COURT OF APPEAL FILE NO. CA47363

COURT OF APPEAL

ON APPEAL FROM the order of Chief Justice Hinkson of the Supreme Court of B.C. pronounced on the March 18, 2021.

BETWEEN:

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

Appellants (Petitioners)

AND:

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

Respondents (Respondents)

APPELLANTS' REPLY FACTUM

SOLICITORS FOR THE APPELLANTS:

ROD WILTSHIRE and MARTY MOORE

c/o Paul Jaffe, Barrister and Solicitor
Suite 200-100 Park Royal
West Vancouver, B.C. V7T 1A2
Telephone: 587-998-1806
Facsimile: 587-352-3233

SOLICITORS FOR THE RESPONDENTS:

EMILY C. LAPPER, KATHERINE REILLY and STEVEN DAVIS

Ministry of Attorney General Legal Services
Branch 1301 – 865 Hornby Street
Vancouver, B.C. V6Z 2G3
Telephone: 604-660-3093
Facsimile: 604-660-6797

COUNSEL FOR THE INTERVENOR:

GEOFFREY TROTTER and ANDRE SCHUTTEN

Geoffrey Trotter Law Corporation
Suite 1700 – 1185 West Georgia Street
Vancouver, BC V6E 4E6

INDEX

A. The appropriate scope of evidence is a live issue in this appeal

1. Contrary to the Respondents' factum,[1] the Appellants have appropriately alleged error below in the determination of the scope of admissible evidence.[2] Both parties agree that this Court steps into the shoes of the chambers judge on judicial review and "whether the chambers judge …adequately defined the record" is reviewable for correctness.[3]

2. This court must address the scope of the record for each Order for its reasonableness review under *Vavilov* (where no deference is owed to the Chambers Judge). The analysis must also be conducted anew if the chambers judge erred by characterizing the orders of Provincial Health Officer ("PHO") as administrative decisions reviewable under *Dore* instead of laws of general application reviewable under *Oakes*, as the restrictions of a "record of proceedings" are not applicable in an *Oakes* review.[4]

i. The Kettner and Warren reports were available to the PHO prior to February 10

3. The Respondents' claim that evidence of Dr. Warren and Dr. Kettner was "not available to Dr. Henry when she made the impugned orders"[5] is contradicted by the PHO's statement that the "affidavits of Dr. Kettner and Dr. Warren do not represent information that was not available to me that would alter these findings and decisions."[6] She, through her counsel, had received the 9-page report of Dr. Warren, which attached referenced scientific studies, and the 17-page report of Dr. Kettner (both unsworn) the day before she issued her February 10th Order, and three business days before she gave a February 12th media briefing, which the Respondents seek to include in the "record of proceedings".[7] Excluding from the "record" information provided to the PHO before her February 10th Order while including information provided by the PHO two days after that Order would be unjust.

---

[1] Factum of the Respondents ("RF") paras 38, 48; see also paras 1, 48-53, 61.
[2] Appellants' Factum ("AF") para 85; see also AF paras 33-36 and 84-88.
[3] RF para 46-47.
[4] See *Gateway Bible Baptist Church et al. v. Manitoba et al*., 2021 MBQB 21 [*Gateway*]; *Ontario v. Trinity Bible Chapel*, 2022 ONSC 1344 [*Trinity*].
[5] RF para. 49.
[6] Affidavit #2 of Valerie Christopherson, Ex. B, AB, p. 1191.
[7] RF para. 52.

ii. Revisionist reasons should not form part of the record for any Order

4. This Court interprets s. 1 of the *JRPA* to prevent the acceptance of "revisionist" reasons into the record.[8] It is this concern, rather than differing perspectives on the chambers judge's findings concerning the February 12th media briefing, that needs to be addressed to determine if the February 12th media briefing is part of the "record" for the February 10th Order, or any prior orders.

iii. The Respondents fail to provide essential data and misconstrue hearsay statements as evidence

5. While the Appellants do not object to the Court receiving the reasoning of the PHO via hearsay exhibits to the Affidavit #1 of Brian Emerson, such exhibits are not evidence of the truth of their assertions. The reasons must be reviewed for reasonableness in light of the evidence before the PHO when she issued the respective orders.[9]

6. The Respondents misleadingly claim that "the evidence before Dr. Henry demonstrated that those measures were no longer sufficient",[10] but do not refer to any evidence before the Court to back up this claim in regard to the prohibition[11] on in-person worship services. The Respondents seek to inspire faith in particular "data" which they claim "became available" after October 26, 2020, which "lead to the G&E Orders", but again fail to cite to any data in evidence, despite having the burden under s. 1.[12]

7. The Respondents acknowledge that in regard to whether "transmission in religious settings where safety protocols were not followed", "there is no suggestion in the record that Dr. Henry had that level of detailed information available to her."[13] This fact demonstrates the unreliability of the February 12th claims purporting to rely on evidence with exactly that level of specificity.[14]

---

[8] *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387, at para. 40; see also *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at paras. 15, 82-83.
[9] *See Vavilov* at para. 126. The PHO is required to put this evidence before the Court.
[10] RF para. 34.
[11] The PHO describes Orders as "prohibiting in-person … worship services": Affidavit #1 of John Koopman, Ex. I, AB, p. 165.
[12] RF para. 33.
[13] RF para. 84.
[14] RF, para. 17, page 7 (second and third paragraphs from bottom of the page).

iv. Expressing data in the record as ratios and percentages is appropriate

8. It is no statistician's feat to express data from the record in the form of a ratio or rounded percentage. In fact, data in regard to Covid transmission settings is provided in this manner by the BCCDC: "132/13876 (.95%) of cases have been associated with an exposure setting of gym/fitness facility."[15] It is entirely appropriate to note for this Court that the BCCDC situation report for January 3-9, 2021, states that "between week 3 (mid-January 2020) and week 1 (early January 2021), there have been 58,677 cases in total in BC",[16] that Dr. Emerson's Affidavit indicated that 180 Covid cases had been "associated with" "religious settings" in BC through January 15, 2021,[17] and that expressing this as a ratio is 180 out of 58,677 or as a rounded percentage is .31%. This Court cannot discharge its constitutional duty to review the Orders for reasonableness and justification without engaging in this type of analysis.

B. The reconsideration process was not an adequate alternative remedy

9. Each of the Appellants did in fact request that the PHO reconsider the prohibition on in-person worship services in 2020, provided the PHO with additional information and confirmed a willingness to follow Covid safety measures.[18] The PHO required no specific form for such requests.

10. The PHO's procedures utilized to respond (or not) to requests for reconsideration from third parties is relevant to whether the reconsideration provided an adequate alternative remedy which must be exhausted prior to seeking judicial review.[19]

11. The Appellants are not required to prove bad faith.[20] Yet, the fact is that the Respondents have sought to rely on their arbitrary and irregular reconsideration process to prevent the courts' review not only of the February 10th Order in place when the

---

[15] Affidavit #1 of Anthony Roy, Ex. A, AB, p. 1248.
[16] Emerson #1, Ex. 38, AB, pp. 839, 844.
[17] Emerson #1, paras. 102-105, AB, pp. 345-46.
[18] Affidavit #2 of Brent Smith, Ex. D, AB, pp. 197-200; Affidavit #1 of John Van Muyen, Ex. A, AB, pp. 108-111; Affidavit #1 of John Koopman, Ex. J, AB, p. 168; see *PHA* s. 43(1).
[19] See *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 at 588; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at 31.
[20] A presumption of regularity does not apply here (see *R. v. Molina*, 2008 ONCA 212) but would be rebutted by the evidence filed in this matter.

Appellants' request was addressed, but also of all of the prior orders which the Appellants had been charged with violating. This legal strategy simply is a procedural machination that would oust the constitutionally-protected supervisory jurisdiction of this Court.

C. Equality rights are distinct constitutional interests that must be addressed

12. The equality interests of the appellants are not adequately accounted for in the s. 2(a) analysis because s. 15 protects distinct interests.[21] The presumption against redundancy requires that the s. 15 interest be given a distinct ~~a~~ analysis.[22] The violation of multiple constitutional interests logically adds weight in a proportionality analysis.[23]

13. A lack of *intentional* discrimination is irrelevant. Per the SCC in *Fraser*: "proof of discriminatory intent has never been required to establish a claim under s. 15(1)".[24]

14. The prohibition on in-person worship services satisfies the two-part test s. 15(1) test, because its effect is to create a distinction on the basis of religion, which in turn burdens members of certain religious groups (i.e. those like the Appellants for whom in-person worship gatherings are a religious obligation) in a way that does not correspond to the transmission risk at their worship services but rather perpetuates disadvantage.[25] It is not necessary that all religious people experience the same disadvantage.[26]

15. In late 2020, one could in person with others in numerous ways to maintain mental health and well-being,[27] unless the gathering was religious in nature. One could go for dinner with friends at a restaurant, enjoy live music at a pub, work out in a gym with fellow

---

[21] Derek BM Ross and Deina Warren, "Religious Equality: Restoring Section 15's Hollowed Ground", (2019) 91 SCLR (2d) 123-158 [Ross/Warren] at 135.
[22] Ross/Warren at 129-33; see *Gateway* at para. 225, citing "the distinct protections that fall with ss. 7 and 15" in rejecting the Manitoba government's argument to ignore the ss. 7 and 15(1) claims because of its concession of s. 2 violations.
[23] See *British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, 2018 BCSC 62, at para. 262; *Gateway* at paras. 226, 228; Ross/Warren at p. 133-34.
[24] *Fraser v. Canada (Attorney General)*, 2020 SCC 28 [*Fraser*] at para. 69; *Law v. Canada*, [1999] 1 SCR 497, at para. 80.
[25] See *Fraser*, at para. 27; *Withler v Canada (A.G.),* 2011 SCC 12, at paras. 35-36, 65.
[26] *Quebec (Attorney General) v. A*, 2013 SCC 5, at paras. 354-355.
[27] The Appellants agree with the Respondents (see RF para 18) that PHO's Orders listed and archived at the following web address are appropriate for judicial notice in this case: https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/covid-19-public-health-guidelines-low-intensity-exercise.pdf

fitness enthusiasts, or gather with others in a support group[28]; but you could not attend an in-person worship service. Religious persons, such as the Appellants, were disproportionately disadvantaged by the PHO Orders. This government discrimination is not neutralized by the fact that religious persons could choose in-person activities like going to a bar or the gym, when attending in-person worship services is what is essential to their personal wellbeing and the fulfillment of their sincerely held religious obligations.

D. The precautionary principle cannot be selectively applied

16. The Respondents' attempted reliance on the "precautionary principle" cannot justify the fact that in-person worship services were prohibited while other in-person settings known to have a more significant Covid transmission were not. The precautionary principle does not green light ignoring data on transmission settings gained from months of experience, or the arbitrary application of caution in contradiction to that data.[29] The unreasonable and unjustifiable error in the prohibition of in-person worship is not the caution and concern to keep transmission below a certain level, but applying different standards of acceptability to religious and other comparable in-person settings. This stands in stark contrast to the restrictions upheld in the *Gateway* case, where worship services were "treated much like movie theatres, sports facilities, plays, restaurants or other venues that involve prolonged periods of close contact".[30]

All of which is respectfully submitted.

Dated at the City of Calgary, Province of Alberta, this 22nd day of March of 2022.

Rod Wiltshire and Marty Moore
Counsel for the Appellants

[28] See RF 63: the Respondents alleged, without evidence, differences between support groups and religious gatherings. Such conjecture should be disregarded.
[29] See *Trinity* at para. 145: "The threat of harm posed by the pandemic required that Ontario act on the best scientific information available at each variable point in time."
[30] *Gateway* at paras. 274, 303(g); *Trinity* at paras. 3, 27.

LIST OF AUTHORITIES