROSK should have been *lower*.
- [139] Reasonable people may disagree on whether Saskatchewan’s public health measures were too intrusive or too lenient. But the Respondents did not have the luxury of debate: in the context of a public health crisis, they had to act. The Outdoor Gathering Limit they chose was within the range of reasonable alternatives.
- [140] *Second*, the Applicants’ argument greatly underestimates the rigor of the ROSK itself. The exemption from the unstructured gathering limits had a *quid pro quo*: a constellation of mandatory protections that needed to be in place to gain the benefit of the ROSK’s more specific gathering limit. There must be a comparison of “comparables.”²⁰⁰ It is not appropriate to compare an unstructured outdoor gathering—with no protections—to an indoor or outdoor gathering with other, layered protections in place.²⁰¹
- [141] *Third*, the Respondents submit there were cogent reasons to have preferred a lower gathering limit instead of attempting to impose ROSK-like protections at unstructured outdoor gatherings, particularly protests:
- a) The Applicants, and others with them, failed to maintain mandatory social distancing or adopt even basic COVID-19 mitigation measures to offset their flagrant non-compliance with the Outdoor Gathering Limit. Non-compliance is a serious concern in COVID-19 public health regulation.²⁰²

²⁰⁰ *Beaudoin*, at para 229; *Ontario Churches*, at para 260.

²⁰¹ Khaketla Report, at R-1374.

²⁰² *E.g. Ontario Churches*, at para 153; *Taylor*, at paras 472 – 475.

- b) This is borne out by other provinces' experiences with pandemic-related protests during this time. For instance, while Alberta might have exempted public protests from gathering limits, several injunction and contempt applications were required to address rally attendees' non-compliance with basic COVID-19 measures, such as masking, social distancing, and prohibitions on the service of food.²⁰³
- c) The lack of structure at protests and other gatherings to which the Outdoor Gathering Limit applied is also serious concern. Unlike movie theatres, retail stores, or other indoor gatherings governed by the ROSK, there is no person or corporation who can be held accountable for misconduct, and no practical way for organizers to admit or exclude non-compliant attendees.
- d) In many facilities where the ROSK applied—particularly food distribution locations (*e.g.* grocery stores), public eating establishments (*e.g.* restaurants and bars), pools, hotels, and personal services (*e.g.* salons and tattoo parlors)—the facility is already regulated by public health.²⁰⁴ These operators are generally both able and willing to comply with public health measures. This is not true of *ad hoc* or unstructured gatherings, including protests.
- e) Limiting the number of attendees at unstructured gatherings restricted the social mixing that could occur before and after such gatherings, including carpooling, set-up and take-down, and social visits, which could only partially be mitigated with controls at the event itself.

²⁰³ See *e.g.* the injunctions addressed in the companion cases of [Alberta Health Services v Scott](#), 2021 ABQB 490; [Alberta Health Services v Pawlowski](#), 2021 ABQB 813; [Alberta Health Services v Johnston](#), 2021 ABQB 508. See also [Canadian Civil Liberties Association v Nova Scotia \(Attorney General\)](#), 2021 NSCA 65.

²⁰⁴ Each of which is licensed and regulated pursuant to *The Public Health Act, 1994*, particularly and respectively: [The Food Safety Regulations](#), RRS c P-37.1 Reg 12; [The Public Accommodation Regulations](#), RRS c P-37.1 Reg 3, [The Swimming Pool Regulations, 1999](#), RRS c P-37.1 Reg 7, and [The Health Hazard Regulations](#), RRS c P-37.1 Reg 10. For the list of general categories of regulated businesses, see section 46(1)(l) of the Act.

- [142] *Fourth*, both primary and secondary transmission must be considered. Even one infection at an outdoor gathering can lead to many secondary infections in the community. Limiting outdoor gatherings could reasonably be expected to have indirect benefits on the rates of infection elsewhere in the province.²⁰⁵
- [143] Contrary to the Applicants' argument, the Court in *Ontario Churches* squarely addressed the constitutionality of outdoor gathering limits. The Ontario applicants had noted that at certain times, religious gathering limits were the same for both indoor and outdoor services and greater for retail and other spaces. They argued that this result could not be minimally impairing because the risk of outdoor transmission was "negligible at best."²⁰⁶
- [144] The Court found that that was not a "fair characterization" of the evidence.²⁰⁷ While there was evidence that the risk of transmission was lower outdoors than indoors, there was also evidence that "there was nonetheless a risk outdoors, particularly if other precautions such as physical distancing were not respected, and high-risk activities such as singing and loud prayer were taking place."²⁰⁸
- [145] At the time Ontario's outdoor gathering limits were imposed, "the public health system was overburdened and approaching a breaking point."²⁰⁹ At the time, even a small additional number of infections could increase pressure on the health system, with dire consequences. Given the context, Ontario "did not need to wait for definitive evidence on outdoor transmission before it imposed limits."²¹⁰ The same is true here.

²⁰⁵ *Ontario Churches*, at para 135. Khaketla Transcript, at 79 line 23 to 81 line 9.

²⁰⁶ *Ontario Churches*, at para 147.

²⁰⁷ *Ontario Churches*, at para 148.

²⁰⁸ *Ontario Churches*, at para 148.

²⁰⁹ *Ontario Churches*, at para 149.

²¹⁰ *Ontario Churches*, at para 149.

The limits were proportionate, on a final balancing

- [146] The third *Oakes* criteria requires the Court to weigh the substance of the rights in question against the state objective, both qualitatively and quantitatively.²¹¹ This analysis requires “difficult value judgments,” and “requires appropriate deference to [the government’s] choice of means, as well as its full legislative objective.”²¹²
- [147] The Respondents agree that public protest is important to free and democratic societies. The Applicants’ protests are entitled to constitutional protection. *Qualitatively*, protest is an important right, jealously guarded by the Court.
- [148] This does not end the inquiry, however. *Quantitatively*, what was the impact on the protected *Charter* rights? Several considerations can be brought to bear:
- [149] *First*, like all other activities, much collective action moved online during the pandemic. The Applicants communicated, networked, and planned online. They also expressed themselves online, both to each other and directly to Government officials.²¹³ There are many ways to protest and assemble; the PHOs restrained only one of them. Online gatherings are an imperfect substitute for personal ones, but not to be disregarded.²¹⁴
- [150] *Second*, public protest was at no point prohibited.²¹⁵ Beyond social distancing, the only restriction was on the *size* of the gathering. There was nothing stopping the Applicants from holding multiple, smaller gatherings, concurrently or consecutively. Indeed, they did so, but paradoxically only *after* July 11, 2021 and the repeal of the last gathering limit.²¹⁶

²¹¹ *R v Brown*, 2022 SCC 18 at para 164.

²¹² *R v K.R.J.*, 2016 SCC 31 at para 79, [2016] 1 SCR 906.

²¹³ See the Respondents Brief of Law on Striking the Affidavit of Christine Rathwell, at para 26.

²¹⁴ *Ontario Churches*, at para 112.

²¹⁵ *Ontario Churches*, at para 166.

²¹⁶ Grandel Transcript, at 23 line 21 to 24 line 4.

- [151] *Third*, the Outdoor Gathering Limit was temporary. It was imposed to respond to the devastating second “phase” of the pandemic, and then rescinded in response to population-wide vaccination thresholds, as set out in *the Re-Opening Roadmap*. Altogether, the ten-person Outdoor Gathering Limit was in place for five months. Each order was time-limited and duly renewed, as were the *Regulations*.
- [152] All of this mitigates—though does not eliminate—the deleterious effects of the measure.
- [153] Against this are weighed the salutary effects. The PHOs were issued to respond to once-in-a-century public health emergency: an objective “amongst the most compelling imaginable.”²¹⁷
- [154] The exact benefit of the PHOs in general—and the Outdoor Gathering Limit specifically—may never be known with certainty. There are too many factors to measure.²¹⁸ But the PHOs had their intended effect. By the concerted, collective action of Saskatchewanians, the short-term crisis was averted, buying time for the procurement and distribution of vaccines.

Conclusion on proportionality

- [155] For the forgoing reasons, the Respondents submit that the Outdoor Gathering Limit was proportionate. Defeating a communicable disease, like COVID-19, cannot be easily reduced to questions of individual choice, or neatly framed as clashes between the state’s interest and individuals’ interests. It is an unavoidably communal endeavour and a shared burden. The community was impacted by the Applicant’s non-compliance, in the same manner as the Applicants benefitted from others’ compliance with public health measures.

²¹⁷ *Ontario Churches*, at para 159.

²¹⁸ *Ontario Churches*, at para 162.

5. RELIEF


[156] Saskatchewan respectfully requests that the application be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.


DATED at Regina, Saskatchewan, this 10th of June, 2022.



Theodore J. C. Litowski



Laura Mazenc



Johnna Van Parys

Solicitors for the Respondents,
The Government of Saskatchewan
and Dr. Saqib Shahab in his capacity as
Chief Medical Health Officer for the
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6. TABLE OF AUTHORITIES

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<p><i>The Disease Control (Vaccination Programs) Amendment Regulations, 2021</i>, Sask Reg 118/2021.</p> <p>[Book of Authorities, Tab 5]</p>	Charter s. 1	Section 4
<p><i>The Disease Control Regulations</i>, RSS c-P37.1, Reg 11.</p>	Charter s. 1	Sections 25.2, 25.2(3), 25.2(3)(b)
<p><i>The Food Safety Regulations</i>, RSS c P-37.2 Reg 12.</p>	Charter s. 1	
<p><i>The Health Hazard Regulations</i>, RRS c P-37.1 Reg 10.</p>	Charter s. 1	
<p><i>The Legislation Act</i>, SS 2019, c L-10.2.</p>	Charter s. 1	Sections 2-34, 2-30(1)(c)
<p><i>The Public Accommodation Regulations</i>, RSS c P-37.1 Reg 3.</p>	Charter s. 1	
<p><i>The Public Health Act, 1994</i>, SS 1994, c P-37.1.</p>	Charter s. 1	Sections 38(1), 38(2), 45(1), 45(2), 46(1)(l)
<p><i>The Public Health Officers Regulations</i>, RRS c P-37.1.</p>	Charter s. 2(c)	Section 2(c)
<p><i>The Swimming Pool Regulations, 1999</i>, RRS c P-37.1 Reg 7.</p>	Charter s. 1	

COMMENTARY AND ARTICLES

Commentary/Article	Legal Principle	Pages cited
Yu, Andy. "Delegated Legislation and the Charter" (2020) Can J Adm Law & Practice 49. [Book of Authorities, Tab 6]	<i>Charter</i> s. 2(b)	56ff and 59

APPENDIX A: PUBLIC HEALTH ORDERS AND TICKETS

Public health orders (by date issued) and gathering limits		Protests attended by Ms. Grandel, and ticketed	Protests attended by Mr. Mills, and ticketed
November 26, 2020 *	30		
December 14, 2020 **	10	Dec. 19 (#85442735) (Ex. D)	Dec. 19 (#85442736) (Ex. B)
January 12, 2021 *	10	Jan. 16 (#85476934) (Ex. J)	
January 26, 2021 **	10	Jan. 30 (#85463188) (Ex. F)	
February 18, 2021	10	Feb. 20 (#85463838) (Ex. H)	
March 9, 2021	10		
March 23, 2021	10	Mar. 27 (#85463750) (Ex. L)	
March 26, 2021	10		
March 30, 2021	10		
April 7, 2021	10		
April 13, 2021	10	Apr. 17 (#85446663) (U/T)	
April 20, 2021	10	Apr. 24 (#85355138) (U/T)	
April 23, 2021 †	10		
April 27, 2021	10		
May 6, 2021	10	May 15 (#85482578) (U/T)	
May 13, 2021	10		
May 28, 2021 ‡ [Step 1]	150		
June 16, 2021	150		
June 17, 2021 [Step 2]	150		
June 24, 2021	150		
July 9, 2021 [Step 3]	N/A		

[See following page for notes]

Notes

- * Issued under sections 38 and 45(2) of *The Public Health Act, 1994*.
- * Issued under sections 38 and 45(2) of *The Public Health Act, 1994*, plus section 25.2 of *The Disease Control Regulations*.
- ** Orders in this list issued on or after January 26, 2021 were issued under section 45(2) of *The Public Health Act, 1994* and section 25.2 of *The Disease Control Regulations*.
- † This order never came into force. It was scheduled to come into force on April 29, 2021 but was replaced by the April 27, 2021 order in advance of that date.
- ‡ Orders in this list issued on or after May 28, 2021 were combined with orders relating to restaurants and indoor masking, which had formerly been separate instruments.



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SASKATCHEWAN REGULATIONS 36/2020

The Public Health Act, 1994

Section 46

Order in Council 159/2020, dated April 8, 2020

(Filed April 9, 2020)

Title

1 These regulations may be cited as *The Disease Control Amendment Regulations, 2020*.

RRS c P-37.1 Reg 11, Appendix amended

2(1) The Appendix to *The Disease Control Regulations* is amended in the manner set forth in this section.

(2) Item 11 in Table 1 is amended by adding “or COVID-19” after “syndrome”.

(3) Table 4 is repealed and the following substituted:

“TABLE 4
[Section 22.1]

Periods of Transmissibility

Column 1	Column 2	Column 3
Disease	Period of transmissibility for cases	Period of transmissibility for contacts
COVID-19	14 days	14 days
haemorrhagic fevers – viral (Ebola, Marburg, Lassa Fever)	70 days	21 days
plague	10 days	7 days
severe acute respiratory syndrome	20 days	14 days
smallpox	21 days	19 days

Coming into force

3 These regulations come into force on the day on which they are filed with the Registrar of Regulations.



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SASKATCHEWAN REGULATIONS 127/2020*The Public Health Act, 1994*

Section 46

Order in Council 542/2020, dated December 2, 2020

(Filed December 3, 2020)

Title

1 These regulations may be cited as *The Disease Control (COVID-19) Amendment Regulations, 2020*.

RRS c P-37.1 Reg 11 amended

2 *The Disease Control Regulations* are amended in the manner set forth in these regulations.

New section 7.1

3 The following section is added after section 7:

“Designated public health officer communicating with infected persons

7.1 If a physician, nurse practitioner, clinic nurse or medical health officer determines that a person is infected with or is the carrier of a category I communicable disease or an emerging communicable disease, that person shall, to the best of the person’s ability and on request:

- (a) answer all questions asked by the physician, nurse practitioner, clinic nurse or medical health officer; and
- (b) provide the names, addresses and telephone numbers of all of that person’s contacts to the physician, nurse practitioner, clinic nurse or medical health officer”.

Section 8 amended

4 Section 8 is amended in the portion preceding clause (a) by striking out “a list of contacts” and substituting “or compiles a list of contacts of a person who is infected with, or is a carrier of, a category I communicable disease, a category II communicable disease or an emerging communicable disease”.

New sections 8.1 and 8.2

5 The following sections are added after section 8:

“References to medical health officer re sections 7.1 and 8

8.1 For the purposes of sections 7.1 and 8, a reference to a medical health officer includes a person who:

- (a) works under the direction of a medical health officer; and
- (b) is designated or who belongs to a class of persons designated by the minister pursuant to section 8.2.

“Minister may designate persons re sections 7.1 and 8

8.2(1) Subject to subsections (2) and (3), the minister may designate persons or a class of persons who are qualified to exercise the powers and carry out the responsibilities set out in sections 7.1 and 8.

(2) If the minister designates a person or class of persons pursuant to subsection (1), the person or class of persons so designated must hold the qualifications, educational background or experience that the chief medical health officer has determined is appropriate.

(3) The minister may, in making a designation pursuant to subsection (1), restrict the powers that may be exercised and the responsibilities that may be carried out by the person or class of persons so designated”.

New sections 25.1 and 25.2

6 The following sections are added after section 25:

“Plan and guidelines adopted

25.1(1) In this section and in section 25.2:

- (a) **‘business’** means a person or association that carries on an enterprise or provides a service with the expectation of profit;
- (b) **‘guidelines’** means the guidelines, as set out in the plan, as amended from time to time;
- (c) **‘person’** includes partnership;
- (d) **‘plan’** means *Re-Open Saskatchewan: A plan to re-open the provincial economy*, as published by the Government of Saskatchewan on April 23, 2020, as amended from time to time.

(2) For the purposes of these regulations, the plan and the guidelines are adopted.

(3) Every person, business, institution, association and other organization to whom or to which the plan and the guidelines apply must comply with the plan and the guidelines.

“Measures re prevention, reduction and control of SARS-CoV-2

25.2(1) In this section:

- (a) **‘face covering’** means a medical or non-medical mask or other face covering that fully covers the nose, mouth and chin, but does not include a face shield or visor;
- (b) **‘SARS-CoV-2’** means severe acute respiratory syndrome coronavirus 2, the virus that causes COVID-19.

(2) If, based on the opinion of the chief medical health officer that the increased rate of infection or the expectation of an increased risk of infection from SARS-CoV-2 is likely to cause a serious public health threat, the minister determines that it is in the public interest to do so, the minister may order that any or all of the measures set out in subsection (3) are to be taken for the purposes of preventing, reducing and controlling the transmission of SARS-CoV-2.

-
- (3) An order made pursuant to subsection (2) may impose all or any of the following measures that are set out in the guidelines or that the minister considers necessary for the purposes of the order:
- (a) a requirement that persons wear a face covering in the manner set out in the order;
 - (b) a requirement to limit the size of gatherings in the manner set out in the order;
 - (c) a requirement that persons who own, operate or have control over indoor premises or areas:
 - (i) advise persons entering those premises or areas of the applicable measures aimed at preventing, reducing and controlling the transmission of SARS-CoV-2; and
 - (ii) ensure that the persons mentioned in subclause (i) take the measures mentioned in that subclause;
 - (d) a requirement to implement screening measures, except testing, for persons entering or leaving a workplace or other premises that are open to the public in the manner set out in the order;
 - (e) a requirement that businesses, corporations, institutions as defined in section 31.1 of the Act, owners and operators of facilities, associations and other organizations have a SARS-CoV-2 mitigation plan that is satisfactory to the minister;
 - (f) a requirement that businesses, corporations, institutions as defined in section 31.1 of the Act, owners and operators of facilities, associations and other organizations operate in a manner that prevents, reduces, or controls the spread of SARS-CoV-2;
 - (g) a requirement that a type of equipment be used, a process be implemented, equipment be removed or equipment or processes be altered to prevent, reduce, or control the transmission of SARS-CoV-2 in the manner set out in the order.
- (4) The minister may, if the minister considers it necessary, make different orders pursuant to subsection (2) with respect to different areas of Saskatchewan.
- (5) Every person, business, institution, association and other organization to whom or to which an order made pursuant to subsection (2) is directed must comply with that order.
- (6) It is sufficient in an order pursuant to subsection (2) to direct the order to a person or class of persons described in the order and the order is not invalid by reason only of the fact that a person to whom the order is directed is not named in the order.

(7) If an order made pursuant to subsection (2) is directed to the public at large or to a number of persons that, in the opinion of the minister, is so large that it would be impractical to effect service in the manner required by section 58 of the Act, the minister may effect service of the order in any manner the minister considers necessary by all or any of the following means:

- (a) publishing the order in a newspaper having general circulation in Saskatchewan or in any area of Saskatchewan that is directly affected by the order;
- (b) broadcasting the order on a television station or radio station the signal of which is received in Saskatchewan or in any area of Saskatchewan that is directly affected by the order;
- (c) posting copies of the order in public places in the manner and to the extent considered necessary by the minister or the medical health officer;
- (d) in the case of an order directed to a large number of persons in a particular place, premises or vehicle, by making a public announcement in the place, premises or vehicle;
- (e) publishing the order on the Government of Saskatchewan's website;
- (f) publishing the order in *The Saskatchewan Gazette*.

(8) A copy of an order made pursuant to subsection (2) that is certified by the minister or a person authorized by the minister is admissible in evidence as a true copy of the order without proof of the office or signature of the minister, and has the same probative force as the original order”.

Sections 25.1 and 25.2 repealed

7 Sections 25.1 and 25.2 are repealed.

Coming into force

8(1) Subject to subsection (2), these regulations come into force on the day on which they are filed with the Registrar of Regulations, but are retroactive and are deemed to have been in force on and from March 11, 2020.

(2) Section 7 comes into force on March 1, 2021.



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Decisions of commission under Part

18 After receiving the results of a public participation pursuant to this Part and after undertaking any further reviews the commission considers necessary, the commission:

- (a) may approve or not approve the major amendment, the master plan renewal, new master plan or standard amendment, as the case may be; and
- (b) shall make its decision available to the public in any manner that the commission considers appropriate, including publishing it on the commission's website.

PART 5**Miscellaneous and Coming into force****Policies to be made public**

19 If the commission makes a policy pursuant to these regulations, the commission shall make the policy available to the public in any manner that the commission considers appropriate, including publishing them on the commission's website.

Coming into force

20 These regulations come into force on the day on which they are filed with the Registrar of Regulations.

SASKATCHEWAN REGULATIONS 11/2021

The Public Health Act, 1994

Section 46

Order in Council 61/2021, dated February 24, 2021

(Filed February 24, 2021)

Title

1 These regulations may be cited as *The Disease Control (COVID-19) Amendment Regulations, 2021*.

RRS c P-37.1 Reg 11 amended

2 *The Disease Control Regulations* are amended in the manner set forth in these regulations.

Section 25.1 amended

3 The following subsection is added after subsection 25.1(3):

“(4) An order made pursuant to subsection 25.2(2) of these regulations or section 38 or 45 of the Act prevails if there is a conflict between:

- (a) the order; and
- (b) the plan and the guidelines”.

Section 25.2 amended

4 Subsection 25.2(3) is amended in the portion preceding clause (a) by striking out “that are set out in the guidelines or”.

New sections 25.3 and 25.4

5 The following sections are added after section 25.2:

“Emergency Vaccination Program

25.3(1) In this section:

- (a) **‘COVID vaccination providers’** means the persons or categories of persons appointed to provide COVID vaccines as set out in the program;
 - (b) **‘program’** means the Saskatchewan COVID-19 Immunization Delivery Plan established pursuant to subsection (2).
- (2) The Saskatchewan COVID-19 Immunization Delivery Plan is established to coordinate and provide a province-wide program to administer COVID-19 vaccines.
- (3) For the purposes of these regulations, the minister may appoint those persons who the minister is satisfied are qualified to administer vaccinations as COVID vaccination providers.
- (4) A COVID vaccination provider may, in accordance with the program and subject to any directions provided by the local authority or the ministry, provide COVID-19 vaccines to individuals at any location in Saskatchewan.
- (5) Persons appointed as COVID vaccination providers may carry out any duties and responsibilities assigned to them pursuant to the program, on the terms and conditions set out in the program, notwithstanding applicable legislation, including professional bylaws, that otherwise govern those persons.
- (6) The minister may cause the program to be made public in any manner the minister considers necessary, including publishing it on the Government of Saskatchewan’s website.

“Certain COVID vaccination providers deemed agents re section 68 of the Act

25.4 For the purposes of section 68 of the Act, a person appointed as a COVID vaccination provider who is not otherwise employed by the ministry, a local authority or a municipality is deemed to be an agent of the ministry, local authority or municipality, as the case may be, with respect to that person’s carrying out of the duties and responsibilities as required by the program”.

Section 25.3 repealed

6 Section 25.3 is repealed.

SR 127/2020, section 8 amended

7 Subsection 8(2) of *The Disease Control (COVID-19) Amendment Regulations, 2020* is amended by striking out “March 1, 2021” and substituting “September 1, 2021”.

Coming into force

- 8(1)** Subject to subsection (2), these regulations come into force on the day on which they are filed with the Registrar of Regulations.
- (2)** Section 6 comes into force on January 1, 2022.



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(3) Subsection 44(4) is amended by striking out “announced” and substituting “determined”.

Section 45 repealed

33 Section 45 is repealed.

Section 46 amended

34 Section 46 is amended:

(a) in the portion preceding clause (a) by striking out “and in section 65”; and

(b) by repealing clause (c) and substituting the following:

“(c) ‘**rate of lay**’ means the number of dozens of eggs per year that a hen is deemed to produce as set by EFC under the authority of the most recent Canadian Egg Marketing Agency Proclamation issued pursuant to the *Farm Marketing Agencies Act* (Canada)”.

Section 50 amended

35 Subsection 50(1) is amended by striking out “CEMA” and substituting “EFC”.

Section 53 amended

36 The following subsection is added after subsection 53(8):

“(9) The board may operate a Quota Leasing Pool program and may require participation for any licensed producer who wishes to lease that producer’s production limit”.

Section 63 amended

37 Subsection 63(4) is repealed and the following substituted:

“(4) The board shall include a copy of the report and financial statement for a fiscal year along with the report that it provides to licensed producers pursuant to subsection 33(7)”.

Section 65 repealed

38 Section 65 is repealed.

Coming into force

39 These regulations come into force on the day on which they are filed with the Registrar of Regulations.

SASKATCHEWAN REGULATIONS 87/2021

The Public Health Act, 1994

Section 46

Order in Council 445/2021, dated August 26, 2021

(Filed August 26, 2021)

Title

1 These regulations may be cited as *The Disease Control (Localized Mitigation of COVID-19) Amendment Regulations, 2021*.

RRS c P-37.1 Reg 11 amended

2 *The Disease Control Regulations* are amended in the manner set forth in these regulations.

Section 25.2 amended**3 The following subsection is added after subsection 25.2(1):**

“(1.1) Notwithstanding the repeal of section 25.1, the terms ‘business’ and ‘person’ as defined in that section before it was repealed continue to apply for the purposes of this section”.

Section 25.3 amended**4 Subsection 25.3(1) is amended in the portion preceding clause (a) by adding “and in section 25.4” after “In this section”.****Sask Reg 127/2020 amended**

5(1) *The Disease Control (COVID-19) Amendment Regulations, 2020* are amended in the manner set forth in this section.

(2) Section 7 is repealed and the following substituted:**“Section 25.1 repealed**

7 Section 25.1 is repealed.

“Section 25.2 repealed

7.1 Section 25.2 is repealed”.

(3) Subsection 8(2) is repealed and the following substituted:

“(2) Section 7 comes into force on September 1, 2021.

“(3) Section 7.1 comes into force on October 1, 2021”.

Coming into force

6(1) Subject to subsection (2), these regulations come into force on the day on which they are filed with the Registrar of Regulations.

(2) Section 3 comes into force on September 1, 2021.

SASKATCHEWAN REGULATIONS 88/2021

The Uniform Building and Accessibility Standards Act

Section 8

Order in Council 446/2021, dated August 26, 2021

(Filed August 26, 2021)

Title

1 These regulations may be cited as *The Uniform Building and Accessibility Standards (Carbon Monoxide and Smoke Alarm) Amendment Regulations, 2021*.

RRS c U-1.2 Reg 5 amended

2 *The Uniform Building and Accessibility Standards Regulations* are amended in the manner set forth in these regulations.

Section 3 amended**3 The following subsections are added after subsection 3(11):**

“(12) Notwithstanding subsections (3) to (5) but subject to subsection (13), on and after July 1, 2022, every building, including a building that was constructed before October 1, 2009, that contains a residential occupancy is required to have a carbon monoxide alarm in accordance with Article 6.9.3.1. and Article 9.32.3.9. of Division B of the National Building Code of Canada as those Articles are amended in the Appendix to these regulations.



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“(6) The windshield must not have more than 10% of the total area discoloured or damaged”.

Section 71 amended

9 Subsection 71(4) is repealed and the following substituted:

“(4) The tires on the steering axle of a type A vehicle must not be retreaded tires unless approved by the administrator”.

New section 252

10 Section 252 is repealed and the following substituted:

“Mirrors

252 The vehicle must have mirrors that:

- (a) meet the requirements of CMVSS 111 in effect at the time the vehicle was manufactured; and
- (b) provide the driver with a clear view to the rear”.

Coming into force

11 These regulations come into force on the day on which they are filed with the Registrar of Regulations.

SASKATCHEWAN REGULATIONS 118/2021

The Public Health Act, 1994

Section 46

Order in Council 535/2021, dated November 3, 2021

(Filed November 4, 2021)

PART 1

Title

Title

1 These regulations may be cited as *The Disease Control (Vaccination Programs) Amendment Regulations, 2021*.

PART 2

The Disease Control Regulations

RRS c P-37.1 Reg 11, new section 25.6

2 The following section is added after section 25.5 of *The Disease Control Regulations*:

“Influenza vaccination program

25.6(1) In this section:

‘**program**’ means the 2021-2022 Saskatchewan Influenza Vaccination Program established pursuant to subsection (2);

‘**vaccination provider**’ means a person or a category of persons appointed to provide influenza vaccinations pursuant to the program.

(2) The 2021-2022 Saskatchewan Influenza Vaccination Program is established to coordinate the delivery of influenza vaccines and the administration of influenza vaccinations on a province-wide basis for the 2021-2022 influenza season.

(3) For the purposes of the program, the minister may appoint those persons as vaccination providers who the minister is satisfied are qualified to administer influenza vaccinations for the program.

(4) In accordance with the program and subject to any directions provided by the ministry or a local authority, a vaccination provider may provide influenza vaccinations to individuals at any location in Saskatchewan.

(5) Persons appointed as vaccination providers may carry out any duties and responsibilities assigned to them pursuant to the program, on the terms and conditions set out in the program, notwithstanding applicable legislation, including professional bylaws, that otherwise govern those persons.

(6) The minister may cause the program to be made public in any manner the minister considers necessary, including publishing notice of the program on the Government of Saskatchewan's website.

(7) For the purposes of section 68 of the Act, a person appointed as a vaccination provider who is not otherwise employed by the ministry, a local authority or a municipality is deemed to be an agent of the ministry, local authority or municipality, as the case may be, with respect to that person's carrying out of the duties and responsibilities as required by the program".

PART 3

The Disease Control (COVID-19) Amendment Regulations, 2020

[Sask Reg 127/2020, section 8 amended](#)

3 Subsection 8(3) of *The Disease Control (COVID-19) Amendment Regulations, 2020*, which effects the repeal of 25.2 of *The Disease Control Regulations, 2020*, is amended by striking out "January 1, 2022" and substituting "March 31, 2022".

PART 4

The Disease Control (COVID-19) Amendment Regulations, 2021

[Sask Reg 11/2021, section 8 amended](#)

4 Subsection 8(2) of *The Disease Control (COVID-19) Amendment Regulations, 2021*, which effects the repeal of 25.3 of *The Disease Control Regulations, 2021*, is amended by striking out "January 1, 2022" and substituting "March 31, 2022".

PART 5

Coming into Force

Coming into force

5 These regulations come into force on the day on which they are filed with the Registrar of Regulations.

Delegated Legislation and the *Charter*

Andy Yu*

The Oakes framework clearly applies to reviewing primary legislation for Charter compliance and the Doré framework clearly applies to reviewing adjudicative/discretionary decisions for Charter compliance. However, it is an open question what framework applies to reviewing delegated legislation for Charter compliance. Given the hybrid nature of delegated legislation, and the competing rationales for each of the Oakes and Doré frameworks, I argue that a hybrid framework applies to reviewing delegated legislation for Charter compliance. This hybrid framework strikes the appropriate balance between requisite deference to administrative bodies and rigorous Charter review.

Le cadre d'analyse établi dans l'arrêt Oakes s'applique clairement à l'examen de la législation primaire pour en vérifier la conformité à la Charte alors que le cadre d'analyse établi dans l'arrêt Doré s'applique tout aussi clairement à l'examen des décisions judiciaires ou discrétionnaires pour en vérifier la conformité à la Charte. Toutefois, la question de savoir quel cadre d'analyse s'applique à l'examen de la législation déléguée pour en vérifier la conformité à la Charte reste ouverte. Compte tenu de la nature hybride de la législation déléguée et des justifications concurrentes de chacun des cadres d'analyse établis dans les arrêts Oakes et Doré, l'auteur soutient qu'un cadre d'analyse hybride s'applique à l'examen de la législation déléguée pour déterminer si elle est conforme à la Charte. Ce cadre d'analyse hybride établit l'équilibre approprié entre la retenue requise à l'égard des organismes administratifs et l'examen rigoureux de la Charte.

1. INTRODUCTION

The *Charter* applies not only to legislation that Parliament itself enacts but also to delegated legislation, that is, subordinate legislation—rules and regulations—that administrative bodies enact under authority that the legislature or the executive delegates to them.¹ Accordingly, just as courts appropriately review primary legislation, from legislatures, for *Charter* compliance, so they appropriately review such secondary legislation, from administrative bodies, for *Charter* compliance.² But exactly how should courts review delegated legislation for *Charter* compliance? The jurisprudence, which

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¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11 [*Charter*].

² See *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, 1986 CarswellBC 411, 1986

has hardly addressed this question, does not offer a clear answer. On the one hand, it is well established that courts should review primary legislation for *Charter* compliance by employing the standard framework from *Oakes*.³ On the other hand, beginning with *Doré*, the Supreme Court of Canada has established a somewhat different framework for reviewing administrative decisions for *Charter* compliance.⁴ Yet the Supreme Court has developed this alternative framework to target administrative decisions of an adjudicative/discretionary nature, and administrative decisions of a legislative nature plausibly raise different considerations. Thus, there is a case to be made for adopting either of the two frameworks when it comes to administrative decisions of a legislative nature, that is, delegated legislation.

With this in mind, in this paper, I will consider what framework courts should adopt to review delegated legislation for *Charter* compliance, and suggest a middle way, which involves refining the *Doré* framework as the black letter law characterizes it. Specifically, I propose adopting the *Doré* framework in this context with two refinements. First, the focus is on *Charter* rights rather than *Charter* values. Second, the onus is on the state to justify any *Charter* interference. The result is a hybrid framework that combines elements of the *Oakes* and *Doré* frameworks, and which I suggest strikes the appropriate balance between deference to administrative bodies and rigorous *Charter* review.

2. THE OAKES AND DORÉ FRAMEWORKS FOR REVIEWING STATE DECISIONS FOR CHARTER COMPLIANCE

Where state conduct engages the *Charter*, a reviewing court determines whether any *Charter* interference is reasonable or justified using either the *Oakes* framework or the *Doré* framework.

The *Oakes* framework applies when reviewing primary legislation for *Charter* compliance. This determines whether a *Charter* infringement is justified under s. 1 of the *Charter*, which guarantees certain rights “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.⁵ Where legislation infringes a *Charter* right, the state must justify the infringement by satisfying four steps, where the first concerns the statutory objective and the remaining three concern the proportionality of the infringing legislation to the objective. First, there must be an objective related to concerns which are pressing and substantial in a free and democratic society.⁶ Second, the legislative means must be rationally

CarswellBC 764, (*sub nom.* R.W.D.S.U. v. Dolphin Delivery Ltd.) [1986] 2 S.C.R. 573 (S.C.C.) at para. 39.

³ *R. v. Oakes*, 1986 CarswellOnt 95, 1986 CarswellOnt 1001, [1986] 1 S.C.R. 103 (S.C.C.) [*Oakes*].

⁴ *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12, 2012 CarswellQue 2048, 2012 CarswellQue 2049 (S.C.C.) [*Doré*].

⁵ *Charter*, *supra*, note 1, s. 1.

connected to the objective.⁷ Third, the means must minimally impair the right. Fourth, the effects of the means must be proportional to the objective.⁸

Until and including *Multani*, the *Oakes* framework applied to all decisions under review for *Charter* compliance.⁹ However, courts and commentators expressed reservations about applying the *Oakes* framework to administrative decisions. In *Slaight*, Dickson CJ, writing for the majority, left open the possibility of adopting another framework in this context.¹⁰ Similarly, in *Multani*, which concerned an administrative decision affecting an individual, Deschamps and Abella JJ, concurring, suggested that the *Oakes* framework was unsuitable given the administrative and specific nature of the decision under review.¹¹ Overall, the gist of the concern from courts and commentators was twofold.¹² First, simply applying the *Oakes* framework might ignore the richness of the usual administrative law approach. Second, that framework seems ill-suited when considering adjudicative/discretionary administrative decisions rather than legislative decisions.

Responding to such concerns, in *Doré*, the Supreme Court of Canada held that the *Oakes* framework does not generally apply when reviewing administrative decisions for *Charter* compliance. Another framework applies, where the judicial review of such decisions involves reviewing them for reasonableness.¹³ After reviewing the concerns with the *Oakes* framework up until *Multani*, the Court noted that *Charter* values belong to administrative law review.¹⁴ Given cases like *Dunsmuir* and *Conway*, it also recognized the need for

⁶ *Oakes*, *supra*, note 3, at para. 69.

⁷ *Ibid.*, at para. 70.

⁸ *Ibid.*, at paras. 70–71.

⁹ *Multani v. Marguerite Bourgeoys (Commission scolaire)*, 2006 SCC 6, 2006 CarswellQue 1368, 2006 CarswellQue 1369 (S.C.C.) [*Multani*]. See also *Slaight Communications Inc. v. Davidson*, 1989 CarswellNat 193, 1989 CarswellNat 695, [1989] 1 S.C.R. 1038 (S.C.C.) [*Slaight*].

¹⁰ *Slaight*, *ibid.*, at 1049.

¹¹ *Multani*, *supra*, note 9, at paras. 85, 109, 112–125.

¹² See Susan L. Gratton & Lorne Sossin, “In Search of Coherence: The *Charter* and Administrative Law under the McLachlin Court,” in David A. Wright & Adam M. Dodek, eds, *Public Law at the McLachlin Court: The First Decade* (2011), 145 at 157–158; David Mullan, “Administrative Tribunals and Judicial Review of *Charter* Issues after *Multani*” (2006) 21 NJCL 127; Geneviève Cartier, “The *Baker* Effect: A New Interface Between the *Canadian Charter of Rights and Freedoms* and Administrative Law – The Case of Discretion” in David Dyzenhaus, ed., *The United of Public Law* (2004), 61 at 68–69; John Evans, “The Principles of Fundamental Justice” (1991) 29 Osgoode Hall LH 51 at 73.

¹³ *Doré*, *supra*, note 4, at para. 3.

¹⁴ *Ibid.*, at paras. 23–29, citing *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, 1979 CarswellNB 17, 1979 CarswellNB 17F, [1979] 2 S.C.R. 227 (S.C.C.); *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 CarswellNat 1124, 1999 CarswellNat 1125, [1999] 2 S.C.R. 817 (S.C.C.) at paras. 53–56 and 65 [*Baker*]. See also David

deference to administrative bodies,¹⁵ where “reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry”.¹⁶ The Supreme Court unanimously found that, in the context of administrative decisions, an alternative framework, which “distill[s] [the] essence [of the *Oakes* framework and] works the same justificatory muscles [of] balance and proportionality” applies.¹⁷ This alternative framework focuses on whether any *Charter* limitation is proportional and reasonable.¹⁸ The decision is reasonable just if it interferes with *Charter* protection “no more than is necessary given the statutory objectives”¹⁹ or “reflects a proportionate balancing of the *Charter* protections at play”.²⁰ Specifically, the decision-maker must balance “*Charter* values with the statutory objectives”²¹ and then “balance the severity of the interference of the *Charter* protection with the statutory objectives”.²² For the Court, this framework appropriately blends the need to ensure *Charter* compliance with the need for deference in the judicial review of administrative decisions.²³

Since *Doré*, the Supreme Court has continued to apply this novel framework in the administrative law context, although the justices have departed from the unanimity in *Doré*. In *Loyola*, a majority of the Supreme Court affirmed the applicability of the *Doré* framework in reviewing administrative decisions for *Charter* compliance.²⁴ However, the concurring minority did not mention which framework was applicable (beyond saying that the analysis of justification of *Charter* infringement engaged s. 1 of the *Charter*), and simply focused on a minimal impairment analysis.²⁵ Similarly, in the recent case of *TWU*, the majority and two separate concurrences affirmed the *Doré* framework, although the concurrences and the dissent suggested clarifying the framework.²⁶ The

Dyzenhaus & Evan Fox Decent, “Rethinking the Process/Substance Distinction: *Baker v. Canada*” (2001) 51 UTLC 193 at 240; Mary Liston, “Governments in Miniature: The Rule of Law in the Administrative State,” in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 77 at 100.

¹⁵ *Dunsmuir v. New Brunswick*, 2008 SCC 9, 2008 CarswellNB 124, 2008 CarswellNB 125 (S.C.C.) [*Dunsmuir*]; *R. v. Conway*, 2010 SCC 22, 2010 CarswellOnt 3847, 2010 CarswellOnt 3848 (S.C.C.) at paras. 78-82 [*Conway*].

¹⁶ *Doré*, *supra*, note 4, at para. 54, citing *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, 2012 CarswellBC 17, 2012 CarswellBC 18 (S.C.C.) at para. 18.

¹⁷ *Doré*, *supra*, note 4, at para. 5.

¹⁸ *Ibid.*, at para. 6.

¹⁹ *Ibid.*, at para. 7.

²⁰ *Ibid.*, at para. 57.

²¹ *Ibid.*, at para. 55.

²² *Ibid.* at para. 56.

²³ *Ibid.*, at paras. 23-54.

²⁴ *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, 2015 CarswellQue 1533, 2015 CarswellQue 1534 (S.C.C.) at paras. 3-4 and 35-42 [*Loyola*].

²⁵ *Ibid.*, at paras. 146-151.

majority simply affirmed the original understanding of the *Doré* framework.²⁷ McLachlin CJ, concurring, expressed the need to clarify that framework. She stressed the need to focus on *Charter* rights rather than *Charter* values, and that the onus is on the state to justify any *Charter* infringement under s. 1 of the *Charter*.²⁸ As well, she suggested that it might be unhelpful to follow the majority in framing the review of administrative decisions for *Charter* compliance in terms of deference and reasonableness.²⁹ In her view, where an administrative decision unjustifiably and disproportionately impacts a *Charter* right, it is accordingly unreasonable. Rowe J., concurring, echoed McLachlin CJ's call for focusing on *Charter* rights rather than *Charter* values and clarifying that the burden is on the state to justify any *Charter* infringement.³⁰ Whereas McLachlin CJ did not elaborate on why the focus is on *Charter* rights, Rowe J. explained that doing so avoids confusion stemming from the unclear scope of *Charter* values.³¹ Further, Rowe J. added that, while considering an analysis of rational connection (and whether there is a pressing and substantial objective) features less prominently in the *Doré* framework than in the *Oakes* framework, it remains relevant and might be necessary.³² Côte and Brown JJ, dissenting, shared the concurrences' criticisms of the original understanding of the *Doré* framework, but were more skeptical of the framework.³³ Nonetheless, they maintained that, in the absence of full submissions on the appropriateness of the framework, this was not an appropriate case for reconsidering it.³⁴

I note that, as the minorities in *Loyola* and *TWU* suggest, we need not consider the suggestion that the *Oakes* framework makes no sense whatsoever in the context of adjudicative/discretionary administrative decisions.³⁵ That is too radical a view. As *Doré* itself acknowledged, in many cases before *Doré*, the Supreme Court itself applied the *Oakes* framework in that context, apparently without difficulty.³⁶ Nonetheless, notwithstanding the more recent disagreement among the Supreme Court justices in *Loyola* and *TWU*, as a matter of black

²⁶ *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, 2018 CarswellBC 1510, 2018 CarswellBC 1511 (S.C.C.) [*TWU*]. See also *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33, 2018 CarswellOnt 9570, 2018 CarswellOnt 9571 (S.C.C.) [*TWU* LSUC].

²⁷ *TWU*, *ibid.*, at paras. 79–82.

²⁸ *Ibid.*, at paras. 111–119.

²⁹ *Ibid.*, at para. 118.

³⁰ *Ibid.*, at paras. 156, 162–175, 195–207.

³¹ *Ibid.*, at paras. 171–173, citing Audrey Macklin, “Charter Right or Charter Lite? Administrative Discretion and the Charter” (2014) 67 SCLR (2d) 561 at 571; Christopher D Bredt & Ewa Krajewska, “*Doré*: All That Glitters Is Not Gold” (2014) 67 SCLR (2d) 339 at 363.

³² *Ibid.*, at para. 205.

³³ *Ibid.*, at paras. 302–314.

³⁴ *Ibid.*, at para. 266.

³⁵ *TWU*, *supra*, note 26, at para. 303.

letter law, there are thus now two frameworks courts employ in reviewing decisions for *Charter* compliance. In the next section, I will consider which framework courts should adopt in reviewing delegated legislation for *Charter* compliance. But before I do that, it is worth discussing the similarities and differences between the two frameworks.

The two frameworks share much in common. Both aim to help determine whether state conduct complies with the *Charter*. As the Supreme Court suggested in *Doré*, both frameworks work the “same justificatory muscles [of] balance and proportionality,”³⁷ and there is “conceptual harmony”³⁸ between the two frameworks. *Loyola* reiterated that the proportionality analysis in both frameworks enjoy “analytical harmony.”³⁹ Further, as the Supreme Court has emphasized in its leading cases on the two frameworks—*Doré*, *Loyola*, and *TWU*—both frameworks consider criteria such as rational connection,⁴⁰ minimal impairment,⁴¹ and balance or proportionality.⁴² Finally, both frameworks are contextual in allowing for a range of acceptable outcomes.⁴³

However, the two frameworks remain at least conceptually distinguishable.⁴⁴ The concurrences in *TWU* highlight two of the most notable differences. First, while the *Oakes* framework clearly focuses on interference with *Charter* rights, the *Doré* framework more ambiguously focuses on interference with *Charter* protections, which are taken to include both *Charter* rights and values.⁴⁵ Second, while the *Oakes* framework clearly puts the onus on the state to justify any *Charter* interference, the *Doré* framework tries to avoid the question of who bears the onus of justification.⁴⁶ There are other differences too. While the *Oakes* framework requires analyses of minimal impairment and proportionality, the *Doré* framework seems to merely permit such analyses, and so conceives of them in a looser way. In *Doré*, the Supreme Court applied a looser proportionality analysis, whereas in *Loyola*, the majority applied a stricter minimal impairment

³⁶ *Doré*, *supra*, note 4, at para. 31. See e.g. *Slaight*, *supra*, note 9; *Multani*, *supra*, note 9, Lamer J.

³⁷ *Doré*, *supra*, note 4, at para. 5.

³⁸ *Ibid.*, at para. 57.

³⁹ *Loyola*, *supra*, note 24, at para. 40.

⁴⁰ See *TWU*, *supra*, note 26, Rowe J, at para. 205.

⁴¹ See *Loyola*, *supra*, note 24, at para. 40.

⁴² *Ibid.*

⁴³ *Ibid.*, at para. 41.

⁴⁴ See Mary Liston, “Administering the Charter, Proportioning Justice: Thirty Five Years of Development in a Nutshell” (2017) 30 Can J Admin L & Prac 211. For a critical discussion, see *E.T. v. Hamilton Wentworth District School Board*, 2017 ONCA 893, 2017 CarswellOnt 18540 (Ont. C.A.) at paras. 42 50 and 108 125, Lauwers JA, concurring [*ET*].

⁴⁵ *Doré*, *supra*, note 4, at para. 5; *Loyola*, *supra*, note 24, at para. 39; *TWU*, *supra*, note 26, at para. 58.

⁴⁶ *Doré*, *supra*, note 4, at para. 40.

analysis.⁴⁷ Further, while the *Oakes* framework also requires analyses of whether the statutory objectives are pressing and substantial, and of rational connection, the *Doré* framework seems to ascribe little weight to them. The *Doré* framework does not explicitly require assessing the legitimacy of the statutory objectives, and so seems to just assume that they are legitimate.⁴⁸ This assumption is in line with the fact that the framework does not place the onus on the state to justify any *Charter* interference. The *Doré* framework also does not explicitly require that the *Charter*-interfering administrative decision be rationally connected to the statutory objectives.

How different are the frameworks in practice? In principle, courts could apply them in a manner that yields similar results, and the Supreme Court's assertion that they are analytically similar suggests that both frameworks may yield the same result. Nonetheless, there is some evidence that the two frameworks can yield different results. The strict requirement under the *Oakes* framework to consider minimal impairment suggests more rigorous *Charter* scrutiny than under the *Doré* framework, which makes a minimal impairment analysis less prominent.

To see the potential divergence, consider the divergence between the Ontario and BC Courts of Appeal in a pair of cases reviewing the refusal of each province's law society to accredit the proposed law school of Trinity Western University (TWU).⁴⁹ The Christian law school's code of conduct prohibited sexual conduct outside heterosexual marriage, so each province's law society refused to accredit the law school.⁵⁰ Both the Ontario and BC Courts of Appeal found that the decisions interfered with religious freedom under s. 2(a) of the *Charter*, and assessed the reasonableness of the interference under the *Doré* framework.⁵¹ But while the BC Court of Appeal struck down the decision of BC's law society as unreasonable, the Ontario Court of Appeal upheld the decision of Ontario's law society as reasonable.⁵² While the facts in each case were slightly different, the difference in reasoning and result seems attributable in large part to the significance of the minimal impairment test. The BC Court of Appeal emphasized that the decision to refuse accreditation was not minimally

⁴⁷ *Doré*, *supra*, note 4, at paras. 66–71; *Loyola*, *supra*, note 24, at paras. 67–79.

⁴⁸ *Doré*, *supra*, note 4, at para. 38.

⁴⁹ *Trinity Western University v. Law Society of Upper Canada*, 2016 ONCA 518, 2016 CarswellOnt 10465 (Ont. C.A.) [TWU ONCA], affirmed 2018 SCC 33, 2018 CarswellOnt 9570, 2018 CarswellOnt 9571 (S.C.C.); *Trinity Western University v. Law Society of British Columbia*, 2016 BCCA 423, 2016 CarswellBC 3008 (B.C. C.A.) [TWU BCCA], reversed *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, 2018 CarswellBC 1510, 2018 CarswellBC 1511 (S.C.C.). See also Justin Safayeni, "The Doré Framework: Five Years Later, Four Key Questions (And Some Suggested Answers)" (2018) 31 Can J Admin L & Prac 31 at 37–39 [Safayeni].

⁵⁰ TWU ONCA, *ibid.*, at paras. 6–9; TWU BCCA, *ibid.*, at paras. 6–30.

⁵¹ TWU ONCA, *ibid.*, at paras. 72–143; TWU BCCA, *ibid.*, at paras. 163–189.

⁵² TWU ONCA, *ibid.*, at para. 145; TWU BCCA, *ibid.*, at paras. 190–193.

impairing.⁵³ By contrast, the Ontario Court of Appeal did not seem to consider the minimal impairment issue, and instead focused on other considerations.⁵⁴

While this pair of cases both concerned applications of the *Doré* framework, where one did but the other did not consider a minimal impairment analysis, it suggests more generally that the significance of that analysis in the framework can yield different results. Insofar as only the *Oakes* framework mandates an analysis of minimal impairment, while the *Doré* framework merely permits the analysis, the *Oakes* and *Doré* frameworks can yield different results.

Despite the Supreme Court's claim that the two frameworks are largely similar, there is reason to suspect that they can be different in practice. As *Côte* and *Brown JJ* wrote in reply to the *TWU* majority's assertion that the *Doré* framework involves a "robust" proportionality analysis, "saying so does not make it so."⁵⁵ As one commentator has concluded, "[t]aken together, the administrative law principles underlying *Doré* do not currently offer as rigorous protection of the *Charter* as *Oakes*."⁵⁶ The *Doré* framework seems more deferential and so provides weaker *Charter* review. Thus, I proceed on the basis that, despite notable similarities, the differences between the two frameworks are significant enough to suggest that the question of which framework applies in a certain context is a genuine one. The question is far from moot.

3. REFINING THE *DORÉ* FRAMEWORK WHEN APPLIED TO DELEGATED LEGISLATION

So far, I have articulated the two frameworks for reviewing decisions for *Charter* compliance, where the Supreme Court has developed each of these frameworks to adapt to certain contexts—the *Oakes* framework for primary legislation and the *Doré* framework for adjudicative/discretionary administrative decisions. The question then arises: which framework should apply to delegated legislation?

There is no straightforward answer, because delegated legislation occupies a middle ground on a spectrum whose extremes are primary legislation and adjudicative/discretionary administrative decisions. Delegated legislation is a kind of hybrid decision, which has elements resembling but also differing from each of these two kinds of decisions. Like primary legislation, delegated legislation is legislative and general—rather than administrative and specific—in nature. As with all legislation, delegated legislation is of broad application and does not target the rights, privileges, or interests of a particular individual or group. In this sense, delegated legislation is unlike adjudicative/discretionary administrative decisions. However, like such decisions, administrative bodies

⁵³ *TWU BCCA*, *ibid.*, at paras. 191–192.

⁵⁴ *TWU ONCA*, *ibid.*, at paras. 112–143.

⁵⁵ *TWU*, *supra*, note 26, at para. 304. See also (*ibid.*, at para. 314).

⁵⁶ Victoria Wicks, "What *Ktunaxa* Can Teach Us about *Doré*" (2018) 31 *Can J Admin L & Prac* 217 at 224.

rather than legislatures enact delegated legislation. As with all administrative decisions, delegated legislation may be the product of appointed rather than popularly elected legislators. In this sense, delegated legislation is unlike primary legislation.

Since delegated legislation occupies a middle ground between primary legislation and adjudicative/discretionary decisions, there are competing rationales for applying each of the *Oakes* and *Doré* frameworks.

On the one hand, the rationale for applying the *Oakes* framework to delegated legislation is that such legislation is legislative and general in application. If the legislature cannot pass legislation that unreasonably infringes the *Charter* under the *Oakes* framework, it should not be able to do so by delegating to an administrative body.⁵⁷ Further, as far as the substantive content of the decision is concerned, as opposed to the origin or procedure by which the decision arose, perhaps the *Oakes* framework applies insofar as it applies to all decisions of a legislative and general nature. A key motivation for departing from the framework when considering adjudicative/discretionary decisions, namely that such decisions are specific to an individual rather than of general application, does not apply to delegated legislation. This concern motivated the Court's departure from the *Oakes* framework in *Doré*: "the approach used when reviewing the constitutionality of a law should be distinguished from the approach used for reviewing an administrative decision that is said to violate the rights of a particular individual. . . . [W]hen *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts."⁵⁸ Throughout that decision, the Court implicitly assumed that all administrative decisions are adjudicative/discretionary decisions.⁵⁹ Unsurprisingly, in all the leading Supreme Court cases applying the *Doré* framework, the decisions under review were adjudicative/discretionary: *Doré* concerned a law society's disciplining of a lawyer, *Loyola* concerned a ministerial decision denying a school's request for exemption from a requirement, and *TWU* concerned a law society's refusal to accredit a law school.

Thus, it is understandable why, in the recent case of *Christian Medical and Dental Society*, the Ontario Superior Court applied the *Oakes* framework rather than the *Doré* framework in reviewing policies for *Charter* compliance.⁶⁰ In that case, certain physicians challenged the constitutional validity of policies of the

⁵⁷ For this kind of concern, see *Multani*, *supra*, note 9, at para. 22.

⁵⁸ *Doré*, *supra*, note 4, at para. 36, citing *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37, 2009 CarswellAlta 1094, 2009 CarswellAlta 1095 (S.C.C.).

⁵⁹ See also *Doré*, *supra*, note 4, at para. 37 58.

⁶⁰ *The Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2018 ONSC 579, 2018 CarswellOnt 1135 (Ont. Div. Ct.) [*Christian Medical and Dental Society*], affirmed *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393, 2019 CarswellOnt 7398 (Ont. C.A.).

College of Physicians and Surgeons of Ontario (CPSO) that require physicians unwilling to provide care on moral or religious grounds to refer patients requesting such care to another health care provider.⁶¹ The physicians argued that the policies unjustifiably infringed ss. 2(a) and 15 of the *Charter*.⁶² The policies were of general application, though they were not “regulations” or a professional “code, standard or guideline” breach of which would be professional misconduct.⁶³ It was undisputed that the *Charter* applied to the policies.⁶⁴ A question was whether the Court should apply the *Oakes* framework or the *Doré* framework in reviewing the policies for *Charter* compliance. The physicians argued for applying the *Oakes* framework, where the standard of review was correctness, so that there was no deference to the CPSO’s decision.⁶⁵ However, the CPSO argued that the *Doré* framework applied, where the standard of review was reasonableness.⁶⁶ Emphasizing the legislative and general nature of the policies, and the inapplicability of the reasons in *Doré* favouring an alternative framework, the Court applied the *Oakes* framework.⁶⁷ Citing the factors in *Dunsmuir*, the Court also determined that the standard of review was correctness.⁶⁸ On the facts, the Court found that the policies infringed the physicians’ s. 2(a) right to religious freedom, but that the infringement was justified under the *Oakes* framework.⁶⁹ However, it added that the *Doré* framework would have yielded the same result in that case: “there is significant overlap between these two approaches that, in my view, compels a similar result under each approach.”⁷⁰

While *Christian Medical and Dental Society* concerned policies rather than delegated legislation in the sense of rules and regulations, there is a strong case that if the *Oakes* framework applies to policies, then it should definitely apply to delegated legislation.⁷¹ After all, delegated legislation is even closer to the primary legislation end of the spectrum than policies are.

⁶¹ *Ibid.*, at para, 1.

⁶² *Ibid.*

⁶³ *Ibid.*, at paras, 28 29.

⁶⁴ *Ibid.*, at para. 28.

⁶⁵ *Ibid.*, at para. 52.

⁶⁶ *Ibid.*, at para. 54.

⁶⁷ *Ibid.*, at paras. 56 62.

⁶⁸ *Ibid.*, at paras. 63 69.

⁶⁹ *Ibid.*, at paras. 135 212.

⁷⁰ *Ibid.*, at para. 231.

⁷¹ See also *Conseil scolaire francophone de la Colombie Britannique v. British Columbia*, 2016 BCSC 1764, 2016 CarswellBC 2685 (B.C. S.C.), additional reasons *Conseil scolaire francophone de la Colombie Britannique v. British Columbia (Education)*, 2018 CarswellBC 115 (B.C. S.C.), reversed in part *Conseil scolaire francophone de la Colombie Britannique v. British Columbia (Education)*, 2018 BCCA 305, 2018 CarswellBC 1956 (B.C. C.A.), additional reasons *Conseil scolaire francophone de la Colombie Britannique v. British Columbia (Education)*, 2018 CarswellBC 3037 (B.C. C.A.), leave to

On the other hand, the rationale for applying the *Doré* framework to delegated legislation is that such legislation is the product of administrative rather than legislative bodies. Perhaps the *Doré* framework applies insofar as it applies to all administrative decisions. One of the key reasons for employing the *Doré* framework when considering adjudicative/discretionary decisions is that reviewing courts owe administrative bodies deference.⁷² This is arguably *the* key reason for employing the *Doré* framework: whereas a decision's non-legislative nature might only mildly suggest departing from the *Oakes* framework, the fact that a decision is created by an administrative body, to which a legislative body has delegated its authority, more strongly suggests adopting the *Doré* framework, which more readily defers to the state. An administrative body's familiarity and expertise in interpreting its enabling legislation and applying it to the facts, to which the body is closer relative to any reviewing court, suggests a more deferential approach.⁷³

Given the hybrid nature of delegated legislation and the competing rationales for applying each of the *Oakes* and *Doré* frameworks, I suggest applying a hybrid framework that combines elements from both the *Oakes* and *Doré* frameworks.

The competing rationales for applying the *Oakes* and *Doré* frameworks provides an initial motivation for adopting a hybrid framework. The hybrid framework accounts for the fact that delegated legislation is legislative and general in nature, and so amenable to the *Oakes* framework. It also accounts for the fact that delegated legislation is the product of administrative bodies, to which reviewing courts owe deference, and so potentially warrants the more flexible and deferential *Doré* framework. Further motivation for adopting a hybrid framework comes from the need to implement safeguards ensuring *Charter* compliance to compensate for the lower or non-existent procedural fairness requirements for enacting delegated legislation. Legislative and general decisions, unlike administrative and specific decisions, attract little or no procedural fairness.⁷⁴ When it comes to primary legislation, the fact that legislatures create it mitigates this fact, insofar as legislative processes conducted

appeal allowed *Conseil scolaire francophone de la Colombie Britannique, Fédération des parents francophones de Colombie Britannique, et al. v. Her Majesty the Queen in Right of the Province of British Columbia, et al.*, 2019 CarswellBC 908, 2019 CarswellBC 909 (S.C.C.) at paras. 1036-1044. There, the BC Supreme Court held that the *Oakes* framework applied to reviewing a *Charter* challenge to both a law and the application of that law. The case did not involve judicial review, but the parties disagreed over whether the *Oakes* framework or the *Doré* framework should apply. For a brief discussion of the overall issue, see Liston, "Administering the Charter, Proportioning Justice: Thirty Five Years of Development in a Nutshell," *supra*, note 44, at 240-241. See also Safayeni, *supra*, note 49, at 48-51.

⁷² *Doré*, *supra*, note 4, at paras. 46-54.

⁷³ See *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, 2018 CarswellBC 1234, 2018 CarswellBC 1235 (S.C.C.) [*West Fraser Mills*]. See also John Mark Keyes, "Judicial Review of Delegated Legislation: What Ever Happened to the Standard of Review?" (2015) 28 Can J Admin L & Prac 357.

by elected legislators provide some safeguards against *Charter* interference. By contrast, delegated legislation is not subject to legislative processes and it is not necessarily considered by elected officials. As Bastarache J. held in *M. v. H.*, “[d]elegated decision-makers are presumptively less likely to have ensured that their decisions have taken into account the legitimate concerns of the excluded group, while a legislative expression of will presumptively indicates that all interests have been adequately weighted”.⁷⁵ Yet delegated legislation attracts deference in virtue of being an administrative decision.⁷⁶ Thus, the heightened risk of unchecked *Charter* interference in this context calls for implementing safeguards to compensate for the reduced procedural fairness requirements. The solution, I suggest, is to adopt a framework that more closely scrutinizes delegated legislation for *Charter* compliance compared to the more relaxed and deferential approach of the *Doré* framework.

The hybrid framework I propose adopting for delegated legislation strikes a compromise between the *Oakes* and *Doré* frameworks, by recognizing the rationales for adopting each of those two frameworks while also recognizing the special nature of delegated legislation. The compromise is to refine the *Doré* framework to make it more rigorous and more closely approximate the *Oakes* framework, while conforming to the Supreme Court’s preference for a more flexible approach, like the *Doré* framework, in reviewing administrative decisions. The hybrid framework reflects the established proposition, which *Doré* itself embraced, that while the standard of review for administrative decisions engaging the *Charter* might be reasonableness, reasonableness takes its colour from the context.⁷⁷ Delegated legislation occupies a special context.

In the context of delegated legislation, I propose refining the *Doré* framework by at least incorporating two of the revisions that the concurrences of McLachlin CJ and Rowe J. in *TWU* proposed. First, the concern is with *Charter* rights rather than *Charter* values. This avoids the lack of clarity concerning *Charter* values that Rowe J. noted in his concurrence in *TWU*.⁷⁸ Second, the onus is on the state to justify any *Charter* interference. This subjects state conduct to stricter review. By revising the *Doré* framework in these two ways, the resulting hybrid framework more closely approximates the *Oakes*

⁷⁴ See *Inuit Tapirisat of Canada v. Canada (Attorney General)*, 1980 CarswellNat 633, 1980 CarswellNat 633F, [1980] 2 S.C.R. 735 (S.C.C.).

⁷⁵ *M. v. H.*, 1999 CarswellOnt 1348, 1999 CarswellOnt 1349, [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577 (S.C.C.) at para. 315, reconsideration / rehearing refused 2000 CarswellOnt 1913, 2000 CarswellOnt 1914 (S.C.C.), Bastarache J., concurring, citing Martha Jackman, “Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the *Charter*” (1996) 34 Osgoode Hall LJ 661 at 668-669.

⁷⁶ See *West Fraser Mills*, *supra*, note 73.

⁷⁷ *Doré*, *supra*, note 4, at para. 54. See also *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, 2009 CarswellNat 434, 2009 CarswellNat 435 (S.C.C.) at para. 59.

⁷⁸ For further criticism, see *ET*, *supra*, note 44, at paras. 102-105, Lauwers JA, concurring.

framework, and subjects delegated legislation to more rigorous *Charter* scrutiny than in the original *Doré* framework.

4. CONCLUSION

In this paper, I have considered which framework should apply in reviewing whether delegated legislation complies with the *Charter*. Delegated legislation is a hybrid kind of decision with legislative yet administrative elements, and competing rationales suggest that each of the *Oakes* and *Doré* frameworks might apply. Accordingly, I have argued that the applicable framework in the context of delegated legislation is a hybrid framework. The proposed framework tightens the *Doré* framework by clarifying that the concern is with *Charter* rights and that the onus is on the state to justify any *Charter* interference. This hybrid framework adapts the *Doré* framework to the context of delegated legislation, while conforming to the principle that reasonableness depends on the context. In doing so, the framework strikes the appropriate balance in the context of delegated legislation between requisite deference to administrative bodies and rigorous *Charter* review.